

Disaggregating *Chevron*

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Before proceeding further, a word of caution is appropriate. This Essay is the work of an interloper. I apologize in advance to the many administrative law scholars and theorists of statutory interpretation and construction whose ideas are not adequately considered herein.

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I. INTRODUCTION

*Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*¹ is widely regarded as the most important administrative law decision in the history of the United States.² The scholarly literature is vast³ and defies summary or cataloging.⁴ Moreover, *Chevron* is contested and criticized, defended and derided, lauded and lamented—the source of “angst and rancor” in the words of Professor Kristin E. Hickman and R. David Hahn in their article, *Categorizing Chevron*.⁵ One might think that when it comes to *Chevron*, there is “no new thing under the sun,”⁶ but in fact, *Chevron* is still full of surprises. When we turn over the *Chevron* rock, some very interesting critters crawl out.

The conventional wisdom is that there is one and only one *Chevron* doctrine, indicated by the definite article “the” and the singular “doctrine” in the familiar phrase, “the *Chevron* doctrine.”⁷ But what if the conventional wisdom is wrong? What if there are many *Chevron* doctrines? The conventional wisdom

¹ *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

² See, e.g., Jonathan H. Adler, *Restoring Chevron’s Domain*, 81 MO. L. REV. 983, 983 (2016) (“*Chevron* has been among the most important and consequential administrative law decisions of all time.”); Thomas W. Merrill, *The Mead Doctrine: Rules and Standards, Meta-Rules and Meta-Standards*, 54 ADMIN. L. REV. 807, 809 (2002) (“*Chevron*, of course, is the Court’s most important decision about the most important issue in modern administrative law”); Cass R. Sunstein, *Chevron as Law*, 107 GEO. L.J. 1613, 1615 (2019) (“[*Chevron*] has a strong claim to being the most important case in all of administrative law.”).

³ Jeffrey A. Pojanowski, *Without Deference*, 81 MO. L. REV. 1075, 1078 (2016) (*Chevron* “launched a thousand scholarly ships”). The search string “advanced: “*Chevron* Deference” & TI(*Chevron*)” in the Secondary Sources database in Westlaw yields 492 hits. WESTLAW EDGE, <https://westlaw.com>.

⁴ Moreover, as an outsider to the field, I cannot claim to have read more than a fraction of the important articles. Among those that have influenced my understanding are the following: Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 YALE L.J. 908, 912 (2017); Abbe R. Gluck, *What 30 Years of Chevron Teach Us About the Rest of Statutory Interpretation*, 83 FORDHAM L. REV. 607, 609 (2014); Sunstein, *supra* note 2, at 1615.

⁵ Kristin E. Hickman & R. David Hahn, *Categorizing Chevron*, 81 OHIO ST. L.J. 611, 615 (2020).

⁶ *Ecclesiastes* 1:9 (King James).

⁷ See Lawrence B. Solum & Cass R. Sunstein, Essay, *Chevron as Construction*, 105 CORNELL L. REV. 1465, 1466–67 (2020) (stating that the “standard view” is that there is a “unitary *Chevron* doctrine”) (quotation marks omitted); see also Thomas W. Merrill, *Textualism and the Future of the Chevron Doctrine*, 72 WASH. U. L.Q. 351, 351 (1994) (using the phrase “the *Chevron* doctrine”).

is that the *Chevron* doctrine is about “deference.”⁸ But if there are many *Chevron* doctrines, is it possible that deference is the right notion for some of them, but other *Chevrons* are not about deference at all? These questions suggest that we might learn something new by disaggregating *Chevron*, replacing “the *Chevron* doctrine” with “many *Chevron* doctrines.” Importantly, disaggregating *Chevron* may tell us something about the question as to whether *Chevron* ought to be overruled, modified, or affirmed.⁹

This Essay tackles these questions in five steps. Part II asserts that “What is the *Chevron* doctrine?” is the wrong question, because there are many *Chevron* doctrines. Part III develops a toolkit for the task of disaggregating *Chevron*: these tools include the interpretation-construction distinction, a three-dimensional typology of underdeterminacy, and a catalog of the theories of statutory interpretation and construction. Part IV investigates the version of the *Chevron* doctrine that Professor Cass Sunstein and I have called “*Chevron* as Construction”—the application of *Chevron* to cases and issues that fall within the realm of underdeterminacy that is sometimes called “the construction zone.” Part V turns to the application of *Chevron* to issues of interpretation, roughly understood as linguistic meaning plus context and more precisely articulated as “communicative content.” Part VI weaves these strands together and provides some tentative thoughts about the proper categorizations of the many *Chevron* doctrines and about the really big question: “Should *Chevron* (or some of its progeny) be overruled?”

II. WHAT IS THE *CHEVRON* DOCTRINE? WRONG QUESTION!

In *Categorizing Chevron*, Professor Kristin E. Hickman and David Hahn ask, “What is the *Chevron* doctrine?”¹⁰ Here is the full version of their formulation of the question, with italics added to emphasize their list of the ways in which *Chevron* might be categorized:

Underlying and perhaps even driving some of the angst and rancor is disagreement over exactly what kind of legal doctrine *Chevron* is. To some, *Chevron* operates as a *rule of decision* that dictates case outcomes, forcing courts to decide cases contrary to their own perceptions of what the law requires. Indeed, some of *Chevron*’s harshest critics seem to view *Chevron* this way, undoubtedly at least in part because the Supreme Court sometimes has used mandatory rhetoric in describing the doctrine’s application. Others think of *Chevron* as a *standard of review*—a judicial “mood” that affects how parties structure their arguments and how a court perceives its role vis-à-vis agencies, but that is flexible and not so outcome-determinative. Finally, still others have suggested that *Chevron* more closely resembles a *canon of statutory*

⁸ Merrill, *supra* note 7, at 355 (“[D]eference doctrine is currently implemented through the *Chevron* doctrine.”).

⁹ This Essay does not investigate the related question of whether there ought to be different *Chevron* doctrines for different agencies.

¹⁰ Hickman & Hahn, *supra* note 5, at 611.

interpretation, with the Supreme Court conducting its own statutory inquiry and treating the agency's interpretation more as a "plus factor" to justify an interpretive result. By that view, *Chevron* may be regarded as merely one of many tools that guide but do not dictate judicial analysis of statutory language.¹¹

Hickman and Hahn's qualified answer to that question is: "*Chevron* is best understood as a standard of review."¹² Their question and their answer assume that there is something like a unitary *Chevron* doctrine. But is that assumption correct? Does the *Chevron* doctrine exist in the sense that there is a single doctrine of law that has a coherent conceptual structure? There are other possibilities. It might be that *the Chevron* doctrine is like Oakland, "there is no there there"¹³—*Chevron* might be a doctrinal illusion. Or perhaps, *Chevron* is like the Quad Cities. Just as Davenport, Bettendorf, Rock Island, and Moline¹⁴ are four district cities that sometimes go by a single name, there might be many *Chevron* doctrines, each of which represents a different legal norm, with its own domain of application and internal structure. Just as it would be a mistake to talk about "*the* mayor of the Quad Cities," it might be a mistake to attempt to categorize *the Chevron* doctrines. If the Quad Cities can have four mayors,¹⁵ then there might be many *Chevron* doctrines.

Hickman and Hahn analyze the question, "What is the *Chevron* doctrine?" by considering the relationship of the doctrine to three categories: (1) rules of decision, (2) standards of review, and (3) canons of statutory interpretation, but they do not tarry long over the explication of these ideas.¹⁶ For the purposes of this Essay, these three categories will be defined and analyzed in two dimensions. First, each of these three categories has what I will call an "ontic status"—the ontic status of a category is its fundamental nature, the kind of thing it is. Second, each of the categories involves a type of norm. Legal norms are usually classified as rules, standards, catalogs, principles, or discretion,¹⁷ but there are other kinds of norms as well, including linguistic norms.¹⁸

¹¹ *Id.* at 615 (emphasis added) (footnotes and citations omitted).

¹² *Id.* at 617.

¹³ GERTRUDE STEIN, *EVERYBODY'S AUTOBIOGRAPHY* 289 (1937) (" . . . [W]hat was the use of my having come from Oakland it was not natural to have come from there yes write about it if I like or anything if I like but not there, there is no there there.").

¹⁴ In reality, there are five cities, including the four listed in text and East Moline. *See Cities*, QUADCITIES.COM, <https://www.quadcities.com/city/> [<https://perma.cc/X9E8-U886>].

¹⁵ Actually, there are five mayors. *See id.*

¹⁶ *See* Hickman & Hahn, *supra* note 5, at 618–39.

¹⁷ *See* Lawrence B. Solum, *Legal Theory Lexicon 026: Rules, Standards, Principles, Catalogs, and Discretion*, LEGAL THEORY LEXICON (Sept. 29, 2019), https://lsolum.typepad.com/legal_theory_lexicon/2004/03/legal_theory_le_3.html [<https://perma.cc/54AD-MM9L>].

¹⁸ For example, we might think of the so-called "rules" of grammar as linguistic norms that govern linguistic behavior. On social norms in general, see ERIC A. POSNER, *LAW AND SOCIAL NORMS* 7–8 (2000).

What is the ontic status of Hickman and Hahn's first category, "rules of decision?" Fundamentally, rules of decision are legal norms. Some legal norms are first-order legal norms; they instruct judges how to decide issues. The rule against perpetuities is a first order legal norm, as is the constitutional rule that the President must be thirty-five years of age. Other legal norms are second-order legal norms; they operate on first-order legal norms. One kind of second-order legal norm allocates legal powers among legal roles (e.g., judge) or institutions (e.g., the Supreme Court). If the *Chevron* doctrine were a rule of decision, it would be a second order legal norm, allocating the power to interpret and construe statutory text to agencies or courts, depending on whether the statute was clear or underdeterminate ("ambiguous"). Given the way that Hickman and Hahn use the phrase, "rule of decision," it seems clear that rules of decision are rules, providing yes or no answers to the second-order legal question, and not standards, providing a closed set of normative considerations to guide the decision.

Ontically, Hickman and Hahn's second category, "standards of review," involves second-order legal norms, but such norms are different in kind from a simple power-allocating rule. Standards of review involve a relationship, "review," between legal institutions. In the case of *Chevron*, the relationship would be between courts and agencies. Agencies are given power to decide questions of statutory interpretation and construction in the first instance; courts are given power to review the agency's action, validating or invalidating it.¹⁹ If *Chevron* were a standard of review, the legal norm that it embodies would be a legal standard and not a rule. The operative term "reasonable" does not provide a decision procedure in which answers to yes or no questions yield an outcome. Rather, "reasonable" involves multiple criteria (many factors) that are incommensurable (not on a unitary scale). Reasonableness is a paradigm case of a standard.

Hickman and Hahn's third category, "canons of statutory interpretation," has a fundamentally different ontic status than do rules of decision or standards of review. There is a terminological issue here that will be discussed below:²⁰ properly understood, "canons of interpretation" are conceptually different from "canons of construction." The reason for that conceptual distinction lies in the interpretation-construction distinction,²¹ which will be explicated in the next Part of this Essay. For now, I will assume that Hickman and Hahn are discussing what are properly called "canons of interpretation," but this may not be how Hickman and Hahn would themselves characterize their position. Canons of interpretation, including the linguistic canons, are not legal norms at all—although they are employed by legal actors to determine facts (the linguistic

¹⁹ *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–44 (1984).

²⁰ See *infra* note 105 (distinguishing "canons of interpretation" from "canons of construction").

²¹ See *infra* Part III.A.

meaning in context of a statutory text).²² These are rules of thumb or defeasible presumptions.²³ Canons of construction are fundamentally different; the so-called “substantive canons” are legal norms that alter or modify the legal effect of statutory text.²⁴

Figure 1 summarizes the ontic status and norm type for each of the three categories introduced by Hickman and Hahn.

Figure 1: *Conceptualizing the Categories*

Category	Ontic Status	Type of Norm
Rule of Decision	Second Order Legal Norm	Rule
Standard of Review	Second Order Legal Norm	Standard
Canon of Interpretation	Linguistic Norm	Rule of Thumb

Hickman and Hahn’s three categories are useful, because they allow us to uncover the ontic status and type of norm that the *Chevron* doctrines express. In other words, categorizing the *Chevron* doctrines is a way of understanding their fundamental nature.

This Essay will disaggregate *Chevron* in three ways. First, we will employ the interpretation-construction distinction to identify two very distinct and different ideas that are mushed together as a unitary *Chevron* doctrine. Second, we will deconstruct the idea of “statutory clarity,” the concept behind the use of the word “clear” in *Chevron* Step One and “ambiguous” in *Chevron* Step Two. Third, we aim to recover the deep structure of the many *Chevrons* using theories of statutory interpretation and construction. To do these things, we will need some tools. The next Part of this Essay provides us with a toolkit for finding the right questions.

²² See Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109, 121 n.52 (2010) (stating that “linguistic canons are rules of thumb about how English speakers use language”).

²³ See *id.*

²⁴ Zachary Baumann, Comment, *The End of the Party: The Necessity of Applying an Ontological Framework to the Party-Based Canons of Construction*, 20 HOUS. BUS. & TAX L.J. 117, 129 (2020) (“The substantive canons pose an existential threat to textualism because they allow a judge to adopt an interpretation that is different than the plainest reading of a statute’s text.”). For general discussion of the substantive canons as involving policymaking or value choices by judges, see William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 595–96 (1992), and David L. Shapiro, *Continuity and Change in Statutory Interpretation*, 67 N.Y.U. L. REV. 921, 923–24 (1992). Professors William Baude and Stephen Sachs believe that the substantive canons are a form of common law. See William Baude & Stephen E. Sachs, *The Law of Interpretation*, 130 HARV. L. REV. 1079, 1121–22 (2017).

III. TOOLS FOR FINDING THE RIGHT QUESTIONS

“What is the *Chevron* doctrine?” is the wrong question. How can we find the right one? This Part offers a toolkit for sorting through the many different *Chevron* doctrines. The first tool in the kit is the interpretation-construction distinction. The second tool is a three-dimensional typology of underdeterminacy. The third tool is a catalog of theories of statutory interpretation and construction. Each tool will enable us to see the ways in which the so-called “*Chevron* doctrine” is actually a cluster of distinct doctrines that share the name “*Chevron*” but point to very different and conceptually distinct ideas.

A. *The Interpretation-Construction Distinction*

The first tool in the kit is the interpretation-construction distinction.²⁵ The central idea is that there is a fundamental conceptual distinction between “interpretation” (discovery of the meaning of a text) and “construction” (determination of the legal effect given to the text).²⁶ The distinction is old, going back at least as far as 1839, and it figured prominently in the work of the great treatise writers of the twentieth century.²⁷ Awareness of the distinction has waxed and waned, declining in the second half of the twentieth century but growing in the twenty-first century in connection with the rise of constitutional originalism.²⁸

²⁵ See Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 CONST. COMMENT. 95, 95–96 (2010) [hereinafter Solum, *Interpretation-Construction*]; Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453, 468 (2013) [hereinafter Solum, *Originalism*].

²⁶ Solum, *Interpretation-Construction*, *supra* note 25, at 96.

²⁷ See Solum, *Originalism*, *supra* note 25, at 468.

²⁸ The interpretation-construction distinction goes back at least as far as Francis Lieber in 1839. FRANCIS LIEBER, *LEGAL AND POLITICAL HERMENEUTICS, OR PRINCIPLES OF INTERPRETATION AND CONSTRUCTION IN LAW AND POLITICS, WITH REMARKS ON PRECEDENTS AND AUTHORITIES* 43–44, 111 (1839). Unlike the modern version of the distinction, Lieber’s version of the distinction does not explicitly differentiate communicative content and legal content. See Gregory Klass, *Contracts, Constitutions, and Getting the Interpretation-Construction Distinction Right*, 18 GEO. J. L. & PUB. POL’Y 13, 20–21 (2020). For use of the distinction in a recent judicial decision, see *Wayne Land & Mineral Grp. LLC v. Del. River Basin Comm’n.*, 894 F.3d 509, 528 n.13 (3d Cir. 2018) (“By ‘interpretation of language’ we determine what ideas that language induces in other persons. By ‘construction of the contract,’ . . . we determine its legal operation—its effect upon the action of courts and administrative officials.”) (citation omitted). For application of the distinction to *Chevron*, see Evan J. Criddle, Response, *The Constitution of Agency Statutory Interpretation*, 69 VAND. L. REV. EN BANC 325, 341 (2016); Michael Herz, *Chevron Is Dead; Long Live Chevron*, 115 COLUM. L. REV. 1867, 1894–95 (2015); Solum & Sunstein, *supra* note 7, at 1469–70; and Jeffrey A. Pojanowski, *Neoclassical Administrative Law*, 133 HARV. L. REV. 852, 887 n.185 (2020).

1. *The Conceptual Distinction Between Interpretation and Construction*

The true importance of the interpretation-construction distinction is conceptual, not terminological. The distinction could be expressed using other words,²⁹ although the use of the terms “interpretation” and “construction” has both a long history and prominence in contemporary legal discourse.³⁰ For the purposes of this Essay, the distinction can be expressed using stipulated definitions:

- Statutory Interpretation: The phrase “statutory interpretation” is stipulated to represent the activity that discerns the meaning (communicative content) of a statutory text.
- Statutory Construction: The phrase “statutory construction” is stipulated to represent the activity that determines the legal effect of a statutory text, including statutory doctrine and the decision of statutory cases.

Some elements of these definitions require further explication. The word “meaning” is ambiguous.³¹ In the context of the stipulated definition of “statutory interpretation,” the word “meaning” represents “communicative content”—which is discussed in the next subpart of this Essay.³²

“Legal effect” has two components. We can call the first component “statutory doctrine.” The statutory doctrine associated with a statute is the set of legal norms that provide the legal content of the statute, including associated implementing rules. The phrase “legal norms” is meant to be inclusive of all the various forms that such norms can take, including “rules,” “standards,” “catalogs,” and “discretion.” “Legal effect” also represents the decision of statutory cases and the actions applying statutes to particular cases by officials and institutions, including law enforcement officials and regulatory agencies.

2. *The Related Idea of Communicative Content and Legal Content*

The interpretation-construction distinction is grounded by a related distinction between “communicative content” and “legal content.”³³ Interpretation aims to recover communicative content; construction involves the articulation of legal content (legal norms, such as implementing rules or statutory doctrines), but it also involves the decision of particular cases and

²⁹ For example, one might use “linguistic interpretation” and “legal interpretation” or a similar locution.

³⁰ See Klass, *supra* note 28, at 19–23 (discussing the history of the interpretation-construction distinction).

³¹ Lawrence B. Solum, *The Fixation Thesis: The Role of Historical Fact in Original Meaning*, 91 NOTRE DAME L. REV. 1, 20 (2015).

³² See *infra* Part III.A.2.

³³ Lawrence B. Solum, *Communicative Content and Legal Content*, 89 NOTRE DAME L. REV. 479, 479 (2013).

constitutional actions by other officials and institutions, including executive officers, the Presidency, legislators, and Congress.

The concept of communicative content is fundamental to textualist approaches to statutory interpretation and construction, which are described below.³⁴ The communicative content of a statute is the set of propositions that the statute communicates.³⁵ Communicative content is roughly equivalent to the meaning that a statutory text communicates when context is properly taken into account. For this reason, communicative content is richer than literal meaning. In other words, communicative content is the full meaning of a statute, including the contributions made by the semantic meanings of the words and phrases as combined and structured by syntax and punctuation and enriched by context.

The concept of legal content is not the same as communicative content. For example, statutes enacted by the Congress of Confederate States of America³⁶ have communicative content; we can usually figure out what they meant, but those statutes create no legal content today, because they are now defunct and utterly without legal force. Likewise, a proposed statute that has not been enacted has communicative content, but there is no legal content associated with the statute, until and unless it is enacted by the legislature (and signed by the executive). The legal content of a statute is the set of legal propositions that the statute creates.

Interpretation recovers communicative content; construction determines legal content. In other words, legislatures write statutes that have meanings (communicative content). When courts and other officials interpret and then construe statutes, they give the statutes legal effect. One form that legal effect takes is statutory doctrine—the articulation of legal norms (e.g., rules and standards) that implement the statute. From a textualist perspective, these implementing statutory doctrines ought to be consistent with and fairly traceable to the meaning of the statutory text, but other approaches to statutory interpretation and construction are different in this regard. Purposivists, intentionalists, and pragmatists all believe that legal content can and should diverge from communicative content.³⁷

³⁴ See *infra* Part III.C.1.

³⁵ For the purposes of this Essay, the word “proposition” is used to denote abstract entities. Propositions are to sentences as concepts are to words and phrases. Just as the word “law” represents a concept that can be represented by other words (e.g., by “loi” in French, “recht” in German, and “ley” in Spanish), a sentence in a statute represents a proposition that can be translated into another language or expressed in English using other words. Communicative content is composed of propositions that in turn are composed of concepts and relationships between concepts.

³⁶ See generally *The Statutes at Large of the Confederate States of America, Passed at the First Session of the First Congress; 1862* (R.M. Smith 1864) (James M. Matthews ed), archived at <https://docsouth.unc.edu/imls/statutes/statutes.html> (1999) [<https://perma.cc/D5UV-EZRT>].

³⁷ See *infra* Part III.C.

3. Underdeterminacy and the Construction Zone

The communicative content of many statutes is underdeterminate for the reasons cataloged below.³⁸ When a statute includes a vague or open textured term, such as “excessive,” “reasonable,” or “heavy,” the communicative content of the statute does not fully determine the legal content of statutory doctrine or the application of the statute to particular cases. The set of issues and cases with respect to which a statute is underdeterminate can be called the “construction zone.”³⁹ The issues and cases that fall within this zone must be resolved by some method of statutory construction.

The articulation of a theory of statutory construction for cases and issues that are in the construction zone is a large task and far beyond the scope of this Essay. One issue that arises in such cases involves the allocation of institutional responsibility. When a statute involves vague or open-textured language, which institution is responsible for statutory construction? One of the many *Chevron* doctrines involves this question. As will be argued below, *Chevron* as Construction allocates institutional responsibility for statutory construction zones to the agencies that are charged with implementing the statutes.⁴⁰

4. The Two-Step Model (Heading Off a Misunderstanding of the Distinction)

There is a serious misunderstanding of the interpretation-construction distinction that requires brief discussion. The distinction might be understood to imply that interpretation and construction are rivals or alternatives: either we interpret a statute, or we construe it. That understanding is wrong, especially from a textualist perspective. Of course, it is possible to engage in statutory interpretation without statutory construction. For example, law professors can interpret a statute in a law review article and limit themselves to an explication of the meaning of the statute—no legal effects result from this kind of interpretation without construction. By themselves, law review articles do not have legal effect; they are about the law, but they are not binding sources of law.⁴¹

But when a court or official engages in statutory construction, they necessarily engage in statutory interpretation as well. This idea can be expressed via a two-step model that rationally reconstructs the process of statutory interpretation and construction:

³⁸ See *infra* Part III.B.

³⁹ See Solum, *Interpretation-Construction*, *supra* note 25, at 108 (introducing “construction zone” to designate issues and cases in which the meaning of a legal text underdetermines legal effect).

⁴⁰ See *infra* Part IV.

⁴¹ To be clear, many law review articles can and do discuss both interpretation and construction, frequently in the form of recommendations to courts about how courts should engage in statutory construction.

- Step One, Interpretation: A judge or official interprets the statute, discovering the communicative content (meaning) of the statutory text.
- Step Two, Construction: The judge or official construes the statute, determining the legal effect to be given to the statute by enunciating statutory doctrine, deciding a case, or acting on the basis of the statute in an official capacity.⁴²

The two-step model is a rational reconstruction. Actual psychological processes may be more complicated. A judge might start with a hunch about how the case should be decided (construction) and then circle back to the text of the statute (interpretation), followed by some revision of the initial hunch about the outcome. Many other patterns are possible.⁴³

Whatever the psychological process, construction necessarily involves interpretation. This is clear for textualists, who believe that the meaning of the text is binding, but other approaches to statutory interpretation and construction also involve the meaning of the statute.⁴⁴ For example, purposivists and intentionalists aim to recover the purpose of the statute or the intent of the legislature that enacted the statute. In order to achieve this aim, judges must know something about the meaning of the statute. Purposivism is about the purpose for which the statutory text was enacted. Intentionalism is about the intention of the legislature in enacting the statutory text. These theories do not treat the text as meaningless scribbles. For this reason, some understanding of statutory meaning is required for purposivist or intentionalist construction to get going.

B. A Three-Dimensional Typology of Underdeterminacy

The second tool in the kit is a typology of underdeterminacy. Courts and commentators sometimes seem to assume that statutory clarity and its absence are binary and unidimensional. In the *Chevron* context, this assumption would lead to the conclusion that if a court finds that a statute is less than perfectly determinate, then *Chevron* deference kicks in and courts should defer to the agency's interpretation and construction of the statute. The assumption that clarity is all or nothing and that it comes in only one flavor is fundamentally mistaken. To see why, we need a typology of underdeterminacy. The typology presented here has three dimensions. The first dimension conceptualizes degrees

⁴² A more complete model might include a "Step Zero" where the judge determines what kind of communicative content is relevant. At "Step Zero," the judge in a statutory case might determine that interpretation should aim at "ordinary meaning." See *infra* Part III.C.1 & Part V (sketching a textualist theory of statutory interpretation and applying that theory to *Chevron* in the context of interpretation).

⁴³ See Lawrence B. Solum, *Themes from Fallon on Constitutional Theory*, 18 GEO. J. L. & PUB. POL'Y 287, 296 (2020) [hereinafter Solum, *Themes from Fallon*].

⁴⁴ See *infra* Part III.C.

of determinacy. The second dimension catalogs forms of indeterminacy. The third dimension distinguishes epistemic and ontic underdeterminacy.

1. *Degrees of Determinacy: Clarity Is a Scalar, Not a Binary*

Clarity is a scalar and not a binary. Statutory language can be more or less determinate. To see why this is so, we can begin with the distinction between “determinacy,” “underdeterminacy,” and “indeterminacy”⁴⁵ and then proceed to the observation that underdeterminacy is a matter of degrees. Begin with the terminology:

- **Determinacy:** The phrase “statutory determinacy” is stipulated to represent the state of affairs in which the communicative content of a statute or part thereof would fully determine the legal content of the doctrines associated with a statute and the application of the statute to all possible cases.
- **Indeterminacy:** The phrase “statutory indeterminacy” is stipulated to represent the state of affairs in which the communicative content of a statute or part thereof neither determines any part of the legal content of the doctrines associated with a statute nor the application of the statute to any possible case.
- **Underdeterminacy:** The phrase “statutory underdeterminacy” is stipulated to represent the state of affairs in which the communicative content of a statute determines some but not all of the legal content of the doctrines associated with a statute and determines some but not all of the applications of the statute to the set of all possible cases.

Less formally, “indeterminacy” means “anything goes.” “Determinacy” means that the linguistic meaning of the statute provides bright line rules for all possible cases. “Underdeterminacy” means that the linguistic meaning of the statute rules out some doctrines and outcomes but leaves some questions without an answer.

True statutory determinacy and indeterminacy are rare or nonexistent. All or almost all statutes are underdeterminate with respect to at least some cases and issues. Importantly, underdeterminacy is a matter of degrees—it is a scalar and not a discrete variable. If the only two possible states were determinate and indeterminate, then statutory clarity would be a binary (a two-valued discrete variable). The point of the concept of underdeterminacy is that there are degrees of underdeterminacy, ranging from something that gets close to radical indeterminacy, on the one hand, to something that approximates complete determinacy, on the other.

⁴⁵ See generally Lawrence B. Solum, *On the Indeterminacy Crisis: Critiquing Critical Dogma*, 54 U. CHI. L. REV. 462 (1987) (distinguishing underdeterminacy from indeterminacy and determinacy).

Some statutory provisions have communicative content that is consistent with a wide variety of outcomes and doctrines. For example, if a statute uses words or phrases like “reasonable,” “unreasonable,” “just,” “equitable,” and “of a mature age and fully competent,” the statutory text provides looser constraints than would a statute that uses words like, “three-feet in length,” “eighteen years of age,” or “composed of at least 99.8% silver.”

Some statutory provisions seem fully determinate for practical purposes. There will rarely be any question whether a person is or is not eighteen years of age, but even numerical provisions may have micro-ambiguities. What rounding rule is used to determine “eighteen years of age”? Is one one-thousandth of a second before midnight the same as the next day for legal purposes? And are whole calendar days used or is the age calculation done using the precise time of birth and the precise time at which the statutory provision is triggered? In other words, some statutes that seem fully determinate may in fact admit of a very small degree of underdeterminacy. Likewise, even the most open-textured words and phrases (e.g., “reasonable,” “just,” or “equitable”) may have a core of meaning that rules out some possible doctrines and some possible outcomes.

2. Forms of Underdeterminacy: Ambiguity, Vagueness, Open Texture, Gaps, and Contradictions

There are many ways in which a statute can be unclear. Expressed in our more precise vocabulary, there are many different forms of underdeterminacy. The following stipulated definitions provide a typology:

- **Ambiguity:** The phrase “statutory ambiguity” is stipulated to represent the state of affairs in which a statute or part thereof has more than one possible meaning (communicative content). Example: the word “cool” is ambiguous, because it can refer to temperature, style, or demeanor.
- **Vagueness:** The phrase “statutory vagueness” is stipulated to represent the state of affairs in which a statute or part thereof admits borderline cases. Example: the word “tall” is ambiguous as applied to males in the United States, because there is no bright line between tall and not tall; e.g., 5’11” is a borderline case.
- **Open Texture:** The phrase “statutory open texture” is stipulated to represent the state of affairs in which a statute employs terms that create penumbral cases to which the statute may or may not apply. Example: the word “reasonable” is open textured, because there are cases where a given action is neither clearly reasonable nor clearly unreasonable.
- **Gaps:** The phrase “statutory gap” refers to the state of affairs in which application of a statute requires a provision dealing with a situation type, but the statute lacks such a provision. Example: a statute regulating air pollution does not specify whether carbon dioxide is subject to regulation or not, but application of the statute requires such a provision.

- Contradictions: The phrase “statutory contradiction” refers to the state of affairs in which a statute contains provisions that are inconsistent, such that complying with one provision would involve violation of the other. Example: a statute that both requires the wearing of masks in public and prohibits this activity.

All of the phenomena defined above involve statutory underdeterminacy, but they are qualitatively different from one another. These differences are exemplified by the relationship between ambiguity and vagueness. When a statute is vague, then we have discovered the meaning of the statutory text; that meaning itself is vague. But ambiguity is quite different.⁴⁶ Usually, a surface level ambiguity can be resolved by considering context. If a statute uses the term “bank,” there is a semantic ambiguity: “bank” can refer to a financial institution or to the soil abutting a river. If the statute involves regulation of financial institutions, the surface level ambiguity disappears; similarly, if the statute concerns the regulation of waterways, the word “bank” almost surely means the bank of a river and not a financial institution.

The *Chevron* case used the word “ambiguity” in the broad sense in which it means a lack of clarity and hence represents the same concept as does “underdeterminacy.” Most *Chevron* scholarship uses “ambiguity” in the same way, and hence fails to distinguish ambiguity in the narrow sense from vagueness, open texture, and other forms of underdeterminacy.⁴⁷

One final point regarding ambiguity: not all ambiguity is resolved by context. Sometimes, a statute is “irreducibly ambiguous”: for example, a legislature might be unable to resolve a disagreement about how a statute should be drafted. One option is to kick the can down the road by introducing deliberate ambiguity. In such a case, the meaning is irreducibly ambiguous; there is no fact of the matter about which of two meanings was chosen, because the legislature did not make a choice.⁴⁸

3. Epistemic and Ontological Underdeterminacy

There is one final distinction to be made in our typology of underdeterminacy. Sometimes, the source of underdeterminacy is epistemological: the statute is unclear because we are missing crucial facts. Other times the source of underdeterminacy is ontological; the lack of clarity is

⁴⁶The word “ambiguity” is itself ambiguous. See Ward Farnsworth, Dustin F. Guzor & Anup Malani, *Ambiguity About Ambiguity: An Empirical Inquiry into Legal Interpretation*, 2 J. LEGAL ANALYSIS 257, 260–91 (2010).

⁴⁷For example, Hickman and Hahn never distinguish ambiguity from vagueness in *Categorizing Chevron*. See generally Hickman & Hahn, *supra* note 5.

⁴⁸Victoria F. Nourse & Jane S. Schacter, *The Politics of Legislative Drafting: A Congressional Case Study*, 77 N.Y.U. L. REV. 575, 594–96 (2002) (discussing “deliberate ambiguity” in statutes); Lawrence B. Solum, *Originalism and the Natural Born Citizen Clause*, 107 MICH. L. REV. FIRST IMPRESSIONS 22, 30 (2008) (using the phrase “irreducible ambiguity” to refer to ambiguities that cannot be resolved by context).

in the statute itself. Nothing we could learn will make the statute clear. Cases in which an ambiguity cannot be resolved because the legislative history is sparse may involve epistemic underdeterminacy, but vagueness and open texture involve ontic underdeterminacy. Ontic underdeterminacy is woven into the fabric of the statutory text: this sort of ambiguity would not “go away” if we had more and better evidence about the context of statutory communication.

C. Four Theories of Statutory Interpretation and Construction

Our understanding of the *Chevron* doctrine is shaped by our theories of statutory interpretation and construction. A variety of important questions can only be answered after we specify our theoretical perspective. The third and final tool in our kit is a simplified typology of theories of statutory construction. Four theories are examined, and each is given a proper name, to wit “Textualism,” “Purposivism,” “Intentionalism,” and “Pragmatism.”⁴⁹

The typology is simplified in two ways. First, only four approaches to statutory interpretation and construction are identified; in reality, there are many more. Second, each theory is presented in its most basic form; qualifications and complexities are deliberately omitted. Nonetheless, the simplified typology will enable us to see that judges with different theoretical perspectives will hold radically different views about the content of the *Chevron* doctrine.

Some readers may object to the decision to limit the discussion to the four simplified theories. For example, a partisan of Purposivism might object that the best version of Purposivism is actually a hybrid theory that requires courts to follow the statutory text when it is clear (or indisputably clear) and only turns to purpose when there is ambiguity, vagueness, or some other form of underdeterminacy. That is a fair objection: advocates of hybrid views are invited to expand the typology and apply the expanded framework to the *Chevron* doctrines.⁵⁰ But such an expansion seems likely to result in further complexity, with additional versions of *Chevron* corresponding to each of the hybrid theories added to the typology.

⁴⁹ When capitalized in the remainder of this Essay, these words are proper names for the theories as defined in this Essay. There are, of course, other theories that are properly called “textualist,” “purposivist,” “intentionalist,” or “pragmatist,” but the discussion in this Essay will focus on the versions that are explicated and explicitly defined here.

⁵⁰ For an example of “moderate purposivism,” see Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 COLUM. L. REV. 1, 64–65 (2006).

1. *Textualism: Legal Content Ought to Be Constrained by the Plain Meaning of the Statutory Text*

The first theory is “Textualism” or “Plain Meaning Textualism” as it is sometimes called.⁵¹ Plain Meaning Textualism for the purposes of this Essay is stipulated to include at least the following two components:

- The Plain Meaning Thesis: The communicative content of a statutory text is best understood as the content conveyed by the text to the intended readers of the statute at the time the statute was enacted. For example, if a criminal statute is directed at the public at large, then the plain meaning of the statute is the “ordinary meaning”—the meaning that would have been attributed to the statute by the public at the time of enactment. But if a statute was directed at a narrower audience, e.g., a regulatory agency and a regulated industry, then the plain meaning of the statute might involve “technical meanings” that would have been familiar to that linguistic subcommunity.
- The Textual Constraint Principle: The legal effect of a statute ought to be consistent with,⁵² fully expressive of,⁵³ and fairly traceable to⁵⁴ the plain meaning of the statute (subject to the constraints and modification introduced by other valid laws).

The Plain Meaning Thesis tells us how to determine the communicative content produced by the statutory text. The Statutory Constraint Principle tells us that this content is binding. Notice, however, that the Statutory Constraint Principle only requires full expression, consistency, and fair traceability. If the statutory text is underdeterminate, then a textualist will need a theory of

⁵¹ See, e.g., Stephen Durden, *Partial Textualism*, 41 U. MEM. L. REV. 1, 2–4 (2010). This theory is related to but distinct from the view that Mark Greenberg identifies with what he calls the “communicative content theory.” See Mark Greenberg, *Legislation as Communication? Legal Interpretation and the Study of Linguistic Communication*, in PHILOSOPHICAL FOUNDATIONS OF LANGUAGE IN THE LAW 217, 217 (Andrei Marmor & Scott Soames eds., 2011). On Greenberg’s account, the communicative content theory conflates interpretation and construction by assuming that communicative content is binding. See *id.* at 219 (“[T]he communication theory moves from an understanding of what the legislature communicated to a thesis about a statute’s contribution to the content of the law.”). Moreover, Greenberg identifies actual communicative content with the first-order communicative intentions of the drafter, *id.* at 230, whereas the Plain Meaning Thesis focuses on the content conveyed to actual intended readers.

⁵² The phrase “consistent with” represents the idea that the legal content of statutory doctrine must not contradict the communicative content of the statutory text.

⁵³ The phrase “fully expressive of” represents the idea that all of the communicative content of the statutory text must be reflected in the legal content of statutory doctrine.

⁵⁴ The phrase “fairly traceable” represents the idea that statutory doctrine must have an anchor in the text. For example, precisifications of vague statutory provisions are fairly traceable to the text. But statutory doctrine that simply adds a new provision to the text would not comply with the requirement of fair traceability.

statutory construction. In the context of the *Chevron* doctrines, one possibility is that courts will defer to agencies in the construction zone, the set of cases and issues where the communicative content of the statutory text underdetermines the legal content of statutory doctrine. In other contexts, the courts will need a decision procedure for the development of precisifications and implementing rules.⁵⁵

It may be helpful to say a few words about what Plain Meaning Textualism is not. Plain Meaning Textualism aims to recover the communicative content of a statutory text. That content is not necessarily the same as the “literal meaning” or bare semantic content of the text. Importantly, plain meaning is a function of both the words of the statutory text (including syntax and punctuation) and the context of statutory communication. As all lawyers know, the actual, full meaning of a legal text is not necessarily the literal meaning.

Context plays several roles for a textualist. First and most obviously, context disambiguates. Textualism aims to recover the full meaning of the statutory text—the communicative content—and not an artificially truncated literal meaning. Second and equally important, context adds meaning that goes beyond meaning of the words (even after disambiguation). In the philosophy of language and theoretical linguistics, this additional meaning is called “pragmatic enrichment.”⁵⁶ The mechanisms of pragmatic enrichment include implicature, implicature, presupposition, and modulation. A footnote provides the reader with citations to explanations of each term.⁵⁷

⁵⁵ Work on this topic in constitutional theory may be helpful to the development of normative theories of statutory construction. See, e.g., Lawrence B. Solum, *Originalism*, *supra* note 25, at 511–24. See generally Randy E. Barnett & Evan D. Bernick, *The Letter and the Spirit: A Unified Theory of Originalism*, 107 GEO. L.J. 1 (2018). An approach inspired by Barnett and Bernick might borrow the notion of objective function from Purposivism. In the construction zone, judges would devise implementing rules and precisifications that were consistent with the objective function of the statute. For this strategy to work, Textualists will need to develop a conception of objective function that is not as “loosey goosey” as that employed by some realist-influenced versions of Purposivism. I believe the key to cabinining the idea of objective function is fit between function and text. The relevant purposes are those that fit the text precisely. There is much more to be said on this topic, but these matters go beyond the scope of this Essay.

⁵⁶ See Lawrence B. Solum, *Originalist Methodology*, 84 U. CHI. L. REV. 269, 288 (2017).

⁵⁷ *Id.* at 288–91. Here are stipulated definitions of each of the forms of pragmatic enrichment mentioned in the text:

- **Implicature:** Implicatures occur when an utterance or text communicates a different message that is explicitly stated. Grice’s famous example is a letter of recommendation: if a law professor wrote, “I recommend Charles Whitebread for the position of law clerk, because this student was always punctual,” this would communicate an unstated message that the student was unqualified.
- **Implicature:** Implicature occurs when an utterance or text communicates additional omitted content. An example is provided in the text following the call to this footnote.
- **Presupposition:** Presupposition involves an unstated assumption. “Cass is no longer the Director of OIRA” communicates that Cass once held that position.

In this short Essay, “implicature” will be used to as an illustrative example. In ordinary talk, much of the content conveyed by words is implicit and unstated. Ben says, “Jack and Jill are married.” Alice understands that this means: “Jack and Jill are married [to each other].” The brackets indicate the implicature, unstated content that is nonetheless conveyed by context. Statutes are full of implicatures: many statutes lack geographic scope restrictions, because drafters assume that readers will supply the necessary implicature, e.g., [in the United States] for federal statutes.⁵⁸

As we shall see, the *Chevron* doctrine is problematic for textualists, especially in cases in which the relevant issue is one of statutory interpretation and not statutory construction.⁵⁹

2. Purposivism: Legal Content Ought to Be Determined by the Objective Function of the Statute

The second theory is Purposivism. I shall use the word “Purposivism” to label a theory that might have been better named “Objective Functionalism.”⁶⁰ The core of Purposivism is the idea that statutory purpose (and not statutory text) ought to determine the legal effect of statutes. Purposivism is about *objective* purpose, not *subjective* intent. Again, we can identify two components:

- The Objective Function Thesis: The purpose of a statute is best understood as its objective function—the telos or goal that the statute would serve if it had been enacted by an ideal, public-spirited and well-informed legislature. (Objective function is not the subjective intention of the actual legislators.)
- The Statutory Purpose Principle: The legal content of statutory doctrines and the decision of statutory cases ought to be guided by the purpose (objective function) of the statute. In the event that the purpose is inconsistent with the statutory text, officials should act in conformity with the purpose and not the text.

In a pluralist society, officials, citizens, and other members of the society will have different views about the objective function of the same statute. Given the wide range of views about political morality, there will be disagreements

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- Modulation: Modulation occurs when a bespoke meaning is created by a new use for an old term. For example, the interpretation-construction distinction could have first been used without explicit definitions. If readers had grasped that new meanings were intended from context, successful modulation would have occurred.

⁵⁸ See William S. Dodge, *The New Presumption Against Extraterritoriality*, 133 HARV. L. REV. 1582, 1593–94 (2020) (discussing the role of implied intent when geographic scope is not named in a statute).

⁵⁹ See *infra* Part V.A.

⁶⁰ The use of “function” rather than “purpose” might help avoid confusion between “Intentionalism” and “Purposivism.” I use “Purposivism” because that name seems (to me) to be more or less standard in the literature.

about the goals of an ideal legislature. Libertarians will understand every statute in light of their commitment to individual liberty. Social conservatives will have very different understandings, as will utilitarians, egalitarians, and others. For this reason, institutional questions are particularly important for purposivists. In the context of *Chevron* deference, the views of judges (especially Supreme Court Justices) and agency officials about the objective function of a given statute may be quite different.

3. *Intentionalism: Legal Content Ought to Reflect the Discernable Policy Choices of the Legislature*

The triad of classic theories of statutory interpretation is completed by intentionalism, the view that statutory construction should be guided by “legislative intent” or “congressional intent” (in the case of federal statutes). Intentionalism, unlike Purposivism, aims to recover the subjective or actual intentions of the legislature or legislators. Again, we can express the theory as the conjunction of two ideas:

- The Legislative Intent Thesis: The intention of a legislative body is best understood as the common or shared policy preferences of the legislators with respect to issues and cases. In other words, the search for legislative intent is the search for the will of actual legislators as combined through legislative processes.
- The Intention Principle: The legal content of statutory doctrine and the decision of statutory cases should conform to the discernable intentions of the legislators who enacted the statutes.

The Intention Principle recognizes that legislative intent is not always discernable. In at least some cases, it seems likely that a full consideration of the legislative record will fail to yield a discernable shared policy preference with respect to some issue. For example, the record may simply be silent with respect to an issue that the legislature did not anticipate. Or the legislators may have disagreed about how a specific issue or case should be resolved; some intentionalists might adopt a “majority votes” rule for such cases, but this leaves open the possibility that there is no discernable will of the majority with respect to a given issue.

Today, Textualism is the dominant approach to statutory interpretation and construction, but at the time *Chevron* was decided, Intentionalism was the more common view, reflected in the following passage from *Chevron*: “First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.”⁶¹

⁶¹ *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984). My discussion elides an ambiguity in this passage. Perhaps, “expressed intent” is a form of

Much of the current controversy about the *Chevron* doctrine reflects the shift from Intentionalism (and Purposivism) to Textualism as the most common approach to statutory interpretation and construction.⁶²

4. Pragmatism: Legal Content Ought to Be Guided by Policy in the Factual Context of Particular Cases (or We Don't Need No Stinking Theories)

The three classic approaches have been joined by a fourth, which I shall call “Pragmatism,” a view that is strongly associated with Judge Richard Posner.⁶³ Once again, there are two main ideas:

- The Anti-Theory Thesis: Statutory interpretation and construction should not be guided by any one theory. Instead, statutory issues should be approached case-by-case and issue-by-issue on the particular facts presented and issues that are to be decided.⁶⁴
- The Policy Principle: The legal content of statutory doctrine should be guided by pragmatic evaluation of policy implications. Judges should select between textualist, purposivist, and intentionalist approaches in each case so as to produce the best consequences.

Pragmatism is radically different from Textualism, Purposivism, and Intentionalism. Each of those theories aims for a consistent approach to statutory interpretation and construction. Pragmatism rejects consistency in favor of an ad hoc, particularistic, and policy-oriented approach to statutes.

* * *

We now have a conceptual toolkit for the investigation of the Chevron doctrine. Some readers may now wonder whether all of this conceptual apparatus is really necessary. Do we really need abstract and unfamiliar legal theories to understand a case that almost every law student studies and every scholar of administrative law reads with great care on multiple occasions? The proof, of course, will be in the pudding. The remainder of this Essay uses the interpretation-construction distinction, the typology of underdeterminacy, and the theories of statutory interpretation and construction to show that there are many

communicative intent and not the will of Congress. For the purposes of this Essay, I am simply bracketing this question. I owe thanks to Evan Bernick for bringing this issue to my attention.

⁶² I do not mean to imply that *Chevron* was uncontroversial at the time it was decided.

⁶³ Matthew A. Edwards, *Posner's Pragmatism and Payton Home Arrests*, 77 WASH. L. REV. 299, 309 (2002).

⁶⁴ The Anti-Theory Thesis is closely related to particularism, a view in moral philosophy. See *Moral Particularism*, STAN. ENCYCLOPEDIA PHIL. (Sept. 22, 2017), <http://plato.stanford.edu/entries/moral-particularism> [<https://perma.cc/5VW4-XM8H>].

Chevron doctrines and that both the shape and justification of these doctrines is quite different from different theoretical perspectives.

* * *

IV. *CHEVRON* AS CONSTRUCTION

We are now in position to return to the central claim of this Essay. There is no single *Chevron* doctrine; rather, there are many *Chevrons*. The development of that claim begins with an exploration of the implications of the interpretation-construction distinction for *Chevron*. The basic idea is that there is a fundamental divide between “*Chevron* as Construction” and “*Chevron* as Interpretation.” That claim has already been developed in an article entitled, “*Chevron* as Construction,” co-authored by Cass Sunstein and the author of this Essay.⁶⁵ In this Part of the Essay, a very concise summary of the ideas from that Article is presented. That summary is followed by a discussion of the relationship between the *Chevron* doctrine in the construction zone and the theories of statutory interpretation and construction that are identified above.⁶⁶

A. The Original Chevron Doctrine: Deference to Agencies in the Construction Zone

Much of the writing about *Chevron* seems to assume that the *Chevron* doctrine is about interpretation. The idea is that courts should defer to agency determinations of statutory meaning when the statute is ambiguous. As discussed below, there are cases of that kind,⁶⁷ but the actual *Chevron* decision in the original case is best understood as involving judicial deference to an agency’s implementing rules⁶⁸ in the construction zone. Although the opinion in *Chevron* used the word “ambiguity,” the word “source” in *Chevron* was not ambiguous in the technical sense of ambiguity.⁶⁹ Rather, the underdeterminacy in *Chevron* resulted from the need for an implementing rule. As Professor Sunstein and I wrote in *Chevron as Construction*:

⁶⁵ Solum & Sunstein, *supra* note 7, at 1468.

⁶⁶ See *supra* Part III.C.

⁶⁷ See *infra* Part V.

⁶⁸ “Rules” here is used in the broad sense that includes legal norms of all kinds, including rules in the narrow sense, standards, catalogs, and discretion.

⁶⁹ That is, the meaning of the word “source” is not in doubt. In comments on an earlier draft, Jeff Pojanowski suggested the question is whether source means one smokestack or a set of them and hence involves ambiguity. This argument seems plausible, but it confuses linguistic meaning (interpretation) with implementation (construction). “Source” does not mean either “smokestack” or “set of smokestacks,” both a single stack and a set can properly be described as a source. The question whether to apply the statute to one smokestack or a related set comes at the implementation stage and hence involves construction, not interpretation.

In *Chevron* itself, the question involved the meaning of a single word in the Clean Air Act: “source.” That word was undefined in the relevant section of the Act. The Environmental Protection Agency (EPA) argued that a source could include an entire plant. The Natural Resources Defense Council argued that a plantwide definition was unlawful and that every pollution-emitting device within a plant counted as a source, and not the plant itself. But no one seriously disputed the linguistic meaning of the word “source”: expressed in the vocabulary of the interpretation-construction distinction, there was agreement on the correct *interpretation* of the statutory language. The real question was not about the linguistic meaning of the term; it was about how to implement that meaning in the relevant context. In that sense, *Chevron* involved a question of statutory *construction*. The Court’s holding was that given that two different implementing rules were consistent with the meaning of the statutory text, it should defer to the choice made by the agency.⁷⁰

In other words, *Chevron* did not involve judicial deference to agency interpretations. Rather, *Chevron*, and the cases it cited, involved judicial deference to agency construction in the form of an implementing rule for statutory language that was unambiguous (had a single meaning) but nonetheless underdeterminate, because its application required further specification in the form of an implementing rule.

B. Theoretical Differences in the Construction Zone

Chevron as Construction is conceptually a different doctrine than *Chevron* as Interpretation. But even within the category of *Chevron* deference in the construction zone there are multiple ideas; *Chevron* as Construction plays out differently from the perspective of different theories of statutory interpretation and construction. That is, *Chevron* as Construction is not a single doctrine; the content and justification for *Chevron* as Construction are different for textualists, purposivists, intentionalists, and pragmatists.

1. Textualism and the Underdeterminacy of Communicative Content

Although textualists have good reason to be skeptical about *Chevron* as Interpretation,⁷¹ they can and should accept *Chevron* as Construction. The case for that claim has been made in *Chevron as Construction*: “Textualists who reject the justifications for deference to agency interpretations can accept the quite different rationale for deference to agency constructions.”⁷² This conclusion flows from two premises. First, textualists are committed to the idea that statutory doctrine should be consistent with the communicative content of the statutory text.⁷³ Second, the communicative content of many statutes

⁷⁰ Solum & Sunstein, *supra* note 7, at 1469–70 (footnotes omitted).

⁷¹ See *infra* Part V.A.

⁷² Solum & Sunstein, *supra* note 7, at 1472.

⁷³ See *supra* Part III.C.1.

sometimes underdetermines the legal content of statutory doctrine and the decision of statutory cases. Within the construction zones created by vagueness and open texture, deference to the implementing rules devised by agencies respects the Statutory Constraint Principle.

There is a further wrinkle here. The Administrative Procedure Act (APA) itself is relevant to the *Chevron* doctrine: this issue is discussed below.⁷⁴ This brief discussion assumes, but does not establish, that the APA does not require courts to devise implementing rules for cases in the construction zone.⁷⁵

2. Purposivism and the Uneasy Case for Chevron

Chevron looks very different from a purposivist perspective. Recall that Purposivism is the view that the objective function of statutes should determine the legal content of statutory doctrines.⁷⁶ The underdeterminacy of the statutory text is irrelevant. In other words, for purposivists, every issue in every case is in the construction zone; it is construction all the way down. For this reason, the purposivist case for *Chevron* as Construction is uneasy. *Chevron* is predicated on a lack of statutory clarity (“ambiguity” in the broad sense), but if textual clarity is irrelevant, why should we have a special rule of deference for cases in which the meaning of the statute is unclear?

It might be argued that the purposivists’ version of the *Chevron* doctrine should take the following shape:

- Purposivist *Chevron* Step One: If the purpose of the statute is clear and clearly decides the precise question before the court, then the clear purpose controls. Agency action will only be upheld if it is consistent with the clear purpose; otherwise it will be invalidated.
- Purposivist *Chevron* Step Two: If the purpose of the statute is unclear, then courts should defer to the agency action so long as it is consistent with a reasonable understanding of the purpose of the statute.⁷⁷

This version of Purposivist *Chevron* might seem plausible on the surface, but it is fraught with deep conceptual difficulties. Recall that the relevant “purpose” is the objective function of the statute: the goal an ideal, public-spirited, and well-informed legislature would have had (as reconstructed by the Court).⁷⁸ Language can be ambiguous, but it is not clear that the idea of an ambiguous objective function makes any sense at all. Even if ambiguity of objective function is conceivable, in practice judges are almost always going to

⁷⁴ See *infra* Part VI.B.2.a.

⁷⁵ See Solum & Sunstein, *supra* note 7, at 1484–85.

⁷⁶ See *supra* Part III.C.2.

⁷⁷ See *supra* Part III.C.2. This formulation is simplified, and it elides cases in which the objective function is clear but the clear purpose has underdeterminate implications for the precise issue before the court. This interesting issue is simply bracketed for the purposes of this Essay.

⁷⁸ See *supra* Part III.C.2.

have a view about what the clear purpose of the statute should have been—reflecting their own understandings about political morality and good public policy. So, this conception of Purposivist *Chevron* Deference would turn every *Chevron* case into a Step One Case; practically speaking, the *Chevron* doctrine would disappear.

Here is a second possibility. Perhaps, courts determine the objective purpose of the statute. The question then becomes whether the agency's action is reasonable given that purpose. On this version of *Chevron*, there is no deference to the agencies' views about the "meaning" (for purposivists, "objective function") of the statute; rather, the question is whether the agency's action is a reasonable implementation of the objective function identified by the court. Sometimes, if the agency misunderstands the purpose of the statute, it might act in ways that are inconsistent with the objective function identified by a court. In that case, the agency action will be invalidated:⁷⁹ this would be a reformulated Step One. Even if the agency action aims to serve the objective function of the statute, that action might be unreasonable: this would be a version of Step Two. Essentially, *Chevron* would involve judicial scrutiny of fit: unreasonableness would be a matter of overinclusion or underinclusion relative to the objective function identified by the courts. This version of *Chevron* seems coherent, but it doesn't seem to correspond to what courts actually do in *Chevron* cases.⁸⁰

And there is a third possibility. Perhaps, the Purposivist *Chevron* doctrine is based on a judgment about institutional capacity. Agencies are better-suited to the task of determining the objective function of the statutes they implement. Courts should defer to agencies unless the agency's understanding of the function is unreasonable. This version of *Chevron* might be grounded on a purposivist reading of the Administrative Procedures Act; the objective function of the APA would be best served by deference to the agency understandings of the objective function of regulatory statutes. But there is still a conceptual problem. On this version of *Chevron*, every case is a Step Two case; practically speaking, *Chevron* deference would be universal.

There may be other versions of the Purposivist *Chevron* doctrine, but it should now be clear that the purposivist case for *Chevron* is uneasy. Of course, purposivists could argue for radical reform of the *Chevron* doctrine, but that would be quite different than giving a purposivist explanation of and justification for the existing doctrine.

⁷⁹ Something like this view may be implicit in Matthew C. Stephenson & Adrian Vermeule, Essay, *Chevron Has Only One Step*, 95 VA. L. REV. 597, 598 (2009) (arguing that *Chevron* is best understood as a one-step inquiry into the reasonableness of an agency's interpretation).

⁸⁰ For further investigations relevant to this topic, see Criddle, *supra* note 28, at 339; Herz, *supra* note 28, at 1895.

3. *Intentionalism and the Recurring Problem of Silence*

Intentionalism seems like a better fit for *Chevron*, in part because *Chevron* itself invokes the idea of legislative intent—as the passage quoted above makes clear.⁸¹ Indeed, the Intentionalist *Chevron* doctrine would be formulated much like the actual statement in *Chevron* itself:

- Intentionalist *Chevron* Step One: If the intention of Congress for the precise legal question upon which the validity of agency action depends is clear, then the agency action will be upheld if it is consistent with that intention; the action will be invalidated if it is inconsistent with that intention.
- Intentionalist *Chevron* Step Two: If the intention of Congress for the precise legal question upon which the validity of agency action depends is unclear, then the agency action will be upheld if it is consistent with a reasonable view of Congress's intent.

Again, this formulation might seem plausible on the surface—from an intentionalist perspective, but a second look reveals deep problems. Some of these problems involve familiar difficulties with discerning the subjective intentions of Congress. Intentions are usually thought of as mental states—which humans can have but multimember legislatures cannot possess. Recent work on group agency and collective intentions may ground thin legislative intentions (the intent to enact the statutory text, for example) and even thicker intentions when they are explicitly expressed in an act by the group agent (e.g., by a statement in the preamble of a statute or an official report approved by the legislature).⁸² But it will be rare that intentions of this kind will address “the precise question at issue.”⁸³ In the usual case, the official statements endorsed by Congress as an institution will say nothing, one way or the other, about the precise legal issue upon which the validity of agency action depends.⁸⁴ This is the familiar problem of congressional silence. If a specific intention with respect to a precise issue is required, then almost every case will be a Step Two case.

And the Intentionalist version of Step Two is itself problematic. It is not clear what a “reasonable view of Congress's intent” concerning “the precise

⁸¹ See *supra* text accompanying note 61. Of course, it is not clear that the *Chevron* case self-consciously created a *Chevron* doctrine. See generally Thomas W. Merrill, *The Story of Chevron: The Making of an Accidental Landmark*, 66 ADMIN. L. REV. 253 (2014).

⁸² See generally RICHARD EKINS, *THE NATURE OF LEGISLATIVE INTENT* (Oxford Legal Philosophy, Oxford Univ. Press 2012) (discussing group agency and legislative intent); CHRISTIAN LIST & PHILIP PETTIT, *GROUP AGENCY: THE POSSIBILITY, DESIGN, AND STATUS OF CORPORATE AGENTS* (Oxford Univ. Press 2011). For a valuable discussion, see Victoria F. Nourse, *Elementary Statutory Interpretation: Rethinking Legislative Intent and History*, 55 B.C. L. REV. 1613, 1641 (2014).

⁸³ *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984).

⁸⁴ See Note, “How Clear Is Clear” in *Chevron*’s Step One?, 118 HARV. L. REV. 1687, 1692 (2005) (“[C]ourts generally find statutes silent or ambiguous at step one of the *Chevron* analysis.”) (internal quotations omitted).

question at issue” means when Congress is silent about that issue. In such cases, there is no actual intent of Congress as an institution, although individual members of Congress might have subjective intentions (subject to the summing problem). Of course, there is the possibility that courts or agencies should construct a counterfactual or hypothetical intent—the intent that Congress would have had if it had considered “the precise question at issue.” But this kind of intent is a legal fiction. Moreover, this version of the intentionalist version of *Chevron* seems to be in grave danger of collapsing into Purposivism—and hence to face all of the difficulties that the purposivist version of *Chevron* must confront.⁸⁵

Perhaps, the question is not whether the agency “interpretation” is reasonable. Instead, the intentionalist version of Step Two of *Chevron* as Construction would ask whether the policy choice of the agency is “reasonable” given the court’s understanding of the Congress’s general aim in enacting the statute. A full articulation of this view would require that the operative conception of “reasonable” be specified—crucially important, but beyond the scope of this Essay. The key point for the purposes of this Essay is that this view would constitute a distinct version of *Chevron*—and that its ultimate viability depends on the larger debate between and among proponents of the competing theories of statutory interpretation and construction.

Moreover, it is unclear how an intentionalist would justify *Chevron*. Agencies may be good at policymaking, but it is hardly clear that they possess special expertise in discerning legislative intent. Once again, it is possible that intentionalists may be able to come up with a coherent version of the *Chevron* doctrine, but it is obvious that it faces grave difficulties. Congressional silence with respect to “precise questions” is ubiquitous, but intentionalist *Chevron* seems to require that Congress communicate “ambiguous” messages regarding such intentions. It is not clear that this version of *Chevron* makes any sense at all.

4. Pragmatism and Juristocracy

From the perspective of a pragmatist theory of statutory interpretation and construction, a general *Chevron* doctrine is problematic. Pragmatists can endorse deference to agency actions in particular cases on pragmatist grounds, but the *Chevron* doctrine purports to provide a general rule that forecloses courts from evaluating the wisdom of deference on a case-by-case basis. And if we try to reformulate *Chevron* in explicitly pragmatist terms, the doctrine seems to turn to mush. Pragmatist Step One might be: “If for pragmatic reasons, a statute ought to be considered clear, then the agency action will be upheld, if it comports with the pragmatic reading of the statute but should be invalidated if it does not comport with the pragmatic reading.” Pragmatist Step Two might be: “If for pragmatic reasons, a statute ought to be considered unclear, then the

⁸⁵ See *supra* Part IV.B.2.

agency action should be upheld, if for pragmatic reasons, the agency action should be considered reasonable.” Doesn’t this simply collapse into: “Uphold the agency action if and only if there are good pragmatic reasons to do so”? And after the collapse, is there anything left of *Chevron*? Just to be clear, the answer to the rhetorical question is “no.”

The problem that pragmatism faces in the context of *Chevron* instantiates a very general difficulty with an ad hoc, pragmatic approach to judging.⁸⁶ The whole point of pragmatism is to circumvent external and objective constraints on judging. Pragmatists oppose general rules and abstract theories. They want judges to decide each case and issue on its face with an eye towards the consequences of their decisions. But this approach turns the judiciary into a juristocracy.⁸⁷ The juristocrats⁸⁸ may be restrained; they may decide in their wisdom that they will let agency decisions stand, but that choice is always theirs. There is no theory of statutory interpretation and construction that would allow us to criticize their action as “wrong” or “incorrect”—except, of course, the amorphous theory provided by pragmatism itself.

V. *CHEVRON* AS INTERPRETATION

Chevron as Construction should be limited to cases in which the statutory text is underdeterminate; deference occurs in the construction zone. *Chevron* as Interpretation is different. It would involve deference to the agency interpretations in the sense specified by the interpretation-construction distinction. Thus, *Chevron* as Interpretation would only operate when courts and agencies differ about the communicative content of the statutory text: courts would be required to defer to an agency interpretation that they believed was wrong but “reasonable.” Investigation of this version of *Chevron* can begin with a statement of the textualist case against *Chevron* as Interpretation. The next step is consideration of the possibility that something that is somewhat like *Chevron* as Interpretation could be defended by textualists in a narrow set of linguistic circumstances.

⁸⁶Evan Bernick suggests that pragmatists might turn to something like rule consequentialism in reply to this objection. See Evan D. Bernick, *Envisioning Administrative Procedure Act Originalism*, 70 ADMIN. L. REV. 807, 870 (2018). This possible line of response raises questions about that nature of legal pragmatism and the coherence of rule consequentialism that are far beyond the scope of this Essay.

⁸⁷RAN HIRSCHL, TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM 212–13 (2004).

⁸⁸“Juristocrats” are to juristocracy, as “aristocrats” are to aristocracy. This neologism is found in K.D. Ewing & John Hendy QC, *The Dramatic Implications of Demir and Baykara*, 39 INDUS. L.J. 2, 42 (2010).

A. *The Textualist Case Against Chevron as Interpretation*

The textualist case against *Chevron* as Interpretation can be stated simply.⁸⁹ When *Chevron* is applied to questions of interpretation, as opposed to construction, the bottom line is that courts are required to defer to agency interpretations, even when the courts disagree, so long as the interpretations are “reasonable.” This doctrine seems inconsistent with core commitments of textualism. First and foremost, textualism just is the theory that courts are bound by the communicative content of the statutory text. Judges have an obligation (a duty) to do their best to discover the actual meaning of the text. Deference to a reasonable meaning that judges have good and sufficient reasons to believe is ultimately incorrect is inconsistent with that judicial obligation. Or to put it differently, *Chevron* as Interpretation violates the Statutory Constraint Principle. Unsurprisingly, the textualist Justices on the Supreme Court have been critical of *Chevron*.⁹⁰

Moreover, textualists are likely to be suspicious of the idea of “reasonable” interpretations. The word “reasonable” is notoriously slippery. There are many possible criteria for reasonableness. Consider the following four illustrative possibilities. An interpretation might be considered reasonable if:

1. The interpretation is supported by some evidence, even if the weight of the evidence is against the interpretation.
2. The interpretation is consistent with at least one definition of the salient words or phrases, even if the contextual evidence suggests that this definition is not the plain meaning in context.
3. The interpretation is supported by reasonable actors, even if their reasons for supporting the interpretation are reasons of policy and not of linguistic fact.
4. The interpretation is a member of a set of interpretations that are supported by relevant linguistic and contextual evidence such that no single interpretation has better support.

The first three possibilities are inconsistent with the core commitments of textualism, but the fourth criterion for reasonableness is different. It cashes out reasonableness in terms of meaning and hence is arguably consistent with textualism. However, the fourth possibility just is what I have called “irreducible ambiguity.” If the fourth possibility holds, then we are in the construction zone and the relevant concept is *Chevron* as Construction, not *Chevron* as

⁸⁹I do not mean to imply that the textualist critique is obviously correct or incontestable. Cass Sunstein has argued that *Chevron* can be reconciled with the text of the Administrative Procedure Act. See Sunstein, *supra* note 2, at 1657 n.225.

⁹⁰*Michigan v. EPA*, 135 S. Ct. 2699, 2712 (2015) (Thomas, J., concurring); *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1149–52 (10th Cir. 2016) (Gorsuch, J., concurring). In the academy, Dean John Manning has expressed textualist doubts about *Chevron*. See John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 125 (2001); see also Bernick, *supra* note 86, at 849. See generally Merrill, *supra* note 7.

Interpretation. Of course, there may be other criteria for reasonableness, but they must be specified and defended for there to be a viable textualist case for *Chevron* as Interpretation.

B. The Textualist Case for a Reformulated Version of Chevron as Interpretation

Because the *Chevron* literature mostly conflates interpretation and construction,⁹¹ the distinct issues raised by *Chevron* as Interpretation are rarely addressed. The following discussion presents a simplified version of an argument for an idea that is “in the ballpark” of *Chevron* as Interpretation. This argument relies on ideas that may be unfamiliar to many theorists of statutory interpretation and administrative law scholars. The argument begins with an account of the complex structure of statutory interpretation for regulatory statutes that employ technical terms. It then moves to the idea of a division of linguistic labor and the related notion of a linguistic subcommunity. Finally, it proceeds to social epistemology and ideas about epistemic relationships among persons and institutions. Without some introduction to this cluster of notions, the argument would be incomprehensible, so rather than a preview, we will simply dive into the deep end of the theoretical pool.

1. The Complex Structure of Statutory Communication for Regulatory Statutes

Textualism requires that there be some account of how meaning (communicative content) is conveyed. In easy cases, we can simply take this account for granted. Judges and lawyers don’t need to know the theoretical details; instead, they can rely on their intuitive grasp of the processes by which communication occurs. But when things get complicated, we may lose our moorings. The simplified model of communication that structures our understanding of face-to-face, cooperative, oral conversations relies on assumptions that simply do not hold in the case of a regulatory statute enacted by a legislature via a multistage process that produces a text that is intended to communicate to several different audiences, including a regulatory agency, regulated industries, representatives of the groups the statute is intended to protect or benefit, as well as judges and lawyers who will resolve disputes that arise when the regulatory statute is applied or regulations are promulgated.

The idea that regulatory statutes involve a complex communicative structure will be developed in two stages. We begin with the sample case—a face-to-face conversation between two individuals. We then consider the ways in which a regulatory statute is different.

⁹¹ There are exceptions, see Bernick, *supra* note 86, at 811; Criddle, *supra* note 28, at 328; and Herz, *supra* note 28, at 1871.

a. *The Simple Case: The Gricean Picture of Face-to-Face, Cooperative, Oral Communication*

Consider a simple face-to-face conversation:

Alice: Let's do lunch!
 Ben: Where?
 Alice: Pizza.
 Ben: When?
 Alice: The yoozh.
 Ben: Great. See you later.
 Alice: Yup.

In this conversation, each participant aims to recover the communicative content that the other intended to convey. Notice that very little is said, but much is conveyed. For example, Alice says, "Let's do lunch!" without specifying who the "us" is, the date, the time, or the place, but Ben grasps that Alice means, "The two of us should have lunch together today." Ben asks where, but Alice seems to specify a food and not a place: "Pizza." Ben doesn't ask for clarification. Presumably, "Pizza" means a specific pizza place—the one that they always go to for pizza. It is possible that when they go to the pizza place, Ben orders salad and Alice orders a calzone. Ben asks, "When?" and Alice replies, "The yoozh" (alternatively spelled "ushe"⁹²) meaning the usual time that they have lunch together, perhaps 12:00pm. Ben does not say, "It is a date," but instead says, "Great," which may actually convey his agreement—and is not necessarily a statement about the greatness of the lunch plan.

Paul Grice, the influential philosopher of language, offered an account of exchanges like this.⁹³ Grice postulated that the "speaker's meaning" of an utterance (an oral communication) is the meaning that the speaker intended to convey to the listener via the listener's recognition of the speaker's communicative intention.⁹⁴ When Alice says "Pizza" she intends to convey to Ben something like, "The pizza place, Lampo, that is the place we frequently go for lunch." Ben recognizes her communicative intention. For this to work, Alice must get Ben to grasp content she intended to communicate, and Ben must recognize that this is what Alice is trying to do.

Speaker's meaning involves reflexive, second-order, communicative intentions. A communicative intention is an intention to convey content (a set of propositions). Speaker's meaning involves reflexive intentions: Alice intends that Ben grasp the content that she intends to convey via his recognition of her communicative intent. This is a second-order intention, because it is an intention that has another intention as its object; it is a reflexive intention, because Alice's

⁹² R.L.G., "The Ushe", *ECONOMIST* (July 6, 2011), <https://www.economist.com/johnson/2011/07/06/the-ushe> [<https://perma.cc/H9D5-CHFJ>].

⁹³ See PAUL GRICE, *STUDIES IN THE WAY OF WORDS* 117–37 (1989).

⁹⁴ *Id.*

intention involves Ben's intention to grasp Alice's intention—the intention reflects back upon itself. This may sound complicated, but as the example of Alice and Ben shows, we grasp this complex structure intuitively. We do it every day without thinking about it explicitly.

b. Complexities: Multiple Stages, Multiple Drafters and Authors, Multiple Audiences, Not Fully Cooperative

The conversation between Alice and Ben was simple in several respects:

- There is only one stage of communication. Alice says something directly to Ben and vice versa.
- Each utterance has only one “drafter” and “author.” Ben and Alice each choose their words (draft) and then utter those words (author the speech act).
- There is only one audience for each utterance. Alice says something to Ben, and Ben says something to Alice. No third parties are involved.
- Alice and Ben are involved in cooperative communication. Alice isn't sending Ben on a wild goose chase; Ben isn't trying to convince Alice that he will be there for pizza, when in fact he plans to go for drinks with LeBron and Hung-Ju.

None of these assumptions fully hold in the case of statutory communication involving regulatory agencies.

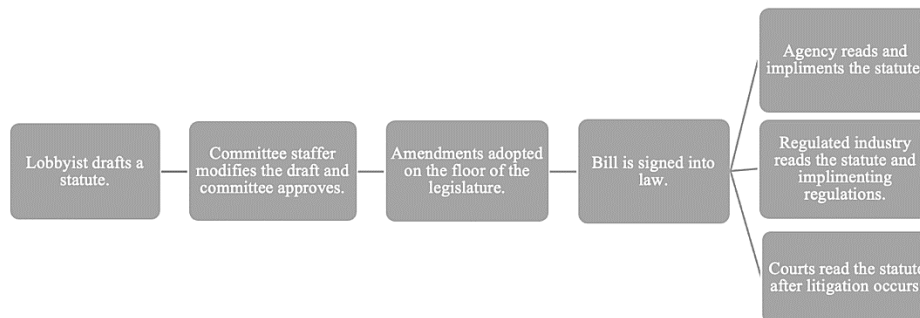
Consider the following ways in which statutory communication is different:

- Statutory communication involves multiple stages, including multiple rounds of drafting, committees, bicameral legislatures, executive assent, and implementation by executive departments and agencies as well as courts.
- Statutes frequently have multiple drafters. A special interest group or a public interest group may draft a statute that is then modified by committee staffers, marked up in committee, amended on the floor of one house (the Senate) and then further modified by staffers, committees, and members on the floor of the other house (the House of Representatives).
- Regulatory statutes typically have multiple audiences, including participants in the legislative process (lobbyists, staffers, committee members, legislators, the executive, agency staff and officials, regulated firms, the beneficiaries of the legislation, judges, law clerks, lawyers, and so forth).
- Statutory communication frequently involves communication that is not fully cooperative. For example, the drafter of a statute might intend for the statute to be understood differently by lobbyists for the regulated industry and lobbyists for a public interest group. In such cases,

communication is deliberately deceptive. The drafter is “speaking out of both sides of their mouth.”

Figure 2 presents a simplified model of the process. The simplifications include: (1) there is a unicameral legislature, (2) there is only one committee, (3) the statute is directed at (a) the agency, (b) the regulated industry, and (c) the courts. Here is the diagram:

Figure 2: *Model of Multistage Statutory Communication*



Notice that the complex multistage process of statutory communication involves multiple “drafters” and “authors.” A quick word about terminology. In the context of legislation, “drafters” and “authors” are usually different. The drafter of a statute might be a lobbyist or committee staffer; they have no authority to formally propose or approve a statute. I am using the term “author” to refer to the participants in the process that have formal authority, including legislators and legislative institutions (the Senate, the House Judiciary Committee, etc.).

In the simplified model presented in Figure 2, the drafters include a lobbyist, a committee staffer, and a legislator who drafts and proposes an amendment. The authors include a legislative committee, the legislature itself, and the executive who signs the bill into law. There are multiple readers, including committee staffers, legislators (if they read the bill themselves), the executive (if they read the statutory text), and agency officials and/or staffers, regulated industry employees and/or lawyers, lawyers for others involved in litigation, and judges and/or law clerks.

In the real world, the process is even more complex. Initial drafting may involve multiple participants. Modifications may be done by multiple staffers and multiple committees. Several amendments may be offered, with the amendments drafted by various staffers. At the federal level, the legislative process will occur in both the House and the Senate. And there will be many other readers—reporters, public interest group staffers, law professors, law students, and even concerned members of the public.

In both the simplified model and the real world, statutory communication does not fit the Gricean model of one-on-one oral communication. How then is meaning conveyed? Begin with the first stage of the process: a lobbyist drafts a

statute. The lobbyist has first order communicative intentions—the set of propositions the lobbyist intends the statute to convey. And the lobbyist has an immediate reader in mind—perhaps, a staffer for the committee with jurisdiction over the bill. But when the statute is drafted, the lobbyist also intends to communicate to downstream readers, more staffers, possibly some legislators, the staffers for the executive who can sign or veto the bill, and the regulatory agency that will implement the statute, the industry that will be regulated, and the courts and lawyers that will engage in statutory interpretation and construction if there is litigation.

During the process of statutory communication, meaning is “passed along.” Committee members grasp the communicative intentions of drafters; they pass along the text to full legislature, which in turn alters the text by amendment and passes along both portions of the text as originally drafted and the amendments to the executive. Once again, the text is passed along via publication (e.g., the Statutes at Large and the United States Code) to a regulatory agency, the regulated industry, and courts. At each stage, readers attempt to recover meanings that are generated by the prior stages of the complex multistage process.

How can communicative intentions be conveyed given the multiplicity of drafters, authors, and readers? Anyone familiar with the history of debates over constitutional and statutory interpretation will recognize the relevance of the so-called “summing problem.”⁹⁵ In the vocabulary of theoretical linguistics and the philosophy of language, we need agreement on communicative content, but it seems likely that the first-order communicative intentions of the various drafters and authors will diverge. Moreover, a reader at one stage (reading of the bill in committee) will become an author at another stage (when the committee votes the bill out). If a committee member forms an erroneous belief about the drafter’s communicative intentions at a prior stage, that mistake seemingly would then become the first-order communicative intention at the subsequent stage. Even worse, different committee members can make different mistakes, introducing an additional obstacle to successful communication.

For successful statutory communication to occur, it seems that multiple actors must grasp the same content. But at each stage of the legislative process, there can be new drafters, new authors, and new readers. How can their communicative intentions mesh? The answer to this question is that the first-order communicative intentions do not need to mesh, nor do the beliefs of the various participants in the process about those intentions. Statutory

⁹⁵ See Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 214–15 (1980); Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 870 (1930) (“The chances that of several hundred men each will have exactly the same determinate situations in mind as possible reductions of a given determinable, are infinitesimally small.”).

communication is possible, because of second-order communicative intentions.⁹⁶

How do second-order communications make statutory communication possible? Recall a second-order communicative intention is involved in the case of a cooperative one-on-one conversation. Alice intends that Ben grasp her meaning via Ben's recognition of Alice's first-order communicative communication. For statutory communication to succeed, we need a second-order communicative intention that can be shared by all of the participants in the multistage process. Plain-meaning textualism maintains that the shared second-order communicative intention just is the intention to convey plain-meaning, understood as the meaning of the statute for its primary intended audience.

What group constitutes the primary intended audience of a statute? The answer to that question is, "it depends on what kind of statute we are discussing." Some criminal statutes may be addressed to the public at large. The plain meaning of such a statute would be its "ordinary meaning"—the meaning that a competent member of the public would grasp. Word and phrases would be understood in their ordinary senses—and not an obtuse or technical sense. But not all statutes are addressed to the public, regulatory statutes are likely to be addressed to regulatory agencies and regulated industries. And this will have implications for what constitutes the plain meaning of a regulatory statute.

* * *

At this point, some readers may wonder how Gricean communicative intentions can form a building block of textualism. Isn't textualism about the "meaning of the statutory text"? Don't textualists reject any role for intention in statutory interpretation? The answer to the first question is "yes": textualism is about meaning in the sense of "communicative content." But the answer to the second question is "no": textualists should not, do not, and cannot reject the role of communicative intentions in the production of statutory meaning. The key to understanding the relationship between Textualism and Intentionalism lies in the fact these two theories are concerned with two very different kinds of intentions. Textualists are concerned with communicative intentions; what is sometimes called the "objective meaning" of the statutory text is the result of intersubjective agreement at the level of second-order communicative intentions. Intentionalists

⁹⁶For discussion of the relationship between first-order and second-order communicative intentions in the analogous context of constitutional communication, see Solum, *Themes from Fallon*, supra note 43, at 305–06. The account of second-order communicative intentions offered in this Essay is sketchy. For example, a full account of the meshing of second-order communicative intentions will require a richer explanation of the nature of such intentions and the mechanisms that enable meshing. Such an account is beyond the scope of this Essay.

are concerned about a different kind of intention—the first order intentions of the legislature concerning specific issues or cases—intentions that might be called “legislative will.”

There is a terminological issue here: some recent intentionalists may wish to embrace Gricean first-order communicative intentions as the source of statutory meaning. We could call that theory “Intentionalism” or “New Intentionalism.”⁹⁷ But on that theory, it turns out that the relevant intentions are the communicative intentions of the individual who drafts a statute or part thereof. This entails the conclusion that for some statutes “legislative intent” is to be found in the mental states of a lobbyist who drafted the language that eventually was enacted into law. There would be no conceptual problem with using the name “Intentionalism” to represent a diverse family of theories that includes legislative-will intentionalism and drafter’s first-order communicative intentions intentionalism. But that is not how I am carving the theoretical pie in this Essay.

* * *

2. The Division of Linguistic Labor and Linguistic Subcommunities

The “ordinary meaning” of a word or phrase is a meaning that is shared by speakers of a natural language.⁹⁸ In this sense “ordinary meaning” is contrasted

⁹⁷ Lawrence B. Solum, *Surprising Originalism: The Regula Lecture*, 9 CONLAWNOW 235, 240 n.27 (2018) (stating “the new intentionalism is the view that the original meaning of the constitutional text is the meaning that the drafters intended to convey to their intended readers via the reader’s recognition of the drafters’ communicative intentions”). For examples, see Larry Alexander, *Simple-Minded Originalism*, in THE CHALLENGE OF ORIGINALISM 87, 87–98 (Grant Huscroft & Bradley W. Miller eds., 2011); see also Jeffrey Goldsworthy, *Legislative Intentions, Legislative Supremacy, and Legal Positivism*, 42 SAN DIEGO L. REV. 493, 510 n.57 (2005); and John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 72 n.7 (2006).

⁹⁸ The meaning of the phrase “ordinary meaning” is itself disputed. See, e.g., Thomas R. Lee & Stephen C. Mouritsen, *Judging Ordinary Meaning*, 127 YALE L.J. 788, 795 (2018) (“When we speak of *ordinary* meaning, we are asking an empirical question—about the sense of a word or phrase that is most likely implicated in a given linguistic context.”); Francis J. Mootz III, *Corpus Linguistics and Vico’s Lament: Against Vivisectional Jurisprudence*, 20 NEV. L.J. 845, 845 (2020) (“The ‘new textualist’ approach to legal interpretation, most closely identified with the late Justice Scalia, argues that the meaning of a legal text is the ordinary meaning attributed to the words by an average competent speaker at the time of their *enactment* as a statute.”) (emphasis added); Brian G. Slocum & Stefan Th. Gries, *Judging Corpus Linguistics*, 94 S. CAL. L. REV. POSTSCRIPT 13, 16 (2020) (“The ordinary meaning doctrine represents a presumption that words in legal texts are to be interpreted in light of accepted and typical standards of communication that apply outside of the law.”); Lawrence M. Solan, *The New Textualists’ New Text*, 38 LOY. L.A. L. REV. 2027, 2030 (2005) (“What makes ordinary meaning ordinary? It can only be that in the context in

with “technical meaning.” Thus, the ordinary meaning of a statute enacted by Congress is the meaning that the words in context would have for competent speakers of standard American English. But when a statute is addressed to a more specialized audience, the drafters can employ technical language (or terms of art). For example, a regulatory statute for the chemical industry might employ technical terms from chemistry (the science) and chemical engineering. Although these terms may not be meaningful for most or even almost all members of the public, they will bear meaning for the members of a linguistic subcommunity—e.g., the community of chemical engineers and those who communicate with chemical engineers about chemical manufacturing.

Sometimes, words and phrases are terms of art that only have meaning for a linguistic subcommunity. Other terms may have both an ordinary meaning and a technical meaning. When the primary audience for a statute is the regulatory agency and regulated industry, it would be a mistake to assume that the meaning of each and every term in the statute is its ordinary meaning. This is obvious in the case of words or phrases that only have technical meanings: “demurrer,” “motion for summary judgement,” and “writ of habeas corpus” are technical legal phrases that lack an ordinary meaning in American English.

Other terms in the statute may have both ordinary and technical meanings—a special kind of ambiguity. Words that have both kinds of meaning might be understood by the regulatory agency and the regulated industry as bearing their technical meaning—given the context in which the words were used and the practices of the relevant linguistic subcommunity. In such cases, the plain meaning of a regulatory statute would be the technical meaning for the regulatory agency and the regulated industry.

Let us pause and review our progress so far. Statutory communication cannot rely on unanimously shared first-order communicative intentions. What makes statutory communication possible is shared second-order communicative intentions—and in particular, the shared intention to convey “plain meaning” understood as the meaning of the statute for its primary audience. Although some statutes are aimed at the public, others are directed at regulatory agencies and regulated industries that form or are members of a linguistic subcommunity with shared understanding of terms of art and technical language.

Textualism requires courts to recover the plain meaning of statutes and to articulate legal doctrines that are consistent with that meaning. In the case of regulatory statutes, that means that lawyers, judges, and law clerks will all need to recover communicative content conveyed by terms of art and technical language with which they may have no prior familiarity—because they are not themselves members of the relevant linguistic subcommunity. Their task may be difficult, but it is not impossible.

which a word is used that meaning stands out as the one that was likely intended, since that is what people generally intend when they use that word.”).

It is at this point that the idea of a division of linguistic labor comes into the picture.⁹⁹ When you are a member of a linguistic subcommunity associated with a specialized field of endeavor (e.g. chemical engineering), you are exposed to terms of art and technical language. You learn that language in various ways. You might just “pick it up” from conversation with other members of the linguistic subcommunity. You might study it in a class. You might consult a reference work. But lawyers, law clerks, and judges may not be members of the linguistic subcommunities to which a regulatory statute is addressed. They must interpret the statute, but they cannot rely on preexisting linguistic competence to do so. Instead, they must rely on the division of linguistic labor. Lawyers can be members of the relevant linguistic subcommunity about what obscure statutory language means. Judges and law clerks might simulate this experience via an expert witness who testifies about the meaning of the language. Or they might rely on the testimony of others in the form of a specialized dictionary or reference work. In all of these cases, the judge would ultimately rely on the linguistic labor of members of the relevant linguistic subcommunity.

But there is an obvious problem here. When judges interpret terms of art and technical language, they can make mistakes—precisely because they are not native speakers of the technical dialect. This leads us to a question that is similar to the issue raised by *Chevron* as Interpretation: what should a judge do when the judge’s interpretation of technical language and terms of art in a regulatory statute diverges from the understanding of the regulatory agency? To answer this question, we need to turn a set of ideas that have been developed by philosophers who work in the field of social epistemology.

3. Social Epistemology and Interpretation of Regulatory Statutes

Social epistemology studies the social aspects of knowledge and belief: it investigates “the epistemic effects of social interactions and social systems.”¹⁰⁰ One of the most important topics in social epistemology is disagreement between “epistemic peers.”¹⁰¹ If Carlos and Danita are equally competent and have access to the same evidence, they are epistemic peers with respect to some question. Suppose they are equally qualified virologists and that they have read the same studies, but they disagree about the question whether COVID-19 is

⁹⁹The idea of a division of linguistic labor was devised by Hilary Putnam (or so I believe). See Hilary Putnam, *The Meaning of “Meaning”*, 7 MINN. STUD. PHIL. SCI. 131, 144 (1975), reprinted in THE TWIN EARTH CHRONICLES: TWENTY YEARS OF REFLECTION ON HILARY PUTNAM’S “THE MEANING OF ‘MEANING’” 13 (Andrew Pessin & Sanford Goldberg eds., 1996); see also Lawrence B. Solum, *Incorporation and Originalist Theory*, 18 J. CONTEMP. LEGAL ISSUES 409, 429 (2009).

¹⁰⁰*Social Epistemology*, STAN. ENCYCLOPEDIA PHIL. (Aug. 28, 2019), <https://plato.stanford.edu/entries/epistemology-social/> [https://perma.cc/JR6U-BLGR].

¹⁰¹Richard M. Re, *Clarity Doctrines*, 86 U. CHI. L. REV. 1497, 1520, 1530, 1539–40 (2019). See generally Alex Stein, *Law and the Epistemology of Disagreements*, 96 WASH. U. L. REV. 51 (2018); R. George Wright, *Epistemic Peerhood in the Law*, 91 ST. JOHN’S L. REV. 663 (2017).

regularly transmitted by aerosols (as opposed to droplets). Should Carlos revise his belief in light of Danita's opinion or vice versa? Or should both Carlos and Danita reduce the level of confidence with which they hold their opinions? These options are of interest to social epistemologists, but we can put them aside for present purposes.

Now consider the situation of Etsuko, who lacks training in virology (and related disciplines) and has only read newspaper reports regarding the aerosol/droplets controversy. Etsuko learns that Danita disagrees with Etsuko's view that COVID-19 is transmitted by droplets and not aerosols. Danita is not Etsuko's epistemic peer: Danita is Etsuko's epistemic superior. Danita has much more information and far better training. Under these circumstances, a strong case can be made that Etsuko's views ought to change. Etsuko's beliefs should be revised in light of Danita's expertise.

How do these ideas apply in the context of *Chevron*? In the case of a statute where the plain meaning of the statutory text is the ordinary meaning, the meaning conveyed to the public, it might be argued that judges and regulators are epistemic peers; both are competent speakers of American English. On the other hand, it might be argued that judges are the epistemic superiors of regulators. Judges interpret statutes on a regular basis; arguably, they acquire expertise in the interpretation of legal texts that regulators lack. When judges decide cases, they have the benefit of adversarial briefing and further research in chambers. Arguably, judges are in a better epistemic position to judge ordinary meaning than are regulators.

But what if the plain meaning of the statute is not ordinary meaning? What if the primary intended audience for the statute is the regulatory agency and the regulated industry and the relevant individuals in the agency and the firms are members of a linguistic subcommunity that have internalized the meanings of the relevant terms of art and technical language? In that case, it would be difficult to argue that judges are the epistemic superiors of the agency officials and staff. Rather, a strong case could be made that the agency officials and staff are the epistemic superiors of judges—who are their epistemic inferiors. If that is the case, then the implication might be that judges ought to form their beliefs about statutory meaning in light of the agency interpretations of the technical language in a regulatory statute. Indeed, it might be argued that judges should adopt the agency's reading unless the judges are very sure that the agency has made a mistake.

So, a case can be made for something like *Chevron* as Interpretation on the basis of social epistemology, although that case might be limited to cases involving technical language and terms of art. But there are further complexities. When a textualist judge interprets a statute, the judge aims to recover its communicative content. But it is not clear that agency officials typically share this aim. Suppose that the officials of the agency regard the communicative content of the statute as a relatively minor factor in their decisionmaking; instead, their goal is to make good policy on the basis of the best science. Once they have decided what policy is best, they then adopt a reading of the statute

that supports the outcome they prefer. Or perhaps they don't even read the statute; instead, they instruct their lawyers to find an interpretation that squares their preferred policy outcome with the statutory text. In that scenario, the testimony of the agency regarding the meaning of the statute would not be trustworthy. In the evocative language of Professors William Baude and Ryan Doerfler, the policy driven agency officials are not the "methodological friends" of textualist judges.¹⁰² Put another way, textualist judges might have very good reason to doubt that policy driven agency officials are making a good faith attempt to discern the communicative content of a regulatory statute. And for similar reasons, the judges might doubt that the agency's representations about statutory meaning are sincere.

In sum, there could be good reasons for textualist judges to accept agency interpretations of technical statutes when agency officials are part of a linguistic subcommunity in which that language has nonstandard meanings. In that sense, *Chevron* as Interpretation could be viewed as a canon of statutory interpretation. But like all the linguistic canons, this version of *Chevron* would be a defeasible presumption and not a standard of review that incorporates a legal norm of deference. "Reasonableness" would not be the operative concept in this form of *Chevron*. In the end, judges and not the agency would be responsible for determining the communicative content of the statutory text.

C. Non-Textualist Theories and *Chevron* as Interpretation

Up to this point, our investigation of *Chevron* as Interpretation has proceeded from a textualist perspective. How would that idea be approached from the perspective of non-textualist theories of statutory interpretation and construction?

1. *The Relevance of Interpretation for Purposivists and Intentionalists*

Textualism holds that legal content ought to be driven by communicative content; both Purposivism and Intentionalism deny this. Nonetheless, the meaning of the text is relevant to both purposivists and textualists. In order for a purposivist to determine the objective function of the text, a purposivist must know what the text means—even if it is the objective function and not the text that determines the legal content of statutory doctrine. When intentionalists seek the will of the legislature, the meaning of the enacted text is at least relevant evidence of that will—and if the legislative history is sparse, it may be the best evidence.

So, both purposivists and intentionalists consider the meaning of the text but believe that this meaning should not bind judges and officials. How should they view *Chevron* as Interpretation? This question is difficult to answer, in part

¹⁰² See William Baude & Ryan D. Doerfler, *Arguing with Friends*, 117 MICH. L. REV. 319, 321 (2018).

because the proponents of these theories have not embraced the interpretation-construction distinction and hence lack the conceptual apparatus that would enable them to make their position clear and precise. Moreover, for practical reasons neither purposivists nor intentionalists are likely to engage in close textual analysis. Both Purposivism and Intentionalism are vulnerable to the objection that these approaches authorize judges to override the plain meaning of the statutory text—and hence are illegitimate. Close textual analysis is likely to reveal the gap between the plain meaning of the text and hence undermine the justificatory force and legitimacy of a non-textualist opinion.

So, purposivists and intentionalists could, in principle, embrace *Chevron* as Interpretation for the reasons discussed above.¹⁰³ But as a practical matter *Chevron* as Interpretation would rarely make any difference to the outcome or reasoning of purposivist or intentionalist decisions. For non-textualists, all of the important action occurs at the construction stage. If interpretation in general is unimportant, then *Chevron* as Interpretation will play a very minor role in the decision of statutory cases and the development of statutory doctrines.

2. When Do Pragmatists Give a Hoot About the Text?

What about Pragmatism? In most cases and for most issues, pragmatists care very little about the statutory text. Judge Richard Posner, the leading theorist of legal pragmatism, has been very frank: pragmatists ought to be free to override statutory text for reasons of policy.¹⁰⁴ Nonetheless, there may be cases in which pragmatists do care about statutory text for pragmatic reasons. When a statute provides a bright line rule and there are good policy reasons for favoring a rule over a standard, a pragmatist judge ought to embrace the rule found in the communicative content of the statute. And if the text is ambiguous, a pragmatist judge might decide that there are good reasons of policy to go with the interpretation provided by the agency. But the pragmatist judge would do this for reasons of policy and not because the interpretation offered by the agency is more likely to resolve the ambiguity correctly: getting the semantics right is not the goal of a pragmatist. Rather, the pragmatist judge would adopt the agency interpretation, because the agency interpretation leads to the better consequences than would the interpretation that the judge believes is supported by the evidence.

* * *

Textualists should care about Chevron as Interpretation. If they are convinced that this version of the Chevron doctrine is inconsistent with Textualism, then they should reject it. If they are convinced that a

¹⁰³ See *supra* Part V.B.

¹⁰⁴ Josh Blackman, *Judge Posner's "Judicial Interpretive Updating"*, JOSH BLACKMAN'S BLOG (Apr. 5, 2017), <http://joshblackman.com/blog/2017/04/05/judge-posners-judicial-interpretive-updating/> [https://perma.cc/YLH3-QP55].

modified version of the doctrine will lead to more accurate interpretations of statutory text, they should embrace it. In either case, they ought to care. Unsurprisingly, purposivists, intentionalists, and pragmatists are unlikely to care much about Chevron as Interpretation: they don't care much about interpretation itself.

* * *

VI. THE DISAGGREGATED *CHEVRON* DOCTRINE

We can now return to the topic with which we began: how should we categorize the *Chevron* doctrine? But now the question has been transformed! The right question is about the many *Chevron* doctrines. We need to consider both *Chevron* as Construction and *Chevron* as Interpretation from the perspectives of Textualism, Purposivism, Intentionalism, and Pragmatism. For each variant of the *Chevron* doctrines, we can ask whether that variant is a standard of review, a rule of decision, a canon of interpretation, or something else entirely.

A. *What Are the Many Chevron Doctrines?*

There are many *Chevron* doctrines. *Chevron* as Construction is conceptually distinct from *Chevron* as Interpretation—and each of these versions of *Chevron* takes on a different meaning from the perspectives of particular theories of statutory interpretation and construction. These many doctrines are conceptually distinct, but they all go by the name *Chevron* because they trace their lineage to the Supreme Court's decision in the original *Chevron* case.

Chevron is most important from the perspective of textualism. Textualists care deeply about the meaning of statutory texts. If *Chevron* as Interpretation would lead to an inaccurate interpretation, then textualists ought to reject it. There is a limited set of cases in which agency officials and employees are the primary audience of the statute and the statute employs terms of art with specialized meanings to a linguistic subcommunity of which the agency officials and employees are members. In those cases, *Chevron* as Interpretation acts as a canon of statutory interpretation.¹⁰⁵ It operates in much the same way as other

¹⁰⁵ Given the interpretation-construction distinction, canons of interpretation are conceptually distinct from canons of construction. Canons of interpretation are rules of thumb that summarize linguistic regularities (understanding linguistic in a very broad sense that includes pragmatic enrichment). Canons of construction are legal norms that modify the legal effect given to the communicative content of the statutory text. The critical distinction between regimes as precedents and regimes as canons is that the former treat deference regimes as independent trumping mechanisms, while the latter treat deference regimes as reflecting values whose weight will vary from case to case, depending on context. Connor Raso and William Eskridge have suggested that *Chevron* should be understood as a “canon” without differentiating between canons of interpretation and canons of construction. On my reading, their argument is that *Chevron* should be understood as a canon of construction. See

linguistic canons. It provides a rule of thumb, creating a defeasible presumption in favor of the agency interpretation of the technical language. Like all rules of thumb, this canon is defeasible. If the evidence supporting the contrary interpretation is compelling (“unreasonable”), then the agency interpretation should be displaced. And if the agency interpretation appears to be a post-hoc rationalization (and not a good-faith attempt to discern communicative content), then the agency interpretation should be disregarded, and courts should look to other evidence of technical meaning.

From a purposivist perspective, *Chevron* as Interpretation is practically irrelevant, because interpretation (in the sense specified by the interpretation-construction distinction) is peripheral: for purposivists, objective function (and not communicative content of the statutory text) ought to determine the legal content of statutory doctrine. *Chevron* as Construction is different, but it is not clear how purposivists should view this version of *Chevron*. On the one hand, Purposivist *Chevron* as Construction might be conceptualized as a standard of review that asks whether the agency action is reasonable as a matter of means-end fit given the judicially identified statutory purpose. On the other hand, that doctrine might be understood as judicial review of the reasonability of the objective function identified by the agency. On either understanding, Purposivist *Chevron* as Construction is a standard of review.

Like purposivists, intentionalists are likely to regard *Chevron* as Interpretation as of very limited importance: Intentionalism aims to recover legislative intent and not the communicative content of statutory texts. There may be some room for an intentionalist version of *Chevron* as Construction. Given the absence of a specific congressional intent for the precise question at issue, courts could employ a deferential standard of review, upholding agency actions if they were reasonable. Of course, the actual content of this standard would depend on the criteria for reasonability, but such criteria are not provided by Intentionalism itself.

Finally, consider the role of *Chevron* as Construction and *Chevron* as Interpretation for pragmatists. Given the antitheoretical nature of Pragmatism, it is difficult to put the pragmatist version of these doctrines into any of the three categories identified by Hickman and Hahn. For the true pragmatist, everything goes into the hopper of holistic, policy-oriented decisionmaking. One way to express this idea is that the pragmatist would view *Chevron* as a factor to be considered in the context of particular cases.

The discussion above is summarized in Table 1:

Table 1: *Classifying the Many Chevron Doctrines*

	<i>Chevron</i> as Construction		<i>Chevron</i> as Interpretation
Textualism	Standard of Review for Agency Actions in the Construction Zone		Canon of Statutory Interpretation for Agency Interpretations of Technical Language
Purposivism	Two Possibilities		Practically Irrelevant Because Interpretation Plays a Peripheral Role
	Standard of Review for Reasonability of Fit Between Agency Action and Judicially Identified Purpose	Standard of Review for Reasonability of Purpose Identified	
Intentionalism	Standard of Review for Reasonability of Agency Actions Given the Absence of Issue-Specific Congressional Intent		Practically Irrelevant Because Interpretation Plays a Peripheral Role
Pragmatism	Factor in Holistic Pragmatic Judging		Factor in Holistic Pragmatic Judging

Hickman and Hahn may have been asking the wrong question, but they did arrive at an answer that is right, *most of the time*. What we call the “*Chevron* doctrine” is usually *Chevron* as Construction. And *Chevron* as Construction is best conceptualized as a standard of review from the perspective of textualists, purposivists, and intentionalists. Pragmatists won’t really care how *Chevron* as Construction is categorized, but to the extent that they do, the reasons underlying *Chevron* as Construction would be factors in holistic pragmatist decisionmaking. *Chevron* as Interpretation is different; in that context, the *Chevron* doctrine is best understood as an unnamed linguistic canon—a rule of thumb that points towards agency understandings of technical language as likely superior to judicial understandings, creating a defeasible presumption in favor of the agency interpretation.

B. *Stare Decisis* and the Many *Chevron* Doctrines

This brings us one of the most important questions raised by Hickman and Hahn: should our categorization of *Chevron* play a role in deciding whether *Chevron* or some of its progeny should be overruled? The *Chevron* doctrine is one thing, but the *Chevron* case and subsequent decisions are another. Moreover, the current state of the doctrine of *stare decisis* is in substantial

disarray. There are multiple theories of stare decisis, and the relationship of stare decisis to theories of constitutional and statutory interpretation and construction is contested.

1. *The Context: Horizontal Stare Decisis in the Supreme Court*

We can begin with the basics. The doctrine of stare decisis has two dimensions, horizontal and vertical. Vertical stare decisis is binding: decisions of the United States Supreme Court are binding on the lower federal courts. Horizontal stare decisis is not binding; the Supreme Court can and does overrule its own prior decisions. Although the Supreme Court has articulated criteria for overruling its prior decisions (notably in *Planned Parenthood v. Casey*¹⁰⁶), it is far from clear that the Court's overruling practice is consistent. Some Justices may endorse the idea that overruling requires more than a judgment that the prior decision is wrong: something else, such as unworkability in practice, inconsistency in reasoning with prior decisions, or changing circumstances is required. But even this is contested: other Justices may believe that prior decisions that are clearly inconsistent with the original public meaning of the constitutional text or the plain meaning of a statutory text ought to be overruled—even in the absence of other factors. And there is a complex scholarly debate about these matters as well.¹⁰⁷

An additional complexity is introduced by the possibility that special norms apply to stare decisis in the context of statutory cases. For example, the Supreme Court has sometimes taken the position that longstanding statutory precedent should be stickier than constitutional or common law precedent on the ground that Congress's awareness of such precedent is silent approval and that Congress should amend the statute if it wishes to overrule the precedent.¹⁰⁸ William Eskridge's treatment of this topic is the locus classicus for discussion of statutory overruling.¹⁰⁹

But the lack of agreement about when to overrule is not the only source of complexity and confusion. The doctrine of stare decisis depends on the distinction between holding and dictum: holdings are binding, dicta are not. But

¹⁰⁶ *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 853–56 (1992).

¹⁰⁷ See Jonathan F. Mitchell, *Stare Decisis and Constitutional Text*, 110 MICH. L. REV. 1, 11–16 (2011). See generally Anita S. Krishnakumar, *Textualism and Statutory Precedents*, 104 VA. L. REV. 157 (2018).

¹⁰⁸ Something like this is suggested in *Francis v. S. Pac. Co.*, 333 U.S. 445, 450 (1948); see also *Boys Mkts., Inc. v. Retail Clerk's Union, Local 770*, 398 U.S. 235, 257 (1970) (Black, J. dissenting) (“When this Court is interpreting a statute, however, an additional factor must be weighed in the balance. It is the deference that this Court owes to the primary responsibility of the legislature in the making of laws.”).

¹⁰⁹ William N. Eskridge, Jr., *Overruling Statutory Precedents*, 76 GEO. L.J. 1361, 1362 (1988).

there is no consensus about the criteria for the holding-dictum distinction. There are at least three¹¹⁰ different conceptions of a holding:

- The Ratio Decidendi Theory: The holding of a case is the legal norm¹¹¹ that follows from the reasoning necessary to the outcome of the case, given the legally salient facts and the issues raised by the parties or the court.
- The Legally Salient Facts Theory: The holding of a case is limited to future cases with the same legally salient fact characteristics as the precedent case.
- The Legislative Holdings Theory: The holding of a case is the legal norm stated by the court that decided the case, even if that legal norm goes beyond the reasoning, legally salient facts, or issues raised by the court or the parties.¹¹²

So far as the author is able to discern, neither the Supreme Court nor the lower federal courts have adopted a consistent approach to holdings. After reading many cases, my impression is that different theories are invoked by different judges; the same judge may invoke different theories in different cases (and possibly in a single opinion).¹¹³

Given this theoretical disarray, it is difficult to say what “overruling *Chevron*” even means. Under the legally-salient facts approach, overruling a single case would have very little effect; given the fact that almost every case involves numerous legally salient factual characteristics, the holding of *Chevron* itself would be very narrow. But given the legislative holdings theory, a case that overrules *Chevron* could create an entirely new doctrinal structure.

2. Overruling in the Context of Theoretical Disagreement

And there is a third level of complexity in the Supreme Court’s relationship to the doctrine of stare decisis: the role of stare decisis likely depends on theories of constitutional and statutory interpretation and construction. This is most obvious in the case of Public Meaning Originalism and Plain Meaning Textualism. Originalists and textualists ought to believe that the texts of the Constitution and statutes are higher in the hierarchy of authority than are judicial decisions. In the case of originalism, there is substantial literature on this issue, with a range of competing positions.

¹¹⁰It seems like there are many other theories, but for the purposes of this Essay, only these three will be considered.

¹¹¹“Legal norm” is meant to be neutral as between rules, standards, catalogs, and discretion.

¹¹²See Lawrence B. Solum, *Originalist Theory and Precedent: A Public Meaning Approach*, 33 CONST. COMMENT. 451, 459 (2018) (laying out the three theories).

¹¹³*Id.* at 459–60.

a. *The Textualist Theory of Stare Decisis*

For the sake of simplicity, we can focus on a simplified textualist theory of statutory stare decisis, which can be expressed as follows:

- The Hierarchy of Authority Principle: The plain meaning of statutory texts is higher in the hierarchy of authority than are judicial interpretations and constructions of the text.
- The Standard for Overruling Non-Textualist Precedents: Legal norms found in the holdings of opinions that are not based on textualist reasoning (e.g., purposivist, intentionalist, and pragmatist opinions) are not entitled to stare decisis effect. Cases in which the holding is found in such opinions should be overruled in due course if the outcome of the case is inconsistent with the plain meaning of the statutory text.
- The Standard for Overruling Textualist Precedents: Legal norms found in the holdings of opinions that are based on textualist reasoning are entitled to stare decisis effect. Cases based on such opinions should only be overruled if the subsequent court finds that there is clear and convincing evidence that the prior court's view of the plain meaning of the statutory text is erroneous and that the state of the evidence is such that the new interpretation is very likely to be stable over time.

From a textualist perspective, *Chevron* and its progeny must be evaluated in light of the plain meaning of Section 706 of the Administrative Procedure Act: "To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action."¹¹⁴ An analysis of the evidence regarding the meaning of this provision is beyond the scope of this Essay, but it should be obvious that a textualist could well conclude that "interpret . . . statutory provisions" requires courts to determine the meaning of regulatory statutes. On the surface, *Chevron* deference might appear to be inconsistent with the plain meaning of the text of the APA.¹¹⁵

¹¹⁴ 5 U.S.C. § 706 (2018).

¹¹⁵ See generally Bamzai, *supra* note 4. For further discussion, see also Jack M. Beermann, *End the Failed Chevron Experiment Now: How Chevron Has Failed and Why It Can and Should Be Overruled*, 42 CONN. L. REV. 779, 788–94 (2010) (explaining that the APA includes provisions that "seem to be relatively clear statements by Congress intended to assign resolution of legal issues to reviewing courts, not to administrative agencies"); John F. Duffy, *Administrative Common Law in Judicial Review*, 77 TEX. L. REV. 113, 189–211 (1998) (arguing that "[t]he legislative history of the APA leaves no doubt that Congress thought the . . . [statute] 'require[d] courts to determine independently all relevant questions of law, including the interpretation of constitutional or statutory provisions'"); Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2150 (2016) (reviewing ROBERT A. KATZMANN, *JUDGING STATUTES* (2014)) (*Chevron* "has no basis in the Administrative Procedure Act"); Terence J. McCarrick, Jr., *In Defense of a Little Judiciary: A Textual and Constitutional Foundation for Chevron*, 55 SAN DIEGO L. REV. 55,

But this surface appearance of inconsistency is not the whole story. Textualists would differentiate between *Chevron* as Interpretation and *Chevron* as Construction, to the extent that the progeny of *Chevron* includes cases that defer to agency interpretations that are contrary to the plain meaning of the statutory text (but were nonetheless deemed reasonable), they should be overruled. If there are cases in which the outcome would have been correct on the basis of the constrained textualist version of *Chevron* as Interpretation (the rule of thumb favoring creating a presumption in favor of agency readings of technical language), then they should be affirmed or left undisturbed.

Chevron as Construction is different. The textualist version of *Chevron* as Construction gives the Court the sole power to determine the plain meaning of the statutory text; no deference to agency interpretations is allowed. (The rule of thumb favoring agency interpretations of statutory language does not involve deference; rather, it treats agency interpretations as evidence of meaning that the Court evaluates.) Deference to an agency implementing rules in the construction zone is entirely consistent with a textualist reading of the “shall . . . interpret statutory provisions” language of Section 706.

A full analysis of the implications of the Textualist Theory of Statutory Stare Decisis for particular decisions applying the *Chevron* to various contexts involving interpretation or construction is beyond the scope of this Essay. But it does seem likely that at least some precedent would need to give way. For example, the Supreme Court’s decision in *Young v. Community Nutrition Institute*¹¹⁶ involved an issue of interpretation, not construction. In *Chevron* as Construction, Professor Sunstein and I argue that *Young* involved syntactic ambiguity:

The statute at issue there stated that the Secretary of Health and Human Services “shall promulgate regulations limiting the quantity therein or thereon to such extent as he finds necessary for the protection of public health.” The question was whether the provision required the Secretary to set a tolerance level for aflatoxin, a carcinogen, as it would if the phrase “as he finds necessary” modified the phrase “to such extent,” or instead gave the Secretary the discretion not to act at all, as it would if the phrase “as he finds necessary” modified the phrase “shall promulgate regulations.” Thus, *Young v. Community Nutrition Institute* involved what is called “syntactic ambiguity”:

57 (2018) (“Textualist and originalist critiques of administrative deference [rest on the claim that] *Chevron* flatly contradicts the plain text of the Administrative Procedure Act (APA), which empowers courts—not agencies—to interpret statutory provisions.”); and Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 196 (2006) (contending that the APA “seems to suggest that ambiguities must be resolved by courts and hence that the *Chevron* framework is wrong”).

¹¹⁶ *Young v. Cmty. Nutrition Inst.*, 476 U.S. 974, 986–87, 987 n.3 (1986) (Stevens, J., dissenting).

the resolution of the ambiguity required interpretation (what did the provision mean?) and not construction (how should it be implemented?).¹¹⁷

If textualists reject *Chevron* as Interpretation doctrine, then the resolution of syntactic ambiguities is a job for courts once the stage of judicial review is reached. *Young* is a clear example of *Chevron* as Interpretation, but it is theoretically possible that there are syntactic ambiguities that would be resolved by a linguistic subcommunity in a way that would differ from the way they would be resolved by ordinary speakers of American English. This statute, 21 U.S.C. § 346, does include technical language, “aflatoxin” is an example.¹¹⁸ If the meaning of “aflatoxin” were in doubt, courts would have good reason to presume that the agency’s interpretation was correct—the defeasible rule of thumb that is akin to a canon of interpretation. But the syntactic ambiguity resolved by the Court in *Young* did not involve a syntactic construction that had a specific meaning in a linguistic subcommunity of experts; this was ordinary statutory language.¹¹⁹ If any expertise is required to parse the statute, it would be legal expertise, the kind of expertise that judges possess. Indeed, Justice John Paul Stevens, the author of *Chevron*, disagreed with the application of *Chevron* deference and dissented in *Young*.¹²⁰ There are other cases involving *Chevron* as Interpretation.¹²¹ From a textualist perspective, they may need to be reexamined and possibly overruled.

b. *Stare Decisis for Purposivists, Intentionalists, and Pragmatists*

How should purposivists, intentionalists, and pragmatists view stare decisis? And what implications would their theories of precedent have for *Chevron* and its progeny? These are big questions, and the existing literature does not (so far as I know) provide well-developed theoretical frameworks. What follows are some tentative thoughts about the implications of these theories for the overruling of *Chevron*:

- Purposivists: The basic impulse behind statutory Purposivism is realist and policy-oriented. For purposivists, stare decisis itself has purposes (e.g., to provide stability and predictability), but these purposes must be weighed against other considerations. To the extent that purposivists approve of *Chevron* as Construction for policy reasons, they would affirm it—irrespective of the label that is applied.¹²²

¹¹⁷ Solum & Sunstein, *supra* note 7, at 1474 (citing 21 U.S.C. § 346 (2020)) (footnote omitted).

¹¹⁸ 21 U.S.C. § 346 (2020) (notes to decisions).

¹¹⁹ *Id.*

¹²⁰ *Young*, 476 U.S. at 984–88 (Stevens, J. dissenting); Solum & Sunstein, *supra* note 7, at 1474.

¹²¹ Solum & Sunstein, *supra* note 7, at 1475 n.47 (listing cases).

¹²² See *supra* Part VI.A & tbl.1.

- Intentionalist: The core idea of Intentionalism is the legislative primacy: the role of courts is to act as faithful agents of Congress, which ranks highest in the hierarchy of institutional authority. Intentionalists would affirm the intentionalist version of *Chevron* as Interpretation but would have good reason to reverse any other version.
- Pragmatists: The central goal of Pragmatism is to reorient judging to a flexible case-by-case and issue-by-issue approach that aims for good consequences. When this approach is applied to the doctrine of stare decisis, it most naturally results in balancing approach in which the benefits of overruling are weighed against the costs imposed by legal change. From the point of view of a pragmatist, the benefits of modifying *Chevron* in pragmatist directions seem likely to exceed the costs; so, for pragmatists, stare decisis would be unlikely to stand in the way of substantial changes in the doctrine.

Of course, the arguments presented as bullet points are very sketchy; they are not intended as demonstrations but are instead speculative suggestions.

* * *

*Underlying the arguments presented above is an important fact about theoretical discourse in law: legal theories concerning diverse doctrinal areas must¹²³ hang together in a relationship of theoretical coherence and mutual support.¹²⁴ As the saying goes, “the law is a seamless web.”¹²⁵ Because of the sociology of the legal academy, there is a tendency for theorists in discrete doctrinal fields to go their separate ways; even with topics so closely connected as theories of statutory and constitutional interpretation and construction, this tendency is obvious. The gap becomes larger when we consider the relationship between theorizing in more distant doctrinal areas such as administrative law, environmental law, and so forth. *Chevron* is first and foremost the central case in the administrative law canon, but the evaluation of *Chevron* requires that we look beyond the internal coherence of administrative law and consider the implications of theoretical developments elsewhere. The rise of Plain Meaning*

¹²³ This is a normative must.

¹²⁴ Rawls expresses this idea as “reflective equilibrium.” See JOHN RAWLS, A THEORY OF JUSTICE 20, 46–51 (1971). For explication, see Solum, *Themes from Fallon*, *supra* note 43, at 320–29.

¹²⁵ Lawrence B. Solum, *Legal Theory Lexicon 059: The Law Is a Seamless Web*, LEGAL THEORY LEXICON (May 10, 2020), https://lsolum.typepad.com/legal_theory_lexicon/2006/10/the_law_is_a_se.html [<https://perma.cc/EJ7K-N7CN>]; see also Lawrence B. Solum, *Legal Theory Lexicon 033: Holism*, LEGAL THEORY LEXICON (Nov. 17, 2019), https://lsolum.typepad.com/legal_theory_lexicon/2004/04/legal_theory_le.html [<https://perma.cc/7JNS-9R6J>]. Legal Theory Lexicon entries are updated regularly; the dates provided are for the most recent version as of the writing of this Essay.

*Textualism and constitutional originalism has important implications for Chevron—even if administrative law scholars have an understandable tendency to police the boundaries of their doctrinal turf and attempt to repel the invasion of foreign ideas.*¹²⁶

* * *

VII. CONCLUSION

There are many *Chevron* doctrines, not one. The notion of a single *Chevron* doctrine rests on a fundamental jurisprudential mistake, conflating “interpretation” (the discovery of statutory communicative content) with “construction” (the determination of legal effect, including the specification of statutory doctrines and the decision of statutory cases). And the *Chevron* doctrines are “theory-dependent,” the content and normative justifications for *Chevron* as Construction and *Chevron* as Interpretation depend on their relationships to theories of statutory interpretation and construction. Textualist *Chevron* is a very different doctrine than purposivist *Chevron*. Intentionalist *Chevron* is miles apart from pragmatist *Chevron*. If theoretical disagreement about theories of statutory interpretation and construction were limited to the ivory tower, then this point would be “merely academic.” But statutory interpretation and construction are hotly disputed on the bench as well as in the academy. Different judges and justices may use the same label, “*Chevron* doctrine,” when in fact they mean very different things given their explicit or implicit theoretical commitments.¹²⁷

Moreover, the case for and against the various *Chevron* doctrines is theory dependent. This point is especially important given the rise of Textualism as a theory of statutory interpretation and construction. Textualism can give *Chevron* as Construction as a doctrine of deference new theoretical foundations. Textualism can provide *Chevron* as Interpretation as a canon of interpretation a new but very limited role.

Presentation of the theoretical and normative case for Textualism is a very large enterprise—far beyond the scope of this Essay. In my opinion, that case is very strong indeed: there are compelling reasons (grounded in legitimacy and the rule of law) to affirm the Plain Meaning Thesis and the Statutory Constraint Principle. If I am right, then the *Chevron* doctrines ought to be modified. The Supreme Court need not overrule *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,¹²⁸ but it should limit the reach of that case to *Chevron* as Construction. The application of *Chevron* deference to most issues of statutory

¹²⁶For a recognition of these connections, see generally Craig Green, *Chevron Debates and the Constitutional Transformation of Administrative Law*, 88 GEO. WASH. L. REV. 654 (2020).

¹²⁷I am indebted to Jeff Pojanowski for emphasizing this point in his comments on a prior version of this Essay.

¹²⁸*Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 837–66 (1984).

interpretation (the discovery of statutory meaning) is fundamentally misguided, but there is some room for a very narrow canon of statutory interpretation, a rule of thumb that creates a defeasible presumption in favor of agency understandings of technical language in statutes primarily directed at regulatory agencies and the firms they regulate.

* * *

There are many Chevrons. Get used to it.