May Legislative History Be Considered at Chevron Step One: The Third Circuit Dances the Chevron Two-Step in United States v. Geiser

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MAY LEGISLATIVE HISTORY BE CONSIDERED AT CHEVRON STEP ONE? THE THIRD CIRCUIT DANCES THE CHEVRON TWO-STEP IN UNITED STATES v. GEISER

I. Introduction

The revolution began in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*\(^1\) In this landmark decision, the United States Supreme Court set forth a new standard for review of an agency's legal interpretation, specifically, an agency's interpretation of a statute that it administers.\(^2\) Under the "Chevron two-step,"\(^3\) federal courts must first ask "whether Congress has directly spoken to the precise question at issue."\(^4\) If so, then Congress's "clear" and "unambiguously expressed intent" is controlling.\(^5\) If not, then analysis proceeds to *Chevron* step two, where deference is accorded to an agency's statutory interpretation if such interpre-

1. 467 U.S. 837 (1984). Among legal scholars, the decision in *Chevron* is often described as a "revolution." See, e.g., GARY LAWSON, FEDERAL ADMINISTRATIVE LAW 434, 442-43 (4th ed. 2007) (describing *Chevron* as "quiet revolution" because, although Court may not have intended to revolutionize judicial review of agency legal conclusions, subsequent application of *Chevron* achieved such outcome); Cass R. Sunstein, *Beyond Marbury: The Executive's Power to Say What the Law Is*, 115 YALE L.J. 2580, 2596 (2006) (noting that, although Supreme Court may not have intended it, *Chevron* has been viewed as "a kind of revolution"). Yet, despite common parlance, the extent to which *Chevron* may be regarded as revolutionary is contested. Compare Evan J. Criddle, *Chevron's Consensus*, 88 B.U. L. REV. 1271, 1279-80 (2008) (discussing *Chevron* as revolutionary inasmuch as it "challenge[d] the reigning principles of certainty and finality in statutory interpretation," but arguing that *Chevron* is evolutionary in other aspects), and Cass R. Sunstein, *Law and Administration After Chevron*, 90 COLUM. L. REV. 2071, 2074-75, 2082-90 (1990) (noting that *Chevron* set forth distinctive theory of statutory interpretation), with William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretation from Chevron to Hamdan*, 96 GEO. L.J. 1083, 1090-91, 1121 (2008) (concluding from empirical research "that there has not been a *Chevron* 'revolution' at the Supreme Court level").

2. See *Chevron*, 467 U.S. at 842-43 (setting forth two-step test for deference to agency interpretation). When *Chevron* first emerged, legal scholars noted its importance, and it remains a landmark decision today. See Criddle, *supra* note 1, at 1272 (noting that, in federal courts, *Chevron* is "the most cited case in modern public law"); Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452, 455-57 (1989) (discussing *Chevron's* significance, particularly that it ended practice of judicial vacillation among de novo review or absolute deference to agency statutory interpretations); Sunstein, *Law and Administration*, *supra* note 1, at 2075 ("*Chevron* promises to be a pillar in administrative law for many years to come.").


4. See *Chevron*, 467 U.S. at 842 (setting forth first step in *Chevron* analysis).

5. See id. at 842-43 (explaining that both courts and agencies must effectuate clear congressional intent).
tation is based upon a “permissible,” or reasonable, construction of the statute.6 With this two-part formulation, Chevron replaced ad hoc deference factors with a basic test to determine whether deference to an agency’s statutory interpretation is due.7

Yet to highlight Chevron’s importance is not to say that it is self-implementing.8 Indeed, although Chevron provided a new test to determine whether a court should defer to an agency’s statutory interpretation, the decision contains little instruction regarding how to apply the test.9 The first step of the Chevron two-step is particularly difficult to apply.10 Although it neatly divides statutes into two categories, clear or ambiguous, and provides that clear congressional intent must be effectuated, the first step of Chevron leaves an important question unanswered: “How clear is clear?”11 Further, although the first step of Chevron instructs courts to deploy “traditional tools of statutory construction” in discerning congres-

6. See id. at 843 (providing second step in Chevron analysis).
7. See Sunstein, Law and Administration, supra note 1, at 2082 (comparing Chevron to earlier standards for review of agency statutory interpretations). As Sunstein succinctly states: “Before 1984, the law thus reflected a puzzling and relatively ad hoc set of doctrines about when courts should defer to administrative interpretations of law. All this was changed by Chevron.” Id. For further discussion of jurisprudence preceding Chevron, see infra note 40.
8. See Lisa Schultz Bressman, Chevron’s Mistake, 58 DUKe L.J. 549, 551 (2009) (arguing that Chevron “fails to supply courts with the tools” for determining whether Congress has delegated interpretative authority to agency, such that deference to agency’s statutory interpretation is due).
9. See Eskridge & Baer, supra note 1, at 1122-23 (stating that Chevron has “created an increasingly complicated set of doctrinal debates” concerning how it should be applied); Note, A Pragmatic Approach to Chevron, 112 Harv. L. Rev. 1723, 1723 (1999) (“Chevron appears clear, but its application is not.”). Specifically, Eskridge and Baer highlight that ambiguity surrounds the relationship of Chevron to other deference regimes, how courts should determine whether congressional intent is clear and unambiguous at Chevron step one, and when the Chevron regime should be applied in the first place. See Eskridge & Baer, supra note 1, at 1123 (listing lingering ambiguities with Chevron’s application).
11. Antonin Scalia, Judicial Deference to Administrative Interpretations of Law, 1989 DUKe L.J. 511, 520 (1989) (discussing ambiguity at Chevron step one, and noting that ambiguity regarding when statute is “clear” prevents Chevron “from being an absolutely clear guide to future judicial decisions”). Faced with the question of “how clear is clear,” courts and commentators have provided differing answers. Compare Pauley v. BethEnergy Mines, Inc., 501 U.S. 680, 707 (1991) (Scalia, J., dissenting) (“Deference is appropriate where the relevant language, carefully considered, can yield more than one reasonable interpretation, not where discerning the only possible interpretation requires a taxing inquiry. Chevron is a recognition that the ambiguities in statutes are to be resolved by the agencies charged with implementing them, not a declaration that, when statutory construction becomes difficult, we will throw up our hands and let regulatory agencies do it for us.”), with Sunstein, Law and Administration, supra note 1, at 2091 (“The Court’s own decisions, however, suggest that the mere fact of a plausible alternative view is insufficient” to deem statute unclear and ambiguous).
sional intent, uncertainty remains as to precisely which tools should be used.\footnote{12} Determining which tools of statutory construction are permissible "is perhaps the most important question in the implementation of \textit{Chevron},"\footnote{13} but presently, no majority opinion of the Supreme Court has addressed the precise issue.\footnote{14}

Recently, however, the Third Circuit expressly considered whether analysis of legislative history is a permissible tool of statutory construction at \textit{Chevron} step one.\footnote{15} In \textit{United States v. Geiser},\footnote{16} the Third Circuit held that analysis of legislative history is not permitted when assessing, at \textit{Chevron} step one, whether there is clear congressional intent as to the precise question at issue.\footnote{17} Instead, a unanimous panel held that only the plain language of a statute may be considered.\footnote{18} The decision in \textit{Geiser} places the Third Circuit in direct disagreement with the First Circuit, which maintains that use of legislative history "is permissible and even may be required at stage one of \textit{Chevron}."\footnote{19}

This Casebrief analyzes differing judicial approaches to \textit{Chevron} step one, and argues that the Third Circuit's decision in \textit{Geiser} should be interpreted narrowly, such that analysis of legislative history at \textit{Chevron} step one is not permitted if statutory text is unambiguous, but remains permissible to resolve ambiguity in statutory text.\footnote{20} Part II provides an overview of

\begin{footnotes}
\item[12] See Bressman, \textit{supra} note 8, at 551 (arguing that because \textit{Chevron} does not specify which tools of statutory construction are permissible, courts select among theories of statutory construction, including textualism, purposivism, and intentionalism); Eskridge \& Baer, \textit{supra} note 1, at 1122-23 (noting that \textit{Chevron} "has created an increasingly complicated set of doctrinal debates about . . . the approach the Court should take and the evidence it ought to consider to determine whether Congress has directly addressed an issue").
\item[13] Lawson, \textit{supra} note 1, at 497.
\item[14] See Santiago v. GMAC Mortgage Group, Inc., 417 F.3d 384, 388 n.3 (3d Cir. 2005) (citing cases for proposition that Supreme Court precedent remains unclear about whether legislative history may be considered at \textit{Chevron} step one); see also Eskridge \& Baer, \textit{supra} note 1, at 1092-93 (arguing that it is time for Supreme Court to "recognize, expressly, that statutory interpretation needs to be understood through a new lens, that of the modern administrative state. Such a lens requires fresh conceptualization of such judicial doctrines as the plain meaning rule, purposive interpretation, legislative history, stare decisis, and the substantive canons of statutory construction.").
\item[17] See id. at 294 ("In sum, the current state of Supreme Court and Third Circuit jurisprudence demonstrates that legislative history should not be considered at \textit{Chevron} step one.").
\item[18] See id. (holding that \textit{Chevron} step one determination of whether congressional intent is clear is strictly based upon consideration of statutory text).
\item[19] See Succar v. Ashcroft, 394 F.3d 8, 31 (1st Cir. 2005) (permitting use of legislative history at \textit{Chevron} step one). For further discussion of the First Circuit's decision in \textit{Succar}, see infra notes 69-77 and accompanying text.
\item[20] For a discussion of whether, in the wake of \textit{Geiser}, consideration of legislative history is permissible at \textit{Chevron} step one, see infra notes 112-33 and accompanying text.
\end{footnotes}
Chevron deference, and analyzes the ways in which the Supreme Court and U.S. Circuit Courts of Appeals have construed Chevron's first step. Part III details the Third Circuit's decision in Geiser that legislative history may not be considered at Chevron step one. Part IV considers the scope of Geiser's holding, and argues that a narrow interpretation is best. Finally, Part V concludes with a discussion of the significance of the Third Circuit's recent decision in Geiser.

II. ORIGINS AND APPLICATIONS OF CHEVRON

In Chevron, the Supreme Court set forth a new standard for review of agency statutory interpretations. Although the Chevron opinion considers legislative history at the first step in the Chevron two-step, subsequent Court cases are inconsistent in the use of legislative history at Chevron step one, and the Court has not expressly ruled on the issue. Application of Chevron step one in several of the circuit courts mirrors this inconsistency. In particular, although the First Circuit has expressly ruled that legislative history is permissible at Chevron step one, other circuits—including the Third Circuit, prior to Geiser—lack an express ruling and consider legislative history only some of the time.

21. For background concerning Chevron deference, see infra notes 25-38 and accompanying text. For a discussion of the Supreme Court's application of Chevron step one, see infra notes 39-65 and accompanying text. For an overview of the Third Circuit's application of Chevron step one prior to Geiser, see infra notes 78-86 and accompanying text. Finally, for an overview of Chevron step one analysis in the other circuit courts, see infra notes 67-77 and accompanying text.

22. For a discussion of the factual context and the Third Circuit's reasoning in Geiser, see infra notes 87-111 and accompanying text.

23. For arguments that Geiser's holding concerning Chevron step one is best interpreted narrowly, see infra notes 112-33 and accompanying text.

24. For a discussion of the impact of excluding legislative history from consideration at Chevron step one, see infra notes 134-38 and accompanying text.


26. See id. at 862 (considering legislative history at Chevron step one); see also Santiago v. GMAC Mortgage Group, Inc., 417 F.3d 384, 388 n.3 (3d Cir. 2005) (noting that Supreme Court precedent is unclear as to whether legislative history may be considered at Chevron step one); Coke v. Long Island Health Care at Home, Ltd., 376 F.3d 118, 127 (2d Cir. 2004) (stating that Court "has issued mixed messages as to whether a court may consider legislative history" at Chevron step one), vacated, 546 U.S. 1147 (2006).

27. For a discussion of the application of Chevron step one in the circuit courts of appeals, see infra notes 66-86 and accompanying text.

28. For a discussion of the First Circuit's application of Chevron step one, see infra notes 69-77 and accompanying text. For a discussion of the Third Circuit's application of Chevron step one prior to Geiser, see infra notes 78-86 and accompanying text. Finally, for a discussion of Chevron step one applied in other circuit courts, see infra note 67 and accompanying text.
A. It "Began with a Bubble"\textsuperscript{29}: The Emergence of Chevron Deference

\textit{Chevron} called upon the Supreme Court to decide the legality of the "bubble concept": whether the Clean Air Act Amendments of 1977 permitted the Environmental Protection Agency's (EPA) regulation providing for a plant-wide definition of "major stationary source," in which a "stationary source" consisted of an entire industrial plant and all buildings within the plant complex (as if a bubble encompassed the plant).\textsuperscript{30} Under this plant-wide definition of "stationary source," a plant could install or modify one pollution-emitting device without triggering permit requirements, so long as total plant emissions did not increase.\textsuperscript{31} EPA defended its regulation by arguing that the statute's text and legislative history were silent as to the propriety of the "bubble concept," providing EPA with discretion in administering the statute.\textsuperscript{32} EPA further argued

\begin{itemize}
\item \textsuperscript{29} Eskridge & Baer, \textit{supra} note 1, at 1085 ("The much-toasted \textit{Chevron Revolution} began with a bubble."). For an interesting account of EPA's litigation strategy in \textit{Chevron}, as well as an account of the Justices' deliberations, see \textit{id.} at 1085-87.
\item \textsuperscript{30} See \textit{Chevron}, 467 U.S. at 840 (stating question presented). The Clean Air Act Amendments required that non-attainment states—that is, states that had not achieved EPA's national ambient air quality standards—establish a permit program to regulate "new or modified major stationary sources." \textit{See id.} (quoting 42 U.S.C. § 7502(b)(6)) (providing context of Clean Air Act Amendments). Administering the Clean Air Act Amendments at the start of the Reagan administration, new leadership at EPA had promulgated a regulation that permitted a state to adopt a plant-wide definition of "stationary source." \textit{See id.} at 852-59 (detailing EPA regulations, particularly changes to definition of "stationary source" from one presidential administration to next).
\item \textsuperscript{31} \textit{See id.} at 840 (summarizing EPA regulation at issue); \textit{see also} Eskridge & Baer, \textit{supra} note 1, at 1085 (explaining that "bubble concept" approach to defining "stationary source" allowed plants to "flexibly offset increased emissions from one building by reducing them elsewhere within the single plant").
\item \textsuperscript{32} \textit{See Chevron}, 467 U.S. at 857-58 (citing 46 Fed. Reg. 16,281 (Mar. 12, 1981)) (summarizing EPA argument concerning ambiguity of term "source" in Clean Air Act Amendments). Specifically, "the EPA first noted that the definitional issue was not squarely addressed in either the statute or its legislative history and therefore that the issue involved an agency 'judgment as how to best carry out the Act.'” \textit{id.} at 858 (citing 46 Fed. Reg. 16,281).
\end{itemize}
that its regulation was a reasonable exercise of its discretion. The Supreme Court agreed, and upheld EPA's regulation.

The Court began its analysis by providing the standard for review of an agency statutory interpretation, and in doing so, set forth what has become the well-known *Chevron* two-step:

When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter, for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

33. See id. at 858 (citing 46 Fed. Reg. 16,281) (summarizing EPA arguments that it reasonably exercised its discretion in defining "stationary source"). In particular, EPA argued that the plant-wide definition was most appropriate because the alternative definition—under which each pollution-emitting structure constituted a "source," rather than the entire plant—would "act as a disincentive to new investment and modernization by discouraging modifications to existing facilities," which, in turn, could "retard progress in air pollution control" because dirtier equipment would not be replaced with cleaner models. See id. (citing 46 Fed. Reg. 16,281) (explaining EPA argument concerning propriety of plant-wide definition of stationary source). Further, EPA argued that the plant-wide definition was most appropriate because it would simplify EPA's regulations, as the same definition of source could be used in multiple regulatory programs, thereby reducing confusion and inconsistency. See id. (citing 46 Fed. Reg. 16,281) (summarizing EPA argument in favor of plant-wide definition). Finally, EPA addressed the concern that the plant-wide definition would undermine attempts to curb air pollution, arguing that other regulations remaining in place would "accomplish the fundamental purposes of achieving attainment with NAAQSs [national ambient air quality standards] as expeditiously as possible." See id. (citing 46 Fed. Reg. 16,281) (explaining EPA argument that plant-wide definition did not undermine continued attainment of reduced air pollution levels).

34. See id. at 866 (reversing D.C. Circuit Court of Appeals and holding that EPA's regulation was permissible construction of statute).

35. Id. at 842-43. Just as significant as the precise standard of review is the Court's articulation of the reasons why judges should defer to reasonable agency interpretations: separation of powers, agency expertise, and democratic accountability. See id. at 843-45, 865-66 (explaining rationales underlying deference); cf. Criddle, supra note 1, at 1273 (noting that theoretical justifications for *Chevron* deference are heavily debated among legal scholars). The premise of the separation of powers rationale is that Article I of the Constitution vests Congress, not the judiciary or administrative agencies, with legislative power. See U.S. Const. art. I, § 1 ("All legislative powers herein granted shall be vested in a Congress of the United States . . . ."). Accordingly, when courts construe a statute, they must give effect to congressional intent. See *Chevron*, 467 U.S. at 843 n.9 (stating that, when
Applying this standard of review, the Court considered the statute’s plain language as well as legislative history at *Chevron* step one, and concluded that no clear congressional intent existed as to the permissibility of the bubble concept. At *Chevron* step two, the Court considered the statute’s purpose and history, and concluded that the regulation was a permissible construction of the statute because it properly accommodated competing policies of environmental protection and economic growth. Thus, the Court deferred to the EPA’s statutory interpretation and upheld its regulation.

**B. The Supreme Court's Application of *Chevron* Step One**

Strong evidence indicates that the Court did not intend its decision in *Chevron* to create a new standard for judicial review of agency statutory construing statute, if court "ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect"). Thus, if a court ascertains congressional intent at *Chevron* step one, the court "must reject administrative constructions which are contrary to clear Congressional intent." See id. (explaining rationale underlying *Chevron* step one). Similarly, at *Chevron* step two, if Congress has expressly delegated interpretive authority to the agency, or if Congress has implicitly left a gap for the agency to fill, the courts must respect the congressional delegation and defer to the agency’s reasonable interpretation. See id. at 843-45 (explaining rationale underlying *Chevron* step two); see also FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 132 (2000) ("Such deference is justified because “[t]he responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones.”) (citation omitted); Pauley v. BethEnergy Mines, Inc., 501 U.S. 680, 696 (1991) ("Judicial deference to an agency’s interpretation of ambiguous provisions of the statute it is authorized to implement reflects a sensitivity to the proper roles of the political and judicial branches."). But see Scalia, *supra* note 11, at 514-16 (rejecting separation of powers as theoretical justification for *Chevron* deference).

The fact of agency expertise is further reason to defer. See *Chevron*, 467 U.S. at 865 (justifying deference on grounds that "the regulatory scheme is technical and complex, the agency considered the matter in a detailed and reasoned fashion, and the decision involves reconciling conflicting policies") (citations omitted); see also Brown & Williamson, 529 U.S. at 132 (explaining that deference is justified "because of the agency’s greater familiarity with the ever-changing facts and circumstances surrounding the subjects regulated"). Finally, deferring to agency interpretation on issues in which there is ambiguous congressional intent or a statutory gap left for the agency to fill is justified because it furthers the process of democratic accountability: as part of the executive branch, agencies are directly accountable to the people. See *Chevron*, 467 U.S. at 865-66 ("[I]t is entirely appropriate for this political branch of the Government to make such policy choices—resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities.").

36. See id. at 859-62 (applying *Chevron* step one).
37. See id. at 863-66 (applying *Chevron* step two).
38. See id. at 865-66 (applying deference and holding that regulation was permissible construction of statute).
interpretations. Indeed, it is possible to read *Chevron* narrowly, as a sheer application of prior precedent in which deference was possible only when an agency applied the law to a set of facts, while pure questions of law continued to be reviewed de novo. Yet subsequent applications favored a broader view, which prevails today: *Chevron* set forth a distinct theory of statutory interpretation and established a canon of construction in which a court must defer to clear congressional intent, or, if unclear, to an agency's reasonable interpretation.

39. See id. at 844-45 (noting that Court has "long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme that it is entrusted to administer," and citing cases); Robert V. Percival, *Environmental Law in the Supreme Court: Highlights from the Marshall Papers*, 23 ENVTL. L. REP. 10606, 10613 (1993) (explaining that Justice Marshall's papers demonstrate that Court did not perceive *Chevron* as landmark decision); Karin P. Sheldon, "It's Not My Job to Care": Understanding Justice Scalia's Method of Statutory Interpretation Through Sweet Home and *Chevron*, 24 B.C. ENvrL. Arr. L. REv. 487, 508 (1997) (quoting from Justice Stevens's letters to Justice Scalia to argue that Justice Stevens did not view *Chevron* as setting forth entirely new standard of review and theory of deference).

40. See LAWSON, supra note 1, at 442 ("It is therefore possible, and even natural, to read *Chevron* simply as a straightforward application of settled principles of judicial review of agency legal conclusions, with the case presenting one of the usual but not unheard-of situations in which the traditional panoply of factors warranted granting an agency deference on a pure question of law."); Sunstein, *Law and Administration*, supra note 1, at 2076 (explaining that author of *Chevron* opinion, Justice Stevens, endorsed narrow view of *Chevron*, in which, consistent with prior administrative law decisions, deference would be accorded only for applications of law to fact and not for pure questions of law). Indeed, only three years after *Chevron*, Justice Stevens's majority opinion in *Cardoza-Fonseca* appeared to place *Chevron* within the analytic framework of prior administrative law jurisprudence, in which deference to administrative agencies was only considered if the issue presented a mixed question of law and fact, rather than a pure question of law. See INS v. Cardoza-Fonseca, 480 U.S. 421, 448 (1987) (explaining lack of deference in part because case presented "narrow legal question" rather than question of law applied to facts); Sunstein, *Law and Administration*, supra note 1, at 2084 (noting that *Cardoza-Fonseca* seemed to indicate that courts would continue to review pure questions of law de novo, and apply *Chevron* only in cases involving mixed questions of law and fact). *But see Cardoza-Fonseca*, 480 U.S. at 454-55 (Scalia, J., concurring) (criticizing majority for departing from "well-established interpretation" of *Chevron*, which applies *Chevron* both to pure legal questions as well as to mixed questions of law and fact).

The problem in establishing *Chevron* as a new standard of review—via subsequent applications of it as a new standard, rather than from the *Chevron* decision itself—is that uncertainty developed in *Chevron*’s application. 42 *Chevron*’s first step instructs courts to apply “traditional tools of statutory construction” to assess “whether Congress has directly spoken to the precise question at issue” such that “congressional intent” is “clear”; however, neither *Chevron* nor subsequent Court decisions expressly address which tools of statutory construction should be employed to discern congressional intent. 43 As one commentator observes, application of *Chevron*’s first step often varies depending upon which theory of statutory interpretation the Court adopts: intentionalism, purposivism, or textualism. 44

As a result, three distinct approaches to the use of legislative history at *Chevron* step one are apparent in the Supreme Court’s application of *Chevron* step one. 45 In one approach, the Court considers legislative history as

supra note 1, at 443 (noting that Justice Scalia helped establish broad reading of *Chevron* as controlling law in D.C. Circuit as well as on Supreme Court); Farina, supra note 2, at 455 (“[T]he appointment of Justice Scalia added an even more determined proponent of *Chevron* and the deferential model.”).

42. Cf. Eskridge & Baer, supra note 1, at 1122-25 (noting that *Chevron* “has created an increasingly complicated set of doctrinal debates about ... the approach the Court should take and the evidence it ought to consider to determine whether Congress has directly addressed an issue”); Starr, supra note 10, at 365 (stating that *Chevron* step one "raises some rather difficult questions of interpretation for the judiciary").

43. See *Chevron*, 467 U.S. at 843 n.9 (instructing courts to employ “traditional tools of statutory construction” to ascertain congressional intent); see also Santiago v. GMAC Mortgage Group, Inc., 417 F.3d 384, 388 n.3 (3d Cir. 2005) (noting that Supreme Court precedent is unclear as to whether legislative history may be considered at first step of *Chevron* analysis); Coke v. Long Island Health Care at Home, Ltd., 376 F.3d 118, 127 (2d Cir. 2004) (stating that Court "has issued mixed messages as to whether a court may consider legislative history" at *Chevron* step one), vacated, 546 U.S. 1147 (2006).

44. See Bressman, supra note 8, at 551-52 (categorizing modes of interpretation under *Chevron* step one). Bressman provides a clear explanation of the three modes of statutory interpretation:

[I]ntentionalism sees Congress as intending a meaning, albeit expressing it imperfectly in the chosen text. Purposivism understands Congress as motivated by a general aim in enacting statutes, often imperfectly expressing that aim. Both permit courts to consult legislative history in pursuit of legislative intent or purpose. Meanwhile, textualism denies that legislative history is a permissible interpretive source as this theory has a strikingly different view of legislative behavior. Textualism tends to conform to public choice theory and the claim that Congress has no intent or purpose distinct from those explicitly stated in the statutory text. Nevertheless, modern textualism invites courts to discern a meaning for awkward or imprecise language. ... Textualists also have a constitutional objection to the use of legislative history because Congress only enacted the text.

Id.

45. For discussion of each of the three approaches, see infra notes 46-48 and accompanying text.
one among several tools of statutory construction used to ascertain congressional intent as to the precise question at issue.\textsuperscript{46} In a separate approach, the Court considers legislative history at \textit{Chevron} step one only if the statutory text is ambiguous.\textsuperscript{47} Finally, in other cases, although not expressly precluding the use of legislative history, the Court only considers statutory text and structure at \textit{Chevron} step one; if the court finds the text ambiguous, the Court proceeds to \textit{Chevron} step two, rather than using legislative history to resolve the textual ambiguity at step one.\textsuperscript{48} A majority

\textsuperscript{46} See, e.g., Gen. Dynamics Land Sys., Inc. v. Cline, 540 U.S. 581, 587-600 (2004) (dicta) (construing statute based upon statutory text, structure, purpose, and legislative history, and stating that application of \textit{Chevron} framework was unnecessary because, given Court's construction of statute, agency interpretation would be inconsistent with clear congressional intent at \textit{Chevron} step one); \textit{Brown \\& Williamson}, 529 U.S. at 147 (noting that although legislative history is not determinative, it "is certainly relevant" to discerning congressional intent); \textit{Pauley}, 501 U.S. at 697-98 (finding that text and legislative history established clear congressional intent to delegate statutory interpretation to agency); Dole v. United Steelworkers of Am., 494 U.S. 26, 35-42 (1990) (stating that petitioner's interpretation of plain language provided most "natural" and "commonsense" meaning, but then examining context, purpose, and legislative history to conclude that Congress actually intended more narrow scope than plain language facially revealed); Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 214 (1988) (using legislative history at \textit{Chevron} step one to confirm interpretation of unambiguous statutory text); \textit{United Food \\& Commercial Workers Union}, 484 U.S. at 123-28 (discerning clear congressional intent from statutory text, structure, and legislative history); INS v. Cardoza-Fonseca, 480 U.S. 421, 427-50 (1987) (examining statutory text and legislative history as "traditional tools of statutory construction" to find clear and unambiguous congressional intent at \textit{Chevron} step one); Bd. of Governors of Fed. Reserve Sys. v. Dimension Fin. Corp., 474 U.S. 361, 367-73 (1986) (discerning clear congressional intent by determining that legislative history confirmed "plain reading" and "commonly accepted meaning" of statutory text).

\textsuperscript{47} See, e.g., Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ., 550 U.S. 81, 89-100 (2007) (stating that "[u]nder this Court's precedents, if the intent of Congress is clear and unambiguously expressed by the statutory language at issue, that would be the end of our analysis," but considering legislative history because of Court's conclusion that statutory text was ambiguous) (citation omitted); Holly Farms Corp. v. NLRB, 517 U.S. 392, 398-401 (1996) (concluding that congressional intent remained ambiguous after examination of text and legislative history); Pension Benefit Guar. Corp. v. LTV Corp., 496 U.S. 633, 648-50 (1990) (using legislative history at \textit{Chevron} step one in attempt to interpret ambiguous statutory text); cf. Dep't of Hous. & Urban Dev. v. Rucker, 535 U.S. 125, 132-33 (2002) (stating that "reference to legislative history is inappropriate when the text of the statute is unambiguous"); \textit{K Mart Corp. v. Cartier, Inc.}, 486 U.S. 281, 293 n.4 (1988) (plurality) (noting that "reference to legislative history[ ] is in the first instance irrelevant" because analysis under \textit{Chevron} step one begins with analysis of plain language).

opinion of the Court has not determined which of these three methods is proper.\textsuperscript{49}

In a recent case, however, concurring and dissenting opinions of the Court squarely addressed the issue of which tools of statutory construction should be utilized at \textit{Chevron}'s first step.\textsuperscript{50} \textit{Zuni Public School District No. 89 v. Department of Education}\textsuperscript{51} asked the Court to decide the validity of the Secretary of Education's mode of calculating a state's per-pupil expenditures under the federal Impact Aid Act.\textsuperscript{52} At \textit{Chevron} step one, the majority discerned clear congressional intent to provide the Secretary with discretion to select a calculation method, and at \textit{Chevron} step two, concluded that the Secretary reasonably exercised its discretion.\textsuperscript{53} Notably, in the analysis at \textit{Chevron} step one, the majority departed from traditional practice, assessing the statute's purpose and legislative history prior to assessing the plain language.\textsuperscript{54}

Concurring and dissenting opinions emerged in response to the majority's consideration of legislative history prior to statutory text, and in responding to this mode of statutory interpretation, the opinions debated the propriety of considering legislative history at \textit{Chevron} step one.\textsuperscript{55} Con-

\textsuperscript{49} See Santiago v. GMAC Mortgage Group, Inc., 417 F.3d 384, 388 n.3 (3d Cir. 2005) (noting that Supreme Court precedent is unclear as to whether legislative history may be considered at first step of \textit{Chevron} analysis); Coke v. Long Island Health Care at Home, Ltd., 376 F.3d 118, 127 (2d Cir. 2004) (stating that Court "has issued mixed messages as to whether a court may consider legislative history" at \textit{Chevron} step one), vacated, 546 U.S. 1147 (2006); Bressman, supra note 8, at 551-52 (discussing Court's separate approaches to statutory construction at \textit{Chevron} step one).

\textsuperscript{50} See \textit{Zuni}, 550 U.S. at 104-22 (Stevens, J., concurring and Scalia, J., dissenting) (commenting upon majority's consideration of statutory purpose and legislative history prior to plain language).

\textsuperscript{51} 550 U.S. 81 (2007).

\textsuperscript{52} See id. at 84-86 (summarizing question presented).

\textsuperscript{53} See id. at 89-100 (applying \textit{Chevron}). Interestingly, the Court's analysis of statutory purpose and legislative history seems to simultaneously encompass both \textit{Chevron} steps one and two. See id. at 90 ("Considerations other than language provide us with unusually strong indications that Congress intended to leave the Secretary free to use the calculation method before us and that the Secretary's chosen method is a reasonable one."); see also id. at 93 ("Thus, the history and purpose of the disregard instruction indicate that the Secretary's calculation formula is a reasonable method that carries out Congress' likely intent in enacting the statutory provision before us.").

\textsuperscript{54} See id. at 89-100 (considering legislature history and statutory purpose prior to plain language). Justice Breyer noted that the order of analysis "depart[ed] from a normal order of discussion, namely an order that first considers Zuni's statutory language argument." \textit{Id.} at 89-90. Nonetheless, Justice Breyer concluded that "because of the technical nature of the language in question," examination of statutory purpose at the outset was necessary to "illuminate [the Court's] subsequent analysis" of the text. See id. at 90 (justifying Court's order of analysis).

\textsuperscript{55} Compare id. at 104-07 (Stevens, J., concurring) (arguing that legislative history may, under certain circumstances, be determinative of congressional intent at \textit{Chevron} step one), with id. at 108-22 (Scalia, J., dissenting) (arguing that legislative
curring, Justice Stevens stated that *Chevron* instructs a court to use traditional tools of statutory construction to ascertain congressional intent, and stated that "legislative history is, of course, a traditional tool of statutory construction."56 Applying *Chevron* step one, Justice Stevens argued that *Zuni* presented the rare circumstance in which clear legislative history, rather than ambiguous statutory text, should determine congressional intent.57 As justification for this conclusion, Justice Stevens explained that there is no reason why a court must confine analysis to, or begin analysis with, the statutory text if other tools of statutory construction provide clear evidence of congressional intent as to the precise question at issue.58 Dissenting, Justice Scalia criticized the majority's consideration of legislative history prior to statutory text, arguing that such practice improperly frames analysis such that otherwise unambiguous text seems ambiguous.59 Further, Justice Scalia criticized Justice Stevens's argument that clear legislative history may take priority over ambiguous statutory text, labeling it "a judge-empowering proposition."60

In criticizing the majority's and Justice Stevens's opinions, Justice Scalia's dissent presents the major criticisms against the use of legislative history in statutory interpretation: that legislative history is unreliable and incoherent, and that its use in statutory interpretation is undemocratic.61

history should not be considered at *Chevron* step one when plain language is unambiguous).

56. See id. at 104-07 (Stevens, J., concurring) (justifying use of legislative history at first step in *Chevron* analysis).

57. See id. at 106 (noting that "the legislative history is pellucidly clear and the statutory text is difficult to fathom"). Justice Stevens referenced past cases in which legislative history, rather than plain language, determined the Court's construction of a statute. See id. at 104-05 ("'[I]n rare cases the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters, and those intentions must be controlling.'" (citing United States v. Ron Pair Enters., Inc., 489 U.S. 235, 242 (1989); Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 571 (1982))). Given these precedents, Justice Stevens stated that, even if the text had been unambiguous, he would have found that the clear legislative history determined congressional intent as to the question at issue. See id. at 107 n.3 ("It is a familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers." (quoting Church of Holy Trinity v. United States, 143 U.S. 457, 459 (1892))). Nonetheless, Justice Stevens agreed with the majority's judgment, and also noted support for the majority's analysis of history and purpose prior to plain language. See id. at 106 (stating that "the text is sufficiently ambiguous to justify the Court's exegesis").

58. See id. (emphasizing clarity of legislative history concerning particular question at issue).

59. See id. at 108-09 (Scalia, J., dissenting) (stating that majority derives congressional intent from "roundabout tour" of "unenacted congressional intent and judicially perceived statutory purpose," and noting that only after such analysis "are we informed how the statute's plain text does not unambiguously preclude the interpretation the Court thinks best").

60. See id. (responding to Justice Stevens's concurrence).

61. See id. at 108-22 (criticizing use of legislative history in statutory interpretation at *Chevron* step one). See generally Lawrence M. Sloan, *Private Language, Public
As Justice Scalia explains, Congress votes only upon the text of the statute, and the deliberations comprising the legislative history are rarely seen or heard by constituents. Therefore, use of legislative history to cast light upon enacted statutory text undermines the democratic rule of law by enabling judges to intervene in the lawmaking process. Further, because legislative history is not enacted, critics charge that it does not reliably indicate congressional intent, so permitting reconstruction of congressional intent from legislative history enables judges to construe statutes based upon their own values. Significantly, Justice Scalia's dissent in \textit{Zuni} only applies this criticism against the use of legislative history to the

\textit{Laws: The Central Role of Legislative Intent in Statutory Interpretation}, 93 Geo. L.J. 427, 427-28 (2005) (introducing three main arguments against use of legislative history in statutory interpretation). As Sloan succinctly describes: (1) the argument that the use of legislative history is undemocratic is grounded in the premise that it is not enacted; (2) the argument that legislative history is unreliable is grounded in the premise that "history is often conflicting, and may even be planted to influence judges in the future"; and (3) the argument that legislative history is incoherent is grounded in the premise that it "does not represent the views of all members of the legislature." \textit{See id.} at 427 (summarizing arguments against judicial use of legislative history in statutory construction).

62. \textit{See Zuni}, 550 U.S. at 117 (Scalia, J., dissenting) (providing premises for argument against use of legislative history). Justice Scalia explains:

\begin{quote}
The only thing we know for certain both Houses of Congress (and the President, if he signed the legislation) agreed upon is the text. Legislative history can never produce a "pellucidly clear" picture of what a law was "intended" to mean, for the simple reason that it is never voted upon—or ordinarily even seen or heard—by the "intending" lawgiving entity, which consists of both Houses of Congress and the President (if he did not veto the bill). . . . Citizens arrange their affairs not on the basis of their legislators' unexpressed intent, but on the basis of the law as it is written and promulgated.
\end{quote}

\textit{Id.} at 117, 119.

63. \textit{See id.} at 119 ("By 'depriving legislators of the assurance that ordinary terms, used in an ordinary context, will be given a predictable meaning,' we deprive Congress of 'a sure means by which it may work the people's will.'") (quoting \textit{Chisom v. Roemer}, 501 U.S. 380, 417 (1991) (Scalia, J., dissenting)); \textit{see also id.} at 116 (stating that majority's interpretation "contort[s] the statute's language beyond recognition").

64. \textit{See id.} at 117-18 (explaining impact of allowing legislative history to determine congressional intent). Specifically, Justice Scalia argued that when judges discern congressional intent from legislative history, the intent discerned has a "disturbing but entirely unsurprising tendency to be whatever judges think Congress must have meant, i.e., \textit{should} have meant." \textit{See id.} at 117 (criticizing use of legislative history to supplant statutory text). For example, in Church of the Holy Trinity, a case to which Justice Stevens's concurring opinion cited, Justice Scalia noted how the Court inserted its own values into interpretation of a statute: "this Court disregarded the plain language of a statute that forbade the hiring of a clergyman from abroad because, after all (they thought), 'this is a Christian nation,' so Congress could not have meant what it said." \textit{Id.} (quoting Church of the Holy Trinity v. United States, 143 U.S. 457, 471 (1892)). The impact to such practice is an erosion of the democratic rule of law, as isolated statements of individual congressmen become binding over the actual enacted laws. \textit{See id.} at 117-19 (arguing that rule of law demands adherence to statutory text over judicial constructions of legislative history because we are "a Government of laws, not of men").
circumstance of unambiguous statutory text; the dissent appears to permit consideration of legislative history at *Chevron* step one when statutory text is ambiguous and further tools of construction would aid in construing the text.65

C. Application of Chevron Step One in the Circuit Courts

Prior to the decision in *Geiser*, the Third Circuit’s application of *Chevron* step one resembled that of the Supreme Court: in the absence of an express ruling, a variety of approaches to the use of legislative history developed.66 Similar varied approaches remain the current state of *Chevron* step one jurisprudence in several other circuit courts of appeals.67 In contrast, the First Circuit expressly holds that use of legislative history is permitted at *Chevron* step one.68

65. See id. at 108-22 (arguing that consideration of legislative history was unnecessary because text was clear, and criticizing majority opinion as "judicial disregard of crystal-clear text").

66. For further discussion of the Third Circuit’s divergent approach to the use of legislative history at *Chevron* step one prior to the *Geiser* decision, see infra notes 78-86 and accompanying text.

67. For an example of the divergent approach in the Ninth Circuit, compare *Rucker v. Davis*, 237 F.3d 1113, 1119-26 (9th Cir. 2001) (considering text, legislative history, and canons of construction to discern clear congressional intent at *Chevron* step one), *rev’d on other grounds*, *Dep’t of Hous. & Urban Dev. v. Rucker*, 535 U.S. 125 (2002), with *Rodriguez v. Smith*, 541 F.3d 1180, 1184 (9th Cir. 2008) (indicating that *Chevron* step one involves determination of whether statutory text indicates clear congressional intent). In the D.C. Circuit, compare *Ohio v. United States Dep’t of the Interior*, 880 F.2d 432, 441 (D.C. Cir. 1989) (stating that legislative history is considered at *Chevron* step one when statutory text is ambiguous), with *Sierra Club v. EPA*, 536 F.3d 673, 678-79 (D.C. Cir. 2008) (discerning clear congressional intent at *Chevron* step one from statutory text alone, and quoting "Justice Frankfurter’s timeless advice on statutory interpretation: ‘(1) Read the statute; (2) read the statute; (3) read the statute!’") (citations omitted). For an example of the Second Circuit’s divergent approach to the use of legislative history at *Chevron* step one, compare *Cohen v. J.P. Morgan Chase & Co.*, 498 F.3d 111, 116 (2d Cir. 2007) (permitting use of legislative history at *Chevron* step one in order to resolve ambiguity in statutory text), with *De Batista v. Gonzales*, 494 F.3d 67, 71 n.3 (2d Cir. 2007) (proceeding to *Chevron* step two after finding textual ambiguity at step one, and only considering legislative history at *Chevron’s* second step). Although it has not expressly take up the issue of the permissibility of legislative history at *Chevron* step one, the Second Circuit acknowledges that "the Supreme Court has issued mixed messages" on the issue. See *Coke v. Long Island Health Care at Home*, Ltd., 376 F.3d 118, 127 (2d Cir. 2004) (deciding whether to consult legislative history in particular case), *vacated*, 546 U.S. 1147 (2006). In *Coke*, rather than expressly holding that legislative history is permitted, the Second Circuit considered legislative history at *Chevron* step one to discern clear congressional intent in favor of the agency’s interpretation, and then argued in the alternative that even if legislative history were not considered, the agency’s regulation would still be upheld at *Chevron* step two. *See id.* at 118-29 (providing analysis in which legislative history is considered at step one, and alternative analysis in which legislative history is not considered).

68. See *Succar v. Ashcroft*, 394 F.3d 8, 30-31 (1st Cir. 2005) (holding that legislative history is permitted at *Chevron* step one). For further discussion of the First Circuit’s decision in *Succar*, see infra notes 69-77 and accompanying text.
1. The First Circuit's Application of Chevron Step One

In Succar v. Ashcroft, the First Circuit considered whether legislative history is permitted at Chevron step one, and held that legislative history "is permissible and even may be required." This holding arose in the context of an Attorney General regulation that rendered certain aliens ineligible to apply for adjustment to permanent resident status. The court invalidated the regulation at Chevron's first step, finding the regulation contrary to clear congressional intent expressed in the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA).

Assessing congressional intent at Chevron step one, the court found the IIRIRA's text and structure plainly unambiguous; nonetheless, the court also considered the statute's legislative history in order to bolster its interpretation of the statutory text. Justifying its decision to use legislative history in this manner, the First Circuit surveyed prior Supreme Court as well as First Circuit cases, and concluded that legislative history may be considered not only to resolve textual ambiguity but also to confirm the propriety of an interpretation of unambiguous statutory text. In particular,

69. 394 F.3d 8 (1st Cir. 2005).
70. See id. at 31 ("Our view is that where traditional doctrines of statutory interpretation have permitted use of legislative history, its use is permissible and may even be required at stage one of Chevron.").
71. See id. at 9, 20 (citing 8 C.F.R. § 245.1(c) (8)) (summarizing regulation at issue). The regulation applied to aliens granted parole in removal proceedings, and denied such aliens eligibility to apply for adjustment to permanent resident status. See id. (explaining regulation). In Succar, an immigration judge applied the regulation to an alien granted parole from removal proceedings, pending resolution of the alien's asylum claim on appeal. See id. at 11-12 (providing factual context from which challenge to regulation emerged). While paroled from removal, the alien married a United States citizen and accordingly sought permanent resident status, but the immigration judge found that the Attorney General regulation denied the alien eligibility to apply for such adjustment of status. See id. (explaining application of regulation to facts of case). The alien argued on appeal that the Attorney General regulation was inconsistent with congressional intent, and was thus invalid. See id. at 21 (summarizing appellant's arguments).
72. See id. at 10, 24 (finding regulation inconsistent with congressional intent). Specifically, the court found that Congress intended to reserve eligibility determinations for Congress, and did not permit the Attorney General to issue regulations on the issue. See id. at 24 (discerning congressional intent).
73. See id. at 32 ("We look to legislative history to check our understanding and determine whether there is a clearly expressed intention by the Congress which is contrary to the plain language of the statute.") (citation omitted). In construing Chevron step one, the court noted that it requires use of all "devices of judicial construction" to attempt to discern congressional intent, and that legislative history in particular may be used when construing text to see if "any 'serious question . . . even about purely textual ambiguity' is left." See id. at 22-23 (citing Gen. Dynamic Land Sys. v. Cline, 540 U.S. 581, 600 (2004)) (explaining nature of analysis at Chevron step one).
74. See id. at 30-32 (analyzing Supreme Court and First Circuit precedent to conclude that legislative history may be used to "discern and/or to confirm legislative intent") (citations omitted). In addition, the First Circuit also noted that while other circuits had not expressly decided upon the permissibility of using legislative
lar, the court noted that the direction of recent Supreme Court cases fa-
vored the use of legislative history, as Justice Kennedy, who previously
condemned its use, subsequently joined in majority opinions consulting
legislative history at *Chevron* step one.75 Finally, responding to criticism
against the use of legislative history, the court reasoned that "[t]he per-
ceived dangers of the use of legislative history are particularly lessened
where the legislative history is used as a check on an understanding ob-
tained from text and structure."76 Thus, under *Succar*, the First Circuit
definitively permits analysis of legislative history at *Chevron* step one.77

2. *The Third Circuit's Application of Chevron Step One Prior to Geiser*

Until *Geiser*, the Third Circuit failed to expressly decide which tools of
statutory construction are permitted at *Chevron* step one.78 To be sure, in
more than one case, the Third Circuit recognized uncertainty as to
whether legislative history should be consulted at *Chevron* step one—and
ultimately decided to consult it, although without expressly ruling on its
applicability.79 Given the lack of an express ruling, divergent approaches
to the use of legislative history at *Chevron* step one developed.80

In one approach, analysis of legislative history was simply one of sev-
eral tools of statutory construction used to discern congressional intent.81
Under this approach, the court used both a statute's text as well as its
legislative history to discern whether clear congressional intent existed as
to the precise question at issue.82 As such, the court considered legislative

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75. See id. at 30 n.30 (discerning direction of Supreme Court authority to
favor use of legislative history) (citations omitted).
76. Id. at 31.
77. See id. at 32 (concluding that legislative history is permitted not only to
resolve textual ambiguity but also to confirm textual analysis).
78. See United States v. Geiser, 527 F.3d 288, 292-93 (3d Cir. 2008) (discussing
prior Third Circuit cases noting uncertainty as to whether legislative history should
be considered at *Chevron* step one) (citations omitted), cert. denied, 129 S. Ct. 937
(2009).
79. See Santiago v. GMAC Mortgage Group, Inc., 417 F.3d 384, 388 n.3 (3d
Cir. 2005) ("It is not clear whether it is appropriate for us to consider legislative
history to determine whether a statute is unambiguous at this point in *Chevron*
analysis. However, it is worth noting that the legislative history of [the statute]
supports the conclusion."); Woodall v. Fed. Bureau of Prisons, 432 F.3d 235, 249
n.12 (3d Cir. 2005) (noting that "[i]t is not entirely clear to what extent it is appro-
priate for us to consider legislative history in analyzing a regulation under the first
prong of *Chevron*," but nonetheless assessing legislative history).
80. For discussion of these divergent approaches, see *infra* notes 81-86 and
accompanying text.
81. For citation to cases applying this approach, see *infra* notes 82-83 and ac-
ccompanying text.
82. See, e.g., Yuposov v. Att'y Gen., 518 F.3d 185, 202-05 (3d Cir. 2008) (find-
ing clear congressional intent from examination of text and legislative history);
*Woodall*, 432 F.3d at 245-46 (considering both text and legislative history at *Chevron*
history both in cases in which it found statutory text to be ambiguous and needed legislative history to attempt to resolve the ambiguity, and also in cases in which the court found the text to be unambiguous and used the legislative history to confirm its textual interpretation.\textsuperscript{83}

In contrast to cases in which both the text and legislative history are considered at \textit{Chevron} step one, a separate line of Third Circuit cases considered only the plain meaning of the statutory text.\textsuperscript{84} To be sure, some of these cases involved unambiguous statutory text, enabling the court to discern congressional intent from text alone.\textsuperscript{85} In the other cases, however, the Third Circuit found statutory text ambiguous at \textit{Chevron} step one, but

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83. For cases in which the Third Circuit considered legislative history at step one to resolve textual ambiguity, see, e.g., \textit{Yuppies}, \textit{518 F.3d} at 202-04 (looking to legislative history to overcome textual ambiguity at \textit{Chevron} step one); \textit{Smristo}, \textit{387 F.3d} at 288 (providing that "the first step in interpreting a statute is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute," but also noting that if plain language is ambiguous, courts should consider other indicia of congressional intent such as legislative history). For cases in which the Third Circuit considered legislative history even after finding the text plainly unambiguous, see, e.g., \textit{Woodall}, \textit{432 F.3d} at 245 (noting that legislative history "bolstered" court's reading of statutory text); \textit{Grocery Town Mkt.}, \textit{848 F.2d} at 395 (noting that legislative history provided "even stronger indication" of congressional intent than plain language alone).

84. For citation to these cases considering only plain meaning at \textit{Chevron} step one, see \textit{infra} notes 85-86.

rather than use legislative history to resolve the ambiguity, the court proceeded to *Chevron* step two. 86

III. **United States v. Geiser: The Third Circuit Expressly Considers Whether Legislative History Is Permitted at **

*Chevron* **Step One**

Recent Third Circuit cases preceding *Geiser* continued the divided approach to *Chevron* step one, with some cases considering legislative history in order to glean clear congressional intent, and others relegating analysis of legislative history to *Chevron* step two. 87 In *Geiser*, the Third Circuit expressly addressed, for the first time, whether a court may examine legislative history in discerning congressional intent at *Chevron* step one. 88 Explaining that Third Circuit cases support analysis of statutory text only, and emphasizing recent Supreme Court cases providing that reference to legislative history is unnecessary in the face of unambiguous statutory text, the Third Circuit held in *Geiser* that legislative history should not be considered at the first step of *Chevron* analysis. 89

A. **Factual Background**

In *Geiser*, the issue of whether legislative history may be considered at *Chevron* step one arose in the context of a denaturalization action. 90 Anton Geiser, a natural Yugoslavian of German descent who had been drafted into the Waffen Schutzstaffel (SS) to serve as an armed guard at multiple Nazi concentration camps, applied for a visa under the Immigration and Nationality Act (INA) and the Refugee Relief Act (RRA). 91

86. See, e.g., Robert Wood Johnson Univ. Hosp. v. Thompson, 297 F.3d 273, 284-87 (3d Cir. 2002) (assessing only statutory text at *Chevron* step one, but considering, among other things, legislative history at step two); Appalachian States Low-Level Radioactive Waste Comm’n v. O’Leary, 93 F.3d 103, 108-10 (3d Cir. 1996) (construing *Chevron* step one as determination of “whether the plain meaning of the statute speaks to the precise question at issue”); Sekula v. FDIC, 99 F.3d 448, 451-52 (3d Cir. 1994) (finding textual ambiguity at *Chevron* step one, but concluding at step two that agency interpretation is reasonable based upon statute’s legislative history); Conoco, Inc. v. Skinner, 970 F.2d 1206, 1216-19 (3d Cir. 1992) (assessing only plain language at *Chevron* step one, and legislative history at step two).

87. Compare Yuposov, 518 F.3d at 202-05 (considering legislative history at *Chevron* step one and discerning clear congressional intent), with Robert Wood Johnson Univ. Hosp., 297 F.3d at 284-87 (assessing statutory text at *Chevron* step one and legislative history at step two).


89. See id. at 294 (“In sum, the current state of Supreme Court and Third Circuit jurisprudence demonstrates that legislative history should not be considered at *Chevron* step one.”) (citations omitted).

90. See id. at 290 (deciding whether to affirm order of district court revoking appellant’s citizenship).

91. See id. (describing Geiser’s background). Further facts are brutal: Geiser was chosen for a “Death’s Head” battalion, which was responsible for guarding

http://digitalcommons.law.villanova.edu/vlr/vol54/iss5/2
Geiser obtained a visa in 1956, entered the United States, and earned naturalization as a United States citizen in 1962.92

Over four decades later, upon learning of Geiser's service as an SS concentration camp guard, the United States filed a complaint to revoke Geiser's citizenship.93 The United States argued that Geiser was ineligible for a visa under the RRA because he "personally advocated or assisted in the persecution of any person or group of persons because of race, religion, or national origin."94 Applying Chevron, the district court found the RRA's plain language unambiguous, and concluded that serving as a concentration camp guard constitutes "personally advocating or assisting in . . . persecution" under the RRA.95 Accordingly, the district court concluded that Geiser's visa and naturalization were unlawful, and ordered revocation of his citizenship.96

On appeal to the Third Circuit, Geiser challenged the district court's Chevron analysis.97 Specifically, Geiser contended that legislative history revealed that the State Department interpreted the word "persecution" in the RRA to render ineligible for naturalization only those former concentration camp guards who were also deemed war criminals.98 Geiser argued that the district court should have considered this legislative history at Chevron step one to "confirm" its statutory analysis, as the legislative his-

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92. See id. (explaining Geiser's naturalization).
93. See id. at 290-91 (explaining denaturalization complaint that formed basis for appeal).
94. Id. (citation omitted). The INA requires revocation of citizenship that is illegally procured; thus, the legality of Geiser's naturalization turned upon Geiser's eligibility for a visa under the RRA. See id. at 291 (providing relevant immigration law) (citations omitted). The Government argued that Geiser's service as a concentration camp guard rendered his RRA visa, and thus his citizenship, unlawful. See id. (explaining legal basis for denaturalization complaint).
95. See id. (presenting district court's reasoning). Specifically, the district court rejected Geiser's argument that the term "persecution" in the RRA is ambiguous, and concluded at Chevron step one that the unambiguous plain language of the RRA precluded Geiser's eligibility for a visa. See id. (explaining district court's Chevron analysis).
96. See id. (summarizing district court's disposition of case).
97. See id. at 291-92 (presenting Geiser's argument concerning application of Chevron standard of review).
98. See id. at 291-94 (summarizing Geiser's argument, as well as State Department interpretation to which Geiser argued court should defer).
tory revealed ambiguity in the RRA’s use of the term “persecution.” Given ambiguity at Chevron step one, Geiser argued that analysis should proceed to step two, where the State Department’s interpretation of “persecution” was reasonable and thus entitled to deference.

B. The Third Circuit Rejects Consideration of Legislative History at Chevron Step One

To resolve Geiser’s arguments on appeal, the court defined the parameters of Chevron’s first step. Noting the government’s construction of Chevron step one—that consideration of legislative history is inappropriate when statutory text is unambiguous—the court stated that “[t]he Government is correct.” Yet, rather than narrowly state that analysis of legislative history is not permitted when statutory text is unambiguous, the court’s opinion broadly states that “legislative history should not be considered at Chevron step one.”

The court harmonized its holding with prior Third Circuit and recent Supreme Court cases. As to Third Circuit precedent, the court noted that no case commands consideration of legislative history at Chevron step one. Instead, the court explained that one Third Circuit case that had considered legislative history only did so because, given ambiguous guidance from the Supreme Court, “we covered our bases.” Further, the court explained that although another Third Circuit case considered legislative history at Chevron step one, the case illustrates the criticisms against the use of legislative history in statutory interpretation, and the case’s holding instead rested upon plain meaning. As to Supreme Court precedent, the Third Circuit reasoned that despite older decisions’ reference

99. See id. at 292 (explaining Geiser’s argument that court should “refer to legislative history to confirm its step one statutory analysis” (citing Santiago v. GMAC Mortgage Group, Inc., 417 F.3d 384, 388 n.3 (3d Cir. 2005))).

100. See id. (noting that Geiser argued that district court should have proceeded to inquire at Chevron step two whether State Department interpretation is reasonable).

101. See id. (assessing whether district court erred by excluding legislative history from consideration at Chevron step one).

102. See id. (agreeing with government’s construction of Chevron step one).

103. Id.

104. See id. at 292-94 (reasoning that reference to legislative history at Chevron step one is unnecessary).

105. See id. at 293 (stating that “closer look at Santiago and subsequent cases” confirms that legislative history should not be considered).

106. See id. (citing Santiago v. GMAC Mortgage Group, Inc., 417 F.3d 384, 388 n.3 (3d Cir. 2005)) (establishing that Third Circuit precedent does not require reference to legislative history).

107. See id. at 293-94 (“Our consideration of legislative history illustrated ‘the perils of appealing to [selected comments from the floor debate] as a guide to statutory meaning;’ we rejected Szelinsky’s argument largely because ‘the statutory language is not ambiguous, and is contrary to [his] interpretation.’” (citing Szelinsky v. Att’y Gen., 432 F.3d 253, 254-60 (3d Cir. 2005))).
to legislative history when construing a statute at *Chevron* step one, recent decisions returned the Court to "its original mode of analysis, which does not include a consideration of legislative history." The Court specifically cites the Supreme Court's application of *Chevron* step one in *Zuni*, which provides that legislative history "would [not] be determinative" when statutory text is unambiguous and therefore sufficient to indicate clear congressional intent.

Based on its review of this precedent, the Third Circuit concluded in *Geiser* that "we no longer find it necessary to consider legislative history at *Chevron* step one," and affirmed the order of the district court to revoke Geiser's citizenship. Rather than consult legislative history, the Third Circuit held that a court determines whether there is clear congressional intent at *Chevron* step one by "looking at the 'plain' and 'literal' language of the statute."  

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108. See id. at 293 (discussing Supreme Court precedent) (citations omitted). In particular, the court noted that the Supreme Court had referenced legislative history at *Chevron* step one in *Brown & Williamson*. See id. (citing FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 133 (2000)). The court explained, however, that recent Supreme Court cases provided that reference to legislative history is unnecessary if the plain language is unambiguous. See id. (citing Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ., 550 U.S. 81, 93 (2007) ("[N]ormally, neither the legislative history nor the reasonableness of the [agency interpretation] would be determinative if the plain language of the statute unambiguously indicated [Congress's intent]."); Dep't of Hous. & Urban Dev. v. Rucker, 535 U.S. 125, 132-33 (2002) ("[R]eference to legislative history is inappropriate when the text of the statute is unambiguous.")).

109. See id. (citing *Zuni*, 550 U.S. at 93) (explaining that recent Supreme Court cases support proposition that legislative history should not be considered). In its discussion of *Zuni*, the Third Circuit's opinion in *Geiser* does not clearly explain that the Court in *Zuni* only narrowly provided that legislative history could not be determinative in the face of unambiguous statutory text, rather than entirely prohibiting legislative history at *Chevron* step one. See id. at 293 (discussing Supreme Court's application of *Chevron* step one in *Zuni*); see also *Zuni*, 550 U.S. at 93 ("[N]ormally neither the legislative history nor the reasonableness of the Secretary's method would be determinative if the plain language of the statute unambiguously indicated that Congress sought to foreclose the Secretary's interpretation."). Indeed, *Zuni* did consider legislative history at *Chevron* step one—yet the Third Circuit's opinion in *Geiser* fails to acknowledge this crucial fact. See *Zuni*, 550 U.S. at 89-100 (assessing legislative history prior to statutory text at *Chevron* step one because of Court's conclusion that text was ambiguous); see also *Geiser*, 527 F.3d at 293 (discussing *Zuni*). For further discussion of the Supreme Court's application of *Chevron* step one in *Zuni*, see supra notes 50-65 and accompanying text.

110. See *Geiser*, 527 F.3d at 293 (concluding from Supreme Court as well as Third Circuit precedent that legislative history need not be considered).

111. See id. at 294 (citing *Zuni*, 550 U.S. at 94) (holding that statutory text, not legislative history, is assessed at *Chevron* step one). Applying this construction of *Chevron* step one, the court concluded that the statutory language unambiguously indicated that an armed guard at a concentration camp personally assisted in persecution under the RRA, and as such, affirmed the district court's order to revoke Geiser's citizenship. See id. at 294-99 (applying *Chevron* step one to facts of case).
IV. Does *Geiser* Categorically Preclude Use of Legislative History at *Chevron* Step One?

The rhetoric in *Geiser* appears to categorically exclude the use of legislative history at *Chevron* step one: the court states that "legislative history should not be considered," and that "we no longer find it necessary to consider legislative history at *Chevron* step one." Yet, rhetoric aside, both the facts of *Geiser* as well as many of the cases to which the court cites in the opinion indicate that *Geiser*’s holding is actually narrow. Under a narrow interpretation, legislative history is only precluded when statutory language is plainly unambiguous. Interpreting *Geiser* in this narrow manner creates consistency with other courts’ *Chevron* step one jurisprudence, and avoids the harms identified in criticism against the use of legislative history in statutory interpretation.

A. Geiser Is a Narrow Holding

A narrow interpretation of *Geiser* provides that legislative history may not be considered at *Chevron* step one when statutory text unambiguously indicates congressional intent, but that legislative history may be considered when statutory text is plainly ambiguous and further tools of statutory construction are necessary to discern congressional intent. Both the facts as well as many of the cases cited in *Geiser* support this narrow interpretation.

The facts of *Geiser* support a narrow interpretation of its holding because the court found the statutory text at issue to be plainly unambiguous. Indeed, it seems common sense that service as an armed guard at a concentration camp constitutes "persecution." *Geiser* argued none-
theless that legislative history should be considered because it revealed that the seemingly unambiguous statutory text was actually subject to more than one plausible interpretation.\textsuperscript{120} When the court rejected Geiser’s argument and held that legislative history should not be considered at \textit{Chevron} step one, this holding was specifically tied to the fact of the plainly unambiguous statutory text, which rendered use of legislative history unnecessary.\textsuperscript{121} Thus, although \textit{Geiser} prohibits use of legislative history to create ambiguity in otherwise unambiguous statutory text, it remains permissible to use legislative history at \textit{Chevron} step one to resolve ambiguity in the statutory text.\textsuperscript{122}

The Supreme Court cases cited in \textit{Geiser} provide further support for interpreting its holding in this narrow manner.\textsuperscript{123} The cases cited provide that because statutory interpretation begins by assessing statutory text, if the text is plainly unambiguous, resort to legislative history is unnecessary.\textsuperscript{124} On the other hand, legislative history may still be considered to resolve ambiguous plain language—as the Supreme Court did in the \textit{Chevron} decision and, recently, in \textit{Zuni}.\textsuperscript{125}

\textbf{B. Benefits of a Narrow Interpretation}

Interpreting \textit{Geiser} narrowly creates consistency with other courts’ \textit{Chevron} step on jurisprudence.\textsuperscript{126} Because the First Circuit broadly permits the use of legislative history to resolve textual ambiguity as well as to confirm an interpretation of unambiguous statutory text, reading \textit{Geiser} to permit the use of legislative history to resolve textual ambiguity would be a critical first step towards harmonizing the decision with the First Circuit’s

\begin{itemize}
\item \textsuperscript{120} See id. at 292 (presenting Geiser’s argument that consideration of legislative history was necessary to “confirm” analysis of plain language).
\item \textsuperscript{121} See id. (“The Government contends that if the statutory text is unambiguous, it is inappropriate and unnecessary to inquire into the legislative history at step one. The Government is correct that legislative history should not be considered at \textit{Chevron} step one.”).
\item \textsuperscript{122} See id. at 291-94 (construing \textit{Chevron} step one based upon facts of particular case, including fact of plainly unambiguous statutory text).
\item \textsuperscript{123} See id. at 293-94 (surveying Supreme Court jurisprudence concerning \textit{Chevron} step one) (citations omitted).
\item \textsuperscript{124} See Zuni Pub. Sch. Dist. No. 89 v. Dep’t of Educ., 550 U.S. 81, 93 (2007) (“[N]ormally neither the legislative history nor the reasonableness of the [agency interpretation] would be determinative if the plain language of the statute unambiguously indicated [Congress’s intent].”); Dep’t of Hous. & Urban Dev. v. Rucker, 535 U.S. 125, 132-33 (2002) (“[R]eference to legislative history is inappropriate when the text of the statute is unambiguous.”).
\item \textsuperscript{126} For a discussion of how a narrow interpretation harmonizes the Third Circuit with other courts’ applications of \textit{Chevron} step one, see infra notes 127-29 and accompanying text.
\end{itemize}
Moreover, interpreting Geiser to permit the use of legislative history at Chevron step one to resolve textual ambiguity is consistent with a long line of Third Circuit as well as Supreme Court cases, which consult legislative history at the first stage of Chevron analysis. Citation to the substantial body of caselaw considering legislative history—most of which the Geiser opinion does not address—remains a vital tool for persuading a panel of Third Circuit judges to consult legislative history.

From a policy perspective, consulting legislative history in order to resolve textual ambiguity avoids several of the harms identified in criticism against the use legislative history in statutory interpretation. For example, the risk of undermining the democratic rule of law is greatly minimized when legislative history is not used to override plainly unambiguous text, but rather is used to determine how ambiguous text applies in a pre-

127. See Succar v. Ashcroft, 394 F.3d 8, 30-32 (1st Cir. 2005) (reasoning that legislative history may be consulted at Chevron step one).

128. See Grocery Town Mkt., Inc. v. United States, 848 F.2d 392, 397-98 (3d Cir. 1988) (Becker, C.J., concurring) (stating that consideration of reasonableness of the agency's construction of statute at Chevron step two is unnecessary when "the statute or the statute plus legislative history is clear"). The majority opinion in Grocery Town Market also assessed legislative history at Chevron step one. See id. at 394-96 (majority opinion) (discerning clear congressional intent from plain language and legislative history). This construction of Chevron's first step remains a vital strand of recent Third Circuit Chevron jurisprudence. See Yaposov v. Atty Gen., 518 F.3d 185, 202-05 (3d Cir. 2008) (finding clear congressional intent upon consideration of text and legislative history); Woodall v. Fed. Bureau of Prisons, 432 F.3d 235, 246-49 (3d Cir. 2005) (considering plain language and legislative history, and noting that court proceeds to Chevron step two only when all "devices of judicial construction have been tried and found to yield no clear sense of congressional intent") (citation omitted); Smrko v. Ashcroft, 387 F.3d 279, 288 (3d Cir. 2004) (assessing text and legislative history at Chevron step one).

As for the Supreme Court, empirical analysis reveals that "there can no longer be serious doubt whether Supreme Court precedent instructs judges to consider relevant legislative history in applying Chevron deference. It does." Eskridge & Baer, supra note 1, at 1135-36. Even ardent textualist Justice Scalia condones the use of legislative history in certain circumstances. See Zuni, 550 U.S. at 109-22 (Scalia, J., dissenting) (criticizing use of legislative history in specific circumstance in which text is unambiguous); see also Scalia, supra note 11, at 515 ("[I]t seems to me that the 'traditional tools of statutory construction' include not merely text and legislative history but also, quite specifically, the consideration of policy consequences."). For comprehensive citation to Supreme Court cases considering legislative history at Chevron step one, see supra notes 46 and 47.

Finally, although the Third Circuit's opinion in Geiser situates its holding within recent Supreme Court precedent—particularly the Supreme Court's decision in Zuni—the Geiser opinion fails to attend to the nuances of the Supreme Court's application of Chevron step one in Zuni. For criticism of Geiser's treatment of Zuni, see supra note 109.

129. For citation to the Third Circuit and Supreme Court cases consulting legislative history at Chevron step one in order to resolve ambiguity in statutory text, see supra note 128.

130. See generally Sloan, supra note 61 (summarizing arguments against use of legislative history in statutory interpretation). For further discussion of the criticisms against the use of legislative history in statutory interpretation, see supra notes 61-64 and accompanying text.
cise circumstance. Similarly, reliability concerns regarding whether legislative history is an accurate reflection of congressional intent are not a compelling reason to reject its consideration at *Chevron* step one when the legislative history is not deemed determinative, but instead is used in conjunction with other tools of statutory construction to interpret ambiguous text. Given that the policies against the use of legislative history are largely inapplicable when legislative history is used only to resolve textual ambiguity, and given the substantial body of precedent consulting legislative history at *Chevron* step one, *Geiser* should be interpreted narrowly to prohibit legislative history at *Chevron* step one only when statutory text is plainly unambiguous.

V. *Geiser's Significance*

Defining the scope of *Geiser's* holding concerning legislative history is important, both from a practical as well as a theoretical perspective. Excluding legislative history at *Chevron* step one makes it more likely that deference will be achieved at step two, as ambiguous plain language at step one would move analysis to step two, where the reasonability standard is easily met. *Chevron* deference is maximum deference; an agency's interpretation controls interpretation of the statute when *Chevron* deference is maximum deference; an agency's interpretation controls interpretation of the statute when *Chevron* deference is maximum deference; an agency's interpretation controls interpretation of the statute when *Chevron* deference is maximum deference; an agency's interpretation controls interpretation of the statute when *Chevron* deference is maximum deference; an agency's interpretation controls interpretation of the statute when *Chevron* deference is maximum deference; an agency's interpretation controls interpretation of the statute when *Chevron* deference is maximum deference; an agency's interpretation controls interpretation of the statute when *Chevron* deference is maximum deference; an agency's interpretation controls interpretation of the statute when *Chevron* deferen-

131. See *Succar*, 394 F.3d at 31 (explaining that use of legislative history at *Chevron* step one does not risk perceived dangers of using legislative history in statutory interpretation, so long as legislative history is not used to override statutory text); *Eskridge & Baer*, supra note 1, at 1093 (arguing that legislative history "provides legitimating links between original enactments and new applications"); *cf. Zuni*, 550 U.S. at 108 (Scalia, J., dissenting) (arguing that democratic rule of law is undermined through "elevation" of legislative history over clear statutory text).

132. *Cf. Zuni*, 550 U.S. at 106 (Stevens, J., concurring) (providing that legislative history is one among many tools of statutory construction that indicate congressional intent); *Woodall*, 432 F.3d at 245-49 (considering legislative history as one of several devices of construction).

133. For the argument from policies underlying the use of legislative history in statutory interpretation, see *supra* notes 130-32 and accompanying text. For the argument from precedent, see *supra* notes 126-29 and accompanying text.

134. For a discussion of practical implications, see *infra* notes 135-37 and accompanying text. For a discussion of implications from a theoretical perspective, see *infra* notes 135-36, 138, and accompanying text.

135. *See Bressman*, *supra* note 8, at 557-58 (explaining that, given demise of nondelegation doctrine, courts apply statutory interpretation in attempt to constrain broad delegations of authority to agencies, yet attempt is frustrated because Congress intended broad delegation); Orin S. Kerr, *Shedding Light on Chevron: An Empirical Study of the Chevron Doctrine in the U.S. Courts of Appeals*, 15 YALE J. ON REG. 1, 14-15 (1998) (summarizing minority view among proponents of interpretive model of *Chevron*, that textualist judges are more likely to defer to agency interpretation); Russell L. Weaver, *Administrative Law Discussion Forum: Teaching (and Testing) Administrative Law*, 38 BRANDEIS L.J. 273, 275-281 (2000) (arguing that flexibility in tools of statutory construction at *Chevron* step one eases challenge of contesting agency interpretation in court). *But see* *Eskridge & Baer*, *supra* note 1, at 1151-52 (reporting that empirical research disproved hypothesis that assessing only plain meaning at *Chevron* step one resulted in greater instances of deference).
ence is accorded. Therefore, from a practical perspective, excluding legislative history from \textit{Chevron} step one may increase the difficulty of challenging an agency regulation. From a theoretical perspective, increasing the frequency of \textit{Chevron} deference is significant because it has the potential to further shift the power of statutory interpretation from the courts to administrative agencies.

For practitioners on both sides, then, \textit{Geiser} is significant. \textit{Geiser}'s rhetoric suggests that the Third Circuit may have categorically excluded legislative history from consideration at \textit{Chevron} step one. On the other hand, arguments grounded in \textit{Geiser}'s facts, prior precedent, and the policies underlying use of legislative history suggest that \textit{Geiser}'s holding concerning legislative history is best interpreted narrowly, such that legislative history remains permissible at \textit{Chevron} step one to resolve ambiguity in statutory text.

\textit{Melina Forte}

\footnotesize{136. See Sheldon, supra note 39, at 504 (explaining that \textit{Chevron} deference is "absolute deference").}

\footnotesize{137. See Weaver, supra note 135, at 275-81 (providing that challenging agency interpretations becomes less difficult if greater number of tools of construction are permitted at \textit{Chevron} step one).}

\footnotesize{138. See Criddle, supra note 1, at 1277 (stating that \textit{Chevron} "fundamentally altered the division of labor between courts and agencies in statutory interpretation"); Eskridge & Baer, supra note 1, at 1198-1200 (discussing potential for deference to administrative agencies to override stare decisis principles); Sunstein, \textit{Law and Administration}, supra note 1, at 2074-75 (describing \textit{Chevron} as "counter-Marbury for the administrative state" because it enables agencies to share in judiciary's traditional function of "saying what the law is").}

\footnotesize{139. For discussion of the importance of defining \textit{Geiser}'s scope concerning \textit{Chevron} step one, see supra notes 135-38 and accompanying text.}

\footnotesize{140. For discussion of the seemingly broad rhetoric in \textit{Geiser}, see supra note 112 and accompanying text.}

\footnotesize{141. For those arguments establishing \textit{Geiser}'s holding concerning \textit{Chevron} step one as narrow, see supra notes 116-32 and accompanying text.}