A Clash of Canons: Lenity, *Chevron*, and the One-Statute, One-Interpretation Rule

JUSTIN LEVINE*

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* Georgetown Law, J.D. expected 2019; Dartmouth College, A.B. 2016. I would like to extend my sincere appreciation to Professors Bernick and Westmoreland for their insights on administrative law and statutory interpretation. Their courses were invaluable in helping me develop my understanding of this topic. Thanks to the editors and staff of *The Georgetown Law Journal* for their thoughtful feedback. Thank you to my mother, father, Lauren, and the rest of my family and friends for your love and encouragement.

INTRODUCTION

In his petition for a writ of certiorari, criminal defendant Douglas Whitman raised a number of issues to challenge his insider trading conviction.[1] One issue on which he neglected to seek review, however, was the Second Circuit's decision to defer to the Securities and Exchange Commission's (SEC) interpretation of the law he was convicted of violating.[2] In affirming Whitman's conviction, the Second Circuit cited United States v. Royer,[3] which held that a defendant commits insider trading in violation of section 10(b) of the Securities Exchange Act of 1934 when he trades "while in knowing possession of nonpublic information material to those trades."[4] Royer's ruling relied in part on the court's deference to the SEC's Rule 10b5-1, which interprets section 10(b) by adopting a "knowing possession" state of mind requirement for insider trading liability.[5]

1. *See* Petition for Writ of Certiorari, Whitman v. United States, 135 S. Ct. 352 (2014) (No. 14-29), 2014 WL 3401635.

2. Although Whitman did not formally seek review on this issue, the Second Circuit's deference to the SEC's "knowing possession" rule was referenced in a footnote in Whitman's petition for a writ of certiorari. *See id.* at *18 n.2.

3. United States v. Royer, 549 F.3d 886, 899 (2d Cir. 2008), *cert. denied*, 558 U.S. 935 (2009).

4. *See* United States v. Whitman, 555 F. App'x 98, 107 (2d Cir. 2014) (citing *Royer*, 549 F.3d at 899).

5. *See Royer*, 549 F.3d at 899; 17 CFR § 240.10b5-1(b) (2018); Final Rule: Selective Disclosure and Insider Trading, Securities Act Release No. 7881, Exchange Act Release No. 43,154, Investment Company Act Release No. 24,599, (Aug. 15, 2000) (defining trading "on the basis of" inside information in terms of whether the trader was "aware" of the information at the time of the trade). For a discussion of Rule 10b5-1, see generally Allan Horwich, *The Origin, Application, Validity and Potential Misuse of Rule 10b5-1*, 62 BUS. LAW. 913 (2007).

A court owes no deference to an administrative agency's interpretation of criminal laws, which "are for the courts, not for the Government, to construe."[6] According to Justice Scalia, in a statement joined by Justice Thomas respecting the denial of Whitman's petition, the Whitman case could have presented a related question: "Does a court owe deference to an executive agency's interpretation of a law that contemplates both criminal *and* administrative enforcement?"[7]

The Securities Exchange Act of 1934, like many statutes, is a hybrid statute that calls for both criminal and administrative (civil) enforcement.[8] The *Chevron* doctrine directs courts to defer to an administrative agency's reasonable interpretation of an ambiguous statute.[9] Substantive canons of statutory construction, on the other hand, provide their own rules for how to resolve an ambiguous statute.[10] Whereas the rule of lenity, one type of substantive canon, requires courts to resolve ambiguity in criminal laws in favor of defendants,[11] *Chevron* urges courts to defer to the agency's interpretation.[12] *Chevron* deference does not apply to criminal statutes.[13] But what about hybrid statutes, in which ambiguous civil provisions may also entail criminal liability?[14] In this setting, lenity and *Chevron* are in conflict—creating a clash of canons.

The proper treatment of hybrid statutes raises a crucial yet unresolved issue that has important ramifications for the course of judicial review in the administrative state.[15] Further, the clash of canons is exacerbated by the so-called "one-

6. *See* Whitman v. United States, 135 S. Ct. 352, 352 (2014) (mem.) (citing Abramski v. United States, 573 U.S. 169, 191 (2014)); *see also* United States v. Bass, 404 U.S. 336, 348 (1971) ("[L]egislatures and not courts should define criminal activity.").

7. *See Whitman*, 135 S. Ct. at 353 (emphasis added).

8. *See, e.g.*, 15 U.S.C. § 78ff (2012) (criminal penalties for securities violations). For other examples of hybrid statutes, see 42 U.S.C. § 7413 (2012); 29 U.S.C. § 666 (2012). *See also* Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1156 (10th Cir. 2016) (Gorsuch, J., concurring) (stating that "a great many (most?) federal statutes today" have both civil and criminal applications); Lawrence M. Solan, *Statutory Inflation and Institutional Choice*, 44 WM. & MARY L. REV. 2209, 2211 (2003).

9. *See* Chevron, U.S.A, Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842–44 (1984).

10. *See* WILLIAM N. ESKRIDGE, JR ET AL., CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 818 (3d ed. 2002).

11. *See Bass*, 404 U.S. at 348 (holding that ambiguity in a criminal statute is resolved in favor of the defendant because "a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed" and "because of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community, legislatures and not courts should define criminal activity" (citations omitted)).

12. *Compare* United States v. Wiltberger, 18 U.S. (5 Wheat.) 76, 96 (1820) (stating that criminal laws should be construed narrowly), *with Chevron*, 467 U.S. at 842–45 (stating that courts should defer to an agency's reasonable interpretation of an ambiguous civil statute).

13. *See, e.g.*, United States v. McGoff, 831 F.2d 1071, 1077 (D.C. Cir. 1987) ("That is to say, the law of crimes must be clear. . . . We are, in short, far outside *Chevron* territory here.").

14. *See, e.g.*, Hosh v. Lucero, 680 F.3d 375, 383 (4th Cir. 2012) ("In some instances, as here, the rule of lenity and *Chevron* point in opposite directions. Deciding whether to apply the rule of lenity or whether to instead give deference to an agency interpretation is no small task.").

15. For a survey of legal scholarship with various views on this issue, see Sanford N. Greenberg, *Who Says It's a Crime?:* Chevron *Deference to Agency Interpretations of Regulatory Statutes that Create Criminal Liability*, 58 U. PITT. L. REV. 1, 2–5 (1996); Elliot Greenfield, *A Lenity Exception to*

statute, one-interpretation rule," which posits that courts must give hybrid statutes just one interpretation for all applications.[16] Adopting the rule of lenity across the board poses the "potential sticker shock of transforming a government-always-wins canon (*Chevron*) into a government-always-loses canon (rule of lenity)."[17] But if *Chevron* always wins, such deference "would turn the normal construction of criminal statutes upside-down, replacing the doctrine of lenity with a doctrine of severity."[18] Furthermore, the hybrid nature of statutory provisions extends far beyond insider trading. "Liability may be either civil or criminal under virtually every provision of the laws administered by the SEC."[19] Hybrid statutes span the regulatory gamut, and include, for example, antitrust laws,[20] the Racketeer Influenced and Corrupt Organizations Act (RICO),[21] environmental laws such as the Clean Water Act,[22] various tax statutes,[23] and the Bankruptcy Code.[24]

This Note seeks to resolve these clashing principles of statutory construction by proposing a novel approach that incorporates the rule of lenity into the *Chevron* framework for hybrid statutes. Specifically, this Note (1) rejects a categorical application of the one-statute, one-interpretation rule, and (2) introduces a framework based on congressional intent, analogous to "Step Zero" of the

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Chevron *Deference*, 58 BAYLOR L. REV. 1, 47–60 (2006); Dan M. Kahan, *Is* Chevron *Relevant to Federal Criminal Law?*, 110 HARV. L. REV. 469, 507–11 (1996); Lawrence M. Solan, *Law, Language, and Lenity*, 40 WM. & MARY L. REV. 57, 128–34 (1998); Mark D. Alexander, Note, *Increased Judicial Scrutiny for the Administrative Crime*, 77 CORNELL L. REV. 612, 615–16 (1992); Asher Steinberg, *Comment to SCOTUS OT Symposium: Anticipating Which Canon Will Fire First in Esquivel-Quintana*, PRAWFSBLAWG (May 30, 2017, 1:07 PM), http://prawfsblawg.blogs.com/prawfsblawg/2017/05/scotus-ot-symposium-anticipating-which-canon-will-fire-first-in-esquivel-quintana-.html#c6a00d8341c6a7953ef01bb09a096c2970d [https://perma.cc/DM9J-DHVW] [hereinafter Steinberg, *Comment to SCOTUS OT Symposium*]; Asher Steinberg, *Torres v. Lynch—The Case on Chevron Deference to Agency Interpretations of Criminal Law We've All Been Waiting For?*, NARROWEST GROUNDS (Nov. 2, 2015, 8:55 PM), http://narrowestgrounds.blogspot.com/2015/11/torres-v-lynch-case-on-chevron.html [https://perma.cc/FR4W-QTK7] [hereinafter Steinberg, Torres v. Lynch].

16. *See, e.g.*, Carter v. Welles-Bowen Realty, Inc., 736 F.3d 722, 730, 733 (6th Cir. 2013) (Sutton, J., concurring) (arguing that under the "one-statute, one-interpretation rule," "[a] single law should have one meaning" (citing Clark v. Martinez, 543 U.S. 371, 380 (2005)); Esquivel-Quintana v. Lynch, 810 F.3d 1019, 1031 (6th Cir. 2016) (Sutton, J., concurring in part and dissenting in part) (noting that the Supreme Court's recent cases require "that the one-statute/one-interpretation rule governs dual-role [hybrid] statutes").

17. *Esquivel-Quintana*, 810 F.3d at 1031 (Sutton, J., concurring in part and dissenting in part).

18. Crandon v. United States, 494 U.S. 152, 178 (1990) (Scalia, J., concurring).

19. Matthew Martens et al., *Scalia's Deference Argument Could Have Dramatic Effects*, LAW360 (Nov. 18, 2014, 11:57 AM), https://www.wilmerhale.com/en/insights/publications/scalias-deference-argument-could-have-dramatic-effects [https://perma.cc/N98V-D6BA]; *see* Securities Act of 1933 § 24, 15 U.S.C. § 77x (2012); Securities Exchange Act of 1934 § 32, 15 U.S.C. § 78ff (2012); Investment Company Act § 49, 15 U.S.C. § 80a-48 (2012); Investment Advisers Act of 1940 § 217, 15 U.S.C. § 80b-17 (2012).

20. 15 U.S.C. §§ 1–7 (2012) (criminal); *id.* at § 15 (civil).

21. 18 U.S.C. § 1963 (2012) (criminal); *id.* at § 1964 (civil).

22. 33 U.S.C. § 1319(c)(2) (2012) (criminal); *id.* at § 1319(b) (civil).

23. *See, e.g.*, 26 U.S.C. §§ 5861, 5871 (2012) (indicating the prohibited acts and criminal penalties for firearm tax evasion); *id.* at § 5801 (civil) (taxing firearms); *see also id.* at § 7201 (criminalizing tax evasion).

24. 18 U.S.C. §§ 152–57 (2012) (criminal); 11 U.S.C. §§ 101–1330 (2012) (civil).

Chevron analysis, introduced in *United States v. Mead Corp*.[25] Thus, if Congress demonstrates an intent to apply the one-statute, one-interpretation rule, then one of the four possible solutions discussed in section I.C.2 should prevail.[26] However, absent congressional intent, separation of powers, due process, and practical factors support rebutting the one-statute, one-interpretation rule and instead applying *Chevron* to civil applications of the statute and the rule of lenity to the criminal applications.

This Note proceeds as follows. Part I analyzes the underlying rationales for the *Chevron* doctrine and the rule of lenity and explores how the two principles come into conflict in the context of hybrid statutes. Part II evaluates the one-statute, one-interpretation rule and challenges its absolute, unqualified application. Part III details the novel approach introduced above—bifurcating the interpretation of the civil and criminal aspects of the law—and evaluates its benefits over potential alternatives.

I. THE RULE OF LENITY AND THE *CHEVRON* DOCTRINE

A. THE RULE OF LENITY

1. Types of Canons

There are three classes of canons of statutory interpretation: textual canons, reference canons, and substantive canons.[27]

Textual canons are maxims that determine words' meaning, derived from an examination of the word or phrase within the text of the overall statute.[28] One widely used example is *ejusdem generis*, which translates to "of the same kind or class."[29] When general words follow specific words in a statutory enumeration, the general words are construed to embrace only subjects similar in nature to those objects enumerated in the preceding words.[30] The purpose of the canon is to give effect to all of the words; the specific words in the statute indicate the class and the general words extend the statutory provision to everything else in that class (even though not specifically enumerated).

Grammar canons compose a subset of the textual canons.[31] For instance, according to the last antecedent rule, in a list of terms with a qualifying word, the adjective only modifies the last term.[32] Other grammar canons describe

25. 533 U.S. 218, 226–27 (2001). In *Mead*, the Court instituted what is now known as a "Step Zero" to the *Chevron* framework to first determine whether Congress intended to grant the agency *Chevron* deference. *See id.*

26. These four approaches are: (1) lenity over *Chevron*, (2) *Chevron* limited by lenity, (3) *Chevron* over lenity, and (4) path dependence. *See infra* Section I.C.2.

27. *See* ESKRIDGE ET AL., *supra* note 10, at 818.

28. *See* WILLIAM N. ESKRIDGE, JR. ET AL., LEGISLATION AND STATUTORY INTERPRETATION 375–76 (2000).

29. Ejusdem Generis, BLACK'S LAW DICTIONARY (10th ed. 2014).

30. *See* ESKRIDGE ET AL, *supra* note 28, at 375.

31. *See id.* at 376.

32. *See* ESKRIDGE ET AL, *supra* note 10, at 826–27.

conjunctive versus disjunctive connectors (the "and" vs. "or" rule) and mandatory versus discretionary language (the "may" vs. "shall" rule).[33]

Textual canons assume a degree of precision and care that may not conform with the realities of the legislative drafting process. Nonetheless, they provide a useful first approximation for structured, technical analysis.

Reference canons are extrinsic aids.[34] They serve as presumptive rules that tell the interpreter what other materials—the common law, other statutes, dictionaries, legislative history, or agency interpretations[35]—might be consulted to figure out what the statute means. The helpfulness and legitimacy of some reference canons is highly controversial. Strict textualists, for instance, strongly disfavor the use of legislative history.[36]

Substantive canons reflect particular policy judgments or normative values.[37] The list of substantive canons is long and continues to grow. Some examples include: strict construction of statutes in derogation of sovereignty, preference for federalism principles, presumption against applying statutes retroactively, constitutional avoidance, and presumption against congressional diminishment of Native American rights.[38]

The three types of canons play different roles in the process of statutory interpretation. Textual canons and reference canons are often used first to discern a statute's meaning.[39] They can be used to identify ambiguities as well as to resolve them. If an ambiguity persists, then substantive canons are applied in an attempt to resolve it.

Although this schema for deploying the three classes of statutory interpretation reflects the general approach, actual practice is often more complicated. Judges and Justices often differ in which canons they apply and the relative weight they accord to them. Furthermore, they often differ in how they classify each of the substantive canons. A judge or Justice interpreting any of the substantive canons could treat the canon as a: (1) tiebreaker, only invoked at the end of the process to tip the balance in one direction; (2) presumption, guiding the analysis from the beginning and only rebutted by sufficient contrary evidence; or (3) clear statement rule, acting as strong presumptions that typically require express congressional intent in the statutory text to be rebutted.[40]

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33. *See* ESKRIDGE ET AL, *supra* note 28, at 375.

34. *See* ESKRIDGE ET AL, *supra* note 10, at 818.

35. The *Chevron* doctrine, discussed *infra* Section I.B, is one such reference canon.

36. *See, e.g.*, ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 31 (1997) ("I object to the use of legislative history on principle, since I reject intent of the legislature as the proper criterion of the law."); Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 214 (1983) ("It sometimes seems that citing legislative history is still, as my late colleague [Judge] Harold Leventhal once observed, akin to 'looking over a crowd and picking out your friends.'").

37. *See* ESKRIDGE ET AL, *supra* note 10, at 848.

38. *Id.* at 849–50.

39. *See id.* at 920.

40. *Id.* at 850–51.

2. Rule of Lenity Examined

The rule of lenity is a substantive canon. It instructs that criminal statutes should be narrowly construed.[41] Thus, according to this canon, ambiguous criminal provisions must be resolved in favor of the defendant.[42] According to Chief Justice Marshall, "[t]he rule that penal laws are to be construed strictly, is perhaps not much less old than construction itself."[43] The rule of lenity is premised on a series of related assumptions: (1) separation of powers principles (only Congress may legitimately define crime);[44] (2) due process (individuals must receive adequate notice of what activities are illegal before being punished);[45] and (3) risk of prosecutorial overreaching.[46] The canon can also be framed in terms of congressional intent; it reflects the presumption that Congress intended the narrower interpretation unless it clearly specifies otherwise.[47]

Despite its long history, the proper weight of the lenity canon remains unresolved. Even the Justices of the Supreme Court disagree: some view it as a clear-statement rule, others as a rebuttable presumption, and still others as a mere tiebreaking role. For instance, the rule of lenity was invoked as a clear-statement rule by Justice Frankfurter in *United States v. Universal C.I.T. Credit Corp.*: "[W]hen choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite."[48]

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41. *See* Bell v. United States, 349 U.S. 81, 83 (1955). In *Bell*, the Court invoked the rule of lenity in holding that the transportation of two women on the same trip and in the same vehicle constituted a single violation of the Mann Act, 18 U.S.C. § 2421 (1952). *Bell*, 349 U.S. at 84. In explaining the rule of lenity, the Court stated that "[w]hen Congress leaves to the Judiciary the task of imputing to Congress an undeclared will, the ambiguity should be resolved in favor of lenity." *Id.* at 83.

42. *See id* at 83. A related canon, based on similar principles, is the immigration rule of lenity. *See generally* Brian G. Slocum, *The Immigration Rule of Lenity and* Chevron *Deference*, 17 GEO. IMMGR. L. REV. 515 (2003).

43. United States v. Wiltberger, 18 U.S. (5 Wheat.) 76, 95 (1820). For a history of the rule of lenity, see generally Solan, *supra* note 15, at 86–108.

44. *See, e.g.*, United States v. Bass, 404 U.S. 336, 348 (1971); *see also* William N. Eskridge, Jr., *Public Values in Statutory Interpretation*, 137 U. PA. L. REV 1007, 1029 (1989) (arguing that the rule of lenity provides separation-of-powers value); Brian Slocum, *RICO and the Legislative Supremacy Approach to Federal Criminal Lawmaking*, 31 LOY. U. CHI. L.J. 639, 662–67 (2000) (discussing the rule of lenity as a "nondelegation doctrine").

45. *See, e.g.*, Dunn v. United States, 442 U.S. 100, 112 (1979) (stating that lenity "is rooted in fundamental principles of due process which mandate that no individual be forced to speculate . . . whether his conduct is prohibited"); McBoyle v. United States, 283 U.S. 25, 27 (1931); *see also* Lisa K. Sachs, *Strict Construction of the Rule of Lenity in the Interpretation of Environmental Crimes*, 5 N.Y.U. ENVTL. L.J. 600, 636 (1996) ("The rule of lenity serves 'to promote fair notice to those subject to the criminal laws'" and "minimize the risk of selective or arbitrary enforcement").

46. *See, e.g.*, United States v. Kozminski, 487 U.S. 931, 960 & n.7 (1988) (Brennan, J., concurring) (arguing that case-by-case assessment of what constitutes "involuntary" servitude "delegates open-ended authority to prosecutors and juries (if it relies on what a reasonable person would consider intolerable)").

47. *See* Ladner v. United States, 358 U.S. 169, 177–78 (1958) (observing that "the Court will not interpret a federal criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what Congress intended").

48. *See* 344 U.S. 218, 221–22 (1952).

The canon can be seen in its weakest form in *Reno v. Koray*, where Justice Rehnquist wrote that "[t]he rule of lenity applies only if, 'after seizing everything from which aid can be derived,' . . . we can make 'no more than a guess as to what Congress intended.'"[49]

The proper weight accorded to the rule of lenity is closely related to its constitutional status. Some scholars view the canon as a constitutional requirement.[50] Others view it as constitutional prophylaxis necessary for the protection of core constitutional rights.[51] To others, it merely reflects a sub-constitutional interest.[52]

B. THE *CHEVRON* DOCTRINE

1. Pre-*Chevron* Jurisprudence

The Court's pre-*Chevron* jurisprudence followed two distinct paths with respect to whether courts should defer to administrative legal interpretations of the statutes that agencies were empowered to implement: (1) the deferential approach, and (2) independent judicial review.[53] Judge Friendly observed that "it is time to recognize . . . that there are two lines of Supreme Court decisions on this subject which are analytically in conflict, with the result that a court of appeals must choose the one it deems more appropriate for the case at hand."[54] *Gray v. Powell* illustrates the deferential approach. In that case, Seaboard Air Line Railway challenged the Bituminous Coal Division of the Department of the Interior's ruling that Seaboard was not a producer of the coal it utilized, which would have exempted its coal from regulatory restrictions.[55] The Court chose to defer to the agency's interpretation, holding that "it is the Court's duty to leave the Commission's judgment undisturbed" unless it reaches an interpretation "so

49. 515 U.S. 50, 65 (1995) (first quoting Smith v. United States, 508 U.S. 223, 239 (1993); then quoting Ladner v. United States, 358 U.S. 169, 178 (1958)).

50. *See* Greenfield, *supra* note 15, at 61 ("The rule of lenity . . . protects core constitutional rights . . . ."); *see also* Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085, 2094 & n.25, 2095–96 (2002). Rosenkranz argues that the rule of lenity may be a constitutional starting-point rule that Congress may alter, but that the Fifth Amendment may not permit a rule requiring that criminal statutes always be construed against the defendant. *See id.* at 2097.

51. *See, e.g.*, Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 332 (2000) ("The rule of lenity is inspired by the due process constraint on conviction pursuant to open-ended or vague statutes. While it is not itself a constitutional mandate, it is rooted in a constitutional principle . . . .").

52. *See* Greenberg, *supra* note 15, at 43–46 (arguing that the inconsistent application of the lenity doctrine belies its ability to poke a hole in the *Chevron* framework).

53. *See, e.g.*, Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 365–67 (1986) (discussing two lines of cases where the Court has espoused, respectively, the deferential approach and independent judicial review); John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 623–24 (1996) (arguing that *Chevron* "did not break new ground" in recognizing "the relationship between binding deference and delegation"); Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 512–13 (noting pre-*Chevron* recognition of two different approaches to review of agency interpretations of statutes and observing *Chevron* represents a choice by the Court of the deferential approach).

54. Pittston Stevedoring Corp. v. Dellaventura, 544 F.2d 35, 49 (2d Cir. 1976).

55. *See* Gray v. Powell, 314 U.S. 402, 406–07 (1941); *see also* Nathaniel L. Nathanson, *Administrative Discretion in the Interpretation of Statutes*, 3 VAND. L. REV. 470, 472–73 (1950) (discussing the facts of *Gray*).

unrelated to the tasks entrusted by Congress . . . as in effect to deny a sensible exercise of judgment."[56] Thus, a court should uphold an agency interpretation as long as it was reasonable, even if the court independently might have reached a different conclusion as to the statute's meaning. In contrast, cases such as *Packard Motor Car Co. v. National Labor Relations Board* exhibit independent judicial review.[57] This line of cases reflects the principle first expressed in *Marbury v. Madison* that "[i]t is emphatically the province and duty of the judicial department to say what the law is."[58]

These conflicting approaches remained unresolved even after passage of the Administrative Procedure Act (APA).[59] Whereas the Attorney General's Committee Report on the APA said deference to agency interpretations was a permissible approach,[60] section 706 of the APA "appear[s] to contemplate . . . de novo review."[61]

2. *Chevron*'s Two-Step Doctrine

Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc. resolved this conflict by endorsing the deferential line of decisions.[62] The case presented the issue of whether the Environmental Protection Agency (EPA) had permissibly interpreted the undefined statutory term "source" in the Clean Air Act Amendments to cover entire plants—via the "bubble concept"—rather than individual pieces of equipment.[63] Then-Judge Ginsburg, writing for the D.C. Circuit, agreed with the Natural Resources Defense Council that the EPA's adoption of the bubble concept contravened the purpose of the statute.[64] The Supreme Court

56. *Gray*, 314 U.S. at 413.

57. *See* 330 U.S. 485, 492–93 (1947).

58. 5 U.S. (1 Cranch) 137, 177 (1803).

59. *See* Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 YALE L.J. 908, 914 (2017) (explaining that the APA, enacted in 1946, was an attempt to "codify and clarify the scope of judicial review of agency legal interpretations").

60. COMM. ON ADMIN. PROCEDURE, FINAL REPORT OF ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE, S. DOC. NO. 77–78, at 90–91 (1st Sess. 1941).

61. *See* Bamzai, *supra* note 59, at 985; *see also* Administrative Procedure Act § 155, 5 U.S.C. § 706 (2012) ("To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action.").

62. 467 U.S. 837, 842–44 (1984). For an alternative account of the origin and significance of the *Chevron* doctrine, see Russell L. Weaver, *Some Realism About* Chevron, 58 MO. L. REV. 129, 131 (1993) (stating that "*Chevron*'s importance has been exaggerated" and discussing *Cardoza-Fonseca*). In *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 (1987), decided shortly after *Chevron*, the Court explained that it need not apply *Chevron* deference when presented only with "pure question[s] of statutory construction." *Id.* at 446–48. However, over time *Chevron* has expanded in scope and extended to such applications. *See* Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969, 986 (1992) (stating that by the end of the 1987 Term "the Court was again applying the *Chevron* doctrine . . . to questions of law, and *Cardoza-Fonseca* quietly dropped from sight"); Bernard Schwartz, *"Shooting the Piano Player"? Justice Scalia and Administrative Law*, 47 ADMIN. L. REV. 1, 47–48 (1995) (discussing letters between Justice Scalia and Justice Stevens at the time of *Cardoza-Fonseca* and arguing that they were in fact debating whether *Chevron* should extend to pure legal questions).

63. Nat. Res. Def. Council v. Gorsuch, 685 F.2d 718, 720, 723 (D.C. Cir. 1982).

64. *See id.* at 727.

reversed, and declared that "the Court of Appeals misconceived the nature of its role in reviewing the regulations at issue" by failing to give the EPA's interpretation sufficient deference.[65] In reaching this conclusion, Justice Stevens outlined the oft-quoted two-step framework:

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. [Step One]. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute. [Step Two].[66]

Thus, instead of determining whether the EPA's "bubble concept" was the best interpretation of the meaning of "stationary source," the D.C. Circuit should have merely decided whether the EPA's interpretation was reasonable.[67]

3. *Chevron*'s Rationales

There are several possible rationales for the *Chevron* doctrine.[68] One proffered justification is institutional competence; agencies are thought to possess superior subject-matter expertise within their particular field.[69] Another aspect of institutional competence is agencies' increased capacity for policy flexibility. Whereas judicial interpretations have the force of law and require a congressional act to overcome them, agencies are better equipped to respond quickly to changing circumstances and new information.[70] Furthermore, this flexibility and subject-matter expertise enables agencies to balance conflicting policy goals. According to the *Chevron* Court: "Judges . . . are not part of either political branch of the Government. . . . The responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest

65. *See Chevron*, 467 U.S. at 845.

66. *Id.* at 842–43 (footnotes omitted).

67. "If Congress has explicitly left a gap for the agency to fill," the agency's interpretation is "given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute." *Id.* at 843–44. If implicit, the court must follow the agency's interpretation unless unreasonable. *See id.*

68. *See* David J. Barron & Elena Kagan, *Chevron's Nondelegation Doctrine*, 2001 SUP. CT. REV. 201, 212 (stating that "the *Chevron* doctrine began its life shrouded in uncertainty about its origin"). A critical analysis of the wisdom of the *Chevron* doctrine is beyond the scope of this Note. Instead, this Note seeks to resolve the conflict between *Chevron* and lenity by taking administrative law jurisprudence as it currently stands (except for an absolute approach to the one-statute, one-interpretation rule, which one might contend remains good law following *Clark v. Martinez*, discussed *infra* Part II).

69. *See Chevron*, 467 U.S. at 865.

70. *See* Scalia, *supra* note 53, at 517.

are not judicial ones: 'Our Constitution vests such responsibilities in the political branches.'"[71]

Competence to engage in policymaking decisions also blends into an institutional legitimacy rationale. Agencies are more politically accountable than the judiciary. Additionally, *Chevron* facilitates increased presidential involvement, dubbed "presidential administration," which Justice Kagan, during her time as a professor, argued increases the two core values of administrative law: accountability and efficiency.[72]

Finally, *Chevron* can be explained in terms of congressional intent. According to Justice Scalia, "ambiguity in a statute" means either "(1) Congress intended a particular result, but was not clear about it; or (2) Congress had no particular intent on the subject, but meant to leave its resolution to the agency."[73] In this sense, *Chevron* creates a presumption of congressional intent: it replaces a case-by-case consideration of option one (no congressional intent/deference to agency) versus option two (congressional intent/no deference to agency) with an across-the-board presumption in favor of option two.[74]

In this light, *Chevron* is analytically similar to the class of reference canons discussed in section I.A.1. Just as other reference canons provide presumptive rules for what sources courts are to examine to resolve statutory ambiguity, *Chevron* provides a process-oriented presumption: deference to reasonable agency interpretations.

4. *Mead*'s Emphasis on Congressional Intent

The congressional intent justification for *Chevron* is further expanded upon in *United States v. Mead Corp.*[75] *Mead* adds a procedural "Step Zero" to the statutory interpretation framework, instructing courts to first consider the appropriateness of using the canon of deference to reasonable agency interpretations.[76] Thus, as substantively applied to the *Chevron* doctrine, *Mead*'s Step Zero tasks the court with first determining whether the agency's interpretation qualifies for deference.[77] *Chevron* deference is warranted "when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority."[78] According to Professor Merrill, "[a]t the most general level, *Mead* eliminates any doubt that *Chevron* deference is grounded in congressional intent. Throughout the opinion, the Court refers to congressional

71. *Chevron*, 467 U.S. at 865–66 (quoting Tenn. Valley Auth. v. Hill, 437 U.S. 153, 195 (1978)).

72. *See generally* Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001).

73. Scalia, *supra* note 53, at 516.

74. *See id.* (explaining that option one presents a "question of law, properly to be resolved by the courts," whereas option two represents a congressional "conferral of discretion upon the agency," in which case "the only question of law presented to the courts is whether the agency has acted within the scope of its discretion").

75. 533 U.S. 218, 226–27 (2001).

76. *See id.*

77. *See id.*

78. *Id.*

intent, expectations, contemplations, thoughts, and objectives. . . . This should put to end the speculation that *Chevron* rests on something other than congressional intent . . . ."[79] *Mead*'s approach reflects "[t]he Court's choice . . . to tailor deference to variety."[80] Rather than treating *Chevron* deference as an "across-the-board presumption" as described by Justice Scalia,[81] *Mead* establishes that agencies are entitled to *Chevron* deference only if Congress provided a signal that it intended to grant the agency such regulatory power.[82]

C. LENITY AND *CHEVRON* IN CONFLICT

1. Overview

Douglas Whitman's case exposes the tension created by ambiguous hybrid statutes between the *Chevron* doctrine and the rule of lenity.[83] Although the SEC often brings civil enforcement actions in federal court against insider trading and accordingly receives deference for its interpretations, insider trading also engenders criminal liability, enforceable by the Department of Justice. In this hybrid statute context, *Chevron* and lenity typically command different results.

Chevron announced that courts should use "traditional tools of statutory construction" to determine where a statute is ambiguous under Step One, but it did not provide any guidance on what qualifies as a traditional tool.[84] There is a general consensus that at least some of the textual canons are "traditional tools of statutory construction" that can be applied at Step One of the *Chevron* framework.[85] Substantive canons, on the other hand, are judge-made normative and

79. Thomas W. Merrill, *The* Mead *Doctrine: Rules and Standards, Meta-Rules and Meta-Standards*, 54 ADMIN. L. REV. 807, 812 (2002); *see also* Barron & Kagan, *supra* note 68, at 212 ("*Mead* represents the apotheosis of a developing trend in *Chevron* cases: the treatment of *Chevron* as a congressional choice, rather than either a constitutional mandate or a judicial doctrine.").

80. *Mead*, 533 U.S. at 236.

81. *See* Scalia, *supra* note 53, at 516.

82. *See* Merrill, *supra* note 79, at 833; Michael P. Healy, *Spurious Interpretation Redux:* Mead *and the Shrinking Domain of Statutory Ambiguity*, 54 ADMIN. L. REV. 673, 677 (2002) ("The [*Mead*] Court concludes statutory silence regarding delegation to the agency of *implied* decision making authority means Congress intended an agency is not to be accorded *Chevron* deference in its interpretive decisions.").

83. *See supra* notes 1–6 and accompanying text.

84. *See* 467 U.S. 837, 843 n.9 (1984); *see also The Supreme Court, 2000 Term—Leading Cases*, 115 HARV. L. REV. 306, 528 (2001) ("Traditional canons of statutory interpretation have played an unclear role in reviewing agency constructions of statutes in recent years."); Mark Burge, Note, *Regulatory Reform and the* Chevron *Doctrine: Can Congress Force Better Decisionmaking by Courts and Agencies?*, 75 TEX. L. REV. 1085, 1093, 1096 (1997) (stating that "[t]he outcome using the 'traditional tools of statutory construction'. . . depends largely on who gets to choose the tools" and that the confusion about what role the canons play in the *Chevron* analysis "is arguably the single largest impediment to the usefulness of *Chevron* as it is presently formulated."); *cf.* Eskridge, *supra* note 44, at 1073–74 (noting the inconsistency of judicial application of canons of statutory construction).

85. *See* Curtis A. Bradley, Chevron *Deference and Foreign Affairs*, 86 VA. L. REV. 649, 675 (2000) ("[T]he Court regularly applies text-oriented canons in determining whether Congress has spoken to an issue under Step One of *Chevron*."); Greenfield, *supra* note 15, at 48 ("Unfortunately, the Court did not state explicitly which tools are included in [the traditional tools], but it appears that at a minimum these tools include the textual canons and at least some extrinsic source canons, such as dictionaries and legislative history."); *see also* Dole v. United Steelworkers of Am., 494 U.S. 26, 36 (1990) (invoking the

policy judgments, and therefore, might be more difficult to reconcile with *Chevron*.[86] If not applied at Step One, it is possible that the substantive canons are Step Two factors to be used in determining whether the agency's interpretation is reasonable.

Courts have been inconsistent in their approach with respect to the interaction of substantive canons and the *Chevron* doctrine.[87] Furthermore, there appears to be no attempt to date to provide a universal jurisprudential theory for their reconciliation.[88] Four possible resolutions are outlined below: (1) lenity over *Chevron*, (2) *Chevron* limited by lenity, (3) *Chevron* over lenity, and (4) path dependence.[89] This Note does not purport to deem one of these options the most favorable; the discussion is intended to highlight that failure to resolve the interaction between lenity and *Chevron* creates confusion and uncertainty. The central thesis of this Note is in Parts II and III, which reframe the issue by arguing that in the context of hybrid statutes, a selection of one option is not necessarily required. This is because each of the four options is grounded in an incorrect premise: the absolute application of the one-statute, one-interpretation rule. Instead, there is an alternative approach, predicated upon rejecting such an application of the one-statute, one-interpretation rule, which creates more optimal results.

2. Possible Resolutions

a. Lenity Over Chevron *(Lenity in Step One)*

One option is that the rule of lenity displaces *Chevron*.[90] Under this approach, if an ambiguous statute contains criminal provisions, *Chevron* does not apply. In the words of Judge Starr, "That is to say, the law of crimes must be clear. . . . We are, in short, far outside *Chevron* territory here."[91] There are two variations of this option. First, courts can limit the displacement of *Chevron* to cases that specifically involve the criminal penalties of the hybrid statute. Second, courts can declare that lenity displaces *Chevron* for all cases involving hybrid statutes, even if a case only involves the civil provisions of the hybrid statute.[92]

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noscitur a sociis textual canon under Step One). *But see* Tex. Rural Legal Aid, Inc. v. Legal Servs. Corp., 940 F.2d 685, 694 (D.C. Cir. 1991) (declaring that the textual canon *expressio unius est exclusio alterius* "has little force in the administrative setting" because it is too weak to support a conclusion that Congress resolved the issue).

86. *See* Slocum, *supra* note 42, at 540–41; *see also* William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 596 (1992) (stating that substantive canons "represent value choices by the Court").

87. *See infra* Section I.C.2.

88. *See* Greenfield, *supra* note 15, at 38 ("The Supreme Court has not addressed this potential conflict decisively, and the courts of appeals have produced conflicting opinions."); Slocum, *supra* note 42, at 555 ("[N]one of the opinions announced a general theory of the role of the rule of lenity when *Chevron* deference is applicable.").

89. *See generally* Greenfield, *supra* note 15, at 41–47 (discussing similar options as reflected by different approaches taken by different courts of appeals decision).

90. *See, e.g.*, Dolfi v. Pontesso, 156 F.3d 696, 700 (6th Cir. 1998) (referencing United States v. Lanier, 520 U.S. 259, 266–67 (1997)); United States v. McGoff, 831 F.2d 1071, 1077 (D.C. Cir. 1987).

91. *McGoff*, 831 F.2d at 1077.

92. This option conforms to the one-statute, one-interpretation rule, discussed *infra* Part II.

Each variation of this option can be viewed as applying the rule of lenity in Step One of *Chevron* to ascertain congressional intent. Under this framework, application of lenity would eliminate ambiguity and render agency deference unnecessary. Such an approach is demonstrated in *AFL-CIO v. FEC*, in which the D.C. Circuit declared, "Among the 'traditional tools of statutory construction' 'the court must first exhaust' under *Chevron* and its progeny are the linguistic and substantive canons of interpretation . . . . In other words, the canon assists us in determining the Congress's intent and, accordingly, it operates at *Chevron* step one."[93]

b. Chevron *Limited by Lenity (Lenity in Step Two)*

Another option is that the rule of lenity limits the strength of *Chevron* deference.[94] Under this approach courts can accord the agency "some deference" as long as the agency interpretation is not in conflict with interpretative norms regarding criminal statutes, such as the rule of lenity.[95] As with option one, the constraint on *Chevron* can apply either to all cases involving hybrid statutes or just to those that specifically involve the statute's criminal provisions.

Under this scenario, lenity can be thought of as operating under Step Two of *Chevron*. Rather than eliminating the ambiguity altogether in Step One, here lenity sets the scope of possible constructions, helping to determine the reasonableness of the agency interpretation. Justice Scalia employs this approach, albeit with a different canon, in his concurrence in *Equal Employment Opportunity Commission v. Arabian American Oil Co.*:

> [D]eference is not abdication, and it requires us to accept only those agency interpretations that are reasonable in light of the principles of construction courts normally employ. Given the presumption against extraterritoriality . . . and the requirement that the intent to overcome it be "clearly expressed," it is in my view not reasonable to give effect to mere implications from the statutory language as the EEOC has done.[96]

c. Chevron *Over Lenity*

Third, courts can find that *Chevron* displaces the rule of lenity.[97] Advocates of this option posit that because *Chevron* purports to effectuate congressional intent, after application of *Chevron* deference, the statute is no longer ambiguous for lenity purposes.[98] The scholar Asher Steinberg is one such advocate of this

93. 333 F.3d 168, 183 (D.C. Cir. 2003) (Henderson, J., concurring).

94. *See, e.g.*, NLRB v. Okla. Fixture Co., 332 F.3d 1284, 1287 (10th Cir. 2003).

95. *See id.*

96. 499 U.S. 244, 260 (1991) (Scalia, J., concurring).

97. *See, e.g.*, Pacheco-Camacho v. Hood, 272 F.3d 1266, 1271–72 (9th Cir. 2001).

98. *See* Steinberg, *Comment to SCOTUS OT Symposium*, *supra* note 15 ("Given *Chevron*, though, when one encounters an ambiguity in a deportation statute, Congress hasn't actually been unclear on the matter; it's clearly said, or said as a matter of law, that the agency has delegated authority to decide what the ambiguity covers."). Because the immigration rule of lenity operates analogously to the criminal rule

position:[99] "Lenity doesn't kick in whenever a statute is ambiguous in the *Chevron* Step One sense; it kicks in when, after exhausting every source of statutory meaning, including 'history and purpose,' a criminal statute remains 'grievously' ambiguous."[100] Steinberg suggests that *Chevron* is one such source of statutory meaning that thereby displaces lenity.[101] This is because lenity was developed as a response to *judicial* interpretations of criminal laws, and its rationale has less force in the agency context.[102] In particular, Steinberg argues that agency interpretation advances the fair notice rationale more than lenity because agency interpretations apply nationally and are more specific than court opinions.[103] Furthermore, Steinberg critiques lenity's separation of powers justification; he contends that the goal is to keep the definition of crimes out of the reach of politically unaccountable courts and that *Chevron* "enhance[s] the democratic legitimacy of criminal law."[104]

According to Professor Sanford Greenberg, lenity-based exceptions to *Chevron* "are not desirable, necessary, or easily administered" and "*Chevron* reflects a more realistic understanding of how Congress and agencies together define administrative crimes."[105] This is because (1) *Chevron* helps promote national conformity and fundamental fairness;[106] (2) statutory crimes require regulatory definition "either because Congress permits agencies to fill legislative gaps or because Congress expressly makes criminal liability rest on violation of a regulation";[107] (3) lenity's fair warning does not justify the lenity exception;[108] and (4) in the administrative crime context lenity is not needed to combat prosecutorial overreaching.[109]

The scholar Dan Kahan critiques the common conception of federal criminal law,[110] arguing that it is best understood as a "regime of delegated common law-making" rather than a statutory system.[111] Upon recognition of the true nature of federal criminal law, Kahan argues that normatively, it would be more desirable

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of lenity, see *supra* note 42 and accompanying text, the argument applies with equal force to the tension between *Chevron* and the criminal rule of lenity.

99. Before arguing that *Chevron* should trump lenity, Steinberg tentatively supported a rebuttal of the one-statute, one-interpretation rule, which is the central thesis of this Note, discussed *infra* Part II and Part III. *See* Steinberg, *Torres v. Lynch*, *supra* note 15 ("Initially I'm inclined to say that the Court should dodge it in *Torres* by holding that the Board gets *Chevron* deference to its interpretations of 'aggravated felony' when that term appears in immigration laws, but not when it appears in criminal laws.").

100. *Id.*

101. *See id.*

102. *Id.*

103. *See id.*

104. *See id.*

105. Greenberg, *supra* note 15, at 4.

106. *Id.* at 25.

107. *Id.*

108. *Id.* at 4.

109. *See id.*

110. The common conception is that federal criminal law is created by the legislature rather than the judiciary.

111. Kahan, *supra* note 15, at 469–70. *See also* Dan M. Kahan, *Lenity and Federal Common Law Crimes*, 1994 SUP. CT. REV. 345, 347 ("Nonetheless, any close examination reveals that federal criminal

if delegated lawmaking authority was wielded by the Department of Justice, via *Chevron*, rather than by the courts.[112] This would supply "greater expertise in the making of criminal law, greater uniformity in the interpretation of it, and . . . greater moderation in the enforcement of it."[113] In advocating for a *Chevron*-based, agency-led formation of federal criminal law, Kahan is particularly cynical about the utility of the rule of lenity: "Given the high cost and futility of complete legislative specification of criminal offenses, it's a good thing that courts have traditionally ignored this rule."[114]

d. Path Dependence

As a fourth option, courts can apply the appropriate canon the first time they interpret the statutory provision and then apply stare decisis if the issue presents itself again in the future. Thus, if the parties are first litigating the hybrid statute in a civil case, then *Chevron* is applied, but if the parties are first litigating a criminal case then the rule of lenity is applied.[115] This path-dependent approach is often used by courts that do not anticipate that the two conflicting doctrines could pose issues in future cases concerning the hybrid statute at issue; however, simply following whichever doctrine is implicated first in perpetuity paints an artificial gloss over the meaning of the statute.[116]

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Although these four options are the methods typically chosen by courts, they are not exhaustive. This Note argues that rejecting an absolute application of the one-statute, one-interpretation rule reframes the issue and presents a more effective approach.

II. ONE-STATUTE, ONE-INTERPRETATION RULE REJECTED

A. OVERVIEW

The principal source of tension between the rule of lenity and *Chevron* deference arises from the supposed "one-statute, one-interpretation rule." Under this theory, courts must give hybrid statutes just one interpretation for all of its applications.[117] After all, "[s]tatutes are not 'chameleon[s]' that mean one thing in one

law, no less than other statutory domains, is dominated by judge-made law crafted to fill the interstices of open-textured statutory provisions.").

112. *See* Kahan, *supra* note 15, at 489–90.

113. *Id.* at 469.

114. *Id.* at 510 (footnote omitted).

115. For an overview of the path-dependent mechanism, see Jonathan Marx, *How to Construe a Hybrid Statute*, 93 VA. L. REV. 235, 235–37 (2007).

116. *See, e.g.*, United States v. Nippon Paper Indus. Co., 109 F.3d 1, 8 (1st Cir. 1997) (citing Hartford Fire Ins. Co. v. California, 509 U.S. 764, 796 (1993)) (concluding that because "the Supreme Court deems it 'well established' that Section One of the Sherman Act applies to wholly foreign conduct, [the First Circuit] effectively [was] foreclosed from trying to tease an ambiguity out of Section One relative to its extraterritorial application" and thus stating that "the rule of lenity play[ed] no part in the instant case").

117. *See supra* note 16 and accompanying text.

setting and something else in another."[118] However, when a statute is ambiguous, it is capable of having multiple meanings. Nonetheless, application of this rule when faced with ambiguity in a hybrid statute suggests that "either the rule of lenity prevails across the board or the agency's interpretation does."[119] As demonstrated in Part I, such an absolutist approach makes reconciliation of the competing approaches difficult.

Proper use of the one-statute, one-interpretation rule should be grounded in an understanding of the effect of ambiguity on statutory construction. When applied to unambiguous, single-use statutes, the one-statute, one-interpretation rule is so obvious it need not even be formally invoked. After all, it is a central justification for stare decisis. However, ambiguity renders a statute indeterminate.[120] Canons of statutory construction, such as *Chevron* deference and the rule of lenity, do not seek to decipher the statute's exact meaning; they merely incorporate background principles to select the best meaning among a range of possible options. When a statutory provision does not have a determinate meaning—when the text "runs out"—courts must engage in construction.[121] However, these tools are only useful when applied in factual scenarios that justify their underlying rationale. When applied to ambiguous, hybrid statutes, the one-statute, one-interpretation rule can force application of a canon of statutory construction to a scenario that does not support its use. Such rigid application creates unnecessarily suboptimal results.

The idea that a single term must always have a single meaning is not mandated linguistically. In the sentence, "I ran ten miles on Monday and an administrative law roundtable discussion on Thursday," the verb 'ran' has one meaning with respect to the sentence's first object, 'ten miles,' and a different meaning with respect to its second object, 'an administrative law roundtable discussion.'[122] Even computers, which use a hyper-literal method of construction, still consider context in interpreting their instructions.[123] For instance, even a simple operator such as "+" lacks a single meaning.[124] In the context of "$x = 1 + 1$," "+"

118. Esquivel-Quintana v. Lynch, 810 F.3d 1019, 1028 (6th Cir. 2016) (Sutton, J., concurring in part and dissenting in part) (alteration in original).

119. *See* Carter v. Welles-Bowen Realty, Inc., 736 F.3d 722, 730 (6th Cir. 2013) (Sutton, J., concurring). Or, the two canons are combined in some manner, according to the options presented in section I.C.2, and applied this way every time.

120. *See* Lawrence B. Solum, *On the Indeterminacy Crisis: Critiquing Critical Dogma*, 54 U. CHI. L. REV. 462, 473 (1987) (arguing that a statutory provision is determinate "if and only if the set of results that can be squared with the legal materials contains one and only one result").

121. *See* Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453, 516 (2013) (describing default rules as "paradigm cases of rules of construction" to be used in "determin[ing] legal effect when the meaning of the text runs out"); Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 CONST. COMMENT. 95, 108 (2010); *see generally* KEITH E. WHITTINGTON, CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING (1999) (discussing when courts engage in constitutional construction).

122. *See* Jonathan R. Siegel, *The Polymorphic Principle and the Judicial Role in Statutory Interpretation*, 84 TEX. L. REV. 339, 366 (2005) (providing a similar example).

123. *Id.* at 350–51 (describing "'polymorphic' operator[s]" as "symbol[s] that may have different meanings depending on context").

124. *Id.* at 351.

indicates an addition of the integer values.[125] But in "Chief Justice = 'John' + 'Marshall,'" the computer would interpret "+" to concatenate the two text strings so that the result of the instruction would be to assign the string "JohnMarshall" to the variable "Chief Justice."[126]

In this regard, statutes are just like computers. Although a statutory provision will *usually* have the same meaning as applied to different factual scenarios, this does not mean it *must* have the same meaning. Although a statute might typically call for addition, in select scenarios it might call for concatenation.[127] Put another way, if a statute takes the form, "if (*A* or *B*), then *C*,"[128] and courts have established that ambiguous *C* has a particular meaning in cases involving *A*, this might create a presumption that *C* will have the same exact meaning in cases involving *B*, but this meaing is not mandated. The importance of this concept is magnified in the context of deploying canons to resolve ambiguity in statutes. When a computer symbol—or a statutory provision—is capable of multiple meanings, the key is to have discrete, easily identifiable factual circumstances that accurately and reliably identify which construction to employ so that the best meaning may be reached. The civil–criminal distinction is one such example. Rigid application of the one-statute, one-interpretation rule, in contrast, unnecessarily forces path dependence and paints an artificial gloss over the meaning of the statute. Courts should, therefore, be careful when invoking this rule. Unfortunately, the Supreme Court has lacked clarity when examining the one-statute, one-interpretation rule.[129]

B. SUPREME COURT PRECEDENT RE-EXAMINED

When faced with an ambiguous hybrid statute that pit the rule of lenity against *Chevron* deference, the Sixth Circuit recognized the dilemma that the one-statute, one-interpretation rule presents.[130] Nonetheless, in such cases the Sixth Circuit has felt bound by three Supreme Court cases that appear to mandate the rule's application.[131] To the contrary, two of these cases—*Leocal v. Ashcroft*[132] and *United States v. Thompson/Center Arms Co.*[133]—do not command the approach that the Sixth Circuit reluctantly follows. To the extent that the third case, *Clark*

125. *See id.* (providing a similar example).

126. *See id.* at 351–52 (same).

127. *See id.*

128. *See id.* at 345 (same).

129. *Cf.* Clark v. Martinez, 543 U.S. 371, 378 (2005) (second alteration in original) (quoting Zadvydas v. Davis, 533 U.S. 678, 689, 697 (2001)) ("[T]he statute can be construed 'literally' to authorize indefinite detention, or . . . it can be read to 'suggest [less than] unlimited discretion' to detain. It cannot, however, be interpreted to do both at the same time.").

130. *See* Esquivel-Quintana v. Lynch, 810 F.3d 1019, 1023–24 (6th Cir. 2016); *id.* at 1031 (Sutton, J., concurring in part and dissenting in part) (noting that the Supreme Court's recent cases require "that the one-statute/one-interpretation rule governs dual-role [hybrid] statutes").

131. *See, e.g.*, *id.* at 1024–25; *id.* at 1028 (Sutton, J., concurring in part and dissenting in part); Carter v. Welles-Bowen Realty, Inc., 736 F.3d 722, 727, 730 (Sutton, J., concurring). These three cases are: *Leocal v. Ashcroft*, *United States v. Thompson/Center Arms Co.*, and *Clark v. Martinez*.

132. 543 U.S. 1 (2004).

133. 504 U.S. 505 (1992).

v. Martinez,[134] requires absolute application of the one-statute, one-interpretation rule, it too misconstrues *Leocal* and *Thompson/Center Arms Co.* as well as long-standing principles of statutory interpretation.

1. *Leocal v. Ashcroft*

Leocal presented the question of whether an alien's conviction for driving under the influence of alcohol (DUI) and causing serious bodily injury, in violation of Florida law,[135] was a "crime of violence," which in turn would constitute an "aggravated felony" under 18 U.S.C. § 16 and would thus authorize the Immigration and Naturalization Service (INS) to initiate removal proceedings.[136] The INS claimed that the petitioner's DUI conviction was, in fact, an aggravated felony and removed the petitioner to Haiti after he completed his sentence.[137]

The Supreme Court granted certiorari to "resolve a conflict among the Courts of Appeals on the question whether state DUI offenses similar to the one in Florida, which either do not have a *mens rea* component or require only a showing of negligence in the operation of a vehicle, qualify as a crime of violence."[138] Looking to the text of section 16, the Court concluded that it was unambiguous that petitioner's DUI conviction under Florida law did not constitute a "crime of violence."[139] However, after reaching this conclusion, the Court dropped the following footnote:

> *Even if* § 16 lacked clarity on this point, we would be constrained to interpret any ambiguity in the statute in petitioner's favor. Although here we deal with § 16 in the deportation context, § 16 is a criminal statute, and it has both criminal and noncriminal applications. Because we must interpret the statute consistently, whether we encounter its application in a criminal or noncriminal context, the rule of lenity applies.[140]

Footnote eight suggests that, although the petitioner was not challenging the INS's interpretation of section 16 in a criminal application, the rule of lenity would still apply because of the need to interpret the statute consistently.[141] However, this rests on faulty reasoning, as the Court fails to mention another related substantive canon: the immigration rule of lenity.[142] The question of whether to apply the traditional rule of lenity in a civil case because the one-

134. 543 U.S. 371 (2005).

135. *See* FLA. STAT. § 316.193(3)(c)(2) (2003).

136. *See Leocal*, 543 U.S. at 3–4. For a more recent case discussing the term "crime of violence" under 18 U.S.C. § 16, see *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018), in which the Court held that section 16(b) is unconstitutionally vague.

137. *See Leocal*, 543 U.S at 5. An immigration judge and the Board of Immigration Appeals agreed with the INS's interpretation, and the Eleventh Circuit dismissed petitioner's subsequent petition for review. *Id.*

138. *Id.* at 6.

139. *Id.* at 11.

140. *Id.* at 11 n.8 (emphasis added).

141. *See id.*

142. *See supra* note 42 and accompanying text.

statute, one-interpretation rule mandates its application is not at issue here. Rather than viewing the statute as having both criminal and noncriminal applications, it should be analyzed as having both criminal and *immigration* applications, both of which command lenity.[143] Regardless of what the *Leocal* Court meant, this footnote plays no role in what the Court did. The Court did not find ambiguities in the text and did not apply *Chevron* deference or any substantive canon in this case. Footnote eight's hypothetical nature (prefaced by "even if") demonstrates that it is only dictum. As support for its approach to the rule of lenity, footnote eight cites just one case: *United States v. Thompson/Center Arms Co*.[144] Due to the footnote's faulty reasoning and nonbinding nature, it should not be followed in future cases.

2. *United States v. Thompson/Center Arms Co*.

Thompson/Center Arms Co. is a plurality opinion[145] in which the Court applied the rule of lenity to an ambiguous provision of the National Firearms Act (NFA) because, although the case dealt only with the statute's civil tax penalties, the statute also had criminal applications.[146]

The case concerned a provision of the NFA, which imposed a tax on makers of "firearms," defined to include a rifle with a barrel less than sixteen inches long, but not to include a pistol or a rifle having a barrel sixteen inches or more in length.[147] Respondent was a manufacturer of a pistol and conversion kit that could be used to convert the pistol into a rifle with either a twenty-one-inch or a ten-inch barrel.[148] Respondent challenged the imposition of the tax, arguing that its product was not a firearm within the meaning of the NFA.[149] The Court held that the statute was ambiguous as to whether it applied to a pistol distributed with a kit that could convert the pistol into a rifle subject to the NFA.[150] Because the NFA also "has criminal applications that carry no additional requirement of willfulness," the plurality invoked the rule of lenity.[151] Justice Stevens, in his dissent, opposed a "mechanical" application of the rule of lenity.[152] In a footnote, the plurality responded: "Justice Stevens contends that lenity should not be applied

143. *See* Slocum, *supra* note 42, at 516.

144. 504 U.S. 505 (1992).

145. The plurality was composed of Justice Souter, Chief Justice Rehnquist, and Justice O'Connor, applying the rule of lenity consistent with Justice Scalia's concurrence (joined by Justice Thomas). In his concurrence, Justice Scalia also applied the rule of lenity. *Id*. at 519. More recently, however, Justice Scalia and Justice Thomas have expressed reservations with respect to the interplay of *Chevron* and the rule of lenity, suggesting that their support in *Thompson/Center Arms Co*. might have been short-lived. *See supra* notes 6–7 and accompanying text. For further evidence of this, see Justice Thomas's pointed dissent to an application of the one-statute, one-interpretation rule in *Clark v. Martinez* discussed *infra* Section II.B.3.

146. *See Thompson/Center Arms Co*., 504 U.S. at 517–18.

147. *Id*. at 506–07 (construing the National Firearms Act, 26 U.S.C. §§ 5849, 5845(a)(3) (1986)).

148. *Id*. at 508.

149. *Id*.

150. *See id*. at 517.

151. *Id*. at 517–18.

152. *See id*. at 526 (Stevens, J., dissenting).

because this is a 'tax statute' . . . rather than a 'criminal statute' . . . But this tax statute has criminal applications, and we know of no other basis for determining when the essential nature of a statute is 'criminal.'"[153]

Two things are noteworthy with the plurality's argument. First, the Court applies the rule of lenity where the potential criminal applications "carry no additional requirement of willfulness."[154] This suggests that criminal applications of a hybrid statute that require willfulness might be sufficiently distinct from the statute's civil applications as to warrant a different construction of ambiguous provisions. Second, the Court's justification for applying the rule, expressed only in a footnote,[155] suggests that had the Court been able to discern whether the "essential nature" of the statute was criminal or civil, the rule of lenity might not have been necessary. When a court tries a case or controversy, it is tasked with applying the law to the facts at hand; a court does not—and need not—weigh in on the broad ramifications of the essence of an entire statute. Thus, within the narrow application of the law to the specific facts at issue, it will often be easy to discern the statute's essential nature. In *Thompson/Center Arms Co.*, the essential nature of the National Firearms Act as a whole was not relevant. Instead, it should have been sufficient that "this case involve[d] 'a tax statute' and its construction 'in a civil setting,'" in which "nothing more than [a] tax liability of $200 was at stake."[156]

3. *Clark v. Martinez*

Clark v. Martinez concerned the interpretation of 8 U.S.C. § 1231(a)(6), which provides that aliens subject to removal "may be detained beyond the [ninety-day] removal period."[157] The Court had previously, in *Zadvydas v. Davis*, applied the canon of constitutional avoidance[158] and held that for aliens who were "admitted to the United States but subsequently ordered removed," the detention period under section 1231(a)(6) is not indefinite, but limited to a period "reasonably necessary" to effectuate the alien's removal.[159] The *Zadvydas* Court's holding was based on the "constitutional concerns" indefinite detention of aliens already admitted into the United States would raise.[160] However, the Court left the

153. *Id.* at 518 n.10 (opinion) (citations omitted).

154. *Id.* at 517.

155. *See id.*

156. *Id.* at 526 (Stevens, J., dissenting).

157. *See* 543 U.S. 371, 377 (2005) (quoting 8 U.S.C. § 1231(a)(6) (2000)). "By its terms, this provision applies to three categories of aliens" who are subject to removal: "(1) those ordered removed who are inadmissible under § 1182, (2) those ordered removed who are removable under § 1227(a)(1)(C), § 1227(a)(2), or § 1227(a)(4), and (3) those ordered removed whom the Secretary determines to be either a risk to the community or a flight risk." *Id.*

158. The constitutional avoidance canon is a presumption that "when an Act of Congress raises 'a serious doubt' as to its constitutionality, '[courts] will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.'" Zadvydas v. Davis, 533 U.S. 678, 689 (2001) (quoting Crowell v. Benson, 285 U.S. 22, 62 (1932)).

159. *Id.* at 682, 689.

160. *Id.* at 682, 693.

question open as to aliens "who ha[d] not yet gained initial admission" to the United States, because these individuals would "present a very different question."[161]

The *Martinez* Court held that *Zadvydas*'s interpretation of section 1231(a)(6) must also apply to aliens not yet admitted into the country, even though the constitutional concerns at issue in *Zadvydas* are not present in such cases.[162] The *Martinez* Court stated that although the question presented was "indeed different from the question decided in *Zadvydas*, . . . because the statutory text provides for no distinction between admitted and nonadmitted aliens, we find that it results in the same answer."[163] Relying on *Leocal* and *Thompson/Center Arms Co*., the Court invoked an absolute, unqualified version of the one-statute, one-interpretation rule:

> In other words, when deciding which of two plausible statutory constructions to adopt, a court must consider the necessary consequences of its choice. If one of them would raise a multitude of constitutional problems, the other should prevail—whether or not those constitutional problems pertain to the particular litigant before the Court.[164]

C. *MARTINEZ* REJECTED

Misconstruing its prior case law, the *Martinez* Court reasoned that failure to apply the one-statute, one-interpretation rule, and thus allowing judges to "give the same statutory text different meanings in different cases," would be "novel" and "dangerous."[165] However, neither contention is accurate. To the contrary, eliminating a strict application of the one-statute, one-interpretation rule is normatively desirable because it would create the flexibility necessary to ensure statutes are applied equitably.

1. Not Novel

First, it is the *Martinez* Court's approach that is novel. Its "lowest common denominator principle" is "not required by any sound principle of statutory construction."[166] Furthermore, the principle is inconsistent with *Zadvydas* itself. By stressing that aliens not yet admitted to the United States would "present a very different question," the *Zadvydas* Court appeared to deliberately leave open the ways in which section 1231(a)(6) might be uniquely constructed to apply to that

161. *Id*. at 682.
162. *Martinez*, 543 U.S. at 380.
163. *Id*. at 379.
164. *Id*. at 380–81.
165. *Id*. at 382, 386.
166. *Id*. at 388–89 (Thomas, J., dissenting). Justice Thomas, who refers to the one-statute, one-interpretation rule as the "lowest common denominator principle," has continued to make this argument in recent cases. *See, e.g*., Sessions v. Dimaya, 138 S. Ct. 1204, 1254 n.6 (2018) (Thomas, J., dissenting) ("[A]s I have explained elsewhere, this 'lowest common denominator' approach to constitutional avoidance is both ahistorical and illogical.").

category of aliens.[167] If the one-statute, one-interpretation rule was really absolute, then "the careful distinction *Zadvydas* drew between admitted aliens and nonadmitted aliens was irrelevant at best and misleading at worst."[168] Relying on the two cases discussed above,[169] which highlighted that the one-statute, one-interpretation rule *could* be one indicator of statutory meaning, the *Martinez* Court reached the conclusion that the rule *must* be determinative of statutory meaning. Furthermore, because the Court acted as if its hands were tied, it did not even explain why it took such a severe approach.

A multitude of other cases that interpret other statutes demonstrate that a rebuttable one-statute, one-interpretation rule is not novel.[170] For instance, 42 U.S.C. § 405(h), a provision of the Social Security Act incorporated into the Medicare Act by 42 U.S.C. § 1395ii, seeks to require that all challenges to Medicare decisions go through a special review process.[171] It does this by blocking any other suits, such as suits arising under general federal question jurisdiction, stating: "No action against the United States . . . or any officer or employee thereof shall be brought under section 1331 or 1346 of Title 28 to recover on *any claim arising under this subchapter*."[172]

The Supreme Court has heard different challenges to section 405(h)'s attempt at jurisdictional preclusion. In *Bowen v. Michigan Academy of Family Physicians*, respondents challenged the validity of a regulation promulgated under Part B of the Medicare program, which concerned benefit amounts.[173] The Court noted that giving section 405(h) its most natural construction would raise a "serious constitutional question" in that it would prevent consideration of all constitutional challenges to the methods for calculating benefits under Part B, because bringing a suit under 28 U.S.C. § 1331 is the only means to challenge the constitutionality of the regulation.[174] Applying constitutional avoidance principles, the Court construed section 405(h) so as not to bar the respondents' claim.[175]

However, when respondents in *Shalala v. Illinois Council on Long Term Care, Inc*. presented a challenge to Part A of the Medicare program, other means for judicial review were available and the constitutional avoidance issue was not implicated.[176] Thus, the Court held that section 405(h) barred the challenge.[177]

167. *See supra* note 161 and accompanying text.
168. *Martinez*, 543 U.S. at 393 (Thomas, J., dissenting).
169. *See supra* Sections II.B.1–2.
170. However, none of these cases are cited to in *Clark v. Martinez*.
171. 42 U.S.C. §§ 405(h), 1395ii (2012).
172. *Id*. § 405(h) (emphasis added).
173. 476 U.S. 667, 668 (1986).
174. *Id*. at 678, 681 n.12.
175. *Id*. at 680–81.
176. *See* 529 U.S. 1, 19–20 (2000).
177. *Id*.

Section 405(h) expressly refers to "*any* claim arising under this subchapter."[178] However, by limiting the application of the constitutional avoidance principle to cases in which the concern actually exists, the *Shalala* Court expressly gave different meanings to the phrase "claim arising under," depending on whether applying section 405(h) would deprive the plaintiff of all forums in which to seek a review of his or her challenge.[179]

Another Supreme Court case, *Vermont Agency of Natural Resources v. United States ex rel. Stevens*,[180] demonstrates that the one-statute, one-interpretation rule is not absolute. Faced with a private relator who brought a *qui tam* suit under the False Claims Act (FCA) against a state agency, the Supreme Court avoided the potential Eleventh Amendment issues that arise in suits against a state entity initiated by private persons by determining that the agency did not constitute a "person" under the FCA.[181] However, the FCA also allows enforcement through actions by the United States; in such suits the constitutional avoidance considerations would not be present.[182] Thus, in her concurrence, joined by Justice Breyer, Justice Ginsburg wrote that she "read the Court's decision to leave open the question whether the word 'person' encompasses States when the United States itself sues under the False Claims Act."[183] Thus, just like the "+" symbol discussed in section II.A, the word "person" in the FCA must not always bear the same meaning.

These examples are not unique; many cases either expressly or implicitly reject absolute application of the one-statute, one-interpretation rule.[184]

2. Not Dangerous

Rejecting an absolute application of the one-statute, one-interpretation rule is also not dangerous. In fact, it would place the rule on the same level as other canons of statutory construction, which are "no more than rules of thumb that help

178. 42 U.S.C. § 405(h) (2012) (emphasis added).

179. The dissenters highlight the Court's rejection of the one-statute, one-interpretation rule. *See Shalala*, 529 U.S. at 32 (Scalia, J., dissenting) (discussing that the majority gave the statute "a different meaning with regard to Part A than with regard to Part B").

180. 529 U.S. 765 (2000).

181. *Id.* at 787.

182. This is because states have no immunity from suits by the United States. *See, e.g.*, United States v. Texas, 507 U.S. 529, 530 (1993).

183. 529 U.S. at 789 (Ginsburg, J., concurring).

184. *See, e.g.*, Will v. Mich. Dep't of State Police, 491 U.S. 58, 71 & n.10 (1989) (interpreting 42 U.S.C. § 1983 to mean that a state officer acting in an official capacity both is and is not a "person" within the meaning of the statute); Library of Cong. v. Shaw, 478 U.S. 310, 314–23 (1986) (interpreting the phrase "reasonable attorney's fee" under Title VII of the Civil Rights Act of 1964 to permit interest on attorney's fees awarded against private parties, but not against the United States); City of Richmond v. United States, 422 U.S 358, 368–79 (1975) (interpreting the phrase "denying or abridging the right to vote" in section 5 of the Voting Rights Act to have one meaning with respect to the purpose prong and a different meaning with respect to the effects prong). *But see* Ruckelshaus v. Sierra Club, 463 U.S. 680, 685–86 (1983) (applying the one-statute, one-interpretation rule to the attorney fee shifting provision of the Clean Air Act for both private parties and the United States).

courts determine the meaning of legislation."[185] The canons often create presumptions, but they are rebuttable.

By contrast, rigid application of the one-statute, one-interpretation rule is dangerous. It takes the initial judicial choice, which already is operating on second-best tiebreaking principles to resolve indeterminate text, and "compels its application even more broadly than might otherwise be required."[186] This "ratchet effect" is demonstrated in *Martinez*.[187] Applying tie-breaking principles, such as the constitutional avoidance canon, in contexts that do not justify their use[188] increases the likelihood that courts will depart from legislative will and impinge on legislative power.[189] This is because absolute application of the one-state, one-interpretation rule forces a lowest common denominator approach that applies to all applications of the text and therefore magnifies judicial interference.

D. OTHER ARGUMENTS CONCERNING A *MARTINEZ*-STYLE APPLICATION OF THE ONE-STATUTE, ONE-INTERPRETATION RULE

Another argument one could make in support of absolute application of the one-statute, one-interpretation rule is the importance of clear rules—such rules could provide Congress with a clear background against which to legislate and might reduce litigation costs. However, these presumed benefits do not outweigh the resulting cost of judicial inflexibility, which, as demonstrated above, leads to suboptimal statutory constructions. The importance of flexibility to reach the best construction in each individual case is precisely why other statutory canons are viewed as guiding principles rather than rigid rules.[190]

Furthermore, the clear rule called for in *Martinez*[191] would not advance its proffered goals. Although in theory a categorical approach to the one-statute, one-interpretation rule promotes clarity, in reality it fosters uncertainty. Take the hypothetical discussed earlier: a simple statute that takes the form, "if (*A* or *B*), then *C*."[192] Assume that in Circuit *X* the court is faced with *A*, and reaches a

185. *See* Conn. Nat'l Bank v. Germain, 503 U.S. 249, 253 (1992).

186. *See* Siegel, *supra* note 122, at 380.

187. *See id*. at 382.

188. Application of the constitutional avoidance canon was not justified in *Martinez* because, unlike in *Zadvydas*, the defendant was an inadmissible alien and the constitutional protection considerations did not apply. *See supra* notes 160–61 and accompanying text.

189. *See* Zadvydas v. Davis, 533 U.S. 678, 705 (2001) (Kennedy, J., dissenting) (stating that the majority's application of the one-statute, one-interpretation rule led to an "obvious disregard of congressional intent").

190. *See generally* Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395 (1950) (demonstrating that for each canon of construction, there is another canon that suggests an opposite construction, and therefore, no canon should be applied too strictly). For a critique of Llewellyn's argument, see David L. Shapiro, *Continuity and Change in Statutory Interpretation*, 67 N.Y.U. L. REV. 921, 935 (1992).

191. *See supra* note 164 and accompanying text.

192. *See supra* note 128 and accompanying text.

holding that determines the meaning of *C*. Is Circuit *Y* bound to ascribe the same meaning to *C* when it is presented with factual scenario *B*? Assume *C* is ambiguous, and Circuit *X* resolved the case through application of the substantive canon that Congress typically does not intend to pass statutes that diminish American Indian rights. Furthermore, assume that *B* raises a question concerning the same statutory provision (in this example, *C*), but its facts do not implicate American Indian rights. Even post-*Martinez*, it is unlikely that the parties in Circuit *Y* would view the issue as clear. And if they litigate and Circuit *Y* ascribes *C* a meaning tailored to better reflect facts *B*, it is possible that this creates a (supposed) circuit split.

***

In seeking to provide a coherent framework, this rigid approach to the one-statute, one-interpretation rule produces suboptimal results. Just as it is not required by linguistics, it is not mandated by any sound principle of law. To create the flexibility necessary to ensure statutes are applied equitably, courts should treat application of the rule as a rebuttable presumption rather than a categorical imperative. In fact, as explained below, the normative considerations against using the one-statute, one-interpretation rule for ambiguous hybrid statutes are so strong that absent clear congressional intent to invoke it, the rule should be rebutted.

III. A NEW STEP ZERO FOR HYBRID STATUTES

A. OVERVIEW

How might one resolve the clash of canons presented in Part I, and exacerbated by the one-statute, one-interpretation rule as discussed in Part II? This Note has demonstrated that application of the one-statute, one-interpretation rule can best be viewed as a rebuttable presumption. When faced with ambiguous, indeterminate text, there are times when courts would be best served by limiting their application of second-best, tiebreaking substantive canons to only the factual scenarios that justify their use, even if this leads to different interpretations of the same text. When courts enter the "construction zone,"[193] there are more important principles at stake than those the one-statute, one-interpretation rule attempts to advance. Just construction of the law should take precedence over impractical and ineffective attempts at predictability.

With respect to the clash between *Chevron* and the rule of lenity, these principles support rebutting the one-statute, one-interpretation rule. *Chevron* forms the bedrock for judicial review of the modern administrate state, and the rule of lenity protects important constitutional rights. Courts should strive to apply the principles of each canon to the facts that justify their use, but not to superimpose one

193. *See* Solum, *supra* note 121, at 458 (referring to instances of textual ambiguity in constitutional interpretation as the "construction zone").

canon at the expense of the other to factual scenarios in which its justification does not apply.

To promote these principles, courts should invoke *Mead*'s rationale and return to the text to look for evidence of congressional intent.[194] If Congress demonstrates an intent to apply the one-statute, one-interpretation rule, then one of the four options discussed in section I.C.2 of this Note should prevail. However, absent clear congressional intent to the contrary, the one-statute, one-interpretation rule should be rebutted; *Chevron* would apply to the statute's civil applications, whereas the rule of lenity would apply to the statute's criminal applications.

To understand this Note's proffered approach, take the following hypothetical Statute A:[195]

Statute A:

§ 1: Conduct X is forbidden

§ 2: $1,000 fine for violating section 1

§ 3: One-year jail sentence for violating section 1

§ 4: Congress intends to apply all sections of this statute uniformly

Statute A is a hybrid statute; section 1 can be enforced both civilly (via section 2) and criminally (via section 3). Assume section 1 is ambiguous such that the precise conduct proscribed by the statute is indeterminate. A court tasked with interpreting Statute A should follow the diagram presented below in Figure 1. First, the court should look for express congressional intent to apply the statute uniformly. Here, this is satisfied by section 4, and the court should subsequently reconcile the competing doctrines of *Chevron* and lenity according to one of the four options presented in section I.C.2 of this Note.

If, however, Statute A did not include section 4, then the court should proceed according to the second branch of Figure 1. For the reasons articulated in Part II, absent express congressional intent to apply the statute uniformly, the court should rebut the one-statute, one-interpretation rule. Thus, cases brought under section 2 would be afforded *Chevron* deference, whereas cases brought under section 3 would be constructed subject to the rule of lenity.

194. *See supra* notes 75–82 and accompanying text. *Mead*'s Step Zero is procedurally similar to the new Step Zero advanced in this Note. Both Step Zeros instruct courts to first consider—by looking to congressional intent—the appropriateness of using the canon at issue.

195. *See* Siegel, *supra* note 122, at 345 (providing a similar example).

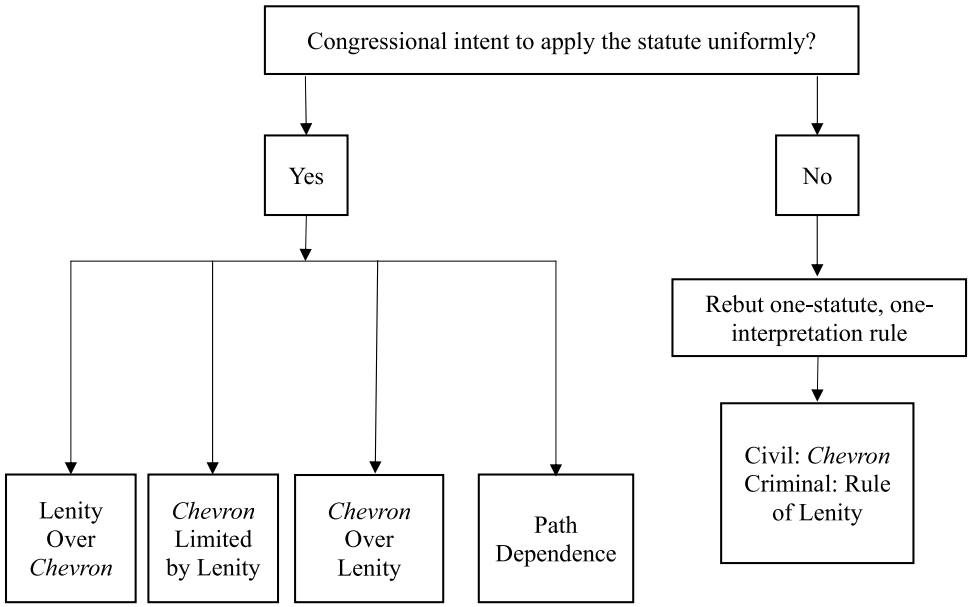

Figure 1

B. COUNTERARGUMENTS REJECTED

Rebutting the one-statute, one-interpretation rule will likely lead to a divergence in outcomes across civil and criminal cases that litigate the same statutory provision. However, this divergence actually promotes clarity in the law because prospective litigants will understand that a particular canon will only apply to their case if the case's factual scenario justifies the canon's use.

Furthermore, a divergence in outcomes between civil and criminal cases is not novel. For example, a defendant is often tried both civilly and criminally for the same offense. However, because a criminal conviction requires a higher standard of proof, a defendant can be found guilty of the civil charge but not guilty of the criminal charge. One widely known example in popular culture is the civil and criminal trials of O.J. Simpson.[196]

Another potential counterargument to the approach proffered in this Part is analogous to a criticism of *Mead*: that the additional layer of doctrinal complexity is unjustified.[197] However, for the same reason this criticism fails with respect to

196. *See* B. Drummond Ayres Jr., *Jury Decides Simpson Must Pay $25 Million in Punitive Award*, N.Y. TIMES (Feb 11, 1997), https://www.nytimes.com/1997/02/11/us/jury-decides-simpson-must-pay-25-million-in-punitive-award.html [https://nyti.ms/2jGICPz] ("The huge award constituted still another pointed contradiction of the much-disputed 1995 criminal court verdict that found Mr. Simpson not guilty of the double slaying. . . .").

197. *See, e.g.*, Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901,

Mead, so too should it fail here. In Professors Gluck and Bressman's extensive empirical study of 137 congressional staffers on their knowledge and use of the canons of statutory interpretation, they found *Mead*'s Step Zero to be a "big winner" because of its consistency with congressional intent and actual practice.[198] "*Mead*, despite abundant criticism, is more rooted in [the congressional staffers'] drafting practice than any other canon in our study except perhaps *Chevron*."[199] Gluck and Bressman's empirical study argues that "the Court has been correct to tailor deference more narrowly than *Chevron*'s broad presumption initially suggested."[200] The empirical support for *Mead* suggests that there would be similar support for "tailor[ing] deference more narrowly" in the context of hybrid statutes based on whether Congress intends to apply the statute uniformly.

In this respect, the normative argument for this Note's approach is even stronger than that for *Mead*'s Step Zero, because a rebuttal of the one-statute, one-interpretation rule is significantly less complex. *Mead* provides a mechanism for courts to discern express congressional authorization, but also allows for "other circumstances reasonably suggesting that Congress ever thought"[201] that the agency should be able to "speak with the force of law when it addresses ambiguity in the statute."[202] Criticism of *Mead* (albeit misplaced according to Gluck and Bressman)[203] centers on the amorphous nature of these unspecified implicit forms of delegation. By contrast, this Note's approach does not require vague proxies for congressional intent; an intent to apply the one-statute, one-interpretation rule can and should be expressed explicitly in the statute. Such an approach is not unique; Congress often includes explicit indications of its intent, such as the intent to preempt state law.[204]

Another potential counterargument stems from this Note's conception of the *Chevron* framework. In contrast to the two-step framework discussed in section I.B.2, Matthew Stephenson and Adrian Vermeule argue that *Chevron* only has one step.[205] Although this approach might have important ramifications for the

991 (2013) ("Opponents of these doctrines [such as *Mead*] view them and some others that we have studied as judicial power grabs that not only lack foundation in congressional intent, but impose a level of doctrinal complexity that courts cannot absorb.").

198. *See id*. at 999.

199. *Id*. at 994.

200. *Id*.

201. United States v. Mead Corp., 533 U.S. 218, 231 (2001). One example of implicit indicia of congressional intent is longstanding precedent giving "personal authority" to the agency. *See id*. at 231 n.13.

202. *Id*. at 229.

203. *See supra* notes 193–96 and accompanying text.

204. *See, e.g.*, 17 U.S.C. § 301(a) (2012) ("On and after January 1, 1978, all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106 in works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright as specified by sections 102 and 103, whether created before or after that date and whether published or unpublished, are governed exclusively by this title. Thereafter, no person is entitled to any such right or equivalent right in any such work under the common law or statutes of any State.").

205. Matthew C. Stephenson & Adrian Vermeule, Chevron *Has Only One Step*, 95 VA. L. REV. 597, 598 (2009) ("Rather than trying to breathe life into each of *Chevron*'s two steps, judges, scholars, and

four options discussed in section I.C.2, it would not affect the central claim of this Note. The number of steps present in the current *Chevron* framework has no impact on the addition of a new step that rebuts the one-statute, one-interpretation rule in the absence of clear congressional intent to apply the hybrid statute uniformly.

CONCLUSION

This Note analyzes why the one-statute, one-interpretation rule is a suboptimal method for resolving the clash of canons between the rule of lenity and the *Chevron* doctrine and proposes a new method for resolving the conflict. Rejecting an absolute application of the one-statute, one-interpretation rule would not upend any significant legal principles. The rule would remain in full force for unambiguous statutes, and even for ambiguous single-use statutes. Instead, this Note seeks to display that the one-statute, one-interpretation rule's underlying logic does not apply with equal force to ambiguous hybrid statutes, or, at the very least, the rule's benefits in this context do not outweigh the costs imposed by its ratchet effect on any resulting reconciliation of *Chevron* and the rule of lenity. This Note's new Step Zero would provide a more just construction of the law for the many cases, such as Douglas Whitman's, which involve ambiguous hybrid statutes.

teachers of administrative law should jettison the two-step framework and acknowledge that *Chevron* calls for a single inquiry into the reasonableness of the agency's statutory interpretation.").