HOW CLEAR IS "CLEAR"?

*Ryan D. Doerfler**

This Article proposes a new framework for evaluating doctrines that assign legal significance to whether a statutory text is "clear." Previous scholarship has failed to recognize that such doctrines come in two distinct types. The first, which this Article calls evidence rules*, instructs a court to "start with the text," and to proceed to other sources of statutory meaning only if absolutely necessary. Because they structure a court's search for what a statute means, the question with each of these evidence rules is whether adhering to it aids or impairs that search—the character of the evaluation is, in other words, mostly epistemic. The second type, which this Article calls* decision rules*, instead tells a court to decide a statutory case on some ground other than statutory meaning if, after considering all the available sources, what the statute means remains opaque. The idea underlying these decision rules is that if statutory meaning is uncertain, erring in some direction constitutes "playing it safe." With each such doctrine, the question is thus whether erring in the identified direction really is "safer" than the alternative(s)—put differently, evaluation of these doctrines is fundamentally practical.*

With the new framework in place, this Article then goes on to address the increasingly popular categorical objection to "clear" text doctrines. As this Article explains, the objection that nobody knows how clear a text has to be to count as "clear" rests partly on a misunderstanding of how "clarity" determinations work—such determinations are sensitive to context, including legal context, in ways critics of these doctrines fail to account for. In addition, the objection that "clear" text doctrines are vulnerable to willfulness or motivated reasoning is fair but, as this Article shows, applies with equal force to any plausible alternative.

* Professor of Law, Harvard Law School. Thanks to Charles Barzun, William Baude, Mitchell Berman, Maggie Blackhawk, Richard Fallon, Jonah Gelbach, Roderick Hills, Aziz Huq, Howell Jackson, John Manning, Jennifer Nou, Jeffrey Pojanowski, David Pozen, Frederick Schauer, Asher Steinberg, and Matthew Stephenson for helpful comments and suggestions.

INTRODUCTION

Everyone agrees that courts must adhere to "clear" or "plain" text.[1] But what to do when a statute is "ambiguous" or its meaning is otherwise uncertain?[2] Numerous legal doctrines condition the permissibility of some judicial action in a statutory case upon the statute at issue being less than "clear" or "plain." Courts may, for example, defer to an administering agency (*Chevron* deference),[3] avoid answering a constitutional question (constitutional avoidance),[4] or consider legislative history if a statutory text has more than one plausible meaning, but not

[1] As a matter of positive law, that is. E.g., Universal Health Servs., Inc. v. United States, 579 U.S. 176, 192 (2016) ("[P]olicy arguments cannot supersede the clear statutory text."); Hughes Aircraft Co. v. Jacobson, 525 U.S. 432, 438 (1999) ("As in any case of statutory construction, our analysis begins with 'the language of the statute.' And where the statutory language provides a clear answer, it ends there as well." (quoting Estate of Cowart v. Nicklos Drilling Co., 505 U.S. 469, 475 (1992))); United States v. Wiltberger, 18 U.S. (5 Wheat.) 76, 95–96 (1820) ("The intention of the legislature is to be collected from the words they employ. Where there is no ambiguity in the words, there is no room for construction.").

[2] Ralf Poscher, Ambiguity and Vagueness in Legal Interpretation, *in* The Oxford Handbook of Language and Law 128, 128 (Peter M. Tiersma & Lawrence M. Solan eds., 2012) (observing that "[i]n a colloquial sense, both vagueness and ambiguity are employed generically to indicate indeterminacy," but that "[i]n a more technical sense . . . ambiguity and vagueness are far more specific phenomena").

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

[4] Crowell v. Benson, 285 U.S. 22, 62 (1932) ("When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.").

otherwise.[5] Taken together, these various doctrines make textual "clarity" (or, alternatively, "plainness") the central organizing principle for much of our law of statutory interpretation.[6] And, indeed, the same has been true (albeit to varying degrees[7]) going back to Chief Justice Marshall, who remarked that where "words in the body of the statute" are "plain," there is "nothing . . . left to construction," but that where ambiguity remains, "the mind . . . seizes every thing from which aid can be derived."[8]

Because it is a doctrinal "linchpin,"[9] a great deal often turns on whether a statutory text is "clear" (or "plain") or not.[10] Perhaps for that reason, however, scholars and jurists have started to question whether it makes sense, either in principle or as a matter of practice, to assign so much importance to clarity determinations. There are those who have asked why courts should "seize" that "from which aid can be derived" *only* if the text is "ambiguous."[11] Or, as Justice Stevens put it, "[W]hy . . . confine ourselves to . . . the statutory text if other tools of statutory construction provide better evidence"?[12] Others, like Justice Kavanaugh, are even more skeptical and query whether we even know what it means to say that

[5] NLRB v. SW Gen., Inc., 137 S. Ct. 929, 941–42 (2017); Ratzlaf v. United States, 510 U.S. 135, 147–48 (1994) ("[W]e do not resort to legislative history to cloud a statutory text that is clear.").

[6] See William Baude & Stephen E. Sachs, The Law of Interpretation, 130 Harv. L. Rev. 1079, 1082 (2017) ("Interpretation isn't just a matter of language; it's also governed by law.").

[7] See, e.g., United States v. Am. Trucking Ass'ns, Inc., 310 U.S. 534, 543–44 (1940) ("When aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no 'rule of law' which forbids its use, however clear the words may appear on 'superficial [inspection].'" (first quoting Bos. Sand & Gravel Co. v. United States, 278 U.S. 41, 48 (1928); and then quoting Helvering v. N.Y. Tr. Co., 292 U.S. 455, 465 (1934))).

[8] United States v. Fisher, 6 U.S. (2 Cranch) 358, 385–86 (1805).

[9] Ward Farnsworth, Dustin F. Guzior & Anup Malani, Ambiguity About Ambiguity: An Empirical Inquiry into Legal Interpretation, 2 J. Legal Analysis 257, 257 (2010) ("Determinations of ambiguity are the linchpin of statutory interpretation.").

[10] Lawrence M. Solan, Pernicious Ambiguity in Contracts and Statutes, 79 Chi.-Kent L. Rev. 859, 861 (2004) ("Part of the problem is that the law has only two ways to characterize the clarity of a legal text: It is either plain or it is ambiguous. The determination is important.").

[11] See William Baude & Ryan D. Doerfler, The (Not So) Plain Meaning Rule, 84 U. Chi. L. Rev. 539, 547 (2017); Adam M. Samaha, If the Text Is Clear—Lexical Ordering in Statutory Interpretation, 94 Notre Dame L. Rev. 155, 177 (2018).

[12] Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ., 550 U.S. 81, 106 (2007) (Stevens, J., concurring).

a statutory text is "clear."[13] Going further still, Judge Easterbrook asserts with characteristic bluntness: "There *is* no metric for clarity."[14]

This Article attempts to clarify[15] the increasingly dogmatic discussion surrounding the range of "clear" text doctrines.[16] As it explains, in working through the question of "how clear is clear enough?" we need to ascertain first what type of clarity we are talking about. As such, it is important to note that clarity doctrines can actually be sorted into two distinct types, with largely distinct concerns associated with each. The first type, which operates as *evidence rules*, raises largely epistemological concerns to the extent that they structure a court's inquiry into what a statute means.[17] Because they organize a court's search for statutory meaning, the concerns associated with this type of doctrine are largely epistemological—they function, in other words, to help judges form true beliefs about what statutes mean. More specifically, these doctrines tell courts to "start with the text,"[18] and to consider additional sources of statutory meaning *only* if absolutely necessary.[19] For reasons this Article explains, this sort of *lexical ordering* of evidence hinders an investigation except in unusual circumstances,[20] which is why evidence rules need to be carefully contained to such circumstances.

[13] See Brett M. Kavanaugh, Fixing Statutory Interpretation, 129 Harv. L. Rev. 2118, 2118 (2016) (reviewing Robert A. Katzmann, Judging Statutes (2014)).

[14] Frank H. Easterbrook, The Role of Original Intent in Statutory Construction, 11 Harv. J.L. & Pub. Pol'y 59, 62 (1988) (emphasis added).

[15] (Ha ha.)

[16] This Article addresses doctrines that assign significance to the "clarity" of statutory text, as opposed to clarity of the law more generally. See Richard M. Re, Clarity Doctrines, 86 U. Chi. L. Rev. 1497, 1505–07 (2019) (addressing the latter). On the relevance of that distinction, see *infra* notes 162–67 and accompanying text.

[17] See infra Section I.A.

[18] Adam M. Samaha, Starting with the Text—On Sequencing Effects in Statutory Interpretation and Beyond, 8 J. Legal Analysis 439, 440 (2016).

[19] Here and throughout, this Article uses the phrase "statutory meaning" to refer to the communicative content expressed by statutory text as used—roughly, Congress's apparent communicative intention (or, alternatively, the conventional meaning of the language as used in the relevant context). See Mitchell N. Berman, The Tragedy of Justice Scalia, 115 Mich. L. Rev. 783, 796–99 (2017) (reviewing Antonin Scalia, A Matter of Interpretation: Federal Courts and the Law (Amy Gutmann ed., 1997)) (distinguishing communicative intention from other forms of intention); see also Richard H. Fallon Jr., The Meaning of Legal "Meaning" and Its Implications for Theories of Legal Interpretation, 82 U. Chi. L. Rev. 1235, 1246–48 (2015) (calling this a statute's "contextual" meaning). This Article takes no position on how best to conceive of Congress's communicative intention (e.g., actual or "objectified") or how best to identify it (e.g., whether to consider legislative history).

[20] See infra notes 43, 51 and accompanying text.

The second type of "clear" text doctrines operates, by contrast, as *decision rules*, instructing a court how to decide a statutory case when, despite its best efforts, it is not sure what the statute at issue means.[21] In other words, the function of the second type of doctrine is not to help determine the meaning of a statute, but rather to provide guidance for how to decide a statutory case once it becomes apparent that the meaning of the statute at issue is not clear. The basic premise underlying decision rules is that, under conditions of uncertainty, sometimes erring in a particular direction constitutes "playing it safe."[22] The concerns associated with these doctrines are, in light of that premise, mostly practical. In each instance, the question is whether a court's erring in the identified direction is actually "safer" than acting on its "best guess" or, alternatively, erring in some other direction. Is it, for example, safer to err in the direction of letting elected officials, via administrative agencies, decide how to resolve a case, or would this be a costly mistake, leading us down the road to administrative "tyranny"?[23]

Using the basic distinction between evidence rules and decision rules, this Article develops a framework for assessing individual "clear" text doctrines that is both completely new and also easy to administer. Within that framework, one asks first whether a given doctrine manages evidence in a determination of the meaning of a statute or, instead, manages uncertainty about how to proceed once the quest for meaning has come up short. If the doctrine manages evidence, one then goes on to determine whether the type of evidence it manages has some or all of the special characteristics that make lexical ordering of evidence epistemically sensible. If, alternatively, the doctrine manages uncertainty, one instead evaluates the risk analysis that underlies it: Is one type of mistake really costlier than the other, as the doctrine presupposes, and, if so, to what degree?

[21] See infra Section I.B.

[22] Here and throughout, this Article uses the term "uncertainty" in a colloquial sense, encompassing both "risk" and "uncertainty" in the technical, decision-theoretic senses of those terms. See Daniel M. Hausman & Michael S. McPherson, Economic Analysis and Moral Philosophy 30–31 (1996) (contrasting situations of "risk," in which the probabilities of the various possible outcomes are known, and situations of "uncertainty," in which those probabilities are unknown).

[23] Cf. City of Arlington v. FCC, 569 U.S. 290, 314–15 (2013) (Roberts, C.J., dissenting) (acknowledging that while it may be hyperbolic to describe *Chevron* deference as "the very definition of tyranny," too much deference to administrative agencies may pose serious risks).

In addition, the distinction between evidence rules and decision rules provides a principled basis for answering long-standing questions concerning the relationship between different "clear" text doctrines—in particular, the order in which such doctrines should be applied.[24] As this Article explains, because decision rules help manage uncertainty that remains *after* the search for statutory meaning, it will almost always make sense for courts to apply any relevant evidence rule (e.g., the conditional admissibility of legislative history or *Skidmore*) *before* determining whether a statute is or is not "clear" for purposes of some decision rule (e.g., the rule of lenity or *Chevron*).[25] So understood, perhaps the most important implication for administrative law of drawing the distinction between evidence rules and decision rules is that doing so necessitates a rethinking of the relationship between the *Skidmore* and *Chevron* doctrines as complements rather than alternatives. In other words, *Skidmore* cannot coherently be thought of as a fallback option should *Chevron* cease to be treated as law, as is widely assumed.[26]

By itself, attending to the distinction between evidence rules and decision rules does not resolve the question of *how* clear a text has to be for purposes of various doctrines, or, as Justice Gorsuch put it, "How much ambiguity is enough?"[27] Implicit in Justice Gorsuch's question is an increasingly pervasive objection that all "clear" text doctrines are

[24] See Abbe R. Gluck, Justice Scalia's Unfinished Business in Statutory Interpretation: Where Textualism's Formalism Gave Up, 92 Notre Dame L. Rev. 2053, 2063 (2017) ("It remains unanswered whether a policy canon is still relevant if legislative history alone would clarify statutory language."); James J. Brudney, Canon Shortfalls and the Virtues of Political Branch Interpretive Assets, 98 Calif. L. Rev. 1199, 1202 (2010) (worrying that the "lack of an intelligible framework for ordering the canons renders them distinctly more susceptible to judicial manipulation than other interpretive resources").

[25] See infra Sections III.C–D (discussing interactions between the rules articulated in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), and *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944)).

[26] See, e.g., Buffington v. McDonough, 143 S. Ct. 14, 22 (2022) (Gorsuch, J., dissenting from denial of certiorari) (arguing that "the aggressive reading of *Chevron* has more or less fallen into desuetude" and "the whole project deserves a tombstone no one can miss"); James Romoser, In an Opinion that Shuns *Chevron*, The Court Rejects a Medicare Cut for Hospital Drugs, SCOTUSblog (Jun. 15, 2022, 2:24 PM), https://www.scotusblog.com/2022/06/in-an-opinion-that-shuns-chevron-the-court-rejects-a-medicare-cut-for-hospital-drugs/ [https://perma.cc/XLW3-JYHR] (observing that "there might not be five votes to scrap *Chevron* officially, but the court could tacitly stop deploying it"). But see Nathan Richardson, Deference is Dead (Long Live *Chevron*), 73 Rutgers U. L. Rev. 441, 516–23 (2021) (arguing that *Chevron* is unlikely to be formally overturned).

[27] Transcript of Oral Argument at 71–72, Am. Hosp. Ass'n v. Becerra, 142 S. Ct. 1896 (2022) (No. 20-1114).

troubling insofar as there is no consensus among judges as to *how* clear a statutory text has to be to count as "clear."[28] Beyond that, many fear that because it is easy for judges to exaggerate or understate—whether consciously or unconsciously—how clear a text is, such doctrines facilitate results-oriented decision-making and thus undermine public confidence in an impartial judiciary.[29] If "clarity" judgments are mere reflections of partisan attitudes, these critics suggest, adherence to "clear" text doctrines undermines the rule of law.

As this Article explains, the lack of a universal "clarity" standard should be both unsurprising and un-concerning.[30] To say that a statutory text is "clear" is, in effect, to say that it is clear *enough* for present purposes. And since purposes vary from case to case—and, in particular, from doctrine to doctrine—so too, one should expect, does the degree of clarity required.[31] Relatedly, if judges disagree about how clear a text

[28] See Meredith A. Holland, Note, The Ambiguous Ambiguity Inquiry: Seeking to Clarify Judicial Determinations of Clarity Versus Ambiguity in Statutory Interpretation, 93 Notre Dame L. Rev. 1371, 1372 (2018) ("[T]here is no established method governing the judge's threshold determination of ambiguity versus clarity. In fact, there is no consistent definition of ambiguity."); Frank H. Easterbrook, The Absence of Method in Statutory Interpretation, 84 U. Chi. L. Rev. 81, 90 (2017) ("[T]he Justices do not agree on what 'ambiguity' means for purposes of the rule [of lenity]."); Jeffrey A. Pojanowski, Without Deference, 81 Mo. L. Rev. 1075, 1082 (2016) (noting "lurking questions about how hard courts ought to work before deciding whether a statute is clear"); Kavanaugh, supra note 13, at 2138 ("The simple and troubling truth is that no definitive guide exists for determining whether statutory language is clear or ambiguous."); Antonin Scalia, Judicial Deference to Administrative Interpretations of Law, 1989 Duke L.J. 511, 520 ("Here, of course, is the chink in *Chevron*'s armor—the ambiguity that prevents it from being an absolutely clear guide to future judicial decisions (though still a better one than what it supplanted). How clear is clear?").

[29] See Kavanaugh, supra note 13, at 2138–39; Dan T. Coenen, The Rehnquist Court, Structural Due Process, and Semisubstantive Constitutional Review, 75 S. Cal. L. Rev. 1281, 1304 (2002) ("On other occasions, however, the Justices may reveal substantive policy preferences not in formulating rules, but in applying them."); Easterbrook, supra note 14, at 62 ("[C]ourt[s] may choose when to declare the language of the statute 'ambiguous.'"); see also Solan, supra note 10, at 859 ("The problem, perhaps ironically, is that the concept of *ambiguity* is itself perniciously ambiguous. People do not always use the term in the same way, and the differences often appear to go unnoticed."); William N. Eskridge, Jr. & Philip P. Frickey, Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking, 45 Vand. L. Rev. 593, 597–98 (1992) (suggesting that variation in the degree of clarity required reflects "the Court's view of what is an important constitutional value," as well as "the relative importance of different constitutional values").

[30] See infra Section II.A.

[31] As with "intention," this Article takes no position on how best to conceive of or identify a legal doctrine's underlying "purpose(s)." See, e.g., Cass R. Sunstein & Adrian Vermeule, The Morality of Administrative Law, 131 Harv. L. Rev. 1924, 1944–47 (2018) (discussing *Chevron* in light of administrative law's "internal morality").

must be in some specific case, that is, at least very often, just a legal dispute about the purposes of the applicable doctrine.

On results-oriented decision-making, this Article argues that what critics have identified is, for the most part, the familiar and entirely general worry that, in close cases, judges can mischaracterize the law without serious reputational harm.[32] While it is true that a judge can with a straight face (and, perhaps, a clean conscience) insist that a very likely reading of a statute is "clearly" correct (or vice versa), it is equally easy for a judge to declare a reading that is somewhat unlikely to be "more likely than not." As such, by increasing the probability threshold a reading must satisfy for a court to enforce it from the typical "more likely than not" to the more demanding "clear," "clarity" doctrines do nothing to increase opportunity for judicial willfulness or motivated reasoning. What they do instead is merely shift the site of plausible argumentation.

This Article has three Parts. Part I distinguishes between two types of "clear" text doctrines, evidence rules and decision rules, identifying concerns specific to each. Part II considers common objections to "clear" text doctrines generally, explaining why those objections are either misguided or generic. Part III shows this Article's proposed framework in action, assessing various familiar "clear" text doctrines, with some passing the assessment and some not.

I. "CLEAR" TEXT DOCTRINES

It is a platitude that courts may not deviate from "clear" statutory text. What exactly this platitude entails is a matter of some confusion. As this Part explains, a host of doctrines within statutory interpretation are fashioned as complements to the consensus position that "when the intent of Congress is clear from the statutory text, that is the end of the matter."[33] Each of these doctrines permits a court to attend to something other than statutory text, but only if the text in question leaves the intent of Congress unknown.[34]

Despite their apparent similarity, these various "clear" text doctrines come in two importantly different varieties—varieties that reflect a basic

[32] See infra Section II.B.

[33] Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ., 550 U.S. 81, 105 (2007) (Stevens, J., concurring) (internal quotation marks and alterations omitted) (quoting Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842 (1984)).

[34] Again, however congressional "intent" is best conceived. See supra note 19 and accompanying text.

ambiguity in courts' insistence upon the importance of "clear" statutory text.

As this Part explains, the first variety of "clear" text doctrines (evidence rules) lets courts consider various sources of statutory meaning only if considering the statutory text in isolation leaves a statute's meaning uncertain. Such evidence rules are peculiar, epistemically speaking. Ordinarily, sources of evidence are either helpful to consider or not. Harder to see is why the helpfulness of considering one source (e.g., legislative history) might turn upon the probative value of some other (e.g., statutory text). As this Part goes on to show, there are unusual circumstances in which this sort of conditional admissibility of evidence does make sense—for instance, if evidence is probative but, for reasons of psychological bias, one is disposed to overweight it. Less clear, though, is whether familiar evidence rules like the plain meaning rule are appropriately limited to those unusual circumstances.

As this Part continues, the second variety of "clear" text doctrines (decision rules) instructs courts to decide statutory cases on grounds *other than* statutory meaning if, after considering all available sources, what a statute means remains unclear. These decision rules are, in contrast to evidence rules, epistemically straightforward. A familiar approach to reasoning under conditions of uncertainty is to err in some direction on the rationale of "playing it safe." An assumption underlying this approach, of course, is that one type of mistake is much worse to make than the other, either individually or in the aggregate. When it comes to familiar decision rules like the canon of constitutional avoidance, the question is thus whether the cost assignments underlying those doctrines are accurate. Is it really much worse, for example, to misread a statute and declare it unconstitutional than it is to misread and then enforce it?

A. Evidence Rules

Sometimes when a court says that statutory text is "clear," what it means is that the meaning of a statute can be discerned by attending to its text exclusively. In *Milner v. Department of the Navy*, for example, the question was whether a Freedom of Information Act ("FOIA") exemption for material "related solely to the internal personnel rules and practices of an agency" included data and maps pertaining to the storage of explosives

at a naval base.[35] The Court held that it did not.[36] As Justice Kagan explained, the exemption's limitation to "personnel" matters plainly excluded maps and data unrelated to "employee relations [or] human resources."[37] Responding to the suggestion that a House Report concerning FOIA supported the opposite conclusion, she remarked that while legislative history may help "illuminate ambiguous text," it may *not* be appealed to for the purpose of "muddy[ing] clear statutory language."[38] In calling the language of the exemption "clear," Justice Kagan was thus indicating that there was no need to consider extratextual evidence—in this case, legislative history—to figure out what that exemption means.

One way to understand the platitude that courts must adhere to "clear" statutory text is, then, as an instruction to courts to prioritize textual evidence of statutory meaning over other, extratextual evidence. So understood, this platitude expresses what is sometimes referred to as the "plain meaning" rule.[39] The plain meaning rule is, in reality, a cluster of specific rules, each of which relates to some extratextual source of statutory meaning—legislative history,[40] institutional practice,[41] statutory titles,[42] etc. Each specific rule permits a court to consider the source at issue, but only if the available textual evidence leaves statutory meaning uncertain. In this way, the plain meaning rule imposes *lexical ordering* on a court's investigation into statutory meaning: start with the statutory text and proceed to other sources only if absolutely necessary.[43]

[35] 562 U.S. 562, 564–65 (2011) (quoting 5 U.S.C. § 552(b)(2) (2006)).

[36] Id. at 565.

[37] Id. at 564, 581.

[38] Id. at 572–73; see also id. at 574 ("Legislative history, for those who take it into account, is meant to clear up ambiguity, not create it.").

[39] Baude & Doerfler, supra note 11, at 541 ("The plain meaning rule says that otherwise-relevant information about statutory meaning is forbidden when the statutory text is plain or unambiguous.").

[40] United States v. Woods, 571 U.S. 31, 46 n.5 (2013) ("Whether or not legislative history is ever relevant, it need not be consulted when, as here, the statutory text is unambiguous.").

[41] *Milner*, 562 U.S. at 575–76 (reasoning that "clear statutory language" would trump even "30 years" of contrary practice by lower courts); United States v. Ron Pair Enters., Inc., 489 U.S. 235, 245 (1989) (reasoning that "pre-Code practice" is relevant only if statutory text is less than clear).

[42] Bhd. of R.R. Trainmen v. Balt. & Ohio R.R. Co., 331 U.S. 519, 528–29 (1947) (recognizing "the wise rule that the title of a statute and the heading of a section cannot limit the plain meaning of the text").

[43] See Samaha, supra note 11, at 162 (explaining lexical ordering); see also Adam M. Samaha, On Law's Tiebreakers, 77 U. Chi. L. Rev. 1661, 1708 (2010) (exploring the use of lexically inferior decision rules as legal "tiebreakers").

This "start with the text" approach to statutory interpretation might seem like a sensible intermediate position between strict textualism and some form of all-things-considered eclecticism or pragmatism. Upon reflection, though, the lexical ordering of interpretive sources gives rise to a puzzle.[44] Ordinarily, information is either helpful to an investigation or not. For that reason, policies of *categorical* inclusion or exclusion of specific types of information are easy to understand and, unsurprisingly, familiar features of our legal landscape. To illustrate, in the eyes of Congress, cost is a relevant consideration when assessing whether to regulate emissions from stationary sources like power plants or factories. The Environmental Protection Agency is thus required to at least consider cost when deciding whether to regulate such sources, even when the noneconomic concerns are overwhelming.[45] By contrast, cost is, in Congress's view, irrelevant when evaluating threshold nuclear safety measures. Hence, the Nuclear Regulatory Commission may not consider cost when determining what is "adequate protection to the health and safety of the public."[46]

More difficult to understand are policies of *conditional* inclusion or exclusion of certain information. For example, if legislative history is evidence of statutory meaning, why not consider it in all statutory cases? Even if textual evidence points strongly in one direction, what is the harm in at least looking at that extratextual source? Alternatively, if legislative history is irrelevant or misleading for purposes of interpretation, why consider it ever? Even if textual evidence is largely unhelpful in some cases, considering an irrelevant or misleading source can only make things worse.

As it turns out, there are at least a couple of potential answers to the rhetorical questions above.[47] If certain information is especially costly to consider, for example, it would make sense, assuming limited resources, to start by considering cheaper information.[48] If one can rule out a restaurant based on the menu, there is no reason to try it in person.[49] Somewhat differently, if information is probative but, for reasons of

[44] This puzzle is articulated more fully in Baude & Doerfler, supra note 11, at 546–49.

[45] See Michigan v. EPA, 576 U.S. 743, 751–53 (2015).

[46] 42 U.S.C. § 2232(a); Union of Concerned Scientists v. U.S. Nuclear Regul. Comm'n, 824 F.2d 108, 114 (D.C. Cir. 1987) (holding that "[t]he Commission must determine, regardless of costs, the precautionary measures necessary to provide adequate protection to the public").

[47] See Baude & Doerfler, supra note 11, at 549–65 (surveying possible answers).

[48] Id. at 549.

[49] A vegan, for example, deciding against a steakhouse.

psychological bias, one is disposed to overweight it, one might be justified in turning to that information only if non-biasing information leaves one uncertain.[50] Job talks by aspiring academics, for instance, may do more harm than good if the paper record is clear. Such talks may at the same time prove helpful if, after considering written materials, the faculty finds itself on the fence.

These sorts of special considerations may or may not support the assorted evidence rules that make up the plain meaning rule. Legislative history is conceivably too expensive to consider as a matter of course. But statutory titles? Hardly so. Beyond that, lexically ordering sources of statutory meaning introduces opportunity for willfulness or motivated reasoning that may swamp any would-be efficiency gains. This objection is considered more fully below.[51] Very briefly, though, it is not hard to see how a willful or motivated judge might exaggerate how clear textual evidence makes things, thereby excluding from consideration other, less convenient evidence. Importantly, the costs of exaggeration and understatement of textual clarity are asymmetrical with such "plain meaning" doctrines insofar as understatement results only in marginal under-weighting of textual evidence, whereas overstatement results in the total exclusion of non-textual evidence.

B. Decision Rules

Other times, in calling statutory language "clear," what a court means is that statutory meaning is apparent based upon whichever source(s) the court is willing to consider. Within the *Chevron* framework, courts defer to the policy judgment of an administering agency unless "Congress has spoken unambiguously" on the issue.[52] To see whether Congress has made itself sufficiently clear, courts employ the "traditional tools of statutory construction," which include, most obviously, attention to statutory text, but also consideration of, for example, linguistic canons,[53]

[50] Baude & Doerfler, supra note 11, at 552.

[51] See infra Section II.B.

[52] City of Arlington v. FCC, 569 U.S. 290, 310 (2013) (Breyer, J., concurring in part and concurring in the judgment); Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984).

[53] See Nat'l Credit Union Admin. v. First Nat'l Bank & Tr. Co., 522 U.S. 479, 500, 502 (1998).

practical consequences,[54] and, for those who consider it at all, legislative history.[55] Hence, as Justice Scalia explained, "[a] statutory provision that may seem ambiguous in isolation is often clarified" as additional information gets folded in.[56]

The other way to hear the platitude that courts must adhere to "clear" text is, accordingly, as forbidding courts from substituting, say, more desirable policy for identifiable statutory meaning. Interpreted this way, the platitude is a complement to numerous legal doctrines that purport not to aid in the search for statutory meaning, but instead to help courts decide cases when statutory meaning remains opaque. Again, *Chevron* is the most straightforward example. Within that framework, courts defer to an administering agency only if a statute is "silent" or "ambiguous" on the question at issue.[57] Even more explicitly, courts say that filling such a statutory "gap" requires a "policy choice[]" on the part of the administering agency.[58] Taken together, such remarks suggest that *Chevron* deference has nothing to do with identifying statutory meaning.[59] Rather, it is only if statutory meaning cannot be identified—again, after employing *all* the traditional tools—that deferring to an administering agency is called for.

Unlike the evidence rules discussed above, doctrines like *Chevron* are, in terms of structure, epistemically straightforward. Because an administering agency is not an authority on what a statute means, it makes sense for a court not to defer to that agency when investigating statutory meaning.[60] But sometimes investigations into statutory meaning come up

[54] See Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 321–22 (2014) (rejecting an agency reading based partly on the "calamitous consequences of interpreting the Act in that way").

[55] See *Chevron*, 467 U.S. at 845 ("If this choice represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute, we should not disturb it unless it appears from the statute *or its legislative history* that the accommodation is not one that Congress would have sanctioned." (emphasis added) (quoting United States v. Shimer, 367 U.S. 374, 383 (1961))).

[56] *Util. Air*, 573 U.S. at 321 (internal quotation marks omitted) (quoting United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., 484 U.S. 365, 371 (1988)).

[57] *Chevron*, 467 U.S. at 843.

[58] Id. at 866.

[59] In this respect, the *Chevron* framework differs interestingly from the earlier approach to agency deference articulated in *Skidmore v. Swift*. See infra Section III.D.

[60] At least, not a *legal* authority. Cf. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is."); Henry P. Monaghan, *Marbury* and the Administrative State, 83 Colum. L. Rev. 1, 27 (1983) ("To be sure, the court must interpret the statute; it must decide what has been committed to

empty, or at least leave courts less than certain. What to do then? One approach is for a court to give its "best guess," enforcing the reading of the statute it thinks is most likely correct. That is what courts do in run-of-the-mill statutory cases—and, really, all that they can do when there is no other legal basis for deciding the case.[61]

Another approach, though, is for a court to err in a certain direction, enforcing a reading that is, for some reason, *safer*, even if it is less likely correct than some other. The idea of "playing it safe" is familiar from everyday life.[62] Suppose, for example, that leaving for the airport at 8:30 a.m. would only "probably" allow one to make one's flight. Barring unusual circumstances, one would opt in that situation to leave a bit earlier, reasoning that it is better to wait around at the gate than to be left there. The same reasoning might easily apply in a statutory case. If reading *A* is only "probably" correct, and erroneously enforcing reading *B* (also plausible, let's assume) would be much less costly than erroneously enforcing reading *A*, enforcing reading *B* might constitute the safer course of action, even though reading *A* is more likely correct.

As with any other type of decision, the reason(s) why erroneously enforcing one reading of a statute would be less costly than erroneously enforcing some other might vary significantly. Most straightforwardly, misinterpreting a statute one way might yield immediate consequences that are much worse than those that would result from the opposite type of mistake.[63] Alternatively, one type of mistake might be less costly to correct.[64] Moving beyond individual decisions, erring in a particular direction might be less costly *on average* or *in the aggregate*, in which

the agency."). An administering agency may, nonetheless, be an *epistemic* authority on the issue. See infra notes 293–306 and accompanying text.

[61] Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 984 (2005) (contrasting cases in which a court decides a case based upon the "best reading" of a statute with those in which a court a court determines there is only one "permissible reading").

[62] See Ryan D. Doerfler, High-Stakes Interpretation, 116 Mich. L. Rev. 523, 549–51 (2018).

[63] In addition, the types of consequences at issue might vary, ranging from concrete harms to individuals (e.g., erroneously imposed fines or imprisonment) to abstract harms to institutions (e.g., a loss of legitimacy).

[64] Here, an everyday analogy would be something like deciding whether to send an email/text late at night. Come morning, one type of mistake is ordinarily much easier to correct than the other.

case courts would reduce costs by erring that way in the relevant class of cases.[65]

Numerous legal doctrines instruct courts to err in some direction when deciding a certain type of statutory case absent "clear" statutory meaning. The premise of these doctrines seems to be that erring in the specified direction amounts to "playing it safe" in those cases. Again, within the *Chevron* framework, courts defer to an administering agency's policy judgment unless the statute at issue is "clear." This means that in some situations, a court will defer to an agency even though it thinks that some other reading is more likely to be correct as a matter of interpretation.[66] Implicit in that decision rule, then, is that it is safer to err in the direction of an agency's policy judgment if statutory meaning is uncertain. In other words, it is better to leave in place an agency policy (or agency polic*ies*[67]) Congress has precluded than it is to displace one that it has not.[68]

One may or may not agree with *Chevron*'s underlying substantive assessment.[69] With any decision rule, there is always the question whether the doctrine manages uncertainty wisely. To use another example, the canon of constitutional avoidance seems to presuppose that misreading and then *enforcing* a statute is much better than misreading and then *declining* to enforce it.[70] If one rejects that presupposition—and some do—one probably thinks that the canon of constitutional avoidance ought to go.[71] Whatever one thinks of any of these doctrines in terms of

[65] See, e.g., Adrian Vermeule, Judging Under Uncertainty: An Institutional Theory of Legal Interpretation 5 (2006) (arguing that "judges should interpret legal texts in accordance with rules whose observance produces the best consequences *overall*" (emphasis added)).

[66] See *Brand X*, 545 U.S. at 980 (holding that courts must enforce an agency's reading "even if the agency's reading differs from what the court believes is the best statutory interpretation").

[67] Again, the benefits of adhering to a decision rule may accrue in the aggregate, as opposed to in each individual case. See supra note 65 and accompanying text.

[68] By characterizing it as a decision rule for situations in which statutory meaning is not "known," the account here renders *Chevron* more obviously compatible with formalist modes of interpretation. See Jeffrey A. Pojanowski, Neoclassical Administrative Law, 133 Harv. L. Rev. 852, 896 (2020) ("There will be questions in which arguments from statutory text, structure, canons, purpose, history, and the like point to more than one reasonable answer. The [formalist], however, would maintain that choosing which one is stronger is more a question of lawyerly judgment than first-order policy preferences."); see also Thomas W. Merrill, Textualism and the Future of the *Chevron* Doctrine, 72 Wash. U. L.Q. 351, 372–73 (1994) (noting a possible tension between textualism and *Chevron*, owed in part to the "creative" intellectual style encouraged by that methodology).

[69] See infra Section III.D.

[70] See infra Section III.A.

[71] Or at least be adjusted. See infra Section III.A.

substance, however, the point here is just that decision rules are, in contrast to evidence rules, unpuzzling in terms of form. With each such doctrine, the idea is, again, that erring in some direction constitutes "playing it safe." That approach to reasoning under conditions of uncertainty is both familiar and straightforward.

* * *

As Justice Kagan remarked, federal judges in the United States are "all textualists now."[72] But what does that mean, exactly? It is part of our law of statutory interpretation that judges may not deviate from "clear" statutory text. As this Part has explained, however, this exaltation of "clear" text is (ironically) ambiguous. Perhaps non-coincidentally, this ambiguity corresponds to a theoretical disagreement about what makes a method of statutory interpretation "textualist" in the first place.

Understood one way, textualism is mainly a view about the legitimate sources of statutory meaning.[73] Textualist judges are, on this picture, ones who attend in statutory cases to "semantic" sources like statutory language, dictionaries, and linguistic canons, and who ignore or de-emphasize "policy" sources like, most famously, legislative history.[74] Corresponding to this picture of textualism, the various evidence rules discussed in Section I.A instruct courts to prioritize "semantic" sources over "policy" sources through lexical ordering, barring consideration of "policy" sources if consideration of "semantic" sources yields a clear answer.

Understood another way, however, textualism has less to do with legitimate sources of statutory meaning and more to do with legitimate sources of *law*.[75] On this picture, textualist judges treat what statutory

[72] Harvard Law School, The 2015 Scalia Lecture | A Dialogue with Justice Elena Kagan on the Reading of Statutes, YouTube, at 8:28 (Nov. 17, 2015), https://www.youtube.com/watch?v=dpEtszFT0Tg [https://perma.cc/Z6M8-NW2C].

[73] See, e.g., John F. Manning, Second-Generation Textualism, 98 Calif. L. Rev. 1287, 1288 (2010) ("Textualism maintains that judges should seek statutory meaning in the semantic import of the enacted text and, in so doing, should reject the longstanding practice of using unenacted legislative history as authoritative evidence of legislative intent or purpose.").

[74] John F. Manning, What Divides Textualists from Purposivists?, 106 Colum. L. Rev. 70, 94–95 (2006) ("In short, textualists give precedence to contextual evidence concerning likely semantic usage while purposivists do the same with contextual cues that reflect policy considerations.").

[75] See Ryan D. Doerfler, The Scrivener's Error, 110 Nw. U. L. Rev. 811, 828 (2016) ("As textualists have long argued, the best (and perhaps only) way for Congress to identify specific [legislative] mean[ing]s is for it to use specific words."); John F. Manning, The New

language communicates (or maybe better, seems to communicate[76]) as a statute's presumptive contribution to the law.[77] In turn, such judges refuse to deviate from what Congress "said" to advance some apparent, more general policy aim.[78] Corresponding to this picture, the different decision rules considered in Section I.B require courts to prioritize statutory meaning over other potential sources of law. These doctrines permit courts to turn to supplementary, non-linguistic sources of law, but only if the primary source of law, statutory meaning, is uncertain.

These two ways of thinking about textualism are compatible but logically distinct. One could, for example, accept that what a statute says is the law, but also that "policy" sources are just as important as "semantic" ones when figuring out what it is that a statute says.[79] Analogously, while one might incline toward both decision rules, like *Chevron*, and evidence rules, like the conditional admissibility of legislative history, one could easily, depending in part upon one's theoretical inclinations, go in for only one.

A follow-on question[80] is whether it even makes sense to look at statutory meaning through an epistemic lens if one believes, pursuant to the second way of thinking about textualism, that statutory text "is not evidence of the law," but instead "*is* the law."[81] The discussion of

Purposivism, 2011 Sup. Ct. Rev. 113, 116 ("If interpreters treat the statutory text as simply a proxy for the law's ulterior purpose, they deny legislators the capacity, through their choice of words, to distinguish those statutes meant to embody specific policy choices from those meant to leave policy discretion to the law's implementers."); see also Frederick Schauer, Law's Boundaries, 130 Harv. L. Rev. 2434, 2435–36 (2017) ("Law is a source-based enterprise, and understanding its nature accordingly requires understanding which sources constitute the law and which do not.").

[76] See infra note 83 and accompanying text.

[77] See Hrafn Asgeirsson, Can Legal Practice Adjudicate Between Theories of Vagueness?, *in* Vagueness and Law: Philosophical and Legal Perspectives 95, 103–04 (Geert Keil & Ralf Poscher eds., 2016) (arguing that the communicative content of a statute is coextensive with its legal content absent some "rebutting" or "undercutting" source of law); Mark Greenberg, The Standard Picture and Its Discontents, *in* 1 Oxford Studies in Philosophy of Law 39, 40–42 (Leslie Green & Brian Leiter eds., 2011) (calling the position according to which a statute's legal content is identical to its communicative content the "standard picture," articulating forceful objections against that position).

[78] Dewsnup v. Timm, 502 U.S. 410, 420 (1992) (Scalia, J., dissenting) ("In holding otherwise, the Court replaces what Congress said with what it thinks Congress ought to have said . . . ."); see also Doerfler, supra note 75, at 823–34.

[79] See, e.g., Ryan D. Doerfler, Who Cares How Congress Really Works?, 66 Duke L.J. 979, 995–98 (2017).

[80] Thanks to Dick Fallon for pressing me on this point.

[81] Easterbrook, supra note 28, at 82.

uncertainty management in Part I.B, for example, seems to presuppose that a judge could be unsure what a statute means at the end of her search for statutory meaning. But how could that be if, as "text-*is*-the-law" textualists insist, a statutory text means whatever a reasonably informed interpreter would *think* that it means?[82] Put differently, if a statute is less than "clear" on this story, isn't that just to say that that statute *has no* meaning for purposes of the case at issue? Or, said another way, isn't it saying that the statute's meaning is under-determined? Setting aside difficult philosophical questions about the nature of under-determinacy,[83] one response is to observe that taking an ordinary epistemological approach to truths that are "whatever we think they are" is familiar from everyday life. When one reads a work of crime fiction, for instance, one forms various hypotheses about the identity of the perpetrator, assigning probabilities to each. Sometimes, however, the novel ends without the identity of the perpetrator being revealed. In that situation, questions like "Who was the killer?" plausibly admit of no determinate answer. And yet, awareness of that possibility (or, for that matter, its realization[84]) does nothing to prevent the reader from thinking about such questions in much the same way as she would if she were reading about some actual crime.

Building on that analogy, one way to understand "text-*is*-the-law" textualism is as providing a solution to the familiar problem of attributing communicative intentions to Congress despite Congress's being a "they," not an "it."[85] The solution this form of textualism provides is to have judges act *as if* legislation had a unitary author, attributing to that legislation whatever communicative intentions one would attribute to its

[82] See, e.g., John F. Manning, The Absurdity Doctrine, 116 Harv. L. Rev. 2387, 2392–93 (2003) (stating that modern textualists "ask how a reasonable person, conversant with the relevant social and linguistic conventions, would read the text in context"); Antonin Scalia, Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws, *in* A Matter of Interpretation: Federal Courts and the Law 3, 17 (Amy Gutmann ed., 1997) (explaining that textualists appeal to "a sort of 'objectified' intent—the intent that a reasonable person would gather from the text of the law, placed alongside the remainder of the corpus juris" (emphasis omitted)).

[83] See S.G. Williams, Indeterminacy and the Rule of Law, 24 Oxford J. Legal Stud. 539, 545–54 (2004) (reviewing Timothy A.O. Endicott, Vagueness in Law (2000)) (surveying metaphysical and epistemological accounts of indeterminacy).

[84] See, e.g., Martha P. Nochimson, Did Tony Die at the End of The Sopranos?, Vox (Aug. 27, 2014, 10:30 PM), https://www.vox.com/2014/8/27/6006139/did-tony-die-at-the-end-of-the-sopranos/ [https://perma.cc/JD82-VNPN].

[85] Kenneth A. Shepsle, Congress Is a "They," Not an "It": Legislative Intent as Oxymoron, 12 Int'l Rev. L. & Econ. 239 (1992); see also Doerfler, supra note 79, at 998–1020 (criticizing more recent attempts to analogize Congress to a corporation).

author as such.[86] On this approach, reading statutory text is thus akin to reading a work of fiction, with the fiction being that Congress is an "it," not a "they."[87] As with any other work of fiction, the reader naturally forms hypotheses about the work, assigns to them different probabilities, etc. And, happily, none of this is impaired by the fact the "story," so to speak, is sometimes cut short.[88]

II. CATEGORICAL OBJECTIONS

As Part I explains, different "clear" text doctrines do very different things. For that reason, it would be surprising if it were possible to assess them as a lot.

A growing number of jurists and scholars are attempting nonetheless to do just that, arguing, roughly, that "clear" text doctrines are generally suspect because they are so hard to administer.[89] More specifically, these critics complain that such doctrines produce unpredictable outcomes both because there is no consensus as to what they require and because there is no way to establish whether that requirement (whatever it is) has been met.

This Part addresses each of these complaints in turn. First, it argues that the expectation of a universal "clarity" standard is misguided. As philosophers have shown, the degree of epistemic confidence or justification required to call something "clear" varies from context to context. More specifically, as the practical stakes of a situation increase or decrease, so too does the requisite confidence or justification. Building upon this insight, this Part reasons that one should expect that how clear a statutory text must be to count as "clear" will vary from case to case, and, in particular, from doctrine to doctrine. Because different "clear" text doctrines serve different purposes, what it takes to satisfy them should be expected to differ as well. Relative to some doctrines, calling a text

[86] Doerfler, supra note 79, at 1024.

[87] Id. at 1022–31 (articulating a "fictionalist" account of congressional intent).

[88] In part, this is plausibly owed to the fact that one can always devote further cognitive resources to answering a question. Especially when the pertinent evidence is varied and complex, it will often seem possible that, with additional consideration, a "clear" answer might reveal itself. Further reflection might, in other words, render coherent a body of evidence that previously seemed conflicting or confusing.

[89] Kavanaugh, supra note 13, at 2121; see also Easterbrook, supra note 14, at 62 (expressing concern that "[t]here is no metric for clarity").

"clear" is, legally speaking, simply not a big deal. Relative to others, however, it really is.

Second, this Part urges that it is no easier to establish that a text is or is not "clear" than it is to show that, for example, one reading of a text is "better" than another. As various critics rightly observe, in some cases it does seem that what best explains a court's declaration that a statute is "clear" (or not) is the court's policy preference and not the law. Be that as it may, the same is surely true in some cases in which a court says that one reading is "better" than another. As this Part suggests, then, the worry that "clear" text doctrines are vulnerable to willfulness or motivated reasoning is just an instance of the more general worry that, in close cases, judges can and do (consciously or unconsciously) mischaracterize the law without serious reputational harm. "Clear" text doctrines are, in other words, indeed vulnerable to judicial willfulness or motivated reasoning. That fails to distinguish them, however, from any other statutory interpretation doctrine.

A. No Consensus On What Is Required

The first and most popular concern with "clear" text doctrines in general is that there is no consensus on how clear a statutory text must be to count as "clear" for doctrinal purposes.[90] "If the statute is 60-40 in one direction, is that enough to call it clear? How about 80-20? Who knows?"[91]

The basic question "How clear is clear?" is a reasonable one.[92] If judges are supposed to base decisions upon whether a text is "clear," they need to know what "clarity" requires. More still, it does seem right to suggest

[90] See, e.g., Easterbrook, supra note 28, at 90; see also Brian G. Slocum, The Importance of Being Ambiguous: Substantive Canons, Stare Decisis, and the Central Role of Ambiguity Determinations in the Administrative State, 69 Md. L. Rev. 791, 807 (2010) ("There is no consensus regarding [the *Chevron*] standard . . . ."); Note, "How Clear Is Clear" in *Chevron*'s Step One?, 118 Harv. L. Rev. 1687, 1691 (2005) (stating that when applying *Chevron*, "clarity or ambiguity is the test, and courts have not been consistent in the level of clarity that they require" (internal quotation marks and alteration omitted) (quoting Peter L. Strauss, Todd D. Rakoff & Cynthia R. Farina, Gellhorn and Byse's Administrative Law 1033 (rev. 10th ed. 2003))).

[91] Kavanaugh, supra note 13, at 2137. Justice Scalia also appears to have believed that the threshold for textual "clarity" was constant across cases. See Scalia, supra note 28, at 520–21 (analogizing *Chevron* to the plain meaning rule). For a contrasting view, see Note, supra note 90, at 1688 (arguing that "the question 'How clear is clear?' should have a different answer depending upon the circumstances").

[92] See Scalia, supra note 28, at 520–21.

that textual clarity has something to do with epistemic confidence or justification: At a minimum, a statute cannot be "clear" if the two candidate readings are equally likely. Before assessing whether 60-40 is "enough," though, it helps to step back and look at how speakers use epistemic terms like "clear" more generally.

As philosophers have observed, people's willingness to use certain epistemic terms varies according to the practical stakes. More specifically, as the practical stakes of a situation increase or decrease, speakers become more willing or less willing to deploy terms like "know" or "clear," holding constant the level of epistemic confidence or justification.[93] The easiest illustration of this linguistic phenomenon are pairs of intuitive, everyday examples involving varying practical circumstances. For instance:

> *Low Stakes*: Two students are several spots down the waitlist for a seminar and attending the first session is mandatory. As they approach the seminar room, they see a line of eager students out the door. Taking this seminar is not especially important to either. Although the meeting time is fairly convenient, the topic does not interest either that much. Looking at the line, one student suggests to the other, "Let's go for food instead." The other student responds, "Are you sure? The class time is really good for my schedule." The first student replies, "Just look at the line. It's clear that we're not going to get in anyway."
>
> *High Stakes*: Two waitlisted students are approaching the seminar room, as in *Low Stakes*, and notice the line out the door. Again, one student suggests to the other going out for food, reasoning that neither will make it off the waitlist. In this case, however, getting into the seminar is very important to both. The topic is in an area in which they would both like to work, and the professor is incredibly important and influential. The other student reminds the first of these facts, and then says, "Sometimes people drop. Is it really clear that we won't get in?"

[93] See generally Keith DeRose, The Case for Contextualism: Knowledge, Skepticism, and Context, Vol. 1 (2009) (arguing that the applicability of epistemic terms is sensitive to the practical stakes of the situation); Jason Stanley, Knowledge and Practical Interests (2005) (similar); Jessica Brown, Contextualism and Warranted Assertibility Manoeuvres, 130 Phil. Stud. 407 (2006) (similar).

> Remaining as confident as she was before that neither will make it off the waitlist, she replies, "Well, no. We'd better go in just to be safe."[94]

What these examples and others like them suggest is that the appropriateness of claiming that something is "clear" can be affected by the practical stakes.[95] In *Low Stakes*, it seems appropriate for the speaker to claim that it is "clear" that neither student will make it off the waitlist based upon apparent enthusiasm. In *High Stakes*, by contrast, it seems appropriate for the speaker to refrain from making such a claim, even though the evidence available to her concerning the chances of making it off the waitlist is the same. What explains the difference? Ostensibly, it is just that, in *High Stakes*, the *practical consequences* of mistakenly acting on the premise that neither would get off the waitlist are much greater.

Technical explanations of the above speech pattern vary.[96] Regardless, what these and other examples bring out is a straightforward connection between epistemic confidence or justification and practical interests. On any of the prevailing technical explanations, it is appropriate to say that something is "clear" only if one has adequate epistemic confidence or justification as to that thing. And, on any of those explanations, what counts as adequate confidence or justification depends upon our practical interests. In low-stakes situations, the truth of the proposition at issue (e.g., that the preferred candidate will win) matters to the conversational participants only a little. What speakers and listeners demand in those situations is just that someone who claims it is "clear" that a certain proposition obtains moderate epistemic confidence or justification concerning that proposition. By contrast, in high-stakes situations, the truth of the proposition in question matters a great deal to the parties involved. For that reason, speakers and listeners demand in those situations that claims of "clarity" have significantly more epistemic support.

By connecting epistemic confidence or justification and practical interests, the way we use terms like "clear" suggests an already intuitive

[94] See Doerfler, supra note 62, at 544 (using similar examples). These examples are modeled on the so-called Bank Case, imagined by Keith DeRose. See Keith DeRose, Contextualism and Knowledge Attributions, 52 Phil. & Phenomenological Rsch. 913, 913 (1992) (demonstrating a similar pattern of usage for "knowledge" and its cognates).

[95] This discussion draws freely from my prior work. See generally Doerfler, supra note 62.

[96] Compare DeRose, supra note 93 (arguing that epistemic terms are context-sensitive in a narrow, semantic sense), with Brown, supra note 93 (arguing that the pattern is best explained by appeal to pragmatic factors).

link between epistemic and practical rationality. To be more precise, it supports the principle that the epistemic confidence or justification required to act on some premise increases or decreases in accordance with the practical stakes.[97] To illustrate, consider again the examples above. In *Low Stakes*, not only is it appropriate for the speaker to *say* that it is "clear" that neither student will get off the waitlist, but also for her to *act* accordingly, walking right past the seminar room. In *High Stakes*, by contrast, the increased cost of acting erroneously on the premise that neither student would get off the waitlist requires that the speaker be more cautious both about what she says and about what she does.

Returning to the law, what this suggests is that adhering to a "65-35 rule" or a "90-10 rule" across cases probably makes little sense. To say that a statutory text is "clear" is, as with anything else, to say that it is clear *enough* for present purposes.[98] And because purposes vary from case to case, it would be surprising for 65-35, 90-10, or any other ratio to be exactly enough epistemic confidence or justification each and every time. Perhaps in a run-of-the-mill statutory case, it would make sense for a court to be satisfied with 65-35 after looking at just the statutory text. But in a major case? It seems like, there, a court really ought to consider additional sources of statutory meaning, even if doing so would be especially costly.[99]

It is worth underlining that the stakes-sensitivity of legal clarity determinations follows from the way we use "clarity" generally. Professor Richard Re, for example, has argued similarly that what legal clarity requires varies from context to context.[100] According to Re, however, this context-to-context variation is a distinctly legal phenomenon.[101] Re

[97] See Doerfler, supra note 62, at 549; see also Gary Lawson, Proving the Law, 86 Nw. U. L. Rev. 859, 879 (1992) (describing this connection as "obvious").

[98] In this respect, "clear" behaves like any other gradable adjective. To say that a basketball player is "tall," for example, communicates one thing (e.g., that she is tall *for a basketball player*), while saying that a gymnast is "tall" communicates something else (e.g., that she is tall *for a gymnast*). See, e.g., Stanley, supra note 93, at 35–37; see also Lawson, supra note 97, at 860 (observing that the question of which standard of proof to impose in a given statutory case "is inescapably normative, depending heavily on the end one seeks to serve through interpretation").

[99] Cf. Frederick Schauer, Statutory Construction and the Coordinating Function of Plain Meaning, 1990 Sup. Ct. Rev. 231, 254 (arguing that "plain meaning," in the sense of ordinary meaning, operates as a low-cost coordinating mechanism for judges in cases that "lack . . . interest").

[100] Re, supra note 16, at 1501.

[101] Id. at 1505–07.

warns, for instance, "[c]ourts and even commentators sometimes . . . conflat[e] legal clarity with linguistic ambiguity," and that "legal clarity," unlike "linguistic clarity," cannot be "assessed solely based on empirical observation."[102] Instead, Re insists, "legal clarity," again, unlike "linguistic clarity," rests ultimately on "normative premises."[103] What Re's contrast between "legal clarity" and "linguistic clarity" misses is that *all* clarity determinations—whether legal, linguistic, or whatever else—involve both non-normative and normative considerations.[104] Again, to say that such and such is "clear" is to say that the thing at issue is clear enough for present purposes. This is true whether one's purposes involve attending a seminar or rendering a legal decision. In either case, the question is whether one has the requisite epistemic confidence or justification to act on the relevant premise. And in either case, the answer to that question will depend on normative considerations, which is to say the practical stakes.

In addition to varying from case to case, stakes can also shift from doctrine to doctrine. Pursuant to the canon of constitutional avoidance, courts famously strain to read statutes in ways that let them avoid answering constitutional questions.[105] As Justice Holmes explained, "declar[ing] an Act of Congress unconstitutional . . . is the gravest and most delicate duty that this Court is called on to perform" and so it is one that demands great caution.[106] Courts will, for that reason, adopt an interpretation they deem less likely correct than some other if doing so will let them avoid calling a statute's constitutionality into question so long as that less likely interpretation is at least "fairly possible," which is to say so long as the constitutionally-concerning interpretation is not "clear[ly]" correct.[107] In practice, "fairly possible" turns out to be an easy threshold to satisfy, and so "clear" an especially difficult one—again,

[102] Id. at 1505, 1507. Here, Re also seems to be making the correct observation that linguistic content only has legal significance insofar as the law makes that so.

[103] See id. at 1505.

[104] See Lawson, supra note 97, at 863, 877 (observing that "[f]rom an epistemological perspective, every positive propositional claim about the law in the form 'the law is X' is a factual claim," and, hence, subject to standards of proof).

[105] See infra notes 171–74 and accompanying text.

[106] Blodgett v. Holden, 275 U.S. 142, 147–48 (1927) (Holmes, J., concurring).

[107] See Miller v. French, 530 U.S. 327, 336 (2000) (quoting Commc'ns Workers of Am. v. Beck, 487 U.S. 735, 762 (1988)).

courts in this area appear closer to 90-10 than 65-35.[108] And given the alleged gravity of invalidation, this should come as no surprise.

Contrast this with the rule of lenity, a facially similar "clear" text doctrine that operates very differently on the ground.[109] Just as the canon of constitutional avoidance tells courts to err in the direction of constitutionality, the rule of lenity says that "where there is ambiguity in a criminal statute, doubts are resolved in favor of the defendant."[110] Despite this similarity, the rule of lenity does almost no work as applied, requiring only that a court adopt a defendant-friendly interpretation "if, after seizing everything from which aid can be derived, [that court] can make *no more than a guess* as to what Congress intended."[111] In ordinary criminal cases, courts thus appear much closer to 65-35 if not 51-49. As Professor Intisar Rabb has argued, one possible explanation for this asymmetry is that courts have lost sight of some of the original constitutional justifications for the rule.[112] Regardless, that courts apply this "clear" statement rule so much more casually suggests that, as a matter of doctrine, the stakes of criminal cases are dramatically lower than those of would-be constitutional ones.[113]

Whether courts should attend to differences in the practical stakes of individual cases is a difficult question.[114] Far less controversial, though, is that courts may recognize differences between classes of cases that are

[108] See infra notes 179–82 and accompanying text.

[109] See, e.g., United States v. Universal C.I.T. Credit Corp., 344 U.S. 218, 221–22 (1952) (Frankfurter, J.) ("But when choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is *clear and definite*." (emphasis added)); United States v. Gradwell, 243 U.S. 476, 485 (1917) ("[B]efore a man can be punished as a criminal under the federal law his case must be '*plainly and unmistakably*' within the provisions of some statute . . . ." (emphasis added) (quoting United States v. Lacher, 134 U.S. 624, 628 (1890))).

[110] United States v. Bass, 404 U.S. 336, 348 (1971); see also Donnelley v. United States, 276 U.S. 505, 511 (1928) (recognizing "the familiar rule that one may not be punished for crime against the United States unless the facts shown *plainly and unmistakably* constitute an offense within the meaning of an Act of Congress" (emphasis added)).

[111] Muscarello v. United States, 524 U.S. 125, 138 (1998) (emphasis added) (internal quotation marks omitted) (quoting United States v. Wells, 519 U.S. 482, 499 (1997)).

[112] See Intisar A. Rabb, The Appellate Rule of Lenity, 131 Harv. L. Rev. F. 179, 193–94, 201–02 (2018) (arguing that the Roberts Court's reluctance to apply the rule of lenity is owed in part to its inattention to the liberty interests that underlie the doctrine).

[113] But see infra Section III.B (considering an alternative explanation).

[114] On the one hand, it seems psychologically implausible to expect courts *not* to attend to such differences. On the other, there does seem to be something unjust about courts treating some cases as more important than others.

encoded in the positive law. As a strictly legal matter, how clear a statute must be to count as "clear" for avoidance purposes is very different from what clarity requires for purposes of lenity. This and similar differences reflect differences in the legally attributed stakes—as a doctrinal matter, avoidance cases are a *much bigger deal* than ordinary criminal cases. One may or may not agree with that assessment, just as one may or may not agree with the familiar doctrinal assessment that criminal cases have higher stakes than civil cases.[115] Either way, such implicit assignments of importance are a familiar feature of the law. And so long as the importance assigned varies from doctrine to doctrine, the idea of a universal standard for what it takes to be "clear" is a non-starter.

Even if a universal standard is not to be had, though, courts still need to know how clear a statutory text has to be to count as "clear" in an individual case. Here, then-Judge Kavanaugh expresses skepticism, remarking that "[n]o case or canon of interpretation says that my 65-35 approach or my colleagues' 90-10 or 55-45 approach is the correct one (or even a better one)."[116] Similarly, Judge Easterbrook remarks, "The Rule of Lenity does not say *how serious* the ambiguity must be" to trigger the rule.[117] But is that right? Remember, as construed, the rule of lenity applies only if a court "can make no more than a guess" as to what the statute means. That sounds a lot like 55-45, and not at all like 90-10.

Concededly, in other doctrinal areas, what "clarity" requires is much more contested. In *Wisconsin Central Ltd. v. United States*, Justice Gorsuch, writing for the majority, rejected an IRS interpretation of a tax statute, reasoning that "in light of all the textual and structural clues before us, we think it's *clear enough*" that the IRS interpretation is incorrect.[118] As discussed above, to say that a text is "clear" is always to say that it is clear enough for present purposes. Still, the apparent implication of Justice Gorsuch's phrasing was that "clear" within the *Chevron* framework is a relatively easy threshold to satisfy. That same day, the Court issued its opinion in *Pereira v. Sessions*.[119] There again, the Court rejected an agency interpretation on the grounds that the statute at issue was "clear," appealing to text, context, and "common sense."[120] In

[115] See Doerfler, supra note 62, at 550.
[116] Kavanaugh, supra note 13, at 2138.
[117] Easterbrook, supra note 28, at 90.
[118] 138 S. Ct. 2067, 2074 (2018) (emphasis added).
[119] 138 S. Ct. 2105 (2018).
[120] Id. at 2113–15.

dissent, Justice Alito accused the majority of "simply ignoring *Chevron*," arguing that the majority's interpretation was "textually permissible," but that the choice between that interpretation and the agency's was "difficult," and so the agency ought to have prevailed.[121] Observing that "[i]n recent years, several Members of this Court have questioned *Chevron*'s foundations," Justice Alito closed by insisting that "unless the Court has overruled *Chevron* in a secret decision that has somehow escaped my attention, it remains good law."[122]

These and other cases indicate a push by some jurists to understand "clarity" for *Chevron* purposes as less demanding than previously thought.[123] Notice, however, that Justice Alito's comment in *Pereira* indicates that this is a squarely *doctrinal* dispute. According to Justice Alito, "*Chevron*'s foundations" establish that overturning an administering agency's interpretation is a big deal, and so a statute must be quite clear for a court to do so. Justice Gorsuch, by contrast, seems to think that, agency or not, courts have a duty to say what the law is, and so a statute's being "clear enough" is enough. Given then-Judge Gorsuch's and others' noted skepticism toward "the premises that underlie *Chevron*,"[124] one fears, with Justice Alito, that Justice Gorsuch's gloss on *Chevron* constitutes a subtle (or not so subtle) attempt to change the law.[125] Either way, there is little reason to think that courts are incapable

[121] Id. at 2121, 2129.

[122] Id. at 2129.

[123] Instructive here is Judge Raymond Kethledge's recent remark that "as a judge, I have never yet had occasion to find a statute ambiguous" under *Chevron*. Raymond M. Kethledge, Ambiguities and Agency Cases: Reflections After (Almost) Ten Years on the Bench, 70 Vand. L. Rev. En Banc 315, 320 (2017). Charitably, Judge Kethledge's statement indicates not that he has enjoyed 90-10 confidence in every *Chevron* case (epistemically implausible), but rather that his threshold for "clarity" is much lower than that.

[124] *Pereira*, 138 S. Ct. at 2121 (Kennedy, J., concurring) (citing Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1149–58 (10th Cir. 2016) (Gorsuch, J., concurring)) ("Given the concerns raised by some Members of this Court . . . it seems necessary and appropriate to reconsider, in an appropriate case, the premises that underlie *Chevron* and how courts have implemented that decision. The proper rules for interpreting statutes and determining agency jurisdiction and substantive agency powers should accord with constitutional separation-of-powers principles and the function and province of the Judiciary.").

[125] In response to *Wisconsin Central*, one scholar remarked, "Perhaps the 'clear enough' standard will encourage circuit and district judges to lower their thresholds for finding clarity closer to the 50-50 range, thus narrowing the scope of *Chevron* deference at step one." Christopher J. Walker, Gorsuch's "Clear Enough" & Kennedy's Anti-"Reflexive Deference": Two Potential Limits on *Chevron* Deference, Yale J. on Regul.: Notice & Comment (June 22, 2018), http://yalejreg.com/nc/gorsuchs-clear-enough-kennedys-anti-reflexive-deference-two-potential-limits-on-chevron-deference/ [https://perma.cc/FUX3-VED7]; see also Gillian E.

of debating openly what *Chevron*'s premises require, or, alternatively, whether those premises should be rejected. In doctrinal areas subject to widespread disagreement, it may also be that the law is simply underdetermined—for instance, there may be no correct answer to the question how clear a statutory text has to be to count as "clear" for *Chevron* purposes.[126] Legal indeterminacy is, however, a generic problem, which is to say there is little reason to think that "clear" text doctrines are especially prone to indeterminacy.

Here it also helps to remember that to reject a "clear" text doctrine like *Chevron* is to take a position in the corresponding debate rather than to avoid it. Again, the basic idea of *Chevron* is that courts "play it safe" by deferring to an administering agency when statutory meaning is uncertain, which is to say that the cost of mistakenly reversing an agency action is greater than the cost of mistakenly affirming it, either individually or in the aggregate. Maybe that's right, maybe it isn't. But to reject *Chevron* without having that discussion is just to act as if it isn't.[127]

B. Inevitably Biased Application

The other pervasive objection to "clear" text doctrines in general is, as Professor Abbe Gluck puts it, that "we have no coherent, cabined, objective, or predictable definition" of "clarity" (or, conversely, "ambiguity").[128] The result, as then-Judge Kavanaugh describes it, is that "judgments about clarity versus ambiguity turn on little more than a judge's instincts," making it difficult "for judges to ensure that they are separating their policy views from what the law requires of them."[129]

The problem these critics allege can be broken into two parts. The first is that determinations of whether a statutory text satisfies some stipulated clarity threshold—say, 65-35—are largely unreasoned. The second is that those determinations are (therefore) especially vulnerable to policy bias.

Metzger, The Supreme Court, 2016 Term—Foreword: 1930s Redux: The Administrative State Under Siege, 131 Harv. L. Rev. 1, 24–28 (2017) (describing increasing skepticism toward *Chevron* and other "[s]ubconstitutional" doctrines by Justice Gorsuch and others).

[126] See Scalia, supra note 28, at 520–21 (calling *Chevron*'s "clarity" standard "ambigu[ous]," and predicting that "future battles" will be fought over the degree of clarity required to satisfy the doctrine).

[127] To return to an earlier analogy, to leave for the airport at whatever time seems more likely than not to be early enough to make the flight is to act as if it is no worse to miss the flight than to wait around at the gate.

[128] Gluck, supra note 24, at 2063.

[129] Kavanaugh, supra note 13, at 2138–39.

Start with the first. According to then-Judge Kavanaugh, whether a statute is "clear" or not "turns out to be an entirely personal question, one subject to a certain sort of *ipse dixit*."[130] As illustration, he cited *MCI Telecommunications Corp. v. AT&T*,[131] a case in which the question was whether the Federal Communication Commission's ("FCC") authority to "modify" a rate-filing requirement for common carriers included the authority to eliminate that requirement for all non-dominant long-distance carriers.[132] The Court held 5-3 that it did not.[133] Writing for the majority, Justice Scalia began by observing that "[v]irtually every dictionary we are aware of says that 'to modify' means to change moderately or in minor fashion."[134] From there, Justice Scalia reasoned that eliminating the rate-filing requirement for such a large swath of long-distance customers was "much too extensive" to constitute a mere "modification" as it changed the statute "from a scheme of rate regulation in long-distance common-carrier communications to a scheme of rate regulation only where effective competition does not exist."[135] In dissent, Justice Stevens emphasized that the Communications Act "gives the FCC unusually broad discretion to meet new and unanticipated problems," and that, owing to new competition in the long-distance market, mandatory filing for non-dominant carriers served "no useful purpose and is actually counterproductive" in the FCC's view.[136] Responding to the argument that "modify" includes only "minor" changes, Justice Stevens observed that if the rate-filing section "is viewed as part of a [larger] statute whose aim is to constrain monopoly power, the Commission's decision to exempt nondominant carriers is a rational and 'measured' adjustment to novel circumstances—one that remains faithful to the core purpose" of that section.[137] For these and other reasons, Justice Stevens concluded that the FCC's interpretation was, at the very least, "permissibl[e]" and so ought to control under *Chevron*.[138]

Whichever side got the better of the exchange in *MCI*, it can hardly be described as unreasoned. Both Justice Scalia and Justice Stevens offer up

[130] Id. at 2142.
[131] 512 U.S. 218 (1994).
[132] Id. at 220.
[133] Id. at 218–19.
[134] Id. at 225.
[135] Id. at 231–32.
[136] Id. at 235, 239.
[137] Id. at 241.
[138] Id. at 245.

familiar sorts of interpretive arguments, explaining why one reading is more likely correct than the other—or at least likely enough (or not) for purposes of *Chevron*. Such arguments are exactly what one would expect in any statutory case. Because *MCI* is a *Chevron* case, the burden of persuasion is different— "clear," as opposed to more likely than not. The evidence put forward is, however, the same. Another way of putting the point is that, in terms of reasoned decision-making, all that doctrines like *Chevron* do is increase the applicable evidentiary threshold. Although, the story is slightly more complicated for evidence rules like the plain-meaning rule, as explained below.[139] Thus, unless one is a skeptic about statutory interpretation *in general*, there is little reason to think that decisions made under a "clarity" standard are anything other than "rational."[140] In terms of "neutral[ity], impartial[ity], and predictab[ility],"[141] it is hard to see why 51-49 would fare any better than, say, 65-35.

Professor Gluck (along with Judge Easterbrook) grounds her pessimism in a discussion of *Lockhart v. United States*, a case that involves the rule of lenity.[142] This Article assesses *Lockhart* below.[143] For now, it suffices to say that, as in *MCI*, both the majority and dissent in that case (authored by Justices Sotomayor and Kagan, respectively) each offer a wide range of familiar interpretive arguments—exactly the sorts of arguments one would expect to see even if the rule of lenity (or any other "clear" text doctrine) were irrelevant to the case.

So why, then, does it seem to many that judgments about "clarity" are "arbitrary," a reflection of judicial "policy preference" as opposed to the law? In part, that perception is probably owed to *implicit* disagreements between judges in individual cases as to how clear a text has to be to count as "clear." As discussed above, whether "clarity" for *Chevron* purposes requires 65-35 or 90-10 is a legal question that can and must be subjected

[139] See infra notes 170–71 and accompanying text.

[140] To their credit, Professor Gluck and Judge Easterbrook tilt in that direction, decrying what Judge Easterbrook calls an "absence of method" in statutory interpretation. See Easterbrook, supra note 28, at 83; Gluck, supra note 24, at 2058 (expressing concern that "true formalism in statutory interpretation might be impossible").

[141] Kavanaugh, supra note 13, at 2137.

[142] See Abbe R. Gluck, Congress, Statutory Interpretation, and the Failure of Formalism: The CBO Canon and Other Ways That Courts Can Improve on What They Are Already Trying to Do, 84 U. Chi. L. Rev. 177, 192–93 (2017) (discussing *Lockhart v. United States*, 577 U.S. 347 (2016)); Easterbrook, supra note 28, at 90 (same).

[143] See infra notes 230–41 and accompanying text.

to legal argumentation. Be that as it may, judges are not always good about debating such issues openly and explicitly. In *Wisconsin Central*, for instance, Justice Gorsuch simply presupposes that "clear enough" is enough for *Chevron*, rather than explaining why "clarity" is not especially demanding under that doctrine.[144] Insofar as such disagreements remain implicit—which is to say unargued—it is easy to see how one might think that something like differences in policy preference are what explain them. What this suggests, however, is that judges need to be open and honest about such doctrinal disagreements, and not try to introduce indirectly their preferred view of the law.

In other part, though, this widespread perception is presumably owed to some number of disagreements about "clarity" *really being disagreements about policy*.[145] Whether consciously or unconsciously, judges (like the rest of us) occasionally exaggerate or understate the likelihood of legal claims based upon their views of what would be good.[146] So long as judges care about their reputations, the degree to which they exaggerate or understate in this way is constrained.[147] If a reading of some statute is clearly correct, a willful or motivated judge could mischaracterize that reading as merely "likely" without serious reputational harm.[148] To mischaracterize it as "clearly *in*correct" would, however, result in significant criticism.[149] Assuming that is right, one should expect that judges will sometimes exaggerate or understate the

[144] Wis. Cent. Ltd. v. United States, 138 S. Ct. 2067, 2074 (2018).

[145] See, e.g., Solan, supra note 10, at 865 ("[A]t times courts themselves may not be sincere when they hold that the language of a statute is clear.").

[146] See generally Ziva Kunda, The Case for Motivated Reasoning, 108 Psych. Bull. 480 (1990) (concluding that an individual's ability to arrive at a desired conclusion is constrained by their ability to construct reasonable justifications).

[147] See Eric A. Posner & Adrian Vermeule, The Votes of Other Judges, 105 Geo. L.J. 159, 182–83 (2016) (observing that if "all judges always act solely so as to promote the interests of their political party," then normative interpretive theory is pointless); Solan, supra note 10, at 866 ("Surely our understanding of language does some work in limiting the range of plausible interpretations of legal texts, and a great deal of work at that.").

[148] See Doerfler, supra note 75, at 840–41. Importantly, the suggestion here is *not* that judges are reputation maximizers. Considerations like the practical significance of a given case might, for example, affect a judge's willingness to incur reputational harm, or, alternatively, her blindness to the reputational harm that might result from adopting a particular reading. Similarly, the argument here need not assume that the *only* determiner of judicial reputation is apparent conformity of judicial decision making with what the law is. See Frederick Schauer, Incentives, Reputation, and the Inglorious Determinants of Judicial Behavior, 68 U. Cin. L. Rev. 615, 627–31 (2000) (considering various possible determiners of judicial reputation).

[149] At least assuming the relevant audience is not similarly willful or motivated.

likelihood of different readings in close cases, moving readings above or below the threshold of "clear" depending on what advances their partisan interests. Whether an agency action is deemed "clearly" precluded, for example, may indeed turn on who is in the White House.[150]

As the above suggests, though, willfulness or motivated reasoning pose a problem in close cases generally.[151] In an ordinary statutory case, a judge could, without embarrassing herself, mischaracterize a merely likely interpretation as "unlikely." And because it is an ordinary case—that is, a case in which the evidentiary threshold is more likely than not—that would be enough to alter the outcome. Here, again, the question is why think that judges would have an easier time exaggerating or understating the likelihood of various readings if the epistemic threshold were, say, 65-35, as opposed to 51-49? In any statutory case, there has to be some line past which the moving party prevails.[152] And wherever that line happens to be, the risk of willfulness or motivated reasoning will be greater the closer a case is to that line.[153]

Worth mentioning here, the degree to which textual "clarity" judgments are vulnerable to motivated reasoning may depend upon the way in which "clarity" questions are framed. In an intriguing empirical study, Professor Ward Farnsworth, Dustin Guzior, and Professor Anup Malani found that when asked directly whether a statutory text is

[150] On the assumption that the Supreme Court cases are closer on average than circuit court cases, this might help explain the empirical observation that *Chevron* constrains the latter more reliably than the former. See Kent Barnett & Christopher J. Walker, *Chevron* in the Circuit Courts, 116 Mich. L. Rev. 1, 9 (2017) ("Although *Chevron* may not have much of an effect on agency outcomes at the Supreme Court (based on prior empirical studies of the Court), it seems to matter markedly in the circuit courts.").

[151] The following argument assumes that would-be legal disputes are distributed evenly across the interpretive probability spectrum, both in terms of numerosity and practical significance. This assumption is based upon the "principle of insufficient reason." See Vermeule, supra note 65, at 173–75 (observing that it is rational under certain circumstances to assume that unknown probabilities are equal). Ex ante, there is no reason to believe that there are more, or more consequential, practical disputes that turn on questions of statutory interpretation near the 51-49 line, as opposed to the 65-35 line (or any other).

[152] Remedies aside, outcomes of legal disputes are binary, not scalar.

[153] Professor David Pozen suggests that "clarity" standards might be especially vulnerable to motivated reasoning because claims of interpretive "necessit[y] . . . allow advocates to hide from themselves the ineradicable contingency and ambiguity of legal meaning and the ineradicable discretion and responsibility that follow." David E. Pozen, Constitutional Bad Faith, 129 Harv. L. Rev. 885, 936 (2016). Even if that's right, one would expect its marginal significance to be limited by the textualist turn in statutory interpretation. The reason is that, following that turn, courts can *already* disavow responsibility for their decisions in a statutory case (e.g., "Congress made me do it!") without having to blame the "clear" text.

"ambiguous," interpreters' judgments were strongly biased by their respective policy preferences.[154] By contrast, when interpreters were asked whether "ordinary readers would agree about the statute's meaning," the effect of the interpreter's policy preference disappeared.[155] Based upon this finding, Farnsworth, Guzior, and Malani argue that legal doctrines that assign significance to textual "ambiguity" ought to turn on what they call "external" judgment—which is to say judgments about how *ordinary readers* would understand the text at issue—and not "internal" judgments—which is to say judgments about how *the judge* understands the statute.[156]

In terms of doctrine, courts are neither clear nor consistent about whether "ambiguity," or, alternatively, "clarity" determinations are supposed to be "internal" or "external." Sometimes, courts hint that what matters is how an "ordinary" person would understand statutory language.[157] Other times, however, the suggestion is that what courts care about is how an "ordinary Member of Congress would have read" the text in question.[158] Most of the time, though, courts give no indication that how some *other* person would understand a statutory text is of interest—the question instead is just *what did Congress mean?*[159] As a constitutional matter, the guarantee of "fair notice" grounded in the Due Process Clause would seem to recommend the "ordinary" person frame.[160] Add to this the practical advantages identified by Farnsworth, Guzior, and Malani, and it seems that courts would do best to resolve any doctrinal inconsistency or under-determinacy in that direction. This is

[154] Farnsworth et al., supra note 9, at 259–60.

[155] Id.

[156] Id.

[157] E.g., Park 'N Fly, Inc. v. Dollar Park & Fly, Inc., 469 U.S. 189, 194 (1985) ("Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose.").

[158] E.g., Chisom v. Roemer, 501 U.S. 380, 405 (1991) (Scalia, J., dissenting).

[159] See, e.g., FAA v. Cooper, 566 U.S. 284, 294 n.4 (2012) ("[O]ur task is to determine what Congress meant by 'actual.'"); U.S. Dep't of State v. Wash. Post Co., 456 U.S. 595, 599 (1982) ("The language of Exemption 6 sheds little light on what Congress meant by 'similar files.'"); United States v. Reynolds, 235 U.S. 133, 143 (1914) ("[I]t is essential to understand what Congress meant in the use of that term . . . .").

[160] See United States v. Williams, 553 U.S. 285, 304 (2008) ("A conviction fails to comport with due process if the statute under which it is obtained fails to provide a person of ordinary intelligence fair notice of what is prohibited . . . ."); BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 574 (1996) ("Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice . . . of the conduct that will subject him to punishment . . . .").

especially so if, as most do, one regards congressional intent as something of a "construct," in which case courts cannot avoid defining the appropriate epistemic perspective from which to evaluate a statutory text.[161] But even if not, it seems both legally plausible and normatively desirable that a statutory text is only clear *enough* to count as "clear" if an "ordinary" or "reasonable" person would regard it as "clear" (attending to the practical stakes, and so on).

In the above respect, the various clarity doctrines discussed here contrast with other doctrines, like qualified immunity, that courts more consistently characterize as relating to the perspective of some specific actor (for example, a police officer). Unlike *Chevron* or the rule of lenity, qualified immunity and others like it assign significance not so much to textual clarity, but instead to the clarity of the law more generally. Qualified immunity doctrine, for example, assigns significance to whether a plaintiff's right is "clearly established,"[162] a determination which involves, in practice, careful attention to judicial precedent.[163] And although that doctrine is typically stated as concerning the perspective of a "reasonable person,"[164] in application and subsequent discussion, courts have made clear that the "reasonable person" in question is a reasonable executive official.[165] In a recent, insightful piece on legal clarity in general, Re argues that such doctrines thus have less to do with judicial *accuracy* in answering some legal question than with the *predictability*

[161] Caleb Nelson, What Is Textualism?, 91 Va. L. Rev. 347, 362 (2005) (observing that because "Congress is a collective entity," the "concept of legislative 'intent' is obviously something of a construct for textualists and intentionalists alike," and that textualists and intentionalists both limit interpreters to "publicly available" evidence). On such an approach, a judge would presumably limit herself to reasonably available information as well as reasonably shared normative and non-normative assumptions. See Richard H. Fallon, Jr., The Statutory Interpretation Muddle, 114 Nw. U. L. Rev. 269, 289–94 (discussing the relevance of overlapping linguistic intuitions to theories of interpretation operating with an "objectified" conception of congressional intent).

[162] Kisela v. Hughes, 138 S. Ct. 1148, 1152 (2018) (quoting White v. Pauly, 580 U.S. 73, 78 (2017) (per curiam)).

[163] See, e.g., Ashcroft v. al-Kidd, 563 U.S. 731, 741 (2011) ("We do not require a case directly on point, but existing precedent must have placed the statutory or constitutional question beyond debate.").

[164] *Kisela*, 138 S. Ct. at 1152 (quoting *White*, 580 U.S. at 79).

[165] See, e.g., Plumhoff v. Rickard, 572 U.S. 765, 778–79 (2014) ("[A] defendant cannot be said to have violated a clearly established right unless the right's contours were sufficiently definite that any *reasonable official* in the defendant's shoes would have understood that he was violating it." (emphasis added)).

that some actor or actors would converge on a particular answer.[166] Re's diagnosis is entirely plausible given qualified immunity's stated purpose, namely affording "fair warning" to officers.[167]

While it goes beyond the scope of this Article, there may be deep theoretical reasons why *textual* clarity doctrines of the sort discussed here systematically concern accuracy rather than predictability, to use Re's terminology.[168] Regardless, as a matter of positive law, it is at least noteworthy that doctrines concerning *precedential* clarity and the like appear to have different aims.

* * *

As indicated above, addressing concerns about willfulness or motivated reasoning is comparatively easy when it comes to decision rules. With respect to the search for statutory meaning, decision rules have no bearing on what evidence a court should consider. Instead, all that such doctrines do is increase the degree of epistemic confidence or justification needed for a court to enforce some reading. Whether, for example, a case falls within *Chevron*'s domain has no bearing on what evidence of statutory meaning a court should consider, or, in turn, the "rationality" or vulnerability to policy bias of its interpretive reasoning.

By contrast, with evidence rules, the story is slightly more complicated. Under an evidence rule, the evidence of statutory meaning a court may consider is potentially different and somewhat more limited than it would be if that doctrine did not apply. A court may, for example, judge it appropriate to enforce a statutory reading under the plain-meaning rule after considering only the statutory text, to the exclusion of other pertinent, non-textual evidence. Such a judgment might fairly be characterized as less "rational"[169] than one arrived at after considering the excluded evidence in addition. Generally speaking, judgments are more accurate and more stable the more evidence upon which they are based. And at least insofar as non-textual evidence is excluded on grounds of,

[166] Re, supra note 16, at 1502. In addition to qualified immunity, Re also discusses 28 U.S.C § 2254(d)(1), which imposes an analogous "clearly established" requirement for federal habeas review of state court convictions. See id. at 1523–31, 1523 n.85.

[167] See, e.g., Hope v. Pelzer, 536 U.S. 730, 739–40 (2002) (quoting United States v. Lanier, 520 U.S. 259, 270–71 (1997)). For a critique of this rationale, see William Baude, Is Qualified Immunity Unlawful?, 106 Calif. L. Rev. 45, 72–74 (2018).

[168] See Doerfler, supra note 79, at 1020–43 (2017) (arguing that Congress's failure to form actual, shared communicative intentions entails that statutory meaning is a function of the information available to all audiences of the relevant statute).

[169] Though probably not as "*ir*rational."

say, cost,[170] a judgment arrived at under the plain-meaning rule is not only less accurate, but also more vulnerable to willfulness or motivated reasoning than an ordinary interpretive judgment. The reason is that the evidentiary basis for that judgment is comparatively thin. That tradeoff may be worth it. Sometimes "cheap and good enough" is the right approach. Still, it is important to recognize that with decision rules like *Chevron*, there really is *no* tradeoff in terms of "rationality." With evidence rules like the plain-meaning rule there is *some* tradeoff, at least if the justification is cost.

III. APPLICATIONS

Parts I and II dealt with "clear" text doctrines mostly in the abstract. This Part is more concrete, discussing in detail four familiar "clear" text doctrines: The canon of constitutional avoidance, the rule of lenity, the "plain meaning" rule as it applies to legislative history, and *Chevron*. As the discussion illustrates, whether a specific doctrine is best understood as an evidence rule or, instead, as a decision rule is sometimes not obvious. Correspondingly, whether or in what form these doctrines should be preserved can be a difficult question.

This Part also highlights how sorting different "clear" text doctrines into different categories can help settle long-standing questions about the order in which such doctrines should be applied. As it explains, because decision rules help courts deal with uncertainty that remains *after* the search for statutory meaning, courts should almost always apply evidence rules—which organize that search—*before* applying the former type of doctrine. As this Part explains, this simple observation leads to some surprising results, including, for example, that courts should afford agencies *Skidmore* deference before deciding whether a statute is "clear" for purposes of *Chevron*, or that courts should consider legislative history when determining whether Congress has "clearly" abrogated state sovereign immunity.

A. Constitutional Avoidance

In its "modern" form, the canon of constitutional avoidance instructs courts to adopt a less natural but "fairly possible" interpretation of a statute if giving that statute its "most natural" interpretation would raise

[170] As opposed to, say, psychological bias. See supra note 50 and accompanying text.

"substantial constitutional questions."[171] The stated justifications for the doctrine vary slightly. Sometimes courts ground the avoidance canon in "due respect" for Congress as a "coordinate branch of the government."[172] Other times, they emphasize the practical wisdom of adjudicating constitutional questions only if necessary.[173] The overall sentiment, though, seems best captured by Justice Holmes's remark, mentioned above, that declaring an act of Congress constitutionally invalid is a "grave[]" and "delicate" duty and so one that courts should approach with great caution.[174]

Looking at these various statements, the canon of constitutional avoidance is characterized most straightforwardly as a decision rule. Again, the motivating idea is that declaring a statute unconstitutional is a really big deal. And from this, courts apparently infer that they should address constitutional questions only if they are really sure that a statute means what they think that it means. But does that make sense? Does the "gravity" and "delicacy" of judicial review really get one to the avoidance canon in its modern form? At the outset, it is worth mentioning that taking an especially cautious approach to statutory interpretation is only one way for courts to "play it safe" in this space. Alternatively, or in addition, courts could take a similarly cautious approach to constitutional interpretation, declaring invalid an act of Congress only if really sure that *the Constitution* means what the court thinks that it means.[175] Beyond that, there is the familiar question of why the avoidance canon should be triggered by mere constitutional "questions," as opposed to actual

[171] United States v. X-Citement Video, Inc., 513 U.S. 64, 68–69 (1994); see also United States ex rel Att'y Gen. v. Del. & Hudson Co., 213 U.S. 366, 408 (1909) (conditioning avoidance on "grave and doubtful constitutional questions").

[172] Trade-Mark Cases, 100 U.S. 82, 96 (1879).

[173] Edward J. DeBartolo Corp. v. NLRB, 463 U.S. 147, 157 (1983) (recognizing "the Court's *prudential* policy of construing Acts of Congress so as to avoid the unnecessary decision of serious constitutional questions" (emphasis added)); NLRB v. Cath. Bishop of Chi., 440 U.S. 490, 501 (1979) (same).

[174] Blodgett v. Holden, 275 U.S. 142, 147–48 (1927) (Holmes, J., concurring).

[175] Cf. James B. Thayer, The Origin and Scope of the American Doctrine of Constitutional Law, 7 Harv. L. Rev. 129 (1893) (arguing that courts should only declare acts of Congress unconstitutional if violation is clear).

unconstitutionality.[176] In terms of avoiding unnecessary denunciation of Congress, the latter would seem to suffice.[177]

Even retreating to "classic" avoidance, questions about the canon remain.[178] As discussed above, the premise of any decision rule is that the costs of mistake are asymmetric. With the avoidance canon, the thought seems to be that misinterpreting a statute and then declaring it invalid is worse than misreading that statute and then enforcing it. Maybe that is right. Misreading a statute and then declaring it invalid does seem like adding insult to injury.[179] But even if so, the more difficult question is *how much* worse is it, really? In practice, courts bend over backwards to avoid constitutional questions, enforcing "strained,"[180] "implausible,"[181] or even "tortured"[182] interpretations of statutes.

Here, the easiest contemporary illustration is *Bond v. United States*.[183] In that case, a Pennsylvania woman had spread dangerous chemicals on the "car door, mailbox, and doorknob" of her "closest friend" upon

[176] See Richard A. Posner, Statutory Interpretation—In the Classroom and in the Courtroom, 50 U. Chi. L. Rev. 800, 816 (1983) (arguing that conditioning avoidance on constitutional questions "create[s] a judge-made constitutional 'penumbra'"); see also Frederick Schauer, Ashwander Revisited, 1995 Sup. Ct. Rev. 71, 74 ("[I]t is by no means clear that a strained interpretation of a federal statute that avoids a constitutional question is any less a judicial intrusion than the judicial invalidation on constitutional grounds of a less strained interpretation of the same statute.").

[177] The switch from "classic" to "modern" avoidance appears to have been motivated by the concern that "when a court engages in classical avoidance, it provides what amounts to an advisory opinion on a constitutional issue." Trevor W. Morrison, Constitutional Avoidance in the Executive Branch, 106 Colum. L. Rev. 1189, 1204–05 (2006).

[178] Eric S. Fish, Constitutional Avoidance as Interpretation and as Remedy, 114 Mich. L. Rev. 1275, 1279 (2016) ("Under the classic doctrine of avoidance, judges only avoided interpretations that would actually make the statute unconstitutional."); see also *Blodgett*, 275 U.S. at 148 (Holmes, J., concurring) ("[A]s between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, our plain duty is to adopt that which will save the Act.").

[179] On the other hand, misinterpreting and then enforcing a statute involves giving force to a policy with no constitutional legitimacy . . . also not great.

[180] John F. Manning, The Nondelegation Doctrine as a Canon of Avoidance, 2000 Sup. Ct. Rev. 223, 254 ("[T]he Court itself has often recognized that the avoidance canon may compel acceptance of a 'strained' interpretation . . . .").

[181] William K. Kelley, Avoiding Constitutional Questions as a Three-Branch Problem, 86 Cornell L. Rev. 831, 865 (2001) ("[T]he most common and persuasive objection to the avoidance canon is that it leads to implausible constructions of statutory language . . . .").

[182] Neal Kumar Katyal & Thomas P. Schmidt, Active Avoidance: The Modern Supreme Court and Legal Change, 128 Harv. L. Rev. 2109, 2112 (2015) (stating that an aggressive application of the canon "leads to tortured constructions of statutes that bear little resemblance to laws actually passed by the elected branches").

[183] 572 U.S. 844 (2014).

learning of an extramarital affair between the friend and the woman's husband.[184] Federal prosecutors subsequently charged the woman with two counts of possessing a "chemical weapon," in violation of the federal statute implementing the near-identically worded international Convention on Chemical Weapons.[185] The statute defines "chemical weapon" in relevant part as a "toxic chemical and its precursors, except where intended for a purpose not prohibited under this chapter as long as the type and quantity is consistent with such a purpose."[186] "Toxic chemical," in turn, is defined as "any chemical which through its chemical action on life processes can cause death, temporary incapacitation or permanent harm to humans or animals."[187] Lastly, the statute defines "purposes not prohibited by this chapter" as "[a]ny peaceful purpose related to an industrial, agricultural, research, medical, or pharmaceutical activity or other activity" and other specific purposes.[188] The chemicals used by the woman in the attacks were, concededly, "toxic to humans and, in high enough doses, potentially lethal."[189] At the same time, it was "undisputed" that the defendant "did not intend to kill" the friend, and instead "hoped" that the friend would "touch the chemicals and develop an uncomfortable rash."[190]

Following her conviction, the defendant argued on appeal that federal criminalization of this sort of domestic assault "exceeded Congress's enumerated powers and invaded powers reserved to the States by the Tenth Amendment."[191] In so arguing, the defendant seemed to call into question the century-old precedent *Missouri v. Holland*, "which stated that '[i]f the treaty is valid there can be no dispute about the validity of the statute' that implements it 'as a necessary and proper means to execute the powers of the Government.'"[192] The Supreme Court in *Bond*, however, avoided the constitutional issue, holding instead that the statute

[184] Id. at 852.

[185] Id. at 852–53 (discussing 18 U.S.C. § 229(a)(1) and Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction art. I, ¶ 1, opened for signature Jan. 13, 1993, T.I.A.S. 97-525, 1974 U.N.T.S. 317 (entered into force Apr. 29, 1997)).

[186] 18 U.S.C. § 229F(1)(A).

[187] Id. § 229F(8)(A).

[188] Id. § 229F(7)(A).

[189] *Bond*, 572 U.S. at 852.

[190] Id.

[191] Id. at 853.

[192] Id. at 854 (quoting Missouri v. Holland, 252 U.S. 416, 432 (1920)).

did not reach the defendant's conduct.[193] The statute's definitional sections notwithstanding, Chief Justice Roberts explained that the "ordinary meaning" of the phrase "chemical weapon" calls to mind "chemical warfare," not "spreading irritating chemicals on [a] doorknob."[194] Chief Justice Roberts emphasized moreover that our "constitutional structure" leaves the prosecution of "purely local crimes" to the states, and so one should hesitate to attribute to Congress the intention to "upset the Constitution's balance between national and local power" by "defin[ing] as a federal crime conduct readily denounced as criminal by the States."[195]

Whatever one thinks of the Chief Justice's reasoning, it seems likely that the Court would have held that the statute applied to the defendant's conduct absent the extraordinary circumstances: the chemicals that she possessed and used were "potentially lethal" and so seemingly "toxic," and her "purpose" was evidently not "peaceful."[196] Q.E.D. Indeed, the Chief Justice seemed to concede as much in his opinion, remarking that an otherwise "clear" statutory text can be made "ambigu[ous]" by the "deeply serious consequences of adopting" its otherwise most natural reading.[197]

The practice of straining to avoid constitutional questions that one sees in *Bond* and other, similar, cases would plausibly be justifiable if the cost of declaring a statute invalid based on a misreading were *dramatically* greater than the alternative.[198] If erroneous non-enforcement truly were catastrophic, then requiring something approaching absolute certainty concerning statutory meaning before declaring a statute invalid would seem to make both practical and epistemic sense. And yet, how plausible is that? In terms of constitutional duties, interpreting statutes faithfully and accurately is also incredibly important. And from an inter-branch perspective, it is less than obvious why Congress would prefer systematic

[193] Id. at 844.

[194] Id. at 860–61.

[195] Id. at 848, 856, 865–66 (internal quotation marks omitted) (quoting United States v. Bass, 404 U.S. 336, 349 (1971)).

[196] Id. at 868 (Scalia, J., concurring in the judgment) ("End of statutory analysis, I would have thought.").

[197] Id. at 859–60 (majority opinion).

[198] See Doerfler, supra note 62, at 552 ("[C]ourts' assessment of what is 'fairly possible' in [modern] cases is plausibly (and reasonably) affected by the perceived practical stakes.").

misinterpretation to the occasional erroneous non-enforcement.[199] Even conceding that, from Congress's perspective, erroneous non-enforcement is worse than mere misreading,[200] to make sense of cases like *Bond*, one would, again, have to claim that it is so much worse that it is worth avoiding at almost any cost in terms of interpretive accuracy.

Qua decision rule, then, the classic avoidance canon is conceivably justified, assuming an easy-to-satisfy threshold for "clarity."[201] Getting to modern avoidance, or to the now-familiar, very demanding "clarity" threshold seems, however, much more doubtful.

Another approach would be to reconceive the canon of constitutional avoidance as an evidence rule. According to Justice Scalia, for example, the avoidance canon rests on the "reasonable presumption" that "between competing plausible interpretations of a statutory text, . . . Congress did not intend the alternative which raises serious constitutional doubts."[202] One way of interpreting Justice Scalia's characterization is as saying that whether an interpretation "raises serious constitutional doubts" is simply evidence of statutory meaning.[203] That seems plausible. Members of Congress swear an oath to uphold the Constitution.[204] It is thus only charitable to assume that Congress intends readings of statutes that are consistent with its constitutional authority. Even with respect to constitutional *questions*, one might argue that members of Congress take (or should take) a cautious approach to exercising its legislative

[199] See Katyal & Schmidt, supra note 182, at 2113 (arguing that aggressive application of the modern avoidance canon "can be even more antidemocratic than outright invalidation, by putting in place a law that Congress did not want and that, because of various inertial forces laced into our constitutional system, Congress will not be able to change").

[200] For instance, because constitutional holdings have broader ramifications for Congress's ability to legislate generally.

[201] Or maybe better, as discussed in the context of criminal cases, a "best guess" standard, with a slight thumb on the scale in favor of actual constitutional readings. See infra notes 241–46 and accompanying text.

[202] Clark v. Martinez, 543 U.S. 371, 381 (2005).

[203] The alternate interpretation is that Justice Scalia is claiming that Congress prefers that courts resolve statutory unclarity in ways that avoid serious constitutional concerns. So interpreted, Justice Scalia's characterization would be analogous to the doctrinal justification for *Chevron*, which is that Congress intends that courts resolve statutory unclarity in administrative cases by deferring to administering agencies. See Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843–44 (1984) (explaining agency deference by appeal to implicit congressional delegation).

[204] U.S. Const. art. VI, cl. 3.

powers.[205] On this line of reasoning, courts should assume that *Congress* "plays it safe" when it legislates, enacting laws that are clearly within its enumerated powers. In so doing, Congress would avoid accidental constitutional excess, even if at the expense of legislating less expansively than it otherwise could.[206]

Suppose one finds that story persuasive. Is that enough to rescue the avoidance canon in its modern form? Maybe. As discussed in Part I, evidence rules like the one proposed here are epistemically puzzling. Ordinarily, evidence that is helpful to an investigation should be considered as a matter of course. In this case, assuming uncertain constitutionality is evidence of statutory meaning, the question is why not consider it in every case, weighing it against other evidence like statutory structure or apparent purpose? Understood as an evidence rule, what the canon of constitutional avoidance instructs courts to do is to determine whether a statute has a "clear" meaning based upon evidence other than uncertain constitutionality (or, in the case of classic avoidance, actual unconstitutionality). Only if the answer is "no" should courts go on to consider whether one of the seemingly available readings would raise "substantial constitutional questions" (or, alternatively, be constitutionally invalid). Again, the question is what would justify that conditional structure?

One possibility is cost. If figuring out whether some reading would raise "substantial constitutional questions" were especially costly, courts would potentially be justified in asking that question only after attending to other, less expensive evidence of statutory meaning. Is that plausible, though? Conceivably, *actually answering* "substantial constitutional questions" takes serious work. For that reason, cost-efficiency might provide an alternate justification for the avoidance canon in its classical form.[207] But merely *identifying* "substantial" questions? Probably not.

Another, more promising possibility is psychological bias. If uncertain constitutionality is probative of statutory meaning, but, for reasons of

[205] See generally Fallon, supra note 161 (arguing that attribution of attitudes to Congress as such is an unavoidably normative task).

[206] Another "advantage" of conceiving of the avoidance canon as an evidence rule is that it would provide a principled justification for the current judicial practice of applying that canon when determining whether a statutory text counts as "clear" for *Chevron* purposes. See Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988); see also infra notes 262–80 and accompanying text.

[207] Though remember the tradeoffs in terms of willfulness and motivated reasoning that would be involved. See supra notes 169–70 and accompanying text.

psychological bias, judges are disposed to overweight it, it could make sense for judges to consider whether a reading would raise "substantial constitutional questions" only if other, less biasing evidence is insufficient to rule it out. And that really does seem plausible. Given the alleged "gravity" of judicial review, it is all too realistic that judges would overweight uncertain constitutionality in an unconscious effort to avoid having to even contemplate declaring an act of Congress invalid.[208] As a check against that bias, courts might be justified, then, in asking whether some reading is "clearly" correct wholly apart from any constitutional questions it might raise, considering apparent constitutionality only if the answer is "no."

Notice, however, that even if reconceiving the avoidance canon as an evidence rule helps make sense of the doctrine being triggered by mere constitutional "questions" or "doubts," it does so at the cost of reducing substantially the legal significance of constitutional questionability or doubtfulness. By analogy, the plain meaning rule conditions consideration of legislative history upon textual unclarity, but says nothing about the *weight* of legislative history in relation to other sources—a court might, for example, determine that legislative history is moderately supportive of reading *A*, but decide that the totality of evidence supports reading *B*. The canon of constitutional avoidance, by contrast, traditionally treats apparent constitutionality as a trumping consideration if courts consider it at all. Treating apparent constitutionality as a trump makes sense if erring in that direction constitutes "playing it safe" under conditions of uncertainty. If, however, apparent constitutionality is merely evidence of statutory meaning, it would likely be outweighed in various cases by various other familiar sources such as text, structure, and apparent purpose. Put differently, reconceiving the avoidance canon as an evidence rule might get one from classic to modern avoidance, but it would probably do so at the expense of rendering the canon dramatically less consequential.

[208] Or, for that matter, to avoid having to do the hard work involved in answering "substantial constitutional questions."

B. Lenity

The rule of lenity famously instructs courts to resolve any unclarity in a criminal statute in favor of the defendant.[209] Like *Chevron*, the rule of lenity seems hard to understand as an evidence rule. Recent attitudinal shifts notwithstanding, the political climate in the United States has, at least since the 1980s, supported an unusually harsh approach to criminal sentencing,[210] as well as an expansive attitude toward criminalization.[211] Given this reality, that a reading of a contemporary criminal statute is relatively harsh probably makes it more likely, not less, to be the one that Congress intended.[212]

So what about uncertainty management? Characterizing lenity as a decision rule fits neatly with the rule's stated justifications. Other than historical pedigree,[213] courts invoking the rule of lenity tend to cite two considerations in support. The first is that it is the role of "legislatures, not courts, [to] define criminal liability."[214] The second is that criminal defendants are entitled to "adequate notice of the conduct that the law prohibits."[215]

On defining criminal liability, the thought here seems to be that the criminal law is, in some places, either under-determined or unknowable.[216] For that reason, holding a defendant liable in one of those places would, either de jure or de facto, amount to a law declaration rather than a law identification. The connection with managing uncertainty is straightforward, given that way of thinking. Assuming there is an

[209] See, e.g., United States v. Granderson, 511 U.S. 39, 54 (1994) ("In these circumstances—where text, structure, and history fail to establish that the Government's position is unambiguously correct—we apply the rule of lenity and resolve the ambiguity in [the defendant's] favor.").

[210] Unusual in relation to the global statistical norms. See Michelle Ye He Lee, Yes, U.S. Locks People Up at a Higher Rate than Any Other Country, Wash. Post (July 7, 2015, 3:00 AM), https://www.washingtonpost.com/news/fact-checker/wp/2015/07/07/yes-u-s-locks-people-up-at-a-higher-rate-than-any-other-country/ [https://perma.cc/T9X6-YHNM].

[211] See Douglas Husak, Overcriminalization: The Limits of the Criminal Law 3 (2008) (describing the "explosive growth in the size and scope of the criminal law").

[212] This is true even for those concerned with "objectified" intent, see supra note 82 and accompanying text, insofar as one infers just from the harshness and scope of contemporary criminal statutes a disposition towards the punitive rather than the lenient.

[213] See United States v. R.L.C., 503 U.S. 291, 310 (1992) (Scalia, J., concurring in part and concurring in the judgment) (recognizing "the ancient requirement that criminal statutes speak plainly and unmistakably" (internal quotation marks omitted) (citation omitted)).

[214] Crandon v. United States, 494 U.S. 152, 158 (1990).

[215] Clark v. Martinez, 543 U.S. 371, 397 (2005) (Thomas, J., dissenting).

[216] See infra note 286 and accompanying text.

illegitimacy cost to convicting a defendant for conduct one could not have known was prohibited at the time, it would be safer for a court to allow conviction only if it *actually knows* that the conduct was prohibited.

The same story applies to adequate notice. There, the illegitimacy of convicting a defendant for conduct one could not have known was prohibited at the time has less to do with separation of powers than with due process and basic fairness. Here again, though, the easiest way to avoid that sort of illegitimate conviction is to permit conviction for conduct a court *knows* is prohibited. Which is to say, conduct "clearly" proscribed by the statute.[217]

Even if the rule of lenity is justified in some form, though, maybe the more interesting question is how demanding a "clarity" threshold the rule can sustain. As mentioned above, the doctrine as presently construed applies only if a court "can make no more than a guess" as to statutory meaning.[218] In a criminal case, in other words, a statute is "clear" at something much closer to 55-45 than to 90-10—and, as a result, "recent judicial applications of the rule appear to be rare."[219] What this easy-to-satisfy threshold suggests, then, is that, even if erring in a defendant's favor constitutes "playing it safe" in a criminal case, very little caution is required because the stakes in such cases are low. That might seem surprising. As suggested by, for example, the increased burden of proof for criminal conviction or the relative severity of criminal sanctions, a seeming premise of our legal system is that criminal conviction is a really big deal.[220] If that is right, though, what accounts for the relative ease with which courts declare criminal statutes "clear," thereby triggering severe criminal sanctions, and so on?

To understand how little work lenity does, consider two cases, one an old chestnut[221] and another more recent. First, in the familiar *Smith v. United States*, the defendant had traded a fully automatic MAC-10 assault

[217] Someone with consequentialist leanings might object that any illegitimacy costs associated with conviction for conduct one could not have known was prohibited is offset by the welfare gains of punishing socially harmful behavior. See Daniel Epps, The Consequences of Error in Criminal Justice, 128 Harv. L. Rev. 1065, 1089–92 (2015) (describing such objections).

[218] Muscarello v. United States, 524 U.S. 125, 138 (1998) (internal quotation marks omitted) (quoting United States v. Wells, 519 U.S. 482, 499 (1997)); see also supra note 111 and accompanying text.

[219] Note, The New Rule of Lenity, 119 Harv. L. Rev. 2420, 2427 (2006).

[220] See Doerfler, supra note 62, at 550.

[221] Or maybe better, middle-aged.

rifle to an undercover officer for two ounces of cocaine.[222] Among other offenses, the defendant was subsequently charged with and convicted of "us[ing]" a firearm "during and in relation to a drug trafficking crime."[223] On appeal, the defendant argued that use *for purposes of exchange* did not constitute "use" of a firearm in the relevant sense.[224] In a 6-3 decision, the Supreme Court held that it did. Writing for the majority, Justice O'Connor observed that various dictionaries as well as previous case law defined "to use" broadly to include "to employ" and "to derive service from."[225] Reasoning that the defendant had plainly "employed" and "derived service from" his firearm, the statute, she concluded, plainly applied to his conduct.[226] In dissent, Justice Scalia marshalled various ordinary language examples in support of the proposition that "[t]o use an instrumentality ordinarily means to use it for its intended purpose."[227] Moving from the general to the specific, Justice Scalia reasoned that, as used in the statute, "us[e]" of a firearm was most naturally read as use *as a weapon*.[228] Bolstering his legal conclusion that the defendant in the case ought to prevail, Justice Scalia added that, "[e]ven if the reader does not consider the issue to be as clear as I do, he must at least acknowledge, I think, that it is eminently debatable—and that is enough, under the rule of lenity, to require finding for the [defendant] here."[229]

Second, in the more recent *Lockhart v. United States*, the defendant had been convicted of possession of child pornography.[230] Based upon a previous conviction for sexual abuse of his then-fifty-three-year-old girlfriend, the defendant was subsequently deemed subject to a ten-year mandatory minimum sentence applicable to offenders with "a prior conviction . . . under the laws of any State relating to aggravated sexual

[222] 508 U.S. 223, 225–26 (1993).

[223] Id. at 226–27 (quoting 18 U.S.C. § 924(c)(1)); see also 18 U.S.C. § 924(c)(1)(B)(ii) (imposing a mandatory minimum sentence of thirty years' imprisonment if the "firearm" used is a "machinegun"); 18 U.S.C. § 921(a)(23) (defining "machinegun" in reference to 26 U.S.C. § 5845(b)); 26 U.S.C. § 5845(b) (defining "machinegun" to include automatic weapons).

[224] *Smith*, 508 U.S. at 228.

[225] Id. at 228–29 (quoting Astor v. Merritt, 111 U.S. 202, 213 (1884)).

[226] Id. at 229 (internal quotation marks omitted). Justice O'Connor also emphasized that there was no indication that Congress intended to deviate from the "ordinary" meaning of the term at issue. Id. at 228–29.

[227] Id. at 242 (Scalia, J., dissenting) ("When someone asks, 'Do you use a cane?,' he is not inquiring whether you have your grandfather's silver-handled walking stick on display in the hall; he wants to know whether you *walk* with a cane.").

[228] Id. at 242–45.

[229] Id. at 246.

[230] 577 U.S. 347, 349 (2016).

abuse, sexual abuse, or abusive sexual conduct involving a minor or ward."[231] On appeal, the defendant argued that his prior conviction was not for "sexual abuse . . . involving a minor or ward," and so the mandatory minimum did not apply.[232] Again, the Supreme Court disagreed, this time 6-2. Writing for the majority, Justice Sotomayor explained that the qualifier "involving a minor or ward" attached only to the last item on the list of offenses, namely "abusive sexual conduct," meaning that the defendant's prior conviction for "sexual abuse" of an adult was sufficient to trigger the mandatory minimum.[233] In defense of that reading, Justice Sotomayor offered ordinary language analogies,[234] as well as an appeal to something called the "rule of the last antecedent."[235] Justice Sotomayor also drew support from "nearly identical[ly]" worded statutes in which it was clear that "sexual abuse" meant sexual abuse *of any kind*.[236] In dissent, Justice Kagan argued that the qualifier "involving a minor or ward" took scope over the entire list of triggering offenses.[237] In support of her reading, Justice Kagan, too, offered colorful (and topical) analogies, observing, for example, that "a real estate agent [who] promised to find a client 'a house, condo, or apartment in New York'" would not have fulfilled her promise by sending "information about condos in Maryland or California."[238] Like Justice Sotomayor, she also attempted to support her position with a purported principle of positive law—this time, the "series-qualifier canon."[239] And finally, like Justice Scalia in *Smith*, Justice Kagan appealed to lenity, reasoning that even if the case were "not as clear as" her opinion suggested, surely the statute was at least ambiguous and so the defendant ought to prevail.[240]

[231] Id. at 349–50 (quoting 18 U.S.C. § 2252(b)(2) (2012)).

[232] Id. at 350.

[233] Id.

[234] Id. at 351–52 ("For example, imagine you are the general manager of the Yankees and you are rounding out your 2016 roster. You tell your scouts to find a defensive catcher, a quick-footed shortstop, or a pitcher from last year's World Champion Kansas City Royals. It would be natural for your scouts to confine their search for a pitcher to last year's championship team, but to look more broadly for catchers and shortstops.").

[235] Id. at 351 (quoting Barnhart v. Thomas, 540 U.S. 20, 26 (2003)).

[236] Id. at 353 (citing 18 U.S.C. §§ 2241–2243 (2012)).

[237] Id. at 362 (Kagan, J., dissenting).

[238] Id. ("Imagine a friend told you that she hoped to meet 'an actor, director, or producer involved with the new Star Wars movie.' You would know immediately that she wanted to meet an actor from the Star Wars cast—not an actor in, for example, the latest Zoolander.").

[239] Id. at 364 (quoting Series-Qualifier Canon, Black's Law Dictionary (10th ed. 2014)).

[240] Id. at 376.

Again, one reading of cases like *Smith* and *Lockhart* is that judges regard criminal cases as having remarkably low stakes. In each case, even if one is disposed to agree with the majority's reading, it is hard to suggest that the majority's arguments are *dramatically* more forceful than those of the dissent. But if that's right, it is correspondingly difficult to imagine that the majority in either case was substantially more confident—let alone *reasonably* more confident—in their reading than 55-45. And, again, if 55-45 is enough to count as "clear" for purposes of lenity, convicting someone of a criminal offense is being treated by courts as akin to giving up on an uninteresting seminar.

Another, more charitable explanation of what is going on in those cases, though, is that, although accepting that the stakes of criminal cases are high, courts regard the costs of mistakes as closer to symmetric than our legal tradition might suggest.[241] "[B]etter that ten guilty persons escape, than that one innocent suffer" is, as Professor Dan Epps puts it, "perhaps the most revered adage in the criminal law."[242] Owing to the relative severity of criminal sanctions, criminal adjudication is biased against false convictions in various ways that, for example, civil adjudication is not similarly biased against false judgments of liability. Implicit in this bias, of course, is that the cost of false acquittals is comparatively low. As scholars going back to Bentham have argued, however, the cost of false acquittals to crime victims is also significant, even if not quite as significant as the cost of false convictions to convicts.[243]

Taking that seriously, what contemporary courts might be thinking is that criminal adjudication is similar to decision-making scenarios in which it is appropriate to act on one's "best guess" under conditions of uncertainty. To illustrate, suppose that a bomb is about to explode, and that a technician can cut one of two wires: red or green. Cutting the correct wire will diffuse the bomb; cutting the incorrect wire will cause the bomb to explode. Suppose now that a technician is moderately confident—say, 65-35—that cutting the red wire will diffuse the bomb. In that situation, it would, given the stakes, be unreasonable for the technician to think it

[241] A less charitable explanation is that courts fail to take seriously the severity of criminal sanctions. See Rabb, supra note 112, at 188 (highlighting the "infringements on liberty that have resulted in the discriminatory mass incarceration, overcriminalization, and overpunishment that characterize the American criminal justice system today").

[242] Epps, supra note 217, at 1067 (quoting 4 William Blackstone, Commentaries *358).

[243] See id. at 1089–92.

"clear" that cutting the red wire will diffuse the bomb. Be that as it may, she should obviously cut the red wire. Given the symmetry of the costs of mistake, the rational thing for the technician to do is to act on her inclination, however modest.

Turning back to criminal adjudication, assume à la Bentham that the cost of false acquittals is high, but that the cost of false convictions is slightly higher—as seems entirely plausible in cases involving cocaine and machine guns or serial sex offenders. On that assumption, how should a court behave if it is moderately confident—again, 65-35—that a defendant's conduct is covered by a criminal statute? As in the bomb scenario, it would be unreasonable, given the stakes, for the court to say that it is "clear" that the defendant acted unlawfully. At the same time, considering the near symmetry of the costs of mistake, it is plausible that courts should nonetheless enforce the more likely reading of the statute, acting, in other words, on its "best guess."[244] As bad as wrongful conviction might be, failing to enforce the criminal law is not to be taken lightly, particularly when the potential offenses are so serious.

The above story also fits with how courts *talk* about lenity today. While the rule of lenity is classically phrased as a rule for "resolv[ing] . . . ambiguity," present doctrine is that the "simple existence of some statutory ambiguity" is not enough to "warrant [the rule's] application," and that instead a court should afford lenity only if it has "no more than a guess" as to statutory meaning.[245] What this suggests is that, as presently understood, the rule of lenity does not actually require "clear" statutory meaning, however much clarity that would require. To the contrary, so long as a court has more than a literal "guess" as to what Congress intended, a court should enforce the reading of the statute it thinks is most likely correct. That there are other plausible readings is neither here nor there.[246]

[244] In terms of expected utility, what to do would depend upon how slight the cost asymmetry turns out to be.

[245] Muscarello v. United States, 524 U.S. 125, 148 (1998) (Ginsburg, J., dissenting) (quoting United States v. Granderson, 511 U.S. 39, 54 (1994)); id. at 138 (majority opinion) (citation omitted).

[246] The story here is also consistent with continued adherence to the "beyond a reasonable doubt" standard of proof in criminal cases. Insofar as it applies to factual, as opposed to legal, determinations, the "beyond a reasonable doubt" standard might serve merely to offset structural advantages at trial enjoyed by the prosecution. Cf. Wardius v. Oregon, 412 U.S. 470, 480 (1973) (Douglas, J., concurring in the result) ("The Bill of Rights does not envision an adversary proceeding between two equal parties.").

C. Legislative History

Under current doctrine, courts should consult legislative history only if the corresponding statutory text is less than "clear."[247] This doctrine is most naturally and most commonly understood as managing evidence of statutory meaning.[248] For those who do so at all, considering legislative history helps to "illuminat[e]" "what Congress meant,"[249] "shed[ding] light" on the correct reading of the statutory language at issue.[250]

Objections to considering legislative history *at all* are, at this point, familiar. Justice Scalia and others famously characterized reliance upon legislative history as effectively permitting members of Congress (as well as lobbyists and staffers) to circumvent Article I, § 7.[251] In addition, he worried that attending to legislative history left judges with nearly unbounded discretion.[252] More modestly, Professor Adrian Vermeule has argued that we have no reason to believe that judges are *any good* at evaluating legislative history, which leaves courts without justification for the tremendous cost that researching legislative history involves.[253]

---

[247] E.g., NLRB v. SW Gen., Inc., 137 S. Ct. 929, 942 (2017) ("The text is clear, so we need not consider this extra-textual evidence."); Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546, 568 (2005) ("Extrinsic materials have a role in statutory interpretation only to the extent they shed a reliable light on the enacting Legislature's understanding of otherwise ambiguous terms."); Whitfield v. United States, 543 U.S. 209, 215 (2005) ("Because the meaning of [the provision's] text is plain and unambiguous, we need not accept petitioners' invitation to consider the legislative history."); Ratzlaf v. United States, 510 U.S. 135, 147–48 (1994) ("[W]e do not resort to legislative history to cloud a statutory text that is clear.").

[248] For a contrary view, see Einer Elhauge, Statutory Default Rules: How to Interpret Unclear Legislation 115–16 (2008) (arguing that resolving statutory unclarity by appeal to legislative history may be appropriate if doing so helps "to determine which interpretation will maximize expected political satisfaction").

[249] U.S. Dep't of State v. Wash. Post Co., 456 U.S. 595, 599 (1982).

[250] Atkins v. Parker, 472 U.S. 115, 124 (1985) ("The legislative history of [the statute] sheds light on its meaning.").

[251] See, e.g., Thompson v. Thompson, 484 U.S. 174, 191–92 (1988) (Scalia, J., concurring in the judgment) ("Committee reports, floor speeches, and . . . colloquies between Congressmen . . . are frail substitutes for bicameral vote upon the text of a law and its presentment to the President."); Conroy v. Aniskoff, 507 U.S. 511, 519 (1993) (Scalia, J., concurring in the judgment) ("The greatest defect of legislative history is its illegitimacy. We are governed by laws, not by the intentions of legislators."); Zedner v. United States, 547 U.S. 489, 509–10 (2006) (Scalia, J., concurring in part and concurring in the judgment) ("[T]he only language that constitutes 'a Law' within the meaning of the Bicameralism and Presentment Clause of Article I, § 7, and hence the only language adopted in a fashion that entitles it to our attention, is the text of the enacted statute.").

[252] See Scalia, supra note 82, at 35–36.

[253] Vermeule, supra note 65, at 107–15, 192.

On the other side of this jurisprudential dispute, those who believe that attending to legislative history is useful occasionally insist that courts should do so as a matter of course. Justice Stevens, for example, reasoned that, although "[i]n recent years the Court has suggested that we should only look at legislative history for the purpose of resolving textual ambiguities," it would be "wiser to acknowledge that it is always appropriate to consider all available evidence of Congress' [sic] true intent when interpreting its work product."[254]

As discussed above, Justice Stevens's reasoning has initial plausibility.[255] Assuming, arguendo, that legislative history is probative of statutory meaning, courts would improve their interpretive accuracy by considering it in any given case.[256] Sometimes, though, interpretive accuracy isn't everything. Even if one is more optimistic than Professor Vermeule concerning courts' ability to evaluate legislative history, it seems hard to deny that conducting legislative history research is, as he puts it, "costly and time-consuming."[257] As Justice Kennedy, quoting Judge Leventhal, cautioned, "[j]udicial investigation of legislative history has a tendency to become . . . an exercise in 'looking over a crowd and picking out your friends.'"[258] To protect against that tendency, responsible legislative-history research requires independent and comprehensive assessment of a sometimes "massively voluminous" set of materials.[259] Even assuming, then, that judges come out at the end of that process with more accurate beliefs about statutory meaning, very often the cost involved will not be justified by the resulting accuracy gain. Again, sometimes "cheap and good enough" really is good enough.

So when (if at all) should courts consider legislative history? The short answer is: whenever it is worth it. Again, when judging whether a statutory text is "clear" for purposes of some "clear" text doctrine, a court

[254] Koons Buick Pontiac GMC, Inc. v. Nigh, 543 U.S. 50, 65 (2004) (Stevens, J., concurring).

[255] See supra Section I.A.

[256] Assuming, that is, that courts are not unduly biased in favor of legislative history in comparison with other sources of statutory meaning. Because legislative history is most often characterized by its critics as a sort of Rorschach test, it is not entirely clear what being biased in its favor even comes to.

[257] Vermeule, supra note 65, at 193.

[258] Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546, 568 (2005) (internal quotation marks omitted) (quoting Patricia M. Wald, Some Observations on the Use of Legislative History in the 1981 Supreme Court Term, 68 Iowa L. Rev. 195, 214 (1983)) (recounting a conversation with Judge Levanthal).

[259] Vermeule, supra note 65, at 193.

is determining whether that text is clear *enough* for the relevant purposes.[260] For the purpose of managing cost, a court might thus deem a statutory text "clear" in a relatively unimportant case based upon moderate epistemic confidence or justification.[261] With so little at stake, why take on the additional burden of wading through a "massively voluminous" set of materials to improve interpretive accuracy only somewhat? By contrast, in a more significant case, a court might declare a text less than "clear" even assuming analogous epistemic justification or confidence. In that situation, a sufficient amount would be on the line to justify consulting additional, more expensive sources of statutory meaning.

Assuming, then, that legislative history is probative of statutory meaning, the doctrinal status quo seems defensible, at least in relation to other, cheaper sources of statutory meaning.[262] More concerning is the status quo as it pertains to the relationship between legislative history and other "clear" text doctrines.[263] In *United States v. R.L.C.*, for instance, the question before the Court was how to interpret a statute limiting juvenile detention to the "maximum term of imprisonment that would be authorized if the juvenile had been tried and convicted as an adult."[264] In that case, the defendant had been convicted of committing an act of juvenile delinquency.[265] The U.S. District Court imposed a sentence of three-years' detention, reasoning that three-years' imprisonment was the maximum sentence for the analogous offence under the corresponding statute.[266] The U.S. Court of Appeals for the Eighth Circuit remanded the case for resentencing, explaining that twenty-one-months' imprisonment was the maximum sentence a court could have imposed on a similarly situated adult after applying the Sentencing Guidelines (the district court

[260] See supra note 98 and accompanying text.

[261] See Schauer, supra note 99, at 253–54.

[262] Indeed, current doctrine seems agnostic as to the probative value of legislative history insofar as consideration of legislative history is *permitted* but not *required* if statutory text is less than "clear." See Milner v. Dep't of Navy, 562 U.S. 562, 574 (2011).

[263] See Gluck, supra note 24, at 2063 ("It remains unanswered whether a policy canon is still relevant if legislative history alone would clarify statutory language.").

[264] 503 U.S. 291, 294 (1992) (quoting 18 U.S.C. § 5037(c)(1)(B) (1988)).

[265] Id. at 295 (citing 18 U.S.C. § 5031 (1988)).

[266] Id.; see also 18 U.S.C. § 1112(b) (1988) (imposing a maximum sentence of three-years' imprisonment for involuntary manslaughter).

settled on a sentence of eighteen months).[267] Justice Souter started with the statutory text, determining that the Government's harsher interpretation was, at best, "one possible resolution of statutory ambiguity."[268] Now writing for a plurality, Justice Souter then went on to consider the Act's legislative history, concluding ultimately that the accompanying Senate Report and "other elements" resolved any ambiguity in the defendant's favor.[269] Concurring in part and concurring in the judgment, Justice Scalia, joined by Justices Thomas and Kennedy, insisted that once the Court had concluded that the statutory text was at most "ambiguous," that should have been the end of the case.[270] The reason, according to Justice Scalia, was that it was "not consistent with the rule of lenity to construe a textually ambiguous penal statute against a criminal defendant on the basis of legislative history."[271]

The rule of lenity is, again, most plausibly characterized as a decision rule—as an empirical matter, there is little reason to think that members of Congress prefer narrower, as opposed to broader, definitions of federal crimes, nor is there any indication that federal judges would be unduly biased in favor of that consideration if it were true.[272] Given that characterization, it is hard to see why there should be any uncertainty whether courts should consider legislative history within the lenity framework. What the rule of lenity does, after all, is help courts "play it safe" in criminal cases under conditions of uncertainty. But if considering legislative history could help courts become certain of statutory meaning, why not do so in the course of determining whether there is a need to "play it safe"?[273]

[267] *R.L.C.*, 503 U.S. at 295–96; see also U.S. Sent'g Guidelines Manual § 2A1.4(a)(2) (U.S. Sent'g Comm'n 1991) (setting the base offense for involuntary manslaughter at level fourteen if the conduct was reckless).

[268] *R.L.C.*, 503 U.S. at 298.

[269] Id. at 303–05 (plurality opinion).

[270] Id. at 307–08 (Scalia, J., concurring in part and concurring in the judgment).

[271] Id. at 307.

[272] Again, one can reason similarly about Congress's "objectified" intent. See supra note 212 and accompanying text.

[273] Alternatively, considering legislative history could make a court uncertain about statutory meaning, in which case it would have discovered that it *has reason* to "play it safe." Either way, what is relevant is that, by considering legislative history, a court will have improved its epistemic position, thereby making its assessment concerning the need to allocate risk better informed.

The inference above is, of course, a general one, applying to decision rules across the board.[274] Consider, for example, *Dellmuth v. Muth*, in which the Court held:

> Legislative history generally will be irrelevant to a judicial inquiry into whether Congress intended to abrogate the Eleventh Amendment. If Congress' [sic] intention is "unmistakably clear in the language of the statute," recourse to legislative history will be unnecessary; if Congress' [sic] intention is not unmistakably clear, recourse to legislative history will be futile, because by definition [the presumption against abrogation is not overcome].[275]

The "clear statement" rule concerning state sovereign immunity is almost certainly about managing uncertainty, as opposed to managing evidence.[276] As the Court explained in *Atascadero State Hospital v. Scanlon*, judicial "reluctance to infer that a State's immunity from suit in the federal courts has been negated stems from recognition of the vital role of the doctrine of sovereign immunity in our federal system."[277] Owing to the "special and specific position in our constitutional system," the Court continued, it is thus "incumbent upon the federal courts to be *certain* of Congress's intent before finding that federal law overrides the guarantees of the Eleventh Amendment."[278]

Taking *Atascadero* at its word, then, construing a federal statute as *not* abrogating state sovereign immunity constitutes "playing it safe" under conditions of uncertainty for the reason that unsettling the "usual constitutional balance between the States and the Federal Government" is a really big deal.[279] Whatever one thinks of that assessment, it is, again, hard to see why courts ought not to consider legislative history when

[274] Again, courts do consider legislative history within the *Chevron* framework. See supra note 55 and accompanying text.

[275] 491 U.S. 223, 230 (1989) (quoting Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 242 (1985)).

[276] See Eskridge & Frickey, supra note 29, at 598–99, 612 (characterizing the application of pro-federalism canons by courts as "activist"). The same is likely true of, for example, the other pro-federalism canons. See, e.g., Gregory v. Ashcroft, 501 U.S. 452, 460 (1991) (recognizing a "clear" statement rule concerning federal regulation of fundamental aspects of state sovereignty); Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 241 (1947) (Frankfurter, J., dissenting) (recognizing a presumption against federal preemption of state law).

[277] 473 U.S. at 242 (quoting Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 99 (1984)).

[278] Id. at 242–43 (emphasis added).

[279] Id.

determining whether Congress has spoken with "unmistakable clarity." Even conceding that statutory text is the "best evidence" of what Congress intends,[280] it is, by no means, the *only* evidence. And what that means is that, at least in some cases, turning from statutory text to legislative history will eliminate (or create) doubt—again, assuming that considering legislative history is helpful in general.

D. Chevron/Skidmore

Chevron holds that a reviewing court should enforce an agency's reading of a statute that the agency administers so long as the agency's reading is not "clear[ly]" inconsistent with the statutory text.[281] As the Court in that case explained, resolving statutory unclarity very often amounts to a "policy choice[]," and within our constitutional system, the "responsibilit[y]" for such choices resides with "the political branches."[282] In view of that explanation, *Chevron* is understood most naturally as a decision rule. An agency's views within the *Chevron* framework are, as discussed above, not treated as evidence of statutory meaning.[283] To the contrary, a reviewing court defers to an agency only if statutory meaning has run out, or, at the very least, is uncertain. Resolving statutory unclarity is, consistent with this story, characterized as "fill[ing]" a "gap" in the law left by Congress.[284] The absence of identifiable law is what makes it appropriate to defer to a more technically competent and more politically accountable agency.[285]

In terms of uncertainty management, the thought here seems to be that, at a certain point, "interpreting" an unclear statute amounts to policy-making insofar as the content of the law is under-determined or, alternatively, unknowable.[286] Reversing an agency action in such

[280] W. Va. Univ. Hosps., Inc. v. Casey, 499 U.S. 83, 98 (1991) ("The best evidence of [Congress's] purpose is the statutory text adopted by both Houses of Congress and submitted to the President."). But see Baude & Doerfler, supra note 11, at 562 (observing that the relative probative value of textual and non-textual evidence is "difficult to assess on a categorical basis").

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

[282] Id. at 866 (quoting Tenn. Valley Auth. v. Hill, 437 U.S. 153, 195 (1978)).

[283] See supra notes 57–59 and accompanying text.

[284] *Chevron*, 467 U.S. at 843 (quoting Morton v. Ruiz, 415 U.S. 199, 231 (1974)).

[285] Id. at 865–66.

[286] In the latter situation, even though there is law that settles the dispute in question, courts lack epistemic access to it and so must decide the case on non-legal grounds. See generally Hrafn Asgeirsson, Can Legal Practice Adjudicate Between Theories of Vagueness?, *in*

circumstances would thus amount to "substitut[ing]" a court's policy choice for those of an agency—an agency *tasked* with making those sorts of choices.[287] On that story, courts thereby "play it safe" by reversing an agency action only if they *know* there is law that precludes it. "[E]ven if the agency's reading differs from what the court believes is the best statutory interpretation," the reasoning goes, best not to risk encroaching upon that agency's assigned policy-making authority.[288]

Whether that reasoning makes sense may turn upon the correct understanding of the role of the judiciary. "It is," as we are reminded so often, "emphatically the province and duty of the judicial department to say what the law is."[289] And, as Justice Thomas observes, "[t]hose who ratified the Constitution knew that legal texts would often contain ambiguities," which is why "[t]he judicial power was understood to include the power to resolve these ambiguities over time."[290] Heard one way, Justice Thomas's observation suggests that courts need not be so hesitant to fill statutory "gaps"—sometimes the law is unsettled, and it is the job of courts, and not agencies, to settle it. Heard another way, of course, all that Justice Thomas's observation entails is that courts should try to identify and declare statutory meaning, even if doing so is hard. Legal texts are, uncontroversially, not always easy to make sense of. Sometimes, though, courts can attend carefully to an "ambiguous" statute and figure out what it means.[291] In those situations, ambiguity is indeed "resolved," but resolved through *discovery*, as opposed to stipulation—that is, as opposed to policy-making. If, then, the judicial power includes merely the "power" to say what the law is even if the law is hard to discern, that says very little about what courts should do if the law cannot be discerned, or at least not discerned with adequate confidence.[292]

Vagueness and Law: Philosophical and Legal Perspectives 95 (Geert Keil & Ralf Poscher eds., 2016) (discussing epistemic and non-epistemic theories of legal indeterminacy).

[287] *Chevron*, 467 U.S. at 843–44, 865–66.

[288] Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 980 (2005).

[289] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

[290] Perez v. Mortg. Bankers Ass'n, 135 S. Ct. 1199, 1217 (2015) (Thomas, J., concurring in the judgment).

[291] See supra note 57 and accompanying text.

[292] Insofar as the role of the judiciary is to "say what the law is," perhaps worth mentioning is that, on the standard account of assertion, it is appropriate to say that *p* (e.g., "The law precludes the agency's action.") is true only if one *knows* that *p* (e.g., only if one *knows* that the law precludes the agency's action). See Timothy Williamson, Knowledge and Its Limits 243 (2000) (describing the "knowledge rule": "One must: assert *p* only if one knows *p*").

Rather than adjudicate that familiar dispute,[293] though, it is maybe more interesting to consider *Chevron*'s doctrinal complement, *Skidmore*.[294] Like *Chevron*, *Skidmore* puts a thumb on the scale in favor of agency readings. Unlike *Chevron*, however, *Skidmore* appears to treat an agency's views as evidence of statutory meaning. To elaborate, *Skidmore* holds that an agency's reading of some statute that agency handles is entitled to "respect proportional to its 'power to persuade.'"[295] The opinion articulates numerous factors that help to determine the amount of "respect" a particular reading is owed, including "the thoroughness evident in its consideration, the validity of its reasoning," and, of special interest here, "its consistency with earlier and later pronouncements."[296] Most tellingly, *Skidmore* instructs courts to assign (potentially "considerable") "weight" to an agency's reading, weighing it along with other evidence of statutory meaning in an effort to determine the statute's "better"[297] or "correct"[298] interpretation.[299]

[293] For recent, helpful treatments of these and other objections to *Chevron*, see Jonathan R. Siegel, The Constitutional Case for *Chevron* Deference, 71 Vand. L. Rev. 937 (2018) (considering objections that *Chevron* violates both Article III and the Fifth Amendment). See generally Cass R. Sunstein, *Chevron* as Law, 107 Geo. L.J. 1613 (2019) (considering both constitutional and statutory objections and defending *Chevron* on stare decisis grounds).

[294] Skidmore v. Swift & Co., 323 U.S. 134 (1944). The account of the *Chevron*/*Skidmore* relationship in this section is broadly consistent with the one articulated by Peter Strauss. See Peter L. Strauss, "Deference" is Too Confusing—Let's Call Them "*Chevron* Space" and "*Skidmore* Weight," 112 Colum. L. Rev. 1143, 1164–65 (2012) (arguing that "*Skidmore* weight" should be conceived as one of the "traditional tools of statutory construction" applied by courts at *Chevron* Step One (quoting Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843 n.9 (1984))). The main purpose of this Section is, thus, to situate that account within a broader analytical framework.

[295] United States v. Mead Corp., 533 U.S. 218, 235 (2001) (quoting *Skidmore*, 323 U.S. at 140).

[296] *Skidmore*, 323 U.S. at 140. Here *Skidmore* contrasts importantly with *Chevron*. See Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 981 (2005) ("Agency inconsistency is not a basis for declining to analyze the agency's interpretation under the *Chevron* framework."); Smiley v. Citibank (S.D.), N.A., 517 U.S. 735, 742 (1996) ("[C]hange is not invalidating, since the whole point of *Chevron* is to leave the discretion provided by the ambiguities of a statute with the implementing agency.").

[297] *Skidmore*, 323 U.S. at 140; Town of Stratford v. FAA, 292 F.3d 251, 253 (D.C. Cir. 2002) (reasoning that if *Chevron* is inapplicable, then the "better" interpretation prevails under *Skidmore*).

[298] Campesinos Unidos, Inc. v. U.S. Dep't of Lab., 803 F.2d 1063, 1070 (9th Cir. 1986) ("Although not binding on this court, the Secretary's interpretation of his own regulation is entitled to some deference, and here we believe that interpretation to be *correct*." (emphasis added)).

[299] See Kristin E. Hickman & Matthew D. Krueger, In Search of the Modern *Skidmore* Standard, 107 Colum. L. Rev. 1235, 1238, 1256 (2007) (acknowledging that "most of the

It makes sense that agencies might have insight into what a statute means. Statutes often deal with technical subject matter, and technical expertise can be an important interpretive resource when making sense of technical statutes.[300] Agencies are also sometimes involved with the drafting of statutes, providing intimate knowledge of how those statutes were understood at the time of enactment.[301] Last and most obvious, agencies deal with statutes on a day-to-day basis in all sorts of settings, providing awareness of both statutory details and overall structure.[302]

In terms of structure, *Skidmore* is, importantly, *not* a "clear" text doctrine. Instead of telling courts to consider an agency's views only if other sources leave statutory meaning uncertain, it tells courts to attend to such views in the course of the general interpretive inquiry. That seems sensible insofar as it is hard to see what special consideration(s) would call for lexical ordering in this instance. Taking account of an agency's views is hardly cost-prohibitive. Nor does it seem that courts would be unduly biased in an agency's favor, at least controlling for partisan leanings.

More difficult to understand is why courts treat *Skidmore* and *Chevron* as alternatives. Generally speaking, courts reason that *Skidmore* "respect" is owed in cases that fall outside of *Chevron*'s "domain."[303] That seems

Court's post-*Mead* applications of *Skidmore* review reflect the independent judgment model," which "effectively denies any deference to agencies"); Richard W. Murphy, Judicial Deference, Agency Commitment, and Force of Law, 66 Ohio St. L.J. 1013, 1015 (2005) (stating *Skidmore* "basically instructs courts to exercise independent judgment regarding statutory meaning subject to the weak requirement that they carefully consider agency views for persuasiveness" if *Chevron* does not apply).

[300] Hickman & Krueger, supra note 299, at 1249 ("[A]s the *Skidmore* Court acknowledged, courts often lack the resources and expertise to understand and evaluate fully the consequences of complex statutory schemes.").

[301] See Jarrod Shobe, Agencies as Legislators: An Empirical Study of the Role of Agencies in the Legislative Process, 85 Geo. Wash. L. Rev. 451, 455 (2017) (describing "various ways . . . agencies are involved in legislative drafting"); see also Norwegian Nitrogen Prods. Co. v. United States, 288 U.S. 294, 315 (1933) (explaining that an agency interpretation adopted contemporaneously with the statute's passage has "peculiar weight").

[302] Such awareness could serve as a helpful check against what Professor Victoria Nourse terms "isolationist" interpretation. See Victoria Nourse, Picking and Choosing Text: Lessons for Statutory Interpretation from the Philosophy of Language, 69 Fla. L. Rev. 1409, 1409 (2017) (identifying and criticizing the practice of "pull[ing] a term out of a statute and isolat[ing] it from the rest of the text").

[303] See Nicholas R. Bednar & Kristin E. Hickman, *Chevron*'s Inevitability, 85 Geo. Wash. L. Rev. 1392, 1441 (2017) (characterizing *Mead* as having "limited the scope of *Chevron*'s applicability to agency actions carrying the force of law and reinstated the multifactor *Skidmore* standard as an alternative for those that do not").

odd insofar as *Skidmore* and *Chevron* appear logically unrelated. Again, under *Skidmore*, an agency's views are evidence of statutory meaning. Under *Chevron*, by contrast, those views constitute a legal basis for deciding a case if statutory meaning is unknown. Assuming those two characterizations are correct, it seems unmotivated to consider an agency's views as evidence of statutory meaning only in those situations in which an agency lacks the authority to make binding policy choices.[304] To the contrary, insofar as the question for cases *within Chevron*'s domain is whether Congress has spoken "clearly," it seems that, in the course of that inquiry, courts should afford an agency interpretation the "respect" such interpretations are owed.

Notice further that, insofar as courts were to afford *Skidmore* "respect" when determining whether a statutory text is "clear" for purposes of *Chevron*, the dispute between Justice Gorsuch and Justice Alito concerning how clear a text has to be to count as "clear" under *Chevron* would become less consequential.[305] Even if, after all, courts were to gravitate towards Justice Gorsuch's position, treating 55-45 as the threshold for "clear," if courts also started treating the agency's interpretation as evidence of statutory meaning, the overall framework would remain substantially deferential.[306]

To be sure, courts might also decide that affording "respect" to informal agency interpretations is better justified by an appeal to pragmatic considerations like technical expertise and democratic accountability—that is, courts might reconceive *Skidmore* as a decision rule.[307] In that event, courts would presumably do best to reject consistency as an indicator of respect-worthiness, just as they have with *Chevron*.[308] More still, courts would need to transform *Skidmore* into a "clear" text doctrine, the reason being that, as with *Chevron*, an agency's views would no longer be regarded as relevant to the question of statutory

[304] See United States v. Mead Corp., 533 U.S. 218, 229 (2001) ("We have recognized a very good indicator of delegation meriting *Chevron* treatment in express congressional authorizations to engage in the process of rulemaking or adjudication . . . .").

[305] See supra notes 118–22 and accompanying text.

[306] Of course, if courts were to begin affording *Skidmore* "respect" when determining "clarity" while also adhering to a relatively demanding clarity threshold, the overall framework would be even more favorable to agencies than it currently is.

[307] Cf. Matthew C. Stephenson & Miri Pogoriler, *Seminole Rock*'s Domain, 79 Geo. Wash. L. Rev. 1449, 1453 (2011) (observing an analogous "transformation" in the rationale for deferring to an agency's interpretation of its own regulations).

[308] See supra note 296 and accompanying text.

meaning.[309] In other words, reconceived as a decision rule, an agency's informal views would only come in under *Skidmore* once statutory meaning had run out.

CONCLUSION

Doctrines like *Chevron* or the plain meaning rule can be frustrating. Sometimes courts declare statutory text "clear" (or not), and it seems grounded in little more than partisanship. In such moments, it is tempting to say that "clarity" standards are the problem—too easily manipulated by willful or motivated judges. The question, though, is, what is the alternative? Why think that other standards would be any less easy to manipulate? And assuming we adopted "clear" text doctrines for a reason, what would we be giving up by abandoning them?

"Clear" text doctrines do require additional, more systematic scrutiny. As this Article argues, though, such doctrines need to be scrutinized individually, not all in one go. *Chevron* and the plain meaning rule do very different things and serve very different purposes. At the end of the day, it may be that courts do best to abandon one or both of those doctrines. But if that's true, it is for reasons having to do with *those specific doctrines*, and not with the abstract idea of "clear" text. More still, those individual doctrines can be assessed in a perfectly rational and organized fashion. As this Article shows, once one understands what different "clear" text doctrines *do*, it becomes much more straightforward to assess whether they do it well.

[309] On this approach, the degree of clarity required would, presumably, be inversely proportional to the degree of "respect" *qua* policy determination the agency's informal views were owed.