

Statutory Ambiguity in *King v. Burwell*: Time for a Categorical *Chevron* Rule

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INTRODUCTION

The fate of the Affordable Care Act¹ (ACA) may turn on the precise meaning of five words tucked into 26 U.S.C. § 36B(b)(2)(A), a once-obscure provision of the law under which tax subsidies are available for “qualified health plans . . . which were enrolled in through an *exchange established by the State*.”² Does this language permit the issuance of subsidies for taxpayers enrolled through exchanges created by the federal government? On one hand, it seems that Congress clearly intended to allow this situation.³ On the other hand, the text says “State”—how much clearer could it be?

During oral arguments in *King v. Burwell*,⁴ the case that will decide what those five words mean, Justice Scalia suggested that even the irrefutable existence of a congressional intent to make insurance subsidies available on federally created health care exchanges might not matter if the relevant provision of the Affordable Care Act was poorly written.⁵ In other words, even

1. Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified in scattered sections of 25, 26, 29, and 42 U.S.C.).

2. 26 U.S.C. § 36B(b)(2)(A) (2012) (emphasis added).

3. See, e.g., Jonathan Cohn, *One More Clue that the Obamacare Lawsuits Are Wrong*, NEW REPUBLIC, July 28, 2014, <http://www.newrepublic.com/article/118867/email-house-aide-undermines-halbig-lawsuit-obamacare-subsidies> [<http://perma.cc/8RVA-V824>].

4. *King v. Burwell*, 135 S. Ct. 475 (2014) (No. 14-114).

5. Transcript of Oral Argument at 45, *id.* [hereinafter *King* Transcript] (“Of course it could be [what Congress intended]. I mean it may not be the statute they intended. The question is whether it’s the statute that they wrote.”); see also Tejinder Singh, *Continued Updates on Oral Arguments in King v. Burwell*, SCOTUSBLOG (Mar. 4, 2015, 11:13 AM), <http://www.scotusblog.com/2015/03/continued-updates-on-oral-arguments-in-king-v-burwell> [<http://perma.cc/7SN7-QJKG>] (“The argument implicit in [Justice Scalia’s] questioning was that even if Congress wanted to enact a law that works, it doesn’t mean that it actually did so.”).

unambiguous legislative history may fail to save a statutory construction if the text cannot plausibly be read to support it.

Courts typically resolve questions of this sort—questions regarding the permissibility of an agency’s interpretation of a statute it administers— by employing the two-step framework provided in *Chevron U.S.A., Inc. v. National Resources Defense Council, Inc.*⁶ *Chevron* held that when reviewing an agency’s construction of a statute it administers, a court asks two questions. At Step One, it asks whether Congress’s “unambiguously expressed intent” is clear; if so, the matter is closed.⁷ If Congress’s intent is unclear, however, a court proceeds to Step Two, asking whether “the agency’s answer is based on a permissible construction of the statute.”⁸ In *Chevron* terminology, Justice Scalia’s comments during the *King* arguments can be reframed as suggesting that when a statute’s meaning seems textually evident, Congress’s unmistakable objective will not suffice to create ambiguity, the presence of which triggers review that is highly deferential to the agency. Cases in which a judge will perceive a conflict between clear statutory text and clear legislative history may be uncommon, but as Scalia’s comments suggest, they can and will arise. What role should unambiguous legislative history play in *Chevron* analysis when a statute’s text is clear? Can it create or dispel ambiguity, and/or weigh in favor or against the reasonability of an agency’s construction, and if so, when?

Though the Supreme Court has confronted these questions before, the case law has not provided a consistent rule.⁹ This is unfortunate; enunciating a bright-line rule for the role of legislative history where the text is clear would enhance the clarity of the *Chevron* test. *King*, which involves a provision of the ACA whose history and text are both arguably clear,¹⁰ yet point in opposite directions, highlights the need for a bright-line, categorical rule on how courts should utilize legislative history in *Chevron* analysis when a statute’s clear text

6. 467 U.S. 837 (1984).

7. *Id.* at 843.

8. *Id.*

9. See, e.g., Note, *The Two Faces of Chevron*, 120 HARV. L. REV 1562, 1586 n.37 (2007) (canvassing instances of the Supreme Court’s invocation of congressional intent in its *Chevron* analysis).

10. Though some argue that Congress in fact intended to provide subsidies only on state-created exchanges, see, e.g., Jonathan H. Adler & Michael F. Cannon, *Taxation Without Representation: The Illegal IRS Rule To Expand Tax Credits Under the PPACA*, 23 HEALTHMATRIX: J. L.-MEDICINE 1, 42 (2013), or that the law’s text should be read to support the Obama Administration’s position, see, e.g., Abbe Gluck, *Symposium: The Grant in King—Obamacare Subsidies as Textualism’s Big Test*, SCOTUSBLOG (Nov. 7, 2014, 12:48 PM), <http://www.scotusblog.com/2014/11/symposium-the-grant-in-king-obamacare-subsidies-as-textualisms-big-test> [<http://perma.cc/P2ZE-N4VY>], Justice Scalia’s remarks indicate that he rejects both of these possibilities. For argument’s sake, this Essay assumes that *King* presents a conflict between unambiguous statutory text and legislative history.

and equally clear legislative history conflict with one another. This Essay proposes three alternative formulations for a categorical rule to govern such conflicts. One would hold statutory text categorically irrelevant when legislative intent is clear, one would hold intent categorically irrelevant when the text is clear, and the third would hold that an agency construction based *either* on clear text or clear intent is automatically reasonable. Any of these three bright-line rules would be acceptable, but the third would be best. This Essay concludes by recommending that the Court use *King* to articulate such a rule.¹¹

I. OPTION ONE: LEGISLATIVE HISTORY TRUMPS

One categorical approach available to the Court is to hold that when legislative history is clear, a reviewing court must read the law in light of it. Admittedly, legislative history is a highly contested method of discovering statutory meaning. Justices have disagreed over whether legislative history should be considered at Step One at all, and if so, whether it can outweigh or trump statutory text. For example, in *Zuni Public School District No. 89 v. Department of Education* (2007), Justice Breyer's majority opinion examined a statute's legislative history at *Chevron* Step One before turning to its text,¹² and Justice Stevens' concurrence asserted that legislative history can be *determinative* at Step One,¹³ while Justice Scalia's dissent asserted that when a statute's text is clear, legislative history had no place in Step One analysis whatsoever.¹⁴ However, a "legislative history trumps" approach is consistent with *Chevron*'s canonical reasoning that when Congress passes indeterminate statutes, it *intends* to delegate discretion to agencies.¹⁵ Because *Chevron* is premised on legislative intent, courts should be more willing to examine evidence of legislative history in *Chevron* analysis. If the reason courts defer to agencies in the first place is that they assume that Congress intended to

11. The adoption of a categorical rule to govern interpretive conflicts pitting clear statutory text against clear legislative history may be complicated by the still-unresolved debate over whether methods of statutory interpretation garner *stare decisis* effect. Compare Sydney Foster, *Should Courts Give Stare Decisis Effect to Statutory Interpretation Methodology?*, 96 GEO. L.J. 1863, 1884-90 (2008) (arguing for methodological *stare decisis*), with Evan J. Criddle & Glen Staszewski, *Against Methodological Stare Decisis*, 102 GEO. L.J. 1573 (2014) (arguing against methodological *stare decisis*). In this context, however, this concern seems unfounded. *Chevron* itself is a fundamentally methodological doctrine, and the Court has not balked at developing it in ways that further bind courts engaged in statutory interpretation. See, e.g., *Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005); *United States v. Mead Corp.*, 533 U.S. 218 (2001).

12. 550 U.S. 81, 89-100 (2007).

13. *Id.* at 104-07 (Stevens, J., concurring).

14. *Id.* at 108-22 (Scalia, J., dissenting).

15. *Chevron U.S.A., Inc. v. Nat'l Res. Def. Council, Inc.*, 467 U.S. 837, 843-44 (1984).

delegate discretion to agencies, courts should be less willing to defer when they know that Congress *did not* intend to give agencies discretion. Because *Chevron* analysis itself turns on congressional intent, under this approach agencies would merit no deference when that intent is clear in the legislative history.¹⁶

Applied to *King*, this approach would require the Court to permit the provision of subsidies on federally created exchanges. In *King*, the legislative history strongly suggests that Congress intended to make subsidies available on state- and federally-created exchanges alike. The Congressional Budget Office, which played a central role in crafting the ACA by scoring its costs, never even considered the possibility that insurance subsidies would not be available in every state.¹⁷ Rather, their analyses assumed that subsidies would be available nationwide.¹⁸ Congressional staffers who helped write the ACA insist that Congress did not intend to require states to create their own exchanges in order for their residents to receive subsidies.¹⁹ Lest this be dismissed as post hoc rationalizing, statements of senior staffers made as Congress deliberated over the law support this claim.²⁰ Notably, an earlier draft of the bill did threaten states with a denial of tax credits – but for failing

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16. See, e.g., Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 370 (1986) (noting the importance of “the extent to which Congress intended that courts should defer to the agency’s view of the proper interpretation”). Then-Judge Breyer notably refers to “legislative history” as one of several “factors” that courts use to discern “congressional intent” in statutory interpretation. *Id.* at 371. Cf. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159–61 (2000) (rejecting the FDA’s construction of its substantive statute on the grounds that it contravenes congressional intent as manifested through subsequent legislative acts).
17. See Letter from Douglas W. Elmendorf, Director, Cong. Budget Office, to Darrell E. Issa, Chairman, Comm. on Oversight & Gov’t Reform, U.S. House of Representatives (Dec. 6, 2012), <http://www.cbo.gov/sites/default/files/cbofiles/attachments/43752-letterToChairmanIssa.pdf> [<http://perma.cc/7AGF-PAHV>]. See also Brian Beutler, *Halbig Truthers Say Everyone Blew It on Obamacare. This Former Analyst Says They’re Full of It.*, NEW REPUBLIC, Aug. 11, 2014, <http://www.newrepublic.com/article/119043/anti-obamacare-halbig-truthers-have-more-questions-answer> [<http://perma.cc/HR77-QBPY>] (“One of the central players in this drama was the Congressional Budget Office, and we know the analysts there never imagined Congress intended to condition subsidies on states setting up their own exchanges.”); Dylan Scott, *BOOM: The Historic Proof Obamacare Foes Are Dead Wrong on Subsidies*, TALKING POINTS MEMO (Aug. 1, 2014), <http://talkingpointsmemo.com/dc/obamacare-halbig-cbo-scores> [<http://perma.cc/DWP5-WYGV>] (“[U]nder all that scrutiny and after all its familiarity with the law, the CBO never did one thing: It never considered that subsidies would be unavailable in some states if they didn’t set up an exchange . . .”).
18. Scott, *supra* note 17 (“In all its iterations of the law, the idea that the subsidies would be available nationwide permeated all of them.”).
19. Jonathan Cohn, *The Legal Crusade To Undermine Obamacare—and Rewrite History*, NEW REPUBLIC, Dec. 5, 2012, <http://www.newrepublic.com/article/110770/legal-challenge-obamacare-insurance-exchanges-full-holes> [<http://perma.cc/A7H6-TDWU>].
20. See, e.g., Cohn, *supra* note 3.

to comply with employer responsibility rules, not for refusing to establish an exchange.²¹ In any case, this punitive provision was conspicuously absent from the final bill altogether.²²

Contrary readings of the ACA's legislative history that purport to show that Congress intended to condition the availability of health insurance subsidies on a state's establishment of an exchange are erroneous. Thomas Christina, the lawyer credited with first noticing that the ACA may limit subsidies to state-created exchanges, originally believed that this language might merely be an unintended drafting error. Only later did conservative activists craft an account of congressional intent to coerce states into establishing their own exchanges.²³ In fact, a Republican-backed bill in 2011—by which time multiple states had manifested their intention to refuse to create their own exchanges—assumed that subsidies would be available in every state under the ACA.²⁴ Remarks by Representative Paul Ryan made in 2010 also suggest that he believed that the law would make insurance subsidies available in all fifty states.²⁵

Those who argue that the ACA does not permit the issuance of subsidies to those on federally created exchanges make a number of arguments that Congress in fact intended to withhold subsidies on federally created exchanges. These arguments, however, ignore the contexts in which the evidence they marshal arose. One is that the Senate Finance Committee, which played a major role in drafting the provisions of the ACA that provide for the exchanges, lacked jurisdiction over “non-group health insurance markets,” and needed to condition the availability of tax credits, which fall within its jurisdiction, on states' creation of exchanges to legislate on the subject.²⁶ In support of this claim, they quote Senator Max Baucus, then-Chairman of the

21. Timothy Jost, *Tax Credits in Federally Facilitated Exchanges Are Consistent with the Affordable Care Act's Language and History*, HEALTH AFF. (July 18, 2012), <http://www.healthaffairs.org/blog/2012/07/18/tax-credits-in-federally-facilitated-exchanges-are-consistent-with-the-affordable-care-acts-language-and-history> [<http://perma.cc/L7JB-AELW>].

22. *Id.*

23. See Brian Beutler, *The Conservative Obamacare Challenge Has Become an Absurdist Comedy*, NEW REPUBLIC, Feb. 11, 2015, <http://www.newrepublic.com/article/121037/king-burwell-obamacare-challengers-hate-obama-may-lack-standing> [<http://perma.cc/5FHR-QXSH>].

24. Brian Beutler, *Republicans Know Their Obamacare Case Is Bogus. Here's the Proof.*, NEW REPUBLIC (Jan. 23, 2015), <http://www.newrepublic.com/article/120834/republicans-voted-say-obamacare-subsidies-are-universal> [<http://perma.cc/8FWM-JQZB>].

25. Representative Ryan said that “it's a new open-ended entitlement that basically says to just about everybody in this country, people making less than \$100,000 . . . [t]axpayers got you covered. Government's gonna subsidize the rest.” Sahil Kapur, *Did Paul Ryan Undermine the SCOTUS Case To Topple Obamacare?*, TALKING POINTS MEMO (Jan. 16, 2015), <http://talkingpointsmemo.com/dc/paul-ryan-obamacare-supreme-court-king-burwell> [<http://perma.cc/4MW8-YJ9S>].

26. Brief of Jonathan H. Adler and Michael F. Cannon as Amici Curiae in Support of the Plaintiffs at 15, *Halbig v. Sebelius*, 27 F. Supp. 3d 1 (2014).

Committee, as saying that the bill “conditions” tax credits on states establishing exchanges.²⁷ But as one commentator has noted, Baucus’ quote had nothing to do with federally created exchanges, but with whether the Committee had jurisdiction to consider an unrelated piece of malpractice reform legislation.²⁸ Moreover, the Committee did not need to limit the availability of tax credits to users of state-created exchanges to bring insurance exchanges within its jurisdiction; extending the availability of credits to users of any exchange, state or federal, would have brought the subject within its reach.²⁹ In fact, this argument does not just fail, but backfires: if the ACA limited the availability of tax credits to users of state-created exchanges, the Senate Finance Committee would have lacked jurisdiction over the federally created exchanges.

Some also point to a statement made by MIT economist Jonathan Gruber, often described as the “architect” of the ACA,³⁰ claiming that subsidies would not be available to users of federally created exchanges.³¹ Gruber certainly played an important role in designing the economic underpinnings of the Massachusetts health care reform law upon which the ACA is largely based, but his role in crafting the ACA itself was fairly minimal. He was a paid consultant who merely “provided the White House and sometimes its congressional allies with data . . . that they could use to devise policies or to defend their positions in public.”³² Second, his claim contradicts everything else that he himself has said about the law at other times, which indicate that the law should not be understood to make subsidies available only in states that establish their own insurance exchanges.³³ It would be dishonest to credit Gruber’s comments only when they weigh against the availability of subsidies on the federal exchanges but not when they weigh in favor of it.

27. *Id.* (quoting *Executive Committee Meeting to Consider Health Care Reform: Before the S. Comm. on Fin.*, 111th Cong. 326 (2009), <http://www.finance.senate.gov/hearings/hearing/download/?id=c6a0c668-37d9-4955-861c-50959b0a8392> [<http://perma.cc/LG5V-GCLT>]).

28. Jost, *supra* note 20.

29. See Samuel Bagenstos, *The (Legally) Nonsensical Rearguard Challenge to Obamacare*, *DISABILITY LAW* (Nov. 26, 2012), <http://www.disabilitylaw.blogspot.com/2012/11/the-legally-nonsensical-rearguard.html> [<http://perma.cc/D66P-7YWU>].

30. See, e.g., Jonathan Cohn, *What Jon Gruber’s Quotes Really Tell Us About Obamacare—and American Politics*, *NEW REPUBLIC*, Nov. 17, 2014, <http://www.newrepublic.com/article/120311/jonathan-gruber-and-obamacare-what-his-quotes-really-tell-us> [<http://perma.cc/5LZU-GRSK>].

31. See Ezra Klein, *Grubergate Is Really Obamacaregate*, *VOX*, Nov. 15, 2014, <http://www.vox.com/2014/11/15/7221397/jon-gruber-grubergate-obamacare> [<http://perma.cc/M7RY-YA3P>].

32. Cohn, *supra* note 30.

33. Klein, *supra* note 31.

The incongruity between the statute’s seemingly-plain textual meaning and Congress’ intent to make subsidies available nationwide is that Congress was simply sloppy. Congress intended the ACA to serve as a first draft, whose language would be cleaned up prior to the passage of a final version.³⁴ However, the election of Senator Scott Brown, a Republican, to replace Ted Kennedy deprived Democrats of a filibuster-proof majority in the Senate, forcing them to use the ACA, which was effectively a first draft, as the final product.³⁵ This account of the ACA’s drafting, if true, explains how Congress could have enacted a law whose plain text seemingly runs contrary to its obvious intent—precisely the scenario that the categorical *Chevron* rules proposed here would resolve.

II. OPTION TWO: TEXT TRUMPS

Alternatively, the Court can rule that legislative history is categorically irrelevant to *Chevron* analysis. Many, including Justice Scalia, have argued that legislative history should not be considered at *Chevron* Step One.³⁶ There are several reasons to disregard legislative history in performing *Chevron* analysis. One is that Congress can be said to have a general macro-intent to delegate discretion to agencies when it passes ambiguous statutes, since it knows that “indeterminacy gives rise to discretion.”³⁷ Then there are the traditional arguments against using legislative history—the impossibility of discerning “intent” in a collective body,³⁸ the unreliability of traditional indicia of legislative intent,³⁹ and the illegitimacy of giving legal status to the unenacted

34. Abbe Gluck, *How Congress Works (And the ObamaCare Subsidies Lawsuit)*, BALKINIZATION (Dec. 12, 2013), <http://balkin.blogspot.com/2013/12/how-congress-works-and-obamacare.html> [http://perma.cc/KDS7-2JBF].

35. *Id.*

36. See, e.g., *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 323 (1988) (Scalia, J., concurring in part and dissenting in part) (refusing to give weight to legislative history in a *Chevron* analysis); Linda Jellum, *Chevron’s Demise: A Survey of Chevron from Infancy to Senescence*, 59 ADMIN. L. REV. 725, 748–53 (2007) (canvassing Justice Scalia’s attack on the use of legislative history at Step One); John F. Manning, *Chevron and Legislative History*, 82 GEO. WASH. L. REV. 1517, 1552 (2014) (“[E]ven if the Court uses legislative history to clarify an indeterminate statute in a run-of-the-mill case, it should not do so under *Chevron*.”); see also WILLIAM N. ESKRIDGE ET AL., *LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 1076 (3d ed. 2001) (“Many of the Court’s post-*K Mart* cases have focused only on textual arguments and have refused to give serious consideration to legislative history.”).

37. Manning, *supra* note 36, at 1527.

38. See, e.g., Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL’Y 61, 68 (1994) (“Intent is elusive for a natural person, fictive for a collective body.”).

39. See, e.g., *Wis. Pub. Intervenor v. Mortier*, 501 U.S. 597, 620 (1991) (Scalia, J., concurring in judgment) (“It is most unlikely that many Members of either Chamber read the pertinent

intent of particular Members of Congress,⁴⁰ which was never subject to bicameralism and presentment.⁴¹ Statutory text may also reflect judgments not only about substantive goals but also the manner in⁴² and extent to which⁴³ those goals should be pursued, which resorting to legislative history may undermine. In the context of *King*, for instance, one could argue that the ACA reflects a congressional judgment not only about whether qualified taxpayers should receive insurance subsidies, but about the precise means by which those subsidies are made available—through exchanges established by the states themselves. Finally, notwithstanding its language about congressional intent and agency expertise, perhaps *Chevron* is best understood as an effort to simplify a doctrine that had grown convoluted over time;⁴⁴ explicitly incorporating an analysis of legislative history into *Chevron* analysis would undermine its hard-won elegance. The government would lose *King* under this “text trumps” rule; “State,” after all, means “State.”

Both categorical approaches outlined above offer the primary advantage of bright-line rules—clarity. The presence of either unambiguous legislative

portions of the Committee Reports before voting on the bill—assuming (we cannot be sure) that the Reports were available before the vote.”).

40. See, e.g., *Thompson v. Thompson*, 484 U.S. 174, 191-92 (1988) (Scalia, J., concurring in judgment) (“Committee reports, floor speeches, and even colloquies between Congressmen are frail substitutes for bicameral vote upon the text of a law and its presentment to the President.” (internal cross-reference omitted)).
41. See U.S. CONST. art. I, § 7.
42. See Manning, *supra* note 36, at 1520 (“Texts convey *substantive* ends—the policy goals that animate the enactment. They also express *implemental* designs—the means by which a law’s policy goals are to be achieved.”).
43. See *W. Va. Univ. Hosps. v. Casey*, 499 U.S. 83, 98 (1991) (“[T]he purpose of a statute includes not only what it sets out to change, but also what it resolves to leave alone.”).
44. Before *Chevron*, courts considered a hodge-podge of factors in determining whether or how much to defer to an agency’s statutory construction, including the agency’s degree of technical expertise, see, e.g., *E.I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112, 135 n.25 (1977); its adherence over time to a consistent interpretation, see, e.g., *Norwegian Nitrogen Prods. Co. v. United States*, 288 U.S. 294, 315 (1933); whether the agency played an important role in creating the legislation, see, e.g., *Zuber v. Allen*, 396 U.S. 168, 192 (1969); when a statute expressly delegated the power to elaborate on a law’s meaning, see, e.g., *SEC v. Cent.-Ill. Sec. Corp.*, 338 U.S. 96, 127 (1949); and whether the agency’s construction had “warrant in the record’ and a reasonable basis in law,” *NLRB v. Hearst Publ’ns, Inc.*, 322 U.S. 111, 131 (1944). In *Skidmore v. Swift & Co.*, the Court said that the degree of deference due to an agency depended on “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.” 323 U.S. 134, 140 (1944). For a longer list of factors that courts used to determine how much to defer to an agency’s construction prior to *Chevron*, see Colin S. Diver, *Statutory Interpretation in the Administrative State*, 133 U. PA. L. REV. 549, 562 n.95 (1985); and Linda D. Jellum, *The Impact of the Rise and Fall of Chevron on the Executive’s Power to Make and Interpret Law*, 44 LOY. U. CHI. L.J. 141, 161 n.119 (2012) (discussing the uncertainty of judicial deference to agency interpretations before *Chevron*).

intent or unambiguous text is completely determinative, telling a judge exactly how the statute must be construed. At the same time, however, they also reflect the shortcomings of a bright-line approach. First, both the ‘legislative history trumps’ and ‘text trumps’ rules reduce agency discretion. Settling a question of statutory interpretation at *Chevron* Step One freezes a statute’s meaning until it is amended, preventing the agency from reaching a different conclusion at a later time due to new scientific or technical knowledge, changing circumstances on the ground, or the emergence of a new political majority. Moreover, both rules feel jurisprudentially incomplete, as both ignore something important about what *law* is. It seems wrong to say that a statute’s text or the intent that animates it can be categorically irrelevant to determining its meaning. As a theoretical matter, both text and intent inform a law’s meaning because both are basic, constitutive elements of what law is. An approach that would require judges to turn a blind eye to either threatens to endorse a stunted notion of law itself.⁴⁵

III. OPTION THREE: AGENCY WINS

There is a categorical third approach that avoids these difficulties—when text and legislative history are clear yet in conflict, a statute should be considered *per se* ambiguous, and a permissible construction relying on either text or legislative history should be considered *per se* reasonable. In effect, clashes between clear text and legislative history would result in the agency winning every time, provided only that the agency’s construction makes sense either as a matter of textualism or of legislative intent. This approach strikes a fair balance between text- and intent-oriented interpretive modalities,⁴⁶ respecting (if not adopting) the reasoning undergirding both approaches. Cases where a statute’s text and legislative history sharply conflict are likely to present especially tricky questions of statutory interpretation. The “agency wins” rule acknowledges that an interpretation contradicting either a statute’s clear text or history cannot be *unambiguously* correct. It is also the jurisprudentially richest approach because it recognizes the valid claims to “lawfulness” of both textual and historical appeal.⁴⁷ In other words, as a methodological matter, an interpretive claim premised on assertions about a legal document’s text or the intent of those who created it is a proper *legal* argument, of the sort that judges and other legal interpreters may validly

45. For a modal approach to constitutional interpretation, see generally PHILIP BOBBITT, *CONSTITUTIONAL INTERPRETATION* (1991) (revisiting his modal theory of constitutional interpretation); PHILIP BOBBITT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION* (1982) (offering a modal approach to constitutional interpretation).

46. See generally *id.*

47. *Id.* at 9-38 (inspecting history- and text-based approaches to constitutional interpretation).

consider. Moreover, giving controlling weight to either statutory text or legislative history would constrain an agency's interpretive discretion, whereas the categorical "agency wins" rule is consistent with *Chevron's* purpose of empowering agencies with broad policymaking latitude.⁴⁸

Finally, the "agency wins" approach serves values associated with both judicial minimalism, the idea that courts should decide less rather than more,⁴⁹ and representation-reinforcement, the idea that courts should generally defer to legislation produced by a fair and open democratic process.⁵⁰ It does so by deciding interpretive questions in a way that maximizes dissatisfied parties' ability to seek correction through the political process. If conflicting text and legislative history mean that a statute is per se ambiguous, then these cases—which, like *King*, might be politically charged—will be resolved at *Chevron's* second step. The court's inquiry at this step involves determining only whether an agency's interpretation was reasonable, not unambiguously correct.⁵¹ Finding ambiguity at Step One thus leaves agencies free to change their mind during subsequent presidential administrations, ultimately entrusting the issue to the realm of electoral politics.⁵² True, dissatisfied parties can also seek legislative change, but legislative modifications to existing statutes are "infrequent" and involve "high transactions costs,"⁵³ while presidential elections occur frequently and on a fixed schedule. There is also reason to believe that voters are more likely to vote based on their views of "general governmental policies" in presidential elections than in congressional elections.⁵⁴ The "agency wins" rule therefore preserves politically delicate issues for the political process to resolve, whereas both the "legislative history trumps" and the "text trumps" alternatives would freeze a statute's "unambiguous" meaning in place. Under the "agency wins" approach, a future Republican president could completely jettison the Obama Administration's reading of section 36B(b)(2)(A) and adopt her own. In *Chevron* cases such as *King*, the outcomes of which will inevitably engender significant political repercussions, the Court may find an approach that would let it rule for the

48. See *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843-45 (1984).

49. See generally CASS R. SUNSTEIN, *ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT* (1999).

50. See generally JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980).

51. *Chevron*, 467 U.S. at 843.

52. See SUNSTEIN, *supra* note 49, at 25-26; cf. *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 59 (1983) (Rehnquist, J., concurring in part and dissenting in part) ("As long as the agency remains within the bounds established by Congress, it is entitled to . . . [act] in light of the philosophy of the administration.").

53. Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1. J.L. ECON. & ORG. 81, 95-96 (1985).

54. *Id.*

agency while leaving future presidents with the final word on a statute's meaning especially attractive.⁵⁵ Indeed, during oral arguments in *King*, Chief Justice Roberts suggested that he might take precisely this approach to the ACA.⁵⁶

CONCLUSION

Going forward, the “agency wins” rule would do the most to resolve legislative history’s uncomfortable existence within current *Chevron* doctrine. This approach differs from existing *Chevron* approaches because it avoids the problem of determining the precise amount of weight to assign legislative history. Using even clear legislative history to find statutory meaning can be problematic because interpreters still must decide how far to stretch a statute’s text to accommodate it. This question, inherently difficult in ordinary cases, is especially vexing when a statute’s text is also clear, as section 36B(b)(2)(A) arguably is. In contrast, the “agency wins” rule accords respect to congressional intent in an eminently manageable way by employing legislative history to find not statutory clarity, which would require reconciling inconsistent text and history, but statutory ambiguity, which requires no such thing. Although it may not seem very respectful to assume that Congress writes laws poorly, it is surely more respectful for a court to find statutory ambiguity at Step One than to find that the statute *unambiguously* means something other than what Congress clearly intended it to mean. It is also consistent with the assumption that Congress means to write ambiguously in order to delegate politically hot decisions to the agencies that are best situated to make them. This assumption is perhaps a legal fiction, but it is at least a respectful one. Even judges who, unlike Scalia, are comfortable using legislative history would benefit from dispensing with the need to nebulously “balance” it against statutory text when clear text and clear intent conflict.

While this essay endorses the “agency wins” approach, any of the three would make for a helpful doctrinal development. It is more important that the Court adopt *some* categorical rule to give meaningful guidance to lower courts, agencies, and litigants when clear statutory text and legislative history contradict one another. *King*, which showcases a stark clash between textual

55. See Jeffrey Rosen, *The Trials of John Roberts*, ATLANTIC (Apr. 15, 2015), <http://www.theatlantic.com/politics/archive/2015/04/the-trials-of-john-roberts/390438> [http://perma.cc/NG8S-BEZ8] (“A finding of textual ambiguity would leave the door open for a subsequent administration to enact a different interpretation. A holding along these lines would allow the chief justice to avoid decimating the ACA while simultaneously placing its fate in the hands of the next president of the United States.”).

56. *King* Transcript, *supra* note 5, at 76 (“[I]f you’re right about *Chevron*, that would indicate that a subsequent administration could change that interpretation?”).

and historical clarity, presents a particularly suitable vehicle to announce a rule for such cases. By directing courts to find per se ambiguity at *Chevron* Step One whenever a statute's clear text and legislative history conflict, such a rule would help courts manage their workloads by avoiding the need to balance the two, and would improve the efficacy and flexibility of agency decision-making going forward.

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