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A CHEVRON FOR THE HOUSE AND SENATE:  
DEFERRING TO POST-ENACTMENT  
CONGRESSIONAL RESOLUTIONS THAT  
INTERPRET AMBIGUOUS STATUTES

If Congress wishes to resolve a statutory ambiguity, it always has the option of passing a law via bicameralism and presentment. In reality, however, passing laws is extremely difficult, and often the legislative enactment costs are simply greater than the benefits of resolving the ambiguity correctly.<sup>1</sup> Indeed, these high legislative enactment costs are among the reasons that so many of our statutes set forth broad principles rather than specify concrete requirements: gaining consensus on concrete textual mandates imposes even more costs on the already difficult process of legislation. A future Congress may want to clarify these vague statutory mandates as societal, legal, or technological circumstances change, as the consequences of certain policy choices become more apparent, or as legislators simply resolve their differences of opinion. But the costs of legislating a fix are usually too high.<sup>2</sup>

Some leading commentators argue that this problem of statutory ossification due to high legislative enactment costs requires judges to interpret statutes as living documents. Professor William Eskridge claims that a statute's meaning changes over time, and thus judges should "dynamically" interpret statutes.<sup>3</sup> Judge Calabresi argues that judges should "update" obsolete statutes by striking down or ignoring any statute that is "sufficiently out of phase with the whole [contemporary] legal framework so that, whatever its age, it can only stand if a current majoritarian or representative body reaffirms it."<sup>4</sup> However,

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<sup>1</sup> EINER ELHAUGE, STATUTORY DEFAULT RULES 57 (2008).

<sup>2</sup> See, e.g., GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 2, 35, 69–70 (1982) ("[B]ecause a statute is hard to revise once it is passed, laws are governing us that would not and could not be enacted today, and . . . some of these laws not only could not be reenacted but also do not fit, are in some sense inconsistent with, our whole legal landscape." *Id.* at 2.); WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 152 (1994) ("Although legislative overrides are more common than legal scholars once thought, most interpretations (especially those below Supreme Court level) are not overridden."); Daniel B. Rodriguez, *Statutory Interpretation and Political Advantage*, 12 INT'L REV. L. & ECON. 217, 224 (1992) ("It turns out to be exceedingly difficult for a majority coalition in Congress to succeed in overturning a judicial decision even where there would not be a majority for enacting the legislation reflecting the court's decision."). *But cf.* William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331, 334 (1991) ("Congress and its committees are aware of the Court's statutory decisions, devote significant efforts toward analyzing their policy implications, and override those decisions with a frequency heretofore unreported.").

<sup>3</sup> See ESKRIDGE, *supra* note 2, at 107–204.

<sup>4</sup> CALABRESI, *supra* note 2, at 164; see also *id.* at 121.

most commentators have criticized such approaches as putting too much power in the hands of unelected and unaccountable judges.<sup>5</sup>

Instead, Congress has largely relied on administrative agencies to continually update the policies that implement various statutes. When charged with administering statutes, such agencies often have the authority to interpret the legislation's vague commands by translating them into more precise and concrete rules.<sup>6</sup> Moreover, courts have given great deference to agency interpretations of ambiguous statutes under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*<sup>7</sup> These agency interpretations, although the products of a more politically accountable process than judicial interpretations, nonetheless are not as publicly deliberative or as nationally representative as a congressional decision. Worse, many other statutes that are similarly indefinite are not administered by any particular agency, thus leaving courts with the primary responsibility to develop the law — and thus the policy — under these statutes, despite judges' lack of expertise and accountability.<sup>8</sup> But by prohibiting one house of Congress from vetoing agency actions, the Supreme Court, in *INS v. Chadha*,<sup>9</sup> limited Congress's role in administering statutes, despite its institutional advantages over courts — and, in some respects, over agencies — in developing policy.

In a recent article, Professors Jacob Gersen and Eric Posner suggest that courts should pay greater attention to post-enactment congressional resolutions when interpreting statutes.<sup>10</sup> This Note develops their idea by proposing more modest congressional involvement than the legislative veto invalidated in *Chadha*: courts should defer to a

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<sup>5</sup> See, e.g., Abner J. Mikva, *The Shifting Sands of Legal Topography*, 96 HARV. L. REV. 534, 544 (1982) (reviewing CALABRESI, *supra* note 2) (“[C]ourts risk a great danger in either disguising or legitimizing their own statutory lawmaking for policy purposes. The legislative process must be reserved for elected representatives and for their constituencies.”).

<sup>6</sup> See, e.g., Immigration and Nationality Act, 8 U.S.C. §§ 1101–1537 (2006); National Labor Relations Act, 29 U.S.C. §§ 151–169 (2006); Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651–678 (2006); Clean Air Act Amendments of 1990, 42 U.S.C. §§ 7661–7661f (2006).

<sup>7</sup> 467 U.S. 837 (1984). Also crucial to the Supreme Court's acquiescence in the interpretations of more institutionally competent agencies is its reluctance to invoke the nondelegation doctrine. See JERRY L. MASHAW, GREED, CHAOS, AND GOVERNANCE 134 (1997) (“Since the *Schechter* case, the Supreme Court has not invalidated a single statute on the basis of excessive delegation. This result — not surprising, of course, given the history of the doctrine — cannot be explained by improvements since 1935 in the drafting of statutes.”); Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721, 1722 (2002) (“In our view there just is no constitutional nondelegation rule, nor has there ever been.”).

<sup>8</sup> See, e.g., Administrative Procedure Act (APA), 5 U.S.C. §§ 551–559, 701–706 (2006); Sherman Act, 15 U.S.C. §§ 1–7 (2006); Copyright Act, 17 U.S.C. §§ 101–810 (2006); Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17 (2006).

<sup>9</sup> 462 U.S. 919 (1983).

<sup>10</sup> See Jacob E. Gersen & Eric A. Posner, *Soft Law: Lessons from Congressional Practice*, 61 STAN. L. REV. 573, 607–12 (2008).

House or Senate resolution that adopts a reasonable interpretation of an ambiguous statute.<sup>11</sup> For statutes not administered by any agency with interpretive authority, such deference to a congressional resolution would improve lawmaking by bringing to bear the legislature's policy expertise and democratic accountability. But even for statutes administered by agencies, this proposal would increase accountability. Further, this proposal would help to restore checks and balances and the Constitution's original allocation of power by making the House and Senate coequal with executive agencies in interpreting ambiguous statutory provisions. Whenever these institutions disagree, courts should simply adopt their own best reading of the statute, *de novo*.

### I. STATUTES WITHOUT AGENCIES

Courts should give *Chevron*-like deference to any resolution passed by either the House or the Senate that reasonably interprets a statutory ambiguity. When deciding whether to defer to such a congressional resolution, courts should engage in both steps of the *Chevron* analysis, just as they do for agency interpretations of statutes: First, the statute must be "silent or ambiguous with respect to the specific issue" addressed by the congressional resolution.<sup>12</sup> Second, the resolution's interpretation must be "based on a permissible construction of the statute."<sup>13</sup>

#### A. *The Rationales for Chevron Deference to an Agency Apply Equally to One House of Congress*

The case for deference to post-enactment congressional resolutions is strongest where no agency has interpretive authority for a statute. A resolution that is adopted by one of the houses of Congress and that meets both of the *Chevron* criteria deserves courts' deference just as much as an executive agency's rule does. Because interpreting an ambiguous statute often requires a policy judgment,<sup>14</sup> the rationale underlying *Chevron* is that agencies are better policymakers than courts

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<sup>11</sup> This proposal accords with Professor Einer Elhauge's argument that courts should interpret ambiguous statutes to comport with current enactable preferences (ascertained through official action), *see generally* ELHAUGE, *supra* note 1, and with Gersen and Posner's suggestion that judges and commentators should give greater consideration to congressional resolutions, *see generally* Gersen & Posner, *supra* note 10.

<sup>12</sup> *Chevron*, 467 U.S. at 843.

<sup>13</sup> *Id.*

<sup>14</sup> *See* FRANK B. CROSS, *THE THEORY AND PRACTICE OF STATUTORY INTERPRETATION* 111 (2009) ("A deference doctrine . . . represents a pragmatic recognition of the ability of agencies to discern the statutory interpretation most in the public interest."); Cass R. Sunstein, *Beyond Marbury: The Executive's Power to Say What the Law Is*, 115 *YALE L.J.* 2580, 2583 (2006) (describing *Chevron* as the *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), of the late twentieth century).

are due to agencies' greater political accountability and technical expertise.<sup>15</sup> These two factors also support deference to the House and Senate.

1. *Democratic Accountability.* — The houses of Congress are certainly more politically accountable than courts (indeed, more so than executive agencies), and this accountability gives each house a comparative institutional advantage over courts in making democratic value judgments. Both the House and Senate are composed of directly elected members who represent discrete geographical constituencies that cumulatively reflect the entire nation.<sup>16</sup> Unlike executive agencies, the House and Senate are deliberative bodies with broad, general authority, allowing them to reach policy compromises that might cross the boundaries of any single agency's jurisdiction. Moreover, an entire house of Congress is less likely than an agency to be captured by a particular special interest.<sup>17</sup> Finally, consideration by either house of Congress would likely be more transparent than agency consideration so long as members of Congress did not adopt a resolution unanimously.<sup>18</sup> Even when a congressman holds a minority viewpoint, he may be able to raise the profile of an issue under consideration by Congress, which may generate public dialogue and result in a more democratic decision.<sup>19</sup>

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<sup>15</sup> See *Chevron*, 467 U.S. at 865–66; Cass R. Sunstein, *Law and Administration After Chevron*, 90 COLUM. L. REV. 2071, 2086 (1990) (“[T]he *Chevron* approach might well be defended on the ground that the resolution of ambiguities in statutes is sometimes a question of policy as much as it is one of law, narrowly understood, and that agencies are uniquely well situated to make the relevant policy decisions.”).

<sup>16</sup> But see SANFORD LEVINSON, *OUR UNDEMOCRATIC CONSTITUTION* 49–62 (2006) (arguing that the apportionment of power in the Senate is unrepresentative of the country as a whole).

<sup>17</sup> See Ian Ayres & John Braithwaite, *Tripartism: Regulatory Capture and Empowerment*, 16 LAW & SOC. INQUIRY 435, 437 (1991) (describing capture as more likely “when the agency regulates a small number of firms in a single industry”). Compare, e.g., JAMES Q. WILSON, *BUREAUCRACY* 75–79 (1989) (describing how “some agencies have their tasks powerfully shaped by external interests,” *id.* at 75), and Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1684–87 (1975) (explaining why agency discretion is “unduly favorable to organized interests,” *id.* at 1687), with, e.g., Paul J. Quirk, *Deliberation and Decision Making, in THE LEGISLATIVE BRANCH* 314, 322 (Paul J. Quirk & Sarah A. Binder eds., 2005) (noting that, “[p]aradoxically,” the proliferation of congressional lobbyists “should help members resist pressure from any one or few groups”).

<sup>18</sup> Where no member of Congress voices any opposition to an interpretation of a statute, however, one house of Congress may be less transparent than an agency, which must comply with the Administrative Procedure Act and other transparency requirements. Cf. *INS v. Chadha*, 462 U.S. 919, 926–27 (1983) (noting that the House passed a resolution without debate or recorded vote, on the basis of a committee recommendation made without disclosing its reasoning, to deny permanent residence to six aliens).

<sup>19</sup> In contrast to agencies, which lack Congress's publicized diversity of viewpoints, political entrepreneurs in Congress often have incentives to raise issues even when their proposals are unlikely to garner a majority. See DAVID R. MAYHEW, *CONGRESS: THE ELECTORAL CONNECTION* 61 (1974) (describing “position-taking”).

2. *Technical Expertise.* — Congress also possesses a comparative advantage over courts in subject matter expertise. By serving on specific committees, often for several terms, legislators develop policy expertise in particular areas in a way that a generalist judge cannot.<sup>20</sup> Moreover, these committees are staffed by specialized experts who help to draft legislation and have the resources to research policy issues for committee members.<sup>21</sup>

3. *Implicit Delegation.* — Although democratic accountability and technical expertise are functional reasons for courts to defer to an interpretation by one house of Congress, the doctrinal foundation for *Chevron* is that Congress's decision to write an ambiguous statute constitutes a congressional delegation of authority to the administering agency to resolve the ambiguity.<sup>22</sup> As commentators have pointed out, however, often "Congress does not speak in explicit terms on the question of deference."<sup>23</sup> The theory that Congress implicitly delegates interpretive authority to agencies is therefore "a kind of legal fiction" under which courts consider whether deference "makes sense" in a particular circumstance for a particular statute,<sup>24</sup> or whether there are indicia that Congress would have wanted an agency to have interpretive authority.<sup>25</sup> This doctrinal foundation for deference with respect to agencies is equally applicable to the House and Senate. For nearly every statute, Congress would likely prefer to grant interpretive authority to one house of Congress, so the legal fiction underlying

<sup>20</sup> See STEVEN S. SMITH ET AL., *THE AMERICAN CONGRESS* 169 (5th ed. 2007).

<sup>21</sup> See JOEL D. ABERBACH, *KEEPING A WATCHFUL EYE: THE POLITICS OF CONGRESSIONAL OVERSIGHT* 103 (1990) ("Though the contemporary American bureaucracy is certainly marked by greater continuity (longer tenure) than committee staff, staffers are not mere 'dilettantes' who stand opposite administrative 'experts.' They have significant experience in the areas covered by the agencies they oversee . . ." (footnote omitted) (quoting MAX WEBER, *Bureaucracy*, in FROM MAX WEBER: *ESSAYS IN SOCIOLOGY* 196, 232 (H.H. Gerth & C. Wright Mills eds. & trans., 1946)); Samuel C. Patterson, *The Professional Staffs of Congressional Committees*, 15 *ADMIN. SCI. Q.* 22, 29 (1970) ("[A] considerable proportion of the professional staff have had wide experience in their areas of specialization, so that their expertise is well established; and this specialization contributes to their capability."). Indeed, many congressional committee staffers are recruited from executive agencies. See *id.* at 27.

<sup>22</sup> See *United States v. Mead Corp.*, 533 U.S. 218, 229–31 (2001).

<sup>23</sup> Sunstein, *supra* note 15, at 2086. Indeed, the Administrative Procedure Act states that "the reviewing court shall decide all relevant questions of law, [and] interpret constitutional and statutory provisions," 5 U.S.C. § 706 (2006) (emphasis added), which seems to be an express delegation of interpretive authority to the courts rather than to agencies.

<sup>24</sup> Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 *ADMIN. L. REV.* 363, 370 (1986) (internal quotation marks omitted); see also *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 865 (1984) (stating that "it matters not" whether Congress considered the question of whether an agency should have interpretive authority); Thomas W. Merrill & Kristin E. Hickman, *Chevron's Domain*, 89 *GEO. L.J.* 833, 872 (2001) ("*Chevron* should apply only where Congress would want *Chevron* to apply."), quoted in *Mead*, 533 U.S. at 230 n.11; Cass R. Sunstein, *Chevron Step Zero*, 92 *VA. L. REV.* 187, 206 (2006).

<sup>25</sup> See *Mead*, 533 U.S. at 230.

deference to agencies is probably reality with respect to this Note's proposal.<sup>26</sup>

4. *Separation of Powers.* — Commentators have also suggested that *Chevron* may be best understood as a separation of powers doctrine “akin to [a relationship] of respect or noninterference indicative of coequal branches.”<sup>27</sup> This Note's proposal improves upon *Chevron* in this sense as well — not only through judicial respect for reasonable statutory interpretations adopted by the House and Senate, but also, as Part II explains, by better reflecting the allocation of power between the President and Congress as originally contemplated by the Constitution.

*B. A House or Senate Resolution Achieves Many  
of the Benefits of Purposivism in the Form of a  
Nationally Representative, Collective Decision*

Most judges do not rely solely on textualist methods of interpretation because “[w]here current values and historical context strongly support an interpretation, a determinate text will not stand in the way.”<sup>28</sup> Rather, judges attempt to discern the purposes of a statute by considering how a “reasonable member of Congress’ . . . would have wanted a court to interpret the statute in light of present circumstances in the particular case.”<sup>29</sup> Purposivism has been fairly criticized, however, as indeterminate and unrealistic. This Note's proposal avoids these problems by relying only on formal, nationally representative majority enactments of resolutions by either house of Congress.

Deference to a House or Senate resolution that interprets an ambiguous statute is more legitimate than reliance on legislative history because a resolution is a formal, collective decision of the entire legisla-

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<sup>26</sup> One indication of Congress's desire to allow one house of Congress to have authority over executive agencies is that, even after *Chadha* invalidated legislative vetoes, Congress continued to enact hundreds of legislative veto provisions; even more were simply “drive[n] . . . underground,” continuing to “operate on the basis of informal and nonstatutory understandings.” Louis Fisher, *The Legislative Veto: Invalidated, It Survives*, LAW & CONTEMP. PROBS., Autumn 1993, at 273, 288.

<sup>27</sup> Douglas W. Kmiec, *Judicial Deference to Executive Agencies and the Decline of the Nondelégation Doctrine*, 2 ADMIN. L.J. 269, 270 (1988) (citing Kenneth W. Starr, *Judicial Review in the Post-Chevron Era*, 3 YALE J. ON REG. 283, 300–01 (1986)); see also Sunstein, *supra* note 24, at 197 (“Perhaps *Chevron* is rooted in the separation of powers, requiring courts to accept executive interpretations of statutory ambiguities in order to guard against judicial displacement of political judgments.”).

<sup>28</sup> William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 343 (1990).

<sup>29</sup> STEPHEN BREYER, ACTIVE LIBERTY 88 (2005) (emphasis omitted); see also HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 1378 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994) (advising that a court “should assume, unless the contrary unmistakably appears, that the legislature was made up of reasonable persons pursuing reasonable purposes reasonably”).

tive chamber. Use of legislative history has declined over the past two decades,<sup>30</sup> partially in response to the critique voiced pithily by Judge Leventhal that using legislative history is akin to “looking over a crowd and picking out your friends.”<sup>31</sup> Congressional “resolutions express the views of a majority, while other legislative history does not.”<sup>32</sup> Moreover, a court’s use of the text of a resolution adopted through majority vote to resolve an ambiguity obviates the need to seek out any “intent” or “purpose” underlying the statutory text — concepts that may be incoherent when applied to a collective decision.<sup>33</sup>

Courts also occasionally look to post-enactment legislative history and related policy decisions to determine the meaning of an ambiguous statute.<sup>34</sup> These sources may be helpful when ambiguity arises due to

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<sup>30</sup> See Michael H. Koby, *The Supreme Court’s Declining Reliance on Legislative History: The Impact of Justice Scalia’s Critique*, 36 HARV. J. ON LEGIS. 369, 384–87 (1999). But see Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845 (1992) (defending the use of legislative history).

<sup>31</sup> Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 214 (1983) (quoting Judge Harold Leventhal) (internal quotation marks omitted). Another critique of legislative history is that committee reports and legislators’ remarks are not approved by each house of Congress and by the President, thereby impermissibly avoiding the constitutional requirements for legislation. See, e.g., John F. Manning, *Putting Legislative History to a Vote: A Response to Professor Siegel*, 53 VAND. L. REV. 1529, 1539–40 (2000); Kenneth W. Starr, *Observations About the Use of Legislative History*, 1987 DUKE L.J. 371, 375–76. Deference to the statutory interpretations of one house of Congress would not fully assuage this concern, although Part II of this Note refines the proposal to allow the other political branches to “veto” deference to these interpretations — in which case courts would interpret such statutes de novo. See also *infra* p. 1524.

<sup>32</sup> Gersen & Posner, *supra* note 10, at 608.

<sup>33</sup> See generally Kenneth A. Shepsle, *Congress Is a “They,” Not an “It”: Legislative Intent as Oxymoron*, 12 INT’L REV. L. & ECON. 239 (1992). Of course, sometimes courts rely on intentionalist or purposivist methods of interpretation to decide whether an interpretation is reasonable under either step of *Chevron*. See, e.g., *INS v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987) (overruling an agency interpretation partly on the basis of the statute’s legislative history); *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 289 (1974) (overruling an agency interpretation before *Chevron* was decided, in part on the basis of “the purpose and legislative history” of the statute); Starr, *supra* note 31, at 379 (“Interpreting congressional intent has become increasingly important since *Chevron* declared that agency decisions must be evaluated in light of that intent.”). However, if one thinks that an agency or Congress is more likely to understand the intent or purpose of the enacting Congress, perhaps purposivist methods of interpretation should not trump *Chevron*. Cf. Peter L. Strauss, *When the Judge Is Not the Primary Official with Responsibility to Read: Agency Interpretation and the Problem of Legislative History*, 66 CHI.-KENT L. REV. 321, 329–31 (1990).

<sup>34</sup> See, e.g., *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 143 (2000) (“At the time a statute is enacted, it may have a range of plausible meanings. Over time, however, subsequent acts can shape or focus those meanings.”); *United States v. Estate of Romani*, 523 U.S. 517, 530–31 (1998) (“[A] specific policy embodied in a later federal statute should control our construction of the [prior] statute, even though it ha[s] not been expressly amended.”); *United States v. Fausto*, 484 U.S. 439, 453 (1988) (Scalia, J.) (“[T]he implications of a statute may be altered by the implications of a later statute.”); see also ELHAUGE, *supra* note 1, at 70–78. Similar uses of post-enactment legislative history include interpreting legislative inaction (or reenactment) as congressional approval of an existing interpretation and presuming that rejection of a proposal to amend

changing circumstances,<sup>35</sup> but like legislative history at the time of enactment, these post-enactment sources rarely speak directly to the ambiguity at issue and therefore are unreliable guides.<sup>36</sup> A congressional resolution that explicitly and directly interprets an ambiguous statute, by contrast, does not require judges to engage in a difficult (perhaps impossible) inquiry into congressional policies and purposes.

## II. STATUTES ADMINISTERED BY AGENCIES

Deference to the House or Senate would be most useful when courts interpret statutes that are not administered by agencies. In those cases, courts lack any formal input from the political branches regarding the best interpretation of the statute. But deference to one house of Congress would also be appropriate for statutes administered by agencies. Sometimes agencies simply fail to offer their own interpretations, leaving courts to fend for themselves. Giving the House and Senate the ability to weigh in on these provisions would bring policy expertise and accountability to bear on the resolution of such ambiguities.

On occasion, however, one house of Congress may adopt an interpretation that conflicts with an agency interpretation — or even with the other house's interpretation.<sup>37</sup> In these cases, courts should refuse to grant *Chevron*-level deference to the political branches insofar as those branches disagree on the best interpretation. Courts should instead review such issues *de novo*, or accord all of the political branches a lower level of deference akin to that shown in *Skidmore v. Swift & Co.*<sup>38</sup> in order to resolve which branch adopted the better interpretation.<sup>39</sup> Courts should interpret ambiguous statutes *de novo* only to the extent that the political branches' interpretations conflict; where

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a statute constitutes majority support for the existing interpretation. See Gersen & Posner, *supra* note 10, at 610. These techniques face problems similar to those faced by pre-enactment legislative history.

<sup>35</sup> See generally ESKRIDGE, *supra* note 2.

<sup>36</sup> Of course, if a subsequent *statute* directly clarifies a prior statute's ambiguity, no *Chevron*-type deference is necessary because the subsequent statute is binding.

<sup>37</sup> The latter situation (where the House and Senate adopt conflicting interpretations of the same statutory ambiguity) could, of course, arise where the statute was not administered by any agency.

<sup>38</sup> 323 U.S. 134 (1944).

<sup>39</sup> *Id.* at 140 ("The weight of such a judgment in a particular case 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."). To be clear, if only one institutional actor has adopted an interpretation and later decides to change its own interpretation, its new interpretation should still receive deference for the same reasons the Court gave in *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967, 980–82 (2005).



the political branches agree, courts should defer.<sup>40</sup> Statutes that do not delegate interpretive authority to any agency (such as the Sherman Act<sup>41</sup>) could be interpreted by either the House or the Senate, while the President could “veto” these interpretations by executive order.<sup>42</sup>

A. *Why a Congressional Resolution Deserves Deference Even for Agency-Administered Statutes*

As explained in section I.A, a house of Congress brings its significant expertise and political accountability to bear when interpreting a statute. Therefore, when an agency charged with administering a statute has not issued an interpretation of an ambiguous provision, courts should defer to a congressional resolution that resolves the ambiguity. But the issue becomes complicated when both an agency and the House or Senate offer conflicting interpretations. As a normative matter, courts should defer to whichever political branch has *greater* accountability and expertise. Generally, the House and Senate might be assumed to be more democratically accountable than agencies, while agencies might possess greater expertise than Congress does. Policy decisions, however, nearly always require a combination of both expertise and value judgments, and the relative importance of these two elements varies depending on the particular decision. Moreover, the extent of each branch’s comparative advantage on either of these variables differs from case to case. Courts therefore should refrain from

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<sup>40</sup> Even in the case of disagreement, courts should confine the realm of possible interpretations to those contemplated by the political branches. For example, if the EPA adopted a plantwide definition of “stationary source” under the Clean Air Act while the House adopted a resolution interpreting “stationary source” to encompass all of a company’s operations within a particular geographical area, a court should choose between these two definitions (or perhaps adopt a reasonable compromise position between them) — even if the court would have chosen a narrower, “individual smokestack” definition had it decided the issue *de novo*.

<sup>41</sup> 15 U.S.C. §§ 1–7 (2006); *see also* Matthew C. Stephenson, *Legislative Allocation of Delegated Power: Uncertainty, Risk, and the Choice Between Agencies and Courts*, 119 HARV. L. REV. 1035, 1040 n.13 (2006).

<sup>42</sup> In the absence of any House or Senate interpretation of such a statute, however, the President should not receive *Chevron* deference for an interpretation she adopts via executive order. Such deference is inappropriate because the costs of issuing an executive order are extremely low, given the few procedural requirements and the President’s ability to act independently. Moreover, many of *Chevron*’s benefits would not necessarily be realized, including transparency and public dialogue, which are important aspects of democratic accountability. Similar concerns may explain why judges frequently look to legislative history when interpreting a statute but rarely, if ever, rely on Presidents’ signing statements. *See, e.g.*, Curtis A. Bradley & Eric A. Posner, *Presidential Signing Statements and Executive Power*, 23 CONST. COMMENT. 307, 310 (2006) (“[C]ourts pay little attention to signing statements . . .”). Presidents should, however, retain the capacity to veto a House or Senate interpretation, because such a veto would merely return the issue to the courts for a *de novo* decision while promoting dialogue between the branches and perhaps spurring compromise legislation. The important point is that a court should not defer to one of the political branches when another political branch would object to that interpretation.

adopting a categorical rule that favors one political branch over another.<sup>43</sup> Rather, judges should engage in a careful *de novo* or *Skidmore* analysis of the particular statute and the interpretations that have been offered before resolving the statutory ambiguity.

Allowing the political branches essentially to veto each other's interpretations of ambiguous statutes by adopting their own conflicting interpretations would increase transparency. Disagreements over the best interpretation would be formalized and public, and each political branch would present its argument for why its interpretation was better — not just as litigants trying to convince the courts, which would have the power to decide between conflicting interpretations, but as elected or accountable officials who are responsible to their constituencies. And by lowering the legislative costs necessary to alter the law, this Note's proposal might promote an investment of resources in developing interpretations that would turn out to be more broadly popular (or where a compromise might be more easily reached) than congressmen initially imagined — thus spurring actual legislation, not just interpretations of existing statutes.

One concern is that this proposal might encourage Congress to draft more ambiguous statutes so that it could delegate more authority to itself. This outcome seems unlikely: when Congress can forge a compromise it will do so, because a clear statute is much more permanent than one house's interpretation. Stakeholders and interest groups will want their congressmen to pass statutes whenever possible for longer-term predictability and more durable legislative victories.<sup>44</sup> Moreover, to the extent that congressmen have more control over drafting while agencies and the executive branch face lower enactment costs, Congress would prefer to resolve more ambiguity up front. The executive branch's lower enactment costs make it relatively easy for the President to deny deference to an interpretation adopted by the House or the Senate.<sup>45</sup>

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<sup>43</sup> Note that if *Chevron* were premised solely on agencies' advantages in expertise and accountability, according *Chevron* deference to agencies but not to the House or the Senate would amount to an irrebuttable presumption that agencies are more expert or accountable than Congress.

<sup>44</sup> See Rodriguez, *supra* note 2, at 219 ("The [enacting] coalition must take care, of course, that [any] ambiguity does not appear to undermine the bargain struck between self-interested legislators and interest groups.").

<sup>45</sup> It is plausible, however, that Congress might draft more ambiguous statutes in order to delegate more interpretive authority to *executive agencies*. Because the House and Senate would be able to veto courts' deference to agencies, they might be more willing to leave ambiguities for agencies to resolve. In such cases, both the President and Congress would gain some nimbleness, and Congress might face lower legislative enactment costs when adopting the statute in the first place. But more ambiguous statutes have significant downsides that present a potential criticism of this Note's proposal. Cf. Thomas W. Merrill, *Rethinking Article I, Section 1: From Nondelega-*

Another potential concern is that the House might be the big winner under this proposal because its legislative enactment costs are generally considered lower than the Senate's, due to a House majority's greater ability to force floor votes. It is likely true that the House would benefit more than the Senate would, but the Senate would nonetheless enjoy a benefit when compared with a *Chevron*-only regime.<sup>46</sup> Moreover, the high enactment costs in the Senate are a product of the Senate's own rules (such as the supermajority requirement for cloture), which are not constitutionally mandated and which the Senate is free to change. More importantly, our laws should improve to the extent that *either* the House or the Senate increases accountability and expertise in federal statutory interpretation.

Finally, reverting to *de novo* judicial review when the political branches disagree might seem to be the worst outcome because courts are less politically accountable and have less expertise than agencies or Congress. But the fact that the political branches disagree about the best interpretation suggests that deference to one branch would be misplaced, because it would come at the expense of the other branch. By what criterion should a court decide that an executive agency is more (or less) politically accountable than the House? It might be easier for a court to discern which political branch has greater technical expertise, but rarely if ever can a policy decision be answered solely by science.<sup>47</sup> In such situations, courts should consider the reasoning of the political branches and make their own informed best judgments in interpreting the statute.

### B. *The Constitution's Original Allocation of Powers*

Another reason one might support this Note's proposal is that it would better reflect the outcome contemplated by the Constitution's pre-*Chevron* allocation of powers,<sup>48</sup> which required bicameralism and

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*tion to Exclusive Delegation*, 104 COLUM. L. REV. 2097, 2141-51 (2004) (discussing policy arguments against delegation).

<sup>46</sup> Some would also say that, because the House is more proportionately representative of the nation, it is a more democratically legitimate institution than the Senate. See LEVINSON, *supra* note 16, at 49-62.

<sup>47</sup> See generally, e.g., Amartya Sen, *The Discipline of Cost-Benefit Analysis*, 29 J. LEGAL STUD. 931 (2000); Wendy E. Wagner, *The Science Charade in Toxic Risk Regulation*, 95 COLUM. L. REV. 1613 (1995).

<sup>48</sup> *Chevron*, of course, was not the first time the courts deferred to the executive branch on a question of statutory interpretation. See, e.g., *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944); *NLRB v. Hearst Publ'ns, Inc.*, 322 U.S. 111, 131 (1944) ("[T]he Board's determination that specified persons are 'employees' under this Act is to be accepted if it has 'warrant in the record' and a reasonable basis in law."). For simplicity and clarity, however, the model that follows considers the issue as though no deference had been extended to executive agencies before *Chevron*. In a world with a lesser level of deference than *Chevron*, the results would be limited to fewer situations.

presentment for legislation and left statutory interpretation to judges.<sup>49</sup> If this original allocation of powers were modeled in a one-dimensional policy space, there could be two different types of outcomes depending on the relative preferences of the institutional actors (the House, the Senate, and the President). In one case, where at least one of the political institutions was to the left of the judicial interpretation and at least one of the political institutions was to the right, the judicial interpretation would remain the law. The status quo would prevail because at least one of the political actors would not support a statute that would overturn the judicial interpretation.<sup>50</sup>

In the other case, all three of the political institutions are to the left (or, without loss of generality, to the right) of the judicial interpretation — in other words, they could all agree on some interpretation they would prefer to the judiciary's interpretation. Assuming that the cost of legislative enactment for each political institution was less than the benefit to that political institution derived from overturning the judicial interpretation, the political branches would enact a statute overruling the judiciary's interpretation with a provision that both houses of Congress and the President prefer to the judicial interpretation.

One impediment to this outcome is that the costs of legislative enactment are frequently too high to make it worth Congress's limited time and energy to overturn a judicial interpretation. The Senate, for example, might prefer the House and the President's interpretation of a statute if it had the time to consider the question and vote on it, but might simply have other business that consumes all of its time. In that case, any bill on the issue introduced by the House or urged by the President would likely fail (or, more likely, would never be initiated). More fundamentally, even where the costs of legislation are less than the benefits gained by legislating, Congress incurs the opportunity

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<sup>49</sup> The argument in this section is a variation on the seminal analysis of the legislative veto by Professors William Eskridge, Jr., and John Ferejohn. See William N. Eskridge, Jr. & John Ferejohn, *The Article I, Section 7 Game*, 80 GEO. L.J. 523 (1992). A problem with Eskridge and Ferejohn's analysis is that they assume that a legislative veto of the sort found in *Chadha* forces the policy to default to some "status quo" rather than what the agency, House, or Senate would have most preferred. See, e.g., *id.* at 541–42. Under the statute struck down in *Chadha*, however, whatever the House or Senate decided became the law — the House exercised its veto to deny permanent residence to six individuals, directly imposing its policy preference. See *INS v. Chadha*, 462 U.S. 919, 926 (1983) (noting that the House denied permanent residence to six individuals in the 340 cases it considered). Thus, much of this Note's analysis of the consequences of the proposal made here mirrors Eskridge and Ferejohn's; their analysis is more applicable to this Note's proposal than to the legislative veto at issue in *Chadha*.

As is common, this Note's analysis assumes for simplicity that the agency and the President share an ideal point. (For an empirical justification of this assumption, see generally Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001).)

<sup>50</sup> For simplicity, this stylized analysis begins by ignoring the possibility of a legislative override of the President by a supermajority.

costs of forgoing other legislative work. And although in the abstract it may seem that all three political institutions would only infrequently agree on a different interpretation from the one adopted by the judiciary, such a situation is particularly likely to arise when judges interpret open-ended statutes that require technical determinations or value judgments; because judges lack expertise and are not accountable to the public, their interpretations may frequently diverge from what the political branches would adopt.

Judicial deference to agencies is aimed at solving these problems. Under *Chevron*, an agency's interpretation of an ambiguous statute prevails so long as it is reasonable.<sup>51</sup> *Chevron* deference better reflects current enactable preferences than do de novo judicial decisions so long as the House and Senate both prefer the agency's interpretation to the judiciary's interpretation.<sup>52</sup> But *Chevron* makes the House (or Senate) worse off whenever it prefers the judicial interpretation. In such a case, the *judicial* interpretation is more representative of current enactable preferences because the House (or Senate) would not have approved legislation that overrode the judiciary's interpretation. (The President is always better off under *Chevron*, assuming that she exerts sufficient control over the agency to prefer its interpretation to the judiciary's.) Ignoring (for now) the President's desire to cement a policy in legislation so that it will constrain future administrations, the House and Senate can overrule an agency's interpretation only if both can muster a supermajority to override the President's veto.<sup>53</sup> Therefore, *Chevron*'s benefit — that it better reflects current enactable preferences whenever the House and Senate happen to agree with the President's interpretation more than they do with the judiciary — comes at the price of congressional power. That cost may be dear either if congressional involvement improves national policymaking or if

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<sup>51</sup> *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984). For the purposes of the modeling in this section, this Note assumes that the agency's interpretation is upheld by the courts as reasonable. Where the agency's interpretation is unreasonable, it would simply be required to choose an interpretation in a narrower range of policy space. As the range of "reasonableness" narrows, less discretion is available both to agencies and to courts in interpreting the statute — presumably because the statute speaks more precisely to the question at issue, and therefore more accurately reflects a policy decision made by the enacting legislature.

<sup>52</sup> See ELHAUGE, *supra* note 1, at 81–82.

<sup>53</sup> See Kagan, *supra* note 49, at 2350 ("Congress cannot easily obtain the two-thirds vote in each house necessary (given the President's veto power) to overturn a presidential order."). Even where the agency's interpretation is not precisely where the President's ideal point is located (as has been assumed in these models), it is likely to be closer to the President's ideal point than a statute would be because, relative to the President, Congress can exert much less influence on an agency than on the drafting and passing of legislation. This dynamic makes it unlikely that the President would want to sign legislation that removes discretion from an agency except in order to bind her successors.

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ignoring Congress's preferences threatens the Constitution's original allocation of power.

By contrast, a system that allowed one house of Congress essentially to "veto" deference to an agency (or to the other house of Congress) would retain the benefits of *Chevron* while partially ameliorating the loss of congressional power. Whenever the House or Senate prefers the judicial interpretation to the agency's (or other chamber's) interpretation *by more than the cost of adopting a resolution*, it will pass a resolution expressing its dissent and thus return the question to the judiciary. This result might seem to double the wasted legislative effort: an agency would have adopted a rule and half of Congress would have adopted a resolution, with no change in the status quo. In equilibrium in such a scenario, however, none of the political branches would bother to adopt an interpretation that strongly diverged from the judiciary's position because they would anticipate being vetoed by another branch; the result would be that the judiciary's *de novo* interpretation would control.<sup>54</sup>

Where all three political branches are to the left (or right) of the judicial interpretation, however, the outcome would likely be similar to what a statute would look like without imposing the entire weight of a statute's enactment costs on the political branches.<sup>55</sup> If the President (or the House) were the first to act, she would likely propose an interpretation as close to her ideal point as possible, while ensuring that both the House and Senate either preferred the President's position to the judicial interpretation outright or were sufficiently indifferent between the two that the cost to the House or Senate of adopting a resolution to veto deference would be greater than the benefit. (Note that if the Senate passed a resolution staking out a middle ground between the President's and the judiciary's interpretations, courts would defer to the Senate's interpretation rather than impose *de novo* review, because all of the political branches that weighed in would agree that the Senate's interpretation is better than the judiciary's. A court would adopt the Senate's interpretation and not the President's because the Senate's interpretation would be closer to the judiciary's preferred in-

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<sup>54</sup> One complication in this scenario could arise if the legislative enactment costs were significantly greater for the Senate than the House or the President. In such a case, if, for example, the House and President preferred an interpretation to the left of the judiciary while the Senate preferred one to the right, the House or the President might adopt an interpretation just to the left of the judiciary's interpretation such that the House or the President found the difference to be worthwhile (less than the cost of adopting a resolution), while the Senate would not find it worthwhile to veto the change.

<sup>55</sup> *Cf.* Eskridge & Ferejohn, *supra* note 49, at 541 ("The effect of the legislative veto is more readily apparent for statutes . . . whose policy direction was supported by all the actors, with the President favoring a more radical change in the status quo than the Congress.")

interpretation than would the President's.<sup>56</sup> This outcome is much closer to what a duly enacted statute would resemble than is the result under *Chevron*, where the agency's interpretation would control even if the House and Senate preferred an interpretation somewhere between the agency's and the judiciary's positions.

One might think that the outlier institutional actor (the one furthest from the judicial interpretation) would frequently adopt an interpretation of an ambiguous statute because its preferences would be strongest (and thus would benefit most from change). Meanwhile, other institutions would not "veto" deference because doing so would not be worth the costs — therefore leading to more extreme interpretations than would occur if courts always deferred to the responsible agency. Such a possibility is unlikely, however, because it is almost always more difficult to adopt a resolution in the House or (especially) the Senate than it is for an executive agency to promulgate a rule.<sup>57</sup> Most likely, this Note's proposal would have a limited (but valuable) impact, especially for statutes administered by agencies; the House or the Senate would use this tool only when it disagreed with an agency interpretation particularly strongly. And for those statutes not administered by agencies, the House or the Senate would likely adopt only interpretations that the President agreed with, because she would be able to veto such interpretations relatively easily via executive order.

Indeed, this proposal's modesty is reflected in the fragility of the interpretation adopted by one house of Congress. Congressional resolutions that interpret ambiguous statutes will not become commonly used shortcuts to bypass formal lawmaking of the bicameralism-and-presentment variety because the other legislative chamber or an executive agency can return the question to the courts for *de novo* review just as easily as the first chamber adopted the initial interpretation. Congress and the President will likely prefer to adopt more permanent legislation when possible, especially because statutes need not be constrained by *Chevron*. And when the enacting Congress wants to bind itself and future legislatures to agencies' decisions, it may do so by opting out of this Note's proposal: where a statute expressly delegates to a

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<sup>56</sup> See *supra* note 40.

<sup>57</sup> Professors Eskridge and Ferejohn offer another argument when discussing the same possibility in the context of the one-house legislative veto:

If the preferences of one chamber of Congress change drastically over time, while those of the President and the other chamber remain stable, then the new 'outlier' chamber may veto statutory policies that precisely envision the original policy choices . . . . We do not consider this a likely scenario, in part because congressional preferences in the post-World War II era do change more slowly than those of the President, and they usually change in conjunction with a change in presidential preferences.

Eskridge & Ferejohn, *supra* note 49, at 543.

particular agency the power to develop rules,<sup>58</sup> neither the House nor the Senate should be able to veto agency action, because the statute contemplates no role for Congress in the rulemaking process.<sup>59</sup> Likewise, Congress presumably can opt out of *Chevron* deference for agencies.<sup>60</sup>

### III. CONSTITUTIONALITY: RECONCILING LEGISLATIVE HISTORY, POST-ENACTMENT CONGRESSIONAL ACTIONS, AND *CHADHA*

Read independently, *INS v. Chadha* stands for a broad proposition: the Constitution allows Congress to alter legal rights directly only by passing statutes via bicameralism and presentment.<sup>61</sup> Those who read *Chadha* in isolation therefore will likely be unreceptive to this Note's proposal regardless of its normative attractiveness.<sup>62</sup> This Part, however, argues that taking *Chadha's* broad language at face value is inconsistent with the Supreme Court's separation of powers and statutory interpretation jurisprudence. Judges rely on legislative history and post-enactment congressional inaction to interpret statutes and to determine the validity of executive action. To square these doctrines with *Chadha*, this Note argues that Congress may permissibly alter legal rights without undergoing bicameralism and presentment so long as its decisions are constrained by a statute providing an intelligible principle and those decisions are subject to scrutiny by the executive or the judicial branch.

In *Chadha*, the INS decided to suspend deportation of Chadha, an East Indian born in Kenya, after finding that he met the statutory re-

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<sup>58</sup> See, e.g., 15 U.S.C. § 3411(a) (2006) (authorizing the Federal Energy Regulatory Commission "to perform any and all acts . . . , and to prescribe, issue, amend, and rescind such rules and orders as it may find necessary or appropriate to carry out its functions").

<sup>59</sup> An agency action undertaken pursuant to such an open-ended delegation of authority cannot be modified by one house of Congress. Cf. *Consumer Energy Council of Am. v. FERC*, 673 F.2d 425 (D.C. Cir. 1982), *aff'd sub nom. Process Gas Consumers Grp. v. Consumer Energy Council of Am.*, 463 U.S. 1216 (1983) (companion case to *Chadha*).

<sup>60</sup> The Bumpers Amendment proposed amending the APA such that "the reviewing court shall *independently* decide all relevant questions of law . . . [and] interpret constitutional and statutory provisions." James T. O'Reilly, *Deference Makes a Difference: A Study of Impacts of the Bumpers Judicial Review Amendment*, 49 U. CIN. L. REV. 739, 740 (1980); see also Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452, 473-74 (1989). Other examples include the Freedom of Information Act, 5 U.S.C. § 552(a)(4)(B) (2006), and the preemption clause of the Gramm-Leach-Bliley Act, 15 U.S.C. § 6714(e) (2006). See Stephenson, *supra* note 41, at 1039 n.11.

<sup>61</sup> 462 U.S. 919, 945-59 (1983). Of course, Congress also may permissibly affect legal rights indirectly, such as by pressuring executive agencies to take certain courses of action.

<sup>62</sup> Cf. *id.* at 944 ("[T]he fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution.").



quirements for permanent residence.<sup>63</sup> Pursuant to its statutory authority, however, the House of Representatives passed a resolution exercising a one-house veto of permanent resident status for six aliens, including Chadha.<sup>64</sup> In declaring the one-house veto unconstitutional, the Supreme Court held that any congressional “action that ha[s] the purpose and effect of altering the legal rights, duties, and relations of persons” must undergo bicameralism and presentment.<sup>65</sup> Many commentators have emphasized the breadth of this command.<sup>66</sup> They have also pointed out, however, that its abstract formalism makes it difficult to apply: “If Chadha’s only right was what the statute gave him — the right to remain in the country unless one house exercised its legislative veto — then the House’s action did not alter Chadha’s rights: the possibility of a legislative veto was built into them in the first place.”<sup>67</sup> But the definition of “legal rights” as the Court used the term in *Chadha* need not be so flexible.

A better understanding of *Chadha*, one that comports with the rest of the Supreme Court’s jurisprudence, is that one house of Congress may not have plenary and unreviewable discretion committed to it by statute to determine legal rights.<sup>68</sup> The *Chadha* Court elaborated that the House’s action was impermissible because “[t]he one-House veto operated in these cases to overrule the Attorney General and mandate Chadha’s deportation; absent the House action, Chadha would remain in the United States. Congress has *acted* and its action has altered Chadha’s status.”<sup>69</sup> This statement might be understood in two ways: (1) that unilateral congressional action cannot have an *unchecked and unconstrained* effect on legal rights, or (2) that unilateral congressional action — even when checked by another branch, thus having only an indirect effect — is *always* impermissible if it affects legal rights.<sup>70</sup>

<sup>63</sup> *Id.* at 923–24.

<sup>64</sup> *Id.* at 925–27.

<sup>65</sup> *Id.* at 952.

<sup>66</sup> See, e.g., E. Donald Elliott, *INS v. Chadha: The Administrative Constitution, the Constitution, and the Legislative Veto*, 1983 SUP. CT. REV. 125, 127 (“What was astonishing about *Chadha* was not the result, but the scope and inflexibility of the Court’s opinion.”).

<sup>67</sup> *Id.* at 135.

<sup>68</sup> See *Chadha*, 462 U.S. at 962 (Powell, J., concurring in the judgment).

<sup>69</sup> *Id.* at 952 (majority opinion).

<sup>70</sup> Some commentators have argued that *Chadha* should be read more narrowly than this second interpretation, but still more broadly than the first: for example, “that Congress cannot delegate power to its own components or to agents under its control.” John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673, 717 (1997); see also Paul M. Bator, *The Constitution as Architecture: Legislative and Administrative Courts Under Article III*, 65 IND. L.J. 233, 272 (1989) (“[T]his Court’s decisions in *Buckley*, *Chadha*, and *Bowsher* gave great weight to the fact of congressional aggrandizement.”). One problem with this theory is that the President often plays an important role in the drafting and passage of legislation — even the implicit threat of a veto may alter the substance of a bill — and thus delegations to executive agencies seem to be violations of a principle against self-delegations. More relevant for this Note’s proposal, this

The latter, broader reading, though plausible on the face of *Chadha*'s majority opinion, is difficult to reconcile with the Court's well-established practices of relying on legislative history and congressional inaction to interpret ambiguous statutes.<sup>71</sup>

### A. Legislative History

Under the broader reading of *Chadha*, judges' use of legislative history to interpret statutes violates the Constitution. If *Chadha* means that "Congress may make law only by bicameral action and presentment, a court's use of legislative history to give a statute meaning allows for the making of law — that is, for determination of the meaning of a statute in a case of future application — without compliance with article I procedures."<sup>72</sup> This view is commonly held by textualists<sup>73</sup> and has been associated with a decline in the use of legislative history by the Supreme Court.<sup>74</sup> Even so, the Supreme Court continues to rely on legislative history, and members of the Court continue to defend the use of legislative history<sup>75</sup> — facts that seriously undermine the view that *Chadha* prohibited the use of legislative history. (Indeed, *Chadha* itself relied in part on legislative history to conclude that the legislative veto provision was severable from the rest of the statute.<sup>76</sup>) But if *Chadha* were construed more narrowly to prohibit only relatively unconstrained, unchecked delegations of authority to Congress, its holding could be reconciled with the Court's longstanding and continued practice of relying on legislative history. The fact that legislative history never trumps the text of a statute constrains the "delegation,"<sup>77</sup> and courts employ legislative history as merely one of many interpretive tools, none of which is inherently dispositive, to give them a "check" on Congress's delegated authority.<sup>78</sup>

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theory (like even broader readings of *Chadha*) is irreconcilable with courts' reliance on legislative history and post-enactment congressional actions.

<sup>71</sup> See Eskridge & Ferejohn, *supra* note 49, at 524–26.

<sup>72</sup> Nicholas S. Zeppos, *Legislative History and the Interpretation of Statutes: Toward a Fact-Finding Model of Statutory Interpretation*, 76 VA. L. REV. 1295, 1301 (1990).

<sup>73</sup> See, e.g., *Thompson v. Thompson*, 484 U.S. 174, 191–92 (1988) (Scalia, J., concurring in the judgment) ("Committee reports, floor speeches, and even colloquies between Congressmen are frail substitutes for bicameral vote upon the text of a law and its presentment to the President." (citation omitted) (citing *Chadha*, 462 U.S. 919)); Manning, *supra* note 70, at 724 (concluding that "[t]he Court's decisions giving authoritative weight to legislative history" are "in serious tension" with the principles of *Chadha*, *Bowsher v. Synar*, 478 U.S. 714 (1986), and *Metropolitan Washington Airports Authority v. Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252 (1991)).

<sup>74</sup> See generally Koby, *supra* note 30.

<sup>75</sup> See generally Breyer, *supra* note 30.

<sup>76</sup> See *Chadha*, 462 U.S. at 932–33.

<sup>77</sup> See HART & SACKS, *supra* note 29, at 1375.

<sup>78</sup> See Eskridge & Frickey, *supra* note 28, at 357 ("[E]ven crystal-clear legislative history will not always control interpretation, and in any event other potential interpretive sources will be considered.").

### B. Post-Enactment Congressional Inaction

One of the reasons why courts look to legislative history is to help understand the original enacting coalition's intent at the time the statute was passed. Were this the sole exception to *Chadha*, the intentions of post-enactment Congresses might still be considered invalid foundations for statutory interpretations. However, the Supreme Court has frequently relied on congressional inaction when interpreting ambiguous statutes. For example, in *Dames & Moore v. Regan*<sup>79</sup> the Court upheld a unilateral executive action in part because "Congress ha[d] not enacted legislation, or even passed a resolution, indicating its displeasure."<sup>80</sup> Likewise, the Court in *Flood v. Kuhn*<sup>81</sup> upheld baseball's unique exemption from the Sherman Act because the Court had previously granted the exemption and because "Congress, by its positive inaction, ha[d] allowed those decisions to stand for so long and, far beyond mere inference and implication, ha[d] clearly evinced a desire not to disapprove them legislatively."<sup>82</sup> Although commentators have criticized the use of post-enactment legislative history to interpret statutes, the Supreme Court continues to reiterate that the legislature's actions (and inaction) after a statute's enactment are relevant to the statute's interpretation.<sup>83</sup> Decisions such as these, which give interpretive weight to actions of Congress that did not undergo bicameralism and presentment, undermine a broad reading of *Chadha*. Indeed, legislative inaction can be secured solely by one recalcitrant house of Congress that refuses to go along with the other house and the President — thus turning the congressional inaction doctrine into something of a one-house legislative veto. On the narrower reading of *Chadha*, Congress is prohibited only from *unchecked* lawmaking, which does not apply to the congressional inaction doctrine because courts can rely on other interpretive methods that may trump inaction.

This Note's proposal is constitutional for the same reasons that reliance on legislative history and post-enactment congressional inaction is constitutional: any alteration of legal rights by one house of Congress must be a reasonable interpretation of the statute subject to judicial scrutiny in the first instance, and must also be subject to checks by

<sup>79</sup> 453 U.S. 654 (1981).

<sup>80</sup> *Id.* at 687 (emphasis added); see also Eskridge & Ferejohn, *supra* note 49, at 524 ("More troubling than the Court's waffle in *Bowsher* is its apparent sacrifice of bicameralism and presentment in *Dames & Moore v. Regan*.").

<sup>81</sup> 407 U.S. 258 (1972).

<sup>82</sup> *Id.* at 283–84; see also William N. Eskridge, Jr., *Post-Enactment Legislative Signals*, LAW & CONTEMP. PROBS., Winter 1994, at 75, 81 ("Perhaps the most criticized case invoking *stare decisis* for statutory precedents and the legislative inaction doctrine is *Flood v. Kuhn*.").

<sup>83</sup> See, e.g., *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 143 (2000) ("At the time a statute is enacted, it may have a range of plausible meanings. Over time, however, subsequent acts can shape or focus those meanings."); see also sources cited *supra* note 34.

the other house of Congress and by the executive branch, each of which has the power to force statutory ambiguities to be resolved ultimately by the courts.<sup>84</sup>

Indeed, recent scholarship suggests that *Chevron* may be best understood as a judicial interpretive canon rather than as a delegation of interpretive authority to the executive branch. The Supreme Court applies *Chevron* as only one of several competing interpretive tools, and agencies' interpretations lose fairly frequently.<sup>85</sup> Therefore, because "the Justices retain the final say," "the Supreme Court has not handed over ultimate interpretive authority to agencies" under *Chevron*.<sup>86</sup> In the same way, courts would retain ultimate authority for statutory interpretation under this Note's proposal by deciding whether to accord deference to a congressional resolution.

#### IV. CONCLUSION

Although *Chevron* deference brings desirable accountability and expertise to the problem of interpreting ambiguous statutes, the current regime needlessly and detrimentally ignores Congress. Judges should therefore extend the same deference to congressional resolutions that they do to executive agencies.

One dimension unexplored in this Note is the extent to which Congress is able to influence agencies' decisions through its oversight and its budgeting authority. Some scholars have suggested that Congress does oversee and constrain agencies' actions, especially by structuring agencies and their processes at the outset.<sup>87</sup> If an effective framework of congressional oversight and control already existed, this Note's proposal might be superfluous, at least with respect to statutes administered by agencies. Other scholars, however, have argued that Presidents exert much greater control over agencies than Congress does,<sup>88</sup>

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<sup>84</sup> In a curious battle that parallels the *Chadha* debate over one-house legislative vetoes, some legislative history opponents have advocated for the President to create her own legislative history through signing statements in order to contradict or undermine Congress's legislative history. See Zeppos, *supra* note 72, at 1301 n.24; see also Hamdan v. Rumsfeld, 548 U.S. 557, 666 (2006) (Scalia, J., dissenting) ("Of course in its discussion of legislative history the Court wholly ignores the President's signing statement, which explicitly set forth *his* understanding that the [Detainee Treatment Act] ousted jurisdiction over pending cases.").

<sup>85</sup> See generally Connor N. Raso & William N. Eskridge, Jr., *Chevron as a Canon, Not a Precedent: An Empirical Study of What Motivates Justices in Agency Deference Cases*, 110 COLUM. L. REV. 1727 (2010).

<sup>86</sup> *Id.* at 1803.

<sup>87</sup> See, e.g., Mathew D. McCubbins, Roger G. Noll & Barry R. Weingast, *Administrative Procedures as Instruments of Political Control*, 3 J.L. ECON. & ORG. 243, 256-64 (1987); Mathew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms*, 28 AM. J. POL. SCI. 165 (1984).

<sup>88</sup> See, e.g., Kagan, *supra* note 49; Terry M. Moe & Scott A. Wilson, *Presidents and the Politics of Structure*, LAW & CONTEMP. PROBS., Spring 1994, at 1, 15-28.

suggesting that arming the House and Senate with the potential for judicial deference to their independent interpretations of statutes may help balance the scales. Regardless, even if Congress already possesses considerable control over agencies, this Note's proposal would at worst be rarely utilized. And even then, it might help influence agencies to take congressional preferences into account simply due to the possibility of a House or Senate "veto."

Another important aspect of statutory interpretation not fully addressed here is the impact of changing institutional preferences over time. As new facts emerge and the contexts in which a statute must be applied change, and as the House, Senate, and presidency change hands, each political institution may change its mind about how an ambiguous statute ought to be interpreted. One crucial element of the proposal, therefore, is the power of each political branch to change its position just as easily as it adopted the position in the first place.<sup>89</sup> This capacity for revision is not a perfect solution — indeed, if the Senate adopts an interpretation that a majority of its members eventually regret, its very high legislative enactment costs may make it difficult for that majority to alter its interpretation. Even so, this Note's proposal is no more "ossifying" than legislation itself, and the other chamber of Congress or the President could veto deference and thus return the question to the judiciary for a *de novo* interpretation.

Finally, it is worth noting that although this Note proposes a strong form of deference — akin to *Chevron* — for congressional resolutions addressing ambiguous statutes, even mere *Skidmore* deference would be a step in the right direction.<sup>90</sup> As it is, courts rarely pay congressional resolutions any heed, despite the fact that such resolutions represent national majoritarian decisions made with expert input and therefore reveal important information relevant to resolving statutory ambiguities.<sup>91</sup>

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<sup>89</sup> See *supra* note 39 and accompanying text.

<sup>90</sup> If courts merely grant *Skidmore* deference to congressional resolutions, however, the legislature would be less likely to invest the resources necessary to pass a resolution. Under *Chevron*, courts would be more likely to accept the House's or the Senate's interpretation, and therefore those legislative chambers would more often find it worth their while to consider and resolve statutory ambiguities.

<sup>91</sup> See Gersen & Posner, *supra* note 10, at 610–11.