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## TEXTUALISM AND TABOO: INTERPRETATION AND DEFERENCE FOR JUSTICE SCALIA

Michael Herz\*

Under the big bang theory of creation, the universe is the product of a gigantic explosion, before which there was neither time nor space. It is meaningless to ask what produced the big bang.<sup>1</sup> This is also Antonin Scalia's view of the United States Code. The statute exists—it is meaningless to ask what produced it. History begins only with the big bang, just as a statute's history begins only with its enactment. "Legislative history" thus does not exist. Or perhaps the more precise analogy is to the formation of matter in the initial chaos: matter and statutes are both the product of a disordered, incoherent, unconscious, anarchic sequence of events.<sup>2</sup> Justice Scalia trusts statutory text, not the process of its creation.

This view is of course most apparent in Justice Scalia's textualist approach to statutory interpretation. For Scalia, the only legitimate basis for statutory interpretation is the text itself (understood broadly to include statutory provisions not immediately before the court). Statutory purposes and history, as well as general policy considerations, are off-limits.<sup>3</sup> Some of the same attitude also underlies the other prominent aspect of Justice Scalia's approach to statutory interpretation: his endorsement of a strong version of judicial deference to agency interpretation of ambiguous statutes. Justice Scalia is a fierce, sometimes strident defender of *Chevron*.<sup>4</sup>

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<sup>1</sup> "A veil of ignorance hangs over the moment of creation. Theory-builders have tried to peer behind it, but none agrees on what they see, nor on ways of telling which of their glimpses is true." *The Big Picture*, *ECONOMIST*, Jan. 5, 1991, at 65.

<sup>2</sup> Immediately after its creation, the universe "was small, immensely hot and filled with a dense soup of the fundamental particles: quarks (which are heavy) and leptons (which are light)." *Id.* This might fairly describe Justice Scalia's view of Congress, although I am not sure which house he would say is composed of quarks and which of leptons.

<sup>3</sup> *H.J., Inc. v. Northwestern Bell Tel.*, 109 S. Ct. 2893, 2907 (1989) (Scalia, J., concurring); *Sable Communications v. FCC*, 109 S. Ct. 2829, 2840 (1989) (Scalia, J., concurring); *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69, 96 (1987) (Scalia, J., concurring); *Hirschey v. FERC*, 777 F.2d 1, 7-8 (D.C. Cir. 1985) (Scalia, J., concurring); Zeppos, *Justice Scalia's Textualism: The "New" New Legal Process*, 12 *CARDOZO L. REV.* 1597, 1615 (1991) [hereinafter Zeppos, *Scalia's Textualism*].

<sup>4</sup> *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984). Justice Scalia's watchfulness over any backsliding from *Chevron* was most apparent in his concurring opinion in *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987). See also *Mississippi Power & Light Co. v. Mississippi*, 487 U.S. 354, 378-83 (1988) (Scalia, J., concurring); Farina, *Statutory Interpretation and the Balance of*

Textualism and deference are both justified as means to ensure that judges do not engage in the great taboo: policy-making. Yet, their coexistence should be uneasy. Part I of this Comment questions whether a textualist can accept *Chevron* and examines the tensions between these two approaches. Part II then considers the separation of powers consequences of this combination of views.

## I. CAN A TEXTUALIST ACCEPT *CHEVRON*?

*Chevron* limits the scope of a court's inquiry into statutory meaning,<sup>5</sup> textualism the basis on which it conducts the inquiry. They are united in purporting to cabin judicial discretion. Nonetheless, their interrelation is problematic.

### A. Text

The first difficulty *Chevron* should present for the textualist is that it lacks a textual peg. The decision's underlying theory is that agency interpretations are binding when Congress has delegated the interpretive task to the agency rather than to the courts<sup>6</sup>—"Congress has transferred discretion to the agency[, which] has been deputized to make a rule."<sup>7</sup> This view of the theoretical underpinning of *Chevron* deference is now commonplace<sup>8</sup> and is shared by Justice Scalia.<sup>9</sup>

If the *Chevron* rule is the product of congressional directive, then one would expect the textualist to feel the need for, and be able to find, the statutory text containing that directive. Congress does sometimes explicitly assign an agency the task of fleshing out vague statu-

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*Power in the Administrative State*, 89 COLUM. L. REV. 452, 455 (1989) ("the appointment of Justice Scalia added an even more determined proponent of *Chevron* and the deferential model."); Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511.

<sup>5</sup> *Chevron* divides review of an agency's construction of a statute into two steps. "First, always, is the question of whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter . . ." 467 U.S. at 842. This is step one. Where "the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843. This is step two. Thus, where Congress "has explicitly left a gap for the agency to fill, . . . [s]uch legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute." *Id.* at 843-44. Even if the gap is implicit, merely the result of ambiguous language, the court may not substitute its policy judgment for that of the agency. *Id.* at 844.

<sup>6</sup> *Id.* at 865-66; see also *Adams Fruit Co. v. Barrett*, 110 S.Ct. 1384, 1390-91 (1990).

<sup>7</sup> *Homemakers N. Shore, Inc. v. Bowen*, 832 F.2d 408, 411 (7th Cir. 1987) (Easterbrook, J.).

<sup>8</sup> E.g., Anthony, *Which Agency Interpretations Should Bind Citizens and Courts?*, 7 YALE J. ON REG. 1, 31-32 (1990).

<sup>9</sup> *Crandon v. United States*, 110 S. Ct. 997, 1011 (1990) (Scalia, J., concurring); Scalia, *supra* note 4, at 516-17.

tory terms through binding rules. In such circumstances, *Chevron* deference rests on firm textualist ground; indeed, it long predates the decision in *Chevron*.<sup>10</sup> More often, however, *Chevron* is called into play when Congress has not made an explicit delegation, but has merely used ambiguous language. The striking aspect of *Chevron* is that it treats ambiguity itself as a congressional delegation. To infer a delegation from merely ambiguous language necessarily goes beyond the four corners of the statute and is therefore at odds with the textualist method, which looks not to what Congress meant or intended, but only to what it *did*, as expressed in the text. But the Clean Air Act, for example, contains no such explicit delegation of authority to the EPA to make a binding determination of the meaning of the ambiguous term "new source."<sup>11</sup>

There may be excellent reasons for treating agency interpretations of vague statutory language as binding: doing so places policy-making in a more democratically accountable branch, forces Congress to make hard decisions and legislate with thought and precision, leads to national uniformity of federal law, produces more sensible results as experts update the statute or apply it in unforeseen circumstances, and so on.<sup>12</sup> But these justifications should all be irrelevant to the

<sup>10</sup> Explicit delegations can be seen, for example, in the statutes involved in two oft-cited "deference" cases: *Batterton v. Francis*, 432 U.S. 416, 419 (1977) (child's benefits hinged in part on whether father was unable to care for child by reason of "unemployment (as determined in accordance with standards prescribed by the Secretary)"), and *Addison v. Holly Hill Fruit Prods., Inc.*, 322 U.S. 607 (1944) (minimum wage requirement does not apply to those within the "area of production (as defined by the Administrator) engaged in handling" agricultural commodities). See also *Herweg v. Ray*, 455 U.S. 265, 274-75 (1982) (where statute called for benefits eligibility determinations to "tak[e] into account only such income and resources as are, as determined in accordance with standards prescribed by the Secretary, available to the applicant," regulations had "'legislative effect'") (emphasis in original); *Schweiker v. Gray Panthers*, 453 U.S. 34, 44 (1981); *INS v. Jong Ha Wang*, 450 U.S. 139 (1981) (construing 8 U.S.C. § 1254(a)(1) (1976)).

<sup>11</sup> This was the issue in *Chevron* itself. The statute imposes fairly stringent air pollution control requirements on "new . . . sources" in areas with air that does not meet federal ambient standards. 42 U.S.C. § 7502(b)(6) (1982). "New source" is left undefined. The EPA issued a rule under which a new installation would not be deemed a "new source" if the plant in which it was installed made offsetting reductions at other points. Under this approach the entire plant is deemed a single source, as if covered by a huge bubble. As long as there is no increase in pollution from a vent at the top of this imaginary bubble, the new source requirements are not triggered. The lawsuit was a challenge to this interpretation of the statutory term.

The Act nowhere assigns interpretive authority to the agency; the Administrator is merely "authorized to prescribe such regulations as are necessary to carry out his function under this chapter." *Id.* § 7601 (a)(1). The Court made no effort to ground its approach in any provision of the Clean Air Act. To the contrary, it expressly stated that *it does not matter* whether or not Congress "consciously desired the Administrator to strike the balance at this level" of specificity. *Chevron*, 467 U.S. at 865.

<sup>12</sup> See *Chevron*, 467 U.S. at 865-66; Moglen & Pierce, *Sunstein's New Canons: Choosing the Fictions of Statutory Interpretation*, 57 U. CHI. L. REV. 1203, 1213-14 (1990); Starr, *Judi-*

textualist if Congress has not taken them to heart in the statute. Indeed, Justice Scalia has acknowledged that the *Chevron* approach does not actually rest on congressional directive.

It is beyond the scope of these remarks to defend that presumption [that where the statute is ambiguous Congress intended to delegate interpretive authority] . . . . Surely, however, it is a more rational presumption today than it would have been thirty years ago . . . . And to tell the truth, the quest for the "genuine" legislative intent is probably a wild-goose chase anyway. In the vast majority of cases I expect that Congress *neither* (1) intended a single result, *nor* (2) meant to confer discretion upon the agency, but rather (3) didn't think about the matter at all. If I am correct in that, then any rule adopted in this field represents merely a fictional, presumed intent, and operates principally as a background rule of law against which Congress can legislate.<sup>13</sup>

It is strange to see the textualist indulge in such fictionalized presumptions about congressional intent rather than grounding the delegation in some actual statutory language. In this respect, *Chevron* is directly counter to the textualist creed. *Chevron* says that when Congress has been ambiguous and has not thought about where to place interpretive authority, the Court will indulge a fictional presumption that Congress meant to delegate that authority to the agency because *the Court* thinks that is what Congress should have done (or would have done if it had thought about it?). That is a far cry from the textualist model.

Justice Scalia's response, implicit in the quote excerpted above, would be that given congressional silence it is equally hypothetical to presume a congressional intent that the *courts* are to do the interpreting; since Congress "didn't think about the matter at all,"<sup>14</sup> the court must choose between judicially established default rules, and *Chevron* is preferable to the alternative. Congress can always overcome the presumption if it doesn't like it. Yet the choice is not between two equally judge-made, fictional background rules. First, Congress *has* spoken. The Administrative Procedure Act (APA) assigns the interpretive task to the courts: in reviewing agency action (which is what *Chevron* cases usually involve), the court "shall decide all relevant questions of law, [and] interpret constitutional and statutory provi-

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*cial Review in the Post-Chevron Era*, 3 YALE J. ON REG. 283, 309-12 (1986); Strauss, *One Hundred Fifty Cases Per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action*, 87 COLUM. L. REV. 1093, 1121-22 (1987) [hereinafter Strauss, *150 Cases*].

<sup>13</sup> Scalia, *supra* note 4, at 516-17 (emphasis in original).

<sup>14</sup> *Id.* at 517.

sions."<sup>15</sup> Justice Scalia endorses far-ranging searches into other parts of the United States Code for illumination of ambiguous statutory terms.<sup>16</sup> If the United States Code is to be read as a unified whole, then, notwithstanding the silence of any particular piece of ambiguous legislation, Congress has clearly and explicitly assigned the interpretive function to the courts.<sup>17</sup> This reading seems especially compelling because the APA states that a "[s]ubsequent statute may not be held to supersede or modify [the Act] except to the extent it does so expressly."<sup>18</sup>

Second, the *Chevron* approach is counter-intuitive, at least if one's intuitions are the product of the frequent incantation of "our lawyers' and judges' national anthem,"<sup>19</sup> John Marshall's admonition that it is the duty of the judicial department to "say what the law is."<sup>20</sup> All other things being equal (as they are in the case of utter congressional silence) the interpretive task falls to the courts, not the agencies. Justice Scalia himself has taken this judicial role for granted in rejecting reliance on postenactment legislative history.<sup>21</sup>

Third, were one to speculate about what a silent Congress *might* have wanted, it would seem that Congress should in general prefer stricter judicial review. After all, our system is designed so that the

<sup>15</sup> 5 U.S.C. § 706 (1988).

<sup>16</sup> See, e.g., *Lukhard v. Reed*, 481 U.S. 368 (1987); *Zeppos, Scalia's Textualism*, *supra* note 3, at 1615, 1621-22.

<sup>17</sup> I do not mean that § 706 shows that *Chevron* is wrong. Most readers can square the two. See, e.g., *Diver, Statutory Interpretation in the Administrative State*, 133 U. PA. L. REV. 549, 570-71 (1985). But most readers are not textualists. My point is only that it should be hard for Justice Scalia to square them.

<sup>18</sup> 5 U.S.C. § 559 (1988).

<sup>19</sup> W. GELLHORN, C. BYSE, P. STRAUSS, T. RAKOFF & R. SCHOTLAND, *ADMINISTRATIVE LAW* 401 n.4 (8th ed. 1987).

<sup>20</sup> *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

<sup>21</sup> Rejecting any reliance on a 1985 House Report pertaining to an amendment to the 1980 Equal Access to Justice Act, Justice Scalia wrote:

If this language is to be controlling upon us, it must be either (1) an authoritative interpretation of what the 1980 statute meant, or (2) an authoritative interpretation of what the 1985 Congress intended. It cannot, of course, be the former, since it is the function of the courts and not the Legislature, much less a Committee of one House of the Legislature, to say what an enacted statute means.

*Pierce v. Underwood*, 487 U.S. 552, 566 (1988). I recognize that delegation to an agency stands on quite different constitutional footing than delegation to a part of Congress. See *Bowsher v. Synar*, 478 U.S. 714 (1986); *id.* at 736 (Stevens, J., concurring); *INS v. Chadha*, 462 U.S. 919, 953 n.16 (1983). One could plausibly hold different views of the appropriate judicial stance toward agency interpretations and postenactment legislative history. Nor would one expect Justice Scalia to discuss agency interpretations in the context of this particular legislation. My point is only that Scalia, like all law school graduates, begins with the presumption that it is the courts who pin down the meaning of vague statutory terms. He did not say that "it is the function of the agencies and the courts to say what an enacted statute means."

laws survive the political coalition that produced them; the legitimacy of a statute does not depend on current public or congressional opinion.<sup>22</sup> The enacting Congress assumes that its action will survive. Under the basic accountability rationale of *Chevron*, that is a reason for placing primary *interpretive* authority with the courts rather than with the agencies. The political result reflected in the statute will more likely be respected by neutral courts than by accountable, politically appointed agencies. Furthermore, the built-in rivalry between the legislative and executive branches, compounded by the now-long-standing phenomenon of powers separated not only by constitutional tasks but by political party, should raise doubt that Congress wants to hand power over to the agencies.<sup>23</sup> By and large, it seems safe to say that Congress prefers relatively stringent judicial review of agency interpretations. The ambiguity of so much modern legislation results from time constraints, logrolling, and individual legislator's desire for credit but not blame. As Justice Stevens was fully aware,<sup>24</sup> it is not the result of a conscious desire to leave policy-making to the agency. Particularly in equating ambiguity with delegation, then, *Chevron's* presumption is counterfactual.<sup>25</sup>

In short, *Chevron* itself is not true to the textualist approach. One can find no text with that command and some, in the APA, that goes the other way. Any inferences as to congressional intent where it has been silent seem also to run counter to *Chevron*.<sup>26</sup> Thus, while Justice Scalia may wish Congress would command the courts to defer, that is only his personal policy preference.

### B. Determinacy

The second problem *Chevron* poses for textualists is the implicit concessions it makes about statutory indeterminacy. The understandings of the binding nature and the determinacy of statutory language that are implicit in *Chevron* conflict with those that are explicit in textualism. The very premise of *Chevron* deference is that the text does not answer the question. It is because the statute is incomplete

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<sup>22</sup> Farber, *Legislative Supremacy*, 78 GEO. L.J. 281, 308-09 (1989).

<sup>23</sup> Moglen & Pierce, *supra* note 12, at 1213.

<sup>24</sup> Justice Stevens did not claim that Congress consciously desired to let the agency answer the hard questions; his point was that, whatever the explanation, that is what Congress had done. *Chevron*, 467 U.S. at 865.

<sup>25</sup> Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 407, 445 (1989).

<sup>26</sup> Despite his credo, Justice Scalia has also drawn such inferences in this setting. See *Mississippi Power & Light Co. v. Mississippi*, 108 S. Ct. 2428, 2444 (1988) (Scalia, J., concurring) ("Congress would naturally expect that the agency would be responsible, within broad limits, for resolving ambiguities in its statutory authority or jurisdiction.").

and its "interpretation" necessarily involves significant policy-making that the (at least indirectly democratically accountable) agency rather than the courts should do the interpreting. As long as there is an agency around, this view of textual indeterminacy should be acceptable and workable for the textualist. But there is not always an agency around. What is a court to do with an ambiguous statute when there is no agency interpretation to which to defer?

The real world answer is that the court will do the best it can with the limited and ambiguous materials at hand, searching for the "better" of two or more plausible interpretations, and in the extreme case strike the statute as void for vagueness or because it is simply not "legislation."<sup>27</sup> Struggling to determine the preferable interpretation of an unclear statute is a manageable task; it is one judges have been performing for centuries. I do not mean to say that it cannot be done, or even that a textualist cannot do it.<sup>28</sup> My point is only that *Chevron's* acknowledgement that there are many statutory provisions that are uncertain and have no obvious meaning should discomfort the textualist. To use a term currently in vogue, and employed elsewhere by both Professor Zeppos and Professor Strauss, *Chevron's* "candor" about indeterminacy should bother Scalia because he claims that textualism is itself the most candid form of statutory interpretation.<sup>29</sup>

It is in part for this reason, I think, that Justice Scalia (and other judges of a similar stripe) are preoccupied by the meaning of "ambiguous" in the *Chevron* analysis. Justice Scalia has been at pains to point out that "ambiguous" does not require that the arguments for conflicting interpretations are in perfect equipoise; rather, a provision may be ambiguous even though one reading is preferable.<sup>30</sup> This admonition takes the form of an effort to preserve *Chevron's* integrity against judges who would avoid deference simply by pretending that an ambiguous statute is clear.<sup>31</sup> But it is also an effort to salvage the

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<sup>27</sup> See *H.J., Inc. v. Northwestern Bell Tel.*, 109 S. Ct. 2893, 2909 (1989) (Scalia, J., concurring); *Georgia Ass'n of Retarded Citizens v. McDaniel*, 716 F.2d 1565, 1582 (11th Cir. 1983) (Hill, J., dissenting) (Education for All Handicapped Children Act, 20 U.S.C. §§ 1400-1495 (1982), does not "amount to legislation by the Congress" because it does nothing more than identify a real problem and announce that it receive the "appropriate" solution), *cert. denied*, 469 U.S. 1228 (1985).

<sup>28</sup> "Of course I can—as can any judge—always determine which of the parties has the better interpretation of a statute." Silberman, *Chevron—The Intersection of Law and Policy*, 58 GEO. WASH. L. REV. 821, 826-27 (1990) (emphasis in original).

<sup>29</sup> Strauss, *150 Cases*, *supra* note 12, at 1124 (acknowledging, as *Chevron* does, "the reality that for some purposes statutes will be indeterminate" is "healthy in its candor"); Zeppos, *Judicial Candor and Statutory Interpretation*, 78 GEO. L.J. 353 (1989). See generally Shapiro, *In Defense of Judicial Candor*, 100 HARV. L. REV. 731 (1987).

<sup>30</sup> Scalia, *supra* note 4, at 520; see also *supra* note 28.

<sup>31</sup> It is balanced by the opposite admonition from those who fear that judges will avoid



textualist enterprise from the doubts cast on it by the very premise of *Chevron*. In defining ambiguity as something other than hopeless uncertainty, Justice Scalia is insisting that a court can make sense of a statute on its own if it has to. Because ambiguity is not unresolvable equipoise, textualism remains a workable technique of statutory interpretation notwithstanding *Chevron*'s recognition that a definite answer cannot always be found in the statute.

These concerns also help explain why Justice Scalia's wariness about *other* judges understating ambiguity is coupled with a tendency in his own opinions to stay in *Chevron* step one. Although the sample is hardly statistically significant, Justice Scalia seems especially willing to strike down agency interpretations because they are inconsistent with the plain words of the statute.<sup>32</sup> This tendency, which Justice Scalia has observed in himself,<sup>33</sup> should not be surprising, for the textualist by definition rejects the cloud of ambiguity.

There is a second possible explanation for Justice Scalia's tendency to stay in *Chevron* step one. The step two inquiry into the "reasonableness" of the agency's interpretation seems to go beyond the limits of the textualist inquiry. As former-Judge Starr, who supports *Chevron* and tends toward textualism, has written, "[r]easonableness' in this context means . . . the compatibility of the agency's interpretation with the policy goals . . . or objectives of Congress."<sup>34</sup> Yet Justice Scalia is not interested in inquiring into the "policy goals or objectives of Congress." Thus, consideration of whether an interpretation is "reasonable," or "not arbitrary and capricious," may open the door to just the sort of interpretive approach Scalia would reject.<sup>35</sup>

These implicit tensions between textualism and *Chevron* are most

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interpretation simply by pretending that a clear statute is ambiguous. *E.g.* *Young v. Community Nutrition Inst.*, 476 U.S. 974, 988 (1986) (Stevens, J., dissenting) ("The task of interpreting a statute requires more than merely inventing an ambiguity and invoking administrative deference.").

<sup>32</sup> See *Maislin Indus. v. Primary Steel Inc.*, 110 S. Ct. 2759 (1990); *Department of the Treasury v. Federal Labor Relations Auth.*, 110 S.Ct. 1623 (1990); *Pittston Coal Group v. Sebben*, 109 S.Ct. 414 (1988); *K Mart Corp. v. Cartier, Inc.*, 108 S. Ct. 1811, 1831 (1988) (Scalia, J., concurring in part and dissenting in part) (relying solely on statute's text, Justice Scalia would set aside agency regulation in its entirety); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 452 (1987) (Scalia, J., concurring).

<sup>33</sup> "One who finds *more* often (as I do) that the meaning of a statute is apparent from its text and from its relationship with other laws, thereby finds *less* often that the triggering requirement for *Chevron* deference exists. It is thus relatively rare that *Chevron* will require me to accept an interpretation which, though reasonable, I would not personally adopt." Scalia, *supra* note 4, at 521 (emphasis in original).

<sup>34</sup> *Continental Airlines v. Department of Transp.*, 843 F.2d 1444, 1452 (D.C. Cir. 1988).

<sup>35</sup> See also *infra* note 49 and accompanying text.

evident if the textualist position is carried to the extreme. They are palpable, for example, in Judge Kozinski's dissenting opinion in *Mesa Verde Construction Co. v. Northern California District Council of Laborers*.<sup>36</sup> In *Mesa Verde*, the Ninth Circuit upheld, under *Chevron*, the NLRB's view that it is an unfair labor practice for an employer to repudiate a prehire agreement negotiated with the union. The difficulty was that the NLRB had previously taken the opposite view of the statute, and the Ninth Circuit and the Supreme Court had upheld *that* interpretation.<sup>37</sup> For the majority, both readings, although conflicting, were permissible. So far so good.<sup>38</sup> But there is an obvious difficulty in first saying that *the statute* means one thing and now saying that it means the opposite.<sup>39</sup> The statute can leave the choice between X and Y to the agency, and it is generally understood that *Chevron* has removed the stigma from agency flip-flops in step two cases,<sup>40</sup> but the *statute* can only mean one or the other. This difficulty

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<sup>36</sup> 861 F.2d 1124, 1146 (9th Cir. 1988) (Kozinski, J., dissenting).

<sup>37</sup> The NLRB had initially ruled that for an employer to repudiate a prehire agreement it had negotiated with a union was an unfair labor practice; it then switched its position, then returned to its original view. During the middle period, the Supreme Court had upheld the Board's view that unilateral repudiation did not violate the National Labor Relations Act, *Jim McNeff, Inc. v. Todd*, 461 U.S. 260 (1983); *NLRB v. Local Union No. 103*, 434 U.S. 335 (1978), and the Ninth Circuit itself had followed those cases. The question facing the court, therefore, was whether the Supreme Court and Ninth Circuit precedents required that it reject the Board's new position. The majority concluded that the previous courts had not independently construed the statute; rather, they had merely concluded that the Board's interpretation was reasonable and consistent with the NLRA and accordingly deferred to it. *Mesa Verde*, 861 F.2d at 1129-30, 1134-36. The opposite interpretation might also be reasonable and consistent with the NLRA—such a possibility is the very premise of *Chevron*—and the majority found that it was. *Id.* at 1131-34.

<sup>38</sup> *Chevron* applies in those (frequent) situations where Congress's vagueness creates what Peter Strauss has labelled a "zone of indeterminacy" within which the agency has a good deal of maneuvering room. See Strauss, *150 Cases*, *supra* note 12, at 1124. To take the issue in *Chevron* itself, it is absolutely clear that the Court would also have upheld the EPA if it had read the Clean Air Act to *forbid* a plantwide definition in nonattainment areas—as indeed the Carter EPA had. The whole basis of *Chevron* was that Congress had nothing to say about the bubble policy. A *statewide* definition of "new source" would be outside the zone of indeterminacy; but both a plantwide and an installation-specific definition are within it.

<sup>39</sup> Since *Mesa Verde*, the Supreme Court has on at least two occasions refused to accept new agency interpretations where it had previously upheld the agency's earlier, different reading. See *Maislin Indus. U.S. v. Primary Steel, Inc.*, 110 S. Ct. 2759, 2770 (1990); *California v. FERC*, 110 S. Ct. 2024, 2029 (1990). The possibility of shifting statutory meaning is not inconceivable, depending on one's theory of statutory interpretation. Under a dynamic theory, such a change might be perfectly correct if there had been a corresponding change in the underlying conditions that the statute addresses. See generally Eskridge, *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479 (1987). Interestingly, the textualist might also allow a statute to mean conflicting things over time if the literal meaning of the statutory terms has changed.

<sup>40</sup> E.g., *Federal Labor Relations Auth. v. Department of the Treasury*, 884 F.2d 1446, 1455 (D.C. Cir. 1989), *cert. denied*, 110 S. Ct. 864 (1990); Starr, *supra* note 12, at 297-98; Strauss, *150 Cases*, *supra* note 12, at 1125-26.

tripped up the dissenters, who each viewed the Supreme Court decisions as binding constructions of the statute.<sup>41</sup> Judge Kozinski's dissent is especially striking in the way in which it highlights the tension between the textualist's belief in determinacy and textual meaning on the one hand and *Chevron's* acknowledgement of ambiguity on the other. Indeed, Judge Kozinski's textualism drives him to adopt precisely the rhetoric of the anti-*Chevron* camp, decrying "the abdication of judicial responsibility."<sup>42</sup> Kozinski accepts that agencies can, within statutorily defined boundaries, "change their outlook as often and easily as a chameleon changes color."<sup>43</sup> But statutory meaning is constant and specific; "it is a fact." Thus, "[w]hen courts interpret a statute, they search for its true meaning—and there can never be more than one true meaning."<sup>44</sup>

In short, the textualist's understanding of the interpretive task is that there is one right answer, and it is found in the statute. *Chevron*, at least in its acceptance of implicit delegation via ambiguity, is based on just the opposite view. Although Judge Kozinski seems scandalized by the thought "that in passing laws Congress approves a range of possible interpretations,"<sup>45</sup> that is precisely the theory of *Chevron*.<sup>46</sup> To be fair, Justice Scalia himself seems more willing to accept that a statute may have a range of possible meanings; he has acknowledged that under *Chevron* court and agency are *not* "searching for the one, permanent, 'correct' meaning of the statute."<sup>47</sup> The tension highlighted by Judge Kozinski's *Mesa Verde* dissent nonetheless remains, if less starkly, in simultaneous endorsement of textualism and a strong version of deference to agency interpretations.

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<sup>41</sup> 861 F.2d at 1137 (Wallace, J., dissenting), 1137-46 (Hug, J., dissenting), 1146-49 (Kozinski, J., dissenting).

<sup>42</sup> *Id.* at 1147.

<sup>43</sup> *Id.* at 1146.

<sup>44</sup> *Id.* Judge Kozinski was fully aware of the links between *Chevron* step two and skepticism about determinate textual meaning:

[T]he court is, in effect, holding that statutes have no fixed meaning, that in passing laws Congress approves a range of possible interpretations, each as good as the next. While this approach fits in neatly with the popular mythology, conceived and nurtured in legal academies, that words are incapable of conveying precise concepts, it "undermines the basic principle that language proves a meaningful constraint on public and private conduct." Needless to say, I disagree with this approach which, in my view, represents a serious abdication of judicial responsibility.

*Id.* at 1147 (citation omitted).

<sup>45</sup> *Id.* at 1147.

<sup>46</sup> See *Chevron*, 467 U.S. at 842-45.

<sup>47</sup> Scalia, *supra* note 4, at 517.

### C. *Delegation and the Interpretive Task*

The third tension (really more a mild paradox) is that textualism and *Chevron* reflect profoundly different hermeneutics. For the textualist, *judicial* interpretation is the narrow task of the honest agent. One need not go to the textualist extreme in pursuing the honest agent approach; to the contrary, judges have turned to extratextual sources such as legislative history in an effort to be faithful to the congressional decision that, as honest agents, they must respect. But textualism is perhaps the honest agent theory's purest and most constrained expression. At the heart of the textualist's position is the conviction that policy considerations conjured up by the courts have no place in statutory interpretation. In utter contrast, the "interpretation" performed by an *agency* is, oddly, not that of the honest agent; it is nontextualist, dynamic, policy-driven. Justice Scalia calls them both "interpretation," but they are two wholly different enterprises. *Chevron* is a major endorsement of dynamic statutory interpretation,<sup>48</sup> the technique of interpretation most anathema to the textualist.

This divergence in interpretive approach is not problematic given the divergence in interpreters. (It is problematic for the textualist in providing another illustration—not that one is needed—of words' lack of fixed meaning; the dictionary does not get us very far in figuring out what "interpretation" is.) It is perfectly reasonable for agencies to pursue a different interpretive approach than courts. In fact, this divergence is indispensable to the simultaneous acceptance of *Chevron* and textualism. If agencies were to adopt a textualist approach to statutory interpretation, *Chevron* would clearly be wrongly decided; for that matter, so would *Skidmore*.<sup>49</sup> If interpretation is really simply a matter of reading the words of the statute and identifying their single and necessary meaning, then any and all arguments for deference disappear. The agency's arguably superior understanding of policy, of legislative intent, of legislative history are all irrelevant to the interpretive task. First, these factors should not inform the reading of the statute. Second, the agency need not go beyond the

<sup>48</sup> Aleinikoff, *Updating Statutory Interpretation*, 87 MICH. L. REV. 20, 45 (1988) ("*Chevron* provides a major route for the updating of statutes."). See generally Eskridge, *supra* note 39.

<sup>49</sup> *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). *Skidmore* is the usually cited description of the pre-*Chevron* doctrine of nonbinding deference to agency interpretive, as opposed to legislative, rules. Under *Skidmore*, agency interpretations "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." *Id.* at 140. The respect owed by a court to such an interpretation "will depend upon the 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.*

statute (in which case the arguments for the comparative advantage of agencies over courts become strongest) because the statute itself answers the question. The agency thus has no comparative advantage; its democratic accountability is a liability rather than a benefit.

The necessary differences between judicial and agency interpretations (at least agency interpretations under step two of *Chevron*) may help explain Justice Scalia's acceptance of broad congressional delegations. Professor Zeppos points out that while Scalia's "textualism suggests that he might demand greater specificity in statutory text, he has repeatedly voted to uphold statutes against claims that they unconstitutionally delegate legislative power."<sup>50</sup> Zeppos explains this paradox as illustrating Scalia's bias toward executive power; Scalia overlooks his textualist scruples if (but only if) the President benefits from Congress's failure to make hard decisions.<sup>51</sup> It is common ground that Justice Scalia likes the executive more than Congress, so I do not think this explanation is necessarily wrong,<sup>52</sup> but it is incomplete.

First, Professor Zeppos suggests that Justice Scalia does not seem to want to force Congress to make hard policy choices through more specific language. That Justice Scalia does not do so directly, by striking down broad delegations as unconstitutional, does not mean that his method does not create that incentive. There is every reason for the courts to stay out of the business of deciding when a statute is sufficiently specific to satisfy the nondelegation doctrine, as they have since *Schechter*.<sup>53</sup> Justice Scalia's approach may still *indirectly* force

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<sup>50</sup> Zeppos, *Scalia's Textualism*, *supra* note 3, at 1639 (citing *Skinner v. Mid-Atlantic Pipeline Co.*, 109 S. Ct. 1728 (1989); *Mistretta v. United States*, 109 S. Ct. 647, 677 (1989) (Scalia, J., dissenting)). One could add to this list the per curiam opinion by the three-judge District Court in *Synar v. United States*, 626 F. Supp. 1374 (D.D.C.) (per curiam) (three-judge court), *aff'd*, 478 U.S. 714 (1986), universally assumed to have been written by then-Judge Scalia.

<sup>51</sup> Zeppos, *Scalia's Textualism*, *supra* note 3, at 1639.

<sup>52</sup> It does raise the question of whether Justice Scalia really means what he says. A recurrent question in any extended discussion of Scalia's jurisprudence, as evidenced by the papers in this symposium, is whether Justice Scalia is sincere or is merely offering a plausible neutral front for a highly conservative political agenda. Professor Zeppos generally assumes Scalia's sincerity and takes him at his word. For example, he points to inconsistencies not as proof that Scalia is a fraud, but only to demonstrate that his method is not all it's cracked up to be. See Zeppos, *Scalia's Textualism*, *supra* note 3, at 1623-34. This is one point in his paper where Professor Zeppos refuses to give Scalia the benefit of the doubt and adopts a more cynical tone. The circumstantial evidence justifying such cynicism is concededly great. To make the argument fully, one should include Peter Strauss's emphasis on the phenomenon of divided government. See P. Strauss, *Comment: Legal Process and Judges in the Real World*, 12 *CARDOZO L. REV.* 1653, 1656 (1991).

<sup>53</sup> *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935). Justice Scalia is one of many who believe that for judges to police the specificity of congressional delegations is a hopeless task. See *Mistretta v. United States*, 488 U.S. 361, 416 (1989) (Scalia, J., dissenting)

greater specificity. As Professor Zeppos and others have pointed out, narrow readings of statutes throw the matter back to Congress.<sup>54</sup> Similarly, viewing vague statutory language as a grant of broad administrative authority should also lead Congress to narrower and more specific delegations in order to keep the agencies in check.<sup>55</sup> This is especially true in the modern era of politically divided government, when a Democratic Congress is handing authority over to Republican administrators.<sup>56</sup> Indeed, *Chevron* enthusiasts repeatedly express the hope that *Chevron* will produce more specific legislation.<sup>57</sup>

Second, it is in one way perfectly natural for the textualist to accept delegations through vague and broadly worded legislation. As Judge Kozinski's opinion in *Mesa Verde* illustrates, confidence in statutory meaning significantly narrows the scope of agency action.<sup>58</sup> If "interpretation" is understood merely as a restatement of what it is Congress has decided, then there is little room for agency interpretation. Agencies can make their own decisions only where Congress has been silent; Congress has been silent only in its broadest delegations or most ambiguous language.

Third, the textualists may actually *need* both delegation and *Chevron* given their rather impoverished view of what goes into interpreting a statute. In this view, interpretation is merely a matter of elucidating or reformulating what Congress has already done, i.e. restating what the words already say. Yet interpretation has to be more than revealing the inherent but somehow hidden meaning, like opening the lid of a box.<sup>59</sup> Judges cannot provide the additional information and perspective, yet someone must; agencies are the obvious someone. In other words, if one accepts the basic premises of the

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("the scope of delegation is largely uncontrollable by the courts"); Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669, 1696-97 (1975). That the Court agrees is seen by its de facto abandonment of the nondelegation doctrine and the meaninglessness of its black-letter "intelligible principle" rule.

<sup>54</sup> Zeppos, *Scalia's Textualism*, *supra* note 3, at 1637-38.

<sup>55</sup> Professor Zeppos points out that "[o]ne can seek to 'reform' Congress not by tilting power to the executive, but by forcing upon Congress the need to make more fundamental policy choices at the delegation level." *Id.* at 1639. Given *Chevron*, tilting power to the executive will force that need upon Congress.

<sup>56</sup> See Strauss, *supra* note 52, at 1656-57.

<sup>57</sup> E.g., Pierce, *The Role of Constitutional and Political Theory in Administrative Law*, 64 TEX. L. REV. 469, 523-24 (1985); Silberman, *supra* note 28, at 824 ("Congress, now aware of the *Chevron* rule and perhaps distrustful of executive branch interpretation, is thereby led to greater specificity in drafting. Such specificity is all to the good."); Starr, *supra* note 12, at 311-12.

<sup>58</sup> 861 F.2d at 1146; see *supra* notes 36-44 and accompanying text.

<sup>59</sup> Farber & Frickey, *Legislative Intent and Public Choice*, 74 VA. L. REV. 423, 457-58 (1988); see also Sunstein, *supra* note 25, at 416-23.

textualist enterprise, then the only way to ensure reasonable and valid interpretations is to hand the task over to agencies, who are not shackled in the same way as judges.

#### D. *Unplain Words*

The interaction of textualism and *Chevron* is illuminating in one final way. The traditional rule about consulting legislative history has been that if the text is clear, the court need (indeed should) not look further; only if the text is not clear should the judge consult the legislative history. Is this the same lack of clarity that triggers *Chevron*'s step two? For most of the Court—i.e., those Justices who regularly consult legislative history—it cannot be. The *Chevron* question is not whether the words are clear, but whether congressional intent is clear.<sup>60</sup> If the words are unclear, the Court turns to the legislative history and the other “traditional tools of statutory construction.”<sup>61</sup> Only if that too is unavailing does the court simply accept any reasonable agency interpretation.<sup>62</sup> Although the role of legislative history after *Chevron* has been a matter of dispute, it remains relevant for a majority of the current Justices. In *Chevron* itself, after all, the Court looked far beyond the statute's four corners before deferring.

For Justice Scalia, on the other hand, the lack of clarity that would trigger resort to the legislative history under the traditional rule—i.e., enough so that the court cannot confidently interpret the statute on the basis of its language alone—is identical to that which triggers *Chevron*'s step two. By definition there can be no resort to the legislative history, so textual uncertainty sends the court straight to the agency without stopping at legislative history.

In a purely consistent and logical world, this should mean that the textualist goes to step two more often and interprets the statute herself less often. The flow chart would ask if the text is clear; if no, the traditional interpreter would turn to the legislative history, and only if that too is unhelpful to the agency, whereas the textualist should go straight to the agency. Yet Justice Scalia's class of step one cases is no smaller, and may be larger, than that of the other Justices. This phenomenon casts light on the textualist enterprise in general. First, it reminds us that for the textualist, a little text goes a long way.<sup>63</sup> Second, it indicates that it is misleading to describe textualism

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<sup>60</sup> *Chevron U.S.A. Inc., v. NRDC*, 467 U.S. 837, 842-43 & n.9 (1984).

<sup>61</sup> *Id.* at 843 n.9.

<sup>62</sup> *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987), for example, was a step one case in which the Court consulted the legislative history in light of somewhat unclear statutory language.

<sup>63</sup> The same lesson is apparent in the numerous cases in which Justice Scalia has written

as a "plain words" approach. The textualist acknowledges that the words may not be plain at all. But they will (or must) be sufficient. Scalia's textualism is not a plain words approach; it is just a "words" approach. Textualism limits the inputs into judicial decisionmaking without limiting the output.

## II. SHIFTING THE BALANCE OF POWER

Despite the many tensions between textualism and deference, the two can comfortably coexist because both are at least presented as doctrines of judicial restraint that limit judicial policy-making.<sup>64</sup> The focus on the judge's role may obscure some of the consequences for the roles played by the other branches. Textualism and deference to agency interpretations are in fact closely linked in their effects on the separation and balance of federal powers: each purports to be respectful of Congress, each in fact reflects a basic distrust of Congress, and each shifts authority away from Congress.

### A. *Passive-Aggressive Judging*

Justice Scalia's textualism boasts a well-polished patina of respect for Congress. First, it rests on a strong version of legislative supremacy. It is because the judicial role must be cabined, amounting merely to application of the legislative mandate, that the courts must deny themselves any tools other than the statutory text. To abandon the constraints of text provides too many opportunities for judges to impose their own, rather than Congress's, policy preferences.<sup>65</sup> Second, textualism places congressional action on a pedestal. Legislative history is irrelevant because it is not adopted via full article I procedures. Only the language actually voted on by both houses and presented to the President is *law*.<sup>66</sup> In dismissing legislative history because it is not "law," Justice Scalia implicitly adopts a strong version of legislative supremacy: *nothing* is law except what Congress

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separately to state that he would reach the same result on the basis of text alone that the majority reached through consideration of the traditional range of relevant materials. *E.g.*, *Taylor v. United States*, 110 S. Ct. 2143, 2160 (1990) (Scalia, J., concurring); *H.J., Inc. v. Northwestern Bell Tel.*, 109 S. Ct. 2893, 2907 (1989) (Scalia, J., concurring); *Jett v. Dallas Indep. School Dist.*, 109 S. Ct. 2702, 2724 (1989) (Scalia, J., concurring).

<sup>64</sup> Aleinikoff, *supra* note 48, at 45-46; Zeppos, *Scalia's Textualism*, *supra* note 3, at 1619-20.

<sup>65</sup> See *Public Citizen v. United States Dep't of Justice*, 109 S. Ct. 2558, 2576 (1989) (Kennedy, J., concurring); *Johnson v. Transportation Agency*, 480 U.S. 616, 670-71 (1987) (Scalia, J., dissenting).

<sup>66</sup> *E.g.*, *Pierce v. Underwood*, 487 U.S. 552, 566-67 (1988); *Puerto Rico Dep't of Consumer Affairs v. Isla Petroleum Corp.*, 485 U.S. 495, 501 (1988); *Center for Auto Safety v. Peck*, 751 F.2d 1336, 1351 (D.C. Cir. 1985).



says. Third, Scalia's treatment of the United States Code as a coherent, integrated, consistent whole implies a legislature of extraordinary abilities whose work is taken seriously.<sup>67</sup>

*Chevron*, too, in its literal content bows deeply to the legislature. Its theoretical premise is that Congress itself has required the deferential stance by delegating interpretive authority to the agency.<sup>68</sup> The court is merely carrying out Congress's command. And if Congress has actually decided the "precise question at issue," then the Court ignores the agency and obediently enforces the congressional decision.<sup>69</sup> Like textualism, deference is justified as a means of limiting the influence of judges' personal policy preferences.<sup>70</sup>

Notwithstanding this surface respect for congressional decision-making, both these doctrines rest on deep suspicion of Congress and disdain for how it does its job. Thus, Justice Scalia's invective about legislative history—rehearsed colloquies, unread insertions by legislative aides, and the many other "frail substitutes"<sup>71</sup> for statutory text—is all sneering derision. As Professors Farber and Frickey put it, the textualists' stance toward members of Congress is one of "denigrating their integrity while exalting the product of their labors."<sup>72</sup> This divergence is not so paradoxical as it seems. The exaltation of the product is in part a consequence of the denigration of the producers. Were the statute itself no more than the imperfect articulation of the sum of seamy, log-rolling, influence-wielding, back-scratching, uncomprehending legislative maneuvers, it would merit no respect or attention at all. But that view is unacceptable given the basic constitutional scheme. So Justice Scalia saves the statute from Congress by insisting that it has a life of its own.<sup>73</sup> He is uninterested in legislative intent because he is uninterested in the legislature; focusing only on the text keeps the interpreter and the text unsoiled.<sup>74</sup> The United

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<sup>67</sup> Professor Zeppos several times refers, with evident perplexity, to Scalia's apparent assumption of an "omniscient" legislature. Zeppos, *Scalia's Textualism*, *supra* note 3, at 1621-23.

<sup>68</sup> See *supra* notes 6-9 and accompanying text.

<sup>69</sup> *Chevron*, 867 U.S. at 843 n.9; see also *ETSI Pipeline Project v. Missouri*, 108 S. Ct. 805, 817 (1988) (declining to rely on *Chevron* because "the Executive Branch is not permitted to administer the Act in a manner that is inconsistent with the administrative structure that Congress enacted into law").

<sup>70</sup> E.g., Pierce, *Chevron and its Aftermath: Judicial Review of Agency Interpretation of Statutory Provisions*, 41 VAND. L. REV. 301, 314 (1988).

<sup>71</sup> *Thompson v. Thompson*, 484 U.S. 174, 192 (1988) (Scalia, J., concurring).

<sup>72</sup> Farber & Frickey, *supra* note 59, at 468.

<sup>73</sup> The usual quotation for this idea is from Justice Holmes: "We do not inquire what the legislature meant; we ask only what the statute means." Holmes, *The Theory of Legal Interpretation*, 12 HARV. L. REV. 417, 419 (1899).

<sup>74</sup> In this respect, Justice Scalia seems to take a more extreme position than Judge Easter-

States Code may resemble an elegant and finely tuned clock, but it turns out that the existence of the clock does not prove the existence of the clockmaker.

It would be possible to have little respect (in the daily sense of the term) for Congress and its members but still respect (in the stricter sense) its decisions and its authority. That is not, however, what Justice Scalia does. Consider, for example, the notion that even if adherence to the text leads to silly results the judge's hands are tied. Although billed as an instance of judicial restraint, this is a mock respect for congressional authority that is at bottom quite hostile. By forcing Congress to rewrite statutes whose language did not quite reach certain unanticipated situations and to be extraordinarily comprehensive in the first place, the textualist's "restraint" only makes Congress's task harder.<sup>75</sup> This textualism is passive-aggressive.

*Chevron* too is at bottom hostile to Congress. While it purports to respect Congress, its underlying theory contains an implicit criticism. Requiring deference because agencies are democratically accountable and the decisions involved are in essence policy matters indicates that the interpretive question arises only because Congress has fallen down on the job. For if, as *Chevron* posits, accountability is the goal, then although we should prefer agencies to courts, we should also much prefer Congress to agencies. Indeed, *Chevron* has been described as creating a "presumption of statutory ambiguity."<sup>76</sup> While I think this is an overstatement, such a reading amounts to an *assumption* that Congress has failed in its constitutionally assigned task. Thus, Justice Scalia should like *Chevron* because it confirms, although very politely, his own view of legislation: Congress makes deals,

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brook. Judge Easterbrook has written that the reason a judge cannot borrow from another statute or even another section to illuminate the meaning of the provision at issue is that the legislative process is not sufficiently coherent. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 547 (1983). If in fact legislative will is relevant to statutory interpretation, Judge Easterbrook is surely right; Congress does not mean the same thing every time it uses a particular word. It is only because Justice Scalia is not interested in the legislative will that he can pretend it does. *E.g.*, *Pierce v. Underwood*, 487 U.S. 552, 565 (1988) (Scalia, J.) (meaning of "substantially justified" in the Equal Access to Justice Act indicated by use of term "substantial" in the Administrative Procedure Act and the Federal Rules of Civil Procedure). Yet no one, least of all Justice Scalia, views Congress as coherent and consistent. Since Justice Scalia's big bang approach does not consider the legislative background at all, he, unlike Judge Easterbrook, can indulge in this fiction.

<sup>75</sup> Zeppos, *Legislative History and the Interpretation of Statutes: Toward a Fact-Finding Model of Statutory Interpretation*, 76 VA. L. REV. 1295, 1332 (1990) [hereinafter Zeppos, *Fact-Finding Model*]; Note, *Intent, Clear Statements, and the Common Law: Statutory Interpretation in the Supreme Court*, 95 HARV. L. REV. 892, 904-05 (1982).

<sup>76</sup> Shapiro & Glicksman, *Congress, the Supreme Court, and the Quiet Revolution in Administrative Law*, 1988 DUKE L.J. 819, 859.

hedges, seeks credit but avoids blame, and does not know what it is doing. Finally, like textualism, extreme deference is sometimes justified as a means of forcing Congress to do its job right.<sup>77</sup> Not only is this in itself critical of Congress, but for the same reasons that narrow and literal statutory readings do Congress no favor, so *Chevron* may require more of Congress than it is up to.<sup>78</sup>

### B. *Growth of Executive Power*

It should come as no surprise that each of these doctrines—and, more importantly, the two of them synergistically—shifts power away from Congress and toward the executive. *Chevron* by its terms increases executive authority. Although it seems to do so at the expense of the judiciary, the legislature loses influence as well. First, any growth in executive power means a loss in legislative power. Second, however much one wants to debate the extent and the benefits of the shift, *Chevron* clearly does involve a shift away from the model (and, I think, the reality) of courts protecting congressional decisions against agency misreadings or abandonment.<sup>79</sup> Textualism, especially in its most literalist manifestations, also diminishes legislative authority in subtle but significant ways.<sup>80</sup> This is well-trodden ground. I wish only to make a few comments about textualism's impact on agency authority.

Professor Zeppos speculates that textualism reduces legislative power, then considers separately its effect on executive authority.<sup>81</sup> These issues are not distinct. Two centuries of struggle between the President and Congress, not to mention the basic political theory un-

<sup>77</sup> See *supra* notes 55-57 and accompanying text.

<sup>78</sup> Indeed, the very commentators who extoll *Chevron*'s incentive for specificity seem to acknowledge that Congress may be unable to respond to the incentive. Thus, Judge Starr states that "Congress . . . may pass fewer laws," but takes solace in the fact that "[t]hose it does pass, however, will be better than many on the books now." Starr, *supra* note 12, at 312. And Judge Silberman, having in one breath stated that *Chevron* will produce greater specificity, which is all to the good, in the next observes that "often there is also ambiguity when statutes are extensively detailed, because the more Congress writes the more difficulty it seems to have making legislation clear." Silberman, *supra* note 28, at 825.

<sup>79</sup> I am among those who not only regret this shift but feel that it is in part the result of a misreading of *Chevron*. That question, however, is for another day.

<sup>80</sup> For discussion of how textualism reduces legislative authority, see Mikva, *The Primacy of Congress and the Legal System*, 15 U. DAYTON L. REV. 193, 197-98 (1990); Ross, *Reaganist Realism Comes to Detroit*, 1989 U. ILL. L. REV. 399, 401-02, 422-26; Wald, *The Sizzling Sleeper: The Use of Legislative History in Construing Statutes in the 1988-89 Term of the United States Supreme Court*, 39 AM. U. L. REV. 277, 308 (1990); Zeppos, *Fact-Finding Model*, *supra* note 75, at 1332-33; Zeppos, *Scalia's Textualism*, *supra* note 3, at 1637; Note, *supra* note 75, at 904-05; Note, *Justice Scalia's Use of Sources in Statutory and Constitutional Interpretation: How Congress Always Loses*, 1990 DUKE L.J. 160, 188-90.

<sup>81</sup> Zeppos, *Scalia's Textualism*, *supra* note 3, at 1638.

derlying the Constitution, demonstrate that where one loses power the other automatically gains. Thus, if textualism reduces legislative authority, that in itself answers Zeppos's next question—whether it also “tilts power toward the executive branch.”

As for that question, the critical way in which textualism may increase agency power is by removing the constraints of other interpretive tools. The problem is compounded by removing this constraint at the agency level. If indeed more content can be given to vague statutory terms if legislative history is consulted, then by denying access to this source of information about statutory meaning, textualism only increases ambiguity. Under *Chevron*, that means increasing the scope of agency discretion. After all, legislative history is read not only by courts, but also by lawyers within the agency or the Department of Justice who must advise the agency on the legality of its intended course of action. This view, which is sketched out by Professors Zeppos and Strauss,<sup>82</sup> is both overstated and underanalyzed.

First, to the interpreter uneasy about limiting herself to text, legislative history looks like a significant constraint given the incompleteness of text as an indicator of congressional meaning. But the promise of textualism is self-fulfilling; if one actually believes that text will answer all questions, then it will do so.<sup>83</sup>

Textualism as practiced by a true believer therefore will not increase the number of ambiguous statutes.<sup>84</sup> It is only if textualism is forced on (and then sincerely applied by) nontextualists that that would happen. If Professor Zeppos were told to look only at text, he would probably find more ambiguous statutes and defer to agency interpretations more often than if he was allowed to consider other sources of meaning. But that does not mean that Justice Scalia, or administrative agencies, would have the same difficulties.

Second, the checking function of legislative history, although real,<sup>85</sup> is easily overstated. There are, to be sure, many individual cases where a vague term is significantly clarified by a specific piece of

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<sup>82</sup> Strauss, *supra* note 52, at 1655-57; *Symposium: Congressional Control of the Administration of Government: Hearings, Investigations, Oversight, and Legislative History*, 68 WASH. U.L.Q. 595, 605-08 (1990) (remarks of Peter Strauss); Zeppos, *Scalia's Textualism*, *supra* note 3, at 1617.

<sup>83</sup> Put more positively, the availability of legislative history may reduce the incentive to draw all available meaning out of the text. If resort to legislative history is foreclosed, the text may legitimately become less ambiguous because of more careful and disciplined (desperate?) examination of it.

<sup>84</sup> See *supra* notes 32-33 and accompanying text.

<sup>85</sup> For a cogent general defense of reliance on legislative history to clarify statutory meaning, see Farber & Frickey, *supra* note 59.

legislative history.<sup>86</sup> But all practicing lawyers and judges know that one can virtually always discover something in the legislative history to support *any* interpretation. Textualist judges seem particularly (perhaps excessively) aware of the malleability and cooperativeness of legislative history; that is part of their critique.<sup>87</sup> It is easy to overstate the extent to which legislative history in fact performs the checking function Professor Zeppos attributes to it.

Third, it is not clear that Justice Scalia would endorse a textualist approach by agency interpreters. As I discussed above, if agencies and judges are both to be textualists then *Chevron* loses all justification.<sup>88</sup> Only a small corner of the textualist argument (*viz.*, legislative history is not law because it was not adopted pursuant to full article I procedures) applies when it is an agency rather than a judge doing the interpreting. Thus, Professors Zeppos and Strauss may be too hasty in bemoaning the loss of the checking function of policy and history at the agency level.

Finally, this view of the consequences of textualism with regard to agency power has an important connection to an overall assessment of textualism as a judicial method. If in fact legislative history does play this critical checking function of *agency* interpretations, then it does the same for *judicial* interpretations. If the threat of placing legislative history off-limits is that agencies will now have too free a hand, implementing their own views of social policy rather than adhering to congressional will, then that threat is also present with regard to judges. When Professors Zeppos and Strauss assert that textualism will work a shift of power to the executive because it abandons the limitations imposed by legislative history, implicitly they are saying that there is an even bigger shift of power to the judiciary. Although left unstated, this is perhaps the most fundamental criticism of textualism that can be made, for it attacks textualism on its own terms.

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<sup>86</sup> For example, the Clean Air Act instructs the Environmental Protection Agency to establish ambient air quality standards at a level that will ensure, with an adequate margin of safety, protection of "the public health." 42 U.S.C. § 7409(b)(1)(1988). The statute is unclear as to just who constitutes the "public" whose health is to be protected. The Senate Report, however, indicates that the "public" is the most sensitive group. S. REP. No. 1196, 91st Cong., 2d Sess. 10 (1970). EPA has so read the statute, and its interpretation has been upheld. *Lead Industries Ass'n v. EPA*, 647 F.2d 1184 (D.C. Cir.), *cert. denied*, 449 U.S. 1042 (1980). "Most sensitive group" is still a less than pellucid description, and this example does not show that it is *correct* to turn to legislative history. It is one example among many, however, of a vague statute whose meaning is clarified by resort to its history.

<sup>87</sup> See, e.g., *Wallace v. Christensen*, 802 F.2d 1539, 1559-60 (9th Cir. 1986) (Kozinski, J., concurring) ("legislative history can be cited to support almost any proposition, and frequently is").

<sup>88</sup> See *supra* notes 48-49 and accompanying text.

## III. CONCLUSION

Justice Scalia seeks an approach to judging in general and statutory interpretation in particular that prevents judges from simply implementing their own policy preferences. He would justify both textualism and deference to agency interpretations as furthering this goal. The two interact in curious ways, however. On the one hand, each undercuts the other; *Chevron* itself is hard to justify on textualist grounds and its implications for statutory meaning run counter to textualist assumptions. On the other hand, each reinforces the other in a sort of false piety toward legislative supremacy.