Selling Chevron

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SELLING CHEVRON

CHRISTINE KEXEL CHABOT*

Over thirty years ago, in Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., the Supreme Court ordered judges to defer to administrative agencies’ reasonable interpretations of ambiguous statutes. Chevron’s deference doctrine has since proved to be a resounding failure. The Supreme Court has applied Chevron in a highly unpredictable manner, failing to offer agencies and lower courts adequate guidance.

In response, this Article compares interpretive problems arising under Chevron to similar problems arising under contract law. Both areas have drawn competing interpretive methodologies and disagreement over how much weight courts should place on written terms. In contract law, however, interpretive methodology may be understood to vary according to parties’ incentives to commit specific contractual terms to writing. This Article concludes that contract law’s semi-tailored compromise approach has the potential to make Chevron more predictable.

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INTRODUCTION

Over thirty years ago, in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, the Supreme Court ordered judges to defer to administrative agencies’ reasonable constructions of ambiguous statutes. Despite its revered status as the “most cited case” in “any legal field,” *Chevron* is growing as notorious as it is famous. Prominent scholars have recently acknowledged that the Court routinely ignores *Chevron* deference and have

2. Id.
called for its elimination or burial. In *Chevron*, deference to the Environmental Protection Agency (EPA) offered a solution for Justices reviewing the agency’s interpretation of a complex regulatory statute. Recently, however, deference failed to attract a single Justice in *King v. Burwell*—the landmark Affordable Care Act case in which the Court affirmed the Internal Revenue Service’s (IRS’s) interpretation of the Act’s complex tax credit provisions. Indeed, since the Court decided *Chevron*, it has applied its deference framework inconsistently. Many times, the Court has failed to obey agency interpretations of seemingly ambiguous statutes. This Article examines problems with *Chevron’s* interpretive framework and compares them to analogous interpretive problems arising under contract law.

Under the *Chevron* framework, deference to an agency’s interpretation hinges on a judicial determination that the statute under review is silent or ambiguous with respect to the issue decided by the agency. According to Step One of *Chevron’s* iconic test, “If the intent of Congress is clear, that is the end of the matter.” If, however, “the statute is silent or ambiguous with respect to the specific issue,” a court moves to Step Two and defers to the agency’s construction so long as it is “permissible.”

Even if one sets aside the additional array of complications introduced by deciding when *Chevron* should apply, its two-step framework confounds...
courts. Empirical studies show that the Supreme Court has applied Chevron inconsistently and in a surprisingly small percentage of cases. As a result, the Court has failed to develop a deference doctrine that provides adequate guidance to lower courts. The Court’s recent decisions in City of Arlington v. Federal Communications Commission (FCC), Utility Air Regulatory Group v. EPA, and King v. Burwell do not resolve Chevron’s problems and seem likely to make them worse.

Judges applying Chevron’s framework have struggled with two fundamental shortcomings. First, Step One hinges on an artificial dichotomy between clarity and ambiguity. Judges’ typical interpretive role requires them to eliminate (or deny the existence of) statutory ambiguity. Under Chevron, then, judges have sometimes constructed clear meaning from very general statutory terms and acted as though they were applying de novo review rather than a doctrine of deference. Chevron’s deference doctrine does not meaningfully distinguish statutes that specify particular policy choices from statutes that leave room for a range of policy choices. This failure is especially problematic since many regulatory statutes contain generally-worded mandates.

Chevron’s second shortcoming is that it implicates a broader, contentious dispute over the proper methodology for assigning meaning to a statute. Some judges follow a rigid textualist approach, which focuses their inquiry on statutory text and text-based sources of meaning. Other judges follow...
a purposive approach, which considers text alongside additional indicia of legislative intent, such as legislative history and purpose. This divide prompts judges to find more reasons to disagree than to agree when deciding whether a statute has clear meaning under *Chevron*. As a result, judges have not developed a *Chevron* test that adequately distinguishes specific statutory terms from terms “phrased so broadly as to invite agency interpretation.”

This Article does not attempt to cite the thousands of law review articles addressing *Chevron* or take on broader debates about theoretical justifications for *Chevron* deference. For *Chevron’s* proponents, as well as judges, agencies, and interested parties who must operate under the current legal regime, however, existing critiques of the *Chevron* framework offer only partial responses to its flaws. Leading critiques make clear that some scholars have focused on revising *Chevron’s* two-step framework, while other scholars have focused on revising the interpretive method judges apply under *Chevron*. Still other scholars give up on *Chevron* deference that the only legitimate sources for this inquiry are text-based or linked sources.”.

25. *Id.* at 229 (asserting that purposivism “sets the originalist inquiry at a higher level of generality” aimed at the “statute’s goal”). This Article follows Jonathan Molot’s lead and uses “purposivism as shorthand to refer to textualism’s nonadherents or adversaries.” Jonathan T. Molot, The Rise and Fall of Textualism, 106 COLUM. L. REV. 1, 3 n.2 (2006).

26. See Beermann, supra note 5, at 817–22 (noting different interpretive methods applied under Step One).


29. See generally Bressman, supra note 21, at 549 (arguing that Step One should be recast as a search for intent to delegate); Matthew C. Stephenson & Adrian Vermulm, *Chevron Has Only One Step*, 95 VA. L. REV. 597, 597–602 (2009) (proposing a single-step “reasonable” interpretation test may place judges in a more deferential mindset); Gersen & Vermulm, supra note 21, at 709 (substituting a doctrinal rule for an institutional voting rule in which “a supermajority of a multi-member judicial panel would be necessary to overturn agency interpretations of law”); Michael Herz, *Deference Running Riot: Separating Interpretation and Lawmaking Under Chevron*, 6 ADMIN. L.J. AM. U. 187 (1992) (arguing that under *Chevron* Step One, courts should distinguish between agency interpretation of what Congress meant, which is not entitled to deference, and agency legislation, which is entitled to deference); Mark Seidenfeld, A Syncopated Chevron: Emphasizing Reasoned Decisionmaking in Reviewing Agency Interpretations of Statutes, 73 TEX. L. REV. 83, 125–38 (1994) (proposing a “syncopated *Chevron*” pursuant to which courts grant agencies more leeway at Step One while emphasizing reasoned decision making at Step Two).

altogether or bypass its two-step analysis in favor of other indicia of Congress's intent to delegate.

In contrast, this Article turns to analogous interpretive problems in contract law. Scholars have widely recognized similarities between statutory interpretation and contractual interpretation. In contract law, courts apply the parol evidence rule when deciding whether a written agreement has a gap, which allows the writing to be supplemented with terms or meaning based on the parties’ earlier negotiations or dealings. Similarly, in administrative law, courts must decide whether Congress has “left a gap for the agency to fill” with specific policy decisions. Both of these interpretive problems have drawn competing interpretive methodologies and disagreement over how much weight courts should place on written terms.

In contract law, some courts have responded to disagreement by Administrative Procedure Act (APA) amendments to specify “standards for reliance on statutory text, legislative history, and tools of statutory construction”; ADRIAN VERMEULE, JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION 227 (2006) (advocating a “modest” plain meaning approach, in which “the agency prevails unless the particular provision at hand clearly bars the regulation, without consideration of legislative history”).

31. See Bercmann, supra note 5, at 782.
32. See Merrill & Hickman, supra note 14, at 920; David J. Barron & Hon. Elena Kagan, Chevron's Nondelegation Doctrine, 2001 Sup. Ct. Rev. 201. This Article's critique of Chevron is meant to complement, rather than supersede, inquiries related to the scope of Chevron's domain.
tailoring competing interpretive methodologies to different circumstances. Rather than adopting an across-the-board interpretive approach, these courts have placed varied levels of weight on written contractual terms. Sometimes they apply interpretive methods akin to textualism, and other times they apply interpretive methods akin to purposivism. Courts’ application of these varied interpretive methodologies has not been reduced to a simple verbal formulation or easily applied rule. Nevertheless, this aspect of contractual interpretation can be understood in terms of parties’ differing incentives to commit specific contractual terms to writing.

Regulatory statutes lend themselves to similar analysis. Congress’s use of specific statutory language in some instances, and general language in others, can be understood to reflect Congress’s differing incentives to commit to specific policy choices in legislation. One of Chevron’s key flaws is that its interpretive framework prompts judges to search for specific meaning in all legislation. By incorporating a more tailored, contractual approach, courts could improve Chevron’s framework by accounting for differences in legislative outcomes. General statutory terms, such as “modify,” should not specify agency policy choices as readily as more specific terms, such as those containing formulas for calculating percentiles of a given population.

An approach in which courts vary how much emphasis they place on textual evidence also calls for greater interpretive compromise. Here, contract law again suggests areas of common ground for textualists and purposivists. The Uniform Commercial Code’s (UCC’s or the Code’s) parole evidence rule offers opportunities for compromise by adding structure to a purposive interpretive framework. The UCC prioritizes textual evidence reflected in specific written terms, but it counsels against embellishing textual evidence with meaning derived from dictionary definitions and canons of construction. The UCC also provides a hierarchy of non-textual evidence and suggests ways in which judges might

37. See Posner, supra note 34, at 550, 554; see discussion infra Part III.
38. See infra Part III.
39. See Posner, supra note 34, at 545.
40. See David B. Spence & Frank Cross, A Public Choice Case for the Administrative State, 89 Geo. L.J. 97, 135 (2000); see also discussion infra Part I.A.
41. Bresman, supra note 21, at 551.
42. See infra note 357.
43. U.C.C. § 1-303(c)(1) (2002) (stating “express terms prevail” when they cannot be construed consistently with evidence based on course of performance, course of dealing, or trade usage).
44. Id. cmt. 1 (rejecting “lay-dictionary” reading of a commercial agreement); id. § 2–202 cmt. 1b (rejecting meaning derived from “rules of construction existing in the law”).
distinguish reliable from unreliable evidence of Congress’s intent. As explained below, the UCC’s framework could afford judges more reasons to agree and allow for more consistent decisions when interpreting statutes under Chevron.

The Article proceeds as follows: Part I describes general struggles the Supreme Court and federal courts of appeals have faced when applying Chevron, as well as recent Supreme Court decisions that further complicate the Chevron framework. Part II relates Chevron’s problems to fundamental flaws in its interpretive framework. Part III views Chevron’s interpretive problems through the lens of contract law. It describes how contract law’s semi-tailored interpretive methodologies address problems similar to those arising under Chevron. These facets of contractual interpretation offer compelling alternatives to Chevron, even accounting for common objections based on notice and judicial error. The Article concludes that Chevron’s flawed interpretive framework is not inevitable. Rather, a more tailored interpretive approach is within reach.

I. CHEVRON IS UNPREDICTABLE

A. Empirical Studies Show Judges Have Applied Chevron Inconsistently

Chevron deference lacks settled theoretical underpinnings. When deciding Chevron, the Court did not consider the case to be a major change in existing standards of review. The Supreme Court granted certiorari to review EPA rules implementing amendments to the Clean Air Act (CAA), which required “new or modified major stationary sources” of air pollution to meet stringent permit conditions. The EPA’s rules limited the number of firms subject to permit requirements by interpreting “source” using a “plant-wide definition” or “bubble” concept. Justice Stevens’s 6-0 opinion found that neither the text nor the legislative history showed that the term “source” had a clear meaning, precluding the EPA’s bubble concept.

The Chevron opinion and subsequent commentary advance numerous

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45. Id. §§ 2-202, 1-303(c) (prioritizing course of performance, course of dealing, and trade usage over evidence of earlier or contemporaneous verbal promises).
46. See Beermann, supra note 5, at 795–809 (maintaining Chevron lacks an “adequate theoretical justification”).
49. Id. at 856.
50. Id. at 851.
legal and pragmatic bases for deference to an agency’s interpretation of an ambiguous statute that it administers. Leading understandings emphasize congressional intent,\textsuperscript{51} deference to the Executive Branch for its superior expertise or for political accountability,\textsuperscript{52} judicial restraint,\textsuperscript{53} and ability to minimize conflict between circuits.\textsuperscript{54} 

Chevron’s multiple foundations have not resulted in a consistently applied deference doctrine at the Supreme Court or federal courts of appeals.\textsuperscript{55} The discussion below first outlines

51. Justice Stevens asserted “legislative delegation to an agency on a particular question is implicit rather than explicit.” \textit{Id.} at 844. Subsequent decisions and writings grounded Chevron deference in congressional intent to authorize an agency to act with the force of law. See, e.g., United States v. Mead Corp., 533 U.S. 218, 227 (2001) (basing force of law determination on open-ended factors including formality of procedures authorized and used by agency); Merrill & Hickman, \textit{supra} note 14, at 875–87 (finding agencies act with the force of law when they issue self-executing orders that are binding on third parties); John F. Duffy, \textit{Administrative Common Law in Judicial Review}, 77 TEX. L. REV. 113, 199–203 (1998) (discussing that agencies act with force of law when they promulgate legislative rules). Congressional intent has gained scholarly consensus as a key basis for Chevron, but it has also been criticized as an unsupportable fiction. See Mark Scidenfeld, \textit{Chevron’s Foundation}, 86 NOTRE DAME L. REV. 273, 277 n.12, 278 (2011).


55. Inconsistency stems from problems in determining when Chevron applies and disagreement over Step One. Beermann, \textit{supra} note 5, at 817–22 (noting that courts have struggled to determine when Chevron’s framework applies and when to apply multiple, competing versions of the Step One test). A number of scholars have documented the lack of a settled framework for identifying clear meaning at Step One. Lawson & Kam, \textit{supra} note 3, at 73 (noting lack of consensus on determinants of clear meaning at Step One). Linda Jellum, \textit{Chevron’s Demise: A Survey of Chevron from Infancy to Senescence}, 59 ADMIN. L. REV.
empirical studies documenting inconsistencies in these courts’ resolution of cases under the *Chevron* framework. It then relates broader uncertainty generated by the Supreme Court’s widespread failure to apply *Chevron* (or even the competing standard of review set forth in *Skidmore v. Swift & Co.*\(^{56}\)) to review agency interpretations of statutes.\(^{57}\)

At the Supreme Court, Justices accord highly inconsistent levels of deference when applying *Chevron*. Thomas Merrill’s early analysis of the Court’s pre- and post-*Chevron* decisions raised important questions about whether *Chevron* deference declined as textualism gained traction on the Court.\(^{56}\) In a subsequent study, Thomas Miles and Cass Sunstein focused on sixty-nine decisions, issued from 1989–2005, in which the Supreme Court applied the *Chevron* framework to review agency interpretations of law.\(^{59}\) Analyzing votes by individual Justices, they found that some Justices voted to validate far more agency opinions than others and that most Justices significantly favored either liberal or conservative agency decisions. Justices Breyer, Souter, Ginsburg, and Stevens had validation rates in the 70–80 percent range.\(^{60}\) Justices Scalia and Thomas, however, validated agency decisions just over half of the time.\(^{61}\)

Justice Scalia’s and Justice Thomas’s staunch textualist approach offers one explanation for their low validation rates. Justice Scalia argues that textualists exhibit judicial restraint when they identify clear meaning in *Chevron* analysis: “One who finds more often (as I do) that the meaning of a statute is apparent from its text and from its relationship with other laws, thereby finds less often that the [ambiguity] required for *Chevron* deference...”\(^{72}\)

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56. 323 U.S. 134 (1944).
60. Id. at 832 tbl.1 (finding their respective validation rates were .818, .770, .740, and .710).
61. Justice Scalia’s validation rate was .522 and Justice Thomas’s rate was .536. Id. Justices Rehnquist, Kennedy, and O’Connor hovered above at affirmance rates in the 60 percent range. Id.
exists. But judicial restraint is hardly the only conclusion to be drawn from textualism. 

A stronger theme is that both textualism and purposivism allow significant judicial discretion. Indeed, Justice Scalia’s and Justice Thomas’s low validation rates can also be explained in terms of their conservative political preferences—a majority of the agency decisions on review were liberal. Any attempt to attribute such a result only to formalist, textual commitments is refuted by an additional fact—Justice Thomas’s and Justice Scalia’s rates of validation are uneven. They both voted to validate conservative agency decisions at significantly higher rates than liberal agency decisions. The converse is true for Justices Breyer, Stevens, and Ginsburg, even though Justice Breyer claims that his purposive interpretative approach and use of legislative history “can promote interpretations that more closely correspond” to lawmakers’ expectations. This evidence suggests that one cannot expect a single interpretive method to even out validation rates for liberal and conservative agency decisions.

Concerns over consistency should not be swept aside based on an

63. Id.
64. See Merrill, supra note 58, at 372 (“In effect, the textualist interpreter does not find the meaning of the statute so much as construct the meaning.”) (emphasis in original); Richard J. Pierce, Jr., The Supreme Court’s New Hypertextualism: An Invitation to Cacophony and Incoherence in the Administrative State, 95 COLUM. L. REV. 749, 752 (1995) (“[The] majority of Justices have now begun to use textualist methods of construction that routinely allow them to attribute ‘plain meaning’ to statutory language that most observers would characterize as ambiguous or internally inconsistent.”).
65. See Pierce, supra note 64, at 778 (concluding that “judges have sometimes abused legislative history,” but an “extreme version of textualism” also allows “disingenuous, result-oriented interpretation”).
66. Miles & Sunstein, supra note 15, at 825–26. For example, Justice Breyer considered thirty liberal agency decisions and fourteen conservative decisions, while Justice Scalia considered forty-three liberal decisions and twenty-six conservative decisions. Id. at 832 tbl.1.
67. Id. Chief Justice Rehnquist exhibited the same pattern. The validation rates for Justices Souter, O’Connor, and Kennedy were not noticeably different for liberal and conservative agency outcomes. Id.
68. Id.
understanding that on average agencies receive adequate levels of deference on judicial review. As noted above, an individual case could draw a wide range of deference outcomes, depending on whether the conservative or liberal wing of the Court prevails. Justice Kennedy, a well-known swing vote, validated liberal agency decisions at almost the same rate as he validated conservative ones, suggesting he sided with the Court’s liberal wing about as much as he sided with its conservative wing. Thus, it appears difficult to predict which side will win five votes in any given case decided under Chevron.

Unpredictable application of Chevron is not limited to the Supreme Court. Outcomes may still vary a great deal from one panel to another in the federal courts of appeals. For example, when Frank Cross and Emerson Tiller considered 170 cases in which the D.C. Circuit applied Chevron, they identified significant correlations between ideologies of panel members and decisions to grant deference. Judges were more likely to defer when the agency policy choice aligned with predicted ideological preferences of a majority of the panel. When the agency’s policy choice ran contrary to a majority of the panel’s policy preferences, however, ideologically divided panels deferred and voted contrary to their political preferences far more than ideologically unified panels.

70. See Raso & Eskridge, Chevron as a Canon, supra note 4, at 1805 (stating that they are “unpersuaded” that the Court “is not deferential enough”).
71. See Miles & Sunstein, supra note 15, at 832 tbl.1 (showing Justice Kennedy validated 66.7 percent of liberal decisions and 68.0 percent of conservative decisions for an insignificant 1.3 percent difference in voting with either side).
72. See Richard J. Pierce, Jr., What Do the Studies of Judicial Review of Agency Actions Mean?, 63 ADMIN. L. REV. 77, 89 (2011) (hereinafter Pierce, Studies of Judicial Review) (“Every study of circuit court decisions that has looked at the question has found that ideological preferences help to explain patterns of decisions in cases in which courts review agency actions.”); see also Frank B. Cross & Emerson H. Tiller, Judicial Partisanship and Obedience to Legal Doctrine: Whistleblowing on the Federal Courts of Appeals, 107 YALE L.J. 2155, 2171–72 & tbl.3 (1998) (hereinafter Cross & Tiller, Judicial Partisanship); Orin S. Kerr, Shedding Light on Chevron: An Empirical Study of the Chevron Doctrine in the U.S. Courts of Appeals, 15 YALE J. ON REG. 1, 40 (1998); Richard L. Revesz, Environmental Regulation, Ideology, and the D.C. Circuit, 83 VA. L. REV. 1717, 1718–19 (1997). Studies reach mixed results as to whether deference rates in the courts of appeals increased after Chevron. See Cross & Tiller, Judicial Partisanship, supra note 72, at 2167 (1998) (noting that studies by Schuck and Elliott and Cohen and Spitzer find increased deference, whereas a study by Shapiro and Levy finds decreased deference). In any event, fluctuation in rates of deference may reflect a response to more aggressive agency interpretations rather than changes in judicial deference. Sunstein, supra note 52, at 2600 n.96. Finally, Chevron decisions in the district courts have not been studied in as much detail as other courts. See Pierce, Studies of Judicial Review, supra note 72, at 84.
73. Cross & Tiller, Judicial Partisanship, supra note 72, at 2168, 2171–72.
74. Id. at 2171.
75. Id. at 2172–73 & fig.2. Unified panels have a 3–0 ratio of republican to democratic
postulated that the divided panel’s minority judge may have had a whistleblower effect, deterring the judge’s colleagues from ignoring Chevron deference. Other studies considering all circuits also conclude that deference decisions vary according to judicial ideology.

Beyond inconsistent grants of deference by courts, confusion also stems from the fact that the Supreme Court applies Chevron in a surprisingly small percentage of cases. Chevron deference does not apply every time an agency interprets general statutory language. The Court’s decisions about when to apply the Chevron framework have been dubbed Chevron “Step Zero.” Despite its added complexity, Step Zero removes pressure from the underlying Chevron framework. This step has allowed contextual analysis that may better approximate Congress’s intent to delegate a policy decision to an agency than Chevron’s clarity versus ambiguity test.

Step Zero analysis tends to focus on two factors: “whether Congress delegated to the agency power to act with the force of law;” and whether the agency exercised “such authority in adopting the interpretation at issue.” In circumstances where Step Zero analysis counsels against Chevron, courts apply an intermediate form of deference, known as Skidmore appointees or vice versa, whereas split panels have a 2-1 ratio of democratic to republican appointees or vice versa. Id.

76. Id. at 2174.
77. Miles & Sunstein, supra note 15, at 852 (considering opinions published in 1990–2004 in which the circuits reviewed statutory interpretations issued by the EPA, National Labor Relations Board, and Federal Communications Commission (FCC), and finding that “both Democratic and Republican appointees show far more political voting patterns when they are sitting on unified panels”); Kerr, supra note 72, at 40–41 & chart 9 (considering decisions from all circuits and identifying significant differences in Republican and Democratic appointees’ acceptance rates in politically salient cases). Although many studies attempting to measure enhanced court of appeals’ deference under Chevron do not control for changes in agency interpretations, one study considering different judicial approaches to the same agency interpretation found varied rates of judicial deference under Chevron. Sullivan, supra note 55, at 407–29 (discussing courts’ application of varying degrees of deference to EEOC’s allowance for early right to sue letters after Chevron).
81. Id. An ambiguous statute does not grant administrators unchecked interpretive authority, for example, over issues which are far removed from their expertise and decided without the benefit of transparent procedure. Gonzales v. Oregon, 546 U.S. 243, 268 (2006) (denying Chevron deference to Attorney General John Ashcroft’s unilateral interpretation of “legitimate medical practice” in the assisted suicide context).
deference. Under *Skidmore* deference, courts are to give weight but not obedience to an agency’s interpretation of a regulatory statute.

When considering the larger group of cases reviewing agency interpretations of statutes, however, decisions become even less predictable. This point is well made by empirical studies undertaken by William Eskridge and co-authors in separate studies, Lauren Baer and Connor Raso. These studies reveal that the Supreme Court applies the *Chevron* framework in a surprisingly small percentage of cases. The most recent study, by Eskridge and Raso, focuses on the application of *Chevron* and competing administrative law deference regimes in 667 Supreme Court cases involving agency interpretations of statutes.

Within this sample, the subset of cases in which the Court applied the *Chevron* framework was surprisingly small; Justices voted to apply *Chevron* in majority, concurring, and dissenting opinions at an average of under 20 percent. By contrast, the Justices voted to apply no deference or an anti-deference regime at an average of almost 50 percent. For remaining opinions, most Justices voted to apply *Skidmore* or a similar type of consultative deference, and a final sliver voted to defer to an agency’s interpretation of its own regulations. These findings reflect inconsistency and lack of predictability in the Court’s review of agency interpretations of statutes.

Adding to *Chevron*’s unpredictability, empirical studies offer mixed results as to whether the use of *Chevron* is correlated with higher agency win rates. As a result, litigants cannot tell whether *Chevron* is likely to bolster their

85. *Raso & Eskridge, Chevron as a Canon, supra* note 4, at 1741.
86. *id* at 1762 tbl.4 (considering *Chevron* with a similar *Beth Israel* doctrine). Eskridge and Baer identify an even smaller percentage of majority and plurality opinions applying *Chevron* (8.3 percent) in an expanded dataset. *Eskridge & Baer, The Continuum of Deference, supra* note 4.
87. *Raso & Eskridge, Chevron as a Canon, supra* note 4, at 1762 tbl.4.
88. *Id* (noting Justices voted to apply *Skidmore* consultative deference in 28.38 percent of all opinions and to defer to agency interpretations of their own rules in 2.66 percent of all opinions).
89. *Id* at 1817 (concluding that “the Justices apply deference doctrine inconsistently”); accord Eskridge & Baer, *The Continuum of Deference, supra* note 4, at 1098.
90. Compare *Raso & Eskridge, Chevron as a Canon, supra* note 4, at 1767 tbl.6 (finding decisions applying the *Chevron* framework had a higher agency win rate (72.13 percent) compared to the win rate in no or anti-deference cases (60.76 percent)), with *Miles & Sunstein, supra* note 14, at 849 (noting decisions applying the *Chevron* framework had only a 67 percent win rate). See generally *Pierce, Studies of Judicial Review, supra* note 72, at 85 (concluding that “doctrinally-based differences in outcome are barely detectable” for all courts).
chances of winning a case. Further, the Court’s broad failure to use any deference regime in almost half of its cases raises concerns about a lack of announced standards for deference. These decisions do not support an understanding that the Court has used Step Zero to incorporate predictable contextual factors that tailor Chevron deference. Moreover, litigants may not know how an agency’s sudden change of interpretation, which is generally accommodated under Chevron but not under Skidmore, will fare if the Court instead grants no deference. This lack of clear guidance to agencies, other interested parties, and lower courts is especially problematic in light of Cross and Tiller’s findings that appellate judges are more inclined to set aside their ideological leanings and defer to the agency’s interpretation when they sit on split panels.

The Supreme Court’s incoherent decisions do not give a minority panel member meaningful parameters to insist that her colleagues follow. There are a variety of possible reasons why Justices (including Justice Scalia) have chosen to spurn Chevron in over 80 percent of all opinions and Chevron and Skidmore in almost 50 percent of all opinions. Justices may wish to avoid the Chevron/Skidmore framework because of the complication and political controversy generated by both Step Zero and Chevron deference. Ignoring Chevron is also consistent with the understanding that it is a highly malleable legal doctrine and is sometimes difficult to distinguish from de novo review. As Thomas Merrill explains, Chevron has been “applied in an accordion-like fashion,” so that judges manipulate its inquiries to find that “clear” means different things in different cases.

Further, Eskridge’s studies with Baer and Raso suggest Chevron does not appeal to many Justices’ desire to “tailor deference to variety” when

92. Pierce, supra note 64, at 752.
93. See Cross & Tiller, Judicial Partisanship, supra note 72, at 2161. What is more, the doctrine’s lack of predictability may drive away courts that have a choice whether to adopt Chevron. When the Michigan Supreme Court was asked to formally adopt Chevron in 2008, for example, it declined to do so. The Michigan Supreme Court noted that Chevron’s framework had proved “very difficult to apply” and did “not provide a clear road map” for state courts to follow. In re Complaint of Rovas Against SBC Michigan, 754 N.W.2d 259, 271–72 (Mich. 2008).
94. See Becerram, supra note 5, at 817–22 (noting confusion caused by both Step Zero and Step One of Chevron).
95. See discussion infra Part II.A.
reviewing agency interpretations of statutes. The overwhelming conclusion to be drawn from both studies is that Justices desire to review these questions using multiple deference frameworks. There is no evidence the Court has ever followed the bright-line “Chevron-or-nothing approach” urged by Justice Scalia.

Given the Justices’ strong revealed preferences for tailoring at Step Zero, it is possible they also favor deference doctrines that can be tailored to reflect variations in facts of a given case. The Chevron framework is woefully lacking on this count. Under Skidmore, for example, a judge may adjust the amount of weight she gives an agency interpretation according to certain non-textual cues, such as the thoroughness of the agency’s reasoning or longstanding nature of an agency’s interpretation. In contrast, traditional application of Chevron omits these factors. Instead, it focuses on textual cues of clarity versus ambiguity, which are highly abstract and untailored.

While Chevron’s clarity versus ambiguity cues are themselves too abstract to be helpful, one might imagine an appellate court refining this inquiry. Chevron itself directs courts to employ “traditional tools of statutory construction” to ascertain whether “Congress had an intention on the precise question at issue.” Courts applying these tools could develop factors to help identify how clear is clear as they separate statutes that leave policy space for the agency from those that limit agencies to specific policy choices. For example, then-Judge Stephen Breyer noted that a court might be inclined to defer when the language is “inherently imprecise” or the “words of the statute are phrased so broadly as to invite agency interpretation.”

Developing analysis of textual cues, however, adds another serious complication: it implicates a sharp dispute over interpretive
methodology. This dispute makes it difficult to agree on indicia of clear meaning. Rather than clarifying the law, Step One’s test for determining clear meaning has complicated it. Conflicting views on interpretive methodology make it difficult for judges to develop consensus on textual cues that might show clarity or ambiguity over a larger range of cases. These concerns have manifested themselves in a *Chevron* framework that is applied inconsistently and infrequently. As explained below, the Court’s recent decisions portend to make things worse.

B. The Supreme Court’s Recent Decisions Generate Further Confusion over Chevron

The Supreme Court’s recent rulings in *City of Arlington v. FCC*, *Utility Air Regulatory Group v. EPA*, and *King v. Burwell* will likely exacerbate inconsistent application of *Chevron*. *City of Arlington* and *King* adopt seemingly inconsistent Step Zero tests for determining when *Chevron* applies. In *City of Arlington*, the Court held that *Chevron* deference applies to an agency’s expansion of its own jurisdiction and refused to recognize an exception for extraordinary decisions amounting to controversial grabs of power. In *King*, however, a different majority of the Court granted no deference (*Chevron* or otherwise) to the IRS’s rules awarding tax credits under the Affordable Care Act. It found *Chevron* inapplicable to this extraordinary question of “deep economic and political significance.”

Courts are unlikely to resolve the further uncertainty generated by *City of Arlington* and *King* in a manner that promotes deference to agencies. *King* directs judges confronted with extraordinary questions to resolve statutory ambiguity and determine meaning independently. Further, the *Chevron* test itself failed to afford deference in *Utility Air Regulatory Group v. EPA*. There, five Justices agreed that highly politically and economically significant EPA regulations were impermissible under *Chevron* because they were not clearly authorized by Congress. *Utility Air* stands *Chevron* on its head and invites courts to withhold deference when reviewing significant agency regulations.

105. Gluck, supra note 23, at 619 (“The Court cannot agree on what the traditional tools of construction are . . . ”).

106. For example, should judges give more weight to dictionary definitions or legislative history? See Merrill, supra note 58, at 354–62.

107. Beezamann, supra note 5, at 822.


110. *Id.*


112. *Id.* at 2444 (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 139–60 (2000)).
The discussion below first provides background on the relationship between *Chevron* and exceptions for extraordinary cases and expansions of agency jurisdiction. It then describes questions raised by the Court’s recent treatments of these issues in *City of Arlington*, *King*, and *Utility Air*.

1. An Exception for Agencies’ Expansion of Jurisdiction in Extraordinary Cases?

Scholars have long questioned whether Step Zero precludes *Chevron* deference for controversial cases involving “extraordinary” questions and an agency’s expansion of jurisdiction. Before *City of Arlington*, decisions such as *Federal Drug Administration (FDA) v. Brown & Williamson Tobacco Corp.* arguably created leeway to exclude such extraordinary cases from the standard *Chevron* framework. In *Brown & Williamson*, the FDA dramatically expanded its jurisdiction by attempting to regulate tobacco products. The agency interpreted the jurisdictional provisions of the Food, Drug, and Cosmetic Act (FDCA) to permit the regulation of sales of cigarettes and smokeless tobacco products to adolescents and minors. While tobacco products seemed to fall under the FDA’s broad authority to regulate “drugs” and “drug delivery devices,” the tobacco industry contested the regulations.

The industry objected to *Chevron* deference for agency interpretations “that implicate the scope of an agency’s regulatory jurisdiction.”

The Court invalidated the FDA’s rules without squarely addressing the jurisdictional objection to *Chevron* deference. The majority applied *Chevron* Step One and found the FDA’s regulation of tobacco products contravened Congress’s clear intent. In so doing, it looked past the FDCA’s broad definitions of drugs and devices and rested its decision on (1) policy concerns that regulation would require tobacco products to be removed from the market and (2) later-enacted statutes that had the effect of ratifying the FDA’s earlier refusal to exercise jurisdiction over tobacco.

At the same time, the Court suggested this might not be a typical *Chevron* case. It questioned whether the *Chevron* framework should imply a

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113. See, e.g., Merrill & Hickman, supra note 14, at 851.
114. 529 U.S. at 126
115. Id. at 159 (suggesting this case is unordinary and unique).
116. Id. at 126. (“The [Food, Drug, and Cosmetic Act (FDCA)] grants the FDA, as the designee of the Secretary of Health and Human Services (HHS, the authority to regulate, among other items, ‘drugs’ and ‘devices.’”). See 21 U.S.C. §§ 321(g)-(h) (2012).
118. Merrill & Hickman, supra note 14, at 844.
120. Id. at 142–43, 156; Molot, supra note 25, at 67–68.
delegation of authority based on “the nature of the question presented.”\textsuperscript{121} The Court deemed the FDA’s regulation of tobacco products an extraordinary question\textsuperscript{122} and doubted that Congress would have delegated “a decision of such economic and political significance to an agency in so cryptic a fashion.”\textsuperscript{123} Thus, it was unclear whether the majority decision rested solely on an aggressive application of Step One or whether the Court was carving out an exception for the extraordinary issue presented by the FDA’s regulation of tobacco products.\textsuperscript{124}

An undifferentiated Chevron test may be problematic. As Merrill and Hickman explained, broad use of Step One to police “agency deviations from their assigned mandates” tends to “distort” the Step One inquiry.\textsuperscript{125} Reviewing judges will be tempted to “insist” on interpretations that are not the only plausible interpretation of the statute, but then “dissemble” by characterizing their preferred readings as resting on the statute’s clear or plain meaning.\textsuperscript{126} In other words, judges may pay lip service to Chevron while making an independent determination whether an agency may expand or contract its jurisdiction. This aggressive manipulation of Chevron undermines its fundamental interests in deference to agency decisions.\textsuperscript{127} Further, aggressive application of Chevron in controversial cases may weaken its framework and reduce deference across all cases.


City of Arlington v. FCC resolved the jurisdictional issue left open in FDA v. Brown & Williamson Tobacco Corp. in favor of broad application of Step One. In City of Arlington, the Court reviewed the FCC’s decision to establish timeframes in which local government authorities must act on siting applications for wireless facilities.\textsuperscript{128} Local authorities challenged the FCC’s Declaratory Ruling, arguing that the Telecommunications Act of 1996 did

\textsuperscript{121} Brown & Williamson, 529 U.S. at 159.
\textsuperscript{122} Id.
\textsuperscript{123} Id. at 160.
\textsuperscript{124} Merrill & Hickman, supra note 14, at 911.
\textsuperscript{125} Id.
\textsuperscript{126} Id. at 911–12 & n.380 (citing MCI v. AT&T, 512 U.S. 218 (1994)).
\textsuperscript{127} Id. at 911 (identifying “serious drawbacks” to an undifferentiated approach where cases like Brown & Williamson are decided at Step One). Even those who favor judicial resolution of extraordinary issues argue it should be conducted under a more transparent framework than Chevron. Merrill, supra note 96, at 783.
\textsuperscript{128} 133 S. Ct. 1863, 1867–71 (2013). This case focused on the Communications Act of 1934’s (Communications Act’s) provisions requiring local governments to act on siting applications for wireless facilities “within a reasonable period of time.” 47 U.S.C. § 332(c)(7)(B)(ii) (2012).
not grant the FCC jurisdiction to impose specific processing timeframes. Writing for the majority, Justice Scalia affirmed the FCC’s ruling and held the FCC was entitled to Chevron deference notwithstanding the jurisdictional issue. Justice Scalia has long opined that across-the-board Chevron will simplify deference doctrine. Here, a majority of the Court agreed with Justice Scalia that it was impossible to distinguish jurisdictional from non-jurisdictional questions in the agency context. Thus, Chevron was applied across the board.

City of Arlington’s core holding focused on jurisdiction, not an exception for extraordinary cases. Still, in ruling on the jurisdictional issue, Justice Scalia refused to distinguish between “big, important” questions, which might be considered jurisdictional issues for independent judicial determination, and “humdrum, run-of-the mill” questions, which should be accorded Chevron deference. Justice Scalia found “no principled basis for carving out some arbitrary subset of such claims.” He went on to cite Brown & Williamson as a case resolved using the traditional Chevron framework. Thus, City of Arlington suggests that Brown & Williamson falls under Chevron’s Step One framework.

Chief Justice Roberts dissented. He disagreed that the argument against deference turned on the difference between “big” and “humdrum” cases. Chief Justice Roberts asserted that case turned on a different argument: courts should not defer on the threshold question “whether Congress has granted the agency interpretive authority over the statutory ambiguity at issue.” Unlike the majority, Chief Justice Roberts would not grant deference simply because the FCC had authority to promulgate rules pursuant to a general grant of rulemaking power.

The next term, in Utility Air Regulatory Group v. EPA, the Court incorporated Brown & Williamson’s extraordinary case standard into the

129. City of Arlington, 133 S. Ct. at 1867.
130. Id. at 1871. Justices Thomas, Sotomayor, Kagan, and Ginsburg joined the majority. Justice Breyer wrote an opinion concurring in part, and Justices Kennedy and Alito joined the Chief Justice’s dissent. Id. at 1865.
133. Id. at 1871.
135. Id. at 1869.
136. Id. at 1872.
137. Id. at 1879.
138. Id. at 1879–80.
139. Id. at 1874.
Chevron framework.\textsuperscript{141} Utility Air involved the EPA’s expanded regulation of greenhouse gas emissions under the Clean Air Act. Under Chevron Step Two,\textsuperscript{142} five Justices held it “impermissible” for the EPA to adopt extraordinary regulations of “vast ‘economic and political significance’” without clear authorization from Congress.\textsuperscript{143} Chief Justice Roberts joined this opinion, thus appearing to agree that Brown & Williamson’s extraordinary case standard fell within the Chevron framework.\textsuperscript{144}

In King v. Burwell, however, Chief Justice Roberts did an about-face and announced an extraordinary case exception to Chevron. King was part of a series of highly controversial challenges to the Affordable Care Act (ACA). Several plaintiffs challenged IRS rules extending ACA’s tax credits to millions of individuals who purchased health insurance on federally-established marketplaces.\textsuperscript{145} While the D.C. Circuit and Fourth Circuit initially split over the legality of the IRS rules,\textsuperscript{146} the judges analyzed the IRS rules under Chevron.\textsuperscript{147} The Supreme Court ultimately decided to review the Fourth Circuit’s decision, which granted Chevron deference on the ground that IRS rules were a reasonable interpretation of an ambiguous statute.\textsuperscript{148}

In their merits briefs, the parties’ arguments focused primarily on competing interpretations of the ACA. In addition to arguments about the unambiguous meaning of the ACA, however, the petitioners offered three

\textsuperscript{141} Utility Air Regulatory Group v. EPA, 134 S. Ct. 2427 (2014).
\textsuperscript{142} Tom Merrill describes the Court’s decision as falling under Chevron Step Two. Merrill, supra note 96, at 756. Alternatively, the analysis could be characterized as collapsing Chevron into a single step and asking whether the agency’s interpretation is permissible. See Stephenson & Vermeule, supra note 29, at 599.
\textsuperscript{143} Utility Air, 134 S. Ct. at 2443–45 (citing FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000)). Justice Scalia wrote an opinion announcing the judgment of the Court. Chief Justice Roberts and Justice Kennedy joined the opinion in full, and Justices Alito and Thomas joined the portion of the opinion finding the certain of the EPA’s new greenhouse gas emission regulations impermissible under Chevron. Id. at 2432.
\textsuperscript{144} Id. at 2435–37.
\textsuperscript{146} Compare Halbig v. Burwell, 758 F.3d 390, 412 (D.C. Cir. 2014) (concluding “section 36B unambiguously forecloses” the IRS’s interpretation under Chevron Step One), with King v. Burwell, 759 F.3d 338, 363 (4th Cir. 2014) (applying Chevron deference to uphold the IRS’s permissible construction of an ambiguous statute).
\textsuperscript{147} Halbig, 758 F.3d at 398–403; King, 759 F.3d at 363 (applying Chevron deference to uphold IRS’s permissible construction of an ambiguous statute); id. at 376 (Davis, J., concurring) (concluding “at Chevron Step One,” the “IRS’s interpretation of the Act is “correct” and “required as a matter of law”); cf. Oklahoma ex rel. Pruitt v. Burwell, 51 F. Supp. 3d 1080, 1091 (E.D. Okla. 2014) (vacating the IRS’s rule on the ground that “clear and unambiguous language” is required to authorize tax credits).
\textsuperscript{148} King, 135 S. Ct. at 2488.
reasons why *Chevron* could not save the IRS’s rules: (1) this was an extraordinary case under *Utility Air and Brown & Williamson*;149 (2) the “clear statement” canon trumps deference to the IRS;150 and (3) the IRS does not administer contested provisions of the ACA.151

The government countered all of these points.152 In particular, it noted that an exception for extraordinary cases was inconsistent with *City of Arlington’s* determination that *Chevron* applies to “big, important” issues.153 The government also argued that *Utility Air and Brown & Williamson* involved determinations of clear meaning under *Chevron*, not exceptions to the *Chevron* framework.154 At oral argument, one of the few questions the Chief Justice asked was about *Chevron*—whether a decision issued under *Chevron* would allow a future administration to change the IRS’s current allowance for tax credits.155

Writing for a 6–3 majority, Chief Justice Roberts affirmed the IRS’s rules but flatly rejected *Chevron* deference.156 Citing *Brown & Williamson* and *Utility Air*, Roberts held that *King* was an “extraordinary case” presenting questions of “deep economic and political significance.”157 As a result, the Court determined de novo the meaning of the ACA, rather than assuming Congress implicitly delegated interpretive authority to the IRS.158 Additionally, Chief Justice Roberts found the IRS’s lack of expertise in health insurance to be another reason to withhold *Chevron* deference.159

When rejecting *Chevron*, Roberts did not cite *City of Arlington* or address its apparent rejection of a Step Zero exception for extraordinary cases.160 He also disregarded the fact that *Utility Air* was an extraordinary case decided under *Chevron*.161 Nor did he clarify why *King* was extraordinary even

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150. Id. at 53–55.
151. Id. at 55–56.
153. Id. at 29 (quoting *City of Arlington v. FCC*, 133 S. Ct. 1863, 1868 (2013)).
154. Id.
157. Id. at 2488-89.
158. Id.
159. Id. (citing Gonzales v. Oregon, 546 U.S. 243, 266–68 (2006)).
160. Id. at 2485–96
the IRS’s rules did not present concerns over expanded jurisdiction.\textsuperscript{162} Finally, although Justice Scalia has long opposed exceptions to \textit{Chevron},\textsuperscript{163} his dissent did not expressly object to the majority’s failure to apply \textit{Chevron}.\textsuperscript{164}

These inconsistencies in the Court’s recent decisions magnify uncertainty over the deference doctrine. Future courts will be required to delineate which agency interpretations are politically and economically significant enough for de novo judicial review.\textsuperscript{165} They will also have to decide whether \textit{City of Arlington} or \textit{King} should govern extraordinary cases that also involve expansions of regulatory jurisdiction.\textsuperscript{166} Further, courts will not know whether decisions outside an agency’s area of expertise should receive \textit{Skidmore} deference, as in \textit{Gonzales v. Oregon},\textsuperscript{167} or no deference whatsoever, as in \textit{King}.\textsuperscript{168}

Even worse, efforts to clarify the scope of \textit{King} are unlikely to produce a deference-oriented framework for agency interpretations of broadly-worded statutes. In \textit{King}, the Court determined statutory meaning based on relatively specific evidence of statutory text, structure, and purpose.\textsuperscript{169} In other cases, however, de novo interpretation may invite judicial

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\item 162. \textit{Id.} Chief Justice Roberts relied on \textit{Brown} \& \textit{Williamson} and \textit{Utility Air}, both of which involved controversial expansions of regulatory jurisdiction. \textit{Id.}
\item 164. \textit{King}, 135 S. Ct. at 2496–507 (Scalia, J., dissenting).
\item 165. As noted above, this exception was once linked to jurisdictional concerns that no longer seem to offer a tenable distinction under \textit{City of Arlington}. See supra notes 127–140. In determining that \textit{King} was an extraordinary case, Chief Justice Roberts noted the large amount of money and number of people affected by agency regulations central to the statutory scheme. 135 S. Ct. at 2489 (reasoning that tax credits involve “billions of dollars in spending” and affect “the price of health insurance for millions of people”); see also \textit{Util. Air Regulatory Grp. v. EPA}, 134 S. Ct. 2427, 2444 (2014) (finding the decision to require permits for operation of millions of small sources of greenhouse gas emissions was one of “vast ‘economic and political significance’” under \textit{Chevron} Step Two). Roberts may also have sidestepped \textit{Chevron} to avoid harm that future change in policy could cause for millions of people relying on the government’s tax credits. Oral Argument at 76:12–15, \textit{King}, 135 S. Ct. 2480, available at http://www.supremecourt.gov/oral.arguments/argument_transcripts/14-114_kln.pdf. Further, Einer Elhauge argues that the extraordinary case exception applies to agency decisions that are politically salient but lack support from both the current Congress and the President. \textsc{Einer Elhauge, Statutory Default Rules: How to Interpret Unclear Legislation} 104 (2008).
\item 166. As noted above, when the EPA dramatically expanded its regulatory jurisdiction to cover stationary sources of greenhouse gas emissions, the Court reviewed that decision under the \textit{Chevron} framework. \textit{Utility Air}, 134 S. Ct. at 2444.
\item 167. 546 U.S. 243, 268 (2006) (holding that Attorney General’s interpretation of “legitimate medical purpose” receives deference “in accordance with \textit{Skidmore}”).
\item 169. 135 S. Ct. at 2502.
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interference with policy questions assigned to the Executive Branch. For example, criticism of Brown & Williamson focuses on the Court’s elevation of policy concerns over plain language showing a broad delegation of authority. Contextual analysis is also likely to impose a heavy policy burden for judges facing statutes that are more open-ended than the ACA.

Despite these problems, de novo review might insulate the Chevron framework from controversial cases and lead to a deference-oriented framework in others. As things stand, however, Chevron raises its own set of concerns over lack of appropriate deference. In City of Arlington, for example, Justice Scalia seemed to invite reversal of agency interpretations at Step One. His opinion directs courts to take “seriously” and apply “rigorously” statutory limits on agency decisions. This call for aggressive Step One analysis could further damage Chevron’s framework. The Court’s subsequent decision in Utility Air Regulatory Group v. EPA adds to these concerns by limiting deference at Step Two.

3. Utility Air Regulatory Group v. EPA Encourages Courts to Withhold Deference under Chevron

Justice Scalia’s opinion in Utility Air further upended the Chevron framework. The case arose under the Clean Air Act (CAA) and involved two categories of EPA permit requirements for stationary sources that emit greenhouse gases: (1) new permit requirements for sources regulated only due to their greenhouse gas emissions; and (2) additional obligations for sources already subject to other permitting requirements. Seven Justices approved the EPA’s latter category of permit requirements, but five voted to invalidate the new permit requirements.

While the CAA generally required permits for major stationary sources emitting “any air pollutant,” its numeric thresholds triggered massive new permit requirements for greenhouse gas emissions. The CAA required

170. See, e.g., City of Arlington v. FCC, 133 S. Ct. 1863, 1886 (2013) (Roberts, C.J., dissenting) (“Chevron importantly guards against the Judiciary arrogating to itself policymaking properly left, under the separation of powers, to the Executive.”).
171. Molot, supra note 25, at 67–68.
172. See generally Merrill & Hickman, supra note 14, at 911–12.
173. City of Arlington, 133 S. Ct. at 1874.
175. Justice Scalia announced the judgment of the Court and an opinion that was joined in full by Justices Roberts and Kennedy. Justices Breyer, Sotomayor, Kagan, and Ginsburg joined the part of the opinion approving the EPA’s additional regulatory requirements for firms already subject to regulation. Justices Alito and Thomas joined the part of the opinion rejecting the EPA’s new permitting requirements.
176. Utility Air, 134 S. Ct. at 2436.
the EPA to impose permit requirements for emissions in excess of 100–250 tons per year. Greenhouse gas emissions, however, were “orders of magnitude greater than emissions of conventional pollutants.” Thus, the EPA anticipated that statutory permit thresholds for greenhouse gases would require “unprecedented expansion of EPA authority,” “touch every household in the land,” but still be “ineffective” at reducing air pollution. The EPA responded to this dilemma by regulating stationary greenhouse gas emissions pursuant to relaxed numeric thresholds.

Justice Scalia found the EPA's regulation an impermissible interpretation of the CAA. He acknowledged that the CAA's general permit requirements for “any air pollutant” were broad and “ambiguous.” Nevertheless, he decided that “air pollutant” meant something “obviously narrower,” holding impermissible the EPA's interpretation under Step Two of Chevron. Justice Scalia offered two reasons to insist on his narrow interpretation of the CAA. First, he argued the statutory structure shows that the category of regulated air pollutants was limited to those emitted by a “handful of large sources.” Second, Justice Scalia rejected the EPA's interpretation because “it would bring about an enormous and transformative expansion in EPA's regulatory authority without clear congressional authorization.”

Justice Scalia's second reason converts the extraordinary cases exception from Brown & Williamson to a new, anti-deference tenet of Chevron. He expects “Congress to speak clearly if it wishes to assign to an agency decisions of vast 'economic and political significance.’” But the expectation of clear statutory authorization stands the entire concept of Chevron deference—upholding agencies’ permissible interpretations of ambiguous statutes—on its head.

To be sure, in other contexts the Court has been reluctant to assume that Congress will “alter the fundamental details of a regulatory scheme in

177. Id.
178. Id. (internal quotation marks omitted).
179. Id.
181. Id. at 2442.
182. Id. at 2444.
183. Id. at 2441–42.
184. Id. at 2443–44.
185. Id. at 2443.
vague terms or ancillary provisions” or “hide elephants in mouseholes.”\(^{189}\)

In *Utility Air*, however, Justice Scalia could not pretend that CAA’s sweeping grant of regulatory authority was a mere mousehole.\(^ {190}\) Instead, Justice Scalia responded to broad statutory language with a presumption against deference. This presumption was triggered by disfavored policy consequences. It also reflected an ad hoc determination that the EPA’s decision requiring millions of permits of small sources fell within a “class of authorizations” the Court was “reluctant to read into ambiguous statutory text.” As Thomas Merrill suggested, this ruling lacks “announced criteria”\(^ {191}\) to distinguish the types of authorizations triggering an anti-deference presumption from the types of authorizations leaving space for agency policy decisions.\(^ {192}\)

A presumption against deference is highly problematic for any understanding of *Chevron* as a doctrine that actually does what it is supposed to do—grant agencies deference. Indeed, if Congress clearly authorized agency action, there would be no need for *Chevron* deference (or perhaps even a lawsuit) because Congress would have already directly resolved the dispute. Further, generally-worded mandates permeate the landscape of regulatory statutes.\(^ {193}\) Justice Scalia’s new presumption raises even more doubts as to which generally-worded statutory provisions qualify for *Chevron* deference. As explained below, *Chevron*’s flawed framework already makes this question highly uncertain.

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190. Thus, it differs from two of the additional cases Justice Scalia cites. In *MCI*, Justice Scalia argued the FCC’s power to “modify” rate-filing requirements was limited to smaller adjustments than the FCC had authorized. See *MCI v. AT&T*, 512 U.S. 218 (1994). In *Industrial Union Department, AFL-CIO* v. *American Petroleum Institute*, the Court considered adopted a narrow construction of the Occupational Safety and Health Act to avoid finding that its “open-ended grant” was an unconstitutional delegation of legislative power. See *Indus. Union Dep’t v. Am. Petroleum Inst.*, 448 U.S. 607, 645–646 (1980) (plurality opinion). Though *Utility Air* is factually closer to *Brown and Williamson*, *Utility Air*’s presumption against authorization becomes part of *Chevron* Step Two analysis rather than an exception to deference or a finding of clarity under Step One.


193. See infra notes 309–319 and accompanying text.
II. Step One of *Chevron* Rests on an Artificial and Contentious Analytical Framework

Courts' inconsistent application of *Chevron* can be traced to its flawed, two-step framework. Under Step One, a court must determine whether Congress has "directly spoken to the precise question at issue."194 If the statute is "silent or ambiguous with respect to the specific issue," then the court moves to Step Two and defers to agency decisions "based on a permissible construction of the statute."195

Under *Chevron*, if a court is inclined to withhold deference and override an agency's decision, it is most likely to do so at Step One and find that the agency's policy contravenes the "unambiguously expressed intent of Congress."196 Courts generally defer to agencies under Step Two (whether the agency has adopted a "permissible" or "reasonable" construction of the statute).197 Thus, problems with inconsistent levels of deference are best addressed at Step One, given that this step's analytical framework has failed to provide a workable standard for reviewing courts.

Under *Chevron*, courts have struggled to apply Step One's criteria and determine whether a statute is "clear" or "silent or ambiguous with respect to the specific issue" addressed by the agency. Their struggle reflects two troublesome elements of Step One: its artificial conceptual framework and the vehement disagreement over the correct method of interpreting statutes.

A. Artificial Conceptual Framework

At first blush, the search for clear meaning might seem to reiterate judges' concerns with identifying lawful limits of agency action—the agency's interpretation may not exceed "the bounds of [the agency's] statutory authority."198 Step One of *Chevron*, however, addresses this concern using a legal fiction. The test assumes Congress intended to grant an agency primary interpretive authority whenever a statute it administers is ambiguous or silent.199 By expressing this concern as a search for clarity

195. Id.
196. Id. at 842–44; *Kerr*, supra note 72, at 31 (“Thus, courts resolving applications at step one upheld the agency interpretations only 42% of the time... and those resolving applications at step two upheld the agency view in 89% of the applications.”); *Miles & Sunstein*, supra note 15, at 838 n.26 (“More than 90 percent of [Supreme Court] invalidations under *Chevron* occurred under Step One.”).
197. *Chevron*, 467 U.S. at 242-44.
199. See generally *Duffy*, supra note 51, at 190 (arguing the Court's determination of
or ambiguity, Step One fails to distinguish between generally-worded and precisely-worded statutes.

Critics of *Chevron* Step One complain that its test can be bent to support almost any outcome a judge may desire. In non-agency cases, judges are routinely required to derive clear meaning from ambiguous language in order to resolve the parties’ dispute. Distinguishing clarity from ambiguity requires judges to make conceptually difficult categorical judgments. It is psychologically difficult for a judge to set aside the role of determining clear meaning and leave room for an agency’s policy decision. As a result, clarity and ambiguity have become empty concepts, and the Court has not mapped them to meaningful differences in the language Congress uses. Step One fails to account for variety in how specifically or generally Congress drafts statutes.

Further, whether a judge searches for clear statutory meaning using a purposive or textual methodology, the interpretive inquiry prompts judges to draw a fairly specific meaning from ambiguous or incomplete statutory text. Purposivism prompts judges to use a statute’s general purpose or goal to assign particular statutory meaning. Textualism instructs judges that a statute’s “plain meaning” will “solve most statutory puzzles.” Judges use these interpretive methods both to identify whether a statute has clear meaning in agency cases and construct meaning from ambiguous statutory provisions in non-agency cases. Thus, it is not surprising that courts are inclined to assign specific meaning to regulatory statutes under *Chevron*.

The framework applied by textualist judges makes it especially difficult for them to recognize statutory ambiguity. Textualist judges prioritize text over Congressional intent. A key textualist objection to intent is that it

“clear” statutory meaning under the first part of *Chevron* is “unremarkable,” while *Chevron*’s innovation is its requirement of deference in the face of statutory silence or ambiguity.

203. One might think these differences ought to relate to Court’s Step One inquiry: general language tends to be ambiguous and specific language tends to be clear. But the Court has not applied *Chevron* in this manner.
204. Bressman, *supra* note 21, at 551.
205. ESKRIDGE ET AL., *supra* note 24, at 229.
206. *Id.* at 231.
is impossible to assign a single intent to a multi-member legislative body. At the same time, however, textualists assume Congress has provided a single, objectively determinable meaning in statutory text. This assumes, however, that “statutes have a legal meaning before the process of interpretation,” even though “an ambiguous statute lacks any clear preexisting meaning.” This analytical framework is designed to deny existence of textual ambiguity.

Given these problems, it is not surprising that Chevron has facilitated some exceedingly aggressive textualist interpretations of generally worded statutes. In MCI Telecommunications Corp. (MCI) v. American Telephone & Telegraph Co. (AT&T), for example, the FCC argued the Communications Act of 1934 (Communications Act) allowed it to “modify” statutory rate-filing requirements. These requirements were originally designed to regulate a single monopoly carrier in long-distance telecommunications, and the FCC held they did not apply when the market finally opened up to competing carriers. After considering an argument that the Communications Act contained “sufficient ambiguity” to afford the FCC’s interpretation Chevron “deference” Justice Scalia insisted that select dictionary definitions and statutory structure required a narrower reading of the term “modify.” Justice Scalia’s majority opinion struck down the FCC’s interpretation even though countervailing textualist evidence was weak and the FCC’s position was supported by “at least one standard dictionary definition.”

In Brown & Williamson, Justice O’Connor aggressively manufactured a “clear intent” to preclude the FDA from regulating tobacco products. As noted above, the FDCA generally authorized the FDA to regulate “drugs” and “devices.” Still, the Court derived an anti-regulatory intent from the high-stakes policy issue and context provided by “later-enacted statutes regulating tobacco labeling and advertising.”

211. Id. at 92 (emphasis in original).
212. Indeed, two of Jonathan Molot’s leading examples of aggressive textualism are Chevron cases. Molot, supra note 25, at 66.
214. Id.
215. Id. at 220–22.
216. Id. at 225–29.
219. Molot, supra note 25, at 67–68. For additional examples of aggressive textualist
These examples are not meant to imply that generally-worded statutes always require a decision in favor of the agency. Agencies can sometimes choose policies that fall outside of general parameters. Nor is general language the only type of language that may give rise to ambiguity. As explained below, however, general language raises fundamental concerns under Chevron because such language permeates the landscape of regulatory statutes.

The Communications Act and FDCA are by no means the only regulatory statutes containing general directives. Indeed, Congress sometimes words regulatory statutes so broadly that they are challenged as unconstitutional delegations of legislative power. In *Whitman v. American Trucking Associations, Inc.*, the Court considered and rejected a delegation doctrine challenge to generally worded CAA provisions. These provisions required the EPA to set air quality standards “requisite to protect the public health” with “an adequate margin of safety.” The Court also noted that it had rejected delegation challenges to several other regulatory statutes with open-ended mandates. These examples underscore the fact that Congress has limited ability to avoid general interpretations of regulatory statutes, see Maislin Indus., U.S., Inc. v. Primary Steel, Inc., 497 U.S. 116, 136–37 (1990) (Scalia, J., concurring) (opining that statutory text precluded ICC’s finding that fraudulent billing fell within the “unreasonable practice” exception to filed rate requirement); Rapanos v. United States, 547 U.S. 715, 739 (2006) (plurality opinion) (joining the plurality opinion, in which Justice Scalia applied textualist methodology to reject the Army Corps of Engineers’ (Corps) interpretation of “the waters of the United States,” was Chief Justice Roberts, Justice Thomas, and Justice Alito); K Mart Corp. v. Cartier, Inc., 486 U.S. 281, 319 (1988) (Scalia, J., dissenting) (basing dissent in part on argument that common usage of phrase “of foreign manufacture” is to refer to goods manufactured abroad).

224. The Court’s examples included several statutes. The Public Utility Holding Company Act authorized the Securities and Exchange Commission (SEC) to modify company structures to ensure that they did not “unfairly or inequitably distribute voting power among security holders.” *American Trucking*, 531 U.S. at 474 (citing *American Power & Light Co. v. SEC*, 329 U.S. 90, 104 (1946)). The Emergency Price Control Act allowed the wartime Office of Price Administration Wartime to fix the prices of commodities at a level that “will be generally fair and equitable.” Id. at 474 (citing *Yakus v. United States*, 321 U.S. 414, 420, 423–26 (1944)). The Communications Act and the Interstate Commerce Act authorized the FCC and ICC to regulate in the “public interest.” Id. (citing *National Broadcasting Co. v. United States*, 319 U.S. 190, 225–26 (1943), and New York Central Securities Corp. v. United States, 287 U.S. 12, 24–25 (1932)).
General delegations to administrative agencies will in many instances present an optimal legislative strategy. David Spence and Frank Cross advance a “transaction cost explanation,” which reflects Congress’s disadvantage in amassing information needed for specific regulatory legislation. In order for Congress to inform itself of appropriate regulatory action, it would “have to embark on an enormously costly self-education program and on the expansion of the congressional bureaucracy.” Thus, Congress stands at a marked disadvantage to agencies when it comes to making specific policy choices. Congress’s informational deficit is even larger when one considers a regulatory statute’s need to adapt to changed circumstances and new learning. Congress lacks the ability to predict the future at the time it passes a statute.

Congress also has strong political incentives to avoid detailed statutory language. It is easier to obtain consensus on a vague statutory provision than to resolve the additional controversies posed by more detailed statutory language. Further, general statutory language may allow legislators to “please the public by taking action” but distance themselves from negative consequences that inevitably accompany any specific policy.

Some will certainly raise normative objections to the incentives created

225. ESKRIDGE ET AL., supra note 24, at 212; see also McNollgast, supra 33, at 714 (stating “statutory language can only rarely be precise”);
226. Spence & Cross, supra note 40, at 135.
227. Id. at 136.
229. Spence & Cross, supra note 40, at 136 (“Wise regulatory commands should be flexible enough to adapt to changes in circumstances. . . .”); ESKRIDGE ET AL., supra note 24, at 212 (“[G]eneral language is required to allow for necessary regulatory flexibility and updating.”).
230. See ESKRIDGE ET AL., supra note 24, at 212 (noting Congress may use general language because it “cannot assemble majority support for precisely worded statutes”); see also WILLIAM N. ESKRIDGE JR., DYNAMIC STATUTORY INTERPRETATION 38 (1994) (stating “the goals of at least some of the authors are to create rather than avoid ambiguity” and this “explains the popularity of referring difficult issues to courts and/or agencies through delegation of authority or through the use of highly generalized terms that have to be fleshed out (or both)”)
231. See Spence & Cross, supra note 40, at 138; see also Bressman, supra note 21, at 568 (“Congress might attempt to avoid blame for controversial policy choices by shifting them to agencies, while still claiming credit for broad solutions to public problems.”).
by political expediency. However, the Supreme Court has not interpreted the Constitution to preclude Congress from delegating controversial policy determinations to agencies. Congress needs to provide only an “intelligible principle” in order for a broad grant of regulatory authority to pass constitutional muster.\(^{232}\)

Moreover, it will often be difficult to tell whether Congress used general language based on political concerns or the more legitimate desire to delegate due to lack of information and expertise. Thus, it is not surprising Justice Stevens’s opinion in *Chevron* expressly disclaims any attempt to identify reasons for ambiguous statutory terms.\(^{233}\) The default rule is instead one in which ambiguity for any reason triggers deference. As noted above, there are many reasons why it is sound to assume Congress, in using general language, made no decision on specific policy questions and instead left them to the agency.

These incentives have not led Congress to pass generally-worded statutory provisions in every instance. Some statutory provisions contain specific numeric thresholds\(^{234}\) or formulas for agency calculations.\(^{235}\) Specific statutory terms can sometimes be combined with general ones, such as in the Clean Air Act. *Chevron’s* clarity/ambiguity test, however, has not been applied in a manner that accounts for the differences in specificity of language Congress uses.

One of *Chevron’s* central flaws, then, is that Step One fails to tailor analysis to differences in statutory language. This lack of tailoring undermines interests in consistency and predictability. It is still possible for a judge applying *Chevron* to derive clear meaning from general statutory terms like “drugs,” “devices,” and “modify.” Step One’s untailed approach also omits nuances judges may find helpful in resolving complex issues raised by regulatory statutes.

\(\text{B. Disagreement over Interpretive Methodology}\)

Divisive questions of interpretive methodology also undermine consistent

\(^{232}\) *Whitman v. Am. Trucking Ass’ns, Inc.*, 531 U.S. 457, 474–75 (2001) (“We have almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law.”) (internal quotation marks omitted).

\(^{233}\) *Chevron, U.S.A.*, Inc. v. Natural Res. Def. Council Inc., 467 U.S. 837, 864–65 (1984) (noting ambiguity may exist because Congress intended to delegate specific decisions to expert agency administrators because Congress either “simply did not consider the question at [a specific] level” or because “Congress was unable to forge a coalition” that was needed to resolve particular contested policy issues).


application of Chevron. Deciding whether an agency has stayed within the bounds of its statutory authority ultimately requires judges to determine what the statute means. But judges do not agree what interpretive method, textualism or purposivism, they should use to determine statutory meaning. By implicating this methodological debate, Chevron Step One invites judges to find reasons to disagree rather than agree.

Whether a statute is clear or ambiguous under Step One can depend heavily on the interpretive method used by a reviewing judge. Step One’s interpretive controversy erupted almost immediately after Chevron and shows no signs of abating. In MCI v. AT&T for example, the Court split 5–3 and the dissenting Justices raised purposivist objections to the majority’s aggressive textualism. Justice Stevens’s dissenting opinion challenged Justice Scalia’s insistence on a narrow textual meaning drawn from select dictionary definitions. Purposivism, on the other hand, can be equally divisive when it leads judges to prioritize historical evidence over contrary terms specified in the statute. The Court’s 2007 decision in Zuni Public School District No. 89 v. Department of Education is a case in point. Although Justice Breyer delivered the opinion of the Court, he convinced only Justice Ginsburg to join his opinion without writing separately. Justices Stevens and Kennedy, joined by Justice Alito, filed concurring opinions, and Justice Scalia dissented along with Chief Justice Roberts and Justices Thomas and Souter.

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238. See, e.g., Immigration & Naturalization Serv. v. Cardoza-Fonseca, 480 U.S. 421, 452–55 (1987) (Scalia, J., concurring) (“Where the language of [the law] is clear, we are not free to replace it with an unenacted legislative intent.”); Strauss, supra note 54, at 1124–25 (discussing interpretive tension).
239. See infra discussion Part I.A.
240. MCI v. AT&T, 512 U.S. 218, 219 (1994). Justice Scalia’s majority opinion was joined by Chief Justice Rehnquist and Justices Kennedy, Thomas, and Ginsburg. Id. Justice Stevens’ dissent was joined by Justices Souter and Blackmun, and Justice O’Connor did not participate in the case. Id.
241. Id. at 235–45 (1994) (Stevens, J., dissenting).
242. Id. at 241–42.
243. Id. at 243–45.
244. 550 U.S. 81 (2007).
245. Id. at 83.
In *Zuni*, the Court was asked to review the Department of Education’s certification that New Mexico equalizes educational expenditures among school districts. The decision turned on whether the Secretary of Education’s underlying calculations complied with the federal Impact Aid Act (Impact Aid).246 Specifically, Impact Aid directed the Secretary to calculate state-wide equalization of expenditures by “disregard[ing] local educational agencies with per-pupil expenditures or revenues above the 95th percentile or below the 5th percentile of such expenditures or revenues in the State.”247 Rather than calculating percentiles by ranking expenditures for “local educational agencies” (or districts), department officials calculated these percentiles by ranking expenditures based on the proportion of the state’s population included in a particular district.248

Justice Breyer found that considerations “other than language” gave the Court “unusually strong indications” Congress did not intend to preclude the Secretary’s method of calculation.249 These considerations included the history of the Act, and the purpose of the Act, and the fact that the calculations involved a “highly technical, specialized interstitial matter.”250 The history of Impact Aid was particularly supportive of the Secretary:

The present statutory language originated in draft legislation that the Secretary himself sent to Congress in 1994. With one minor change (irrelevant to the present calculation controversy), Congress adopted that language without comment or clarification. No one at the time—no Member of Congress, no Department of Education official, no school district or State—expressed the view that this statutory language (which, after all, was supplied by the Secretary) was intended to require, or did require, the Secretary to change the Department’s system of calculation, a system that the Department and school districts across the Nation had followed for nearly 20 years, without (as far as we are told) any adverse effect.251

Justice Breyer concluded that the language of Impact Aid was ambiguous and held the Secretary’s method of calculation lawful.252 Justice Breyer’s approach did not gain widespread support. Justices Kennedy and Alito concurred, agreeing with Justice Breyer’s conclusion that the statute was ambiguous but expressing reservations about Justice Breyer’s unorthodox approach of downplaying the statutory text.253

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246. *Id.* at 86.
251. *Id.* (emphasis added).
252. *Id.* at 100.
253. *Id.* at 107 (Kennedy, J., concurring).
dissent, Justice Scalia railed against Justice Breyer’s analysis, comparing it to *Church of the Holy Trinity v. United States* and arguing that the text of the federal Impact Aid Act required the Court to invalidate the Secretary’s decision under Step One of *Chevron*. Justice Souter joined the portion of Justice Scalia’s dissent holding that Impact Aid unambiguously foreclosed the Secretary’s calculations.

The Court’s competing interpretive approaches add to *Chevron’s* problems. As Jack Beermann aptly notes, the Court’s distinct interpretive approaches “can lead to different results.” He finds that *Chevron* review can be “virtually indistinguishable” from pre-*Chevron* review, and that *Chevron* has failed to afford agencies more deference or clarify the law. This is not surprising. If judges become bogged down by disagreement over methodology, they will have trouble agreeing that different textual cues support different results under *Chevron*. Further, the lack of agreement on interpretive method contributes to inconsistent and unpredictable applications of *Chevron*.

When considered from the perspective of an administrative agency, competition between textualist and purposivist methodology magnifies uncertainty. It is well known that agencies rely on legislative history in evaluating particular readings of statutory text. This purposive inquiry is contrary to the textualist approach taken by some reviewing judges. Thus, judicial review of agency interpretations raises the possibility of a dual standard.

Whether this dual standard will apply turns on whether the reviewing judges randomly selected to review the case are textualists or purposivists. Thus, lawyers representing agencies or interested parties should address all

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254. 143 U. S. 457 (1892). *Church of the Holy Trinity v. United States* is a “leading purposivist authority,” in which the Court invoked the “spirit” of a statute to justify an interpretation that seemed to depart from the statute’s plain language. ESKRIDGE ET AL., supra note 24, at 229.


257. Professor Beermann breaks *Chevron* Step One into four versions: (1) “original directly spoken *Chevron*”; (2) “traditional tools *Chevron*”; (3) “plain meaning *Chevron*”; and (4) “extraordinary cases *Chevron*.” Beermann, supra note 5, at 817. While the Court has never consistently applied the “directly spoken” test, its failure to choose between the traditional tools and plain meaning test makes *Chevron* a “moving target.” *Id.* at 817–22.

258. *Id.*

259. Strauss, supra note 36, at 329–30 (stating, “Legislative history has a centrality and importance for agency lawyers,” which may assist their “understanding” or “justification” of particular readings of statutory text); see also Gluck, supra note 23, at 631.
possible variations of Step One. While this scattershot approach may be a workable solution for a lawyer fulfilling her professional obligations, the uncertainty remains troubling for the agency. The agency must invest great resources in rulemaking or formal adjudication, only to risk having the result of its proceeding vacated according to a different interpretive methodology. This possibility amplifies problems caused by inconsistent application of Chevron.

III. CONTRACT LAW OFFERS TAILORED, COMPROMISE APPROACHES TO INTERPRETIVE PROBLEMS POSED BY CHEVRON

Contract law can shed new light on Chevron’s interpretive problems. General similarities between statutory interpretation and contractual interpretation have been widely recognized. As with interpretation of statutes, contractual interpretation emphasizes judicial restraint and the importance of deferring to the parties’ intent. Moreover, both regulatory statutes and contracts have drawn competing interpretive methodologies on judicial review. Under contract law, however, different interpretive methodologies may be understood to vary according to parties’ differing incentives to commit specific contractual terms to writing.

Contract law utilizes different interpretive methods for deciding when a writing is clear on its face or open to additional meanings. Courts have applied different interpretive methods, and they have sometimes allowed interpretive methods to vary within the same jurisdiction. Although these varied interpretive methodologies do not follow simple rules, they may be understood according to differing incentives of drafting parties. These incentives reflect two key factors: transaction costs of putting a term

260. See Beccmann, supra note 5, at 822 (explaining that unless “it becomes easier to predict which variant a court will apply in a particular case” all possibilities should be addressed); see also GARY LAWSON, FEDERAL ADMINISTRATIVE LAW 130 (6th ed.) (“It remains unprofessional for an administrative lawyer not to be intimately familiar with the legislative history of any statute with which he or she is dealing in court.”).

261. See supra notes 32–42 and accompanying text.

262. 11 Williston on Contracts § 32:2 (4th ed. 2014) (stating that the “overriding principle that courts must effecuate [is] the intention of the parties”). As noted above, congressional intent is a key basis for Chevron deference. See supra note 51 and accompanying text. Even those who object to this basis as a fiction recognize that courts must interpret the regulatory statute to identify statutory limits on the agencies’ exercise of discretion. See Seidenfeld, supra note 51, at 277 n.13, 296. In interpretation statutes generally, textualists focus on objective evidence of congressional intent found in statutory text. See John F. Manning, Textualism as a Nondelegation Doctrine, 97 COLUM. L. REV. 673, 696 (1997). Purposivists embrace a more open-ended inquiry into congressional intent.

263. See infra notes 287–291 and surrounding text.

264. See infra notes 287–297.
in writing and the value parties place on enforcement of that term.\textsuperscript{263} Emphasis on textual evidence makes less sense when transaction costs exceed the value of the term.\textsuperscript{266}

The Uniform Commercial Code’s hierarchical interpretive framework also suggests broader grounds for interpretive compromise. The UCC directs courts to prioritize specific text over non-textual sources of meaning and to prioritize reliable extra-textual sources of meaning over less reliable non-textual evidence of meaning. The section below describes these aspects of contract law, how they could be incorporated into \textit{Chevron} analysis, and how contractual interpretation principles could make \textit{Chevron} deference more predictable.

\textbf{A. Contract Law Offers Semi-Tailored Interpretive Frameworks}

Parties to contracts sometimes ask courts to fill gaps when a written contract is silent with respect to certain contingencies.\textsuperscript{267} The court’s role in filling contractual gaps implicates an interpretive gatekeeping function similar to that addressed in \textit{Chevron}. Courts must decide whether a written agreement has a gap, which allows the writing to be supplemented with terms or meaning based on extrinsic evidence of the parties’ earlier negotiations or dealings.\textsuperscript{268} In administrative law, the similar interpretive question is whether a statute has a gap that may be supplemented by agency policy decisions.

In contract law, this gatekeeping analysis is governed by the parol evidence rule.\textsuperscript{269} Eric Posner offers a helpful classification of “hard” and “soft” parol evidence rule as two dominant versions of the rule.\textsuperscript{270} Different versions of the rule reflect whether courts will determine the existence of a gap based on the written agreement alone or by supplementing the writing with extrinsic evidence.\textsuperscript{271} Existence of a gap reflects both the contract’s incompleteness and ambiguity. Writings that are “long and detailed,” address “the most important contingencies,” and contain a merger clause will generally be considered complete.\textsuperscript{272} Writings are generally ambiguous “when the writing has conflicting terms or no provision relating to the contingency under which the dispute arises.”\textsuperscript{273}

\begin{thebibliography}{9}
\bibitem{265} Posner, \textit{supra} note 34, at 545.
\bibitem{266} Id.
\bibitem{267} Id. at 533.
\bibitem{268} Id.
\bibitem{269} Id.
\bibitem{270} Id. at 534.
\bibitem{271} Posner, \textit{supra} note 34, at 534
\bibitem{272} Id. at 535.
\bibitem{273} Id.
\end{thebibliography}
Under a hard parol evidence rule, courts bar extrinsic evidence and focus solely on the writing to determine whether the contract has a gap due to incompleteness or ambiguity. This approach generally recognizes “the parties’ written expression of intent” as “the only relevant evidence of objective intent.” The approach requires judges to focus on the plain meaning of words in a contract, aided by dictionary definitions. If the plain meaning is not clear, judges may also employ interpretive rules reflecting canons of statutory construction or similar rules of thumb for contracts. Thus, this “plain meaning” approach provides that “contracts should be interpreted in much the same manner as the New Textualists interpret statutes today.”

Under a soft parol evidence rule, which is adopted by both the UCC and Restatement (Second) of Contracts, courts will identify any gaps by giving “weight both to the writing and to the extrinsic evidence.” The UCC’s soft approach discourages courts from aggressively constructing textual meaning from independent judicial sources such as a dictionary or other legal rules of construction. The main difference between a hard and soft parol evidence rule, then, is twofold. The first difference is whether to identify gaps relying on the written agreement exclusively or whether to consider written terms alongside extrinsic evidence of meaning. The second difference is how much emphasis judges should place on

274. Id. at 534–35.
275. Ross & Tranen, supra note 36, at 200–01.
276. 11 Williston on Contracts § 32:3 (4th ed. 2014) (“The plain, common, or normal meaning of language will be given to words of a contract unless the circumstances show that in a particular case a special meaning should be attached to them.”).
277. See, e.g., id. (citing Easton v. Washington County Insurance Co., 137 A.2d 332, 335–36 (Pa. 1957) (relying on the dictionary definition to establish plain meaning of term “sheds” in a contract); see generally Ross & Tranen, supra note 36, at 223 (expressing that Williston’s hard-parol evidence rule approach is informed by the judge’s view of the “plain meaning of the text and dictionary definitions”).
278. 11 Williston on Contracts § 32:8 (“resort[ing] to the secondary rules of contract interpretation is appropriate” where the plain meaning is unclear). Some of the rules incorporate canons of statutory construction. See id. § 32:6 (advocating the maxim nocietor a sociis where the meaning of a word is known by associate words); see also id. § 32:10 (discussing the rule of ejusdem generis, where general words that follow a specific listing of things are interpreted to mean things of the same kind included in the specific listing). See generally Ross & Tranen, supra note 36, at 200–01.
279. Ross & Tranen, supra note 36, at 199.
280. Posner, supra note 34, at 534.
independent judicial sources, such as dictionaries and canons of construction, when determining meaning of the contract. The difference in methods of contractual interpretation is similar to the divide between purposive and textualist methods of statutory interpretation. The hard parol evidence rule approach aligns with the methods textualists use to identify gaps or ambiguities in Step One of Chevron—both focus on text, text-based sources of meaning (dictionaries), and judicial canons of construction. The soft parol evidence rule approach, by contrast, aligns with the methods purposivists use to identify gaps or ambiguities—while both soft parol evidence rule and purposivism consider text and text-based sources, they place less emphasis on text alone and more emphasis on non-textual sources of meaning such as purpose and legislative history.

In contract law, courts have failed to uniformly adopt a hard or soft interpretive approach. Sometimes common-law interpretive approaches vary from jurisdiction to jurisdiction. For example, Virginia adheres to a hard parol evidence rule approach, while California has embraced a soft parol evidence rule. In other states, courts have not settled on a single

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284. As noted above, the hard parol evidence rule approach encourages judges to derive plain meaning from dictionary definitions and canons of construction. See 11 Williston on Contracts § 32:8 (4th ed. 2015) (supporting use of dictionaries and canons of construction). The soft parol evidence rule approach adopted by the Uniform Commercial Code (UCC), on the other hand, expressly discourages judges from relying on rules of construction and lay dictionaries as sources of meaning. U.C.C. § 2-202 cmt. 1(b) (rejecting meaning derived from “rules of construction existing in the law”); U.C.C. § 1-303 cmt. 1 (rejecting the dictionary).

285. Ross & Tranen, supra note 36, at 223 (stating that both Williston’s hard parol evidence rule and Scalia’s textualism rely on the text’s plain meaning, dictionary definitions, and canons of construction); Eskridge et al., supra note 24, at 256, 261–62 (explaining that textualists consider statutory text and contextual evidence such as dictionaries, and canons of construction, while they reject non-textual evidence of legislative intent or purpose).


287. See Posner, supra note 32, at 538. At common law there is a mix of jurisdictions following the hard parol evidence rule and soft parol evidence rule, and all states but Louisiana have adopted the UCC’s soft parol evidence rule for transactions in the sale of goods.

288. Id. (“Although some jurisdictions use something like the hard [parol evidence rule], while other jurisdictions use something like the soft [parol evidence rule], many jurisdictions take different and often conflicting approaches to the treatment of extrinsic evidence.”).

289. See Palaski Nat'l Bank v. Harrell, 123 S.E.2d 382, 387 (Va. 1962) (noting that Virginia strictly adheres to the “rule which excludes parol evidence when offered to vary the terms and conditions” of a clear and integrated contract).

290. See Pac. Gas & Elec. Co. v. G.W. Thomas Drayage & Rigging Co., 442 P.2d 641, 642–43 (Cal. 1968) (en banc) (finding the trial court erred when it “refused to admit any extrinsic evidence that would contradict” the contract’s “plain meaning”); Posner, supra note 34, at 539–40 (explaining the soft parol evidence rule prevailed after the 1960s in
interpretive approach, but use both soft and hard parol evidence rule in different circumstances.\textsuperscript{291}

Admittedly, variations in the parol evidence rule are not simple to apply.\textsuperscript{292} Unlike statutory interpretation, however, scholars have offered broader rationales to explain courts’ use of varied interpretive approaches. Eric Posner theorizes that judicial practice may be understood as adopting a semi-tailored approach, in which courts’ interpretive methodology varies according to the incentives of contracting parties.\textsuperscript{293} These incentives reflect two key factors: transaction costs of putting a term in writing and the value parties place on enforcement of that term.\textsuperscript{294}

Desirability of the hard or soft parol evidence rule may therefore vary in different categories of cases. The hard parol evidence rule is more desirable “when the transaction costs are less than the value of the promise” because parties have incentives to commit the promise to writing to attain more “accurate enforcement.”\textsuperscript{295} The soft parol evidence rule, on the other hand, is more desirable “when transaction costs are greater than the value of the promise.”\textsuperscript{296} When transaction costs predominate, it is valuable to have courts enforce aspects of the bargain that parties included in general terms because they were too costly to specify in writing.\textsuperscript{297}

Posner does not offer global rules for identifying types of contracts best

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\item \textsuperscript{291}See, e.g., Mercury Inv. Co. v. F.W. Woolworth Co., 706 P.2d 523, 529 (Okla. 1985) (stating that under Oklahoma law, parol evidence “cannot vary” or “modify” a written agreement, but such evidence “is admissible to explain the meaning of words” when the text of the agreement is ambiguous); Big G Corp. v. Henry, 536 A.2d 559, 561–62 (Vt. 1987) (holding that under Vermont law, while “extrinsic or parol evidence may be used” if a writing is “found to be ambiguous,” a prior or contemporaneous oral agreement may not be used to vary a written agreement). Compare Heyman Assocs. No. 1 v. Ins. Co. of the State of Pa., 653 A.2d 122, 133 (Conn. 1995) (demonstrating that in Connecticut, courts have forbidden extrinsic evidence to vary plain meaning), with Shelton Yacht & Cabsana Club, Inc. v. Suto, 188 A.2d 493, 496 (Conn. 1963) (asserting that Connecticut courts consider extrinsic evidence when deciding whether a writing was a complete expression of the parties’ agreement). See generally Posner, supra note 34, at 338–39 (noting that some courts take a hard approach to completeness exceptions and a soft approach to ambiguity exceptions and vice versa).
\item \textsuperscript{292}Posner, supra note 34, at 540 (noting that the parol evidence rule has caused “confusion” and “cries of despair” in virtually every jurisdiction).
\item \textsuperscript{293}Id. at 553–54 (offering “general comments about recurring fact situations and doctrines related to contractual interpretation”).
\item \textsuperscript{294}Id. at 545.
\item \textsuperscript{295}Id.
\item \textsuperscript{296}Id.
\item \textsuperscript{297}Id. Posner also assumes that a hard parol evidence rule will lead to less judicial error than a soft parol evidence rule. As noted below, this assumption is not universal.
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suited to a particular approach. This is understandable, given the complex host of issues raised by interpretation. Posner does, however, offer general guidance as to when a soft parol evidence rule and hard parol evidence rule is preferable. A soft parol evidence rule is preferable when (1) the contract’s subject matter is complex or parties are unsophisticated and (2) the conventional nature of the contract minimizes concern over lack of enforcement due to judicial error. Conversely, a hard parol evidence rule is preferable when (1) the subject matter is simple or parties are sophisticated and (2) unconventional nature of the contract raises concern over judicial error.

For regulatory statutes, however, these factors point in opposite directions. Although regulatory statutes often address complex problems for which Congress (the drafter) lacks sophistication or expertise, these statutes seem unlikely to present conventional interpretive matters that minimize concern over lack of enforcement due to judicial error. It is unclear, under Posner’s framework, whether courts should apply a soft or hard interpretive methodology to identify gaps in regulatory statutes. It may be that high transaction costs are the overriding concern. Posner suggests, for example, that courts should apply a soft approach to legislation that creates an “entirely new set of legal rights and entitlements or administrative machinery.”

Overriding transaction costs also suggest important distinctions in the type of language Congress will enact. As described above, high transaction costs and political expediency have sometimes led Congress to pass generally-worded legislation. This is similar to the outcome one may expect in long-term contracts, which, like regulatory statutes, are expected to govern parties’ relationships over an extended period of time. Such contracts often contain “underspecified” terms, as “parties cannot at low cost commit” to writing the entire long-term contract.

For regulatory statutes, the link between enacted language and

299. Id. at 553 & fig. 2.
300. Id.
301. Cross & Spence, supra note 40, at 135–36.
303. Posner, supra note 34, at 573. Posner contrasts it with “incremental modifications of existing legislation” for which hard approach is more appropriate. Id.
304. Spence & Cross, supra note 40, at 135–36 (stating “Congress does not currently enact highly specific legislation” due to transaction costs and political expediency).
305. Posner, supra note 34, at 557.
overriding transaction costs suggests a simple rule of thumb for Step One analysis. When Congress uses general statutory language, it is reasonable to assume Congress faced overriding transaction costs. As in contractual interpretation, these overriding transaction costs provide good reasons to apply a soft or purposive analysis when identifying statutory gaps. Conversely, when Congress uses specific language, one may assume transaction costs did not dominate. There are better reasons to determine gaps using an approach that prioritizes textual meaning. The section below will explore how these different textual cues would play out in leading Chevron cases. Before this discussion, the section immediately below will address why one should expect overriding transaction costs to call for a soft or purposive approach in some regulatory cases.

1. Transaction Costs and Enforcement Values for Public Law

Interpretation of statutes presents issues of public law, whereas interpretation of contracts presents issues of private law. This section explains why a contractual interpretation framework is helpful for public statutes. Namely, transaction costs and expected enforcement values for public statutes present a compelling argument for purposive interpretation in certain cases. As noted above, a purposive approach is generally desirable when transaction costs of drafting outweigh the value parties place on enforcement of particular terms. The discussion below compares the incentives of parties drafting contracts to incentives of legislators, finding that legislative incentives provide even stronger reasons to expect transaction costs to overwhelm the value of enforced statutory terms. It also finds that a tailored purposive approach will not deprive third parties of adequate notice of their legal obligations.

Congress faces immense transaction costs any time it wishes to enact a new piece of legislation. Parties can easily enter contracts that determine their legal obligations to one another, but a federal statute must pass numerous procedural hurdles before it is legally binding on the public. Statutory provisions must be considered and approved by applicable committees, a majority of both houses of Congress, and the President (or a supermajority of both houses of Congress) before they become law.

306. Ross & Tranen, supra note 36, at 224–23 (offering additional grounds for preferring a purposive approach in statutory interpretation).

307. Posner, supra note 34 at 545. This section of the paper refers to purposive statutory interpretation, which is analogous to the soft parol evidence rule approach to contractual interpretation. See supra note 270–286 and accompanying text.

308. ESKRIDGE ET AL., supra note 24, at 70.

Specific statutory language only makes it more difficult for Congress to overcome these hurdles. As noted above, regulatory statutes often implicate complex issues for which Congress lacks information or ability to predict future policy concerns. Thus, even though some assume Congress will address major issues, Congress may not know the major regulatory issues or specific policies it should consider pinning down in legislation. Specific language may also make it harder for Congress to obtain the consensus needed to pass the legislation.

What is more, Congress may place less value on enforcement of statutory terms than parties to a private contract. One would not expect private parties to benefit from existence of a contract beyond obtaining the terms for which they have bargained. Congress, on the other hand, may benefit from passing a statute regardless of how its terms are actually implemented or enforced. Generally-worded statutes allow legislators to claim credit for solutions to major problems while shifting blame to courts or agencies for any unfavorable outcomes that flow from interpretation of general language. Congress may also find that specific legislative terms lack option value because they cannot easily accommodate new circumstances or scientific knowledge.

Therefore, Congress has strong incentives to enact generally-worded regulatory statutes. Under Chevron, general language offers a low-cost way to delegate complex decisions to agencies with greater expertise. A contrary understanding—such as that manifested in aggressive textual analysis that fixes meaning of general language or expects clear Congressional authorization—overlooks steep costs Congress faces to avoid delegating in areas where it lacks expertise.

Perhaps the same tradeoffs do not apply to generally-worded statutes enacted before the Court’s 1984 decision in Chevron. If earlier Congresses

311. Breyer, supra note 27, at 370–71 (“Congress is more likely to have focused upon, and answered, major questions.”).
312. See Spence & Cross, supra note 40, at 135–36 (“Congress would either have to embark on an enormously costly self-education program . . . or else act with much less information than agencies currently possess.”).
313. ESKRIDGE ET AL., supra note 24, at 205.
314. See Spence & Cross, supra note 40, at 138 (“Vague, aspirational statutes are attributable to strategic politics by legislatures.”); Bressman, supra note 21, at 568 (asserting Congress balances diverse interests when it decides how much authority to grant agencies).
316. Id. at 135–37 (stating the “costs of legislating with specificity are quite high” and the “primary cost of specific is the cost of information” to inform parameters of regulatory action).
317. Seidenfeld, supra note 51, at 278.
had been aware of *Chevron* deference, then maybe they would not have enacted statutes with such general language.\(^{318}\) As explained below, however, it is doubtful that *Chevron* has worked a great enough change to alter assumptions about Congress’s preferences for enacting generally-worded statutes.

Any time Congress enacts generally-worded legislation, it passes the ability to make specific policy choices on to an agency or a judge.\(^{319}\) Even before *Chevron*, there were many cases in which agencies acted as the primary interpreter of a regulatory statute. Many agencies have substantial power to issue rules or orders that operate with independent force of law. Some regulated parties might comply with these rules without ever seeking judicial review.\(^{320}\) Under the Administrative Procedure Act (APA), moreover, not all agency decisions are subject to judicial review.\(^{321}\) The APA excludes from judicial review many discretionary acts that nevertheless have great consequences for certain parties.\(^{322}\)

Even for matters subject to judicial review, courts had an established pre-*Chevron* practice of deferring to agencies on certain interpretive questions. They granted agencies substantial deference on mixed questions of law and fact.\(^{323}\) Historically, courts also gave some weight to non-authoritative agency interpretations.\(^{324}\) After *Chevron*, courts extended the scope of substantial deference to pure questions of law.\(^{325}\)

*Chevron’s* changes are matters of degree and expand on an earlier practice of granting agencies some deference. While there is no clear evidence of

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319. *See generally* U.S. CONST. art. II, § 3 ("[The President] shall take care that the laws be faithfully executed."); U.S. CONST. art. III, § 2 ("The judicial power shall extend to all cases, in law and equity, arising under this Constitution."). Deference may make Congress less willing to pass legislation because it could unravel originally agreed-to limitations on the President’s preferences.

320. *See* Merrill & Hickman, *supra* note 14, at 878 (stating that the agency may be the “primary interpreter,” as it “may be that no court will ever be asked to review one of the agency’s rules” or reach the merits of the agency’s decision).


322. *See, e.g.*, Heckler v. Chaney, 470 U.S. 821, 823, 837–38 (1985) (holding the FDA’s refusal to enforce FDCA requirements against states who administered lethal injection drugs was not subject to judicial review); Cir. for Auto Safety & Pub. Citizens, Inc. v. Nat’l Highway Traffic Safety Admin. (NHTSA), 452 F.3d 798, 811 (D.C. Cir. 2006) (finding the NHTSA’s policy guidelines on regional auto recalls were not final agency action and thus not subject to judicial review).


324. Skidmore v. Swift & Co., 323 U.S. 134, 139–40 (1944) (finding the Administrator’s interpretations “constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance”).

how past Congresses would have responded to Chevron, recent self-reporting suggests Chevron has not driven current Congresses to avoid vague statutory terms. Given the many areas in which agencies had primary interpretive authority prior to Chevron, earlier Congresses should not have been surprised that some open-ended statutes would be interpreted primarily by agencies.

Overall, Congress has even stronger incentives than contracting parties to agree to open-ended terms. Contractual interpretation principles offer a compelling case for applying a purposive interpretive methodology to generally-worded statutes. Still, some scholars have argued that concerns over notice to third parties make purposive methodology inappropriate for public laws. In contract law, a purposive or soft approach would allow evidence of earlier oral agreements to become part of the parties’ binding contract. There is no concern these parties lacked notice of the oral terms because they actually participated in the earlier agreements or negotiations. In statutory interpretation, however, a purposive approach could bind third parties to standards contained in legislative history that they did not create or of which they did not otherwise know. Because a statute establishes binding “rules of conduct” for third parties, the text of the statute must notify them of these rules.

Despite this objection, concerns over notice do not pose a serious objection to use of non-textual evidence to interpret regulatory statutes. For starters, regulatory statutes subject to Chevron deference do not operate directly on third parties. The agency empowered to enforce a statute with the force of law must first interpret the regulatory statute, often using a relatively formal process. The processes through which agencies issue binding interpretations are designed to illuminate the agency’s reliance on


328. Id. (emphasizing that the essential point of a statute is that it is directed at third persons outside the legislature).

329. Id. (explaining that because a person must follow the rules of conduct created by a statute, “notice to third persons is . . . of critical importance”).

legislative history. The APA obliges agencies to provide notice of “legal authority” under which a rulemaking or adjudication is to be held, as well as notice of matters of law involved or asserted in the proceeding. The APA obliges agencies to provide notice of “legal authority” under which a rulemaking or adjudication is to be held, as well as notice of matters of law involved or asserted in the proceeding. Lawyers who represent private parties and public interest groups in agency proceedings will provide these interested parties with access to relevant legislative history. Further, the agency would include analysis of legislative history as part of its statement of reasons in support of its decision.

One might object that notice during the adjudicative process is insufficient because an order may retroactively impose liability for actions taken prior to the hearing. Still, this concern does not provide a reason to reject legislative history; the general text of regulatory statutes may be equally deficient in providing third parties advance notice of their legal rights and obligations. In Security and Exchange Commission v. Cheney Corp., for example, the SEC issued an order disapproving the management’s purchase of preferred stock in a public utility holding company during reorganization. There was no evidence of fraud, lack of disclosure, or breach of fiduciary duty based on pre-existing judicial standards, and management was clearly caught off guard by the new legal standard adopted in the SEC’s order. The management’s surprise was understandable, given the broad statutory language authorizing the SEC to approve “fair and equitable” reorganization plans. These

331. 5 U.S.C. § 553(b)(2)-(3) (2012) (calling for reference to “legal authority” and a description of “issues involved” in notice of proposed rulemaking); id. § 554 6(b)(2)-(3) (requiring notice of “legal authority” and matters of “law asserted” before a formal adjudicatory hearing).
332. Ross & Tranen, supra note 36, at 236.
333. See 5 U.S.C. § 553(c) (“After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose.”); see also § 557(c)(A) (“All decisions . . . shall include a statement of . . . findings and conclusions, and the reasons or basis therefor, on all the material issues or fact, law, or discretion presented on the record.”).
336. Id. at 198–99.
337. Id. at 197–98.
338. Id. at 203 (permitting the SEC to order compliance with “a new standard of conduct” despite its “retroactive effect”); id. at 212–13 (Jackson, J., dissenting) (objecting that the SEC’s order was not supported by pre-existing “law or regulation”).
339. Public Utility Act of 1935, 49 Stat. 803 § 11(d) (1935). As noted by the Court, the SEC’s underlying order was based on “conclusions from the particular facts in the case, its general experience in reorganization matters and its informed view of statutory requirements.” Cheney, 332 U.S. at 204. Although the SEC noted some legislative history
capacious statutory terms did not provide private parties notice as to whether trading during reorganization violated the law.\textsuperscript{340} In the wake of \textit{Chenery}, parties subject to regulatory oversight are on notice that they may have no advance warning of how an agency would evaluate their conduct under a broadly-worded statute. If anything, legislative history might be desirable to add context to the agency’s view of statutory obligations.

Further, parties trying to predict how agencies will interpret statutes will likely be on notice of agency practice. It is routine practice for agencies to consider legislative history when interpreting a statute.\textsuperscript{341} Indeed, in many cases agencies were actually involved in the legislative process of amending the regulatory statute.\textsuperscript{342} Lawyers representing parties affected by agency action also have a professional duty to consider legislative history that may shape the agency’s interpretation of the governing statute.\textsuperscript{343}

Finally, courts adopting a textualist approach on judicial review raises distinct concerns over lack of notice to agencies and interested parties. As noted above, textualism enhances uncertainty by raising the possibility that dual interpretive standards will determine the legality of agency decisions: the purposive methodology applied by agencies and the textualist methodology applied by a reviewing judge. Even when textualism does apply, it is difficult to predict which dictionary definition or canon of construction will trump in a particular case.\textsuperscript{344}

For all of these reasons, textualism may make it more difficult to predict what legal requirements a regulatory statute imposes. Notice-based objections do not require a textual approach to interpretation of regulatory statutes. If anything, use of textualism in the regulatory context raises its own set of concerns about notice to third parties.


\textsuperscript{340} As Justice Frankfurter noted, “Congress itself did not proscribe the respondents’ purchases of preferred stock.” \textit{Chenery}, 318 U.S. at 93.

\textsuperscript{341} Strauss, supra note 36, at 329–30 (noting legislative history is central and important to work of agency lawyers).

\textsuperscript{342} See discussion of \textit{Zuni}, supra notes 245–257 and accompanying text.

\textsuperscript{343} Bickmann, supra note 5; Lawson, supra note 260.

\textsuperscript{344} See Pierce, supra note 64, at 765 (noting that “plain meaning” approach could be unpredictable because different judges might rely on different sets of dictionary definitions); see also Karl N. Llewellyn, \textit{Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are To Be Construed}, 3 \textit{VAND. L. REV.} 395, 401 (1950) (demonstrating that there “are two opposing canons on almost every point”).
regulatory statutes. In some cases, overwhelming transaction costs will lead Congress to use general language in regulatory statutes. Contractual analysis suggests that in such cases it is preferable for courts to tailor their interpretive analysis along purposive lines. This is not a universal rule, however. When Congress uses specific language, the interpretive method should be tailored to prioritize textual meaning. The discussion below illustrates how contract law’s semi-tailored approach would apply to leading Chevron cases in which regulatory statutes presented different degrees of specificity.

2. Application to Generally-Worded Regulatory Statutes

A purposive approach recognizes that text will often fail to specify a single answer to the disputed policy before the court. It counsels against aggressive readings that insist on deriving a single binding meaning from judicial canons of construction or a dictionary definition of general statutory language. MCI v. AT&T illustrates how failure to use a purposive approach can run roughshod over Congress’s likely intent to delegate interpretive flexibility to an agency through general language.

It is highly unrealistic to assume Congress ever anticipated the FCC’s rate-filing exception for competing carriers. When Congress enacted the Communications Act of 1934, it established the FCC and authorized the FCC to regulate rates charged for communication services “to ensure that they were reasonable and nondiscriminatory.” At that time, AT&T’s vertically integrated Bell system gave it a “virtual monopoly” over telephone service in the United States.

One of the Act’s mechanisms for regulating rates was the requirement that AT&T, as a common carrier, charge only rates it had filed with the FCC. Section 203(a) requires common carriers to “file with the Commission . . . schedules showing all charges” for their services. But section 203(b)(2) anticipated that these rate-filing requirements should be dynamic rather than static. It provided that the “Commission may, in its discretion and for good cause shown, modify any requirement made by or under the authority of this section . . . by general order applicable to special

346. See infra note 284 (noting the UCC rejects dictionary definitions for contractual interpretation).
349. MCI, 512 U.S. at 220.
350. Id.
circumstances or conditions.”

It was not until the 1970s that advances in technology reduced barriers to entry and allowed competitors to enter the market for long-distance telephone service. The FCC decided that rate-filing requirements designed to constrain monopoly pricing did not apply to competing carriers. Given that competing carriers did not exist when Congress passed the Act, the FCC’s power to “modify” original rate-filing requirements in “special circumstances” seemed to apply.

But Justice Scalia’s majority opinion left no room for the FCC’s understanding or ability to update the law based on changed circumstances. As noted in Justice Stevens’s dissent, the majority “seiz[ed] upon a particular sense of the word ‘modify’ at the expense of another, long-established meaning that fully support[ed] the Commission’s position.” Scalia’s insistence on a narrow understanding of the term “modify”—derived in key part from select dictionary definitions—specifies a greater limitation on the FCC than Congress likely considered or intended when it passed the Communications Act. It flies in the face of Congress’s likely intent to delegate to the FCC power to address changes in the communications industry.

Further, MCI illustrates that a purposive interpretive approach need not always tackle divisive questions such as the use of legislative history. The purposive approach recognizes that general statutory terms have limited ability to fix specific legal meaning. Judges are not to supply more meaning than Congress intended through interpretive sources such as dictionaries. The Court could have resolved MCI differently on the sole basis of the textual meaning of the term “modify.” The Court could simply have deferred to the FCC’s interpretation of that general term in accordance with “long-established meaning” of the word. Likewise, in Brown & Williamson, the Court could have accepted the broad and literal meaning of “drugs and devices” without cobbling together a more limited

352. Id. § 203(b) (emphasis added).
354. See id. at 240 (Stevens, J., dissenting) (“From the vantage of a Congress seeking to regulate an almost completely monopolized industry, the advent of competition is surely a ‘special circumstance or condition’ that might legitimately call for different regulatory treatment.”).
355. Id. at 241–42.
357. MCI, 512 U.S. at 241–42 (Stevens, J., dissenting).
358. FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 162 (2000) (Breyer, J., dissenting) (stating “tobacco products (including cigarettes) fall within the scope of this statutory definition, read literally”).
understanding of the FDA’s jurisdiction from subsequently enacted statutes.

There are numerous other cases where the Court deferred to an agency’s interpretation of generally-worded statutory provisions. For example, consider the IRS’s interpretation that medical residents were not “students”;\footnote{Mayo Found. for Med. Educ. & Res., v. United States, 562 U.S. 44, 60 (2011).} the EPA’s use of cost-benefit proxies to determine otherwise immeasurable “amounts” of pollution contributed from neighboring states;\footnote{EPA v. EME Homer City Generation, L.P., 134 S. Ct. 1584, 1607 (2014).} the EPA’s consideration of technology’s relative costs and environmental benefits under a “best technology available” standard;\footnote{Entergy Corp. v. Riverkeeper, Inc., 556 U.S. 208, 225–26 (2009).} and the Secretary of Interior’s interpretation of “harm” to include habitat modification which kills endangered species.\footnote{Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or., 515 U.S. 687, 703 (1995).} The purposive approach aligns with a modest judicial role and a presumption of deference whenever Congress uses open-ended terms.\footnote{Herz, supra note 29, at 200 (finding that review of an agency’s interpretation of a broadly-worded statute is “narrow . . . because there is so little to interpret”).} It fulfills \textit{Chevron’s} purpose—“to put a thumb on the scales in favor of agency interpretations of law.”\footnote{Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984).}

3. Application to Specific Language in Regulatory Statutes

Not all statutes contain gaps for agencies to fill. \textit{Chevron} acknowledges as much: both courts and agencies must abide by statutory terms when “Congress has directly spoken to the precise question at issue.”\footnote{See Posner, supra note 34, at 535.} Contractual interpretation reflects a similar principle—written contracts are unlikely to contain gaps when the writing is “long and detailed” or when it specifically addresses important or disputed contingencies.\footnote{See Posner, supra note 34, at 535.} Specific language suggests that the drafters valued enforcement of particular terms and invested resources needed to commit those terms to writing. When courts face specific statutory language, then, they should approach it with more reverence and a lesser presumption of deference.

The cases below address how courts might tailor their deference analysis when faced with specific statutory language. First, \textit{Zuni Public School District v. Department of Education} illustrates problems of a purposive approach that does not adequately account for specific statutory language. Second, \textit{King v. Burwell} provides an example of how specific language invites courts to play a more active role in identifying meaning. Finally, Justice Breyer’s dissent

\begin{footnotesize}
\textsuperscript{363.} Herz, supra note 29, at 200 (finding that review of an agency’s interpretation of a broadly-worded statute is “narrow . . . because there is so little to interpret”).
\textsuperscript{364.} Gersen & Vermeule, supra note 21 at 709.
\textsuperscript{366.} See Posner, supra note 34, at 535.
\end{footnotesize}
in *Utility Air Regulatory Group v. EPA* suggests how a textual interpretive approach may help courts resolve a conflict between specific and general language in the same statute.

*Zuni Public School District v. Department of Education*

*Zuni* presents a case in which lower transaction costs may have allowed Congress to draft more specific statutory provisions. In the Impact Aid Act, Congress specified a formula for the Department of Education to follow in calculating state-wide school expenditures. In addition to being specific, these calculations were not perceived as presenting highly contested political issues. Congress may have also been better informed about the calculations because they had been applied in the past.

Justice Breyer’s opinion struggled with the specific language of Impact Aid. The statute directed the Secretary of Education to “disregard local educational agencies with per-pupil expenditures or revenues above the 95th percentile or below the 5th percentile of such expenditures or revenues in the State.” The Secretary instead calculated ninety-fifth and fifth percentiles by ranking expenditures based on the proportion of the state’s population included in a particular district.

Although Justice Breyer’s purposive reading ultimately allowed the Secretary’s decision to stand, his opinion began by focusing on “[c]on siderations other than language.” Only after reviewing extra-textual considerations did Justice Breyer examine the statutory language and determine that it was ambiguous. Justice Breyer failed to account for specific statutory language. His opinion repeatedly paraphrased the key term “local educational agency,” and it failed to adequately explain why the statute expressly noted this population rather than the weighted population used by the Secretary.

Justice Breyer’s failure to account for specific statutory provisions did not attract broad support on the Court. Six Justices expressed concern with Justice Breyer’s approach. Justices Kennedy and Alito agreed that the Act

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368. *Id.* at 106 (Stevens, J., concurring) (stating he could not imagine Justices being accused of voting their “own policy preferences”).
370. *Id.* at 86.
371. *Id.* at 90.
372. *See id.* at 94 (paraphrasing the statute instead to read “local school districts”).
374. Only Justice Ginsburg joined his opinion without writing separately. *Id.* at 83. Justice Stevens’s concurrence openly disclaimed any need to account for the statute’s “literal application.” *Id.* at 104–05 (Stevens, J., concurring) (internal quotation marks omitted).
was ambiguous, but their concurrence questioned Justice Breyer’s emphasis on “policy concerns, rather than the traditional tools of statutory construction.” Part I of Justice Scalia’s dissent, which was joined by Chief Justice Roberts, Justice Thomas, and Justice Souter, asserted that Impact Aid unambiguously required percentiles to be calculated based on per-pupil expenditures of local educational agencies. Thus, the dissent argued the Secretary’s decision should have been invalidated under Step One of Chevron.

Breyer’s failure to attract a broader coalition may reflect the difficulty of applying an overly deferential approach to agency interpretations that contradict specific statutory language. Zuni was not the typical Chevron case in which the Court faced an agency interpretation of a generally-worded statute. Beyond discord over interpretive method, Zuni shows that specific statutory terms make it difficult to adopt a strong presumption of deference. An overly permissive purposive approach may overlook the fact that Congress supplied a precise answer to the policy dispute.

**King v. Burwell**

Specific language can also help explain why Justices interpreted the Affordable Care Act de novo in **King v. Burwell**. To be sure, Chief Justice Roberts viewed **King** as an extraordinary case that was not subject to Chevron. In **King**, however, the ACA’s text and structure provided relatively specific evidence of meaning.

The Chief Justice made sense of the ACA in light of overarching structure. As he noted, the ACA requires three “interlocking reforms” to sustain broader health insurance coverage. First, the ACA bars insurers from refusing to cover persons based on preexisting medical conditions. Second, it requires all individuals to purchase health insurance or make a payment to the IRS. Third, the ACA gives low- to moderate-income people tax credits to help them afford insurance.

In **King**, the dispute focused on provisions of the ACA requiring establishment of an “Exchange,” or marketplace that allows people to purchase insurance plans, in each State. If a State chooses not to...

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375. *Id. at 107* (Kennedy, J., concurring).
376. *Id. at 111–12* (Scalia, J., dissenting).
378. *Id. at 2485.*
379. *Id.*
380. *Id.*
381. *Id.*
382. *Id.*
establish its own Exchange, the federal government will do so instead.\textsuperscript{383} Thus, the Court had to decide whether the ACA permitted the IRS to extend ACA’s tax credits to States with federally-run Exchanges.\textsuperscript{384}

As noted above, the majority decided this question without deferring to the IRS.\textsuperscript{385} The Court based its interpretation on the ACA’s specific instructions for tax credits, the manner in which these instructions interacted with other requirements of the ACA, and the ACA’s broader structure and purpose. Section 36B of Internal Revenue Code contains specific instructions for tax credits. This section allows eligible taxpayers to receive a “premium assistance credit amount.”\textsuperscript{386} The credit amount reflects “monthly premiums for ... qualified health plans ... which were enrolled in through an Exchange established by the State under [42 U.S.C. § 18,031].”\textsuperscript{387} As the majority noted, when viewed in isolation, the phrase “established by the State under [42 U.S.C. § 18,031]” suggests that credits are available only for insurance purchased on state-run Exchanges.\textsuperscript{388}

When the Court considered this language in context, however, it doubted that Congress intended to limit credits in this manner.\textsuperscript{389} For example, the ACA gives States the option to establish an Exchange under § 18,031. If a State fails to do so, however, § 18,041 directs the federal government to step into the State’s shoes: The federal government must establish and operate “such Exchange within the State.”\textsuperscript{390} Further, the ACA establishes “qualified individuals” who are eligible to purchase insurance on exchanges, and provides that these individuals must “resid[e] in the State that established the Exchange.”\textsuperscript{391} If the federally-run exchanges do not count as state-run Exchanges, States with federally-run exchanges would have no qualified individuals.\textsuperscript{392} The majority found that this outcome would make no sense, given the ACA’s fundamental requirement that all Exchanges offer “qualified health plans to qualified

\textsuperscript{384} Id.
\textsuperscript{385} Id. at 2488–89; see Part II.B(2).
\textsuperscript{386} 26 U.S.C. § 36B(b) (2012).
\textsuperscript{387} Id. § 36B(b)(2)(A) (emphasis added).
\textsuperscript{388} King, 135 S. Ct. 2489.
\textsuperscript{389} King v. Burwell, 135 S. Ct. 2480, 2489 (2015). Despite the majority’s rejection of Chevron, its consideration of other parts the Act led only to the conclusion that the text of the Act was “ambiguous.” Id. at 2490–92. The majority assigned meaning based on the “broader structure” or purpose of the Act. Id. at 2492–93.
\textsuperscript{390} Id. at 2489 (citing 42 U.S.C. § 18,041(c)(1) (2012)).
\textsuperscript{392} This is because residents of a state with a federally-run exchange would not live in the “State that established the Exchange” under § 18032(f)(1)(A)(ii). King, 135 S. Ct. 2490.
The majority identified several other parts of the Act that would make better sense if federally-run exchanges were treated as equivalent to state-run exchanges. The Court also rejected an argument that this interpretation would render specific language of § 36B surplusage. In *King*, the canon against surplusage required unfair assumptions about the precision with which the Affordable Care Act was drafted; the ACA contained several examples of “inartful drafting” that seemed to have been passed without the “care and deliberation” one would expect. Finally, the majority held that denial of tax credits would be inconsistent with the ACA’s overall design. An allowance for tax credits preserved the ACA’s fundamental requirement that sufficient numbers of people purchase health insurance.

In his dissent, Justice Scalia condemned the majority’s interpretation of the ACA. Justice Scalia contended that specific language in § 36B controlled and precluded tax credits for federally-run exchanges. He also disagreed that § 36B had a different meaning when considered alongside the rest of the Affordable Care Act. Justice Scalia went on to chastise the majority for considering the ACA’s purpose and for pursuing a single purpose without accounting for the alternative statutory goal—“encouraging state involvement” in implementing the ACA. He concluded that the majority changed the “usual rules of statutory interpretation for the sake of the Affordable Care Act” and that the ACA ought to be renamed “SCOTUScare.”

Much of the Justices’ dispute focused on how much emphasis to place on different provisions in the ACA’s detailed scheme for health insurance

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393. *Id.*
394. *Id.* at 2490–92 [explaining other provisions in the Act require all Exchanges to disseminate information about availability of tax credits, assist persons in calculation of tax credits, and report to the Treasury Secretary payments of tax credits]; *Id.* at 2494–95 [stating it was unlikely Congress would have buried a major exception to the Act’s reforms in details of tax credit calculation under section 36B].
396. *Id.* In other words, the Court recognized that the Act was far from poetry.
397. *Id.* at 2492–93. As explained by Chief Justice Roberts, a plan which allowed everyone to obtain health insurance but did not mandate coverage would induce only the very sick to purchase insurance. *Id.* 2485. This adverse selection would cause insurance premiums to skyrocket and create a “death spiral” pursuant to which fewer and fewer people wanted to purchase health insurance. *Id.* at 2493.
398. *Id.* at 2494–98.
399. *Id.* at 2497–502.
400. *Id.* at 2504.
reform. King did not require Justices to derive particular meaning from a broadly-worded statute. Instead, the Justices sorted out conflicting terms in a series of complicated and interlocking health insurance reforms. This complex legal determination presented a matter fit for judicial resolution.

*Utility Air Regulatory Group v. Environmental Protection Agency*

Textualist principles can also help judges reconcile conflicts between general and specific language in the same statute. In *Utility Air Regulatory Group v. EPA*, the Clean Air Act (CAA) required permits for major stationary emitters of “any air pollutant,” while specifying numeric thresholds (100–250 tons of yearly air pollutant emissions) to trigger permit requirements.\(^4\)\(^0\)\(^3\) As noted above, applying both of these provisions at face value would be problematic as applied to sources emitting greenhouse gases.

The CAA’s numerical thresholds for permits were reasonable for other air pollutants but very low for greenhouse gas emissions. Thus, if greenhouse gases were considered “air pollutants,” the CAA’s statutory thresholds would require millions of new permits without significant environmental benefits.\(^4\)\(^0\)\(^4\) The EPA responded by following the CAA’s general command (regulate “any air pollutant”) but relaxed specific commands (numeric permit thresholds), which did not make sense when applied to greenhouse gas.

Neither the EPA nor any Justice argued for an interpretation giving effect to both the general and specific provisions of the CAA. Justice Scalia’s solution was to narrow the meaning of the general command—greenhouse gas could not be considered an air pollutant.\(^4\)\(^0\)\(^5\) He argued that the CAA’s structure showed that the category of regulated air pollutants was limited to “a relative handful of large sources capable of shouldering heavy substantive and procedural burdens.”\(^4\)\(^0\)\(^6\) But this understanding seems grounded in fear of dire policy consequences rather than necessary implication of the CAA’s plain language. A strict textual reading could give effect to all of the CAA’s provisions and impose vast permitting requirements for stationary sources that emit greenhouse gases.

Justice Breyer’s dissent offered a different solution, which should have been equally acceptable to textualists. Textualists do not apply statutory

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402. *Id.* at 2492–93.
404. *Id.* at 2436–39.
405. *Id.* at 2441 (stating that “what is meant” by Congress in this case “is obviously narrower”).
406. *Id.* at 2443.
terms literally, and textualist judges sometimes ease literal meaning to avoid an absurd result. Justice Breyer noted these absurdity concerns in *Utility Air*. No one wanted the absurd result of applying both provisions to achieve extremely burdensome permit requirements that do not actually improve air quality.

To resolve the issue, Justice Breyer proposed an implied exception to the CAA's specific requirements: the statute could generally be understood to regulate “any source with the potential to emit two hundred fifty tons per year or more of any air pollutant.” This general rule would exclude sources emitting small amounts of greenhouse cases “to which regulation at that threshold would be impractical or absurd.” Justice Breyer defended this proposed limitation based on the CAA's purpose and legislative history. But the limitation could also be explained as allowing textualist methodology—and the absurd results exception—to provide a helpful interpretation of specific language.

4. Objections to the Purposive Approach’s Presumption of Deference

Applying a purposive interpretive approach to generally-worded regulatory statutes would no doubt draw objections. Deference could lead judges to affirm agency policy choices to which the enacting Congress would never have agreed. The specter of such error has haunted the Court in high-stake cases such as *Brown & Williamson*. Questions of error implicate seemingly intractable debates over

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407. Eskridge et al., supra note 24, at 243 (“Justice Scalia has endorsed the absurd results exception.”).
410. *Id.* (emphasis in original).
411. *Id.* at 2453–55. Justice Breyer has also argued legislative history can help judges decide whether a statutory provision should be considered absurd. Breyer, supra note 69, at 848–49.
412. Posner notes this type of error is possible when courts apply the soft approach. See Posner, supra note 34, at 542.
413. The majority refused to allow regulation of tobacco products and opined that “Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion.” FDA v. Brown & Williamson, 529 U.S. 120, 160 (2000). Justice Scalia echoed this sentiment in cases such as *American Trucking* and *Utility Air*. In *American Trucking*, the Court refused to construe an alleged ambiguity in the CAA as permitting the EPA to consider costs of regulation without more clear instruction from Congress. 531 U.S. 457, 468 (2001). Even more dramatically, in *Utility Air,* Justice Scalia refused to construe a sweeping grant of regulatory authority as allowing the EPA to require millions of new permits without clear congressional authorization. 134 S. Ct. at 2444.
comparative institutional advantage and what method of statutory interpretation will keep judges more faithful to the drafters' true intentions. The divide over interpretive method pervades both contractual and statutory interpretation. To be sure, not all textualist arguments in statutory interpretation can be reduced to concerns over accuracy. But constitutional objections to consideration of legislative history extend beyond judicial review to questions of whether legislative history is a legitimate source of meaning for agencies. Constitutional objections also do not reach other interpretive problems such as how aggressively or modestly one should read statutory text. Accuracy of interpretation, on the other hand, presents a core objection, which must be addressed in any helpful understanding of Chevron.

Any understanding of interpretive error must recognize the fact that neither interpretive method will be error free. One must account for two different types of error. As noted in contractual interpretation, under a soft parol evidence rule, "courts err by enforcing extra-contractual statements" to which parties never actually agreed. Under a hard parol evidence rule, the "characteristic error...is the court's refusal to enforce statements...which are part of the contract, even if not part of the writing." The same concerns hold true in the regulatory context. For example, the majority in Brown & Williamson was worried about erroneously affirming tobacco regulations to which Congress had not agreed. But it may have committed the other type of error—failure to recognize health protection Congress did delegate (or at least assume the risk of delegating) to the FDA through general language. This error would also come at great cost, as it would deny safety and health benefits of FDA regulation over

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414. Compare Arthur L. Corbin, The Interpretation of Words and the Parol Evidence Rule, 50 CORNELL L.Q. 161, 162–63 (1965) (asserting extrinsic evidence helps a court fulfill its duty to "put itself in the shoes" of the parties at the time the contract was made), with 3 SAMUEL WILLOXON & GEORGE J. THOMPSON, A TREATISE ON THE LAW OF CONTRACTS 1531–32 (rev. ed. 1936) (expressing fear that false or unreliable parol evidence would mislead jurors).

415. There is a massive literature debating the preferred approach to statutory interpretation. For a synopsis of competing views, compare Breyer, supra note 69, at 861 (arguing that purposive approach allows judges to better approximate legislative intent), with Scalia, supra note 209, at 17 (stating textualism reduces judicial discretion to ensure a "government of laws, not of men").

416. See Manning, supra note 262, 698–99 (1997) (discussing constitutional arguments based on bicameralism and presentment and nondelegation); Gluck, supra note 237, at 1763–64 (summarizing constitutional bases for textualism).

417. Posner, supra note 34, at 542.

418. Id. at 543.

tobacco products everyone agreed were dangerous.

As noted above, there is no consensus as to which interpretive method will best limit judicial error, or which institution (agencies or courts) are less likely to err. In contract law, error is not a freestanding concern but a function of how much a party values enforcement of terms in her contract. Error in enforcing terms of a real estate contract presents a greater concern than error in enforcing terms of a contract to buy an inexpensive consumer good. Thus, courts might apply different interpretive approaches to contracts for sales of consumer goods and real estate. For regulatory statutes, general language suggests Congress did not value specific enforcement enough to direct the agency’s policy choice; instead, it delegated the question to an agency.

For regulatory statutes, moreover, one should not overlook institutional considerations suggesting that different errors impose different costs. An erroneous denial of regulatory authority is harder to undo than an erroneous decision permitting regulation. A court erroneously vacating an agency’s interpretation under Step One imposes not only an incorrect reading of a statute, but one that carries the weight of stare decisis. This error would require further legislation or overruling of precedent to be changed.

A court that erroneously validates an agency’s interpretation of a statute, on the other hand, does not have the last word over the agency’s policy choice. It leaves the agency’s interpretation open to agency revision based on political pressure from Congress and the President, both of whom are more electorally accountable than federal judges. To be sure, revising a rule may present its own set of difficulties for an agency. And the added political accountability offers a second best outcome, as the agency’s views will likely be shaped by currently governing political forces rather than the views of the enacting Congress. Nevertheless, this outcome offers a greater

420. Posner, supra note 34, at 567 (“Judicial accuracy is not independently valuable; it is valuable only to the extent that it increases the value of contracts.”).
421. Id. at 554–55.
422. Id.
424. Id.
425. This point is distinct from debate over which institution is less likely to err.
427. FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 190 (2000) (Breyer, J., dissenting) (stating the “decision to regulate tobacco” is one “for which that administration, and those politically elected officials who support it, must (and will) take responsibility”); Sunstein, Step Zero, supra note 79, at 243 (explaining that agencies offer accountability and expertise on most important political questions).
degree of flexibility and accountability than a judicial determination to limit the meaning of a statute.

What is more, courts wishing to check excessive agency policy decisions also have lower-cost options than Chevron. Legal review of an agency’s statutory interpretation is only one standard of review available to the courts. The arbitrary and capricious standard of review allows courts to consider, among other things, whether the agency “entirely failed to consider an important aspect of the problem” or “relied on factors which Congress has not intended it to consider.” This standard allows a court to remand an issue to the agency for further consideration, rather than imposing a categorical ban on its policy decision as a matter of statutory construction.

Thus, while concerns over error are legitimate, they do not dictate a single interpretive method under Chevron. A rule designed to systematically limit agency enforcement should not be considered free of concerns over error, especially given Congress’s strong incentives to delegate choices to agencies using general language. Failure to leave room for an agency’s policy decision may be just as problematic as failure to check an agency action.

In contract law, courts have accommodated competing interpretive frameworks with a semi-tailored approach. Differences in interpretive methodology may be understood to reflect parties’ differing incentives to draft a complete and unambiguous expression of their final agreement. To be sure, courts do not have the ability to weigh incentives and customize interpretive approaches to every case. Still, the ability to use a semi-tailored interpretive approach suggests some helpful rules of thumb that courts may apply to regulatory statutes.

When a statute administered by an agency contains broad or general


429. Id. at 41, 43, 57. In Michigan v. EPA, for example, the Supreme Court found it unreasonable for the EPA to issue preliminary power plant regulations without considering cost as an “important aspect of the problem.” Michigan v. EPA, 135 S. Ct. 2699, 2706–07 (2015). The Court gave the EPA leeway to determine “how to account for cost” on remand. Id. at 2711–12. Further, in reversing the D.C. Circuit’s judgment, the Supreme Court remanded the cases to that circuit without vacating the EPA’s underlying rules. Id. The D.C. Circuit may remand without vacatur and allow the EPA to keep its rules intact while the agency considers costs of regulation. Lisa Heinzerling, Michigan v. EPA: Costs Matter, But Everything Else is Up for Grabs, AM CONST SOC’Y BLOG [June 29, 2015], http://www.acslaw.org/acshblog/michigan-v-epa-costs-matter-but-everything-else-is-up-for-grabs.

language, it is unrealistic to assume Congress bound the agency to a particular policy choice. Courts reviewing interpretations of generally-worded regulatory statutes can reflect Congress’s incentives by adopting a purposive interpretive framework. The purposive framework acknowledges statutory text will often be insufficient to address the policy question resolved by the agency.

This presumption should not extend, however, to cases where Congress passed a statute containing more specific language. While this line may not always be easy to draw, it is a concept that judges can apply without difficulty in many cases. A very general definition or standard is not the same as a specific formula directing the agency how to make a particular calculation. At the very least, the distinction should make courts pause before insisting that vague language “clearly” requires a particular regulatory outcome.

B. Contract Law Suggests Areas of Interpretive Compromise

Whenever a judge reviews an agency’s interpretation of a statute, under Chevron or any other standard, she must ultimately determine the meaning of the underlying statute. This task invites disagreement over interpretive method. The unresolved debate over interpretive method persists in both Chevron cases and larger questions of statutory interpretation.

As noted above, judges do not need to choose a single interpretive method for all cases. They could tailor their interpretive approach, using purposive methodology for generally-worded statutory provisions and textualist methodology where statutory language is more specific. But this semi-tailored approach would still present obstacles for some judges. Justice Breyer would probably be reluctant to approach specific statutory terms with a textualist methodology, and Justice Scalia would no doubt vehemently resist a purposive interpretation of general statutory terms.

These problems are not hopeless. Even on the Supreme Court, there are Justices who might embrace a more flexible approach. Justices Kennedy, Roberts, and Alito, for example, have not adopted absolutist objections to consideration of legislative history. And, in practice, even committed textualists and purposivists have areas of overlap and agreement. Purposivists still prioritize specific textual requirements over other evidence. Justice Breyer’s discussion of the absurdity canon of construction in Utility Air invoked an argument amenable to textualists as well as purposivists. Textualists, on the other hand, may not be as opposed

431. See, e.g., supra note 26.
432. Gluck, States as Laboratories, supra note 237, at 1831–32.
to modest readings of statutory language as use of legislative history. Further, Justice Scalia has expressly endorsed consideration of agency practice in *Entergy Corp. v. Riverkeeper, Inc.*

Consensus seems within even closer reach for federal court of appeals and district court judges. The cases these judges decide are often less controversial than cases decided by the Supreme Court. In addition, empirical studies suggest that court of appeals judges are predisposed to find reasons to agree, even when their panel contains ideologically distant colleagues. District court judges who fear reversal may also prefer interpretive methods with potential to appease appellate judges applying different interpretive approaches. The discussion below describes areas of potential compromise and then introduces the UCC as an interpretive framework that could facilitate such compromise.

Scholars addressing the debate over statutory interpretation have begun to identify possibilities for compromise. Textualism and purposivism have more in common than one might think, and Jonathan Molot points out that both approaches “place great weight on statutory text and look beyond text to context.” He argues that the primary difference between textualists and non-textualists is willingness to consider legislative history, and that in many cases this difference will not point to different outcomes.

Abbe Gluck identifies a modified textualism, which has taken hold in several states. Modified textualism diverges from original textualism applied by Justices such as Scalia in two key respects. First, modified textualism “ranks interpretive tools in a clear order.” Second, “it includes legislative history in the hierarchy.” Judges, then, are to consider different interpretive tools in tiers—“textual analysis, then legislative history, then default judicial presumptions.” While the modified approach will not appeal to textualist purists, Gluck identifies how it still meets important goals of textualism. It offers formality designed to limit judicial discretion and allows textual analysis priority over all other factors.

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436. Molot, supra note 25, at 3.
437. Id. at 38.
439. Id.
440. Id.
441. Id.
442. Id.
443. Id. at 1829.
While modified textualism has had some success at the state level, its framework seems less helpful for regulatory statutes. States using a tiered approach limit their initial inquiry to traditional textualist sources and open the analysis to legislative history or other sources only if the text is not clear. This approach seems to re-hash problems in the current version of *Chevron*. It uses a clarity/ambiguity framework and prompts courts to derive clear meaning from statutory text without regard to how general or specific its language is. These presumptions are ill suited to generally-worded federal regulatory statutes.

This Article proposes the UCC’s parol evidence rule as an alternative compromise framework. The Code offers a purposive framework capable of accommodating generally-worded regulatory statutes. At the same time, the Code recognizes the need to defer to specific textual provisions and acknowledge a hierarchy of interpretive sources. The Code’s interpretive rules have been widely adopted and are currently the law governing transactions in the sale of goods in every state except Louisiana. The discussion below outlines the Code’s compromise approach and then describes how it might be applied in the *Chevron* context.

1. The UCC’s Compromise Interpretive Approach

The Code’s parol evidence rule generally aligns with the soft parol evidence rule outlined above. Karl Llewellyn, the principal architect of UCC Articles 1 and 2, crafted §2-202 in response to courts’ unpredictable application of the hard parol evidence rule. Llewellyn believed that “legal rules themselves should reflect the actual practices of those they were designed to regulate.” The hard parol evidence rule failed to account for the “frequency with which vital terms of oral negotiations are in fact omitted from (or not reduced to) a formal

445. See, e.g., id. at 1777 (noting Oregon’s practice of considering legislative history only if “textual aids do not achieve clarity”).
447. See supra Part III.A.
449. Brench, supra note 36, at 296.
450. Id. at 308.
At the same time, Llewellyn recognized a need to exclude "prior or contemporaneous modifying terms" for agreements “drawn under advice of counsel” or “made wholly by correspondence.” The Code’s parol evidence rule attempts to account for writings with varying degrees of completeness.

The UCC rejects assumptions that parties will specify all terms of their agreement. In general, Article 2 assumes parties will often agree on sales of goods without nailing down significant terms such as those reflecting price and delivery. Section 1–201(3) also provides a contextual definition of “agreement,” which means “the bargain of the parties in fact, as found in their language or inferred from other circumstances, including course of dealing, or usage of trade.”

Thus, rather than requiring exclusive reliance on text unless it is shown to be ambiguous, the UCC approach requires courts to automatically consider reliable non-textual evidence alongside express written terms. Courts also have an obligation to construe both textual and non-textual forms of evidence as “consistent with each other” “whenever reasonable.” Further, courts are directed to be modest in interpreting written terms—the UCC approach eschews dictionary definitions and canons of construction that might imbue general terms with more meaning than their drafters intended. Finally, the Code provides a hierarchy for comparing express contractual terms to other evidence of meaning. This hierarchy favors textual evidence because express terms trump all other evidence where express terms cannot reasonably be construed in a manner consistent with evidence such as course of dealing or usage of trade.

Under the UCC, the primary question is whether an express term is specific enough to render course of dealing or trade usage “inconsistent.”

452. Id.
453. U.C.C. § 2–204(3) (2012) (stating that a contract will not fail for indefiniteness due to open terms); id. § 2–305 (open price term); id. § 2–308 (absence of specified place for delivery).
454. Id. § 1-201(b)(3) (emphasis added).
455. Id. § 1–303(e).
456. Id. § 1–303 cmt. 1 (rejecting “lay-dictionary” reading of a commercial agreement); id. § 2–202 cmt. 1(b) (rejecting meaning derived from “rules of construction existing in the law”).
458. U.C.C. § 1–303(c).
leading case, *Columbia Nitrogen Corp. v. Royster Co.*,\(^{460}\) illustrates that express terms may require a high level of specificity to displace non-textual evidence. This dispute centered on a contract in which Columbia Nitrogen initially agreed to buy certain quantities of phosphate (a fertilizer product) from Royster, but then refused to make these purchases after the market for fertilizer plummeted.\(^{460}\)

Over the course of the past six years, Columbia had on several occasions sold fertilizer products to Royster, but Columbia had rarely purchased Royster’s products. Columbia recounted these contracts were marked by “repeated and substantial deviation from the stated amount or price, including four instances where Royster took none of the goods for which it had contracted.”\(^{461}\) The disputed provisions detailed agreements on “base price, escalation, minimum tonnage, and delivery schedules.” The court held this language was not specific to the contingency at issue here—the contract was “silent about adjusting prices and quantities to reflect a declining market.”\(^{462}\) Thus the Court allowed evidence of course of dealing and trade usage (reflecting deviations from stated quantities and prices) to be considered as evidence of the parties’ agreement.\(^{463}\)

Nevertheless, the UCC contemplates that written terms govern if they are sufficiently definite.\(^{464}\) Comment 2 to § 2-202 allows parties to “carefully negate” meanings created by course of dealing, trade usage, and course of performance. In *Royster*, a contract term specifically excluding the parties’ particular course of dealing would have undoubtedly governed the dispute.\(^{465}\)

Under the UCC, moreover, non-textual evidence does not receive equal weight. Section 2–202’s general assumption is that terms “set forth in a writing intended by the parties as a final expression of their agreement... may be explained or supplemented.”\(^{466}\) But it also limits supplemental or explanatory evidence to (a) “course of dealing,” “usage of

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459. 451 F.2d 3, 9 (4th Cir. 1971).
460. *Id.* at 6–7.
461. *Id.* at 8.
462. *Id.* at 9.
463. *Id.* at 9–11.
465. *Columbia Nitrogen Corp. v. Royster Co.*, 451 F.2d 3, 9 (4th Cir. 1971) (noting the contract “did not expressly state that course of dealing and trade usage cannot be used”); FARNSWORTH, supra 457, at § 7.13 (emphasizing that *Royster* “stopped short” of saying whether a general disclaimer of course of dealing or trade usage would be sufficient, and parties would be required to negate the particular course of dealing at issue).
466. U.C.C. § 2–202 (emphasis added).
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trade,” or “course of performance” and (b) “evidence of consistent additional terms.” Section 202 excludes contradictory prior or contemporaneous agreements to additional terms. Unlike course of dealing, course of performance, and trade usage, courts have no obligation to attempt to construe agreements to additional terms as consistent whenever reasonable. Prior or contemporaneous agreements to additional terms fall at the bottom of the UCC’s interpretive hierarchy.

This hierarchy reflects the fact that some forms of non-textual evidence are inherently more reliable than others. For example, course of dealing, course of performance, and usage of trade are based on objectively observable behavior. Respectively, they reflect a “sequence of conduct” between parties, parties’ performance under a current contract, and a “practice or method of dealing having . . . regularity of observance in a place, vocation or trade.” These behaviors are difficult for one party to manufacture unilaterally in order to escape contractual obligations. Thus, they generally offer reliable evidence of parties’ intent, and it makes sense for them to receive greater weight as part of the parties’ agreement.

The UCC excludes less reliable types of extrinsic evidence. A key concern with parol evidence is that some parties may use evidence of earlier negotiations to raise dishonest or erroneous claims as to terms of the agreement. This is most likely to manifest itself in testimony where one party unilaterally claims a prior agreement to terms that differ from those in the final writing. Unilateral evidence of additional terms is definitively excluded by § 2–202’s parol evidence. Such evidence may not be used to

467. U.C.C. § 2–202(a). Comment 1(c) to § 2–202 discourages courts from limiting their search for meaning to plain language of a writing, and expressly rejects the “requirement” that a court find that “the language used is ambiguous” before admitting evidence of course of dealing, usage of trade, or course of performance. Id. § 2–202 cmt. 1(c).

468. Id. § 2–202(b). Consistent additional terms are also excluded if the agreement is integrated. Roger W. Kirs, Usage of Trade and Course of Dealing: Subversion of UCC Theory, 1977 U. ILL. L.F. 811, 816 (1977) (stating “Section 2–202 provides a rule for excluding three types of evidence: contradictory prior agreements, contradictory contemporaneous oral agreements, and consistent additional terms if the agreement is integrated” and “contains no exclusionary language applicable to evidence of usage of trade or course of dealing”).

469. Compare U.C.C. § 1–303(c), with id. § 2–202.

470. U.C.C. § 1–303(b) (2014).

471. Id. § 1–303(a)(1).

472. Id. § 1–303(c).


474. For contemporaneous oral agreement, see U.C.C. § 2–202.

475. A consistent additional term may also be excluded if the agreement is integrated.
contradict terms contained in a writing “intended by the parties as a final expression of their agreement.”

As with states’ modified textualism, the UCC’s interpretive method will not appeal to purists like Justice Scalia. The Code’s approach seems even more objectionable to textualists; it is not tiered and requires judges to weigh textual and non-textual evidence together at the first level of analysis. Nevertheless, its hierarchy has more structure than an open-ended purposive approach. Specific express terms trump inconsistent evidence of course of dealing and trade usage, and reliable forms of non-textual evidence also trump less reliable forms.

2. Application of the Code’s Interpretive Method to Regulatory Statutes

The UCC structures purposive analysis to prioritize specific text and objective non-textual evidence of meaning. This Article has already discussed problems of failing to prioritize specific textual commands. The discussion below explores how the UCC’s interpretive principles may help identify objective, non-textual evidence of statutory meaning.

The UCC prioritizes three types of reliable non-textual evidence, which are based on objective evidence of parties’ or market participants’ actions. Two of these categories, course of performance and course of dealing, involve sequences of “conduct between the parties to a particular transaction.” They are comparable to some forms of legislative history based on official actions taken by Congress and agencies as part of the legislative process.

In Zuni, for example, had the amended statute used more general language, the Code’s interpretive principles would support the Court’s use of legislative history. The Court relied on actions that were objectively inconsistent with an understanding that statutory amendments were designed to displace the Secretary of Education’s existing calculations. The amendments stemmed from draft legislation provided by the Secretary himself, without Congress or the agency discussing a change to the Secretary’s existing method of calculation. These actions may not rise to a sequence of conduct, as required by the UCC, but they do bear some

See id.; Kirst, supra note 468, at 816.
478. U.C.C. §1–303(a)–(b).
480. Id.
481. U.C.C. §1–303.
of the same indicia of objective reliability. These are not actions one would expect to accompany legislation changing the Secretary’s longstanding rules.

The Code also recognizes a third category of evidence, trade usage, which is not limited to conduct by parties that drafted the contract. Trade usage is a “practice or method of dealing having . . . regularity of observance in a place, vocation, or trade so as to justify an expectation that it will be observed with respect to the transaction in question.”482 It may also be embodied in a “trade code.”483 Evidence of a regularly observed practice provides objectively verifiable evidence of what participants in the relevant industry have done in the past.

Agency practice may offer similar assurances of objective, verifiable evidence. It is evidence of past conduct that cannot be manufactured and which also has not proved problematic enough for Congress to displace it through appropriation bills, oversight hearings, or new legislation.484

To be clear, this point is not intended to undermine Chevron’s dynamism and argue that agencies are bound to follow their past practice in every case.485 Instead, the point is that in some cases agency practice may have a beneficial defensive use. It may offer reliable evidence supporting an agency’s continuation of a particular policy.

The Court’s 2009 decision in Coeur Alaska, Inc. v. Southeast Alaska Conservation Council486 illustrates how agency practice may aid court’s Chevron analysis.487 Here, conservation groups challenged a permit the Army Corps of Engineers (Corps) granted to a gold-mining company under the Clean Water Act (CWA). They argued the Corps permit for discharge of mining waste, in the form of fill material, was inconsistent with arguably overlapping EPA regulations calling for a permit from the EPA.488 The Court found the CWA “ambiguous” on this question489 and deferred to the agencies’ “reasonable decision to continue their prior practice” of allocating fill material discharge permits to the Corps.490

The Court found that both the agencies’ “published statements” and

482. U.C.C. § 1–303(c) (2012).
483. Id.
484. Eskridge & Bader, The Continuum of Deference, supra note 4, at 1151.
487. Id.
488. Id. at 266.
489. Id. at 281.
490. Id. at 291.
regulatory actions established a practice of allocating fill material discharge permits to the Corps. Petitioners could not cite even one instance where the EPA applied applicable standards to a discharge of fill material. *Coeur Alaska*, by contrast, pointed out two instances where the Corps issued a permit to a mine wishing to discharge fill material.  

Justice Kennedy’s analysis and use of agency practice gained support from a wide range of Justices. His opinion was joined not only by Chief Justice Roberts, Justice Thomas, and Justice Alito, but also by Justice Breyer, and in material part by Justice Scalia. Justice Scalia additionally expressly endorsed consideration of agency practice in *Entergy Corp. v. Riverkeeper, Inc.* There, he took as helpful but not “conclusive” the fact that “the agency has been proceeding in essentially [the same] fashion for over 30 years.”

Thus, some types of legislative history and agency practice can offer reliable evidence to supplement a court’s understanding of a generally-worded statute. The UCC suggests criteria courts may use to distinguish evidence of past conduct from less reliable evidence based on words. For example, courts should discount legislators’ self-serving statements that do “not reflect the ultimate deals entered to get the statute through Congress.” This does not require judges to categorically rule out consideration of legislative history in other cases.

**CONCLUSION**

Critiques of the *Chevron* framework are well grounded. They may nevertheless be lost on the Supreme Court. In its recent decisions, the Court chose to plow forward with an inconsistently applied *Chevron* framework. This inconsistency poses problems for *Chevron’s* proponents,

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491. Id. at 290–91.

492. Justice Breyer wrote a separate concurrence to emphasize the reasonableness of the agency interpretations, which incorporated safeguards to ensure that there was not a loophole excusing whole categories of regulated industry from pollution control standards. Id. at 293–94. Justices Ginsburg, Stevens, and Souter dissented on the ground that these safeguards were not adequate. Id. at 296–97.

493. In his concurrence, Justice Scalia took exception only to the understanding that the Court was, in part, deferring to an agency’s interpretation of its own regulation rather than deferring under *Chevron*. *Coeur Alaska, Inc. v. Sc. Alaska Conservation Council*, 557 U.S. 295–96 (2009).


495. Id. at 224.

496. ESKRIDGE ET AL., supra note 24, at 307; Manning, supra note 262, at 732 (noting the problem of self-serving legislative history).

as well as judges, agencies, and interested parties who must operate under the current legal regime.

Nevertheless, judges and interested parties need not resign themselves to the mess created by the Supreme Court. *Chevron* is so indeterminate that lower courts have plenty of room to tailor their interpretive approach to varied facts, using contractual interpretation as a familiar guidepost. This approach could make a real difference for agencies and interested parties. They might find *Chevron* more predictable at the court of appeals level where most cases end. It is even possible the Supreme Court will incorporate *Chevron* developments from lower courts.  

Contractual interpretation calls for a purposive analysis in cases where transaction costs dominate the value of enforced terms and textual analysis in others. For regulatory statutes, it is reasonable to assume that general language highlights overriding transaction costs, and specific language does not. Thus, judges could tailor their approach by evaluating general statutory language purposively. Such analysis would recognize that text, dictionary definitions, and canons of constructions might not specify a single correct answer to the policy question at hand. When faced with more specific language, however, the same judges could place greater emphasis on textual meaning. This differentiated approach falls comfortably within the existing *Chevron* framework—agencies have room to interpret general statutory provisions but must adhere to specific terms when “Congress has directly spoken to the precise question at issue.”

These judges might also find common interpretive ground in the UCC’s structured purposive framework. The UCC encourages a form of modest textualism, which prioritizes specific text, but does not allow judges to add otherwise non-existent meaning through dictionary definitions and canons of construction. The UCC also provides a hierarchy of non-textual evidence. It suggests ways in which judges might distinguish agency practice and reliable evidence of legislative history from unreliable evidence of legislative history.

If started, this beneficial dialogue might even spill over to other unsettled aspects of the *Chevron* framework. For example, *Utility Air Regulatory Group v. Environmental Protection Agency* and *King v. Burwell* raise important questions as to which agency interpretations are of such great economic and political significance that they call for less deference. As noted above, *King* grants these decisions no deference, and *Utility Air* approaches them with a

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498. Lawson & Kam, supra note 3, at 5 (describing how early “lower court developments” with respect to *Chevron* “uneasily found their way into Supreme Court jurisprudence”).

presumption against permissibility under *Chevron* Step Two. Judges might also find it helpful to tailor these holdings and develop criteria for agency interpretations that qualify for more searching judicial review. One factor might be whether the text of the statute is sufficiently detailed to support a judicial determination of fixed meaning. Another factor might be whether the case involves regulations affecting millions of people and involving billions of dollars. Yet another factor might be reliance interests that call for consistent regulatory policy.

This dialogue might also address whether Step Two’s “permissibility” inquiry should turn on legal interpretation or policy judgment. A court’s invalidation of an agency’s statutory interpretation is binding. A determination that the agency’s interpretation is arbitrary and capricious would be less restrictive. It would check the agency’s immediate judgment without binding the agency to a particular policy choice in the future.

*Chevron*’s current problems are a choice, not an inevitability. This fact benefits its proponents, as well as judges, agencies, and interested parties who must operate under the Court’s current regime. Contract law’s semi-tailored compromise approach could make *Chevron* more predictable. *Chevron* has the potential to flourish, rather than wither, over the next thirty years.

500. See discussion supra note 165.
501. Id.