GIVE VETERANS THE BENEFIT OF THE DOUBT: *CHEVRON*, *AUER*, AND THE VETERAN'S CANON

As the Civil War drew to a close, President Lincoln spoke of the nation's duty "to care for him who shall have borne the battle and for his widow and his orphan."[1] Congress's attempts to fulfill that duty have created some hard questions for the courts. *Hayburn's Case*,[2] now better known for what it reveals about Founding-era ideas of judicial review and the separation of powers,[3] originated in a Revolutionary War veteran's efforts to claim benefits.[4] For about 200 years thereafter, however, Congress exempted decisions concerning veterans' benefits from judicial review.[5] Congress changed that in 1988 when it passed the Veterans' Judicial Review Act (VJRA).[6] The VJRA created the Court of Appeals for Veterans Claims (CAVC), a non–Article III court with jurisdiction over decisions made by officials within the Department of Veterans Affairs (VA),[7] and gave the Federal Circuit power to review CAVC decisions on questions of law.[8] Thus judicial review of veterans' benefits decisions returned. With it came more hard questions for the courts.

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1. Abraham Lincoln, Second Inaugural Address (Mar. 4, 1865), http://avalon.law.yale.edu/19th_century/lincoln2.asp [https://perma.cc/WE43-E8EK].

2. 2 U.S. (2 Dall.) 408, 409 (1792).

3. *See, e.g.*, Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 218 (1995) ("*Hayburn's Case* . . . stands for the principle that Congress cannot vest review of the decisions of Article III courts in officials of the Executive Branch."); *see also* RICHARD H. FALLON, JR. ET AL., HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 81–87 (7th ed. 2015).

4. FALLON ET AL., *supra* note 3, at 82.

5. James D. Ridgway, *The Veterans' Judicial Review Act Twenty Years Later: Confronting the New Complexities of the Veterans Benefits System*, 66 N.Y.U. ANN. SURV. AM. L. 251, 253–56 (2010) (discussing the aftermath of *Hayburn's Case* and congressional choices to exempt veterans' benefits decisions from judicial review).

6. Veterans' Judicial Review Act, Pub. L. No. 100-687, 102 Stat. 4105 (1988) (codified as amended in various parts of 38 U.S.C.).

7. 38 U.S.C. §§ 7251–7252 (2012).

8. *Id.* § 7292 (granting the Federal Circuit jurisdiction over any CAVC decision with respect to "a rule of law or of any statute or regulation . . . or any interpretation thereof" with limited exceptions).

Courts face one such question when doctrines of deference like *Chevron*[9] and *Auer*[10] conflict with the veteran's canon—the Supreme Court's "rule that interpretive doubt is to be resolved in the veteran's favor."[11] When a statute or regulation is ambiguous,[12] should a reviewing court defer to the VA under agency deference doctrines, or follow the veteran's canon and resolve the doubtful language in favor of the veteran? The Federal Circuit has yet to answer that question.[13] And though a case involving this conflict[14] led the Supreme Court to grant certiorari on whether the Court should overrule *Auer*, the Court declined to address the conflict between the veteran's canon and agency deference.[15] So the question remains a live one.

This Note answers that question by arguing that in those interpretive battles, the veteran's canon should triumph over *Chevron* and *Auer*. The veteran's canon is a traditional tool of interpretation,[16] and as such, it should be applied to resolve

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9. Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984) (holding that when statutory language is ambiguous, courts should defer to the interpretation of the agency charged with administering the statute so long as the agency's interpretation is reasonable).

10. Auer v. Robbins, 519 U.S. 452, 461 (1997) (holding that courts should defer to an agency's interpretation of its own regulation unless it is plainly erroneous or inconsistent with the regulation).

11. Brown v. Gardner, 513 U.S. 115, 118 (1994).

12. Professor Solan prefaced his discussion of ambiguity by observing that "[l]egal writers, and judges in particular, use the word 'ambiguity' to refer to all kinds of indeterminacy, whatever their source. Because this Article focuses heavily on what judges say, I will generally use the word ambiguity in this looser, legal sense." Lawrence M. Solan, *Pernicious Ambiguity in Contracts and Statutes*, 79 CHI.-KENT L. REV. 859, 860 (2004). This Note will do the same.

13. *See* Procopio v. Wilkie, 913 F.3d 1371, 1387 (Fed. Cir. 2019) (O'Malley, J., concurring) (noting "the court's failure—yet again—to address and resolve the tension between the pro-veteran canon and agency deference.")

14. Kisor v. Shulkin, 880 F.3d 1378, 1379–80 (Fed. Cir. 2018) (O'Malley, J., dissenting from denial of en banc hearing) (noting that the majority's holding granted deference to the VA because of *Auer* and arguing that the veteran's canon should prevail in such situations).

15. The petitioners in *Kisor* presented both the question of whether *Auer* should be overruled and the question of whether *Auer* should yield to the veteran's canon. *See* Petition for a Writ of Certiorari at i, Kisor v. O'Rourke, No. 18-15 (U.S. June 29, 2018), 2018 WL 3239696 (listing both questions presented by petition for certiorari); Kisor v. Wilkie, 139 S. Ct. 657 (Mem.), No. 18-15, 2018 WL 6439837, at *1 (U.S. Dec. 10, 2018) (granting certiorari only on the first question presented).

16. *See, e.g.*, Henderson v. Shinseki, 562 U.S. 428, 441 (2011) ("We have long applied 'the canon that provisions for benefits to members of the Armed Services

ambiguity before courts defer to the VA's views on a statute or regulation.[17] This use of the veteran's canon reflects Congress's general intent in providing judicial review of the VA's decisions,[18] and its specific intent in legislating in the area of veterans' benefits.[19]

Moreover, several elements of veterans law support this result. As a practical matter, because veterans sometimes

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are to be construed in the beneficiaries' favor.'"); *Gardner*, 513 U.S. at 118 (1994) (noting "the rule that interpretive doubt is to be resolved in the veteran's favor"); Coffy v. Republic Steel Corp., 447 U.S. 191, 196 (1980) ("The statute is to be liberally construed for the benefit of the returning veteran."); Fishgold v. Sullivan Drydock & Repair Corp., 328 U.S. 275, 285 (1946) ("Our problem is to construe the separate provisions of the Act as parts of an organic whole and give each as liberal a construction for the benefit of the veteran as a harmonious interplay of the separate provisions permits."); Boone v. Lightner, 319 U.S. 561, 575 (1943) ("The Soldiers' and Sailors' Civil Relief Act is always to be liberally construed to protect those who have been obliged to drop their own affairs to take up the burdens of the nation.").

17. SAS Inst. Inc. v. Iancu, 138 S. Ct. 1348, 1358 (2018) (noting that "under *Chevron*, we owe an agency's interpretation of the law no deference unless, after 'employing traditional tools of statutory construction,' we find ourselves unable to discern Congress's meaning.") (citations omitted). In the context of *Auer*, the Court has not explicitly stated that traditional tools of statutory interpretation apply, but *Auer* analysis appears to have been shaped by this element of *Chevron*. *See* Cass R. Sunstein & Adrian Vermeule, *The Unbearable Rightness of* Auer, 84 U. CHI. L. REV. 297, 307 (2017) (observing that in *Auer* as well as *Chevron* cases, "the 'traditional tools of statutory construction' can be used to determine *whether there is ambiguity at all*.") (internal citations omitted) (emphasis added); Kristin E. Hickman, *Contemplating a Weaker Auer Standard*, 36 YALE J. ON REG.: NOTICE & COMMENT (Sept. 23, 2016), http://yalejreg.com/nc/contemplating-a-weaker-auer-standard-by-kristin-e-hickman/ [https://perma.cc/R2QU-E2AB] (noting that in the aftermath of the Court's decision in *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142 (2012), several circuit court opinions have used traditional tools of statutory construction in determining whether a regulation is ambiguous and triggers *Auer* deference).

18. Ridgway, *supra* note 5, at 256 (explaining that the goal of the VJRA was increased accountability).

19. *See* King v. St. Vincent's Hosp., 502 U.S. 215, 220–21 n.9 (1991) (discussing the veteran's canon and the Court's presumption that Congress legislates against the background of such rules of construction); *see also* McNary v. Haitian Refugee Ctr., Inc., 498 U.S. 479, 496 (1991) ("It is presumable that Congress legislates with knowledge of our basic rules of statutory construction."). This argument does not depend on individual members of Congress knowing about the veteran's canon. *Cf.* William Baude & Stephen E. Sachs, *The Law of Interpretation*, 130 HARV. L. REV. 1079, 1124 (2017) ("We can say that an enacting Congress 'understood' or 'knew' or 'accepted' all these rules, but that's true only of Congress-the-legal-entity, the artificial construct of our legal rules. The natural persons we call 'members of Congress' didn't have to know these rules at all, and it seriously confuses matters to pretend that they did.").

endure injuries or illnesses unique to the conditions of war, those maladies are often not well-understood. The veteran's canon helps ensure that veterans are not denied benefits when science moves at a slower pace than suffering.[20] As a structural matter, the single chain of review established by the VJRA erases the uniformity concern that may support deference elsewhere.[21] For all those reasons and more, courts should apply the veteran's canon before *Chevron* or *Auer* and thereby give veterans the benefit of the doubt in the law.

This Note makes that case in three parts. Part I provides some background on *Chevron*, *Auer*, and the veteran's canon. Part II illustrates the tension between *Chevron*, *Auer*, and the veteran's canon through the story of "blue water" Navy veterans' litigation involving Agent Orange legislation and regulation,[22] and briefly surveys the positions scholars have taken on how to resolve this conflict. Finally, Part III concludes by arguing that where such conflict exists, the veteran's canon should take priority in the interpretation of statutes and regulations in veterans' benefits schemes.

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20. *See On the Agent Orange Trail*, N.Y. TIMES, July 5, 1979, at A16 (noting that veterans who approached the Veterans Administration with concerns about Agent Orange exposure "were told there was no such thing as Agent Orange poisoning, nor any conclusive evidence that the chemical harmed anything other than vegetation"); Clyde Haberman, *Agent Orange's Long Legacy, for Vietnam and Veterans*, N.Y. TIMES (May 11, 2014), https://www.nytimes.com/2014/05/12/us/agent-oranges-long-legacy-for-vietnam-and-veterans.html [https://nyti.ms/1ouNfIT] (noting that "[s]tudies on Agent Orange's effects tend to use language that is less than absolute").

21. *See, e.g.*, Peter L. Strauss, *One Hundred Fifty Cases per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action*, 87 COLUM. L. REV. 1093, 1121–22 (1987) (framing *Chevron* as a way to enhance the likelihood of uniform administration of statutes).

22. The "blue water" Navy refers to Vietnam-era Navy veterans who served off-shore (as contrasted with "brown water" Navy veterans, who served in Vietnam's inland waterways). *See* Ann E. Marimow, *The "blue water" Navy veterans of the Vietnam War battle Agent Orange*, WASH. POST (Dec. 28, 2018), https://www.washingtonpost.com/local/legal-issues/the-blue-water-navy-veterans-of-the-vietnam-war-battle-agent-orange/2018/12/28/d9f8a9ea-ff09-11e8-ad40-cdfd0e0dd65a_story.html?utm_term=.25c08364f048 [https://perma.cc/Q39Q-YB26].

I. *CHEVRON*, *AUER*, AND THE VETERAN'S CANON: AN INTRODUCTION

Veterans law exists in an odd, long-isolated outpost of law's empire.[23] Even so, administrative law atmospherics affect the whole realm.[24] As such, this Part situates this particular puzzle of veterans law within the broader conversation about *Chevron* and *Auer*.[25]

A. Chevron*'s Revolution and Evolution*

In *Chevron*, the Supreme Court handed down a decision it believed to be a restatement of "well-settled principles" of "deference to administrative interpretations."[26] The Court's distillation of those principles seemed simple: When interpreting statutes administered by an agency, unless Congress had "directly spoken to the precise question at issue," courts should defer to agency interpretations "based on a permissible construction of the statute."[27] For a construction to be permissible, the Court noted that it need not be "the only one [the court] permissibly could have adopted to uphold the construction, or even the reading the court would have reached if the question initially had arisen in a judicial proceeding."[28]

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23. *See* James D. Ridgway, *The Splendid Isolation Revisited: Lessons from the History of Veterans' Benefits Before Judicial Review*, 3 VETERANS L. REV. 135, 135–36 (2011) (discussing the history of veterans' benefits law in the United States, and noting that judicial review was generally unavailable for benefits decisions prior to the Veterans' Judicial Review Act of 1988).

24. *Cf.* Victoria Hadfield Moshiashwili, *The Downfall of* Auer *Deference: Veterans Law at the Federal Circuit in 2014*, 64 AM. U. L. REV. 1007, 1008 (2015) ("The 2014 veterans benefits case law of the U.S. Court of Appeals for the Federal Circuit mirrored a growing trend at the U.S. Supreme Court to question the well-established tradition of judicial deference to a federal agency's interpretation of its own regulations.").

25. This Note tries to give readers a general sense of the debate, but those seeking a more in-depth exploration of the conversation should look elsewhere. For a collection of criticisms of the current regime, see Christopher J. Walker, *Attacking Auer and Chevron Deference: A Literature Review*, 16 GEO. J.L. & PUB. POL'Y 103 (2018). For a leading defense of *Auer*, see Sunstein & Vermeule, *supra* note 17. For Prof. Sunstein's most recent defense of *Chevron*, see Cass R. Sunstein, Chevron *as Law*, GEO. L.J. (forthcoming), available at https://ssrn.com/abstract=3225880 [https://perma.cc/AM6E-65KP].

26. Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 844–45 (1984).

27. *Id.* at 842–43.

28. *Id.* at 843 n.11.

Instead, when faced with ambiguity or silence in a statute,[29] agencies should get deference for any reasonable interpretation.[30] Thanks to the papers of Justice Blackmun, we know that this rule reflected the disposition of the *Chevron* opinion's author, Justice Stevens—"When I am so confused, I go with the agency."[31]

The *Chevron* Court justified that rule by casting ambiguous statutory provisions as congressional delegations of policy-making power to the agencies tasked with administering those statutes.[32] Where Congress expressed no specific intent, the Court assumed that Congress intended for the agency to work out the details.[33] As such, those interpreting an ambiguous provision were making a "policy choice."[34] Per the Court, those choices should be made by expert agencies who answer to the President (and thus to the people), not by generalist judges with life tenure.[35]

Perhaps accidentally, *Chevron* transformed administrative law.[36] Members of the Executive branch quickly recognized its potential power. According to Professor Eskridge and Lauren Baer, "Reagan Administration officials and appointees

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29. For the sake of simplicity and brevity, this Note refers to *Chevron*'s threshold inquiry as one of ambiguity, and thus does not repeat the Court's point about silence as an alternative or additional sufficient condition to trigger deference to reasonable agency interpretations.

30. *Chevron*, 467 U.S. at 844.

31. William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from* Chevron *to* Hamdan, 96 GEO. L.J. 1083, 1086 n.7 (2008).

32. *Chevron*, 467 U.S. at 843–44.

33. *Id.* at 865–66.

34. *Id.* at 866.

35. *Id.* at 865–66 (contrasting agencies with "[j]udges [who] are not experts in the field, and are not part of either political branch of the Government"). Justice Kagan's scholarship suggests that the political accountability rationale of *Chevron* could lead to a spectrum of deference with more or less deference being granted according to the degree of presidential involvement. *See* Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2376–78 (2001). Tying deference to accountability has significant ramifications for independent agencies. *See generally id.; see also* Randolph J. May, *Defining Deference Down: Independent Agencies and* Chevron *Deference*, 58 ADMIN. L. REV. 429, 432 (2006) ("*Chevron*'s political accountability rationale should imply that statutory interpretations of independent agencies receive less judicial deference.").

36. *See* Thomas W. Merrill, *The Story of* Chevron*: The Making of an Accidental Landmark*, 66 ADMIN. L. REV. 253, 282–83 (2014).

proclaimed a '*Chevron* Revolution.'"[37] Why would Reaganites celebrate this accidental revolution? Because *Chevron*'s political accountability rationale supported and enabled greater presidential control of administrative agencies.[38] For members of the Reagan Administration, *Chevron* came as a gift.

Members of the judiciary also took notice of *Chevron*, and yet they disagreed about how it should be applied. Judge Kenneth Starr of the D.C. Circuit praised *Chevron* for its "simple, two-step framework."[39] He understood *Chevron* to mean that "absent direct evidence of legislative intent, the Agency's interpretation should be allowed if it is a reasonable reading of the statute."[40] With that test, Judge Starr contended, the *Chevron* Court "eliminated a significant ambiguity in the law"[41] and returned "the power to set policy to democratically accountable officials."[42] By shifting power from courts to agencies, Judge Starr reasoned, *Chevron* undermined a foundational assumption of other jurisprudential regimes—that "federal courts have a general duty to supervise agencies in much the same way that the Supreme Court supervises lower federal courts."[43] Not so, Judge Starr argued. That supervisory duty belonged to Congress and the President. *Chevron* made that clear.[44]

That same year, then-Judge Stephen Breyer of the First Circuit criticized those who read *Chevron* as a simple, widely applicable rule.[45] Such interpretations of the decision, he maintained, were "seriously overbroad, counterproductive and sometimes senseless."[46] Judge Breyer specifically criticized the

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37. *See* Eskridge & Baer, *supra* note 31, at 1087.

38. *See* Jonathan Adler, *Restoring* Chevron*'s Domain*, 81 MO. L. REV. 983, 986 (2016); *see also* Kagan, *supra* note 35, at 2373–74 (noting that "political accountability, within the gaps left by Congress, attaches to and resides in choice by the President").

39. Kenneth W. Starr, *Judicial Review in the Post-*Chevron *Era*, 3 YALE J. ON REG. 283, 288 (1986).

40. *Id.* at 285.

41. *Id.* at 284.

42. *Id.* at 312.

43. *Id.* at 284.

44. *Id.* at 312.

45. Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 373 (1986).

46. *Id.*

D.C. Circuit's emerging *Chevron* jurisprudence for reading *Chevron* as a simple test.[47] Treating *Chevron* as a rule, he argued, represented "a greater abdication of judicial responsibility to interpret the law than seems wise, from either a jurisprudential or an administrative perspective."[48] For Judge Breyer, the judicial duty to interpret the law required consideration of more factors than *Chevron*-as-a-rule accounted for.[49] Although skeptical of the judiciary's capacity to police agencies' substantive policy decisions,[50] Judge Breyer believed courts should "build a jurisprudence of 'degree and difference' into *Chevron's* word 'permissible.'"[51] Otherwise, the country would be left with a legal regime which "requires courts to defer to agency judgments about *matters of law*, but . . . also suggests that courts conduct independent, 'in-depth' reviews of agency judgments about *matters of policy.* Is this not the exact opposite of a rational system?"[52]

Fast-forward to last year's decision in *SAS Institute Inc. v. Iancu*[53] to glimpse how much the world has changed since 1986. In that case, the administrator argued in part that he should receive *Chevron* deference because the statutory language was

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47. *Id.*

48. *Id.* at 381. Notably, then-Judge Breyer also suggested that "*Chevron*, too, might be limited to its factual and statutory context, where it is well suited." *Id.*

49. *Id.* at 373 ("[T]here are too many different types of circumstances, including different statutes, different kinds of application, different substantive regulatory or administrative problems, and different legal postures in which cases arrive, to allow 'proper' judicial attitudes about questions of law to be reduced to any single simple verbal formula.").

50. *Id.* at 390. In particular, then-Judge Breyer noted that judges are often pressed for time and may not be able to sufficiently familiarize themselves with the record, and that even when judges can familiarize themselves with the record, ex post judicial evaluations of a decision are likely to be far removed from the realities faced by administrators ex ante. *See id.* at 389–90.

51. *Id.* at 382.

52. *Id.* at 397. In the early years of the *Chevron* regime, members of the academy also questioned *Chevron*'s constitutional legitimacy. *See, e.g.*, Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 467 (1987) (arguing that the separation of powers means "that foxes should not guard henhouses—an injunction to which *Chevron* appears deaf"); Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452, 465 (1989) (describing *Chevron* as a "siren's song" and asserting that "[t]he danger of *Chevron*'s song lies in its apparent obliviousness to the fundamental alterations it makes in our constitutional conception of the administrative state.").

53. 138 S. Ct. 1348 (2018).

unclear.[54] Justice Gorsuch, no great fan of *Chevron*,[55] declined the invitation to reconsider *Chevron* or apply it to the matter at hand. Instead, he applied the "traditional tools of statutory construction" and found that the statute's language resolved the question.[56] Justice Breyer's dissent revealed that although his view of *Chevron* has remained remarkably consistent over the decades—for him, *Chevron* is and ever was a context-sensitive "rule of thumb" rather than a sweeping mandate—much else had changed.[57] Where jurists like Judge Starr had once praised *Chevron* as a doctrine of judicial restraint,[58] the

54. *Id.* at 1358. The specific administrator involved was the Director of the Patent and Trademark Office. *Id.* at 1354.

55. *See* Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1149–58 (10th Cir. 2016) (Gorsuch, J., concurring) (noting that *Chevron* and its extensions raise significant separation of powers issues and appear to conflict with the plain text of the Administrative Procedure Act); *see also* Trevor W. Ezell & Lloyd Marshall, *If Goliath Falls: Judge Gorsuch and the Administrative State*, 69 STAN. L. REV. ONLINE 171 (2017) (surveying Justice Gorsuch's administrative law jurisprudence from his time on the Tenth Circuit).

56. *SAS, Inst. Inc.* at 1358–59.

57. *Compare Iancu*, 138 S. Ct. at 1364 (Breyer, J., dissenting) ("In referring to *Chevron*, I do not mean that courts are to treat that case like a rigid, black-letter rule of law, instructing them always to allow agencies leeway to fill every gap in every statutory provision . . . Rather, I understand *Chevron* as a rule of thumb, guiding courts in an effort to respect that leeway which Congress intended the agencies to have.") (citations omitted) *with* Breyer, *supra* note 45, at 373–82 (encouraging a flexible understanding of *Chevron* and suggesting that "the word 'permissible' is general enough to embody the range of relevant factors").

58. Starr, *supra* note 39, at 308; *see also* John F. Manning, *Justice Scalia and the Idea of Judicial Restraint*, 115 MICH. L. REV. 747, 764–67 (2017) (explaining Justice Scalia's defenses of *Chevron* as efforts to cabin judicial discretion). But insofar as the threshold ambiguity inquiry remains irreducibly squishy, *Chevron* may promise more restraint in theory than it can deliver in practice. *Cf.* Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546, 572 (Stevens, J., dissenting) (2005) (noting that "'ambiguity' is a term that may have different meanings for different judges"); Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2136 (2016) (contending that "there is often no good or predictable way for judges to determine whether statutory text contains 'enough' ambiguity to cross the line beyond which courts may resort to the constitutional avoidance canon, legislative history, or *Chevron* deference."); Ethan J. Leib & Michael Serota, *The Costs of Consensus in Statutory Construction*, 120 YALE L.J. ONLINE 47, 59 (2010) ("[W]ithout guidance to help judges understand the threshold inquiry into ambiguity that is supposed to constrain them, the benefits of curbing judicial discretion vanish."); Solan, *supra* note 12, at 859 ("The problem, perhaps ironically, is that the concept of *ambiguity* is itself perniciously ambiguous.").

doctrine is now damned as an abdication of the judicial duty to say what the law is.[59]

Several current and former Justices have criticized *Chevron* or its extensions.[60] Some lower court judges have expressed skepticism about the current regime.[61] And the Court has restricted *Chevron*'s domain—for instance, it does not apply to criminal statutes,[62] nor "extraordinary cases" where Congress likely did not intend to delegate significant questions to an agency,[63] nor when agency interpretations emerge from circumstances that do not suggest "delegation meriting *Chevron* treatment."[64] For now, though, *Chevron*

59. *See, e.g.*, *Gutierrez-Brizuela*, 834 F.3d at 1152 (Gorsuch, J., concurring) (observing that "*Chevron* seems no less than a judge-made doctrine for the abdication of the judicial duty."). For some, this is why *Chevron* has become known as the "counter-*Marbury* of the administrative state." *See* Aditya Bamzai, Marbury v. Madison *and the Concept of Judicial Deference*, 81 MO. L. REV. 1057, 1057–58 (2016). For a potentially complementary argument that due process requires judges to render independent interpretations of the law, see Philip Hamburger, *Chevron Bias*, 84 GEO. WASH. L. REV. 1187, 1250 (2016) (arguing that when "when judges defer to agency judgments about statutory interpretation, the judges abandon their very office or duty as judges").

60. *See, e.g.*, Pereira v. Sessions, 138 S. Ct. 2105, 2120 (2018) (Kennedy, J., concurring) ("The type of reflexive deference exhibited in some of these cases is troubling."); Michigan v. EPA, 135 S. Ct. 2699, 2712 (2015) (Thomas, J., concurring) ("*Chevron* deference precludes judges from exercising that judgment, forcing them to abandon what they believe is 'the best reading of an ambiguous statute' in favor of an agency's construction."); City of Arlington v. FCC, 569 U.S. 290, 312 (2013) (Roberts, C.J., dissenting) ("A court should not defer to an agency until the court decides, on its own, that the agency is entitled to deference."). Note that Chief Justice Robert's dissent in *City of Arlington* also includes a defense of *Chevron*. *Id.* at 317. For then-Judge Gorsuch's assessment of *Chevron*, see *supra* note 55. As for Justice Kavanaugh's views, see Kavanaugh, *supra* note 58, at 2150–52 (2016) (arguing that *Chevron* "has no basis in the Administrative Procedure Act" but noting that "*Chevron* makes a lot of sense in certain circumstances").

61. *See, e.g.*, Esquivel-Quintana v. Lynch, 810 F.3d 1019, 1027–28 (6th Cir. 2016) (Sutton, J., concurring in part and dissenting in part) (arguing that *Chevron* does not apply to statutes that have both criminal and civil applications); Raymond M. Kethledge, *Ambiguities and Agency Cases: Reflections After (Almost) Ten Years on the Bench*, 70 VAND. L. REV. EN BANC 315, 323–26 (2017) (observing that *Chevron*'s secondary effects can include judicial laziness and administrative sloppiness).

62. Abramski v. United States, 573 U.S. 169, 191 (2014) ("[C]riminal laws are for courts, not for the Government, to construe.").

63. King v. Burwell, 135 S. Ct. 2480, 2488–89 (2015).

64. United States v. Mead Corp., 533 U.S. 218, 229 (2001).

remains the law of the land,[65] and "a powerful weapon in an agency's regulatory arsenal."[66]

B. Auer *Deference*

In its "canonical formulation," *Auer* deference requires courts to "enforce an agency's interpretation of its own rules unless that interpretation is 'plainly erroneous or inconsistent with the regulation.'"[67] According to Justice Scalia, who authored the Court's opinion in *Auer*,[68] "[i]n practice, *Auer* deference is *Chevron* deference applied to regulations rather than statutes."[69] Its roots run back to a pre-APA decision, *Bowles v. Seminole Rock & Sand Co.*,[70] and for many years, it generated little of the controversy produced by *Chevron*.[71]

That changed when Professor Manning attacked *Auer* as a unique threat to the separation of powers. Unlike *Chevron*, which grants deference to agencies interpreting ambiguities in the statutes that Congress writes, *Auer* gives agencies the power of self-interpretation—the agency gets to say what its own regulation means.[72] By allowing "agencies both to write

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65. Pereira v. Sessions, 138 S. Ct. 2105, 2129 (2018) (Alito, J., dissenting) ("[U]nless the Court has overruled *Chevron* in a secret decision that has somehow escaped my attention, it remains good law."). One should also consider Professor Vermeule's contention that something like *Chevron* "would persist in *de facto* form even if *Chevron* were overruled *de jure*." ADRIAN VERMEULE, LAW'S ABNEGATION 13 (2016).

66. City of Arlington v. FCC, 569 U.S. 290, 314 (2013) (Roberts, C.J., dissenting).

67. Decker v. Nw. Envtl. Def. Ctr., 568 U.S. 597, 617 (2013) (Scalia, J., concurring in part and dissenting in part) (citations omitted).

68. *See* Auer v. Robbins, 519 U.S. 452 (1997).

69. *Decker*, 568 U.S. at 617 (Scalia, J., concurring in part and dissenting in part).

70. 325 U.S. 410, 414 (1945) (holding that the administrative agency's interpretation controls "unless it is plainly erroneous or inconsistent with the regulation"). Both *Auer* and *Seminole Rock* are used to refer to this form of deference. But the two decisions might not be as similar as this practice would suggest. *See* Jeffrey A. Pojanowski, *Revisiting* Seminole Rock, 16 GEO. J.L. & PUB. POL'Y 87, 88 (2018) (arguing that "*Auer* deference is an anachronistic reading of *Seminole Rock* through *Chevron*-filtered lenses.")

71. John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 614 (1996) ("Until quite recently, the Supreme Court and most of the academic community have accordingly been content to treat *Seminole Rock* as uncontroversial.").

72. *But see* Aneil Kovvali, Note, Seminole Rock *and the Separation of Powers*, 36 HARV. J.L. & PUB. POL'Y 849 (2013) (arguing that only some regulations—those that create liability not found in the statutory source—generate the kind of separation of powers concerns raised by Dean Manning's critique of *Auer*).

regulations and to construe them authoritatively, *Seminole Rock* effectively unifies lawmaking and law-exposition—a combination of powers decisively rejected by our constitutional structure."[73] In this way, *Auer* unites that which the Constitution divided.

Moreover, the argument goes, that unification of powers gives agencies the incentive (and ability) to evade the costs of notice-and-comment rulemaking.[74] Under *Auer*, an agency can promulgate unclear or incomplete regulations that the agency can later interpret as it pleases.[75] Insofar as *Auer* incentivizes such regulatory chicanery, that creates two more problems—mushy regulations deprive the public of notice,[76] and law gets made without the benefit of public input.[77] So to preserve the separation of powers, protect due process, and promote public participation in lawmaking, Manning recommended replacing *Auer* with "an independent judicial check on agency interpretations of agency rules."[78]

Justice Scalia came to agree. Having authored the Court's opinion in *Auer*, he later argued that *Auer* "contravenes one of the great rules of separation of powers: He who writes a law must not adjudge its violation."[79] As it stands, several other

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73. Manning, *supra* note 71, at 631; *see also* United States v. Havis, 907 F.3d 439, 450 (6th Cir. 2018) (Thapar, J., concurring) (explaining that "just as a pitcher cannot call his own balls and strikes, an agency cannot trespass upon the court's province to 'say what the law is.'").

74. *See* Matthew C. Stephenson & Miri Pogoriler, Seminole Rock*'s Domain*, 79 GEO. WASH. L. REV. 1449, 1464 (2011) (noting that unqualified *Auer* deference could enable "agencies to issue binding legal norms while escaping both procedural constraints and meaningful judicial scrutiny").

75. Manning, *supra* note 71, at 618 (1996) ("By providing the agency an incentive to promulgate imprecise and vague rules, *Seminole Rock* undercuts important deliberative process objectives of the APA, and it creates potential problems of inadequate notice and arbitrariness in the enforcement of agency rules.").

76. *Id.* at 662 ("[W]hen an agency adopts an empty regulation . . . the commenting public will have little idea—indeed, no idea—of what it will be getting until the agency gives its rule content in application.").

77. *Id.* at 661–62.

78. *Id.* at 696.

79. Decker v. Nw. Envtl. Def. Ctr., 568 U.S. 597, 621 (2013) (Scalia, J., concurring in part and dissenting in part). After Justice Scalia's death, Justice Thomas recalled one exchange they had about *Auer*:

> [S]o we were sitting on the bench one day, and [Scalia] leans over to me. He said, "Clarence. *Auer*—A-U-E-R. *Auer* is one of the worst opinions in the history of this country."
>
> "Yeah, Nino. Nino?"

Justices have expressed concern about *Auer*.[80] As for the more recently confirmed Justices, Justice Gorsuch's criticisms of *Chevron* would seem to apply with even more force to *Auer*.[81] For his part, then-Judge Kavanaugh gave a speech about Justice Scalia's legacy in which he suggested that *Auer* would one day be overruled.[82] Maybe that day has come.[83]

But maybe not. Professors Sunstein and Vermeule have argued that the separation of powers concerns raised by *Auer* would, if carried to their logical ends, "require declaring unconstitutional dozens of major federal agencies."[84] Moreover, they contend that because the interpretation of ambiguous

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"Yeah."

"You wrote it."

Clarence Thomas & John Malcolm, *Joseph Story Distinguished Lecture: A Conversation with Clarence Thomas*, HERITAGE FOUND. (Nov. 22, 2017), https://www.heritage.org/courts/report/joseph-story-distinguished-lecture-conversation-clarence-thomas [https://perma.cc/WV34-TFG8].

80. *Decker*, 568 U.S. at 616 (2013) (Roberts, C.J., concurring, joined by Alito, J.) (declining to reconsider *Auer* in the instant case but noting that the "issue is a basic one going to the heart of administrative law."); Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 525 (1994) (Thomas, J., dissenting) ("It is perfectly understandable, of course, for an agency to issue vague regulations, because to do so maximizes agency power and allows the agency greater latitude to make law through adjudication rather than through the more cumbersome rulemaking process.").

81. Hence Justice Gorsuch joined Justice Thomas's dissent from denial of certiorari in a case that would have raised the question of *Auer*'s status. *See* Garco Const., Inc. v. Speer, 138 S. Ct. 1052 (2018) (Thomas, J., joined by Gorsuch, J., dissenting from denial of certiorari).

82. Patrick Gregory, *Kavanaugh: 3 Scalia Dissents Will Become Law of Land*, BLOOMBERG LAW (June 9, 2016), https://www.bna.com/kavanaugh-scalia-dissents-n57982073854/ [https://perma.cc/9S26-4SLR].

83. Daniel E. Walters, *The Self-Delegation False Alarm: Analyzing* Auer *Deference's Effect on Agency Rules*, 119 COLUM. L. REV. 85, 91 (2019) (noting that "the Court now appears to be on the verge of overturning or significantly limiting *Auer* deference"). As some have noted, the coalition pushing for *Auer* to be overturned also includes immigration rights groups and the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO). *See* Alison Frankel, *Everybody hates Auer: Supreme Court challenge to agency deference draws 25 amicus briefs*, REUTERS (Feb. 1, 2019, 4:23 PM), https://www.reuters.com/article/us-otc-auer/everybody-hates-auer-supreme-court-challenge-to-agency-deference-draws-25-amicus-briefs-idUSKCN1PQ5TZ [https://perma.cc/4AUN-2MWX].

84. Sunstein & Vermeule, *supra* note 17, at 299. Some might agree with that premise, but disagree with the implication that *Auer* should therefore not be overruled. And there is always the possibility that concerns will not be carried to their logical ends. *Cf.* ALBERT CAMUS, THE MYTH OF SISYPHUS AND OTHER ESSAYS 3 (Justin O'Brien trans., Vintage Books 1955) (1942) ("It is always easy to be logical. It is almost impossible to be logical to the bitter end.").

regulations—much like the interpretation of ambiguous statutory provisions—requires making complex decisions involving judgments of fact and value, agencies' expertise and political accountability make them better suited for that task.[85] In contrast to earlier arguments for *Auer* based on an agency's relative epistemological advantages in interpretation,[86] Sunstein and Vermeule's defense of *Auer* highlights an agency's comparative advantages as a policy-maker.[87] They conclude that just as "*Chevron* is the best fictional default rule for statutory construction, so too *Auer* is the best fictional default rule for interpretation of agency regulations."[88]

Finally, Professors Sunstein and Vermeule suggest that the perverse incentives critique of *Auer* is "intuitively appealing, but wildly unrealistic."[89] When writing regulations, "agencies have a wide range of incentives, cutting in different directions, and the most important of these have nothing at all to do with *Auer*."[90] Two examples: First, other government actors and regulated parties will push for clarity so they can act in accord with the regulation,[91] and second, for agencies with political orientations, ambiguity creates the possibility that future agency actors will exploit that language for different ends—something drafters would therefore presumably strive to avoid.[92] Even when ambiguity appears in a regulation, *Auer* might not be to blame, because many writers of agency regulations do not know of the doctrine.[93] Moreover, some who

85. Sunstein & Vermeule, *supra* note 17, at 305.

86. For some time, courts justified *Auer* deference with "the idea that the agency, as the entity that originally drafted and enacted the regulation in question, has special insight into its meaning." Stephenson & Pogoriler, *supra* note 74, at 1454. Yet that assumption is questionable, especially when an agency offers an interpretation of a regulation long after it was drafted, or when a later agency interpretation contradicts one contemporaneous to the regulation's drafting. *Id.* at 1454–58.

87. If one thinks that agencies are less accountable to political actors than they should be, it remains true that agencies have greater accountability than do unelected, life-tenured federal judges.

88. Sunstein & Vermeule, *supra* note 17, at 307.

89. *Id.* at 299.

90. *Id.* at 308.

91. *Id.* at 309.

92. *Id.*

93. *Id. See also* Christopher J. Walker, *Inside Agency Statutory Interpretation*, 67 STAN. L. REV. 999, 1061–66 (2015) (comparing drafter knowledge of *Auer* to knowledge of other doctrines of deference). Although regulation drafters

accept the theoretical critique of *Auer*'s incentive structure might think its associated problems (vague regulations) better than the alternative (transition costs and reduced agency flexibility).[94] Finally, some empirical research suggests that *Auer* has not led to more vague agency regulations.[95]

What exactly the Court will do in *Kisor* is hard to predict.[96] Commentators have suggested a wide range of options, with some arguing that *Auer* should be overruled,[97] others that it should be reformulated,[98] and still others that it should simply be affirmed.[99] One recent piece even contends that "*Auer* deference is an anachronistic reading of *Seminole Rock* through *Chevron*-filtered lenses," and that the Court should abandon *Auer*'s error for a faithful reading of *Seminole*

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exhibited less familiarity with *Auer* than other doctrines (like *Chevron*), Walker suggests that "the fact that two in five rule drafters surveyed indicated that they are using *Auer* deference when drafting regulations may well persuade many that it is not worth preserving, as such a doctrine should play no role at the initial regulation-drafting stage." *Id.* at 1066.

94. *See* Conor Clarke, *Why the Supreme Court Might Not Overrule* Seminole Rock, 36 YALE J. ON REG.: NOTICE & COMMENT (Sept. 21, 2016), http://yalejreg.com/nc/why-the-supreme-court-might-not-overrule-seminole-rock-by-conor-clarke/ [https://perma.cc/9X99-DJHH].

95. *See* Walters, *supra* note 83 (examining a dataset of federal rules from 1982 to 2016 and finding that agencies did not increase the vagueness of their rules in response to *Auer*).

96. *Cf.* Galen Druke, *How The Supreme Court Could End Extreme Partisan Gerrymandering This Month*, FIVETHIRTYEIGHT (June 7, 2018, 6:00 AM), https://fivethirtyeight.com/features/how-the-supreme-court-could-end-extreme-partisan-gerrymandering-this-month/ [https://perma.cc/GXN6-9V2H] ("Predicting the high court's decisions is a fool's errand, in part because there are many paths the justices can take.").

97. Allyson N. Ho, *Why* Seminole Rock *Should Be Overruled*, 36 YALE J. ON REG.: NOTICE & COMMENT (Sept. 19, 2016), http://yalejreg.com/nc/2039-2/ [https://perma.cc/FQV3-K3KN].

98. Hickman, *supra* note 17. Hickman also notes that "several circuit court opinions since *Christopher* have approached the question of whether an agency's interpretation of a regulation is 'plainly erroneous or inconsistent with the regulation' by employing traditional tools of *statutory* construction to analyze—in very *Chevron*-like terms—whether the regulation being interpreted is 'ambiguous' or 'unambiguous.'" *Id.*

99. Cass R. Sunstein & Adrian Vermeule, Auer*, Now and Forever*, 36 YALE J. ON REG.: NOTICE & COMMENT (Sept. 19, 2016), http://yalejreg.com/nc/auer-now-and-forever-by-cass-r-sunstein-adrian-vermeule/ [https://perma.cc/BXW2-XXEK]. Professors Sunstein and Vermeule also stated that "we have low confidence in Supreme Court prognostication, either by ourselves or by others." *Id.*

Rock.[100] Analysis of oral arguments suggests that the question of what to do with *Auer* may split the Court.[101] Whatever happens, because *Auer*'s modern justifications closely track those of *Chevron*,[102] *Kisor*'s outcome will also interest those who wonder about *Chevron*'s future.[103]

C. The Veteran's Canon

Perhaps less familiar to most than *Chevron* or *Auer* is the veteran's canon—"the rule that interpretive doubt is to be resolved in the veteran's favor."[104] Some call the veteran's canon "*Gardner*'s Presumption," a reference to the 1994 decision in which the Court articulated the rule in that way.[105] There, the Court faced the case of a Korean War veteran whose surgery at a VA facility left him with lasting infirmities in his left calf, ankle, and foot.[106] He claimed disability benefits under

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100. Jeffrey A. Pojanowski, *Revisiting* Seminole Rock, 16 GEO. J.L. & PUB. POL'Y 87, 88 (2018).

101. Amy Howe, *Argument analysis: Justices divided on agency deference doctrine*, SCOTUSBLOG (Mar. 27, 2019, 4:07 PM), https://www.scotusblog.com/2019/03/argument-analysis-justices-divided-on-agency-deference-doctrine/ [https://perma.cc/CJU3-TZ6B].

102. *See* Stephenson & Pogoriler, *supra* note 74, at 1458 (noting that "the *Chevron*-like rationale for *Seminole Rock*—a pragmatic concern about institutional competence, coupled with a legal fiction about implied congressional delegation—is the dominant modern account of *Seminole Rock* deference."). For an argument that *Auer* lacks *Chevron*'s justification of implicit delegation and thus could fall without bringing *Chevron* down, see Jonathan Adler, *Symposium: Government agencies shouldn't get to put a thumb on the scales*, SCOTUSBLOG (Jan. 31, 2019, 2:36 PM), https://www.scotusblog.com/2019/01/symposium-government-agencies-shouldnt-get-to-put-a-thumb-on-the-scales/ [https://perma.cc/98PP-Q95U].

103. Perhaps awareness of that possibility has led administrative law professors to file an amicus brief in support of neither party that strives to distinguish *Auer* from *Chevron*. *See* Brief of Professors of Administrative Law and Federal Regulation as Amicus Curiae, Kisor v. Wilkie (No. 18-15), available at https://www.supremecourt.gov/DocketPDF/18/18-15/87583/20190208102133472_18-15%20ac%20Professors%20of%20Administrative%20Law%20and%20Federal%20Regulation%20-Corrected.pdf [https://perma.cc/6F8K-WS2M].

104. Brown v. Gardner, 513 U.S. 115, 118 (1994).

105. *See, e.g.*, Linda D. Jellum, *Heads I Win, Tails You Lose: Reconciling* Brown v. Gardner*'s Presumption That Interpretive Doubt Be Resolved in Veterans' Favor with* Chevron, 61 AM. U. L. REV. 59, 61 n.3 (2011) (using the term "*Gardner*'s Presumption" and noting that this is the author's term, not the courts' phrase); Carolyn Ryan, *The Common Law Solution to* Gardner*'s Presumption*, 8 VETERANS L. REV. 24 (2016) (using the same term).

106. *Gardner*, 513 U.S. at 116.

a statute providing for such benefits when an injury was "the result of hospitalization, medical or surgical treatment" under laws administered by the VA and not due to that "veteran's own willful misconduct."[107] The VA denied his claim, citing its own regulation interpreting that statute. That regulation required the injury to be the result of the VA's negligence or an accident.[108] After losing at the Court of Veterans Appeals and the Federal Circuit, the VA appealed to the Supreme Court.[109]

In affirming the decision against the VA, the Court noted that the VA's claims to be interpreting ambiguity in the statute could only succeed if such ambiguity remained "*after* applying the rule that interpretive doubt is to be resolved in the veteran's favor."[110] Given that the *Gardner* Court twice cited *Chevron*,[111] that sequencing hardly seems accidental. In this way, *Gardner* suggests that courts should apply the veteran's canon before finding ambiguity sufficient for deference to an agency.

The veteran's canon has been justified in terms of congressional intent and statutory context. In *King v. St. Vincent's Hospital*,[112] a National Guardsman sought a leave of absence from his civilian employer (the hospital) so that when he returned from his three-year tour of duty, he could go back to work at the hospital.[113] King, the Guardsman and hospital employee, based his claim on the Veterans' Reemployment Rights Act,[114] and the question for the Court was whether the Act's employment protections had an implicit time limit that would allow the hospital to deny King's request for a three-year leave of absence.[115] The Court held that it did not.[116] In so

107. *Id. See* 38 U.S.C. § 1151 (2012).

108. *Gardner*, 513 U.S. at 116–17 (citing 38 C.F.R. § 3.358(c)(3) (1993)).

109. *Gardner*, 513 U.S. at 117. The Court of Veterans Appeals was the former name of the Court of Appeals for Veterans Claims. Congress changed the court's name in 1998. See *U.S. Court of Appeals for Veterans Claims, 1999-Present*, FEDERAL JUDICIAL CENTER, https://www.fjc.gov/history/courts/u.s.-court-appeals-veterans-claims-1999-present [https://perma.cc/AW8J-943S] (last visited May 8, 2019).

110. *Gardner*, 513 U.S. at 117–18 (emphasis added).

111. *Id.* at 120, 122.

112. 502 U.S. 215 (1991).

113. *Id.* at 216–17.

114. *Id.* at 216. The relevant section of the act was codified at 38 U.S.C. § 2024(d).

115. *King*, 502 U.S. at 216.

116. *Id.*

holding, the Court dismissed one potential argument by noting that even if ambiguity had arisen as a result of conflicting provisions, the Court would have read those provisions in light of "the canon that provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor."[117] As a result of its long history, the veteran's canon forms a part of the backdrop against which Congress legislates, and the Court explained that it relied on "congressional understanding of such interpretive principles."[118] In context, then, the best reading of the statute's language would have been the veteran-friendly one.

The veteran's canon also has a normative justification. As the Court explained in 1946, veterans' benefits statutes should be "liberally construed for the benefit of those who left private life to serve their country in its hour of great need."[119] While not going beyond what the text can bear, courts interpreting the different parts of veterans' benefits schemes should "give each as liberal a construction for the benefit of the veteran as a harmonious interplay of the separate provisions permits."[120] Only a few years before, the Court had noted that "[t]he Soldiers' and Sailors' Civil Relief Act is always to be liberally construed to protect those who have been obliged to drop their own affairs to take up the burdens of the nation."[121] These uses of the canon reflect an awareness of the sacrifices veterans have made for the United States, and the country's corresponding obligations to them. Given that three of the justices at the time of that decision were World War I veterans themselves,[122] and that all surely knew how poorly veterans had been treated in

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117. *Id.* at 221–22 n.9.

118. *Id.* (citing Fishgold v. Sullivan Drydock & Repair Corp., 328 U.S. 275, 285 (1946)). *Cf.* John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 125 (2001) (discussing "the textualists' practice of reading statutes in light of established background conventions."); Antonin Scalia, *Assorted Canards of Contemporary Legal Analysis*, 40 CASE W. RES. L. REV. 581, 583 (1989) (discussing strict construction rules and noting that "[o]nce they have been long indulged, they acquire a sort of prescriptive validity, since the legislature presumably has them in mind when it chooses its language.").

119. *Fishgold*, 328 U.S. at 285.

120. *Id.*

121. Boone v. Lightner, 319 U.S. 561, 575 (1943).

122. James D. Ridgway, *Toward A Less Adversarial Relationship Between* Chevron *and* Gardner, 9 U. MASS. L. REV. 388, 404 (2014).

the near past,[123] one might think that the veteran's canon originated as a "value-based canon created by veteran-justices."[124] However it might have originated, the canon has been in use for nearly eighty years, and in 2011, a unanimous Court noted that "[w]e have long applied 'the canon that provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor.'"[125] Simply put, the veteran's canon is a traditional tool of interpretation.

II. THE CONFLICT AS IT STANDS, AND POSSIBLE SOLUTIONS

When a court reviews a veteran's case involving ambiguous language in a statute or regulation, it faces a choice—follow the veteran's canon, or defer to the VA under *Chevron* or *Auer*.[126] Assuming that the same level of uncertainty triggers both deference doctrines and the veteran's canon,[127] that leaves courts with what appears to be an irreconcilable conflict. Justice Scalia, in a speech to the Judicial Conference of the Court of Appeals for Veterans Claims, suggested that *Chevron* and the

123. In 1932, thousands of veterans and their families went to Washington, D.C., to protest congressional inaction on veterans' benefits. They were removed from the city by use of tear gas and tanks, and the shantytown where they had been living was burned down. For a more complete telling of the story of the "Bonus Army," see James D. Ridgway, *The Splendid Isolation Revisited: Lessons from the History of Veterans' Benefits Before Judicial Review*, 3 VETERANS L. REV. 135, 176–79 (2011).

124. Ridgway, *supra* note 122, at 404.

125. Henderson v. Shinseki, 562 U.S. 428, 440–41 (2011) (quoting King v. St. Vincent's Hospital, 502 U.S. 215, 220–21 n.9 (1991)).

126. This framing assumes that the interpretation offered by the VA meets the various thresholds required for these deference doctrines to apply. *Cf.* Cass R. Sunstein, Chevron *Step Zero*, 92 VA. L. REV. 187, 247 (2006) (discussing "*Chevron* Step Zero—the inquiry into whether the *Chevron* framework applies at all"); Hickman, *supra* note 17 (observing that some lower courts have instituted an *Auer* Step Zero); William Yeatman, Note, *An Empirical Defense of* Auer *Step Zero*, 106 GEO. L.J. 515, 524 (2018) ("Notwithstanding the similarities between *Chevron* and *Auer* deference, the Supreme Court has not set forth a Step Zero for its *Auer* framework.").

127. The *Gardner* Court did not flesh out the meaning of "interpretive doubt," but after articulating the veteran's canon, it noted that "[a]mbiguity is a creature not of definitional possibilities but of statutory context," *Brown v. Gardner*, 513 U.S. 115, 118 (1994), perhaps suggesting that the terms were being used interchangeably. But nailing down a precise definition for either term is probably impossible. *Cf.* Ward Farnsworth, Dustin F. Guzior, & Anup Malani, *Ambiguity about Ambiguity: An Empirical Inquiry into Legal Interpretation*, 2 J. LEGAL ANALYSIS 257, 258 (2010) (noting that "ambiguity" is itself an ambiguous word).

veteran's canon simply could not co-exist.[128] Judge O'Malley of the Federal Circuit summed up one front in the conflict by simply saying, "Where there is a conflict between an agency's reasonable interpretation of an ambiguous regulation and a more veteran-friendly interpretation, it is unclear which interpretation controls."[129] So it remains.[130]

A. Agent Orange and the Blue Water Navy: A Case Study of the Conflict

To see what this doctrinal confusion means in practice, consider the litigation involving blue water Navy veterans and Agent Orange exposure. These Navy veterans served in the off-shore waters of Vietnam while millions of tons of herbicides like Agent Orange were sprayed in that country, and they have long contested their exclusion from the presumptions of service-connection[131] and Agent Orange exposure that the VA has granted other veterans.[132] For decades, the VA has declined to extend that presumption to blue water Navy veterans, citing high costs and a lack of scientific consensus.[133]

The Federal Circuit's recent decision in *Procopio v. Wilkie*[134] brought that sad, long story to an end, and in so doing,

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128. *See Justice Scalia Headlines the Twelfth CAVC Judicial Conference*, VETERANS L.J. 1, 1 (2013).

129. Johnson v. McDonald, 762 F.3d 1362, 1367 (Fed. Cir. 2014) (O'Malley, J., concurring).

130. *See* Procopio v. Wilkie, 913 F.3d 1371, 1387 (Fed. Cir. 2019) (en banc) (O'Malley, J., concurring) (criticizing "the court's failure—yet again—to address and resolve the tension between the pro-veteran canon and agency deference.")

131. To qualify for certain disability benefits within the VA, a veteran must establish that his disability is connected to his service in the military. For a thorough explanation of this process and the evidentiary issues involved in proving service connection, see Jessica Lynn Wherry, *Interminable Parade Rest: the Impossibility of Establishing Service Connection in Veterans Disability Compensation Claims When Records Are Lost or Destroyed*, 83 BROOK. L. REV. 477 (2018).

132. *See generally* Marimow, *supra* note 22.

133. *See, e.g.*, Nikki Wentling, *Last-ditch effort to pass Blue Water Navy bill fails in Senate*, STARS & STRIPES (Dec. 11, 2018), https://www.stripes.com/news/veterans/last-ditch-effort-to-pass-blue-water-navy-bill-fails-in-senate-1.560126 [https://perma.cc/228M-YQD3] (reporting that VA officials expressed concerns about the costs of expanding benefits to more veterans and the uncertain state of medical research on this veteran population and Agent Orange exposure). In terms of costs, the Congressional Budget Office estimated that benefits to blue water Navy veterans would cost $1.1 billion over the next ten years, but the VA contested that figure and suggested the total cost could be billions more. *Id.*

134. *Procopio*, 913 F.3d 1371.

recounted its origins. In 1991, Congress passed the Agent Orange Act, codified at 38 U.S.C. § 1116.[135] That legislation created a presumption of service connection for specific diseases ailing veterans who "served in the Republic of Vietnam."[136] Another part of the statute created a presumption of exposure to Agent Orange for veterans with qualifying service unless affirmative evidence showed otherwise.[137] For many veterans the critical question then became, "what counts as serving in the Republic of Vietnam?" In a regulation and a subsequent General Counsel opinion, the VA defined serving in the Republic of Vietnam in terms of either: (a) setting foot on the landmass of Vietnam or (b) sailing on its inland waterways.[138] That created an uphill battle for blue water Navy veterans trying to get benefits.[139]

In *Haas v. Peake*,[140] one such veteran challenged the VA's interpretation at the Federal Circuit.[141] The court in *Haas* followed the *Chevron* framework. At Step One, it held that "the statutory phrase 'served in the Republic of Vietnam' is ambiguous as applied to" off-shore service,[142] and then at Step Two, the court held that the VA's own regulation was "sufficiently ambiguous" such that it did not resolve the issue."[143] That uncertainty brought *Auer* deference into play, and the court deferred to the position outlined in the VA's General Counsel opinion.[144] Thus the veteran lost in a case in which a kind of fractal of deference doctrines led the court to agree with the VA. In arriving at that conclusion, the court never mentioned the veteran's canon.

In January of 2019, an en banc sitting of the Federal Circuit overruled *Haas* in *Procopio v. Wilkie* and found that the Agent

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135. *Id.* at 1373.

136. *Id.* (quoting 38 U.S.C. § 1116(a) (2012)).

137. *Id.*; *see* 38 U.S.C. § 1116(f).

138. *Procopio*, 913 F.3d at 1373. For the regulation, see 38 C.F.R. § 3.307(a)(6) (1993). For the General Counsel opinion interpreting that regulation, see Gen. Counsel Prec. 27-97 (July 23, 1997); 62 Fed. Reg. 63,603, 63,604 (Dec. 1, 1997).

139. *See* Marimow, *supra* note 22.

140. 525 F.3d 1168 (Fed. Cir. 2008), *overruled by* Procopio v. Wilkie, 913 F.3d 1371 (Fed. Cir 2019) (en banc).

141. *Haas*, 525 F.3d at 1172.

142. *Id.* at 1184.

143. *Id.* at 1186.

144. *Id.* at 1195.

Orange Act unambiguously extended the presumption of service connection to blue water Navy veterans.[145] Still, though the court in *Procopio* asked for briefing on the tension between the veteran's canon and deference doctrines,[146] it did not resolve that tension in its opinion.[147] So although the plight of some Vietnam veterans improved with this decision, the doctrinal confusion endures.

B. Some Possible Solutions to the Conflict Between Chevron, Auer, and the Veteran's Canon

What should the Federal Circuit do? Scholars and veterans law practitioners have offered various solutions to the problem.[148] In her article discussing the issue, Professor Jellum lamented the way that "the [Supreme] Court transformed [the veteran's canon] from liberal construction canon to a trump card that veterans could assert to defeat reasonable agency interpretations."[149] In part, Jellum theorized, this stemmed from the Supreme Court's failure to recognize the conflict with *Chevron* that *Gardner* could create.[150] Ultimately, Jellum recommended that at the very least the veteran's canon be restored to its status as a liberal construction canon,[151] and that ideally, the veteran's canon "might be viewed as a duty belonging to the VA rather than as an interpretive tool belonging to courts."[152] Per Jellum, that transformation of the veteran's canon would settle the conflict with *Chevron* and encourage the VA to make policy with all veterans in mind, instead of running the risk that a single veteran might use the

145. *Procopio*, 913 F.3d at 1375.

146. *Id.* at 1374.

147. *Id.* at 1380 (noting that because the issue was resolved at *Chevron* Step One, the court did not need to decide what "role the pro-veteran canon should play in this analysis.").

148. *See* Jellum, *supra* note 105, at 59–60; Ridgway, *supra* note 122, at 391–92; Ryan, *supra* note 105, at 26.

149. Jellum, *supra* note 105, at 68.

150. *Id.* at 73–74.

151. *Id.* at 106. That development would be unlikely to satisfy those who see a search for a "liberal construction" as "an open invitation to engage in 'purposive' rather than textual interpretation." *See* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS, 364–65 (2012).

152. Jellum, *supra* note 105, at 103.

veteran's canon to "hijack the interpretive process from the VA."[153]

Professor Ridgway suggested that a reconciliation of the values of agency deference and veteran-friendliness could be achieved by conditioning the application of either deference or the veteran's canon on "the overall strength of the arguments on a systemic level."[154] That is, veterans would need to demonstrate that their interpretation would be more beneficial to veterans as a whole, and the VA would need to show "the systemic considerations and policy judgments" that informed their decision.[155] That approach would not involve a "rigid *ex ante* hierarchy" between the veteran's canon and deference doctrines.[156] Instead, it would allow judges greater flexibility to evaluate the strengths and weaknesses of each litigant's case. Moreover, Ridgway reasoned, that approach would create an incentive for parties to give the courts more information so as to better understand the wider effects of any given decision. Ultimately, Professor Ridgway argued, that incentive structure would lead to a more informed judicial oversight of the system.[157]

III. COURTS SHOULD RECOGNIZE THE VETERAN'S CANON AS A TRADITIONAL TOOL OF INTERPRETATION

This Note argues for a different course: Courts should resolve this conflict by holding that the veteran's canon is a traditional tool of interpretation that applies before agency deference doctrines come into play. That is, at *Chevron* Step One, or when interpreting an ambiguous VA regulation, courts should apply the veteran's canon to resolve ambiguity before deferring to the VA's interpretation. Such an approach has already received the imprimatur of several veterans' organizations—in the *Procopio* litigation, several veterans

153. *Id.* at 113.

154. Ridgway, *supra* note 122, at 417.

155. *Id.*

156. *Id.*

157. *See id.* at 417–18. For an extended argument that judicial oversight of high volume administrative adjudication systems like the VA's can be beneficial, see Jonah B. Gelbach & David Marcus, *Rethinking Judicial Review of High Volume Agency Adjudication*, 96 TEX. L. REV. 1097 (2018).

organizations argued for this result with regards to *Chevron*.[158] And in *Procopio*, Judge O'Malley authored a concurrence advocating this solution.[159] It is time to give veterans the benefit of the doubt in cases where the veteran's canon collides with *Chevron* and *Auer*.

A. The Veteran's Canon is a Traditional Tool of Interpretation

Courts should recognize that the veteran's canon is a traditional tool of interpretation. That would simplify veterans law because it maps onto the interpretive framework courts already use. In *Chevron*, the Court noted that "If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect."[160] *Auer* might be similarly formulated—only after the use of traditional tools of interpretation should any remaining ambiguity be resolved by deferring to an agency's interpretation of its own regulation.[161]

Writing for a unanimous Court in *Henderson*, Justice Alito observed that the Court has "long applied 'the canon that provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor.'"[162] Unquestionably, that is so. For almost eighty years, the veteran's canon has maintained a place in Supreme Court jurisprudence.[163] One

158. *See, e.g.*, Brief for Disabled American Veterans as Amicus Curiae Supporting Claimant-Appellant, Procopio v. Wilkie, 913 F.3d 1371 (Fed. Cir. 2019) (No. 2017-1821); Brief for the National Veterans Legal Services Program and the Veterans of Foreign Wars of the United States as Amici Curiae Supporting Claimant-Appellant, Procopio v. Wilkie, 913 F.3d 1371 (Fed. Cir. 2019) (No. 2017-1821). Note that veterans' organizations did not take a uniform approach to this question. *See* Brief for the American Legion as Amicus Curiae Supporting Claimant-Appellant, Procopio v. Wilkie, 913 F.3d 1371 (Fed. Cir 2019) (No. 2017-1821) (arguing that the veteran's canon should operate as a limitation on what counts as a "reasonable" interpretation under *Chevron*).

159. *Procopio*, 913 F.3d at 1382 (O'Malley, J., concurring).

160. Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843 n.9 (1984).

161. *See* Sunstein & Vermeule, *supra* note 17, at 321 ("Use the conventional tools of interpretation, and if ambiguity remains, the agency's interpretation prevails.").

162. Henderson v. Shinseki, 562 U.S. 428, 441 (2011).

163. Boone v. Lightner, 319 U.S. 561, 575 (1943) ("The Soldiers' and Sailors' Civil Relief Act is always to be liberally construed to protect those who have been obliged to drop their own affairs to take up the burdens of the nation.").

would think that this long history demonstrates that the veteran's canon is a traditional tool of interpretation.

Yet the Court has not offered much guidance about what constitutes a traditional tool of interpretation. In the *Chevron* context, that led then-Judge Gorsuch to complain, "In deciding whether Congress has 'directly spoken' to a question or left it 'ambiguous,' what materials are we to consult? The narrow language of the statute alone? Its structure and history? Canons of interpretation? Committee reports? Every scrap of legislative history we can dig up?"[164] The answers to those questions were not clear then, and they are not perfectly clear now.

But since arriving at the Supreme Court, Justice Gorsuch has given some guidance to lower courts. In *Epic Systems Corp. v. Lewis*,[165] he explained that one reason for rejecting the agency's *Chevron* argument was that "the canon against reading conflicts into statutes is a traditional tool of statutory construction and it, along with the other traditional canons we have discussed, is more than up to the job of solving today's interpretive puzzle. Where, as here, the canons supply an answer, '*Chevron* leaves the stage.'"[166]

In developing that answer, the Court also relied on "the usual rule that Congress 'does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes.'"[167] Both those canons reflect presumptions about how Congress legislates.[168] Similarly, the veteran's canon reflects a presumption about how Congress legislates in veterans law. The Court has recognized that the "pattern of legislation

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164. Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1157 (10th Cir. 2016) (Gorsuch, J., concurring).

165. 138 S. Ct. 1612 (2018).

166. *Id.* at 1630 (quoting Nat'l Labor Relations Bd. v. Alternative Entm't, Inc., 858 F.3d 393, 417 (6th Cir. 2017) (Sutton, J., dissenting)).

167. *Id.* at 1626–27 (quoting Whitman v. American Trucking Assns., Inc., 531 U.S. 457, 468 (2001)). The Court also used the *ejusdem generis* canon to make sense of the statutory language. *Id.* at 1625.

168. *Id.* at 1624 (explaining that "in approaching a claimed conflict, we come armed with the stron[g] presum[ption] that repeals by implication are disfavored and that Congress will specifically address preexisting law when it wishes to suspend its normal operations in a later statute.") (internal quotation marks omitted); *id.* at 1627 (observing that "[i]t's more than a little doubtful that Congress would have tucked into the mousehole of Section 7's catchall term an elephant that tramples the work done by these other laws").

dealing with this subject" shows that the "solicitude of Congress for veterans is of long standing."[169] Hence "Congress's understandable decision to place a thumb on the scale in the veteran's favor in the course of administrative and judicial review of VA decisions."[170] In light of Congress's abiding concern for veterans and Congress's pattern of legislation in veterans law, the veteran's canon reflects a reasonable presumption about how Congress legislates in this context. Like the canons used in *Epic Systems*, the veteran's canon should be applied before deference doctrines come on stage.[171]

The veteran's canon resembles another traditional canon that courts have applied to resolve ambiguity before turning to deference doctrines—the so-called "Indian canon."[172] As Judge O'Malley has noted, the veteran's canon resembles the traditional canon of construction that calls for ambiguity in Indian law to be resolved in favor of Native American tribes.[173] Both canons reflect the unique relationships between particular

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169. United States v. Oregon, 366 U.S. 643, 647 (1961).

170. Shinseki v. Sanders, 556 U.S. 396, 416 (2009) (Souter, J., dissenting).

171. *Epic Systems* was certainly not the first time the Court had applied traditional canons and therefore found *Chevron* inapplicable. *See, e.g.*, Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Const. Trades Council, 485 U.S. 568, 574–75 (1988) (noting that *Chevron* deference would normally apply unless the agency's construction failed Step Two, but resolving the case by reference to the canon of constitutional avoidance); *see also* Kenneth A. Bamberger, *Normative Canons in the Review of Administrative Policymaking*, 118 YALE L.J. 64, 77–78 (2008) (collecting additional examples of canons prevailing over *Chevron*).

172. *See generally* Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 HARV. L. REV. 381 (1993); Note, *Indian Canon Originalism*, 126 HARV. L. REV. 1100 (2013). Because it is the standard practice of judges and scholars to use the term "Indian canon," this Note follows suit. But note that although some indigenous people consider themselves "Indian" or "American Indian," others prefer to identify with their specific tribes and nations. *See* Amanda Blackhorse, *Do You Prefer "Native American" or "American Indian"?*, INDIAN COUNTRY TODAY (May 22, 2015), https://newsmaven.io/indiancountrytoday/archive/blackhorse-do-you-prefer-native-american-or-american-indian-kHWRPJqIGU6X3FTVdMi9EQ/ [https://perma.cc/TFD8-89YU] (interviewing individuals with varied approaches to questions of identity); Amanda Blackhorse, *Native American? American Indian? Nope.*, INDIAN COUNTRY TODAY (Aug. 14, 2017), https://newsmaven.io/indiancountrytoday/archive/blackhorse-native-american-american-indian-nope-hNAQB_MRSk-07Cw1hAF8Xw/ [https://perma.cc/F2W5-LLCS] (same).

173. Procopio v. Wilkie, 913 F.3d 1371, 1386 (Fed. Cir. 2019) (en banc) (O'Malley, J., concurring).

groups and the government, and the duties owed by the government to those groups.[174] Both canons are traditional tools of interpretation,[175] and both canons can help hold the government to its promises.[176]

Indeed, Justice Gorsuch has observed that the application of the Indian canon is a particular instantiation of a broader principle from contract law—"we normally construe any ambiguities against the drafter who enjoys the power of the pen."[177] Admittedly, the contract analogy fits imperfectly with veteran's law.[178] But politicians often speak of what we owe to our veterans,[179] and the gross asymmetry of power between veterans and the government suggests that the principles underlying the rule of *contra proferentem* could support the use of the veteran's canon, too.[180] Relying on these rationales,

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174. *Id.* at 1386–87.

175. For the proposition that the Indian canon is a traditional tool of statutory interpretation, see Cty. of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation, 502 U.S. 251, 269 (1992) (Scalia, J.) (noting that the Indian canon is "a principle deeply rooted in this Court's Indian jurisprudence"); Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 582 (1832) (M'Lean, J., concurring) ("The language used in treaties with the Indians should never be construed to their prejudice.").

176. *See, e.g.*, Wash. State Dep't of Licensing v. Cougar Den, Inc., 139 S. Ct. 1000, 1016–22 (2019) (Gorsuch, J., concurring) (construing the treaty in favor of tribe to hold government to terms of treaty); *Procopio*, 913 F.3d at 1387 (O'Malley, J., concurring) (explaining that the veteran's canon flows from the conviction that "those who served their country are entitled to special benefits from a grateful nation").

177. *Cougar Den, Inc.*, 139 S. Ct. at 1016 (Gorsuch, J., concurring); *see also* Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109, 152 (2010) (discussing the Indian canon's origins in treaty interpretation as "essentially a rule of contract interpretation").

178. *See* Levy v. Brown, 6 Vet. App. 23, 24 (1993) ("It is well settled that veterans have no contractual or vested right to an initial receipt of VA benefits. VA benefits involve no agreement of the parties and may be redistributed or withdrawn at any time in the discretion of Congress." (internal quotation marks omitted)).

179. *See, e.g.*, 130 Cong. Rec. 29,944 (1984) (statement of Sen. Alan Simpson) ("America has always recognized a special responsibility to care for those whose injuries or illnesses are a consequence of military service. An extraordinary varied network of veterans programs and benefits is proof of our regard for the sacrifices rendered by men and women in uniform—past and present. The compensation program fulfills the nation's promise to veterans disabled in the line of duty. The rules and regulations for this program are designed to make certain no veteran's reasonable claim of disability resulting from military service is overlooked or ignored.").

180. Turner Const. Co. v. United States, 367 F.3d 1319, 1321 (Fed. Cir. 2004) (describing "the rule of *contra proferentem*, which requires that ambiguous or

courts have found that in the context of Indian law, "the canon of construction favoring Native Americans controls over the more general rule of deference to agency interpretations of ambiguous statutes."[181] Like the Indian canon, the veteran's canon has deep roots in our jurisprudence, reflects the unique relationship between the government and a particular population, and helps the government fulfill the obligations flowing from that relationship. Like the Indian canon, the veteran's canon should be applied as a traditional tool of interpretation before courts turn to *Chevron* or *Auer*.

Moreover, this interpretive order of operations—applying the veteran's canon before relying on *Chevron* or *Auer*—follows from the Supreme Court's decision in *Gardner*. The language and logic of that opinion suggest that courts should apply the veteran's canon before turning to deference doctrines.[182] Admittedly, the decision did not depend on that interpretive hierarchy.[183] But in dismissing one of the VA's arguments for deference, the Court relied in part on *Chevron* itself.[184] In light of that use of *Chevron*, consider the Court's statement that ambiguity triggering deference to the VA's interpretation would only arise if such ambiguity existed *after* the application of the veteran's canon.[185] That indicates that courts should only defer to the VA's interpretation when neither a text's plain language nor the veteran's canon can decide the case. As the

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unclear terms that are subject to more than one reasonable interpretation be construed against the party who drafted the document.").

181. Ramah Navajo Chapter v. Lujan, 112 F.3d 1455, 1462 (10th Cir. 1997); Cobell v. Norton, 240 F.3d 1081, 1101 (D.C. Cir. 2001) (same). *But see* Haynes v. United States, 891 F.2d 235, 239 (9th Cir. 1989) (explaining that the Ninth Circuit does not apply the Indian canon in such cases "in light of competing deference given to an agency charged with the statute's administration").

182. *See* Jellum, *supra* note 105, at 73 (discussing the *Gardner* Court's treatment of the veteran's canon and describing it as "a directive to courts to resolve any interpretive doubt in the veteran-litigant's favor—even in the face of a contrary agency interpretation").

183. Instead, the Court found that VA's regulation contradicted "the plain language of the statutory text," and that "exempt[ed] courts from any obligation to defer to it." Brown v. Gardner, 513 U.S. 115, 122 (1994).

184. *Id.*

185. *Id.* at 117–18 ("The most, then, that the Government could claim on the basis of this term is the existence of an ambiguity to be resolved in favor of a fault requirement . . . assuming that such a resolution would be possible after applying the rule that interpretive doubt is to be resolved in the veteran's favor.") (citation omitted).

Gardner Court also explained, "Ambiguity is a creature not of definitional possibilities but of statutory context."[186] In the statutory context of veterans' benefits, the Court's precedent offers an answer to the question of how to resolve ambiguity: Courts, following *Gardner*'s logic, should apply the veteran's canon before looking to *Chevron* or *Auer*.

Applying the veteran's canon as a traditional tool of interpretation would also accord with Congress's design of judicial review of veteran's claims. As Justice Alito explained in *Henderson*, courts should understand the veterans benefits system in light of "the singular characteristics of the review scheme that Congress created for the adjudication of veterans' benefits claims."[187] As a general matter, "[t]he contrast between ordinary civil litigation . . . and the system that Congress created for the adjudication of veterans' benefits claims could hardly be more dramatic."[188] For example, veterans seeking benefits do not face the statutes of limitations governing most claims in civil litigation, and the first rounds of adjudication with the VA are "informal and nonadversarial."[189] The VA must help veterans collect the evidence for their claims, and when weighing that evidence, "the VA must give the veteran the benefit of any doubt."[190] If the veteran does not prevail at that first stage, she can appeal to the Board of Veterans Appeals, and if she loses there, she can appeal to the Veterans Court.[191] In contrast, if the VA loses at the Board, that decision is final.[192] Finally, if a veteran exhausts his options, the claim

186. *Id.* at 118.

187. Henderson v. Shinseki, 562 U.S. 428, 440 (2011).

188. *Id.*

189. *Id.* Congress certainly designed the VA process to be a non-adversarial one, but many veterans do not experience it as such. *See* Stacey-Rae Simcox, *Thirty Years after* Walters *the Mission Is Clear, the Execution Is Muddled: A Fresh Look at the Supreme Court's Decision to Deny Veterans the Due Process Right to Hire Attorneys in the VA Benefits Process*, 84 U. CIN. L. REV. 671, 727 (2016) (observing that the "oft repeated comment on the VA's attitude towards veterans 'delay, deny until I die' is heard echoed by veterans at many of these town halls"); Seth Harp, *Veterans Go Back to Court Over Burn Pits. Do They Have a Chance?*, N.Y. TIMES (May 17, 2018), https://www.nytimes.com/2018/05/17/magazine/burn-pits-veterans.html [https://nyti.ms/2Gr7p4K] (discussing the difficulties faced by some veterans in VA adjudications).

190. *Henderson*, 562 U.S. at 440.

191. *Id.* at 440–41.

192. *Id.* at 441.

can be reopened if the veteran presents "new and material evidence."[193] As Justice Breyer has observed, "Congress has made clear that the VA is not an ordinary agency."[194]

So even if one thinks agencies should ordinarily enjoy the benefit of the doubt in interpretation, the substantive and procedural protections Congress gave veterans in designing the benefits adjudication system support an exception to that rule. Criminal law provides a useful analogy on this point. In that system, "ambiguity typically favors the defendant. If there is reasonable doubt, no conviction . . . And if a statute is ambiguous, courts construe the statute in the criminal defendant's favor."[195] In veterans law, veterans already receive the benefit of the doubt in weighing evidence.[196] Just as criminal law's reasonable doubt standard pairs well with the rule of lenity, the claimant-friendly evidentiary standard of veterans law pairs well with the veteran's canon. These complementary elements of veterans law fit with the veteran-friendly scheme Congress has designed. In light of that design, Justice Scalia was wrong to think that it would be anomalous for the VA to receive a different level of deference than other agencies.[197] If anything, the truly anomalous result would be the VA getting the same sort of deference that other agencies receive.

This application of the veteran's canon would also line up with Congress's rationale for introducing judicial review of VA decisions. In response to a movement led by Vietnam veterans who believed judicial review would help them receive benefits for post-traumatic stress disorder and exposure to Agent Orange, [198] Congress made judicial review of VA decisions available in 1988.[199] As a part of that process, Congress has

193. *Id.*

194. Shinseki v. Sanders, 556 U.S. 396, 412 (2009) (Breyer, J.) (internal citations omitted).

195. United States v. Havis, 907 F.3d 439, 451 (6th Cir. 2018) (Thapar, J., concurring) (citations omitted).

196. *Henderson*, 562 U.S. at 440.

197. *See Justice Scalia Headlines the Twelfth CAVC Judicial Conference*, *supra* note 128, at 12.

198. James D. Ridgway, *Fresh Eyes on Persistent Issues: Veterans Law at the Federal Circuit in 2012*, 62 AM. U. L. REV. 1037, 1046 (2013).

199. James D. Ridgway, *The Splendid Isolation Revisited: Lessons from the History of Veterans' Benefits Before Judicial Review*, 3 VETERANS L. REV. 135, 135–36 (2011).

commanded the CAVC to "decide all relevant questions of law, interpret constitutional, statutory, and regulatory provisions, and determine the meaning or applicability of the terms of an action of the Administrator."[200] Furthermore, in reviewing CAVC decisions, Congress has instructed the Federal Circuit to "decide all relevant questions of law, including interpreting constitutional and statutory provisions."[201] Congress introduced two layers of independent review of interpretive questions to the veterans' benefits adjudication system because the VA was struggling to meet the needs of veterans. Given that historical context, Congress's underlying rationale for instituting judicial review supports applying the veteran's canon as a conventional tool of interpretation.

For all these reasons—the long history of the veteran's canon, its similarity to other traditional canons, its place within *Gardner*'s suggested order of operations, and its close fit with the design and rationale of the VJRA—the veteran's canon should be recognized as a traditional tool of interpretation. Having argued that this is the right result, this Note now makes the case that it is also a good one.

B. The Veteran's Canon Addresses Recurring Problems of Proof in Veterans Law

The veteran's canon addresses recurring evidentiary problems faced by veterans. Veterans law often involves unique problems of proof.[202] Sometimes, for instance, medical research takes decades to find the link between a veteran's service and a disease or disorder. The saga of veterans exposed to Agent Orange provides one example of that dynamic. The U.S. military stopped using Agent Orange almost fifty years

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200. Veterans' Judicial Review Act, Pub. L. No. 100–687, § 301(a), 102 Stat. 4115, § 4061 (1988) (codified at 38 U.S.C. § 7261(a)(1) (2012)).

201. *Id.* at 102 Stat. 4120, § 4092 (1988) (codified at 38 U.S.C. § 7292(d)(1)); *see also* Shinseki v. Sanders, 556 U.S. 396, 411 (2009) ("Statutes limit the Federal Circuit's review to certain kinds of Veterans Court errors, namely, those that concern 'the validity of . . . any statute or regulation . . . or any interpretation thereof.'").

202. *Cf.* Daniel L. Nagin, *The Credibility Trap: Notes on a VA Evidentiary Standard*, 45 U. MEM. L. REV. 887, 898 (2015) (observing that "substantial gaps in time between a veteran's military service and the adjudication of his or her claim can create difficult evidentiary questions").

ago,[203] and yet scientific uncertainty about who was exposed and the effects of such exposure persists even now.[204] Some VA officials used that uncertainty to argue against extending benefits to blue water Navy veterans like Mr. Procopio until after further study could be completed.[205] The problems with that wait-and-see approach are threefold. First, scant evidence exists to help researchers know precisely who was serving in a particular operational area when Agent Orange was being dropped.[206] Second, decades of studies about Agent Orange have returned uncertain results,[207] and so it is perhaps unduly optimistic to think one more study will settle the question. Third, as all that research goes on, many veterans suffer and wait, and some die without ever receiving any help.

Sometimes history rhymes. As veterans from Iraq and Afghanistan develop diseases that may have been caused by exposure to toxic materials at burn pits—places where all kinds of trash was doused in jet fuel and burned—they too are finding that the VA denies their claims and cites a lack of scientific backing and evidentiary support.[208] That kind of scientific uncertainty, combined with the chronic problem of

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203. Agent Orange was used as a part of Operation Ranch Hand, a mission that ran from 1962 to 1971, in which millions of gallons of herbicides were sprayed on the Vietnamese mainland. *See* Haberman, *supra* note 20.

204. *See* Marimow, *supra* note 22; *see also* SIDATH VIRANGA PANANGALA & DANIEL T. SHEDD, CONG. RESEARCH SERV., VETERANS EXPOSED TO AGENT ORANGE: LEGISLATIVE HISTORY, LITIGATION, AND CURRENT ISSUES 1–14 (2014), https://fas.org/sgp/crs/misc/R43790.pdf [https://perma.cc/F8BY-LZCS] (discussing some of the studies on Agent Orange's effects and the uncertain conclusions of those studies).

205. *See* Marimow, *supra* note 22.

206. *See* Haas v. Peake, 525 F.3d 1168, 1176 (Fed. Cir. 2008) (noting "the many uncertainties associated with herbicide spraying during that period which are further confounded by lack of precise data on troop movements at the time") (internal citations omitted) *overruled on other grounds by* Procopio v. Wilkie, 913 F.3d 1371 (Fed. Cir. 2019) (en banc).

207. *See* Charles Ornstein, *Agent Orange Act Was Supposed to Help Vietnam Veterans — But Many Still Don't Qualify*, PROPUBLICA (July 17, 2014, 4:00 PM), https://www.propublica.org/article/agent-orange-act-was-supposed-to-help-vietnam-veterans-but-many-still-dont- [https://perma.cc/JYZ6-K4QC].

208. Jennifer Steinhauer, *Congress Poised to Help Veterans Exposed to 'Burn Pits' Over Decades of War*, N.Y. TIMES (Feb. 12, 2019), https://www.nytimes.com/2019/02/12/us/politics/veterans-burn-pits-congress.html [https://nyti.ms/2UWKtlv].

service records being lost or destroyed,[209] means veterans often fight an uphill battle to get benefits.[210] When such cases are caught in legal limbo, the veteran's canon could help some veterans escape by ensuring that linguistic uncertainty does not compound the problems generated by evidentiary uncertainty. Certain problems of proof are endemic to veterans law, and courts should consider how the veteran's canon might offset them.

C. This Use of Veteran's Canon Improves VA's Incentives and Simplifies Adjudication

Applying the veteran's canon before deferring to agencies would also change the VA's incentives at lower levels of adjudication. VA officials would know that if a close case made it to court, they could not count on *Auer* or *Chevron* to win the day.[211] That, in turn, could lead the VA to grant more veteran's claims in close cases at lower levels of adjudications, thereby reducing the number of appeals veterans make and cutting down on the backlog in the system.[212] The VA has a host of

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209. Wherry, *supra* note 131, at 480 ("Lost records are a well-known and widespread challenge to veterans seeking disability compensation.").

210. Some of the health risks faced by servicemembers are not limited to wartime service, nor to servicemembers alone. *See, e.g.*, *Public Health*, U.S. DEP'T OF VETERANS AFF. (Feb. 22, 2019), https://www.publichealth.va.gov/exposures/camp-lejeune/ [https://perma.cc/WH6R-MWJR] ("From the 1950s through the 1980s, people living or working at the U.S. Marine Corps Base Camp Lejeune, North Carolina, were potentially exposed to drinking water contaminated with industrial solvents, benzene, and other chemicals.").

211. The suggestion is not that the front-line adjudicators in the VA's system are (or even should try to be) sensitive to shifts in the controlling interpretive regime. Instead, the contention is that insofar as higher-level agency officials and attorneys consider likely legal outcomes in their decisionmaking, a change in this area of the law would then have downstream effects within the VA.

212. The backlog in the system is caused in part by the procedural asymmetries that benefit veterans. Though some reforms have been made, the backlog remains substantial, and a recent investigation found that the VA had underreported the number of backlogged cases. *See* Leo Shane III, *Watchdog report: The VA benefits backlog is higher than officials say*, MILITARY TIMES (Sept. 10, 2018), https://www.militarytimes.com/news/2018/09/10/watchdog-report-the-va-benefits-backlog-is-higher-than-officials-say/ [https://perma.cc/FDF6-GTH7]. Sadly, it also appears that the VA's internal quality control regime has failed to provide an accurate accounting of its error rate. *See* Daniel E. Ho & David Marcus, *When the VA misrepresents performance, veterans suffer*, THE HILL (Mar. 5, 2019, 7:30AM), https://thehill.com/opinion/national-security/432196-when-the-va-misrepresents-performance-veterans-suffer [https://perma.cc/Z7FX-PPLW] (reporting the results of

pressures it must respond to, but all else being equal, this doctrinal shift would at least alter the agency's litigation calculus in favor of veteran-friendly resolutions.

Moreover, this sequencing of the veteran's canon with the agency deference doctrines does not entirely eliminate the VA from the process of interpretation. Nor should it.[213] So where the veteran's canon cannot resolve ambiguity, courts could then turn to those deference doctrines. That might be a rare situation, as "the veteran's interpretation will almost always be the most veteran-friendly."[214] But when it is not clear which interpretation best serves veterans,[215] courts could still defer to agency analysis on the issue. Instead of removing the VA from the interpretive process entirely, this approach channels VA's decisionmaking and litigation efforts toward the agency's goal of serving veterans. That would be good for the VA, and good for veterans.

This approach is also conceptually simpler than alternatives which involve balancing a host of factors. That could help non-lawyers making decisions at the Regional Office level of the VA, as well as the many veterans who navigate the system

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extensive analysis and finding that the Board of Veterans' Appeals "is seriously misrepresenting its performance.").

213. It is worth noting that about one third of VA employees are veterans themselves. *See* Leo Shane III, *VA by the numbers: Has the department made progress?*, MILITARY TIMES (Jan. 16, 2017), https://www.militarytimes.com/veterans/2017/01/16/va-by-the-numbers-has-the-department-made-progress/ [https://perma.cc/UW3H-7A5S]. Moreover, many within the VA are doing about as well as anyone could pursuing a challenging mission within the constraints of a complex system. As Professor Ridgway has pointed out, critics of the current system should avoid falling "into the easy trap of demonizing and blaming people who do their best to make it work . . . . That lazy mental shortcut harms not only public servants who are doing their best, but also veterans . . . ." Mark Hay, *America Has Been Screwing Over Its Veterans Since the Revolutionary War*, VICE NEWS (Feb. 20, 2017), https://www.vice.com/en_us/article/ezqzdm/america-has-been-screwing-over-its-veterans-since-the-revolutionary-war [https://perma.cc/Y9CG-PVDZ] (quoting Professor Ridgway).

214. Jellum, *supra* note 105, at 110. Insofar as one worries that this solution shifts power from an expert agency to an inexpert court, one should recognize that the veteran's canon empowers veterans themselves—and it seems safe to say that veterans have a particular kind of expertise when it comes to assessing their own needs.

215. In such cases, veterans service organizations could also present their positions as amici (as they often do now in significant cases) and help courts know when there is no clear answer to the question of what will best serve veterans.

without counsel.[216] To whatever extent the perverse incentives critique of *Auer* applies here, this interpretive order of operations would also encourage the VA to draft regulations with greater clarity and precision. In both adjudication and regulation, this use of the veteran's canon could simplify and clarify veterans law.

D. Concerns About Stability, Cost, and Uniformity Should Not Keep Courts from Taking this Approach

This Note's suggested approach could be attacked along at least three lines, and this section addresses potential counter-arguments sounding in stability, cost, and uniformity. Although some of these concerns carry more weight than others, none should dissuade courts from treating the veteran's canon as a traditional tool of interpretation.

Stability is a central value of our legal order.[217] Taking that as a point of departure, one might argue that this Note's approach would destabilize veterans law by calling into question decisions that relied on *Auer* or *Chevron* without addressing the veteran's canon.[218] At least two factors should mitigate that concern. First, courts should recognize that *Auer* and *Chevron* themselves introduce some instability into the law because (within certain limits) those doctrines allow agencies to change their minds about the meaning of a statute or regulation.[219] A

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216. James D. Ridgway, *Why So Many Remands: A Comparative Analysis of Appellate Review by the United States Court of Appeals for Veterans Claims*, 1 VETERANS L. REV. 113, 132, 160 (2009) (observing that many veterans proceed pro se or with the help of a non-attorney from a veterans service organization).

217. *Cf.* Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting) ("Stare decisis is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right.").

218. Concerns about stability and the place of precedent played a major role in *Kisor*'s oral argument. For instance, Justice Ginsburg raised questions about the potential effects of overturning *Auer* on lower court decisions that relied on that doctrine. *See* Transcript of Oral Argument at 29–30, Kisor v. Wilkie, No. 18-15 (argued Mar. 27, 2019).

219. *See* Nat'l Cable & Telecommunications Ass'n v. Brand X Internet Servs., 545 U.S. 967, 981, (2005) ("Agency inconsistency is not a basis for declining to analyze the agency's interpretation under the *Chevron* framework."); Smiley v. Citibank (S. Dakota), N.A., 517 U.S. 735, 742 (1996) (noting that "if [certain] pitfalls are avoided, change is not invalidating, since the whole point of *Chevron* is to leave the discretion provided by the ambiguities of a statute with the implementing agency"); Perez v. Mortg. Bankers Ass'n, 135 S. Ct. 1199, 1207 (2015) (observing

jurist might conceive of that phenomenon as a good thing insofar as it leaves an agency with flexibility to respond to changing circumstances. Some measure of instability, under that view, is the price paid for flexibility.[220] But even under that view, the relevant choice is not between a status quo with a stable body of law and some brave new world; the choice is between forms of instability. Moreover, in veterans law in particular, the confused and confusing state of the doctrine on this issue means that almost any resolution of this particular issue would make this body of law relatively more stable than it is now.[221] Stability in law can be a great virtue. But the inherent instability (or flexibility) of *Auer* and *Chevron* and the uncertain state of the doctrine in veterans law mean that stability does not necessarily weigh against using the veteran's canon as a traditional tool of interpretation. For the same reasons, stability may well weigh in favor of exactly that resolution.

Just as courts should not consider the doctrinal transition costs of this approach against an unreal baseline, so they should not consider the fiscal costs of this approach in a vacuum. To be sure, giving veterans the benefit of the doubt could increase costs.[222] Moreover, having the best of intentions does nothing to prevent the worst of results,[223] and a lack of

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that "Congress decided to adopt standards that permit agencies to promulgate freely [interpretive] rules—whether or not they are consistent with earlier interpretations").

220. *See* United States v. Mead Corp., 533 U.S. 218, 247 (2001) (Scalia, J., dissenting)

(praising the *Chevron* regime for avoiding ossification in law because "[w]here *Chevron* applies, statutory ambiguities remain ambiguities subject to the agency's ongoing clarification.").

221. Jellum, *supra* note 105, at 102 ("In sum, the Federal Circuit has approached the *Chevron*/*Gardner* conflict somewhat inconsistently."). For a similar criticism of the Veterans Court's inconsistent jurisprudence on the issue, see *id.* at 84–85.

222. *See, e.g.*, Wentling, *supra* note 133 (discussing the increased costs of allowing blue water Navy veterans to claim benefits related to Agent Orange exposure).

223. *Cf.* James D. Ridgway, *Fresh Eyes on Persistent Issues: Veterans Law at the Federal Circuit in 2012*, 62 AM. U. L. REV. 1037, 1044–45 (2013) ("[t]he proliferation of procedures intended to make the system more 'veteran friendly' has, in fact, made the system forbidding to claimants and caused increasingly painful delays."). Given the ever-present potential for unintended consequences stemming from legal reforms, those of us in the law might do well to consider the medical concept of "iatrogenic" harm—from the Greek "*iatros*," meaning "healer," it refers to unintentional injury caused by a medical professional who is trying to

reliable empirical data on the veterans' benefits system makes it hard to anticipate what the full consequences of any given change will be.[224] But courts should not ignore the costs of maintaining the status quo.

Part of that status quo is the staggeringly high rate of suicide among veterans. We lose about twenty veterans to suicide every day.[225] At that rate, more than 7,000 veterans take their own lives each year.[226] To make visible what is too often invisible—the price of doing nothing—imagine a world in which some enemy of the United States killed 7,000 servicemembers each year. How much money would Congress pour into making war on that enemy? Or to illustrate the point another way, consider that statistic in terms of the value the government usually assigns a human life when carrying out cost-benefit analysis (roughly nine million dollars).[227] Doing that grim math (7,000 lives × $9,000,000 per life) yields this figure: $63,000,000,000, or 63 billion dollars. That war hypothetical and the reductionist cost-benefit analysis are offered only to give some idea of the urgent need for reform. Certainly, this Note's suggested approach will come with certain costs, and it may only make marginal contributions to addressing many of the pressing issues facing veterans today. But when evaluating the relative costs and benefits of that approach, the price of inaction should be considered, too.

Finally, one of the strongest arguments in favor of *Chevron* and *Auer*—uniformity—does not apply in the context of

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help. *See* Paul B. Klaas et al., *When Patients Are Harmed, But Are Not Wronged: Ethics, Law, and History*, 89 MAYO CLINIC PROCEEDINGS 1279, 1279–80 (2014).

224. Ridgway, *supra* note 223, at 1053 ("Unfortunately, veterans law currently lacks a resource for reliable information on many of the complexities that would be important to making well crafted [sic] policy.").

225. Jennifer Steinhauer, *V.A. Officials, and the Nation, Battle an Unrelenting Tide of Veteran Suicides*, N.Y. TIMES (April 14, 2019), https://www.nytimes.com/2019/04/14/us/politics/veterans-suicide.html [https://nyti.ms/2DbEZgk].

226. A host of factors contribute to that tragic figure. *See id.* For one veteran's perspective on the issue, see Danny O'Neel, *I survived combat in Iraq and a suicide attempt at home. But many veterans aren't so lucky.*, USA TODAY (Jan. 16, 2019, 6:00 AM), https://www.usatoday.com/story/opinion/voices/2019/01/16/veteran-affairs-suicide-military-iraq-war-column/2580957002/ [https://perma.cc/GZ99-YQVB].

227. *See* CASS R. SUNSTEIN, THE COST-BENEFIT REVOLUTION 39 (2018) (noting that the government uses that figure for the value of a statistical life when performing cost-benefit analysis).

veterans law. Proponents of *Chevron* and *Auer* argue that without these doctrines, circuit splits would force agencies and regulated parties to track the opinions of various courts throughout the country in order to know what law governs in any particular area.[228] That is a fair point, and one that critics of the current regime must answer.[229] But it has no weight here. Like a state court system with "a single line of appellate courts and thus no real prospect for a split of judicial authority,"[230] the structure of veterans law ensures uniformity. With the Court of Appeals for Veterans Claims (CAVC) having exclusive jurisdiction over decisions of the Board of Veterans' Appeals,[231] and the Federal Circuit having exclusive jurisdiction to review CAVC decisions,[232] uniformity can be maintained through judicial review.

IV. CONCLUSION

Ambiguity in the language of the law is perhaps inevitable. As James Madison wrote, "When the Almighty himself condescends to address mankind in their own language, his meaning, luminous as it must be, is rendered dim and doubtful by the cloudy medium through which it is communicated."[233] Indeed, Stanley Fish observed that even the clearest divine commands can be muddled—in his reading of *Paradise Lost*, temptation begins with ambiguation.[234] In more prosaic

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228. *See* Decker v. Nw. Envtl. Def. Ctr., 568 U.S. 597, 621 (2013) (Scalia, J., concurring in part and dissenting in part) ("*Auer* deference has the same beneficial pragmatic effect as *Chevron* deference: The country need not endure the uncertainty produced by divergent views of numerous district courts and courts of appeals as to what is the fairest reading of the regulation, until a definitive answer is finally provided, years later, by this Court.").

229. For Justice Scalia's attempt to do so, see *id.* (arguing that uniformity presents less of a problem in the context of regulations because agencies can simply craft new rules).

230. Hughes Gen. Contractors, Inc. v. Utah Labor Comm'n, 322 P.3d 712, 718 (Utah 2014) (Lee, J.).

231. 38 U.S.C.A. § 7252 (2012) ("The Court of Appeals for Veterans Claims shall have exclusive jurisdiction to review decisions of the Board of Veterans' Appeals.").

232. *See id.* § 7292.

233. THE FEDERALIST NO. 37, at 215 (James Madison) (Bantam Classic ed., 1982).

234. STANLEY FISH, WINNING ARGUMENTS 24 (2016). In discussing Milton's depiction of the Fall, Fish explains how God's perfectly clear rule—*do not eat the fruit of this one tree*—became clouded by diabolical rhetoric. "Satan opens up a

matters, although reformers have tried to promote clear writing in regulations,[235] it remains true that ambiguity exists in many statutes and regulations.[236] And where the language of the law is dim and doubtful, it can have enormous consequences for parties to a case.[237]

That is true in veterans law, where courts face a hard choice when dealing with dim and doubtful language in statutes and regulations. The veteran's canon would lead courts to follow the veteran-friendly interpretation, and *Chevron* and *Auer* would lead courts to defer to the VA. This Note has made the case that courts should recognize the veteran's canon as a traditional tool of interpretation, and apply it to resolve ambiguity before turning to deference doctrines. That would ensure that veterans get the benefit of the doubt in the interpretation of veterans law, and give veterans more of a voice in the system as a whole.[238] We have much more to do to fulfill our duties to veterans; we ought not do less.

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space of doubt that he then fills with alternative readings of God's utterance." *Id.* For Milton's telling of the tale, see JOHN MILTON, PARADISE LOST bk. IX, 655–58 (Barnes & Noble Classics 2004)) (1674). For the Biblical source material, see *Genesis* 2:15–3:6.

235. The plain language movement has had some success in changing how government communicates with citizens, but much work remains to be done. *See* Lisa Rein, *Plain writing in government: Agencies, plainly speaking, aren't there yet*, WASH. POST (Nov. 19, 2013), https://www.washingtonpost.com/news/federal-eye/wp/2013/11/19/plain-writing-in-government-agencies-plainly-speaking-arent-there-yet/?utm_term=.d2587a009fa2 [https://perma.cc/3RP8-83QU].

236. And reform efforts can only do so much to eradicate ambiguity from the law. *See* Lawrence B. Solum, *Originalist Methodology*, 84 U. CHI. L. REV. 269, 287–88 (2017) (noting that "[a]mbiguity is pervasive in English" and that sometimes, legal texts contain irreducible ambiguity).

237. *See* Ward Farnsworth et al., *supra* note 127, at 257–58.

238. There is good reason to think the entire system needs an overhaul. *See* Nagin, *supra* note 202, at 887–90. And given the particular expertise veterans have on the issues they face, their voices should feature prominently in any conversation about how to reform veterans law. *Cf.* Nathan Jerauld, *A Veteran's Message to Congress: "I Am Not Honored. I Am Disgusted.,"* THE ATLANTIC (Mar. 23, 2019), https://www.theatlantic.com/letters/archive/2019/03/us-army-veteran-argues-against-afghan-service-act/585316/ [https://perma.cc/9VA2-4ZB2] (arguing that Congress could help veterans by, among other things, funding more research into the effects of burn pits, hiring more judges and staff for the veterans' appeals court system, and increasing funding for programs for survivors of sexual trauma and those struggling with mental health issues).