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I. Introduction

Chevron U.S.A. Inc. v. Natural Resource Defense Council, Inc.[1] is the most cited decision in all of administrative law.[2] The significance of *Chevron* jurisprudence to modern administrative law cannot be overstated: The doctrine shapes the federal courts' approach to practically all statutory interpretation questions when assessing administrative action.[3] Since the Supreme Court handed down this landmark decision, however, the Court's philosophical approach to statutory interpretation has undergone a dramatic transformation into hypertextualism.[4] Hypertextualism occurs whenever a court relies on a technical construction of a phrase or word, even when it appears that such a

1. *See* Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 866 (1984) (holding that where the legislative history of the statute was silent in regard to the issue at hand, the EPA's interpretation of the statute at issue was a permissible construction and entitled to deference). In *Chevron*, the Supreme Court determined that Congress did not specifically address the instant issue—the applicability of the bubble concept. *Id.* at 845. The Court then considered the EPA's interpretation of the statute and concluded that it was a reasonable policy choice, fully consistent with the principal goals of the statute. *Id.* at 865. The Court stated that judges have a duty to respect and defer to legitimate policy choices made by federal agencies. *Id.* at 866. Thus, a court must afford considerable weight to an agency's construction of a statute. *Id.* at 844. Consequently, the Court held that if a statute is silent or ambiguous with respect to the instant issue, the question for the court is simply whether the agency's action was based on a permissible interpretation of the statute. *Id.* at 966.

2. STEPHEN G. BREYER ET AL., ADMINISTRATIVE LAW AND REGULATORY POLICY 289 (5th ed. 2002).

3. *See* Thomas W. Merrill, *Rethinking Article I, Section I: From Nondelegation to Exclusive Delegation*, 104 COLUM. L. REV. 2097, 2171–72 (2004) ("It is difficult to overstate the importance of this jurisprudence to modern administrative law."); *see also id.* at 2172 (describing *Chevron* as the "template through which federal courts approach virtually all questions of statutory interpretation when reviewing agency action").

4. *See* 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) (defining "hypertextualism" as "finding linguistic precision where it does not exist, and relying exclusively on the abstract meaning of a particular word or phrase even when other evidence suggests strongly that Congress intended a result inconsistent with that usage").

construction contradicts congressional intent. This shift to hypertextualism could have unintended effects on *Chevron* jurisprudence. The connecting factor is ambiguity. Hypertextualism discourages judges from finding ambiguity except in the most extreme situations,[5] while *Chevron* deference depends on a broader concept of ambiguity.[6] The two approaches therefore are incompatible. Further, hypertextualism threatens the efficiency of administrative agencies, undermines agencies' autonomous decisionmaking and thwarts textualist objectives.[7]

This Note presents the Supreme Court's recent decision in *Exxon Mobil Corp. v. Allapattah Services., Inc.*[8] as a decision that solidified the Court's adoption of a hypertextualist approach to statutory interpretation. The debate over the textualist approach versus the pragmatic approach is a constant in the field of statutory interpretation.[9] Much of the scholarly debate about statutory interpretation centers on the use of legislative history as a tool of statutory interpretation[10]—simply stated, in the face of an ambiguous statute, textualists forbid its use and intentionalists encourage it.[11] Ambiguity—specifically, its absence—is therefore an issue of critical importance for the textualist approach. But, ambiguity is a core concept for the *Chevron* doctrine: The central question

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5. *See* discussion *infra* Part III.B.1 (explaining how a textualist approach can result in less deference to agency interpretations).

6. *See* discussion *infra* Part III.B.2 (discussing the effects of ambiguity on the interpretation of administrative statutes).

7. *See* discussion *infra* Parts II.A–C, III.B.3, IV.B (describing the spillover effects of hypertextualism on the administrative state).

8. *See* Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546, 558–59 (2005) (holding that § 1367 permits diversity jurisdiction to be exercised over plaintiffs failing to satisfy the minimum amount-in-controversy requirement so long as the other diversity jurisdiction elements are satisfied and at least one plaintiff satisfies the minimum amount requirement).

9. *See* ARISTOTLE, THE NICHOMACHEAN ETHICS OF ARISTOTLE 133 (Sir David Ross trans., 1925) ("When the law speaks universally . . . and a case arises on which it is not covered by the universal statement, then it is right, where the legislator fails us and has erred by oversimplicity, to correct the omission—to say what the legislator himself would have said had he been present . . . ."); *see also* John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 4 (2001) (discussing the Supreme Court's philosophical divide over the appropriate course to take in statutory interpretation cases).

10. *See* Patricia M. Wald, *The Sizzling Sleeper: The Use of Legislative History in Construing Statutes in the 1988–89 Term of the United States Supreme Court*, 39 AM. U. L. REV. 277, 279 (1990) ("[T]he issue of whether and how to use legislative history in determining the meaning of statutes ought to be a pressing concern to all of us who care about how laws are made and interpreted . . . . We need to worry about it . . . .").

11. *See* Jonathan R. Siegel, *Textualism and Contextualism in Administrative Law*, 78 B.U. L. REV. 1023, 1024 (1998) (noting that the "factions have argued particularly about the use of legislative history as a tool of statutory interpretation").

in *Chevron*'s "step one" is whether the statute is ambiguous.[12] Without ambiguity, a court will never advance to step two of *Chevron* and recognize the agency interpretation as controlling.[13] Ambiguity liberates the agency.

To illustrate the unintended consequences hypertextualism may have on the modern administrative state, consider a paraphrased version of a hypothetical posed by Professor Richard Pierce. Congress charges an agency with implementing a statute that has three provisions, A, B, and C, each of which can support two meanings, 1 and 2.[14] The agency interprets the provisions to mean A1, B1, and C1, because it perceives programmatic advantages to that particular construction.[15] Decades later, a court reviews the agency's interpretation under *Chevron*, and finds the "plain meaning" of the statute to be A2, B1, and C1, thus disregarding the agency's A1 interpretation.[16] Later, a different circuit court finds the "plain meaning" in fact to be A2, B2, and C1.[17] Consequently, the agency will be forced to implement its statutory mission in two different ways in two circuits.[18] If the Supreme Court then determines that the "plain meaning" is in fact A1, B2, and C1, the agency may not be able to perform its mission at all.[19]

One may not find statutory interpretation trends or the continued vitality of administrative law doctrines to be of pressing concern. Consider, however, a more tangible example. Many rights granted to citizens by Congress hinge upon the chosen construction of a particular statute or a definition of a key term. For instance, are you a lawyer, faculty member, librarian, engineer, or architect? Then the collective bargaining and organizational rights of your profession and many others depend upon the appropriate construction of the National Labor Relations Act (NLRA). Congress enacted the NLRA to provide

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12. *See* Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984) ("First, always, is the question whether Congress has directly spoken to the precise question at issue . . . . [I]f the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.").

13. *See id.* at 845 ("Once it determined . . . that Congress did not actually have an intent . . . the question before it was not whether in its view the concept is 'inappropriate' . . . but whether the Administrator's view that it is appropriate in the context of this particular program is a reasonable one.").

14. *See* Pierce, *supra* note 4, at 764 (setting out a hypothetical to illustrate the consequences of conflicting interpretations of administrative statutes).

15. *Id.* at 763.

16. *Id.*

17. *Id.*

18. *Id.*

19. Pierce, *supra* note 4, at 763.

employees with legal protection to freely associate, organize, and bargain collectively to negotiate terms and conditions of employment.[20] Through the NLRA, Congress created the National Labor Relations Board (NLRB) to administer the Act.[21] The NLRA does not protect those employees who are deemed to have supervisory status;[22] thus, the NLRB's interpretation of "supervisory status" is all-important to the Act's application.

Imagine then that the NLRB relied upon a particular status-determining test for twenty years, a test consistently upheld by the Supreme Court and the Second, Seventh, Eighth, Ninth, and Eleventh Circuit Courts of Appeals.[23] The Sixth Circuit, however, rejects that test, disregarding the agency's interpretation by relying upon the "plain meaning" of the statutory language.[24] Consequently, a professional residing in a Sixth Circuit state is less likely to be protected than professionals residing in other states. Suppose that the Supreme Court, using a textualist approach, then affirms the Sixth Circuit decision, rejecting the test relied upon by the NLRB for twenty years and substantially narrowing the class of individuals protected as professionals nationwide.[25] Now, employees in the majority of the circuits—all of whom followed the test developed by Congress's chosen interpreter—face the unenviable task of conforming to a new standard, submitted by five members of the judicial branch.

The above hypothetical, based on an actual case, illustrates the importance of judicial deference when statutory language is susceptible to multiple constructions: The NLRB test was true to congressional intent and the policy underlying the NLRA.[26] Instead of implicating *Chevron*, however, the Supreme Court relied on a hypertextualist approach, ignored the legislative history and policy arguments reflected in the NLRB test, and "struck down this important test and compromised the organizational rights of thousands of professionals and further endangered our administrative system."[27] This is the

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20. *See* Edwin A. Keller, Jr., *Death by Textualism: The NLRB's "Incidental to Patient Care" Supervisory Status Test for Charge Nurses*, 46 AM. U. L. REV. 575, 578 (1996) (describing the NLRA).

21. *Id.*

22. *See* 29 U.S.C. § 157 (2000) (describing a qualifying employee's organizational rights).

23. *See* Keller, *supra* note 20, at 594 (discussing the court's acceptance of the NLRB's "incidental to patient care" test).

24. *Id.*

25. *See id.* at 599 (discussing the Court decision affirming the Sixth Circuit decision).

26. *See id.* at 623 ("The [test formulated by the NLRB] was a reasonable interpretation of an ambiguous statutory phrase grounded in legislative history and a wealth of prior case law. In addition, the NLRB test was true to the policies underlying the NLRA.").

27. *Id.*

threat that a hypertextualist analysis poses in the labor law arena, and, more broadly, this example illuminates the ramifications of hypertextualism for the future of *Chevron*.

A textualist-minded Supreme Court, fixated on "finding" linguistic precision rather than facilitating agency deference, will impede the efficacy of the administrative state.[28] In the mid-1990s, the deference-deteriorating effect of an overly textualist approach received some attention from legal scholars.[29] One commentator warned that an unchecked spread of textualism could "wreak havoc" on the federal administrative system and stated that immediate action was necessary to prevent the proliferation of this "destructive form of statutory interpretation."[30] Another commentator expressed the hope that the Court would "soon abandon[] its new hypertextualist approach" and warned that the "inevitable result" of failing to do so would be "cacophony and incoherence throughout the administrative state."[31]

These warnings have not been heeded. Instead, the Supreme Court's hypertextualist approach has solidified, culminating with its recent decision in *Exxon Mobil*.[32] Although *Exxon Mobil* did not involve an administrative law issue, it signifies a high-water mark of hypertextualism for the Court. Most troubling, the majority utilized an extremely narrow concept of ambiguity. If

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28. *See id.* at 576 (discussing the "dramatic implications" and the "clear and growing threat to all federal administrative agencies" presented by the increasing use of a textualist method to resolve a statutory issue in the labor law arena and beyond).

29. *See* Thomas W. Merrill, *Textualism and the Future of the* Chevron *Doctrine*, 72 WASH. U. L.Q. 351, 354 (1994) [hereinafter Merrill] (discussing the threat textualism poses to the future of the deference doctrine); Pierce, *supra* note 4, at 752 (discussing concerns "rooted in the extremes to which the Court has gone in its use (or abuse) of textualist tools to the exclusion of other evidence of legislative intent and with the effect of virtually emasculating the *Chevron* doctrine"); Keller, *supra* note 20, at 577 ("If left unchecked, the unpredictable and haphazard nature of textualism will exact great financial, economic, and social costs, wreaking havoc in an already less-than-efficient federal administrative system.").

30. Keller, *supra* note 20, at 577.

31. Pierce, *supra* note 4, at 752, 781.

32. *See* Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546, 549 (2005) (holding that § 1367 authorizes supplemental jurisdiction over the claims of other plaintiffs, even if those claims do not meet the minimum jurisdictional amount specified in the diversity jurisdiction statute). In *Exxon Mobil*, the Supreme Court granted certiorari to resolve the longstanding circuit split as to the correct interpretation of 28 U.S.C. § 1367. *Id.* According to the *Exxon Mobil* Court, § 1367 is not ambiguous. *Id.* at 567. Consequently, the *Exxon Mobil* Court refused to resort to legislative history evidencing congressional intent contrary to the Court's holding. *Id.* The *Exxon Mobil* Court stated that even if a resort to legislative history were appropriate, the Court would not give significant weight to the relevant House Report. *Id.* at 570. Consequently, the *Exxon Mobil* Court held that by its plain text, § 1367 authorizes supplemental jurisdiction over all claims by diverse parties arising out of the same case or controversy. *Id.*

the Court allows this approach to spill over into the administrative context, "cacophony and incoherence" will plague the administrative state.[33]

This Note focuses on the unintended consequences of this hypertextualist approach—primarily, the implicit potential to eradicate the *Chevron* doctrine and the threat this phenomenon poses. Part II describes *Chevron* as a necessary response to the realities of the modern administrative state and outlines the indispensable benefits agency interpretations provide. Part III focuses on the evolution of statutory interpretation into the current hypertextualist approach and analyzes hypertextualism's dire consequences in the area of administrative law. Finally, Part IV suggests a two-track approach to questions of ambiguity and reconciles a broad conception of ambiguity in *Chevron*-applicable cases with the underlying goals of textualism.

II. Chevron U.S.A. Inc. v. Natural Resource Defense Council, Inc.: *An Essential Tool of Modern Governance*

In *Chevron v. Natural Resource Defense Council, Inc.*,[34] the Supreme Court unanimously established a two-part test to determine when a court should defer to an agency's interpretation of a statute. As in most statutory interpretation cases, courts interpreting administrative statutes first ask the question "Is the statute ambiguous?" in determining whether to accord deference to an agency's interpretation.[35] If the intent of Congress is clear, that is the end of the matter. Both the court and the agency "must give effect to the unambiguously expressed intent of Congress."[36] If, however, the court determines that Congress has not directly addressed the specific issue at hand, "the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation."[37] Rather, if the statute is silent or ambiguous, the second analytical step is to evaluate whether

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33. Pierce, *supra* note 4, at 752.

34. *See* Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 866 (1984) (holding that where the legislative history of the statute was silent in regard to the issue at hand, the EPA's interpretation of the statute at issue was a permissible construction and entitled to deference).

35. *See id.* at 842–43 ("First, always, is the question whether Congress has directly spoken to the precise question at issue . . . . [I]f the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.").

36. *Id.* at 842–43.

37. *Id.*

the agency has provided a reasonable and permissible interpretation of the statute.[38] If so, the court must defer to that interpretation.[39]

In the contemporary administrative state, federal administrative agencies wield immense power.[40] Congress grants implicit power to agencies by passing ambiguous statutes with the intention of allowing agencies the opportunity to interpret the ambiguity.[41] Agencies, rather than courts, should interpret these ambiguous statutes to facilitate efficient governance.[42] The *Chevron* doctrine affirms this power by mandating judicial deference to reasonable agency interpretations of ambiguous statutes.[43] Thus, the effectiveness of the *Chevron* doctrine depends upon courts having a relatively broad conception of ambiguity: Without a finding of ambiguity, the benefits of an agency interpretation go unrealized.

A. Chevron*: A Response to the Realities of the Modern Administrative State*

The legislative and judicial branches are ill-suited to perform many of the daily tasks required in today's complex society thus necessitating allocation of administrative power to agencies.[44] This delegation of government functions to administrative agencies is certainly not a new phenomenon in the Anglo-American legal tradition.[45] During the past half-century, however, the

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38. *Id.*

39. *Chevron*, 467 U.S. at 844.

40. *See* discussion *infra* Part II.A (describing how the complexity of today's society demands delegation of power to administrative agencies).

41. *See* discussion *infra* Part II.C (discussing Congress's intent to authorize the agencies to resolve statutory ambiguities, rather than the courts).

42. *See* discussion *infra* Part II.A–C (supporting the role of agencies in statutory interpretation).

43. *See* Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843 (1984) ("[I]f the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.").

44. *See* Gregory C. Ward, Lussier v. Maryland Racing Commission: *Maryland's Court of Appeals Upholds a Fine Imposed by an Administrative Agency Despite a Lack of Specific Authorization to Fine from the General Assembly*, 27 U. BALT. L. REV. 515, 528–29 (1998) (discussing the "well-recognized reality that legislative and judicial branches are illsuited to perform many of the day-to-day functions required of the government") (citing Peter Marra, *Have Administrative Agencies Abandoned Reasonability?*, 6 SETON HALL CONST. L.J. 763, 772, 777 (1996)).

45. *See* MATTHEW BENDER, ADMINISTRATIVE LAW TREATISE § 1.01 (2005) (discussing the background of the federal administrative process).

administrative state has experienced exponential growth.[46] Spurred by President Franklin Roosevelt's New Deal,[47] there has been a rapid proliferation in both the number and variety of agencies. Indeed, "[t]he size and scope of federal administrative activity has increased during every period in the nation's history."[48] In response, American government has adapted itself to a modern society's evolving needs by permitting Congress to delegate portions of its lawmaking power to agencies.[49] This grant of congressional latitude is supported by both traditional principles of judicial deference to legislative decisions[50] and judicial recognition that some degree of delegation to agencies is necessary to permit the government to function.[51] The Court has stated that "a hermetic sealing off of the three branches of Government from one another would preclude the establishment of a Nation capable of governing itself effectively."[52]

Agencies allow for the management of the modern administrative state without placing impossible burdens of micromanagement upon Congress. With clearly and narrowly defined fields of responsibility, agencies are able to handle the sheer volume of record keeping that regulatory administration necessarily involves, a task that the more established branches of government could not feasibly handle.[53] In this sense, the *Chevron* doctrine is an indispensable tool to effective and efficient government. By mandating judicial deference to a reasonable agency interpretation, the *Chevron* doctrine assures that well-

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46. *Id.*

47. *See* Henry G. Manne, *The Judiciary and Free Markets*, 21 HARV. J.L. & PUB. POL'Y 11, 23 (1997) ("The most powerful source of the dilution of the older structure in American law was the growth, particularly during and after the 'New Deal' in the 1930s, of vast amounts of regulatory legislation and the enormous growth of administrative law . . . .").

48. 1 KENNETH CULP DAVIS & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 1.3, at 6 (3d ed. 1994).

49. *See* ALFRED C. AMAN, JR. & WILLIAM T. MAYTON, ADMINISTRATIVE LAW 11 (1993) (explaining that Congress has constitutional power under the Necessary and Proper Clause to create administrative agencies for legislative responsibilities).

50. *See* Yvette M. Barksdale, *The Presidency and Administrative Value Selection*, 42 AM. U. L. REV. 273, 306 n.192 (1993) ("Stating that [the] Court's jurisprudence has been 'driven' by recognition that Congress must be permitted to delegate authority to other branches of government." (citing Mistretta v. United States, 488 U.S. 361, 372 (1989))).

51. *See id.* at 306 n.193 ("Finding that in 'increasingly complex society' Congress is unable to perform its function without authority to delegate power to agencies 'under broad general directives.'" (citing Mistretta v. United States, 488 U.S. 361, 372 (1989))).

52. Buckley v. Valeo, 424 U.S. 1, 121 (1976); *see also* Michael J. Klarman, *Antifidelity*, 70 S. CAL. L. REV. 381, 412–13 (1997) (noting the evisceration of a precise separation of powers "in order to accommodate the exponential growth of the modern administrative state").

53. *See* BENDER, *supra* note 45, § 1.01 (discussing "the manifest advantages of independent administrative agency action over executive action").

deliberated decisions[54] by an entity with expertise in a specific area will trump a concededly less-informed judicial interpretation by a politically insulated court.[55]

B. Crippling Chevron *Eliminates Regulatory Flexibility*

Modern challenges demand a flexible administrative environment. A primary advantage of the *Chevron* approach is that it permits needed flexibility by accepting changes in agency interpretation.[56] In comparison to courts limited by stare decisis, an agency is in a better position to know when and how regulatory interpretations need to change. When a court resolves an ambiguity, it resolves it permanently unless modified by statutory amendment.[57] Under *Chevron,* however, an agency may alter its interpretation[58] of a statute in response to advancing technology, new information, and changing political pressures.[59]

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54. *See* Barksdale, *supra* note 50, at 308 (noting that administrative decision-making processes involve considerable debate and deliberation); *see also* Colin S. Driver, *Policymaking Paradigms in Administrative Law*, 95 HARV. L. REV. 393, 409–28 (1981) (discussing modern comprehensive rationality model of administrative policymaking with its emphasis on specifying goals, identifying alternatives, analyzing consequences, and optimizing choices).

55. *See* Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 865 (1984) (declaring that the agency will likely have greater expertise in the area of law under consideration than the court); *see also id.* (expressing preference for an agency interpretation over a judicial interpretation because of political accountability concerns). The majority stated:

> [A]n agency to which Congress has delegated policymaking responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments. While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices . . . .

Id.

56. *See* The Honorable Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 518 (noting that *Chevron*'s approach of accepting changes in agency interpretation "*ungrudgingly* seems to me one of the strongest indications that the *Chevron* approach is correct").

57. *See id.* at 517 (discussing the disadvantages of having courts resolve ambiguities).

58. *See id.* ("[T]he agency is free to give the statute whichever of several possible meanings it thinks most conducive to accomplishment of the statutory purpose . . . . [T]here is no apparent justification for holding the agency to its first answer, or penalizing it for a change of mind.").

59. *See id.* at 518 (recognizing the necessity of agency flexibility in light of modern times by stating that "[i]f Congress is to delegate broadly, as modern times are thought to demand, it seems to me desirable that the delegee be able to suit its actions to the times").

The flexibility of expert administrative agencies provides a major advantage over Congress's unwieldiness in resolving many government policy issues that involve intricate and highly complex issues.[60] This expertise and flexibility is indispensable in rapidly evolving areas of regulation.[61] An agency's unique expertise in its particular field allows anticipation and prevention, or, at the least, minimization of potentially adverse costs.[62] Congress lacks this flexibility: "[B]ecause of its lack of expertise, size and structure, and mode of functioning, [Congress] is able to legislate against existing evils; it is incapable of effectively anticipating and preventing future problems."[63] In comparison to the courts and the legislature, the administrative process also allows flexibility in its methods of policy formulation.[64] Undoubtedly, delegation of problem areas to the appropriate agency allows "continuity of attention and clear allocation of responsibility."[65] *Chevron* recognizes the reality that an agency is conferred a range of discretion to "change the law" in response to "new information or even new social attitudes impressed upon it through the political process."[66] A finding of agency-

60. *See* Charles H. Koch, Jr., *An Issue-Driven Strategy for Review of Agency Decisions*, 43 ADMIN. L. REV. 511, 516 (1991) (stating that "agencies embody special expertise" and maintain a "superior capacity for compiling the information" and "synthesizing the information"); Marra, *supra* note 44, at 767 ("The justification for the delegation of congressional power to administrative agencies include Congress's inability to handle technical issues and act efficiently and effectively.").

61. *See* Mistretta v. United States, 488 U.S. 361, 372 (1989) ("[O]ur jurisprudence has been driven by a practical understanding that in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives.").

62. *See* BENDER, *supra* note 45, § 1.01 (noting that agencies are "best qualified" to anticipate and prevent economic consequences).

63. *Id.*

64. *See* Scott A. Zebrak, *The Future of NLRB Rulemaking: Analyzing the Mixed Signals Sent by the Implementation of the Health Care Bargaining Unit Rule and by the Proposed Beck Union Dues Relegation*, 8 ADMIN. L.J. AM. U. 125, 128 (1994) (discussing the choice between rulemaking and adjudication); David L. Shapiro, *The Choice of Rulemaking or Adjudication in the Development of Administrative Policy*, 78 HARV. L. REV. 921, 921 (1965) (discussing the flexibility of administrative processes and noting that "[while] a legislature must normally confine itself to the declaration of generally applicable standards of conduct, and a court must deal with a problem as defined by the particular controversy before it, an administrative agency may often choose between these approaches . . . .").

65. BENDER, *supra* note 45, § 1.01.

66. *See* Scalia, *supra* note 56, at 518–19 (recognizing that when an agency "changes the law" it is not admitting that it "got the law wrong;" instead, the agency is simply responding to changing societal attitudes or advanced information, "all within the limited range of discretion to 'change the law' conferred by the governing statute").

liberating ambiguity under *Chevron* step one thus permits a dynamic construction of the statute rather than a static judicial interpretation.

C. Chevron: *A Political Choice*

Chevron defined a new interpretive regime, one resting on the premise that an implied delegation of lawmaking power to agencies lies within statutory ambiguity.[67] When adopting a particular method of interpretation, judges inevitably "identify and promote their political values."[68] Accordingly, in establishing this new regime, *Chevron* defined the relative roles of the legislature, agencies, and courts in formulating the substance of administrative law.[69] When Congress unambiguously expresses its intentions regarding the content of the law, *Chevron* recognizes the primacy of the legislature: The congressional mandate controls.[70] When a statute is ambiguous, however, *Chevron* operates upon a default rule that Congress delegates to the agency, not to the court, the authority to resolve the statutory ambiguity.[71] In comparison to

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67. *See* Michael P. Healy, *Spurious Interpretation Redux:* Mead *and the Shrinking Domain of Statutory Ambiguity*, 54 ADMIN. L. REV. 673, 674 (2002) (discussing the interpretive regime established in *Chevron*).

68. *Id.* at 674 n.5; *see* CASS R. SUNSTEIN, LEGAL REASONING AND POLITICAL CONFLICT 168–69 (1996) ("People trying to choose an interpretive method must decide how to allocate power among various groups and institutions—indeed, allocating power is what the choice of an interpretive method *does*."); *see also* SUNSTEIN, *supra*, at 174 ("[A] system of legal interpretation is inevitably a function of decisions that are, broadly speaking, political in character."); John F. Manning, *Constitutional Structure and Statutory Formalism*, 66 U. CHI. L. REV. 685, 691–92 (1999) (discussing the political choices involved in choosing a method of statutory construction). Manning states:

> Selecting an interpretive methodology thus involves inevitable choices about the institutional allocation of power. If courts give strong deference to agencies' interpretations of the statutes they administer, that arrangement shifts law elaboration authority away from judges and toward the executive. If courts reject the authority of legislative history, they shift power away from committees and bill sponsors and towards agencies and courts. If courts start from an assumption of strong legislative supremacy in statutory cases, they define themselves as subordinates of the legislature.

Id.

69. *See* Healy, *supra* note 67, at 675 (stating that "[t]he canon of construction identified in *Chevron* has played a critical role in defining the relative roles of legislature, agency, and court in developing the content of public law").

70. *See* Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843 (1984) (recognizing the primacy of the legislature by holding that "the court . . . must give effect to the unambiguously expressed intent of Congress").

71. *See id.* at 843 ("[I]f the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction

the court, the agency is in a better position to make an unresolved policy choice—courts should not use statutory interpretation as a means to impose their political stance on a public to which they are not accountable.[72] The delegation of interpretive authority is a direct result of the statute's ambiguity: "[T]he default rule applies regardless of whether the delegation to the agency was express or implied, intended or unintended."[73] *Chevron*'s allocation of lawmaking power was thus based on the Court's judgment that the agency is best suited to interpret and implement statutes needing a determinate meaning.

It follows from the above discussion that one justification for favoring agency interpretations is to comport with congressional intent: The administrative state is based on Congress passing intentionally ambiguous statutes on the assumption that agencies will interpret them. The *Chevron* doctrine merely states the courts' duty to refrain from making policy decisions by creating "an across-the-board presumption that, in the case of ambiguity, agency discretion is meant."[74] In this sense, *Chevron* provides a background presumption upon which Congress can legislate, as "Congress now knows that the ambiguities it creates, whether intentionally or unintentionally, will be resolved, within the bounds of permissible interpretation, not by the courts but by a particular agency, whose policy biases will ordinarily be known."[75]

Another justification for preferring an agency interpretation to a judicial interpretation is that an agency is more democratically responsive and thus

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of the statute.").

72. *See* Healy, *supra* note 67, at 675 (citing Thomas W. Merrill & Kristin E. Hickman, Chevron*'s Domain*, 89 GEO. L.J. 883, 861 (2001) (citations omitted) ("Choosing between two or more permissible interpretations of a statute is a political act . . . . [a] robust deference doctrine therefore helps minimize the occasions in which courts are tempted to employ statutory interpretation to impose their policy preferences on a public to which they are not accountable.")).

73. *See id.* at 675–76 (citing *Chevron*, 467 U.S. at 865). The Court stated that:

> Perhaps [Congress] consciously desired the Administrator to strike the balance at this level, thinking that those with great expertise and charged with responsibility for administering the provision would be in a better position to do so; perhaps it simply did not consider the question at this level; and perhaps Congress was unable to forge a coalition on either side of the question, and those on each side decided to take their chances with the scheme devised by the agency. For judicial purposes, it matters not which of these things occurred.

Id.

74. Scalia, *supra* note 56, at 516; *see also Chevron*, 467 U.S at 866 ("[F]ederal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do. The responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones . . . .").

75. Scalia, *supra* note 56, at 517.

better suited to make policy judgments.[76] The *Chevron* doctrine is premised on an understanding that Congress prefers a politically accountable agency—rather than a politically insulated judge—to resolve statutory ambiguities.[77] *Chevron* emphasizes that an agency's "democratic pedigree"—the President generally controls the agency's policy judgments—puts it in a better position than a court to make judgments about statutory meaning.[78] Although executive agency heads are not directly elected by the public, they are directly accountable to the President, who wields both appointment and removal power.[79] An agency will thus be susceptible to the influence of the public's changing judgment and the executive's goals.[80] In this sense, *Chevron* acknowledges "original constitutional commitments to electoral accountability by presuming that Congress has selected agencies rather than courts to resolve serious ambiguities in agency-administered statutes."[81] By committing

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76. *See Chevron*, 467 U.S. at 864 ("[P]olicy arguments are more properly addressed to legislators or administrators, not to judges.").

77. *Id.* at 865–66. The Court stated that:

> [A]n agency to which Congress has delegated policymaking responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments. While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices—resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities . . . . The responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones: "Our Constitution vests such responsibilities in the political branches."

Id. (quoting TVA v. Hill, 437 U.S. 153, 195 (1978)).

78. *See* Cass R. Sunstein, *Is Tobacco a Drug? Administrative Agencies as Common Law Courts*, 47 DUKE L.J. 1013, 1056 (1998) (discussing the notion of an agency having a "democratic pedigree").

79. *See* Myers v. United States, 272 U.S. 52, 135 (1926) (discussing the President's "general administrative control of those executing the laws, including the power of appointment and removal of executive officers"). Although independent agencies are not subject to this same oversight, they are certainly more politically accountable than a court. *See* Peter M. Shane, *Independent Policymaking and Presidential Power: A Constitutional Analysis*, 57 GEO. WASH. L. REV. 596, 609 (1989) ("Independent agencies, even if not required to do so, may nonetheless choose to align their policies with those of the President.").

80. *See* Sunstein, *supra* note 78, at 1056 n.212 (citing JERRY L. MASHAW, GREED, CHAOS, AND GOVERNANCE 131–57 (1997)) ("In some ways, perhaps, agencies have a stronger democratic pedigree than Congress itself, though the *Chevron* Court does not so argue.").

81. John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 626 n.77 (1996); *see* Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969, 978–79 (1992) [hereinafter Merrill, *Deference*] (explaining judicial justifications for preferring administrative interpretations to those of courts) ("Democratic theory supplied the justification: agency decisionmaking is always more democratic than judicial decisionmaking because all agencies

policy decisions to the executive rather than the judicial branch, the *Chevron* doctrine reinforces fundamental principles of our democratic system.[82] When presented with an ambiguous administrative statute, the reviewing court best satisfies its constitutional obligation by accepting the agency's sensible exercise of discretion within congressionally delegated bounds.[83]

Another reason for preferring an agency interpretation over a judicial interpretation is based on an agency expertise rationale: Congress creates agencies to manage a relatively specific area and gives them the resources and tools to do so.[84] In comparison to courts, agencies have greater expertise and greater resources to give complex issues the attention they merit.[85] Judges lack familiarity with the often highly technical, complex, and obscure information critical to agency decision making. Judge and scholar Patricia M. Wald articulated this concept, stating that:

> [A]sking judges to familiarize themselves enough with the policies and operations of the dozens of agencies that appear in hundreds of cases a year, and whose functions vary from labor to shipping to nuclear energy to gas regulation, so that we can participate as equals in their good governance, is asking a great deal.[86]

Courts recognized this expertise rationale for judicial deference to agency decisions long before *Chevron*.[87]

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are accountable (to some degree) to the President, and the President is elected by the people."));
Richard J. Pierce, Jr., *The Role of the Judiciary in Implementing an Agency Theory of Government*, 64 N.Y.U. L. REV. 1239, 1256 (1989) (noting that "*Chevron*'s reasoning reflects an effort to reconcile the administrative state with principles of democracy"); *see also* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH 19 (1962) (stating that policymaking is better left to "representative institutions, born of the electoral process").

82. *See* Manning, *supra* note 81, at 627 ("It is more consistent with the assumptions of our constitutional system to vest discretion in more expert, representative, and accountable administrative agencies . . . a reviewing court satisfies its *Marbury* obligation simply by accepting an agency's reasonable exercise of discretion within the boundaries of the authority delegated by Congress.").

83. *Id.*

84. *See id.* at 681 ("Congress's decision to commit lawmaking power to agencies vests substantial regulatory authority in specialized bodies with knowledge, expertise, and experience that generalist courts lack. Agencies may therefore have insights into regulatory history, context, or purpose that may not be readily apparent to even the most seasoned federal judge.").

85. *See* Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 865 (stating that "[j]udges are not experts in the field").

86. Patricia M. Wald, *The "New Administrative Law"—With the Same Old Judges in It?*, 1991 DUKE L.J. 647, 658–59.

87. *See* Ronald J. Krotoszynski, Jr., *Why Deference?: Implied Delegations, Agency Expertise, and the Misplaced Legacy of* Skidmore, 54 ADMIN. L. REV. 735, 736 n.3 (2002) (noting that for decades prior to *Chevron,* the Supreme Court directed lower courts to take a deferential approach in reviewing agency decisions); *see also* SEC v. Chenery Corp., 332 U.S.

The Court also uses the expertise rationale to legitimize an agency's combined roles—courts have recognized that Congress intended to create administrative entities with "specialized knowledge and experience in interpreting and enforcing a federal regulatory regime."[88] By performing a combination of executive, legislative, and judicial duties, the agency is able to develop and to sustain expertise in a specific area.[89] Previous experience with a certain area and problems that may arise within that area can enhance the agency's ability to deal with similar problems efficiently and effectively.[90] Thus, courts can generally trust an agency to provide a suitable interpretation for a statute due to the agency's "intense familiarity with the history and purposes of the legislation at issue" and "their practical knowledge of what will best effectuate those purposes."[91] This enhanced agency expertise rationale buttresses *Chevron*'s doctrine of judicial deference to reasonable agency interpretations.[92]

III. The Effect of Hypertextualism on the Administrative State

A. Overview of Statutory Interpretation

For most of this country's history, judges have been pragmatic in their approach to statutory interpretation, drawing from such conventions as legislative

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194, 209 (1947) ("[E]xplaining that agency decisions reflecting 'the product of administrative experience, appreciation of the complexities of the problem, realization of the statutory policies, and responsible treatment of the uncontested facts' are 'entitled to the greatest amount of weight by appellate courts.'").

88. Krotoszynski, *supra* note 87, at 741; *see* FTC v. Cement Inst., 333 U.S. 683, 720 (1948) ("We are persuaded that the Commission's long and close examination of the questions it here decided has provided it with precisely the experience that fits it for performance of its statutory duty.").

89. *See id.* at 741 (discussing how the "marriage of functions" within an agency allows an agency to develop and maintain expertise).

90. *See id.* (referring to Justice Black's view that permitting agencies to perform multiple functions improves the agency's work product); *see also Cement Inst.*, 333 U.S. at 702 (stating that forcing agencies to separate functions would debase the work product as "experience acquired from their work as commissioners would be a handicap instead of an advantage. Such was not the intendment of Congress").

91. Scalia, *supra* note 56, at 514–17.

92. In fact, some would argue that the primary justification for deference should rest on the expertise rationale, rather than *Chevron*'s primary implied delegation rationale. *See* Krotoszynski, *supra* note 87, at 754 ("In my view, *Chevron* departed from the primary justification for affording agency interpretations of ambiguous statutes deference: administrative agencies possess greater expertise than the generalist courts that review their decisions.").

history, the plain meaning rule, and considerations of statutory purpose.[93] Under this traditional view, judges would make use of all available interpretive materials in trying to understand ambiguous statutes.[94] Recent decades, however, have been remarkable for statutory interpretation. If the Court's decision in *Exxon Mobil* is any indication, this traditional view may be all but extinct. Although gradual at first, it seems that the Supreme Court has undergone a major transformation in adopting a hypertextualist[95] approach to statutory interpretation cases and the Court is now quite reluctant to rely on traditional interpretative methods. A new breed of textualism has replaced this pragmatic approach—one in which the Court imputes clear congressional intent and refuses to consider traditional interpretational tools by declining to find ambiguity even in the vaguest of statutes. The most serious implication of this aggressive application of textualism is its spill-over effect in the interpretation of administrative statutes.

1. Textualism Versus Pragmatism

To understand fully the potential impact of the Court's approach to statutory interpretation, a more detailed explanation of the pragmatic and textualist approaches is warranted. Both approaches begin by looking at the relevant language of a statute. After that point, the two quickly diverge.[96] A court using a pragmatic approach makes use of all available and potentially relevant interpretative materials, such as committee reports and floor statements, in an attempt to understand ambiguous statutes and draw interpretative inferences from these materials.[97] Pragmatists recognize the underlying reliability issues inherent in the use of extraneous resources, as such

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93. *See* Merrill, *supra* note 29, at 351–52 (discussing the historical transformation in statutory interpretation techniques).

94. *See* John C. Roberts, *Are Congressional Committees Constitutional?: Radical Textualism, Separation of Powers, and the Enactment Process*, 52 CASE W. RES. L. REV. 489, 490 (2001) (describing the traditional view of statutory interpretation).

95. *See* Merrill, *supra* note 29, at 351 (noting that there has been "a major transformation in the way the Supreme Court approaches statutory interpretation cases"); *see also* Pierce, *supra* note 4, at 752 (using "hypertextualism" in reference to two interpretive techniques: "finding linguistic precision where it does not exist, and relying exclusively on the abstract meaning of a particular word or phrase even when other evidence suggests strongly that Congress intended a result inconsistent with that usage").

96. *See* Richard J. Pierce, Jr., *Justice Breyer: Intentionalist, Pragmatist, and Empiricist*, 8 ADMIN. L.J. AM. U. 747, 747 (1995) (characterizing Justice Breyer's approach to statutory interpretation).

97. *See* Roberts, *supra* note 94, at 490 (describing the traditional approach to statutory interpretation).

sources are sometimes murky and contradictory.[98] An overriding respect and understanding of legislative procedures tempers and compensates for this drawback and provides a foundation for the pragmatic approach.[99] For example, the use of a committee report can provide context and explanation for otherwise ambiguous statutes by offering insight into the purposes of the legislation.[100] This pragmatic view (also referred to as the traditional or intentionalist approach) has dominated the federal courts for the majority of the last century.[101] Over the past couple of decades, however, the textualist approach has been gaining momentum.

Textualism is "a sophisticated theory of interpretation which readily acknowledges that the meaning of the words depends on the context in which they are used."[102] Using this approach, judges decipher statutes in accordance with presumably objective criteria to determine the significance and meaning of the various words, phrases, and sentences.[103] Textualists criticize legislative materials as unreliable, confusing, and misleading in determining a statute's meaning.[104] Accordingly, textualist judges rely almost exclusively on statutory words and structure to assess what the ordinary reader of a statute would understand the words to mean. In other words, the goal is to ascertain the statute's "plain" meaning.[105] Textualism thus requires an objective interpretation; rather than attempting to discern the intentions of the legislators, the textualist judge asks what the ordinary reader would have understood the statute to mean.[106] By using the ordinary reader perspective, textualism has the practical effect of reducing—sometimes eliminating—consideration of

98. *See id.* at 490–91 (noting that traditionalists will concede that use of interpretive materials "should be tempered by commonsense concerns about reliability").

99. *See id.* at 491 (characterizing the traditionalist position "by an overriding respect for and understanding of the legislative process").

100. *See id.* at 566 (noting that committee reports are the most important means of setting out the committee's views on the purposes, background, and meaning of statutory text).

101. *See id.* at 491 (stating that the traditionalist approach "has been dominant in the federal courts for most of the last one hundred years, and certainly in the period since World War II").

102. Merrill, *supra* note 29, at 352.

103. *See* Pierce, *supra* note 4, at 750 (comparing textualist tools to intentionalist tools).

104. *See* Roberts, *supra* note 94, at 492 (stating the textualist position that legislative materials should be ignored because they are unreliable, confusing, and contradictory).

105. *See id.* at 491 (discussing textualist reliance on "statutory words, related statutory provisions, statutory structure, and certain canons of interpretation").

106. *See* Merrill, *supra* note 29, at 352 ("The critical assumption is that interpretation should be objective rather than subjective; that is, the judge should ask what the ordinary reader of a statute would have understood the words to mean at the time of enactment, not what the intentions of the enacting legislators were.").

legislative history in statutory interpretation.[107] Instead of relying on interpretive sources, textualists place heavy emphasis on dictionary definitions, grammar rules, punctuation, and canons of construction.[108]

Both the pragmatic approach and the textualist approach have distinct advantages and drawbacks, and both are capable of abuse when taken to the extreme. For a period of time in the 1970s and the 1980s, some judges implemented an extreme version of pragmatism that permitted them to advance their own objective by attributing to Congress intentions that Congress never had.[109] Judges were able to reach their desired outcome by carefully selecting excerpts from a statute's conflicting legislative history to comport with the judge's preference, conveniently ignoring unfavorable passages in the history.[110] Beginning in the mid-1980s, criticism of the overuse of legislative history, stemming primarily from realist and functionalist concerns, began to spread.[111] With Justice Scalia's arrival on the Supreme Court in the late 1980s, the attacks on the pragmatic approach gained momentum and force.[112] In the 1990s, Justice Scalia and like-minded textualists further developed and reinforced these criticisms, and a modern form of textualism began to emerge.[113]

2. The Rise of Textualism

To some extent, the revival of the textualist approach was a healthy development counteracting judges' misuse of legislative history.[114] If used as intended, the textualist approach to statutory interpretation makes sense; there is little opposition to textualism's basic premise "that the statutory text is the

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107. *See id.* at 352 ("In practical terms, the principal implication of this ordinary reader perspective is to banish virtually all consideration of legislative history from statutory interpretation.").

108. *See* Pierce, *supra* note 4, at 750 (discussing the tools of textualism).

109. *See id.* at 752 (discussing extreme versions of intentionalism).

110. *Id.*

111. *See* Roberts, *supra* note 94, at 497 (discussing the progression of the textualist position).

112. *Id.*

113. *Id.*

114. *See* Bradford C. Mank, *Textualism's Selective Canons of Statutory Construction: Reinvigorating Individual Liberties, Legislative Authority, and Deference to Executive Agencies*, 86 KY. L.J. 527, 539 (1997) [hereinafter Mank, *Textualism's Selective Canons*] ("To some extent, the revival of textualism during the 1980s was a healthy reaction to the misuse by many judges of legislative history.").

most authoritative interpretive criterion."[115] With proper use, textualism can curb potential abuse of legislative history by encouraging judges to interpret the law rather than reconstruct the legislature's intentions to reflect a desired outcome.[116] Thus, a primary objective of textualism is to discern the plain meaning of the text.[117] This objective of textualism stems from its underlying philosophy—that unelected judges have no authority to decide what the law ought to be; rather, "the text is the law and it is the text that must be observed."[118]

Modern textualism, however, is not merely a revitalization of the traditional plain meaning rule.[119] By insisting on applying the textualist doctrine even when the plain or ordinary meaning of the text is not readily discernible, a textualist judge risks the unfortunate consequence of destroying ambiguity.[120] Textualism thus becomes susceptible to a major criticism associated with legislative history. Just as judges can manipulate or reconstruct legislative history to reach a desired outcome, so too can judges manipulate the textualist doctrine to support a different interpretation by declaring the statute unambiguous and refusing to consider other interpretations or extrinsic evidence. What was described as "new textualism" in the early 1990s is not so novel anymore; rather, it has become the preferred choice of statutory interpretation for the Court today.[121] Heavy or absolute reliance on this

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115. William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 354 (1990).

116. *See* INS v. Cardoza-Fonseca, 480 U.S. 421, 452–53 (1987) (Scalia, J., concurring) (articulating the fundamental textualist canon by stating that "[j]udges interpret laws rather than reconstruct legislators' intentions").

117. *See* ANTONIN SCALIA, A MATTER OF INTERPRETATION 22 (1997) ("The text is the law, and it is the text that must be observed.").

118. *Id.* Many justices support this statement. *See* Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 528 (1947) ("Only a day or two ago—when counsel talked of the intention of a legislature, I was indiscreet enough to say I don't care what their intention was. I only want to know what the words mean."); *see also* OLIVER WENDELL HOLMES, COLLECTED LEGAL PAPERS 207 (1920) ("We do not inquire what the legislature meant; we ask only what the statute means.") (*quoted in* Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384, 397 (1951) (Jackson, J., concurring)).

119. Merrill, *supra* note 29, at 351, 352; *see also* United States v. Mo. Pac. R.R. Co., 278 U.S. 269, 269 (1929) (endorsing and defining the plain meaning rule: "Where the language of an enactment is clear and construction according to its terms does not lead to absurd or impracticable consequences, the words employed are to be taken as the final expression of the meaning intended").

120. *See* discussion *supra* Part IV.B (describing how the nature of textualism deteriorates deference by reducing findings of ambiguity).

121. *See* Caleb Nelson, *What is Textualism*, 91 VA. L. REV. 347, 347 (2005) (discussing textualism as a leading approach to statutory interpretation).

hypertextualist approach to statutory interpretation effectively eliminates statutory ambiguity. Use of the textualist method of statutory construction allows courts to attribute a "plain meaning" to language that most would characterize as ambiguous or contradictory.[122] Modern textualism, or hypertextualism, thus subverts the underlying philosophy of textualism by sanctioning substitution of judicial judgment for legislative or administrative judgment.

3. Exxon Mobil Corp. v. Allapattah Services., Inc.: *A High-Water Mark for the Court*

Exxon Mobil further solidifies the Supreme Court's change in judicial philosophy. It is an extraordinary example of the Court's remarkable resolve to attribute a "plain meaning" to statutory language that has been universally controverted for many years.[123] In *Exxon Mobil,* the Supreme Court illustrated this resolve to declare a statute unambiguous when it held that U.S.C. § 1367's plain text prohibited reliance on legislative history that contradicted the majority's interpretation.[124] The *Exxon Mobil* Court implicitly adopted the "active ambiguity" approach discussed in Part IV.

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122. Pierce, *supra* note 4, at 752. Pierce notes that:

> The Court now rarely defers to an agency's construction of ambiguous statutory language because a 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. Moreover, the Court has shown a remarkable willingness to attribute a "plain meaning" to statutory language that was nearly universally believed to have a contrary meaning for many decades.

Id.

123. *See* Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546, 577 (2005) (Ginsburg, J., dissenting) (noting that the courts of appeals have been sharply divided as to the proper interpretation of § 1367). One need not look far to find the sharp divide. *Compare* Stromberg Metal Works, Inc. v. Press Mech., Inc., 77 F.3d 928, 930 (7th Cir. 1996) (stating that "§ 1367 supersedes *Clark* and allows pendent-party jurisdiction when the additional parties have claims worth less than [the jurisdictional minimum]"), *and In re* Abbott Labs., 51 F.3d 524, 529 (5th Cir. 1995) ("[U]nder § 1367 a district court can exercise supplemental jurisdiction over members of a class, although they did not meet the amount-in-controversy requirement, as did the class representatives."), *with* Meritcare Inc. v. St. Paul Mercury Ins. Co., 166 F.3d 214, 222 (3d Cir. 1999) (declaring § 1367 ambiguous and deferring to legislative history to reject argument that § 1367 overrules *Zahn* and thus preserves the complete diversity rule), *and* Leonhardt v. W. Sugar Co., 160 F.3d 631, 641 (10th Cir. 1998) (relying on legislative history in order to preserve *Zahn*'s prohibition of claim aggregation in diversity class actions).

124. Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546, 567 (2005) (interpreting § 1367 "in light of other statutory provisions and our established jurisprudence").

To anyone familiar with § 1367, the declaration of the statute as unambiguous is unnerving. The statute and its intended meaning have been the source of much debate among judges, litigators, distinguished scholars, and especially civil procedure students. Even the justices of the Supreme Court were unable to agree on the statute's proper interpretation.[125] Unable to resolve the controversy, the Court deadlocked 4–4, with Justice O'Connor recusing herself.[126] The mere fact that the justices themselves drew conflicting inferences from the same definitional text would seem to be the principal indication that the statute is ambiguous.

Despite the disputed meaning of the statute in *Exxon Mobil*, five justices were able to declare § 1367 unambiguous.[127] This is a remarkable finding considering the strong alternative interpretation set forth by Justice Ginsburg, an interpretation supported by three other justices and the statute's legislative history.[128] Perhaps textualist justices define "ambiguity" differently. However, the dictionary (ironically, a preferred textualist tool) defines the term "ambiguity" as "capable of being understood in two or more possible senses or ways."[129] Two possible explanations were offered for the supplemental jurisdiction statute at issue in *Exxon Mobil*, making it logical to conclude that the statute is ambiguous and subject to the deferential standard advocated by this Note.[130] In this sense, *Exxon Mobil* illustrates the chief concern with the textualist approach: Courts will defy ambiguity simply by stating that there is none.

This Note does not argue that the *Exxon Mobil* Court misinterpreted § 1367. There are certainly strong arguments for the legitimacy of the majority's decision.[131] Rather, this Note takes issue with the method employed

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125. *See* Free v. Abbott Labs., 529 U.S. 333, 333 (2000) (granting certiorari to determine the meaning of § 1367; the court was unable to resolve the controversy and divided 4–4, affirming without opinion).

126. *Id.*

127. *See Exxon Mobil*, 545 U.S. at 567 (rejecting an alternative interpretation "simply because § 1367 is not ambiguous").

128. *See id.* at 572 (Stevens, J., dissenting) (observing that "the Court has made the remarkable declaration that its reading of the statute is so obviously correct—and Justice Ginsburg's so obviously wrong—that the text does not even qualify as 'ambiguous'").

129. MERRIAM-WEBSTER DICTIONARY 66 (11th ed. 2003); *see also* BLACK'S LAW DICTIONARY 33 (2d pocket ed. 2001) (defining ambiguity as "an uncertainty of meaning or intention, as in a contractual term or statutory provision").

130. *See* discussion *infra* Part IV.C (outlining a "deferential" ambiguity approach for statutory interpretation in the administrative context).

131. For example, textualists often argue that legislative history is unreliable, as did the *Exxon Mobil* majority. *See* Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546, 568–70 (2005) (discussing how "legislative history is itself often murky, ambiguous, and contradictory"

by the Court to reach its decision. *Exxon Mobil* is illustrative of textualism taken to the extreme and potentially signals the death of ambiguity, or, at the very least, the increasing proclivity of the Court to declare statutes unambiguous. By effectively eliminating or drastically reducing ambiguity, the Supreme Court risks the unintended consequence of rejecting the vast majority of agency interpretations at *Chevron*'s first step.

B. The Impact of Hypertextualism on Chevron

1. Textualist Judges are Less Likely to Defer to Agency Interpretations

Theoretically, a textualist approach could result in either greater or less deference to an agency—the result should depend on whether the statutory text is clear.[132] In practice, however, most judges using the textualist approach are prone to believe that they can "find" the proper construction of the statute using textualist tools without any assistance from an agency.[133] Textualism's very methodology may lead judges to believe that they are more adept at statutory interpretation than agencies.[134] "In effect, the textualist interpreter does not find the meaning of the statute so much as construct the meaning. Such a person very likely will experience some difficulty in deferring to the meanings that other institutions have developed."[135] In this sense, textualism may be associated with a certain style of judging that "seems to transform statutory interpretation into a kind of exercise in judicial ingenuity. The textualist judge treats questions of interpretation like a puzzle to which it is assumed there is one right answer."[136] Cleverness and creativity are assets in such an exercise—the outcome may turn on the location of a comma, on a variety of linguistic data, or by rifling through different dictionaries until locating the "right"

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and that trying to determine the intention of the enacting legislators "is a hopeless task"). This is certainly a legitimate argument for a narrower definition of ambiguity in the non-administrative context.

132. *See* Bradford C. Mank, *Is a Textualist Approach to Statutory Interpretation Pro-Environmentalist?: Why Pragmatic Agency Decisionmaking is Better than Judicial Literalism*, 53 WASH. & LEE L. REV. 1231, 1248 (1996) (discussing the Supreme Court's application of *Chevron* given a textualist approach).

133. *Id.*

134. *See* Mank, *Textualism's Selective Canons*, *supra* note 114, at 576 (arguing that textualist judges are less likely to follow *Chevron*).

135. *See* Pierce, *supra* note 4, at 752 (discussing the results of Thomas Merrill's study of Supreme Court decisionmaking in the 1992 term).

136. Merrill, *supra* note 29, at 372.

definition.[137] Also, by rejecting legislative history as a tool of statutory interpretation, a textualist judge must become creative out of necessity.[138] Logically, with fewer tools at his disposal, the textualist judge, "like the painter working with a small palette—necessarily has to become more imaginative in resolving questions of statutory interpretation."[139] This active and creative approach to statutory interpretation is clearly out of sync with the *Chevron* doctrine.[140]

Additionally, an active textualist approach to statutory interpretation does not comport with an attitude of deference to Congress or to an agency because it endorses an autonomous interpreter model.[141] *Chevron* is premised upon the model of courts as faithful agents—first, faithful agents of Congress, but in the face of ambiguity from which no legislative instruction can be discerned, then faithful agents of administrative agencies.[142] Textualism rejects this faithful agent model and instead adopts "a model of courts as autonomous interpreters who seek answers to questions of statutory meaning through application of the ordinary reader perspective, supplemented by various judge-made rules of interpretation."[143] This autonomous interpreter model has spill-over effects into the administrative area—"[o]nce courts embrace this autonomous interpreter model when dealing with legislative materials, it may be difficult to shift gears and assume the posture of the faithful agent when dealing with executive branch agencies."[144] Thus, although the language may be subject to multiple interpretations, a textualist is intent on finding the "objective" meaning and may consequently disregard a permissible agency construction.

Some scholars have hypothesized that due to textualism's influence, the Court has developed an increasing antipathy toward legislative history and pragmatic tools as an aid to statutory interpretation, which in turn has resulted in a more general reluctance to find ambiguity in statutory language.[145] Some

137. *See id.* at 372 (comparing questions of statutory interpretation to a puzzle in which "[t]he task is to assemble the various pieces of linguistic data, dictionary definitions, and canons into the best, most coherent, explanatory account of the meaning of the statute").

138. *Id.* at 373.

139. *Id.*

140. *See id.* (suggesting that "the eclipse of the deference doctrine is likely to last as long as textualism remains dominant").

141. Merrill, *supra* note 29, at 372.

142. *See id.* at 353 (discussing the fundamental problem of *Chevron*'s basis on a model of courts as faithful agents).

143. *Id.*

144. *Id.*

145. *See* Pierce, *supra* note 4, at 777 (identifying various theories to explain the Court's dramatic transformation in its statutory interpretation approach); Merrill, *supra* note 29, at 363–

of the justices are so hostile to the use of legislative history that they will dissent from or concur with the majority opinion solely to express their displeasure.[146] Most consistently, Justice Scalia has a practice of refusing to join opinions relying on legislative history.[147] In this most extreme version of the textualist position, Justice Scalia rejects nearly all uses of legislative history.[148] Justice Scalia's adamant stance, often echoed by Justice Thomas,[149] provides incentive for the other justices to abandon references to legislative history in their own opinions, at least if they need Scalia's or Thomas's vote to form a majority.[150] As none of the pragmatic justices refuse to join opinions that ignore legislative history, there is no counterweight to the textualist justices' unyielding stance.[151] Thus, there exists a powerful voting incentive for justices to find a "plain meaning" using textual tools rather then admitting ambiguity and thus opening the door to secondary sources.[152] An opinion based on legislative history will surely cost a justice at least a couple of votes; no votes are lost by avoiding legislative history and instead declaring the statute "unambiguous" by means of textualist methods.[153] Consequently, the remaining justices, though not adamant textualists, regularly compose very

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66 (noting the importance of declaring a statute unambiguous in order to build voting coalitions).

146. *See, e.g.*, Cherokee Nation v. Leavitt, 543 U.S. 631, 647 (2005) (Scalia, J., concurring) ("I join the Court's opinion except its reliance . . . on a Senate Committee Report to establish the meaning of the statute at issue here."); Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 390 (2000) (Scalia & Thomas, JJ., concurring) ("Of course even if all of the Court's invocations of legislative history were not utterly irrelevant, I would still object to them."); O'Gilvie v. United States, 519 U.S. 79, 97, 101 (1996) (Scalia, O'Connor, & Thomas, JJ., dissenting) (declaring the statute unambiguous and expressing displeasure at the majority's making a "snippet of legislative history relevant").

147. *See* Merrill, *supra* note 29, at 365 (discussing Justice Scalia's critical role in the rapid spread of textualism).

148. *See* Roberts, *supra* note 94, at 491 (noting that this position is "relentlessly championed" by Justice Scalia).

149. *See* Merrill, *supra* note 29, at 365 ("The arrival of Justice Thomas, who has taken up a similar stance, effectively doubles Justice Scalia's voting clout in this regard.").

150. *See id.* (commenting that "the writing Justice knows that if legislative history is employed he or she will lose majority status with respect to at least a portion of the opinion").

151. *See id.* (noting that the "defenders of legislative history . . . have adopted no such irredentist stance").

152. *See id.* (noting that the defenders of legislative history have not adopted such an irredentist position).

153. *See* Merrill, *supra* note 29, at 365 ("In short, the internal dynamic on the Court is such that each justice now has an incentive to abandon all references to legislative history in his or her opinions, at least if the Justice has any hope of attracting the votes of Justices Scalia and Thomas.").

"Scalia-esque" opinions.[154] Furthermore, this pattern is likely to continue so long as Justices Scalia and Thomas maintain their inflexible position and so long as their votes remain centrally important to other justices in forming voting coalitions.[155] Dogmatic hypertextualism thus makes a court substantially less likely to find ambiguity in a given statutory text.

The hypertextualist movement is unlikely to abate anytime soon. Indeed, the Court's recent change in composition will likely favor textualism. Newly appointed Chief Justice Roberts and Justice Alito will likely be receptive to these views as "[b]oth Roberts and Alito give every indication of being textualists as they examine statutes."[156] When adopting a particular method of interpretation, judges inevitably make political choices as they determine how best to allocate power among various institutions.[157] Textualism, in the non-administrative context, shifts power away from the legislative branch and toward the executive and judicial branches and is typically associated with conservative political views.[158] Thus, it is a trend likely to continue with the federal judiciary's recent influx of avowedly conservative judges.[159]

2. *Why Ambiguity Matters: The Core of* Chevron *Deference*

Statutory interpretation in the area of administrative law is unique in that specialized agencies are available to interpret the law. But if courts are unwilling to find ambiguity in statutes, cases to which *Chevron* applies will never get past step one. The court, rather than the agency, will construe the statute and the benefits of agency interpretation will not be realized. As discussed in Part III, agencies have greater expertise, are more democratically

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154. *See id.* (noting that the remaining justices' opinions often look like they were "written in the workshops of Justices Scalia and Thomas").

155. *Id.* at 365–66. Justice Scalia has shown no sign of changing his position in recent opinions. *See* Cherokee Nation v. Leavitt, 543 U.S. 631, 647 (2005) (Scalia, J., concurring) ("I join the Court's opinion except its reliance . . . on a Senate Committee's Report to establish the meaning of the statute at issue here.").

156. Julia K. Stronks, *Breyer v. Scalia: Will Alito Be an Activist or a Textualist?*, SEATTLE TIMES (Jan. 15, 2006), *available at* http://archives.seattletimes.nwsource.com/cgi-bin/texis.cgi/web/vortex/display?slug=sundaystronks15&date=20060115&query=stronks.

157. *See* CASS R. SUNSTEIN, LEGAL REASONING AND POLITICAL CONFLICT 168–69 (1996) ("[A]llocating power is what the choice of an interpretive method *does*.").

158. *See* John F. Manning, *Constitutional Structure and Statutory Formalism*, 66 U. CHI. L. REV. 685, 692 (1999) ("If courts reject the authority of legislative history, they shift power away from committees and bill sponsors and toward agencies and courts.").

159. *See* Stronks, *supra* note 156 ("Both Roberts and Alito give every indication of being textualists as they examine statutes. This makes them similar to Scalia.").

responsive, and have greater resources to consider complex issues. Judicial usurpation of this administrative power runs contrary to congressional intent and eliminates regulatory flexibility, a necessity of modern government.

Chevron was decided in a pretextualist era in which virtually every justice routinely considered legislative history.[160] Thus, it is not surprising that the decision describes step one as a search for the "intentions"[161] of the legislature, and consequently expects an examination of legislative history to discern those intentions. The *Chevron* test was originally intended to be highly deferential. With the rise of the hypertextualist analysis, however, *Chevron* deference may become a dead letter.[162]

Step one of *Chevron* requires the court to determine if the statute at issue is ambiguous.[163] The significance of the textualist trend for *Chevron* becomes immediately clear: With no ambiguity, courts will never proceed to the second step. And with no step two, a reasonable agency interpretation will carry no weight. The Court has stated that *Chevron* deference "is premised on the theory that a statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps."[164] If *Chevron* is to have any significance at all, a statute must be regarded as ambiguous, even when a court feels its own interpretation is superior to that of the agency, so long as two or more reasonable interpretations exist.[165]

As the Court has changed its choice of statutory construction tools and the way in which it employs them, it has gradually ceased to uphold agency interpretations of ambiguous statutory language because it rarely recognizes the ambiguity.[166] The highly deferential *Chevron* test was created in part as a

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160. Merrill, *supra* note 29, at 353 (discussing the "rather obvious problem is that *Chevron* was decided during the pretextualist area when legislative history was routinely considered by all Justices").

161. Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 937, 842–43 (1984).

162. *See* Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969, 980–85 (1992) (attributing the "decline in reliance on traditional contextual factors for determining whether deference is appropriate" to the emergence of the *Chevron* doctrine).

163. *See Chevron*, 467 U.S. at 843 (stating that the first question is whether "the statute is silent or ambiguous with respect to the specific issue").

164. FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159 (2000).

165. *See* Scalia, *supra* note 56, at 520 ("If *Chevron* is to have any meaning, then, congressional intent must be regarded as 'ambiguous' not just when no interpretation is even marginally better than any other, but rather when two or more reasonable, though not necessary equally valid, interpretations exist.").

166. *See* Pierce, *supra* note 4, at 750 ("As the Court has changed the mix of 'tools' it uses and the ways in which it uses those tools, it has gradually ceased to apply step two of the *Chevron* test to uphold an agency construction of ambiguous statutory language, because it rarely acknowledges the existence of ambiguity.").

reaction to judges' abuse of the pragmatic approach.[167] It was an attempt on the Court's part "to deter creative methods of divining legislative intent that effectively allowed politically unaccountable judges to substitute their policy preferences for those of politically accountable agencies."[168] Initially, the Court's shift from pragmatism to textualism had the desired effect: *Chevron* deference increased.[169] Unfortunately, textualism now resembles the extreme versions of pragmatism that the textualists have long criticized; it suffers from the same overuse and manipulation that plagued the pragmatic approach. In fact, the Court's hypertextualist approach accords considerably less deference to agency interpretations than was the case prior to *Chevron*.[170] If the Court continues to extend its hypertextualist approach to *Chevron* cases, lower courts will have no alternative but to follow suit.[171] Ultimately, the Court's current approach to statutory construction will impair administrative attempts to execute coherent national regulations and programs.[172]

3. Administrative Action in an Unambiguous World

This aggressive application of textualism in administrative law will create an environment in which agencies are greatly hindered in their attempts to execute their congressionally delegated missions.[173] In one fell swoop, the Court can eliminate the interpretation that an agency had relied upon for years and completely undermine the foundation of the agency's regulatory program.[174] Theoretically, if a court uses a hypertextualist approach to adopt an

167. *See id.* at 751 ("The Court created the deferential *Chevron* test in part to deter creative methods of divining legislative intent that effectively allowed politically unaccountable judges to substitute their policy preferences for those of politically accountable agencies.").

168. *Id.*

169. *See* Peter H. Schuck & E. Donald Elliott, *To the* Chevron *Station: An Empirical Study of Federal Administrative Law*, 1990 DUKE L.J. 984, 1029–41 (noting *Chevron*'s initial effect of increased deference).

170. *See* Pierce, *supra* note 4, at 752 (stating that "[t]he Court now rarely defers to an agency's construction of ambiguous statutory language because a majority of Justices have now begun to use textualist methods of construction").

171. *See id.* (stating that lower courts will be forced to adopt the hypertextualist method if the Court persists in using it).

172. *See id.* (noting that "[i]f the court persists in its use of hypertextualism . . . [t]he inevitable result will be cacophony and incoherence throughout the administrative state").

173. *See id.* at 763 (discussing the effects of hypertextualism on agency-administered statutes).

174. *See id.* at 765–66 ("A court can eliminate the interpretive underpinning of an agency's benefit or regulatory program after the agency has spent decades carefully constructing the many elements of its program on that foundation.").

interpretation that hinders an agency's performance, Congress could remedy this result by amending the statute to comport with congressional intent.[175] This is easier said than done. Practically speaking, considerable barriers prevent effective and efficient legislative correction of an erroneous judicial interpretation.[176] Due to collective action problems, even if a statute is disfavored by the majority of Congress, it is often extraordinarily difficult or impossible to effect a change.[177] Thus, even if a hypertextualist interpretation of an agency statute subverts legislative intent or undermines the regulatory program, congressional attempts to amend the statute will likely fail.

If the Court feels free to choose a plain meaning that ignores congressional intent, an agency may be forced to act in a way that will anger Congress.[178] In contrast with the insulated courts, an agency could suffer severe consequences if it ignores congressional policy preferences.[179] Courts' varying application of the "plain meaning" rule creates internal inconsistencies: Under the hypertextualist approach, each court could potentially attribute a different meaning to a term simply by relying on a different dictionary.[180] This would greatly hinder functionality by forcing an agency to deal with these judicially-created inconsistencies.[181] Furthermore, a hypertextualist court could implement its variation of the plain meaning rule at any time, thus eliminating "the interpretive underpinning of an agency's benefit or regulatory program after the agency has spent decades carefully constructing the many elements of its program on that foundation."[182]

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175. *See* Pierce, *supra* note 4, at 764 n.108 (discussing the impracticality of legislative correction of judicial errors).

176. *See id.* (noting that "the obstacles to legislative correction of judicial errors are formidable" (citing William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331, 353–90 (1991))).

177. *See id.* ("[D]emonstrating that it is often impossible for a collective body, like a legislature, to eliminate a policy that is disfavored by a majority of members because no alternative policy is supported by a majority of members." (citing KENNETH J. ARROW, SOCIAL CHOICE AND INDIVIDUAL VALUES (1963))).

178. *See id.* at 764–66 (predicting that if lower courts begin to apply a hypertextualist approach, agencies will "experience extreme difficulty in their efforts to perform their statutorily-assigned missions").

179. *See* Pierce, *supra* note 4, at 765 ("Since courts also may feel free to ignore powerful evidence that Congress intended a construction that differs from a plain meaning chosen by the court, agencies also may discover that they are often instructed by courts to act in ways that will anger Congress.").

180. *Id.*

181. *Id.*

182. *Id.* at 765–76.

It seems unlikely that the Court's agenda includes using a hypertextualist approach to wreak havoc on the administrative state.[183] Unfortunately, although the textualist movement began as a reaction to abuse of legislative history as a statutory interpretation aid,[184] textualism itself has fallen prey to judicial manipulation and poses a threat to the future of the *Chevron* doctrine.[185] The Court has dramatically transformed its approach to statutory interpretation with unfortunate results for agency-administered statutes. As Professor Pierce notes, "Unless the Court's agenda is to maximize the workload of lawyers, judges, and agencies, and to minimize the coherence and efficacy of agency-administered programs, it must return to the deferential approach it announced in *Chevron*."[186]

IV. The Solution: A Two-Track Ambiguity Standard

To ameliorate the effect of hypertextualism on the administrative state, this Note advocates a two-track ambiguity standard for statutory interpretation cases. A hypertextualist analysis embraces "active ambiguity," a narrow approach that has clearly detrimental effects on the administrative state.[187] To combat these spill-over effects of hypertextualism, a broader "deferential ambiguity" standard must be used by courts when agency interpretations are involved. A finding of ambiguity has profound implications in the administrative agency context because deference to an agency's interpretation hinges upon a finding of ambiguity in *Chevron* step one.[188] As the *Chevron* Court declared:

> [T]he two-step structure makes deference an all-or-nothing matter. If the court resolves the question at step one, then it exercises purely independent

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183. *See id.* at 776 ("It seems unlikely that the Court's actual agenda is to maximize incoherence and cacophony in the implementation of regulatory and benefit systems.").

184. *See* Mank, *Textualism's Selective Canons*, *supra* note 114, at 539 ("To some extent, the revival of textualism during the 1980s was a healthy reaction to the misuse by many judges of legislative history.").

185. *See* Merrill, *supra* note 29, at 354–55 ("For those who believe that judicial deference to agency interpretations of law is a good thing, this [textualism] should be a cause for concern, and provides some reason to question the wisdom of textualism, or at least the way the deference doctrine is currently implemented through the *Chevron* doctrine.").

186. Pierce, *supra* note 4, at 776.

187. *See* discussion *supra* Part III.B (discussing the deference deteriorating effects of hypertextualism on *Chevron* deference).

188. *See* Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984) (basing judicial deference on statutory silence or ambiguity with regard to the specific issue at hand).

> judgment and gives no consideration to the [agency's] view. If it resolves the question at step two, then it applies a standard of maximum deference.[189]

As Part II demonstrated, deference to agency interpretations provides indispensable benefits to this country's modern governance.[190] The deferential approach to ambiguity strives to preserve these values.

A. Ambiguity as a Legal Concept

Ambiguity lies at the core of all statutory interpretation cases—as noted by Justice Scalia, "[e]very statute that comes into litigation is to some degree 'ambiguous.'"[191] A finding of ambiguity can be a "magically liberating factor" for courts because that finding allows a judge to peek outside the text and consider the statute in its broader context and purposes.[192] By not finding ambiguity, on the other hand, the court is free to ignore these broader objectives and considerations of the statute. Thus, courts can manipulate ambiguity to reach the desired result. Both textualists and pragmatists can play the ambiguity card, selectively employing it as necessary.

This Note argues that the ultimate difficulty with the Court's ambiguity jurisprudence is not that the justices use varied concepts of ambiguity to reach inconsistent results.[193] Rather, it is that they do not candidly acknowledge this practice. As the court has stated, "[a] word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used."[194] Ambiguity is relative—both case law and commonsense make clear that the ambiguity of a particular passage is not some objectively ascertainable fact.[195]

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189. Merrill, *Deference*, *supra* note 81, at 977.

190. *See* discussion *supra* Part II.A–C (discussing the importance of *Chevron* to the administrative state).

191. SCALIA, *supra* note 117, at 28.

192. *See* Philip P. Frickey, *Revisiting the Revival of Theory in Statutory Interpretation: A Lecture in Honor of Irving Younger*, 84 MINN. L. REV. 199, 214–15 (1999) (suggesting that "like beauty, ambiguity is in the eye of the beholder").

193. *See* Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546, 572 (2005) (Stevens, J., dissenting) (noting that Justice Ginsburg "demonstrated that 'ambiguity' is a term that may have different meanings for different judges").

194. Towne v. Eisner, 245 U.S. 418, 425 (1918).

195. *See supra* note 194 and accompanying text (illustrating the subjectivity of words); *see also Exxon Mobil*, 545 U.S. at 572 (Stevens, J., dissenting) ("Ambiguity is apparently in the eye of the beholder.").

It is simply a legal conclusion drawn after application of the Court's preferred definition of "ambiguity" to the given text.[196] Yet the Court clings to a simplistic, all-or-nothing concept of ambiguity, as evidenced by justices' recurrent expressions of disbelief that their colleagues could possibly have read a plainly unambiguous passage as ambiguous, or vice versa.[197]

Understanding the idea of ambiguity as an ordinary legal construct with a range of context-specific meanings is critical to this Note's proposed solution. Generally, hypertextualists favor a narrow concept of ambiguity when constructing statutes. If hypertextualists fail to differentiate ambiguity within the realm of *Chevron*, their *Chevron* analyses will produce results that impair effective government and contradict the hypertextualists' credence of judicial restraint. This Note offers a more realistic model of ambiguity analysis that employs multiple standards: a narrow one for general statutory interpretation and another, broader one for construing administrative statutes. In distinguishing ambiguity based on context, hypertextualists will best serve their ultimate ends.

B. The "Active" Ambiguity Standard versus the "Deferential" Ambiguity Standard

Textualists, in using an active approach to ambiguity, "lose sight of deference because they are consumed with finding imaginative and creative ways of applying the few tools of statutory construction to which they have limited themselves in their quest to discern the statute's plain meaning."[198] Textualism, by its very nature, inhibits the value of *Chevron* deference to the administrative state.[199] To prevent deterioration of the deference doctrine,

196. *See* Robinson v. Shell Oil Co., 70 F.3d 325, 332–33 (4th Cir. 1995) (en banc), *rev'd*, 519 U.S. 337 (1997) (providing an example of how different legal conclusions can be drawn from the same language). The Fourth Circuit determined that the meaning of "employee" was unambiguous, even though this literal interpretation produced a result contrary to the underlying purposes of the statute. *Id.* at 332. In declaring the statute unambiguous, the Fourth Circuit acknowledged that most of the other circuits had avoided a literal interpretation so as to comport with the purposes of the statute, but noted that "these decisions fail to heed the Supreme Court's repeated mandate" to follow the meaning of the text. *Id.* (citing *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 254 (1992)). Remarkably, the Supreme Court, in an opinion written by Justice Thomas, reversed unanimously, concluding that "employee" was ambiguous. *See Robinson*, 519 U.S. at 340–45.

197. *See Exxon Mobil*, 545 U.S. at 572 (Stevens, J., dissenting) (observing that "the Court has made the remarkable declaration that its reading of the statute is so obviously correct—and Justice Ginsburg's so obviously wrong—that the text does not even qualify as 'ambiguous'").

198. Keller, *supra* note 20, at 615.

199. *Id.*

judges must distinguish between the definition of ambiguity in the non-administrative context and the definition of ambiguity in the administrative context, where *Chevron* applies.

Courts use two approaches to ambiguity in statutory interpretation cases. In the first approach—the one used implicitly in *Exxon Mobil*—a court finds ambiguity only when the arguments for the alternative interpretations are in absolute equipoise.[200] This will rarely, if ever, occur.[201] For the purposes of this Note, this narrow concept of ambiguity is classified as "active ambiguity," as it encourages judicial activism by allowing the judge or court to impose its judgment as to what constitutes the "best" interpretation.

An alternative approach to ambiguity, the one intended by *Chevron*,[202] allows a court to declare a statute ambiguous whenever two or more reasonable interpretations exist. In this approach, a court may not make a value judgment on which interpretation is "better," so long as both interpretations are permissible. Instead, the court must declare the statute ambiguous and move on to interpretive sources such as legislative history, or, in the administrative context, proceed to *Chevron* step two. For the purposes of this Note, this latter, broader type of ambiguity is referred to as "deferential ambiguity," as it comports with the deferential approach intended by *Chevron*.

The textualist methodology encourages predominant use of the active ambiguity approach to statutory interpretation issues, which effectively eliminates ambiguity.[203] As discussed earlier, that result implicates serious concerns for the future viability of the *Chevron* doctrine, and the administrative state in general.[204] If courts are unwilling to apply the deferential approach consistently to determine ambiguity,[205] they must, at the very least be willing to

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200. *See* Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546, 567 (2005) (admitting that the Court selected, in the majority's opinion, the "best interpretation of § 1367").

201. *See* Scalia, *supra* note 56, at 520 ("If the judicial mentality that is developed by such a system were set to answering the question, 'When are the arguments for and against a particular statutory interpretation in equipoise?,' I am certain that the response would be 'almost never.'").

202. *See* Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843 n.11 (1984) ("The court need not conclude that the agency construction was the only one it permissibly could have adopted to uphold the construction, or even the reading the court would have reached if the question initially had arisen in a judicial proceeding.").

203. *See* discussion *supra* Part III.B.1 (arguing that textualist judges are less likely to defer to an agency interpretation).

204. *See* Pierce, *supra* note 4, at 776 ("Unless the Court's agenda is to maximize the workload of lawyers, judges, and agencies, and to minimize the coherence and efficacy of agency-administered programs, it must return to the deferential approach it announced in *Chevron*.").

205. It is beyond the scope of this Note to discuss the consequences of this approach in the non-administrative context.

distinguish between general statutory interpretation cases and *Chevron*-type cases. Thus, courts must carve out an exception for *Chevron* cases, diligently recognizing the statute as ambiguous whenever reasonable and permissible agency interpretations exist.

In these situations, the opposite of ambiguity must not be "resolvability," but rather "clarity."[206] So, "if Congress has *clearly* expressed an intent contrary to that of the [a]gency,"[207] the statute is unambiguous and the court has a duty to enforce Congress's will. However, if congresssional intent is unclear, the court must not "resolve" the issue by choosing the best interpretation or by considering only the "ordinary meaning." Rather, as mandated by *Chevron*, the court must declare a statute ambiguous whenever two or more reasonable interpretations are presented and resist the temptation to impose its own judgment, choosing the interpretation that yields the result most desirable to the court.[208]

Although the language of *Chevron* itself supports this distinction, courts have drifted away from this traditional definition of ambiguity in their over-zealous application of textualist tools. Rather than a cursory inquiry at step one—merely asking itself subjectively whether the statute appears ambiguous—the court should instead consider whether the language is susceptible to the different interpretations proffered. If so, the court must make an objective determination as to the reasonableness of the agency's interpretation. The proposition seems too commonsense to merit much discussion; if disagreement exists as to the meaning of a word, that word is inherently ambiguous.

Exxon Mobil, however, proves that ambiguity is a more complicated concept. A hypertextualist approach relegates alternative interpretations to a dissent or to a footnote rather than seeing disagreement as an indication of ambiguity.[209] But, the mere fact that a court can discern an "ordinary meaning" should not foreclose a finding of ambiguity, unless of course the "ordinary meaning" is also the only permissible definition. For example, the issue in *Chevron* was the appropriate definition of the term "source"[210] in the Act. The

206. *See* Scalia, *supra* note 56, at 520 n.21 ("If the intent of Congress is *clear,* that is the end of the matter.") (citing *Chevron,* 467 U.S. at 842).

207. Chem. Mfrs. Ass'n v. NRDC, 470 U.S. 116, 125 (1985) (emphasis added).

208. *See supra* Part II.A–C (discussing the importance of *Chevron* to the administrative state).

209. *See* Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546, 577–94 (2005) (Ginsburg, J., dissenting) (providing an alternative interpretation of § 1367).

210. *See* Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 866 (1984) (holding that "the EPA's definition of the term 'source' is a permissible construction of the statute which seeks to accommodate progress in reducing air pollution with economic growth").

Court could conceivably have declared that the term "source" has an ordinary or plain meaning. Instead, the *Chevron* Court recognized that the Environmental Protection Agency was best positioned to interpret the term in the context of its application to pollutant controls.[211] Courts must be acutely aware of the risks for the administrative state, associated closely with the hypertextualist approach, of finding an "ordinary" meaning when one does not exist, or of substituting a "best" interpretation for one by the agency. When reasonable alternative explanations exist, a court must willingly admit ambiguity.

C. Argument for Using the "Deferential" Ambiguity Approach in the Administrative Context

The deferential ambiguity approach facilitates four generally desirable results. First, it ensures that policy decisions are made by a politically-accountable agency.[212] Second, it allows these policy decisions to be made by individuals with expertise.[213] Third, it facilitates flexibility in statutory interpretation.[214] Finally, it guarantees a "nationally uniform approach to statutory constructions."[215]

First, a deferential approach ensures that a politically-accountable agency resolves statutory ambiguities. If statutory language is susceptible to multiple constructions, the deferential approach mandates that a rational agency interpretation prevails, even over the "ordinary meaning" of the statute or an interpretation that the court may find superior. In contrast, the active ambiguity approach allows the court to circumvent *Chevron* deference; by finding an "ordinary meaning," the court is able to impose a judicially preferred interpretation.[216] Consequently, an active approach allows a politically-insulated court to impose its policy choices on a public to which it is not accountable.[217] The deferential approach recognizes that an administrative agency is in a better position to resolve these kinds of policy choices. Unlike a

211. *See id.* at 865 (discussing the superiority of the agency in resolving policy questions).

212. *See* Keller, *supra* note 20, at 615 (discussing how textualism undermines "several generally desirable results of deference").

213. *See id.* (noting that deference to agency interpretations ensures "that policy is made by individuals who have specialized knowledge").

214. *See id.* (stating that deference allows for more flexible interpretations).

215. *Id.*

216. *See id.* at 615–16 (describing this very phenomenon in the Supreme Court's interpretation of the NLRA).

217. *See* discussion *supra* Part II.C (describing *Chevron* as a political choice).

politically-insulated court, an agency is open to the influence of the executive branch and can better adjust its interpretations to reflect the public's changing needs.[218]

Second, a deferential approach takes advantage of the agency's enhanced expertise and specialized knowledge. Judges usually lack familiarity with the complex and often highly technical issues that agencies consider.[219] In comparison, Congress equips agencies with the resources and tools necessary to manage highly specific areas, a task simplified by the agency's institutional knowledge.[220] The deferential standard asks the judge to assess only the rationality of the agency interpretation rather than to subjectively determine its correctness. The active approach encourages less-informed judges to make a determination as to the "best" interpretation of the statute, potentially undermining or rejecting the agency's well-reasoned construction. Statutory interpretation in the administrative context is not enhanced by a hierarchy of possible meanings from which the court selects a preferred interpretation. The agency's interpretation must simply be reasonable, which is an important distinction.

Thirdly, the deferential ambiguity standard ensures regulatory flexibility by assuring that statutes subject to more than one interpretation are in fact labeled ambiguous. The critical ambiguity classification prevents foreclosure of future interpretations by the agency. Recently, the Supreme Court held that if a court declares a statute "unambiguous," the agency is no longer the authoritative interpreter of the statute and that it is barred from choosing a different interpretation.[221] Although a court interpretation of an *ambiguous* statute does not foreclose future agency interpretations, the Court suggested that a court could "remove" a preexisting ambiguity, and this principle would no longer apply.[222]

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218. *Supra* Part II.C.

219. *See supra* note 72 and accompanying text (noting that a deference doctrine discourages courts from using statutory interpretation as a means to impress policy preferences upon the public).

220. *Supra* note 72 and accompanying text.

221. *See* Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 982 (2005) (holding that "[a] court's prior construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion").

222. *See Brand X*, 545 U.S. at 1003 (Stevens, J., concurring) (stating that this principle "would not necessarily be applicable to a decision by this Court that would presumably remove any pre-existing ambiguity").

Consequently, a finding of ambiguity is the only way to ensure that agencies are not constrained by stare decisis; ambiguity thus promotes the regulatory flexibility essential to modern governance. As noted in *Chevron*: "An initial agency interpretation is not instantly carved in stone. On the contrary, the agency, to engage in informed rulemaking, must consider varying interpretations and the wisdom of its policy on a continuing basis."[223] Under the active approach, if a court finds a plain or ordinary meaning and declares the statute unambiguous, a judicial interpretation does carve its construction in stone. In contrast, a court applying the deferential standard is more likely to find ambiguity, permitting the agency to respond appropriately in rapidly evolving, highly complex areas.[224]

Finally, a deferential ambiguity approach helps to assure a nationally uniform approach to regulatory programs and statutory constructions.[225] Agency-administered statutes illustrate the need for agencies, as these statutes typically include hundreds of provisions, "are plagued with ambiguities, omissions, and internal inconsistencies,"[226] and are thus subject to many combinations of alternative interpretations. The utility of the agency is its ability to choose the appropriate combination of constructions to implement effectively and efficiently its congressionally delegated mission.[227] Although a court may be able to draw a prudent construction of the statute at issue, it often will not be the construction intended by Congress, or the one that the agency found in the statute before judicial review of its work product.[228] Most important, if the court interpretation conflicts with the agency interpretation, the agency will be unable to administer a nationally consistent program. The deferential ambiguity approach seeks to avoid this result by giving the agency interpretation priority, even if the court could conceivably discern an ordinary or plain meaning from the text at issue.

In contrast, the active approach endorsed by hypertextualism undermines an agency's ability to implement nationally uniform programs. Under a hypertextualist analysis, one court may rely on a highly technical construction

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223. Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 863–64 (1984).

224. *See supra* Part II.B (discussing the importance of *Chevron* to administrative flexibility).

225. *See* Keller, *supra* note 20, at 615 (arguing that the very nature of textualism "inhibits several generally desirable results of deference").

226. Pierce, *supra* note 4, at 764.

227. *See id.* (discussing how agencies often must deal with "a statutory environment in which a single statute can support millions of combinations of alternative constructions").

228. *See Chevron*, 467 U.S. at 864 (stating that the court of appeals read the statute inflexibility and contrary to congressional intent and the agency interpretation).

of a phrase and disregard a carefully reasoned agency interpretation.[229] Another court may consider the same phrase, discern an ordinary meaning, and adopt a different construction.[230] By allowing different courts to discern conflicting plain or ordinary meanings from the same statutory language, the active approach to ambiguity undermines agency attempts to administer coherent regulatory schemes.

D. Deferential Ambiguity Advances Textualist Objectives

A deferential concept of ambiguity reconciles textualism's underlying objectives better than does an active approach. At first glance, the active ambiguity approach appears to advance textualist goals. It decreases findings of ambiguity and purports to focus objectively on the text. In the administrative context, however, an active approach is actually counter-productive to the primary goals of textualism. Instead of promoting judicial minimalism, an active approach encourages judicial activism by allowing a court to declare its judgment as to the "best" interpretation of the statute. Unelected judges are effectively legislating from the bench. In contrast, a deferential ambiguity approach prevents this judicial usurpation of power—when the statutory language is susceptible to multiple meanings, the deferential approach allows the agency to determine the appropriate interpretation of the statute at hand. Congress authorizes an agency to administer its respective legislation and anticipates interpretation by the agency of the inevitable ambiguities within the statutory language. Hence, a deferential ambiguity approach should satisfy judicial conservatives (a group that includes most textualists) because that approach honors congressional intent.

Textualists are uncomfortable with legislative history, which they consider unreliable. Accordingly, one of the underlying goals of textualism is to eliminate or reduce the use of legislative history and other pragmatic interpretation tools.[231] While this concern may be valid in the non-administrative context, it has no place in cases governed by *Chevron*. *Chevron* recognizes that Congress delegates the task of implementing and interpreting statutes and programs to federal agencies. Most legislation is fraught with

229. *See supra* Part I (presenting a real world example of this situation).

230. *Supra* Part I.

231. *See* SCALIA, *supra* note 117, at 29–30 (concluding that "legislative history should not be used as an authoritative indication of a statute's meaning"); *see also* Merrill, *supra* note 29, at 352 (noting that the practical effect of textualism is to "banish virtually all consideration of legislative history from statutory interpretation").

internal tensions and ambiguities. A deferential ambiguity approach provides results consistent with congressional intent: It is the agency's province to focus on the policies that motivated Congress to pass the legislation and, on that basis, to interpret the ambiguities within the statute in a manner consistent with those underlying objectives. This approach does not ask an extrinsic-source-averse textualist to weigh policy arguments or to wade through legislative history; rather, a deferential approach allows the better equipped agency to consider these resources. Using this approach, a court's task is only to assess the reasonableness of the agency interpretation, just as *Chevron* mandates.[232]

Textualists using an active ambiguity standard are prone to resolve *Chevron* questions at step one by finding a plain or unambiguous meaning in language that is often susceptible to multiple interpretations. A deferential ambiguity approach reconciles textualist objectives in the administrative context while mitigating the incidental effects of hypertextualist analysis. It does not require judicial use of the pragmatic interpretation tools that textualists find so objectionable. It encourages judicial minimalism by giving priority to permissible agency interpretations (and, implicitly, to congressional intent) over judicially preferred interpretations. The deferential ambiguity standard ought to be acceptable to textualists. Rather than a contradiction, the textualist two step can become a reality in *Chevron* cases.

V. Conclusion

The hypertextualist trend, if checked, is not necessarily cause for alarm. After all, it is the judge's province to read and interpret the laws.[233] As noted by Justice Scalia, the poster child of the textualist movement, a judge's "highest responsibility in the field of statutory construction is to read the laws in a consistent way, giving Congress a sure means by which it may work the people's will."[234] A judge's job is not to "psychoanalyze" Congress by sifting through murky and often contradictory legislative history.[235] There is certainly a time and a place for the use of a textualist judicial philosophy—when the

232. *See* Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 865 (1984) ("In these cases the Administrator's interpretation represents a reasonable accommodation of manifestly competing interests and is entitled to deference: the regulatory scheme is technical and complex, the agency considered the matter in a detailed and reasoned fashion, and the decision involves reconciling conflicting policies.").

233. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) (establishing the practice of judicial review).

234. Chisom v. Roemer, 501 U.S. 380, 417 (1991) (Scalia, J., dissenting).

235. *Id.*

meaning of the statute is truly unambiguous and Congress's intent is unmistakably clear. Clearly, there is great value in the appropriate use of textualist tools of statutory construction. The trend of late, however, is an aggressive application of textualism and an overuse of clear-statement rules to narrow statutory meaning.[236] This shift has implications for all statutory interpretation cases. The most worrisome implication of the trend is its potential to eliminate findings of ambiguity, a phenomenon that poses serious risks in the area of administrative law. The greatest cause for concern stems from "the extremes to which the Court has gone in its use (or abuse) of textualist tools to the exclusion of other evidence of legislative intent and with the effect of virtually emasculating the *Chevron* doctrine."[237]

If courts consistently employ the statutory interpretation methods used in *Exxon Mobil*, the *Chevron* doctrine will become virtually meaningless. If *Chevron* is to have any lasting value, courts must be willing to find ambiguity not just when one interpretation is preferable to another, but rather "when two or more reasonable, though not necessarily equally valid, interpretations exist."[238] The *Exxon Mobil* Court used the "active ambiguity" approach in order to declare the statute at issue unambiguous, recognizing that alternative explanations existed but choosing what the majority felt was the "best" interpretation.[239] This approach has no place in the administrative arena.

The deferential approach to ambiguity must be accepted in *Chevron*-applicable cases, if *Chevron* is to have any meaning at all. Thus, in determining what constitutes an "ambiguity," courts must distinguish between non-administrative law cases, such as *Exxon Mobil*, and administrative law cases in which *Chevron* applies. Rather than determining congressional intent by using "traditional tools of statutory construction," courts should simply assess the permissibility of the agency's interpretation, not its correctness.[240]

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236. *See* Mank, *Textualism's Selective Canons*, *supra* note 114, at 528 (discussing the revival of textualist statutory interpretation).

237. Pierce, *supra* note 4, at 752.

238. Scalia, *supra* note 56, at 520.

239. Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546, 567 (2005). The majority stated:

> The proponents of the alternative view of § 1367 insist that the statute is at least ambiguous and that we should look to other interpretive tools . . . . We can reject this argument at the very outset simply because § 1367 is not ambiguous . . . . Even if we were to stipulate, however, that the reading these proponents urge upon us is textually plausible . . . it would not alter our view as to the *best* interpretation of § 1367.

Id. (emphasis added).

240. NLRB v. United Food & Commercial Workers Union, Local 23, 484 U.S. 112, 123

The modern reality is that courts' use of hypertextualism is not likely to abate anytime soon. The approach used in *Exxon Mobil* may not be cause for alarm outside of the administrative context, but within the administrative state, an exception must be carved out if the meaning of *Chevron* is to be preserved. Ambiguity fuels *Chevron*—but after *Exxon Mobil*, *Chevron* may be running on empty.

(1987) (stating that under the *Chevron* principle, the court traditionally accords deference to an agency interpretation "so long as its interpretation is rational and consistent with the statute").