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THE IMPORTANCE OF BEING AMBIGUOUS: SUBSTANTIVE CANONS, STARE DECISIS, AND THE CENTRAL ROLE OF AMBIGUITY DETERMINATIONS IN THE ADMINISTRATIVE STATE

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ABSTRACT

The concept of ambiguity plays an underappreciated and undertheorized role in the judicial review of agency statutory interpretations. Its importance is difficult to exaggerate. Ambiguity often functions as the determiner of whether an agency's statutory interpretation will receive deference, as well as whether courts will apply the stare decisis standard for statutory interpretation cases instead of the recent principle that agencies can change their interpretations even in the face of a previous conflicting judicial interpretation. The prominence of ambiguity has caused many commentators and courts to proclaim a bright line distinction between interpretive tools that help evaluate statutory clarity and those that resolve statutory uncertainty. Although linguists would agree that ambiguity is unexceptional in normative legal texts due to its ubiquity, the judiciary, which has created a highly idiosyncratic definition, is far more selective about declaring language to be ambiguous. The judiciary's selectivity regarding ambiguity is driven by its conflation of ambiguity

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identification with ambiguity resolution, which allows courts to determine arbitrarily the context for resolving statutory meaning through the discretionary selection of judicially created, but untested, interpretive tools.

This Article addresses the concept of ambiguity from a linguistic perspective and argues that the United States Supreme Court's Chevron *doctrine has fostered an unfortunate emphasis on ambiguity. Instead of* Chevron*'s misguided elevation of the explicit ambiguity determination, judicial review should focus on other considerations. Such a commitment would mean the end of the bifurcated review process that distinguishes between ambiguity identification and ambiguity resolution. It would also allow for the consideration of substantive canons of statutory construction equally in agency and nonagency cases. Finally, it would view* Chevron*'s contribution to statutory interpretation as a softening of the strict stare decisis standard that would no longer depend on a previous explicit ambiguity determination.*

I. INTRODUCTION

Is it possible that a case widely viewed as the most cited and important public law decision in the past quarter century, which has spawned innumerable law review articles, could be an enigma?[1] If so, the United States Supreme Court's landmark decision in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*[2] certainly qualifies. Despite the unprecedented attention paid to *Chevron* over the past twenty-five years, fundamental questions about it remain. To be sure, scholars have extensively addressed many of these issues. The scholarship, though, has tended to focus on two main categories of issues: (1) the scope of *Chevron*, including whether it should apply in certain circumstances;[3] and (2) whether *Chevron*'s division of interpretive authority between courts and agencies is desirable as a normative matter.[4] One of the most significant aspects of *Chevron*—its elevation of an explicit ambiguity analysis as the determiner of whether an agency interpretation will receive deference—has remained undertheorized. Likewise, other problematic ways in which the *Chevron* doctrine intersects with the concept of ambiguity also have remained

1. *See* 1 RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE 140 (4th ed. 2002) ("*Chevron* is one of the most important decisions in the history of administrative law. It has been cited and applied in more cases than any other Supreme Court decision in history."); Thomas J. Miles & Cass R. Sunstein, *Do Judges Make Regulatory Policy? An Empirical Investigation of* Chevron, 73 U. CHI. L. REV. 823, 824 (2006) (describing *Chevron* as "one of the most important rulings in the past quarter century in American public law").

2. 467 U.S. 837 (1984).

3. *See, e.g.*, Thomas W. Merrill & Kristin E. Hickman, Chevron*'s Domain*, 89 GEO. L.J. 833, 838–39 (2001) (examining whether *Chevron* applies in various situations, including agency interpretations of their own jurisdiction).

4. *See, e.g.*, Mark Seidenfeld, *A Syncopated* Chevron*: Emphasizing Reasoned Decisionmaking in Reviewing Agency Interpretations of Statutes*, 73 TEX. L. REV. 83, 86–87 (1994) (arguing that the current application of *Chevron* does not accord with public policy because it reflects a pluralistic democracy model, rather than a deliberative democracy model).

largely ignored in the areas of stare decisis and the application of substantive canons of statutory construction.

It is perhaps not surprising that most of the scholarly focus has been on *Chevron*'s allocation of interpretive authority as a matter of policy or political legitimacy, rather than from a linguistic perspective. Superficially at least, *Chevron*'s description of how interpretive authority is to be allocated is linguistically straightforward. The first step ("Step One") requires the reviewing court to inquire whether "Congress has directly spoken to the precise question at issue," using "traditional tools of statutory construction."[5] If the reviewing court determines that "the statute is silent or ambiguous with respect to the specific issue," it should proceed to the second step ("Step Two"), which requires the court to defer to a reasonable agency interpretation, even if that interpretation is not the one that the reviewing court would have chosen.[6] A court's search for clarity in Step One thus stands in contraposition to the finding of ambiguity that triggers Step Two.[7]

Under *Chevron*, the concept of ambiguity is therefore central to whether an agency's interpretation of a statute that it administers will receive judicial deference, but the determination of ambiguity by the judiciary is entirely standardless and discretionary. The definitions of ambiguity used by courts are themselves vague, ambiguous, and unhelpful.[8] More importantly, judges conflate the identification of ambiguity with its resolution.[9] Thus, courts label a provision ambiguous only when the context fails to reveal the correct interpretation, which makes the identification of permissible contextual evidence crucial.[10] Interpretive tools, such as legislative history, canons, dictionaries, leg-

5. *Chevron*, 467 U.S. at 842, 843 n.9.

6. *Id.* at 843 (stating that "if the statute is silent or ambiguous . . . the question . . . is whether the agency's answer is based on a permissible construction of the statute"); *see also* Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 980 (2005) ("*Chevron* requires a federal court to accept the agency's construction of the statute, even if the agency's reading differs from what the court believes is the best statutory interpretation.").

7. *See Brand X*, 545 U.S. at 986 ("If the statute is ambiguous . . . we defer at step two to the agency's interpretation so long as the construction is 'a reasonable policy choice for the agency to make.'" (quoting *Chevron*, 467 U.S. at 845)).

8. *See infra* notes 38–45 and accompanying text (describing the various definitions of ambiguity used by courts). R

9. *See infra* notes 60–62 and accompanying text (explaining how courts conflate ambiguity identification with ambiguity resolution). R

10. *See* Gary Lawson, *Legal Indeterminacy: Its Cause and Cure*, 19 HARV. J.L. & PUB. POL'Y 411, 411 (1996) (stating that "indeterminacy is a function both of the level of uncertainty concerning any particular claim and of the standard of proof that is needed to establish a claim").

islative purpose, and pragmatic judgments, provide the context that courts consider when determining whether statutory language is ambiguous.[11] If a consensus existed regarding the accuracy of these interpretive tools, the judicial conflation of ambiguity identification and its resolution would be trivial. This is not the case, however. Modern statutory interpretation, both inside and outside of the administrative state, is replete with hermeneutical disputes, which include questions regarding the accuracy of all of the interpretive tools commonly used by courts.

The problematic nature of establishing the accuracy of any given interpretive tool undoubtedly helps to explain why courts do not purport to base their selection of interpretive tools on empirical evidence.[12] Instead, the selection of interpretive tools to provide contextual evidence of ambiguity, the persuasive force to give each interpretive tool, and the point at which the interpretive tools are deemed not to signal a correct meaning are, among other related issues, entirely matters of judicial judgment.[13] Further, courts arbitrarily designate certain interpretive tools as being applicable to ambiguity determinations and others as being applicable to only ambiguity resolution, such as the position of some courts, including the Supreme Court on occasion, that legislative history will only be considered if the statute is first found to be ambiguous.[14] Thus, the *Chevron* doctrine's reliance on explicit ambiguity conclusions to determine whether an agency's interpretation will receive deference has elevated the importance of a concept that is subjective, discretionary, typically addressed through conclusory statements, and, not surprisingly, a source of considerable disagreement among members of the Court.[15]

Commentators see the *Chevron* doctrine as making a sharp distinction between assessments of statutory clarity and the resolution of

11. *See infra* Part III.D (describing the various interpretive tools that courts apply when deciding whether a statutory provision is ambiguous).

12. *See infra* Part II.B.4 (explaining the difficulty of measuring the accuracy of interpretive tools).

13. *See infra* Part II.B (explaining the various aspects of the ambiguity determination that are subjective and discretionary).

14. *See, e.g.*, Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546, 567 (2005) (indicating that a court should only consult legislative history after it first determines that the statute is ambiguous).

15. *See* Bruce A. Markell, *Bankruptcy, Lenity, and the Statutory Interpretation of Cognate Civil and Criminal Statutes*, 69 IND. L.J. 335, 346 (1994) (explaining how "the Court is deeply divided" regarding how ambiguity should be determined); *see also* Moskal v. United States, 498 U.S. 103, 108 (1990) (wondering "'how much ambiguousness constitutes . . . ambiguity'" (emphasis omitted) (quoting United States v. Hansen, 772 F.2d 940, 948 (D.C. Cir. 1985))).

ambiguity through policy choices, but the application of any interpretive tool in Step One is discretionary and is thus, in a sense, a policy choice because the tool might resolve the hermeneutical inquiry at Step One and preclude agency discretion. Notwithstanding the general problem of establishing the accuracy of any particular interpretive tool used to provide contextual evidence of statutory meaning, the application of substantive canons of construction in Step One is widely thought to raise particular problems of legitimacy. Substantive canons, also known as "normative canons" among other terms, are commonly described as policy-based directives about how statutory uncertainty should be resolved.[16] These interpretive tools are applicable in cases involving a wide range of issues, including constitutional concerns, retroactive effects, divestment of judicial review or habeas corpus jurisdiction, extraterritorial application, negative impact on Native Americans or immigrants, or various federalism concerns.[17] In addition to their widely perceived association with judicial policy choices, substantive canons are controversial because they often require courts to choose textually less persuasive interpretations and to narrow invariably the meaning of the applicable statutory provision.[18] The application of a substantive canon in Step One, therefore, has the effect of precluding judicial deference to an agency interpretation in favor of a less textually persuasive interpretation.[19]

The *Chevron* Court did not provide much guidance regarding which traditional tools of statutory construction are appropriate in Step One, and thus left the canons to play an uncertain role in the review of agency interpretations of statutes.[20] Notwithstanding significant scholarly criticism, though, the Supreme Court has on several occasions applied substantive canons instead of deferring to agency interpretations.[21] Based on the conventional understanding of sub-

16. *See infra* notes 106–07 and accompanying text (describing the conventional view that substantive canons are policy-based). R

17. *See* WILLIAM N. ESKRIDGE, JR. ET AL., CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 880–941 (4th ed. 2007) (listing and exploring many of the substantive canons).

18. *See infra* notes 111–20 and accompanying text (describing substantive canons). R

19. *See* Brian G. Slocum, *Canons, the Plenary Power Doctrine, and Immigration Law*, 34 FLA. ST. U. L. REV. 363, 376–77 (2007) (explaining how substantive canons result in courts choosing "second-best" statutory interpretations).

20. *See* Nina A. Mendelson, Chevron *and Preemption*, 102 MICH. L. REV. 737, 742 (2004) ("Courts have yet to articulate a consistent framework to reconcile substantive canons with *Chevron*, leaving the status of the canons murky."); *The Supreme Court, 2000 Term—Leading Cases*, 115 HARV. L. REV. 306, 528 (2001) ("Traditional canons of statutory interpretation have played an unclear role in reviewing agency constructions of statutes in recent years.").

21. *See infra* note 109 (citing several cases in which the Court has allowed substantive cannons to displace *Chevron*). R

stantive canons, these decisions are troubling considering the Court's recent statement that interpreting ambiguous statutes "involves difficult policy choices that agencies are better equipped to make than courts."[22] The flaw in the conventional view of substantive canons as policy-oriented devices used to resolve statutory ambiguity is that the Court avers that these substantive canons reflect congressional intent.[23] Further, it can be plausibly said that the various substantive canons do not resolve ambiguity, but instead represent useful conventions about language that apply at the outset of the interpretive process.[24]

The concept of ambiguity is also crucial to the operation of stare decisis in the administrative state. In *National Cable & Telecommunications Ass'n v. Brand X Internet Services*,[25] the Court addressed the tension between the rationale of *Chevron*, which asserts that agencies may legitimately change their interpretations of ambiguous statutes, and the traditional stare decisis rule that judicial interpretations of statutes in particular are not amenable to be overruled.[26] The Court held that "[a] court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion."[27] The *Brand X* decision has thus created another significant doctrinal distinction where an explicit ambiguity finding is the determiner. If the original reviewing court decided that the statute was unambiguous, the traditional heightened stare decisis rule applies. If instead the original reviewing court decided that the statute was ambiguous, the agency's subsequent interpretation may receive *Chevron* deference.

The *Chevron* doctrine is an enigma because the concept of ambiguity obscures its true character. *Chevron* has been described as a moderate interpretive doctrine,[28] but this description is most accurately viewed as an abstraction. On a very general level, by providing

22. Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 980 (2005).

23. *See infra* notes 111–29 and accompanying text (describing how the Court defends substantive canons on the basis that they are consistent with congressional intent). R

24. *See infra* Part III.B (arguing that substantive canons represent conventions about the interpretation of language).

25. 545 U.S. 967.

26. *See infra* notes 297–301 and accompanying text (describing the strong stare decisis doctrine as applied in statutory interpretation cases). R

27. *Brand X*, 545 U.S. at 982.

28. *See* Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 COLUM. L. REV. 1, 59 (2006) (describing *Chevron* as a "moderate" approach).

that the judiciary should independently determine statutory meaning but defer to reasonable agency interpretations of ambiguous statutes, *Chevron* appears to reflect a moderate accommodation between judicial supremacy over interpretive matters and agency control over policy. If, however, as some have assumed, *Chevron* forces courts to change their interpretive methodologies and exclude application of various interpretive tools,[29] *Chevron* is a radical doctrine. In contrast, it is a far less significant doctrine if it does not require significant changes to statutory interpretation methodology, it is routinely ignored by courts, and it does not constrain judicial discretion because it allows judges to decide cases in accordance with their ideological preferences.

This Article will argue that the enigma of *Chevron* should be seen as dissipating because the Court, uncomfortable with a strong application of the doctrine, has recently created various exceptions to it, and thus has rendered it less distinguishable from pre-*Chevron* doctrine.[30] Despite this Article's extended effort to frame *Chevron* as a doctrine that is less exceptional than conventional views suggest, *Chevron* is significant in a way that few scholars have appreciated: It represents a shift from a focus on factors related to agency deliberation and expertise to a primary initial focus on ambiguity determinations.[31] Part II of this Article will discuss how courts determine statutory ambiguity and will argue that this process, which relies entirely on discretionary choices, renders the ambiguity concept incoherent. Part III will argue that, similar to other interpretive tools, substantive canons can be viewed as representing conventions about the meaning of language, rather than policy-based attempts to resolve statutory ambiguity, and are therefore not as exceptional as many scholars claim. Further, statutory interpretation, regardless of the methodology used, can only estimate congressional intent, and the Supreme Court has described substantive canons as helping determine congressional intent.

Part IV will argue that pursuant to the Court's understanding of substantive canons, they should be considered equally in *Chevron* and

29. *See infra* note 108 and accompanying text (explaining that the majority view among legal scholars is that substantive canons should not be applied in the *Chevron* context). R

30. *See infra* notes 119–29 and accompanying text (describing the exception to *Chevron* for issues of major importance); *see also infra* notes 266–72 and accompanying text (describing the exception to *Chevron* for agency interpretations that were not made pursuant to sufficiently formal procedures). R R

31. *See* Miles & Sunstein, *supra* note 1, at 838 n.26 (finding that most invalidations of agency action involve disputes over whether a statute is ambiguous). R

non-*Chevron* cases.[32] Part V will argue that considering the arbitrary nature of concluding that statutory language is ambiguous, *Chevron*'s focus on ambiguity should be eliminated, which will further attenuate the doctrine's exceptional nature and conform it to the pre-*Chevron* deference doctrine. Doing so would still render *Chevron* as meaningful due to *Brand X*. Instead of *Brand X*'s focus on a previous court's ambiguity determination—an archeological dig that will undoubtedly prove to be frustrating—reviewing courts should treat the *Brand X* understanding of the relationship between courts and agencies as a relaxation of the traditional stare decisis standard.[33] Thus, *Chevron* should be viewed as transforming the stare decisis doctrine in the administrative state, but not as transforming statutory interpretation methodology.

II. THE DISCRETIONARY NATURE OF THE AMBIGUITY DETERMINATION IN STATUTORY INTERPRETATION CASES

The concept of ambiguity is important in the modern administrative state, even though the determination of whether statutory language is ambiguous has challenged both courts and scholars. Such an assertion may seem surprising. After all, the generic description of ambiguity as an expression that can be understood in more than one sense is conceptually simple.[34] Describing differing types of ambiguity is similarly straightforward. A statute can, for example, contain semantic ambiguities due to the multiplicities of dictionary meanings for particular words or syntactic ambiguities due to the "uncertainties of modification or reference within the particular statute."[35]

A. Defining Ambiguity

Despite the seemingly straightforward nature of the ambiguity definition, courts have struggled to adapt it to legal usage.[36] Consider the hodgepodge of differing, and generally unhelpful, standards

32. This Article will not offer a first-order defense of substantive canons, but rather will argue that if courts continue to consider substantive canons to be legitimate interpretive tools, they should not distinguish between *Chevron* and non-*Chevron* applications of these canons.

33. *See infra* Part V.B.

34. *See* Lawrence M. Solan, *Pernicious Ambiguity in Contracts and Statutes*, 79 CHI.-KENT L. REV. 859, 860 (2004) (defining ambiguity as "an expression [that] can be understood in more than one distinct sense").

35. REED DICKERSON, THE INTERPRETATION AND APPLICATION OF STATUTES 46 (1975).

36. *See* Solan, *supra* note 34, at 859 (noting that "the concept of ambiguity is itself perniciously ambiguous" (emphasis omitted)). R

courts have used for describing statutory ambiguity.[37] Often these definitions are circular, declaring that a statute is ambiguous merely if it is unclear.[38] Other definitions focus on the interpreter rather than the text. One common definition, for example, posits that ambiguity "exists when a statute is capable of being understood by reasonably well-informed persons in two or more different senses,"[39] but it is also often asserted that language is not ambiguous "simply because the parties in litigation differ concerning its meaning."[40] Courts are thus left with a definition that if not so inclusive as to be unworkable, is certainly facially indeterminate.[41]

Other common definitions are too narrow to be taken literally. For example, one definition is that "a provision of the law is ambiguous only . . . when it is equally susceptible to more than a single meaning."[42] In the *Chevron* context, this definition would mean that an agency interpretation would receive deference only if it was at least as persuasive as the competing interpretation. Such a view would give a narrow scope to deference, and is thus in tension with *Chevron*'s realist observation that statutory interpretation often involves policy determinations that agencies are best suited to resolve.[43]

Some definitions explicitly indicate that the determination of ambiguity depends on context. For example, one definition is that "a provision is ambiguous when, despite a studied examination of the statutory context, the natural reading of a provision remains elusive."[44] Finally, another common formulation simply tracks the generic definition of ambiguity and states that a statute is ambiguous if it

37. *See infra* notes 38–42, 44–45 and accompanying text. R

38. *See, e.g.*, Maldonado v. Nutri/System, Inc., 776 F. Supp. 278, 282 (E.D. Va. 1991) ("An ambiguity exists when the language is difficult to comprehend or lacks clearness and definiteness.").

39. 2A NORMAN J. SINGER & J.D. SHAMBIE SINGER, STATUTES AND STATUTORY CONSTRUCTION § 45:2, at 13 (7th ed. 2007).

40. City Investing Co. Liquidating Trust v. Cont'l Cas. Co., 624 A.2d 1191, 1198 (Del. 1993).

41. *Cf.* Cass R. Sunstein, *Law and Administration After* Chevron, 90 COLUM. L. REV. 2071, 2093 (1990) ("An understanding that would allow the agency to prevail merely because there is some room for disagreement would pose an undue threat to the basic principle of congressional supremacy in lawmaking, risking as it would administrative subversion of statutory standards.").

42. Mayor of Lansing v. Mich. Pub. Serv. Comm'n, 680 N.W.2d 840, 847 (Mich. 2004) (emphasis omitted).

43. *See* Cass R. Sunstein, *Beyond* Marbury*: The Executive's Power to Say What the Law Is*, 115 YALE L.J. 2580, 2589 (2006) (noting that "statutory ambiguities often cannot be resolved without judgments of policy").

44. *In re* Price, 370 F.3d 362, 369 (3d Cir. 2004).

is "susceptible to more than one reasonable interpretation."[45] *Black's Law Dictionary* is thus undoubtedly accurate when it asserts that "judicial usage sanctions the application of the word 'ambiguity' to describe any kind of doubtful meaning of words, phrases or longer statutory provisions,"[46] but even this description fails to note that courts are not required to label a provision ambiguous just because it has a doubtful meaning.

Determining ambiguity in statutory interpretation cases is complicated by the tendency of courts to conflate ambiguity with vagueness.[47] The distinction between these two concepts is not trivial, however, because vagueness, even more so than ambiguity, is a characterizing feature of legal discourse.[48] A term is vague if it presents borderline difficulties.[49] For example, when is something green and not brown or blue? Vagueness can also be a species of wanted or unwanted generality in the sense that the term or provision is underspecific because it fails to provide sufficient detail for the purpose at issue.[50] For example, the statement "[s]ome event will happen at some time" is vague in the under-specific sense.[51]

The under-specific sense of vagueness includes "hedging terms," which delegate not only the responsibility of applying a word in actual circumstances (its "extension"), but also the criteria that define it in the abstract (its "intension").[52] Hedging terms, which include such words as "reasonable" and other modifiers (such as "just," "due,"

45. *In re* Rogers, 513 F.3d 212, 226 (5th Cir. 2008) ("For the language to be considered ambiguous, however, it must be susceptible to more than one reasonable interpretation or more than one accepted meaning.").

46. BLACK'S LAW DICTIONARY 88 (8th ed. 2004) (citation and internal quotation marks omitted).

47. *See* Solan, *supra* note 34, at 860 (explaining that legal writers and judges "use the word 'ambiguity' to refer to all kinds of indeterminacy," including vagueness). R

48. *See* VIJAY K. BHATIA ET AL., VAGUENESS IN NORMATIVE TEXTS 9 (2005) (stating that "a number of studies show that a certain degree of vagueness is a characterising feature of legal discourse"); *see also* Frederick Schauer, *A Critical Guide to Vehicles in the Park*, 83 N.Y.U. L. REV. 1109, 1126–27 (2008) ("Even the most precise term has the potential for becoming vague upon confronting the unexpected . . . and so no amount of precision can wall off every possibility of future but now unforeseen and even unforeseeable vagueness.").

49. *See* Roy A. Sorensen, *The Ambiguity of Vagueness and Precision*, 70 PAC. PHIL. Q. 174, 174 (1989) (explaining that "a statement is vague iff [sic] it is borderline . . . or could have been borderline").

50. *See id.* at 175 ("[V]agueness is a species of unwanted *generality* and does not imply inquiry-resistance.").

51. *See id.* (explaining that "underspecific statements, by definition, fail to give us enough detail for the purpose at hand").

52. *See* Michel Paradis, *Just Reasonable: Can Linguistic Analysis Help Us Know What It Is to Be Reasonable?*, 47 JURIMETRICS 169, 170 (2007) (explaining that "'hedges' . . . delegate not only the extension of a word but its intension").

"proper," and "fair"), contribute to linguistic uncertainty by taking specific words and loosening the standard for how they apply.[53] Despite their nature, or rather because of it, hedging terms are ubiquitous in statutes.[54] While it may be desirable in an ease-of-interpretation sense for legal texts to be maximally determinate and precise, they also must be drafted to cover every relevant situation.[55] Indeed, it is quite common for Congress to use vague terminology to enact a sufficiently broad statute to give the relevant agency regulatory flexibility.[56]

B. The Judicial Conflation of Ambiguity Determination and Ambiguity Resolution

The lack of a coherent legal definition of ambiguity and the conflation of ambiguity with vagueness help illustrate the problematic nature of the ambiguity concept in legal discourse, although these issues are peripheral to the central problem of how ambiguity determinations are made by judges. Consider the following sentence, taken from a linguistics text, intended to be an example of a syntactically ambiguous sentence: "Lizards are green and brown."[57] The following arguably are possible interpretations of this sentence: (1) lizards are a color that falls between green and brown; (2) some parts of the bodies of lizards are green and other parts are brown; (3) some types of lizards are green and other types are brown; and (4) lizards look green under some conditions, but look brown under other conditions.[58]

1. The Judicial Use of Contextual Evidence to Determine Ambiguity

In light of the multiple possible interpretations of the above sentence, it might seem likely that judges would agree that the sentence is ambiguous. In fact, such declarations of ambiguity should be routine because "[a]mbiguity is ubiquitous in natural language."[59] Judges

53. *See id.* at 172–73 (discussing legal hedging terms).

54. *See id.* at 172 (describing the excessive use of legal hedging terms in rules, such as in the Vienna Convention on the Law of Treaties).

55. *See* BHATIA ET AL., *supra* note 48, at 10 (describing the inherent tension between determinate language and all-inclusive language). R

56. *See* Lisa Schultz Bressman, Chevron*'s Mistake*, 58 DUKE L.J. 549, 614–17 (2009) (arguing that courts err when they construe statutory text as if Congress intended the text to have a relatively specific meaning, and that courts should instead realize that Congress is eschewing specificity in favor of agency delegation).

57. EDITH MORAVCSIK, AN INTRODUCTION TO SYNTACTIC THEORY 15 (2006).

58. *See id.* at 16–17 (discussing the possible interpretations of the sentence "[l]izards are green and brown").

59. Patrizia Tabossi & Francesco Zardon, *Processing Ambiguous Words in Context*, 32 J. MEMORY & LANGUAGE 359, 359 (1993); *see also* Thomas Wasow et al., *The Puzzle of Ambiguity*,

tend to conflate the resolution of ambiguity with its identification, however, perhaps due to the important legal effects of an ambiguity declaration.[60] Thus, courts would undoubtedly evaluate the above sentence by asserting that a consideration of the relevant context will reveal the sentence's intended meaning, thereby rendering the language unambiguous.[61] Indeed, if syntax is considered to be the interface between form and meaning in linguistics, in the statutory interpretation context it is considered to be the interface between language interpretation and congressional intent.[62]

2. *Statutory Interpretation Methodologies and the Estimation of Congressional Intent*

A commitment to labeling a provision ambiguous only when the context fails to reveal the "correct" interpretation creates numerous problems for the interpretive enterprise. One overarching problem is that it makes the identification of permissible contextual evidence crucial.[63] If all agreed that the contextual evidence that judges considered accurately resolved linguistic uncertainty, the judicial conflation of ambiguity identification and resolution would be insignificant. Unfortunately, as explained below, determining the accuracy of the various interpretive tools that courts consider to be part of the statutory context would be a daunting endeavor.[64] Before considering whether the accuracy of an interpretive tool can be empirically validated, however, it is necessary to consider the preliminary question of whether one should be epistemologically skeptical about the coherence of labeling an interpretation as accurate or inaccurate.

One view of the problem of indeterminacy is that statutory language is inherently uncertain because its meaning can only emerge in communication, and interpretive choices are therefore constrained only by the self-interest of judges.[65] Under this theory, interpretation

in MORPHOLOGY AND THE WEB OF GRAMMAR 265, 268–70 (C. Orhan Orgun & Peter Sells eds., 2005) (describing ambiguity as being pervasive in the English language).

60. *See supra* note 45 and accompanying text (providing an example of a definition of ambiguity that conflates these two concepts). R

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

62. *See* MORAVCSIK, *supra* note 57, at 3 (indicating that syntax is the interface between form and meaning in linguistics). R

63. *See supra* note 10 and accompanying text (explaining that courts will only deem a provision ambiguous when the context cannot inform the interpretation). R

64. *See infra* Part II.B.4.

65. *See* BHATIA ET AL., *supra* note 48, at 13 (describing the belief of some scholars that legal language is inherently indeterminate); Randal N. M. Graham, *What Judges Want: Judicial Self-Interest and Statutory Interpretation*, 30 STATUTE L. REV. 38, 39 (2009) (describing the R

involves the manipulation of text in furtherance of the interpreter's preferences.[66] A deconstructionist view of interpretation, though, is obviously unhelpful in resolving methodological disputes and is inconsistent with the consensus among judges that they are the faithful agents of Congress in matters of statutory interpretation.[67] Moreover, while empirical data might suggest that ideology plays a central role in interpretation, it does not follow that judges do not take language seriously.[68]

Nevertheless, even advocates of traditional approaches to legal scholarship must concede that the judiciary's unsystematic approach to matters of statutory interpretation precludes agreement on a methodology for determining whether an interpretation is accurate.[69] Modern statutory interpretation, both inside and outside of the administrative state, is replete with philosophical and jurisprudential disputes. Even the most fundamental first-order principle of statutory interpretation—its ultimate goal—is subject to widespread disagreement. Is the proper goal to, as textualists claim, discern congressional intent through "the public meaning of the enacted text, understood in context"?[70] Or is it, as intentionalists claim, to interpret the text consistently with the purpose of the legislation or the intent of Congress?[71]

Regardless of the methodology chosen, congressional intent, however it is framed, can rarely, if ever, be determined with absolute certainty. This is especially true with regard to the current dominant methods of statutory interpretation, which are originalist in orienta-

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deconstructionist view that interpretive choices are constrained only by the self-interest of judges).

66. *See* Graham, *supra* note 65, at 40 (explaining that judicial statutory interpretation is subject to the price theory, whereby one chooses the path of least relative cost to guide decisionmaking). R

67. *See* John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2393–94 (2003) ("In our constitutional system, it is widely assumed that federal judges must act as Congress's faithful agents.").

68. *See* Solan, *supra* note 34, at 865 (arguing that judges do take language arguments seriously, but may ultimately rely on these arguments to reach a result that they perceive to be fair). R

69. *See* Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085, 2086 (2002) ("American courts have no intelligible, generally accepted, and consistently applied theory of statutory interpretation." (citation and internal quotation marks omitted)).

70. John F. Manning, *Textualism and Legislative Intent*, 91 VA. L. REV. 419, 420 (2005).

71. *See id.* at 424 (stating that "whereas intentionalists believe that legislatures have coherent and identifiable but *unexpressed* policy intentions, textualists believe that the only meaningful collective legislative intentions are those reflected in the *public meaning* of the final statutory text").

tion and hence typically seek to discern the intent of a previous Congress.[72] Thus, the process of interpretation is essentially a probability estimation of congressional intent, and interpretive tools can only assist in this estimation.[73]

To textualists, the concept of statutory interpretation as estimation should be readily accepted. Textualists focus on the public meaning of a text, largely because of the uncertainties of determining actual congressional intent.[74] Nevertheless, while by definition textualists argue that determining actual congressional intent is impossible, they must also concede that their efforts to determine the public meaning of language are also estimations. It is well accepted that, for example, Congress sometimes drafts linguistically indeterminate language that intentionally leaves unanswered questions in an effort to delegate issues to other actors.[75] Even when delegation is not intended, statutes are often vague or ambiguous for various reasons, including legislative compromises, the inherent imprecision of language, and the difficulty of drafting language to address unknowable future events.[76] For these reasons, it is typically difficult to assert that there is only one correct public meaning. The acceptance of the textualist abstraction from intent to public meaning is therefore not

72. *See* W. Va. Univ. Hosps., Inc. v. Casey, 499 U.S. 83, 101 n.7 (1991) ("The 'will of Congress' we look to is not a will evolving from Session to Session, but a will expressed and fixed in a particular enactment."). As Einer Elhauge has argued, estimating the intent of the current Congress is often an easier task than estimating the intent of a previous Congress. *See* Einer Elhauge, *Preference-Estimating Statutory Default Rules*, 102 COLUM. L. REV. 2027, 2029–30 (2002) (arguing that statutory ambiguities should be resolved by default rules that are designed to minimize the expected dissatisfaction of the current preferences of the political branches that could be enacted into law).

73. *Cf.* Paradis, *supra* note 52, at 175 ("The biggest obstacle for any linguistic analysis is always how to measure the words you are studying."). R

74. *See* John F. Manning, *Competing Presumptions About Statutory Coherence*, 74 FORDHAM L. REV. 2009, 2011 (2006) ("[T]he presumption of deliberate drafting but untidy compromise is more respectful of the central place of compromise in the constitutional design of the legislative process.").

75. *See* Bressman, *supra* note 56, at 550–51 (explaining that "Congress may delegate to an agency not only the authority to implement the statute but, implicitly, the authority to interpret it as well—that is, to specify its meaning"); Gary Lawson, *Dirty Dancing—The FDA Stumbles with the* Chevron *Two-Step: A Response to Professor Noah*, 93 CORNELL L. REV. 927, 936 (2008) (arguing that "given the demise of the nondelegation doctrine, there will be many statutes for which there is no 'correct' interpretation" (footnote call number omitted)). R

76. *See* Wasow et al., *supra* note 59, at 268–70 (describing the ubiquitous nature of vagueness and ambiguity in the English language); Jonathan T. Molot, *Reexamining* Marbury *in the Administrative State: A Structural and Institutional Defense of Judicial Power over Statutory Interpretation*, 96 NW. U. L. REV. 1239, 1241 (2002) ("There is simply too much law today, governing too many subjects, for legislators to address every important policy question that might arise under their statutes."). R

sufficient to surmount the reality that even a textualist approach to interpretation involves estimations of meaning.[77]

Intentionalists must similarly concede that their methodology seeks only to estimate congressional intent.[78] In addition to the difficulties associated with the very concept of determining the "intent" of a multi-member body, Congress frequently is unable or unwilling to express an intent regarding many potential applications of any given statute.[79] Some intentionalists, such as Justice Breyer, have thus advocated that the intent sought should be an objectified one that focuses on "how a (hypothetical) reasonable member of Congress, given the statutory language, structure, history, and purpose, would have answered the question, had it been presented."[80] The advocacy of such an approach implicitly concedes that, similar to textualism, intentionalism's methodology can, at best, only attempt to estimate congressional intent.

3. Probabilistic Determinations of Meaning

If the identification of ambiguity is, in legal discourse, thought to be determined through the consideration of contextual evidence, which involves estimations of congressional intent, it follows that one must consider the probabilistic threshold that an interpretation must

77. *See* William N. Eskridge, Jr. & John Ferejohn, *Structuring Lawmaking to Reduce Cognitive Bias: A Critical View*, 87 CORNELL L. REV. 616, 642 (2002) ("Any statute that seeks to affect human conduct—especially statutes seeking strong changes in conduct . . . will be adopted under conditions of uncertainty . . . . Legislators delegate a lot of lawmaking to agencies because of the difficulty they face when correcting their own errors, including cognitive dissonance as well as the excessive costs of monitoring and re-legislating.").

78. Some would distinguish intentionalists from purposivists when describing the dominant interpretive methodologies, with intentionalists focusing on specific congressional intent and purposivists focusing on statutory purpose. Regardless of whether such a bright line distinction is valid, purposivists explicitly maintain that estimation of specific congressional intent is not the goal of statutory interpretation. *See* Martin H. Redish & Dennis Murashko, *The Rules Enabling Act and the Procedural-Substantive Tension: A Lesson in Statutory Interpretation*, 93 MINN. L. REV. 26, 95 (2008) (advocating "common sense and an attempt to translate underlying purpose into legal reality, rather than narrow, shortsighted adherence to textual literalism or legislative history"). Thus, they too would agree that, at best, courts can only estimate congressional intent.

79. *See* Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 547 (1983) ("Because legislatures comprise many members, they do not have 'intents' or 'designs,' hidden yet discoverable."); Kenneth A. Shepsle, *Congress Is a "They," Not an "It": Legislative Intent as Oxymoron*, 12 INT'L REV. L. & ECON. 239, 241–45 (1992) (describing the fiction of collective congressional intent). *But see* Lawrence M. Solan, *Private Language, Public Laws: The Central Role of Legislative Intent in Statutory Interpretation*, 93 GEO. L.J. 427, 427–30 (2005) (defending the concept that a collective body can possess a discernable intent).

80. Stephen Breyer, *Madison Lecture: Our Democratic Constitution*, 77 N.Y.U. L. REV. 245, 266 (2002) (emphasis omitted).

meet to allow a statutory provision to be deemed unambiguous.[81] After all, irrespective of the definition of ambiguity, it is possible that *Chevron* was intended to establish its own idiosyncratic standard for identifying the threshold at which statutory provisions will be deemed ambiguous and deference will be given to agency interpretations. Indeed, as the *Chevron* opinion indicated, courts are required to accept agency interpretations that are not as persuasive as competing interpretations, which raises the possibility that the definition of ambiguity in *Chevron* should be considered more capacious than in other contexts.[82]

The probabilistic threshold that an interpretation must meet in order to render a statutory provision unambiguous under *Chevron* is similar to the general concept of ambiguity, which is also under-conceptualized.[83] Some have asserted that, in practice, the reviewing court will decide the case at Step One if there is a "clearly preferred meaning."[84] There is no consensus regarding this standard, however. Justice Scalia, for example, has stated that textualists will tend to confine *Chevron* deference to relatively close cases, suggesting that the agency interpretation must be, at the least, almost as persuasive as the competing interpretation.[85] In contrast, the United States Court of Appeals for the Second Circuit has stated that it would not decide a case at Step One, and thus reject an agency's interpretation, unless it was confident "beyond reasonable doubt" that the agency's interpreta-

81. *Cf.* Gary Lawson, *Proving the Law*, 86 NW. U. L. REV. 859, 859–60 (1992) (explaining that interpretation involves a determination of significance and a standard of proof).

82. *See* Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843 n.11 (1984) (stating that a reasonable interpretation is not necessarily the "reading the court would have reached if the question initially had arisen in a judicial proceeding"); *see also* Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 980 (2005) ("*Chevron* requires a federal court to accept the agency's construction of the statute, even if the agency's reading differs from what the court believes is the best statutory interpretation.").

83. *See* Caleb Nelson, *What Is Textualism?*, 91 VA. L. REV. 347, 396 (2005) ("Questions of this sort call to mind the criterion for *Chevron* deference: when is one construction of a statute so superior to the alternatives that the administering agency has no option but to use it, and how close must the alternatives get in order to become 'permissible'?").

84. *See* Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969, 991 (1992) (emphasis omitted) (explaining that the Step One "inquiry has tended in practice to devolve into an inquiry about whether the statute as a whole generates a *clearly preferred* meaning").

85. *See* Antonin Scalia, *Judicial Deference to Administrative Interpretation of Law*, 1989 DUKE L.J. 511, 515 ("Only when the court concludes that the policy furthered by *neither* textually possible interpretation will be clearly 'better' (in the sense of achieving what Congress apparently wished to achieve) will it, pursuant to *Chevron*, yield to the agency's choice.").

tion was incorrect.[86] Such a standard would accept agency interpretations that are vastly inferior to competing interpretations. Thus, although it is possible that the definition of ambiguity in *Chevron* should be considered more capacious than in other contexts, the extent to which it is more capacious is unclear.

4. Empirically Measuring the Accuracy of Interpretive Tools

So far, this Article has observed that the judicial determination of ambiguity is highly discretionary due to the indeterminate and unhelpful definitions of ambiguity, the conflation of ambiguity identification and its resolution, the nature of language and legislative drafting, and the lack of consensus regarding the probabilistic threshold an interpretation must meet in order to render a statutory provision unambiguous. Adding to the discretionary nature of the ambiguity inquiry is the non-empirically based foundation for interpretive rules.[87] If the definition of ambiguity requires a determination of the probabilistic threshold an interpretation must reach in order to be chosen instead of an alternative interpretation, the probabilistic force each interpretive tool possesses must also be considered. An objective, systematic approach to determining the accuracy of interpretive rules is unlikely to develop, however.[88]

Consider, for example, the numerous difficulties associated with determining the accuracy of interpretive tools. In order to determine the probabilistic force of any given interpretive tool, it must be demonstrated that, through empirical analysis or otherwise, an interpretive tool actually reveals congressional intent. Even if judges could agree on the goal of statutory interpretation, whether it is to find the specific or objectified intent of Congress or the public meaning of the language, it is unlikely that a consensus could exist regarding how to measure the accuracy of an interpretive tool.[89] In addition, even if a consensus could be reached, it would still be necessary to set a standard for determining whether the probabilistic value of the tool was sufficiently strong to warrant judicial use. If, for example, it could be

86. Cohen v. JP Morgan Chase & Co., 498 F.3d 111, 122 (2d Cir. 2007) (internal quotation marks omitted).

87. *See* Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 544 (1947) (noting that "these rules of construction are not in any true sense rules of law," but are "axioms of experience" that "were abstracted, taken out of the context of actuality, and, as it were, codified in treatises").

88. *See id.* at 543–44 (suggesting that there is no precision to the application of interpretive rules).

89. *See supra* notes 70–71 and accompanying text (revealing the disagreement about the goal of statutory interpretation). R

estimated that a given canon approximated congressional intent fifty-five percent of the time, would such an interpretive tool be considered to adequately reflect congressional intent?[90]

Another fundamental problem is that it is not possible to measure the accuracy of an interpretive tool in isolation because judges typically consider various interpretive tools when interpreting statutes.[91] Thus, it is often unclear how important any individual interpretive tool was to the judge's selection of the particular interpretation. Other problems also contribute to making accuracy determinations difficult. First, interpretive principles such as canons are frequently referred to by courts as "tools" of interpretation rather than "rules," which indicates that even if a canon is applicable according to its definition, its application is non-mandatory if the resulting interpretation would be inaccurate for some reason.[92] The application of canons is therefore highly contextual because they merely set forth presumptions that can be rebutted. In addition, determinations of accuracy would be particularly challenging considering that many interpretive tools are triggered by statutory ambiguity, which is, as this Article has argued, an inherently subjective interpretation that is highly amenable to judicial manipulation.[93]

Even if a methodology for determining the accuracy of interpretive tools were possible in a general sense, some common interpretive tools are much less amenable to measurement because they are too broad to be clearly defined and depend on the skill of the interpreter.[94] Pragmatic reasoning, for example, is common in statutory interpretation decisions, as is reliance on "common sense," yet such tools are not amenable to general conclusions about their accuracy.[95] Moreover, it is not clear that when a judge engages in pragmatic or

90. Obviously, problems of how the probability value of a particular interpretive tool could be quantified would present enormous difficulties.

91. *See generally* Frank B. Cross, *The Significance of Statutory Interpretive Methodologies*, 82 NOTRE DAME L. REV. 1971 (2007) (discussing the various interpretive tools that the Supreme Court uses in statutory interpretation cases).

92. *See, e.g.*, Chickasaw Nation v. United States, 534 U.S. 84, 94 (2001) (noting that "canons are not mandatory rules," but are guides "designed to help judges determine the Legislature's intent," and that "other circumstances evidencing congressional intent can overcome their force").

93. *See* Frankfurter, *supra* note 87, at 544 ("In the end, language and external aids, each accorded the authority deserved in the circumstances, must be weighed in the balance of judicial judgment."). R

94. *See infra* notes 95–96 and accompanying text. R

95. *See* Koons Buick Pontiac GMC, Inc. v. Nigh, 543 U.S. 50, 65–66 (2004) (Stevens, J., concurring) ("Common sense is often more reliable than rote repetition of canons of statutory construction."); Cross, *supra* note 91, at 1976–77 (discussing judicial reliance on pragmatic reasoning in statutory interpretation cases). R

common sense reasoning, the judge is attempting to use such tools as a proxy for congressional intent.[96] In addition, some interpretive tools require judicial expertise in order to be used effectively, such as legislative history.[97] It could, therefore, be concluded that interpretive tools like legislative history may be accurate when used by some judges but not when used by others.

Apart from the problem of probability determinations for the various interpretive tools is the lack of a methodology for aggregating the probabilistic force of each interpretive tool and linking this aggregate to confidence in a particular interpretation.[98] One main issue is commensurability.[99] Justice Scalia has claimed that balancing tests are roughly the equivalent of attempting to determine "whether a particular line is longer than a particular rock is heavy."[100] The same could be said regarding the comparison of conflicting, or even congruent, interpretive tools. Even if a probabilistic determination could be made for some interpretive tools, it may not be possible to combine these determinations with other interpretive principles, like common sense and pragmatic reasoning, which may not allow for probabilistic determinations.[101]

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96. Instead, the court is engaging in a reasoning process similar to purposivists and is focusing on the goals of the legislation and other considerations. *See supra* note 78 (describing purposivists' methodology and their claim that determining congressional intent is not the goal of statutory interpretation). R

97. *See generally* Adrian Vermeule, *Legislative History and the Limits of Judicial Competence: The Untold Story of* Holy Trinity Church, 50 STAN. L. REV. 1833 (1998) (discussing the difficulties involved in using legislative history effectively, particularly through the lens of *Holy Trinity Church v. United States*, 143 U.S. 457 (1892)).

98. *See supra* note 10 and accompanying text (explaining the labeling of provisions as ambiguous when the context does not reveal correct interpretations and noting that indeterminacy is in part a function of uncertainty). R

99. *See* Frederick Schauer, Balancing, Subsumption, and the Constraining Role of Legal Text 2–5 (Feb. 18, 2009) (unpublished manuscript, on file with the Maryland Law Review) (discussing and rejecting the merits of those who espouse the view that balancing is unconstrained because balancing, particularly when it takes a proportional form, is rational).

100. Bendix Autolite Corp. v. Midwesco Enters., Inc., 486 U.S. 888, 897 (1988) (Scalia, J., concurring in the judgment).

101. It is also likely that the probability values of interpretive tools would change depending on the applicability of other interpretive rules. For example, if the Court is correct that Congress does not generally intend to change the federal/state balance, a criminal statute that regulated formally state concerns would trigger a federalism clear statement rule and, if the statute is ambiguous, the criminal rule of lenity. *See infra* note 116 and accompanying text (discussing the federalism canons). Thus, the applicability of the federalism canon would enhance the probability value of the rule of lenity. Conversely, relevant legislative history might lower the probability value of the rule of lenity. R

III. ILLEGITIMATE POLICY JUDGMENTS AND SUBSTANTIVE CANONS OF STATUTORY CONSTRUCTION

The difficulties outlined above illustrate why the determination of statutory ambiguity is highly consequential, but, at the same time, subjective and standardless.[102] The problematic nature of establishing the accuracy of any given interpretive tool also provides one major reason why the Court does not purport to base its methodology of statutory interpretation on empirical evidence.[103] Instead, the selection of interpretive tools to provide contextual evidence for determining ambiguity, and the persuasive force to give each interpretive tool, are matters of judicial judgment.[104] Further, courts arbitrarily designate certain interpretive tools as being applicable to ambiguity determinations and others as being applicable to only ambiguity resolution, such as the position of some courts, including the Supreme Court on occasion, that legislative history will only be considered if the statute is first found to be ambiguous.[105]

A. Substantive Canons and Congressional Intent

Notwithstanding the difficulties involved in determining whether interpretive tools accurately reflect congressional intent, substantive canons, also known as normative canons, are widely viewed as being based on policy, rather than congressional intent.[106] Indeed, some scholars have argued that substantive canons should be used to pro-

102. *Cf.* Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546, 572 (2005) (Stevens, J., dissenting) ("Because ambiguity is apparently in the eye of the beholder, I remain convinced that it is unwise to treat the ambiguity *vel non* of a statute as determinative of whether legislative history is consulted.").

103. *See* Adrian Vermeule, *Interpretive Choice*, 75 N.Y.U. L. REV. 74, 77 (2000) (explaining that "[c]ourts must choose interpretive doctrines on largely empirical grounds, under conditions of severe empirical uncertainty, often without the luxury of postponing their decisions" until "new information . . . becomes available or . . . crucial experiments can be conducted").

104. *See* Frankfurter, *supra* note 87, at 543–44 (stating that "[i]n the end, language and external aids" are "weighed in the balance of judicial judgment"); *see also supra* Part II.B. R

105. *See, e.g.*, *Exxon Mobil*, 545 U.S. at 567 (majority opinion) (indicating that a court should consult legislative history only after first determining that the statute is ambiguous).

106. *See* William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 638 (1992) (arguing that "even ordinary clear statement rules are particularly countermajoritarian, because they permit the Court to override probable congressional preferences in statutory interpretation in favor of norms and values favored by the Court"); Mendelson, *supra* note 20, at 745 (stating that substantive canons "encod[e] some sort of value judgment"). R

tect important public values.[107] The conventional view among scholars, however, is that the policy judgments underlying substantive canons make them inconsistent with *Chevron*'s rationale that agencies have been delegated authority to decide policy issues.[108] Despite these concerns, in several cases, the Court has allowed substantive canons to displace *Chevron*.[109] Although these applications of substantive canons are highly significant because they foreclose the possibility of deference to agency interpretations, the Court has not yet offered a comprehensive explanation for when substantive canons should be invoked as a substitute for deference to agency interpretations. As a result, the relationship between substantive canons and *Chevron* is widely regarded as being unclear.[110]

The conventional characterization of substantive canons as originating due to judicial policy concerns, as opposed to efforts to estimate congressional intent, is problematic for various reasons. Perhaps the most important reason to question the conventional characterization is that it ignores the Court's defense of substantive canons. A primary reason for why many substantive canons are seen by the

107. *See, e.g.*, Sunstein, *supra* note 41, at 2105–18 (arguing that giving preference to certain canons over the *Chevron* principle is an effective means of balancing separation of powers concerns). R

108. *See* Bernard W. Bell, *Using Statutory Interpretation to Improve the Legislative Process: Can It Be Done in the Post-*Chevron *Era?*, 13 J.L. & POL. 105, 159 (1997) ("*Chevron* changed the status of the substantive canons much like it has changed the courts' authority with respect to the resolution of methodological issues."); Bradford C. Mank, *Textualism's Selective Canons of Statutory Construction: Reinvigorating Individual Liberties, Legislative Authority, and Deference to Executive Agencies*, 86 KY. L.J. 527, 613 (1998) (arguing that the *Chevron* principle that Congress has delegated lawmaking or interpretive authority should prevail over various substantive canons); Mendelson, *supra* note 20, at 745–46 (arguing that judicial application of substantive canons in Step One "seems inappropriate"); Merrill & Hickman, *supra* note 3, at 873 ("All norms and canons grounded in common law must give way to the *Chevron* doctrine."); David L. Shapiro, *Continuity and Change in Statutory Interpretation*, 67 N.Y.U. L. REV. 921, 955–56 & n.173 (1992) (arguing that *Chevron* "should generally prevail over the various tie-breakers that tilt in favor of continuity"). R R R

109. *See, e.g.*, Watters v. Wachovia Bank, N.A., 550 U.S. 1, 20–21 (2007) (applying the preemption canon instead of *Chevron*); Clark v. Martinez, 543 U.S. 371, 381–82 (2005) (applying the canon of constitutional avoidance instead of *Chevron*); Zadvydas v. Davis, 533 U.S. 678, 696–97 (2001) (stating that if Congress had made its intent clear, the Court must give effect to Congress's intent, but concluding that Congress had not made a clear indication in this case); *id.* at 707 (Kennedy, J., dissenting) (implying that the Court applied the canon of constitutional avoidance instead of *Chevron* by accusing the Court of "misunderstand[ing] the principle of constitutional avoidance which it seeks to invoke"); INS v. St. Cyr, 533 U.S. 289, 298, 316–18 (2001) (applying both the "longstanding rule requiring a clear statement of congressional intent to repeal habeas jurisdiction" and the presumption against retroactivity instead of *Chevron*); Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988) (applying the constitutional avoidance canon instead of *Chevron*).

110. *See supra* note 20 and accompanying text. R

Court as fitting naturally within Step One is because the Court views these canons as useful in determining congressional intent.

Consider the Court's statements regarding several substantive canons. The canon of constitutional avoidance—which directs courts to adopt a narrow, even if second-best, interpretation if doing so would avoid a serious constitutional issue—represents a "reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts" and is "thus a means of giving effect to congressional intent, not of subverting it."[111] The presumption against retroactive application of statutes "will generally coincide with legislative and public expectations."[112] The presumption against extraterritorial application of federal statutes reflects "the commonsense notion that Congress generally legislates with domestic concerns in mind."[113] The canon benefiting Native Americans "assumes Congress intends its statutes to benefit the tribes,"[114] and the immigration rule of lenity assumes that the interpretation intended by Congress is "the narrowest of several possible meanings of the words used."[115] Similarly, several federalism canons are based on the assumption that Congress is concerned with federalism issues and desires to preserve local authority.[116]

In the same way as other substantive canons, *Chevron* is also based on a generalized assumption about congressional intent. The Court has asserted that *Chevron* established a "presumption that Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows."[117] Likewise, the Court's recent restrictions on the scope of

111. *Clark*, 543 U.S. at 381–82.

112. Landgraf v. USI Film Prods., 511 U.S. 244, 272 (1994).

113. Smith v. United States, 507 U.S. 197, 204 n.5 (1993); *see also* Small v. United States, 544 U.S. 385, 388–89 (2005) (stating that the Court has "adopt[ed] the legal presumption that Congress ordinarily intends its statutes to have domestic, not extraterritorial, application").

114. Chickasaw Nation v. United States, 534 U.S. 84, 95 (2001).

115. Fong Haw Tan v. Phelan, 333 U.S. 6, 10 (1948).

116. *See, e.g.*, AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366, 420 (1999) (discussing the "assumption that Congress intended to preserve local authority"); Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996) (stating that "because the States are independent sovereigns in our federal system, we have long presumed that Congress does not cavalierly pre-empt state-law causes of action"); Gregory v. Ashcroft, 501 U.S. 452, 470 (1991) (indicating that the Court would "not attribute to Congress an intent to intrude on state governmental functions").

117. Smiley v. Citibank (S.D.), N.A., 517 U.S. 735, 740–41 (1996).

Chevron have been justified on the basis of generalized assumptions about congressional intent.[118]

The use of substantive canons with their tendency to direct courts to interpret statutes narrowly against agency interests, especially when significant issues are at stake, is consistent with the Court's recent disinclination to extend *Chevron* to issues of major importance.[119] At least part of the rationale for this practice is reflected in Justice Breyer's claim that "Congress is more likely to have focused upon, and answered, major questions, while leaving interstitial matters to answer themselves in the course of the statute's daily administration."[120] Thus, if Congress did not focus on a major issue, it did not likely intend to delegate that issue to an agency to resolve.

In several recent cases, the Court has refused to extend *Chevron* deference to broad agency interpretations that arguably were consistent with the plain language of the relevant statutes. In *Gonzales v. Oregon*,[121] for example, the Court held that the U.S. Attorney General was not entitled to deference regarding an interpretation extending the reach of the Controlled Substances Act to physician-assisted suicide.[122] The Court refused to presume that Congress would have implicitly authorized the Attorney General to reach an issue as "extraordinary" as the restriction of physician-assisted suicide.[123] Similarly, in *MCI Telecommunications Corp. v. AT&T Co.*,[124] the Court argued that "[i]t is highly unlikely that Congress would leave the determination of whether an industry will be entirely, or even substantially, rate-regulated to agency discretion."[125] Additionally, in *FDA v.*

118. *See* United States v. Mead Corp., 533 U.S. 218, 230 (2001) ("It is fair to assume generally that Congress contemplates administrative action with the effect of law when it provides for a relatively formal administrative procedure tending to foster the fairness and deliberation that should underlie a pronouncement of such force."). For an explanation of this restriction on *Chevron*'s scope, see *infra* notes 269–72 and accompanying text. R

119. *See* Cass R. Sunstein, Chevron *Step Zero*, 92 VA. L. REV. 187, 231–47 (2006) (explaining the "major questions" exception).

120. Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 370 (1986).

121. 546 U.S. 243 (2006).

122. *Id.* at 274–75.

123. *See id.* at 267 (stating that Congress does not "hide elephants in mouseholes" (citation and internal quotation marks omitted)). *Gonzales* can also be seen as a case that was influenced by substantive canons. *See* Ernest A. Young, *The Constitution Outside the Constitution*, 117 YALE L.J. 408, 467 (2007) ("The majority's interpretation . . . was plainly influenced by federalism-based assumptions concerning the traditional and proper allocation of regulatory authority over the medical profession."). Since the major questions exception and clear statement canons both require clear evidence of congressional intent, it is not surprising that the Court has used these doctrines interchangeably.

124. 512 U.S. 218 (1994).

125. *Id.* at 231.

Brown & Williamson Tobacco Corp.,[126] the Court stated that "Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion."[127] Other explanations by scholars of these decisions have tied the Court's refusal to grant *Chevron* deference to the agency procedures involved.[128] Nevertheless, the explanation put forth by the Court is that based on estimations of congressional intent, it is reluctant to countenance congressional delegation to agencies of important or sensitive issues.[129]

B. Substantive Canons and Conventions About Language

Notwithstanding the Court's claims about the connection between substantive canons and congressional intent, these statutes narrowing substantive canons, particularly the clear statement canons, run counter to how courts typically conceptualize statutory breadth.[130] Often broad statutory language is depicted as being ambiguous or vague, which, in the modern administrative state as *Chevron* exemplifies, is interpreted as evidencing an intention to delegate authority to agencies to fill in the statutory gaps.[131] Alternatively, and perhaps more intuitively, courts often attribute breadth of meaning to broadly worded statutes. The Court's interpretations of the notoriously broad and open-ended Racketeer Influenced and Corrupt Organizations Act ("RICO")[132] serve as a paradigmatic example of this approach. RICO

126. 529 U.S. 120 (2000).

127. *Id.* at 160; *see also id.* at 133 ("In addition, we must be guided to a degree by common sense as to the manner in which Congress is likely to delegate a policy decision of such economic and political magnitude to an administrative agency.").

128. *See, e.g.*, Lisa Schultz Bressman, *Deference and Democracy*, 75 GEO. WASH. L. REV. 761, 764 (2007) (arguing "that the Court withheld deference" in *Gonzales* "because the respective administrations . . . although electorally accountable, had interpreted broad delegations in ways that were undemocratic when viewed in the larger legal and social contexts").

129. *See* Sunstein, *supra* note 119, at 236–42 (discussing the major question trilogy). R

130. Not all substantive canons are of equal strength. The classification of specific substantive canons can be difficult because courts often are vague when describing the canons and occasionally increase or decrease their strength, but two broad categories can be identified. The weakest substantive canons are tie-breaker canons, which direct that certain statutes be construed "liberally" or "strictly" and are considered at only the end of a court's search for statutory meaning. *See* WILLIAM N. ESKRIDGE, JR. ET AL., LEGISLATION AND STATUTORY INTERPRETATION 343–52 (2d ed. 2006) (discussing liberal versus strict construction). In contrast to the case with the relatively weak canons that serve as tie-breakers, an interpretation must be highly persuasive in order to overcome the presumption created by the clear statement rule. Courts are often forced to accept second-best interpretations, including the frequent creation of implied exceptions to otherwise unambiguously broad statutory language. *See supra* note 19 and accompanying text. R

131. *See generally* Margaret H. Lemos, *The Other Delegate: Judicially Administered Statutes and the Nondelegation Doctrine*, 81 S. CAL. L. REV. 405 (2008) (describing the challenges posed by broadly worded statutes that delegate lawmaking power to courts).

132. 18 U.S.C. §§ 1961–1968 (2006).

is filled with broad and undefined terms, such as "enterprise" and "pattern of racketeering activity."[133] Yet, the Court has stated, "'[T]he fact that RICO has been applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth.'"[134]

Application of clear statement rules, and other similar substantive canons, changes the normal rules of interpretation that treat broad statutory language as connoting ambiguity, vagueness, or benign breadth. Instead, clear statement rules and other similar rules counterintuitively construe seemingly broad statutory language as being clearly narrow in some respects. These interpretations are accomplished by the creation of "implied limitation[s] on otherwise unambiguous general terms of the statute."[135] Thus, as illustrated above, pursuant to the presumption against retroactivity, a statute that is full of broad terms but is silent with respect to retroactive application is construed to be unambiguously prospective in effect.[136] Similarly, pursuant to the presumption against extraterritorial application of federal statutes, a statute that is full of broad terms but is silent with respect to extraterritorial application is interpreted as not having an extraterritorial reach.[137]

One objection to the notion of creating exceptions to broad statutory language under *Chevron* Step One is that a court's task is not to infer what Congress *might* have said about the issue in dispute if it had considered the matter, but rather "'whether Congress has directly spoken to [the] precise question.'"[138] The Court, though, has main-

133. *See* Brian Slocum, *RICO and the Legislative Supremacy Approach to Federal Criminal Lawmaking*, 31 LOY. U. CHI. L.J. 639, 641–48 (2000) (describing the broad nature of RICO).

134. Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 499 (1985) (alteration in original) (quoting Haroco, Inc. v. Am. Nat'l Bank & Trust Co. of Chi., 747 F.2d 384, 398 (7th Cir. 1984)).

135. Spector v. Norwegian Cruise Line Ltd., 545 U.S. 119, 139 (2005).

136. *See* Nelson, *supra* note 83, at 384 (noting that the presumption against retroactivity "often causes courts to infer exceptions to statutory provisions whose words, on their face, appear to cover all pending cases"). R

137. *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 586 n.4 (1992) (stating that "inclusive language, by itself, is not sufficient to overcome the presumption against the extraterritorial application of statutes").

138. Cohen v. JP Morgan Chase & Co., 498 F.3d 111, 120–21 (2d Cir. 2007) (quoting Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842 (1984)). In this case, the Second Circuit seemed merely to be making the unremarkable point that reviewing courts must be highly confident in an interpretation before selecting it at Step One. *See id.* at 124 ("Because neither the structure, purpose, nor legislative history of RESPA § 8(b) clearly resolves the identified textual ambiguity . . . we proceed to the second step of *Chevron* analysis."). Nevertheless, the question remains whether the application of a clear statement rule signifies that the reviewing court believes that Congress has, albeit through its silence, directly spoken to the issue in question or, somewhat differently, that if Con-

tained that using canons to create limitations on broad statutory language "is a valid approach whereby unexpressed congressional intent may be ascertained."[139] As Justice Scalia has explained with regard to the clear statement rule against waiver of state sovereign immunity, "[S]ince congressional elimination of state sovereign immunity is such an extraordinary act, one would normally expect it to be explicitly decreed [by Congress] rather than offhandedly implied—so something like a 'clear statement' rule is merely normal interpretation."[140]

In essence, the absence of explicit statutory language is, to the Court, in some circumstances sufficient to conclude that Congress does not desire that a statute be interpreted as broadly as its terms might suggest. The relevant principle is that when exceptions to a normative proposition are "part of an antecedent understanding between speaker and listener that limits conditions of application, the exceptions are part of the meaning" of the proposition.[141] Even if there is no evidence that Congress had considered a particular matter, the Court is able to discern congressional intent pursuant to its conclusion that the absence of a clear congressional statement is equivalent to a statutory qualification.[142] This understanding of congressional intent is particularly justifiable with regard to modern statutes, which are often drafted in broad terms. Pursuant to this assumption about language and congressional intent, clear statement rules, as the Court has explained, do not resolve statutory ambiguity, but rather assist the reviewing court in reaching a conclusion that a statute is unambiguous.[143] If the meaning of a text is derived from the

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gress had considered the issue, it would have chosen the interpretation consistent with the clear statement rule. The former would, assuming the legitimacy of the clear statement rule, justify the reviewing court deciding the case at Step One, while the latter would make a Step One interpretation in accordance with the canon arguably inconsistent with *Chevron*'s admonition to courts not to decide cases at Step One based on speculation about a statute's purpose.

139. Foley Bros. v. Filardo, 336 U.S. 281, 285 (1949).

140. Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION 3, 29 (Amy Gutmann ed., 1997).

141. *See* Kent Greenawalt, *How Law Can Be Determinate*, 38 UCLA L. REV. 1, 10 (1990) ("When exceptions to an imperative are part of an antecedent understanding between speaker and listener that limits conditions of application, the exceptions are part of the meaning of the imperative.").

142. *See* Spector v. Norwegian Cruise Line Ltd., 545 U.S. 119, 139 (2005) ("Implied limitation rules avoid applications of otherwise unambiguous statutes that would intrude on sensitive domains in a way that Congress is unlikely to have intended had it considered the matter.").

143. *See id.* at 141 (drawing a "distinction between a canon for choosing among plausible meanings of an ambiguous statute and a clear statement rule that implies a special substantive limit on the application of an otherwise unambiguous mandate").

conventions of the relevant linguistic community, then users of language must be presumed to know "the assumptions shared by the speakers and the intended audience."[144]

Although clear statement canons may seem counterintuitive in some respects, they should not, as a class, be viewed as exogenous to the traditional interpretive process. Clear statement canons are in large part conventions about language, and there is no such thing as interpretation without at least some conventions about the meaning of language.[145] Indeed, interpretation necessarily requires an understanding of acontextual conventions. At a basic level, if the relevant interpretive community did not possess a general understanding of words, sentences, grammar, and syntax, communication would be impossible.[146] Thus, at least some conventions add benefits to the interpretive enterprise, such as improved coherency and consistency of interpretations.[147] These conventions necessarily exist in all widely accepted interpretive methodologies. Few proponents of contextual conventions, such as the principle that the plain meaning of statutory text should be subordinate to legislative intent, would argue that courts should exclusively use a purposivist approach unanchored by statutory text along with any conventions for interpreting that text.[148]

It is natural that many of the conventions for the interpretation of legal texts would not be shared by the interpreters of nonlegal texts. As the branch with the primary responsibility of determining the rules and principles of interpretation, the linguistic subcommunity of judges will shape the linguistic understandings relevant to

144. Manning, *supra* note 67, at 2467 (citation and internal quotation marks omitted); *see also id.* (explaining that "interpreters should consult the assumptions of a reasonable person conversant with legal conventions," which include such things as recognizing the defense of justification even with regard to unqualified statutory crimes). R

145. *See* William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from* Chevron *to* Hamdan, 96 GEO. L.J. 1083, 1152 (2008) (arguing that determining the plain meaning of a text requires a normative baseline).

146. *See* Schauer, *supra* note 48, at 1120 (arguing that "[w]ithout knowing something about words and sentences and grammar and syntax as general or acontextual rules (or, even better, conventions), we could never hope to understand each other"). R

147. *See* Easterbrook, *supra* note 79, at 540 (stating that canons serve "as off-the-rack provisions that spare legislators the costs of anticipating all possible interpretive problems and legislating solutions for them"). Arguably, the stronger the substantive canon, the more likely it is to improve the consistency of interpretations because such canons require more specific language in order to be overcome. *See* Slocum, *supra* note 19, at 381–84 (arguing that the "superclear statement" rule regarding the repeal of habeas corpus jurisdiction provides guidance to Congress and courts (citation and internal quotation marks omitted)). R R

148. *See* Molot, *supra* note 28, at 29–30 (stating that "few judges or scholars today espouse the strong purposivism that textualists set out to discredit two decades ago"). R

the interpretation of statutes, which will reflect the values of the legal system.[149] As David Shapiro has observed, courts are naturally conservative and seek legal coherence by minimizing disruption of the status quo.[150] Substantive canons therefore generally narrow statutory meaning.[151] Many of these narrowing conventions are long-standing and uncontroversial. For example, "textualists read mens rea requirements into otherwise unqualified criminal statutes because established judicial practice calls for interpreting such statutes in light of common law mental state requirements."[152] Even the more controversial substantive canons, though, can likewise be defended on the basis that they establish conventions about language that form the baseline for legislative drafting and interpretation.

C. Substantive Canons May Set Forth Inaccurate Conventions About Language Usage

It may be accurate to theorize that substantive canons are merely conventions about the meaning of language, but once it is agreed that the role of interpretive rules is to estimate congressional intent, substantive canons nevertheless can be objected to on the basis that they set forth inaccurate conventions. The Court may generally claim that the substantive canons it creates reflect congressional intent, but, at best, such claims can be accepted only as broad and non-empirically based generalizations. In one sense this should not be surprising because the nature of rules (and substantive canons can be seen as putting forth rule-like statements about how language should be interpreted) is such that they, to varying degrees, necessarily draw arbitrary lines and are both over- and under-inclusive.[153] Statutory interpretation, in a very limited sense, accounts for this problem. As John Manning has argued, the reality that rules are over- and under-inclusive is part of what inspires the absurdity doctrine, which gives judges the power to ignore the plain import of provisions if doing so

149. *Cf.* Schauer, *supra* note 48, at 1122–23 (discussing the distinction between ordinary language and legal language). R

150. *See* Shapiro, *supra* note 108, at 925 (arguing that canons are consistent with the "judicial tendency to favor continuity over change"). R

151. *See* Brian G. Slocum, *The Problematic Nature of Contractionist Statutory Interpretations*, 102 NW. U. L. REV. COLLOQUY 307, 310 (2008) ("Substantive canons of interpretation . . . almost uniformly direct courts to interpret statutes narrowly.").

152. Manning, *supra* note 67, at 2466. R

153. *See* Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J.L. & PUB. POL'Y 59, 65 (1988) (stating that "[r]ules overshoot or undershoot"); Nelson, *supra* note 83, at 399 (explaining that "rules . . . are simultaneously over- and under-inclusive: they apply in some situations not warranted by their underlying purposes, and they fail to reach other situations that those purposes would seem to cover"). R

would avoid an absurd result.[154] Nevertheless, even allowing for the natural imprecision of rules, substantive canons in particular may be based on erroneous assumptions about Congress and the legislative process.

Even if one accepts the legitimacy of substantive canons, it cannot be argued that these canons attempt to answer questions about specific congressional intent with regard to any particular statute.[155] Rather, like most other tools of interpretation, canons purport implicitly to reflect a kind of universal congressional intent. All substantive canons apply across distinct time periods, and many purport to apply equally to diverse subject matter. The intertemporal dimension of substantive canons is such that each canon assumes that all Congresses share the same intent. Thus, courts assume, for example, that every Congress desires that the ambiguities in the statutes that it enacts be interpreted in favor of immigrants and Native Americans.[156] Similarly, courts assume that every Congress desires the same division of interpretive responsibility between courts and agencies and thus the same deference rules, as reflected in the fact that courts do not reevaluate the *Chevron* doctrine each time the composition of Congress or the Executive Branch changes.[157]

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154. *See* Manning, *supra* note 67, at 2394 (stating that the "absurdity doctrine rests on the intuition that some such outcomes are so unthinkable that the federal courts may safely presume that legislators did not foresee those particular results"). R

155. Charles Tiefer, *The Reconceptualization of Legislative History in the Supreme Court*, 2000 WIS. L. REV. 205, 250 ("In cases involving a substantive canon, the canon constitutes a factor in the Justices' thinking that does not derive closely from original congressional intent, however defined.").

156. *See supra* text accompanying note 115 (explaining the immigration rule of lenity). A few well-known canons cannot be consistent with congressional intent. For example, it is doubtful that Congress desires that ambiguities in criminal statutes be interpreted in favor of defendants. *See generally* Craig S. Lerner, *Legislators as the "American Criminal Class": Why Congress (Sometimes) Protects the Rights of Defendants*, 2004 U. ILL. L. REV. 599 (discussing the general principle that Congress does not often enact legislation that benefits defendants). Indeed, many state legislatures have enacted legislation that abolishes this rule of lenity. *See* Rosenkranz, *supra* note 69, at 2094 n.25 (listing states that have abrogated the rule of lenity). Thus, interpretive tools such as the criminal rule of lenity must be defended on grounds other than congressional intent. *See infra* note 162 and accompanying text. Nevertheless, while commentators may speculate that a given interpretive tool is inconsistent with congressional intent, there is no methodology available to validate such speculation. *See supra* Part II.B.4 (discussing the difficulties associated with determining whether interpretive tools are consistent with congressional intent). R R R

157. *See* Caleb Nelson, *Statutory Interpretation and Decision Theory*, 74 U. CHI. L. REV. 329, 357 n.47 (2007) (book review) ("The general presumption announced in *Chevron*—that when Congress entrusts the administration of a statutory provision to a federal agency, Congress should usually be understood to be letting the agency take the lead in resolving any indeterminacies in the provision—is thus a paradigmatic normative canon."); Jordan Wilder Connors, Note, *Treating Like Subdecisions Alike: The Scope of Stare Decisis as Applied to*

Substantive canons also possess a questionable trans-subject matter dimension. The trans-subject matter dimension means that each canon, at least theoretically, is used when applicable, regardless of the subject of the legislation or the affected groups. Thus, for example, the presumption against retroactivity applies with equal force to both legislation affecting business interests, even though Congress may be quite protective of business, and immigrants, even in cases where a Congress particularly hostile to immigrants had passed extremely punitive, anti-immigrant legislation.[158]

The reality that substantive canons are subject to crude intertemporal and subject matter assumptions does not serve to distinguish them from other interpretive tools, especially textual canons, because they are subject to the same assumptions.[159] A more fundamental claim about substantive canons, though, is that they are idiosyncratically selected by the Court according to its policy preferences, which contributes to the poor connection between the canons and congressional intent.[160] Indeed, considering the distributive implications of substantive canons, it is not difficult to imagine ideologically driven judges, and others, being attracted to them.[161] The Court itself has often indicated that substantive canons are not entirely based on estimations of congressional intent. For example, the Court has indicated that the presumption against retroactivity helps protect disadvantaged groups that might be the natural targets of retroactive legislation, and that the rule of lenity acts as a nondelegation device that forces Congress to legislate explicitly and precisely in the area of

Judicial Methodology, 108 COLUM. L. REV. 681, 703 (2008) (explaining that "the *Chevron* doctrine involves a presumption about congressional intent, much like some textual canons" because "[t]he Court presumes that Congress intended to delegate gap-filling authority in ambiguous statutes to the agencies implementing them rather than the courts").

158. *See* Slocum, *supra* note 19, at 408 (noting that the Court has applied the presumption against retroactivity in immigration cases even in instances where the provision at issue was part of punitive, anti-immigrant legislation). R

159. *See infra* notes 190–94 and accompanying text (explaining the assumptions underlying textual canons). R

160. *See* Eskridge & Frickey, *supra* note 106, at 595–96 ("[S]ubstantive canons are not policy neutral. They represent value choices by the Court."). R

161. *See* Adrian Vermeule, *The Judiciary Is a They, Not an It: Interpretive Theory and the Fallacy of Division*, 14 J. CONTEMP. LEGAL ISSUES 549, 572 (2005) (stating that clear statement rules "inevitably have controversial normative and distributive implications"). The distributional effects of substantive canons are undoubtedly why scholars generally focus on proposing new substantive canons, as opposed to new textual canons. *See, e.g.*, Jonathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223, 242–50 (1986) (proposing a canon of statutory construction that would preserve economic liberty in the face of majoritarian political processes).

criminal law.[162] Of course, the *Chevron* doctrine can similarly be described as being at least partially motivated by policy considerations rather than by an attempt to estimate congressional intent.[163]

Even if substantive canons may not capture the subjective intent of Congress, they can, as explained above, still be defended on the basis that they represent the interpretive conventions that Congress is obligated to consider when drafting legislation.[164] The Court has maintained that the stability of the conventions of interpretation is more important than whether the conventions accurately estimate congressional intent.[165] Thus, if it seems counterintuitive that broad statutory terms do not necessarily connote broad statutory meaning when sensitive areas are threatened, Congress, at least theoretically, has the ability to overcome ex ante the presumptions created by canons by drafting explicit legislation.[166]

The theory that substantive canons accurately estimate congressional intent because they exist as background conventions about language that Congress can access when drafting statutory language is subject to various objections. One important objection is that, as empirical inquiries have shown, it is questionable how much attention Congress pays to the rules of interpretation when drafting legislation.[167] Even if Congress purported to consider substantive canons when drafting legislation, it is often difficult to assess exactly how the potential applicability of substantive canons should impact the draft-

162. *See* United States v. Santos, 128 S. Ct. 2020, 2025 (2008) (stating that the rule of lenity "places the weight of inertia upon the party that can best induce Congress to speak more clearly"); INS v. St. Cyr, 533 U.S. 289, 315 n.39 (2001) (noting that concerns about retroactive laws become more acute when they target an "unpopular group," and that "because noncitizens cannot vote, they are particularly vulnerable to adverse legislation" (internal quotation marks omitted)).

163. *See* Eskridge & Frickey, *supra* note 106, at 618–19 (describing *Chevron* as one of many policy-based substantive canons of statutory interpretation). R

164. *See supra* Part III.B (arguing that substantive canons can be viewed as conventions about how legal language should be interpreted).

165. *See* John R. Sand & Gravel Co. v. United States, 552 U.S. 130, 139 (2008) (indicating that "'it is more important that the applicable rule of law be settled than that it be settled right'" (quoting Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting))).

166. *See* Viet D. Dinh, *Reassessing the Law of Preemption*, 88 GEO. L.J. 2085, 2106 (2000) (explaining that the presumption against preemption "makes sense, however, if one considers the traditional assumption not as a dice-loading, ambiguity-resolving presumption, but rather simply as the background in which Congress legislates and therefore against which courts interpret the legislation").

167. *See* Victoria F. Nourse & Jane S. Schacter, *The Politics of Legislative Drafting: A Congressional Case Study*, 77 N.Y.U. L. REV. 575, 597–605 (2002) (finding that Congress does not pay particular attention to the rules of interpretation when drafting legislation).

ing.[168] The identity, scope, and level of clarity required of applicable canons are often difficult to gauge, partly because they are always subject to change, and changes are often applied retroactively.[169] Even the canons that do not represent specific ideological commitments, such as the canon of constitutional avoidance, give the judge significant latitude to apply the canon in order to achieve ideological results.[170]

In addition, even assuming a static list of canons, it is fictional to think that many of the canons could be part of a legislative drafting bargain. John Manning has argued that the absurdity doctrine cannot be considered a part of the legislative bargain due to its open-ended and ad hoc nature.[171] The same could be said of some of the substantive canons. It is plausible that judicial application of some clear statement rules, such as the presumption against retroactivity, can be predicted ex ante by Congress and thus could be part of the legislative bargain.[172] Such a conclusion is less plausible with regard to many of the other canons, however, such as the canon of constitutional avoidance and the weaker, tie-breaker canons, which apply in a much more general and diffuse manner.[173]

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168. *See id.* at 598–99 (explaining that legislators are familiar with the canons of construction, but "[t]he real issue was whether and *how* this knowledge was used" in the drafting process (emphasis added)); *see also* Dinh, *supra* note 166, at 2085 ("Notwithstanding its repeated claims to the contrary, the Supreme Court's numerous preemption cases follow no predictable jurisprudential or analytical pattern."). R

169. *See* William N. Eskridge, Jr. & Kevin S. Schwartz, Chevron *and Agency Norm-Entrepreneurship*, 115 YALE L.J. 2623, 2627–30 (2006) (arguing that canons are a weak constraint because of their changing nature and the uncertainty of their application); *see also* John F. Manning, *The Nondelegation Doctrine as a Canon of Avoidance*, 2000 SUP. CT. REV. 223, 228 (arguing that judicial manipulation of canons upsets congressional choice to legislate in broad terms and gives the Court, rather than Congress, the ultimate responsibility for defining legislative policy).

170. *See* Richard A. Posner, *Statutory Interpretation—in the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 816 (1983) ("The practical effect of interpreting statutes to avoid raising constitutional questions is therefore to enlarge the already vast reach of constitutional prohibition beyond even the most extravagant modern interpretation of the Constitution.").

171. *See* Manning, *supra* note 67, at 2471 (arguing that "[i]n contrast with the rather more precise background conventions . . . the absurdity doctrine is too broad and unintelligible to give either legislators or the public a realistic basis on which to evaluate the specific outcomes reached through the legislative process"). R

172. *See* Slocum, *supra* note 19, at 381–83 (arguing that some clear statement canons can add predictability to the law). R

173. *See* Russello v. United States, 464 U.S. 16, 29 (1983) (explaining that the "rule [of lenity] 'comes into operation at the end of the process of construing what Congress has expressed'" (quoting Callanan v. United States, 364 U.S. 587, 596 (1961))); *see also supra* note 130 (explaining the difference between clear statement rules and tie-breaker canons). R

D. Other Interpretive Tools and Congressional Intent

Substantive canons can thus be framed as setting forth conventions, on the basis of broad generalizations about congressional intent and the interpretation of legal language, but the legitimacy of these conventions can be challenged based on their accuracy.[174] The proposition that the conventions underlying substantive canons have been viewed by some as inaccurate does not, however, distinguish them from other interpretive tools. Despite the absence of any kind of objective standard for determining the probabilistic force of interpretive tools, most tools have been criticized for being inaccurate gauges of congressional intent.

1. Legislative History and Dictionaries

Consider several popular interpretive tools. Legislative history, for example, if considered at any early stage of the interpretive process, may, in contrast to substantive canons, help agencies because it may contribute to a finding of ambiguity.[175] Legislative history has long been a tool that courts have used (including the Court in *Chevron*) to search for indications of congressional intent.[176] Although the judiciary's use of legislative history has declined, it is still frequently consulted by courts.[177] Some scholars have argued, however, that judicial consideration of legislative history is, at best, not probative, and, at worst, has a negative probative value.[178] Additionally, a common criticism of legislative history is its particular amenability to ideologi-

174. *See supra* Part III.A–C.

175. *See* Bell, *supra* note 108, at 132 ("[B]ecause legislative history is voluminous and conflicting, a court might more likely conclude that most statutes are unambiguous if it uses a theory that disregards legislative history."). R

176. *See, e.g.*, Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 851–53 (1984) (providing an extensive discussion of legislative history). The Court's decision in *Holy Trinity Church v. United States*, 143 U.S. 457 (1892), is generally recognized as the first case to sanction the use of legislative history. *See* Vermeule, *supra* note 97, at 1835 (noting that "*Holy Trinity* elevated legislative history to new prominence by overturning the traditional rule that barred judicial recourse to internal legislative history"). R

177. *See generally* James J. Brudney & Corey Ditslear, *The Decline and Fall of Legislative History? Patterns of Supreme Court Reliance in the Burger and Rehnquist Eras*, 89 JUDICATURE 220 (2006) (examining the decline in the use of legislative history); *see also* Cross, *supra* note 91, at 1980–83 (showing empirically that legislative history "remains a significant source for statutory interpretation in the Supreme Court"). R

178. *See, e.g.*, Abner S. Greene, *The Missing Step of Textualism*, 74 FORDHAM L. REV. 1913, 1924–25 (2006) (listing the arguments against the use of legislative history, including the fact that the purpose of a multi-member body cannot readily be discerned, such purposes are often mixed or muddled, and the statements of committees or individual members do not stand for the whole); Vermeule, *supra* note 97, at 1838 (questioning the judiciary's competence to draw intentionalist inferences from legislative history). R

cally motivated misuse.[179] Thus, the use of legislative history has been criticized for being both inherently unreliable and susceptible to ideological manipulation.

In *Chevron* cases, some courts have agreed that legislative history should not be considered. The Second Circuit, for example, is reluctant to consider legislative history at Step One because the "'interpretive clues' to be found in such history will rarely speak with sufficient clarity to permit us to conclude 'beyond reasonable doubt' that Congress has directly spoken to the precise question at issue."[180] Similarly, the Third Circuit has indicated that legislative history should not be considered at Step One.[181] In essence, these courts, as well as some scholars, believe that the consideration of legislative history does not reliably increase the probability of accurate interpretations when *Chevron* is applicable.[182]

The criticism of legislative history may reflect the broader trend of greater judicial reliance on text-centric modes of interpretation, but such interpretive tools have similarly been criticized.[183] Consider the use of dictionaries to define statutory terms, which has greatly increased over the last couple of decades.[184] Similar to claims that other tools of interpretation are selectively employed, judges have been accused of using dictionaries to support result-oriented interpretations by searching various dictionaries until a desired interpretation is lo-

179. *See* Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546, 568 (2005) (explaining that "legislative history is itself often murky, ambiguous, and contradictory" and subject to manipulation by "unelected staffers and lobbyists"). *But see* James J. Brudney & Corey Ditslear, *Liberal Justices' Reliance on Legislative History: Principle, Strategy, and the Scalia Effect*, 29 BERKELEY J. EMP. & LAB. L. 117, 146–51 (2008) (arguing that legislative history has often been used in a principled manner by the Supreme Court).

180. Cohen v. JP Morgan Chase & Co., 498 F.3d 111, 122 (2d Cir. 2007) (citation omitted).

181. *See* United States v. Geiser, 527 F.3d 288, 292–94 (3d Cir. 2008) (indicating that legislative history should not be considered in Step One, but noting past confusion about the issue).

182. *See, e.g.*, ADRIAN VERMEULE, JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION 192–93 (2006) (arguing that judicial use of legislative history cannot be expected to improve the decisional process because the possibility of benefits is effectively counterbalanced by the possibility of harms, although legislative history can be expected to increase the costs of the process itself).

183. *See* Nancy Staudt et al., *Judging Statutes: Interpretive Regimes*, 38 LOY. L.A. L. REV. 1909, 1935 (2005) (indicating that "some scholars have alleged a growing disenchantment" with textualism).

184. *See* 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, 251–60 (1999) (documenting the increased use of dictionaries by the Court); *see also* Note, *Looking It Up: Dictionaries and Statutory Interpretation*, 107 HARV. L. REV. 1437, 1438 (1994) [hereinafter *Looking It Up*] ("Over the past decade, the Supreme Court's use of dictionaries in its published opinions has increased dramatically.").

cated.[185] In addition, courts, perhaps unwittingly, often commit temporal errors by relying on dictionaries from a time period different than the relevant statutory text, even though the meaning of words often changes over time.[186] Even ingenuous uses of dictionaries are seen by some as problematic due to the "fundamental indeterminacy" of dictionary meanings and the flawed relationship that dictionary meanings bear to the context and meaning of statutory terms.[187]

2. Textual Canons and Conventions About Language

Similar to dictionaries, textual canons are popular interpretive tools that are considered to be traditional tools of statutory construction.[188] Unlike substantive canons, which typically narrow statutory meaning and thereby reduce the range of allowable agency discretion, textual canons can make a broader interpretation more plausible.[189] Textual canons "set forth inferences that are usually drawn from the drafter's choice of words, their grammatical placement in sentences, and their relationship to other parts of the statute."[190] The key assumption underlying these canons is that when Congress enacts statutory language, it does so according to accepted precepts of grammar and logic.[191] Courts assume, for example, that Congress does not include superfluous statutory language,[192] that when it enumerates things it does not intend to include things not listed,[193] and that it

185. *See* Ellen P. Aprill, *The Law of the Word: Dictionary Shopping in the Supreme Court*, 30 ARIZ. ST. L.J. 275, 297–331 (1998) (suggesting that the level of linguistic analysis performed by courts rarely rises above "definition shopping").

186. *See Looking It Up*, *supra* note 184, at 1447 ("The meanings of words change over time, and major dictionaries are updated at sufficiently infrequent intervals to allow significant linguistic development between editions." (footnote call numbers omitted)). R

187. *Id.* at 1445.

188. *See* Scheidler v. Nat'l Org. for Women, Inc., 547 U.S. 9, 23 (2006) ("[Interpretive] canons are tools designed to help courts better determine what Congress intended, not to lead courts to interpret the law contrary to that intent."); Stephen F. Ross, *Where Have You Gone, Karl Llewellyn? Should Congress Turn Its Lonely Eyes to You?*, 45 VAND. L. REV. 561, 563 (1992) ("A judge deploying a [textual] canon is attempting to act as an agent to effectuate congressional intent.").

189. The rule against surplusage, for example, can broaden the reach of a provision by forcing a court to give all of the terms in the provision a separate meaning. *See infra* note 192 and accompanying text (describing the rule against surplusage). R

190. ESKRIDGE ET AL., *supra* note 17, at 848. R

191. *See* ESKRIDGE ET AL., *supra* note 130, at 341 (asserting that textual canons have "long-standing pedigrees and reflect linguistic and syntactic understandings that may be useful in context"). R

192. *See, e.g.*, Lindsey Coal Mining Co. v. Chater, 90 F.3d 688, 692 (3d Cir. 1996) (indicating that surplusage "cannot have been Congress's intent").

193. *See, e.g.*, Carlson v. Reed, 249 F.3d 876, 882 (9th Cir. 2001) ("Applying the canon *expressio unius est exclusio alterius*, Congress's failure to expressly require R nonimmigrants to maintain a foreign residence must have been deliberate.").

intends for similar language within the same statutory section to have a consistent meaning.[194]

Courts often apply textual canons in Step One pursuant to the view that these tools assist in determining whether Congress has directly answered a statutory question.[195] Compared to substantive canons, textual canons are not controversial in Step One because they are widely viewed as devices that courts use when attempting to estimate congressional intent, rather than when attempting to promote the court's own vision of desirable policy.[196] Some scholars who criticize the use of substantive canons in Step One find textual canons less objectionable, if not appropriate.[197]

Because both types of canons are based on conventions about language, textual canons are quite similar to substantive canons, despite the distinction typically made between the two types by scholars.[198] It is true that textual canons focus on the language of the statute itself, through grammatical and similar rules, while substantive canons relate to how exogenous issues interact with the statutory language.[199] Both groups of canons, however, set forth presumptions about how Congress chooses statutory language.[200] Thus, a substantive canon, such as the presumption against retroactivity, assumes that Congress includes specific and explicit language when it intends for statutory language to have retroactive effects, while a textual canon, such as the rule against surplusage, assumes that Congress intends for

194. *See, e.g.*, Ingersoll v. Magone, 53 F. 1008, 1010 (2d Cir. 1893) (indicating that the "principle of noscitur a sociis[ ] show[s] the intent of congress").

195. *See* Curtis A. Bradley, Chevron *Deference and Foreign Affairs*, 86 VA. L. REV. 649, 675 (2000) ("[T]he Court regularly applies text-oriented canons in determining whether Congress has spoken to an issue under Step One of *Chevron*."); Mendelson, *supra* note 20, at 745 ("Despite *Chevron* . . . courts generally have applied rules of syntax in preference to agency interpretations on the ground that the syntax rules represent traditional tools of statutory construction by which courts can discern whether Congress has directly answered a statutory question under *Chevron* Step One."). R

196. *See* Sunstein, *supra* note 41, at 2105, 2109 (stating that "*Chevron* is plainly overcome by principles that help to ascertain congressional instructions," which include "syntactic principles" because such principles are "explicitly designed to help capture legislative instructions"). R

197. *See, e.g.*, Mendelson, *supra* note 20, at 745 (distinguishing textual canons from substantive canons and criticizing the use of substantive canons in Step One). R

198. *See supra* note 108 and accompanying text (demonstrating that some scholars disfavor the application of substantive canons when addressing the interpretive tools that courts should consider in Step One). R

199. *See supra* Part III.A (describing substantive canons); *see also supra* notes 188–94 and accompanying text (describing textual canons). R

200. *See supra* notes 111–16 and accompanying text (describing some assumptions underlying substantive canons). R

each statutory term to have meaning.[201] An understanding of substantive canons as well-established conventions used to estimate congressional intent makes the exceptions to statutory language created by them resemble the nonideological, if sometimes controversial, conventions used with regard to textual canons and less like simple normative choices made by courts.[202] Indeed, it has been argued that relying on rules of interpretation, instead of open-ended judgments about congressional intent, helps restrain judges who might interpret statutes according to their own policy preferences.[203]

Legitimizing substantive canons by virtue of their commonalities with textual canons is only effective if one is convinced, as many are not, that textual canons are legitimate. Although textual canons may be free from claims that they are endogenously underscored by policy choices, they are subject to other familiar criticisms. One important criticism, made by various prominent scholars, is that their presumptions do not actually reflect congressional intent or practice.[204] Textual canons have also been criticized on the basis that they are often, and easily, manipulated by judges in order to reach favored interpretations.[205] In addition, due to Karl Llewellyn's classic analysis, the conventional wisdom for some time was that canons are habitually in conflict.[206] It should not be surprising, then, that a high percentage

201. *See supra* note 136 and accompanying text (explaining the presumption against retroactivity); *supra* note 192 and accompanying text (discussing the rule against surplusage). R R

202. *See supra* note 108 and accompanying text (describing the view among many scholars that substantive canons represent judicial policy choices). R

203. *See* Andrew C. Spiropoulos, *Making Laws Moral: A Defense of Substantive Canons of Construction*, 2001 UTAH L. REV. 915, 918 ("A canons-based approach to interpretation will permit judges to bring in extrinsic legal principles to resolve hard cases without making ad hoc decisions based on one's policy preferences.").

204. *See* John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 97–98 (2006) (maintaining that it cannot be argued that all of the textual canons reflect legislators' actual knowledge of the contents of legislation); Posner, *supra* note 170, at 806 (arguing against the use of interpretative canons in part because they do not reflect the way in which legislatures behave); *see also* Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 873–74 (1930) ("The rule that the expression of one thing is the exclusion of another is in direct contradiction to the habits of speech of most persons."). R

205. *See* James J. Brudney & Corey Ditslear, *Canons of Construction and the Elusive Quest for Neutral Reasoning*, 58 VAND. L. REV. 1, 58–59 (2005) (indicating that a study of the Supreme Court's workplace decisions revealed that generally "liberals and conservatives seem to have relied on both language and substantive canons as support for their pre-existing ideological preferences"). In addition, textual canons also have a non-empirically based reputation for being manipulable. *See, e.g.*, Rosenkranz, *supra* note 69, at 2148 ("[C]hoosing interpretive canons is like entering a crowded cocktail party and looking over the heads of the guests for one's friends." (citation and internal quotation marks omitted)). R

206. *See* Karl N. Llewellyn, *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) (providing Llewellyn's analysis of canons of construction); *see also* DICKERSON, *supra* note 35, at 227 R

of references to textual canons by Supreme Court Justices have been negative in nature.[207] Some lower courts have also expressed hesitation about applying textual canons in Step One.[208]

IV. SUBSTANTIVE CANONS SHOULD BE APPLIED IN *CHEVRON* CASES SIMILARLY TO NON-*CHEVRON* CASES

Even if one is convinced that the creation of substantive canons is typically motivated by policy concerns, such a conclusion is not automatically delegitimizing, even when *Chevron* is applicable. A defensible normative view of the judiciary is that one of its proper functions is to exercise authority "temporarily to obstruct hasty and ill-conceived laws" through substantive canons "so to protect minorities and ameliorate changes that trench on fundamental liberties."[209] Nevertheless, even if it is conceded that the primary goal of statutory interpretation is to accurately estimate congressional intent, as I assume, various aspects of the endeavor, such as the broadly worded nature of many statutes and the indeterminate nature of language, the unproven connection between interpretive tools and congressional intent, as well as the subjective nature of the ambiguity determination, make the process highly discretionary.[210] It is thus problematic to draw distinctions—as those who would prohibit judicial consideration of substantive canons in the *Chevron* context would do—between interpretive tools that guide interpreters in determining whether a statute is ambiguous and those that guide interpreters in construing statutes that are ambiguous.[211] For similar reasons, distinctions between tools that reflect judicial policy determinations and those that reflect estimations of congressional intent or drafting habits are also problematic.[212]

(indicating that "[i]t is now fashionable to repudiate all 'canons of interpretation' on the ground that they largely cancel each other out" (citation omitted)).

207. *See* Cross, *supra* note 91, at 1985 (indicating that a "proportionally high number of references to the canons are negative ones"). R

208. *See, e.g.*, Tex. Rural Legal Aid, Inc. v. Legal Servs. Corp., 940 F.2d 685, 694 (D.C. Cir. 1991) (declaring that the canon *expressio unius est exclusio alterius*—"'the expression of one is the exclusion of others'"—"has little force in the administrative setting" because it is too weak to support a conclusion that Congress resolved the issue).

209. Eskridge & Ferejohn, *supra* note 77, at 618. R

210. *See supra* Part II.B (describing the various reasons why legal ambiguity determinations are discretionary and subjective).

211. *See supra* note 108 and accompanying text (discussing the conventional view among scholars that policy judgments underlying substantive canons make such canons inconsistent with *Chevron*). R

212. Obviously, it is not difficult to create hypothetical interpretive tools that all would concede are based on policy determinations rather than estimations of congressional in-

As this Article has illustrated, all interpretive tools can be attacked on the basis that their definitions contain inaccurate presumptions of congressional drafting practices and that they can be manipulated by judges in order to reach favored interpretations.[213] In addition, the application of any interpretive tool is discretionary and thus constitutes a policy choice.[214] A proper understanding of the nature of statutory interpretation reveals, then, that substantive canons are not as exceptional as some have claimed.[215] Indeed, there is symmetry between the broad assumptions about congressional intent underlying the *Chevron* doctrine and those underlying substantive canons.[216]

A. Substantive Canons Should Be Applied in Chevron *Step One*

The argument against the consideration of substantive canons in Step One is based on the questionable notions that distinctions can and should be made between policy-based interpretive tools and interpretive tools that are based on estimations of congressional intent, that distinctions can readily be made between accurate and inaccurate interpretive tools, and that ambiguity-determining interpretive tools can be distinguished from tools designed to choose between ambiguous interpretations.[217] The view that substantive canons should be applied in Step One when determining whether statutory language is ambiguous may possess significant conceptual difficulties, as Part II explained, but it reflects the Court's view of the role of canons and *Chevron* better than would alternative approaches.[218] The persistent view among scholars that *Chevron* fundamentally changed the hermeneutics of statutory interpretation, especially the legitimacy of substantive canons, is unsurprising considering the facile two-step doctrine that some thought would systematize the seemingly arbitrary nature of

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tent. It is more difficult, though, to prove that existing interpretive tools are based on policy, rather than estimations of congressional intent.

213. *See supra* Part III.C (discussing the perceived inaccuracies of substantive canons).

214. *See supra* Part II.B (explaining the various aspects of the ambiguity determination that are subjective and discretionary).

215. This is not to say that substantive canons are not important or that one should not be skeptical of the judiciary's motivations for creating these canons. *See* Slocum, *supra* note 151, at 313–16 (criticizing substantive canons that are designed to narrow interpretations beyond what legislators would have expected). R

216. *See supra* notes 111–18 and accompanying text (explaining that both substantive canons and the *Chevron* doctrine are based on judicial claims of congressional intent). R

217. *See supra* Parts II–III.

218. *See supra* note 108 and accompanying text (describing the conventional view held by scholars that substantive canons are inconsistent with the *Chevron* doctrine). R

the former deference regime.[219] There is little evidence, however, that *Chevron* was intended to be a defining case that would require dramatic changes to the judicial selection and application of interpretive tools.

Supporting the argument that *Chevron* was not intended to fundamentally alter the continuing legitimacy of substantive canons, or other interpretive tools, is the absence of any indication from the Court of such an intent. Indeed, it has been pointed out that the personal papers of the Justices indicate that it does not appear that any of them considered the case to be anything other than routine.[220] In its opinion, the Court indicated only that "traditional tools of statutory construction" should be applied in Step One.[221] Considering that many canons of statutory construction predate the *Chevron* decision, the Court would likely have at least hinted at the transformational nature of a decision that would preclude courts from considering substantive canons in Step One. Instead, at most, the Court indicated that reviewing courts should not rely on generalized purposive reasoning, unconnected to actual congressional intent, in order to decide a case at Step One.[222] In addition, in a later case, *United States v. Mead Corp.*,[223] the Court indicated that the *Chevron* decision stood for the proposition that an agency's compliance with more formal procedures provided an "additional reason for judicial deference" to an agency's interpretation,[224] which suggests that *Chevron*'s change to the doctrines relating to deference to agency interpretations was meant, at most, to be modest rather than significant.[225]

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219. *See infra* note 289 and accompanying text (explaining that some observers believed *Chevron* would bring greater consistency to judicial review of agency interpretations). R

220. *See* Ronald M. Levin, *The Anatomy of* Chevron*: Step Two Reconsidered*, 72 CHI.-KENT L. REV. 1253, 1257 (1997) ("A scholar who has examined the file on *Chevron* in the papers of the late Justice Thurgood Marshall at the National Archives reports that it contains no evidence that any Justice saw the case as anything other than a routine environmental opinion." (citing Robert V. Percival, *Environmental Law in the Supreme Court: Highlights from the Marshall Papers*, 23 ENVTL. L. REP. 10,606, 10,613 (1993))).

221. Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843 n.9 (1984).

222. *See id.* at 845 (finding that "the Court of Appeals misconceived the nature of its role" and explaining that the court should have confined itself to search for specific congressional intent regarding the particular program at issue).

223. 533 U.S. 218 (2001).

224. *Id.* at 229.

225. In a previous article, I suggested that the *Chevron* decision transformed statutory interpretation methodology. *See* Brian G. Slocum, *Overlooked Temporal Issues in Statutory Interpretation*, 81 TEMP. L. REV. 635, 675–77 (2008) (noting that "*Chevron* significantly modified the existing rules of judicial deference to agency statutory interpretations"). The Court claimed in *Chevron*, though, that it was merely restating "well-settled principles." 467 U.S. at 845. Regardless of whether this assertion was disingenuous, or later proved to be an

Beyond the absence of any indication in *Chevron* that substantive canons are incompatible with the *Chevron* doctrine, the nonconsideration of substantive canons when *Chevron* is implicated would cause fundamental, and doctrinally troublesome, changes to statutory interpretation, both in and out of the administrative state.[226] A conclusion that substantive canons are generally legitimate yet inconsistent with *Chevron* because they are based on policy considerations, rather than congressional intent, would likely be seen by the Court as delegitimizing its interpretive rules. The Court has a dual role in matters of statutory interpretation as both the self-proclaimed "faithful agent[ ]" of Congress and the creator of the rules of interpretation.[227] The Court would undoubtedly resist a categorization of substantive canons that would create disharmony between these dual roles.[228]

Declaring substantive canons to be incompatible with *Chevron* would also be problematic because it would create a significant discrepancy between the cases where *Chevron* is not applicable and the canons are applied and the cases where *Chevron* is applicable and the canons are not applied. Considering that William Eskridge's recent empirical study of *Chevron* demonstrated that the doctrine is frequently ignored by the Court,[229] a rigid distinction between *Chevron* applicable and non-*Chevron* cases for purposes of substantive canon application would draw an arbitrary bright line, in addition to the already present ambiguity bright line, that may not be particularly effective as a means of preserving agency discretion. Another reason also indicates that such a policy would not necessarily ensure that substantive canons would not interfere with agency policymaking. After the Court's decision in *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, a reviewing court must defer to a reasonable agency interpretation even when a previous court has adopted an alternative interpretation, so long as the previous court held that the provision at

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understatement, it is consistent with the recent trend of the Court to frame its decisions as non-transformative.

226. *See supra* note 108 and accompanying text (explaining the widely shared view among scholars that the policy judgments that undergird substantive canons are inconsistent with *Chevron*). R

227. *See* Manning, *supra* note 70, at 419 (explaining that courts purport to act as the "faithful agents" of Congress); Slocum, *supra* note 225, at 639 (explaining that courts have primary responsibility for creating interpretive rules). R R

228. *Cf.* Peter J. Smith, *New Legal Fictions*, 95 GEO. L.J. 1435, 1478–79 (2007) (explaining that courts often create legal fictions in order to avoid delegitimizing consequences).

229. *See* Eskridge & Baer, *supra* note 145, at 1090 (noting that the "most striking finding" of their study was that "in the majority of cases—53.6% of them—the Court [did] not apply any deference regime at all"). R

issue was ambiguous.[230] In a case where *Chevron* is not applicable and the court resolves the case through the application of a canon without a formal finding that the statute is ambiguous, it is not clear that the agency, pursuant to the Court's decision in *Brand X*, can subsequently change the court's interpretation.[231]

Certainly, it is difficult to maintain, as substantive canons assume, that the Court has accurately identified the areas where Congress is more explicit when drafting legislation, and the Court's generalized, and perhaps erroneous, assumptions about congressional intent may sometimes preclude deferring to agency policy views.[232] Yet such observations do not require a conclusion that substantive canons are incompatible with *Chevron*. If, as it has been argued, agencies are more politically accountable than courts, more knowledgeable regarding the statutes that they administer, and more capable of making sound policy choices, it is not clear why courts should not defer to *all* agency interpretations.[233] Instead, the issue is one of language and the judiciary's constitutional duty to interpret legislative commands. Although legal realist understandings of the inherently subjective and discretionary nature of interpretation should convince courts to exercise more restraint in their creation and modification of substantive canons and perhaps to reduce the strength of some of the canons that overdetermine statutory meaning, the legitimacy of substantive canons must be separated from their compatibility with *Chevron*.[234] If the consideration of substantive canons were to be prohibited in Step One, it should be part of a general first-order reconsideration of interpretive tools rather than through the selective labeling of substantive canons as being inconsistent with *Chevron*.[235]

230. 545 U.S. 967, 982–83 (2005).

231. Even if an agency can subsequently change the court's interpretation, courts might be more likely to declare that the statutory provision at issue is unambiguous and to interpret the statute in accordance with what the unapplied substantive canon would have dictated. *See infra* Part V.B (discussing the *Brand X* decision and its consequences).

232. *See supra* notes 111–16 and accompanying text (describing the assumptions underlying substantive canons). R

233. One response might be that agencies are better at identifying current legislative preferences, but are not likely to be as skilled at identifying past legislative preferences as courts are; however, even this assertion is far from self-evident.

234. *Cf.* Slocum, *supra* note 151, at 317–18 (arguing for more judicial restraint in the creation and modification of substantive canons). R

235. *See* VERMEULE, *supra* note 182, at 147 (distinguishing between first-order and second-order arguments in statutory interpretation). R

B. Substantive Canons Should Not Be Applied in Chevron *Step Two*

An alternative approach, argued recently by Kenneth Bamberger, is that substantive canons only should be considered in Step Two when the court evaluates the reasonableness of the agency's chosen interpretation.[236] Such an approach purports to reconcile the proposition that judicial review should not be policy-free with the proposition that agencies should have primary responsibility for policy application.[237] A decision that substantive canons should be considered in Step Two as part of an agency-dominated balancing of values process, instead of in Step One as devices used to estimate congressional intent, would, however, fit awkwardly within the existing *Chevron* framework. The Court does not currently review whether canons are considered by agencies.[238] More importantly, such an approach would serve to delegitimize substantive canons. If substantive canons can be classified as unverified, and sometimes false, when viewed as being based on estimations of congressional intent, they seem illegitimate if explicitly viewed as solely judicial policy choices imposed on agencies and Congress.[239]

Apart from the low probability of judicial adoption, the normative benefits of considering substantive canons in Step Two are unclear. Bamberger claims that the consideration of substantive canons in Step Two will uniquely encourage agencies to internalize the norms promoted by such canons.[240] It is unlikely, though, that the consideration of substantive canons in Step Two, which is often not reached by reviewing courts, could surpass the incentives created by Step One application. Under Step One consideration of substantive canons, if the agency ignores an applicable canon, it risks being reversed by a reviewing court that is willing to apply the canon.[241] For example, if an agency considers adopting an interpretation of a statute that would have retroactive effects on individuals, it should anticipate that, unless the statute contains clear language sanctioning such an interpreta-

236. *See generally* Kenneth A. Bamberger, *Normative Canons in the Review of Administrative Policymaking*, 118 YALE L.J. 64 (2008) (providing Bamberger's recent argument).

237. *Id.* at 117–21.

238. *See* Bell, *supra* note 108, at 124 (explaining that courts typically "review only the agency's ultimate decisions, not the grounds on which they are based"). R

239. Even if some see the Court's proper role as being explicitly policy-based in nature, the Court views its primary function as being the faithful agent of Congress in matters of statutory interpretation. *See supra* note 67 and accompanying text. R

240. *See* Bamberger, *supra* note 236, at 64 (arguing that his Step Two proposal "creates incentives for robust agency norm protection in the first instance"). R

241. *See, e.g.*, Clark v. Martinez, 543 U.S. 371, 377, 380–82 (2005) (applying the canon of constitutional avoidance to strike down an agency regulation that gave the agency the power to detain a particular class of immigrants indefinitely).

tion, a reviewing court will likely apply the presumption against retroactivity and invalidate the agency's interpretation without ever reaching Step Two.[242]

In addition, many would likely disagree with *Chevron* reforms that could potentially increase the already high rate of deference given to agency interpretations. It is logical to conclude that the consideration of fewer interpretive tools in Step One will lead to an increased number of cases that reach Step Two and hence greater deference to agency interpretations because "[m]ore than 90 percent of invalidations under *Chevron* occur[ ] under Step One."[243] The impact of considering substantive canons in Step Two, though, is unknown because the addition of a new balancing process in Step Two may lead to unpredictable changes in the degree of deference given to agency interpretations.

More importantly, advocating the consideration of substantive canons in Step Two necessarily conflates the requirements for application of the canon (which occurs in all cases—even those outside of the *Chevron* context) with a novel Step Two balancing process of whether the canon should be applied.[244] For many canons where relevant agency expertise is likely lacking, such as the canon requiring a clear congressional statement to repeal habeas corpus jurisdiction, it is not clear what benefits would accrue from judicial deference to an agency's balancing of the canon's norms and other considerations, or what the other considerations may be.[245] In addition, there is no reason why, in Step One, courts cannot adequately account for agency arguments, especially ones based on agency expertise, about whether the conditions for triggering the canon have been met.[246]

242. *See supra* note 136 and accompanying text (describing the presumption against retroactivity). R

243. Miles & Sunstein, *supra* note 1, at 838 n.26. R

244. *See* Bamberger, *supra* note 236, at 111–14 (advocating a balancing approach to the application of substantive canons). R

245. *See* Slocum, *supra* note 19, at 372–76, 401 (describing the habeas corpus clear statement rule). Bamberger recognizes that agency expertise will not be relevant to the application of some substantive canons. *See* Bamberger, *supra* note 236, at 101 (explaining that "some underlying doctrines may prescribe inquiries amenable to agency competence, while others may not"). For these canons, Step Two application would make little sense, as would the application of some strong substantive canons in Step One and other equally strong substantive canons in Step Two. R R

246. *See infra* Part V.A (arguing that courts should consider agency views when determining the meaning of statutory language).

V. RECONCILING *SKIDMORE* AND *CHEVRON*

This Article has argued against the popular notion that *Chevron*, in both a positive and normative sense, should be viewed as a transformative case in the way in which courts apply interpretive tools when reviewing agency interpretations.[247] Thus, substantive canons should be applied equally in *Chevron* and non-*Chevron* cases.[248] The *Chevron* doctrine did have a transformative, but generally unacknowledged, impact on judicial review of agency interpretations, though, by granting significant doctrinal importance to the explicit ambiguity analysis as the determiner of whether an agency's interpretation will receive deference. Regardless of the agency's expertise or the circumstances of the case, a reviewing court under *Chevron* purports to independently determine the meaning of the relevant statute unless and until it determines that the statute is ambiguous.[249] *Chevron*'s transformation shifted judicial review from a process that considered agency deliberation and expertise, among other factors, to an initial and primary focus on ambiguity.[250]

Prior to *Chevron*, courts applied the standard from *Skidmore v. Swift & Co.*,[251] which provided a sliding scale of deference depending on the circumstances, such as whether the agency interpretations were longstanding, consistent, well reasoned, thorough, based on expertise, and the result of participatory and adequate procedures.[252] The Court made clear that agency interpretations would have only persuasive authority, and hence that the statutory question would be resolved judicially rather than administratively.[253] In contrast, *Chevron* has been seen as a triumph of legal realism because it recognizes that the resolution of statutory uncertainties involves policy choices that

247. *See supra* notes 220–25 and accompanying text (discussing the reasons why *Chevron* was not seen by the Court as an important case). R

248. *See supra* Part IV.A (arguing that there is no reason to distinguish between *Chevron* and non-*Chevron* applications).

249. *See supra* notes 5–7 and accompanying text (describing the two-step *Chevron* doctrine). R

250. *See* Merrill, *supra* note 84, at 977 ("*Chevron* transformed a regime that allowed courts to give agencies deference along a sliding scale into a regime with an on/off switch."); Molot, *supra* note 28, at 51 (discussing *Chevron*'s transformation of "judicial decisionmaking from a choice along a spectrum to a single 'all-or-nothing' dichotomy"). R R

251. 323 U.S. 134 (1944).

252. *See* Kristin E. Hickman & Matthew D. Krueger, *In Search of the Modern* Skidmore *Standard*, 107 COLUM. L. REV. 1235, 1258–59 (2007) (discussing the *Skidmore* factors); Glen Staszewski, *Reason-Giving and Accountability*, 93 MINN. L. REV. 1253, 1306 n.196 (2009) (listing the *Skidmore* factors).

253. *See Skidmore*, 323 U.S. at 140 (explaining that deference is calibrated to the agency interpretation's "power to persuade").

are more suited for agency, rather than judicial, resolution.[254] Ultimately, though, the ambiguity-elevating aspect of *Chevron* places unnecessary emphasis on a purely subjective and discretionary standard and is incongruent with the realities of statutory interpretation.[255]

A. The Superfluity of Chevron

A recent scholarly debate about *Chevron* illustrates the disutility of the traditional ambiguity determination. Matthew Stephenson and Adrian Vermeule argue that *Chevron* should be seen as requiring courts to address the single inquiry of the "reasonableness of the agency's statutory interpretation."[256] In their view, courts must first decide whether the agency's interpretation falls within the court-constructed "zone of ambiguity."[257] The other applicable review is the non-*Chevron* review of whether the agency's explanation for its interpretation satisfies the arbitrary and capricious standard.[258] In contrast, Kenneth Bamberger and Peter Strauss agree with the "zone of ambiguity" view, but highlight the importance of the Step One ambiguity determination.[259] In their view, deemphasizing the central ambiguity determination of *Chevron*, as Stephenson and Vermeule's version does, would distract courts from the "essential judicial function" of "bounding agency authority."[260]

Framing Step One as requiring courts to determine a statute's "zone of ambiguity" is an improvement on the traditional approach. Recall that the traditional ambiguity determination operates as an on/off switch: A court declares a statutory provision to be either ambiguous or clear.[261] Under a zone of ambiguity understanding, though, the reviewing court determines the "set of interpretations which the statute does not clearly prohibit."[262] The zone of ambiguity

254. *See* Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 980 (2005) ("Filling these gaps [in ambiguous statutes] involves difficult policy choices that agencies are better equipped to make than courts.").

255. *See supra* Part II.B.4 (explaining the difficulties involved with determining whether interpretive rules reflect congressional intent).

256. Matthew C. Stephenson & Adrian Vermeule, Chevron *Has Only One Step*, 95 VA. L. REV. 597, 598 (2009).

257. *See id.* (arguing that courts should "jettison the two-step framework and acknowledge that *Chevron* calls for a single inquiry into the reasonableness of the agency's statutory interpretation").

258. *See id.* at 604 (distinguishing between *Chevron* and "arbitrary and capricious review").

259. Kenneth A. Bamberger & Peter L. Strauss, Chevron*'s Two Steps*, 95 VA. L. REV. 611, 611 (2009).

260. *Id.* at 612.

261. *See supra* note 250 and accompanying text. R

262. Stephenson & Vermeule, *supra* note 256, at 601. R

approach thus softens the rigid traditional ambiguity on/off determination. It thereby reflects the essential understanding that interpretation is an uncertain and discretionary process that involves applying nonempirically tested interpretive rules to estimate congressional intent.[263] As Stephenson and Vermeule point out, one major disadvantage of the traditional ambiguity determination is that if a judge spends an "inordinate amount of time trying to figure out the best construction of the statute," which the traditional approach encourages, "it may be difficult for [her] to shift mental gears to decide whether an agency interpretation that differs from the judge's sense of the best interpretation is nonetheless reasonable."[264]

While it is an improvement on the current way in which courts determine ambiguity, the zone of ambiguity conceptualization is nonetheless insufficiently reformatory. The zone of ambiguity approach might soften the all-or-nothing approach of the traditional ambiguity determination, but it still nevertheless can only be described as a softened all-or-nothing approach.[265] Thus, the two approaches described above may differ on various details regarding the administration of *Chevron* but still incorporate, although with different degrees of emphasis, an explicit ambiguity determination as part of their judicial review paradigms. In that respect, neither proposal is willing to abandon altogether *Chevron* or its explicit ambiguity determination.

Although Stephenson and Vermeule may seem close to disavowing the centrality of *Chevron*'s ambiguity determination, their proposal maintains its relevance in related ways. One fundamental flaw in Stephenson and Vermeule's approach is that it maintains the distinction between *Chevron* and *Skidmore* by continuing to grant paradigmatic doctrinal significance to whether the agency's interpretation was contained in sufficiently formal procedures.[266] Until recently, one of the notable aspects of *Chevron* was its across-the-board presumption that in cases of statutory ambiguity courts should defer to agency interpretations.[267] In *United States v. Mead Corp.*,[268] the Court held that Congress

263. *See supra* note 103 and accompanying text (explaining that courts do not subject interpretive tools to empirical validation). R

264. Stephenson & Vermeule, *supra* note 256, at 605 (emphasis omitted). R

265. *Cf. supra* note 250 (describing *Chevron* as creating an all-or-nothing approach). R

266. *See* Stephenson & Vermeule, *supra* note 256, at 598 & n.4 (advocating that courts should view "*Chevron* [as] call[ing] for a single inquiry," while maintaining the distinction between *Chevron* and *Skidmore*). R

267. *See* Scalia, *supra* note 85, at 516 ("*Chevron* . . . replaced this statute-by-statute evaluation . . . with an across-the-board presumption that, in the case of ambiguity, agency discretion is meant."). R

intends for *Chevron* deference to be granted to agency interpretations only under certain circumstances.[269] The Court stated that *Chevron* deference should apply only when "it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority."[270] Thus, *Chevron* does not apply to a broad array of administrative interpretations that lack the force of law and result from relatively informal procedures.[271] Instead, *Skidmore* is applicable.[272]

Substituting the zone of ambiguity approach for the traditional ambiguity determination yet maintaining the *Chevron/Skidmore* distinction would exaggerate any remaining difference between the two doctrines. The reconceptualization of *Chevron*'s explicit ambiguity determination as a zone of ambiguity renders it difficult, in both a positive and normative sense, to ascribe any remaining distinctiveness to *Chevron* when compared to *Skidmore*'s sliding scale approach. This is especially true if a reviewing court chooses to consider the agency's interpretation as one of the "traditional tools of statutory interpretation" under *Chevron* Step One and believes that the range of ambiguity should depend on the context, including the agency's expertise.[273] The only remaining distinction is an unspecified, but supposedly greater, degree of deference due the agency's interpretation under *Chevron* because of the procedural format pursuant to which the

268. 533 U.S. 218 (2001).

269. *Id.* at 226–27. The question in *Mead* was whether *Chevron* applied to a tariff classification ruling of the U.S. Customs Service. *Id.* at 221. The Court held that *Chevron* did not apply to the tariff ruling. *Id.* The *Mead* decision followed the Court's earlier decision in *Christensen v. Harris County*, in which the Court held that *Chevron* did not apply to an agency interpretation contained in an opinion letter written by an agency official and later endorsed in an amicus curiae brief filed with the Supreme Court. 529 U.S. 576, 587 (2000). The Court held that *Chevron* is applicable to agency interpretations only if they have been made in a manner that has the "force of law." *Id.*

270. *Mead*, 533 U.S. at 226–27.

271. *See id.* at 229 (indicating that reviewing courts must consider all circumstances surrounding the statutory scheme and agency action to ascertain whether "Congress would expect the agency to be able to speak with the force of law" on the matter at hand).

272. *See id.* at 234–35 (recognizing that if *Chevron* is not applicable, *Skidmore*'s deference to an agency's interpretation of the law might be); *see also* Thomas W. Merrill & Kathryn Tongue Watts, *Agency Rules with the Force of Law: The Original Convention*, 116 HARV. L. REV. 467, 479 (2002) (explaining the conditions under which the *Skidmore* standard applies).

273. *See* Bamberger & Strauss, *supra* note 259, at 616 n.23 ("[T]he agency's interpretation may itself constitute one of the 'traditional tools of statutory interpretation.'" (citation omitted)); Peter L. Strauss, *Overseers or "The Deciders"—The Courts in Administrative Law*, 75 U. CHI. L. REV. 815, 818 (2008) ("As part of its step one determination, a court might well turn to a responsible agency's judgment about the matter as one weight to be considered on the scales the court is using."). R

agency's interpretation was produced.[274] Any difference in the degree of deference, though, can be accounted for through Justice Souter's remark in *Mead* that an agency following formal procedures presented an additional reason for deference.[275] Thus, the formality of the agency's procedures can be given appropriate weight under a sliding scale approach to deference, such as *Skidmore*.[276]

Considering the subjective nature of ambiguity determinations and the absence of a need for two distinct deference doctrines, the *Chevron* two-step doctrine should be abandoned in favor of the *Skidmore* sliding scale approach. Even though the zone of ambiguity formulation is an improvement on the traditional approach to ambiguity, it still conflates the identification of ambiguity with its resolution.[277] There is no sufficient reason to insert the discretionary and subjective explicit ambiguity test into the review process.[278] As Cass Sunstein remarked when questioning the necessity of the *Mead* doctrine, the Court should not privilege doctrinal complexity over simplicity when there is little to gain from maintaining multiple standards.[279] Indeed, in practice, courts do not announce a statute's range of ambiguity, indicating that such a practice would be foreign and would not likely be adopted by a majority of the judiciary.[280] Furthermore, empirical studies have indicated a lack of judicial commitment to the *Chevron* doctrine and its explicit ambiguity determination. In a significant percentage of cases, courts do not distinguish between

274. The difference between *Chevron* and *Skidmore* has been referred to as the distinction between oversight and independent judgment. *See* Strauss, *supra* note 273, at 817 ("*Chevron*'s notorious two-step analysis is perhaps best understood as separating those elements of the judicial relationship to agency action that are appropriate for *independent* judicial judgment from those for which the judicial role is constrained to oversight."). The empirical evidence indicates, however, that such a bright line doctrinal distinction has not resulted in significant differences in the deference given to agency interpretations. *See infra* note 292. R R

275. *See Mead*, 533 U.S. at 230 ("[T]he overwhelming number of cases applying *Chevron* deference have reviewed the fruits of notice-and-comment rulemaking or formal adjudication [of the agency]."); *see also supra* notes 224–25 and accompanying text. R

276. *See supra* note 252 and accompanying text (citing sources that list the relevant *Skidmore* factors). R

277. *See supra* Part II.B (explaining how the traditional approach to ambiguity conflates the identification of ambiguity with its resolution).

278. *See supra* Part II (explaining the subjective nature of ambiguity determinations).

279. Sunstein, *supra* note 119, at 228. R

280. A search of Westlaw reveals no mention of a "range of ambiguity" with regard to statutory interpretation. The likelihood that widespread adoption of the range of ambiguity will not occur counsels against its adoption. *See* VERMEULE, *supra* note 182, at 123–24 (arguing that problems of judicial coordination in matters of statutory interpretation methodology should weigh against recommendations that are unlikely to be universally adopted). R

Step One and Step Two, but rather conflate the two steps.[281] In addition, while perhaps not as directly condemnatory of the explicit ambiguity determination, William Eskridge has shown that in a majority of Supreme Court cases, the Court inexplicably does not apply any deference standard at all.[282]

Instead of the artificial distinction between the consideration of agency views regarding the meaning of a statute and the consideration of agency views regarding the resolution of statutory ambiguity, *Chevron*'s two-step doctrine should be collapsed into the functionalist *Skidmore* review, which considers the agency's interpretation without a prior ambiguity determination.[283] The judiciary would maintain its role as the final authority on the interpretive scope of statutory meaning, while at the same time being obligated to consider agency views at an earlier stage in the process.[284] The more confident the court is about its estimation of congressional intent through the application of interpretive tools, the more powerful the other relevant factors—such as agency expertise and procedural formality—must be in order to prevail.[285] In a sense, it would coalesce at some point with the absurdity doctrine: If one interpretation is far superior to any other, the agency's explanation for an alternative interpretation would need to satisfy the absurdity doctrine's requirement that the favored interpretation is clearly contrary to congressional intent.[286] Along with its other advantages, such a deference standard would help satiate those critics of *Chevron* who have maintained that the decision is inconsis-

281. *See* Orin S. Kerr, *Shedding Light on* Chevron*: An Empirical Study of the* Chevron *Doctrine in the U.S. Courts of Appeals*, 15 YALE J. ON REG. 1, 30 (1998) (examining over 200 U.S. Courts of Appeals cases applying *Chevron* and finding that in twenty-eight percent of them, the inquiry was collapsed into the single question of whether the interpretation was reasonable).

282. *See* Eskridge & Baer, *supra* note 145, at 1090 (indicating that in 53.6% of the cases "the Court does not apply any deference regime at all," but rather "relies on ad hoc judicial reasoning of the sort that typifies the Court's methodology in regular statutory interpretation cases"). R

283. *See supra* notes 251–53 and accompanying text (describing the operation of *Skidmore*). R

284. *Cf. supra* text accompanying note 260 (expressing the view that the ambiguity determination is vital in order to bound agency authority). R

285. *See* Matthew C. Stephenson, *The Strategic Substitution Effect: Textual Plausibility, Procedural Formality, and Judicial Review of Agency Statutory Interpretations*, 120 HARV. L. REV. 528, 547–48 (2006) (arguing that the interpretive latitude given to an agency may depend on various factors, such as the court's confidence in the agency's expertise, its sympathy for the agency's policy goals, or its assessment of the importance of the interpretive issue).

286. *See* Manning, *supra* note 67, at 2393–94 (explaining the role of the absurdity doctrine). R

tent with the *Marbury v. Madison*[287] principle that it is the judiciary's prerogative to declare the meaning of the law.[288]

It is not evident that there would be any significant disadvantages to eliminating the distinction between *Chevron* and *Skidmore* because it is not at all clear that the *Chevron* doctrine has produced the advantages that many have claimed. It has been argued that two of the major advantages of *Chevron*, as compared to *Skidmore*, are that *Chevron* introduced simplicity to the deference rules through the two-step process and, by mandating deference to reasonable agency interpretations in cases of ambiguity, increased the uniformity of interpretations.[289] The fruition of either of these predicted benefits has not been realized. While *Skidmore*'s factor-based standard is superficially more complex and nuanced, the two-step *Chevron* doctrine, even twenty-five years after its introduction, is undermined by pervasive uncertainty about its basic operation. There has been, for example, no resolution of such fundamental issues as whether substantive canons should be considered when *Chevron* is applicable or the nature of review under Step Two, as well as many other issues of varying importance.[290]

The uniformity advantages of the *Chevron* doctrine also appear to be more theoretical than real.[291] Indeed, it is not clear that *Chevron* produces results much different from those that *Skidmore* produces.[292]

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287. 5 U.S. (1 Cranch) 137 (1803).

288. *See* Molot, *supra* note 76, at 1242–43 (discussing the concerns of *Chevron*'s critics and describing the relationship between these concerns and *Marbury*); Jim Rossi, *Respecting Deference: Conceptualizing* Skidmore *Within the Architecture of* Chevron, 42 WM. & MARY L. REV. 1105, 1108 (2001) (describing *Chevron* "as the 'counter-*Marbury*' for the administrative state" (citation omitted)). R

289. *See* Peter L. Strauss, *One Hundred Fifty Cases Per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action*, 87 COLUM. L. REV. 1093, 1121 (1987) (arguing that in light of practical limits on the Supreme Court's ability "directly to enforce uniformity upon the courts of appeals," the *Chevron* doctrine "enhances the probability of uniform national administration of the laws").

290. *See* Levin, *supra* note 220, at 1260–62 (discussing the confusion regarding Step Two); Merrill & Hickman, *supra* note 3, at 838–52 (identifying and discussing the numerous open issues regarding the application of *Chevron*); *see also supra* note 20 and accompanying text (discussing the confusion regarding whether application of *Chevron* precludes application of substantive canons). R R R

291. Moreover, it is not clear that the uniformity goal is even worth pursuing. *See* Amanda Frost, *Overvaluing Uniformity*, 94 VA. L. REV. 1567, 1571, 1584–606 (2008) (arguing against the notion that uniformity has inherent value and suggesting that courts should avoid expending resources to standardize federal law).

292. *See* Eskridge & Baer, *supra* note 145, at 1142–43 (indicating that the win rates for *Chevron* and *Skidmore* are relatively similar, and that both are only modestly higher than the win rate when no deference doctrine is invoked); Sunstein, *supra* note 119, at 229 ("*Chevron* and *Skidmore* are not radically different in practice; in most cases, either approach will lead to the same result."). In any case, the issue of *Chevron*'s explicit ambiguity determina- R R

Early empirical research showed that the rate of judicial affirmations of agency interpretations increased after the *Chevron* decision.[293] More recent research, however, indicates that *Chevron*'s uniformity-promoting promise has not been as significant as predicted. Cass Sunstein's empirical research has shown that *Chevron* has not had the disciplining effect that some scholars projected because judges tend to be ideologically motivated when reviewing agency interpretations.[294] Other research also indicates that the application of *Chevron* is driven by the judiciary's policy preferences.[295] These findings should be anticipated, though, when one considers the centrality of *Chevron*'s highly discretionary ambiguity determination.[296]

B. Ambiguity Determinations and Stare Decisis

Another reason for abandoning *Chevron*'s explicit ambiguity determination is that it has created unfortunate doctrinal difficulties in *Chevron*-related areas. Traditionally, in statutory interpretation cases, the Court accords "special force" to its precedents, unlike its decisions interpreting the Constitution where stare decisis principles are not as strong.[297] This heightened stare decisis doctrine is such that the Court has even expressed a reluctance to overturn decisions that no longer may be correctly decided due to a change in an interpretive

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tion is distinct from the level of deference *Chevron* affords agency interpretations. The elimination of the explicit ambiguity determination, therefore, does not necessarily require a change in the degree of deference accorded to agency interpretations.

293. *See* Peter H. Schuck & E. Donald Elliott, *To the* Chevron *Station: An Empirical Study of Federal Administrative Law*, 1990 DUKE L.J. 984, 1030 (finding an increase in rate of affirmed cases from approximately seventy-one percent in the pre-*Chevron* year of 1984 to approximately eighty-one percent in the post-*Chevron* year of 1985).

294. *See* Miles & Sunstein, *supra* note 1, at 823 (showing that the "most conservative members of the Court are less likely to validate liberal agency interpretations than conservative ones, and the least conservative members of the Court show the opposite pattern"). R

295. *See* Linda R. Cohen & Matthew L. Spitzer, *Solving the* Chevron *Puzzle*, 57 LAW & CONTEMP. PROBS. 65, 109 (1994) (suggesting, based on preliminary analysis, that judicial deference to agency decisions is driven in part by Supreme Court Justices' policy preferences); Frank B. Cross & Emerson H. Tiller, *Judicial Partisanship and Obedience to Legal Doctrine: Whistleblowing on the Federal Courts of Appeals*, 107 YALE L.J. 2155, 2168–73 (1998) (finding that unified Republican panels were less likely to follow *Chevron* when the agency decision aligned with judicial political policy preferences).

296. Even supporters of *Chevron* have noted that its application is subjective. *See* Eskridge & Schwartz, *supra* note 169, at 2632 (noting that *Chevron* "as flexibly applied by the Court [is] workable and desirable in part because it contains play within its joints"). R

297. *See* John R. Sand & Gravel Co. v. United States, 552 U.S. 130, 139 (2008) (indicating that stare decisis in statutory interpretation cases has "special force" (citation and internal quotation marks omitted)).

rule.[298] The main justification for a heightened stare decisis principle in statutory interpretation cases is based on a legislative supremacy notion that refusing to revisit a statutory interpretation is a means of shifting policymaking responsibility back to Congress.[299] Courts have also based the heightened stare decisis standard on the fiction of congressional acquiescence in the judicial interpretation.[300] Other policies are also, of course, protected through stare decisis, including judicial economy and reliance interests.[301]

After *Chevron*, the Court continued to grant stare decisis to its statutory interpretations even in cases where the original decision was a pre-*Chevron* interpretation of an ambiguous statute.[302] The heightened stare decisis doctrine is in tension, however, with *Chevron*'s rationale that Congress intends to delegate to agencies the responsibility for resolving statutory ambiguities.[303] It is also in tension with the Court's policy that agencies may validly change their statutory interpretations as long as those changes are adequately explained.[304] Unlike other rules of interpretation, Step Two functions as a dynamic

298. *See id.* (reasoning that "overturn[ing] a decision . . . simply because we might believe that decision is no longer 'right' would inevitably reflect a willingness to reconsider others[, a]nd that willingness could itself threaten to substitute disruption, confusion, and uncertainty for necessary legal stability").

299. *See* Amy Coney Barrett, *Statutory Stare Decisis in the Courts of Appeals*, 73 GEO. WASH. L. REV. 317, 318 (2005) (explaining that "super-strong statutory stare decisis lets Congress know that changes in statutory interpretations ought to come from it"); Benjamin P. Friedman, Comment, Fishkin *and Precedent: Liberal Political Theory and the Normative Uses of History*, 42 EMORY L.J. 647, 693 (1993) (arguing that the reason for stare decisis is to limit discretionary policymaking power of the judiciary).

300. *See, e.g.*, *John R. Sand & Gravel Co.*, 552 U.S. at 139 (noting that "Congress has long acquiesced in the interpretation we have given"); *see also* Barrett, *supra* note 299, at 317 (explaining that "[b]y failing to amend the statute, Congress signals its acquiescence in the Supreme Court's approach"). R

301. *See generally* Lawrence C. Marshall, *"Let Congress Do It": The Case for an Absolute Rule of Statutory Stare Decisis*, 88 MICH. L. REV. 177 (1989) (explaining the justifications for heightened stare decisis in statutory interpretation cases).

302. *See* Richard J. Pierce, Jr., *Reconciling* Chevron *and Stare Decisis*, 85 GEO. L.J. 2225, 2248–51 (1997) (describing cases in which the Court addressed the relationship between its precedents and *Chevron*); *see also* Merrill & Hickman, *supra* note 3, at 852 n.96 (indicating a pre-*Brand X* split of authority over the issue of whether federal circuit court statutory interpretation precedents trump *Chevron*). R

303. *See supra* text accompanying note 22 (explaining the principle that agencies are to resolve statutory ambiguities through the application of policy choices). R

304. *See* FCC v. Fox Television Stations, Inc., 129 S. Ct. 1800, 1810 (2009) ("We find no basis in the Administrative Procedure Act or in our opinions for a requirement that all agency change be subjected to more searching review.").

rule because it allows the content of an act of Congress to change with the changing policy views of the Executive Branch.[305]

In *National Cable & Telecommunications Ass'n v. Brand X Internet Services*,[306] the Court addressed the tension between the rationales of *Chevron* and the statutory stare decisis rule by holding that "[a] court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion."[307] In the Court's view, applying traditional stare decisis in such cases would produce the "anomalous result[ ]" of the applicability of deference depending on whether the reviewing court's interpretation preceded the agency's interpretation.[308] The *Brand X* decision is therefore relevant when a court has interpreted an ambiguous statutory provision and either the agency has not promulgated an interpretation or the interpretation is not eligible for *Chevron* deference.[309]

The combination of the traditional stare decisis rule and *Brand X* has created another significant doctrinal distinction where an explicit ambiguity finding is the determiner. If the original reviewing court decided that the statute was unambiguous, the traditional heightened stare decisis rule applies, but if the original reviewing court decided that the statute was ambiguous, the agency's subsequent interpretation may receive *Chevron* deference.[310] It is uncertain, but may be unlikely, that an authoritative agency interpretation that is eligible for *Skidmore*, but not *Chevron*, deference can displace a judicial interpretation that was made in the absence of an agency interpretation.[311] The fundamental problem, though, is that the *Brand X* rule is inconsistent with the theory that statutory interpretation should focus on grada-

305. *See* Jonathan T. Molot, *Ambivalence About Formalism*, 93 VA. L. REV. 1, 41 (2007) ("*Chevron*'s formal rule allows agencies a great deal of room to update their interpretations as times change.").

306. 545 U.S. 967 (2005).

307. *Id.* at 982; *see also* Kathryn A. Watts, *Adapting to Administrative Law's* Erie *Doctrine*, 101 NW. U. L. REV. 997, 1015 (2007) (explaining that *Brand X* "rests on a desire to avoid the concerns Justice Scalia raised in *Mead* about the 'ossification of large portions of our statutory law'" (quoting United States v. Mead Corp., 533 U.S. 218, 247 (2001) (Scalia, J., dissenting))).

308. *Brand X*, 545 U.S. at 983.

309. *See* Lisa Schultz Bressman, *Procedures as Politics in Administrative Law*, 107 COLUM. L. REV. 1749, 1796 (2007) (explaining the scope of *Brand X*).

310. *See supra* notes 307–09 and accompanying text. R

311. *See* Hickman & Krueger, *supra* note 252, at 1304–05 (indicating that the relationship between *Skidmore* and *Chevron* is open because "*Skidmore* is neither discussed nor even cited in any of the opinions issued in *Brand X*, even though *Skidmore* deference shares the same tension with stare decisis as *Chevron* previously did"). R

tions, which the *Skidmore* doctrine offers, rather than *Chevron*'s on/off switches. Courts attempting to conduct the *Brand X* analysis will find daunting the challenges of attempting to determine whether the earlier court asserted that its construction was the only reasonable one and if its discussion was a holding or dicta.[312]

The focus of the *Brand X* decision on ambiguity detracts from the principle that agencies remain in the superior position to remedy mistakes and update understandings of statutory schemes.[313] Instead of relying on a previous court's ambiguity determination, an archeological dig that will undoubtedly prove to be frustrating, reviewing courts should treat the *Brand X* understanding of the relationship between courts and agencies as a relaxation of the traditional stare decisis standard. Similar to the *Skidmore* deference standard, review should operate on a sliding scale.[314] Instead of searching for the previous court's (often absent) explicit indication of the provision's ambiguity, the reviewing court should focus on the reasons proffered by the agency for the interpretive change. The stronger the court's certainty about statutory meaning, the less room there is for policy judgments, and stronger agency arguments would be required to reverse the original interpretation.[315] Thus, in some cases, it will be clear that the agency cannot change the original interpretation.

The following brief description outlines a stare decisis rule that does not depend on *Chevron*'s explicit ambiguity determination. Regardless of the reviewing court's views of the clarity of the relevant statutory provision, if the agency wishes to change a previous interpretation, it must offer some new justification for its interpretation. This is consistent with the traditional principle that stare decisis is at its "strongest when the Court is asked to change its mind, though nothing else of significance has changed."[316] For example, perhaps the court accepted the agency's interpretation in the first case. If the agency wishes to change its interpretation, it should be required to convince the reviewing court that it has selected a reasonable interpretation and has adequately explained the reasons for the change in

312. *See generally* Comment, *Implementing* Brand X*: What Counts as a Step One Holding?*, 119 HARV. L. REV. 1532 (2005) (explaining the difficulties courts will have when trying to determine whether a previous court held a statutory provision to be ambiguous).

313. *See* Eskridge & Ferejohn, *supra* note 77, at 644 (referring to the "[c]onventional wisdom . . . that agencies are in the best position to correct errors"). R

314. *See supra* notes 251–53 and accompanying text (describing the *Skidmore* doctrine). R

315. *See supra* notes 251–53 and accompanying text (describing the flexible nature of *Skidmore* review). R

316. John R. Sand & Gravel Co. v. United States, 552 U.S. 130, 144 (2008).

policy.[317] Similar to the current *Chevron* doctrine, the agency would have to offer particularly persuasive reasons to change a longstanding interpretation.[318] If, in contrast, the original court chose an interpretation other than the agency's interpretation, the agency will, in addition to establishing that its interpretation is reasonable, have to demonstrate that some important circumstance has changed, such as an increased level of procedural formality.[319] The reviewing court would thus still be policing the boundaries of agency action while also maintaining a relatively vibrant stare decisis doctrine.

VI. CONCLUSION

Chevron may properly be termed an enigma due to the outstanding and important issues regarding its application, but even under a narrow reading of the decision, the doctrine that was created has been transformative.[320] Although the changes perhaps now appear to have been more rhetorical than actual, the *Chevron* decision set forth important interpretive principles that occupy a permanent place in administrative law. These principles include the important realist observations that statutory interpretation involves policy decisions, that agencies are better suited to make these policy decisions than are courts, and that a reviewing court must accept a reasonable agency interpretation of an ambiguous statute even if the interpretation is not the one the reviewing court would have adopted.[321]

Despite *Chevron*'s important contributions to administrative law, not all of its transformations can be deemed beneficial. The *Chevron* doctrine has been described by Cass Sunstein as "a natural and proper outgrowth of . . . the legal realist attack on the autonomy of legal reasoning,"[322] but it is time for the *Chevron* doctrine itself to receive a

317. *See* FCC v. Fox Television Stations, Inc., 129 S. Ct. 1800, 1811 (2009) (explaining that "the requirement that an agency provide reasoned explanation for its action would ordinarily demand that it display awareness that it is changing position," and that "the agency must show that there are good reasons for the new policy" (emphasis omitted)).

318. *See* Eskridge & Baer, *supra* note 145, at 1133 (indicating that "the overwhelming majority of the cases in which the Court invokes *Chevron* (70.6%) involve[s] a longstanding or fairly stable interpretation"); *see also* Merrill & Hickman, *supra* note 3, at 855–56 & n.124 (explaining that under *Skidmore*, longstanding and consistent interpretations were granted heavier weight than new or fluctuating interpretations). R R

319. *See supra* text accompanying note 224 (explaining the importance of the procedural circumstances in which the agency set forth its interpretation). R

320. *See supra* notes 28–30 and accompanying text (describing the narrow and broad readings of *Chevron*). R

321. *See supra* note 6 and accompanying text (describing how *Chevron* requires courts to accept second-best statutory interpretations). R

322. Sunstein, *supra* note 43, at 2583. R

dose of legal realism. As this Article has argued, *Chevron*'s two-step doctrine is in need of reformation in order to remain true to its realist underpinnings. Most importantly, *Chevron* inappropriately elevates ambiguity as the determiner of whether a court must consider the merits of an agency's interpretation. This determination is made wholly subjective and discretionary by the judiciary's conflation of ambiguity identification with ambiguity resolution, which allows courts to determine arbitrarily the context for resolving statutory meaning.[323] The two-step doctrine has also caused unnecessary confusion regarding the continuing legitimacy of various interpretive tools, particularly substantive canons. Although many scholars have deemed substantive canons to be policy-oriented in nature and thus incongruent with *Chevron*'s rationale, substantive canons should not be excluded from consideration on this basis because it is problematic to view Step One as requiring a bright line distinction between interpretive tools that reflect judicial policy determinations and those that reflect estimations of congressional intent.

Notwithstanding its valuable rhetorical admonishment to courts to accord proper deference to agency statutory interpretations, *Chevron*'s doctrinal transformation should not be seen as extending to interpretive methodology. Rather, it should be limited to only a softening of the previously strict stare decisis doctrine.[324] In this way, *Chevron*'s unfortunate and misleading bifurcation of statutory interpretation into ambiguity determination and ambiguity resolution can be eliminated, and courts can return to a single-step interpretive process that considers agency views from the beginning of the process, while at the same time still bounding the limits of agency interpretive freedom.

323. *See supra* Part II.B.1 (explaining how courts conflate ambiguity identification with ambiguity resolution).

324. *See supra* notes 297–301 and accompanying text (explaining the heightened stare decisis standard that is applied to statutory interpretation cases). R