Rethinking *Chevron*

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Must a Question Have an Answer?
Can't There Be Another Way?[1]

INTRODUCTION

Statutory interpretation can be hard. The now thirty-eight-year-old *Chevron* doctrine offered the promise of relieving federal courts of some of this burden if an agency, tasked with enforcing a statute, had already done the work of interpreting a vague statutory provision. Then, instead of having to start from scratch, a court need simply defer to the agency's interpretation so long as it is reasonable. The court would not only have saved itself from a potentially difficult task, but also would have helped burnish the reputation of a branch of government often criticized for legislating from the bench by making this show of respect for Congress's role in drafting legislation and the executive branch's role in implementing it.

Although *Chevron U.S.A. v. Natural Resources Defense Council, Inc.*[2] is one of the most cited Supreme Court decisions,[3] reflecting how heavily the lower courts rely on it, there is a real possibility that its days are numbered. That became clear recently when a long-serving Supreme Court justice opened an oral argument by asking the petitioner whether he was asking the Court to overrule *Chevron*.[4]

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1 DAVID BYRNE, *It's Not Dark Up Here, on* AMERICAN UTOPIA (Nonesuch 2018).

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

3 *Id.* (citing Westlaw on May 11, 2023, its website noted that *Chevron* had been cited 98,483 times in all sources, including 18,248 times in case reports, 3,533 times in administrative decisions and guidance documents, and 39,746 times in appellate court documents).

4 Transcript of Oral Argument at 5, Am. Hosp. Ass'n v. Becerra, 142 S. Ct. 1896 (2022) (No. 20-1114), https://perma.cc/6TNV-JH2F. Justice Thomas previously expressed reservations about the constitutionality of the Chevron doctrine. *See* Michigan v. EPA, 576 U.S. 743, 761–62 (2015) (Thomas, J., concurring). As it happens, when the decision was issued, it examined the statutory

This has been a long time coming since *Chevron* has been controversial from the start. The case appears to conflict with the Administrative Procedure Act's provision tasking the courts with deciding whether an agency's action conflicts with the law.[5] Two of the latest Supreme Court appointees have criticized it for this reason, worrying that it grants too much authority to administrative agencies.[6] It has engendered a host of special rules that are inconsistent with the usual approach to administrative law, and the Supreme Court has not always applied its own approach with consistency.[7] Consequently, *Chevron* is a decision that has launched a thousand law review articles trying to explain, critique, or fix it.[8]

It is time to take a fresh look. The problem with *Chevron* is that it suffers from being half right. It recognizes that not every statutory interpretation question presented to a court must necessarily lead to one, and only one, way an agency can implement a statute. Had the Court stopped there and simply stated that the agency before it had discretion to fill in necessary details in a statutory scheme it was implementing, that would have been commonplace. But instead, the Court adopted a novel legal fiction that if a statute is vague or silent on a particular point, it can be assumed Congress meant that the agency implementing the statute was free to adopt any minimally credible reading it wanted.

This unnecessary and misleading assumption is what is wrong with *Chevron*. What should it be replaced with? Literally, nothing. Instead of

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interpretation question before it in the manner proposed in this article. It directly addressed whether the statute in question gave the agency the discretion to act as it did and answered the question without the need for any presumptions.

[5] *See* 5 U.S.C. § 706(2)(A)–(D).

[6] Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1149 (10th Cir. 2016) (Gorsuch, J., concurring) ("There's an elephant in the room with us today. We have studiously attempted to work our way around it and even left it unremarked. But the fact is *Chevron* and *Brand X* permit executive bureaucracies to swallow huge amounts of core judicial and legislative power and concentrate federal power in a way that seems more than a little difficult to square with the Constitution of the framers' design."); Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2150 (2016) (book review) (writing while on the D.C. Circuit, "Chevron has been criticized for many reasons. To begin with, it has no basis in the Administrative Procedure Act. . . . In many ways, Chevron is nothing more than a judicially orchestrated shift of power from Congress to the Executive Branch.").

[7] *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, 1098–99 (2008) (noting that one study reviewing 1014 agency interpretation cases heard by the Supreme Court between 1984 and 2006 came to the surprising conclusion that the Court relied on *Chevron* in only 8.3% of those cases, while in a whopping 53.6% of them it relied on ad hoc judicial reasoning with no deference given to the agency's view).

[8] Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984) (citing Westlaw on May 11,2023, which noted that *Chevron* had been cited 21,652 times in secondary sources); *see, e.g.*, Kristin E. Hickman & Aaron L. Nielson, *Symposium: The Future of Chevron Deference*, 70 DUKE L.J. 931, 1016 (2021).

assuming that statutory ambiguity or silence equals agency discretion, the courts should directly examine whether the agency really has discretion.

The assumption conflates an agency's role in interpreting a statute with its role in implementing the statute. An agency must interpret a statute before implementing it, but not every implementation is an interpretation. If an agency concludes that Congress meant it to act in only one way, then the manner in which the agency implements the statute is driven by its interpretation of the statute. If the agency concludes that the statute gives it discretion to choose between various means of implementation, then it has interpreted the statute only to the extent that it claims authority to act under the statute and its chosen method is within the limits of its discretion. The particular approach it takes to implement the statute is a policy choice, not an interpretation of the statute.

Chevron's assumption that ambiguity or silence necessarily means that an agency has discretion to interpret—and therefore implement—a statute simply muddies the water by failing to distinguish between agency statutory interpretations and agency implementation decisions.[9] The corollary, that if a statute is clear an agency lacks interpretive and implementation discretion, has led to an excessive focus on whether a statute is clear or ambiguous, not on whether Congress meant to give the agency a range of options when implementing a statute.

Asking the wrong question is unlikely to lead to the right answer. Courts should ask not simply whether a statute is vague or silent on a point, but whether it appears plausible that the agency has discretion to adopt more than one approach consistent with the basic meaning of the statute. If the statute admits only one correct interpretation that must be implemented in only one way, the agency does not have any discretion to interpret it otherwise. If discretion is inconsistent with the statutory scheme, then the courts must determine what path the agency is to follow even if it is not immediately evident. On the other hand, if the statute grants the agency discretion in the way it should be implemented, then the agency lacks the power to interpret that discretion more narrowly or broadly than the statute provides. Not until it has been determined that the agency has some discretion in implementing a statutory phrase should a court decide whether the agency adopted an approach within the allowable range of discretion.

I will look first at the *Chevron* decision itself and endeavor to show that the distinction made between statutory clarity and ambiguity does not demonstrate that an ambiguous or silent statute necessarily means the agency tasked with implementing it has discretion to interpret the statute as

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[9] *See* Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 515–16 (1989). There have been other purported rationales for Chevron, such as that the separation of powers requires it. Justice Scalia, a long-time proponent of Chevron, dismissed that justification by noting there could be no constitutional objection to Congress passing a statute forbidding the courts from giving deference to an agency's views.

it chooses. Moreover, an examination of the facts of *Chevron* will show that the statutory term involved was not in fact ambiguous; it was reasonably straightforward in providing the agency with options to adopt a more detailed approach than described in the statute itself. Thus, the case was not an appropriate vehicle to adopt a broad rule on how to handle the interpretation of statutory ambiguity or silence.

I will then examine, in some detail, ten post-*Chevron* Supreme Court decisions. I will look at how *Chevron* has influenced and distorted the way statutory interpretation is conducted, particularly the way in which the distinction *Chevron* makes between clear statutes (in which the agency does not have discretion), and ambiguous or silent ones (in which it does). This has pushed the parties and ultimately the justices into trying to pigeonhole a statute into one of these two possibilities. I begin with a case in which the interpretation issue should have been easy to resolve but was made more difficult by trying to make the statute fit one of these categories. I then consider a case in which the statute seemed quite clear, but a purported ambiguity led to a questionable result. I turn next to a case that presented the opposite situation: a statute that was remarkably obscure but was viewed as clear by a majority. The fourth case shows how forceful the pull of *Chevron* has become when any hint of statutory interpretation is involved and ends up being used in situations where it is unnecessary to the decision. Following that, I will discuss some of the ancillary rules derived from *Chevro*n: a rule that would allow agencies' views of their jurisdiction to prevail when a statute is ambiguous or silent; an exception to the application of *Chevron* if the interpretation is particularly important; and the distinction between the types of agency actions that the Supreme Court has determined would warrant *Chevron* deference. None of these rules, which further distort statutory interpretation, would be necessary but for *Chevron*.

A close examination of these cases will also show the folly of basing discretion on a determination that a statute is ambiguous without a clear notion of what ambiguity is. In only two of the cases I examine does the agency involved clearly have some discretion to adopt different approaches to a statutory phrase. Six of the remaining cases are instances in which the agency did not have discretion either because: the purported ambiguity or silence could not sensibly be read in more than one way, or because the only two plausible interpretations were polar opposites that could not both be correct interpretations of Congressional intent.

I. The Chevron Decision

I begin with the *Chevron* decision itself and start with the adopted rule before turning to the situation that called this rule into being. A close look will demonstrate that the Court's rationale, that statutory ambiguity or silence equals agency interpretive and implementation discretion, does not hold up and this assumption is unnecessary to resolve the interpretation

question at issue in the case itself.

A. *The* Chevron *Rule*

Justice John Paul Stevens, who wrote the *Chevron* opinion, divided the analysis into two steps that he explained as follows:

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.[10]

In these steps, Justice Stevens mentioned only two possible types of statutes: a clear one that directed an agency to implement it in a specific way or an ambiguous or silent one that an agency could interpret and implement in multiple ways. But there are obviously more possible options, including a statute that clearly gave an agency discretion, and an ambiguous or silent one that was meant, if inarticulately, to limit an agency to only one method of implementation.[11] By focusing on only the two options he mentioned,

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[10] 467 U.S. at 842–43.

[11] *See id.* at 843. Justice Stevens acknowledged one way that Congress could clearly give an agency broad discretion, saying that when "Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation." He does not say exactly how a statutory gap can be explicit, but Justice Stevens sets up an analogy that he hopes will convince the reader that his assumption of agency discretion is valid when the agency is faced with an ambiguous or silent statute. If, in the "explicit gap" situation, Congress expressly delegates an agency to provide detailed enforcement of a very general statute, then the agency must have the authority to decide how to fill the gap. So too, according to Justice Stevens, if Congress has left a statute ambiguous or silent, the agency that implements it must also have interpretive authority. The problem with the analogy is that the premise is flawed. This is shown by looking at a few examples of explicit delegation. *See, e.g.*, 42 U.S.C. § 7408(a)(1)(A) (1990). For example, a provision of the Clean Air Act gives the EPA Administrator the authority to publish a list of air pollutant "emissions of which, in his judgment, cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare." A direction to an agency head to use his or her judgment is as clear a grant of discretion as there can be. Congress frequently uses this method to grant an agency discretion to broadly describe a topic and give an agency the authority to regulate it. Examples like this abound. 29 U.S.C. § 651(b)(3) (1970). In the Occupational Safety and Health Act, Congress has authorized "the Secretary of Labor to set

Justice Stevens was using the two-step approach as proof that agencies can be assumed to have broad discretion to interpret statutory silence or ambiguity. His proof starts with the dichotomy he set forth in step one. Congress has either given clear direction to an agency or it has not. In the first instance, the agency must do as Congress has instructed; by contrast, in the latter instance, Congress must have meant the opposite. Thus, it can be assumed that the ambiguous or silent statute can have multiple plausible meanings, and the agency will have some discretion in interpreting and implementing the statute.

The assumption that agencies always have interpretive discretion if a statute is ambiguous or silent is true only if the proof holds up. Justice Stevens' proof seems to state a logical proposition, but in application, it does not. Try it the other way around. Look at the occasions in which Congress has explicitly given agencies discretion. Could anyone reasonably conclude from those occasions that the opposite must be true of ambiguity or silence, meaning they must be instances in which Congress meant to limit agency options?

The truth is that there is no contrast between clarity and ambiguity when it comes to determining whether a statute has given an agency specific marching orders or discretion. That Congress sometimes clearly tells agencies exactly what to do has no bearing on whether an ambiguity or silence in a statute means that an agency has discretion. Justice Stevens's supposition that statutory ambiguity or silence equals discretion cannot hold up without this crutch.

1. Ambiguity

Ambiguity and silence are quite different things. An ambiguous word or phrase may be subject to multiple meanings. Congress may sometimes leave a term deliberately vague in order to ease a bill's passage, with the understanding that the agency charged with implementing the bill will sort it out later. That is a circumstance in which the deference proposed by *Chevron* would apply, but it is hardly the only reason a statute might be ambiguous. It is just as likely that Congress failed to see a purported ambiguity that a litigant assert. A more neutral examination of the statute might show that it is not that ambiguous, or that deference to an agency's interpretation is not appropriate. But because of the different ways that *Chevron* treats clear statutes, there will always be at least one party to

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mandatory occupational safety and health standards applicable to businesses affecting interstate commerce." *Id.* In these two instances, the agencies would not be filling a gap. Instead, they would be following an explicit Congressional direction to act. Nor would they be elucidating the meaning of the statute when they act. The listing of an air pollutant or the setting of a safety standard would be actions allowed by the statute, not ones that further define the meaning of the underlying statutes. Thus, instances of explicit delegation shed no light on the interpretive authority of agencies faced with an ambiguous or silent statute.

litigation—generally the government—that has an incentive to view a statute as ambiguous.

The claim that ambiguity implies discretion does not always hold up. Take the dispute in *U.S. v. Mead Corporation*, a good example of a purported ambiguity that did not lead to the conclusion that the agency had interpretive discretion.[12] The issue was whether "day planners" were subject to a 4% tariff on "diaries" or no tariff at all because they were not diaries.[13] The United States Customs Service ("Customs") thought day planners were diaries because one of the dictionary definitions of "diary" was "a book including 'printed dates for daily memoranda and jottings.'"[14] Mead argued, and the Federal Circuit agreed, that "diary" referred only to the alternative dictionary definition, namely a personal journal.[15] If the fact that a word may have more than one meaning is enough to create ambiguity, then virtually every statutory interpretation problem post-*Chevron* will involve ambiguity. But there is no real reason to believe that the word "diary" was ambiguous, or that any difficulty in figuring out whether it applied to day planners gave Customs discretion to decide which types of diaries should be subject to a tariff. Customs had only two diametrically opposed options to deal with, which was both an interpretation and an implementation issue: whether or not to impose a tariff on day planners. This is not a situation with multiple possible options along a continuum that might suggest discretion. Congress meant to subject diaries to a tariff. It did not further define the word or say which type of diary it meant. But this does not obscure the meaning of "diary." To the contrary, the answer is discernible, and Customs got it right. Congress meant to impose a tariff on anything that could be called a diary. Therefore, consistent with Custom's position, both day planners and personal journals are diaries for tariff purposes.[16]

It is hard to conceive that Congress intended to give Customs discretion to impose a tariff on day planners one day and changed its mind the next, declining to impose a tariff at all. Either a day planner is a diary, or it is not. Even if it is difficult to discern Congress's intent as to whether day planners are diaries, there must be a single, definitive answer. It is the obligation of the agency and then the courts, when asked, to figure it out. The purportedly ambiguous term at issue in *Mead* was not one that the agency had discretion to resolve from time to time. Hence, *Chevron* ought to play no role—and, as shall be seen, Customs recognized this. Other examples of purported

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[12] *E.g.*, U.S. v. Mead Corp., 533 U.S. 218, 221 (2001).

[13] *Id.* at 224.

[14] *Id.* at 225.

[15] *Id.* at 226; Mead Corp. v. U.S., 185 F.3d 1304, 1305–06 (Fed. Cir. 1999). The Federal Circuit thought it significant that Customs had not defined Mead's planner as a diary in a regulation to which *Chevron* deference was owed but in an administrative ruling that could differ from one customs port to another.

[16] *See Mead Corp.*, 533 U.S. at 225.

ambiguity will be offered later, but *Mead* demonstrates that claims of ambiguity must be scrutinized carefully to see if they are accurate at all—let alone whether they have anything to do with discretion.

2. Silence

It is much harder to tell what, if anything, silence means. As with ambiguity, Congress may have deliberately chosen not to address what would seem an obvious topic if the proponents of a bill wished to avoid controversy that would interfere with its passage; they may have chosen not to say anything so that the agency tasked with implementing a statute would not have the authority to address it. But silence in a statute could just as well mean that Congress had not thought to address a question. Though silence may prove more confusing, it may not necessarily involve agency discretion. There are even some circumstances in which silence ought not interfere with a definitive resolution of an issue.

Such was the case in *Barnhart v. Walton*, which involved an interpretation of a Social Security statute addressing disability claims.[17] The contested provision defined "disability" as an "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months."[18] Under this provision, an applicant for disability benefits would have to show two things: an inability to work, and a physical or mental impairment that caused the inability. There was no dispute that the statute required a physical or mental impairment lasting for at least twelve months, but there was also no dispute that the statute was silent as to the duration of the inability to work. This mattered in *Barnhart* because the disability applicant was a school teacher who lost his job after developing schizophrenia. He claimed eligibility for benefits because his schizophrenia was going to last for more than twelve months and prevent him from being able to work. However, he obtained a new job as a cashier within eleven months.[19]

So, what meaning could be found in the statute's silence as to how long an applicant must be disabled from work? The Fourth Circuit held that, because the statute did not require an inability to work to last twelve months, the teacher was entitled to the benefits he sought. The Court's view was that silence was an unambiguous sign that no duration requirements applied to the inability to work, and thus, there was no need to defer to a regulatory interpretation contrary to the text of the statute.[20] But the Supreme Court found a different meaning in the statutory silence. Because the statute also

[17] Barnhart v. Walton, 535 U.S. 212 (2002).

[18] 42 U.S.C. § 423(d)(1)(A) (2021).

[19] *Barnhart*, 535 U.S. at 215.

[20] Walton v. Apfel, 235 F.3d 184, 188–89 (4th Cir. 2000).

provided that an "individual shall be determined to be under a disability only if his . . . impairment . . . [is] of such severity that he is not only unable to do his previous work but cannot . . . engage in any other kind of substantial gainful work which exists in the national economy," then, by implication, the statute also required that an individual be unable to work gainfully for some length of time.[21] Thus, even silence can be pierced to come to a definitive answer.

A closer reading of *Barnhart* highlights two issues for the Social Security Administration (SSA) to address: does an applicant have to be unable to work for a certain length of time to qualify for disability benefits and, if so, how long? The first question presents only two divergent options on how the statute should be interpreted: there was no requirement that an applicant had to be unable to work for any particular period of time (the Fourth Circuit's opinion) or there must be some requirement of lengthy incapacity (the agency's view). Although the Supreme Court treated the SSA's construction of the statute as "permissible,"[22] it must be more than that. It is hard to read the Court's opinion and come to the conclusion that it could also have thought the Fourth Circuit's approach, though inferior, would have been an option the agency could have adopted. Either the statute's silence meant there is no length of incapacity requirement or, despite the silence, there is such a requirement. There was no room for the SSA to have the discretion to adopt one approach, shift gears, and adopt the exact opposite approach. The practical consequences of these divergent approaches would have led to an eighty-billion-dollar difference in Social Security disability payouts over a ten year period, according to the Court.[23] Could Congress really have intended for the SSA to decide on its own whether to impose a length of incapacity requirement and potentially incur such a huge debt? There was simply no reason to believe this when the statute was otherwise geared to provide disability benefits only to those who were permanently disabled from all gainful employment. The Court's opinion that the statute imposed a length of incapacity requirement should be read as definitive—despite its insistence that it was simply deferring to a reasonable agency interpretation—because the Court reasoned that there is no discretion for the SSA to do otherwise.

But having decided that an SSA disability applicant must be incapacitated from work for at least some period of time, how long should that period be? Unsurprisingly, the statute is silent on this implementation issue. The SSA picked twelve months—the same as the time period set forth in the statute that a physical or mental impairment must exist, or be expected to exist, for benefit eligibility—to which the Court then deferred. In theory, if the agency really had discretion, it could have decided on six months,

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[21] *Barnhart*, 535 U.S. at 218–19 (discussing 42 U.S.C. § 423(d)(2)(A)).

[22] *Id.* at 219.

[23] *Id.* at 217.

fourteen months, or some other length of time; this is just the sort of continuum of options one might expect if an agency had discretion.

In reality, however, the SSA had little choice, for it is hard to see how any other length of time would be defensible. The purpose of Social Security Disability Insurance (SSDI) is to provide benefits to those who are permanently disabled from all gainful employment. Some may have suffered an injury so severe that it was immediately obvious that the individual could never work again. As the Court pointed out, one provision of the statute allows for such individuals to apply for disability insurance payments five months after a disabling injury.[24] In many instances, the permanence of a physical or mental impairment, and how long a person could not work, may not be so obvious. The injured person may go through various medical treatments—or physical or mental therapy— and simply need some time to recover.

The twelve-month impairment requirement is a legislative judgment that such a length of time will be sufficient to decide whether the impairment is permanent, potentially qualifying a person for disability benefits. This length of time may not accurately reflect how long it takes to make every such decision, but is, in effect, a legislative compromise between the desire to provide benefits to a disabled person quickly and the urge to hold off until it can be definitively determined that an individual is permanently disabled from work. Assuming that this was Congress's considered judgment on impairment, it is hard to justify any different length of time when it comes to work incapacity. Why should a person who is physically or mentally impaired for twelve months have to show work incapacity that has lasted fourteen months? Or, why should that same person be eligible for disability benefits after only six months of work incapacity? Although the Social Security statute is silent as to whether there is a length of time required for work incapacity, once it was recognized that such a requirement must be established, the only plausible choice was the same twelve-month requirement that Congress adopted in connection with impairment. Hence, the agency had no discretion on this question, and thus, the Court's deference to the agency's decision was unnecessary to decide the issue.

Statutory ambiguity or silence does not indicate whether an agency has discretion to implement a statute in more than one way, and this ought to affect how a court analyzes an agency's approach. Thus, when faced with a question about the meaning of a contested statutory provision, the question should not be simply whether the provision is clear, ambiguous, or silent; but rather, whether the provision appears to allow for only one answer (even though what that answer is may not be readily apparent) or allows the agency some discretion in implementation. To the extent only one answer is plausible, the agency's role in litigation over the meaning of a statute would

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[24] *See id.* at 220–21.

be limited to arguing that the position it proposes is correct.[25] A court should be willing to listen intently to the views of an agency that is responsible for implementing a statute and presumably some expertise in doing so, but only to the extent the agency is persuasive. If a definitive answer must be found, then agency discretion plays no role and the court must strive to find the correct answer—one that may agree with the agency's approach but need not. If, on the other hand, a proper interpretation of statutory ambiguity or silence shows that the agency has discretion, and its approach is within the limits of that discretion, then the agency should prevail, absent a substantive reason to the contrary. For questions that allow only one definitive answer, an agency's views of the existence of discretion and its breadth should be adopted only to the extent they are persuasive. These are interpretive issues in which agency expertise can prove useful to a court examining the nature and limits of agency discretion. The agency's policy choice to pick one allowable option is not an interpretive act and should play no role in determining the meaning of a statute.

B. *The* Chevron *Facts*

These examples show that an agency does not necessarily have discretion to pick from multiple options when tasked with implementing a statute that is ambiguous or silent. How is it that the *Chevron* case led Justice Stevens and a unanimous Court to a far different conclusion? The likely answer is that the facts fit Justice Stevens's proposition because it was clear that the agency had discretion and the only question was its limit.

Fundamentally, the statute needed to contain an ambiguity for the Court to state a rule as to how the ambiguity should be addressed. The law is replete with vague provisions, such as "due process." The phrase "stationary source" in the Clean Air Act was supposedly vague enough to require a rule to address it.[26] On its face, the phrase does not seem vague at all. "Stationary" means fixed and unmoving. There is no obvious need to resort to a dictionary or any other source to figure that out. "Source," in the context of the Clean Air Act, means a pollution source. So, a stationary source is a pollution source that does not move.

Where was the confusion, then? It was in the implementation. Congress amended the Clean Air Act in 1977, in part to address those areas of the country that had not yet achieved national air quality standards within the time Congress had set. It required that states in nonattainment areas establish a new permit program regulating "new or modified major stationary sources."[27] The amendment that added this new permit program

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[25] *See* Skidmore v. Swift & Co., 323 U.S. 134 (1944) (describing the specific type of deference).

[26] *See* 42 U.S.C. § 7502(c)(4) (1990).

[27] Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 850 (1984) (citing Fair Debt Collection Practices Act, Pub. L. No. 95–109, 91 Stat. 747 (1977)).

did not define stationary source.[28] In regulating a stationary source, the Environmental Protection Agency ("the EPA") had to determine whether to focus on an individual pollution-emitting apparatus, a factory building containing a series of pollution-emitting machines, or a group of buildings that made up an entire plant. With the advent of the Reagan administration in 1981, the agency changed its regulatory definition to allow states to adopt a plant-wide definition of "stationary source."[29] This "bubble concept" was previously applied to another provision of the Act called the New Source Performance Standards, which was favored by the industry because the provision allowed a plant modification to proceed without needing to adopt the best available anti-pollution technology otherwise required if the change would not increase total emissions from the plant.[30] The D.C. Circuit already held that a plantwide approach was inconsistent with the definition of "stationary source" in the New Source Performance Standards.[31] When a challenge was brought using this same approach under the 1977 amendment, then-D.C. Circuit Judge Ruth Bader Ginsburg, while guided by the earlier decision, ruled that the bubble concept could not be the governing principle in nonattainment areas because it would fail to ameliorate air quality in those states as quickly as Congress intended. Thus, the statute could not be read to allow it.[32]

This case came before the Supreme Court as *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.* Although the Circuit had ruled on both the proper interpretation of "stationary source" and on the substantive merits of the bubble concept, Justice Stevens turned the focus of the case away from the substantive merit of the EPA's regulation to the question of what "stationary source" meant. He treated this issue as a primarily legal one involving statutory construction. To this question, he developed and applied the two-step process and concluded that the EPA's approach to "stationary source" was both allowable and reasonable.[33]

Starting with step one, where does "stationary source" fit? Is the statute clear, ambiguous, or silent as to whether the source to be regulated is an

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[28] *Id.* at 851.

[29] *Id.* at 857–58.

[30] *See* ASARCO Inc. v. EPA, 578 F.2d 319, 323 (D.C. Cir. 1978).

[31] *See* 42 U.S.C. § 1857c-6(a)(2) (1970) (defining statutory source in 1970 amendment to the Clean Air Act as it applied to New York Performance Standards to mean "any building, structure, facility, or installation which emits or may emit any air pollution"); *see also ASARCO Inc.*, 578 F.2d at 326–29 (rejecting use of bubble concept in connection with these standards, focusing on use of the singular in the statutory source, and concluding that treating a whole plant with multiple buildings as a stationary source conflicted with the plain language of the Clean Air Act; also concluding that the bubble concept was inconsistent with the purpose of the statute to enhance air quality because it postponed the time when the best pollution control technology would be employed).

[32] Nat. Res. Def. Council, Inc. v. Gorsuch, 685 F.2d 718, 726 (D.C. Cir. 1982).

[33] *Chevron U.S.A., Inc.*, 467 U.S. at 860–66.

apparatus, a factory building, or an entire plant? The *Chevron* opinion, for all its emphasis on distinguishing clarity and ambiguity, offers little in the way of a precise answer as to where Justice Stevens thought the regulatory take on "stationary source" fell within the rubric he set forth. This was hardly a situation in which Congress had spoken to the precise question, as the 1977 amendment did not define the meaning of "stationary source" in any more detail. Indeed, if the statute clearly told the agency what to do, there would have been no need to devise the approach Justice Stevens adopted, as it was already beyond doubt that agencies had to follow explicit Congressional commands. Justice Stevens mentioned only three possible choices, and one was eliminated, therefore, he must have concluded as to the meaning of stationary source that the statute was either ambiguous or silent.

Which one was it? Justice Stevens did not quite say, but he emphasized that the EPA had tried a number of different approaches to defining a "stationary source," suggesting that the phrase was ambiguous enough to accommodate multiple interpretations.[34] Yet, read plainly, "stationary source" is quite clear; it refers, as stated at the outset of this section, to pollution sources that are fixed. Congress's use of this phrase serves to distinguish this section of the Clean Air Act from another section that regulates mobile sources. Beyond that, the use of "stationary source" does nothing more. So, what we have here is not vagueness, but the limit of meaning. The phrase "stationary source" describes clearly the meaning Congress intended because it distinguished between fixed and mobile sources, but after that, it is silent as to which aspect of a fixed air pollution source should be the focus of EPA regulation. This mix of clarity and silence does not make the phrase ambiguous at all. Congress explicitly commanded the EPA to regulate "stationary sources." The statute's silence on what specific devices or buildings could be considered "stationary sources" meant that, in this instance, the EPA ought to have the discretion to choose to regulate any pollution source that does not move, whether it be an apparatus, a factory building, or an entire plant. Each of the options mentioned fits the definition of "stationary source": each emits air pollution, and each is fixed.

The Reagan Administration EPA thus had the discretion to adopt a plant-wide approach to "stationary sources." The statutory phrase "stationary source" gave the agency multiple viable options to choose from, and the plant-wide approach was one of the plausible ways. Although the D.C. Circuit had treated the EPA's plant-wide definition of "stationary source" as intrinsically tied to its policy merits,[35] the definition and the policy issues can be shown to be separable. The Circuit objected to the particular manner in which the EPA used a plant-wide definition and the bubble concept. By allowing a polluter to modify an existing plant without reducing

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[34] *Id.* at 863–64.

[35] Nat. Res. Def. Council, Inc., 685 F.2d at 726–27.

the plant's total emissions, the Circuit believed the EPA would not achieve the congressional goal of reducing pollution in nonattainment states, and therefore, "stationary source" could not mean an entire plant in a nonattainment area.[36] But there is no inherent reason why an approach that looks at pollution totals from an entire plant must be conditioned this way. In a nonattainment area, such modification could be allowed only if the net result was pollution reduction commensurate with a goal that would bring the state into attainment. It is this substantive objection that one might have expected the Court to turn to next.

But in *Chevron*, Justice Stevens, having determined that the EPA's decision to take a plant-wide approach to "stationary sources" was within its discretion, did not move on to examine the substantive legitimacy of the Agency's approach. Although the Supreme Court had already accepted that one of its roles was to evaluate the substantive merit of regulations,[37] Justice Stevens backed away from reviewing a regulation if it would have been intrinsically tied to a statutory interpretation made by an agency. He explained that:

> When a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency's policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail. In such a case, federal judges —who have no constituency— have a duty to respect legitimate policy choices made by those who do.[38]

Although he explicitly declined to engage in a substantive analysis of the EPA's approach, his analysis of the second step pulled in elements of what one would expect in such an analysis. His reasoning is most likely in response to the manner in which the D.C. Circuit had bound its analysis of the definition of "stationary source" with a substantive analysis of the EPA's approach. Justice Stevens initially described step two as inquiring into whether an agency's interpretation was "permissible."[39] But later in the opinion, he examined whether the EPA's approach was "reasonable."[40] After reviewing the twists and turns of the EPA's approach to the Clean Air Act over the years and the legislative history of the 1977 amendment, he concluded that "the Administrator's interpretation represents a reasonable accommodation of manifestly competing interests and is entitled to deference: the regulatory scheme is technical and complex, the agency considered the matter in a detailed and reasoned fashion, and the decision

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[36] *Id.* at 727.

[37] *See* Motor Vehicle Mfrs. Ass'n of the U.S. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 46–49 (1983).

[38] *Chevron, U.S.A., Inc.*, 467 U.S. at 866.

[39] *Id.* at 843.

[40] *Id.* at 866.

involves reconciling conflicting policies."[41]

All that shows is that the EPA thought before deciding to take a plantwide approach to "stationary sources," but does not address the substantive problem that caused the D.C. Circuit to conclude that the EPA's approach made no sense for nonattainment areas. In areas that needed to reduce pollution overall to meet air quality standards, how could that goal be achieved if a polluter was allowed to introduce new equipment, but on a plantwide basis could still emit just as much pollution as before? The EPA's explanation was that by making it easier for plant owners to install new equipment, more plants would be modernized, and presumably more modern equipment would produce less pollution, thereby achieving the law's pollution reduction goals.[42] This is essentially an empirical claim about how factory owners will behave. On substantive grounds, it could be rejected as unproven, as the D.C. Circuit did,[43] or the agency could have been allowed to proceed to see if this prediction proved true, with the caveat that the matter could be revisited if the prediction proved inaccurate. But because the Court thought the attack on the wisdom of treating an entire plant as a "stationary source" was just a backdoor challenge to the EPA's decision to read the statute this way—a decision it thought allowable—it declined to weigh the merits of the substantive challenge to the regulation.

By engaging in what amounted to substantive review light, the Court suggested that the reasonableness of an agency's regulation has some bearing on the validity of the agency's interpretation of statutory ambiguity or silence. Yet, no matter how reasonable the agency contended its approach was, it could hardly expand beyond whatever limits Congress had imposed in the statute. This will be seen later on in the discussion of *MCI Telecommunications Corp. v. American Telephone and Telegraph Co*.[44]

Furthermore, by compressing the definitional issue and the substantive issue together and giving priority to the definitional issue, the *Chevron* decision made future arguments over regulations focus, first and foremost, on an agency's interpretation of a statute rather than on the merits of the particular approach the agency took.[45]

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[41] *Id.* at 865.

[42] *Id.* at 858 (citing Requirements for Preparation, Adoption, and Submittal of Implementation Plans, 46 Fed. Reg. 16,280, 16,281 (proposed Mar. 12, 1981) (amending 40 C.F.R. § 51.18, 40 C.F.R. § 52.24).

[43] Nat. Res. Def. Council, Inc., 685 F.2d at 725–27.

[44] *See infra* Part II(E).

[45] There is a certain irony in this. Although the EPA noted when it proposed a regulation adopting the bubble concept that what the statute meant by "stationary source" was not clear, it did not adopt a plant-wide approach because it thought this was what Congress wanted it to do; it did so because it thought the approach was a good idea that was substantively defensible. *See* Requirements for Preparation, Adoption, and Submittal of Implementation Plans, 46 Fed. Reg. at 16, 280.

Ultimately, although *Chevron* purports to stand for courts deferring completely to an agency's reasonable interpretation of statutory ambiguity or silence, that is not really an accurate description of what the *Chevron* Court did. More accurately, the Court determined that the agency had discretion on how to approach what a "stationary source" was and acted within the limits of that authority. That is, in this instance there was no question that Congress had given the EPA jurisdiction to regulate "stationary sources" and the discretion to choose how to do this, leaving the only question of whether the choice the EPA made—to adopt a plant-wide regulatory definition of "stationary source"—fits within the limits of the statutory framework.

The EPA's regulatory approach involved two separate decisions. The Court cannot be said to have deferred to the agency on either of these decisions. First, the EPA thought that "stationary source" could be read broadly enough to include an entire plant. Second, of the various ways available to define "stationary source" in a regulation, the Agency chose to focus on an entire plant. The latter decision, so long as it involved an allowable option, was the EPA's policy choice to make, absent a substantive reason to reject it. The Court might have agreed or disagreed with the EPA's choice, but it cannot be said to have deferred to the Agency by allowing it to proceed with an available regulatory option. But to find in the EPA's favor on the initial question of whether a "stationary source" could be an entire plant, the Court had to interpret the Clean Air Act definitively to allow the EPA to take this approach. It may have couched its decision as merely deferential to the agency, but it was more than this. It had to agree that the phrase "stationary source" was broad enough to allow the EPA to treat an entire plant as a "stationary source." The Court, having held this, made a plant-wide approach a continuing option available to the EPA. The Agency might later choose a different option, but it could not validly reject the plant-wide approach on the grounds that the Clean Air Act did not allow it. Thus, it simply cannot be said that the Court deferred to the EPA's interpretation at all. Instead, it determined that the Agency had a number of options when it came to regulating "stationary sources," and treating an entire plant as a "stationary source" was one of them.

It is the availability of those options that explains how the *Chevron* decision came to stand for deference. Instead of first approaching the legal question of how broadly the phrase "stationary source" could be interpreted, and then determining whether the EPA's decision to adopt a plantlike approach was allowable—neither of which would have required deferring to the Agency—Justice Stevens took the various approaches the EPA had used toward "stationary sources" and determined that, because the Agency had been picking from these optional approaches, then the Agency must have been exercising interpretive discretion.[46] Thus, an agency's

[46] *See Chevron, U.S.A., Inc.*, 467 U.S. at 863–64.

discretionary policy authority was now seen as encompassing discretionary authority to interpret an ambiguous statute.

This case should have held that, when figuring out whether a purportedly ambiguous or silent statutory phrase required some agency discretion, the Court would first need to determine whether there was more than one option available to the agency consistent with the general meaning of the statute. Then, if it appeared that the agency did have discretion, the Court would ask whether the agency's action was within the limit of that discretion.

Instead, the *Chevron* decision simply assumed that when a statute was ambiguous, an agency had the discretion to interpret it in any way that was reasonable. The assumption worked in *Chevron* because, under the Clean Air Act, the EPA had the jurisdiction to regulate stationary sources, had the discretion to approach stationary sources in a variety of ways, and picked an option that was consistent with the statutory language. But the Court made an unwarranted leap from this one example in which the agency obviously had both jurisdiction and discretion to choose from multiple available options consistent with the basic meaning of the statute. The leap was to say that every instance of ambiguity gave an agency similar discretion even when the agency's jurisdiction, the ambiguity of the statute, or the presence of discretion were at issue.

II. Post-Chevron Decisions

A. Zuni: *The Clarity/Ambiguity Battle Line*

One of the striking features of *Chevron* is that it was a unanimous decision. It was not a 9-0 decision because three justices did not participate,[47] but it was unanimous nonetheless. This might have suggested that the Court was solidly behind the innovation wrought by *Chevron* and that there would be clear sailing ahead when the Court examined statutory interpretation by an agency in the future. But unanimity has not been the hallmark of the post-*Chevron* decisions. The Court routinely divides. One major reason is that *Chevron*, by making every issue of agency statutory interpretation turn on whether the statute is clear or ambiguous, has inspired litigants to have the same focus on this issue as well. That has pushed the Justices into one camp or another when faced with a statutory interpretation problem.[48]

Although precise direction by Congress, ambiguity or silence (which equals discretion) are not the only possible classifications of a statutory phrase, the impact of finding that one of these classifications applies has a

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[47] *Id.* at 866.

[48] *See* Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2137 (2016) ("Determining the level of ambiguity in a given piece of statutory language is often not possible in any rational way. One judge's clarity is another judge's ambiguity. It is difficult for judges (or anyone else) to perform that kind of task in a neutral, impartial, and predictable fashion.").

profound effect on whether an agency will have interpretive discretion. As a result, litigants first focus on pigeonholing a statute as clear, ambiguous, or silent. This plays into one of the worst tendencies of practicing attorneys: excessive cleverness in finding ways to misunderstand the written word to the benefit of one's client. Each side will endeavor to force a statutory term to fit into its own Procrustean bed. A party challenging agency enforcement of a statute will try to claim that a statutory term, no matter how obscure, if looked at in the right way, is perfectly clear and commands the agency to implement the statute in a way the client would prefer. The government has an equal incentive to argue that a statutory term, no matter how obvious its meaning, is really ambiguous, and therefore deference is owed to the agency's interpretation.[49] It is aided by the lack of any clear definition of ambiguity. The stakes are particularly high because if a statutory phrase is determined to be ambiguous or silent, the assumption that the agency has discretion to interpret it is unassailable and cannot be defeated by evidence to the contrary, unlike most other legal assumptions.

A good example of the way *Chevron* has shaped arguments over agency actions can be found in *Zuni Public School District No. 89 v. Department of Education*.[50] *Zuni* bears some similarity to *Chevron*. The agency clearly had jurisdiction over the statutory terms in both cases, but the statute went only so far in describing what the agency should do. *Zuni*, as well as *Chevron*, involved the limit of the statutory meaning, with the issue being whether the approach that agency took exceeded its allowable discretion to provide more detail. It should have been just as easy to resolve, but it proved otherwise.

The Zuni Public School District received federal aid meant to make up for lost tax revenue due to a large non-tax-paying federal presence there. Congress forbade states from using this occasion to reduce state aid to districts, unless used as part of a state program to equalize education expenditures throughout the state. The Department of Education ("the Department") was tasked with determining if a state was doing that by comparing the relative difference between expenditures in the state's school districts, excluding outliers.[51] The Department used a formula that showed New Mexico just barely made the cut, so the state could reduce aid to the Zuni Public School District.[52] Pre-*Chevron*, the district might have challenged the result by arguing that it was just the sort of district Congress meant to

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[49] Thomas W. Merrill, *The Story of Chevron: The Making of an Accidental Landmark*, 66 ADMIN. L. REV 253, 281 (2014) ("*Chevron* was regarded as a godsend by executive branch lawyers charged with writing briefs defending agency interpretation of law. . . . [T]he opinion seemed to say that deference was the default rule in any case where Congress had not spoken to the precise issue in controversy. Since this describes (or can be made to seem to describe) virtually every case, *Chevron* seemed to say that the government should nearly always win.").

[50] *See generally* Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ., 550 U.S. 81 (2007).

[51] *Id.* at 82–84.

[52] *Id.* at 81–82, 88.

protect from reductions in state aid. But guided by *Chevron* and wishful thinking, the district argued that the method the Department used to exclude outliers was not allowed by statute, and instead the statute required a formula that, as it happened, would prevent New Mexico from reducing state aid.[53]

The statutory language at issue required the Secretary to "disregard local educational agencies with per-pupil expenditures or revenues above the 95th percentile or below the 5th percentile of such expenditures or revenues in the State."[54] Based on this language, how was the Secretary supposed to figure out the outlying expenditures that should be disregarded? Must it be based on the top and bottom five percent of expenditures per student or per school district, or could the Secretary choose either method? Take a closer look at the statutory language. Does it help to know that at the time this language was adopted, the Secretary already was using the per-student approach and it was the Department that drafted the statutory language?[55] Read it again and put yourself in the place of the person at the Department who drafted this. As the drafter, wouldn't you have thought that what you wrote at least allowed the Department to continue with its existing approach?

But that very question split the Supreme Court, with a bare majority affirming the Department's position that it could adopt a regulation that discounted outliers based on per-pupil expenditure. The majority opinion suffered from some indecision as to what the statute meant. At one point, it suggested the agency drafted the statutory language to incorporate its existing per-pupil expenditure approach toward excluding outlying expenditures.[56] Later, it posited that the language was drafted to give the agency some flexibility in deciding how to address the issue.[57] In his dissent, Justice Scalia was his usual decisive self. He pointed out that another section of the same statute explicitly adopted the per-pupil method, stating that "the Secretary shall weigh the variation between per-pupil expenditures in each local educational agency . . . according to the number of pupils served by the

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[53] *Id.* at 88–89.

[54] 20 U.S.C. § 7709(b)(2)(B)(i) (2015).

[55] *See* Zuni Pub. Sch. Dist. No. 89, 550 U.S. at 90–91.

[56] *Id.* Failure to determine whether the statute mandated the approach the agency adopted or instead, simply allowed that approach as one of the options available to the agency did not affect the result, but it could have potential unintended consequences down the road. The easy approach to approving agency action under *Chevron* is simply to treat the statute as ambiguous and say that the agency's approach involved a plausible interpretation of that ambiguity. Doing so would suggest that the agency had other options. If that's not what the Court meant, it could leave the agency with the false sense that it could change its approach if it chose. Furthermore, the assumption that an agency has discretion might amount to a failure to wrestle with the proper interpretation of a statute in situations in which there could be only one correct answer.

[57] *Id.* at 98.

local educational agency."[58] Admittedly, the statute could have been clearer on this point, if that was all it meant to say. But just because a statute could have been more specific hardly means that the Secretary's chosen method was obviously excluded. At least four justices thought the language unambiguously meant that the Secretary had to perform the exclusion based only on the top and bottom five percent of school districts.[59] The argument that the open-ended provision at issue could mean only one thing, therefore, is hard to swallow, particularly when it took fourteen pages for Justice Scalia to explain why the meaning of the contested provision was so obvious.[60]

Both the majority and the dissent claimed to be following *Chevron*, but *Chevron* did not help them figure out whether the statute was clear or ambiguous. Indeed, because the Court focused on the resolution of the issue, it made sorting out the meaning of the statute harder than necessary. Look at the statutory language again: the Secretary must "disregard local educational agencies with per-pupil expenditures or revenues above the 95th percentile or below the 5th percentile of such expenditures or revenues in the state."[61] This time, look at it in terms of whether the Department had discretion to use per-pupil expenditure in its calculation. Local educational agencies are the subject of this provision, as the dissent pointed out,[62] but that does not necessarily mean that the excluded percentiles are to be determined by the expenditures of the highest and lowest school districts. The statute directs that the exclusion be based on per-pupil expenditures, but does not say whether the Department, when figuring out the top and bottom five percent of per-pupil expenditures in a state, must look at the expenditures student-by-student or in the top- and bottom-spending school districts. As in *Chevron*, the statutory language is an issue of the limit of meaning, rather than one of clarity or ambiguity. That is, so long as the agency adopted a method that, one way or another, was based on per-pupil expenditures, it ought to pass muster from a purely definitional point of view.

Zuni should have been a fairly routine statutory interpretation case. Yet, it managed to reach the Supreme Court and proved divisive. The *Chevron* rubric, on which all the justices relied, did not help reach a sensible resolution. Its premise is that clarity, ambiguity, or silence in a statute will lead to an obvious conclusion about whether an agency has discretion to act.

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[58] *Id.* at 120 (quoting 20 U.S.C. § 6337(b)(3)(A)(ii)(II)).

[59] *Id.* at 106–107. Justice Stevens concurred, providing the fifth vote for the majority, but suggested some sympathy for Justice Scalia's interpretation, saying, "Given the clarity of the evidence of Congress' 'intention on the precise question at issue,' I would affirm the judgment of the Court of Appeals even if I thought that petitioners' literal reading of the statutory text was correct."

[60] *See id.* at 108–22.

[61] 20 U.S.C. § 7709(b)(2)(B)(i) (2018).

[62] *See Zuni Pub. Sch. Dist. No. 89*, 550 U.S. at 110–11 (Scalia, J., dissenting).

But that did not happen in *Zuni*. The dissent adopted a narrow, wooden reading, while the majority failed to see clearly the discretion built into the statutory language that cannot rightly be said to be ambiguous. Thus, what should have been a simple case to resolve led to a mixed decision without a wholly satisfactory conclusion.

B. *Chemical Manufacturers: Purported Ambiguity Without Discretion*

Zuni is but one example of a statutory interpretation decision driven by the belief that figuring out whether the statutory language was clear or ambiguous will determine the result; discretion is typically the conclusion if the language is ambiguous. But rulings in favor of an agency that rely on the assumption that an agency faced with a purported ambiguity necessarily has discretion can lead to two possible flawed results: accepting a weak agency argument that would not withstand scrutiny if the court had been focused on trying to determine whether the agency really had discretion, and weakening the acceptance of an agency position the Court thinks is correct by treating it as merely one of various possible available options, as was the case in *Zuni*.

Chemical Manufacturers Association v. Natural Resources Defense Council[63] is an example of the former. It involved an argument between the parties over the meaning of the word "modify." The Clean Water Act placed limits on the discharge of pollution into waterways and tasked the EPA with establishing discharge standards for different categories of industry.[64] The statute allowed individual companies to seek exceptions in only two circumstances: if the company could show that it was doing the best it could, given its economic constraints, or if its discharge would not interfere with the overall attainment of water quality standards.[65] The Act also provided that the EPA administrator "may not modify any requirement of this section as it applies to any specific pollutant which is on the toxic pollutant list."[66]

On its face, this looked like a clear direction by Congress that limited what the Agency could do. By regulation, however, the EPA decided to allow variances to toxic discharge limits if a company could show that its plant was atypical of the category of its industry.[67] The Natural Resources Defense Council challenged the regulation as inconsistent with the statute's ban on modifying toxic pollutant discharge limitations.[68] The EPA defended its approach, contending that the cap on the administrator's ability to modify toxic discharge limits precluded the EPA from granting toxic pollution

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[63] Chem. Mfrs. Ass'n v. Nat. Res. Def. Council, 470 U.S. 116, 116 (1985).

[64] *Id.* at 118–19.

[65] 33 U.S.C. §§ 1311(c), (g) (2021).

[66] *Id.* § 1311(l).

[67] Environmental Protection Agency: National Pollutant Discharge Elimination System; Revision of Regulation, 44 Fed. Reg. 32,854, 32,893–94 (June 7, 1979).

[68] *Chem. Mfrs. Ass'n*, 470 U.S. at 118, 125.

waivers only when issuing variances under the two exceptions contained within the statute.[69]

One obvious thing to note about this dispute is that if mere disagreement about the meaning of a statute (no matter how paper-thin the basis for the disagreement) demonstrates its ambiguity, then every statutory interpretation dispute involves an ambiguity. Needless to say, that would make ambiguity practically presumptive.

Justice White, for the majority, accepted the EPA's approach as a permissible and rational construction of a complex statute.[70] An argument can be made in favor of the Agency's position, and Justice White did so at length, exploring the statutory scheme and its legislative history. But no matter how plausible the EPA's position was, it amounted to a contention that although Congress described only two statutory exceptions, it nonetheless gave the agency discretion to create a novel toxic pollution exception by regulation—an exception that Congress had not thought was sufficiently meritorious to include in the statute and indeed one that the statute specifically banned. Fundamentally, the Court accepted the weaker argument about the meaning of the provision that barred modifications of toxic discharge limits.[71]

To *Chevron* adherents, this is a feature, not a flaw. Agencies need not adopt the best interpretation of a statute, only one that is plausible. Again, it is important to distinguish interpretation from implementation. If, when properly interpreted, a statute gives an agency implementation discretion, then the agency has the option to adopt a different approach than the one a court might think is the best. But the *Chevron* rubric, even on its own terms that focus on statutory interpretation, makes no sense unless the agency

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[69] *Id.* at 125.

[70] *Id.* at 125–34.

[71] Here's an example of the argument's weakness. Justice White quotes Representative Roberts, the House manager of the toxic pollution bill, as saying: "Due to the nature of toxic pollutants, those identified for regulation will not be subject to waivers from or modification of the requirements prescribed under this section, *specifically, neither section ... waivers based on the economic capability of the discharger nor ... waivers based on water quality considerations shall be available*. Leg. Hist. 328–329 (emphasis added)." *Id.* at 127. Justice White seemed to regard this quote as supporting EPA's position that the purpose of the bill was to ban toxic pollution waivers only when EPA was making otherwise-allowable exceptions to pollution discharge limits. The quote shows no such thing. Representative Roberts was clearly expressing particular concern with the existing waiver process and the possibility that EPA might, when issuing such waivers, grant toxic pollution waivers as well. The obvious reason for this concern was that economic and water quality waivers were the only waivers the statute allowed and were, thus, the only circumstance in which the agency might grant toxic pollution waivers. There would have been no reason for Representative Roberts to express concern with discharge permits issued without the two allowable statutory waivers because the Clean Water Act did not allow any exceptions for those permits. Moreover, at the beginning of the quoted sentence, he makes clear that no waiver should be allowed for any toxic pollutant discharges.

actually has more than one interpretive option. In this instance, there was only one other plausible option, which Justice Marshall vigorously defended in his dissent: that the EPA had no authority to grant variances to the limits placed on discharging toxic pollutants.[72] Regardless of whether one agrees with the majority or the dissent, given that the only apparent options were that the EPA had discretion to issue toxic pollution variances or it did not, it is hard to see how Congress could have intended that the EPA would be free to adopt either of two completely opposite approaches. Congress either meant to bar such toxic pollutant variances completely or to allow them. The majority, by adopting *Chevron*'s willingness to defer to a plausible agency position, failed to come to a definite conclusion as to what Congress meant the EPA's authority to be. Presumably, if the EPA's position had been that the statute barred it from granting toxic pollution variances, the majority would have accepted that position as well. But it is wholly unlikely that both positions could be correct.

This situation is far removed from the one in *Chevron*. There, whether the EPA chose to regulate individual pollution-emitting equipment, factory buildings, or an entire multi-building plant, each position would have been consistent with the statutory term "stationary source." In *Chemical Manufacturers*, the two positions present fundamentally opposite interpretations of the statutory ban on toxic pollution variances. To accept both as potentially valid is to say that the words of the statute have no meaning. Even if decent arguments could be made for either position, only one of them could be correct. The Court's role in the case was to decide between them, a role it failed to perform.

C. *King v. Burwell: Failure to Determine Whether Discretion Exists*

An example of a decision where the Court's holding is made weaker by relying on a finding of ambiguity can be found in one of its recent Affordable Care Act ("the ACA") decisions. One provision of the ACA called for the establishment of exchanges in each state that would allow residents to purchase health insurance. States were encouraged to establish these exchanges, but if any state did not, the federal government would step in and establish an exchange there.[73] The ACA also strove to maximize the number of people who purchased insurance through these exchanges by offering tax credits that would make health insurance more affordable. However, the portion of the statute dealing with these credits made them available only to those enrolled in a health insurance plan through an exchange "established by the State."[74] The Internal Revenue Service's ("the IRS") regulation implementing this provision allowed taxpayers the credit

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[72] *See id.* at 134–65.

[73] 42 U.S.C. § 18031 (2019); 42 U.S.C. § 18041 (2010).

[74] I.R.C. § 36B(b)–(c) (2021).

whether they bought insurance on a state or federal exchange.[75] Predictably, the plaintiffs who brought the suit argued that the statute was clear and disallowed tax credits for those who purchased insurance on a federal exchange.[76] Justice Scalia took this up in his dissent.[77]

Justice Roberts, writing for the majority in *King v. Burwell*, claimed that *Chevron* did not apply, for reasons I will discuss later, and thus no deference was to be accorded to the IRS's regulation.[78] But his opinion is imbued with the *Chevron* approach nonetheless. The statute literally refers to state exchanges only. On this point, Justice Scalia is certainly correct that the statute is clear. But instead of acknowledging this, Justice Roberts found ambiguity because other provisions of the ACA assumed that state and federal exchanges were functionally the same.[79] If this creates an ambiguity, then the IRS would have discretion not only to allow tax credits to those who purchased insurance on an exchange, but also to deny those credits as well. But Justice Roberts did not mean this.[80] He meant that Congress intended to allow tax credits for people who purchased insurance on federal exchanges, despite the literal meaning of what it wrote—and not merely that Congress meant to allow this yet failed inexplicably to do so, but rather that the statutory provisions assuming the tax credit's availability showed that Congress thought that it had done what it intended to do.[81] Thus, the references to exchanges "established by the State" in the tax credit provision were shorthand for whatever exchange had been established in the state, whether by the state itself or by the federal government.[82] But by not making this the decision's rationale, Justice Roberts opened the door to a future IRS that would deny tax credits to those who purchase health insurance on federal exchanges.

And, just as in *Chemical Manufacturers*, if you examine the possible options here, that should make it clear that the IRS does not have such discretion. There are only two options. Either the IRS must grant tax credits to those who purchase health insurance on a federal exchange or it is barred from doing so. Both cannot be true. Congress meant one or the other, and

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[75] 45 C.F.R. § 155.20 (2021).

[76] King v. Burwell, 576 U.S. 473, 483 (2015).

[77] *See generally id.* at 498–518 (Scalia, J., dissenting) (arguing that an exchange established by the Secretary of Health and Human Services is not an exchange established by the State).

[78] *Id.* at 485–86.

[79] *Id.* at 487–90 (Scalia, J., dissenting).

[80] *Id.* at 490. What he said was: "The upshot . . . is that the phrase 'an Exchange established by the State under [42 U.S.C. § 18031]' is properly viewed as ambiguous. The phrase may be limited in its reach to State Exchanges. But it is also possible that the phrase refers to *all* Exchanges—both State and Federal—at least for purposes of the tax credits."

[81] *Id.* at 494–97.

[82] *King*, 576 U.S. at 495 ("[I]t stands to reason that Congress meant for those provisions to apply in every State as well.").

the Court was obligated to choose.

The opinions in this case also illustrate the downside of the way *Chevron* channels attacks by opponents of agency action who strive to find some way to say that the agency's approach is precluded by a clear meaning inconsistent with what the agency is doing. Justice Scalia's dissent in *King* focuses on the literal meaning of the phrase at issue without addressing whether it might have been shorthand for something broader.[83] At the very least, whatever one's theory of how to read statutes, an attempt should be made to comprehend what Congress actually meant. Justice Scalia did not support his interpretation by citing any person who drafted or voted for the bill. But it did not prevent him from defending the wooden literalism of his interpretation by imagining that Congress might have intended to deny tax credits to those who purchased insurance on federal exchanges in an effort to pressure states to set up their own exchanges—a position he did not claim that any actual congressperson who voted for the ACA held.[84]

D. *Rapanos: Literalism in the Void*

At least in *King*, the literalist approach had some very literal language to work with. But the incentive to escape from the *Chevron* world in which statutory ambiguity equals agency discretion is so strong that clarity is claimed to exist in far less likely circumstances. As already noted, the dissent in *Zuni* chose to read what was likely a congressional invitation to exercise some discretion as a clear mandate that permitted only one approach.

The extent to which efforts to find clarity in the midst of evident obscurity can be seen most strikingly in *Rapanos v. United States*,[85] where the Supreme Court improbably found clarity amidst a dense statutory fog. *Rapanos* dealt with the Clean Water Act ("the Act"), which bars discharge of pollutants or fill into "navigable waters," which are defined as the "waters of the United States."[86] That definition is obscure enough but made more obscure by a provision that dealt with how much responsibility states could assume in enforcing the Act. There, in what was essentially an aside, Congress noted that the Act meant to cover wetlands, but nowhere does the Act define which wetlands those are.[87] Traditional notions of navigable waterways looked only to waterbodies that were actually navigable,[88] but the addition of wetlands to the equation was acknowledged by Justice Scalia,

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[83] *See id.* at 498–518 (Scalia, J., dissenting). I am reminded of my mother telling my brother who walked into the house with mud-caked arms to wash his hands before dinner. He would choose to take her literally and wash only his hands, though I'm sure he knew exactly what she meant.

[84] *See id.* at 498–518 (Scalia, J., dissenting).

[85] 547 U.S. 715 (2006).

[86] 33 U.S.C. §§ 1311(a), 1362(7), (12).

[87] *See* 33 U.S.C. § 1344(g)(1) (2012).

[88] *Rapanos*, 547 U.S. at 723.

in his plurality opinion, to show that "the Act's term 'navigable waters' includes something more than traditional navigable waters."[89] Still, somehow, despite this vagueness, Justice Scalia held that the statute plainly meant that intermittent streams and their associated wetlands were not waterways protected by the Act, and therefore an Army Corps of Engineers regulation that said that they were protected exceeded its authority.[90] To him, "waters" meant only water found in rivers, streams, oceans, or lakes, which are relatively permanent waterbodies.[91] An intermittent stream is not permanent and therefore cannot be protected by the Act. But to say that the Act covered only permanent waterbodies is a huge assumption not fairly grounded in the sparse text.[92] While Congress likely had in mind some idea of the waterways and wetlands it intended for the Act to cover, trying to figure that out from the sparse text of the Act is nearly impossible, by trying to find the Act's plain meaning.[93]

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[89] *Id.* at 731.

[90] *Id.* at 732–33.

[91] *Id.* at 733.

[92] One troubling aspect of Justice Scalia's opinion is that he appeared not to understand what an intermittent stream is. He looked to dictionary definitions of streams, which emphasized that streams flow. *Id.* at 732. From this he posited that the term "intermittent stream" is an "oxymoron" because it is inconsistent with the regular flow, which is an essential characteristic of streams. *Id.* at n.5. Taken literally, this interpretation suggests that the dictionary definition of a stream controls events in the physical world—a proposition he surely did not believe. Indeed, he acknowledged that he did not necessarily mean to exclude from the Act's coverage seasonal rivers that may not flow during dry months, which is exactly the way intermittent streams may behave. *Rapanos*, 547 U.S. at 715, n.5. Had Justice Scalia looked at the language that those in the wetlands and waterways field use, and not just at general purpose dictionaries, he would have seen that the intermittent stream is a widely used term. *See, e.g.*, 310 Mass. Code Regs. § 10.04 (2022) ("stream" defined to include "a body of running water . . . which moves in a definite channel in the ground due to a hydraulic gradient . . . [and] which does not flow throughout the year . . . is intermittent."); *see also Rapanos*, 547 U.S. at 801 (Stevens, J., with Souter, Ginsburg, and Breyer, JJ., dissenting) (pointing out that the U.S. Geological Survey includes intermittent streams on its topographical maps).

[93] The vagueness of the Clean Water Act regarding the extent of the Army Corps's jurisdiction, led by multiple opinions from the justices that proposed three different answers with no majority. In addition, Chief Justice Roberts, in a concurrence, chastised the Corps for failing to adopt a revised regulation after an earlier Supreme Court decision had rejected the Corps's broad definition of wetlands to include wetlands that did not border a waterbody. *Rapanos*, 547 U.S. at 757–58 (Roberts, C.J., concurring). Given the extreme vagueness of the statute, it is hard to see how a revised definition of covered waterbodies would have changed the result. Had the Corps adopted a more limited regulation, would Justice Roberts have changed his vote and agreed with the Corps, not Justice Scalia, that the Clean Water Act now covered intermittent streams?

Justice Stevens's dissent relies on the vagueness of the Act to argue that the Corps's broad definition is permissible, but his reasoning suggests that what he really meant was that the Corps was faithfully implementing Congress's intent. Although both he and Justice Scalia claimed to be adhering to *Chevron*, they were actually offering their definitive views on what

Left unanswered is whether Congress intended that the Army Corps regulate discharges into certain specific types of wetlands or if it is at the agency's discretion to figure out which wetlands should be covered. It may very well be some mix of direction and discretion, which *Chevron*'s clarity/ambiguity dichotomy will not help resolve. One possible alternative to determine what jurisdiction Congress intended appears in Justice Stevens's dissenting opinion. In 1977, Congress debated whether it should revise the Clean Water Act and declined to amend it, but appropriated funds for the creation of a National Wetlands Inventory to assist states in enforcing the Act.[94] That inventory, produced by the Fish and Wildlife Service at Congress's direction, could serve as a useful tool to clarify which water bodies and wetlands Congress meant to cover.

E. *MCI Telecommunications Corp: The Chevron Distraction*

This singular focus on whether a statute is clear or ambiguous has generated decisions in which it is clear that the agency has discretion, but the justices still end up needlessly arguing about the clarity/ambiguity distinction. A good example of this is found in *MCI Telecommunications Corp. v. American Telephone and Telegraph Co.*,[95] which dealt with a modern-day implementation of a 1930s-era statute. The statute in question required long-distance phone carriers to file their rates with the Federal Communications Commission.[96] It also granted the Commission the authority to "modify any requirement" of this section.[97] Both the majority and the dissent agreed that this meant the Commission had authority to make exceptions to the rate-filing requirement.[98] However, the justices disagreed as to how extensive this authority was,[99] and that was where they shoehorned *Chevron* into the decision. The extent of the agency's discretion, which was the focus of *Chevron*, mattered because the Commission had adopted an approach exempting every phone provider other than the dominant provider (AT&T) from the rate-filing requirement.[100] The majority thought "modify" could mean only an incremental change, and thus the agency's interpretation of the statute was not entitled to deference.[101] The dissent thought the

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the statute means, regardless of what the Corps thought at any given time. Had the Corps adopted the restrictive definition that Justice Scalia thought was correct, it is unlikely that Justice Stevens would have deferred to it.

[94] *Id.* at 797; *see Nat'l Wetlands Inventory*, U.S. FISH & WILDLIFE SERV., https://perma.cc/93GF-NSBR (last visited Mar. 21, 2022).

[95] 512 U.S. 218 (1994).

[96] 47 U.S.C. § 203(a).

[97] *Id.* § 203(b)(2).

[98] *MCI Telecomm. Corp.*, 512 U.S. at 234, 239–40.

[99] *Id.*

[100] *Id.* at 221–22.

[101] *Id.* at 225–29.

modifications could be narrow or broad; therefore, the agency had discretion to do what it did, and thus the Court should defer to it.[102]

But the meaning of "modify" was the main focus of neither the majority nor the dissent. The central argument was over the present-day meaning of a statute passed decades ago, when AT&T was the sole long-distance carrier and the rate-filing requirement was key to Congress's goal of ensuring reasonable rates for phone customers. Could the statute now be read broadly enough to allow the agency to drop the rate-filing requirement for non-dominant carriers as more companies enter the field, and competitive pressures on their own compel these new companies to offer reasonable rates? Even if Justice Scalia, who wrote the majority opinion, was willing to accept that "modify" could encompass major changes,[103] he would still have argued that the exception should not be allowed to swallow the rule.[104] And Justice Stevens, who authored the dissent, would still have argued that the agency was acting consistently with the main statutory purpose of making sure phone customers were charged reasonable rates.[105] The discussion of whether to defer to the agency's broad reading of the word "modify" was an unnecessary sideshow to what was otherwise an on-point debate about how much discretion the agency had to waive the rate-filing requirement.

III. Chevron Ancillary Rules

Not only has *Chevron* directed statutory interpretation disputes away from deciding whether Congress has actually given an agency discretion to implement a statute more than one way, it has also led to ancillary rules that stray further from a sensible approach to interpreting ambiguous statutes.[106] I will discuss whether statutory ambiguity or silence allows an agency to decide whether it has jurisdiction to act; the purported exception to *Chevron* when the statutory interpretation question is particularly important; and the

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[102] *Id.* at 239–40 (Stevens, J., with Blackmun and Souter, JJ., dissenting).

[103] Justice Scalia's linguistic argument is his weaker point. One would think from his discussion that the phrase "major modification" would be a crime against the English language. But someone neglected to tell him that Congress had used the phrase in drafting a statute that should be familiar from *Chevron*. The EPA adopted a definition of "major modification" in its Prevention of Significant Deterioration regulations that played a role leading up to *Chevron*. *See* 40 C.F.R. § 51.241(b)(2) (2021); 40 C.F.R. § 52.21(b)(2) (2021). A major modification is a "physical change in or change in the method of operation of a major stationary source that would result in a significant net emissions increase of any pollutant subject to regulation under the [Clean Air Act]."

[104] *MCI Telecomm. Corp.*, 512 U.S. at 232–34.

[105] *Id.* at 237–39 (Stevens, J., dissenting).

[106] Thomas W. Merrill & Kristin E. Hickman, *Chevron's Domain*, 89 GEO. L.J. 833, 873 (2001). Many of these ancillary rules concern whether to apply Chevron at all. Professor Thomas Merrill coined the term "step zero" to describe "the inquiry that courts should undertake before moving on to step one of Chevron." *See also* Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 227 (2006).

question of which types of agency discretionary decisions deserve deference.

The manner in which the Court has resolved these questions is inconsistent with otherwise established approaches to administrative law. There would be no need for any of these added complexities if the court abandoned the assumption that statutory ambiguity equates to judicial discretion. An agency's jurisdiction ought to depend on what Congress enacted, not on an agency's attempt to expand or contract that jurisdiction. Whether an agency has discretion should depend on the analysis of a statute, not solely on whether the issue involved is important or routine. Furthermore, if the agency truly has discretion to implement a statute in a variety of ways and has exercised that discretion, the manner in which it acted may affect whether the statute is enforceable against the regulated community, it should otherwise not be caught up in any dispute over whether courts or agencies have the final say on a statute's interpretation.

A. *Agency Discretion to Pick its Jurisdiction*

Take the issue of jurisdiction. It is black letter administrative law that agencies are creatures of statute and have only as much power as Congress has given them.[107] But what if the statutory grant of authority is ambiguous? Traditionally, that should not matter. Ambiguity may make it harder to determine an agency's jurisdiction, but that does not give the agency any greater power to decide whether or not it has jurisdiction. Under *Chevron*, however, it might seem that agencies would get to pick and choose the limits of their authority in such an instance. If so, then at one time an agency may think it has a great deal of authority, while at another time it may decide it has less.

Even so, it is not at all clear under *Chevron* why mere ambiguity should be enough to give agencies a free hand to determine their own regulatory jurisdiction. After all, the premise of *Chevron* is that an agency is assumed to have some discretion in how it approaches a statutory ambiguity. This implies that there must be at least two viable options from which the agency has to choose. But if the only options are that the agency has regulatory jurisdiction under a statute or that it doesn't, only one can be correct, no matter how ambiguous the statute is. Thus, there are not two viable options between which the agency could choose. Furthermore, when an agency makes a decision about its own jurisdiction, it must be making such a decision with the idea that its interpretation is correct, not based on some notion that it was simply free to choose as it pleases between jurisdiction or the lack of it. That is, it is not acting as if it is making a discretionary decision.

Still, in 2013, Justice Scalia managed to convince five of his colleagues to go along with a ruling that agencies should be entitled to deference when

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[107] *See, e.g.*, La. Pub. Serv. Comm'n. v. FCC, 476 U.S. 355, 374 (1986) ("[A]n agency literally has no power to act . . . unless and until Congress confers power on it.").

they interpret ambiguous jurisdictional provisions. While the argument among the Justices concerned primarily the legal question of whether agencies can make jurisdictional decisions when interpreting a vague statute, the facts of the case are worth considering. *City of Arlington v. FCC*[108] involved the Telecommunications Act of 1996. Congress passed this statute in order to pressure state and local governments to speed up cell tower siting decisions, while still recognizing the importance of local decision-making.[109] To meet these two objectives, the Act directed state and local governments to act on cell tower siting applications "within a reasonable period of time after the request is duly filed,"[110] but it also stated that the Act shall not "limit or affect the authority of a State or local government"[111] overseeing decisions. These provisions, standing alone, might suggest that Congress wished the Federal Communications Commission ("FCC") to determine the proper balance between speedy cell tower permitting and the time needed for an adequate local permitting process. The FCC thought so and adopted time limits on the local process.[112] The state and local government petitioners, who opposed the FCC-determined time limit, contended that another provision of the Act foreclosed the FCC from adopting a uniform, nationwide regulation. This provision allowed cell tower applicants who were unhappy with slow local permitting to petition a federal district court for relief. The opponents of the FCC's rule argued that this private right of action was the exclusive means of enforcing the speedy-cell-tower-permitting provision of the legislation.[113] While this was not the strongest argument, it raised a central question: had Congress granted the FCC regulatory authority to determine how fast local cell tower permitting should proceed? Either the FCC had this authority or it did not. This was a pure question of jurisdiction. If Congress had granted the FCC the authority to write rules on cell tower permitting, the FCC could act; if it had not been granted such authority, the FCC could not act at all. This appeared to be a yes or no question to which there can be only one answer.

Justice Scalia avoided this obvious conclusion by saying that *Chevron* applies broadly to all questions of statutory interpretation of ambiguous statutes and that phrasing the issue as one of jurisdiction was simply an attempt to avoid this principle.[114] In his view, there was no clear line between jurisdictional issues, to which the petitioners contended *Chevron* should not apply, and nonjurisdictional issues, to which they conceded *Chevron* applied. He declared:

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[108] 569 U.S. 290, 290 (2013).

[109] *Id.* at 294.

[110] 47 U.S.C. § 332(c)(7)(B)(ii).

[111] *Id.* § 332(c)(7)(A).

[112] *City of Arlington*, 569 U.S. at 294–95.

[113] *Id.* at 295.

[114] *Id.* at 296–97.

> The argument against deference rests on the premise that there exist two distinct classes of agency interpretations: Some interpretations—the big, important ones, presumably—define the agency's "jurisdiction." Others—humdrum, run-of-the-mill stuff—are simply applications of jurisdiction the agency plainly has. That premise is false, because the distinction between "jurisdictional" and "nonjurisdictional" interpretations is a mirage. No matter how it is framed, the question a court faces when confronted with an agency's interpretation of a statute it administers is always, simply, whether the agency has stayed within the bounds of its statutory authority.[115]

Because he thought it would be hard in practice to tell the difference between jurisdictional and nonjurisdictional questions, Justice Scalia declared that *Chevron* should apply to both.[116]

This is mixing apples and oranges. Whether an agency is faced with a large or small question has nothing inherently to do with jurisdiction. But there are two types of jurisdiction questions. One is whether an agency has jurisdiction at all. *Barnhart* is an example of this, as the issue was whether the Social Security Administration had the authority at all to impose an eligibility requirement on disability applicants that would require them to have been unable to work for a specific length of time.[117] The other jurisdiction issue arises when an agency has the authority to address an issue, and the question is whether it has exceeded the limits of that authority. *Chevron* itself is such a case. The EPA had conceded authority to regulate stationary sources, and the only issue was whether the particular approach it intended to follow was within the limits of its discretion.[118]

Justice Scalia assumes that "there is *no difference*, insofar as the validity of agency action is concerned, between an agency's exceeding the scope of its authority (its 'jurisdiction') and its exceeding authorized application of authority that it unquestionably has,"[119] and thus there is no reason to apply *Chevron* only to statutory ambiguities that are non-jurisdictional. But a close look at the issues involving an agency potentially exceeding its discretionary authority shows that such cases present the same yes-or-no questions as in pure jurisdiction cases, and thus there exists no discretion that would call for application of *Chevron* at all. In the *Chevron* case itself, the EPA had undisputed jurisdiction to regulate stationary sources, with the only legal issue being whether it could go so far as to treat an entire plant as a stationary source. Either it could, in which case it could then use its discretion to pick that option, or it could not, and then would be confined to picking a different

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[115] *Id.* at 297 (emphasis omitted).

[116] *Id.* at 301.

[117] *See supra* Part I(A)(2).

[118] *See supra* Part I(B).

[119] *City of Arlington*, 569 U.S. at 299.

option. Thus, any discretion the EPA might have to adopt a plantwide approach existed only if its authority extended that far, and not otherwise.[120] This is just as much a jurisdictional question that demands a definitive answer as was the issue in *Barnhart* about whether the Social Security Administration had authority to impose an eligibility requirement on disability applicants that would require them to have been unable to work for a certain length of time. The EPA cannot simultaneously have the authority, confirmed by the Supreme Court, to treat an entire plant as a stationary source, then later decide that it also lacks such authority, and have the same Court affirm this opposite reading of the statute.

Thus, because issues involving claims that an agency is exceeding its admitted authority are truly jurisdictional, courts ought to approach them just the same way as jurisdictional issues involving whether an agency has authority to act at all. If an agency is acting in either manner, in excess of its jurisdiction, a court should say so. Similarly, if in one way or the other, an agency disclaims jurisdiction that it actually has, a court should not be bound to accept this erroneous interpretation.[121]

Although there is no reason to give *Chevron* deference to agencies making either kind of jurisdictional call, there is a real practical difference between the two types of jurisdiction issues, and this distinction goes to the heart of how a court handles the matter—and it is not as hard to sort out as Justice Scalia claimed. If an agency lacks jurisdiction over a topic, it has no discretion to act at all, and that is the end of the matter. If an agency has jurisdiction but exceeded its discretion, that discretionary authority will still exist, and can be exercised by the agency, but now in a manner more confined by statute than the agency had previously thought.

Consider how that would apply to the FCC in the cell tower issue before

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[120] *See, e.g.*, Am. Hosp. Ass'n v. Becerra, 142 S. Ct. 1896 (2022). The recent *Becerra* decision is an example of the Court examining whether an agency exceeded the limits of its discretion. The Department of Health and Human Services adopted a regulation establishing a lower reimbursement rate for outpatient prescription drugs purchased by a class of hospitals that served underserved communities. The agency sought to justify its approach by citing a statutory provision allowing reimbursement rates to be "adjusted by the Secretary as necessary." Although this provision obviously granted HHS some discretion, the Court in a unanimous decision authored by Justice Kavanaugh held that the statute did not give the agency this option because it allowed HHS to "vary [reimbursement rates] by hospital group" only if the agency had conducted a survey of hospital drug acquisition costs, a step HHS had not taken.

[121] Of course, there are instances in which Congress has given agencies what is, in effect, power to determine their jurisdiction. The classic example is the National Labor Relations Board ("the NLRB"). The NLRB enforces the National Labor Relations Act, which governs how businesses treat their employees. A determination by the NLRB that a certain class of workers are employees gave it jurisdiction; if it finds the workers were independent contractors, it lacks jurisdiction. But such determinations are questions of fact, not of law. *See* NLRB v. Hearst Publ'ns, Inc., 322 U.S. 111, 130–31 (1944).

the Court in *City of Arlington*. If the FCC decided not to simply set a time limit on local permitting, but also added conditions to cell tower building permits that exceeded the powers granted to it by statute, this would be beyond its authority under 47 U.S.C. § 203 (a) and (b) and would be struck down. The agency just could not do it. If on the other hand, the FCC told local authorities they had just two days to decide whether to issue a permit or gave them two years to do so, chances are neither approach would withstand scrutiny because the agency failed to reasonably balance Congress's desire for speed in cell tower siting decisions and the need to provide enough time for localities to make that decision. A court rejecting either of these actions would not pick a time limit it thought proper, but would instead leave it to the agency to balance the relevant interests and then choose a new time limit.[122]

This is exactly what the Supreme Court has done when addressing agency jurisdiction issues head-on. In *Massachusetts v. EPA*,[123] for example, the Court considered whether the EPA had the authority to regulate greenhouse gasses under a Clean Air Act provision that gave the agency power to regulate emission of "any air pollutant [that] . . . may reasonably be anticipated to endanger public health."[124] At one time, the EPA thought it had such authority; then, it changed its mind.[125] The Court held that the EPA did have the authority but did not prescribe how the agency, in its discretion, should approach the issue.[126]

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[122] *See* Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 839–42, 846 (1984). Consider the provision of the Clean Air Act at issue in *Chevron* that gave EPA authority to regulate stationary sources. The EPA had no jurisdiction to use that authority to regulate mobile sources under this provision of the Act. Had it attempted to do so, a court would have struck down the attempt and barred EPA from using the stationary source provision to regulate mobile sources. But what if instead of picking from the possible options I previously listed as ways to look at stationary sources (a pollution emitting device, a factory building, an entire multiple building plant), the EPA chose to regulate a city as a stationary source? Cities don't move and, chances are, they have stationary pollution-emitting devices within their boundaries. But unless the city happens to be a company town, these devices are not likely all owned by the same person or business. Such an approach would be inconsistent with the Act and thus barred, but any court decision to that effect would not limit EPA's authority to pick among the allowable options.

[123] 549 U.S. 497, 497 (2007).

[124] 42 U.S.C. § 7521(a)(1) (2011).

[125] *Massachusetts*, 549 U.S. at 510–12.

[126] *Id.* at 528–35. The Court purported to follow *Chevron* when it held that the EPA, by denying that it had jurisdiction to regulate greenhouse gasses, had "refused to comply with [the] clear statutory command" to regulate air pollution, *Id.* at 533, but in reality it was making a call that EPA had jurisdiction. A few years later, the tables were turned. When EPA decided to regulate greenhouse gasses in the context of certain portions of the Clean Air Act that applied to stationary sources, the Court rejected the agency's effort to defend this as an exercise of discretion by determining that this interpretation of the statute would unreasonably expand the scope of regulation of such sources. Util. Air Regul. Grp. V. EPA, 537 U.S. 302, 315–16 (2014).

Justice Scalia cited two of the aforementioned cases as examples of how the Court has applied *Chevron* to many jurisdiction questions. These cases prove the weakness of the argument that *Chevron* should apply to any type of jurisdiction question. The first, *Chemical Mfrs. Assn. v. Natural Resources Defense Council, Inc.*, is a pure jurisdiction case.[127] The issue in this case was whether the EPA had the authority to grant discharge variances if the discharges included toxic pollutants. It either did or it didn't. There was no obvious room for discretion, as there was in *Chevron*. The failure of the Court to focus on this point is the problem with the decision—and with the *Chevron* approach itself—which allowed the Court to defer to the agency if one day it thought it could issue such variances and subsequently, thought it could not. A definitive answer was called for, yet none was made.

On the other hand, *MCI Telecommunications Corp. v. AT&T Co.* is what Justice Scalia would call a "nonjurisdiction case." The governing statute gave the FCC authority to modify rate-filing requirements.[128] Thus, the agency had jurisdiction to make such modifications. The question was whether it exceeded that authority by dropping rate-filing requirements for all phone companies other than AT&T. Though it strained to rely on *Chevron*, the decision of the Court was a definitive answer that the agency had exceeded its authority. Although the Court decided this was a violation, the FCC retained its discretion to modify rate-filing requirements, and the Court did not tell the FCC how to use this discretion. This shows that the Court could tell the difference between the two types of jurisdiction issues and how they affected the nature of the Court's decision.[129]

The case law also shows that the Court has decided jurisdiction questions of one sort or the other even when purporting to follow *Chevron*. This is most obvious when it has rejected the agency's interpretation. The Court has, on numerous occasions, rejected agency claims to jurisdiction. In *Rapanos*, for example, the plurality rejected the EPA's effort to regulate discharges into intermittent streams under the Clean Water Act.[130] Although the decision was an instance in which Congress had clearly denied the agency this authority, it is the Court that determines the extent of the EPA's jurisdiction under the Clean Water Act. In *FDA v. Brown & Williamson Tobacco Corp.*, the Court's decision that the Food and Drug Administration did not have authority to regulate cigarettes was unabashedly a ruling on the Agency's jurisdiction.[131] The same is true when the Court rejects an agency's claim that it lacks jurisdiction. In *Massachusetts v. EPA*, the Court's

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Though the Court purported to reject EPA's effort under *Chevron* step two, it again was making a jurisdictional call.

[127] *See supra* notes 63–73; *supra* text accompanying note 71.

[128] *See supra* notes 95–105; *supra* text accompanying note 103.

[129] *See* MCI Telecomm. Corp. v. AT&T Co., 512 U.S. 218, 234 (1994).

[130] Rapanos v. United States, 547 U.S. 715, 739 (2006).

[131] 529 U.S. 120, 160–61 (2000).

rejection of the Agency's contention that it lacked authority to regulate greenhouse gasses under the Clean Air Act was a definitive jurisdictional determination.[132]

Even when the Court accepted an agency's view and based its decision upon the agency's discretion to interpret an ambiguous statute, it was making a decision on jurisdiction. As I pointed out earlier, the Court's decision in *Chevron*—allowing the EPA to adopt a plantwide approach to stationary sources—no matter how couched in deference, was a determination that this action did not exceed the Agency's jurisdiction.[133] When the Court in *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*[134] decided whether the Interior Department could enforce the Endangered Species Act's prohibition against "harming" an endangered species,[135] the Court's decision in favor of the agency was a determination that the Secretary had jurisdiction to enforce the Endangered Species Act in this manner. The Court has also decided jurisdiction in an interpretation of statutory silence. For example, Title X provides federal money for family planning but forbids use of such funds "in programs where abortion is a method of family planning."[136] The statute does not say whether the Secretary of Health and Human Services, when implementing the statute, can place any conditions on what organizations receiving Title X funds can or cannot say about abortion.[137] The Court's decision in *Rust v. Sullivan* stated that the Agency could forbid organizations receiving Title X funds from providing abortion counseling was a clear jurisdictional call.[138]

B. *Important Issue Exception*

In the *Babbitt* and *Rust* decisions, the Court claimed to be following *Chevron* even though it was deciding jurisdictional issues. But sometimes, it drops the mask and makes these decisions without deferring to the agency. One of the exceptions to *Chevron* the Court has created is based on a presumed distinction between important and routine issues, with *Chevron* applying only if the issue is routine. This was the distinction Chief Justice Roberts relied upon in *King v. Burwell*, where the Court decided the case based on its own analysis without giving *Chevron* deference to the IRS's decision to award tax credits to individuals who purchased health insurance

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[132] 549 U.S. 497, 531, 534–35 (2007).

[133] *See supra* Part I(A).

[134] 515 U.S. 687, 708 (1995).

[135] Endangered Species Act, 16 U.S.C. §§ 1538(a)(1)(B) (2021) (barring "tak[ing]" an endangered species), 1532(19) (2021) (defining "take" as including "harm").

[136] Prohibition Against Funding Programs Using Abortion as Family Planning Method, 42 U.S.C. § 300a-6 (2022).

[137] *See* Rust v. Sullivan, 500 U.S. 173, 184 (1991).

[138] *Id.* at 187 (couching this decision and "defer[ring] to the [Health and Human Services] Secretary's permissible construction of the statute").

from federal exchanges set up under the Affordable Care Act.[139] The Chief Justice explained that the Court's normal assumption, that statutory ambiguity implies agency discretion, did not apply because the matter at hand was such a significant question:

> The tax credits are among the Act's key reforms, involving billions of dollars in spending each year and affecting the price of health insurance for millions of people. Whether those credits are available on Federal Exchanges is thus a question of deep "economic and political significance" that is central to this statutory scheme; had Congress wished to assign that question to an agency, it surely would have done so expressly.[140]

A close analysis of the Affordable Care Act would lead to the conclusion that the statute could have meant only one thing, but beyond that, there are two basic problems with this *Chevron* exception. First, like *Chevron* itself, it is based on an assumption that Congress wished to have the last word on significant issues, even if expressed ambiguously (or silently), and not grant implementation discretion to the agency enforcing the statute. In some instances, as was the case in *Barnhart*,[141] while the statute was silent on the issue, the Court held that Congress intended to grant disability benefits only to those whose incapacity to work was lengthy. But there is no reason to believe that the assumption (that on all major issues Congress did not want agencies to have discretion when implementing important aspects of a statute) is universally true. Indeed, in some cases, the opposite assumption would be just as plausible. Take the Endangered Species Act's ban on "harming" endangered species that was the subject of *Babbitt*;[142] or the Clean Water Act's ambiguous direction to the Army Corps to regulate discharges into unspecified wetlands connected somehow to "navigable waters" that was at issue in *Rapanos*.[143] Each of the ambiguous terms was a central feature of the respective statute. It could just as easily be assumed that Congress gave only sparse direction to agencies tasked with implementing these statutes because it wanted them to determine, respectively, what types of

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[139] *See* King v. Burwell, 576 U.S. 473, 486 (2015).

[140] *Id.* at 485–86; *see also* Nat'l Fed'n of Indep. Bus. V. Dep't of Lab., 142 S. Ct. 661, 665 (2022) (holding that when the issue is whether an agency has any authority to address a topic, the Court expects Congress to clearly state that an agency may "exercise powers of vast economic and political significance."). There, the dispute was over whether OSHA had the authority to issue a broad vaccine mandate that applied to all businesses employing 100 or more people. As used in the *Chevron* context, an agency's authority over an important topic is conceded, with the issue being whether the agency has discretion in the manner in which it addresses the topic.

[141] Barnhart v. Walton, 535 U.S. 212, 214–15 (2002).

[142] Endangered Species Act, 16 U.S.C. § 1532(19) (1988); Babbitt v. Sweet Home Chapter of Cmtys. For a Great Or., 515 U.S. 687, 690–91 (1995).

[143] Navigation and Navigable Waters, 33 U.S.C. §§ 1311(a), 1344(g)(1), 1362(7) (2020); Rapanos v. United States, 547 U.S. 715 (2006).

harm would put endangered species at risk and which wetlands needed to be protected to limit pollution of navigable waters.

As for silence, *Rust* is a good example.[144] It is hard to imagine a subject more controversial than abortion, and that very fact may well have led Congress to decide not to address abortion more than necessary when passing Title X. Instead, Congress deferred to the Department of Health and Human Services regarding what family planning organizations could say to their clients about abortion. Whether suppositions about endangered species, waterways discharges, and abortion legislation are true or not, they illustrate that examining whether Congress meant to limit an agency's discretion must be decided based on the facts of each instance, rather than on a universal assumption.

As Justice Scalia pointed out in *City of Arlington*, there is no good way to decide whether a particular case involves an important or routine statutory interpretation question. In an article authored by Justice Stephen Breyer prior to *City of Arlington*, Breyer cited examples from 1940s-era Supreme Court decisions interpreting the National Labor Relations Act to show that the distinction between important and routine interpretation questions had been made historically and was of continued utility.[145] Instead, his examples seemed to prove Justice Scalia's point.

Justice Breyer's examples concerned whether news distributors or foremen were employees subject to the Act. If you were unfamiliar with the two cases from which these examples were derived—*NLRB v. Hearst Publications, Inc.*[146] for news distributors and *Packard Motor Car Co. v. NLRB*[147] for foremen—would it be clear which was the routine matter and which was the important one? Granted, the question of whether foremen were employees was an issue widespread across many industries and seems the more important of the two. However, as Justice Robert Jackson declared in his majority opinion in *Packard*, the question was easy to answer because "[t]he point that these foremen are employees both in the most technical sense at common law as well as in common acceptance of the term, is too

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[144] *See* Rust v. Sullivan, 500 U.S. 173, 178–81, 183, 186–87 (1991). There is likely a difference between silence and ambiguity, however. An ambiguous phrase can place a topic within an agency's jurisdiction, even if it is not clear how the agency should approach it. But silence alone does no such thing. Title X's only direction to Health and Human Services was to forbid the agency from funding family planning programs that offered abortions. Title X did not say what the agency could tell the programs it funded what to say about abortion. Because federal agencies lack jurisdiction absent a positive grant from Congress, it could be argued that the statutory silence meant that Health and Human Services lacked authority to tell funded programs what they could or could not say about abortion.

[145] Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 366–67 (1986).

[146] NLRB v. Hearst Publ'ns, Inc., 322 U.S. 111, 113 (1944).

[147] Packard Motor Car Co. v. NLRB, 330 U.S. 485, 486 (1947).

obvious to be labored."[148] So in that sense, both are routine. And these pre-*Chevron* cases are hardly adequate precursors of the Court's current effort to distinguish important from routine cases. The argument that Chief Justice Roberts made in *King*—that Congress would not have left it up to agencies to resolve truly important statutory interpretation questions—was mentioned in *Packard* as a reason not to consider foremen to be employees, but it was not decisive. Instead, it was a point made by Justice William Douglas[149] in his dissent from Justice Jackson's opinion that agreed with the agency's approach.[150]

Turning to more contemporary examples, the three cases I mentioned at the outset of this discussion all involve important questions: whether the Endangered Species Act bars species habitat destruction (*Babbitt*), the extent of the Army Corps of Engineers' jurisdiction to regulate discharge into wetlands that are near navigable waterways (*Rapanos*), and whether a family planning organization that receives Title X funds can be barred from advising its clients about abortion (*Rust*). If the application of *Chevron* was truly governed by an initial determination as to the importance of the statutory interpretation question at issue, these three cases should have been decided without reference to *Chevron*. But in each case, the Court relied on *Chevron*—in *Babbitt* and *Rust* to uphold the agency's approach, and in

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[148] *Id.* at 488.

[149] *Id.* at 495 (Douglas, J., dissenting) (arguing "tremendously important policy questions are involved in the present decision. My purpose is to suggest that if Congress, when it enacted the National Labor Relations Act, had in mind such a basic change in industrial philosophy, it would have left some clear and unmistakable trace of that purpose.").

[150] Justice Breyer noted that the Court in *Packard* did not defer to the NLRB in the same way that it did in *Hearst*. Thus, it had two apparently divergent approaches to deference, which he suggested could be explained by the Court having looked at many factors in figuring out whether or not to defer to an agency's interpretation of a statute. The decisions themselves seem to offer a more straightforward explanation. In *Packard*, Justice Jackson did not even consider deference when trying to decide whether foremen were employees because "[i]f [the Court] were obliged to depend upon administrative interpretation for light in finding the meaning of the statute, the inconsistency of the Board's decisions would leave us in the dark." 330 U.S. at 492. In *Hearst*, the Court did not accept the agency's view that "employee" should be defined in accordance with common law. Instead, Justice Rutledge determined that Congress wanted to establish a federal standard, but that in doing so "[i]t is not necessary in this case to make a completely definitive limitation around the term 'employee.' That task has been assigned primarily to the agency created by Congress to administer the Act." *Hearst*, 322 U.S. at 130. In both cases, the Court made a determination as to the meaning of the statute whose interpretation was contested. In *Packard*, the Court did not think the NLRB could help it make this determination because the agency had changed its mind so many times. In *Hearst*, the Court didn't really defer to the agency on the ultimate question of whether news distributors were employees. Rather, as opposed to the blanket assumption on which *Chevron* is based, the Court made a finding that as to this statute, Congress thought that there would be factual questions to be resolved when figuring out whether a particular type of worker was an employee or an independent contractor, and it intended that the agency make those determinations.

Rapanos to reject it.

The haphazard application of the distinction between important and routine questions of statutory interpretation suggests that the Court uses the distinction when it is convenient and to reach a desired result.[151] In *Barnhart*, although the Court acknowledged that the interpretation issue involved an $80 billion difference in Social Security disability payouts over a ten year period, the fiscal significance of the case did not lead the Court to conduct an independent inquiry into the meaning of the disputed statutory provision because the Social Security Administration had adopted a favorable interpretation.[152] But when the Food and Drug Administration ("the FDA") decided to regulate cigarette sales by determining that cigarettes were devices to deliver a drug, the majority of the Court in *Brown & Williamson* disagreed that the agency had such authority. However, the Court could not credibly rely on *Chevron* because nicotine is a drug and cigarettes are a device to deliver that drug.[153] And so Justice Sandra Day O'Connor declared this to be an "extraordinary case" in which *Chevron*'s typical assumption of agency discretion to interpret a statute did not apply.[154] She then proceeded to do her own full-blown analysis of the Food, Drug, and Cosmetics Act, other tobacco-related legislation, and the FDA's earlier position that it lacked authority to regulate cigarettes, before concluding contrary to the agency's position.[155]

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[151] Of late, the Court has relied heavily on the presence of major questions to invalidate significant executive branch programs. It disallowed the Centers for Disease Control nationwide eviction moratorium in response to the Covid pandemic. Ala. Assn. of Realtors v. Dep't of Health and Hum. Servs., 141 S. Ct. 2485, 2486, 2890 (2021) (per curiam). It invalidated the Occupational Safety and Health Administration's mandate that millions of corporate employees either get a Covid vaccine or undergo weekly testing. Nat'l Fed'n of Indep. Bus. V. OSHA, 142 S. Ct. 661, 662, 666 (2022). And it struck down the Obama administration's never-implemented Clean Power Plan regulations that sought to steer electric power generation away from fossil fuels. W. Va. V. EPA, 142 S. Ct. 2587, 2602, 2616 (2022). The *West Virginia* decision illustrates a different tone to the discussion of major cases. Chief Justice Roberts spoke of it as a major questions doctrine and did not refer to it as an exception to *Chevron*, although he did concede that in each instance the agency had asserted a plausible textual basis for its approach, which under *Chevron* ought to have led the Court to defer to the agency. *Id.* at 2609. Instead, he stated that although in "more 'ordinary' circumstances" an agency's interpretation of a statute would be upheld, "assertions of 'extravagant statutory power over the national economy'" would pass muster only if there was "clear congressional authorization." *Id.* The trouble with saying the Court would usually have accepted the agency's interpretation of a statute unless it thought the topic was too big is that it opens the Court up to the criticism that it is making policy, an opinion Justice Elena Kagan voiced in her dissent. She declared that "the Court [was] substitut[ing] its own ideas about policymaking for Congress's." *Id.* at 2643 (Kagan, J., dissenting).

[152] *See* Barnhart v. Walton, 535 U.S. 212, 217–18 (2002).

[153] *See* FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 123 (2000).

[154] *Id.* at 159.

[155] *Id.* at 160–61. Given the gravitational pull of *Chevron*, Justice O'Connor strove to make her

If this distinction between important and routine questions has any validity, then it ought to apply just as much to questions that are so obviously unimportant that Congress must have left them to an agency to resolve. *Christensen v. Harris County*[156] is an example of a statutory interpretation dispute in which the stakes were low because whichever way the decision came out would likely make no practical difference. The dispute centered around compensatory time. The Fair Labor Standards Amendment of 1985 allowed states and localities to avoid paying overtime to their employees by granting them compensated ("comp") time instead.[157] Employees had to agree to be compensated in this way,[158] but once they agreed, the question was whether their employer could impose conditions on the use of accrued comp time, which the statute did not explicitly address. Harris County thought it could impose conditions on its own (despite the Secretary of Labor's contrary view) and placed a maximum limit on the number of comp time hours a deputy sheriff could accrue.[159] The dispute devolved into a question of whether a public employer could impose conditions on use of comp time once its employees had agreed to accept it or, alternatively, whether such conditions had to be part of the agreement before they could be imposed. Although the Court divided on this question,[160] the majority's acceptance of Harris County's view should have led to no different result than if the minority view had prevailed. If an employer can impose comp time use conditions of its choosing once its employees agreed to accept comp time in lieu of overtime payments, the basic requirement that the employees must agree to accept comp time in the first place still gives employees leverage. Before agreeing to accept comp time, any semi-alert employee representative, knowing the holding of *Christensen*, would demand that conditions on the use of comp time be negotiated and placed in the underlying agreement, and that any future changes in comp time practices be negotiated. Thus, the end result would be the same. Yet, despite the silence of the statute and the insignificance of the dispute, the majority did not give deference to the agency's opinion,[161] belying the supposed import of the routine/significant distinction when it comes to deciding whether to give deference.

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opinion fit the *Chevron* rubric saying that her lengthy statutory analysis made it clear that "Congress has directly spoken to the question at issue and precluded the FDA from regulating tobacco products."

[156] *See* Christensen v. Harris Cty., 529 U.S. 576, 587–88 (2000).

[157] Fair Labor Standards Act, 29 U.S.C. § 207(o)(1) (2010).

[158] *Id.* § 207(o)(2); 29 C.F.R § 553.21 (2022).

[159] *Christensen*, 529 U.S. at 580–81.

[160] *Compare id.* at 578–88 (containing Justice Thomas's majority opinion), *with id.* at 592–96 (containing Justice Stevens's dissent).

[161] *See id.* at 587–88.

C. *Which Agency Actions Deserve Deference?*

1. Christensen: Force of Law One

The majority in *Christensen* failed to give deference despite admitting that its opinion was only a "better reading" of the statute,[162] which suggests that the agency's alternative reading was reasonable and should have been given deference under *Chevron,* if it applied. The Court did not give such deference because it determined that the manner in which the agency acted did not warrant the complete deference *Chevron* would give to agency interpretations of ambiguous or silent statutory provisions. The Court has been willing to grant such complete deference when the agency takes a formal action, such as a notice and comment rulemaking or a formal adjudication.[163] The Court has had a harder time determining what other agency actions warrant *Chevron* deference. Unfortunately, examining this subsidiary problem presented by *Chevron* will take us down a rabbit hole and lead to long, winding passages with no apparent hope of seeing daylight.

In *Christensen*, the Secretary of Labor sent an opinion letter in response to the inquiry by Harris County in which he stated that neither the statute nor an agency's regulations allowed the county to require an employee to use accrued comp time.[164] According to Justice Thomas, this letter did not deserve deference because "interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law—do not warrant *Chevron*-style deference."[165]

But why the insistence on formality and actions that have the force of law? One premise of *Chevron* is that statutory silence means the agency has the discretion to fill in any gap this silence occupies. Thus, the silence of the Fair Labor Standards Amendment of 1985 on whether an employer could impose conditions on the use of comp time should have meant that, if *Chevron* were being followed, the Secretary of Labor had the discretion to adopt any reasonable approach to the question. In that case, why would any discretionary action by the Secretary interpreting the statute not be deserving of deference? If it is authoritative, does it matter whether the Secretary's action has the "force of law," which is the position Justice Scalia took in a concurrence?[166]

The oddity of all this can be seen by turning to Justice Souter's brief concurrence. He only voted with the majority with the understanding that

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[162] *Id.* at 585.

[163] *See* Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 866 (1984) (setting agency deference standard in rulemaking context)*; see also, e.g.*, INS v. Aguirre-Aguirre, 526 U.S. 415, 425 (1999) (exemplifying *Chevron* deference in formal adjudication context).

[164] 529 U.S. at 580–81.

[165] *Id.* at 587.

[166] *See id.* at 591.

the Secretary retained the authority "to issue regulations limiting forced use" of comp time.[167] Why Justice Souter concurred with a majority opinion that appeared as if it viewed its interpretation of the statute as precluding such a result is a head-scratcher, except that the majority made much of the failure of the agency to put its interpretation into a regulation, suggesting that it too might have viewed the situation differently had the agency gone that route.

What would have happened if, in response to Harris County's inquiry, the agency had issued a regulation? Most obviously, it would have taken the Secretary a great deal longer to answer Harris County, which made this approach impractical for the Secretary to adopt routinely when answering such inquiries. But what real difference on the issue of whether the Secretary had exercised discretion would it have made if the Secretary had adopted a regulation? The interpretation would have been the same, though this time the regulation would have bound Harris County in a way the opinion letter did not. While that is certainly significant, it is hardly the case that an agency exercises its discretion only when it takes steps that legally bind regulated entities. The formal process of going through notice and comment before adopting a regulation might have improved the Secretary's thinking on the subject, but in the end, the discretionary choice was still the Secretary's; whether expressed in an opinion letter or in a regulation, either approach would have reflected the Secretary's discretionary decision.

It is worth considering what options were available in this situation. The initial question should be whether the silence of the statute meant that public employers could impose conditions on the use of comp time or whether it meant the agency had policy discretion to tell public employers what they could and could not do. If this was a question of legal interpretation, and the statute clearly meant to preclude the Department of Labor from imposing any conditions on a public employer's directions to its employees on the use of comp time, then the agency would not have discretion to determine which approach to take. But it would have been a stretch to say that silence clearly precluded the Department's regulatory authority, and hence the majority did not fully embrace this approach.[168] If, on the other hand, the statutory silence meant that Congress had expressed no intent as to whether employers could impose conditions on the use of comp time and left it up to the Secretary how to approach the issue, then the legal question would have reached a definitive resolution and, consequently, the Department of Labor would have discretion as a matter of policy to adopt an approach its Secretary thought best. Furthermore, the Supreme Court would have had no grounds to make a different policy choice when the question was brought before it, even if it thought there was a better way to approach the topic.

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[167] *Id.* at 589.

[168] *See id.* at 587 (noting that the Department's regulations do "not address the issue of compelled compensatory time," leaving open the possibility for future regulations to do so).

But the Court did not quite take either of these approaches. It did not separate the basic legal interpretation question of whether the Secretary had authority to act from the policy question —how the Secretary should act— but instead treated them as a single legal interpretation question. Some of this is due to the way the opinion letter was written. The agency phrased its answer in terms of the statute disallowing local authorities from placing conditions on the use of comp time. Because the agency had treated the question as one of legal interpretation, so did the Court. But in the end, the Court's failure to distinguish an interpretation from an implementation issue left open the possibility that although the agency lost the statutory interpretation issue before the Supreme Court, its view of the statute's interpretation could still prevail if the agency responded by adopting a regulation that implicitly rejected the Court's view.

2. Brand X: Agency Trumps Court

That an agency's legal interpretation of a statute could displace a court's interpretation was confirmed a few years later in *National Cable & Telecommunications Association v. Brand X Internet Services*,[169] in which the Court held that: "A court's prior 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."[170]

Stop for a moment to think of the implications of this rule. If a statute is ambiguous or silent, and the agency has yet to choose its preferred interpretation, then whatever interpretation a court happens to pick to resolve the case will not preclude the agency from choosing a different interpretation in the future.

It is not easy to see how this would come about. After all, if a court recognized that it was being asked to make a legal ruling on an issue that an agency clearly had authority under *Chevron* to resolve in a variety of ways, why would it make a ruling at all, let alone an evanescent one that would disappear as soon as the agency made its choice?

Brand X presents a situation in which a court acted before the agency did. But the dispute involved does not present an ideal example of a court interpreting a statute one way, and an agency then adopting a different legal interpretation. This is because it was not generally agreed that the agency had discretion in the first place to make the desired legal interpretation.[171]

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[169] 545 U.S. 967 (2005).

[170] *Id.* at 982.

[171] Rather, it shows how confusing the application of *Chevron* can be, because it was not clear whether the agency's action should have been based on a determination of law or fact. The dispute in *Brand X* concerned the regulation of broadband access to the internet via cable modem. Under the Telecommunications Act of 1996, cable companies that offered cable modem internet access to its customers would either be classified as "telecommunications carriers," in

Christensen presents a better scenario in which to explore whether an agency interpretation can override an earlier legal interpretation of a statute by a court. That is because the majority agreed that the Department of Labor had the power to issue regulations that placed limits on a public employer's ability to set local rules on employee comp time accrual. If the Department had such regulatory authority, it did not disappear just because a majority of the Supreme Court thought that the better reading of the silence of the Fair Labor Standards Amendment was that public employers need not enter into an agreement with its employees on comp time accrual rules before imposing such rules. Instead, because there was a plausible alternative reading, the Secretary would still have the ability to adopt that alternative

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which case they would be subject to mandatory common carrier regulations, or as "information-service providers," who were not subject to the common carrier regulations. 545 U.S. at 977 (discussing 47 U.S.C. § 153(20), (44), (46)). The 9th Circuit ruled that the better reading of the statute was that cable service via a modem was a telecommunications service, but the Federal Communications Commission later decided cable service via a modem was an information service. *Id.* at 978–80, 984. The distinction between the two possible options was whether cable companies were "offering" a telecommunication service. There was no dispute that phone lines were a telecommunication service, and thus the cable companies' lines used to provide cable modem access to the Internet were telecommunication lines. *See id.* at 988. But the cable companies were only "offering" a telecommunications service if their customers perceived that was what they were buying. *Id.* at 987–88. The Supreme Court determined that the statute was unclear on the question, and the agency's conclusion that customers using a cable modem thought they were getting the information service provided by the internet was a reasonable reading of the statute, and thus was allowable. *Id.* at 996–97, 1000.

What makes this a less than ideal decision, in which to examine whether an agency rule can trump a court's statutory interpretation, is that the majority's opinion evades a major jurisdiction question raised by Justice Scalia in his dissent, and the decision ultimately turned on a factual—not a legal—issue. The legal conclusion that Justice Scalia objected to was that a company offering a service across its own telecommunications lines could somehow escape regulation as a telecommunication service. *Id.* at 1005–14. Though it was Justice Scalia who convinced the Court to hold that agencies could decide whether they have jurisdiction when a statute is ambiguous, here, he took a firm stand against the FCC doing so. He attempted to deregulate an industry that Congress intended the FCC to regulate, because in his opinion, it was "perfectly clear that someone who sells cable-modem service is 'offering' telecommunications." *Brand X*, 545 U.S. at 1014. Whether or not Justice Scalia was right, the legal question surrounding Congress's intention for the FCC's regulation as a telecommunications service admitted only two possible conclusions: (1) whether the FCC has to regulate such companies; or (2) whether it needs to regulate them only if it made a factual determination that the particular service offered would be perceived by a customer as an offer for a telecommunication service. These possibilities are inconsistent with each other. Thus, this is not the sort of question that allows room for agency discretion, and it should have been decided definitively. If Justice Scalia was right and the FCC was bound to regulate cable modem as a telecommunications service, then the issue of whether the prior court's decision or the agency rule should predominate would have disappeared. If the FCC was found to have the authority to decide as a factual matter whether providing cable modem access to the internet was offering a telecommunications service, then that factual decision would have no bearing on whether the agency, or the court's statutory interpretation should prevail.

and decide to issue regulations limiting public employers' flexibility to act in this way.[172] And because a decision now adopted by regulation would deserve *Chevron* deference, the same Court would now have to conclude that the regulation that adopted an interpretation contrary to the Court's own interpretation was nonetheless valid. This is a self-inflicted problem of the Court's own making caused, as I noted above, by it treating the question of the agency's authority and what was the preferred way to exercise it as one legal interpretation issue.

The problem faced in *Christensen* could have been resolved without ending up with the conundrum that made it look like the agency could

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[172] Two objections were raised in *Brand X* to the idea that an agency could adopt a different interpretation than one previously adopted by a court.

Oddly, in his *Brand X* concurrence, Justice Stevens took the position that while an agency might adopt a regulation that makes a different interpretation of a statute than a federal appeals court, he did not think this rule should apply if the Supreme Court had weighed in because "a decision by this Court . . . would presumably remove any pre-existing ambiguity." 545 U.S. at 1003. Why that would be so under the *Chevron* rubric is hard to understand. If the Court held the statute to be ambiguous, and accepted the agency's approach as plausible, that would not seem to limit the agency from adopting another plausible approach, even one that was contrary to the one the Court approved. If the Court rejected an agency's approach to a statutory provision as unreasonable, but thought the provision ambiguous, the agency could not revive that approach, but would presumably still have other options since the Court had not said the statute gave a clear direction.

Even more oddly, Justice Scalia, the long-time proponent of *Chevron* who had just convinced his colleagues that agencies should have the flexibility to decide their own jurisdiction in ambiguous instances, now objected to the Court's decision that gave agencies continued flexibility to go their own way, despite a court's prior interpretation of a statute, in instances in which the court did not rule that the statute had only one clear meaning. He described this as a "breathtaking novelty: judicial decisions subject to reversal by executive officers." *Id.* at 1016. While the Justice's consternation is understandable, think what would happen in the *Chevron* world if his approach were adopted. Which interpretation prevailed would depend on whether an agency or a court made the first decision. Any industry or public interest group that feared an agency was going to adopt an unfavorable interpretation of a statute would try to find a way to move the matter before a sympathetic court and obtain a ruling to their liking, thus stopping the agency in its tracks. Such suits can be imagined that do not involve the agency at all, say in *Christensen* had the sheriffs sued Harris County in federal court claiming that its comp time approach violated federal law. Had that happened, the federal court would have made a ruling on the meaning of the statute without any input from the agency.

But, even more fundamentally, if a court ruling can eliminate agency discretion, how much discretion could there have been in the first place? How do other plausible approaches become implausible just because a court picked a different one? That would not be the case in instances in which an agency truly had discretion. *Chevron* itself is a good example, as there were a number of viable ways for the EPA to look at stationary air emission sources. If someone somehow obtained a court ruling that favored one of these approaches before EPA acted, that would hardly have made any of the other alternative approaches less viable. And that should be the answer. The agency's discretion will solely be in the manner it implements a statute, and thus the anomaly of an agency essentially overruling a court on a legal interpretation will not exist.

overrule a Supreme Court legal interpretation. The issue of whether the Secretary had the authority to tell local officials how to handle comp time accrual was a question of jurisdiction. The Secretary either had this authority or lacked it.[173] A majority of the Justices thought the Secretary had it. That was as far as the interpretation issue should have gone once the majority recognized the agency could choose to regulate public employers' conditioning of the use of comp time. Although the majority also thought that an opinion letter was not an enforceable way to exercise this authority, this did not negate the existence of such authority. A subsequent regulation by the Department of Labor barring public employers from conditioning the use of comp time would not change the Court's interpretation at all since the Court would not have held that the statute required a particular way for the agency to approach the issue. That is, the resolution of the "force of law" question should have affected only the issue of the enforceability of the agency's approach, not any interpretation issue.

3. Mead: Force of Law Two

The Court, however, reinforced its connection between the deference a court owes to an agency's interpretation and the "force of law" of the agency's action when it issued *U.S. v. Mead*, which was discussed earlier. When *Mead* raised the issue of whether day planners were subject to the tariff applicable to diaries, Customs issued a "ruling letter."[174] In accordance with Customs's regulations, a ruling letter represented "the official position of the Customs Service with respect to the particular transaction or issue described therein and [was] binding on all Customs Service personnel" and the principle a ruling letter established "may be cited as authority in the disposition of transactions involving the same circumstances."[175] The Court did not doubt that a Customs's ruling letter was an authorized means of enforcing tariff compliance or that the ruling bound the entity that sought it.[176] Thus, Customs could determine whether day planners were diaries, and when it ruled that they were, Mead was obliged to pay the tariff. From Mead's perspective, this would look like the force of law, which was surely why Mead appealed first to the Court of International Trade and then to federal court.[177] Justice Souter emphasized, however, that ruling letters were

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[173] Another possibility also exists: both the Department of Labor and local authorities may each have some discretion. Congress, when it enacted the Fair Labor Standards Amendment of 1985, would have been aware that many employers impose conditions on the use of vacation time and limit its accrual, and thus thought public employers ought to have a similar opportunity to impose some restrictions on use of comp time while still granting the Department of Labor, in turn, the ability to impose limits on employers' options.

[174] 533 U.S. 218, 225 (2001).

[175] *Id.* at 222 (quoting 19 C.F.R. § 177.9(a) (2022)).

[176] *Id.* at 222–23.

[177] *Id.* at 225.

not "the legislative type of activity that would naturally bind more than the parties to the ruling"[178] because "Customs has regarded a classification as conclusive only as between itself and the importer to whom it was issued."[179] He noted that "[a]ny suggestion that rulings intended to have the force of law are being churned out at a rate of 10,000 a year at an agency's 46 scattered [Customs] offices is simply self-refuting."[180]

Whether an agency has few or many questions of statutory interpretation to address, or whether all of those decisions are made at agency headquarters or in multiple regional offices, has little or no bearing on whether an agency has actually taken a definitive discretionary action or whether any interpretation involved was a discretionary decision that was the agency's to make. If an agency that must make myriad decisions chooses to limit the impact of each individual decision so that it can maintain control of its process, that again has more to do with agency internal management than whether the agency has made a discretionary decision.

Be that as it may, Justice Souter appeared to suggest that an agency should be deferred to only when it has adopted rules of general applicability. But he did not limit deference to rulemaking or formal adjudication, which are typical ways agencies adopt such general rules, noting that the Court has "sometimes found reasons for *Chevron* deference even when no such administrative formality was required and none was afforded."[181] He did not, however, explain what these circumstances were that should lead to deference for agency actions that were not as formal as rulemaking or adjudication.

But whether agency actions are formal, or nearly so, has little to do with the approach to statutory interpretation described in *Chevron*. If you take seriously the premise of *Chevron* that an ambiguous statute inherently gives an agency the authority and discretion to adopt any plausible meaning of the ambiguous phrase, then the first question ought to be whether the agency has used that purportedly inherent discretion to interpret an ambiguous phrase in an allowable fashion. This is the position that Justice Scalia took in his dissenting opinion. He argued that the focus should be on whether the Customs's ruling letter was the "agency's authoritative interpretation."[182] Indeed, in this case, not only had the Customs Headquarters Office made the initial determination, but it had affirmed it in a more extensive letter ruling, which Justice Souter admitted was "carefully reasoned."[183] Furthermore, the agency had defended this position all the way up to the Supreme Court.

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[178] *Id.* at 232.

[179] *Id.* at 233 (citing 19 C.F.R. § 177.9(c)).

[180] United States v. Mead Corp., 533 U.S. 218, 233 (2021).

[181] *Id.* at 231.

[182] *Id.* at 239 (Scalia, J., dissenting).

[183] *Id.* at 225.

And as a matter of legal interpretation, the agency's explanation of its interpretation of the law was clearer than the explanation EPA offered when it promulgated the rule that led to the *Chevron* decision. The entirety of EPA's explanation was that:

> The issue of the proper scope of the nonattainment area definition of "source" is not a clear-cut legal question. The statute does not provide an explicit answer, nor is the issue squarely addressed in the legislative history. The D.C. Circuit (in *Alabama Power Co. v. Costle*[184]) has stated by implication that EPA has substantial discretion to define the constituent elements of this term.[185]

This is simply an assertion of authority to further define "stationary source" in a regulation, not an explanation at all as to why the term could be read broadly enough so that the source might be considered an entire multi-building industrial plant.

Customs's explanation about whether day planners were "diaries" was based on its analysis of the two dictionary definitions of the word. According to the Court, "Customs concluded that 'diary' was not confined to the first [personal journal definition of diary], in part because the broader definition [that included day planners] reflects commercial usage and hence the 'commercial identity of these items in the marketplace.'"[186] Even in this brief description, Customs not only explained why it thought day planners were diaries, it also did two other things the Court should have noticed. First, it relied not simply on the dictionary definition of the word diary, which is something anyone could do, but on its own expertise in noting that in commerce, day planners were thought of as diaries. This is the sort of agency expertise that the Court remanded for further analysis, a seemingly unnecessary step since the evidence was already in the record. Second, the agency's analysis showed that it did not think it was making a discretionary decision. It thought Congress intended to place tariffs on all items that in commerce were considered diaries. What Customs did was similar to adopting a species of interpretive rule—one that need not go through notice and comment but sets forth what an agency thinks Congress has commanded it to do. If the Court really thought that Congress had not commanded the agency to adhere to this one broad definition of diary, and instead permitted the agency to pick any plausible definition of diary it wanted, Congress should have told the agency that it was not bound to consider day planners as diaries, and directed it to start again and decide, in its discretion, how it would treat day planners for tariff purposes.[187]

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[184] 636 F.2d 323 (D.C. Cir. 1979).

[185] Requirements for Preparation, Adoption, and Submittal of Implementation Plans, 46 Fed. Reg. 16,280, 16,281 (proposed Mar. 12, 1981) (amending 40 C.F.R. § 51.18, 40 C.F.R. § 52.24).

[186] *Mead Corp.*, 533 U.S. at 225.

[187] *See, e.g.*, Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891, 1912 (2020)

While *Mead*, like other decisions discussed, did not adequately address whether the agency had discretion, its import was that agency interpretations of ambiguous statutory terms found in some agency action that was not a rulemaking or formal adjudication might or might not receive *Chevron* deference depending on some yet-to-be-defined standard. This, at best, would lead to inconsistency and at worst to results-oriented jurisprudence.

4. Barnhart: Developing a Mead Test

The Supreme Court followed up *Mead*'s vagueness on this score in *Barnhart* with an effort to establish a test to determine what types of agency actions that were not regulations or adjudications would qualify for *Chevron* deference. Mr. Barnhart developed schizophrenia, lost his job, and applied for Social Security disability benefits before the Social Security Administration had a regulation addressing how long a person must be unable to work before becoming eligible for such benefits.[188] The Social Security Administration denied his benefits application, relying on a long-stated view expressed in a Social Security ruling, a disability insurance manual, and a disability insurance letter that the inability to work must be for at least twelve months.[189] By the time the case reached the Supreme Court, the Social Security Administration embodied this twelve month requirement in a regulation,[190] which illustrates an obvious way for agencies to get their interpretations accepted post-*Mead*, and to bolster the case for *Chevron* deference. While the Court thought the agency's legal maneuver was valid and analyzed whether the regulation deserved *Chevron* deference,[191] it also thought the Social Security Administration's earlier actions, before it adopted a regulation, were deserving of deference. On this score, Justice Breyer stated:

> In this case, the interstitial nature of the legal question, the related expertise of the Agency, the importance of the question to administration of the statute, the complexity of that administration, and the careful consideration the Agency has given the question over a long period of time all indicate that *Chevron* provides the appropriate legal lens through which to view the legality of the Agency

(depicting a recent example of the Court rejecting an agency approach based on its incorrect conclusion of what the law required, when instead, the agency had discretion) (rejecting the Attorney General's attempted rescission of the Deferred Action for Childhood Arrivals program because even if it was unlawful to "extend work authorization . . . to DACA recipients," this "did not cast doubt on the . . . original reasons for extending forbearance to childhood arrivals.").

[188] Barnhart v. Walton, 535 U.S. 212, 215–16 (2002).

[189] *Id.* at 215, 219-20.

[190] *Id.* at 217.

[191] *Id.* at 217–19.

interpretation here at issue.[192]

How much of a test is this, really? Can it usefully distinguish agency actions short of regulations that do or do not deserve *Chevron* deference? Close examination of the five factors listed shows that this is an easy test to pass, and it is only the last, and most questionable, criterion that has any teeth. If the statute is ambiguous, which is why *Chevron* deference is under consideration in the first place, then the interpretation issue presented must involve answering some question that Congress has not, which should make the question "interstitial." The one roadblock to such a finding, as noted earlier, would be if the question was so important that it was doubtful that Congress would leave it to agency discretion to resolve. The $80 billion question in *Barnhart* would appear to have been such a substantial question that should have precluded *Chevron* deference. That it did not, shows that the purported interstitial/substantial distinction is not so important that the Court feels the need to attempt to apply it consistently. But *Barnhart* aside, if the question presented involves an ambiguous statute, the chances are that the "interstitial nature of the legal question" can be established readily. The agency charged with implementing the statute presumably has expertise in this area of the law; therefore, the second factor is practically a giveaway. As for administrative complexity, I can think of no area of federal administrative law that its practitioners think is child's play. Taxation, environmental protection, securities regulation, health care, education, ERISA, telecommunications, immigration, and so on all involve considerable complexity.

The particular question at issue in *Barnhart*, though significant, was relatively straightforward, but if it was significant to the complex administration of Social Security disability, then most interpretation questions involving federal administrative law should pass this portion of the test as well. That leaves only the hurdle that the agency must have given the question "careful consideration . . . over a long period of time." Justice Scalia, in a concurrence, objected to relying on the longstanding nature of an interpretation as a reason to defer to an agency because "once it is accepted, as it was in *Chevron*, that there is a range of permissible interpretations, and that the agency is free to move from one to another, so long as the most recent interpretation is reasonable its antiquity should make no difference."[193] This factor represents Justice Breyer's long-held view[194] and happens to have worked in favor of the agency in *Barnhart*, but Justice Scalia is correct that it is inconsistent with the very case whose rule the Court was determining whether to apply. In all, despite its numerous factors, the test set forth in *Barnhart* is one that would allow many, if not most, agency

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[192] *Id.* at 222.

[193] *Id.* at 226 (Scalia, J., concurring).

[194] *See* Breyer, *supra* note 145, at 368.

actions short of regulations to be given *Chevron* deference—if, that is, a court chooses to apply this test. This will inevitably lead to result-oriented jurisprudence.

CONCLUSION

Chevron itself is longstanding, but it is time to discard its assumption that ambiguity or silence equals agency interpretive discretion. The Supreme Court decisions I have analyzed demonstrate this inadequacy. Had the Court first examined whether it was plausible that the agency had discretion to interpret the phrase at issue in more than one way, it should have been clear in *Chemical Manufacturers*, *King*, *Arlington*, and *Brand X* that the diametrically opposing positions on the meaning of the statute showed that Congress could not have intended both to be options the agency could choose between, and the Court could then have focused on which one was correct. A close examination of the statute in *Mead* should have shown that the agency lacked discretion, but that its interpretation was correct. Similarly, the agency in *Barnhart*, though it appeared to have some discretion really did not, and its interpretation was correct as well. *Christensen* shows that recognizing agency discretion should have an impact on the remedy chosen, while *MCI* shows that *Chevron* is, even on its own terms, not necessary to every statutory interpretation question. *Zuni* demonstrates that *Chevron* has made simple statutory interpretation questions more difficult. As I began with the notion that statutory interpretation can be hard, *Rapanos* is an example of this, one that is not made easier by *Chevron*.

The *Chevron* assumption that ambiguity or silence equals agency interpretive discretion is unnecessary and not useful. In the future, courts that analyze statutory ambiguity or silence should examine whether the agency actually has discretion in the way it implements the statute. Courts can further this inquiry by determining whether the agency has more than one option consistent with the basic meaning of the controlling statute to select.