

ESSAY

TEXTUALISM AND THE FUTURE OF THE *CHEVRON* DOCTRINE

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I. INTRODUCTION

The last decade has been a remarkable one for statutory interpretation. For most of our history, American judges have been pragmatists when it comes to interpreting statutes.¹ They have drawn on various conventions—the plain meaning rule, legislative history, considerations of statutory purpose, canons of construction—“much as a golfer selects the proper club when he gauges the distance to the pin and the contours of the course.”² The arrival of Justice Scalia on the Supreme Court has changed this. Justice Scalia is a foundationalist, insisting that certain interpretational tools should be permanently banned from judicial use. What is more, Justice Scalia is sufficiently committed to his views about legal method that he often declines to join other Justice’s opinions that employ improper methods. This unyielding stance, reinforced by the appointment of Justice Thomas, who appears to share similar convictions, is producing a major transformation in the way the Supreme Court approaches statutory interpretation cases.

The two foundationalist positions with which Justice Scalia is most closely associated are textualism and the *Chevron* doctrine. Textualism is

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1. See generally Nicholas S. Zeppos, *The Use of Authority in Statutory Interpretation: An Empirical Analysis*, 70 TEX. L. REV. 1073 (1992) (collecting diverse sources of authority relied upon by the Supreme Court in interpreting statutes); William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321 (1990) (arguing that no foundationalist theory can account for the Court’s statutory interpretation cases).

2. Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 215-16 (1983).

not simply a revival of the old plain meaning rule. It is a sophisticated theory of interpretation which readily acknowledges that the meaning of words depends on the context in which they are used.³ The critical assumption is that interpretation should be objective rather than subjective; that is, the judge should ask what the ordinary reader of a statute would have understood the words to mean at the time of enactment, not what the intentions of the enacting legislators were.⁴ In practical terms, the principal implication of this ordinary reader perspective is to banish virtually all consideration of legislative history from statutory interpretation.

The *Chevron* doctrine⁵ is a narrower precept that concerns when courts should defer to interpretations of statutes by administrative agencies. In contrast to the older pragmatic tradition that emphasized a variety of contextual factors in deciding when and to what extent deference is appropriate,⁶ *Chevron* posits that a two-step inquiry is required in every case. At step one, the court undertakes an independent examination of the question. If it concludes the meaning of the statute is clear, that ends the matter. But if the court concludes that the statute is ambiguous, then it moves on to step two, under which it must defer to any interpretation by a responsible administrative agency that the court finds to be reasonable. Although *Chevron* itself was decided before Justice Scalia joined the Court, he has long been perceived as the Court's most enthusiastic partisan of the two-step method associated with the decision.⁷

Both textualism and the *Chevron* doctrine have produced an outpouring of commentary.⁸ However, relatively little attention has been given to the

3. See *Smith v. United States*, 113 S. Ct. 2050, 2060-61 (1993) (Scalia, J. dissenting) (noting that it is a "fundamental principle of statutory construction (and, indeed, of language itself) that the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used"); Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL'Y 61, 61 (1994).

4. See Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J.L. & PUB. POL'Y 59 (1988); U.S. DEP'T OF JUSTICE, OFFICE OF LEGAL POLICY, USING AND MISUSING LEGISLATIVE HISTORY: A RE-EVALUATION OF THE STATUS OF LEGISLATIVE HISTORY IN STATUTORY INTERPRETATION 20-26 (1989).

5. So named for *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984).

6. See Colin S. Diver, *Statutory Interpretation in the Administrative State*, 133 U. PA. L. REV. 549, 562 n.95 (1985).

7. See Michael Herz, *Textualism and Taboo: Interpretation and Deference for Justice Scalia*, 12 CARDOZO L. REV. 1663, 1663 (1991) ("Justice Scalia is a fierce, sometimes strident defender of *Chevron*").

8. On textualism, see, e.g., Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845 (1992); William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L.

relationship between these two foundationalist positions.⁹ In one sense textualism and *Chevron* seem like natural allies, “because both are at least presented as doctrines of judicial restraint that limit judicial policy-making.”¹⁰ Beneath this surface compatibility, however, lurks considerable tension.

One rather obvious problem is that *Chevron* was decided during the pre-textualist era when legislative history was routinely considered by all Justices. The decision describes step one in terms of a search for the “intentions” of the legislature¹¹ and examines legislative history in an effort to discover these intentions.¹² At a minimum, therefore, a committed textualist must reformulate the two-step inquiry to purge it of these intentionalist elements.

A less obvious but more fundamental problem is that *Chevron* is based on a model of courts as faithful agents—faithful agents first of the legislature, but when no instructions from the legislature can be discerned, then faithful agents of administrative decisionmakers.¹³ Textualism, in contrast, rejects the faithful agent model and instead adopts a model of courts as autonomous interpreters who seek answers to questions of statutory meaning through application of the ordinary reader perspective, supplemented by various judge-made rules of interpretation. Once courts embrace this autonomous interpreter model when dealing with legislative branch materials, it may be difficult to shift gears and assume the posture of the faithful agent when dealing with executive branch agencies.

This Essay offers a preliminary assessment of how textualism and the

REV. 621 (1990); Daniel A. Farber & Philip P. Frickey, *Legislative Intent and Public Choice*, 74 VA. L. REV. 423 (1988); William D. Popkin, *An “Internal” Critique of Justice Scalia’s Theory of Statutory Interpretation*, 76 MINN. L. REV. 1133 (1992); Frederick Schauer, *Statutory Construction and the Coordinating Function of Plain Meaning*, 1990 SUP. CT. REV. 231.

On *Chevron*, see, e.g., Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452 (1989); Kenneth W. Starr, *Judicial Review in the Post-Chevron Era*, 3 YALE J. ON REG. 283 (1986); Cass R. Sunstein, *Law and Administration After Chevron*, 90 COLUM. L. REV. 2071 (1990).

9. An important exception is Herz, *supra* note 7.

10. Herz, *supra* note 7, at 1677. As Justice Scalia has noted: “In my experience, there is a fairly close correlation between the degree to which a person is (for want of a better word) a ‘strict constructionist’ of statutes, and the degree to which that person favors *Chevron* and is willing to give it broad scope.” Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 521.

11. *Chevron*, 467 U.S. at 842-43.

12. *Id.* at 851-53, 862-64.

13. For fuller treatment of this point, see Thomas W. Merrill, *Pluralism, the Prisoner’s Dilemma, and the Behavior of the Independent Judiciary*, 88 NW. U. L. REV. 396, 399 (1993).

Chevron doctrine are faring together in the Supreme Court. Part II tracks the progress of these two tenets in recent terms of the Supreme Court. Textualism is clearly ascendant. The use of legislative history (a disfavored tool among textualists) is dropping precipitously, while the use of dictionaries (a favored tool) is moving up. The *Chevron* doctrine, in contrast, is not flourishing. Although the Court tends to identify the deference doctrine more closely with *Chevron* than ever before, deference to agency interpretations appears to be playing a smaller role overall than had been the norm up through the end of the 1980s. Thus, the general pattern in the Court appears to suggest something of an inverse relationship between textualism and use of the *Chevron* doctrine.

In Part III, I consider some possible explanations for these trends. Justice Scalia's own explanation, which suggests a basic harmony between textualism and *Chevron*, is straightforward: textualism is a more objective method of interpretation than intentionalism, and thus generates less "agency-liberating ambiguity" that requires courts to move beyond step one.¹⁴ The empirical basis for this claim, however, is doubtful. I will suggest two alternative explanations. One, which is short term, focuses on the competition within the Court between the textualists (led by Justice Scalia) and the intentionalists (led by Justice Stevens). As long as each of these rival groups seeks to persuade swing Justices that its preferred method is more restraining of judges than the other method, each group has an incentive to avoid the conclusion that any given statute is ambiguous, and thus that deference to agency interpretations is appropriate. The second explanation, which is longer term, focuses on the style of interpretation associated with textualism. Textualism tends to approach problems of statutory interpretation like a puzzle, the answer to which is found by developing the most persuasive account of all the public sources (dictionaries, other provisions of the statute, other statutes) that bear on ordinary meaning. This in turn tends to make statutory interpretation an exercise in ingenuity—an attitude that may be less conducive to deference to the decisions of other institutions than the dry archival approach associated with intentionalism.

Under either explanation, textualism poses a threat to the future of the deference doctrine. For those who believe that judicial deference to agency interpretations of law is a good thing, this should be a cause for concern, and provides some reason to question the wisdom of textualism, or at least

14. Scalia, *supra* note 10, at 521.

the way the deference doctrine is currently implemented through the *Chevron* doctrine.

II. TEXTUALISM AND *CHEVRON* IN RECENT TERMS OF THE SUPREME COURT

By far the most important story from the Supreme Court on the statutory interpretation front these days is the emergence of the textualist method associated with Justice Scalia. As is well known, since his arrival on the Court Justice Scalia has campaigned assiduously for the elimination of legislative history from the Court's statutory interpretation opinions.¹⁵ At first this effort seemed quixotic and appeared to have little impact on the other Justices. Over time, however, Justice Scalia's influence on this question has grown, to the point where it now appears that he has achieved a substantial measure of success.

Three data points may be used to demonstrate the march of textualism in the Supreme Court. They are summarized in Table 1.

Term	Total Statutory Interpretation Cases	Cases making Substantive Use of Legislative Hist.	Cases Not Mentioning Legislative History	Cases Relying on Dictionaries
1981	69	69(100%)	0(0%)	1(1%)
1988	71	53(75%)	10(14%)	9(13%)
1992	66	12(18%)	41(62%)	22(33%)

The data on use of legislative history in the 1981 and 1988 Terms have been borrowed from law review articles published by Judge Patricia Wald. Her first article¹⁶ included a survey of the Supreme Court's statutory interpretation decisions in the 1981 Term. She reported that although the Court made frequent use of the "plain meaning" rule, in practice the rule had been "laid to rest."¹⁷ In what today seems a truly remarkable finding, she uncovered no case in the 1981 Term in which the Court did not refer to legislative history in a substantive way in determining the meaning of a

15. The emergence of Justice Scalia's views is described in Eskridge, *supra* note 8.

16. Wald, *supra* note 2.

17. Wald, *supra* note 2, at 195.

federal statute.¹⁸

Judge Wald later repeated this analysis for the 1988 Term.¹⁹ She reported that the textualists, in particular Justice Scalia and to a lesser degree Justice Kennedy, had made some inroads. Legislative history was still used in a substantive way in nearly three-fourths of the Court's statutory interpretation opinions.²⁰ But the controlling opinion in ten statutory interpretation cases that Term made no reference to legislative history. And even those opinions that referred to legislative history appeared to do so with a "certain tone of caution."²¹

The data for the most recent Term, 1992, are my own. The sixty-six statutory interpretation cases I identified in the last Term reveal that what was at most an emerging trend in 1988 has become a major transformation. In over forty decisions, there is no reference to legislative history by any of the participating Justices. Indeed, adopting even the most generous construction of Judge Wald's criterion for inclusion,²² only thirteen decisions from the 1992 Term can be said to include any "substantive use" of legislative history by the majority or plurality opinion. In short, in slightly more than a decade the Court has moved from a position in which legislative history was routinely considered in all cases, to a situation in which it is considered by the controlling opinion in only a small minority of decisions. And in most cases, it is not mentioned at all.

To corroborate the trend suggested by the decline in use of legislative history, I also examined the frequency of the Court's use of dictionary definitions in resolving issues of statutory interpretation. Dictionary definitions are by no means the only tool of textualism, nor are they limited

18. *Id.* at 195, 197.

19. Patricia M. 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 (1990).

20. *Id.* at 288.

21. *Id.* at 309.

22. I included every case in which the controlling opinion (majority or plurality) employed legislative history in some nontrivial way to advance the legal argument. For example, citation to a committee report for a definition of a word used in the statute was enough to merit inclusion. *See United States Dep't of Justice v. Landano*, 113 S. Ct. 2014, 2019-20 (1993). Also included were cases in which legislative history is referred to in the text only to be rejected. *See United States Dep't of Treasury v. Fabe*, 113 S. Ct. 2202, 2210-11 (1993). I excluded cases that cited legislative history for noncontroversial propositions, e.g., *Spectrum Sports, Inc. v. McQuillan*, 113 S. Ct. 884, 889 (1993) (citing legislative history of Sherman Act for proposition that antitrust law is developed by courts on a case-by-case basis), or simply as illustration, e.g., *Building & Construction Trades Council v. Associated Builders*, 113 S. Ct. 1190, 1198 (1993), or that rejected the relevance of legislative history in a footnote, *see Bufford v. Commissioner*, 113 S. Ct. 927, 932 n.10 (1993).

to the textualist method. But it is probably fair to say that the textualist method, with its search for the ordinary meaning ascribed to words by the contemporaneous reader, probably leads to the dictionary more often than does the approach that frames the inquiry in terms of legislative intent.²³

Here too we find a remarkable corroboration of the rise of textualism. In the 1981 Term, only one majority opinion referred to a dictionary in resolving a question of statutory interpretation. The number had grown to nine by the 1988 Term (13% of statutory interpretation opinions) and jumped to twenty-two (33% of all statutory interpretation opinions) in the most recent Term. Thus, the dramatic decline in the use of legislative history from 1981 to 1992 finds as its almost perfect mirror image a rise in the use of dictionaries.

Taking both pieces of evidence together, there can be no doubt that textualism has asserted a powerful hold over the Supreme Court's statutory interpretation jurisprudence. To be sure, the transformation is far from complete. Justice Stevens in particular has emerged in recent Terms as a forceful defender of the search for legislative intent and the use of legislative history.²⁴ But there can be no doubt that textualism is in ascendancy and the use of legislative history to discover congressional intent is very much on the decline.

What then has been the impact of the textualist revolution on *Chevron* and the deference doctrine? One would naturally expect some kind of impact. The *Chevron* opinion speaks the language of legislative intent²⁵ and was authored by Justice Stevens, the last true-blue holdout in favor of intentionalism and legislative history in statutory interpretation. Moreover, *Chevron* itself carefully canvassed the legislative history of the Clean Air Act before concluding that Congress did not have an intent on the issue before the Court.²⁶ At a minimum, therefore, one would expect that the Court's formulation of the *Chevron* doctrine would have to change.

It appears that this has indeed happened. The Court's most recent comprehensive restatement of the *Chevron* doctrine reads as follows:

If the agency interpretation is not in conflict with the plain language of the statute, deference is due. In ascertaining whether the agency's interpretation is a permissible construction of the language, a court must look to the

23. See A. Raymond Randolph, *Dictionaries, Plain Meaning, and Context in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL'Y 71 (1994).

24. See Popkin, *supra* note 8.

25. 467 U.S. at 845.

26. *Id.* at 851-53, 862-64.

structure and language of the statute as a whole. If the text is ambiguous and so open to interpretation in some respects, a degree of deference is granted to the agency, though a reviewing court need not accept an interpretation which is unreasonable.²⁷

This reformulation is obviously designed to make step one of the *Chevron* doctrine a purely textualist inquiry. No consideration of legislative history or of the "intent" of Congress is mentioned. "Plain language," "structure and language," and "the text" are all that count. It remains to be seen whether one should read any significance into the use of the phrase "a degree of deference" to describe the consequences of finding ambiguity at step one.²⁸

Beyond the reformulation of the doctrine, the more important question is whether textualism is having an impact on the frequency with which the Court invokes the deference doctrine or decides to defer to agency constructions of law. To assess this question, I expanded upon a survey I published in 1992.²⁹ The object of the earlier survey was to assess the impact of the *Chevron* decision on the Court's own jurisprudence of deference. Some lower courts, especially the D.C. Circuit, had treated *Chevron* like the *magna carta* of deference, mandating greater respect for administrative interpretations than had theretofore been the case.³⁰ I was curious to see whether the Supreme Court regarded it the same way, and to this end surveyed all the Court's decisions involving a deference

27. *National R.R. Passenger Corp. v. Boston & Maine Corp.*, 112 S. Ct. 1394, 1401-02 (1992) (citations omitted).

28. Other than this reformulation, which was foreshadowed in earlier cases, see *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988), there are few significant developments in the *Chevron* doctrine to report on in the last two years. The above noted decision in *Boston & Maine Corp.* also breaks new ground in holding that *Chevron* deference should be given to an interpretation that is a "necessary presupposition" of an agency decision, even if the agency did not make this interpretation explicit. 112 S. Ct. at 1402-03. And a case from the 1992 Term, *Good Samaritan Hosp. v. Shalala*, 113 S. Ct. 2151, 2159-62 (1993), contains an unusually elaborate discussion of three pre-*Chevron* contextual factors (contemporaneous interpretation, consistent interpretation, and delegated rulemaking authority), and tries (without any notable success) to integrate them into the *Chevron* framework. Finally, *Lechmere, Inc. v. NLRB*, 112 S. Ct. 841 (1992), confirms a point first advanced in *Maislin Indus., U.S. v. Primary Steel, Inc.*, 497 U.S., Inc. 116, 131 (1990)—that in determining whether a statute is ambiguous for *Chevron* purposes a court must treat prior Supreme Court constructions of the statute as part of the statute itself. 112 S. Ct. at 847-48. In other words, prior Supreme Court interpretations trump administrative interpretations. This important point obviously constricts significantly the possible scope of the *Chevron* doctrine.

29. Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969 (1992).

30. For empirical support for this perception, see Peter H. Schuck & E. Donald Elliott, *To the Chevron Station: An Empirical Study of Federal Administrative Law*, 1990 DUKE L.J. 984.

question from the 1981 Term through the 1990 Term. Table 2 below is adapted from the earlier study.

Table 2. Deference Decisions in the Supreme Court, 1984-1990 Terms

Term	A Total Cases In- volving Deference Question	B Agency View Accepted	C <i>Chevron</i> Frame- work Applied	D <i>Chevron</i> Frame- work: Agency View Accepted	E <i>Chevron</i> Frame- work: Decided at Step Two	F Cases Citing Tradi- tional Factors
1981	11	10(90%)	N/A	N/A	N/A	8(73%)
1982	15	11(73%)	N/A	N/A	N/A	11(73%)
1983	19	13(68%)	N/A	N/A	N/A	11(57%)
Total 1981- 1983	45	34(75%)	N/A	N/A	N/A	30(66%)
1984	19	18(94%)	1(5%)	1(100%)	1(100%)	7(37%)
1985	14	11(78%)	6(43%)	5(83%)	4(66%)	6(43%)
1986	9	5(55%)	2(22%)	1(50%)	1(50%)	2(22%)
1987	14	9(64%)	5(36%)	3(60%)	3(60%)	3(21%)
1988	9	4(44%)	3(33%)	1(33%)	1(33%)	6(66%)
1989	14	8(57%)	9(64%)	4(44%)	2(22%)	4(29%)
1990	11	8(73%)	6(55%)	4(66%)	2(33%)	6(55%)
Total 1984- 1990	90	63(70%)	32(36%)	19(59%)	14(44%)	34(37%)

The most general finding of the survey was that *Chevron* had not made a dramatic difference in the frequency with which the Supreme Court deferred to agency interpretations of statutes. If anything, the number of deference cases and the rate at which the Supreme Court accepted the agency view went down somewhat after *Chevron* was decided (columns A and B). Indeed, I found that the Court applied the *Chevron* framework to less than half the cases that presented a question of deference (column C), although the frequency started to rise in the 1989 and 1990 Terms. Perhaps the most counterintuitive finding of the survey was that in the

cases in which the Court did apply the two-step *Chevron* approach, the Court was somewhat less likely to defer to agency views than in cases in which the Court did not invoke the *Chevron* standard (compare columns D and B). Most lower courts and commentators have assumed that the *Chevron* framework was designed to, and if faithfully applied would, result in a greater degree of deference to agency interpretations of statutes.³¹

Table 3 reports the same results for the two most recent Terms.

Term	A Total Cases Involving Deference Question	B Agency View Accepted	C <i>Chevron</i> Frame- work Applied	D <i>Chevron</i> Frame- work: Agency View Accepted	E <i>Chevron</i> Frame- work: Decided at Step Two	F Cases Citing Tradi- tional Factors
1992	8	6(75%)	3(37%)	3(100%)	2(66%)	1(13%)
1991	8	6(75%)	6(75%)	4(66%)	3(50%)	4(50%)
Total 1991- 1992	16	12(75%)	9(56%)	7(77%)	5(55%)	5(31%)

At first blush, the last two Terms appear to be more-or-less business as usual on the *Chevron* front. Comparing the data from the two tables, we see that the overall rate of acceptance of agency interpretations in the last two years (column B) is up slightly (to 75%), but this is not too far out of line with the general average during the post-*Chevron* period (70%). And

31. I sought to explain these results on the basis of various perceived jurisprudential failings of the *Chevron* doctrine: *Chevron* tends to make deference an all or nothing proposition, whereas the Court is more likely to want a sliding scale; *Chevron* adopts a sequential inquiry that either overemphasizes judicial inputs or overemphasizes administrative inputs, whereas the Court is likely to prefer a blending of the two; *Chevron* makes it difficult in some cases for the Court to perform an effective job of policing overreaching or other abuses of power by the executive, whereas the Court is likely to regard this as a key function of judicial review; and *Chevron* makes traditional contextual factors that have guided courts—such as whether the agency interpretation is longstanding, contemporaneous with enactment of the statute, well reasoned, or the product of an express delegation of rulemaking authority—largely irrelevant, whereas the Court is likely to want to continue to rely on these factors in appropriate cases. Merrill, *supra* note 29, at 993-1003. In other words, the suggestion was that *Chevron* is a kind of jurisprudential straightjacket that the Court itself is not likely to don very often, lest the expectation arise that it is compulsory attire.

the percentage of deference cases that employ the *Chevron* framework (column C) is roughly consistent with the trend that started around 1988, after *Chevron* took on greater visibility within the Court.³²

The aggregate data nevertheless suggest several possible divergences from the earlier period. Given the small sample size, any inference of change must necessarily be cautious and preliminary. Still, there appears to be a slightly increased tendency to affirm the agency interpretation in cases in which *Chevron* is applied (column D). Here the rate goes from 50% in the 1988-90 period to 77% in the two most recent years. In addition, there appears to be a slightly increased tendency, again in the cases applying *Chevron*, to affirm on the ground that the agency interpretation is reasonable (step two), as opposed to finding that the agency interpretation is compelled by the meaning of the statute (step one) (column E). The number of step two cases increased from 30% in the 1988-90 period to 55% in the most recent two year period. Standing alone both of these trends would tend to disconfirm a prediction I made in my previous article, to the effect that *Chevron* was turning into a doctrine of antideference.³³

On the other hand, it also appears that the number of deference cases decided in each of the last two Terms (column A) is down somewhat from the previous period.³⁴ Although the total number of cases decided by the Court is also down, when we look at deference cases as a percentage of all statutory interpretation cases we nevertheless find that a decline in the invocation of the deference doctrine appears to be taking place.³⁵ When we move beyond the aggregate data to examine individual cases, moreover, an even more dramatic falloff appears. To some degree in the 1991 Term, but much more noticeably in the 1992 Term, the deference doctrine appears to be playing an increasingly peripheral role in the decisions even when it is mentioned.

Specifically, of the total of eight deference cases that I identified in the 1992 Term, four mentioned the possibility of deference in a footnote or in

32. During the 1988-90 Terms, the Court applied *Chevron* in 51% of its deference cases, and accepted the agency view in 50% of the cases in which *Chevron* was applied. Merrill, *supra* note 29, at 992.

33. Merrill, *supra* note 29, at 1002.

34. The average number of deference cases in the first 7 post-*Chevron* years was 12.85.

35. Looking at only the three Terms for which I have figures for the total number of statutory interpretation cases, we find that the deference doctrine was raised in 16% of all statutory cases in the 1981 Term, in 13% of all statutory cases in the 1988 Term, and in 12% of all statutory cases in the 1992 Term.

passing, only to say that it was not necessary to reach it.³⁶ In a fifth case, the doctrine was mentioned by the dissent in passing, but not alluded to at all in the majority opinion.³⁷ And in a sixth case, the doctrine was used to resolve only a subsidiary issue.³⁸ Thus, a closer examination of the opinions on deference from the 1992 Term reveals that there were in fact only two decisions that turned in any significant degree on the deference doctrine. This is a dramatic reduction in the incidence of the use of the doctrine relative to what we have witnessed throughout most of the modern era.

This trend toward marginalization of the deference doctrine, if it persists, largely negates any inferences that might be drawn from the aggregate data suggesting a turn toward greater use of the *Chevron* doctrine and a more deferential use of that doctrine. Indeed, what we may be witnessing is a kind of extension of a trend that emerged in the 1989 to 1990 period, when the Court began applying the *Chevron* doctrine more frequently, but also tended to resolve most cases at step one. The currently fashionable approach, which is functionally no different, is for the Court to exercise independent judgment, find that the statutory meaning is unambiguous, and then drop a footnote indicating that there is no need to consider deference to agency views. If this conjecture is correct, then what appears from the aggregate data to be a shift toward greater deference is largely an illusion.

There is, however, an important symbolic difference between applying *Chevron* and resolving the case at step one, and resolving the case based on independent judgment and not reaching the *Chevron* inquiry. A Court that frames its inquiry in terms of the *Chevron* doctrine acknowledges in effect that a major issue in the case is the choice of the appropriate interpretative institution—the agency or the court. Every statutory interpretation case becomes a separation of powers case. In contrast, a Court that resolves the issue itself and then drops a footnote saying it is not necessary to consider the deference doctrine says in effect that deference to the agency is just another pair of pliers in the statutory interpretation tool chest. Deference on this view raises no separation of powers question, but is analogous to selecting a canon of interpretation to resolve an issue

36. *United States Nat'l Bank v. Independent Ins. Agents of America*, 113 S. Ct. 2173, 2186 n.11 (1993); *South Dakota v. Bourland*, 113 S. Ct. 2309 (1993); *Commissioner v. Keystone Consol. Indus., Inc.*, 113 S. Ct. 2006, 2013 n.3 (1993); *Moreau v. Klevenhagen*, 113 S. Ct. 1905, 1912 (1993); *Bath Iron Works v. Director, OWCP*, 113 S. Ct. 692, 700 (1993).

37. *Newark Morning Ledger Co. v. United States*, 113 S. Ct. 1670 (1993) (Souter, J., dissenting).

38. *Reiter v. Cooper*, 113 S. Ct. 1213, 1220-21 (1993).

otherwise too close to call.³⁹

At any event, the apparent marginalization of the deference doctrine in the last Term means that it is still not possible to say that *Chevron* has had any lasting impact on the Supreme Court, at least in terms of pressing the Court toward greater deference to agency views. It also means it is premature to reject my earlier prediction that the deficiencies in the *Chevron* doctrine may lead to less rather than more deference by the Supreme Court. The Court can avoid deferring to agency views by ignoring the *Chevron* doctrine or by expanding the scope of judicial inquiry at step one. But it can also avoid deferring to agencies by relegating *Chevron* to a footnote.

III. SOME POSSIBLE EXPLANATIONS

The previous Part showed that textualism is clearly ascendent in the Supreme Court, and suggested, albeit more tentatively, that *Chevron* may be on the wane. In this Part, I will consider some possible explanations for these developments.

A. *The Rise of Textualism*

The rapid spread of textualism among the Justices no doubt owes something to Justice Scalia's powers of persuasion. Since 1987, Justice Scalia has been conducting what amounts to a continuous seminar on the virtues of textualism and evils of legislative history. During this time, he has authored nearly twenty controlling opinions for the Court which demonstrate his textualist method in action. Perhaps more importantly, he has authored almost twice as many separate concurring or dissenting opinions that chastise other Justices for straying from the proper path. The fact that some of the more recently appointed (Republican) Justices have been receptive to these views, especially Justice Thomas and to a lesser degree Justice Kennedy, is a sign that Justice Scalia's arguments have persuaded at least some of the other Justices.

Nevertheless, there is reason to believe that the spread of textualism does not reflect anything like a genuine conversion by most of the other Justices. First, Justice Scalia's separate opinions have occasionally elicited responses directly challenging his views. For example, in *Wisconsin Public*

39. For a defense of the idea that the *Chevron* doctrine should be understood as a canon of interpretation, see Sunstein, *supra* note 8, at 2113.

Intervenor v. Mortier,⁴⁰ Justice White's opinion for the Court responded to a Scalia concurring opinion with a brief defense of using legislative history in a "good faith effort to discern legislative intent."⁴¹ Justice White concluded that "the Court's practice of utilizing legislative history reaches well into its past" and "[w]e suspect that the practice will likewise reach well into the future."⁴² All seven other Justices joined this footnote, including Justice Kennedy (Justice Thomas was not yet on the Court). Similarly, in *United States v. Thompson/Center Arms Co.*,⁴³ Justice Scalia upbraided Justice Souter (writing for a plurality of three, including Chief Justice Rehnquist and Justice O'Connor) for using legislative history, the "St. Jude of the hagiology of statutory construction."⁴⁴ Souter breezily responded that "[t]he shrine . . . is well peopled (though it has room for one more) and its congregation has included such noted elders as Mr. Justice Frankfurter"⁴⁵ These exchanges suggest that, with the exception of Justice Thomas, no one else on the Court is prepared to endorse Justice Scalia's unbending views.

Second, it is highly unlikely that Justices whose careers on the bench predate 1987—and who therefore have made profligate use of legislative history in their past decisions—are likely to endorse a position that impeaches their own past practice. Chief Justice Rehnquist, for example, has long been a proponent of judicial deference to legislatures⁴⁶ and has fairly consistently portrayed the proper role of the courts in statutory interpretation cases as that of the faithful agent seeking out the intentions of the enacting legislature.⁴⁷ Not surprisingly, he has been lavish in his use of legislative history.⁴⁸ Indeed, although he is clearly bending with the textualist wind, Chief Justice Rehnquist continues to show no compunctions about using legislative history when an appropriate occasion

40. 111 S. Ct. 2476 (1991).

41. *Id.* at 2485 n.4.

42. *Id.*

43. 112 S. Ct. 2102 (1992).

44. *Id.* at 2111 (Scalia, J. joined by Thomas J., concurring in the judgment).

45. *Id.* at 2109 n.8.

46. *See, e.g.*, William H. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693 (1976).

47. *See* Thomas W. Merrill, *Chief Justice Rehnquist, Pluralist Theory, and the Interpretation of Statutes*, 25 RUT.-CAM. L.J. (forthcoming).

48. *See, e.g.*, *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 686-94 (1983); *Smith v. Wade*, 461 U.S. 30, 66 (1983) (Rehnquist, J. dissenting); *Leo Sheep Co. v. United States*, 440 U.S. 668, 681-87 (1979); *United Steelworkers v. Weber*, 443 U.S. 193, 201-07 (1979).

arises to make reference to it.⁴⁹

A better explanation for the triumph of textualism, in my opinion, lies not so much in Justice Scalia's persuasiveness as in his persistence. The critical factor here is Justice Scalia's practice of refusing to join any part of another Justice's opinion that relies on legislative history. This means that in any case in which another Justice needs the vote of Justice Scalia to form a majority or controlling opinion, the writing Justice knows that if legislative history is employed he or she will lose majority status with respect to at least a portion of the opinion. The arrival of Justice Thomas, who has taken up a similar stance, effectively doubles Justice Scalia's voting clout in this regard.

On the other side of the ledger, the defenders of legislative history, most prominently Justice Stevens but to a lesser extent all of the other Justices, have adopted no such irredentist stance. Specifically, neither Justice Stevens nor any other Justice has adopted a policy of declining to join any opinion that *fails* to ground statutory interpretation in a conception of legislative purpose derived from legislative history. The simple logic of coalition building thus points powerfully toward suppression of legislative history: two sure votes lost if you use it, no votes necessarily lost if you ignore it.

In short, the internal dynamic on the Court is such that each Justice now has an incentive to abandon all references to legislative history in his or her opinions, at least if the Justice has any hope of attracting the votes of Justices Scalia and Thomas. The result is that the remaining Justices—all of whom have from time to time endorsed the use of legislative history—now regularly produce textualist opinions that look very much like those written in the workshops of Justices Scalia and Thomas. Moreover, we can probably expect this pattern to persist as long as Justices Scalia and Thomas maintain their current uncompromising stance—and as long as they remain sufficiently close to the center of the Court that their votes remain

49. For example, in *Negonsott v. Samuels*, 113 S. Ct. 1119 (1993), Chief Justice Rehnquist wrote for a unanimous Court (and hence did not need the votes of Justices Scalia and Thomas). Although he purported to find the language of the statute plain, *id.* at 1123, in fact the language presented a classic case in which one sentence of the Act appeared to conflict with another. *Id.* Chief Justice Rehnquist went on to examine the legislative history, *id.* at 1123-25, which provided clear and persuasive support for his conclusion that the first sentence rather than the second was controlling. Justices Scalia and Thomas, as usual, did not join the discussion of legislative history, *id.* at 1120 n.**, but did not file a dissent.

important to other Justices in building coalitions.⁵⁰

B. *The Waning of Chevron*

The more difficult question is why the rise in textualism may be associated with a decline in use of the *Chevron* doctrine. The textualist in chief, Justice Scalia, has supplied one explanation for this phenomenon. As he wrote in an article on *Chevron* published in 1989:

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. Contrariwise, one who abhors a “plain meaning” rule, and is willing to permit the apparent meaning of a statute to be impeached by the legislative history, will more frequently find agency-liberating ambiguity, and will discern a much broader range of “reasonable” interpretation that the agency may adopt and to which the courts must pay deference. The frequency with which *Chevron* will require *that* judge to accept an interpretation he thinks wrong is infinitely greater.⁵¹

In other words, Justice Scalia sees textualism as a doctrine of judicial restraint, reducing the range of possible statutory meanings, and thus reducing the occasions on which reference to agency views is appropriate. In contrast, he sees intentionalism as *increasing* the range of possible meanings because it allows “the apparent meaning of a statute to be impeached by the legislative history.”⁵² Thus, intentionalism will generate more “agency-liberating ambiguity” than will a consistent application of textualism.⁵³

Those who defend the use of legislative history would strenuously dispute this analysis. They would point out that statutory language is often

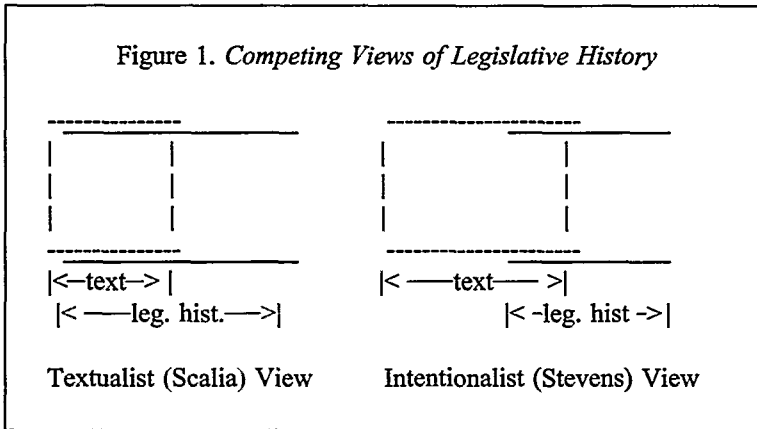
50. It is interesting in this regard to contrast the position of Justices Scalia and Thomas with that of Justices Brennan and Marshall with respect to the death penalty. Although the uncompromising Brennan-Marshall stance on the death penalty no doubt shifted the pattern of outcomes in death penalty cases toward a more liberal position, it did not appear to have any significant influence on the way other Justices wrote opinions. The difference may be that the Brennan-Marshall position concerned legal outcomes, while the Scalia-Thomas position on legislative history concerns legal method. One can nearly always reach a given result in a statutory interpretation case either by ignoring or by consulting legislative history. Thus, on the plausible assumption that the other Justices care mostly about outcomes, they are willing to shade their legal method in the direction of the Scalia-Thomas position on legislative history, but were not similarly inclined to move toward an accommodation with the Brennan-Marshall position on the death penalty.

51. Scalia, *supra* note 10, at 521.

52. *Id.*

53. *Id.*

vague or ambiguous and that it is often necessary to determine the purpose of the statute in order to particularize the meaning or select between two or more facially plausible meanings.⁵⁴ Textualism may afford no basis for selecting between two competing meanings and will thus render the outcome random or unpredictable. Intentionalism, in contrast, allows the court to consult the legislative history for evidence of Congress' purposes, and armed with this understanding, to select the meaning most consistent with those purposes. Consequently, for the pragmatic or intentionalist interpreter, consulting legislative history is the true doctrine of restraint and is likely to reduce, not increase, the number of occasions when courts are unable to identify a controlling congressional intention at step one of the *Chevron* process. For the intentionalist, it is textualism—at least a textualism honestly employed—that is more likely to generate “agency-liberating ambiguity.” Figure 1 attempts to illustrate the disagreement.



Obviously, legislative history can be used both to expand upon or limit the range of meanings that the text alone will sustain. The question is which effect dominates. The textualists believe that the range of meanings permitted by the text alone is fairly narrow, and that admitting considerations of legislative history will, on the whole, tend to *expand* the range of possible meanings. The intentionalists, in contrast, believe that the text alone will yield a fairly wide range of possible meanings; admit legislative

54. See, e.g., Wald, *supra* note 19, at 301-02; Breyer, *supra* note 8, at 856-61; Farber & Frickey, *supra* note 8, at 457-58.

history and the range of possible meanings narrows.

This dispute over whether the use of legislative history expands or narrows the range of permissible meanings presents an empirical question that, at least in principle, should be testable. To be sure, determining the overall impact of legislative history is difficult today, because the Court often does not tell us what the legislative history contains. It would be a herculean task to perform a legislative history analysis for all the cases in which the Court says nothing about it (even with the aid of the briefs of the parties, which in most cases no doubt still contain discussions of legislative history). Nevertheless, there is at least some available evidence that tends to cast doubt on Justice Scalia's assertion that the predominant effect of legislative history is "to permit the apparent meaning of a statute to be impeached."⁵⁵

The first is supplied by Judge Wald's article reporting the results of a detailed survey of the Supreme Court's use of legislative history in the 1988 Term.⁵⁶ After reviewing all the Court's statutory construction opinions that year, she concluded that in only five cases "did the Court use legislative materials to come to a different result from that derived from the arguably 'plain' language of the statute."⁵⁷ In contrast, in thirty-two cases the Court found that the text of the law was silent or ambiguous on the issue in question, and "[i]n eight of these cases, legislative history was able to shed some light on the particular issue for decision."⁵⁸ In the remaining eighteen cases, the Court used legislative history "to confirm its reading of statutory language."⁵⁹ Although this analysis casts serious doubt on the utility of legislative history—whether its benefits are worth its costs⁶⁰—it

55. Scalia, *supra* note 10, at 521.

56. Wald, *supra* note 19.

57. *Id.* at 294.

58. *Id.* at 292.

59. *Id.* at 289. Note that Judge Wald's numbers do not add up. She reported a total number of fifty-three cases that considered legislative history in the 1988 Term, but her three categories (five cases, thirty-two cases, and eighteen cases) add up to fifty-five. The discrepancy is not explained.

60. In terms of Judge Wald's survey, the question whether the benefits from using legislative history are worth the added costs to the courts and the parties would depend in part on one's attitude toward the five cases in which legislative history was used to modify the outcome suggested by the text. If these cases are regarded as properly decided (the position a pure intentionalist would presumably take), then legislative history had a positive payoff in thirteen cases and added nothing (except perhaps a comfort factor) in forty-two. If one regards these five cases as wrongly decided (the position required by the classic statement of the plain meaning rule), then legislative history had a positive payoff in eight cases, a negative effect in five cases, and added nothing in forty-two. If one adopts this latter view, it may well be that legislative history could be condemned solely on the ground that the benefits are too small relative to the additional administrative costs imposed on courts and parties.

hardly supports the textualist claim that the dominant role of legislative history is to expand the range of permissible readings of a statute.⁶¹ Expansion occurred in less than 10% of the cases using legislative history; in the remaining cases legislative history either narrowed the range of possible meaning or added nothing.⁶²

A second source of evidence would be to look at the *type* of statutory interpretation questions presented to the Court for decision in each case. Justice Scalia's view that legislative history "permit[s] the apparent meaning of a statute to be impeached" suggests that the dominant type of question is one in which the result produced by the ordinary meaning is challenged as overly broad or overly narrow relative to the purposes of the law, or in which the language is said to result in an absurd outcome or to reflect a drafting error. These are circumstances in which legislative history might be used to "impeach" the ordinary meaning, and hence expand the range of permissible outcomes. The competing intentionalist view suggests that the dominant type of question is one in which the ordinary meaning is ambiguous, *i.e.*, admits of two or more possible meanings, is vague, contains a gap, or conflicts with another provision of the statute. These are the types of questions in which legislative history would be expected to narrow the possible range of meanings.

I have collected preliminary data designed to determine the relative frequency of these issues.⁶³ The data suggest that roughly 50% of the Supreme Court's statutory interpretation cases concern questions about the

61. It would have been even more illuminating had Judge Wald broken down the cases from the 1981 Term into similar categories. Recall that the Supreme Court considered legislative history in *every single* statutory interpretation case that year. Thus, the 1981 Term in effect offers up a laboratory experiment on what effect legislative history would have if it were systematically considered in every case. Although Judge Wald reported generally of the cases that Term that "legislative history is rarely the determinative factor in statutory construction," Wald, *supra* note 2, at 195, it is not possible to tell from her discussion how frequently legislative history was used to trump the apparent plain meaning of the text. See also Wald, *supra* note 2, at 216.

62. William Eskridge provides confirmation of this in *The New Textualism*. He reports that in the 1988 Term, the 1987 Term, and the 1986 Term, the Court used legislative history to get around "apparent meaning" only four, three, and seven times, respectively. Eskridge, *supra* note 8, at 657.

63. The figures in the text are derived from an analysis done by my research assistant of all Supreme Court statutory interpretation opinions from four Terms, 1981, 1982, 1991 and 1992—that is, two from the legislative history era and two from the current textualist era. There are no major shifts in the percentages from one period to the next, suggesting that the relative magnitudes are probably reasonably accurate. For another source suggesting that a large number of the Courts statutory interpretation decisions involve questions of ambiguity, see Gregory E. Maggs, *Reducing the Costs of Statutory Ambiguity: Alternative Approaches and the Federal Courts Study Committee*, 29 HARV. J. ON LEGIS. 123 (1992).

proper construction of past precedent and the like, and thus do fit neatly into either category. Of the remaining cases, roughly 40% involve questions of ambiguity, vagueness, gaps, or internal conflict, and roughly 10% involve claims that the statutory language yields results that are overly broad or overly narrow relative to the statute's purpose, or produces an absurdity or is the product of mistake. If this breakdown of the types of statutory interpretation questions that arise is even roughly accurate, then again it is difficult to endorse the claim that the dominant effect of legislative history is to expand, rather than to narrow, the range of possible meanings.

In short, Justice Scalia's explanation for why the rise of textualism would produce a decline in *Chevron* deference—that textualism constrains judicial discretion and hence reduces the number of occasions when reference to agency views is appropriate under step one—is at best unproven. For alternative explanations, I will suggest two possibilities. One focuses on short term dynamics within the Court, the other on longer term consequences associated with the style of textualist interpretation.

The short term explanation starts with the proposition that even if textualism does not in fact constrain judicial discretion, Justices Scalia and his allies very much want to persuade us that it does. In fact, if we view the Court as currently divided into two camps engaged in a competitive struggle over the use of legislative history, it is plausible that Justices in both camps will strain to avoid deferring to agency interpretations of law as long as that struggle continues.

The point can be made by referring again to Figure 1. The current situation on the Court can be conceived of as one in which Justice Scalia and his allies are anxious to persuade their colleagues and the wider legal world that the left hand side of Figure 1 accurately depicts interpretative reality. That is to say, that on the whole the texts of statutes and associated conventions of ordinary meaning generate a fairly narrow range of permissible outcomes, and that, again on the whole, the dominant effect of adding legislative history to the mix is to expand the range of permissible outcomes. On the other hand, Justice Stevens and his allies (which means to some degree most of the other Justices), believe that on the whole the right side of Figure 1 is a more accurate depiction of interpretative reality. In other words, the text and ordinary meaning conventions generate a wide range of permissible outcomes, and the introduction of legislative history will, on the whole, constrain the range of permissible outcomes.

Absent definitive empirical proof that persuades either camp to abandon its position, each side has an incentive to try to persuade the centrist

Justices and the wider legal world that its vision of reality is the more accurate one. Justice Scalia will want to demonstrate that textualism in fact produces a narrower range of permissible meanings than does intentionalism; Justice Stevens will try to demonstrate that intentionalism generates a narrower range of permissible meanings than does textualism. In these circumstances, a majority decision written from the perspective of either camp to the effect that a statute is ambiguous and that deference to agency interpretation is required is an open invitation to the other camp to impeach the decision by showing that the alternative methodology would *not* generate ambiguity. A textualist opinion finding ambiguity could be impeached by an intentionalist dissent showing that there is no ambiguity once the legislative history is considered; and an intentionalist opinion finding ambiguity could be impeached by a textualist dissent showing that if legislative history were excluded, the ambiguity goes away.

Obviously, I am not describing a process that necessarily manifests itself on the surface of the cases, or that even influences many outcomes. But even if such a competitive process operates at a subterranean level, it would be enough to produce a perceptible shift in the frequency with which the Court defers to agency interpretations. And it is plausible that something very much like this competitive process is going on, at least from the perspective of Justice Scalia. Justice Scalia has lectured widely⁶⁴ and has written some forty separate concurring or dissenting opinions whose sole purpose is to persuade his colleagues and the wider legal community to abandon legislative history and embrace textualism. He has also publicly announced that textualism, because of the greater constraints it imposes on judges, should produce less deference to agency interpretations of law.⁶⁵ It would hardly be surprising that, whatever the validity of the assumptions underlying these positions, Justice Scalia would be loath to expose his positions too often to a contrary demonstration from a committed intentionalist.

The warring camps hypothesis carries the implication that the eclipse of the deference doctrine may be only a temporary phenomenon, and that if textualism eventually becomes completely dominant (or is completely vanquished) an equilibrium of deference will again be restored. But there is another, more subtle explanation for why textualism and deference may be inversely related—an explanation that suggests that textualism

64. See Eskridge, *supra* note 8, at 650-51.

65. Scalia, *supra* note 10, at 521.

triumphant would lead to a permanent subordination of the *Chevron* doctrine.

This has to do with the style of judging associated with textualism. Intentionalism mandates an “archeological” excavation of the past,⁶⁶ producing opinions written in the style of the dry archivist sifting through countless documents in search of the tell-tale smoking gun of congressional intent. Textualism, in contrast, seems to transform statutory interpretation into a kind of exercise in judicial ingenuity. The textualist judge treats questions of interpretation like a puzzle to which it is assumed there is one right answer. The task is to assemble the various pieces of linguistic data, dictionary definitions, and canons into the best (most coherent, most explanatory) account of the meaning of the statute. This exercise places a great premium on cleverness. In one case the outcome turns on the placement of a comma,⁶⁷ in another on the inconsistency between a comma and rules of grammar,⁶⁸ in a third on the conflict between quotation marks and the language of the text.⁶⁹ One day arguments must be advanced in support of broad dictionary definitions;⁷⁰ the next day in support of narrow dictionary definitions.⁷¹ New canons of construction and clear statement rules must be invented and old ones reinterpreted.⁷²

This active, creative approach to interpretation is subtly incompatible with an attitude of deference toward other institutions—whether the other institution is Congress or an administrative agency. In effect, the textualist interpreter does not *find* the meaning of the statute so much as *construct* the meaning. Such a person will very likely experience some difficulty in deferring to the meanings that other institutions have developed.

There are at least two reasons why textualism may lead to this more creative, less deferential style of judging. One was alluded to in the introduction: textualism implicitly rejects the faithful agent model of

66. See T. Alexander Aleinikoff, *Updating Statutory Interpretation*, 87 MICH. L. REV. 20, 21 (1988).

67. *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989).

68. *Crandon v. United States*, 494 U.S. 152, 170 (1990) (Scalia, J., concurring).

69. *United States Nat'l Bank v. Independent Ins. Agents of Am.*, 113 S. Ct. 2173, 2182-85 (1993).

70. *Morales v. Trans World Airlines*, 112 S. Ct. 2031, 2037 (1992).

71. *Chisom v. Roemer*, 111 S. Ct. 2354, 2372 (1991) (Scalia, J., dissenting) (arguing that ordinary meaning of “representatives” does not include “judges”).

72. See David L. Shapiro, *Continuity and Change in Statutory Interpretation*, 67 N.Y.U. L. REV. 921, 923 (1992) (noting increasing use of canons by the Supreme Court); William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 629 (1992) (finding that the current Court has been “unusually activist” in creating new clear-statement rules).

judging that underlies intentionalism. By changing the focus from what Congress intended to what the ordinary reader would understand, textualism adopts, at least implicitly, a model of the court as an autonomous interpreter, applying its own judicially-prescribed conventions and canons for understanding the code that Congress has built up over the years. Once the Court grows comfortable with the autonomous interpreter model, its creativity in matters of statutory interpretation begins to expand apace, exemplified perhaps most clearly by the proliferating use of canons.

The second reason is that the textualist must become creative out of necessity. To return one last time to Figure 1, if Justice Stevens and the intentionalists are correct that interpretative reality looks more like the right side of Figure 1—and there is at least some preliminary evidence to suggest they are correct⁷³—then a Court that adopts the textualist method and rejects legislative history necessarily has fewer tools at its disposal to particularize the meaning of the text than was the case in the era of legislative history. Having fewer tools to work with, the textualist—like the painter working with a small pallet—necessarily has to become more imaginative in resolving questions of statutory interpretation.

Whatever the explanation for the active, creative style associated with textualism, it is fair to say that this attitude is out of sync with the *Chevron* doctrine, based as it is on a generalized model of the courts as faithful agents of the politically accountable branches of government. To the extent this change in style explains what appears to be an inverse relationship between the rise of textualism and the waning of *Chevron*, it suggests that the eclipse of the deference doctrine is likely to last as long as textualism remains dominant.

IV. CONCLUSION

I am not prepared to take sides on the large question whether the rise of textualism in the Supreme Court (and soon by inevitable emulation, in the lower courts) is to be celebrated or deplored. That question involves a highly complex judgment implicating multiple variables that are difficult to isolate and measure.⁷⁴ To name just a few, in evaluating the choice between textualism and intentionalism it would be necessary: (1) to determine whether courts can ever interpret texts without attributing a

73. See *supra* notes 56-63 and accompanying text.

74. For some helpful beginnings in sorting out these variables, see Breyer, *supra* note 8; Farber & Frickey, *supra* note 8, at 458-61; Robert K. Rasmussen, *A Study of the Costs and Benefits of Textualism: The Supreme Court's Bankruptcy Cases*, 71 WASH. U. L.Q. 535 (1993).

purpose to the authors of the text, and if so, how much the judicial process will suffer if courts are cut off from discussing (but presumably not from consulting) a primary source of data about legislative purpose; (2) to determine whether legislative history can ever serve as a reliable guide to congressional purpose, given its inevitable incompleteness and increasingly voiced concerns that it is subject to manipulation by staff and interest groups; (3) to determine whether the outcome of statutory interpretation cases will become more or less predictable if courts do or do not rely on legislative history; (4) to estimate the savings in administrative costs, both to courts and parties, of eliminating the need to collect legislative history materials while increasing reliance on other interpretational tools; (5) to evaluate the incentive effects for Congress if it became generally understood that courts will not rely on legislative history (for example, will interest group efforts to manipulate the legislative process and staff influence go down, or will statutes become longer and more complex?); and (6) to consider whether the typical American judge (Justice Scalia is not typical) is up to the task of engaging in the creative, puzzle-solving exercise that the textualist method demands, or whether the plodding archival approach is the most we can expect of most of our lower court judges.

I am more certain that the practice of consulting and deferring to the interpretations of executive agencies is generally desirable. As I have argued elsewhere, “[t]he practice of deferring to executive interpretations of statutes performs many valuable functions: it allows policy to be made by actors who are politically accountable; it draws upon the specialized knowledge of administrators; it injects an element of flexibility into statutory interpretation; and it helps assure nationally uniform constructions.”⁷⁵ If the rise of textualism means the decline of the deference doctrine, either in the short or the long run, then this alone is cause for concern. It may suggest one reason to reject textualism. Or, as I have urged at length on another occasion,⁷⁶ it may suggest reason to abandon the *Chevron* doctrine, and think of deference not in terms of a fictitious command from Congress, but rather in terms of a system of interbranch precedent. If the practice of deferring to agency precedent were assimilated to the practice of following judicial precedent, the future of the deference doctrine would no longer be bound up with the fate of textualism. Thus,

75. Merrill, *supra* note 29, at 1002.

76. *Id.* at 1003-31.

whether the ultimate objective of interpretation is framed in terms of ordinary meaning or legislative intent, the views of the responsible agency would be considered in every case.

APPENDIX

Agency Deference Cases in the Supreme Court 1991-1992 Terms				
Case	Agency Interpretation Accepted?	<i>Chevron</i> Framework Followed?	Step 1 or Step 2	Traditional Factors
1992 Term				
1. Good Samaritan Hosp. v. Shalala, 113 S. Ct. 2151 (1993).	Y	Y	Step 2	Longstanding Contemporaneous Legis./Interp.
2. United States Nat'l Bank of Oregon v. Independent Ins. Agents of Am., 113 S. Ct. 2173 (1993).	Y	Y	Step 1	None
3. South Dakota v. Bourland, 113 S. Ct. 2309 (1993).	N	N	N/A	None
4. CIR v. Keystone Consol. Indus., Inc., 113 S. Ct. 2006 (1993).	Y	N	N/A	None
5. Moreau v. Klevenhagen, 113 S. Ct. 1905 (1993).	Y	N	N/A	None
6. Newark v. Morning Ledger Co., 113 S. Ct. 1670 (1993).	N	N	N/A	None
7. Reno v. Flores, 113 S. Ct. 1439 (1993).	Y	N	N/A	None
8. Reiter v. Cooper, 113 S. Ct. 1213 (1993).	Y	Y	Step 2	None

Agency Deference Cases in the Supreme Court 1991-1992 Terms				
Case	Agency Interpretation Accepted?	<i>Chevron</i> Framework Followed?	Step 1 or Step 2	Traditional Factors
1991 Term				
9. Estate of Cowart v. Nicklos Drilling Co., 112 S. Ct. 2589 (1992).	Y	Y	Step 1	Ratification Longstanding
10. United States v. Burke, 112 S. Ct. 1867 (1992).	Y	N	N/A	Longstanding
11. United States v. Alaska, 112 S. Ct. 1606 (1992).	Y	Y	Step 2	Longstanding
12. National R.R. Passenger Corp. v. Boston & Maine Corp., 112 S. Ct. 1394 (1992).	Y	Y	Step 2	None
13. Arkansas v. Oklahoma, 112 S. Ct. 1046 (1992).	Y	Y	Step 2	Longstanding Well-reasoned
14. Presley v. Etowah, 112 S. Ct. 820 (1992).	N	Y	Step 1	None
15. Lechmere, Inc. v. NLRB, 112 S. Ct. 841 (1992).	N	Y	Step 1	None
16. Ardestani v. INS, 112 S. Ct. 515 (1991).	Y	N	N/A	None

