CHEVRON AS A DOCTRINE OF HARD CASES

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According to the conventional wisdom, the Chevron *doctrine rests on a presumption about congressional intent—a presumption that when a statute is ambiguous, Congress intended the gap to be filled by the agency charged with administering the statute. But the presumption is a mere fiction; when Congress enacts a statute, it generally has no view on who should resolve the ambiguities that later arise.*

This Article proposes a new theory of Chevron*, one that rests on a simple reality: no matter how determinate the law may seem, there will inevitably be hard cases—cases in which the law runs out before providing a solution. As legal positivism teaches, hard cases cannot be decided by merely applying existing law. When the law runs out, a case can be decided only by making new law to fill the gap. There are thus two distinct stages in deciding every hard case: applying the law and making it.*

This Article argues that these two stages correspond to Chevron*'s two steps. Step One is the ordinary, law-applying stage of any case of statutory interpretation. Step Two is the law-making stage, when a court is faced with a gap to fill. The presence of an agency construction, however, means that the court itself need not make law to fill that gap; instead, it may defer to the law-making of the agency—which, unlike the court, is accountable to the political branches. Viewed this way, deference emerges as an act of judicial self-restraint, grounded in the recognition that the law carries greater legitimacy when made by politically accountable agencies than by unelected judges.*

This positivist account of Chevron *elucidates the doctrine's familiar two-step inquiry, shedding light on longstanding questions about the doctrine's application. It also answers recurring objections to judicial deference more generally, including the claim that such deference conflicts with the Constitution. Finally, understanding* Chevron *as a doctrine of hard cases has important implications for the scope of* Chevron*'s domain.*

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INTRODUCTION

The most important doctrine of statutory construction in the modern administrative state rests today on a legal fiction. That doctrine, announced three decades ago by the Supreme Court in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, directs courts to defer to reasonable agency constructions of ambiguous statutes.[1] The conventional wisdom holds that the doctrine rests on a presumption about congressional intent—a presumption that when a statute is ambiguous, Congress intended the gap

1. 467 U.S. 837, 843–44 (1984).

to be filled by the agency charged with administering the statute.[2] On this view, shared by scholars and jurists alike from across the philosophical spectrum, courts are merely respecting Congress's wishes when they defer to agency constructions of law.[3]

2. *See* City of Arlington v. FCC, 133 S. Ct. 1863, 1868 (2013) ("*Chevron* is rooted in a background presumption of congressional intent . . . ."); FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159 (2000) ("Deference under *Chevron* to an agency's construction of a statute that it administers is premised on the theory that a statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps."); Smiley v. Citibank (S.D.), N.A., 517 U.S. 735, 740–41 (1996) (embracing the "presumption that Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows").

3. *See, e.g.*, Robert A. Anthony, *Which Agency Interpretations Should Bind Citizens and the Courts?*, 7 YALE J. ON REG. 1, 4 (1990) ("The threshold issue for the court is always one of congressional intent: did Congress intend the agency's interpretation to bind the courts? The touchstone in every case is *whether Congress intended to delegate to the agency the power to interpret with the force of law in the particular format that was used*."); Curtis A. Bradley, Chevron *Deference and Foreign Affairs*, 86 VA. L. REV. 649, 670 (2000) ("The linchpin of the *Chevron* doctrine . . . is not realism or democratic theory, but rather a theory of delegation."); Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 372 (1986) (arguing that one justification for deference that "can reconcile apparent conflict in case law descriptions of a proper judicial attitude towards agency decisions of law . . . rests upon Congress' intent that courts give an agency['s] legal interpretations special weight, an intent that (where Congress is silent) courts may impute on the basis of various 'practical' circumstances"); William N. Eskridge, Jr., *Vetogates,* Chevron*, Preemption*, 83 NOTRE DAME L. REV. 1441, 1463 (2008) ("[T]o the extent that *Chevron* demands special judicial deference to certain agency interpretations of law, the justification must be congressional delegation of lawmaking power . . . ."); Elizabeth Garrett, *Legislating* Chevron, 101 MICH. L. REV. 2637, 2637 (2003) ("According to the consensus view, *Chevron* deference is consistent with *Marbury*, as long as Congress has delegated to agencies the power to make policy by interpreting ambiguous statutory language or filling gaps in regulatory laws."); John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 623 (1996) ("[B]inding deference is the product of Congress's right to delegate legislative authority to administrative agencies."); Thomas W. Merrill & Kristin E. Hickman, Chevron*'s Domain*, 89 GEO. L.J. 833, 872 (2001) ("[W]e think that the congressional-intent theory is the best of the three explanations for the legal foundation of *Chevron* deference."); Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 516 ("'The extent to which courts should defer to agency interpretations of law is ultimately a function of Congress' intent on the subject as revealed in the particular statutory scheme at issue.'" (quoting Process Gas Consumers Grp. v. U.S. Dep't of Agric., 694 F.2d 778, 791 (D.C. Cir. 1982) (en banc) (internal quotation marks omitted))); Laurence H. Silberman, Chevron*—The Intersection of Law & Policy*, 58 GEO. WASH. L. REV. 821, 822 (1990) (explaining that "Congress is presumed to delegate" to agencies the authority to resolve ambiguities in statutory meaning); Matthew C. Stephenson & Miri Pogoriler, Seminole Rock*'s Domain*, 79 GEO. WASH. L. REV. 1449, 1449–50 (2011) ("[A] consensus has gradually emerged that *Chevron* is grounded in a presumption (likely a legal fiction) about congressional

No one, however, believes the presumption reflects actual congressional intent.[4] The truth of the matter is that when Congress enacts a statute, it generally has no view on who should resolve the ambiguities that later arise.[5] Although Congress sometimes delegates authority to an agency "to define a statutory term or prescribe a method of executing a statutory provision,"[6] it usually has nothing to say about how statutory gaps should be filled. The presumption about congressional intent is but a legal fiction.[7]

intent."); Cass R. Sunstein, *Law and Administration After* Chevron, 90 COLUM. L. REV. 2071, 2076 (1990) ("*Chevron* is best defended as a sensible reconstruction of congressional instructions in light of the relevant institutional capacities . . . .").

4. *See* John F. Duffy, *Administrative Common Law in Judicial Review*, 77 TEX. L. REV. 113, 198 (1998) ("[I]mplicit delegation theory lacks any solid basis in actual congressional intent."); Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452, 470 (1989) ("*Chevron* offers no evidence to support its conclusion that silence or unclarity in a regulatory statute typically represents Congress's deliberate delegation of meaning-elaboration power to the agency."); Manning, *supra* note 3, at 623 ("[*Chevron*'s] categorical presumption cannot be explained in terms of actual or imputed congressional expectations about the allocation of law-interpreting authority between agencies and courts."); Caleb Nelson, *Statutory Interpretation and Decision Theory*, 74 U. CHI. L. REV. 329, 348, 350 n.33 (2007) (reviewing ADRIAN VERMEULE, JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION (2006)) ("The *Chevron* canon . . . cannot plausibly be defended as an estimation of some preexisting legislative intent.").

5. *See* David J. Barron & Elena Kagan, Chevron*'s Nondelegation Doctrine*, 2001 SUP. CT. REV. 201, 203 (2001) ("Congress so rarely discloses (or, perhaps, even has) a view on this subject as to make a search for legislative intent chimerical and a conclusion regarding that intent fraudulent in the mine run of cases."); Merrill & Hickman, *supra* note 3, at 871 ("The principal problem [with the congressional-intent theory] is the evidence supporting the presumption that Congress generally intends agencies to be the primary interpreters of statutory ambiguities is weak."); Scalia, *supra* note 3, at 517 ("In the vast majority of cases I expect that Congress *neither* (1) intended a single result, *nor* (2) meant to confer discretion upon the agency, but rather (3) didn't think about the matter at all.").

6. United States v. Vogel Fertilizer Co., 455 U.S. 16, 24 (1982) (internal quotation marks omitted); *see, e.g.*, Batterton v. Francis, 432 U.S. 416, 425 (1977) (concluding that Congress "expressly *delegated* to the Secretary [of Health, Education, and Welfare] the power to prescribe standards for determining what constitutes 'unemployment'" for purposes of eligibility for benefits under the Aid to Families with Dependent Children-Unemployed Fathers program).

7. *See* Barron & Kagan, *supra* note 5, at 212 ("Because Congress so rarely makes its intentions about deference clear, *Chevron* doctrine at most can rely on a fictionalized statement of legislative desire . . . ."); Bradley, *supra* note 3, at 671 ("The *Chevron* delegation presumption . . . has a fictional quality to it."); Breyer, *supra* note 3, at 370 ("For the most part courts have used 'legislative intent to delegate the law-interpreting function' as a kind of legal fiction."); Scalia, *supra* note 3, at 517 (acknowledging that the *Chevron* doctrine "represents merely a fictional, presumed intent, and operates principally as a background rule of law against which Congress can legislate"); Cass R. Sunstein, *Beyond* Marbury*: The Executive's Power To Say What the Law Is*, 115 YALE L.J. 2580, 2592 n.58 (2006) (noting that, because "it is hard to tease out, from the existing legal materials, an authoritative legislative

The Supreme Court has nevertheless adhered to that fiction and developed a complex test for when the presumption should be honored. The point of the test, as the Court explained in *United States v. Mead*, is to determine whether "Congress delegated authority to the agency generally to make rules carrying the force of law."[8] But because actual congressional intent on that question is hard to come by, the test necessarily turns on the practical circumstances of each case and a court's own judgment of whether deference would make sense in light of them.[9]

While paying all this attention to what the presumption means for *Chevron*'s domain, the Court has said little, if anything, about what the presumption means for the doctrine's familiar two steps. The Court in *Chevron* did say, of course, that a court must inquire whether Congress has spoken directly to the statutory question at Step One, and if not, whether the answer furnished by the agency is reasonable at Step Two.[10] But that general description leaves many questions unanswered:

- What methods of statutory interpretation should courts use at Step One? *Chevron* directs courts to employ the "traditional tools of statutory construction,"[11] but what are those tools? Some of the Court's decisions look to legislative history;[12] others rely on only statutory text and structure.[13] One scholar has said that the "traditional tools" include reliance on statutory purpose;[14] another has argued that they do not.[15] Yet a third has suggested that they encompass "[c]onstitutionally inspired norms, along with many others that serve institutional or substantive goals."[16]
- Just how clear must a statute be for the inquiry to end at the first step? Is it enough for the court to have a "firm conviction" about the statute's meaning?[17] Or should the court proceed to Step Two "so

judgment" on "the question of deference to executive interpretations," "it is necessary . . . to speak in terms of legal fictions").

8. 533 U.S. 218, 226–27 (2001).

9. *See* Barron & Kagan, *supra* note 5, at 212; Breyer, *supra* note 3, at 370.

10. Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843–44 (1984).

11. *Id.* at 843 n.9.

12. *See, e.g.*, INS v. Cardoza-Fonseca, 480 U.S. 421, 432–43 (1987); *Chevron*, 467 U.S. at 862–64.

13. *See, e.g.*, MCI Telecomms. Corp. v. AT&T Co., 512 U.S. 218, 225–29 (1994); K Mart Corp. v. Cartier, Inc., 486 U.S. 281, 291 (1988).

14. Kenneth A. Bamberger, *Normative Canons in the Review of Administrative Policymaking*, 118 YALE L.J. 64, 76 (2008).

15. Anthony, *supra* note 3, at 18–19 & n.65.

16. Sunstein, *supra* note 3, at 2110.

17. *Id.* at 2092.

long as the text immediately at hand contains a surface-level gap or ambiguity"?[18] It has been said that "courts have not been consistent in the level of clarity that they require."[19]

- What does it mean for an agency construction to be "reasonable"? Some have suggested that Step Two is merely redundant of Step One,[20] while others have compared it with "hard look" review of agency decisionmaking under the Administrative Procedure Act (APA).[21]

Despite the near-consensus that *Chevron* rests on a presumption about congressional intent, these seemingly basic questions persist. A theory of *Chevron* based on a legal fiction has failed to resolve them.

This Article proposes a new theory of *Chevron*, one that rests on a simple reality: the law has limits. Although the law contains many answers, it does not provide a solution to every case. No matter how precise the law may seem, there will inevitably be "hard cases"—cases "in which on some point no decision either way is dictated by the law and the law is accordingly partly indeterminate or incomplete."[22] Legal positivism teaches that hard cases cannot be decided by merely applying existing law. When the law runs out, the case can be decided only by making new law to fill the gap.[23] There are thus "two completely different stages" in deciding every hard case: applying the law and making it.[24]

This Article argues that these two stages correspond to *Chevron*'s two steps. Step One is the ordinary, law-applying stage of any case of statutory interpretation. The court must say what the law is and give effect to what the law says. But if the law runs out before yielding a solution, then the court is faced with a hard case, and it must proceed to Step Two, the law-

18. ADRIAN VERMEULE, JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION 215 (2006).

19. Note, *"How Clear Is Clear" in* Chevron*'s Step One?*, 118 HARV. L. REV. 1687, 1691 (2005) [hereinafter Note, *Step One*]; *see also* Mark Seidenfeld, *A Syncopated* Chevron*: Emphasizing Reasoned Decisionmaking in Reviewing Agency Interpretations of Statutes*, 73 TEX. L. REV. 83, 94–95 (1994) (noting "deferential" and "active" approaches to Step One in the courts of appeals).

20. Ronald M. Levin, *The Anatomy of* Chevron*: Step Two Reconsidered*, 72 CHI.-KENT L. REV. 1253, 1261 (1997); Matthew C. Stephenson & Adrian Vermeule, Chevron *Has Only One Step*, 95 VA. L. REV. 597, 599 (2009).

21. Gary S. Lawson, *Reconceptualizing* Chevron *and Discretion: A Comment on Levin and Rubin*, 72 CHI.-KENT L. REV. 1377, 1378–79 (1997); Levin, *supra* note 20, at 1276; Seidenfeld, *supra* note 19, at 128–29; Silberman, *supra* note 3, at 827–28; Sunstein, *supra* note 3, at 2105.

22. H.L.A. HART, THE CONCEPT OF LAW 272 (2d ed. 1994); *see also* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 81 (1977).

23. HART, *supra* note 22, at 272.

24. *Id.* at 273.

making stage. The presence of an agency construction, however, means that judges need not engage in law-making of their own, as if they were legislators. They can instead defer to the law-making of the agency, which, unlike the court, is accountable to the political branches. Viewed this way, deference emerges as an act of judicial self-restraint, grounded in the recognition that the law carries greater legitimacy when made by politically accountable agencies than by unelected judges.

This positivist account of *Chevron* avoids relying on any fiction about congressional intent. By grounding deference in the reality of hard cases, it owns up to the fact that Congress hardly ever considers the issue of who should resolve statutory ambiguities. But that is not the only reason it is superior to the conventional wisdom. A hard-cases theory of *Chevron* also fills gaps in the application of the two-step inquiry itself. What tools should courts use at Step One? If the first step is simply the initial stage of any statutory interpretation case, then courts should employ whatever tools they would ordinarily use to apply the law. When is a statute "clear," so that the inquiry can end there? If *Chevron*'s two steps reflect the line between applying the law and making it, then a statute is clear when the law provides an answer before running out. When is an agency construction "reasonable," so that a court can uphold it? If Step Two is about law-making, then a "reasonable" construction is any construction the court itself could have imposed by making law on its own. Positivism provides a theory for answering these doctrinal questions, succeeding where the presumption about congressional intent fails.

But that is not all: positivism also answers recurring objections to judicial deference in general. These objections come in various forms. It has been said, for instance, that deference cannot be reconciled with the Judiciary's Article III duty to "say what the law is."[25] It has also been said that deference forces judges to adopt a mindset that is psychologically challenging,[26] and that differences between judicial and administrative methods of statutory construction render deference paradoxical.[27] But when *Chevron* is understood as a doctrine of hard cases, these objections lose force. *Chevron* can be squared with the Constitution because it mandates deference only at the point of law-making, when the court has already done all it can to "say what the law is." *Chevron* is psychologically manageable because it asks only that judges respect the most basic of distinctions,

25. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803); *see* sources cited *infra* note 223.

26. Breyer, *supra* note 3, at 379.

27. Jerry L. Mashaw, *Norms, Practices, and the Paradox of Deference: A Preliminary Inquiry into Agency Statutory Interpretation*, 57 ADMIN. L. REV. 501, 504 (2005).

between applying the law and making it. And *Chevron* makes sense of the differences between judicial and administrative approaches to statutory construction because when a court defers, it does not make new law—only the agency does.

Finally, understanding *Chevron* as a doctrine of hard cases has important implications for *Chevron*'s domain. As noted above, the Court's current jurisprudence holds that the *Chevron* framework should not apply at all unless it appears that Congress has empowered the agency to speak with the "force of law." But if the purpose of *Chevron* is to keep judges from acting as legislators, then *Chevron* should apply in every hard case involving an agency construction. Understanding *Chevron* as a doctrine of hard cases thus entails a different approach to Step Zero. It also suggests a certain relationship between *Chevron* and other canons of statutory construction. Positivism contemplates three types of canons: for applying the law, for creating ambiguity, and for making the law. Only canons of the third type compete with *Chevron* deference, forcing the court to decide which should prevail. Faced with such a decision, the court should weigh the values served by the other canon against the value of deferring to a more legitimate (and occasionally more expert) law-maker in the agency. The balance of values could mean that *Chevron* should be displaced, as when the other canon is a clear statement rule. Or it could mean that *Chevron* should prevail, as when the other canon is the canon of constitutional avoidance.

To explain and defend *Chevron* as a doctrine of hard cases, this Article proceeds as follows. Part I provides an overview of the notion of hard cases, relying on the work of two of legal positivism's leading theorists, the English philosophers H.L.A. Hart and Joseph Raz. Through a number of hypothetical examples, Part I explains the process of deciding hard cases from a positivist perspective. Part II applies the lessons of legal positivism to the *Chevron* doctrine. It explains how understanding *Chevron* as a doctrine of hard cases not only offers insight into *Chevron*'s familiar two-step inquiry, but also solves longstanding puzzles about judicial deference more generally. Part III explores the implications of this theory of hard cases for *Chevron*'s domain. It considers when, if ever, the *Chevron* doctrine should not apply because of the type of agency action at issue or because of a competing canon of statutory construction.

I. LEGAL POSITIVISM AND THE NOTION OF HARD CASES

The question seems simple enough, and yet it has persisted for centuries: "What is law?"[28] Legal positivism offers one theory—that "the law is

28. HART, *supra* note 22, at 1.

posited, is made law by the activities of human beings."[29] On this account, "what is law and what is not is a matter of social fact."[30] Positivism, as a general theory about the law,[31] cannot tell us how to resolve specific cases or controversies. But it can give us a framework for approaching them. This Part describes the theory's insights as they relate to the judicial process.

A. Identifying the Law

One of positivism's most important insights is that every legal system has a "rule of recognition"[32]—a "rule about rules"[33] that determines "which rules are, and which rules are not, part of the legal system."[34] In developed legal systems, the rule of recognition typically operates by identifying a characteristic that other rules must possess to be legally valid, such as "the fact of their having been enacted by a specific body, or their long customary practice, or their relation to judicial decisions."[35] When there are many such characteristics, the rule also provides "for their possible conflict by their arrangement in an order of superiority, as by the common subordination of custom or precedent to statute, the latter being a 'superior source' of law."[36] According to positivists, the content of the rule of recognition is a matter of social convention—not of morality or natural law.[37] Thus, "to state for a particular society what the criteria of law are, and the hierarchy in which these criteria stand to each other, is to describe the standards that recognized officials [in the society] accept."[38]

How a rule of recognition works can be illustrated by the following example. Suppose a dispute arises over whether vehicles are allowed in a park. Some citizens of the community believe they are; others believe they

29. JOSEPH RAZ, THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY 38 (1979).

30. *Id.* at 37.

31. *See* BRIAN BIX, JURISPRUDENCE: THEORY AND CONTEXT 33 (5th ed. 2009).

32. HART, *supra* note 22, at 94 (explaining that a legal system consists in "a union of primary rules of obligation with . . . secondary rules," including a rule of recognition).

33. Scott J. Shapiro, *What Is the Rule of Recognition (and Does It Exist)?*, *in* THE RULE OF RECOGNITION AND THE U.S. CONSTITUTION 235, 237 (Matthew D. Adler & Kenneth Einar Himma eds., 2009).

34. BIX, *supra* note 31, at 40.

35. HART, *supra* note 22, at 95.

36. *Id.*

37. *See* BIX, *supra* note 31, at 40–41.

38. Kent Greenawalt, *The Rule of Recognition and the Constitution*, 85 MICH. L. REV. 621, 624 (1987); *see also* HART, *supra* note 22, at 116 (arguing that for a legal system to exist, "its rules of recognition specifying the criteria of legal validity . . . must be effectively accepted as common public standards of official behaviour by its officials").

are not. Absent a rule of recognition, such disagreement will persist.[39] But if the community has a functioning legal system, then its rule of recognition will help identify which view the law regards as authoritative.[40] Suppose, for instance, the rule specifies enactment by the city council as the ultimate criterion of legal validity.[41] And suppose the council enacted an ordinance stating: "No vehicles in the park. Anyone found in possession of a vehicle in the park shall be guilty of a misdemeanor."[42] Such an ordinance, possessing the characteristic identified by the rule of recognition, would authoritatively settle whether vehicles are allowed in the park: they are not. A rule of recognition thus serves the essential purpose of remedying uncertainty about what in a society counts as law.[43]

B. Deciding Provided-For Cases

Positivists acknowledge that the rule of recognition alone will not settle every legal dispute.[44] That is because the law speaks in general terms, referring to "*classes* of person, and to *classes* of acts, things, and circumstances."[45] This makes it necessary to have a judicial process—a process for making "authoritative determinations"[46] regarding the "particular acts, things, and circumstances" that qualify as "instances of the general classifications which the law makes."[47]

Which brings us to what, according to positivists, is the first stage of the judicial process: applying the law to a given set of facts. It is here that the judge can be said to exercise "neither Force nor Will, but merely

39. *See* HART, *supra* note 22, at 92.

40. *See id.* at 94–95.

41. This example assumes that there are no superior sources of law. *Cf.* Greenawalt, *supra* note 38, at 625 (noting additional questions that might be asked about the validity of a local ordinance).

42. This hypothetical of a rule prohibiting vehicles in the park comes from Hart himself. *See* HART, *supra* note 22, at 126–29; H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 607 (1958). "It is the most famous hypothetical in the common law world." Frederick Schauer, *A Critical Guide to Vehicles in the Park*, 83 N.Y.U. L. REV. 1109, 1109 (2008). And it may be familiar to law students who have taken a course on legislation. *See* WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY & ELIZABETH GARRETT, CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 819 (3d ed. 2001) (using the example as an introductory problem); William N. Eskridge, Jr., *No Frills Textualism*, 119 HARV. L. REV. 2041, 2041–43 (2006) (reviewing ADRIAN VERMEULE, JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION (2006)) (same).

43. *See* HART, *supra* note 22, at 94–95.

44. *See id.* at 93.

45. *Id.* at 124.

46. *Id.* at 96–97.

47. *Id.* at 124.

judgment,"[48] for the task of applying the law consists of saying what the law is, not what it ought to be.[49] The goal of the judge is to discover the existing meaning of the law, based on traditional legal materials such as text, structure, history, and purpose.[50] And the duty of the judge is to act as the faithful agent of those who enacted the law, be they a council, a legislature, or the people themselves.[51]

Although "[p]articular fact-situations do not await us already marked off from each other, and labelled as instances of the general rule,"[52] positivists maintain that "the life of the law" consists mainly of cases in which the application of the law is clear.[53] Consider, for instance, the application of the hypothetical ordinance above to a man driving his minivan through the park on his way to work. Given that a minivan meets the very definition of

48. THE FEDERALIST NO. 78, at 523 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

49. *See* JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED 157 (W.E. Rumble ed., 1995) (1832) ("The existence of law is one thing; its merit or demerit is another. Whether it be or be not is one enquiry; whether it be or be not conformable to an assumed standard, is a different enquiry."); *cf.* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").

50. It may be questioned whether "purpose" should be counted among the traditional *legal* materials on the view that purposive reasoning is necessarily *moral* in nature. *See* Michael W. McConnell, *Active Liberty: A Progressive Alternative to Textualism and Originalism?*, 119 HARV. L. REV. 2387, 2405 (2006) (reviewing STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION (2005)) ("To ask what a hypothetical 'reasonable member of Congress' 'would have wanted,' I suspect, is not much different from asking what the judge thinks would be best, at least within the general constraints of the statutory scheme."). Because "purpose" is commonly regarded as a source of *legal* meaning, however, it is treated as such here. *See id.* at 2404–05 (describing the debate between textualists and purposivists as "an intramural disagreement over what methodology will best translate the public will into law").

51. *See* John F. Manning, *Deriving Rules of Statutory Interpretation from the Constitution*, 101 COLUM. L. REV. 1648, 1648 n.1 (2001) ("The faithful agent theory assumes that judges have a duty to discern and enforce legislative instructions as accurately as possible and to abide by those commands when legislative intent is clear."); Richard A. Posner, *Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution*, 37 CASE W. RES. L. REV. 179, 189 (1987) ("In our system of government the framers of statutes and constitutions are superiors of the judges. The framers communicate orders to the judges through legislative texts (including, of course, the Constitution). If the orders are clear, the judges must obey them.").

52. HART, *supra* note 22, at 126; *see also* Hart, *supra* note 42, at 607 ("Fact situations do not await us neatly labeled, creased, and folded, nor is their legal classification written on them to be simply read off by the judge.").

53. HART, *supra* note 22, at 135; *see id.* at 126 ("There will indeed be plain cases constantly recurring in similar contexts to which general expressions are clearly applicable . . . ."); *id.* at 128 (referring to "the great mass of ordinary cases" in which legal rules work "smoothly"); *id.* at 131 ("Of course even with very general standards there will be plain indisputable examples of what does, or does not, satisfy them.").

a "vehicle"—"a carrier of goods or passengers . . . *specif[ically]*: MOTOR VEHICLE"[54]—the ordinance plainly prohibits the man's conduct.[55] Or consider the case of a girl in the park pushing a toy truck through a sandbox. The truck is not designed to carry actual goods or passengers, and it has no motor. It is merely a model of a "vehicle"—a miniature replica of the real thing—so the girl's behavior clearly falls outside the ordinance.[56]

The case of the minivan (in which the law clearly applies) and the case of the toy truck (in which it clearly does not) are what positivists call legally "provided-for"[57] or "regulated"[58] disputes. Such disputes are marked by three related characteristics. First, the law yields a solution—a uniquely correct answer—to the question presented.[59] Is the man guilty of violating the ordinance? The answer "provided for" by the law is yes, because a minivan is a "vehicle." Is the girl? The answer "provided for" by the law is no, because a toy truck is not a "vehicle." Second, resolving the dispute does not require the exercise of any judicial discretion.[60] There is no room for such discretion because the answer "provided for" by the law is conclusive. Finally, to decide the dispute by making new law would entail the rewriting of existing law.[61] Thus, if a court were to hold that the man is *permitted* to drive his minivan in the park, or that the girl is *prohibited* from playing with her toy truck in the sandbox, the court would not just be making the law; it would be replacing the law already on the books. Accordingly, a legally provided-for case need not, and should not, proceed beyond the first stage of the judicial process: if the court faithfully applies the law, the matter should end there.

C. Deciding Hard Cases

Things are more complicated when there is no legally provided-for answer. Consider what the hypothetical ordinance means for a woman in

54. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2538 (1961).

55. HART, *supra* note 22, at 126 ("If anything is a vehicle a motor-car is one.") (internal quotation marks omitted).

56. Hart suggests that "a toy motor-car electrically propelled" would present a hard case. *Id.* at 129; *see also* Hart, *supra* note 42, at 607 (mentioning "toy automobiles"). It is unclear, however, whether the toy car he has in mind could transport a child. A toy car that could do so would certainly present a harder case than that of the toy truck considered here.

57. *See* HART, *supra* note 22, at 272 (referring to "*un*regulated" cases as "legally *un*provided-for") (emphases added).

58. RAZ, *supra* note 29, at 181.

59. *Id.* at 182.

60. *Id.* at 181.

61. *Id.* at 182.

the park riding her bicycle. On the one hand, a bicycle is a carrier of passengers, which suggests that it is a "vehicle"; on the other, a bicycle has no motor, which suggests that it is not. Does "vehicle," as used in the ordinance, embrace the broader definition of the term, which encompasses carriers generally, or the narrower one, which is limited to carriers with motors? A court might find it unclear what a "skilled, objectively reasonable user of words" would understand "vehicle" to mean in this context.[62] The term certainly includes minivans and excludes toy trucks. But beyond this "core of certainty" lies "a penumbra of doubt,"[63] which surrounds bicycles and perhaps other non-motor carriers, such as roller skates,[64] baby strollers,[65] and wheelchairs.[66] Positivists call such indeterminacy "open texture,"[67] a consequence of the "limit . . . to the guidance which general language can provide."[68] Because such indeterminacy is "inherent in the nature of language,"[69] it is an inevitable part of the law.

Not every theory of interpretation, of course, gives precedence to the semantic meaning of the enacted text, and a court might look beyond the words of the ordinance to the subjective intentions of the legislators who enacted them. But positivists believe there is a limit as well to the guidance that such intentions can provide.[70] The problem is not merely that legislators seldom think alike,[71] or that their genuine beliefs are often

62. Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J.L. & PUB. POL'Y 59, 65 (1988); *see also* Antonin Scalia, *Common-Law Courts in a Civil Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3, 17 (Amy Gutmann ed., 1997) ("We look for a sort of 'objectified' intent—the intent that a reasonable person would gather from the text of the law, placed alongside the remainder of the *corpus juris*."); John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 79–80 (2006) (describing the textualist's inquiry).

63. HART, *supra* note 22, at 123; *see also* RAZ, *supra* note 29, at 193 (noting "the cases which fall within the vague borderlines of various descriptive concepts").

64. *See* HART, *supra* note 22, at 126; Hart, *supra* note 42, at 607.

65. *See* Thomas O. Sargentich, *The Contemporary Assault on Checks and Balances*, 7 WIDENER J. PUB. L. 231, 251 (1998) ("Surely in this context a baby carriage would not be a prohibited vehicle.").

66. *See* Pierre Schlag, *No Vehicles in the Park*, 23 SEATTLE U. L. REV. 381, 381 (1999).

67. HART, *supra* note 22, at 135.

68. *Id.* at 126, 128 (describing open texture as "the price to be paid for the use of general classifying terms in any form of communication concerning matters of fact").

69. *Id.* at 126.

70. *See* RAZ, *supra* note 29, at 193 ("[A]ppeal to legislative intention is often of no avail, for that intention, even when ascertained, is often itself indeterminate.").

71. *See* Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 870 (1930) ("The chances that of several hundred men each will have exactly the same determinate situations in mind as possible reductions of a given determinable, are infinitesimally small.").

difficult to discover.[72] Rather, according to positivists, there is a problem even more fundamental: given that "the world in which we live" cannot be reduced to "a finite number of features," it is impossible for legislators to anticipate "all the possible combinations of circumstances which the future may bring."[73] This "relative ignorance of fact" means that legislative intentions will not always be determinate.[74] So, in the case of the bicycle, one could easily imagine a legislative history ambiguous or silent on whether bicycles should be allowed in the park. Perhaps council members expressed conflicting views on the issue, or perhaps they lacked the foresight to discuss the issue at all.[75] Either way, it would be unclear whether the council actually intended the ordinance to cover bicycles.

If the text and history of the ordinance fail to resolve the dispute, a court might seek guidance in the general purposes behind the ordinance.[76] It might ask how a hypothetical "reasonable member"[77] of the city council "pursuing reasonable purposes reasonably"[78] "*would have wanted* a court to interpret the [ordinance] in light of present circumstances in the particular case."[79] But positivists maintain that there is a limit to the guidance that

72. *See id.* at 870–71 ("Even if the contents of the minds of the legislature were uniform, we have no means of knowing that content except by the external utterances or behavior of these hundreds of men, and in almost every case the only external act is the extremely ambiguous one of acquiescence, which may be motivated in literally hundreds of ways, and which by itself indicates little or nothing of the pictures which the statutory descriptions imply.").

73. HART, *supra* note 22, at 128; *see also* Ford Motor Credit Co. v. Milhollin, 444 U.S. 555, 565 (1980) (acknowledging that "judges must decide unanticipated cases" because "legislators cannot foresee all eventualities").

74. HART, *supra* note 22, at 128.

75. *Cf.* Beech Aircraft Corp. v. Rainey, 488 U.S. 153, 164 (1988) (noting that legislative history may yield "no clear answer" when "legislators . . . did not focus directly on the problem at hand," or when they "clearly recognized and expressed their opinions on the precise question at issue" but "took diametrically opposite positions").

76. *See* STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION 88 (2005) (explaining that a purpose-based approach remains viable "even when Congress did not in fact consider a particular problem").

77. *Id.* (internal quotation marks omitted).

78. HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 1378 (William N. Eskridge, Jr. & Philip P. Frickey eds., Foundation Press 1994) (1958).

79. BREYER, *supra* note 76, at 88. A purposivist approach is similar to an approach that seeks to imaginatively reconstruct the legislature's intentions. *See* United States v. Klinger, 199 F.2d 645, 648 (2d Cir. 1952) (L. Hand, J.) ("Flinch as we may, what we do, and must do, is to project ourselves, as best we can, into the position of those who uttered words, and to impute to them how they would have dealt with the concrete occasion."), *aff'd per curiam by an equally divided court*, 345 U.S. 979 (1953); Richard A. Posner, *Statutory Interpretation—in the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 817 (1983) ("[T]he task for the judge

even a purpose-based approach can provide. Even assuming that the "reasonable purposes" of a law can be identified, there will inevitably be cases in which those purposes conflict, leaving judges with "no neutral way" to decide which to favor.[80] The case of the bicycle may well be such a case. A council member in supporting the ordinance could have been pursuing a number of purposes, all of them reasonable. One purpose could have been to enhance the peace and quiet of the park by eliminating the distraction of vehicles. Another could have been to make the park more enjoyable to children, who would otherwise have to be wary of vehicles while playing. But when it comes to whether there should be bicycles in the park, these purposes conflict. A ban on bicycles might enhance the park's peacefulness, while detracting from its enjoyment by children. Should "some degree of peace in the park" give way to the "pleasure or interest" of children, or vice versa?[81] It may not be clear how a "reasonable member" of the city council would have decided this question. When the law suffers from this "relative indeterminacy of aim,"[82] a purposivist must look elsewhere for a basis of decision.

But what if a judge, following whatever method of interpretation he deems appropriate (whether textualism, intentionalism, purposivism, or some combination thereof), exhausts all the relevant legal materials without finding an answer to the statutory question presented? The judge, then, is confronted with what positivists call a "hard case"—a case "in which on some point no decision either way is dictated by the law and the law is accordingly partly indeterminate or incomplete."[83] In a hard case, the law

called upon to interpret a statute is . . . one of imaginative reconstruction. The judge should try to think his way as best he can into the minds of the enacting legislators and imagine how they would have wanted the statute applied to the case at bar." (footnote omitted)); Roscoe Pound, *Spurious Interpretation*, 7 COLUM. L. REV. 379, 381 (1907) (describing, as a legitimate means of interpretation, efforts to "find out directly what the law-maker meant by assuming his position, in the surroundings in which he acted, and endeavoring to gather from the mischiefs he had to meet and the remedy by which he sought to meet them, his intention with respect to the particular point in controversy").

80. WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY & ELIZABETH GARRETT, LEGISLATION AND STATUTORY INTERPRETATION 230 (2d ed. 2006). Even when a law has only one "reasonable" purpose, it will not always be clear how far the legislature sought to pursue that purpose. *See* Pension Benefit Guar. Corp. v. LTV Corp., 496 U.S. 633, 646–47 (1990) ("'[N]o legislation pursues its purposes at all costs. Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice—and it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law.'" (quoting Rodriguez v. United States, 480 U.S. 522, 525–26 (1987))).

81. HART, *supra* note 22, at 129.

82. *Id.* at 128.

83. *Id.* at 272.

runs out before providing a solution,[84] leaving a gap that cannot be filled by merely applying the law.[85] As a result, according to positivists, the judge has no choice but to proceed to the next stage in the judicial process: law-making. At this (the second) stage, it is not enough to say what the law is; the case can be resolved only by saying what the law should be. Faced with a gap in the law, the court must exercise some discretion to fill it.[86]

Assuming, then, that in the case of the bicycle, existing law fails to dictate a solution, how should a judge go about the task of deciding it? One way would be to "act just as legislators do,"[87] namely, "by deciding according to his own beliefs and values."[88] The judge could, for example, weigh the interests of children against those of other park-goers. And after doing so, the judge might conclude that a policy prohibiting bicycles in the park would achieve the greatest good, and that bicycles should therefore be "vehicles" within the meaning of the ordinance.[89] Or the judge might conclude that, all things considered, the best policy would be to allow bicycles in the park, and that they should therefore not be "vehicles." Where the law runs out, judges face "a fresh choice between open alternatives."[90] But, maintain positivists, the judge as legislator still has a responsibility to exercise reasoned judgment[91]: whatever law the judge makes ought to reflect "a reasonable compromise between . . . conflicting

84. *Id.* at 273 (describing "hard cases" as ones "where the existing law fails to dictate any decision as the correct one"); RAZ, *supra* note 29, at 181 (describing "unregulated" disputes as ones that "do not have a correct legal answer").

85. *See* HART, *supra* note 22, at 272 ("If in such cases the judge is to reach a decision and is not, as Bentham once advocated, to disclaim jurisdiction or to refer the points not regulated by the existing law to the legislature to decide, he must exercise his *discretion* and *make* law for the case instead of merely applying already pre-existing settled law.").

86. *Id.*; *see also* Mistretta v. United States, 488 U.S. 361, 417 (1989) (Scalia, J., dissenting) (recognizing a degree of "law-making" left to judges in cases of statutory interpretation, the extent of which depends on the "relative specificity or generality of [Congress's] statutory commands").

87. RAZ, *supra* note 29, at 197.

88. HART, *supra* note 22, at 273; *see also* RAZ, *supra* note 29, at 197 (explaining that judges in hard cases "should adopt those rules which they judge best"); *id.* at 199 ("[I]n their law-making judges do rely and should rely on their own moral judgment.").

89. *See* HART, *supra* note 22, at 128–29. This is not to say that the judge's decisionmaking should necessarily have a consequentialist or utilitarian cast.

90. *Id.* at 128.

91. *Id.* at 273; *see also* RAZ, *supra* note 29, at 197 (arguing that judges in hard cases have a "legal duty" not "to act arbitrarily"); Joseph Raz, *Legal Principles and the Limits of Law*, 81 YALE L.J. 823, 847 (1972) ("Courts are never allowed to act arbitrarily. Even when discretion is not limited or guided in any specific direction the courts are still legally bound to act as they think is best according to their beliefs and values. If they do not, if they give arbitrary judgment by tossing a coin, for example, they violate a legal duty.").

interests."[92]

Before legislating from the bench, however, judges might consider the institutional significance of doing so: instead of focusing on *what* the law should be, they might think about *who* should really be making it.[93] Judges considering the latter question in the context of the criminal law, for example, might conclude that "because of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community, legislatures and not courts should define criminal activity."[94] If so, then judges might exercise restraint in hard cases by declining to extend the criminal law beyond the terms clearly set by the legislature. By resolving statutory ambiguities in favor of the criminal defendant—that is, by applying a so-called rule of lenity[95]—judges would ensure that no one "languish[es] in prison" for a crime the legislature did not make.[96] A judge who took such institutional concerns seriously would conclude that bicycles are not "vehicles" after all, regardless of what he personally thinks of permitting them in the park.[97] In doing so, the judge would necessarily be exercising some discretion—but in a way that avoids legislating from the bench.

The notion that judges ever have discretion may seem alarming in a democracy such as ours. But it is a reality in hard cases, and what is important is that judicial discretion is never unlimited. For one thing,

92. HART, *supra* note 22, at 132. Of course, there may be cases in which the only reasonable compromise is no compromise at all.

93. *See generally* Dan M. Kahan, *Is* Chevron *Relevant to Federal Criminal Law?*, 110 HARV. L. REV. 469 (1996) (focusing not on *what* the criminal law should be, but on *who* should make it).

94. United States v. Bass, 404 U.S. 336, 348 (1971).

95. Rewis v. United States, 401 U.S. 808, 812 (1971) ("[A]mbiguity concerning the ambit of criminal statutes should be resolved in favor of lenity.").

96. HENRY J. FRIENDLY, BENCHMARKS 209 (1967); *see also* United States v. Santos, 553 U.S. 507, 514 (2008) (recognizing that the "venerable" rule of lenity "keeps courts from making criminal law in Congress's stead"); United States v. Wiltberger, 18 U.S. (5 Wheat.) 76, 95 (1820) (Marshall, C.J.) ("The rule that penal laws are to be construed strictly, is perhaps not much less old than construction itself. It is founded . . . on the plain principle that the power of punishment is vested in the legislative, not in the judicial department. It is the legislature, not the Court, which is to define a crime, and ordain its punishment.").

97. Raz himself recognized that judges "may be guided by law as to the manner in which discretion should be exercised." RAZ, *supra* note 29, at 96. He also recognized that "[s]uch instructions may be given in a statute, but they may also exist only in the practice of the courts." *Id.* This Article argues that like the rule of lenity, the *Chevron* doctrine should be understood as a judge-made rule guiding the courts' law-making discretion in hard cases. *See infra* Part II. For a fuller discussion of other canons of construction, see *infra* Section III.B.

judicial discretion is constrained by the law that already exists.[98] Although law-making may sometimes be a necessary step in the judicial process, it is never the only one: "There are no pure law-creating cases."[99] Even hard cases are "partly regulated" because the law has to be applied as well as made.[100] Given that the term "vehicle" clearly includes cars, for example, a judge faced with a hard case cannot, without violating his duty to apply the law, define the term in a way that would exclude them. In any given hard case, then, the gap to be filled by law-making is only so big, its size depending on how determinate the existing law is.

For another thing, judicial discretion is constrained by the kind of cases that happen to arise. Unlike legislators, judges cannot "introduce large-scale reforms or new codes."[101] In exercising their discretion, judges can fashion "only rules to deal with the specific issues thrown up by particular cases."[102] Even a judge who believes that bicycles should be allowed in the park, therefore, is powerless until the issue is properly presented in a case before him. And even a judge who believes that bicycle-riding should be encouraged more generally must wait for yet other hard cases involving, say, rules governing bicycle registration or safety.[103] Unable to set their own dockets or enact far-reaching reforms, judges are limited to filling gaps in the laws that happen to be implicated in the cases they hear. Their discretion is at most interstitial.[104]

The fact remains, however, that in hard cases there are "two completely different stages in the process of decision": one in which the law is applied and the other in which it is made.[105] Unlike legally provided-for cases, hard cases cannot be resolved at the first stage; when the law "fails to dictate a

98. *See* HART, *supra* note 22, at 273.

99. RAZ, *supra* note 29, at 195.

100. *Id.* at 182; *see also id*. at 195 ("In every case in which the court makes law it also applies laws restricting and guiding its law-creating activities.").

101. HART, *supra* note 22, at 273.

102. *Id.* at 275.

103. *See* RAZ, *supra* note 29, at 200 ("[I]t is usually impossible for the courts to introduce in one decision all the changes necessary for the effective implementation of a radical reform in any aspect of the law.").

104. HART, *supra* note 22, at 273; *see also* RAZ, *supra* note 29, at 200 (noting the "piecemeal nature of judicial law-making").

105. HART, *supra* note 22, at 273. The law-applying/law-making distinction does not quite track the interpretation/construction distinction much discussed in constitutional law. The latter distinguishes the "process (or activity) that recognizes or discovers the linguistic meaning or semantic content of the legal text" (interpretation) from the "process that gives a text legal effect" (construction). Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 CONST. COMMENT. 95, 96 (2010). Giving a text legal effect, however, need not entail any law-making; indeed, it may involve only law-applying.

decision either way,"[106] the matter must proceed to the second. Nor can hard cases be resolved without the exercise of some judicial discretion; although judges need not legislate from the bench, they must decide, one way or another, how to fill the gaps left open by the law.[107]

This picture of the judicial process is of course simplified. It suggests a sharp divide between law-applying and law-making, such that judges can make a clean break from one stage to the next. But distinguishing the two stages in a judicial opinion is not always easy.[108] One reason is that judges sometimes do not realize that they have proceeded from one stage to the next; "law-making need not be intentional," and occasionally it is not.[109] Another is that judges sometimes deliberately obscure the extent to which they are exercising any discretion, either "to avoid the need to bear full responsibility for it or to avoid having to justify it by long and explicit arguments."[110] Still another reason is that there is often no need for judges to distinguish law-applying from law-making when nothing turns on the difference. If, for instance, judges have to impose their own construction on the statute anyway, there is no point in identifying statutory ambiguities along the way.[111] But the most important reason why distinguishing the

106. HART, *supra* note 22, at 273.

107. Given the nomenclature, one might assume that hard cases are unlike regulated cases in a further respect: the former are difficult to decide while the latter are easy. But though many hard cases are more challenging than regulated ones, not all are. *See* RAZ, *supra* note 29, at 182 ("Regulated cases can be complex and more difficult to decide than unregulated cases. The difficulty in solving a complex tax problem according to law may be much greater than that of solving a natural justice problem according to moral principles."). The opposite of a hard case is thus not a simple one, but rather a case in which the law, no matter how complex, provides a solution.

108. *See* Caleb Nelson, *What Is Textualism?*, 91 VA. L. REV. 347, 395 n.143 (2005) ("[S]tatutory interpretation is not a crisp two-stage process, in which interpreters first determine the range of meanings that Congress could be thought to have intended and then use a different set of tools to select a single interpretation from that range."); RICHARD A. POSNER, HOW JUDGES THINK 85 (2008) ("A judge does not reach a point in a difficult case at which he says, 'The law has run out and now I must do some legislating.'"); RAZ, *supra* note 29, at 208 ("In cases of indeterminacy there is often no clear divide between application and innovation."). According to Ronald Dworkin, the way lawyers and judges speak about the law betrays no awareness that there are two different stages of judicial decisionmaking. RONALD DWORKIN, LAW'S EMPIRE 37–43 (1986).

109. RAZ, *supra* note 29, at 207. "Whether or not a case falls within the vague, indeterminate borderline area of a descriptive concept is often itself an indeterminate issue." *Id.* at 208.

110. *Id.* at 208 n.20.

111. *Cf.* Edelman v. Lynchburg Coll., 535 U.S. 106, 114 (2002) (concluding that because the agency's construction of the statute is the one the Court would have imposed on its own anyway, "there is no occasion to defer and no point in asking what kind of deference, or how much"); POSNER, *supra* note 108, at 85 (explaining that a judge might not distinguish law-

two stages is often difficult is that "on most occasions the reasoning justifying law-making decisions is similar to and continuous with decisions interpreting and applying law."[112] Argument by analogy, for example, permeates judicial reasoning at both stages in the process.[113] And when "the same kind[s] of arguments are used in applying and creating laws,"[114] it should come as no surprise that judges "move[] imperceptibly from one function to the other."[115]

Notwithstanding these caveats, the account of adjudication set forth here remains controversial in certain circles. Legal positivism "assumes that it is possible to distinguish between the roles of the courts in applying and making law."[116] Not everyone shares this assumption: legal realists deny that courts ever merely apply the law, while Dworkinians deny that courts need ever make it.[117] Still, there is a real sense in which "we are all to some degree positivists now."[118] Central tenets of legal positivism have been accepted not only by disciples of Hart and Raz,[119] but also by legal pragmatists,[120] and even by natural law theorists.[121] Among their ranks,

applying from law-making when "[h]e knows that he has to decide and that whatever he does decide will (within the broadest of limits) be law"); Note, *Implementing* Brand X*: What Counts as a Step One Holding?*, 119 HARV. L. REV. 1532, 1537 (2006) ("Before *Chevron*, a court usually had no reason to distinguish whether its interpretation was the only reasonable one, or merely the best one. . . . Courts would have been unlikely, after constructing the best interpretation of a statute, to assert that other interpretations were not reasonable.").

112. RAZ, *supra* note 29, at 208; *see also* HART, *supra* note 22, at 274 ("It is true that when particular statutes or precedents prove indeterminate, or when the explicit law is silent, judges do not just push away their law books and start to legislate without further guidance from the law.").

113. RAZ, *supra* note 29, at 208–09.

114. *Id.* at 209.

115. *Id.* at 208.

116. *Id.* at 197.

117. *See* H.L.A. Hart, *American Jurisprudence Through English Eyes: The Nightmare and the Noble Dream*, 11 GA. L. REV. 969, 973–74, 983 (1977).

118. Frank I. Michelman, *Thirteen Easy Pieces*, 93 MICH. L. REV. 1297, 1298 (1995) (reviewing RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT (Sanford Levinson ed., 1995)).

119. *See, e.g.*, Jules L. Coleman, *Negative and Positive Positivism*, 11 J. LEGAL STUD. 139, 163 (1982); John Gardner, *Legal Positivism: 5½ Myths*, 46 AM. J. JURIS. 199, 202 (2001).

120. *See, e.g.*, POSNER, *supra* note 108, at 9 ("Because the materials of legalist decision making fail to generate acceptable answers to all legal questions that American judges are required to decide, judges perforce have occasional—indeed rather frequent—recourse to other sources of judgment, including their own political opinions or policy judgments, even their idiosyncrasies.").

121. *See, e.g.*, John Finnis, *The Truth in Legal Positivism*, *in* THE AUTONOMY OF LAW: ESSAYS ON LEGAL POSITIVISM 195, 203–04 (Robert P. George ed., 1996); Robert P. George, *Natural Law*, 31 HARV. J.L. & PUB. POL'Y 171, 192 (2008) ("[Natural law] theorists have had no difficulty accepting the central thesis of what we today call legal positivism—that is, that

positivists can count politicians,[122] jurists,[123] and academics[124] alike. The next Part shows how this overlapping consensus on the nature of law can help us understand the workings of the *Chevron* doctrine.

II. *CHEVRON* AS A DOCTRINE OF HARD CASES

Under *Chevron*, judicial review of agency interpretations of federal statutes is governed by a two-step inquiry. At Step One, the reviewing court asks "whether Congress has directly spoken to the precise question at issue."[125] If yes, then "the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."[126] If no, then the court must proceed to Step Two, where it asks "whether the agency's answer is based on a permissible construction of the statute."[127]

This Part argues that the *Chevron* doctrine embodies the positivist account of the law described above. It explains how the doctrine's two steps correspond to the "two completely different stages in the process of decision" identified by legal positivists: law-applying and law-making.[128] Translated into the language of positivism, the question at Step One is whether existing law provides a uniquely correct answer to the dispute. If it does, then the court must enforce the law. But if the law runs out before providing a solution, then the court must proceed to Step Two. There, the question is whether the construction furnished by the agency is one the court could have imposed by making law on its own. If it is, then the court must exercise its limited discretion by deferring to the agency. Only if it is not must the court itself make new law, as if it were a legislature.

Sections A and B describe how positivism provides a cogent theory of Steps One and Two, respectively. Section C shows how this positivist account of *Chevron* answers recurring objections to judicial deference to agency interpretations of law. And Section D explains how this novel

the existence and content of the positive law depends on social facts and not on its moral merits.").

122. *See, e.g.*, 151 CONG. REC. 21,032 (2005) (statement of Sen. Barack Obama) (noting the existence of "hard cases" in which the law "will not be directly on point" or "will not be perfectly clear").

123. *See, e.g.*, POSNER, *supra* note 108, at 9; William H. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693, 704 (1976).

124. *See* Franklin G. Snyder, *Nomos, Narrative, and Adjudication: Toward a Jurisgenetic Theory of Law*, 40 WM. & MARY L. REV. 1623, 1646 (1999) (stating that "the dominant orthodoxy," at least "among legal academics," is that judges in hard cases make law).

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

126. *Id.* at 842–43.

127. *Id.* at 843.

128. HART, *supra* note 22, at 273.

theory of *Chevron* challenges—and improves upon—the conventional wisdom, which instead grounds the doctrine in a presumption about congressional intent.

A. Chevron *Step One: Applying the Law*

"When a court reviews an agency's construction of the statute which it administers . . . ," the Court explained in *Chevron*, "[f]irst, 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."[129] In a footnote, the Court went on to say:

> The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent. 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.[130]

These passages set forth the contours of *Chevron* Step One. But they raise questions of their own: What is meant by "the intent of Congress"? What are the "traditional tools of statutory construction"? And when is the intent of Congress "clear"?

Positivism answers these questions in a coherent way. As in any ordinary case of statutory interpretation, courts should begin by determining what existing law says (i.e., the intent of Congress) using the tools they would normally use to apply the law (i.e., the traditional tools of statutory construction). If the law provides a solution before running out (i.e., if the intent of Congress is clear), then they should simply enforce the law. In short, *Chevron* Step One asks courts to apply the law, the first stage in the positivist's process of decision.

1. "Intent of Congress"

Chevron phrases the Step One inquiry in different ways, but always in terms of what Congress has said or done: Has Congress "spoken to the precise question at issue"?[131] Has Congress "addressed" it?[132] Did Congress have an "intention"?[133] These various ways of referring to the

129. *Chevron*, 467 U.S. at 842–43.
130. *Id.* at 843 n.9 (citations omitted).
131. *Id.* at 842.
132. *Id.* at 843.
133. *Id.* at 843 n.9.

"intent of Congress"[134] may sound like mere synonyms for "statutory meaning." But to the legal positivist, they are more than that; they are also a clue about which stage of the judicial process—law-applying or law-making—Step One represents. For if the object of the inquiry is the "intent of *Congress*," then the role of the judge is necessarily that of *Congress*'s faithful agent, whose task is to discover the meaning of the law already made. That the inquiry centers on congressional intent implies that judges are to begin their review of an agency's construction of a statute just as they would any case of statutory interpretation: by applying existing law.

A number of methods of statutory interpretation are rooted in faithful agent theory[135] and thus could be said to be consistent with "giv[ing] effect to the . . . intent of Congress" at Step One.[136] Surely an approach that seeks to discern what a majority of the members of Congress *actually* had in mind when they enacted a particular statute would be a suitable Step One methodology. But judges need not embrace the search for subjective legislative intent to act as Congress's faithful agents. The so-called new textualism,[137] for example, eschews reliance on "traditional conceptions of 'actual' legislative intent," directing judges to focus instead on "how 'a skilled, objectively-reasonable user of words' would have understood the statutory text in context."[138] And yet, modern textualists regard their method as "the only safe course for a faithful agent" on the view that "respect for the legislative process requires judges to adhere to the precise terms of statutory texts."[139] Modern purposivists have also abandoned the search for subjective legislative intent, but they, too, claim to respect Congress's wishes.[140] In their view, legislators think in terms of general purposes,[141] so fidelity requires that statutes be read from the perspective of a hypothetical member of the legislature, pursuing such purposes reasonably.[142] The upshot is that all three of these methodologies—intentionalism, textualism, and purposivism—would in theory be

134. *Id.* at 842–43.

135. *See* Manning, *supra* note 51, at 1648 n.1; Posner, *supra* note 51, at 189.

136. *Chevron*, 467 U.S. at 843.

137. William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 623 & n.11 (1990).

138. Manning, *supra* note 62, at 75 (quoting Easterbrook, *supra* note 62, at 65); *see also* Scalia, *supra* note 62, at 17 ("We look for a sort of 'objectified' intent—the intent that a reasonable person would gather from the text of the law, placed alongside the remainder of the *corpus juris*.").

139. John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2390 (2003).

140. *See* BREYER, *supra* note 76, at 88, 98–101; HART & SACKS, *supra* note 78, at 1378.

141. *See* BREYER, *supra* note 76, at 98–101; Max Radin, *A Short Way with Statutes*, 56 HARV. L. REV. 388, 400, 406 (1942).

142. *See* BREYER, *supra* note 76, at 88, 98–101; HART & SACKS, *supra* note 78, at 1378.

appropriate at Step One.

Not every approach to statutory interpretation, however, has as its object the "intent of Congress." Professor Ronald Dworkin's method of "constructive interpretation," for example, envisions judges as the legislature's collaborative partners, rather than its faithful agents.[143] It calls on judges to treat Congress as just another author in the "chain of law," and to "continue[] to develop, in what [they] believe[] is the best way, the statutory scheme Congress began."[144] Because the goal there would be to go beyond the intent of Congress, Dworkin's method of constructive interpretation would be inappropriate at Step One.[145] Equally inappropriate would be a method that authorizes judges to rewrite statutory terms on grounds of equity. According to Professor William Eskridge, such authority was originally understood to be part of the judicial power.[146] But regardless of whether Eskridge's view of history is correct,[147] Step One rules out reliance on equity and other considerations that have nothing to do with the intent of Congress. The range of appropriate methods at Step One is limited to those consistent with faithful-agent theory—that is, with applying the law, as opposed to making it.

2. "Traditional Tools of Statutory Construction"

Chevron instructs courts at Step One to use "traditional tools of statutory construction" to ascertain Congress's intent.[148] Positivism guides our understanding of these tools. If Step One corresponds to the law-applying stage of the judicial process, then the "traditional tools of statutory construction" refer to the tools used ordinarily by judges to discern the existing meaning of a statute. As such, they encompass a range of diverse but familiar devices, from analysis of statutory text, to consideration of legislative history and purpose, to application of selected canons of

143. DWORKIN, *supra* note 108, at 315.

144. *Id.* at 313. It might be argued that Dworkin's method of constructive interpretation applies only in hard cases, but Dworkin expressly maintained that it "is equally at work in easy cases." *Id.* at 354.

145. Dworkin would claim that whether his method of constructive interpretation is appropriate or not, judges have no choice but to engage in some form of it. *See id.* at 316–17.

146. *See* William N. Eskridge, Jr., *All About Words: Early Understandings of the "Judicial Power" in Statutory Interpretation*, 101 COLUM. L. REV. 990, 995–97 (2001).

147. For a competing view of the original understanding of the judicial power in statutory interpretation, see John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1 (2001).

148. Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843 n.9 (1984).

construction.[149]

This account of the "tools of statutory construction" finds support in *Chevron*'s use of the label "traditional," which indicates that the tools themselves are no different from those used to apply statutes generally.[150] It also finds support in other of the Court's decisions. In *General Dynamics Land Systems, Inc. v. Cline*, for example, the Court described the Step One inquiry as involving "regular interpretive method."[151] Like "traditional," "regular" suggests that the tools for discerning Congress's intent at Step One are nothing special, but rather those a court would employ at the initial, law-applying stage of any statutory case. And indeed, the Court has invoked the use of "traditional tools of statutory construction" not only in cases involving *Chevron*,[152] but also in ordinary cases of statutory interpretation, in which no administrative interpretation was at issue.[153]

It should come as no surprise, then, that the growing debate within the Court regarding the tools to be employed at Step One mirrors the broader debate among the Justices regarding interpretive methods generally. Justices Scalia, Kennedy, and Thomas, commonly considered among the Court's textualists, have suggested that the Step One inquiry be confined to an examination of statutory text and structure.[154] Justice Stevens, by

149. For a discussion of how *Chevron* relates to other canons of construction, see *infra* Section III.B.

150. *Chevron*, 467 U.S. at 843 n.9. Depending on how one reads it, *Chevron*'s statement that, "[f]irst, *always*, is the question whether Congress has directly spoken to the precise question at issue" might also suggest that Step One is an inquiry a court "always" conducts when interpreting statutes. *Id.* at 842 (emphasis added).

151. 540 U.S. 581, 600 (2004).

152. *See, e.g.*, Rust v. Sullivan, 500 U.S. 173, 185–86 n.3 (1991); Dole v. United Steelworkers of Am., 494 U.S. 26, 35 (1990); INS v. Cardoza-Fonseca, 480 U.S. 421, 446–48 (1987).

153. *See, e.g.*, Richlin Sec. Serv. Co. v. Chertoff, 553 U.S. 571, 590 (2008) (holding that "traditional tools of statutory construction and considerations of *stare decisis*" left no ambiguity for the sovereign-immunity canon to resolve); Caron v. United States, 524 U.S. 308, 316 (1998) (noting that the "traditional tools of statutory construction" must be used to resolve ambiguities in a criminal statute before resorting to the rule of lenity); Beech Aircraft Corp. v. Rainey, 488 U.S. 153, 163 (1988) ("Because the Federal Rules of Evidence are a legislative enactment, we turn to the 'traditional tools of statutory construction' in order to construe their provisions." (citation omitted) (quoting *Cardoza-Fonseca*, 480 U.S. at 446)); J.W. Bateson Co. v. United States *ex rel.* Bd. of Trs. of the Nat'l Automatic Sprinkler Indus. Pension Fund, 434 U.S. 586, 594 (1978) (concluding that the interpretive approach adopted by the court of appeals was ruled out by the "traditional tools of statutory construction").

154. *See, e.g.*, Negusie v. Holder, 555 U.S. 511, 542 (2009) (Thomas, J., dissenting) ("If the text of a statute governing agency action directly addresses the precise question at issue, then, 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.") (internal quotation marks and brackets omitted); K Mart Corp. v. Cartier, Inc., 486 U.S. 281, 292 (1988) (Kennedy, J.) ("If the

contrast, has insisted that other sources of statutory meaning, particularly legislative history, be consulted as well.[155] Viewed through a positivist lens, *Chevron* does not take sides in this methodological dispute.[156] For if Step One is no different from the law-applying stage of any case of statutory interpretation, then debates over proper interpretive methods are just as legitimate at Step One as they are in other statutory cases. One should therefore not read too deeply into the fact that *Chevron* itself discusses legislative history as part of its Step One analysis.[157] That discussion may simply reflect the fact that the opinion was written by Justice Stevens, or the fact that in 1984 the new textualism had yet to emerge as a viable alternative to intentionalism and purposivism.[158] When it comes to methodology, Step One requires merely that judges employ the tools they normally would in discerning the "intent of Congress."

3. "Clear"

A final ambiguity in the operation of Step One remains: when is the intent of Congress "clear"? The question is of central importance because it represents "the dividing line between the two steps in the sequential inquiry."[159] To the positivist, it also represents the dividing line between the two stages of the judicial process. Thus, in positivist terminology, the intent of Congress is "clear" when the dispute over statutory meaning can be resolved at the first stage alone, by merely applying the law. That will be so when the statute provides a solution to the interpretive question, making the exercise of judicial discretion unnecessary. In other words, the

agency regulation is not in conflict with the plain language of the statute, a reviewing court must give deference to the agency's interpretation of the statute."); *Cardoza-Fonseca*, 480 U.S. at 452 (Scalia, J., concurring) (criticizing the Court's "exhaustive investigation" of the statute's legislative history at Step One).

155. *See, e.g.*, Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ., 550 U.S. 81, 106 (2007) (Stevens, J., concurring) ("Analysis of legislative history is, of course, a traditional tool of statutory construction."); *Cardoza-Fonseca*, 480 U.S. at 432–43 (majority opinion) (Stevens, J.) (examining the statute's legislative history at Step One).

156. *Cf.* Merrill & Hickman, *supra* note 3, at 869 n.197 ("*Chevron* appears largely agnostic about how a court should go about ascertaining whether a statute has a clear or unambiguous meaning at step one . . . .").

157. Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 862–64 (1984); *see also id.* at 845 (stating that an agency's statutory construction should not be disturbed "unless it appears from the statute or its legislative history that the [construction] is not one that Congress would have sanctioned") (internal quotation marks omitted).

158. The new textualism did not emerge until the Court's 1986 Term, Justice Scalia's first. *See* Eskridge, *supra* note 137, at 623.

159. Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969, 1000 (1992).

intent of Congress is "clear" when the meaning of the statute is determinate. "How clear is clear?"[160] Clear enough to render the dispute legally provided-for.

It follows that a statute is *not* clear when the law runs out before providing a uniquely correct answer.[161] And indeed, the Court's opinion in *Chevron* describes "silent or ambiguous" statutes as those susceptible to more than one "permissible" construction[162] because of "gap[s] left open by Congress."[163] It even addresses the causes of such gaps, citing sources of indeterminacy familiar to positivists: perhaps Congress "consciously desired" to leave a question of law unclear; perhaps it was "unable to forge a coalition on either side of the question"; or perhaps it "simply did not consider the question" at all.[164] All of this suggests that the positivist's definition of clarity is correct: asking whether the statute is "clear" is akin to asking whether the case is legally provided-for, and concluding that the statute is "silent or ambiguous" is the same as concluding that the law has run out.

Conceiving of Step One as the law-applying stage of the judicial process sheds light not only on the terms of the inquiry, but also on the consequences of reaching an answer. *Chevron* provides that "[i]f 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."[165] Positivism explains why giving effect to Congress's unambiguously expressed intent is mandatory. When the intent of Congress is "clear," "that is the end of the matter,"[166] because no room for judicial discretion remains; the statute provides a solution to the dispute, and judges have a duty to apply the law. Moreover, because Congress's "intention is the law,"[167] any law-making would entail rewriting existing law—law already made by Congress. Thus, concluding that the statute is "clear" means that the court need not—and should not—proceed any further.

Commentators have noted that federal judges differ in the frequency

160. Scalia, *supra* note 3, at 520.

161. *Chevron*, 467 U.S. at 843.

162. *Id.* at 843 & n.11.

163. *Id.* at 866; *see also id.* at 843 ("'The power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress.'") (quoting Morton v. Ruiz, 415 U.S. 199, 231 (1974)).

164. *Id.* at 865.

165. *Id.* at 843 n.9.

166. *Id.* at 842.

167. *Id.* at 843 n.9.

with which they find a statute "clear" at Step One.[168] Some have attributed these differences to interpretive methodology, claiming, for example, that textualists are less likely to acknowledge the existence of ambiguity than purposivists are.[169] But if judges have been applying the positivist definition of clarity all along, then the differences may be attributable instead to differing views about the determinacy of the law—views that may have little to do with interpretive methodology. Two judges might both be textualists, and yet have different thresholds for concluding that an interpretation is uniquely correct in light of the statutory text; one judge, for example, might require a probability of correctness of only 51% (i.e., that the interpretation be "more likely than not" correct), while the other might require a probability of as high as 90%.[170] Such probabilities represent a judge's standard of proof for legal arguments—of "when 'enough' evidence has been gathered to warrant a legal truth claim about the [law's] meaning."[171] And though such standards may bear some correlation with a judge's interpretive methodology, they may be linked

168. *See* Seidenfeld, *supra* note 19, at 94–95; Note, *Step One*, *supra* note 19, at 1691–92.

169. *See* Thomas W. Merrill, *Textualism and the Future of the* Chevron *Doctrine*, 72 WASH. U. L.Q. 351, 354 (1994) ("[T]he general pattern in the Court appears to suggest something of an inverse relationship between textualism and the use of the *Chevron* doctrine."); Thomas J. Miles & Cass R. Sunstein, *Do Judges Make Regulatory Policy? An Empirical Investigation of* Chevron, 73 U. CHI. L. REV. 823, 826 (2006) ("Justice Breyer, the Court's most vocal critic of a strong reading of *Chevron*, is the most deferential justice in practice, while Justice Scalia, the Court's most vocal *Chevron* enthusiast, is the least deferential.") (footnotes omitted); Scalia, *supra* note 3, at 521 ("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."). *But see* Note, *Step One*, *supra* note 19, at 1696 n.39 ("It is enough to assume that the relationship—if any—between a judge's theory of statutory interpretation and the requisite clarity that a judge demands before deciding a *Chevron* case at Step One is indeterminate.").

170. For a similar example, see Note, *Step One*, *supra* note 19, at 1698. Justice Scalia, for his part, rejects the view that "ambiguity exists only when the arguments for and against the various possible interpretations are in absolute equipoise." Scalia, *supra* note 3, at 520. "[N]othing in *Chevron* tells judges, even in principle, where the threshold should be located." Jacob E. Gersen & Adrian Vermeule, Chevron *as a Voting Rule*, 116 YALE L.J. 676, 694 (2007).

171. Gary Lawson, *Proving the Law*, 86 NW. U. L. REV. 859, 875 (1992) (emphasis removed). Some might argue that *Chevron* imposes its own standard of proof by requiring that the statute be "clear" for the inquiry to end at Step One. *See* JOHN F. MANNING & MATTHEW C. STEPHENSON, LEGISLATION AND REGULATION 836 (2010) ("*Chevron* cannot mean that the reviewing court may defer to the agency only when the traditional tools of statutory construction provide *no answer whatsoever* to the interpretive question. . . . *Chevron* instead must mean that a reviewing court should defer to the agency if the application of the traditional tools of statutory construction fails to supply a *sufficiently clear* answer to the interpretive question."). But clarity is only *what* must be proved; *how* it must be proved, including by what standard of proof, is a separate matter.

more closely to other aspects of a judge's judicial philosophy.[172] In any event, there will inevitably be cases in which judges conclude that the law is unclear, whatever their standard for proving the law. And if the statute fails to provide a solution—if the law runs out—then courts must proceed to Step Two.

B. Chevron *Step Two: Making the Law*

At Step Two, the presence of an administrative interpretation is finally relevant. As the Court explained in *Chevron*:

> If . . . the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.[173]

The Court stressed in a footnote that "[t]he court need not conclude that the agency construction was the only one it permissibly could have adopted to uphold the construction, or even the reading the court would have reached if the question initially had arisen in a judicial proceeding."[174] Rather, the agency construction must be upheld so long as it is one among "permissible,"[175] or "reasonable,"[176] interpretations of the statute.

Like Step One, Step Two contains ambiguities of its own. What would it mean for a court to "impose its own construction on the statute"? When is an interpretation of a statute "permissible"? And why should a court defer to a "permissible" agency interpretation at all?

Once again, positivism clarifies these ambiguities in the doctrine. Viewed through the lens of legal positivism, Step Two corresponds to the second stage in the process of decision: law-making. When the law runs out (i.e., when the statute is silent or ambiguous), the court has no choice but to exercise some discretion. The presence of an agency interpretation, however, means that the court itself need not act as a legislature (i.e., impose its own construction on the statute). Instead, the court may defer to

172. *Cf.* Frederick Liu, Book Note, *The Supreme Court Appointments Process and the Real Divide Between Liberals and Conservatives*, 117 YALE L.J. 1947, 1956 (2008) (reviewing CHRISTOPHER L. EISGRUBER, THE NEXT JUSTICE: REPAIRING THE SUPREME COURT APPOINTMENTS PROCESS (2007)) ("The real divide between judicial liberals and judicial conservatives lies in their views of the relative number of hard cases the Supreme Court hears.").

173. Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843 (1984) (footnote omitted).

174. *Id.* at 843 n.11.

175. *Id.* at 843.

176. *Id.* at 844.

the agency construction, so long as that construction is one the court could have imposed on its own (i.e., is permissible). Such deference is justified as an act of judicial self-restraint, born of the recognition that law-making in our democratic system is more legitimate when carried out by politically accountable agencies than by unelected judges.

1. "Impose Its Own Construction"

When a statute is "silent or ambiguous," the court cannot resolve the dispute by relying on the "intent of Congress" alone. "[I]n the absence of an administrative interpretation," *Chevron* explains, it "would be necessary" for the court to "impose its own construction on the statute."[177] The Court's diction is telling. "Impose" connotes an act of independent will, not faithful agency. The Court's use of the word signals that absent an administrative interpretation, the judicial role at Step Two is that of making the law, not merely applying it.

For a court to "impose its own construction on the statute" would thus be for it to engage in law-making of its own, just as a legislature would, based on its own beliefs and values. The Court in *Chevron* accurately characterized this gap-filling process as one of finding "a reasonable accommodation of manifestly competing interests,"[178] echoing the positivist view that "a reasonable compromise between many conflicting interests" is what a court must achieve in hard cases.[179] The Court even recognized that filling statutory gaps entails the exercise of judicial discretion, citing, in an often-overlooked footnote, *The Spirit of the Common Law* by Roscoe Pound.[180] There, on the pages referenced by the Court, Pound discusses "the myriad cases in respect to which the lawmaker had no intention because he had never thought of them."[181] In such cases, Pound explains, "the courts, willing or unwilling, must to some extent make the law under the guise of interpretation."[182] By citing Pound, the Court implicitly acknowledged that judges make new law when they "impose [their] own construction" on a "silent or ambiguous" statute.[183]

177. *Id.* at 843.
178. *Id.* at 865.
179. HART, *supra* note 22, at 132.
180. *Chevron*, 467 U.S. at 843 n.10.
181. ROSCOE POUND, THE SPIRIT OF THE COMMON LAW 174 (photo. reprint 1999) (1921).
182. *Id.*
183. *Chevron*, 467 U.S. at 843.

2. "Permissible"/"Reasonable"

Chevron, of course, holds that a court need not "impose its own construction" when the "agency's answer" to the statutory question presented "is based on a permissible construction of the statute."[184] What it means for a construction to be "permissible" (or equivalently, "reasonable") has long puzzled scholars and jurists,[185] but positivism makes the term clear. If Step Two is the law-making stage of a hard case, then a "permissible" construction is any construction the court itself could have imposed through exercise of its law-making discretion. As that discretion is limited by existing law,[186] so, too, is the range of permissibility: a construction is "permissible" if it fills a statutory gap without rewriting the law already made by Congress, as expressed in the statute's clear terms; conversely, a construction is impermissible if it is contrary to the application of existing law.[187]

Given that the "intent of Congress" delimits what is "permissible,"

184. *Id.*

185. *See* Levin, *supra* note 20, at 1260 (finding the "vagueness of the step two standard . . . troubling"); Sunstein, *supra* note 3, at 2104 ("The Supreme Court has given little explicit guidance for determining when interpretations will be found reasonable.").

186. *See supra* notes 98–100 and accompanying text.

187. *See* Entergy Corp. v. Riverkeeper, Inc., 556 U.S. 208, 218 n.4 (2009) ("[S]urely if Congress has directly spoken to an issue then any agency interpretation contradicting what Congress has said would be unreasonable."); Smiley v. Citibank (S.D.), N.A., 517 U.S. 735, 741 (1996) (explaining that when *Chevron* deference applies, the agency "possess[es] whatever degree of discretion the ambiguity allows"); Clark Byse, *Judicial Review of Administrative Interpretation of Statutes: An Analysis of* Chevron*'s Step Two*, 2 ADMIN. L.J. 255, 256 n.10 (1988) ("[I]f the intent of Congress is clear, a nonconforming interpretation would necessarily be unreasonable."). Understanding "permissible" and "reasonable" to describe interpretations that are not ruled out by the clear terms of the statute is consistent with their usage in the context of other canons of statutory construction. *See, e.g.*, Legal Servs. Corp. v. Velazquez, 531 U.S. 533, 545 (2001) ("It is well understood that when there are two reasonable constructions for a statute, yet one raises a constitutional question, the Court should prefer the interpretation which avoids the constitutional issue."). It is also consistent with their usage in the context of contract interpretation. *See, e.g.*, Universal Sales Corp. v. Cal. Press Mfg. Co., 128 P.2d 665, 672 (Cal. 1942) ("[W]hen a contract is ambiguous, a construction given to it by the acts and conduct of the parties with knowledge of its terms, before any controversy has arisen as to its meaning, is entitled to great weight, and will, when reasonable, be adopted and enforced by the court."); State v. Home Indem. Co., 486 N.E.2d 827, 829 (N.Y. 1985) ("If . . . the language of the insurance contract is ambiguous and susceptible of two reasonable interpretations, the parties may submit extrinsic evidence as an aid in construction . . . ."); J.M. Davidson, Inc. v. Webster, 128 S.W.3d 223, 229 (Tex. 2003) ("A contract is unambiguous if it can be given a definite or certain legal meaning. On the other hand, if the contract is subject to two or more reasonable interpretations after applying the pertinent rules of construction, the contract is ambiguous, creating a fact issue on the parties' intent.") (citation omitted).

traditional legal materials, such as the text, history, and purpose of the statute, are just as relevant at Step Two as they are at Step One. From a positivist perspective, however, the two steps remain distinct.[188] Properly understood, Step One is an exercise in law-applying; the question is whether existing law provides an answer to the statutory question presented. Step Two, by contrast, is an evaluation of law-making; the question is whether existing law requires an answer different from that provided by the agency. The distinction is more than theoretical. The law may fail to provide a solution at Step One, and yet rule out the agency's answer at Step Two.[189] That is because the size of a statutory gap is never unlimited; even in hard cases, the law provides some guidance before running out. Thus, even when a gap has been left open by Congress, the agency's construction may be impermissible because it fails to fit within it.[190]

Some maintain that Step Two requires courts to do more than determine whether an agency construction is contrary to the "intent of Congress." In their view, a construction is "permissible" (or "reasonable") only if it is also the product of a reasoned decisionmaking process.[191] Accordingly, they regard Step Two as something akin to "arbitrary" and "capricious" review under the APA,[192] which requires courts to take a "hard look" at the reasoning behind an agency's exercise of policy discretion.[193] In applying such review at Step Two, courts would be authorized to reject agency constructions on grounds that the agency failed to consider certain factors or failed to "articulate a satisfactory explanation

188. *Contra* Levin, *supra* note 20, at 1261 (questioning why "the second step [is] not superfluous"); Stephenson & Vermeule, *supra* note 20, at 599 (arguing that *Chevron*'s two steps are "mutually convertible").

189. *See, e.g.*, Natural Res. Def. Council, Inc. v. Reilly, 976 F.2d 36, 43–44 (D.C. Cir. 1992) (Silberman, J., concurring).

190. *See* K Mart Corp. v. Cartier, Inc., 486 U.S. 281, 318 (1988) (Scalia, J., concurring in part and dissenting in part) ("The authority to clarify an ambiguity in a statute is not the authority to alter even its unambiguous applications . . . ."). That the two steps are distinct and serve different purposes is not to say that a court could not proceed directly to Step Two. *See, e.g.*, Holder v. Martinez Gutierrez, 132 S. Ct. 2011, 2017 (2012); *Entergy*, 556 U.S. at 218 n.4.

191. *See* sources cited *supra* note 20–21. There is some support for this view in the Supreme Court's opinions. *See* United States v. Mead Corp., 533 U.S. 218, 229 (2001) (citing the Administrative Procedure Act's (APA's) "arbitrary" and "capricious" standard in its exposition of Step Two); Rust v. Sullivan, 500 U.S. 173, 183–87 (1991) (conflating "arbitrary" and "capricious" review with Step Two's "permissibility" analysis).

192. 5 U.S.C. § 706(2)(A) (2012).

193. *See* FCC v. Fox Television Stations, Inc., 556 U.S. 502, 513 (2009); Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 42–44 (1983).

for its action."[194]

There is nothing inconsistent between "hard look" review of agency decisionmaking and a positivist conception of *Chevron*. But if, as some have suggested, the only point of equating Step Two with "hard look" review is to keep *Chevron*'s two steps distinct,[195] then there is no reason for making such review part of the doctrine. Under a positivist conception, *Chevron*'s two steps correspond to the two stages of the judicial process: law-applying and law-making. Given that these stages are "completely different,"[196] there is, for the reasons above, no redundancy to avoid. Moreover, agency interpretive decisions are already subject to "hard look" review under the APA itself. Incorporating "hard look" review into the *Chevron* doctrine would thus create a redundancy of its own, rendering the APA "superfluous."[197]

3. Why Defer?

The test of permissibility thus boils down to whether the agency construction is contrary to existing law. If it is, then it is impermissible, for the law-making discretion of the agency, no less than that of the court, is constrained by the law already created by Congress. If it is not, then it is permissible, for it is a construction the court itself could have imposed on the statute. But if the discretion of the agency is no greater than that of the court, then what is the point of deference anyway? Why should courts defer to the judgment of agencies in filling gaps in the law, when they could fill those gaps using their own judgment?

Positivism places this question of institutional choice—of whose statutory constructions should prevail—in its proper context. For if Step Two corresponds to the second stage of the judicial process, then the question is not which institution should prevail in *applying* the law, which by then has run out. Rather, the question is which institution should prevail in *making* the law, to fill the gap left open. When the issue is framed in these terms, considerations of legitimacy naturally come to the fore. In a democracy such as ours, we expect the law to be made by the people and their elected representatives. The prospect of judicial law-making threatens this ideal, for federal judges are not popularly elected. Of course, heads of federal agencies are not either, but they at least are subject to political control, particularly through supervision by the President.[198] In our democracy,

194. *State Farm*, 463 U.S. at 43.
195. *See* Levin, *supra* note 20, at 1270; Stephenson & Vermeule, *supra* note 20, at 602–03.
196. HART, *supra* note 22, at 273.
197. Stephenson & Vermeule, *supra* note 20, at 603.
198. Farina, *supra* note 4, at 466.

this "link to the electorate" gives agency law-making a measure of legitimacy that judicial law-making lacks.[199] Thus, by deferring to an agency's permissible construction of a statute, a court allows statutory gaps to be filled by a more legitimate source of law-making power. *Chevron* emerges as a doctrine of judicial self-restraint, grounded in the recognition that, as members of the "least accountable" branch,[200] judges should avoid legislating from the bench as much as possible.[201]

This legitimacy-based justification for deference finds support in *Chevron* itself. There, the Court recognized that agencies may be more *capable* policymakers than courts, particularly when "the regulatory scheme is technical and complex" and "[j]udges are not experts in the field."[202] But in justifying judicial deference to agency statutory constructions, the Court devoted "far greater emphasis" to the recognition that agencies are more *legitimate* policymakers,[203] given that judges "are not part of either political branch of the Government."[204] The Court noted that "[w]hile agencies are not directly accountable to the people," they are answerable to a Chief Executive who is.[205] And because "it is entirely appropriate for [the Chief Executive] to make . . . policy choices," the Court explained, an agency may "properly rely upon the incumbent administration's views of wise

199. *Id.*

200. *Id.*

201. Others have argued that *Chevron* is best understood as a doctrine of judicial self-restraint, though without grounding the doctrine in the notion of hard cases. *See* Maureen B. Callahan, *Must Federal Courts Defer to Agency Interpretations of Statutes?: A New Doctrinal Basis for* Chevron U.S.A. v. Natural Resources Defense Council, 1991 WIS. L. REV. 1275, 1289 (1991); Mark Seidenfeld, Chevron*'s Foundation*, 86 NOTRE DAME L. REV. 273, 292 (2011); Note, *Justifying the* Chevron *Doctrine: Insights from the Rule of Lenity*, 123 HARV. L. REV. 2043, 2056 (2010) [hereinafter Note, *Rule of Lenity*]. Others have also argued that *Chevron* deference is best justified by the relative legitimacy of agency policymaking, though without situating the doctrine within positivist theory. *See, e.g.*, Manning, *supra* note 3, at 626; Seidenfeld, *supra*, at 289–90; Note, *Rule of Lenity*, *supra*, at 2056. And the Court itself has acknowledged that *Chevron* prevents judges "from substituting their own interstitial lawmaking for that of an agency," *City of Arlington v. FCC*, 133 S. Ct. 1863, 1873 (2013) (internal quotation marks omitted), though without abandoning its view that "*Chevron* is rooted in a background presumption of congressional intent," *id.* at 1868.

202. Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 865 (1984). The strength of this expertise-based rationale would seem to vary from case to case; there may be some areas—civil rights, for example—in which courts are in fact more capable law-makers than agencies. *See* Note, *Rule of Lenity*, *supra* note 201, at 2045–46 ("[T]he expertise of the agency, standing on its own, would be weak grounds for a blanket rule of deference to agency interpretations.").

203. Manning, *supra* note 3, at 626.

204. *Chevron*, 467 U.S. at 865.

205. *Id.*

policy to inform its judgments."[206] Thus, the Court concluded:

> When a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency's policy, rather than whether it is a reasonable choice within a gap left by Congress, 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.[207]

As the Court recognized, this legitimacy-based rationale is hardly trivial. "The responsibilities for assessing the wisdom of . . . policy choices and resolving the struggle between competing views of the public interest are not judicial ones," the Court explained, because "'[*o*]*ur Constitution* vests such responsibilities in the political branches.'"[208] The relative legitimacy of agency law-making is therefore a consequence of not just democratic theory, but constitutional structure.[209] It is thus wrong to assert that "conceiving of *Chevron* as a judge-made norm robs it of much of its normative force."[210] No less than other canons of construction, such as the so-called federalism canon[211] or the rule of lenity,[212] *Chevron* has a constitutional underpinning.

To say that *Chevron* is constitutionally *inspired*,[213] however, is not to say that it is constitutionally *required*.[214] If, as this Article argues, *Chevron* is a

206. *Id.*

207. *Id.* at 866; *see also id.* at 864 (stating that arguments over policy "are more properly addressed to legislators or administrators, not judges").

208. *Id.* at 866 (emphasis added) (quoting TVA v. Hill, 437 U.S. 153, 195 (1978)); *see also* U.S. CONST. art. I, § 1 (vesting "[a]ll legislative Powers herein granted" in Congress); *id.* art. I, § 7 (giving the President the power to veto legislation passed by Congress); *id.* art. II, § 2 (giving the President the "Power, by and with the Advice and Consent of the Senate, to make Treaties"); *id.* art. II, § 3 (giving the President the power to "recommend to [Congress's] Consideration such Measures as he shall judge necessary and expedient").

209. *See* Manning, *supra* note 3, at 625 ("*Chevron* deference rests . . . on premises of constitutional derivation.").

210. Merrill & Hickman, *supra* note 3, at 869.

211. *See* Gregory v. Ashcroft, 501 U.S. 452, 460 (1991) (holding that an intent to "upset the usual constitutional balance of federal and state powers" will not be attributed to Congress unless Congress makes that intent "unmistakably clear in the language of the statute") (internal quotation marks omitted).

212. *See* Dan M. Kahan, *Lenity and Federal Common Law Crimes*, 1994 SUP. CT. REV. 345, 345 (noting that the rule of lenity is "considered essential to securing a variety of values of near-constitutional stature," such as fair notice and legislative supremacy).

213. *See* Manning, *supra* note 3, at 623 (describing *Chevron* as "[a] [c]onstitutionally-[i]nspired [c]anon of [c]onstruction"); Seidenfeld, *supra* note 201, at 289–90.

214. Professors Douglas Kmiec and Richard Pierce have each come close to arguing that separation of powers principles *mandate* judicial deference to agency policy decisions. *See* Douglas W. Kmiec, *Judicial Deference to Executive Agencies and the Decline of the Nondelegation Doctrine*, 2 ADMIN. L.J. 269, 286 (1988) ("*Panama Refining Corp.* and *Chevron* cannot both be

judge-made doctrine, then its regime of deference can be overridden by Congress at any time. Congress could adopt a blanket rule requiring courts to impose their own construction on a statute in any case of ambiguity.[215] Or, instead of abolishing deference across the board, Congress could eliminate it on a statute-by-statute basis by specifying, for instance, "that in all suits involving interpretation or application of the Clean Air Act the courts [a]re to give no deference to the agency's views, but [a]re to determine the issue de novo."[216] Justice Scalia is surely correct that there is no "constitutional impediment" to Congress doing any of these things.[217] "It is generally assumed that common-law rules are subordinate to rules of positive legislation[,]"[218] and in this respect *Chevron* is no different from any other judge-made, common-law doctrine. The authority to decide hard cases may be part of the judicial power, but it is still subject to constraints imposed by Congress.

C. Solving Chevron*'s Puzzles*

The preceding Sections applied the teachings of positivism to the workings of the *Chevron* doctrine. They argued that Step One corresponds to the law-applying stage of the positivist's process of decision, and that Step Two corresponds to the law-making stage. And they showed how viewing *Chevron* in these terms answers recurring questions about the doctrine's application—about the object of the Step One inquiry, and the tools for conducting it; about when a statute is "clear," as opposed to "ambiguous"; about when an agency construction is "permissible," and when a court must "impose its own construction on the statute"; and about why a court should defer to a "permissible" agency construction as a matter of first principles.

This Section moves beyond the intricacies of the two-step inquiry to consider questions about judicial deference more generally. It examines

right. If expansively worded delegations of legislative authority are permissible, interpretations made in pursuit of that authority merit judicial deference."); Richard J. Pierce, Jr., *Reconciling* Chevron *and Stare Decisis*, 85 GEO. L.J. 2225, 2227 (1997) ("[*Chevron*] is one of the most important constitutional law decisions in history, even though the opinion does not cite any provision of the Constitution.").

215. *See* Silberman, *supra* note 3, at 824 ("Congress could reverse *Chevron*'s presumption generically by amending the Administrative Procedure Act (APA).").

216. Scalia, *supra* note 3, at 515–16.

217. *Id.* at 516; *see also* Silberman, *supra* note 3, at 824 ("As Justice Scalia has observed, for any given statute, Congress could rebut *Chevron*'s presumption—that ambiguous statutes should be interpreted by the agency rather than the judiciary—by stripping the agency of deference.").

218. Merrill & Hickman, *supra* note 3, at 868.

three familiar puzzles about the propriety of such deference: (1) whether *Chevron* is consistent with Article III of the Constitution; (2) whether it "asks judges to develop a cast of mind that often is psychologically difficult to maintain";[219] and (3) whether it results in a "paradox" in the sense that judges must defer to agencies whose interpretive methods differ sharply from their own.[220] This Section shows how conceiving of *Chevron* as a doctrine of hard cases solves these puzzles.

1. Marbury*'s Instructions*

While some scholars have suggested that the *Chevron* doctrine is constitutionally required, others have questioned whether it is even constitutionally permissible. Article III of the Constitution vests the "judicial Power" in "one supreme Court, and in such inferior Courts as Congress may from time to time ordain and establish."[221] Construing the scope of this power in *Marbury v. Madison*, Chief Justice Marshall famously declared that "[i]t is emphatically the province and duty of the judicial department to say what the law is."[222] Some believe *Chevron* stands for something altogether different and seemingly irreconcilable: "that in the face of ambiguity, it is emphatically the province of the *executive* department to say what the law is."[223] In their view, *Chevron* is "a kind of counter-*Marbury*,"[224] a doctrine fundamentally at odds with the understanding that "[t]he interpretation of the laws is the proper and peculiar province of the courts."[225]

When *Chevron* is understood as a doctrine of hard cases, however, any tension with *Marbury* disappears. *Chevron* mandates deference to agency constructions of law only when a statute is "silent or ambiguous," and in

219. Breyer, *supra* note 3, at 379.

220. Mashaw, *supra* note 27, at 504.

221. U.S. CONST. art. III, § 1.

222. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

223. Sunstein, *supra* note 7, at 2589 (emphasis added); *see also* Henry P. Monaghan, Marbury *and the Administrative State*, 83 COLUM. L. REV. 1, 2 (1983) ("Marshall's grand conception of judicial autonomy in law declaration was not in terms or in logic limited to constitutional interpretation, and taken at face value seemed to condemn the now entrenched practice of judicial deference to administrative construction of law."); William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from* Chevron *to* Hamdan, 96 GEO. L.J. 1083, 1160 (2008) ("If *Chevron* is a revolution, it is one seeking to overturn . . . almost two centuries of constitutional understandings."); Scalia, *supra* note 3, at 513 ("[O]n its face the suggestion [that courts should defer to an executive agency on a question of law] seems quite incompatible with Marshall's aphorism . . . .").

224. Sunstein, *supra* note 7, at 2589.

225. THE FEDERALIST NO. 78, *supra* note 48, at 525.

positivist terms, that is so only when the law runs out before providing a solution. Thus, under a positivist conception of *Chevron*, deference enters the picture only when the court has done all it can to "say what the law is" but the law nevertheless fails to yield a single right answer. At that point, resolving the dispute becomes a matter not merely of applying the law but also of making it, and any deference by the court would extend only to the agency's views of what the law *should* be. Properly understood, therefore, *Chevron* does not interfere with a court's Article III duty to apply the law. The court remains obliged to reject any agency construction that conflicts with the application of existing law, and the scope of judicial deference is confined to hard cases and the making of new law by the agency.[226]

Of course, conceiving of *Chevron* as a doctrine of hard cases raises the separate question whether federal courts have the authority to decide hard cases at all. History suggests that the answer is yes—that such authority was implicit in Article III's grant of "judicial Power."[227] The framers of the Constitution recognized that the law would at times be ambiguous, and that such ambiguities would be left for the Judiciary to resolve in the course of deciding individual cases.[228] The founding generations even contemplated the use of judge-made doctrines to guide the exercise of judicial discretion in hard cases. As one such doctrine (albeit of relatively recent vintage), *Chevron* is no less legitimate an exercise of the "judicial Power" than, say, the rule of lenity, which was applied in the early Republic by Chief Justice Marshall himself.[229] Indeed, as one insightful

226. *See* Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843 n.9 (1984) ("The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent.").

227. H.L.A. Hart himself believed that the "jurisdiction to settle [hard cases] by choosing between the alternatives which the statute leaves open" "seems obviously to be part, even if only an implied part," of the judicial power. HART, *supra* note 22, at 153. Of course, "there might be a legal system which contains a rule that whenever the courts are faced with a case for which the law does not provide a uniquely correct solution they ought to refuse to render judgment." Raz, *supra* note 91, at 845; *see also* HART, *supra* note 22, at 272 (noting that "Bentham once advocated" that judges in hard cases should "disclaim jurisdiction or . . . refer the points not regulated by the existing law to the legislature to decide"). But in our legal system, cases do not leave the courts' jurisdiction when they turn out to be hard.

228. *See* THE FEDERALIST NO. 37, at 236 (James Madison) (Jacob E. Cooke ed., 1961) ("All new laws, though penned with the greatest technical skill, and passed on the fullest and most mature deliberation, are considered as more or less obscure and equivocal, until their meaning be liquidated and ascertained by a series of particular discussions and adjudications."); Manning, *supra* note 147, at 88 n.340.

229. *See* United States v. Wiltberger, 18 U.S. (5 Wheat.) 76, 95 (1820) (Marshall, C.J.); The Adventure, 1 F. Cas. 202, 204 (Marshall, Circuit Justice, C.C.D. Va. 1812) (No. 93); Note, *Rule of Lenity*, *supra* note 201, at 2055–56.

student note has argued, *Chevron* can be seen as "a modern successor to the rule of lenity,"[230] given that both doctrines "require[] the judiciary to refrain from exercising political discretion in order to ensure that such discretion remains in the politically accountable branches," be it the Legislature (in the case of the rule of lenity) or the Executive (in the case of *Chevron*).[231] Thus, there is no tension between *Chevron* and the Constitution.[232] Quite the opposite: as explained above, *Chevron* reflects the norm, derived from the Constitution's separation of powers, that judges should avoid legislating from the bench whenever possible.

2. Breyer's Psychology

The second puzzle comes from Justice Breyer, an early critic of the *Chevron* doctrine. While a judge on the Court of Appeals for the First Circuit, he wrote an article advocating a "complex approach" to judicial deference under which courts would consider a "range of relevant factors" in deciding whether to defer to an agency.[233] Insofar as *Chevron* represented a "simpler approach," mandating deference in *all* cases in which the agency offered a reasonable construction of the statute, Justice Breyer feared that its two-step inquiry was too rigid.[234] In his view, one of the reasons "a strict view of *Chevron*" could not "prove successful in the long run" was that:

> [S]uch a formula asks judges to develop a cast of mind that often is psychologically difficult to maintain. It is difficult, after having examined a legal question in depth with the object of deciding it correctly, to believe both

230. Note, *Rule of Lenity*, *supra* note 201, at 2053.

231. *Id.* at 2056.

232. Nor is there any tension between *Chevron* and the APA, which provides that a "reviewing court shall decide all relevant questions of law, [and] interpret . . . statutory provisions." 5 U.S.C. § 706 (2012). Some have argued that the APA requires courts to resolve statutory ambiguities on their own, without deferring to agency views. *See* Duffy, *supra* note 4, at 193 ("*Chevron* was an APA case, so any attempt to justify its rule should begin with the APA. The doctrine runs into trouble immediately."); Eskridge & Baer, *supra* note 223, at 1160 ("If *Chevron* is a revolution, it is one seeking to overturn the APA . . . ."); Merrill & Hickman, *supra* note 3, at 868 ("If *Chevron* is a judicially developed norm, it is particularly difficult to explain why the doctrine supersedes the instruction in the APA that courts are to 'decide all relevant questions of law.'"); Cass R. Sunstein, Chevron *Step Zero*, 92 VA. L. REV. 187, 196 (2006) ("[Section 706] seems to suggest that ambiguities must be resolved by courts and hence that the *Chevron* framework is wrong."). But the APA's requirement of independent judicial review extends only to questions of law-applying; accordingly, it does not preclude judicial deference on questions of law-making. *Chevron* is consistent with the APA for the same reasons it is consistent with Article III.

233. Breyer, *supra* note 3, at 373. The merits of Justice Breyer's approach are considered in Section III.A, *infra*.

234. *Id.*

> that the agency's interpretation is legally wrong, *and* that its interpretation is reasonable. More often one concludes that there is a "better" view of the statute for example, and that the "better" view is "correct," and the alternative view is "erroneous."[235]

It may be true that a judge would find it psychologically difficult to "believe both that the agency's interpretation is legally wrong, *and* that its interpretation is reasonable." As a doctrine of hard cases, however, *Chevron* demands no such thing; it never asks judges to uphold as "reasonable" an agency construction they believe to be "legally wrong." That is because an agency construction is "reasonable" only if it is consistent with application of existing law—which is to say, legally permissible. And an agency construction is "legally wrong" only if it is ruled out by application of existing law—which is to say, unreasonable. For the positivist, then, a "reasonable" construction is never "legally wrong," and a "legally wrong" interpretation is never "reasonable." Furthermore, because deference is warranted only when the law is indeterminate, *Chevron* never requires a judge to defer to an agency construction contrary to his own view of the "correct" answer. If the judge believes there is a "correct" answer, then his duty is to apply it at Step One, without ever reaching the question of deference at Step Two. Justice Breyer's psychology-based critique thus fails: *Chevron* does not require judges either to accept interpretations they believe legally wrong or to reject interpretations they believe legally right.

The doctrine does require judges to uphold constructions they dispute as a matter of policy—constructions they themselves would not impose on the statute if they were acting as legislators. Reframing Justice Breyer's critique, one might ask whether it is psychologically difficult for judges to believe both that the agency's construction is unwise policy *and* that its construction is legally permissible. The distinction between law and policy, however, is present in every case, not just cases raising questions of deference. Judges must always strive to distinguish their views of what the law is from their views of what the law should be. And though at times they may be tempted to conflate the two, the challenge of keeping them separate is simply part of the judicial role. As a doctrine of hard cases, *Chevron* asks judges merely to respect a distinction they must always observe between applying the law and making it. If it is too psychologically difficult to do so, then the problem lies not with *Chevron*, but with our system of laws more generally.

235. *Id.* at 379.

3. Mashaw's Paradox

The final puzzle comes from Jerry Mashaw, an administrative law professor at Yale Law School. In perhaps the first article to consider "administrative interpretation in its own right,"[236] Mashaw observed that "legitimate techniques and standards for agency statutory interpretation diverge sharply from the legitimate techniques and standards for judicial statutory interpretation."[237] He noted, for example, that it is appropriate for agencies to "[f]ollow presidential directions" when construing statutes, but inappropriate for courts to do the same; it is also acceptable for agencies to interpret statutes in light of the "contemporary political milieu," but not for courts to do likewise.[238] These differences give rise to what Mashaw called the "paradox of deference"[239]: "How can a court's determination of 'ambiguity' or 'reasonableness' at *Chevron*'s famous two analytical 'steps' be understood as deferential when that determination emerges from the normative commitments and epistemological presumptions of 'judging' rather than 'administering'?"[240]

The paradox vanishes, however, when *Chevron* is understood as a doctrine of hard cases. The positivist views courts and agencies as occupying different roles within the *Chevron* framework. Courts have a single responsibility: to apply existing law. But the responsibilities of agencies are two-fold: in addition to following existing law, they must make new law in hard cases. Given that the responsibilities of the two institutions differ, it should come as no surprise that their methods do as well. One would expect both courts and agencies to employ "traditional tools of statutory construction" when applying existing law.[241] But surely such tools are ill suited to the task of law-making, the goal of which is to achieve "a reasonable accommodation of manifestly competing interests."[242] In fashioning new law, agencies are properly guided by the methods of the legislator, not the methods of the judge.

Quite appropriately, then, most of the techniques that Mashaw identified as appropriate for agencies (but not courts) are ones associated with law-making. If agencies must occasionally make new law, then we should not be surprised when they "[f]ollow presidential directions" and "pay constant

236. Mashaw, *supra* note 27, at 503.
237. *Id.* at 504.
238. *Id.* at 522 tbl.1.
239. *Id.* at 504.
240. *Id.* at 537–38.
241. Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843 n.9 (1984).
242. *Id.* at 865.

attention to [the] contemporary political milieu," in order to ensure that their law-making reflects the popular will.[243] The Court recognized as much in *Chevron*, when it stated that an agency could "properly rely upon the incumbent administration's views of wise policy."[244] Nor should we be surprised when agencies fill statutory gaps with an eye to "insur[ing] hierarchical control over subordinates"[245] or "mak[ing] the statutory scheme effective,"[246] for those are the sort of things we would expect any responsible law-maker to do.

There is thus no paradox of deference. Indeed, if deference is to be justified at all, the perspectives of courts and agencies *must* differ. The real paradox would be if they did not. For what would be the point of deference if courts and agencies went about the task of statutory construction in exactly the same way? Under *Chevron* as a doctrine of hard cases, deference is justified only because agencies are more legitimate law-makers than courts; and agencies have greater legitimacy precisely because they approach statutory construction from a different place in the constitutional order.

D. Challenging the Conventional Wisdom

The notion of hard cases not only elucidates *Chevron*'s two-step inquiry, but also solves longstanding puzzles about judicial deference generally. And yet, the conventional wisdom, as reflected in Supreme Court case law and academic commentary, is that *Chevron* rests instead on a presumption about congressional intent—a presumption that "a statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps."[247]

The conventional wisdom is not without some merit. By grounding deference in the commands of Congress, the congressional-intent theory eliminates any tension between *Chevron* and Article III.[248] If deference rests on a congressional delegation of law-making authority to the agency, then by deferring to the agency, the court is "simply applying the law as 'made'

243. Mashaw, *supra* note 27, at 522 tbl.1.

244. *Chevron*, 467 U.S. at 865.

245. Mashaw, *supra* note 27, at 522 tbl.1.

246. *Id.* at 518 (internal quotation marks omitted).

247. FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159 (2000); *see also* sources cited *supra* notes 2–3.

248. Manning, *supra* note 3, at 627 ("If the Court presumes that ambiguity is a delegation of interpretive discretion to the agency, then a reviewing court satisfies its *Marbury* obligation simply by accepting an agency's reasonable exercise of discretion within the boundaries of the authority delegated by Congress.").

by" Congress.[249] To "say what the law is" is thus to say that the law commands deference. But this ability to reconcile *Chevron* with the Constitution is hardly special; as explained above, the notion of hard cases accomplishes the same thing, though by way of different reasoning.

For the reconciliation to work, moreover, the delegation on which the congressional-intent theory rests must be grounded in reality. One must be able to say that Congress, aware of the potential for ambiguities in the laws it enacts, actually means for them to be resolved by agencies.[250] But "the evidence supporting the presumption that Congress generally intends agencies to be the primary interpreters of statutory ambiguities is weak."[251] No one seriously denies that the presumption about congressional intent is but a legal fiction created by the Judiciary.[252] And if the presumption is a judge-made fiction, then *Chevron* must necessarily be a judge-made doctrine, as this Article argues.[253]

Unlike the presumption about congressional intent, a theory of deference grounded in the notion of hard cases owns up to the fact that *Chevron* is a doctrine "developed by courts based on their own authority."[254] To explain *Chevron* as a doctrine of hard cases is to acknowledge that the law has limits; that when the law runs out, new law must be made to fill the gap; and that new law is more legitimately made by a politically accountable agency in such cases. By tracing *Chevron* deference to its true source, this positivist account of the doctrine bears an important virtue that the congressional-intent theory lacks: intellectual honesty.

But the hard-cases theory is not just more honest; it is more instructive. Unlike the presumption about congressional intent, the hard-cases theory is robust enough to answer longstanding questions about the application of *Chevron*'s two-step inquiry. At Step One, for example, the theory shows how the inquiry into "whether Congress has directly spoken to the precise question at issue" merely replicates the initial, law-applying stage of any

249. Monaghan, *supra* note 223, at 28.

250. H.L.A. Hart himself endorsed "delegation of limited powers to the executive" as a legislative solution to the problem of judicial discretion in hard cases. HART, *supra* note 22, at 275; *see also id.* at 131 ("Sometimes the sphere to be legally controlled is recognized from the start as one in which the features of individual cases will vary so much in socially important but unpredictable respects, that uniform rules to be applied from case to case without further official direction cannot usefully be framed by the legislature in advance. Accordingly, to regulate such a sphere the legislature sets up very general standards and then delegates to an administrative, rule-making body acquainted with the varying types of case, the task of fashioning rules adapted to their special needs.").

251. Merrill & Hickman, *supra* note 3, at 871.

252. *See* sources cited *supra* note 7.

253. *See* Barron & Kagan, *supra* note 5, at 212.

254. Merrill & Hickman, *supra* note 3, at 868.

case of statutory interpretation. And at Step Two, the theory shows how the question "whether the agency's answer is based on a permissible construction of the statute" is just another way of asking whether the court itself could have imposed the same construction by making law on its own. By contrast, the presumption about congressional intent tells us hardly anything about how clear is "clear," when a construction is "permissible," or other aspects of the two-step inquiry. It is little wonder, then, that such questions have continued to persist after all these years. Jeremy Bentham once said that it would be "foolish" to adhere to a legal fiction if "[w]hat you have been doing by the fiction" could be done just as well without it.[255] Adhering to the conventional account of *Chevron* is even worse, because what we have been doing by the fiction could be done *better* with a theory grounded in reality.

Despite shedding little light on the workings of *Chevron*'s two-step inquiry, the congressional-intent theory does illuminate the scope of *Chevron*'s domain—the question when, if ever, courts should withhold deference to a reasonable agency construction of law. It is here where the implications of the conventional wisdom diverge most sharply from those of a theory grounded in the notion of hard cases. The next Part explains why.

III. IMPLICATIONS FOR *CHEVRON*'S DOMAIN

Prior to the Supreme Court's decision in *Chevron*, judicial deference to agency constructions of law was contextual. When a statute expressly delegated authority to an agency "to define a statutory term or prescribe a method of executing a statutory provision," deference was required.[256] But in the absence of an express statutory delegation, deference "depended upon multiple factors that courts evaluated in light of the circumstances of each case."[257] The Court's decision in *Chevron* seemed to replace this multifactor analysis with a categorical rule mandating deference whenever a statute is ambiguous and an agency construction reasonable.[258] By its

255. JEREMY BENTHAM, *Rationale of Judicial Evidence: On the Cause of Exclusion of Evidence—The Technical System of Procedure*, *in* 7 THE WORKS OF JEREMY BENTHAM 196, 283 (John Bowring ed., Russell & Russell, Inc. 1962) (1843).

256. United States v. Vogel Fertilizer Co., 455 U.S. 16, 24 (1982) (internal quotation marks omitted); *see also* Batterton v. Francis, 432 U.S. 416, 425 (1977) (holding that because Congress "expressly *delegated* to the Secretary [of Health, Education, and Welfare] the power to prescribe standards for determining what constitutes 'unemployment' for purposes of [Title IV of the Social Security Act]," a reviewing court could not set aside the Secretary's interpretation "simply because it would have interpreted the statute in a different manner").

257. Merrill & Hickman, *supra* note 3, at 833.

258. *See* Christensen v. Harris Cnty., 529 U.S. 576, 589 n.* (2000) (Scalia, J., concurring in part and concurring in the judgment) (reading *Chevron* to establish a blanket presumption

terms, *Chevron* seemed to require courts to defer to *every* reasonable agency construction of *any* statutory ambiguity.[259]

In the years following *Chevron*, however, courts began doubting the wisdom of such a categorical rule, asking whether it made sense to *always* defer to the agency when *Chevron*'s two steps were satisfied.[260] Today, questions regarding *Chevron*'s domain regularly show up in one of two forms: first, whether the *Chevron* framework should apply to particular types of agency action; and second, whether other canons of statutory construction should displace the deference mandated by *Chevron*. This Part considers the implications for these questions of *Chevron* as a doctrine of hard cases.

A. Understanding Chevron *Step Zero*

In their influential article on *Chevron*'s domain,[261] Professors Thomas Merrill and Kristin Hickman coined the term "Step Zero" to describe the "inquiry that must be made in deciding whether courts should turn to the *Chevron* framework at all, as opposed to [a different] framework or deciding the interpretational issue de novo."[262] The necessity of a Step Zero inquiry is far from obvious. Are not Steps One and Two sufficient by themselves to establish when *Chevron* deference is appropriate? No, according to Merrill and Hickman: "if *Chevron* rests on a presumption about congressional intent, then *Chevron* should apply only where Congress would want *Chevron* to apply."[263] It is therefore not enough that the statute is ambiguous and the agency construction reasonable; Congress may have intended for courts to apply a different framework even when Steps One and Two are satisfied.

The trouble lies in the fact that "tangible evidence"[264] of Congress's intent regarding *Chevron*'s application will almost always be lacking. To be

that "ambiguities are to be resolved (within the bounds of reasonable interpretation) by the administering agency").

259. *See* Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984).

260. Ironically, it was Justice Stevens, the author of the Court's opinion in *Chevron*, who led early efforts to cabin *Chevron*'s domain. Sunstein, *supra* note 232, at 188 & n.2; *see* INS v. Cardoza-Fonseca, 480 U.S. 421, 446 (1987) (Stevens, J.) (suggesting that *Chevron* deference does not apply to "pure question[s] of statutory construction," as distinguished from mixed questions of law and fact); Negusie v. Holder, 555 U.S. 511, 538 (2009) (Stevens, J., concurring in part and dissenting in part) (arguing in favor of "the narrower interpretation of *Chevron* endorsed by the Court in *Cardoza-Fonseca*").

261. Just after its publication, the article was cited by the Supreme Court in *United States v. Mead Corp.*, 533 U.S. 218, 230 n.11 (2001).

262. Merrill & Hickman, *supra* note 3, at 836.

263. *Id.* at 872.

264. Breyer, *supra* note 3, at 371.

sure, "Congress has broad power to decide what kind of judicial review should apply to what kind of administrative decision."[265] But as already noted,[266] "Congress so rarely discloses (or, perhaps, even has) a view on this subject as to make a search for legislative intent chimerical and a conclusion regarding that intent fraudulent in the mine run of cases."[267] As a result, the best a court can typically do is construct a "'hypothetical' congressional intent on the 'deference' question"[268] based on "the practical features of the particular circumstance" and the court's own judgment of whether judicial deference would "make[] sense" in light of them.[269]

That is the approach the Court took in *United States v. Mead Corp.*,[270] the first case to address the Step Zero inquiry in detail. Justice Souter's opinion for the Court in *Mead*, joined by all his colleagues except Justice Scalia, held that judges may infer that Congress intended *Chevron* to apply "when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law."[271] The Court noted that one "very good indicator" that Congress has delegated such authority is whether the agency has the "power to engage in adjudication or notice-and-comment rulemaking."[272] "It is fair to assume generally," the Court explained, "that Congress contemplates administrative action with the effect of law when it provides for a relatively formal administrative procedure tending to foster the fairness and deliberation that should underlie a pronouncement of such force."[273] The Court was quick to emphasize, however, that it has "sometimes found reasons for *Chevron* deference even when no such administrative formality was required and none was afforded."[274] Of the "variety of indicators that Congress would expect *Chevron* deference," the Court stressed, the formality of the administrative action is only one.[275]

265. Barron & Kagan, *supra* note 5, at 203.

266. *See supra* notes 4, 5, and 7 and accompanying text.

267. Barron & Kagan, *supra* note 5, at 203.

268. Breyer, *supra* note 3, at 371; *see also* BREYER, *supra* note 76, at 106 ("It is quite possible that no member of Congress actually thought about the matter. But a judge can still ask how a reasonable member of Congress would have answered it had the question come to mind.").

269. Breyer, *supra* note 3, at 370 (internal quotation marks omitted); *see also* Barron & Kagan, *supra* note 5, at 212 ("Because Congress so rarely makes its intentions about deference clear, *Chevron* doctrine at most can rely on a fictionalized statement of legislative desire, which in the end must rest on the Court's view of how best to allocate interpretive authority.").

270. 533 U.S. 218 (2001).

271. *Id.* at 226–27.

272. *Id.* at 229.

273. *Id.* at 230.

274. *Id.* at 231.

275. *Id.* at 237; *see also id.* at 227 ("Delegation of such authority may be shown in a

The Court proceeded to identify other indicators in subsequent cases, beginning with *Barnhart v. Walton*.[276] There, writing for the same eight-Justice majority as in *Mead*, Justice Breyer held that the agency construction at issue qualified for *Chevron* deference despite having been originally promulgated "through means less formal than 'notice and comment' rulemaking."[277] According to the Court, there were other factors—"the interstitial nature of the legal question, the related expertise of the Agency, the importance of the question to the administration of the statute, the complexity of that administration, and the careful consideration the Agency has given the question over a long period of time"—that made the construction *Chevron*-eligible.[278] Citing some of those same factors in *Zuni Public School District No. 89 v. Department of Education*, the Court held that the *Chevron* framework was applicable there as well.[279] Writing again for the majority in *Zuni*, Justice Breyer emphasized that "the matter at issue . . . [was] the kind of highly technical, specialized interstitial matter that Congress often does not decide itself, but delegates to specialized agencies to decide."[280]

Ironically, the effect of the Court's Step Zero jurisprudence in *Mead* and subsequent cases has been a return to the pre-*Chevron* days, when the scope of judicial deference depended on the circumstances of each case. Having embraced *Chevron*'s supposed origins in congressional intent, the Court has now embraced the search for such intent. And because such intent is for the most part a fiction, the search necessarily entails consideration of "various 'practical' circumstances"[281]—chief among them "the interpretive method used [by the agency] and the nature of the question at issue."[282] The consequence is a substantial narrowing of *Chevron*'s domain. Under *Mead* and subsequent Step Zero cases, "'interpretations contained in policy statements, agency manuals, and enforcement guidelines' . . . are beyond the *Chevron* pale."[283] So, too, apparently are "questions of major importance"[284] and "central legal issues,"[285] on the view that they are too

variety of ways, as by an agency's power to engage in adjudication or notice-and-comment rulemaking, or by some other indication of comparable congressional intent.").

276. 535 U.S. 212 (2002).

277. *Id.* at 221.

278. *Id.* at 222.

279. 550 U.S. 81, 89–90 (2007).

280. *Id.* at 90.

281. Breyer, *supra* note 3, at 372.

282. *Barnhart*, 535 U.S. at 222.

283. United States v. Mead Corp., 533 U.S. 218, 234 (2001) (quoting Christensen v. Harris Cnty., 529 U.S. 576, 587 (2000)).

284. BREYER, *supra* note 76, at 107; *see also* Gonzales v. Oregon, 546 U.S. 243, 267 (2006) (citing the "importance of the issue of physician-assisted suicide" in concluding that

far removed from "the kind of highly technical, specialized interstitial matter" Congress would presumably want an agency to decide.[286]

Conceiving of *Chevron* as a doctrine of hard cases entails a drastically different approach to Step Zero—an approach that would restore *Chevron*'s status as a categorical rule. Recall that *Chevron* as a doctrine of hard cases is grounded not in congressional intent, but in judicial self-restraint; and that the purpose of the doctrine, when so conceived, is not to enforce a congressional delegation of power to the agency, but to prevent an exercise of legislative power by the court. Given that purpose, it follows that *Chevron* should apply each time the exercise of such legislative power can be avoided by deference to a more legitimate lawmaker—which is in *every* case where the statute is ambiguous and the agency construction reasonable. Conceived as a doctrine of hard cases, *Chevron* would contemplate deference *whenever* Steps One and Two are satisfied.

To embrace *Chevron* as a doctrine of hard cases would thus be to render Step Zero unnecessary—and unwarranted. If the purpose of the *Chevron* doctrine is to keep judges from acting as legislators, then *Mead* and other Step Zero decisions serve only to undermine that purpose by arbitrarily preserving judicial law-making discretion in cases in which the agency did not speak with the "force of law."[287] Under a legitimacy-based rationale, the supposed "force" of the agency construction is simply irrelevant; even when the construction is issued without the "force of law," it still represents a form of law-making more legitimate than a court's imposition of its own construction on the statute. What matters for purposes of legitimacy is that agencies are politically accountable while judges are not—a fact unaffected by whether the agency construction appears in a policy statement instead of

the Attorney General's interpretation of the Controlled Substances Act to prohibit doctors from prescribing drugs for use in suicide was not *Chevron*-eligible).

285. Negusie v. Holder, 555 U.S. 511, 531 (2009) (Stevens, J., concurring in part and dissenting in part) (citing *Barnhart*, 535 U.S. at 222).

286. Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ., 550 U.S. 81, 90 (2007).

287. *Cf.* Note, *Rule of Lenity*, *supra* note 201, at 2063 ("Once *Chevron* is understood as a constitutional responsibility of the judiciary to avoid policymaking power, it makes little sense to limit deference only to those interpretations issued with the force of law."). It is true that even if *Chevron* deference does not apply, the court must still review the agency construction under the doctrine set forth in *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). *See Mead*, 533 U.S. at 234. But *Skidmore* is itself a doctrine of discretion, which does nothing to constrain a court's discretion in hard cases. *See Skidmore*, 323 U.S. at 140 (holding that agency rulings should be given such weight as they have the "power to persuade"); *cf.* Kasten v. Saint-Gobain Performance Plastics Corp., 131 S. Ct. 1325, 1340 n.6 (2011) (Scalia, J., dissenting) ("If one has been persuaded by another, so that one's judgment accords with the other's, there is no room for deferral—only for agreement. Speaking of '*Skidmore* deference' to a persuasive agency position does nothing but confuse.").

a regulation, or whether the case concerns a major question rather than an interstitial one.[288] When *Chevron* is understood as a doctrine of hard cases, there is simply no reason to limit the scope of its domain because of such "practical" considerations as the formality of the administrative action and the nature of the question at issue.

As a doctrine of hard cases, therefore, *Chevron* has only two steps.[289] But though there is no place for a Step Zero, there is still need for an additional rule, implicit in any regime of judicial deference: a rule of recognition for agency constructions of law.[290] After all, a court cannot defer to an agency construction under any doctrine without first identifying what that construction is. A rule of recognition for agency constructions would thus serve three purposes.

First, it would identify the criteria for determining which agency's constructions matter for the statute in question. Just as a law enacted by the General Assembly of Ohio would not qualify as a federal statute, a construction adopted by the Board of Immigration Appeals would not qualify as a construction of the Internal Revenue Code. An agency charged with administering one statute may lack authority to administer another.[291] A rule of recognition would tell us whose constructions are relevant.

Second, a rule of recognition would specify the general characteristics that an administrative action must possess to count as the construction of the relevant agency.[292] The import of an administrative action will frequently be obvious, but questions may arise regarding whether an action represents the agency's authoritative position. What if, for instance, a construction was approved by the agency's assistant director, but not by the director himself? Or what if a construction was advanced only in the course of litigation by the agency's lawyers? By specifying certain criteria of administrative validity, a rule of recognition would establish whether such

288. If anything, the relative illegitimacy of judicial law-making grows with the importance of issue. *See* Sunstein, *supra* note 232, at 233.

289. Professors Matthew Stephenson and Adrian Vermeule have argued that *Chevron* has only one step. Stephenson & Vermeule, *supra* note 20, at 597. Insofar as they mean that Steps One and Two are analytically indistinct, they are wrong. *See* Richard M. Re, *Should* Chevron *Have Two Steps?*, 89 IND. L.J. 605, 608 (2014) ("[T]raditional *Chevron* has two steps that respectively ask whether the agency's view is mandatory and whether it is reasonable."); *supra* text accompanying notes 188–190.

290. For a discussion of rules of recognition generally, see *supra* Section I.A.

291. It may even be the case that no agency is charged with administering a particular statute. *See* Crandon v. United States, 494 U.S. 152, 177 (1990) (Scalia, J., concurring) (explaining that a federal criminal statute "is not administered by any agency but by the courts").

292. *See* HART, *supra* note 22, at 95.

constructions should be attributed to the agency.

Third, a rule of recognition would order the various criteria of validity in a hierarchy, thus making "provision . . . for their possible conflict."[293] Suppose, for example, that two agencies, in the course of administering the same statute, construed the same provision in inconsistent ways. Or suppose that a single agency, in the course of adjudicating separate disputes, issued two different interpretations of the same provision, one in a published opinion and the other in an unpublished opinion. A rule of recognition would settle which of two conflicting but otherwise valid constructions was supreme.

To get a sense of how a rule of recognition would function in practice, one need look no further than the opinions of Justice Scalia. Unlike the rest of his colleagues on the Court, Justice Scalia has rejected the notion that *Chevron* deference should be limited to agency constructions issued with the "force of law."[294] "[A]dher[ing] to the original formulation of *Chevron*,"[295] he has maintained instead that deference should extend to "all *authoritative* agency interpretations of the statutes [that agencies] are charged with administering."[296] An interpretation is "authoritative," according to Justice Scalia, if it "represent[s] the judgment of central agency management, approved at the highest levels."[297] And the purpose of that limitation, Justice Scalia has explained, is to ensure that "it is truly the agency's considered view, [and not] the opinions of some underlings, that are at issue."[298] By identifying certain agency constructions as valid or not depending on whether they represent the authoritative view of the agency charged with administering the statute, Justice Scalia's rule meets the very definition of a rule of recognition. Of course, his is not the only possible rule of recognition for agency constructions of law; nor is his rule, as expressed in his opinions, necessarily as developed as it could be. But unlike the rule developed by the Court in *Mead* and subsequent Step Zero cases, Justice Scalia's rule is at least consistent with *Chevron* as a doctrine of hard cases.[299]

293. *Id.*

294. *See* United States v. Mead Corp., 533 U.S. 218, 241 (2001) (Scalia, J., dissenting) (criticizing the Court's Step Zero holding as "neither sound in principle nor sustainable in practice").

295. *Id.* at 256.

296. *Id.* at 241.

297. *Id.* at 258 n.6; *see also id.* at 257 (stating that an agency construction is "authoritative" if it "represents the official position of the agency").

298. *Id.* at 258 n.6.

299. This despite the fact that Justice Scalia accepts the conventional wisdom that *Chevron* is grounded in a presumption about congressional intent. *See id.* at 241, 256–57. In light of his rejection of the Court's Step Zero jurisprudence, Justice Scalia has been said to

Finally, a note about timing: as the name "Step Zero" suggests, scholars have generally thought of the Step Zero inquiry as occurring *before* Step One. Merrill and Hickman, for their part, have referred to the inquiry as a "threshold issue."[300] On a positivist reading of *Chevron*, however, Step One is simply the ordinary law-applying stage of any case of statutory interpretation, regardless of whether an agency construction is available. Only if the law runs out is judicial deference—of any type—even a possibility.[301] There is thus no need to ask whether an agency construction was issued with the "force of law," or even whether it represents the authoritative position of the agency, until *after* Step One.[302] And indeed, that is when the Court has at times conducted the inquiry.[303] At a minimum, then, Step Zero should be renamed Step One-and-One-Half.[304] But it would be even better if Step Zero were discarded altogether.

B. Understanding the Relationship Between Chevron *and Other Canons*

For centuries, courts have applied various rules of construction in interpreting statutes. The relationship between these canons and judicial deference is "one of the most uncertain aspects of the *Chevron* doctrine,"[305]

favor "nearly unlimited deference" to agencies. Barron & Kagan, *supra* note 5, at 206. But that is not true, given the relative infrequency with which he finds a statute ambiguous at Step One. *See* Scalia, *supra* note 3, at 521. In fact, Justice Scalia was the least deferential of the Justices, according to a study of Supreme Court cases decided between 1989 and 2005. Miles & Sunstein, *supra* note 169, at 826.

300. Merrill & Hickman, *supra* note 3, at 848.

301. *See* Kristin E. Hickman & Matthew D. Krueger, *In Search of the Modern* Skidmore *Standard*, 107 COLUM. L. REV. 1235, 1247 (2007) ("[B]ecause a reviewing court will not defer to an agency under either doctrine if the statute's meaning is clear, the *Skidmore* standard implicitly replicates *Chevron*'s first step.").

302. Put differently, when the statute's meaning is clear, the choice among *Chevron*, *Skidmore*, or some other standard is moot—which probably explains why, in the majority of cases the Court hears in which an agency construction is available, the Court declines to invoke any deference regime whatsoever. *See* Eskridge & Baer, *supra* note 223, at 1100 (reporting that no deference regime was invoked in 53.6% of the cases involving an agency interpretation that the Court heard between 1984 and 2006); Sunstein, *supra* note 232, at 191 ("Many cases can be decided without resolving the Step Zero question; in such cases, it will not matter whether *Chevron* deference is applied.").

303. *See* Mayo Found. for Med. Educ. & Research v. United States, 131 S. Ct. 704, 711–14 (2011) (inquiring into *Chevron*'s domain only after completing Step One); Barnhart v. Walton, 535 U.S. 212, 221–22 (2002) (inquiring into *Chevron*'s domain only after completing both Step One and Step Two).

304. *See* Joseph Cordaro, Note, *Who Defers to Whom? The Attorney General Targets Oregon's Death with Dignity Act*, 70 FORDHAM L. REV. 2477, 2506 (2002).

305. Bradley, *supra* note 3, at 675; *see also* Nelson, *supra* note 4, at 348 ("With a few notable exceptions, . . . legal scholars have spent little time trying to dispel the uncertainty.") (footnote omitted).

and grounding *Chevron* in a presumption about congressional intent has brought little enlightenment. Of course, *Chevron* itself directs courts to "employ[] traditional tools of statutory construction" in "ascertain[ing] [whether] Congress ha[s] an intention on the precise question at issue."[306] That "would seem to support reliance on at least some canons of construction" at Step One.[307] But which canons? And what happens to *Chevron*'s domain when applying a canon would rule out an agency construction that would otherwise be deemed permissible at Step Two? Should the canon displace judicial deference, or vice versa?

In answering these questions, some scholars[308] have found it useful to discuss the canons in terms of their traditional categorization into two types: textual canons, which function as "guidelines for evaluating linguistic or syntactic meaning,"[309] and substantive (or normative) canons, "rooted in broader policy or value judgments."[310] When the canons are viewed through the lens of legal positivism, however, a different typology emerges, consisting of three categories: law-applying canons, which help courts discern meaning already existing in a statute; ambiguity-creating canons, which create ambiguity where a statute would otherwise be clear; and law-making canons, which guide courts' exercise of discretion in the face of statutory ambiguity. This Section explains these categories and their relationship to *Chevron* as a doctrine of hard cases.

1. Law-Applying Canons

The first category consists of canons corresponding to the first stage of the positivist's process of decision: applying the law. These are canons designed to aid courts in their efforts to discover the existing meaning of a statute. By serving as guides to what the Legislature intended, these canons help uncover what the law is. They should thus be considered among the "traditional tools" properly employed at Step One, when the question is "whether Congress has directly spoken to the precise question at issue."[311]

All of the so-called textual canons qualify as law-applying canons.

306. Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843 n.9 (1984).

307. Bradley, *supra* note 3, at 675.

308. *See, e.g.*, Bamberger, *supra* note 14, at 71–76.

309. ESKRIDGE, FRICKEY & GARRETT, *supra* note 80, at 341.

310. *Id.* at 342.

311. *Chevron*, 467 U.S. at 842. Of course, the extent to which the law-applying canons can give content to the law is limited. As H.L.A. Hart recognized, "Canons of 'interpretation' cannot eliminate, though they can diminish, [the law's open texture]; for these canons are themselves general rules for the use of language, and make use of general terms which themselves require interpretation." HART, *supra* note 22, at 126.

"[A]imed at identifying the intended meaning of statutory language,"[312] textual canons help courts apply the law. Examples include the plain meaning rule, the canons of word association, the canons of negative implication, the grammar and punctuation rules, and the whole act rule.[313] Consistent with their law-applying function, such canons are regularly invoked by courts at Step One.[314]

What about the so-called substantive canons? At first glance, most substantive canons would seem to fit the "law-applying" description. Most are premised, after all, on a presumption about congressional intent.[315] The canon of constitutional avoidance, for example, has been described by the Court as rooted in "the reasonable presumption that Congress did not intend [a statutory meaning] which raises serious constitutional doubts"; the Court has thus referred to the canon as "a means of giving effect to congressional intent."[316] But the presumptions underlying substantive canons are widely regarded as fictions, even in the case of the avoidance canon: as Professor John Manning has noted, "[V]irtually no one (except the Supreme Court Justices) views [the rationale for avoidance] as resting upon a plausible account of what a rational legislator would intend."[317] It

312. Nelson, *supra* note at 4, at 349; *see also* Bamberger, *supra* note 14, at 72 ("[T]extual canons offer tools for deciphering evidence of statutory meaning supplied by Congress itself . . . .").

313. ESKRIDGE, FRICKEY & GARRETT, *supra* note 80, app., at 389–90.

314. Nat'l Credit Union Admin. v. First Nat'l Bank & Trust Co., 522 U.S. 479, 501 (1998) (invoking the canon that "similar language contained within the same section of a statute must be accorded a consistent meaning"); MCI Telecomms. Corp. v. AT&T Co., 512 U.S. 218, 225–28 (1994) (relying on the plain meaning of a statutory term as reflected in relevant dictionaries); Dole v. United Steelworkers of Am., 494 U.S. 26, 36 (1990) (invoking the canon, known as *noscitur a sociis*, that "words grouped in a list should be given related meaning") (internal quotation marks omitted); *see also* Bradley, *supra* note 3, at 675 ("[T]he Court regularly applies text-oriented canons in determining whether Congress has spoken to an issue under Step One of *Chevron*."); Nina A. Mendelson, Chevron *and Preemption*, 102 MICH. L. REV. 737, 745 (2004) ("[C]ourts generally have applied rules of syntax in preference to agency interpretations on the ground that the syntax rules represent traditional tools of statutory construction by which courts can discern whether Congress has directly answered a statutory question under *Chevron* Step One.").

315. *See* Bamberger, *supra* note 14, at 73–74 (noting that normative canons are "often framed in terms of fictions about legislative intent").

316. Clark v. Martinez, 543 U.S. 371, 381–82 (2005).

317. John F. Manning, *Clear Statement Rules and the Constitution*, 110 COLUM. L. REV. 399, 419 n.108 (2010); *see also* FRIENDLY, *supra* note 96, at 210 ("It does not seem in any way obvious, as a matter of construction, that the legislature would prefer a narrow construction which does not raise constitutional doubts to a broader one which does raise them."); William K. Kelley, *Avoiding Constitutional Questions as a Three-Branch Problem*, 86 CORNELL L. REV. 831, 854 (2001) ("It is certainly true that the system presumes that Congress intends to act constitutionally . . . . It is quite a different point, however, to assume that Congress would

follows that substantive canons "do not really help a court ascertain whether Congress has spoken to an issue."[318] Most are designed instead "to guide judges when the available information about intended meaning has run out."[319] Thus, with a few exceptions discussed in the next Section, substantive canons are strictly law-making in nature and not appropriately invoked at Step One.[320]

2. Ambiguity-Creating Canons

Ambiguity-creating canons, as their name suggests, create ambiguity where the statute would otherwise be clear. They function by eliminating what would normally be the best reading of a statute, thus leaving the court with the task of resolving the resulting ambiguity. Because these canons create hard cases where none before existed, they are properly applied at Step One, while the court is determining whether there are any statutory gaps for the agency to fill.

The best example of an ambiguity-creating canon is the absurd results canon (also known as the absurdity doctrine), which holds that "judges may deviate from even the clearest statutory text when a given application would otherwise produce 'absurd' results."[321] *Green v. Bock Laundry Machine Co.*[322] illustrates how the canon can create ambiguity. At issue in *Bock Laundry* was former Federal Rule of Evidence 609(a)(1), which governed the admission of evidence for attacking the credibility of a witness. The rule provided that evidence of a witness's prior felony convictions "shall be admitted" for that purpose, but only if the trial court determines that the "probative value of admitting [the] evidence outweighs its prejudicial effect to the *defendant*."[323] All nine Justices agreed that the rule could not mean what it said given the "odd" result it would produce in civil cases: a civil defendant would always be able to impeach a civil plaintiff's witnesses with

want its work to be interpreted as not even approaching the constitutional line."); Frederick Schauer, Ashwander *Revisited*, 1995 SUP. CT. REV. 71, 92 ("[T]here is no evidence whatsoever that members of Congress are risk-averse about the possibility that legislation they believe to be wise policy will be invalidated by the courts.").

318. Bradley, *supra* note 3, at 676.

319. Nelson, *supra* note at 4, at 349; *see also* Mendelson, *supra* note 314, at 746 ("Substantive presumptions or canons really represent a judicial resolution of a statutory question where the evidence of what Congress meant is unclear.").

320. *Contra* Morales-Izquierdo v. Gonzales, 486 F.3d 484, 504 (9th Cir. 2007) (en banc) (Thomas, J., dissenting) (arguing that the avoidance canon is "properly applied at step one of the *Chevron* analysis" because "the canon is unquestionably a 'traditional tool of statutory interpretation'").

321. Manning, *supra* note 139, at 2388.

322. 490 U.S. 504 (1989).

323. *Bock Laundry*, 490 U.S. at 509 (quoting FED. R. EVID. 609(a)(1) (1987)). .

evidence of their prior felony convictions, because such evidence could never be shown to prejudice the defendant.[324] Having eliminated the most straightforward reading of the rule as absurd, the Justices were left with a hard case: If "defendant" could not mean literally *any* defendant, including a defendant in a civil case, then what did it mean?[325] The Justices disagreed about how this canon-created ambiguity should be resolved. While a majority decided to interpret "defendant" to mean "criminal defendant," such that "only the accused in a criminal case should be protected from unfair prejudice by the balance set out in Rule 609(a)(1),"[326] a minority would have interpreted "defendant" to require "the trial court to consider the risk of prejudice faced by any *party*."[327] Of course, the Court lacked the benefit of an agency construction in *Bock Laundry*, but if such a construction had been available and permissible, the Court could have simply deferred to it. Given the possibility of deference that applying the absurd results canon can create, it makes sense for courts to apply the canon at Step One before concluding that the "intent of Congress" is dispositive.[328]

Ambiguity-creating canons also include a subset of substantive canons known as clear statement rules. Clear statement rules provide that a statute shall not be construed to have a particular meaning unless that meaning is unequivocally expressed in the text of the statute itself. An example is the federalism canon, which holds that "if Congress intends to alter the usual constitutional balance between the States and the Federal Government, it must make its intention to do so unmistakably clear in the language of the statute."[329] From a positivist perspective, clear statement rules can be viewed as operating in two steps. The first is the creation of ambiguity. A clear statement rule raises the standard for proving that a statute has a

324. *Bock Laundry*, 490 U.S. at 509–10; *see id.* at 527 (Scalia, J., concurring in the judgment); *id.* at 530 (Blackmun, J., dissenting).

325. *See id.* at 511 (majority opinion) (discussing the alternative meanings of "defendant"); *id.* at 529 (Scalia, J., concurring in the judgment) (same).

326. *Id.* at 523–24 (majority opinion); *see id.* at 529 (Scalia, J., concurring in the judgment).

327. *Id.* at 530 (Blackmun, J., dissenting) (emphasis added).

328. *See* Scalia, *supra* note 3, at 515. In addition to employing the absurd results canon to create an ambiguity, courts could invoke the canon to rule that an otherwise permissible agency construction is absurd. The latter use of the canon, however, would make little sense. That a construction has been adopted by an agency should be conclusive evidence that it is *not* absurd. *See* Sunstein, *supra* note 3, at 2117 ("[T]he court ought to be especially cautious in attributing irrationality or absurdity to the agency's view. It is the agency that is most likely to be in a good position to know whether the application, taken in context of the statutory scheme as a whole, is in fact irrational or absurd.").

329. Gregory v. Ashcroft, 501 U.S. 452, 460 (1991) (internal quotation marks omitted).

particular meaning by demanding the clearest of evidence: an unequivocal expression in the statutory text.[330] A judge, operating under his usual standard of proof, may attribute that meaning to the statute even in the absence of such evidence. But because of the clear statement rule, the judge may no longer do so; his preferred reading of the statute—the one he considers uniquely correct—may not satisfy the rule's heightened standard of proof. What was once a clear statute is thus made ambiguous. The ambiguity is short-lived, however, because a clear statement rule moves inexorably to its second, law-making step, where it resolves the ambiguity by disfavoring a particular interpretation of the statute (e.g., an interpretation that alters the usual federal-state balance). Thus, despite creating ambiguity, clear statement rules rarely, if ever, create opportunities for judicial deference. Indeed, they can also be described as law-making canons, the topic of the next Section.

3. Law-Making Canons

Law-making canons correspond to the second stage of the positivist's process of decision. Their application presupposes the existence of a hard case in which the statute is silent or ambiguous on a point of law. When such a case arises, law-making canons guide the court's exercise of its limited discretion, allowing the statutory gap to be filled in a predictable, rule-like way.

As a doctrine of hard cases, *Chevron* is itself a law-making canon, aimed at resolving what the law should be when the law runs out.[331] But *Chevron* is not the only canon of this kind. There are other canons—commonly known as substantive canons—that are likewise rooted in fictions about congressional intent;[332] likewise triggered by the existence of hard cases; and likewise designed to tell courts what to do about statutory ambiguity.[333] What happens, then, when *Chevron* and another law-making canon give conflicting instructions about how to resolve a hard case? What happens, in other words, when deferring to a statutory construction under *Chevron* would violate a different canon disfavoring that very construction? Should *Chevron* trump the other canon, or the other way around?

The relationship between *Chevron* and other law-making canons remains

330. For a discussion of standards of proof for legal arguments, see *supra* notes 170–71 and accompanying text.

331. *See* Nelson, *supra* note at 4, at 357 ("[T]he basis for *Chevron* deference is itself a normative canon.").

332. *See* Bamberger, *supra* note 14, at 75 ("Both the normative canons and *Chevron* . . . are rooted in fictions about Congress's wishes.").

333. *See id.* at 72; Bradley, *supra* note 3, at 676; Nelson, *supra* note at 4, at 349.

"unsettled,"[334] but conceiving of *Chevron* as a doctrine of hard cases focuses the inquiry on the right question. A hard-cases approach to *Chevron* sees the doctrine's supposed foundation in congressional intent for what it is: a fiction. Going beyond that fiction, it shows that *Chevron* rests instead on a constitutionally inspired judgment about whose law-making is more legitimate in hard cases. Taking the same hard-cases approach to other canons yields a similar insight: behind every fiction about congressional intent lies a normative judgment, derived from values found in the Constitution or elsewhere.[335] The conflict between *Chevron* and other law-making canons thus boils down to a conflict between the values underlying them. When the law runs out, then, the question for the court is whether the values served by the other canon are subsumed in, or outweighed by, the value in deferring to a more legitimate (and occasionally more expert) law-maker in the agency. If they are, then the court should defer to the agency at Step Two, disregarding the other canon. If they are not, then the court at Step Two should apply the other canon, denying the agency deference.[336]

Consider the implications of this approach for *Chevron*'s relationship with clear statement rules, which function as a kind of law-making canon. Clear statement rules can be defended on the ground that "certain decisions are ordinarily expected to be made by the national legislature, with its various institutional safeguards,"[337] and not by either the Executive or the Judiciary. On this view, the purpose of requiring a clear statement is "to ensure congressional deliberation on the questions involved."[338] Suppose, then, that an agency has construed an ambiguous statute to "alter the usual constitutional balance between the States and the Federal Government."[339] Should the court apply *Chevron* and defer to the agency construction, or should it apply the federalism canon and insist on a clear statement from Congress? The balance of values suggests the latter. Deference to the agency would allow the ambiguity to be resolved by a more legitimate law-maker than the court. But the federalism canon is itself concerned about

334. Note, Chevron *and the Substantive Canons*, 124 HARV. L. REV. 594, 594 (2010) [hereinafter Note, *Substantive Canons*].

335. *See* Nelson, *supra* note at 4, at 349.

336. Rejecting a categorical approach to reconciling *Chevron* with the substantive canons, Professor Kenneth Bamberger has argued that courts should take into account whether the agency construction "sufficiently reflects" the values animating the relevant substantive canon in reviewing the reasonableness of the construction at Step Two. Bamberger, *supra* note 14, at 72. Bamberger's approach, however, is inconsistent with the understanding of Step Two discussed in Subsection II.B.2, *supra*.

337. Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 343 (2000).

338. Sunstein, *supra* note 3, at 2105.

339. Gregory v. Ashcroft, 501 U.S. 452, 460 (1991) (internal quotation marks omitted).

legitimacy, and it reflects the judgment that only Congress may legitimately decide to alter the usual federal-state balance. Because the federalism canon accounts for the sort of legitimacy-based considerations at the heart of *Chevron*, it should trump judicial deference—as should other clear statement rules, for the same reason.[340]

The balance of values in the case of other law-making canons, however, may tip the other way. Take the relationship between *Chevron* and the canon of constitutional avoidance, which holds that "where 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."[341] If an otherwise reasonable agency construction of an ambiguous statute raises serious constitutional questions, should the court confront those questions and defer to the agency if the construction turns out to be constitutional—or should the court apply the avoidance canon and impose its own construction on the statute? The avoidance canon has been said to rest on a "presumption that Congress did not intend [a statutory meaning] which raises serious constitutional doubts."[342] Looking beyond that obvious fiction,[343] one is left with two rationales for the canon. The first is that "a decision to declare an Act of Congress unconstitutional is the gravest and most delicate duty that [a] Court is called on to perform" and should therefore be avoided.[344] Even if one assumes that a decision to declare an act of the *Executive* unconstitutional raises the same concern, however, the rationale cannot support allowing the canon to trump *Chevron* given that the practical effect of applying the canon would be the same: invalidation of the agency construction. That leaves only the second rationale, described as the "prudential concern that constitutional issues not be needlessly confronted."[345] Deciding a constitutional question, however, is simply part

340. *See* Sunstein, *supra* note 3, at 2111; Note, *Substantive Canons*, *supra* note 334, at 610.

341. Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988). Some scholars have characterized the avoidance canon as a clear statement rule. *See* Manning, *supra* note 317, at 405; Sunstein, *supra* note 3, at 2111. The Court, however, has treated the canon as a doctrine that "enters in only where a statute is susceptible of two constructions." Pa. Dep't of Corr. v. Yeskey, 524 U.S. 206, 212 (1998) (internal quotation marks omitted); *see also* Clark v. Martinez, 543 U.S. 371, 402 (2005) (Thomas, J., dissenting) ("Just as we exhaust the aid of the 'traditional tools of statutory construction' before deferring to an agency's interpretation of a statute, so too should we exhaust those tools before deciding that a statute is ambiguous and that an alternative plausible construction of the statute should be adopted.") (citation omitted).

342. *Clark*, 543 U.S. at 381 (majority opinion).

343. *See supra* note 317 and accompanying text.

344. Rust v. Sullivan, 500 U.S. 173, 191 (1991) (internal quotation marks omitted).

345. *DeBartolo*, 485 U.S. at 575.

of the Judiciary's traditional Article III duty to "say what the law is."[346] Resolving a statutory ambiguity, by contrast, entails an exercise of law-making power. From a perspective that views judicial law-making as relatively illegitimate, then, it is better for the court to avoid imposing its own construction on the statute than to avoid deciding a constitutional question. *Chevron* should trump the avoidance canon.[347]

As the foregoing demonstrates, the relationship between *Chevron* and the other canons of construction is complex. But positivism suggests a framework for making sense of it. Some canons help courts say what the law is, and these law-applying canons should be employed at Step One, along with the other tools courts traditionally use in the first stage of the judicial process. Other canons create ambiguity in existing law, and these ambiguity-creating canons should also be invoked at Step One, as the court looks for statutory gaps that need filling. Still other canons help courts say what the law should be, and these law-making canons should be considered at Step Two, when the court must decide whether judicial deference is appropriate after all. Thus, while ambiguity-creating canons may cause *Chevron*'s domain to expand, some law-making canons may cause it to contract.

CONCLUSION

Addressing an American audience in 1977, H.L.A. Hart portrayed the nation's jurisprudence as "beset by two extremes," which he called the Nightmare and the Noble Dream.[348] The Nightmare sees the judge as no different from the legislator.[349] It holds that "in spite of pretensions to the contrary, judges make the law which they apply to litigants and are not impartial, objective declarers of existing law."[350] That is because, in the Nightmare, existing law is too indeterminate to contain any answers.

346. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

347. *See* Morales-Izquierdo v. Gonzales, 486 F.3d 484, 493 (9th Cir. 2007) (en banc) (holding that the canon of constitutional avoidance "plays no role in the second *Chevron* inquiry"); Kelley, *supra* note 317, at 835. *Contra* Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs, 531 U.S. 159, 172–73 (2001) ("Where an administrative interpretation of a statute invokes the outer limits of Congress' power, we expect a clear indication that Congress intended that result. This requirement stems from our prudential desire not to needlessly reach constitutional issues and our assumption that Congress does not casually authorize administrative agencies to interpret a statute to push the limit of congressional authority.") (citation omitted); *DeBartolo*, 485 U.S. at 568; Sunstein, *supra* note 3, at 2113.

348. Hart, *supra* note 117, at 989.

349. *See id.* at 972.

350. *Id.* at 973.

The Noble Dream represents the opposite view. Envisioning the law as limitless, it presumes the existence of "a single correct answer awaiting discovery" in every case.[351] Thus, in the Noble Dream, "the judge, however hard the case, is never to determine what the law *shall* be"; insofar as the law ever appears indeterminate, "the fault is not in *it*, but in the judge's limited human powers of discernment."[352]

Calling these visions "illusions," Hart rejected both the view that judges never apply the law and the view that they never make it.[353] "The truth, perhaps unexciting," Hart maintained, "is that sometimes judges do one and sometimes the other."[354] His insight that the judicial process in hard cases consists of two distinct stages—applying the law and making it—provides the best understanding of *Chevron*'s two-step inquiry. Though not every case is a hard case, hard cases do arise. And when they do, *Chevron* allows judges to decide them without legislating from the bench.

351. *Id.* at 984–85.
352. *Id.* at 983.
353. *Id.* at 989.
354. *Id.*