IN DEFENSE OF LEGISLATIVE HISTORY

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"Legislators, like other busy people, often depend on the judgment of trusted colleagues when discharging their official responsibilities."

—*Bank One Chicago, N.A. v. Midwest Bank & Trust Co.*, 516 U.S. 264, 276 (1996) (Stevens, J., concurring).

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INTRODUCTION

Since the 1980s, the United States Supreme Court has been waging a quiet but very public war on the use (some say abuse) of a statute's legislative history to resolve statutory ambiguity.[1] In a paradigmatic case, some justices would look to legislative history—such as a committee report opining on a bill—to work out the intent of the enacting congress and argue its use is fair game; other justices would focus on the text of the statute and argue that extra-textual sources of intent—such as a committee report—are unhelpful and even unconstitutional.[2] In subsequent decades, the so-called textualist approach championed by the late Justice Antonin Scalia succeeded by attrition to become the dominant interpretative approach on the Court.[3]

The ascendancy of textualism, however, should not mean the demise of legislative history as a useful means—and sometimes the only means—of gleaning the intent of Congress. A statute's history often includes analysis of and opinions on the meaning of ambiguous statutory terms and provisions. These pronouncements are often the product of a legislator's expertise and experience in the very subject matter of the law in question.[4] Legislative expertise is a byproduct of each chamber's decentralized law-making processes. The House of Representatives and the Senate are required to delegate much of its work to a committee architecture that is designed to foster and maintain policy specialization in discreet areas of law.[5] This committee structure serves to incentivize subject-matter expertise in a small number of

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[1] *See, e.g.*, Bank One Chicago, N.A. v. Midwest Bank & Trust Co., 516 U.S. 264, 276 (1996) (Stevens, J., concurring); *id.* at 279 (Scalia, J., concurring in part & concurring in judgment); *see also infra* Part III.A (discussing the Supreme Court's stance on the use of legislative history).

[2] *See infra* Part III.A (discussing the Supreme Court justices' views on the use of legislative history to resolve statutory ambiguity).

[3] *See* Justice Elena Kagan, The Scalia Lecture: A Dialogue with Justice Kagan on the Reading of Statutes (Nov. 17, 2015), https://today.law.harvard.edu/in-scalia-lecture-kagan-discusses-statutory-interpretation/ [https://perma.cc/KTU5-LYAZ] (noting that the Supreme Court has adopted textualism as its dominant interpretative approach).

[4] *See infra* Part III (discussing legislative expertise).

[5] *See infra* PartIII.B.1 (discussing Congress' committee architecture).

policy specialists to allow a large body of mostly policy generalists to make law in complex and fast-changing legal environments.[6] This legislative expertise is real and deserves some respect.

As the United States Supreme Court noted over seventy-five years ago in its seminal decision in *Skidmore v. Swift*, an administrator's nonbinding interpretation of ambiguous statutory language based upon her specialized expertise and experience warrants respect.[7] This so-called persuasiveness standard of deference is keyed to the administrative actor's expertise in the agency's subject matter rather than her authority to make binding interpretative rules.[8] Under *Skidmore* and its progeny, a court is obliged to consider whether the expert's nonbinding interpretation is persuasive; if it is, then deference is warranted.[9]

Administrative expertise of an agency actor tasked with solving complex problems is analogous to legislative expertise of a legislator tasked with drafting a bill. A legislator's expertise is a product of Congress' legislative committee structure and the various incentives in place to persuade members to specialize in discreet areas of law.[10] If the Supreme Court is obliged to defer to *administrative experts* opining on the meaning of statutory text within the scope of their expertise, then logic suggests that it should also defer to *legislative experts* opining on the meaning of text within their scope of expertise.

This Article argues that legislative history—the product of legislative expertise—should warrant the same persuasiveness standard of deference that the Court employs for nonbinding administrative interpretations. First, the Article examines judicial deference to administrative expertise under *Skidmore* and its progeny and explains the Supreme Court's persuasiveness standard as applied to nonbinding administrative interpretations. Next, the Article introduces the idea of legislative expertise by

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[6] *See infra* Part III.B.1 (explaining Congress' committee structure and its need for specialization).

[7] *See infra* Part II.A (discussing Skidmore v. Swift & Co., 323 U.S. 134 (1944)).

[8] *See infra* text accompanying notes 27-28 (explaining the basis of *Skidmore* deference).

[9] *See infra* text accompanying note 36 (discussing the meaning of *Skidmore* deference).

[10] *See infra* Part III.B.3 (examining Congress committee architecture and seniority rules).

discussing the United States Congress, its committee structure, and the ways the House of Representatives and the Senate incentive legislators to specialize in discrete subject areas. This Part also examines the Supreme Court's historical use of legislative committee reports and describes how rank-and-file legislators must rely on the expertise of a small number of legislator-specialists. Finally, this Article asserts that legislative expertise warrants the same measure of judicial deference as administrative expertise, because both are the product of specialized knowledge and experience in discrete areas of law. Legislative history is fair game, because it has the "power to persuade."[11]

I. JUDICIAL DEFERENCE TO *ADMINISTRATIVE* EXPERTISE

A. Skidmore v. Swift

In the 1940s, the United States Supreme Court was busy sussing out the scope of judicial review of administrative decisions.[12] One of its more famous decisions is *Skidmore v. Swift*, decided in 1944.[13] The case introduced a measure of judicial deference to non-binding administrative opinions. In *Skidmore*, employees of Swift & Company—a packing plant in Texas—sued the company under the Fair Labor Standards Act of 1938 to recover overtime pay.[14] These employees served as a private fire brigade for Swift. They were hired to maintain the company's fire-fighting equipment and to man a fire hall ready to respond to fire alarms during the day.[15] These employees also agreed to stay in

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[11] *See Skidmore*, 323 U.S. at 140 (describing the weight of deference to administrative interpretations of ambiguous statutes).

[12] *See generally* Universal Camera Corp. v Nat'l Lab. Rel. Bd., 340 U.S. 474 (1951); Packard Motor Car Co. v. Nat'l Lab. Rel. Bd., 330 U.S. 485 (1947); Nat'l Lab. Rel. Bd. v. Hearst Publ'ns, 322 U.S. 111 (1944).

[13] *Skidmore*, 323 U.S. at 134.

[14] *Id.* at 135. The Fair Labor Standards Act, in part, provided for minimum wages, maximum hours, and child-labor restrictions for all employees "engaged in commerce or in the production of goods for commerce." Fair Labor and Standards Act of 1938 §§ 6(a), 7(a) & 12(a), 29 U.S.C.A. §§ 206(a), 207(a) & 212(c) (West, Westlaw through P.L. 116-259).

[15] *Skidmore*, 323 U.S. at 135.

the fire hall a number of nights each week in case of fire.[16] Swift paid the overnight employees only when they responded to a fire alarm and not when they were waiting for a fire alarm.[17] The employees sued and argued that their time spent in fire-hall duty at night waiting for an alarm is working time and thus compensated under the statute.[18] The district court ruled in favor of Swift, concluding as a matter of law that waiting time is not working time under the Fair Labor Standards Act.[19] Thus, the employees were not entitled to overtime pay. The circuit court affirmed.[20]

The United States Supreme Court disagreed with the lower courts, holding "that no principle of law found either in the statute or in Court decisions precludes waiting time from also being

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[16] *Id.* The Court noted that the employees had no other duties overnight at the fire hall other than to answer alarms. *Id.* Evidently, Swift recognized that the employees would spend much of the time in the fire hall waiting to respond to an alarm and thus provided them with beds, a pool table, and other diversions to occupy their time. *Id.* at 136.

[17] *Id.* at 135-36.

[18] *Id.* at 136. Section 7 of the Fair Labor Standards Act states, in pertinent part:

> [N]o employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce . . . for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

Fair Labor Standards Act of 1938 § 7, 29 U.S.C.A. § 207(a)(1) (West, Westlaw through P.L. 116-259).

[19] *Skidmore*, 323 U.S. at 136.

[20] *Id.* The Supreme Court also decided a companion case, *Armour & Co. v. Wantock*, 323 U.S. 126 (1944). The *Armour* case raised almost identical facts to *Skidmore*. *See Armour*, 323 U.S. at 127-28. In *Armour*, the company kept an auxiliary fire-fighting force tasked with maintaining the soap factory's fire-fighting equipment during the day and tasked with responding to fire alarms during the night. *Id.* Unlike the employees in *Skidmore*, Armour & Company paid its employees a single and fixed weekly wage. *Id.* at 128. The Armour & Company employees sued and argued that the Fair Labor Standards Act required the company to pay them overtime when they stayed overnight at the factory waiting for (or responding to) fire alarms. *Id.* The district court found a compromise and held that while the company did have to pay the fire-hall employees overtime, it did not have to pay while the employees ate or slept in the fire hall. *Id.* at 128-9. The United States Court of Appeals for the Seventh Circuit affirmed. *Id.* at 129. The Supreme Court accepted certiorari to resolve a conflict between the Fifth and Seventh Circuits. *Compare* Skidmore v. Swift & Co., 136 F.2d 112 (5th Cir. 1943) (holding overnight fire-hall employees were not entitled to overtime compensation) *with* Wantock v. Armour & Co., 140 F.2d 356 (7th Cir. 1944) (holding overnight fire-hall employees were entitled to overtime compensation).

working time."[21] The Court noted that due to the countless factual circumstances under which such cases may arise, it is hopeless for a court to fashion a workable legal test.[22] Concluding that the trial court erred when it ruled that waiting time is not working time, the Court reversed.[23]

The *Skidmore* Court observed that the district court referred to an agency administrator's Interpretative Bulletin in its decision.[24] But importantly, the lower court did not give the Bulletin any weight—and should have.[25] The Supreme Court had noted in an earlier case that while Interpretative Bulletins "are not issued as regulations under statutory authority, they do carry persuasiveness as an expression of the view of those experienced in the administration of the Act and acting with the advice of a staff specializing in its interpretation and application."[26] Thus, the Court had already recognized the merit of administrative guidance that may not have the force of law but does explicate useful agency standards and practices. Going one step further, the *Skidmore* Court for the first time introduced a test to measure the degree of deference afforded to these nonbinding standards and practices now commonly referred to as *Skidmore* deference.

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[21] *Skidmore*, 323 U.S. at 136.

[22] *See id.* The Court also noted that whether a particular work setting falls within the Fair Labor Standards Act is a question of fact not law. *Id.* at 134-35. The Court stated that the "[f]acts may show that the employee was engaged to wait, or they may show that he waited to be engaged." *Id.* at 137. More accurately, however, the question is really one of ultimate fact—whether a certain result is required when a particular set of facts is applied to the language of the Act.

[23] *Id.* at 140.

[24] *Id*. The office of the Administrator was created by the Fair Labor Standard Act. Section 204(a) created the Wage and Hour Division within the Department of Labor, headed by the Administrator of the Wage and Hour Division. Fair Labor Standards Act of 1938 § 4, 29 U.S.C.A. § 204(a) (West, Westlaw through P.L. 116-259). Congress intended the Administrator to be an Officer of the United States, empowered to appoint inferior officers, to appoint industry-specific committees to recommend minimum wages, to "approve and carry into effect the [committees] recommendations," to investigate and gather data on wage and hour practices, and to "restrain violations" of the Act through injunctive proceedings brought in federal courts. Fair Labor Standards Act of 1938 §§ 4, 5, 8, 11 & 17, 29 U.S.C.A. §§ 204, 205, 208, 211 & 217 (West, Westlaw through P.L. 116-259).

[25] *Skidmore*, 323 U.S. at 140.

[26] Overnight Motor Transp. Co. v. Missel, 316 U.S. 572, 580 n.17 (1942), *superseded by statute as recognized in* Trans World Airlines, Inc. v. Thurston, 469 U.S. 111 (1985).

Before offering its famous test, the Court made its case for deference. First, the Court observed that Congress intended courts to decide cases questioning the Act's wage and hour requirements in particular cases.[27] The Administrator had no statutory authority to adjudicate civil damages or criminal penalties. But Congress did create the office of Administrator and, among other duties, empowered the Administrator to investigate and gather data on industries within the Act's reach and to bring injunctive actions against employers to enforce its standards.[28] Thus, the Court surmised that Congress did intend the Administrator's office to have consequence.

Writing for a unanimous Court, Justice Jackson noted that the Administrator's statutory power to seek injunctions against non-conforming employers required him[29] to assess compliance (or not) with the Act's wage and hour standards and practices.[30] As such, the Administrator "has accumulated a considerable experience in the problems of ascertaining working time in

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[27] *See Skidmore*, 323 U.S. at 137 (citing Kirschbaum Co. v. Walling, 316 U.S. 517, 523 (1942)). Section 10(a) of the Fair Labor Standards Act of 1938 states, in pertinent part, "[a]ny person aggrieved by an order of the [Administrator] . . . may obtain review of such order in the United States Court of Appeals for any circuit . . . by filing in such court, within 60 days after the entry of such order a written petition praying that the order of the Secretary be modified or set aside in whole or in part." Fair Labor Standards Act of 1938 § 10 (a), 29 U.S.C.A. § 210(a) (West, Westlaw through P.L. 116-259). The "order" alluded to in Section 10(a) is not an adjudicative order made after a hearing and on the record, but instead a wage-classification rubric by industry made on the recommendation of an "industry committee" convened for that purpose. *Id.* at § 208.

Section 16 of the Act confers jurisdiction on courts to prosecute "[a]ny person who willfully violates" the Act and to decide civil liability for an employer found to violate the Act. Fair Labor Standards Act of 1938 § 16, 29 U.S.C.A. § 216 (West, Westlaw through P.L. 116-259). Thus, the agency Administrator cannot adjudicate criminal or civil claims in particularized cases.

[28] *Skidmore*, 323 U.S. at 137. Section 11 of the Fair Labor Standards Act of 1938 allows the Administrator to "investigate and gather data regarding the wages, hours, and other conditions and practices of employment in any industry subject to this [Act] . . . to determine whether any person has violated any provision of this [Act], or which may aid in the enforcement of [the Act]." 29 U.S.C.A. § 211(a) (West, Westlaw through P.L. 116-259). Section 11 continues, "[t]he Administrator shall bring all actions under section 17 . . . to restrain violations of this [Act]." *Id.*

[29] The Administrator of the Wage and Hour Division during this period was L. Metcalfe Walling. *See* Marc Linder, *Class Struggle at the Door: The Origins of the Portal-to-Portal Act of 1947*, 39 BUFF. L. REV. 53, 128-29 (1991).

[30] *Skidmore*, 323 U.S. at 137.

employments . . . and a knowledge of the customs prevailing in reference to their solution."[31] Justice Jackson observed that "the Administrator's policies are made in pursuance of official duty, based upon more specialized experience and broader investigations and information than is likely to come to a judge in a particular case."[32] Armed with this experience and expertise, Justice Jackson continued, the Administrator published Interpretative Bulletins to "set forth his views of the application of the Act under different circumstances" to "provide a practical guide to employers and employees as to how the office representing the public interest in its enforcement will seek to apply [the Act]."[33] While not controlling, Justice Jackson concluded, the Administrator's opinions were entitled to respect.[34]

Justice Jackson noted that "while we have given [the Interpretative Bulletins] notice, we have had no occasion to try to prescribe their influence."[35] Until now. Announcing what will be called *Skidmore* deference, Justice Jackson stated:

> We consider that the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later

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[31] *Id.* at 137-38.

[32] *Id.* at 139.

[33] *Id.* at 138. Justice Jackson cited to the Administrator's Interpretative Bulletin 13. *Id.* The Bulletin "endeavors to suggest standards and examples to guide in particular situations" that may involve periods of inactivity. *Id.* According to Bulletin 13, determining when waiting time is working time "depends 'upon the degree to which the employee is free to engage in personal activities during periods of idleness when he is subject to call and the number of consecutive hours that the employee is subject to call without being required to perform active work.'" *See id.* at 138 (citing Wage and Hour Division, Interpretative Bulletin 13).

[34] *Id.* at 139-40. Justice Jackson observed that the Interpretative Bulletin's guidance was not conclusive because it was not the product of adversarial proceedings. *Id.* Neither could the Bulletin announce an authoritative interpretation of the Act nor serve as a precedent that could bind courts because Congress did not delegate that authority to the Administrator. *Id*. at 140. Nevertheless, Justice Jackson concluded that the Administrator's opinion warranted deference. *Id.* at 140.

[35] *Id.* at 139.

> pronouncements, and all those factors which to give it power to persuade, if lacking power to control.[36]

Remarkably, the Supreme Court for the first time recognized the value of official and authoritative guidance not made pursuant to a Congressional grant of rule-making power. The Court acknowledged the significance of the Administrator's specialized experience and expertise in a technical and complex area of law that he was tasked to administer. The result was judicial respect for the Administrator's opinion—not because it was binding but because it had inherent value. Interpretative guidance from an authoritative source on the meaning and application of a statute is entitled to respect.

B. United States v. Mead *and Progeny*

Fifty-seven years after *Skidmore*, the United States Supreme Court confirmed the significance of its decision in *United States v. Mead Corp*.[37] In *Mead*, the Court considered generally whether its consequential *Chevron* decision—decided after *Skidmore*—replaced and overruled *Skidmore*.[38] If *Chevron* did not swallow *Skidmore*, then *Skidmore* deference survives it. The *Skidmore-Chevron* question was called when the United States Customs Service—an executive agency—issued a tariff classification ruling on day planners imported by Mead Corporation.[39]

Certain goods imported to the United States are subject to a tariff.[40] The government determines the appropriate tariff according to a complex and technical regulatory scheme required by the Harmonized Tariff Schedule of the United States, a federal

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[36] *Skidmore*, 323 U.S. at 140. The Supreme Court did not apply its new standard of deference to the case before it. Instead, it ruled that the District Court erred as a matter of law when it concluded that waiting time is not working time under the Fair Labor Standards Act. *Id.* at 136. The Court reversed the ruling and remanded the case back to the District Court. *Id.* at 140.

[37] United States v. Mead Corp., 533 U.S. 218, 221 (2001).

[38] *See id.* at 226-27. The *Mead* Court agreed to resolve whether *Chevron* deference applies to all authoritative agency interpretation of its enabling statute or whether it is limited by the type of administrative action. *Id.* at 226. In particular, the Court considered whether *Chevron* deference is triggered only when an agency acts with the force of law. *Id.* at 226-27.

[39] *Id.* at 221.

[40] *Id.* at 221-22.

statute.[41] Under this scheme, the Secretary of the Treasury is required to promulgate rules and procedures to determine tariffs on imported goods.[42] Exercising this statutory authority, the Secretary published rules requiring Customs Service agents to issue "ruling letters" to determine tariff rates for particular goods at the various ports of entry into the country.[43] The *Mead* Court was careful to describe the origin and nature of these ruling letters. It noted that they are not the product of notice-and-comment rulemaking.[44] The Customs Service may revoke or modify a ruling letter "without notice to any [party] except the person to whom the letter was addressed," limiting the reach of the letter to the named importer thus precluding any third-party reliance.[45] The Court also noted that the ruling letters are issued at forty-six different ports of entry and the Customs Headquarters which when combined release between 10,000 and 15,000 letters each year (at least in 2000).[46]

In the case at bar, the Mead Corporation sought to import three-ring day planners.[47] The planners are subject to a tariff schedule that either assessed them at a 4% duty or no duty at all, depending on the Customs official interpretation of the statute and the applicable regulations.[48] Prior to 1993, the Customs

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[41] *Id.* (citing 19 U.S.C. § 1202).

[42] *Id.* The Act states in pertinent part that "the Secretary of the Treasury shall establish and promulgate such rules and regulations . . . as may be necessary to secure a just, impartial, and uniform appraisement of imported merchandise and the classification and assessment of duties thereon at the various ports of entry." *Id.* at 222 (citing 19 U.S.C. § 1502(a)).

[43] *Id.* at 222 (citing 19 C.F.R. § 177.8 (2000)).

[44] *Id.* at 223 (citing 19 U.S.C. § 1625(a) and 19 C.F.R. § 177.10(c) (2000)).

[45] *Id.* The *Mead* Court noted that third parties who anticipate importing goods similar to those listed in a ruling letter may not rely on the letter in order to demonstrate that ruling letters are not legislative rulings and thus do not have the force of law. *See id.* at 233 (concluding that ruling letters do not have the force of law in part because third parties are not bound by them).

[46] *Id.* at 224, 233.

[47] *Id.* at 224. The Court described the day planners as "three-ring binders with pages having room for notes of daily schedules and phone numbers and addresses, together with a calendar and suchlike." *Id.*

[48] *Id.* at 224-25. The day planners fell under the statutory category for "registers, account books, notebooks, order books, receipt books, letter pads, memorandum pads, diaries and similar articles." *Id.* at 224. The statutory category was further subdivided into two subheadings. *Id.* Imported items in the first subcategory include "diaries, notebooks and address books, bound; memorandum pads, letter pads, and similar

Service determined that Mead's day planners were not subject to a tariff under the applicable tariff schedule.[49] In January of 1993, however, the Customs Service changed its position and issued a ruling letter that subjected the day planners to a 4% tariff.[50] Mead sued.[51] The United States Court of International Trade sided with the Customs Service without any mention of judicial deference to the agency's ruling letter.[52] Mead appealed.[53] The United States Court of Appeals for the Federal Circuit reversed the Court of International Trade, concluding that a Customs Service ruling letter does not have the force of law, and thus did not trigger *Chevron* deference.[54] Without *Chevron*, the appeals court continued, no deference to the agency decision was required.[55] The Federal Circuit then determined that the Customs Service was

articles." *Id.* (citing Mead Corp. v. United States, 185 F.3d 1304, 1305 (Fed. Cir. 1999)). Imports in this category are subject to a 4% tariff. *Id.* Items in the second category included "other items" and were duty free. *Id.* at 224-25.

[49] *Id.* at 225.

[50] *Id.* In its ruling letter, the Customs Service concluded that Mead's day planners were subject to a 4% assessment under the applicable tariff schedule, because they fell within the "[d]iaries . . . bound" statutory subheading and not within the "other items" (and duty free) subheading. *Id.* The Customs Service opted to use a broad definition of "diary" that includes the type of organizer Mead sought to import; and determined that its three-ring planner was "bound." *Id.*

[51] *Id.*

[52] *See id.* (citing Mead Corp. v. United States, 17 F. Supp. 2d 1004 (Ct. Int'l Trade 1998)).

[53] *Id.* at 225-26.

[54] *Id.* at 226. The Federal Circuit decided the case on the heels of the United States Supreme Court's *Haggar* decision. *Id.* at 225-26. In *Haggar*, the Court determined that *Chevron* deference applied to Customs Service regulations. *Id.*; *see also* United States v. Haggar Apparel Co., 526 U.S. 380 (1999). The Federal Circuit, however, concluded that a Customs Service ruling letter was a different sort of administrative decision than a regulation. Unlike a binding regulation, a ruling letter does not have the force of law; and without binding effect, *Chevron* does not apply. *Mead*, 533 U.S. at 226. The lower court pointed to three features of Custom Services ruling letters that distinguishes them from force-of-law regulations. Mead Corp. v. United States, 185 F.3d 1304, 1307-08 (Fed. Cir. 1999). First, they are not the product of notice-and-comment rulemaking as described by § 553 of the Administrative Procedure Act. *Id.* at 1307. Second, they are issued by various Custom Services offices scattered across the United States. *Id.* at 1308. Third, they are not published. *See id.*

[55] *See Mead*, 533 U.S. at 226 (describing the circuit court's decision). Concluding that *Chevron* did not apply to the ruling letter and thus no deference was warranted, the Federal Circuit rejected the Customs Service's tariff classification of Mead's day planners and reversed the lower court. *Id.* at 227.

wrong when it assessed a duty on Mead's day planners and reversed the Court of International Trade.[56]

The United States Supreme Court granted certiorari to determine whether a Customs Service ruling on the proper tariff classification for imported goods warrants judicial deference.[57] First, the Court considered whether the Customs Service ruling letter triggered *Chevron* deference.[58] In concluding that the ruling letter did not qualify for *Chevron* deference, the Court both clarified and limited the reach of *Chevron* deference.[59] Justice Souter, writing for the Supreme Court, ruled that *Chevron* deference applies "when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority."[60] Justice Souter

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[56] *Mead*, 185 F.3d at 1311.

[57] *Mead*, 533 U.S. at 226-27. The narrow issue on appeal was whether the Court of International Trade erred when it granted summary judgment to Mead Corp. *See id.* at 225. The underlying question, however, was whether the Custom Service ruling letter was owed some deference by the lower court. *Id.* 225-27.

[58] *Id.* at 227-34.

[59] *Id.* at 226-27.

[60] *Id.* Justice Souter explained that by leaving a gap in a statute, either explicitly or implicitly, Congress intends to delegate its rulemaking authority to the agency to resolve the statutory question. *Id.* at 228-29. Justice Souter continued "that Congress would expect the agency to be able to speak with the force of law when it addresses ambiguity in the statute or fills a space in the enacted law." *Id.* at 229. A reviewing court, Justice Souter reasoned, has "no business rejecting an agency's exercise of its generally conferred authority to resolve a particular statutory ambiguity" simply because it disagrees with the agency's choice. *Id.* (citing Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 845-46 (1984)). Under *Chevron*, a reviewing court must accept the agency's choice unless it's unreasonable. *See generally Chevron*, 467 U.S. at 845. Here, Justice Souter was broadly referring to the separation-of-powers concern animating *Chevron*. Should a reviewing court disagree with an agency's otherwise reasonable construction of its enabling statute, the court could encroach on the legislative power reserved to Congress—and delegated to the agency—in Article I of the United States Constitution.

Justice Souter explained that the best evidence of Congress' intent to delegate its rulemaking power to the agency—and the best indicator that *Chevron* deference is required—is when Congress authorizes the agency to promulgate rules and regulations through formal procedures such as adjudication or rulemaking. *Mead*, 533 U.S. at 229. But, Justice Souter continued, even without such statutory authorization, "some other indication of a comparable congressional intent" may suffice to show that Congress intended the agency to act with the force of law. *Id.* at 227, 229.

When Congress authorizes an agency to use formal procedures to interpret statutory ambiguities, Justice Souter explained, it is fair to assume that Congress intended the

determined that the ruling letter in the case at bar did not qualify for *Chevron* deference, because it did not carry the force of law.[61] Second, and importantly for the purposes of this Article, Justice Souter concluded that while the ruling letter did not qualify for *Chevron* deference, it may qualify for *Skidmore* deference.[62] In effect, even if not formally acknowledged, Justice Souter confirmed that *Skidmore* survived *Chevron*.

The *Mead* Court recognized that administrative agencies do not always act with the force of law—the trigger for *Chevron* deference. As such, the Supreme Court has long endeavored to take into account the many ways that Congress delegates discretion to administrative agencies.[63] Congress may choose to delegate to the agency the authority to adjudicate claims, to promulgate regulations, to offer guidance to regulated parties, to enter into contracts, to issue licenses, to offer interpretative rules, and many other official exercises of administrative authority including ruling letters. The breadth and variety of administrative action "has led the Court to recognize more than one variety of judicial deference."[64] And despite Justice Scalia's insistence in

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resulting decision to carry the force of law. *Id.* at 230. A statutory interpretation promulgated using adjudication or notice-and-comment rulemaking fosters fairness and deliberation that corroborates Congress' intent that these rulings are binding. *Id.*

[61] *Id.* at 227. The ruling letter at issue in *Mead* was not developed using formal procedures such as adjudication or notice-and-comment rulemaking. *Id.* at 230-31. Thus, *Chevron* deference could only apply if Customs Service ruling letters fell into the "other indication[s] of . . . comparable congressional intent." *Id.* at 227. Justice Souter concluded that they did not. First, ruling letters may be modified or revoked without public notice; second, Customs Service ruling letters only bind the party addressed in the letter and are not intended to be relied on by third parties; third, ruling letters are not published; and fourth, thousands of ruling letters are issued by forty-six different Customs offices and Headquarters each year. *Id.* at 223, 233-34. Based on the above factors, Justice Souter reasoned that Congress did not intend for ruling letters to have the force of law and thus, *Chevron* deference was not warranted. *Id.* at 231. Instead, Justice Souter concluded, "classification rulings are best treated like 'interpretations contained in policy statements, agency manuals, and enforcement guidelines' . . . [t]hey are beyond the *Chevron* pale." *Id.* at 234 (citing Christensen v. Harris County, 529 U.S. 576, 587 (2000)).

[62] *Id.* at 234.

[63] *Id.* at 236.

[64] *Id.* at 237. Justice Souter explained that the "fair measure of deference to an agency administering its own statute has been understood to vary with circumstances, and courts have looked to the degree of the agency's care, its consistency, formality, and relative expertness, and to the persuasiveness of the agency's position." *Id.* at 228 (citation omitted).

dissent that *Chevron* swallowed *Skidmore*, Justice Souter affirmed "that *Chevron* left *Skidmore* intact and applicable."[65]

Skidmore deference, according to Justice Souter, is triggered when an agency acts without the force law but executes a decision applying its specialized experience and expertise in the statutory scheme administered.[66] So, while a Customs Service ruling letter may be outside the pale of *Chevron*, the agency's interpretation of its enabling statute in the guise of a non-binding letter may deserve some respect under *Skidmore*. Justice Souter suggested that "[t]here is room at least to raise a *Skidmore* claim here, where the regulatory scheme is highly detailed, and Customs can bring the benefit of specialized experience to bear."[67] Echoing the *Skidmore* test, Justice Souter concluded that a ruling letter "may surely claim the merit of its writer's thoroughness, logic, and expertness, its fit with prior interpretations, and any other sources of weight" to demonstrate its power to persuade.[68]

Mead served to revitalize *Skidmore* deference. The Supreme Court applied *Skidmore* (or at least cited to it) on dozens of

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[65] *Id.* at 237. Writing in dissent, Justice Scalia argued that *Chevron* deference applies whenever an agency authoritatively interprets its statute and is not dependent on the formality of the agency's chosen procedure or whether it acts with the force of law. *Id.* at 239-43 (Scalia, J., dissenting). *Skidmore* deference, Justice Scalia believed, was overruled and replaced by *Chevron*. *Id.* at 241. Justice Scalia feared "the resurrection" of *Skidmore* would cause confusion in the courts; would induce agencies to notice-and-comment rulemake to secure *Chevron* deference; would lead to the ossification of statutory law when federal courts apply *Skidmore* to agency decisions and thereby create an immutable precedent; and would lead to "uncertainty, unpredictability, and endless litigation." *See id*. at 245-50. With his customary (and sadly missed) flair for words, Justice Scalia concluded that "today's decision [is] one of the most significant opinions ever rendered by the Court dealing with judicial review of administrative action. Its consequences will be enormous, and almost uniformly bad." *Id.* at 261.

[66] *Id.* at 234-35 (majority opinion).

[67] *Id.* at 235.

[68] *Id.* Justice Souter vacated the judgment and remanded the case, because neither the Court of International Trade nor the Court of Appeals for the Federal Circuit determined whether *Skidmore* applied to Mead's tariff classification ruling letter. *Id.* at 238-39. On remand, the Federal Circuit applied *Skidmore* to the Customs Service tariff classification to Mead's day planners, but determined that "[d]espite Customs' relative expertise and the reasoning in its classification ruling . . . this court holds that . . . [t]he classification ruling at issue here lacks the power to persuade under the principles set forth in *Skidmore*. Because the imported articles are properly classified under the 'other' provision . . . this court reverses the decision of the Court of International Trade." Mead Corp. v. United States, 283 F.3d 1342, 1350 (Fed. Cir. 2002).

occasions since 2001.[69] Sometimes, the Court concluded that an agency interpretation warranted respect and deferred to it.[70] Other times, the Court concluded that the agency's interpretation was not persuasive and rejected it.[71] In the 2019 term, the Supreme Court cited with approval to *Skidmore* in *Kisor v. Wilkie*.[72] *Kisor* presented the Supreme Court with a different breed of administrative deference—judicial deference to an agency's interpretation of its own ambiguous regulation.[73] The Court was asked to consider whether an agency's interpretation of an ambiguous regulation warrants deference—so called *Auer* or *Seminole Rock* deference, after two cases in which the Court employed it.[74] The Supreme Court reaffirmed *Auer* and offered a multi-step metric for lower courts to follow when faced with an administrative interpretation of a regulation.[75] Justice Kagan, writing for the majority, concluded generally that a court ought to defer to an agency's reasonable interpretation of a

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[69] *See, e.g.*, Wos v. E.M.A. *ex rel.* Johnson, 568 U.S. 627, 643 (2013) (determining that federal Medicare and Medicaid agency's opinion letters to state agency lacked persuasive force to trigger *Skidmore*); Fed. Express Corp. v. Holowecki, 522 U.S. 389, 399-400 (2008) (concluding *Skidmore* warranted deference to EEOC policy statement).

[70] *E.g.*, *Fed. Express Corp.*, 522 U.S. at 399-40. In *Fed. Express Corp.*, the Supreme Court was asked to determine, in part, whether a party's filing with the EEOC amounted to a "charge" under the Age Discrimination in Employment Act (ADEA). *Id.* at 395. The EEOC had issued policy statements, embodied in a compliance manual and other internal memoranda, that interpreted the requirements of a charge under the statute. *Id.* at 399. Despite some evidence of inconsistent application of the interpretation, the Court concluded that "[t]he agency's interpretive position . . . provides a reasonable alternative that is consistent with the statutory framework. No clearer alternatives are within our authority or expertise to adopt; and so deference to the agency is appropriate under *Skidmore*." *Id.* at 401-02.

[71] *E.g.,* Ky. Ret. Sys. v. EEOC, 554 U.S. 135 (2008). In *Kentucky Retirement*, the Supreme Court considered whether Kentucky's disability retirement plan violated the Age Discrimination in Employment Act (ADEA). *Id.* at 138. The government requested deference to an agency compliance manual that interpreted the statute in its favor. *Id.* at 149. The Court disagreed and noted that the EEOC's statement in the compliance manual reached a conclusion contrary to precedent. *Id.* at 150. And the agency's manual made little effort to justify a departure from existing caselaw. *Id.* Thus, the agency's interpretation lacked the necessary "power to persuade." *Id.* (citing Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944)).

[72] *See* Kisor v. Wilkie, 139 S. Ct. 2400, 2414 (2019).

[73] *Id.* at 2408.

[74] *Id.*; *see also* Auer v. Robbins, 519 U.S. 452 (1997); Bowles v. Seminole Rock & Sand Co., 325 U.S. 410 (1945).

[75] *Kisor*, 139 S. Ct. at 2414-18.

genuinely ambiguous agency regulation.[76] In the opinion's first concurrence, Chief Justice Roberts noted that *Auer* and *Skidmore* are different tests.[77] *Auer* is used to determine the validity of an agency interpretation of a regulation under a reasonableness standard, while *Skidmore* is used to determine the validity of an agency interpretation of a statute under a persuasiveness standard.[78] Other members of the Court, however, would overrule *Auer*. They agreed that deference was warranted in this case but contended that the proper test for deference is *Skidmore*'s more flexible test and not *Auer*.[79]

While the *Kisor* debate in not central to this Article, it does demonstrate the continuing vitality and authority of *Skidmore*. Whether or not it ought to apply to an agency's interpretation of an ambiguous regulation, the Court consistently has held that the weight of an agency's nonbinding interpretation of a statute is proportional to its power to persuade—the classic *Skidmore* test.

II. LEGISLATIVE EXPERTISE

While the Supreme Court continues to apply *Skidmore* deference to administrative expertise, the Court has yet to afford that same level of respect to legislative expertise. A legislature is organized by design into committees and subcommittees to allow its members' experience and expertise to endow and inform its work product—enacted law. Legislative expertise is preserved and catalogued in the body of legislative history attached to each bill and created to document the bill's enactment into law. The most useful piece of this legislative history is the committee report. These reports often include an authoritative analysis of a statute. These reports are authoritative, because they are drafted by experts with accumulated experience in the subject matter of the law. These reports often include guidance on the resolution of statutory ambiguity. Like *Skidmore*'s administrative bulletin, committee reports are not enacted and thus lack the force of law. Yet instead of bestowing "some respect" to the accumulated

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[76] *Id.*

[77] *Id.* at 2424 (Roberts, C.J., concurring).

[78] *Id.* at 2424-25 (Roberts, C.J., concurring).

[79] *See id.* at 2425-48 (Gorsuch, J., concurring).

experience and expertise of the drafters, courts often ignore or deride evidence of legislative intent found in these reports. This disparity in the Court's treatment of administrative and legislative expertise suggests an intellectual inconsistency most likely grounded in political philosophy, not juridical logic.

A. The Authority of Legislative Committee Reports

The United States Congress defines a committee report as a "[d]ocument accompanying a measure reported from a committee. It contains an explanation of the provisions of the measure, arguments for its approval, votes held in markup, individual committee members' opinions, cost estimates, and other information."[80] According to the United States Senate, "Senate committees usually publish a committee report to accompany the legislation they have voted out. . . . Committee reports discuss and explain the purpose of measures and contain other, related information."[81] Similarly, the Clerk of the House of Representatives explains:

> [a] reported measure usually is accompanied by a written document, called a report, describing the measure's purposes and provisions and telling Members why this version has been reported and why it should be passed. The report reflects the views of a majority of the committee, but also may contain minority, supplemental, or additional views of committee members. It usually includes . . . a section-by-section analysis, and a comparison with existing law. Officials of the executive and judicial branches of government use these reports to determine the legislative history of laws and Congress' intent in enacting them.[82]

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[80] *Glossary of Legislative Terms*, CONG.GOV, https://www.congress.gov/help/legislative-glossary#glossary_committeereport [https://perma.cc/TLT7-QP9E] (last visited July 21, 2020).

[81] *Glossary*, U.S. SENATE, https://web.archive.org/web/20200326142216/https://www.senate.gov/reference/glossary_term/report.htm [https://perma.cc/XH33-D97J] (last visited Sep. 9, 2021).

[82] *Committee FAQs*, OFFICE OF THE CLERK OF THE H.R., https://web.archive.org/web/20200705015642/http://clerk.house.gov/committee_info/commfaq.aspx [https://perma.cc/LJ2T-W9QX] (last visited Sep. 9, 2021).

Both the House and Senate standing rules require committee reports to be filed with bills reported out of legislative committees. Rule XXVI of the Standing Rules of the Senate describes the committee report and its required parts.[83] Likewise, Rule XXVII of the Rules of the House of Representatives describes the House committee report.[84]

Until relatively recently, courts and commentators had long-considered legislative committee reports as authoritative indicators of legislative intent to aid in the resolution of statutory ambiguity. In 1990, George Costello, a legislative attorney for the Congressional Research Service, noted that "committee reports constituted nearly fifty percent of the Supreme Court's references to legislative history . . . [because they] are considered the most reliable and persuasive element of legislative history."[85] As far back as 1959, Justice Felix Frankfurter wrote:

> Congress can be the glossator of the words it legislatively uses either by writing its desired meaning, however odd, into the text of its enactment, or by a contemporaneously authoritative explanation accompanying a statute. The most authoritative form of such explanation is a congressional report defining the scope and meaning of proposed legislation.[86]

A few years later, Justice John Marshall Harlan noted in *Zuber v. Allen* that "[a] committee report represents the considered and collective understanding of those Congressmen involved in drafting and studying proposed legislation."[87] Justice

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[83] STANDING RULES OF THE SENATE, S. DOC. NO. 113-18, at 28 (2013) (Rule XXVI), https://www.rules.senate.gov/imo/media/doc/CDOC-113sdoc18.pdf [https://perma.cc/SB7L-EY78].

[84] THOMAS J. WICKHAM, CONSTITUTION, JEFFERSON'S MANUAL, AND RULES OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES ONE HUNDRED SIXTEENTH CONGRESS, H.R. DOC. NO. 115-177, at 222-23 (2019), https://www.govinfo.gov/content/pkg/HMAN-116/pdf/HMAN-116.pdf [https://perma.cc/JR6W-BNBF].

[85] *See* George A. Costello, *Average Voting Members and Other "Benign Fictions": The Relative Reliability of Committee Reports, Floor Debates, and Other Sources of Legislative History*, 40 DUKE L.J. 39, 43 (1990) (examining the courts' use of legislative history).

[86] *See* Comm'r v. Acker, 361 U.S. 87, 94 (1959) (Frankfurter, J., dissenting).

[87] Zuber v. Allen, 396 U.S. 168, 186 (1969) (comparing the value of floor debates to committee reports in gleaning the intent of the legislature).

William Rehnquist agreed with this assertion in *Garcia v. United States* when he explained that "[i]n surveying legislative history we have repeatedly stated that the authoritative source for finding the Legislature's intent lies in the Committee Reports on the bill."[88] Perhaps the most robust champion of committee reports is Justice John Paul Stevens. In *Exxon Mobil Corp. v. Allapattah Services, Inc.*, Justice Stevens excoriated the majority for adopting an interpretation of a federal supplemental-jurisdiction statute directly at odds with the House subcommittee report filed with the statute in question.[89] Justice Stevens noted "[i]n Congress, committee reports are normally considered the authoritative explication of a statute's text and purposes, and busy legislators and their assistants rely on that explication when casting their votes."[90] Justice Stevens observed that the purpose of a committee report is to allow the whole Congress to execute its legislative duties.[91]

Justice Stevens advanced the busy-legislator theme in *Bank One Chicago, N.A. v. Midwest Bank & Trust*.[92] Responding to Justice Scalia's exercised concurrence on the Court's use of legislative history to resolve an ambiguity in the Expedited Funds Availability Act, Justice Stevens argued that "[l]egislators, like other busy people, often depend on the judgment of trusted colleagues when discharging their official responsibilities. . . . Representatives and Senators may appropriately rely on the views of the committee members in casting their votes."[93] For Justice Stevens, Congress' committee structure and its products—

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[88] Garcia v. United States, 469 U.S. 70, 76 (1984) (confirming that committee reports are more authoritative than floor debates).

[89] Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546, 575 (2005) (Stevens, J., dissenting).

[90] *Id.* Justice Stevens inadvertently helped to coin a new title for a theory of statutory interpretation called the "Busy Congress" model. *See* Charles Tiefer, *The Reconceptualization of Legislative History in the Supreme Court*, 2000 WIS. L. REV. 205, 230-32 (2000) (describing Justice Stevens busy-legislator model for statutory interpretation).

[91] *See Exxon Mobil Corp.*, 545 U.S. at 575.

[92] Bank One Chicago, N.A. v. Midwest Bank & Tr. Co., 516 U.S. 264, 276 (1996) (Stevens, J., concurring).

[93] *Id.* at 276. Justice Stevens argued that, because rank-and-file members of Congress appropriately rely on legislative committees, the intent of those charged with drafting the bill—committee and subcommittee members— "is properly regarded as the intent of the entire Congress." *Id.* at 276-77.

committee reports—are an integral part of the lawmaking process and should not be treated as meaningless clutter.

Justice Breyer agrees with Justice Stevens' institutional approach to lawmaking. In a now-famous 1992 article, *On the Uses of Legislative History in Interpreting Statutes*, Breyer offers a spirited defense of legislative history.[94] He posits that those who object to the use of legislative history—unnamed textualists—may not understand "how Congress actually works."[95] He observed that "Congress is a bureaucratic organization . . . generating legislation through complicated, but organized, processes."[96] This process includes congressional staff, relevant executive agencies, and important external stake holders who draft legislation and legislative reports.[97] Justice Breyer explains that members of Congress are required to rely on these legislative subgroups and their work product to execute their chief constitutional function—to make laws.[98] Legislative history—such as committee reports—are important institutional instruments that should inform and instruct judicial resolution of statutory ambiguity.[99]

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[94] *See* Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845 (1992). Responding to the rise of textualism on the Supreme Court and the concomitant decline of legislative history, Justice Breyer offers five circumstances in which courts should reasonably use history—including committee reports—to help resolve statutory questions: (i) avoid absurd results; (ii) discover drafting errors; (iii) identify when Congress intended a specialized meaning; (iv) identify Congress' purpose; and (v) choose among reasonable alternatives. *Id.* at 848-61.

[95] *Id.* at 858. Justice Breyer artfully avoids labeling his detractors or identifying the textualists to whom the article is clearly addressed. Instead, he identifies them inferentially as critics of legislative history. *See, e.g.*, *id.* at 861 (noting "five categories of criticism" related to the use of legislative history).

[96] *Id.* at 858. Here, Justice Breyer argues that Congress operates through a form of "downward delegation" with ultimate legislative authority residing in elected legislators, who are required to rely on staff to draft bills and reports. *Id.* at 859. This process involves important extra-Congressional stake holders—such as lobby groups, unions, business groups, executive branch agencies, and public interest groups—who work with Congressional staff on behalf of its elected members to solve important problems. *Id.* Justice Breyer acknowledges the "busy legislator" and the necessity of institutional aids—such as committee reports—to allow Congress to law-make. *See generally id.* at 858-61 (describing institutional norms in Congress).

[97] *Id.* at 858.

[98] *Id.*

[99] Of note, Justice Breyer suggests that judges may be quick to condemn Congress' use of downward delegation and its reliance on subgroups and work products, because that model is foreign to judges who operate within a much more centralized model that

In his article, Justice Breyer also notes the rise of textualism and the attendant decline of legislative history beginning in the 1980s.[100] This has required some justices, who may otherwise agree with Breyer's and Stevens' balanced approach to legislative history, to proclaim outward fealty to textualism before resorting to a committee report to resolve statutory ambiguity. For example, in *Tapia v. United States*, Justice Kagan resolved a statutory question involving the Sentencing Reform Act of 1984.[101] The petitioner, Alejandra Tapia, argued that the sentencing judge erred when he interpreted the statute to allow a sentence based in part on her need to complete a drug rehabilitation program in prison.[102] In resolving the statutory question, Justice Kagan applied familiar textualist tools of interpretation, such as common usage, dictionary definitions, rules of grammar, statutory context, and legislative silence.[103] After making her case she adds, almost in apology, "[f]inally, for those who consider legislative history useful, the key Senate Report . . . provides one last piece of corroborating evidence."[104] That report clearly and expressly described Congress' purpose and rationale when it enacted the statutory section in question.[105] Yet, because the committee report was extra-textual and thus taboo, Kagan was obliged to relegate

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is far more direct and far less delegated. *Id.* at 859-60. Justice Breyer asks why some courts insist that "the judicial ideal be the model for Congress" when the role, function, and purpose of Congress are so different. *Id.* at 859.

[100] *Id.* at 846. Writing on the once frequent and accepted use of legislative history to resolve statutory ambiguity, Justice Breyer noted in 1991 that "[l]awyers and judges, teachers and legislators, have begun to reexamine this venerable practice, often with a highly critical eye. Some have urged drastically curtailing, or even totaling abandoning, its use." *Id.* at 845.

[101] 564 U.S. 319 (2011). Section 3582(a) of the Sentencing Reform Act of 1984 stipulates the factors a court may consider when imposing imprisonment. The section states that a court "in determining whether to impose a term of imprisonment, and . . . in determining the length of the term, shall consider the factors set forth in section 3553(a) . . . recognizing that imprisonment is not an appropriate means of promoting correction and rehabilitation." 18 U.S.C. § 3582(a) (2018).

[102] *Tapia*, 564 U.S. at 321.

[103] *Id.* at 326-32.

[104] *Id.* at 331.

[105] *Id.* at 331-32. The Senate Report accurately described the committee's intention to keep rehabilitation as a sentencing factor but not for terms of imprisonment, indicating the Senate's intention to prohibit courts from considering a prisoner's rehabilitation when imposing prison terms. *See id.* at 331-33.

its use to confirm her otherwise textualist-centered interpretation of the statute.

Perhaps the strongest advocate on the current Supreme Court for the continued vitality of committee reports is Justice Sonia Sotomayor. In 2010, Justice Sotomayor delivered the opinion for the Court in *Carr v. United States*.[106] The Supreme Court resolved a split in the circuit courts of appeals on whether the Sex Offender Registration and Notification Act (SORNA) applies to sex offenders who travel interstate *before* the effective date of the statute.[107] In support of her conclusion that SORNA does not apply to pre-enactment travel, Justice Sotomayor examined the House Judiciary Committee Report, which confirmed her view that Congress intended SORNA to apply to post-enactment travel.[108] Not surprisingly, Justice Scalia—the most vocal textualist on the Court—issued a concurrence opposing Justice Sotomayor's use of legislative history to resolve the statutory question.[109]

Later in 2018, Justice Sotomayor filed a concurring opinion in *Digital Realty Trust, Inc. v. Somers*[110] defending the Court's use of a committee report to determine the meaning of "whistleblower" in Dodd-Frank's anti-retaliatory provision.[111] In *Digital Realty Trust*, Justice Ginsburg, writing for the Court, cited to the Senate Report of the Dodd-Frank Act of 2010 to evidence Congress' purpose in enacting the law[112]: to acknowledge the "core objective" of the Act's whistleblower program,[113] to express

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106 560 U.S. 438 (2010).

107 *See id.* at 444.

108 *See id.* at 457-58 (discussing SORNA's legislative history materials).

109 *See id.* at 458-59 (Scalia, J., concurring) (concurring in judgment but opposing the Court's use of legislative history). Justice Scalia insisted that "only the text Congress voted on, and not the unapproved statements made or comments written during [SORNA's] drafting and enactment process, is an authoritative indicator of the law." *Id.* at 458; *see also supra* notes 100-05, 119-27 (describing textualists' resistance to the use of legislative history).

110 138 S. Ct. 767 (2018).

111 *Id.* at 782-83 (Sotomayor, J., concurring).

112 *See id.* at 773-74 (majority opinion) (citing to the Senate Report to demonstrate that the statute was intended to protect whistleblowers from retaliation).

113 *See id.* at 777 (citing the Senate Report to evidence the purpose of the whistleblower provision is "to motivate people who know of securities violations to tell the SEC").

Congress' desire to encourage disclosures to the SEC,[114] and to indicate Congress' focus on securities-law violations.[115] In response, Justice Thomas, joined by Justice Alito and Justice Gorsuch, filed a concurring opinion objecting to the majority's use of a "single Senate Report" to defend its interpretation of the statute.[116] Justice Sotomayor wrote separately "to note [her] disagreement with the suggestion . . . that a Senate Report is not an appropriate source for [the] Court to consider when interpreting a statute."[117] Justice Sotomayor explained:

> Committee reports, like the Senate Report the Court discusses here, . . . are a particularly reliable source to which we can look to ensure our fidelity to Congress' intended meaning. . . . [Committee Reports] "have long been important means of informing the whole chamber about proposed legislation," . . . a point Members themselves have emphasized over the years. . . . [C]onfirming our construction of a statute by considering reliable legislative history shows respect for and promotes comity with a coequal branch of Government. . . . I do not think it wise for judges to close their eyes to reliable legislative history—and the realities of how Members of Congress create and enact laws—when it is available.[118]

The following year in 2019, the fault-line on legislative history and committee reports was on display in *Azar v. Allina Health Services*.[119] Here, Justice Breyer was the lone proponent for the use of legislative history and committee reports to resolve a statutory ambiguity in the Medicare Act.[120] Justice Gorsuch wrote for the majority in *Azar* and ruled that the Department of Health and Human Services had a statutory duty to provide notice and an opportunity for public comment before it implemented a policy

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[114] *See id.* at 780 (noting that the Court's interpretation is consistent with Congress' goals).

[115] *See id.* at 781 (distinguishing a drug-trafficking whistleblower from an SEC whistleblower).

[116] *See id.* at 783-84 (Thomas, J., concurring) (objecting to the Court's use of a Senate Report to justify its interpretation of a term defined in the statute).

[117] *Id.* at 782 (Sotomayor, J., concurring).

[118] *Id.* at 782-83 (citations omitted).

[119] 139 S. Ct. 1804 (2019).

[120] *Id.* at 1819-21 (Breyer, J., dissenting).

changing its Medicare reimbursement formula.[121] At issue was whether the agency's policy was a "substantive legal standard" requiring public notice and comment under the Medicare Act.[122] Justice Gorsuch declined the government's (and dissent's) invitation "to follow it into the legislative history lurking behind the Medicare Act."[123] Justice Breyer, however, used that same history—a House Report, a Senate Report, and a Conference Report—to dissent with the Court's interpretation of the statute.[124] Breyer contended that the "statute's history provides considerable evidence" of what Congress meant when it enacted the statute.[125] Justice Breyer cited to an earlier House-Senate Conference Report, the House Report, and the attendant House-Senate Report to evidence Congress' intent not to require public comment on statements of policy.[126]

Despite Justice Breyer's effort to use legislative expertise evidenced in committee reports to help the Supreme Court resolve statutory questions, the Court remains cautious if not hostile to its use.[127] Committee reports, however, are products of legislative expertise and accumulated experience in discrete subject matters. If the Supreme Court is willing to defer to administrative expertise, then it should be willing to afford some deference to legislative expertise, particularly when the drafters themselves are opining on statutory meaning. If legislators are indeed experts in law-making and have accumulated the necessary experience to develop competence and judgment, then their views and opinions on statutory meaning deserve some respect.

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[121] *See id.* at 1811 (majority opinion) (resolving the term "substantive legal standard" in the Medicare Act).

[122] *Id.* at 1808.

[123] *Id.* at 1814. Justice Gorsuch noted that he would not allow "ambiguous legislative history to muddy clear statutory language." *Id.* (citing Milner v. Dep't of Navy, 562 U.S. 562, 572 (2011)).

[124] *Azar*, 139 S. Ct. at 1819-21 (Breyer, J., dissenting).

[125] *Id.* at 1821.

[126] *Id.* at 1819-21.

[127] *See supra* notes 100-05 (discussing textualists' distrust of legislative history).

B. Congress, Committees, and Specialization

While Article I of the U.S. Constitution creates Congress,[128] vests it with exclusive legislative powers,[129] and determines baseline qualification for its members,[130] it is largely silent on how each chamber is supposed to exercise its legislative duties. The role and duties of members is determined largely by chamber rules, history, custom, and tradition.[131] From its inception in 1789, Congress has relied on a decentralized committee structure to allow it to fulfill its constitutional duties.[132] Through dozens of subject-specific legislative committees and subcommittees, Members of Congress consider, debate, draft, amend, mark-up and report out laws to the full chamber.[133] Legislative committees also have a key oversight function to make certain the executive branch, through administrative agencies are performing their duties within the law as determined by Congress.[134] Thus, legislative committees are central and essential to the business of

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[128] U.S. CONST. art. I, § 1. Section I of Article I provides, "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives." *Id.*

[129] *Id.*

[130] *Id.* art. I, §§ 2-3. Section 2 of Article I limits House members to those who have been citizens of the United States for seven years, who are twenty-five years of age when elected, and who are residents of the state. *Id.* art. I, § 2. Section 3 of Article I limits Senators to persons who have been citizens of the United States for nine years, who are thirty years of age when elected, and who are residents of the state. *Id.* art. I, § 3.

[131] *See generally* R. ERIC PETERSEN, CONG. RESEARCH SERV., RL33686, ROLES AND DUTIES OF A MEMBER OF CONGRESS: BRIEF OVERVIEW (2012), https://crsreports.congress.gov/product/pdf/RL/RL33686 [https://perma.cc/7SXT-YPZR]. According to the United States Congressional Research Service ("CRS") disclaimer page that appears in all of its documents and reports, the CRS is a federal legislative branch agency within the Library of Congress. *See About Site & FAQs*, CONG. RESEARCH SERV., https://crsreports.congress.gov/Home/About [https://perma.cc/QSC7-YAUG]. It is charged with providing Members of Congress non-partisan advice and analysis on issues that may come before Congress. *Id.*

[132] JUDY SCHNEIDER, CONG. RESEARCH SERV., RS20794, THE COMMITTEE SYSTEM IN THE U.S. CONGRESS 1 (2009), https://crsreports.congress.gov/product/pdf/RS/RS20794 [https://perma.cc/8B6V-Z8UK].

[133] For the 115th Congress that spanned 2017 and 2018, Congress relied on 20 standing committees with 97 subcommittees in the House, and 16 committees with 68 subcommittees in the Senate. *See* VALERIE HEITSHUSEN, CONG. RESEARCH SERV., 98-241, COMMITTEE TYPES AND ROLES 1 (2017), https://fas.org/sgp/crs/misc/98-241.pdf [https://perma.cc/3MD4-N9F9].

[134] *Id.*

lawmaking and serve as the chief vehicle for members of Congress to gain and leverage policy expertise.

1. Congressional Committee Structure

Due to the enormity of its constitutional mandate and the ever-increasing complexity of its work, Congress delegates much of its work to committees (and subcommittees). The idea is to distribute legislative and oversight functions to sub-units with specialized knowledge and expertise on specific policy matters.[135] This organization encourages individual committee members to gain expertise and experience in particular subjects, and more importantly it enables the full membership of the House or Senate to operate effectively with mostly policy generalists. A policy generalist may have some familiarity with a few subjects, but likely won't have the necessary proficiency to fully understand most measures in committee or on the floor. Without a few legislators with policy specialization, Congress' work would be difficult if not impossible. Congress' ability to macro-decision-make necessitates its committee architecture. Thus, in Congress committees are always "center stage."[136] A leading political scientist noted that "[c]ommittees, as agents of their parent chambers, exist to investigate, deliberate, apply specialized knowledge, and recommend action" to the floor of the full chamber.[137]

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[135] *See* SCHNEIDER, *supra* note 132, at 1-3.

[136] *See* Tim Groseclose & David C. King, *Committee Theories Reconsidered*, *in* CONGRESS RECONSIDERED 191, 191 (Lawrence C. Dodd & Bruce I. Oppenheimer eds., 7th ed. 2001) (evaluating competing theories on why committees exists). Tim Groseclose and David C. King are political scientists who studied four popular and competing theories on Congress' committee architecture and concluded that each theory helps to explain the existence and persistence of congressional committees. *Id.* at 191. Very generally, *information efficiency theory* focuses on information and expertise and the utility of legislative subunits—committees—to foster specialization to benefit the general membership; *distributive benefits theory* suggests that committees are a collection of members with special interests who act collectively to obtain special benefits; *majority-party cartel* theory posits that committees persist because they are an important strategic reward for the majority party; and *bicameral rivalry theory* suggests that the committee architecture is a product of House-Senate competition that incentivized legislative hurdles—like committees—in each chamber. *See generally id.* 192-96.

[137] KEITH KREHBIEL, INFORMATION AND LEGISLATIVE ORGANIZATION 105 (1992).

Congress' committee structure and its concomitant specialization of labor has long roots in the United States Congress.[138] One commentator studying the development of legislative committees in the United States and England noted in 1922, "[i]n each country it has been found absolutely impossible for the lawmaking body itself, acting as a whole, to do the preliminary and subsidiary work . . . much of the work must be done outside of the legislative chamber, simply because the hands of the clock compel."[139] Committees, it appears, were fundamental and created with intention to foster policy expertise in legislative subgroups. And, as issues became increasingly complex, the need for decentralization, specialization, and policy expertise grew.[140]

The House and Senate committee structures are designed to foster policy expertise in legislators and legislative subgroups to allow each chamber, populated with mostly generalists, to make good policy decisions. That design is revealed in the formal and informal rules and customs that regulate committee assignments and incentivize legislators to accrue policy expertise.[141] Legislative committees composed of policy experts are essential to enable Congress to discharge its duty to make law.

2. Assignment & Selection

As discussed more fully below, members of Congress request assignment to committees that are important to their constituents and important to themselves. While the committee assignment process in each chamber may consider the member's preferences, assignment decisions are made by the party caucus leadership with the approval of the caucus, and ultimately the approval of the full chamber. Once assigned to a committee, a member is likely to continue on that committee to leverage the perks of seniority.[142] The rules that govern a member's committee

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[138] *Id.* at 109.

[139] *See id.* (citing ROBERT LUCE, LEGISLATIVE PROCEDURE: PARLIAMENTARY PRACTICES AND THE COURSE OF BUSINESS IN THE FRAMING OF STATUTES 180-81 (1922)).

[140] *Id.* at 110-11. Professor Krehbiel notes that as originally conceived, the Congress was egalitarian but "asymmetries emerged" when each chamber developed systems and protocols to foster expertise and specialization in order to make the legislative process work. *Id.* at 113.

[141] *See infra* Part III.B.2.

[142] *See infra* text accompanying notes 180-89.

assignments are generally found in House and Senate standing rules, party caucus rules, and custom and may change with each new Congress.[143]

a. House of Representatives

According to the standing rules of the House of Representatives ("House Rules"), a Member may serve on no more than two standing committees and four subcommittees of the standing committee.[144] A standing committee is a committee expressly authorized by the House Rules.[145] The House Rules, however, are silent on the size of each committee and its party ratio. Traditionally, the party leadership negotiates the total number of members assigned to each committee prior to the start of a new Congress. The ratio of Democrats and Republicans on each standing committee generally corresponds to each party's electoral strength in the House; but so-called "exclusive committees" might be more heavily weighted in favor of the majority party to allow for a comfortable working majority on key committees.[146]

Both the DNC and GOP caucus rules designate certain committees as "exclusive" and—due to their workloads or

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[143] *See infra* text accompanying notes 180-89. While the standing rules of each chamber are published and available to the public, party caucus rules are generally not public or published. And the Democratic National Committee ("DNC") appears to be far less inclined to publish its internal rules of procedure than the Grand Old Party ("GOP").

[144] WICKHAM, *supra* note 84, at 520.

[145] *Id.* at 445. For the 115th Congress, the House Rules recognized twenty standing committees: Agriculture, Appropriations, Armed Services, Budget, Education & the Workforce, Energy & Commerce, Ethics, Financial Services, Foreign Affairs, Homeland Security, House Administration, Judiciary, Natural Resources, Oversight & Government Reform, Rules, Science/Space & Technology, Small Business, Transportation & Infrastructure, Veterans' Affairs, and Ways & Means. https://republicans-rules.house.gov/sites/republicans.rules.house.gov/files/115/PDF/House-Rules-115.pdf [https://perma.cc/3QYA-8L99].

[146] JUDITH SCHNEIDER, CONG. RESEARCH SERV., 98-367, HOUSE COMMITTEES: ASSIGNMENT PROCESS 1 (2008), https://www.everycrsreport.com/files/20080225_98-367_a0b9dde820351d4cc1909a96e2b9c7087c53f604.pdf [https://perma.cc/V4T7-QPKY]. The House Rules, however, make exceptions to this tradition. For example, "[t]he "Committee on Ethics shall be composed of 10 members, five from the majority party and five from the minority party." WICKHAM 7, *supra* note 84, at 517; *see also* Groseclose & King, *Committee Theories Reconsidered*, *supra* note 136, at 206-07 (discussing proportional representation on standing committees).

importance—limit a Member's service to just one exclusive committee.[147] Generally, a Member may serve on only two "non-exclusive" committees unless the House Rules say otherwise.[148] Similar rules limit a Member's service on subcommittees of the standing committee.[149]

Once assigned to a standing committee, a Member is customarily granted an informal property right to remain on that committee for as many subsequent Congresses as she is reelected.[150] A long-serving member of the House observed that "a member who has served on a committee is regarded as entitled to continue to serve on it as long as he keeps his seat."[151] This so-called "property norm," means that the committee selection and assignment process is limited mostly to the appointment of newly elected members of the House of Representatives.[152]

One observer noted that the committee selection process resembles a "giant jig saw puzzle" as the caucus weighs a variety

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[147] JUDY SCHNEIDER, CONG. RESEARCH SERV., 98-151, HOUSE COMMITTEES: CATEGORIES AND RULES FOR COMMITTEE ASSIGNMENTS 1 (2014), https://fas.org/sgp/crs/misc/98-151.pdf [https://perma.cc/T6SG-ASVK]. Exclusive committees include Appropriations, Rules, Ways & Means, Energy & Commerce, and Financial Services. *Id.* at 2.

[148] For example, the House Committee on Ethics is exempt from these assignment rules, allowing a Member to serve on one other exclusive committee or two other non-exclusive Committees. *Id.* at 1.

[149] WICKHAM, *supra* note 84, at 520.

[150] *See generally infra* text accompanying notes 184-89 (describing the rules for how committee members advance in rank as other members drop from the committee) and text accompanying notes 190-96 (describing the advantages of seniority). The House Rules, however, do make membership on a standing committee contingent on the member's continuing membership in the party caucus. WICKHAM, *supra* note 84, at 519. *See also infra* text accompanying note 197-98 (discussing why Members are incentivized to retain their seats on committees).

One former House representative noted that the "salient and long-established features of the committee system in the American Congress are thus seen to include length of uninterrupted tenure as the traditional determinant of choice in committee assignment." Emanuel Celler, *The Seniority Rule in Congress*, 14 WESTERN POL. Q. 160, 163 (1961) (Emanuel Celler served in the House of Representatives from 1923 to 1973).

[151] *See* Celler, *supra* note 150, at 162 (opining on the seniority rule).

[152] SCHNEIDER, *supra* note 146, at 1-2. Other than a freshman Member's initial assignment to a committee, the caucus leadership may also need to appoint a new Member due to an unexpected vacancy on the committee or when the size of a committee is increased. *See id.* at 2.

of factors to fill open committee seats.[153] In the mix are the Members' preferences, geographic distribution, experience, and training[154] as well as seniority, background, ideology, election margin, state delegation support, and constituent priorities.[155] Typically, a Member communicates his or her committee preferences to a representative on the caucus steering committee prior to the start of a new Congress.[156] Each caucus's steering committee is composed of the party's House leadership, Members elected by the caucus, and Members appointed by the leadership. The steering committee works to solve the puzzle and recommends to the full party caucus its slate of candidates. When the roster is approved, the recommendations are forwarded to the House for final approval by way of a simple resolution.[157] Once seated on a committee, a Member may expect to remain on that committee for the entirety of her tenure in the House of Representatives.

b. The Senate

Like the House of Representatives, the Senate also determines standing committee sizes and ratios prior to the start

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[153] George Goodwin, Jr., *The Seniority System in Congress*, 53 AM. POL. SCI. REV. 412, 414 (1959).

[154] *Id.* at 414-15.

[155] SCHNEIDER, *supra* note 146, at 1.

[156] *See id.* at 2.

[157] *Id.* Committee chairs are selected through a similar process. The steering committee makes committee chair recommendations to the full caucus. JUDY SCHNEIDER & MICHAEL L. KOEMPEL, CONG. RESEARCH SERV., RL34679, HOUSE COMMITTEE CHAIRS: CONSIDERATIONS, DECISIONS, AND ACTIONS AS ONE CONGRESS ENDS AND A NEW CONGRESS BEGINS 3 (2018), https://fas.org/sgp/crs/misc/RL34679.pdf [https://perma.cc/VA6D-VCJX]. After the slate of chairs (and subcommittee chairs) is approved, the House meeting in a new Congress will adopt simple resolutions ratifying the slate of candidates. *Id.*

A Member's appointment to a subcommittee of a standing committee is determined by a patchwork of caucus rules, committee-specific rules, and custom. Generally, the GOP allows committee chairs to populate subcommittees from the standing committee's roster, although most committees employ a bidding process that favors seniority. JUDY SCHNEIDER, CONG. RESEARCH SERV., 98-610, HOUSE SUBCOMMITTEES: ASSIGNMENT PROCESS 2 (2007), https://crsreports.congress.gov/product/pdf/RS/98-610 [https://perma.cc/N5MD-UQ8M]. The DNC caucus rules instruct committee members to bid based on seniority on subcommittee seats. *Id.* The selection of subcommittee leaders is similar. For the GOP, the selection process is left to the discretion of the committee chair although a majority of Republican Members may disapprove of the process. *Id.* The DNC allows committee members to bid based on seniority on subcommittee chairs. *Id.*

of a new Congress.[158] And, like the House, the ratio of Democrats and Republicans on each standing committee generally corresponds to each party's electoral strength in the Senate.[159] Unlike the House, the Senate sets by rule the size of each committee, but these numbers are typically amended at the start of each new Congress.[160] The Senate Rules also divide standing committees into three classes—"A" Committees; "B" Committees; and "C" Committees—and regulate the number of committees and subcommittees from each group that a Senator may join.[161] The rules operate to equitably distribute committee assignments (and thus workloads) among Senators. Generally, a Senator may serve on two "A" committees, one "B" committee; and an unrestricted number of "C" committees.[162]

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[158] JUDY SCHNEIDER, CONG. RESEARCH SERV., RL30743, COMMITTEE ASSIGNMENT PROCESS IN THE U.S. SENATE: DEMOCRATIC AND REPUBLICAN PARTY PROCEDURES 2 (2006), https://crsreports.congress.gov/product/pdf/RL/RL30743 [https://perma.cc/D2LF-F7FG].

[159] *Id.*

[160] *Id.*; *see also* STANDING RULES OF THE SENATE, *supra* note 83, at 28 (2013) (Rule XXV) (setting the number of Senators for each standing committee). For the 116th Congress, Senate Rules recognize sixteen standing committees: Agriculture, Nutrition, & Forestry; Appropriations; Armed Services; Banking, Housing, & Urban Affairs; Commerce, Science, & Transportation; Energy & Natural Resources; Environment & Public Works; Finance; Foreign Relations; Health, Education, Labor, & Pensions; Homeland Security & Governmental Affairs; Judiciary; Budget; Rules & Administration; Veterans' Affairs; Small Business & Entrepreneurship. *See id.* at 28-29 (a joint committee is composed of members from both chambers).

[161] *Id.* at 28-29. For the 116th Congress, the "A" Committees are: Agriculture, Nutrition, & Forestry; Appropriations; Armed Services; Banking, Housing, & Urban Affairs; Commerce, Science, & Transportation; Energy & Natural Resources; Environment & Public Works; Finance; Foreign Relations; Health, Education, Labor, & Pensions; Homeland Security & Governmental Affairs; and Judiciary. *Id.* at 28. The "B" Committees are: Budget; Rules & Administration; Veterans' Affairs; Small Business & Entrepreneurship; Aging; Intelligence; and the Joint Economic Committee. *Id.* The "C" Committees are Ethics, Indian Affairs, and the Joint Committee on Taxation. *Id.* at 29.

Additionally, the party caucus may further divide standing committees to impose additional appointment restrictions. For example, the Republican caucus rules carve out a group of four so-called "Super A" committees—Appropriations, Armed Services, Finance, and Foreign Relations. SCHNEIDER, *supra* note 158, at 8. A caucus rule prevents a Republican Senator from serving on more than one "Super A" committee. *Id.* at 4-5.

[162] STANDING RULES OF THE SENATE, *supra* note 83, at 29 (Rule XXV). The Senate may make exceptions to these restrictions—to accommodate a Senator's preferences or enable a working majority to the majority party—through a simple resolution approved by the chamber. SCHNEIDER, *supra* note 158, at 2.

Like the House, a Senator's seniority plays a dominant role in the committee appointment process. But unlike its large and unwieldy sister chamber, the Senate allows Senators some measure of choice in assignments. For the Republican caucus, a Senator submits her or his committee preferences to the caucus leadership prior to the start of a new Congress.[163] The Republican caucus utilizes a Committee on Committees to nominate Senators to serve on group "A" committees.[164] The Republican leader, a position elected by the caucus membership, has authority to nominate half of the vacancies (if any) on "A" committees and also nominates Senators to the other committees.[165] The leadership then employs a seniority formula to nominate members to committees.[166] The formula grants incumbents, in order of seniority in the Senate, to choose two "A" committees; then, all newly-elected Senators are ranked by a complex seniority/experience formula and nominated to committees.[167] The slate of nominations is put before the Republican conference for approval and then presented to the full Senate chamber for ratification.[168] Once committee assignments are approved, the Republican members of each committee choose the chair or ranking member as the case may be.[169]

The Democratic caucus in the Senate behaves similarly to the Republican caucus. The Democratic Leader appoints a Steering and Outreach Committee, which includes the leader.[170] Unlike the Republican caucus, the Democratic committee nominates Senators to all standing committees and does not use a seniority formula. To make appointments equitable, the caucus applies the so-called "Johnson Rule," which allows all caucus members an assignment to an "A" committee before a member may choose a second

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163 SCHNEIDER, *supra* note 158, at 4.

164 *Id.*

165 *Id.* at 5.

166 *Id.*

167 *Id.* Seniority for newly elected Senators is determined by considering the Senator's previous service in the Senate, previous service in the House, and previous service in state government. *Id.* To ensure parity, the slate of new Senators is seated on a first committee before they are seated on a second committee. *Id.*

168 *Id.* at 6.

169 *See id.* at 4.

170 *Id.* at 7.

committee.[171] Since most incumbents elect to remain on the committees on which they previously sat, the Steering & Outreach Committee focuses its work on selecting newly-elected Senators to committees.[172] And while the committee is required to comply with the standing rules of the Senate relating to committee membership,[173] it weighs other factors including the freshman Senator's preferences, experiences, party loyalty, and state.[174] The full roster of nominations is put before the Democratic caucus for approval and then presented to the full Senate chamber for ratification.[175] Typically, the ranking democrat on each committee serves as chair or ranking member as the case may be.[176]

For both parties in both chambers, important and long-standing institutional incentives exist to motivate an incumbent to remain on a committee once appointed to it.[177] These incentives allow members to acquire specialization at very low cost to the chamber on discreet policy matters. This specialization starts even before a newly elected member begins her inaugural congressional term. Incumbents tend to remain on committees from congress to congress, so appointment decisions are usually made for freshman. Political scientists suggest that freshman legislators tend to prefer committees whose legislative jurisdiction aligns with their own backgrounds and experiences.[178] So, a farmer tends to seek appointment on Agriculture Committee, a teacher on Education & Labor Committee, and a lawyer on Judiciary Committee.[179] This early self-selection tendency combined with incentives to stay put operate to cultivate a few policy specialists in a sea of generalists.

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[171] *Id.* at 8; *see also* Goodwin, *supra* note 153, at 432 (discussing the Johnson Rule, so named after Lyndon B. Johnson when he served as the Democratic Leader in 1953).

[172] *See* SCHNEIDER, *supra* note 158, at 7.

[173] *See supra* text accompanying note 160-62.

[174] SCHNEIDER, *supra* note 158, at 8.

[175] *Id.*

[176] *Senate Committees: The Role of Seniority in Selection of Chairmen and Ranking Members*, U.S. SENATE, https://www.senate.gov/artandhistory/history/common/briefing/Committees.htm [https://perma.cc/6N32-DL5L] (last visited July 23, 2020).

[177] *See generally infra* text accompanying notes 184-89 (describing the rules for how committee members advance in rank as other members drop from the committee) and text accompanying notes 190-96 (describing the advantages of seniority).

[178] KREHBIEL, *supra* note 137, at 135.

[179] *Id.* at 135-36.

Legislative expertise is a product of committee selection and committee tenure. Committee tenure is a product of the seniority system. Members of the United States Congress operate under a long-established and deeply rooted culture that motivates members to remain on legislative committees and in the process become policy specialists in discreet areas of law. Producing policy experts and specialists enables Congress to make law.

3. Seniority in the United States Congress

Seniority refers not to a member's chronological age or tenure in Congress, but a member's continuous service on a legislative committee.[180] Neither the House's nor the Senate's standing rules regulate seniority; rather it is a norm or custom promulgated and reinforced by the party caucuses.[181] Despite this, seniority is an integral part of Congress' committee architecture that has proven to be durable and quite robust.[182] It is the "spirit pervading the total behavior of Congress."[183]

The traditional seniority rule specifies "that a member shall be ranked, by party, according to years of consecutive service on a

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[180] Groseclose & King, *supra* note 136, at 197.

[181] *Id.* While each chamber is required to vote on the committee rosters determined by the party caucuses, the votes are along strict party lines and rarely contested. *See id.*; *see also* Celler, *supra* note 150, at 160 (noting that while the seniority rule is a "long-standing congressional tradition," the rules are informal and not sacrosanct). One commentator explains that informal seniority practices likely first evolved in the Senate. *See* Goodwin, *supra* note 153, at 412-13 (explaining why seniority rules are not formal standing rules in Congress). Duly elected Senators were wary of conferring committee-appointment powers to the unelected presiding officer of the Senate, the Vice President of the United States. *Id.* at 417. In the House, members rose up against an unpopular Speaker of the House, took way the officer's appointment powers, and instituted the seniority system. *Id.*

This history belies a practical benefit of using informal practices to reward seniority instead of standing rules. If committee seniority was a standing rule, "incompetents or outliers would inevitably prevail on some committees in some Congresses." KREHBIEL, *supra* note 137, at 143. Cultural norms like seniority practices are malleable and allow the House or Senate to remove (or decline to appoint) a bad chair.

[182] *See* KREHBIEL, *supra* note 137, at 141 (discussing the seniority system and informational theory).

[183] Goodwin, *supra* note 153, at 412 (quoting ERNEST S. GRIFFITH, CONGRESS: ITS CONTEMPORARY ROLE 18 (1956)). Professor Goodwin notes that seniority in Congress determines far more than just committee and subcommittee membership or chairs. It also "affects the deference shown legislators on the floor, the assignment of office space, even invitations to dinners." *Id.*

specific committee."[184] This so-called seniority ladder determines a committee member's rank on the committee and her succession to the position of chair or ranking member as the case may be.[185] Rank on a committee generally is determined by a member's continuous service on that committee; a break in service, however short, could result in a forfeiture of all seniority on that committee.[186] If two or more members are appointed to a committee for the first time, each caucus has complicated rules to distinguish the rank between them.[187] When a member relinquishes her committee assignment (typically when she loses her seat), the next-ranked member of the same party moves up in rank.[188] Ultimately, a legislator's objective is to persist continuously and longer than any other fellow party member in order to elevate to the chair (or ranking member) of the committee.[189]

The pull of seniority permeates the committee architecture in the House and Senate and advances the institutional need for specialization and expertise. The reward for a member's endurance is a committee chair (or ranking minority seat).[190] The chairperson enjoys special perks and rewards not available to the rank-and-file and presents members with two irresistible enticements: public visibility and clout. Standing committee chairs form part of the party leadership in the House and Senate. More specifically, chairs have "great powers. They subdivide the work of the committees, arrange the agenda and the work schedule, control the staff, preside over committee meetings, manage floor debate . . . to mention only their more obvious activities."[191]

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[184] Barbara Hinckley, *Seniority in the Committee Leadership Selection of Congress*, 13 MIDWEST J. POL. SCI. 613, 615 (1969).

[185] Celler, *supra* note 150, at 162.

[186] *See* Goodwin, *supra* note 153, at 413-14 (describing committee seniority protocols); *see also* SCHNEIDER, *supra* note 152, at 8.

[187] *See* SCHNEIDER, *supra* note 158, at 4, 8; *see also* Goodwin, *supra* note 153, at 413 (describing committee seniority protocols). For example, if a newly-elected Senator is appointed with an incumbent Senator, the incumbent is ranked ahead of the freshman. *Id.*

[188] Goodwin, *supra* note 153, at 413-14.

[189] *See id.* at 414.

[190] Hinckley, *supra* note 184, at 621.

[191] Goodwin, *supra* note 153, at 416.

Control over the committee (and its subcommittees) could afford the chair a power equivalent to a legislative veto.[192]

Many congressional scholars "regard committee and subcommittee chairs as gatekeepers of the highest order."[193] If the chair acting as the leader of the majority party on the committee, refuses to schedule a hearing, or markup, or report out a bill to the floor, then the bill dies.[194] Although the chair could be overruled by a majority of the committee and the committee could be overruled by the full House or Senate, chairs still exert considerably power and influence.[195] The enduring lure of the chair is that a "committee's authority is centered in its chair."[196]

The seniority rules facilitate a number of key advantages in Congress. First, they promote subject-matter specialization among the rank-and-file by incentivizing members to pick and stick with committee assignments.[197] Both the House and the Senate can bank on having a group of members with policy expertise developed at a very low cost to the chamber.[198] Second, they facilitate expertise in the committee chair (and ranking member), who likely committed many years to serving on the committee, developing expertise in its subject matter.[199] Most importantly, they enable Congress to be populated with mostly policy generalists to enact good policy.[200] The House and Senate's committee architecture informed by seniority practices allows Congress to execute its Constitutional powers.

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[192] *See* Groseclose & King, *supra* note 136, at 208 (discussing gatekeeping powers of chairs); *see also* Celler, *supra* note 150, at 166; SCHNEIDER, *supra* note 132, at 2.

[193] *See* Groseclose & King, *supra* note 136, at 210 (discussing the gatekeeper function of committees and chairs).

[194] *See id.* Professors Groseclose and King suggest that a chair's gatekeeper power is somewhat inflated, because the chair will usually consider the preferences of the majority before acting to kill a bill. *Id.* at 210-11.

[195] *See* SCHNEIDER, *supra* note 132, at 2 (describing the power of the chair).

[196] *Id.*

[197] *See* KREHBIEL, *supra* note 137, at 142 (explaining the informational benefits of seniority and specialization).

[198] *Id.*

[199] *Id.*

[200] *See id.* (explaining the informational benefits of seniority and specialization).

4. Legislators' Deference to Legislative Expertise

In *Bank One Chicago, N.A. v. Midwest Bank & Trust Co.*, Justices Scalia and Stevens famously squared off in competing concurrences debating the value of committee reports to resolve an ambiguity in a federal statute.[201] Justice Scalia was unconvinced of the value of committee reports, noting "[t]he law *is* what the law says, and we should content ourselves with reading it rather than psychoanalyzing those who enact it."[202] Justice Scalia argued that it was nonprobative and likely unconstitutional to allow a committee report to speak for the whole House or Senate.[203] Justice Stevens disagreed.[204] He understood better how Congress works when he noted that "[l]egislators . . . often depend on the judgment of trusted colleagues when discharging their official responsibilities."[205] He continued:

> If a statute . . . has been carefully considered by committees familiar with the subject matter, Representatives and Senators may appropriately rely on the views of the committee members in casting their votes. In such circumstances, since most Members are content to endorse the views of the responsible committees, the intent of those involved in the drafting process is properly regarded as the intent of the entire Congress.[206]

Perhaps inadvertently, Justice Stevens was describing the significance and necessity of member specialization required to enable Congress to make law.

Recent scholarship confirms that legislators rely on expert peers when they vote on proposed legislation.[207] While political scientists had observational evidence that describes voting behaviors, one scholar designed an empirical study to test whether

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[201] 516 U.S. 264, 277-78 (1996) (Stevens, J., concurring); *see also supra* Part III.A (discussing the United States Supreme Court's use of committee reports).

[202] *Bank One Chicago*, 516 U.S. at 279 (Scalia, J., concurring).

[203] *Id.* at 280.

[204] *Id.* at 276-79 (Stevens, J., concurring).

[205] *Id.* at 276.

[206] *Id.* at 276-77.

[207] *See generally* Christian Fong, *Expertise, Networks, and Interpersonal Influence in Congress*, 82 J. POL. 269 (2020) (examining how a legislator's expertise influences voting behavior).

members take voting cues from expert colleagues.[208] Analyzing congressional voting records from 1975 through 2015, he concluded that they do, and that expert cue-taking is a "remarkably robust phenomenon."[209] He noted that when "legislators are called upon to vote on a question that they do not understand, they take cues from experts"[210] and that these cues allow "Congress to reach informed collective decisions even though individual legislators are uninformed on many issues."[211] A generalist's reliance on a colleague's specialization and expertise "is a fundamental mechanism for coping with the pervasive problem of incomplete information."[212] Cue-taking or relying on a trusted colleague's expertise enables Congress to make well-informed collective decisions when most members are uninformed on a given question.

Justice Stevens, it appears, was not entirely wrong when he posited that the intent of the committee is properly regarded as the intent of Congress.[213] Congress' committee apparatus, the committee appointment process, and the enduring culture of seniority are designed to produce policy experts with specialized knowledge and experience in discrete subject areas. The idea is to enable a legislative body populated with mostly uninformed generalists on any given issue to make good law in an increasing complex society.

III. JUDICIAL DEFERENCE TO *LEGISLATIVE* EXPERTISE

In 1944, the United States Supreme Court first introduced a test to measure the degree of deference afforded to administrative interpretations of federal statutes that lack the force of law—*Skidmore* deference.[214] The Court explained that while Congress

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[208] *Id.* at 269. The scholar, Professor Christian Fong, compared how often like-party colleagues voted with a member who had been recently added to a legislative committee both before and after the assignment. *Id.* at 271. He observed that the colleagues voted with the newly assigned member more often after the assignment than they did before. *Id.*

[209] *Id.* at 270.

[210] *Id.*

[211] *Id.*

[212] *Id.*

[213] *See supra* text accompanying note 206.

[214] *See supra* Part II.A (discussing Skidmore v. Swift & Co., 323 U.S. 134 (1944)).

did not delegate the power to make binding rules, the Administrator's specialized experience and expertise in the statute's subject matter entitled his opinions to some measure of respect.[215] The *Skidmore* test for deference instructs a court to weigh the thoroughness of the administrator's judgment in rendering an opinion or interpretation, the validity of the reasoning, its consistency with other pronouncements, and any other factor which give it the power to persuade.[216]

Since *Skidmore*, the Court continues to apply a persuasiveness standard to nonbinding statutory interpretations when the agency is exercising its specialized knowledge in the statutory scheme administered.[217] In *United States v. Mead Corp.*, an important post-*Chevron* opinion, the United States Supreme Court confirmed that *Skidmore* deference survives *Chevron*.[218] The *Mead* Court opined that an administrative actor with specialized expertise ought to be afforded some respect when making nonbinding interpretations of authorizing statutes.[219] Under *Mead*, the degree of deference rests on the pronouncement's thoroughness, logic, expertness, and other factors which give it the power to persuade.[220] Thus, a court is obliged to consider an agency actor's accumulated experience and expertise when it is asked to the assess the persuasiveness of her or his nonbinding rulings, interpretations, or opinions resolving a statutory ambiguity.

A legislative committee may also clarify or define the meaning of a statutory term. That opinion is likely to be found in a committee report attached to a bill reported out of committee.[221] As Justice Frankfurter observed:

> Congress can be the glossator of the words it legislatively uses either by writing its desired meaning, however odd, into the text of its enactment, or by a contemporaneously

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[215] *See generally Skidmore*, 323 U.S. at 139-40.

[216] *Id.* at 140.

[217] *See supra* Part II.B (discussing United States v. Mead Corp., 533 U.S. 218 (2001), and its progeny).

[218] *See generally Mead Corp.*, 533 U.S. at 226-27.

[219] *Id.*

[220] *Id.* at 228-29.

[221] *See supra* text accompanying notes 80-84.

> authoritative explanation accompanying a statute. The most authoritative form of such explanation is a congressional report defining the scope and meaning of proposed legislation.[222]

Until relatively recently, the Court often used committee reports and other authoritative pieces of legislative history to help it glean the intent of the enacting Congress. That began to change, however, with the advent of textualist-leaning justices on the Supreme Court who were hostile to any extra-textual source of legislative intent.[223] The gist of the textualists' position, as articulated by Justice Scalia in *Bank One Chicago*, is twofold.[224] First, a court is supposed to glean the intent of the *whole* Congress when it resolves an ambiguity in a statute, and a committee report generated by a legislative subgroup fails in that regard.[225] Second, the Constitution likely forbids courts from using a committee report (or other drafting history), because Article I gives Congress—not legislative subgroups—legislative power.[226] No doubt, Justice Scalia recognized that the intent of the whole Congress is impossible to know, thus the enacted text of a statute is the prudent source of meaning. Justice Scalia asserts that "Congress cannot leave the formation of [legislative] intent to *a small band of its number*, but must, as the Constitution says, form an intent of the *Congress*."[227] Perhaps so, but Justice Scalia likely failed to appreciate how Congress works and the complexity and difficulty of lawmaking in a complicated world. Congress' decentralized design, its push for specialization, and its reliance on members' expertise all conspire to require most legislators to rely on a *small band of its number*.

Congress is obligated to delegate most of its work to an entrenched and deliberate committee structure designed to allow

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[222] Comm'r v. Acker, 361 U.S. 87, 94 (1959) (Frankfurter, J., dissenting). *See also supra* text accompanying notes 85-86.

[223] *See supra* text accompanying 100-05.

[224] *See* Bank One Chicago, N.A. v. Midwest Bank & Tr. Co., 516 U.S. 264, 279-83 (1996) (Scalia, J., concurring).

[225] *Id.* at 280-81.

[226] *Id.*

[227] *Id.* at 280 (emphasis added). Justice Scalia questions whether "the House of Representatives would be content to endorse the views that its Agriculture Committee would come up with." *Id.* at 279-80 (internal quotation marks omitted).

Congress to make good law in a complicated world.[228] As previously explained, the House and Senate are populated with policy generalists in most areas. So, Congress is required to distribute drafting and decision-making functions over dozens of jurisdiction-specific committees and subcommittees. The idea is to funnel policy initiatives away from the general population to legislative subgroups with specialized expertise and experience in a particular subject matter.[229] Each chamber's ability to decision-make is dependent on a committee system designed to foster legislative specialization.

A number of important institutional norms conspire to create, promote, and maintain legislative expertise on committees. First, newly-elected members are initially assigned to and tend to remain on a committee throughout their tenure in Congress.[230] Typically, a member will keep her seat on a standing committee unless she resigns from Congress, she loses an election, her party loses the chamber (requiring a reshuffle of party ratios on the committee), or (less frequently) she requests a change. This stability is a byproduct of an entrenched seniority system present in both chambers.[231] Seniority determines a committee member's rank on the committee. The higher the rank, the closer the member is to a leadership post. Rank on a committee generally is determined by a member's continuous service on that committee. As more senior co-party members leave, the remaining co-party members move up the seniority ladder. The perks, privileges, and power of rank and leadership serve to induce the rank-and-file to persist and remain—and accumulate valuable expertise and experience in discreet policy matters along the way.[232] This specialization is intended to allow Congress to make law.

The United States Supreme Court recognized the value of specialization and subject-matter expertise when it decided *Skidmore*.[233] There, the Court announced a persuasiveness test to

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[228] *See supra* Part III.B.1 (discussing Congress' committee structure).

[229] *Id.*

[230] *See supra* Part III.B.2 (describing the committee assignment process in both the House and Senate).

[231] *See supra* Part III.B.3 (discussing the seniority system in the House and the Senate).

[232] *Id.*

[233] *See supra* Part II.A (discussing *Skidmore* deference).

measure the weight of deference afforded to administrative actors who interpret the meaning of ambiguous text in a statute.[234] *Skidmore* requires courts to defer to a persuasive administrative ruling, interpretation, or opinion even when it lacks the force of law and thus fails to trigger *Chevron* deference.[235] Under *Skidmore* and its progeny, courts are obliged to defer to persuasive administrative interpretations, not to respect Article I values, but to respect the agency actor's expertise and experience in the area.[236]

Curiously, judicial hostility to legislative history in general and committee reports in particular rests in part on Justice Scalia's suggestion in *Bank One Chicago* that deference to legislative committees is unconstitutional.[237] The intent of a legislative subgroup—like a standing committee—is not the intent of Congress. Justice Scalia wrote, "the very first provision of the Constitution forbids it. Article I, § 1, provides that [a]ll legislative Powers herein granted shall be vested in a Congress . . . . It has always been assumed that these powers are nondelegable [to a committee] . . . ."[238] Maybe so, but the Court freely defers to nonbinding *administrative* interpretations of ambiguous statutory text.[239] The reason for deference is not to respect Article I values but to respect the agency actor's expertise in the administrative area. It makes little sense to distinguish constitutionally between

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[234] *Id.* Justice Breyer referred to *Skidmore* as a persuasiveness test of deference as opposed to *Auer*'s reasonableness test. *See supra* Part II.B (discussing contemporary application of *Skidmore*).

[235] *See generally* Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984). Justice Stevens' landmark opinion ties deference to administrative interpretations of statutory ambiguity to Congress' delegation of that authority to the agency. *Id.* at 851. Simply put, if an agency is exercising its statutory authority to make binding law when it interprets a statutory term, a court may not second-guess a reasonable interpretation without offending Article I of the United States Constitution, which grants exclusive law-making powers to Congress and not the courts. *Id.* at 851, 866.

[236] *See supra* Part II.A-B (describing *Skidmore* and *Mead*).

[237] *See supra* text accompanying notes 93, 223-27 (discussing *Bank One Chicago* and Justice Scalia concurring opinion).

[238] Bank One Chicago, N.A. v. Midwest Bank & Tr. Co., 516 U.S. 264, 279 (1996) (Scalia, J. concurring) (examining the constitutional basis for textualism) (internal quotation marks omitted).

[239] *See supra* Part II.A-B (discussing *Skidmore* and *Mead* deference).

an agency expert and a legislative expert when both actors issue nonbinding interpretations of ambiguous statutory text.

At a lecture at Harvard Law School in the fall of 2015, Justice Elena Kagan famously admitted that "we're all textualists now."[240] Justice Kagan's public affirmation of textualism confirmed its ascendancy on the Supreme Court and the relegation of legislative history to an interpretative afterthought and historical curiosity.[241] Yet, even Justice Scalia would have recognized the obvious logical fallacy of treating legislative expertise differently from administrative expertise. For a court resolving statutory ambiguity, the only significant difference between a legislative actor and an administrative actor is that the former is elected. As Justice Jackson observed in *Skidmore v. Swift*, "the Administrator's policies are made in pursuance of official duty, based upon more specialized experience and broader investigations and information than is likely to come to a judge in a particular case" is entitled to respect.[242] A legislative actor is also pursuing her official duty based on specialized expertise and experience. The product of that expertise—formalized in a committee report—is entitled to some measure of deference.

The degree of judicial deference owed to legislative experts opining on statutory meaning ought to be similar to *Skidmore*'s deference to administrative experts because in both cases deference is a consequence of the actors' experience and expertise in a specialized area operating in an official capacity. Thus, the scope of deference owed to a legislative expert ought to be evaluated using the Supreme Court's persuasiveness standard first developed in *Skidmore v. Swift*. The degree of deference would depend on the *thoroughness* evident in its consideration, the *validity* of its reasoning, its *logic*, and all those factors which may give it the power to *persuade*. A House or Senate committee populated with experts on the subject of the statute that generates

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[240] Justice Elena Kagan, *supra* note 3, at 8:28 (explaining Justice Scalia's legacy on the Supreme Court); *see also supra* text accompanying notes 100-05 (discussing Justice Kagan's views on statutory interpretation).

[241] *See supra* text accompanying note 103 (discussing Justice Kagan's use of legislative history).

[242] Skidmore v. Swift & Co., 323 U.S. 134, 139 (1944).

a formal report opining on statutory meaning is entitled to some respect.

CONCLUSION

To preserve the separation of powers, courts are expected to glean the intent of the enacting congress when construing the meaning of ambiguous or opaque statutory language. But divining the intent of a large institution like the Congress of the United States that is composed of hundreds of moving parts—sometimes working at odds with itself—is a hopeless if not impossible task. Recognizing this truth, the Supreme Court has settled on the idea that Congress only manifests an intent when it enacts law.[243] Thus, the intent of Congress should only be revealed by examining the text of the statute. This idea, however, grossly simplifies the enactment process and fails to understand how Congress actually works to make law.[244]

Each chamber of Congress operates under an elaborate and sophisticated committee structure that delegates to a few policy specialists the lion's share of its legislative work.[245] Subject-matter specialization is the product of a committee apparatus and rules and customs calculated to promote a member's experience and expertise in a discrete area of law. The full chamber's collective decision as recorded in the final vote to enact a bill into law is dependent upon those few policy specialists toiling on committees and subcommittees. When a court fails to recognize legislative expertise, it fails to appreciate how Congress is able to exercise its Article I power.

The United States Supreme Court recognizes the value of administrative expertise and is ready to defer to persuasive administrative interpretations of ambiguous statutes even when they lack the force of law.[246] It stands to reason that if a court is

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[243] *See supra* Part IV (discussing broadly the basis of textualists resistance to legislative history).

[244] *See supra* note 95 (noting Justice Breyer's opinion that the Court may not fully understanding how Congress works).

[245] *See supra* Part III.B (discussing how Congress establishes legislative experts through its committee architecture).

[246] *See supra* Part II (discussing administrative deference to nonbinding interpretation of statutory ambiguity).

willing to defer to administrative expertise, it should be willing to defer to legislative expertise when it bears on the meaning of ambiguous statutory language. If the interpretation is the product of Congress—or its subparts—acting in its official capacity and if it is a persuasive opinion on statutory meaning, then it is owed some respect. Legislative expertise is real; and it warrants a measure of deference from courts at least akin to *Skidmore*'s persuasiveness standard.