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ARTICLES

OVERLOOKED TEMPORAL ISSUES IN STATUTORY INTERPRETATION

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There is an important but chronically overlooked problem in statutory interpretation. Courts frequently create and modify rules of statutory interpretation in common law fashion but ignore important temporal issues raised by the creation or modification of these interpretive rules. Specifically, courts seldom consider whether new or modified interpretive rules should be applied only prospectively to statutes enacted after the decisions that created or modified the rules. The failure of courts to consider these temporal issues undermines one of the fundamental assumptions of statutory interpretation—that Congress chooses statutory language in light of established rules of interpretation—and thus risks delegitimizing statutory interpretation. Indeed, as this Article illustrates through the examination of representative Supreme Court decisions, the judiciary's failure to consider these temporal issues has resulted in erroneous statutory interpretations.

Notwithstanding the enormous attention given statutory interpretation by scholars over the past couple of decades (including the proposal and examination of various sophisticated, high-level interpretive methodologies), the temporal issues that retroactive application of new or modified interpretive rules raises have been virtually ignored in statutory interpretation scholarship. This Article fills the void by outlining when courts should apply new or modified rules only

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prospectively. Despite the plausibility of an argument that all new or modified interpretive rules should be applied only prospectively, this Article argues that only the most powerful rules should be considered for prospective-only application and describes when it is appropriate for even these rules to be applied retroactively. As this Article explains, the judicial consideration of temporal issues will bring much-needed clarity and transparency to statutory interpretation, as well as potentially cause courts to reexamine the proper judicial role in light of legal realist insights about the nature of statutory interpretation.

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INTRODUCTION

Some statutory interpretation cases should raise more issues than courts currently recognize. Imagine, for example, that a federal court in 2009 is faced with a novel issue concerning the interpretation of a statute enacted in 1960.[1] The 2009 court decides to either create a new rule of statutory interpretation that did not exist in 1960 or significantly modify a rule of interpretation that did exist in 1960.[2] The new or modified rule of interpretation is sufficiently powerful that its application would be quite important in determining the meaning of the statute.[3] Although it should, the court almost certainly will not address the following issue: Should the new or modified rule be applied when interpreting the 1960 statute or should it be applied only prospectively to statutes enacted after the court's decision?[4] Instead, the court will automatically apply the new or

1. This Article focuses on federal cases and theory, but the same conclusions, and much of the same theory, could also be applied to statutory interpretations made by state courts.

2. The word "rule" in this Article signifies a non-case-specific principle governing the interpretation of statutes. A rule should be distinguished from a methodology of interpretation, such as the commonly referred to "plain meaning rule," which is a collection of rules. The concept of a rule in this Article is broad, though, and encompasses such things as the rule allowing courts to consider legislative history. See *infra* notes 76–78 and accompanying text for a discussion of rules governing courts' use of legislative history. Whether a rule is "new" can be a complex and frustrating issue for courts in nonstatutory interpretation contexts. *See* Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1789 (1991) (identifying governmental faithfulness to law as most fundamental goal of judicial analysis). For purposes of statutory interpretation, a rule should be considered to be new when it is formally announced by a court to be a rule, as long as the rule was not so clearly established that it was previously recognized (even if implicitly) as a rule.

3. Many current rules of statutory interpretation are sufficiently powerful that their application by courts would be dispositive, or at least extremely influential, in interpreting a statute. See *infra* Parts IV.C and IV.D for a description of the various rules of interpretation that require or allow courts to choose textually inferior interpretations.

4. As used in this Article, the term "modify" includes the elimination of rules of interpretation, even though the word typically denotes only a moderate change. Using this word to signify the

modified rule retroactively to the statute.[5] Making matters worse, if the rule is applicable, the court will use it when interpreting other statutes enacted prior to the creation or modification of the rule.

The virtual certainty that the court in the above hypothetical would fail to address the temporal issue of whether to apply a new or modified rule of interpretation to a previously enacted statute *should* be surprising, considering the current nature of statutory interpretation. In theory, the interpretation of a statute should not depend on whether the interpretive issue is raised soon after the statute's enactment or decades later. The currently dominant methods of statutory interpretation are originalist in orientation and seek to effectuate either the intent of the enacting Congress or the original public meaning of the text.[6] Most judges would therefore, if they considered the issue, assert that a court in 2009 should reach the same conclusion about the meaning of a statute as the same court would have in 1960.[7] The failure of judges to consider whether new or modified rules of interpretation should be applied only prospectively

elimination of rules, as well as changes to their definitions and scope, is efficient and also recognizes that courts typically underutilize rules of interpretation rather than explicitly eliminate them. See *infra* notes 100–03 and accompanying text for a description of how courts typically ignore rather than eliminate disfavored interpretive rules.

5. The determination of the point at which a law is sufficiently harmful to existing interests so that it merits being classified as "retroactive" has been a difficult one for courts. Daniel E. Troy, *Toward a Definition and Critique of Retroactivity*, 51 ALA. L. REV. 1329, 1331 (2000). In contrast, when describing the application of rules of interpretation, the retroactive designation is straightforward. A new or modified rule is applied retroactively if a court uses it when interpreting a statute enacted prior to the creation or modification of the rule. Conversely, a rule is applied only prospectively if it is applied only to statutes enacted subsequent to the judicial decision that created or modified the rule.

6. *See* W. Va. Univ. Hosps., Inc. v. Casey, 499 U.S. 83, 101 n.7 (1991) ("The 'will of Congress' we look to is not a will evolving from Session to Session, but a will expressed and fixed in a particular enactment."); WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 14 (1994) ("[N]one of the originalist schools (intentionalism, purposivism, textualism) is able to generate a theory of what the process or the coalition 'would want' over time, after circumstances have changed."). Some scholars have identified a multitude of originalist approaches to statutory interpretation used by courts. *See, e.g.*, J. Clark Kelso & Charles D. Kelso, *Statutory Interpretation: Four Theories in Disarray*, 53 SMU L. REV. 81, 83 (2000) (asserting that courts and judges mostly adhere to "four competing theories of decision-making": formalism, holmesian, natural law, and instrumentalism). Broadly speaking, however, when engaging in interpretation courts prioritize either the text of the statute or the intent or purpose of the statute or legislature. *See* John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 76 (2006) [hereinafter Manning, *What Divides*] (distinguishing theories on basis of how each emphasizes context, with textualists using semantic context and purposivists using policy context); John F. Manning, *Textualism and Legislative Intent*, 91 VA. L. REV. 419, 424 (2005) [hereinafter Manning, *Textualism*] (stating that intentionalists try to identify and enforce subjective intent of enacting legislature, while textualists care only about objective meaning of statutory text).

7. Thus, the overruling of an earlier interpretation is a conclusion that the earlier interpretation was mistaken, not that the original meaning of the statute should be changed. There are some statutes enacted with the idea that they will be updated as conditions change, however. The Sherman Antitrust Act is one example. *See* United States v. Associated Press, 52 F. Supp. 362, 370 (S.D.N.Y. 1943) ("Congress has incorporated into the Anti-Trust Acts the changing standards of the common law, and by so doing has delegated to the courts the duty of fixing the standard for each case.").

results, however, in the meaning of some statutes being changed from what they would have been thought by judges to mean at the time of their enactment.

The temporal problem described above is not an isolated phenomenon in statutory interpretation cases, but rather a commonly occurring one. The rules of interpretation are most important when courts use them to resolve statutory ambiguities, and modern statutes are often unclear. Congress inevitably leaves ambiguities in the statutes it enacts because it is unable and frequently unwilling to legislate without ambiguities.[8] Courts must therefore resolve many difficult interpretive issues. Although they purport to be the "faithful agents" of Congress when resolving these interpretive issues, courts consider the creation and modification of the rules of statutory interpretation to be subject to judicial prerogative and frequently change the rules.[9]

The tension between the originalist orientation of courts and the power they have to create and modify the rules of statutory interpretation would be present but perhaps not as troubling if the rules of interpretation were designed merely to capture congressional intent or the public meaning of the statutory text.[10] While courts will typically defend a chosen rule of interpretation on the ground that its application will result in a statutory interpretation that reflects congressional intent, courts frequently choose rules for other reasons, such as a desire to protect vulnerable individuals or groups or to force Congress to address sensitive issues expressly.[11] Moreover, many of the rules of interpretation are quite powerful and require courts to choose second-best interpretations that would not have been chosen if not for the application of the rule.[12] Courts attempt to legitimize rules of interpretation, and reduce criticisms that the rules do not correspond with congressional intent, by asserting that Congress is assumed to enact statutes in light of established rules of interpretation.[13] Rules of interpretation risk losing their legitimacy, however, when they are applied

8. *See* Jonathan T. Molot, *Reexamining* Marbury *in the Administrative State: A Structural and Institutional Defense of Judicial Power over Statutory Interpretation*, 96 NW. U. L. REV. 1239, 1241 (2002) ("There is simply too much law today, governing too many subjects, for legislators to address every important policy question that might arise under their statutes.").

9. It is widely recognized that federal courts have the power, as well as the primary role, in creating rules of statutory interpretation. *See* Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085, 2088 (2002) (arguing that Congress could enact rules of statutory interpretation but has used this power "only sporadically and unselfconsciously, at the periphery of the United States Code").

10. The temporal issues would still be present because courts are not well equipped to determine whether rules of interpretation are consistent with often shifting legislative intent. See *infra* Part II.B.1 for a discussion of why statutory interpretation rules based on congressional intent should be applied only prospectively.

11. *See* Jane S. Schacter, *Metademocracy: The Changing Structure of Legitimacy in Statutory Interpretation*, 108 HARV. L. REV. 593, 613–46 (1995) (describing how courts use rules of interpretation to pursue various visions of democracy).

12. See *infra* notes 136–37 and accompanying text for a discussion of when and why courts choose a second-best interpretation over one logically inferred from the language and structure of a statute.

13. See *infra* Part II.A for a discussion of the background rules theory underlying courts' interpretation of congressional intent.

retroactively, and it cannot be assumed that Congress was aware of the rules when drafting legislation.

Despite the numerous and important statutory interpretation issues raised every year, courts have failed to address the conflict between originalism and the retroactive application of changes to interpretive rules. To be sure, judges frequently debate issues concerning the rules of interpretation. The conflicts typically focus, though, solely on such issues as whether a majority opinion created or modified a rule, whether a new or modified rule is appropriate or desirable, or whether a rule has been ignored despite its relevance or is being used despite its inapplicability.[14] Similarly, the temporal problems raised by the retroactive application of new or modified interpretive rules are greatly underappreciated and undertheorized in statutory interpretation scholarship.[15]

The impact of legal realism on statutory interpretation should make apparent to courts and scholars the partial delegitimization of the rules of interpretation due to the nonrecognition of temporal issues. The twentieth-century legal realist insights into the nature of jurisprudence have already forced courts to accommodate the reality that the interpretive latitude intrinsic to statutory interpretation necessarily requires the application of policy choices to resolve issues of statutory meaning.[16] Scholars have noted that the judiciary's subsequent reexamination of its role in statutory interpretation has resulted in increased deference to Congress and administrative agencies.[17] But while courts

14. See *infra* notes 95–99 and accompanying text for a description of the various ways in which courts use rules when interpreting statutes.

15. *See* Adrian Vermeule, *Legislative History and the Limits of Judicial Competence: The Untold Story of* Holy Trinity Church, 50 STAN. L. REV. 1833, 1895 n.214 (1998) (noting that "[t]here is only sparse academic commentary on the general problem of the retroactivity of interpretive rules"). Typically, the temporal issues are briefly discussed in a general manner or, more often, mentioned in a footnote. *See, e.g.*, Hans W. Baade, *Time and Meaning: Notes on the Intertemporal Law of Statutory Construction and Constitutional Interpretation*, 43 AM. J. COMP. L. 319, 321 (1995) (observing correctly, but without criticism, that new rules of statutory interpretation are applied retroactively); Philip P. Frickey, *Interpretive-Regime Change*, 38 LOY. L.A. L. REV. 1971, 1981–86 (2005) (discussing, in general manner, problems caused by courts applying textualist methodology when Congress has relied on judges applying purposivist methodologies); John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673, 721 n.208 (1997) (arguing that if legislative history is accepted as functional equivalent of statutory text, courts' rejection of legislative history results in interpretations contrary to congressional intent); Stephen F. Ross, *Where Have You Gone, Karl Llewellyn? Should Congress Turn Its Lonely Eyes to You?*, 45 VAND. L. REV. 561, 567 (1992) (arguing that Supreme Court's creation of clear statement rules promoting federalism "may prove particularly offensive as applied to statutes enacted prior to 1985 when prevailing Supreme Court decisions suggested that less positive indicia of congressional intent would be sufficient"); Amanda L. Tyler, *Continuity, Coherence, and the Canons*, 99 NW. U. L. REV. 1389, 1420 n.143 (2005) (indicating that best policy "may be to limit new canons to prospective application").

16. *See* Cass R. Sunstein, *Beyond* Marbury: *The Executive's Power to Say What the Law Is*, 115 YALE L.J. 2580, 2591 (2006) (suggesting that Supreme Court's allocation of interpretive power to executive is partly due to attack of realists, who believe that policy judgments are made in resolving statutory ambiguity).

17. Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 COLUM. L. REV. 1, 16 (2006) (finding that in twentieth century, Supreme Court was forced to reassess its role in interpretation and, as a result, gave increased deference to state courts, federal administrative agencies, and Congress).

have in some respects updated their approach to statutory interpretation in light of legal realist insights, the nonrecognition of temporal issues represents a failure to fully update statutory interpretation methodology. This failure is particularly troubling considering the statutorification of the law and the judiciary's trend of relying more on rules to determine statutory meaning and less on pragmatic analysis or conclusions about likely congressional intent or purpose.[18]

This Article provides a framework for determining when new or modified rules of interpretation should be applied only prospectively. Its purpose is not to offer a first-order defense of originalism in statutory interpretation or of courts' view of their role as faithful agents of Congress.[19] Similarly, this Article does not offer criticisms or defenses of any of the rules of interpretation chosen by courts, and its primary aim is not to condemn the current judicial practice of making frequent changes to the rules.[20] Rather, its purpose is to instead present a second-order theory of how the rules of statutory interpretation should be legitimized given current judicial theories of statutory interpretation.[21]

Part I briefly describes how the current retroactive application of new or modified rules of interpretation is consistent with the traditional inclination of courts to apply, with some exceptions, judicially created rules of law retroactively. Part II explains why, despite courts' traditional inclination, the judicial practice of retroactive application is fundamentally at odds with the

18. *See id.* at 29–36 (recognizing that increased acceptance of textualism resulted in larger role of statutory text in interpretation of statutes); Mathew D. McCubbins & Daniel B. Rodriguez, *Canonical Construction and Statutory Revisionism: The Strange Case of the Appropriations Canon*, 14 J. CONTEMP. LEGAL ISSUES 669, 670 (2005) (declaring that in past half-century, use of statutory construction canons has increased in attempt to improve legislative process). Of course, it is a generality to assert that courts rely more now than in the past on rules of interpretation. Many judges still strongly disagree with a rules-based approach. *See, e.g.*, Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy, 548 U.S. 291, 323 (2006) (Breyer, J., dissenting) ("And our ultimate judicial goal is to interpret language in light of the statute's purpose. Only by seeking that purpose can we avoid the substitution of judicial for legislative will."). Nevertheless, although there is no unanimity (and likely never will be) among judges regarding the proper methodology for interpreting statutes, a trend of greater judicial reliance on rules when interpreting statutes underscores the necessity of ensuring that those rules are properly applied.

19. In addition, this Article focuses on rules of interpretation, but its purpose is not to advocate textualism. It would not be inconsistent with the arguments presented in this Article for courts to decide cases based on the intent or purpose of a statute or Congress instead of applying specific rules of interpretation. This Article merely objects to the judicial reliance on rules of interpretation to determine statutory meaning when the rules were created or modified subsequent to the enactment of the statute at issue.

20. This Article also does not argue that judicial consideration of temporal issues would result in fewer statutory interpretations being overruled by Congress, although such a conclusion would be reasonable. Applying a new or modified rule of interpretation retroactively can change the original meaning of a statute and thereby upset the expectations of the originally enacting Congress, but the rule is not likely to better capture the current Congress's preferences. *Cf.* Einer Elhauge, *Preference-Eliciting Statutory Default Rules*, 102 COLUM. L. REV. 2162, 2164–65 (2002) (offering theory of why so many rules of interpretation run counter to likely legislative preferences).

21. *See* ADRIAN VERMEULE, JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION 147 (2006) (distinguishing between first-order and second-order arguments in statutory interpretation).

originalist orientation of courts and the background rules theory, which assumes that Congress enacts legislation in light of established rules of interpretation. This Part argues that the logic of the background rules theory should usually outweigh the typical judicial justifications for changes to interpretive rules, such as estimations of congressional intent and policy concerns.

Despite its importance to statutory interpretation, it must be conceded, as Part III explains, that the background rules theory is based in part on fictions about both courts and Congress. While the theory is necessary as a legitimizing device for the rules of interpretation, Part IV argues that its weaknesses suggest that only the most powerful new or modified rules of interpretation should be applied only prospectively. This Part explains that the most powerful rules of interpretation, which I refer to as dice-loading rules, require courts to adopt second-best statutory interpretations that would not have been adopted absent the application of the rule and describes which interpretive rules fall within this category.

Considering that not all new or modified rules of interpretation should be applied only prospectively, ultimately it is sometimes permissible for a statute enacted in 1960 to be interpreted differently in 2009 than it would have been in 1960. Courts have thoughtlessly, and often inappropriately, adopted such interpretations, however. Although there are numerous, and ideologically diverse, cases to choose from, Part V examines two recent cases (and one not-so-recent case) where the Court arguably and inappropriately applied a new or modified rule of interpretation retroactively.[22] If courts did consider whether new or modified interpretive rules should be applied only prospectively, Part VI argues that greater judicial transparency and candor in statutory interpretation would result. The ensuing increase in judicial self-awareness might also convince courts to continue to reassess the judiciary's role in statutory interpretation and whether it is proper for courts to continue to create dice-loading rules of interpretation.

I. THE CURRENT PRACTICE OF RETROACTIVE APPLICATION OF JUDICIALLY CREATED RULES

Courts do consider some temporal issues when interpreting statutes. For example, courts consider temporal issues when deciding whether statutes themselves should be applied retroactively or only prospectively. Although Congress can generally enact civil legislation with retroactive effects, the Court has created a rule of interpretation—the presumption against retroactivity—that directs courts to apply statutes only prospectively unless the statutory language is "so clear that it could sustain only one interpretation."[23]

22. Indeed, many of the various cases where the Court created a new clear statement rule to protect federalism values as well as the cases where the Court created or modified rules more popular with liberal judges and scholars could have been chosen.

23. INS v. St. Cyr, 533 U.S. 289, 317 (2001) (quoting Lindh v. Murphy, 521 U.S. 320, 328 n.4 (1997)).

Another common example of temporal consideration is the judicial use of dictionaries to define statutory terms.[24] The use of dictionaries can raise temporal issues because the meanings of words often change over time.[25] Thus, if a court consults a dictionary to define a statutory term, the court must decide whether to use a dictionary published contemporaneously with the enactment of the statute at issue or a dictionary published at the time of the case (or at some other time). The Supreme Court has indicated that dictionaries published contemporaneously with a statute's enactment are the most appropriate for determining a statutory term's meaning.[26] Reflecting its general lack of appreciation for temporal concerns, however, the Court has not followed this principle consistently.[27]

Despite the occasional consideration of some temporal issues when interpreting statutes, courts do not normally consider the temporal implications of creating or modifying rules of statutory interpretation.[28] The Supreme Court has made a limited exception of sorts, however, when the retroactive application of the rule would require the Court to overrule an earlier statutory interpretation. The Court's reluctance to apply new or modified rules retroactively in such cases is based on its heightened burden for overruling a statutory precedent, which is underpinned by the notion that Congress is able to amend the relevant statutory language if it so wishes.[29] Thus, in a recent decision, *John R. Sand & Gravel Co. v. United States*,[30] the Court refused to overturn its previous interpretation of a statute, in which it had interpreted the limitations period as jurisdictional in nature with regard to suits against the United States,

24. *See* Samuel A. Thumma & Jeffrey L. Kirchmeier, *The Lexicon Has Become a Fortress: The United States Supreme Court's Use of Dictionaries*, 47 BUFF. L. REV. 227, 252–60 (1999) (documenting increased use of dictionaries by Court); Note, *Looking It Up: Dictionaries and Statutory Interpretation*, 107 HARV. L. REV. 1437, 1438 (1994) ("Over the past decade, the Supreme Court's use of dictionaries in its published opinions has increased dramatically.").

25. *See* Note, *supra* note 24, at 1447 (recognizing infrequency with which major dictionaries are updated, allowing for evolution of language between editions).

26. *See, e.g.*, MCI Telecomms. Corp. v. Am. Tel. & Tel. Co., 512 U.S. 218, 228 (1994) (stating that most relevant time to determine meaning of statutory term is time of statute's enactment and that contemporaneous dictionaries should thus be consulted); *see also* Thumma & Kirchmeier, *supra* note 24, at 272 (finding "some consensus" in notion that in interpreting statutory provisions, court should use dictionaries contemporaneous with enactment of statute).

27. *See* Note, *supra* note 24, at 1447–48 (noting that Court's choice of dictionaries shows "no [consistent or principled] relationship between the age of the dictionary and that of the statute under consideration").

28. There are occasional, and often short-lived, exceptions. *See, e.g.*, Bradford C. Mank, *Legal Context: Reading Statutes in Light of Prevailing Legal Precedent*, 34 ARIZ. ST. L.J. 815, 816–17 (2002) (describing how, in 2001, Court changed its practice of considering interpretive rule that existed when Congress enacted relevant statute when deciding whether to recognize implied private right of action).

29. *See* Amy Coney Barrett, *Statutory Stare Decisis in the Courts of Appeals*, 73 GEO. WASH. L. REV. 317, 317 (2005) (stating that Supreme Court imposes heightened burden to overrule statutory interpretation due to principle of legislative supremacy).

30. 128 S. Ct. 750 (2008).

on the basis of a new rule of interpretation that created a rebuttable presumption of equitable tolling with regard to suits against the United States.[31]

Apart from the occasional exception, little apparent consideration has been evident regarding the appropriateness of the historical inclination of courts to apply the current interpretive rules, even if newly created, to the statute before them. Courts' failure to consider the temporal issues involved when rules of interpretation are created or modified is at least partly understandable, however. The idea that any new judicially created rules (not just rules of statutory interpretation) should be applied only prospectively is a relatively novel concept.[32] Historically, the common practice has been for courts to apply the current law, even if newly created, at the time of their decisions.[33]

Undoubtedly, one reason courts generally apply judicially created rules retroactively is because doing so is consistent with how judges perceive the adjudicative function. Applying new rules only prospectively would require courts to announce new rules that would not be applied to the case before the court. It is odd, though, for courts to decide issues external to a particular dispute or determine the law applicable in future cases even when such law has not yet served as the basis for any decision.[34] In addition, it has been argued that a policy where new or modified rules would be applied only prospectively would provide little incentive for parties to argue for changes to the rules, and courts would thus not have the benefit of briefing by the parties on the desirability of changes.[35]

Courts have considered arguments that certain judicially created substantive and constitutional rules should be applied only prospectively because retroactive application would undermine settled expectations of the law.[36]

31. *John R. Sand & Gravel Co.*, 128 S. Ct. at 755.

32. *See* United States v. Sec. Indus. Bank, 459 U.S. 70, 79 (1982) ("The principle that statutes operate only prospectively, while judicial decisions operate retrospectively, is familiar to every law student."); Kermit Roosevelt III, *A Little Theory Is a Dangerous Thing: The Myth of Adjudicative Retroactivity*, 31 CONN. L. REV. 1075, 1082 (1999) (stating that retroactive application of judicial decisions has been so much the historical norm that the "concept of retroactivity is a relative newcomer to our jurisprudence").

33. *See* Toby J. Heytens, *Managing Transitional Moments in Criminal Cases*, 115 YALE L.J. 922, 972 (2006) (explaining traditional rule that reviewing court is "required to resolve a case based on its best current understanding of the law").

34. *See* Bradley Scott Shannon, *The Retroactive and Prospective Application of Judicial Decisions*, 26 HARV. J.L. & PUB. POL'Y 811, 841–42 (2003) (reasoning that prospectivity is inconsistent with adjudicative role of courts because they would be deciding issues not before them).

35. *Id.* at 859–60. It is questionable whether parties currently often argue for changes to the rules of statutory interpretation in their briefs or arguments to courts and, if they do, whether courts rely on these arguments. In any case, to the extent that parties make arguments regarding the rules of interpretation, they would still have an incentive to do so even if some of the rules would be applied only prospectively. Under the framework introduced in this Article for determining whether new or modified rules of interpretation should be applied only prospectively, parties would have an incentive to brief the court on the issues of whether a particular rule is new or is a modification of an existing rule, whether it is a powerful dice-loading rule, and whether the new or modified rule should be applied only prospectively.

36. *Id.* at 813. There are numerous and varied scholarly articles that make reliance-based arguments why certain judicial decisions or rules should be applied only prospectively. *See, e.g.*, Ted

Courts have mostly rejected these arguments, but they have shown a willingness to create limited exceptions for what they view as compelling reasons.[37] One exception concerns the rules for adjudicating claims of qualified immunity in civil actions against public officials. The Supreme Court has determined that due to notice concerns, it must be shown not only that the officer's conduct violated a constitutional right but also that the constitutional right was clearly established at the time of the act in question.[38] The rules thus establish an intentional "right-remedy gap" that allows courts to issue rulings regarding constitutional rights that have only prospective application.[39] Similarly, federal habeas corpus review is premised on judicial compliance with the law as it was recognized at the time of the defendant's direct review, and new constitutional rights created subsequently are not retroactively applied in habeas corpus proceedings.[40]

Like most judicially created substantive and constitutional rules, courts generally apply rules of procedure retroactively.[41] The retroactive application of procedural rules is less controversial because they are thought to present fewer issues regarding justifiable reliance on settled rules.[42] The fact that a new procedural rule was promulgated after the conduct giving rise to a lawsuit is not seen as presenting troublesome retroactivity issues because rules of procedure regulate secondary rather than primary conduct.[43] Due to the lack of similar reliance concerns, new or modified rules of statutory interpretation have been analogized to procedural rules as a reason for their automatic retroactive application.[44]

Sampsell-Jones, *Reviving* Saucier*: Prospective Interpretations of Criminal Laws*, 14 GEO. MASON L. REV. 725, 727 (2007) (arguing that courts should issue prospective clarifications of vague or ambiguous criminal statutes in order to overcome problems associated with rules of interpretation such as criminal rule of lenity).

37. *See* Shannon, *supra* note 34, at 814 (describing Court's use of prospectivity in collateral review of criminal cases).

38. Saucier v. Katz, 533 U.S. 194, 207–09 (2001).

39. Sampsell-Jones, *supra* note 36, at 726.

40. *See* Susan Bandes, *Taking Justice to Its Logical Extreme: A Comment on* Teague v. Lane, 66 S. CAL. L. REV. 2453, 2457 (1993) (discussing decisions depriving parties of benefit of retroactive application of newly created rules). Rather than concerns about adequate notice, the restrictions on federal habeas corpus review are based on notions of "[f]inality, comity, and respect for state court judgments." Note, *Defining the Reach of* Heck v. Humphrey*: Should the Favorable Termination Rule Apply to Individuals Who Lack Access to Habeas Corpus?*, 121 HARV. L. REV. 868, 886 (2008).

41. *See* Baade, *supra* note 15, at 323 (describing application of new rules of procedure to past events and pending cases).

42. Landgraf v. USI Film Prods., 511 U.S. 244, 275 (1994).

43. *Landgraf*, 511 U.S. at 275.

44. *See* Baade, *supra* note 15, at 323 (stating that "rules of statutory construction are classifiable as procedural and remedial, rather than substantive").

II. AN ARGUMENT FOR APPLYING NEW OR MODIFIED RULES OF INTERPRETATION ONLY PROSPECTIVELY

A. The Background Rules Theory as a Reason for Prospective-Only Application of New or Modified Rules of Statutory Interpretation

Despite the historical inclination of judges to apply new or modified rules of statutory interpretation retroactively, and notwithstanding the comparison made to procedural rules, there are compelling reasons why new or modified interpretive rules should be applied only prospectively. The strongest argument is that applying new or modified rules only prospectively is consistent with legislative expectations regarding statutory meaning. The legislative expectations that are relevant to courts are the expectations of the originally enacting Congress. Thus, as self-styled "faithful agents" of Congress in matters of statutory interpretation, courts attempt to interpret statutes in accordance with either the original public meaning of the statutory language or the original intent of the enacting Congress, rather than some subsequent meaning of the statutory language or the preferences of some later Congress.[45]

In implicitly attempting to reconcile its faithful agent and originalist orientation with its control of the rules of interpretation, the Court has consistently asserted that Congress realizes that statutory text cannot be interpreted without reference to principles of statutory construction.[46] Courts are

45. See *supra* notes 6–7 and accompanying text for a description of the originalist orientation of courts. There is a large body of scholarship that argues that courts should engage in dynamic statutory interpretation when interpreting statutes and pursue goals other than capturing original meaning. *See, e.g.*, Elhauge, *supra* note 20, at 2034 (arguing that statutory ambiguities should be resolved by default rules that are designed to minimize expected dissatisfaction of current preferences of political branches that could be enacted into law). Some scholars have also argued that courts should reconsider their faithful agent role in certain circumstances. *See, e.g.*, Bernard W. Bell, *Interpreting and Enacting Statutes in the Constitution's Shadows: An Introduction*, 32 U. DAYTON L. REV. 307, 315 (2007) (arguing that courts should reconsider their role as faithful agents of Congress when statutes implicate constitutional values). While most courts and scholars would agree that courts should act as the faithful agents of Congress, there is disagreement regarding the discretion such a goal leaves courts when interpreting statutes. *Compare* John F. Manning, *Deriving Rules of Statutory Interpretation from the Constitution*, 101 COLUM. L. REV. 1648, 1650–51 (2001) (arguing that constitutional structure compels courts to adopt "faithful agent" model of statutory interpretation and to reject English practice of equitable interpretation), *with* William N. Eskridge, Jr., *All About Words: Early Understandings of the "Judicial Power" in Statutory Interpretation, 1776–1806*, 101 COLUM. L. REV. 990, 992 (2001) (arguing that Constitution permits nontextualist interpretive practices). These differences are not relevant, however, to this Article's argument that courts frequently and inappropriately apply new or modified rules of interpretation retroactively.

46. *See, e.g.*, John R. Sand & Gravel Co. v. United States, 128 S.Ct. 750, 757 (2008) (indicating that "it is more important that the applicable rule of law be settled than that it be settled right" (internal quotation marks omitted)); United States v. Texas, 507 U.S. 529, 534 (1993) (stating that Congress "does not write upon a clean slate" when statutory presumptions are involved and that courts "may take it as a given that Congress has legislated with an expectation" that presumption will apply (internal quotation marks omitted)); King v. St. Vincent's Hosp., 502 U.S. 215, 220–21 n.9 (1991) (stating that it assumed Congress was aware of the "canon that provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor"); McNary v. Haitian Refugee Ctr.,

thus to assume that Congress enacts statutes in light of established rules of interpretation.[47] Because what I term the background rules theory assumes that Congress relies on established rules of interpretation when choosing statutory language, if the retroactive application of a new or modified rule of interpretation changes the original meaning of the statute, congressional intent has been thwarted. This is especially true if the newly created or modified rule is one of the most powerful rules of interpretation that require courts to choose inferior, second-best interpretations, including ones that infer exceptions to statutory provisions that facially appear to cover all cases.[48]

The tension between the background rules theory and the retroactive application of new or modified rules of interpretation is almost always ignored by the judiciary but has been occasionally noted. For example, in *Dellmuth v. Muth*,[49] the Court applied a clear statement rule that Congress may abrogate a state's Eleventh Amendment immunity from suit in federal court only by making its intention unmistakably clear in the language of the statute.[50] The Court concluded that the language in the statute at issue, the Education of the Handicapped Act, did not meet the standard of clarity required by the clear statement rule.[51] In dissent, Justice Brennan claimed that the Court had created a new rule of interpretation and inappropriately applied it to a statute enacted before the rule's creation. Justice Brennan in effect argued, on the basis of the background rules theory, that the canon should be applied only prospectively:

> It would be one thing to tell Congress how in the future the Court will measure Congress' intent. That at least would ensure that Congress and this Court were operating under the same rules at the same time.

Inc., 498 U.S. 479, 496 (1991) (stating that "[i]t is presumable that Congress legislates with knowledge of our basic rules of statutory construction"); Finley v. United States, 490 U.S. 545, 556 (1989) (Blackmun, J., dissenting) ("What is of paramount importance is that Congress be able to legislate against a background of clear interpretive rules, so that it may know the effect of the language it adopts.").

47. Many prominent scholars have acknowledged that rules of interpretation can serve an essential function as background rules that Congress can consult when drafting legislation. *See, e.g.*, William N. Eskridge, Jr. & Philip P. Frickey, *The Supreme Court, 1993 Term—Foreword: Law as Equilibrium*, 108 HARV. L. REV. 26, 67 (1994) ("The usefulness of the canons . . . does not depend upon the Court's choosing the 'best' canons for each proposition. Instead, the canons may be understood as conventions, similar to driving a car on the right-hand side of the road; often it is not as important to choose the best convention as it is to choose one convention, and stick to it."); Manning, *Textualism*, *supra* note 6, at 436 n.57 (arguing value of canons derives from their communicative value, in that they are known both to legislature and judiciary); Daniel B. Rodriguez, *The Presumption of Reviewability: A Study in Canonical Construction and Its Consequences*, 45 VAND. L. REV. 743, 772 (1992) (pointing out that content of statute is "in part a function of the predictions of those who demand [the] legislation," and those predictions "include the current judicial approach to statutory interpretation"); Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 407, 504 (1989) (stating that "[i]nterpretation cannot occur without background principles that fill gaps in the face of legislative silence and provide the backdrop against which to read linguistic commands").

48. See *infra* notes 136–37 and accompanying text for an explanation of the significance of rules that require courts to adopt second-best statutory interpretations.

49. 491 U.S. 223 (1989).

50. *Dellmuth*, 491 U.S. at 227–28.

51. *Id.* at 230.

> But it makes no sense whatsoever to test congressional intent using a set of interpretative rules that Congress could not conceivably have foreseen at the time it acted—rules altogether different from, and much more stringent than, those with which Congress, reasonably relying upon this Court's opinions, believed itself to be working. The effect of retroactively applying the Court's peculiar rule will be to override congressional intent to abrogate immunity, though such intent was absolutely clear under principles of statutory interpretation established at the time of enactment.[52]

The failure of courts to consider temporal issues when creating or modifying rules of interpretation has always been problematic. The increasing reliance by judges on rules to determine statutory meaning, as opposed to the formerly dominant reliance on notions of legislative intent or purpose,[53] however, underscores the need for a judicial reevaluation of the automatic retroactive application of new or modified rules. Textualism, the methodology that relies the most on rules of interpretation, instructs that a judge should interpret a statute from the perspective of a "skilled, objectively reasonable user of words."[54] John Manning has described textualism as the "basic proposition that judges must seek and abide by the public meaning of the enacted text, understood in context (as all texts must be)."[55] Manning argues that one of the justifications for textualism is that its "presumption of deliberate drafting but untidy compromise is more respectful of the central place of compromise in the constitutional design of the legislative process" than are intent or purpose based theories.[56] A presumption of deliberate drafting "enables legislators to rely on semantic detail to express the level of generality at which a proposed legislative policy is acceptable to them."[57]

If courts wish to assume that Congress focuses on semantic detail when drafting legislation, it logically follows that they should carefully calibrate the rules of interpretation in order to ensure that Congress is able to reference the rules that courts will use. The rules of statutory interpretation are therefore unlike rules of procedure in a crucial respect.[58] While reliance by private parties may not be a pressing concern with regard to rules of statutory interpretation or civil procedure, reliance of a different sort, namely that by Congress, is very

52. *Id.* at 239–40 (Brennan, J., dissenting) (citation omitted); *see also* Small v. United States, 544 U.S. 385, 399, 404–05 (2005) (Thomas, J., dissenting) (accusing Court of creating new clear statement rule providing that domestically oriented statutes do not include foreign facts or entities and improperly applying it retroactively).

53. See *supra* note 18 and accompanying text for a description of the increasing reliance on rules of interpretation.

54. Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J.L. & PUB. POL'Y 59, 65 (1988).

55. Manning, *Textualism*, *supra* note 6, at 420.

56. John F. Manning, *Competing Presumptions About Statutory Coherence*, 74 FORDHAM L. REV. 2009, 2011 (2006).

57. *Id.*

58. See *supra* notes 41–44 and accompanying text for a comparison of the rules of statutory interpretation to procedural rules, for purposes of retroactive application.

relevant when rules of interpretation are created or modified.[59] The judicial nonrecognition of this temporal aspect of statutory interpretation raises serious separation of powers concerns.[60] Creating and modifying rules of interpretation may be a proper judicial function. It is questionable, however, whether courts should feel at liberty to apply rules of interpretation that would change the interpretation that would have been adopted if the issue had arisen at the time of the statute's enactment.

B. The Reasons Judges Create or Modify Rules of Interpretation Typically Should Not Outweigh the Force of the Background Rules Theory

1. Rules Based on Estimations of Congressional Intent Should Be Applied Only Prospectively

In theory, courts support the basic premise that Congress should be able to access the applicable rules of interpretation when it drafts legislation.[61] There is little judicial recognition, however, that support for the background rules theory means that the typical judicial justifications for interpretive rules do not support retroactive application of the new or modified rules. Courts will typically assert, for example, that a given rule of interpretation produces interpretations that are consistent with congressional intent but will fail to recognize that such a claim is usually untenable with regard to the retroactive application of a new or modified interpretive rule.

A conclusion of prospective-only application should be obvious in the rather rare case of a court deciding that a rule of interpretation was once but is no longer consistent with congressional intent.[62] Because the court has determined that the rule was formerly consistent with congressional intent, the elimination of the rule should be applied only prospectively.[63] Likewise, a determination that a newly created rule is currently, but not formerly, consistent with congressional intent would indicate that the new rule should be applied only prospectively.

Suppose, however, that the court decides that the rule should be eliminated on the basis of perceived congressional intent and assumes, likely implicitly, that it has never been consistent with congressional intent. Considering the difficulty

59. *Cf.* Baade, *supra* note 15, at 323 (noting that justice and convenience are best accomplished by applying new rules to past and pending cases where there is no reliance interest in previous rules).

60. *See* Andrew C. Spiropoulos, *Making Laws Moral: A Defense of Substantive Canons of Construction*, 2001 UTAH L. REV. 915, 953 ("[I]n the context of statutory interpretation, [separation of powers] requires that judges do not usurp the legislators' power to make law.").

61. See *supra* notes 46–48 and accompanying text for a description of courts' commitment to the background rules theory.

62. A court could attempt to determine exactly when the rule became inconsistent with congressional intent and apply the rule to statutes enacted prior to that time. A court is unlikely to be able to accurately make such precise determinations, however.

63. Unfortunately, a court would be more likely to simply underutilize a rule instead of explicitly eliminating it. See *infra* note 99 and accompanying text for a description of the judiciary's tendency to ignore rather than explicitly eliminate interpretive rules.

of determining congressional intent with regard to a specific rule of interpretation (especially by the judiciary with its limited resources), courts should exercise significant restraint when making such a conclusion.[64] It is one thing to recognize that a rule allows or requires courts to sometimes choose textually inferior interpretations, or even to conclude that a particular rule is inconsistent with the intent of the current Congress.[65] It is quite another to conclude that a rule of interpretation is inconsistent with what all prior Congresses would desire or to determine which Congresses would desire the rule and which would not.[66]

Even apart from the often questionable nature of a determination that a specific rule of interpretation has never been consistent with congressional intent, it would be a mistake for a court to apply the elimination of a rule retroactively. The background rules theory assumes that Congress enacted statutes in light of the rule at issue.[67] The crucial aspect of the background rules theory is not that any given rule is one that Congress would choose for courts to apply to its enactments but, rather, that Congress has access to the rules that courts will apply to its enactments.[68] It would thus be inconsistent with the background rules theory, as well as empirically unsupported, to retroactively apply a determination that a given rule was actually inconsistent with congressional intent.[69] For the same reasons as explained above, courts should also apply only prospectively rules created on the basis of perceived congressional intent.

Consider an obvious example illustrating the error of retroactively applying the elimination of one of the rules of interpretation. The Court has recently stated that the presumption against retroactivity, which directs courts to give a statute only prospective application unless its text clearly provides that it should have retroactive effects, does not require that the statute contain "an express provision about temporal reach."[70] Suppose, however, that the canon does require such an express provision but that the Court later decides to eliminate the canon on the basis that its presumption is not consistent with congressional

64. Such a conclusion is empirical in nature but without the necessary empirical research. *See* Adrian Vermeule, *Interpretive Choice*, 75 N.Y.U. L. REV. 74, 77 (2000) (explaining that "[c]ourts must choose interpretive doctrines on largely empirical grounds, under conditions of severe empirical uncertainty, often without the luxury of postponing their decisions" until "new information . . . becomes available or . . . crucial experiments can be conducted").

65. See *infra* notes 136–37 and accompanying text for a definition of dice-loading rules.

66. *Cf.* Lawrence Solan, *When Judges Use the Dictionary*, 68 AM. SPEECH 50, 55 (1993) (noting the difficulties of reconstructing the original understanding of drafters who lived two centuries ago).

67. See *supra* Part II.A for a description of the background rules theory.

68. *See* Vermeule, *supra* note 64, at 140 (noting that Congress can anticipate judicial behavior if judges apply interpretive rules consistently).

69. *See* Welch v. Tex. Dep't of Highways & Pub. Transp., 483 U.S. 468, 496 (1987) (Scalia, J., concurring in part and concurring in judgment) (arguing that where Congress has enacted statutes based on assumption about interpretation reasonably derived from Court's cases, "[e]ven if we were now to find that assumption to have been wrong, we could not, in reason, interpret the statutes as though the assumption never existed").

70. Fernandez-Vargas v. Gonzales, 548 U.S. 30, 40 (2006).

intent. If this modification were to be applied retroactively, statutes enacted while the old rule requiring an "express provision" was the governing standard could suddenly be given retroactive effect even though they lacked an express provision. Applying the elimination of the canon retroactively could thus result in statutes with unintended retroactive applications.[71]

Even though the actual presumption against retroactivity does not require that a statute have an express provision about temporal reach in order to overcome the presumption, the canon requires courts to adopt second-best interpretations that would not have been chosen but for the rule.[72] The canon requires language that is "'so clear that it could sustain only one interpretation'" before a statutory provision will be applied retroactively.[73] The fact that the rule existed at the time of the statute's enactment could therefore still create problems of unintended retroactive application if the elimination of the rule was applied retroactively. The elimination should thus be applied only prospectively.[74]

Although estimations of congressional intent should generally not be a basis for retroactive application of new or modified rules, in very limited situations it is conceivable that congressional intent, in a different sense, may support retroactive application.[75] If, for example, the Court determines that legislative history is unreliable as a means of discerning congressional intent and decides to eliminate judicial consideration of legislative history on that basis, the elimination of the rule allowing its consideration should be applied retroactively.[76] Such a determination is not based on an estimation of congressional intent regarding a specific rule of interpretation, but rather a conclusion about a source (and the judiciary's ability to use it) for discovering legislative intent.

Professor Eskridge has pointed out that courts' reliance on legislative history "has encouraged Congress to develop conventions by which much of the elaboration of statutes . . . has been put in committee reports rather than in the

71. *See* Mank, *supra* note 28, at 816–17 (describing example of Court inappropriately applying new rule retroactively on basis that old rule was inconsistent with congressional intent).

72. *See* Caleb Nelson, *What is Textualism?*, 91 VA. L. REV. 347, 384 (2005) (noting that, because of presumption against retroactivity, courts often read exceptions into statutory provisions that might otherwise be interpreted to impact pending cases).

73. INS v. St. Cyr, 533 U.S. 289, 314, 317 (2001) (quoting Lindh v. Murphy, 521 U.S. 320, 328 n.4 (1997)) (holding that provisions that repealed discretionary relief from deportation did not apply retroactively because provisions lacked "a clearly expressed statement of congressional intent" that they be applied retroactively).

74. The downgrade of a rule from clear statement to tie-breaker status should also be applied only prospectively. See *infra* note 156 for an explanation of the prospective application of the elevation of a rule from tie-breaker to clear statement status.

75. See *infra* note 140 and accompanying text for a discussion of the rule allowing courts to consider legislative history as a dice-loading rule.

76. *Cf.* Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546, 568–69 (2005) (criticizing use of legislative history but refusing to declare that its use is "inherently unreliable in all circumstances, a point on which Members of this Court have disagreed"); Vermeule, *supra* note 15, at 1838 (questioning judiciary's competence to draw intentionalist inferences from legislative history).

statutes themselves."[77] Despite these reliance claims, a conclusion—even if wrong—that judicial consideration of legislative history is costly but not helpful to the resolution of interpretive issues or, even worse, will lead courts to adopt erroneous interpretations, is a determination that reliance on legislative history is not beneficial to the goals of statutory interpretation. Such a conclusion should outweigh any congressional reliance on the rule.[78]

2. Rules Based on Policy Concerns Should Be Applied Only Prospectively but Rules That Are Constitutionally Required or Prohibited Should Be Applied Retroactively

Although most justifications for new or modified rules support only prospective application, in some cases retroactive application should be the obvious choice because the background rules theory will not be particularly persuasive in light of the rationale for the new or modified rule. Judges create and modify interpretive rules for various functionalist or formalist reasons. The conflict between the historical inclination of judges to apply new or modified rules retroactively and the background rules theory should sometimes be resolved through consideration of these noncongressional-intent-based reasons for the creation or modification of a rule. A court must examine its reasons for creating or modifying the rule at issue and determine whether the reasons are of the type that should outweigh the background rules theory.

One formalist reason should in particular outweigh considerations of congressional reliance. A court may determine that a rule of interpretation should be eliminated on the basis that the rule is unconstitutional or, conversely, that a new or modified rule is constitutionally required. The methodologies for interpreting statutes can raise separation of powers issues, but it is a rare instance where a court would hold that a specific rule is constitutionally prohibited or required.[79] Nevertheless, a determination that a rule is

77. William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 683 (1990).

78. Not all agree with the conclusion that the elimination of legislative history should be applied retroactively. *See* Vermeule, *supra* note 15, at 1895–96 n.214 ("The [elimination of judicial reliance on legislative history] advocated here, as a rule of judicial self-governance founded on prudential concerns, may thus be a candidate for solely prospective application."). It is difficult to think of reasons why it would not be odd, though, for a court to continue to apply a rule that it has adjudged to be counterproductive.

79. Nicholas Rosenkranz has suggested that some rules of interpretation may be constitutionally required. Rosenkranz, *supra* note 9, at 2097–98. It is questionable, though, whether the Constitution requires any rules of interpretation, except for perhaps a rare exception such as the due-process-related criminal rule of lenity, and even more unlikely that the Constitution requires that a rule of interpretation be a clear statement rule, as opposed to a mere tie-breaker rule. See *infra* notes 163–69 and accompanying text for an argument that clear statement rules are based on policy considerations. As well, while it is possible to think of hypothetical rules of interpretation that would be unconstitutional (e.g., a rule that instructs courts to favor one ethnicity over another), it is unlikely that any of the actual rules chosen by courts are unconstitutional.

unconstitutional or constitutionally required should outweigh the background rules theory.[80]

On other rare occasions a court may have functionalist reasons for modifying a rule of interpretation that dictate that the changes be applied retroactively. For example, a court may determine that the existing rule is extremely unclear and therefore unworkable and should be modified (i.e., essentially replaced with a new rule).[81] Even if the court concedes that it is doing more than merely clarifying an existing rule, the modified rule should be applied retroactively.[82] In such a scenario, the background rules theory would be particularly weak because any reliance by Congress would be especially unlikely.[83] On the other hand, the judiciary, as well as interested parties, would benefit from a workable and clear rule of interpretation applicable to all legislation.[84]

In contrast to constitutional and other unusual reasons for the creation or modification of interpretive rules, the typical policy reasons that underlie many rules of interpretation do not support retroactive application. For example, courts sometimes create or modify rules based on concerns about protecting vulnerable groups or a desire to force Congress to explicitly address sensitive issues.[85] Courts also create or modify rules based on ideological views about the proper role of courts, such as a desire to constrain judicial discretion.[86] The Court's creation of clear statement rules provides perhaps the best example of rules created for policy reasons.[87] The Court has created numerous clear statement rules designed to promote various constitutional values, including

80. *See* Vermeule, *supra* note 15, at 721 ("[T]he case for retroactive application of an interpretive rule is strongest when the rule is of constitutional origin.").

81. See *infra* Part V.B.1 for an argument that the Court correctly applied the *Chevron* doctrine retroactively because it replaced unclear and unworkable rules. For purposes of temporal consideration, it does not matter whether a rule is deemed to be a new rule or a modification of an existing rule. Either way, the temporal issues are the same.

82. See *infra* notes 104–06 and accompanying text for an explanation of how the clarification of an existing rule should not raise temporal concerns.

83. Courts should not engage in an analysis to determine whether Congress relied on any particular rule of interpretation when drafting the statute at issue. Rather, courts should determine whether the reasons for the new or modified rule make congressional reliance irrelevant or logically unlikely.

84. Similarly, courts may find it necessary to sometimes continue to apply a rule retroactively to a statute, even if the original decision to apply the rule retroactively was erroneous, in to order produce interpretations that are consistent with older interpretations of the statute.

85. See *supra* notes 10–11 and accompanying text for an argument that many interpretive rules are motivated by policy concerns. *See* Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 331–32 (2000) (asserting that some canons are intended to operate as nondelegation doctrines that force Congress to deliberate on issues of great sensitivity).

86. See *infra* notes 194–95 and accompanying text for a description of the Court's modification of the canon of constitutional avoidance based on concerns about excessive judicial discretion.

87. See *infra* notes 159–69 and accompanying text for an argument that clear statement rules are based on policy and are not attempts to estimate congressional intent.

those associated with federalism.[88] Even if one supports the creation of these rules, unless the Court declares that a rule of interpretation that mandates a certain high level of textual clarity in order to be overcome is constitutionally required, courts' visions of good policy, even if normatively appealing, should not be employed to retroactively change the meaning of statutory language.[89] It is controversial enough when courts impose judicial values through interpretive rules that were established at the time of a statute's enactment.[90] It is an entirely different matter, though, when the rules were not in existence at the time of the statute's enactment.

III. AN EXAMINATION OF THE PREMISE THAT CONGRESS LEGISLATES IN LIGHT OF THE RULES OF STATUTORY INTERPRETATION

A. The Fictions of the Background Rules Theory

The last Part argued that the common judicial practice of automatically applying new or modified interpretive rules retroactively is in tension with the background rules theory, and that the typical justifications for interpretive rules do not resolve the tension. Nevertheless, it is undeniable that the background rules theory is based on assumptions that likely are fictions. All theories of interpretation rest on familiar fictions of some sort, such as the intentionalist notion of collective congressional intent or the textualist notion of the rational drafting legislature.[91] Despite the pervasiveness of these legal fictions, this Part argues that the fictions underlying the background rules theory sufficiently weaken the argument for prospective-only application of new or modified interpretive rules so that courts should apply only the strongest interpretive rules only prospectively.

88. See *infra* notes 165–66 and accompanying text for a discussion of the Court's recent promotion of federalist values absent a clear congressional statement.

89. Professor Baade suggests that new or modified rules should be applied retroactively because retroactive application is "a matter of viewing past events in the light of new insights." Baade, *supra* note 15, at 324. Such a view is mistaken. Courts are of course free to change the rules of interpretation on the basis of new insights about statutory interpretation. See *supra* note 9 and accompanying text for a discussion of courts' primary responsibility of creating and changing the rules of interpretation. Applying new or changed rules retroactively, however, is in tension with courts' role as faithful agents of Congress. See *supra* Part II.A for a description of the background rules theory. Courts must thus limit retroactive application to situations where doing so is exceedingly persuasive.

90. *See, e.g.*, Brian G. Slocum, *The Problematic Nature of Contractionist Statutory Interpretations*, 102 NW. U. L. REV. COLLOQUY 307, 313–16 (2008) (criticizing policy-based interpretive rules that are designed to narrow interpretations beyond what legislators would have expected).

91. *See* Eben Moglen & Richard J. Pierce, Jr., *Sunstein's New Canons: Choosing the Fictions of Statutory Interpretation*, 57 U. CHI. L. REV. 1203, 1211 (1990) (noting that "[t]he fundamental fiction, one so broad as to escape being primarily legal at all, may be called the fiction of collective intent"); Kenneth A. Shepsle, *Congress Is a "They," Not an "It": Legislative Intent as Oxymoron*, 12 INT'L REV. L. & ECON. 239, 241–45 (1992) (describing fiction of collective congressional intent); Peter J. Smith, *New Legal Fictions*, 95 GEO. L.J. 1435, 1462–63 (2007) (describing textualist fiction of the "rational drafting legislature" and fiction that "members of Congress have read the text of the bills upon which they have voted").

The basic assumption underpinning the background rules theory—congressional reliance on rules of interpretation when drafting statutory language—is questionable for various reasons relating to the nature of courts and the legislative process. In order for Congress to be able to consider the rules of interpretation when it enacts legislation, it must be possible to identify the rules in existence when statutory language is drafted.[92] Certainly, there are instances when Congress chooses statutory language with specific rules of interpretation in mind.[93] It is questionable whether Congress often has specific interpretive rules in mind when it enacts legislation, however, or that it expects courts to apply any particular rules of interpretation.[94] Consistent reliance by Congress on the rules of interpretation when drafting statutes may be unrealistic due in part to the sloppy, and preventable, way in which courts describe and apply interpretive rules, but also because of inherent aspects of statutory interpretation as well as the institutional limitations on collective action by the judiciary.

1. The Disingenuous Nature of Judicial Descriptions of Interpretive Rules

The frequent failure of courts to exercise care, both intentionally and unintentionally, when describing and applying the rules of interpretation makes it difficult as a practical matter for courts to consider temporal issues, even if they were inclined to do so, and for Congress to consider the rules of interpretation when drafting legislation. Precision and transparency in statutory interpretation decisions are crucial to the judicial consideration of temporal issues, as well as enabling congressional reliance on the rules, because courts can use the rules of statutory interpretation in several different ways, not all of which change the rules or raise temporal issues. For example, courts can 1) create a new rule,[95] 2) modify an existing rule by enlarging or narrowing its scope or making it stronger or weaker,[96] 3) clarify already existing rules,[97] 4) accurately

92. Undoubtedly, it would be a fiction to assume that Congress was aware of a rule of interpretation and could consider its impact the day the judicial opinion was released that created the rule. Courts could, of course, consider the likelihood that Congress was able to consider a rule of interpretation in the relatively rare instance of a statute being enacted soon after the creation or modification of a rule.

93. *See, e.g.*, Brian G. Slocum, *Canons, the Plenary Power Doctrine, and Immigration Law*, 34 FLA. ST. U. L. REV. 363, 382–83 (2007) (arguing that it is likely that Congress enacted the REAL ID Act of 2005 with certain interpretive rules in mind).

94. *See* VERMEULE, *supra* note 21, at 133–34, 199 (noting lack of reliable information regarding Congress's responsiveness to judicial methods of interpretation); William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331, 358–72 (1991) (describing role interest groups and committees play in pursuing specific agendas, regardless of potential conflicting interpretive methods of future legislation); Victoria F. Nourse & Jane S. Schacter, *The Politics of Legislative Drafting: A Congressional Case Study*, 77 N.Y.U. L. REV. 575, 602 (2002) (arguing that, where statutory language was drafted with particular interpretive canon in mind, another contradictory canon has often been used to interpret language differently).

95. See *supra* note 2 for a description of when a rule should be considered "new."

96. Typically, this category will be most relevant in regard to canons of statutory construction.

apply existing rules without modifying or clarifying the rules,[98] or 5) apply a rule when doing so is not warranted by the rule's definition (overutilizing the rule) or ignore a rule when applying it is compelled by the rule's definition (underutilizing the rule).[99]

Despite the obvious importance of doing so, courts rarely announce that they are creating new rules of statutory interpretation or modifying existing ones, much less offer extensive rationales for doing so.[100] Judges often create or

Courts can enlarge the scope of a canon by making it applicable in cases in which it formerly did not apply. See *infra* Part V.A for a description of how the Court has modified the scope of the canon of constitutional avoidance. Courts can make canons stronger or weaker in two different ways. One is by making the canon more or less difficult to overcome. The trigger for any substantive canon is something less than statutory clarity, but canons are not all triggered by the same level of uncertainty. Clear statement canons, for example, are triggered by less statutory ambiguity than are tie-breaker canons. See *infra* note 113 and accompanying text for a description of the definition of statutory ambiguity. Courts can thus make a canon stronger by elevating it from tie-breaker status to clear statement status. Courts can also make a canon stronger or weaker by changing the point in the interpretive process when courts will apply the rule. *Cf.* Leading Cases, *Definition of "Violent Felony*," 121 HARV. L. REV. 345, 351 n.51 (2007) (noting that much of judicial debate over rule of lenity has concerned whether rule should be applied only after exhausting all other interpretive aids or whether it should be applied earlier in process, such as before court considers legislative history).

97. The distinction between clarifying versus modifying an existing rule is definitionally straightforward. A clarification resolves a legitimate dispute regarding a rule while a modification changes a rule. For example, explicitly describing an aspect of a rule could be seen as a clarification when that aspect had been in legitimate doubt. In contrast, if courts had always applied a rule in a certain way but did so without discussion, an explicit change in the application of the rule should be seen as a modification. See *infra* notes 235–43 and accompanying text for an argument that the Court's decision announcing a narrower rule for deferring to agency statutory interpretations was a modification because courts had implicitly applied a broader rule previously. The distinction between clarifying and modifying a rule is often a disputed matter, however, especially considering the common law development of the rules and the incentive courts have to claim that they are merely clarifying existing rules.

98. That is, rules that existed at the time of the statute's enactment.

99. Courts have frequently been accused of ignoring applicable canons. *See, e.g.*, Zachary Price, *The Rule of Lenity as a Rule of Structure*, 72 FORDHAM L. REV. 885, 886 (2004) (stating that rule of lenity has "fallen out of favor"). Courts have also been accused of applying canons when doing so is not warranted. *See, e.g.*, Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 547 (1990) (accusing Court of overutilizing canon of constitutional avoidance in immigration cases). Often, the improper use of canons and other rules of interpretation is attributed to ideology. *See* Gonzales v. Carhart, 127 S. Ct. 1610, 1631 (2007) (stating that Court in past had misapplied canon of constitutional avoidance in abortion cases and applied canon that avoided permissible interpretations of statutes that regulate abortion); James J. Brudney & Corey Ditslear, *Canons of Construction and the Elusive Quest for Neutral Reasoning*, 58 VAND. L. REV. 1, 58–59 (2005) (arguing that canons are disproportionately invoked by liberal Justices to reach liberal opinions and conservative Justices to reach conservative opinions); Thomas J. Miles & Cass R. Sunstein, *Do Judges Make Regulatory Policy? An Empirical Investigation of* Chevron, 73 U. CHI. L. REV. 823, 870–71 (2006) (concluding that political commitments of Justices continue to play substantial role in review of agency interpretations of law).

100. Indeed, it is difficult to find many examples of a court explicitly stating that it is creating or modifying a rule of interpretation. One example is *Irwin v. Department of Veterans Affairs*, where the Court explicitly eliminated its practice of ad hoc determinations in favor of a "more general rule to govern the applicability of equitable tolling in suits against the Government." 498 U.S. 89, 95 (1990). Typically, though, a court will claim that it is merely explicitly announcing an already existing rule of

modify rules of interpretation, of course, but they obviously prefer not to appear to create or modify a rule in order to reach a desired interpretation. After all, it is easier to justify an interpretation by purporting to objectively rely on a seemingly long-standing rule than it is to explain a decision to create or modify an interpretive rule. Judges thus have an incentive to be disingenuous when creating or modifying rules of interpretation by drafting opinions that claim that they are merely describing, or perhaps clarifying, already existing rules.[101] Similarly, instead of explicitly modifying rules, judges often implicitly over- and underutilize existing rules in order to reach desired interpretations.[102] Such obfuscation and misuse of the rules by courts makes congressional reliance difficult.[103]

Thus, by frequently using the rules of interpretation in ways that categories one, two, and five above describe, usually without explicitly announcing their intentions, courts make it difficult for Congress to rely on the rules when drafting statutory language. Courts also effectively obscure the tension between originalism and the retroactive application of new or modified interpretive rules by not clearly indicating when they are creating or modifying rules. Indeed, most statutory interpretation cases do not raise temporal issues. Cases that fall within category four (the accurate application of existing rules), for example, obviously do not raise any temporal issues. Although they are (rightly) controversial because they involve the improper application of the rules of interpretation, cases that fall within category five also do not raise any temporal issues.[104]

interpretation. *See, e.g.*, EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 261 (1991) (Marshall, J., dissenting) (arguing that Court had modified, without admitting to doing so, presumption against extraterritorial application into clear statement rule in order to reach desired interpretation). See also *infra* notes 209–18 and accompanying text for a description of how the Court in the *Chevron* decision claimed that it was merely restating settled principles even though the Court had created one of the most significant rules of interpretation of the last half century.

101. *Cf.* Stefanie A. Lindquist & Frank B. Cross, *Empirically Testing Dworkin's Chain Novel Theory: Studying the Path of Precedent*, 80 N.Y.U. L. REV. 1156, 1156 (2005) (finding, in empirical study, that "judicial ideology plays a statistically more significant role in cases where judges acknowledge that they are not bound by precedent (as in cases of first impression) than in cases where prior precedent exists"); Richard A. Posner, *Statutory Interpretation—in the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 816 (1983) (noting that canons "enable a judge to create the appearance that his decisions are constrained").

102. See *supra* note 99 for examples of courts overutilizing and underutilizing canons to achieve favorable results.

103. The obfuscation and misuse of the rules by courts undoubtedly adds to the common perception that the rules of interpretation are constantly changing. *See* David L. Shapiro, *Continuity and Change in Statutory Interpretation*, 67 N.Y.U. L. REV. 921, 940 (1992) (stating that exhaustive list of clear statement rules would constantly change).

104. If a court ignores a rule when it should apply it or applies a rule when doing so is inappropriate, the court technically has not modified the rule and the temporal concerns that this Article addresses do not apply. Courts can implicitly modify the scope of a canon, however, by consistently not applying it in situations in which the definition of the canon calls for its application. *See, e.g.*, Note, *The New Rule of Lenity*, 119 HARV. L. REV. 2420, 2421 (2006) (arguing that Court has implicitly narrowed scope of rule of lenity so that it applies only in cases where broad interpretation of ambiguous criminal statute would create strict liability offense or punish conduct that "is not wrong by its very nature but rather wrong because it is prohibited").

Similarly, cases in category three, which involve courts clarifying but not significantly changing existing rules, do not raise temporal issues despite being close in nature to cases in category two.

Conversely, cases that fall within categories one (creating a new rule) and two (modifying a rule) do raise temporal issues. Even with regard to these cases, however, the court is not likely to admit that it is creating or modifying a rule, but will instead claim that at most it is merely clarifying an existing rule (category three).[105] Debates in such cases often also focus on an accusation that the majority is over- or underutilizing an existing interpretive rule (category five).[106] Thus, Congress has to work hard to determine the applicable rules of interpretation at any given time (to the extent doing so is even possible), and courts can ignore temporal issues (even if they were otherwise inclined to consider them) because they do not usually put themselves in the position of explicitly creating or modifying a rule.

2. The Institutional Limitations on Collective Action by the Judiciary

The institutional limitations of the judiciary also illustrate why congressional reliance on the rules of interpretation is unlikely. One significant problem is that there is no theory of statutory interpretation to which all judges must adhere, making judicial coordination on the rules of interpretation impossible.[107] Although many judges may faithfully apply a first-best, or normative, theory of interpretation, the interpretive approaches fluctuate across courts.[108] Some judges are textualists and some are purposivists and thus disagree about the proper rules.[109] In a narrower sense, putting aside issues of first-order methodologies, lower courts sometimes disagree about the scope and definition of specific rules of interpretation.[110] Considering that most statutory

105. Even when a dissenting opinion disputes the majority's characterization that it has only clarified an existing rule, the dissenting opinion rarely focuses on whether the new or modified rule should be applied only prospectively. *See, e.g.*, Clark v. Martinez, 543 U.S. 371, 393–401 (2005) (Thomas, J., dissenting) (arguing only about whether Court had modified canon of constitutional avoidance and expanded its scope).

106. *See, e.g.*, Zadvydas v. Davis, 533 U.S. 678, 707 (2001) (Kennedy, J., dissenting) (arguing that Court overutilized canon of constitutional avoidance by creating exception to statute that was not ambiguous).

107. *See* Rosenkranz, *supra* note 9, at 2086 (observing that increase in number of judges and judicially created statutory interpretations has only led to increased unpredictability and confusion).

108. *See* VERMEULE, *supra* note 21, at 134–45, 153 (referring to "stalemate of empirical intuitions" about proper rules of interpretation (emphasis omitted)).

109. See *supra* note 6 and accompanying text for a description of the differences between the approaches to statutory interpretation.

110. *See, e.g.*, Brian G. Slocum, *The Immigration Rule of Lenity and* Chevron *Deference*, 17 GEO. IMMIGR. L.J. 515, 532–33 (2003) (describing how circuit courts have split over scope of *Chevron* doctrine, which governs whether reviewing courts must give deference to agency legal interpretations). Even if circuit courts sometimes disagree about the definition of a specific rule (rather than one circuit just applying the rule more or less frequently than another), however, it would be rational for Congress to take account of the most demanding version of the rule when it drafted statutory language.

interpretations are made by lower courts, it may be fanciful to think that Congress could ever predict which rules of interpretation will be applied to any given statute.[111]

3. The Imprecise Nature of Statutory Interpretation

Even in a best case, and unrealistic, scenario where all judges agreed to follow a particular methodology of interpretation and both branches of government agreed on all of the rules of interpretation and attempted to apply them faithfully, congressional reliance would still be at least somewhat fictional because statutory interpretation is an inherently subjective enterprise. The most powerful rules of interpretation are implicated when a statute is deemed to be unclear or ambiguous, but there is no agreed upon method of determining unclarity or ambiguity.[112] The definitions of unclarity and ambiguity used by courts are necessarily vague, and their application to any given statute would be highly subjective even with precise definitions.[113] Thus, even if one assumes that Congress could know which rules of interpretation would be accepted by courts, it is questionable whether Congress could rely on the application of many of the rules when drafting statutes.

111. Thus, Congress may know about the rules of interpretation but may not refer to them when drafting legislation because of a belief that they do not predict how judges are likely to interpret the legislation. *See* Nourse & Schacter, *supra* note 94, at 602 (discussing lawmakers' rationales for drafting ambiguous legislation).

112. *See* Nelson, *supra* note 72, at 396 (wondering "[h]ow big a gap must exist between the leading interpretation and the next most likely alternative for the Court to say that the statute permits only one construction"); Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 520 (noting uncertainty in determining how much ambiguity is necessary before deeming statute ambiguous).

113. I distinguish between unclarity and ambiguity because canons of statutory construction are of different strengths, with some canons being more powerful than others. Clear statement canons are applied when a statute is less than clear, although courts do not agree on when a statute is sufficiently clear to avoid the application of a clear statement rule. See *infra* Part IV.D for a description of clear statement rules. Other less powerful canons are applied when statutory language is ambiguous, but the judicial methodology for determining ambiguity is equally unsatisfying. Many courts state that "[a]mbiguity exists when a statute is capable of being understood by reasonably well-informed persons in two or more different senses." United States v. Iron Mountain Mines, Inc., 812 F. Supp. 1528, 1557 (E.D. Cal. 1992) (citing 2A NORMAN J. SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 45.02 (5th ed. 1992)). Of course, this definition is practically useless. Obviously, the definition does not mean that anytime a lawsuit is filed that hinges on the meaning of statutory text the text is ambiguous. Equally so, courts do not assert that ambiguity exists when two or more judges disagree about the meaning of statutory text. Some courts have stated that "a provision of the law is ambiguous only . . . when it is *equally* susceptible to more than a single meaning." Mayor of Lansing v. Mich. Pub. Serv. Comm'n, 680 N.W.2d 840, 847 (Mich. 2004). But such a definition is much too narrow if it is to be taken literally. Competing interpretations are never *exactly* equal. More often, one interpretation is at least slightly more persuasive than the next most persuasive interpretation. Courts have not resolved the issue of how persuasive the second most persuasive interpretation must be in order to label a statutory provision "ambiguous," and such a determination is inherently subjective in any case. *Cf.* Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546, 572 (2005) (Stevens, J., dissenting) ("Because ambiguity is apparently in the eye of the beholder, I remain convinced that it is unwise to treat the ambiguity *vel non* of a statute as determinative of whether legislative history is consulted.").

B. A Partial Defense of the Background Rules Theory

As explained above, it must be conceded that the background rules theory is largely based on fictions that likely are not consistent in some respects with the reality of statutory creation and interpretation. These fictions should not be overstated, however. The crucial assumption of the background rules theory may be that Congress is aware of the rules of interpretation when it drafts legislation, but it does not necessarily follow that the rules of interpretation must be precisely predictive. Reliance on a rule of interpretation would be justified if the existence of the rule made a certain interpretation more likely than if the rule did not exist, regardless of whether a court actually decides to apply the rule.[114] For example, if Congress enacts a statute with possible retroactive effects, it should anticipate that a court will likely invoke the presumption against retroactivity and apply the statute only prospectively unless the statute clearly indicates that it should have retroactive effects.[115] While at the time a statute is enacted it may be uncertain whether a reviewing court will determine that the statute clearly indicates that it should be applied retroactively, it would not be accurate to assert that congressional reliance on the rule is impossible for that reason alone.[116]

The common conception of congressional reliance on the rules of interpretation focuses on the (often difficult) prediction of how a court will apply the rules in order to reach a conclusion about the meaning of a statute. Congress can also rely on some rules of interpretation in different and more certain ways, however. For example, Congress may rely on rules that determine when courts should defer to agency statutory interpretations.[117] If the Court decides to create a new rule that agencies must follow certain formalities, or possess certain powers, in order for their statutory interpretations to be eligible for deference, Congress may well rely on such a rule (or its absence) when designing legislative schemes.[118] It follows that the retroactive application of such a rule could upset legislative designs that were enacted before such a rule was created.

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114. *Cf.* Rodriguez, *supra* note 47, at 772 (noting that content of statute is in "part a function of the predictions of those who demand [the] legislation").

115. See *supra* notes 70–74 and accompanying text for a description of the presumption against retroactivity. Of course, there are cases where Congress could have, but did not, consider the possible retroactive effects of a statute it enacted. In such a situation, the presumption against retroactivity acts as a nondelegation canon that forces Congress, rather than a court, to specifically provide that the statute should have retroactive effects. Sunstein, *supra* note 85, at 332.

116. For example, in *Fernandez-Vargas v. Gonzales*, the Court explicitly considered the presumption against retroactivity to be part of its interpretive analysis but ultimately held that Congress was sufficiently clear in expressing its intent that the statute be applied retroactively. 548 U.S. 30, 37–47 (2006). Regardless of the actual holding in any given case, it certainly cannot be said that congressional reliance on the presumption against retroactivity when drafting legislation is unwarranted.

117. See *infra* Part V.B for an explanation of the rules governing when courts must defer to agency statutory interpretations.

118. See *infra* notes 250–53 and accompanying text for a discussion of the proposition that Congress may have relied on *Chevron*'s rule of deference to agency legal interpretations when it drafted subsequent legislation.

In addition, while the background rules theory is fictional in part because of the institutional limitations of the judiciary, these limitations should also not be exaggerated.[119] While it may not be realistic for the judiciary to coordinate on the rules of interpretation, even if two circuits split over whether a new or modified rule should be applied only prospectively the split will not impact the application of the rule to future legislation.[120] Also, Supreme Court statements about the rules of interpretation are binding on lower courts, which should foreclose at least some circuit splits.[121] In any case, judicial disagreements over the rules of interpretation are hardly novel. Compared to the existing system, where new or modified rules are automatically applied retroactively, even an imperfect system with some judicial disagreements would provide cause for Congress to focus more on the rules of interpretation when drafting legislation.[122]

Apart from the importance of not exaggerating the fictions of the background rules theory, conceding that the fictions, at least to some degree, are based on erroneous assumptions should not be thought to completely delegitimize the theory. Legal fictions are common throughout the law and necessarily rest on untested or erroneous factual premises.[123] Certainly, all statutory interpretive theories rest at least in part on fictions, and it is difficult to establish that a certain regime better reflects congressional intent.[124] While judges would likely claim that candor in judicial opinions is important, they choose and maintain legal fictions for various reasons, including an understandable desire to avoid delegitimating consequences.[125] Indeed, considering the current nature of statutory interpretation, jettisoning the background rules theory would have delegitimating consequences.

The legitimacy of many of the rules of interpretation depends at least in part on the background rules theory. Courts attempt to interpret statutes in a

119. See *supra* Part III.A.2 for a description of the institutional limitations of the judiciary.

120. Thus, the current Congress can rely on the rule when choosing statutory language.

121. *See* Ali v. Fed. Bureau of Prisons, 128 S.Ct. 831, 841 (2008) (Kennedy, J., dissenting) (stating that both "analytic framework" and "specific interpretation" of Court become binding on federal courts). *But see* Jordan Wilder Connors, Note, *Treating Like Subdecisions Alike: The Scope of Stare Decisis as Applied to Judicial Methodology*, 108 COLUM. L. REV. 681, 681–84 (2008) (discussing often inconsistent role of stare decisis with regard to interpretive rules).

122. See *infra* Part VI for a discussion of the benefits of judicial consideration of temporal issues.

123. *See generally* Smith, *supra* note 91 (describing various legal fictions employed by modern judges); Note, *Lessons From Abroad: Mathematical, Poetic, and Literary Fictions in the Law*, 115 HARV. L. REV. 2228 (2002) (exploring law's broad use of fictions). Justice Scalia, for example, advocates use of the "benign fiction" that Congress has in mind the surrounding body of law into which a statutory provision must be integrated. Green v. Bock Laundry Mach. Co., 490 U.S. 504, 528 (1989) (Scalia, J., concurring). Not everyone is a proponent of these fictions, however. *See, e.g.*, Cass R. Sunstein, *Principles, Not Fictions*, 57 U. CHI. L. REV. 1247, 1256–58 (1990) (urging rejection of fictions in statutory interpretation).

124. See *supra* note 64 and accompanying text for a description of the difficulty of discerning congressional intent. *See also* Moglen & Pierce, *supra* note 91, at 1208–09 (labeling statutory interpretive theories as "interpretive fictions").

125. Smith, *supra* note 91, at 1478–80.

manner that effectuates congressional intent, and they typically justify the rules of interpretation on the basis that, at the very least, they are consistent with this objective.[126] Thus, for example, the Court has stated that it applies the presumption against retroactive application of statutes because doing so "will generally coincide with legislative and public expectations."[127] With perhaps increasing frequency, however, the judiciary does not simply choose the most persuasive statutory interpretation. Rather, for various reasons, courts place significant weights in the form of "substantive canons" on the interpretive scale in favor of desirable interpretations.[128] The background rules theory is especially necessary as a legitimating device with regard to these rules.

Substantive canons, also known as "normative canons" among other terms, are policy-based directives about how statutory ambiguity should be resolved.[129] For example, a statute will not be interpreted as having eliminated courts from exercising habeas corpus jurisdiction unless that interpretation far exceeds the persuasiveness of an interpretation that would save habeas corpus jurisdiction.[130] As long as courts are willing to pursue such public policy objectives, and proclaim at the same time to be faithful agents of Congress, they must assume that Congress is aware of, at the very least, the most powerful rules of statutory interpretation. A contrary assumption that Congress believes that courts will simply choose the most persuasive interpretation, pursuant to a textual or intent-based inquiry, would expose many rules of statutory interpretation as mere devices used to frustrate congressional intent.[131] Thus, the background rules theory is especially critical to the legitimacy of the stronger rules of interpretation that courts rely on when adopting what would otherwise be less persuasive, or second-best, statutory interpretations.[132]

It is arguable that a persuasive first-order theory of statutory interpretation would reject devices such as the background rules theory that are based on questionable fictions. Considering, however, that judges will continue to apply rules that are not necessarily consistent with congressional intent, they will likely also continue to utilize the background rules theory in order to help legitimate

126. See *supra* notes 9, 45 and accompanying text for descriptions of the faithful agent orientation of courts.

127. Landgraf v. USI Film Prods., 511 U.S. 244, 272 (1994). Whether the presumption against retroactivity is always consistent with congressional intent is debatable, however. *See* Slocum, *supra* note 93, at 408–09 (arguing that presumption is likely not consistent with congressional intent when applied in immigration cases).

128. See *infra* Part IV.B–D for an explanation of how tie-breaker canons, clear statement rules, and intermediate canons are used to resolve statutory ambiguity.

129. WILLIAM N. ESKRIDGE, JR. & PHILIP P. FRICKEY, CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 634 (2d ed. 1995).

130. *See* Demore v. Kim, 538 U.S. 510, 517 (2003) (referring to "'superclear statement, 'magic words' requirement for the congressional expression of' an intent to preclude habeas review" (quoting INS v. St. Cyr, 533 U.S. 289, 327 (2001) (Scalia, J., dissenting))).

131. *See generally* Elhauge, *supra* note 20 (explaining that many rules of interpretation run counter to congressional intent).

132. See *infra* notes 136–37 and accompanying text for an explanation of second-best statutory interpretations.

their interpretations.[133] A persuasive second-order theory of statutory interpretation should therefore attempt to define the background rules theory in the most persuasive, and constitutionally legitimate, manner possible.[134] Thus, notwithstanding its limitations as a nonfictitious description of the legislative process, the most persuasive and legitimate background rules theory is one that accounts for temporal considerations.

IV. ONLY THE MOST POWERFUL RULES OF INTERPRETATION SHOULD BE CONSIDERED FOR PROSPECTIVE-ONLY APPLICATION

As this Article has described, the traditional inclination of judges is to automatically apply new or modified rules of interpretation retroactively, but the logic of the background rules theory dictates that new or modified rules be applied only prospectively. The background rules theory, even if it is questionable to some as a normative matter, is likely a permanent aspect of statutory interpretation because it helps courts legitimize judicially created rules of interpretation. Nevertheless, its weaknesses and fictional nature, as well as the difficulty inherent in determining whether an interpretive rule has been created or an existing one modified, support a moderate approach to retroactivity issues. Thus, while the logic of the background rules theory extends perhaps to all of the rules of interpretation, this Part argues that courts should consider prospective-only application of new or modified interpretive rules only in circumstances when doing so is most persuasive.

The most compelling case for prospective-only application is when a "dice-loading" rule is created or modified.[135] A rule is dice-loading if, when it is first created, the rule would require or allow courts to adopt a second-best statutory interpretation.[136] In other words, if the rule would require or allow a court to

133. *Cf.* LON L. FULLER, LEGAL FICTIONS 108 (1967) (arguing that legal fictions serve important role as simplifying and organizing devices). Perhaps a persuasive first-order theory would be that judges should only choose rules that are consistent with congressional intent, but considering the limited empirical data available to courts, such determinations would often be based on guesswork. See *supra* note 64 and accompanying text for a discussion of the assertion that courts choose interpretive doctrines on empirical grounds despite the limited resources with which they can resolve empirical uncertainty.

134. See *supra* notes 19–21 and accompanying text for an explanation of this Article's focus on how the rules of a second-order interpretive theory can be legitimized within current methodologies of statutory interpretation.

135. The argument that only dice-loading interpretive rules should be considered for prospective-only application is obviously independent of the argument that courts should consider temporal issues when creating or modifying interpretive rules. Thus, one could be convinced by my argument that courts should consider temporal issues when creating or modifying interpretive rules but disagree with the argument that such consideration should be limited to dice-loading interpretive rules.

136. When referring to a rule of interpretation, the term "dice-loading" typically carries with it a negative connotation. *See, e.g.*, ANTONIN SCALIA, COMMON-LAW COURTS IN A CIVIL-LAW SYSTEM: THE ROLE OF UNITED STATES FEDERAL COURTS IN INTERPRETING THE CONSTITUTION AND LAWS, IN A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 28–29 (Amy Gutmann ed., 1997) (arguing that dice-loading rules increase unpredictability of judicial decision making and questioning courts' authority to impose them); Maura D. Corrigan & J. Michael Thomas, *"Dice*

adopt a textually less persuasive interpretation (without consideration of the background rules theory's assumption that Congress has referenced the rule when drafting legislation), the rule is dice-loading for purposes of temporal consideration.[137] The consideration of only dice-loading rules for prospective-only application acknowledges the fictions of the background rules theory and the difficulties of determining whether prospective-only application is warranted while focusing on the rules that Congress is most likely to consider when drafting legislation.[138]

A. Textual Canons and Other Rules

Numerous rules qualify as dice-loading rules, and categorizing many of them as such is relatively straightforward. The *Chevron* doctrine, for example, is a dice-loading rule because it requires courts to defer to agency legal interpretations that they courts might not otherwise choose as the most persuasive interpretation.[139] Similarly, the rule allowing courts to consider legislative history is a dice-loading rule because courts can use legislative history to choose a textually inferior interpretation.[140]

The canons of statutory construction (which have arguably increased in importance with the rise of textualism)[141] present special challenges, however. Textual canons, for example, "set forth inferences that are usually drawn from the drafter's choice of words, their grammatical placement in sentences, and their relationship to other parts of the 'whole' statute."[142] They are the least controversial canons in terms of the democratic legitimacy of their application by the judiciary, although their accuracy in revealing legislative intent has been

Loading" Rules of Statutory Interpretation, 59 N.Y.U. ANN. SURV. AM. L. 231, 231 (2003) (implying that dice-loading rules allow judges to disregard statutory text). In this Article, the term is intended to be a purely descriptive reference to rules that require courts to adopt second-best interpretations.

137. Part of what makes one interpretation second best is that the court is required to ignore another interpretation that is a logical inference from the language and structure of the text because the text was not sufficiently clear. *See* Dellmuth v. Muth, 491 U.S. 223, 238–39 (1989) (Brennan, J., dissenting) (arguing that "stringent test" that Court creates in order for state sovereign immunity to be abrogated does not coincide with language and structure of statute).

138. While it may be a fiction to assume that Congress enacts legislation with all of the rules of interpretation in mind, it is far less certain that Congress drafts statutory language without regard to rules of interpretation that require courts to adopt second-best interpretations.

139. See *infra* Part V.B.1 for a description of the *Chevron* doctrine.

140. Indeed, in the first case to sanction the use of legislative history, *Church of the Holy Trinity v. United States*, the Court followed what it viewed as congressional intent as found in the legislative history despite its direct conflict with the statutory text. 143 U.S. 457, 458–59 (1892); *see also* Baade, *supra* note 15, at 321–22 (noting that *Holy Trinity* applied new interpretive rule retroactively despite direct conflict with clear statutory language); Vermeule, *supra* note 15, at 1835 (noting *Holy Trinity* relied on legislative history to construe statute, finding congressional intent that conflicted with plain meaning of statute).

141. *See* Frank B. Cross, *The Significance of Statutory Interpretive Methodologies*, 82 NOTRE DAME L. REV. 1971, 1977 (2007) (explaining that canons of construction are interpretative rules that are often complementary to textualism).

142. ESKRIDGE & FRICKEY, *supra* note 129, at 634.

criticized.[143] It may be true that the application of a textual canon is strictly an attempt to effectuate congressional intent.[144] Many of the textual canons are only persuasive when courts assume that Congress is aware of the rules when it enacts legislation, however.[145] Nevertheless, textual canons are designed to assist courts in determining the ordinary meaning of statutory language, as opposed to devices designed to allow courts to choose second-best interpretations.[146] As such, textual canons are not dice-loading rules.[147]

B. Tie-Breaker Canons

Substantive canons present more difficult issues of categorization.[148] Not all substantive canons are of equal strength, and the differences among the canons should compel different temporal treatment by courts. The classification of specific substantive canons can be difficult because courts are often vague when describing the canons and occasionally increase or decrease their strength, but broad categories can be identified.[149] The weakest substantive canons are tie-breaker canons, which direct that certain statutes be construed "liberally" or "strictly" and are only considered at the end of a court's search for statutory meaning.[150] Tie-breaker canons are frequently used by courts as a way of resolving statutory ambiguity, but because they are only used to choose between roughly equal interpretations they do not require or allow courts to choose second-best interpretations.[151]

Considering that they are not dice-loading rules, it is reasonable for judges to conclude that the temporal issues involved with new or modified tie-breaker canons are comparatively minor and allow for retroactive application. For

143. Karl Llewellyn made perhaps the most famous critique. *See generally* Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395 (1950). His criticisms have been effectively countered, however. *See generally* Shapiro, *supra* note 103 (emphasizing importance of textual canons in statutory construction).

144. *See* Ross, *supra* note 15, at 563 ("A judge deploying a [textual] canon is attempting to act as an agent to effectuate congressional intent.").

145. *See* Manning, *What Divides*, *supra* note 6, at 97–98 (maintaining improbability that all textual canons reflect legislators' actual knowledge of contents of legislation).

146. *See* Frickey, *supra* note 15, at 1987 (stating that textual canons "purport to provide guidance about the ordinary meaning of statutory language").

147. Despite their categorization in this Article as nondice-loading rules, a strong argument could be made that if a court creates a new textual canon that could change the meaning of the statutory term, the new canon should be applied only prospectively for the same reasons that some substantive canons such as clear statement rules should be applied only prospectively. See *supra* Part II for a description of why new or modified interpretive rules should be applied only prospectively.

148. See *supra* note 129 and accompanying text for a description of substantive canons as directives motivated by public policy objectives.

149. See *supra* Part III.A.1 for a description of how courts use the rules of interpretation when deciding cases.

150. WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY & ELIZABETH GARRETT, LEGISLATION AND STATUTORY INTERPRETATION 341 (2000).

151. *See id.* (explaining that tie-breaker canons are only used if court is left in doubt).

example, imagine that a court is interpreting an immigration statute. If a court has exhausted its typical hermeneutic inquiry but has determined that one interpretation is not clearly better than another, how should the court choose between the competing interpretations?[152] Perhaps the court has traditionally chosen the more persuasive interpretation, even if it is only slightly more persuasive.[153] But this resolution would undoubtedly be unsatisfying to many judges. It has seemed natural to courts that they should not only resolve the statutory ambiguity in the present case on the basis of some important public policy, such as leniency to politically vulnerable groups, but that they should announce that they will resolve future ambiguities in such a fashion. Courts have therefore constructed numerous permanent devices for resolving ambiguity, such as the immigration rule of lenity, which instructs courts to interpret "ambiguities in deportation statutes in favor of the alien."[154]

Tie-breaker canons like the immigration rule of lenity thus resolve ambiguity at the end of the process of determining meaning and are not applied before the court has determined that Congress has not made its views clear. By resolving ambiguities through the retroactive application of newly created tie-breaker canons, courts do not undermine reliance by Congress on any particular resolution of statutory ambiguity.[155] Moreover, unlike the case with dice-loading substantive canons that require courts to often choose clearly inferior interpretations, courts could resolve ambiguities in the same way without an explicit tie-breaker canon. In an immigration case, for example, the court could simply decide to resolve the ambiguity in favor of the immigrant regardless of the applicability of any canon. It thus follows that new or modified tie-breaker

152. When an agency is involved, the court might resolve the issue by deferring to the agency's interpretation pursuant to *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, which requires that courts defer to some reasonable agency interpretations of ambiguous statutes. 467 U.S. 837, 844 (1984). See *infra* Part V.B.1 for a discussion of the *Chevron* decision. In an earlier article, I discussed the conflict between the *Chevron* doctrine and the immigration rule of lenity. *See* Slocum, *supra* note 110, at 531–33 (describing how some courts dealing with immigration law have invoked rule of lenity while others have applied *Chevron* deference).

153. It is the rare case where the two competing interpretations are equally plausible. Far more often, even in cases where courts state that a statutory provision is ambiguous, one interpretation is at least slightly more persuasive than the next most persuasive interpretation. See *supra* Part III.A.3 for a discussion of the inherent subjectivity in labeling a statutory provision ambiguous.

154. INS v. Cardoza-Fonseca, 480 U.S. 421, 449 (1987). The immigration rule of lenity was created by the Court in a 1948 case, *Fong Haw Tan v. Phelan*, on the theory that "because deportation is a drastic measure and at times the equivalent of banishment or exile," deportation provisions should be strictly construed in favor of the immigrant. 333 U.S. 6, 10 (1948).

155. Some would argue that it is important to choose canons that resolve statutory ambiguity in accordance with likely congressional intent. *See* Thomas W. Merrill & Kristin E. Hickman, Chevron*'s Domain*, 89 GEO. L.J. 833, 870 (2001) (arguing respect for congressional intent best explains *Chevron*). But even if courts could estimate likely congressional intent for a general category of cases such as immigration cases, canons are more or less permanent while congressional intent changes. Thus, instead of consistently applying the immigration rule of lenity, a court would have to apply the immigration rule of lenity for one Congress but perhaps an immigration rule of severity for another if it determined that particular Congress to be consistently anti-immigrant.

canons can be applied retroactively without undermining the background rules theory.[156]

C. Clear Statement Rules

In contrast to the relatively weak canons that serve as tie-breakers, clear statement rules play a much more aggressive role in statutory interpretations. Clear statement rules have two distinguishing characteristics. The first is that an interpretation must be highly persuasive in order to overcome the presumption created by the clear statement rule. In that sense, courts are often forced to accept second-best interpretations, including the frequent creation of implied exceptions to otherwise unambiguously broad statutory language.[157] The other distinguishing feature is that the presumption created by a clear statement rule can usually only be overcome by clear statutory text rather than congressional intent discovered in an extrinsic source such as legislative history.[158]

Clear statement rules and other dice-loading canons that require courts to adopt second-best statutory interpretations have been subjected to significant scholarly criticism.[159] One criticism is that the clear statement requirement assumes an unrealistic level of congressional foresight.[160] Others, though, have questioned whether clear statement rules truly require courts to choose second-best interpretations. Justice Scalia, for example, has argued that some clear statement rules may simply be "exaggerated statement[s] of what normal, no-thumb-on-the-scales interpretation would produce anyway."[161] Justice Scalia points to the clear statement rule against a waiver of state sovereign immunity as an example and argues that "since congressional elimination of state sovereign

156. Like the creation of tie-breaker canons, the elimination of tie-breaker canons should be applied retroactively by courts. The change from a rule requiring roughly equal interpretations to be resolved in a certain way to one either giving judges discretion in determining which interpretation to choose or requiring them to choose the slightly more persuasive interpretation is sufficiently minor so as not to require prospective-only application. If the Court were to elevate a tie-breaker canon to clear statement rule (and thus dice-loading) status, though, the Court should analyze whether the modified rule should be applied only prospectively.

157. *See* Nelson, *supra* note 72, at 384 (noting that presumption against retroactivity "often causes courts to infer exceptions to statutory provisions whose words, on their face, appear to cover all pending cases"). Some clear statement rules are more powerful than others and require extremely explicit statutory language in order to overcome their presumptions. The rule requiring a clear statement of congressional intent to repeal habeas jurisdiction is one such super-clear statement rule. See *supra* note 130 and accompanying text for a discussion of how a statute will not be interpreted as having eliminated courts' habeas corpus jurisdiction unless the statute provides a super-clear expression of that intent.

158. *See* William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 597 (1992) (describing importance of clarity within statutory text itself).

159. *See id.* at 598 (arguing that Court's clear statement rules "amount to a 'backdoor' version of the constitutional activism that most Justices on the current Court have publicly denounced").

160. *See* Brudney & Ditslear, *supra* note 99, at 9–10 (stating that Court's use of clear statement rules "may . . . ignor[e] clearly discoverable legislative purpose" and frustrate "policy preferences of the legislature" because they assume "an unrealistic level of congressional foresight").

161. Scalia, *supra* note 136, at 29.

immunity is such an extraordinary act, one would normally expect it to be explicitly decreed rather than offhandedly implied—so something like a 'clear statement' rule is merely normal interpretation."[162]

On its face, the idea that Congress adopts more explicit language in areas that the *Court* thinks are important is questionable, at least as an initial matter before clear statement rules are established as background rules. The Court has stated that clear statement rules "prevail only to the protection of weighty and constant values," but Congress legislates in many areas of great importance.[163] The Court's decision to create clear statement rules for some areas but not others is surely based on policy, not merely attempts to estimate congressional intent.[164] The Court, as the ultimate authority for the rules of interpretation, decides which values are sufficiently weighty to justify clear statement rules, and it has frequently created clear statement rules that appeal to diverse ideological perspectives. For example, within the last couple of decades, the relatively conservative Court has created several clear statement rules that promote federalism concerns.[165] The Court has created clear statement rules that prevent, absent a clear congressional statement, the abrogation of state Eleventh Amendment immunity, private damages actions against the states, the exposure of states to generally applicable regulations, and the displacement of state law in domains of traditional state concern.[166]

It is true that courts could, for example, sometimes adopt interpretations that would not result in a waiver of state sovereign immunity even absent an applicable clear statement rule.[167] It is certainly the case, however, that clear statement rules often require courts to choose second-best statutory interpretations.[168] Moreover, Justice Scalia's argument regarding clear statement

162. *Id.*

163. Astoria Fed. Sav. and Loan Ass'n v. Solimino, 501 U.S. 104, 108 (1991).

164. *Cf.* Eskridge & Frickey, *supra* note 158, at 638 (criticizing clear statement rules as allowing Court to override congressional intent "in favor of norms and values favored by the Court").

165. *See* Frickey, *supra* note 15, at 1991 ("The Court's relatively recent creation of clear statement rules implemented to guard core federalism values from inadvertent congressional intrusion . . . serve to protect 'underenforced' constitutional norms"); John F. Manning, *Continuity and the Legislative Design*, 79 NOTRE DAME L. REV. 1863, 1866 (2004) (noting that "[a] growing number of (concededly idiosyncratic) substantive canons . . . require[] particularly clear policy expression when a statute otherwise threatens to intrude upon constitutional values such as federalism or the separation of powers"); Larry J. Obhof, *Federalism, I Presume? A Look at the Enforcement of Federalism Principles Through Presumptions and Clear Statement Rules*, 2004 MICH. ST. L. REV. 123, 124–25 (arguing that Court has begun to use clear statement rules to protect state functions and state sovereign immunity).

166. *See* Dan M. Kahan, *Lenity and Federal Common Law Crimes*, 1994 SUP. CT. REV. 345, 355–56; John Copeland Nagle, *Waiving Sovereign Immunity in an Age of Clear Statement Rules*, 1995 WIS. L. REV. 771, 771.

167. In other words, the interpretation that a statute does not waive state sovereign immunity may simply be more persuasive than the contrary interpretation, even without regard to the clear statement rule.

168. *See* EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 262 (1991) (Marshall, J., dissenting) ("Clear-statement rules operate less to reveal *actual* congressional intent than to shield important values from an *insufficiently strong* legislative intent to displace them."); Note, *Clear Statement Rules,*

rules and congressional intent, even if true to some degree, is too imprecise. Congress may be more careful when legislating in areas of great importance, but clear statement rules sometimes require extraordinary clarity.[169] Even if Congress is more explicit than usual, it might not be explicit enough to satisfy the applicable clear statement requirement. Thus, while it may be true that Congress legislates with greater clarity in some areas, clear statement rules require courts to adopt second-best interpretations and therefore should be classified as dice-loading rules.

D. Intermediate Canons

Some canons cannot be easily placed into either the tie-breaker category or the clear statement category but seem to fall somewhere between the two.[170] The canon of constitutional avoidance, for example, directs that "if an otherwise acceptable construction of a statute would raise serious constitutional problems, and where an alternative interpretation of the statute is 'fairly possible,' . . . [reviewing courts] are obligated to construe the statute to avoid such problems."[171] The canon has been identified in the past as a clear statement canon, but the Court has recently stated that the avoidance canon's function is to "choos[e] among plausible meanings of an ambiguous statute," as opposed to a clear statement rule, which "implies a special substantive limit on the application of an otherwise unambiguous mandate."[172]

Despite the Court's characterization of the avoidance canon as akin to a tie-breaker canon, it often requires a court to adopt the second-best interpretation—one that is, in the Court's words, "fairly possible" but not the best interpretation.[173] The Court claims that the canon represents a "reasonable

Federalism, and Congressional Regulation of States, 107 HARV. L. REV. 1959, 1959, 1973 (1994) (arguing that because they require such explicit statutory language, clear statement canons are concerned more with protecting important values than they are with capturing most accurate reconstruction of congressional intent).

169. See *supra* note 130 and accompanying text for a discussion of how statutes are not interpreted to bar courts from exercising habeas corpus jurisdiction unless the congressional statement is super clear in expressing that intent.

170. This is true in part because the Court is often vague regarding whether a rule is a tie-breaker or clear statement rule. *See generally* Shapiro, *supra* note 103 (describing difficulty of creating exhaustive list of clear statement rules because list is ever evolving).

171. INS v. St. Cyr, 533 U.S. 289, 299–300 (2001) (citation omitted).

172. Spector v. Norwegian Cruise Line Ltd., 545 U.S. 119, 141 (2005); *see also* Clark v. Martinez, 543 U.S. 371, 385 (2005) ("The canon of constitutional avoidance comes into play only when, after the application of ordinary textual analysis, the statute is found to be susceptible of more than one construction . . . ."). Some have described the canon as a clear statement rule, however. *See* Eskridge, *supra* note 77, at 599 (arguing that Congress has developed conventions that place pertinent information in committee reports instead of statutes as response to courts' review of legislative history).

173. Zadvydas v. Davis, 533 U.S. 678, 689 (2001); *see also* William K. Kelley, *Avoiding Constitutional Questions as a Three-Branch Problem*, 86 CORNELL L. REV. 831, 840 (2001) (describing Court's long-held view that, when applying avoidance canon, "a court should prefer a permissible, even if not an optimal, reading of the statute to which it can give effect to a pure statutory reading that it must strike down").

presumption" that Congress intends to legislate constitutionally and is "a means of giving effect to congressional intent, not of subverting it."[174] Applications of the avoidance canon and the consequent adoption of second-best interpretations sometimes involve, similar to clear statement rules, the Court creating exceptions to broad statutes or drafting language to insert into the statute at issue, however.[175] The avoidance canon should thus be considered a dice-loading rule of interpretation.

V. THE SUPREME COURT AND THE IMPROPER RETROACTIVE APPLICATION OF NEW OR MODIFIED RULES OF STATUTORY INTERPRETATION

The proposal outlined above for determining whether new or modified rules of interpretation should be applied only prospectively would require only a moderate change in some respects to the current way that courts interpret statutes. Only newly created or modified dice-loading rules must be considered for prospective-only application.[176] In addition, new or modified dice-loading rules based on estimations of congressional intent should be applied only prospectively, but judges create and modify dice-loading rules for a variety of reasons, from functionalist to formalist. As explained in Part III.B.2, the reasons underlying the creation or modification of the interpretive rule in question will sometimes outweigh the background rules theory and allow courts to apply the new or modified rule retroactively.[177]

Nevertheless, courts often change the rules of interpretation and often apply dice-loading rules. This Part will examine the Supreme Court's creation or modification of two dice-loading rules of interpretation. Its purpose is not to present evidence conclusively establishing that the Court actually created or modified either of the rules, although in each of the cases discussed scholars have

174. *Martinez*, 543 U.S. at 382.

175. *See* Slocum, *supra* note 93, at 378–81 (describing how application of avoidance canon often requires reviewing court to choose second-best interpretations). Currently, courts do not consider the inherent temporal issue that is present whenever the constitutional rule that could potentially invalidate all or part of the statute in question was established after the enactment of the statute. *See* Robert W. Scheef, *Temporal Dynamics in Statutory Interpretation: Courts, Congress, and the Canon of Constitutional Avoidance*, 64 U. PITT. L. REV. 529, 544 (2003) (arguing that transformation of avoidance canon into clear statement rule increases burden on Congress). A presumption that Congress intended to avoid constitutional problems is problematic in those situations where Congress could not have been aware of the constitutional issues at the time of the enactment of the statute. In these cases, the best solution would be to modify the canon to avoid interpretations that are actually unconstitutional, even if the interpretation adopted is second best. *Cf.* Ernest A. Young, *Constitutional Avoidance, Resistance Norms, and the Preservation of Judicial Review*, 78 TEX. L. REV. 1549, 1574–75 (2000) (noting Court's long-standing policy of deciding constitutional issues only as last resort).

176. See *supra* Part IV for a discussion of why only the strongest rules of interpretation should be considered for prospective-only application.

177. Because the existence of statutory ambiguity sometimes triggers more than one substantive canon, there will be cases where the rule at issue will not be dispositive because the same interpretation would have been chosen regardless of whether the new or modified rule is applied retroactively. *See, e.g.*, INS v. St. Cyr, 533 U.S. 289, 298 (2001) (citing both habeas corpus clear statement rule and canon of constitutional avoidance).

claimed that the Court did create or modify the rule in question. Rather, this Part seeks to illustrate, in the context of specific cases, the proper process for determining whether new or modified rules of interpretation should be applied only prospectively and the consequences of decisions that inappropriately apply new or modified rules retroactively.

A. Clark v. Martinez *and the Modification of the Canon of Constitutional Avoidance*

As Part IV.D described, the canon of constitutional avoidance is a dice-loading rule and modifications to it raise temporal issues that courts should consider.[178] Recently, in *Clark v. Martinez*,[179] the Court added a new and powerful aspect to the avoidance canon by directing that a statutory interpretation made by invoking the canon be uniformly applied in subsequent cases even when the later cases do not raise any serious constitutional issues.[180] The creation of what the Court termed the "lowest common denominator"[181] principle started with the Court's earlier decision in *Zadvydas v. Davis*.[182] In *Zadvydas*, the Court applied the avoidance canon in interpreting 8 U.S.C. § 1231(a)(6), which states that certain immigrants "may be detained beyond the [90-day] removal period."[183] The Court, required by the avoidance canon to adopt a "fairly possible" interpretation of the statute that would avoid the constitutional questions raised by the indefinite detention of immigrants who legally are considered to have entered the country, held that these immigrants can be detained only for a six-month period unless there is a "significant likelihood of removal in the reasonably foreseeable future."[184] Thus, as a result of the Court's use of the avoidance canon, the holding was one of statutory construction that was driven by constitutional concerns.

In *Martinez*, the Court extended the *Zadvydas* statutory holding to include a different group of immigrants—inadmissible immigrants—who have far different constitutional rights.[185] The Court held that § 1231(a)(6) would be construed as imposing the same temporal limitation on the detention of inadmissible immigrants as it found in *Zadvydas* was applicable to the detention of deportable immigrants.[186] The Court acknowledged that its interpretation in

178. See *supra* Part IV.D for a description of why the avoidance canon raises temporal issues that require examination by courts.

179. 543 U.S. 371 (2005).

180. *Martinez*, 543 U.S. at 380–81.

181. *Id.* at 380.

182. 533 U.S. 678 (2001).

183. 8 U.S.C. § 1231(a)(6) (2006).

184. *Zadvydas*, 533 U.S. at 689, 701.

185. Brian G. Slocum, *The War on Terrorism and the Extraterritorial Application of the Constitution in Immigration Law*, 84 DENV. U. L. REV. 1017, 1023–28 (2007).

186. *Martinez*, 543 U.S. at 377–78. In dissent, Justice Thomas interpreted *Zadvydas* differently, arguing that "*Zadvydas* established a single and unchanging, if implausible, meaning of § 1231(a)(6): that the detention period authorized by § 1231(a)(6) depends not only on the circumstances

Zadvydas was made possible by application of the avoidance canon.[187] The Court stated, however, that it did not matter whether indefinite detention of inadmissible immigrants would raise serious constitutional questions.[188] Instead, the Court stated:

> It is not at all unusual to give a statute's ambiguous language a limiting construction called for by one of the statute's applications, even though other of the statute's applications, standing alone, would not support the same limitation. The lowest common denominator, as it were, must govern . . . . whether or not those constitutional problems pertain to the particular litigant before the Court.[189]

The Court's application of the lowest common denominator principle in *Martinez* had very broad consequences. Before the enactment of § 1231(a)(6) as part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), courts consistently found that the Attorney General had both statutory and constitutional authority to detain inadmissible immigrants indefinitely.[190] Due to the Court's use of the avoidance canon in *Zadvydas* and *Martinez*, the Attorney General was precluded from indefinitely detaining not only deportable immigrants, whose indefinite detention raises serious constitutional problems, but also inadmissible immigrants, whose indefinite detention does not currently raise serious constitutional problems.[191]

The Court in *Martinez* claimed that it was not modifying the avoidance canon, stating that the "lowest common denominator" principle is a legitimate and necessary consequence of the invocation of the avoidance canon.[192] Such a statement was rather surprising considering that the Court earlier in *Zadvydas* had emphasized the long-standing constitutional distinction between deportable and inadmissible immigrants and explicitly maintained that its decision only concerned deportable immigrants.[193] One has to conclude that the Court was

surrounding a removal, but also on the type of alien ordered removed." *Id.* at 391 (Thomas, J., dissenting).

187. *Id.* at 379 (majority opinion).

188. *See id.* at 380–81 (opining that the statutory provisions should be construed consistently). Significantly, the Court in *Martinez* did not claim that its interpretation of 8 U.S.C. § 1231(a)(6) in *Zadvydas* was the most persuasive interpretation available, only that the interpretation in *Zadvydas* must be applied uniformly to cases involving inadmissible immigrants.

189. *Id.* Thus, if the case that reached the Court first had involved the group of inadmissible immigrants, whose indefinite detention does not raise constitutional questions, under the lowest common denominator rule the Court would nonetheless be compelled to interpret the statute so as to avoid the serious constitutional issues raised by the statute's application to the other group of immigrants, deportable immigrants.

190. Slocum, *supra* note 93, at 396–97.

191. *Id.* at 397.

192. 543 U.S. at 381–83.

193. Zadvydas v. Davis, 533 U.S. 678, 695 (2001) (emphasizing that "the cases before us [do not] require us to consider the political branches' authority to control entry into the United States"). Highlighting the distinction between the two classes of immigrants as the Court did in *Zadvydas* was puzzling considering the Court in *Martinez* claimed that the distinction was irrelevant to the statutory interpretation.

either being disingenuous or did not anticipate that its interpretation would be uniformly applied in a subsequent case.

Professor Siegel has also disputed the Court's characterization of the avoidance canon, claiming that the lowest common denominator principle is new in the sense that courts in the past have often interpreted the same statutory language in different ways depending on the status of the litigant before the court.[194] Siegel has theorized that the lowest common denominator principle was adopted by the author of the *Martinez* decision, Justice Scalia, in an attempt to limit the judicial discretion inherent when judges are able to choose different interpretations for the same statutory language.[195]

If the lowest common denominator is a new aspect of the avoidance canon (and I will assume that it is for purposes of this Article), it should not have been applied retroactively in *Martinez*.[196] There was no suggestion by the Court in *Martinez* that the lowest common denominator rule is mandated by the Constitution, and such a theory would be rather far-fetched.[197] Similarly, the Court did not claim that the existing avoidance canon rule allowing different interpretations of the same statutory language depending on the status of the litigants was unclear and unworkable, or even that its interpretation of the statute reflected congressional intent.[198] Rather, the probable justification for the modification of the canon, the concern with excessive judicial discretion, is the type of rationale that should only support prospective application.[199] A policy of narrowing judicial discretion should not come at the expense of Congress through the retroactive application of the modified avoidance canon.

Although when considering temporal issues courts should not attempt to determine whether Congress specifically relied on a rule of interpretation when drafting the statute at issue, it is instructive to consider that Congress may very

194. Jonathan R. Siegel, *The Polymorphic Principle and the Judicial Role in Statutory Interpretation*, 84 TEX. L. REV. 339, 346–50 (2005). Significantly, the Court has subsequently cited to "*Martinez*'s interpretive principle" when discussing the lowest common denominator rule. Rita v. United States, 127 S. Ct. 2456, 2479 (2007) (Scalia, J., concurring); *see also* Pasquantino v. United States, 544 U.S. 349, 358 (2005) (applying lowest common denominator rule).

195. Siegel, *supra* note 194, at 370–77. Justice Scalia did seem concerned about restraining the power of judges when they interpret statutes. *See Martinez*, 543 U.S. at 386 ("But for this Court to sanction indefinite detention in the face of *Zadvydas* would establish within our jurisprudence, beyond the power of Congress to remedy, the dangerous principle that judges can give the same statutory text different meanings in different cases.").

196. I certainly agree with the result in the case, as well as the use of substantive canons in immigration cases, but not with the Court's retroactive application of a dice-loading rule of interpretation.

197. The avoidance of serious constitutional issues (not just unconstitutional interpretations), let alone the expansion of the canon to cases that do not raise any constitutional issues, is likely not constitutionally required. See *supra* note 79 and accompanying text for an explanation of why most rules of statutory interpretation are not constitutionally required.

198. See *supra* notes 81–84 and accompanying text for an explanation of how new or modified rules of interpretation can be applied retroactively if the existing rules of interpretation were unclear and unworkable.

199. See *supra* notes 87–90 and accompanying text for an argument that new or modified rules based on policy rationales should be applied only prospectively.

well have relied on the old avoidance canon rule when drafting the detention statute in *Zadvydas*.[200] IIRIRA was a notoriously harsh, punitive, and controversial immigration statute.[201] The application of the avoidance canon in *Zadvydas*, which limited detention of deportable immigrants to six months, was a second-best interpretation that did not reflect likely congressional intent. The statutory interpretation in *Zadvydas* was perhaps defensible, though, considering the constitutional issues involved and the Court's assertion that Congress had previously doubted the constitutionality of indefinite detention of deportable immigrants.[202] The avoidance canon sometimes requires courts to adopt second-best statutory interpretations and create exceptions to otherwise broad statutory language, and the Court merely adopted the same kind of rather aggressive interpretation it had adopted in previous cases.[203]

While the *Zadvydas* interpretation was defensible, the extension of the second-best interpretation to an area that did not raise constitutional issues—the detention of inadmissible immigrants—likely, and inappropriately, overturned settled expectations. There was certainly no evidence that when drafting IIRIRA Congress intended to take the dramatic step of removing the Attorney General's longstanding power to indefinitely detain inadmissible immigrants.[204] Indeed, Congress, although it did not need to do so, enacted statutory language in IIRIRA that made the Attorney General's authority to detain inadmissible immigrants *more* explicit.[205] It is probable that Congress would have thought (if it considered the issue at all) that any constitutional problems that would be raised by the indefinite detention of deportable immigrants would not undermine the long-standing authority that the Attorney General possessed to detain inadmissible immigrants. By applying its modification to the avoidance canon retroactively, the Court inappropriately deprived Congress of the ability to enact statutory language that would have accomplished its purposes.

200. See *supra* note 83 and accompanying text for an explanation of why the Court should only attempt to determine whether the background rules theory is outweighed by other considerations, such as a conclusion that the existing rule is unclear and unworkable.

201. *See* T. Alexander Aleinikoff, *Detaining Plenary Power: The Meaning and Impact of* Zadvydas v. Davis, 16 GEO. IMMIGR. L.J. 365, 368 (2002) (referring to IIRIRA as "the toughest immigration legislation adopted in half a century").

202. Zadvydas v. Davis, 533 U.S. 678, 701 (2001).

203. Slocum, *supra* note 93, at 378–81. Many scholars object to the idea that the Court should adopt second-best interpretations in order to avoid constitutional issues, but such criticisms are beyond the scope of this Article. See *supra* notes 19–21 and accompanying text for an explanation that criticism of specific rules of interpretation is beyond the scope of this Article.

204. Such a purpose would have been at odds with the overall tenor of the legislation and the other provisions enacted.

205. Prior to IIRIRA's enactment, some courts found that the Attorney General had the authority to detain inadmissible immigrants indefinitely through the "intersection of several statutory provisions," none of which explicitly authorized indefinite detention. Barrera-Echavarria v. Rison, 44 F.3d 1441, 1445 (9th Cir. 1995) (en banc). Thus, IIRIRA's provision that the Attorney General "may" detain immigrants beyond the removal period made that power more explicit. *See* 8 U.S.C. § 1231(a)(6) (2006) (stating certain immigrants "may be detained beyond the removal period").

B. Creation and Modification of the Rules Governing Judicial Deference to Agency Statutory Interpretations

1. Creation of the *Chevron* Doctrine

Some of the most important rules of interpretation are those applied to determine whether statutory interpretations made by agencies are due judicial deference. In 1984, in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*,[206] the Court formulated a two-step test to determine the deference a reviewing court should accord an agency interpretation of a statute that the agency administers.[207] The first step ("Step One") requires the reviewing court to inquire whether "Congress has directly spoken to the precise question at issue."[208] If the reviewing court determines that "the statute is silent or ambiguous with respect to the specific issue," it should proceed to the second step ("Step Two"), which requires the court to defer to a reasonable agency interpretation.[209]

The Court itself acknowledged in *Chevron* that Step Two requires courts to accept second-best agency interpretations, stating that a reasonable interpretation is not necessarily the "reading the court would have reached if the question initially had arisen in a judicial proceeding."[210] Unlike other rules of interpretation, Step Two functions as a dynamic rule because it allows the content of an act of Congress to change with the changing policy views of the executive branch.[211] Agencies are thus allowed to choose second-best interpretations and can change those interpretations when the agency's policy commitments change.

The *Chevron* decision is now famous, but at the time of its decision (as well as in later opinions) the Court seemed to be unaware that it had created a dice-loading rule of interpretation, maintaining that the case only restated "well-settled principles."[212] It is true that the case did restate some familiar principles.

206. 467 U.S. 837 (1984).

207. *Chevron*, 467 U.S. at 842–44.

208. *Id.* at 842. In making this determination, courts are to "employ[] traditional tools of statutory construction." *Id.* at 843 n.9.

209. *Id.* at 843–45.

210. *Id.* at 843 n.11; *see also* Sunstein, *supra* note 16, at 2588 ("*Chevron* means that courts must uphold reasonable agency interpretations even if they would reject those interpretations on their own.").

211. *See* Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 982–84 (2005) (holding that when court independently construes ambiguous provision in agency-administered statute, judicial construction is not authoritative and agency remains free to subsequently adopt contrary *Chevron*-eligible interpretation); Jonathan T. Molot, *Ambivalence About Formalism*, 93 VA. L. REV. 1, 41 (2007) ("*Chevron*'s formal rule allows agencies a great deal of room to update their interpretations as times change.").

212. *Chevron*, 467 U.S. at 845. Others have voiced support for this position. *See* Kristin E. Hickman & Matthew D. Krueger, *In Search of the Modern* Skidmore *Standard*, 107 COLUM. L. REV. 1235, 1241 (2007) ("*Chevron*'s two steps merely reflect pre-*Chevron* deference principles."); Scalia, *supra* note 112, at 512 (stating that *Chevron* doctrine should not be thought of as "entirely new law"

For example, Step One of *Chevron* maintained the longstanding interpretive principle that it is the judiciary's duty to decide whether statutory language is clear or ambiguous before deferring to an agency's interpretation.[213] It is rather dubious, however, for the Court to continue to maintain that such a famous case, widely regarded as one of the most significant administrative law cases ever,[214] merely restated "well-settled principles." The opinion did more than create a nifty name, the *Chevron* doctrine, for an already existing deference rule. Indeed, scholars and courts generally understand that *Chevron* is a defining case that altered the distribution of national power among courts, Congress, and administrative agencies.[215]

Certainly, the distinction between clarifying and modifying a rule of interpretation is a matter of degree and can be subject to legitimate debate, but the better view is that *Chevron* significantly modified the existing rules of judicial deference to agency statutory interpretations. Previous to *Chevron*, it was unclear when a court would be compelled to defer to an agency interpretation.[216] Under the Court's decision in *Skidmore v. Swift & Co.*,[217] reviewing courts were to consider a variety of factors in evaluating agency interpretations.[218] The cases, though, articulated "a puzzling and relatively ad hoc set of doctrines about when courts should defer to administrative interpretations of law."[219] Sometimes the reviewing court greatly deferred to the agency interpretation, sometimes the court reviewed the agency's interpretation skeptically, and sometimes the court ignored the agency's interpretation.[220] *Chevron* changed the rules by seeming to

because "courts have been content to accept 'reasonable' executive interpretations of law for some time").

213. *See Chevron*, 467 U.S. at 843 n.9 ("The judiciary is the final authority on issues of statutory construction.").

214. *See* Cass R. Sunstein, *Law and Administration After* Chevron, 90 COLUM. L. REV. 2071, 2075 (1990) ("[T]he decision has established itself as one of the very few defining cases in the last twenty years of American public law.").

215. *See* Cass R. Sunstein, Chevron *Step Zero*, 92 VA. L. REV. 187, 189 (2006) (stating that *Chevron* went "so far as to create a kind of counter-*Marbury*"). Considering the hundreds of law review articles devoted to the decision, it must have changed *something* significant about the previously existing rules.

216. *See* Curtis A. Bradley, Chevron *Deference and Foreign Affairs*, 86 VA. L. REV. 649, 668 (2000) (noting courts previously applied multivariable approach leading to inconsistent application).

217. 323 U.S. 134 (1944).

218. *Skidmore*, 323 U.S. at 140 (explaining that when assigning weight to administrative decisions, reviewing court must consider decision's thoroughness, validity of reasoning, consistency with other pronouncements, and persuasiveness); *see also* Bradley, *supra* note 216, at 668 (discussing numerous factors courts used prior to *Chevron*); Colin S. Diver, *Statutory Interpretation in the Administrative State*, 133 U. PA. L. REV. 549, 552–67 (1985) (discussing various past approaches courts used in statutory interpretation).

219. Sunstein, *supra* note 214, at 2082; *see also* John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 623–24 (1996) (stating that "[pre-*Chevron*] cases were not all easily reconcilable"); Richard J. Pierce, Jr., *The Supreme Court's New Hypertextualism: An Invitation to Cacophony and Incoherence in the Administrative State*, 95 COLUM. L. REV. 749, 750 (1995) (noting that, prior to *Chevron*, level of deference given to administrative agencies' interpretations varied).

220. *See* Robert A. Anthony, *Which Agency Interpretations Should Bind Citizens and the*

stand for an across-the-board proposition that when a court determined that a statute was ambiguous, deference to the agency interpretation was warranted.[221]

Considering that the Court created a dice-loading rule of interpretation in *Chevron*, it should have determined whether the rule was to be applied only prospectively.[222] Professor Manning argues that the decision must rest on "premises of constitutional derivation" because the Court could not have applied *Chevron* retroactively if the doctrine had merely rested on real or imputed legislative expectations about the applicable interpretive framework.[223] This argument is partly correct in that it would have been inappropriate to apply *Chevron* on the basis of purported legislative expectations, but it is ultimately unpersuasive in its conclusion about the basis for *Chevron*.[224] The *Chevron* doctrine is not constitutionally required, although some scholars, seizing on the Court's use of democratic theory in *Chevron* as a justification for deference, have argued that *Chevron* deference is required by the Constitution.[225] While the proper deference to be given to agency interpretations certainly implicates separation of powers concerns, there is no evidence that the specific *Chevron* doctrine, as opposed to many other potential rules, is actually required by the Constitution.[226] The Court has never made such a claim, and most scholars offer different justifications for the *Chevron* doctrine.

Courts?, 7 YALE J. ON REG. 1, 6 (1990) (noting inconsistent level of judicial deference to agency interpretations).

221. *See* Manning, *supra* note 219, at 623, 625 (arguing that "*Chevron*'s importance lay in its adoption of a *categorical* presumption that silence or ambiguity in an agency-administered statute should be understood as an implicit delegation of authority to the agency" and that *Chevron* "therefore significantly revised the interpretive background against which Congress legislates"); Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969, 977 (1992) ("*Chevron* transformed a regime that allowed courts to give agencies deference along a sliding scale into a regime with an on/off switch.").

222. Alternatively, instead of having created a new rule, *Chevron* can be viewed as modifying the existing rule of interpretation from one that required courts to occasionally accept agency second-best interpretations (based on various factors) to one that required courts to consistently accept second-best agency interpretations (as long as the statute at issue was ambiguous). See *supra* note 221 and accompanying text for a discussion of the impact of *Chevron* on statutory interpretation by the courts. Either way, the Court should have considered whether the *Chevron* rule should have been applied only prospectively.

223. *See* Manning, *supra* note 219, at 625.

224. See *supra* Part II.B.1 for an argument that courts should not apply new or modified rules retroactively if they are based on estimations of congressional intent.

225. *See, e.g.*, Richard J. Pierce, Jr., *Reconciling* Chevron *and Stare Decisis*, 85 GEO. L.J. 2225, 2229–30 (1997) (arguing that *Chevron* Court established hierarchy consistent with Constitution).

226. Nicholas Rosenkranz has suggested that the Constitution establishes *Chevron* as a constitutional starting-point rule, but because Congress is more responsive and accountable than agencies, and is vested with the federal legislative power, Congress could by statute eliminate the *Chevron* doctrine. Rosenkranz, *supra* note 9, at 2129–30. It is doubtful that *Chevron* is even a constitutional starting-point rule. A conclusion that judicial deference to agency interpretations is constitutionally required (a questionable concept itself) does not answer the question of exactly how the deference doctrine should be defined. The Court's narrowing of the *Chevron* doctrine, on the basis of policy and congressional intent, illustrates that the Court does not consider any specific rule of

Rather than the doctrine being constitutionally compelled, the best view is that the Court in *Chevron* was motivated by estimations of congressional intent and other related theories.[227] Courts are required by congressional intent to approach statutory interpretation as though Congress has delegated discretionary policymaking authority to agencies to interpret gaps and ambiguities in statutes.[228] Perhaps at the time of the Court's decision in *Chevron* there was sufficient reason for the Court to conclude that the *Chevron* doctrine was more consistent with congressional intent than any other rule.[229] Even supporters of this theory, though, recognize that congressional intent in this area is fictional.[230] *Chevron*'s categorical presumption that in cases of ambiguity reasonable agency interpretations should receive judicial deference "cannot be explained in terms of actual . . . congressional expectations about the allocation of law-interpreting authority between agencies and courts."[231] Justice Scalia, for example, has realized that the *Chevron* doctrine "represents merely a fictional, presumed intent, and operates principally as a background rule of law against which Congress can legislate."[232]

Even though the *Chevron* doctrine is not constitutionally required, a strong argument can be made that it was still proper for the Court to apply the rule retroactively, even if it did so for the wrong reasons. As Part II.B.2 explained, there are valid nonconstitutional reasons why it can be appropriate to apply dice-loading new or modified rules retroactively. It was proper to apply the *Chevron* doctrine retroactively because the new two-step doctrine helped bring clarity to a muddled, and arguably unworkable, area of the law.[233] The *Chevron* doctrine helped guide review of agency legal interpretations by providing a two-step test that, even if it left many questions unanswered, was easier to apply than the previous regime. Indeed, the clarification and simplification of the rules of deference to agency legal interpretations is likely a major reason why the

deference to be constitutionally required. See *infra* Part V.B.2 for a discussion of one of the major modifications of *Chevron*.

227. In addition to congressional intent, some have argued that *Chevron* is justified because of the political accountability of agencies. *See* Bradley, *supra* note 216, at 669 (noting that *Chevron* is based on legal realism, democratic theory, and notion that agencies' statutory interpretations often more closely resemble lawmaking than interpretation).

228. *See* Merrill & Hickman, *supra* note 155, at 870 ("Deference is mandatory because Congress has commanded it."); Sunstein, *supra* note 214, at 2090 (suggesting *Chevron* is consistent with "legislative instructions on the question of deference").

229. But see *supra* Part II.B.1 for an argument that courts are generally not capable of determining whether a specific rule of interpretation is consistent with congressional intent.

230. *See* Lisa Schultz Bressman, *Deference and Democracy*, 75 GEO. WASH. L. REV. 761, 765 (2007) (describing *Chevron* as relying on fiction of congressional intent to further democratic values); Merrill & Hickman, *supra* note 155, at 871–72 (noting that *Chevron*'s attribution of general intention has been described as fictional); Sunstein, *supra* note 16, at 2590 (stating that Justices Breyer and Scalia agree that *Chevron* doctrine is based on a "legal fiction").

231. Manning, *supra* note 219, at 623.

232. Scalia, *supra* note 112, at 517.

233. See *supra* notes 81–84 and accompanying text for an argument that it is proper for courts to apply new or modified dice-loading rules retroactively if the existing rule is unclear and unworkable.

Chevron doctrine flourished after its creation. Because the pre-*Chevron* rules for deference to agency legal interpretations were muddled and unpredictable, the background rules theory that Congress had the rules in mind when enacting legislation was even more fictional than is usually the case.[234] Thus, the substitution of a workable rule for a rule that was unclear and unworkable was sufficient justification to apply the new rule retroactively.

2. *United States v. Mead* and the Modification of the *Chevron* Doctrine

The Court may have correctly, even if for unpersuasive reasons, applied the *Chevron* doctrine retroactively, but it has failed to consider whether at least some of the subsequent modifications of the rule should have been applied only prospectively. For example, the Court has recently amended one of the most important aspects of *Chevron*, its across-the-board presumption that in cases of statutory ambiguity courts should defer to agency interpretations.[235] In *United States v. Mead Corp.*,[236] the Court held that Congress only intends for *Chevron* deference to be granted to agency interpretations when it has given some signal that the agency has been granted lawmaking power.[237] The Court stated that *Chevron* deference should therefore apply only when "it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority."[238] Thus, *Chevron* does not apply to a broad array of administrative interpretations that lack the force of law and result from relatively informal procedures.[239]

234. See *supra* Part III.A for an explanation of the fictions of the background rules theory.

235. One of the exceptions to the across-the-board presumption was created in *FDA v. Brown & Williamson Tobacco Corp.* for questions too extraordinary for Congress implicitly to have delegated. 529 U.S. 120, 123 (2000); *see also* Bressman, *supra* note 230, at 763 (noting *Brown & Williamson Tobacco Corp.* as exception to *Chevron* doctrine); Sunstein, *supra* note 16, at 2605–07 (explaining why implicit delegation ought not to be found for decisions of great economic or political significance).

236. 533 U.S. 218 (2001).

237. *Mead*, 533 U.S. at 226–27. The question in *Mead* was whether *Chevron* applied to a tariff classification ruling of the U.S. Customs Service. The Court held that *Chevron* did not apply to the tariff ruling. *Id.* at 227. The *Mead* decision followed the Court's earlier decision in *Christensen*, where the Court held that *Chevron* did not apply to an agency interpretation contained in an opinion letter written by an agency official and later endorsed in an amicus curiae brief filed with the Supreme Court. *Christensen v. Harris County*, 529 U.S. 576, 587–88 (2000). The Court held that *Chevron* is applicable to agency interpretations only if they have been made in a manner that has the "force of law." *Id.* at 587.

238. *Mead*, 533 U.S. at 226–27.

239. Reviewing courts must consider all circumstances surrounding the statutory scheme and agency action to ascertain whether "Congress would expect the agency to be able to speak with the force of law" on the matter at hand. *Id.* at 229–30. Agency interpretations that do not qualify for *Chevron* deference are reviewed under *Skidmore*. *Id.* at 234–35 (explaining that *Chevron* does not eliminate *Skidmore* holding that agency's interpretation "may merit some deference"); *see also* Thomas W. Merrill & Kathryn Tongue Watts, *Agency Rules with the Force of Law: The Original Convention*, 116 HARV. L. REV. 467, 479 (2002) (stating that agency interpretations to which *Chevron* is not applicable will be reviewed with level of deference due under *Skidmore*).

In its *Mead* opinion, the Court, not surprisingly, denied that it was changing the rule regarding deference to agency interpretations. The Court rejected the notion that *Chevron* has stood for the proposition that statutory ambiguity means that agency discretion is intended and that "authoritative" agency interpretations, even if promulgated informally, should receive *Chevron* deference.[240] Some scholars have asserted, however, that the *Mead* decision significantly changed the rules of judicial deference to agency statutory interpretations.[241] Cass Sunstein, for example, has termed the *Mead* amendment to the *Chevron* doctrine *Chevron* Step Zero.[242] Sunstein has pointed out that prior to *Mead* the Court extended *Chevron* deference to a number of agency actions that clearly would not be *Chevron*-eligible post-*Mead*.[243]

Like *Chevron*, *Mead* modified the existing rules of deference to agency statutory interpretations, and like *Chevron* the *Mead* decision was likely based on purported congressional intent rather than constitutional requirements.[244] The Court has asserted that Congress only intends for *Chevron* deference to be given in situations where Congress has granted the agency power to make decisions that have the force of law and the agency has followed sufficient procedures.[245] Of course, this determination of congressional intent is fictitious. Like *Chevron*, the real basis for the *Mead* decision is the Court's view of the optimal policy for deference to agency interpretations.[246] Professor Sunstein suggests that the Court in *Mead* may have believed that "the absence of [formal]

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

241. *See id.* at 239 (Scalia, J., dissenting) (claiming that *Mead* is "avulsive change"); Lisa Schultz Bressman, *How* Mead *Has Muddled Judicial Review of Agency Action*, 58 VAND. L. REV. 1443, 1443–44 (2005) (recognizing that Justice Scalia was correct in predicting that *Mead* would create mess); Michael P. Healy, *Spurious Interpretation Redux:* Mead *and the Shrinking Domain of Statutory Ambiguity*, 54 ADMIN. L. REV. 673, 674, 680 (2002) (arguing that *Mead* redefines default rule for determining when *Chevron* interpretive regime will apply and rule now is that silence regarding delegation means that Congress did not intend that agency be accorded automatic deference); Russell L. Weaver, *The Emperor Has No Clothes:* Christensen*,* Mead *and Dual Deference Standards*, 54 ADMIN. L. REV. 173, 173–75 (2002) (arguing that *Mead* and *Christensen* change *Chevron* doctrine by introducing dual deference standards and by focusing on congressional intent). Other scholars have disagreed with the idea that *Mead* was a substantial modification of the *Chevron* doctrine. *See, e.g.*, Matthew C. Stephenson, *The Strategic Substitution Effect: Textual Plausibility, Procedural Formality, and Judicial Review of Agency Statutory Interpretations*, 120 HARV. L. REV. 528, 534 (2006) (indicating that "*Mead* was . . . simply an explicit endorsement of what most courts had already been doing for some time").

242. Sunstein, *supra* note 215, at 191.

243. *See id.* at 208 (explaining that *Chevron* doctrine was applied in numerous decisions in first decade after *Chevron* was decided without serious consideration of the issue).

244. See *supra* notes 224–29 and accompanying text for a description of the basis of *Chevron*.

245. See *supra* notes 238–39 and accompanying text for a discussion of the situations in which courts must give *Chevron* deference.

246. *See* Slocum, *supra* note 110, at 570–71 (stating that *Mead* Court made policy determinations about what would help promote good government).

procedures signals a lack of accountability and a risk of arbitrariness" and thus reason for reduced deference.[247]

Even if one agrees with *Mead*'s restriction on *Chevron* deference, considering the rationale supporting *Mead*, the modified rule the decision created should not have been applied retroactively.[248] Unlike the situation with the pre-*Chevron* rules, there is no evidence that the *Chevron* doctrine was unworkable, only that a majority of the Justices believed that a strong version of it was bad policy.[249] In contrast, the background rules theory is at least plausibly relevant.[250] It is reasonable to assume that Congress might have relied on *Chevron*'s across-the-board rule of deference to agency legal interpretations when it drafted legislation subsequent to the *Chevron* decision. The choice between relying on agencies or courts to have the primary authority to fill statutory gaps and ambiguities is one that Congress may well focus on.[251] Formalized agency procedures are expensive, and Congress might not have realized that the failure to grant an agency rule-making powers would mean that the agency's interpretations would not receive *Chevron* deference.[252] Thus, Congress's assumption that agency interpretations would be deferred to under *Chevron* may have been undermined when the Court modified the *Chevron* rule in *Mead* and applied the modification retroactively.[253]

VI. THE JUDICIAL CONSIDERATION OF TEMPORAL ISSUES WILL RESULT IN SEVERAL POSITIVE CHANGES TO STATUTORY INTERPRETATION

This Article has argued that the current judicial practice of automatically applying new or modified rules of interpretation retroactively partially delegitimizes the rules. The question remains, though, whether courts are likely to resist changing this long-standing practice even if there are pressing reasons for doing so. Certainly, the judiciary's approach to statutory interpretation has never been static, so it cannot be said that changes, even ones deemed by some to be significant, are inconceivable. As is typical when rules are chosen in

247. Sunstein, *supra* note 16, at 2603. Professor Sunstein also recognizes that formal procedures make the agency more likely to properly utilize expert information. *Id.*

248. I am not claiming that the actual interpretation in *Mead* would have changed if the *Chevron* doctrine had been applied instead of the *Skidmore* standard the Court used. My claim is only that the modified deference rule created by *Mead* should have been applied only prospectively.

249. See *supra* notes 233–35 and accompanying text for a discussion of the argument that the pre-*Chevron* deference rules were unworkable.

250. See *supra* Part II.A for an explanation of the background rules theory.

251. *See* Matthew C. Stephenson, *Legislative Allocation of Delegated Power: Uncertainty, Risk, and the Choice Between Agencies and Courts*, 119 HARV. L. REV. 1035, 1042 (2006) (describing circumstances under which legislatures prefer to delegate to agencies rather than courts).

252. *Cf.* Stephenson, *supra* note 241, at 531 (explaining that reviewing courts' focus on procedural formalities raises costs of agency decisions).

253. The *Mead* decision might have also undermined agencies' reliance on *Chevron*'s across-the-board presumption of deference.

common law fashion, the approach of courts to statutory interpretation has shifted and evolved over centuries.[254]

Many of the changes that once may have seemed controversial are now readily embraced. Few question, for example, the evolution of the attitude of courts from antagonism toward legislation to sincerely attempting to interpret a statute according to its purpose or public meaning.[255] Many of the legal realist insights into the legislative process and the proper role of courts with regard to statutory interpretation are similarly uncontroversial. Not many scholars or courts now doubt that statutory ambiguity is inevitable, that the process of interpreting statutes necessarily involves creativity and policy choices and that, in a more general sense, when judges decide the governing rules they make the law rather than find it.[256]

Undoubtedly, legal realism's insights have forced courts to reconsider and minimize the nature of their role in statutory interpretation in order to avoid usurping the power of the executive and legislative branches. The controversial *Chevron* decision, and its statement that agencies should often make the policy choices that are necessary to resolve statutory ambiguity, is perhaps the most important instance of the Court's integration of legal realist understandings into the rules of interpretation.[257] Still, while some would argue that realism-influenced changes to statutory interpretation have gone too far in some areas, such as *Chevron*, legal realism has not yet forced judges to seriously consider the tension between their faithful agent originalism and the retroactive application of the frequent changes they make to interpretive rules. Resolving this tension would update statutory interpretation to conform to legal realist insights as well as infuse statutory interpretation with much needed transparency and candor.

One benefit from judicial consideration of temporal issues would be that courts would be more explicit when discussing the rules of interpretation. Statutory interpretation suffers from a lack of clarity and candor because judges

254. *See* WILLIAM D. POPKIN, STATUTES IN COURT: THE HISTORY AND THEORY OF STATUTORY INTERPRETATION 7 (1999) (explaining that "[o]ur thinking about statutory interpretation is the product of a long period of evolution from the earliest English practice to the modern period"); William S. Blatt, *The History of Statutory Interpretation: A Study in Form and Substance*, 6 CARDOZO L. REV. 799, 826–27 (1985) (describing criticisms of classical rules of statutory interpretation by legal realists); Jane S. Schacter, *The Confounding Common Law Originalism in Recent Supreme Court Statutory Interpretation: Implications for the Legislative History Debate and Beyond*, 51 STAN. L. REV. 1, 5 (1998) (noting common law nature of rules of statutory interpretation).

255. *See* POPKIN, *supra* note 254, at 112–13, 131–33, 201 (describing evolution of courts' attitude regarding statutory interpretation).

256. See *supra* notes 16–18 and accompanying text for a discussion of the legal realists' insights into statutory interpretation.

257. *See* Sunstein, *supra* note 16, at 2583, 2591 (stating that "the executive's law-interpreting authority is a natural and proper outgrowth of . . . the legal realist attack on the autonomy of legal reasoning"). One of the reasons why the *Chevron* doctrine is controversial is because some see it as raising separation of powers concerns by shifting interpretive responsibility from courts to agencies. *See, e.g.*, Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452, 478–88 (1989) (describing *Chevron*'s inconsistency with "vision of separation of powers embodied in" nondelegation doctrine).

are often vague, as well as disingenuous, when describing how they are applying, creating, or modifying rules of interpretation and often over- and underutilize rules without explanation.[258] The consideration of temporal issues would not solve these problems of course, but it should help because the process of considering whether the court should apply a new or modified rule only prospectively requires a significant degree of judicial candor and transparency.

In determining whether prospective-only application is warranted, the reviewing court must reason through three steps, each of which would enhance judicial candor and transparency. First, the court must consider whether it is creating or modifying a rule of interpretation.[259] One major benefit of this determination is that more self-awareness by judges about whether they are creating new rules would result in fewer instances of inadvertent new rules, such as arguably occurred in *Chevron* and other decisions.[260] Although courts can still disingenuously claim that they are not creating or modifying rules, an expectation that courts will consider temporal issues when creating or modifying rules furnishes an additional and important reason why dissenting judges and others should challenge these claims.[261]

A court can also falsely claim that it is not necessary to determine whether it created a new rule or modified an existing rule, or whether the new or modified rule should be applied only prospectively, because the court would have reached the same interpretation regardless of the existence of the rule in question.[262] Even if courts are sometimes disingenuous, a system where courts are obligated to consider whether they are creating new rules or modifying existing ones is an improvement over the current system where new or modified

258. See *supra* Part III.A.1 for a discussion of the ways in which judicial descriptions of interpretive rules can be disingenuous.

259. See *supra* note 2 for an explanation of when a rule should be considered new.

260. See *supra* notes 212–15 and accompanying text for a description of the Court's claim in *Chevron* that it was not modifying its existing deference rules.

261. See *supra* notes 100–06 and accompanying text for a discussion indicating that disputes about the rules of interpretation typically involve issues other than whether new or modified rules should be applied retroactively.

262. Of course, there will be cases where such claims will be plausible. For example, in *INS v. St. Cyr*, Justice Scalia accused the majority of creating a new clear statement rule. 533 U.S. 289, 327 (2001) (Scalia, J., dissenting) (accusing Court of "fabricat[ing] a superclear statement, 'magic words' requirement for the congressional expression of . . . an intent [to preclude habeas review], unjustified in law and unparalleled in any other area of our jurisprudence"). The Court had also relied on other rules of interpretation, however, such as the canon of constitutional avoidance and "the strong presumption in favor of judicial review of administrative action." *Id.* at 298 (majority opinion). It is possible those canons by themselves were strong enough to compel the same interpretation that habeas corpus jurisdiction had not been removed.

rules are automatically applied retroactively.[263] Moreover, disingenuousness is a problem with any interpretive methodology.[264]

Second, a court will have to determine whether the rule it has created or modified is a dice-loading rule of interpretation.[265] When considering canons of statutory construction, for example, courts will have to precisely identify whether a canon is a clear statement rule or merely a tie-breaker.[266] Doing so will help alleviate the frequent uncertainty surrounding the status of some of the canons and give courts better guidance regarding when the canons should be applied.[267]

Finally, if the court has declared that it has created or modified a dice-loading rule of interpretation, it must explain why it has created or modified the rule and consider whether the reasons require prospective-only application.[268] An interpretive rule created or modified on the basis of perceived congressional intent should be applied only prospectively.[269] Thus, a discussion of the reasons for creating or modifying the rule would require a greater degree of candor than typically found in statutory interpretation cases because judges would be forced, at least implicitly, to concede that the rules of interpretation do not, for both intentional and inadvertent reasons, merely reflect the enacting Congress's preferences.[270] After all, there would be no need to consider whether a new or modified rule should be applied only prospectively if all new or modified rules perfectly reflected congressional intent. A court could simply apply the rules retroactively because they would better reflect congressional intent than the existing rules.[271]

Calls for increased judicial candor, as well as significant reform, in statutory interpretation are not novel. Prominent scholars have, for example, argued that

263. Courts currently have incentives to write disingenuous opinions in order to avoid the appearance of creating or modifying a rule of interpretation in order to reach a favored interpretation, so requiring consideration of temporal issues would not necessarily add to those incentives. See *supra* notes 100–01 and accompanying text for a discussion of the reluctance of courts to state that they are creating or modifying rules of statutory interpretation.

264. *See* William N. Eskridge, Jr., *Textualism, the Unknown Ideal?*, 96 MICH. L. REV. 1509, 1549 (1998) (stating that "[a]ll interpretive methodologies" allow for judicial discretion).

265. See *supra* Part IV for a discussion supporting the notion that only the most powerful rules of interpretation should be considered for prospective-only application.

266. See *supra* Part III for an explanation of why some new or modified clear statement rules should be applied only prospectively but all new or modified tie-breaker rules can be applied retroactively.

267. See *supra* note 113 for an explanation of the difference between the lack of clarity required to apply clear statement rules and the ambiguity required to apply tie-breaker rules.

268. See *supra* Part II.B for a discussion supporting prospective-only application of new or modified rules of interpretation.

269. See *supra* Part II.B.1 for a discussion in support of the notion that the force of the background rules theory generally should not be outweighed by the reasons that judges create or modify rules of interpretation.

270. See *supra* Part II.B.2 for a discussion of the different motivations courts have when creating rules of interpretation. See *supra* notes 64–66 and accompanying text for a discussion of the difficulty that courts face in determining whether rules of interpretation reflect congressional intent.

271. Once rules of interpretation are established, however, courts can assume that Congress has them in mind when drafting legislation.

judges should candidly admit that they update statutes to reflect current societal needs rather than choose originalist interpretations.[272] These arguments have been rightly criticized because of the legitimacy concerns that would arise if a court candidly declared its power to refuse to apply a statute or to interpret a statute according to its own vision of society's current needs.[273] In contrast, judicial candor in conceding that the rules of statutory interpretation, when first created or modified, do not necessarily reflect congressional intent, would not have the same delegitimating effects and would not be a significant departure from current judicial views of the rules of interpretation.

The judiciary has recognized in various ways that the rules of interpretation do not always reflect congressional intent. The background rules theory, which assumes that Congress is aware of the rules of interpretation when it drafts legislation, would be unnecessary if judges believed that the rules always reflected congressional intent perfectly.[274] Indeed, the Court itself has recently stated that it is more important that the governing rules be "settled" than that they be "settled right," and various judges have recognized that rules such as the *Chevron* doctrine rest on fictions about congressional intent.[275] Thus, while judges often purport to craft the rules of interpretation to correspond with perceived congressional intent, they realize that they are unlikely to achieve this goal.[276] In any case, when discussing the rules courts demonstrate their interest in goals other than congressional intent, such as protecting vulnerable groups, constraining judicial discretion, and forcing Congress to address sensitive issues explicitly.[277] Moreover, the heightened burden created by the Court for overruling a statutory precedent recognizes that statutory interpretation inevitably involves policy making, as well as uncertainty about congressional

272. *See, e.g.*, GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 180 (1982) (arguing that judges, in order to prevent cheapening the law, should admit when they modify rules to meet societal needs); William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1482 (1987) (urging judges to update rules to meet changing circumstances).

273. *See* Nicholas S. Zeppos, *Judicial Candor and Statutory Interpretation*, 78 GEO. L.J. 353, 359 (1989) (arguing that legitimacy concerns make judicial candor in statutory interpretation problematic).

274. See *supra* Part II.A for an explanation of the background rules theory.

275. John R. Sand & Gravel Co. v. United States, 128 S.Ct. 750, 757 (2008) (quoting Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting)). Judge Posner, for one, has recognized that *Chevron* is based on fictions about congressional intent. *See* Krzalic v. Republic Title Co., 314 F.3d 875, 878 (7th Cir. 2002) (noting that "realists" acknowledge that "it is a fiction to suppose *Chevron* itself an interpretation of the statutes to which it applies"). Justice Scalia has come to a similar conclusion. *See* Scalia, *supra* note 112, at 517 (recognizing fictional basis of *Chevron*).

276. Part of the problem is attributable to a temporal mismatch between the rules of interpretation and the preferences of Congress. For example, canons of statutory construction purport to be permanent devices for resolving statutory unclarity or ambiguity, but the makeup of Congress changes. Thus, while the background rules theory assumes that Congress will account for the rules when drafting statutes, it is likely that canons will sometimes match congressional preferences and sometimes will conflict with congressional preferences.

277. *See generally* Schacter, *supra* note 11 (advocating new method of statutory interpretation utilizing goals other than congressional intent).

intent, and is the Court's way of shifting the policy making responsibility back to Congress.[278]

The consideration of whether a court should apply new or modified dice-loading interpretive rules only prospectively will lead to greater clarity and transparency in statutory interpretation, but the judicial self-awareness required for such a task could also produce other benefits. Consideration of temporal issues should cause courts to reconsider how closely their statutory interpretive methodologies correspond with their self-appointed role as faithful agents of Congress. Many dice-loading interpretive rules that courts have created have been attacked on various grounds, such as the claim that rules that run counter to congressional intent may raise the cost of litigation and make it more difficult for Congress to achieve its goals.[279] Perhaps having to explicitly announce the creation or modification of dice-loading rules will encourage courts to consider whether it is proper to create rules that require the adoption of second-best interpretations.[280] If courts are reluctant to explicitly create such rules, well-intentioned judges will also be reluctant to implicitly do so.[281]

Other changes are also possible. To be sure, courts will continue to create and modify rules of statutory interpretation in common law fashion, and this Article has not argued that they should discontinue doing so. But if legal realism's insights have encouraged courts to exercise caution and minimize their role in some areas of statutory interpretation, this caution may expand to other areas beyond the consideration of temporal issues. While judges should continue to make changes to the rules of interpretation when appropriate, the consideration of temporal issues may convince courts to more carefully consider whether changes to the rules of interpretation are necessary, which would be beneficial to Congress, as well as to courts and the bar.

CONCLUSION

This Article has argued that it is necessary for courts to consider whether new or modified dice-loading rules of statutory interpretation should be applied only prospectively. It has also examined recent Supreme Court decisions and illustrated why the Court's practice of ignoring temporal issues can result in interpretations that do not reflect congressional intent. While the cases examined

278. *See* Barrett, *supra* note 29, at 317 (noting that, due to supremacy of legislature, courts impose heightened burden on party seeking abandonment of statutory precedent).

279. *See* Rodriguez, *supra* note 47, at 747 ("[T]he presumption of reviewability ensures that legislators must expend greater than normal costs to rebut this presumption and thus to exercise their final collective judgment. As with other costs borne by legislators attempting to reach agreement over statutory policies, these costs may have the effect of changing the final bargain."). See *supra* note 160 and accompanying text for a discussion of the high level of congressional foresight required by the clear statement requirement.

280. See *supra* notes 136–37 and accompanying text for an explanation of second-best interpretations.

281. The implicit creation of new rules occurs when courts incorrectly claim, as they frequently do, that a rule is not new but in fact is supported by the court's past decisions. See *supra* notes 100–01 and accompanying text for a discussion of why courts prefer to implicitly create new rules.

have been criticized by others for various reasons, the Article has offered novel criticisms, including a fresh perspective on why the Court's narrowing of *Chevron* deference is troubling in at least an important subset of cases.[282] Even if one disagrees with the Article's arguments about which rules should be considered for prospective-only application, or its description of the limited justifications that are sufficient to apply a new or modified rule retroactively, it should be apparent that courts have ignored temporal issues in statutory interpretation for far too long.

282. See *supra* Part V.B for a discussion of how the Court erred in not applying its modification of the *Chevron* doctrine in *Mead* only prospectively.