Divining Regulatory Intent: The Place for a "Legislative History" of Agency Rules

Lars Noah

Follow this and additional works at: https://repository.uchastings.edu/hastings_law_journal

Part of the Law Commons

Recommended Citation
Available at: https://repository.uchastings.edu/hastings_law_journal/vol51/iss2/1

This Article is brought to you for free and open access by the Law Journals at UC Hastings Scholarship Repository. It has been accepted for inclusion in Hastings Law Journal by an authorized editor of UC Hastings Scholarship Repository. For more information, please contact wangangela@uchastings.edu.
Divining Regulatory Intent: The Place for a "Legislative History" of Agency Rules

by
LARS NOAH*

Table of Contents

Introduction...........................................................................................................257
I. The Modern Critique of Legislative History ..............................................261
   A. Historical Background ...........................................................................261
   B. Terms of the Contemporary Debate ......................................................264
      (1) The Textualist Critique .................................................................266
      (2) The Intentionalist Response ............................................................269
      (3) Dynamic Interpretation ....................................................................273
   C. Crafting a Legislative History Hierarchy ..............................................274
   D. State Legislative Histories .....................................................................277
II. Searching for Administrative Intent ............................................................280
   A. Administrative Records and Legislative Fact-Finding ............................282
   B. The Tradition of Deference to Post-Promulgation Interpretations ..........284
   C. The Continuing Relevance of Original Agency Intent ..........................290
      (1) Providing a Benchmark for Evaluating Interpretations ..................291
      (2) Enforcing the APA’s Rulemaking Procedures ...............................294

* Professor of Law, University of Florida. I wrote this paper while serving as the “Roger J. Traynor Summer Research Professor” at University of California, Hastings College of the Law. and I subsequently presented it at faculty colloquia held at Hastings, Arizona State University College of Law, and Florida State University College of Law. I would like to thank the faculty members at those schools for their assistance and feedback, especially Jim Rossi, Mark Seidenfeld, and Bill Wang, as well as Justice Traynor’s family for its generous support of this research project.
<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>(3) Interpreting Regulations During Litigation</td>
<td>299</td>
</tr>
<tr>
<td>(4) Interpreting Regulations in Other Contexts</td>
<td>303</td>
</tr>
<tr>
<td>D. Constructing a Regulatory History</td>
<td>306</td>
</tr>
<tr>
<td>(1) Final Preambles</td>
<td>307</td>
</tr>
<tr>
<td>(2) Regulatory Analyses</td>
<td>314</td>
</tr>
<tr>
<td>(3) Other Published Documents</td>
<td>317</td>
</tr>
<tr>
<td>(4) Miscellaneous Materials</td>
<td>320</td>
</tr>
<tr>
<td>Conclusion</td>
<td>322</td>
</tr>
</tbody>
</table>
Introduction

The recent renaissance in scholarship about statutory interpretation, a long neglected subject,1 has left significant doubts about the judiciary's use of legislative history. Some commentators have assailed the courts' traditional reliance on committee reports, floor statements, earlier versions of bills, and the like, as essentially misguided and undemocratic. Apart from the text of a statute, legislatures cannot express an intent, and individual legislators have no power to speak for the body as a whole. Other commentators decry such arid textualism, responding that legislative history can provide some valuable assistance when one attempts to divine statutory meaning or its animating purpose. This Article will inquire whether the insights of this important debate might tell us anything about the sources that courts should consult when they interpret agency regulations, which often suffer from the same imprecision and ambiguity found in statutes.

Legislators depend on the executive branch to play a significant if not the predominant role in the specification of public law. By delegating rulemaking authority to administrative agencies, legislatures empower regulatory officials to make law on a par with any duly enacted statute.2 Unlike legislatures, agencies maintain a direct and continuous involvement in the texts of laws that they have authored. Such regulations are often called "legislative" rules, both to emphasize their authoritative status and to distinguish them from interpretive rules and other non-binding administrative pronouncements.3

1. See Philip P. Frickey, From the Big Sleep to the Big Heat: The Revival of Theory in Statutory Interpretation, 77 MINN. L. REV. 241, 259-60 (1992); see also Philip P. Frickey, Legislative Processes and Products, 46 J. LEGAL EDUC. 469, 469 (1996) ("In the past dozen years, an avalanche of scholarly and pedagogical materials on legislative processes and their products has swamped legal education." (footnote omitted)).

2. See Batterton v. Francis, 432 U.S. 416, 425 n.9 (1977); see also Albertsons, Inc. v. Kirkingburg, 119 S. Ct. 2162, 2171 (1999) (explaining that the Department of Transportation's rules specifying visual acuity standards for truck drivers "have the force of law"); Arizona Grocery Co. v. Athchison, Topeka & Santa Fe Ry., 284 U.S. 370, 386 (1932) (explaining that a rulemaking agency "speaks as the legislature, and its pronouncement has the force of a statute"); National Latino Media Coalition v. FCC, 816 F.2d 785, 788 (D.C. Cir. 1987) ("When Congress delegates rulemaking authority to an agency, and the agency adopts legislative rules, the agency stands in the place of Congress and makes law."); Peter L. Strauss, From Expertise to Politics: The Transformation of American Rulemaking, 31 WAKE FOREST L. REV. 745, 748 (1996) ("[R]ules may be subordinate legislation, but are unmistakably legislative in their impact.").

Because legislative rules—like their statutory counterparts—inevitably leave gaps and ambiguities, agencies must have an opportunity to clarify their regulations through the issuance of interpretive rules and other forms of guidance.

Whether or not an agency provides such post-promulgation clarification, do pre-promulgation materials provide a legitimate source of guidance about the agency's original intent? As explained in one of the leading treatises on statutory interpretation, "the courts have not often considered problems having to do with the interpretation of [administrative] regulations." In contrast to the recent outpouring of

---


5. See Shalala v. Guernsey Mem'l Hosp., 514 U.S. 87, 96 (1995) (noting that the Medicare reimbursement "regulations are comprehensive and intricate in detail," but adding that "[t]he APA does not require that all specific applications of a rule evolve by further, more precise rules"); id. at 110 (O'Connor, J., dissenting) ("An agency certainly cannot foresee every factual scenario with which it may be presented in administering its programs; to fill in the gaps, it must rely on adjudication of particular cases and other forms of agency action, such as the promulgation of interpretive rules and policy statements . . . ."); Hockett v. USDA, 82 F.3d 165, 170 (7th Cir. 1996); Estate of Kurz v. Commissioner, 68 F.3d 1027, 1030 (7th Cir. 1995) (explaining that "interpretation is a vital part of the law-creation process"); see also Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidelines, Manuals, and the Like—Should Federal Agencies Use Them to Bind the Public?*, 41 DUKE L.J. 1311, 1314, 1325 (1992) (conflating agency interpretations of statutes and legislative rules).

6. 1A Norman J. Singer, *Sutherland on Statutes and Statutory Construction* § 31.06, at 544 (5th ed. 1992); see also id. ("In this new and largely unexplored field of interpretation, the courts have an opportunity to rethink fundamental problems of communication, free from an established set of stereotyped rules." (footnote omitted)). As another well-known authority in the field remarked in concluding an article on the use of extrinsic aids in statutory interpretation:

Ultimately, we must face up to the fact that all but a minute percentage of new law is promulgated, not by legislatures or courts, but by administrative agencies exercising rule-making power (which the British more aptly call "delegated legislation"). If legislative history is part of external context and thus vital to understanding statutes, must not "regulatory history" be a vital part of understanding
commentary on the utilization of legislative history, this subject has received comparatively little attention. A few scholars have applied insights gleaned from the intense debate over methods of statutory interpretation to other texts having the same force and effect as legislation enacted by Congress—namely, treaties negotiated by the President and ratified by the Senate, as well as the federal rules of procedure formulated by the Supreme Court. The same interpretive issues involving legislative rules promulgated by administrative agencies have gone largely unnoticed.

This relative lack of emphasis fails to take proper account of the far greater prevalence of legislative rules issued by agencies than by Congress, even accepting the fact that such regulations typically ad-

---

the quasi-statutes that confront us as administrative regulations? Think about it.

Reed Dickerson, Statutory Interpretation: Dipping into Legislative History, 11 Hofstra L. Rev. 1125, 1162 (1983).

7. For the only comprehensive (and somewhat dated) effort to address this question, see Russell L. Weaver, Judicial Interpretation of Administrative Regulations: An Overview, 53 U. Cin. L. Rev. 681, 729 (1984) (summarizing some of the similarities and differences between statutes and regulations as these may affect the manner in which courts go about interpreting agency rules). See also John F. Manning, Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules, 96 Colum. L. Rev. 612, 689-90 (1996) (focusing on the appropriateness of deference to post-promulgation agency interpretations of their rules, and noting with little elaboration that “important differences between the regulatory and legislative processes offer agencies the opportunity to produce explanatory materials that courts may consult in ascertaining regulatory meaning”). Professor Weaver’s other related work, cited elsewhere herein, deals primarily with judicial deference to post-promulgation agency interpretations of their regulations. See id. at 614 n.12. An entirely separate question concerns the extent to which agencies properly may rely on legislative history to interpret the meaning of their enabling statutes. See 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 (1990).


dress more pedestrian matters,\textsuperscript{11} filling in the interstices of the legislature's grand reforms. Grant Gilmore's famous reference to this century's "orgy of statute making"\textsuperscript{12} seems quaint when compared to the orgy of rulemaking that we have witnessed during the last half of the century.\textsuperscript{13}

This Article juxtaposes the contrasting judicial approaches to the interpretation of statutes and regulations in order to suggest that the courts have got it backwards when they largely ignore an agency's original intent in promulgating a legislative rule. Part I discusses the debate over how best to approach statutory interpretation, focusing in particular on differing views about the legitimacy of consulting pre-enactment materials in searching for the legislature's original intent. After describing the increasing judicial use of legislative histories this century, and the twin assaults on intentionalist theories launched by proponents of the polar extremes of textualism and dynamic interpretation, Part I sketches a hierarchy of pre-enactment legislative materials used by the courts, and lastly it explains why the resort to legislative histories occurs far less frequently when dealing with state statutes.

Part II turns to the interpretation of legislative rules issued by agencies, noting that courts have cared far less about original intent, even though they could far more readily discern such intent from a regulatory history. Instead, courts usually defer to an agency's post-promulgation views about the meaning of ambiguous language in a rule. Part II then explores some possible reasons for this paradoxical treatment, and it suggests that courts should pay more attention to original agency intent and consult pre-promulgation materials, which are far superior to the pre-enactment materials that judges consult.

\textsuperscript{11} See Peter L. Strauss, The Rulemaking Continuum, 41 DUKE L.J. 1463, 1477 (1992) (explaining that "[interpretive] rules outnumber [legislative] rules, which in turn dwarf statutes, which in turn dwarf constitutional provisions. As a general matter, we also see more and more particular focus by the decisionmaker as we descended into the details").


\textsuperscript{13} As another prominent legal historian has observed, "by mid-twentieth century the curve for administrative legislation topped that for statute law." James Willard Hurst, Law and Social Order in the United States 41 (1977) (adding that "by the 1950's lawyers with business clients and individuals with demands on the increasing service functions of government had to turn more to administrative rule books than to statute books to locate the legal frame of reference for their affairs").
when interpreting statutes. Finally, Part II offers a hierarchy of appropriate sources from which to construct such a regulatory history. The Article concludes that courts should heed pre-promulgation expressions of agency intent more so than they do in divining legislative intent.

I. The Modern Critique of Legislative History

Numerous courts and commentators have criticized the judicial use of legislative history when interpreting statutes. This Part introduces the competing approaches to statutory interpretation, emphasizing the extent to which this debate reflects a response to some of the defects identified in the sorts of materials traditionally consulted for evidence of legislative intent. The debate over statutory interpretation turns, of course, even more fundamentally on competing conceptions about the proper role of the courts and the indeterminacy of language, but this Article focuses on the aspects of these broader disputes that concern the utilization of legislative histories, which have provided a flashpoint for this debate, as a prelude for considering the appropriate uses of regulatory histories of agency rules. The deeper jurisprudential disputes must remain in the background for present purposes.

A. Historical Background

For just over a century, the federal courts have consulted pre-enactment materials in the course of construing a statute. It was not always so. During most of the nineteenth century, the Supreme Court resisted using legislative histories, though the relative scarcity of federal legislation at the time offered few occasions for consulting such materials for statutory interpretation even if otherwise available. This approach comported with the longstanding English rule against considering parliamentary materials. The Court first clearly en-
endorsed a departure from this tradition in 1892, though it did not immediately abandon the plain meaning rule for a broader inquiry into legislative intent, deciding instead that judges could resort to extrinsic materials only in cases of ambiguity.

By mid-century, however, references to legislative histories had become an increasingly common feature of judicial opinions, and courts began to inquire about legislative intent in all cases. In 1940, the United States Supreme Court explained: "When aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no rule of law which forbids its use, however clear the words may appear on superficial examination." Legal process theories of the 1950s promoted this practice, though with the goal of identifying the legislature's general purposes (objective intent) rather than its specific (subjective) intent, making this teleological approach a distinct subset of intentionalism sometimes denominated as purposivism. Although some notable jurists of the time expressed seri-

17. See Church of the Holy Trinity v. United States, 143 U.S. 457, 459-65 (1892); see also Binns v. United States, 194 U.S. 486, 495-96 (1904); United States v. National Marine Eng'rs' Beneficial Ass'n, 294 F.2d 385, 391 (2d Cir. 1961) (Friendly, J.) (describing Holy Trinity as a watershed); Baade, supra note 15, at 1084 ("The English no-recourse rule had ceased to prevail in the United States in the last quarter of the nineteenth century.").


20. See HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 1379 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994) ("Evidence of specific intention with respect to particular applications is competent only to the extent that the particular applications illuminate the general purpose and are consistent with other evidence of it."); id. at 1378 (assuming "that the legislature was made up of reasonable persons pursuing reasonable purposes reasonably"); see also William N. Eskridge, Jr. & Philip P. Frickey, The Making of The Legal Process, 107 HARV. L. REV. 2031, 2047-49 (1994) (discussing the substantial initial influence of this perspective).

ous concern about the growing reliance on pre-enactment materials, this practice became quite widespread. In an unanimous 1976 decision, the Supreme Court reversed a lower federal court for interpreting a statute without having considered its legislative history.

By the early 1980s, surveys confirmed extensive judicial references to legislative histories, but the chorus of criticism began in earnest at around this time. Of course, strands of these various objections and alternative approaches to statutory interpretation have long existed, at least since the Realist critique of classical legal orthodoxy, but the terms of this debate have resurfaced in a focused way during the last two decades. Notwithstanding sometimes withering attacks from commentators, inspired in no small part by Justice Scalia's repeated admonitions about the hazards of this practice, the

22. See United States v. Public Utils. Comm'n, 345 U.S. 295, 319-20 (1953) (Jackson, J., concurring) (objecting to the "weird endeavor" of attempting a "psychoanalysis of Congress" and that the use of legislative history "pulls federal law... into a fog in which little can be seen if found"); Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384, 396-97 (1951) (Jackson, J., concurring) (expressing similar concerns); Shapiro v. United States, 335 U.S. 1, 48-49 (1948) (Frankfurter, J., dissenting) (complaining that the majority's reliance on materials provided by witnesses at hearings would tempt outsiders to plant their preferred glosses on the bill in the legislative history); Felix Frankfurter, Some Reflections on the Reading of Statutes, 47 COLUM. L. REV. 527, 540-44 (1947); Robert H. Jackson, Problems of Statutory Interpretation, 8 F.R.D. 121, 124-25 (1948); see also Arthur W. Murphy, Old Maxims Never Die: The "Plain-Meaning Rule" and Statutory Interpretation in the "Modern" Federal Courts, 75 COLUM. L. REV. 1299, 1304-11 (1975) (describing some early resistance among the lower courts to the use of extrinsic materials for construing statutes).


judicial urge to consult legislative materials to divine congressional intent remains fairly strong,\textsuperscript{27} even if now tempered by a greater appreciation of the limitations and pitfalls of this practice.\textsuperscript{28}

\section*{B. Terms of the Contemporary Debate}

At the risk of seriously oversimplifying a rich and complex debate, one may group theories of statutory interpretation into three broad categories: textualism, intentionalism, and dynamism.\textsuperscript{29} Textualism and intentionalism both strive to reconstruct the original intent of the enacting legislature but differ over where to look for this intent; textualists care only about the language of the statute, while intentionalists also look to legislative history.\textsuperscript{30} Proponents of dynamic in-

\begin{footnotesize}
\footnotesubscript{27} See Wisconsin Pub. Intervenor, 501 U.S. at 612 n.4 (claiming that “the Court’s practice of utilizing legislative history reaches well into its past,” and predicting “that the practice will likewise reach well into the future”); Jane S. Schacter, The Confounding Common Law Originalism in Recent Supreme Court Statutory Interpretation: Implications for the Legislative History Debate and Beyond, 51 STAN. L. REV. 1, 5 (1998) (“[W]hen measured against other empirical analyses, the 1996 Term reflects some resurgence in the use of legislative history and an apparent decline in another benchmark of the new textualism—citations to the dictionary.”); id. at 37 (“If the data from the 1996 Term are predictive of future Terms, and the trend toward textualism is reversing, it may be that the critique of legislative history is losing steam.”) (footnote omitted)); Nicholas S. Zepps, The Use of Authority in Statutory Interpretation: An Empirical Analysis, 70 TEX. L. REV. 1073, 1088 (1992) (“If originalism retains no defenders in the academy, it seems only fair to ask how it could have remained a viable approach for the judiciary.”).

\footnotesubscript{28} See Patricia M. Wald, The Sizzling Sleeper: The Use of Legislative History in Construing Statutes in the 1988-89 Term of the United States Supreme Court, 39 AM. U. L. REV. 277, 281-300 (1990) (describing the recent though still unsuccessful “assault” on the conventional approach, but again finding that legislative histories generally had only a marginal impact on the Court’s decisions); see also id. at 309-10 (“One can detect a certain tone of caution in the Court’s use of legislative history in almost all cases [from the 1988-89 Term]. Accordingly, it would be reasonable to assume that caution represents an awareness of and a reaction to the persistent attacks of the textualists.”); Gregory E. Maggs, The Secret Decline of Legislative History: Has Someone Heard a Voice Crying in the Wilderness?, 1994 PUB. INT. L. REV. 57, 58-59 (noting a similar type of effect); Lawrence M. Solan, Learning Our Limits: The Decline of Textualism in Statutory Cases, 1997 WIS. L. REV. 235, 283 (applauding the Supreme Court’s failure to embrace textualism even while it has been influenced by the critique); cf. Thomas W. Merrill, Textualism and the Future of the Chevron Doctrine, 72 WASH. U. L.Q. 351, 357 (1994) (“[T]here can be no doubt that textualism is in ascendency and the use of legislative history to discover congressional intent is very much on the decline.”).

\footnotesubscript{29} For introductions to this subject, see WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION (1994); WILLIAM N. ESKRIDGE, JR. & PHILIP P. FRICKER, CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY (2d ed. 1995); KENT GREENAWALT, STATUTORY INTERPRETATION: TWENTY QUESTIONS (1999); ABNER J. MIKVA & ERIC LANE, AN INTRODUCTION TO STATUTORY INTERPRETATION AND THE LEGISLATIVE PROCESS (1997); WILLIAM D. POPKIN, LEGISLATION (2d ed. 1997).

\footnotesubscript{30} See Daniel B. Rodriguez, The Substance of the New Legal Process, 77 CAL. L.
terpretation start with the static text but strive to effectuate the purpose of the legislation and adapt it as necessary to deal with changed circumstances. Naturally, each of these categories contains important gradations. For instance, one may subdivide textualists into literalists and contextualists; intentionalists may vary in their willingness to accept different sources of legislative history; and dynamic interpretation broadly includes a range of approaches that look beyond text and history to a greater or lesser extent. More importantly, even these broad categories overlap, and in practice most courts and commentators, including the staunchest of advocates for one particular theory, adopt some mix of approaches.\(^3\)

For our purposes, the competing views about legislative history represent the most salient feature of this debate. Again, at the risk of mischaracterizing a quite complicated intellectual history, textualism resurfaced with a vengeance in the 1980s, though in a more sophisticated garb than old-style literalism; intentionalists rebutted these objections while also conceding problems with some of the excesses of the past in consulting legislative history; and, finally, dynamic statutory interpretation coalesced as an alternative response to the shortcomings with both intentionalism and textualism, though it had clear antecedents in the common law tradition.

\(^3\) See RICHARD A. POSNER, OVERCOMING LAW 400 (1995) (advocating a pragmatic approach); William N. Eskridge, Jr. & Philip P. Frickey, Statutory Interpretation as Practical Reasoning, 42 STAN. L. REV. 321, 345-62 (1990) (suggesting a model for pragmatic interpretation); Daniel A. Farber, The Inevitability of Practical Reason: Statutes, Formalism, and the Rule of Law, 45 VAND. L. REV. 533, 558-59 (1992); Robert J. Martineau, Craft and Technique, Not Canons and Grand Theories: A Neo-Realist View of Statutory Construction, 62 GEO. WASH. L. REV. 1, 40 (1993) (criticizing the disjunction between theory and practice in statutory interpretation); Schacter, supra note 27, at 18-20, 36, 55 (calling the Court's eclectic or "blended approach" to statutory interpretation "common law originalism" that cuts across the dichotomies drawn by most scholars); id. at 19 ("While statutory language is the consistent point of departure, and there is, thus, plainly an originalist component to the Court's approach, it is only a distinctly diluted form of originalism that the Court seems to be practicing. . . . [T]he Justices regularly invoke a wide-ranging set of judicially-created devices to develop and give meaning to the contested statutory language."); Zeppos, supra note 27, at 1120 ("[N]either originalism nor textualism adequately describes the Court's existing practice. Rather, the Court's approach is eclectic, relying not only on text and originalist sources, but on practical considerations and other dynamic sources as well."); id. at 1125 (finding a "remarkable constancy" in the types of sources cited over a hundred-year period).
(1) *The Textualist Critique*

The textualists reacted in part to a growing appreciation of the flimsiness of commonly cited pre-enactment materials. For instance, some of the "colloquies" published in the *Congressional Record* never took place as floor debates; instead, they represented written submissions offered by individual members anxious to insert some commentary that may prove helpful to constituents in the course of future litigation over the meaning of the statute.32 Similarly, because staffers shoulder primary responsibility for drafting bills and committee reports, lobbyists may more readily succeed in influencing their content.33 At the very end of the Reagan administration, the Department of Justice even issued a report cataloging some of the misuses of legislative history materials by the courts.34

More seriously, some critics complained that judges focused on the legislative history to such an extent that they forgot about the text itself.35 Borrowing from the insights of public choice theory, textualists argued that the enacted language of a statute provided the only legitimate evidence of a legislature's intent.36 In rejecting the ten-

---


35. See Reed Dickerson, *The Interpretation and Application of Statutes* 164 (1975) (recounting a "Canadian gibe that in the United States whenever the legislative history is ambiguous it is permissible to refer to the statute"); William T. Mayton, *Law Among the Pleonasms: The Futility and Aconstitutionality of Legislative History in Statutory Interpretation*, 41 EMORY L.J. 113, 114 (1992). An unusually candid example of this tendency appears in an administrative law classic. See Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 412 n.29 (1971) ("The legislative history... is ambiguous.... Because of this ambiguity it is clear that we must look primarily to the statutes themselves to find the legislative intent."); see also Public Citizen v. DOJ, 491 U.S. 440, 452-67 (1989) (trumping statutory text with some contrary legislative intent); Chevron U.S.A. Inc. v. NRDC, 467 U.S. 837, 842-43 & n.9 (1984) (referring repeatedly to the clarity of congressional "intent" rather than the terms of the enabling statute).

dency to personify Congress, they emphasized that collective bodies comprised of hundreds of members cannot form an intent apart from the text of legislation.37

Accordingly, the judiciary’s preoccupation with finding this elusive intent in the various materials that make up a legislative history posed constitutional problems. Critics argued that the intentionalist approach circumvented the requirements for the passage of federal legislation—namely, bicameralism and presentment.38 By treating language in committee reports and floor statements as authoritative, courts distorted the lawmaking dynamic, inviting members of Congress to take short-cuts. Legislators found it easier to manufacture legislative history than attempt to amend a bill,39 and those members

Alex Kozinski, Should Reading Legislative History Be an Impeachable Offense?, 31 SUFFOLK U. L. REV. 807, 813 (1998) (“To give substantive effect to this flotsam and jetsam of the legislative process is to short-circuit the constitutional scheme for making law.”); Thomas W. Merrill, Chief Justice Rehnquist, Pluralist Theory, and the Interpretation of Statutes, 25 RUTGERS L.J. 621, 643-44 (1994) (contrasting this view with the notion that statutory text is merely some evidence of the law).


38. See Bank One Chicago, N.A. v. Midwest Bank & Trust Co., 516 U.S. 264, 280 (1996) (Scalia, J., concurring) (“Congress cannot leave the formation of that intent to a small band of its number, but must, as the Constitution says, form an intent of the Congress.”); see also RICHARD L. HALL, PARTICIPATION IN CONGRESS 21-24, 56-85 (1996) (explaining that even the work of committees normally reflects the input of only a few of the members or their staff).

39. See Taylor, 487 U.S. at 345 (Scalia, J., concurring) (quoting one legislator’s remarkably candid floor statement as follows: “I have an amendment here in my hand which could be offered, but if we can make up some legislative history which would do the same thing, I am willing to do it.”); Regan v. Wald, 468 U.S. 222, 237 (1984) (fearing that judicial reliance on colloquies “would open the door to the inadvertent, or perhaps even planned, undermining of the language actually voted on”); FEC v. Rose, 806 F.2d 1081, 1090 (D.C. Cir. 1986) (“[T]his court sitting en banc has condemned the well-recognized phenomenon of deliberate manipulation of legislative history at the committee level to achieve what likely cannot be won before Congress as a whole.”); Daniel R. Ortiz, The Self-Limitation of Legislative History: An Intrainstitutional Perspective, 12 INT’L REV. L. & ECON. 232, 233 (1992) (“[I]t costs less to create legislative history than it does to change the words of the text . . . . A single legislator, for example, cannot change the words of a bill herself, but she can, by herself, add to the legislative history.”); W. David Slawson, Legislative History and the Need to Bring Statutory Interpretation Under the Rule of Law, 44 STAN. L. REV. 383, 397 (1992) (“Manufacturing legislative history offers two advantages over amending. First, it is quicker and easier than drafting, debating, and voting on an amendment. Second, manufacturing increases the chances that the member’s intentions will become law if they are controversial.”); see also id. at 403-10 (objecting to the judiciary’s reliance on such
who may have disagreed with such explanations got no opportunity to alter the legislative history except by noting their own objections on the floor and hoping that courts will notice these.\textsuperscript{40}

Finally, textualists have objected to the use of legislative history because it offers judges too ready a mechanism for inappropriately reaching a preferred outcome even in the face of contrary statutory text.\textsuperscript{41} In addition to selectively empowering individual members of Congress or their staff, the search for a legislative intent disguises unconstitutional lawmaking by members of the judiciary. Thus, textualist critics contend that intentionalism short-circuits the legislative process and invites usurpation of the legislative power by the judicial branch.

When statutory language contains ambiguities, textualists might employ various canons of construction, on the theory that Congress legislates against the background of this judge-made law.\textsuperscript{42} Textualists also take statutory structure and context into account,\textsuperscript{43} including materials).

\textsuperscript{40} See, e.g., 128 CONG. REC. 16,918 (1982) (statement of Sen. Armstrong) ("If there were matter within this report which was disagreed to... even by a majority of all Senators, there would be no way for us to change the report. I could not offer an amendment tonight to amend the committee report.").

\textsuperscript{41} See Conroy v. Aniskoff, 507 U.S. 511, 527-28 (1993) (Scalia, J., concurring); West Virginia Univ. Hosps., 499 U.S. at 100-01 (calling a purposive approach judicial "usurpation"); Public Citizen v. DOJ, 491 U.S. 440, 473 (1989) (Kennedy, J., concurring) ("[I]t does not foster a democratic exegesis for this Court to rummage through unauthoritative materials to consult the spirit of the legislation in order to discover an alternative interpretation of the statute with which the Court is more comfortable."); Sinclair, 870 F.2d at 1343 ("Often there is so much legislative history that a court can manipulate the meaning of a law by choosing which snippets to emphasize... "); Wallace v. Christensen, 802 F.2d 1539, 1559 (9th Cir. 1986) (en banc) (Kozinski, J., concurring) ("[L]egislative history can be cited to support almost any proposition, and frequently is."); ANTONIN SCALIA, A MATTER OF INTERPRETATION 17-18, 35 (1997) (claiming that the use of legislative history "has facilitated rather than deferred decisions that are based upon the courts' policy preferences, rather than neutral principles of law").

\textsuperscript{42} See Finley v. United States, 490 U.S. 545, 556 (1989) (Scalia, J.) ("What is of paramount importance is that Congress be able to legislate against a background of clear interpretive rules, so that it may know the effect of the language it adopts."); see also Geoffrey P. Miller, Pragmatics and the Maxims of Interpretation, 1990 Wis. L. Rev. 1179, 1224-25; Frederick Schauer, Statutory Construction and the Coordinating Function of Plain Meaning, 1990 SUP. CR. REV. 231, 250-56 (offering a pragmatic justification for emphasizing text); David L. Shapiro, Continuity and Change in Statutory Interpretation, 67 N.Y.U. L. REV. 921, 941-60 (1992) (defending the use of canons); David A. Strauss, Why Plain Meaning?, 72 NOTRE DAME L. REV. 1565, 1579-82 (1997) (same).

any relevant language in other sections or even unrelated statutes as well as linguistic conventions of the time—primarily, dictionaries then in use. Armed with these various tools, a textualist can confidently cut through almost any seeming ambiguity in a statutory text. Except in rare cases to confirm that an apparently absurd result was not in fact what the legislature had intended, the adherents of this approach, most notably Justice Scalia, adamantly refuse to consider a statute's legislative history.

(2) The Intentionalist Response

Intentionalists and others responded to these textualist critiques in a variety of ways. Among other things, they emphasized that nobody views legislative history as authoritative, but as only one source of perhaps weak information about the meaning of an authoritative, though ambiguous, statutory text. Some commentators have suggested that this more enlightened approach actually represents a new form of originalism, distinct from the older forms of intentionalism or purposivism that, at least in practice, allowed legislative intent to trump plain text.
In any event, giving priority to the text and viewing legislative history as only some evidence of intent would answer the constitutional concern because bicameralism and presentment only apply to congressional texts that have binding effect. The constitutional objection would have more force if Congress ever enacted a law that directed judges to adhere, for instance, to the views expressed in committee reports when interpreting a statute. Instead, where courts do so under no legislative compulsion and merely as some aid to interpretation, they act consistently with the "judicial power" vested by Article III, especially if one considers the essentially common law approaches to statutory interpretation that prevailed at the time of the founding.

Intentionalists seriously doubt that textualism will reduce judicial activism. Judges fixated on a particular reading of a statute can defend it just as easily by selecting and revising canons of construction, or shopping for a suitable dictionary definition, as by dredging a


50. See U.S. Const. art. I, § 5, cl. 3 ("Each House shall keep a Journal of its Proceedings, and from time to time publish the same . . . ."). This clause does not, however, specify the content of such reports, see Gregg v. Barrett, 771 F.2d 539, 540-41 (D.C. Cir. 1985) (explaining that "these official journals are abbreviated versions of congressional proceedings" and are "distinct from the Congressional Record"), and the Constitution vests in Congress the power to "determine the rules of its proceedings," U.S. Const. art. I, § 5, cl. 2; see also United States v. Durenberger, 48 F.3d 1239, 1243 (D.C. Cir. 1995) (noting that courts will not review compliance by Congress with its self-imposed rules of procedure).


54. See Eskridge, supra note 52, at 1542-47 (describing this as the problem of "loose canons").

legislative history. Thus, textualism does not circumscribe judicial discretion but may even increase it by interpreting ambiguous texts according to any one of a number of judge-made canons of construction. Intentionalists also explain that members of Congress manufacture legislative history for purposes other than hoodwinking judges—namely, influencing the votes of their colleagues, communicating views to their constituents, and hoping to guide agency officials entrusted with administering the statute—in which case judicial abstention will not necessarily alter the legislative process by redirecting energy into clearer specification of law in statutory text. Finally, they note that the textualists’ absurd result exception belies the theoretical attack against the possibility of finding an extra-statutory intent.

The fact that most legislators do not read the pre-enactment explanatory materials hardly undermines its value as some evidence of intent. Legislators do not always read the bills for which they vote, yet textualists pore over that text with excessive confidence that minute drafting choices will reflect important distinctions in meaning. Even those legislators who conscientiously read the text of bills be-

Interpretation, 107 HARV. L. REV. 1437, 1447-48 (1994); see also Samuel A. Thumma & Jeffrey L. Kirchmeier, The Lexicon Has Become a Fortress: The Supreme Court’s Use of Dictionaries, 47 BUFF. L. REV. 227 (1999) (exhaustively surveying and criticizing the Court’s increasing reliance on dictionaries in statutory interpretation and other contexts).


58. See Zeppos, supra note 48, at 1311-12; Christopher Cox, Editorial, The Con Game We Call Congress: In the Still of the Night, Members Raised Pay, Raided Treasury, ORANGE COUNTY REG., Nov. 26, 1989, at G3 (providing one member’s account of the process of enacting the Budget Reconciliation Act of 1989: “So voluminous was this monster bill that it was hauled into the chamber in an oversized corrugated box. . . . While reading it was obviously out of the question, it’s true that I was permitted to walk around the box and gaze upon it from several angles, and even to touch it.”). Indeed, even when given a copy of a bill, it appears that legislators rely more frequently on summaries appearing in committee reports or other materials. See Larry Evans et al., Congressional Procedure and Statutory Interpretation, 45 ADMIN. L. REV. 239, 245 (1993).
before a vote probably do not consult lay dictionaries for clarification of unclear terms, and they rarely know of the Supreme Court's favored canons of construction, yet textualists put great stock in such aids to meaning. Indeed, for courts to quibble with the subdelegation of legislative work shows a lack of respect for a coordinate branch of government, and it also smacks a bit of hypocrisy insofar as some federal judges give their law clerks tremendous responsibility in drafting opinions. Naive textualism may demand the impossible of Congress and, thereby, actually work to undermine the legislative power relative to the other branches of government.

Even so, some intentionalists have come to regard legislative history materials as sufficiently untrustworthy that they would confine any search for legislative intent to other sources. In particular, these commentators concede that the judicial use of legislative history signals to the participants in the legislative process that, by shaping the historical materials, they easily can influence how courts later will in-

59. See Zeppos, supra note 48, at 1320-21. Textualists respond that the authoritative use of legislative history amounts to an unconstitutional legislative "self-delegation" that differs from judicial references to sources external to the legislative process. See John F. Manning, Textualism as Nondelegation Doctrine, 97 COLUM. L. REV. 673, 739 (1997).

60. See Muriel Morisey Spence, The Sleeping Giant: Textualism as Power Struggle, 67 S. CAL. L. REV. 585, 597-615 (1994); id. at 588 ("To denigrate legislative history is to denigrate Congress as an institution."); see also James J. Brudney, Congressional Commentary on Judicial Interpretations of Statutes: Idle Chatter or Telling Response?, 93 MICH. L. REV. 1, 104-05 (1994); William N. Eskridge, Jr. & Philip P. Frickey, The Supreme Court, 1993 Term—Foreword: Law as Equilibrium, 108 HARV. L. REV. 26, 77 (1994) ("Insisting that statutory interpretation ignore legislative history and adhering to dictionaries at the expense of common sense, the new textualism is insensitive to the expectations of elected representatives."); Richard J. Pierce, Jr., The Supreme Court's New Hypertextualism: An Invitation to Cacophony and Incoherence in the Administrative State, 95 COLUM. L. REV. 749, 752 (1995) (criticizing the recent emergence of "hypertextualism," which he characterized as "finding linguistic precision where it does not exist, and relying exclusively on the abstract meaning of a particular word or phrase even when other evidence suggests strongly that Congress intended a result inconsistent with that usage").

61. See Schacter, supra note 27, at 50; Zeppos, supra note 48, at 1313 & n.68. Does a classic Supreme Court opinion lose precedential force if later historical research uncovers that the nominal author had never written or reviewed the opinion? On the recent controversy over allegations concerning the drafting of Supreme Court opinions in particular, see David J. Garrow, "The Lowest Form of Animal Life"?: Supreme Court Clerks and Supreme Court History, 84 CORNELL L. REV. 855, 860, 863-65, 869, 872, 874-76 (1999) (reviewing EDWARD LAZARUS, CLOSED CHAMBERS (1998)).

terpret a statute, thereby inevitably distorting the historical record.\(^{63}\) Thus, even under intentionalist premises, one might do better not to look for genuine signs of intent in the legislative history—and focus instead on the statute’s text and context, judicial precedent, and the canons of construction—because of the high likelihood that judges will make mistakes if tempted to consult any pre-enactment materials.\(^{64}\)

(3) Dynamic Interpretation

The dynamic theories of statutory interpretation do not share textualism’s revulsion toward legislative history, but they also do not share intentionalism’s evident preoccupation with such pre-enactment materials. Instead, legislative text and history provide starting points for judges when struggling to make sense of a statute in new and perhaps unforeseen circumstances.\(^{65}\) Proponents of this essentially fluid approach worry much more about identifying the broader purposes rather than any particular intent of the legislature in order to guide courts in the process of figuratively updating or revising the text where necessary. Whereas both intentionalists and textualists care

---

63. See Note, Why Learned Hand Would Never Consult Legislative History Today, 105 HARV. L. REV. 1005, 1012 (1992) (“[T]he widespread expectation that judges will consult legislative histories leads to distortion of the histories and makes them unreliable indicators of congressional intent.”); id. at 1017 (“Once they know that judges will refer to legislative history when interpreting statutes, legislators, staffs, and lobbyists have great incentives to introduce comments in the record solely to influence future interpretations—and especially to insert statements that could not win majority support in Congress.”).

64. See Adrian Vermeule, Legislative History and the Limits of Judicial Competence: The Untold Story of Holy Trinity Church, 50 STAN. L. REV. 1833, 1874 (1998) (“[D]istinctive features of legislative history, particularly its volume and heterogeneity, may increase the risk of erroneous judicial interpretation even if an unbiased interpreter, acting under no constraints of time, information, or expertise, would find that the legislative history reliably reflects a collective intention concerning the relevant interpretive question.”); id. at 1896 (“Even assuming that legislative intent is a coherent concept, that legislative history reliably reflects legislative intent in a broad range of cases, and that constitutional norms permit courts to consult legislative history, there are reasons to doubt judicial competence to discern legislative intent from legislative history.”).

about original meaning, notwithstanding sharp differences over how to identify it, proponents of dynamic approaches are not terribly concerned about what the legislature may have intended on the date of statutory enactment. Instead, among other techniques, they advocate the use of value-laden canons of construction to assist judges with the interpretive process.\textsuperscript{66}

\section*{C. Crafting a Legislative History Hierarchy}

Whatever one thinks of this debate, courts, lawyers, and commentators seemingly cannot resist the use of legislative history, but they have become more aware of its limitations.\textsuperscript{67} Thus, intentionalists concede that not all sources for divining legislative intent deserve equal consideration, and they have identified the relative strength of different pre-enactment materials, consistent with a rough hierarchy that has emerged from the Supreme Court’s decisions over the years.\textsuperscript{68} For the most part, committee reports accompanying a bill and statements made by its sponsors during floor debates receive the highest marks, while post-enactment commentary merits scant attention. Even these guideposts have exceptions, of course, and between them one finds a wide range of pre-enactment materials that courts sometimes consult.

Committee reports deserve more weight than floor statements,\textsuperscript{69} though not everyone agrees with this particular rank-ordering,\textsuperscript{70} espe-

\begin{itemize}
\item \textsuperscript{67} See supra notes 24-28 and accompanying text.
\item \textsuperscript{69} See, e.g., Thornburg v. Gingles, 478 U.S. 30, 43 n.7 (1986) ("We have repeatedly recognized that the authoritative source for legislative intent lies in the Committee Reports on the bill."); Weinberger v. Rossi, 456 U.S. 25, 35 n.15 (1982) ("The contemporaneous remarks of a sponsor of legislation are certainly not controlling in analyzing legislative history."); see also SEC v. Robert Collier & Co., 76 F.2d 939, 941 (2d Cir. 1935) (L. Hand, J.) ("[W]hile members deliberately express their personal position upon the general purposes of the legislation, as to the details of its articulation they accept the work of the committees; so much they delegate because legislation could not go on in any other way.").
\item \textsuperscript{70} Compare Kenneth W. Starr, \textit{Observations About the Use of Legislative History}, 1987 DUKE L.J. 371, 375 ("Even in the setting of the congressional committee, in many
cially where the weaker source speaks more directly to the specific question, as may happen when an amendment emerges during floor consideration of a bill. Among floor debates, the statements made by a bill’s sponsors or managers generally trump those of other members of the legislature, and, among the latter group, comments by supporters should prevail over the remarks made by opponents of a bill.

Courts sometimes look further back into the legislative process for clues about intended statutory meaning. Differences in the language of earlier versions of the bill may provide limited insights about legislative intent. Courts might find the transcripts of committee mark-up sessions more meaningful though rarely available, but the cases the report adopted will likely not even have been reviewed, much less written or studied, by all members. Given these practical realities, only the record of speeches on the floor of either chamber should be considered even minimally probative of Congress’s intent. with Costello, supra note 68, at 66-73 (defending the traditional preference for committee reports over floor statements); Abner J. Mikva, A Reply to Judge Starr’s Observations, 1987 DUKE L.J. 380, 385 (“I always find that the committee report is the most useful device . . . . [It usually] represents the synthesis of the last meaningful discussion and debate on the issue.”); Abner J. Mikva, Statutory Interpretation: Getting the Law to Be Less Common, 50 OHIO ST. L.J. 979, 980-82 (1990) (identifying some of the flaws with the use of recorded floor debates); Schacter, supra note 27, at 43 (“Compared to so much else in the legislative process, committee reports are public, deliberative, reasoned documents that create a policymaking record.”).


72. See North Haven Bd. of Educ. v. Bell, 456 U.S. 512, 524-27 (1982) (relying heavily on comments made by a sponsor); Steiner v. Mitchell, 350 U.S. 247, 254 (1956) (same). One commentator recently has argued that, because legislative history should not be consulted for evidence of a collective subjective intent but instead as an institutional expression emerging from an obligation to explain and justify legislation to the public, only committee reports and the floor statements by managers or sponsors deserve consideration as the official explanatory materials. See Bernard W. Bell, Legislative History Without Legislative Intent: The Public Justification Approach to Statutory Interpretation, 60 OHIO ST. L.J. 1, 84-88, 97 (1999) (allowing, however, for reference to other pre-enactment materials if both the text and these official explanations leave unresolved ambiguities).

73. See NLRB v. Fruit Packers, 377 U.S. 58, 66 (1964) (“In their zeal to defeat a bill, [opponents] understandably tend to overstate its reach.”); Mastro Plastics Corp. v. NLRB, 350 U.S. 270, 288 (1956) (“An unsuccessful minority cannot put words into the mouths of the majority and thus, indirectly, amend a bill.”); see also Costello, supra note 68, at 71-72 (defending these traditional distinctions when referring to floor statements).

74. Cf. Mead Corp. v. Tilley, 490 U.S. 714, 723 (1989) (refusing to “attach decisive significance to the unexplained disappearance of one word from an unenacted bill”).

75. See Regan v. Wald, 468 U.S. 222, 236-38 (1984) (considering remarks evidently made during a mark-up session); Borrell v. United States Int’l Communication Agency, 682 F.2d 981, 988 (D.C. Cir. 1982) (same); see also Costello, supra note 68, at 46-50 (discussing the possible use of transcripts from mark-up sessions as well as conference com-
transcripts of committee hearings, which include testimony presented by officials from the executive branch as well as private parties, offer even less useful guidance if one wants to identify likely legislative intent.  

Courts generally and properly treat post-enactment explanatory materials with suspicion. Presidential signing statements may merit some limited attention, but congressional explanations of legislative intent in the wake of passage deserve little notice. As the Supreme Court has repeatedly warned, “the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one.” This is particularly true of post hoc explanations offered by individual legislators about what their colleagues sought to accomplish when enacting a particular law.


79. See, e.g., Bread Political Action Comm. v. FEC, 455 U.S. 577, 582 n.3 (1982) (rejecting affidavit from a legislator who had sponsored amendment years earlier); Quern v. Mandley, 436 U.S. 725, 736 n.10 (1978) (noting that “post hoc observations by a single member of Congress carry little if any weight”); see also Western Air Lines, Inc. v. Board of Equalization, 480 U.S. 123, 131 n.* (1987) (noting that “the creation of legislative his-
A different response to growing concerns about the use of legislative history materials would focus less on the stage during which those materials emerged and more on their character. Thus, courts should consider legislative materials that help explain the text but not those that embellish it. Although judges surely find it easier to differentiate among a hierarchy of sources based on their genesis rather than their character, the proposed distinction would respond more directly to many of textualism's critiques without entirely sacrificing the context offered by these extrinsic aids to statutory interpretation.

D. State Legislative Histories

Although normally addressed in the context of federal statutes, courts may attempt to use legislative histories to illuminate the meaning of state enactments as well. Do the critiques leveled against the reliance on pre-enactment congressional materials have the same force when dealing with a state legislature? Because the documentation of state legislative activity remains less thorough than at the federal level, practical constraints affect this debate as much
as theoretical ones do. If state courts have had few or no pre-enactment materials at their disposal in the past, do they tend toward textualism, purposivism, or dynamism in statutory interpretation out of simple necessity?

Among state court judges, Roger Traynor, formerly Chief Justice of the California Supreme Court, has offered some valuable guidance on these questions. Deservedly credited for his contributions to a diverse range of subjects such as torts and conflicts, Justice Traynor's views on matters of statutory interpretation have received only sparse notice, even though he spent the first decade of his legal career specializing in tax law, a discipline far removed from the common law style that became his primary legacy. The failure to consider his less distinctive forays, first as a scholar and then also as a jurist, into questions of statutory interpretation misses a potentially important contribution.

Although Traynor hinted at a seemingly dynamic approach to statutory interpretation, perhaps a natural outgrowth of his creative

---


86. See Roger J. Traynor, Comment on the Courts and Lawmaking, in LEGAL INSTITUTIONS TODAY AND TOMORROW 48, 60 (Monrad G. Paulsen ed., 1959) ("If in many fields it is impossible to prophesy forthcoming events and idle to tabulate actual ones, we must expect our statutory laws to become increasingly pliable to creative judicial elaboration."); see also Stefan A. Riesenfeld, Workmen's Compensation and Other Social Legislation: The Shadow of Stone Tablets, 53 CAL. L. REV. 207, 221 (1965) ("The opinions dealing with workmen's compensation reveal his capacity for giving new directions and meaning to parts of a statute which theretofore had been taken too much at face value. Of course, in some instances, the confinement of the statutory mandates stifled even Justice
common law bent, his judicial opinions hew closer to the legal process theories of that era and reflect a decidedly pragmatic cast. The fullest expression of his views on the subject appeared in 1950, in the majority opinion in *People v. Knowles.*

In *Knowles,* which involved a statute criminalizing kidnapping, Justice Traynor offered the following observations:

An insistence upon judicial regard for the words of a statute does not imply that they are like words in a dictionary, to be read with no ranging of the mind. They are no longer at rest in their alphabetical bins. Released, combined in phrases that imperfectly communicate the thoughts of one man to another, they challenge men to give them more than passive reading, to consider well their context, to ponder what may be their consequences. Speculation cuts brush with the pertinent question: what purpose did the Legislature seek to express as it strung those words into a statute? The court turns first to the words themselves for the answer. It may also properly rely on extrinsic aids, the history of the statute, the legislative debates, committee reports, statements to the voters on initiative and referendum measures. Primarily, however, the words, in arrangement that superimposes the purpose of the Legislature upon their dictionary meaning, stand in immobilized sentry, reminders that whether their arrangement was wisdom or folly, it was wittingly undertaken and not to be disregarded.

Although one might extract tantalizing hints of endorsement for any number of approaches, this position steers a middle and pragmatic

---

Roger J. Traynor's creativity.

87. 217 P.2d 1 (Cal. 1950).

88. *Id.* at 5; see also Roger J. Traynor, *No Magic Words Could Do It Justice,* 49 CAL. L. REV. 615, 618-20 (1961). These sentiments paralleled those of a great federal jurist from a previous generation. See Archibald Cox, *Judge Learned Hand and the Interpretation of Statutes,* 60 HARV. L. REV. 370, 375-90 (1947). More than a quarter of a century after *Knowles,* Traynor echoed some of the predictions of public choice theory about the nature of the legislative process:

In the din of a largely urban society, [a legislator] may hear the bellowing of militant groups or the siren songs of sophisticated special pleaders, but not the murmur of other individuals. He may be quick with a generous dispensation of public funds to groups for ostensibly worthy projects, so long as such dispensation attracts little public notice. He is given to assessing the effect of a given action upon his chances for re-election. His will for lawmaking is a will of many wisps. It is the exceptional legislator who is guided by *fiat lux* rather than the murky light of *ignis fatuus.*

Roger J. Traynor, *The Limits of Judicial Creativity,* 63 IOWA L. REV. 1, 8 (1977); see also Roger J. Traynor, *The Well-Tempered Judicial Decision,* 21 ARK. L. REV. 287, 290 (1967) ("In the legislative process there is neither beginning nor end: It is an endless freewheeling experiment, without institutional constraints, that may have rational origins and procedures and goals or that may lack them.").
course between the extremes of textualism and dynamism, preferring a form of purposivism or what some have called modified intentiona-

lism.

In most cases, however, Justice Traynor's statutory opinions made no mention of extrinsic aids to construction, focusing only on the drafting history behind a particular provision—particularly tracing revisions of the text over time—to help understand legislative intent where the words did not provide a plain enough meaning. On one occasion, he did credit affidavits submitted by legislators involved in the drafting of a statute as a source of relevant guidance. Despite an announced willingness to consider pre-enactment materials, their infrequent citation confirms that practical limitations affected the interpretation of state statutes during this period more so than the theoretical disputes prominent today in the federal courts. As suggested in the next Part, a similar factor may help account for the somewhat counter-intuitive method used to interpret federal regulations that the United States Supreme Court first announced at around this same time.

II. Searching for Administrative Intent

Much like the criticized fiction of a discoverable legislative intent, the notion of a single and authoritative administrative intent encounters some conceptual difficulties, though of a different sort.

89. See, e.g., In re Culver, 447 P.2d 633, 634-37 (Cal. 1968); Harvey v. Davis, 444 P.2d 705, 709 (Cal. 1968); California Motor Transp. Co. v. Public Utils. Comm'n, 379 P.2d 324, 326 (Cal. 1963); Burge v. City and County of San Francisco, 262 P.2d 6, 10-12 & n.7 (Cal. 1953); People v. Odle, 230 P.2d 345, 347-49 (Cal. 1951); In re Garcia's Estate, 210 P.2d 841, 842-43 (Cal. 1949); Loustalot v. Superior Court, 186 P.2d 673, 676-77 (Cal. 1947); In re Halcomb, 130 P.2d 384, 387-88 (Cal. 1942) (Traynor, J., dissenting); see also Roger J. Traynor, Statutes Revolving in Common-Law Orbits, 17 CATH. U. L. REV. 401, 424 (1968) ("Sometimes a statute has no readily traceable history or even any recorded history at all. Legislators are under no compulsion to disclose the reasons for a rule, let alone to keep a chronicle of its origins. Sometimes a statute is enveloped in a history so voluminous or ambiguous as to be more confusing than revealing."). A citation survey of the court during Justice Traynor's tenure did not even bother counting references to statutory materials. See John Henry Merryman, Toward a Theory of Citations: An Empirical Study of the Citation Practice of the California Supreme Court in 1950, 1960, and 1970, 50 S. CAL. L. REV. 381, 381-82 n.2 (1977).

Many agency officials may have a hand in the formulation of a legislative rule, and the Supreme Court has accepted the reality that the head of an agency must subdelegate work to subordinates.\(^9\) With multi-member commissions, these problems become still trickier—perhaps akin to the difficulty of interpreting a plurality decision by the Supreme Court—but the same hierarchical structure and duty of explanation distinguishes all administrative agencies from the collective decisionmaking process of a legislature.

The head of such an entity does not simply exercise something akin to the veto available to the President when Congress presents him with legislation for signature. As some defenders of using legislative history have noted, the law readily ascribes intent to hierarchical organizations such as corporations.\(^9\) Although perhaps inapt as an analogy to collective bodies such as legislatures,\(^9\) the parallel works in the administrative context. At the same time, the insights of public choice theory that have inspired the textualist critique of the legislative process seem less apt for understanding agency behavior.\(^9\)


\(^9\) See Edward L. Rubin, Public Choice and Legal Scholarship, 46 J. LEGAL EDUC. 490, 496 (1996) (summarizing the limitations of public choice theory in predicting the behavior of unelected officials). Even if agency officials do not behave like legislators seeking to maximize their re-election chances, they may act in ways designed to enhance their own power and flexibility. See Peter H. Aranson et al., A Theory of Legislative Delegation, 68 CORNELL L. REV. 1, 51 (1982) (“Budget maximizing, jurisdictional expansion, and output maximizing in their various manifestations may increase private payoffs to agency personnel.”). They also face similar forms of lobbying by interested parties. See Home Box Office, Inc. v. FCC, 567 F.2d 9, 53-57 (D.C. Cir. 1977) (objecting to lobbying during rulemaking); Manning, supra note 7, at 676-80 (arguing that excessive deference may accentuate these tendencies); Lars Noah, Sham Petitioning as a Threat to the Integrity of the Regulatory Process, 74 N.C. L. REV. 1, 34 (1995) (In applying Noerr-Pennington antitrust immunity for petitions directed to government agencies, “courts have distinguished between legislative and adjudicatory decisionmaking because the standards of acceptable conduct are said to vary substantially in the two arenas.”); id. at 51 (explaining the view that the rules of professional conduct for attorneys do not apply during agency rulemaking).
nally, though agencies may engage in obfuscation, choosing to communicate their decisions using formats designed to evade procedural or substantive constraints on the exercise of their powers, this would complicate but should not scuttle efforts to divine regulatory intent.

As argued herein, it is far easier to ascribe an intent to an agency when it issues a rule than to a legislature when it enacts a statute, both because of differences in their decisionmaking routines and because of the greater reliability of the materials that document the bases for their decisions. Why then do courts seem so much less preoccupied with administrative intent and consulting regulatory histories than when they search for legislative intent in pre-enactment statutory materials? Does this reflect a greater preference for textualism when applied to regulations or an acceptance of a form of dynamic interpretation entrusted to agency officials rather than judges? This Part suggests that, instead of deferring so readily to an agency's post-promulgation interpretation, courts should prefer intentionalism—whatever its drawbacks as a method of statutory construction—when asked to interpret legislative rules.

A. Administrative Records and Legislative Fact-Finding

Records of legislative and administrative consideration of a proposal provide potentially critical information wholly apart from possible guidance about intended meaning. Most importantly, when reviewing a substantive challenge to a regulation, a court looks for evidence and explanation in the record compiled by the agency. Post hoc rationalizations generally will not suffice. Because the

95. See Chamber of Commerce v. United States Dep't of Labor, 174 F.3d 206, 211-13 (D.C. Cir. 1999); Chamber of Commerce v. OSHA, 636 F.2d 464, 468 (D.C. Cir. 1980) ("Divining agency intent is rarely a simple matter, for bureaucratic boilerplate often obscures the true purpose."); Robert A. Anthony, "Well, You Want the Permit, Don't You?" Agency Efforts to Make Nonlegislative Documents Bind the Public, 44 ADMIN. L. REV. 31, 35-38 (1992); Lars Noah, Administrative Arm-Twisting in the Shadow of Congressional Delegations of Authority, 1997 Wis. L. REV. 873, 876-78, 898, 922-23 (identifying various bureaucratic ruses designed to circumvent statutory constraints).

96. See infra note 203 (discussing the evolution of "hard look" review). In contrast, several state courts continue to engage in fairly deferential review of state administrative rulemaking under a minimum rationality standard. See William Funk, Rationality Review of State Administrative Rulemaking, 43 ADMIN. L. REV. 147, 153-60 (1991); see also Pacific States Box & Basket Co. v. White, 296 U.S. 176, 185-86 (1935) (applying a minimum rationality test where a state agency's order was challenged on substantive due process grounds).

Administrative Procedure Act (APA) prohibits agency action that is "arbitrary, capricious, [or] an abuse of discretion,"\(^9\) a rule must purported to serve some public regarding purpose whatever political imperatives may have really motivated the agency.\(^9\) Thus, unlike legislation, an identifiable and defensible purpose must underlie legislative rules. Finally, when assessing an equal protection challenge to agency action, a court may look at the "administrative history" to determine whether some discriminatory intent motivated the decision.\(^10\)

Similarly, when reviewing certain constitutional challenges to a statute, a court may look at findings of legislative fact and underlying motive.\(^10\) When engaged in minimum rationality review, however, courts will presume an intent to pursue legitimate ends.\(^10\) Unlike

---

**ADMINISTRATIVE LAW 758-59 (4th ed. 1998) (questioning the judicial insistence on contemporaneous rationalizations).** By comparison, courts often accept post hoc interpretations when an agency seeks to enforce an ambiguous rule. *See infra* notes 105-106, 176, and accompanying text.


99. *See* *Chevron U.S.A. Inc.* v. NRDC, 467 U.S. 837, 857-58 (1984) ("In 1981 a new administration took office and ... the EPA reevaluated the various arguments that had been advanced in connection with the proper definition of the term 'source' ... "); *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 42 (holding that "an agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change"); *id.* at 59 (Rehnquist, J., concurring in part and dissenting in part) ("The agency's changed view of the [passive restraint] standard seems to be related to the election of a new President of a different political party. ... [I]t is entitled to assess administrative records and evaluate priorities in light of the philosophy of the administration."); *Paralyzed Veterans of Am.* v. D.C. Arena L.P., 117 F.3d 579, 586 (D.C. Cir. 1997) (Under *Chevron* "there is no barrier to an agency altering its initial interpretation to adopt another reasonable interpretation—even one that represents a new policy response generated by a different administration."); Merrick B. Garland, *Deregulation and Judicial Review*, 98 HARV. L. REV. 505, 585-86 (1985) (same).

100. *See* *Village of Arlington Heights* v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 268 (1977) ("The legislative or administrative history may be highly relevant [in determining whether discriminatory intent existed], especially where there are contemporaneous statements by members of the decisionmaking body, minutes of its meetings, or reports."); *see also* Ashutosh Bhagwat, *Purpose Scrutiny in Constitutional Analysis*, 85 CAL. L. REV. 297, 368-69 (1997) (concluding that the Court has increasingly and appropriately, though inconsistently, focused on the legislature's motivations in resolving constitutional challenges); John Hart Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205 (1970) (defending the tradition of fairly limited judicial inquiries into governmental motivation).

101. In addition to equal protection challenges, *see id.*, inquiries into subjective motivations also may take place in First Amendment challenges to legislation, *see* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 532-42 (1993) (invalidating city ordinances prohibiting animal sacrifices on free exercise grounds because they evidently reflected animosity toward a particular religion); Edwards v. Aguillard, 482 U.S. 578, 586-96 (1987) (invalidating a state statute requiring that schools teach creationism alongside theories of evolution on establishment clause grounds). *But see id.* at 636-39 (Scalia, J., dissenting) (objecting to such an inquiry into subjective legislative motivation).

federal agencies engaged in rulemaking, legislatures generally need not develop an explanatory record in anticipation of substantive judicial review or in order to provide notice to the public. Nonetheless, in some instances the absence of necessary findings may lead courts to invalidate a statute, most recently in challenges to congressional exercises of the power to regulate interstate commerce. In these cases, judges may consult a range of pre-enactment legislative materials. Given the well-established use of these records, especially in the administrative context, the seeming judicial disinterest in using these same materials when construing—as opposed to reviewing—agency rules makes little sense.

B. The Tradition of Deference to Post-Promulgation Interpretations

Ironically, when interpreting regulations, courts appear to give the most credence to post-promulgation expressions of agency intent, precisely the converse of the view that post-enactment expressions of legislative intent deserve little if any weight. Courts have long deferred to agency interpretations of ambiguities in their legislative rules. As the Supreme Court explained in 1965, “[w]hen the con-
struction of an administrative regulation rather than a statute is in issue, deference is even more clearly in order.\footnote{107} In essence, dynamic interpretation (though exercised by agencies instead of courts),\footnote{108} rather than either textualism or intentionalism, has been the norm for judicial interpretation of legislative rules. This stands in sharp contrast to the judiciary’s evident continuing preference for one of the originalist approaches in matters of statutory interpretation.

In 1945, in \textit{Bowles v. Seminole Rock & Sand Co.},\footnote{109} the United States Supreme Court provided the classic and oft-quoted statement of this rule of deference:

\begin{quote}
Since this [case] involves an interpretation of an administrative regulation a court must necessarily look to the administrative construction of the regulation if the meaning of the words used is in doubt. . . . [T]he ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation. . . . Our only tools, therefore, are the plain words of the regulation and any relevant interpretations of the Administrator.\footnote{110}
\end{quote}

The fact that the Court’s most prominent initial expression of this rule pre-dated the enactment of the APA by one year may help


108. Cf. Cass R. Sunstein, \textit{Is Tobacco a Drug? Administrative Agencies as Common Law Courts}, 47 DUKE L.J. 1013, 1056, 1060 (1998) (describing dynamic interpretation of statutes as “an administrative task, not a judicial one”). For a highly critical response to this argument, see Lars Noah, \textit{Interpreting Agency Enabling Acts: Misplaced Metaphors in Administrative Law}, 41 WM. & MARY L. REV. 1463. Even if one agrees with Professor Sunstein’s claim, however, it does not necessarily support the affiliated suggestion that federal agencies, which have the power to update their own regulations more directly through promulgating an amendment, should have the freedom to interpret their rules in a dynamic fashion. Nonetheless, a rule of strong deference may reflect the Court’s limited opportunity to supervise agency decisionmaking and the potentially conflicting lower court interpretations of uniform federal regulations, as some have suggested to explain \textit{Chevron} deference for enabling statutes. See Peter L. Strauss, \textit{One Hundred Fifty Cases Per Year: Some Implications of the Supreme Court’s Limited Resources for Judicial Review of Agency Action}, 87 COLUM. L. REV. 1093, 1121-22 (1987).


110. Id. at 413-14; see also Frank C. Newman, \textit{How Courts Interpret Regulations}, 35 CAL. L. REV. 509, 515-16, 520-22, 542-44 (1947) (drawing comparisons between the search for legislative and administrative intent, and generally supporting a rule of deference to agency interpretations as superior to the use of extrinsic aids and canons of construction).}
account for its deferential approach because judges would have had no useful pre-promulgation materials to consult when asked to interpret an unclear agency rule. Although the Federal Register Act, enacted in 1935, demanded publication and codification of final regulations, the extensive explanatory materials found in the Federal Register nowadays simply did not exist at that time. In 1946, the APA reinforced the requirement that agencies publish legislative rules in the Federal Register. In fact, even after the enactment of the APA, decades passed before agencies published meaningful preambles with their final regulations. Like the traditional English rule against consulting parliamentary materials, which may have rested in part on the sparse documentation of legislative debates that

111. The Court did refer to an agency “bulletin” published in the Federal Register immediately after issuance of the rule that sought to explain it to the industry. See Seminole Rock, 325 U.S. at 417. One should also note that the reference to this and other consistent interpretations came only after the Court engaged in a careful textual analysis. See id. (“Any doubts concerning this interpretation of rule (i) are removed by reference to the administrative construction . . . .”). Lastly, a different contextual factor may account for the announced rule of substantial deference (even if the Court did not really apply it in that fashion): the regulation imposed a price freeze necessitated by World War II. See id. at 413; cf. Manning, supra note 7, at 616-17 (“Seminole Rock may be an understandable reaction to the exigencies of modern regulatory governance; it cuts agencies helpful interpretive slack in a world in which life is short, resources are limited, and agencies must address complex issues that have unpredictable twists and turns.” (footnote omitted)). A number of the more recent decisions deferring to post-promulgation interpretations of agency rules have a similar genesis, in this case the energy and inflationary crises of the 1970s, and were issued by a specialized lower federal court. For a criticism of its track record, see James R. Elkins, The Temporary Emergency Court of Appeals: A Study in the Abdication of Judicial Responsibility, 1978 DUKE L.J. 113, 151 (“The TECA has abdicated its judicial responsibility by its deference to administrative agencies, its failure to secure agency compliance with procedural safeguards and its unwillingness to closely scrutinize the series of emergency economic regulatory programs which were spawned during the 1970’s.”).


115. See infra Part II.D.1.
existed in that country, or the infrequent reference to legislative histories for state statutes, the failure to consult regulatory histories may have emerged from similar practical considerations. Given the ready availability of such materials today, courts should rethink this rule of deference to agency interpretations of ambiguous regulations.

Nonetheless, recent Supreme Court decisions confirm the highly deferential approach. Apart from a handful of opinions that make passing references to the ingrained rule of deference, a pair of the Court’s latest decisions, both 5-4 splits, have highlighted its application and pitfalls. In 1994, in *Thomas Jefferson University v. Shalala*, the majority sustained a ruling by the Health Care Financing Administration (HCFA) to deny Medicare reimbursement to a teaching hospital of certain educational costs incurred by its affiliated medical school. First, the Court reiterated its longstanding approach to reviewing such cases: “We must give substantial deference to an agency’s interpretation of its own regulations. . . . [W]e must defer to the Secretary’s interpretation unless an ‘alternative reading is compelled by the regulation’s plain language or by other indications of the Secretary’s intent at the time of the regulation’s promulgation.’” In resolving the dispute, the majority accepted the agency’s construction because it found no ambiguity in the text of the applicable regulation, so the Court had no occasion to inquire about the agency’s original intent. The four dissenters, however, found ambiguity in the rule, and they also would have rejected HCFA’s interpretation as unreasonable.

The following year, the Court decided *Shalala v. Guernsey Memorial Hospital*, another case dealing with HCFA’s Medicare reimbursement rules. The dispute turned on whether an informal guideline calling for the amortization of a hospital’s defeasance costs conflicted with a regulation that appeared to provide for reimburse-

---

116. See Baade, supra note 15, at 1009, 1011-12 (questioning the extent to which this was really a factor).


119. Id. at 512 (quoting Gardebring v. Jenkins, 485 U.S. 415, 430 (1988)).

120. See id. at 514-15, 518 (concluding that “the Secretary’s construction of the anti-redistribution principle is faithful to the regulation’s plain language?”).

121. See id. at 518-19, 525-31 (Thomas, J., dissenting).

ment according to generally accepted accounting principles, which would have allowed for immediate recovery of the full amount of this loss.\textsuperscript{123} This time the majority expressed less confidence that the text of the regulation lacked any ambiguity, though it found plain meaning by looking at the context surrounding the text in question, including the organization of the subparts in the relevant section and their titles.\textsuperscript{124} Once again, four members of the Court disagreed (though only two of them had also dissented in \textit{Thomas Jefferson}), taking a contrary view of the text and structure of the regulation in question and, therefore, concluding that the guideline amounted to an impermissible attempt by HCFA to amend rather than interpret its existing legislative rule.\textsuperscript{125}

Without becoming bogged down in the complexities of the particular Medicare regulations, which may explain the readiness of the majorities in both cases to defer,\textsuperscript{126} this pair of recent decisions illustrates a couple of broader points. First, as others have noted in connection with statutory interpretation cases, reasonable minds may disagree about the plain meaning of a regulation as well as the threshold of ambiguity before a court must defer to an agency's construction. Second, the Supreme Court generally makes no effort to consult a regulation's administrative history for extrinsic aids to interpretation,\textsuperscript{127} though, in contrast to some of its opinions rejecting re-

\begin{itemize}
  \item \textsuperscript{123} \textit{See} \textit{id.} at 89-92.
  \item \textsuperscript{124} \textit{See} \textit{id.} at 93-94; \textit{id.} at 94 ("The logical sequence of a regulation or a part of it can be significant in interpreting its meaning. . . . The Secretary's position . . . is supported by the regulation's text . . . and structure . . . "). The majority also concluded that the agency had adopted a "sensible" approach, \textit{see} \textit{id.} at 101, even though the substantive merits of the guideline were not at issue; the only question was whether the guideline simply interpreted or instead impermissibly attempted to amend the underlying legislative rule.
  \item \textsuperscript{125} \textit{See} \textit{id.} at 104-09 (O'Connor, J., dissenting); \textit{id.} at 110-11 ("An agency is bound by the regulations it promulgates and may not attempt to circumvent the amendment process through substantive changes recorded in an informal policy manual that are unsupported by the language of the regulation."). The dissenters also emphasized an apparent inconsistency with HCFA's earlier view that the rule had adopted generally accepted accounting principles. \textit{See} \textit{id.} at 106.
  \item \textsuperscript{126} \textit{Cf.} \textit{BethEnergy Mines}, 501 U.S. at 707-11 (Scalia, J., dissenting) (criticizing the majority for failing to undertake the effort to locate the plain meaning of a complex rule from its text and structure).
  \item \textsuperscript{127} The dissenting opinion in \textit{Thomas Jefferson University} did quote from two HCFA \textit{Federal Register} notices, though both post-dated the promulgation of the regulation in question, \textit{see} 512 U.S. at 527-28 (Thomas, J., dissenting), and it also looked to the "regulatory history" of another challenged regulation, though this inquiry simply compared the text of that regulation to the predecessor versions of the rule that it had amended, \textit{see} \textit{id.} at 530-31. In an earlier case, by comparison, Justices Marshall and Brennan described the preamble to an agency rule as "strong evidence of regulatory intent" that contradicted the agency's current interpretation. \textit{See} Mullins Coal Co. v. Director, OWCP, 484 U.S. 135, 165 (1987) (Marshall, J., dissenting); \textit{see also} Gardebring v. Jenkins, 485 U.S. 415, 427 n.13 & 428 n.14 (1988) (evaluating the drafting history of the regulations in question).
\end{itemize}
course to legislative history, without any apparent explanation for ignoring such materials. The dissents in both of these cases warned that deferring too readily to such post-promulgation interpretations might give agencies an incentive to issue excessively vague legislative rules so as to retain maximum future flexibility.\textsuperscript{128} "[T]he Secretary has merely replaced statutory ambiguity with regulatory ambiguity. It is perfectly understandable, of course, for an agency to issue vague regulations, because to do so maximizes agency power and allows the agency greater latitude to make law through adjudication rather than through the more cumbersome rulemaking process."

Notwithstanding this cautionary note, lower federal courts have gotten the message about deferring,\textsuperscript{130} explaining that agencies receive even greater deference when interpreting their own regulations than they do under \textit{Chevron} when interpreting ambiguous language in their enabling statutes.\textsuperscript{131} Although intoning a plain meaning approach, which usually allows reference to extrinsic materials in the event of textual ambiguity, many judges simply inquire whether the

\textsuperscript{128} See \textit{Guernsey Mem'l Hosp.}, 514 U.S. at 104, 108-09 (O'Connor, J., dissenting); \textit{Thomas Jefferson Univ.}, 512 U.S. at 519 (Thomas, J., dissenting); cf. Robert A. Anthony, "Interpretive" Rules, "Legislative" Rules and "Spurious" Rules: Lifting the Smog, 8 ADMIN. L.J. 1, 6 n.21 (1994) ("If the relevant language of the existing document consists of vague or vacuous terms . . . the process of announcing propositions that specify applications of those terms is not ordinarily one of interpretation, because those terms in themselves do not supply substance from which the propositions can be derived.").

\textsuperscript{129} \textit{Thomas Jefferson Univ.}, 512 U.S. at 525 (Thomas, J., dissenting); see also Manning, \textit{supra} note 7, at 647-48 ("[W]hen a lawmaker controls the interpretation of its own laws, an important incentive for adopting transparent and self-limiting rules is lost because any discretion created by an imprecise, vague, or ambiguous law inures to the very entity that created it."); \textit{id.} at 655 ("[S]ince the agency can say what its own regulations mean (unless the agency's view is plainly erroneous), the agency bears little, if any, risk of its own opacity or imprecision."); cf. Paralyzed Veterans of Am. v. D.C. Arena L.P., 117 F.3d 579, 584 (D.C. Cir. 1997) ("A substantive regulation must have sufficient content and definitiveness as to be a meaningful exercise in agency lawmaking. It is certainly not open to an agency to promulgate mush and then give it concrete form only through subsequent less formal 'interpretations.'").

\textsuperscript{130} See, e.g., \textit{Electronic Eng'g Co. v. FCC}, 140 F.3d 1045, 1049 (D.C. Cir. 1998); State of New York v. Shalala, 119 F.3d 175, 182 (2d Cir. 1997); Ramey v. Gober, 120 F.3d 1239, 1246 (Fed. Cir. 1997); MobileTel, Inc. v. FCC, 107 F.3d 888, 894-95 (D.C. Cir. 1997). Others previously have noted this effect in statutory cases, finding that, at least initially, the lower courts took \textit{Chevron} more seriously than the Supreme Court did in subsequent cases. See Orin S. Kerr, \textit{Shedding Light on Chevron: An Empirical Study of the Chevron Doctrine in the U.S. Courts of Appeals}, 15 YALE J. ON REG. 1, 30-31, 47 (1998); Thomas W. Merrill, \textit{Judicial Deference to Executive Precedent}, 101 YALE L.J. 969, 980-84 (1992); Peter H. Schuck & E. Donald Elliott, \textit{To the Chevron Station: An Empirical Study of Federal Administrative Law}, 1990 DUKE L.J. 984, 1058-59.

\textsuperscript{131} See, e.g., \textit{Freeman Eng'g Assocs., Inc. v. FCC}, 103 F.3d 169, 178 (D.C. Cir. 1997); Adams v. EPA, 38 F.3d 43, 49 (1st Cir. 1994); cf. \textit{Paralyzed Veterans}, 117 F.3d at 584 (suggesting that, as \textit{Chevron} deference has increased, the two standards actually have converged).
agency's interpretation of the text is plainly erroneous rather than attempting to determine its original intent. They seem largely unconcerned that this creates incentives for agencies to promulgate excessively vague legislative rules that leave the more difficult task of specification to the more flexible and unaccountable process of later "interpreting" these open-ended regulations.

C. The Continuing Relevance of Original Agency Intent

Even with this deeply ingrained tradition of deference, courts may have to search for an agency's original intent in order to determine whether the latest view espoused by the incumbent administration deserves to be regarded as authoritative. Rather than largely abandoning the rule of deference, as at least one commentator has suggested, courts could assume a greater role in applying the reasonableness requirement by paying closer attention to the text of an existing rule and also giving at least some attention to its regulatory history before accepting the agency's current reading. Agencies would not lose all flexibility to adopt evolving interpretations, but they would face greater constraints on the range of permissible readings of their own regulations than they do at present. This more cautious approach might parallel what the Supreme Court has done recently when it resolves more *Chevron* questions at step one.

132. See Manning, *supra* note 7, at 680-90 (advocating that *Seminole Rock*’s strong form of deference be substituted with an approach more similar to old-style *Skidmore* deference for agency interpretations of statutes, which would instruct courts to reach an independent judgment about the meaning of a regulation while taking into account and assigning appropriate weight to whatever expertise or persuasive arguments an agency might have to offer). But cf. Robert A. Anthony & David A. Codevilla, *Pro-Ossification: A Harder Look at Agency Policy Statements*, 31 WAKE FOREST L. REV. 667, 686-88 (1996) (incorrectly suggesting that *Skidmore*’s weak deference remains the standard for reviewing interpretive rules, whether they construe language in a statute or a legislative rule, though their emphasis on the format in which the interpretation is issued as opposed to the character of the document subject to interpretation may account for this mistake). For one rare recent example of a court using the *Skidmore* test in reviewing an agency’s interpretation of an ambiguous regulation, see *Reich v. Newspapers of New England, Inc.*, 44 F.3d 1060, 1070-73 (1st Cir. 1995). See also *Sekula v. FDIC*, 39 F.3d 448, 453 & n.13 (3d Cir. 1994). Other opinions do, of course, reflect varying degrees of deference, but they generally enunciate a more forgiving standard of review and, in practice, usually give the agency’s view controlling weight.

occasionally even consulting legislative history to decide that Congress thereby had spoken unambiguously to the precise question at issue.134

As explained in the sections that follow, an agency’s original intent might matter in several ways. First, in any number of contexts, expressions of intent found in pre-enactment materials could provide a benchmark for assessing the reasonableness of an agency’s post-promulgation interpretation of ambiguities in the text of a legislative rule. Second, and more particularly, attention to original intent could help courts enforce the APA’s procedural requirements governing the amendment of a regulation. Third, because agencies may not appear in litigation where questions about the meaning of their rules arise, they may not be in a position to offer courts post-promulgation guidance. Finally, treating administrative history as reliable guidance addresses the concern that regulated parties receive fair notice of their legal rights and obligations. Although these contexts and uses overlap, they help illustrate the many situations in which pre-promulgation materials can assist in the interpretive process.

(1) Providing a Benchmark for Evaluating Interpretations

An agency’s interpretation of its own regulations must be minimally reasonable. Verbal formulations of the degree of deference vary, ranging from the “plainly erroneous” test that the Supreme Court has emphasized to a more skeptical version that considers inconsistencies with earlier interpretations and the quality of the agency’s explanation for its latest construction of a regulation. Whatever the announced standard, courts show tremendous deference in practice, though on occasion they have rejected agency interpretations as unreasonable.135 More importantly for present purposes, most courts suggest measuring the agency’s interpretation only against the unadorned text of the regulation, others refer to both the text and underlying purpose, and only a few add mention of the agency’s intent at the time that it promulgated the regulation.136

---


136. For examples of the latter formulation, see In re Transcon Lines, 89 F.3d 559, 567 (9th Cir. 1996); SSM Rehab. Inst. v. Shalala, 68 F.3d 266, 269-71 (8th Cir. 1995) (relying on agency statements in the preamble accompanying the rule in question, and rejecting a hospital’s attempt to contradict these with statements in a subsequent preamble explaining a proposed amendment to the regulation); United States v. Boynton, 63 F.3d 337, 342, 344 (4th Cir. 1995); Knapp Shoes, Inc. v. Sylvania Shoe Mfg. Corp., 640 N.E.2d 1101, 1105 (Mass. 1994) (evaluating the text, context, and history in order to determine what the state
though not reflected in its practice, the latter formulation most closely approximates the Supreme Court's announced guidance. As one lower court explained, only if it could not find a plain meaning of the text, and if the agency had not later provided any interpretation to which it could defer, would the court bother to inquire about the history and purpose of the regulation. Thus, some judges seek out original agency intent in rulemaking only as a last resort.

Deference only comes into play if the meaning of a regulation is "doubtful or ambiguous." In searching for the plain meaning of a regulation, courts sometimes deploy textualist conventions such as canons of construction. Thus, judges usually prefer interpretations that avoid possible constitutional conflicts. For instance, just as the Supreme Court has imposed a clear statement rule when Congress wishes to preempt state law in order to protect values of federalism, it

137. See Gardebring v. Jenkins, 485 U.S. 415, 430 (1988) ("[W]e are properly hesitant to substitute an alternative reading for the Secretary's unless that alternative reading is compelled by the regulation's plain language or by other indications of the Secretary's intent at the time of the regulation's promulgation." (emphasis added) (quoted with approval in Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 512 (1994))); Jewett v. Commissioner, 455 U.S. 305, 312 (1982) ("[T]he text of the Regulation supports the Commissioner's interpretation. Because that text is not entirely clear, however, it is appropriate to examine briefly the Regulation's history."). Although this language usefully draws attention to an agency's original intent, how often will a court feel "compelled" on this basis to reject an agency's subsequent interpretation? For one such rare case, see S.G. Loewendick & Sons, Inc. v. Reich, 70 F.3d 1291, 1295 (D.C. Cir. 1995).

138. See United States v. Heller, 726 F.2d 756, 762 (Temp. Emer. Ct. App. 1983); id. at 763 ("Finding the rule's language ambiguous, and receiving no administrative guidance, we turn to the regulation's history and purpose."); see also North Haven Bd. of Educ. v. Bell, 456 U.S. 512, 538-39 & n.29 (1982) (looking to the preamble for evidence of agency "intent" only after finding no consistent post-promulgation agency interpretation to which to defer); Cash v. Conn Appliances, Inc., 2 F. Supp. 2d 884, 891 (E.D. Tex. 1997) ("If the Administrator offers no statement settling the rule's meaning, then a court resorts to other interpretive tools.").

139. American Train Dispatchers Ass'n v. ICC, 54 F.3d 842, 848 (D.C. Cir. 1995); see also id. at 853 (Wald, J., dissenting) ("[D]eference is not due when the agency's interpretation flatly contradicts the only sensible reading of an unambiguous regulation."); Clean Ocean Action v. York, 57 F.3d 328, 333 (3d Cir. 1995) (holding that an agency's interpretation was inconsistent with the plain meaning of its regulation); KCMC, Inc. v. FCC, 600 F.2d 546, 549-52 (5th Cir. 1979) (same).


has applied a similar rule of construction to agency regulations that arguably sought to displace state law, though in this context the Court has endorsed references to pre-promulgation materials to discern an intent to preempt.\textsuperscript{142} In some cases, courts also consult dictionaries,\textsuperscript{143} though the lexicographic fetishism that has emerged recently in statutory interpretation cases has not yet really filtered down to the interpretation of ambiguous regulations. Even so, whatever use that judges may make of textualist tools of construction when confronting an unclear legislative rule, their understanding of original agency intent may affect the reasonableness determination.\textsuperscript{144} For instance, courts that emphasize text but also express wariness about inconsistent interpretations may look to the agency's original expression of intent as the more reliable contemporaneous explanation of a regulation.\textsuperscript{145}

\textsuperscript{142} See Hillsborough County v. Automated Med. Lab., Inc., 471 U.S. 707, 716-18 (1985) (declining to infer an agency's intent to preempt based solely on the promulgation of comprehensive regulations in the field); \textit{id.} at 718 ("[B]ecause agencies normally address problems in a detailed manner and can speak through a variety of means, including regulations, preambles, interpretive statements, and responses to comments, we can expect that they will make their intentions clear if they intend for their regulations to be exclusive."); Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta, 458 U.S. 141, 158 (1982) ("Any ambiguity in [the regulation's] language is dispelled by the preamble accompanying and explaining the regulation. The preamble unequivocally expresses the Board's determination to displace state law."); Symens v. SmithKline Beecham Corp., 152 F.3d 1050, 1053-54 (8th Cir. 1998); Industrial Truck Ass'n v. Henry, 125 F.3d 1305, 1311-14 (9th Cir. 1997) (finding clear OSHA intent that its regulation would preempt state law, especially in the preamble accompanying the final rule); Toy Mfrs. of Am., Inc. v. Blumenthal, 986 F.2d 615, 621-23 (2d Cir. 1992) (finding no such clear intent in the CPSC's failure to issue any regulations); \textit{see also} Jack W. Campbell, IV, \textit{Regulatory Preemption in the Garcia/Chevron Era}, 59 U. PITT. L. REV. 805, 834, 844 (1998) ("Unless the agency has clearly stated its intent to preempt the field, the court should uphold the challenged state law absent an actual conflict with the federal regulations.").

\textsuperscript{143} See, e.g., Auer v. Robbins, 519 U.S. 452, 461 (1997) (citing a pair of dictionaries to confirm that a phrase "comfortably bears the meaning the Secretary assigns"); Rocky Mt. Radar, Inc. v. FCC, 158 F.3d 1118, 1124 (10th Cir. 1998); Walker Stone Co. v. Secretary of Labor, 156 F.3d 1076, 1081-82 (10th Cir. 1998); Empire Co. v. OSHRC, 136 F.3d 873, 878 \& n.2 (1st Cir. 1998); United States v. Tenzer, 127 F.3d 222, 226 (2d Cir. 1997); Gore, Inc. v. Espy, 87 F.3d 767, 773 (5th Cir. 1996).

\textsuperscript{144} See Russell L. Weaver, \textit{Judicial Interpretation of Administrative Regulations: The Deference Rule}, 45 U. PITT. L. REV. 387, 615 (1984) (explaining that a court should "determine[] whether the agency's interpretation is reasonable and whether it is consistent with the regulation's language and purpose, and the agency's intent (to the extent ascertainable) as of the date the regulation was promulgated").

\textsuperscript{145} See, e.g., Shalala v. Guernsey Mem'l Hosp., 514 U.S. 87, 104, 106 (1995) (O'Connor, J., dissenting) (emphasizing the inconsistency in the agency's interpretations of its regulation); Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 515-16 (1994) (conceding that an agency interpretation of a regulation that conflicts with a prior interpretation should receive considerably less deference, but finding no such earlier post-promulgation interpretation that conflicted with the agency's current considered view);
(2) Enforcing the APA's Rulemaking Procedures

In one of its recent separation-of-powers decisions, the Supreme Court took the following position: "If the power is legislative, Congress must exercise it in conformity with the bicameralism and presentment requirements of Art. I, § 7."\(^{146}\) In parallel, one could say that, if the power is legislative rulemaking, agencies must exercise it in conformity with the notice-and-comment requirements of APA § 553.\(^{147}\) Indeed, to grant "controlling weight" to agency interpretations of their own regulations unless such constructions are "plainly erroneous," as the Supreme Court has instructed ever since Seminole Rock,\(^ {148}\) may conflict with separation-of-powers principles by lodging primary and largely conclusive interpretive power in the same entity that exercises the lawmaking function.\(^ {149}\)

Whatever one's view of the seriousness of this constitutional objection, the stated rationale for treating agency interpretations as authoritative rests on the debatable ground that current officials can best identify their predecessors' original intent.\(^ {150}\) rather than the sug-

Malcomb v. Island Creek Coal Co., 15 F.3d 364, 369 (4th Cir. 1994) (declining to defer to an agency's "shockingly inconsistent" interpretation of its own regulation).


147. See 5 U.S.C. § 553(b) & (c) (1994); see also Manning, supra note 7, at 694 ("If the Court were to overturn Seminole Rock, agencies would no longer be in a position to enjoy the often-substantial benefits of rulemaking without bearing the full deliberative-process costs that the APA contemplates.").


149. See Manning, supra note 7, at 631 ("By permitting agencies both to write regulations and to construe them authoritatively, Seminole Rock effectively unifies lawmaking and law-exposition—a combination of powers decisively rejected by our constitutional structure."); id. at 654 (same); see also id. at 639, 696 (distinguishing this form of deference from Chevron, which simply reallocated the power to interpret properly enacted congressional legislation from courts to agencies). If correct, one could lodge a similar objection to the rules of procedure that the Supreme Court both formulates and interprets (as described below), an issue that Professor Manning does not confront. Cf. id. at 648 n.175 (distinguishing the judiciary's subsequent interpretation of its own precedents from agency interpretations of their regulations).

150. See Martin v. OSHRC, 499 U.S. 144, 152-53 (1991) (explaining that the agency "is in a better position ... to reconstruct the purpose of the regulations in question," in part because of its "historical familiarity"); I KENNETH CULP DAVIS & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 6.10, at 282 (3d ed. 1994) (referring to the "common sense" notion underlying this well-settled rule of deference that an "agency typically is in a superior position to determine what it intended when it issued a rule, how and when it intended the rule to apply, and the interpretation that makes the most sense given the agency's purposes in issuing the rule"); see also Paralyzed Veterans of Am. v. D.C. Arena L.P., 117 F.3d 579, 585 (D.C. Cir. 1997) ("We do not defer, however, to an administrative agency's interpretation solely because its employees are the drafters and presumably have superior knowledge as to what they intended.... [T]he doctrine of def-
gestion that current officials can better adapt the rule to new circumstances. Otherwise, courts would condone efforts to avoid notice-and-comment rulemaking requirements. As several members of the Supreme Court have explained in recent dissenting opinions, "[a]n agency is bound by the regulations it promulgates and may not attempt to circumvent the amendment process through substantive changes recorded in an informal policy manual that are unsupported by the language of the regulation."

Courts allow agencies to alter interpretations of their enabling statutes so long as they justify such revisions. This recognizes the fact that Congress often delegates policymaking responsibilities to agencies but generally not the power to alter the statutory language directly. In contrast, agencies do enjoy the power to amend their

\*\*\*\*

\*151. See, e.g., Pettibone Corp. v. United States, 34 F.3d 536, 541-42 (7th Cir. 1994) (rejecting the IRS's claim that it could update an obsolete regulation by reinterpreting it). \*152. See 5 U.S.C. § 551(5) (1994) (defining rulemaking to include "amending, or repealing a rule"); Hoctor v. USDA, 82 F.3d 165, 171 (7th Cir. 1996); National Family Planning & Reprod. Health Ass'n v. Sullivan, 979 F.2d 227, 235-40 (D.C. Cir. 1992) (holding that an agency could not "amend" a rule through interpretation); American Fed'n of Gov't Employees v. FLRA, 777 F.2d 751, 759 (D.C. Cir. 1985).

\*153. Shalala v. Guernsey Mem'l Hosp., 514 U.S. 87, 110-11 (1995) (O'Connor, J., dissenting); see also id. at 111 (emphasizing that interpretive rules "must explain existing law and not contradict what the regulations require"); Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 525 (1994) (Thomas, J., dissenting). Together, these two dissents reflect the views of six members of the current Court, and the majority opinions in both cases did not question their basic premise.


\*155. In rare instances, Congress has given agencies the power to modify statutory requirements directly. See 26 U.S.C. § 163(i)(5)(A) (1994) (IRS); 47 U.S.C. § 203(b)(2)
own regulations if necessitated by changed circumstances, in which case amendatory "interpretations" of legislative rules should be less acceptable than revised administrative interpretations of statutory language.\textsuperscript{156} Thus, the relative ease of amending a regulation through informal rulemaking procedures, at least as compared to the inertia and other difficulties encountered by Congress,\textsuperscript{157} should make judges less shy about interpreting an ambiguous legislative rule according to the agency's original intent as expressed in pre-promulgation materials.\textsuperscript{158} If a legislative rule must evolve to meet unforeseen contingencies, agencies should be able to reinterpret their rules in a manner consistent with their original intent. See Martin Shapiro, \textit{APA: Past, Present, Future}, 72 VA. L. REV. 447, 453 (1986) (explaining that the informal rulemaking procedures originally had been designed as a less cumbersome method for legislating); Nicholas S. Zeppos, \textit{Deference to Political Decision-makers and the Preferred Scope of Political Review}, 88 NW. U. L. REV. 296, 328 (1993) (noting that it is relatively easier for agencies to make federal law than it is for Congress). Obviously, agencies find it easiest to "amend" a regulation by reinterpretation rather than through rulemaking, which has become more cumbersome over time. Moreover, a number of the deferential decisions on this question arose in the wage and price control context, where agencies needed to react quickly in the face of changing conditions. Nonetheless, the APA's good cause exception exists to allow streamlined rulemaking procedures in cases of genuine necessity. See 5 U.S.C. § 553(b)(B) (1994); see also Lars Noah, \textit{Doubts About Direct Final Rulemaking}, 51 ADMIN. L. REV. 401, 412-16 (1999) (criticizing recent efforts to use this exception routinely to avoid notice-and-comment procedures for non-controversial regulations).

\textsuperscript{156} See Syncor Int'l Corp. v. Shalala, 127 F.3d 90, 94-95 (D.C. Cir. 1997) (suggesting that agencies deserve somewhat less freedom to construe their own regulations through the issuance of interpretive rules than they have in the case of statutes because, "[o]therwise, the agency could evade its notice and comment obligation by 'modifying' a substantive rule that was promulgated by notice and comment rulemaking"); American Train Dispatchers Ass'n v. ICC, 54 F.3d 842, 857 (D.C. Cir. 1995) (Wald, J., dissenting) ("The Commission presumably may take appropriate measures to amend or replace the offending provisions. But those measures should not include reading the current provision to say what it plainly does not say."); Beazer East, Inc. v. EPA, 965 F.2d 603, 611 n.7 (3d Cir. 1992) (same); cf. Paralyzed Veterans of Am. v. D.C. Arena L.P., 117 F.3d 579, 585-86 (D.C. Cir. 1997) (arguing that the rules of deference to agency interpretations of ambiguities in both statutes and regulations rest on the same rationale of an implicit delegation of lawmaking authority, but recognizing that the analogy is not complete because the APA requires notice-and-comment procedures when agencies seek to exercise that delegated power).

\textsuperscript{157} See Martin Shapiro, \textit{APA: Past, Present, Future}, 72 VA. L. REV. 447, 453 (1986) (explaining that the informal rulemaking procedures originally had been designed as a less cumbersome method for legislating); Nicholas S. Zeppos, \textit{Deference to Political Decision-makers and the Preferred Scope of Political Review}, 88 NW. U. L. REV. 296, 328 (1993) (noting that it is relatively easier for agencies to make federal law than it is for Congress). Obviously, agencies find it easiest to "amend" a regulation by reinterpretation rather than through rulemaking, which has become more cumbersome over time. Moreover, a number of the deferential decisions on this question arose in the wage and price control context, where agencies needed to react quickly in the face of changing conditions. Nonetheless, the APA's good cause exception exists to allow streamlined rulemaking procedures in cases of genuine necessity. See 5 U.S.C. § 553(b)(B) (1994); see also Lars Noah, \textit{Doubts About Direct Final Rulemaking}, 51 ADMIN. L. REV. 401, 412-16 (1999) (criticizing recent efforts to use this exception routinely to avoid notice-and-comment procedures for non-controversial regulations).

\textsuperscript{158} See Citizens Awareness Network, Inc. v. NRC, 59 F.3d 284, 291-92 (1st Cir. 1995) (holding that the agency failed to justify an interpretation of its regulation which conflicted with the explanation that it had provided in the preamble accompanying the final regulation); Director, OWCP v. Eastern Associated Coal Corp., 54 F.3d 141, 147 (3d Cir. 1995) ("The responsibility to promulgate clear and unambiguous standards is on the Secretary. . . . If the language is faulty, the Secretary has the means and the obligation to amend."); United States v. Trident Seafoods Corp., 60 F.3d 556, 559 (9th Cir. 1995) (same). This differentiates the construction of agency rules from the rationale for dynamic judicial interpretation of statutes. See supra note 65; see also Henry J. Friendly, \textit{The Gap in Lawmaking—Judges Who Can't and Legislators Who Won't}, 63 COLUM. L. REV. 787, 792-802 (1963) (lamenting Congress's failure to revisit and revise flawed statutes).
cies, the agency has the means at its disposal to revise the regulation directly, so courts need not tolerate the subterfuge of a newly revised interpretation of the original text to accomplish the same end.

The line between permissible and amendatory interpretations is, of course, difficult to define. At the extremes, a document that simply restates and reminds parties of an existing legislative rule need not again undergo the previously completed rulemaking procedures, while a document that contradicts an existing regulation would have to satisfy these procedures in order to rescind the old rule. Between these poles lie documents that clarify ambiguities in—or provide some refinement of—the text of an existing regulation, and those that supplement an existing regulation by filling gaps though not directly altering the meaning of the original text. These closer questions depend on some notion of what meaning to ascribe to the text of the existing regulation. If courts leave that task largely to the agency, then far more will pass muster as simply a clarifying interpretation than as an amendment or rescission for which the agency should have used additional procedures.

One recent procedural challenge to an interpretive rule provides


160. See American Mining Congress v. MSHA, 995 F.2d 1106, 1109, 1110 (D.C. Cir. 1993).

161. See id. at 1112 ("A rule does not, in this inquiry, become an amendment merely because it supplies crisper and more detailed lines than the authority being interpreted."); see also Interport Inc. v. Magaw, 135 F.3d 826, 829 (D.C. Cir. 1998) (sustaining interpretive rule as a gloss on an existing regulation); In re Offshore Management Corp., 111 F.3d 443, 453 (6th Cir. 1997) (same); Clarry v. United States, 85 F.3d 1041, 1049 (2d Cir. 1996) (same).

162. See American Mining Congress, 995 F.2d at 1110-12 (explaining that an interpretive rule cannot go beyond the existing regulation); Chamber of Commerce v. OSHA, 636 F.2d 464, 469 (D.C. Cir. 1980) (distinguishing supplementation from construction); see also Paralyzed Veterans of Am. v. D.C. Arena L.P., 117 F.3d 579, 586-88 (D.C. Cir. 1997); Hctor v. USDA, 82 F.3d 165, 169-71 (7th Cir. 1996) (holding that an agency could not "interpret" a regulation to supply non-existent language); Shalala v. St. Paul-Ramsey Med. Ctr., 50 F.3d 522, 528-29 (8th Cir. 1995) (same); United States v. Picciotto, 875 F.2d 345, 348 (D.C. Cir. 1989) (invalidating on procedural grounds an interpretive rule used to specify an open-ended provision in a legislative rule); supra note 80 and accompanying text (discussing the suggestion that courts should distinguish between "explanation" and "embellishment" when consulting legislative history materials).

163. See Asimow, supra note 3, at 396 ("[W]hen the second rule is consistent with the earlier one . . . there is no principled way to determine whether it amends the prior rule or merely explains, clarifies, or interprets it, and courts by necessity usually defer to an agency's characterization of its intent." (footnotes omitted)).
striking confirmation of this problem. The Mine Safety and Health Administration (MSHA) had issued a series of three “Program Policy Letters” over the course of one year, each superseding its predecessor, in order to define the term “diagnosed” in an existing regulation to include chest x-rays scored as having a certain degree of darkening of the lungs. In deciding that the agency’s latest interpretation did not amount to an amendment of the rule, and therefore did not need to satisfy notice-and-comment requirements, the court consulted relevant definitions appearing in medical dictionaries and guidelines (only one of which pre-dated the fifteen year old rule) and in regulations issued by unrelated federal agencies.164 This approach closely resembles textualism’s emphasis on dictionaries and surrounding context or structure to assist in the search for meaning. The court made no apparent effort to discern MSHA’s original intent, though it had cited the Federal Register notices for the proposed and final rule in the background section of the opinion.165 Perhaps none of the parties drew the court’s attention to the regulation’s administrative history, even though the language in the preamble to the final rule seemed to support the petitioner’s argument that a chest x-ray read by technicians did not, without more, amount to a diagnosis of lung disease as originally understood by the agency.166

Putting aside the inevitable turnover in the upper echelons of an agency, whether prompted by changes in the administration or simply the passage of time, rulemaking requires the collaborative but episodic attention of numerous agency officials,167 so much so that an easily cured flaw identified by a judicial remand just a few years after promulgation may derail an initiative entirely.168 To think that high-

164. See American Mining Congress, 995 F.2d at 1112-13.
165. See id. at 1107. Ironically, the court relied on what it characterized as the “legislative history” of the APA, though the source it quoted from was published after enactment by an agency involved in the drafting of that statute. See id. at 1109 (twice quoting from the Attorney General’s Manual on the APA); see also infra note 201 (explaining the Supreme Court’s longstanding acceptance of the Attorney General’s Manual as a source of legislative history for the APA).
166. See 42 Fed. Reg. 65,534, 65,535 (1977) (describing the obligations under the new legislative rule as “reporting the fact that a doctor has diagnosed an illness”); see also Lars Noah, Pigeonholing Illness: Medical Diagnosis as a Legal Construct, 50 HASTINGS L.J. 241, 259 (1999) (“Federal agencies make numerous decisions that depend on how one defines disease.”). If in fact the petitioners neglected to quote this snippet (putting aside its admittedly minimal illumination of agency intent), this may simply reflect their recognition of the strong tradition of judicial deference to post-promulgation interpretations by agencies and the infrequent citation of language in preambles.
168. See Jerry L. Mashaw & David L. Harfst, Regulation and Legal Culture: The Case of Motor Vehicle Safety, 4 YALE J. ON REG. 258, 295 (1987) (Courts “imagine that remands for further consideration or explanation have a modest effect on an agency’s regulatory
level agency officials will either know or care what their predecessors had in mind many years earlier seems naive; instead, agencies will select the interpretation best suited to the exigencies of the present day.\textsuperscript{169} Just as members of Congress may attempt to manufacture legislative intent, sometimes years after the passage of a bill, rather than go to the trouble of attempting to amend it, agencies may offer contrived reinterpretations of old regulations rather than undertaking the notice-and-comment procedures necessary for adopting a genuine amendment.

(3) Interpreting Regulations During Litigation

One critical difference exists between the interpretation of statutes and regulations by the courts. When the meaning of a statute comes into question during litigation, the author of the text is rarely if ever before the court. Although Congress occasionally participates by filing an amicus brief when someone challenges recent legislation,\textsuperscript{170} the Department of Justice (DOJ) generally represents the policy choice. . . . But this view enormously underestimates the potential impact of a judicial remand . . . .\textsuperscript{169}\textsuperscript{170}

As these commentators elaborated:

Any remand occurs long after the rulemaking docket has been closed and the staff has been reassigned. Often the remand finds the agency with a new administrator and a new agenda. The idea that an agency can or will quickly turn to remediating the factual or analytic defects in its remanded rule is surely naive, however minor those problems might appear in the abstract.

\textit{Id.; see also} American Med. Ass'n v. Reno, 57 F.3d 1129, 1135 (D.C. Cir. 1995) (remanding without vacating a rule so as to minimize the "obvious hardship" to the agency of curing its procedural error).


\textsuperscript{170} See, e.g., Morrison v. Olson, 487 U.S. 654, 659 (1988); \textit{see also} Charles Tiefer, \textit{The Senate and House Counsel Offices: Dilemmas of Representing in Court the Institutional Congressional Client}, LAW & CONTEMP. PROBS., Spring 1998, at 47, 54-55 (discussing congressional defense of statutes). Occasionally, Congress will intervene to support old legislation whose constitutionality the DOJ would not defend. See Adolph Coors Co. v. Brady, 944 F.2d 1543, 1546 (10th Cir. 1991); \textit{see also} Department of Commerce v. United States House of Representatives, 119 S. Ct. 765, 772, 779 (1999) (resolving challenges to Census Bureau interpretation of an old statute brought by private individuals as well as the House of Representatives); Linda Greenhouse, \textit{Justices to Hear Case That Tests Miranda Decision}, N.Y. TIMES, Dec. 7, 1999, at A1 (explaining that the DOJ has refused to defend the constitutionality of an old federal statute designed to override the Court's Miranda decision). Challenges to newly enacted statutes may emanate from members who voted against passage. On the standing of legislators to file such challenges, see
United States in litigation.\textsuperscript{171} Thus, a court will not have the benefit of the views of the institutional author (or, more typically, the author's successor) about the meaning of the statutory text in question.

In contrast, when questions about the meaning of agency regulations arise during litigation, the institutional author (or successor) frequently will be a party to the suit and available to assist judges when grappling with ambiguities. Indeed, unlike legislators who have no legitimate role in the execution of the laws that they write,\textsuperscript{172} agencies must implement the laws that they adopt, and oftentimes judicial review of a regulation will involve the authoring agency directly, whether in defending against a pre-enforcement challenge to a rule or in the course of attempting to enforce the rule against a party.\textsuperscript{173} This difference also suggests, however, that courts need to guard against self-serving agency interpretations. Whatever congruence may have existed between an agency's original intent and a contemporaneous interpretation announced shortly after promulgation, the passage of time will lead to a divergence between the agency's likely original understanding and its current considered view of the rule. In other contexts, ambiguities in a text are construed against the drafter for precisely this reason.\textsuperscript{174} Although courts generally will not credit agency


\textsuperscript{172} See 28 U.S.C. § 516 (1994); see also Case, Inc. v. United States, 88 F.3d 1004, 1011 (Fed. Cir. 1996) (recognizing "that the statutory scheme grant[s] the Department of Justice exclusive and plenary power to supervise and conduct all litigation to which the United States is a party"); Senate Select Comm. on Presidential Campaign Activities v. Nixon, 366 F. Supp. 51, 56 (D.D.C. 1973) (concluding that this provision denies a congressional "litigant the right to sue as the United States").

\textsuperscript{173} See Metropolitan Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc., 501 U.S. 252, 275 (1991) ("Congress may not delegate the power to legislate to its own agents or to its own Members." (footnote omitted)); Bowsher v. Synar, 478 U.S. 714, 726 (1986) ("The structure of the Constitution does not permit Congress to execute the laws; it follows that Congress cannot grant to an officer under its control what it does not possess.").

\textsuperscript{174} See supra Part II.A & B. In rare cases, such questions also may arise in tort litigation brought against an agency. See Berkovitz v. United States, 486 U.S. 531, 545 (1988) ("The parties . . . have given us no indication of the way in which the [agency] interprets and applies the regulations setting forth the criteria for compliance. Given that these regulations are particularly abstruse, we hesitate to decide the question on the scanty record before us.").
interpretations of regulations advanced for the first time by appellate counsel. the Supreme Court has accepted interpretations that an agency first expresses during administrative adjudication that then finds its way into the courts.

Issues of regulatory meaning do not, however, arise only in litigation involving the authoring agency. In some instances, challenges to agency action may turn on the interpretation of regulations issued by another agency, or these questions will arise in the context of a citizen suit to enforce regulatory requirements. In addition, challenges brought by the beneficiaries of federal programs administered by state and local agencies may require an interpretation of regulations promulgated by the federal agency charged with supervising the program but not named as a party to the lawsuit.

175. See United States v. Trident Seafoods Corp., 60 F.3d 556, 559 (9th Cir. 1995) ("No deference is owed when an agency has not formulated an official interpretation of its regulation, but is merely advancing a litigation position."); see also Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 212-13 (1988) ("We have never [deferred] to agency litigating positions that are wholly unsupported by regulations, rulings, or administrative practice.... Deference to what appears to be nothing more than an agency's convenient litigating position would be entirely inappropriate.").

176. See Martin v. OSHRC, 499 U.S. 144, 157 (1991) ("The Secretary's interpretation of the OSH Act regulations in an administrative adjudication, however, is agency action, not a post hoc rationalization of it."); id. at 158 ("[T]he Secretary's interpretation is not under- serving of deference merely because the Secretary advances it for the first time in an administrative adjudication."); see also Auer v. Robbins, 519 U.S. 452, 462 (1997) ("Petitioners complain that the Secretary's interpretation comes to us in the form of a legal brief; but that does not, in the circumstances of this case, make it unworthy of deference."); Gardebring v. Jenkins, 485 U.S. 415, 429-30 & n.16 (1988) (deferring even though "the Secretary had not taken a position on this question until this litigation"); National Wildlife Fed'n v. Browner, 127 F.3d 1126, 1129 (D.C. Cir. 1997) ("The mere fact that an agency offers its interpretation in the course of litigation does not automatically preclude deference to the agency."); Bradberry v. Director, OWCP, 117 F.3d 1361, 1366 (11th Cir. 1997).


179. See, e.g., Thorpe v. Housing Auth., 393 U.S. 268, 276 & 279 n.33 (1969); Clarke v. Alexander, 85 F.3d 146, 152-53 (4th Cir. 1996); Ritter v. Cecil County Office of Housing & Community Dev., 33 F.3d 323, 327-30 (4th Cir. 1994); Jones v. Illinois Dep't of Rehab. Servs., 689 F.2d 724, 728-29 (7th Cir. 1982); cf. Philip J. Weiser, Chevron, Cooperative Federalism, and Telecommunications Reform, 52 VAND. L. REV. 1, 36 (1999) (arguing for similar reasons that state agencies should receive Chevron deference when they must im-
In other cases, purely private disputes will raise such interpretive questions. For example, in tort litigation, the violation of a relevant federal safety regulation may give the plaintiff the benefit of a negligence per se instruction, and agencies sometimes file amicus briefs to offer their assistance to the courts in such cases. In addition, commercial litigation may turn on the meaning of ambiguous federal regulations, and again agencies sometimes file amicus briefs in such cases. Finally, private litigation may involve the assertion of statutory rights that Congress decided to entrust to a federal agency for complement federal statutes).


182. See, e.g., Duvall v. Bristol-Myers-Squibb Co., 65 F.3d 392, 401 n.9 (4th Cir. 1995); Margaret Jane Porter, The Lohr Decision: FDA Perspective and Position, 52 FOOD & DRUG L.J. 7, 9-10 (1997); see also National Broiler Council v. Voss, 44 F.3d 740, 747 & n.9 (9th Cir. 1994) (crediting USDA amicus brief as an interpretation of labeling regulations in the course of declaring a state statute preempted). Such submissions may, however, seek to contradict the plain meaning of the agency's regulation. See Lars Noah, Amplification of Federal Preemption in Medical Device Cases, 49 FOOD & DRUG L.J. 183, 187-88 (1994). Courts will not necessarily credit such interpretations. See United Housing Found., Inc. v. Forman, 421 U.S. 837, 858-59 n.25 (1975); Paralyzed Veterans of Am. v. D.C. Arena L.P., 117 F.3d 579, 589 (D.C. Cir. 1997); cf. American Fed'n of Gov't Employes v. FLRA, 840 F.2d 947, 952 (D.C. Cir. 1988) (explaining that it would not necessarily defer to an agency's interpretation expressed by one of its lawyers in an amicus brief because this did not represent an official position and was offered during a remand proceeding in which the agency had no stake).


Four decisions issued during the final week of the Supreme Court's latest Term amply illustrate this situation. All of the cases involved claims brought under the Americans with Disabilities Act (ADA): one lawsuit against a state agency that turned in part on the meaning of the DOJ's implementing regulations, and the others against private employers that turned in part on the meaning of rules issued by the Equal Employment Opportunity Commission (EEOC) coupled with the Department of Transportation's rules governing certain job qualifications. In each case, the Court emphasized that none of the parties had questioned the validity of these regulations but only disagreed about their reading. In all such instances, judges must decipher the meaning of legislative rules without the benefit of the agency's direct guidance, a posture akin to disputes about statutory meaning that arise in all sorts of litigation that Congress can only watch from the sidelines. Whether or not regulatory officials go to the trouble of filing an amicus brief in such cases, private attorneys and the courts would do well to consult published pre-enactment expressions of agency intent.

(4) Interpreting Regulations in Other Contexts

Whatever courts might do with such extrinsic materials, attorneys who provide regulatory advice to clients routinely consult pre-
post–) promulgation agency pronouncements when attempting to construe the meaning of administrative rules. For example, in tax planning, one often relies on what amounts to a regulatory history of IRS rules, much as one depends on committee reports and explanations for understanding amendments to the Code.\footnote{189} Materials reflecting post-promulgation interpretations are, however, more varied and often less readily available to members of the public and regulated industry than pre-promulgation sources,\footnote{190} and, of course, they lack the relative permanence of a codified regulation and the published explanatory materials that accompany it. As a result, final preambles provide a common source for attorneys to consult when offering opinions about a regulated entity’s rights and obligations.

When problems of inadequate notice arise during administrative enforcement proceedings, reviewing courts may defer to the agency’s unanticipated reinterpretation but soften its impact on the party ensnared by that interpretation.\footnote{191} Other courts will reject such inter-

\fnn{189} See Sheldon I. Banoff, Dealing with the “Authorities”: Determining Valid Legal Authority in Advising Clients, Rendering Opinions, Preparing Tax Returns and Avoiding Penalties, 66 TAXES 1072, 1086-109, 1130-33 (1988) (discussing a hierarchy of 29 categories of administrative authority that may be relevant to tax planning, though noting that preambles have only limited value); see also Linda Galler, Judicial Deference to Revenue Rulings: Reconciling Diverging Standards, 56 OHIO ST. L.J. 1037, 1041-48 (1995) (distinguishing between Treasury regulations, interpretive rules, revenue rulings, and letter rulings).

\fnn{190} See 61 Fed. Reg. 9181, 9182 (1996) (documenting the proliferation of such informal communications at the FDA: “Well over a thousand such [guidance] documents exist.”); American Mining Congress v. MSHA, 995 F.2d 1106, 1108 (D.C. Cir. 1993) (describing a series of three “Program Policy Letters” issued in less than one year—each superseding the previous one and none of them published in the Federal Register—to define a term appearing in the agency’s 15 year old regulation). Even if made available to most of the directly interested parties, persons subject to (or benefitting from) the regulation will have no simple way of determining whether they have before them the latest interpretation, in contrast to the greater ease of checking the currency of a regulation appearing in the C.F.R. and tracing its preamble.

\fnn{191} See United States v. Hoechst Celanese Corp., 128 F.3d 216, 221-23, 225-30 (4th Cir. 1997) (deferring to the agency’s interpretation, but sustaining only those sanctions imposed for conduct occurring after a company received actual notice of the agency’s interpretation where nothing in the rulemaking record had hinted at such an interpretation of the rule); Upton v. SEC, 75 F.3d 92, 98 (2d Cir. 1996); General Elec. Co. v. EPA, 53 F.3d 1324, 1328-34 (D.C. Cir. 1995) (rejecting the imposition of liability, finding that the regulations and post-promulgation letters provided inadequate notice); id. at 1330 (“[T]he interpretation is so far from a reasonable person’s understanding of the regulations that they could not have fairly informed GE of the agency’s perspective.”); Rollins Envtl. Servs. (N.J.) Inc. v. EPA, 937 F.2d 649, 653 (D.C. Cir. 1991) (mitigating civil penalties: “EPA’s misleading imprecision, not Rollins’ lack of acuity, led the company astray. No reasonable reader of this provision could have known that EPA’s current construction is what the agency originally must have had in mind.”); Satellite Broad. Co. v. FCC, 824 F.2d 1, 3-4 (D.C. Cir. 1987) (reversing denial of license application: “The agency’s interpretation is entitled to deference, but if it wishes to use that interpretation to cut off a party’s right, it
pretations altogether and instead urge the agency to use its power to
amend the regulation, on the theory that the inability of regulated
parties to anticipate the agency's construction demonstrates its unreas-
sonableness.192 Thus, concerns about fair notice to regulated entities
of their legal obligations explain why the effort to divine regulatory
intent has such practical importance outside of the private litigation context when agencies directly apply their rules. Although courts ul-
timately may review enforcement decisions, agencies resolve the bulk
of such disputes internally without any judicial scrutiny.

Lawyers who represent clients before agencies frequently utilize
pre-enactment materials in presenting arguments to agency officials,
whether in adjudicatory or rulemaking settings. I can still recall as an
associate poring over old preambles in search of interpretive clues
that would add further authoritative weight to rulemaking comments
or licensing submissions to agencies on behalf of our clients. The
agency officials with whom we dealt appeared to feel somewhat con-
strained by their predecessors' expressions of intent, but I would hate
to think that this endeavor was largely pointless as a theoretical mat-
ner.

In short, private parties inevitably consider explanatory materials
that accompany a rule whenever the text fails to provide a clear an-
swer to a particular question. Courts should endorse rather than un-
dermine the reliability of these materials when questions later arise
about the meaning of a regulation. Otherwise, agencies will get the
message—if they have not gotten it already—that their original intent
means nothing after all and act accordingly,193 leaving regulated enti-

---

192. See, e.g., Georgia Pac. Corp. v. OSHRC, 25 F.3d 999, 1004-06 (11th Cir. 1994) (per
curiam); Diamond Roofing Co. v. OSHRC, 528 F.2d 645, 649 (5th Cir. 1976). This bor-
rows from the canon of construction favoring lenity. See M. Kraus & Bros., Inc. v. United
States, 327 U.S. 614, 621-26 (1946) (plurality opinion) (applying canon of strict construc-
tion to a rule carrying criminal penalties); id. at 622 ("Not even the Administrator's inter-
pretations of his own regulations can cure an omission or add certainty and definiteness to
otherwise vague language."); Sanford N. Greenberg, Who Says It's a Crime?: Chevron
Deference to Agency Interpretations of Regulatory Statutes that Create Criminal Liability,
58 U. PITT. L. REV. 1, 14-25 (1996) (discussing the rule of lenity as applied in cases of
statutory construction).

193. A similar phenomenon has emerged in the wake of Chevron's strong rule of defer-
ence to agencies on statutory interpretation, with at least a few regulatory officials busy
cloaking themselves in that safe haven from the outset of a rulemaking or other proceed-
ties guessing about the precise nature of their legal rights and obligations.

D. Constructing a Regulatory History

Because of the strong tradition of deference to post-promulgation agency interpretations, courts rarely look to pre-promulgation materials when questions about the meaning of ambiguous regulations arise, even though they could benefit from doing so in a variety of contexts. Moreover, when they do inquire about the agency's original intent, courts usually refer only to the preamble accompanying the final rule, which represents the best but hardly only useful source of guidance. This phenomenon is doubling surprising, given the judiciary's continuing readiness to look to legislative histories and the far greater reliability of regulatory histories as guides to an agency's original intent. This section will suggest that courts should reconsider their prevailing approach and make greater use of a wide range of pre-promulgation sources.

Aside from focusing on the text and context of ambiguous language in a legislative rule, or more frequently deflecting the task altogether by simply deferring to an agency's post-promulgation interpretation, courts could consider a variety of materials as providing evidence of an agency's original intent in promulgating a regulation. "The informal rulemaking process... often will result in the creation of a legislative history more useful and reliable than that of a statute.' Possible materials include the preamble accompanying the

instead of attempting to offer persuasive explanations defending the reasonableness of their preferred interpretations and then only later, in defending against a judicial challenge, invoking Chevron as a kicker. See, e.g., 63 Fed. Reg. 35,117, 35,121, 35,124 (1998) (FHPB); 61 Fed. Reg. 51,599, 51,603-04 (1996) (EPA); 61 Fed. Reg. 44,396, 44,402, 44,415 n.31, 45,221, 45,252 (1996) (FDA); see also Bernard W. Bell, Using Statutory Interpretation to Improve the Legislative Process: Can It Be Done in the Post-Chevron Era?, 13 J.L. & POL. 105, 128 (1997) ("[C]ourts have reviewed agencies' ultimate interpretations of statutes to determine whether they are within the 'zone of indeterminacy,' but have not examined the interpretive methodologies that form the basis of those decisions."); Mark Seidenfeld, A Syncopated Chevron: Emphasizing Reasoned Decisionmaking in Reviewing Agency Interpretations of Statutes, 73 TEX. L. REV. 83, 109-11 & n.157 (1994) (criticizing the agency's failure to justify a revised statutory interpretation designed to support the abortion gag rule).

194. Weaver, supra note 7, at 711. As Professor Weaver elaborated:

Courts must treat regulations differently than statutes because agencies generate different types of interpretive materials than do legislatures. Instead of committee reports, explanations of committee chairmen, records of debate and the other materials that legislatures typically create, agencies prepare notices of proposed rulemakings, draft rules, regulatory analyses and other documents. Courts have not thoroughly considered which of these materials should be used for interpretive purposes...
final rule, regulatory analyses of various sorts prepared in tandem with promulgation of the final rule, notices of proposed rulemaking and similar published documents, internal agency memoranda, and even the recollections of persons involved in the formulation of the rule. This hierarchy superficially resembles the sorts of materials utilized in preparing a legislative history of a statute, but, when courts bother to inquire about original agency intent, they have approached these sources of regulatory history differently, in part because the correspondence to pre-enactment legislative materials is inexact. In fact, administrative rulemaking may have more in common with the work performed by congressional committees than by the full legislature when considering a bill, though the pedigree of the materials generated by agencies during this process generally is a good deal less suspect than committee reports.

(1) **Final Preambles**

The preamble that accompanies a final rule when it is published in the *Federal Register* represents the most obvious source of guidance, and courts occasionally do look to preambles for clues about an agency’s original intent. As Justice Thurgood Marshall explained in a dissenting opinion, the preamble to a final rule provides “strong

---

Id. at 683 (footnotes omitted); see also id. at 711-17 (suggesting that courts look to NPRMs and preambles to final rules or other official statements issued during the rulemaking process but not unofficial views expressed by agency employees).

195. See Strauss, *supra* note 2, at 753 (observing that the APA’s basic rulemaking procedures “fairly suggested the parameters of a hearing on legislation, conducted by a legislative committee”); see also Hocott v. USDA, 82 F.3d 165, 171 (7th Cir. 1996) (“[N]otice and comment rulemaking . . . is analogous to the procedure employed by legislatures in making statutes. The notice of proposed rulemaking corresponds to the bill and the reception of written comments to the hearing on the bill.”); United States v. Frontier Airlines, Inc., 563 F.2d 1008, 1013 (10th Cir. 1977) (“The [agency preamble] is a summary of what, in the legislative process, would be gleaned from the hearings and the statements of position which make up the legislative history. The Basis and Purpose Statement is a very significant portion of a regulation when an issue arises as to its application and scope.”).

196. See, e.g., Empire Co. v. OSHRC, 136 F.3d 873, 877-78 (1st Cir. 1998); Ramey v. Gober, 120 F.3d 1239, 1245 (Fed. Cir. 1997) (calling statements in a preamble “powerful extrinsic evidence”); Clarke v. Alexander, 85 F.3d 146, 153 (4th Cir. 1996); Martin v. American Cyanamid Co., 5 F.3d 140, 145-46 (6th Cir. 1993); Martin v. OSHRC, 941 F.2d 1051, 1056-57 (10th Cir. 1991); Vermont v. Thomas, 850 F.2d 99, 103 (2d Cir. 1988); McLaughlin v. ASARCO, Inc., 841 F.2d 1006, 1009 (9th Cir. 1988); Wiggins Bros., Inc. v. Department of Energy, 667 F.2d 77, 88 (Temp. Emer. Ct. App. 1981) (rejecting the argument that only the regulatory materials codified in the C.F.R. may be considered, drawing analogies to other forms of legislative history: “In the construction of the Constitution of the United States, statutes and regulations, the federal rule permits and requires consideration of preambles in appropriate cases.”); UPG, Inc. v. Edwards, 647 F.2d 147, 152 (Temp. Emer. Ct. App. 1981) (“In considering the question of plain meaning, the preamble to the regulation in question must not be disregarded.”).
evidence of regulatory intent.” In the past few years, the United States Court of Appeals for the D.C. Circuit has more clearly endorsed (though only in dicta) reference to such preambles for interpretive guidance. In 1997, the court allowed that “contemporary indications as to what the agency meant by the language used, such as the comments received, could play the same role as legislative history does in both steps of a *Chevron* analysis.” In 1999, the court added that “we have often recognized that the preamble to a regulation is evidence of an agency’s contemporaneous understanding of its proposed rules. . . . Although the preamble does not ‘control’ the meaning of the regulation, it may serve as a source of evidence concerning contemporaneous agency intent.”

The D.C. Circuit may have exaggerated the frequency of its use of preambles for this purpose, but the approach makes perfect sense. After all, the APA requires that agencies “incorporate in the rules adopted a concise general statement of their basis and purpose.”

197. Mullins Coal Co. v. Director, OWCP, 484 U.S. 135, 165 (1987) (Marshall, J., dissenting). Only rarely, however, has the Supreme Court referred to preambles when interpreting agency regulations, and then only in passing. See, e.g., INS v. National Ctr. for Immigrants’ Rights, Inc., 502 U.S. 183, 190 & n.4 (1991) (citing, among other things, the response to public comments published in the agency’s preamble); United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 129-30 & n.7 (1985) (quoting from the preamble, though simply to underscore the Court’s conclusion about the plain meaning of the regulation); see also supra note 142 (preemption cases). In one recent decision that was not framed as involving deference to an agency’s interpretation of an ambiguous regulation, the Court quoted at length from the preamble to support the application of an SEC rule in a misappropriation prosecution. See United States v. O’Hagan, 521 U.S. 642, 674 (1997); cf. *id.* at 698 (Thomas, J., concurring in part and dissenting in part) (criticizing the majority’s selective quotation from this preamble).

198. Paralyzed Veterans of Am. v. D.C. Arena L.P., 117 F.3d 579, 585 (D.C. Cir. 1997); *see also id.* at 586-87 (quoting from the preambles accompanying the proposed and final rule issued by another agency whose guidelines the DOJ adopted but without reiterating the same relevant points in its own preamble).

199. Wyoming Outdoor Council v. United States Forest Serv., 165 F.3d 43, 53 (D.C. Cir. 1999) (concluding, however, that “[t]he preamble language at issue here is as ambiguous as the regulatory text”); *see also* Chemical Mfrs. Ass’n v. DOT, 105 F.3d 702, 708 (D.C. Cir. 1997) (accepting an agency’s narrow interpretation, based on language in the preamble, to resolve a pre-enforcement constitutional challenge to a regulation); Booker v. Edwards, 99 F.3d 1165, 1168 (D.C. Cir. 1996) (sustaining an agency interpretation of a regulation based on consistency with statements in its preamble); National Family Planning & Reproductive Health Ass’n v. Sullivan, 979 F.2d 227, 232-33 (D.C. Cir. 1992) (quoting at length from a preamble in the course of deciding that a subsequent interpretation of the rule amounted to an impermissible amendment).

200. 5 U.S.C. § 553(c) (1994) (emphasis added); *see also* H.R. REP. NO. 79-1980, at 25 (1946) (explaining that the concise statement “should not only relate to the data so presented but with reasonable fullness explain the actual basis and objectives of the rule”); Gary Lawson, *Outcome, Procedure and Process: Agency Duties of Explanation for Legal Conclusions*, 48 RUTGERS L. REV. 313, 315, 325-31 (1996) (arguing that courts should require that agencies explain the basis for their legal conclusions); Mark Seidenfeld, *A Civic
According to a widely-accepted contemporaneous interpretation of the Act, this provision was "important in that the courts and the public may be expected to use such statements in the interpretation of the agency's rules." Thus, Congress evidently viewed the concise statement less as a basis for undertaking judicial review of legislative rules than as a method for providing some further elaboration about their meaning. Moreover, some agencies subsequently adopted regulations promising to adhere to statements of policy appearing in such preambles, thereby further confirming the reliability of such explanations.

Until thirty years ago, preambles generally contained little of substance, providing only a conclusory statement that the agency had considered all public comments received and decided to promulgate the accompanying rule. As courts became more demanding in their substantive review of rules adopted through notice-and-comment procedures, however, agency prolixity increased. Preambles for

*Republican Justification for the Bureaucratic State, 105 HARV. L. REV. 1511, 1547 (1992) (emphasizing the importance of this agency obligation to explain decisions).*

201. ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 32 (1947). The courts have treated this document as authoritative guidance on the APA. *See, e.g.,* Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 218 (1988) (Scalia, J., concurring) (calling it "the Government's own most authoritative interpretation of the APA ... which we have repeatedly given great weight"); Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 546 (1978) (noting that it represents "a contemporaneous interpretation previously given some deference by this Court because of the role played by the Department of Justice in drafting the legislation"). *But cf. John F. Duffy, Administrative Common Law in Judicial Review, 77 TEX. L. REV. 113, 131-34 (1998)* (criticizing this as a source of relevant legislative history because it was prepared post-enactment by an agency with a direct stake in the issues). This interpretation seems consistent with the judicial review provision of the APA, which provides that "the reviewing court shall ... determine the meaning or applicability of the terms of an agency action." 5 U.S.C. § 706; see also Robert A. Anthony, *The Supreme Court and the APA: Sometimes They Just Don't Get It*, 10 ADMIN. L.J. 1, 9-10 (1996) (making this point).


especially controversial rules may respond in detail to public comments in anticipation of defending against a judicial challenge. Although an extreme example, the text of the FDA's 1996 tobacco product marketing regulations occupied only three pages, but the accompanying preamble and appended jurisdictional statement ran almost 1000 pages in the Federal Register.\textsuperscript{205}

As preambles become more detailed and self-consciously drafted in anticipation of substantive challenges, the opportunities for misunderstanding an agency's intent based on some language extracted from this wealth of materials may increase.\textsuperscript{206} Nonetheless, agencies


204. See Thomas O. McGarity, Some Thoughts on "Deossifying" the Rulemaking Process, 41 DUKE L.J. 1385, 1387 (1992) ("Agency explanations for rules are far more lengthy and intricate than they were in the 1960s and early 1970s."). More typically, agencies will avoid the hassles of engaging in notice-and-comment rulemaking whenever possible. See Mark Seidenfeld, Demystifying Deossification: Rethinking Recent Proposals to Modify Judicial Review of Notice and Comment Rulemaking, 75 TEX. L. REV. 483 (1997); Paul R. Verkuil, Rulemaking Ossification—A Modest Proposal, 47 ADMIN. L. REV. 453 (1995). This may help explain agencies' preference for amending old rules through reinterpretation. If courts took original intent more seriously and stopped condoning amatory interpretations, agencies may have still another reason to avoid rulemaking in the first place, but this seems unlikely. Instead, agencies may adapt rules to changing circumstances more slowly, which could exacerbate the problem of regulatory obsolescence. Cf. Pettibone Corp. v. United States, 34 F.3d 536, 541-42 (7th Cir. 1994) (rejecting the IRS's claim that it could update an obsolete regulation by reinterpreting it); Harold J. Krent, Reviewing Agency Action for Inconsistency with Prior Rules and Regulations, 72 CHI.-KENT L. REV. 1187, 1251 (1997) ("If forced to comply with preexisting rules, agencies, as a theoretical matter, may be unable to apply new policies to current disputes. Agencies may lose the flexibility to change policy when contemporary technological or financial realities so dictate.").


206. See, e.g., Seneca Oil Co. v. Department of Energy, 712 F.2d 1384, 1398 (Temp. Emer. Ct. App. 1983) (concluding that the arguments of the regulated parties gave "undue predominance and effect to minor disconnected and imprecise language of the preamble, selected out of context"); see also Frank B. Cross, Shattering the Fragile Case for Judicial Review of Rulemaking, 85 VA. L. REV. 1243, 1311 & n.367 (1999) (arguing that agencies craft their preambles with a view toward litigation); Manning, supra note 7, at 690 (noting
may provide precise guidance in preambles that courts should not later allow officials to ignore. For instance, a preamble may have included reassurances in response to comments that expressed concerns about particular applications of a proposed rule, and the agency should not subsequently interpret the rule otherwise.207

One must not confuse regulatory preambles with statutory preambles. On occasion, Congress will include a series of findings or purposes in a bill,208 and these statements will have run the gauntlet of bicameralism and presentment along with the rest of the text of the statute, though ironically the Supreme Court rarely cites these sections when looking for expressions of intent.209 Preambles that accompany a final rule will not themselves have undergone notice-and-comment procedures,210 though they have emerged from such proce-

that the anticipation of searching judicial review in the event of a substantive challenge to a rule "may well distract agencies from using the statement of basis and purpose as a device for coherent explanation of regulatory meaning"). Conversely, if courts gave undue attention to preambles when construing ambiguous rules, agencies may do what legislators have done with the Congressional Record—namely, spice these up with misleading expressions of intent. Cf. id. at 690 n.372 ("Overreliance [by reviewing courts on preambles for interpretive guidance] could distort the rulemaking process by tempting agencies to slip desired points into their statements of basis and purpose rather than including them in the text of a regulation.").

207. See Caruso v. Blockbuster-Sony Music, 193 F.3d 730, 737 n.6 (3d Cir. 1999) ("When the 'legislative history' of an administrative regulation evinces an intent not to cover a certain subject matter, the notice-and-comment requirements of the APA cannot be evaded merely by interpreting an existing regulation to cover subject matter consciously omitted from its scope." (quoting the lower court's opinion with approval)).

208. See, e.g., Dietary Supplement Health and Education Act of 1994, Pub. L. No. 103-417, § 2, 108 Stat. 4325, 4325-26 (enumerating more than a dozen findings); Consumer Product Safety Act, Pub. L. No. 92-573, § 2, 86 Stat. 1207, 1207-08 (1972) (codified at 15 U.S.C. § 2051 (1994)); Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922, 922-23; see also Spence, supra note 60, at 600 n.76 (noting that almost 10% of the statutes enacted by the 102d Congress included "policy" or "purpose" sections); id. at 617 (urging Congress more frequently to include such findings, or statements of policy and intent, in the text of statutes as a response to the judiciary's increased textualism).

209. See Schacter, supra note 27, at 26-27. For one such example, see Boggs v. Boggs, 520 U.S. 833, 845 (1997). Even more recently, the Court relied on such a finding to infer an intent for a more limited coverage of a statute than claimed by the litigants. See Sutton v. United Air Lines, Inc., 119 S. Ct. 2139, 2147-49 (1999) (emphasizing that, because the ADA included a finding that 43 million Americans had disabilities, Congress could not have intended to include persons with easily corrected infirmities such as near-sightedness because that group exceeds 160 million Americans); cf. Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 19 & n.14 (1981) (holding that a statutory preamble simply offered findings but did not create any substantive rights); Jurgensen v. Fairfax County, 745 F.2d 868, 885 (4th Cir. 1984) (same).

210. The only exception is the occasional codification of a short introduction with the text of the regulation. See Pauley v. BethEnergy Mines, Inc., 501 U.S. 680, 711-12 (1991) (Scalia, J., dissenting) (quoting an introductory section to help interpret the meaning of a set of rules); Industrial Truck Ass'n v. Henry, 125 F.3d 1305, 1312 n.7 (9th Cir. 1997) (dis-
and one could argue that they simply represent a "logical outgrowth" of the proposal, which would obviate the need for further notice-and-comment procedures. The occasional congressional practice of ratifying a legislative history at the time of enactment might provide a better analogy to the preambles that accompany a regulation.

A similar parallel might be drawn to the advisory committee notes that accompany the various rules of procedure formulated by the federal courts. Although some commentators have complained about the Supreme Court's recent turn to textualism when interpreting the Federal Rules of Evidence or of Civil Procedure, judges routinely consult these explanatory materials. The federal rules of

tinguishing a codified "purpose" section from the "preamble" published in the Federal Register). Such statements by agencies would more clearly resemble statutory preambles and findings.

211. See Citizens Awareness Network, Inc. v. NRC, 59 F.3d 284, 291 (1st Cir. 1995) (emphasizing that an interpretation expressed in a preamble "was developed through a lengthy notice and comment period, with substantial public participation"); see also Fertilizer Inst. v. EPA, 935 F.2d 1303, 1307-08 (D.C. Cir. 1991) (holding that an interpretation of a statutory term in the preamble does not itself require informal rulemaking); cf. Robert A. Anthony, Which Agency Interpretations Should Bind Citizens and the Courts?, 7 YALE J. ON REG. 1, 55-63 (1990) (arguing that Chevron deference should not extend to agency interpretations of statutes if expressed through interpretive rules and other less formal formats not subject to notice-and-comment procedures).

212. See Air Transport Ass'n of Am. v. FAA, 169 F.3d 1, 6-7 (D.C. Cir. 1999); McLaughlin v. ASARCO, Inc., 841 F.2d 1006, 1010 (9th Cir. 1988); Phillip M. Kannan, The Logical Outgrowth Doctrine in Rulemaking, 48 ADMIN. L. REV. 213 (1996).

213. See, e.g., Civil Rights Act of 1991, Pub. L. No. 102-166, § 105(b), 105 Stat. 1071, 1075; see also Spence, supra note 60, at 616 (suggesting that "Congress should explicitly affirm that legislative history is an integral part of the enacting process"); supra note 51 (mentioning similar interpretive directives from the legislature).

214. See 4 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1029, at 124 (2d ed. 1987) ("In interpreting the rules, the Advisory Committee Notes are a very important source of information and should be given considerable weight. Although these Notes are not conclusive, they provide something akin to a 'legislative history' of the rules ....." (footnotes omitted)); see also Mississippi Publ'g Corp. v. Murphee, 326 U.S. 438, 444 (1946) ("[I]n ascertaining [the Rules'] meaning the construction given to them by the [Advisory] Committee is of weight.").

215. See Randolph N. Jonakait, The Supreme Court, Plain Meaning, and the Changed Rules of Evidence, 68 TEX. L. REV. 745, 783-86 (1990) (criticizing the Court's plain meaning approach as interfering with the dynamic, common law method best suited for interpreting the rules); Moore, supra note 9, at 1076-97, 1107-09 (objecting to the plain meaning approach, which simply may reflect the Supreme Court's own unease about formulating rules in the first place, and advocating a purposive or dynamic approach because these rules differ from statutes and because the advisory committee notes provide only a weak form of legislative history as they do not necessarily reflect what the Court itself had intended). This argument could also be understood as urging the acceptance of post-promulgation interpretive materials that the Court generates by virtue of its dual role as rule-maker and rule-interpreter. See id. at 1094-96.
procedure represent an unusual hybrid between legislative rules promulgated by agencies and regular congressional statutes,216 and the Court occasionally uses a strict plain meaning standard,217 but its more typical approach even today relies heavily on commentary from the advisory committee notes.218 This greater attention to pre-promulgation materials may reflect two distinctive characteristics of the rules of procedure: first, the advisory committee notes are transmitted to Congress in tandem with the text of the rules in the same way that committee reports accompany a bill to the floor; and, second, the Court itself would have to generate any post-promulgation interpretations,219 which is essentially what it does at the time that it interprets a rule in litigation, but such precedent would not yet exist in a case of first impression where the Court must resolve an ambiguity. When construing agency rules, courts should feel no more hesitant about consulting pre-promulgation materials.

216. See Moore, supra note 9, at 1053-61 (explaining that the rules may supersede existing statutes, and that Congress sometimes legislates to amend the rules). In the last decade, the Court's rulemaking process has come to resemble the more open APA notice-and-comment procedures. See id. at 1061-64, 1073; Robert G. Bone, The Process of Making Process: Court Rulemaking, Democratic Legitimacy, and Procedural Efficiency, 87 GEO. L.J. 887, 902-07, 954 (1999) ("[C]ourt rulemaking today more closely resembles a legislative process with broad public participation and interest group compromise than the process of principled deliberation it was originally conceived to be."). This may enhance the utility of explanatory materials that accompany rules in the future. See Moore, supra note 9, at 1093-94 ("In the rules context, the legislative history consists of the comments of the Advisory Committee and the other bodies involved in the promulgation process" even though the Court as the ultimate decisionmaker does not have to issue an explanation. "[I]n the future there is likely to be more extensive rulemaking history from the bodies that have drafted a new Rule or amendment."); cf. Bone, supra, at 953 & n.302 (arguing that future advisory committee notes should provide clearer explanations of the rules).

217. See Pavelic & LeFlore v. Marvel Entertainment Group, 493 U.S. 120, 123-27 (1989) (focusing on the plain meaning of the rule and, in contrast to the dissenting opinion, declining to cite the advisory committee notes in the course of evaluating policy arguments); Schiavone v. Fortune, 477 U.S. 21, 30-31 (1986) (focusing on the plain language of a rule, though finding confirmation in the advisory committee notes).


(2) Regulatory Analyses

Agencies increasingly must prepare regulatory analyses of various types, which may be summarized in the published preamble and made available in full upon request. Congress has added a series of analytical demands that agencies consider the possible consequences of their actions on such things as the environment, small businesses, and paperwork burdens; in addition, executive orders over the years have called on agencies to pay special attention to possible impacts on inflation, business, and federalism. Many of these materials subsequently must be made available to the public.

A number of these analytical requirements direct agencies to consider alternatives and to explain why they decided against adopting these alternatives in favor of the final rule. Obviously, if an agency specifically considers and rejects such alternatives to a regulation that it promulgates, it should not subsequently interpret the regulation as if it encompassed one or more of those alternatives all along. Nonetheless, so far it appears that no court has credited such materials in the course of interpreting an ambiguous agency regulation.

These analytical requirements do not simply seek to discipline agency decisionmaking. They also create documentation that other institutions rely on in assessing a new legislative rule. All three branches of government look to these regulatory analyses when reviewing administrative action. In particular, "report-and-wait" mechanisms sometimes provide Congress with the opportunity to consider overriding certain types of regulations. Since 1996, Con-

---

220. See Noah, supra note 157, at 404-05 (summarizing these various analytical requirements); see also Associated Fisheries of Maine, Inc. v. Daley, 127 F.3d 104, 111-18 (1st Cir. 1997) (rejecting a challenge to a final regulatory flexibility analysis).


222. Cf. Pfizer Inc. v. Heckler, 735 F.2d 1502, 1509-12 (D.C. Cir. 1984) (holding that the "language in the Inflation Impact Statement cannot control the plain meaning of the [maximum allowable cost] regulation," and adding in dicta that it would not give the statement much attention even in the case of an ambiguity, especially where it was inconsistent with the NPRM, and that the statement did not support the company’s preferred interpretation in any event); Seneca Oil Co. v. Department of Energy, 712 F.2d 1384, 1393, 1400 (Temp. Emer. Ct. App. 1983) ("[t]he regulatory analysis is a lengthy unreliable inferior source.... This selected isolated paragraph of an unreliable inferior source cannot be treated as controlling....").

gress has demanded that agencies transmit all rules to it accompanied by any available cost-benefit and other regulatory analyses. Whether or not one defends this procedure as a realistic method for promoting accountability, Congress thereby has assumed that the accompanying explanatory materials have some reliability. For an agency to disregard such contemporaneous interpretations at a subsequent date would amount to a "bait-and-switch" strategy.

Here one might draw an analogy to the interpretation of international treaties based on their negotiating history (travaux préparatoires) and the explanations provided by State Department officials to secure Senate ratification. Several scholars have criticized claims made by members of the executive branch that the President need not abide by such explanations when later choosing to reinterpret an international treaty. Otherwise, these critics argue, Presidents would manage to amend treaties without satisfying the ratification procedures specified in the Constitution. For similar reasons, the regula-


225. Cf. National Family Planning & Reproductive Health Ass'n v. Sullivan, 979 F.2d 227, 231, 234, 236 (D.C. Cir. 1992) (emphasizing repeatedly that, where an agency had announced an interpretation of a rule accepted by the Supreme Court in the course of resolving a challenge to its validity, the agency could not subsequently alter its reading but would have to amend the rule by notice and comment). One could make the same point about congressional testimony by agency officials, which may derail legislative proposals to override or supplement a regulation. Cf. Brown & Williamson Tobacco Corp. v. FDA, 153 F.3d 155, 168-71 (4th Cir. 1998) (holding that an agency's interpretation of a statutory provision that conflicts with an earlier interpretation is entitled to less deference than a consistently held agency view), cert. granted, 119 S. Ct. 1495 (Apr. 26, 1999) (No. 98-1152). Courts have not, however, generally given such testimony much credence as a basis for interpreting a regulation. See Paralyzed Veterans of Am. v. D.C. Arena L.P., 117 F.3d 579, 587 n.6 (D.C. Cir. 1997); see also William N. Eskridge, Jr., Interpreting Legislative Inaction, 87 MICH. L. REV. 67, 127-28, 130-31 (1988) (cataloging the Supreme Court's inconsistent treatment of apparent legislative acquiescence in agency interpretations of a statute).

tory analyses and other explanatory materials that agencies now must transmit to Congress should set comparable limitations on subsequent agency reinterpretations of a rule.

In contrast, the Supreme Court recently rejected a suggested parallel between the advisory committee notes to the rules of procedure and the official commentary issued by the U.S. Sentencing Commission to further clarify its guidelines, precisely because the latter may not appear until after Congress has acquiesced in the sentencing guidelines presented for its consideration.227 Like the federal rules of procedure, sentencing guidelines do not take effect until after surviving a report-and-wait process. Congress has six months within which to review new guidelines if it wishes to block them with a resolution of disapproval, but the Commission subsequently may revise its commentary without again going before Congress. Nonetheless, the Court held that the commentary "binds" judges by virtue of the rule of deference to post-promulgation interpretations of regulations by agencies.228 Putting aside the questionable retention and extension of that rule of deference, the Court's analysis suggests that, at least since Congress began reviewing new agency rules in 1996, preambles and regulatory analyses may have a better pedigree by virtue of that report-and-wait system and, therefore, deserve closer attention from the courts than they have received in the past, more akin to the respect given to the advisory committee notes that accompany the federal rules of procedure.229

227. See Stinson v. United States, 508 U.S. 36, 43-44 (1993) ("We do not think it helpful to treat commentary as a contemporaneous statement of intent by the drafters or issuers of the guideline, having a status similar to that of, for example, legislative committee reports or the advisory committee notes to the various federal rules of procedure and evidence."). By comparison, advisory committee notes accompany federal rules of procedure when sent to Congress and are not subsequently modified, so the Supreme Court might resist adopting novel interpretations after the fact. Cf. Harris v. Nelson, 394 U.S. 286, 298 (1969) ("We have no power to rewrite the Rules by judicial interpretations. . . . [An expansive interpretation must have been] within the purpose of the draftsmen or the congressional understanding.").

228. See Stinson, 508 U.S. at 44-46; id. at 46 ("Amended commentary is binding on the federal courts even though it is not reviewed by Congress . . . ."); see also id. (noting the irony that the Commission had described its commentary as "legislative history" that could provide only some evidence of its intended meaning); cf. Paralyzed Veterans of Am. v. D.C. Arena L.P., 117 F.3d 579, 585 (D.C. Cir. 1997) (emphasizing, in deferring to DOJ's post-promulgation view, that "Congress, by specifically requiring the publication of a technical manual that would further refine or interpret in detail the [ADA] regulation's substantive obligations, contemplated a continuing administration of the regulation").

229. See supra notes 214-19 and accompanying text; cf. Pauley v. BethEnergy Mines, Inc., 501 U.S. 680, 707-08, 712-13, 716-19 (1991) (Scalia, J., dissenting) (arguing that, where Congress has cross-referenced one agency's existing rules in a statutory amendment, a second agency given the responsibility to implement the statute should not receive deference for its interpretation of those regulations but instead that the first agency's intent, to
Other Published Documents

Courts also may look to the notice of proposed rulemaking (NPRM), and any advance notice of proposed rulemaking (ANPRM), for interpretive guidance. Although the APA calls for only sketchy information in the NPRM, courts began remanding rules for inadequate notice when the proposals lacked enough specificity. Just as preambles accompanying final rules became tomes in response to substantive review of the "concise general statement of their basis and purpose," agencies expanded their NPRMs to include both the proposed text of a rule and a preliminary preamble that differs from a final preamble primarily by anticipating rather than responding to public comments. The APA does not require the issuance of ANPRMs, but a few statutes call for them as the initial step in particular rulemaking proceedings, and some agencies have decided to use them routinely for certain classes of regulations.

Although cited only infrequently by the courts, NPRMs can of-
fer valuable guidance about agency intent. For example, the fact that
the originally proposed text contained a particular provision that
does not appear in the final rule, even if not explained in the final pream-
ble, may suggest a conscious decision against addressing that subject
in the regulation (though it might also imply that the agency thought
that the rule already covered it and that separate specification simply
created surplusage).236 In particular, if the preamble to a final rule in-
corporates by reference the agency’s earlier explanation of an aspect
of the rule,237 a court should regard that part of the NPRM as no less
authoritative than the final preamble. In addition, ANPRMs may ex-
plain more clearly than some of the subsequent Federal Register
notices what problems the agency sought to address and some of the
regulatory alternatives that it had originally considered.

Other documents linked to a rulemaking proceeding may not ap-
pear in the Federal Register but could provide further evidence about
the agency’s thinking. For instance, letters denying a petition for re-
consideration may provide guidance238 Informal guidelines may have
served as a precursor for a subsequently promulgated legislative
rule.239 Transcripts of advisory committee meetings or public hear-
ings may help illuminate issues that influenced the agency’s decision-

Local No. 474 v. NLRB, 814 F.2d 697, 712 (D.C. Cir. 1987) ("[A] cardinal principle of the
judicial function of statutory interpretation is that courts have no authority to enforce
principles gleaned solely from legislative history that has no statutory reference point.").

planation, the notice provision [that the agency had proposed revising] was shifted back to
its original, and current, form... [T]his history provides strong support for the conclusion
that the current provision does not extend beyond applicants."); Jewett v. Commissioner,
455 U.S. 305, 312-15 (1982) (discussing a change in a critical term between the proposed
and final rule, which evidently was not explained in the 1958 preamble but in a memoran-
dum sent from the Commissioner of Internal Revenue to the Secretary of Treasury more
than one month earlier); Electronic Eng’g Co. v. FCC, 140 F.3d 1045, 1051 (D.C. Cir.
1998) ("Indeed, the Commission initially proposed that a coordinator return an applica-
tion if it disagrees with a request for a specific frequency, but ultimately decided against
this proposal in its final rules."). Even more clearly, if a regulation amends an earlier
regulation, the differences in text between the two versions can provide evidence of the
agency’s intent. See Sekula v. FDIC, 39 F.3d 448, 455 & n.17 (3d Cir. 1994).


(D.C. Cir. 1968) (referencing the agency’s rationales for denying such a petition in the
course of rejecting a substantive challenge).

239. See Lyng v. Payne, 476 U.S. 926, 939 (1986) (treating an agency’s staff instruction
as a contemporaneous interpretation of a statutory provision subsequently reflected in a
regulation that deserved substantial deference); see also Sekula, 39 F.3d at 456 ("We find it
particularly significant that the agency’s interpretation of the regulation is contained in a
question-and-answer booklet they disseminated to financial institutions for distribution to
the public” both before and after amending the regulation in question.).
making process. Regulated parties may have made commitments memorialized in correspondence with the agency in exchange for concessions in the text of a final rule. The APA requires that agencies make all such documents “available for public inspection and copying.”

In some instances, requirements for more formal rulemaking procedures will produce a hearing record as well as findings of fact and conclusions of law. Because of the enormous time and effort involved in such trial-like proceedings, however, agencies have

240. See Lars Noah & Richard A. Merrill, Starting from Scratch?: Reinventing the Food Additive Approval Process, 78 B.U. L. Rev. 329, 416 & n.383 (1998) (referring to the FDA advisory committee meeting that reviewed olestra); see also Steven P. Croley & William F. Funk, The Federal Advisory Committee Act and Good Government, 14 YALE J. ON REG. 451, 504, 513 (1997) (summarizing requirements that agency advisory committees retain and make available to the public the minutes and any transcripts of their meetings). But cf. San Luis Obispo Mothers for Peace v. NRC, 789 F.2d 26, 44-45 (D.C. Cir. 1986) (en banc) (refusing to inquire into “the collective mental processes” of a multi-member commission by reviewing available transcripts of a closed meeting); Phelps Dodge Corp. v. Federal Mine Safety & Health Rev. Comm’n, 681 F.2d 1189, 1193 n.6 (9th Cir. 1982) (considering the transcript of a public advisory committee meeting, but finding it unilluminating and also not adequate to resolve concerns about the lack of fair notice to regulated entities before the agency pursued an enforcement action because the transcript had not been published in the Federal Register).

241. See 61 Fed. Reg. 3118, 3168-69 (1996) (cross-referencing in the preamble to the final regulation approving the food additive olestra commitments made by the manufacturer in letters received by the agency after the close of the public comment period).

242. 5 U.S.C. § 552(a)(2) (1994); see also 21 C.F.R. § 20.103(a) (1999) (providing for public access to any official FDA correspondence unless otherwise exempt from disclosure); cf. Peter L. Strauss, The Internal Relations of Government: Cautionary Tales from Inside the Black Box, LAW & CONTEMP. PROBS., Spring 1998, at 155, 160 (“[T]he federal government’s web sites are many, yet many seem constructed largely as tourist attractions, rather than serious centers for information dispersal; few if any agencies yet make rule-making or its documents electronically accessible.” (internal quotation marks omitted)). On the question of what properly constitutes an administrative record for purposes of judicial review of an agency rule as it has evolved, see James V. DeLong, Informal Rulemaking and the Integration of Law and Policy, 65 VA. L. Rev. 257, 269-72, 350-53 (1979); William F. Pedersen, Jr., Formal Records and Informal Rulemaking, 85 YALE L.J. 38, 60-82 (1975); id. at 79 (proposing the compilation of a closed rulemaking file). Administrative records have become unwieldy. See Patricia M. Wald, Making “Informed” Decisions on the District of Columbia Circuit, 50 GEO. WASH. L. Rev. 135, 142 (1982) (“The physical impossibility of a single judge (and law clerk) reading every page of a 10,000 page rulemaking record—five years in the making—puts a high priority on organization of that record.” (footnote omitted)).

243. See 5 U.S.C. §§ 553(c), 557(c) (1994); see also Robert W. Hamilton, Procedures for the Adoption of Rules of General Applicability: The Need for Procedural Innovation in Administrative Rulemaking, 60 CAL. L. Rev. 1276, 1286 (1972) (“The final order includes detailed findings of fact and conclusions upon which the order is based. Such findings are typically lengthy and replete with numerous citations to the transcript and documentary exhibits.”).

244. See Robert W. Hamilton, Rulemaking on a Record by the Food and Drug Admini-
largely abandoned formal rulemaking whenever possible. Even so, Congress continues to supplement or “hybridize” the APA’s basic notice-and-comment rulemaking procedures for particular agencies in ways that may provide more complete administrative records and further sources for possible clues about original intent.²⁴⁵

(4) Miscellaneous Materials

Regulated parties may attempt to depose agency officials who were responsible for drafting the regulation or else seek discovery of documents reflecting internal deliberations. Unlike the shield given members of Congress by the speech or debate clause,²⁴⁶ agency officials may have to testify about their decisionmaking where necessary to provide a record for judicial review, though courts require this only occasionally in resolving substantive challenges.²⁴⁷ The Freedom of Information Act (FOIA),²⁴⁸ enacted in 1966, became a discovery mechanism for private parties seeking access to internal documents

²⁴⁵. See, e.g., 42 U.S.C. § 7607(d)(4)(B) (1994) (requiring that certain EPA rulemaking proceedings maintain a docket containing, in addition to the NPRM and comments received, drafts of proposed rules submitted for interagency review, and all documents accompanying them and responding to them, as well as the promulgated rule and the various accompanying agency documents which explain and justify it).


that may shed light on an agency's intent, though it exempts pre-decisional deliberative process materials from disclosure. Discovery requests also may be used in an attempt to identify possible procedural irregularities such as improper ex parte communications or impermissible prejudgment by an agency decisionmaker. The advent of negotiated rulemaking, which gives interested parties the opportunity to hammer out a compromise over language that will become the basis for the agency's NPRM, raises a related set of questions about attempting to determine what happened behind the scenes that may have affected the particular form of the regulation ultimately promulgated by the agency.

Although sometimes included in a rulemaking docket, agencies do not routinely publish staff memoranda and similar internal documents, and these materials provide a questionable basis for interpreting a regulation in any event, though in one case the Supreme Court relied on an internal memorandum sent from the Commissioner of Internal Revenue to the Secretary of the Treasury more


252. See 5 U.S.C. §§ 561-570 (1994); USA Group Loan Servs., Inc. v. Riley, 82 F.3d 708, 714-15 (7th Cir. 1996) (rejecting the claim that an agency had acted in bad faith when promulgating a rule that deviated from its announced bargaining position, and declining request for additional discovery of notes kept by participants in the regulatory negotiation); see also William Funk, Bargaining Toward the New Millennium: Regulatory Negotiation and the Subversion of the Public Interest, 46 DUKE L.J. 1351, 1356-65, 1374-87 (1997) (discussing these questions at length); Patricia M. Wald, ADR and the Courts: An Update, 46 DUKE L.J. 1445, 1457-72 (1997) (same); cf. Mark H. Grunewald, The NLRB's First Rulemaking: An Exercise in Pragmatism, 41 DUKE L.J. 274, 290-93 (1991) (quoting from transcripts of the Board's preliminary discussions about proposing a rule).


254. See San Luis Obispo Mothers for Peace v. NRC, 789 F.2d 26, 33-34 (D.C. Cir. 1986) (en banc) (rejecting a public interest group's novel suggestion that a staff report cross-referenced in a footnote to the final rule could restrict the agency's power to interpret that rule differently); cf. National Small Shipments Traffic Conference, Inc. v. ICC, 725 F.2d 1442, 1450-51 (D.C. Cir. 1984) ("At some point . . . staff-prepared synopses may so distort the record that an agency decisionmaking body can no longer rely on them in meeting its obligations under the law.").
than one month before the issuance of a final rule which explained
the rationale for a critical revision to the proposed text.255 In addition,
agency officials may publish articles or otherwise convey their un-
derstanding of the meaning of a newly promulgated regulation, and these
contemporaneous though post-promulgation recollections may pro-
vide some guidance about the original agency intent. For example, in
Seminole Rock, which first announced the rule of deference, the Su-
preme Court looked to a bulletin issued by the agency and designed
to explain the new regulation to the industry.256 Ultimately, however,
such unofficial sources provide a haphazard, potentially unreliable,
and nowadays largely unnecessary basis for identifying the agency's
intent in rulemaking.

Conclusion

This Article has compared the recent ferment about statutory in-
terpretation and the use of legislative histories with the apparent in-
difference about how to interpret agency rules. The contrast usefully
draws attention to some puzzles in the way courts approach the latter
task. These questions merit more attention than they have received
heretofore given the relatively greater prevalence and practical im-
port of legislative rules as compared with statutory commands. Blind
judicial deference to post-promulgation explanations of an agency's
original intent grants executive officials unnecessary and perhaps un-
fair license for creative reinterpretations of a rule. Whatever one
thinks of dynamic judicial approaches to construing statutes, courts
would do well to use intentionalism—whose limitations in the reading
of statutes seem less bothersome in the administrative arena—as a
counterweight to agency tendencies toward dynamism—an interpre-
tative strategy whose supposed advantages seem even less apt in this
case—in construing their own regulations.

In combination with the expansion of preambles and the formal-
ization of administrative records prompted by more searching judicial
scrutiny of informal rulemaking, collateral statutes have expanded the
amount and availability of pre-promulgation materials. The rule of
strong deference to agency interpretations of ambiguous regulations,
in lieu of an inquiry into original intent, emerged at a time when
courts had little else to go on—even though, during that same era,

particular document was published in Tax Notes more than 20 years later).
alyzed Veterans of Am. v. D.C. Arena L.P., 117 F.3d 579, 587 n.6 (D.C. Cir. 1997) (noting
that the subsequent congressional testimony by an agency official about the meaning of a
regulation "is no more probative then would be a congressman's post-enactment testi-
mony as to what Congress intended when it passed legislation").
they showed little compunction about consulting pre-enactment ma-
terials for evidence of legislative intent when construing statutes. The
dearth of readily available information about rulemaking intent in
1945 no longer exists today. During the last thirty years, the quantity
and accessibility of pre-promulgation materials have exploded. More
importantly, these materials pose less of a risk of manipulation or cir-
cumvention of procedures for legislating than do legislative histories.
On the contrary, the alternative of excessive deference to post-
promulgation interpretations invites agencies to sidestep APA proce-
dures. Courts should embrace such valuable interpretive materials
rather than rushing to defer to the interpretation that an incumbent
administration finds most convenient at the moment.