CHEVRON AND CONSTITUTIONAL DOUBT

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> In cases where the policy of constitutional avoidance must be considered . . . the administrative construction cannot be decisive.[1]

INTRODUCTION

FEDERAL agencies regularly sail in murky constitutional waters.[2] Established principles of statutory interpretation, however, leave federal courts adrift amid these dangerous shoals. When faced with agency interpretations that raise constitutional doubts, courts are torn. On the one hand, the famous rule of *Chevron U.S.A. v. Natural Resources Defense Council* instructs courts to defer to an agency's reasonable interpretation of its own statute.[3] On the other, cutting against deference, the longstanding canon of constitutional avoidance counsels courts, when possible, to choose a statutory construction avoiding serious constitutional doubts. Although the Supreme Court eventually resolved this dilemma in favor of the avoidance canon,[4] the Court's rationale remains somewhat of a mystery. Commentators generally tell a

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[1] Lowe v. SEC, 472 U.S. 181, 216 (1985) (White, J., concurring).

[2] For example, by regulating communication methods and sometimes even content itself, agencies such as the Federal Communications Commission, the Federal Election Commission, and the National Labor Relations Board often raise difficult First Amendment questions. Kenneth A. Bamberger, Normative Canons in the Review of Administrative Policymaking, 118 Yale L.J. 64, 94 (2008).

[3] 467 U.S. 837, 866 (1984).

[4] See Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs, 531 U.S. 159, 174 (2001); Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 588 (1988).

story of policy.[5] This Note offers an alternative textualist account rooted in historical practice.

The Supreme Court in *Chevron* provides no apparent answer to the conflict between constitutional avoidance and deference. Despite the essential role of statutory interpretation in *Chevron*'s renowned two-step framework, the Court's opinion offers little guidance on interpretive methodology. Courts applying *Chevron*'s deference test must first identify the range of statutory ambiguity using "traditional tools of statutory construction."[6] If Congress's intent on the question at issue remains unclear, courts then "shift into . . . deference mode."[7] According to the *Chevron* Court, if the agency's interpretation is "reasonable"—meaning it lies within the range of statutory ambiguity—the reviewing court must defer to the agency's construction.[8] Notwithstanding this relatively simple framework, Justice Stevens's opinion in *Chevron* "appears largely agnostic about how a court should go about ascertaining whether a statute has a clear or unambiguous meaning" in the first place.[9] The precise interaction between *Chevron* deference and certain canons of statutory interpretation accordingly remains unsettled.[10]

Chevron itself, however, can also be thought of as a canon of statutory interpretation—"a presumption that when a federal statute authorizes an agency to 'administer' certain statutory provisions in the relevant sense, the statute should also be understood as giving the agency the sort of interpretative authority that *Chevron* describes."[11] The interaction between *Chevron* and the canons is thus a question of how courts should resolve conflicts between the canons themselves. Much of this debate

[5] See infra Section II.B.

[6] *Chevron*, 467 U.S. at 843 n.9.

[7] Thomas W. Merrill, Judicial Deference to Executive Precedent, 101 Yale L.J. 969, 976 (1992).

[8] *Chevron*, 467 U.S. at 844.

[9] Thomas W. Merrill & Kristin E. Hickman, *Chevron*'s Domain, 89 Geo. L.J. 833, 869 n.197 (2001).

[10] Note, *Chevron* and the Substantive Canons: A Categorical Distinction, 124 Harv. L. Rev. 594, 594 (2010) (citing Caleb Nelson, Statutory Interpretation and Decision Theory, 74 U. Chi. L. Rev. 329, 347 (2007)); see also Curtis A. Bradley, *Chevron* Deference and Foreign Affairs, 86 Va. L. Rev. 649, 675 (2000) (noting that *Chevron*'s relationship with the canons is "one of the most uncertain aspects of the *Chevron* doctrine"); Brian G. Slocum, The Immigration Rule of Lenity and *Chevron* Deference, 17 Geo. Immigr. L.J. 515, 543–44 (2003) (noting that "courts have not attempted to formulate a jurisprudence that would resolve the conflict between substantive canons and *Chevron* deference").

[11] Caleb Nelson, Statutory Interpretation 701 (2011).

concerns conflicts between canons regarded as "normative."[12] Unlike their descriptive counterparts, normative canons of construction are not designed to reflect statutory meaning or congressional intent, "but rather direct courts to construe any ambiguity in a particular way in order to further some policy objective."[13] Since commentators generally regard both *Chevron* deference and constitutional avoidance as normative, most also assume a normative resolution to their conflict.[14]

This is an oversimplification. As this Note contends, the common textualist practice of reading statutes in light of established background conventions supports a more nuanced analysis. Although the *origins* of both *Chevron* deference and the canon of avoidance may be more normative than descriptive, principles of interpretation over time "acquire a sort of prescriptive validity."[15] Since many textualists presume that Congress is aware of these longstanding conventions when it legislates, textualists arguably should treat *Chevron* and constitutional avoidance as more descriptive than normative. But judicial deference to agency interpretation of statutes long predates *Chevron*, and so does constitutional avoidance.[16] As a result, the historical interaction between these longstanding principles is relevant to resolving their modern conflict. Courts and commentators have thus underappreciated the potential power of pre-*Chevron* case law to explain the Supreme Court's conclusion that avoidance trumps deference.

This Note seeks to demonstrate that by the time *Chevron* was decided, there was a plausible background understanding that constitutional avoidance displaces judicial deference to administrative statutory interpretation. Supreme Court cases before and shortly after *Chevron* largely support this understanding, although not always explicitly. This background rule is also supported by a number of pre-*Chevron* decisions of the United States Courts of Appeals, especially the Court of Appeals for

[12] See infra Section IV.A.

[13] Stephen F. Ross, Where Have You Gone, Karl Llewellyn? Should Congress Turn Its Lonely Eyes to You?, 45 Vand. L. Rev. 561, 563 (1992).

[14] See, e.g., Bamberger, supra note 2, at 68 (arguing that courts considering the conflict between *Chevron* and normative canons "should consider the background values animating the canons"); Cass R. Sunstein, Law and Administration After *Chevron*, 90 Colum. L. Rev. 2071, 2110–16 (1990) (discussing various categories of normative canons that should limit *Chevron* deference).

[15] Antonin Scalia, Assorted Canards of Contemporary Legal Analysis, 40 Case W. Res. L. Rev. 581, 583 (1990).

[16] See infra Section I.A (discussing deference regimes predating *Chevron*); Section IV.A (discussing historical origins of the avoidance canon).

the District of Columbia Circuit, the primary authority on administrative law among the lower courts. Further, in light of its historical foundation and the textualist aversion to interpretive instability,[17] this pre-*Chevron* understanding can potentially be attributed to Congress as an implied limitation on agency discretion to resolve statutory ambiguity. In other words, if true, this historical account arguably establishes a mandatory, rather than merely prudential, limitation on the presumed delegation of interpretive authority behind *Chevron* deference. Commentators are thus wrong to automatically conclude that "[a]ll norms and canons grounded in common law," such as the avoidance canon, "must give way to the *Chevron* doctrine."[18] As this Note contends, the interpretive analysis is not nearly so simple. Whatever questions surround a canon's origins, longstanding court practice is an important yet currently undervalued consideration when resolving the interaction between *Chevron* and established canons of construction.

In order to illustrate the significance of pre-*Chevron* case law, Part I of this Note discusses the modern history of judicial deference to agency interpretations of statutes, including most notably the "*Chevron* revolution." Part II then describes the constitutional avoidance canon and the Supreme Court's relatively unexplained resolution of the conflict between the canon and *Chevron* deference. Part III then offers an interpretation of pre-*Chevron* case law that arguably establishes a background legal understanding that constitutional avoidance trumps administrative deference. Part IV discusses why this background understanding is important and how it changes the interpretive analysis.

I. THE STATUS OF PREEXISTING LIMITS ON DEFERENCE AFTER *CHEVRON*

Deference to agency interpretation of statutes has an established historical pedigree with roots in the early nineteenth century.[19] Since the 1940s, however, the Supreme Court applied a complex array of deference regimes that were largely displaced in 1984 by *Chevron*. Familiarity with these regimes is crucial to understanding the primarily pre-*Chevron* cases discussed in Part III. This historical foundation is also

[17] See Antonin Scalia & Brian A. Garner, Reading Law: The Interpretation of Legal Texts 6 (2012) ("Variability in interpretation is a distemper.").

[18] Merrill & Hickman, supra note 9, at 873.

[19] See infra text accompanying notes 38–39 (discussing reasons invoked by early American courts for deferring to executive interpretations).

necessary to appreciate why these early cases are even relevant to *current* limits on deference—namely, why avoidance still trumps deference after the "*Chevron* revolution." As this Note contends, deference standards predating *Chevron* are properly understood as the substantive ancestors of the current, more rule-like regime. Since *Chevron* was primarily a revolution of form, well recognized substantive limits on the scope of judicial deference to agency statutory interpretation—such as those potentially imposed by constitutional avoidance—should accordingly survive the revolution intact.

A. Prior Deference Regimes

The Supreme Court's deference doctrine before *Chevron* was complex and unclear to say the least. According to Professor William Eskridge and Lauren Baer, "[p]rior to *Chevron*, the Court had articulated numerous agency-specific deference regimes that in form and substance foreshadowed the *Chevron* test."[20] No single standard of judicial review for agency interpretations was apparent.[21] Writing in 1986, Judge Kenneth Starr noted that before *Chevron*, conflicting pro-deference and antideference cases had fostered "a long-standing ambiguity in the law," with no consistent rationale explaining their differences.[22] Starr traced the prodeference cases to *NLRB v. Hearst Publications, Inc.*, in which the Court explained that "where the question is one of specific application of a broad statutory term in a proceeding in which the agency administering the statute must determine it initially, the reviewing court's function is limited."[23]

Eskridge and Baer have identified at least four pre-*Chevron* deference regimes, not including judicial silence on the matter.[24] Judicial deference was strongest when involving "executive department interpretations in matters of foreign affairs and national security."[25] Eskridge and Baer re-

[20] William N. Eskridge, Jr. & Lauren E. Baer, The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from *Chevron* to *Hamdan*, 96 Geo. L.J. 1083, 1106 (2008).

[21] Kenneth W. Starr, Judicial Review in the Post-*Chevron* Era, 3 Yale J. on Reg. 283, 292–93 (1986) ("Prior to *Chevron*, it was difficult to discern any single standard for judicial review of agency interpretations.").

[22] Id.

[23] Id. at 292 (quoting NLRB v. Hearst Publ'ns, Inc., 322 U.S. 111, 131 (1944)) (internal quotation marks omitted).

[24] See Eskridge & Baer, supra note 20, at 1098.

[25] Id. at 1100.

fer to this regime as "*Curtiss-Wright* deference after the famous 1936 decision in which the Court held that 'congressional legislation . . . within the international field must often accord to the President a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved.'"[26] The curious absence of *Curtiss-Wright* deference where it would otherwise be expected to apply turns out to be a strong sign of the Supreme Court's early understanding that constitutional avoidance trumps deference to executive statutory interpretation.[27]

Eskridge and Baer also identify a number of additional deference regimes including strong deference for agency interpretations of their own regulations under *Bowles v. Seminole Rock & Sand Co.*[28] and deference for expert agency judgments under *Skidmore v. Swift & Co.*[29] Deference under *Beth Israel Hospital v. NLRB*, however, perhaps most strongly foreshadows *Chevron*.[30] According to the Court in *Beth Israel*, "[e]ven if the legislative history arguably pointed toward a contrary view, the Board's construction of the statute's policies would be entitled to considerable deference."[31] The Court further noted that "[t]he judicial role is narrow," and that "[t]he rule which the Board adopts is judicially reviewable for consistency with the Act, and for rationality."[32] As with *Curtiss-Wright* deference, the minimal role these regimes play in relevant pre-*Chevron* cases is persuasive evidence of a background understanding favoring the avoidance canon.[33]

Without a unifying theory for when judges should defer to agency determinations of statutes, the Supreme Court's pre-*Chevron* approach was generally "pragmatic and contextual."[34] As recounted by Professor Thomas Merrill, "deference existed along a sliding scale," and could vary over a spectrum from "great" to "some" to "little."[35] While "[t]he default rule was one of independent judicial judgment," a multitude of

[26] Id. (alteration in original) (quoting United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 320 (1936)).

[27] See infra Section III.A (discussing Kent v. Dulles, 357 U.S. 116 (1958)).

[28] 325 U.S. 410 (1945). Today this principle is often referred to as *Auer* deference, after the more recent case of *Auer v. Robbins*, 519 U.S. 452 (1997).

[29] 323 U.S. 134 (1944).

[30] 437 U.S. 483 (1978).

[31] Id. at 500.

[32] Id. at 501.

[33] See infra Section III.B.

[34] Merrill, supra note 7, at 972.

[35] Id.

inconsistently applied factors could influence the Court to defer.[36] Merrill groups these pre-*Chevron* factors into categories concerning (1) Congress's intent that courts "defer to an agency's interpretation of a statutory provision;" (2) the "attributes of the particular agency decision at issue" (such as whether the issue fell within an area of agency "expertise"); and (3) Congress's intent regarding the specific question at issue.[37]

One prominent standard within Merrill's second category includes special deference for "longstanding," "consistent," or "contemporaneous" agency interpretations.[38] These factors have been invoked as reasons for deferring to executive statutory construction since the early nineteenth century.[39] Nevertheless, longstanding and consistent agency interpretations before *Chevron* did not receive the expected level of deference when constitutional limits were potentially implicated.[40] This is further evidence of an established rule against deference in such cases. Finally, interpretations supported by well-reasoned analysis were also historically entitled to deference. As the Supreme Court stated in *Skidmore*, the weight given to an agency interpretation depends on "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."[41] Merrill makes clear, however, that these factors in no way constitute a "coherent doctrine"—on the contrary, they "impose a greater sense of order than the cases themselves warrant."[42]

B. The Chevron "Revolution"

When viewed in light of the previous era, the Supreme Court's decision in *Chevron* primarily represents the triumph of a relatively clear rule over the vague standards of prior doctrine. The "*Chevron* revolu-

[36] Id.
[37] Id. at 973.
[38] Id. at 973–74.
[39] Id. at 975 n.29 (citing Brown v. United States, 113 U.S. 568, 570–71 (1885) (longstanding and contemporaneous construction); United States v. Moore, 95 U.S. 760, 763 (1877) (contemporaneous construction); Edward's Lessee v. Darby, 25 U.S. (12 Wheat.) 206, 210 (1827) (contemporaneous construction); United States v. Vowell, 9 U.S. (5 Cranch) 368, 371 (1809) (longstanding construction)).
[40] See infra Section III.B.
[41] 323 U.S. at 140.
[42] Merrill, supra note 7, at 974.

tion" is thus best understood as one mainly of form, rather than substance.[43] Most importantly for this Note, this understanding allows preexisting constitutional "buffer zones" established by the avoidance canon to survive the revolution intact.

At the time *Chevron* was decided it was hardly regarded as revolutionary. The text of the opinion certainly signals no great sea change.[44] Writing for a unanimous court, Justice Stevens's opinion does not seem to have sparked much debate among the Justices.[45] Stevens himself most likely regarded *Chevron* as simply "a restatement of existing law rather than a new approach."[46] Similarly, the Supreme Court as a whole did not initially seem to view *Chevron* as much of a break from the past: "[I]n the year following *Chevron*, the Court decided nineteen cases involving [administrative] deference issues, but applied the *Chevron* framework only once."[47] "In time, however, lower courts, [administrative] agencies, and commentators all came to regard . . . *Chevron* as fundamentally different from . . . the previous era."[48] Despite Justice Stevens's probably modest aim, Thomas Merrill insists that his "opinion contained several features that can only be described as 'revolutionary,' even if no revolution was intended at the time."[49]

Certainly the most prominent contribution of *Chevron* is its now famous two-step framework. In contrast to the seemingly ad hoc "formlessness of the previous era," *Chevron* offered a more predictable, rule-like test that discarded the various factors formerly considered.[50] Under step one of *Chevron*, the reviewing court determines whether Congress "has directly spoken to the precise question at issue."[51] If Congress's in-

[43] "Substance" here refers to "what sorts of statutes and what sorts of agency interpretations" are even eligible for deference in the first place. Merrill & Hickman, supra note 9, at 835. This is sometimes referred to as deference doctrine's "domain." Id. "Form," on the other hand, refers to how courts determine the weight an agency's interpretation receives. For further discussion, see infra Section I.C.

[44] Starr, supra note 21, at 284 ("[*Chevron*'s] revolutionary effect is not apparent from a quick examination of the opinion itself. The opinion on its face signals no break with the past; it does not explicitly overrule or disapprove of a single case.").

[45] Evan J. Criddle, *Chevron*'s Consensus, 88 B.U. L. Rev. 1271, 1279 (2008).

[46] Merrill, supra note 7, at 976 n.33.

[47] Id. at 976.

[48] Id.

[49] Id. at 975–76.

[50] Id. at 976.

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

tent is clear, "that is the end of the matter."[52] However, in cases where "the statute is silent or ambiguous with respect to the specific issue,"[53] the reviewing court "shift[s] into . . . deference mode" under step two.[54] At step two, the court must defer to the agency's interpretation so long as it is "a permissible construction of the statute," meaning any "reasonable interpretation."[55] This relatively straightforward approach eliminated a "lingering ambiguity in the law" that was a consistent source of confusion for both litigants and lower courts alike.[56]

Besides making deference "an all-or-nothing matter," the *Chevron* test "inverted the traditional default rule" away from independent judicial judgment.[57] Under the new *Chevron* regime, "independent judgment . . . requires special justification, and deference is the default rule."[58] Although a substantive shift, this presumption simply reflects an equally arbitrary default rule for Congress to legislate against.[59] As this Note contends, established, rule-like limits on deference were not affected.[60] Nevertheless, *Chevron* introduced democratic theory as a new rationale for switching the historical presumption[61]: when the intent of Congress is unclear administrative agencies "are the preferred gap fill-

[52] Id.

[53] Id. at 843.

[54] Merrill, supra note 7.

[55] *Chevron*, 467 U.S. at 843–44. Scholars are divided over how best to understand step two. Some view both of *Chevron*'s steps as getting at the same basic question: whether the agency's interpretation lies within the permissible range of interpretations or outside it. See Matthew C. Stephenson & Adrian Vermeule, *Chevron* Has Only One Step, 95 Va. L. Rev. 597 (2009). Justice Scalia has endorsed this view. See United States v. Home Concrete & Supply, LLC, 132 S. Ct. 1836, 1846 n.1 (2012) (Scalia, J., concurring). Other commentators argue that step two analysis should also ensure that the agency's method and reasons for selecting its interpretation are not "arbitrary, capricious, [or] an abuse of discretion" in violation of § 706(2)(A) of the Administrative Procedure Act. See Kenneth A. Bamberger & Peter L. Strauss, *Chevron*'s Two Steps, 95 Va. L. Rev. 611, 621 (2009); M. Elizabeth Magill, Step Two of *Chevron v. Natural Resources Defense Council*, *in* A Guide to Judicial and Political Review of Federal Agencies 85, 97 & n.167 (John F. Duffy & Michael Herz eds., 2005).

[56] Starr, supra note 21, at 294 (observing that conflicting Supreme Court cases involving deference "constituted a source of confusion for lower federal courts"); see also Antonin Scalia, Judicial Deference to Administrative Interpretations of Law, 1989 Duke L.J. 511, 516 ("*Chevron* . . . replaced this statute-by-statute evaluation (which was assuredly a font of uncertainty and litigation) with an across-the-board presumption that, in the case of ambiguity, agency discretion is meant.").

[57] Merrill, supra note 7, at 977.

[58] Id.

[59] See infra Section I.C.

[60] See infra Section I.C.

[61] See Merrill, supra note 7, at 978.

er[s]." Since judges "are not part of either political branch," they "have no constituency."[62] Agencies, on the other hand, while "not directly accountable to the people," are subject to the general oversight and supervision of the President, who is democratically accountable.[63]

But how did the Supreme Court know that Congress actually wants indeterminacies in statutes to be resolved by administrative agencies rather than by Article III courts? The short answer is, It didn't.[64] The Court in *Chevron*, however, answered this question by adopting perhaps its "most controversial innovation."[65] According to Justice Stevens, *Chevron*'s default rule rests on the presumption that administrative delegations by Congress also include the interpretive authority to resolve ambiguities:

> 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. If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. . . . Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit.[66]

Some commentators accordingly rely on this rationale to conclude that *Chevron* should displace restrictive interpretive principles such as the avoidance canon.[67] As described below, this conclusion gives undue force to a legal fiction.

C. Substantive Limits Surviving the Revolution

Although *Chevron* introduced democratic theory as a new foundation for deference to administrative statutory interpretation, the binding force of this rationale ultimately depends on the presumption of congressional delegation. Only if Congress genuinely intended to delegate interpretive authority could *Chevron*'s democratic rationale displace longstanding

[62] *Chevron*, 467 U.S. at 865–66.
[63] Id.
[64] See infra Section I.C.
[65] Merrill, supra note 7, at 979.
[66] *Chevron*, 467 U.S. at 843–44 (quoting Morton v. Ruiz, 415 U.S. 199, 231 (1974)) (internal quotation marks omitted).
[67] See Merrill & Hickman, supra note 9, at 915.

substantive limits on deference. As most commentators and even *Chevron*'s staunchest defenders acknowledge, however, this intent is simply a fiction. According to Merrill and Hickman, "[a]t the time *Chevron* was decided, there was no established background understanding" supporting *Chevron*'s presumption of delegation.[68] Since in reality Congress most likely "didn't think about [deference] at all," *Chevron*'s default rule is ultimately arbitrary, operating merely "as a background rule of law against which Congress can legislate."[69] *Chevron*'s revolution is therefore best understood primarily as one of *form*—moving from standards to a rule—rather than substance. This is *Chevron*'s true rationale, its real innovation. After *Chevron*, vague factors such as agency "expertise," the "longstanding" or "consistent" nature of its interpretation, and the "thoroughness" of its consideration are all irrelevant to deference, discarded in favor of a clear presumption. Where definitive rules already operated, however, the need for clarity and a stable legislative backdrop is already met. Indeed, where historical practice is clear, there is a risk of upsetting legislative expectations.[70] Modern doctrine accordingly should not upset traditional, clear rules that cabined the pre-*Chevron* haze of factors influencing deference.

This analysis finds support in the Supreme Court's post-*Chevron* precedents. The Court has held, for example, that *Chevron* deference is inappropriate in "extraordinary cases."[71] As Justice O'Connor suggests in *FDA v. Brown & Williamson Tobacco Corp.*, "the distinction between ordinary and extraordinary is a function of history and context."[72] Likewise, the Supreme Court in *United States v. Haggar Apparel Co.* strongly implied that *Chevron* would not apply if historical norms were "so uniform and clear . . . that judicial deference would thwart congressional intent."[73] Current doctrine thus already makes historical practice relevant to *Chevron*'s scope.

The reasoning of a plurality of the Supreme Court in the recent case of *United States v. Home Concrete & Supply, LLC* could be read, however, as challenging the relevance of historical practice to the modern

[68] Id. at 871.
[69] Scalia, supra note 56, at 517.
[70] See infra text accompanying notes 246–249.
[71] FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159 (2000).
[72] Merrill & Hickman, supra note 9, at 912.
[73] 526 U.S. 380, 393 (1999).

contours of *Chevron* doctrine.[74] *Home Concrete* arguably addresses a question deeply related to the issues raised here: whether a *current* aspect of deference doctrine applies to cases decided *before Chevron*.[75] Answering this question requires at least an implicit view of the current relevance of pre-*Chevron* features of deference doctrine, the issue raised directly by this Note. For if a feature of the current deference regime does not apply to pre-*Chevron* cases, it begs the question as to why the rule at issue is a feature of *Chevron* doctrine at all. If history is to be any guide, however, there are only two options: either pre-*Chevron* practice on the question at issue was varied or unclear, leaving room for *Chevron*'s rule of deference to settle the issue; or historical practice was already settled by the time of *Chevron*, leaving no need or space for a new deference rule. Perhaps, in the first scenario, there is room for the Court to adopt an arbitrary "transitional rule," applying current doctrine from *Chevron* onward, but establishing a presumption that all pre-*Chevron* cases would have been decided similarly even under the current post-*Chevron* rule.[76] Such a transitional rule could functionally result in divergent deference doctrines before and after *Chevron*. In the second scenario, there is no justification for such divergence—current deference doctrine should either apply to pre-*Chevron* cases or not be a feature of *Chevron* at all. Notably, however, Justice Breyer's plurality opinion in *Home Concrete* did not address the initial question of pre-*Chevron* practice, suggesting that the scope of modern *Chevron* doctrine is unrelated to historical deference norms.

The relevant question addressed in *Home Concrete* is whether the current rule that *Chevron* deference sometimes permits agencies to deviate from judicial interpretations[77] also applies to cases decided before *Chevron*.[78] According to *National Cable & Telecommunications Association v. Brand X Internet Services*, an administrative interpretation potentially trumps a prior judicial construction of statutory language unless "the prior court decision holds that its construction follows from the unambiguous terms of the statute."[79] The Court in *Home Concrete* was faced

[74] 132 S. Ct. 1836, 1838 (2012).

[75] Depending on how the plurality's opinion is interpreted, however, *Home Concrete* may not even address this question at all. See infra note 82.

[76] See Merrill & Hickman, supra note 9, at 916.

[77] See Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 982 (2005).

[78] *Home Concrete*, 132 S. Ct. at 1842–43.

[79] 545 U.S. at 982.

with an administrative construction at odds with a pre-*Chevron* Supreme Court decision that nevertheless conceded that the language at issue was ambiguous.[80] There is thus at least a plausible argument that this pre-*Chevron* opinion came within *Brand X*'s scope, allowing the agency to adopt a new interpretation.

According to a four Justice plurality led by Justice Breyer, however, *Brand X* does not apply to cases decided before *Chevron* because "[t]here is no reason to believe" that pre-*Chevron* ambiguities "reflect[] a post-*Chevron* conclusion that Congress had delegated gap-filling power to the agency."[81] As described by Justice Scalia, Breyer's argument essentially "is that post-*Chevron* a finding of ambiguity is accompanied by a finding of agency authority to resolve the ambiguity, but pre-*Chevron* that was not so."[82] By this account, Breyer reads *Chevron* literally, grounding deference on a *deliberate* congressional delegation of interpretive authority. Without an historical inquiry, however, it seems that the plurality is unconcerned that *Brand X* might be inconsistent with pre-*Chevron* practice. Justice Breyer's opinion thus arguably allows *Chevron* to breathe new substantive content into deference doctrine. This would seem to be a break even from the debate among the Justices in *Brand X* itself, which focused in part on the novelty of its rule.[83] The

[80] See Colony, Inc. v. Comm'r, 357 U.S. 28, 33 (1958) ("[I]t cannot be said that the language is unambiguous.").

[81] *Home Concrete*, 132 S. Ct. at 1844.

[82] Id. at 1847 (Scalia, J., concurring). Justice Breyer's position need not, however, rest on this claim. Nor is this the only possible reading of his argument. Breyer's argument could alternatively be read as addressing (1) the type of ambiguity that triggers *Chevron* deference, and (2) whether the Supreme Court in *Colony* had identified such an ambiguity. In other words, the *Colony* Court's admission that the statute is ambiguous is *itself* ambiguous. Since courts use the word "ambiguous" in different senses—referring both to *superficial* ambiguities resolved by further interpretation and *residual* ambiguities that remain even after the application of at least some "traditional tools of statutory construction," *Chevron*, 467 U.S. at 843 n.9—the Court in *Colony* might not have found the statute at issue to be ambiguous in the sense relevant to *Chevron*. Contrary to Justice Scalia's characterization, this might be what Justice Breyer means when he asserts that "[t]here is no reason to believe that the linguistic ambiguity noted by *Colony* reflects a post-*Chevron* conclusion that Congress had delegated gap-filling power to the agency." *Home Concrete*, 132 S. Ct. at 1844. If this alternative reading is correct, the *Home Concrete* plurality's reasoning does not necessarily rule out applying *Brand X* to pre-*Chevron* cases. More so than usual, I am deeply indebted to Caleb Nelson for this analysis.

[83] Compare *Brand X*, 545 U.S. at 1016 (Scalia, J., dissenting) (accusing the Court of "inventing yet another breathtaking novelty"), with id. at 984 (majority opinion) (arguing that the Court's precedents "allow a court's prior interpretation of a statute to override an agency's interpretation only if the relevant court decision held the statute unambiguous").

Home Concrete plurality could thus be read at least to suggest that the scope of modern *Chevron* doctrine is unmoored from historical rules restricting deference.

If Justice Scalia has correctly described Breyer's argument, the plurality's analysis gives far too much substantive content to the delegation fiction behind *Chevron*. As Scalia reiterated in his concurrence, "[t]he premise is false."[84] Ambiguities do not trigger deference because Congress *actually* intends to delegate gap-filling authority; instead, deference "is simply the *legal effect* of ambiguity."[85] Justice Breyer's rationale would thus be inconsistent with a realistic foundation for *Chevron*. Although by now, reacting to *Chevron*, Congress arguably delegates interpretive authority through ambiguities,[86] it is error to ignore pre-*Chevron* practice. If *Chevron*'s current descriptive power is based on its feedback effects, Congress could not possibly intend to delegate (even presumptively) a species of interpretive power that was *inconsistent* with established deference doctrine in the first place. It certainly seems relevant to both *Home Concrete* and *Brand X*, for example, that "there was no understanding before *Chevron* that agencies were free to change judicial interpretations of ambiguous statutes."[87] Nevertheless, while democratic theory provides the normative rationale for setting the default rule to deference in most cases, the fiction of congressional delegation should not displace longstanding historical practice predating this modern fiction. Applying acknowledged limits on deference to displace *Chevron* thus "follow[s] from the textualist[] practice of reading statutes in light of established background conventions."[88] Any constitutional buffer zone recognized before *Chevron* accordingly remains good law today.

II. CONSTITUTIONAL AVOIDANCE AND DEFERENCE COLLIDE

Only four years after *Chevron*, constitutional avoidance and deference collided at the Supreme Court.[89] Without much explanation, the Court eventually resolved this conflict in favor of avoidance. While scholarly

[84] *Home Concrete*, 132 S. Ct. at 1846 (Scalia, J., concurring).
[85] Id.
[86] See infra text accompanying notes 255–257.
[87] Merrill and Hickman, supra note 9, at 918.
[88] John F. Manning, Textualism and the Equity of the Statute, 101 Colum. L. Rev. 1, 125 (2001).
[89] See infra Section II.A.

views on this result are mixed, commentators have focused solely on why either *Chevron* or constitutional avoidance should trump as a policy matter. No scholar has even considered the relevance of historical practice to this conflict. Given the important role established background conventions play in textualist analysis, this is a significant oversight.

A. Resolving the Conflict

The Supreme Court first addressed the interaction between *Chevron* deference and the avoidance canon in *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council*.[90] The Court in *DeBartolo* confronted a question under the National Labor Relations Act ("NLRA") that potentially also implicated the First Amendment. Explicitly denying the need to address these constitutional concerns, the National Labor Relations Board adopted a construction of the NLRA that arguably violated union members' First Amendment rights. Citing *Chevron*, Justice Byron White acknowledged that the Board's statutory interpretation "would normally be entitled to deference."[91] *DeBartolo*, however, was not a normal case of administrative interpretation. Invoking the famous constitutional avoidance case *NLRB v. Catholic Bishop of Chicago*, Justice White explained that "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress."[92] Justice White went on to reject the Board's interpretation of the NLRA because the relevant section was "open to a construction that obviates deciding whether [the Act] . . . would violate the First Amendment."[93]

It is important to note what the Supreme Court did *not* hold in *DeBartolo*. Justice White did *not* conclude that a construction avoiding constitutional doubts was clearly supported by the text or legislative history of the NLRA. Rather, he simply argued that such an interpretation "is not foreclosed either by the language of the section or its legislative history."[94] Consequently, the ambiguity necessary to trigger both *Chevron* deference and the avoidance canon was present in *DeBartolo*. Faced

[90] 485 U.S. 568 (1988).
[91] Id. at 574.
[92] Id. at 575 (citing NLRB v. Catholic Bishop of Chi., 440 U.S. 490, 499–501, 504 (1979)).
[93] Id. at 578.
[94] Id. at 588.

with this direct conflict between interpretive principles, Justice White applied the avoidance canon to cut off *Chevron* after step one, holding that *Chevron* simply did not apply in cases of serious constitutional doubt. *DeBartolo* thus established—albeit without a clear rationale—that the avoidance canon "trumps" *Chevron* deference.

The Supreme Court threw this conclusion somewhat into doubt in the controversial case of *Rust v. Sullivan*.[95] Writing for a five Justice majority, Chief Justice Rehnquist refused to reject the administrative construction under the avoidance canon, arguing that the abortion spending rules at issue "do not raise the sort of 'grave and doubtful constitutional questions' that would lead us to assume Congress did not intend to authorize their issuance."[96] The majority also seemed to regard the Court's earlier holding in *DeBartolo* as standing for a principle more akin to the *saving* canon.[97] After finding the statute ambiguous, the Court applied *Chevron* and deferred to the agency construction. Chief Justice Rehnquist then went on to uphold the regulations under the Constitution. Writing in dissent, Justice Blackmun accused the majority of disingenuously sidestepping the avoidance canon "in its zeal to address the constitutional issues."[98] "Whether or not one believes that these regulations are valid," Blackmun argued, "it avoids reality to contend that they do not give rise to serious constitutional questions."[99]

In light of *DeBartolo*, the Court in *Rust* "sent conflicting signals" on whether *Chevron* applies to interpretations that raise constitutional questions.[100] The Supreme Court ultimately resolved this uncertainty against deference in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*.[101] Chief Justice Rehnquist confirmed that "[w]here an administrative interpretation of a statute invokes the outer limits of Congress's power, we expect a clear indication that Con-

[95] 500 U.S. 173 (1991).

[96] Id. at 191 (citing United States ex rel. Att'y Gen. v. Del. & Hudson Co., 213 U.S. 366, 408 (1909)) (internal citation omitted).

[97] Id. at 190 ("[A]n Act of Congress ought not be construed to violate the Constitution if any other possible construction remains available."). The saving canon is conceptually distinct from the avoidance canon. While the saving canon merely directs courts to choose among interpretations that preserve a statute's constitutionality, the avoidance canon applies no matter how a court would ultimately resolve the constitutional question that it invokes the canon to avoid. See infra text accompanying notes 217–224.

[98] *Rust*, 500 U.S. at 204 (Blackmun, J., dissenting).

[99] Id. at 205.

[100] Merrill & Hickman, supra note 9, at 851.

[101] 531 U.S. 159 (2001).

gress intended that result."[102] The Court's reasoning invoked both normative and descriptive rationales. According to the Chief Justice, the avoidance canon "stems from our prudential desire not to needlessly reach constitutional issues and our assumption that Congress does not casually authorize administrative agencies to interpret a statute to push the limit of congressional authority."[103] The Roberts Court affirmed this understanding in *Rapanos v. United States*.[104]

B. Scholarly Views

Commentators are split on the conflict between *Chevron* deference and the avoidance canon. Professor Adrian Vermeule certainly takes the most extreme position, arguing that agency interpretation should displace all normative canons of construction.[105] Professors Merrill and Hickman believe the constitutional *saving* canon "comports better with the underlying rationale of the *Chevron* doctrine than does the avoidance of questions canon."[106] According to their argument, *Chevron* rests largely on the premise that Congress prefers discretionary policy choices to be made by politically accountable entities such as Congress itself or administrative agencies.[107] The avoidance canon is therefore inconsistent with *Chevron* deference because it "has the opposite effect of enlarging the scope of policymaking by courts at the expense of Congress and the agencies."[108] This argument is certainly based on the premise that avoidance is a prudential policy, rather than a canon rooted in congressional intent, else *Chevron* would at best claim no greater basis in the will of Congress than avoidance. Professor Cass Sunstein disagrees with Merrill and Hickman's conception of constitutional avoidance. According to his view, the avoidance canon is properly understood as a clear statement

[102] Id. at 172 (citing *DeBartolo*, 485 U.S. at 575).

[103] Id. at 172–73.

[104] 547 U.S. 715, 738 (2006) ("[W]e would expect a clearer statement from Congress to authorize an agency theory of jurisdiction that presses the envelope of constitutional validity.") (citing *DeBartolo*, 485 U.S. at 575).

[105] Adrian Vermeule, Judging Under Uncertainty: An Institutional Theory of Legal Interpretation 132–37 (2006).

[106] Merrill & Hickman, supra note 9, at 915.

[107] Id.

[108] Id. It is worth noting that this criticism seems like a wholesale indictment of the avoidance canon itself, rather than a criticism specifically tailored to the interaction of the canon and *Chevron* deference.

rule ensuring adequate congressional deliberation.[109] When understood this way, constitutional avoidance must trump *Chevron* deference since "[t]he very reason for the interpretive principle in favor of avoiding . . . serious doubts is to ensure explicit *congressional* authorization before certain results may be reached."[110] Most recently, Professor Kenneth Bamberger takes a middle road, promoting a case-by-case approach that allows agencies to argue that the goals of a particular statute or the agency's procedures cut against applying the avoidance canon.[111]

This debate to date has taken place exclusively on normative ground. Scholars barely even acknowledge the relevance of pre-*Chevron* law to this question.[112] According to Bamberger, the operation of judicially constructed normative canons "does not reflect an absolute preference for judicial canon application, but rather a means of vindicating certain norms in a particular institutional context—*one in which judges independently set the meaning of statutes more broadly*."[113] While Bamberger's claim may certainly be true in the context of many normative canons, at least regarding the avoidance canon, his claim is arguably overstated. Whatever the normative merits of the Supreme Court's holding that constitutional avoidance trumps deference, commentators have underappreciated the potential of pre-*Chevron* case law to resolve this conflict. Since textualists often assume Congress legislates against the backdrop of established legal principles, this is a glaring omission in the interpretive analysis.

III. THE PRE-*CHEVRON* BACKGROUND UNDERSTANDING

Cases before and shortly after *Chevron* reveal a consistent preference for constitutional avoidance over deference to administrative statutory interpretation. If an accurate reflection of the pre-*Chevron* period, this account establishes a preexisting legal understanding that arguably can be imputed to Congress at the time *Chevron* was decided. This back-

[109] Cass R. Sunstein, Nondelegation Canons, 67 U. Chi. L. Rev. 315, 331 (2000).

[110] Sunstein, supra note 14, at 2113; see also Cass R. Sunstein, Beyond *Marbury*: The Executive's Power to Say What the Law Is, 115 Yale L.J. 2580, 2607–09 (2006) (arguing that when nondelegation canons such as constitutional avoidance are triggered, "an exception to the *Chevron* principle . . . is entirely appropriate").

[111] Bamberger, supra note 2, at 120–21.

[112] See, e.g., id. at 76 (asking whether "statutory ambiguity [should] be resolved by courts applying normative canons, as it was previous to *Chevron*").

[113] Id. at 84 (emphasis added).

ground understanding is accordingly the key to grounding *DeBartolo* and *Solid Waste Agency* in congressional intent rather than merely policy.

A. The Warren Court

The Supreme Court's modern views on the conflict between constitutional avoidance and deference can be traced to *Kent v. Dulles*, decided approximately twenty-five years before *Chevron*.[114] Since the case for deference in *Kent* was actually quite strong, the Court's refusal to defer is especially compelling evidence of a background understanding favoring avoidance. The question in *Kent* concerned the contours of the Secretary of State's generally broad statutory authority to withhold passports. As established by Congress, "[t]he Secretary of State may grant and issue passports . . . under such rules as the President shall designate and prescribe for and on behalf of the United States."[115] Pursuant to this mandate, the Secretary promulgated regulations prohibiting a passport from issuing to any Communist Party member or supporter, or to anyone seeking to travel for the purpose of assisting the Communist movement.[116] Two applicants denied passports under these regulations, including one Rockwell Kent, challenged the Secretary's authority to withhold passports based on the applicants' politics.

As a construction of the Secretary's extremely broad authority under the passport statute, the regulation at issue in *Kent* was a strong candidate for deference. According to the Supreme Court, "a large body of precedents" had developed under the act which all affirmed that the issuance of passports is "a discretionary act."[117] The authorities cited included scholars, Attorneys General, the President, and no less than the Supreme Court itself.[118] Under the Court's deference principles at the time, an executive construction's "consistency with earlier and later pronouncements" is generally a factor weighing in favor of deference.[119]

[114] 357 U.S. 116 (1958).

[115] 22 U.S.C. § 211a (2006).

[116] Limitations on Issuance of Passports to Persons Supporting Communist Movement, 22 C.F.R. § 51.135 (1958).

[117] *Kent*, 357 U.S. at 124.

[118] Id. at 124–25.

[119] Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944). This principle goes back even further than *Skidmore*. See United States v. Haggar Apparel Co., 526 U.S. 380, 393 (1999) ("As early as 1809, Chief Justice Marshall noted in a customs case that '[i]f the question had been doubtful, the court would have respected the uniform construction which it is understood has

More tellingly, however, *Kent* concerns national security and foreign affairs, areas where judicial deference to executive statutory interpretation is normally at its apex.[120] As Eskridge and Baer observe, typically only a clear statement from Congress can overcome judicial deference to the executive's construction in these realms: "the executive department interpretation prevails not only in cases of statutory ambiguity, but also in cases where Congress has not clearly trumped the agency or presidential construction."[121] In light of this established doctrine, only an even stronger principle of statutory interpretation could move the Court to reject the Secretary's construction.

Constitutional avoidance proved such a principle. Despite the factors weighing in favor of deference, the Supreme Court in *Kent* adopted a narrow construction of the Secretary's passport authority. Potentially unconstitutional restrictions on the right to travel under the Fifth Amendment were the primary concern. "Since we start with an exercise by an American citizen of an activity included in constitutional protection," the Court declared, "we will not readily infer that Congress gave the Secretary of State unbridled discretion to grant or withhold it."[122] Justice Douglas made clear, however, that he did "not reach the question of constitutionality."[123] Rather, the Court held only that Congress had not delegated to the Secretary the authority exercised in *Kent*.[124] Grounding his construction in part on a presumed congressional intent to respect constitutional rights, Douglas noted that the Court "would be faced with important constitutional questions were we to hold that Congress . . . had given the Secretary authority to withhold passports to citizens because of their beliefs or associations."[125] Constitutional avoidance is thus clearly doing the work. As a result, *Kent* establishes early recognition by the Supreme Court that avoidance trumps deference—even when faced with compelling reasons to defer.

been given by the treasury department of the United States upon similar questions.'" (quoting United States v. Vowell, 9 U.S. (5 Cranch) 368, 372 (1809))).

[120] See Eskridge & Baer, supra note 20, at 1100 (noting the tradition of "super-strong deference to executive department interpretations in matters of foreign affairs and national security"); see also supra notes 25–26 and accompanying text.

[121] See Eskridge & Baer, supra note 20, at 1101.

[122] *Kent*, 357 U.S. at 129.

[123] Id.

[124] Id.

[125] Id. at 130.

B. The Burger Court

During the tenure of Chief Justice Burger, the Supreme Court continued to apply the avoidance canon as a tool for invalidating administrative action without addressing the constitutionality of statutes.[126] As Professor Matthew Adler has chronicled, there are numerous pre-*Chevron* cases limiting federal agency authority in which the Burger Court explicitly raised "serious constitutional doubts."[127] Nevertheless, during this era the Court also repeatedly upheld agency rules, orders, or actions despite plausible claims that they raised constitutional questions.[128] As Eskridge observes, "for every case like *Catholic Bishop*, which interprets statutes to avoid constitutional doubts, there are other cases where a statute is construed boldly, to face substantial constitutional troubles."[129] At most, however, this indicates the Court's unfaithful application of the avoidance canon. The Court seems to have never acknowledged that on account of agency deference it was reaching a constitutional question it otherwise would have avoided. Whenever the Court actually did apply principles of constitutional avoidance (either explicitly or implicitly), well-established principles of deference gave way. This confirms the pre-*Chevron* understanding.

The Burger Court first confronted the conflict between deference and constitutional avoidance in the case of *Trans World Airlines v. Hardison*.[130] The *Hardison* Court's views on the conflict are admittedly not very explicit. The case nevertheless presented a strong case for judicial deference. Faced with potentially difficult constitutional questions, the Court in *Hardison* refused to defer to the Equal Employment Opportunity Commission's ("EEOC") guidelines interpreting Title VII of the Civil Rights Act of 1964. Although the Court did not openly rely on the avoidance canon, the circumstances surrounding *Hardison* strongly indicate that what motivated the Court's statutory construction was in fact constitutional avoidance. This is further evidence of an established pre-*Chevron* understanding that avoidance trumps deference.

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[126] Matthew D. Adler, Judicial Restraint in the Administrative State: Beyond the Countermajoritarian Difficulty, 145 U. Pa. L. Rev. 759, 866 (1997).

[127] Id. at 863 n.282 (collecting cases).

[128] Id. at 867.

[129] William N. Eskridge, Jr., Public Values in Statutory Interpretation, 137 U. Pa. L. Rev. 1007, 1073 (1989).

[130] 432 U.S. 63 (1977).

As an employee of Trans World Airlines ("TWA"), Hardison refused to work on Saturdays in order to observe the Sabbath. After being dismissed for insubordination, he challenged his dismissal under Title VII of the Civil Rights Act. An EEOC guideline issued pursuant to the Act's ban on religious discrimination seemingly supported Hardison's claim. According to the EEOC, Title VII required employers "to make reasonable accommodations to the religious needs of employees . . . where such accommodations can be made without undue hardship on the conduct of the employer's business."[131] Not even a year before *Hardison*, the Supreme Court held that such guidelines were entitled to *Skidmore* deference.[132] Justice White was initially reluctant to accord the EEOC's guideline "great weight," however, since it "varie[d] from prior EEOC policy.[133] Yet because Congress amended Title VII in 1972 to include a provision essentially identical to this guideline, Justice White concluded that it was "entitled to some deference . . . as a defensible construction of the pre-1972 statute."[134]

Despite acknowledging that some deference to the EEOC was appropriate, Justice White was concerned that the Commission's construction would force employers to favor employees of certain religions over others. As he describes, TWA could accommodate Hardison's religious observance "only at the expense of others who had strong, but perhaps nonreligious, reasons for not working on weekends."[135] This construction of Title VII would have required TWA "to deprive another employee of his shift preference at least in part because he did not adhere to a religion that observed the Saturday Sabbath."[136] Without explicitly raising constitutional concerns, Justice White pivoted to the *amended* statute, observing that "[i]t would be anomalous to conclude that by 'reasonable accommodation' Congress meant that an employer must deny

[131] Observation of the Sabbath and Other Religious Holidays, 29 C.F.R. § 1605.1 (1968).

[132] Gen. Elec. Co. v. Gilbert, 429 U.S. 125, 141 (1976) ("The most comprehensive statement of the role of interpretative rulings such as the EEOC guidelines is found in *Skidmore v. Swift & Co.*"). Even after *Chevron*, however, the Supreme Court has maintained that EEOC guidelines only receive *Skidmore* deference. See EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 257 (1991); see also United States v. Mead Corp., 533 U.S. 218, 220 (2001) (reaffirming that *Chevron* does not apply to "interpretations contained in policy statements, agency manuals, and enforcement guidelines" (quoting Christensen v. Harris Cnty., 529 U.S. 576, 587 (2000) (internal quotation marks omitted))).

[133] *Hardison*, 432 U.S. at 76 n.11.

[134] Id.

[135] Id. at 81.

[136] Id.

the shift and job preference of some employees . . . in order to accommodate or prefer the religious needs of others."[137] The Court accordingly refused to defer to the EEOC guideline interpreting the *unamended* Title VII.

As Justice White's analysis indicates, the *Hardison* Court was effectively construing both the pre-1972 statute *and* the more recent language codifying the EEOC's accommodation guideline. As a construction of the amended Title VII, however, the EEOC's application of its guideline arguably should have received greater weight under *Skidmore v. Swift & Co*. Agency constructions of vague terms like "reasonable" are generally considered strong candidates for judicial deference. Such interpretations are essentially questions of law *application* rather than pure questions of law.[138] These questions inevitably involve difficult policy judgments that courts should not lightly second-guess.[139] Disputes over the application of the word "reasonable" consequently "are not primarily *interpretive* disputes at all," but rather are disagreements over "policy trade-offs or the underlying facts."[140] Coming from "a body of experience and informed judgment," then, the EEOC's guideline accordingly should have had particularly convincing "power to persuade."[141] On top of Justice White's concession that the agency's construction deserved at least some deference, this makes the *Hardison* Court's decision not to defer look motivated by considerations other than the text of Title VII.

Constitutional avoidance offers the best explanation. Writing in dissent, Justice Marshall argued that this was precisely the majority's motive.[142] Like Justice Marshall, a number of scholars also believe that the true explanation for the Court's construction in *Hardison* is constitutional avoidance.[143] In fact, only eight years after *Hardison*, the Supreme

[137] Id.

[138] Nelson, supra note 11, at 704.

[139] Id. (arguing that a reviewing court should not ignore an agency's determination that something is reasonable "simply because the court would have reached a different judgment").

[140] Id.

[141] Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944).

[142] *Hardison*, 432 U.S. at 89 (Marshall, J., dissenting) ("The Court's interpretation of the statute, by effectively nullifying it, has the singular advantage of making consideration of petitioners' constitutional challenge unnecessary.").

[143] See, e.g., Pamela S. Karlan & George Rutherglen, Disabilities, Discrimination, and Reasonable Accommodation, 46 Duke L.J. 1, 7 (1996) ("Apparently to avoid constitutional questions under the Establishment Clause, the Supreme Court interpreted the duty of reasonable accommodation narrowly . . . ."); Mark Tushnet, The Emerging Principle of Accommo-

Court ruled that a Connecticut statute mandating that employees be given time off work for their chosen Sabbath was in violation of the Establishment Clause.[144] As a result, as one commentator concluded, "it can be inferred that the Court would find constitutionally suspect any application of Title VII's reasonable-accommodation clause which was too strict. By setting a lower standard, the Court was able to avoid the question entirely in *Hardison*."[145] This history powerfully suggests that the *Hardison* Court regarded the concerns behind constitutional avoidance as overcoming the strong arguments for deference. *Hardison* is thus compelling evidence that courts before *Chevron* understood this hierarchy.

The framework of the Burger Court's analysis in some pre-*Chevron* cases also seems to indicate a preference for constitutional avoidance over agency deference. For example, the debate among the Justices in *Industrial Union Department, AFL-CIO v. American Petroleum Institute*,[146] more commonly known as *The Benzene Case*, seems to indicate such a preference. While the validity of the regulation at issue divided the Court, the disagreement between the plurality and the dissent centered on whether there was in fact a serious constitutional question to avoid. In contrast, the Justices in *The Benzene Case* notably do not seem divided over the role of the avoidance canon. This suggests general agreement that avoidance trumps deference, even in a case such as this, where the arguments for deference are again quite compelling.

The Court in *The Benzene Case* confronted the scope of the Secretary of Labor's authority to regulate workers' exposure to carcinogens under the Occupational Safety and Health Act of 1970 ("OSH Act").[147] The OSH Act generally delegated broad authority to the Secretary to prom-

dation of Religion (Dubitante), 76 Geo. L.J. 1691, 1695 (1988) ("The Court has construed the 'reasonable accommodation' requirement narrowly, allowing it to avoid ruling on the provision's constitutionality."). But see Karen Engle, The Persistence of Neutrality: The Failure of the Religious Accommodation Provision To Redeem Title VII, 76 Tex. L. Rev. 317, 402 (1997) (arguing that the Court's decision in *Hardison* was not constitutionally mandated).

[144] Estate of Thornton v. Caldor, Inc., 472 U.S. 703, 710–11 (1985).

[145] Alan D. Schuchman, Note, The Holy and the Handicapped: An Examination of the Different Applications of the Reasonable-Accommodation Clauses in Title VII and the ADA, 73 Ind. L.J. 745, 758 (1998).

[146] 448 U.S. 607 (1980).

[147] Pub. L. No. 91-596, 84 Stat. 1590 (codified as amended at 29 U.S.C. §§ 651–678 (2006)).

ulgate safety standards to ensure healthy working conditions.[148] Section 652(8) of the Act defined an "occupational safety and health standard" as a standard that is "reasonably necessary or appropriate to provide safe or healthful employment."[149] When concerning "toxic materials or harmful physical agents," Section 6(b)(5) of the Act specifically requires the Secretary to "set the standard which most adequately assures, to the extent feasible, . . . that no employee will suffer material impairment of health or functional capacity even if such employee has regular exposure to the hazard."[150] For carcinogens with no known safe exposure level such as benzene, the Secretary interpreted Section 6(b)(5) to require the lowest technologically feasible level of benzene exposure that would not threaten the financial viability of benzene-dependent industries.[151] Acting through the Occupational Safety and Health Administration ("OSHA"), the Secretary promulgated a safety standard reducing the permissible airborne benzene exposure from the consensus standard of ten parts per million ("ppm") to one ppm.[152] Producers of benzene challenged the regulation.

Writing for a four Justice plurality, Justice Stevens invoked the avoidance canon to narrow the Secretary's authority under the Act. He accordingly escaped allegedly serious nondelegation questions raised in a concurrence by then-Justice Rehnquist.[153] Emphasizing that under the Secretary's construction the Act would delegate "unprecedented power over American industry" if "limited only by the constraint of feasibility," the plurality asserted that such a broad grant might be unconstitutional.[154] Justice Stevens thus argued that "[a] construction of the statute that avoids this kind of open-ended grant should certainly be favored."[155]

In light of these constitutional concerns, the Court imposed a threshold requirement—found nowhere explicitly in the statute—that the Secretary find a "significant risk" to employee health before adopting a safety regulation. Rooting this requirement in the word "safe" in Section 3(8), the plurality reasoned that "a workplace can hardly be considered

[148] *The Benzene Case*, 448 U.S. at 611.

[149] Occupational Health and Safety Act of 1970 § 3(8) (codified as amended at 29 U.S.C. § 652(8) (2006)).

[150] Id. § 6(b)(5) (codified as amended at 29 U.S.C. § 655(b)(5)).

[151] *The Benzene Case*, 448 U.S. at 637.

[152] Id. at 623.

[153] Id. at 686 (Rehnquist, J., concurring in the judgment).

[154] Id. at 645–46 (plurality opinion).

[155] Id. at 646.

'unsafe' unless it threatens the workers with a significant risk of harm."[156] The Court then incorporated the Act's general definition of "occupational safety and health standard" into the more specific criteria established by Section 6(b)(5) for safety standards governing toxic materials such as benzene.[157] The plurality also cited legislative history that it claimed suggested a congressional intent to eliminate only "significant" risks of harm.[158] Noting this legislative history as well as inconsistencies in OSHA's position, Justice Stevens quickly dismissed deference to the agency's interpretation.[159]

Again writing in dissent, Justice Marshall expressed dismay at this odd result in light of the Court's normal deference doctrine. A "regulation is entitled to deference," Marshall dutifully recited, "unless it can be said not to be a reasoned and supportable interpretation of the Act."[160] As a number of commentators have observed, the plurality's imposition of a "significant risk" requirement actually seems to rewrite the OSH Act itself.[161] Further, Justice Stevens's dismissal of deference is especially peculiar since the regulation at issue in *The Benzene Case* is the quintessential example of the sort of vague delegation that strongly implies a corresponding delegation of interpretive authority.[162] Vagueness, as distinct from *ambiguity*,[163] naturally supports a construction of implicit delegation.[164] Congress thus most likely committed discretion to the

[156] Id. at 642.
[157] Id. at 642–43.
[158] Id. at 646–48.
[159] Id. at 651 n.58.
[160] Id. at 712 (Marshall, J., dissenting) (quoting Whirlpool Corp. v. Marshall, 445 U.S. 1, 11 (1980)).
[161] See John F. Manning, The Nondelegation Doctrine as a Canon of Avoidance, 2000 Sup. Ct. Rev. 223, 245; Jerry L. Mashaw, As If Republican Interpretation, 97 Yale L.J. 1685, 1691 (1988); Martin Shapiro, Administrative Discretion: The Next Stage, 92 Yale L.J. 1487, 1508 (1983); Richard B. Stewart, Regulatory Jurisprudence: Canons Redux?, 79 Calif. L. Rev. 807, 817–18 (1991).
[162] See Nelson, supra note 11, at 704 (arguing that "provisions of this sort, which link a vague statutory standard to an explicit grant of rulemaking authority," are most "readily . . . described as delegating authority to an administrative agency to flesh out what the terms will mean in practice").
[163] Id. at 78 ("In philosophical jargon, 'ambiguity' is not an umbrella term for all linguistic indeterminacies. . . . Specifically, an expression is said to be 'ambiguous' if it might be understood in two or more distinct senses. . . . By contrast, an expression is said to be 'vague' if it refers to a range with fuzzy borders, so that its application to particular circumstances requires lines to be drawn in places whose specific location is not dictated by the expression itself.").
[164] Id. at 704.

Secretary of Labor and OSHA through the intentional use of a vague term.[165] Such a regulation is the strongest possible candidate for deference, short of an explicit statutory grant of interpretive power. The nature of the regulation in *The Benzene Case* thus powerfully suggests that something other than the Court's deference doctrine motivated the decision not to defer. As in *Hardison*, constitutional avoidance is the more likely explanation for the Supreme Court's holding.

Despite Justice Marshall's dissent, the Court in *The Benzene Case* was not split on the role of the avoidance canon. On the contrary, Marshall simply denied any constitutional doubts, arguing that "[t]he plurality's apparent suggestion . . . that the nondelegation doctrine might be violated . . . is plainly wrong."[166] According to Justice Marshall, the statute as construed by the Secretary "would . . . raise no constitutional question."[167] The Justices in *The Benzene Case* thus seem to take for granted that the avoidance canon, properly applied, trumps principles of deference. Like *Hardison*, then, *The Benzene Case* is another illustration of constitutional avoidance prevailing despite a compelling case for deference to an agency's expert judgment.

The framework of the Court's analysis in *St. Martin Evangelical Lutheran Church v. South Dakota* also implies the priority of constitutional avoidance over deference.[168] The Court in *St. Martin* was asked to construe the meaning of the word "church" in the Federal Unemployment Tax Act ("FUTA"). Under the relevant section of FUTA, Congress exempted labor performed for "a church or convention or association of churches" from unemployment compensation taxes.[169] According to the Secretary of Labor's construction, employees of nonprofit church-related primary and secondary schools were not covered by this exemption.[170] Two religiously affiliated schools challenged the Secretary's construction, and they also contended that if they were indeed subject to unemployment taxes, FUTA would violate both the Free Exercise

[165] Id. at 78 ("Vagueness often reflects a deliberate decision by members of the enacting legislature to transfer various important decisions to the courts or agencies that must apply the statute. When legislators use a vague word like 'reasonable,' they are not embedding all the answers in the statute itself.").

[166] *The Benzene Case*, 448 U.S. at 717 n.30 (Marshall, J., dissenting).

[167] Id.

[168] 451 U.S. 772 (1981).

[169] Unemployment Compensation Amendments of 1976 § 115(b)(1), Pub. L. 94-556, 90 Stat. 2667, 2670 (codified as amended at 26 U.S.C. § 3309(b)(1) (2006)).

[170] *St. Martin*, 451 U.S. at 775.

Clause and the Establishment Clause of the First Amendment.[171] The Supreme Court held that the FUTA exemption does indeed apply to schools that have no separate legal existence from a church.

Justice Blackmun began his legal analysis with the avoidance canon's familiar command that "[a] statute, of course, is to be construed, if such a construction is fairly possible, to avoid raising doubts of its constitutionality."[172] This certainly seems to suggest that the Court in *St. Martin* set the interpretive bar lower than usual, not necessarily searching for the *best* construction of FUTA, but merely a construction that would avoid constitutional doubt. Although the Court did ultimately find that its construction of FUTA was the only reasonable construction available,[173] *Skidmore*'s perfunctory place in the analysis suggests a limited role for deference. The statute at issue in *St. Martin* seemed like a suitable candidate for deference. As the Court itself acknowledged, the Department of Labor had consistently advanced its construction of "church" since the relevant 1970 amendments.[174] As discussed, this consistency is a factor that generally supports deference. Nevertheless, after reciting the basics of the *Skidmore* standard, the Court summarily dismissed deference in one sentence, concluding that after "[c]arefully considering the merits of the Secretary's interpretation, we believe it does not warrant deference."[175]

Elsewhere in his opinion Justice Blackmun generally seems to assume that traditional presumptions of statutory interpretation are given added force when an alternative construction would raise serious constitutional questions. When discussing the presumption against implied repeals, Blackmun argued that this "long-established canon of construction carries *special weight* when an implied repeal or amendment might raise constitutional questions."[176] Justice Blackmun's argument clearly suggests that the presumption against implied repeals is harder than normal to overcome when the alternative construction would raise constitutional doubts. If this is true, however, it stands to reason that this principle would extend to other canons of interpretation as well. Following Justice

[171] U.S. Const. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . .").
[172] *St. Martin*, 451 U.S. at 780.
[173] Id. at 780–81.
[174] Id. at 783 n.13.
[175] Id.
[176] Id. at 788 (emphasis added).

Blackmun's logic, a principle of statutory construction that tends to help avoid constitutional questions in a particular case would gain interpretive force, while an alternative principle that would tend to raise constitutional questions would similarly lose interpretive force. If this is the general principle behind Blackmun's comment in *St. Martin*, then it should also apply to deference under *Skidmore*, such that the deference test is harder to satisfy when the agency's interpretation would raise difficult constitutional issues. This certainly tends to support an assumption behind the Court's opinion in *St. Martin* that constitutional avoidance trumps, or at least weakens, agency deference.

Approximately four months before deciding *The Benzene Case*, the Burger Court in *United States v. Clark*[177] made its most definitive statement yet on the conflict between avoidance and deference. The Court in *Clark* interpreted a provision in the Civil Service Retirement Act ("CSRA") that awarded deceased employees' benefits to nonmarital children only if they "lived with the . . . employee in a regular parent-child relationship."[178] Despite a longstanding Civil Service Commission interpretation of the provision requiring the child to have been living with the employee at the time of the latter's death (a construction seemingly also shared by Congress),[179] the Court refused to defer to the agency. Justice Marshall alternatively construed the provision to require only that the child had lived with the employee at some point. Reflecting the Court's extension of heightened scrutiny to legitimacy-based classifications,[180] this interpretation avoided serious constitutional doubts about the statute under the equal-protection component of the Fifth Amendment.[181]

Most notable for the purposes of this Note, however, is Justice Marshall's explanation for why deference was not appropriate. Noting that it was unclear whether the Commission's interpretation of the CSRA "was contemporaneous with the 1956 enactment" (a factor that would support deference), Marshall concluded that "[i]n view of our analysis of the statute and its legislative history, and *considering the need to avoid un-*

[177] 445 U.S. 23 (1980).

[178] Civil Service Retirement Amendments Act of 1956, Title IV, § 1(j) 70 Stat. 743, 744 (codified as amended at 5 U.S.C. § 8341(a)(3)(A) (2006)).

[179] *Clark*, 445 U.S. at 26–28.

[180] See Levy v. Louisiana, 391 U.S. 68, 71–72 (1968) (holding that denial to illegitimate children of right to recover for wrongful death of their mother on whom they depended constituted unconstitutional invidious discrimination).

[181] *Clark*, 445 U.S. at 31–34.

necessary constitutional adjudication[,] . . . the agency interpretation would not be decisive even if it were contemporaneous."[182] This is the Supreme Court's first explicit statement declaring that constitutional avoidance overcomes established principles of judicial deference to agency interpretations of statutes. When viewed along with other cases of the Burger Court discussed above, *Clark* is perhaps the strongest available evidence of such a pre-*Chevron* background understanding.

Justice Marshall's statements in *Clark* are also explicitly supported by the views of three concurring Justices in *Lowe v. SEC*.[183] The Supreme Court actually decided *Lowe* shortly after *Chevron*, but since the "*Chevron* revolution" took some time to develop, the views of these Justices provide helpful evidence regarding the pre-*Chevron* understanding. (Justice White's concurrence cited *Skidmore* for the relevant deference doctrine—*Chevron* is nowhere to be found in the entire case.) The Court in *Lowe* considered whether the Investment Advisers Act of 1940 ("IAA") requires the publisher of an investment newsletter to register as an investment adviser. The Act's definition of an investment adviser specifically excludes "the publisher of any bona fide newspaper, news magazine, or business or financial publication of general and regular circulation."[184] According to the SEC's longstanding and consistent interpretation, publications that were "primarily a vehicle for distributing investment advice" did not qualify for this exemption.[185] Lowe challenged the Commission's construction under the First Amendment, arguing that it constituted an unconstitutional prior restraint on the financial press.

Writing for the majority, Justice Stevens rejected the SEC's construction of the IAA in favor of a broader reading of the bona fide newspaper exemption. Avoiding the constitutional argument, the Court dug into legislative history, finding that Congress's primary concern behind the Act was personalized advice to specific clients.[186] Lowe did not give such advice, and according to the Court, he therefore was not an investment adviser subject to SEC regulation. The Court reasoned that because Lowe's newsletters were disinterested and were regularly offered to the

[182] Id. at 33 n.10 (emphasis added).
[183] 472 U.S. 181, 216 (1985).
[184] Investment Advisers Act of 1940, ch. 686, Title II, § 202(a)(11)(D), 54 Stat. 847, 849 (codified as amended at15 U.S.C. § 80b-2(a)(11)(D) (2006)).
[185] *Lowe*, 472 U.S. at 215–16.
[186] Id. at 210.

public, they fell within the exclusion.[187] Crediting Congress with knowledge of two prominent First Amendment cases decided before the enactment of the IAA,[188] Justice Stevens inferred that Congress was concerned with possible unconstitutional prior restraints on speech through licensing of impersonal investment advice contained in newsletters.[189] During its discussion of the legislative history, the majority even offered a common justification for constitutional avoidance, arguing that "[i]n areas where legislation might intrude on constitutional guarantees, we believe that Congress . . . would err on the side of fundamental constitutional liberties when its legislation implicates those liberties."[190] This analysis seems like the avoidance canon masquerading as legislative history.

Justice White in his concurrence accused the majority of impermissibly contorting the language of the IAA simply to avoid a constitutional question.[191] Concurring in the result only, he would have accepted the SEC's construction of the bona fide newspaper exemption, but held the statue unconstitutional under the First Amendment as applied to Lowe.[192] Apparently in an effort to make sense of the majority's construction of the statute, Justice White made a noteworthy concession that was actually unnecessary to support his position. According to him, had the statute actually been ambiguous, constitutional avoidance would certainly have been appropriate in this case, despite the normal principles of deference:

> An agency's construction of legislation that it is charged with enforcing is entitled to substantial weight, particularly when the construction is contemporaneous with the enactment of the statute. . . . *In cases where the policy of constitutional avoidance must be considered, however, the administrative construction cannot be decisive*. . . . We must, therefore, turn to other guides to the meaning of the statute to determine whether a reasonable construction of the statute is available by

[187] Id. at 206.

[188] Id. at 204–05 (citing Lovell v. City of Griffin, 303 U.S. 444 (1938); Near v. Minn. ex rel. Olson, 283 U.S. 697 (1931)).

[189] Id. at 204.

[190] Id. at 206 n.50 (quoting Regan v. Time, Inc., 468 U.S. 641, 697 (1984) (Stevens, J., concurring in part and dissenting in part)).

[191] Id. at 225 (White, J., concurring in the result).

[192] Id. at 211.

> which petitioner can be excluded from the category of investment advisers and the constitutional issues thereby be avoided.[193]

Although this statement comes in concurrence, it is arguably telling evidence regarding the views of the Court as a whole. Since this concession actually supports the majority's position, it seems as though Justice White is first acknowledging the established principle that avoidance at least weakens deference (which explains the majority's result). He then argues, however, that distorting the statute beyond what it can reasonably bear—as he claims the majority does—simply pushes principles of constitutional avoidance too far. Like the Court in *The Benzene Case*, the Justices in *Lowe* do not seem divided over whether avoidance weakens deference. On the contrary, they seem to take this principle for granted. Rather, the Court in *Lowe* seems divided over the range of reasonable constructions of the statute in question.

Although hardly conclusive evidence, Justice White's statement in concurrence citing *Skidmore* seems to confirm the Court's understanding of pre-*Chevron* deference regimes. Moreover, approximately three years after *Lowe*, White himself led a six Justice majority in *DeBartolo* holding that constitutional avoidance overcomes *Chevron* deference. In light of his earlier concurrence, Justice White's widely accepted opinion in *DeBartolo* suggests the Court's general acceptance of the longstanding principle that avoidance trumps judicial deference to agency statutory interpretation.

C. The Courts of Appeals

A number of cases of the United States Courts of Appeals, including those of the D.C. Circuit, a persuasive authority on administrative law, also tend to confirm the pre-*Chevron* understanding described above. Eight years before *Chevron*, the D.C. Circuit in 1976 asserted that constitutional concerns remain within the purview of the courts, despite principles of deference:

> [The agency's] position is not entitled to the usual deference due an agency's construction of a statute it administers; for the case involves the appropriate application of a construction of the statute by the Supreme Court. This is a judicial function no less than an agency's. Moreover, the decision of the Supreme Court and our application of it

[193] Id. at 216 (emphasis added).

> are influenced by a rule of statutory construction which requires the courts to avoid unnecessary confrontation with the constitutional guarantee of freedom of speech.[194]

Only one year later, the D.C. Circuit once again stressed agency expertise as the rationale for deference.[195] While acknowledging the settled law of deference to an agency's interpretation of its own regulations,[196] the court nevertheless declined to defer, in part due to the "duty to avoid deciding constitutional questions unless essential to the proper disposition of a case."[197]

Two D.C. Circuit cases roughly contemporaneous to *Chevron* also discuss the interaction between established principles of deference and constitutional avoidance. Notably, neither case actually cites *Chevron*, making them good indicators of the understanding of pre-*Chevron* deference regimes. The court in *Schor v. Commodity Futures Trading Commission* rejected deference when an agency construction of its own jurisdiction raised constitutional doubts under Article III.[198] Writing for a unanimous panel, then-Judge Ruth Bader Ginsburg predictably rooted deference in relative agency expertise.[199] In light of this rationale, Judge Ginsburg went on to conclude that the question of whether agency jurisdiction runs afoul of Article III "is not one on which a specialized administrative agency, in contrast to a court of general jurisdiction, has superior expertise."[200] This conclusion seems to flow from the more general proposition that an agency determination that its own construction does not raise constitutional doubts is not entitled to deference. This proposition, however, would only be relevant in *Schor* if constitutional avoidance trumps deference. That same year, the D.C. Circuit in *American Airways Charters v. Regan* more explicitly acknowledged that it understood the Supreme Court's directive to be that "courts should prefer [a] plausible construction . . . that avoids serious constitutional questions to [an] agency's construction raising such questions, unless [the] agen-

[194] Local 14055, United Steelworkers of Am. v. NLRB, 524 F.2d 853, 860 (D.C. Cir. 1975), vacated, 429 U.S. 807 (1976).

[195] S. Mut. Help Ass'n v. Califano, 574 F.2d 518, 526 (D.C. Cir. 1977).

[196] Id. (citing Bowles v. Seminole Rock Co., 325 U.S. 410, 414 (1945)).

[197] Id. at 525.

[198] 740 F.2d 1262, 1279 (D.C. Cir. 1984), vacated sub nom. Conticommodity Servs., Inc. v. Schor, 473 U.S. 922 (1985) (holding that constitutional avoidance was inappropriate because Congressional intent was clear).

[199] Id.

[200] Id.

cy's position reflects the affirmative intention of the Congress clearly expressed."[201] This is a direct assertion by the D.C. Circuit that avoidance trumps deference.

The views of other circuits also seem to be in accord. According to the Third Circuit, "[n]ot all administrative interpretations of regulatory statutes will be accepted by the courts. . . . Similarly, less deference may be called for when an agency is interpreting the scope of its own jurisdiction."[202] Citing the prominent constitutional avoidance case *NLRB v. Catholic Bishop of Chicago*, the court undoubtedly had constitutional concerns in mind beyond the mere statutory scope of the agency's jurisdiction. The Seventh Circuit also seems to have shared the Third Circuit's view. Among various factors offered for its refusal to defer, the court noted the "well settled" principle "that courts are obligated to interpret a statute in a manner which avoids potential constitutional infirmities."[203] Out of all the courts of appeals, however, the Second Circuit offered perhaps the most explicit articulation of the pre-*Chevron* understanding that constitutional avoidance trumps deference:

> Whatever vitality decisions . . . giving weight to an agency's construction of statutory language may have generally, . . . such considerations have little weight when the statute being enforced approaches the limits of constitutional power. In such a case we encounter the *overriding principle of construction* requiring that statutes be read so as to avoid serious constitutional doubt.[204]

Although this account is not conclusive, it certainly lends significant support for a pre-*Chevron* understanding among the courts of appeals that avoidance displaces deference to agency interpretations of statutes.

[201] 746 F.2d 865, 874 (D.C. Cir. 1984) (internal quotation marks omitted) (explaining its understanding of the Supreme Court's holding in *NLRB v. Catholic Bishop of Chi.*, 440 U.S. 490 (1979)).

[202] Nat'l Indus. Sand Ass'n v. Marshall, 601 F.2d 689, 698 n.32 (3d Cir. 1979) (citing NLRB v. Catholic Bishop of Chi., 440 U.S. 490 (1979)).

[203] Nw. Hosp. v. Hosp. Serv. Corp., 687 F.2d 985, 992 (7th Cir. 1982).

[204] NLRB v. Golub Corp., 388 F.2d 921, 928 (2d Cir. 1967) (emphasis added) (citations omitted) (citing Int'l Ass'n of Machinists v. Street, 367 U.S. 740, 749–750 (1961); NLRB v. Hearst Publ'ns, 322 U.S. 111, 130 (1944); Gray v. Powell, 314 U.S. 402, 412 (1941)).

IV. IMPLICATIONS FOR STATUTORY INTERPRETATION

While it may be correct that "no established background understanding" supports *Chevron* itself,[205] history illustrates a consistent result regarding the broader interaction between the avoidance canon and judicial deference to agency interpretations of statutes. Assuming an established background understanding that constitutional avoidance trumps deference, the implications of this history for statutory interpretation ultimately depend on the foundation of these competing principles.

Canons of statutory interpretation are classified according to their connection (or lack thereof) to congressional intent.[206] Descriptive canons are "principles that involve predictions as to what the legislature must have meant, or probably meant, by employing particular statutory language."[207] Obvious examples of descriptive canons include rules of syntax or grammar, and the presumption that a single term carries the same meaning throughout a statute (the presumption of consistent usage).[208] Descriptive canons also include formalized conventions of English communication given Latin names, such as *noscitur a sociis*. In contrast, normative canons of construction are "principles . . . that do not purport to describe accurately what Congress actually intended or what the words of a statute mean, but rather direct courts to construe any ambiguity in a particular way in order to further some policy objective."[209] A common example of a normative canon is the rule of lenity.[210]

If both avoidance and deference remain strictly normative principles of interpretation, having no basis in congressional intent, then a policy-based solution to their conflict is natural. Since longstanding judicial application arguably creates legislative feedback effects, however, canons gain descriptive force over time. As a result, for the more rule-oriented textualist at least, history offers a congressionally imposed resolution to the conflict between avoidance and deference.

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[205] Merrill & Hickman, supra note 9, at 871.

[206] Ross, supra note 13. There are indeed other ways to classify canons of statutory interpretation. See, e.g., Cass R. Sunstein, Interpreting Statutes in the Regulatory State, 103 Harv. L. Rev. 405, 454–59 (1989). For the purposes of this Note, however, the descriptive/normative distinction is most useful.

[207] Ross, supra note 13.

[208] Id.

[209] Id.

[210] Nelson, supra note 11, at 110 ("There is widespread agreement that the rule of lenity is not a tool for identifying what members of the enacting legislature probably intended penal statutes to mean.").

A. The Normative Analysis

Chevron describes its presumption in descriptive terms.[211] Subsequent Supreme Court decisions and commentators also ground *Chevron* deference in congressional intent.[212] Most commentators, however, acknowledge that this presumed congressional intent is largely fictional.[213] Their primary objection is that "evidence supporting the presumption that Congress generally intends agencies to be the primary interpreters of statutory ambiguities is weak."[214] *Chevron* is therefore usually classified among commentators as a normative, rather than descriptive, canon.[215]

As with *Chevron*, the Supreme Court often speaks of the avoidance canon in terms of congressional intent. Judicial presumptions regarding Congress's respect for the Constitution are longstanding and common. Courts invoking the avoidance canon, for example, often rely on "the reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts."[216] It is important, however,

[211] 467 U.S. at 843–44 ("If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute. Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.").

[212] See, e.g., Smiley v. Citibank, 517 U.S. 735, 740–41 (1996) ("We accord deference to agencies under *Chevron* . . . because of a presumption that Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows."); Pauley v. BethEnergy Mines, Inc., 501 U.S. 680, 696 (1991); Adams Fruit Co. v. Barrett, 494 U.S. 638, 649 (1990) ("A precondition to deference under *Chevron* is a congressional delegation of administrative authority."); see also Laurence H. Silberman, *Chevron*—The Intersection of Law & Policy, 58 Geo. Wash. L. Rev. 821, 822 (1990).

[213] See Scalia, supra note 56, at 517 ("In the vast majority of cases I expect that 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. If I am correct in that, then any rule adopted in this field represents merely a fictional, presumed intent, and operates principally as a background rule of law against which Congress can legislate."); see also Merrill & Hickman, supra note 9, at 871–72.

[214] Merrill & Hickman, supra note 9, at 871.

[215] See Ross, supra note 13, at 569 (discussing *Chevron* deference as a normative canon).

[216] Clark v. Martinez, 543 U.S. 371, 381 (2005); see also Lowe v. SEC, 472 U.S. 181, 205 n.50 (1985) ("[W]here legislation might intrude on constitutional guarantees, we believe that Congress . . . would err on the side of fundamental constitutional liberties when its legisla-

to distinguish the avoidance canon from its close relative, the "saving" canon.[217] Where a statute could be read *either* to fall within the enacting legislature's constitutional authority *or* to transgress such authority, the saving canon instructs courts to choose among the readings that preserve the statute's constitutionality. This longstanding principle of statutory interpretation traces its roots to the early Republic, even before the Supreme Court in *Marbury v. Madison*[218] established judicial review.[219] Commentators generally accept the saving canon as a reasonable presumption of what Congress would want a court to do when facing an unconstitutional construction.[220]

Unlike the saving canon, the avoidance canon applies *regardless* of how the Court would end up resolving the constitutional question that it is invoking the canon to avoid.[221] According to the Supreme Court,

> [w]hen the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided."[222]

Therefore, under the standard formulation of the avoidance canon, "where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter."[223]

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tion implicates those liberties." (quoting Regan v. Time, Inc., 468 U.S. 641, 697 (1984) (Stevens, J., concurring in part and dissenting in part))).

[217] Cf. Adrian Vermeule, Saving Constructions, 85 Geo. L.J. 1945, 1946 (1997) (noting the tension between modern constitutional avoidance and the doctrine of severability).

[218] 5 U.S. (1 Cranch) 137 (1803).

[219] See, e.g., United States v. Coombs, 37 U.S. (12 Pet.) 72, 72 (1838) ("If a section of an act of congress admits of two interpretations, one of which brings it within, and the other presses it beyond the constitutional authority of congress; it is the duty of the Supreme Court to adopt the former construction: because a presumption never ought to be indulged, that congress meant to exercise or usurp any unconstitutional authority; unless that conclusion is forced on the Court, by language altogether unambiguous."); Mossman v. Higginson, 4 U.S. (4 Dall.) 12, 14 (1800) (reasoning that the Judiciary Act of 1789 "can, and must, receive a construction, consistent with the constitution" and accordingly interpreting the Act to avoid causing it to exceed Article III limitations on federal court jurisdiction over aliens).

[220] See, e.g., Nelson, supra note 11, at 138–39 (noting that "[i]n many contexts, the saving canon . . . helps courts identify the meaning that members of the enacting legislature probably intended" and that "the saving canon might help courts capture . . . the interpretive rules that legislators want courts to apply").

[221] Id. at 147.

[222] Crowell v. Benson, 285 U.S. 22, 62 (1932).

[223] United States v. Del. & Hudson Co., 213 U.S. 366, 408 (1909).

What distinguishes the saving canon is that it "requires a court to decide the constitutional question while the doubts canon allows a court to avoid any such decision."[224] Despite this distinction, the Supreme Court in *United States v. Delaware & Hudson Co.* conflated the two principles, giving birth to the modern avoidance canon.[225] Justice Brandeis then famously restated the principle in his concurring opinion in *Ashwander v. Tennessee Valley Authority*.[226]

Many modern commentators, however, doubt the accuracy of any across-the-board presumption that Congress intends to avoid approaching constitutional boundaries. Scholars have noted that this presumption seems inconsistent with modern legislative practice.[227] According to Professor Frederick Schauer, "there is no evidence whatsoever that members of Congress are risk-averse about the possibility that legislation they believe to be wise policy will be invalidated by the courts."[228] On the contrary, the political incentives seem to cut in the opposite direction, rewarding Congress for exercising maximum constitutional authority in pursuit of policies supported by voters.[229] Members of Congress also often believe that the courts, rather than legislators themselves, are responsible for addressing the constitutionality of legislation.[230] As a result, the avoidance canon is primarily considered a normative principle of statutory interpretation.[231]

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[224] John Copeland Nagle, *Delaware & Hudson* Revisited, 72 Notre Dame L. Rev. 1495, 1496–97 (1997).

[225] 213 U.S. at 408; see also Nagle, supra note 224, at 1497 (arguing that the avoidance canon begins with *Delaware & Hudson*).

[226] 297 U.S. 288, 348 (1936) (Brandeis, J., concurring).

[227] Nelson, supra note 11, at 147; see also Einer Elhauge, Preference-Estimating Statutory Default Rules, 102 Colum. L. Rev. 2027, 2054 (2002) (noting that every state legislature to have addressed the topic "has directed courts to construe statutes to avoid constitutional invalidity," but no state legislature has told "courts to avoid constitutional doubts that do not result in actual invalidity").

[228] Frederick Schauer, *Ashwander* Revisited, 1995 Sup. Ct. Rev. 71, 92.

[229] Id. ("[G]iven the essentially political nature of the job of legislating, and given that the American political system does not penalize legislators for voting for good (in the eyes of the voters) policies that are determined by the courts to be unconstitutional, one would expect members of Congress to be anything but risk-averse.").

[230] Abner J. Mikva, How Well Does Congress Support and Defend the Constitution?, 61 N.C. L. Rev. 587, 597–606 (1983).

[231] See, e.g., Frank H. Easterbrook, Do Liberals and Conservatives Differ in Judicial Activism?, 73 U. Colo. L. Rev. 1401, 1405–06 (2002) (arguing that the canon of constitutional avoidance likely does not reflect congressional intent); Richard A. Posner, Statutory Interpretation—in the Classroom and in the Courtroom, 50 U. Chi. L. Rev. 800, 815 (1983) (same); Schauer, supra note 228 (same).

The most common normative justification for the avoidance canon is judicial restraint.[232] In his *Ashwander* concurrence, Justice Brandeis described the canon in just these terms as a prudential rule that the Supreme Court developed "for its own governance."[233] More recent cases likewise reflect this normative rationale.[234] Scholars also have suggested additional normative grounds for the avoidance canon. Professor Cass Sunstein, for example, has proposed understanding constitutional avoidance as a clear statement rule requiring Congress to deliberately broach a constitutional line.[235] According to this rationale, the canon is designed to "protect important constitutional values against accidental or undeliberated infringement by requiring Congress to address those values specifically and directly."[236] Professor Einer Elhauge describes this function of the avoidance canon as a "preference-eliciting default rule."[237] Justice Scalia similarly acknowledges that the primary motivation for constitutional avoidance "is that it represents judicial policy—a judgment that statutes *ought not* to tread on questionable constitutional grounds unless they do so clearly, or perhaps a judgment that courts should minimize the occasions on which they confront and perhaps contradict the legislative branch."[238] Whatever its normative rationale, the avoidance canon

[232] Trevor W. Morrison, Constitutional Avoidance in the Executive Branch, 106 Colum. L. Rev. 1189, 1202–07 (2006) (describing a judicial restraint justification as the predominant account of constitutional avoidance).

[233] 297 U.S. at 346 (Brandeis, J., concurring).

[234] See, e.g., Verizon Commc'ns v. FCC, 535 U.S. 467, 525 (2002) (referring to the Court's "policy of construing a statute to avoid constitutional questions"); Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 445 (1988) ("A fundamental and longstanding principle of judicial restraint requires that courts avoid reaching constitutional questions in advance of the necessity of deciding them."); NLRB v. Catholic Bishop of Chi., 440 U.S. 490, 501 (1979) (describing the canon of constitutional avoidance as "the Court's prudential policy").

[235] Sunstein, supra note 109.

[236] William N. Eskridge, Jr. & Philip P. Frickey, Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking, 45 Vand. L. Rev. 593, 631 (1992); see also Sunstein, supra note 206, at 469 (arguing that the avoidance canon "strengthens judicially underenforced constitutional norms"); Ernest A. Young, Constitutional Avoidance, Resistance Norms, and the Preservation of Judicial Review, 78 Tex. L. Rev. 1549, 1587 (2000) (arguing "that the avoidance canon protects the substantive constitutional values" at stake).

[237] Einer Elhauge, Preference-Eliciting Statutory Default Rules, 102 Colum. L. Rev. 2162, 2255 (2002).

[238] Scalia & Garner, supra note 17, at 249.

has come under considerable fire from textualists and nontextualists alike due to its arguable lack of a descriptive justification.[239]

Since there is fairly widespread agreement that descriptive "canons occupy a higher place in the interpretive hierarchy" than normative ones,[240] scholars have most actively debated the interaction between *Chevron* deference and canons generally regarded as normative, such as avoidance.[241] As Professor Caleb Nelson observes, this question is just "a subset of a broader question: within the space in which normative canons matter, how should courts proceed when two normative canons point in opposite directions?"[242] Courts generally have declined to "establish[] any firm pecking order among normative canons," but rather have taken a more ad hoc approach in light of the particular statute and circumstances in question.[243] Relying on normative rationales, some commentators argue for a categorical approach where either *Chevron* deference or the canons triumph.[244] Another scholar promotes a case-by-case approach.[245] Whatever questions surround its origins, however, constitutional avoidance has been a prominent canon of statutory interpretation for over a century. To the particularly rule-oriented textualist, this makes all the difference.

[239] See, e.g., Easterbrook, supra note 231, at 1405–06, 1409 (attacking avoidance canon as "noxious," "wholly illegitimate," and "a misuse of judicial power"); Posner, supra note 231, at 816 ("The practical effect of interpreting statutes to avoid raising constitutional questions is therefore to enlarge the already vast reach of constitutional prohibition beyond even the most extravagant modern interpretation of the Constitution."); Schauer, supra note 228, at 97–98 (advocating the abandonment of the avoidance canon).

[240] Nelson, supra note 11, at 228.

[241] See, e.g., Elliot Greenfield, A Lenity Exception to *Chevron* Deference, 58 Baylor L. Rev. 1, 61 (2006) (arguing that the rule of lenity "must trump the rule of deference"); Scott C. Hall, The Indian Law Canons of Construction v. The *Chevron* Doctrine: Congressional Intent and the Unambiguous Answer to the Ambiguous Problem, 37 Conn. L. Rev. 495, 497 (2004) (arguing "that the Indian law canons should trump *Chevron*").

[242] Nelson, supra note 10, at 357.

[243] Id. at 357–58.

[244] Compare Sunstein, supra note 109 at 330–35 (arguing that certain "nondelegation cannons" should trump *Chevron* deference), with Vermeule, supra note 105, at 206–14 (arguing that courts should defer to agencies without applying traditional tools of statutory construction).

[245] Bamberger, supra note 2, at 68.

B. The Textualist Alternative

Commentators, and especially textualists, generally recognize that judicially created canons can create legislative feedback effects.[246] As a result, while both *Chevron* deference and constitutional avoidance may in origin be more normative than descriptive, these principles of interpretation gain descriptive force over time. Relying at least in part on this rationale, the Supreme Court's most prominent textualists continue to invoke constitutional avoidance in light of its established pedigree.[247] Justices Scalia and Thomas have "embraced the canon, essentially because it *is* a canon."[248] According to Justice Scalia, "long indulged" principles of interpretation such as the avoidance canon "acquire a sort of prescriptive validity, since the legislature presumably has them in mind when it chooses its language."[249] This presumption is especially appealing to interpreters with a rather strong predilection for rule-like methods of statutory construction.

Despite ongoing questions about the avoidance canon's descriptive bona fides, "some textualists might doubt the ability of judges to distinguish accurately between established canons that remain useful in the search for legislative intent and those that do not."[250] According to these textualists, interpreters in the long run will deviate less from genuine congressional intent by simply applying longstanding canons of construction, rather than attempting "to distinguish between the established canons that are valid and those that are not."[251] Even for textualists who believe that courts should apply only descriptive canons, "the difficulty of separating the descriptive aspects of particular canons from their normative aspects might give one pause."[252] Since "most of the recog-

[246] See generally Elhauge, supra note 237.

[247] See, e.g., Lopez v. Monterey Cnty., 525 U.S. 266, 293 (1999) (Thomas, J., dissenting) ("[W]here a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter." (quoting *Del. & Hudson Co.*, 213 U.S. at 408)); Almendarez-Torres v. United States, 523 U.S. 224, 250 (1998) (Scalia, J., dissenting) (noting that constitutional avoidance "has for so long been applied by this Court that it is beyond debate" (quoting Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988))).

[248] Caleb Nelson, What Is Textualism?, 91 Va. L. Rev. 347, 388 (2005); see also Manning, supra note 88, at 121 n.482 (collecting cases).

[249] Scalia, supra note 15.

[250] Nelson, supra note 248, at 389 n.127.

[251] Id.

[252] Nelson, supra note 11, at 733.

nized canons have at least some descriptive force," attempting to separate the normative and descriptive applications of the avoidance canon could potentially "produce some uncertainty or arbitrariness."[253] Preferring to avoid this uncertainty, rule-oriented textualists might continue to apply a longstanding canon across the board, despite some descriptive misgivings. This might partially explain Justice Scalia's continued classification of constitutional avoidance as an "expected-meaning canon," despite acknowledging that congressional intent "is today a dubious rationale."[254]

The presumption behind *Chevron* deference is justified by similar feedback effects. According to Merrill, "[t]he strongest evidence in support of the Court's presumption is the fact that Congress knows about the practice of judicial deference to agency interpretations and has not acted to prohibit it."[255] Dean Lisa Schultz Bressman has recently defended this descriptive basis for *Chevron*, arguing that there is "direct evidence . . . that Congress attends to the delegation of interpretive authority."[256] Congress also recently confirmed this conclusion in the Dodd-Frank Act by explicitly addressing the appropriate level of deference for certain preemption determinations by federal bank regulators.[257] For Justice Scalia, this was the *entire point* of the Supreme Court's decision in *Chevron*—to establish a stable "background rule of law against which Congress can legislate."[258] As a result, for the more rule-oriented textualist concerned with upsetting congressional expectations, both avoidance and deference are now sufficiently established to make them both descriptive.

Although Congresses predating *Chevron* probably formed no collective intent on the issue of judicial deference to agency interpretations of law, there is little doubt that they were well aware of this common—albeit inconsistent—practice among federal courts.[259] It is thus plausible

[253] Id.

[254] Scalia & Garner, supra note 17, at 248.

[255] Merrill, supra note 7, at 995.

[256] Lisa Schultz Bressman, Reclaiming the Legal Fiction of Congressional Delegation, 97 Va. L. Rev. 2009, 2041 (2011).

[257] Dodd-Frank Wall Street Reform and Consumer Protection Act § 1044(b)(5)(A), 12 U.S.C. § 25b(b)(5)(A) (Supp. 2010) (effectively adopting the *Skidmore* deference standard for review of preemption determinations by the Office of the Comptroller of the Currency under the National Bank Act).

[258] Scalia, supra note 56, at 517.

[259] See Cynthia R. Farina, Statutory Interpretation and the Balance of Power in the Administrative State, 89 Colum. L. Rev. 452, 473–74 (1989) (discussing the efforts of Senator Dale

to presume that Congress's perception of the nature and scope of deference doctrine would correspond over time to the relevant holdings of the federal courts and especially the Supreme Court. If it is true that "[t]he strongest evidence in support of the [*Chevron*] Court's presumption is the fact that Congress knows about the practice of judicial deference to agency interpretations and has not acted to prohibit it,"[260] then it is logical to extend this principle to the interaction between deference and established canons of construction. Consequently, if a pre-*Chevron* background understanding that constitutional avoidance trumps deference does in fact exist, this understanding can be imputed to Congress on account of its prescriptive validity. Applying the avoidance canon to displace *Chevron* would thus "follow from the textualist[] practice of reading statutes in light of established background conventions."[261]

When viewed in this light, the outcomes in *DeBartolo* and *Solid Waste Agency* simply result from the Court's effort to maintain a stable "background . . . against which Congress can legislate" by respecting Congress's presumed knowledge of longstanding precedent.[262] According to this textualist account, the results in these cases arguably command a stronger basis in congressional intent than the core presumption of *Chevron* itself. If this basic argument is correct, then it is an overstatement to conclude that *Chevron* automatically displaces "[a]ll norms and canons grounded in common law."[263] As this analysis reveals, there is a plausible textualist answer rooted in congressional intent to the conflict between deference and constitutional avoidance.

CONCLUSION

At the end of the day, the normative solutions to the conflict between *Chevron* deference and the avoidance canon may prove far more compelling than any descriptive story pre-*Chevron* case law can tell. Moreover, textualists and other interpreters who are more confident in judges'

Bumpers beginning in 1975 to end judicial deference to administrative statutory interpretation by amending the Administrative Procedure Act to expressly require courts to decide all questions of law "de novo" or "independently"). See generally James T. O'Reilly, Deference Makes a Difference: A Study of Impacts of the Bumpers Judicial Review Amendment, 49 U. Cin. L. Rev. 739 (1980).

[260] Merrill, supra note 7, at 995.

[261] Manning, supra note 88.

[262] Scalia, supra note 56, at 517.

[263] Merrill & Hickman, supra note 9, at 873.

ability to identify longstanding canons with no remaining descriptive power will probably not find this Note's rationale for maintaining the avoidance canon persuasive. Nor will these interpreters likely find *any* pre-*Chevron* background understanding persuasive or even relevant. Nevertheless, this Note has demonstrated that under the Supreme Court's current theory of deference based on presumptive congressional intent, the Court's resolution of the conflict between *Chevron* and constitutional avoidance can plausibly be explained on textualist grounds as a continuation of settled pre-*Chevron* law. Due to the uncertain nature of judicial feedback effects on Congress, however, the resolution of this conflict from a descriptive perspective admittedly remains debatable. At a bare minimum, this Note illustrates that judges who interpret statutes in light of established background conventions cannot ignore pre-*Chevron* practice when facing the conflict between agency deference and competing canons of statutory interpretation.