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## Defining Ambiguity in Broken Statutory Frameworks and its Limits on Agency Action

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*Michigan Supreme Court*

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# DEFINING AMBIGUITY IN BROKEN STATUTORY FRAMEWORKS AND ITS LIMITS ON AGENCY ACTION

*Amanda Urban\**

## ABSTRACT

*“The Problem” occurs when a statute’s provisions become contradictory or unworkable in the context of new or unforeseen phenomena, yet the statute mandates agency action. The application of an unambiguous statutory provision may become problematic or unclear. Similarly, unambiguous provisions may become inconsistent given a particular application of the statute. During the same term, in Scialabba and UARG, the Supreme Court performed a Chevron review of agency interpretations of statutes facing three variations of the Problem, which this Note characterizes as direct conflict, internal inconsistency, and unworkability. In each case, the Court defined ambiguity in various, nontraditional ways and deferred to the agency’s reasonable interpretation of the statute.*

*The broadest definition of ambiguity provided by the Justices encompassed direct conflicts, internal inconsistencies, and unworkability. In contrast, the narrowest definition found ambiguity based only on internal inconsistency. Some Justices found no ambiguity, but allowed an agency more interpretive flexibility to resolve the Problem and accomplish the unambiguous mandate of the statute.*

*This Note contends that ambiguity in broken statutory frameworks may influence the traditional Chevron analysis; the Court may defer to an agency’s reasonable interpretation or allow an agency greater interpretive flexibility where it would not otherwise. But an agency does not have unlimited interpretive authority each time the Problem arises. Agency interpretations that alter or ignore unambiguous statutory text or functionally change the statute may still be impermissible under Chevron review. This Note raises agencies’ awareness regarding these nontraditional definitions of Chevron ambiguity, and discusses agency interpretive authority and limitations in the context of the Problem.*

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## TABLE OF CONTENTS

I.	INTRODUCTION .....	314
II.	THE BASICS OF <i>CHEVRON</i> .....	317
III.	CASE STUDIES APPLYING <i>CHEVRON</i> TO BROKEN STATUTORY FRAMEWORKS .....	318
	A. Scialabba v. Cuellar de Osorio: <i>Internal Statutory Inconsistency or Direct Conflict</i> .....	319
	B. Utility Air Regulatory Group v. EPA: <i>An Unworkable Statutory Program</i> .....	322
	1. No Deference for EPA's Tailoring Rule .....	324
	2. Deference Warranted for EPA's BACT Interpretation .....	327
IV.	DEFINING AMBIGUITY .....	328
	A. <i>Unworkability as Ambiguity</i> .....	328
	B. <i>Internal Inconsistency as Ambiguity</i> .....	331
	C. <i>Direct Conflict as Ambiguity</i> .....	332
	D. <i>Direct Conflict as Not Ambiguity</i> .....	335
V.	IMPERMISSIBLE AGENCY ACTION .....	336
	A. " <i>Tailoring</i> " the Text .....	337
	B. <i>Ignoring the Text</i> .....	337
	C. <i>Functional Changes</i> .....	339
VI.	CONCLUSION .....	340

## I. INTRODUCTION

Under the *Chevron* doctrine, a court will defer to an agency's reasonable interpretation of a statute an agency administers, provided that the statute is silent or ambiguous concerning the relevant issue.<sup>1</sup> Unfortunately, the *Chevron* doctrine leaves confusion as to the meaning of ambiguity and the limits of reasonableness. Some scholars posit that the Supreme Court's *Chevron* analyses track political party differences.<sup>2</sup> Similarly, skeptics of the doctrine suggest that *Chevron* can be manipulated to support either side in any given case.<sup>3</sup> Others argue that the *Chevron* confusion stems from its

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1. *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984).

2. Jack M. Beerman, *End the Failed Chevron Experiment Now: How Chevron Has Failed and Why It Can and Should Be Overruled*, 42 CONN. L. REV. 779, 839 (2010).

3. See Adam Babich, *Fun with Administrative Law: A Game for Lawyers and Judges*, 4 MICH. J. ENVIL. & ADMIN. L. 341, 348, 353 (2015) (stating that administrative law under *Chevron* is a language game used to reach an intended result).

multi-step analysis and that it should be collapsed into a single step.<sup>4</sup> Yet, some defend the doctrine, arguing that it operates under a consensus of core rationales.<sup>5</sup> This Note builds on previous literature by examining ambiguity within the context of an increasingly common circumstance: broken statutory frameworks.<sup>6</sup>

Broken statutory frameworks arise when the implementation of a statutory program is unworkable or statutory provisions seem inconsistent because of an unforeseen phenomenon.<sup>7</sup> For example, broken statutory frameworks are common in environmental law. Many federal environmental laws were passed in the 1970s, and although Congress has occasionally updated these laws in the intervening decades,<sup>8</sup> today's environmental problems differ from those of past decades. The U.S. Environmental Protection Agency (EPA), the U.S. Army Corps of Engineers, and other environmental regulatory agencies struggle to apply old statutory frameworks to new environmental concerns that surface as a result of evolving scientific knowledge.<sup>9</sup> Changes in scientific understanding complicate agencies' administration of the programs created by these decades-old statutes.<sup>10</sup> Bro-

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4. Marianne Kunz Shanor, *Administrative Law – The Supreme Court's Impingement of Chevron's Two-Step; Entergy Corp. v. Riverkeeper, Inc.*, 129 S. Ct. 1498 (2009), 10 WYO. L. REV. 537, 537–38 (2010).

5. See, e.g., Evan J. Criddle, *Chevron's Consensus*, 88 B.U. L. REV. 1271, 1275 (2008).

6. See Ann E. Carlson & Megan M. Herzog, *Text in Context: The Fate of Emergent Climate Regulation After UARG and EME Homer*, 39 HARV. ENVTL. L. REV. 23, 30 (2015) (suggesting two possible *Chevron* deference approaches on the Supreme Court regarding agency interpretive authority in the context of the Clean Power Plan); see also Brenden Cline, Comment, *Scialabba v. Cuellar de Osorio*, 39 HARV. ENVTL. L. REV. 275, 275 (2015) (suggesting that the Court's *Chevron* analysis in *Scialabba* can be applied to predict the Court's outcome in its review of the EPA's Clean Power Plan rulemaking).

7. Cf. Jorge E. Vinuales, *Legal Techniques for Dealing with Scientific Uncertainty in Environmental Law*, 43 VAND. J. TRANSNAT'L L. 437, 439 (2010) (discussing the effect scientific uncertainty over emerging environmental problems has on formulating international environmental law).

8. Comprehensive Environmental Response, Compensation, and Liability, 42 U.S.C. §§ 9601–9675 (1980) (amended 1986); Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901–6992k (1976) (amended 1984); Clean Water Act, 33 U.S.C. §§ 1251–1388 (1972) (amended 1981 and 1987); National Environmental Policy Act, 42 U.S.C. §§ 4331–4370m-12 (1970) (amended 1975 and 1982); Clean Air Act, 42 U.S.C. §§ 7401–7515 (1963) (amended 1970, 1977 and 1990).

9. See, e.g., *Rapanos v. United States*, 547 U.S. 715 (2006) (addressing EPA's interpretation of the Clean Water Act's term "navigable waters" in light of emerging hydrological scientific knowledge).

10. See Jody Freeman & David B. Spence, *Old Statutes, New Problems*, 163 U. PA. L. REV. 1, 3 (2014) (describing how federal agencies encounter problems of "fit" with older statutes); cf. Kirsten Engel & Jonathan Overpeck, *Adaptation and the Courtroom: Judging Climate Science*, 3 MICH. J. ENVTL. & ADMIN. L. 1, 4, 10–11, 25–26 (2013) (stating that climate change litigation has been dominated by challenges to agency action (or failure to act) in

ken statutory frameworks become more problematic when a statute compels agency action—what this Note calls “the Problem.”

The Problem occurs when statutory provisions become contradictory or unworkable in the context of new or unforeseen phenomena, yet the statute requires agency action.<sup>11</sup> In other words, while the text of the command may be unambiguous, its application is unclear in light of new circumstances. Without legislative action, an agency must innovate to accomplish its statutory mandate; otherwise, it may face litigation.<sup>12</sup> Furthermore, an agency must abide by judicial standards for administrative action while doing so, namely *Chevron*.<sup>13</sup> The definition of ambiguity is central to the *Chevron* analysis because, absent ambiguity, an agency has no chance of receiving deference from the court.<sup>14</sup> If ambiguity exists, the focus shifts to an agency’s action and whether it is based on a reasonable reading of the statute.<sup>15</sup>

Whether a statutory provision is ambiguous is traditionally determined by whether its text is clear, but ambiguity may be assessed differently within the context of broken statutory frameworks. This Note addresses various definitions of ambiguity applied by the Supreme Court in the context of the interpretive challenge posed by the Problem in two cases from the 2014 Term: *Scialabba v. Cuellar de Osorio*<sup>16</sup> and *Utility Air Regulatory Group v. EPA (UARG)*.<sup>17</sup> Between *Scialabba* and *UARG*, six Justices authored opinions conducting *Chevron* review of three broken statutory frameworks — (1) direct statutory conflict; (2) internal inconsistency; and (3) unworkability. The six opinions from these cases recognized various definitions of ambiguity and highlighted agency actions that the Justices found impermissible even in light of the Problem. The Justices’ definitions of ambiguity in the exemplary cases are only illustrative—each Justice’s

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addressing climate change, arguing that the rapid pace of new discoveries in climate change science complicates judges’ abilities to evaluate the merits of legal claims and judges should afford further “technical expertise deference” to agencies in climate change actions than the more general *Chevron* deference principle).

11. See Freeman & Spence, *supra* note 10.

12. See, e.g., *Massachusetts v. EPA*, 549 U.S. 497 (2007) (involving a law suit by several states against EPA for its failure to take regulatory action over GHGs as required by mandates under the CAA).

13. In general agency action is subject to “arbitrary and capricious” review under the APA, 5 U.S.C. § 706 (2)(A), but *Chevron* deference is applicable when an agency interprets a statute that it administers. *Chevron U.S.A., Inc. v. Nat. Res. Def. Council*, 467 U.S. 837, 837, 842–45 (1984).

14. *Id.* at 837, 842–43 (1984).

15. See *id.* at 842–45.

16. *Scialabba v. Cuellar De Osorio*, 134 S. Ct. 2191 (2014).

17. *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427 (2014).

*Chevron* application varies by case.<sup>18</sup> The definitions featured are not comprehensive because this Note does not address every statutory challenge an agency may encounter due to the Problem, or every action an agency might take as a result. But this Note recognizes that the nontraditional definition of ambiguity in broken statutory frameworks may bring new meaning to the *Chevron* analysis. Where a statute containing an unambiguous command is internally inconsistent or unworkable due to changed circumstances, courts may be more likely to defer to an agency's interpretation or allow an agency greater interpretive flexibility. This Note also recognizes that the Court has already suggested some boundaries in this new area of *Chevron* ambiguity; an agency cannot alter or ignore explicit statutory text or functionally change the statute through its interpretation.<sup>19</sup>

This Note evaluates various definitions of ambiguity in the context of broken statutory frameworks to provide some insight to agencies and lower courts in interpreting the bounds of ambiguity within the Problem. Section II provides a brief background of the *Chevron* doctrine. Section III reviews the cases *Scialabba* and *UARG*, which showcase how the Court has defined ambiguity when confronted with statutory complications, including circumstances where Justices have withheld deference despite recognizing the Problem. Section IV analyzes the splintered opinions from *UARG* and *Scialabba* to illuminate the differences among the two cases' various definitions of ambiguity. Section V identifies and discusses agency actions that the Court has held were impermissible even in light of the Problem.

## II. THE BASICS OF CHEVRON

In *Chevron, U.S.A. v. Natural Resources Defense Council*,<sup>20</sup> the Supreme Court established a doctrine requiring courts to defer to reasonable agency statutory interpretations and actions if Congress delegated authority over the relevant subject to the agency.<sup>21</sup> The Court reasoned that Congress sometimes delegates authority to an agency to craft the details of a statutory program,<sup>22</sup> and that in those instances, courts should defer to the agency's action as long as it is within the limits of the delegation because agencies are part of a political branch tasked with making policy choices, while courts

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18. In addition, the new appointee to the Court may have a different perspective from those discussed in this Note and those espoused by the late Justice Antonin Scalia. The most recent nominee certainly does. See *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1149 (10th Cir. 2016) (Gorsuch, J., concurring).

19. *Infra* Section V.

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

21. *Id.* at 843–44.

22. *Id.* at 865.

are not.<sup>23</sup> In determining whether Congress has delegated such power to an agency, the Court developed a two-step test, now known as *Chevron* review.<sup>24</sup>

At *Chevron* Step One, the court decides whether Congress has evinced its intent through unambiguous language in the statute.<sup>25</sup> If the congressional intent is apparent in the statute itself, the court applies that interpretation.<sup>26</sup> Whether Congress's intent is clear or ambiguous within the statutory language is unique to each statutory context and is often a daunting task. If the court finds the statutory language is ambiguous or silent regarding congressional intent, then the court presumes that Congress delegated interpretive authority to the agency and moves to Step Two.<sup>27</sup>

During *Chevron* Step Two, the court decides if the agency's interpretation is a permissible construction of the statute.<sup>28</sup> Traditionally, Step Two is characterized by broad respect for congressional delegation to agency expertise.<sup>29</sup> This Note identifies instances where Justices have found that the Problem constituted statutory ambiguity under Step One, discusses some actions that agencies have taken to address the Problem, and explains why some Justices concluded that those actions were impermissible exercises under Step Two. From this discussion, this Note contends that the Problem can present a nontraditional definition of ambiguity that may allow agencies greater interpretive flexibility.

### III. CASE STUDIES APPLYING *CHEVRON* TO BROKEN STATUTORY FRAMEWORKS

The statutes in *Scialabba* and *UARG* contain broad, unambiguous mandates to agencies; however, when these mandates were applied to new or unforeseen circumstances, the Problem arose: the statutes became internally inconsistent and the framework appeared unworkable. In each case, an agency sought to resolve the complication and accomplish its mandate. The

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23. *Id.* at 865–66.

24. Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 520 (1989) (describing the origins of *Chevron*, defending the doctrine, and arguing that the determination of when ambiguity exists in a statute is critical to *Chevron* review).

25. *Chevron*, 467 U.S. at 842–43.

26. *Id.*

27. *Id.* at 843–44.

28. *Id.* at 843.

29. Complicating the *Chevron* framework is the evolution of a third step—*Chevron* Step Zero—at which the court decides whether to apply *Chevron* deference at all. See *United States v. Mead Corp.*, 533 U.S. 218 (2001) (explaining *Chevron* Step Zero). *Chevron* Step Zero is not relevant for purposes of this Note as the cases discussed herein involve decisions preceded by formal procedures.

Supreme Court reviewed each agency's interpretative action under *Chevron*. While the Court was able to come to a conclusion in each case, its *Chevron* analysis was divided. The Court's splintered opinions demonstrate that the Problem can influence the traditional understanding of ambiguity and allow an agency deference or greater interpretive flexibility when pursuing an unambiguous mandate.

### A. *Scialabba v. Cuellar de Osorio: Internal Statutory Inconsistency or Direct Conflict*

In *Scialabba*, the Problem arose in the context of the Immigration and Nationality Act (INA).<sup>30</sup> Under the INA, lawful permanent residents (LPRs) may petition for certain family members—their minor children, spouse, and siblings—to obtain immigrant visas.<sup>31</sup> These family members are referred to as “principal beneficiaries” under the INA.<sup>32</sup> In turn, the spouse and minor children of a principal beneficiary are “derivative beneficiaries.”<sup>33</sup> The LPR is known as the “sponsor.”<sup>34</sup> When an LPR files a petition for an immigrant visa with United States Citizenship and Immigration Services (USCIS), all of his beneficiaries are given a priority date for an immigrant visa.<sup>35</sup>

In some instances, a minor child beneficiary “aged-out” of the INA, meaning the beneficiary reached 21 years of age or older while his sponsor was waiting for a visa.<sup>36</sup> As a result, the child no longer qualified for principal or derivative beneficiary status.<sup>37</sup> In these cases, the “aged-out” immigrant could no longer “piggy-back” on the qualifying principal and would need to re-petition and restart the visa process over as a principal or LPR.<sup>38</sup> The Child Protection Status Act (CSPA) attempts to remedy this unanticipated problem.<sup>39</sup> The relevant language of the CSPA reads, “[i]f the age of an alien is determined . . . to be 21 years of age or older,” notwithstanding

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30. *Scialabba v. Cuellar de Osorio*, 134 S. Ct. 2191, 2196, 2201 (2014) (holding that deference was owed to the BIA's reasonable interpretation of CSPA that priority date retention, based on automatic conversion to the appropriate family preference category for a primary beneficiary, applies only to aged-out derivative beneficiaries who qualify or could have qualified as principal beneficiaries without seeking new sponsor).

31. The Immigration and Nationality Act, 8 U.S.C. § 1153(a) (2015).

32. *Scialabba*, 134 S. Ct. at 2196.

33. *Id.*

34. *Id.* at 2198.

35. *Id.* at 2196.

36. *Id.*

37. *Id.* at 2199.

38. *See id.* at 2198–99.

39. *Id.* at 2199.



certain allowances for bureaucratic delay,<sup>40</sup> “the alien’s petition shall automatically be converted to the appropriate category and the alien shall retain the original priority date issued upon receipt of the original petition.”<sup>41</sup>

Following enactment of the CSPA, USCIS refused to convert some beneficiary petitions. LPRs of aged-out beneficiaries challenged the refusal and demanded retention of their beneficiaries’ original priority dates.<sup>42</sup> The Bureau of Immigrant Appeals (BIA) upheld USCIS’s refusals. As the BIA interpreted the CSPA, USCIS was required to convert only those petitions that did not require a new LPR to be converted.<sup>43</sup> *Scialabba* addressed whether the BIA reasonably interpreted the CSPA.<sup>44</sup>

Justice Kagan, joined in full by Justices Kennedy and Ginsburg, wrote the plurality opinion in *Scialabba*, which gave deference to the BIA’s analysis of the CSPA.<sup>45</sup> The first clause of the CSPA stated that any aged-out beneficiary’s petition “shall” be automatically converted to the appropriate category, but the second clause stated that converted aliens shall retain their original priority date.<sup>46</sup> Sometimes, when an alien aged-out, there was not a new sponsor available to convert the alien to a principal beneficiary.<sup>47</sup> In those instances, the alien could not retain her original priority date.<sup>48</sup> Justice Kagan recognized that “[t]he two faces of the statute do not easily cohere with each other: Read either most naturally, and the other appears to mean not what it says.”<sup>49</sup> Justice Kagan’s plurality treated this conflict as a form of ambiguity.<sup>50</sup> The plurality moved past *Chevron* Step One and determined that the agency could resolve the conflict in the statutory language under *Chevron* Step Two by choosing between the competing statutory commands; the plurality then deferred to the BIA’s choice of outcomes under *Chevron* Step Two.<sup>51</sup>

Chief Justice Roberts, joined by Justice Scalia, concurred in the Court’s judgment deferring to the agency’s interpretation, but concluded that the agency passed *Chevron* Step Two because the statute was ambiguous, not

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40. See 8 U.S.C. § 1153(h)(1)–(2) (2012); see also *Scialabba*, 134 S. Ct. at 2196, 2201 (upholding interpretation that bureaucratic delay does not include delays stemming from a lack of available visas).

41. 8 U.S.C. § 1153(h)(3).

42. *Scialabba*, 134 S. Ct. at 2201–02.

43. *Matter of Wang*, 25 I. & N. Dec. 28, 28 (BIA 2009).

44. See *Scialabba*, 134 S. Ct. at 2201–02.

45. *Id.* at 2196.

46. See 8 U.S.C. § 1153(h)(3).

47. *Scialabba*, 134 S. Ct. at 2206.

48. *Id.*

49. *Id.* at 2203.

50. *Id.* at 2207.

51. *Id.*

because there was a conflict in the statute.<sup>52</sup> Chief Justice Roberts clarified that direct conflict would not constitute statutory ambiguity.<sup>53</sup> He stated that when a statute can be read as being in tension, then the Court's job is to fit all parts of the statute into a harmonious whole if possible.<sup>54</sup>

Justice Alito dissented from the plurality's deferral to the BIA's interpretation of the CSPA.<sup>55</sup> He believed that the BIA's interpretation failed *Chevron* Step One because the statute was not in conflict or ambiguous.<sup>56</sup> The statute commanded USCIS to convert the aged-out petitions to the appropriate category in order to retain their priority date and "[t]he Board was not free to disregard this clear statutory command."<sup>57</sup> The plurality held that an appropriate category did not always exist and therefore, the aged-out immigrants had to re-file.<sup>58</sup> Justice Alito argued that an appropriate category did exist; because the adult children remained children of the sponsor or LPR, their petitions could be converted to preference status for adult unmarried children of an LPR.<sup>59</sup> Justice Alito proposed an interpretation that adopted what he viewed as the unambiguous statutory text.<sup>60</sup> Notably, Justice Alito agreed with Chief Justice Roberts's disapproval of the plurality's definition of statutory ambiguity.<sup>61</sup> Justice Alito concluded that a direct conflict was not a statutory ambiguity under *Chevron* Step One and that an agency is not authorized to choose a path of interpretation when a statute is directly and unequivocally internally conflicted.<sup>62</sup>

Justice Sotomayor, joined by Justices Breyer and Thomas, dissented separately from Justice Alito.<sup>63</sup> Their dissent agreed with Justice Alito that the statutory language was unambiguous and that the BIA's interpretation failed *Chevron* Step One for not applying the statute's clear directive.<sup>64</sup> Likewise, their dissent did not believe that the statute was directly conflicted and echoed the concurrence in stating that when a statute is internally inconsistent, then an agency's job is to fit all parts of the statute into a

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52. *Id.* at 2214–16 (Roberts, J., concurring).

53. *Id.*

54. *Id.*

55. *Id.* at 2216 (Alito, J., dissenting).

56. *Id.*

57. *Id.*

58. *Id.* at 2208 (majority opinion).

59. *Id.* at 2216 (Alito, J., dissenting).

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.* (Sotomayor, J., dissenting).

64. *Id.* at 2217.

harmonious whole, if possible.<sup>65</sup> They found that the inconsistency in the statute was not an ambiguity under *Chevron* Step One.

Yet their view on how the agency should have interpreted the statute to comply with its command differed from Justice Alito's view in that Justice Sotomayor argued automatic conversion was not a prerequisite for a beneficiary to retain his priority date.<sup>66</sup> She explained that the first clause in the CSPA stated the only condition necessary to retaining original priority date: be twenty-one years of age or older for the purposes of derivative beneficiary status.<sup>67</sup> Therefore, all categories of aged-out children were entitled to retain their original priority dates.<sup>68</sup>

The fragmented opinions in *Scialabba* indicate that ambiguity may exist under an unambiguous statutory provision given the Problem. The CSPA's provisions mandated visa conversion and priority date retention, but these commands seemed inconsistent as applied to the unforeseen circumstances where an immigrant aged-out of beneficiary status before his LPR obtained a visa. The Court deferred to the BIA's interpretation of the statute that resolved the inconsistency created by the Problem. After reviewing *Scialabba's* opinions alongside the opinions in *UARG*, the scope of ambiguity within broken statutory frameworks begins to emerge.

## B. Utility Air Regulatory Group v. EPA: *An Unworkable Statutory Program*

The Clean Air Act's Prevention of Significant Deterioration (PSD) program prohibits the construction or modification of a major emitting facility in a PSD area without a permit.<sup>69</sup> Major emitting facilities are defined as "stationary sources of air pollutants which emit, or have the potential to emit, one hundred tons per year or more of any air pollutant."<sup>70</sup> Historically, the negative public health effects of greenhouse gases (GHGs) were unknown and, as a result, GHGs were not considered a pollutant for the purposes of the Clean Air Act (CAA). As scientific knowledge regarding the negative effects of GHGs grew, the regulation of GHGs became controversial. The debate over regulation culminated when the Supreme Court held that the EPA could regulate GHGs under the CAA if it found they were pollutants.<sup>71</sup> Following the ruling, the EPA conducted a study of

65. *Id.* at 2220.

66. *Id.* at 2216 (Alito, J., dissenting) ("I, like Justice Sotomayor, would affirm the Court of Appeals, my justification for doing so differs somewhat from hers.").

67. *Id.* at 2217 (Sotomayor, J., dissenting).

68. *Id.*

69. 42 U.S.C. §§ 7475(a)(1), 7479(2)(c) (1990).

70. *Id.* §§ 7661(2)(B), 7602(j) (2015).

71. *Massachusetts v. EPA*, 549 U.S. 497, 534–35 (2007).

the health effects of GHGs and issued a finding declaring GHGs a pollutant under the CAA.<sup>72</sup>

This change in scientific knowledge created two problems regarding the EPA's interpretation and application of the PSD program. First, the EPA believed that the new finding triggered PSD requirements for stationary sources emitting GHGs in quantities above 100 tons per year (tpy).<sup>73</sup> Because GHGs tend to be emitted in quantities significantly greater than conventional pollutants, the 100 tpy threshold would subject numerous small emitters, such as office and residential buildings, to PSD requirements.<sup>74</sup> Regulating all facilities emitting such small amounts of GHGs would "would radically expand those programs [PSD and Title V of CAA], making them both unadministrable and unrecognizable to the Congress that designed them."<sup>75</sup> This change in the PSD program would be unworkable within the CAA's regulatory structure.<sup>76</sup> The EPA tried to address this unworkability through an interpretive rulemaking, which tailored the PSD program to develop a better regulatory scheme for stationary emitters of GHGs.<sup>77</sup> Through its Tailoring Rule, the EPA adjusted the triggering statutory threshold from 100 tpy to 100,000 tpy for GHG sources.<sup>78</sup>

Second, in order to obtain a permit under the PSD program, a facility must use Best Available Control Technology (BACT) for each pollutant subject to regulation under the CAA.<sup>79</sup> Some facilities may be subject to the PSD program and, in turn, BACT standards because of their emissions of conventional pollutants, but will not have triggered the PSD program for their emission of GHGs.<sup>80</sup> These facilities have been termed "anyway" facilities because they are already subject to permitting requirements under the PSD program due to exceeding the statutory threshold for a pollutant other than GHGs.<sup>81</sup> The EPA's interpretation required these "anyway" fa-

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72. Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66,496-01, 66,496 (Dec. 15, 2009) (to be codified at 40 C.F.R. ch. 1).

73. Reconsideration of Interpretation of Regulations That Determine Pollutants Covered by Clean Air Act Permitting Programs, 75 Fed. Reg 17,004-01, 17,022-23 (Apr. 2, 2010) (to be codified at 40 C.F.R. pts. 50, 51, 70, 71).

74. *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2436 (2014).

75. *Id.* at 2437 (citation omitted).

76. *Id.* at 2442.

77. *Id.* at 2437.

78. *Id.*

79. *Id.* at 2447.

80. *Id.* at 2437.

81. *Id.*

cilities to meet BACT standards for their GHG emissions since they were already within the PSD program.<sup>82</sup>

Various groups challenged the EPA's new interpretation of the CAA before the Supreme Court in *Utility Air Regulatory Group v. EPA*, arguing that the EPA acted outside its permissible scope of interpretation under *Chevron*.<sup>83</sup> Two issues were before the Court: first, whether the EPA reasonably interpreted the PSD program trigger for GHGs, and second, whether the EPA could require "anyways" emitters of GHGs to meet BACT standards for emissions other than GHGs.<sup>84</sup>

Justice Scalia, joined by Chief Justice Roberts and Justice Kennedy in full, wrote for a shifting majority on both issues (meaning that the majority for each issue was comprised of different Justices).<sup>85</sup> The Court gave deference to the EPA's interpretation regarding the BACT program,<sup>86</sup> but rejected the EPA's interpretation of the PSD triggering provision.<sup>87</sup>

## 1. No Deference for EPA's Tailoring Rule

The Court, in a majority formed by the three-Justice plurality and the concurrence of Justices Alito and Thomas, held that the CAA did not require, nor did it allow, the EPA's interpretation of the PSD program.<sup>88</sup> If the PSD program threshold trigger was applied to GHGs, it would require a drastic and unworkable expansion of agency regulation that could not be read as an implicit delegation from Congress.<sup>89</sup> For example, if PSD and Title V permitting requirements were directly applied to GHGs, "annual permit applications would jump from about 800 to nearly 82,000; annual administrative costs would swell from \$12 million to over \$1.5 billion; and decade-long delays in issuing permits would become common, causing construction projects to grind to a halt nationwide."<sup>90</sup> The majority concluded that "applying the PSD and Title V permitting requirements to greenhouse gases would be inconsistent with—in fact, would overthrow—the Act's structure and design."<sup>91</sup>

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82. *Id.*; 40 C.F.R. § 51.166(b)(48) (2016).

83. *See UARG*, 134 S. Ct. at 2438–39.

84. *Id.*

85. *Id.* at 2432.

86. *Id.* at 2448.

87. *Id.* at 2439.

88. *Id.* at 2439, 2442.

89. *See id.* at 2444 ("EPA's interpretation is also unreasonable because it would bring about an enormous and transformative expansion in EPA's regulatory authority without clear congressional authorization.").

90. *Id.* at 2443.

91. *Id.* at 2442.

Nonetheless, the majority determined that the EPA could not cure the unworkability of the CAA by tailoring its explicit terms.<sup>92</sup> Justice Scalia explained that an agency could not change the unambiguous language of a statute when its interpretation of the statute was unworkable.<sup>93</sup> If almost all stationary sources of GHGs would exceed the statutory threshold triggering the PSD permitting requirement and this result seemed impractical, then the agency should have looked to a more sensible interpretation of the Act.<sup>94</sup> “[T]he need to rewrite clear provisions of the statute should have alerted EPA that it had taken a wrong interpretive turn.”<sup>95</sup>

Justice Scalia’s interpretation suggests that the majority may have permitted the agency some flexibility, and thus may have deferred to an alternative interpretation of the CAA under *Chevron* Step Two, if the agency had taken a different “interpretive turn.” He argued that “any air pollutant” as defined under the CAA could be read as a broad category of examples of substances that the EPA could regulate under some of the Act’s operative provisions.<sup>96</sup> Under this interpretation, the EPA would not regulate a substance in a given operative program if regulation of the pollutant did not fit properly in the implementation strategy of that provision of the Act.<sup>97</sup> Justice Scalia explained that “[precedent] does not strip EPA of authority to exclude greenhouse gases from the class of regulable air pollutants under other parts of the Act where their inclusion would be inconsistent with the statutory scheme.”<sup>98</sup> Under the majority’s interpretation, the agency could have resolved the statutory unworkability by excluding GHGs from the PSD program and thus passed *Chevron* Step Two.

Justice Breyer, joined by Justices Kagan, Sotomayor, and Ginsburg, dissented from the majority’s analysis of the PSD program trigger.<sup>99</sup> Like the majority, the dissent recognized the unworkability that would result from a plain interpretation and direct application of the PSD program to GHGs<sup>100</sup>

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92. *Id.* at 2445.

93. *Id.* at 2442 (quoting *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2529 (2013)).

94. *Id.* at 2442–43.

95. *Id.* at 2446.

96. *Id.* at 2442.

97. *Id.* at 2442–43 (“EPA itself has repeatedly acknowledged that applying the PSD and Title V permitting requirements to greenhouse gases would be inconsistent with—in fact, would overthrow—the Act’s structure and design. . . . A brief review of the relevant statutory provisions leaves no doubt that the PSD program and Title V are designed to apply to, and cannot rationally be extended beyond, a relative handful of large sources capable of shouldering heavy substantive and procedural burdens.”).

98. *Id.* at 2441.

99. *Id.* at 2449–58 (Breyer, J., concurring in part and dissenting in part).

100. *Id.* at 2450–51.

and agreed that the EPA could not adjust the explicit threshold stated in the CAA.<sup>101</sup> However, the dissent believed there was another interpretation of the CAA that allowed the EPA to regulate GHG sources under the PSD program.<sup>102</sup>

The dissent concluded that the statute triggered the PSD program for emitters of GHGs in excess of the threshold just as it did for any other pollutants under the Act exceeding the threshold.<sup>103</sup> However, the dissent read the definition of major emitting facility<sup>104</sup> to contain an implicit exception for smaller sources of GHGs, explaining that “[a]s a linguistic matter, one can just as easily read an implicit exception for small-scale greenhouse gas emissions into the phrase ‘any source’ as into the phrase ‘any air pollutant.’”<sup>105</sup> Justice Breyer explained that a sensible reading excludes small-scale sources of GHGs from the definition of “any source” because “law has long recognized that terms such as ‘any’ admit of unwritten limitations and exceptions.”<sup>106</sup>

The dissent argued that reading an exception into the scope of sources covered by the PSD program was more reasonable than reading an exception into the “any air pollutant” provision as the majority suggested because the latter would exclude sources of GHGs from ever triggering the PSD program requirements.<sup>107</sup> The dissent argued that the exclusion of all sources of GHGs from the PSD program was inconsistent with the CAA’s mandate to regulate all pollutants harmful to public health.<sup>108</sup> Justice Breyer explained, “The purpose of [the 250 tons-per-year threshold] number was not to prevent the regulation of dangerous air pollutants that cannot be sensibly regulated at that particular threshold.”<sup>109</sup> Thus, despite disagreeing with the EPA’s rewriting of the 250 tpy threshold, the dissent would have deferred, under *Chevron* Step Two, to the EPA’s general conclusion that emitters of GHGs triggered the PSD program.<sup>110</sup>

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101. *Id.* at 2451 (“The statute says nothing about agency discretion to change [the 250 tons-per-year threshold] number.”).

102. *Id.* at 2452–54.

103. *See id.* at 2454–55.

104. *See* 42 U.S.C. § 7479(1) (1990).

105. *UARG*, 134 S. Ct. at 2452 (Breyer, J., concurring in part and dissenting in part).

106. *Id.*

107. *Id.*

108. *Id.* at 2453–54 (citing 42 U.S.C. § 7401 (1990)).

109. *Id.* at 2453.

110. *Id.* at 2455.

## 2. Deference Warranted for EPA's BACT Interpretation

The Court deferred to the EPA's interpretation of the BACT program in a majority formed by Justice Scalia's plurality and the concurrences of Justices Breyer, Kagan, Sotomayor, and Ginsburg.<sup>111</sup> The EPA may require these "already regulated" facilities to meet BACT standards for other pollutants under the CAA rather than only those pollutants that triggered the facilities' PSD permit requirements.<sup>112</sup> The Court gave the agency deference at Step One for following the unambiguous language of the BACT program in the CAA: "[T]he more specific phrasing of the BACT provision suggests that the necessary judgment [in identifying the subset of pollutants covered by the BACT program] has already been made by Congress."<sup>113</sup> Additionally, Justice Scalia explained that this interpretation was a permissible application of the CAA to new scientific findings because it did not result in an unworkable statutory program.<sup>114</sup> "Even if the text were not clear, applying BACT to greenhouse gases is not so disastrously unworkable . . . ." <sup>115</sup>

Justice Alito, joined by Justice Thomas, concurred concerning the PSD program and dissented regarding the BACT program.<sup>116</sup> Their concurrence approved of the majority's holding that the EPA's interpretation of the PSD program, which adjusted unambiguous statutory language in an attempt to fix an unworkable system, was impermissible.<sup>117</sup> But, they went one step further, arguing that the PSD and BACT programs should not be read to apply to GHGs at all.<sup>118</sup>

According to Justices Alito and Thomas, the agency failed *Chevron* Step One because the CAA's text and structure were unambiguous regarding the PSD program, and GHGs did not fit within it regardless of the type of emitter.<sup>119</sup> "BACT analysis, like the rest of the Clean Air Act, was developed for use in regulating the emission of conventional pollutants and is simply not suited for use with respect to greenhouse gases."<sup>120</sup> To Justices Alito and Thomas, unworkability resulting from the Problem did not allow the agency or the Court to provide an alternative interpretation.<sup>121</sup> Instead,

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111. *Id.* at 2448 (majority opinion).

112. *Id.* at 2449.

113. *Id.* at 2448.

114. *Id.*

115. *Id.*

116. *Id.* at 2455–56 (Alito, J., concurring in part and dissenting in part).

117. *Id.*

118. *Id.* at 2456.

119. *Id.* at 2456–57.

120. *Id.* at 2458.

121. *Id.* at 2455.



they argued that unworkability signaled a limitation on the statute's scope and thus on the agency's authority.<sup>122</sup>

The mix of opinions in *UARG* demonstrate that unworkability influences the Court's ambiguity analysis under *Chevron*. When the *Chevron* positions in each *UARG* opinion are separated and compared to the arguments in *Scialabba*, more detailed insights into *Chevron* ambiguity begin to emerge.

#### IV. DEFINING AMBIGUITY

The seven combined opinions of *Scialabba* and *UARG* show that definitions of ambiguity can vary within broken statutory frameworks, and that ambiguity can arise, despite unambiguous text. Importantly, these cases illuminate three key inquiries: (1) whether the Problem ever amounts to an ambiguity that will influence the Court's *Chevron* review; (2) if so, which forms of the Problem constitute ambiguity; and (3) whether any agency actions are impermissible when addressing the Problem.

The Problem can arise in many different circumstances; however, this section addresses the types of broken statutory framework at issue in *Scialabba* and *UARG*—direct conflict, internal inconsistency, and unworkability—and how each one can affect the *Chevron* ambiguity analysis by moving the Court to Step Two or providing greater interpretive flexibility under Step One. Whether any of the above circumstances constitutes ambiguity varies by Justice and by case, but the opinions in *Scialabba* and *UARG* share some perspectives on how ambiguity may operate in the *Chevron* review of broken statutory frameworks.

##### A. Unworkability as Ambiguity

When confronted with an unworkable statute, seven Justices<sup>123</sup> allowed an agency some interpretive flexibility. While fewer than all seven equated unworkability with ambiguity, they all indicated that unworkability may permit adoption of an alternative interpretation of the statute. In *UARG*, the EPA believed that the PSD program was triggered solely by a source's emission of GHGs, but recognized that interpretation would create an unworkable program.<sup>124</sup> The majority agreed that such a program would be unworkable, but criticized the EPA for not seeking an alternative interpre-

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122. *Id.* (discussing his disagreement with the Court's decision in *Mass. v. EPA* and the Court's failure to limit the CAA's scope when confronted with unworkability).

123. This occurred in Justice Scalia's majority in *UARG*, which was joined by Justice Kennedy and Chief Justice Roberts, and Justice Breyer's concurrence in *UARG*, which was joined by Justices Kagan, Ginsburg, and Sotomayor.

124. *UARG*, 134 S. Ct. at 2437.

tation of the statute in light of the unworkability. The broad language of ‘any air pollutant’ gave the agency some discretion to address the complications created when the CAA mandate was applied to GHGs. Justice Scalia explained, “[T]he dubious breadth of ‘any air pollutant’ in the permitting triggers suggests a role for agency judgment in identifying the subset of pollutants covered by the particular regulatory program at issue.”<sup>125</sup> Similarly, Justice Breyer’s dissent noted that “from a legal, administrative, and functional perspective” there was a reading of the statute that was sensible:<sup>126</sup> a more limiting interpretation of the term “any source” under the definition of “major emitting facility.”<sup>127</sup>

In the face of unambiguous statutory provisions that appeared to create an unworkable program, both the majority and Justice Breyer’s dissent urged the agency to adopt alternative constructions of other arguably ambiguous portions of the Clean Air Act.<sup>128</sup> The unworkability allowed review of the agency’s interpretation to pass to Step Two because the proper application of the provisions was ambiguous in the context of the remainder of the statute even though the provisions were unambiguous. Unworkability gave the agency some flexibility, but not boundless authority—as Justice Scalia explained, “agencies exercise discretion only in the interstices created by statutory silence or ambiguity; they must always give effect to the unambiguously expressed intent of Congress.”<sup>129</sup> Therefore, whether unworkability is a form of ambiguity itself is unclear, but unworkability can allow an agency some flexibility to move past Step One.

In contrast, unworkability can signal that Congress intended the statute to provide an agency limited power. For example, dissenting in *UARG*, Justices Alito and Thomas argued that the BACT program’s design and internal EPA guidance documents showed that the CAA did not contemplate application of the BACT program to GHGs.<sup>130</sup> They concluded that the text of the statute was unambiguous and did not encompass GHGs, which explained why applying the program to GHGs was unworkable.<sup>131</sup> Accordingly, they did not defer to an interpretation that they believed altered the CAA in order to give the agency unauthorized power over GHG emissions.<sup>132</sup> Their dissent remained in *Chevron* Step One regarding the

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125. *Id.* at 2448.

126. *Id.* at 2453 (Breyer, J., concurring in part and dissenting in part).

127. *Id.* at 2452–53.

128. *Id.* at 2448 (majority opinion), 2452–53 (Breyer, J., concurring in part and dissenting in part).

129. *Id.* at 2445 (majority opinion) (citation omitted).

130. *Id.* at 2458 (Alito, J., concurring in part and dissenting in part).

131. *Id.* at 2455.

132. *Id.* at 2458.

BACT program while the rest of the Court was willing to find that the unworkability could move the Court's review to Step Two.

Interestingly, Justice Alito, in his dissent in *Scialabba*, theorized that he would move to Step Two when considering an internal statutory inconsistency, if the agency worked within an ambiguous portion of the statute.<sup>133</sup> Likewise, Justice Thomas joined in Justice Sotomayor's dissent in *Scialabba* in which she suggested that the BIA could have interpreted other ambiguous portions of the CSPA in order to correct the internal inconsistency in the unambiguous text.<sup>134</sup> Considering that internal inconsistency and unworkability are often linked, it is unclear why Justices Alito and Thomas may have been willing to defer in *Scialabba* but not in *UARG*.

Consider that two provisions in a statute may be consistent until an agency complies with both provisions in a new circumstance. For instance, in *UARG*, the PSD program provisions seemed consistent with the 250 tpy threshold provision. The EPA reasonably complied with both provisions until it applied the provisions to GHG emitters. Then suddenly, the threshold provision seemed inconsistent with the PSD regulatory provisions. The provisions were internally inconsistent because when the EPA complied with both provisions, the statutory program was unworkable.<sup>135</sup> In *Scialabba*, the first clause of the CSPA, establishing an age condition, conflicted with the second clause, which required automatic petition conversion and priority retention, because when the BIA complied with both provisions the statutory program was unworkable.<sup>136</sup> In both cases, the statutory inconsistency in the language arose only because of unworkability arising in the statutory scheme. These are just two examples of how the concepts of internal inconsistency and unworkability can overlap in a single statute given the right framing. Nevertheless, Justices Alito and Thomas had different perspectives on ambiguity in *Scialabba* and *UARG*.<sup>137</sup> As a

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133. *Scialabba v. Cuellar De Osorio*, 134 S. Ct. 2191, 2216 (2014) (Alito, J., dissenting).

134. *Id.* at 2217 (Sotomayor, J., dissenting).

135. *UARG*, 134 S. Ct. at 2437 (presenting EPA's argument that if it applied the PSD program to GHG sources within the statutory threshold, the program would be "unadministrable").

136. *Scialabba*, 134 S. Ct. at 2202 (providing the BIA's argument that it could not allow all beneficiaries to retain their original priority dates because not all beneficiaries' petitions could be automatically converted and if the BIA did allow retention, the beneficiaries would cut the visa line ahead of those in other preference categories).

137. *See supra* notes 130–34 and accompanying text. Perhaps Justices Alito and Thomas view inconsistency as distinct from unworkability because to the extent one can differentiate between the concepts, the former is internal and the latter is external. When reading a statute, the Court presumes Congress did not enact inconsistent provisions. *See* ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 180 (2012) (the Harmonious-Reading Canon of interpretation states that "[t]he provisions of a text should be

result, this Note reviews the two forms of broken statutory framework independently.

### B. *Internal Inconsistency as Ambiguity*

When the unambiguous text of a statute seems internally inconsistent and an ambiguous provision can be read to avoid or dismiss the conflict, all Justices<sup>138</sup> have indicated they would allow an agency to adopt the non-conflicting reading. In *Scialabba*, Chief Justice Roberts's concurrence concluded that no conflict existed in the CSPA because any alleged conflict was resolved through an interpretation that incorporated the requirements for automatic conversion as a prerequisite to conversion.<sup>139</sup> Similarly, in Justice Sotomayor's dissent in *Scialabba*, she concluded that the BIA failed to recognize an interpretation of the CSPA that allowed USCIS to comply with the statute's conversion command.<sup>140</sup> Alien petitioners could retain their original priority dates even absent the ability of their petitions to be automatically converted. She reasoned that "the Court and the BIA ignore[d] obvious ways in which § 1153(h)(3) can operate as a coherent whole and instead construe[d] the statute as a self-contradiction that was broken from the moment Congress wrote it."<sup>141</sup>

In his dissent in *Scialabba*, Justice Alito agreed with Justice Sotomayor's dissent that the CSPA had a clear command and the agency had to convert alien petitions.<sup>142</sup> He found that any conflict with the command could be avoided through an interpretation that read "appropriate category" to mean conversion to "preference status, as unmarried, adult children of legal permanent residents."<sup>143</sup> Last, Justice Kagan's plurality found that the BIA could resolve the statutory conflict through an interpretation consistent with the remedial clause of the Act.<sup>144</sup> Each member of the Court indicated

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interpreted in a way that renders them compatible, not contradictory"). Therefore, the Court will prefer an interpretation that resolves or avoids a textual conflict. In doing so, the Court may allow an agency more interpretive flexibility. In contrast, if only the application of the statute is problematic, then the application may be wrong. There is no presumption that Congress intended the statute to apply to the present circumstances. The Court has no obligation to prefer an interpretation that resolves or avoids the unworkability. Justice Thomas joined in Justice Sotomayor's dissent, which also suggested an interpretation of the statute that eliminated any alleged conflict.

138. See *Scialabba*, 134 S. Ct. at 2207 (Kagan, J., plurality opinion), 2215 (Roberts, C.J., concurring), 2216 (Alito, J., dissenting), 2217 (Sotomayor, J., dissenting).

139. *Id.* at 2215 (Roberts, C.J., concurring).

140. *Id.* at 2217 (Sotomayor, J., dissenting).

141. *Id.*

142. *Id.* at 2216 (Alito, J., dissenting).

143. *Id.*

144. *Id.* at 2207 (Kagan, J., plurality opinion).

that an internal inconsistency based on unambiguous commands in the statute could allow an agency some interpretive flexibility to resolve the inconsistency. This interpretive flexibility implies that inconsistency is a form of ambiguity, but labeling it so would not be accurate, because some of the Justices indicated that they were resolving *Scialabba* under Step One.<sup>145</sup>

Where exactly internal inconsistency, or unworkability for that matter, falls within the *Chevron* analysis and its relationship to ambiguity are not static. As illustrated by the various opinions in *Scialabba* and *UARG*, the Problem can exist when the text of the statute is arguably unambiguous, but this lack of ambiguity does not mean that the agency has no interpretive flexibility.<sup>146</sup> Some Justices chose to characterize inconsistency or unworkability as ambiguity and move to Step Two.<sup>147</sup> Others clarified that the statutory mandate was unambiguous, but inconsistency or unworkability could allow for exploration of other provisions of the statute in order to honor the statute's unambiguous command under Step One.<sup>148</sup> In practice, these two approaches often reach the same result: deference to an agency's interpretation.<sup>149</sup> Thus, on some level, internal inconsistency is similar to ambiguity in that it can allow an agency some interpretive flexibility.

### C. Direct Conflict as Ambiguity

In *Scialabba*, five Justices indicated that direct, or unresolvable, statutory conflict can be ambiguity.<sup>150</sup> A direct conflict differs from an internal

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145. See *id.* at 2216 (Alito, J., dissenting) (“[T]he statute is clear on at least one point . . . [t]he Board was not free to disregard this clear statutory command.”); see also *id.* at 2217 (Sotomayor, J., dissenting) (citation omitted) (“The Court [plurality] does not identify any ambiguity in the dispositive initial clause of § 1153(h)(3). Indeed, it candidly admits that the clause mandates relief for every aged-out beneficiary of a family-preference petition in any of the five categories.”).

146. Consider Justice Alito's position in *UARG* that unworkability was not an ambiguity and was instead a signal on the limit of the agency's interpretive authority.

147. See *supra* notes 50–51 and accompanying text (discussing Justice Kagan's *Chevron* analysis in her plurality opinion in *Scialabba*); *supra* notes 52–54 and accompanying text (discussing Chief Justice Roberts' *Chevron* analysis in his concurring opinion in *Scialabba*); *supra* notes 99–110 and accompanying text (discussing Justice Breyer's *Chevron* analysis in his dissent in *UARG*).

148. See *supra* notes 55–61 and accompanying text (discussing Justice Alito's *Chevron* analysis in his dissent in *Scialabba*); *supra* notes 66–68 and accompanying text (discussing Justice Sotomayor's *Chevron* analysis in her dissent in *Scialabba*); *supra* notes 96–98 and accompanying text (discussing Justice Scalia's *Chevron* analysis in *UARG*).

149. Although, the agency should not reach its interpretation through one of the impermissible actions discussed *infra* Section V.

150. This occurred in Justice Kagan's plurality, which was joined by Justices Ginsburg and Kennedy, and in Justice Sotomayor's dissent, which was joined by Justice Breyer. Justice Thomas is not included here because he dissented from footnote 3 in Justice Sotomayor's

inconsistency because the latter can be resolved through interpretive tools while the former is unresolvable. Agencies can receive *Chevron* deference even when interpreting an unambiguous statute if two provisions of the statute are in direct, unresolvable conflict with one another. Justice Kagan explained, “[I]nternal tension makes possible alternative reasonable constructions, bringing into correspondence in one way or another the section’s different parts.”<sup>151</sup> In instances of direct conflict, an agency may address the ambiguity by choosing which of the two conflicting provisions apply in a given case. Justice Kagan wrote, “[T]he ambiguity those ill-fitting clauses create instead left the Board with a choice—essentially of how to reconcile the statute’s different commands.”<sup>152</sup> This broader definition of ambiguity equates direct textual conflict with statutory ambiguity and allows an agency to pass to *Chevron* Step Two when it arises. Justice Kagan explained the scope of ambiguity in *Scialabba*:

[Section] 1153(h)(3)’s ill-fitting clauses left the BIA to choose how to reconcile the statute’s different commands. It reasonably opted to abide by the inherent limits of § 1153(h)(3)’s remedial clause, rather than go beyond those limits so as to match the sweep of the first clause’s condition. When an agency thus resolves statutory tension, ordinary principles of administrative deference require this Court to defer.<sup>153</sup>

Likewise, Justice Sotomayor’s dissent in *Scialabba* noted that in cases of truly direct statutory conflict, the Court should defer to the agency’s choice between the competing provisions. They concluded that in some limited circumstances, “conflict . . . can make deference appropriate to an agency’s decision to override unambiguous statutory text.”<sup>154</sup> Justices Kagan’s and Sotomayor’s opinions in *Scialabba* are important because they suggest that in some cases statutory ambiguity may encompass textual conflict.

Within the definition of ambiguity discussed above exists a narrower definition of ambiguity based on the definition of direct conflict. For instance, in *Scialabba*, Justices Kagan, Kennedy, and Ginsburg found the CSPA was in direct conflict while the remainder of the Court found either no conflict at all or only an internal inconsistency that could be resolved

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dissent which shows his disagreement with her *Chevron* application to direct conflicts. This distinction is discussed later in this section.

151. *Scialabba v. Cuellar de Osorio*, 134 S. Ct. 2191, 2203 (2014) (Kagan, J., plurality).

152. *Id.* at 2207.

153. *Id.* at 2194–95.

154. *Id.* at 2219 n.3 (Sotomayor, J., dissenting).

through interpretive tools.<sup>155</sup> Justices Sotomayor and Alito believed the CSPA had an unambiguous command and suggested interpretations of other ambiguous portions of the Act to resolve or dispense with the alleged conflict and honor the unambiguous command.<sup>156</sup> While Justice Sotomayor's dissent agreed with the plurality that a direct conflict constituted ambiguity, it narrowed the plurality's definition of direct conflict. The dissent indicated that a direct conflict, and thus an ambiguity, exists only when an exact figure or word is in conflict between two provisions in the statute. For example, despite finding no direct conflict in *Scialabba*, the dissent noted that if the statutory conflict had been direct rather than resolvable, they would have allowed the agency to choose between the competing provisions under *Chevron* Step Two.<sup>157</sup> Justice Sotomayor explained that direct conflict arises only when it is impossible for an agency to comply with two statutory provisions. She provided an example from *National Association of Home Builders v. Defenders of Wildlife*,<sup>158</sup> where the Clean Water Act (CWA) required the agency to consider set criteria in making a particular decision, but the Endangered Species Act (ESA) required the agency to consider additional criteria:

To understand the kind of conflict that can make deference appropriate to an agency's decision to override unambiguous statutory text, consider the provisions at issue in *National Assn. of Home Builders v. Defenders of Wildlife*. . . . The agency [ ] could not "simultaneously obey" both commands: It could consider 9 criteria or 10, but not both. In that circumstance, we found it appropriate to defer to the agency's choice as to "which command must give way."<sup>159</sup>

According to the dissent, the statute at issue in *Scialabba*, the CSPA, simply did not present the BIA with the level of direct conflict that was at issue in *National Association of Home Builders* over the Endangered Species Act and the Clean Water Act.<sup>160</sup> Thus, one definition of ambiguity could include

155. See *id.* at 2207 (Kagan, J., plurality opinion).

156. *Id.* at 2219 (Sotomayor, J., dissenting) (finding the statute had a clear interpretation that eliminated the conflict).

157. *Id.* at 2219 n.3 (Sotomayor, J., dissenting).

158. *Nat'l Assn. of Home Builders v. Defs. Of Wildlife*, 551 U.S. 644 (2007).

159. *Scialabba*, 134 S. Ct. at 2220 n.3 (Sotomayor, J., dissenting) (citations omitted).

160. Importantly, Justices Alito, Scalia, Kennedy, Thomas, and Chief Justice Roberts did not find a direct irreconcilable conflict between the ESA and the CWA in *Nat'l Ass'n of Home Builders*. Instead, they held that the internal inconsistency was an ambiguity created by the statutes' unambiguous commands and deferred to the agency's resolution, which found that the exclusive nine criteria in the CWA did not trigger consideration of additional

direct conflict and another slightly narrower definition of ambiguity could include only “truly” direct conflicts.

#### D. *Direct Conflict as Not Ambiguity*

Whether direct conflict constitutes ambiguity is contested among the Court. Some Justices concluded in *Scialabba* that direct conflict was not ambiguity. If the text of the statute is unambiguous, an agency fails *Chevron* Step One regardless of direct conflict because Congress has spoken to the issue.<sup>161</sup> For example, after finding the statute did not contain a direct conflict, Chief Justice Roberts wrote, “Direct conflict is not ambiguity, and the resolution of such a conflict is not statutory construction but legislative choice. *Chevron* is not a license for an agency to repair a statute that does not make sense.”<sup>162</sup> In Justice Alito’s dissent, despite finding that the statute was in conflict, he agreed with Chief Justice Roberts’s concurrence that *Chevron* did not extend to agency resolution of direct statutory conflict.<sup>163</sup> Interestingly, Justice Thomas disagreed with Justice Sotomayor’s third footnote in *Scialabba*, where she endorsed agency discretion over truly direct conflicts.<sup>164</sup> Justice Thomas’s dissent from footnote three indicates that he agreed with the concurrence’s *Chevron* analysis and would not find ambiguity given a direct conflict, but also agreed with Justice Sotomayor’s dissent’s determination that the CSPA did not possess a direct conflict. If this is correct, then four Justices abstained from finding ambiguity in direct conflict and held the agency to Step One.<sup>165</sup>

Under instances of “truly” direct conflict, an agency is placed in a difficult position given this more limited definition of ambiguity. It cannot ignore the conflict because that resolution would amount to “legislative choice,”<sup>166</sup> but an agency must still fulfill its statutory mandate.<sup>167</sup> This more limited definition of ambiguity fails to provide a remedy for agencies

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criteria under the ESA. *Nat’l Ass’n of Home Builders*, 551 U.S. at 666–67. Justices Ginsburg and Breyer dissented (by joining Justice Stevens’ dissent) arguing that the CWA and the ESA were conflicted, but were not “truly incapable of coexistence,” therefore the criteria in the ESA were triggered, but the agency could honor both statutory commands. *See id.* at 678, 687 (Stevens, J., dissenting). Justices Sotomayor and Kagan were not members of the Court at the time.

161. *See supra* notes 53, 62, and 64–65, and accompanying text.

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

163. *See id.* at 2216.

164. *Id.*

165. The four justices being Chief Justice Roberts and Justices Alito, Scalia, and Thomas.

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

167. *See, e.g., Massachusetts v. EPA*, 549 U.S. 497 (2007).



attempting to work within a directly conflicted statute.<sup>168</sup> Chief Justice Roberts's and Justice Alito's analyses in *Scialabba* and *UARG* help by explaining that a statute is almost never directly conflicted;<sup>169</sup> instead, an agency failed to recognize an interpretation that would have resolved the conflict, meaning the conflict was only an internal inconsistency.<sup>170</sup> Thus, the definition of direct conflict is narrower—encompassing only “truly” direct conflicts.<sup>171</sup> Other allegedly direct conflicts would in fact be resolvable internal inconsistencies that would give an agency some interpretive flexibility.<sup>172</sup> In other words, the conflict or inconsistency in the unambiguous text creates enough of an ambiguity to allow an agency to craft an interpretation to remedy the conflict and honor the unambiguous text, but it does not allow an agency to disregard an unambiguous provision in the statute. Presumably, an agency should never be in a position where it cannot resolve the conflict through an alternative interpretation, i.e., a “truly” direct conflict; otherwise it misunderstands its statutory mandate.

## V. IMPERMISSIBLE AGENCY ACTION

After identifying an ambiguity, the next key of agency success under *Chevron* review is to take permissible action. Consequently, a court's inquiry does not end with whether and under what circumstances an internal inconsistency or unworkability constitutes a statutory ambiguity; it must also consider which agency actions are an impermissible means of addressing ambiguity. As discussed above in Section IV, the presence of a broken statutory framework sometimes moves the *Chevron* inquiry to Step Two or sometimes allows for greater flexibility under Step One. In either instance,

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168. *Scialabba*, 134 S. Ct. at 2214 (Roberts, C.J., concurring), 2216 (Alito, J., dissenting).

169. See also *Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 666 (2007) (where Chief Justice Roberts and Justice Alito concluded that the statutes contained seemingly irreconcilable commands, but allowed the agency some interpretive authority).

170. *Scialabba*, 134 S. Ct. at 2215, 2216. (Chief Justice Roberts explaining how he believes the BIA could have resolved the apparent statutory conflict through a different interpretation followed by Justice Alito similarly explaining); see also *Natl. Ass'n of Home Builders*, 551 US at 666 (Justice Alito, joined by Chief Justice Roberts, recognizing that the agency could not “simultaneously obey the differing mandates” in the two statutes at issue, but the agency could harmonize the statutes). But see *Scialabba*, 134 S. Ct. at 2217 n.3 (Sotomayor, J., dissenting) (Justice Sotomayor used the same case as an example of when a statute is directly conflicted).

171. Notice the similarity to Justice Sotomayor's narrow definition of direct conflict discussed *supra* notes 158–61 and accompanying text. It seems that Chief Justice Roberts and Justice Alito may agree with Justice Sotomayor's narrower definition of direct conflict, but diverge on how to treat such conflicts.

172. See *supra* Section IV.B.

an agency's interpretive authority is not boundless. *Scialabba* and *UARG* identify some actions that may be considered an impermissible means of rectifying the Problem.

### A. "Tailoring" the Text

The unworkable nature of a statute may provide an agency with some interpretive authority,<sup>173</sup> but an agency is not permitted to alter unambiguous text and pass Step One. In *UARG* the entire Court agreed<sup>174</sup> that an agency could not rewrite the unambiguous text of a statute through a rulemaking to resolve an unworkable statutory framework.<sup>175</sup> Justice Scalia wrote in the majority opinion, "An agency has no power to 'tailor' legislation to bureaucratic policy goals by rewriting unambiguous statutory terms."<sup>176</sup> Even Justice Breyer's dissent, which would have confirmed EPA's authority to regulate GHGs through the PSD program, refused to give the agency deference for rewriting the statute. "The statute specifies a definite number—250, not 100,000," he noted.<sup>177</sup> "[It] says nothing about agency discretion to change that number."<sup>178</sup> Justice Alito, concurring, similarly observed that "[t]he Act contains specific emissions thresholds that trigger PSD and Title V coverage, but the EPA crossed out the figures enacted by Congress and substituted figures of its own . . . . [T]he EPA is neither required nor permitted to take this extraordinary step."<sup>179</sup> Altering explicit statutory text is one of the few actions the entire Court seemed to agree that an agency could not take when addressing the Problem.

### B. Ignoring the Text

In *Scialabba*, six of the Justices did not allow the agency to resolve an internal statutory inconsistency by choosing between seemingly conflicted provisions.<sup>180</sup> Instead, they suggested that the agency should have done its best to find an alternative interpretation that harmoniously resolved the

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173. See *supra* Section IV.A.

174. See *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427 (2014) (Scalia's plurality opinion as to the PSD program joined by Justices Kennedy and Roberts; Justice Breyer's dissent on the PSD program joined by Justices Ginsburg, Sotomayor and Kagan; and Justice Alito's concurrence joined by Justice Thomas).

175. *Id.* at 2445 (Scalia, J., plurality opinion) (holding that EPA could not directly alter the emissions threshold used to trigger the PSD program under the CAA).

176. *Id.*

177. *Id.* at 2451 (Breyer, J., concurring in part and dissenting in part).

178. *Id.*

179. *Id.* at 2455 (Alito, J., concurring in part and dissenting in part).

180. See *Scialabba v. Cuellar De Osorio*, 134 S. Ct. 2191 (2014) (Chief Justice Roberts concurrence joined by Justice Scalia; Justice Alito dissenting; Justice Sotomayor dissenting with Justices Breyer and Thomas).

conflict. Dissenting, Justice Sotomayor concluded that the CSPA contained a clear command and that the BIA failed *Chevron* Step One: “Congress has spoken directly to the question in this case.”<sup>181</sup> Justice Sotomayor’s dissent rejected the plurality’s *Chevron* application, writing, “[T]he plurality tries to fit this case into a special pocket of *Chevron* jurisprudence in which it says we must defer to an agency’s decision to ignore a clear statutory command due to a conflict between that command and another statutory provision.”<sup>182</sup> In his dissent, Justice Alito critiqued the plurality for suggesting that “when two halves of a statute ‘do not easily cohere with each other,’ an agency administering the statute is free to decide which half it will obey.”<sup>183</sup> Like Justice Sotomayor, Justice Alito found that the CSPA was unambiguous regarding automatic conversion of alien petitions, and the “[BIA] was not free to disregard this clear statutory command.”<sup>184</sup> Both Justices Sotomayor and Alito found that the BIA failed *Chevron* Step One by choosing between unambiguous provisions in the Act.<sup>185</sup>

In the concurrence in *Scialabba*, Chief Justice Roberts agreed with Justice Sotomayor’s dissent’s *Chevron* analysis despite disagreeing on the case outcome. Chief Justice Roberts explained that the BIA could not permissibly choose between competing provisions. “To the extent the plurality’s opinion could be read to suggest that deference is warranted because of a direct conflict between these clauses, that is wrong.”<sup>186</sup> But, he emphasized that the BIA was not taking such impermissible action in this case. He explained that he supported giving deference to the BIA’s statutory interpretation because the statute was ambiguous and not directly conflicted, stating, “I see no conflict, or even internal tension.”<sup>187</sup> While other Justices believed the statute contained an internal inconsistency, the concurrence would have resolved this apparent conflict by reading only the second clause in the CSPA as operative.<sup>188</sup> Therefore, beyond the requirements of the second clause, “Congress did not speak clearly to which petitions can automatically be converted. Whatever other interpretations of that provision might be possible, it was reasonable, for the reasons explained by the plurality, for the Board to interpret section 1153(h)(3).”<sup>189</sup> Chief Justice Roberts found that the statute was ambiguous and that the BIA deserved deference

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181. *Id.* at 2217.

182. *Id.* at 2219 (Sotomayor, J., dissenting).

183. *Id.* at 2216 (Alito, J., dissenting).

184. *Id.*

185. *See supra* notes 56–65 and accompanying text.

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

187. *Id.* at 2214 (citation omitted).

188. *Id.* at 2215.

189. *Id.* (citation omitted).

under *Chevron* Step Two. Nonetheless, he was clear that he would not have deferred if he believed the Act was unambiguous or that the BIA had disregarded unambiguous portions of it.<sup>190</sup>

Consequently, each of the three Justices and those joining their opinions suggested that an agency could not choose between unambiguous statutory provisions when attempting to address an internal inconsistency in the statute. In order to move to Step Two, an agency had to respect the unambiguous text and instead address its ambiguous application through interpretation of other ambiguous provisions in the statute.

### C. *Functional Changes*

There may be another potential limitation on agency action that exists even when attempting to remedy the Problem under *Chevron* Step Two: An agency's interpretation should not functionally change the statute in an attempt to make the statutory application workable. The PSD majority in *UARG* explained that a statute should not be interpreted to drastically change its functionality, stating, "[A]n agency interpretation that is 'inconsistent[t] with the design and structure of the statute as a whole . . . does not merit deference.'"<sup>191</sup> In dissent, Justice Breyer also argued that a statutory interpretation should not force workability by functionally changing the statute, stating, "Nothing in the statutory text, the legislative history, or common sense suggests that Congress, when it imposed the 250 tons-per-year threshold, was trying to undermine its own deliberate decision to use the broad language 'any air pollutant' by removing some substances (rather than some facilities) from the PSD program's coverage."<sup>192</sup> Justice Breyer argued the dissent's interpretation was correct because it complied with the CAA functionally. "[G]iven the purposes of the PSD program and the Act as a whole, as well as the specific roles of the different parts of the statutory definition, finding flexibility in any source is . . . sensible."<sup>193</sup> These opinions suggest that when an agency interpretation results in drastic changes to the statute, an agency can, and in some instances should, look to an alternative construction of the statute to resolve the Problem rather than cling to its current interpretation.<sup>194</sup>

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190. *Id.* at 2214.

191. *Util. Air Regulatory Grp v. EPA*, 134 S. Ct. 2427, 2442 (2014) (quotations omitted).

192. *Id.* at 2454 (Breyer, J., concurring in part and dissenting in part).

193. *Id.* at 2452 (quotations omitted).

194. *See id.* at 2446 (majority opinion).

## VI. CONCLUSION

The Problem occurs when a statute's provisions become contradictory or unworkable in the context of new or unforeseen phenomena, yet the statute mandates agency action.<sup>195</sup> The text of the statute may be unambiguous, yet its application may be problematic or unclear. Similarly, unambiguous provisions may become inconsistent given a particular application of the statute. The Court addressed three variations of the Problem during the same term in *Scialabba* and *UARG*, which this Note characterized as direct conflict, internal inconsistency, and unworkability. In these cases, various definitions of ambiguity were applied.

The broadest definition encompassed "truly" direct conflicts, direct conflicts, internal inconsistencies, and unworkability.<sup>196</sup> In contrast, the narrowest definition found ambiguity based only on internal inconsistency.<sup>197</sup> In some instances, the Court found no ambiguity, but allowed an agency more interpretive flexibility under Step One in order to resolve the Problem and accomplish the unambiguous mandate of the statute. The non-traditional role of ambiguity in broken statutory frameworks lends new meaning to the *Chevron* analysis because it can move a court to Step Two or provide an agency greater interpretive flexibility under Step One. But these two cases show that the Problem does not give an agency boundless interpretive authority. Some agency action may be impermissible even when an agency is faced with the Problem. Justices disapproved of agency solutions that altered or ignored unambiguous statutory text, and of solutions that used interpretation to change statutes' functions. A review of these principles alongside other cases where the Court has reviewed agency interpretations of broken statutory frameworks would help further illuminate the definition of ambiguity and the extent of interpretive flexibility in addressing the Problem. In the meantime, agencies should reevaluate the definition of *Chevron* ambiguity when interpreting broken statutory frameworks and be attentive as lower courts attempt to define this developing area of *Chevron* review.

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195. See Freeman & Spence, *supra* note 10.

196. See *Scialabba v. Cuellar de Osorio*, 134 S. Ct. 2191 (2014) (Kagan, J., plurality opinion); see also *UARG*, 134 S. Ct. at 2449 (Breyer, J., concurring in part and dissenting in part).

197. See *Scialabba*, 134 S. Ct. at 2216 (Alito, J., dissenting); *UARG*, 134 S. Ct. at 2445 (Alito, J., concurring in part and dissenting in part).