CHEVRON AND THE SUBSTANTIVE CANONS: A CATEGORICAL DISTINCTION

In the years since the Supreme Court's 1984 decision *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*,[1] the intersection of *Chevron*'s two-step deference regime with the various substantive canons of statutory interpretation has remained unsettled.[2] In the face of conflict between these two doctrinal frameworks, commentators have suggested that either the canons or the deference rule should displace the other entirely.[3] A more recent proposal has argued that this question should turn on a case-by-case analysis of the degree to which an agency's interpretation has taken into account the value protected by a given substantive canon.[4] To this point, the debate has largely ignored a categorical distinction in the way the canons operate. On the one hand, courts have used substantive canons as truly discretion-constraining clear statement rules. These canons require a clear statement in the statute itself that a disfavored outcome should result and are justified by a nondelegation account of their role. On the other hand, courts have used canons in more discretion-channeling ways. In this role, the canons ensure that courts conduct their interpretive processes with the norm protected by the canon in mind, justified on a limited "resistance norms" account. While giving priority to the canons over *Chevron* deference makes sense for canons in the first group, this same priority is not warranted for canons in the second group. Absent greater justification for these canons' continued use, courts should simply apply ordinary *Chevron* review to an agency interpretation even when a canon in this second group is implicated.

This Note proceeds in three parts. Part I outlines the doctrinal rules and justifications provided for both *Chevron* deference and the various substantive canons and explores some of the leading attempts to reconcile the two doctrinal frameworks. Part II analyzes the variation in application of the canons and suggests that a significant, categorical distinction exists between the discretion-constraining and discretion-channeling categories of canons. Finally, Part III outlines the

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

[2] *See, e.g.*, Caleb Nelson, *Statutory Interpretation and Decision Theory*, 74 U. CHI. L. REV. 329, 347 (2007) ("The relationship between *Chevron* deference and the canons . . . remains 'one of the most uncertain aspects of the *Chevron* doctrine.'" (quoting Curtis A. Bradley, Chevron *Deference and Foreign Affairs*, 86 VA. L. REV. 649, 675 (2000))).

[3] *Compare* Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315 (2000), *with* ADRIAN VERMEULE, JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION 206–14 (2006).

[4] *See* Kenneth A. Bamberger, *Normative Canons in the Review of Administrative Policymaking*, 118 YALE L.J. 64, 68 (2008).

implications of this distinction for the debate as to whether the canons or the deference rule should have priority in judicial review of agency statutory interpretation. It suggests that for a canon of the first type, like the rule against retroactivity, the current framework of denying *Chevron* deference is consistent with the canon's functioning outside the *Chevron* context. However, for a canon of the second type, like the presumption against preemption, it need not pose a special bar to deference to the agency view, absent greater justification of its countermajoritarian effects.

I. *CHEVRON* AND THE SUBSTANTIVE CANONS: DOCTRINE AND RATIONALE

A. An Overview of Chevron

The *Chevron* rule is at this point a familiar one. The deference doctrine asks courts to determine first "whether Congress has directly spoken to the precise question at issue,"[5] and second, in the event there is ambiguity, "whether the agency's answer is based on a permissible construction of the statute."[6] After *United States v. Mead Corp.*,[7] full deference now depends on a judicial determination that Congress, in effect, intended to delegate to the agency authority to resolve statutory ambiguity.[8] While *Mead*'s standard for assessing this intent introduces some uncertainty into the *Chevron* deference regime,[9] *Chevron*-eligible interpretations still reallocate primary interpretive responsibility for resolving statutory ambiguity from the courts to the agencies.

Chevron deference to agencies finds potential support in a number of grounds. The principal justification has come to rest on the "attribution of a general intention to Congress that agencies be the frontline interpreters of regulatory statutes,"[10] a justification the Court itself

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[5] *Chevron*, 467 U.S. at 842.

[6] *Id.* at 843.

[7] 533 U.S. 218 (2001).

[8] *See id.* at 226–27. The Court will typically find such intent in cases in which Congress has given the agency "authority . . . generally to make rules carrying the force of law, and . . . the agency interpretation claiming deference was promulgated in the exercise of that authority." *Id.* The "power to engage in adjudication or notice-and-comment rulemaking" then serves, itself, as a proxy for this force-of-law authority. *Id.* at 227.

[9] *See, e.g.*, Cass R. Sunstein, Chevron *Step Zero*, 92 VA. L. REV. 187, 219–21 (2006) (describing confusion in the lower courts); Adrian Vermeule, *Introduction:* Mead *in the Trenches*, 71 GEO. WASH. L. REV. 347 (2003) (same).

[10] Thomas W. Merrill & Kristin E. Hickman, Chevron*'s Domain*, 89 GEO. L.J. 833, 871–72 (2001); *see also, e.g.*, Smiley v. Citibank (S.D.), N.A., 517 U.S. 735, 740–41 (1996). This intent has been described as "a fictional, presumed intent" that may nonetheless be useful as a background principle against which Congress may legislate. Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 517.

has highlighted in opinions such as *Mead*.[11] In *Chevron* itself, the Court emphasized institutional factors such as the specialized agencies' relatively greater technical expertise.[12] More importantly, the Court stressed the agencies' superior political accountability: "While agencies are not directly accountable to the people, the Chief Executive is."[13] Commentators have also offered constitutionally inspired justifications grounded in separation of powers concerns.[14] However, the dominant judicial rationale for *Chevron* remains this potentially fictive congressional intent claim and a series of institutional choice arguments.

B. The Substantive Canons

In contrast to the relatively clear deference rule of *Chevron*, the substantive canons vary significantly more in their application. On the one hand, the canons are a response to the ambiguity inherent in statutory interpretation, "designed to guide judges when the available information about intended meaning has run out."[15] On the other hand, they are not confined to areas of otherwise irresolvable ambiguity. One of the paradigmatic canons, the constitutional avoidance canon, is triggered not primarily by otherwise irresolvable ambiguity, but rather by situations in which "an otherwise acceptable construction of a statute would raise serious constitutional problems."[16] A court then "construe[s] the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress."[17] Canons have also developed in a variety of areas. They include, nonexhaustively, a clear statement rule protecting traditional "state governmental functions,"[18] the presumption against preemption,[19] the traditional rule of lenity,[20] the canon against extraterritorial application of U.S. law,[21] and the

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[11] *See Mead*, 533 U.S. at 229.

[12] Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 865 (1984).

[13] *Id.* Commentators have proposed additional institutional choice justifications. *See, e.g.*, Peter L. Strauss, *One Hundred Fifty Cases Per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action*, 87 COLUM. L. REV. 1093, 1117–22 (1987) (suggesting *Chevron* may make uniform statutory constructions more likely given the Supreme Court's limited ability to hear cases and enforce intercircuit uniformity).

[14] *See, e.g.*, Douglas W. Kmiec, *Judicial Deference to Executive Agencies and the Decline of the Nondelegation Doctrine*, 2 ADMIN. L.J. 269, 269–70 (1988); Richard J. Pierce, Jr., *The Role of Constitutional and Political Theory in Administrative Law*, 64 TEX. L. REV. 469, 496–97 (1985).

[15] Nelson, *supra* note 2, at 349.

[16] Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988) (citing NLRB v. Catholic Bishop of Chi., 440 U.S. 490, 499–501, 504 (1979)).

[17] *Id.*

[18] Gregory v. Ashcroft, 501 U.S. 452, 470 (1991).

[19] *See, e.g.*, Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947) (announcing a presumption against preemption absent congressional demonstration of "clear and manifest purpose").

[20] *See, e.g.*, Crandon v. United States, 494 U.S. 152, 158 (1990) (requiring that legislatures provide "fair warning of the boundaries of criminal conduct" to apply a criminal statute to a party).

[21] *See, e.g.*, EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 248 (1991).

clear statement rule against retroactivity.[22] The canons can also be applied with varying degrees of strength, from rules of thumb, to presumptions, to ordinary and even "super-strong" clear statement rules.[23]

Courts and commentators have justified the substantive canons on a number of grounds. One rationale courts offer for the avoidance canon, albeit one widely rejected by commentators,[24] parallels *Chevron*'s legislative intent claim. The presumption is that Congress is unlikely to have intended to infringe on a given constitutionally inspired value and should thus not be interpreted to have done so in cases of ambiguity.[25] Courts have also justified avoidance based on its "judicial restraint" function, limiting through statutory construction the instances in which the judiciary engages in full-scale *Marbury*-style review given "the 'great gravity and delicacy' of its function" in this area.[26]

Commentators have also defended the canons more generally on targeted nondelegation grounds. Professor Cass Sunstein has argued that they serve "to trigger democratic (in the sense of legislative) processes and to ensure the forms of deliberation, and bargaining, that are likely to occur in the proper arenas" by requiring Congress to "sp[eak] clearly" before the court will recognize a certain statutory meaning.[27] The canons do raise the costs of passing certain types of legislation, serving as a sort of "clarity tax."[28] However, provided that Congress deliberates and expresses clearly its intent that a certain result prevail, the courts would not then bar the result in question.[29]

The canons are further thought to protect in particular the sort of "underenforced" values that may not easily be protected via full-scale constitutional review.[30] Such norms are believed to be difficult for courts to enforce fully via the outright invalidation of legislative or executive actions, whether due to institutional concerns, line-drawing

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[22] *See, e.g.*, INS v. St. Cyr, 533 U.S. 289, 320 n.45 (2001).

[23] *See* William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 595 & n.4 (1992).

[24] *See* John F. Manning, *Clear Statement Rules and the Constitution*, 110 COLUM. L. REV. 399, 419 n.108 (2010) ("These days, virtually no one (except the Supreme Court Justices) views this rationale as resting upon a plausible account of what a rational legislator would intend.").

[25] *See, e.g.*, Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988).

[26] Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 345–46 (1936) (Brandeis, J., concurring) (internal quotation marks omitted).

[27] Sunstein, *supra* note 3, at 335; *see also* Eskridge & Frickey, *supra* note 23, at 631.

[28] Manning, *supra* note 24 at 403; *see also* Matthew C. Stephenson, *The Price of Public Action: Constitutional Doctrine and the Judicial Manipulation of Legislative Enactment Costs*, 118 YALE L.J. 2, 40–42 (2008).

[29] The avoidance canon of course leaves open the possibility that a statute could still be struck down when its constitutionality is fully adjudicated.

[30] *See* Manning, *supra* note 24, at 422.

problems, or other administrability difficulties.[31] For example, judicial attempts to directly police federal intrusions on state governmental prerogatives have been notoriously unsuccessful.[32] In conjunction with the security offered in the federalism context by the "structure of the Federal Government itself,"[33] canons may help protect the underlying constitutional value of federalism while avoiding the administrability concerns of direct judicial review.[34] This "resistance norms" account[35] — in which canons operate as "constitutional rules that raise obstacles to particular governmental actions without barring those actions entirely"[36] — dispenses to at least some degree with a judicial claim to being a "faithful agent" of the legislature in this context. It embraces instead the principle that, at the very least, "[c]ourts have some authority to enforce constitutional values indirectly, by construing ambiguous statutes in ways that advance those values."[37]

Critics of the substantive canons have challenged the idea that their use addresses the countermajoritarian difficulty of judicial review.[38] Indeed, canon-influenced statutory interpretation decisions may be less salient for nonjudicial actors than constitutional decisions. This relationship may deepen the canons' counter-majoritarian dimension, while increasing judicial willingness to deploy them.[39] Further concern exists regarding the defensibility of the normative choices un-

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[31] *Cf.* VERMEULE, *supra* note 3, at 133. *See generally* Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212 (1978) (outlining the concept of underenforced norms).

[32] *See, e.g.*, Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 531 (1985) (rejecting the "traditional governmental function" test of *National League of Cities v. Usery*, 426 U.S. 833 (1976), as an unworkable limit on Congress's Commerce Clause power).

[33] *See id.* at 550.

[34] *See* VERMEULE, *supra* note 3, at 133; Ernest A. Young, *Constitutional Avoidance, Resistance Norms, and the Preservation of Judicial Review*, 78 TEX. L. REV. 1549, 1603–08 (2000). For use of canons in this context specifically, see *Gregory v. Ashcroft*, 501 U.S. 452, 470 (1991).

[35] *See* Young, *supra* note 34, at 1590–96.

[36] *Id.* at 1585.

[37] Stephenson, *supra* note 28, at 39. One critic of the avoidance canon has suggested that it creates an undesirable "judge-made constitutional 'penumbra'" with "much the same prohibitory effect as the . . . Constitution itself." Richard A. Posner, *Statutory Interpretation — in the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 816 (1983). Proponents of a "resistance norms" account may simply embrace this aspect and "assert that a judge who construes a statute in such a way as to avoid a constitutional 'doubt' is enforcing the Constitution itself — nothing more, nothing less." Young, *supra* note 34, at 1552.

[38] The avoidance canon, for example, "is only important in those cases in which the result is different from what the result would have been by application of a judge's or court's preconstitutional views about how a statute should be interpreted." Frederick Schauer, Ashwander *Revisited*, 1995 SUP. CT. REV. 71, 89; *see also* William K. Kelley, *Avoiding Constitutional Questions as a Three-Branch Problem*, 86 CORNELL L. REV. 831, 857 (2001); *cf.* JERRY L. MASHAW, GREED, CHAOS, & GOVERNANCE: USING PUBLIC CHOICE TO IMPROVE PUBLIC LAW 101–05 (1997) (arguing the canons may actually make it more difficult to overturn judicial decisions than outright statutory invalidation).

[39] *See* Eskridge & Frickey, *supra* note 23, at 636.

derlying the canons,[40] perhaps of particular concern if the lower salience of these interpretive decisions reduces the need for judges to defend them. In addition, commentators have asked whether the same factors prompting "underenforcement" of certain values via traditional constitutional review also should prompt "underenforcement" in statutory interpretation.[41] Finally, even if the canons might be useful as a consistent backdrop against which Congress can legislate, critics assert that in practice they have been exceedingly manipulable and inconsistently applied.[42]

C. Approaches to Reconciling Chevron *with the Canons*

A conflict can arise between the canons and *Chevron* doctrine whenever an agency interpretation eligible for *Chevron* deference potentially impinges on a value protected by a substantive canon. The *Chevron* rule counsels deference to the agency. However, the canon ordinarily mandates avoiding infringement of the value in question through judicial construction of the statute, provided such a construction is fairly possible.

At the Supreme Court, resolution of this issue with respect to the avoidance canon came soon after *Chevron*. In *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council*,[43] the Court reviewed an NLRB decision that a union's handbilling efforts protesting a mall owner's use of a certain construction company constituted a coercive secondary boycott under the NLRA. Terming the avoidance canon "beyond debate,"[44] the Court held that the desire to avoid needless constitutional adjudication and the presumption that Congress did not intend to act in an unconstitutional fashion justified the canon's continued application post-*Chevron*.[45] With the avoidance canon displacing *Chevron*, the Court found that the handbilling efforts were not coercive under the statute.[46] A number of other canons have also been found to displace *Chevron*, but for some, like the presumption against preemption, the relationship remains unclear.[47]

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[40] *See id.* at 640–45.

[41] *See id.* at 633; Manning, *supra* note 24, at 439.

[42] *See, e.g.*, VERMEULE, *supra* note 3, at 134–35; Kelley, *supra* note 38, at 866.

[43] 485 U.S. 568 (1988).

[44] *Id.* at 575.

[45] *See id.* at 575–77.

[46] *Id.* at 575–76. The Court reaffirmed its treatment of the avoidance canon in the *Chevron* context in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159 (2001). The Court again gave avoidance precedence over *Chevron* and added an explicit presumption that Congress likely did not intend a delegation to the agency to permit the agency to raise serious constitutional questions in interpretation. *See id.* at 172–73.

[47] *Compare INS* v. St. Cyr, 533 U.S. 289, 320 n.45 (2001) (stating that the canon against finding retroactivity in statutes without a clear statement trumps *Chevron*), *with* Watters v. Wachovia Bank, N.A., 127 S. Ct. 1559, 1572–73 (2007) (leaving undecided the applicable standard for review

Sunstein has offered strong support for the current precedence given to the canons. As he argued in the context of the avoidance canon, "[e]xecutive interpretation of a vague statute is not enough when the purpose of the canon is to require Congress to make its instructions clear."[48] Sunstein has extended this argument to canons prompted by constitutional concerns like the presumption against preemption, to canons prompted by sovereignty concerns like the canon in favor of Native American tribes, and to a more general set of "[n]ondelegation canons inspired by perceived public policy."[49] Moreover, subject-specific substantive canons allow courts to focus on a more determinate inquiry into the subject matter of a delegation rather than the degree of authority delegated, potentially avoiding the line-drawing difficulties of nondelegation doctrine more generally.[50] These relatively specific canons can then serve as the "only limitations" on an otherwise broad degree of latitude for agencies in statutory interpretation.[51] In contrast, Professor Adrian Vermeule has argued that *Chevron* doctrine should displace a wide range of traditional tools of statutory interpretation, including the substantive canons.[52] He suggests that use of the canons in judicial interpretation is costly relative to agency interpretation, with no corresponding reason to think that agencies are worse at law-interpretation.[53] More sweepingly, Professor William Kelley has suggested that the canons, while problematic generally, are especially so in the *Chevron* context. First, they permit judges to reject the executive's preferred reading of a statute without a finding that it is unconstitutional.[54] Second, they displace any executive role whatsoever in making constitutional judgments.[55]

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of agency interpretations finding preemption). Even for the avoidance canon, some controversy still exists. *Compare* Morales-Izquierdo v. Gonzales, 486 F.3d 484, 489–91, 493 (9th Cir. 2007) (en banc) (conducting the entire *Chevron* Step One review of the Attorney General's statutory interpretation without mentioning an avoidance-canon–based objection to the interpretation and then rejecting a role for avoidance in Step Two), *with id.* at 500, 504 (Thomas, J., dissenting) (arguing that the avoidance canon, "[b]ecause [it] centers on a presumption about congressional intent," *id.* at 504, should have been used in Step One to determine "whether Congress's intent is 'clear,'" *id.* at 500 (quoting Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843 n.9 (1984))).

48 Sunstein, *supra* note 3, at 331.

49 *Id.* at 334; *see also id.* at 331–35.

50 *See id.* at 338.

51 Cass R. Sunstein, *Beyond* Marbury*: The Executive's Power to Say What the Law Is*, 115 YALE L.J. 2580, 2610 (2006); *see also id.* at 2609–10.

52 VERMEULE, *supra* note 3, at 206.

53 *See id.* at 210–11. Indeed, there is perhaps even reason to think that agencies are better able to weigh the costs and benefits of using a particular interpretive tool. *See id.* at 213.

54 Kelley, *supra* note 38, at 882–83.

55 *Id.* at 885–86. Kelley acknowledges the canons' nondelegation rationale but suggests they are blunt tools for this purpose and may simply draw power from agencies to the courts. *Id.* at

The most recent scholarly effort in this vein seeks to distinguish itself from previous "categorical" approaches in both directions. Professor Kenneth Bamberger proposes instead what he describes as a middle-ground alternative, locating consideration of the substantive or, as he terms them, normative canons in *Chevron* Step Two.[56] Bamberger highlights the extent of variation in application of the substantive canons, with many operating as rebuttable presumptions rather than clear statement rules, and variation in agency ability to help resolve the norm-balancing interpretive questions posed.[57] Applying canons on a case-by-case basis at Step Two allows judges to determine if a particular agency decisionmaking process utilized an agency's expertise, its capacity to allow for representation of various views, and its political accountability. These factors may assure the court that the agency balanced the protected norm in a way that displaces the concerns with the court's limited information-gathering abilities that Bamberger argues underlie the canons.[58] Agencies would have an incentive to take the canons into account,[59] while the courts would remain "a final bulwark against the excesses of bureaucratic power."[60] At the same time, courts would be forced to clarify "which aspects of an interpretive decision trigger which particular canonic formulation, which types of agency behavior might contribute to the analysis, and what the governing standard suggests about both the limit of judicial interpretive authority and the remaining space for administrative policymaking."[61]

This approach seemingly reflects that these canons represent a competing claim to the use of interpretive discretion left by a statute to an agency under *Chevron* Step Two. However, it relies on a contested understanding of the Step Two inquiry and may both impose unjustified costs on the interpretive process and improperly expand courts' role in this area. Courts, in reviewing agency interpretations within the zone of ambiguity, are charged with "the task of bringing to bear a host of extrastatutory norms relevant to the reasonableness of the agency determination," often, but not exclusively, contained in procedural requirements for agency action.[62] This characterization of the

892–94; *see also* Merrill & Hickman, *supra* note 10, at 915 (also suggesting the canons improperly enlarge judicial discretion at the expense of the agencies).

[56] Bamberger, *supra* note 4, at 67–69. Professor Lisa Bressman suggests a similar approach to the nondelegation canons, termed an "administrative law alternative." *See* Lisa Schultz Bressman, Chevron*'s Mistake*, 58 DUKE L.J. 549, 617–19 (2009).

[57] Bamberger, *supra* note 4, at 67.

[58] *Id.* at 118.

[59] *Id.* at 118–19.

[60] *Id.* at 122.

[61] *Id.* at 69.

[62] *Id.* at 115. Thus, Bamberger views the APA and judicial review under it as incorporating

Chevron process has courts responsible for both defining the zone of permissible interpretations in Step One and then overseeing the reasonableness of the agency's use of that range of delegated authority in Step Two.[63] Professors Matthew Stephenson and Adrian Vermeule assert, in contrast, that a court's proper role in this inquiry is simply to assess whether an agency interpretation is "permissible as a matter of statutory interpretation,"[64] essentially what Bamberger understands to be the Step One inquiry.

The Step Two approach, while reflecting Bamberger's important insight that the canons do vary significantly in their application, thus necessarily links the courts' role in continued enforcement of the canons with a more general understanding of their role extending far beyond policing the boundaries of an implied delegation from Congress to the agency. Just as *Mead* added to *Chevron* a judicial oversight role at "Step Zero," inquiring into whether the circumstances surrounding a given interpretation indicate intent to defer, the Step Two proposal would add a parallel, even more searching, review into the reasonableness of agency norm-balancing when a canon is triggered. It therefore has potentially substantial costs to both agencies and courts, as Bamberger recognizes.[65] Building on Bamberger's recognition of variation in the substantive canons, this Note will attempt to assess whether this costly approach and continued judicial role remain necessary.[66]

II. ANALYZING APPLICATION OF THE CANONS IN STATUTORY INTERPRETATION

A case-by-case approach to the canons' application in the *Chevron* context is not inevitable. Bamberger's account of the canons as varying means of ensuring that "the process of shaping positive lawmaking should be structured to ensure that [values protected by the canons]

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promoting accountability, transparency, and thorough decisionmaking." *Id.* at 115–16. Even those decisions finding an agency "unreasonable," he asserts, frequently rely on values outside the statute interpreted. *See id.* at 116 (citing, for example, the norm against delegating governmental authority to private parties used in *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366 (1999)).

[63] *See* Kenneth A. Bamberger & Peter L. Strauss, Chevron*'s Two Steps*, 95 VA. L. REV. 611, 611 (2009).

[64] Matthew C. Stephenson & Adrian Vermeule, Chevron *Has Only One Step*, 95 VA. L. REV. 597, 599 (2009). They assert that the Step Two approach reflects a "conflat[ion of] the question whether the relationship between *Chevron* and normative canons should be governed by rules or standards with an artificial choice between applying those canons at Step One or Step Two." *Id.* at 608–09.

[65] *See* Bamberger, *supra* note 4, at 121–22.

[66] *Cf.* Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2379 (2001) (noting costs to the *Chevron* regime's rule-like certainty created by "Step Zero"–type exceptions and suggesting the attendant benefits may not have justified this effect).

are reflected in government policy"[67] elides a significant distinction in the way the canons operate. Their variation reflects a categorical distinction between discretion-constraining and discretion-channeling canons. On the one hand, discretion-constraining canons fit the traditional nondelegation model highlighted by Sunstein and others. They operate in a way that mirrors *Chevron* Step One, translating statutory ambiguity into a specific intent, even if fictive, that the disfavored outcome not result. Thus, the Court described the antiretroactivity canon in *INS v. St. Cyr*[68] in these terms: "Because a statute that is ambiguous with respect to retroactive application is construed under our precedent to be unambiguously prospective, there is, for *Chevron* purposes, no ambiguity in such a statute for an agency to resolve."[69] Use of the canons reflects a need for legislative consideration of the value in question sufficient to produce a clear statement. The requirement thus structures the lawmaking process with respect to that norm.

On the other hand, many canons are used not to constrain judicial discretion altogether but to shape the statutory construction process to reflect judicially articulated values within a zone of ambiguity. With respect to *Chevron*, the discretion-channeling canons operate essentially as competing claims to that zone of ambiguity in which agencies otherwise receive deference under Step Two. They embrace the fact that legislative consideration is not always realistic[70] and reflect courts' use of ambiguity to advance or protect constitutionally grounded values. It is thus a resistance-norms account justified more by the limited scope of its operation than by a nondelegation-related claim as to how the lawmaking process should be structured.

A. Discretion-Constraining Canons

In *St. Cyr*, the Court used a number of canons in a manner that fits squarely within the first group of true nondelegation canons. The case involved a challenge, in the habeas petition of a permanent resident facing deportation, to the Attorney General's interpretation of amendments made by the Antiterrorism and Effective Death Penalty Act of 1996[71] (AEDPA) and the Illegal Immigration Reform and Immigrant

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[67] Bamberger, *supra* note 4, at 107.

[68] 533 U.S. 289 (2001).

[69] *Id.* at 321 n.45 (citation omitted).

[70] *Cf.* Mistretta v. United States, 488 U.S. 361, 372 (1989) ("[O]ur jurisprudence has been driven by a practical understanding that in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives.").

[71] Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of the U.S. Code).

Responsibility Act of 1996.[72] The amendments narrowed the Attorney General's discretion to waive deportation when a noncitizen is convicted of a deportable crime.[73] The habeas petitioner argued that they should not be construed to extend to convictions such as his occurring prior to the amendments' enactment.[74] The Attorney General interpreted the amendments to eliminate not just discretion to waive deportation but also courts' habeas jurisdiction to hear St. Cyr's suit at all.[75]

The Attorney General's interpretation ran counter to a host of substantive canons. First, the claim that the federal courts' habeas jurisdiction was stripped ran counter to "the strong presumption in favor of judicial review of administrative action and the longstanding rule requiring a clear statement of congressional intent to repeal habeas jurisdiction,"[76] as well as the avoidance canon.[77] Second, the claim that the amendments applied to crimes occurring before their passage was contrary to the canon that "congressional enactments . . . will not be construed to have retroactive effect unless their language requires this result."[78] With respect to the first claim, the Court found that the statute lacked the "clear, unambiguous, and express statement of congressional intent" needed to achieve such a jurisdiction-stripping result.[79] With respect to the second claim, the Court noted that previous cases had construed statutes as being truly retroactive only when the "statutory language . . . was so clear that it could sustain only one interpretation."[80] It held that presumptions against retroactivity and in favor of immigrants "foreclose[] the conclusion that, in enacting § 304(b), 'Congress itself has affirmatively considered the potential unfairness of retroactive application and determined that it is an acceptable price to pay for the countervailing benefits.'"[81] It also refused to defer to the INS's interpretation due to the presumption against retroactivity.[82]

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[72] Pub. L. No. 104-208, div. C, 110 Stat. 3009-546 (codified in scattered sections of 8, 18, and 28 U.S.C.) (amending Immigration and Nationality Act, 8 U.S.C. §§ 1101–1537).

[73] *See St. Cyr*, 533 U.S. at 293–94, 297.

[74] *See id.* at 293.

[75] *See id.* at 297.

[76] *Id.* at 298 (footnote omitted).

[77] *Id.* at 299–300 (noting as well a further, distinct canon requiring "a clear indication" "when a particular interpretation of a statute invokes the outer limits of Congress' power," *id.* at 299).

[78] *Id.* at 315–16 (omission in original) (quoting Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 208 (1988)) (internal quotation marks omitted). This canon was additionally "buttressed by 'the longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien.'" *Id.* at 320 (quoting INS v. Cardoza-Fonseca, 480 U.S. 421, 449 (1987)).

[79] *Id.* at 314. The Court rejected a number of INS arguments that various provisions in the two acts provided such a sufficiently clear statement, *see id.* at 308–14, including the title of § 401(e) of AEDPA, "Elimination of Custody Review by Habeas Corpus," *see id.* at 308–09.

[80] *Id.* at 317 (quoting Lindh v. Murphy, 521 U.S. 320, 328 n.4 (1997)) (internal quotation mark omitted).

[81] *Id.* at 320 (quoting Landgraf v. USI Film Prods., 511 U.S. 244, 272–73 (1994)).

[82] *See id.* at 320 n.45.

The interpretive approach adopted here is transparently countermajoritarian. At the same time, it reflects strongly the nondelegation rationale that Sunstein highlights. Thus, the Court explicitly recognized that Congress could act retroactively should it so choose. However, Congress itself had to consider the costs of such retroactive action. The analysis essentially mirrors that presented in *Chevron* Step One, albeit with a different result in the event ambiguity is found: to the extent the issue is not resolved as a matter of clearly expressed intent, the Court will refuse to use whatever interpretive ambiguity is left in the statutory terms to achieve the disfavored result. The outcome may be a result that diverges significantly from the otherwise "best" statutory construction. While there may still be concern that the Court will be inconsistent in deploying such a canon,[83] once triggered, it removes any further discretion available to the interpreter.

B. Discretion-Channeling Canons

However, *St. Cyr* does not represent the mine run of canon cases. The presumption against preemption, for example, differs categorically in application from the discretion-constraining clear statement rules deployed in *St. Cyr*. Application of this presumption in recent cases has seemingly had relatively little effect in actually barring courts from finding statutes to have preemptive effect.[84] Indeed, some recent preemption cases have found a statute to have preemptive effect via expansive implied or express preemption analysis, with the presumption against preemption mentioned only in dissent.[85] Even when the Court has expressly deployed the presumption, its demands differ substantially from those imposed in *St. Cyr*.

In *Bates v. Dow Agrosciences LLC*,[86] for example, the Court ultimately found that that the Federal Insecticide, Fungicide, and Rodenticide Act[87] (FIFRA) did not preempt various state law tort claims.[88] It deployed the presumption against preemption only after a long dis-

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[83] *See, e.g.*, *id.* at 335–36 (Scalia, J., dissenting). *St. Cyr*'s deployment of the canons arguably offers a specific example of the self-protective use of canons to preserve the Court's own power, reflecting that "the judiciary is certainly not immune from the self-aggrandizing interests more frequently associated with the other two branches." Trevor W. Morrison, *Constitutional Avoidance in the Executive Branch*, 106 COLUM. L. REV. 1189, 1233 n.189 (2006) (citing MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS 26 (1999)).

[84] *See, e.g.*, Richard H. Fallon, Jr., *The "Conservative" Paths of the Rehnquist Court's Federalism Decisions*, 69 U. CHI. L. REV. 429, 463–64 (2002); Note, *New Evidence on the Presumption Against Preemption: An Empirical Study of Congressional Responses to Supreme Court Preemption Decisions*, 120 HARV. L. REV. 1604, 1604 & n.5 (2007) (collecting sources).

[85] *See, e.g.*, Watters v. Wachovia Bank, N.A., 127 S. Ct. 1559, 1579 (2007) (Stevens, J., dissenting); Geier v. Am. Honda Motor Co., 529 U.S. 861, 888 (2000) (Stevens, J., dissenting).

[86] 544 U.S. 431 (2005).

[87] 7 U.S.C. §§ 136–136y (2006).

[88] *See Bates*, 544 U.S. at 442–46.

cussion of the proper interpretation of the terms of the Act's preemption clause.[89] Even before suggesting application of the presumption against preemption, the Court grounded the superiority of its nonpreemptive interpretation of the clause in a comparison of the terms of FIFRA's preemption clause and those of preemption clauses interpreted in past cases.[90] Certainly, the Court at the end of its analysis stated that the presumption against preemption requires Congress to make its preemptive intent "clear and manifest."[91] Thus, "even if [the preemptive] alternative were just as plausible as our reading of that text — we would nevertheless have a duty to accept the reading that disfavors pre-emption."[92] However, the canon as used in the case at most guided the Court's own search within plausible alternatives.

The Court further demonstrated this approach in a recent implied preemption case, *Wyeth v. Levine*.[93] The Court had to decide whether the FDA's approval of a drug's label had preemptive effect.[94] In finding no such effect, the Court for the first time recognized the application of the presumption against preemption in the implied preemption context.[95] Even with that presumption, however, the Court did not require congressional consideration of whether FDA approval of a drug's label should displace state common law tort actions with respect to that drug.[96] Instead, the majority pursued the same broadly purposivist inquiry that, as Justice Thomas noted in concurrence, had previously allowed findings of preemption "based on nothing more than assumptions and goals . . . untethered from the constitutionally enacted federal law authorizing the federal regulatory standard."[97] Again, the canon simply guided the Court in its own inquiry into whether preemption was consistent with statutory purpose, the "ultimate touchstone in every pre-emption case,"[98] balanced against the federalism values underlying the presumption. The canon in *Bates* and *Wyeth* thus does not require legislative consideration of the rele-

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[89] 7 U.S.C. § 136v(b) ("[A covered] State shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under this subchapter.").

[90] *See Bates*, 544 U.S. at 447–48 (distinguishing *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992), while drawing support from a similarly worded provision in *Medtronic, Inc. v. Lohr*, 518 U.S. 470 (1996)).

[91] *Id.* at 449 (quoting N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645, 655 (1995)) (internal quotation marks omitted).

[92] *Id.*

[93] 129 S. Ct. 1187 (2009).

[94] *See id.* at 1191.

[95] *See id.* at 1194–95.

[96] *Id.* at 1200.

[97] *Id.* at 1215 (Thomas, J., concurring in the judgment).

[98] *Id.* at 1194 (majority opinion) (quoting Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996)) (internal quotation mark omitted).

vant issue.[99] Instead, it ensures that — in interpreting within the zone of ambiguity otherwise left to the agency under *Chevron* — the Court gives sufficient consideration to the relevant norm of federalism.[100]

Canons applied in this sense are frequently designed to operate in those ambiguous areas in which "judges' primary interpretive tools have succeeded only in identifying a range of possible meanings, none of which seems significantly more likely than the others to reflect what members of the enacting legislature probably had in mind."[101] Faced with such an essentially "probabilistic judgment,"[102] courts use canons in this second category to give structure and some degree of rule-like character to the "normative judgments" guiding judicial resolution of this ambiguity.[103] If canons in this sense operate to constrain discretion, they do so only by formalizing the manner in which judges interpret statutory ambiguity to advance or protect certain values. Their function is thus primarily one of discretion channeling. Courts may still characterize the statutory construction process as a search for congressional intent to overturn a given presumption.[104] However, as the evidence accepted for such intent expands beyond the requirement of a statutory clear statement, there will frequently be no certain answer as to whether a given mix of conflicting indicia of statutory meaning constitutes intent on Congress's part for a certain result.[105]

Because these canons allow judges to balance the protected norm against indicia of statutory meaning or purpose to substitute for a legislative clear statement, nondelegation fits awkwardly as a justification. Certainly, the canons still impose a "clarity tax." Congress remains able to speak with added clarity to constrain the discretion available to the courts. Canons of this sort may then provide the legislature with some added incentive to consider the issue in question.[106]

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[99] In both cases, the executive branch's interpretation was ineligible for *Chevron* deference for reasons unrelated to the canon. In *Bates*, the Executive's view was set out in an amicus brief. *See* Bates v. Dow Agrosciences LLC, 544 U.S. 431, 436–47 & n.7 (2005). In *Wyeth*, the FDA's pro-preemptive view was communicated in a regulatory preamble to a notice of proposed rulemaking that specifically disclaimed any preemption implications. *See Wyeth*, 129 S. Ct. at 1201.

[100] *See* Bamberger, *supra* note 4, at 92 (arguing canons operating "as prophylactic, but rebuttable, presumptions" are "intended to shape statutory construction so as to protect underlying values that courts might not enforce directly").

[101] Nelson, *supra* note 2, at 349.

[102] John F. Manning, *Lessons from a Nondelegation Canon*, 83 NOTRE DAME L. REV. 1541, 1555 (2008).

[103] *See* Nelson, *supra* note 2, at 356.

[104] *E.g.*, *Wyeth*, 129 S. Ct. at 1194–95 ("[W]e 'start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'" (quoting Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996))).

[105] *See* Jacob E. Gersen & Adrian Vermeule, Chevron *as a Voting Rule*, 116 YALE L.J. 676, 693–94 (2007); *see also* Manning, *supra* note 102, at 1554–55.

[106] *But cf.* Kagan, *supra* note 66, at 2379–80 (noting limited direct congressional response to the *Chevron* rule that might be thought to provide similar incentives).

Ultimately, however, the canons' muted effect simply provides no guarantee of the "distinctive kind of accountability . . . that comes from requiring specific decisions from a deliberative body reflecting the views of representatives from various states of the union."[107]

As a result, the canons in this second category largely must draw their justification from elsewhere. To some extent, this justification derives from the courts' interpretive role and the need to provide some means of channeling the interpretive discretion that inevitably arises in the construction of broadly worded statutes. In the absence of an agency to administer a given statute, the federal courts are the principal, perhaps only, front-line interpreters. Legislative consideration of each instance of potential statutory infringement of a protected norm may be unfeasible.[108] The federal courts' status as primary interpreters makes developing presumptions a sensible means of dealing with a situation in which necessarily "probabilistic" judgments must be made by a branch of government for whom simple policy preferences cannot instead supply a means of resolving the ambiguity.

It may then further make sense to permit courts actively to shape their use of the presumptions channeling this discretion essentially on a "resistance norms" account of their role in this area.[109] Judges are relatively expert in the intricacies of constitutional doctrine and have a particular charge to ensure enforcement of the Constitution.[110] They thus may be permitted to advance constitutionally grounded values in a manner limited to shaping the interpretive leeway granted to the courts by ambiguity in the statutes interpreted.[111] This account is consistent with a historical analysis of the canons' development from the early days of the federal court system.[112] While there is certainly some

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[107] Cass R. Sunstein, *Is the Clean Air Act Unconstitutional?*, 98 MICH. L. REV. 303, 335–36 (1999).

[108] *Cf.* Gillian E. Metzger, *Administrative Law as the New Federalism*, 57 DUKE L.J. 2023, 2081 (2008) (suggesting as a general matter that Congress lacks the resources to consider all federal-state questions in a given regulatory scheme).

[109] Kelley suggests that classic avoidance doctrine was justified in part in an analogous way, on a "pre-realist" recognition that statutes can have multiple reasonable readings, such that permissible constitutional readings could be preferred to those determined to be unconstitutional. *See* Kelley, *supra* note 38, at 840.

[110] *See* Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109, 169 (2010) ("Constitutionally inspired canons might be explained as an outgrowth of the power of judicial review. Judges do not act as faithful agents of Congress in exercising judicial review; they act as faithful agents of the Constitution."); *see also* Bamberger, *supra* note 4, at 75.

[111] *Cf.* Barrett, *supra* note 110, at 123 ("When Congress has delegated resolution of statutory ambiguity to the courts, it is no violation of the obligation of faithful agency for a court to exercise the discretion that Congress has given it.").

[112] Professor Amy Barrett notes the long existence of many of the canons, but further recognizes that these canons present an uneasy fit with a faithful agent model of the judicial role and particularly with the textualist understanding of this role. *See id.* at 123–26. She concludes that this historical practice can be justified so long as the canons' effects are confined to operating within

tension with a "faithful agent" model of the judicial role, it is limited by the relatively small degree of leeway permitted. Moreover, the limited effect of canons in this group also reflects both the courts' continued reliance on legislative intent to justify deployment of the canons and their continued failure to provide the stronger rationale needed for a more aggressively countermajoritarian approach.[113]

C. Differentiating the Two Types

Given the current lack of attention paid to this distinction, for many canons it is unclear whether they operate as discretion-constraining clear statement rules or discretion-channeling interpretive presumptions. Some canons, particularly the stronger clear statement rules, do fall easily within the first camp of true nondelegation canons. Thus, the super-strong clear statement rule protecting traditional "state governmental functions" from federal infringement,[114] the clear statement rule governing conditions placed on states via the spending power,[115] and perhaps the presumption against extraterritoriality[116] all serve as examples of canons of the first type.[117] Other canons, like the presumption against preemption, fall as clearly within the second camp, merely conditioning exercise of the court's interpretive process. For example, the canon of lenity, frequently used as a mere tiebreaker after a lengthy independent analysis of a given criminal statute,[118] would, along with the rule that courts must "construe statutes favoring Native Americans liberally,"[119] also serve as an example of a discretion-channeling canon of the second type. For still others, their rationales do not clearly point in either direction or indeed even conflict.[120] Some canons' position in this framework is thus less determi-

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the range of textually plausible meanings for a given statute, and careful consideration is given to the specificity of the constitutional norm underlying the canon and the means by which deviating from an otherwise preferred statutory construction advances that norm. *See id.* at 181–82.

113 In *Wyeth*, for example, the only sustained discussion of the benefits of federalism underlying the presumption came in Justice Thomas's concurrence. *See* Wyeth v. Levine, 129 S. Ct. 1187, 1205–08 (2009) (Thomas, J., concurring in the judgment). Further, as with *Chevron* itself, limiting the canons' effect to the "implied delegation" provided by gaps left in the interpreted statute makes the legislative intent rationale at least somewhat plausible.

114 Gregory v. Ashcroft, 501 U.S. 452, 470 (1991).

115 *E.g.*, Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 17 (1981).

116 *See* EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 260 (1991) (Scalia, J., concurring in part and concurring in the judgment).

117 Indeed, even if the justification for a given clear statement rule is to give affected parties notice of the obligations imposed, *e.g.*, *Pennhurst*, 451 U.S. at 17, it nevertheless requires legislative consideration to provide such notice.

118 *See* Muscarello v. United States, 524 U.S. 125, 138 (1998) (quoting United States v. Wells, 519 U.S. 482, 499 (1997)).

119 Williams v. Babbitt, 115 F.3d 657, 660 (9th Cir. 1997).

120 *Cf.* Kristin E. Hickman, *Of Lenity,* Chevron*, and KPMG*, 26 VA. TAX REV. 905, 933 (2007) (suggesting that resolution of the conflict between the lenity rule and *Chevron* in *Babbitt v. Sweet*

nate at the present time, including most significantly the avoidance canon itself.[121]

III. IMPLICATIONS FOR THE RELATIONSHIP WITH *CHEVRON*

The effect of this distinction on the debate over which rule of statutory construction should prevail when the substantive canons and *Chevron* doctrine conflict depends on the form of canon considered. For canons of the first type, their requirement of a legislatively produced clear statement strongly indicates that they must displace *Chevron* deference. For canons of the second type, the changed setting a court faces in *Chevron* review of an agency interpretation alters much of their original justification. Both the agency's role as primary frontline interpreter and its independent ability to bring normative commitments to bear indicate less need for judicial application of canons of this type. Faced with this new setting, and absent substantially greater justification for the canons' continued use, courts must allow the canons to give way to deference to the agency view under *Chevron*.

As a preliminary matter, although it is true that the line between the two categories is not currently always clear, it will be clear in many applications. Moreover, a benefit of this Note's suggested categorical approach is that it will force courts to consider and clarify the interpretive status of canons such as the avoidance canon. Determining whether the presumption in question requires legislative consideration and a true clear statement will bring order to a disordered set of interpretive rules. Further, the determination clarifies the justifications available to any given canon in the event that it conflicts with *Chevron* deference.[122] As a result of such clarification, a categorical distinction in the substantive canons thus would be possible.

Once the distinction between nondelegation canons and discretion-channeling canons is understood, it is clear that courts should apply the first category as a matter of statutory interpretation at Step One.[123] To the extent that a canon requires a true clear statement, it leaves no

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Home Chapter of Communities for a Great Oregon, 515 U.S. 687 (1995), "exposed a tension . . . between the legislative function and fair warning justifications for the rule of lenity").

121 *See, e.g.*, Morrison, *supra* note 83, at 1215–16 (outlining disagreement regarding how the avoidance canon should be applied).

122 *Cf.* Clark v. Martinez, 543 U.S. 371, 397–98 (2005) (Thomas, J., dissenting) (distinguishing between lenity understood as a "constitutionally based clear statement rule," *id.* at 397, and as a "nonconstitutionally based presumption about the interpretation of criminal statutes," *id.* at 398).

123 Bamberger does not view canons that recognize that a certain "norm-impinging choice is the type of politically charged decision only appropriate when reached through the strictures of congressional decisionmaking," as categorically distinct from the less discretion-constraining canons. Bamberger, *supra* note 4, at 117. However, he also suggests that, for these canons, it remains appropriate to rule out agency contribution to the interpretive issue altogether and simply find against the norm-impinging result when Congress has not spoken to the question. *See id.*

discretion for an agency or a court to remedy the failure to provide one. However, the canon must apply equally to the court and the agency: neither the courts nor the executive branch can account for the absence of a clear statement.[124] An agency's request for *Chevron* deference in the face of ambiguity itself suggests that, should a nondelegation canon apply, it precludes an agency interpretation infringing on a protected norm.[125] A principled application of the approach, such that a nondelegation canon's privileged outcome does in fact "prevail unless Congress has said otherwise,"[126] would then be limited only to those canons the Court has been willing to treat consistently in this way.[127]

The second category of discretion-channeling canons merely provides for some consideration of particular values in statutory interpretation, permitting judges to find that other factors nonetheless override the protected norm. In this context, deference to the agency view at Step Two is both consistent with the allocation of interpretive authority under *Chevron* and at least potentially consistent with the justifications underlying the canons. The previous, limited use of these canons was justified by judges' position as the predominant front-line interpreters of statutes, resolving areas of doubtful application under sometimes broadly worded congressional mandates. In this context, historical evidence from the earliest days of the federal court system supports "the proposition that federal courts believed themselves empowered to deploy substantive canons to choose less plausible interpretations of statutory language to advance policy goals."[128]

However, the legal landscape now looks very different from that in which the canons arose. The executive branch has emerged as an increasingly prominent participant in statutory interpretation. Its practice in implementing statutes can frequently be a much more flexible, expansive affair than an interpretive process confined solely to case-specific adjudication by courts.[129] The executive branch's participation extends not just to new interpretive settings but also to areas in which there is no prospect for judicial review, due to standing, justi-

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[124] *See* Sunstein, *supra* note 3, at 330 ("[W]hen statutory terms are ambiguous, there is no escaping delegation. . . . If *Chevron* is rejected, ambiguous terms will be construed by judges rather than administrators, and in neither event will hard questions be decided legislatively.").

[125] *See* Manning, *supra* note 102, at 1565–66; Sunstein, *supra* note 3, at 330.

[126] Sunstein, *supra* note 3, at 340.

[127] The number of canons that meet this standard may be relatively small. Clear statement rules may have a decidedly expansive scope of application given the relative infrequency of actual congressional clear statements. *See* Manning, *supra* note 102, at 1549. Relatively few values might be thought to justify this extensive a level of protection. For many canons, then, one can expect courts to have difficulty consistently maintaining a clear statement understanding when faced with reasonably strong evidence that a disfavored result was intended. *See id.* at 1559–61.

[128] Barrett, *supra* note 110, at 158–59; *see also id.* at 125–59.

[129] *See* Morrison, *supra* note 83, at 1191–92.

ciability, or other concerns.[130] This development has arguably tempered the problem of a distant legislature enacting broadly worded statutes that initially helped justify judicial use of the canons. Now, in judicial review of agency action, there is already an initial decision as to whether a statute should extend in a given situation made by a politically responsive executive official who frequently has greater regulatory expertise than the judge.[131] Further, the *Chevron* decision itself makes explicit the general transfer of the ability to use interpretive discretion to pursue policy goals from the courts to the agencies.

In this new setting, simply deferring to a *Chevron*-eligible agency view at Step Two, even when it implicates a discretion-channeling canon, adequately advances the values protected by the substantive canons at a cost far lower than Bamberger's case-by-case approach. First, the administrative process itself is likely to give significant weight to the values protected by the various substantive canons, if not necessarily to the exact set of values favored by the federal judiciary at any given time. The promotion of certain normative commitments by the executive branch may be reflected in a formal executive order, as with Executive Order 12,866's mandate to executive branch agencies to consider federalism values and Native American tribal interests in their actions.[132] However, it can also be seen in less formal or less generally applicable ways, such as an agency's consideration of a particular constitutionally grounded value in implementing a given regulatory mandate[133] or even agencies or the Office of Legal Counsel themselves using the avoidance canon in a particular interpretation.[134]

Defenders of the current approach to the canons have argued that even after *Chevron*, the judiciary has the expertise and authority to determine how constitutional values affect statutes' scope.[135] However,

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[130] *Id.* at 1196–97.

[131] Professor Trevor Morrison suggests that a greater familiarity with the legislative materials surrounding a certain statutory provision may even allow an executive branch interpreter to determine that congressional intent exists for a statute to apply in a certain situation where a court could have perceived only ambiguity. *See* Morrison, *supra* note 83, at 1240–41.

[132] *See* Exec. Order No. 12,866 § 1(b)(9), 3 C.F.R. 638, *reprinted in* 5 U.S.C. § 601 (2006).

[133] For example, after passage of the Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (codified in scattered sections of 2 and 47 U.S.C.), the FEC repeatedly presented First Amendment concerns as a reason to use caution in implementing the provisions of the new Act, concerns that were indeed largely dismissed by the D.C. Circuit. *See* Shays v. FEC, 528 F.3d 914, 925–26 (D.C. Cir. 2008); Shays v. FEC, 414 F.3d 76, 101–02 (D.C. Cir. 2005).

[134] Morrison, *supra* note 83, at 1218–19. One scholar has, however, criticized agency deployment of this canon as relatively cursory. *See* Jerry L. Mashaw, *Norms, Practices, and the Paradox of Deference: A Preliminary Inquiry into Agency Statutory Interpretation*, 57 ADMIN. L. REV. 501, 533 & n.75 (2005) (finding relatively cursory agency responses to constitutional objections, albeit in small sample size and with largely frivolous constitutional claims).

[135] *See, e.g.*, Univ. of Great Falls v. NLRB, 278 F.3d 1335, 1341 (D.C. Cir. 2002) (holding that courts need not defer to agency interpretation of Supreme Court precedent, especially where constitutional concerns are involved).

as these examples show, in interpreting statutes, agencies are not simply single-minded "accelerators" of regulatory change, with courts as "brakes" responding to an awareness of the legal system as a whole.[136] The executive branch promotes its own "extrastatutory" normative commitments in its competing claim to statutory ambiguity, including commitments influenced by the executive's understanding of constitutionally grounded values.[137] Indeed, this independent practice of constitutional interpretation makes Kelley's critique of the canons as precluding such an executive role entirely especially compelling.[138]

The existing procedural and substantive requirements for judicial review set out in the APA and various organic statutes, particularly the requirement of reasoned consideration, further promote consideration of protected values, even in situations where the executive branch may be disinclined to consider them in the first instance. At least after *Mead*, the deference regime itself also encourages use of more participation-fostering notice-and-comment rulemaking and formal adjudication procedures.[139] Given that the agency must respond to concerns raised in rulemaking, parties who believe that a given statutory application infringes on a protected value can be expected to raise the issue in such a proceeding. Thus, agencies already have the means to adapt a given statutory mandate to sensitive areas, often with a duty to provide some response to complaints or comments from affected parties. Indeed, in areas where judicial review is unlikely, these means alone must suffice to permit agencies to assess adequately the desirability of extending statutes into these sensitive areas.[140]

Certainly, agencies may sometimes choose to advance other values at the expense of the canon-protected values. When they do so, however, they are well positioned to make a judgment that such a sacrifice is necessary. An agency has the ability to gather information as to the costs and benefits of a certain statutory construction, including any infringements on constitutionally protected values. Unlike a court, in doing so, an agency has the flexibility to choose between its rulemaking and adjudicative powers.[141] It can also account for the shifting

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136 *See* Mashaw, *supra* note 134, at 518 (outlining a model along these lines).

137 *Cf.* Frank H. Easterbrook, *Presidential Review*, 40 CASE W. RES. L. REV. 905, 927–29 (1990).

138 *See* Kelley, *supra* note 38, at 881–82.

139 *See, e.g.*, United States v. Mead Corp., 533 U.S. 218, 246 (2001) (Scalia, J., dissenting) (suggesting an artificial increase in informal rulemaking as one result of the *Mead* decision).

140 *Cf.* Morrison, *supra* note 83, at 1196–97 ("[I]n a great many instances of executive branch statutory interpretation, the question of judicial review does not arise. . . . In areas like these, to think about executive branch interpretation is necessarily to think about that process without regard to the prospect of judicial review.").

141 Indeed, this procedural flexibility may allow agencies to avoid the difficulty raised in *Clark v. Martinez*, 543 U.S. 371 (2005), in which the Justices divided over whether a previous avoidance-influenced construction of the Immigration and Nationality Act should apply to a new plain-

weight given to certain values relative to other policy goals as the administration in power changes. The preemption cases reflect just such a pattern. In *Bates*, the Court noted that the Executive's position on the preemption question reflected a shift from a view offered five years earlier that the statute did not have preemptive effect.[142] Since *Wyeth*, in contrast, executive branch interpretation in this area has again shifted, moving, with a new presidential administration, to a generally less preemptive approach.[143] This flexibility may reflect changes in both the weight given to the protected value of federalism in this context and the policy views on the product liability regulation at issue. For the discretion-channeling canons, the answer thus seems to be, as Vermeule argues, to defer on cost-benefit grounds not only to agencies' interpretations but to their interpretive methodologies as well, including the choice to deploy a given canon.[144] Courts' own deployment of such canons regularly accepts that protected values could give way to other interests in the absence of a legislative clear statement; if anything, agencies are *better* positioned to make these judgments.

It is undoubtedly true that choosing a deference approach for this category may sometimes result in values going unprotected in cases that Bamberger's approach would reach. Agencies may ignore a norm altogether or address it dismissively,[145] although the requirement of APA § 706(2) that agency actions not be arbitrary or capricious provides some protection from overly dismissive responses to concerns raised in a given rulemaking or adjudicative process. However, even given parties' incentives to raise such issues, there is no guarantee that the issue will be raised or that the general prospect of judicial review will spur the agency to grapple with the question of whether a given interpretation is warranted. The agency may simply avoid the rulemaking process altogether and still attempt to claim deference.[146] When protecting an extrastatutory norm narrows the scope of a statute the agency administers, an agency may also be subject to the same concerns regarding its lack of unique expertise and "tunnel vision" or "empire-building" tendencies highlighted in debates over deference to

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tiff for whom the previously rejected construction would pose no constitutional problem, with the majority deciding the same construction should apply., *id.* at 386. Unlike courts, whose interpretive process is necessarily driven by the cases before them, agencies can more easily consider statutory applications that do and do not raise constitutional concerns in applying ambiguous provisions to sensitive areas.

142 *See* Bates v. Dow Agrosciences LLC, 544 U.S. 431, 449 & n.24 (2005).

143 *See* Memorandum on Preemption, 2009 DAILY COMP. PRES. DOC. 384 (May 20, 2009), *available at* http://www.gpoaccess.gov/presdocs/2009/DCPD-200900384.pdf.

144 *See* VERMEULE, *supra* note 3, at 213–14.

145 *See* Bamberger, *supra* note 4, at 102.

146 Such a tactic arguably occurred in *Wyeth v. Levine*, 129 S. Ct. 1187 (2009). In that case, the FDA attempted to claim deference for a preemption interpretation included in a regulatory preamble not subject to notice and comment. *See id.* at 1201.

agency determinations of the scope of their jurisdiction.[147] However, even if the agency interpretive process may at times only imperfectly protect norms promoted via the substantive canons,[148] the consideration agencies provide raises the burden to continue justifying judicial use of the canons to promote these values. In light of the foregoing concerns, their continued application through a case-by-case approach can be justified only if the examples of imperfect protection of canon-protected norms highlighted above are in fact sufficiently numerous and significant to outweigh the approach's substantial costs.

IV. CONCLUSION

Consideration of the question as to how *Chevron* and the substantive canons interact has thus to this point reflected a failure to distinguish between two significantly different uses of the canons. Defenders of the nondelegation approach to the canons provide a plausible account of discretion-constraining canons such as those on display in *St. Cyr*. The same considerations of requiring legislative deliberation to take certain actions that support use of these canons in the first place also clearly counsel for their trumping *Chevron* deference. However, this account is only partial. A significant number of substantive canons are not consistently used in this discretion-constraining fashion. For the category of discretion-channeling canons, their continued justification most plausibly rests on a more limited "resistance norm" account, in which they function essentially as a competing claim to the zone of statutory ambiguity granted to agencies under *Chevron*. As courts transition from a role as front-line interpreters of federal statutes and find themselves increasingly in the role of reviewing agency statutory interpretation, these changes should affect the continued viability of the use of canons in this second category. Absent further justification that the canons' continued use is necessary, courts in this changed context should allow the ordinary process of *Chevron* review to displace the discretion-channeling canons in judicial review of agency statutory interpretation.

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147 *See* Bamberger, *supra* note 4, at 101; *see also* Miss. Power & Light Co. v. Mississippi *ex rel.* Moore, 487 U.S. 354, 387 (1988) (Brennan, J., dissenting); Merrill, *supra* note 47, at 756 (noting the empire-building concern in agency preemption interpretations); Metzger, *supra* note 108, at 2077 (noting aggrandizement, tunnel vision, and expertise concerns in the federalism context). It has yet to be shown that agencies do systematically overreach in their jurisdictional interpretations. *See* Jacob E. Gersen, *Overlapping and Underlapping Jurisdiction in Administrative Law*, 2006 SUP. CT. REV. 201, 235.

148 *Cf.* Metzger, *supra* note 108, at 2107 (suggesting administrative law means to protect various federalism norms, but questioning whether federalism-specific administrative law doctrines would be necessary).