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NOTES

The Single-Scheme Exception to Criminal Deportations and the Case for *Chevron's* Step Two

David A. Luigs

INTRODUCTION

In 1992, the State of Georgia convicted Akintunde Taofik Animashaun of two counts of criminal forgery.¹ Both of Animashaun's crimes resulted from actions he took as part of a plan to steal some furniture. First, Animashaun completed an instant credit application at a furniture store using a false identity. Two days later, he arrived at the store's warehouse to pick up the furniture and presented a receipt with the forged signature. These actions supported convictions for two separate crimes: for forgery on the credit application, and for forgery on the delivery receipt.²

Because Animashaun was a native and citizen of Nigeria who had entered the United States in 1981 as a student, his two crimes enabled the Immigration and Naturalization Service (INS) to institute deportation proceedings against him on its authority to deport aliens who commit multiple crimes.³ Although Animashaun had become a permanent resident after marrying an American citizen,

1. See *Animashaun v. INS*, 990 F.2d 234 (5th Cir.), *cert. denied*, 114 S. Ct. 557 (1993). The Fifth Circuit's opinion recites all of the facts that are discussed in the text.

2. The Fifth Circuit's opinion does not explain the exact relationship between the receipt and the credit application. The full discussion in the opinion reads: "On August 11, Animashaun completed an instant credit application at a furniture store using a false identity; on August 13, Animashaun arrived at the store's warehouse to take delivery of that furniture by presenting the receipt with the forged signature." *Animashaun*, 990 F.2d at 237. It appears that the "receipt" was a copy of the "application" that Animashaun had previously filled out, such that it constituted a second forgery because it was another presentation of a forged signature.

3. Immigration and Nationality Act § 241(a)(2)(A)(ii), 8 U.S.C. § 1251(a)(2)(A)(ii) (Supp. II 1990). The Attorney General is principally responsible for enforcing and administering the immigration laws. See THOMAS ALEXANDER ALEINIKOFF & DAVID A. MARTIN, *IMMIGRATION PROCESS AND POLICY* 101 (2d ed. 1991). These laws dictate which aliens, under what conditions, can immigrate to the United States, *id.* at 119, and when they can be deported, *id.* at 498. The Attorney General has delegated most of the responsibility for enforcing and administering the immigration laws to the Immigration and Naturalization Service (INS). *Id.* at 101.

The INS performs a variety of immigration-related tasks dealing with enforcement, service, and adjudication. *Id.* at 102-04. Deportation is one of the INS's enforcement functions; it removes an alien from the United States. *Id.* at 475. The immigration laws provide various grounds by which the INS can impose this process on an alien. For example, the INS may deport an alien if she misrepresented material facts on her immigration application or if she has committed certain crimes while legally residing in the United States. 8 U.S.C. § 1251 (Supp. II 1990); see also ALEINIKOFF & MARTIN, *supra*, at 498-543.

he remained an alien subject to the immigration laws. The legal authority for Animashaun's deportation derived from section 241(a)(2)(A)(ii) of the Immigration and Nationality Act, which authorizes the INS to deport legal resident aliens who are convicted of "two or more crimes involving moral turpitude."⁴

The deportation provision provides an exception, however, for those aliens who commit multiple crimes "arising out of a *single scheme of criminal misconduct*."⁵ Relying on a recent Ninth Circuit opinion⁶ that interprets this exception to cover multiple crimes that an alien plans and executes together as part of a *single plan*, Animashaun argued that his convictions fell within the exception because both of his crimes arose from his single plan to steal furniture. The INS disagreed, contending that the exception applies only when an alien's multiple crimes arise out of a *single act*.

At a deportation hearing,⁷ an immigration judge agreed with the INS's single-act interpretation and held that Animashaun's crimes did not fall within the exception.⁸ Animashaun appealed to the

To initiate a deportation proceeding, an INS officer files an order to show cause with the office of the local immigration judge and serves the order on the affected alien. This order, which requires the alien to show why she should not be deported, explains the deportation proceeding and informs the alien of the statutory and factual grounds for deportation. *Id.* at 543. The immigration judge presides over deportation hearings and decides whether to order termination, grant permanent residence, or order deportation. *Id.* at 543.

4. 8 U.S.C. § 1251(a)(2)(A)(ii) (Supp. II 1990). There is a long line of cases explaining which crimes involve moral turpitude. *See, e.g.,* Okoroha v. INS, 715 F.2d 380 (8th Cir. 1983) (holding that possessing stolen property involves moral turpitude); Tseung Chu v. Cornell, 247 F.2d 929 (9th Cir.), *cert. denied*, 355 U.S. 892 (1957) (holding that tax evasion involves moral turpitude); *In re Flores*, 17 I & N Dec. 225 (BIA 1980) (holding that fraud, as a general rule, involves moral turpitude); *In re Rosario*, 15 I & N Dec. 416 (BIA 1975) (holding that voluntary manslaughter, even without malice, constitutes moral turpitude); *In re Moore*, 13 I & N Dec. 711 (BIA 1971) (holding that breaking and entering with intent to commit larceny involves moral turpitude). *See generally* ALENIKOFF & MARTIN, *supra* note 3, at 503-24; CHARLES GORDON & STANLEY MAILMAN, *IMMIGRATION LAW AND PROCEDURE* § 71.05 (1994).

5. 8 U.S.C. § 1251(a)(2)(A)(ii) (Supp. II 1990) (emphasis added). The full text of this provision reads: "Any alien who at any time after entry is convicted of two or more crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, regardless of whether confined therefor and regardless of whether the convictions were in a single trial, is deportable." 8 U.S.C. § 1251(a)-(2)(A)(ii) (Supp. II 1990).

6. *Gonzalez-Sandoval v. INS*, 910 F.2d 614 (9th Cir. 1990).

7. At a contested deportation hearing, a trial attorney presents the INS's case, and the INS bears the burden of proving the alien's deportability by "clear, unequivocal, and convincing evidence." *Woodby v. INS*, 385 U.S. 276, 285 (1966). The immigration judge hears evidence and testimony presented by both sides and comes to a decision ordering a termination, granting permanent residence, or ordering deportation. *See generally* ALENIKOFF & MARTIN, *supra* note 3, at 110; Jack Wasserman, *Practical Aspects of Representing an Alien at a Deportation Hearing*, 14 SAN DIEGO L. REV. 111 (1976).

8. The INS does not adjudicate most immigration issues; instead, a separate umbrella organization within the Department of Justice, the Executive Office of Immigration Review (EOIR), contains other adjudicative bodies that hear most immigration disputes. 8 C.F.R. § 3.1(a)(1) (1994). The Department of Justice segregated these adjudicators — the immigration judges, the Board of Immigration Appeals (BIA), and the Administrative Appeals Unit (AAU) — from the INS in an effort to separate the enforcement and the adjudication of

Board of Immigration Appeals (BIA)⁹ which affirmed the immigration judge's decision. The BIA adopted the INS's view that crimes arise out of a single scheme only when they are the consequence of a *single act*:

When an alien performs an act that in and of itself constitutes a complete, individual, and distinct crime, he is deportable when he again commits such an act, even though one may closely follow the other, be similar in character, and even be part of an overall plan of criminal misconduct.¹⁰

The BIA reasoned that Animashaun's crimes did not fall within the single-scheme exception because they "were two complete, individual, and distinct acts"¹¹ — namely, the two different instances of presenting a false name.

On appeal to the Fifth Circuit,¹² Animashaun again challenged the BIA's single-act interpretation of the single-scheme exception, but the Fifth Circuit concluded that it had no choice but to adopt

immigration issues. See ALENIKOFF & MARTIN, *supra* note 3, at 109. Aleinikoff & Martin explain that the

[n]ew regulations separated the corps of immigration judges from the Immigration and Naturalization Service and placed them in a new unit, known as the Executive Office of Immigration Review (EOIR), located in the Department of Justice and directly accountable to the Associate Attorney General. . . . [I]t is clear that EOIR now controls the budget available to immigration judges and provides directly for support services. Today, no immigration judge is answerable to anyone in the Service, and this different line of accountability provides an improved structural assurance of adjudicative neutrality.

Id. at 109-10. The Immigration and Nationality Act provides for "special inquiry officers," now known as immigration judges, to conduct the most dramatic and important adjudications: proceedings to exclude or deport aliens. 8 U.S.C. §§ 101(b)(4), 1225(b), 1226(a), 1252(a) (1988 & Supp. II 1990). Immigration judges also take part in "proceedings to rescind an admitted immigrant's adjustment of status under [§ 246 of the Immigration and Nationality Act], in proceedings to withdraw the approval of schools previously authorized for attendance by nonimmigrant students, 8 C.F.R. § 214.4, and in hearing challenges brought by aliens ordered *not* to leave the country under the departure control provisions of 8 C.F.R. Part 215." ALENIKOFF & MARTIN, *supra* note 3, at 110.

9. Aliens found to be deportable at an initial deportation hearing have the right to appeal to the Attorney General. 8 C.F.R. § 242.21 (1994). The Attorney General set up the BIA as a multimember body to review these appeals. Although the BIA has existed since 1940, it has never been authorized by statute and exists only because of regulations promulgated by the Attorney General. 8 C.F.R. § 3.1(a)(1) (1994); see also ALENIKOFF & MARTIN, *supra* note 3, at 112.

10. Animashaun v. INS, 990 F.2d 234, 237-38 (5th Cir.) (quoting the BIA's decision in *In re Adetiba*, Interim Decision 3177, 1992 WL 195812 (BIA May 22, 1992)), *cert. denied*, 114 S. Ct. 557 (1993); see *infra* section I.B.1 (explaining the BIA's single-act test).

11. Animashaun, 990 F.2d at 236.

12. Section 106(a) of the Immigration and Nationality Act establishes federal judicial review of deportation orders. 8 U.S.C. § 1105a(a) (Supp. II 1990). The statute provides that the procedure established by the Hobbs Act, codified at 28 U.S.C. ch. 158, shall be the exclusive procedure for review of deportation orders. The Hobbs Act governs judicial review of several other administrative agencies, including the Federal Communications Commission, the Federal Maritime Commission, and the Interstate Commerce Commission. See 28 U.S.C. §§ 2341-51 (1988). This Act vests the power of review in the federal appellate, rather than district, courts. ALENIKOFF & MARTIN, *supra* note 3, at 862. These courts are required to uphold the Board's fact findings if they are supported by "reasonable, substantial, and probative evidence." 8 U.S.C. § 1105a(a)(4) (1988).

the BIA's "single-act" test.¹³ The court explained that because the meaning of the statute was ambiguous, the landmark Supreme Court case of *Chevron, Inc. v. Natural Resources Defense Council, Inc.*¹⁴ required the court to defer to the BIA's view. In *Chevron*, the Supreme Court announced that a federal court applying an ambiguous statute must defer to any reasonable interpretation adopted by the agency administering the statute. Courts have generally referred to this rule as having two steps: At step one, a court determines whether the statute clearly answers the interpretive question at issue. If the statute is unambiguous, the court will give effect to the statute's clear meaning. But if the statute is ambiguous, the court moves on to step two: determining whether the agency's interpretation of the statute is reasonable and permissible. *Chevron* requires courts to defer to reasonable agency interpretations of ambiguous statutes.¹⁵ Applying the *Chevron* rule to the *Animashaun* case, the Fifth Circuit concluded that it had to defer to the BIA's "single-act" test, and it affirmed Animashaun's deportation order.¹⁶

Other circuits, however, have interpreted the single-scheme exception differently and refused to defer to the BIA's interpretation. Instead of focusing on whether the multiple crimes arise from a single act, these courts focus on the alien's state of mind. In applying their interpretations of the exception, the Second, Third, and Ninth Circuits ask whether the alien's crimes were planned together and executed as part of a *single plan*.¹⁷ The First Circuit asks a slightly different question — whether the alien had sufficient *time to reflect* between the commission of the two crimes to change his mind and halt his course of criminal misconduct.¹⁸ None of these courts that

13. *Animashaun*, 990 F.2d at 237.

14. 467 U.S. 837 (1984).

15. See *infra* Part II (discussing the rule in *Chevron*).

16. 990 F.2d at 237. The court made clear, however, that precedent required its holding because a *prior* Fifth Circuit case had held that *Chevron* applied to the single-scheme exception, requiring deference to the BIA's single-act test. See *infra* note 60 and accompanying text (discussing the Fifth Circuit's precedent requiring the *Animashaun* court to defer to the BIA's view). The court hinted, however, that it thought *Chevron* deference was inappropriate in this case and that absent *stare decisis*, it might have held that *Chevron* did *not* require it to defer to the BIA's interpretation of the single-scheme exception. 990 F.2d at 237 n.3 ("Were we reviewing this agency interpretation without our precedential guidance, we may have reached a different result. We are, of course, bound by our [prior] holding . . ."); see also *infra* Part III (arguing that *Chevron* does not require courts to defer to the BIA's single-act test). In 1993, the Supreme Court denied certiorari on Animashaun's case, and he was deported. *Animashaun v. INS*, 114 S. Ct. 557 (1993).

17. See, e.g., *Gonzalez-Sandoval v. INS*, 910 F.2d 614 (9th Cir. 1990); *Nason v. INS*, 394 F.2d 223 (2d Cir.), *cert. denied*, 393 U.S. 830 (1968); *Sawkow v. INS*, 314 F.2d 34 (3d Cir. 1963). See generally *infra* Part I.B.2 (discussing the single-plan test).

18. See *Pacheco v. INS*, 546 F.2d 448 (1st Cir. 1976), *cert. denied*, 430 U.S. 985 (1977). See generally *infra* Part I.B.3 (discussing the time-to-reflect test).

reject the BIA's interpretation, however, have analyzed the issue under *Chevron*.

This Note applies the two-step *Chevron* analysis to the single-scheme exception and argues that courts should reject the BIA's single-act test. In applying *Chevron*, this Note uses the narrow controversy over the proper interpretation of the single-scheme exception as a window on the larger ambiguity that plagues the Supreme Court's *Chevron* jurisprudence. This Note suggests an answer to a broader issue that has remained unclear under the Supreme Court's precedents: how courts should review agency interpretations at *Chevron*'s second step. Part I discusses the text and legislative history of the single-scheme exception and surveys how courts have interpreted the exception, explaining the three competing approaches: the *single-act* test, the *single-plan* test, and the *time-to-reflect* test.

To determine how courts should apply *Chevron* to the BIA's choice among these tests, Part II focuses on what courts examine at each of *Chevron*'s two steps. This Part first explains the numerous criteria the Supreme Court has employed under *Chevron*'s first step in deciding whether a statute clearly answers an interpretive controversy. Then it addresses the broader question on which the Supreme Court has provided little explicit guidance: what courts should do at *Chevron*'s step two. Part II argues that although courts have often engaged in cursory review of agency interpretations at *Chevron*'s second step, the rationale of *Chevron* and a careful review of the Supreme Court's case law on deference to agency interpretations of statutes support a more rigorous standard of review. This Part concludes by providing an appropriate structure for judicial review at *Chevron*'s step two.

Part III applies this understanding of *Chevron*'s two steps to conclude that courts should not defer to the BIA's single-act test. This Part first argues that the ordinary meaning of "single scheme" embraces the *single-plan* test. But even if the meaning of the exception were ambiguous, this Part concludes that courts should reject the BIA's single-act test at *Chevron*'s step two — as an unreasonable and impermissible reading of the statute.

I. APPROACHES TO INTERPRETING THE SINGLE-SCHEME EXCEPTION

This Part describes the background to the controversy over interpreting the single-scheme exception. Section I.A examines how the text and legislative history of the exception leave the meaning of "single scheme" unclear. Section I.B describes the approaches taken by the BIA and the different courts in defining the exception.

A. *The Text and Legislative History of the Exception*

Section 241(a)(2)(A)(ii) of the Immigration and Nationality Act permits the INS to deport an alien who commits two or more crimes of moral turpitude, but it creates an exception for aliens whose multiple crimes arise out of a single scheme of criminal misconduct.¹⁹ The section provides:

Any alien who at any time after entry is convicted of two or more crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, regardless of whether confined therefor and regardless of whether the convictions were in a single trial, is deportable.²⁰

Congress gave no explicit guidance regarding how this exception should be understood. The Act's "definitions" section, while thorough, does not define *single scheme of criminal misconduct*,²¹ nor does the legislative history shed any light on the intent of Congress in drafting this provision.²² The House Report advises merely that

19. 8 U.S.C. § 1251(a)(2)(A)(ii) (Supp. II 1990). The Immigration and Nationality Act authorizes the INS to deport aliens for several other reasons. The INS may deport five broad classes of aliens: (1) aliens who were excludable at the time they entered the country or who have violated or adjusted their status since entering the country in such a way as to become deportable (e.g., by smuggling illegal aliens into the United States or by failing to maintain employment); (2) aliens who have committed "criminal offenses," with different rules governing aliens with a single criminal conviction, multiple convictions (the subject of this Note), aggravated felonies, controlled substances, firearm felonies, and other miscellaneous crimes; (3) aliens who fail to register or provide a change of address to the Attorney General as required by the Act or who have engaged in document fraud; (4) aliens who are deportable on security and related grounds (e.g., aliens who endanger national security or who engage in terrorist activity); and (5) aliens who, within five years of entry, have become "public charges." 8 U.S.C. § 1251 (Supp. II 1990).

20. 8 U.S.C. § 1251(a)(2)(A)(ii) (Supp. II 1990).

21. 8 U.S.C. § 1101 (1988 & Supp. II 1990) (defining more than fifty terms).

22. See H.R. CONF. REP. NO. 2046, 82d Cong., 2d Sess. (1952), *reprinted in* 1952 U.S.C.C.A.N. 1753; S. REP. NO. 1137, 82d Cong., 2d Sess. (1952); H.R. REP. NO. 1365, 82d Cong., 2d Sess. (1952), *reprinted in* 1952 U.S.C.C.A.N. 1653. Courts that have examined the statute's legislative history have universally agreed that it is not helpful regarding this issue. See *Nguyen v. INS*, 991 F.2d 621, 623 (10th Cir. 1993) ("The legislative history of the 1952 Immigration and Nationality Act offers no illumination as to congressional intent regarding what constitutes a single scheme of criminal misconduct for purposes of the exception . . ."); *Pacheco v. INS*, 546 F.2d 448, 449 (1st Cir. 1976), *cert. denied*, 430 U.S. 985 (1977) ("The legislative history, while atmospheric, sheds no light on [§ 1251(a)(2)(A)(ii)]."); *Nason v. INS*, 394 F.2d 223, 227 (2d Cir.) ("[T]here is no meaningful legislative history to illumine the meaning of the specific statutory language 'two crimes . . . not arising out of a single scheme of criminal misconduct.'"), *cert. denied*, 393 U.S. 830 (1968); *Wood v. Hoy*, 266 F.2d 825, 828-29 (9th Cir. 1959) ("The Act does not define what is a 'single scheme of criminal misconduct.' Nor does the legislative history shed any light on what was the intent of Congress in drafting this provision."); *In re Adetiba*, Interim Decision 3177, 1992 WL 195812 at *3-4 (BIA May 22, 1992) ("[T]he legislative history provides [no] assistance or insight into what Congress meant by the phrase 'single scheme of criminal misconduct.'").

Some courts have observed, however, that the 1952 Immigration Act "was looked on generally as more restrictive than prior legislation." *Pacheco*, 546 F.2d at 449. "The section itself replaced a gentler one under which the alien, to be deported, must have been 'sentenced more than once to [a term of one year or more].'" *Pacheco*, 546 F.2d at 449 n.3; see also *Costello v. INS*, 311 F.2d 343, 348 (2d Cir. 1962). But the generalized idea that the prior

"[t]he bill contains detailed and comprehensive provisions relating to the apprehension and deportation of aliens who are within the deportable classes."²³ This Report discusses several of the definitions contained in the Act's definitions section but does not advise how to construe undefined terms.²⁴

B. Three Different Interpretations

The different immigration, district, and circuit courts that have considered Section 241(a)(2)(A)(ii) have interpreted the single-scheme exception in different ways. Although the courts' opinions are often imprecise and unclear, these interpretations can be grouped into three competing approaches: the "single-act" test, the "single-plan" test, and the "time-to-reflect" test. The single-act test asks whether the nature of the crimes essentially makes them one act. The single-plan test looks to whether the alien planned the entire program of criminal misconduct at a single time before the crimes. The time-to-reflect test focuses on whether the alien had sufficient time between the commission of the crimes to reflect upon them and change her mind.

1. The Nature of the Crimes: The Single-Act Test

Although the scope of the BIA's definition of section 241's single-scheme exception is not entirely clear,²⁵ its single-act test appears to focus on the nature of the alien's crimes to determine whether they are sufficiently related that they essentially constitute one act. As evidenced by the *Animashaun* case, at its most restrictive this test requires that all the crimes be traceable to a single physical act. The BIA explained this test in a recent decision, *In re Adetiba*:²⁶

[W]hen an alien has performed an act, which, in and of itself constitutes a complete, individual, and distinct crime, he is deportable when he again commits such an act, even though one may closely follow the

statute was gentler to aliens does not help to determine how much more restrictive the new statute was intended to be. Thus, the vast majority of courts have not relied on this idea to support their reasoning in defining the exception. But see *Costello*, 311 F.2d at 348, in which the Second Circuit rejected the notion that a single-scheme should be defined as a "common . . . plan" in part because "there is no denying the fact that the Congress by the 1952 Act intended to make it easier rather than more difficult to deport aliens who were recurrent criminals." However, the *Costello* court acknowledged that this was mere dictum, observing "[b]ut this [discussion] is by the way." 311 F.2d at 348. Later the Second Circuit explicitly adopted a version of the single-plan test. See *Nason*, 394 F.2d at 227.

23. H.R. REP. NO. 1365, *supra* note 22, at 56, reprinted in 1952 U.S.C.C.A.N. at 1711.

24. H.R. REP. NO. 1365, *supra* note 22, at 31-34, reprinted in 1952 U.S.C.C.A.N. at 1683-86.

25. See *infra* notes 133-41 and accompanying text (describing the various different formulations the BIA has developed to articulate its interpretation of the single-scheme exception).

26. *In re Adetiba*, Interim Decision 3177, 1992 WL 195812 (BIA May 22, 1992).

other, be similar in character, and even be part of an overall plan of criminal misconduct. [Such an approach] recognize[s] that the statutory language was meant to distinguish cases where there are separate and distinct crimes, but they are performed in furtherance of a single criminal episode.

Under this analysis, there would exist a single scheme of criminal misconduct where one crime constitutes a lesser offense of another or where two crimes flow from and are the natural consequences of a single act of criminal misconduct.²⁷

This language suggests that the BIA believes that Congress created the single-scheme exception to ensure that crimes that were merely two different aspects of the same physical act of wrongdoing would not count as two crimes for purposes of deportation. Under this narrow conception of the exception, it does not matter whether the crimes are similar in nature, close in time, or part of the same plan; so long as they can be traced to two separate physical acts, they fall outside the exception. The BIA elaborated on this interpretation by providing an example that a single scheme occurs when an alien both possesses and passes a counterfeit bill.²⁸ The BIA apparently considers this to be a single scheme because an alien is guilty of both these crimes when he performs the single physical act of passing the counterfeit bill.

2. *A Prior Conceived Program: The Single-Plan Test*

The Second, Third, and Ninth Circuits have read the single-scheme exception to require a court to determine whether there was a moment prior to the crimes when the alien conceived of a single coherent plan embracing all of her crimes.²⁹ The Ninth Circuit recently described this test in *Gonzalez-Sandoval v. INS*,³⁰ explaining that where the evidence "shows that the two predicate

27. *Adetiba*, 1992 WL 195812, at *1 (citations omitted). There is some ambiguity in this language, however, and perhaps the BIA could reread this definition to create a "single-episode" test that would cover more multiple-crime situations than the restrictive "single-act" test. But the BIA has not articulated any separate test to determine when multiple crimes arise from a single episode. Therefore, given that *Adetiba's* narrow language requires that the crimes to result from a single physical act and given the stringent application of this language in the *Animashaun* case, this Note takes the BIA's test as it has been applied. *But see infra* notes 133-41 and accompanying text (describing other ways the BIA has previously interpreted the exception).

28. *In re D*, 5 I & N Dec. 728, 730 (BIA 1954). The BIA has also inexplicably provided as an example the case of an alien who breaks and enters a store with the intent to commit larceny and, in connection with that criminal act, also commits an assault with a deadly weapon. *In re D*, 5 I & N Dec. at 730; *see In re B*, 8 I & N Dec. 236, 239 (BIA 1958). But these two crimes, of course, result from two different physical acts. Perhaps this 1958 example is simply out-of-line with the BIA's current test.

29. *See, e.g., Gonzalez-Sandoval v. INS*, 910 F.2d 614 (9th Cir. 1990); *Nason v. INS*, 394 F.2d 223 (2d Cir.), *cert. denied*, 393 U.S. 830 (1968); *Sawkow v. INS*, 314 F.2d 34 (3d Cir. 1963).

30. 910 F.2d 614 (9th Cir. 1990).

crimes were planned at the same time and executed in accordance with that plan," the crimes arise out of a single scheme.³¹ The Ninth Circuit explicitly distinguished the government's single-act test: "The statute exempts crimes arising out of a 'single *scheme* of criminal misconduct' and not those out of a single criminal *act*, as the government would have us read it."³²

Other courts applying the single-act test have defined the exception much like the Ninth Circuit. In *Nason v. INS*,³³ the Second Circuit similarly defined the exception by looking for a single plan: "[T]he word 'scheme' implies a specific, more or less articulated and coherent plan or program of future action"³⁴ The Second Circuit also rejected the single-act test, observing that "[t]he statutory language, 'a single scheme of criminal misconduct,' is not so narrow as a single criminal act or transaction."³⁵ The Third Circuit³⁶ and the few district court decisions construing the statute are consistent with this understanding of the single-plan test.³⁷

31. 910 F.2d at 616.

32. 910 F.2d at 616.

33. 394 F.2d 223 (2d Cir.), *cert. denied*, 393 U.S. 830 (1968). But see *Costello v. INS*, 311 F.2d 343 (2d Cir. 1962), where the Second Circuit earlier had criticized in dicta possible extreme versions of the single-plan test:

We would not wish, however, to be thought to subscribe to the views expressed in the cases [supporting the single-plan test] . . . nor would it seem reasonable to suppose that the Congress intended to grant immunity from deportation to those who over a period of time pursued a course of criminal misconduct, involving numerous successive, separate crimes, consummated at different times but in the same manner, or with the same associates, or even by the use of the same fraudulent devices, disguises, tools or weapons. Nor, in the case of successive bank robberies . . . would it seem that these could be said to have arisen out of a single rather than two separate schemes of criminal misconduct, simply because the robbers, prior to the first robbery, had in mind and had discussed the robbery of the second bank

Costello, 311 F.2d at 348. Nevertheless, this dictum from *Costello* was implicitly rejected when the Second Circuit articulated its version of the single-plan test in *Nason*. See *Nason*, 394 F.2d at 227. Moreover, the BIA seems to concede that the Second Circuit has endorsed the single-plan test. *In re Adetiba*, Interim Decision 3177, 1992 WL 195812, at *4 (BIA May 22, 1992) (citing *Nason* to include the Second Circuit, along with the Third and the Ninth, as the jurisdictions applying a "more expansive interpretation of the [statutory] language.").

34. 394 F.2d at 227.

35. 394 F.2d at 227 ("Congress . . . reserved deportation for those who, having completed a criminal scheme, proceeded to commit a fresh crime or to renew the prior course of criminal conduct.").

36. The exact test followed by the Third Circuit is unclear. However, in *Sawkow v. INS*, 314 F.2d 34, 37-38 (3d Cir. 1963), the court approvingly cited *Wood v. Hoy*, 266 F.2d 825 (9th Cir. 1959), a case from the single-plan Ninth Circuit, in reversing a BIA deportation order. The BIA has cited *Sawkow* in listing the Third Circuit, along with the Second and Ninth, as a jurisdiction applying a "more expansive interpretation of the [statutory] language" than its single-act test. *Adetiba*, 1992 WL 195812, at *4.

37. See *Barrese v. Ryan*, 203 F. Supp. 880, 886-87 (D. Conn. 1962) (rejecting the Board's interpretation of the statute, that a "single scheme" must be equated with "one criminal episode"); *Zito v. Moutal*, 174 F. Supp. 531, 536 (N.D. Ill. 1959) ("[D]eportation may not be predicated upon offenses which are part of a single continuing enterprise even though the offenses are separated by time."); *Jeronimo v. Murff*, 157 F. Supp. 808, 813 (S.D.N.Y. 1957)

These courts have clarified that to satisfy this single-plan test a *plan* must be a coherent, premeditated design embracing all of the alien's future crimes. For example, the Second Circuit in *Nason* explained how an alien's vague intentions did not rise to the level of a *plan*:

Petitioner's nebulous intention to repeat his crime . . . some day in the indefinite future, will not bridge the gap of nine months [between the crimes]. The word 'scheme' implies a specific, more or less articulated and coherent plan or program of future action, much more than a vague, indeterminate expectation to repeat a prior criminal *modus operandi*. As used in the statute, 'scheme' is not to be construed as an abstract concept or strategy capable of future application at any time and any place, but planned definitely for none.³⁸

The Ninth Circuit cited *Nason* in adopting this strict definition of *plan* in a recent case, *Leon-Hernandez v. INS*.³⁹ In *Leon-Hernandez*, an alien who was convicted of two acts of sexual misconduct with a minor argued that his crimes arose from a single scheme because both crimes resulted from his ongoing relationship with the minor whom he believed to be his girlfriend. The court rejected this relationship as sufficient to constitute a single scheme, because Leon-Hernandez

did not show that the crimes were executed according to any considered plan At the very most [the evidence of his relationship with the minor] implies only that Leon-Hernandez had, at some time, a "nebulous intention to repeat his crime with the same . . . victim[] some day in the indefinite future." In the absence of evidence of a more conscious, coherent "plan or program of future action," the BIA's determination that Leon-Hernandez's crimes did not arise from a single scheme of criminal misconduct is reasonable.⁴⁰

These cases demonstrate that although defendants may allege that their crimes were carried out pursuant to a single plan, courts require more than mere vague or continuing criminal intentions to satisfy the single-plan test.

Much of the case law explaining the scope of this test concerns what evidence the INS must present in order to meet its burden of showing that the alien's crimes did not arise out of a single scheme.⁴¹ The practical effect of the single-plan test has been de-

(observing that all the acts and transactions described in the indictment were closely "connected together" constituting the "parts" of one "scheme and plan").

38. 394 F.2d at 227. The Second Circuit twice considered *Nason's* case. *Nason v. INS* (*Nason I*), 370 F.2d 865 (2d Cir. 1967); *Nason v. INS* (*Nason II*), 394 F.2d 223 (2d Cir.), *cert. denied*, 393 U.S. 830 (1968) (case referred to in the text). After first remanding the case to the Board, the Second Circuit eventually upheld the deportation because of the nine-month hiatus between the crimes and their lack of a relation to the original scheme. 394 F.2d at 227.

39. 926 F.2d 902 (9th Cir. 1991).

40. 926 F.2d at 905 (citations omitted).

41. See DAN KESSELBRENNER & LORY D. ROSENBERG, IMMIGRATION LAW AND CRIMES § 6.4 (1994) ("Judicial interpretation of the 'single scheme' phrase has frequently focused on

terminated through these evidentiary rulings. Courts employing the single-plan test have made clear that they will look to various types of evidence regarding the nature and circumstances of the crimes as well as the time passing between them to determine whether they arose out of a single scheme. As the Ninth Circuit explained in its 1959 decision, *Wood v. Hoy*:

It may be that in some cases the proof of the commission of two crimes may by the very nature of the crimes themselves, or the time or circumstances of their commission, be reasonable, substantial and probative evidence that they did not arise out of a single scheme of criminal misconduct.⁴²

Several courts since *Wood* have considered the nature, circumstances, and timing of the crimes to determine whether they arose out of a single scheme. The courts considering this type of circumstantial evidence have generally held that the government failed to carry its burden where the alien's crimes were similar in nature and committed within a short time of each other. For example, in *Wood*, the defendant alien had committed two similar robberies with the same three cohorts within three days of each other, and the evidence showed that the defendant had agreed with his co-defendants to commit these crimes at one meeting prior to the crimes.⁴³ The *Wood* court held that, given the similar nature and circumstances of the two crimes and in the absence of any evidence to the contrary, the government had failed to meet its burden of showing that the alien's crimes did not arise out of a single scheme.⁴⁴

Similarly in *Gonzalez-Sandoval v. INS*,⁴⁵ the state of California convicted Gonzalez-Sandoval of two bank robberies.⁴⁶ Because he robbed the same bank twice within three days and because he testified that he conceived of both crimes simultaneously as part of a single plan, the Ninth Circuit reversed the BIA's deportation or-

the issue of evidentiary sufficiency. The introduction of the conviction records alone is not necessarily sufficient to meet the government's burden."'). The BIA has accepted that the government has the burden of proving that the alien's crimes did not arise from a single scheme. *In re Pataki*, 15 I & N 324 (BIA 1975); *In re T*, 9 I & N 646 (BIA 1962); see also *Nason*, 394 F.2d at 226; *Wood v. Hoy*, 266 F.2d 825, 831 (9th Cir. 1959).

42. 266 F.2d at 831. The Second Circuit has provided an even more extensive laundry list of criteria to be examined:

[E]vidence of the similarity of two crimes in terms of intent, motive, purpose, techniques, similarity of victims and the like may often be significant on the issue of the existence of a "single scheme," especially in serial crimes. Such evidence may establish that what appeared at first blush as separate and distinct crimes may, indeed, have been spawned by a single criminal scheme. But, it does not have that conclusive significance so that it could, by itself, outweigh other overwhelming evidence that the two crimes were unrelated.

Nason, 394 F.2d at 227-28.

43. *Wood*, 266 F.2d at 828-29.

44. *Wood*, 266 F.2d at 831-32.

45. 910 F.2d 614 (9th Cir. 1990).

46. 910 F.2d at 614.

der.⁴⁷ In the absence of *any* contrary evidence to rebut Gonzalez-Sandoval's testimony and the fact that the crimes were within two days of each other and directed against the same bank, the court held that the government had failed to prove that the crimes did not arise out of a single plan.⁴⁸

On the other hand, courts applying the single-plan test have held that where the nature and circumstances of the alien's crimes differ and especially where the crimes are separated by a substantial period of time, this evidence alone will satisfy the INS's burden to show that the crimes did *not* arise out of a single scheme. For example, in *LeTourneur v. INS*,⁴⁹ where an alien's two robberies involved different companions and different stolen goods, the court held that, in the absence of any evidence to the contrary, the government had met its burden to show that the crimes did not arise out of a single scheme.⁵⁰

The factor most often used by the government to show the absence of a single scheme is that a large span of time intervened between the two crimes. Such a large time gap has been held to carry the government's burden even where the two crimes are similar in nature. For example, the Second and Ninth Circuits have agreed that two fraudulent tax returns filed in two successive years presumptively do not arise out of a single scheme.⁵¹ Courts have also relied on such large time gaps to overcome both evidence that the crimes were similar in nature and the alien's allegation that he executed them pursuant to a single plan. For example, in both *Nason* and *Leon-Hernandez v. INS*,⁵² the courts held that the government had met its burden of proof in part due to the long time interval between the crimes, despite evidence regarding the similar-

47. *Gonzalez-Sandoval*, 910 F.2d at 615.

48. The BIA had found Gonzalez-Sandoval deportable by applying its single-act test, *see supra* section I.B.1, but the Ninth Circuit reversed the deportation order "because the [immigration judge] and the Board applied a legally erroneous test" — the single-act rather than the single-plan test. *Gonzalez-Sandoval*, 910 F.2d at 617.

49. 538 F.2d 1368 (9th Cir. 1976).

50. 538 F.2d at 1371.

51. *Costello v. INS*, 311 F.2d 343 (2d Cir. 1962); *Chanan Din Khan v. Barber*, 253 F.2d 547 (9th Cir. 1958). *Chanan Din Khan*, in fact, articulated as a "presumption" that crimes involving somewhat different circumstances and separated by a large amount of time do not arise out of a single scheme. *See Chanan Din Khan*, 253 F.2d at 549-50. Later courts have referred to this "*Chanan* presumption" in holding that the INS had met its burden of proof by demonstrating such dissimilarities between the alien's crimes. *See, e.g., Nason v. INS*, 394 F.2d 223 (2d Cir.), *cert. denied*, 393 U.S. 830 (1968). In both *Chanan* and *Costello*, the alien offered no evidence to rebut the presumption created by these facts. *Costello*, 311 F.2d at 347 ("The acts constituting the commission of these two crimes are separated by a substantial interval of time. In the absence of additional facts to support an inference that the two crimes [were] related, we think the [immigration judge] was required to find [no single scheme].").

52. 926 F.2d 902 (9th Cir. 1990).

ity of the crimes and despite the aliens' contentions that the crimes were pursuant to a single plan.⁵³

3. *Mental State During Commission: The Time-to-Reflect Test*

In *Pacheco v. INS*⁵⁴ the First Circuit formulated a slightly different interpretation of the single scheme exception by focusing exclusively on the *time* that passes between the two crimes and whether this time was sufficient to permit the alien to change her mind about her criminal misconduct:

[A] scheme, to be a "single scheme," must take place at one time; there must be no[] substantial interruption that would allow the participant to disassociate himself from his enterprise and reflect on what he has done. . . .

. . . [B]oth the purpose of the statute and the use of the adjective "single" point to a temporally integrated episode of continuous activity. When the immediate activity has ended, even though a 'scheme' calls for future activity a participant has his second chance to make a decision. He need not further pursue a multistage scheme.⁵⁵

The First Circuit's test is similar to the single-plan test in that it focuses both on the circumstances of the crime and on the defendant's state of mind. But, under the First Circuit's test, a court looks to the defendant's state of mind between the commission of the crimes, not before them. If the defendant has sufficient time to change her mind, the crimes do not arise out of a single scheme.

The First Circuit has twice applied this test. In *Pacheco*, the court held that the defendant's two separate acts of attempted burglary against a restaurant and a church within three days did not arise out of a single scheme, despite the defendant's arguments that the two break-ins resulted from a single prolonged period of drunkenness, that the time interval between them was brief, and that his technique and companions were the same in both crimes.⁵⁶ In *Ba-*

53. *Nason*, 394 F.2d at 225 (holding that there was no single scheme despite the defendant's contention "that except for the use of a different fictitious name, the crimes in every other respect were identical: his intent and purpose were the same, as was his mode of operation; the merchandise ordered was of a similar type and the victims in both cases were publishing houses and various New York department stores."); *Leon-Hernandez*, 926 F.2d at 905.

54. 546 F.2d 448 (1st Cir. 1976), *cert. denied*, 430 U.S. 985 (1977).

55. 546 F.2d at 451-52.

56. 546 F.2d at 451. In rejecting the BIA's single-act-transaction test, *Pacheco* provided another example of a set of facts that would fall within its time-to-reflect test, but not within the BIA's test:

[W]hile "transaction" might cover the generality of cases, such as a bank robbery which encompasses an assault on bank employees, we can conceive of more than one separate criminal transaction occurring within a short time period and emanating from the same enterprise. For example, a bank robbery might involve not only an executable assault against bank employees but also other crimes which could occur in the course of the escape [such as] theft of a car, assault on a pursuer, reckless driving, and the like. Such,

logun v. INS,⁵⁷ a recent per curiam opinion, an alien's three counts of mail fraud were separated by four and twenty-four days. The First Circuit held that "petitioner's separate crimes . . . occurred on widely separated dates. Petitioner had ample opportunity between crimes to change direction. Accordingly, his convictions do not arise from a 'single scheme'. . . ."⁵⁸

The First Circuit has also explicitly distinguished the INS's 'single-act' test, observing that "[t]he government wishes us to adopt the formulation of a 'single transaction.' We think that to equate 'single scheme' with 'act' or 'transaction' may give insufficient scope to the statutory phrase, particularly if these words are narrowly construed."⁵⁹

II. UNDERSTANDING *CHEVRON*

The previous Part introduced three competing interpretations of the single-scheme exception. The Fifth and Tenth Circuits have recently provided another way for courts to settle the controversy over how to define "a single scheme of criminal misconduct." In *Iredia v. INS*,⁶⁰ the Fifth Circuit held that because the meaning of the single-scheme exception was ambiguous, the Supreme Court's decision in *Chevron, Inc. v. Natural Resources Defense Council, Inc.*,⁶¹ required the court to defer to any reasonable test chosen by the BIA. In *Nguyen v. INS*,⁶² the Tenth Circuit likewise held that *Chevron* required the court to defer to the BIA's interpretation of Section 241's "single scheme."⁶³

In *Chevron*, the Supreme Court established a two-step test for courts to apply in reviewing the interpretation of a statute by an administrative agency.⁶⁴ At step one, a reviewing court must determine whether the statute is ambiguous with regard to the precise question at hand — that is, whether the statute evidences a specific congressional intent on how to interpret this particular issue.⁶⁵ If

we think, might well be deemed part of a single scheme, even though they might also be called separate transactions.
546 F.2d at 451.

57. 31 F.3d 8 (1st Cir. 1994).

58. *Balogun*, 31 F.3d at 9.

59. *Pacheco*, 546 F.2d at 451. Interestingly, in *Balogun*, the First Circuit noted the multi-circuit split over how to interpret the exception and the argument for *Chevron* deference to the BIA, yet the court tersely stated "petitioner offers no persuasive reason for deviating from our own longstanding interpretation and the majority of recent decisions." 31 F.3d at 9.

60. 981 F.2d 847 (5th Cir. 1993).

61. 467 U.S. 837 (1984).

62. 991 F.2d 621 (10th Cir. 1993).

63. 991 F.2d at 623 ("[W]e adopt [the BIA's] interpretation within the Tenth Circuit after giving due deference to the Board pursuant to *Chevron*" (citations omitted)).

64. 467 U.S. at 842-45.

65. 467 U.S. at 842-43.

the meaning is unambiguous, a court simply applies that clear meaning. Second, if the statute is ambiguous, if there is a "gap" in the statute on this specific policy question, then *Chevron* directs the courts to defer to the administrative agency's interpretation of the statute, so long as that interpretation is "permissible" or "reasonable."⁶⁶ *Chevron* justified such deference on the grounds that when Congress creates an administrative agency, it implicitly authorizes the agency to make such gap-filling policy judgments. The Court explained that this delegation of policy making power is sensible because the agencies are more politically accountable than the courts.⁶⁷

But the courts that have invoked *Chevron* to justify deference to the BIA's single-act interpretation of the single-scheme exception have not rigorously analyzed the issue under either of the two *Chevron* steps. *Chevron*'s step one requires a court to have an idea of how it determines a statute is unambiguous. Similarly, step two requires an understanding of what types of agency interpretations are reasonable or permissible. The courts that have applied *Chevron* to the single-scheme exception have done so without clearly explaining what they envision these two steps to entail and without justifying their conclusions at both steps.⁶⁸

66. 467 U.S. at 845.

67. 467 U.S. at 865-66.

68. For example, in *Nguyen v. INS*, 991 F.2d 621 (10th Cir. 1993), the Tenth Circuit never actually stated that the exception was ambiguous at step one or why it was ambiguous. The court apparently held that the meaning of the exception was necessarily ambiguous because different cases had interpreted it differently; this was the apparent implication of its statements that "[t]he legislative history . . . offers no illumination as to congressional intent . . . and the circuits that have interpreted this language are split." 991 F.2d at 623. Similarly, the *Iredia* court's analysis went as follows:

Interpretations of ambiguous law by an executive agency are accorded considerable weight and deference.

....

... The cases cited by both sides agree that there is no clear [c]ongressional intent on the definition of a "single scheme" of criminal misconduct. Since the legislature has not spoken, *Chevron* directs us to accept the interpretation of the statute by the administrative agency so long as it is reasonable.

981 F.2d at 848-49 (citations omitted).

The courts' applications of *Chevron*'s second step to the single-scheme exception have provided equally little explanation. In *Iredia*, the Fifth Circuit provided one justification for its summary acceptance of the single-act test as reasonable — not by explaining how the single-act interpretation made sense, however, but by crediting the INS's criticism of the rival single-plan test. The court held that "[t]he INS in this case gives a convincing account of the reasonableness of its interpretation of the word 'scheme' in explaining that 'a focus on the pre-planning aspect of criminal activity can lead to theoretical absurdities.'" 981 F.2d at 849. The court gave as an example of this absurdity "an alien who is convicted of ten bank robberies [who] cannot be deported . . . if he establishes the robberies were all carried out pursuant to a plan that he devised prior to executing them." 981 F.2d at 849. The Tenth Circuit's analysis of the reasonableness of the BIA's position was even more perfunctory than the analysis of the Fifth circuit in *Iredia*; the *Nguyen* court cited to *Iredia* and simply stated, "We hold that this is a permissible interpretation of the statute." 991 F.2d at 623. Part III of this

This Part examines the Supreme Court's *Chevron* case law to explain what courts should do at each of *Chevron*'s two steps. Section II.A examines Supreme Court precedents applying *Chevron*'s step one and concludes that the case law clearly instructs courts to employ a wide variety of traditional tools of statutory construction to determine whether a statutory provision is ambiguous. Section II.B proposes a theory of judicial review at *Chevron*'s step two. This theory incorporates two definitions: first, that an agency's interpretation is "reasonable" only if it does not stretch the ordinary meaning of the statutory text too far and is supported by reasoned deliberation; and second, that the text and logic of *Chevron*, as well as the cases that come before and after it, all support a multifactor analysis of which agency interpretations are "permissible" and therefore deserving of deference.

A. *Understanding Step One: How Courts Determine if a Statute is Clear*

According to *Chevron*, the first step in reviewing an agency's interpretation of a statute focuses only on the clarity of the congressional intent embodied in the statute. As the *Chevron* Court stated: "First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."⁶⁹ This language suggests that if a statute is clear at step one, then there is no interpretation to be done by either the court or the agency. The step-one inquiry into whether a statute embodies a clear congressional intent raises two questions: What may a court examine to determine the clarity of congressional intent? And how much clarity is necessary to constitute an "unambiguously expressed intent of Congress"?⁷⁰ An examination of the Supreme Court's *Chevron* case law provides rough answers to both questions.

In *Chevron* itself, the Court advised that judges should use their traditional methods of statutory interpretation to determine whether a statute embodies a clear congressional intent.⁷¹ The Court's cases applying *Chevron* have borne out this description of the step-one inquiry. In addition to examining the statute's text,

Note argues that these courts have misapplied the *Chevron* rule to the single-scheme exception.

69. 467 U.S. at 842-43.

70. Or as Justice Scalia phrased this inquiry, "How clear is clear?" See Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 520.

71. 467 U.S. at 843 n.9 ("If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect." (emphasis added)).

the Court has frequently looked to a statute's "structure" or to "the statute, as a whole" to help find a clear expression of congressional intent in one of the statute's particular provisions.⁷² Also, the Court has relied on the legislative history⁷³ and canons of construction⁷⁴ to determine the clarity of congressional intent. Thus the case law makes clear that the Court's inquiry at step one has developed into something akin to the conventional judicial search for the meaning of a statute by relying on the traditional tools of statutory construction.⁷⁵ But this search for a clear intent differs from conventional statutory interpretation in that the Court is not attempt-

72. See *Dole v. United Steelworkers*, 494 U.S. 26, 42 (1990) (observing that "the statute, as a whole, clearly expresses Congress' intention" (emphasis added)); *Bethesda Hosp. Assn. v. Bowen*, 485 U.S. 399, 405 (1988) ("Our conclusion is also supported by the language and design of the statute as a whole." (emphasis added)); *EEOC v. Commercial Office Prods. Co.*, 486 U.S. 107, 121 (1988); *ETSI Pipeline Project v. Missouri*, 484 U.S. 495, 514 (1988) ("[T]he language, structure, and legislative history of the Act fail to support the petitioners in this case . . ." (emphasis added)); *NLRB v. United Food & Commercial Workers Union*, 484 U.S. 112, 124 (1987) ("The words, structure, and history of the LMRA amendments to the NLRA clearly reveal" congressional intent. (emphasis added)).

73. See *Rust v. Sullivan*, 500 U.S. 173, 185 (1991) (Deference is required when "the legislative history is ambiguous and unenlightening on the matters with respect to which the regulations deal . . ." (emphasis added)); *Commercial Office Prods. Co.*, 486 U.S. at 115-16 (1988); *ETSI Pipeline Project*, 484 U.S. at 514 ("[T]he language, structure, and legislative history of the Act fail to support the petitioner in this case . . ." (emphasis added)); *United Food & Commercial Workers Union*, 484 U.S. at 124 ("The words, structure, and history of the LMRA amendments to the NLRA clearly reveal" congressional intent. (emphasis added)); *Chemical Mfrs. Assn. v. NRDC*, 470 U.S. 116, 126 (1985) (Deference is required "unless the legislative history or the purpose and structure of the statute clearly reveal a contrary intent." (emphasis added)).

74. See *Norfolk & W. Ry. v. American Train Dispatchers Assn.*, 499 U.S. 117, 129 (1991) ("When a general term follows a specific one, the general term should be understood as a reference to subjects akin to the one with specific enumeration."); *Dole*, 494 U.S. at 36 ("The traditional canon of construction, *noscitur a sociis*, dictates that 'words grouped in a list should be given related meaning.'" (quoting *Massachusetts v. Morash*, 490 U.S. 107, 114-15 (1989))); *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212 (1988) (stating a presumption against retroactive rulemaking); *DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) ("[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress.").

75. See *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 647 (1990); *Regents of Univ. of Cal. v. Public Employment Relations Bd.*, 485 U.S. 589, 603 (1988) (White, J., concurring); *United Food & Commercial Workers Union*, 484 U.S. at 123 ("On a pure question of statutory construction, our first job is to try to determine congressional intent, using 'traditional tools of statutory construction.' If we can do so, then that interpretation must be given effect, and the regulations at issue must be fully consistent with it." (quoting *INS v. Cardozo-Fonseca*, 480 U.S. 421, 446 (1987))); *Chemical Mfrs. Assn. v. NRDC*, 470 U.S. 116, 152 (1985) (Marshall, J., dissenting) ("Chevron's deference requirement, however, was explicitly limited to cases in which congressional intent cannot be discerned through the use of the traditional techniques of statutory interpretation."); see also Erika Jones et al., *Developments in Judicial Review with Emphasis on the Concepts of Standing and Deference to the Agency*, 4 ADMIN. L.J. 113, 124-25 (1990) (In which Judge Stephen Williams observed that "it is clear from *Chevron* itself that 'directly' does not exclude consideration of legislative history. And as to Congress's speaking to the 'precise question,' *Chevron* makes it clear that congressional assertions of policy values, even though not addressed directly to the issue before the court, play an important role . . ." (footnote omitted)).

ing to discover *the best* reading of a statutory provision, but whether the statutory provision evidences a *clear* intent.

It remains uncertain exactly how much clarity is necessary for a statute to satisfy step one, because the Court has described this inquiry in a variety of ways. Although *Chevron* required a court to find that a statute "clearly" showed that Congress "had an intention on the *precise question* at issue" in order to find a statute unambiguous,⁷⁶ subsequent opinions have reformulated this requirement to demand a less exacting expression of congressional intent. The Court has asked merely whether the statute is "ambiguous" or "unclear,"⁷⁷ or whether the statute has a "plain meaning."⁷⁸ Rather than rejecting deference, as *Chevron* did, by holding that a statute displays a clear congressional intent on the precise question in dispute, subsequent opinions have rejected deference because the agency's interpretation was "strained" and "inconsistent" with the statute's "express language,"⁷⁹ because the agency's view was not an "accurate or reasonable interpretation" of the statute,⁸⁰ because a "common sense" or "natural reading" of the statute was contrary to the agency's interpretation;⁸¹ or because an agency's interpretation was "at odds with the plain language of the statute itself."⁸²

The trend thus seems to be toward finding that if one reading of the statute is clearly the most plausible candidate, then the statute is clear. Commentators have confirmed that in applying such a standard, courts more readily find statutory clarity at step one. For example, Professor Cass Sunstein has observed that in many cases the Supreme Court has held that congressional intent is clear even though the statute is sufficiently ambiguous to permit several plausible readings.⁸³ Such opinions often generate stinging dissents that invoke *Chevron's* deference rule.⁸⁴ As a consequence of opening

76. *Chevron*, 467 U.S. at 843 n.9 (emphasis added).

77. See, e.g., *Mobil Oil Exploration & Producing S.E. Inc. v. United Distrib. Cos.*, 498 U.S. 211, 223 (1991); *Honig v. Doe*, 484 U.S. 305, 323 (1988); *Pittston Coal Group v. Sebben*, 488 U.S. 105, 113 (1988); *Young v. Community Nutrition Inst.*, 476 U.S. 974, 980-81 (1986).

78. See, e.g., *Demarest v. Manspeaker*, 498 U.S. 184, 190 (1991) (rejecting deference to administrative interpretation contrary to statute's plain language); *Sullivan v. Stroop*, 496 U.S. 478, 482-83 (1990) (deferring to agency interpretation compelled by statute's plain meaning); *Public Employment Retirement Sys. v. Betts*, 492 U.S. 158, 171 (1989) ("[N]o deference is due to agency interpretations at odds with the plain language of the statute itself.").

79. *Bethesda Hosp. Assn. v. Bowen*, 485 U.S. 399, 404 (1988).

80. *Board of Governors of the Fed. Reserve Sys. v. Dimension Fin. Corp.*, 474 U.S. 361, 368 (1986).

81. *Dole v. United Steelworkers*, 494 U.S. 26, 35 (1990).

82. *Public Employees Retirement Sys. v. Betts*, 492 U.S. 158, 171 (1989).

83. See Cass R. Sunstein, *Law and Administration After Chevron*, 90 COLUM. L. REV. 2071, 2085 (1990) (citing as examples *Dole v. United Steelworkers*, 494 U.S. 26 (1990); *Pittston Coal Group v. Sebben*, 488 U.S. 105 (1988); and *Connecticut Department of Income Maintenance v. Heckler*, 471 U.S. 524 (1985)).

84. See Sunstein, *supra* note 83, at 2085.

up the inquiry at step one to include a wide range of traditional methods of statutory interpretation, the Court has made it easier to find a sufficiently clear intent in statutes to reject deference to the agency's interpretations. It would seem to require a great deal of ambiguity to fail *Chevron's* first step.⁸⁵

B. *Understanding Step Two: When an Agency Interpretation is Unreasonable or Impermissible*

The second step of the *Chevron* test has been the agency-friendly branch of the *Chevron* case law. From 1984 through 1992, the Supreme Court affirmed every agency interpretation that made it to step two.⁸⁶ Recently, however, the Court has begun to reject agency interpretations as unacceptable at *Chevron's* second step.⁸⁷ Overall, there has been little explicit guidance from the Court⁸⁸ as to how courts should structure their application of *Chevron's* step

85. See Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969, 991 (1992) (The step-one "inquiry has tended in practice to devolve into an inquiry about whether the statute as a whole generates a *clearly preferred meaning*. [This] movement from 'specific intention' to 'plain meaning' to 'plain meaning considering the design of the statute as a whole' is but one short step away from 'best meaning.' In other words . . . the Court has moved the [step-one] inquiry a long way toward the exercise of independent judgment."); Sunstein, *supra* note 83, at 2091 ("The Court's own decisions . . . suggest that the mere fact of a plausible alternative view is insufficient to trigger the *Chevron* [deference] rule.").

In a law review article, Justice Scalia also observed that his method of statutory interpretation will often find that statutes have a clear meaning: "One who finds *more* often (as I do) that the meaning of a statute is apparent from its text and from its relationship with other laws, thereby finds *less* often that the triggering requirement for *Chevron* deference exists. It is thus relatively rare that *Chevron* will require me to accept an interpretation which, though reasonable, I would not personally adopt." Scalia, *supra* note 70, at 521.

86. Professor Merrill has examined the rationales behind all of the Supreme Court's *Chevron* cases. His exhaustive analyses show that until recently whenever the Court rejected an agency interpretation, it always did so at step one. Merrill, *supra* note 85, at 1034-38; Thomas W. Merrill, *Textualism and the Future of the Chevron Doctrine*, 72 WASH. U. L.Q. 351, 376-77 (1994). At least one commentator has argued that the behavior of lower courts has been similar. Mark Seidenfeld, *A Syncopated Chevron: Emphasizing Reasoned Decisionmaking in Reviewing Agency Interpretations of Statutes*, 73 TEXAS L. REV. 83, 96 (1994) ("Regardless of whether a reviewing court is deferential or active, once it reaches step two it rarely reverses an agency interpretation as unreasonable.").

87. See *infra* notes 91-94 and accompanying text (discussing recent Supreme Court precedents rejecting agency interpretations at *Chevron's* step two).

88. See Merrill, *supra* note 85, at 993 (observing that "the Court has not given much consideration to step two at any time throughout the post-*Chevron* period . . . [and] the frequency declined even further between the earlier and later periods"); Sunstein, *supra* note 83, at 2104 ("The Supreme Court has given little explicit guidance for determining when interpretations will be found reasonable. In most of the cases rejecting an agency's view, the Court has relied on the first step of *Chevron*, finding an explicit congressional decision on the point."). In a panel discussion, Judge Stephen F. Williams questioned whether step two offered any restriction on an agency's interpretations: "When would an agency fail [the step-two] test? Only when it would flunk the laugh test at the Kennedy School of Public Policy?" Jones et al., *supra* note 75, at 124. But see *infra* section II.B.1-2 (mining the Supreme Court's case law for relevant factors to be considered at step two).

two to determine when an agency's interpretation is unreasonable or impermissible.⁸⁹

This section, however, suggests a theory of judicial review at *Chevron's* step two, by building on the text and logic of the *Chevron* opinion and on a careful review of the Supreme Court's other precedents regarding judicial deference to agency interpretations of statutes. Section II.B.1 argues that an interpretation is "unreasonable" if it strays too far from the natural meaning of the words used in the statutory text and if it is not supported by reasoned deliberation. Section II.B.2 argues that "permissible" interpretations only include those readings supported by *Chevron's* rationales for deference. This section argues that *Chevron* itself, as well as other Supreme Court case law, indicate that courts should look to factors like agency expertise and consistency of interpretation to determine whether Congress intended courts to defer to the agency interpretation at issue.

1. Reasonableness

The starting point for the step-two inquiry remains the statutory text. The court has already scrutinized the text alone and found that it does not display a sufficiently clear congressional intent to establish authoritatively one particular interpretation. At step two, the court proceeds to compare the most ordinary and natural meaning of the text to the interpretation advanced by the administrative agency. The statutory text thus acts as a continuing constraint on an agency's interpretive discretion at step two. "Reasonableness" thus requires an agency interpretation to be properly within its delegated policymaking power because the statute's text embodies the boundaries of the agency's policymaking discretion as established by Congress. Without this constraint, an agency could interpret statutes in ways utterly at odds with the congressional intent embodied in the statute's text. Courts reviewing agency interpretations of ambiguous statutes at *Chevron's* step two should apply its reasonableness requirement to enforce the boundaries represented by an even ambiguous statutory text to maintain the agency's fidelity to congressional will.⁹⁰

89. *Chevron* described the types of agency interpretations that would fail at step two alternatively—using the terms *unreasonable* and *impermissible* without providing any independent content to either term. See *Chevron*, 467 U.S. at 866. This section, however, proposes a standard of judicial review at step two that gives independent meaning to each term.

90. In fact, the Supreme Court's delegation doctrine requires that Congress provide an "intelligible principle" in statutes that delegate policymaking power to administrative agencies. See *American Textile Mfrs. Inst. v. Donovan*, 452 U.S. 490, 543 (1981) (Rehnquist, J., dissenting); *Industrial Union Dept. v. American Petroleum Inst.*, 448 U.S. 607, 671 (1980) (Rehnquist, J., concurring in judgment); *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); *Panama Ref. Co. v. Ryan*, 293 U.S. 388 (1935); *J.W. Hampton, Jr. & Co. v.*

Recent Supreme Court cases that have rejected agency interpretations at step two support this understanding of even ambiguous statutes as providing boundaries on an agency's discretion. For example, in *John Hancock Mutual Life Insurance Co. v. Harris Trust & Savings Bank*,⁹¹ the Court rejected an agency's request for *Chevron* deference because "[b]y reading the words 'to the extent' to mean nothing more than 'if,' the Department has exceeded the scope of available ambiguity."⁹² Similarly, in *City of Chicago v. Environmental Defense Fund*,⁹³ the Court rejected an agency's argument for *Chevron* deference because "the [agency's] interpretation . . . goes beyond the scope of whatever ambiguity [the statute] contains. . . . [The statutory provision] simply cannot be read to contain the [agency's interpretation]."⁹⁴

Also, an agency interpretation is "reasonable" only if the agency explains its interpretation of a statute in a rational and sensible way. Assuring that agencies engage in reasoned deliberation is a traditional justification for judicial review of agency action.⁹⁵ Moreover, this component of the step two inquiry is supported by both *Chevron* and the cases preceding it. In holding that the EPA's construction of the Clean Air Act passed step two, the *Chevron* Court justified this conclusion in part by observing that the "agency considered the matter in a detailed and reasoned fashion."⁹⁶ This requirement that agency interpretations be well-reasoned to merit deference from a reviewing court was a common factor that courts considered in reviewing agencies' statutory interpretations *before Chevron*. The best-known statement of this principle came in *Skidmore v. Swift & Co.*,⁹⁷ in which the Court held that the degree of deference a court should give to an agency's interpretation de-

United States, 276 U.S. 394 (1928). The concept of "reasonableness" explained in the text merely requires that agencies stay within such principles even to the extent they are somewhat ambiguous.

91. 114 S. Ct. 517 (1993).

92. 114 S. Ct. at 531.

93. 114 S. Ct. 1588 (1993).

94. 114 S. Ct. at 1574.

95. See generally LOUIS LEVENTHAL JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION (1965). One scholar has recently argued that courts should ensure that agencies engage in reasoned decisionmaking as the predominant value in applying *Chevron*. See Seidenfeld, *supra* note 86.

96. *Chevron, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 865 (1984). The Court explicitly relied on the agency's reasoned deliberation as one of three reasons (along with the fact that the statute involved a technical policy issue and that the interpretation required the reconciliation of competing policy objectives) for its holding that the ambiguous statutory provision satisfied step two: "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." 467 U.S. at 865 (footnotes omitted).

97. 323 U.S. 134 (1944).

pendent on "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."⁹⁸

2. *Permissibility*

If an agency's interpretation of a statute is reasonable, courts must next look to whether *Chevron's* rationale for deference applies. *Chevron* justifies its presumption of deference to agency interpretations on the rationale that Congress implicitly delegates interpretive authority to an agency because the agency is a better policymaker in the face of statutory ambiguity than a court.⁹⁹ The Supreme Court's cases both before and after *Chevron* have consistently looked to two additional factors to help determine when an agency interpretation is probably the result of a legislative delegation of policymaking power and thus deserves deference: the presence of a particular agency expertise and agency interpretations that are longstanding and consistent.

The importance of technical expertise as a factor that legitimates an agency's interpretation at step two is evident from the

98. 323 U.S. at 140, *quoted in* *Adamo Wrecking Co. v. United States*, 434 U.S. 275, 287 n.5 (1978); *see also* *SEC v. Sloan*, 436 U.S. 103, 117-18 (1978); *Investment Co. Inst. v. Camp*, 401 U.S. 617, 626-27 (1971); *Merrill*, *supra* note 85, at 972-74 ("[I]n deciding what degree of deference to give an executive interpretation, the Court [before *Chevron*] relied on an eclectic cluster of considerations. . . . [One factor] was that interpretations supported by a reasoned analysis were entitled to deference.").

99. *Chevron*, 467 U.S. at 844-45 ("Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. . . . [The agency decision] here is a reasonable policy choice for the agency to make."). As the Court explained:

[A]n agency to which Congress has delegated policy-making responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments. . . . [I]t is entirely appropriate for [the Executive Branch] 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.

When a challenge to an agency construction of a statutory provision . . . really centers on the wisdom of the agency's policy . . . the challenge must fail. In such a case, federal judges — who have no constituency — have a duty to respect legitimate policy choices made by those who do. 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

467 U.S. at 865-66; *see also* *Jones et al. supra* note 75, at 130 (In which Judge Williams observed that "[*Chevron*] reminds us that where the texts provide no serious guidance, 'interpretation' is really policy choice, and that this belongs with the politically responsible."); Richard J. Pierce, *Chevron and its Aftermath: Judicial Review of Agency Interpretations of Statutory Provisions*, 41 VAND. L. REV. 301, 305-07 (1988) ("When a court 'interprets' imprecise, ambiguous, or conflicting statutory language in a particular manner, the court is resolving a policy issue. . . . Like a court, an agency frequently makes policy when it interprets ambiguous or imprecise terms in the statute that grants the agency its legal powers. . . . Once a court realizes that it is reviewing an agency's resolution of a policy issue . . . comparative institutional analysis demonstrates that the agency is a more appropriate institution than a court to resolve the controversy.").

Chevron opinion itself. In *Chevron*, the Court held that the EPA's interpretation of the Clean Air Act satisfied step two in part because it involved a "regulatory scheme [that] is technical and complex" ¹⁰⁰ This focus on technical expertise has much support in the history of Supreme Court precedents according deference to agency interpretations of statutes. ¹⁰¹

Similarly, the importance of an agency's longstanding and consistent interpretation of a statute was regularly considered in the Supreme Court's cases before *Chevron*. ¹⁰² Moreover, this factor has been perhaps the most frequently cited justification since *Chevron*, supporting the Court's approval of agency interpretations at step two. ¹⁰³ In a 1993 case, the Court explicitly stated the importance of this factor in affecting the rigor of judicial review at step two: "[T]he consistency of an agency's position is a factor in assessing the weight that position is due. As we have stated, '[a]n agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is 'entitled to considerably less deference' than a consistently held agency view.' " ¹⁰⁴ Thus this Note offers a theory of *Chevron*'s step two that instructs courts to look at four factors: the extent to which the agency interpretation stretches

100. 467 U.S. at 865; see *supra* note 96 (full quote). Moreover, in explaining the rule, the *Chevron* Court observed that "the principle of deference to administrative interpretations 'has been consistently followed by this Court whenever . . . a full understanding of the force of the statutory policy in the given situation has depended upon more than ordinary knowledge respecting the matters subjected to agency regulations.'" 467 U.S. at 844 (emphasis added). The Court explicitly contrasted agencies with the courts, observing that in specialized administrative areas, "Judges are not experts in the field." 467 U.S. at 865.

101. This is true for cases coming both before and after *Chevron*. See *Aluminum Co. of Am. v. Central Lincoln Peoples' Util. Dist.*, 467 U.S. 380, 390 (1984); *E.I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112, 135 n.25 (1977); *United States v. Shimer*, 367 U.S. 374, 382 (1961); *NLRB v. Seven-Up Bottling Co.*, 344 U.S. 344, 348 (1958). Cases after *Chevron* in which the Court has observed the importance of agency expertise in accepting the agency's interpretation of a statute include *Pauley v. Bethenergy Mines, Inc.*, 501 U.S. 680 (1991); *Litton Financial Printing Division v. NLRB*, 501 U.S. 190 (1991); and *Commodity Futures Trading Commission v. Schor*, 478 U.S. 833 (1986).

102. See *United States v. Clark*, 454 U.S. 555, 565 (1982); *Haig v. Agee*, 453 U.S. 280, 291 (1981); *Watt v. Alaska*, 451 U.S. 259, 272-73 (1981); *General Elec. Co. v. Gilert*, 429 U.S. 125, 143 (1976); *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 274-75 (1974).

103. See, e.g., *California v. FERC*, 495 U.S. 490, 499 (1990) (referring to "the deference this Court must accord to long-standing and well-entrenched decisions, especially those interpreting statutes that underlie complex regulatory regimes" (emphasis added)); *NLRB v. United Food & Commercial Workers' Union*, 484 U.S. 112, 124 n.20 (1987).

Moreover, in at least one instance, the Court has explicitly rejected deference to the BIA, in part because of the inconsistent interpretations it had taken over the years. See *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 n.30 ("An additional reason for rejecting the INS's request for heightened deference to its position is the inconsistency of the positions the BIA has taken through the years."); see *infra* section III.B.2 (arguing that the BIA's interpretation of the single-scheme exception merits less deference because of the inconsistent ways it has interpreted the exception).

104. *Good Samaritan Hosp. v. Shalala*, 113 S. Ct. 2151, 2161 (1993) (quoting *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 n.30 (1987) (quoting *Watt v. Alaska*, 451 U.S. 259, 273 (1981)) (emphasis added)).

too far from the statutory text, the agency's reasoning, the presence of agency expertise, and how longstanding and consistent the agency's interpretation has been. Such a multi-factor approach at step two is supported by the Supreme Court's cases predating *Chevron*, by *Chevron* itself, and by the cases since *Chevron*.¹⁰⁵

III. APPLYING *CHEVRON* TO THE SINGLE-SCHEME EXCEPTION

This Part takes the understanding of *Chevron* developed in Part II and applies it to the controversy over the proper definition of the single-scheme exception, concluding that courts should reject the BIA's single-act test. It provides two alternative arguments to reach this conclusion. Section III.A argues that the text of the single-scheme exception embodies a clear congressional intent to apply the single-plan test. Section III.B then argues that, even if the

105. Before *Chevron*, the Supreme Court lacked a single doctrine that governed how courts should review agencies' statutory interpretations. See Merrill, *supra* note 85, at 972. Instead courts engaged in a case-by-case determination of when to defer to a given agency and when not to defer. In 1976, Judge Henry Friendly described the ad hoc character of the case law, observing that "two lines of Supreme Court decisions on this subject . . . are analytically in conflict Leading cases support[] the view that great deference must be given to the decisions of an administrative agency applying a statute However, there is [also] an impressive body of law sanctioning free substitution of judicial for administrative judgment" on questions of statutory interpretation. *Pittston Stevedoring Corp. v. Dellaventura*, 544 F.2d 35, 49 (2d Cir. 1976), *affd. sub nom. Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249 (1977).

In making these ad hoc determinations, courts relied on a whole host of considerations, which commentators later referred to as "deference factors." See, e.g., Merrill, *supra* note 85, at 972-75; Eric M. Braun, Note, *Coring The Seedless Grape: A Reinterpretation of Chevron U.S.A. Inc. v. NRDC*, 87 COLUM. L. REV. 986 (1987). For example, deference to an agency was generally more appropriate if the issue involved an agency's particular technical expertise or if the agency had held the same interpretation for a long time. See *supra* notes 101-03 and accompanying text. Although courts often relied on these deference factors before *Chevron*, their role in the post-*Chevron* era is a matter of hot debate among commentators. See, e.g., Kenneth W. Starr, *Judicial Review in the Post-Chevron Era*, 3 YALE J. ON REG. 283, 299 (1985) (In which then-Judge Starr opined that one of the leading "unresolved issues" after *Chevron* is whether "any of the [traditionally significant] factors . . . are still relevant."): They have never been explicitly incorporated into *Chevron*'s two-part test, and Justice Scalia, for one, has argued that such factors are now irrelevant to a court's decision whether to defer because *Chevron* replaced the multi-factor decision on deference with a broad presumption that courts must defer to an agency's statutory interpretations unless deference is inappropriate under either of *Chevron*'s two steps. See Scalia, *supra* note 70, at 517, 521 (arguing that under *Chevron*, "there is no longer any justification for giving 'special' deference to 'long-standing and consistent' agency interpretations of law. . . . [T]hose concepts are no longer relevant, or no longer relevant in the same way."). Justice Breyer, on the other hand, in an article written when he was an appellate judge, explicitly counseled in favor of continuing use of these "deference factors," as a guide to when to defer to an agency's view. Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 373, 382 (1986) ("Despite its attractive simplicity, [the *Chevron* approach] seems unlikely in the long run, to replace the complex [deference factor] approach. . . . [P]ressures . . . will tend to build a jurisprudence of 'degree and difference' into *Chevron*'s word 'permissible.'"). This debate appears to have been resolved by the Supreme Court's case law. The factors have not disappeared from Supreme Court opinions in the *Chevron* era, but rather the Court continues to cite to them as reasons for its deference decisions. See Merrill, *supra* note 85, at 980-85; *infra* notes 130-141 and accompanying text.

exception does not demonstrate that Congress clearly intended to apply the single-plan test, courts should reject the BIA's single-act test as an unreasonable and impermissible reading of the statute.

A. Step One Applied to the Single-Scheme Exception

Section II.A concluded that a court can use its traditional tools of statutory construction at *Chevron's* step one in determining whether a statutory provision is ambiguous. A broad inquiry employing these tools indicates that the single-scheme exception clearly embraces the single-plan test. Specifically, the statutory text's plain meaning and an established canon of construction in immigration law seem to require that courts adopt the single-plan test.

1. The Ordinary Meaning of "Scheme"

The word *scheme* has a natural and ordinary meaning. A *scheme* is a plan, and especially a plan that involves a coherent set of related parts. The American Heritage Dictionary defines a "scheme" as

1. A systematic *plan* of action. 2. An orderly combination of related parts or elements. 3. A *plan*, esp. a secret or devious one; *plot*. 4. A chart, diagram, or outline of a system or object. 5. A visionary *plan*.¹⁰⁶

Thus the natural and ordinary meaning of *scheme* combines two ideas. The primary idea is of a conscious plan or design. Such a plan or design requires a certain forward-looking conceptual state of mind on the part of the planner. The second idea is that this design involves related, coherent parts that are systematic and or-

106. AMERICAN HERITAGE DICTIONARY 1097 (2d ed. 1985) (emphasis added); see also MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 1044 (10th ed. 1993) (defining *scheme* as "1 a *archaic* (1): a mathematical or astronomical diagram (2): a representation of the astrological aspects of the planets at a particular time b: a graphic sketch or outline 2: a concise statement or table: EPITOME 3: a *plan or program of action*; esp: a crafty or secret one 4: a systematic or organized framework: DESIGN *syn* see PLAN" (emphasis added)); ROGET'S II THE NEW THESAURUS 866 (1988) (giving synonyms for *scheme*: 1. A method for making, doing, or accomplishing something. 1. DESIGN . . . 2. A secret plan to achieve an evil or illegal end. 2. PLOT"); WEBSTER'S COLLEGIATE THESAURUS 705 (1976) (giving synonyms for *scheme*: "1 *syn* PLAN 1, blueprint, design, game plan, project, strategy . . . 2 *syn* PLOT 2, cabal, conspiracy, covin, intrigue, machination, practice"); WEBSTER'S II NEW RIVERSIDE UNIVERSITY DICTIONARY 1044 (1984) (defining *scheme* as "1. A systematic *plan of action*. 2. An orderly combination of related or successive parts or elements: SYSTEM. 3. A *plan*, esp. a secret or underhand one: PLOT. 4. A chart, diagram, or outline of a system or object. 5. A *visionary plan*." (emphasis added)).

The Supreme Court has often sanctioned the use of dictionaries as an effort to get at the natural and plain meaning of statutory text. See Merrill, *Textualism*, *supra* note 86, at 355-57 (citing nine Supreme Court cases that relied on dictionaries in 1988 and 22 cases in 1992 and observing "a rise in the use of dictionaries" by the Supreme Court); see also A. Raymond Randolph, *Dictionaries, Plain Meaning, and Context in Statutory Interpretation*, 17 HARV. J.L. & PUB. POLY. 71 (1994); Note, *Looking It Up: The Use of Dictionaries in Statutory Interpretation*, 107 HARV. L. REV. 1437 (1994).

derly, like a chart or diagram. These two ideas combine into a *scheme* when the related parts cohere because of a conscious design or plan. The ordinary and natural meaning of "single scheme of criminal misconduct" therefore is a plan, plot, or design to commit a coherent set of related crimes. The single-plan interpretation of "single scheme of criminal misconduct" accurately embodies the statute's natural and ordinary meaning, by focusing on whether the alien planned the crimes and executed those crimes as the related parts of one systematic plan or plot.¹⁰⁷

2. *A Canon of Construction*

In addition to the statute's natural meaning, a traditional canon of statutory construction supports finding that the single-scheme exception clearly embodies the single-plan test. The Supreme Court has established a customary rule on how to interpret deportation laws. The Court has held that courts should read deportation statutes quite narrowly and resolve all doubts in favor of the alien. The Court explained that

deportation is a drastic measure and at times the equivalent of banishment or exile [S]ince the stakes are considerable for the individual, we will not assume that Congress meant to trench on his freedom beyond that which is required by the *narrowest of several possible meanings* of the words used.¹⁰⁸

This traditional rule of interpretation supports the single-plan test because that test reads the exception in the way most generous to aliens. The BIA's single-act test, on the other hand, least protects the interests of aliens by nearly reading the exception out of the statute — applying it only in the extremely rare circumstances when the alien's crimes result from a single physical act. Similarly the First Circuit's time-to-reflect test is generally less generous to aliens because it requires a very short time span between the crimes. The BIA, in fact, has criticized the single-plan test as being too generous to aliens because it "would allow for criminals to commit numerous similar crimes over a period of time, but still avoid deportability. . . ."¹⁰⁹ The Supreme Court, however, has made clear

107. Similarly, the idea of a *scheme* in criminal law involves conscious design on the part of the criminal. See FED. R. CRIM. P. 8(a), which permits separate offenses to be joined in a single trial so long as they occur pursuant to a common scheme). Otherwise, the Rule does not permit separate offenses to be joined out of concern that juries will cumulate evidence; see also WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE § 17.1(a) (2d ed. 1992) which discusses case law defining "common scheme".

108. *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948) (emphasis added). In a 1987 decision that rejected *Chevron* deference to the BIA, the Supreme Court approvingly cited the *Fong Haw Tan* canon as a "longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien," although the Court did not rely on the canon. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987).

109. *In re Adetiba*, Interim Decision 3177, 1992 WL 195812, at *5 (BIA May 22 1992).

that immigration statutes should be interpreted wherever possible to avoid deportability. The single-plan test is thus consistent with the Supreme Court's interpretive presumption regarding the congressional intent embodied in the deportation laws.¹¹⁰

Some courts and the INS, however, have rejected the single-plan test by invoking the canon that requires avoiding statutory interpretations that lead to "absurd results."¹¹¹ These courts suggest that the single-plan test in practice would lead to "theoretical absurdities," such as permitting an alien who committed multiple robberies to avoid deportation simply by alleging that the robberies were all carried out pursuant to a prior plan.¹¹² The experiences of courts that have applied the single-plan test, however, belie this allegation of its possible absurd consequences. Although the single-plan test may be more generous to aliens than the BIA's test, it does not necessarily provide an effortless way for convicted aliens to avoid deportation. Single-plan courts have defined *plan* strictly to require a close relationship between the crimes, have required that evidence factually support an alien's contention of a single plan, and have allowed the INS to establish a presumption of no single plan where the facts show that such a plan is unlikely.¹¹³ For example, courts have presumed that no single plan existed when the crimes were separated by a significant amount of time. The *Wood*

110. A plausible argument can be made that courts cannot use canons to determine that the meaning of a statute is clear at *Chevron's* step one, because courts only employ canons when the meaning of a statutory text is ambiguous. But the *Fong Haw Tan* canon can be employed at step one as a guide to congressional intent, which is how the Supreme Court articulated it: "[W]e will not assume that *Congress meant* to trench on his freedom beyond that which is required . . ." *Fong Haw Tan*, 333 U.S. at 10. Because the goal of *Chevron's* first step is to determine the clarity of congressional intent, a court should employ all guides to congressional intent. Cf. Merrill, *supra* note 85, at 988 (observing that "the canons clearly qualify as a 'traditional tool of statutory construction' " but also acknowledging the argument above). At least one commentator has argued that a canon very similar to the *Fong Haw Tan* canon should continue to be applied as consistent with *Chevron*. See Note, *Chevron and the Canon Concerning Indians*, 60 U. CHI. L. REV. 1015, 1022 (1993) (arguing that "[b]efore applying a canon, a court should determine if its application is consistent with the Court's post-Chevron presumptions concerning congressional intent" and concluding that the canon requiring statutes to be interpreted favorably to Indians should continue to be applied); see also Denise W. DeFranco, Note, *Chevron and Canons of Statutory Construction*, 58 GEO. WASH. L. REV. 829 (1990).

The *Fong Haw Tan* canon may also be a particularly strong guide to congressional intent regarding the single-scheme exception because *Fong Haw Tan* was decided in 1948 — four years before the Congress that adopted the 1952 legislation containing the single-scheme exception. Moreover, the *Fong Haw Tan* Court was construing language that, like § 241, restricted the category of aliens otherwise deportable. Therefore, it is likely that the 1952 Congress understood the manner in which the courts would construe the single-scheme exception in the new immigration statute.

111. See, e.g., *Church of the Holy Trinity v. United States*, 143 U.S. 457, 459-60 (1892).

112. *Iredia v. INS*, 981 F.2d 847, 849 (5th Cir.), cert. denied, 114 S. Ct. 203 (1993).

113. See *supra* note 51 (discussing the case law in which single-plan courts created "the Chanan presumption" that allows the government to meet its burden of proof by showing that the alien's crimes are separated by a long time interval or are otherwise unrelated).

court explained that in some cases the government can meet its burden to show no single scheme merely by pointing to certain facts:

It may be that in some cases the proof of the commission of two crimes may by the very nature of the crimes themselves, or the time or circumstances of their commission, be reasonable, substantial and probative evidence that they did not arise out of a single scheme of criminal misconduct.¹¹⁴

In several cases, single-plan courts have upheld deportation orders despite an alien's contention that his crimes arose out of a single scheme. For example, in both *Nason v. INS*¹¹⁵ and *Leon-Hernandez v. INS*,¹¹⁶ the courts held that the government had met its burden of proof in part due to the long time interval between the crimes, despite evidence regarding the similarity of the crimes and despite the aliens' contentions that the crimes were pursuant to a single plan.¹¹⁷ Similarly, in *Chanan Din Khan v. Barber*,¹¹⁸ where the alien had been convicted of two counts of willfully evading income taxes for two consecutive years, the court held that because the alien had not produced sufficient evidence of a single scheme, his bare contention that there was a scheme was inadequate.

The single-plan test thus requires immigration judges and the BIA to look at all the circumstances surrounding the crimes and to make a factual finding whether the crimes actually arose out of a single scheme of criminal misconduct. While such findings are open to all the problems inherent in trying to determine what actually happened after the fact, such a test does not necessarily lead to "theoretical absurdities."

Nor have the courts applying the single-plan test hobbled INS enforcement efforts. Under the single-plan test, the INS clearly can institute deportation against aliens who commit crimes that appear *prima facie* unrelated or are separated by such a long time interval that it is unlikely that the crimes were part of a single plan. In these cases, the burden then effectively shifts to the defendant alien to produce some evidence of a plan, and the immigration judge can evaluate the credibility and persuasiveness of such evidence.¹¹⁹

B. Step Two Applied to the Single-Scheme Exception

Even though the single-plan test appears to capture the natural and ordinary meaning of the single-scheme exception, one could

114. *Wood v. Hoy*, 266 F.2d 825, 831 (9th Cir. 1959).

115. 394 F.2d 223 (2d Cir.), *cert. denied*, 393 U.S. 830 (1968).

116. 926 F.2d 902 (9th Cir. 1991).

117. *Nason*, 394 F.2d at 227; *Leon-Hernandez*, 926 F.2d at 904-05.

118. 253 F.2d 547 (9th Cir.), *cert. denied*, 357 U.S. 920 (1958).

119. See generally note 51 (describing how the courts created the *Chanan* presumption, permitting the INS to meet its burden of proof in such cases).

argue that the Immigration and Nationality Act does not express a clear congressional intent on this precise issue because the phrase is not defined by the statute, nor does the legislative history tell us how to define it.¹²⁰ A court taking this approach would then have to move on to *Chevron*'s step two and defer to any reasonable BIA interpretation of this ambiguous language. This section argues, however, that courts should reject the BIA's single-act interpretation of the single-scheme exception as an unreasonable and impermissible interpretation of the immigration statute. Section III.B.1 compares the statutory text to the BIA's interpretation to conclude that the BIA's view is not "reasonable," because it embodies a highly strained reading of the statute and because the BIA has not provided any detailed reasoning to support such a strained reading. Section III.B.2 then argues that the BIA's interpretation also does not merit judicial deference as a "permissible" reading of the statute.

1. *Why the BIA's Reading is Unreasonable*

The BIA's single-act interpretation of the single-scheme exception embodies a strained and insufficiently reasoned reading of the statute. First, the BIA's test belies the natural and ordinary meaning of the statutory text, focusing instead on whether the crimes are part of a single physical act. Even if *scheme* does not clearly mean *plan*, it surely does not mean *act*.¹²¹ As the Ninth Circuit has explained:

[T]his is not what the statute says. The Board of Immigration Appeals . . . has applied the statute as if it read "single criminal act."

We must take the language of the statute as we find it. It says "not arising out of a single scheme of criminal misconduct"; it does *not* say "not arising out of a single criminal *act*." If such latter reading had been the intent of Congress they could have so declared.¹²²

Other courts have agreed. For example, the First Circuit reasoned that "to equate 'single scheme' with 'act' or 'transaction' may give insufficient scope to the statutory phrase, particularly if these words are narrowly construed. As other courts have noted, the Congress

120. This language is thus arguably ambiguous for the same reason that the language "stationary source" was ambiguous in *Chevron*. See also *supra* notes 76-85 and accompanying text (discussing the uncertainty over what qualifies as sufficiently ambiguous to trigger step two under *Chevron*).

121. As discussed above, dictionaries and thesauri demonstrate that the plain and ordinary meaning of *scheme* is a "plan" or a "design" or a "system." See *supra* section III.A.1. None of these sources, however, equated the word *scheme* with the words *act* or *episode*. Although the Fifth and Tenth Circuits have held the BIA's single-act interpretation of the single-scheme exception to be reasonable, see *supra* notes 60-63 and accompanying text, neither provided rigorous analysis of the BIA's view, see *supra* note 68, and the Fifth Circuit later expressed doubt about the wisdom of its previous decision, see *supra* note 16.

122. *Wood v. Hoy*, 266 F.2d 825, 830 (9th Cir. 1959) (footnote omitted).

could have chosen more precise words.”¹²³ And the Second Circuit declared that “[t]he statutory language, ‘a single scheme of criminal misconduct,’ is not so narrow as a single criminal act or transaction.”¹²⁴ Thus even if the statutory term *scheme* is somewhat ambiguous, the BIA’s “interpretation . . . goes beyond the scope of whatever ambiguity [the statute] contains.”¹²⁵

Additionally, the BIA has not “considered the matter in [the kind of] detailed and reasoned fashion”¹²⁶ that merits judicial deference. The BIA has offered no justification for equating the words *scheme* and *act* or for ignoring the plain and natural meaning of the statutory text.¹²⁷ Nor has the BIA offered any reason to ignore the canon articulated in the Supreme Court’s *Fong Haw Tan* case that presumes Congress intends a restrictive reading of deportation provisions.¹²⁸ Finally, the BIA’s argument that the single-plan test would lead to “theoretical absurdities” is belied by the experiences of the courts applying the single-plan test and the nuances of the test that single-plan courts have developed to accommodate the practical realities of deportation enforcement.¹²⁹

2. *Why the BIA’s Interpretation is Impermissible*

Perhaps the most persuasive reason that courts have traditionally cited in deferring to an agency’s interpretation of a statute is the presence of a highly complicated question calling on an agency’s special expertise,¹³⁰ but this rationale for deference is inapplicable to the single-scheme exception. This attention to expertise reflects Congress’s understandable desire to refer questions to the institution — whether a court or an agency — with the most competence to answer the question. But the definition of the single-scheme exception does not seem to call on the particular technical competence of the Board of *Immigration Appeals*. Rather, divining what Congress meant by “scheme” seems to fall more comfortably within the courts’ specialized skills of both statutory construction and evaluating criminal behavior.

The other traditional deference factor most often cited by courts as a reason to accord an agency deference — the longstanding and

123. *Pacheco v. INS*, 546 F.2d 448, 451 (1st Cir. 1976), *cert. denied*, 430 U.S. 985 (1977).

124. *Nason v. INS*, 394 F.2d 223, 227 (2d Cir.), *cert. denied*, 393 U.S. 830 (1968).

125. *Chicago v. Environmental Defense Fund*, 114 S. Ct. 1588, 1594 (1994) (rejecting an agency’s argument for *Chevron* deference because “the [agency’s] interpretation . . . goes beyond the scope of whatever ambiguity [the statute] contains”).

126. *Chevron, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 865 (1984).

127. *See supra* note 68.

128. *See supra* notes 108-10 and accompanying text.

129. *See supra* notes 111-19 and accompanying text.

130. Indeed, such a question of expertise was involved in *Chevron* itself, as was explicitly noted by the Court. 467 U.S. at 865.

consistent character of an agency's view¹³¹ — is similarly inapplicable to interpreting the single-scheme exception. This factor might seem to weigh in the BIA's favor because the Board has referred to the *Adetiba* test as its "historic approach."¹³² Nevertheless, an examination of the BIA case law reveals that the Board has actually interpreted the single-scheme exception in a variety of ways.¹³³ Although consistently rejecting the single-plan approach,¹³⁴ the BIA has formulated its interpretation of "single scheme" in language of extraordinary diversity. The BIA has employed a variety of formulations to find that multiple crimes did not arise out of a single scheme, by focusing on such different factors as the unitary character of the alien's actions;¹³⁵ the number of victims;¹³⁶ the passage of time between crimes;¹³⁷ the necessity of the first crime as making possible further crimes;¹³⁸ whether the crimes were motivated by the same impulse;¹³⁹ a "moral" characterization of the crimes;¹⁴⁰ and whether the crimes shared a specific objective.¹⁴¹ These diverse characterizations suggest much less the principled consistency of the BIA's view and much more the Board's desire to alter its reading of the statute to accommodate various factual circumstances.

131. See *supra* notes 102-04 and accompanying text.

132. See *In re Adetiba*, Interim Decision 3177, 1992 WL 195812, at *1 (BIA May 22, 1992).

133. Cf. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 n.30 (1987) (The Supreme Court rejected deference to an interpretation of the Immigration statute by the BIA, in part because of "the inconsistency of the positions the BIA has taken through the years." The Court observed that "[t]he BIA has [interpreted the statute] in at least three different ways.").

134. See *Adetiba*, 1992 WL 195812, at *1; *In re J*, 6 I & N Dec. 382 (BIA 1954).

135. See *In re B*, I & N Dec. 236, 239 (BIA 1958) (finding that a single scheme existed, where "essentially one episode existed" (emphasis added)).

136. See *In re B*, 8 I & N Dec. at 239 (observing that a single scheme has been found "[w]here there is in fact one physical act affecting one person" (emphasis added)).

137. See *In re B*, 8 I & N Dec. at 239 (observing that a single scheme has been found "[w]here there are a series of similar acts which occurred at 'one time'" (emphasis added)).

138. See *In re B*, 8 I & N Dec. at 239 (observing that a single scheme has been found "[w]here the acts occur within a comparatively short time of each other, involve the same parties, and the first act or acts are committed for the purpose of making possible the specific criminal objective accomplished by the last of the criminal acts" (emphasis added)).

139. See *In re Pataki*, 15 I & N Dec. 324, 326 (BIA 1974) (observing that a single scheme has been found where "both crimes were committed within a few minutes of each other as the result of the same criminal impulse" (emphasis added)).

140. See *In re D*, 5 I & N Dec. 728, 730 (BIA 1954) (holding there is a single scheme where "morally the transaction constitutes only a single wrong" (emphasis added)).

141. See *In re Z*, 6 I & N Dec. 167, 171 (BIA 1954) (holding there is a single scheme where "both [crimes] are . . . designed to accomplish a specific and limited criminal objective" (emphasis added)).

CONCLUSION: THE CASE FOR STEP TWO

This Note has argued that under the analysis of *Chevron*, courts should reject the BIA's interpretation of the single-scheme exception. It has provided two alternative arguments to support this conclusion — one at each of *Chevron*'s two steps.¹⁴² Given that when the Supreme Court has rejected an agency's interpretation under *Chevron*, it has almost always done so at the first step of the analysis,¹⁴³ it would seem most in line with this precedent for courts to reject the BIA's test at *Chevron*'s first step. Nevertheless, this Note concludes that rejecting the BIA's test at the second step is a preferable approach.¹⁴⁴ In this regard, it has provided a standard of judicial review for courts to apply at this second step derived from traditional judicial insights regarding when courts should defer to agency interpretations of statutes. This understanding of step two focuses on the underlying important questions of which institution

142. The necessity of providing both arguments is due to the uncertainty in when the Supreme Court's standards will find a statute to be sufficiently ambiguous to require a court to ignore what might seem to be the most plausible interpretation and move on to the analysis at step two. See *supra* notes 70-85 and accompanying text.

143. According to Professor Merrill's encyclopedic analyses, through the 1992 term, the Supreme Court clearly applied the *Chevron* framework to reject agency interpretations fourteen times. In all fourteen cases, it rejected the agency's view at step one by finding that the statute embodied a clear meaning that was different from the view adopted by the agency. Merrill, *Textualism*, *supra* note 85, at 1034-38; Merrill, *supra* note 86, at 376-77. But see *supra* notes 91-94 and accompanying text (describing two recent cases where the Court apparently struck down agency interpretations at step two).

144. If a court rejects an agency's interpretation at *Chevron*'s step two, it remains unclear whether the court should itself independently interpret the statute or remand to the agency for a new interpretation. Strong institutional arguments can be made in favor of a court independently construing a statute after it has rejected deference to an agency at step two. First, if a court knows that it will have to remand, then the only way it will be able to interpret the statute itself is by finding sufficient clarity to satisfy *Chevron*'s step one. Therefore, remand may give a court incentive to strain to find clarity at step one in order to adopt its own interpretation. Second, if courts independently interpret after rejecting an agency interpretation at step two, this provides an even stronger incentive for agencies to do a good job of interpreting the statute the first time around. Finally, such independent interpretation may be more efficient than a time-consuming remand. If a court were to interpret independently the single-scheme exception after rejecting the BIA's single-act test, the arguments provided in section III.A would support a single-plan test interpretation. Additionally, a court might elaborate on this test regarding how closely related the crimes need to be to satisfy the idea of coherence in the word *scheme* — for example, by requiring that all the crimes be necessary to accomplish one specific objective and that they be close in time and space.

Nevertheless the logic of *Chevron* seems to require a court to remand the interpretive question to the agency. If a court remanded the single-scheme exception to the BIA for a second chance to fill the policy gap in the statute, what would be a reasonable and permissible interpretation? This Note has concluded both that the single-act test is simply too strained a reading of the statutory text and that the single-plan test embodies a natural and ordinary meaning of the text. Thus the BIA could adopt a version of the single-plan test, perhaps as elaborated earlier. Whether or not the BIA could reasonably and permissibly formulate some other standard, such as the First Circuit's time-to-reflect test, should turn on how well-reasoned the BIA's new interpretation is and how far it stretches the statutory text.

is better suited to answer the interpretive question and whether Congress delegated interpretive authority to the agency.

Such an application of *Chevron's* step two is preferable to a *Chevron* that invariably rejects agency interpretations at step one, for three reasons. First, such a step-two analysis is the best way to allocate questions of statutory interpretation between institutions by comparing their strengths and weaknesses. As *Chevron* observed, agencies are often better interpreters of statutes where they are more politically accountable and have greater expertise than courts. But agencies may be driven by political pressures to warp the meaning of statutes or by the pressures of a heavy administrative caseload to engage in cursory and inconsistent reasoning. Moreover, for some questions of statutory interpretation the agencies may not possess a comparative advantage in expertise over the courts. In such situations, courts should police the agency's reasoning and ensure that the agency's discretion is confined to the boundaries of meaning that Congress established in the statute.

Second, a focus on step two fosters a healthy institutional tension or dialogue between the judicial and administrative branches. Because courts always have the last word in interpreting statutes, the genius of *Chevron* was in *requiring* the courts presumptively to defer to an agency's interpretation that they otherwise would be under no requirement even to consider. But such a presumption should not be absolute. Rejecting agency interpretations at step two helpfully requires the courts to justify nondeference with good reasons — to explain why the court is a better interpreter of a particular statute in any given case. This understanding of *Chevron's* step two provides proper incentives *both* to the courts — requiring them to defer to agency interpretations unless they can articulate a good reason not to — and to the agencies, letting them know that courts will defer to their interpretations *only* if they engage in detailed and reasoned analysis and do not stretch the statute's text too far beyond its ordinary meaning.

Finally, by requiring legitimate reasons for courts to reject agency interpretations even where a statute is arguably ambiguous, this understanding of step two avoids a disingenuous and perplexing debate about whether a statute is sufficiently clear. Although the clarity of congressional intent is surely one good reason to reject unacceptable agency interpretations, it does not provide helpful guidance as to which is the better institution to interpret statutes that are not crystal clear. This Note concludes that *Chevron's* step two provides an effective way for courts to take up their traditional historical role of policing agency action. Such a role offers the best allocation of authority among institutions: agencies would have flexibility to make policy choices that would be presumptively valid,

and courts would retain the ultimate power to cabin agency discretion within the bounds of the law, but only by providing particular good reasons for rejecting the agencies' views.