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Bridging the Divide: Finding Common Ground on the Modern Chevron Debate

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By Nicholas C. Stewart*

Abstract: Traditionally, when reviewing an administrative agency’s adjudication or rulemaking under *National Labor Relations Board v. Hearst Publications, Inc.*, 322 U.S. 111 (1944), courts would ask whether the question before them was one of law or a mixed question of law and fact. While the former was accorded no deference, the latter received a great deal. Despite this seemingly simple construct, courts persistently confused questions of law with mixed questions, and vice versa, resulting in the inconsistent application of standards of review. In *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), the U.S. Supreme Court drastically changed the conversation, but *Chevron* had problems of its own. Judges and litigants began to regularly debate not just how, but also when to apply *Chevron*. The leading voices in this contest were Justices Stephen Breyer and John Paul Stevens squaring off against Justice Antonin Scalia.

This article posits that these Justices may be understood as disagreeing over the continued relevance, if any, of *Hearst*’s distinction between questions of law and mixed questions. It avers that both sides are flawed and instead argues for a hybrid approach, which retains the courts’ responsibility to say what the law is. Borrowing heavily from Professor Ronald Levin, courts should apply *Chevron*-like two-step framework to questions arising out of most adjudications and rulemakings. At step one, they should decide whether and to what extent the legislature delegated a statute’s interpretation or application to an agency. This question is always one of law and answered independently. If the legislature used the well-known fiction of ambiguity, then it is fair to say that the question – even if purely legal in a traditional sense – was entrusted to the agency and is actually a “question of discretion.” Thus, courts should move on to step two and review it under a deferential standard that subsumes both the arbitrariness and substantial evidence standards. This article closes with a case study that demonstrates the model’s clarifying potential on Maryland administrative law jurisprudence.

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I. **Introduction.**

Our representatives at the federal and state level created administrative agencies to share in the responsibilities of an increasingly complex and involved government. In principle, these legislatures entrust agencies with the simple “execution” of various regulatory schemes. However, to carry out and make meaningful these expansive and complex schemes, agencies are forced to make important and consequential decisions. Indeed, while adjudicating or adopting a rule, they must interpret and apply commonly vague statutory provisions.

When asked, courts are often able to review these adjudications and rulemakings. In doing so, they must determine what standard of review to apply. In connection with the delegations of authority, legislatures have enacted statutes directing the terms of judicial review. For example, federal courts find congressional instruction in the 1982 Administrative Procedure Act (“APA”). However, these statutes are often of little practical help. As a result, courts have spent significant time devising a judicial-review framework, based largely on the principle that a legislature’s delegation of authority ought to be respected with a befitting amount of deference.

Traditionally, the amount of deference accorded an agency depended on the kind of question under review. If a party challenged how an agency interpreted a statute, the court would give no deference under the theory that “questions of law” involve only legal interpretation, a traditionally judicial function. If a party challenged how an agency *applied* a statute, the court would style the question “mixed” and apply a deferential standard in recognition of the administrative expertise required to make such an application.

Notwithstanding the apparent straightforwardness of this regime, trouble arose in distinguishing between questions of law and mixed questions. Many respected judges, practitioners, and commentators have proposed various guidelines to help illuminate the way, but
these descriptors are normally insufficient. Courts continue to confuse questions of law with mixed questions (and vice versa), with the result that they apply decidedly incorrect and inappropriate standards of review.

Let us briefly explore a classic illustration. Envision a statute offers “employees” certain protections. Newsboys – hawking the latest copy on street corners in a bygone era – organize a union, but their newspaper-employers decline to recognize it. The agency charged with administering the statute must now decide: (1) whether the common law should contribute to the understanding of the statutory term “employees,” and (2) whether the newsboys should be considered “employees” under the statute.

Such was the case in *National Labor Relations Board v. Hearst Publications, Inc.*, 322 U.S. 111 (1944), the decision most often cited when discussing “questions of law” and “mixed questions.” Most agree that, in a traditional sense, the first question is purely one of law because it did not depend in any sense on the facts of the case. However, the second question is a closer call. Because the statute provided a vague definition of the term “employee,” one view is that the question involved simple statutory construction – the judiciary’s domain. Contrariwise, one may believe (as the Supreme Court did) that the law and facts were sufficiently uncontroverted, such that the mixed question was how the agency applied the law to those facts.

Forty years after *Hearst*, the Supreme Court re-entered the debate, setting forth a two-step approach for reviewing administrative decisions in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Simply stated, this approach requires courts to ask whether the controlling statute is clear and unambiguous. If so, it may be reasonably inferred that the legislature chose to decide the matter outright. If not, the legislature
implicitly intended the agency to “take the first cut,” such that a reviewing court should proceed deferentially.

Like Hearst, the Chevron two-step seemed straightforward, but it proved to be difficult to apply in practice. Moreover, factual variations required federal courts to interpret and re-interpret Chevron, adding more confusion and awkwardness to the doctrine. At the Supreme Court, the interpretative tug-of-war has been led by Justices Stephen Breyer and John Paul Stevens against Antonin Scalia.1 While much has been said over their dispute, this article asserts that the Justices may be understood as disagreeing over the continued relevance, if any, of Hearst’s distinction between questions of law and mixed questions.

Breyer and Stevens would largely preserve Hearst. In the same fashion as Hearst, they would begin every analysis by separating pure questions of law from mixed questions. (They describe mixed questions as “policy judgments” to take into account the fact that, in rulemakings, there are no adjudicative-type “facts” involved).2 Breyer and Stevens would independently interpret questions of law (even those that are ambiguous) and defer on “policy judgments.” Scalia, however, sees Chevron as an “across-the-board” presumption, applicable at the beginning of most analyses of agency decisions.3 Regrettably, both positions have certain flaws. Breyer and Stevens ask courts to continue the futile task of trying to pick out “pure” questions of law, while Scalia has agencies resolve all ambiguous questions (including those of

3 Chevron Step Zero, supra note 1, at 202.
“pure law”) but does not confront the apparent conflict created by the court’s constitutional and APA duty to say what the law is.⁴

A year after Chevron was decided, Professor Ronald Levin proposed a Chevron-like two-step model for reviewing administrative determinations.⁵ Perhaps unknowingly, his approach includes a key nuance in legal theory that allows us to find some common ground between the Justices’ positions. Professor Levin contends that “question of law” and “mixed question” are mere “after-the-fact” labels, derived during the two-step process.⁶ He describes step one as always a question of law: Whether Congress chose to answer the question at bar and, if not, to what extent did it restrict its delegate.⁷ If a court reaches step two, then it faces a discretionary question and should proceed deferentially.

Although helpful, this article does not flatly adopt Levin’s approach. Despite his statements suggesting otherwise, Levin seems to concur with Breyer and Stevens that courts should continue to identify questions of law and independently interpret them (regardless of the presence of ambiguity).⁸ This article agrees with Scalia that – in light of ambiguity – agencies are entitled to deference not only when they apply the law, but also when they interpret the law in the abstract. Unlike Scalia, however, we believe that deferral to an agency’s legal interpretation does not contravene the court’s constitutional and APA duties. As Professor Levin himself explained, “[s]ometimes the most faithful reading of a statute is that the legislature

⁶ Id. at 27.
⁷ See id. at 21-22.
⁸ See id. at 25 (stating that, if the party challenges “the agency’s understanding of its congressional mandate,” the court must “independent[ly]” determine if “the agency’s action is incompatible with the statute”).
intended to . . . leave [an] issue to administrative creativity” and that, “[i]n such a situation, a
court’s refusal to use independent judgment actually fulfills Congress’ intent.”

Part II describes *Chevron* and its development. Then, in Part III, we discuss the tenets of
our hybrid model, while also viewing the model at work in a couple of examples. Finally, Part
IV discusses the present confusion in Maryland administrative jurisprudence and suggests that
the outright adoption of our hybrid model could serve the State well.

II. **Chevron and Its Development.**

A. **Background.**

*Chevron* was a case about the Clean Air Act, a statute that required owners of “major
stationary sources” of air pollution to meet “very stringent requirements whenever they modify a
major stationary source so that it increases pollution.” As explained by two authors:

> The Environmental Protection Agency [“EPA”] adopted a rule . . . that interpreted the [ambiguous] term “stationary source” in the
> Act to mean a collection of smokestacks within a contiguous
> facility. The effect of this interpretation was to allow a company
to avoid the stringent requirements . . . by offsetting any increase
in pollution from one smokestack by decreasing emissions from
other smokestacks at the facility so that the [overall] emissions did
not increase. This was known as the “bubble policy,” because it in
effect allowed a company to place a bubble over a facility and
measure the emissions from the bubble, rather than from each
smokestack. An environmental group, unhappy because this
interpretation would enable facilities to avoid stringent emission
limitations in many cases, s[ought] judicial review of the rule,
alleging that the term “stationary source” . . . requires each
smokestack to be considered a separate source. The Act d[id] not
itself define the term.\(^{11}\)

\(^{9}\) *Id.* at 21.

\(^{10}\) *WILLIAM F. FUNK & RICHARD H. SEAMON, EXAMPLES & EXPLANATIONS: ADMINISTRATIVE LAW* 256 (2001).

\(^{11}\) *Id.*
Ultimately, the matter came before the Supreme Court. Initially, the Court “undertook an extensive analysis of the statutory language, but . . . concluded that the statute did not directly address the question [of] whether the bubble policy was allowed.”\textsuperscript{12} After seeming to set some boundaries based on the Act’s purpose to “provide[] certain types of flexibility to accommodate economic expansion and change,” the high court upheld the EPA’s interpretation as reasonable.\textsuperscript{13}

B. \textit{Chevron Step Zero.}

While the \textit{Chevron} Court provided scant practical guidance on how to apply its two-step framework, equally troublesome is that it left unresolved \textit{when} this framework applies. This is the key disagreement between Justices Breyer, Stevens, and Scalia at issue in this article. Professor Cass Sunstein dubbed the issue of when to apply \textit{Chevron} as “Chevron Step Zero.”\textsuperscript{14}

Of course, given the complexity of administrative jurisprudence, choosing the proper standard of review is a challenge in any case. As one commentator explains:

> Review of agency fact[-]finding in many cases is done under a “substantial evidence” standard, but in others under an “arbitrary and capricious” standard. Review of agency legal determinations triggers either so-called \textit{Chevron} or \textit{Skidmore} [\textit{v. Swift & Co.}, 323 U.S. 134 (1944)] deference, or sometimes no deference at all – such as when an agency is interpreting the Constitution or the . . . APA. Finally, courts must perform a general arbitrariness review in every case, under which, regardless of the factual conclusions or legal interpretations made by the agency, courts take a “hard look”

\textsuperscript{12} \textit{Id.}

\textsuperscript{13} \textit{Id.} at 257. The idea of deference to administrative agencies, as articulated in \textit{Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.}, 467 U.S. 837 (1984), is most commonly supported on the grounds that (1) “Congress entrusts agencies to implement law in a particular area because of th[eir] expertise,” (2) Congress passed comprehensive regulatory schemes expecting agencies to use this expertise in resolving inevitable gaps and ambiguities, and (3) agencies should resolve these gaps and ambiguities because “administrative officials, unlike federal judges, have a political constituency to which they are accountable.” Linda D. Jellum, \textit{The United States Court of Appeals for Veterans Claims: Has It Mastered Chevron’s Step Zero?} 3 \textit{VETERANS L. REV.} 67, 82 (2011).

\textsuperscript{14} See \textit{Chevron Step Zero}, supra note 1, at 190 (“Like a novel or even a poem, the [\textit{Chevron}] decision has inspired fresh and occasionally even shocking readings.”).
at the agency decision to see whether the agency has sufficiently explained its decision and whether the decision is basically rational, based on a review of the record as a whole.\[15\]

With respect to “[r]eview of agency legal determinations,” courts have had a particularly difficult time deciphering the proper standard of review. Often, courts simply neglect to appreciate that \textit{Chevron} may be the appropriate framework through which to analyze a given case. Indeed, “\textit{Chevron} is cited in only about one-third of the cases in which it is potentially relevant.”\[16\] Other times, courts acknowledge \textit{Chevron} but choose instead to apply some other quantum of deference like \textit{Skidmore}, which varies with the persuasiveness of the agency’s rationale.

Some members of the Court (including Justices Breyer and Stevens) advocate for a case-by-case approach in which \textit{Chevron} deference is accorded to policy judgments only after an intensive, multi-factored analysis. In the first of a trilogy of cases outlining this case-by-case

\[16\] Jack M. Beermann, \textit{End the Failed Chevron Experiment Now: How Chevron Has Failed and Why It Can and Should Be Overruled}, 42 CONN. L. REV. 779, 829 (2010). Beermann cites a 2008 “exhaustive study of \textit{Chevron},” performed by William Eskridge, Jr. and Lauren Baer, which found that:

\textit{Chevron} is cited in only a small minority of Supreme Court cases in which it is, on its terms, relevant. [Eskridge and Baer] report that in 1014 cases involving agency interpretation, the \textit{Chevron} two-step process was cited in 8.3\% of the cases. In about 40\% of the cases, some other form of deference was applied. And in more than half of the cases, 53.6\% to be exact, no deference regime was applied. In other words . . . , in more than half of the post-\textit{Chevron} cases in which the Supreme Court reviewed an agency interpretation, the Court applied what the authors term “[t]he old ‘independent judgment of judges’ approach that predated the modern administrative state.”

\textit{Id.} at 829 (footnotes omitted).
approach, *Christensen v. Harris County*, 529 U.S. 576 (2000), the Supreme Court explained that *Chevron* should be applied only if it appears: “[(1)] that Congress delegated authority to the agency generally to make rules carrying the *force of law*, and [(2)] that the agency interpretation claiming deference was promulgated in the exercise of that authority.”

A year later, the Supreme Court issued *United States v. Mead*, 533 U.S. 218, 226-27 (2001), which unfortunately added even greater uncertainty, at least with respect to the “force of law” prong of *Christensen*. The Court stated that “formality” of the procedure by which the agency rendered the judgment was not dispositive of the “force of law” issue. Rather, authority to make rules carrying the force of law “may be shown in a variety of ways,” such as by the power to adjudicate or to promulgate rules, or “by some other indication of a comparable congressional intent.”

18 *Id.* at 231.
19 *Id.* at 227. In *Mead*, the Supreme Court not only outlined this additional inquiry for prong one, but also demonstrated the risk of confusion and misapplication associated with it. The question in *Mead* was whether Congress intended Customs Service tariff rulings to have the force of law in the *Chevron* sense. *See id.* at 221. In recounting this convoluted analysis, one writer explains that the Court cited a number of relevant but apparently non-dispositive factors, including how:

> [T]he legislation . . . authorize[d] the agency to promulgate procedural regulations, and it referred to the tariff classifications as “binding rulings,” but the reference to “binding rulings” according to the Court meant that the rulings were binding between the agency and the particular party, not binding on third parties which would give them legislative effect. In fact, the agency had disavowed any effect on third parties.

In addition to the lack of congressional intent for the customs rulings to have the force of law, the Court relied on several additional factors for declining to confer *Chevron* deference on the rulings. These factors include the fact that customs rulings are issued without notice and comment, by forty-six different field offices, at a rate of over 10,000 per year, and are
A year after *Mead*, the Court completed its post-*Chevron* trilogy with *Barnhart v. Walton*, 535 U.S. 212 (2002). There, an agency made a policy judgment through formal notice-and-comment rulemaking, which was eligible for *Chevron* deference. In dictum, Justice Breyer asked whether informal interpretations (say, by letter) would also be eligible for *Chevron* deference. Answering in the affirmative, Breyer cited a number of other factors, such as “the interstitial nature of the legal question, the related expertise of the Agency, the importance of the question to 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 . . .”

C. *Chevron* and the Relevance of the Question of Law/Mixed Question Distinction.

Many commentators have discussed the Justices’ disagreement over *Chevron*. With due respect for those insights, this article asserts that the Justices may also be understood as disagreeing over the relevance of *Hearst’s* distinction between questions of law and mixed questions.


Breyer and Stevens argue that courts should deal separately with questions of law and mixed questions (or what they describe as “policy judgments”). With questions of law, the court should interpret them independently with no reference to the *Chevron* two-step. With policy judgments, the court has to decide whether to apply the *Chevron* two-step at all (i.e., subject to “independent” judicial review by the Court of International Trade.

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21 See *id.* at 219-22.
22 See *id.* at 222.
23 *Neguise*, 555 U.S. at 532 n.4 (Stevens, J., concurring and dissenting in part, Breyer, J., joining).
*Chevron* step zero). To do this, they have to go through the multi-factored analysis described *supra* and evaluate whether the legislature meant for the agency to speak with the force of law. If the legislature intended for the agency to so speak, then courts may apply the *Chevron* two-step and ask whether the legislature left unanswered the question at hand. It is only after going through all these steps that courts should defer to the agency’s application of the law to the facts, i.e., to the agency’s policy judgment.

Thus, at the beginning of every analysis, courts should go through a threshold sorting-out process (as the *Hearst* Court did) and separate questions of law from policy judgments. In this way, *Chevron* was not a watershed divergence from *Hearst* but rather a restatement of it.24 Breyer and Stevens see the *Hearst* Court as isolating questions of law from mixed questions, and then applying deferential review to mixed questions *but only if* the legislature did not answer the issue at hand.25

The case *Immigration and Naturalization Service v. Cardoza-Fonseca*, 480 U.S. 421 (1987), appeared to confirm this reading of Breyer and Stevens’s position. On behalf of the majority, Stevens “appeared to say” that “Chevron would apply only in cases involving mixed questions of law and fact, rather than pure questions of law: courts would decide pure questions of law on their own.”26

In particular, the Court stated in *Cardoza-Fonseca* that:

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24 *Id.* at 529.
25 *Nat’l Labor Relations Board v. Hearst Pub., Inc.*, 322 U.S. 111, 129 (1944) (“In this light, the broad language of the Act’s definitions, which in terms reject conventional limitations on such conceptions as ‘employee,’ ‘employer,’ and ‘labor dispute,’ leaves no doubt that its applicability is to be determined broadly, in doubtful situations, by underlying economic facts, rather than technically and exclusively by previously established legal classifications.”).
The narrow legal question whether . . . two [legal] standards are the same is, of course, quite different from the question of interpretation that arises in each case in which the agency is required to apply either or both standards to a particular set of facts. There is obviously some ambiguity in a [statutory] term like ‘well-founded fear[,]’ for example,] which can only be given concrete meaning through a process of case-by-case adjudication. In that process of filling ‘any gap left, implicitly or explicitly, by Congress,’ the courts must respect the interpretation of the agency to which Congress has delegated the responsibility for administering the statutory program. *See Chevron,* [467 U.S. at 843]. But our task today [regarding the two legal standards] is much narrower, and is well within the province of the Judiciary.”[27]

Recently, Breyer and Stevens have confirmed their belief that courts should decide all legal questions and apply the *Chevron* two-step only to policy judgments. In *Negusie v. Holder,* 555 U.S. 511, 531 (2009), Stevens wrote a concurring opinion (which Breyer joined), contending that “[c]ertain aspects of statutory interpretation remain within the purview of the courts, *even when the statute is not entirely clear,* while others are properly understood as delegated by Congress to an expert and accountable administrative body.”[28] If courts are supposed to decide all legal questions, *even where the statute is ambiguous,* then the only role remaining for the *Chevron* two-step lies with policy judgments.[29]

[29] Sunstein argues that this perceptive of *Chevron* has never gained traction, as “the Court has failed to take it up in subsequent cases.” This author is not persuaded that the question of law/mixed question dichotomy has left unaffected the *Chevron* discussion. The germane language in *Cardoza-Fonseca* is reflected in numerous opinions in the federal Courts of Appeals.

For instance, the Fourth Circuit deployed this approach in *EFCO Corp. v. National Labor Relations Board,* 2000 U.S. App. LEXIS 10909 (4th Cir. 2000), distinguishing between “classic judicial exercise[s],” which “do[] not implicate the . . . central concerns in *Chevron*” and “determination[s] . . . that involve policy choices or rulemaking in the legislative[-*Chevron*] sense . . . .” *See, e.g., Union of Concerned Scientists v. U.S. Nuclear Regulatory Comm’n,* 824 F.2d 108, 113 (D.C. Cir. 1987) (“In . . . *Cardoza-Fonseca* . . . , the Supreme Court strongly
This approach preserves the court’s role to say what the law is, but it harbors a practical difficulty – determining when *Chevron* applies.\(^{30}\) As explained above, even if the court is able to identify a “policy judgment,” the trilogy prevents the *Chevron* framework from automatically applying. Instead, courts must weigh the trilogy’s “laundry list of factors,” which Professor Jack Beerman characterizes as an “invit[ation for] protracted litigation over every plausible claim for and against *Chevron* deference.”\(^{31}\)

\(^{30}\) See Sidney A. Shapiro & Richard E. Levy, *Judicial Incentives and Indeterminacy in Substantive Review of Administrative Decisions*, 44 DUKE L. J. 1051, 1080 (1995) (“The difference between these two categories [of questions], however, has not always been clear . . . . Judges have been able therefore to manipulate the ‘law’ and ‘fact’ categories to affect the standard of review.” (footnotes omitted)).

\(^{31}\) Beermann, *supra* note 16, at 825; *see Mead*, 533 U.S. at 250 (Scalia, J., dissenting) (“[I]n an era when federal statutory law administered by federal agencies is pervasive, and when the ambiguities . . . that those statutes contain are innumerable, totality-of-the-circumstances . . . deference is a recipe for uncertainty, unpredictability, and endless litigation.”).
Perhaps the harder task, however, is singling out “policy judgments” from questions of law in the first instance. The easiest issues to separate most often arise in the basic formal adjudication context. We may be able to conclude some questions are purely legal in nature – for example, whether Congress intended for a given statutory term to include the common law definition. Even here, however, we find practical difficulties. Consider *Gray v. Powell*, 314 U.S. 402 (1941), in which the Court confronted two questions:

(1) Whether coal that was transferred from one entity to another without any transfer of title has been “sold or otherwise disposed of” within the meaning of the Bituminous Coal Act of 1937; and

(2) Whether the regulated entity [in the instant case] qualified for a tax exemption as a “producer” of coal.\(^{32}\)

Observer Linda Jellum posits that “[w]hile both issues involved questions of law – specifically, the meaning of statutory language – the first issue was a pure question of law, while the second involved the application of the law to the facts of the case.”\(^{33}\) Accordingly, the former received de novo review and the latter deference.\(^{34}\) This author does not believe that the two questions may be so cleanly and easily distinguished.

In *Gray*, a railroad was transferring coal and wanted to avoid a price control provision. To do so, it sought the protection of a statutory exemption, which spared producers who consumed the same coal. Thus, the first issue regarding what governed “transferred” coal – the price control or exemption provision – stemmed directly from the facts of the case. Stated another way, it involved the application of the law to the facts and, thus, resembled a mixed question. The plain language of the opinion affirms this construct: “We conclude that coal

\(^{32}\) Jellum, *supra* note 13, at 73.

\(^{33}\) *Id.*

\(^{34}\) *See id.*
extracted under the circumstances of this case is within the scope of the [price control] provisions."

Justice Breyer and Stevens prescribe the same sorting-out process for judicial review of regulations, a context which gives rise to the same or even greater challenges. In an agency adjudication, a court will try to identify mixed questions by asking if the question involves the application of the law to a particular set of facts. In a rulemaking, there are no hard facts per se but rather “so-called legislative facts . . . .” For example:

[When the EPA decides that a particular standard for air pollution is requisite to protect the public health within an adequate margin of safety, the factual determinations the agency is making are global in nature – what level of pollution will cause what level of risk and whether that level of risk provides an adequate margin of safety. This is a different nature of fact from what the EPA must find when it determines that a particular polluter on a given day emitted more pollution than . . . permitted.]

This contrast is why Breyer and Stevens use the label “policy judgments” instead of mixed questions. However, this author is again skeptical that such a distinction may be clearly and consistently drawn by any court. We find a suitable example in Chevron, a “legislative fact” case. One commentator inadvertently demonstrated the inherent risk of confusion, suggesting that:

[Int Chevron itself, the Court should have separated the question of whether the bubble concept was linguistically consistent with the [governing] statutory phrase “stationary source,” from the question of whether adopting that meaning made regulatory [or policymaking] sense. The former question should be reviewed de novo,

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36 Funk & Seamon, supra note 10, at 280.
37 Id.
38 See Negusie, 555 U.S. at 531 (“In the context of agency rulemaking, for instance, we might distinguish between pure questions of statutory interpretation and policymaking . . . .”). In addition to separating questions by law and policymaking, Justice Stevens and Breyer suggest that questions may also be distinguished as “central legal issues and interstitial . . . .” Id.
while the latter question should be reviewed under the deferential arbitrary, capricious standard.[39]

Even if we use the legal/policy judgment distinction, we find that the sorting-out process remains wishy-washy and challenging. Perhaps the question of “whether the bubble concept was linguistically consistent with the . . . phrase ‘stationary source’” can be seen as purely legal. However, it may just as easily be confused with a policy judgment, for the “bubble concept” did not appear out of thin air but was the result of various normative, fact-based judgments about the nature, causes, and tolerances of pollution. Stated differently, the “bubble concept” was the result of the EPA applying a statutory term – stationary source – to certain facts. Just because these facts are “legislative” in nature does not make them fundamentally different than traditional, adjudicative facts. Thus, the EPA was applying the statute to facts – this is the very essence of a mixed question.40

39 Beermann, supra note 16, at 786-87.
40 One supporter of the classic approach in Hearst (and perhaps a supporter of the “Chevron Preserved Hearst” approach) acknowledges that the “simple, clear, and consistent [model]” in Hearst did not always lead to consistent results:

[T]he Court . . . decid[ed] other cases in which it did not use its simple two-tracked [mode]. For example, in 1947, the Court decided Packard Motor Car Co. v. National Labor Relations Board, 330 U.S. 485 (1947). The issue in that case was whether the term “employees” in the Wagner Act covered foremen with specific, supervisory responsibilities. Id. at 486. . . . [T]his issue really involved the application of law to the specific facts of the case. Yet, the Court did not defer to the Board’s interpretation in this case, as the Court had in Hearst.

It is unclear why the Court took a different approach. Some commentators have suggested that the issue in Packard was much more important than the issue in Hearst . . . . Perhaps, though, the Court’s decision to apply a different standard was less calculated and more inadvertent. Possibly, because the Court mischaracterized the issue as a “naked question of law,” it then applied the applicable (de novo), albeit wrong, standard for questions of law. Packard, 330 U.S. at 493.

Some believe that *Chevron* should be reserved for purely legal “interpretations,” while *Hearst* should be used for the mixed questions as they are traditionally understood. An archetype of this approach is *America Online, Inc. v. AT&T Corp.*, 243 F.3d 812, 817 (4th Cir. 2001), where the Fourth Circuit deemed *Chevron* inapplicable. “*Chevron* . . . relates to statutory interpretation,” and the instant case involved an “administrative adjudication[] of mixed questions of law and fact.” As a result, the Court employed the deferential “substantial evidence” standard.41 This approach seems untenable as it would leave *Chevron* and *Hearst* as competing doctrines from which courts would likely pick and choose without much justification.


Justice Scalia perceives *Chevron* as rendering obsolete *Hearst* and the labels “question of law” and “mixed question.” In particular, he views *Chevron* as:

> [A]n across-the-board presumption, which operates as a background rule of law against which Congress legislates[.]

Ambiguity means Congress intended agency discretion. Any resolution of the ambiguity by the administering agency that is authoritative – that represents the official position of the agency – must be accepted by the courts if it is reasonable.42, 43

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Jellum, *supra* note 13, at 76 n.52.

41 *See also Khan v. Holder*, 584 F.3d 773, 776 (9th Cir. 2009) (“We apply *Chevron* deference to the Attorney General’s interpretations of ambiguous immigration statutes, but need not defer if the statute is unambiguous. We review agency factual findings and determinations of mixed questions of law and fact for substantial evidence.”) (emphasis added; citations omitted); *Natural Res. Def. Council, Inc. v. Herrington*, 768 F.2d 1355, 1369 (D.C. Cir. 1985) (applying the “substantial evidence standard,” as opposed to *Chevron*, to the review of “the policy judgments made by the Secretary, including those predictive and difficult judgment calls the Secretary is called upon to make”) (emphasis added; citations omitted).

42 *See Mead*, 533 U.S. at 257 (Scalia, J., dissenting); *see also Beermann, supra* note 16, at 785 (“[T]he application of
This approach has the benefit of minimizing the challenges of determining when Chevron applies. Courts would no longer have to try to separate out questions of law from policy judgments and then consider the laundry list of trilogy factors to see if the *Chevron* framework should even apply to the policy judgment (as Justices Breyer and Stevens would have them do). However, Justice Scalia’s approach presents its own challenges, which – unlike Breyer and Stevens’s approach’s challenges – are rooted in legal theory.

As explained, there are certain interpretative questions that do not depend on any factual specifics, such as whether a statute equates two legal principles. When these “pure” questions of law are governed by an ambiguous statute, Scalia would have the reviewing court defer to the agency under *Chevron* step two. This would seem to contradict the express language of the APA. As Professor John Duffy (former judicial clerk to Justice Scalia) has observed:

> The first sentence of Section 706 of the APA requires a reviewing court to “decide all relevant questions of law” and to “interpret constitutional and statutory provisions.” The legislative history of the APA leaves no doubt that Congress thought the meaning of this provision plain. As Representative Walter, Chairman of the House Subcommittee on Administrative Law and author of the House Committee Report on the bill, explained to the House just before it passed the bill, the provision “requires courts to determine independently all relevant questions of law, including the interpretation of constitutional or statutory provisions.”

Thus

*Chevron* is so unpredictable. No one rationally orders their affairs in reliance on *Chevron* deference.”).

43 *Chevron Step Zero, supra* note 1, at 206. Sunstein’s proposed solution mirrors Scalia’s:

> “Whenever an agency makes an authoritative interpretation of a statute that it administers, that interpretation falls under the Chevron framework, unless the agency’s self-interest is so conspicuously at stake that it is implausible to infer a congressional delegation of law-interpreting power.”

*Chevron Step Zero, supra* note 1, at 210.
Justice Scalia, in championing *Chevron*, admits that the 79th Congress was laboring under “the quite mistaken assumption that questions of law would always be decided de novo by the courts.” But if Congress enacted that assumption into law with Section 706, what power do the courts have to overturn the decision as “mistaken?”[44]

Moreover, this would seem to contravene constitutional law as articulated in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803), a case that reserves for courts the “province and duty . . . to say what the law is.”

III. **An Alternative Approach: Professor Levin’s Model.**

A year after the Supreme Court handed down *Chevron*, but before the reverberations of that case would be fully felt, Professor Levin published an article proposing a similar model for determining the proper standard of review.45 This model remains relevant because it provides a way to integrate *Hearst* into administrative law jurisprudence, while minimizing the practical and theoretical difficulties associated with the approaches described *supra*.

A. **Bridging the Divide Between the Justices’ Approaches.**

Like Breyer and Stevens, Levin would preserve the labels “questions of law” and “mixed questions” (or, in his terms, “question of discretion”), but he would place less emphasis on them. This is an important caveat. For Levin, questions do not come to the court pre-ordained as legal or discretionary. Rather, the nature of a question is determined through the two-step process. In his words, the “province of the agency is defined during the process of construing the statute.”46


45 See *Identifying Questions of Law, supra* note 5.

46 Id. at 27.
Thus, like Scalia, Levin broadly applies his two-step to most situations.\textsuperscript{47} However, unlike Scalia, Levin would have courts undertake an additional task at step one: Even if the statute is ambiguous, courts should identify what restrictions the legislature did impose on its delegation to the agency.\textsuperscript{48} Also different from Scalia, Levin confronts the apparent constitutional and APA issue created by courts deferring to agencies on pure questions of law. Levin suggests that the legislature’s knowing delegation of authority – via ambiguity – means that the agency is not so much “interpreting . . . legislative will” as it is “responding to a legislative invitation to make law.”\textsuperscript{49} Levin continues:

\begin{quote}
[A]lthough the courts are supreme in construing statutes, statutory construction becomes less relevant when Congress delegates decision-making power to an agency. Sometimes the most faithful reading of a statute is that the legislature intended to make no decision on a particular substantive issue and to leave that issue to administrative creativity. In such a situation, a court’s refusal to use independent judgment actually fulfills Congress’[s] intent. Nor should such passivity be viewed as an abdication of the judicial function. After all, the article III concept that judges “say what the law is” has always embodied an element of passivity, because it has had to coexist with Congress’[s] authority to write
\end{quote}

\textsuperscript{47} Id. at 22.
\textsuperscript{48} Id. In a second article on the subject of judicial review of agency determinations, Professor Levin restates and reaffirms this approach (albeit as an alternative) of identifying interpretative boundaries. See Ronald D. Levin, The Anatomy of Chevron: Step Two Reconsidered, 72 CJI.-KENT L. REV. 1253, 1285 n.136 (1997) (discussing an alternative approach that involves “argu[ing] that scrutiny at step one narrows the range of possibilities available under the statute, and that, within the confines of that range, the agency’s actual choice was [‘reasonable’ or] ‘unreasonable’” (in the arbitrariness sense) under step two”).

Others have put forward the same idea. Justice Scalia contends that “Chevron establishes a presumption that ambiguities are to be resolved (within the bounds of reasonable interpretation) by the administering agency.” Christensen v. Harris County, 529 U.S. 576, 589 (2000) (Scalia, J., concurring in part and in the judgment). And in City of New York v. Permanent Mission of India, 618 F.3d 172, 182 (2d Cir. 2010) (quoting Schweiker v. Gray Panthers, 453 U.S. 34, 44 (1981)), the Second Circuit commented on earlier Supreme Court jurisprudence which “indicat[ed] that courts do not abdicate review in the context of an express delegation of substantive authority . . . .” Instead, they “follow the limited task of ensuring that the [agency] did not exceed [its] delegated authority . . . .” Id.
\textsuperscript{49} Id. at 22.
the laws under article I. When Congress delegates part of its legislative authority – as modern precedents unquestionably allow it to do – one may logically suppose that the *Marbury* duty can be discharged by a reviewing role falling well short of complete substitution of judicial for administrative judgment.[50]

**B. Levin’s Model Does Not Go Far Enough.**

In addition to these differences, Levin’s approach stands in contrast to Scalia’s for other, more substantive reasons. While Scalia’s key variable distinguishing step one from step two is statutory ambiguity, Levin’s is the kind of possible errors the court is addressing.”[51] “Where the agency’s understanding of its congressional mandate is in question,” according to Levin, “the court must resolve that controversy through independent judgment.”[52] Levin continues: “The case ends if the court finds that the agency’s action is incompatible with the statute or that the agency relied on premises other than those contemplated by the statute.”[53]

As an example of this “error-based” approach, the Professor engages in a substantive discussion of *Hearst*. As discussed above, *Hearst* involved two questions: (1) whether the common law should contribute to the understanding of the statutory term “employees,” and (2) whether newsboys should be considered “employees.” In analyzing the first question, Levin does not ask whether the controlling statute was ambiguous but instead explains (approvingly) that the “Court spoke on its own authority” because the newspaper publishers challenged the agency’s understanding of the statute.[54] In this way, Levin seems to fall in line with Breyer and Stevens who believe that “[c]ertain aspects of statutory interpretation remain within the purview

50 *Id.* at 20–21.
51 *Id.* at 25.
52 *Id.*
53 *Id.*
54 *Id.*
of the courts, irrespective of whether the statute is not entirely clear . . . .”55 Ostensibly, Scalia would have deferred to the agency’s decision as to the significance of the common law because the controlling statute was ambiguous.

This author favors Scalia’s more inclusive approach because, under Levin’s model, courts would still have to decide when a party is challenging the agency’s understanding of a statute (a question of law), rather than the agency’s application of that statute to a particular set of facts (mixed question). This presents the same descriptive challenge as Breyer and Stevens’s approach. Moreover, Levin’s model does not fully appreciate his own determination that, sometimes, “the most faithful reading of a statute is that the legislature intended to make no decision on a particular substantive issue and to leave that issue to administrative creativity.”56

IV. Our Hybrid Approach.

A. The Basics.

What follows are the basic tenets of our model. Courts should approach each case in the same way – that is, they should apply the two-step, so long as the agency was: (1) authoritatively interpreting or applying (2) a statute (3) that it is responsible for administering, and (4) its “self-interest is [not] so conspicuously at stake that it is implausible to infer a congressional delegation of law-interpreting power.”57

Courts should conduct an independent search not only for the presence of any ambiguity, but also – in the footsteps of Levin – for any restrictions the legislature imposed on its delegate. Such a delegation may be found by dint of the legal fiction of statutory ambiguity. If none is found because the statute possesses clear instructions, then courts should simply enforce the law.

55 See Neguise, 555 U.S. at 531 (Stevens, J., concurring and dissenting in part, Breyer, J., joining).
56 Identifying Questions of Law, supra note 5, at 20-21 (footnotes omitted).
57 Chevron Step Zero, supra note 1, at 210.
If the legislature delegated either the interpretation or application of the statute to the agency, however, then courts should respect that consignment by vocalizing what legislative instructions/restrictions do exist and, thereafter, applying a deferential standard of review.

Stated in different terms, when Congress enacts an ambiguous statute and entrusts the execution of that statute to a particular agency, chokepoints will necessarily arise that require the agency to gap-fill. The agency will face consequential policy decisions vital for the successful administration of the statute. In passing an ambiguous statute, Congress purposefully chose to “punt” certain politically or intellectually difficult decisions, trusting the agency to evaluate the purpose and limitations of the administered statute and to make the “right” call.

These policy decisions will arise in the context of both statutory application and interpretation, or what some would call “pure” questions of law. This model presumes that, if the legislature left undecided a pure question of law, then it effectively transformed that question into one of discretion – entrusting it to the experiential and interpretative judgment of the agency. In this way, “the agency is not [actually] interpreting the legislative will, but instead, responding to a legislative invitation to make law.”

This hybrid model resembles Justice Scalia’s approach because it applies presumptively and it turns on statutory ambiguity. However, unlike Scalia’s approach, it preserves a role for Hearst’s distinction between “questions of law” and “mixed questions” by applying these labels only after conducting a step-one search for legislative delegations of discretion. Also unlike Scalia’s approach, our hybrid model confronts the question of whether courts are abdicating their

\[\text{\textsuperscript{58} See The Anatomy of Chevron, supra note 48, at 1269.}\]
\[\text{\textsuperscript{59} Identifying Questions of Law, supra note 5, at 22.}\]
\[\text{\textsuperscript{60} Note that we still prefer Levin’s phrase “question of discretion” instead of “mixed question” because it recognizes that ambiguity requires deference for both statutory applications and interpretations.}\]
responsibility to say what the law is under the APA and Constitution. In light of the fact that: (1) courts must always conduct an independent review to see what the legislature has said and what boundaries it imposed; (2) that agencies are not so much interpreting law as they are making it; (3) courts often defer to such lawmaking (think rational basis review); (4) that Art. III and Marbury have “always embodied an element of passivity,” the answer to whether there is a conflict with the APA and Constitution is no.

This hybrid model also resembles Professor Levin’s because it uses the term “question of discretion” and it relies on Levin’s reconciliation among Chevron, the APA, and the Constitution. Our model also subscribes to the Professor’s belief that the court should not move onto step two until it has independently identified the legislative restrictions imposed on the agency. According to Levin, this is “a form of statutory interpretation and hence poses a ‘question of law.’”

61 Id. In the second article, Professor Levin attempts to simplify scope-of-review doctrine by breaking down Chevron into statutory and non-statutory stages. See The Anatomy of Chevron, supra note 48, at 1285. At step one, Levin has courts go further than just asking whether a statute is broad and perhaps imposes some boundaries. Instead, they use all available tools to determine if some aspect of the statute precludes the agency’s interpretation. See id. at 1280. In Levin’s reformulation, courts could find that, although the statute is “ambiguous in some respects, its language and structure . . . show that the intent of Congress [is] clear on at least one [dispositive] point . . . .” Id. at 1282. This reformulation seems to suggest that statutes almost always contain some clear and determinative answers, which can be “belatedly discovered . . . .” Id. at 1284-85 (internal quotation marks omitted). This assumption gives rise to concerns about the manufacturing of clear intent and deference becoming a doctrine of desperation. Moreover, Professor Levin recognizes that, although his model adds simplicity, it does not prescribe how courts should treat the questions before them – “[i]n any given case, the court must decide how far it will express its view ‘as a matter of law’ . . . and how far it will, instead, treat the issues as a matter of discretion and consider whether the agency used that discretion rationally.” Id. at 1290. He also acknowledges that this determination has very real ramifications, for if a court settles a case under step one, it is effectively saying the legislature spoke clearly and, thus, gave the agency no interpretative room within which to maneuver in the future. See id. We do not subscribe to this reformulation due to the risk of manufactured clear intent.
B. What Tools of Statutory Interpretation Are Available to Courts at Step One?

As mentioned, originally, a court could move past *Chevron* step one with the discovery of any ambiguity as to the precise question at hand. Ostensibly, this low bar should have resulted in the frequent deferral to agency discretion under *Chevron* step two. However, the Supreme Court later proclaimed that, at step one, all tools of statutory construction may be deployed, leading to frequent spats over the alleged existence of statutory clarity. Some argue that these tools are “inherently imprecise,” such that the “Court has returned to a situation in which manipulable categories of different degrees of deference apply.”

Justice Scalia has gone one step further. He believes that the “all traditional tools” approach “make[s] deference a doctrine of desperation, authorizing courts to defer only if they would otherwise be unable to construe the enactment at issue. This is not an interpretation but an evisceration of *Chevron*.”

No doubt these critics speak with a fair degree of accuracy. Advocates of the “all traditional tools” approach agree that a legislature enacts comprehensive regulatory schemes, expecting agencies to make many value-laden judgments in the process of gap-filling. Yet, their opinions often conclude that the legislature clearly answered a very technical and difficult to foresee question associated with a statute’s administration. According to this logic, the legislature embeds instructions in the esoteric annals of legislative history, and courts should unearth this guidance, deem it to be “clear,” and thereafter enforce it. This is unrealistic.

Nonetheless, this author envisions many of the tools of statutory construction being deployed at step one, for the practicalities of a two-step analysis often require it. Indeed, at

63 Id.
64 *Cardoza-Fonseca*, 480 U.S. at 454 (Scalia, J., concurring).
Chevron step two, courts are said to assess the reasonableness of the agency’s decision, a standard that turns on whether the agency exceeded its delegated authority. The only way to determine if an agency exceeded its authority is to roughly define, at step one, the limits of that authority.

In doing so, however, courts should not deploy all of the tools of statutory construction. They should look to a statute’s purpose, structure, and apposite provisions, for a legislature’s instructions on any one matter may reasonably be found in these places. But they should not consult legislative history, for it is beyond the pale to think a legislature buried guidelines that it expected the agency to follow in materials as esoteric as a single floor speech accompanying a bill report.

C. Equating Step Two with Arbitrariness Review.

We have discussed the tenets of our hybrid model and the particulars of step one. We turn now to the role of step two, concluding first the “substantial evidence” and “arbitrariness” review are equivalent and then that they are subsumed by step two’s rationality review.

Traditionally, the substantial evidence standard applied only in formal adjudications, as these were the only decision-making methods that produced an evidentiary record. Arbitrariness applied more generally to informal adjudications and informal (i.e., notice-and-comment) rulemakings – decision-making methods that do not usually create a record. Practically speaking, however, the U.S. Court of Appeals for the District of Columbia Circuit (“the D.C. Circuit”), Professor Levin, and many others view the two standards as identical.65

The question now is whether arbitrariness/substantial evidence may be equated with *Chevron* step two. There are those who suggest that courts should apply *Chevron* step two and then conduct “a separate and subsequent inquiry into whether the agency action was arbitrary and capricious.” We believe that rationality review is capable of providing not only the same deference as arbitrariness/substantial evidence review, but also the same degree and extent of review. In describing step two, the *Chevron* Court specifically invoked the “arbitrary and capricious” standard. Likewise, the Administrative Law Section of the American Bar Association has “urged that ‘Chevron step two should be explicitly understood to incorporate the requirements of arbitrariness review’ given that ‘the arguments with respect to both may often be similar,’ and ‘distinguishing conceptually between’ the two standards is ‘difficult.’”

What does equating step two and arbitrariness mean as a practical matter? Once a court determines what boundaries exist in an ambiguous statute, it would then ask whether the administrative decision: (1) was the product of a reasonable decision-making process, and (2) produced a reasonable outcome. After all, the *Chevron* Court did not just conclude that the agency’s process was sufficient, but also that the use of the bubble concept was “a reasonable policy choice” (or outcome). As a practical matter, it does not make a lot of sense to consider only the agency’s procedure at step two and “spin off” the “policy wisdom of an agency’s

67 *Chevron*, 467 U.S. at 843-44 (“If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are *arbitrary, capricious, or manifestly contrary* to the statute.” (emphasis added)).
69 See *The Anatomy of Chevron*, supra note 48, at 1268, 1294.
70 *Chevron*, 467 U.S. at 845. In his second article, Professor Levin outright equates *Chevron* with arbitrariness/substantial evidence review. See *Anatomy of Chevron*, supra note 48, at 1263. Unlike this article, however, he does so through an expansion of the matters considered under step one. It is not evident from *Chevron* such an enlargement is necessary before combining the two standards.
decision . . . into a doctrinal ‘test’ of its own.” According to Levin, “this is exactly what judges, at least in the D.C. Circuit, are already doing.  

D. Examples of the Hybrid Judicial Review Model.

To demonstrate the practical application of our hybrid model of judicial review, we examine the details and reasoning of two cases, which seem receptive to much of our approach.


In National Labor Relations Board v. United Food & Commercial Workers Union, Local 23, 484 U.S. 112, 114 (1987), the Supreme Court considered what traditionalists would surely characterize as a “pure” question of law – whether the “dismiss[al of] an unfair labor practice complaint . . . [wa]s subject to judicial review under either the amended National Labor Relations Act or the [APA].” Nevertheless, the Court limited itself to determining whether the agency’s decision was “permissible.”

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71 Id. at 1294.
72 Id. (footnote omitted). Aside from precedent, the agency’s decision-making process and outcome should be analyzed together because:

An agency’s duty of [well-]reasoned decision[-]making is not a command to engage in lengthy discussion for the sake of lengthy discussion. It is an obligation to deal meaningfully with issues that might otherwise be troublesome enough to raise doubts about the rationality of the agency’s position. Thus, the questionable policy consequences of an agency’s chosen interpretation are among the factors that give direction to a court’s implementation of the [well-]reasoned decision[-]making standard.

74 Id. at 125.
Justice Scalia authored a concurrence, which three other Justices joined.\textsuperscript{75} He averred that – under \textit{Cardoza-Fonseca} and other cases – this question “would be [viewed as] ‘a pure question of statutory construction,’ rather than the application of a ‘standar[d] to a particular set of facts’ . . . .”\textsuperscript{76} The present case was “decided correctly” under a deferential standard because “the statute [wa]s silent or ambiguous’ with respect to [this legal] issue \textit{relevant} to the agency’s administration of the law committed to its charge – which is the test for deference set forth in \textit{Chevron}.”\textsuperscript{77}


The next example illustrates nicely how a court should approach any case – by independently searching for not only the presence, but also the extent of any ambiguity. In \textit{Commonwealth of Massachusetts v. U.S. Department of Transportation}, 93 F. 3d 890 (D.C. Cir. 1996), the Department of Transportation (“DOT”) had decided that a federal statute – the Hazardous Materials Transportation Act (“HMTA”) – preempted a state licensing requirement.\textsuperscript{78} Massachusetts had enacted a licensing requirement that applied only to “transporters of hazardous wastes” who did business in the State.\textsuperscript{79} A private entity – the National Solid Wastes Management Association – challenged the state requirement as preempted by the HMTA and its “general goal [of] uniform waste regulation . . . .”\textsuperscript{80}

\textsuperscript{75} \textit{Id.} at 133. Those Justices were William Rehnquist, Byron White, and Sandra Day O’Conner.
\textsuperscript{76} \textit{Id.} at 134.
\textsuperscript{77} \textit{Id.} (emphasis added).
\textsuperscript{79} \textit{Id.} at 892.
\textsuperscript{80} \textit{Id.}
The D.C. Circuit did not decide whether *Chevron* applied, “as the agency’s determination here c[ould not] be upheld with or without deference.”\(^{81}\) Nonetheless, the Court conducted a *Chevron* analysis, in which it reiterated the traditional understanding of step one, but added, in reference to step two, that:

\[
\text{[A] court must determine whether the agency’s interpretation is a reasonable resolution of whatever ambiguity precluded a clear declaration of congressional intent in the first step. This second inquiry is thus not independent of the first: what a court may consider a reasonable interpretation largely depends on the nature and extent of the ambiguity already identified in *Chevron*’s first step. Because the range of permissible interpretations of a statute is limited by the extent of its ambiguity, an agency cannot exploit some minor unclarity to put forth a reading that diverges from any realistic meaning of the statute lest the agency’s action be held unreasonable.}^{82}\]

Much like our hybrid model, the Court tried to divine Congress’s “clear intent” but determined that “the plain wording of the statute alone” did not answer the question because it did not “clearly bar DOT’s current reading.”\(^{83}\) As a result, the Court moved onto step two and seemed to identify a number of factors – the provision at issue, related language in the same statute, and a well-known presumption against preemption – as boundaries that the agency’s interpretation should have respected but did not.\(^{84}\)

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\(^{81}\) Id.

\(^{82}\) Id. at 893 (emphasis added; citations omitted).

\(^{83}\) Id. at 895-96.

\(^{84}\) See id. at 896-97. Here, the statutory provision imposed an “obstacle test,” which nixed “any state or local requirement that makes simultaneous compliance with the HMTA . . . ‘not possible’” or very difficult. Id. at 891. The DOT’s interpretation seemed to go far beyond the “obstacle test,” “even preclud[ing] a rule that only affects those parties who wish to load or unload . . . waste within a particular state, and . . . state rules in many areas of hazardous-waste regulation . . . .” Id. at 895-96.

Other provisions of the statute confirmed the improperly expansive nature of the agency’s interpretation. See id. at 896. The statute singles out types of state rules that are preempted, as well as “expressly [provides] that federal standards may not override state procedural requirements until [twenty-six] states approve the recommendations of a working group on the
E. Benefits.

To better understand our hybrid model, we pause briefly to take account of its benefits. First, because the model applies broadly to questions of law and mixed questions, we militate against the harmful, needless confusion and inconsistency associated with *Chevron* step zero. This includes not only the Breyer/Stevens “question of law/mixed question” distinction, but also the many trilogy factors that are supposed to determine if Congress intended to delegate interpretative authority. No longer must courts ask whether (1) the question is one of law or mixed, and (2) if the latter, does *Chevron* actually apply in light of many various factors.

Second, our approach prevents *Chevron* from becoming a doctrine of desperation by applying the tools of statutory construction not to manufacture “clear intent,” but to divine the boundaries imposed by the legislature on its delegates. Because legislative history is unlikely to contain practical, administrative boundaries but is likely to lead to manipulation and the manufacture of “clear” intent, it should not be consulted by courts.

Third, the hybrid model removes any uncertainty as to the distinction between step two and arbitrariness/substantial evidence review – there is none. This should reassure courts (like the Fourth Circuit) who may otherwise discard the two-step framework in the face of what appears to be a mixed question. It should also render superfluous the idea of conducting a separate review for arbitrariness after the two-step.

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subject . . .” *Id.* Thus, the agency’s “claim that HMTA’s general goal of uniformity automatically precludes all state rules, like bonding requirements” would “render superfluous [these] two . . . segments of th[e] . . . statutory scheme.” *Id.* at 895-96 ("[T]he limited goal of ‘greater uniformity’ is a far cry from DOT’s implicit claim that HMTA demands *absolute* uniformity in matters of bonding requirements.").

Further restraining the agency’s reading was the “powerful and well-established presumption against extending a preemption statute to matters not clearly addressed in the statute in areas of traditional state control . . .” *Id.* at 896. Because DOT’s “broad” and “expansive” position “necessarily conflict[ed]” with the statute’s limitations, the D.C. Circuit deemed it “[un]reasonable.” *Id.* at 896-97.
Fourth, rather than completely jettisoning the seemingly entrenched distinction between questions of law and discretionary questions, our hybrid approach keeps steady the administrative law boat with an important caveat – we recognize that “question of law” and “question of discretion” are mere labels, ascribed to questions only after a court conducts a two-step analysis. In doing so, we make our hybrid framework more palatable to the various jurisdictions (including some federal circuits) that are reluctant to cast aside decades of otherwise instructive and citable caselaw built around these terms.

V. The Clarifying Effect of Our Hybrid Model in Maryland Administrative Law.

We turn our attention to the Old Line State – Maryland. A thorough canvass of state administrative cases reveals an unfortunate fact: Maryland courts are among those that label questions before going through the two-step. Nevertheless, a smattering of opinions demonstrates an appreciation if not a tendency toward a bifurcated method of analysis. The central inquiry in these opinions is whether, and to what degree, the legislature (known as the General Assembly) delegated a certain interpretative or applicative decision to an agency.

Our intent here is to demonstrate how the hybrid model can effectuate a positive shift in administrative law jurisprudence. Maryland has what many would describe as a sometimes abstruse and amorphous approach to reviewing administrative decisions. As we shall see, our hybrid model is able to take a few of the state cases, which seem analytically receptive, and establish a formal two-step approach. In the process, we also inject needed consistency and predictability, while retaining much of the existing caselaw.

A. A Background in Maryland’s Standard of Review Jurisprudence.

In Maryland, “[t]he standards for judicial review of the action of state administrative agencies are derived from the Maryland Administrative Procedure Act, codified at Title 10 of the
State Government Article.”85 In reviewing an agency adjudication (described as a “contested case” in Maryland), a court may:

(1) remand the case for further proceedings;
(2) affirm the final decision; or
(3) reverse or modify the decision if any substantial right of the petitioner may have been prejudiced because a finding, conclusion, or decision:
   (i) is unconstitutional;
   (ii) exceeds the statutory authority or jurisdiction of the final decision maker;
   (iii) results from an unlawful procedure;
   (iv) is affected by any other error of law;
   (v) is unsupported by competent, material, and substantial evidence in light of the entire record as submitted; or
   (vi) is arbitrary or capricious.86

The state high court, the Maryland Court of Appeals, has acknowledged that these legislative guidelines are less than dispositive. In Bayly Crossing, LLC v. Consumer Protection Division, 417 Md. 128, 136 (2010), the Court recognized that, although “instructive,” these provisions “do not provide . . . complete guidance, in and of themselves, [on] how to approach each category of questions cognizable in a challenge to an agency decision.” As a result, “[a]ppellate courts have devoted many pages to the consideration of the meaning (and implications) of this subject.”87 Unfortunately, not all of these pages have articulated the same or even a fundamentally-consistent approach.

86 Maryland Code (1984), State Government Article, § 10-222(h). In Maryland, rulemakings may be challenged under Section 10-125 of the State Government Article as unconstitutional; exceeding statutory authority; or non-compliant with statutory requirements for enacting a regulation. See ARNOLD ROCHVARG, MARYLAND ADMINISTRATIVE LAW 206 (2d ed. 2007). Moreover, although “Maryland courts have not used the term ‘arbitrary or capricious’ when reviewing a challenge to a regulation, the arguments present and the courts’ analyses have been ‘arbitrary or capricious’ arguments and analyses.” Id. at 208.
87 Bayly Crossing, 417 Md. at 136-37.
We start with a brief generalization of how Maryland courts treat questions of law and discretionary questions. We quickly see, however, that the courts often treat similarly situated questions differently, resulting in a jurisprudence that may be molded to conform to any desired argument. This is another way of saying that Maryland standard of law jurisprudence stands for so much that it conveys very little.

With respect to questions of law, state courts apply a “non-deferential” or independent standard of review. Notwithstanding this supposed de novo level of scrutiny, jurists are supposed to “give weight to an agency’s experience in interpretation of a statute that it administers.” “That is especially true (and justified),” according to the Court, “where the implicated statutory provisions are ambiguous or unclear.

However, “[d]efining the extent of that deference . . . remains an elusive snipe hunt.”

As the Bayly Crossing Court explained:

[T]he proper quantum of deference turns on various “considerations,” including whether the agency (1) administers the statute it is interpreting, (2) developed its interpretation through a well-reasoned process, (3) in an adversarial proceeding or formal rule promulgation, and (4) consistently applied that interpretation for a “long” period of time. Thus, the amount of deference may be seen to fluctuate with the number of “considerations” present in a given record.

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88 See id. at 137.
89 Schwartz v. Md. Dep’t of Natural Res., 385 Md. 534, 554, 870 A.2d 168, 180 (2005); see also Bd. of Physician Quality Assurance v. Banks, 354 Md. 59, 69, 729 A.2d 376, 381 (1999) (“Even with regard to some legal issues, a degree of deference should often be accorded the position of the administrative agency.”).
90 Bayly Crossing, 417 Md. at 137; see also Div. of Labor & Indus. v. Triangle Gen. Contrs., Inc., 366 Md. 407, 417 (2001) (“[W]hen a statutory provision is entirely clear, with no ambiguity whatsoever, administrative constructions, no matter how well entrenched, are not given weight.” (internal quotation marks and citations omitted)).
91 Bayly Crossing, 417 Md. at 137.
92 Id. at 137-38 (citing Baltimore Gas & Electric Co. v. Public Service Comm’n, 305 Md. 145, 161-62 (1986)).
Maryland courts also recognize the traditional category of “mixed question of law and fact,” to which they supply the deferential arbitrariness standard. Under state law, mixed questions arise “[w]hen a party challenges how an agency applied, as opposed to interpreted, a statute . . . .” Thus, like many jurisdictions, Maryland courts envision mixed questions as involving not interpretation, but law application.

B. A State of Confusion.

State caselaw is replete with instances where courts have, inexplicably, reviewed similar cases differently. In State Department of Assessments & Taxation v. North Baltimore Center, Inc., 129 Md. App. 588, 593 (2000), the intermediate appellate court – the Court of Special Appeals – considered a statute that said certain properties are exempt from taxes if they are, among other things, owned by a “charitable organization.” Like the first issue in Hearst, the primary question appeared purely legal in character – whether the statutory term “charitable” carried its common law definition. If so, an organization under the statute need only serve a charitable purpose, rather than also receive a significant amount of private donations.

The Court of Special Appeals recognized that the Legislature left ambiguous and undefined the term “charitable.” However, it did not appreciate the possibility that the Legislature, thereby, delegated the term’s interpretation to the Tax Court. Rather, it explained


\[\text{See id.}\]

\[\text{Id.}\]
that “[a]ll decisions as to what should be taxed [and exempted] are policy questions for the appropriate legislative body.” 99

As a result, the court conducted an independent “examin[ation of] the language in the exemption statute,” as though it was addressing a pure question of law. 100 It ultimately held that “‘charitable’ is used in the general common law sense.” 101 As in Hearst, however, the court left for the agency the “factual determination” and “ultimate question of whether a[ particular] entity is a ‘charitable organization.’” 102

In Comptroller of the Treasury v. Blanton, 390 Md. 528, 530 (2006), the question was whether a couple may apply a statutory tax credit to reduce not only their state income taxes, but also their local income taxes. To traditionalists, this case would present a pure question of law, in that the only issue was how a state law impacted the collection of local income taxes. And, indeed, the court described “[t]he issue sub judice [as] one of statutory interpretation.” 103 Therefore, the court followed in the footsteps of North Baltimore Center, “hold[ing]” that the credit applies only to state incomes taxes. However, in a confusing final coda that conflicted with North Baltimore Center, the high court explained that its holding was driven by “deference to the decision by the [agency] and its interpretation . . . .” 104

In Board of Physician Quality Assurance v. Banks, 354 Md. 59, 62 (1999), the question was whether Dr. Banks, a medical practitioner licensed by the State, sexually harassed hospital employees while engaged “in the practice of medicine.” To many observers, this would appear to be a traditional “mixed question of law and fact,” as the statutory phrase “in the practice of

99 Id.
100 North Baltimore Center, 129 Md. App. at 596-97.
101 Id. at 610.
102 Id. at 610-11.
104 Id. at 288.
medicine” found meaning only through its application to the facts. Nevertheless, the Court of Appeals identified the matter as purely legal.105

Also confusing was that the high court did not conduct an independent interpretation of this supposed legal question. Instead, it observed that “[e]ven with . . . some legal issues, a degree of deference should often be accorded the position of the administrative agency.”106 In fact, the court went so far as to say that the “agency’s interpretation . . . should . . . be given considerable weight” and, accordingly, upheld it as “warranted.”107

Finally, in Comptroller of the Treasury v. Citicorp International Communications, 389 Md. 156, 160 (2005), the question was whether a fee paid to terminate a lease is a “sale” and, thus, taxable. In some ways, this case resembled a pure question of law, as the central debate was whether a tax statute applied to termination fees generally. In other ways, the matter could be construed as “mixed,” for the parties did not disagree over what statute controlled or the specific facts at issue; they only disagreed over the application of the law to the facts.

The court confidently described the question as mixed.108 However, practically speaking, the court did not seem to accord the agency any deference, instead proceeding with an independent interpretation of “the plain language of the statute and regulatory provisions in question”109 and concluding that, “[i]n our view,” a termination fee is “not among the transactions that fairly fit within the statutory definition of ‘sale.’”110

105 See Banks, 354 Md. at 76; see also ROCHVARG, supra note 86, at 146 (stating that the Court of Appeals viewed the lead question in Banks as purely legal).
106 Banks, 354 Md. at 69.
107 Id. at 76 (emphasis added).
109 Id. at 167.
110 Id. at 173.
As these cases demonstrate, when it comes to review of administrative decisions, one would be wise to proceed with caution for there are no clear rules. What a court deems to be a “pure question of law” may be reviewed independently (North Baltimore Center) or result in deference to the agency (Blanton and Banks). And what appears to be a “mixed question” may receive some deference (Banks) or incur an independent de novo standard (Citicorp). In short, the traditional method of “eyeballing” questions as legal or mixed has proved unreliable; it is time for a change.

C. The Makings of a Two-Step Approach in Maryland.

The hybrid approach we propose for Maryland is not without local foundation. State courts could adopt a two-step – such as the one argued for in this article – by simply formalizing the analytical structure they have already used in various opinions.

In Maryland Division of Labor & Industry v. Triangle General Contractors, 366 Md. 407, 421 (2001), a statute authorized an agency to impose restitution on “a contractor or subcontractor [that] pays an employee less than the prevailing wage.” The agency interpreted the statute as making a general contractor liable for a subcontractor’s failure to pay a prevailing wage. The Court of Appeals held that:

Although we often give deference and considerable weight to an administrative agency’s interpretation of a statute which it administers, in this case, the language of [the statute] is entirely

111 Professor Rochvarg of the University of Baltimore School of Law highlights this inconsistency in his treatise on Maryland administrative law. He observes that “[t]he Maryland cases seem to take three different approaches” when it comes to reviewing an agency’s interpretation of a statute it administers. See ROCHVARG, supra note 86, at 143.

112 Our hybrid model would help settle much of this confusion. The clear instructions from the General Assembly in Blanton and Citicorp would augur for independent scrutiny. However, the ambiguity evident in North Baltimore Center and Banks would reveal that the so-called “purely” legal issues involved in those cases were actually delegated to the interpretative and applicative (i.e., discretionary) functions of the agencies, respectively.

113 See Triangle Gen. Contrs, 366 Md. at 426.
clear. We, therefore, do not adopt the [agency’s] construction, and interpret [the statute] based on the plain meaning of its words.\textsuperscript{[114]}

Stated another way, the court acknowledged the fulcrum that is statutory clarity. And by negative implication, it recognized that an agency’s interpretation of a statute is entitled to considerable weight, but only if there exists statutory ambiguity.

Further evidence of this principle is found in \textit{Schwartz v. Maryland Department of Natural Resources}, 385 Md. 534, 546 (2005), where the purchaser of a vessel sought a statutory sales tax exemption because the vessel would be “‘used principally’ in a state other than Maryland . . . .” The statutory definition of “used principally” provided that “a vessel is not considered to be in use for any period of time that it is held for maintenance or repair for 30 consecutive days or more.”\textsuperscript{[115]} The Court of Appeals identified two issues for review: (1) “whether and for how long the vessel was ‘held for maintenance and repair,’” and (2) “whether a vessel can be ‘used principally in this State’ if kept here fewer than six months in a given year . . . .”\textsuperscript{[116]}

The court concluded that the first question was “mixed,” for “its resolution requires not only factual findings . . . , but also construction of the somewhat ambiguous statutory language in light of those facts.”\textsuperscript{[117]} In other words, the issue was “mixed” – although it would have been more accurate to say “discretionary” – because the ambiguity leaves the statute “susceptible to various interpretations.”\textsuperscript{[118]} After discovery of this ambiguity, however, the court did not just move onto step two, but rather identified some statutory boundaries. Indeed, it described some of the necessary decisions entrusted to the agency, including, among other questions, whether

\textsuperscript{[114]} \textit{Id.}
\textsuperscript{[115]} \textit{Schwartz}, 385 Md. at 546 (internal quotation marks omitted).
\textsuperscript{[116]} \textit{Id.} at 557, 559.
\textsuperscript{[117]} \textit{Id.} at 557 (emphases added).
\textsuperscript{[118]} \textit{Id.} at 557 n.5.
“‘held’ mean[s] ‘held by a mechanic[.] . . . or ‘held in Maryland’ and whether the vessel must be operable.”

As to the second question, the state high court determined that it was “solely . . . of law.” Although it did not indicate why this was so, the court made it seem as though the clarity of the statute defined the character and ultimate treatment of the question. Indeed, the court stated that the statutory “language is susceptible to only one reading . . . .”

Finally, in Consumer Protection Division v. Morgan, 387 Md. 125, 209-10 (2005), a civil defendant challenged the imposition of $34,000 in fines, a figure the agency derived through application of various statutory factors. On review, the Court of Appeals independently determined what boundaries the legislature imposed on the agency. Then, using those boundaries as a guide for step-two reasonableness review, the court deferred to the agency’s judgment.

In most of these cases, the court considered independently whether and to what extent the General Assembly had delegated a decision to an agency – be it an interpretation or an application of a statute. In other words, the court asked whether the legislature resolved the dispute at hand (Triangle General Contractors) or remained relatively quiet, thereby compelling the agency to make purely interpretative (Schwartz) or applicative (Morgan) decisions to render meaningful the statute.

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119 Id. To this mixed question, it applied a deferential, reasonableness standard. Schwartz, 385 Md. at 558.
120 Id. at 559.
121 Id.
123 Id. at 190-91, 210; see also Supervisor of Assessments v. Group Health Ass’n., 308 Md. 151, 157 (1986) (concluding independently that the Tax Court “understood the law” and “considered all the[] factors” and then applying the substantial evidence test to its subsequent, fact-dependent determinations).
Thus, Maryland law implicitly recognizes that, in the face of ambiguity, agencies do not so much interpret legislative will, but rather respond to a “legislative invitation to make law.”\textsuperscript{124} The formalization of this principle, i.e., the adoption of the two-step approach, would not only be consistent with Maryland jurisprudence, but it would also shepherd in a new era of understanding and consistency. In its wake would be “simplicity and clear thinking in scope of review doctrine, improved communication among participants in the judicial review process, and . . . increased legitimacy [through use of] an accessible framework over time.”\textsuperscript{125, 126}

VI. Conclusion.

Since the middle of the 20th Century, our country has created and steadily developed the size and scope of the Administrative State. Our elected representatives have placed a great deal of trust in federal agencies, charging them with the execution of the nation’s laws. Due to the complexity and expansiveness of these laws, however, this executing function necessarily requires gap-filling. That is to say, agencies continually face decisions about what a statute

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{124} Identifying Questions of Law, supra note 5, at 22 (footnote omitted).
\item \textsuperscript{125} The Anatomy of Chevron, supra note 48, at 255-56. Framed in the negative, the frequent and undiscerning use of a de novo standard of review for mixed questions would “plunge judges into technical matters far exceeding their competence, cause wasteful duplication of effort at the judicial review stage, and destroy the coherence of regulatory programs.” Identifying Questions of Law, supra note 5, at 6.
\item \textsuperscript{126} Our discussion so far has pertained mainly to agency adjudications, but our hybrid two-step would apply equally-well to rulemakings, be them legislative or interpretative. After all, Chevron – the case on which much of this article is premised – was a rulemaking, not an adjudication. Moreover, we recognize that the Chevron two-step does not normally apply to informal adjudications/agency actions (such as the decision to route a highway through a park). See generally Christensen, 529 U.S. 576; Mead, 533 U.S. 218. However, the two-step approach may apply in those limited instances where the informal adjudication was the result of an agency (1) authoritatively interpreting or applying (2) a statute (3) that it is responsible for administering, and (4) its “self-interest is [not] so conspicuously at stake that it is implausible to infer a congressional delegation of law-interpreting power.” Chevron Step Zero, supra note 1, at 210.
\end{enumerate}
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means and how it should apply in a particular circumstance. Our scheme of judicial review rightfully reflects this increasing amount of federal discretion through the principle of deference.

Unfortunately, things have gotten out of hand. Today, there is very little consistency when it comes to choosing the proper standard of review in a challenge to an agency decision. Courts and litigants are inevitably able to find cases that support their side, and they spend significant time squabbling over whom should carry the day. There is a better way.

We take the principle of deference as formulated in *Chevron* and propose a few alterations. Of course, many sage courts, attorneys, and commentators have already articulated these suggestions. We simply package them in a way that may be even more palatable. The core tenets of our hybrid approach are as follows:

- Courts should approach each question on review in the same way, so long as the agency was (1) authoritatively interpreting or applying (2) a statute (3) that it is responsible for administering, and (4) its self-interest is not too conspicuously at stake.

- Questions do not come before the court pre-labeled; the two-step process itself reveals whether questions are “legal” or “discretionary” in nature.

- By leaving ambiguity in a statute, the legislature delegates to the agency not just the application but also the interpretation of the statute. Thus, the legislature may transform what traditionalists would call “pure” questions of law into discretionary questions through ambiguity.

- The Two-Step: First, courts should search for the presence of any ambiguity. If they find none, they must carry out the clear statutory instructions. If they find some, the courts must vocalize what statutory boundaries the legislature did impose.

- Courts should not deploy all tools of statutory construction in an effort to manufacture clear intent out of ambiguity. If there is ambiguity, courts should only define its extent and move on to step two.

- At step two, the court should apply a deferential, arbitrariness standard, reviewing the agency’s decision-making process and outcome. No other test need be applied.
Clearly, our two-step is much different from the one now referred to as *Chevron*. However, we posit that these tenets more accurately reflect *Chevron’s* original intentions. Taken together, they comprise a balanced scheme for the review of administrative decisions that preserves for courts their independent role to say what the law is, while recognizing the incredible responsibilities entrusted to the Administrative State. If the American citizenry is uneasy with the amount of power and discretion enjoyed by agencies, they should take it up with their representatives, who continue to unabashedly “punt” to agencies important interpretations and policy judgments of all stripes. We cannot and should not expect courts to ride to the rescue and obstruct the express wishes of the representatives whom we have chosen.