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Chevron as a Doctrine of Hard Cases

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ABSTRACT

The conventional wisdom holds that the *Chevron* doctrine rests on a presumption about congressional intent—a presumption that when a statute is ambiguous, Congress intended the gap to be filled by the agency charged with administering the statute. But the presumption is a mere fiction; Congress generally has no view on whether ambiguities in a statute should be resolved by the agency or the court. This Article proposes a new theory of *Chevron*, one that rests on a simple reality: No matter how determinate the law may seem, there will inevitably be hard cases—cases in which the law runs out before providing a solution. Legal positivism teaches that such cases cannot be decided by merely applying existing law. When the law runs out, the gap can be filled only by making new law. Positivism thus holds that there are two distinct stages in the process of deciding hard cases: applying the law and making it. This Article argues that these two stages correspond to *Chevron*’s two steps. Step One is the ordinary, law-applying stage of any case of statutory interpretation. Step Two is the law-making stage, when a court would typically have no choice but to make law on its own. But the presence of an administrative construction means that the court can exercise its law-creating discretion by deferring to the agency, a law-maker that, unlike the court, is accountable to the political branches. Viewed in this light, deference emerges as an act of judicial self-restraint, grounded in the recognition that the law carries greater legitimacy when made by politically accountable agencies than by unelected judges. This positivist account of *Chevron* elucidates the doctrine’s familiar two-step inquiry, shedding light on longstanding questions about the doctrine’s application. It also answers recurring objections to judicial deference more generally, including the claim that such deference conflicts with the Constitution. Finally, understanding *Chevron* as a doctrine of hard cases has important implications for the scope of *Chevron*’s domain.
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INTRODUCTION

The most important doctrine of statutory construction in the modern administrative state rests today on a legal fiction. That doctrine, announced nearly three decades ago by the Supreme Court in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, directs courts to defer to reasonable agency constructions of ambiguous statutes.1 The conventional wisdom holds that the doctrine rests on a presumption about congressional intent—a presumption that when a statute is ambiguous, Congress intended the gap to be filled by the agency charged with administering the statute.2 On this view, shared by scholars and jurists alike from across the philosophical spectrum, courts are merely respecting Congress’s wishes when they defer to agency constructions of law.3

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2 See *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000) (“Defereence under *Chevron* to an agency’s construction of a statute it administers is premised on the theory that a statute’s ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps.”); *Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735, 740-41 (1996) (embracing the “presumption that Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows”).
3 See, e.g., Robert A. Anthony, *Which Agency Interpretations Should Bind Citizens and the Courts?*, 7 YALE J. ON REG. 1, 4 (1990) (“The threshold issue for the court is always one of congressional intent: did Congress intend the agency’s interpretation to bind the courts? The touchstone in every case is whether Congress intended to delegate to the agency the power to interpret with the force of law in the particular format that was used.”); Curtis A. Bradley, *Chevron Deference and Foreign Affairs*, 86 VA. L. REV. 649, 670 (2000) (“The linchpin of the Chevron doctrine . . . is not realism or democratic theory, but rather a theory of delegation.”); Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 372 (1986) (arguing that one justification for deference that “can reconcile apparent conflict in case law descriptions of a proper judicial attitude towards agency decisions of law . . . rests upon Congress’ intent that courts give an agency legal interpretations special weight, an intent that (where Congress is silent) courts may impute on the basis of various ‘practical’ circumstances”); William N. Eskridge, Jr., *Vetogates*, *Chevron, Preemption*, 83 NOTRE DAME L. REV. 1441, 1463 (2008) (“[T]o the extent that *Chevron* demands special judicial deference to certain agency interpretations of law, the justification must be congressional delegation of lawmaking power . . . .”); Elizabeth Garrett, *Legislator* 81 MICH. L. REV. 2637, 2637 (2003) (“According to the consensus view, *Chevron* deference is consistent with *Marbury*, as long as Congress has delegated to agencies the power to make policy by interpreting ambiguous statutory language or filling gaps in regulatory laws.”); John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 623 (1996) (“[B]inding deference is the product of Congress’s right to delegate legislative authority to administrative agencies.”); Thomas W. Merrill & Kristin E. Hickman, *Chevron’s Domain*, 89 GEO. L.J. 833, 872 (2001) (“[W]e think that the congressional-intent theory is the best of the three explanations for the legal foundation of *Chevron* deference.”); Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 516 (“The extent to which courts should defer to agency interpretations of law is ultimately a function of Congress’ intent on the subject as revealed in the particular statutory scheme at issue.” (internal quotation marks omitted)); Laurence H. Silberman, *Chevron—The Intersection of Law & Policy*, 58 GEO. WASH. L. REV. 821, 822 (1990) (explaining that “Congress is presumed to delegate” to
No one, however, believes the presumption reflects actual congressional intent. The truth of the matter is that Congress rarely considers the question of institutional choice raised by *Chevron*—the question of *who* should resolve the statutory ambiguities that inevitably arise. Thus, although Congress sometimes delegates authority to an agency “to define a statutory term or prescribe a method of executing a statutory provision,” Congress generally has no view on whether gaps in a statute should be filled by the agency or the court. The presumption about congressional intent is a legal fiction.
The Court has nevertheless adhered to the fiction and developed a complex test for determining when the presumption should be honored. In the absence of actual congressional intent on the deference question, however, the Court’s test has necessarily focused on the practical circumstances of each case and the Court’s own judgment of whether deference would make sense in light of them.\(^8\) This approach came to a head in *United States v. Mead*, in which the Court held that judges may infer that Congress intended *Chevron* to apply “when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law.”\(^9\)

For all its efforts exploring the implications of the presumption about congressional intent for *Chevron*’s domain, however, the Court has said little, if anything, about what the presumption entails for the doctrine’s familiar two steps. *Chevron* says, of course, that a court must inquire whether Congress has spoken directly to the question at issue at Step One, and if not, whether the answer furnished by the agency is reasonable at Step Two.\(^10\) But that general description leaves many questions unanswered:

- What methods of statutory interpretation should courts use at Step One? *Chevron* directs courts to employ the “traditional tools of statutory construction,”\(^11\) but what are these tools? Some of the Court’s decisions look to legislative history;\(^12\) others rely only on statutory text and structure.\(^13\) One scholar has said that the “traditional tools” include reliance on statutory purpose;\(^14\) another has argued that they do not.\(^15\)

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\(^11\) *Id.* at 843 n.9.

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


suggested that they encompass “[c]onstitutionally inspired norms, along with many others that serve institutional or substantive goals.”

• Just how clear must a statute be for the inquiry to end at the first step? Is it enough for the court to have a “firm conviction” about the statute’s meaning? Or should the court proceed to Step Two “so long as the text immediately at hand contains a surface-level gap or ambiguity”? According to scholars, “courts have not been consistent in the level of clarity that they require.”

• What does it mean for an agency construction to be “reasonable”? Some have suggested that the Step Two inquiry is merely redundant of Step One, while others have said that it is similar to “hard look” review of agency decisionmaking under the Administrative Procedure Act (APA).

Despite the near-consensus that Chevron rests on a presumption about congressional intent, these seemingly basic questions persist. An intent-based theory of Chevron has failed to resolve them, and indeed, it is hard to imagine how a mere fiction ever could.

This Article proposes a new theory of Chevron, one that rests on a simple reality: The law has limits. Although the law provides many answers, it does not provide a solution to every case. No matter how precise the law may seem, there will inevitably be “hard cases”—cases “in

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15 Anthony, supra note 3, at 18 & n.65.
16 Sunstein, supra note 3, at 2110.
17 Id. at 2092.
21 Gary S. Lawson, Reconceptualizing Chevron and Discretion: A Comment on Levin and Rubin, 72 Chi.-Kent L. Rev. 1377, 1378-79 (1997); Levin, supra note 20, at 1276; Seidenfeld, supra note 19, at 128-29; Silberman, supra note 3, at 827-28; Sunstein, supra note 3, at 2105.
which on some point no decision either way is dictated by the law and the law is accordingly partly indeterminate or incomplete.” 22 One of the lessons of legal positivism is that such cases cannot be decided by merely applying existing law. When the law runs out, the gap can be filled only by making new law. 23 Positivism thus holds that there are “two completely different stages” in the process of deciding hard cases: applying the law and making it. 24

This Article argues that these two stages correspond to *Chevron*’s two steps. Step One is the ordinary, law-applying stage of any case of statutory interpretation. The court must say what the law is and give effect to what the law says. But if the law runs out before yielding a solution, then the case is a hard one, and the court must proceed to Step Two, the law-making stage. The presence of an agency construction, however, means that judges can avoid making law as if they were legislators. They can instead exercise their discretion in hard cases by deferring to the agency, a law-maker that, unlike the court, is accountable to the political branches. Viewed in this light, deference emerges as an act of judicial self-restraint, grounded in the recognition that the law carries greater legitimacy when made by politically accountable agencies than by unelected judges.

This positivist account of *Chevron* avoids relying on any fiction about congressional intent. By grounding deference in the reality of hard cases, it owns up to the fact that Congress hardly ever considers the issue of who should resolve statutory ambiguities. But that is not its only advantage over the conventional wisdom. A hard-cases theory of *Chevron* also fills gaps in the application of the two-step inquiry itself. What tools should courts use at Step One? If the first step is simply the initial stage of any statutory interpretation case, then courts should employ

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23 HART, supra note 22, at 272.
24 Id. at 273.
whatever tools they would ordinarily use to apply the law. When is a statute “clear,” so that the inquiry can end at Step One? If the line between *Chevron*’s two steps corresponds to the line between applying the law and making it, then a statute is clear when the law provides an answer before running out. When is an agency construction “reasonable”? If Step Two is the law-making stage of a hard case, then a “reasonable” construction is any construction the court itself could have imposed by making law on its own.

Positivism provides a theory for answering these doctrinal questions, thus succeeding where the presumption about congressional intent fails. But that is not all: Positivism also answers recurring objections to judicial deference more generally. These objections come in many forms. It has been said, for instance, that deference cannot be reconciled with the judiciary’s Article III duty to “say what the law is.”\(^\text{25}\) It has also been said that deference forces judges to adopt a mindset that is psychologically difficult to maintain,\(^\text{26}\) and that differences between judicial and administrative methods of statutory construction render deference paradoxical.\(^\text{27}\) But when *Chevron* is understood as a doctrine of hard cases, these objections lose their force. *Chevron* is constitutional because it mandates deference only at the point of law-making, when the court has already done all it can to “say what the law is.” It is psychologically bearable because it asks judges simply to make the most basic of distinctions, between applying the law that already exists and making new law. And it makes sense of the differences between judicial and administrative approaches to statutory construction by recognizing that agencies, unlike courts, must perform as legislators at the second stage of a hard case.

\(^{25}\) Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803); see sources cited infra note 224.

\(^{26}\) Breyer, *supra* note 3, at 379.

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

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

I. LEGAL POSITIVISM AND THE NOTION OF HARD CASES

The question seems simple enough, and yet it has persisted for centuries: “What is law?” Legal positivism offers a theory, which holds that “the law is posited, is made law by the activities of human beings.” On this account, “what is law and what is not is a matter of social fact.” As a general theory about the nature of law, positivism cannot tell us how to resolve specific cases or controversies. But it can give us a framework for approaching them. This Part describes the theory’s insights as they relate to the judicial process.

A. Identifying the Law

One of positivism’s most important insights is that every legal system has a “rule of recognition”—a “rule about rules” that determines “which rules are, and which rules are not, part of the legal system.” In developed legal systems, the rule of recognition typically operates by identifying “some general characteristic” that other rules must possess to be legally valid, such as “the fact of their having been enacted by a specific body, or their long customary practice, or their relation to judicial decisions.” Where there is more than one such characteristic, the rule makes “provision . . . for their possible conflict by their arrangement in an order of superiority, as by the common subordination of custom or precedent to statute, the latter being a

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28 HART, supra note 22, at 1.
30 Id. at 37.
31 See BRIAN BIX, JURISPRUDENCE: THEORY AND CONTEXT 33 (5th ed. 2009).
32 HART, supra note 22, at 94 (explaining that a legal system consists in “a union of primary rules of obligation with . . . secondary rules,” including a rule of recognition).
34 BIX, supra note 31, at 40.
35 HART, supra note 22, at 95.
According to positivists, the content of the rule of recognition is a matter of social convention—not of morality or natural law. Thus, “[t]o state for a particular society what the criteria of law are, and the hierarchy in which these criteria stand to each other, is to describe the standards that recognized officials [in the society] accept.”

The role of the rule can be illustrated by the following example: Suppose a dispute arises over whether vehicles are allowed in a park. Some citizens of the community believe vehicles are allowed; others believe they are not. In the absence of a rule of recognition, such disagreement will persist. But if the community has a functioning legal system, its rule of recognition will help identify which view the law regards as authoritative. Suppose, for instance, the rule specifies enactment by the city council as the ultimate criterion of legal validity. And suppose the council enacted an ordinance stating: “No vehicles in the park. Anyone found in possession of a vehicle in the park shall be guilty of a misdemeanor.” Such an ordinance, possessing the characteristic identified by the rule of recognition, would authoritatively settle the question whether vehicles are allowed in the park: They are not. A rule

36 Id.
37 See Bix, supra note 31, at 40-41.
38 Kent Greenawalt, The Rule of Recognition and the Constitution, 85 Mich. L. Rev. 621, 624 (1987); see also HART, supra note 22, at 116 (arguing that for a legal system to exist, “its rules of recognition specifying the criteria of legal validity . . . must be effectively accepted as common public standards of official behaviour by its officials”).
39 See HART, supra note 22, at 92.
40 See id. at 94-95.
41 This example assumes that there are no superior sources of law. Cf. Greenawalt, supra note 38, at 625 (noting additional questions that might be asked about the validity of a local ordinance).
of recognition thus serves the essential purpose of remediying uncertainty about what in a society counts as law.\textsuperscript{43}

\textbf{B. Deciding Provided-For Cases}

Positivists acknowledge that the rule of recognition alone will not settle every legal dispute.\textsuperscript{44} In order to function as society’s “main instrument of social control,” after all, “the law must predominantly . . . refer to \textit{classes} of person, and to \textit{classes} of acts, things, and circumstances.”\textsuperscript{45} As a result, there is a need for a judicial process, and for judges who will make “authoritative determinations”\textsuperscript{46} regarding the “particular acts, things, and circumstances” that qualify “as instances of the general classifications which the law makes.”\textsuperscript{47}

Which brings us to what, according to positivists, is the first stage of the judicial process: applying the law to a given set of facts. It is in this stage that the judge can be said to exercise “neither Force nor Will, but merely judgment,”\textsuperscript{48} for the task of applying the law consists of saying what the law is, not what it ought to be.\textsuperscript{49} The goal of the judge is to discover the existing meaning of the law, based on traditional legal materials such as text, structure, history, and purpose.\textsuperscript{50} And the duty of the judge is to act as the faithful agent of those who enacted the law, be they a council, a legislature, or the people themselves.\textsuperscript{51}

\textsuperscript{43} See \textsc{Hart}, \textit{supra} note 22, at 94-95.
\textsuperscript{44} See \textit{id.} at 93.
\textsuperscript{45} \textit{Id.} at 124.
\textsuperscript{46} \textit{Id.} at 96.
\textsuperscript{47} \textit{Id.}
\textsuperscript{48} \textsc{The Federalist} No. 78, at 523 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).
\textsuperscript{49} See \textsc{John Austin}, \textit{The Province of Jurisprudence Determined} 157 (W.E. Rumble ed., 1995) (1832) (“The existence of law is one thing; its merit or demerit is another. Whether it be or be not is one enquiry; whether it be or be not conformable to an assumed standard, is a different enquiry.”); \textit{cf.} Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) (“It is emphatically the province and duty of the judicial department to say what the law is.”).
\textsuperscript{50} It may be questioned whether “purpose” should be counted among the traditional \textit{legal} materials on the ground that purposive reasoning is necessarily \textit{moral} in nature. See Michael W. McConnell, \textit{Active Liberty: A Progressive Alternative to Textualism and Originalism?}, 119 \textsc{Harv. L. Rev.} 2387, 2405 (2006) (book review) (“To ask what a hypothetical ‘reasonable member of Congress’ ‘would have wanted,’ I suspect, is not much different from asking what the judge thinks would be best, at least within the general constraints of the statutory scheme.’”). Because “purpose” is commonly regarded as a source of \textit{legal} meaning, however, I treat it as such here. See \textit{id.} at 2404-05.
Although “[p]articular fact-situations do not await us already marked off from each other, and labelled as instances of the general rule,” positivists maintain that “the life of the law” consists mainly of cases in which the application of the law is clear. Consider, for instance, the application of the hypothetical ordinance above to a woman driving her sport-utility vehicle (SUV) through the park on her way to work. Given that an SUV meets the very definition of a “vehicle”—“a carrier of goods or passengers . . . ; specifically: MOTOR VEHICLE”—the ordinance plainly prohibits the woman’s conduct. Or consider the case of a boy in the park pushing a toy truck through a sandbox. Such a truck, of course, is not designed to carry actual goods or passengers. Nor is it propelled by a motor, as the specific definition of “vehicle” requires. Because the boy’s toy truck is just a model of a “vehicle”—a miniature replica of the real thing—it is clear that his behavior falls outside the prohibition of the ordinance.

The case of the SUV (in which the law clearly applies) and the case of the toy truck (in which it clearly does not) are what positivists call legally “provided-for” or “regulated” (describing the debate between textualists and purposivists as “an intramural disagreement over what methodology will best translate the public will into law”).

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

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

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

54 WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 2538 (2002).

55 Hart, supra note 22, at 126 (“If anything is a vehicle a motor-car is one.” (internal quotation marks omitted)).

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

57 See Hart, supra note 22, 272 (referred to “unregulated” cases as “legally unprovided-for” (emphases added)).

58 RAZ, supra note 29, at 181.
disputes. Such a dispute is marked by three related characteristics. First, the law yields a solution, or uniquely correct answer, to the question presented. Is the woman guilty of violating the ordinance? The answer provided by the law is yes, because an SUV is a “vehicle.” Is the boy? The answer provided by the law is no, because a toy truck is not a “vehicle.” Second, resolving the dispute does not require any exercise of judicial discretion. In both the case of the SUV and that of the toy truck, any exercise of such discretion is unnecessary because the answer provided by the law is conclusive. Finally, and relatedly, any exercise of judicial law-making in the course of resolving the dispute would necessarily involve the rewriting of already existing law. Thus, if a court were to decide that the law does allow the woman to drive an SUV in the park, or that it does prohibit the boy from playing with a toy truck in the sandbox, the court would essentially be replacing the law on the books with one of its own making. Accordingly, a legally provided-for case need not, and should not, proceed beyond the first stage of the judicial process: If the court faithfully applies the law, the matter should end there.

C. Deciding Hard Cases

The analysis must proceed further when a dispute admits of no legally provided-for answer. Consider the application of the hypothetical ordinance to a man riding his bicycle in the park. On the one hand, a bicycle is a carrier of passengers, which suggests that it is a “vehicle”; on the other, a bicycle has no motor, which suggests that it is not. Does “vehicle,” as used in the ordinance, embrace the broader definition of the term, which encompasses carriers of passengers generally, or the narrower one, which refers specifically to carriers with motors? It is unclear what a “skilled, objectively reasonable user of words” would understand “vehicle” to mean in

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59 Id. at 182.
60 Id. at 181.
61 Id. at 182.
this context.\textsuperscript{62} We can be certain that the term includes SUVs but not toy trucks. But beyond this “core of certainty” lies “a penumbra of doubt,”\textsuperscript{63} where bicycles (and perhaps other non-motor carriers, such as roller skates,\textsuperscript{64} baby strollers,\textsuperscript{65} and wheelchairs\textsuperscript{66}) fall. Positivists call such indeterminacy “open texture,”\textsuperscript{67} a consequence of the “limit . . . to the guidance which general language can provide.”\textsuperscript{68} As such indeterminacy is “inherent in the nature of language,”\textsuperscript{69} positivists concede that it is an inevitable part of the law.

Not every theory of interpretation, of course, gives precedence to the semantic meaning of the enacted text. A court might look beyond the words of the ordinance to the subjective intentions of the legislators who enacted them. But positivists believe there is a limit as well to the guidance that such intentions can provide.\textsuperscript{70} The problem is not merely that legislators seldom think alike,\textsuperscript{71} or that their genuine beliefs are often difficult to discover.\textsuperscript{72} Rather, according to positivists, there is a problem even more fundamental: Given that “the world in

\begin{itemize}
  \item \textsuperscript{63}Id. at 123; see also RAZ, supra note 29, at 193 (noting “the cases which fall within the vague borderlines of various descriptive concepts”).
  \item \textsuperscript{64}See HART, supra note 22, at 126; Hart, supra note 42, at 607.
  \item \textsuperscript{65}See Thomas O. Sargentich, \textit{The Contemporary Assault on Checks and Balances}, 7 WIDENER J. PUB. L. 231, 251 (1998) (“Surely in this context a baby carriage would not be a prohibited vehicle.”).
  \item \textsuperscript{67}HART, supra note 22, at 135.
  \item \textsuperscript{68}Id. at 126; see also id. at 128 (describing open texture as “the price to be paid for the use of general classifying terms in any form of communication concerning matters of fact”).
  \item \textsuperscript{69}HART, supra note 22, at 126.
  \item \textsuperscript{70}See RAZ, supra note 29, at 193 (“[A]ppeal to legislative intention is often of no avail, for that intention, even when ascertained, is often itself indeterminate.”).
  \item \textsuperscript{71}See Max Radin, \textit{Statutory Interpretation}, 43 HARV. L. REV. 863, 870 (1930) (“The chances that of several hundred men each will have exactly the same determinate situations in mind as possible reductions of a given determinable, are infinitesimally small.”).
  \item \textsuperscript{72}See id. at 870-71 (“Even if the contents of the minds of the legislature were uniform, we have no means of knowing that content except by the external utterances or behavior of these hundreds of men, and in almost every case the only external act is the extremely ambiguous one of acquiescence, which may be motivated in literally hundreds of ways, and which by itself indicates little or nothing of the pictures which the statutory descriptions imply.”).
\end{itemize}
which we live” cannot be reduced to “a finite number of features,” it is impossible for legislators to anticipate “all the possible combinations of circumstances which the future may bring.”

This “relative ignorance of fact” means that legislative intentions will not always be determinate. So, in the case of the bicycle, one can easily imagine a legislative history ambiguous or silent on whether bicycles should be allowed in the park. Perhaps council members expressed conflicting views on the issue, or perhaps they lacked the foresight to discuss the issue at all. Either way, it would be unclear whether the council actually intended the ordinance to cover bicycles.

If the text and history of the ordinance fail to resolve the dispute, one might seek guidance in the general purposes behind the ordinance. One might ask how a hypothetical “reasonable member” of the city council “pursuing reasonable purposes reasonably” would have wanted a court to interpret the [ordinance] in light of present circumstances in the particular case.

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

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

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80 William N. Eskridge, Jr., Philip P. Frickey & Elizabeth Garrett, Legislation and Statutory Interpretation 230 (2d ed. 2006). Even when a law has only one “reasonable” purpose, it will not always be clear how far the legislature sought to pursue that purpose. See Pension Benefit Guar. Corp. v. LTV Corp., 496 U.S. 633, 646 (1990) (“[N]o legislation pursues its purposes at all costs. Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice—and it frustrates rather than effectuates legislative intent simplistically to assume that whatever furthers the statute’s primary objective must be the law.”) (quoting Rodriguez v. United States, 480 U.S. 522, 525-26 (1987)).
81 Hart, supra note 22, at 129.
82 Id. at 128.
83 Id. at 272.
cannot be filled by merely applying the law. As a result, according to positivists, the judge has no choice but to proceed to the next stage in the judicial process: law-making. At this (the second) stage, the judge’s duty is no longer to say what the law is, but rather to say what it should be. Faced with a gap in the law, the court must “exercis[e] a limited law-creating discretion” to fill it.

Assuming, then, that in the case of the bicycle, existing law fails to dictate a solution, how should a judge go about the task of making law to decide it? One way would be to “act just as legislators do,” namely, “by deciding according to his own beliefs and values.” After weighing the interests of children against those of other park-goers, for example, a judge might conclude that a policy prohibiting bicycles in the park would achieve the greatest good, and that bicycles should therefore be “vehicles” within the meaning of the ordinance. Or the judge might conclude that, all things considered, the best policy would be to allow bicycles in the park, and that they should therefore not be prohibited. Where the law runs out, judges face “a fresh choice between open alternatives.” Even so, positivists maintain, judges have a responsibility

84 Id. at 273 (describing “hard cases” as ones “where the existing law fails to dictate any decision as the correct one”); RAZ, supra note 29, at 181 (describing “unregulated” disputes as ones that “do not have a correct legal answer”).
85 See HART, supra note 22, at 272 (“If in such cases the judge is to reach a decision and is not, as Bentham once advocated, to disclaim jurisdiction or to refer the points not regulated by the existing law to the legislature to decide, he must exercise his discretion and make law for the case instead of merely applying already pre-existing law.”).
86 Id.; accord Mistretta v. United States, 488 U.S. 361, 417 (1989) (Scalia, J., dissenting) (recognizing a degree of “lawmaking” left to judges in cases of statutory interpretation, the extent of which depends on the “relative specificity or generality of [Congress’s] statutory commands”).
87 RAZ, supra note 29, at 197.
88 HART, supra note 22, at 273; see also RAZ, supra note 29, at 197 (explaining that judges in hard cases “should adopt those rules which they judge best”); id. at 199 (“[I]n their law-making judges do rely and should rely on their own moral judgment.”).
89 See HART, supra note 22, at 129. This is not to say that the judge’s decision-making should necessarily have a consequentialist or utilitarian cast.
90 Id. at 128.
in hard cases to exercise reasoned judgment\textsuperscript{91}: Whatever law they make to fill the gap ought to reflect “a reasonable compromise between . . . conflicting interests.”\textsuperscript{92}

Judges need not make law as if they were legislators, however. Before filling a gap with their own policy views, judges might consider the institutional significance of doing so. In the criminal context, for example, they might consider not only what the criminal law should be, but also who should make it.\textsuperscript{93} Perhaps “because of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community, legislatures and not courts should define criminal activity.”\textsuperscript{94} If so, then courts might exercise restraint in hard cases by declining to extend the criminal law beyond its clear terms. By resolving statutory ambiguities in favor of the criminal defendant (i.e., by applying a rule of lenity),\textsuperscript{95} courts would ensure that no one “languish[es] in prison” for a crime the legislature did not make.\textsuperscript{96} A judge who took such institutional concerns seriously would conclude that bicycles are not “vehicles” after all, regardless of what he thinks personally of permitting them in the park.\textsuperscript{97}

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

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

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


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

\textsuperscript{96} HENRY J. FRIENDLY, BENCHMARKS 209 (1967); see also United States v. Santos, 128 S. Ct. 2020, 2025 (2008) (recognizing that the “venerable” rule of lenity “keeps courts from making criminal law in Congress’s stead”); see also United States v. Wiltberger, 18 U.S. (5 Wheat.) 76, 95 (1820) (Marshall, C.J.) (“The rule that penal laws are to be construed strictly, is perhaps not much less old than construction itself. It is founded . . . on the plain principle that the power of punishment is vested in the legislative, not in the judicial department. It is the legislature, not the Court, which is to define a crime, and ordain its punishment.”).

\textsuperscript{97} Raz himself recognized that judges “may be guided by law as to the manner in which discretion should be exercised.” RAZ, supra note 29, at 96. He also recognized that “[s]uch instructions may be given in a statute, but they may also exist only in the practice of the courts.” Id. This Article argues that like the rule of lenity, the
To some, the notion of cases in which judges must create law might seem misguided, even dangerous. It thus bears emphasis that the law-making discretion judges enjoy in hard cases is limited in important ways. For one thing, their discretion is constrained by the law that already exists.\textsuperscript{98} Although law-making may sometimes be a necessary step in the judicial process, it is never the only one: “There are no pure law-creating cases.”\textsuperscript{99} Even hard cases are “partly regulated” because the judge “has to apply existing law as well as to make new law.”\textsuperscript{100} Given that the term “vehicle” clearly includes cars, for example, a judge faced with a hard case cannot, without violating his duty to apply the law, define the term in a way that would exclude them. Indeed, the term admits of only two reasonable constructions, from which a judge at the law-making stage must choose: It encompasses either all carriers of goods and passengers, or only such carriers with motors.\textsuperscript{101} In any given hard case, then, the gap to be filled by judicial law-making is only so big, its size depending on how determinate the legal materials are.

For another thing, the authority to make law in hard cases is interstitial.\textsuperscript{102} Unlike legislators, judges cannot “introduce large-scale reforms or new codes.”\textsuperscript{103} In their law-making, judges can fashion “only rules to deal with the specific issues thrown up by particular cases.”\textsuperscript{104} A judge who believes that bicycles should be allowed in the park, therefore, must wait for the issue to arise in a case before him. A more ambitious judge, seeking to encourage bicycle-riding generally, must wait for still other cases involving, say, rules governing bicycle registration or

\textit{Chevron} doctrine should be understood as a judge-made rule guiding the courts’ law-making discretion in hard cases. \textit{See infra} Part II. For a fuller discussion of the rule of lenity and other canons of construction, see \textit{infra} Section III.B.

\textsuperscript{98} \textit{See} H\textit{art, supra} note 22, at 273.
\textsuperscript{99} \textit{Raz, supra} note 29, at 195.
\textsuperscript{100} \textit{Id.} at 182; \textit{see also id.} at 195 (“In every case in which the court makes law it also applies laws restricting and guiding its law-creating activities.”).
\textsuperscript{101} \textit{See Webster’s Third New International Dictionary, supra} note 54, at 2538.
\textsuperscript{102} H\textit{art, supra} note 22, at 273; \textit{see also Raz, supra} note 29, at 200 (noting the “piecemeal nature of judicial law-making”).
\textsuperscript{103} H\textit{art, supra} note 22, at 273.
\textsuperscript{104} \textit{Id.} at 275.
Unable to set their own agenda or enact far-reaching reforms, judges are limited to filling gaps in the laws that happen to be implicated in the cases they hear.

The fact remains, however, that in hard cases there are “two completely different stages in the process of decision”: one in which judges apply the law and the other in which they make it. Unlike legally provided-for cases, hard cases cannot be resolved at the first stage; when the law “fails to dictate a decision either way,” the matter must proceed to the second. Nor can hard cases be resolved without the exercise of judicial discretion; the judge must exercise some degree of moral or equitable reasoning to fill in the gaps left open by the law. But the presence of gaps means that in hard cases, unlike in regulated ones, new law can be made without changing existing law.

This picture of the judicial process is of course simplified. It suggests a sharp divide between law-applying and law-making, such that judges can make a clean break from one stage to the next. Distinguishing the two stages in a judicial opinion, however, is not always easy.

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105 See RAZ, supra note 29, at 200 (“[I]t is usually impossible for the courts to introduce in one decision all the changes necessary for the effective implementation of a radical reform in any aspect of the law.”).
106 HART, supra note 22, at 273. The law-applying/law-making distinction does not quite track the interpretation/construction distinction much discussed in constitutional law. The latter distinguishes the “process (or activity) that recognizes or discovers the linguistic meaning or semantic content of the legal text” (interpretation) from the “process that gives a text legal effect” (construction). Lawrence B. Solum, The Interpretation-Construction Distinction, 27 CONST. COMMENT. 95, 96 (2010). Giving a text legal effect, however, need not entail any law-making; indeed, it may involve only law-applying.
107 HART, supra note 22, at 273.
108 RAZ, supra note 29, at 182. Given the nomenclature, one might assume that hard cases are unlike regulated cases in a further respect: the former are difficult to decide while the latter are easy. But though many hard cases are more challenging than regulated ones, not all are. “Regulated cases can be complex and more difficult to decide than unregulated cases. The difficulty in solving a complex tax problem according to law may be much greater than that of solving a natural justice problem according to moral principles.” Id. The opposite of a hard case is thus not an easy one, but rather a case in which the law, no matter how complex, provides a solution.
109 See Caleb Nelson, What Is Textualism?, 91 VA. L. REV. 347, 395 n.143 (2005) (“[S]tatutory interpretation is not a crisp two-stage process, in which interpreters first determine the range of meanings that Congress could be thought to have intended and then use a different set of tools to select a single interpretation from that range.”); RICHARD A. POSNER, HOW JUDGES THINK 85 (2008) (“A judge does not reach a point in a difficult case at which he says, ‘The law has run out and now I must do some legislating.’”); RAZ, supra note 29, at 208 (“In cases of indeterminacy there is often no clear divide between application and innovation.”). According to Ronald Dworkin, the way lawyers and judges speak about the law betrays no awareness that there are two different stages of judicial decision-making. RONALD DWORINKIN, LAW’S EMPIRE 37-43 (1986).
One reason is that judges sometimes do not realize that they have proceeded from merely applying the law to actually making it; “[j]udicial law-making need not be intentional,” and occasionally it is not. 110 Another is that judges sometimes intentionally obscure the extent to which they are creating new law, either “to avoid the need to bear full responsibility for it or to avoid having to justify it by long and explicit arguments.” 111 Still another reason is that there is often no need for judges to differentiate law-applying from law-making, particularly when nothing turns on the distinction. If judges have to impose their own construction on the statute anyway, there is no point to identifying statutory ambiguities along the way. 112 But the most important reason is that “on most occasions the reasoning justifying law-making decisions is similar to and continuous with decisions interpreting and applying law.” 113 Argument by analogy, for example, permeates judicial reasoning at both stages in the process. 114 When “the same kinds of arguments are used in applying and creating laws,” 115 it should come as no surprise that judges “move[] imperceptibly from one function to the other.” 116

Notwithstanding these caveats, the account of adjudication set forth here remains somewhat controversial. Legal positivism “assumes that it is possible to distinguish between the

10 RAZ, supra note 29, at 207. “Whether or not a case falls within the vague, indeterminate borderline area of a descriptive concept is often itself an indeterminate issue.” Id. at 208.
11 Id. at 209 n.20.
12 Cf. Edelman v. Lynchburg Coll., 535 U.S. 106, 114 (2002) (concluding that because the agency’s construction of the statute is the one the Court would have imposed on its own anyway, “there is no occasion to defer and no point in asking what kind of deference, or how much”); POSNER, supra note 109, at 85 (explaining that a judge may not distinguish law-applying from law-making when “[h]e knows that he has to decide and that whatever he does decide will (within the broadest of limits) be law”); Note, Implementing Brand X: What Counts as a Step One Holding?, 119 HARV. L. REV. 1532, 1537 (2006) (“Before Chevron, a court usually had no reason to distinguish whether its interpretation was the only reasonable one, or merely the best one. . . . Courts would have been unlikely, after constructing the best interpretation of a statute, to assert that other interpretations were not reasonable.”).
13 RAZ, supra note 29, at 209; see also HART, supra note 22, at 274 (“It is true that when particular statutes or precedents prove indeterminate, or when the explicit law is silent, judges do not just push away their law books and start to legislate without further guidance from the law. Very often, in deciding such cases, they cite some general principle or some general aim or purpose which some considerable relevant area of the existing law can be understood as exemplifying or advancing and which points towards a determinate answer for the instant hard case.”).
14 RAZ, supra note 29, at 208-09.
15 Id. at 209.
16 Id. at 208.
roles of the courts in applying and making law.”117 Not everyone shares this assumption: Legal realists deny that courts ever merely apply the law, while Ronald Dworkin and his followers deny that courts need ever make it.118 Still, there is a real sense in which “we are all to some degree positivists now.”119 Central tenets of legal positivism have been accepted not only by disciples of Hart and Raz,120 but also by legal pragmatists121 and even by natural law theorists.122 Among their ranks, positivists can count politicians,123 jurists,124 and academics125 alike. The next Part seeks to show how this overlapping consensus on the nature of law can help us understand the workings of the Chevron doctrine.

II. **CHEVRON AS A DOCTRINE OF HARD CASES**

Under Chevron, judicial review of agency interpretations of federal statutes is governed by a two-step inquiry. At Step One, the reviewing court asks “whether Congress has directly spoken to the precise question at issue.”126 If yes, then “the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.”127 If no, then the court must

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117 Id. at 197.
121 See, e.g., POSNER, supra note 109, at 9.
123 See, e.g., 115 Cong. Rec. 21,032, 21,032 (2005) (statement of Sen. Barack Obama) (noting the existence of “hard cases” in which the law “will not be directly on point” or “will not be perfectly clear”).
125 See Franklin G. Snyder, Nomos, Narrative, and Adjudication: Toward a Jurisgenetic Theory of Law, 40 Wm. & Mary L. Rev. 1623, 1646 (1999) (stating that “the dominant orthodoxy,” at least “among legal academics,” is that judges in hard cases make law).
127 Id. at 842-43.
proceed to Step Two, where it asks “whether the agency’s answer is based on a permissible construction of the statute.”\textsuperscript{128}

This Part argues that the \textit{Chevron} doctrine embodies the positivist account of the law described above. It explains how the doctrine’s two steps correspond to the “two completely different stages in the process of decision” identified by legal positivists: law-applying and law-making.\textsuperscript{129} Translated into the language of positivism, the question at Step One is whether existing law provides a uniquely correct answer to the dispute. If it does, then the court must enforce the law. But if the law runs out before providing a solution, then the court must proceed to Step Two. There, the question is whether the construction furnished by the agency is one the court itself could have imposed by making law on its own. If it is, then the court must exercise its limited law-making discretion by deferring to the agency. But if it is not, then the court must make law on its own, as if it were a legislature.

Sections A and B describe how positivism provides a cogent theory of Steps One and Two, respectively. Section C shows how this positivist account of \textit{Chevron} answers recurring objections to judicial deference to agency interpretations of law. And Section D explains how this novel theory of \textit{Chevron} challenges—and improves upon—the conventional wisdom, which instead grounds the doctrine in a presumption about congressional intent.

\textbf{A. \textit{Chevron} Step One: Applying the Law}

“When a court reviews an agency’s construction of the statute which it administers . . . ,” the Court explained in \textit{Chevron}, “[F]irst, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the

\textsuperscript{128} \textit{id.} at 843.

\textsuperscript{129} HART, supra note 22, at 273.
matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.”

In a footnote, the Court went on to say:

The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent. If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect.

These passages clarify the content of Chevron Step One. But they raise questions of their own: What is meant by “the intent of Congress”? What are the “traditional tools of statutory construction”? And when is the intent of Congress “clear”?

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

1. “Intent of Congress”

Chevron phrases the Step One inquiry in different ways, but always in terms of what Congress has said or done: Has Congress “spoken to the precise question at issue”? Has Congress “addressed” it? Did Congress have an “intention”? These various ways of referring to the “intent of Congress” may sound like mere synonyms for “statutory meaning.” But to the legal positivist, they are more than that; they are also a clue about which stage of the

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130 Chevron, 467 U.S. at 842-43.
131 Id. at 843 n.9 (citations omitted).
132 Id. at 842.
133 Id. at 843.
134 Id. at 843 n.9.
135 Id. at 842, 843.
judicial process—law-applying or law-making—Step One represents. For if the object of the inquiry is the “intent of Congress,” then the role of the judge is necessarily that of Congress’s faithful agent, whose task is to discover the meaning of the law already made. That the inquiry centers on congressional intent implies that judges are to begin their review of an agency’s construction of a statute just as they would any case of statutory interpretation: by applying existing law.

A number of methods of statutory interpretation are rooted in faithful agent theory and thus could be said to be consistent with “giv[ing] effect to . . . the intent of Congress” at Step One. Surely an approach that seeks to discern what a majority of the members of Congress actually had in mind when they enacted a particular statute would be a suitable Step One methodology. But judges need not embrace the search for subjective legislative intent to act as Congress’s faithful agents. The so-called “new textualism,” for example, eschews reliance on “traditional conceptions of ‘actual’ legislative intent,” directing judges to focus instead on “how ‘a skilled, objectively-reasonable user of words’ would have understood the statutory text in context.” And yet, modern textualists regard their method as “the only safe course for a faithful agent” on the view that “respect for the legislative process requires judges to adhere to the precise terms of statutory texts.” Modern purposivists have also abandoned the search for subjective legislative intent, but they, too, claim to respect Congress’s wishes. In their view,

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136 See Manning, supra note 51, at 1648 n.1; Posner, supra note 51, at 189.
137 Chevron, 467 U.S. at 843.
139 Manning, supra note 62, at 75 (quoting Easterbrook, supra note 62, at 65); see also Scalia, supra note 62, at 17 (“We look for a sort of ‘objectified’ intent—the intent that a reasonable person would gather from the text of the law, placed alongside the remainder of the corpus juris.”).
141 See Breyer, supra note 76, at 88, 98-101; Hart & Sacks, supra note 78, at 1378.
legislators think in terms of general purposes, so fidelity requires that statutes be read from the perspective of a hypothetical member of the legislature, pursuing such purposes reasonably. The upshot is that all three of these methodologies—intentionalism, textualism, and purposivism—would in theory be appropriate at Step One.

Not every approach to statutory interpretation, however, has as its object the “intent of Congress.” Ronald Dworkin’s method of “constructive interpretation,” for example, envisions judges as the legislature’s collaborative partners, rather than its faithful agents. It calls on judges to treat Congress as just one author in the “chain of law,” and to “continue[] to develop, in what [they] believe is the best way, the statutory scheme Congress began.” Because the goal would not merely be to give effect to the intent of Congress, Dworkin’s method of constructive interpretation would not be appropriate at Step One. Nor would a method that authorizes judges to rewrite statutory terms on grounds of equity. According to Professor William Eskridge, such authority to consider the “equity of the statute” was originally understood to be part of the judicial power. But regardless of whether Eskridge’s view of history is correct, Step One rules out reliance on equity and other considerations that lie beyond an inquiry into the intent of Congress. The range of appropriate methods at Step One is limited to those consistent with faithful-agent theory—that is, with applying the law, as opposed to making it.

142 See Breyer, supra note 76, at 98-101; Max Radin, A Short Way with Statutes, 56 Harv. L. Rev. 388, 400, 406 (1942).
143 See Breyer, supra note 76, at 88, 98-101; Hart & Sacks, supra note 78, at 1378.
144 Dworkin, supra note 109, at 315.
145 Id. at 313. It might be argued that Dworkin’s method of constructive interpretation applies only in hard cases, but Dworkin expressly maintains that it “is equally at work in easy cases.” Id. at 354.
146 Dworkin would claim that whether his method of constructive interpretation is appropriate or not, judges have no choice but to engage in some form of it. See id. at 316-17.
148 For a competing view of the original understanding of the judicial power in statutory interpretation, see John F. Manning, Textualism and the Equity of the Statute, 101 Colum. L. Rev. 1 (2001).
2. “Traditional Tools of Statutory Construction”

*Chevron* instructs courts at Step One to use “traditional tools of statutory construction” to ascertain Congress’s intent.\(^\text{149}\) What are these tools? Positivism provides the answer. If Step One corresponds to the law-applying stage of the judicial process, then the “traditional tools of statutory construction” refer to the tools used ordinarily by judges to discern the existing meaning of a statute. As such, they encompass a range of diverse but familiar devices, from analysis of statutory text, to consideration of legislative history and purpose, to application of selected canons of construction.\(^\text{150}\)

This account of the “tools of statutory construction” finds support in *Chevron*’s use of the label “traditional,” which indicates that the tools themselves are no different from those used to apply statutes generally.\(^\text{151}\) It also finds support in other of the Court’s decisions. In *General Dynamics Land Systems, Inc. v. Cline*, for example, the Court described the Step One inquiry as involving “regular interpretive method.”\(^\text{152}\) Like “traditional,” “regular” suggests that the tools for discerning Congress’s intent at Step One are nothing special, but rather those a court would employ at the initial, law-applying stage of any statutory case. And indeed, the Court has invoked the use of “traditional tools of statutory construction” not only in cases involving *Chevron*,\(^\text{153}\) but also in ordinary cases of statutory interpretation, in which no administrative interpretation was at issue.\(^\text{154}\)

\(^{150}\) For a discussion of how *Chevron* relates to other canons of construction, see infra Section III.B.
\(^{151}\) *Chevron*, 467 U.S. at 843 n.9. Depending on how one reads it, *Chevron*’s statement that, “[f]irst, always, is the question whether Congress has directly spoken to the precise question at issue” might also suggest that Step One is an inquiry a court “always” conducts when interpreting statutes. *Id.* at 842 (emphasis added).
It should come as no surprise, then, that the growing debate within the Court regarding
the tools to be employed at Step One mirrors the broader debate among the Justices regarding
interpretive methods generally. Justices Scalia, Kennedy, and Thomas, commonly considered
among the Court’s textualists, have suggested that the Step One inquiry be confined to an
examination of statutory text and structure. Justices Stevens, by contrast, has insisted that
other sources of statutory meaning, particularly legislative history, be consulted as well.
Viewed through a positivist lens, *Chevron* does not take sides in this methodological dispute.
For if Step One is no different from the law-applying stage of any case of statutory interpretation,
then debates over proper interpretive methods are just as legitimate at Step One as they are in
other statutory cases. One should therefore not read too deeply into the fact that *Chevron*
itself discusses legislative history as part of its Step One analysis. That discussion may simply
reflect the fact that the opinion was written by Justice Stevens, and that in 1984 the new

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governing agency action directly addresses the precise question at issue, then, that is the end of the matter; for the
court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.” (internal
the agency regulation is not in conflict with the plain language of the statute, a reviewing court must give deference
to the agency’s interpretation of the statute.”); INS v. Cardoza-Fonseca, 480 U.S. 421, 452 (1987) (Scalia, J.,
concurring in the judgment) (criticizing the Court’s “exhaustive investigation” of the statute’s legislative history at
Step One).

(“Analysis of legislative history is, of course, a traditional tool of statutory construction.”); Cardoza-Fonseca, 480
U.S. at 432-43 (majority opinion) (Stevens, J.) (examining the statute’s legislative history at Step One).

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

158 Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 862-64 (1984); see also id. at 845 (stating
that an agency’s statutory construction should not be disturbed “unless it appears from the statute or its legislative
history that the [construction] is not one that Congress would have sanctioned” (internal quotation marks omitted)).
textualism had yet to emerge as a viable alternative to intentionalism and purposivism. When it comes to methodology, Step One requires merely that judges employ the tools they normally would in statutory cases to discern the “intent of Congress.”

3. “Clear”

A final ambiguity in the operation of Step One remains: When is the intent of Congress “clear”? The question is of central importance because it represents “the dividing line between the two steps in the sequential inquiry.” To the positivist, however, it also represents the dividing line between the two stages of the judicial process. Thus, in positivist terminology, the intent of Congress is “clear” when the dispute over statutory meaning can be resolved at the first stage alone, by merely applying the law. This will be so when the statute provides a solution to the interpretive question, making the exercise of judicial discretion unnecessary. In other words, the intent of Congress is “clear” when the meaning of the statute is determinate. “How clear is clear?” Clear enough to render the dispute legally provided-for.

On this view, a statute is unclear when the law runs out before providing a uniquely correct answer. And indeed, the Court’s opinion in *Chevron* describes “silent or ambiguous” statutes as those susceptible to more than one “permissible” construction because of “gap[s] left open by Congress.” It even addresses the causes of such gaps, citing sources of indeterminacy familiar to positivists: Perhaps Congress “consciously desired” to leave a question of law unclear; perhaps Congress was “unable to forge a coalition on either side of the

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161 Scalia, *supra* note 3, at 520.
162 *Chevron*, 467 U.S. at 843.
163 Id. at 843 & n.11.
164 Id. at 866; *see also id.* at 843 (“‘The power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress.’” (quoting Morton v. Ruiz, 415 U.S. 199, 231 (1974))).
question”; or perhaps Congress “simply did not consider the question” at all. All of this suggests that the positivist’s definition of clarity is correct: Asking whether the statute is “clear” is akin to asking whether the case is legally provided-for, and finding the statute “silent or ambiguous” is the same as finding the case hard.

Conceiving of Step One as the law-applying stage of the judicial process sheds light not only on the terms of the inquiry, but also on the consequences of reaching an answer. *Chevron* provides that “[i]f a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect.” Positivism explains why giving effect to Congress’s unambiguously expressed intent is mandatory. When the intent of Congress is “clear,” “that is the end of the matter,” because no room for judicial discretion remains; the statute provides a solution to the dispute, and judges have a duty to apply the law. Moreover, because Congress’s “intention is the law,” any judicial law-making would entail rewriting existing law—law already made by Congress. Thus, finding the statute “clear” means finding the case legally provided-for—with all the consequences that follow.

Commentators have noted that federal judges differ in the frequency with which they find a statute “clear” at Step One. Some have attributed these differences to interpretive methodology, claiming, for example, that textualists are less likely to acknowledge the existence of ambiguity than purposivists are. But if judges have been applying the positivist definition

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165 *Id.* at 865.
166 *Id.* at 843 n.9.
167 *Id.* at 842.
168 *Id.* at 843 n.9.
of clarity all along, then the differences may be attributable instead to differing views about the
determinacy of the law—views that may have little to do with interpretive methodology. Two
judges might both be textualists, and yet have different thresholds for concluding that an
interpretation is uniquely correct in light of the statutory text; one judge, for example, might
require a probability of correctness of only 51% (i.e., that the interpretation be “more likely than
not” correct), while the other might require a probability of as high as 90%.171 Such probabilities
represent a judge’s standard of proof for legal arguments—of “when ‘enough’ evidence has been
gathered to warrant a legal truth claim about the [law’s] meaning.”172 And though such
standards may bear some correlation with a judge’s interpretive methodology, they may be
linked more closely to other aspects of a judge’s judicial philosophy.173 Whatever their standard
for proving the law, there will inevitably be cases in which judges conclude that the law unclear.
If the statute fails to provide a solution—if the law runs out—then courts must proceed to Step
Two, the topic of the next Section.

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171 For a similar example, see Note, supra note 19, at 1698. Justice Scalia rejects the view that “ambiguity exists
only when the arguments for and against the various possible interpretations are in absolute equipoise.” Scalia,
supra note 3, at 520. His standard of proof is thus somewhere above 51%. “[N]othing in *Chevron* tells judges, even
in principle, where the threshold should be located.” Jacob E. Gersen & Adrian Vermeule, *Chevron as a Voting

*Chevron* imposes its own standard of proof by requiring that the statute be “clear” for the inquiry to end at Step One. See
JOHN F. MANNING & MATTHEW C. STEPHENSON, LEGISLATION AND REGULATION 836 (2010) (“*Chevron* cannot
mean that the reviewing court may defer to the agency only when the traditional tools of statutory construction
provide *no answer whatsoever* to the interpretive question . . . . *Chevron* instead must mean that a reviewing court
should defer to the agency if the application of the traditional tools of statutory construction fails to the supply a
*sufficiently clear* answer to the interpretive question.”). But clarity is what must be proved; how it must be proved,
including by what standard of proof, is a separate matter.

173 Cf. Frederick Liu, Book Note, *The Supreme Court Appointments Process and the Real Divide Between Liberals
conservatives lies in their views of the relative number of hard cases the Supreme Court hears.”).
B. *Chevron* Step Two: Making the Law

At Step Two, the possibility of deference finally enters the picture. As the Court explained in *Chevron*:

If . . . the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency’s answer is based on a permissible construction of the statute.\(^{174}\)

The Court stressed in a footnote that “[t]he court need not conclude that the agency construction was the only one it permissibly could have adopted to uphold the construction, or even the reading the court would have reached if the question initially had arisen in a judicial proceeding.”\(^{175}\) Rather, the agency construction must be upheld so long as it is among “permissible,”\(^{176}\) or “reasonable,”\(^{177}\) interpretations of the statute.

Though seemingly straightforward, Step Two, like Step One, warrants more explanation than the Court’s decision in *Chevron* provided. What would it mean for a court to “impose its own construction on the statute”? When is an interpretation of a statute “permissible”? Why is deference to “permissible” agency interpretations ever justified?

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


\(^{175}\) *Id.* at 843 n.11.

\(^{176}\) *Id.* at 843.

\(^{177}\) *Id.* at 844.
as that construction is one the court could have imposed on its own (i.e., is permissible). Such deference is justified by the fact that law-making in our democratic system is more legitimate when carried out by politically accountable agencies than by unelected judges.

1. “Impose Its Own Construction”

Having found the statute “silent or ambiguous,” the court cannot resolve the dispute by relying on the “intent of Congress” alone. Under such circumstances, *Chevron* explains, it “would be necessary in the absence of an administrative interpretation” for the court to “impose its own construction on the statute.”\(^\text{178}\) The Court’s diction is telling. “Impose” connotes an act of independent will, not faithful agency. The Court’s use of the word signals that the judicial role at Step Two is that of making the law, not that of merely applying it.

For a court to “impose its own construction on the statute” (“as would be necessary in the absence of an administrative interpretation”) is thus for it to fill a statutory gap by making law, just as a legislature would, based on its own beliefs and values. The Court in *Chevron* accurately characterized this gap-filling process as one of finding “a reasonable accommodation of manifestly competing interests,”\(^\text{179}\) echoing the positivist view that “a reasonable compromise between many conflicting interests” is all that can be achieved in hard cases.\(^\text{180}\) The Court even recognized that filling statutory gaps entails the exercise of a limited law-creating discretion, citing, in an often overlooked footnote, *The Spirit of the Common Law* by Roscoe Pound.\(^\text{181}\)

There, on the pages referenced by the Court, Pound discusses “the myriad cases in respect to which the lawmaker had no intention because he had never thought of them.”\(^\text{182}\) In such cases, Pound explains, “the courts, willing or unwilling, must to some extent make the law under the

\(^{178}Id.\text{ at } 843.
^{179}Id.\text{ at } 865.
^{180}\text{HART, supra note 22, at 132.}
^{181}*Chevron*, 467 U.S. at 843 n.10.
guise of interpretation.” By citing Pound, the Court implicitly acknowledged that judges make new law when they “impose [their] own construction” on a “silent or ambiguous” statute.184

2. “Permissible”/“Reasonable”

_Chevron_, of course, holds that a court need not “impose its own construction” when the “agency’s answer” to the statutory question presented “is based on a permissible construction of the statute.”185 What it means for a construction to be “permissible” (or equivalently, “reasonable”) has long puzzled scholars and jurists,186 but positivism brings clarity to the term. If Step Two is the law-making stage of a hard case, then a “permissible” construction is any construction the court itself could have imposed through exercise of its law-making discretion. As that discretion is limited by existing law,187 so, too, is the range of permissibility: A construction is “permissible” if and only if it fills a statutory gap without changing the law already made by Congress, as expressed in the statute’s clear terms; conversely, a construction is impermissible if and only if it is contrary to the application of existing law.188

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183 Id.
184 _Chevron_, 467 U.S. at 843.
185 Id. at 843.
186 See Levin, supra note 20, at 1260 (finding the “vagueness of the step two standard . . . troubling”); Sunstein, supra note 3, at 2104 (“The Supreme Court has given little explicit guidance for determining when interpretations will be found reasonable.”).
187 See supra notes 98-101 and accompanying text.
188 See Entergy Corp. v. Riverkeeper, Inc., 129 S. Ct. 1498, 1505 n.4 (2009) (“[S]urely if Congress has directly spoken to an issue then any agency interpretation contradicting what Congress has said would be unreasonable.”); Smiley v. Citibank (S.D.), N.A., 517 U.S. 735, 741 (1996) (explaining that when _Chevron_ deference applies, the agency “possess[es] whatever degree of discretion the ambiguity allows”); Clark Byse, _Judicial Review of Administrative Interpretation of Statutes: An Analysis of Chevron’s Step Two_, 2 _ADMIN. L.J._ 255, 256 n.10 (1988) (“[I]f the intent of Congress is clear, a nonconforming interpretation would necessarily be unreasonable.”). Understanding “permissible” and “reasonable” to describe interpretations that are not ruled out by the clear terms of the statute is consistent with their usage in the context of other canons of statutory construction. See, e.g., _Legal Servs. Corp. v. Velazquez_, 531 U.S. 533, 545 (2001) (“It is well understood that when there are two reasonable constructions for a statute, yet one raises a constitutional question, the Court should prefer the interpretation which avoids the constitutional issue.”). It is also consistent with their usage in the context of contract interpretation. See, e.g., _Universal Sales Corp. v. Cal. Press Mfg. Co._, 128 P.2d 665, 672 (Cal. 1942) (“[W]hen a contract is ambiguous, a construction given to it by the acts and conduct of the parties with knowledge of its terms, before any controversy has arisen as to its meaning, is entitled to great weight, and will, when reasonable, be adopted and enforced by the court.”); _State v. Home Indem. Co._, 486 N.E.2d 827, 829 (N.Y. 1985) (“If . . . the language of the insurance contract is ambiguous and susceptible of two reasonable interpretations, the parties may submit extrinsic evidence as an aid
Given that the “intent of Congress” delimits what is “permissible,” traditional legal materials, such as the text, history, and purpose of the statute, are just as relevant at Step Two as they are at Step One. From a positivist perspective, however, the two steps remain distinct.\(^{189}\) Properly understood, Step One is an exercise in law-applying; the question is whether existing law provides an answer to the statutory question presented. Step Two, by contrast, is an evaluation of law-making; the question is whether existing law requires an answer different from that provided by the agency. The distinction is more than theoretical. The law may fail to provide a solution at Step One, and yet rule out the agency’s answer at Step Two.\(^{190}\) That is because the size of a statutory gap is never unlimited; even in hard cases, the law provides some guidance before running out. Thus, even when a gap has been left open by Congress, the agency’s construction may impermissibly fail to fit within it.\(^{191}\)

Some maintain that Step Two requires courts to do more than determine whether an agency construction is contrary to the “intent of Congress.” In their view, a construction is “permissible” (or “reasonable”) only if it is also the product of a reasoned decisionmaking process.\(^{192}\) Accordingly, they regard Step Two as something akin to “arbitrary” and “capricious”

\(^{189}\) J.M. Davidson, Inc. v. Webster, 128 S.W.3d 223, 229 (Tex. 2003) (“A contract is ambiguous if it can be given a definite or certain legal meaning. On the other hand, if the contract is subject to two or more reasonable interpretations after applying the pertinent rules of construction, the contract is ambiguous, creating a fact issue on the parties’ intent.”) (citation omitted).

\(^{190}\) Contra Levin, supra note 20, at 1261 (questioning why “the second step is not superfluous”); Stephenson & Vermeule, supra note 20, at 599 (arguing that Chevron’s two steps are “mutually convertible”).


\(^{192}\) See K Mart Corp. v. Cartier, Inc., 486 U.S. 281, 318 (1988) (Scalia, J., concurring in part and dissenting in part) (“The authority to clarify an ambiguity in a statute is not the authority to alter even its unambiguous applications . . . .”). That the two steps are distinct and serve different purposes is not to say that a court could not proceed directly to Step Two. See Entergy, 129 S. Ct. at 1505 n.4.

\(^{189}\) See sources cited supra note 21. There is some support for this view in the Supreme Court’s opinions. See United States v. Mead, 533 U.S. 218, 229 (2001) (citing the APA’s “arbitrary” and “capricious” standard in its exposition of Step Two); Rust v. Sullivan, 500 U.S. 173, 183-87 (1991) (conflating “arbitrary” and “capricious” review with Step Two’s “permissibility” analysis).
review under the APA, which requires courts to take a “hard look” at the reasoning behind an agency’s exercise of policy discretion. In applying such review at Step Two, courts would be authorized to reject agency constructions on grounds that the agency failed to consider the relevant factors adequately or failed to “articulate a satisfactory explanation for its action.”

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

3. **Why Defer?**

The test of permissibility thus boils down to whether the agency construction is contrary to existing law. If it is, then it is impermissible, for the law-making discretion of the agency, no less than that of the court, is constrained by the law already created by Congress. If it is not, then it is permissible, for it is a construction the court itself could have imposed on the statute. But if it is true that the discretion of the agency is no greater than that of the court, then what is the

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195 *id.* at 43.
196 See Levin, *supra* note 20, at 1270; Stephenson & Vermeule, *supra* note 20, at 602-03.
197 HART, *supra* note 22, at 273.
198 Stephenson & Vermeule, *supra* note 20, at 603.
point of deference anyway? Why should courts defer to the judgment of agencies in filling gaps in the law, when they could fill those gaps using their own judgment?

Positivism places this question of institutional choice—of whose statutory constructions should prevail—in its proper context. For if Step Two corresponds to the second stage of the judicial process, then the question is not which institution should prevail in applying the law, which by then has run out. Rather, the question is which institution should prevail in making the law, to fill the gap left open. When the issue is framed in these terms, considerations of legitimacy naturally come to the fore. In a democracy such as ours, we expect the law to be made by the people and their elected representatives. The prospect of judicial law-making threatens this ideal, for federal judges are not popularly elected. Nor of course are heads of federal agencies, but they at least are subject to political control, particularly through supervision by the President.\textsuperscript{199} In light of democratic principles, this “link to the electorate” gives agency law-making a measure of legitimacy that judicial law-making lacks.\textsuperscript{200} Thus, by deferring to an agency’s permissible construction of a statute, a court allows statutory gaps to be filled by a more legitimate source of law-making power. \textit{Chevron} emerges as a doctrine of judicial self-restraint, grounded in the recognition that, as members of the “least accountable” branch,\textsuperscript{201} judges should avoid acting as legislators as much as possible.\textsuperscript{202}

\textsuperscript{199} Farina, \textit{supra} note 4, at 466.
\textsuperscript{200} Id.
\textsuperscript{201} Id.
\textsuperscript{202} Others have argued that \textit{Chevron} is best understood as a doctrine of judicial self-restraint, though without grounding the doctrine in the notion of hard cases. See Maureen B. Callahan, \textit{Must Federal Courts Defer to Agency Interpretations of Statutes?: A New Doctrinal Basis for Chevron U.S.A. v. Natural Resources Defense Council}, 1991 Wis. L. Rev. 1275, 1289 (1991); Mark Seidenfeld, \textit{Chevron’s Foundation}, 86 Notre Dame L. Rev. 273, 292 (2011); Note, \textit{Justifying the Chevron Doctrine: Insights from the Rule of Lenity}, 123 Harv. L. Rev. 2043, 2056 (2010). Others have also argued that \textit{Chevron} deference is best justified by the relative legitimacy of agency policymaking, though without situating the doctrine within positivist theory. See, \textit{e.g.}, Manning, \textit{supra} note 3, at 626; Seidenfeld, \textit{supra}, at 289-90; Note, \textit{supra}, at 2056.
This legitimacy-based justification for deference finds support in *Chevron* itself. There, the Court recognized that agencies may be more capable policy-makers than courts, particularly when “the regulatory scheme is technical and complex” and “[j]udges are not experts in the field.” But in justifying judicial deference to agency statutory constructions, the Court devoted “far greater emphasis” to the recognition that agencies are more legitimate policy-makers, given that judges “are not part of either political branch of the Government.” The Court noted that “[w]hile agencies are not directly accountable to the people,” they are answerable to a Chief Executive who is. And as “it is entirely appropriate for [the Chief Executive] to make . . . policy choices,” the Court explained, an agency may “properly rely upon the incumbent administration’s views of wise policy to inform its judgments.” Thus, the Court concluded:

> When a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency’s policy, rather than whether it is a reasonable choice within a gap left by Congress, the challenge must fail. In such a case, federal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do.

As the Court recognized, this legitimacy-based rationale is hardly trivial. “The responsibilities for assessing the wisdom of . . . policy choices and resolving the struggle between competing views of the public interest are not judicial ones,” the Court explained,

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

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

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

206 *Id.*

207 *Id.*

208 *Id.* at 866; *see also id.* at 864 (stating that arguments over policy “are more properly addressed to legislators or administrators, not judges”).
because “‘[o]ur Constitution vests such responsibilities in the political branches.’”\textsuperscript{209} That the law is more legitimately made by agencies than by courts is a consequence not only of democratic theory, but also of constitutional structure.\textsuperscript{210} It is thus simply wrong to assert that “conceiving of \textit{Chevron} as a judge-made norm robs it of much of its normative force.”\textsuperscript{211} Not unlike other canons of construction, such as the so-called federalism canons\textsuperscript{212} or the rule of lenity,\textsuperscript{213} \textit{Chevron} has a constitutional underpinning.

To say that \textit{Chevron} is constitutionally inspired,\textsuperscript{214} however, is not to say that it is constitutionally required.\textsuperscript{215} If \textit{Chevron} has the status of a judge-made doctrine, then its regime of deference can be overridden by Congress at any time. Congress could adopt a blanket rule requiring courts to impose their own construction on a statute in any case of ambiguity.\textsuperscript{216} Or, instead of abolishing deference across the board, Congress could eliminate it on a statute-by-statute basis by specifying, for instance, “that in all suits involving interpretation or application of the Clean Air Act the courts [a]re to give no deference to the agency’s views, but [a]re to

\textsuperscript{209}Id. at 866 (emphasis added) (quoting TVA v. Hill, 437 U.S. 153, 195 (1978)); see also U.S. CONST. art. I, § 1 (vesting “[a]ll legislative Powers herein granted” in Congress); id. art. I, § 7 (giving the President the power to veto legislation passed by Congress); id. art. II, § 2 (giving the President the “Power, by and with the Advice and Consent of the Senate, to make Treaties”); id. art. II, § 3 (giving the President the power to “recommend to [Congress’s] Consideration such Measures as he shall judge necessary and expedient”).

\textsuperscript{210}See Manning, supra note 3, at 625 (“\textit{Chevron} deference rests . . . on premises of constitutional derivation.”).

\textsuperscript{211}Merrill & Hickman, supra note 3, at 869.

\textsuperscript{212}See \textit{Gregory v. Ashcroft}, 501 U.S. 452, 461 (1991) (holding that an intent to “upset the usual constitutional balance of federal and state powers” will not be attributed to Congress unless Congress makes that intent “unmistakably clear in the language of the statute” (internal quotation marks omitted)).

\textsuperscript{213}See Dan M. Kahan, \textit{Lenity and Federal Common Law Crimes}, 1994 Sup. Ct. Rev. 345, 345 (noting that the rule of lenity is “considered essential to securing a variety of values of near-constitutional stature,” such as fair notice and legislative supremacy).


\textsuperscript{215}Douglas Kmiec and Richard Pierce have each come close to arguing that separation of powers principles mandate judicial deference to agency policy decisions. See Douglas W. Kmiec, \textit{Judicial Deference to Executive Agencies and the Decline of the Nondelegation Doctrine}, 2 ADMIN. L.J. 269, 286 (1988) (“\textit{Panama Refining Corp.} and \textit{Chevron} cannot both be right. If expansively worded delegations of legislative authority are permissible, interpretations made in pursuit of that authority merit judicial deference.”); Richard J. Pierce, Jr., \textit{Reconciling Chevron and Stare Decisis}, 85 GEO. L.J. 2225, 2227 (1997) (“\textit{Chevron} is one of the most important constitutional law decisions in history, even though the opinion does not cite any provision of the Constitution.”).

\textsuperscript{216}See Silberman, supra note 3, at 824 (“Congress could reverse \textit{Chevron}’s presumption generically by amending the Administrative Procedure Act (APA).”).
determine the issue de novo.”

Justice Scalia is surely correct that there is no “constitutional impediment” to Congress doing any of these things. “It is generally assumed that common-law rules are subordinate to rules of positive legislation,” and *Chevron* is no different in this respect from any other judge-made, common-law doctrine. The authority to decide hard cases may be part of the judicial power, but it is still subject to constraints imposed by Congress.

**C. Solving *Chevron*’s Puzzles**

The preceding Sections sought to apply the teachings of positivism to the workings of the *Chevron* doctrine. They argued that Step One corresponds to the law-applying stage of the positivist’s process of decision, and that Step Two corresponds to the law-making stage. And they showed how viewing *Chevron* in these terms answers recurring questions about the doctrine’s application—about the object of the Step One inquiry, and the tools for conducting it; about when a statute is “clear,” and when it is “ambiguous”; about when an agency construction is “permissible,” and when a court must “impose its own construction on the statute”; and about the reasons for accepting an agency construction at Step Two.

This Section moves beyond the intricacies of the two-step inquiry to consider questions about judicial deference more generally. It examines three familiar puzzles about the soundness of such deference: (1) whether *Chevron* is consistent with Article III of the Constitution; (2) whether it “asks judges to develop a cast of mind that often is psychologically difficult to maintain”; and (3) whether it results in a “paradox” because judges must defer to agencies

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218 *Id.* at 516; *see also* Silberman, *supra* note 3, at 824 (“As Justice Scalia has observed, for any given statute, Congress could rebut *Chevron*’s presumption—that ambiguous statutes should be interpreted by the agency rather than the judiciary—by stripping the agency of deference.”).
whose interpretive methods differ sharply from their own.\(^{221}\) This Section shows how conceiving of *Chevron* as a doctrine of hard cases solves these puzzles.

1. *Marbury’s Instructions*

While some scholars have suggested that the *Chevron* doctrine is constitutionally required, others have questioned whether it is even constitutionally permissible. Article III of the Constitution vests the “judicial Power” in “one supreme Court, and in such inferior Courts as Congress may from time to time ordain and establish.”\(^{222}\) Construing the scope of this power in *Marbury v. Madison*, Chief Justice Marshall famously declared that “[i]t is emphatically the province and duty of the Judicial Department to say what the law is.”\(^{223}\) Some believe *Chevron* stands for something altogether different and seemingly irreconcilable: “that in the face of ambiguity, it is emphatically the province of the executive department to say what the law is.”\(^{224}\) In their view, *Chevron* is “a kind of counter-*Marbury,*”\(^{225}\) a doctrine fundamentally at odds with the understanding that “[t]he interpretation of the laws is the proper and peculiar province of the courts.”\(^{226}\)

When *Chevron* is understood as a doctrine of hard cases, however, any tension with *Marbury* disappears. *Chevron* mandates deference to agency constructions of law only when a statute is “silent or ambiguous,” and in positivist terms, a statute is “silent or ambiguous” only when the law runs out before providing a solution to the dispute. Thus, under a positivist

\(^{221}\) Mashaw, *supra* note 27, at 504.

\(^{222}\) U.S. CONST. art. III, § 1.

\(^{223}\) Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

\(^{224}\) Sunstein, *supra* note 7, at 2589 (emphasis added); see also Henry P. Monaghan, *Marbury and the Administrative State*, 83 COLUM. L. REV. 1, 2 (1983) (“Marshall’s grand conception of judicial autonomy in law declaration was not in terms or in logic limited to constitutional interpretation, and taken at face value seemed to condemn the now entrenched practice of judicial deference to administrative construction of law.”); William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan*, 96 Geo. L.J. 1083, 1160 (2008) (“If Chevron is a revolution, it is one seeking to overturn . . . almost two centuries of constitutional understandings.”); Scalia, *supra* note 3, at 513 (“[O]n its face the suggestion [that courts should defer to an executive agency on a question of law] seems quite incompatible with Marshall’s aphorism . . . .”).

\(^{225}\) Sunstein, *supra* note 7, at 2589.

\(^{226}\) THE FEDERALIST NO. 78, *supra* note 48, at 525.
conception of *Chevron*, deference enters the picture only when the court has done all it can to “say what the law is” but the law nevertheless fails to yield a single right answer. At that point, resolving the dispute becomes a matter not merely of applying the law but also of making it, and any deference by the court would extend only to the agency’s views of what the law should be. Properly understood, therefore, *Chevron* does not interfere with a court’s Article III duty to apply the law. The court remains obliged to reject any agency construction that conflicts with the application of existing law, and the scope of judicial deference remains confined to the making of new law by the agency in hard cases.227

Of course, conceiving of *Chevron* as a doctrine of hard cases raises the separate question whether federal courts have the authority to decide hard cases at all. History suggests that such authority was implicit in Article III’s grant of “judicial Power.”228 The framers of the Constitution recognized that the law would at times be ambiguous, and that such ambiguities would be left for the judiciary to resolve in the course of deciding individual cases.229 The founding generations even contemplated the use of judge-made doctrines to guide the exercise of judicial discretion in hard cases. As one such doctrine (albeit of relatively recent vintage), *Chevron* is no less a legitimate exercise of the “judicial Power” than, say, the rule of lenity,

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

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

229 See *The Federalist No. 37*, at 236 (James Madison) (Jacob E. Cooke ed., 1961) (“All new laws, though penned with the greatest technical skill, and passed on the fullest and most mature deliberation, are considered as more or less obscure and equivocal, until their meaning by liquidated and ascertained by a series of particular discussions and adjudications.”); Manning, *supra* note 148, at 88 n.340.
which was applied in the early Republic by Chief Justice Marshall himself.\textsuperscript{230} Indeed, \textit{Chevron} can be seen as “a modern successor to the rule of lenity,”\textsuperscript{231} given that both doctrines “require[] the judiciary to refrain from exercising political discretion in order to ensure that such discretion remains in the politically accountable branches,” be it the legislature (in the case of the rule of lenity) or the executive (in the case of \textit{Chevron}).\textsuperscript{232} Contrary to the assertions of some, there is no tension between \textit{Chevron} and the Constitution.\textsuperscript{233}

2. \textit{Breyer’s Psychology}

Justice Breyer was an early critic of the \textit{Chevron} doctrine. While a judge on the U.S. Court of Appeals for the First Circuit, he wrote an article advocating a “complex approach” to judicial deference under which courts would consider a “range of relevant factors” in deciding whether to defer to an agency.\textsuperscript{234} Insofar as \textit{Chevron} represented a “simpler approach,” mandating deference in all cases in which the agency offered a reasonable construction of the statute, Justice Breyer feared that its two-step inquiry was too rigid.\textsuperscript{235} In his view, one of the reasons “a strict view of \textit{Chevron}” could not “prove successful in the long run” was that:

such a formula asks judges to develop a cast of mind that often is psychologically difficult to maintain. It is difficult, after having examined a legal question in

\textsuperscript{230} See United States v. Wiltberger, 18 U.S. (5 Wheat.) 76, 95 (1820) (Marshall, C.J.); The Adventure, 1 F. Cas. 202, 204 (Marshall, Circuit Justice, C.C.D. Va. 1812) (No. 93); Note, \textit{supra} note 143, at 2055-56.

\textsuperscript{231} Note, \textit{supra} note 143, at 2054.

\textsuperscript{232} \textit{Id.} at 2056.

\textsuperscript{233} Nor is there any tension between \textit{Chevron} and the APA, which provides that a “reviewing court shall decide all relevant questions of law, [and] interpret . . . statutory provisions.” 5 U.S.C. § 706 (2006). Some have argued that the APA requires courts to resolve statutory ambiguities on their own, without deferring to agency views. See Duffy, \textit{supra} note 4, at 193 (“\textit{Chevron} was an APA case, so any attempt to justify its rule should begin the APA. The doctrine runs into trouble immediately.”); Eskridge & Baer, \textit{supra} note 224, at 1160 (“If \textit{Chevron} is a revolution, it is one seeking to overturn the APA . . . .”); Merrill & Hickman, \textit{supra} note 3, at 868 (“If \textit{Chevron} is a judicially developed norm, it is particularly difficult to explain why the doctrine supersedes the instruction in the APA that courts are to ‘decide all relevant questions of law.’”); Cass R. Sunstein, \textit{Chevron Step Zero}, 92 Va. L. REV. 187, 196 (2006) (“[Section 706] seems to suggest that ambiguities must be resolved by courts and hence that the \textit{Chevron} framework is wrong.”). But the APA’s requirement of independent judicial review extends only to questions of law-applying; accordingly, it does not preclude judicial deference on questions of law-making. \textit{Chevron} is consistent with the APA for the same reasons it is consistent with Article III.

\textsuperscript{234} Breyer, \textit{supra} note 3, at 373. The merits of Justice Breyer’s approach are considered in Part III, \textit{infra}.

\textsuperscript{235} \textit{Id.}
depth with the object of deciding it correctly, to believe both that the agency’s interpretation is legally wrong, and that its interpretation is reasonable. More often one concludes that there is a “better” view of the statute for example, and that the “better” view is “correct,” and the alternative view is “erroneous.”

It may be true that a judge would find it psychologically difficult to “believe both that the agency’s interpretation is legally wrong, and that its interpretation is reasonable.” Viewed as a doctrine of hard cases, however, Chevron never asks judges to maintain such a cast of mind; it never asks judges to uphold as “reasonable” an agency construction they believe to be “legally wrong.” In positivist terms, an agency construction is “reasonable” only if it is consistent with application of existing law—which is to say, legally permissible. An agency construction is “unreasonable,” by contrast, only if it is ruled out by application of existing law—which is to say, legally wrong. For the positivist, then, a “reasonable” construction is never “legally wrong,” and a “legally wrong” interpretation is never “reasonable.” Furthermore, because deference is warranted only when the law is indeterminate, Chevron never requires a judge to defer to an agency construction contrary to his own view of the “correct” answer. If the judge believes the law provides such an answer, then his duty is to apply it at Step One, before even reaching the question of deference at Step Two. Justice Breyer’s psychology-based critique thus fails: Chevron does not require judges either to accept interpretations they believe legally wrong or to reject interpretations they believe legally right.

The doctrine does require judges to uphold constructions with which they disagree as a matter of policy—constructions they themselves would not impose on the statute if they were acting as legislators. Reframing Justice Breyer’s critique, one might ask whether it is psychologically difficult for judges to believe both that the agency’s construction is unwise policy and that it is legally permissible. But the distinction between law and policy is present in

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236 Id. at 379.
every case, not just in cases raising questions of deference. Judges must always strive to
distinguish their views of what the law is from their views of what the law should be. And
though at times they may be tempted to conflate the two, the challenge of keeping them separate
is simply part of the judicial role. As a doctrine of hard cases, Chevron asks judges merely to
respect a distinction they must always observe between applying the law and making it. If it is
too psychologically difficult to do so, then the problem lies not with Chevron, but with our
system of laws more generally.

3. Mashaw’s Paradox

In perhaps the first article to consider “administrative interpretation in its own right,”237
Professor Jerry Mashaw observes that “legitimate techniques and standards for agency statutory
interpretation diverge sharply from the legitimate techniques and standards for judicial statutory
interpretation.”238 He notes, for example, that it is appropriate for agencies to “[f]ollow
presidential directions” when construing statutes, but inappropriate for courts to do the same; it is
also acceptable for agencies to interpret statutes in light of the “contemporary political milieu,”
but not for courts to do likewise.239 These differences give rise to what Mashaw calls the
“paradox of deference”240: “How can a court’s determination of ‘ambiguity’ or ‘reasonableness’
at Chevron’s famous two analytical ‘steps’ be understood as deferential when that determination
emerges from the normative commitments and epistemological presumptions of ‘judging’ rather
than ‘administering’?”241

The paradox vanishes, however, when Chevron is understood as a doctrine of hard cases.

The positivist views courts and agencies as occupying different roles within the Chevron

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237 Mashaw, supra note 27, at 503.
238 Id. at 504.
239 Id. at 522 tbl.1.
240 Id. at 504.
241 Id. at 537-38.
framework. Courts have a single responsibility: to apply existing law. But the responsibilities of agencies are two-fold: Like courts, they must follow existing law, but in hard cases, they must also make new law. Given that the responsibilities of the two institutions differ, it should come as no surprise that their methods do as well. One would expect both courts and agencies to employ “traditional tools of statutory construction” when applying existing law. But surely such tools are ill suited to the task of law-making, the goal of which is to achieve “a reasonable accommodation of manifestly competing interests.” In fashioning new law, agencies should be guided by the methods of the legislator, not the methods of the judge.

Quite appropriately, then, most of the techniques that Mashaw identifies as appropriate for agencies (but not for courts) are ones associated with law-making. If agencies must occasionally make new law, then we should not be surprised when they “[f]ollow presidential directions” and “pay constant attention to [the] contemporary political milieu,” in order to ensure that their law-making reflects the popular will. The Court recognized as much in *Chevron*, when it stated that an agency could “properly rely upon the incumbent administration’s views of wise policy.” Nor should we be surprised when agencies fill statutory gaps with an eye to “insur[ing] hierarchical control over subordinates” or “mak[ing] the statutory scheme effective,” for those are the sort of things we would expect any responsible law-maker to do.

There is thus no paradox of deference. Indeed, if deference is to be justified at all, the perspectives of courts and agencies must differ. The real paradox would be if they did not. For what would be the point of deference if courts and agencies went about the task of statutory

243 *Id.* at 865.
244 Mashaw, *supra* note 27, at 522 tbl.1.
245 *Chevron*, 467 U.S. at 865.
247 *Id.* at 518 (internal quotation marks omitted).
construction in exactly the same way? Under *Chevron* as a doctrine of hard cases, deference is justified only because agencies are more legitimate law-makers than courts; and agencies have greater legitimacy precisely because they approach statutory construction from a different place in the constitutional order.

**D. Challenging the Conventional Wisdom**

The notion of hard cases not only elucidates *Chevron*’s two-step inquiry, but also solves longstanding puzzles about judicial deference generally. And yet, the conventional wisdom, as reflected in Supreme Court case law and academic commentary, is that *Chevron* rests instead on a presumption about congressional intent—a presumption that “a statute’s ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps.”\(^{248}\)

The conventional wisdom is not without some merit. By grounding deference in the commands of Congress, the congressional-intent theory eliminates any tension between *Chevron* and Article III.\(^{249}\) If deference rests on a congressional delegation of law-making authority to the agency, then by deferring to the agency, the court is “simply applying the law as ‘made’ by” Congress.\(^{250}\) To “say what the law is” is thus to say that the law commands deference. But this ability to reconcile *Chevron* with the Constitution is hardly unique; as explained above, the notion of hard cases accomplishes the same thing, though in a different fashion.

For the reconciliation to work, moreover, the delegation on which the congressional-intent theory is based must be grounded in reality. One must be able to say that Congress, aware of the potential for ambiguities in the laws it enacts, actually means for them to be resolved by

\(^{248}\) FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159 (2000); *see also* sources cited supra notes 2-3.

\(^{249}\) Manning, *supra* note 3, at 627 (“If the Court presumes that ambiguity is a delegation of interpretive discretion to the agency, then a reviewing court satisfies its *Marbury* obligation simply by accepting an agency’s reasonable exercise of discretion within the boundaries of the authority delegated by Congress.”).

\(^{250}\) Monaghan, *supra* note 224, at 28.
agencies. But “the evidence supporting the presumption that Congress generally intends agencies to be the primary interpreters of statutory ambiguities is weak.” No one seriously denies that the presumption about congressional intent is but a legal fiction created by the judiciary. And if the presumption is a judge-made fiction, then *Chevron* must necessarily be a judge-made doctrine, precisely as this Article argues.

Unlike the presumption about congressional intent, a theory of deference grounded in the notion of hard cases owns up to the fact that *Chevron* is a doctrine “developed by courts based on their own authority.” To explain *Chevron* as a doctrine of hard cases is to acknowledge that the law has limits; that when the law runs out, judges have no choice but to make new law to fill the gap; and that judicial deference is an exercise of that limited law-making discretion in hard cases. By tracing *Chevron* deference to its true source, this positivist account of the doctrine bears an important virtue that the congressional-intent theory lacks: intellectual honesty.

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

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

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

253 *See sources cited supra* note 7.

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

255 *Merrill & Hickman, supra* note 3, at 868.
answer is based on a permissible construction of the statute” is just another way of asking whether the court could have imposed the same construction through exercise of its limited law-making discretion. By contrast, the presumption about congressional intent tells us hardly anything about how clear is “clear,” when a construction is “permissible,” or other aspects of the two-step inquiry. It is little wonder, then, that such questions have continued to persist after all these years. Jeremy Bentham once said that it would be “foolish” to adhere to a legal fiction if “[w]hat you have been doing by the fiction” could have been done without it.256 Adhering to the conventional account of *Chevron* is even worse, because what we have been doing by the fiction could actually have been done better with a theory grounded in reality.

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

### III. IMPLICATIONS FOR *CHEVRON’S* DOMAIN

Prior to the Supreme Court’s decision in *Chevron*, judicial deference to agency constructions of law was contextual. When a statute expressly delegated authority to an agency “to define a statutory term or prescribe a method of executing a statutory provision,” deference was required.257 But in the absence of an express statutory delegation, deference “depended

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257 United States v. Vogel Fertilizer Co., 455 U.S. 16, 24 (1982) (internal quotation marks omitted); see also Batterton v. Francis, 432 U.S. 416, 425 (1977) (holding that because Congress “expressly delegated to the Secretary [of Health, Education, and Welfare] the power to prescribe standards for determining what constitutes ‘unemployment’ for purposes of [Title IV of the Social Security Act],” a reviewing court could not set aside the Secretary’s interpretation “simply because it would have interpreted the statute in a different manner”).
upon multiple factors that courts evaluated in light of the circumstances of each case." The Court’s decision in *Chevron* seemed to replace this multifactor analysis with a categorical rule mandating deference whenever a statute is ambiguous and an agency construction reasonable. By its terms, *Chevron* seemed to require courts to defer to *every* reasonable agency construction of *any* statutory ambiguity.

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

**A. Understanding *Chevron* Step Zero**

In their influential article on *Chevron*’s domain, Professors Thomas Merrill and Kristin Hickman coined the term “Step Zero” to describe the “inquiry that must be made in deciding whether courts should turn to the *Chevron* framework at all, as opposed to [a different] framework or deciding the interpretational issue de novo.” The necessity of a Step Zero

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258 Merrill & Hickman, *supra* note 3, at 833.
259 See Christensen v. Harris County, 529 U.S. 576, 589 n.9 (2000) (Scalia, J., concurring in part and concurring in the judgment) (reading *Chevron* to establish a blanket presumption that “ambiguities are to be resolved (within the bounds of reasonable interpretation) by the administering agency”).
261 Ironically, it was Justice Stevens, the author of the Court’s opinion in *Chevron*, who led early efforts to cabin *Chevron*’s domain. Sunstein, *supra* note 233, at 188 & n.2; see INS v. Cardoza-Fonseca, 480 U.S. 421, 446 (1987) (Stevens, J.) (suggesting that *Chevron* deference does not apply to “pure question[s] of statutory construction,” as distinguished from mixed questions of law and fact); Negusie v. Holder, 129 S. Ct. 1159, 1176 (2009) (Stevens, J., concurring in part and dissenting in part) (arguing in favor of “the narrower interpretation of *Chevron* endorsed by the Court in *Cardoza-Fonseca*”).
262 Almost immediately following its publication, the article was cited by the Supreme Court in *United States v. Mead Corp.*, 533 U.S. 218, 230 n.11 (2001).
263 Merrill & Hickman, *supra* note 3, at 836.
inquiry is far from obvious. Aren’t Steps One and Two sufficient by themselves to establish when *Chevron* deference is appropriate? No, according to Merrill and Hickman: “[I]f *Chevron* rests on a presumption about congressional intent, then *Chevron* should apply only where Congress would want *Chevron* to apply.”264 It is therefore not enough that the statute is ambiguous and the agency construction reasonable; Congress may have intended for courts to apply a different framework even when Steps One and Two are satisfied.

The trouble lies in the fact that “tangible evidence”265 of Congress’s intent regarding *Chevron*’s application will almost always be lacking. To be sure, “Congress has broad power to decide what kind of judicial review should apply to what kind of administrative decision.”266 But as already noted,267 “Congress so rarely discloses (or, perhaps, even has) a view on this subject as to make a search for legislative intent chimerical and a conclusion regarding that intent fraudulent in the mine run of cases.”268 As a result, the best a court can typically do is construct a “‘hypothetical’ congressional intent on the ‘deference’ question”269 based on “the practical features of the particular circumstance” and the court’s own judgment of whether judicial deference would “make[] sense” in light of them.270

That is the approach the Court took in *United States v. Mead Corp.*,271 the first case to address the Step Zero inquiry in detail. Justice Souter’s opinion for the Court in *Mead*, joined by all his colleagues except Justice Scalia, held that judges may infer that Congress intended

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264 *Id.* at 872.
267 See *supra* notes 5 and 7 and accompanying text.
269 Breyer, *supra* note 3, at 371; see also Breyer, *supra* note 76, at 106 (“It is quite possible that no member of Congress actually thought about the matter. But a judge can still ask how a reasonable member of Congress would have answered it had the question come to mind.”).
270 Breyer, *supra* note 3, at 370 (internal quotation marks omitted); see also Barron & Kagan, *supra* note 5, at 212 (“Because Congress so rarely makes its intentions about deference clear, *Chevron* doctrine at most can rely on a fictionalized statement of legislative desire, which in the end must rest on the Court’s view of how best to allocate interpretive authority.”).
Chevron to apply “when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law.” The Court noted that one “very good indicator” that Congress has delegated such authority is if the agency has the “power to engage in adjudication or notice-and-comment rulemaking.” “It is fair to assume generally,” the Court explained, “that Congress contemplates administrative action with the effect of law when it provides for a relatively formal administrative procedure tending to foster the fairness and deliberation that should underlie a pronouncement of such force.” The Court was quick to emphasize, however, that it has “sometimes found reasons for Chevron deference even when no such administrative formality was required and none was afforded.” Of the “variety of indicators that Congress would expect Chevron deference,” the Court stressed, the formality of the administrative action is only one.

The Court proceeded to identify other indicators in subsequent cases, beginning with Barnhart v. Walton. There, writing for the same eight-Justice majority as in Mead, Justice Breyer held that the agency construction at issue qualified for Chevron deference despite having been originally promulgated “through means less formal than ‘notice and comment’ rulemaking.” According to the Court, there were other factors—“the interstitial nature of the legal question, the related expertise of the Agency, the importance of the question to the administration of the statute, the complexity of that administration, and the careful consideration the Agency has given the question over a long period of time”—that made the construction

272 Id. at 226-27.
273 Id. at 229.
274 Id. at 230.
275 Id. at 231.
276 Id. at 237; see also id. at 227 ("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 comparable congressional intent.").
278 Id. at 221.
Chevron-eligible.\textsuperscript{279} Citing some of those same factors in \textit{Zuni Public School District No. 89 v. Department of Education}, the Court held that the \textit{Chevron} framework was applicable there as well.\textsuperscript{280} Writing again for the majority, Justice Breyer emphasized that “the matter at issue . . . [was] the kind of highly technical, specialized interstitial matter that Congress often does not decide itself, but delegates to specialized agencies to decide.”\textsuperscript{281}

Ironically, the effect of the Court’s Step Zero jurisprudence in \textit{Mead} and subsequent cases has been a return to the pre-\textit{Chevron} days, when the scope of judicial deference depended on the circumstances of each case. Having embraced \textit{Chevron}’s supposed origins in congressional intent, the Court has now embraced the search for such intent. And because such intent is for the most part a fiction, the search necessarily entails consideration of “various ‘practical’ circumstances”\textsuperscript{282}—chief among them “the interpretive method used [by the agency] and the nature of the question at issue.”\textsuperscript{283} The consequence is a substantial narrowing of \textit{Chevron}’s domain. Under \textit{Mead} and subsequent Step Zero cases, “‘interpretations contained in policy statements, agency manuals, and enforcement guidelines’ . . . are beyond the \textit{Chevron} pale.”\textsuperscript{284} So, too, apparently are “questions of major importance”\textsuperscript{285} and “central legal issues,”\textsuperscript{286} on the view that they are too far removed from “the kind of highly technical, specialized interstitial matter” Congress would presumably want an agency to decide.\textsuperscript{287}

\begin{itemize}
\item \textsuperscript{279}\textit{Id.} at 222.
\item \textsuperscript{280}550 U.S. 81, 89-90 (2007).
\item \textsuperscript{281}\textit{Id.} at 90.
\item \textsuperscript{282}Breyer, \textit{supra} note 3, at 372.
\item \textsuperscript{283}\textit{Barnhart}, 535 U.S. at 232.
\item \textsuperscript{284}United States v. Mead Corp., 533 U.S. 218, 234 (2001) (quoting Christensen v. Harris County, 529 U.S. 576, 587 (2000)).
\item \textsuperscript{285}BREYER, \textit{supra} note 76, at 107; \textit{see also} Gonzales v. Oregon, 546 U.S. 243, 267 (2006) (citing the “importance of the issue of physician-assisted suicide” in concluding that the Attorney General’s interpretation of the Controlled Substances Act to prohibit doctors from prescribing drugs for use in suicide was not \textit{Chevron}-eligible).
\item \textsuperscript{286}Negusie v. Holder, 129 S. Ct. 1159, 1172 (2009) (Stevens, J., concurring in part and dissenting in part) (citing \textit{Barnhart}, 535 U.S. at 222).
\item \textsuperscript{287}\textit{Zuni}, 550 U.S. at 90.
\end{itemize}
Conceiving of *Chevron* as a doctrine of hard cases entails a drastically different approach to Step Zero—an approach that would restore *Chevron*’s status as a categorical rule. Recall that *Chevron* as a doctrine of hard cases is grounded not in congressional intent, but in judicial self-restraint; and that the purpose of the doctrine, when so conceived, is not to enforce a congressional delegation of power to the agency, but to prevent an exercise of legislative power by the court. Given that purpose, it follows that *Chevron* should apply whenever the exercise of such power can be avoided by deference to a more legitimate law-maker—which is true in every case in which the statute is ambiguous and the agency construction reasonable. Conceived as a doctrine of hard cases, *Chevron* would contemplate deference whenever Steps One and Two are satisfied.

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

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288 *Cf.* Note, supra note 143, at 2063 (“Once *Chevron* is understood as a constitutional responsibility of the judiciary to avoid policymaking power, it makes little sense to limit deference only to those interpretations issued with the force of law.”). It is true that even if *Chevron* deference does not apply, the court must still review the agency construction under the doctrine set forth in *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). *See Mead*, 533 U.S. at 234. But *Skidmore* is itself a doctrine of discretion, which does nothing to constrain a court’s limited law-making discretion in hard cases. *See Skidmore*, 323 U.S. at 140 (holding that agency rulings should be given such weight as they have the “power to persuade”); *cf.* Kasten v. Saint-Gobain Performance Plastics Corp., No. 09-834, slip op. 7 n.6 (Mar. 22, 2011) (Scalia, J., dissenting) (“If one has been persuaded by another, so that one’s judgment accords with the other’s, there is no room for deferral—only for agreement. Speaking of *Skidmore* deference to a persuasive agency decision does nothing but confuse.”).
by whether the agency construction appears in a policy statement instead of a regulation, or whether the case concerns a major question rather than an interstitial one.\textsuperscript{289} When \textit{Chevron} is understood as a doctrine of hard cases, there is simply no reason to limit the scope of its domain on the basis of such “practical” considerations as the formality of the administrative action and the nature of the question at issue.

Understood as a doctrine of hard cases, therefore, \textit{Chevron} has only two steps.\textsuperscript{290} But while there is no place for a Step Zero, there is still need for an additional rule, implicit in any regime of judicial deference: a rule of recognition for agency constructions of law.\textsuperscript{291} After all, a court cannot defer to an agency construction under any doctrine without first identifying what that construction is. A rule of recognition for agency constructions would thus serve three purposes:

First, it would identify the criteria for determining which agency’s constructions are the ones that matter for the statute in question. Just as a law enacted by the General Assembly of Ohio would not qualify as a federal statute, a construction adopted by the Board of Immigration Appeals would not qualify as a construction of the Internal Revenue Code. An agency charged with administering one statute may lack authority to administer another.\textsuperscript{292} A rule of recognition would tell us whose constructions are relevant.

\textsuperscript{289} If anything, the relative illegitimacy of judicial law-making grows with the importance of issue. \textit{See} Sunstein, \textit{supra} note 233, at 233.
\textsuperscript{290} Professors Stephenson and Vermeule have argued that \textit{Chevron} has only one step. Stephenson & Vermeule, \textit{supra} note 20, at 597. Insofar as they mean that Steps One and Two are analytically indistinct, they are wrong. \textit{See supra} text accompanying notes 189-191.
\textsuperscript{291} For a discussion of rules of recognition generally, see \textit{supra} Section I.A.
\textsuperscript{292} It may even be the case that no agency is charged with administering a particular statute. \textit{See} Crandon v. United States, 494 U.S. 152, 177 (1990) (Scalia, J., concurring in the judgment) (explaining that a federal criminal statute “is not administered by any agency but by the courts”).
Second, a rule of recognition would specify the general characteristics that an administrative action must possess to count as the construction of the relevant agency. The import of an administrative action will frequently be obvious, but questions may arise regarding whether an action represents the authoritative position of the agency. What if, for instance, a construction was approved by the agency’s assistant director, but not by the director himself? Or what if a construction was advanced only in the course of litigation by the agency’s lawyers? By specifying certain criteria of administrative validity, a rule of recognition would establish whether such constructions should be attributed to the agency.

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

To get a sense of how a rule of recognition would function in practice, one need look no further than the opinions of Justice Scalia. Unlike the rest of his colleagues on the Court, Justice Scalia has rejected the notion that *Chevron* deference should be limited to agency constructions issued with the “force of law.” “[A]dher[ing] to the original formulation of *Chevron,*” he has maintained instead that deference should extend to “all authoritative agency interpretations

\[\text{See Hart, supra note 22, at 95.}\]
\[\text{Id.}\]
\[\text{See United States v. Mead Corp., 533 U.S. 218, 241 (2001) (Scalia, J., dissenting) (criticizing the Court’s Step Zero holding as “neither sound in principle nor sustainable in practice”).}\]
\[\text{Id. at 256.}\]
of the statutes [that agencies] are charged with administering.” An interpretation is “authoritative,” according to Justice Scalia, if it “represent[s] the judgment of central agency management, approved at the highest levels.” And the purpose of that limitation, Justice Scalia has explained, is to ensure that “it is truly the agency’s considered view, [and not] the opinions of some underlings, that are at issue.” By identifying an agency construction as valid based on whether it is the authoritative construction of the agency charged with administering the statute, Justice Scalia’s rule meets the very definition a rule of recognition. Of course, his is not the only possible rule of recognition for agency constructions of law; nor is his rule, as currently expressed in his opinions, as developed as it could be. But unlike the rule developed by the Court in *Mead* and subsequent Step Zero cases, Justice Scalia’s rule is at least consistent with *Chevron* as a doctrine of hard cases.

Finally, a note about timing: As the name “Step Zero” suggests, scholars have generally thought of the Step Zero inquiry as occurring before Step One. Merrill and Hickman, for their part, have referred to the inquiry as a “threshold issue.” On a positivist reading of *Chevron*, however, Step One is simply the ordinary, law-applying stage of any case of statutory interpretation, regardless of whether an agency construction is available. Only if the law runs

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297 *Id.* at 241.
298 *Id.* at 258 n.6; see also *id.* at 257 (stating that an agency construction is “authoritative” if it “represents the official position of the agency”).
299 *Id.* at 258 n.6.
300 This despite the fact that Justice Scalia accepts the conventional wisdom that *Chevron* is grounded in a presumption about congressional intent. *See Mead*, 533 U.S. at 241, 256-57 (Scalia, J., dissenting). In light of his rejection of the Court’s Step Zero jurisprudence, Justice Scalia has been said to favor “nearly unlimited deference” to agencies. Barron & Kagan, *supra* note 5, at 212. But that is not true, given the relative infrequency with which he finds a statute ambiguous at Step One. *See Scalia*, *supra* note 3, at 521. In fact, Justice Scalia was the least deferential of the Justices, according to a study of Supreme Court cases decided between 1989 and 2005. Miles & Sunstein, *supra* note 170, at 825-26.
301 Merrill & Hickman, *supra* note 3, at 848.
out is judicial deference—of any type—even a possibility.\textsuperscript{302} There is thus no need to ask whether an agency construction was issued with the “force of law,” or even whether it represents the authoritative position of the agency, until after Step One.\textsuperscript{303} And indeed, that is when the Court has at times conducted the inquiry.\textsuperscript{304} At a minimum, then, Step Zero should be renamed Step One-and-One-Half.\textsuperscript{305} But it would be even better if Step Zero were discarded altogether.

\textbf{B. Understanding the Relationship Between \textit{Chevron} and Other Canons}

For centuries, courts have applied various rules of construction in interpreting statutes. The relationship between these canons and judicial deference is “one of the most uncertain aspects of the \textit{Chevron} doctrine,”\textsuperscript{306} and grounding \textit{Chevron} in a presumption about congressional intent has brought little enlightenment. Of course, \textit{Chevron} itself directs courts to “employ[] traditional tools of statutory construction” in “ascertain[ing] [whether] Congress has an intention on the precise question at issue.”\textsuperscript{307} That “would seem to support reliance on at least some canons of construction” at Step One.\textsuperscript{308} But which canons? And what happens to \textit{Chevron}’s domain when application of a canon would rule out an agency construction that would otherwise be deemed permissible at Step Two? Should the canon displace judicial deference, or vice versa?

\textsuperscript{302} Accord Kristin E. Hickman & Matthew D. Krueger, \textit{In Search of the Modern Skidmore Standard}, 107 COLUM. L. REV. 1235, 1247 (2007) (“\textit{B}ecause a reviewing court will not defer to an agency under either doctrine if the statute’s meaning is clear, the \textit{Skidmore} standard implicitly replicates \textit{Chevron}’s first step.”).

\textsuperscript{303} Put differently, when the statute’s meaning is clear, the choice among \textit{Chevron}, \textit{Skidmore}, or some other standard is moot—which probably explains why, in the majority of cases the Court hears in which an agency construction is available, the Court declines to invoke any deference regime whatsoever. Eskridge & Baer, \textit{supra} note 224, at 1100 (reporting that no deference regime was invoked in 53.6\% of the cases involving an agency interpretation that the Court heard between 1984 and 2006); \textit{see also} Sunstein, \textit{supra} note 233, at 191 (“\textit{M}any cases can be decided without resolving the Step Zero question; in such cases, it will not matter whether \textit{Chevron} deference is applied.”).

\textsuperscript{304} \textit{See} Mayo Found. for Medical Educ. & Research v. United States, No. 09-837, slip op. 7-12 (Jan. 11, 2011); Barnhart v. Walton, 535 U.S. 212, 221-22 (2002).


\textsuperscript{306} Bradley, \textit{supra} note 3, at 675; \textit{see also} Nelson, \textit{supra} note 4, at 348 (“\textit{W}ith a few notable exceptions, . . . legal scholars have spent little time trying to dispel the uncertainty.” (footnote omitted)).


\textsuperscript{308} Bradley, \textit{supra} note 3, at 676.
In answering these questions, some scholars have found it useful to discuss the canons in terms of their traditional categorization into two types: textual canons, which function as “guidelines for evaluating linguistic or syntactic meaning,” and substantive (or normative) canons, “rooted in broader policy or value judgments.” When the canons are viewed through the lens of legal positivism, however, a different typology emerges, consisting of three categories: law-applying canons, which help courts discern meaning already existing in a statute; ambiguity-creating canons, which create ambiguity where a statute would otherwise be clear; and law-making canons, which guide courts’ exercise of discretion in the face of statutory ambiguity. This Section explains these categories and their relationship to Chevron as a doctrine of hard cases.

1. Law-Applying Canons

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

All of the so-called textual canons qualify as law-applying canons. “[A]imed at identifying the intended meaning of statutory language,” textual canons help courts apply the

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309 See, e.g., Bamberger, supra note 14, at 71-76.
310 ESKRIDGE, FRICKEY & GARRETT, supra note 80, at 341.
311 Id. at 342.
312 Chevron, 467 U.S. at 842. Of course, the extent to which the law-applying canons can give content to the law is limited. As H.L.A. Hart recognized, “[c]anons of ‘interpretation’ cannot eliminate, though they can diminish, [the law’s open texture]: for these canons are themselves general rules for the use of language, and make use of general terms which themselves require interpretation.” HART, supra note 22, at 126.
313 Nelson, supra note at 4, at 349; see also Bamberger, supra note 14, at 72 (“[T]extual canons offer tools for deciphering evidence of statutory meaning supplied by Congress itself . . . .”).
law. Examples include the plain meaning rule, the canons of word association, the canons of negative implication, the grammar and punctuation rules, and the whole act rule.\textsuperscript{314} Consistent with their law-applying function, such canons are regularly invoked by courts at Step One.\textsuperscript{315}

What about the so-called substantive canons? At first glance, most substantive canons would seem to fit the “law-applying” description. Most are premised, after all, on a presumption about congressional intent.\textsuperscript{316} The canon of constitutional avoidance, for example, has been described by the Court as rooted in “the presumption that Congress did not intend a [statutory meaning] which raises constitutional doubts”; the Court has thus referred to the canon as “a means of giving effect to congressional intent.”\textsuperscript{317} But the presumptions underlying substantive canons are widely regarded as fictions, even in the case of the avoidance canon: As Professor John Manning has noted, “virtually no one (except the Supreme Court Justices) views [the rationale for avoidance] as resting upon a plausible account of what a rational legislator would intend.”\textsuperscript{318} It follows that substantive canons “do not really help a court ascertain whether

\textsuperscript{314} ESKRIDGE, FRICKEY & GARRETT, supra note 80, app., at 389-90.
\textsuperscript{315} Nat’l Credit Union Admin. v. First Nat’l Bank & Trust Co., 522 U.S. 479, 501 (1998) (invoking the canon that “similar language contained within the same section of a statute must be accorded a consistent meaning”); MCI Telecomms. Corp. v. AT&T Co., 512 U.S. 218, 225-28 (1994) (relying on the plain meaning of a statutory term as reflected in relevant dictionaries); Dole v. United Steelworkers of Am., 494 U.S. 26, 36 (1990) (invoking the canon, known as noscitur a sociis, that “words grouped in a list should be given related meaning” (internal quotation marks omitted)); see also Bradley, supra note 3, at 675 (“[T]he Court regularly applies text-oriented canons in determining whether Congress has spoken to an issue under Step One of \textit{Chevron}.”); Nina A. Mendelson, \textit{Chevron} and \textit{Preemption}, 102 MICH. L. REV. 737, 745 (2004) (“[C]ourts generally have applied rules of syntax in preference to agency interpretations on the ground that the syntax rules represent traditional tools of statutory construction by which courts can discern whether Congress has directly answered a statutory question under \textit{Chevron} Step One.”).
\textsuperscript{316} See Bamberger, supra note 14, at 73-74 (noting that normative canons are “often framed in terms of fictions about legislative intent”).
\textsuperscript{318} John F. Manning, \textit{Clear Statement Rules and the Constitution}, 110 COLUM. L. REV. 399, 419 n.108 (2010); see also HENRY J. FRIENDLY, BENCHMARKS 210 (1967) (“It does not seem in any way obvious, as a matter of construction, that the legislature would prefer a narrow construction which does not raise constitutional doubts to a broader one which does raise them.”); William K. Kelley, \textit{Avoiding Constitutional Questions as a Three-Branch Problem}, 86 CORNELL L. REV. 831, 854 (2001) (“It is certainly true that the system presumes that Congress intends to act constitutionally . . . . It is quite a different point, however, to assume that Congress would want its work to be interpreted as not even approaching the constitutional line.”); Frederick Schauer, \textit{Ashwander Revisited}, 1995 SUP. CT. REV. 71, 92 (“[T]here is no evidence whatsoever that members of Congress are risk-averse about the possibility that legislation they believe to be wise policy will be invalidated by the courts.”).
Congress has spoken to an issue.”

Most are designed instead “to guide judges when the available information about intended meaning has run out.” Thus, with a few exceptions discussed in the next section, substantive canons are strictly law-making in nature, not appropriately invoked at Step One.

2. Ambiguity-Creating Canons

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

The best example of an ambiguity-creating canon is the absurd results canon (also known as the absurdity doctrine), which holds that “judges may deviate from even the clearest statutory text when a given application would otherwise produce ‘absurd’ results.”

Green v. Bock Laundry Machine Co. illustrates how the canon can create ambiguity. At issue in Bock Laundry was former Federal Rule of Evidence 609(a)(1), which governed the admission of evidence for attacking the credibility of a witness. The rule provided that evidence of a witness’s prior felony convictions “shall be admitted” for that purpose, but only if the trial court determines that the “probative value of admitting [the] evidence outweighs its prejudicial effect

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319 Bradley, supra note 3, at 676.
320 Nelson, supra note at 4, at 349; see also Mendelson, supra note 315, at 746 (“Substantive presumptions or canons really represent a judicial resolution of a statutory question where the evidence of what Congress meant is unclear.”).
321 Contra Morales-Izquierdo v. Gonzales, 486 F.3d 484, 504 (9th Cir. 2007) (en banc) (Thomas, J., dissenting) (arguing that the avoidance canon is “properly applied at step one of the Chevron analysis” because “the canon is unquestionably a ‘traditional tool of statutory interpretation’”).
322 Manning, supra note 140, at 2388.
to the *defendant*." All nine Justices agreed that the rule could not mean what it said given the "odd" result it would produce in civil cases: Civil defendants would always be able to impeach a civil plaintiff’s witnesses with evidence of their prior felony convictions, because such evidence could never be shown to prejudice the defendant. Having eliminated the most straightforward reading of the rule as absurd, the Justices were left with a hard case: If “defendant” could not mean literally *any* defendant, including a defendant in a civil case, then what did it mean? The Justices disagreed about how this canon-created ambiguity should be resolved. Whereas a majority decided to interpret “defendant” to mean “criminal defendant,” such that “only the accused in a criminal case should be protected from unfair prejudiced by the balance set out in Rule 609(a)(1),” a minority would have interpreted “defendant” to require “the trial court to consider the risk of prejudice faced by *any* party.” Of course, the Court lacked the benefit of an agency construction in *Bock Laundry*, but had such a construction been available and permissible, the Court could have simply deferred to it. Given the possibility of deference that application of the absurd results canon can create, it makes sense for courts to apply the canon at Step One before concluding that the “intent of Congress” is dispositive.

Ambiguity-creating canons also include a subset of substantive canons known as clear statement rules. Clear statement rules provide that a statute shall not be construed to have a

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325 *Bock Laundry*, 490 U.S. at 509-10; see *id.* at 527 (Scalia, J., concurring in the judgment); *id.* at 530 (Blackmun, J., dissenting).
326 See *id.* at 511 (majority opinion) (discussing the alternative meanings of “defendant”); *id.* at 529 (Scalia, J., concurring in the judgment) (same).
327 *Id.* at 524 (majority opinion); *see id.* at 529 (Scalia, J., concurring in the judgment).
328 *Id.* at 530 (Blackmun, J., dissenting) (emphasis added).
329 Accord Scalia, *supra* note 3, at 515. In addition to employing the absurd results canon to create an ambiguity, courts could invoke the canon to rule that an otherwise permissible agency construction is absurd. The latter use of the canon, however, would make little sense. That a construction has been adopted by an agency should be conclusive evidence that it is *not* absurd. See Sunstein, *supra* note 3, at 2117 (“[T]he court ought to be especially cautious in attributing irrationality or absurdity to the agency’s view. It is the agency that is most likely to be in a good position to know whether the application, taken in the context of the statutory scheme as a whole, is in fact irrational or absurd.”).
particular meaning unless that meaning is unequivocally expressed in the text of the statute itself. An example is the federalism canon, which holds that “if Congress intends to alter the usual constitutional balance between the States and the Federal Government, it must make its intention to do so unmistakably clear in the language of the statute.” From a positivist perspective, clear statement rules can be viewed as working in two steps. The first is the creation of ambiguity. A clear statement rule raises the standard for proving that a statute has a particular meaning by demanding the clearest of evidence: an unequivocal expression in the statutory text. A judge, operating under his usual standard of proof, may attribute that meaning to the statute even in the absence of such evidence. But because of the clear statement rule, the judge may no longer do so; his preferred reading of the statute—the one he considers uniquely correct—may not satisfy the rule’s heightened standard of proof. What was once a clear statute is thus made ambiguous. The ambiguity is short-lived, however, because a clear statement rule moves imperceptibly to its second, law-making step, where it resolves the ambiguity by disfavoring a particular interpretation of the statute (e.g., an interpretation that alters the usual federal-state balance). Thus, despite creating ambiguity, clear statement rules rarely, if ever, create opportunities for judicial deference. Indeed, they can also be described as law-making canons, the topic of the next section.

3. Law-Making Canons

Law-making canons correspond to the second stage of the positivist’s process of decision. Their application presupposes the existence of a hard case in which the statute is silent or ambiguous on a point of law. When such a case arises, law-making canons guide the court’s

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331 For a discussion of standards of proof for legal arguments, see supra notes 171-172 and accompanying text.
exercise of its limited law-making discretion, thus allowing the statutory gap to be filled in a predictable, rule-like way.

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

The relationship between *Chevron* and other law-making canons remains “unsettled,” but conceiving of *Chevron* as a doctrine of hard cases focuses the inquiry on the right question. A hard-cases approach to *Chevron* sees the doctrine’s supposed foundation in congressional intent for what it is: a fiction. Going beyond that fiction, it shows that *Chevron* rests instead on a constitutionally inspired judgment about who makes law more legitimately in hard cases. Taking the same hard-cases approach to other canons yields a similar insight: Behind every fiction about congressional intent lies a normative judgment, derived from values found in the Constitution or elsewhere. The conflict between *Chevron* and other law-making canons thus boils down to a conflict between the values underlying them. When the law runs out, then, the

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332 See Nelson, supra note at 4, at 357 (“[T]he basis for *Chevron* deference is itself a normative canon.”).
333 See Bamberger, supra note 14, at 75 (“Both the normative canons and *Chevron* . . . are rooted in fictions about Congress’s wishes.”).
334 See id. at 72; Bradley, supra note 3, at 676; Nelson, supra note at 4, at 349.
336 See Nelson, supra note at 4, at 349.
question for the court is whether the values served by the other canon are accounted for, or outweighed by, the value of deferring to a more legitimate (and occasionally more expert) lawmaker in the agency. If they are, then the court should defer to the agency at Step Two, thereby disregarding the other canon. If they are not, then the court at Step Two should apply the other canon, thereby denying the agency deference. 337

Consider the implications of this approach for *Chevron*’s relationship with clear statement rules, which function as a kind of law-making canon. Clear statement rules can be defended on the ground that “certain decisions are ordinarily expected to be made by the national legislature, with its various institutional safeguards,” 338 and not by either the executive or the judiciary. On this view, the purpose of requiring a clear statement is “to ensure congressional deliberation on the questions involved.” 339 Suppose, then, that an agency has construed an ambiguous statute to “alter the usual constitutional balance between the States and the Federal Government.” 340 Should the court apply *Chevron* and defer to the agency construction, or should it apply the federalism canon and insist on a clear statement from Congress? The balance of values suggests the latter. Deference to the agency would allow the ambiguity to be resolved by a more legitimate law-maker than the court. But the federalism canon is itself concerned about legitimacy, and it reflects the judgment that only *Congress* may legitimately decide to alter the usual federal-state balance. Because it accounts for the sort of legitimacy-based considerations

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


at the heart of *Chevron*, the federalism canon should trump judicial deference—as should other clear statement rules, for the same reason.\textsuperscript{341}

The balance of values in the case of other law-making canons, however, may tip the other way. Take the relationship between *Chevron* and the canon of constitutional avoidance, which holds that “where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress.”\textsuperscript{342} If an agency construction of an ambiguous statute raises serious constitutional questions, should the court apply *Chevron* and defer to the agency, or should it apply the avoidance canon and impose its own construction on the statute? The avoidance canon has been said to rest on a “presumption that Congress did not intend a [statutory meaning] which raises constitutional doubts.”\textsuperscript{343} Looking beyond that obvious fiction,\textsuperscript{344} one is left with two rationales for the canon. The first is that “a decision to declare an Act of Congress unconstitutional is the gravest and most delicate duty that [a] Court is called on to perform” and should therefore be avoided.\textsuperscript{345} Even if one assumes that a decision to strike down an act of the executive raises the same concern, however, the rationale cannot support allowing the canon to trump *Chevron* given that the result would be the same: invalidation of the agency construction. That leaves only the second rationale, described as the

\textsuperscript{341} *Accord* Sunstein, supra note 3, at 2111; Note, supra note 335, at 610.

\textsuperscript{342} Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988). Some scholars have characterized the avoidance canon as a clear statement rule. See Manning, supra note 318, at 405; Sunstein, supra note 3, at 2111. The Court, however, has treated the canon as a doctrine that “enters in only where a statute is susceptible of two constructions.” Pa. Dep’t of Corr. v. Yeskey, 524 U.S. 206, 212 (1998) (internal quotation marks omitted); see also Clark v. Martinez, 543 U.S. 371, 402 (2005) (Thomas, J., dissenting) (“Just as we exhaust the aid of the ‘traditional tools of statutory construction’ before deferring to an agency’s interpretation of a statute, so too we should exhaust those tools before deciding that a statute is ambiguous and that an alternative plausible construction of the statute should be adopted.”).

\textsuperscript{343} *Clark*, 543 U.S. at 381 (majority opinion).

\textsuperscript{344} See supra note 318 and accompanying text.

“prudential concern that constitutional issues not be needlessly confronted.’’ Deciding a constitutional question, however, is simply part of the court’s traditional Article III duty to “say what the law is.” Resolving a statutory ambiguity, by contrast, entails an exercise of law-making power. From a perspective that views judicial law-making as relatively illegitimate, then, it is better for the court to avoid imposing its own construction on the statute than to avoid deciding a constitutional question. *Chevron* should trump the avoidance canon. As the foregoing demonstrates, the relationship between *Chevron* and the other canons of construction is complex. But positivism suggests a typology for making sense of it. Some canons help courts say what the law is, and these law-applying canons should be employed at Step One, along with the other tools courts traditionally use in the first stage of the judicial process. Other canons create ambiguity in existing law, and these ambiguity-creating canons should also be invoked at Step One, as the court looks for statutory gaps that need filling. Still other canons help courts say what the law should be, and these law-making canons should be considered at Step Two, when the court must decide whether judicial deference is appropriate after all. Accordingly, *Chevron*’s domain may expand with the application of ambiguity-creating canons but contract with the application of law-making canons.

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346 *DeBartolo*, 485 U.S. at 575.
348 Accord *Morales-Izquierdo v. Gonzales*, 486 F.3d 484, 493 (9th Cir. 2007) (en banc); Kelley, *supra* note 318, at 835. *Contra* Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps v. Eng’rs, 531 U.S. 159, 172-73 (2001) (“Where an administrative interpretation of a statute invokes the outer limits of Congress’ power, we expect a clear indication that Congress intended that result. This requirement stems from our prudential desire not to needlessly reach constitutional issues and our assumption that Congress does not casually authorize administrative agencies to interpret a statute to push the limit of congressional authority.”); *DeBartolo*, 485 U.S. at 568; Sunstein, *supra* note 3, at 2113.
CONCLUSION

Addressing an American audience in 1977, H.L.A. Hart portrayed the nation’s jurisprudence as “beset by two extremes,” which he called the Nightmare and the Noble Dream.\textsuperscript{349} The Nightmare sees the judge as no different from the legislator.\textsuperscript{350} It holds that “in spite of pretensions to the contrary, judges make the law which they apply to litigants and are not impartial, objective declarers of existing law.”\textsuperscript{351} That is because, according to the Nightmare, existing law does not contain any answers.

The Noble Dream represents the opposite view. Envisioning the law as limitless, it presumes the existence of “a single correct answer awaiting discovery” in every case.\textsuperscript{352} Thus, according to the Noble Dream, “the judge, however hard the case, is never to determine what the law shall be”; insofar as the law ever appears indeterminate, “the fault is not in it, but in the judge’s limited human powers of discernment.”\textsuperscript{353}

Calling these visions “illusions,” Hart rejected both the view that judges never apply the law and the view that they never make it.\textsuperscript{354} “The truth, perhaps unexciting,” Hart maintained, “is that sometimes judges do one and sometimes the other.”\textsuperscript{355} His insight that the judicial process in hard cases consists of two distinct stages—applying the law and making it—provides the best understanding of \textit{Chevron}’s two-step inquiry. Though not every case is a hard case, hard cases do arise. And when they do, \textit{Chevron} allows judges to decide them without legislating from the bench.

\textsuperscript{349} Hart, \textit{supra} note 118, at 989.
\textsuperscript{350} \textit{See id.} at 972.
\textsuperscript{351} \textit{Id.} at 973.
\textsuperscript{352} \textit{Id.} at 984-85.
\textsuperscript{353} \textit{Id.} at 983.
\textsuperscript{354} \textit{Id.} at 989.
\textsuperscript{355} \textit{Id.}