

January 2014

Toward a Less Adversarial Relationship Between *Chevron* and *Gardner*

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Ridgway, James D. (2014) "Toward a Less Adversarial Relationship Between *Chevron* and *Gardner*," *University of Massachusetts Law Review*: Vol. 9: Iss. 2, Article 7.

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Toward a Less Adversarial Relationship Between *Chevron* and *Gardner*

James D. Ridgway

9 U. MASS. L. REV. 388

ABSTRACT

Veterans benefits are a creature of statute. As such, nearly every veterans benefits issue presented to the courts for resolution involves the interpretation of a statute, regulation, or sub-regulatory authority. Although veterans law has been subject to judicial review for over twenty-five years, the courts still have yet to develop a coherent doctrine regarding when to resolve ambiguity in favor of the veteran versus when to defer to the interpretations of the Department of Veterans Affairs.

This Article explores three possible approaches to developing a coherent vision of how veteran friendliness and agency deference can coexist and provide more predictability in how to interpret veterans benefits laws.

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I. INTRODUCTION

“There are places in law through which a pair of mutually oblivious doctrines run in infinitely parallel contrariety, like a pair of poolhall scoring racks on one or the other of which, seemingly at random, cases get hung up.”¹

Veterans benefits are a creature of statute.² As such, nearly every veterans benefits issue presented to the courts for resolution involves the interpretation of a statute, regulation, or sub-regulatory authority.³ To resolve these issues, the courts use a pair of legal toolboxes.⁴ One box holds a collection of tools that require ambiguity to be resolved in favor of the veteran.⁵ The other box contains tools that require deference to the interpretations of the Department of Veterans Affairs (VA), which administers the benefits paid under Title 38 of the United States Code.⁶ Although veterans law has been subject to judicial review for over twenty-five years, the courts still have yet to develop a coherent doctrine regarding when to draw from which box.⁷

¹ Tony Amsterdam, Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PENN. L. REV. 67, 67 (1960).

² See generally *Veterans Benefits*, 38 U.S.C. Pt. II (2014) (chapters 11, 13, 15, 17, 18, 19, 20, 21, 23, and 24 cover veterans benefits under Part II).

³ See 38 U.S.C. § 7292 (2002).

⁴ Of course, these toolboxes are not the exclusive tools available to the courts. The number of available canons is quite lengthy. See, e.g., William N. Eskridge, Jr. & Philip P. Frickey, *The Supreme Court 1993 Term: Foreword*, 108 HARV. L. REV. 97 app. (1994) (The Rehnquist Court’s Canons of Statutory Construction) (listing over 100 canons of statutory construction applied by the Supreme Court from 1986 to 1993).

⁵ *Id.*

⁶ See *Veterans Benefits*, 38 U.S.C. pt. II (2014).

⁷ Veteran friendliness is not the only principle that courts struggle to reconcile with agency deference. Compare *Yi v. Fed. Bureau of Prisons*, 412 F.3d 526, 534 (4th Cir. 2005) (deferring to agency’s interpretation of statute with criminal penalties), with *Carter v. Welles-Bowen Realty, Inc.*, 736 F.3d 722, 730 (6th Cir. 2013) (Sutton, J., concurring) (arguing the rule of lenity trumps deference and, therefore, “a court should not defer to an agency’s anti-defendant interpretation of a law backed by criminal penalties.”). There has also been some confusion as to how agency deference interacts with the presumption against federal preemption of state law. See Nina A. Mendelson, *Chevron and Preemption*, 102 MICH. L. REV. 737, 739–40 (2004).

Each set of tools tends to be phrased as mandatory default rules and overriding principles, rather than general concerns subject to countervailing considerations. Instead of trying to reconcile the coexistence of seemingly contradictory principles about how to resolve ambiguity, the courts persistently avoid the tension between the toolsets by just applying one or the other, without discussing their interaction.⁸

This Article suggests that resolving the tension between the principles of agency deference and veteran friendliness will require developing a sophisticated framework that recognizes the truth that both ideas serve a role. In particular, there are approaches to this fundamental tension of veterans law that make the canons less adversarial and more cooperative, while also improving the functionality of the benefits system. These canons poorly serve veterans when used merely as window dressings, rather than the basis of thoughtful analysis of how to provide the best possible benefits system for veterans.⁹ Although judicial review has improved the outcomes of benefits decisions for veterans, it has also increased the complexity of the law, which has caused a host of problems.¹⁰

This Article explores three possible approaches to developing a coherent vision of how veteran friendliness and agency deference can coexist and provide more predictability in how to interpret veterans benefits laws.¹¹ First, this Article briefly reviews some evidence that illustrates problems from the past five years of case law. Next, it

⁸ See *infra* notes 24–25, 60–61 and accompanying text.

⁹ A leading commentator on veterans law has asserted that the CAVC has struggled with its law-giving function. See Michael P. Allen, *The United States Court of Appeals for Veterans Claims Significant Developments (2004-2006) and What They Reveal About the U.S. Court of Appeals for Veterans Claims and the U.S. Court of Appeals for the Federal Circuit*, 40 U. MICH. J. L. REFORM 483, 514–22 (2007). To the extent that this is true, it may well be explained by the court's inability to make progress in reconciling the two doctrines that lie at the heart of its law-giving role in reviewing veterans claims.

¹⁰ See James D. Ridgway, *The Veterans Judicial Review Act Twenty Years Later: Confronting the New Complexities of VA Adjudication*, 66 N.Y.U. ANN. SURV. AM. L. 251, 265–71 (2010) [hereinafter Ridgway, *The Veterans Judicial Review Act*].

¹¹ Not everyone would agree that certainty in the courts' use of interpretive principles is always positive. See Jud Mathews, *Deference Lotteries*, 91 TEX. L. REV. 1349, 1372–82 (2013) (using game theory to argue that there are some benefits to having uncertainty as to the deference level to be applied).

explores the origins of the two canons for detailed guidance on the role of the courts in veterans law. Based upon that foundation, the next section reflects on some philosophical considerations that should guide the reconciliation of the two canons. Finally, Section V suggests three specific approaches to resolve the tension between veteran friendliness and agency deference that may prove to be fruitful stepping stones in evolving a sophisticated understanding of how the canons can work together to best serve veterans. Judicial review will never be as non-adversarial as the agency adjudication process, but the system as a whole would benefit from thinking about the key canons of review in a less adversarial manner.¹²

II. A CLOSER LOOK AT THE CANONS

The heart and soul of veterans law is the relationship between two principles: veteran friendliness and agency deference. The principle of veteran friendliness suggests that the administrative system operated by VA should be navigable without assistance and produce generous outcomes.¹³ The principle of agency deference suggests that courts should defer to VA in reviewing the system that the agency administers.¹⁴ Both of these principles have multiple facets, and, so far, the courts have been unable to develop a framework for their interaction. Instead, the courts studiously ignore the problem.¹⁵

Until the courts squarely confront the tension between veteran friendliness and agency deference, scholars must examine the canons more closely to take the first step in finding a satisfactory resolution. A more nuanced view is crucial because the simplified versions of the canons cannot coexist.¹⁶ In other areas of the law, canons each have

¹² See H.R. Rep. No. 100-963, at 13–14 (1988); see also Michael P. Allen, *Due Process and the American Veteran: What the Constitution Can Tell us About the Veterans Benefits System*, 80 U. CIN. L. REV. 501, 507–08 (2011).

¹³ James D. Ridgway, *Changing Voices in a Familiar Conversation About Rules vs. Standards: Veterans Law at the Federal Circuit in 2011*, 61 AM. U. L. REV. 1175, 1186–90 (2012) [hereinafter Ridgway, *Changing Voices*].

¹⁴ *Deference Lotteries*, 91 TEX. L. REV. 1349, 1379–82 (2013).

¹⁵ See *infra* Part III.

¹⁶ In fact, Justice Scalia gave the keynote address to the CAVC's 2013 Judicial Conference, and "told the judicial conference attendees that he believes that *Chevron* and *Gardner* cannot coexist." See *Justice Scalia Headlines the Twelfth CAVC Judicial Conference*, VETERANS L.J. 1 (summer 2013), available at <http://www.cavcbar.net/Summer%202013%20VLJ%20Web.pdf>.

their own sphere of control and sometimes clash in borderline cases.¹⁷ However, the shorthand versions of veteran friendliness and agency deference both purport to explain how ambiguity is resolved,¹⁸ and therefore compete for the same sphere of control. Accordingly, a brief survey of their origins is warranted before attempting to harmonize the doctrines.

A. The Origins of Veteran Friendliness

1. Gardner

*Brown v. Gardner*¹⁹ and *Hodge v. West*²⁰ are the two primary cases that embody the principle of veteran friendliness. *Gardner* was the first veterans benefits case reviewed by the Supreme Court after the Veterans Judicial Review Act of 1988 (VJRA)²¹ made such claims subject to review. The question presented in *Gardner* was whether a veteran injured by VA hospital care had to prove negligence or similar fault in order to receive benefits.²² In *Gardner*, the Court noted that, even if the language of the benefits statute at issue were not clear, it might apply “the rule that interpretive doubt is to be resolved in the veteran’s favor.”²³ In other words, ambiguity in a veterans benefits statute should be resolved in the veteran’s favor.

This holding drew from a series of cases that predate the Veterans Judicial Review Act, in which the Supreme Court reviewed statutes that provided benefits to veterans outside of the claims process. Specifically, the principle traces to a World War II-era case, *Boone v. Lightner*,²⁴ in which the Court ruled against a soldier seeking special treatment under the Soldiers’ and Sailors’ Civil Relief Act of 1940.²⁵

¹⁷ See generally James J. Brudney & Corey Ditslear, *Canons of Construction and the Elusive Quest for Neutral Reasoning*, 58 VAND. L. REV. 1, 112 (2005).

¹⁸ James D. Ridgway, *Changing Voices*, *supra* note 13, at 1186.

¹⁹ 513 U.S. 115 (1994).

²⁰ 155 F.3d 1356 (Fed. Cir. 1998).

²¹ Pub. L. No. 100-687, 102 Stat. 4105 (1988).

²² 513 U.S. at 116.

²³ *Brown v. Gardner*, 513 U.S. 115, 118 (1994).

²⁴ 319 U.S. 561 (1943). See Linda Jellum, *Heads I Win, Tails You Lose: Reconciling Brown v. Gardner’s Presumption that Interpretive Doubt Be Resolved in Veterans Favor with Chevron*, 61 AM. U. L. REV. 59, 66–70 (2011) (tracing the doctrine to *Boone*) [hereinafter Jellum, *Heads I Win*].

²⁵ *Boone*, 319 at 575.

The Court remarked at the end of the opinion that the Act “is always to be liberally construed to protect those who have been obliged to drop their own affairs to take up the burdens of the nation.”²⁶

Since deciding *Gardner*, the Court’s remark has become one of the defining cases of veterans law, and citations to it are ubiquitous. Unfortunately, neither the case law that precedes it nor those cases that apply it provide much guidance as to its contours. Even so, one analyst commented, “*Gardner*’s Presumption [has] morphed from a simple directive to courts to construe veterans benefits statutes liberally into a veterans’ trump card in which . . . VA always loses the interpretive battle.”²⁷ Accordingly, it is easy to see why courts often find it difficult to discuss agency deference when invoking *Gardner*.

2. Hodge

Gardner is not the only facet of the canon of veteran friendliness. Not every case involves statutory interpretation, and veteran friendliness has become a broader principle than that announced in that case. The other key aspect of veteran-friendly interpretation is the sympathetic-reading doctrine.²⁸ The doctrine is somewhat amorphous, but its essence is that veterans benefits procedures and submissions by claimants pursuant to those procedures should be interpreted to maximize the theories of entitlement at issue and minimize denials based upon technical grounds.

This principle’s origins are murkier than the *Gardner* presumption.²⁹ Citations to case law invariably trace the doctrine’s origins to the Federal Circuit’s decision in *Hodge*. On this point, *Hodge* is a curious decision. As with *Gardner* and *Boone*, the portion of *Hodge* that enunciates this principle is structured as an afterthought, rather than actually controlling the outcome.³⁰ The issue in *Hodge* was

²⁶ *Id.* Although the principle resembles the remedial purposes doctrine, see Jellum, *Heads I Win*, *supra* note 24, at 67, the Court has never linked the two, and history may better explain the origins of this doctrine than the law. *See infra* notes 71–74 and accompanying text.

²⁷ Jellum, *Heads I Win*, *supra* note 24, at 121. Justice Scalia has publicly commented that, “‘in practice, [the presumption] may be more like a fist [on the scales] than a thumb, as it should be.’” *Scalia Headlines*, *supra* note 59.

²⁸ John Fussell & Jonathan Hager, *The Evolution of the Pending Claim Doctrine*, 2 VETERANS L. REV. 145, 157 (2010).

²⁹ *Id.* at 181.

³⁰ *See Hodge v. West*, 155 F.3d at 1363.

the interpretation of 38 C.F.R. § 3.156(a), which deals with “whether proffered evidence is sufficiently ‘new and material’ such that a veteran’s claim for service-connected disability benefits must be reopened.”³¹ Like *Gardner*, the opinion resolved the main issue on other grounds. The Federal Circuit held that the CAVC had failed to give *Chevron* deference to the agency’s regulation.³² It then proceeded to discuss a rule of veteran-friendly interpretation only as a tool that the Federal Circuit would invoke had it been necessary.³³

In this regard, the analysis in *Hodge* is particularly unusual. The court added that the CAVC had “imposed on veterans a requirement inconsistent with the general character of the underlying statutory scheme for awarding veterans’ benefits.”³⁴ The central support for this conclusion was an extensive quotation from the legislative history of the VJRA: “[m]plicit in such a beneficial system has been an evolution of a completely ex-parte system of adjudication in which Congress expects [the DVA] to fully and sympathetically develop the veteran’s claim to its optimum before deciding it on the merits.”³⁵ Numerous cases have used the above quotation, and variations thereof, since.³⁶

As with *Gardner*, the origins of *Hodge* do not provide much guidance as to its precise scope. The description in *Hodge* certainly captures the ideal vision of a non-adversarial, paternalistic system. However, placing *Hodge* in the hierarchy of interpretive principles is tricky. The net result of invoking *Hodge* is that courts use the legislative history of the VJRA to interpret statutes and regulations enacted both long before and after that legislation passed into law. It is simply not clear how much strength such legislative history should

³¹ *Id.* at 1357.

³² This holding by the CAVC failing to give deference to the agency’s interpretation of the regulation is curious by itself, because the agency was defending the CAVC’s interpretation of the regulation. *Hodge* was decided more than a year after the Supreme Court’s decision in *Auer v. Robbins*, 519 U.S. 452 (1997), which held that an agency’s interpretation of its own regulation is entitled to the highest deference, but *Hodge* makes no mention of the extra deference owed to an agency in interpreting its own regulations.

³³ *Id.*

³⁴ *Id.* at 1362.

³⁵ *Id.* (quoting H.R. Rep. No. 100-963, at 13 (1988), *reprinted in* 1988 U.S.C.C.A.N. 5782, 5795) (altered text as appeared in the original).

³⁶ *See generally* *Bailey v. West*, 160 F.3d 1360, 1369 (Fed. Cir. 1998).

have in interpreting authorities beyond the statute at issue. Nonetheless, courts also use the ruling as something of a “trump card.”³⁷ For example, in one application of *Hodge*, the Federal Circuit characterized its rule as follows: “The government’s interest in veterans cases is not that [veterans] *shall* win, but rather that justice shall be done, that all veterans so entitled receive the benefits due to them.”³⁸ Indeed, the Federal Circuit has castigated the government for advancing interpretations that the court views as “a trap for the unwary, or a stratagem to deny compensation to a veteran who has a valid claim, but who may be unaware of the various forms of compensation available to him.”³⁹ Accordingly, *Hodge* and the sympathetic-reading doctrine are also hard to reconcile with agency deference.

B. Agency Deference

On the other side of the coin, there is well-established court deference to agencies as to their reasonable interpretations of the the authorities that define the system that the agency administers. The seminal case cited for this point is *Chevron U.S.A. Inc. v. Natural Resources Defense Counsel, Inc.*,⁴⁰ which held that courts should defer to an agency’s reasonable interpretation of the statutes it administers.⁴¹

The precise contours of *Chevron* and the deference owed to agencies is a topic that has been extensively examined elsewhere,⁴² and only a few highlights are noted here. Prior to *Chevron*, under *Skidmore v. Swift & Company*,⁴³ the Court gave agencies deference to their opinions as “a body of experience and informed judgment to which courts and litigants may properly resort for guidance.”⁴⁴

³⁷ See *Barrett v. Nicholson*, 466 F.3d 1038, 1044 (Fed. Cir. 2006).

³⁸ *Id.* (emphasis added).

³⁹ *Comer v. Peake*, 552 F.3d 1362, 1369 (Fed. Cir. 2009).

⁴⁰ 467 U.S. 837 (1984).

⁴¹ *Id.* at 844.

⁴² See, e.g. William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan*, 96 GEO. L.J. 1083 (2008); Ann Graham, *Searching for Chevron in Muddy Waters: The Roberts Court and Judicial Review of Agency Regulations*, 60 ADMIN. L. REV. 229 (2008); Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187 (2006).

⁴³ 323 U.S. 134 (1944).

⁴⁴ *Id.* at 140.

However, *Chevron* in large part replaced the expertise rationale with one of democratic accountability.⁴⁵ In this conception, courts avoid making policy because they have neither the expertise of agencies nor the accountability of the political branches.⁴⁶

The judicial modesty required by *Chevron* was initially expanded in cases such as *Auer v. Robbins*,⁴⁷ which reinforced that an agency's interpretation of its own regulation was entitled to deference unless plainly erroneous or inconsistent with the regulation.⁴⁸ However, the initial clarity of *Chevron* has since given way to doubt in light of decisions such as *Christensen v. Harris County*⁴⁹ and *United States v. Mead Corporation*.⁵⁰ Both cases indicated that, regardless of the overarching institutional concerns, *Chevron* deference sometimes does not apply.⁵¹ Moreover, Justice Scalia—the staunchest defender of *Chevron*—has recently backed off from his commitment to *Auer* deference, leaving the framework further muddled.⁵²

In surveying this landscape, Professor Cass Sunstein asserted that the Supreme Court decisions have created “a significant increase in uncertainty about the appropriate approach [to deference]. More than at any time in recent years, a threshold question—the scope of judicial review—has become one of the most vexing in regulatory cases.”⁵³ Accordingly, discerning a complete and satisfactory theory of agency deference doctrines in current case law is as unrealistic as searching

⁴⁵ ADRIAN VERMEULE, *MECHANISMS OF DEMOCRACY: INSTITUTIONAL DESIGN* WRIT SMALL 155 (2007).

⁴⁶ “Judges are not experts in the field, and are not part of either political branch of government.” *Chevron*, 467 U.S. at 865.

⁴⁷ 519 U.S. 452, 461 (1997).

⁴⁸ *Id.*

⁴⁹ 529 U.S. 576 (2000).

⁵⁰ 533 U.S. 218 (2001).

⁵¹ See Linda D. Jellum, *The United States Court of Appeals for Veterans Claims: Has it Mastered Chevron's Step Zero?*, 3 *VETERANS L. REV.* 67, 87–97 (2011) (discussing the Supreme Court's post-*Chevron* case law) [hereinafter Jellum, *CAVC*].

⁵² See *Decker v. Nw. Env'tl. Def. Ctr.*, 133 S. Ct. 1326, 1342 (2013) (Scalia, J., concurring in part and dissenting in part) (“[H]owever great may be the efficiency gains derived from *Auer* deference, beneficial effect cannot justify a rule that not only has no principled basis but contravenes one of the great rules of separation of powers: He who writes a law must not adjudicate its violation.”).

⁵³ Sunstein, *Chevron Step Zero*, *supra* note 42, at 190.

for a similar theory of veteran friendliness. Nonetheless, there is no question that agency deference is a deeply held canon of judicial review, and is currently founded on concepts of democratic accountability and agency expertise.

III. THE CANONS AT THE COURTS

In theory, it should be very hard for the courts to avoid the tension between the canons of veteran friendliness and agency deference. Once a court finds ambiguity in a veterans benefits statute, it must apply a rule to resolve that ambiguity when the agency and the claimant are at odds.⁵⁴ In their simplest forms, each of the competing doctrines states how ambiguity should be resolved in veterans law cases, and each doctrine typically points to opposite outcomes in cases in which the claimant and the VA Secretary are at odds.⁵⁵ Accordingly, there should be a myriad of cases in which courts discuss and resolve these competing arguments. In reality, there are not.

A search of the last five years of the U.S. Courts of Appeals for the Federal Circuit veterans law cases yields only four decisions mentioning both *Gardner* and *Chevron*.⁵⁶ During the same five years, the court issued thirteen opinions mentioning either *Gardner* or *Chevron*, but not the other.⁵⁷ Moreover, none of the four cases that discusses both precedents comes close to articulating a coherent vision of the relationship between *Gardner* and *Chevron*.

First, in *Nielson v. Shinseki*,⁵⁸ the Federal Circuit held that “[t]he mere fact that the particular words of the statute . . . standing alone might be ambiguous does not compel us to resort to the [*Gardner*] canon. Rather, that canon is only applicable after other interpretive guidelines have been exhausted, including *Chevron*.”⁵⁹ However, the

⁵⁴ Compare *Brown v. Gardner*, 513 U.S. 115 (1994), with *Chevron U.S.A. Inc. v. Nat. Resources Def. Council Inc.*, 467 U.S. 837 (1984).

⁵⁵ *Id.*

⁵⁶ The Westlaw search was “advanced: chevron & gardner & DA(aft 1-21-2009) & TI(shinseki).” The chosen date of January 21, 2009, coincides with the confirmation of Eric K. Shinseki as Secretary of Veterans Affairs.

⁵⁷ The Westlaw searches were “advanced: gardner & DA(aft 01-21-2009) & TI(shinseki) % chevron” (producing ten results) and “advanced: chevron & DA(aft 01-21-2009) & TI(shinseki) % gardner” (producing four results).

⁵⁸ 607 F.3d 802 (Fed. Cir. 2010).

⁵⁹ *Id.* at 808.

court relied primarily on the *ejusdem generis* canon,⁶⁰ and concluded that the statute at issue was not ambiguous when applying the applicable canons in toto.⁶¹

The subsequent case of *Guerra v. Shinseki* illustrates the avoidance seen in many court decisions. *Guerra* is a divided Federal Circuit panel opinion in which the majority applied *Chevron* deference to resolve the case against the veteran, without mentioning *Gardner*.⁶² However, the dissent argued that *Chevron* deference was inappropriate because the language of the statute clearly commanded the opposition conclusion.⁶³ The dissent argued that, in the alternative, “the majority also ignores the canon of statutory construction that requires ambiguities, if any, in veterans statutes to be resolved in favor of the veteran.”⁶⁴ However, there is no discussion in the dissent as to why *Gardner* should trump *Chevron* in general, or in the case that was at hand.⁶⁵

In the third Federal Circuit case, *Heino v. Shinseki*,⁶⁶ the court conducted a straight *Chevron* analysis and ruled against the veteran.⁶⁷ However, the court stated in a footnote:

⁶⁰ *Id.* at 806–07. The *ejusdem generis* canon states that when an authority contains a list of examples, it only applies to items similar to the kinds listed.

⁶¹ *Id.* at 808.

⁶² *Guerra v. Shinseki*, 642 F.3d 1046, 1049 (Fed. Cir. 2011), *cert. denied*, 132 S. Ct. 1795 (2012).

⁶³ *Id.* at 1052 (Gajarsa, J., dissenting).

⁶⁴ *Id.*

⁶⁵ The dialogue between the Federal Circuit and the Court of Appeals for Veterans Claims shows additional avoidance. For example, *Frederick v. Shinseki* held that the plain language of the statutes favored the veterans, but the Federal Circuit reversed, holding that the plain language supported the Secretary’s interpretation. *See* 24 Vet. App. 335, 341 (2011), *rev’d*, 684 F.3d 1263, 1270 (Fed. Cir. 2012), *cert. denied*, 133 S. Ct. 1634 (2013).

⁶⁶ 683 F.3d 1372 (Fed. Cir. 2012). *Frederick* is also remarkable because Judge Reyna dissented at the Federal Circuit and agreed with the CAVC panel that the plain language favored the veteran. *Frederick v. Shinseki*, 684 F.3d 1263, 1274 (Fed. Cir. 2012) (Reyna, J., dissenting), *cert. denied*, 133 S. Ct. 1634 (2013). Therefore, the Secretary prevailed even though four of the six appellate judges who reviewed the case interpreted the statute in favor of the veteran. Notably, Judge Reyna remarked that he would have applied *Gardner* to resolve ambiguity in the veteran’s favor had he found the statute ambiguous. *Id.* at 1275 (Reyna, J., dissenting). He made no mention of deference to the Secretary. *Id.* (Reyna, J., dissenting).

⁶⁷ *Id.* at 1375–77.

It is not clear where the [*Gardner*] canon fits within the *Chevron* doctrine, or whether it should be part of the *Chevron* analysis at all. Compare *Nielson v. Shinseki*, 607 F.3d 802, 808 (Fed. Cir. 2010) (stating that the [*Gardner*] canon ‘is only applicable after other interpretive guidelines have been exhausted, including *Chevron*’), with *Disabled Am. Veterans v. Gober*, 234 F.3d 682, 692, 694 (Fed. Cir. 2000) (stating that the [*Gardner*] canon ‘modif[ies] the traditional *Chevron* analysis’).⁶⁸

After this bout of honesty, the court rejected the idea of applying *Gardner* by stating, “[W]e will not hold a statute unambiguous by resorting to a tool of statutory construction used to analyze ambiguous statutes.”⁶⁹ This suggests the court viewed *Gardner* as a rule that applies to the question of the existence of ambiguity, before reaching the question of deference.

Perhaps the most telling part of *Heino* is Judge Plager’s concurrence, in which he candidly described the decision as follows:

With a creative bit of definitional construction and *Chevron* analysis, we conclude that what . . . VA does is legitimate; this avoids throwing . . . the VA co-payment system into total chaos, and probably is, in a broad sense, consistent with what Congress thought . . . VA should be doing.⁷⁰

Accordingly, he suggested an approach that is more practical than rigidly doctrinal.

Finally, in *Burden v. Shinseki*,⁷¹ the court cited *Chevron* for the step one principle that courts must give effect to the plain language of the statute, and then never mentioned it again.⁷² As for *Gardner*, the *Burden* court noted three pages later in its decision that there was no particularly “veteran friendly” way to resolve a dispute between two widows who were both claiming to be the surviving spouse of the veteran.⁷³ Ultimately, the court relied on the plain language of the statute, and said nothing about the competing canons.⁷⁴

⁶⁸ *Id.* at 1379 n.8.

⁶⁹ *Id.*

⁷⁰ *Id.* at 1382 (Plager, J., concurring).

⁷¹ 727 F.3d 1161 (Fed. Cir. 2013).

⁷² *Id.* at 1166.

⁷³ *Id.* at 1169.

⁷⁴ *Id.* at 1171–72.

These five years of cases cannot be easily reconciled. *Nielson* suggests that *Gardner* simply would not apply if there were a regulation requiring *Chevron* deference.⁷⁵ On the other hand, *Heino* suggests that *Gardner* applies to the question of ambiguity before considering deference.⁷⁶ Meanwhile, *Guerra* shows that the court is so uncomfortable with the tension between the canons that they are loath to admit ambiguity, even when the judges involved in a case have diametrically opposite views of the plain meaning of the language.⁷⁷ Instead, in the overwhelming majority of cases from the Federal Circuit, the court prefers to avoid the problem by discussing only one canon at a time. As it stands, the most illuminating opinions may be *Burden* and Judge Plager's concurrence in *Heino*, which appear to avoid taking the canons at face value, but peek behind the curtain to consider the larger system in choosing which canon to apply.

The opinions of the Court of Appeals for Veterans Claims (CAVC) from the same period echo the same disparities as those of the Federal Circuit. Sometimes, the CAVC mentions both canons but applies neither, because it concludes that the statute is clear on its face.⁷⁸ At other times, it concludes that both *Gardner* and *Chevron* support its conclusion.⁷⁹ Opinions such as *Sharp v. Shinseki*⁸⁰ reject the Secretary's claim of deference under *Chevron*, and apply *Gardner* to rule in favor of the veteran;⁸¹ however, opinions such as *Meedel v. Shinseki*⁸² apply agency deference with only a passing mention of *Gardner* at the beginning of the analysis.⁸³ The CAVC even has opinions similar to *Guerra*, such as *Breniser v. Shinseki*,⁸⁴ in which the majority applied *Chevron*⁸⁵ while the dissent invoked *Gardner*.⁸⁶

⁷⁵ *Nielson*, 607 F. 3d at 808.

⁷⁶ *Heino*, 683 F.3d at 1379 n.8.

⁷⁷ *Guerra*, 642 F.3d at 1049–52.

⁷⁸ *See, e.g.*, *Nielson*, 23 Vet. App. at 60–61.

⁷⁹ *See, e.g.*, *Wingard v. Shinseki*, 26 Vet. App. 334, 346–47 (2013); *Mason v. Shinseki*, 26 Vet. App. 1, 8–9 (2012).

⁸⁰ 23 Vet. App. 267 (2009).

⁸¹ *Id.* at 275–76; *see also* *Trafter v. Shinseki*, 26 Vet. App. 267 (2013).

⁸² 23 Vet. App. 277 (2009).

⁸³ *Id.* at 282–83; *see also* *Wanless v. Shinseki*, 23 Vet. App. 143, 150 (2009).

⁸⁴ 25 Vet. App. 64 (2011).

⁸⁵ *Id.* at 75.

⁸⁶ *Id.* at 81 (Kasold, C.J., dissenting).

Overall, the application of the canons at the CAVC is no more consistent than it is at the Federal Circuit.

The story told by the numbers at the CAVC is also similar. Over the same past five-year period, the CAVC issued thirteen precedential opinions that mention both *Gardner* and *Chevron*, including the seven cited in the previous paragraph.⁸⁷ However, during that same time it also issued forty-six opinions that mentioned *Gardner* but not *Chevron*,⁸⁸ and ten more opinions that mentioned *Chevron* but not *Gardner*.⁸⁹ Like its reviewing court, therefore, the CAVC also has the overwhelming tendency to discuss only one canon at a time.

Ultimately, the Supreme Court may have to resolve the tension, but so far it has not accepted an opportunity to do so.⁹⁰ Since the *Gardner* decision in 1994—which mentioned only the first step of *Chevron*—the Court has reviewed three more Federal Circuit decisions originating from the CAVC.⁹¹ However, one of those decisions involved the Equal Access to Justice Act,⁹² and the other two involved the CAVC’s organic act.⁹³ Therefore, a situation has not yet been presented to the Supreme Court in which deference might be owed to VA in its interpretation of Title 38.

⁸⁷ The search done on Westlaw was “advanced: gardner & chevron & DA(aft 01-21-2009) % unpublished.” “Shinseki” was not needed as a limiting term to search CAVC cases because the Secretary is a party to every case at the CAVC.

⁸⁸ The search was “advanced: gardner & DA(aft 01-21-2009) % chevron % unpublished.”

⁸⁹ The search was “advanced: chevron & DA(aft 01-21-2009) % gardner % unpublished.”

⁹⁰ As the Federal Circuit has exclusive jurisdiction to review CAVC decisions, it is not possible for a circuit split to develop. Moreover, as discussed above, the Federal Circuit has tended to avoid addressing the tension directly, rather than teeing it up for resolution by presenting a definitive, in-depth ruling. Accordingly, it is not surprising that the issue has not been accepted for review by the Supreme Court.

⁹¹ Paul R. Gugliuzza, *Veterans Benefits in 2010: A New Dialogue Between the Supreme Court and the Federal Circuit*, 60 AM. U. L. REV. 1201, 1211–13 (2011).

⁹² See *Scarborough v. Principi*, 541 U.S. 401 (2004).

⁹³ See *Henderson ex rel. Henderson v. Shinseki*, 131 S. Ct. 1197 (2011); *Sanders v. Shinseki*, 556 U.S. 396 (2009).

IV. GARDNER, *CHEVRON*, AND THE TENSION BETWEEN FACT- AND VALUE-BASED JUDICIAL REVIEW

Given that both veteran friendliness and agency deference lack cohesive borders on their own, it may seem impossible to reconcile the two canons. However, it is imperative to explore the possibility. At the very least, it may be possible to make progress toward harmonizing the two competing views. Indeed, the lingering malleability in both doctrines may well provide the flexibility to find a compromise in aligning the competing spheres of control. Almost certainly, a workable approach to the doctrines exists that is less adversarial and more productive than those currently recognized.

One place to begin is to look abstractly at what the canons might represent. There is “a spectrum between fact- and value-based canons of interpretation.”⁹⁴ Fact-based canons seek to discern what the original policy maker would have said if it had spoken more clearly to the problem at hand, while value-based canons give authority to the courts to protect certain values regardless of the original intent of the policy at hand.⁹⁵ In other words, some canons seek to implement the decisions of the political branches as faithfully as possible, while others tend to protect specified values against the tendency of those same branches to sacrifice values when expedient or unpopular.⁹⁶ Therefore, we can begin the exploration process by recognizing that how one resolves the tension between veteran-friendliness and agency deference depends a lot on whether one views the role of the courts as protecting the value of veteran friendliness or as ensuring that the agency remains true to democratically made policy decisions.

Looking at the value side of the coin, the question of how much the courts should defer to the democratic branches on veterans policy is key because the nation has a decidedly checkered history of caring for its veterans, one that extends far beyond the negative experiences of the Vietnam generation.⁹⁷ As mentioned above, the principle of

⁹⁴ See Thomas B. Bennett, Note, *The Canon at the Water's Edge*, 87 N.Y.U. L. REV. 207, 212 (2012).

⁹⁵ *Id.*

⁹⁶ See generally *id.* at 246.

⁹⁷ See generally James D. Ridgway, *Splendid Isolation Revisited: Lessons from the History of Veterans Benefits Before Judicial Review*, 3 VETERANS L. REV. 135 (2011) [hereinafter Ridgway, *Splendid Isolation Revisited*].

veteran-friendly interpretation traces to *Boone*.⁹⁸ Three of the justices on the Supreme Court at that time were World War I veterans, and a fourth had been a War Department official.⁹⁹ They had front-row seats¹⁰⁰ a decade earlier to the Bonus Army fiasco, where the U.S. Army used bayonets, tanks, and tear gas to drive tens of thousands of peacefully protesting veterans from the National Mall.¹⁰¹ There is a very plausible interpretation that *Boone/Gardner* is, at its heart, a value-based canon created by veteran-justices, who had seen first-hand how badly treated some veterans were when petitioning for redress of their grievances.¹⁰² Therefore, a value-based approach may well lead to an active role for the courts, typified more recently by the language in *Barrett* and *Cromer*.¹⁰³

⁹⁸ See *Boone*, 319 U.S. at 575.

⁹⁹ See generally SUSAN NAVARRO SMELCER, CONG. RES. SERV., R40802, SUPREME COURT JUSTICES: DEMOGRAPHIC CHARACTERISTICS, PROFESSIONAL EXPERIENCE, AND LEGAL EDUCATION, 1789-2010, 25-27 (2010); Benjamin H. Barton, *An Empirical Study of Supreme Court Justice Pre-Appointment Experience*, 64 FLA. L. REV. 1137, 1160-61 (2012). When *Boone* was decided in 1943, the Court included WWI veterans Justices Hugo Black, Stanley Reed, and Frank Murphy. See Andrew Cohen, *None of the Supreme Court Justices Has Battle Experience*, THE ATLANTIC (Aug. 13, 2012), available at <http://www.theatlantic.com/national/archive/2012/08/none-of-the-supreme-court-justices-has-battle-experience/260973/>. Furthermore, “Harlan Stone (1941–1946) served on a War Department Board of Inquiry.” *Id.*

¹⁰⁰ Before completion of the Supreme Court building in 1935, the Supreme Court met in the “Old Senate Chamber” of the U.S. Capitol. See *The Court Building*, THE SUPREME COURT OF THE UNITED STATES, <http://www.supremecourt.gov/about/courtbuilding.aspx> (last visited Jan. 6, 2014).

¹⁰¹ See Ridgway, *The Splendid Isolation Revisited*, *supra* note 97, at 176–78. See generally PAUL DICKSON & THOMAS B. ALLEN, THE BONUS ARMY: AN AMERICAN EPIC (2004).

¹⁰² This may also explain why the *Gardner* canon has maintained its distance from the remedial purpose canon. Although the two have been compared to each other, see Jellum, *Heads I Win*, *supra* note 24, at 67, the Court usually describes the remedial purpose canon as a fact-based canon in which the courts are trying to promote Congress’ remedial intent, rather than a value-based canon in which courts take statutes as licenses to resist the democratic process. See *N.E. Marine Terminal Co. v. Caputo*, 432 U.S. 249, 268 (1977) (concluding that the broad language of a remedial statute indicates that the Court should interpret it expansively); *Voris v. Eikel*, 346 U.S. 328, 333 (1953) (stating that the statute should be liberally interpreted to achieve the result intended by Congress).

¹⁰³ Another manifestation of this pro-veteran sentiment is observable in the efforts to apply due process to the current problem of the claims processing backlog.

The opposite side of the coin—the side concerned with faithfully executing democratic decisions regardless of policy—aligns clearly with the essential notion of *Chevron*. Here, courts should defer to the democratic will of the political branches and the expertise of the agencies charged with administering their directions.¹⁰⁴ The fact-based approach (attempting to faithfully discern and implement the decisions of the democratic branches) raises difficult questions of the types of intent to attribute to Congress and the Secretary in interpreting the authorities they have drafted. The problems of the veterans benefits system are complex, and it is often very difficult to predict the effect of systemic decisions before implementation.¹⁰⁵ In such an environment, it is very hard to judge intent based upon results.¹⁰⁶ Good intentions will sometimes nonetheless lead to bad outcomes, and the general rule of deference is that agencies and Congress must correct their own mistakes.¹⁰⁷ Even if courts were to explicitly adopt an approach that it is the general intent of the democratic branches that the system function well, *Chevron* is explicitly based upon the notion that courts lack the institutional competence to make better decisions than the political branches about what policies would achieve the desired functioning.¹⁰⁸

This is not to say that a fact-based approach leaves little role for courts. There is no consensus as to whether Congress would generally intend for ambiguity to be resolved by agencies or by the courts.¹⁰⁹ Moreover, the insulation of courts from political pressures allows them

See James D. Ridgway, *Equitable Power in the Time of Budget Austerity: The Problem of Judicial Remedies for Unconstitutional Delays in Claims Processing by Federal Agencies*, 64 ADMIN. L. REV. 57 (2012) [hereinafter Ridgway, *Equitable Power*].

¹⁰⁴ *Arlington v. F.C.C.*, 133 S. Ct. 1863, 1863 (2013).

¹⁰⁵ *See* Ridgway, *The Veterans Judicial Review Act*, *supra* note 10, at 296–98 (2010).

¹⁰⁶ *Id.* at 297–98.

¹⁰⁷ *See* U.S. v. Mead Corp., 533 U.S. 218, 238 (2001) (“We think, in sum, that . . . efforts to simplify ultimately run afoul of Congress’s indications that different statutes present different reasons for considering respect for the exercise of administrative authority or deference to it.”).

¹⁰⁸ *See id.*; *see also generally* *Chevron*, 467 U.S. at 837.

¹⁰⁹ *See* Lisa Schultz Bressman, *Reclaiming the Legal Fiction of Congressional Delegation*, 97 VA. L. REV. 2009, 2050 (2011) (arguing that the assumption that Congress intends to delegate interpretative authority to agencies is “both false and fraudulent”).

to examine problems with the system honestly, while the political branches face strong incentives to gloss over them.¹¹⁰ Therefore, a fact-based approach to the canon may take a very sophisticated view of the role of the courts if they treat the political branches and the agency, realistically, as imperfect actors.¹¹¹

Overall, the distinction between a value-based review and fact-based review helps explain a lot of the tension between the canons of veteran friendliness and agency deference.¹¹² Before leaving this thought, it is important to note that the relationship between the two views may be further complicated in practice. A value-based approach to review will not necessarily lead to different outcomes than a fact-based review, because the intents of the political branches and the agency often align with the value of veteran friendliness.¹¹³ Nevertheless, the foundations of veterans law were based on a statutory scheme that was explicitly intended to roll back benefits,¹¹⁴ but countless modifications to the system since then were motivated by a much more compassionate approach to veterans.¹¹⁵ Accordingly, there has been substantial variance over time in the motivations of the

¹¹⁰ See Ridgway, *Equitable Power*, *supra* note 103, at 130–31 (discussing how public choice theory predicts that the incentives of politicians and agency administrators will often be at odds with the sound execution of an agency’s mission).

¹¹¹ See David S. Rubenstein, “Relative Checks”: *Towards Optimal Control of Administrative Power*, 51 WM. & MARY L. REV. 2169, 2213–14 (2010). In this regard, the choice between fact- and value-based review is another manifestation of the classic problem of how to determine when courts should be majoritarian versus counter-majoritarian. See ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* 16 (2d ed. 1986); Michael C. Dorf, *The Majoritarian Difficulty and Theories of Constitutional Decision Making*, 13 U. PA. J. CONST. L. 283 (2010); Steven L. Winter, *An Upside/Down View of the Counter-majoritarian Difficulty*, 69 TEX. L. REV. 1881 (1991).

¹¹² However, it is not the only way to recast this tension. For example, it is possible to perceive the debate as a version of rules-versus-standards. See Ridgway, *Changing Voices*, *supra* note 13, at 1183–86 (2012).

¹¹³ James D. Ridgway, *Fresh Eyes on Persistent Issues: Veterans Law at the Federal Circuit in 2012*, 62 AM. U. L. REV. 1037, 1087 (2013) [hereinafter Ridgway, *Fresh Eyes on Persistent Issues*].

¹¹⁴ James D. Ridgway, *Recovering an Institutional Memory: The Origins of the Modern Veterans Benefits System, 1914 to 1958*, 5 VETERANS L. REV. 1, 7 (2013).

¹¹⁵ Ridgway, *Fresh Eyes on Persistent Issues*, *supra* note 113, at 1087.

drafters of veterans law.¹¹⁶ The way courts approach the relationship between veteran friendliness and agency deference may depend upon the drafting date of the authority. Arguably, when veteran friendliness clearly motivated the agency in making a difficult judgment call, courts have less reason to aggressively invoke value-based review.¹¹⁷

V. TOWARD A LESS ADVERSARIAL RELATIONSHIP

Ultimately, distilling any practical guidance requires a synthesis of the competing canons of veteran friendliness and agency deference. Below are three alternative approaches that might serve to move the doctrinal development forward. Individually, each may be flawed and insufficient. Nonetheless, the evolution toward a more sophisticated and workable approach necessarily begins with such stepping-stones.

These three approaches are not mutually exclusive.¹¹⁸ Indeed, they each focus on a different relationship, and therefore might coexist, at least uneasily, while selective pressures of case-by-case decision making work to fashion a more holistic theory.¹¹⁹ The first approach focuses on the relationship between VA and the courts, and seeks to rearticulate and clarify the canons and their respective roles.¹²⁰ The second approach focuses on the relationship between VA and Congress, and suggests that the weight of the two canons may vary depending upon the type of issue presented.¹²¹ Finally, the third approach focuses on the relationship between the courts and the advocates in veterans benefits cases, and suggests that the courts may use the canons to extract better information from advocates before deciding an issue.¹²²

¹¹⁶ Melissa E. Murray, *Whatever Happened to G.I. Jane? Citizenship, Gender, and Social Policy in the Post War Era*, 9 MICH J. GENDER & L. 91, 120 (2002); Ridgway, *Fresh Eyes on Persistent Issues*, *supra* note 113, at 1087.

¹¹⁷ See Ridgway, *Changing Voices*, *supra* note 13, at 1186–89.

¹¹⁸ Ridgway, *Fresh Eyes on Persistent Issues*, *supra* note 113, at 1075–76; see also Jellum, *Heads I Win*, *supra* note 24, at 88–102.

¹¹⁹ Ridgway, *Fresh Eyes on Persistent Issues*, *supra* note 113, at 1075–76.

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*

A. The Canons and Congressional Delegations

One logical starting place to look for common ground is at the intersection of the canons' conceptions, both of which are often treated as presumptions of congressional intent.¹²³ On the one hand, the Supreme Court decided *Boone* and *Hodge* based upon the premise that Congress, knowing that it cannot resolve all issues *ex ante*, created the system with a residual intent that ambiguity be resolved in the favor of veterans.¹²⁴ On the other hand, an essential notion of *Chevron* is that Congress knows that, in general, the agency administering a statute should resolve ambiguity.¹²⁵

The courts can harmonize these competing notions because the issue of Congress's intent is not black and white. Rather, we can think in terms of the degree of freedom delegated by Congress.¹²⁶ The Supreme Court has recognized that Congress sometimes does not intend to delegate interpretive discretion to an agency.¹²⁷ It follows that Congress can also delegate limited interpretive authority.¹²⁸ In other words, Congress could afford VA some—but not full—discretion in interpreting veterans benefits statutes, and thereby avoid

¹²³ See Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside — An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STANFORD L. REV. 901 (2013); Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside — An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part II*, 66 STANFORD L. REV. 901 (2014).

¹²⁴ The premise of such a view of congressional intent is contingent on the members of Congress and their staffs having an understanding of the canons of interpretation applied by the courts. In practice, it seems that such understanding is inconsistent at best. *See id.*

¹²⁵ *See Chevron*, 467 U.S. at 837.

¹²⁶ *Arlington v. F.C.C.*, 133 S. Ct. at 1863.

¹²⁷ *See Jellum, CAVC, supra* note 51, at 98 (discussing *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000); *Gonzales v. Oregon*, 546 U.S. 243 (2006); and *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006)).

¹²⁸ *See Jellum, Heads I Win, supra* note 24, at 90. A recent, notable example of Congress explicitly circumscribing an agency's interpretive authority is the Dodd-Frank Act, which "instruct[s] courts to apply the *Skidmore* deference factors when reviewing certain agency preemption decisions and . . . refer[r] to *Chevron* throughout." Kent H. Barnett, *Codifying Chevmore*, 89 N.Y.U. L. REV. ___ (forthcoming 2015), available at <http://ssrn.com/abstract=2405016>.

causing non-delegation issues.¹²⁹ As a result, *Gardner* should not be taken as necessarily mandating specific interpretations of ambiguous language, but as limiting those that would be otherwise permitted under *Chevron* to a smaller subset. Under this framework, veteran friendliness would not trump agency deference; rather, it would limit the field of interpretations to which the courts must defer.¹³⁰ Moreover, courts should operate with the premise that the outcome of any interpretive question should be veteran friendly, but must give deference to VA when it chooses among plausibly veteran-friendly options.¹³¹ Indeed, when judicial review was enacted, the House Committee on Veterans' Affairs' report on the legislation explicitly stated that "decisions of [VA] deserve the respect of the judicial branch, *even when that branch views such decisions as dubious or unwise*. It is only through such deference that the three branches of government can continue to coexist."¹³²

The attraction of this option is that it recognizes that the question of veteran friendliness is often a very complex question. The design and operation of the system involves trade-offs between speed, tailoring, and costs.¹³³ To the extent that the agency does not have unlimited funds, it must decide how best to allocate its finite resources.¹³⁴ In some situations, it may choose to use easier-to-administer, bright-line rules to speed up decision making and reduce inconsistent outcomes.¹³⁵ In others, it may choose to create subjective rules to provide some discretion to adjudicators to handle complex

¹²⁹ See generally Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315 (2000) (describing how canons of construction applicable to administrative agencies effectively exist as a type of nondelegation doctrine).

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² H.R. REP. 100-963, at 25 (1988), reprinted in 1988 U.S.C.C.A.N. 5782, 5807 (emphasis added).

¹³³ Richard E. Levy & Sidney A. Shapiro, *Government Benefits and the Rule of Law: Toward a Standards-Based Theory of Judicial Review*, 58 ADMIN. L. REV. 499, 549 (2006) (arguing that "the CAVC has exhibited excessive tolerance for VA delay and error by failing to interpret its powers and VA's mandate in ways that could speed decision-making and improve its accuracy"); see also Ridgway, *Changing Voices*, *supra* note 13, at 1188–89.

¹³⁴ See Ridgway, *Changing Voices*, *supra* note 13, at 1188–89.

¹³⁵ Robert N. Davis, *Veterans Fighting Wars at Home and Abroad*, 45 TEX. TECH L. REV. 389, 402–03 (2013).

cases and quickly evolving medical issues.¹³⁶ This calculus on the part of the agency is not limited to just the cost of administering the system, but also may involve other tradeoffs.¹³⁷ For example, the Veterans Health Administration (the medical arm of VA that primarily operates VA hospitals) provides over a million medical opinions each year in support of the Veterans Benefits Administration (the adjudication arm of the agency).¹³⁸ Every hour devoted to these opinions limits the health care provided to veterans and the number of new veterans admitted to the health care system each year.¹³⁹

In essence, the courts apply *Gardner* and similar principles to provide a degree of value-based review that shepherds the agency into a box of acceptable decisions.¹⁴⁰ Within that box, the courts conduct a more deferential fact-based review in a traditional *Chevron* model. This model is not novel. In fact, some argue that the Constitution generally requires that “legislative delegations of authority to government actors must contain legal standards that guide and control discretion.”¹⁴¹ The veteran-friendliness canon, then, is part of the legislative delegation that limits the Secretary.¹⁴² If some reasonable vision of veteran friendliness were interpretable from the Secretary’s interpretation of a statute, then it is permissible and sustainable.¹⁴³ This approach is similar to that taken by Professor Linda Jellum in asserting

¹³⁶ *See Id.*

¹³⁷ *See* Ridgway, *Changing Voices*, *supra* note 13, at 1188–89.

¹³⁸ *See generally About, VETERANS HEALTH ADMIN.*, <http://www.va.gov/health/aboutVHA.asp> (last visited Apr. 9, 2014) (generally describing the duties and function of the Veterans Health Administration).

¹³⁹ To the extent that Congress is deeply involved in defining VA’s budget with substantial detail as to its specific allocations among numerous programs, it is a matter of more than just agency discretion. The ongoing involvement by Congress in defining the agency’s budget tends to legitimize VA’s choices in allocating scarce resources.

¹⁴⁰ *See* Michael P. Healy, *Reconciling Chevron, Mead, and the Review of Agency Discretion: Source of Law and the Standards of Judicial Review*, 19 *GEO. MASON L. REV.* 1, 9 (2011); *see also Gardner*, 513 U.S. at 118.

¹⁴¹ *See* Levy & Shapiro, *supra* note 133, at 501.

¹⁴² *See id.*

¹⁴³ *See* Healy, *supra* note 140, at 55 (2011) (arguing that, “when an agency has exercised delegated lawmaking power to interpret an ambiguous statute, a reviewing court should review only the permissibility of the agency’s decision-making process, rather than the agency’s substantive interpretation”).

that perhaps “*Gardner*’s presumption belongs to VA, not to the court,”¹⁴⁴ but perhaps with a bit more teeth.

The prospect of the courts explicitly adopting such an approach is murky. However, a recent CAVC case tends to support this view. In *Trafter v. Shinseki*,¹⁴⁵ a panel of the court explicitly characterized *Gardner* as a limitation on *Chevron*, holding that the court must defer to the agency’s interpretations “unless . . . the Secretary’s interpretation is unfavorable to veterans, such that it conflicts with the beneficence underpinning VA’s veterans benefits scheme, and a more liberal construction is available that affords a harmonious interplay between provisions.”¹⁴⁶ The opinion cited *Gardner* for this proposition, but not any intervening Federal Circuit or CAVC opinions formulating the relationship this way.

In general, it is rare to find a veterans law opinion that explicitly admits that the Secretary has chosen a permissible interpretation even though the court disagrees with it.¹⁴⁷ Rather, the Federal Circuit, in *Haas v. Peake*,¹⁴⁸ rejected an analogous approach to residual congressional intent.¹⁴⁹ That case dealt with ambiguous language in a statute about exposure of Vietnam veterans to Agent Orange.¹⁵⁰ The CAVC¹⁵¹ and the dissenting judge at the Federal Circuit¹⁵² both argued

¹⁴⁴ See Jellum, *Heads I Win*, *supra* note 24, at 120.

¹⁴⁵ 26 Vet. App. 267 (2013).

¹⁴⁶ *Id.* at 272.

¹⁴⁷ One notable counter-example is a recent concurring opinion by Judge Moorman, in which he “reluctantly conclude[s] that the Secretary has presented a plausible, even though strained, alternative reading of [the regulation at issue] that warrants an affirmance of the Board’s decision.” *Johnson v. Shinseki*, 26 Vet. App. 237, 251 (2013) (en banc) (Moorman, J., concurring).

¹⁴⁸ See *Haas v. Peake*, 525 F.3d 1168 (Fed. Cir. 2008).

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Haas v. Nicholson*, 20 Vet. App. 257, 275 (2006) (concluding that it was Congress’s intent that veterans “‘have their exposure claims adjudicated under uniform and consistent regulations that incorporate rational scientific judgments’” (quoting 130 CONG. REC. S13, 591 (daily ed. Oct. 4, 1984) (statement of Sen. Alan Simpson))), *rev’d sub nom.* *Haas v. Peake*, 525 F.3d 1168 (Fed. Cir. 2008).

¹⁵² *Haas v. Peake*, 525 F.3d 1168, 1198 (Fed. Cir. 2008) (Fogel, J., dissenting) (“[I]t is reasonable to expect that an administrative interpretation limiting the benefits of the presumption at issue here would be based on at least some scientific evidence.”).

that Congress had created ambiguity in the statute but had a specific intent that VA resolve this ambiguity based upon scientific research about actual exposure.¹⁵³ However, the majority of the Federal Circuit ignored that argument, deciding the claim based upon *Auer* deference.¹⁵⁴

The Federal Circuit has yet to consider the CAVC's articulation in *Trafter*.¹⁵⁵ Nonetheless, if someone were to present a clear articulation of this reconciliation of the canons to the courts, they might well find that it would fit comfortably within their traditional notions of review. However, as explored in the next two sections, more exotic approaches might allow for even better judicial management of the benefits system.

B. The Canons and Separation of Powers

Reference to the structural roles of Congress and agencies further refines the idea that the canons can coexist to guide courts in managing the authority delegated by Congress to VA. Pursuant to the separation of powers model underlying the United States government, there lies an obvious distinction between substance and procedure. Defining benefits—the monies the Treasury will pay out—is quintessentially a legislative function.¹⁵⁶ Benefits tend to be defined in significant detail, and relatively little discretion is normally afforded to agencies. Congress has the power of the purse and defines when it is lawful to write checks;¹⁵⁷ therefore, courts should give Congress's intent great deference—compared to that of the Secretary—with regard to defining benefits.

On the other hand, administering programs is the quintessential function of an executive agency. Congress defines its goals and may outline guidance as to the administration of programs, but the nitty-gritty of turning legislative intent into actual results is what agencies do. Statutes such as section 501 of Title 38, which states, “The Secretary has authority to prescribe all rules and regulations which are necessary or appropriate to carry out the laws administered by the

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ See *supra* notes 195–96 and accompanying text. *Trafter* was not appealed by the Secretary.

¹⁵⁶ See 31 U.S.C. § 301 (2012).

¹⁵⁷ *Id.*

Department and are consistent with those laws,”¹⁵⁸ embody this notion. Accordingly, deference to the agency would be at its maximum for procedural issues, where the Secretary has exercised this delegation of authority.

Based on these notions, the default judicial approach would be that veteran friendliness should be the applicable principle when it comes to the definition of benefits; indeed, *Gardner* was such a case. On the other hand, *Chevron/Auer* deference would be the default approach in cases disputing the proper interpretation of procedures for administering the system.

This view makes intuitive sense. Congress spends significant time seeking to understand veterans’ needs and adjusting the benefits provided to them.¹⁵⁹ Statutes define the procedures used by VA in broad language, however, and include subjective terms that allow for much discretion. Congress engages in extensive oversight of the agency,¹⁶⁰ but in reality, congressional hearings often focus on the adequacy of benefits and the overall performance of the agency, and are far less likely to delve down into the weeds of procedural interpretation.¹⁶¹ As a result, the use of the substantive/procedural distinction tends to align judicial review principles with the correct notions of the allocation of power between Congress and agencies. This distinction is also consistent with the fact/values distinction, because responsibility for veteran friendliness is more clearly delegated to the agency in the procedural arena than it is in the substantive arena.

Nonetheless, such an approach is not a panacea. The question of whether a particular rule is substantive or procedural is often itself

¹⁵⁸ 38 U.S.C. § 501(a) (2012).

¹⁵⁹ See generally Ridgway, *Splendid Isolation Revisited*, *supra* note 97, at 194–219 (exploring the history of veterans benefits and the role of Congress therein).

¹⁶⁰ In fact, one study found that “agency ‘infractions’ that are subject to congressional oversight are approximately 22% less likely to reoccur, compared to similar actions that do not receive oversight attention.” Brian D. Feinstein, *Congressional Control of Administrative Agencies 2* (2014) (working paper), available at <http://ssrn.com/abstract=2304497>.

¹⁶¹ For a collection of significant congressional hearings on the operation of VA, see *House Hearing Transcripts*, VETERANS LAW LIBRARY (last visited Aug. 10, 2014), available at http://www.veteranslawlibrary.com/House_Hearings.html, and *Senate Hearing Transcripts*, VETERANS LAW LIBRARY (last visited Aug. 10, 2014), available at http://www.veteranslawlibrary.com/Senate_Hearings.html.

difficult.¹⁶² Moreover, it does not explain the current use of *Gardner* and *Chevron* by the courts, particularly the Federal Circuit. In a number of recent Federal Circuit cases, and in a complete reversal of the above approach, the court invoked agency deference to narrowly interpret veterans benefits. In *Haas v. Peake*,¹⁶³ for example, the Federal Circuit invoked *Auer* deference to narrowly interpret which groups of veterans were entitled to benefits based upon presumptive exposure to Agent Orange.¹⁶⁴ On the other hand, the court in *Rivera v. Shinseki*¹⁶⁵ invoked the sympathetic reading doctrine to rule against the government on a procedural issue,¹⁶⁶ without mentioning agency deference at all. A move toward the procedure/substance distinction would, therefore, represent a significant change of approach by the courts.

C. The Canons and Court Review

Although the above approaches focus on the relationship between Congress and VA, another approach is to turn the focus to the role of the courts. Any reconciliation of veteran friendliness and agency deference will continue to require courts to evaluate the effects of agency decisions.¹⁶⁷ In creating judicial review of veterans claims, Congress clearly intended to establish the courts not just as arbiters of disputes, but also as stewards of the system that would critically review the agency's interpretations of law and thereby help increase public confidence in the system's operation.¹⁶⁸ Fulfilling this role by

¹⁶² See Karen Petroski, *Statutory Genres: Substance, Procedure, Jurisdiction*, 44 *LOY. U. CHI. L.J.* 189, 196–97 (2012).

¹⁶³ See 525 F.3d 1168, 1186–90 (Fed. Cir. 2008).

¹⁶⁴ *Id.* at 1199.

¹⁶⁵ See 654 F.3d 1377 (Fed. Cir. 2011).

¹⁶⁶ *Id.* at 1380.

¹⁶⁷ See generally Russell L. Weaver, *Deference to Regulatory Interpretations: Inter-Agency Conflicts*, 43 *ALA. L. REV.* 35, 35–36 (1992) (discussing the conflict that although federal courts have the authority to independently determine the meaning of statutory provisions, they are required to defer to an administrative agency's interpretation of its own governing statute and regulation pursuant to the “deference rule”).

¹⁶⁸ See H.R. REP. 100-963, at 26 (1988), *reprinted in* 1988 U.S.C.C.A.N. 5782, 5808 (noting that “the creation of a court is intended to provide a more independent review by a body which is not bound by the [VA]’s view of the law, and that will be more clearly perceived as one which has as its sole function

peeking under the policy hood to determine whether VA's choices are veteran friendly, however, is often quite challenging in practice. The courts can conduct a sophisticated analysis of what is veteran friendly only if they have the necessary information to do so.

Opposing sides invoke the doctrines of veteran friendliness and deference, respectively, most often when the agency is advocating for a position that, while unspoken, is intentionally unfriendly to veterans. This is a suspect proposition, however. The individual values of agency employees often strongly align with the agency's mission, and, arguably, agency employees are often in a better position to understand the best way to advance those values.¹⁶⁹ Certainly, in recent decades it is quite challenging to find either public statements from agency officials, agency commentary on proposed legislation, or Federal Register statements on regulation changes that express anything other than a desire to make the system work well for veterans.¹⁷⁰ Furthermore, a substantial portion of VA staff and leadership themselves are veterans and have past experience working for veterans service organizations.¹⁷¹ Accordingly, it is simply unrealistic to believe that VA routinely sets out to take veteran-unfriendly positions. Clearly, determinations about whether the agency's position is truly unfriendly, and if so, how it came to be, tend to be very complicated.

It is entirely possible for the agency to take a veteran-unfriendly position, as agencies operate through human beings. Public choice

deciding claims in accordance with the Constitution and the laws of the United States”).

¹⁶⁹ See Peter M. Shane, *The Rule of Law and the Inevitability of Discretion*, 36 HARV. J.L. & PUB. POL'Y 21, 24–25 (2013) (arguing that agencies are better structured than Congress to faithfully and consistently advance policy values).

¹⁷⁰ See Core Characteristics, 38 C.F.R. § 0.602 (2012) (defining the core characteristics of VA as an organization, which are focused on making the system work best for veterans); see also Core Values, 38 C.F.R. § 0.601 (2012) (defining the core values for VA employees, which establish VA as a veteran-centric agency).

¹⁷¹ See, e.g., *VA Claims System: Review of VA's Transformation Progress: Hearing Before the S. Comm. on Veterans' Affairs*, 113th Cong. (Dec. 11, 2013), available at <http://www.veterans.senate.gov/hearings/va-claims-system-review-of-vas-transformation-progress> (testimony of Allison A. Hickey, Under Secretary for Benefits, Dep't of Veterans Affairs) (noting that over half of the employees of the Veterans Benefits Administration are veterans).

theory¹⁷² and bounded rationality theory¹⁷³ predict that agency actors will sometimes make less-than-ideal choices for reasons both conscious and unconscious. In many cases, however, the agency's objection to a claimant's proposed "veteran-friendly" interpretation is that the agency has a different view of which interpretation would lead to the most veteran-friendly outcome across the entire system.¹⁷⁴ Other times, the agency's view is that the cost in time or money of accepting a particular "veteran-friendly" rule is simply too high, given the finite budget provided by Congress.¹⁷⁵ Litigation often involves statutes or regulations that are decades old and no longer operate as intended due to changed circumstances.¹⁷⁶ In such situations, the grounds for the government's opposition may be that the proper remedy is new legislation or regulations, rather than adopting a strained interpretation. Furthermore, one of the defining attributes of complex systems is that it is very hard to accurately predict the effect of changes *ex ante*.¹⁷⁷ In such situations, the basis of VA's position may turn upon an honest misjudgment of the effect it would have in practice. Consequently, substantial information and context is often necessary for the courts to accurately analyze competing claims about whether a policy is veteran friendly or goes beyond the discretion of the agency.

Given the complexity of the problems, *Gardner, Hodge, Chevron*, and related cases may benefit the system more if used as litigation burdens. Acceptance of congressional intent in creating judicial review of veterans claims includes both agency deference¹⁷⁸ and veteran

¹⁷² Public choice theory holds that government officials responding to their personal incentives—such as getting promoted or reelected—will not always act in ways that produce optimal results for the public. *See, e.g.,* Ridgway, *Equitable Power*, *supra* note 103, at 130–31.

¹⁷³ Bounded rationality holds that even when officials attempt to faithfully execute their duties, they will frequently make suboptimal choices because they do not possess perfect information, have only limited time to deliberate, and are subject to the same unconscious biases and limitations as all humans. *See, e.g.,* Stephanie Stern, *Cognitive Consistency: Theory Maintenance and Administrative Rulemaking*, 63 U. PITT. L. REV. 589 (2002).

¹⁷⁴ *See generally* Weaver, *supra* note 167.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *See generally* David Epstein & Sharyn O'Halloran, *Administrative Procedures, Information, and Agency Discretion*, 38 AM. J. POL. SCI. 697 (1994).

¹⁷⁸ *See supra* note 168 and accompanying text.

friendliness.¹⁷⁹ Aggressively encouraging both parties to make a well-supported case as to how their interpretations are consistent with the values of agency deference and veteran friendliness would best serve the role of the courts. In other words, the courts should not treat either one of these values as heuristics that greatly simplify decision making when invoked.¹⁸⁰ Rather, these are guidelines for persuasive arguments to the courts based upon congressionally entrusted, assessable interests. As a result, the canons place the burden on the parties to develop and support their arguments with a vision of how the system would be of service to veterans.

What might this look like in practice? The courts could make clear that the applicability of the canons in any case is dependent upon the overall strength of the arguments on a systemic level. A claimant should base his or her argument for veteran friendliness upon more than just the outcome of the case at hand. Rather, the argument should detail how the alternative interpretation being advanced produces more veteran-friendly outcomes overall, without infringing on the primary role of the democratic branches, which is making difficult judgments about budgeting and resource allocation. Similarly, the agency should base its argument for deference upon more than the mere fact that it has already made an interpretation. It should explain the systemic considerations and policy judgments that went into the interpretation to which the courts owe deference. In other words, the strength of the canons are not tied to a rigid *ex ante* hierarchy, but to the advocates' ability to make compelling arguments about how the advanced positions promote veteran friendliness while also respecting agency deference.

A key benefit of this approach is to create more informed court decisions by incentivizing both sides to develop the necessary information to make difficult judgments regarding rules that affect the operation of the system. Engaging the energy of the advocates on both sides is critical because obtaining information from large institutions, or about how such institutions function, is an inherently difficult

¹⁷⁹ See *supra* note 7 and accompanying text.

¹⁸⁰ See James D. Ridgway, *The Behavioral Psychology of Appellate Persuasion*, 1 STETSON J. ADVOC. & L. 67, 74 (2014), available at <http://www2.stetson.edu/advocacy-journal/the-behavioral-psychology-of-appellate-persuasion/>.

problem.¹⁸¹ Furthermore, serious problems can occur when a court misunderstands the operation of a system that it is attempting to guide.¹⁸² Indeed, there have been multiple occasions when the CAVC has declined to take Federal Circuit decisions at face value due the decisions' overlooked, veteran-unfriendly consequences.¹⁸³ Accordingly, there would be a tremendous benefit from the courts incentivizing the parties to find and present detailed information and analyses of systemic effects.¹⁸⁴

Perhaps a detailed review of cases may show that the quality of argument already has a strong bearing on which canon the courts rely. There are a number of additional advantages from the courts explicitly announcing that the force to be accorded to each of the canons in a given case depends upon how well developed the argument is

¹⁸¹ See RUSSELL HARDIN, *HOW DO YOU KNOW?: THE ECONOMICS OF ORDINARY KNOWLEDGE* 121–34 (2009) (discussing the difficulties in assessing institutional knowledge).

¹⁸² See Seth W. Stoughton, *Policing Facts*, 88 TULANE L. REV 847 (2014) (arguing that the Supreme Court's criminal procedure case law is often flawed because the Court misunderstands how police work is actually performed).

¹⁸³ See *Clemons v. Shinseki*, 23 Vet. App. 1, 7–8 (2009) (narrowly interpreting *Boggs v. Peake*, 520 F.3d 1330, 1335 (Fed. Cir. 2008), to avoid disadvantaging veterans and placing unnecessary burdens on the agency); *Ingram v. Nicholson*, 21 Vet. App. 232, 246–47 (2007) (narrowly interpreting *Deshotel v. Nicholson*, 457 F.3d 1258 (Fed. Cir. 2006), to avoid serious due process concerns).

¹⁸⁴ There is much room for improvement in the area of independent analysis of the veterans benefits system. See Ridgway, *Fresh Eyes on Persistent Issues*, *supra* note 113, at 1053. However, there is a substantial amount of data available to advocates. VA releases many detailed reports on the system. See *VA Plans, Budget, and Performance*, U.S. DEP'T OF VETERANS AFFAIRS, <http://www.va.gov/performance/> (last visited Jan. 6, 2014). The Government Accountability Office has conducted numerous reviews of the system. See *Reports and Testimonies: Veterans Benefits Administration*, U.S. GOV'T ACCOUNTABILITY OFFICE, http://www.gao.gov/browse/a-z/Veterans_Benefits_Administration_Department_of_Veterans_Affairs_Executive (last visited Jan. 6, 2014). In addition, the National Veterans Legal Services Program publishes a comprehensive guide to the system. See *VETERANS BENEFITS MANUAL* (Barton F. Stichman et al. eds., 2013). Accordingly, there is ample opportunity for advocates on both sides to research and analyze information for the courts. Nonetheless, advocates will need to be sensitive to how far the courts may go in taking judicial notice of the operation of the system. See *Kyhn v. Shinseki*, 716 F.3d 572, 576 (2013) (holding that the CAVC erred in considering affidavits outside the record).

supporting its application.¹⁸⁵ First, the likelihood that the parties will submit the information needed will greatly improve the courts' ability to make fully informed decisions, particularly when there is no ambiguity that such information is essential to the courts' analysis. Perhaps more importantly, it may open the door for the courts to adopt an explicit doctrine that they will abstain from making far reaching interpretative decisions when it appears that the parties have insufficiently explored the relevant issues. Of course, it would still be necessary for individual cases to be resolved. Nevertheless, courts may handle difficult cases with opinions that reserve judgment on interpretative issues and instead provide guidance on issues courts need to understand in the future before they would be comfortable making definitive rulings.

Furthermore, if properly executed, such a doctrine could benefit veterans by dramatically improving the dialogue between the courts and the parties. In many situations, the Secretary and experienced veterans advocates have far superior access than the courts to information on the benefits system. Drawing this information out in the course of litigation would not only produce better, more clearly reasoned decisions, but also improve public understanding of the system. Over time, such review would: (1) make the operation of the system more transparent; (2) encourage making key data easily accessible, either by VA itself or by service organizations wielding Freedom of Information Act requests; and (3) make veterans law more attractive to academics and independent think tanks looking for areas in which their work might receive public recognition.

Finally, such an approach would reconcile the fact-based and value-based approaches to judicial review by recognizing that, in passing the VJRA, Congress explicitly intended that judicial review recognize both veteran friendliness and agency deference as core values. Accordingly, courts would not resolve complex cases by treating either principle as a trump card, but by carefully examining how the system would operate under each of the alternative

¹⁸⁵ A possible objection to this approach is that agency deference would operate differently than it does in the traditional *Chevron* framework. However, this is not a doctrinal problem because recent case law makes clear that specific congressional intent regarding agency deference in a particular area can trump the default rules. *See supra* note 75 and accompanying text. Moreover, it is hard to make the case that the current operation of agency deference within the realm of veterans law is not already a departure.

interpretations being advanced. In this regard, such an approach would advance the ultimate goal of Congress in bringing judicial review to veterans benefits and ensuring the delivery of the best possible benefits system for veterans and their families.

VI. CONCLUSION

Veterans law is distinctly different from most other areas of law. In almost every other area of law, deep divisions are caused by profoundly different worldviews between the parties. For example, in areas of law such as environmental, antitrust, labor, election, discrimination, or religious-liberty, two or more distinct ideologies advocate for wholly different and often incompatible agendas.¹⁸⁶

Veterans law is special, if not unique, in that essentially everyone who practices it shares a basic vision of a veteran-friendly system in which claimants receive substantial assistance in filing claims that are adjudicated quickly, accurately, and fairly. Those who represent veterans often forego more lucrative careers in other areas of the law to help their clients.¹⁸⁷ Although government attorneys oppose claimants in many appeals to the courts,¹⁸⁸ their goal is not to deny benefits, but to preserve the Secretary's view of how best to operate the system in the interest of all veterans.¹⁸⁹ The challenge for judges, practitioners, and policymakers is that, for countless issues, it is very difficult to see how the various choices will affect speed, accuracy,

¹⁸⁶ See generally David B. Young, *Alternative Ideologies of Law: Traditionalists and Reformers in Eighteenth-Century Lombardy*, 34 MCGILL L. J. 264 (1989); Richard H. Fallon, Jr., *The Ideologies of Federal Courts Law*, 74 VA. L. REV. 1141 (1988).

¹⁸⁷ See Ridgway, *Fresh Eyes on Persistent Issues*, supra note 113, at 1048–50 (discussing the economics of veterans law practice).

¹⁸⁸ We must note that the government agrees to remand a large a portion of the Board of Veterans' Appeals decisions appealed to the CAVC. See James D. Ridgway, *Why So Many Remands?: A Comparative Analysis of Appellate Review by the United States Court of Appeals for Veterans Claims*, 1 VETERANS L. REV. 113, 153 (2009).

¹⁸⁹ The Federal Circuit has even compared the role of VA attorneys in furthering justice to that of prosecutors. See *Barrett v. Nicholson*, 466 F.3d 1038, 1044 (Fed. Cir. 2006) (“The government’s interest in veterans cases is not that it shall win, but rather that justice shall be done, that all veterans so entitled receive the benefits due to them.”), citing *Campbell v. U.S.*, 365 U.S. 85, 96 (1961) (“[T]he interest of the United States in a criminal prosecution . . . is not that it shall win a case, but that justice shall be done.” (internal quotation omitted)).

and claimants' ability to participate in the process, much less make judgments about the veteran-friendliness of the tradeoffs presented.¹⁹⁰

The long-term solution to making the system more veteran friendly is to scrap the current Rube Goldberg-like process that has accumulated over decades, and replace it with a more streamlined process that has a coherent, end-to-end vision balancing many competing values. In the meantime, the courts need to work toward a concept of judicial review that produces clear, useful guidance as to how the system should operate. The cornerstone of this effort will be developing a more sophisticated concept of how to balance the ideals embodied by *Gardner* and *Chevron*.

There are a number of possible paths to take. In the end, the different approaches may be pieces of the same puzzle, rather than alternatives. No approach will guide the system toward better results, however, unless it recognizes that veteran friendliness and deference to the Secretary are not antithetical. Instead, they can operate together to demand more of both advocates and VA in presenting a coherent vision to the courts. This will occur, however, only if the courts themselves both articulate guidance as to how these principles interact and require both sides to take these principles seriously in their advocacy.

Ultimately, the courts should not fear the evolution of the canons of veteran friendliness and agency deference. As Judge Posner observed, “[o]ld rules sometimes accrete new rationales as the original rationales fall to changed circumstances.”¹⁹¹ Although the opposing sides before the courts are adversaries in one technical sense, neither intends to oppose the best interests of veterans. Accordingly, the courts should foster a constructive relationship between VA and veterans’ representatives, by pushing both sides to do a better job of articulating how their positions are part of a larger vision of a veteran-friendly system. Only by elevating the conversation can we hope to tame the complexity of the current process and avoid the unintended delays and frustrations that cause so many to believe that the system has lost its way.

¹⁹⁰ When parties are seeking to cooperate, their disagreements are essentially factual disputes as to what choices are most likely to achieve the desired goal. See James D. Ridgway, *Patternicity and Persuasion: Evolutionary Biology as a Bridge Between Economic and Narrative Analysis in the Law*, 35 SIU L.J. 269, 284–85 (2011).

¹⁹¹ *Tregenza v. Great Am. Comm. Co.*, 12 F.3d 717, 719 (7th Cir. 1993).