REPLACING THE FLAWED *CHEVRON* STANDARD

BRIAN G. SLOCUM*

ABSTRACT

Judicial review of agency statutory interpretations depends heavily on the linguistic concept of ambiguity. Most significantly, under Chevron*, judicial deference to an agency's interpretation hinges on whether the court determines the statute to be ambiguous. Despite its importance, the ambiguity concept has been poorly developed by courts and deviates in important respects from how linguists approach ambiguity. For instance, courts conflate ambiguity identification and disambiguation and treat ambiguity as an umbrella concept that encompasses distinct forms of linguistic indeterminacy such as vagueness and generality. The resulting ambiguity standard is unpredictable and does not adequately perform its function of mediating between judicial interpretive autonomy and deference to agency interpretations.*

This Article offers a novel alternative to the problematic ambiguity concept. Rather than the current binary choice between clarity and ambiguity, different types of linguistic issues should call for different judicial treatment. Instead of the ambiguity trigger for deference, courts should presume that certain categories of issues are judicially resolvable while other categories are for the agency to resolve. The categories proposed in this Article reflect the traditional view that courts are experts at statutory interpretation (which

* Professor of Law, University of the Pacific, McGeorge School of Law. J.D., Harvard Law School; Ph.D. in Linguistics, University of California, Davis. For helpful comments, the author would like to thank Omar Dajani, Frank Gevurtz, Abbe Gluck, Jay Mootz, Victoria Nourse, Larry Solan, Peter L. Strauss, the participants at the Roundtable on Linguistics and Legal Language (University of Oslo), the Society of Legal Scholars (St Catherine's College, Oxford), the participants at the Norcal Administrative Law Conference (Stanford Law School), and the faculty at Texas A&M University School of Law.

includes determining congressional intent), and agencies are experts at policymaking (which includes exercising delegated discretion). The categories thus provide a framework for the allocation of interpretive authority between courts and agencies on the basis of their respective areas of expertise. Furthermore, the proposed framework offers a better account of significant cases, such as the famous King v. Burwell *case where the Court refused to defer to the agency's interpretation, than does the Court's own explanations.*

TABLE OF CONTENTS

INTRODUCTION

Courts have given an outsized role to the concept of ambiguity in statutory interpretation. For example, a finding of statutory ambiguity is necessary before some judges will consult legislative history.[1] As well, a determination of ambiguity often allows a court to apply a canon of statutory construction and select an interpretation on the basis of normative concerns. For instance, if an interpretation raises a serious constitutional question, a determination of ambiguity allows a court to select a different interpretation.[2] In criminal cases, a finding of ambiguity dictates an interpretation in favor of the defendant.[3] Similarly, in administrative law ambiguity serves a crucial role because it often mediates between judicial and agency interpretive authority. Under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*,[4] often declared to be one of the most influential administrative law decisions of the twentieth century, if a provision is ambiguous a reasonable agency interpretation will receive deference from the reviewing court.[5] In fact, the D.C. Circuit asserts as a precondition of deference that the agency recognize that the statutory provision is ambiguous.[6] Furthermore, even if an agency's interpretation is confirmed by a reviewing court, the agency may select a different interpretation in the future only if the original court deemed the provision to be ambiguous.[7]

---

1. *See* Victoria F. Nourse, *A Decision Theory of Statutory Interpretation: Legislative History by the Rules*, 122 YALE L.J. 70, 72 (2012) ("The Supreme Court and the courts of appeals routinely invoke legislative history when statutory text is ambiguous.").

2. *See, e.g.*, Zadvydas v. Davis, 533 U.S. 678, 697-99 (2001) (explaining the ambiguity in the statute before applying the canon of constitutional avoidance).

3. *See* Note, *The New Rule of Lenity*, 119 HARV. L. REV. 2420, 2420 (2006) (explaining that the rule of lenity "requires that a court interpreting a criminal statute resolve any ambiguity in favor of the defendant").

4. 467 U.S. 837, 844 (1984).

5. *See, e.g.*, Jack M. Beermann, Chevron *at the Roberts Court: Still Failing After All These Years*, 83 FORDHAM L. REV. 731, 731 (2014) ("[T]he *Chevron* decision has been the most-cited Supreme Court administrative law decision, and the *Chevron* doctrine has spawned legions of law review articles analyzing its numerous twists and turns.").

6. *See* Daniel J. Hemel & Aaron L. Nielson, Chevron *Step One-and-a-Half*, 84 U. CHI. L. REV. 757, 760, 765 (2017) (discussing D.C. Circuit decisions that reveal an expectation that agencies assert statutory ambiguity in order to receive *Chevron* deference).

7. *See* Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 982 (2005) ("A court's prior judicial construction of a statute trumps an agency construction

It should not be surprising that the concept of ambiguity has been given such a significant role in interpretive outcomes. The legal realist notion that there is not inevitably one "correct" answer to every interpretive question, but rather multiple plausible resolutions are often available, suggests the need for some mechanism to signal situations involving interpretive choice.[8] Thus, under *Chevron*, a court may determine that the statute requires or precludes the agency's interpretation, but it may also find that the statute neither requires nor precludes the agency's interpretation.[9] Step One of *Chevron* requires an independent judicial evaluation, via "traditional tools of statutory construction," of whether "Congress has directly spoken to the precise question at issue."[10] If, instead, "the statute is silent or ambiguous with respect to the specific issue," the reviewing court proceeds to Step Two and determines "whether the agency's answer is based on a permissible construction of the statute."[11] Ambiguity was seen by the Court as a "gap left, implicitly or explicitly, by Congress," which requires the "formulation of policy and the making of rules" that agencies are better equipped to make than courts.[12] The ambiguity concept thus mediates between interpretation (Step One) and policymaking (Step Two) and also shifts the judicial focus from the traditional function of selecting the "best reading" of a statute.[13]

---

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.").

8. *See Chevron*, 467 U.S. at 842-43 ("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.").

9. *See* Richard M. Re, *Should* Chevron *Have Two Steps?*, 89 IND. L.J. 605, 610 (2014) ("There are three possible outcomes in every case involving judicial deference to an agency interpretation: (i) the statute clearly means what the agency says, (ii) the statute is ambiguous as to what the agency says, or (iii) the statute is clearly contrary to what the agency says."); *see also* Barnhart v. Walton, 535 U.S. 212, 226 (2002) (Scalia, J., concurring in part) (referring to the "pre-*Chevron* days, when there was thought to be only one 'correct' interpretation of a statutory text").

10. 467 U.S. at 843 n.9.

11. *Id.* at 843.

12. *Id.*

13. *See* Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2121 (2016) (explaining that the primary function of courts is to determine the "best reading" of a statute).

In creating the ambiguity doctrine, the judiciary has transformed a neutral linguistic concept into a uniquely legal concept. Linguists distinguish, via various tests and definitions, between ambiguity and other forms of potential indeterminacy such as vagueness, polysemy, and generality.[14] Furthermore, natural languages are said to be pervasively ambiguous, but an ambiguous expression is not always indeterminate in the sense that the intended meaning is unclear to the comprehender.[15] Linguists thus distinguish between the identification of ambiguity and disambiguation.[16] In contrast to the linguistic conception of ambiguity, though, courts conflate ambiguity identification and disambiguation and also use ambiguity as an umbrella concept that encompasses the various forms of indeterminacy.[17] These actions have created an unpredictable doctrine that does not satisfactorily mediate between judicial interpretive autonomy and deference to agency interpretations.

As various commentators have observed, there is an enormous body of scholarship that has been devoted to *Chevron*.[18] Very little of the scholarship, however, has focused on the ambiguity concept, and there are no comprehensive, interdisciplinary analyses of it. Recently, though, Justice Brett M. Kavanaugh, while not offering a detailed alternative in administrative cases, wondered whether courts should "avoid attaching serious interpretive consequences to binary ambiguity determinations that are so hard to make in a neutral, impartial way."[19] This Article agrees that the ambiguity concept is a problematic device for allocating interpretive authority in administrative cases. Through an interdisciplinary comparison of the linguistic concept of ambiguity and the judicially created legal doctrine of ambiguity, this Article argues that courts should eliminate the ambiguity concept, thereby transforming the *Chevron* doctrine. The Article further outlines an alternative linguistic

14. *See infra* Part III.A.

15. *See infra* Part II.

16. *See infra* Part III.

17. *See infra* Part III.

18. *See* Michael Herz, Chevron *Is Dead; Long Live* Chevron, 115 COLUM. L. REV. 1867, 1867 (2015) ("At this point, it takes chutzpah to write about *Chevron.* Everyone is sick to death of *Chevron,* and four gazillion other people have written about it, creating a huge pile of scholarship and precious little left to say.").

19. *See* Kavanaugh, *supra* note 13, at 2144.

framework that better allocates interpretive authority to judges and policymaking authority to agencies.

Part I explains that part of the uncertainty regarding the division of interpretive authority between courts and agencies is due to *Chevron*'s incoherent treatment of legislative "intent."[20] While interpretive issues are generally judicially decidable on the basis of perceived legislative intent, the Court indicated that provisions that are "ambiguous" may be interpreted by the agency on the basis of policy concerns.[21] The Court's superficial description of legislative intent and the possibility of multiple permissible meanings of statutory provisions is in tension with the historical inclination of judges to choose interpretations that represent the "best readings" of statutes.[22] Furthermore, as Parts II and III explain, the judicial conception of ambiguity is different from how linguists generally use the term. In particular, the judicially created ambiguity concept elides the separate issues of ambiguity identification and disambiguation, as well as the various forms of indeterminacy. When ambiguity identification and disambiguation are conflated, ambiguity determination depends on an assessment of the available evidence, but the determination is a conclusion that is not based on any linguistic tests or useful definitions.[23]

The ambiguity concept does not add structure to the interpretive process in a way that would make it more objective and less ideological than interpretation outside of the administrative context.[24] Considering the judicial conflation of ambiguity identification and disambiguation, there is no obvious point in the interpretive process, prior to its completion, where a reviewing court can stop the process and declare the provision to be ambiguous.[25] There is therefore no objective standard to determine whether the determination is correct or incorrect (unlike linguists' tests, which are

20. Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842 (1984).

21. *Id.* at 842-43.

22. *See* Kavanaugh, *supra* note 13, at 2121.

23. *See infra* notes 141-49 and accompanying text (describing judicial definitions of ambiguity).

24. *See* Beermann, *supra* note 5, at 731-32 (indicating that when applying *Chevron* the "Court generally split along familiar ideological lines, with liberals deferring to liberal agency interpretations and conservatives deferring to conservative agency interpretations").

25. *See infra* Part IV.

theoretically based and can at least be verified by others).[26] As a result, no stable standard exists for mediating between contextual disambiguation that tracks legislative intentions and a determination that the provision is ambiguous and agency discretion is therefore legislatively intended.

The *Chevron* doctrine has been the subject of renewed criticism and is said to be "entering a period of uncertainty, after long seeming to enjoy consensus support on the Court."[27] Despite these criticisms, some form of deference is likely to continue.[28] Any critique of *Chevron* that focuses primarily on linguistic issues (as this article does) is necessarily incomplete, though, due to the multiple justifications for deference and the likelihood of doctrinal constraints on any deference doctrine. Consider that the *Chevron* decision itself emphasized the existence of congressional intent that agencies resolve statutory uncertainties as well as the greater expertise and political accountability of agencies compared to courts.[29] Other theories for *Chevron* include the views that agencies are superior to courts in ascertaining congressional intent and that deference is a judicially self-imposed constraint to assuage concerns about courts' counter majoritarian role under the Constitution.[30] In

---

26. *See infra* Part IV.

27. Michael Kagan, *Loud and Soft Anti-*Chevron *Decisions*, 53 WAKE FOREST L. REV. (forthcoming 2018) ("In retrospect, it makes sense to view the many cases in which the Court failed to apply *Chevron* consistently as signals of underlying doctrinal doubt.").

28. *See* Nicholas R. Bednar & Kristin E. Hickman, Chevron*'s Inevitability*, 85 GEO. WASH. L. REV. 1392, 1398 (2017) ("*Chevron* deference, or something much like it, is a necessary consequence of and corollary to Congress's longstanding habit of relying on agencies."); Cory Coglianese, Chevron*'s Interstitial Steps*, 85 GEO. WASH. L. REV. 1339, 1343 (2017) ("At a broad level of generality, something like the two-step framework may always exist, even if relabeled or disavowed.").

29. 467 U.S. 837, 844 (1984) ("Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency."); *id.* at 865 ("While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices."); *id.* ("Judges are not experts in the field, and are not part of either political branch of the Government.").

30. *See* William N. Eskridge, Jr., *Expanding* Chevron*'s Domain: A Comparative Institutional Analysis of the Relative Competence of Courts and Agencies to Interpret Statutes*, 2013 WIS. L. REV. 411, 446-48 (arguing that a "comparative institutional analysis suggests that *Chevron*'s domain should be expanded to include all interpretations promulgated by an agency's governing board or director"); Mark Seidenfeld, Chevron*'s Foundation*, 86 NOTRE DAME L. REV. 273, 275 (2011) (arguing that *Chevron* is a judicially self-imposed constraint).

addition, various considerations have been thought by the Court to be relevant to deference, including the formality of the agency procedures used when promulgating the interpretation.[31]

Notwithstanding the incompleteness of any linguistic critique of deference, as well as the ineffectiveness of the ambiguity concept, Part IV argues that it is intuitive that indeterminacy should play a role in the allocation of interpretive authority. In the absence of indeterminacy congressional intent must be implemented in most cases and, thus, there is no basis for deferring to an agency's interpretation.[32] Conversely, when indeterminacy does exist there may be no discernable congressional intent to implement, and though the interpretive issue may still be decidable by a court (as interpretive issues generally are), even before *Chevron* it was widely thought that the agency's views regarding the interpretive issue should be influential.[33] Thus, the basic principle, expressed in *Chevron* and elsewhere, that indeterminacy should signal some sort of additional judicial consideration of the agency's interpretation is coherent, even if determining the role that indeterminacy should play has proven to be difficult.

Part IV also outlines an alternative to the traditional *Chevron* doctrine. First, courts should eliminate the ambiguity trigger, which arbitrarily mediates between de novo judicial interpretation and deference to agency interpretations. Instead of the umbrella ambiguity concept, which does not distinguish among different forms of indeterminacy, courts should consider that different types of indeterminacy may call for different judicial treatment.[34] Second, an understanding that interpretive issues are judicially resolvable should replace the current judicial practice of deciding whether to defer at some undetermined point in the interpretive process, as happens with the ambiguity concept. The judicial resolvability of interpretive issues means that certain types of indeterminacy are judicially resolvable while other types of indeterminacy are

31. *See generally* Lisa Schultz Bressman, *How* Mead *Has Muddled Judicial Review of Agency Action*, 58 VAND. L. REV. 1443 (2005).

32. *See infra* Part IV.

33. *See generally* Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 YALE L.J. 908 (2017).

34. *See infra* notes 136-49 and accompanying text (describing the umbrella ambiguity concept).

presumptively for the agency to resolve. Taking account of such nuance would help make judicial review more coherent, as well as better match likely congressional intent about delegation of interpretive issues to agencies.

This Article proposes three different categories as a collective replacement for the umbrella ambiguity concept, which is underinclusive as a description of the types of linguistic phenomena relevant to judicial review. The groupings reflect the traditional view that courts are experts at statutory interpretation (which includes determining congressional intent) and agencies are experts at policymaking (which includes exercising delegated discretion).[35] The categories thus provide a framework for the allocation of interpretive authority between courts and agencies on the basis of their respective areas of expertise. Furthermore, various Supreme Court decisions (including *Chevron*,[36] the infamous anti-*Chevron* case *INS v. Cardoza-Fonseca*,[37] and the controversial case interpreting the Patient Protection and Affordable Care Act, *King v. Burwell*[38]), reflect the distinctions represented by the categories, although the Court has consistently—and confusingly—treated the issues as though they fall under the ambiguity concept.

I. JUDICIAL DECIDABILITY AND LEGISLATIVE INTENT

Part of the enduring uncertainty regarding *Chevron*'s division of interpretive authority between courts and agencies is due to the enigmatic nature of "intent." The Court in *Chevron* indicated that when congressional intent is unclear, the provision is ambiguous, which signals interpretive choice. The Court thereby established a connection between "ambiguity" and the absence of congressional intent.[39] This legal-realist view of the existence of

35. *See* Negusie v. Holder, 555 U.S. 511, 530 (2009) (Stevens, J., concurring in part and dissenting in part) ("The *Chevron* framework thus accounts for the different institutional competencies of agencies and courts: Courts are expert at statutory construction, while agencies are expert at statutory implementation. That the distinction can be subtle does not lessen its importance.").

36. 467 U.S. 837 (1984).

37. 480 U.S. 421 (1987).

38. 135 S. Ct. 2480 (2015).

39. 467 U.S. at 842-43 (explaining that "[i]f the intent of Congress is clear, that is the end of the matter," but if it is not clear, "the question for the court is whether the agency's answer

multiple meanings as signaling interpretive choice is in tension, however, with the historical inclination of judges to choose interpretations that represent the "best readings" of statutes.[40] It is natural for courts to believe that interpretive questions are inherently judicially decidable in the sense that a best reading can be given the relevant language. Generally, words—and correlatively, sentences—can be given meanings, and any residual uncertainty can be resolved through consideration of the overall legislative design of the statute.[41] Especially if a court considers broad contextual evidence, it is not difficult to understand why some courts feel confident about averring "correct" answers even in the face of epistemic uncertainty about the legislature's intended meaning regarding some specific issue.

The general decidability of interpretive issues on the basis of legislative intent suggests that intent is a protean concept that can be framed at various levels of generality.[42] At a high level of generality, "intent" is synonymous with "purpose" and may always be said to exist, even if the judge has to infer the purpose from the

---

is based on a permissible construction of the statute").

40. *See* Kavanaugh, *supra* note 13, at 2121 (arguing that instead of determining whether a provision is ambiguous, "courts should seek the *best reading* of the statute by interpreting the words of the statute, taking account of the context of the whole statute, and applying the agreed-upon semantic canons"). Some might argue, though, that even under *Chevron* courts should seek the "best reading" of a statute. *See, e.g.*, Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 515 ("Only when the court concludes that the policy furthered by *neither* textually possible interpretation will be clearly 'better' (in the sense of achieving what Congress apparently wished to achieve) will it, pursuant to *Chevron*, yield to the agency's choice.").

41. The term "legislative design" will be used throughout this Article and is meant to refer to the totality of contextual cues courts often consider when making sense of a provision, such as information from legislative history and related provisions.

42. Unless otherwise indicated, this Article will refer to legislative "intent" in a general way that captures both the textualist notion of objectified intent and the intentionalist notion of actual intent or purpose. While scholars and judges have suggested a variety of interpretive methodologies, the basic division is between judges, known as textualists, who privilege the linguistic meaning of a legal text and judges, known as intentionalists, who privilege the intent or purpose of the legislative body that enacted the text. *See generally* Jonathan R. Siegel, *The Inexorable Radicalization of Textualism*, 158 U. PA. L. REV. 117 (2009). While differences in interpretive methodology may influence case outcomes, the arguments presented in this Article do not presuppose any particular methodology. Instead, they assume the basic, and widely accepted, premise that courts interpret statutes as the "faithful agents" of Congress. *See* Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 COLUM. L. REV. 1, 6 (2006) (explaining that prevailing views see judges as either "'faithful agents' or 'coequal partners' of Congress").

statutory language and broader legislative design.[43] Many of the determinants of intent employed by judges (for example, dictionaries, canons of interpretation, statutory purpose) seek an objectified or hypothetical intent of some sort and do not depend on actual legislative consideration of the interpretive issue.[44] As a very general matter, then, interpretive issues are judicially decidable on the basis of legislative "intent," defined broadly, even if there is no evidence that the specific interpretive issue was ever contemplated by the legislature (or any of its members).

Perhaps, as the Supreme Court recently suggested in *King v. Burwell*, inferences about legislative intent (even if objectified or hypothetical) are more reliable if the interpretive issue is crucial to the overall legislative design.[45] In *King*, the Court indicated that some interpretive questions are, as a category, judicially decidable with no possibility of deference to the agency due to sufficient epistemic certainty regarding congressional intent.[46] The case required the Court to interpret the Patient Protection and Affordable Care Act (ACA), which sought "to make health insurance more affordable by giving refundable tax credits to individuals with household incomes between 100 percent and 400 percent of the federal poverty line."[47] The ACA also "require[d] the creation of an 'Exchange' in each State where people can shop for insurance, usually online. An Exchange [could] be created in one of two ways."[48] A state itself could create an Exchange.[49] If a state "[chose] not to establish its own Exchange, the [ACA] provide[d] that the Secretary of Health

43. For an example of the Supreme Court inferring legislative purpose from the broad legislative design, see the discussion of King v. Burwell, 135 S. Ct. 2480 (2015), and FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000), in Part IV.D.3.

44. *See* BRIAN G. SLOCUM, ORDINARY MEANING 76-79 (2015) (describing how both intentionalists and textualists rely on hypothetical notions of legislative intent). Even legislative history may arguably reveal actual legislative intent but often provides information about general purpose. *See id.* at 77-78.

45. 135 S. Ct. at 2488-89 (explaining that "[i]n extraordinary cases" deference should not be given the agency's interpretation and, instead, the task of the reviewing court is "to determine the correct reading" of the provision (citations omitted)).

46. *Id.*

47. *Id.* at 2487 (citing 26 U.S.C. § 36B (2012)).

48. *Id.* (citing 42 U.S.C. § 18031(b)(1) (2012)).

49. *Id.*

and Human Services 'shall ... establish and operate such Exchange within the State.'"[50]

The interpretive issue for the Court arose because the ACA, in 28 U.S.C. § 36B(b)-(c), provided that the tax credits would be available to "taxpayer[s] [who] ha[d] enrolled in an insurance plan through 'an Exchange *established by the State* under section 1311 of the [ACA].'"[51] The Treasury Department, through the Internal Revenue Service (IRS), promulgated a regulation interpreting the ACA as allowing for tax subsidies in healthcare Exchanges established by the federal government.[52] The challengers to the regulation argued that the agency's interpretation contradicted the plain meaning of the statute.[53]

In upholding the government's regulation, the Court relied heavily on the purpose of the ACA, which indicated that tax "credits are necessary for the Federal Exchanges to function like their State Exchange counterparts," and sought to "avoid the type of calamitous result that Congress plainly meant to avoid."[54] Although the Court agreed with the government's interpretation of the ACA, it refused to accord deference to the regulation interpreting the statute.[55] Invoking an earlier decision, *FDA v. Brown & Williamson Tobacco Corp.*,[56] the *King* Court stated that "[i]n extraordinary cases ... there may be reason to hesitate before concluding that Congress has intended ... an implicit delegation [of interpretive authority to the agency]."[57] The Court explained:

> This is one of those cases. 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

50. *Id.* (quoting 42 U.S.C. § 18041(c)(1) (2012)).

51. *Id.* (quoting 26 U.S.C. §§ 36B(b)-(c) (2012)).

52. *See id.*

53. *See id.* at 2488, 2492, 2495.

54. *Id.* at 2495-96.

55. *See id.* at 2488-89, 2494-96 (finding that Congress did not leave the issue of whether the tax credits would be available on the Federal Exchanges up to the IRS, but later coming to the same conclusion that "an Exchange established by the State" in § 36B includes State *and* Federal Exchanges).

56. 529 U.S. 120 (2000).

57. *King*, 135 S. Ct. at 2488-89 (quoting *Brown & Williamson Tobacco Corp.*, 529 U.S. at 159).

> 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.[58]

The Court thus rejected the possibility that the agency's interpretation might receive deference and instead concluded, based on its own weighing of the evidence, that "the context and structure of the Act compel us to depart from what would otherwise be the most natural reading of the pertinent statutory phrase," thereby "allow[ing] tax credits for insurance purchased on any Exchange created under the Act."[59]

In refusing to apply the *Chevron* framework, the Court did not view itself as arrogating the power to decide policy issues under the statute to the judiciary (at the expense of the agency).[60] Rather, the Court assumed that for issues "central" to the statutory scheme there would be sufficient indications of congressional intent to make the issue judicially decidable.[61] The Court thus did not decide the case under Step One but instead rejected the *Chevron* framework altogether.[62] In foreclosing the very possibility of deference, the Court implicitly indicated that the decidability of the interpretive question did not depend on the language of the statute. The Court was likely not implying that Congress always drafts important provisions with greater semantic clarity, considering the poor drafting of the ACA and the Court's decision to reject the literal meaning of "State" on the basis of the context and purpose of the overall statute.[63] Rather, the theory is that when cases present such important issues, the judiciary is able to determine the best reading of the statute on the basis of the available evidence.[64]

---

58. *Id.* at 2489.

59. *Id.* at 2495-96.

60. *See id.* at 2488-89.

61. *See id.* at 2489.

62. *Id.* ("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." (quoting Util. Air Regulatory Grp. v. EPA, 134 S. Ct. 2427, 2444 (2014))).

63. *See id.* at 2492 ("The Affordable Care Act contains more than a few examples of inartful drafting.").

64. *Id.* at 2489.

The Court's position in *King* that interpretive issues "central" to the legislative design are judicially decidable thus depends on a kind of systemic confidence in the judiciary's ability to determine the best reading of a statute in such situations, even when the statutory language is unclear. In *Brown & Williamson Tobacco Corp.*, in defending the idea that the interpretive question was judicially decidable, the Court cited Justice Breyer's 1986 law review article for the proposition that courts should not interpret *Chevron* as creating an across-the-board presumption of deference to agencies.[65] Rather, in the view of Justice Breyer, deference should vary based on, among other things, the importance of the statutory question at issue.[66] Justice Breyer argued that "Congress is more likely to have focused upon, and answered, major questions, while leaving interstitial matters to ... daily administration" by agencies.[67] Whether Congress always "answers" major questions (which would seem to be the claim if the *Chevron* framework is not applicable to such issues) may be correct, but its relevance is thus dependent on the epistemic verifiability of congressional intent in such cases.[68]

The Court in *King* resolved the interpretive dispute on the basis of the legislative design (including drawing inferences from related provisions and statutory purpose) and seemed to limit its rejection of *Chevron* to interpretive issues that are "central"; but, as addressed above, courts may always determine meaning (whether it is based on general, objectified, or hypothetical intent). If a court frames intent in a general manner, it should typically be inclined to believe that the interpretive question is decidable and, in fact, has a correct answer. The complication is that the Court in *Chevron* rejected the notion that courts should define intent at a high level of generality.[69] Instead, the Court indicated that a reviewing court

---

65. 529 U.S. 120, 159 (2000) (citing Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 370 (1986)).

66. *See* Breyer, *supra* note 65, at 371-77.

67. *See id.* at 370 (citation omitted).

68. *Cf.* Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I,* 65 STAN. L. REV. 901, 994-97 (2013) (explaining that congressional drafters "feel an obligation to address major questions and that Congress is not trying to 'punt' big decisions as often as some theorists have assumed").

69. *Chevron*, 467 U.S. 837, 842-43 (1984) ("First, always, is the question whether Congress has *directly* spoken to the *precise* question at issue." (emphasis added)).

should determine whether Congress had expressed an intention regarding the "precise question at issue."[70] In *Chevron*, the Court of Appeals had conceded that the relevant provisions were indeterminate and the precise issues not "squarely addressed in the legislative history."[71] Nevertheless, the court reasoned that "the purposes of the nonattainment program should guide our decision here."[72] In reversing the lower court's decision, the Supreme Court indicated that "[t]he basic legal error of the Court of Appeals was to adopt a static judicial definition of the term 'stationary source' when it had decided that Congress itself had not commanded that definition."[73] The Court stated that "[o]nce it determined, after its own examination of the legislation, that Congress did not actually have an intent regarding the applicability of the bubble concept to the permit program," the reviewing court was to consider only whether the agency's interpretation was "reasonable."[74]

Even though it seemed to describe the appropriate level of generality at which to frame the issue of congressional intent, the Court's opinion in *Chevron* was nevertheless unsatisfying. For one, the "precise question at issue" language is not an accurate description of how courts approach the interpretation of statutes, if precise issue is taken to mean either that the semantic meaning of the relevant provision must clearly answer the interpretive question or the legislative history must indicate that the legislature explicitly considered the issue.[75] Courts often consider broad contextual evidence when determining ambiguity.[76] Logically, such broad contextual evidence could dictate a certain interpretation even if the legislature had not explicitly expressed an intention on the precise question at issue.[77] Imagine a scenario where the semantic meaning

70. *Id.* at 843.

71. Nat. Res. Def. Council v. Gorsuch, 685 F.2d 718, 723 (D.C. Cir. 1982), *rev'd sub nom.* 467 U.S. 837 (1984).

72. *Id.* at 726 n.39.

73. *Chevron*, 467 U.S. at 842.

74. *Id.* at 845.

75. See *infra* Part IV.D. for examples of cases where the Court did not limit itself to determining whether Congress explicitly answered the "precise issue."

76. *See, e.g.*, King v. Burwell, 135 S. Ct. 2480, 2489 (2015) ("So when deciding whether the language is plain, we must read the words 'in their context and with a view to their place in the overall statutory scheme.' Our duty, after all, is 'to construe statutes, not isolated provisions.'" (citations omitted)).

77. *See* Util. Air Regulatory Grp. v. EPA, 134 S. Ct. 2427, 2442 (2014) ("[A]n agency inter-

of the relevant provision is indeterminate (if considered in isolation), and the legislative history does not contain any indication that Congress ever explicitly considered the interpretive issue. Nevertheless, the structure of the statute, including related provisions and the obvious purpose of the legislation, is clearly at odds with the agency's interpretation. It seems unlikely in such a scenario that a reviewing court would determine that the provision is ambiguous (or that the court should accept the agency's interpretation).[78] Not surprisingly, reviewing courts have found statutes to be clear on an issue even if there is no evidence that Congress considered the precise question at issue.[79]

The idea of legislative intent might be a coherent notion but it is also a general one.[80] *Chevron* framed ascertainable legislative intent as being in contradistinction to ambiguity,[81] but "intent" is a malleable concept that can be framed at different levels of generality.[82] The Court's discussion of intent in *Chevron* was superficial, and the notion that courts should determine "whether Congress has directly spoken to the precise question at issue" is at odds with how courts

---

pretation that is inconsistent with the design and structure of the statute as a whole does not merit deference." (quotations and citations omitted)).

78. *See King*, 135 S. Ct. at 2492 ("A [statutory] provision that to an agency may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme ... because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law." (quoting United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., 484 U.S. 365, 371 (1988))). It is possible that the reviewing court could find the statute to be ambiguous but reject the agency's interpretation at Step Two, although the court might believe there is little to gain by moving to Step Two when there is no chance that the agency interpretation could be upheld.

79. For example, in *Gonzales v. Oregon*, the Court concluded that the Controlled Substances Act prescription requirement did not authorize the Attorney General to bar dispensing controlled substances for assisted suicide in the face of a state medical regime permitting such conduct. 546 U.S. 243, 274-75 (2006). The Court did not base its decision on explicit congressional consideration of assisted suicide but, rather, on the fact that the "statute manifests no intent to regulate the practice of medicine generally." *Id.* at 270.

80. There are some "intent skeptics" who doubt the coherence of the concept of legislative intent. *See, e.g.*, John F. Manning, *Without the Pretense of Legislative Intent*, 130 HARV. L. REV. 2397 (2017). This Article does not take a position on the coherence of legislative intent, other than to note that it can be framed at varying levels of generality and its determination is typically of particular concern to judges. *See generally id.*

81. *See supra* notes 10-13 and accompanying text.

82. *See generally* Manning, *supra* note 80. Furthermore, the existence of ambiguity does not always prevent an interpreter from accurately ascertaining intent. *See infra* notes 189-201 and accompanying text (explaining how the presence of ambiguity often makes communication more efficient).

typically discuss and determine intent.[83] Thus, combined with the traditional judicial decidability of interpretive questions, *Chevron*'s reference to legislative intent confounds rather than clarifies the role of ambiguity in mediating between judicial and agency interpretation.

II. LINGUISTS AND INDETERMINACY

While the ascertainability of congressional intent was intended by the Court in *Chevron* to signal judicially decidable interpretive issues, the correlative notion of "ambiguity" represents judicially undecidable situations. Recall that whereas congressional intent must control in Step One, provisions that are "ambiguous" may be interpreted by the agency on the basis of policy considerations.[84] The concept of ambiguity is thus intended to mediate between court-centered interpretation (Step One) and agency-centered policymaking (Step Two), thereby making ambiguity identification of crucial significance to the division of interpretive responsibility.[85] Despite its centrality to judicial review, "ambiguity," like the "intent" concept, was not explicated by the Court in *Chevron*, and, in fact, was implied to be a self-evident concept.[86] Ambiguity as developed by courts, though, is a problematic concept in some important ways, and the judicial conception of it differs from how ambiguity is analyzed by linguists. Before describing in Part III how the judicial conception of ambiguity makes its determination intrinsically discretionary and subjective and thus unpredictable, this Part explains how indeterminacy is analyzed by linguists.

Linguists frequently note that natural languages, including English, are massively ambiguous.[87] They often divide ambiguous

83. *See* Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842 (1984).

84. *See id.* at 845.

85. *See* Brian G. Slocum, *The Importance of Being Ambiguous: Substantive Canons, Stare Decisis and the Central Role of Ambiguity Determinations in the Administrative State*, 69 MD. L. REV. 791, 799, 802 (2010).

86. *See Chevron*, 467 U.S. at 842-43. The Court did little more than refer to "intent" generically. *See supra* note 39.

87. *See* Elin Fredsted, *On Semantic and Pragmatic Ambiguity*, 30 J. PRAGMATICS 527, 532 (1998); Brendan Juba et al., *Compression Without a Common Prior: An Information-Theoretic Justification for Ambiguity in Language*, INNOVATIONS COMPUTER SCI., 79 (2011) ("Natural language is ambiguous."); Steven T. Piantadosi et al., *The Communicative Function of Ambiguity in Language*, 122 COGNITION 280, 280 (2012) ("Ambiguity is a pervasive phenomenon

expressions into two categories.[88] An expression is *lexically ambiguous* if it has two or more unrelated lexical meanings.[89] In contrast, an expression is *syntactically ambiguous* if it has two or more possible logical structures.[90] Thus, when linguists examine ambiguity, it is usually at the sentential, phrasal, or word level.[91] Ambiguous expressions are therefore merely potentially indeterminate in the sense that the relevant context may disambiguate the expressions.[92]

Furthermore, linguists do not use the term "ambiguity" to refer to all expressions that are potentially indeterminate.[93] In addition to ambiguity, three other basic categories are typically used to identify and describe the causes of semantic indeterminacy. Two of the categories account for an expression's multiple meanings. An expression may be lexically ambiguous, as indicated above.[94] In contrast, an expression is *polysemous* if it has two or more (related) senses of one lexical meaning.[95] The distinction between polysemy and lexical ambiguity concerns the "relatedness of the meanings."[96] Polysemy, which is a feature of most natural language expressions, involves meanings that are more closely related, although the distinction operates on a continuum rather than a bright line.[97] The expression "bank" is often used as an example of lexical ambiguity because it can mean either a financial institution or the slopes bordering a river. The expression is, thus, in reality unrelated words which happen to look and sound alike.[98] "Bank" is also polysemous

---

in language which occurs at all levels of linguistic analysis."); Thomas Wasow et al., *The Puzzle of Ambiguity*, *in* MORPHOLOGY AND THE WEB OF GRAMMAR: ESSAYS IN MEMORY OF STEVEN G. LAPOINTE 265 (C. Orhan Orgun & Peter Sells eds., 2005) (stating that "ambiguity abounds in natural languages" and "English is massively ambiguous").

88. *See* Wasow et al., *supra* note 87, at 266-67.

89. *See* DAVID LANIUS, STRATEGIC INDETERMINACY IN THE LAW (forthcoming 2018) (manuscript at 16) (on file with author).

90. *See id.* (manuscript at 14).

91. *See Word Meaning*, STAN. ENCYCLOPEDIA PHILOSOPHY, https://plato.stanford.edu/entries/word-meaning/ [https://perma.cc/X5H6-M92R].

92. *See* LANIUS, *supra* note 89 (manuscript at 11-12).

93. *See* Brendan S. Gillon, *Ambiguity, Generality, and Indeterminancy: Tests and Definitions*, 85 SYNTHESE 391, 393-95 (1990).

94. *See supra* note 89 and accompanying text.

95. *See* LANIUS, *supra* note 89 (manuscript at 17).

96. *See id.* (manuscript at 18).

97. *See id.*

98. *See Polysemy Is Like Homonomy, Only Different*, SCIENCEBLOGS, (Nov. 3, 2006), http://scienceblogs.com/mixingmemory/2006/11/03/polysemy-is-like-homonomy-only/ [https://

because it can mean a financial institution or the building where a financial institution offers services.[99]

The other two categories account for indeterminacy regarding an expression's single meaning. In contrast to lexical ambiguity and polysemy, an expression is *semantically vague* if its meaning "allows for borderline cases."[100] For instance, a gradable adjective such as "tall" is vague because it allows for borderline cases and, thus, multiple, equally permissible, ways to apply the expression.[101] The term, viewed in its context of usage, has a core of settled meaning, but there will be borderline cases that can be decided either way (often arbitrarily),[102] akin to H.L.A. Hart's famous (within the law) "core of settled meaning" and "penumbra of debatable cases" framework.[103] When borderline cases are possible, it is often said that the expression is "fuzzy."[104] Expressions such as "many friends" or "about 20" are fuzzy because the phrases may have an invariant core (for example, 100,000 is not "about 20" but 19.999 is) but an indistinct boundary that often varies depending on the context.[105] Similarly, the referential boundaries of expressions like "city" and "town" are also not clear-cut.[106]

Somewhat differently, an expression is *general* if its meaning is a "genus of more than one species."[107] Thus, for example, the term "color" is general because it includes within its scope "red," "green," "blue," et cetera.[108] The term "parent" is general because it includes

---

perma.cc/RF9J-7CFQ].

99. *Id.*

100. *See* LANIUS, *supra* note 89 (manuscript at 21).

101. *See id.* (manuscript at 174-75).

102. *See* DIANA RAFFMAN, UNRULY WORDS: A STUDY OF VAGUE LANGUAGE 106 (2014) (claiming that "vagueness is a form of arbitrariness").

103. *See* H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 607 (1958).

104. The term "fuzziness" is used in linguistics and philosophy of language to describe the boundaries of categories (such as "vehicle") that are "ill-defined, rather than sharp." M. LYNNE MURPHY & ANU KOSKELA, KEY TERMS IN SEMANTICS 72 (2010). Commentators often describe fuzziness as a type of vagueness.

105. Grace Zhang, *Fuzziness—Vagueness—Generality—Ambiguity*, 29 J. PRAGMATICS 13, 14-15 (1998) [hereinafter Zhang, *Fuzziness-Vagueness*]; *see also* Grace Zhang, *Fuzziness and Relevance Theory*, 22 FOREIGN LANGUAGE & LITERATURE STUD. 73, 74-75 (2005) [hereinafter Zhang, *Relevance Theory*].

106. *See* Zhang, *Fuzziness-Vagueness*, *supra* note 105, at 18.

107. Gillon, *supra* note 93, at 394.

108. *Id.*

within its scope "mother" and "father."[109] As these examples suggest, the more general the expression is, the less informative the utterance becomes (and vice versa).[110] Yet, whether generality causes indeterminacy depends on an expression's context of use (which includes the purpose of the conversation).[111] One can easily imagine scenarios when "color" or "parent" could be used when indeterminacy would not result.

Some types of semantic indeterminacy require a more nuanced description than those given above, and the additional nuance makes it less likely that context will make the expression at issue more determinate. For instance, *multi-dimensional polysemy* exists when it is unclear which features are aspects of a word's lexical meaning, resulting in two or more (related) senses.[112] In turn, *multi-dimensional vagueness* exists when an expression allows for borderline cases due to incommensurability among the expression's features.[113] For example, the term "intelligent" (like "reasonable") is potentially indeterminate, based on multi-dimensional polysemy, because it may be unclear which features must be instantiated in order to fall within the concept.[114] The term may be applied based on some combination of "one's capacity for memory, abstract thought, self-awareness, communication, learning, emotional knowledge, creativity and problem solving," or on the basis of other features.[115] It may, however, be debatable which possible features must be present or how those features are to be "weighted against each other in cases of conflict or doubt."[116] Competent language users may thus reasonably disagree about which features are intrinsic to the concept itself.[117] Similarly, the term may be multi-dimensionally vague because some of the features may be "instantiated to a high degree and others to a low degree" (for example, a person may have an excellent memory but poor problem solving skills).[118] In such a

109. *Id.*
110. *Cf. id.*
111. *See id.* at 394-95.
112. *See* LANIUS, *supra* note 89, (manuscript at 33).
113. *See id.*
114. *See id.* (manuscript at 32-33).
115. *Id.* (manuscript at 32).
116. *Id.*
117. *See id.* (manuscript at 33).
118. *Id.*

situation, the features may not be properly compared, making them incommensurable and resulting in borderline cases where the expression neither clearly applies nor clearly does not apply.[119]

Finally, some expressions may be indeterminate because their meaning is relative to a contextually valued standard, which may be difficult to determine precisely.[120] For example, the meaning of "fast," "big," or "reasonable" depends on some standard or comparison class.[121] Determining the comparison or standard is often dependent on context and sometimes requires that an evaluative judgment be made (for example, what is "cruel and unusual punishment" or "due process"?).[122] As a result, the discretion (as well as the uncertainty) inherent in evaluating context is also present when determining the specifics of the comparison class or standard.[123] Even when all of the relevant contextual facts are known, there still may be significant disagreement about the comparison standard or class and how it should be applied.[124]

Linguists often use devices, such as definitions and tests, to describe and identify ambiguity and distinguish it from other forms of indeterminacy, such as vagueness and generality.[125] Nevertheless, despite these distinctions, it may be observed that a routine sentence containing ambiguity, like "Chunka hit a man with a stick,"[126] might not lead to comprehension difficulties because "context is also a crucial factor in communication" and would indicate the correct meaning.[127] The ability to assess context and interpret ambiguous

119. *See id.*

120. *See* TIMOTHY A. O. ENDICOTT, VAGUENESS IN LAW 131 (2000).

121. *See, e.g.*, *id.*

122. *See id.* at 133 ("To judge what comes within the comparison class is not to answer a question of fact whose precise answer is unknowable, but to make an evaluative judgment concerning what matters for the purpose in question. This fact ties the unspecificity of context dependence to the vagueness of evaluation.").

123. *See id.* at 132.

124. *See id.*

125. *See, e.g.*, Gillon, *supra* note 93, at 393-95, 406-07. Although linguists distinguish among different forms of indeterminacy, there is debate regarding the tests used to identify the different forms. *See, e.g.*, David Tuggy, *Ambiguity, Polysemy, and Vagueness*, 4 COGNITIVE LINGUISTICS 273, 273 (1993) ("Traditional linguistic tests for ambiguity vs. vagueness fail to yield clear judgments in such cases, and in fact can easily be made to yield opposing judgments by varying the context.").

126. *See* Gillon, *supra* note 93, at 407.

127. *See* Varol Akman, *Rethinking Context as a Social Construct*, 32 J. PRAGMATICS 743, 745 (2000).

communications is understood to be an important aspect of communicative, as well as cultural, competence.[128] The intrinsic context for understanding a speaker is quite broad and includes the "totality of the knowledge, beliefs, and suppositions that are shared by the speaker and the listener, a.k.a. the common ground."[129] An ambiguous expression may thus be present in a context which renders the expression univocal (i.e., having one meaning), sometimes without the language user being aware of the ambiguity.[130] For instance, the sentence following the one above may indicate that "Chunka dropped the stick after hitting the man with it." Some other indication of the correct meaning, such as the title in a written document, may also be present.[131]

Sentences like the one above illustrate the difference between ambiguity and disambiguation.[132] A distinction between the two is commonly made by linguists who study how context enables listeners in a conversation to disambiguate ambiguous words, along with the various other ways in which language is disambiguated.[133] The distinction illustrates that the presence of ambiguity does not mean that the correct meaning is undiscoverable by the audience of the communication.[134] In fact, in many cases the expression can be disambiguated and the correct meaning identified. Still, in these situations ambiguity nevertheless exists, even though disambiguation is possible.

---

128. *See id.* at 745-46.

129. *Id.*; *see also id.* at 745 (explaining that context can include "(i) the words around a word, phrase, statement, etc. often used to help explain (fix) the meaning; [and] (ii) the general conditions (circumstances) in which an event, action, etc. takes place").

130. *See* Fredsted, *supra* note 87, at 532 ("[M]ost semantic ambiguities are resolved by context and situation without the user of the language being aware of them.").

131. For example, the sentence may be in a book chapter with the title "Deadly Assaults with Sticks" or "Chunka Uses a Stick to Hit a Man."

132. *See* LANIUS, *supra* note 89, (manuscript at 13-14) (explaining that "[e]ven though many utterances contain ambiguous expressions, they are not necessarily indeterminate" because "[c]ontext can fail or succeed to disambiguate an ambiguous expression").

133. *See, e.g.*, Nicholas Asher & Alex Lascarides, *Lexical Disambiguation in a Discourse Context*, 12 J. SEMANTICS 69 (1995).

134. This is true however "correct meaning" is defined, whether by reference to the actual intent of the speaker or some objectified notion of intent. *See supra* note 42 (explaining the difference between textualism and intentionalism).

III. THE JUDICIARY AND AMBIGUITY

In various ways, judges do not treat ambiguity in the same way as do linguists.[135] One significant difference, which helps explain the other differences, is that judges typically treat ambiguity as an umbrella concept that covers any sort of meaning indeterminacy, including the forms described earlier (for example, vagueness, polysemy, generality).[136] Sometimes, the term "ambiguity" is used to describe any situation when opposing interpretive arguments are deemed to be equally persuasive, irrespective of the presence of linguistic indeterminacy.[137] The judicial labeling of any type of interpretive uncertainty as "ambiguity" is unsurprising. Distinguishing among different forms of indeterminacy can be difficult, the accuracy of the various tests used by linguists to identify and distinguish among different indeterminacies is disputed, and identifying the kind of indeterminacy at issue may not have doctrinal significance.[138] Furthermore, in litigation there are typically two opposing parties with each advocating in favor of a particular interpretation. A reviewing court, remembering that ambiguity is typically defined by judges as a provision that has more than one meaning, might naturally conclude that the provision is unambiguous if there is one clearly preferred meaning and ambiguous if there is not.[139] Still, notwithstanding these mitigating factors, the judiciary's typical process of determining ambiguity has led to confusion and an often arbitrary allocation of interpretive authority between courts and agencies.[140]

---

135. *See* Slocum, *supra* note 85, at 799-800.

136. *See id.* at 801.

137. The *King v. Burwell* case is one such example. *See infra* notes 381-403 and accompanying text; *see also* Negusie v. Holder, 555 U.S. 511, 517 (2009) ("The parties disagree over whether coercion or duress is relevant in determining if an alien assisted or otherwise participated in persecution. As there is substance to both contentions, we conclude that the statute has an ambiguity that the agency should address in the first instance.").

138. *See supra* note 125.

139. *See* Slocum, *supra* note 85, at 799, 802-03.

140. *See id.* at 811.

A. Judicial Conflation of Ambiguity and Disambiguation

The judicial treatment of ambiguity as an umbrella concept, encompassing various forms of indeterminacy, has naturally led to definitions of ambiguity that are unhelpful, as well as inconsistent and incoherent.[141] The definitions sometimes focus on an objectified interpreter and whether that interpreter would find the provision to be ambiguous.[142] While such a standard is undoubtedly intended to make the ambiguity determination external to the perhaps idiosyncratic views of the reviewing judge, it does not provide any tests or criteria for making that determination. Other definitions focus on the provision itself and contain language indicating that ambiguity exists if the provision is "susceptible" to more than one meaning.[143] Such definitions similarly do not offer any tests or useful criteria for judging susceptibility. Thus, regardless of the focus (interpreter or provision), the definitions read as broadly worded boilerplate that fail to guide a court's determination of whether a provision is ambiguous.[144]

In addition to the conflation of various forms of indeterminacy under the ambiguity umbrella and consequent absence of a meaningful standard for determining ambiguity, an additional fact separates legal and non-legal treatment of ambiguity. Namely, despite the prevalence of ambiguity in natural languages, the significant effects of labeling a provision as ambiguous in some situations (for example, interpreting a criminal provision in favor of the defendant via the rule of lenity) makes it understandable that judges would be reluctant to readily find ambiguity.[145] The reluctance to find

141. *See id.* at 794.

142. *See id.* at 800.

143. *Id.* at 801.

144. *See id.* at 801-02.

145. Certainly, courts are more reluctant to find ambiguity in some contexts than in others. *The New Rule of Lenity*, *supra* note 3, at 2421 (explaining how the Rehnquist Court "did not apply the rule [of lenity] to every ambiguous penal statute"). Even in the *Chevron* context some judges are reluctant to declare a provision to be ambiguous and defer to the agency interpretation. *See* Scalia, *supra* note 40, at 521 ("It is thus relatively rare that *Chevron* will require me to accept an interpretation which, though reasonable, I would not personally adopt."). In fact, there is empirical evidence that Justice Scalia tended not to give deference to interpretations with which he disagreed. *See* Beermann, *supra* note 5, at 732 (indicating from a study on Justices' voting records that "Justice Scalia's eleven votes against deference was the highest number of votes among the Justices against deference").

ambiguity is manifested in the judiciary's tendency to conflate ambiguity identification and disambiguation. The conflation of the two means that courts do not declare a provision to be ambiguous on the basis of lexical or syntactic ambiguity (i.e., ambiguity identification), but instead consider broad contextual evidence for indications of authorial intent as part of the determination.[146] The Supreme Court has consistently asserted that "[a]mbiguity is a creature not of definitional possibilities but of statutory context."[147] Courts must therefore interpret statutory words in their context and with a view "to their place in the overall statutory scheme," which the court must presume is symmetrical and coherent.[148] Thus, language that a linguist might identify as ambiguous, if viewed in isolation, is deemed to be unambiguous by courts if the relevant context can disambiguate the language.[149]

The judicial conflation of ambiguity identification and disambiguation means that courts must consider in every interpretive dispute both what words mean as a general matter and what they mean in a particular context. *Chevron* Step One requires the court to determine whether the provision at issue is clear or, instead, ambiguous, but a court's role is not to decide whether a provision is clear in every respect (i.e., without regard to the issue presented).[150] If done correctly, this would always result in a finding of ambiguity.[151] Instead, the court's role is to decide whether the provision is clear with respect to the interpretive issue presented. For example, the dispute may involve what most commentators would term *lexical fuzziness*.[152] In such cases, a court should not frame the interpretive issue as being whether, for example, the term "vehicle" is ambiguous but, instead, whether the term includes within its

146. *See* United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assoc., 484 U.S. 365, 371 (1988) ("A [statutory] provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme ... because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law." (citations omitted)).

147. Brown v. Gardner, 513 U.S. 115, 118 (1994).

148. Davis v. Mich. Dep't of Treasury, 489 U.S. 803, 809 (1989).

149. *See id.*

150. *See* Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842-43 (1984).

151. As linguists sometimes assert, it is impossible to make a completely determinate sentence. *See* Alex Barber, *Indeterminacy*, *in* KEY IDEAS IN LINGUISTICS AND THE PHILOSOPHY OF LANGUAGE 92, 95 (Biobhan Chapman & Christopher Routledge eds., 2009).

152. *See supra* note 104 and accompanying text (describing the linguistic concept of fuzziness).

scope the object in dispute (for example, a Segway) in light of the legislative design.[153] Alternatively, the interpretive dispute may involve polysemy.[154] In such cases, the court should not describe the interpretive issue as requiring it to determine, for example, whether the statutory phrase "major stationary source" is ambiguous but, instead, whether its meaning precludes the government's "bubble" interpretation in light of the legislative design.[155]

In exploring word meanings and how context contributes to meaning, linguists often distinguish between "semantic" meaning and "pragmatic" meaning.[156] Semantics accounts for meaning by relating, via the rules of the language and abstracting away from specific contexts, linguistic expressions to the world objects to which they refer.[157] A semantic meaning is therefore compositional (i.e., rule-governed) and convention based.[158] Thus, in a legal context, semantics would include determining the ordinary meaning of the textual language, which may include consideration of some traditional tools of interpretation like textual canons of interpretation.[159] In turn, pragmatics accounts for meaning by reference to the language user (producer or interpreter), and it involves inferential processes.[160] Context is thus centrally involved in explaining how

153. *See* Hart, *supra* note 103, at 607.

154. *See supra* notes 95-99 and accompanying text (describing polysemy).

155. *See infra* note 245 and accompanying text (describing the "bubble" interpretation at issue in *Chevron*). Of course, the court should not use the term "ambiguity" at all, considering that the interpretive dispute could be said to involve multi-dimensional polysemy (as opposed to ambiguity) because it is unclear what features are aspects of the lexical meaning of "major stationary source." *See infra* notes 243-47 (describing the indeterminacy at issue in *Chevron*). In any case, under the proposed framework in Part IV, the issue would be classified as one of semantic indeterminacy resolution.

156. *See* MIRA ARIEL, DEFINING PRAGMATICS 6 (2010) (describing the "semantics/pragmatics division of labor").

157. *See id.* at 24. There is a wide, and sometimes contradictory, range of ways in which philosophers and linguistics have used the terms "semantic" and "pragmatic." *See id.* at 4-16. A general description of the distinction, though, is sufficient for present purposes.

158. "The principle of compositionality states that the meaning of a complex linguistic expression is built up from the meanings of its composite parts in a rule-governed fashion." MURPHY & KOSKELA, *supra* note 104, at 36. Thus, a sentence is compositional if its meaning is the sum of the meanings of its parts and of the relations of the parts.

159. Textual canons are presumptions that are drawn from the drafter's choice of words, their grammatical placement in sentences, and their relationship to other parts of the "whole" statute. *See* SLOCUM, *supra* note 44, at 181-202 (analyzing whether textual canons help determine the ordinary meaning of a legal text).

160. *See* ARIEL, *supra* note 156, at 4-8, 28.

pragmatics complements semantics. Pragmatics takes account of contextual factors, such as the mutual knowledge shared by the speaker and addressee.[161] The interpreter seeks to identify the utterer's intention in making the utterance by considering what the utterer said and the way she said it.[162] Pragmatics is therefore concerned with whatever information is relevant to understanding an utterance, even if such information is not reflected in the syntactic properties of the sentence.[163] In legal cases, pragmatic information might therefore include evidence from legislative history, even if that information does not assist in determining the ordinary meaning of the textual language.[164]

If a given provision is deemed by a court to be ambiguous, it must be viewed as multivocal with respect to the interpretive question based on a combination of general language usage (i.e., semantics) and the meaning of the language in some particular context (i.e., pragmatics).[165] Despite the importance of conventional word meanings, and other objective determinants of meaning, they do not provide the sole basis for interpretations, either outside of the law or for judges.[166] Semantic meaning that cuts across contexts is always overlaid by context-specific pragmatic determinants of meaning that can shape and change the ultimate meaning of the communication.[167] Ignoring this pragmatic (i.e., contextual) evidence results in the interpreter not taking sufficient note of the circumstances which

161. *Cf. id.*

162. *See id.* at 24.

163. *See id.* at 28.

164. Legislative history is pragmatic evidence because it "allows the interpreter to consider the particular context surrounding the enactment of a statute and make inferences about legislative intent based on that evidence." Stefan Th. Gries & Brian G. Slocum, *Ordinary Meaning and Corpus Linguistics*, 2017 BYU L. REV. 1417, 1430.

165. *See* SLOCUM, *supra* note 44, at 107-09 (explaining how legal interpretation depends on both generalizations about language usage and inferences from the specific context of the statute).

166. *See* Akman, *supra* note 127, at 745 (discussing the importance of context).

167. *See* Fredsted, *supra* note 87, at 532 (explaining that ambiguity is manifest in the use of language where "a stable logical-semantic kernel of meaning exists" that is "overlaid by an unstable context specific pragmatic meaning"). In fact, many scholars agree with the "linguistic underdeterminacy thesis," which holds that "[t]he linguistically encoded meaning of a sentence radically underdetermines the proposition a speaker expresses when he or she utters that sentence." Yan Huang, *Neo-Gricean Pragmatics, in* THE OXFORD HANDBOOK OF PRAGMATICS 70 (Yan Huang ed., 2017).

regulate natural language comprehension.[168] Yet, accounting for both semantic and pragmatic evidence in the ambiguity determination will naturally involve the same, often ideological, debates about the weighing of semantic meaning and contextual evidence that occur outside of the administrative context.[169]

Considering the judicial conflation of ambiguity identification and disambiguation, there is no obvious point (either as a matter of language or in the law) in the interpretive process, prior to its completion, where a reviewing court can stop and declare the provision to be ambiguous. There is therefore no objective standard to determine whether the determination is correct or incorrect (unlike linguists' tests, which are theoretically based and can at least be verified by others).[170]

B. Judicial Confusion About Ambiguity

The uncertainties of the judicially created ambiguity concept, including the conflation of ambiguity identification and disambiguation, have helped to elide the analytic distinction between *Chevron*'s Step One and Step Two. Typically, regardless of the kind of indeterminacy involved, a legal interpretive dispute is resolved in the context of litigation, where the court considers two competing interpretations. If the court determines that the provision is ambiguous, it has, according to one common judicial definition of ambiguity, decided that there are at least two plausible interpretations, which would typically be the two interpretations offered by the opposing parties.[171] If so, the Step Two question of "reasonableness" has also been decided, unless Step Two is additionally concerned with whether the agency adequately explained why it chose one plausible interpretation rather than another.[172] The natural

168. *See* Fredsted, *supra* note 87, at 532.

169. *See supra* note 42 (describing textualism and intentionalism).

170. *See supra* note 125 and accompanying text.

171. *See supra* note 143 and accompanying text.

172. Some commentators have suggested that Step Two review should consider whether the agency's interpretive methodology and reasons for selecting its interpretation are not "arbitrary, capricious, [or] an abuse of discretion" in violation of Section 706(2)(A) of the Administrative Procedure Act. *See, e.g.*, Kenneth A. Bamberger & Peter L. Strauss, Chevron*'s Two Steps*, 95 VA. L. REV. 611, 621 (2009); Catherine M. Sharkey, *Cutting in on the* Chevron *Two-Step*, 86 FORDHAM L. REV. 2359, 2365 (2018).

tendency of the Step One ambiguity determination to also decide the reasonableness of the agency's interpretation accounts for why some commentators claim that *Chevron* should be properly viewed as having only one step.[173]

The judiciary's conflation of ambiguity identification and disambiguation also means that linguistic indeterminacy can be present in situations where legislative intent is discernable, even though a judicial declaration of ambiguity signals the non-identifiability of congressional intent.[174] The uncertainty of this process has caused ambiguity determination to be seen as subjective, both within and outside the *Chevron* context.[175] Even the extent to which ambiguity identification and disambiguation should be conflated is not clear. Consider the Supreme Court's decision in *National Cable & Telecommunication Ass'n v. Brand X Internet Services*,[176] where the Court indicated 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."[177] In a later case, *United States v. Home Concrete & Supply, LLC*,[178] the Court had to interpret its decision in *Colony, Inc. v. Commissioner*,[179] decided more than five decades earlier, and determine whether it had deemed the relevant statutory language to be ambiguous.[180] The Court in *Home Concrete* reasoned that although it indicated in *Colony* that the

173. *See generally* Matthew C. Stephenson & Adrian Vermeule, Chevron *Has Only One Step*, 95 VA. L. REV. 597 (2009). Nevertheless, sometimes a court will invalidate an agency's interpretation at Step Two. *See* Kent Barnett & Christopher J. Walker, Chevron *in the Circuit Courts*, 116 MICH. L. REV. 1, 33 (2017) (explaining that 93.8 percent of agency interpretations that made it to Step Two were upheld).

174. For a discussion of the judiciary's conflation of ambiguity determination and disambiguation, see *infra* Part III.A.

175. *See, e.g.*, Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546, 572 (2005) (Stevens, J., dissenting) ("Because ambiguity is apparently in the eye of the beholder, I remain convinced that it is unwise to treat the ambiguity *vel non* of a statute as determinative of whether legislative history is consulted."); Scalia, *supra* note 40, at 520-21 ("How clear is clear? It is here, if *Chevron* is not abandoned, that the future battles over acceptance of agency interpretations of law will be fought.").

176. 545 U.S. 967 (2005).

177. *Id.* at 982 (emphasis added).

178. 566 U.S. 478 (2012).

179. 357 U.S. 28 (1958).

180. *Home Concrete & Supply*, 566 U.S. at 480.

relevant language was not "unambiguous," it was able to discern congressional intent by consulting legislative history, thus rendering the provision unambiguous.[181] The Court, in essence, indicated that "linguistic ambiguity" is not sufficient to make a provision ambiguous.[182]

In response, Justice Scalia, in a concurring opinion, argued that the Court was confusing ambiguity identification with disambiguation, indicating that the Court's reliance on legislative history and statutory coherence were

> the sorts of arguments that courts *always* use in *resolving* ambiguities. They do not prove that no ambiguity existed, unless one believes that an ambiguity resolved is an ambiguity that never existed in the first place. *Colony* said unambiguously that the text was ambiguous, and that should be an end of the matter.[183]

Note that Justice Scalia's argument was not that contextual evidence should not be considered by courts, but rather that some determinants of meaning are relevant to ambiguity identification rather than disambiguation.[184] The Court did not address Justice Scalia's argument, however, nor did the Court indicate that there are any restrictions on the evidence that can be considered when determining ambiguity.[185] Some have argued that *Chevron*'s rationale or changing judicial views on the proper determinants of meaning should preclude the inclusion of some determinants of meaning as "traditional tools" of statutory interpretation.[186] These

---

181. *Id.* at 482.

182. *Id.* at 488-89 ("There is no reason to believe that the linguistic ambiguity noted by *Colony* reflects a post-*Chevron* conclusion that Congress had delegated gap-filling power to the agency.").

183. *Id.* at 496 (Scalia, J., concurring).

184. *See id.*

185. *Id.* at 487-90 (majority opinion). Similarly, other than declaring that courts should apply "traditional tools of statutory construction" in Step One, the Court in *Chevron* did not instruct courts on how to manage contextual considerations. Chevron U.S.A. Inc. v. Nat'l Res. Def. Council, Inc., 467 U.S. 837, 843 n.9 (1984).

186. *See, e.g.*, John F. Manning, Chevron *and Legislative History*, 82 GEO. WASH. L. REV. 1517, 1517 (2014) ("[T]he Court's understanding of the 'traditional tools' of statutory interpretation has changed" and legislative history should no longer be considered a "traditional tool.").

arguments, although relevant to the administration of *Chevron*, do not address the definition or nature of ambiguity.

C. Evaluating the Judicially Created Ambiguity Standard

The judicial conflation of ambiguity identification and disambiguation has had various consequences, including the unhelpful definitions of ambiguity and confusion about when ambiguity should be declared. These consequences cast doubt on whether the ambiguity concept is well-suited to fulfill its doctrinal purpose of mediating between judicial autonomy (Step One) and agency discretion (Step Two).[187] Even so, the judicial conflation of ambiguity and disambiguation is arguably a coherent response to the entrenched nature of ambiguity in natural languages and, correlatively, the judicial need to limit its doctrinal significance by connecting it to the absence of discernable congressional intent rather than linguistic indeterminacy. In fact, connecting ambiguity to intent is consistent with recent psycholinguistic theories of language processing.[188] These theories only offer limited support for the ambiguity concept, though, if linguistic ambiguity cannot be as efficiently disambiguated in statutory interpretation cases as it is in nonlegal communication.

Scholars have recently demonstrated that efficient communication systems will contain ambiguity as long as context is informative about meaning.[189] Thus, ambiguity can result from a rational process of communication and can act as a functional property of language which allows for greater communicative efficiency.[190] An efficient communication system may produce ambiguous language when it is examined out of context but will not express information

187. *See supra* notes 9-13 and accompanying text (explaining Step One and Step Two of the *Chevron* doctrine).

188. *See* Juba et al., *supra* note 87, at 2.

189. *See id.* ("[I]t is easy to justify ambiguity to anyone who is familiar with information theory."); Hannah Rohde et al., *Communicating with Cost-based Implicature: a Game-Theoretic Approach to Ambiguity, in* PROCEEDINGS OF SEMDIAL 2012 (SEINEDIAL) 108 (Sarah Brown-Schmidt et al. eds., 2012) ("Rather than avoiding ambiguity, speakers show behavior that is in keeping with theories of communicative efficiency that posit that speakers make rational decisions about redundancy and reduction."); Piantadosi et al., *supra* note 87, at 280.

190. *See* Rohde et al., *supra* note 189, at 108.

already provided by the context.[191] Listeners are good at disambiguating in context, and therefore any effort the speaker makes to express a distinction that listeners could have inferred is, in effect, wasted effort.[192] Evidence from language processing indicates that comprehenders are able to quickly use contextual information in the form of discourse context, local linguistic context, or more global world knowledge in disambiguating language.[193] Comprehenders continually make inferences about what speakers are intending to convey.[194] In fact, inference is "cognitively cheap" and articulation expensive, which means that normal human communication requires the comprehender to make continual inferences about speaker intention and, at the same time, does not require the speaker to fully articulate every shade of meaning.[195]

Researchers have demonstrated that systems that strive for communicative or cognitive efficiency will be naturally ambiguous, and the presence of ambiguity in natural languages should not therefore be puzzling.[196] The pressure of communicative ease may come at the cost of clarity, requiring comprehenders to actively use context to disambiguate meaning, but ease does not necessarily undermine efficiency if disambiguation is not prohibitively costly.[197] In many communicative situations, speakers easily infer the intended meaning on the basis of various items of evidence, including that provided by context.[198] Thus, if there are at least two meanings that are unlikely to occur in the same contexts, speakers can

---

191. *See* Juba et al., *supra* note 87, at 79 ("In context, the intended meaning is often clear, and hence shorter communication is preferred."); Piantadosi et al., *supra* note 87, at 281 ("[W]here context is informative about meaning, unambiguous language is partly redundant with the context and therefore inefficient.").

192. *See* Juba et al., *supra* note 87, at 80-81, ("[I]t would be infeasible to print a 'sentence dictionary' of what every sentence or document might mean in any context. However, such a mapping is, to some extent, implicitly computable in people's minds."); Piantadosi et al., *supra* note 87, at 289.

193. *See* Piantadosi et al., *supra* note 87, at 289.

194. *See id.*

195. STEPHEN C. LEVINSON, PRESUMPTIVE MEANINGS: THE THEORY OF GENERALIZED CONVERSATIONAL IMPLICATURE 29 (2000) (arguing that the design requirements of natural languages "maximize[ ] inference").

196. *See* Piantadosi et al., *supra* note 87, at 282.

197. *See id.* at 284.

198. *See id.* ("[T]he inference involved in disambiguation does not appear to be especially costly. In many if not all communicative situations, speakers easily infer a rich set of pragmatic and social consequences of language use.").

improve the linguistic system by introducing ambiguity.[199] If disambiguation is costly, though, a language with ambiguity would no longer be efficient, and the necessity of using information from context to infer the correct meaning would substantially impede comprehension.[200] Such a result could occur if key information is omitted from the context or the system re-uses particularly difficult linguistic elements.[201]

Outside of law, the presence of ambiguity is not a license for the audience to exercise discretion in determining the speaker's meaning. Rather, as indicted above, ambiguity's function is to promote efficiency in communication.[202] If the communicative system of legislative inscription and judicial interpretation were "easy," conflation of ambiguity identification and disambiguation would be efficient.[203] The system would allow for ambiguity yet still involve messages that are efficiently produced, communicated, and processed.[204] The ambiguity concept as developed by courts might therefore not be problematic if the resolution of linguistic indeterminacy in legal texts was routine and uncontroversial, but such resolution is costly.[205] Contextual inference may be "cognitively cheap" and articulation expensive in nonlegal communications, but inference in legal interpretation, although unavoidable, is expensive.[206]

Perhaps most importantly, the research on the efficiency of ambiguity is of limited usefulness to legal texts because ambiguity is

199. *See id.*

200. *See id.*

201. *See id.*

202. *See* LEVINSON, *supra* note 195, at 29 (explaining that much of a speaker's intent is not explicitly coded in language but inferred through the comprehender's knowledge of likely intentions, conventions of interaction, and common sense knowledge about the world); Piantadosi, et al., *supra* note 87, at 282 ("[A]mbiguity likely results from ubiquitous pressure for efficient communication.").

203. *See* Piantadosi et al., *supra* note 87, at 281 ("An easy communication system is one which signals are efficiently produced, communicated, and processed.").

204. *See id.* at 281 ("An easy communication system is one which signals are efficiently produced, communicated, and processed.").

205. *Cf.* Rohde et al., *supra* note 189, at 108 ("Using ambiguous forms to convey meaning depends in part on the listener's ability to diagnose the source of the ambiguity: Does the ambiguity likely arise from the speaker's own production decisions or from other factors that make the expression noisy or unclear.").

206. *Cf. id.*

only one form of indeterminacy.[207] Context may often enable comprehenders to disambiguate, or resolve polysemy, but a richer set of contextual cues is often necessary to precisify a vague or general expression (especially when it is multi-dimensionally polysemous or vague), or give a determinate meaning to a contextually valued standard.[208] The inefficiency of indeterminacy in legal texts is a function, in part, of the costs of resolving indeterminacy and the unpredictability of interpretive results.[209] Unpredictability is caused by methodological differences among judges, as well as the inherent variances in judicial interpretive judgments that occur when contextual determinants are being weighed.[210] The resolution of indeterminacy in legal texts thus allows for judicial discretion, which is consciously exercised and often informed by ideology and other non-language considerations that are largely empirically untested.[211]

The ambiguity concept created by judges is thus irredeemably flawed. The judicially created umbrella ambiguity concept elides the separate issues of ambiguity identification and disambiguation, as well as the various forms of indeterminacy, but the superficial simplicity of the standard and existing definitions also obscures the intractable problem of how reviewing courts are to identify ambiguity.[212] When ambiguity identification and disambiguation are conflated, ambiguity determination depends on an assessment of the available evidence, but the determination is a conclusion that is not based on any linguistic tests or useful definitions.[213] As a result,

---

207. *See supra* notes 89-124 (describing the various forms of indeterminacy).

208. For example, with a contextually valued standard, determining the comparison standard sometimes requires that an evaluative judgment be made, which involves discretion and is not likely something that would be fully fleshed out by the legislature only in the context of the statute and not in the language of the statute itself. *See supra* notes 120-24 (describing the challenges of contextually valued standards).

209. *See* Beermann, *supra* note 5, at 741-50.

210. *See id. See generally* 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 (2008) (discussing the factors that predict agency win rates, including the applicability of *Chevron*).

211. *See* SLOCUM, *supra* note 44, at 81-82 (explaining the non-empirical nature of legal interpretation).

212. *See supra* notes 141-44 and accompanying text (describing judicial definitions of ambiguity).

213. *See supra* notes 141-44 and accompanying text.

there is no stable standard for mediating between contextual disambiguation that tracks legislative intentions and a determination that the provision is ambiguous and agency discretion is therefore legislatively intended.[214]

The flaws inherent in the ambiguity concept thus extend beyond the concept's inability to foreclose the ideologically charged disputes about interpretive methodologies.[215] In fact, the ambiguity concept adds to the discretion and uncertainty that is central to the *Chevron* standard.[216] As a device for allocating interpretive power between courts and agencies, the ambiguity concept is not well-designed to serve the role that courts have assigned it.[217] Rejection of the ambiguity concept in favor of some alternative that better performs the task is therefore warranted.

IV. SOURCES OF INDETERMINACY AS A FRAMEWORK FOR ALLOCATING INTERPRETIVE AUTHORITY

Even though the ambiguity concept is not able to coherently allocate interpretive authority between courts and agencies, it is intuitive that indeterminacy should play a role in the allocation of interpretive authority. In the absence of indeterminacy, congressional intent typically must be implemented and there is no basis for deferring to an agency's interpretation. Conversely, when indeterminacy does exist there may be no discernable congressional intent to implement. Though the interpretive issue may still be decidable by a court (as interpretive issues generally are), even before *Chevron* it was widely thought that in these situations the agency's views regarding the interpretive issue should be influential.[218] Thus, the basic principle, expressed in *Chevron* and elsewhere, that indeterminacy should signal some sort of additional judicial consideration of the agency's interpretation is coherent, intuitive, and perhaps

214. *See* Beermann, *supra* note 5, at 731-32 (indicating that, when applying *Chevron*, "the Court generally split along familiar ideological lines, with liberals deferring to liberal agency interpretations and conservatives deferring to conservative agency interpretations").

215. *See supra* note 42 (describing the basic division regarding interpretive methodology that extends beyond the administrative state).

216. *See supra* notes 9-13 and accompanying text (explaining the *Chevron* standard).

217. *See supra* notes 9-13 and accompanying text.

218. *See* Gary Lawson & Stephen Kam, *Making Law Out of Nothing at All: The Origins of the* Chevron *Doctrine*, 65 ADMIN. L. REV. 1, 6-29 (2013) (describing pre-*Chevron* law).

inevitable, even if determining the role that indeterminacy should play is difficult.[219]

This Part outlines how indeterminacy should be relevant to judicial review. The basic premise is that instead of the umbrella ambiguity concept—which does not distinguish among different forms of indeterminacy—courts should consider that different types of indeterminacy call for different judicial treatment.[220] Taking account of such nuance would help make judicial review more coherent, as well as better match likely congressional intent about delegation of interpretive issues to agencies. The proposed framework would also eliminate the ambiguity trigger, which arbitrarily mediates between de novo judicial interpretation and deference to agency interpretations. Instead of deciding whether to defer at some undetermined point in the interpretive process, as happens with the ambiguity concept, courts should instead declare that interpretive issues, properly defined, are judicially resolvable. The notion that interpretive issues are judicially resolvable should lead to the conclusion that, due to the nature of language and legal interpretation, certain types of potential indeterminacy are presumptively judicially resolvable while other types of potential indeterminacy are presumptively for the agency to resolve.[221]

A. A New Framework for Judicial Review

Courts should first recognize that "ambiguity" is underinclusive as a description of the types of linguistic phenomena relevant to judicial review. Various types of indeterminacy were described earlier in this Article, but not all of them require a distinct standard of review. Rather, many of them present similar issues relevant to the allocation of interpretive authority between courts and agencies.[222] Instead, three different categories are proposed: (1) Semantic Indeterminacy Resolution, (2) Structural Indeterminacy Reconciliation,

219. *See* Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 844 (1984).

220. *See supra* notes 136-49 and accompanying text (describing the umbrella ambiguity concept).

221. *See supra* notes 156-68 and accompanying text (describing the distinction between semantics and pragmatics).

222. *See supra* Part II.

and (3) Literal Meaning Mandatoriness.[223] Although bright-line distinctions are not always possible to maintain, the three categories present different interpretive questions for courts.

Consider a brief introductory description of the three categories using H. L. A. Hart's famous hypothetical involving a legal rule that "forbids you to take a vehicle into the public park."[224] A semantic indeterminacy resolution issue might, for example, involve a dispute about the meaning of the term "vehicle" and whether a Segway falls under the definition. In turn, a structural indeterminacy reconciliation issue would not involve a challenge to the agency's definition of "vehicle." Instead, imagine that another, arguably related, provision of the code defines "vehicle." The interpretive question might be whether the legislature intended for that definition to be applicable to the no-vehicles-in-the-park provision. The question would involve a reconciliation of the two relevant provisions as opposed to an attempt (as in a semantic indeterminacy scenario) to determine the meaning of "vehicle." Consider, instead, a literal meaning mandatoriness issue. Imagine that the agency believes that the no-vehicles-in-the-park provision should not cover any emergency vehicles, such as ambulances and police cars. In such a situation, the interpretive issue does not involve the meaning of "vehicle," but, rather, whether the provision must be given its literal meaning.[225]

---

223. Justice Kavanaugh proposes that courts distinguish between statutes with broad and open-ended terms, where courts should generally give agencies the discretion to make policy judgments, and statutes with specific terms or phrases, where courts should determine whether the agency's interpretation is the best reading of the statutory text. *See* Kavanaugh, *supra* note 13, at 2153-54. Perhaps Justice Kavanaugh is referring to a distinction between generality and polysemy, or, less likely, between semantic indeterminacy resolution and structural indeterminacy reconciliation. *See supra* notes 95-119 and accompanying text (explaining the distinctions among the terms). If the former distinction is intended, a broad versus narrow distinction would likely not be workable considering that the terms "broad" and "narrow" are contextually valued standards whose meanings are not clear in the context of administrative statutes. If the former distinction is intended, the proper description is not "broad" and "narrow" terms (which does not accurately depict the two categories) but, rather, semantic indeterminacy and structural indeterminacy.

224. Hart, *supra* note 103, at 607.

225. The interpretive dispute could involve a semantic indeterminacy issue if, for example, the government argued that the legal meaning of "vehicle" excluded emergency vehicles. Alternatively, the interpretive question might involve structural indeterminacy resolution if another provision that exempts emergency vehicles from generally applicable government rules pertaining to traffic control and enforcement arguably applied to the no-vehicles-in-the-park provision.

The above categories represent actual linguistic phenomena, but their importation to the law necessarily involves certain normative principles about the proper relationship between courts and agencies.[226] Specifically, the groupings reflect the traditional view that courts are experts at statutory interpretation—which includes determining congressional intent—and agencies are experts at policymaking—which includes exercising delegated discretion.[227] As will be explained below, the categories thus provide a framework for the allocation of interpretive authority between courts and agencies on the basis of their respective areas of expertise.[228] Furthermore, the distinctions represented by the categories are reflected in various Supreme Court decisions, although the Court has consistently (and confusingly) treated the issues as though they fall under the ambiguity concept.[229]

The current undifferentiated judicial approach to linguistic indeterminacy ignores the probabilities of legislative delegation. Unlike the case with most efficient nonlegal communication, the legislature sometimes intends by lexical indeterminacy to signal delegation to a third party (in other words, an agency) to determine the meaning of a provision.[230] Courts do not, however, typically inquire into the type of linguistic indeterminacy involved as a way of gauging congressional intent to delegate.[231] Other kinds of indeterminacy, such as syntactic ambiguity, may not typically signal the intent to delegate interpretive authority to the relevant agency.[232] These

226. *See supra* notes 93-124 and accompanying text (describing the linguistic phenomena that result in indeterminacy).

227. *Cf.* Negusie v. Holder, 555 U.S. 511, 530 (2009) (Stevens, J., concurring in part and dissenting in part) ("The *Chevron* framework thus accounts for the different institutional competencies of agencies and courts: Courts are expert at statutory construction, while agencies are expert at statutory implementation. That the distinction can be subtle does not lessen its importance.").

228. *See id.*

229. *See supra* notes 136-49 and accompanying text (describing the umbrella ambiguity concept).

230. *See* Gluck & Bressman, *supra* note 68, at 997 (describing the view of legislative drafters that "one reason for statutory ambiguity is a desire to delegate decisionmaking to agencies").

231. One arguable exception is the "major questions" doctrine, although the doctrine does not describe a linguistic phenomenon but rather covers issues deemed to be of exceptional importance to the legislative design. *See infra* notes 378-80 and accompanying text (describing the major questions doctrine).

232. *See supra* note 90 and accompanying text (describing syntactic ambiguity).

kinds of indeterminacy may reflect, instead, a failure of the legislature to clearly express its intent. Yet, without regard to the type of indeterminacy at issue, a reviewing court, in Step One, is to assume that Congress decided the interpretive issue and retain that assumption until some unspecified point in the interpretive process when it determines that the provision is ambiguous.[233]

The nature of much of the language in regulatory texts underscores the need for judges to inquire into the type of indeterminacy involved as a way of gauging congressional intent to delegate. Many of the key expressions in regulatory statutes do not exist outside of the regulatory environment (for example, "major stationary source" in *Chevron*).[234] In such situations, the words may lack ordinary meanings or recognized technical meanings, making the determination of meaning less an empirical matter and more a matter of policy consideration.[235] Furthermore, in these cases, the indeterminacy may not be readily resolvable through the consideration of context. This is especially true when the indeterminancy involves vagueness or contextually valued standards.[236] Vagueness and contextually valued standards do not involve a choice between two discreet meanings.[237] This problem is exacerbated by the precision required in legal disputes. Legal texts may be drafted with greater explicitness than exists in most nonlegal communications, but legal language is nevertheless often indeterminate, at least relative to the needs of the legal system.[238] Scholars have observed that speakers and hearers mean "approximately" the same thing by the same

233. *Cf.* Lisa Schultz Bressman, Chevron*'s Mistake*, 58 DUKE L.J. 549, 559-71 (2009) (describing the mistaken assumption underlying *Chevron* that courts should interpret statutes as if Congress intended that text to have a relatively specific meaning).

234. In nonlegal communication, ambiguity is a trade-off between the two communicative pressures of clarity and ease, with more frequent words being more ambiguous. This trade-off is not possible if the words being used cannot be easily interpreted (as is the case in the administrative context). *Cf.* Molly Lewis et al., *The Structure of the Lexicon Reflects Principles of Communication*, 36 PROC. ANN. MEETING COGNITIVE SCI. SOC'Y 845, 845 (2014) ("[A] regularity in the lexicon [is] that more complex ideas tend to be named by longer words.").

235. *Cf.* Rohde et al., *supra* note 189, at 114 ("Speakers also experience difficulty ... when describing objects which ... are unfamiliar or lack a name.").

236. *See supra* notes 100-24 and accompanying text (describing vagueness and contextually valued standards).

237. *See supra* notes 100-24 and accompanying text.

238. *See* SLOCUM, *supra* note 44, at 118-19 (discussing the precision required of answers to interpretive questions in law compared to most nonlegal communication).

words, "and [ ] that is all that matters for practical purposes."[239] Yet, legal cases require binary and precise answers to interpretive disputes (for example, is a Segway a vehicle), and approximateness is insufficient.[240] Interpretation must therefore often yield precise answers to questions the enacting legislature did not likely consider.

In addition to acknowledging a broader range of linguistic phenomena relevant to judicial review, courts should eliminate the ambiguity trigger, which does not serve to coherently mediate between judicial and agency interpretation. Instead, courts should engage in statutory interpretation and agencies in exercising delegated powers in statutory implementation. With any interpretive dispute, a reviewing court must determine whether the provision has a mandatory semantic meaning, which is determined by precedent, or the ordinary or technical meaning of the provision's language. If there is no mandatory semantic meaning, and an issue of semantic indeterminacy is at issue, the court should presume that the agency's construction of the provision is correct. The presumption of correctness may be rebutted through the court's consideration of the available pragmatic or semantic evidence and a subsequent conclusion that the agency's interpretation conflicts with the legislative design.[241]

In contrast, if structural indeterminacy is at issue, the court should assume that the issue is judicially decidable through a consideration of legislative design. If multiple meanings are consistent with the legislative design, the agency's interpretation, especially if based on expertise, may be influential in resolving the indeterminacy.[242] Similarly, it is judicially decidable whether the literal meaning of a provision is consistent with the overall legislative design. If so, an agency's interpretation may not deviate from the literal

239. Timothy Williamson, *Vagueness, Indeterminacy, and Social Meaning*, 16 CRITICAL STUD. 61, 73 (2001).

240. *See supra* note 238 and accompanying text.

241. Congress, like speakers outside of the law, signals its intent in a variety of ways. *See* Gluck & Bressman, *supra* note 68, at 994 (indicating that their study "suggests that Congress often uses extratextual signals as well" as textual signals of intent).

242. Even if the legislative design indicates that a particular interpretation is more consistent with congressional intent, a reviewing court may nevertheless select a different interpretation for various reasons specific to the law, such as the applicability of a substantive canon of interpretation. *See, e.g.*, Zadvydas v. Davis, 533 U.S. 678, 701-02 (2001) (creating a doctrinal limitation to an immigration detention provision in order to avoid a serious constitutional issue).

meaning of the provision and, if not, the agency's interpretation must deviate from the literal meaning of the provision. Thus, in all of the situations described above, the category implicated by the interpretive dispute should direct the reviewing court's approach to the interpretive question and its attitude towards the agency's resolution of it.

B. Semantic Indeterminacy Resolution

Chevron itself involved an issue of semantic indeterminacy. "Congress enacted certain requirements applicable to States that had not achieved the national air quality standards established by the Environmental Protection Agency ... pursuant to earlier legislation. The amended Clean Air Act required these nonattainment States to establish a permit program regulating new or modified major stationary sources of air pollution."[243] The Environmental Protection Agency (EPA) regulation at issue "allo[wed] a State to adopt a plantwide definition of the term 'stationary source.'"[244] The plantwide definition, the so-called "bubble" concept, authorized an existing plant "contain[ing] several pollution-emitting devices [to] install or modify one piece of equipment without meeting the permit conditions if the alteration [would] not increase the total emissions from the plant."[245] The D.C. Circuit, in striking down the regulation, relied on pragmatic evidence.[246] Illustrating the judicial decidability of most interpretive issues, the court indicated that the legislative history was "at best contradictory," but relied on the purpose of the statute and reasoned that the bubble concept was "inappropriate" in programs enacted to improve air quality.[247]

Notwithstanding the D.C. Circuit's decision (which was reversed by the Supreme Court),[248] several aspects of *Chevron* make it a

243. Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 839-40 (1984). The relevant provision, 42 U.S.C. § 7502(c), provided: "The plan provisions ... required [by subsection (a)] ... shall require permits for the construction and operation of new or modified major stationary sources ... in accordance with section 7503 [relating to permit requirements]." 42 U.S.C. §§ 7502(c), (c)(5) (2012).

244. *Chevron*, 467 U.S. at 840.

245. *Id.*

246. *See id.* at 841 (citing Nat. Res. Def. Council, Inc. v. Gorsuch, 685 F.2d 718 (1982)).

247. *Id.* at 841-42 (quoting *Nat. Res. Def. Council*, 685 F.2d at 726 n.39).

248. *See id.* at 842.

paradigmatic example of a situation where there is indeterminacy that should be presumptively for the agency to resolve. The indeterminacy could be said to involve multi-dimensional polysemy because it is unclear what features are aspects of the lexical meaning of "major stationary source."[249] In order to reject the agency's interpretation, a reviewing court must of course give some meaning to "major stationary source" that would exclude the agency's "bubble" concept as not falling within the possible boundaries of the concept.[250] If precedent does not determine the meaning of the relevant statutory language, the presumption is that it should be given its "ordinary meaning."[251] Considering that judicial reliance on dictionaries has dramatically increased since 1987, a court might approach the ordinary meaning of "major stationary source" by consulting dictionary definitions.[252] If the court adheres to the classical theory of meaning (as is likely), it will assume that a dictionary definition describes a category with a set of properties (i.e., "defining attributes") in which each attribute is singly necessary for category membership, and possession of the set of attributes is sufficient for category membership.[253] "[T]he parameters of the concept's extension (i.e., its referential range of application) are [thus] always capable of being determined with precision."[254] In this way "the meaning of a word consists of a set of properties that can be used as a sort of decision procedure to identify all and only the things denoted by the word."[255] A court could therefore consult dictionary definitions of "stationary" and "source," combine the two in some

249. *Id.* at 840; *see supra* notes 112-17 and accompanying text (describing multi-dimensional polysemy).

250. *See Chevron*, 467 U.S. at 860-62.

251. *See* Taniguchi v. Kan Pac. Saipan, Ltd., 566 U.S. 560, 566 (2012) ("When a term goes undefined in a statute, [the Court] give[s] the term its ordinary meaning."). If the language has an established common law meaning, the interpretive dispute may turn on whether the statutory term must be given its common law meaning.

252. *Chevron*, 467 U.S. at 840; *see* James J. Brudney & Lawrence Baum, *Oasis or Mirage: The Supreme Court's Thirst for Dictionaries in the Rehnquist and Roberts Eras*, 55 WM. & MARY L. REV. 483, 486, 495 (2013) (explaining that, while the United States Supreme Court's use of dictionaries was virtually non-existent before 1987, now as many as one-third of statutory decisions cite dictionary definitions).

253. *See* SLOCUM, *supra* note 44, at 221-22 ("By averring that words in legal texts can be defined by necessary and sufficient criteria, judges can avoid alternative views of meaning that complicate and undermine the classical theory.").

254. *Id.* at 222.

255. *Id.* at 221-22.

manner, and treat the dictionary definitions as setting forth necessary and sufficient conditions for membership within the "major stationary source" concept.[256]

The above approach, though, is deeply flawed. One issue is that the practice of determining word meanings through dictionary definitions is problematic due to the acontextual nature of dictionary definitions, which present words more or less individually in an "accessible list."[257] More importantly, viewing most definitions as providing necessary and sufficient conditions of meaning has been thoroughly undermined by prototype theory.[258] By the 1970s, the classical view of categorization began suffering sustained criticisms.[259] In particular, researchers rejected the view that category membership involves a set of necessary attributes that are jointly sufficient to delimit the category in contrast with others.[260] These researchers offered as alternatives to the classical view psycholinguistic theories of how people perceive categories.[261] In contrast to the traditional view, many words are not defined by people in terms of a list of necessary and sufficient conditions that must be satisfied for a thing to count as a member of the relevant category.[262] Instead, they have prototypical structures that cannot be defined by means of a single set of criterial (i.e., necessary and sufficient) attributes, and blurring occurs at the edges of the category.[263] Category membership is thus seen as being a matter of degree, rather than simply a yes-or-no question.[264] Such a view of word definitions poses obvious problems for legal interpretation, which in general relies on

256. *Chevron*, 467 U.S. at 840. The statute defined "major" as a source that "must emit at least 100 tons of pollution to qualify." *Id.*

257. *See* M. A. K. HALLIDAY & COLIN YALLOP, LEXICOLOGY: A SHORT INTRODUCTION 24-25 (2007).

258. *See* LAWRENCE M. SOLAN, THE LANGUAGE OF STATUTES: LAWS AND THEIR INTERPRETATION 62-63 (John M. Conley & Lynn Mather eds., 2010).

259. *See id.* at 62-64. Even before the 1970s, philosophers like Wittgenstein undermined the classical theory of meaning and the mental structures underlying it. *See, e.g.*, LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS §§ 66-67 (G.E.M. Anscombe trans., 3d ed. 1968).

260. *See, e.g.*, SOLAN, *supra* note 258, at 63.

261. *See id.* at 62-65.

262. *See id.* at 63.

263. *See id.* at 63-64.

264. *See* Zhang, *supra* note 105, at 16 ("Category membership is not simply a yes-or-no question, but rather, a matter of degree. Different individuals may have different category-rankings depending on their experiences, their world knowledge, and their beliefs.").

bivalency (i.e., the idea that interpretative questions have "yes" or "no" answers).[265]

Two other factors, especially pertinent in the administrative state, should similarly counsel against judicial efforts to assertively define word categories. The first is that terms in legal texts often refer to intangible concepts that either do not exist outside of the law (such as "major stationary source")[266] or exist at too high a level of generality compared to the needs of the legal profession. These terms often do not refer to *natural kinds* (i.e., categories of things, such as "pigeon," "that occur naturally in the world without need for human intervention"), which might lend themselves to technical definitions or ordinary meanings that have at least prototypical examples.[267] Tangible *artefactual kinds* (i.e., "categor[ies] based on a particular human relationship to some natural things") might similarly at least have readily discernable ordinary meanings.[268] In contrast, "major stationary source,"[269] unlike familiar statutory terms such as "vehicle" and "fruit," is not a phrase that is used outside of the law, which undermines the notion that it has an ordinary meaning.[270] Even if a judicially created definition were possible, it would nevertheless not preclude problems of indeterminacy due to the possibility of vagueness, generality, or some other form of indeterminacy.[271]

The second factor counseling against judicial assertiveness is that defining a complex concept, such as "major stationary source,"[272] is not a situation where the separate concepts can simply be combined in a straightforward manner to form the complex concept. The definitional issue is especially acute for intangible concepts, such as "major stationary source," that do not exist outside of the law.[273] Conceptual combination is often illustrated using

265. *See* Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 840 (1984).

266. *See id.*

267. *See* MURPHY & KOSKELA, *supra* note 104, at 110.

268. *See id.*

269. *See Chevron*, 467 U.S. at 840.

270. *See* McBoyle v. United States, 283 U.S. 25, 25-27 (1931) (determining that an "airplane[]" is not a "vehicle"); Nix v. Hedden, 149 U.S. 304, 306-07 (1893) (determining that "tomatoes" are "vegetables" and not "fruit").

271. *See supra* notes 88-124 and accompanying text (describing the various forms of indeterminacy).

272. *See Chevron*, 467 U.S. at 840.

273. *See id.*

the "pet fish" example.[274] Something is a "pet fish" if it is both a "pet" and a "fish."[275] One might think that something is a stereotypical pet fish if it is a stereotypical pet and a stereotypical fish.[276] The problem, though, is that "a good example of a pet fish" (perhaps, a guppy) "is neither a prototypical pet" (some breed of dog) nor a prototypical fish (perhaps, a trout).[277] The example raises the issue of whether the two concepts, "pet" and "fish," can be combined in a straightforward way in order to create a complex concept that inherits the stereotypes of the constituents.[278] The pet fish problem illustrates that complex concepts require some theory as to how one can expect the separate concepts, each with its own prototype structure, to combine. Any such theories, though, do not offer algorithms and depend on the interpreter's knowledge and judgement of the world.[279]

As the above discussion indicates, giving determinate meanings to statutory terms in administrative cases should be viewed as challenging due to the prototypical nature of categories, the intangible nature of the concepts (which often do not exist outside of the law), and the difficulties associated with determining how the constituent concepts of complex concepts should combine. In light of these issues, the Court in *Chevron* properly recognized that the meaning of the relevant statutory provision was indeterminate.[280] The Clean Air Act Amendments of 1977, which were at issue in the case, did not specifically define "major stationary source."[281] Other provisions in the Clean Air Act did define the concept, but, in the Court's opinion, not precisely enough to resolve the interpretive issue.[282] Thus, the Court was left to determine the features of the "major

274. *See* Andrew C. Connolly, Jerry A. Fodor, Lila R. Gleitman, & Henry Gleitman, *Why Stereotypes Don't Even Make Good Defaults*, 103 COGNITION 1, 5 (2007).

275. *See id.*

276. *See id.*

277. *See id.* ("There is a *prima facie* problem about how to reconcile the stereotype theory of concepts with the compositionality constraint.").

278. *See id.*

279. *See* SLOCUM, *supra* note 44, at 251 ("One important source of information, world knowledge, has a greatly attenuated relevance when a complex concept that does not exist outside of the law is at issue.").

280. *See* Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 851 (1984).

281. *See id.*

282. *See id.* at 851, 860 (explaining that the definition "sheds virtually no light on the meaning of the term 'stationary source'").

stationary source" category on its own, and wisely determined that it could not do so on the basis of semantic meaning.[283] Of course, the Court did not explicitly consider the interpretive difficulties explained above, but it did realize it was not in a position to declare that "major stationary source," as a general matter, had a determinate meaning—either because of its ordinary meaning or because of the definitions Congress provided—that could resolve the interpretive issue before the Court.[284]

Although the Court's *Chevron* opinion famously created more uncertainty about judicial review than it resolved, the case is consistent with the theory that interpretive questions involving semantic indeterminacy should presumptively be decided by the agency.[285] The semantic meaning of "major stationary source"[286] is indeterminate, but such a determination should not conclude the interpretive process. Rather, the presumption can be rebutted by either semantic or pragmatic evidence. The presumption may be overcome on semantic grounds on the basis that even though words generally cannot be defined by means of a single set of criterial attributes, the agency's interpretation may clearly fall outside any plausible meaning of the term at issue. Imagine, for example, that the EPA adopted an expanded version of the "bubble" concept that provided that "major stationary source" could cover all of the factories a company owned.[287] Thus, the company could construct a pollution emitting device without obtaining a permit if it reduced emissions at one of its other plants, perhaps located far away from the plant at issue. In such a situation the reviewing court might well determine that even considering the presumption of agency resolution and the problems associated with determinate definitions described above, the meaning of "major stationary source"[288] must necessarily exclude the agency's interpretation.

As indicated above, the presumption of judicial undecidability might also be rebutted on the basis of pragmatic evidence indicating

283. *See id.* at 840, 861-62. The Court did not use the term "semantic meaning," of course.
284. *See id.* at 840, 862.
285. *See supra* notes 156-68 and accompanying text (describing the distinction between semantics and pragmatics).
286. *Chevron*, 467 U.S. at 840.
287. *Id.*
288. *Id.*

that some particular meaning was preferred or rejected. There may be, for example, an indication in the legislative history that Congress had considered and rejected the very interpretation the agency has adopted.[289] The interpretation may also be rejected by more indirect inferences about congressional intent. Perhaps the agency's interpretation is incompatible with related provisions, thereby indicating ex-ante congressional disapproval of the agency's interpretation.[290] Similarly, the agency's interpretation may be incompatible with judicial precedents interpreting a related provision.

The presumption of agency resolution of semantic indeterminacy thus reflects the institutional competencies of agencies and courts.[291] If courts are experts at statutory interpretation and agencies statutory implementation, issues of semantic indeterminacy should not be considered matters of prototypical statutory interpretation. Currently, under *Chevron*, issues of statutory implementation are not identified ex-ante but rather only after a comprehensive process of statutory interpretation has been conducted (i.e., the traditional ambiguity analysis).[292] The division of institutional competencies is thus muddled and contingent on the judge's personal predilections regarding the determination of ambiguity. In the administrative state, though, issues of semantic indeterminacy present situations where epistemic certainty regarding the interpretive question should be presumed unlikely. In such situations, the interpretation chosen by the agency can be ex-ante seen as statutory

289. Obviously, if the reviewing court is unwilling to consider legislative history, as some are, that source of pragmatic meaning will be unavailable. *See* Thomas W. Merrill, *Textualism and the Future of the* Chevron *Doctrine*, 72 WASH. U. L.Q. 351, 351-52 (1994).

290. Statutes and provisions *in pari materia* are to be construed together. *See* Michael Sinclair, "*Only a Sith Thinks Like That": Llewellyn's "Dueling Canons," One to Seven*, 50 N.Y. L. SCH. L. REV. 919, 973-74 (2006). Thus, "[i]f there is uncertainty as to the meaning of a word in a particular statute, one might look to its use in another statute on the same subject matter for guidance" on the basis that "among statutes *in pari materia*, one can reasonably expect similar uses, especially if they are part of an intentionally coherent scheme." *Id.* at 976-77.

291. Arguably, agencies have an institutional advantage over courts in ascertaining legislative intent. *See* ADRIAN VERMEULE, JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION 209-10 (2006) (arguing that agencies may be better at determining legislative intent than judges due to agencies' greater political responsiveness). Even if true, it is the judicial function to determine legislative intent and ensure that the agency is not acting outside the bounds of its statutory authority.

292. *See Chevron*, 467 U.S. at 842-43.

implementation, with statutory interpretation by the court cancelling the agency's meaning possible but presumptively unavailable.[293]

C. Structural Indeterminacy Reconciliation

If judicial review is to be structured on the basis of institutional competencies and semantic indeterminacy signals a presumptive area for agency authority, then issues involving structural indeterminacy should signal an area for judicial interpretive primacy. Structural indeterminacy reconciliation involves determining the relationship between sentences or phrases within the provision at issue or between the provision at issue and some other determinant of meaning, such as a related provision or some other statute.[294] Considering that the judiciary has institutional primacy in matters of interpretation, an issue of possible structural indeterminacy should be considered a matter of prototypical statutory construction for the reviewing court to resolve.[295] Unlike the case with semantic indeterminacy, an issue of possible structural indeterminacy primarily and necessarily involves an assessment of legislative design, and hence congressional intent. The issue raised by the interpretive dispute should be seen as judicially decidable on the basis of the traditional materials that courts consider when interpreting statutes, such as precedents, legislative history, and inferences from related provisions. In contrast to the current *Chevron* doctrine, though, where the ambiguity concept allocates interpretive responsibility, courts should ex-ante indicate that the

---

293. The distinction is somewhat similar to that between interpretation and construction. *See* Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 CONST. COMMENT. 95, 96 (2010) (explaining that "interpretation ... is the process (or activity) that recognizes or discovers the linguistic meaning or semantic content of the legal text" while "construction ... is the "process that gives a text legal effect (either [b]y translating the linguistic meaning into legal doctrine or by applying or implementing the text)").

294. *See supra* notes 224-25 and accompanying text.

295. The principle that courts have primacy in matters of statutory interpretation is well-accepted, although contestable. *See* Eskridge, *supra* note 30, at 414-16 (arguing that agencies should be given primacy in matters of statutory interpretation). Even those scholars arguing for agency primacy agree that courts are the final authority in determining legislative intent. *See id.* at 449 (arguing that courts in Step One should "pay close attention to the agency's reasoning"). While paying "close attention" to an agency's reasoning seems like a wise course of action in virtually all circumstances, it would be a dangerous shifting of power (well beyond what *Chevron* provides) for a court to defer to an agency's views of legislative intent.

interpretive issue is one of possible structural indeterminacy rather than waiting until the end of the interpretive process to make the announcement about interpretive authority.

1. INS v. Cardoza-Fonseca

The Court's decision in *INS v. Cardoza-Fonseca*,[296] offers a good example of structural indeterminacy resolution. The case required the Court to review an INS determination that two related provisions of the Immigration and Nationality Act ("Act") with different terms nevertheless required the same level of proof from applicants.[297] One provision of the Act, 8 U.S.C. § 1253(h), "require[d] the Attorney General to withhold deportation of an alien who demonstrate[d] that his 'life or freedom would be threatened'" thereby on account of specified factors.[298] The "would be threatened" language required that the alien demonstrate that "'it is more likely than not that the alien would be subject to persecution' in the country to which he would be returned."[299] In turn, § 208(a) of the Act authorized the Attorney General, in his discretion, to grant asylum to a "refugee," who, under § 1101(a)(42)(A) of the Act, is unable or unwilling to return to his home country "because of persecution or a well-founded fear" thereof on account of particular factors.[300] The agency held that the § 1253(h) "more likely than not" proof standard applied to § 208(a) asylum claims.[301] The Court, though, rejected the agency's interpretation on the basis of the differing language of the two provisions and various indications from the legislative history.[302]

Justice Stevens (the author of the *Chevron* opinion), writing for the Court, reasoned that because the nature of the interpretive

296. 480 U.S. 421 (1987).

297. *See id.* at 423.

298. *See id.*

299. *Id.* (quoting INS v. Stevic, 467 U.S. 407, 429-30 (1984)).

300. *Id.* Section 1101(a)(42) provides that "[t]he term 'refugee' does not include any person who ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1101(a)(42) (2012).

301. *Cardoza-Fonseca*, 480 U.S. at 433.

302. *See id.* at 432 ("The message conveyed by the plain language of the Act is confirmed by an examination of its history.").

issue was per se for judicial, not agency, resolution, indicating that "[t]he question whether Congress intended the two standards to be identical is a pure question of statutory construction for the courts to decide."[303] Justice Stevens contrasted a "pure question of statutory construction" (constituting a "narrow legal question"), where the agency's interpretation would not receive deference, with an applied question (involving the agency giving "concrete meaning" to a term "through a process of case-by-case adjudication"), where the agency's interpretation would receive deference.[304] The Court thus "[e]mploy[ed] traditional tools of statutory construction" and "concluded that Congress did not intend the two standards to be identical."[305]

In a concurring opinion, Justice Scalia observed that the Court's distinction was "contradicted by the case the Court purports to be interpreting, since in *Chevron* the Court deferred to the Environmental Protection Agency's abstract interpretation of the phrase 'stationary source.'"[306] Having rejected the pure versus applied distinction (at least as framed by the Court), Justice Scalia argued that there was no basis for declaring the interpretive issue to be judicially decidable, characterizing the Court's position as indicating that reviewing "courts may substitute their interpretation of a statute for that of an agency whenever, '[e]mploying traditional tools of statutory construction,' they are able to reach a conclusion as to the proper interpretation of the statute."[307] In Justice Scalia's view, the Court's approach "would make deference a doctrine of desperation, authorizing courts to defer only if they would otherwise be unable to construe the enactment at issue. This is not an interpretation but an evisceration of *Chevron*."[308] Justice Scalia did not indicate, however, how a reviewing court should determine which interpretive issues are judicially decidable and which are not.[309]

---

303. *Id.* at 446; *see also* Cass R. Sunstein, *Beyond* Marbury*: The Executive's Power To Say What the Law Is*, 115 YALE L.J. 2580, 2604 (2006) ("Taken on its face, *Cardoza-Fonseca* seems to be an effort to restore the pre-*Chevron* status quo by asserting the primacy of the judiciary on purely legal questions.").

304. *Cardoza-Fonseca*, 480 U.S. at 446, 448.

305. *Id.* at 446.

306. *Id.* at 455 (Scalia, J., concurring in the judgment).

307. *Id.* at 454.

308. *Id.* at 454.

309. In a later article, Justice Scalia stated that "[i]f *Chevron* is to have any meaning, then,

Justice Scalia is correct that the *Cardoza-Fonseca* case is difficult to reconcile with *Chevron* if the pure versus applied framework is applied to the cases, but viewing the distinction between *Cardoza-Fonseca* and *Chevron* as turning on the type of legal indeterminacy presented provides the proper foundation for the difference in treatment. In contrast to *Chevron*, *Cardoza-Fonseca* did not involve an issue of semantic indeterminacy. Ultimately, of course, the agency was attempting to determine the meaning of "refugee," but the case did not involve the agency's definitional efforts.[310] Reviewing courts were not required to consider the agency's definition of "refugee," but, rather, decide whether two provisions with different terms nevertheless established the same standard of review.[311] The Court did reference "ordinary meaning" in its decision when explaining why one can have a "well-founded" fear of something even when there is less than a 50 percent chance of its occurrence.[312] Consideration of "ordinary meaning" in such a case should not be surprising, though. When reconciling statutory provisions, a reviewing court may naturally consider semantic evidence relating to the language of each provision.[313] After all, the court must determine the relationship between the two provisions. The Court's consideration of ordinary meaning does not indicate that the real issue in *Cardoza-Fonseca* was one of semantic indeterminacy but instead

---

congressional intent must be regarded as 'ambiguous' not just when no interpretation is even marginally better than any other, but rather when two or more reasonable, though not necessarily equally valid, interpretations exist." *See* Scalia, *supra* note 40, at 520. Justice Scalia also indicated, though, that "[i]t is thus relatively rare that *Chevron* will require me to accept an interpretation which, though reasonable, I would not personally adopt." *Id.* at 521. Considering Justice Scalia's later statement, there would seem to be only a slight difference between the majority's presumption that "pure questions" are judicially decidable and Justice Scalia's position that under *Chevron* it is rare that he would be forced to defer to an interpretation with which he did not agree. In any case, Justice Scalia's reference to "two or more reasonable, though not necessarily equally valid, interpretations" is simply a reference to a typical way in which ambiguity is defined by the judiciary (along with a conflation of ambiguity identification and disambiguation). *Id.* at 520. As such, it does not offer any special insight into the determination of ambiguity.

310. *Cardoza-Fonseca*, 480 U.S. at 423.

311. *See id.*

312. *See id.* at 431 (indicating that the "ordinary and obvious meaning of [well-founded] is not to be lightly discounted").

313. *See, e.g.*, Richards v. United States, 369 U.S. 1, 9 (1962) ("[W]e must, of course, start with the assumption that the legislative purpose is expressed by the ordinary meaning of the words used.").

illustrates that linguistic analysis of the relevant language is inevitable when resolving interpretive disputes regarding the meaning of statutory language.

The line between constructing meaning (i.e., semantic indeterminacy) and resolving (potentially) conflicting indications of legislative intent may not always be distinct, but as the *Chevron* and *Cardoza-Fonseca* cases illustrate, the two categories are coherent. Unlike the pure versus applied distinction, the difference between semantic and structural indeterminacy provides a workable framework for mediating between judicial statutory interpretation and agency statutory implementation. When the issue is one of semantic indeterminacy, the presumption should be that it is one for the agency to resolve, as long as the word or phrase at issue does not have some meaning (ordinary or technical) that resolves the issue. Conversely, when the issue is one of structural indeterminacy, which typically involves reconciling various statutory provisions, there should be a presumption that the reviewing court can discern congressional intent using traditional tools of statutory interpretation. Still, there is no claim here that the distinction between semantic and structural indeterminacy can generally account (even if implicitly) for the Court's decisions regarding deference to agency interpretations, even if the distinction offers a way to reconcile *Chevron* and *Cardoza-Fonseca*. Undoubtedly, in various cases the Court has cited to *Chevron* even when the interpretive dispute involves structural indeterminacy.[314] Yet, as discussed below, there is some support on the Court that *Chevron* should not be applied in at least some cases involving structural indeterminacy.

2. Mixed Cases of Semantic Indeterminacy Resolution and Structural Indeterminacy Reconciliation

As this Article argues, courts should presume that agency resolution of semantic indeterminacy is correct and independently resolve structural indeterminacy; however, interpretive disputes may involve both semantic indeterminacy and structural indeterminacy.

314. Scialabba v. Cuellar De Osori, 134 S. Ct. 2191 (2014), as discussed in the next section, is an example where the plurality opinion explicitly indicated that *Chevron* deference should apply to issues involving structural indeterminacy.

Even in such cases, the principles underlying how interpretive authority should be allocated between courts and agencies support judicial deference to the agency's resolution of any semantic indeterminacy, but not its resolution of structural indeterminacy. *Scialabba v. Cuellar De Osori* provides a good example of an interpretive dispute that involves both semantic and structural indeterminacy, as well as disagreement about the application of *Chevron* to certain disputes regarding structural indeterminacy.[315] The interpretive dispute centered on immigrant visas and a provision, 8 U.S.C. § 1153(h)(3), of the Child Status Protection Act (CSPA).[316] The context involved the family-preference system which allows citizens and lawful permanent residents to "petition for certain family members—spouses, siblings, and children of various ages—to obtain immigrant visas."[317] Such a sponsored individual is known as the petitioner's "principal beneficiary."[318] A principal beneficiary's unmarried child under the age of twenty-one qualifies as a "derivative beneficiary" and is "entitled to the same [immigration] status" and "order of consideration" as the principal beneficiary.[319] The beneficiaries are eligible to apply for visas in order of "priority date," which is set by the date the petition is filed.[320]

The problem is that the immigration process may take many years to complete, due to a combination of slow government processing and the limited number of visas available each year.[321] As a result, the derivative beneficiaries may "age out" and lose their immigration status before a visa becomes available.[322] Congress's response to the aging out problem, § 1153(h)(3), provides as follows:

> If the age of an alien is determined ... to be 21 years of age or older ..., the alien's petition shall automatically be converted to

315. *Id.*
316. Pub. L. No. 107-208, 116 Stat. 927 (2002) (codified as amended at 8 U.S.C. §§ 1151, 1153-54, 1157-58 (2012)).
317. *Scialabba*, 134 S. Ct. at 2196.
318. *Id.*
319. *Id.*
320. *Id.* at 2198.
321. *See id.* at 2196.
322. *Id.*

> the appropriate category and the alien shall retain the original priority date issued upon receipt of the original petition.[323]

The broad interpretive question was whether the provision grants a remedy of some kind to all aliens who have aged out or, instead, as the government argued, only to those aliens who can be seamlessly converted from one family preference category to another without the need for a new sponsor.[324] Thus, for example, under the government's interpretation, if the original principal beneficiary was the sibling of a U.S. citizen, the principal beneficiary's child (originally a derivative beneficiary) who had aged out would not be eligible for relief because a niece or nephew does not qualify as a principal beneficiary and the now adult child would need a new sponsor.[325]

The potential semantic indeterminacy came from the phrase "automatically be converted."[326] Section 1153(h)(3) does not explicitly state which petitions qualify for automatic conversion and retention of priority dates, referencing only "the appropriate category."[327] The Board of Immigration Appeals (BIA) argued that there was no semantic indeterminacy because the phrase "automatic conversion" has a "recognized meaning" within immigration law.[328] In the government's view, the phrase applies only "when a petition [can] move seamlessly from one family preference category to another [but] not when a new sponsor [is] needed to fit a beneficiary into a different category."[329] Through a survey of other immigration provisions (as well as, oddly, dictionary definitions), the Court concluded that the "exclusive way immigration law" uses the phrase is only when it entails "nothing more than picking up the petition from one category and dropping it into another for which the alien now qualified."[330]

In comparison to the meaning of the automatic conversion language, the structural indeterminacy in § 1153(h)(3) could not be as

---

323. 8 U.S.C. § 1153(h)(3) (2012).
324. *See Scialabba*, 134 S. Ct. at 2201.
325. *See id.* at 2202.
326. 8 U.S.C. § 1153(I)(3) (2012).
327. *Id.*
328. *Scialabba*, 134 S. Ct. at 2201.
329. *Id.*
330. *Id.* at 2204.

easily resolved (in the view of the plurality, at least). The plurality reasoned that the provision "does not speak unambiguously to the issue" because it is "Janus-faced."[331] The "first half [of § 1153(h)(3)] looks in one direction, toward ... sweeping relief [for an alien 21 years of age or older], which would reach every aged-out beneficiary of a family preference petition."[332] In contrast, the "second half looks another way, toward a remedy that can apply to only a subset of those beneficiaries."[333] The plurality opinion indicated that "[r]ead either most naturally, and the other appears to mean not what it says. That internal tension makes possible alternative reasonable constructions, bringing into correspondence in one way or another the section's different parts."[334] The plurality, along with Chief Justice Roberts and Justice Scalia concurring in the judgment, resolved the internal tension in favor of the reading that would grant relief only for those aliens who can seamlessly convert from one family preference category to another without the need for a new sponsor.[335] In contrast, Justice Sotomayor in a dissenting opinion, joined by Justices Breyer and Thomas, argued that the plurality was incorrect in its interpretation of "automatic" and "that § 1153(h)(3) permits an aged-out child to retain her original priority date [even] if her petition cannot be automatically converted" in the manner described by the plurality.[336]

The plurality, indicating that "[t]his is the kind of case *Chevron* was built for,"[337] concluded that §1153(h)(3) "permits" but does not require the BIA's "decision to so distinguish among aged-out beneficiaries."[338] The plurality reasoned that when "possible alternative reasonable constructions, bringing into correspondence in one way or another the section's different parts" exist, "*Chevron* dictates that a court defer to the agency's choice—here, to the Board's expert judgment about which interpretation fits best with, and makes most sense of, the statutory scheme."[339] The concurring Justices (along

331. *Id.* at 2203.
332. *Id.*
333. *Id.*
334. *Id.*
335. *See id.* at 2206; *see also id.* at 2214-15 (Roberts, C.J., concurring).
336. *See id.* at 2221-23 (Sotomayor, J., dissenting).
337. *Id.* at 2213 (plurality opinion).
338. *Id.* at 2207.
339. *Id.* at 2203.

with Justice Alito in a dissenting opinion),[340] though, disagreed that *Chevron* applied, arguing that

> when Congress assigns to an agency the responsibility for deciding whether a particular group should get relief, it does not do so by simultaneously saying that the group should and that it should not. Direct conflict is not ambiguity, and the resolution of such a conflict is not statutory construction but legislative choice. *Chevron* is not a license for an agency to repair a statute that does not make sense.[341]

In the view of the concurring Justices, there was "no conflict, or even 'internal tension'" within § 1153(h)(3) because the second, limiting clause is the "only operative provision."[342]

Making sense of statutory schemes and resolving possible structural conflicts *is*, of course, statutory interpretation (as illustrated by the plurality opinion) designed to determine the "legislative choice."[343] Despite the odd phrasing, the argument made by the concurring Justices that "[d]irect conflict is not ambiguity, and the resolution of such a conflict is not statutory construction but legislative choice" is effectively treating "ambiguity" as a legal doctrine, shorn of linguistic significance, which represents a judicial determination that the interpretive issue involves congressional delegation to the relevant agency.[344] Thus, at least some types of structural indeterminacy are judicially decidable on the basis of an assessment of the legislative design, and are thus not situations involving ambiguity for an agency to resolve.[345] If *Chevron* is viewed as a doctrine of judicial self-restraint, determining legislative choice through an evaluation of the legislative design does not implicate

340. *See id.* at 2216 (Alito, J., dissenting).

341. *Id.* at 2214 (Roberts, C.J., concurring).

342. *Id.* at 2214-15.

343. *See id.* at 2214. The plurality noted that *Chevron* deference was appropriate in part because of the agency's expertise. *See id.* at 2203 (plurality opinion). But a court can take account of agency expertise without formal deference being given to the agency. In fact, the expertise agencies possess may sometimes be exceeded by that of business, trade associations, nonprofits, think tanks, and others, thus underscoring the notion that expertise, by itself, cannot justify deference. *See* Stephen M. Johnson, *Advancing* Auer *in an Era of Retreat*, 41 WM. & MARY ENVTL. L. & POL'Y REV. 551, 562 n.82 (2017).

344. *See Scialabba*, 134 S. Ct. at 2214 (Roberts, C.J., concurring).

345. *See id.*

the reasons for allocating primary interpretive authority to the agency.[346] Even so, as the plurality opinion indicated, the Court may conclude in some cases that the structural issues render the statute indeterminate.[347] In these situations, the agency's views on the proper interpretation, if based on expertise, may be relevant to the resolution of the indeterminacy.

D. Literal Meaning Mandatoriness

1. The Judicial Decidability of Interpretive Issues Involving Literal Meaning

The semantic and structural indeterminacy categories cover a wide range of interpretive issues relevant to legal cases, but the separate linguistic phenomenon of literalness has also presented difficult issues related to deference that have been particularly controversial in recent years. Of course, like other linguistic categories, there are various ways to define "literal meaning." To simplify a bit, literal meaning can be identified with the linguistic meaning of the relevant sentence that is conventional and context independent.[348] Essentially, then, literal meaning is based on the conventional meaning of language, which is primarily tied to the semantic meanings of the words.[349] In the administrative state, the issue of literalness concerns whether the legal meaning of the provision may or must deviate from its literal meaning. In part, the issue of literalness is controversial because there is said to be a "clear preference" for interpreting language in legal texts according to its literal meaning.[350] Natural "[l]anguage is full of nonliteral meanings, such

346. *See supra* note 30 and accompanying text (explaining that one theory of *Chevron* is that it is best viewed as a doctrine of judicial self-restraint).

347. The plurality opinion arguably indicated that the government's interpretation was permissible but not mandated, reasoning that "[c]onfronted with a self-contradictory, ambiguous provision in a complex statutory scheme, the Board chose a textually reasonable construction consonant with its view of the purposes and policies underlying immigration law." *Scialabba*, 134 S. Ct. at 2213.

348. *See* C.J.L. Talmage, *Literal Meaning, Conventional Meaning and First Meaning*, 40 ERKENNTNIS 213, 213 (1994).

349. FRANCOIS RECANATI, LITERAL MEANING 3 (2004).

350. Ross Charnock, *Hart as Contextualist? Theories of Interpretation in Language and the Law, in* 15 LAW AND LANGUAGE: CURRENT LEGAL ISSUES 128 (Michael Freeman & Fiona Smith eds., 2013).

as metaphors, idioms, slang, and polite talk."[351] "When such expressions are used, the literal meaning of the expression may differ from" the speaker's intended meaning.[352] Nevertheless, such usages of language are far less common in legal texts.[353] The preference for literal meaning in law is strong enough that it has been said that the literal meaning must be applied even in situations where the drafter may have had a contrary intention.[354]

It may thus seem as though agency interpretations that deviate from the literal meaning of the relevant provision should be invalidated because they are inconsistent with the manner in which courts interpret statutes. Nevertheless, despite the assertions of the primacy of literal meaning, the judicial commitment to it is far from absolute.[355] Courts are often motivated for various reasons to select interpretations that deviate from the literal meanings of the relevant texts.[356] Indeed, a common characteristic of principles of legal interpretation is that they serve to restrict the domains of legal texts (that is, their scopes of application), sometimes thereby creating a gap between literal meaning and legal meaning.[357] So-called substantive canons of interpretation, for instance, derive from legal considerations, not linguistic ones, and often restrict the scope of provisions or create exceptions to statutes that are, on their face, clear.[358] Similarly, a court might declare that a defense is available in a criminal case even though the relevant statute does not explicitly provide for the defense.[359]

---

351. SLOCUM, *supra* note 44, at 26.

352. *See id.*

353. *See* Peter M. Tiersma, *A Message in a Bottle: Text, Autonomy, and Statutory Interpretation*, 76 TUL. L. REV. 431, 454 (2001) ("[S]poken language abounds in what we can loosely call nonliteral or figurative usage. It is far less appropriate in an autonomous written text.").

354. *See* PETER M. TIERSMA, LEGAL LANGUAGE 110 (1999).

355. *See* SLOCUM, *supra* note 44, at 187, 209.

356. *See id.*

357. *See id.*; *see also* David L. Shapiro, *Continuity and Change in Statutory Interpretation*, 67 N.Y.U. L. REV. 921, 925 (1992) (noting that the canons of interpretation often resolve statutory meaning "in favor of continuity and against change").

358. *See* Shapiro, *supra* note 357, at 934 (explaining that some substantive canons, "embracing rules of 'clear statement,' [are] far more likely to exclude an interpretation that is not supported by express language").

359. *See, e.g.*, People v. Khan, 264 N.W.2d 360, 366-67 (Mich. Ct. App. 1978) (finding an implied defense of consent in rape cases).

Even though deviations from literal meaning are common, and expected by Congress in some situations, an agency interpretation that deviates from the literal meaning of the relevant text should not receive deference. This does not mean that such deviations should always be prohibited. To the contrary, some deviations may well be consistent with congressional intent. Nevertheless, two factors counsel against deference. First, the permissibility of nonliteral meanings must necessarily be based on non-language, pragmatic factors such as legislative design and a court's precedents, which may allow or prohibit certain deviations. As such, the issue facing courts is similar to that posed by the structural indeterminacy category.[360] Second, and relatedly, the permissibility of a deviation from literal meaning is an issue that is easily within the scope of traditional statutory interpretation and thus decidable by courts. There is no semantic indeterminacy to address.[361] Instead, the reviewing court must consider whether the literal meaning of the text must control. The legitimacy of such a deviation is not a matter of policy but, rather, turns on a judgment about whether the legislative design permits or requires the deviation.[362] Thus, notwithstanding the frequency with which deviations from the literal meanings of legal texts occur, sanctioning a deviation from congressionally enacted text is a job suited to the judiciary.

The converse of a deviation from literal meaning occurs when an agency's adherence to the literal meaning of a provision's language is at odds with the overall legislative design. The later issue is often connected to the issue of generality. Recall that an expression is general if its meaning is a genus of more than one species, such that "parent" includes within its scope "mother" and "father."[363] A sentence can be said to be general, or unspecified, to the extent that it

360. *See supra* Part IV.C (discussing the phenomenon of structural indeterminacy).

361. *See supra* Part IV.B (discussing the phenomenon of semantic indeterminacy).

362. Sometimes an applicable interpretive principle, such as the constitutional avoidance canon, could be said to be based on normative principles that are separate from legislative intent. *See* Ernest A. Young, *Constitutional Avoidance, Resistance Norms, and the Preservation of Judicial Review*, 78 TEX. L. REV. 1549, 1551 (2000) (describing the canon of constitutional avoidance "as a *normative* canon—a rule designed to push interpretations in directions that reflect enduring public values"). Nevertheless, reviewing courts determine whether the interpretive principle applies independently of any agency views on the topic.

363. *See supra* notes 107-11 and accompanying text (describing the linguistic notion of generality).

does not specify certain details.[364] This phenomenon can also be referred to as "communicative underdeterminacy."[365] In some cases, the underdeterminacy is relatively easy to identify. For instance, the statement "'some event will happen at some time' is vague in the lack-of-detail sense."[366] "Both 'some event' and 'some time' are, for most purposes, insufficiently informative in a way that needs little elaboration."[367] "The statement ... represents more than just a category with a fuzzy boundary. Rather, the indeterminacy extends beyond the boundary of [the statement]. If required to provide guidance, [the statement] will require significant nonlanguage-based precisification."[368]

The narrowing of generalities is a common feature of language comprehension, as many natural language expressions are quite general.[369] Likewise, legal texts are often drafted with high levels of generality (sometimes alarmingly so), especially when the statute is to be administered by an agency.[370] The generality serves various legitimate functions, including delegating discretion to the agency to fill in the details of the statute.[371] Yet, as with any legislation, the enacting legislature is unlikely to have considered many of the interpretive issues that will arise when the statute must be applied to specific cases.[372] There are various reasons for this neglect, such as inattention to detail or a desire not to upset legislative compromises, but certainly a significant reason is the inability to foresee all of the factual scenarios that an agency may claim fall under the statute.[373] Such a scenario is the expected price that must be paid for enacting legislation that will be applied in the future. Still, generality can create interpretive problems when an agency takes some action consistent with the literal meaning of the language, but the broad, yet literal, meaning may not be consistent with the

364. *See* Zhang, *supra* note 105, at 16.

365. *See* SLOCUM, *supra* note 44, at 249.

366. *Id.*

367. *Id.*

368. *Id.*

369. *See* LEVINSON, *supra* note 195, at 184 (explaining that one theory is that "many natural language expressions are maximally general, to the point of bordering on vacuity").

370. *See* Gluck & Bressman, *supra* note 68, at 996-97.

371. *See id.*

372. *See id.* (explaining that "lack of time," the "complexity of the issue," and the "need for consensus" were reasons why statutes were drafted with indeterminacy).

373. *See id.*

legislative design. A reviewing court may therefore be naturally skeptical that Congress considered, when enacting the legislation, the problems created by generality.

Considering that an agency's resolution of semantic indeterminacy should be deemed presumed correct but the determination whether literal meaning is mandated or prohibited is for judicial resolution, it is likely that the agency will often claim that its interpretation is either mandatory or a resolution of semantic indeterminacy. In some cases, the interpretive issue may indeed involve the resolution of semantic indeterminacy rather than literalness. In other cases, it may be that the agency's interpretation actually deviates from the literal meaning of the text but that such deviation is nonetheless consistent with the legislative design. After determining that the agency's interpretation deviates from the literal meaning of the text, the court should independently determine whether doing so is consistent with the legislative design. The *King v. Burwell* case, discussed below, would be such an example.[374] Alternatively, the court may determine that the agency's interpretation does not deviate from the literal meaning of the text but that certain pragmatic facts should invalidate the agency's interpretation.[375] The *Brown & Williamson Tobacco Corp.* case, discussed below, would be such an example.[376] In this scenario, the agency's interpretation is invalidated, as it may be in any case involving semantic indeterminacy, by the court's assessment that the chosen meaning is inconsistent with the legislative design.[377]

2. Agency Interpretations that Depart from Literal Meaning

As explained above, when the question is whether a provision can or should be given a nonliteral meaning, the reviewing court does not confront semantic indeterminacy but, rather, must decide whether the nonliteral interpretation is consistent with legislative design. As such, the issue is similar to structural indeterminacy

374. *See* 135 S. Ct. 2480, 2489 (2015).

375. Because the agency's interpretation is consistent with the literal meaning of the text, it is pragmatic evidence, if anything, that would invalidate the interpretation.

376. *See* 529 U.S. 120, 133 (2000) ("[W]e must be guided to a degree by common sense.").

377. *See id.*

(exemplified by *Cardoza-Fonseca*).[378] In both situations, the question is how to make sense of the statutory design enacted by Congress. On occasion, the Court has decided cases involving literalness and addressed the applicability of *Chevron* deference, but has done so in an oblique manner.[379] Instead of identifying the relevant issue as being whether the literal meaning of the provision must determine its legal meaning, considering the context of the statute, the Court has created a "major questions" exception to *Chevron* that focuses on whether the interpretive issue was "extraordinary."[380] The problem is that what is "extraordinary" is a contextually valued standard that is unnecessarily indeterminate (what counts as "extraordinary"?) and purports to set too high of a standard for the category.[381] More importantly, what is "extraordinary" about these situations is not, as the Court would have it, the importance of the underlying interpretive issue to the implementation of the relevant statute but, instead, the possibility that the literal meaning of a validly enacted statute is being rejected in favor of a nonliteral meaning. It may not be likely that Congress will have explicitly addressed deviations from literal meaning, but it is likely that a determination of these issues can be made on the basis of consideration of legislative design.[382]

Consider the Court's recent, and controversial, decision in *King v. Burwell*, discussed earlier.[383] Recall that the IRS issued a regulation interpreting the ACA as providing for tax credits even in states that have a federal exchange rather than a state exchange.[384] As is its custom, the Court framed the interpretive dispute in terms of ambiguity, indicating that the key provision, "when read in context," was "properly viewed as ambiguous."[385] The Court reasoned

---

378. *See supra* Part IV.C.1 (describing structural indeterminacy and *Cardoza-Fonseca*).

379. *See generally* Jonas J. Monast, *Major Questions About the Major Questions Doctrine*, 68 ADMIN. L. REV. 445 (2016).

380. *See id.* at 452.

381. *See supra* note 120-24 and accompanying text (describing contextually valued, evaluative standards).

382. *See supra* note 68 (explaining that legislative drafters feel an obligation to address major questions).

383. *See* 135 S. Ct. 2480 (2015); *see also supra* notes 45-68 and accompanying text (discussing *King*).

384. *See King*, 135 S. Ct. at 2487 (citing Health Insurance Premium Tax Credit, 77 Fed. Reg. 30378 (2012)).

385. *Id.* at 2490-91.

that the phrase "'an Exchange established by the State' ... may be limited in its reach to State Exchanges" but could "also ... refer[ ] to *all* Exchanges—both State and Federal—at least for purposes of the tax credits."[386] The Court's identification of "ambiguity," though, was motivated by the consequences of the alternative interpretations rather than any ordinary or technical meaning of "State."[387] The Court's main reasoning was that "[i]f tax credits were not available on Federal Exchanges," related "provisions would make little sense."[388] The Court sought to "avoid the type of calamitous result that Congress plainly meant to avoid," and, thus, the Court indicated that "[i]f at all possible, [it] must interpret the Act in a way that" improves health insurance markets and does not destroy them.[389]

Contrary to the Court's rhetoric, the language in § 36B was not "ambiguous," nor was there semantic indeterminacy with respect to the interpretive issue before the Court.[390] After all, the ACA definition of "State" as meaning "each of the 50 States and the District of Columbia" was straightforward and clearly excluded the federal government.[391] Neither the IRS nor the Court was attempting to interpret the ACA's definition of "State," determine the term's ordinary meaning or, in any genuine sense, declare that the term must be given some special technical meaning in light of the context.[392] The Court did not claim that Congress had explicitly expressed an intention that "State" should include the federal government, which would be an odd and carelessly expressed congressional intention considering the definition of "State" in the statute (which did not, of course, include the federal government).[393] Instead, the real issue was whether the literal meaning of the term, and thereby the provision, should control or, instead, the provision should be given a nonliteral meaning.[394] The Court itself seemed to realize this to some degree, indicating that "the context and structure of the Act

386. *Id.* at 2491.
387. *See id.*
388. *Id.* at 2492.
389. *Id.* at 2496.
390. *See id.* at 2492.
391. 42 U.S.C. § 18024(d) (2012).
392. *See King*, 135 S. Ct. at 2495.
393. *See id.*
394. *See id.*

compel us to depart from what would otherwise be the most natural reading of the pertinent statutory phrase."[395]

Although the Court likely engaged in the ambiguity discussion as a way to justify its interpretation (considering that resolving statutory indeterminacy is seen as less activist than rejecting the literal meaning of a provision),[396] it apparently was not relevant to whether the agency's interpretation should receive deference.[397] The Court noted that it "often appl[ies] the two-step framework announced in *Chevron*," which "is premised on the theory that a statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps."[398] The Court indicated, however, that "[i]n extraordinary cases ... there may be reason to hesitate before concluding that Congress has intended such an implicit delegation."[399] The Court explained that the tax credits were such an issue and that Congress would have delegated the issue expressly had they wanted the agency to decide it.[400]

While some might argue that *King* should be viewed as a structural indeterminacy case because the Court had to reconcile the ACA's various provisions, it is more accurate to frame the case as involving a lexical meaning issue involving "State."[401] As indicated above, though, the interpretive issue could not straightforwardly be considered a lexical meaning issue due to the weakness of any claim that the agency was engaged in the construction of semantic meaning.[402] The Court implicitly indicated discomfort with the notion that the agency was engaging in authentic lexical

395. *Id.*

396. Resolving indeterminacy is a normal and expected function of courts, while interpreting a provision contrary to its literal meaning invokes the image of the controversial case *Church of the Holy Trinity v. United States*. 143 U.S. 457, 459 (1892). For an analysis of *Holy Trinity*, see VERMEULE, *supra* note 291, at 93-107. The legitimacy of judicial deviations from literal meaning, and the continuing relevance of *Holy Trinity*, were hotly debated by Justice Stevens, via concurring opinion, and Justice Scalia, via dissenting opinion, in *Zuni Public School District No. 89 v. Department of Education*. 550 U.S. 81, 104-05, 108 (2007).

397. *See King*, 135 S. Ct. at 2488-89.

398. *King*, 135 S. Ct. at 2488 (quoting FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159 (2000)).

399. *Id.* at 2488-89.

400. *Id.* at 2489. *See supra* note 58 and accompanying text for the full quote.

401. Even if the case were viewed as a structural indeterminacy case, under the framework offered in this Article the Court would still interpret the statute independently. *See supra* notes 242, 294 and accompanying text.

402. *See supra* notes 388-93 and accompanying text.

construction by indicating that there was no possibility, based on the "extraordinary" exception, it would defer to the agency's interpretation.[403] Instead, the best justification for the Court's interpretation is that it adopted a nonliteral meaning of the provision on the basis that doing so would further the statutory design (unlike the literal meaning of "State").[404] As such, the decision should be seen as an example of the principle suggested in this Article that interpretive issues involving literalness are for courts to resolve, as they invariably require a determination of whether a nonliteral meaning is consistent with the statutory design.[405] The Court was thus justified in refusing to give *Chevron* deference to the agency's interpretation, although its reasoning was flawed.

3. Agency Interpretations that Incorrectly Adhere to Literal Meaning

As explained earlier, one consequence of the high level of generality at which many texts in the administrative state are drafted is that agency jurisdiction to regulate may fall within the scope of the literal meaning of a provision yet conflict with overall legislative design.[406] Similar to cases involving structural indeterminacy and agency departures from literal meaning, courts should presume that such issues are judicially decidable. Consider, for example, the *FDA v. Brown & Williamson Tobacco Corp.*, case involving a challenge to the Food and Drug Administration's (FDA) regulation of tobacco products.[407] The Food, Drug, and Cosmetic Act (FDCA) granted the FDA the authority to regulate, among other items, any "drug" or "device."[408] In 1996, the FDA asserted jurisdiction to regulate tobacco products, concluding that, under the FDCA, "nicotine is a 'drug' and that cigarettes and smokeless tobacco are ... 'devices'" that deliver nicotine to the body.[409] The FDCA provided a capacious definition of "drug," indicating that it included "articles (other than

403. *See King*, 135 S. Ct. at 2488-89.

404. *See id.* at 2495.

405. *See supra* notes 358-60 and accompanying text.

406. *See supra* notes 361-71 and accompanying text (explaining the issues caused by generality).

407. *See generally* 529 U.S. 120 (2000).

408. *See id.* at 129.

409. *Id.* at 131.

food) intended to affect the structure or any function of the body."[410] Similarly, it provided that a "device" was "an instrument, apparatus, implement, machine, contrivance, ... or other similar or related article, including any component, part, or accessory, which is ... intended to affect the structure or any function of the body."[411] The Act also granted the FDA the authority to regulate so-called "combination products," which "constitute a combination of a drug, device, or biological product."[412] The FDA construed the provision as giving it the discretion to regulate combination products as drugs, as devices, or as both.[413]

Despite the very broad terms of the F.D.C.A., the Court considered the overall legislative design of the statute and determined that the provisions at issue could not be interpreted in accordance with their literal meanings.[414] Thus, the statute did not give the FDA the authority it claimed over tobacco products.[415] As in *King v. Burwell*, the Court declined to grant *Chevron* deference to the agency's interpretation based on "the nature of the question presented."[416] Specifically, "[i]n extraordinary cases ... there may be reason to hesitate before concluding that Congress has intended ... an implicit delegation" of interpretive authority to the agency.[417] In *Williamson Tobacco Corp.*, the issue was whether the agency could adhere to the literal meaning of a provision, while in *King* the issue was whether the agency could deviate from a provision's literal meaning, yet in both cases the Court believed the interpretive issue to be judicially decidable because of its importance.[418]

410. 21 U.S.C. § 321(g)(1)(c) (2012).

411. *Id.* § 321(h).

412. *Id.* § 353(g)(1).

413. Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents; Final Rule, 61 Fed. Reg. 44400 (Aug. 28, 1996).

414. *See Williamson Tobacco Corp.*, 529 U.S. at 133.

415. *Id.* ("Congress has directly spoken to the issue here and precluded the FDA's jurisdiction to regulate tobacco products.").

416. *Id.* at 159. Recall that the Court in *King* cited *Williamson Tobacco Corp*. in support of its holding that agency interpretations do not receive deference if the interpretive issue is "extraordinary." *See supra* notes 56-57 and accompanying text.

417. *Williamson Tobacco Corp.*, 529 U.S. at 159.

418. *See supra* notes 383-405, 407-15 and accompanying text.

4. Indeterminacy Involving Literal Meaning

Implicit in mandatoriness of literal meaning cases is the assumption, reminiscent of the structural indeterminacy category, that there will be pragmatic evidence sufficient to enable the reviewing court to resolve whether adherence to a provision's literal meaning is mandated or prohibited.[419] Despite the judicial decidability of literal meaning issues, there may be situations where a deviation from literal meaning is neither precluded nor required. Congress sometimes designs statutes assuming that the relevant agency will create exceptions to the enacted language, but whether the exceptions are warranted and adequately justified is separate from the issue of whether Congress *has* sanctioned such deviations.[420] The content and scope of such exceptions may be matters of policy, but the sanction to create exceptions is one of legislative design.[421]

Consider the Supreme Court's 2009 decision in *Negusie v. Holder*,[422] where the agency argued that the so-called "persecutor bar," making an alien ineligible for asylum if she has persecuted others, applies even if the alien's involvement in persecution was the product of coercion or duress.[423] The provision itself did not explicitly address the issue, indicating only that "[t]he term 'refugee' does not include any person who ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion."[424] The interpretive dispute could be framed in alternative ways. One issue is whether the agency is bound by the literal meaning of the provision, which does not explicitly provide for any exceptions.[425] The other issue concerns the meaning of "persecution" and whether the meaning of the term requires moral blameworthiness.[426] Not surprisingly, the government framed the

419. *See supra* note 294 and accompanying text (explaining why structural indeterminacy reconciliation cases are judicially decidable).

420. *See supra* notes 353-57 and accompanying text (explaining why the literal meaning of a provision might not constitute its legal meaning).

421. *See supra* notes 358-60 and accompanying text.

422. 555 U.S. 511 (2009).

423. *Id.* at 514.

424. 8 U.S.C. § 1101(a)(42) (2012).

425. *Cf. id.*

426. *Negusie*, 555 U.S. at 517-18.

question to be answered as whether the provision should be interpreted literally (arguing that it should), and the petitioner focused on the meaning of "persecution."[427] Obviously, though, the two possibilities could be addressed in the same interpretive dispute.[428] In order to win, the government would have to argue that the provision should be interpreted literally (or that some recognized exception did not apply in the present case) and that the term "persecution" did not require moral blameworthiness (or, if it did, that the petitioner was blameworthy).[429]

At the outset of its decision, the Court indicated that "[i]t is well settled that 'principles of *Chevron* deference are applicable to this statutory scheme.'"[430] The case was remanded back to the agency, though, on the basis that it had misinterpreted an earlier Supreme Court case, *Fedorenko v. United States*,[431] as mandating that it is irrelevant for persecutor-bar purposes whether the petitioner had been compelled to assist in persecution.[432] In the Court's view, the agency had "not exercised its interpretive authority" but had instead merely determined that *Fedorenko* controlled.[433] Remand to the agency was appropriate because the question "[w]hether the statute permits [consideration of coercion or duress] based on a different course of reasoning must be determined in the first instance by the agency."[434] Consequently, "[w]hether such an interpretation would be reasonable, and thus owed *Chevron* deference," was not an issue then before the Court.[435]

---

427. *Id.* at 518 (explaining the government's argument that the statute "directly answers that question: there is no exception for conduct that is coerced because Congress did not include one" (internal quotations omitted)).

428. *See id.*

429. *See id.* at 517-18.

430. *Id.* at 516 (quoting INS v. Aguirre-Aguirre, 526 U.S. 415, 424 (1999)). In contrast, in an opinion concurring in part and dissenting in part, Justice Stevens argued that the interpretive question was a "pure question of statutory construction for the courts to decide." *Id.* at 529 (Stevens, J., concurring and dissenting) (quoting INS v. Cardoza-Fonseca, 480 U.S. 421, 446 (1987)); *see also supra* notes 303-05 and accompanying text (describing Justice Stevens's views on the distinction between pure and applied questions of law).

431. 449 U.S. 490 (1981).

432. *Negusie*, 555 U.S. at 522-23.

433. *Id.* at 522.

434. *Id.* at 523.

435. *Id.* at 521.

As indicated above, the issue whether the literal meaning of a provision must control should be deemed decidable by the reviewing court, although of course the government's views on the interpretive dispute may be valuable to the reviewing court (perhaps justifying the decision in *Negusie* to remand to the agency).[436] It is the reviewing court's duty to ensure that the agency is acting within the bounds of the law, and determining whether the literal meaning of the statutory language should control is something that courts should be able to discern.[437] Although the issue whether the statute requires deviation from the literal meaning should be presumed to be judicially decidable, one may object that the issue calls for deference because the statute, as Justice Scalia argued, neither precluded nor mandated the recognition of a duress defense.[438] The two separate issues should not, however, be conflated. The Court must determine whether the legislative design precludes, permits, or (in atypical situations) mandates departure from the literal meaning of the provision.[439] Only if the provision permits, but does not require, departure from the literal meaning of the provision does the issue become one of policy for the agency to decide. In this situation, then, the agency's role does not involve statutory interpretation but, rather, policymaking.

---

436. *See supra* notes 431-33 and accompanying text.

437. *See supra* notes 361-62 and accompanying text.

438. *Negusie*, 555 U.S. at 525 (Scalia, J., concurring) ("The statute does not mandate the rule precluding the duress defense but does not foreclose it either; the agency is free to retain that rule so long as the choice to do so is soundly reasoned, not based on irrelevant or arbitrary factors (like the *Fedorenko* precedent).").

439. *See supra* notes 360-62 and accompanying text. In *King*, for instance, it could be that the statute mandated a departure from the literal meaning of the statutory text in order to avoid undermining the legislative design. *See* King v. Burwell, 135 S. Ct. 2480, 2495 (2015).

CONCLUSION

For over three decades, *Chevron* has been an enormously controversial precedent, in part because the nature of its two-step doctrine appears transformative yet its exact meaning is uncertain.[440] The doctrine, unconstitutionally to some, arguably shifts interpretive responsibility from courts to agencies, but, at least to some judges, does not require a reviewing court to accept an interpretation with which it does not agree.[441] Some of this uncertainty can be traced to *Chevron*'s ambiguity concept, perhaps its least convincing contribution to judicial review.[442] This aspect of *Chevron* has received little attention compared to its other features.[443] Nevertheless, revising this element of *Chevron*, while not addressing various aspects of judicial review, can make the standard of review both consistent with historical judicial practice and congruent with current research on language.[444]

No realistic doctrine of review can avoid judicial disputes in individual cases about the "best reading" of a provision, but a reassessment of indeterminacy can make the process of interpretation more coherent.[445] Reforming how courts view indeterminacy should make a standard of review requiring deference to some agency interpretations seem less like an abdication of judicial responsibility than does the current *Chevron* doctrine.[446] Under the framework advocated in this Article, reviewing courts independently reconcile potentially conflicting provisions and determinants of meaning, determine whether agency adherence to the literal meaning of a provision is mandatory or prohibited, assess the semantic

---

440. *See supra* note 18 and accompanying text (noting that there is an enormous body of scholarship that has been devoted to *Chevron*, which is an indication of the uncertainty surrounding its meaning and significance).

441. *See supra* note 145 (describing Justice Scalia's view that *Chevron* did not require him to accept an interpretation with which he did not agree).

442. *See supra* notes 187-217 and accompanying text (criticizing *Chevron*'s ambiguity concept).

443. *See supra* notes 18-19 and accompanying text.

444. *See supra* Part IV.A.

445. *Cf.* Robert A. Katzmann, *Response to Judge Kavanaugh's Review of* Judging Statutes, 129 HARV. L. REV. F. 388, 398 (2016) (arguing that there will always be "legitimate differences about what is the 'best reading'" of a provision "whenever there is ambiguity").

446. *See supra* Part IV.A.

meaning of the provision at issue, and consider whether contextual evidence precludes the agency's interpretation.[447] Each of these functions is consistent with the traditional responsibility of courts to decide questions of law. Furthermore, such determinations would not be subject to revision by the relevant agency.[448] Still, the nature of word meanings, the uniqueness of much of the language in administrative statutes, and the likelihood of congressional intent to delegate such issues to agencies, should convince courts that semantic indeterminacy resolution is properly viewed as a job for agencies, subject to the reviewing court's assessment of pragmatic evidence of legislative intent.

447. *See supra* Part IV.A.

448. As discussed earlier, the Court's decision in *National Cable & Telecommunication Ass'n v. Brand X Internet Services* held that a court's prior construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the provision is unambiguous. 545 U.S. 967, 982 (2005). This holding should not apply to matters of interpretation but, rather, only to policy decisions. Thus, situations involving structural indeterminacy reconciliation and literal meaning mandatoriness, which involve making sense of the legislative design, should not be subject to revision by the agency.