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Chevron as a Doctrine of Hard Cases

Frederick Liu

Yale Law School, Frederick.Liu@aya.yale.edu

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Frederick Liu

Theories of Statutory Interpretation

Professor William N. Eskridge, Jr.

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TABLE OF CONTENTS

INTRODUCTION	1
I. THE NOTION OF HARD CASES.....	2
II. <i>CHEVRON</i> AS A DOCTRINE OF HARD CASES.....	9
A. <i>Chevron Step One: Identifying Hard Cases</i>	10
B. <i>Chevron Step Two: Deferring in Hard Cases</i>	17
C. <i>Solving Chevron's Puzzles</i>	25
D. <i>Challenging the Conventional Wisdom</i>	33
III. IMPLICATIONS FOR <i>CHEVRON'S</i> DOMAIN	36
A. <i>Understanding Chevron Step Zero</i>	36
B. <i>Understanding the Relationship Between Chevron and the Canons</i>	43
CONCLUSION.....	48

INTRODUCTION

The most important doctrine of statutory interpretation in the modern administrative state rests today on a legal fiction. That doctrine, announced over twenty years ago in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*,¹ directs courts to defer to “reasonable” agency interpretations of “ambiguous” statutes.² Although *Chevron* itself left unclear the doctrine’s precise basis,³ a consensus has since formed on what that basis is. According to a diverse group of jurists and scholars alike, the doctrine rests on a presumption about congressional intent: when courts follow *Chevron*, they are merely respecting Congress’s decision to delegate interpretive authority to the agency.⁴ Of course, Congress seldom delegates such authority explicitly; *Chevron* itself dealt with an “implicit” delegation.⁵ For the most part, then, the presumption about congressional intent is a mere legal fiction—a fact no one denies.⁶

This paper identifies a different foundation for *Chevron*, one that does not rely on a fiction. It argues that *Chevron* is grounded not in the intent of Congress, but in the nature of law itself. A central tenet of legal positivism is that “in any legal system there will always be certain legally unregulated cases in which on some point no decision

¹ 467 U.S. 837 (1984).

² *Id.* at 843-44.

³ Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 197 (2006) (“The *Chevron* Court’s approach was much clearer than the rationale that accounted for it.”).

⁴ *See, e.g.*, Robert A. Anthony, *Which Agency Interpretations Should Bind Citizens and the Courts*, 7 YALE J. ON REG. 1, 4 (1990); Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 369-72 (1986); Elizabeth Garrett, *Legislating Chevron*, 101 MICH. L. REV. 2637, 2637 (2003); John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 623 (1996); Jerry L. Mashaw, *Norms, Practices, and the Paradox of Deference: A Preliminary Inquiry into Agency Statutory Interpretation*, 57 ADMIN. L. REV. 501, 505 (2005); Thomas W. Merrill & Kristin E. Hickman, *Chevron’s Domain*, 89 GEO. L.J. 833, 872 (2001); Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 516; Laurence H. Silberman, *Chevron—The Intersection of Law & Policy*, 58 GEO. WASH. L. REV. 821, 822 (1990).

⁵ *Chevron*, 467 U.S. at 844.

⁶ *See, e.g.*, Breyer, *supra* note 4, at 370; Manning, *supra* note 4, 623; Scalia, *supra* note 4, at 517; Cass R. Sunstein, *Beyond Marbury, The Executive’s Power To Say What the Law Is*, 115 YALE L.J. 2580, 2610 n.58 (2006).

either way is dictated by the law.”⁷ In deciding these so-called hard cases, judges must rely on their own moral reasoning to fill in the gaps where the law has run out—to make law where none before existed. This interstitial law-making authority is implicit in the notion of judicial power. *Chevron* is best understood as a doctrine of judicial prudence guiding the courts’ discretion in hard cases. Where the law is indeterminate, it mandates deference to gap-filling agency interpretations out of a constitutionally-inspired respect for the legitimacy of agency law-making in our system of democracy.

In defending *Chevron* as a doctrine of hard cases, this paper 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, H.L.A. Hart and Joseph Raz. Part II argues that *Chevron* is best understood as a doctrine of hard cases, a doctrine directing courts to exercise their discretion by deferring to agencies. Finally, Part III explores some of the implications of understanding *Chevron* as a doctrine of hard cases.

I. THE NOTION OF HARD CASES

To succeed as an “instrument of social control,” the law could not merely give particular directions to particular individuals.⁸ If the law were so specific, it would be easy to evade, for legislators cannot possibly anticipate every instance of the type of conduct they seek to regulate. “Hence the law must predominantly, but by no means exclusively, refer to *classes* of person[s], and to *classes* of acts, things, and

⁷ H.L.A. HART, *THE CONCEPT OF LAW* 272 (2d ed. 1994).

⁸ HART, *supra* note 7, at 124.

circumstances”; it must lay down general rules and standards “in advance of the successive occasions on which they are to be applied.”⁹

With any rule, no matter how general, there will be “clear central cases, where it certainly applies.”¹⁰ The law is no different. Consider, for example, a statute “prohibiting the use of vehicles in the park.”¹¹ Does it apply to a visitor driving his car down one of the park’s paths? Of course it does. Whatever else the statute might prohibit, it certainly prohibits the use of a car: “If anything is a vehicle a motor-car is one.”¹² Whether the term “vehicle” encompasses a car is so plain that application of the law seems almost mechanical: the judge “identifies the law, determines the facts, and applies the law to the facts.”¹³

When “the law provides a solution to the case,” as it does in the example just mentioned, the case is a “regulated” one.¹⁴ To be sure, finding the solution to a case will not always be as easy as determining whether a car is a “vehicle.” But a case need not be easy to be “regulated.”¹⁵ A regulated case is merely one in which the law yields a uniquely correct answer. To resolve such a case, the judge need only apply pre-existing law.¹⁶

⁹ *Id.*

¹⁰ *Id.* at 123; *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 131 (“Of course even with very general standards there will be plain indisputable examples of what does, or does not, satisfy them.”).

¹¹ *Id.* at 128. This example will no doubt be familiar to law students who have taken a course on Legislation. *See* WILLIAM N. ESKRIDGE, JR., PHILIP R. FRICKEY & ELIZABETH GARRETT, *CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 819 (3d ed. 2001) (using a similar example as an introductory problem); *see also* William N. Eskridge, Jr., *No Frills Textualism*, 119 *HARV. L. REV.* 2041, 2041-43 (2006) (book review) (same).

¹² HART, *supra* note 7, at 126 (internal quotation marks omitted).

¹³ JOSEPH RAZ, *THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY* 182 (1979).

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

Although “the life of the law” consists largely of regulated cases, “uncertainties” inevitably arise.¹⁷ All rules, “however smoothly they work over the great mass of ordinary cases, will, at some point where their application is in question, prove indeterminate; they will have what has been termed an *open texture*.”¹⁸ Open texture is “a general feature of human language,” “the price to be paid for the use of general classifying terms in any form of communication concerning matters of fact.”¹⁹ Consider again the term “vehicle.” A car is clearly a “vehicle.” But beyond this “core of certainty” lies “a penumbra of doubt.”²⁰ Like all “descriptive concepts,” the term “vehicle” contains “vague borderlines”²¹: “Does ‘vehicle’ used here include bicycles, airplanes, roller skates?”²²

Because open texture is “inherent in the nature of language,” it exists from the moment a law is enacted.²³ Over time, the openness expands as a result of “two connected handicaps.”²⁴ The first is “our relative ignorance of fact.”²⁵ Because we cannot know “all the possible combinations of circumstances which the future may bring,”²⁶ the boundaries of the law are constantly tested by unanticipated “fact-situations.”²⁷ These fact-situations do not come “labelled as instances of the general

¹⁷ HART, *supra* note 7, at 124.

¹⁸ *Id.* at 128; *see also id.* at 123 (noting that “all rules” have “a fringe of vagueness or ‘open texture’”).

¹⁹ *Id.* at 128.

²⁰ *Id.* at 123.

²¹ RAZ, *supra* note 13, at 193.

²² HART, *supra* note 7, at 126 (internal quotation marks omitted).

²³ *Id.* at 126.

²⁴ *Id.* at 128. It should be noted that these additional handicaps, which result from the indeterminacy of legislative intention, rather than of statutory language, would be of no concern to textualists. *See* ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 29 (1997) (“[T]he objective indication of the words, rather than the intent of the legislature, is what constitutes the law . . .”).

²⁵ HART, *supra* note 7, at 128.

²⁶ *Id.*

²⁷ *Id.* at 126.

rule”; “nor can the rule itself step forward to claim its own instances.”²⁸ The second handicap is “our relative indeterminacy of aim.”²⁹ We commonly legislate with both a general purpose and particular cases in mind. When we ban vehicles in the park, for instance, our aim might be to preserve “peace and quiet” by ensuring that no cars, buses, or motorcycles enter in.³⁰ But what happens in the unanticipated case of, say, “a toy motor-car electrically propelled”?³¹ “We have not settled, because we have not anticipated, the question which will be raised by the unenvisaged case when it occurs: whether some degree of peace in the park is to be sacrificed to, or defended against, those children whose pleasure or interest it is to use these things.”³²

Of course, open texture is not always unintentional or unanticipated.³³ Sometimes open texture is the deliberate choice of legislators who cannot agree on more specific language, or who intend the meaning of vague terms to be developed by the courts in a common-law fashion.³⁴ Whether intended or unintended, however, open texture invariably gives rise to “unregulated” or “hard” cases—cases “in which on some point no decision is dictated by the law and the law is accordingly partly indeterminate or incomplete.”³⁵ Because of these gaps in the law, hard cases “do not have a correct legal answer.”³⁶ Unlike regulated disputes, they cannot be resolved by “merely applying already pre-existing settled law.”³⁷

²⁸ *Id.*

²⁹ *Id.* at 128.

³⁰ *Id.* at 129.

³¹ *Id.*

³² *Id.*

³³ RAZ, *supra* note 13, at 193.

³⁴ *Id.*

³⁵ HART, *supra* note 7, at 272.

³⁶ RAZ, *supra* note 13, at 181; *see also* HART, *supra* note 7, at 273 (describing “hard cases” as ones “where the existing law fails to dictate any decision as the correct one”).

³⁷ HART, *supra* note 7, at 272.

How, then, are judges to decide hard cases? Where the law runs out, judges have no choice but to “fill[] the gaps by exercising a limited law-creating discretion.”³⁸ They must “*make* law for the case,”³⁹ “act[ing] just as legislators do.”⁴⁰ This means that judges “do rely and should rely on their own moral judgment.”⁴¹ It also means that “they should adopt those rules which they judge best.”⁴² Thus, although hard cases present “a fresh choice between open alternatives,”⁴³ they do not grant judges license to act arbitrarily.⁴⁴ Judges have a legal duty to exercise reasoned judgment, even in hard cases.⁴⁵ If the law does not settle whether the term “vehicle” includes an electrically propelled toy car, the judge should decide the question by weighing conscientiously the interests of park-goers, children, and others.⁴⁶ In resolving the case one way or another, the honest judge will not be able to say he discovered a “uniquely correct answer” in the law.⁴⁷ But he should be able to say he reached “an answer which is a reasonable compromise between many conflicting interests.”⁴⁸

Although judges with different values might reach different conclusions in hard cases,⁴⁹ it bears emphasis that the discretion they enjoy in such cases is limited. For one thing, judges are substantively constrained by pre-existing law.⁵⁰ “There are no pure law-

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ RAZ, *supra* note 13, at 197.

⁴¹ *Id.* at 199.

⁴² *Id.* at 197.

⁴³ HART, *supra* note 7, at 128.

⁴⁴ *Id.* at 273; *see also* RAZ, *supra* note 13, at 197.

⁴⁵ RAZ, *supra* note 13, at 197.

⁴⁶ *See* HART, *supra* note 7, at 129. This is not to say that the judge’s decision-making should have a consequentialist or utilitarian cast. This is only to say that the judge should render a decision consistent with the common good.

⁴⁷ *Id.* at 132.

⁴⁸ *Id.*

⁴⁹ *Id.* at 273.

⁵⁰ *Id.*

creating cases.”⁵¹ Even hard cases are “partly regulated” in the sense that the judge “has to apply existing law as well as to make new law.”⁵² Indeed, “the law may rule out several solutions as inappropriate and give some general guidance concerning the choice between some or all of the remaining possible solutions.”⁵³ The degree of the judge’s discretion thus depends on the size of the gap where the law has run out. For another thing, judges’ powers are merely “*interstitial*.”⁵⁴ Unlike legislators, judges lack the ability to “introduce large-scale reforms or new codes.”⁵⁵ In their law-making, judges can only fashion “rules to deal with the specific issues thrown up by particular cases.”⁵⁶

Where do judges derive the authority, albeit a limited one, to make law in hard cases? Just as the notion of hard cases inheres in the very nature of law, the authority to decide hard cases inheres in the very nature of judicial power. This is not to say that the judge’s role in hard cases cannot be altered, or his discretion constrained, by settled rules of adjudication.⁵⁷ Rather, this is merely to say that, in the absence of such secondary rules, judges have no choice but to exercise their own moral reasoning in hard cases. The “jurisdiction to settle [hard cases] by choosing between the alternatives which the statute leaves open” thus “seems obviously to be part, even if only an implied part,” of the judicial power.⁵⁸

⁵¹ RAZ, *supra* note 13, at 195.

⁵² *Id.* at 182; *see also id.* at 195 (“In every case in which the court makes law it also applies laws restricting and guiding its law-creating activities.”).

⁵³ *Id.* at 181.

⁵⁴ HART, *supra* note 7, at 273; *see also* RAZ, *supra* note 13, at 200 (noting the “piecemeal nature of judicial law-making”).

⁵⁵ HART, *supra* note 7, at 273.

⁵⁶ *Id.* at 275.

⁵⁷ Indeed, this paper argues that the *Chevron* doctrine is one such rule of adjudication, guiding judges’ discretion in hard cases. *See infra* Part II.

⁵⁸ HART, *supra* note 7, at 153.

To be sure, the “familiar rhetoric of the judicial process” belies the existence of *any* judicial law-making authority: “lawyers address the judge as if he was always concerned to discover and enforce existing law and the judge speaks as if the law were a gapless system of entitlements in which a solution for every case awaits his discovery, not his invention.”⁵⁹ But this familiar rhetoric is easily explained. Lawyers will seldom admit that the law itself does not win them their case. For their part, judges may think that they are merely applying the law when they are in fact making it; “[j]udicial law-making need not be intentional.”⁶⁰ Moreover, “the same kinds of arguments are used in applying and creating laws.”⁶¹ Argument by analogy, for example, is often a prominent feature of judicial reasoning at both stages.⁶² Because of this “strong continuity between law-applying and law-making,” judges often “move[] imperceptibly from one function to the other.”⁶³

The account of the law set forth here is not uncontroversial. Legal positivism “assumes that it is possible to distinguish between the roles of the courts in applying and making law.”⁶⁴ Not everyone shares this assumption: legal realists deny that courts ever simply apply the law, while Dworkin and his followers deny that courts ever have to make it.⁶⁵ Nevertheless, there is a real sense in which “we are all to some degree positivists now.”⁶⁶ Central tenets of legal positivism have been accepted not only by

⁵⁹ *Id.* at 274. For the criticism that legal positivism fails to capture how lawyers and judges speak about the law, see RONALD DWORKIN, *LAW’S EMPIRE* 37-43 (1986).

⁶⁰ RAZ, *supra* note 13, at 207.

⁶¹ *Id.* at 209.

⁶² *Id.* at 208-09.

⁶³ *Id.* at 208.

⁶⁴ *Id.* at 197.

⁶⁵ See H.L.A. Hart, *American Jurisprudence Through English Eyes: The Nightmare and the Noble Dream*, 11 GA. L. REV. 969, 973-74, 983 (1977).

⁶⁶ Frank I. Michelman, *Thirteen Easy Pieces*, 93 MICH. L. REV. 1297, 1298 (1995) (book review); see also Franklin G. Snyder, *Nomos, Narrative, and Adjudication: Toward a Jurisgenetic Theory of Law*, 40 WM. &

disciples of Hart and Raz, but also by legal pragmatists⁶⁷ and even natural law theorists.⁶⁸

The next Part of this paper seeks to show how this overlapping consensus on the nature of law can help us understand the purposes behind 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 court asks “whether Congress has directly spoken to the precise question at issue.”⁶⁹ If yes, “the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.”⁷⁰ If no, the court must proceed to Step Two, where it asks “whether the agency’s answer is based on a permissible construction of the statute.”⁷¹

The *Chevron* doctrine embodies the positivist account of the law described in Part I. Its two steps correspond to the “two completely different stages in the process of decision” identified by legal positivists: law-applying and law-making.⁷² Translated into the language of legal positivism, the question at Step One becomes whether the law provides a solution to the dispute. If it does, the court must simply apply the law. But if it does not, the case is a hard one, and the court must exercise its limited law-creating discretion. The question at Step Two becomes whether the agency’s construction fits

MARY L. REV. 1623, 1646 (1999) (stating that “the dominant orthodoxy,” at least “among legal academics,” is that judges make law in hard cases).

⁶⁷ See, e.g., RICHARD A. POSNER, *HOW JUDGES THINK* 9 (2008).

⁶⁸ See, e.g., John Finnis, *The Truth in Legal Positivism*, in *THE AUTONOMY OF LAW: ESSAYS ON LEGAL POSITIVISM* 195, 203-04 (Robert P. George ed., 1996); Robert P. George, *Natural Law*, 31 HARV. J.L. & PUB. POL’Y 171, 192 (2008) (“[Natural law] theorists have had no difficulty accepting the central thesis of what we today call legal positivism—that is, that the existence and content of the positive law depends on social facts and not on its moral merits.”).

⁶⁹ *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984).

⁷⁰ *Id.* at 842-43.

⁷¹ *Id.* at 843.

⁷² HART, *supra* note 7, at 273.

within the gap where the law has run out. If it does, the court must defer to the agency's law-making. But if it does not, the court must make law on its own by adopting the rule it deems best.

Chevron is therefore best understood as a judge-made rule guiding the court's discretion in hard cases. Section A goes into greater detail about how legal positivism provides a cogent theory of *Chevron* Step One; Section B does the same with respect to *Chevron* Step Two. Section C shows how this positivist account of *Chevron* answers recurring objections to agency deference. Section D contrasts this novel theory of *Chevron* with the conventional wisdom.

A. *Chevron Step One: Identifying Hard Cases*

“When a court reviews an agency's construction of the statute which it administers . . . ,” wrote Justice Stevens on behalf of the *Chevron* Court, “[f]irst, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.”⁷³ In an important footnote, Justice Stevens 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.⁷⁴

⁷³ *Chevron*, 467 U.S. at 842-43.

⁷⁴ *Id.* at 843 n.9 (citations omitted).

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”? How clear is “clear”?

The notion of hard cases provides cogent answers to these questions. Just as they would any ordinary statutory interpretation case, courts should begin by determining what the law says (i.e., the intent of Congress) using generally accepted legal methods (i.e., traditional tools of statutory construction). If the law provides a solution (i.e., if the intent of Congress is clear), they should simply apply (i.e., give effect to) the law. *Chevron* Step One consists in interpreting and applying the law, the first stage in the positivist’s process of decision. Only if the case turns out to be a hard one should courts proceed to Step Two.

This positivist account of *Chevron* Step One conforms with a close reading of the decision in *Chevron* itself. There, Justice Stevens implied that Step One is not an inquiry unique to *Chevron* deference, but rather one a court “always” conducts when interpreting statutes.⁷⁵ Three central aspects of *Chevron* Step One—the object of the inquiry, the means by which it is pursued, and the consequences of finding an answer—affirm that Step One is not anything special, but rather the initial, law-applying stage of any decision.

Consider first the *object* of the Step One inquiry: determining whether “the intent of Congress is clear.”⁷⁶ An obvious question is, “How clear is clear?”⁷⁷ In *Chevron*, Justice Stevens contrasted a “clear” statute with a “silent or ambiguous” one.⁷⁸ A “silent or ambiguous” statute is one that lends itself to multiple constructions, all of which are

⁷⁵ *Id.* at 842.

⁷⁶ *Id.*

⁷⁷ Scalia, *supra* note 4, at 520.

⁷⁸ *Chevron*, 467 U.S. at 842-43.

permissible.⁷⁹ If clarity is the opposite of ambiguity,⁸⁰ then a “clear” statute is one that admits of a single permissible construction. For purposes of *Chevron*, then, a statute is clear when it is determinate—that is, when it provides a solution to the question at issue. Determining whether “the intent of Congress is clear” is therefore the same as determining whether the case is hard—the first stage in the positivist’s process of decision.

Some might argue that a “clear” statute is not merely one that provides a solution, but one whose solution is particularly plain. On this view, *Chevron* Step One serves as a sort of clear statement rule that functions as a strong presumption in favor of deference to agencies. Under this rule, courts would be obliged to defer even in some cases in which the law has a uniquely correct interpretation. Nothing in the *Chevron* decision itself, however, suggests that deference is ever warranted when the statute admits of a uniquely correct interpretation. Quite the contrary, the decision states that when a court “ascertains that Congress had an intention on the precise question at issue, that intention is law and must be given effect.”⁸¹ If the Court meant to impose a clear statement rule, then it omitted a crucial step; for in addition to “ascertain[ing] that Congress had an intention,”⁸² a court would have to assess whether that intention was sufficiently “clear.” A fair reading of *Chevron* suggests that, upon finding a solution in the law, the court should simply enforce it, without requiring an added standard of clarity.

This is not to say that standards of clarity are altogether irrelevant to the Step One inquiry. To determine whether the statute provides a solution in the first place, a court

⁷⁹ *See id.* at 843 & n.11.

⁸⁰ Scalia, *supra* note 4, at 520.

⁸¹ *Chevron*, 467 U.S. at 843 n.9.

⁸² *Id.*

must have some standard of proof—some idea of “when ‘enough’ evidence has been gathered to warrant a legal truth claim about the text’s meaning.”⁸³ If interpretation *A* has a probability of correctness of 51%, and interpretation *B* has a probability of correctness of 49%, a court must decide whether *A* is the only permissible interpretation of the statute.⁸⁴ If the court’s standard of proof is “more likely than not,” then interpretation *A* is uniquely correct, the “intent of Congress is clear,” and the analysis ends at Step One. But if its standard of proof is higher—requiring a probability of correctness of 60%, for example—then both interpretations *A* and *B* are permissible, the statute is ambiguous, and the analysis moves on to Step Two.

Chevron does not impose a standard of clarity, such as a clear statement rule, beyond the standard of proof already built into the analysis of whether the statute provides a solution. Nor does it require that judges adopt a particular standard of proof in their analysis. Judges are free to set their standard of proof at whatever probability of correctness they wish,⁸⁵ just as they are free to adopt whatever interpretive methodology they desire. Some have suggested the existence of a close relationship between a judge’s interpretive methodology and his standard of proof. Justice Scalia, for example, has claimed that “[o]ne who finds *more* often (as I do) that the meaning of a statute is apparent from its text and from its relationship with other laws, thereby finds *less* often that the triggering requirement for *Chevron* deference exists.”⁸⁶ Studies have indeed

⁸³ Gary Lawson, *Proving the Law*, 86 NW. U. L. REV. 859, 875 (1992).

⁸⁴ For a similar example, see Note, “How Clear Is Clear” in *Chevron’s Step One?*, 118 HARV. L. REV. 1687, 1698 (2005).

⁸⁵ Justice Scalia, for example, rejects the view that “ambiguity exists only when the arguments for and against the various possible interpretations are in absolute equipoise.” Scalia, *supra* note 4, at 520. He thus sets a standard of proof somewhere above 51%.

⁸⁶ *Id.* at 521; see also Thomas W. Merrill, *Textualism and the Future of the Chevron Doctrine*, 72 WASH. U. L.Q. 351, 354 (1994) (“[T]he general pattern in the Court appears to suggest something of an inverse relationship between textualism and the use of the *Chevron* doctrine.”).

shown that the textualist Justice Scalia is overall less deferential to agencies than his colleagues, especially the purposivist Justice Breyer.⁸⁷ But a judge's interpretive methodology is analytically distinct from his standard of proof; two judges might both be textualists, for instance, and yet have different thresholds for concluding that an interpretation is uniquely correct in light of the statutory text.

My own hypothesis is that standards of proof are what truly divide judicial liberals from judicial conservatives.⁸⁸ Whereas judicial liberals, including Justice Breyer, have higher standards of proof and are thus more likely to proceed to Step Two, judicial conservatives, including Justice Scalia, have lower standards of proof and are thus more likely to end the analysis at Step One. In other words, judicial liberals perceive very many hard cases, and judicial conservatives extremely few. The notion of hard cases not only captures the meaning of the *Chevron* doctrine, but also explains how judicial liberals and judicial conservatives differ in their application of it.

In sum, the object of *Chevron* Step One is no different from the object of the first stage of any statutory interpretation decision: determining whether the statute provides a solution. Judging by a close reading of *Chevron* itself, a "clear" statute is one whose meaning on the question at issue is determinate. In contrast, a "silent or ambiguous" statute is one that fails to provide a solution and thus gives rise to a hard case. The question, "How clear is clear?," finds its answer in the principles of legal positivism.

⁸⁷ See Thomas J. Miles & Cass R. Sunstein, *Do Judges Make Regulatory Policy? An Empirical Investigation of Chevron*, 73 U. CHI. L. REV. 823, 826 (2006).

⁸⁸ See my Book Note, *The Supreme Court Appointments Process and the Real Divide Between Liberals and Conservatives*, 117 YALE L.J. (forthcoming 2008).

Consider next the *means* of discerning “the intent of Congress”: what Justice Stevens’s opinion in *Chevron* terms the “traditional tools of statutory construction.”⁸⁹ The word “traditional” bolsters the conclusion that the Step One inquiry is no different from ordinary statutory interpretation. It should come as no surprise, then, that the growing debate within the Court regarding the appropriate method of interpretation at *Chevron* Step One mirrors the broader debate among the Justices regarding interpretive methodology generally. Justice Scalia, an avowed textualist, has insisted that the Step One inquiry be confined to an examination of statutory text and structure.⁹⁰ Justice Stevens, ever the intentionalist, has insisted that other sources of statutory meaning, including legislative history and purpose, be consulted as well.⁹¹

Though authored by Justice Stevens, *Chevron* itself does not take sides in this methodological dispute. To be sure, the decision makes “the *intent* of Congress” the touchstone of the Step One inquiry,⁹² and devotes an entire section to a discussion of legislative history.⁹³ But the term “intent of Congress” is sufficiently broad to encompass even textualist theories of interpretation; Justice Scalia, for instance, claims that he “look[s] 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*.”⁹⁴ And indeed, the decision in *Chevron* uses the term in an ecumenical fashion, essentially

⁸⁹ *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 n.9 (1984).

⁹⁰ *See, e.g., City of Chicago v. Envtl. Def. Fund*, 511 U.S. 328 (1994) (Scalia, J.); *INS v. Cardozo-Fonseca*, 480 U.S. 421, 452-53 (1987) (Scalia, J., concurring in the judgment).

⁹¹ *See, e.g., Babbitt v. Sweet Home Chapter of Cmty. for a Great Or.*, 515 U.S. 687, 704-08 (1995) (Stevens, J.); *INS v. Cardozo-Fonseca*, 480 U.S. 421, 432-43 (1987) (Stevens, J.).

⁹² *Chevron*, 467 U.S. at 842 (1984) (emphasis added).

⁹³ *Id.* at 862-64.

⁹⁴ SCALIA, *supra* note 24, at 17.

as a synonym for statutory meaning.⁹⁵ Moreover, the discussion of legislative history may simply reflect the fact that the opinion was written by an ardent intentionalist, and that the new textualism had yet to emerge as a viable alternative to intentionalism and purposivism.⁹⁶ In any event, the recurring debate over interpretive methodology suggests that the question at Step One is no different from that in every case of statutory interpretation—whether the law yields a solution to the question at issue.

Finally, consider the *consequences* that flow from the Step One inquiry. “If the intent of Congress is clear, that is the end of the matter,” regardless of whether an administrative interpretation is involved, because “the unambiguously expressed intent of Congress” binds “the court, as well as the agency.”⁹⁷ This is just another way of saying that, when the law provides a solution to the case, the court need only apply the law, because there is no room for law-making by either the court or the agency. The complete lack of discretion when “the intent of Congress is clear” is further proof that Step One is simply the law-applying stage of the positivist’s process of decision.⁹⁸

Of course, the intent of Congress is not always clear. If the statute fails to provide a solution—if, in other words, the law runs out—then courts are to proceed to *Chevron* Step Two. The next Section takes a closer look at *Chevron* Step Two through the lens of legal positivism.

⁹⁵ See *Chevron*, 467 U.S. at 843 (equating the absence of an “unambiguously expressed intent of Congress” with “the statute [being] silent or ambiguous”).

⁹⁶ The new textualism only emerged during the Court’s 1986 Term, Justice Scalia’s first. See William N. Eskridge, Jr., *The New Textualism*, 37 U.C.L.A. L. Rev. 621, 623 (1990).

⁹⁷ *Id.* at 842-43.

⁹⁸ *Id.* at 842.

B. *Chevron Step Two: Deferring in Hard Cases*

As the previous Section showed, Step One is no different from the law-applying stage in an ordinary case of statutory interpretation. It is not until Step Two that the presence of an agency interpretation affects the analysis. “If . . . the court determines Congress has not directly addressed the precise question at issue,” wrote Justice Stevens in *Chevron*:

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.⁹⁹

It is here that the notion of deference finally enters the picture. As Justice Stevens stressed in a footnote, “[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.”¹⁰⁰ To justify deference, the court need only conclude that the agency construction was one among “permissible,”¹⁰¹ or “reasonable,”¹⁰² interpretations of the statute.

Though seemingly straightforward, Step Two, like Step One, warrants more explanation than Justice Stevens provided in *Chevron*. What would it mean for a court to “impose its own construction on the statute”? When is an interpretation of a statute

⁹⁹ *Id.* at 843 (footnote omitted).

¹⁰⁰ *Id.* at 843 n.11.

¹⁰¹ *Id.* at 843.

¹⁰² *Id.* at 844.

“permissible”? Why is deference to “permissible” agency interpretations justified in the first place? Once again, the notion of hard cases 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 its limited law-creating discretion. When an agency has already construed the statute, however, the court need not weigh the various policy options itself (i.e., the court need not impose its own construction on the statute). Rather, the court should simply defer to the agency construction, so long as that construction fits within a gap left by the law (i.e., so long as that construction is permissible). Deference is warranted because, in our democratic system, law-making by politically accountable agencies is more legitimate than law-making by unelected judges.

That Step Two is triggered by the law running out is evident from the decision in *Chevron* itself. There, Justice Stevens used the language of legal positivism to describe the circumstances under which a court should proceed to Step Two. He spoke, for instance, of “silent or ambiguous” statutes,¹⁰³ of “gap[s] left open by Congress,”¹⁰⁴ and of issues on which “Congress did not actually have an intent”¹⁰⁵—each a reference to the indeterminacy of language and intention that inevitably gives rise to hard cases. He even speculated about the reasons for that indeterminacy, pointing to the positivist’s sources of open texture: perhaps Congress “consciously desired” the agency to fill in the ambiguities; perhaps Congress “simply did not consider the question” at all; or “perhaps Congress was

¹⁰³ *Id.* at 843.

¹⁰⁴ *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))).

¹⁰⁵ *Id.* at 845.

unable to forge a coalition on either side of the question, and those on each side decided to take their chances with the scheme devised by the agency.”¹⁰⁶ These passages strongly suggest that Justice Stevens conceived of Step Two as an inquiry triggered only in hard cases, by the law running out.

Consistent with legal positivism, Justice Stevens further recognized that hard cases leave judges with a limited discretion to make law. In an often overlooked footnote to his opinion, Justice Stevens cited *The Spirit of the Common Law* by Roscoe Pound.¹⁰⁷ On the pages cited, Pound discusses “the myriad cases in respect to which the lawmaker had no intention because he had never thought of them.”¹⁰⁸ In such cases, Pound explains, “the courts, willing or unwilling, must to some extent make the law under the guise of interpretation.”¹⁰⁹ By citing Pound, Justice Stevens implied that a court makes law when it “impose[s] its own construction” on a “silent or ambiguous” statute.¹¹⁰

At other points in his opinion, Justice Stevens further emphasized the discretion inherent in construing indeterminate statutes. He explained that the agency’s interpretation need not be “the only one it permissibly could have adopted,” recognizing the absence of uniquely correct answers at Step Two.¹¹¹ He also characterized the process of filling in statutory gaps as one of finding “a reasonable accommodation of manifestly competing interests,”¹¹² echoing the positivist’s admonition that “a reasonable

¹⁰⁶ *Id.* at 865.

¹⁰⁷ *Id.* at 843 n.10.

¹⁰⁸ ROSCOE POUND, *THE SPIRIT OF THE COMMON LAW* 174 (photo. reprint 1999) (1921).

¹⁰⁹ *Id.*

¹¹⁰ *Chevron*, 467 U.S. at 843.

¹¹¹ *Id.* at 843 n.11.

¹¹² *Id.* at 865.

compromise between many conflicting interests” is the best that can be achieved in a hard case.¹¹³

The central innovation of the *Chevron* doctrine is that courts themselves need not engage in “reconciling conflicting policies” when an agency has already done so.¹¹⁴ Rather than “impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation,” a court should simply ask “whether the agency’s answer is based on a permissible construction of the statute.”¹¹⁵ One might think that, if Step Two is truly limited to hard cases, then it makes no sense to inquire into the “reasonable[ness]” of the agency’s interpretation.¹¹⁶ After all, the law does not provide a uniquely correct answer to a hard case. What standard would courts use, then, to measure the reasonableness of an agency interpretation?

Recall, however, that the law-creating discretion in hard cases is limited. A hard case is not one in which the law does no work at all; indeed, a hard case may be one in which the law goes a long way before running out. Even in hard cases, then, courts and agencies must apply pre-existing law as well as make new law. Their law-making is substantively constrained by pre-existing law, which they have no power to change. Thus, to be upheld, an agency interpretation must reflect “a reasonable choice *within* a gap left open by Congress.”¹¹⁷ The size of the gap varies from case to case, depending on the scope of pre-existing law.¹¹⁸ But in every case, the duty of the reviewing court

¹¹³ HART, *supra* note 7, at 132.

¹¹⁴ *Chevron*, 467 U.S. at 865.

¹¹⁵ *Id.* at 843.

¹¹⁶ *Id.* at 844.

¹¹⁷ *Id.* at 866 (emphasis added).

¹¹⁸ As we shall see in Section III.B, the size of the gap may also depend on the application of certain substantive canons of statutory interpretation.

remains the same: to make sure that the agency interpretation falls within the range of reasonableness represented by the size of the gap where the law has run out.

By deferring to a reasonable agency construction, the court avoids having to resolve silences and ambiguities on its own. But it does not avoid having to exercise its moral judgment. As an exercise of the court's limited law-creating discretion in hard cases, the decision to defer is itself a moral one. We should ask, then, what justifies the moral choice to defer. Why should courts defer to the judgment of agencies in filling gaps in the law, when courts could fill those gaps using their own judgment?

Justice Stevens's decision in *Chevron* embraced two different answers to this question. The first was that agencies are *more capable* policy-makers than courts. Especially when "the regulatory scheme is technical and complex," agencies may be "in a better position" to reconcile competing policy considerations.¹¹⁹ *Chevron* itself dealt with the issue of environmental regulation, and Justice Stevens pointed out that "[j]udges are not experts in the field."¹²⁰ He also suggested that judges may not be as familiar with how a particular statute operates, noting that Congress might "consciously desire[]" to delegate policy-making responsibilities to agencies because of their "great expertise" and awareness of "everyday realities."¹²¹

Although Justice Stevens cited agency expertise as one reason for deference, he relied more heavily on another: agencies are *more legitimate* policy-makers than courts.¹²² The "policy arguments" made at Step Two, he stated, "are more properly

¹¹⁹ *Id.* at 865.

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Accord Manning, supra* note 4, at 626 ("While ascribing [the presumption of a congressional delegation of law-making authority to the agency] in part to the fact that judges are 'not experts in the field,' *Chevron*'s reasoning devotes far greater emphasis to the broader assumptions underlying our structure of government." (footnote omitted)).

addressed to legislators or administrators, not judges.”¹²³ This is because “[t]he responsibilities for assessing the wisdom of . . . policy choices and resolving the struggle between competing views of the public interest are not judicial ones: ‘Our Constitution vests such responsibilities in the political branches.’”¹²⁴ Justice Stevens acknowledged that “agencies are not directly accountable to the people.”¹²⁵ But he pointed out that agencies are supervised by the Chief Executive, who *is* directly accountable.¹²⁶ Thus, he concluded, “[w]hen a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency’s policy, . . . federal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do.”¹²⁷

Because agency policy-making is rendered legitimate by its connection to the political process, Justice Stevens found nothing wrong with an agency formulating policies with political considerations in mind, or with policies changing as administrations change. *Chevron* itself involved an agency construction that was revised when a new administration took office.¹²⁸ In upholding the revised construction, Justice Stevens confirmed that an agency “may properly rely upon the incumbent administration’s views of wise policy to inform its judgments.”¹²⁹

According to Justice Stevens, then, *Chevron* deference is justified for two reasons: first, because agencies are more capable policy-makers than courts, and second, because they are more legitimate policy-makers. The strength of the first reason would seem to

¹²³ *Id.* at 864.

¹²⁴ *Id.* at 866 (quoting *TVA v. Hill*, 437 U.S. 153, 195 (1978)); *see also id.* at 865 (“Judges . . . are not part of either political branch of the Government.”).

¹²⁵ *Id.* at 865.

¹²⁶ *Id.*

¹²⁷ *Id.* at 866.

¹²⁸ *Id.* at 853-59.

¹²⁹ *Id.* at 865.

vary from case to case; there may be some areas—civil rights, for example—in which judges are in fact more capable policy-makers than agencies. In contrast, the second reason rests on an enduring principle of our democratic system of government—namely, that policy is more legitimately made by the political branches. Because it applies across the board, no matter the subject matter of the dispute, the second reason seems stronger than the first. If *Chevron* is best understood as a doctrine of judicial prudence guiding the courts’ discretion in hard cases, then it is best justified on the ground that agencies are more legitimate policy-makers than courts.

It should be noted that this legitimacy-based rationale is hardly trivial. As Justice Stevens himself recognized, it is derived from the Constitution itself.¹³⁰ The fact that agencies are more legitimate policy-makers than courts is a consequence of our constitutional structure, which expresses a clear preference for policy-making by politically accountable bodies.¹³¹ It is thus simply wrong to assert that “conceiving of *Chevron* as a judge-made norm robs it of much of its normative force.”¹³² Not unlike other doctrines, like the rule of lenity and the federalism canons, *Chevron* has a “constitutional underpinning.”¹³³

To say that *Chevron* is constitutionally inspired, however, is not to say that it is constitutionally required.¹³⁴ If *Chevron* is indeed a doctrine of judicial prudence, it

¹³⁰ *Id.* at 866 (“Our Constitution vests [policy-making] responsibilities in the political branches.” (quoting *TVA v. Hill*, 437 U.S. 153, 195 (1978))).

¹³¹ Manning, *supra* note 4, at 627 (“It is more consistent with the assumptions of our constitutional system to vest discretion in more expert, representative, and accountable administrative agencies.”).

¹³² Merrill & Hickman, *supra* note 4, at 869.

¹³³ *Id.*

¹³⁴ Both Douglas Kmiec and Richard Pierce have come close to arguing that separation of powers principles *mandate* judicial deference to agency policy decisions. See Douglas W. Kmiec, *Judicial Deference to Executive Agencies and the Decline of the Nondelegation Doctrine*, 2 ADMIN. L.J. 269, 286 (1988) (“*Panama Refining Corp.* and *Chevron* cannot both be right. If expansively worded delegations of legislative authority are permissible, interpretations made in pursuit of that authority merit judicial

follows that *Chevron* can be overridden by Congress at any time. Congress could say, for example, that it wants courts to “impose [their] own construction on the statute” in any hard case it hears¹³⁵—that it wants courts to reconcile the competing policy considerations on their own whenever the law runs out. Or, instead of abolishing deference across the board, Congress could eliminate it on a statute-by-statute basis, specifying, for instance, “that in all suits involving interpretation or application of the Clean Air Act the courts [a]re to give no deference to the agency’s views, but [a]re to determine the issue de novo.”¹³⁶ Justice Scalia is surely correct that there is no “constitutional impediment” to Congress doing any of these things.¹³⁷ “It is generally assumed that common-law rules are subordinate to rules of positive legislation,”¹³⁸ and *Chevron* is no different in this respect from any other judge-made, common-law rule. Although the authority to decide hard cases is inherent in the notion of judicial power, that authority is subject to constraints imposed by Congress.¹³⁹

We are now ready to take stock of the arguments advanced thus far. The *Chevron* doctrine fits neatly within the framework of legal positivism. *Chevron*’s two steps correspond to the two stages in the positivist’s process of decision: law-applying and law-making. At Step One, the court determines whether the case is a hard one by applying pre-existing law to its fullest extent. If the law runs out before providing a solution, the

deference.”); Richard J. Pierce, Jr., *Reconciling Chevron and Stare Decisis*, 85 GEO. L.J. 2225, 2227 (1997) (“[*Chevron*] is one of the most important constitutional law decisions in history, even though the opinion does not cite any provision of the Constitution.”).

¹³⁵ *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984).

¹³⁶ Scalia, *supra* note 4, at 515-16.

¹³⁷ *Id.* at 516; *see also* Silberman, *supra* note 4, 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. Or Congress could reverse *Chevron*’s presumption generically by amending the Administrative Procedure Act (APA).”).

¹³⁸ Merrill & Hickman, *supra* note 4, at 868.

¹³⁹ *See supra* text accompanying note 57.

court proceeds to Step Two. There, it considers whether the agency construction fits within the gap left by the law. If the agency construction fits, the court exercises its limited law-making discretion by deferring to the agency construction. Deference is justified because agencies are more legitimate policy-makers than courts in our constitutional structure. Viewed in this way, *Chevron* is a doctrine of judicial prudence guiding a court's discretion in hard cases, a judge-made rule for confronting the inevitable existence of open texture in the law.

C. Solving *Chevron*'s Puzzles

Sections A and B argued that *Chevron* is best understood through the lens of legal positivism. This Section shows how conceiving of *Chevron* as a doctrine of hard cases solves three familiar puzzles about *Chevron*'s application. The three puzzles are: (1) whether *Chevron* is consistent with Article III of the Constitution and the Administrative Procedure Act (APA); (2) whether *Chevron* “asks judges to develop a cast of mind that often is psychologically difficult to maintain”;¹⁴⁰ and (3) whether *Chevron* gives rise to a “paradox” by asking judges to defer to agencies whose interpretive methods differ sharply from their own.¹⁴¹ We consider each of these puzzles in turn.

Marbury's (and the APA's) instructions. Some have questioned whether *Chevron* is consistent with the commands of Article III and the APA.¹⁴² As construed in *Marbury*

¹⁴⁰ Breyer, *supra* note 4, at 379.

¹⁴¹ Mashaw, *supra* note 4, at 504.

¹⁴² See, e.g., John F. Duffy, *Administrative Common Law in Judicial Review*, 77 TEX. L. REV. 113, 193-99 (1998) (“*Chevron* was an APA case, so any attempt to justify its rule should begin with the APA. The doctrine runs into trouble immediately.”); William N. Eskridge, Jr. & Lauren 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 the APA as well as almost two centuries of constitutional understandings.”); Merrill & Hickman, *supra* note 4, at 868 (“If *Chevron* is a judicially developed norm, it is particularly difficult to explain why the doctrine supersedes the instruction in the APA that courts are to ‘decide all relevant questions of law.’”); Henry P. Monaghan, *Marbury and the Administrative State*, 83 COLUM. L. REV. 1, 2 (1983) (“There is no hint of acquiescence in

v. Madison, Article III instructs courts “to say what the law is.”¹⁴³ The APA similarly directs courts to “decide all relevant questions of law, interpret . . . statutory provisions, and determine the meaning or applicability of the terms of an agency action.”¹⁴⁴ Both *Marbury* and the APA seem to require courts to exercise independent judgment when interpreting the law. Neither seems to countenance deference to reasonable agency interpretations of ambiguous statutes.

When viewed through the lens of legal positivism, however, *Chevron* avoids running afoul of either Article III or the APA. In fact, the doctrine itself mandates that courts “say what the law is.” At both steps of the inquiry, courts are directed to reject any agency interpretation contrary to the law.¹⁴⁵ *Chevron* recognizes, however, that the law has limits; in hard cases, the law runs out before providing a solution. It is only in these cases that *Chevron* directs courts to defer to permissible agency constructions. Thus, by the time deference enters the picture, the court has already done all it can to “say what the law is” and to decide “relevant questions of law.” When the court defers to the agency, it relinquishes its authority to make law, but not its Article III- and APA-imposed duty to apply it.

Of course, it is one thing whether the duty “to say what the law is” limits how courts decide hard cases; it is quite another whether courts have the authority to decide hard cases at all. The framers of both Article III and the APA contemplated, however, that courts would have to deal with hard cases. The power to decide hard cases has long

a reasonable but contrary administrative interpretation of the relevant congressional legislation in *Marbury*’s much quoted pronouncement that “[i]t is emphatically the duty of the judicial department to say what the law is.” (footnote omitted); Sunstein, *supra* note 6, at 2589 (“*Chevron* is properly understood as a kind of counter-*Marbury* for the administrative state. Indeed, it suggests that in the face of ambiguity, it is emphatically the province of the executive department to say what the law is.” (footnote omitted)).

¹⁴³ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

¹⁴⁴ 5 U.S.C. § 706 (2000).

¹⁴⁵ See *supra* Section II.A and text accompanying notes 116-117.

been implicit in the notion of judicial power.¹⁴⁶ Blackstone, with whose work the Constitution’s framers were intimately familiar,¹⁴⁷ recognized in his *Commentaries* that “in laws all cases cannot be foreseen or expressed.”¹⁴⁸ In such cases, Blackstone wrote, “there should be somewhere a power vested of defining those circumstances, which (had they been foreseen) the legislator himself would have expressed.”¹⁴⁹ That power—the power to decide hard cases—is today an implied part of the “judicial Power” vested in Article III courts.¹⁵⁰

While Article III leaves unspecified how courts should exercise their discretion in hard cases, the APA makes some strong suggestions. Section 701(a)(2) of the APA exempts “agency action [that] is committed to agency discretion by law” from judicial review.¹⁵¹ In *Citizens To Preserve Overton Park, Inc. v. Volpe*, the Supreme Court examined the legislative history of § 701(a)(2) and concluded that the section applies “in those rare instances where ‘statutes are drawn in *such broad terms* that in a given case *there is no law to apply.*’”¹⁵² Of course, those “rare instances” are known to the positivist as hard cases: § 701(a)(2) essentially exempts the hardest of the hard cases from judicial review, leaving them to agency discretion.¹⁵³ In cases that are hard but not so hard that they are exempt from judicial review altogether, the broader principle underlying § 701(a)(2) suggests that courts should defer to the agency’s exercise of discretion where

¹⁴⁶ See *supra* note 58 and accompanying text.

¹⁴⁷ See DONALD S. LUTZ, A PREFACE TO AMERICAN POLITICAL THEORY 134-40 (1992).

¹⁴⁸ 1 WILLIAM BLACKSTONE, COMMENTARIES *61-62.

¹⁴⁹ *Id.*

¹⁵⁰ U.S. CONST. art. III, § 1.

¹⁵¹ 5 U.S.C. § 701(a) (2000).

¹⁵² *Citizens To Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971) (emphases added) (quoting S. REP. NO. 79-752, at 26 (1945)); see also *Heckler v. Chaney*, 470 U.S. 821, 830 (1985) (interpreting § 701(a)(2) to mean that “review is not to be had if the statute is drawn so that a court would have no meaningful standard against which to judge the agency’s exercise of discretion”).

¹⁵³ For a discussion of the kinds of cases § 701(a)(2) exempts, see Viktoria Lovei, Comment, *Revealing the Definition of APA § 701(a)(2) by Reconciling “No Law To Apply” with the Nondelegation Doctrine*, 73 U. CHI. L. REV. 1047 (2006).

the law runs out (i.e., where “there is no law to apply”). Thus, insofar as the APA suggests anything about agency deference, it affirmatively supports the doctrine of *Chevron*.

Breyer’s psychology of deference. Justice Breyer was one of the *Chevron* doctrine’s earliest critics. While a judge on the First Circuit, he wrote an article advocating a “complex approach” to agency deference under which courts would consider “a range of relevant factors” in deciding whether to defer.¹⁵⁴ Although *Chevron* represented a “simpler approach,” Breyer feared that its two-step inquiry was too rigid.¹⁵⁵ In his view, one of the reasons “a strict view of *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 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.”¹⁵⁶

If *Chevron* is understood as a doctrine of hard cases, however, Breyer’s criticism of the two-step approach fails. Properly conceived, *Chevron* never asks judges “to believe both that the agency’s interpretation is legally wrong, *and* that its interpretation is reasonable.” For if the agency’s interpretation is *legally* wrong—that is, contrary to pre-existing law—then the inquiry should simply end there. If the law eliminates the

¹⁵⁴ Breyer, *supra* note 4, at 373. The merits of Breyer’s approach are considered in Part III.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 379.

agency's interpretation before running out, the duty of the judge is to apply the law and reject the interpretation. To be sure, the law may rule out the agency's interpretation and yet fail to yield a single right answer to the precise question at issue. But that would mean only that the case requires law-making, not that the agency's interpretation warrants deference.

Moreover, a "legally wrong" agency interpretation is by definition *not* "reasonable" under *Chevron* as a doctrine of hard cases. At Step Two, whether an agency interpretation is "reasonable" turns on whether it fits within a gap where the law has run out. An agency interpretation that is legally wrong necessarily exceeds that gap. It thus cannot be "reasonable." The bottom line is that judges are never asked to defer to an agency interpretation that runs counter to their own views of the legal merits.

Even so, we should not lose sight of Breyer's broader point, which concerned the psychology of deference. For while *Chevron* never asks judges to uphold as reasonable an agency interpretation that they consider legally wrong, it sometimes asks them to uphold as reasonable an agency interpretation that they consider bad policy. Breyer may be suggesting that it is psychologically difficult for a judge to believe both that the agency's interpretation is bad policy, *and* that its interpretation is reasonable.

Framed this way, Breyer's critique doubts whether it is possible in practice to maintain positivism's distinction between applying the law and making it. The question whether the agency's interpretation is reasonable arises at the law-applying stage, when the court is supposed to be exercising independent judgment; the question whether the agency's interpretation is bad policy arises at the law-making stage, when the court is supposed to be deferential. If judges find it difficult to believe both that the agency's

interpretation is bad policy, *and* that its interpretation is reasonable, it is because they cannot distinguish between these two stages in the process of decision.

To be sure, judges often do not distinguish between law-applying and law-making when deciding hard cases in practice. Richard Posner, himself a judge, explains:

Most judges blend the two inquiries, the legalist and the legislative, rather than addressing them in sequence. Their response to a case is generated by legal doctrine, institutional constraints, policy preferences, strategic considerations, and the equities of the case, all mixed together and all mediated by temperament, experience, ambition, and other personal factors. 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.”¹⁵⁷

Legal positivists do not deny the truth of Posner’s account. Long before Posner made these observations, Joseph Raz had already noted that “[i]n cases of indeterminacy there is often no clear divide between application and innovation.”¹⁵⁸ Indeed, he argued, there is “a strong continuity between law-applying and law-making” because the same types of arguments—the use of analogy, for example—often permeate both.¹⁵⁹ According to Raz, “the occurrence of the same type of arguments in both kinds of judicial reasoning explains why the courts often do not bother to define explicitly which function they are fulfilling at any given stage of their reasoning.”¹⁶⁰

That judges rarely distinguish between the two stages of decision, however, does not mean that they find it psychologically difficult to do so. Instead, it may simply mean

¹⁵⁷ POSNER, *supra* note 67, at 84-85.

¹⁵⁸ RAZ, *supra* note 13, at 208.

¹⁵⁹ *Id.*; *see also supra* notes 61-63 and accompanying text.

¹⁶⁰ RAZ, *supra* note 13, at 209.

that they rarely need to be clear about when one stage ends and the other begins. After all, there is little reason to be clear when the judge is simply going to impose his own construction on the statute anyway; “[h]e knows that he has to decide and that whatever he does decide will . . . be law.”¹⁶¹ It is only when deference is a possibility—when, for instance, an agency construction is involved—that courts need to be clear about precisely where the law runs out. Because judges typically have a sense of the law’s determinacy in the cases they hear, there is every reason to believe that they can differentiate between law-applying and law-making without much difficulty, psychological or otherwise.

Mashaw’s paradox of deference. In perhaps the first article to consider “administrative interpretation in its own right,”¹⁶² Jerry Mashaw observes that “legitimate techniques and standards for agency statutory interpretation diverge sharply from the legitimate techniques and standards for judicial statutory interpretation.”¹⁶³ He notes, for example, that it is appropriate for agencies to “[f]ollow presidential directions” when interpreting statutes, but inappropriate for courts to do the same; conversely, it is institutionally responsible for courts, but not for agencies, to “[i]nterpret to lend coherence to the overall legal order.”¹⁶⁴ The differences in how courts and agencies interpret statutes lead Mashaw to identify what he calls the “paradox of deference”¹⁶⁵: “How can a court’s determination of ‘ambiguity’ or ‘reasonableness’ at *Chevron*’s famous two analytical ‘steps’ be understood as deferential when that determination

¹⁶¹ POSNER, *supra* note 67, at 85.

¹⁶² Mashaw, *supra* note 4, at 503.

¹⁶³ *Id.* at 504.

¹⁶⁴ *Id.* at 522 tbl.1.

¹⁶⁵ *Id.* at 504.

emerges from the normative commitments and epistemological presumptions of ‘judging’ rather than ‘administering’?”¹⁶⁶

If *Chevron* is understood as a doctrine of hard cases, however, the paradox vanishes completely. Courts and agencies occupy different roles within the *Chevron* framework. The courts have only one responsibility: to apply pre-existing law. In contrast, the responsibilities of agencies are two-fold: like courts, they must follow pre-existing law, but in hard cases they must also create new law. Because their responsibilities differ, it should come as no surprise that their interpretive methods differ as well. In applying pre-existing law, it makes sense that courts and agencies would both employ “traditional tools of statutory interpretation.”¹⁶⁷ But surely such tools are not fully suited to the task of law-making, in which the goal is to achieve “a reasonable accommodation of manifestly competing interests.”¹⁶⁸ When it comes to making the 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 courts) are those that policy-makers would be expected to use. Indeed, if the goal is to make policy, it would be sensible to “[f]ollow presidential directions” and “pay constant attention to [the] contemporary political milieu,” so that the policy better reflects the popular will.¹⁶⁹ Justice Stevens recognized as much in *Chevron*, when he wrote that an agency could “properly rely upon the incumbent administration’s views of wise policy.”¹⁷⁰ It would also be sensible to “insure hierarchical control over subordinates,” because a policy must be implemented to be effective. Finally, agencies

¹⁶⁶ *Id.* at 537-38.

¹⁶⁷ *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 n.9 (1984).

¹⁶⁸ *Id.* at 865.

¹⁶⁹ Mashaw, *supra* note 4, at 522 tbl.1.

¹⁷⁰ *Chevron*, 467 U.S. at 865.

should not be wary of the label “activist,” since good policy-makers are not afraid to tackle new problems as they arise.¹⁷¹

There is thus no paradox of deference. Indeed, if deference is to be justified at all, the perspectives of agencies and courts *must* differ. For what would be the point of deference if courts and agencies went about the task of statutory construction in exactly the same way? If courts and agencies were similarly situated, agencies would neither be more capable nor more legitimate policy-makers than courts, and deference would therefore be unjustified.

D. Challenging the Conventional Wisdom

The notion of hard cases not only elucidates *Chevron*’s two-step inquiry, but also solves some of the puzzles about *Chevron*’s application. And yet, the conventional wisdom is that *Chevron* rests on a presumption about congressional intent¹⁷²—a presumption that “a statute’s ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps.”¹⁷³

To be sure, there is much to be said for the congressional-intent theory. For one, it finds support in the case law.¹⁷⁴ *Chevron* itself describes statutory gaps as “implicit” delegations of interpretive authority to agencies,¹⁷⁵ and later decisions do the same.¹⁷⁶ For another, the congressional-intent theory is consistent with positivist premises. By grounding deference in the commands of Congress, the theory eliminates any tension between a court’s duty to “say what the law is,” on the one hand, and its decision to defer

¹⁷¹ Mashaw, *supra* note 4, at 522 tbl.1.

¹⁷² *See, e.g.*, sources cited *supra* note 4.

¹⁷³ *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000).

¹⁷⁴ *Merrill & Hickman*, *supra* note 4, at 869.

¹⁷⁵ *Chevron*, 467 U.S. at 844.

¹⁷⁶ *See, e.g., Brown & Williamson Tobacco*, 529 U.S. at 159; *INS v. Cardoza-Fonseca*, 480 U.S. 421, 447-48 (1987).

to a reasonable agency interpretation, on the other.¹⁷⁷ By deferring, the court “is simply applying the law as ‘made’ by the authorized law-making entity.”¹⁷⁸ Lest there be any doubt about the theory’s positivist credentials, one need only note that H.L.A. Hart himself endorsed “delegation of limited legislative powers to the executive” as a solution to the problem of judicial discretion in hard cases.¹⁷⁹

If Congress actually understood itself as making implicit delegations of interpretive authority to agencies, there would be no problem with the congressional-intent theory. But “the evidence supporting the presumption that Congress generally intends agencies to be the primary interpreters of statutory ambiguities is weak.”¹⁸⁰ No one seriously denies that the presumption about congressional intent is but a legal fiction created by the Court.¹⁸¹ According to Justice Scalia, “[i]n the vast majority of cases . . . Congress *neither* (1) intended a single result, *nor* (2) meant to confer discretion upon the agency, but rather (3) didn’t think about the matter at all.”¹⁸²

If Justice Scalia is correct—and there is no reason to think he is not—then the presumption about congressional intent is a judicial creation, no different from the judge-made doctrine of hard cases described in this paper. What turns, then, on whether *Chevron* is grounded in a theory of congressional intent or a theory of hard cases? For starters, it is simply more honest for judges to admit that *Chevron* grows out of their own

¹⁷⁷ Manning, *supra* note 4, 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.”).

¹⁷⁸ Monaghan, *supra* note 142, at 28.

¹⁷⁹ HART, *supra* note 7, 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.”).

¹⁸⁰ Merrill & Hickman, *supra* note 4, at 871.

¹⁸¹ *See* sources cited *supra* note 6.

¹⁸² Scalia, *supra* note 4, at 517.

authority to decide hard cases than for judges to maintain that *Chevron* flows from the commands of Congress. There is no reason for judges to rely on a fiction when the truth is so simple and straightforward.

Furthermore, the notion of hard cases tells us more about the two-step inquiry than does a theory of congressional intent. It resolves longstanding ambiguities in the doctrine, answering such recurring questions as “how clear is ‘clear?’” and “what makes for a ‘reasonable’ agency construction?” In contrast, the presumption about congressional intent is too empty to give meaningful content to the doctrine’s terms. This is the problem with fictions: the world they create is hardly ever as complete and satisfying as the actual one.

The two theories’ starkest differences, however, arise with respect to *Chevron*’s domain. As Thomas Merrill and Kristin Hickman rightly argue, “if *Chevron* rests on a presumption about congressional intent, then *Chevron* should apply only where Congress would want *Chevron* to apply.”¹⁸³ Further, “if *Chevron* rests upon a presumption about congressional intent, then the *Chevron* doctrine has the full force and effect of a federal statute. All norms and canons grounded in common law must give way to the *Chevron* doctrine.”¹⁸⁴ The notion of hard cases has completely different implications for when *Chevron* applies and how *Chevron* relates to other judge-made canons. The next Part explains why.

¹⁸³ Merrill & Hickman, *supra* note 4, at 872.

¹⁸⁴ *Id.* at 873.

III. IMPLICATIONS FOR *CHEVRON'S* DOMAIN¹⁸⁵

A. *Understanding Chevron Step Zero*

Our review of the *Chevron* doctrine would not be complete without considering one more step in the inquiry: whether the *Chevron* doctrine applies at all. Merrill and Hickman named this step in the inquiry “step zero” because they envisioned courts addressing it before reaching Step One.¹⁸⁶ Whenever it occurs,¹⁸⁷ the inquiry is a basic one. Any theory of *Chevron* must give an account of when *Chevron* applies.

The conventional wisdom is that *Chevron* rests on a presumption about congressional intent, and that therefore *Chevron* applies only when Congress wants it to apply.¹⁸⁸ On this view, *Chevron* is triggered by “an implicit delegation from Congress to the agency to fill in the statutory gaps.”¹⁸⁹ The question at Step Zero is thus whether such a delegation of interpretive authority has been made. The Justices who take the congressional-intent theory most seriously have adopted two different answers to this question.¹⁹⁰

One answer appears in the Court’s decision in *United States v. Mead Corp.*¹⁹¹ There, in an opinion written by Justice Souter and joined by all the other Justices except Scalia, the Court held that “administrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated

¹⁸⁵ The heading of this Part is borrowed from the heading of section III.D of Merrill and Hickman’s influential article on *Chevron’s* domain. *Id.* at 872. This borrowing is meant to highlight the differences between their account of *Chevron’s* domain and the one advanced here.

¹⁸⁶ *Id.* at 873.

¹⁸⁷ Step Zero arguably occurs after Step One. *See infra* text accompanying notes 214-218.

¹⁸⁸ *Id.* at 872.

¹⁸⁹ *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000).

¹⁹⁰ Although Justice Scalia accepts the congressional-intent theory, he takes it less seriously than his colleagues do. *See* Scalia, *supra* note 4, at 516 (declining to defend the presumption about congressional intent, noting that “[he] was not on the Court . . . when *Chevron* was decided”). His views of Step Zero are thus considered separately, *infra*.

¹⁹¹ 533 U.S. 218 (2001).

authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority.”¹⁹² In other words, there must be an *express* delegation of authority to “speak with the force of law” for the Court to find an *implicit* delegation of authority to fill in statutory gaps.¹⁹³ Although the Court was not particularly clear about what sorts of express congressional authorizations constitute delegations to “speak with the force of law,” it did say that “[i]t is fair to assume generally 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.”¹⁹⁴ According to the Court, “relatively formal administrative procedure[s]” include notice-and-comment rulemaking and formal adjudication,¹⁹⁵ but not the process by which the U.S. Customs Service issues tens of thousands of tariff classifications each year.¹⁹⁶ Thus, the particular tariff classifications at issue in *Mead* did not qualify for *Chevron* deference. They were, however, entitled to review under the *Skidmore* standard,¹⁹⁷ which “call[s] upon reviewing courts to assess multiple factors to decide on a case-by-case basis what deference, if any, to afford agency legal interpretations.”¹⁹⁸

¹⁹² *Id.* at 226-27.

¹⁹³ *Id.* at 229.

¹⁹⁴ *Id.* at 230.

¹⁹⁵ *Id.* at 229.

¹⁹⁶ *Id.* at 233.

¹⁹⁷ See *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) (“[T]he rulings, interpretations and opinions of the [agency], while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.”).

¹⁹⁸ Kristin E. Hickman & Matthew D. Krueger, *In Search of the Modern Skidmore Standard*, 107 COLUM. L. REV. 1235, 1236-37 (2007).

Although Justice Breyer joined the Court’s opinion in *Mead*, he has consistently adopted a different approach to determining whether there has been an implicit delegation of interpretive authority from Congress. In his view, the inquiry should not turn on a single factor, such as whether the agency interpretation carries the force of law. Rather, the inquiry should consider a “range of relevant factors,”¹⁹⁹ such as whether “the agency has special expertise” and “whether the legal question is an important one.”²⁰⁰ To help frame the inquiry, Justice Breyer recommends that judges imagine a hypothetical “reasonable member of Congress” and ask “whether, given the statutory aims and circumstances, [that] member would likely have wanted judicial deference in this situation.”²⁰¹ If the answer is yes, judges should “imply a congressional intent that courts defer to the agency’s interpretation.”²⁰² This “complex approach”²⁰³ to *Chevron* Step Zero carried the day in *Barnhart v. Walton*.²⁰⁴ There, writing for an eight-Justice majority, Justice Breyer concluded that the agency interpretation at issue qualified for *Chevron* deference based on “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.”²⁰⁵

Although the *Mead* analysis and Justice Breyer’s analysis differ in important respects, the touchstone of both is congressional intent. By looking past the fiction that Step Zero involves an inquiry into congressional intent, however, we can begin to see

¹⁹⁹ Breyer, *supra* note 4, at 373.

²⁰⁰ *Id.* at 370-71.

²⁰¹ STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* 106 (2005).

²⁰² Breyer, *supra* note 4, at 370.

²⁰³ *Id.* at 373.

²⁰⁴ 535 U.S. 212 (2002).

²⁰⁵ *Id.* at 222.

what is really at stake. If *Chevron* is a doctrine directing courts to defer to agencies in hard cases, then the question at Step Zero boils down to when agencies, rather than courts, should be allowed to make law in hard cases.

Viewed through this lens, the *Mead* approach is concerned about the *legitimacy* of agency law-making. By limiting *Chevron* to cases in which the agency undergoes “relatively formal administrative procedure[s],” *Mead* suggests that agency law-making is legitimate only when accompanied by guarantees of “fairness and deliberation.”²⁰⁶ Both notice-and-comment rulemaking and formal adjudication, which the Court offers as examples of *Chevron*-qualifying procedures, afford an opportunity for people to participate and be heard, and require that agencies give reasons for their decisions. As Cass Sunstein acknowledges, “we can see *Mead* as attempting to carry forward a central theme in administrative law: developing surrogate safeguards for the protections in the Constitution itself.”²⁰⁷

In contrast, Justice Breyer’s approach is concerned about the level of agency *expertise*. Justice Breyer views the question of deference in terms of a trade-off between administrative decision-making by experts and democratic decision-making by Congress.²⁰⁸ The goal of his approach is thus to strike the right “democratic/administrative balance.”²⁰⁹ By considering at Step Zero such factors as the agency’s expertise and the statute’s complexity, he limits *Chevron*’s domain to matters that would benefit the most from administrative decision-making.

²⁰⁶ *United States v. Mead Corp.*, 533 U.S. 218, 230 (2001).

²⁰⁷ Sunstein, *supra* note 3, at 225.

²⁰⁸ BREYER, *supra* note 201, at 102.

²⁰⁹ *Id.* at 105.

By understanding *Chevron* as a doctrine of hard cases, we can begin to see the error of both the *Mead* approach and Justice Breyer's approach. Framing the Step Zero inquiry in terms of congressional intent leads both approaches to measure agency policy-making against the baseline of *congressional* policy-making. Thus, *Mead* compares the legitimacy of agency policy-making to that of congressional policy-making, and Justice Breyer weighs administrative decision-making by experts against democratic decision-making by Congress. Not surprisingly, agencies often come up short in these comparisons. If *Chevron* is understood as a doctrine of judicial prudence rather than a presumption about congressional intent, however, the relevant point of comparison is not congressional policy-making, but *judicial* policy-making. The question is which institution, agencies or *courts*, should make law in hard cases. We already discussed this issue in Section II.B: although courts may sometimes be more capable policy-makers than courts, our constitutional structure favors agencies as more legitimate policy-makers.

Conceiving of *Chevron* as a doctrine of hard cases thus entails a different approach to Step Zero. *Chevron* should be triggered not by an implicit delegation from Congress, but by the existence of a hard case. That is, *Chevron* should apply whenever the statute is silent or ambiguous on the precise legal question at issue, given the fact that agencies are more legitimate policy-makers than courts. Of course, there must also be an agency interpretation to which courts can defer. If the point of *Chevron* is to defer to agency policy-making, then courts should assure themselves that the agency interpretation represents the policy of the agency. Courts should adopt a rule of recognition that identifies as agency policy any statutory interpretation that was (1)

adopted by an agency head and therefore authoritative; and (2) adopted by an agency charged with administering the statute and therefore valid.

This approach to Step Zero is essentially the one favored by Justice Scalia,²¹⁰ despite the fact that he remains faithful to the congressional-intent theory.²¹¹ Justice Scalia's approach has been criticized as being "seriously overbroad" in its deference to agencies.²¹² But conceiving of *Chevron* as a doctrine of hard cases defuses such criticism: even if Step Zero is read broadly, deference is only appropriate when the law runs out at Step One. It is therefore difficult to estimate whether one regime is more deferential than another by considering competing views of Step Zero alone. Indeed, it is misleading to call Justice Scalia's approach to *Chevron* "seriously overbroad" when he is the least deferential of the Justices as a result of his strict reading of Step One.²¹³

Of course, if *Chevron* is triggered whenever there is an authoritative interpretation of a statute by the agency that administers it, there would be no room left for *Skidmore* deference. Eliminating *Skidmore* deference, however, would not be as drastic as it might first seem. *Skidmore* and *Chevron* are in fact quite similar. If *Chevron* Step One is simply the law-applying stage in the process of deciding any case of statutory interpretation,²¹⁴ then the court conducts a Step One inquiry even when deciding a case under the *Skidmore* standard. Indeed, according to Kristin Hickman and Matthew Krueger, "because a reviewing court will not defer to an agency under either doctrine if the statute's meaning is clear, the *Skidmore* standard implicitly replicates *Chevron*'s first

²¹⁰ See *Mead*, 533 U.S. at 241 (Scalia, J., dissenting); *Christensen v. Harris County*, 529 U.S. 576, 589 fn. (Scalia, J., concurring); Eskridge & Baer, *supra* note 142, at 1159; Scalia, *supra* note 4, at 519; Sunstein, *supra* note 3, at 210.

²¹¹ See *Mead*, 533 U.S. at 241 (Scalia, J., dissenting).

²¹² Breyer, *supra* note 3, at 373.

²¹³ Miles & Sunstein, *supra* note 87, at 826.

²¹⁴ See *supra* Section II.A.

step.”²¹⁵ When the statute’s meaning is clear, the choice between *Chevron*, *Skidmore*, or some other standard is moot²¹⁶—which might explain why, in a majority of cases the Court hears involving an agency interpretation, it declines to invoke any deference regime whatsoever.²¹⁷ Because the Step One inquiry is ubiquitous, the Step Zero inquiry actually takes place after Step One, and would be better named Step One-and-One-Half.²¹⁸

What truly distinguishes *Chevron* from *Skidmore* is thus the standard of deference the court applies *after* it determines the statute is ambiguous. But here, too, the two regimes are quite similar. Under either one, courts must assess the substance of the agency’s interpretation. At *Chevron* Step Two, courts must determine whether an agency’s interpretation is “reasonable” or “permissible”;²¹⁹ under *Skidmore*, courts must determine whether the agency’s interpretation is “valid.”²²⁰ Whatever difference lies between “reasonable” and “permissible,” on the one hand, and “valid,” on the other, seems altogether illusory. Not surprisingly, then, only a small percentage of cases actually turn on which standard is applied. Based on their study of federal court of appeals decisions, Hickman and Krueger conclude that “*Skidmore* deference, while less deferential than *Chevron*, is nevertheless *highly deferential* to administrative interpretations as applied.”²²¹ Similarly, Eskridge and Baer found only a 2.7% disparity

²¹⁵ Hickman & Krueger, *supra* note 198, at 1247.

²¹⁶ Sunstein, *supra* note 3, at 191 (“Many cases can be decided without resolving the Step Zero question; in such cases, it will not matter whether *Chevron* deference is applied.”).

²¹⁷ Eskridge and Baer report that no deference regime was invoked in 53.6% of the cases involving an agency interpretation that the Court heard between *Chevron* and *Hamdan*. Eskridge & Baer, *supra* note 142, at 1100.

²¹⁸ See Joseph Cordaro, Note, *Who Defers to Whom? The Attorney General Targets Oregon’s Death With Dignity Act*, 70 *FORDHAM L. REV.* 2477, 2506 (2002).

²¹⁹ *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843-44 (1984).

²²⁰ See Hickman & Krueger, *supra* note 198, at 1285.

²²¹ *Id.* at 1271 (emphasis added).

in agency win rates between *Skidmore* deference and *Chevron* deference before the Supreme Court.²²²

In sum, *Chevron* Step Zero is best understood as an inquiry into whether agencies or courts should make law in hard cases. *Chevron* rests on the basic premise that agencies are more legitimate policy-makers than courts. Thus, whenever the court determines at Step One that the statute is ambiguous, it should look for an authoritative interpretation of the statute by the agency charged with administering it. If such an interpretation exists, the court should consider it at Step Two, and defer to it if it represents a permissible construction of the statute.

B. Understanding the Relationship Between Chevron and the Canons

“[I]f *Chevron* rests upon a presumption about congressional intent, then the *Chevron* doctrine has the full force and effect of a federal statute. All norms and canons grounded in common law must give way to the *Chevron* doctrine.”²²³ But if *Chevron* rests on a notion of hard cases, the relationship between *Chevron* and other canons of statutory interpretation is more complex.

The canons of construction are traditionally divided into two broad categories: textual canons, “which are guidelines for evaluating linguistic or syntactic meaning,”²²⁴ and substantive canons, which “are rooted in broader policy or value judgments.”²²⁵ When interpreting statutes with the notion of hard cases in mind, however, a different typology emerges. This hard-cases typology features three types of canons: law-applying canons, which help courts discern meaning already existing in a statute; ambiguity-

²²² Eskridge & Baer, *supra* note 142, at 1099 tbl.1.

²²³ Merrill & Hickman, *supra* note 4, at 873.

²²⁴ WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY & ELIZABETH GARRETT, *LEGISLATION AND STATUTORY INTERPRETATION* 341 (2d ed. 2006).

²²⁵ *Id.* at 342.

creating canons, which create ambiguity where a statute would otherwise be clear; and law-making canons, which help courts fill in statutory silences and ambiguities. How do the traditional categories map onto the hard-cases typology and thus onto the *Chevron* inquiry? We consider each type of canon within the hard-cases typology in turn.

Law-applying canons. The law-applying canons and the textual canons are one and the same: they help courts identify the meaning of pre-existing law. Examples include the plain meaning rule,²²⁶ the canons of word association,²²⁷ the canons of negative implication,²²⁸ the grammar and punctuation rules,²²⁹ and the whole act rule.²³⁰ Because the law-applying canons are intended to discern meaning already present in the statute, they are properly applied at Step One, when the court is determining how far the law goes before running out.

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

²²⁶ See, e.g., *MCI Telecomms. Corp. v. AT&T Co.*, 512 U.S. 218 (1994) (relying on the plain meaning, supported by the dictionary definition, of “modify”).

²²⁷ See, e.g., *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001) (invoking *eiusdem generis*); *Babbitt v. Sweet Home Chapter of Cmty. for a Great Or.*, 515 U.S. 687, 720-21 (1995) (Scalia, J., dissenting) (invoking *noscitur a sociis*).

²²⁸ See, e.g., *City of Chicago v. Envtl. Def. Fund*, 511 U.S. 328 (1994) (invoking *expressio unius*).

²²⁹ See, e.g., *Rapanos v. United States*, 547 U.S. 715, 732-33 (2006) (plurality opinion) (Scalia, J.).

²³⁰ See, e.g., *Sweet Home*, 515 U.S. 687. The elephants-in-mouseholes canon is simply the whole act rule applied to the context of administrative law. As such, it, too, is a law-applying canon properly invoked at Step One—not Step Zero, as some argue. Compare Sunstein, *supra* note 3, at 191 (arguing that the excessive delegation doctrine at work in *MCI* and *Brown & Williamson* can be read as resting on the principle that agencies should be denied the authority to interpret statutes “in a way that would massively alter the preexisting statutory scheme”), with BREYER, *supra* note 201, at 107 (arguing that whether the question at issue is one of “major importance” should enter into the Step Zero inquiry).

require interpretation.”²³¹ Thus, even when armed with these canons, courts cannot avoid the problem of hard cases.

Ambiguity-creating canons. Ambiguity-creating canons create ambiguity where a statute would otherwise be clear. They function by eliminating the most straightforward reading of a statute out of concern about the substantive results that such a reading would produce. The court is then left with the discretion to determine which among the remaining possible constructions of the statute is next best. Because these canons create hard cases where none before existed, they are properly applied at Step One,²³² when the court is considering whether there are statutory gaps for an agency to fill.

*Green v. Bock Laundry Machine Co.*²³³ furnishes an excellent example of an ambiguity-creating canon in action. There, the Court applied the absurd results canon in construing Federal Rule of Evidence 609(a)(1). The most straightforward reading of Rule 609(a)(1) would have created a serious asymmetry: evidence of a civil plaintiff’s prior felony convictions could always be admitted to impeach his testimony at trial, but evidence of a civil defendant’s prior felony convictions could only be admitted if its probative value outweighed its prejudicial effect to the defendant.²³⁴ All nine Justices agreed that this reading of the rule was absurd. By eliminating the most straightforward construction of the rule, however, they created a hard case: if “defendant” does not mean any defendant, criminal or civil, then what does it mean? Exercising their own moral

²³¹ HART, *supra* note 7, at 126; cf. Karl Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are To Be Construed*, 3 VAND. L. REV. 395 (1950).

²³² Justice Scalia agrees, at least with respect to the absurd results canon. See Scalia, *supra* note 4, at 515.

²³³ 490 U.S. 504 (1989).

²³⁴ *Id.* at 509-10.

reasoning, the Justices reached different conclusions about how to resolve this canon-created ambiguity.²³⁵

In addition to the absurd results canon, ambiguity-creating canons include substantive canons that serve as clear statement rules and rebuttable presumptions about statutory meaning. Clear statement rules and rebuttable presumptions eliminate the most straightforward reading of a statute when such a reading is not sufficiently clear, leaving courts the discretion to choose from among the remaining possible constructions.

Law-making canons. The law-making canons help courts fill in statutory silences and ambiguities in a predictable way. Their application presupposes the existence of a hard case in which the statute lends itself to more than one permissible construction. The law-making canons serve as tiebreakers directing courts to choose one permissible construction over another. Examples include substantive canons such as the rule of lenity, which directs courts to resolve statutory ambiguities in favor of the criminal defendant,²³⁶ and the canon of constitutional avoidance, which directs courts to construe ambiguous statutes to avoid serious constitutional doubts.²³⁷ Because the law-making canons apply only in hard cases, they are properly invoked at Step Two, as part of the court’s analysis of whether the agency construction is “reasonable.”

Properly understood, *Chevron* is itself a law-making canon that directs courts to resolve statutory ambiguities by deferring to permissible agency constructions. The question therefore arises: Should *Chevron* trump the other law-making canons, or vice

²³⁵ Compare *id.* at 521 (majority opinion) (Stevens, J.) (holding that “defendant” should be read to mean “criminal defendant”), with *id.* at 530 (Blackmun, J., dissenting) (arguing that “defendant” should be read to mean “any party”).

²³⁶ See, e.g., *Muscarello v. United States*, 524 U.S. 125, 138 (1998).

²³⁷ See, e.g., *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) (“[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress.”).

versa? Dan Kahan has provocatively argued that courts should defer to interpretations of federal criminal statutes rendered by the Department of Justice instead of applying the rule of lenity.²³⁸ But the balance of reasons tilts in favor of giving the other law-making canons precedence over *Chevron*. First, application of the other law-making canons has a salutary effect on agency policy-making by inhibiting the development of agency “tunnel vision.” If courts consistently apply the canon of constitutional avoidance to overturn agency interpretations, for example, agencies will eventually react by taking into account broader constitutional values in their policy-making.²³⁹ Second, application of the other law-making canons serves the rule of law by rendering statutory interpretation uniform and predictable. If the rule of lenity applies when an agency has not issued an interpretation, it should also apply when an agency has. Like cases should be treated alike, regardless of whether an agency construction is involved. For these reasons, the other law-making canons should limit the range of reasonableness within which an agency interpretation may fall at Step Two.

Chevron therefore interacts with other canons of statutory interpretation differently depending on whether the doctrine is understood as resting on a notion of hard cases or a presumption about congressional intent. If *Chevron* rests on a notion of hard cases, it should incorporate or give way to other canons at each step of the inquiry.

²³⁸ Dan M. Kahan, *Is Chevron Relevant to Federal Criminal Law?*, 110 HARV. L. REV. 469 (1996).

²³⁹ Admittedly, it is arguable whether agencies should always take into account broader constitutional values in their policy-making. See Trevor W. Morrison, *Constitutional Avoidance in the Executive Branch*, 106 COLUM. L. REV. 1189 (2006).

CONCLUSION

Acknowledging that *Chevron* is “not rooted in actual legislative judgments,” Cass Sunstein argues that *Chevron* is instead rooted in the tenets of legal realism.²⁴⁰

According to Sunstein, “the executive’s law-interpreting authority is a natural and proper outgrowth of . . . the legal realist attack on the autonomy of legal reasoning.”²⁴¹ Indeed, he contends, “*Chevron* is this generation’s *Erie*”²⁴²: like the landmark 1938 case eliminating the power of federal courts to create federal general common law,²⁴³ *Chevron* vindicates the realist claim that “judicial judgments about ‘what the law is’ [a]re not a matter of finding something, but a product of judicial norms and values.”²⁴⁴

Sunstein’s account of *Chevron*’s theoretical foundation could hardly be more misleading. Far from embracing legal realism, *Chevron* thoroughly rejects it. At Step One, the doctrine presupposes what legal realism denies: that the law has an autonomous meaning, discoverable through traditional tools of statutory interpretation. And at Step Two, it recognizes what legal realism refuses to acknowledge: that even hard cases cannot be pure law-creating cases, because of the constraints imposed by pre-existing law. The analogy to *Erie* only undermines Sunstein’s argument, for most scholars regard *Erie* as a triumph for legal positivism, not legal realism.²⁴⁵

²⁴⁰ Sunstein, *supra* note 6, at 2591.

²⁴¹ *Id.* at 2583.

²⁴² *Id.* at 2598.

²⁴³ *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

²⁴⁴ *Id.* at 2598.

²⁴⁵ See, e.g., Patrick J. Borchers, *The Origins of Diversity Jurisdiction, the Rise of Legal Positivism, and a Brave New World for Erie and Klaxon*, 72 TEX. L. REV. 79, 115-16 (1993); Bradford R. Clark, *Ascertaining the Laws of the Several States: Positivism and Judicial Federalism After Erie*, 145 U. PA. L. REV. 1459, 1462 (1997); Larry Kramer, *The Lawmaking Power of the Federal Courts*, 12 PACE L. REV. 263, 283 (1992); George Rutherglen, *Reconstructing Erie: A Comment on the Perils of Legal Positivism*, 10 CONST. COMMENTARY 285, 285 (1989).

H.L.A. Hart famously called the view of the law offered by legal realism “the Nightmare.”²⁴⁶ He and other legal positivists resist the realist notion that every case was a hard one in which the law had to be made. But they concede that hard cases do exist. Their insight that the process of decision in hard cases consists of two stages—law-applying and law-making—provides the best understanding of *Chevron*’s two-step inquiry. Viewed within the framework of legal positivism, *Chevron* emerges as a doctrine of judicial prudence guiding the courts’ limited law-creating discretion in hard cases.

²⁴⁶ Hart, *supra* note 65, at 972.