ESSAY

CHEVRON AS CONSTRUCTION

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In 1984, the Supreme Court declared that courts should uphold agency interpretations of ambiguous statutory provisions, so long as those interpretations are reasonable. The Chevron framework, as it is called, is now under serious pressure. Current debates can be both illuminated and softened with reference to an old distinction between interpretation on the one hand and construction on the other. In cases of interpretation, judges (or agencies) must ascertain the meaning of a statutory term. In cases of construction, judges (or agencies) must develop implementing principles or specify a statutory term. Chevron as construction is supported by powerful arguments; it is consistent with the underlying sources of law, and agencies have relevant comparative advantages in developing implementing principles. Chevron as interpretation is more controversial. Those who reject Chevron in the context of interpretation should nonetheless accept it in the context of construction. The distinction between interpretation and construction explains some important cases in the 1940s and also in the post-Chevron era.

I
TWO CHEVRONS

Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.[1] has a strong claim to being the most important case in all of administrative law. It offers a familiar two-step framework for organizing judicial review of agency interpretations of law.

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

In the Court's own words, "[f]irst, 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."[2] If the intent of Congress is not clear, courts must proceed to Step Two. Again in the Court's words, "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute."[3] With Step Two, courts ask whether the agency's interpretation is "permissible" or reasonable, not whether it is correct.

On a standard view, this framework reflects a unitary "*Chevron* Doctrine."[4] It applies to a single activity, called "interpretation," and it grows out of a single problem, called "ambiguity." In the face of ambiguity, courts show "deference" to agency action. This simple framework captures much of the conventional wisdom about *Chevron*. If the framework is understood in this light, the current controversy over *Chevron* is understandable. Contrary to *Marbury v. Madison*,[5] it seems to say that it is emphatically the province of the administrative department to say what the law is.[6]

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2 *Id.* at 842–43.

3 *Id.* at 843.

4 The literature is vast. For a highly selective sampling, see generally Nicholas R. Bednar & Kristin E. Hickman, Chevron*'s Inevitability*, 85 GEO. WASH. L. REV. 1392 (2017); 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 (2010); Lisa Schultz Bressman, Chevron*'s Mistake*, 58 DUKE L.J. 549 (2009); Clark Byse, *Judicial Review of Administrative Interpretation of Statutes: An Analysis of* Chevron*'s Step Two*, 2 ADMIN. L.J. 255 (1988); Jacob E. Gersen & Adrian Vermeule, Chevron *as a Voting Rule*, 116 YALE L.J. 676 (2007); Lisa Heinzerling, *The Power Canons*, 58 WM. & MARY L. REV. 1933 (2017); Michael Herz, Chevron *Is Dead; Long Live* Chevron, 115 COLUM. L. REV. 1867 (2015); Douglas W. Kmiec, *Judicial Deference to Executive Agencies and the Decline of the Nondelegation Doctrine*, 2 ADMIN. L.J. 269 (1988); Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969 (1992); Thomas W. Merrill, *Textualism and the Future of the* Chevron *Doctrine*, 72 WASH. U. L.Q. 351 (1994); Richard J. Pierce, Jr., Chevron *and its Aftermath: Judicial Review of Agency Interpretations of Statutory Provisions*, 41 VAND. L. REV. 301 (1988); Matthew C. Stephenson & Adrian Vermeule, Chevron *Has Only One Step*, 95 VA. L. REV. 597 (2009); Peter L. Strauss, *"Deference" Is Too Confusing—Let's Call Them "*Chevron *Space" and "*Skidmore *Weight,"* 112 COLUM. L. REV. 1143 (2012); Note, *"How Clear is Clear" in* Chevron*'s Step One?*, 118 HARV. L. REV. 1687 (2005).

5 Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

6 *See generally* Philip Hamburger, Chevron *Bias*, 84 GEO. WASH. L. REV. 1187 (2016) (outlining the tension between *Chevron* deference and the constitutional function of an independent judiciary). We are bracketing the questions raised by so-called "*Auer* deference," based on *Auer v. Robbins*, 519 U.S. 452, 461 (1997), which calls for judicial deference to agency interpretations of regulations (as op-

With this concern in mind, Justice Neil Gorsuch objects that *Chevron* "[t]ransfer[s] the job of saying what the law is from the judiciary to the executive."[7] Justice Brett Kavanaugh describes *Chevron* as "an atextual invention by courts" and as "nothing more than a judicially orchestrated shift of power from Congress to the Executive Branch."[8] Justice Clarence Thomas argues that *Chevron* is inconsistent with the Constitution.[9] In his view, the decision "wrests from Courts the ultimate interpretative authority to 'say what the law is,'" and instead "hands it over to the Executive."[10] Justice Anthony Kennedy captured a widespread view in his parting shot at *Chevron*.[11] He wrote that "reflexive deference" to agency interpretations "is troubling," and that "when deference is applied to other questions of statutory interpretation, such as an agency's interpretation of the statutory provisions that concern the scope of its own authority, it is more troubling still."[12] He concluded that "it seems necessary and appropriate to reconsider, in an appropriate case, the premises that underlie *Chevron* and how courts have implemented that decision."[13] He suggested that the proper rules "should accord with constitutional separation-of-powers principles and the function and province of the Judiciary."[14]

These various suggestions make it clear that the *Chevron* doctrine may be ripe for reconsideration. But what if there are actually two quite distinct *Chevron* doctrines? In one sense, this is an odd suggestion, asking us to think about *Chevron* in a new way. But as we shall show, the idea that there are two *Chevron* doctrines helps makes sense of much of what courts have actually been doing with the doctrine, of where the doc-

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posed to statutes). The status of *Auer* deference was recently considered by the Supreme Court, which narrowly reaffirmed that form of deference (while also qualifying it). *See* Kisor v. Wilkie, 139 S. Ct. 2400, 2408 (2019). In our view, the distinction between construction and interpretation may be relevant in that context as well, but it raises separate considerations. For a recent discussion of "*Auer* deference," see generally Kristin E. Hickman & Mark R. Thomson, *The* Chevron*ization of* Auer, 103 MINN. L. REV. HEADNOTES 103 (2019).

7 Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1152 (10th Cir. 2016) (Gorsuch, J., concurring).

8 Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2150 (2016) (reviewing ROBERT A. KATZMANN, JUDGING STATUTES (2014)).

9 Michigan v. EPA, 135 S. Ct. 2699, 2712 (2015) (Thomas, J. concurring) (quoting *Marbury*, 5 U.S. (1 Cranch) at 177).

10 *Id.*

11 Pereira v. Sessions, 138 S. Ct. 2105, 2120–21 (2018) (Kennedy, J., concurring).

12 *Id.* at 2120.

13 *Id.* at 2121.

14 *Id.*

trine is most secure, and of where the current controversy is most understandable.

Our analysis turns on an old distinction in American legal theory between "interpretation," which calls for discerning the meaning[15] of a statute, and "construction," which calls for determining the legal effect of the statute, through implementation rules, specification, and other devices.[16] The modern version of the distinction traces its origins to the work of the great contracts treatise writer, Arthur Corbin,[17] and was reintroduced to contemporary legal theory starting in the 1990s by

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15 The word "meaning" is itself ambiguous. *See* C.K. OGDEN & I.A. RICHARDS, THE MEANING OF MEANING: A STUDY OF THE INFLUENCE OF LANGUAGE UPON THOUGHT AND OF THE SCIENCE OF SYMBOLISM 186–87 (8th ed. 1946) (exploring different senses of "meaning"); Michael L. Geis, *On* Meaning*: The Meaning of* Meaning *in the Law*, 73 WASH. U. L.Q. 1125, 1125–26 (1995) (observing that the Supreme Court uses the words "means" and "meaning" in multiple ways); A.P. Martinich, *Four Senses of 'Meaning' in the History of Ideas: Quentin Skinner's Theory of Historical Interpretation*, 3 J. PHIL. HIST. 225, 226 (2009) ("Equivocating on the word 'meaning' is easy both because that word has several related senses and because understanding the meaning of a text in one of these senses is crucial to understanding its meaning in another sense."). To be precise, we use the word "meaning" to refer to "communicative content," roughly the linguistic meaning of the statute in context. The communicative content of a statutory text can be understood as the set of propositions and concepts that are communicated by the statute to the intended readers of the text. *See* Lawrence B. Solum, *Communicative Content and Legal Content*, 89 NOTRE DAME L. REV. 479, 484–507 (2013).

16 The interpretation-construction distinction goes back at least as far as Francis Lieber in 1939. FRANCIS LIEBER, LEGAL AND POLITICAL HERMENEUTICS 43–44, 111 n.2 (Roy M. Mersky & J. Myron Jacobstein eds., 1970). 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 (forthcoming 2020); Greg Klass, *Interpretation and Construction 1: Francis Lieber*, NEW PRIV. L. (Nov. 19, 2015), http://blogs.harvard.edu/nplblog/2015/11/19/interpretation-and-construction-1-francis-lieber-greg-klass/ [https://perma.cc/K52V-B3YJ]; Greg Klass, *Interpretation and Construction 2: Samuel Williston*, NEW PRIV. L. (Nov. 23, 2015), https://blogs.harvard.edu/nplblog/2015/11/23/interpretation-and-construction-2-samuel-williston-greg-klass/ [https://perma.cc/3224-W4CD]; Greg Klass, *Interpretation and Construction 3*: *Arthur Linton Corbin*, NEW PRIV. L. (Nov. 25, 2015), http://blogs.harvard.edu/nplblog/2015/11/25/interpretation-and-construction-3-arthur-linton-corbin-greg-klass/ [https://perma.cc/8ELH-PJHK]; *see also* Ralf Poscher, *The Hermeneutic Character of Legal Construction*, *in* LAW'S HERMENEUTICS: OTHER INVESTIGATIONS 207 (Simone Glanert & Fabien Girard eds., 2017).

17 3 ARTHUR LINTON CORBIN, CORBIN ON CONTRACTS: A COMPREHENSIVE TREATISE ON THE RULES OF CONTRACT LAW §§ 532–35 (1960 & Supp.1980); *see also* 4 SAMUEL WILLISTON, A TREATISE ON THE LAW OF CONTRACTS §§ 600–02 (3d ed. 1961).

Keith Whittington[18] and others.[19] Today, most courts and scholars use the two words interchangeably, sometimes referring to "interpretation" in the older sense, sometimes to "construction," and sometimes to both.[20] We shall argue that an understanding of this old distinction casts a new light on the debate over judicial review of agency interpretations of law.

In *Chevron* itself, the question involved the meaning of a single word in the Clean Air Act: "source."[21] 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.[22] 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.[23] 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.[24] 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* in-

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18 KEITH E. WHITTINGTON, CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING 4–15 (1999); KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW 5–14 (1999), and subsequently in the work of Randy Barnett. *See* Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611, 613–14 & n.9, 644–45 (1999).

19 RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 89–130 (2004, rev. ed. 2014) (discussing the interpretation-construction distinction); Randy E. Barnett, *Interpretation and Construction*, 34 HARV. J.L. & PUB. POL'Y 65, 65–66 (2011) [hereinafter Barnett, *Interpretation*]. One of us (Solum) has written on the distinction. *See generally* Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 CONST. COMMENT. 95 (2010) [hereinafter Solum, *Interpretation-Construction*]; Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453 (2013) [hereinafter Solum, *Originalism*].

20 *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984), is itself a case in point. Examples are legion. *See, e.g.*, Entergy Corp. v. Riverkeeper, Inc., 556 U.S. 208, 218–23 (2009); Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or., 515 U.S. 687, 697–703 (1995). Justice Antonin Scalia and Bryan Garner took the position that "interpretation" and "construction" are synonymous. ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 15–17 (2012). For a reply, see Solum, *supra* note 15, at 483–88. Nothing important hangs on the use of the words "interpretation" and "construction" to describe the conceptual difference between the discovery of the meaning (or communicative content) of a statute and the determination of the legal effect (including implementing rules) given to the statutory text. We use those words because they reflect longstanding usage.

21 42 U.S.C. § 7502(c)(5) (2018).

22 *Chevron*, 467 U.S. at 837, 857.

23 *Id.* at 859.

24 *Id.* at 860–61.

volved 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.

Many cases follow this basic pattern. Consider, for example, the question whether a statutory term "harm," in the Endangered Species Act, includes "significant habitat modification or degradation where it actually kills or injures wildlife."[25] Landowners and others argued that "harm" was limited to hunting or killing members of endangered species, and that it could not include habitat modification that incidentally or unintentionally harmed them.[26] There is a good argument that in context, the word "harm" was sufficiently open-textured as to permit either a broad or a narrow construction. Both ways of implementing the statute are consistent with the meaning of "harm." Let us call such cases "*Chevron* as Construction."

Chevron as Construction insists on judicial deference to agency action in what is sometimes called the "construction zone"—the space created when a statute is vague or open-textured. When such spaces exist, someone must fill them through an implementation rule, which is more specific or precise than the statute itself.[27] *Chevron* as Construction does not involve deference to an agency's view of the linguistic meaning of the statute, and it does not authorize judicial deference to an agency construction that is inconsistent with that meaning.

Thus understood, *Chevron* as Construction is consistent with relevant sources of law,[28] and it is supported by powerful

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25 *Sweet Home*, 515 U.S. at 690.

26 *Id.* at 693.

27 The phrase "construction zone" expresses the idea that a statute with vague, open-textured, or irreducibly ambiguous language creates underdeterminacy with respect to a set of issues and cases. In the zone of underdeterminacy, statutory construction is required. By contrast, the phrase "interpretation zone" is sometimes used to refer to the set of issues and cases where the outcome is determined by the clear meaning of the statutory text. *See* Samuel P. Jordan & Christopher K. Bader, *State Power to Define Jurisdiction*, 47 GA. L. REV. 1161, 1213 (2013) (using the phrase "interpretation zone" to refer to the set of issues and cases in which adherence to the meaning of a legal text would determine legal effect); Solum, *Interpretation-Construction*, *supra* note 19, at 108 (introducing "construction zone" to designate issues and cases in which the meaning of a legal text underdetermines legal effect).

28 On those sources, above all the Administrative Procedure Act, 5 U.S.C. §§ 551–559 (2018). *See* Cass R. Sunstein, Chevron *as Law*, 107 GEO. L.J. 1613 (2019). In Part IV, we turn to the question whether Congress has authorized courts to defer to agency decisions in the circumstances of *Chevron* as Construction. On the primacy of congressional instructions, see Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 516–17.

and familiar pragmatic arguments. The agency may have an advantage over courts in terms of technical expertise. The agency is better equipped to choose between alternative implementing rules on policy grounds. As the *Chevron* Court itself put it:

> Judges are not experts in the field, and are not part of either political branch of the Government. Courts must, in some cases, reconcile competing political interests, but not on the basis of the judges' personal policy preferences. In contrast, an agency to which Congress has delegated policymaking responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments. While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices—resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities.[29]

Nor is *Chevron* as Construction problematic on separation of powers grounds. When agencies engage in statutory construction, they are not impinging on the judicial responsibility to interpret any statute. The courts can interpret the statute and determine whether the agency's implementation rule is consistent with the statutory text. Indeed, *Chevron* as Construction requires them to do exactly that. Under *Chevron* itself, courts must decide, on their own, whether the statute is ambiguous; they may not defer to the agency's view on that question. Moreover, the court defers to the agency's choice only so long as it is reasonable. In our view, *Chevron* as Construction stands on firm ground.[30] And indeed, many decisions that defer to agency "interpretations" of law, both before and after *Chevron*, are best understood as *Chevron* as Construction.[31]

From its inception, however, *Chevron* could also be understood to support what we will call "*Chevron* as Interpretation."

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29 Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 865–66 (1984).

30 Again we assume that there is congressional authorization, *infra* Part IV.

31 *See, e.g.*, Mayo Found. for Med. Educ. & Res. v. United States, 562 U.S. 44, 45 (2011) (finding that the Treasury Department reasonably construed "full-time employee" in 26 U.S.C. § 3121(b)(10)); Entergy Corp. v. Riverkeeper, Inc., 556 U.S. 208, 217–19, 218 n.4 (2009) (finding that the EPA reasonably construed national performance standards under the Clean Water Act); *see also supra* text accompanying note 28.

Recall that "interpretation" is the activity that discovers the meaning (the linguistic meaning in context) of the statutory text. Under *Chevron* as Interpretation, deference to agency interpretations of law is required even when interpretation is involved. The trigger is *ambiguity*. Given that for many lawyers and judges, the standard vocabulary uses the word "interpretation" to encompass both the discovery of meaning and the creation of implementation rules ("interpretation" and "construction" in the older sense of these terms), it was natural for courts to apply *Chevron* to cases that involved questions about the meaning of the statute—and they did.[32]

In short: *Chevron* as Construction is limited to statutory "construction zones." *Chevron* as Construction allows agencies to operate in the construction zone, so long as they are doing so reasonably. *Chevron* as Interpretation applies *Chevron* to cases that required the resolution of a dispute about the meaning of statutory language: these cases are in the "interpretation zone," where the meaning of the statute will determine the outcome. *Chevron* as Interpretation allows agencies to resolve ambiguities with respect to interpretation, and that is controversial. Even so, there are plausible reasons for courts to pay substantial attention to an agency's reading of a statute in *Chevron* as Interpretation cases and perhaps to defer to that reading.[33] But these reasons are different in kind from those that apply in *Chevron* as Construction cases. Textualists who reject the justifications for deference to agency interpretations can accept the quite different rationale for deference to agency constructions.

II
AMBIGUITIES

The word "ambiguity" has several different senses (or semantic meanings).[34] One sense of "ambiguity" applies whenever a statute is unclear for any reason, including vagueness or "open texture." When a statute is vague, there are borderline

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32 *See, e.g.*, Young v. Cmty. Nutrition Inst., 476 U.S. 974 (1986) (finding that the FDA reasonably interpreted 21 U.S.C. § 346 even in light of the statute's ambiguity); *see also infra* pp. 109–11.

33 For some of those reasons, see Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 368–71 (1986); Scalia, *supra* note 28, at 514–18.

34 For relevant discussion, see generally Ward Farnsworth et al., *Ambiguity About Ambiguity: An Empirical Inquiry into Legal Interpretation*, 2 J. LEGAL ANALYSIS 257, 260–91 (2010) (empirically examining the distinctions between how judges and ordinary English readers define "ambiguity" and interpret ambiguous texts).

cases.[35] Open texture, a term made famous by H.L.A. Hart in *The Concept of Law*,[36] is more complex.[37] Open-textured language involves concepts that are not precise, leaving cases that might or might not be covered by the concept.[38]

But there is another sense of ambiguity, a more technical sense, that limits ambiguity to cases in which a statutory provision has more than one possible linguistic meaning.[39] In law as in life, most ambiguity is resolved by context. There may be two possible readings given the literal meaning of the words, but once we examine the context, only one of these readings may be correct. "Bank" can refer to financial institutions or the ground that abuts a river, but in a statute, it will almost always be clear which of the two senses of the word was intended. "Bat" can be an animal or an implement used by hitters in baseball, but in a statute, there will almost never be confusion about the meaning of that word. Semantic ambiguity is ubiquitous, but it is generally resolved by context.

Because *Chevron* used the word "ambiguity," it reinforced the natural tendency to read its framework as applicable to both interpretation and construction—to both the discovery of

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35 For discussion of the philosophical idea of "vagueness," see Roy Sorensen, *Vagueness*, STAN. ENCYCLOPEDIA. PHIL. ARCHIVE (Feb. 8, 1997), https://plato.stanford.edu/archives/sum2018/entries/vagueness/ [https://perma.cc/96QH-62NP]; *see infra* Part II, pp. 109–10.

36 *See* H.L.A. HART, THE CONCEPT OF LAW 127–28 (2d ed. 1994) ("Whichever device, precedent or legislation, is chosen for the communication of standards of behaviour, these, however smoothly they work over the great mass of ordinary cases, will, at some point where their application is in question, prove indeterminate; they will have what has been termed an *open texture*.").

37 The phrase "open texture" was devised by Friedrich Waismann to express the idea that family-resemblance concepts are underdeterminate. Friedrich Waismann, *Verifiability*, *in* LOGIC AND LANGUAGE, 117–144 (Antony Flew ed., 1951). The idea of family resemblance itself derives from Ludwig Wittgenstein. LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS §§ 67–77, 108 (P.M.S. Hacker & Joachim Schulte eds., G.E.M. Anscombe et al. trans., rev. 4th ed. 2009).

38 The phrase "open textured" has been used in different ways by different legal theorists. We are using the phrase "open texture" in a stipulated sense that includes (but is not necessarily limited to) the following: (1) terms that express family resemblance concepts; (2) terms that express multi-criterial concepts where the criteria are incommensurable; and (3) terms that express concepts that involve multi-dimensional vagueness. Whatever the ultimate nature of "open texture," we will assume that an open-textured provision has a core of settled meaning and penumbral cases. *See* H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 607 (1958) ("There must be a core of settled meaning, but there will be, as well, a penumbra of debatable cases in which words are neither obviously applicable nor obviously ruled out."). On the idea of multicriterial concepts with incommensurable dimensions, see Hrafn Asgeirsson, *On the Instrumental Value of Vagueness in the Law*, 125 ETHICS 425, 429–31 (2015).

39 Lawrence B. Solum, *The Fixation Thesis: The Role of Historical Fact in Original Meaning*, 91 NOTRE DAME L. REV. 1, 11 (2015).

meaning and the creation of implementation rules or the effort to specify a vague or open-textured language. And in some cases, *Chevron* has been applied to interpretation (again, the discovery of meaning). For a clear example, consider *Young v. Community Nutrition Institute*.[40] 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."[41] 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": the resolution of the ambiguity required interpretation (what did the provision mean?) and not construction (how should it be implemented?).

Justice John Paul Stevens, author of *Chevron*, thought that the case was exceptionally easy. As he put it, the "antecedent of the qualifying language is quite clearly the phrase 'limiting the quantity therein or thereon,' which immediately precedes it, rather than the word 'shall,' which appears eight words before it."[42] As he saw it, the alternative interpretation, "by skipping over the words 'limiting the quantity therein or thereon,' renders them superfluous and of no operative force or effect."[43] Justice Stevens believed that the statute's meaning was clear (under *Chevron* Step One) and therefore that deference was not required.[44] (In our terms, he might have been read to say that *Young* was a case of interpretation, not construction.)

But the Court in *Young* disagreed. In its words: "As enemies of the dangling participle well know, the English language does not always force a writer to specify which of two possible objects is the one to which a modifying phrase relates."[45] In the Court's view, the dense sentence could be read either way; "to such extent as he finds necessary" could well qualify "shall promulgate regulations."[46] In the face of an ambiguous statu-

40 Young v. Cmty. Nutrition Inst., 476 U.S. 974, 986–87, 987 n.3 (1986).
41 21 U.S.C. § 346 (2018).
42 *Young*, 476 U.S. at 985 (Stevens, J., dissenting).
43 *Id.* at 986.
44 *Id.* at 986–88.
45 *Id.* at 980–81 (majority opinion).
46 *Id.*

tory provision, the agency would prevail under *Chevron*. There are many cases in this vein.[47] A statutory term is ambiguous; reasonable people can read it differently. The agency prevails for that reason.

This is *Chevron* as Interpretation: deference to an agency in a case in which the question concerns the meaning of statutory language. *Young v. Community Nutrition Institute* moved beyond *Chevron* as Construction by deferring to an agency's interpretation of language that was ambiguous in the narrow sense of "ambiguity" that is distinct from open texture or vagueness. Such deference is different in kind from what occurred in *Chevron* itself—that is, deference to the agency's decision about how to implement a statute within the construction zone created by vague or open-textured language.

Justice Stevens' essential argument does not provide all of the picture, but it helps account for the distinction between many cases in which agencies prevail and many cases in which they do not. Much of the time, agencies are essentially specifying vague statutory terms. When they are operating in the construction zone, their choices are generally upheld, and courts are notably deferential. Courts find no Step One violation, and under Step Two, agency choices are usually deemed reasonable.[48] But in other cases, the real question is how to handle an ambiguity. These cases, typically resolved under Step One, often produce losses, and courts are notably less deferential.[49] In a nutshell: *Step One losses, for agencies, typically involve interpretation rather than construction*. As a prominent example, consider *Massachusetts v. EPA*,[50] which raised the question whether the EPA could define the statutory term

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47 *See, e.g.*, Am. Water Works Ass'n v. EPA, 40 F.3d 1266, 1270–71 (D.C. Cir. 1994) (upholding the Environmental Protection Agency's interpretation of the term "feasible" under the Safe Drinking Water Act); Entergy Corp. v. Riverkeeper, Inc., 556 U.S. 208, 219–20 (2009) (upholding the Environmental Protection Agency's interpretation of the phrase "best technology available" under the Clean Water Act).

48 *See, e.g.*, *Entergy Corp.*, 556 U.S. at 217–18 (upholding the Environmental Protection Agency's interpretation of the term "best technology available" to include a cost-benefit analysis as reasonable); Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or., 515 U.S. 687, 697–98 (1995) (upholding the Secretary of the Interior's interpretation of the Endangered Species Act's term "harm" to include habitat destruction as reasonable). Agencies do of course lose, even if they are in the construction zone, if their interpretations are deemed unreasonable. An illuminating example is *Michigan v. EPA*, 135 S. Ct. 2699 (2015).

49 *See, e.g.*, MCI Telecomms. Corp. v. Am. Tel. & Tel. Co., 512 U.S. 218, 225–26 (1994) (holding that the Federal Communications Commission's interpretation of the term "modify" was not owed deference because the term in its statutory context was not ambiguous).

50 Massachusetts v. EPA, 549 U.S. 497 (2007).

"air pollutant" so as not to include greenhouse gases. The Court ruled that it could not because the term had a single meaning, taken in its context.[51]

Consider in this light the dispute about the level of ambiguity that is sufficient to trigger *Chevron* deference. Should a court defer to an agency if it thinks that the agency is forty-five percent likely to be right? Thirty percent? Twenty percent?[52] When an ambiguity is involved, it seems extreme to say that the agency will prevail even if the court has a very firm conviction that it is wrong. Actual practice[53] fits with the view that courts ought not to accept agency interpretations of ambiguities merely because there is *some* question about meaning.[54]

On any view, *Chevron* as Construction should be unproblematic, but *Chevron* as Interpretation can be questioned.[55] From the standpoint of "textualism" (the theory of statutory interpretation that holds that courts should be bound by the plain meaning of the statutory text, taken in context), the interpretive version of *Chevron* seems problematic.[56] Why should agencies be allowed to sort out ambiguities? Why should courts defer to agency *interpretations*? *Young* did not seem to present a question about policy or about implementing rules; it presented a question about meaning. At the very least, the question whether courts should defer to agency interpretations raises distinctive considerations. In short, there are two *Chevron* doctrines, and they rest on quite different premises: the two *Chevrons* do not stand or fall together.

In an instructive discussion, Justice Kavanaugh implicitly distinguishes between construction and interpretation.[57] Indeed, he seems to argue for recasting *Chevron* in terms that closely correspond to those urged here. Justice Kavanaugh contends that when Congress has used some vague or open-

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51 *Id.* at 500.

52 *See* Kavanaugh, *supra* note 8, at 2150–51.

53 *See, e.g.*, Util. Air Regulatory Grp. v. EPA, 573 U.S. 302, 303 (2014) ("Agencies empowered to resolve statutory ambiguities must operate within the bounds of reasonable interpretation." (internal quotation marks omitted)); *MCI Telecomms. Corp.*, 512 U.S. at 226–27 (holding that an agency's interpretation of the term "modify" was not owed deference solely because one dictionary gave the word a more expansive definition than is generally accepted).

54 *See* Kavanaugh, *supra* note 8, at 2150–51.

55 *See* Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452, 499 (1989); Abner J. Mikva, *How Should the Courts Treat Administrative Agencies?*, 36 AM. U. L. REV. 1, 7–9 (1986).

56 We are bracketing the question whether Congress has directed courts to defer to agency interpretations. *See* discussion *infra* Part IV.

57 Kavanaugh, *supra* note 8, at 2121–22.

textured term, like "reasonable" or "feasible," it makes sense for judges to defer to agency interpretations.[58] He is far more skeptical of the idea of deference in cases in which Congress has used some specific term.[59] In essence, Justice Kavanaugh can be seen to be making a distinction between construction and interpretation, and arguing that *Chevron* should be applied to the former and not to the latter.[60]

We do not mean to say that insofar as he rejects *Chevron* as applied to specific terms, Justice Kavanaugh's conclusion is necessarily correct. Those who reject his conclusion might urge that even in the face of ambiguity—when interpretation of specific terms is involved—it is appropriate to allow agencies, with their expertise and accountability, to make the choice.[61] On one view, resolution of genuine ambiguities calls for some kind of policy choice, or even if it does not, the resolution is best made by those with political accountability and technical expertise.[62] In some cases, textualism might turn out to produce uncertainty: even if context suggests that one meaning is more likely than another, reasonable doubts may remain. And perhaps agencies should be allowed to sort out uncertainty if there is room for reasonable disagreement. In any case, textualism is not the only theory of statutory interpretation; other views emphasize the objective purpose or function of statutes.

Our goal here is not to evaluate Justice Kavanaugh's criticism of *Chevron* as it is now understood, but to say that his central argument can be accepted while also approving of *Chevron* deference both on the facts of *Chevron* itself and, more generally, in the large category of cases that involve *Chevron* as Construction. To sharpen the point: it is one thing to say that agencies should be allowed to adopt constructions that specify or implement the meaning of terms like "source" and "harm," assuming these have not been defined in a way that resolves the question of construction. It is another thing to say that agencies should be allowed to decide what words are modified by the phrase "to such extent as he finds necessary." Textualists can embrace deference with respect to the agency crafting

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58 *Id.* at 2153–54.

59 *Id.*

60 A similar point can be made about the controversial ruling in *Auer v. Robbins*, 519 U.S. 452 (1997), though we do not explore that point here.

61 *See* Sunstein, *supra* note 28, at 1626–29.

62 For a useful discussion of the nature of purposivism or functionalism as a theory of statutory interpretation, see Michael Herz, *Purposivism and Institutional Competence in Statutory Interpretation*, 2009 MICH. ST. L. REV. 89, 92–93. Herz distinguishes "purposivism" from "intentionalism." *See id.* at 93.

of implementation rules, while rejecting deference to agency interpretations that resolve semantic or syntactic ambiguities. In other words, textualists can embrace *Chevron* as Construction, even if they reject *Chevron* as Interpretation.

III
AN OBJECTION

We are keenly aware of a possible objection to the distinction we are drawing between interpretation and construction, at least for purposes of analyzing *Chevron*. Courts today only rarely make the distinction in an explicit way,[63] and until recently it has been largely lost in contemporary public law. As Professor Michael Herz has observed, "[a]lmost without exception, writing about statutory interpretation uses 'interpretation' and 'construction' as synonyms."[64]

In administrative law, reviving the distinction between interpretation and construction might not be so controversial if the distinction were always easy to apply. But at least sometimes it is not. In practice, answers to the question whether an agency or a court is involved in interpretation or instead construction may not have a clear answer, and lawyers and judges

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63 Very recently, some courts have noted the distinction. *See, e.g.*, 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."); Herrera v. Santa Fe Pub. Sch., 41 F. Supp. 3d 1188, 1275 n.86 (D.N.M. 2014) (questioning "whether only the semantic meaning of 'causes' is fixed . . . based upon the term's original public meaning, or whether the legal doctrines of 'causation' are also fixed"); Grinnell Mut. Reinsurance Co. v. Voeltz, 431 N.W.2d 783, 786 (1988) ("Because this case was tried to the court, the distinction between interpretation and construction becomes important in relation to our scope of review. When, as here, extrinsic evidence is offered for the interpretation of policy words, the court's interpretation if supported by substantial evidence is binding on us."); Wischmeier Farms, Inc. v. Wischmeier, 883 N.W.2d 538, *3 (Iowa Ct. App. 2016) (unpublished table decision) ("*Interpretation* is the process of determining the meaning of the words in the contract, while *construction* is the process of deciding their legal effect."); Bullion Monarch Mining, Inc. v. Barrick Goldstrike Mines, Inc., 345 P.3d 1040, 1041 (Nev. 2015) (arguing that the meanings of the Constitution's words remain constant, but their application may vary depending on time and place). Other courts continue to resist the distinction. *See* Absher v. AutoZone, Inc., 78 Cal. Rptr. 3d 817, 821 n.10 (Cal. Ct. App. 2008) ("Although there may be a theoretical distinction between 'interpretation' and 'construction,' we make no such distinction." (citations omitted)).

64 Herz, *supra* note 4, at 1891–92; *see also* Evan J. Criddle, Response, *The Constitution of Agency Statutory Interpretation*, 69 VAND. L. REV. EN BANC 325, 341 (2016) ("[S]tatutory construction constitutes statutory meaning through an act of juris-generative judgment that draws on normative considerations.").

could have reasonable disagreements about the proper characterization of an agency action.

In short, one might object to our use of the interpretation-construction distinction on the ground that it is an unfamiliar idea that is sometimes difficult to apply in practice. We begin our reply to this objection by emphasizing that if the distinction is not familiar, it once was,[65] and it is more familiar now than it was a decade or two ago.[66] In the context of administrative law, Professor Gillian Metzger has deployed the distinction in her argument for "administrative constitutionalism" as a manifestation of constitutional construction.[67] Both Professor Michael Herz and Professor Evan Criddle have noted the possible significance of the interpretation-construction distinction for *Chevron* deference.[68] Evan Bernick's recent article, *Envisioning Administrative Procedure Act Originalism*, discusses the significance of the interpretation-construction distinction for an originalist understanding of the Administrative Procedure Act.[69] More broadly, the distinction between interpretation and construction has come to be recognized in many contexts,

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65 *See supra* text accompanying notes 6–7.

66 *See* Amy Barrett, *The Interpretation/Construction Distinction in Constitutional Law: Annual Meeting of the AALS Section on Constitutional Law*, 27 CONST. COMMENT. 1, 1 (2010); Harold Anthony Lloyd, *Speaker Meaning and the Interpretation and Construction of Executive Orders*, 8 WAKE FOREST J.L. & POL'Y 319, 323 (2018); Victoria Nourse, *Reclaiming the Constitutional Text from Originalism: The Case of Executive Power*, 106 CALIF. L. REV. 1, 9–10 (2018); Brian Taylor Goldman, Note, *The Classical Avoidance Canon as a Principle of Good-Faith Construction*, 43 J. LEGIS. 170, 172–75 (2017); *supra* text accompanying notes 8–9.

67 Gillian E. Metzger, *Administrative Constitutionalism*, 91 TEX. L. REV. 1897, 1912–14 (2013).

68 *See* Criddle, *supra* note 64; Herz, *supra* note 4, at 1871. Professor Jeffrey Pojanowski also notes the potential significance of the distinction for *Chevron*. *See* Jeffrey A. Pojanowski, *Neoclassical Administrative Law*, 133 HARV. L. REV. 852, 887 n.185 (2020).

69 Evan D. Bernick, *Envisioning Administrative Procedure Act Originalism*, 70 ADMIN. L. REV. 807, 835 (2018).

including constitutional law,[70] contract law,[71] criminal law,[72] patent law,[73] and the law of trusts and wills.[74]

But we acknowledge that on some theories of interpretation, the distinction is contestable. Take, for example, Ronald Dworkin's view, which sees interpretation as an effort to make the best constructive sense out of the relevant legal materials (including statutory text).[75] To simplify a complex story, Dworkin's approach requires judges (1) to respect the constraints of "fit" (meaning fidelity to the existing materials) and (2) within those constraints, to decide what best "justifies" the existing materials, by making the best constructive sense of them. In constitutional law, for example, the meaning of the Equal Protection Clause, as applied to (say) bans on same-sex marriage, would turn on what ruling would make that Clause the best that it can be. We could say the same thing about "source" and "to such extent as he finds necessary." If we embrace Dworkin's view, *Chevron* would, on plausible assumptions, rest on new and firmer grounds. Aren't agencies in a better position than courts to make the best constructive sense out of statutory provisions? But on other also plausible assumptions, Dworkin's view casts *Chevron* in a much worse light. Shouldn't independent courts attempt that task?

But put the questions of comparative competence, and of trust and distrust, to one side. It should be clear that on Dworkin's view, the distinction between interpretation and construction is blurred: this blurring is reflected in Dworkin's label

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70 Barnett, *Interpretation*, *supra* note 19; Solum, *Originalism*, *supra* note 19, at 453;.

71 Lawrence A. Cunningham, *Hermeneutics and Contract Default Rules: An Essay on Lieber and Corbin*, 16 CARDOZO L. REV. 2225, 2225-26 (1995); E. Allan Farnsworth, *"Meaning" in the Law of Contracts*, 76 YALE L.J. 939, 940 (1967).

72 Paul R. Piaskoski, *The Federal Bank Robbery Act: Why the Current Split Involving the Use of Force Requirement for Attempted Bank Robbery Is Really an Exception*, 109 J. CRIM. L. & CRIMINOLOGY 675, 685 (2019).

73 Tun-Jen Chiang & Lawrence B. Solum, *The Interpretation-Construction Distinction in Patent Law*, 123 YALE L.J. 530, 536 (2013). *See also* Camilla Hrdy & Ben V. Picozzi, *Claim Construction or Statutory Construction?: A Response to Chiang & Solum*, 124 YALE L.J. F. 208, 208–11 (2014).

74 Richard F. Storrow, *Judicial Discretion and the Disappearing Distinction Between Will Interpretation and Construction*, 56 CASE W. RES. L. REV. 65, 65–66 (2005); Jarell A. Dillman, Note, *Where There's a Will There's a Way: An Examination of In Re* Estate of Kesling *and the South Dakota Supreme Court's Application of the Plain Meaning Rule*, 60 S.D. L. REV. 121, 133 (2015).

75 RONALD DWORKIN, LAW'S EMPIRE 52–53 (1986). For discussion of the complex and uncertain relationship between Dworkin's views and the interpretation-construction distinction, see Lawrence B. Solum, *The Unity of Interpretation*, 90 B.U. L. REV. 551, 568–69 (2010).

for his theory, "constructive interpretation."[76] For Dworkin, interpretation has a *constructive* dimension, and necessarily so.[77] For those who embrace purposive approaches to interpretation, or follow the Legal Process approach, the same might

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76 Ronald Dworkin, *Bork's Jurisprudence*, 57 U. CHI. L. REV. 657, 676 (1990) (reviewing ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW (1990)).

77 Because Dworkin does not explicitly address the interpretation-construction distinction, his position has to be teased out from his development of the theory of constructive interpretation. Some version of the conceptual content of the interpretation-construction distinction might be implicit in Dworkin's notion of "semantic availability," introduced in the following passage:

> [Lawyers] must decide, for example, what division of political authority among different branches of government and civil society is best, all things considered. That question in turn forces upon American lawyers, at least, further and more general questions of democratic theory; they must assume or decide, for instance, drawing on theory or instinct, how far unelected judges should assume an authority to decide for themselves which of the semantically available interpretations of a controversial statute would produce the best law.

RONALD DWORKIN, JUSTICE FOR HEDGEHOGS 133 (2011). As one of the present authors (Solum) has argued, the notion of semantic availability, when combined with the idea that "constructive interpretations" must fit and justify the legal materials, seems to imply something that is very much like the conceptual content of the interpretation-construction distinction. Dworkin's implicit reliance on the distinction is especially clear when he relies on a two-step model of constructive interpretation:

> We can now see that the first step involves interpretation; after Hercules identifies the set of authoritative legal texts, he then ascertains their linguistic meaning or semantic content. The linguistic meaning of the texts in turn determines what Dworkin calls "semantic availability." The second step involves construction—determination of the content of legal doctrine from among the range of possibilities that are semantically available. In easy cases, the range of semantically available alternatives is narrow. Once we have discovered the linguistic meaning of the relevant legal texts, the relevant content of legal doctrine is clear, and construction (the translation of semantic content into legal content) is easy. In hard cases, the range of semantically available alternatives underdetermines the set of possible legal doctrines, and determination of the legal effect of the text requires construction that goes beyond easy translation of semantic content into legal content. This additional work at the stage of construction is what makes these cases "hard." Hard cases are located in what I call "the construction zone."

Solum, *supra* note 75, at 569 (footnotes omitted). We take no position on the question whether Dworkin himself is implicitly committed to the conceptual content of the interpretation-construction distinction, but we observe that his resort to semantic availability illustrates the powerful pull of the idea that discerning the linguistic meaning of legal contexts can be distinguished from determining their legal effect. The conceptual content of the interpretation-construction distinction is independent of the use of the words "interpretation" and "construction" to mark the difference between meaning and legal effect.

also be true.[78] The distinction between interpretation and construction is intelligible only on certain assumptions about the nature of interpretation. In other words, the interpretation-construction distinction is contestable; the merits of the distinction are linked to deep and persistent theoretical debates about the nature of legal interpretation in general and statutory interpretation in particular.

Nonetheless, we insist that the distinction should not be elusive or even obscure to lawyers and judges. Without a clear statutory definition of "source," a plantwide approach does not depart from the standard meaning of that term. Without a clear statutory definition of "harm," significant habitat modification, actually killing or injuring wildlife, may or may not count as such. But whether we side with the majority or the dissent in *Young*, there was no construction zone. As we have seen, the only question was whether the placement of "to such extent as he finds necessary" produced ambiguity. Some of the prominent Supreme Court decisions that apply *Chevron* deference plainly involved construction,[79] and some of the most prominent decisions that refuse to defer to agency views plainly involved interpretation.[80] It is not so hard to say which is which. Our confidence in the ability of judges and lawyers to understand and apply the interpretation-construction distinction is bolstered by the prominent role that it played in legal theory and practice during the first half of the twentieth century.

In other words, we believe that the interpretation-construction distinction is intelligible, even if it is also contestable. Critics of *Chevron* who insist that "interpretation" is the proper function of judges and embrace a textualist approach may nonetheless embrace *Chevron* as Construction. Deference to agencies in the construction zone is entirely consistent with the preservation of judicial authority over statutory interpretation. Purposivists and others like Dworkin who may reject the inter-

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78 *See* John F. Manning, Chevron *and the Reasonable Legislator*, 128 HARV. L. REV. 457, 458–59 (2014).

79 Entergy Corp. v. Riverkeeper, Inc., 556 U.S. 208, 226 (2009); Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or., 515 US 687, 687–88 (1995). To be sure, it would be possible to argue, in these cases, that the agency's decision was an erroneous interpretation. In some cases, the real debate, within the Court, is whether what is involved is a reasonable construction or instead an erroneous interpretation.

80 *See* MCI Telecomms. Corp. v. Am. Tel. & Tel. Co., 512 U.S. 218, 218–19 (1994).

pretation-construction distinction may support further extensions of the *Chevron* doctrine for other reasons.

In these circumstances, we suggest that there may be common ground on *Chevron* as Construction. Judges might be able to reach an incompletely theorized agreement[81] that deference is appropriate in cases in which an agency acts to clarify vague or open-textured language—despite disagreement at the more fundamental theoretical level about what theory of statutory interpretation is true or best. Recall that the distinction between *Chevron* as Interpretation and *Chevron* as Construction helps to explain a number of the decided cases. To be sure, it is more usual to say that when agencies lose, it is because statutory terms are unambiguous at Step One. In at least some such cases, however, there is at least some kind of ambiguity—but the Court insists on resolving it.[82]

Because of the fundamental distinction between *Chevron* as Interpretation and *Chevron* as Construction, there is good reason for the Supreme Court to adopt a cautious approach if it should decide to reexamine the *Chevron* doctrine. If the Court were to undertake such a reexamination in a *Chevron*-as-Interpretation case, it should be careful to distinguish that context from the superficially similar *Chevron*-as-Construction category. In this area, the Court would be wise to adopt a minimalist approach, proceeding one step at a time and avoiding a sweeping approach that conflates interpretation and construction.[83] Whatever the Court ultimately decides about the viability of *Chevron* as Interpretation, it is clear that the viability of this aspect of *Chevron* turns on concerns that are substantially different from those that apply to the less controversial *Chevron* as Construction line of cases.

IV
THE QUESTION OF LEGAL AUTHORITY

Thus far, we have argued that *Chevron* as Construction is easy to justify and that the argument on behalf of *Chevron* as Interpretation is both more challenging and different. These

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81 Cass R. Sunstein, *Incompletely Theorized Agreements*, 108 HARV. L. REV. 1733, 1735–36 (1995).

82 *See* Massachusetts v. EPA, 549 U.S. 497, 498–99 (2007); *MCI Telecomms. Corp.*, 512 U.S. at 218–19.

83 *See generally* CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT (2001); *see also* Neil S. Siegel, *A Theory in Search of a Court, and Itself: Judicial Minimalism at the Supreme Court Bar*, 103 MICH. L. REV. 1951 (2005) (arguing that Sunstein's theory of judicial minimalism may not be descriptively accurate or normatively convincing).

arguments operate at the level of principle. But we have delayed answering a question that is both natural and essential to ask: what source of law justifies judicial deference to agency interpretations of law, and does it allow for a distinction between interpretation and construction?

Section 706 of the APA says that courts "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."[84] It also says that courts shall "hold unlawful and set aside agency action, findings, and conclusions found to be . . . not in accordance with law"[85] or "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right."[86] These provisions might be read to make a simple declaration: decisions about the meaning of statutes are for courts, not agencies, and the interpretation-construction distinction is beside the point.[87]

This is not a wholly implausible reading of the text of section 706.[88] Professor Thomas Merrill writes that the text "suggests that Congress contemplated courts would always apply independent judgment on questions of law."[89] Professor John Duffy agrees and adds, "[t]he legislative history of the APA leaves no doubt that Congress thought the meaning of this

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84 5 U.S.C. § 706 (2018).

85 *Id.* § 706(2)(A).

86 *Id.* § 706(2)(C).

87 Even from a purely textualist perspective, there is a case to be made that Section 706 is consistent with *Chevron* as Construction. The injunctions to "interpret constitutional and statutory provisions" and decide "all relevant questions of law" is ambiguous for at least two reasons. 5 U.S.C. § 706. First, the word "interpretation," when used without reference to the interpretation-construction distinction, is ambiguous, sometimes referring to the combined activity of interpretation and construction but sometimes to construction or interpretation alone. Second, the injunction to decide all *relevant* questions of law assumes but does not specify some standard of relevance. In light of the legislative history, discussed briefly below, see *supra* text accompanying notes 84–92, and more fully by Sunstein, *supra* note 28, at 1644–52, a case could be made that these ambiguities should be resolved in favor of a reading that requires courts to determine the linguistic meaning of the statutory text but allows for agency construction when statutory language is vague, open-textured, or otherwise incomplete. Although textualists eschew the use of legislative history as a source of purposes or intentions that determine statutory constructions independently, textualists can and should embrace legislative history in the contextual disambiguation of language that is vague or open textured. Even Justice Scalia embraced this role for legislative history. *See* Lawrence B. Solum, Federalist Society Panelist, *Text Over Intent and the Demise of Legislative History*, 43 U. DAYTON L. REV. 103, 114 (2018).

88 See the important discussion in Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 YALE L.J. 908 (2017), which reaches this conclusion without engaging the construction-interpretation distinction.

89 *See* Merrill, *supra* note 4, at 995.

provision plain."[90] Professor Jerry Mashaw sees things the same way.[91] But this reading is not inevitable. Read in its context, the text section 706 is far from clear. The answer to the "relevant question of law" *may depend on what the agency has said*. With respect to judicial review of agency interpretations of law, Section 706 could easily be read as a restatement of existing law, which allowed courts to defer to such interpretations; a great deal of contextual evidence in the 1940s supports exactly that reading.[92]

This is not the place for a full discussion, but we note that the Senate Judiciary Committee print announces, "[a] *restatement* of the scope of review . . . is obviously necessary lest the proposed statute be taken as limiting or unduly expanding judicial review."[93] It adds that the goal of the section is "merely *to restate* the several categories of questions of law subject to judicial review." The important 1945 letter of the Attorney General, written to both houses of Congress shortly before enactment of the APA, had this to say about section 706: "This *declares the existing law* concerning the scope of judicial review."[94]

And what was that existing law? In the key cases in which the Court gave deference to agency judgments about law, the construction zone was involved. In *Gray v. Powell*,[95] decided in 1941, the Court was asked to review a determination by the Director of the Bituminous Coal Division that a railroad company was not the "producer" of certain coal that it consumed. The Court said that Congress had "delegate[d] th[e] function" of interpreting the statutory term "to those whose experience in a particular field gave promise of a better informed, more equitable" judgment, and that "this delegation will be respected and the administrative conclusion left untouched."[96] These pragmatic observations were made in a case in which the agency

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90 *See* John F. Duffy, *Administrative Common Law in Judicial Review*, 77 TEX. L. REV. 113, 193 (1998).

91 *See* Jerry L. Mashaw, *Rethinking Judicial Review of Administrative Action: A Nineteenth Century Perspective*, 32 CARDOZO L. REV. 2241, 2243 (2011).

92 *See* Sunstein, *supra* note 2861, at 1664.

93 STAFF OF S. COMM. ON THE JUDICIARY, 79TH CONG., REPORT ON S. 7: A BILL TO IMPROVE THE ADMINISTRATION OF JUSTICE BY PRESCRIBING FAIR ADMINISTRATIVE PROCEDURE (Comm. Print 1945), *reprinted in* STAFF OF S. COMM. ON THE JUDICIARY, 79TH CONG., LEGISLATIVE HISTORY OF THE ADMINISTRATIVE PROCEDURE ACT OF 1944–46, at 11, 39 (1946) [hereinafter APA LEGISLATIVE HISTORY] (emphasis added).

94 S. Rep. No. 79-752 (1945), *as reprinted in* APA LEGISLATIVE HISTORY, *supra* note 93, at 187, 230; *see also* APA LEGISLATIVE HISTORY, *supra* note 93, at 279, 414 (emphasis added).

95 Gray v. Powell, 314 U.S. 402, 411–12 (1941).

96 *Id.* at 412.

was specifying the meaning of "producer," an open-textured term, and in which the linguistic meaning of that term would support different constructions.

In *NLRB v. Hearst Publications*,[97] decided in 1944, the Court was asked to decide on the meaning of the word "employee" under the National Labor Relations Act, as applied to "newsboys." It said that the agency's "[e]veryday experience in the administration of the statute gives it familiarity" with the underlying problem and concluded that the agency's interpretation "is to be accepted if it has 'warrant in the record' and a reasonable basis in law."[98] Here as well, the linguistic meaning of the word "employee" did not either require or forbid the agency's view. As for the term "source," so for the terms "employee" and "producers": the agency was engaged in construction, and the Court deferred to its decisions. There are many cases in this vein.

No large body of law is easily fit within a simple framework, but we think that it is plausible to say that in cases in which courts deferred to agency decisions in the pre-APA period, construction was frequently involved. We have noted that something similar can be said about the period since the APA was enacted, emphatically including many decisions that apply the *Chevron* framework.[99] When agencies lose under Step One, it is because they did not interpret the statute correctly.[100] When agencies win under Step One, it is often because they are in the construction zone.[101] It would be excessive to say that the interpretation-construction distinction organizes all of the cases, or explains what is "really" going on in them. But it is not excessive to say that in many of the most important cases, courts defer to agency constructions and reject agency interpretations.

V
TERRA FIRMA

Our main suggestion is that *Chevron* is on firm ground insofar as it requires courts to defer to agency constructions of

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97 NLRB v. Hearst Publ'ns, Inc., 322 U.S. 111, 130 (1944).

98 *Id.* at 131.

99 *See* Astrue v. Capato *ex rel.* B.N.C., 566 U.S. 541, 558 (2012); Mayo Found. for Med. Educ. & Research v. United States, 562 U.S. 44, 45 (2011); Household Credit Servs. Inc. v. Pfennig, 541 U.S. 232, 238 (2004).

100 Massachusetts v. EPA, 549 U.S. 497, 528-29 (2007); MCI Telecomms. Corp. v. Am. Tel. & Tel. Co., 512 U.S. 218, 218–19 (1994).

101 Entergy Corp. v. Riverkeeper, Inc., 556 U.S. 208, 226 (2009); Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or., 515 U.S. 687, 687–88 (1995).

law. On that understanding of *Chevron*, its framework is compatible with relevant sources of law, and agencies are in a better position than courts to devise implementing rules and to specify the meaning of open-textured terms. Reasonable people can and do disagree about whether *Chevron* is on firm ground insofar as it requires courts to defer to agency interpretations of law. The case against *Chevron* as Interpretation rests on the plausible view that interpretation—resolving questions about the meaning of a statutory text—is the responsibility of the courts.[102] But that does not entail the quite distinct conclusion that agencies may not devise implementation rules for vague, open-textured, or incomplete statutory language. Textualists can oppose *Chevron* as Interpretation and embrace *Chevron* as Construction.

The distinction between *Chevron* as Interpretation and *Chevron* as Construction accounts for widespread intuitions and much (though not all) of actual practice. Whatever *Chevron*'s ultimate fate, we should be able to agree on one proposition: it makes sense to apply its framework to agency decisions in the construction zone. In other words, *Chevron* itself, or *Chevron* as Construction, should be uncontroversial.

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102 One of us offers a general account of *Chevron*, with qualified approval of *Chevron* as Interpretation, in Sunstein, *supra* note 61, at 1672–73.