Chevron and Legislative History

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ABSTRACT

The Court's decision in Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc. *presupposes that when Congress leaves indeterminacy in an organic act, that indeterminacy reflects an implicit delegation of power to the agency to fill in the details of statutory meaning. Accordingly, a reviewing court must accept the agency's interpretation if reasonable. At its threshold, the* Chevron *test requires the reviewing court to use the "traditional tools of statutory construction" to determine if Congress expressed a clear intention concerning the interpretive question or, by virtue of indeterminacy, left the question for agency resolution. In the era in which it decided* Chevron, *the Court felt free to use legislative history to help determine whether Congress had directly spoken to the question at issue in the case. In the years since* Chevron, *the Court's understanding of the "traditional tools" of statutory interpretation has changed. Contrary to its practice at the time of* Chevron, *the Court has made it flatly impermissible for interpreters to rely on legislative history in a way that contradicts the text of the statute. This Article argues that the Court's new approach to legislative history precludes the Court's use of that tool of construction to resolve indeterminacy under the* Chevron *doctrine. If, as* Chevron *suggests, an administrative statute's indeterminacy presumptively reflects a legislative intention to delegate broad policymaking discretion to the responsible agency, then the reviewing court's use of legislative history to narrow that discretion contradicts the implemental design of the statute by narrowing the delegation effectuated by the text.*

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INTRODUCTION

The genius of the *Chevron* doctrine[1] is its simplicity. *Chevron* tells us when a reviewing court should "defer to" an agency's interpretation of a statute that the agency administers. The opinion provides a simple formula for identifying those instances in which Congress has resolved a policy question itself and those in which Congress has delegated policymaking discretion to the agency. The reviewing court first examines a statute using the "traditional tools of statutory construction."[2] If Congress has "directly spoken to the precise question at issue," *Chevron* directs reviewing courts to take that precision as a signal that Congress has itself squared up to and resolved the matter in dispute.[3] If, however, the reviewing court finds the statute to be "silent or ambiguous with respect to the specific issue," that court is to read the resultant indeterminacy as a delegation of interpretive discretion—one that warrants judicial deference so long as the agency interpretation is "reasonable" or "permissible."[4]

On the surface, the *Chevron* framework seems commonsensical, even elegant, in the context of the modern administrative state.[5] Behind it, however, lie innumerable questions of application—including the question of what methods should count as "traditional tools of statutory construction" for purposes of sorting clear from indeterminate statutes.[6] No consensus exists about the proper mode of statutory construction. And the *Chevron* doctrine took hold in a period of particular intellectual ferment about how to read statutes.[7] In particular, the Court's attitude about the proper role of legislative history—the subject of this Article—changed significantly during the period in which the *Chevron* doctrine took hold.

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1 The *Chevron* doctrine, of course, derives from the Court's influential decision in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

2 *Id.* at 843 n.9.

3 *Id.* at 842–43.

4 *Id.* at 843–44.

5 *See infra* text accompanying notes 45–53.

6 *See Chevron*, 467 U.S. at 843 n.9. For a particularly thoughtful and prescient account of these issues, see generally Cass R. Sunstein, *Law and Administration After* Chevron, 90 COLUM. L. REV. 2071 (1990), which explores the role of conventional canons of construction under *Chevron*.

7 *See generally* Philip P. Frickey, *From the Big Sleep to the Big Heat: The Revival of Theory in Statutory Interpretation*, 77 MINN. L. REV. 241 (1992) [hereinafter Frickey, *Big Sleep*] (describing the fault lines in the modern debate); Philip P. Frickey, *Revisiting the Revival of Theory in Statutory Interpretation: A Lecture in Honor of Irving Younger*, 84 MINN. L. REV. 199 (1999) [hereinafter Frickey, *Revival of Theory*] (same).

When the Court decided *Chevron* in 1984, the prevailing approach to statutes focused on the discovery of legislative intent or purpose, derived from the statute's legislative history.[8] In the years after *Chevron*, several textualist judges (including some on the Supreme Court) called into question the legitimacy and reliability of legislative history as a source of statutory evidence, and the Court began to use less of it.[9] At the same time, legislative history's defenders, both on and off the Court, raised enough doubts about the textualists' doubts to stop the Court from abandoning that tool of construction altogether.[10] A middle ground then emerged: when the text of a statute is clear, the Court may not use legislative history to contradict the statute's ordinary meaning.[11] Hence, to the extent that the Court relies on legislative history at all, it may do so only "to clear up ambiguity."[12] In such cases, the Court today also takes pains to ensure that it does not credit legislative history that seems, in some way, "cooked" or otherwise unreliable.[13]

In light of the current approach, legislative history would (at least on the surface) appear relevant to *Chevron*'s analysis of whether Congress has "spoken directly" to the precise question at issue. When the text is clear on a particular matter, neither legislative history nor deference is appropriate. But if the text is indeterminate on the question before the court, then legislative history might, as ever, provide a vehicle for clarifying legislative intent or purpose—a stopping point between a judicial determination that the text has no "plain meaning" and the further conclusion that deference is due. Although the Court has sent some mixed signals,[14] its practice in *Chevron* cases seems to align with the position that a reviewing court may use legislative history to clarify textual indeterminacy in an administrative statute—and thereby to preclude *Chevron* deference.[15]

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8 *See infra* text accompanying notes 69–86.

9 *See infra* text accompanying notes 87–98.

10 *See infra* text accompanying notes 99–108 & 116.

11 *See, e.g.*, Conn. Nat'l Bank v. Germain, 503 U.S. 249, 253–54 (1992); W. Va. Univ. Hosps., Inc. v. Casey, 499 U.S. 83, 98–99 (1991).

12 Milner v. Dep't of the Navy, 131 S. Ct. 1259, 1267 (2011).

13 *See, e.g.*, Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546, 568–70 (2005).

14 At times, the Court has suggested that a reviewing court owes *Chevron* deference unless the statute's "plain language" contradicts the agency's position. *E.g.*, Nat'l R.R. Passenger Corp. v. Bos. & Me. Corp., 503 U.S. 407, 417 (1992); K Mart Corp. v. Cartier, Inc., 486 U.S. 281, 292 (1988).

15 *See* William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from* Chevron *to* Hamdan, 96 GEO. L.J.

This Article argues that this conventional approach to *Chevron* and legislative history is misplaced—that it takes too narrow a view of what it means for legislative history to conflict with a statute. Statutes serve multiple functions. Texts convey *substantive* ends—the policy goals that animate the enactment. They also express *implemental* designs—the means by which a law's policy goals are to be achieved.[16] If the Court takes a statute's level of generality seriously, then Congress has the capacity—through the relative precision or open-endedness of the texts it enacts—to signal important choices about the allocation of decisionmaking power.[17] According to *Chevron*, statutory precision signals Congress's design to determine for itself the policy question at issue; indeterminacy signals a delegation of *discretion* to the body charged with interpreting it.[18]

From that starting point, one might think that if the legislative history "clarifies"—that is, adds detail to—an open-ended command, such legislative history conflicts with the statutory text by narrowing the discretion that the text confers.[19] For example, if Congress asks the National Park Service to promulgate rules banning "disruptive pets" from the national parks, the open-endedness of the operative command gives the Service considerable discretion to determine which pets will satisfy the statutory criterion. If the legislative history accompanying that statute asserted that "the term 'disruptive pets' is meant to exclude dogs but not cats," one might say that the legislative history clarifies rather than contradicts the statute. That assertion would be true, however, only if one focused solely on the statute's substantive goals. Looked at from the perspective of implementation, however, that same legislative history would narrow the discretion—and thus contradict the broad delegation of power—that the *statutory text* confers upon the agency.

1083, 1136 (2008) (collecting statistics on the use of legislative history in *Chevron* cases); *see also infra* text accompanying notes 126–43.

16 *See infra* text accompanying notes 150–58.

17 *See infra* text accompanying notes 155–56. In recent work, I have argued that the Court's focus on the level of generality of the text does not, properly understood, reflect an assertion that the Court has thereby identified some actual or subjective legislative decision, implemental or otherwise. *See* John F. Manning, *The Supreme Court, 2013 Term—Foreword: The Means of Constitutional Power*, 128 HARV. L. REV. 1, 24–25 (2014). Rather, I argue that by *presuming* that Congress sends differential signals through the relative precision or open-endedness of its texts, the modern Court promotes legislative supremacy by *empowering* Congress to use the level of statutory generality to signal when it wishes to resolve a policy question itself or to leave it to an agency or court to do so. *See id.* at 29.

18 *See* Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843–44 (1984).

19 *See infra* text accompanying notes 157–58.

This problem with the use of legislative history occurs whenever a court uses legislative history to shift the level of generality of any statutory text. But the reason for excluding legislative history is more obvious—and more acute—when a reviewing court relies on legislative history to narrow an agency's discretion under an organic act. Even if a court could appropriately choose to consult legislative history when exercising *its own discretion* under a statute that Congress has asked *the court* to administer, the same court could not properly use legislative history to confine the *administrative discretion* that an organic act has delegated to *an agency*.[20] Since *Chevron* deference presupposes just such a delegation, I argue here that a reviewing court's use of legislative history to particularize an open-ended statute in *Chevron* cases necessarily alters the scope of—and thereby contradicts—a delegation made by the relevant statute to the agency.

The balance of this Article will elaborate on that theme. Part I offers a few more words about the *Chevron* doctrine and the relationship between statutory indeterminacy and delegation. Part II examines the trajectory of the modern legislative history debate and attempts to explain why the Court has come to rest where it has. Part II then considers the Court's use of legislative history in *Chevron* cases. Part III contends that if one takes seriously the Court's general scruple against using legislative history to contradict the statutory text, then the Court should not invoke legislative history in any proper *Chevron* case.[21]

I. DEFERENCE AND DELEGATION

Chevron deference assumes that indeterminacy in qualifying agency-administered statutes reflects a signal that Congress delegated interpretive discretion to the agency.[22] As long as the agency does not abuse that discretion—that is, as long as the agency's interpretation reflects a "reasonable" or "permissible" reading of the statute—a reviewing court must defer to the agency's position, even if the court ultimately disagrees with it.

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20 *See infra* text accompanying notes 165–80.

21 The exclusionary rule proposed here is subject to minor exceptions where a court or agency uses legislative history—much as it might use a brief or article—as a source of externally verifiable information about the social and linguistic context of statutory language. *See infra* text accompanying notes 183–87.

22 For discussion of which administrative statutes qualify for application of the *Chevron* framework, see *infra* text accompanying notes 54–63.

Unsurprisingly, no opinion illustrates the *Chevron* principle better than *Chevron* itself. The Clean Air Act Amendments of 1977[23] required "new or modified major stationary sources" of air pollution to comply with rather strict permit requirements.[24] The statute did not define a "stationary source" but gave the Environmental Protection Agency ("EPA") authority to promulgate regulations defining that term.[25] During the Carter Administration, the EPA at first determined that "stationary source" should refer to any individual piece of pollution-emitting equipment within a plant.[26] When the Reagan Administration took office, however, the agency changed its position; it reinterpreted the term "source" to mean an entire plant.[27] Given the statutory definition of what sources count as "new or modified" for purposes of triggering the permit requirements, this change in administrative interpretation allowed firms to avoid permit requirements by offsetting any emissions from new equipment with reduced emissions from old equipment within the same plant.[28] While acknowledging that neither the text of the statute nor its legislative history defined "stationary source," the D.C. Circuit held that the plantwide defini-

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23 Clean Air Act Amendments of 1977, Pub. L. No. 95-95, 91 Stat. 685 (codified as amended in scattered sections of 42 U.S.C.).

24 42 U.S.C. § 7502(c)(5) (2012). The permit requirements applied in states that had not yet complied with national ambient air quality standards. In those states, a new or modified source had to comply with the "'lowest achievable emission rate,'" and the polluter had to demonstrate that all of its other sources within the state complied with applicable emissions standards. Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 861 n.34 (1984) (quoting Clean Air Act Amendments of 1977 § 173).

25 In particular, the definitional section of the Clean Air Act ("CAA") stated:

> Except as otherwise expressly provided, the terms "major stationary source" and "major emitting facility" mean any stationary facility or source of air pollutants which directly emits, or has the potential to emit, one hundred tons per year or more of any air pollutant (including any major emitting facility or source of fugitive emissions of any such pollutant, *as determined by rule by the Administrator*).

42 U.S.C. § 7602(j) (2012) (emphasis added).

26 *See* 45 Fed. Reg. 52,676, 52,696–98 (1980).

27 *See* 46 Fed. Reg. 50,766 (1981).

28 If a "stationary source" constitutes an entire plant, then adding a new piece of polluting equipment does not constitute a "new" stationary source. Nor would a new piece of equipment give rise to a "modified" stationary source as long as the polluter offset any new emissions from such equipment with commensurate reductions elsewhere in the plant. This flexibility stems from the fact that the Act defines a "modification" as a change that "*increases* the amount of any air pollutant emitted by such source or [that] results in the emission of any air pollutant not previously emitted." 42 U.S.C. § 7411(a)(4) (2012) (emphasis added). The EPA reasoned that such an approach would permit firms to update their plants with cleaner equipment—without triggering a heavy permit requirement. *See Chevron*, 467 U.S. at 858–59.

tion did not fit with the purpose of a program designed to improve air quality in areas that had not yet attained the requisite standards.[29]

In reversing, the Supreme Court announced its now-famous framework for challenges to agency interpretations of law. When adjudicating such cases, the reviewing court's first step is to use the "traditional tools of statutory construction" to determine "whether Congress has directly spoken to the precise question at issue."[30] If Congress has made itself clear, then principles of legislative supremacy require the reviewing court to effectuate "the unambiguously expressed intent of Congress"—and to do so, if need be, by reversing an agency decision that disregards such clear intent.[31] If, however, the statute is "silent or ambiguous" regarding the litigated issue, then the reviewing court may not substitute its own judgment about the best reading of the statute.[32] To the contrary, at the second step of the analysis, the reviewing court must defer to the agency as long as the latter has advanced a "permissible" or "reasonable" reading of the statute it administers.[33]

Applying the traditional tools of statutory construction, the Court found that the available materials amply justified judicial deference. The text of the statute did not resolve the question at issue.[34] Both a plant and an individual piece of equipment fit the conventional meaning of "stationary source," and the statute's technical definition did not help sort between the two.[35] The legislative history also did not

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29 *See* Natural Res. Def. Council, Inc. v. Gorsuch, 685 F.2d 718, 723, 726 (D.C. Cir. 1982), *rev'd sub nom.* Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984).

30 *Chevron*, 467 U.S. at 842–43 & n.9.

31 *Id.* at 842–44.

32 *Id.* at 843.

33 *Id.* at 843–44.

34 *Id.* at 861.

35 *See id.* at 860–62. Section 302(j) of the statute defined "major stationary source" or "major emitting facility" to mean "any stationary facility or source of air pollutants which directly emits, or has the potential to emit, one hundred tons per year or more of any air pollutant . . . ." Clean Air Act Amendments of 1977, Pub. L. No. 95-95, § 301, 91 Stat. 685, 770 (codified as amended at 42 U.S.C. § 7602(j) (2012)). The Court concluded that this definition "shed[ ] virtually no light on the meaning of the term 'stationary source.'" *Chevron*, 467 U.S. at 860. While the definition equated "stationary source" with the term "facility," the Court thought it "no affront to common English usage to take a reference to a major facility or a major source to connote an entire plant as opposed to its constituent parts." *Id.*

The Natural Resources Defense Council (NRDC) further contended that while not directly applicable to the permit program, the definition of "stationary source" in another Clean Air Act program cast doubt on the EPA's plantwide definition. *See id.* at 861. In particular, for purposes of setting "new source performance standards" (NSPS), section 111(a)(3) defines "stationary source" to mean "any building, structure, facility, or installation which emits or may emit any air pollutant." Clean Air Act Amendments of 1970, Pub. L. No. 91-604, § 111(a)(3), 84 Stat. 1676,

speak to "the precise issue" of the scope of a "stationary source."[36] Finally, the general purposes expressed in the legislative history—"to accommodate . . . the economic interest in permitting capital improvements . . . and the environmental interest in improving air quality"—were broad and inconclusive.[37] The Court felt compelled to accept the agency's reasonable judgment that a plantwide definition best served the competing goals of the permit program.[38] Even if a reviewing court could have sensibly rejected the plantwide definition in a case of first impression, the EPA was entitled to adopt a reasonable contrary view of the statute that Congress had charged *the agency* with administering.[39]

Though this approach might on the surface seem at odds with the *Marbury*[40] principle that *judges* have the duty to declare the law applicable to the cases they decide,[41] *Chevron* of course finds its justification in the concept of delegation. In our system, Congress has long enjoyed constitutional authority to delegate substantial discretion to agencies.[42] Accordingly, whereas some statutes purport to define the public's rights and duties directly, others serve primarily to delegate power to other institutions to fill up the details of broad statutory criteria.[43] If the point of an administrative statute is to confer upon an agency the discretion to choose among reasonably available interpretations of the statute, then a reviewing court fulfills its duty to interpret the statute when it determines that the statute has effected a

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1683 (codified as amended at 42 U.S.C. § 7411(a)(3) (2012)). This definition, the NRDC claimed, revealed a generalizable congressional intent to equate "source" with discrete sources of emission (such as "buildings") rather than an entire plant. *Chevron*, 467 U.S. at 861. The Court rejected that position. It reasoned that even if the definition used in the NSPS program also reflected Congress's intent regarding the permit program at issue in *Chevron*, the definition itself did not foreclose the agency's plantwide definition. *See id.* In particular, the Court concluded that, if anything, section 111(a)(3)'s "listing of overlapping, illustrative terms was intended to enlarge, rather than to confine, the scope of the agency's power to regulate particular sources in order to effectuate the policies of the Act." *Id.* at 862.

36 *Chevron*, 467 U.S. at 862.

37 *Id.* at 851, 862.

38 *See id.* at 863.

39 *See id.* at 864 (acknowledging that the court of appeals' position was "sensible").

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

41 *See id.* at 173, 177. To similar effect, the Administrative Procedure Act instructs reviewing courts to "interpret . . . statutory provisions" and to "decide all relevant questions of law." 5 U.S.C. § 706 (2012). Cass Sunstein has thus described *Chevron* as a "counter-*Marbury* for the administrative state." Sunstein, *supra* note 6, at 2119.

42 *See, e.g.*, Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 474–75 (2001).

43 *See* Richard J. Pierce, Jr., *The Role of the Judiciary in Implementing an Agency Theory of Government*, 64 N.Y.U. L. REV. 1239, 1244–46 (1989); Edward L. Rubin, *Law and Legislation in the Administrative State*, 89 COLUM. L. REV. 369, 380–85 (1989).

delegation and that the agency has stayed within the bounds of discretion assigned by the statute.[44] In other words, if the Clean Air Act Amendments assigned the EPA discretion to choose among reasonable readings of "stationary source," then the reviewing court interpreted the Act by identifying that assignment of discretion and asking whether the EPA's interpretation lay within the range of reasonable readings among which that statute gave it discretion to choose.

While the equation of deference with delegation was nothing novel,[45] what *Chevron* added was the *categorical* presumption that silence or ambiguity in an administrative statute constitutes an *implicit* legislative delegation to the responsible agency to resolve the resultant indeterminacy.[46] This presumption did not rest on any claim that indeterminacy reflected an *actual* legislative intent to delegate. To the contrary, the Court made clear that even if one could not say precisely why Congress left the meaning of "stationary source" unresolved, it did not matter;[47] the fact that Congress left a blank to be filled made it reasonable, perhaps inevitable, to assume that Congress meant for

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44 Even before *Chevron*, this account of deference had become standard. *See, e.g.*, Henry P. Monaghan, Marbury *and the Administrative State*, 83 COLUM. L. REV. 1, 25–31 (1983); Robert L. Stern, *Review of Findings of Administrators, Judges and Juries: A Comparative Analysis*, 58 HARV. L. REV. 70, 106–07 (1944). As Professor Monaghan points out, this idea provides an answer to Henry Hart's influential position that, at least in civil enforcement actions, the *Marbury* principle requires courts to exercise independent judgment with respect to all questions of law. *See* Monaghan, *supra*, at 20–25 (discussing Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1377–78 (1953)). Where an administrative delegation is concerned, Monaghan notes, the reviewing court "has discharged its [*Marbury*] duty to say what the law is" once it has determined "what statutory authority has been conferred upon the administrative agency." *Id.* at 27. In short, the *Marbury* principle has different implications when it comes to administratively, rather than judicially, administered statutes.

45 *See supra* note 44.

46 *See* Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843–44 (1984). Prior to *Chevron*, the Court invoked multiple common-sense factors to determine on a case-by-case basis when to defer to an agency's determination of law. *See, e.g.*, KENNETH CULP DAVIS, HANDBOOK ON ADMINISTRATIVE LAW §§ 248–251, at 893–908 (1951); Nathaniel L. Nathanson, *Administrative Discretion in the Interpretation of Statutes*, 3 VAND. L. REV. 470, 476–81 (1950). For example, the Court was more likely to defer when the question at issue depended upon an agency's technical expertise; when the agency held fast to a consistent interpretive position over time; when the agency played a key role in negotiating the legislation; or when the statute explicitly delegated law elaboration power to the agency. *See, e.g.*, E.I. du Pont de Nemours & Co. v. Train, 430 U.S. 112, 135 n.25 (1977) (expertise); Zuber v. Allen, 396 U.S. 168, 192 (1969) (participation in negotiations); SEC v. Cent.-Ill. Sec. Corp., 338 U.S. 96, 127 (1949) (explicit delegation); Norwegian Nitrogen Prods. Co. v. United States, 288 U.S. 294, 315 (1933) (consistent agency position). Professor Colin Diver identified ten distinct factors in the Court's cases. *See* Colin S. Diver, *Statutory Interpretation in the Administrative State*, 133 U. PA. L. REV. 549, 562 n.95 (1985).

47 In a famous passage, the Court wrote:

one of the institutions implementing the statute to fill in that blank.[48] In the absence of any firm indication to the contrary,[49] moreover, the Court thought it sensible to impute to Congress an intention to give

> Perhaps [Congress] consciously desired the Administrator to strike the balance at this level, thinking that those with great expertise and charged with responsibility for administering the provision would be in a better position to do so; perhaps it simply did not consider the question at this level; and perhaps Congress was unable to forge a coalition on either side of the question, and those on each side decided to take their chances with the scheme devised by the agency. For judicial purposes, it matters not which of these things occurred.

Chevron, 467 U.S. at 865.

48 *See* Laurence H. Silberman, Chevron—*The Intersection of Law & Policy*, 58 GEO. WASH. L. REV. 821, 823 (1990). In a survey of 137 congressional staffers responsible for statutory drafting, Professors Abbe Gluck and Lisa Bressman tried to test that assumption by posing a series of questions about the *Chevron* doctrine and the presumption of delegation. *See* Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901, 990–1015 (2013). Gluck and Bressman reported that a large percentage of the surveyed staffers (82%) were familiar with *Chevron* and that a majority (58%) reported that *Chevron* plays a role when they draft legislation. *Id.* at 995–96. At the same time, they found that a substantial number of staffers (28%) resisted the notion "that *Chevron* itself [is] the reason that drafters leave aspects of statutes ambiguous." *Id.* at 997. In particular, upwards of 90% of those surveyed cited several potential reasons for ambiguity, including "desire to delegate decisionmaking to agencies [(91%),] . . . lack of time (92%), the complexity of the issue (93%), and the need for consensus (99%)." *Id.* From this, Gluck and Bressman concluded that *Chevron* "does not seem to be a typical reason for ambiguity." *Id.*

I assume for present purposes that Gluck and Bressman used survey techniques that capture the views of the drafting staff. *See generally* SHARON L. LOHR, SAMPLING: DESIGN AND ANALYSIS (2d ed. 2010) (discussing sampling techniques). Taken on their own terms, the results of the study do not refute the Court's equation of statutory indeterminacy with delegation in cases governed by the *Chevron* framework. As discussed above, the Court in *Chevron* did not purport to rely on the conclusion that indeterminacy in an administrative statute reflected an actual or genuine congressional intent to delegate. *See supra* note 47 and accompanying text. Rather, acknowledging that indeterminacy might reflect any number of legislative causes—a premise consistent with the survey's results, *see* Gluck & Bressman, *supra*, at 997—the Court adopted the *Chevron* presumption as a sensible imputation of legislative intent in the absence of firm evidence to the contrary about why Congress left the statute indeterminate. Indeed, although Gluck and Bressman's survey raises independent questions about the proper threshold conditions for triggering the application of *Chevron*, *see id.* at 998–1006; *see also infra* text accompanying notes 54–63, it also confirms that most staffers understand the way *Chevron* works in cases to which it applies. *See* Gluck & Bressman, *supra*, at 995–96. If so, then Gluck and Bressman's findings may actually support the judicial presumption that, in cases within *Chevron*'s domain, statutory indeterminacy effects a delegation to the responsible agency. *See, e.g.*, Cannon v. Univ. of Chi., 441 U.S. 677, 699 (1979) (deeming it "not only appropriate but also realistic to presume that Congress was thoroughly familiar with . . . unusually important precedents" and that Congress "expect[s] its enactment[s] to be interpreted in conformity with them").

49 In most administrative statutes, Congress is usually silent or opaque about whether it wants agencies or courts to have the final say about indeterminacy. *See, e.g.*, David J. Barron & Elena Kagan, Chevron*'s Nondelegation Doctrine*, 2001 SUP. CT. REV. 201, 203; Eric A. Posner & Cass R. Sunstein, Chevron*izing Foreign Relations Law*, 116 YALE L.J. 1170, 1220 (2007).

the agency, rather than the reviewing court, the discretion implicit in choosing among available reasonable interpretations.[50] "Judges," the Court emphasized, "are not experts in the field, and are not part of either political branch of the Government."[51] In contrast, because an agency answers at some level to the President, and through the President to the people, it is more appropriate for such an entity to "resolv[e] the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities."[52] In short, the Court premised its apparent across-the-board presumption of deference on the reality that indeterminacy gives rise to discretion and the conviction that, in our system of government, agencies enjoy a comparative advantage in the exercise of such discretion.[53]

Subsequent opinions of the Court have narrowed *Chevron*'s domain and complicated the threshold conditions for its application.[54] But these decisions have not altered *Chevron*'s basic message about

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50 *See* JOHN F. MANNING & MATTHEW C. STEPHENSON, LEGISLATION AND REGULATION 769–70 (2d ed. 2013); *see also* John F. Manning, Chevron *and the Reasonable Legislator*, 128 HARV. L. REV. 457 (2014). The Court's interpretive technique reflected the Legal Process approach, which dominated the Court's statutory cases during the post-World War II period. *See* HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 1376–78 (1994); *see also* William N. Eskridge, Jr. & Philip P. Frickey, *Legislation Scholarship and Pedagogy in the Post-Legal Process Era*, 48 U. PITT. L. REV. 691, 698–99 (1987) (describing the influence of the Legal Process school). The Legal Process approach presumed that law is a purposive enterprise and that statutory interpretation should be guided by the assumption "that the legislature was made up of reasonable persons pursuing reasonable purposes reasonably." HART & SACKS, *supra*, at 1378. Under this approach, a judge had to try to reconstruct from various clues what a reasonable legislator would prefer under the circumstances. *See id.*

51 *Chevron*, 467 U.S. at 865.

52 *Id.* at 865–66.

53 *See, e.g.*, Posner & Sunstein, *supra* note 49, at 1194; Matthew C. Stephenson, *Public Regulation of Private Enforcement: The Case for Expanding the Role of Administrative Agencies*, 91 VA. L. REV. 93, 149 (2005). Some students of *Chevron* (myself included) had read it as adopting a new constitutionally inspired clear statement rule resting on the premises of constitutional democracy. *See, e.g.*, John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 626, 634 (1996); Richard J. Pierce, Jr., *Reconciling* Chevron *and Stare Decisis*, 85 GEO. L.J. 2225, 2229–33 (1997). On that view, an interpreter must assume that indeterminacy in an organic act represents a delegation of discretion to democratically accountable agencies, rather than life-tenured judges, unless Congress unmistakably signals an intention to the contrary. *See* MANNING & STEPHENSON, *supra* note 50, at 771 (describing the constitutional position). The imputed intent account of *Chevron* fits subsequent caselaw better than does the constitutional position. *See infra* text accompanying notes 57–59.

54 *See* Cass R. Sunstein, Chevron *Step Zero*, 92 VA. L. REV. 187, 244–47 (2006).

indeterminacy and delegation.[55] In particular, the much-discussed decision in *United States v. Mead Corp.*[56] deemed it implausible to impute to Congress an intent to delegate unless the organic act prescribed "relatively formal administrative procedure[s] tending to foster the fairness and deliberation that should underlie [an agency] pronouncement" carrying the force of law.[57] Accordingly, unless a given statutory scheme gave "some other indication of . . . congressional intent" to delegate,[58] *Chevron* deference would be available only for interpretations that grew out of procedures such as formal adjudication or notice-and-comment rulemaking.[59]

Whatever the merits or demerits of *Mead*'s refinement of *Chevron*,[60] the later decision leaves intact *Chevron*'s central insight. Within

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55 *See* Thomas W. Merrill & Kathryn Tongue Watts, *Agency Rules with the Force of Law: The Original Convention*, 116 HARV. L. REV. 467, 590 (2002).

56 United States v. Mead Corp., 533 U.S. 218 (2001).

57 *Id.* at 230. The Court in *Mead* emphasized that even where a reviewing court does not owe *Chevron* deference, it still must accord the agency interpretation whatever weight it deserves in light of "thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *Id.* at 228 (quoting Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944)) (internal quotation marks omitted). Though sometimes referred to as a form of deference, the so-called *Skidmore* principle is better understood as reflecting the conclusion that "an agency's view on a given statutory question may in itself warrant respect by judges who themselves have ultimate interpretive authority." Peter L. Strauss, *"Deference" Is Too Confusing—Let's Call Them "*Chevron *Space" and "*Skidmore *Weight,"* 112 COLUM. L. REV. 1143, 1145 (2012). This Article is concerned with the way a reviewing court relies on legislative history in contexts in which the agency exercises delegated law-elaboration authority that the reviewing court must accept (if the agency has interpreted the statute reasonably). Hence, the question whether the *Skidmore* principle itself entails any special rules of interpretation must await another day.

58 *Mead*, 533 U.S. at 227.

59 *See id.* at 226–27. The Court did not clearly articulate what those "other indicia" of legislative intent might include. In *Barnhart v. Walton*, 535 U.S. 212 (2002), the Court made clear that even if an agency announces its policy positions through informal pronouncements, "the interstitial nature of the legal question, the related expertise of the Agency, the importance of the question to administration of the statute, the complexity of that administration, and the careful consideration the Agency has given the question over a long period of time" may justify invoking *Chevron* to assess the resulting interpretations. *Id.* at 222.

60 *Mead* has generated considerable scholarship, much of it critical. *See, e.g.*, David L. Franklin, *Legislative Rules, Nonlegislative Rules, and the Perils of the Short Cut*, 120 YALE L.J. 276, 320–23 (2010); Thomas W. Merrill, *The* Mead *Doctrine: Rules and Standards, Meta-Rules and Meta-Standards*, 54 ADMIN. L. REV. 807, 814–15 (2002); Merrill & Watts, *supra* note 55, at 476; Russell L. Weaver, *The Emperor Has No Clothes:* Christensen, Mead, *and Dual Deference Standards*, 54 ADMIN. L. REV. 173, 175 (2002). In defense of *Mead*, Gluck and Bressman report that of the 137 staffers they surveyed, 88% concluded that the authorization of notice-and-comment rulemaking "is always or often relevant to whether drafters intend for an agency to have gap-filling authority." Gluck & Bressman, *supra* note 48, at 999.

Chevron's domain (whatever it may be),[61] the Court still treats indeterminacy as the relevant signal that Congress meant to delegate policymaking discretion to the agency.[62] As the Court recently put it, "'when [Congress has] left ambiguity in a statute' administered by an agency," the Court will presume that Congress "'understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows.'"[63] If Congress has spoken clearly to the question at issue, it has settled the relevant policy itself; if it has left the question unresolved, it has delegated discretion to its chosen agent. Thus, in cases where *Chevron* applies—where the formality of agency procedure makes it plausible to infer a delegation of power—the reviewing court must accept the agency's exercise of any discretion that flows from the statute's indeterminacy.

Of course, however simple and elegant that formula may be in theory, it is quite another thing to put it into practice. The trigger for delegation is indeterminacy. But neither clarity nor indeterminacy is self defining. To determine whether a statute has spoken clearly to the precise question at issue, one must interpret it. Yet the appropriate methods of interpretation are hotly contested. The next Part addresses one crucial aspect of that question—the acceptability of using legislative history to resolve latent indeterminacy in the text of an agency-administered statute.

II. *CHEVRON* AND THE LEGISLATIVE HISTORY DEBATE

Throughout *Chevron*'s three-decade history, an extensive debate has grown up around the question of how to determine whether Congress has spoken directly to the precise question at issue or left the matter for agency resolution. How frequently should a court applying the *Chevron* doctrine expect to find a clear answer to the statutory question in the first step of the *Chevron* inquiry?[64] How aggressively

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61 The conventional wisdom is that *Mead* has sown confusion in deference doctrine. *See, e.g.*, Lisa Schultz Bressman, *How* Mead *Has Muddled Judicial Review of Agency Action*, 58 VAND. L. REV. 1443, 1445 (2005); Adrian Vermeule, *Introduction*: Mead *in the Trenches*, 71 GEO. WASH. L. REV. 347, 347 (2003).

62 *See, e.g.*, City of Arlington, Tex. v. FCC, 133 S. Ct. 1863, 1874 (2013); Yellow Transp., Inc. v. Michigan, 537 U.S. 36, 45 (2002).

63 *City of Arlington, Texas*, 133 S. Ct. at 1868 (quoting Smiley v. Citibank (South Dakota), N.A., 517 U.S. 735, 740–41 (1996)).

64 *Compare, e.g.*, Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 521 (arguing that a judge applying the available tools of construction should usually be able to determine the meaning of a statute), *with* Silberman, *supra* note 48, at 826 ("If a case is resolved at the first step of *Chevron*, one must assume a situation where either

should such a court exploit semantic resources, such as dictionaries or syntactic canons of construction, in order to resolve latent indeterminacy?[65] Should substantive clear statement rules, such as the rule of lenity or the presumption against preemption, trump *Chevron* deference?[66] Finally, should a court use legislative history to resolve textual indeterminacy and negate the availability of *Chevron* deference?[67]

To address all of these issues today would take a book.[68] This Article will, therefore, confine itself to the evolving question under *Chevron* of when, if ever, a reviewing court properly relies on legislative history to make indeterminate statutes determinate. When the Court decided *Chevron*, the answer could not have been simpler: the Court routinely used legislative history to clarify the meaning of indeterminate statutes.[69] The Court's practice was straightforward; it relied implicitly on the premise of modern language theory that the meaning of language reflects the way people use words.[70] From that starting point, the Court thought it appropriate to search the record of legislative deliberations for evidence of Congress's intended mean-

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a petitioner has brought a particularly weak case to the court of appeals, or the agency is sailing directly against a focused legislative wind. Neither eventuality occurs very often.").

65 Most academics think it contrary to the spirit of *Chevron* to rely too heavily on semantic resources to clarify latent ambiguity in the text of an administrative statute. *See, e.g.*, Thomas W. Merrill, *Textualism and the Future of the* Chevron *Doctrine*, 72 WASH. U. L.Q. 351, 372–73 (1994); Richard J. Pierce, Jr., *The Supreme Court's New Hypertextualism: An Invitation to Cacophony and Incoherence in the Administrative State*, 95 COLUM. L. REV. 749, 752 (1995); Peter L. Strauss, *On Resegregating the Worlds of Statute and Common Law*, 1994 SUP. CT. REV. 429, 498.

66 *See, e.g.*, Kenneth A. Bamberger, *Normative Canons in the Review of Administrative Policymaking*, 118 YALE L.J. 64, 79–80 (2008); Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321, 1430–38 (2001); Gregory M. Dickinson, *Calibrating* Chevron *for Preemption*, 63 ADMIN. L. REV. 667, 668 (2011); Elliot Greenfield, *A Lenity Exception to* Chevron *Deference*, 58 BAYLOR L. REV. 1, 4 (2006); Nina A. Mendelson, Chevron *and Preemption*, 102 MICH. L. REV. 737, 758–79 (2004); Thomas W. Merrill, *Preemption and Institutional Choice*, 102 NW. U. L. REV. 727, 728 (2008); Catherine M. Sharkey, *Products Liability Preemption: An Institutional Approach*, 76 GEO. WASH. L. REV. 449, 491–98 (2008).

67 *See, e.g.*, Eskridge & Baer, *supra* note 15, at 1135–36.

68 For a thoughtful article addressing most of these issues soon after the Court decided *Chevron*, see generally Sunstein, *supra* note 6.

69 *See, e.g.*, Thornburg v. Gingles, 478 U.S. 30, 43 n.7 (1986); N. Haven Bd. of Educ. v. Bell, 456 U.S. 512, 526–27 (1982); Steadman v. SEC, 450 U.S. 91, 101 (1981); J.W. Bateson Co. v. United States *ex rel.* Bd. of Trs. of the Nat'l Automatic Sprinkler Indus. Pension Fund, 434 U.S. 586, 591 (1978).

70 *See, e.g.*, Stanley Fish, *Play of Surfaces: Theory and the Law*, *in* LEGAL HERMENEUTICS: HISTORY, THEORY, AND PRACTICE 297, 299 (Gregory Leyh ed., 1992); Steven Knapp & Walter Benn Michaels, *Against Theory*, 8 CRITICAL INQUIRY 723, 723 (1982); *see also* Larry Alexander & Saikrishna Prakash, *"Is That English You're Speaking?" Why Intention Free Interpretation Is an Impossibility*, 41 SAN DIEGO L. REV. 967, 974–78 (2004).

ing.[71] On the implicit assumption that rank-and-file members would naturally look to the informed views of a bill's drafters or managers for clarification of its meaning or goals, the Court gave special weight to explanations offered by sponsors or found in the reports of originating committees.[72] Even if the expressions of pivotal legislators did not constitute a perfect proxy for the views of Congress as a whole, interpreters were thought *more likely* to capture Congress's intended meaning if they considered the views of pivotal legislators rather than relying on their own uninformed conjecture about which interpretation best captured legislative purposes.[73]

The Court's much-discussed opinion in *Blanchard v. Bergeron*[74] offers a classic example—and may have been the high-water mark—of the Court's reliance on legislative history.[75] Under 42 U.S.C. § 1988, prevailing plaintiffs in certain classes of civil rights cases could recover a "reasonable attorney's fee" as part of costs.[76] At issue in *Blanchard* was whether the terms of a contingent-fee agreement lim-

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71 *See* Hans W. Baade, *"Original Intent" in Historical Perspective: Some Critical Glosses*, 69 TEX. L. REV. 1001, 1082–84 (1991); John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673, 678–79 (1997).

72 *See, e.g.*, Garcia v. United States, 469 U.S. 70, 76 (1984) ("[T]he authoritative source for finding the Legislature's intent lies in the Committee Reports on the bill, which 'represen[t] the considered and collective understanding of those Congressmen involved in drafting and studying proposed legislation.'" (quoting Zuber v. Allen, 396 U.S. 168, 186 (1969))); Nat'l Woodwork Mfrs. Ass'n v. NLRB, 386 U.S. 612, 640 (1967) ("'It is the sponsors that we look to when the meaning of the statutory words is in doubt.'" (quoting Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384, 394–95 (1951))); *see also, e.g.*, SEC v. Robert Collier & Co., 76 F.2d 939, 941 (2d Cir. 1935) (L. Hand, J.) (explaining the rationale for relying on committee reports); J.P. Chamberlain, *The Courts and Committee Reports*, 1 U. CHI. L. REV. 81, 82 (1933) (same); Jacobus tenBroek, *Admissibility of Congressional Debates in Statutory Construction by the United States Supreme Court*, 25 CALIF. L. REV. 326, 329 n.20 (1937) (explaining the special role of sponsors' statements).

73 *See, e.g.*, United States v. O'Brien, 391 U.S. 367, 383–84 (1968) ("When the issue is simply the interpretation of legislation, the Court will look to statements by legislators for guidance as to the purpose of the legislature, because the benefit to sound decision-making in this circumstance is thought sufficient to risk the possibility of misreading Congress' purpose." (footnote omitted)); Harry Willmer Jones, *Extrinsic Aids in the Federal Courts*, 25 IOWA L. REV. 737, 743 (1940) ("[T]he choice before the judges is that they must either derive the meaning of a statute solely from its language and from conjecture as to its purposes, or must accept as the 'legislative intention' the understanding of the committee experts and other interested legislators really responsible for its formulation.").

74 Blanchard v. Bergeron, 489 U.S. 87 (1989).

75 The Court decided *Blanchard* just as a broad challenge to the Court's reliance on legislative history began to unfold. *See infra* notes 87–98 and accompanying text. Indeed, Justice Scalia's concurrence in *Blanchard* was one of the most prominent early attacks on the practice. *See* Frickey, *Big Sleep*, *supra* note 7, at 254–55.

76 *See* Civil Rights Attorney's Fees Awards Act of 1976, Pub. L. No. 94-559, 90 Stat. 2641 (codified as amended at 42 U.S.C. § 1988 (2012)).

ited the amount of statutory attorney's fees that a prevailing plaintiff could recover.[77] In rejecting any such limit, the Court emphasized that while § 1988 does not provide "a specific definition" of "reasonable attorney's fee," the committee reports in both Houses referred to a twelve-factor test described in *Johnson v. Georgia Highway Express, Inc.*,[78] a Fifth Circuit decision that had construed the same language in a prior attorney's fee statute.[79] *Johnson* had listed the existence of a contingent fee arrangement among its twelve factors and, in dicta, suggested that a statutory fee award should not exceed the amount to which the representation contract entitled the lawyer.[80] While reaffirming its reliance on the twelve *Johnson* factors, the Court in *Blanchard* rejected *Johnson*'s dicta about fee agreements.[81] It seems that the Senate Report had also cited three district court opinions that, in the report's words, "correctly applied" *Johnson*, and the Court's examination of those opinions revealed that each had treated a fee agreement as a factor to consider but not as a "dispositive" cap on recovery.[82] The Court followed suit, using the detailed contents of the committee reports as "guidance to Congress' intent" about what constitutes a "reasonable" fee.[83]

In the legal culture of the period, therefore, it is no surprise that, in *Chevron* itself, the legislative history of the Clean Air Act Amendments—in particular, the views expressed in the relevant committee reports—figured centrally among the "traditional tools of statutory

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77 *Blanchard*, 489 U.S. at 88.

78 Johnson v. Ga. Highway Express, Inc., 488 F.2d 714 (1974).

79 *Blanchard*, 489 U.S. at 91. The Court in *Blanchard* thus explained:

> The 12 factors set forth by the *Johnson* court for determining fee awards under § 706(k) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(k) are: (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the "undesirability" of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases.

Id. at 91 n.5 (citing *Johnson*, 488 F.2d at 717–19).

80 *See id.* at 92.

81 *Id.*

82 *Id.* at 92–93 (discussing Swann v. Charlotte-Mecklenburg Bd. of Educ., 66 F.R.D. 483 (W.D.N.C. 1975); Stanford Daily v. Zurcher, 64 F.R.D. 680 (N.D. Cal. 1974), *aff'd*, 550 F.2d 464 (9th Cir. 1977), *rev'd on other grounds*, 436 U.S. 547 (1978); Davis v. Cnty. of Los Angeles, 8 Empl. Prac. Dec. (CCH) ¶ 9444 (C.D. Cal. 1974)).

83 *Id.* at 91.

construction" that the Court consulted.[84] Indeed, the Court tellingly remarked that if an agency's decision "'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.'"[85] In the years following *Chevron*, moreover, the Court did not hesitate to consult legislative history in determining whether an agency interpretation contradicted congressional will.[86]

Soon after *Chevron*, however, the "new textualists"—a group of then-recently appointed judges who urged a revisionist approach to statutory interpretation—broadly challenged the reliability and legitimacy of using legislative history as a proxy for legislative intent.[87] At the most basic level, textualists questioned the very idea that legislatures have a collective "intent" on which legislative history might shed light.[88] Judge Easterbrook, in particular, argued that "[i]ntent is elusive for a natural person, fictive for a collective body."[89] This intent skepticism rested on the idea that the complexity, opacity, and path dependence of the legislative process make it difficult, if not impossible, to aggregate individual legislators' preferences into a coherent policy choice.[90] In particular, textualists stressed that legislative outcomes frequently turn on nonsubstantive factors such as agenda manipulation and logrolling.[91] For that reason, they found it implausible to think that interpreters could unravel what a legislature likely "intended" on a matter that the text did not clearly resolve.[92]

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84 Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843 n.9 (1984); *see also id.* at 851–53 (examining whether the legislative history addressed the proper scope of "stationary source").

85 *Id.* at 845 (emphasis added) (quoting United States v. Shimer, 367 U.S. 374, 383 (1961)).

86 *See, e.g.*, Dole v. United Steelworkers of Am., 494 U.S. 26, 40 n.7 (1990); INS v. Cardoza-Fonseca, 480 U.S. 421, 432–41 (1987); Japan Whaling Ass'n v. Am. Cetacean Soc'y, 478 U.S. 221, 234–40 (1986); United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 131–34 (1985); Chem. Mfrs. Ass'n v. Natural Res. Def. Council, Inc., 470 U.S. 116, 126–29 (1985).

87 *See* William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 646–48 (1990) (discussing this development); Frickey, *Big Sleep*, *supra* note 7, at 254–55 (same).

88 *See, e.g.*, Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 547 (1983); Scalia, *supra* note 64, at 517. This line of argument built on Arrovian social choice theory, which uses game theory to analyze the workings of the legislative process. *See, e.g.*, KENNETH J. ARROW, SOCIAL CHOICE AND INDIVIDUAL VALUES (2d ed. 1963).

89 Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL'Y 61, 68 (1994).

90 *See* John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2410–13 (2003).

91 Easterbrook, *supra* note 88, at 547–48.

92 *Id.*

In addition, textualists argued that even if Congress did have a collective intent, legislative history was, at best, unreliable and, at worst, positively misleading evidence of such intent. Courts simply cannot know how many legislators were aware of, much less agreed with, even the highest value legislative history.[93] Worse still, once members of Congress realized that courts will rely on legislative history to fill in the details of indeterminate statutes, such legislators had every incentive "to salt the legislative record with unilateral interpretations of statutory provisions they were unable to persuade their colleagues to accept."[94] Indeed, to the extent that legislative committees represent interests narrower than those represented by Congress as a whole, one might expect a systematic skewing of the policy preferences or understandings expressed in committee reports.[95]

Finally, the new textualists questioned the very legitimacy of equating legislative history generated by only a part of Congress with the intentions of the body as a whole. In particular, textualists argued that if judges treat an indeterminate text as a mere conduit for the unenacted intentions of a bill's sponsors or originating committees, the process of interpretation risks making an "end run" around the process of bicameralism and presentment prescribed by Article I, Sec-

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93 *See, e.g.*, Wis. Pub. Intervenor v. Mortier, 501 U.S. 597, 620 (1991) (Scalia, J., concurring in judgment) ("It is most unlikely that many Members of either Chamber read the pertinent portions of the Committee Reports before voting on the bill—assuming (we cannot be sure) that the Reports were available before the vote.").

94 Int'l Bhd. of Elec. Workers, Local Union No. 474 v. NLRB, 814 F.2d 697, 717 (D.C. Cir. 1987) (Buckley, J., concurring); *see also* Note, *Why Learned Hand Would Never Consult Legislative History Today*, 105 HARV. L. REV. 1005, 1016 (1992).

95 In a widely publicized speech delivered by now Justice Scalia in various venues in the 1980s, he thus argued:

> "Nor, in the realities of the modern Congress, is a committee likely to represent a microcosm of the whole body, with 'middle-of-the-road' views on the issues it addresses. To the contrary, by process of self-selection the committee is almost invariably 'out in front' of the remainder of the Congress on the issues for which it has responsibility. A farm bill adopted by the Agriculture Committee in either house, for example, would be a far cry from what the full Congress would adopt. Why, then, should we assume that a legislative history largely fabricated by such a committee will be representative of the full Congress? It almost assuredly will not."

John F. Manning, *Second-Generation Textualism*, 98 CALIF. L. REV. 1287, 1294 n.42 (2010) (quoting Antonin Scalia, Speech on Use of Legislative History 13 (delivered during fall 1985 and spring 1986 at various law schools)). The evidence on whether legislative committees do, in fact, reflect outlying preferences is mixed. *See generally* Richard L. Hall & Bernard Grofman, *The Committee Assignment Process and the Conditional Nature of Committee Bias*, 84 AM. POL. SCI. REV. 1149, 1149 (1990) (contending that there is no clear-cut answer); John Londregan & James M. Snyder, Jr., *Comparing Committee and Floor Preferences*, 19 LEGIS. STUD. Q. 233, 233–36 (1994) (same).

tion 7 of the Constitution.[96] As textualism's leading proponent, Justice Scalia, put it: "We are governed by laws, not by the intentions of legislators. . . . 'The law as it passed is the will of the majority of both houses, *and the only mode in which that will is spoken is in the act itself.*'"[97] To ascribe the contents of a committee report to Congress as a whole effectively permits Congress to delegate its policymaking function to its components, circumventing the complex multilateral process that the Constitution prescribes.[98]

Those claims, of course, did not go unanswered. Defenders of legislative history emphasized that the legislative process, as observed, is not as chaotic and unreadable as textualists suggest.[99] The legislature relies on "structures, rules, and norms"—including gatekeeping committees—to create relatively stable outcomes.[100] And because of the central drafting role of committees and the relative readability of committee reports, rank-and-file legislators—and, more likely, the staff who advise them—can be expected to consult committee reports

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96 *See* Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J.L. & PUB. POL'Y 59, 64–65 (1988).

97 Conroy v. Aniskoff, 507 U.S. 511, 519 (1993) (Scalia, J., concurring in judgment) (quoting Aldridge v. Williams, 44 U.S. (3 How.) 9, 24 (1845)); *see also, e.g.*, Thompson v. Thompson, 484 U.S. 174, 191–92 (1988) (Scalia, J., concurring in judgment) ("Committee reports, floor speeches, and even colloquies between Congressmen are frail substitutes for bicameral vote upon the text of a law and its presentment to the President." (internal cross reference omitted)); In re Sinclair, 870 F.2d 1340, 1344 (7th Cir. 1989) (Easterbrook, J.) ("It would demean the constitutionally prescribed method of legislating to suppose that its elaborate apparatus for deliberation on, amending, and approving a text is just a way to create some evidence about the law, while the real source of legal rules is the mental processes of legislators." (emphasis omitted)).

98 Justice Scalia thus wrote:

> Article I, § 1, provides that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and a House of Representatives." It has always been assumed that these powers are nondelegable—or, as John Locke put it, that legislative power consists of the power "to make laws, . . . not to make legislators." J. Locke, Second Treatise of Government 87 (R. Cox ed. 1982). . . . Thus, if legislation consists of forming an "intent" rather than adopting a text (a proposition with which I do not agree), Congress cannot leave the formation of that intent to a small band of its number, but must, as the Constitution says, form an intent of the *Congress*.

Bank One Chi., N.A. v. Midwest Bank & Trust Co., 516 U.S. 264, 280 (1996) (Scalia, J., concurring in part and concurring in judgment); *see also* Manning, *supra* note 71, at 695.

99 *See* DANIEL A. FARBER & PHILIP P. FRICKEY, LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION 48–49 (1991).

100 *See id.* at 49–50 (summarizing political science scholarship); *see also* Kenneth A. Shepsle & Barry R. Weingast, *Structure-Induced Equilibrium and Legislative Choice*, 37 PUB. CHOICE 503, 513–14 (1981); Kenneth A. Shepsle & Barry R. Weingast, *Uncovered Sets and Sophisticated Voting Outcomes with Implications for Agenda Institutions*, 28 AM. J. POL. SCI. 49, 71 (1984); Kenneth A. Shepsle & Barry R. Weingast, *When Do Rules of Procedure Matter?*, 46 J. POL. 206, 217–18 (1984).

to learn what a piece of legislation contains.[101] Indeed, rank-and-file legislators may affirmatively rely on sponsors or committees to elaborate the details of statutory meaning.[102]

Legislative history proponents further contended that committees and sponsors have every incentive to create reliable legislative history. These pivotal legislators generate such history as "appointed agent[s] of the legislative majority that passed the chamber's version of the statute."[103] If the legislative history does not accurately reflect the majority's views, the committee or sponsor "can be subject to sanctions and loss of reputation."[104] This set of incentives, defenders say, helps ensure accuracy in the most authoritative forms of legislative history.[105]

Finally, defenders of the pre-textualist status quo stressed that if the Court were to alter its interpretive approach retroactively, that course of action would create its own legitimacy problem by unfairly defeating congressional expectations. For many years, established legal conventions treated committee reports and sponsors' statements as authoritative evidence of legislative intent.[106] In light of the well-worn presumption that "Congress legislates with knowledge of [the] basic rules of statutory construction,"[107] legislators voted for legislation with the reasonable expectation that the Court would consult

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101 *See, e.g.*, Archer-Daniels-Midland Co. v. United States, 37 F.3d 321, 324 (7th Cir. 1994) (Posner, C.J.) ("Even advised by his personal staff a member of Congress would have great difficulty figuring out the purport of [a complex and technical statute] without the aid of the committee reports."); Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845, 859 (1992) ("[N]o legislator reads every word of every report or floor statement or proposed statute, which may consist of hundreds of pages of text. However, . . . those words are carefully reviewed by those whom they will likely affect and by the legislator's own employees."); Gluck & Bressman, *supra* note 48, at 968–69 (explaining that their survey of congressional staff suggests that legislators and their staff are more likely to learn about the contents of a bill from the legislative history than from the text of the statute).

102 *See, e.g.*, *Bank One Chi., N.A.*, 516 U.S. at 276–77 (Stevens, J., concurring) ("If a statute . . . has bipartisan support and has been carefully considered by committees familiar with the subject matter, Representatives and Senators may appropriately rely on the views of the committee members in casting their votes."). As noted, textualists believe that any such expectation runs afoul of the norm against legislative self-delegation. *See supra* note 98.

103 McNollgast, *Legislative Intent: The Use of Positive Political Theory in Statutory Interpretation*, LAW & CONTEMP. PROBS., Winter & Spring 1994, at 3, 24.

104 *Id.*

105 *See* Daniel B. Rodriguez & Barry R. Weingast, *The Positive Political Theory of Legislative History: New Perspectives on the 1964 Civil Rights Act and Its Interpretation*, 151 U. PA. L. REV. 1417, 1538 (2003).

106 *See* William N. Eskridge, Jr. & John Ferejohn, *Politics, Interpretation, and the Rule of Law*, *in* THE RULE OF LAW: NOMOS XXXVI 265, 276 (Ian Shapiro ed., 1994).

107 McNary v. Haitian Refugee Ctr., Inc., 498 U.S. 479, 496 (1991).

committee reports and sponsors' statements to clarify indeterminacy in the text.[108]

Nonetheless, even critics of textualism have had to acknowledge its impact.[109] In the post–New Deal period, the Court had come to rely heavily on legislative history.[110] Often, it reflexively equated the views of sponsors or committees with the intent of Congress as a whole.[111] Its decisions sometimes seemed to involve a search, first and foremost, for legislative intent rather than for the meaning of the enacted text.[112] And when the Court concluded that the legislative history revealed an intention at odds with the plain meaning of the text, the spirit trumped the letter of the law.[113]

What the textualist critique highlighted was that "the Court should devote more of its energy to analyzing statutory *texts*" and that "legislative history is, at best, secondary and supporting evidence of statutory meaning."[114] The new textualism also pressed the Court to be "more critical of the legislative history it uses" and to ask whether particular legislative history might be cooked or strategic.[115] In practice, this meant that while the Court did not adopt an exclusionary rule for legislative history, it came to rely on that resource far less

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108 *See* Jonathan R. Siegel, *The Use of Legislative History in a System of Separated Powers*, 53 VAND. L. REV. 1457, 1515 (2000).

109 *See infra* note 116.

110 *See* Eskridge & Ferejohn, *supra* note 106.

111 *See, e.g.*, Steadman v. SEC, 450 U.S. 91, 101 (1981) (noting that "[a]ny doubt as to the intent of Congress is removed by the House Report"); J.W. Bateson Co. v. United States *ex rel.* Bd. of Trs. of the Nat'l Automatic Sprinkler Indus. Pension Fund, 434 U.S. 586, 591 (1978) (concluding that "the authoritative Committee Reports" "leave[ ] no room for doubt about Congress' intent").

112 In the heyday of its use of legislative history, the Court once remarked: "The legislative history . . . is ambiguous. . . . Because of this ambiguity it is clear that we must look primarily to the statutes themselves to find the legislative intent." Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 412 n.29 (1971).

113 *See, e.g.*, Pub. Citizen v. U.S. Dep't of Justice, 491 U.S. 440, 452–55 (1989); Cal. Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 272, 284 (1987); United Steelworkers of Am. v. Weber, 443 U.S. 193, 201–02 (1979); Train v. Colo. Pub. Interest Research Grp., 426 U.S. 1, 10–11 (1976).

114 Eskridge, *supra* note 87, at 625.

115 *Id.* at 625, 636; *see also, e.g.*, Graham Cnty. Soil & Water Conservation Dist. v. United States *ex rel.* Wilson, 559 U.S. 280, 296 (2010) (finding that the legislative history "raises more questions than it answers"); Richlin Sec. Serv. Co. v. Chertoff, 553 U.S. 571, 584 n.8 (2008) (deeming "the legislative history . . . a wash"); Long Island Care at Home, Ltd. v Coke, 551 U.S. 158, 168 (2007) ("Nor can one find any clear answer in the statute's legislative history."); Nat'l Credit Union Admin. v. First Nat'l Bank & Trust Co., 522 U.S. 479, 503 n.10 (1998) (dismissing legislative history as "murky" and as a "slender reed" on which to rely); Dunn v. CFTC, 519 U.S. 465, 478 (1997) (dismissing a comment in the committee report as "legislative dicta" unrelated to the main point of the bill).

than it had.[116] The Court now works hard to ascertain whether the text is clear, exhausting semantic resources before turning to legislative history.[117] Perhaps most importantly, if the Court finds the statutory text to be clear, that is the end of the matter; legislative intent, as revealed by the legislative history, can no longer trump the unambiguous import of the statutory text.[118] As the Court has written, "courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.'"[119]

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116 As Philip Frickey, a critic of textualism, wrote: "The Court is less likely to cite legislative history today, and when it does, the citations seem less important to the outcome." Frickey, *Revival of Theory*, *supra* note 7, at 205 (footnote omitted). Quite a few scholars have crunched the numbers and found a marked decline in the Court's use of legislative history. *See, e.g.*, James J. Brudney & Corey Ditslear, *The Decline and Fall of Legislative History? Patterns of Supreme Court Reliance in the Burger and Rehnquist Eras*, 89 JUDICATURE 220, 222 (2006) (documenting that in workplace law cases, "the Court's reliance on legislative history declined from 51 percent during the Burger years to 29 percent in the Rehnquist era"); Michael H. Koby, *The Supreme Court's Declining Reliance on Legislative History: The Impact of Justice Scalia's Critique*, 36 HARV. J. ON LEGIS. 369, 386 (1999) (reporting that in the six years before Justice Scalia's appointment, the Court averaged 3.47 citations of legislative history per opinion and that the average in the twelve years after his appointment dropped to 1.87). Some take a contrary view of the Court's trajectory. *See generally* Jane S. Schacter, *The Confounding Common Law Originalism in Recent Supreme Court Statutory Interpretation: Implications for the Legislative History Debate and Beyond*, 51 STAN. L. REV. 1 (1998); Charles Tiefer, *The Reconceptualization of Legislative History in the Supreme Court*, 2000 WIS. L. REV. 205.

117 *See, e.g.*, Merrill, *supra* note 64, at 356–58 (noting the rise of dictionaries at the expense of legislative history in statutory interpretation); Samuel A. Thumma & Jeffrey L. Kirchmeier, *The Lexicon Has Become a Fortress: The United States Supreme Court's Use of Dictionaries*, 47 BUFF. L. REV. 227, 252–60 (1999) (same).

118 *See, e.g.*, Milner v Dep't of the Navy, 131 S. Ct. 1259, 1267 (2011) ("Legislative history, for those who take it into account, is meant to clear up ambiguity, not create it."); Milavetz, Gallop & Milavetz, P.A. v. United States, 559 U.S. 229, 236 n.3 (2010) (noting that "reliance on legislative history is unnecessary in light of the statute's unambiguous language"); United States v Gonzales, 520 U.S. 1, 6 (1997) ("Given the straightforward statutory command, there is no reason to resort to legislative history.").

119 Conn. Nat'l Bank v Germain, 503 U.S. 249, 253–54 (1992) (citations omitted) (quoting Rubin v. United States, 449 U.S. 424, 430 (1981)). The Court's current attitude is perhaps best captured by Justice Kennedy's now-famous opinion for the Court in *Exxon Mobil Corp. v. Allapattah Services, Inc.*, 545 U.S. 546 (2005), which states:

> As we have repeatedly held, the authoritative statement is the statutory text, not the legislative history or any other extrinsic material. 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. Not all extrinsic materials are reliable sources of insight into legislative understandings, however, and legislative history in particular is vulnerable to two serious criticisms. First, legislative history is itself often murky, ambiguous, and contradictory. Judicial investigation of legislative history has a tendency to become, to borrow Judge Leventhal's memorable phrase, an exercise in "'looking over a crowd and picking

One might think that this shift in attitude would map onto *Chevron* in a straightforward, predictable way. The Court's new approach leaves open the possibility that an interpreter may properly use legislative history to resolve ambiguity. Accordingly, as long as the Court takes care to exclude suspicious legislative history, one might think it still perfectly natural for a reviewing court to consult legislative history when it finds that *the text* itself does not speak clearly to the precise question at issue. The very condition that triggers step two of *Chevron*—the presence of statutory indeterminacy—would seem to invite consideration of legislative history, even after one factors in the Court's new equilibrium.

Yet some confusion surrounds the question of what role legislative history plays under the *Chevron* doctrine in the post-textualist environment.[120] Some of the Court's post-textualist opinions have framed the *Chevron* test in overtly textualist terms, stating that "[i]f the agency interpretation is not in conflict with *the plain language of the statute*, deference is due."[121] At the same time, however, even if the Court rarely invokes legislative history to reject an agency interpretation, a majority of the Court still deems it appropriate to consider the legislative history when deciding whether Congress has spoken to the precise question in issue.[122] Most federal circuit courts have found it permissible under *Chevron* to rely on legislative history

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> out your friends.'" See Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 214 (1983). Second, judicial reliance on legislative materials like committee reports, which are not themselves subject to the requirements of Article I, may give unrepresentative committee members—or, worse yet, unelected staffers and lobbyists—both the power and the incentive to attempt strategic manipulations of legislative history to secure results they were unable to achieve through the statutory text.

Id. at 568. In other words, even when ambiguity opens the door for the Court to use legislative history, the Court is on the lookout for evidence that the legislative history is self-contradictory or was generated to produce a result that could not have survived the rigors of bicameralism and presentment.

120 *See* MANNING & STEPHENSON, *supra* note 50, at 822–25.

121 Nat'l R.R. Passenger Corp. v. Bos. & Me. Corp., 503 U.S. 407, 417 (1992) (emphasis added); *see also, e.g., id.* ("In ascertaining whether the agency's interpretation is a permissible construction of the language, a court must look to the structure and language of the statute as a whole."); K Mart Corp. v. Cartier, Inc., 486 U.S. 281, 292 (1988) ("If the agency regulation is not in conflict with the plain language of the statute, a reviewing court must give deference to the agency's interpretation of the statute.").

122 *See, e.g.*, Long Island Care at Home, Ltd. v. Coke, 551 U.S. 158, 166–68 (2007); Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ., 550 U.S. 81, 90–91 (2007); Envtl. Def. v. Duke Energy Corp., 549 U.S. 561, 576 (2007); Meyer v. Holley, 537 U.S. 280, 290 (2003); NLRB v. Town & Country Elec., Inc., 516 U.S. 85, 91 (1995); Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or., 515 U.S. 687, 704–07 (1995).

to determine whether Congress has spoken clearly to the interpretive question at hand.[123] But that view has not been unanimous.[124] And a number of the circuits have acknowledged that the role of legislative history under *Chevron* is a matter of debate.[125]

My own sense is that, as a matter of Supreme Court caselaw, the better view is that the Court today permits the use of legislative history to resolve indeterminacy under *Chevron* step one, just as it would in a run-of-the-mill non-agency case. William Eskridge and Lauren Baer have cited numerous instances in which the post-textualist Court has found it appropriate at least to consult legislative history in the *Chevron* context.[126] Perhaps the best example is *FDA v. Brown & Williamson Tobacco Corp.*,[127] in which the Court used legislative history to narrow the open-ended terms of an obvious delegation.[128]

At issue in *Brown & Williamson* was whether the Food and Drug Administration ("FDA") possessed authority to regulate tobacco under a provision of the Food, Drug, and Cosmetic Act ("FDCA")[129] that defined "drugs" as "articles (other than food) intended to affect

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123 *See, e.g.*, Salman Ranch, Ltd. v. Comm'r of Internal Revenue, 647 F.3d 929, 937 (10th Cir. 2011), *vacated*, 132 S. Ct. 2100 (2012) (mem.); Cohen v. JP Morgan Chase & Co., 498 F.3d 111, 116 (2d Cir. 2007); Succar v. Ashcroft, 394 F.3d 8, 30–31 (1st Cir. 2005); Am. Rivers v. Fed. Energy Regulatory Comm'n, 201 F.3d 1186, 1196 n.16 (9th Cir. 1999); Ark. AFL–CIO v. FCC, 11 F.3d 1430, 1441 n.9 (8th Cir. 1993) (en banc). In a similar vein, some circuits also have suggested that a reviewing court may consult legislative history at step two of *Chevron* in order to determine whether an agency interpretation is "permissible" or "reasonable" in light of the statutory intent or purpose. *See, e.g.*, Bankers Life & Cas. Co. v. United States, 142 F.3d 973, 983 (7th Cir. 1998); Jewish Hosp., Inc. v. Sec'y of Health & Human Servs., 19 F.3d 270, 276 (6th Cir. 1994). For further consideration of this alternative strategy, see *infra* text accompanying notes 181–82.

124 At least one circuit has suggested that a reviewing court should not consult "legislative history" but should look only to the "plain and literal language of the statute" in determining whether Congress spoke directly to the precise question at issue. United States v. Geiser, 527 F.3d 288, 294 (3d Cir. 2008) (internal quotation marks omitted). Another has said that "legislative history" alone should not suffice "to *reject* an agency's interpretation" but that "strong legislative history against one interpretation would restrict the range of choices that the bare text of the provision might otherwise seem to leave the administering agency." Nat'l Elec. Mfrs. Ass'n v. U.S. Dep't of Energy, 654 F.3d 496, 504–05, 511 (4th Cir. 2011) (internal quotation marks omitted).

125 *See, e.g.*, Perez-Olivo v. Chavez, 394 F.3d 45, 50 n.2 (1st Cir. 2005); Coke v. Long Island Care at Home, Ltd., 376 F.3d 118, 127 & n.3 (2d Cir. 2004), *rev'd on other grounds*, 551 U.S. 158 (2007); *Am. Rivers*, 201 F.3d at 1196 n.16.

126 *See* Eskridge & Baer, *supra* note 15, at 1136.

127 FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000).

128 *See id.* at 147.

129 Federal Food, Drug, and Cosmetic Act, Pub. L. No. 75-717, 52 Stat. 1040 (1938) (codified as amended at 21 U.S.C. §§ 301–399f (2012)).

the structure or any function of the body."[130] Though no one considered tobacco a drug when Congress enacted the FDCA in 1938, near the end of the twentieth century the FDA collected considerable new evidence to support findings that cigarette companies marketed their products with knowledge that the nicotine in tobacco had addictive, tranquilizing, stimulating, and weight-reducing effects.[131] Notwithstanding that these pharmacological effects seemed to bring tobacco comfortably within the FDCA's definition of "drug," the Court did not feel it necessary to resolve the question whether tobacco falls within the text of the FDCA because the Court found that "the FDA's claim to jurisdiction contravenes the clear intent of Congress."[132]

Though the Court rested its conclusion on several grounds, its reasoning relied heavily on the post-enactment legislative history of the FDCA. In particular, the Court emphasized that when passing a series of post-FDCA tobacco statutes, "Congress . . . acted against the backdrop of the FDA's consistent and repeated statements that it lacked authority under the FDCA to regulate tobacco absent claims of therapeutic benefit by the manufacturer."[133] For example, in congressional hearings on the Federal Cigarette Labeling and Advertising Act ("FCLAA"),[134] which required warning labels on cigarette packages,[135] FDA representatives and other executive branch officials repeatedly testified that the FDA had no jurisdiction over tobacco under the FDCA.[136] The Court also cited several unsuccessful legislative attempts to grant the FDA explicit jurisdiction over tobacco.[137] This history led the Court to conclude that, whatever the text of the FDCA might require, the legislative history accompanying statutes such as the FCLAA expressed a legislative "intent" to ratify the FDA's prior position that it lacked jurisdiction over "smoking and health."[138]

Accordingly, just as the Court in *Blanchard* used the committee reports to specify the intended meaning of a "reasonable attorney's fee,"[139] the Court in *Brown & Williamson* relied on even more tenu-

130 21 U.S.C. § 321(g)(1)(C) (2012).

131 *See Brown & Williamson*, 529 U.S. at 127.

132 *Id.* at 132.

133 *Id.* at 144.

134 Federal Cigarette Labeling and Advertising Act, Pub. L. No. 89-92, 79 Stat. 282 (1965).

135 *See id.* § 4, 79 Stat. at 283.

136 *See Brown & Williamson*, 529 U.S. at 144–46 (discussing the relevant testimony).

137 *See id.* at 147–49.

138 *Id.* at 149, 157–58.

139 *See supra* notes 74–83 and accompanying text.

ous legislative history to specify Congress's intended meaning of the open-ended definition of "drug."[140] As noted, moreover, the Court has also consulted legislative history in other *Chevron* cases.[141] Yet because the post-textualist Court is more apt to find the text decisive and more cautious about the use of legislative history, it has become a relative rarity to find an opinion in which legislative history proves dispositive.[142] Still, the Court continues to treat legislative history as an available resource for resolving indeterminacy both in the *Chevron* context and in the run-of-the-mill case in which the judiciary is the interpreter of first instance.[143] Notwithstanding this apparent congruence, the Part that follows contends that even if the Court permits the use of legislative history in the typical non-agency case, it should adopt something close to an exclusionary rule for *Chevron* cases.

III. LEGISLATIVE HISTORY AND DELEGATED DISCRETION

My claim here is this: If a reviewing court relies on legislative history to displace an agency interpretation under the *Chevron* doctrine, that court runs afoul of the most salient feature of the Court's post-textualist jurisprudence—the conviction that an interpreter may not use legislative history to contradict the clear import of the text.[144] If, as *Chevron* suggests, statutory indeterminacy in qualifying administrative schemes signals a congressional delegation to the agency charged with implementing the statute, then a court's use of legislative history to specify the terms of that delegation—to narrow the scope of *statutory* discretion—contradicts the very point of the statute.[145] To see why this is so, one must look behind the Court's new policy of enforcing the plain meaning of the text even when the legislative history suggests that Congress had a contrary intent.

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140 The Court has long emphasized that post-enactment legislative history has especially weak probative value. *See, e.g.*, Haynes v. United States, 390 U.S. 85, 87 n.4 (1968) ("The views of a subsequent Congress of course provide no controlling basis from which to infer the purposes of an earlier Congress."); United States v. Price, 361 U.S. 304, 313 (1960) (noting that "the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one").

141 *See supra* note 122 and accompanying text.

142 Most frequently, the Court these days will invoke legislative history either to confirm its own analysis of the text or to reject a party's reliance on legislative history that runs counter to the text. *See, e.g.*, James J. Brudney, *Confirmatory Legislative History*, 76 BROOK. L. REV. 901, 901–02 (2011); John F. Manning, *The New Purposivism*, 2011 SUP. CT. REV. 113, 165.

143 *See supra* note 122 and accompanying text (collecting cases).

144 *See* Manning, *supra* note 95, at 1310–16 (discussing the modern Court's scruple against using legislative history to trump the statutory text).

145 *See* Manning, *supra* note 142, at 174 & n.283.

The Supreme Court, as noted,[146] had until recently concluded that if the meaning of the statutory text conflicted with the legislative intention or purpose clearly revealed by the legislative history, the letter had to yield to the spirit.[147] Behind this practice lay the premise that legislators enact statutes against the constraints of scarce resources, limited foresight, and the imperfections of human language.[148] For this reason, the Court concluded that fidelity to legislative supremacy would require interpreters to adjust even the clearest text when necessary to compensate for the inevitable failure of legislators to translate their true intentions or purposes into the language of the statute they adopted.[149]

The Court's modern approach rejects this once-entrenched practice on the ground that enforcing the spirit over the letter of the statute denies Congress the capacity to use statutory language to record the often-awkward compromises that are the staple of legislation.[150] In particular, the Court has emphasized that focusing on the policy intentions behind a piece of legislation, rather than the terms of the enacted text, risks denying Congress vital control over the *means* of implementing the law:

> Congress may be unanimous in its intent to stamp out some vague social or economic evil; however, because its Members may differ sharply on the means for effectuating that intent, the final language of the legislation may reflect hard-fought compromises. Invocation of the "plain purpose" of legisla-

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146 *See supra* notes 110–13 and accompanying text.

147 The canonical cases that marked this tradition were *Church of the Holy Trinity v. United States*, 143 U.S. 457, 459 (1892), and *United States v. American Trucking Ass'ns*, 310 U.S. 534, 543–44 (1940).

148 *See, e.g.*, Friedrich v. City of Chicago, 888 F.2d 511, 514 (7th Cir. 1989) (Posner, J.) (noting that "language is a slippery medium in which to encode a purpose" and that "legislatures . . . often legislate in haste, without considering fully the potential application of their words to novel settings"), *vacated*, 499 U.S. 933 (1991).

149 As the Court in *Holy Trinity* put it:

> This is not the substitution of the will of the judge for that of the legislator; for frequently words of general meaning are used in a statute, words broad enough to include an act in question, and yet a consideration of the whole legislation, or of the circumstances surrounding its enactment, or of the absurd results which follow from giving such broad meaning to the words, makes it unreasonable to believe that the legislator intended to include the particular act.

Holy Trinity, 143 U.S. at 459.

150 *See, e.g.*, Ragsdale v. Wolverine World Wide, Inc., 535 U.S. 81, 93–94 (2002); Barnhart v. Sigmon Coal Co., 534 U.S. 438, 461 (2002); Artuz v. Bennett, 531 U.S. 4, 10 (2000).

> tion at the expense of the terms of the statute itself takes no account of the processes of compromise . . . .[151]

Or, as the Court put it in another prominent opinion, an interpreter is "bound, not only by the ultimate purposes Congress has selected, but by the means it has deemed appropriate, and prescribed, for the pursuit of those purposes."[152] Hence, if the Court were to presume that a conflict between the clear import of the text and the intentions articulated in the legislative history reflected a failure of statutory expression, such a posture would undermine the capacity of Congress as a whole to record—and make stick—compromises that diverged from the stated views of the bill's drafters.[153]

The argument for excluding legislative history from the *Chevron* doctrine derives from the Court's new emphasis on protecting Con-

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151 Bd. of Governors of the Fed. Reserve Sys. v. Dimension Fin. Corp., 474 U.S. 361, 374 (1986).

152 MCI Telecomms. Corp. v. AT&T Co., 512 U.S. 218, 231 n.4 (1994).

153 *See* Manning, *supra* note 17, at 25–26. In theory, one could assume that if the committee reports say "up" and the text says "down," it is the committee reports that better capture whatever compromise the legislature struck. Two considerations counsel against such a resolution. First, the text of the statute alone has survived the full rigors of the legislative process, which involves "committees, fighting for time on the floor, compromise because other members want some unrelated objective, passage, exposure to veto, and so on." Easterbrook, *supra* note 96, at 64. Second, if one cannot tell which source—the text or a committee report—represents the "true" compromise, then the appropriate default rule would favor the text, given that the text has the formal imprimatur of bicameralism and presentment. *See* Manning, *supra* note 142, at 167–68.

Contrary to these premises, Professors Bressman and Gluck infer from their survey of legislative staff that the legislative history may reflect the preferences of pivotal legislators more faithfully than does the statutory text. *See* Lisa Schultz Bressman & Abbe R. Gluck, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part II*, 66 STAN. L. REV. 725, 740–41 (2014). They note that a lot of statutory drafting is done by the technical staff in the nonpartisan Office of Legislative Counsel—whose drafters do not answer directly to the legislators responsible for crafting legislation. *See id.* at 741. Bressman and Gluck further argue that, in contrast with the technical drafters, policy staffers who generate the legislative history tend to have closer ties with the responsible legislators. *See id.*

Whatever the merits of that empirical claim, it seems that Congress's own practices tell us which signal—statutory text or legislative history—should take priority. *See* Manning, *supra* note 17, at 77–78. Since the Constitution requires bicameralism and presentment for the enactment of legislation, U.S. CONST. art. I, § 7, legislators presumably send a signal through their selection of what materials to put to a vote. *See* Manning, *supra* note 17, at 77. If so, it means something for Congress to structure its proceedings to produce votes on formal statutory texts rather than legislative history—both of which are drafted and available prior to a bill's enactment. *See id.* at 77–78. Hence, crediting statutory text over legislative history in cases of conflict merely gives effect to Congress's own decision about how to conduct legislative business. *See id.*; *see also* U.S. CONST. art. I, § 5 (giving each House authority to prescribe its own procedures).

gress's choice of means.[154] This imperative requires interpreters to pay close attention to the level of generality at which Congress speaks.[155] As Judge Easterbrook has written:

> A legislature that seeks to achieve Goal *X* can do so in one of two ways. First, it can identify the goal and instruct courts or agencies to design rules to achieve the goal. In that event, the subsequent selection of rules implements the actual legislative decision, even if the rules are not what the legislature would have selected itself. The second approach is for the legislature to pick the rules. It pursues Goal *X* by Rule *Y*. The selection of *Y* is a measure of what Goal *X* was worth to the legislature, of how best to achieve *X*, and of where to stop in pursuit of *X*. Like any other rule, *Y* is bound to be . . . over- and under-inclusive. This is not a good reason for a court, observing the inevitable imprecision, to add to or subtract from Rule *Y* on the argument that, by doing so, it can get more of Goal *X*. The judicial selection of means to pursue *X* displaces and directly overrides the legislative selection of ways to obtain *X*. It denies to legislatures the choice of creating or withholding gap-filling authority.[156]

This insight suggests that conflicts between a statute and its legislative history are not limited to situations in which the statute and the legislative history say something inconsistent—for example, a text that states "no dogs allowed in the National Parks" and a committee report that elaborates an intention to "bar all cats." Rather, if part of the point of a statute is *implemental*—to opt for relatively precise rules or relatively open-ended standards as the means of carrying out legislative aims[157]—then anything in the legislative history that shifts the level of generality at which the text speaks also conflicts with the text.[158]

The generality-shifting problem is most apparent when the legislative history embraces a broader criterion than the text of the statute. If the statute says, "no dogs in the National Parks," and the legislative history states that "this applies to all disruptive pets," then applying the statute to animals outside the *canidae* family would plainly exceed

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154 Manning, *supra* note 142, at 174 & n.283.

155 *Id.* at 169–70.

156 Easterbrook, *supra* note 88, at 546–47 (footnotes omitted).

157 For discussion of rules versus standards, see, for example, Colin S. Diver, *The Optimal Precision of Administrative Rules*, 93 YALE L.J. 65 (1983), and Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557 (1992).

158 *See* Manning, *supra* note 142, at 169.

all accepted semantic boundaries for the term "dogs."[159] The conflict there is hard to mistake. Though less obvious, however, the problem still persists when the interpreter replaces an open-ended standard with more detailed rules—the scenario most relevant to understanding the *Chevron* doctrine.

As noted,[160] if Congress passes a statute stating that the National Park Service shall promulgate regulations to exclude "disruptive pets from the National Parks," the open-endedness of that statute itself signals a grant of interpretive or policymaking discretion. If the Service implements the statute through a *Chevron*-eligible procedure, *Chevron* instructs courts to presume that the resultant indeterminacy delegates to *the agency* the power to determine which pets are likely to disrupt the quiet enjoyment of the National Parks.[161] If the originating committees in each House issued identical reports stating that "we understand disruptive pets to mean dogs but not cats," the reports would not merely "clarify" legislative intent. Rather, they would narrow the scope of the discretion that the text of the statute delegates to the agency through the adoption of an open-ended standard rather than a hard-edged rule.

This phenomenon has potentially different implications for (a) statutes that give courts primary authority for implementing a delegation[162] and (b) statutes that give agencies such primacy. Consider a judicially administered delegation, such as the "reasonable attorney's fee" statute at issue in *Blanchard v. Bergeron*.[163] Certainly, under its post-textualist interpretive criteria, the Court should no longer feel *bound* to interpret "reasonable attorney's fee" in light of the detailed criteria specified in the committee reports—the twelve-factor *Johnson* test and the approach to fee agreements employed by the district court cases cited in the reports.[164] If Congress passes a statute inviting the courts to elaborate a vaporous standard such as "reasonable attorney's fee," then treating the more detailed committee reports as au-

159 *See* THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 531 (4th. ed. 2000); *see also* Easterbrook, *supra* note 88, at 535 ("Most people would say that the statute does not go beyond dogs, because after all the verbal torturing of the words has been completed it is still too plain for argument what the statute means.").

160 *See supra* notes 154–56 and accompanying text.

161 *See* Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843–44 (1984).

162 It is now clear beyond quibble that Congress can delegate to courts the policymaking discretion to fill in statutory blanks through the generation of federal common law. *See, e.g.*, Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 455–56, 459 (1957); D'Oench, Duhme & Co. v. FDIC, 315 U.S. 447, 456–57 (1942).

163 Blanchard v. Bergeron, 489 U.S. 87 (1989).

164 *See supra* text accompanying notes 74–83.

thoritative (*viz.* binding) evidence of legislative intent would surely contradict the broad grant of discretion that the text of the statute itself seems to confer.[165]

Still, one could imagine a court's having somewhat greater latitude to consult legislative history when interpreting a judicially administered statute rather than reviewing an agency's interpretation of an administrative statute. If a judicially administered statute confers discretion upon *the courts*, judges might *choose* to consult a variety of sources—perhaps even the legislative history—as a way to inform their own discretion.[166] For example, if a court implementing a judicially administered statute wished to select an interpretation within a policy space that made congressional override unlikely, that court might use the originating committees' reports to identify ideal policy points of those key legislative gatekeepers.[167] Or if a court wished to exercise its discretion in a way that would most efficaciously advance the statute's remedy and suppress the mischief,[168] it might feel moved by a committee report's compelling account of the real-world problems that spurred the committee to action.[169] To whatever extent a court might legitimately use legislative history when exercising the discretion that an open-ended statute has conferred upon *the court itself*,[170] a quite different question would arise were the same court to

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165 Indeed, since the committee reports clearly anticipated—and prescribed detailed solutions for—some of the interpretive issues that would arise under the statute's open-ended terms, the committees' failure to include those details in text of the statute at least raises the question of whether the bill's managers thought it politically feasible to do so. *See* Manning, *supra* note 17, at 77–78.

166 The analysis here of course applies *a fortiori* to an agency's choice to use legislative history to inform whatever discretion its organic act has conferred upon it. *See infra* note 171.

167 *See* William N. Eskridge, Jr. & John Ferejohn, *The Article I, Section 7 Game*, 80 GEO. L.J. 523, 550 (1992).

168 Attention to legislative purpose goes back a long way. *See, e.g.*, Heydon's Case, (1584) 76 Eng. Rep. 637 (Exch.) 638; 1 WILLIAM BLACKSTONE, COMMENTARIES *87–88. Textualists do not deny the relevance of purpose to interpretation. *See, e.g.*, Nat'l Tax Credit Partners, L.P. v. Havlik, 20 F.3d 705, 707 (7th Cir. 1994) (Easterbrook, J.) ("Knowing the purpose behind a rule may help a court decode an ambiguous text, but first there must be some ambiguity." (citations omitted)); Scalia, *supra* note 64, at 515 ("Surely one of the most frequent justifications courts give for choosing a particular construction is that the alternative interpretation would produce . . . results less compatible with the reason or purpose of the statute.").

169 Even the strictest textualist will sometimes use legislative history in this way. *See, e.g.*, United States v. Fausto, 484 U.S. 439, 449 (1988) (Scalia, J.) (relying on a Senate Report for information indicating the Civil Service Reform Act replaced a chaotic patchwork of civil service procedures); Frank H. Easterbrook, *What Does Legislative History Tell Us?*, 66 CHI.-KENT L. REV. 441, 443 (1990) ("Because laws themselves do not have purposes or spirits—only the authors are sentient—it may be essential to mine the context of the utterance out of the debates, just as we learn the limits of a holding from reading the entire opinion.").

170 For further discussion of this question, see Manning, *supra* note 71, at 731–37.

use legislative history to displace an agency interpretation in a case arising under the *Chevron* doctrine.

Put to one side the point, made by others, that it is exceedingly unlikely that a reviewing court would do a better job than an agency of reading the legislative record and discerning legislative intent, if that were the appropriate inquiry.[171] The central claim here is that if one takes *Chevron*'s reasoning seriously, the whole basis for deference is the conclusion that an organic act delegates interpretive discretion to *the agency* charged with implementing the statute. If the statute effects such a delegation, then a reviewing court necessarily contradicts the implemental part of the statute if it relies on legislative history to shift the level of generality at which the statute delegated discretion to the agency.[172] Consider *Brown & Williamson*.[173] In an ever-changing context like the regulation of "drugs," one can certainly understand why Congress would give the FDA open-ended jurisdiction over "articles (other than food) intended to affect the structure or any function of the body."[174] That standard invites change and adaptation over time. If new scientific evidence reveals that cigarette companies market tobacco with the knowledge that nicotine has psychoactive effects, then the *text* of the statute gives the FDA discretion to change its mind about the scope of its own authority and to adopt regulations governing tobacco.[175] To the extent that the Court relied on legislative history to exclude tobacco, its approach permitted those who generated that legislative history to narrow and, therefore,

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171 As Peter Strauss has pointed out:

> [A reviewing court] does not participate in, indeed very likely is utterly unaware of, what occurs in drafting, hearings, debates, or a continuing course of oversight hearings, presidential guidance, and frustrated efforts at securing legislative change; a court is not continually studying issues of statutory meaning and adjusting outcomes—as administrators responsible for a program must. For the agency, of course, the reverse is generally true; its closeness to the legislative process, continued involvement, and responsibility are, as we have seen, precisely the reasons courts have long given its readings of statutory meaning special weight.

Peter L. Strauss, *When the Judge Is Not the Primary Official With Responsibility To Read: Agency Interpretation and the Problem of Legislative History*, 66 CHI.-KENT L. REV. 321, 346–47 (1990); *see also* ADRIAN VERMEULE, JUDGING UNDER UNCERTAINTY 209–10 (2006); William N. Eskridge Jr., *Expanding* Chevron*'s Domain: A Comparative Institutional Analysis of the Relative Competence of Courts and Agencies to Interpret Statutes*, 2013 WIS. L. REV. 411, 425–26; Mark Seidenfeld, *A Syncopated* Chevron*: Emphasizing Reasoned Decisionmaking in Reviewing Agency Interpretations of Statutes*, 73 TEX. L. REV 83, 115–16 (1994).

172 Manning, *supra* note 142, at 172.

173 FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000).

174 21 U.S.C. § 321(g)(1)(C) (2012).

175 The Court has made clear that *Chevron* applies even when the agency is interpreting the scope of its own jurisdiction. *See* City of Arlington, Tex. v. FCC, 133 S. Ct. 1863, 1868 (2013).

to contradict the discretion that the text of the statute conferred upon the agency itself.

To be sure, one might argue that this conclusion is question begging. It is not logically inconsistent to say that a statute has delegated interpretive discretion to an agency, but that the legislative history clarifies the scope of the delegation. Such a conclusion, however, gives short shrift to the reality that the level of generality of a statute itself conveys an important set of implemental goals. When Congress prescribed its permit requirement for a "new and modified stationary source," it could have adopted a definitional section that specified whether it meant "an individual piece of polluting equipment" or "an entire plant."[176] If one accepts *Chevron*'s theory of implicit delegation, then Congress delegated power to the agency by leaving that question unresolved. If a committee report or a sponsor's statement had said that a "stationary source" refers to "the entire plant," it would have shifted the level of generality at which the statute spoke and taken away from the agency discretion that *the text of the statute* conferred upon it to act.

It should be emphasized that the exclusion of legislative history under *Chevron* does not merely give effect to the Court's formal position that it will not use legislative history in a manner that contradicts statutory text. Rather, this position also gives effect to a key functional objective of the Court's modern approach—to forgo interpretive reliance on legislative history when there is a risk that such history was generated "to secure results [its creators] were unable to achieve through the statutory text."[177] Where the legislative history speaks at a more particular level of generality than the text of the statute itself, those who produced the legislative history unmistakably anticipated—and prescribed detailed solutions for—issues likely to arise under the statute's open-ended terms.[178] In *Blanchard*, for example, the committees in both Houses plainly anticipated the open texture of "reasonable attorney's fee" and made an effort to particularize its meaning through the citation of *Johnson* and the other

176 *See* Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 851 (1984).

177 Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546, 568 (2005).

178 Based on their survey of staffers, Professors Gluck and Bressman suggest that at least some legislative drafters use legislative history, at times, to convey "instructions to an agency for implementing or interpreting a provision." Gluck & Bressman, *supra* note 48, at 1014. Gluck and Bressman do not explain, however, why it is appropriate for staffers, having anticipated those implemental and interpretive questions, to provide the relevant instructions in the legislative history rather than subjecting those policy details to the full legislative process.

cases.[179] If, in *Chevron*, the responsible committees had stated that "stationary source" refers to an individual piece of polluting equipment (and not an entire factory), the committees, again, would have anticipated the interpretive issue and, having done so, would have chosen to particularize the indeterminacy offline, through committee reports rather than through the statute itself. Either situation would at least raise a question about whether (the bill's managers thought) it was politically feasible to achieve the same detailed results through the full legislative process.[180]

The same analysis above applies, moreover, whether a reviewing court takes legislative history into account at *Chevron*'s first step (deciding whether the statute speaks clearly) or, as some lower courts have urged, at the second (determining whether the agency's position is "reasonable").[181] When a reviewing court measures the "reasonableness" of an agency interpretation against the court's perception of congressional intent or purpose (at step two), the analytical structure of the inquiry is no different from the inquiry (at step one) into whether Congress spoke to the precise question at issue.[182] That is to say, if the reviewing court finds that the agency's interpretation lies within the broad boundaries set by the text but is unreasonable because it contradicts some expression of policy found in the legislative history, the court has still used the legislative history to narrow the scope of the discretion effected by the text.

None of this is to suggest that legislative history is entirely off limits to a reviewing court under *Chevron*. Like any other source—a newspaper, a book, a law review article, or even a brief—legislative history may contain useful information.[183] For example, the legislative history may contain references that help modern interpreters understand the way people use language, especially the technical language

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179 Blanchard v. Bergeron, 489 U.S. 87, 91 (1989).

180 *See* Manning, *supra* note 142, at 168. For an unusually compelling example of this phenomenon, see the discussion of the Alien Contract Labor Act's legislative history in Adrian Vermeule, *Legislative History and the Limits of Judicial Competence: The Untold Story of* Holy Trinity Church, 50 STAN. L. REV. 1833, 1848–52 (1998).

181 As noted, some lower courts have excluded legislative history at step one but considered it in conjunction with the question of whether the agency interpretation is reasonable or permissible at the second step of the *Chevron* analysis. *See supra* note 123.

182 *See* Matthew C. Stephenson & Adrian Vermeule, Chevron *Has Only One Step*, 95 VA. L. REV. 597, 599–602 (2009). As the Court has observed, "if Congress has directly spoken to an issue then any agency interpretation contradicting what Congress has said would be unreasonable." Entergy Corp. v. Riverkeeper, Inc., 556 U.S. 208, 218 n.4 (2009).

183 *See* Manning, *supra* note 71, at 732–33.

that is so often the currency of statutes.[184] Words have meaning only in social and linguistic context, and that context may grow distant with time.[185] If the legislative history of a tax bill tells us that in the world of tax accounting, a reference to "substantially all" of a taxpayer's assets conventionally means eighty-five percent, then a sponsor's making note of that fact may, in some distant future, alert a court against using a layperson's definition of what was really a term of the trade.[186] To be sure, a court cannot take any such assertion at face value; because legislators, like other humans, may succumb to the temptation to shade the "facts" to their advantage, a court should always independently verify, for example, that a sponsor's perception of a term of art corresponds to the conventional understanding.[187] But a reviewing court's use of legislative history as a resource to unearth the accepted social meaning of statutory language is not inconsistent with the premises of *Chevron*. Such use is worlds apart from judicial reliance on a sponsor's or committee's naked assertions of intent or purpose to particularize otherwise open-ended statutory language. It is the latter, traditionally more common use of legislative history that contradicts the legislative delegation of agency discretion underlying the *Chevron* doctrine.

CONCLUSION

The *Chevron* doctrine is straightforward in principle but not in practice. *Chevron* holds that when Congress invites an agency to administer a regulatory scheme (through relatively formal procedures), statutory indeterminacy reflects a delegation of interpretive discretion to the agency.[188] Despite the simplicity of that framework, *Chevron* has generated a significant amount of controversy. Among other

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184 *See, e.g.*, Corning Glass Works v. Brennan, 417 U.S. 188, 201–03 (1974).

185 As Judge Easterbrook has put it:

> Legislation speaks across the decades, during which legal institutions and linguistic conventions change. To decode words one must frequently reconstruct the legal and political culture of the drafters. Legislative history may be invaluable in revealing the setting of the enactment and the assumptions its authors entertained about how their words would be understood. It may show, too, that words with a denotation "clear" to an outsider are terms of art, with an equally "clear" but different meaning to an insider. . . . Clarity depends on context, which legislative history may illuminate.

In re Sinclair, 870 F.2d 1340, 1342 (7th Cir. 1989).

186 This example is loosely based on the facts of *Continental Can Co. v. Chicago Truck Drivers, Helpers and Warehouse Workers Union (Independent) Pension Fund*, 916 F.2d 1154 (7th Cir. 1990).

187 *See* Manning, *supra* note 71, at 732–33, 737.

188 Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842–44 (1984).

things, doubt has surrounded the question whether a reviewing court should use legislative history to decide whether a statute has spoken clearly to the question at issue or has left the agency discretion to choose among multiple reasonable interpretations. Although existing caselaw seems to support the consultation of legislative history under *Chevron*, the use of such history to particularize the meaning of an open-ended statute, in fact, contradicts a core premise of the Court's modern legislative history caselaw—namely, that one cannot use legislative history to contradict a statute's text.

The Court now recognizes that statutes have implemental as well as substantive dimensions. The use of precise rules or open-ended standards sends an important signal about whether Congress wants to decide a question itself or leave it to its chosen delegate. A court might think it appropriate to consult legislative history in an effort to guide its exercise of discretion under an open-ended statute that Congress has asked *the court* to implement. But when the same reviewing court relies on legislative history to particularize the terms of an open-ended statute that Congress has asked *an agency* to implement, the court uses legislative history to shift the level of generality and, thereby, to alter the meaning of the statutory text. Accordingly, even if the Court uses legislative history to clarify an indeterminate statute in a run-of-the-mill case, it should not do so under *Chevron*.