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Article 3

The Clear-Statement Chevron Canon

Nicholas R. Bednar

THE CLEAR-STATEMENT *CHEVRON* CANON

*Nicholas R. Bednar**

ABSTRACT

As Chevron *has fallen into disfavor with some, judges and scholars have begun searching for alternative formulations of administrative law's favorite deference doctrine. Some judges have embraced Matthew Stephenson and Adrian Vermeule's One-Step* Chevron*. But One-Step* Chevron*'s theoretical foundations lacks practical application.*

This Article argues that judges can make One-Step Chevron *workable by reframing it as a clear-statement rule: "Unless refuted by the clear language of the statute, a court must defer to an agency interpretation." Scholars have long labelled* Chevron *as a "canon," but have never framed* Chevron *as a substantive canon.* Chevron *works as a substantive canon without disturbing the traditional* Chevron *analysis. The* Chevron *Canon reforms the two-step deference doctrine using an interpretive tool familiar to all judges. This Article also resolves a longstanding dispute about the place of* Chevron *on the continuum of substantive canons. The* Chevron *Canon trumps tiebreaking canons, but succumbs to institutional clear-statement rules.*

The Chevron *Canon promotes simplicity and casts* Chevron *as a traditional tool of statutory interpretation. As judges reconsider* Chevron*, the* Chevron *Canon presents a more intuitive option than One-Step* Chevron.

I. INTRODUCTION

Chevron is, and always has been, about framing. The seminal 1984 case, *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*,[1] created the namesake doctrine's two steps: first whether Congress has directly spoken to the precise question at issue, and second whether

* J.D., University of Minnesota Law School; B.A., University of Minnesota. Above all, I must thank Kristin Hickman for her guidance and comments. Thank you to Brett McDonnell, Mark Thomson, and Gerald Kerska for their comments. Additional thanks to Karianne Jones, Emily Scholtes, Grace Doherty, Jake Gilbert, Zac Van Cleve, and the editors of the *DePaul Law Review*. All mistakes are, of course, my own.

1. 467 U.S. 837 (1984).

the agency's interpretation of the statute is reasonable.[2] Justice Stevens, who authored the Court's opinion, never intended *Chevron* to depart from prior precedent.[3] But his equivocal opinion has generated much debate about *Chevron*'s proper application.[4] All standards of review, including *Chevron*, are malleable and become confused as reviewing judges respond differently to new situations.[5] In *Universal Camera Corp. v. NLRB*,[6] Justice Frankfurter described standards of review as a "mood" that "only serve as a standard of judgment and not as a body of rigid rules assuring sameness of application."[7] Correspondingly, judges can disagree about the substance of *Chevron*'s steps but reach the same outcome in any given case. Over time, scholars and jurists have produced a number of different substantive frameworks of *Chevron*, all of which reflect different interpretations of *Chevron*'s vague directive.[8]

Although most scholars focus on the contours of *Chevron*'s Step One and Step Two,[9] Matthew Stephenson and Adrian Vermeule argue

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2. *See id*. at 842–43. The full recitation of *Chevron*'s two-steps are as follows:

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, 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 . . . . 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.

Id. (footnotes omitted).

3. *See* Thomas W. Merrill, *The Story of* Chevron*: The Making of an Accidental Landmark*, *in* ADMINISTRATIVE LAW STORIES 398, 412–21 (Peter L. Strauss ed., 2006).

4. *See generally* Kenneth A. Bamberger & Peter L. Strauss, Chevron*'s Two Steps*, 95 VA. L. REV. 611 (2009) (arguing against One-Step *Chevron*); Gary S. Lawson, *Reconceptualizing* Chevron *and Discretion: A Comment on Levin and Rubin*, 72 CHI.-KENT L. REV. 1377 (1997) (endorsing Levin's conception of Step Two *Chevron*); Ronald M. Levin, *The Anatomy of* Chevron*: Step Two Reconsidered*, 72 CHI.-KENT L. REV. 1253 (1997) (proposing that *Chevron* has one primary step and an optional step); Richard M. Re, *Should* Chevron *Have Two Steps?*, 89 IND. L.J. 605 (2014) (advocating for a hard look Step Two); Matthew C. Stephenson & Adrian Vermeule, Chevron *Has Only One Step*, 95 VA. L. REV. 597 (2009) (proposing a One-Step *Chevron*).

5. Martha S. Davis & Steven Alan Childress, *Standards of Review in Criminal Appeals: Fifth Circuit Illustrations and Analysis*, 60 TUL. L. REV. 461, 561 (1986); *see also* 5 KENNETH C. DAVIS, ADMINISTRATIVE LAW TREATISE § 29:2 (2d ed. 1984) (acknowledging the relative unimportance of standard of reviews' boilerplate in administrative law).

6. 340 U.S. 474 (1951).

7. *Id*. at 487.

8. *See* Kristin E. Hickman & Nicholas R. Bednar, *The Waxing and Waning (or Not) of* Chevron, 85 GEO. WASH. L. REV. (forthcoming 2017) (cataloging the various interpretations of *Chevron*'s two steps).

9. I use "Traditional *Chevron*," "Step One," and "Step Two" to refer to *Chevron*'s traditional doctrine and steps. "One-Step *Chevron*" refers specifically to the standard crafted by Matthew

that *Chevron* "has only one step."[10] Stephenson and Vermeule identify two conceptions of Step Two, both of which render this additional step superfluous.[11] If Step Two asks whether the agency reasonably interpreted the statute as a matter of statutory interpretation, then Step Two is "mutually convertible" with Step One.[12] On the other hand, if Step Two asks whether the agency's interpretation is the result of arbitrary-and-capricious decisionmaking, then Step Two is redundant with *State Farm*[13] hard look review.[14] Hence the only question One-Step *Chevron* asks is whether the agency's interpretation falls within the "range of permissible interpretations" or, rather, the "zone of ambiguity."[15]

Some judges, including the late-Justice Scalia, have nodded to Stephenson and Vermeule's concerns of redundancy.[16] Yet, One-Step *Chevron* as currently conceived is difficult to apply. No traditional statutory interpretation analysis requires courts to define a "zone of ambiguity" in the way expressed by Stephenson and Vermeule. Furthermore, One-Step *Chevron* may conflict with the Supreme Court's holding in *National Cable & Telecommunications Ass'n v. Brand X Internet Services*[17] because it does not distinguish between mandatory

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Stephenson and Adrian Vermeule. Finally, I refer to my own conception of *Chevron* as the "*Chevron* Canon."

10. Stephenson & Vermeule, *supra* note 4, at 597.

11. This realization is not new, but one that has been popularized in recent years by Stephenson and Vermeule. *See, e.g.*, 1 RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE 170–71 (4th ed. 2002) (noting that many courts interchangeably apply *Chevron*'s two steps); Levin, *supra* note 4, at 1282–83 (characterizing Step Two reversals on statutory interpretation grounds as "belatedly discovered clear meaning," and arguing that courts should decide such cases at Step One).

12. *See* Stephenson & Vermeule, *supra* note 4, at 599.

13. Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto Ins. Co., 463 U.S. 29 (1981).

14. *See id.* at 603–04.

15. *Id.* at 601.

16. *See, e.g.*, United States v. Home Concrete & Supply, LLC, 566 U.S. 478, 493 (2012) (Scalia, J., concurring) ("'Step 1' has never been an essential part of *Chevron* analysis. Whether a particular statute is ambiguous makes no difference if the interpretation adopted by the agency is clearly reasonable—and it would be a waste of time to conduct that inquiry. The same would be true if the agency interpretation is clearly beyond the scope of any conceivable ambiguity. It does not matter whether the word 'yellow' is ambiguous when the agency has interpreted it to me 'purple.'" (citations omitted)); Esquivel-Quintana v. Lynch, 810 F.3d 1019, 1025 (6th Cir. 2016), *cert. granted*, 137 S. Ct. 368 (2016) (mem.); United States v. Garcia-Santana, 774 F.3d 528, 542–43 (9th Cir. 2014); Teva Pharm. USA, Inc. v. Sebelius, 595 F.3d 1303, 1315 (D.C. Cir. 2010); Friends of the Everglades v. S. Fla. Water Mgmt. Dist., 570 F.3d 1210, 1219 (11th Cir. 2009); Cisneros v. Napolitano, No. 13-700 JNE/JJK, 2013 WL 3353939, at *6 n.5 (D. Minn. July 3, 2013) ("[T]he two steps of the *Chevron* doctrine can arguably be merged into a single inquiry. . . . As it must, this Court retains the two-step framework of *Chevron*, but acknowledges that the framework can create confusion.").

17. 545 U.S. 967 (2005).

and permissible interpretations of a statute. If One-Step *Chevron* is to be taken seriously by courts, scholars must find a more practical way of presenting the reformulated standard.

This Article argues that reconstructing *Chevron* as a clear-statement rule eliminates Traditional *Chevron*'s redundancy, while presenting a simpler version of One-Step *Chevron*. Scholars have long described *Chevron* as a "canon" but have never bothered to frame it in the traditional substantive-canon literature.[18] The *Chevron* Canon commands, "Unless refuted by the clear language of the statute, a court must defer to an agency interpretation."[19] Reframing One-Step *Chevron* as a clear-statement rule accomplishes three goals: First, it reforms *Chevron* into a preexisting tool of statutory interpretation, ensuring ease of applicability. Second, it informs an agency when a statute clearly mandates or forbids particular interpretations, as required by *Brand X*. Finally, it solves a longstanding dispute about whether substantive canons apply to the *Chevron* analysis.

The Article proceeds in five parts. Part II argues that while Stephenson and Vermeule's One-Step *Chevron* has merit, courts struggle to apply it.[20] The Article then develops the *Chevron* Canon as an alternative to One-Step *Chevron*. Part III reviews traditional understandings of substantive canons.[21] Part IV then places *Chevron* Canon in the framework described in Part III, arguing first that, like many institutional clear-statement rules, *Chevron* is founded on constitutional values of legislative supremacy and separation of powers and, second, *Chevron* already carries interpretive weight similar to an institutional clear-statement rule because courts focus on Step One's clarity question.[22] Next, Part V explains how the *Chevron* Canon interacts with tiebreaking canons and other institutional clear-statement rules.[23] Finally, Part VI discusses the *Chevron* Canon's potential critiques.[24]

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18. *See infra* notes 144–46 and accompanying text.

19. William N. Eskridge, Jr. & Philip Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 618–19 (1992). Unfortunately, William Eskridge and Philip Frickey do not develop the *Chevron* Canon much more outside of this statement. *See infra* notes 144–46 and accompanying text.

20. *See infra* notes 26–88 and accompanying text.

21. *See infra* notes 89–143 and accompanying text.

22. *See infra* notes 144–237 and accompanying text.

23. *See infra* notes 238–305 and accompanying text.

24. *See infra* notes 306–27 and accompanying text.

II. ONE-STEP *CHEVRON*

At the heart of Matthew Stephenson and Adrian Vermeule's One-Step *Chevron* is redundancy. Depending on how one parses the Supreme Court's *Chevron* opinion, Step Two is redundant with either Step One or *State Farm* hard look review. Stephenson and Vermeule resolve this redundancy by reducing *Chevron* to one step, but the resulting analysis is more theoretical than pragmatic. Without further exposition, Stephenson and Vermeule's One-Step *Chevron* creates a standard of review just as difficult to apply and understand as Traditional *Chevron*.

A. Chevron*'s Redundancy*

Justice Stevens' *Chevron* opinion supports numerous constructions of the doctrine's two steps. No matter how one reads the *Chevron* opinion, Step One is a question of statutory interpretation.[25] At Step One, if the court finds that the language of the statute is clear after "employing traditional tools of statutory construction," then the inquiry ends.[26] The court and the agency must give effect to "the unambiguously expressed intent of Congress."[27] The depth of Step One's inquiry will depend on the court's understanding of "how clear is clear?"[28] If "the court determines Congress has not directly addressed the precise question at issue," then the court reviews the agency's interpretation under Step Two.[29]

According to Stephenson and Vermeule, *Chevron*'s redundancy appears at Step Two. Justice Stevens described Step Two in a number of ways throughout his opinion. At first, he states that "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*."[30] Justice Stevens noted 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."[31] This language frames Step Two as a question

25. *See generally* Note, *"How Clear Is Clear" in* Chevron*'s Step One?*, 118 HARV. L. REV. 1687 (2005).

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

27. *Id.* at 842–43.

28. Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 520 (1989) ("Here, of course, is the chink in *Chevron*'s armor—the ambiguity that prevents it from being an absolutely clear guide to future judicial decisions . . . .").

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

30. *Id.* (emphasis added).

31. *Id.* at 843 n.11.

of statutory interpretation aimed at whether the court can reach the agency's interpretation through traditional interpretive means.

An interpretive Step Two is redundant with Step One's statutory interpretation question. If an agency's interpretation conflicts with the plain meaning of the statute at Step One, then the interpretation is unreasonable at Step Two. If the court finds that the statute is ambiguous at Step One but concludes that the agency's interpretation falls outside the "permissible range of readings," then "Congress's precise intention was to exclude the agency's interpretation from the permissible range."[32] Citing Stephenson and Vermeule, Justice Scalia claimed that Step One has "never been an essential part of *Chevron*," because "[w]hether a particular statute is ambiguous makes no difference if the interpretation adopted by the agency is clearly reasonable" or "clearly beyond the scope of any conceivable ambiguity."[33] Stephenson and Vermeule argue that both Step One and Step Two are "always mutually convertible" because both steps present statutory interpretation questions.[34] The sole question presented by *Chevron* under this reading of Step Two is whether the agency's interpretation is a reasonable construction of the statute.

Later in the *Chevron* opinion, Justice Stevens described Step Two as asking whether the agency's interpretation is "arbitrary, capricious, or manifestly contrary to the statute."[35] This statement echoes the arbitrary and capricious standard under section 706(2)(A) of the Administrative Procedure Act (APA).[36] If Step Two asks judges to review whether the agency's interpretation is arbitrary and capricious, then Step Two is redundant with *State Farm* hard look review.[37] As the language of the *Chevron* opinion illustrates, the idea of employing *State Farm* at Step Two is not as "revisionist" as one recent commen-

32. Stephenson & Vermeule, *supra* note 4, at 600.

33. United States v. Home Concrete & Supply, LLC, 566 U.S. 478, 493 n.1 (2012) (Scalia, J., concurring).

34. *See* Stephenson & Vermeule, *supra* note 4, at 600–01.

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

36. *See* 5 U.S.C. § 706(2)(A) (2012) ("The reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.").

37. *See* Stephenson & Vermeule, *supra* note 4, at 603. In *State Farm* the Supreme Court articulated the arbitrary and capricious standard—"hard look review"—pursuant to section 706 of the APA. *See* Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto Ins. Co., 463 U.S. 29, 42–43 (1981) ("Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.").

tator has sought to describe it.[38] The D.C. Circuit has employed a hard look Step Two since 1984, though not always consistently.[39] Ronald Levin has advocated that courts should apply hard look review at Step Two to give meaning to *Chevron*'s "extra baggage."[40] More recently, some Supreme Court justices have endorsed a hard look Step Two.[41]

Stephenson and Vermeule argue that courts should apply *Chevron* and *State Farm* separately because the application of hard look review at Step Two forces courts to address whether the statute is ambiguous even when the "agency has clearly failed the reasoned decision-making requirement."[42] Criticizing Stephenson and Vermeule's One-Step *Chevron*, Kenneth Bamberger and Peter Strauss respond that *State Farm* review differs depending on the agency's action and offers courts invaluable tools for assessing the "reasonableness" of an agency's interpretation at Step Two.[43] Nevertheless, *Chevron* and *State Farm* feasibly operate as separate tests. Because this Article does not pass judgment on the doctrinal wisdom of one step versus two, I accept arguendo Stephenson and Vermeule's assessment that *Chevron* and *State Farm* operate best as distinct standards.

B. Eliminating Redundancy with One-Step Chevron

Stephenson and Vermeule eliminate the redundancy between Step One and an interpretive Step Two by collapsing both steps into a single inquiry that examines the reasonableness of the agency's interpretation.[44] They diagram One-Step *Chevron* on a line with three points: a "'best' interpretation," a "permissible interpretation" within a

38. *See* Re, *supra* note 4, at 607 ("Bamberger and Strauss actually defended two-step *Chevron* based on their own revisionist view—namely, that step two replicates the Administrative Procedure Act's general prohibition on arbitrary-and-capricious agency action." (footnote omitted)).

39. *See, e.g.*, Rettig v. Pension Benefit Guar. Corp., 744 F.2d 133, 135 (D.C. Cir. 1984) (reversing an agency decision at Step Two because the PBGC's position did not "reflect the results of a reasoned decisionmaking process"); *see also* Cont'l Air Lines, Inc. v. Dep't of Transp., 843 F.2d 1444, 1450–54 (D.C. Cir. 1988).

40. *See* Levin, *supra* note 4, at 1296. Gary Lawson has called Levin's piece a "commentator's nightmare"—"well argued, well written, and almost certainly right." Lawson, *supra* note 4, at 1377.

41. *See, e.g.*, Encino Motor Cars v. Navarro, 136 S. Ct. 2117, 2125–26 (2016); Michigan v. EPA, 135 S. Ct. 2699, 2707–08 (2015) (citing *State Farm* in requiring the EPA to consider cost when interpreting the phrase "appropriate and necessary" in the Clean Air Act); Judulang v. Holder, 565 U.S. 42, 52–53 (2011).

42. *See* Stephenson & Vermeule, *supra* note 4, at 603–04.

43. *See* Bamberger & Strauss, *supra* note 4, at 621–24.

44. *See* Stephenson & Vermeule, *supra* note 4, at 602.

"range of permissible interpretations," and a third point outside this realm.[45] According to the authors:

> The statutory language, read in the light of the traditional tools of statutory construction, will suggest to the reviewing court both a "best" interpretation of the statute . . . and a range of interpretations that are sufficiently plausible that the court would view them as reasonable, though not ideal. This range is the statute's "zone of ambiguity," the set of interpretations which the statute does not clearly prohibit. If the agency promulgates an interpretation within this zone, then under *Chevron* the review court must uphold the agency's interpretation, even though it differs from the court's most-preferred construction . . . . But if the agency chooses an interpretation outside the range of permissible meanings, the court must strike it down.[46]

This zone of ambiguity represents a "policy space within which agencies may make reasoned choices."[47]

When applying One-Step *Chevron*, a court may not defer to an agency interpretation if (1) the statute mandates a single interpretation or (2) if the agency's interpretation falls outside the zone of ambiguity. The first scenario embraces Step One's mandate that courts and agencies "must give effect to the unambiguous expressed intent of Congress."[48] The second scenario acknowledges that "Congress's intention may be ambiguous within a range, but not at all ambiguous as to interpretations outside that range, which are clearly forbidden."[49] For example, in *INS v. Cardoza-Fonseca*,[50] the Supreme Court considered the Immigration and Nationality Service's (INS) interpretation of "well-founded fear" under the Immigration and Nationality Act (INA).[51] The INS construed both "well-founded fear" and "clear probability of persecution" to require an asylum applicant to prove "that it is more likely than not that he or she will be persecuted."[52] Writing for the Court, Justice Stevens acknowledged that there "is obviously some ambiguity in a term like 'well-founded fear.'"[53] The statute's plain language and legislative history, however, demonstrated that Congress clearly did not intend "well-founded fear" and "clear probability of persecution" to require the same standard of

45. *Id.* at 601 (displaying a diagram of a line with three points of potential interpretations—two within the "zone of ambiguity" and one outside of this zone).
46. *Id.*
47. *Id.*
48. *See* Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843 (1984).
49. Stephenson & Vermeule, *supra* note 4, at 602.
50. 480 U.S. 421 (1987).
51. *See id.* at 423.
52. *Id.* at 443.
53. *Id.* at 448.

proof.[54] In other words, the INS's interpretation fell outside the zone of ambiguity and was therefore impermissible under *Chevron*.

Stephenson and Vermeule dismiss attempts to distinguish Step One and Step Two by narrowing Step One to ask only "whether Congress has clearly specified *one*, *and only one*, permissible interpretation of the statute."[55] According to Stephenson and Vermeule, "This approach assumes that a statute can unambiguously forbid an agency's interpretation only when Congress has specified a single possible meaning."[56] In other words, the plain language of a statute may clearly forbid some interpretations while leaving enough ambiguity to allow for agency interpretation. For example, a statute authorizing an agency to select the font of warning labels on cigarette packaging probably permits the agency to select between Times New Roman and Helvetica but surely forbids the agency from selecting Wingdings.[57]

Cardoza-Fonseca is again instructive. Congress unambiguously intended "well-founded fear" and "clear probability of persecution" to have two different meanings. "Well-founded fear" is an ambiguous term open to interpretation by the INS.[58] But the INS is constrained by the statutory text, and it is a maxim of statutory interpretation that Congress meaningfully varies language in its statutes.[59] The plain language of the INA does not mandate a single interpretation of "well-founded fear," but it prevents the INS from adopting the same interpretation as "clear probability of persecution." Under Traditional *Chevron*, the Court could frame its holding either under Step One (the INA clearly prohibits the adoption of the same interpretation for both terms) or Step Two ("well-founded fear" is ambiguous but the INS unreasonably adopted the same interpretation for both terms). Under One-Step *Chevron*, the Court would conclude that the INS's interpretation is unreasonable because it falls outside the zone of ambiguity.

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54. *Id.* at 449.

55. *See* Stephenson & Vermeule, *supra* note 4, at 602.

56. *Id.*

57. *See, e.g.*, 15 U.S.C. § 1333 (2012) (requiring warning labels on cigarette packaging and permitting the FDA to make rules regarding the "text, format, and type sizes" of such warning labels). Whether a selection of Comic Sans would survive hard look review is an issue that has yet to come before the courts. *See* Holly Combs & David Combs, *Ban Comic Sans Manifesto*, 1000MANIFESTOS.COM, http://www.1000manifestos.com/ban-comic-sans/ (last visited Apr. 17, 2017) ("[W]hen designing a 'Do Not Enter Sign' the use of a heavy-stroked, attention-commanding font such as Impact or Arial Black is appropriate. Typesetting such a message in Comic Sans would be ludicrous. . . . It is analogous to showing up for a black tie event in a clown costume.").

58. *Cardoza-Fonseca*, 480 U.S. at 448.

59. *See, e.g.*, Comm'r v. Lundy, 516 U.S. 235, 249–50 (1996) (refusing to adopt varying definitions of "claim" under the Internal Revenue Code).

I credit Stephenson and Vermeule with encouraging judges to confront their framing of *Chevron*. One-Step *Chevron* builds a theoretical base from which *Chevron* can be simplified; however, One-Step *Chevron* lacks pragmatic value as a standard of review. First, Stephenson and Vermeule's formulation leaves no place for the court to find that the statutory text *mandates* only one interpretation, raising conflicts with the Supreme Court's holding in *Brand X*.[60] Second, judges will have similar difficulties applying One-Step *Chevron* as they do Traditional *Chevron*.

C. One-Step Chevron *Conflicts with* Brand X

Under the Supreme Court's holding in *Brand X*, if a court has concluded in a prior case that the statute at issue mandates one interpretation, then the agency cannot adopt an alternative interpretation of the statute.[61] But if the court concluded that the statute is ambiguous with respect to the particular issue, then the agency may change its interpretation to a different permissible construction of the statute. *Brand X* affords the agency flexibility in effectuating its mission. Stephenson and Vermeule acknowledge the importance of allowing agencies to adopt alternative constructions,[62] but their One-Step *Chevron* threatens this flexibility.[63]

In a response to Stephenson and Vermeule's article, Kenneth Bamberger and Peter Strauss criticize One-Step *Chevron* as incompatible with *Brand X*.[64] One-Step *Chevron* muddles the distinction between a mandatory interpretation and a permissible interpretation. Both mandatory and permissible interpretations survive One-Step *Chevron*'s reasonableness inquiry, but the court is not instructed to hold whether the statute mandates a particular interpretation.

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60. 545 U.S. 967, 982–83 (2005).

61. *Id.*

62. *See* Stephenson & Vermeule, *supra* note 4, at 605–06 (citing *Brand X*, 545 U.S. at 982–85) ("[T]he more judges are inclined to declare that a statute has one and only meaning, the harder it will be for future agencies to adopt alternative constructions of the same statute that the initial court did not anticipate.").

63. It is possible that Stephenson and Vermeule see a greater degree of indeterminacy in language. Indeed, most statutory interpretation cases come down to one or two plausible interpretations. If all cases came down to a finite number of plausible interpretations, I have no doubt One-Step *Chevron* could be reconciled with *Brand X*. As is, the Supreme Court has spent over a hundred years arguing about the meaning of "waters of the United States." *See* Rapanos v. United States, 547 U.S. 715, 722–30 (2006). It is for these murkier cases, in which it is impossible to pin the proper analysis down to one or two interpretations, which I think One-Step *Chevron* cannot work.

64. Bamberger & Strauss, *supra* note 4, at 616–20.

Pre-*Brand X* cases illustrate the difficulty of deciphering whether a court has held that an agency's interpretation is a mandatory interpretation or a permissible one. In *Edelman v. Lynchburg College*[65] the Supreme Court considered the validity of an Equal Employment Opportunity Commission (EEOC) regulation requiring a filer to verify a "charge" under Title VII of the Civil Rights Act after the time for filing has expired.[66] The Court began its discussion by noting that the statute is "open to interpretation and the regulation addresses a legitimate question."[67] The Court implied that *Chevron* deference *may* be appropriate but ultimately found "no need to resolve any question of deference."[68] Rather, the Court held,

> We find the EEOC rule not only a reasonable one, but the position we would adopt even if there were no formal rule and we were interpreting the statute from scratch. Because we so clearly agree with the EEOC, there is no occasion to defer and no point in asking what kind of deference, or how much.[69]

Post-*Brand X*, it is unclear whether the EEOC could change its understanding of "charge"; the Court noted the statute's ambiguity but refused to apply *Chevron* and seemed to suggest that the EEOC's interpretation was mandatory.

Stephenson and Vermeule preemptively respond, "[T]here is no good reason why we should decide whether the statute has only one possible reading before deciding simply whether the agency's interpretation falls into the range of permissible interpretations."[70] But if One-Step *Chevron* truly has one step, then a court need not revisit whether the statute mandates a single interpretation once it finds that the agency's interpretation falls within the zone of ambiguity. Bamberger and Strauss argue that agencies "might be deterred from seeking regulatory changes warranted by sound policy by the misimpression that a court has already given a precedential imprimatur to outdated choices."[71] Rulemaking diverts resources from other agency goals and an agency is less likely to pursue rulemaking it perceives as preempted by a prior holding.

Admittedly, this concern is possibly blown out of proportion. Courts could remedy this problem by adopting an additional step after the reasonableness inquiry in which the court identifies whether the

65. 535 U.S. 106 (2002).
66. *Id*. at 109.
67. *Id.* at 113.
68. *Id.* at 114.
69. *Id.*
70. *See* Stephenson & Vermeule, *supra* note 4, at 602.
71. Bamberger & Strauss, *supra* note 4, at 618–19.

agency's interpretation is mandatory.[72] Nothing about One-Step *Chevron* prevents a court from informing the agency whether the statute mandates one interpretation. If a court's holding is ambiguous, such as that of *Edelman*, an agency reconsidering its interpretation will weigh the importance of regulatory change against its odds of convincing the court that its first interpretation was permissible rather than mandatory. But if we are already recasting *Chevron*, is the risk of more muddled decisions and doctrine worthwhile? *Brand X* aside, One-Step *Chevron* presents even greater hurdles that ought to be considered by reformers.

D. Courts Cannot Easily Apply One-Step Chevron

Stephenson and Vermeule suggest that most courts have "a clear understanding of the two relevant questions" and apply *Chevron* "without tripping over the superfluity" of its steps.[73] Scholars hoping to reformat *Chevron* must convince courts of the alternative formulation's ease of use. One-Step *Chevron* is easy enough to apply when the plain text of the statute mandates a single interpretation or forbids a particular interpretation. Stephenson and Vermeule's inquiry, however, focuses not on this clarity question but the reasonableness of the agency's interpretation.

Stephenson and Vermeule suggest that an agency's interpretation may be unreasonable for reasons other than contrary statutory text. They claim that the zone of ambiguity is not "fixed" and may depend on "the court's confidence in the agency's expertise, its sympathy for

72. Richard Re has proposed introducing an optional second step that asks whether the statute mandates the agency's reasonable interpretation. *See* Re, *supra* note 4, at 618–19. Re argues that it may "be preferable for courts to postpone ruling out potential agency constructions until they are adopted by the government and squarely challenged as unreasonable." *Id.* at 624. Re's suggestion is unpersuasive for two reasons. First, an agency may mistakenly find that the court exercised this optional step, even though the court did not intend to mandate a particular interpretation. For example, in *Edelman v. Lynchburg College*, the Supreme Court concluded the agency's interpretation was reasonable and then stated it would reach the same result "even if . . . we were interpreting the statute from scratch." 535 U.S. 106, 114 (2002). Under the optional two-step approach, the agency may read this language as a statement of "mandatoriness," even if the Court only meant to imply that the agency's interpretation represented the best, permissible construction. Second, Re ignores the realities of the regulatory process. The average rulemaking procedure takes four years (though it may take as long as fourteen years), costs hundreds of millions of dollars, and diverts resources away from other agency goals. *See generally* U.S. GOV'T ACCOUNTABILITY OFF., GAO-09-205, FEDERAL RULEMAKING: IMPROVEMENTS NEEDED TO MONITORING AND EVALUATION OF RULES DEVELOPMENT AS WELL AS TO THE TRANSPARENCY OF OMB REGULATORY REVIEWS 5 (2009) (reviewing the results of sixteen significant rulemaking procedures). Thus, Re's argument rigidifies agency responses to rulings in the same way as Stephenson and Vermeule's One-Step *Chevron*.

73. Stephenson & Vermeule, *supra* note 4, at 605.

the agency's policy goals, or its assessment of the importance of the interpretive issue."[74] This language suggests that Stephenson and Vermeule seek to incorporate the pre-*Chevron* contextual factors to ascertain the boundaries of the zone of ambiguity.[75] If so, One-Step *Chevron* is too similar to "th'ol' 'totality of the circumstances' test."[76] Statutory ambiguity is a textual feature that should be assessed only with traditional tools of statutory interpretation. Agency expertise and agency policy goals are unrelated to whether Congress drafted an ambiguous statute; a statute is not any clearer because the court sympathizes with the agency's policy pursuit. Furthermore, judges will differ on how much weight to accord each factor and how that factor should expand or restrict their finding of statutory ambiguity. Including contextual factors limits One-Step *Chevron*'s simplicity by adding complex variables that not even Traditional *Chevron* (in most of its framings) possesses.[77]

Moreover, One-Step *Chevron* gets lost in the weeds of "reasonableness" and the "zone of ambiguity." Stephenson and Vermeule's discussion of the zone of ambiguity suggests that One-Step *Chevron* requires judges to find boundaries of ambiguity. As they phrase it, the statutory text will suggest both a "'best' interpretation of the statute" and "a range of interpretations that are sufficiently plausible that the court would view them as reasonable, though not ideal." Aside from contextual factors, how does one assess the reasonableness of an interpretation if the plain text of the statute does not clearly prohibit the interpretation? In an ambiguous statute, where does the zone of ambiguity end and unreasonableness begin? No statutory interpretation

74. *Id.* at 601 n.19. To the extent Stephenson and Vermeule argue courts should consider extra-statutory factors, their One-Step *Chevron* looks similar to Justice Breyer's conception of *Chevron*. *See* Kristin E. Hickman, *The Three Phases of Mead*, 83 FORDHAM L. REV. 527, 541–45 (2014) (describing Justice Breyer's "more blended approach" to *Chevron* as a "word cloud" and stating, "When one assembles the picture, what pops out, and does it favor deference or counsel against it?").

75. *See* Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944) (listing contextual factors such as "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control").

76. United States v. Mead Corp., 533 U.S. 218, 239–41 (2001) (Scalia, J., dissenting).

77. *But see* City of Arlington v. FCC, 133 S. Ct. 1863, 1875 (2013) (Breyer, J., concurring) (including contextual factors in his description of *Chevron*). Justice Breyer has continually asserted that many of the so-called *Skidmore* factors are applicable in *Chevron*. Justice Breyer does not view *Chevron* as a departure from *Skidmore* but rather an additional reason to defer. Christensen v. Harris Cty., 529 U.S. 576, 596 (2000) (Breyer, J., dissenting) ("*Chevron* made no relevant change. It simply focused upon an additional, separate reason for deferring to certain agency determinations, namely that Congress had delegated to the agency to the legal authority to make those determinations.").

analysis requires courts to identify a zone of ambiguity or range of reasonable interpretations. In a traditional statutory interpretation case, courts deconstruct the walls of ambiguity to arrive at a single, "best" interpretation.[78] Under *Chevron*, courts focus on finding either statutory clarity or ambiguity.[79] The statutory text either prohibits or permits the agency's interpretation. In sum, courts either locate a single "best" meaning of the statute or compare the interpretation to the statute to assure conformity with the text.

Admittedly, Stephenson and Vermeule probably never intended courts to identify the boundaries of statutory ambiguity, but their article reads that way. The zone of ambiguity works as a descriptive explanation of *Chevron*'s redundancy. But this theoretical description wants of a pragmatic iteration. If courts could theoretically identify all possible interpretations of statute, then they could easily assess an agency's interpretation for reasonableness. In reality, whether an agency's interpretation falls within the zone of ambiguity remains a question of whether the statute is clear on the "precise question at issue."[80]

This argument seems wholly semantic until one learns that courts have yet to properly apply One-Step *Chevron*.[81] In *United States v. Garcia-Santana*,[82] the Ninth Circuit concluded that the "one-step approach makes much more sense" in rejecting the Board of Immigration Appeals' interpretation of "conspiracy."[83] Relying on Supreme Court precedents, the Ninth Circuit held that "Congress intends to adopt the common law definition" of generic federal crimes when a statute is ambiguous with respect to these crimes.[84] Yet the court concluded that it did not matter what form of *Chevron* the court applied]because the agency's interpretation was both contrary to the clear text and unreasonable in light of contrary Supreme Court precedent.[85]

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78. *See* RONALD DWORKIN, LAW'S EMPIRE 337–38 (1986) (suggesting that statutes should be interpreted "in the best light overall").

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

80. *See id.*

81. *See generally, e.g.*, United States v. Garcia-Santana, 774 F.3d 528 (9th Cir. 2014); United States v. Home Concrete & Supply, LLC, 566 U.S. 478, 493 n.1 (2012) (Scalia, J., concurring); Teva Pharm. USA, Inc. v. Sebelius, 595 F.3d 1303 (D.C. Cir. 2010); Friends of the Everglades v. S. Fla. Water Mgmt. Dist., 570 F.3d 1210, 1219–28 (11th Cir. 2009); Cisneros v. Napolitano, No. 13-700 (JNE/JJK), 2013 WL 3353939 (D. Minn. July 3, 2013).

82. 774 F.3d 528.

83. *Id*.

84. *See id.* at 543 (quoting United States v. Shabani, 513 U.S. 10, 13–14 (1994)).

85. *See id*. ("Whether we characterize this conclusion as (1) a rejection of the BIA's interpretation at *Chevron* step one because the only correct traditional tool of statutory construction ambiguously yields a different result, or (2) a rejection at *Chevron* step two on the ground that

In *Friends of the Everglades v. South Florida Water Management District*,[86] the Eleventh Circuit cited Stephenson and Vermeule, suggesting that "[a]ll that matters is whether the regulation is a reasonable construction of an ambiguous statute."[87] But the Eleventh Circuit applied both steps of *Chevron*, first finding that the statute was ambiguous and then concluding that the agency had reasonably construed the statute.[88] Some judges appear to embrace the conceptual ideals behind One-Step *Chevron* but fail to apply the revised standard. This suggests that One-Step *Chevron* requires a more pragmatic iteration outside of Stephenson and Vermeule's logic-gamed analysis.

One-Step *Chevron* needs improvement. Stephenson and Vermeule offered a simplified *Chevron*, but wrapped it in theoretical packaging. An alternative exists that addresses concerns of redundancy while presenting courts with a pragmatic and simplified *Chevron* standard. To the extent that One-Step *Chevron* seeks to ascertain solely whether the agency's interpretation comports with the statute, *Chevron* operates just as well as a substantive canon. Construing *Chevron* as a clear-statement rule eliminates redundancy, conforms to *Brand X*, and recasts *Chevron* as a traditional tool of statutory interpretation.

III. The Role of Substantive Canons in Statutory Interpretation

Among the many implements in the judge's interpretive toolbox, substantive canons are perhaps the most specialized.[89] Substantive canons resolve statutory ambiguities in favor of desired policy outcomes and apply only in narrow circumstances, such as in a particular area of law or when one interpretation presents extra-statutory concerns. No typology fully satisfies their diverse range of rationales and applications,[90] but existing categorical models are essential to framing any discussion of substantive canons. For the purposes of a *Chevron* Ca-

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the statute is ambiguous but the BIA's interpretation unreasonable in light of its improper methodology, makes no difference.").

86. 574 F.3d 1210.

87. *Id*. at 1219.

88. *Id.* at 1227–28.

89. Scholars use different terminology to refer to these policy-based canons. Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. Rev. 109, 117 n.27 (2010). For uniformity, I refer to them as "substantive canons," though others may call them "normative canons" or "maxims."

90. Although this Article favors a more fluid continuum of the strength of substantive canons, a full reconsideration of current literature is left for another time. For various explanations of substantive canons, see generally, for example, Barrett, *supra* note 89; James J. Brudney & Corey Ditslear, *Canons of Construction and the Elusive Quest for Neutral Reasoning*, 58 Vand. L. Rev. 1 (2005); Aaron-Andrew P. Bruhl, *Communicating the Canons: How Lower Courts React*

non, it is enough to consider the potential policy rationales behind substantive canons and the weight that judges accord these canons.

A. The Policy Rationales and Interpretive Weight of Substantive Canons

United States courts create and apply substantive canons based on perceived public values.[91] A 2010 study by Amy Coney Barrett reveals that United States courts have historically padded substantive canons in perceived legislative intent.[92] For example, in *Talbot v. Seeman*,[93] Chief Justice John Marshall justified the principle that courts should interpret law in accordance with the "law of nations" on the basis that "the legislature of the United States will always hold sacred" those principles.[94] However, as Barrett acknowledges, this rationalization is too simplistic.[95] Not all canons mesh well with the idea of legislative intent.[96] Canons may also reflect statutory purpose, quasi-constitutional law,[97] rule of law principles,[98] a preference for legal continuity,[99] or any other normative principle.

When the Supreme Court Changes the Rules of Statutory Interpretation, 100 MINN. L. REV. 481 (2015).

91. Substantive canons have existed since at least 1584. *See* Jacob Scott, *Codified Canons and the Common Law of Interpretation*, 98 GEO. L.J. 341, 345 (2010) (quoting Heydon's Case, (1584) 76 Eng. Rep. 637, 638 (L.R. Exch.)). All fifty states and the District of Columbia have codified certain interpretive principles as a guide for courts. The federal government lacks any comparable statute, though some scholars argue Congress should adopt a statute of this nature. *See generally* Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085 (2002).

92. Barrett, *supra* note 89, at 158 (exploring all cases from 1789 to 1840 that applied the rule of lenity, *Charming Betsy*, avoidance, the presumption against retroactivity, the sovereign immunity clear statement rules, and the Indian canon).

93. 5 U.S. 1 (1801).

94. *Id*. at 44. This canon is more commonly known as the *Charming Betsy* canon. *See* Murray v. Schooner Charming Betsy, 6 U.S. 64, 104 (1804).

95. Barrett, *supra* note 89, at 158 ("[T]he modern treatment of substantive canons reveals that a canon's purpose often lies in the eyes of the beholder . . . .").

96. For example, the Indian canon was originally founded on the principle that courts should liberally interpret treaties between Indians and the federal government in favor of the Indians. *See* Worcester v. Georgia, 31 U.S. 515, 582 (1832) (M'Lean, J., concurring), *abrogated by* Nevada v. Hicks, 533 U.S. 353 (2001) (holding that tribal courts do not have jurisdiction over wardens for federal civil rights claims). Despite *Worcester*'s abrogation on unrelated grounds, the Indian canon remains a viable substantive canon applied by circuit courts. *See, e.g.*, Soaring Eagle Casino & Resort v. NLRB, 791 F.3d 648, 656–58 (6th Cir. 2015); Artichoke Joe's Cal. Grand Casino v. Norton, 353 F.3d 712, 728–31 (9th Cir. 2003).

97. *See generally* Eskridge & Frickey, *supra* note 19.

98. *See generally* William N. Eskridge, Jr., *Norms, Empiricism, and Canons in Statutory Interpretation*, 66 U. CHI. L. REV. 671 (1999).

99. *See generally* David L. Shapiro, *Continuity and Change in Statutory Interpretation*, 67 N.Y.U. L. REV. 921 (1992).

The rule of lenity illustrates the complexity of labelling the policy goals of canons. Lenity requires courts to interpret ambiguous provisions in favor of the accused when interpreting criminal statutes.[100] Lenity may reflect values of legislative supremacy by discouraging courts from establishing common law crimes.[101] Alternatively, lenity may ensure that the public has adequate notice of criminalized conduct.[102] Other scholars posit that lenity promotes legislative transparency, checks the prosecutorial charging authority, or quells the tyranny of the majority that pushes legislatures to expand criminal law.[103]

One can identify multiple rationales for numerous canons.[104] Of course, some canons may be so specific as to reflect only one value. Statute-based canons or canons limited to particular regulatory areas often fall into this category. For example, the canon that courts should construe veterans' benefits statutes in favor of the beneficiary derives from purposivist notions that Congress acted to promote veterans' welfare.[105]

The policy rationale imputed to the canon by the interpreter influences how much weight the interpreter accords the canon. Canons

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100. *See* United States v. Bass, 404 U.S. 336, 347 (1971).

101. *See* Crandon v. United States, 494 U.S. 152, 158 (1990) ("[L]egislatures, not courts, define criminal liability.").

102. *See* United States v. Rivera, 265 F.3d 310, 312 (5th Cir. 2001) ("The rule-of-lenity fosters the constitutional due-process principle 'that no individual be forced to speculate, at peril of indictment, whether his conduct is prohibited.'" (quoting Dunn v. United States, 442 U.S. 100 (1979))); *see also* Eskridge & Frickey, *supra* note 19, at 600 ("This canon is closely related to the rule to avoid constitutional difficulties, for a lenient interpretation of a criminal statute obviates inquiries into underlying due process concerns.").

103. *See* Zachary Price, *The Rule of Lenity as a Rule of Structure*, 72 FORDHAM L. REV. 885, 911–25 (2004); Daniel C. Richman, *Federal Criminal Law, Congressional Delegation, and Enforcement Discretion*, 46 UCLA L. REV. 757, 758 (1999) (contending that legislators delegate authority to prosecutors to appear "tough on crime").

104. The *Charming Betsy* canon may promote legislative supremacy, international law, or preservation of the balance between Congress and the President in foreign affairs. *See* Curtis A. Bradley, *The* Charming Betsy *Canon and Separation of Powers: Rethinking the Interpretive Role of International Law*, 86 GEO. L.J. 479, 495–504, 524–29 (1997). Jurists and scholars have grounded the constitutional avoidance canon in judicial restraint, legislative supremacy, or judicial enforcement of the Constitution. *See* Note, *Should the Supreme Court Presume that Congress Acts Constitutionally? The Role of the Canon of Avoidance and Reliance on Early Legislative Practice in Constitutional Interpretation*, 116 HARV. L. REV. 1798, 1812–16 (2003). The absurdity canon may, again, reflect legislative supremacy or due process and equal protection requirements. *See* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TESTS 239 n.18 (2012); William N. Eskridge, Jr., *The New Textualism and Normative Canons*, 113 COLUM. L. REV. 531, 544 (2013) (describing problems with textualists' use of the absurdity canon).

105. *See* Fishgold v. Sullivan Drydock & Repair Corp., 328 U.S. 275, 284–85 (1946); *see also* King v. St. Vincent's Hosp., 502 U.S. 215, 220–21 n.9 (1991).

fall along a continuum of other canons and interpretive principles. For simplicity, scholars generally place substantive canons in two categories: tiebreakers (weak) and clear-statement rules (strong). Courts use tiebreakers to decide between two plausible interpretations and only apply these canons in cases when the statute is ambiguous. In contrast, clear-statement rules require a contrary clear statement from Congress to overcome the canon's presumption.[106] Clear-statement rules permit a judge to forgo the "best" interpretation of an ambiguous statutory provision in favor of effectuating the canon's policy goal. Beyond clear-statement rules are "'super-strong clear-statement rules,' which establish very strong presumptions of statutory meaning that can be rebutted only through unambiguous statutory text targeted at the specific problem."[107]

Depending on the policy rationale accorded to the canon by the judge, some canons can be framed as either tiebreakers or clear-statement rules.[108] As such, a substantive canon's label is not decisive.[109] According to Zachary Price, the "key question" in applying a substantive canon "is what rank the rule holds relative to other interpretive conventions."[110]

The avoidance canon illustrates the subtle problems that may arise in weighing canons. The avoidance canon instructs courts to construe statutes to evade potential constitutional problems. In *NLRB v. Catholic Bishop of Chicago*,[111] the majority refused to adopt an interpretation of the National Labor Relations Act (NLRA) granting the National Labor Relations Board (NLRB) jurisdiction over collective bargaining in Catholic high schools. The majority feared that the agency's interpretation implicated the Religion Clauses of the First Amendment.[112] Writing for the majority, Chief Justice Burger concluded that "[t]here is *no clear expression of an affirmative intention of Congress* that teachers in church-operated schools should be covered by the Act."[113]

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106. WILLIAM N. ESKRIDGE, JR. ET AL., CASES AND MATERIALS ON STATUTORY INTERPRETATION 362–66 (2012). The Supreme Court has acknowledged this categorization. *See* Astoria Fed. Sav. & Loan Ass'n v. Solimino, 501 U.S. 104, 108–09 (1991) (comparing clear-statement rules to presumptions).

107. Eskridge & Frickey, *supra* note 19, at 611–12.

108. Price, *supra* note 103, at 891.

109. Barrett, *supra* note 89, at 167.

110. Price, *supra* note 103, at 890.

111. 440 U.S. 490 (1979).

112. *Id*. at 491–95, 507.

113. *Id.* at 504 (emphasis added). Despite the Supreme Court's holding in *Catholic Bishop*, courts have held that NLRB jurisdiction over religious schools does not violate the First Amend-

Justice Brennan's dissent illuminates the strength with which the majority applied the avoidance canon.[114] According to the dissent, the avoidance canon applies only when the alternative "construction of the statute is *fairly possible*" in order to prevent "wholesale judicial dismemberment of congressional enactments."[115] The NLRA "covers all employers not within the eight express exceptions."[116] Legislative history reveals that Congress rejected an amendment that would have included religious organizations within these exceptions.[117] Absent the avoidance canon, Justice Brennan's interpretation adheres more faithfully to the whole act and Congress's intent. Justice Brennan's avoidance canon resembles a more traditional clear-statement rule by deferring to contextual hints of congressional intent. Chief Justice Burger's analysis, however, presents something closer to a super-strong clear statement rule because nothing short of a clear textual affirmation, such as "the NLRB has jurisdiction over religious institutions," will satisfy his avoidance canon.

In sum, two factors influence the weight a judge accords a canon: the policy value the judge attributes to the canon and the importance of that policy value to the judge's ideology. Judges accord different weights to substantive canons because they perceive the value of certain canons as greater or lesser than other canons. Any attempt to construct a new substantive canon must therefore evaluate the canon's underlying policy value.

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ment. *See* Christopher M. Gaul, Note, Catholic Bishop *Revisited: Resolving the Problem of Labor Board Jurisdiction over Religious Schools*, 2007 U. ILL. L. REV., 1505, 1533–34 (2007).

114. *Catholic Bishop*, 440 U.S. at 508–11 (Brennan, J., dissenting) ("The general principle of construing statutes to avoid unnecessary constitutional decisions is a well-settled and salutary one. The governing canon, however, is *not* that expressed by the Court today."). The Court relied on *Machinists v. Street*:

> When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is *fairly possible* by which the question may be avoided.

Id. at 510 (Brennan, J., dissenting) (quoting Machinists v. Street, 367 U.S. 740, 749–50 (1961)). Justice Brennan lambasted the majority's construction of the avoidance canon:

> This limitation to constructions that are 'fairly possible,' and 'reasonable,' acts as a brake against wholesale judicial dismemberment of congressional enactments. It confines the judiciary to its proper role in construing statutes, which is to interpret them so as to give effect to congressional intention. The Court's new 'affirmative expression rule' releases that brake.

Id. at 510–11 (Brennan, J., dissenting) (citations omitted).

115. *Id*. (Brennan, J., dissenting).

116. *Id.* at 511 (Brennan, J., dissenting).

117. *Id*. (Brennan, J., dissenting).

B. The Scope of Clear-Statement Rules

According to the Supreme Court, clear-statement rules only protect "weighty and constant values."[118] These canons may embody constitutional values or "constrain[ ] judicial discretion in the interpretation of the laws . . . ."[119]

Scholars question the validity and scope of these canons. The Supreme Court has acknowledged that statutory interpretation "is often more a question of policy than of law."[120] As Congress is the supreme policymaker in the federal government,[121] judges should carry out Congress's will when interpreting statutes—whether its will is best understood through textualist or purposivist interpretation is a separate debate.[122] Scholars disagree as to whether clear-statement rules violate principles of legislative supremacy and result in arbitrary judicial activism.[123] Clear-statement rules may result in undemocratic and

118. *See* Astoria Fed. Sav. & Loan Ass'n v. Solimino, 501 U.S. 104, 108 (1991).

119. *Id*. at 109.

120. Pauley v. Bethenergy Mines, Inc., 501 U.S. 680, 696 (1991).

121. *See* Gregory v. Ashcroft, 501 U.S. 452, 487 n.1 (1991) (Blackmun, J., dissenting) ("A judge is first and foremost one who resolves disputes, and not one charged with the duty to fashion broad policies establishing the rights and duties of citizens. That task is reserved primarily for legislators.").

122. Textualism and purposivism are not the only faithful agency theories. "Intentionalism" and "purposivism" are often used interchangeably today but have historically represented two different approaches to statutory interpretation. *See* Adam N. Steinman, *"Less" Is "More"? Textualism, Intentionalism, and a Better Solution to the Class Action Fairness Act's Appellate Deadline Riddle*, 92 IOWA L. REV. 1183, 1196 n.73 (2007). For simplicity, I contrast textualism with purposivism.

I also acknowledge that dynamists disagree with faithful agency theorists. Dynamists believe Congress and the courts are "cooperative partners." *See* William N. Eskridge, Jr., *All About Words: Early Understandings of the "Judicial Power" in Statutory Interpretation, 1776–1806*, 101 COLUM. L. REV. 990, 992 (2001) ("In my view, Article III judges are both agents carrying out directives laid down by the legislature and partners in the enterprise of law elaboration, for they (like the legislature) are ultimately agents of 'We the People.'"). Dynamic statutory interpretation accords more interpretive power to the judicial branch than purposivism or textualism. But, even the most renowned dynamists acknowledge that the court has *some* duty to carry out Congress's will. According to Eskridge, "the agent is supposed to follow the general directives embodied in the contract and the specific orders given her by the principal, but her primary obligation is to use her best efforts to carry out the general goals and specific orders over time." WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 125 (1994). To the extent that dynamism refocuses the interpretive inquiry on statutory goals over statutory text, dynamists should have no qualms about applying clear-statement rules. I hesitate to accept that courts have much of any policymaking authority and can broaden the application of statutes, so long as they keep in line with the general goals of the legislation. *See* U.S. CONST. art. I, § 1 ("All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."). I am much more comfortable leaving policy decisions (and for that matter dynamic interpretation) to Congress and the agencies they assign to carry out regulatory tasks. I do not address dynamism throughout this Article, because my *Chevron* Canon assumes the existence of a faithful agency relationship.

123. John Manning has summarized arguments of both critics and defenders:

counter-majoritarian statutory interpretation to the extent that they subvert Congress's will. Yet clear-statement rules enjoy widespread application among courts,[124] rendering these existential debates moot on a practical level.

Scholars who are at least somewhat amenable to clear-statement rules have sought to restrict their scope to particular classes of policy values. The majority view links clear-statement rules to the Constitution and the essential institutions of the U.S. government.[125] Adhering to legislative supremacy principles, courts may only rely on their own authority when interpreting statutes through extra-statutory means.[126] Institutional clear-statement rules comport with legislative supremacy because the Constitution qualifies legislative supremacy.[127] Thus, institutional clear-statement rules derive from judges' foremost role as "guardians of the Constitution."[128] These canons protect under-enforced structural guarantees and reserve the power to deviate from structural norms to the politically accountable branches.[129] Congress must act deliberately when it chooses to deviate from these

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> In short, critics argue (1) that the distortions of statutory meaning required by such rules intrude upon legislative prerogatives no less than does *Marbury*-style judicial review; (2) that by creating judge-made penumbras around the Constitution, clear statement rules may, in fact, exacerbate the countermajoritarian difficulty typically associated with judicial review; and (3) that the Court's most recent clear statement rules have favored some values (such as structural and property norms) over others (such as civil liberties), without acknowledging any basis for the new emphasis. Defenders have variously replied (1) that clear statements do not interfere with legislative supremacy but merely compel Congress to take responsibility for its choices; (2) that one person's "penumbras" are another person's method of enforcing the Constitution itself; and (3) that the clear statement rule device provides a benign way of protecting so-called "underenforced constitutional norms"—values such as federalism and separation of powers, for which the Court has perennially had difficulty devising judicially manageable standards.

John F. Manning, *Clear Statement Rules and the Constitution*, 110 COLUM. L. REV. 399, 417 (2010).

124. Bruhl, *supra* note 90, at 499 (finding that the use of substantive canons by lower courts has increased since the 1980s).

125. *See* Manning, *Clear Statement Rules and the Constitution*, *supra* note 123, at 406-07. *But see* Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 334 (2000) (arguing that "social commitments" in certain regulatory areas, such as tax, benefits, and antitrust, may form the basis of clear-statement rules).

126. *See infra* notes 153–69 and accompanying text.

127. Barrett, *supra* note 89, at 181.

128. *Cf.* THE FEDERALIST NO. 78, at 454 (Alexander Hamilton) (A.B.A. ed., 2009). Other scholars call these "quasi-constitutional" clear statement rules. *See generally* Eskridge & Frickey, *supra* note 19. As I discuss later, John Manning has critiqued this connection to the Constitution as unfounded. *See* Manning, *Clear Statement Rules and the Constitution*, *supra* note 123, at 437-38. I disagree with Manning's conclusions but understand his overall point. I thus refer to these types of canon as "institutional clear-statement rules" throughout.

129. Eskridge & Frickey, *supra* note 19, at 631.

norms to avoid upsetting the structural balance of government. For example, the clear-statement rule requiring Congress to unambiguously define conditions attached to federal funding protects federalism by ensuring that states make informed decisions when deciding to accept federal funding.[130] As Daniel Farber stated, "These rules are faithful to the constitutional scheme, and their use in statutory interpretation serves to advance by means of interstitial policymaking the constitutional goals of democratic, just, and effective government."[131]

Institutional clear-statement rules are founded in the penumbra of constitutional values and send a warning to Congress. When a court applies a clear-statement rule, it signals Congress to "stop and think" about the systemic implications of the statute.[132] If Congress intended to deviate from the norm protected by the canon, it may amend the statute to reflect that intent. In the case of the avoidance canon, if Congress decides that it has acted constitutionally, then it may override the court's interpretation and force the court to conduct constitutional review of the statute in a later case.[133] Courts should, however, exercise judicial review sparingly.[134] Hence, institutional clear-statement rules restrain judges by encouraging courts to avoid confronting constitutional issues.

Other scholars remain critical of the role of institutional clear-statement rules in statutory interpretation. John Manning responds that quasi-constitutional values—such as federalism or separation of powers—are too amorphous and "abstracted from the concrete provisions that define them."[135] As a result, quasi-constitutional values "are no

130. *See* Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 24–25 (1981).

131. Daniel A. Farber, *Statutory Interpretation and Legislative Supremacy*, 78 GEO L.J. 281, 285 (1989).

132. *See* Barrett, *supra* note 89, at 175.

133. *See* William Eskridge, *Overriding Supreme Court Statutory Interpretations*, 101 YALE L.J. 331, 338 (1991) (demonstrating that Congress overrides judicial interpretations with some frequency).

134. *See* Furman v. Georgia, 408 U.S. 238, 470 (1972) (Rehnquist, J., dissenting) ("The very nature of judicial review . . . makes courts the least subject to the Madisonian check in the event that they shall, for the best of motives, expand judicial authority beyond the limits contemplated by the Framers. It is for this reason that judicial self-restraint is surely an implied, if not an expressed, condition of the grant of authority of judicial review."); Trop v. Dulles, 356 U.S. 86, 120 (1958) (Frankfurter, J., dissenting) ("[I]t is not the business of this court to pronounce policy. It must observe a fastidious regard for limitations on its own power, and this precludes the Court's giving effect to its own notions of what is wise or politic. That self-restraint is of the essence in the observance of the judicial oath, for the Constitution has not authorized the judges to sit in judgment on the wisdom of what Congress and the Executive Branch do."); United States v. Butler, 297 U.S. 1, 78-79 (1936) (Stone, J., dissenting) ("[W]hile unconstitutional exercise of power by the executive and legislative branches of the government is subject to judicial restraint, the only check upon our own exercise of power is our own sense of self-restraint.").

135. Manning, *Clear Statement Rules and the Constitution*, *supra* note 123, at 438.

longer *constitutional* values; they are just values."[136] According to Manning, "one cannot meaningfully speak of a *constitutional* value without reference to the constitution makers' decisions about how to put that value into effect."[137] As such, institutional clear-statement rules present as many conflicts as any other canon.

Even if Manning's assertion is true, is it a problem? In the words of Justice Jackson, "The purpose of the Constitution was not only to grant power, but to keep it from getting out of hand."[138] Accordingly, "our Constitution does not and cannot conform to judicial definitions of the power of any of its branches based on isolated clauses or even single Articles torn from context."[139]

Admittedly, outside of particular doctrines like the dormant commerce clause, no provision of the Constitution requires courts to enforce broad values of federalism or separation of powers. But few scholars would deny that the Constitution implicitly embraces these values. Read together, Articles I, II, and III create a delicate balance of power between the three branches of government.[140] Similarly, Article I, Article IV, and the Tenth Amendment create separate spheres of power for the federal government and the states.[141] Courts may confront possible interpretations of statutes deviating from these values that otherwise do not violate the Constitution. The "best" interpretation of a statute may survive constitutional review but still trigger the federalism canon. Even though the "best" interpretation is consti-

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136. *Id.*

137. *Id*. at 404.

138. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 640 (1952) (Jackson, J., concurring).

139. *Id.* at 635 (Jackson, J., concurring).

140. *Accord* U.S. CONST. art. I, § 1 ("All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."); *id*. art. II, § 1 ("The executive Power shall be vested in a President of the United States of America."); *id.* art. III, § 1 ("The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.").

141. *Accord id.* art. I, § 10 ("No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility."); *id.* art. IV, § 1 ("Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in such Acts, Records and Proceedings shall be proved, and the Effect thereof."); *id.* § 2 ("The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."); *id.* § 4 ("The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence."); *id.* amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

tutional, Congress may not have intended the statute to obstruct state rights. Principles of legislative supremacy dictate that these constitutional, but otherwise balance-upsetting, decisions should be made by Congress, not courts. All institutional clear-statement rules—regardless of whether they truly reflect the Constitution—reflect *institutional values* that Congress, the executive branch, and the courts should strive to preserve.

Manning correctly notes that the values of clear-statement rules can conflict.[142] For example, one reading of a statute may raise federalism concerns, while another implicates tribal sovereignty. That does not mean, however, that clear-statement rules are foundationless. Conflicts between institutional values reveal tensions over the weight that policymakers should accord competing norms. While the court must decide the case in favor of one interpretation over another, clear-statement rules should not be altogether abandoned because they occasionally conflict. Rather, these conflicts represent great policy choices that our democratic system must toil with when passing laws.

We cannot divorce ideology from statutory or constitutional interpretation. Manning, a prominent textualist, presents views a purposivist would reject. Yes, judges will weigh these institutional values in light of their own ideologies and understandings of the law. Even if courts reject these clear-statement rules and rule on the constitutionality of the statute, constitutional interpretation will still reflect the ideological values of the interpreter.[143] Resorting to constitutional interpretation, however, is more drastic than employing institutional clear-statement rules. Clear-statement rules stop courts from making decisions that rattle the balance of government until such a time when the more politically accountable branches may decide these issues. Courts should afford Congress the opportunity to decide whether it intended to digress from these values when enacting the statute by invoking institutional clear-statement rules as an act of judicial restraint.

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142. Manning, *Clear Statement Rules and the Constitution*, *supra* note 128, at 437-38.

143. *See, e.g.*, DAVID A. STRAUSS, THE LIVING CONSTITUTION 21-23 (2010) (calling originalism indeterminate); Richard H. Fallon, Jr., *How to Choose a Constitutional Theory*, 87 CAL. L. REV. 535, 549-58 (1999) (providing a set of criteria by which to evaluate the validity of constitutional theories). *See generally* Michael Moore, *Originalist Theories of Constitutional Interpretation*, 73 CORNELL L. REV. 364 (1988) (describing originalism); Robert A. Stein, *Foreword: A Consequential Justice*, 101 MINN. L. REV. HEADNOTES 1 (2016) (comparing the constitutional interpretation of Justices Scalia and Brennan).

IV. THE CLEAR-STATEMENT *CHEVRON* CANON

The history of *Chevron*'s application supports reframing it as an institutional clear-statement rule. Describing *Chevron* as a canon is not new, but few, if any, scholars have sought to frame *Chevron* within the traditional substantive canon framework. Rather "canon" has often acted as a convenient label much in the same way as "rule" or "standard." In a catalogue of clear-statement rules, William Eskridge and Philip Frickey described the *Chevron* standard as a substantive canon: "Unless refuted by the clear language of the statute, a court must defer to an agency interpretation."[144] Eskridge and Frickey, however, did not take the time to explain *Chevron* in the context of the substantive canon literature. Published in 1992, Eskridge and Frickey's explanation spans barely a page and ignores the literature regarding *Chevron*'s two steps.[145] While I adopt their framing, their piece serves otherwise little value for the contemporary administrative law scholar studying *Chevron*. In subsequent works, both authors have depicted a more traditional and elaborate understanding of *Chevron*.[146] This Part develops *Chevron*'s place in this catalogue of clear-statement rules.

The *Chevron* Canon operates like any other clear-statement rule. The court searches for a clear statement from Congress forbidding the agency's interpretation. If the court can find no such statement, then the agency's interpretation receives deference. If Congress, however, clearly intended to prohibit the agency's interpretation, then the agency does not receive deference. The *Chevron* Canon offers more simplicity than either One-Step *Chevron* or Traditional *Chevron*. The court neither searches for a zone of ambiguity, nor tangles in the redundancy of *Chevron*'s two steps.

A. The Policy Value(s) of Chevron

Richard Pierce describes *Chevron* as "a coherent hierarchical relationship among the three branches of government that is consistent with the text of the Constitution, the intent of the Framers, and the basic principles of democracy the Framers were attempting to further."[147] Similarly, Judge Laurence Silberman of the D.C. Circuit heralds *Chevron* as a "sound recognition that a political branch, the

144. *See* Eskridge & Frickey, *supra* note 19, at 618.

145. *See id*. at 618-19.

146. *See* ESKRIDGE, JR. ET AL., *supra* note 106, at 644–831.

147. Richard J. Pierce, Jr., *Reconciling* Chevron *and Stare Decisis*, 85 GEO. L.J. 2225, 2227 (1997).

executive, has a greater claim to make policy choices than the judiciary."[148] I agree.

Since the death of the nondelegation doctrine,[149] Congress has shifted much of the regulatory lawmaking process to administrative agencies. Courts have ceded much of their authority to agencies, providing agencies flexibility to implement policies and interpret ambiguous statutes.[150] Together, the APA and the Supreme Court's administrative law precedent have built a more modern understanding of U.S. lawmaking. To govern this more complex and hierarchical form of lawmaking, the Supreme Court has adopted new understandings of the separation of powers.[151] *Chevron* and its progeny form the most important blueprint of the U.S. lawmaking scheme and the separation of powers since Justice Jackson's concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*.[152]

Chevron protects legislative supremacy and Congress's ability to delegate lawmaking authority to agencies. Article I, section 1 vests the legislative power of the United States in Congress.[153] For this reason, the constitutional norm of legislative supremacy subordinates courts to Congress in the policymaking realm, but the judiciary retains the power to review the law's constitutionality.[154] In the statutory context, legislative supremacy requires courts to interpret statutes faithfully to the will of Congress.

John Manning offers an explanation of legislative supremacy's constitutional roots.[155] Legislative supremacy derives from two features fundamental to the U.S. system of government: (1) separation of powers and (2) bicameralism and presentment.[156] According to Manning,

148. Laurence H. Silberman, Chevron*: The Intersection of Law & Policy*, 58 GEO. WASH. L. REV. 821, 822 (1990).

149. *See* Mistretta v. United States, 488 U.S. 361, 373 n.7 (1989); John Locke, *The Second Treatise of Government*, *in* TWO TREATISES OF GOVERNMENT 285, 381 (Peter Laslett ed., 1988) (confining the legislative power "only to make *Laws*, and not to make *Legislators*, the *Legislative* can have no power to transfer their Authority of making Laws, and place it in other hands"). For cases applying the nondelegation doctrine, see A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 537-39 (1935); Pan. Ref. Co. v. Ryan, 293 U.S. 388, 425-26 (1935).

150. *See* ADRIAN VERMEULE, LAW'S ABNEGATION: FROM LAW'S EMPIRE TO THE ADMINISTRATIVE STATE 30 (2016).

151. *Mistretta*, 488 U.S. at 372 ("[I]n our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives.").

152. 343 U.S. 579, 634–55 (1952) (Jackson, J., concurring).

153. *See* U.S. CONST. art. I, § 1 ("All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.").

154. *See* Farber, *supra* note 131, at 282.

155. *See* John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 56–105 (2001).

156. *Id.* at 58, 70; *see also* Barrett, *supra* note 89, at 115.

the Founders departed from the English system of equitable interpretation, which permitted courts to pursue equity over textual adherence. Article III of the Constitution severed the connection between the judicial and legislative powers. The Constitution "takes pains to ensure judicial independence from the control and functions of the political branches," but in doing so "undercuts any judicial claim to derivative lawmaking authority."[157] Furthermore, the Constitution creates a complex lawmaking regime through Article I, section 7's bicameralism and presentment requirements,[158] which are intended to "break and control the violence of faction."[159] Equitable interpretation may lead judges to "systematically undercut" the separation of powers protected by bicameralism and presentment.[160] Legislative supremacy thus promotes the separation of powers by preventing judicial intrusion in the lawmaking process.

Legislative supremacy controls not only the relationship between Congress and the courts but also the relationship between Congress and administrative agencies. Article II, section 3 requires that the President "shall take Care that the Laws *be faithfully executed*."[161] The executive branch's role as executioner of laws is derived from the laws passed by Congress, and Congress may be as specific in its instructions as it wishes.[162] So long as Congress prescribes an "intelligible principle," Congress may delegate policymaking authority to executive agencies.[163] Complex societal problems require experts in medicine, agriculture, and technology to adapt regulatory programs to evolving circumstances. Congress intentionally leaves provisions ambiguous when it expects the implementing agency—staffed by relevant experts—to promulgate regulations to effectuate a broad regulatory regime.[164] But agencies must adopt regulations in conformance with

157. Manning, *Textualism and the Equity of the Statute*, *supra* note 155, at 58–59.

158. *See id.* at 70.

159. THE FEDERALIST NO. 10, at 45 (James Madison) (A.B.A. ed., 2009).

160. *See* Manning, *Textualism and the Equity of the Statute*, *supra* note 155, at 78.

161. U.S. CONST. art. II, § 3.

162. Biodiversity Assocs. v. Cables, 357 F.3d 1152, 1162 (10th Cir. 2004).

163. *See* Mistretta v. United States, 488 U.S. 361, 372 (1989) ("Apply this 'intelligible principle' test to congressional delegations, our jurisprudence has been driven by a practical understanding that in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives."); *see also* J. W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928). *But see* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 530 (1935); Pan. Ref. Co. v. Ryan, 293 U.S. 388, 420-25 (1935).

164. Richard Pierce has argued that *Chevron* creates a rivalry between Congress and the executive branch by requiring Congress to speak clearly in order to minimize executive intrusion in the lawmaking process—creating a *de facto* nondelegation doctrine. *See* Pierce, *supra* note 147, at 2232. If this is the case, then *Chevron* represents a check on congressional authority. Yet

their delegated authority. Absent delegation, Congress can freely carry out this policymaking on its own. If the agency does a poor job executing its task, Congress may revoke the agency's authority or allocate it to a more faithful agency.[165]

Chevron is thus best explained as an implicit delegation from Congress to agencies to resolve statutory ambiguities.[166] According to the Supreme Court in *United States v. Mead Corp.*,[167] *Chevron* applies when Congress *intended* the agency to speak with the force of law and the agency promulgated its interpretation in an exercise of that authority.[168] Empirical studies support this congressional-intent theory. Lisa Bressman and Abbe Gluck's 2014 survey of congressional drafters found that Congress views "agencies as the everyday statutory interpreters."[169] If Congress expects agencies—not courts—to interpret statutes, courts should defer to agency interpretations because the decision to delegate interpretive authority is a policy decision left up to Congress.

The congressional–agency relationship, therefore, represents a delicate principal–agent relationship between Congress and the executive that courts ought not to fiddle with unless the agency takes an uncon-

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Congress has admitted, at least in Bressman and Gluck's study, that it *wants* agencies to have interpretive lawmaking authority. The U.S. regulatory system is far too complex and specialized for 535 elected officials. Congress needs help from experts who can best implement these regulatory regimes. Pierce's analysis ignores that what Congress giveth, Congress can taketh away. The Supreme Court has acknowledged that "a refusal to overrule an agency's construction of legislation is at least some evidence of the reasonableness of that construction." United States v. Riverside Bayview Homes, 474 U.S. 121, 137 (1985). Congress holds all of the power in this relationship.

165. *See* G.G. v. Gloucester Cty. Sch. Bd., 822 F.3d 709, 724 (4th Cir. 2016) (noting that Congress has the authority to revise a statute to prohibit or authorize an agency's interpretation), *vacated*, No. 16-273, 2017 WL 855755 (U.S. Mar. 6, 2017) (mem.).

166. *See* Smiley v. Citibank (S.D.), N.A., 517 U.S. 735, 740–41 (1996) ("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."); John F. Duffy, *Administrative Common Law in Judicial Review*, 77 TEX. L. REV. 113, 202 (1998) ("*Chevron* is primarily a case about delegation, not deference."); Thomas W. Merrill & Kristin E. Hickman, Chevron*'s Domain*, 89 GEO. L.J. 833, 833–34 (2001).

167. 533 U.S. 218 (2001).

168. *Id*. at 226–27 ("We hold that administrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority. Delegation of such authority may be shown in a variety of ways, as by an agency's power to engage in adjudication or notice-and-comment rulemaking, or by some other indication of a *comparable congressional intent*." (emphasis added)).

169. Lisa Schultz Bressman & Abbe R. Gluck, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part II*, 66 STAN. L. REV. 725, 765 (2014).

stitutional action or the agency violates Congress's directive. The Supreme Court has recognized that it is not a policymaker and it is "not at liberty to substitute its own discretion for that of administrative officers who have kept within the bounds of their administrative powers."[170] The *Chevron* Court recognized that statutory interpretation in the administrative law context "really centers on the wisdom of the agency's policy, rather than whether it is a reasonable choice within a gap left open by Congress."[171] The *Chevron* Court further acknowledged that its role did not extend to lawmaking:

> Judges are not experts in the field, and are *not part of either political branch of the Government*. Courts must, in some cases, reconcile competing political interests, but not on the basis of the judges' personal policy preferences . . . . While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices—resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in life of everyday realities . . . .
>
> . . . [F]ederal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do. The responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones: "Our Constitution vests such responsibilities in the political branches."[172]

Statutory interpretation in the administrative law context is often less saying "what the law is"[173] and is more akin to the policymaking conducted by Congress.

Courts must respect Congress's decision to delegate interpretive authority to agencies. *Chevron* is consistent with the constitutional presumption identified in *Youngstown Sheet & Tube* that "[w]hen the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate."[174] *Chevron* checks executive authority by preventing agencies from straying too far outside of their delegated tasks. If an agency interprets a statute contrary to its clear text, then "the agency is due no

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170. Am. Tel. & Tel. Co. v. United States, 299 U.S. 232, 236 (1936).

171. *See* Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 866 (1984).

172. *Id.* at 865–66 (emphasis added) (quoting Tenn. Valley Auth. v. Hill, 437 U.S. 153, 195 (1978)).

173. Marbury v. Madison, 5 U.S. 137, 177 (1803).

174. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

deference, for Congress has left no gap for the agency to fill."[175] Statutory clarity represents Congress's decision to reserve its authority as the federal government's supreme policymaker. Agencies, like courts, must respect Congress's intent.[176]

To protect congressional delegation of interpretive authority, the clear-statement *Chevron* canon commands: "Unless refuted by the clear language of the statute, a court must defer to an agency interpretation."[177] When an agency has faithfully interpreted a statute, the reviewing court may only overturn an agency interpretation to protect the Constitution from congressional or executive action.[178] The court may exercise this authority in one of two ways. First, it may use another institutional clear-statement rule to signal Congress that the agency's interpretation threatens an institutional value.[179] If Congress approves of the agency's interpretation and suspects that it is otherwise constitutional, then Congress retains the authority to adopt the agency's initial interpretation through legislation. Second, the Court may consider the constitutional question and hold that the agency's interpretation is unconstitutional. As discussed earlier,[180] the use of other institutional clear-statement rules is preferable for preserving legislative supremacy.

The Supreme Court has already begun to pad *Chevron* in this hierarchical understanding of the separation of powers. In *Utility Air Regulatory Group v. Environmental Protection Agency*,[181] the Supreme Court rejected Environmental Protection Agency (EPA) regulations that "would bring about an enormous and transformative expansion in EPA's regulatory authority without clear congressional authorization."[182] Writing for the majority, Justice Scalia opined, "It would be patently unreasonable—not to say outrageous—for EPA to insist on seizing expansive power that it admits the statute is not designed to grant."[183] Justice Scalia described the agency's duty as a faithful agent to Congress:

> Under our system of government, Congress makes laws and the President, acting at times through agencies like EPA, "faithfully execute[s]" them. The power of executing the law necessarily includes

175. City of Arlington v. FCC, 133 S. Ct. 1863, 1875 (2013) (Breyer, J., concurring).
176. *See Chevron*, 467 U.S. at 842–43.
177. *See* Eskridge & Frickey, *supra* note 19, at 618–19.
178. *Cf. Marbury*, 5 U.S. at 178.
179. *See* Barrett, *supra* note 89, at 175 n.316.
180. *See supra* Section II.B.
181. 134 S. Ct. 2427 (2014).
182. *Id*. at 2444.
183. *Id*.

> both authority and responsibility to resolve some questions left open by Congress that arise during the law's administration. But it does not include a power to revise clear statutory terms that turn out not to work in practice.[184]

Gone are the days when the Court does not justify *Chevron* in constitutional rhetoric.[185] Thus, *Chevron* rests comfortably alongside other institutional clear-statement rules in protecting under enforced constitutional norms.

B. Reconciling the Chevron *Canon with the Weight of Step One and Step Two*

Construing *Chevron* as a clear-statement rule requires more than simply finding a quasi-constitutional hook. To fit the clear-statement rule framework, *Chevron* must be capable of overriding the "best" interpretation of the statute. Undoubtedly, *Chevron* mandates deference to an agency's interpretation over the "best" interpretation, prohibiting a court from "substitut[ing] its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency."[186] If implemented, the *Chevron* Canon would do little to disrupt the traditional weight courts have given to Traditional *Chevron* because courts emphasize the clarity question of Step One over the reasonableness question of Step Two.

The *Chevron* Canon behaves most similarly to Step One. Under the *Chevron* Canon, a court may find a clear-statement in one of two ways. First, a statute may be so clear as to mandate a single interpretation. A single, mandated interpretation forecloses deference because courts and the agency "must give effect to the unambiguously expressed intent of Congress."[187] Alternatively, a statute may be ambiguous, but the statutory text clearly precludes the agency from adopting a particular interpretation. As Justice Scalia once explained, "It does not matter whether the word 'yellow' is ambiguous when the agency has interpreted it to mean 'purple.'"[188] The *Chevron* Canon thus protects *Brand X* because the court may only override the agency's interpretation if the statute clearly prohibits the agency's interpretation, signaling to the agency that its interpretation was impermissible.

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184. *See id.* at 2446 (alteration in original) (citations omitted) (quoting U.S. CONST. art. II, § 3).

185. *See* Merrill & Hickman, *supra* note 166, at 866 ("But *Chevron* does not suggest that the nondelegation doctrine or any other principle of separation of powers compels this outcome.").

186. Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 844 (1984).

187. *Id.* at 842–43.

188. United States v. Home Concrete & Supply, LLC, 566 U.S. 478, 493 n.1 (2012).

The text of the *Chevron* opinion can be read to support applying Step One like a clear-statement rule.[189] The Court describes Step One as asking "whether Congress has *directly spoken* to the *precise* question at issue."[190] The Court goes on to state that if "the court determines Congress has not *directly* addressed the *precise* question at issue, the court does not simply impose its own construction of the statute."[191] This language suggests that courts should not overturn an agency's interpretation unless a clear statement in the statutory text, addressing the precise question at issue, prohibits the agency's interpretation.

As applied by courts, Step One centers on a search for prohibiting language—indicia that Congress wished to prevent the agency's interpretation. For example, in *National Credit Union Administration v. First National Bank & Trust Co.*,[192] the Supreme Court found the agency's interpretation impermissible at Step One because the agency's interpretation both created surplusage and would render other provisions of the statute meaningless.[193] Similarly, in *INS v. Cardoza-Fonseca*, the Court refused to defer to the agency's interpretation because the agency's interpretation violated the canon of meaningful variation.[194] The Court found statutory clarity in both cases because other statutory provisions and textual canons prohibited the agency's interpretation.

But absent prohibiting language, the Step One analysis in many cases is relatively unintrustive, much like a clear-statement rule analysis. For example, in *Yellow Transportation, Inc. v. Michigan*,[195] the Court conducted little interpretive analysis and simply concluded that the statute did not "foreclose" the agency's interpretation.[196] In *National Railroad Passenger Corp. v. Boston and Maine Corp.*,[197] the Court deferred to an agency's interpretation merely because it was "not in conflict with the plain language of the statute."[198] Some scholars have supported this less intrusive approach to Step One. Mark Seidenfeld argued that "a court should find a statute silent or ambiguous under *Chevron* Step One unless the statute *clearly manifests con-*

189. I would never assert that this is the only interpretation supported by the *Chevron* opinion. Rather, it is one permissible interpretation.

190. *Chevron*, 467 U.S. at 842 (emphasis added).

191. *Id.* at 843 (emphasis added).

192. 522 U.S. 479 (1998).

193. *Id*. at 500–01.

194. *See* 480 U.S. 421, 446–48 (1987).

195. 537 U.S. 36 (2002).

196. *Id.* at 45–46.

197. 503 U.S. 407 (1992).

198. *Id.* at 417–18.

gressional intent to constrain agency discretion."[199] Thus the language of the *Chevron* opinion and its subsequent application of Step One by the Supreme Court has, at times, resembled a clear-statement rule.[200]

Step One's clarity question still leaves space for interpretive disagreements and ideological posturing. Early in *Chevron*'s history, Justice Scalia prophesized that "the future battles over acceptance of agency interpretations of law" would be fought at Step One.[201] He identified Step One's greatest debate as "how clear is clear?"[202] In a later essay, he described substantive canons using similar language: "how clear is an 'unmistakably clear' statement?"[203] Indeed, the opinions of Chief Justice Burger and Justice Brennan in *Catholic Bishop* demonstrate the difficulties that sometimes come with defining clarity for purposes of clear-statement rules.[204] Recently, Judge Brett Kavanaugh of the D.C. Circuit remarked, "[J]udges often cannot make that initial clarity versus ambiguity decision in a settled, principled, or evenhanded way."[205] Through the exercise of either textualist or purposivist ideology, judges may decide how clear Congress must speak to preclude deference under the *Chevron* Canon. The *Chevron* Canon thus has many of the same features as *Chevron* Step One.

By focusing on Step One's clarity question, the *Chevron* Canon abandons Step Two's reasonableness inquiry. Step Two has always lacked teeth. Thirteen years after *Chevron*, the Supreme Court still had not reversed an agency interpretation at Step Two.[206] Ronald Levin remarked, "Inevitably one is moved to wonder whether Step Two, as the Court conceives of it, serves any useful purpose at all."[207] A 1998 empirical study by Orin Kerr observed that circuit courts applying a two-step *Chevron* resolved the analysis at Step One in 38% of cases.[208] Among these 38% of cases, courts concluded that the

199. Mark Seidenfeld, *A Syncopated* Chevron*: Emphasizing Reasoned Decisionmaking in Reviewing Agency Interpretations of Statutes*, 73 TEX. L. REV. 83, 128 (1994) (emphasis added). Seidenfeld argued in favor of a hard look Step Two. *Id.*

200. Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843 (1984) (emphasis added).

201. Scalia, *supra* note 28, at 520-21.

202. *Id.* at 520.

203. ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 28 (1997).

204. NLRB v. Catholic Bishop of Chi., 440 U.S. 490 (1979).

205. Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2118 (2016) (reviewing ROBERT KATZMANN, JUDGING STATUTES (2014)).

206. The first Step Two reversal came in 1999. *See* AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366, 385-97 (1998).

207. Levin, *supra* note 4, at 1262.

208. Orin S. Kerr, *Shedding Light on* Chevron*: An Empirical Study of the* Chevron *Doctrine in the U.S. Courts of Appeals*, 15 YALE J. ON REG. 1, 31 (1998).

agency's interpretation conflicted with the clear language of the statute in 58% of cases.[209] In contrast, when courts reached Step Two, they denied deference in only 11% of cases.[210] A forthcoming study by Kent Barnett and Christopher Walker presents similar findings.[211] Barnett and Walker found that circuit courts resolve *Chevron* at Step One in 27.2% of cases, with courts concluding that the agency's interpretation conflicted with the clear language of the statute in 61% of these cases. Similar to Kerr's findings, when Barnett and Walker found that when courts reached Step Two, they denied deference in only 6.2% of cases.[212] *Chevron* has thus always focused on a search for a textual prohibition of the agency's interpretation, not the reasonableness of the agency's interpretation.

The Supreme Court has been inattentive to Step Two, having only resolved four cases against agencies at Step Two,[213] reaffirming the importance of statutory clarity and the relative unimportance of reasonableness.

Sometimes, the focus of the Court remained on statutory clarity even at Step Two. In its first Step Two refusal case, *AT&T Corp. v. Iowa Utilities Board*,[214] the Supreme Court considered the permissibility of the Federal Communications Commission's (FCC) "unbundling rules" under the Telecommunications Act, which gave competing telephone service providers access to the incumbent providers' entire system of "network elements."[215] The Court agreed with the agency that, given "the breadth of [its] definition," "network element" was ambiguous.[216] However, the Court concluded that the agency's unbundling rules were unreasonable because the statute required the FCC to consider whether the network elements were "necessary" and whether "failure to provide access to such network elements would

209. *Id.* (finding that courts upheld the agency's interpretation as the unambiguously correct interpretation in 42% of cases).

210. *Id*. Of those eleven percent of cases, a portion invoked a hard look conception of Step Two, which this Article ignores. *See, e.g.*, Rettig v. Pension Benefit Guar. Corp., 744 F.2d 133, 150-54 (D.C. Cir. 1984). Other cases, however, applied the redundant interpretive Step Two, rejecting the agency's interpretation in a case of "belatedly discovered clear meaning." Levin, *supra* note 4, at 1280–86.

211. Kent Barnett & Christopher J. Walker, Chevron *in the Circuit Courts*, 115 MICH. L. REV. (forthcoming 2017) (manuscript at 6), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2808848.

212. *Id.*

213. *See id. See generally* Michigan v. EPA, 135 S. Ct. 2699, 2706-07 (2015); Util. Air Regulatory Grp. v. EPA, 134 S. Ct. 2427, 2438-49 (2014); AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366, 430-31 (1999) (Breyer, J., concurring).

214. 525 U.S. at 366.

215. *See id*. at 370–73.

216. *Id.* at 386–87.

impair" competitors from entering the market.[217] By providing a blanket grant to incumbent providers' network elements, the FCC failed to apply "*some* limiting standard" as the statute required.[218] According to the Court, "if Congress had wanted to give blanket access to incumbents' networks on a basis as unrestricted as the scheme the Commission has come up with, it would not have included [the limiting provision] in the statute at all."[219] While the Court framed *Iowa Utilities Board* as a Step Two decision, it could have been a Step One decision. The agency's interpretation was not impermissible for policy reasons or because it stretched the meaning of the Telecommunications Act. Rather, Congress *clearly* stated in the act that the FCC should adopt limiting provisions on the definition of "network element," which the FCC failed to do. In failing to implement the statute as Congress intended, FCC strayed outside of its delegated authority.[220]

Entergy Corp. v. Riverkeeper, Inc.[221] also illustrates the importance of statutory clarity. *Entergy Corp.* concerned an EPA regulation under the Clean Water Act (CWA), which construed the phrase "best technology available for minimizing adverse environmental impact" to allow consideration of the technology's costs. Justice Scalia, who by his own words believed he applied One-Step *Chevron*,[222] stated the *Chevron* standard without including the traditional bifurcation of its two steps: "[The agency's] view governs if it is a reasonable interpretation of the statute—not necessarily the only possible interpretation,

217. *Id.* at 388 (quoting 47 U.S.C. § 251(d)(2) (1994)).

218. *Id*.

219. *Id.* at 390.

220. The Court's 2015 decision in *Michigan v. EPA* follows similar logic as *Iowa Utilities Board*. *See* Michigan v. EPA, 135 S. Ct. 2699, 2705-07 (2015). In *Michigan v. EPA*, the Court argued that the agency failed to properly consider whether a regulation was "appropriate and necessary" under the Clean Air Act because it failed to consider cost. *Id.* Like *Iowa Utilities Board*, the agency failed to properly consider limitations placed on its regulatory authority under the statute. *Michigan v. EPA*, however, presents the *State Farm* conception of Step Two that this Article rejects. While Justice Scalia's opinion cites to other statutory provisions requiring consideration of "cost," the opinion overall relies on a *State Farm*-esque conception of Step Two. *Id.* at 2706–09. The plain language of the statute neither required consideration of cost, nor did the agency truly stray outside of the "zone of ambiguity." To the extent that this Article rejects a hard look Step Two, *Michigan v. EPA* is irrelevant for consideration beyond this footnote. *See also* Util. Air Regulatory Grp. v. EPA, 134 S. Ct. 2427, 2444 (2014) (finding an EPA interpretation unreasonable on grounds that it would permit the EPA to regulate a majority of the economy).

221. 556 U.S. 208 (2009).

222. *Entergy Corp.* does not cite Matthew C. Stephenson & Adrian Vermeule, Chevron *Has Only One Step*, 95 VA. L. REV. 597 (2009). Rather, Justice Scalia endorsed *Entergy Corp.* as a one-step opinion in *United States v. Home Concrete & Supply, LLC*., 566 U.S. 478, 493 n.1 (2012).

nor even the interpretation deemed *most* reasonable by the courts."[223] He presented two possible interpretations of the statute: "best technology available" meaning either the technology "that produces the most of some good" or the technology "that *most efficiently* produces some good."[224]

Justice Scalia rejected the former interpretation on three grounds. First, other provisions of the CWA stated in plain language when the agency was to adopt regulations aimed at producing the "greatest feasible reduction in water pollution."[225] According to Justice Scalia, Congress did not use such strong language in this provision as to preclude cost-benefit analysis. Second, respondent argued that other provisions of the CWA originally required the "best available technology economically achievable," but the provision at issue did not expressly authorize the EPA to consider cost.[226] Justice Scalia dismissed this argument, stating that "silence is meant to convey nothing more than a refusal to tie the agency's hands as to whether cost-benefit analysis should be used, and if so to what degree."[227] Finally, he rejected arguments that Supreme Court precedent barred the EPA from considering cost considerations under the Clean Air Act.[228] He refused to apply an earlier case, *American Textile Manufacturers Institute, Inc. v. Donovan*, in which the Court "relied in part on a statute's failure to mention cost-benefit analysis in holding that the relevant agency was not required to engage in cost-benefit analysis in certain health and safety standards."[229] Justice Scalia retorted, "Under *Chevron*, that an agency is not *required* to do so does not mean that an agency is not *permitted* to do so."[230]

Justice Scalia supports his entire argument on the notion that the Act "does not *unambiguously* preclude cost-benefit analysis."[231] Justice Scalia's search for a clear prohibition and his highly deferential application of *Chevron* resembles a clear-statement rule.

Contrast Justice Scalia's opinion with Justice Stevens' dissent. Justice Stevens pointed to *American Textile Manufacturers*, in which the Court held "[w]hen Congress has intended that an agency engage in

223. *Entergy Corp.*, 556 U.S. at 218.

224. *Id.*

225. *Id.* at 209.

226. *See id.* at 219, 221.

227. *Id.* at 222.

228. *Id.* at 223 (citing Whitman v. Am. Trucking Ass'ns, Inc., 531 U.S. 457, 467–68 (2001)).

229. *Entergy Corp.*, 556 U.S. at 223 (citing Am. Textile Mfrs. Inst., Inc. v. Donovan, 452 U.S. 490, 510–512 (1981)).

230. *Id.*

231. *Id.* at 220 (emphasis added).

cost-benefit analysis, it has clearly indicated such intent on the face of the statute."[232] Moreover, Justice Stevens argued that Congress does not "hide elephants in mouseholes"; when Congress wanted the EPA to consider cost it did so explicitly.[233] Finally, according to the dissent, the "legislative history strongly supports the view that Congress purposefully withheld cost-benefit authority" in similar provisions of the CWA.[234]

This exchange between Justices Scalia and Stevens resembles the opinions of Chief Justice Burger and Justice Brennan in *Catholic Bishop*.[235] Without an affirmative statement that Congress intended to prevent the EPA from considering cost, Justice Scalia defers to the agency's interpretation. Yet Justice Stevens presented rather persuasive legislative history, contextual clues, and precedent that suggest otherwise. As applied by Justice Scalia, One-Step *Chevron* looks like a clear-statement rule. Admittedly, I hesitate to read too much into Justice Scalia's opinion in *Entergy Corp.* because Justice Scalia championed a robust Step One inquiry.[236] *Entergy Corp.*'s departure from this robust analysis may otherwise reflect Justice Scalia's general dislike of environmental law, coupled with courts' willingness to more readily defer to agencies in cases involving environmental policy or science.[237] Nevertheless, *Entergy Corp.* reaffirms that the Court emphasizes the clarity question over the reasonableness question.

V. DUELING CANONS AND "REASONABLENESS"

In creating any variation of a single step *Chevron*, either the clarity question or the reasonableness question must be disposed of. The *Chevron* Canon eliminates the reasonableness question. By abandoning the reasonableness question, the *Chevron* Canon may allow for deference to interpretations courts would find unreasonable at Step Two. As explained in Part III, however, courts' analyses have

232. *Id.* at 238–39 (Stevens, J., dissenting) (quoting *Am. Textile Mfrs. Inst., Inc.*, 452 U.S. at 510).

233. *Id*. at 238–39 (Stevens, J., dissenting) (quoting *Whitman*, 513 U.S. at 467–68).

234. *Id.* at 243 (Stevens, J., dissenting).

235. *See supra* notes 112–17 and accompanying text.

236. Scalia, *supra* note 28, at 521 ("In my experience, there is a fairly close correlation between the degree to which a person is (for want of a better word) a 'strict constructionist' of statutes, and the degree to which that person favors *Chevron* and is willing to give it broad scope. The reason is obvious. 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.").

237. *See* Jason J. Czarnezki, *An Empirical Investigation of Judicial Decisionmaking, Statutory Interpretation, and the* Chevron *Doctrine in Environmental Law*, 79 U. COLO. L. REV. 767, 815–17 (2008).

always focused on whether the statutory text prevents the agency's interpretation, not whether the agency arrived at a reasonable interpretation through traditional interpretive means.[238] Abandonment of Step Two, therefore, should not be cause for alarm.

Admittedly, a sliver of interpretations courts would find unreasonable at Step Two—those interpretations that are not clearly prohibited by the statutory text—may survive the *Chevron* Canon. Some of those cases may threaten the Constitution, separation of powers, and federalism. Any *Chevron* framework must establish some method of identifying cases where deference presents too much of a systemic risk. In the past, courts have occasionally tried to do this through the "major questions doctrine."[239] Under the major questions doctrine, courts will not defer to agency's interpretation in "extraordinary cases" of "economic and political significance."[240] Scholars, however, have dismissed the doctrine as "unpredictable"[241] and "fruitless."[242] The Supreme Court has never articulated how reviewing courts should identify "extraordinary cases" with any particularity, preferring an "I know it when I see it" attitude towards the doctrine's application.[243] As such, the major questions doctrine raises more questions than it answers and remains unworkable as a test for "threatening" cases.

Rather than relying on amorphous doctrines, courts can use other substantive canons to check agency power under the *Chevron* Canon. Whether substantive canons apply in *Chevron* cases remains contested. Richard Pierce has opined that "canons are too numerous, in-

238. *See supra* notes 118–43 and accompanying text.

239. *See, e.g.*, King v. Burwell, 135 S. Ct. 2480, 2489 (2015) ("[A] question of deep 'economic and political significance' that is central to the statutory scheme."); Util. Air Regulatory Grp. v. EPA, 134 S. Ct. 2427, 2444 (2014) ("We expect Congress to speak clearly if it wishes to assign an agency decisions of vast 'economic and political significance.'") (quoting FDA. v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 160 (2000)).

240. *Brown & Williamson Tobacco Corp.*, 529 U.S. at 159–60.

241. Kevin O. Leske, *Major Questions About the "Major Questions" Doctrine*, 5 MICH. J. ENVTL. & ADMIN. L. 479, 500 (2016); *see also* Lisa Heinzerling, *The Power Canons*, 58 WM. & MARY L. REV. (forthcoming 2017) (manuscript at 1–2) (arguing that the major-questions doctrine and other "power canons" are without basis in law).

242. *See* Note, *Major Question Objections*, 129 HARV. L. REV. 2191, 2192 (2016). *But see* Abigail R. Moncrieff, *Reincarnating the Major Questions Exception to* Chevron *Deference as a Doctrine of Non-Interference (or Why* Massachusetts v. EPA *Got It Wrong)*, 60 ADMIN L. REV. 593, 598 (2008) (arguing the importance of the major questions doctrine).

243. *See* Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring); *see also* U.S. Telecom Ass'n v. FCC, 855 F.3d 381, 423 (D.C. Cir. 2017) (Kavanaugh, J., dissenting) (per curiam) ("To be sure, determining whether a rule constitutes a major rule sometimes has a bit of a 'know it when you see it quality.' So there inevitably will be close cases and debates at the margins about whether a rule qualifies as major.").

determinate, and conflicting for use in this context."[244] Substantive canons present a hurdle in the two-step framework. If a court applies a substantive canon at Step One, then the canon defeats *Chevron* because it resolves any ambiguity in the statute in favor of the canon's policy concern. Courts applying substantive canons at Step One are more likely to find clarity because the court will interpret the statute in the manner that best effectuates the policy concern of the canon. If a court applies a substantive canon at Step Two, then *Chevron* defeats the canon because the court will defer to the agency's reasonable interpretation over the policy presumption of the canon. Applied at Step Two, substantive canons merely represent an additional policy consideration the agency may, but is not obligated to, choose to consider when adopting its interpretation.

The *Chevron* Canon does not entirely solve this problem. Courts must still consider where the *Chevron* Canon falls along the continuum of canons. This inquiry, however, becomes much simpler when understood against the background of the previously discussed literature. Using other institutional clear-statement rules to check agency interpretive authority resolves two problems. First, it reworks some form of reasonableness into the *Chevron* analysis. Second, it resolves the longstanding dispute of how substantive canons fit into the *Chevron* framework. This Part concludes that *Chevron* is a weak clear-statement rule, falling somewhere between tiebreaking canons and traditional institutional clear-statement rules on the substantive canon continuum.

A. Tiebreaking Canons

Tiebreaking canons must succumb to the might of *Chevron*. These weaker canons form from patterns of past congressional conduct or a statute's purpose. Tiebreaking canons reflect judge-made presumptions about how Congress would have interpreted the statute if afforded the opportunity to decide the issue. Courts apply these canons in traditional statutory interpretation cases because courts must reach a final interpretation to resolve the matter and canons prevent the court from intruding too heavily in the policymaking realm. Absent an applicable agency interpretation, courts apply tiebreaking canons when they cannot locate any other indicia of congressional intent.

When an agency interprets a statute, however, the court has a stronger indicia of congressional intent than a judge-made presumption. Delegation demonstrates Congress's intent for the agency to re-

244. 1 PIERCE, *supra* note 11, at 191.

solve the ambiguity. When *Chevron* applies, Congress delegated interpretive authority to the agency because it *wanted* the agency—not the courts—to resolve the policy issue.[245] Congress had the opportunity to resolve the ambiguity in the agency-administered statute but left that job to the agency. Courts should respect Congress's choice to have an agency resolve the ambiguity rather than applying a wholesale tiebreaking canon because legislative supremacy requires courts to respect this policymaking hierarchy.

A more practical reason requires *Chevron* to overcome tiebreaking canons. Most tiebreaking canons enforce purposivist norms about the general policy concerns of a specific regulated area.[246] If these regulatory canons defeat *Chevron*, then they would preclude many agencies from ever obtaining *Chevron* deference. For example, courts narrowly interpret exemptions from federal taxation against the taxpayer.[247] If this tiebreaking canon supplants *Chevron*, then the IRS can never interpret an exemption liberally in favor of taxpayers. Similarly, courts ought to construe ambiguities in the Fair Labor Standards Act in favor of employees.[248] Strict application of this canon prevents the U.S. Department of Labor (DOL) from construing ambiguities against employees. These canons describe the general missions and cultures of these agencies—the IRS favors revenue collection and the DOL favors protecting employees. To the extent that Congress has left a gap in a statute, these agencies should decide for themselves how best to effectuate their missions, not judge-made norms derived from the general purpose of complex statutory regimes.

B. Institutional Clear-Statement Rules

Institutional clear-statement rules promote structural guarantees of democracy, restrain judges, and warn Congress when its actions threaten the balance of power.[249] *Chevron* embraces two of these values. First, *Chevron* protects Congress's ability to delegate tasks to agencies. Second, *Chevron* prevents courts from usurping policymaking authority from the more democratically accountable branches. *Chevron* creates a hierarchy of policymaking power with Congress at top, courts on the bottom, and agencies in the middle.[250] Courts re-

245. *See* Gluck & Bressman, *supra* note 169, at 765.

246. ESKRIDGE, JR. ET AL., *supra* note 106, at 867–70 (listing and describing how statutory cannons apply to different subject areas of law).

247. *See* United States v. Wells Fargo Bank, 485 U.S. 351, 357 (1988).

248. *See* Navarro v. Encino Motor Cars, LLC, 780 F.3d 1267 (9th Cir. 2015), *vacated*, 136 S. Ct. 2117 (2016).

249. *See supra* notes 118–41 and accompanying text.

250. *See supra* notes 153–64 and accompanying text.

spect this balance of power by deferring to Congress and agencies when their policies are constitutional.

The *Chevron* Canon also acknowledges that agencies can overstep their delegated authority. If a statute is clear, then Congress never delegated authority to the agency to decide the issue. Yet the *Chevron* Canon, left to operate with no constraints, leaves a loophole. Agencies may permissibly interpret a statute but in doing so threaten the Constitution, federalism, or the separation of powers. Agencies should not promulgate regulations that threaten these institutional norms without express delegation. According to principles of legislative supremacy, these fundamental questions ought to be left to the most democratically accountable branch of government: Congress.

Agencies require some restraint. In part, the APA, resource concerns, and statutory guidelines prevent agencies from grasping at naïve temptations of power.[251] But agencies attach a high priority to their autonomy and protecting their "turf."[252] Agencies may, intentionally or unintentionally, intrude upon state power, other agencies, or the Constitution to preserve or expand their jurisdiction. For example, the Federal Energy Regulatory Commission has continually expanded its oversight over transmission line siting—a power traditionally left to the states.[253] So long as the statute does not prohibit the agency's interpretation, the *Chevron* Canon allows the agency to test institutional boundaries.

Courts should apply institutional clear-statement rules over *Chevron* to encourage agency restraint, much as they apply institutional clear-statement rules in traditional statutory interpretation cases as an act of judicial restraint. In traditional statutory interpretation cases, institutional clear-statement rules warn Congress that its actions may have unintended consequences.[254] In the administrative context, however, the agency does not signal Congress when new regulations may raise similar concerns. Congress does not have the resources to police every notice-and-comment rulemaking procedure or adjudication, pe-

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251. JAMES Q. WILSON, BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT 119 (1989). For more on congressional oversight, see generally WALTER J. OLESZEK, CONG. RESEARCH SERV., R41079, CONGRESSIONAL OVERSIGHT: AN OVERVIEW (2010), https://fas.org/sgp/crs/misc/R41079.pdf.

252. WILSON, *supra* note 251, at 180.

253. *See* Alexandra B. Klass & Jim Rossi, *Revitalizing the Dormant Commerce Clause Revise for Interstate Coordination*, 100 MINN. L. REV. 129, 140–155 (2015) (describing conflicts between FERC and state regulatory primacy over siting); *see also* Matthew R. McGuire, Comment, *(Mis)understanding "Undue Discrimination": FERC's Misguided Effort to Extend the Boundaries of the Federal Power Act*, 19 GEO. MASON L. REV. 549, 550–51 (2012).

254. *See* Barrett, *supra* note 89, at 175.

rusing for potentially dangerous regulations. By applying institutional clear-statement rules over *Chevron*, the court warns Congress that—while the statute does not prohibit the agency's interpretation—the agency may have overstepped the intended boundaries of delegated authority.

At times, the Supreme Court has applied institutional clear-statement rules over *Chevron*. In *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council*,[255] the Supreme Court declined to defer to an agency interpretation that implicated the First Amendment.[256] In *Rapanos v. United States*,[257] Justice Scalia applied the federalism canon to preclude an agency's interpretation at Step Two.[258] Pursuant to the CWA, the U.S. Army Corps of Engineers interpreted "waters of the United States" expansively to include wetlands.[259] The Court had juggled multiple different definitions of "waters" since 1871,[260] leading Justice Scalia to admit that "waters of the United States" was "inherently ambiguous" at Step One.[261] Nevertheless, Justice Scalia concluded that "'waters of the United States' . . . cannot bear the expansive meaning that the Corps would give it."[262] At Step Two, Justice Scalia applied the federalism canon in absence of "'a clear and manifest' statement from Congress," fearing that the "Government's expansive interpretation would 'result in a significant impingement of the States' traditional and primary power over land and water use.'"[263] *Rapanos* exemplifies how the *Chevron* Canon would interact with institutional clear-statement rules. Even though the statute did not prohibit the agency's interpretation, Justice Scalia applied the federalism canon rather than deferring to the agency's interpretation under *Chevron*.

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255. 485 U.S. 568 (1988).

256. *See id*. at 575 ("This approach not only reflects the prudential concern that constitutional issues not be needlessly confronted, but also recognizes that Congress, like this Court, is bound by and swears an oath to uphold the Constitution. The courts will therefore not lightly assume that Congress intended to infringe constitutionally protected liberties or usurp power constitutionally forbidden it.").

257. 547 U.S. 715 (2006).

258. *See id*. at 737–38.

259. *Id.* at 719.

260. *Id.* at 731–32; *see also* Solid Waste Agency of N. Cook Cty. v. Army Corps of Eng'rs, 531 U.S. 159, 168 (2001); United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 133 (1985); The Daniel Ball, 77 U.S. 557, 563 (1870), *superseded by statute*, Federal Water Pollution Control Act Amendments of 1972 (Clean Water Act), P.L. No. 92-500, 86 Stat. 816, *as recognized in Rapanos*, 547 U.S. at 740.

261. *Rapanos*, 547 U.S. at 740.

262. *Id.* at 731–32.

263. *Id.* at 738 (quoting *Solid Waste Agency of N. Cook Cty.*, 531 U.S. at 174 (Stevens, J., dissenting)).

Some scholars have argued that courts should simply resolve any constitutional issues presented by an agency interpretation.[264] If a court finds the agency's interpretation unconstitutional, then the court has committed no harm since Congress could not have adopted the agency's interpretation anyway. However, the court may ultimately find an agency interpretation constitutional, even if it precariously teeters on the line of upsetting the balance of government. Perhaps, however, Congress never wanted the agency to interpret the statute so close to the constitutional boundary. Institutional clear-statement rules notify Congress of the potential issue, before the court defers, so that Congress can respond to the agency's action by amending the statute to either support or preclude the agency's interpretation. On review, Congress may also reprimand the agency by holding hearings, curtailing appropriations, or restricting agency authority.[265] Until Congress acts, the agency may adopt a less precarious interpretation in order to carry out its executive functions.

Institutional clear-statements rules protect structural norms from agency trespass. They also act as a reasonableness check on agency power. In effect, the court punts the interpretive question to Congress to decide whether it truly meant to delegate such authority to the agency. Thus, institutional clear-statement rules further protect legislative supremacy by ensuring Congress decides fundamental questions about the functions of our government.

C. The Rule of Lenity

While the *Chevron* Canon fits well between tiebreaking canons and clear-statement rules, the rule of lenity presents an additional quandary.[266] Depending on her ideology, a judge may apply lenity as a tiebreaking canon or as a clear-statement rule.[267] If lenity embodies a regulatory norm in the criminal law context, analogous to substantive canons in the tax or employment law contexts, then *Chevron* defeats lenity. If lenity embraces norms of legislative supremacy and fair no-

264. *See* Christopher J. Walker, *Avoiding Normative Canons in the Review of Administrative Interpretation of Law: A* Brand X *Doctrine of Constitutional Avoidance*, 64 ADMIN. L. REV. 139 (2012).

265. *See* OLESZEK, *supra* note 251.

266. One that ought to be explored more thoroughly than in the final section of an already full-length article.

267. *See, e.g.*, Yates v. United States, 135 S. Ct. 1074, 1098–99 (2015) (Kagan, J., dissenting) (arguing that lenity only applies "after all legitimate tools of interpretation have been exhausted, [and] 'a reasonable doubt persists' regarding whether Congress has made the defendant's conduct a federal crime" (quoting Abramski v. United States, 134 S. Ct. 2259, 2218 (2014) (Scalia, J., dissenting))).

tice, then lenity's dual quasi-constitutional and regulatory characteristics complicate the *Chevron* analysis. Like *Chevron*, lenity succumbs to other clear-statement rules, such as the avoidance canon.[268] Thus, *Chevron* and lenity occupy a similar space on the canon continuum.

In a footnote in *Babbitt v. Sweet Home*,[269] the Supreme Court implied that lenity does not foreclose deference.[270] Yet circuit courts continue to examine whether "*Chevron* still leaves some place for the rule of lenity."[271] In his concurring opinion in *Carter v. Welles-Bowen Realty, Inc.*,[272] Sixth Circuit Judge Jeffrey Sutton argued that a court should not "defer to an agency's anti-defendant interpretation of a law backed by criminal penalties."[273] According to Judge Sutton, "Allowing agencies to fill gaps in criminal statutes would impair the rule of lenity's purposes."[274] In a memorandum accompanying the denial of certiorari of *Whitman v. United States*,[275] Justice Scalia acknowledged the conflict between *Chevron* and the rule of lenity.[276] Citing Justice Sutton's opinion in *Welles-Bowen Realty*, Justice Scalia stated, "Undoubtedly Congress may make it a crime to violate a regulation . . . but it is quite a different matter for Congress to give agencies—let alone for us to *presume* that Congress gave agencies—power to resolve ambiguities in criminal legislation."[277]

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268. *See* Note, *The New Rule of Lenity*, 119 HARV. L. REV. 2420, 2430 (2006) (discussing occasions when courts applied the federalism canon over lenity).

269. Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or., 515 U.S. 687, 704 n.18 (1995).

270. The court noted:

> Respondents also argue that the rule of lenity should foreclose any deference to the Secretary's interpretation of the ESA because the statute includes criminal penalties. . . . We have applied the rule of lenity in a case raising a narrow question concerning the application of a statute that contains criminal sanctions to a specific factual dispute—whether pistols with short barrels and attachable should stocks are short-barreled rifles—where no regulation was present. We have never suggested that the rule of lenity should provide the standard for reviewing facial challenge to administrative regulations whenever the governing statute authorizes criminal enforcement. Even if there exist regulations whose interpretations of statutory criminal penalties provide such inadequate notice of potential liability as to offend the rule of lenity, the "harm" regulation, which has existed for two decades and gives a fair warning of its consequences, cannot be one of them.

Id. at 704 n.18.

271. Espinal-Andrades v. Holder, 777 F.3d 163, 170 n.4 (4th Cir. 2015) ("In light of *Chevron*, some have questioned the rule of lenity's role in the immigration context.").

272. 36 F.3d 722 (6th Cir. 2013).

273. *Id*. at 730 (Sutton, J., concurring) ("[T]he rule of lenity forbids deference to the executive branch's interpretation of a crime-creating law. If an ordinary criminal law contains an uncertainty, every court would agree that it must resolve the uncertainty in the defendant's favor. No judge would think of deferring to the Department of Justice.").

274. *Id.* at 732.

275. 135 S. Ct. 352 (2014).

276. *See id*. at 353.

277. *Id*.

The rule of lenity also extends to civil penalties in hybrid criminal/civil statutes. In *Esquivel-Quintana v. Lynch*,[278] Judge Sutton revived his argument in the deportation context because deportation results in the civil consequence of removal from the country and possible criminal consequences if the offender attempts to reenter the United States illegally.[279] Similarly, in *United States v. Thompson/Center Arms Co.*,[280] the Supreme Court applied the rule of lenity in the tax context because the law included both a civil tax penalty and a criminal penalty.[281] Many regulatory statutes impose civil fines or sanctions in addition to criminal penalties. Applying lenity over *Chevron* precludes certain agencies from interpreting statutes against the offender. In the deportation context, the Second Circuit has rebutted that "it cannot be the case . . . that the doctrine of lenity must be applied whenever there is an ambiguity in an immigration statute because, if that were true, it would supplant the application of *Chevron* in the immigration context."[282]

In the case of hybrid statutes, courts cannot divide the criminal consequences from the civil consequences.[283] A statute's meaning cannot change from case to case.[284] Resolving this conflict requires comparing both *Chevron* and lenity's goals.[285] I conclude that lenity does not

278. 810 F.3d 1019 (2016), *cert. granted*, 137 S. Ct. 368 (2016) (mem.).

279. *Id*. at 1027–28 (Sutton, J., concurring in part, dissenting in part).

280. 504 U.S. 505 (1992).

281. *See id.* at 518.

282. Florez v. Holder, 779 F.3d 207, 213 (2d Cir. 2015) (citing Ruiz-Almanzar v. Ridge, 485 F.3d 193, 198 (2d Cir. 2007)).

283. *See* Carter v. Welles-Bowen Realty, Inc., 736 F.3d 722, 730 (6th Cir. 2013) (Sutton, J., concurring) ("One possibility is to apply the rule of lenity in criminal prosecutions and to defer to the agency's position in civil actions. But a statute is not a chameleon. It does not change from a case to case." (citing Clark v. Martinez, 543 U.S. 371, 380–82 (2005))).

284. *Clark*, 543 U.S. at 380.

285. Many of Sutton's arguments stem from his conception of a less-deferential *Chevron*. According to Sutton, *Chevron* applies only after "deployment of all pertinent interpretive principles." *Welles-Bowen Realty, Inc.*, 736 F.3d at 731. In Sutton's view, Supreme Court precedent has decided that all substantive canons supersede *Chevron*. *See id.* ("All manners of presumptions, substantive canons and clear-statement rules take precedence over conflicting agency views . . . . [The Court] has confirmed that *Chevron* does not permit an agency to trump other rules of interpretation."). Curiously, the Court failed to deliver this message to the other circuits. *See generally* Olmos v. Holder, 780 F.3d 1313 (10th Cir. 2015) (applying *Chevron* over lenity and the avoidance canon); *Florez*, 779 F.3d at 207 (arguing lenity does not trump *Chevron*); Morales-Izquierdo v. Gonzales, 486 F.3d 484 (9th Cir. 2007) (en banc). Sutton also proposes that a number of other non-interpretive facts apply in determining *Chevron*'s application. *See Welles-Bowen Realty, Inc.*, 736 F.3d at 732 (quoting Barnhart v. Walton, 535 U.S. 212, 222 (2002)). If *Chevron* requires application of a multi-factor test, then fair notice is unachievable because no affected individual can predict how a court will weigh these factors.

Sutton's *Chevron* looks like Justice Breyer's "word cloud." *See* Hickman, *supra* note 74, at 541–42 (2014). This weak, multi-factor conception of *Chevron* appears too much like "th'ol' 'totality of the circumstances' test'" of yore. United States v. Mead, 533 U.S. 218, 241 (2001)

preclude deference but concede that *Chevron* requires limiting in the criminal context.

Both lenity and *Chevron* rest on legislative supremacy. Lenity supposes that only Congress, not courts, should create criminal law.[286] Unless otherwise delegated to an agency, Congress reserves policymaking authority in both the civil and criminal law realms. Lenity is founded no more on legislative supremacy than any other tool of judicial restraint that prevents courts from encroaching on Congress's policymaking authority. In *Touby v. United States*,[287] a case concerning the Attorney General's controlled substance scheduling authority, the Supreme Court acknowledged that "the nondelegation doctrine does not prevent Congress from seeking assistance, within proper limits, from its coordinate Branches."[288] Even Judge Sutton concedes that if Congress lays down an "intelligible principle," then Congress may delegate criminal lawmaking authority to an agency.[289]

Yet Judge Sutton argues that Congress must "legislate deliberately and explicitly" when it wants an agency to promulgate criminal regulations.[290] According to Judge Sutton, if *Chevron* supersedes lenity, then "courts could *presume* a congressional delegation of authority to create crimes whenever a criminal statute contains a gap."[291] But this is not an argument against the application of *Chevron* in the criminal context, rather it is an attack on the entire doctrine. The purpose of *Chevron* is to presume that Congress left the agency the power to fill these gaps—whether criminal or civil in nature. Congress expects and

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(Scalia, J., dissenting). The Supreme Court—aside from Breyer—rejected this conception when it held that *Chevron* and *Skidmore* operate as different standards. If courts should apply every conceivable interpretive tool, as well as a host of extraneous factors, before considering *Chevron*, then what distinction exists between *Skidmore* and *Chevron*? The *Chevron* Canon reinforces *Chevron* as the stronger of the two deference standards. Sutton's argument that *all* substantive canons displace deference ignores the advantage of dividing canons by their imbued policy goals (as I have done) to protect both Congress's delegation powers and other quasi-constitutional norms. This, however, is not an argument for applying *Chevron* over lenity. One can adopt the *Chevron* Canon and still find lenity supreme. Rather, this point simply suggests that nothing about the *Chevron* Canon's structure prohibits its application over lenity.

286. Historically, courts could create common law crimes. These common law crimes remain valid in some states. At the federal level, however, common law crimes have been abolished.

287. 500 U.S. 160, 165 (1991).

288. *Id*. at 165.

289. *See Welles-Bowen Realty, Inc.*, 736 F.3d at 733–34 (Sutton, J., concurring) ("Congress's authority to define crimes is not exclusive. Although the Constitution as a general matter vests power to define crimes in Congress alone, the modern nondelegation doctrine, it is true, occasionally allows Congress to transfer some responsibility for defining crimes to the executive branch.").

290. *Id.* at 733 (Sutton, J., concurring).

291. *Id.* (Sutton, J., concurring).

wants the agency to fill these gaps.[292] If Congress does not want the agency to fill gaps in criminal statutes, it will draft clear and unambiguous penal statutes or prohibit the agency from exercising its rulemaking authority with respect to the particular provisions at issue. Congress can delegate its authority to create criminal laws in the same way it delegates its authority to create tax, immigration, or employment laws.

Applying lenity over *Chevron* curbs Congress's power to delegate authority to agencies. In allowing an agency to interpret criminal and hybrid statutes, Congress has decided that an agency is better equipped to create the necessary laws. In effect, applying lenity over *Chevron* prevents Congress from delegating this authority. Due to the prevalence of hybrid statutes, Congress would lose the authority to delegate interpretive questions to many agencies. In the modern regulatory era, Congress cannot effectively respond to every issue as it arises. Hence, Congress delegates authority to agencies, which have more resources and expertise to contemporaneously adapt to issues.

Legislative supremacy cannot explain why lenity would trump *Chevron*. If lenity precludes deference, then it must be because *Chevron* does not provide fair notice of criminalized conduct. If *Chevron* does not provide adequate notice it is because the agency did not promulgate its interpretation in publicized materials. Judge Sutton fears that "[a]ll kinds of administrative documents, ranging from manuals to opinion letters, sometimes receive *Chevron* deference."[293] The Supreme Court's ruling in *United States v. Mead Corp.*, however, requires that an agency adopt its interpretation pursuant to the delegation of Congressional authority to act with "force of law" to be eligible for *Chevron* deference.[294] Judge Sutton's cited materials generally lack the "force of law" and do not warrant *Chevron* deference.[295] Though an over-generalization and by no means all-inclusive,[296] *Chevron* typically applies to interpretations adopted in

292. Bressman & Gluck, *supra* note 169, at 729.

293. *See Welles-Bowen Realty, Inc.*, 736 F.3d at 732 (Sutton, J., concurring) (citing Barnhart v. Walton, 535 U.S. 212, 211–22 (2002)).

294. *See* United States v. Mead Corp., 533 U.S. 218, 226–27 (2001).

295. *See* Christensen v. Harris Cty., 529 U.S. 576, 587 (2000) ("Interpretations such as those in opinion letters—like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law—do not warrant *Chevron*-style deference.").

296. *Mead* itself specifies that "the want [of notice-and-comment rulemaking] does not decide the case, for we have sometimes found reasons for *Chevron* deference even when no such administrative formality was required and none was afforded." *Mead*, 533 U.S. at 230–31. Justice Breyer insists that—beyond procedure—the Court should consider "the interstitial nature of the legal question, the related expertise of the Agency, the importance of the question to administra-

notice-and-comment rulemaking or agency adjudications. Notice-and-comment rulemaking provides even more fair notice than congressionally created laws.[297] Before Congress passes legislation authorizing an agency to regulate criminal conduct, the concerned individual may voice her opinion to congressional representatives. If she remains unsatisfied with Congress's delegation, then she may participate in the agency's rulemaking proceedings.[298] Moreover, the Federal Register publishes promulgated rules so individuals would have codified notice of criminalized conduct.[299]

Judge Sutton worries that agencies may promulgate vague criminal regulations, only to interpret them more harshly in interpretive rules.[300] An agency's interpretation of its own regulations receives highly deferential treatment from courts under *Auer* deference but avoids the public rulemaking procedures.[301] This argument fails to attack *Chevron*. Rather, it merely suggests that lenity should overcome *Auer* because *Auer* cannot guarantee the same notice guarantees as *Chevron*.[302] While *Chevron* and *Auer* are certainly related, courts apply the two standards in separate circumstances. Courts can (and should) restrict *Auer* without altering *Chevron*.

While notice-and-comment rulemaking procedures provide fair notice and enhance democratic participation, agency adjudications present other problems. Judge Sutton argues that contemporaneous interpretation of criminal statutes in agency adjudications may implicate the Ex Post Facto Clause.[303] Indeed, courts apply lenity to avoid notice-less expansions of criminal law. In a deportation proceeding, the Board of Immigration Appeals may expansively interpret a civil

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tion of the statute, the complexity of that administration, and the careful consideration the Agency has given the question over a long period of time." *Barnhart*, 535 U.S. at 222. Thus, *Chevron* may apply to more informal agency materials. For the sake of this Article, this generalization suffices.

297. *See* VANESSA K. BURROWS & TODD GARVEY, CONG. RESEARCH SERV., R41546, A BRIEF OVERVIEW OF RULEMAKING AND JUDICIAL REVIEW 1–3 (2011), https://fas.org/sgp/crs/misc/R41546.pdf (describing the requirements of notice-and-comment rulemaking); *see also* 5 U.S.C. § 553(b) (2012).

298. *See* 5 U.S.C. § 553(c) (requiring agencies to give interested parties an opportunity to comment of the proposed rules).

299. *See id.* § 553(d) (requiring publication thirty days before the rule's effective date).

300. Carter v. Welles-Bowen Realty, Inc., 736 F.3d 722, 732–33 (6th Cir. 2013).

301. *See* Auer v. Robbins, 519 U.S. 452 (1997).

302. It may also support the notion that the Supreme Court should just abandon *Auer* deference. *See* Nicholas R. Bednar, *Defying* Auer *Deference:* Skidmore *as a Solution to Conservative Concerns in* Perez v. Mortgage Bankers Association, MINN. L. REV.: DE NOVO (June 24, 2015), http://www.minnesotalawreview.org/2015/06/defying-auer-deference-skidmore-solution-conservative-concerns-perez-v-mortgage-bankers-association/.

303. *Welles-Bowen Realty, Inc.*, 736 F.3d at 733.

deportation provision contained in a hybrid statute and still receive *Chevron* deference.[304] Prior to that immigration proceeding, the defendant may have had no knowledge or expectation that her actions would result in deportation and additional criminal penalties. Contemporaneous interpretation of criminal or hybrid statutes, without the benefit of lenity, denies defendants fair notice of criminalized conduct, regardless of whether the interpretation comes from courts or agencies.

At the same time, courts should not categorically deny Congress's authority to delegate interpretive power over criminal or hybrid statutes to agencies. As one possible solution, courts could ensure fair notice by modifying *Mead*. Instead of applying *Chevron* whenever agencies act with the force of law in the criminal context, courts could require agencies interpreting criminal or hybrid statutes to do so in notice-and-comment regulations. The interpretation arrived at in adjudication would receive *Skidmore* deference, but lenity should prevent the agency from criminalizing conduct the defendant reasonably assumed was permissible under the statute. The agency remains free to interpret criminal or hybrid statutes, but it must do so in a manner that provides regulated parties with warning and the opportunity for democratic participation.[305] This approach encourages agencies to use notice-and-comment rulemaking to codify interpretations rather than rely on adjudication. It further preserves fair notice, while also ensuring that Congress gets the help it needs in implementing penal statutes. As things stand, *Chevron* should trump lenity.

VI. OBJECTIONS TO A *CHEVRON* CANON

The *Chevron* Canon works like any other clear-statement rule and offers more simplicity than either One-Step *Chevron* or Traditional *Chevron*. Those interested in One-Step *Chevron* have already decided to abandon *Chevron*'s two steps and are seeking alternative formulations. But scholars and jurists are right to be skeptical of any alternative formulation that purportedly makes a thirty-year-old stan-

304. *See, e.g.*, Esquivel-Quintana v. Lynch, 810 F.3d 1019, 1025 (6th Cir. 2016).

305. I recognize that this modification to *Chevron* conflicts with longstanding Supreme Court precedent that an agency may choose to make rules through rulemaking procedures or adjudication. SEC v. Chenery Corp. (*Chenery II*), 332 U.S. 194 (1947). Perhaps an exception ought to be made when a rule raises criminal concerns or the *Chenery II* doctrine should be reconsidered in general. *See generally* Russell L. Weaver, Chenery II*: A Forty Year Retrospective*, 40 ADMIN. L. REV. 161 (1988) (discussing the controversy surrounding *Chenery II*). I am not the first to suggest that perhaps deference is owed to agency interpretations adopted in rulemaking but not adjudication. *See* J. LANDIS, THE ADMINISTRATIVE PROCESS 147–49 (1938). *But see* Scalia, *supra* note 28, at 519.

dard "easier" to apply. This final Part thus discusses potential critiques of the *Chevron* Canon.

A. A Tiebreaking Chevron*?*

A *Chevron* Canon works best as a clear-statement rule because it mirrors the traditional policy values and weight of a clear-statement rule. Yet one might argue that the *Chevron* Canon works best as a weaker tiebreaking canon. As a tiebreaker, the court searches not for clear text prohibiting the agency's interpretation, but rather any indicia of congressional intent that contradicts the agency's interpretation. Under this conception, *Chevron* advances an administrative law norm that, when presented with two equally ambiguous interpretations, the court should defer to the agency's interpretation. A tiebreaking *Chevron* ignores the fact that *Chevron* is a highly deferential standard. Justice Scalia believed that

> *Chevron* becomes virtually meaningless . . . if ambiguity exists only when the arguments for and against the various possible interpretations are in absolute equipoise . . . . If *Chevron* is to have any meaning, then, congressional intent must be regarded as 'ambiguous' not just when no interpretation is even marginally better than any other, but rather when two or more reasonable, though not necessarily equally valid, interpretations exist.[306]

a tiebreaking *Chevron* canon may appeal to those judges worried about ceding judicial power to the executive branch. Judges need not worry about the *Chevron* Canon depriving them of their interpretive ideology because they will still need to identify the limits of "clarity." But I acknowledge that a tiebreaking *Chevron* canon may work best if courts hope to weaken *Chevron*. This Article, however, does not argue for a weaker *Chevron*, just a simpler *Chevron* that preserves its historical values and weight.

B. Classic Objections to a Chevron *Canon*

Scholars initially advanced three possible legal foundations for *Chevron*: the Constitution, federal common law, and congressional intent.[307] As my analysis above suggests, *Chevron* contains elements of all three foundations. In their article, Chevron*'s Domain*, Thomas Merrill and Kristin Hickman rejected the constitutional and common law framings,[308] and the Supreme Court seemed to validate their argu-

306. Scalia, *supra* note 28.

307. Merrill & Hickman, *supra* note 166 at 863.

308. *See id.* at 867–70 ("*Chevron* is more difficult to situate within the traditions associated with judge-made norms of self-governance.").

ments by favorable citation in *United States v. Mead Corp*.[309] Fifteen years have passed since Chevron*'s Domain* but scholars and courts continue to toy with *Chevron*'s proper place in the interpretive regime.[310] If the rising prominence of Stephenson and Vermeule's One-Step *Chevron* tells us anything, it is that scholars and courts remain unhappy with where *Chevron* has ended up.[311] I tussle with Merill and Hickman's critiques of conceptualizing *Chevron* as a canon and conclude that these critiques are now outdated.

Merrill and Hickman recognized that if *Chevron* is a common law rule created by the Supreme Court, it is best analogized to a substantive canon.[312] "If *Chevron* is just another canon of interpretation, then application of the *Chevron* doctrine is no more inconsistent with the exercise of independent judicial judgment than it is for courts to refer to rules of grammar or canons like the doctrine of lenity."[313] But, "if *Chevron* is just a canon, this makes it difficult to explain why *Chevron* deference is described as being mandatory."[314] Indeed, *Chevron* enjoys universal application. In its application, however, *Chevron* is only "mandatory" "if the statute is silent or ambiguous with respect to the specific issue" and the agency adopts "a permissible construction of the statute."[315] The *Chevron* Canon can never supplant clear statutory text. How mandatory the *Chevron* Canon ends up being depends upon on how thoroughly the court searches for statutory clarity.[316] Even Merrill and Hickman admit that "[s]ome judicially developed norms approach the level of mandatory duties."[317] Clear-statement rules are just as mandatory as *Chevron* when courts apply them. Courts have often framed the avoidance canon as mandating the court's selected interpretation.[318] To the extent that *Chev-*

309. 533 U.S. 218, 230 n.11 (2001).

310. *See* Michael Herz, Chevron *Is Dead; Long Live* Chevron, 115 COLUM. L. REV. 1867 (2015).

311. *See* Jack M. Beerman, *End the Failed* Chevron *Experiment Now: How* Chevron *Has Failed and Why It Can and Should Be Overruled*, 42 CONN. L. REV. 779 (2010); Herz, *supra* note 310, at 1867; *see also* Vikram David Amar, Chevron *Deference and the Proposed "Separation of Powers Restoration Act of 2016": A Sign of the Times*, VERDICT JUSTIA (July 26, 2016), https://verdict.justia.com/2016/07/26/chevron-deference-proposed-separation-powers-restoration-act-2016-sign-times.

312. *See* Merrill & Hickman, *supra* note 166, at 868.

313. *Id*.

314. *Id*.

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

316. *See* Scalia, *supra* note 28, at 520 ("[T]he ambiguity [ ] prevents it from being an absolutely clear guide to future judicial decisions.").

317. Merrill & Hickman, *supra* note 166, at 869.

318. *See* Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988) ("[W]here an otherwise acceptable construction of a statute would raise

ron may be framed as a clear-statement rule, *Chevron*'s mandatory application supports, rather than prevents, the construction of *Chevron* as a clear-statement rule.

Second, "the Court rarely speaks of *Chevron* if it were a judge-made norm."[319] True. But failure to label *Chevron* as a substantive canon does not exclude courts from applying *Chevron* in a substantive canon-like manner. *Entergy Corp.* demonstrates that judges sometimes adopt substantive canon-like *Chevron* analyses, even if they do not label them as such. If it looks like a duck, swims like a duck, and quacks like a duck, then it is probably a duck.[320] Overcoming this hurdle simply requires a shift in labelling.

Third, "the Court has already developed one common-law deference doctrine: the *Skidmore* doctrine."[321] The suggestion that only one common-law deference regime can exist ignores the foundational premise of Chevron's *Domain—Skidmore* and *Chevron* coexist. Earlier in their article, the authors contend that "[t]his large menu of options allows *Chevron* to be given a relatively narrow domain, one that hopefully captures those circumstances where deference is most appropriate. *Skidmore* then steps into the breach and allows courts to give appropriate weight to agency interpretations outside the core area where *Chevron* holds sway."[322] Constructing *Chevron* as a substantive canon does not abrogate the *Mead* doctrine. *Chevron* may operate as a strong substantive canon that applies in cases where the agency has the authority to act with and pursuant to the force of law. *Skidmore*'s factors apply to other agency interpretations. By way of comparison, one can imagine a criminal case where lenity *may* apply

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serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress. This cardinal principle . . . has for so long been applied by this Court that it is beyond debate." (citations omitted)); Hooper v. California, 155 U.S. 648, 657 (1895) ("The elementary rule is that every reasonable construction must be resorted to in order to save a statute from unconstitutionality."); Parson v. Bedford, 28 U.S. 433, 448–49 (1830) ("No court ought, unless the terms of an act render it unavoidable, to give a construction to it which should involve a violation, however unintentional, of the constitution.").

319. Merrill & Hickman, *supra* note 166, at 869.

320. *Compare* RICHARD H. IMMERMAN, THE CIA IN GUATEMALA: THE FOREIGN POLICY OF INTERVENTION 102 (1982) ("[S]uppose you see a bird walking around in a farm yard. The bird has no label that says 'duck.' But the bird certainly looks like a duck. Also, he goes to the pond and you notice he swims like a duck. Then he opens his beak and quacks like a duck. Well, by this time you have probably reached the conclusion that the bird is a duck, whether he's wearing a label or not."), *with* DOUGLAS ADAMS, DIRK GENTLY'S HOLISTIC DETECTIVE AGENCY 270 (1987) ("If it looks like a duck, and quacks like a duck, we have at least to consider the possibility that we have a small aquatic bird of the family Anatidae on our hands.").

321. *See* Merrill & Hickman, *supra* note 166, at 870.

322. *Id.*

as a tiebreaker, but the avoidance canon undeniably applies to avoid Fifth Amendment concerns.[323] It is not, as Merrill and Hickman claim, "anomalous" to have two common-law deference doctrines.

Finally, Merrill and Hickman argue that the *Chevron* Canon "raises a host of problems" fitting the doctrine into the "mélange of canons." Merrill and Hickman list several possible rationales for this "mélange of canons," including "congressional intent." Courts historically crafted substantive canons based on presumptions of congressional intent.[324] *Chevron* is also based on congressional intent. In fact, Merrill and Hickman pioneered the congressional-intent model of *Chevron*. Furthermore, "[m]ost strong canons have some constitutional underpinning (like the doctrine of lenity or the federalism canons), or reflect institutional imperatives (like the judge-made norm requiring lower courts to follow Supreme Court precedents until overruled)."[325] Courts, however, have begun using constitutional rhetoric to rationalize *Chevron*'s existence.[326] *Chevron* protects legislative supremacy and the policymaking hierarchy of the U.S. government. Therefore, *Chevron* incorporates sufficient institutional values to create a clear-statement rule. In finding that *Chevron* does not fit with other substantive canons, the authors conflate *Chevron*'s rationale with the vehicle of its application. *Chevron*'s policy rationale is congressional intent; "substantive canon" is not a policy rationale. A *Chevron* Canon is the means by which courts effectuate congressional intent in the agency interpretation context.

At time of Chevron*'s Domain*, Merrill and Hickman synthesized and created the theoretical foundations for the *Mead* Doctrine.[327] Their arguments, however, were merely descriptive: describing *Chevron* as then applied and understood by the courts. Their arguments do not foreclose the possibility that *Chevron* may now be reformed. As *Chevron* retreats into a period of skepticism, a *Chevron* Canon—founded in the same legislative supremacy arguments advanced by Hickman and Merrill—offers the chance to breathe new life into this deference doctrine.

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323. *Cf.* Skilling v. United States, 561 U.S. 358, 404–12 (2010) (applying the avoidance canon in a criminal case to avoid vagueness and later buttressing this holding with lenity).

324. Barrett, *supra* note 89, at 158.

325. Merrill & Hickman, *supra* note 166, at 871.

326. *See supra* note 182 and accompanying text.

327. *See* United States v. Mead Corp., 533 U.S. 218, 230 n.11 (2001) (citing Merrill & Hickman, *supra* note 166, at 872).

VII. Conclusion

Courts are searching for alternative formulations of *Chevron*. While One-Step *Chevron* has attracted some judges through its promise of eliminating redundancy, it can be more practically implemented by a clear-statement rule. Like other clear-statement rules, *Chevron* embodies institutional norms that ensure the balance of the U.S. system of government, like the federalism canon or the avoidance canon. The *Chevron* Canon represents a formula for determining and protecting the hierarchy of policymaking authority of the federal government.

Beyond its normative justifications, the *Chevron* Canon works like any other clear-statement rule and offers more simplicity than either One-Step *Chevron* or Traditional *Chevron*. The court neither searches for a zone of ambiguity nor tangles with the redundancy of *Chevron's* two steps. Rather, *Chevron* is reformed as an interpretive tool judges already utilize, resulting in a more traditional statutory interpretation analysis. Unlike One-Step *Chevron*, the *Chevro*n Canon preserves *Brand X* because a clear-statement rule focuses on whether the statute clearly prohibits the agency's interpretation. If the court applies the *Chevron* Canon and finds that the statute provides no clear guidance, then the agency may change its interpretation at will. The *Chevron* Canon also resolves longstanding concerns about *Chevron*'s role in the dueling canons problem. Competing institutional clear-statement norms can protect fundamental principles of U.S. government, while providing agencies the policy space necessary to act as Congress's faithful agents. Compared to One-Step *Chevron*, the *Chevron* Canon offers a simplified standard that nests well with other interpretive tools.

The *Chevron* Canon is just one of many alternative formulations that may take root in the years to come. Offered against competing alternatives, however, it warrants consideration by the courts.