

PURPOSIVISM AND INSTITUTIONAL COMPETENCE IN STATUTORY INTERPRETATION

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INTRODUCTION

Different institutions will approach the same task differently, and *should* approach it differently, in light of their particular skills. Wilt Chamberlain and Bob Cousy took different approaches to scoring baskets. So

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with statutory interpretation; the techniques employed may depend on who is doing the interpreting. Even if we could agree on a first-best approach to statutory interpretation, that approach would not necessarily be appropriate for all interpreters. Dunking might be the first-best scoring technique; but that doesn't mean it's the right approach for a 5' 10" point guard, who will produce more points, given his particular skills, by passing and taking outside shots. As Adrian Vermeule points out:

It is impossible to derive interpretive rules directly from the first-best account because institutional considerations always intervene. An intentionalist account of statutes' authority by itself tells us nothing about whether real judges should consult or not consult legislative history [C]ertain findings about institutional capacities might cause the proponent of the first-best account either to adopt or reject the interpretive doctrine in question.¹

Whether the normative conclusions about judicial interpretation that Vermeule reaches in light of this insight are correct is debatable, but this basic point about first-best and second-best approaches and institutional capacity seems to me indisputable.

Writing about interpretation almost always ignores possible differences between interpreters; it is focused on the first-best. For example, in 1839, Francis Lieber wrote a striking text with a modern-sounding name: *Legal and Political Hermeneutics*.² Lieber operates at a very high level of abstraction, describing the interpretive task generally. He sets out to "examine the fundamental principles of every sort of interpretation, applied in whatever branch, to whatever text."³ The bulk of the book takes this approach. In the penultimate chapter, Lieber does turn to distinctive features of the interpretation of different sorts of *texts*—constitutions, laws, contracts, letters, speeches—but he never asks, let alone answers, whether the task might vary among different sorts of *interpreters*.

Subsequent writers on legal interpretation have almost all followed Lieber in considering general principles or focusing on differences in the

1. ADRIAN VERMEULE, JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION 81-82 (2006). See also *id.* at 147-48.

2. FRANCIS LIEBER, LEGAL AND POLITICAL HERMENEUTICS, OR PRINCIPLES OF INTERPRETATION AND CONSTRUCTION IN LAW AND POLITICS, WITH REMARKS ON PRECEDENTS AND AUTHORITIES (2d ed. 1839). A third edition, edited by William Hammond, appeared in 1860 and is reprinted, with commentary, at 16 CARDOZO L. REV. 1883 (1995). Despite its contemporary sounding title, Lieber's work was in fact rather unmodern. For example:

No sentence, or form of words, can have more than one "true sense," and this is the only one we have to inquire for. This is the very basis of all interpretation. Interpretation without it has no meaning. Every man or body of persons, making use of words, does so, in order to convey certain meaning; and to find this precise meaning is the object of all interpretation. To have two meanings in view is equivalent to having no meaning.

Id. at 1943.

3. *Id.* at 1941.

interpretation of different sorts of texts but not distinguishing among different sorts of *interpreters*. This is true of Hart and Sacks; it is true of Ronald Dworkin; it is true of William Eskridge. Of course, there are some important exceptions. Peter Strauss, Jerry Mashaw, and Frank Easterbrook have each written about how the institutional setting and capacity of agencies might dictate a different interpretive approach than that appropriate for courts.⁴ And it has been said that in recent years writing on legal interpretation, particularly statutory interpretation, has taken an “institutional turn.”⁵ The leading example is probably Sunstein and Vermeule’s 2003 article, *Interpretation and Institutions*.⁶ The authors canvass many of the leading works on statutory and constitutional interpretation, going back to Blackstone and Bentham, through Hart and Dworkin, and up to Eskridge, Manning, and Posner, describing how consistently each fails to grapple with the institutional dimension. All these writers have discussed the abstract question of how an undifferentiated “we” should interpret statutes; if the interpreter is actually specified, it is almost always a judge. Sunstein and Vermeule argue, convincingly, that this makes their accounts radically incomplete and that any inquiry into the proper interpretive approach must take into account the institutional capacities of interpreters. In particular, they suggest that judicial formalism in statutory interpretation is better justified not in the abstract, as the platonically correct, first-best approach to interpretation, but rather in light of the judiciary’s institutional limitations.⁷ For present purposes, the key part of their discussion concerns possible distinctions between agencies and courts. In particular, they propose that it may well be that agencies and courts should take different approaches to statutory interpretation because the institutional justifications for courts taking a formalist approach are weaker when applied to agencies:

First, agencies are likely to be in a better position to decide whether departures from the text actually make sense. This is so mostly because agencies have a superior degree of technical competence; but it is not irrelevant that agencies are subject to a degree of democratic supervision. Second, agencies are likely to be in a

4. See Frank H. Easterbrook, *Judicial Discretion in Statutory Interpretation*, 57 OKLA. L. REV. 1 (2004); Jerry L. Mashaw, *Between Facts and Norms: Agency Statutory Interpretation as an Autonomous Enterprise*, 55 U. TORONTO L.J. 497 (2005); Peter L. Strauss, *When the Judge is Not the Primary Official with Responsibility to Read: Agency Interpretation and the Problem of Legislative History*, 66 CHI.-KENT. L. REV. 321 (1990). But see Richard J. Pierce, Jr., *How Agencies Should Give Meaning to the Statutes They Administer: A Response to Mashaw and Strauss*, 59 ADMIN. L. REV. 197 (2007).

5. VERMEULE, *supra* note 1, at 65. William Eskridge counters that the institutional turn began almost a century ago. William N. Eskridge, Jr., *No-Frills Textualism*, 119 HARV. L. REV. 2041, 2045 (2006) (book review).

6. Cass R. Sunstein & Adrian Vermeule, *Interpretation and Institutions*, 101 MICH. L. REV. 885 (2003).

7. Vermeule has since developed this proposition at book length. See VERMEULE, *supra* note 1.

better position to know whether departures from the text will seriously diminish predictability or otherwise unsettle the statutory scheme. If agencies are not concerned about the risk of unsettlement, there is some reason to think that the risk is low. Our suggestion is that because of these points, the case for formalistic interpretation from judges might well be stronger than the case for formalistic interpretation by agencies.⁸

Sunstein and Vermeule's description of the silence with regard to institutional capacity is somewhat overstated, I think. Writers on statutory interpretation *have* been sensitive to institutional factors, but they have been almost entirely focused on courts. This is particularly true of the critique of purposivism. Many, though not all, of the arguments against purposivism are institutional in nature, but they focus on limitations or tendencies of courts in particular. There is no *a priori* reason to think that this critique applies to other interpreters.

My goal in this article is to examine the standard critiques of purposivism, developed with judges in mind, and consider whether these objections are strengthened, weakened, or unaffected when it is an agency rather than a court that is doing the interpreting.⁹ In general, my conclusion is that agencies make more respectable and less problematic purposivists than do judges. I conclude with some observations about the consequences of a regime in which courts review agency interpretations using a different interpretive methodology than that used by agencies.

One point should be made about terminology at the outset. "Purposivism" is a slippery term, with no single definition. Justice Barak uses it to refer sweepingly to all intentionalist approaches to interpretation, which he labels "subjective purpose," *plus* "the values, goals, interests, politics, aims, and function that the text should actualize in a democracy," which he labels "objective purpose."¹⁰ I have in mind something far narrower. First, purposivism is grounded on, respects, and seeks to advance legislative preferences; it is a form of faithful agency. Of course, many dismiss such an approach as pure fiction, arguing that invocations of purpose are rarely, if ever, actually founded on the preferences of the legislature as opposed to the preferences of the interpreter.¹¹ I will return to that question, which need not be definitively resolved for purposes of this article.

8. Sunstein & Vermeule, *supra* note 6, at 928.

9. I say agencies intentionally; the same conclusions do not necessarily hold if the executive branch interpreter is the president.

10. AHARON BARAK, PURPOSIVE INTERPRETATION IN LAW 89, 90 (Sari Bashi trans., 2005); *see also id.* at 88-96.

11. *See, e.g.*, Edward A. Zelinsky, Commentary, *Text, Purpose, Capacity and Albertson's: A Response to Professor Geier*, 2 FLA. TAX REV. 717, 721 (1996) ("When courts and commentators [invoke purpose to go beyond statutory text] . . . , they are essentially substituting their own policy preferences for those embodied in the statute and calling that substitution the implementation of underlying purpose."). Francis Lieber made the same point, cautioning that "it is also dangerous to construe upon supposed motives, that is, such

Second, I mean to distinguish the legislature's "intent" from its "purpose." "Intent" refers to what the legislature meant—the specific understanding it had in mind;¹² "purpose" refers to what the legislature ultimately sought to accomplish.¹³ Intent is about means; purpose about ends.¹⁴ Of course, there is not a clear divide here. Often, an "end" is in turn a "means" to some further end, and all actors, legislative or otherwise, have a range of objectives that vary from direct and immediate to wholly ulterior.¹⁵ But neither is the distinction meaningless.

In short, I will use "purposivism" to refer to an interpretive method that is informed by the statute's, or the legislature's, goals; ambiguous or vague texts are read in the way that advances what the legislature was trying to accomplish. Thus, one would distinguish three basic sorts of "faithful agent" statutory interpretation: textualism, intentionalism, and purposivism.¹⁶

I. ADMINISTRATIVE AGENCIES AND THE CRITIQUE OF PURPOSIVISM

Purposive interpretation has a lengthy and impressive pedigree, but has come under significant attack in the last few decades. The rise of the new textualism has inflicted serious blows on the purposive approach. This

as are not ascertainable from the interpretation of the text. Everyone is apt to substitute what his motives would have been, or, unconsciously perhaps, to fashion the supposed motives according to his own interests and views of the case." LIEBER, *supra* note 2, 16 CARDOZO L. REV. at 1975.

12. Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 429 (1989) ("[For intent-based views,] the goal is not to look at a general legislative aim or purpose, but instead to see more particularly how the enacting legislature would have resolved the question, or how it intended that question to be resolved, if it had been presented.").

13. Martin H. Redish & Theodore T. Chung, *Democratic Theory and the Legislative Process: Mourning the Death of Originalism in Statutory Interpretation*, 68 TUL. L. REV. 803, 815 (1994) ("[P]urposivism calls on judges to identify the statute's broader purposes and to resolve the interpretive question in light of those purposes.").

14. In Reed Dickerson's words, intent is "immediate," purpose "ulterior." REED DICKERSON, *THE INTERPRETATION AND APPLICATION OF STATUTES* 285 (1975). See also Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 538-39 (1947) (arguing against reliance on or inquiry into the legislature's subjective "intent" and in favor of effectuating the legislature's "aim").

15. See ANDREI MARMOR, *INTERPRETATION AND LEGAL THEORY* 166 (1992).

16. See generally Elizabeth Garrett, *Legislation and Statutory Interpretation*, in OXFORD HANDBOOK OF LAW & POLITICS 360, 361-72 (Keith Whittington et al. eds., 2008); William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 324 (1990). What I have in mind is essentially good old Hart & Sacks, Legal Process purposivism, though one could quibble about the challenge of how exactly purpose is to be discovered or, in Hart and Sacks's word, "attributed." See HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 1374-80 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994).

has been in many respects salutary. Like judicial reliance on legislative history, which has also—indeed, more dramatically—declined, judicial invocation of supposed statutory purpose has at times gone overboard, undeniably shifting legislative authority from Congress to the courts.

While the overall critique of purposivism is powerful, my task is not to assess the ultimate force of these arguments, but only to explore whether the critique applies equally to courts and to agencies. I do not mean to endorse that critique as applied to courts, nor do I mean to say it is wholly inapplicable to agencies. My goal is modest and relative rather than absolute; it is only to establish that overall, and in almost all particular respects, agencies are in a better position to interpret statutes in light of their purpose than are courts.

A. The Constitutional Objection

It is often said that inquiring into purpose is simply not the court's job. If the words of the statute seem inconsistent with its purpose, that only means the legislature did not do a very good job in writing the statute. It is not up to the court to rewrite it; courts lack that sort of legislative authority. This is a particular application of the general textualist position that the law is the text and nothing else. It rests ultimately on a separation of powers proposition: deciding how to pursue a given purpose (or policy or one's own preferences) is to act like a legislature; it is amendment rather than interpretation, and the Constitution vests legislative authority exclusively in Congress.¹⁷ What counts is what the legislature did (which in turn is no more or less than the text it enacted), not what it wanted to do or was hoping to accomplish.

The constitutional objection has two elements, not always carefully disentangled. Like so much else in the area of separation of powers, one is functional and the other formal.¹⁸ The functional argument rests on understandings of relative capacity. Where should the legislative task be housed? The formal argument rests on the fact that only actual legislative text has satisfied the constitutional requirements of passage by both houses and presentment to the President. Nothing that has not gone through such procedures is law.

17. In the words of Justice Scalia: "The text is the law, and it is the text that must be observed. . . . A statute . . . has a claim to our attention simply because Article I, section 7 of the Constitution provides that since it has been passed by the prescribed majority . . . it is the law." ANTONIN SCALIA, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 3, 22, 35 (Amy Gutmann ed., 1998); see also Laurence H. Tribe, *Comment*, in *id.* at 65.

18. See generally Peter L. Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions—A Foolish Inconsistency?*, 72 CORNELL L. REV. 488 (1987).

The functional argument loses much of its force when applied to agencies rather than courts. Agencies *do* have an indisputable—indeed, an uncontroversial—legislative function. Even those dubious of *judicial* law-making, such as Justice Scalia, accept the legislative function of agencies, although they insist that this power exists only as an incident of executive functions.¹⁹ And, of course, *Chevron* honestly embraces the legislative role of agencies.²⁰ By virtue of expertise and accountability, the agency is better equipped to make policy decisions.

The formal constitutional objection does reach agency purposivist interpretation. If an interpretation goes beyond enacted text when a court does it, then it goes beyond enacted text when an agency does it. Nonetheless, there is an arguable exception to this objection that is more readily applicable to agencies than to courts. Suppose the enacted text outlines broad goals but hands fairly open-ended decisionmaking authority to the “interpreter.” In that setting, it is not unconstitutional for the interpreter to expand upon or elaborate the text, and appropriate for it to do so in light of overall statutory purposes.²¹ This is equally true of courts and of agencies. But such a delegation is more likely actually to exist in the case of an agency.

19. See, e.g., *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472-76 (2001) (explaining that while Congress had delegated broad policymaking authority to EPA, that authority was incidental to executive functions and therefore not a delegation of legislative power as such); cf. *id.* at 488-89 (Stevens, J., concurring in part) (agreeing with the result but arguing that the Court should have acknowledged that Congress *had* delegated “legislative power” and upheld the delegation as within permissible bounds).

20. See *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-44 (1984) (justifying deference to agency interpretations on the ground that where Congress has left a question unanswered, the issue is one of policy, and therefore best suited for agency rather than judicial resolution in light of the agency’s edge in expertise and accountability); Caleb Nelson, *Statutory Interpretation and Decision Theory*, 74 U. CHI. L. REV. 329, 357 n.47 (2007) (reviewing ADRIAN VERMEULE, *JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION* (2006)) (“*Chevron* deference is not conventionally seen as a tool for courts to identify the intended meaning of statutory language; rather, it is a tool for the legal system as a whole to fill gaps and resolve ambiguities left by the enacting Congress.”).

21. See Michael Rosensaft, *The Role of Purposivism in the Delegation of Rulemaking Power to the Courts*, 29 VT. L. REV. 611 (2005) (arguing that while judicial purposivism can be a problematic approach, it is wholly legitimate, and to be preferred, in those settings when Congress has delegated “rulemaking power” to the courts, as, for example, it has in the antitrust laws). On the broad judicial role in such settings of congressional delegation, see Margaret H. Lemos, *The Other Delegate: Judicially Administered Statutes and the Nondelegation Doctrine*, 81 S. CAL. L. REV. 405, 408 (2008).

B. Does “Purpose” Even Exist?

Even if legislative purpose is theoretically relevant, the argument goes, it just does not exist. Congress is a they, not an it;²² its members have varying degrees of familiarity with any particular bill and divergent goals in mind.²³ Here is Caleb Nelson’s summary of this attack (which is applied equally to reliance on “intent” and reliance on “purpose”):

Textualists emphasize that the legislative process is set up to achieve agreement on words, not motives or purposes. To be sure, some people might expect legislators to deliberate with each other until they reach a consensus about the direction that public policy should take, and then to implement that consensus through legislation designed to carry out the agreed-upon goals. If one has this vision of the legislative process, one might understand the resulting statutes to reflect collective intentions that go well beyond the statutes’ specific provisions. But most textualists (and indeed most modern scholars of legislation) take a different view of the legislative process. Influenced by public choice theory, they speak of contests between rival interest groups whose advocates struggle to hammer out compromises on statutory language even while agreeing to disagree about broader policy goals. To the extent that statutes are compromises of this sort, courts trying to enforce their intended meaning should not lightly extrapolate from their “spirit” to answer questions that the statutes do not seem to address. Indeed, textualists object that such extrapolation “is a sure way of defeating the original legislative plan”; the point of most statutes is to effectuate a compromise between competing goals, and courts that extend one or another of those goals to some new area risk “upsetting the balance of the package” that the enacting legislature approved.²⁴

If valid (which is contestable), this is a powerful critique of purposive interpretation, undercutting its very premise. Again, however, the inquiry here is not whether the critique is well founded; it is whether it applies equally to courts and to agencies.

If legislative purpose does in fact exist, then this criticism collapses, regardless of the identity of the interpreter. So for purposes of the comparative inquiry, we must assume that indeed no such thing as legislative purpose exists. If so, then what is an interpreter actually doing when she in-

22. Kenneth A. Shepsle, *Congress Is a “They,” Not an “It”: Legislative Intent as Oxymoron*, 12 INT’L REV. L. & ECON. 239 (1992).

23. *Stewart v. Abend*, 495 U.S. 207, 225 (1990) (“The process of compromise between competing special interests leading to the enactment of the 1976 Act undermines any such attempt to draw an overarching policy . . . [as it was a] ‘compromise package involving the controversial and intertwined issues’”); Jonathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223, 227-33 (1986) (arguing that the multiple purposes pursued by interest groups through the legislative process cannot be aggregated into one “public” purpose). Max Radin offered the classic statement of this objection, though he was more focused on intent than purpose. See Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 869-71 (1930).

24. Caleb Nelson, *What is Textualism?*, 91 VA. L. REV. 347, 370-71 (2005) (footnotes omitted). For a defense, see BARAK, *supra* note 10, at 132-35.

vokes this nonexistent referent? She must be (mis)labeling something else as purpose. Making it up, critics would say.²⁵ “*Attributing*” a purpose, Hart and Sacks called it,²⁶ using a verb that implies a strong, creative role for the interpreter. And if that is what is happening, whether acknowledged by the interpreter or not, the agency is in a far better position to do it than is a court. The reasons are the same as those that underlie *Chevron* deference: accountability, expertise, and (presumed) delegation from Congress.

The same point can be made using different terminology. What purposivism’s critics assert does not exist is “subjective purpose,” an actual shared goal of the legislature. If the legislature has no shared goal(s), it has no shared goal(s); courts and agencies are equally stymied. Faced with this void, the interpreter looking to purpose will turn to “objective purpose,” i.e. a hypothesized purpose, reflecting the goal(s) a reasonable legislature would have had, perhaps in light of overarching legal principles or societal commitments. Despite this reassuring label, reliance on “objective purpose” poses an obvious risk that the interpreter will invent or discover a purpose that corresponds not with any objective reality but only with the interpreter’s subjective preferences. Purposivism “risks attributing to legislation not the purposes reasonably inferable from the legislation itself but the judge’s own conception of the public interest.”²⁷ If there is no such thing as actual, or subjective, purpose, then where will the interpreter find its purpose? Either or both of two places. First, in her own policy preferences and values. If that is what is happening, the agency’s preferences and values are a more legitimate basis for decisionmaking than those of a court. Second, in the general legal fabric or perhaps, more broadly, basic societal commitments. Here again, in most or all statutory settings, the agency has the edge given its greater familiarity with the particular statutory regime and its indirect electoral accountability.

Note that a longstanding set of arguments in the constitutional setting rests on the converse of this argument: *because of* their independence, judges can pursue the “ways of the scholar” and identify, and insist that government officials adhere to, society’s basic values, unmoved by passing and temporary majorities and their wrongheaded enthusiasms or hatreds.²⁸ It is judges who are best equipped to identify fundamental societal values, not elected officials or partisan members of the current administration. There is no tension here. In the interpretation and implementation of sta-

25. See, e.g., Zelinsky, *supra* note 11, at 727.

26. HART & SACKS, *supra* note 16, at 1377.

27. RICHARD A. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* 288 (1985). See, e.g., *Public Citizen v. U.S. Dep’t of Justice*, 491 U.S. 440, 473 (1989) (Kennedy, J., concurring) (“The problem with spirits is that they tend to reflect less the views of the world whence they come than the views of those who seek their advice.”).

28. See, e.g., ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* 25 (1962).

tutes, which are majoritarian in nature and subject to legislative amendment, a connection to current political and societal preferences is a strength. In articulating and developing constitutional principles, which are countermajoritarian²⁹ (or, in a sense, supermajoritarian³⁰) in nature and not subject to legislative override, a connection to current political and societal preferences is a shortcoming.

C. Challenges in Determining Purpose

A third standard objection is that even if legislative purpose (a) exists and (b) matters, it is just too hard to discern. The historical record is malleable and conflicting at best, self-consciously constructed and duplicitous at worst.³¹

This critique is again less powerful as applied to agencies than to courts. Peter Strauss's valuable discussion of why it makes more sense for agencies than courts to rely on legislative history is directly applicable here. For one thing, agencies' closeness to the legislative process gives them an advantage in determining what the legislative purpose was.³² Agencies propose legislation, they testify at hearings, and they are participants in the legislative process. "[T]heir close day-to-day contact with and control by executive and legislative officials and staff may give agencies insight into the legislative purpose of statutes that outsiders, such as politically insulated judges, may not have."³³ And even if one still fears that the agency interpreter will be pursuing her own conception of the public interest rather than Congress's, we return to the point that doing so is more legitimate for agencies than for courts.

29. *Id.* at 24.

30. Bruce A. Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013, 1045-50 (1984) (arguing that the "countermajoritarian difficulty" is in fact an "intertemporal difficulty," resulting from the fact that when a law is unconstitutional, yesterday's constitution-making supermajority trumps today's political simple majority).

31. See, e.g., Damien M. Schiff, *Purposivism and the "Reasonable Legislator": A Review Essay of Justice Stephen Breyer's Active Liberty*, 33 WM. MITCHELL L. REV. 1081, 1096-98 (2007) (book review).

32. See Strauss, *supra* note 4. Accord Bradford C. Mank, *Is a Textualist Approach to Statutory Interpretation Pro-Environmental? Why Pragmatic Agency Decisionmaking Is Better than Judicial Literalism*, 53 WASH. & LEE L. REV. 1231, 1283 (1996) (asserting that "agencies are better suited than courts . . . to know when the use of legislative history is truly appropriate in reading the statutory text").

33. William R. Andersen, *Chevron in the States: An Assessment and a Proposal*, 58 ADMIN. L. REV. 1017, 1025 (2006).

D. The Challenge of “Effectuating” Purpose through Interpretation

Fourth, one can object that even if there is such a thing as an identifiable legislative purpose, courts are ill-equipped to determine which interpretation of a statute will most effectively advance that purpose. For example, all but very hard-core public choice true believers could agree that the *purpose* of rent control is to ensure a reasonable stock of affordable housing. But there are profound disagreements over whether rent control actually furthers that goal. Therefore, determining what interpretation of a rent control law will best achieve that goal requires making controversial and technical policy choices as to which a court lacks expertise, information, or a democratic mandate.³⁴

Yet expertise, information, and a (concededly dilute) democratic mandate are exactly what an agency does have. Recall *Chevron* itself. The Court described the purposes of the Clean Air Act generally, and the nonattainment provisions in particular, as being to reduce air pollution to acceptable levels from the point of view of human health without crippling American industry. Whether the bubble policy advanced or retarded those goals was just not something that the judiciary could determine. But, teaches the Supreme Court, the EPA administrator could.

Or, to take a more recent example, consider *Michigan v. EPA*.³⁵ The EPA required twenty-two states to regulate emissions of nitrogen oxides (NOx) because of their contributions to ozone pollution in downwind states that exceeded federal Clean Air Act standards.³⁶ The relevant statutory provision requires states to prohibit emissions “in amounts which will . . . contribute significantly to nonattainment” of air quality standards in any other state.³⁷ In determining which states were making “significant contributions” to downwind nonattainment, the EPA proceeded in two steps. First, it looked to “the magnitude, frequency, and relative amount of each state’s ozone contribution to a nonattainment area.”³⁸ So states that were at least occasionally responsible for about a quarter of the ozone in a nonattainment area were deemed “significant contributors”; others which never contributed that much to exceedances were not. This step raised no controversy and would strike anyone as a reasonable approach to determining what contributions are “significant.” The EPA’s next step was less clearly consistent with the statutory language. It required the states on its list to limit NOx emis-

34. EVA H. HANKS ET AL., *ELEMENTS OF LAW* 278-79 (1994).

35. 213 F.3d 663 (D.C. Cir. 2000).

36. USEPA, *Finding of Significant Contribution and Rulemaking for Certain States in the Ozone Transport Assessment Group Region for Purposes of Reducing Regional Transport of Ozone*, 63 Fed. Reg. 57356 (Oct. 27, 1998).

37. 42 U.S.C. § 7410(a)(2)(D) (2000).

38. *Michigan*, 213 F.3d at 675.

sions only so far as possible with “highly cost-effective controls.”³⁹ It defined “highly cost effective” as being less than \$2000 per ton of emissions reduction. Thus, once a state had been preliminarily identified as a “significant contributor,” it could satisfy the statute, i.e., reduce its emissions such that they would no longer make a “significant contribution” to downwind pollution within the meaning of the statute, by mandating those reductions that could be achieved for less than \$2000 a ton. Under this approach, what counts as “significant,” whether stated in terms of total NOx emitted, or amount reaching nonattainment areas, or portion of resulting ozone concentrations attributable to those emissions, varies from state to state depending on variations in control costs. This is an undeniable stretch of the statutory language. The “significance” of the contribution has nothing to do with costs of its control; we would not say that the “significance” of a problem—say, insider trading, or illiteracy, or tuberculosis—is a function of the costs of its elimination. It may be sound policy to eliminate problems when doing so is cheap, and live with those whose elimination would be expensive, but that is not because the first are significant and the second are not.

The D.C. Circuit upheld the agency’s interpretation. In a portion of the per curiam opinion written by Judge Williams, and sounding what are for him familiar themes,⁴⁰ he stressed the fudginess of the term “significant,” the presumptive ability of agencies to take cost into account, and the general soundness of regulating with a view to cost-effectiveness.⁴¹ He glided over the most natural reading of the statutory language, fudged the point that the statute used the phrase “significant contribution” rather than “significant risk” (which is more easily read to imply some attention to the costs of control),⁴² and ignored the statutory reference to emissions in *amounts* which make a significant contribution to downwind nonattainment. For a textualist, the opinion is altogether unconvincing. Indeed, Judge Sentelle was altogether unconvinced. He dissented with a brief, direct opinion focusing on the text of the statute⁴³ and characterizing the majority’s approach to statutory construction as “fundamental[ly] mistake[n]” and “unusual,” and the agency’s as “unreasonable” and “scurrilous.”⁴⁴

Judge Sentelle clearly has the better of the textual argument. The question is whether textualism is the right approach. And, I would suggest, that requires asking, “the right approach for whom?” It matters that the

39. *Id.* (quoting 63 Fed. Reg. at 57403).

40. *Cf.* *Am. Trucking Ass’ns v. EPA*, 175 F.3d 1027, 1052-53 (D.C. Cir. 1999), *aff’d in part, rev’d in part sub nom.*, *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457 (2001).

41. *Michigan*, 213 F.3d at 674-79.

42. *Id.* at 677-79.

43. *Id.* at 695-97 (Sentelle, J., dissenting).

44. *Id.* at 696-97.

court was not interpreting the statute on its own, but was reviewing the agency's interpretation. The agency's approach was a careful and explicit balance of the two central, and sometimes conflicting, purposes of the Clean Air Act—noted by the Supreme Court in *Chevron* itself: (1) protecting air quality generally and human health in particular while (2) avoiding crippling burdens on economic activity. How that balance should be struck is not something courts are in any position to determine. The EPA was effectuating statutory purposes in a way that would be far more dubious coming from a court.⁴⁵

E. Fair Notice

Another perceived advantage of textualism—one it boasts over all forms of intentionalism and purposivism—is the need for those subject to statutory commands to be able to understand them and have notice of their obligations thereunder. To the extent that interpreters rely on extratextual sources of meaning, the argument goes, regulated entities will be unable to predict what the law actually requires. If instead the “law” is embedded exclusively in the text, then all will have equal and sufficient access to it, and unfair surprises will be avoided.⁴⁶

To some extent, this objection is equally applicable to courts and agencies. If the problem is that statutory meaning is revealed after the fact, the identity of the revealer matters not. But to the extent there is a difference, it is again in favor of agencies. To be precise, this objection to purposive interpretation is more powerful with regard to *adjudicators* than with regard to legislators or rulemakers. When the government tells regulated entities what the law is by deciding cases, every law-changing decision will have an element of retroactivity. When the government tells regulated enti-

45. For a similar analysis of another EPA case, see Sunstein & Vermeule, *supra* note 6, at 928-30 (discussing *Am. Water Works Ass'n v. EPA*, 40 F.3d 1266, 1271 (D.C. Cir. 1994) and upholding, through a somewhat contorted reading of the statutory term “feasible,” EPA’s Maximum Contaminant Level for lead in drinking water). For a counterexample, in which strong textualism inappropriately trumped a purpose-based agency interpretation (and judicial dissent), see *Am. Mining Congress v. EPA*, 824 F.2d 1177, 1193 (D.C. Cir. 1987) (Starr, J.) (holding that EPA could not regulate certain materials destined for recycling as wastes because they had not been, as the statute required, “discarded”); *see also id.* at 1196-97 (Mikva, J., dissenting) (arguing that regulation was justified because the materials in question posed the same threat to public health and the environment as other wastes). *American Mining Congress* is discussed in somewhat similar terms in CASS R. SUNSTEIN, *ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT* 230-31 (1999).

46. *See, e.g.,* SCALIA, *supra* note 17, at 17 (“[I]t is simply incompatible with democratic government, or indeed, even with fair government, to have the meaning of a law determined by what the lawgiver meant, rather than by what the lawgiver promulgated. That seems to me one step worse than the trick the emperor Nero was said to engage in: posting edicts high up on the pillars, so that they could not easily be read.”).

ties what the law is by writing statutes or regulations, law-changing decisions are (almost always) prospective, allowing affected entities to learn of and adjust to the new requirements before they are enforced. The retroactivity of adjudication was one central reason why Jeremy Bentham so strenuously preferred legislation to the common law.⁴⁷

Courts are always adjudicators. Agencies are only sometimes adjudicators. For many decades, almost all agencies (the NLRB being the notable federal exception) have done their most important interpretation in the context of rulemaking, not adjudication. The advantages of rulemaking over adjudication for policy formulation are generally acknowledged, and not least among them is the fact that rulemaking provides superior notice to affected entities, both in that its articulation of legal rules tends to be more precise and informative and in that the rule is prospective.⁴⁸ The case for rulemaking thus in part overlaps the case for textualism. The claim is that if legal rules are embedded in publicly available texts, affected persons will be able to know, understand, and comply with those rules. If they have to wait until an adjudicator reveals what the rules are, interpreting texts in light of materials that are not readily available or whose meaning is uncertain and unpredictable (such as, it is said, statutory purpose), they will lack notice of relevant legal requirements until it is too late. Put slightly differently, the fair notice argument for textualism in statutory interpretation presupposes, and seeks to ensure the full benefit of, a shift from the common law to statutes.

This criticism is therefore significantly less powerful as applied to agencies than as applied to courts. First, most agencies most of the time are making their critical decisions through rulemaking rather than adjudication. They need to interpret statutes in order to announce to the world what the rules are. Assuming that the *regulations* themselves are articulated with

47. The common law's retroactive nature made it, for Bentham, no better than "dog law":

It is the judges (as we have seen) that make the common law. Do you know how they make it? Just as a man makes laws for his dog. When your dog does anything you want to break him of, you wait till he does it, and then beat him for it. This is the way you make laws for your dog: and this is the way the judges make law for you and me. They won't tell a man beforehand what it is he *should not do*—they won't so much as allow of his being told: they lie by till he has done something which they say he should not *have done*, and then they hang him for it. What way, then, has any man of coming at this dog-law? Only by watching their proceedings: by observing in what *cases* they have hanged a man, in what *cases* they have sent him to jail, in what *cases* they have seized his goods, and so forth.

5 JEREMY BENTHAM, *THE WORKS OF JEREMY BENTHAM* 235 (1843).

48. *Nat'l Petroleum Refiners Ass'n v. FTC*, 482 F.2d 672, 678-79 (D.C. Cir. 1973); David L. Shapiro, *The Choice of Rulemaking or Adjudication in the Development of Administrative Policy*, 78 HARV. L. REV. 921 (1965).

sufficient clarity,⁴⁹ the fact that they rest on a purposive interpretation of which regulated entities had no notice raises virtually no fairness concerns. Those entities *now* have notice, in the form of the regulation, which is prospective.⁵⁰ (Retroactive rulemaking, though very rare, does occur and it would, of course, raise notice problems. However, that is so regardless of the approach to statutory interpretation that underlies it.)

Second, to the extent agencies are adjudicators, they generally have far greater dialogue and informal contact with regulated entities than do courts. Agencies give advice, answer inquiries, publish guidance, issue press releases, have websites, and hold meetings. Courts do none of these things. Thus, it is much less likely that a purpose-based statutory interpretation will come out of the blue from an agency than from a court.

F. Overshooting the Mark

The next objection to purposive interpretation is the one where the call is closest, and the edge may even go to the judiciary.

The objection is that reliance on purpose can be seductive and misleading, resulting in too devoted or single-minded a pursuit of legislative purpose. For example, federal law awards attorney's fees to the prevailing party in a civil rights case.⁵¹ Congress's generally acknowledged purpose was to encourage civil rights litigation by increasing the expected value of such lawsuits. Several cases have raised the question of how broadly "attorney's fee" should be read. Does it cover the costs of expert witnesses? Work done by paralegals? The more expansively one reads "attorney's fees," the higher the expected value of a civil rights suit, and the more Congress's desire to encourage civil rights litigation is furthered. Accordingly, if one's *only* goal was to encourage such litigation, one would read attorney's fees to include expert witness fees, which seems textually plausible,⁵² or double fees, or a million-dollar bonus, which do not. But Congress did not want to do *everything possible* to achieve its purpose; it chose a specific means. It went so far and no further. The concern is that in focusing on

49. Which is not always the case. *See* *Gen. Elec. Corp. v. EPA*, 53 F.3d 1324, 1328, 1333 (D.C. Cir. 1995) (holding that enforcement of a vague regulation would violate the Due Process Clause because General Electric lacked "fair warning" of its meaning).

50. This argument raises an interesting question about the interpretation of regulations. A regulation is to the agency as a statute is to a court; perhaps agencies can and should read statutes in light of their purposes, but not take such an approach to regulations. Would this argument in turn depend on whether the interpretation was first articulated in the adjudication or had previously been set out in an interpretive rule?

51. 42 U.S.C. § 1988(b) (2006).

52. *See* *Friedrich v. City of Chicago*, 888 F.2d 511, 513, 517-18 (7th Cir. 1989) (reading "attorney's fees" to include expert witness fees).

Congress's *end*, the purposive interpreter will lose sight of Congress's choice of *means*.⁵³

Is this danger (however overstated) of greater concern with regard to courts or agencies? Here we may have a tie.

1. *Agency Advantages*

On the one hand, once again, the agency is closer to the legislative process and will have a keener sense of what compromises it produced and the limits of the legislative pursuit of a particular goal. This now familiar Straussian point has two aspects here. First, the agency will likely have a solid understanding of what Congress did *not* do. What alternatives were rejected? Who wanted the legislation to go even further than it did, but lost? Informed by this background, the agency will be aware of the compromises reflected in the final legislation and appreciate the ways Congress chose not to further its central purpose. Second, statutes tend to have multiple and sometimes conflicting purposes, and the agency is more likely to be alert to all of them. *Chevron* is an example. As the Court noted, Congress had two goals: to protect and enhance air quality and to allow for further economic growth.

[The legislative] history plainly identifies the policy concerns that motivated the enactment; [EPA's interpretation] is fully consistent with one of those concerns—the allowance of reasonable economic growth—and, whether or not we believe it most effectively implements the other, we must recognize that the EPA has advanced a reasonable explanation for its conclusion that the regulations serve the environmental objectives as well.⁵⁴

2. *Judicial Advantages*

Nevertheless, there remains a significant concern about agencies going too far in pursuit of statutory goals. An agency has a specialized mission. Its career staff, and sometimes its political staff, is committed to that mission. They tend to view it as important, and their professional obligation is to pursue it. The agency's specialization therefore may make it less sensitive than a court would be to the compromises and tradeoffs that would stop the legislature shy of full achievement of a goal. The EPA may focus on Congress's desire to achieve clean air in the Clean Air Act and do anything to get there, or the EEOC overemphasize equality concerns and downplay

53. See *W. Va. Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 97-98 (1991) (Scalia, J.) (holding that expert witness fees are not recoverable under § 1988 and observing that “the purpose of a statute includes not only what it sets out to change, but also what it resolves to leave alone”).

54. *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 863 (1984).

employers' interests. As generalists, not committed to a particular program, courts may be less likely to abuse purposive interpretation in this way.

This concern should sound familiar. It is essentially identical to a standard and fundamental justification for White House control of rulemaking. As Judge Patricia Wald wrote in one well-known judicial endorsement of centralized regulatory control:

Our form of government simply could not function effectively or rationally if key executive policymakers were isolated from each other and from the Chief Executive. Single mission agencies do not always have the answers to complex regulatory problems. An overworked administrator exposed on a 24-hour basis to a dedicated but zealous staff needs to know the arguments and ideas of policymakers in other agencies as well as in the White House.⁵⁵

The necessity of such oversight, and whether there is a systemic bias toward over-regulation, are, of course, matters of ongoing controversy in the context of regulatory review.⁵⁶ But the central insight—that an agent with a specific substantive commitment may go further than its more neutral principal would approve—has undeniable validity.

G. Interpretive Creep

Damion Schiff offers a slightly different, but related, objection to purposivism, which he labels “interpretive creep.”⁵⁷

By that phrase I mean the process of interpreting particular provisions of a statute in light of the statute's supposed purpose such that, after a series of interpretations, the statute as a whole, as judicially interpreted, falls decidedly more to one side of the policy balance than would have been possible given the ideological make-up of the enacting legislature.⁵⁸

Schiff's point is that the legislature has multiple, conflicting, and offsetting purposes, which are reflected in the final legislative compromise. But purposivist judges will latch on to one particular legislative goal, revising the story so that it is about only one thing, and, as a result, pushing statutory meaning further in that direction than the actual legislative compromise justifies.⁵⁹ In his view, decisions under the Endangered Species Act are a good example of “interpretive creep.”

55. *Sierra Club v. Costle*, 657 F.2d 298, 406 (D.C. Cir. 1981).

56. See generally RICHARD L. REVESZ & MICHAEL A. LIVERMORE, *RETAKING RATIONALITY: HOW COST-BENEFIT ANALYSIS CAN BETTER PROTECT THE ENVIRONMENT AND OUR HEALTH* (2008) (arguing that agencies are not, in theory or in practice, inherently prone to over-regulation and that the value of centralized regulatory review lies in achieving consistency rather than in restraining over-exuberant regulators).

57. Schiff, *supra* note 31, at 1091.

58. *Id.* at 1091-92.

59. *Id.* at 1092 (“A purposivist interpretation will cause a statute to morph over time so that it reflects more and more a particular lobby in the enacting Congress, thereby giving

For essentially the reasons discussed in the previous subsection, agencies may indeed be prone to interpretive creep. This would really just be a variation, if not an example, of the point about tunnel vision. But, again, the question is whether agencies are more prone to interpretive creep than are judges, against whom Schiff directs his attack. To the extent Schiff's point is distinct from the general concern about overshooting the mark, interpretive creep seems less likely, or less problematic, in agencies than in courts. This is for three reasons.

First, agencies are more plastic. Administrations change; agency policies ebb and flow. Examining a saga such as the long fight over passive restraints that produced *State Farm*,⁶⁰ one would be hard-pressed to find even a hint of interpretive creep within the National Highway Transportation Safety Administration.⁶¹ To the contrary, as administrations change, so does the understanding of the statute's primary purpose. Second, agencies are not bound by their own precedents in the way courts are. Interpretive creep assumes the existence of some sort of ratchet; change goes in only one direction. The doctrine of *stare decisis*, which is especially powerful in statutory cases,⁶² is such a mechanism. While agencies also develop an internal culture or narrative about the meaning of a statute, it is not set out in authoritative statements such as judicial opinions. Finally, agencies' superior democratic accountability means that if indeed the story of a particular statute is rewritten to increasingly emphasize one among many possible purposes, that may not be such a bad thing.

II. TWO ILLUSTRATIONS

The discussion thus far has been abstract. To illustrate the foregoing, this section examines two judicial decisions under the Clean Air Act. In one, the court adopts a strong, and somewhat dubious, purposive interpretation in rejecting the agency's view of the statute. In the second, a more agnostic court upholds the agency's strong purposive reading. In both, statutory text largely falls by the wayside. But for me, at least, the one is a cautionary tale of judicial purposivism run amok; the other a reassuring exam-

effect to that lobby's views to a degree not democratically justifiable. Interpretive creep is an unavoidable and undesirable consequence of purposivism.”).

60. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983).

61. See generally Jerry L. Mashaw, *The Story of Motor Vehicle Manufacturers Association of the U.S. v. State Farm Mutual Automobile Insurance Co.: Law, Science and Politics in the Administrative State*, in *ADMINISTRATIVE LAW STORIES* 334 (Peter Strauss ed., 2006).

62. See, e.g., *Shepard v. United States*, 544 U.S. 13, 23 (2005); *Patterson v. McLean Credit Union*, 491 U.S. 164, 172-73 (1989) (“Considerations of *stare decisis* have special force in the area of statutory interpretation . . .”).

ple of the legitimacy of agency purposivism. I hasten to acknowledge that these are only two cases; even if one agrees that they are examples of “bad” judicial purposivism and “good” agency purposivism, their existence does not actually *prove* anything. But they illustrate the foregoing discussion in concrete settings.

A. *Sierra Club v. Ruckelshaus*

First, consider a case from the heady early years of modern environmental law, *Sierra Club v. Ruckelshaus*.⁶³ This decision led to the establishment of one of the most significant and contentious regulatory programs under the Clean Air Act, its Prevention of Significant Deterioration (PSD) provisions. The Clean Air Act requires the EPA to establish National Ambient Air Quality Standards (NAAQS) for a handful of ubiquitous, well-known pollutants. Each state must prepare a State Implementation Plan (SIP), to be approved by the EPA, consisting of the accumulation of all state limitations on emissions of these pollutants. In theory, the requirements contained in the SIP suffice to bring air quality within the state into compliance with the NAAQS. The Act also imposes requirements that are not tied to the NAAQS regime. For example, it requires EPA to adopt New Source Performance Standards for major new facilities and set emission standards for new automobiles; these apply regardless of the air quality of the region in which they were located. All of these features date back to the 1970 version of the Act. What the 1970 Act did not do, however, was to impose any apparent requirement on states to maintain air quality in areas that more than satisfied the NAAQS.⁶⁴ Accordingly, the EPA took the position that it would approve any SIP that guaranteed that compliance with the NAAQS would be achieved and maintained. States had to ensure that am-

63. 344 F. Supp. 253 (D.C. Cir. 1972), *aff'd without opinion*, 4 ERC 1815, 2 Env'tl. L. Rep. 20,656 (D.C. Cir. 1972), *aff'd by an equally divided court*, 412 U.S. 541 (1973).

64. Craig Oren explains:

As the Clean Air Act stood after the 1970 Amendments, the NSPS and the ambient standards were the only explicit protection for areas whose air quality is better than the ambient standards from stationary sources that would increase air pollution. Suppose, then, that a firm wishes to locate a new factory in an area where the ambient standards are met by a wide margin. Suppose further that the factory would comply with any applicable NSPS for its category, and can demonstrate that, though it will add some pollution to the air, it would not interfere with the attainment and maintenance of the ambient standards. Nothing in the [1970 Act] expressly restricts the construction of the factory. It is therefore possible that pollutant concentrations in presently clean areas would eventually rise to the level of the standards—that, to put it in the words of environmentalists, the “graying of America” would occur.

Craig N. Oren, *Prevention of Significant Deterioration: Control-Compelling Versus Site-Shifting*, 74 IOWA L. REV. 1, 9 (1988).

bient pollution levels did not exceed the relevant standard, but they had no obligation to prevent the degradation of air quality that was better than the NAAQS required.

In the *Sierra Club* litigation, the plaintiffs sought an injunction requiring the EPA Administrator to disapprove any state plan that allowed “significant deterioration” in clean air areas. They argued that the Clean Air Act included an implicit nondegradation requirement. This was a challenging legal argument because there simply was no substantive provision of the Act in which such a requirement could be found. Nor was there any apparent authority for the EPA to impose such a requirement. Rather, the Administrator *had* to approve any proposed SIP that satisfied specific statutory requirements, none of which said anything about deterioration of clean air absent a violation of an ambient standard. Nonetheless, the plaintiffs prevailed. The heart of the district court’s reasoning was that allowing air quality to become significantly worse, even if the ambient standards were not violated, was inconsistent with the Act’s purpose. Section 101(b) of the Act sets out four basic congressional purposes, the first of which is “to protect and enhance the quality of the Nation’s air resources so as to promote the public health and welfare and the productive capacity of its population.”⁶⁵ That did the trick. Wrote the court: “On its face, this language would appear to declare Congress’ intent to improve the quality of the nation’s air and to prevent deterioration of that air quality, no matter how presently pure that quality in some sections of the country happens to be.”⁶⁶ The problem, of course, is that this intent is expressed in a hortatory provision in the Act’s statement of purpose that has absolutely no counterpart in the law’s substantive provisions. Undeterred, the court also offered a bit of legislative history and found some inconsistency in the administrative interpretations taken by the EPA and its predecessor agency (under a fundamentally different version of the Clean Air Act). All in all, it is an extraordinarily thin opinion.⁶⁷

In response to the decision, the EPA established a sweeping regulatory regime to prevent significant deterioration of air quality in areas that satis-

65. 42 U.S.C. § 7401(b)(1) (2006).

66. *Ruckelshaus*, 344 F. Supp. at 255; *see also id.* at 256 (“[P]ermitting the states to submit plans which allow pollution levels of clean air to rise to the [ambient] standard level of pollution, is contrary to the legislative policy of the Act and is, therefore, invalid.”).

67. *See, e.g.*, Richard B. Stewart, *The Development of Administrative and Quasi-Constitutional Law in Judicial Review of Environmental Decisionmaking: Lessons from The Clean Air Act*, 62 IOWA L. REV. 713, 741-45 (1977) (strenuously attacking the absence of any basis for the decision in the actual statute); Comment, *The Clean Air Act and the Concept of Non-Degradation: Sierra Club v. Ruckelshaus*, 2 ECOLOGY L.Q. 801, 835 (1972) (celebrating the decision as an important step in the fight against air pollution). A useful overview is N. William Hines, *A Decade of Nondegradation Policy in Congress and the Courts: The Erratic Pursuit of Clear Air and Clean Water*, 62 IOWA L. REV. 643 (1977).

fied the NAAQS.⁶⁸ The new regulations were upheld by the D.C. Circuit in *Sierra Club v. Environmental Protection Agency*.⁶⁹ The Court of Appeals opinion, written by Judge Skelly Wright, is a more substantial effort than Judge Pratt's 1972 opinion, but in its essence it is much the same. It acknowledges the lack of any statutory provision actually imposing a PSD requirement, but discerns a mandate for such a program in the Act's purpose and legislative history.⁷⁰

The PSD program may make policy sense. And in 1977 Congress essentially took EPA's regulations and wrote them into the Act,⁷¹ so the legality and legitimacy of the program are no longer open to question, the dubious circumstances of its birth notwithstanding. However, the *Sierra Club* decisions are exceedingly hard to defend; even died-in-the-wool purposivists must be given pause. This is not the place to critique the courts' reading of the since-amended 1970 Clean Air Act. Richard Stewart did so at the time, devastatingly.⁷² The court's result rests on a breathtakingly grand purposivism; if one moves just an inch or two toward textualism, the opinion collapses. Even if it is not quite true that "we are all textualists" now,⁷³ it is almost inconceivable that these cases would come out the same way today. They are products of a particular period in statutory interpretation generally and environmental litigation in particular.⁷⁴ For present purposes, the point

68. See Prevention of Significant Air Quality Deterioration, 39 Fed. Reg. 42510, 42514 (Dec. 5, 1974).

69. 540 F.2d 1114 (D.C. Cir. 1976).

70. *Id.*

71. See Clean Air Act Amendments of 1977, Pub. L. No. 95-95, 91 Stat. 731 (1977) (codified at 42 U.S.C. §§ 7470-7492).

72. See Stewart, *supra* note 67, at 741-45; accord Hines, *supra* note 67, at 666-67.

73. See William N. Eskridge, Jr., *All About Words: Early Understandings of the "Judicial Power" in Statutory Interpretation 1776-1806*, 101 COLUM. L. REV. 990, 1090 (2001) ("[T]he proposition that statutory text . . . ought to be the primary source of statutory meaning. . . . needs little defense today. We are all textualists."); see also Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 COLUM. L. REV. 1, 43 (2006) ("Textualism seems to have been so successful—indeed, far more successful than its defenders or detractors care to admit—that we are all textualists in an important sense."); Marjorie O. Rendell, *2003—A Year of Discovery: Cybergenics and Plain Meaning in Bankruptcy Cases*, 49 VILL. L. REV. 887, 887 (2004) ("We are all textualists now."); Jonathan R. Siegel, *Textualism and Contextualism in Administrative Law*, 78 B.U. L. REV. 1023, 1057 (1998) ("In a significant sense, we are all textualists now."). On the judicial turn to textualism, see Molot, *supra*, at 30-36.

74. It is hard to imagine a federal judge in 2009 writing something like the following, for example:

When a specific provision of a total statutory scheme reasonably may be construed to be in conflict with the congressional purpose expressed in the act, our first task is to examine the act's legislative history to determine whether the specific provision is reconcilable and consistent with the intent of Congress. We find, in the legislative history of the Clean Air Act of 1970, a clear understanding that the Act embodied a pre-existing policy of nondeterioration of air cleaner than the national standards.

is not that this is an example of judicial over-reaching. The important fact is that the courts rejected the *agency's* understanding of the statute. Suppose *the EPA* had concluded that the statute required, or at least authorized, a nondegradation program. The courts' *Sierra Club* decisions would then look quite different and more justifiable—all the more so if examined through the lens of *Chevron*.⁷⁵ More important, in the actual case the EPA *had not* read the Act to include a nondegradation program; it was the defendant, sued for not having discovered the implicit nondegradation mandate. How did it miss what the courts found? Perhaps it just did not want the burden of creating such a program from scratch. But, alternatively, perhaps the EPA understood the new statute better than the courts did. As N. William Hines wrote in 1977, the 1970 Act “completely overhauled” the existing legislation—a fact to which the courts were blind—replacing a system of state-established ambient standards (which were never actually promulgated) with uniform federal standards. “The structural approach of the statute . . . appears to require uniform federal standards supplemented by optional, more stringent, state ambient standards. Mandatory imposition of an unstated nondegradation policy seems logically inconsistent with the plan of the statute.”⁷⁶

In short, the story of *Sierra Club v. Ruckelshaus* seems an example of courts falling prey to the defects that judicial purposivism is said to be heir to, and the agency avoiding them. And it is at least plausible to attribute that divergence to the institutional differences discussed in Part I.

Sierra Club, 540 F.2d at 1124.

William Hines's *strongest* argument *in favor* of the decision was that Judge Pratt simply understood that nondegradation policy was a sound policy and, given “the political difficulties faced by Congress in legislating it directly,” simply “assumed responsibility for deciding a major issue of national policy that other legal institutions seemed incapable of resolving.” Hines, *supra* note 67, at 668. Three decades later, such a description would be encountered only in the context of the criticism of a judicial decision.

Richard Stewart's critique has a much more modern ring:

The [1970 Act's] sponsors perhaps favored a nondegradation policy and sprinkled the legislative history with their preference. But they failed to state the issue explicitly, no doubt because of fears that an explicit nondegradation requirement would have been rejected and perhaps would have jeopardized the Amendments as a whole. This was no idle fear The failure of the 1970 Amendments' sponsors to propose an explicit nondegradation requirement, and the failure of Congress to adopt any such requirement[,] mean that the *Sierra Club* decisions are not sustainable on normal principles of statutory construction

Stewart, *supra* note 67, at 745.

75. *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984). Viewing the litigation through the lens of *Chevron* would be altogether anachronistic, but I will return to *Chevron* in Part III.

76. Hines, *supra* note 67, at 665.

B. *Environmental Defense v. Duke Energy Corporation*

The rulemakings and litigation that led to the Supreme Court's 2006 *Duke Energy* decision⁷⁷ provide the obverse to the *Sierra Club* scenario. The case concerned the meaning of the term "modification" under the Clean Air Act.

The Clean Air Act has two regulatory requirements that apply to "new" stationary sources of air pollution. First, under Section 111, the EPA issues New Source Performance Standards (NSPS) for categories of facilities—coal-fired power plants, garbage incinerators, cement plants, etc. These standards, which are to reflect the best system of emissions reduction that has been "adequately demonstrated,"⁷⁸ do exactly what their name indicates: establish minimum levels of performance (meaning pollution control) for new sources.⁷⁹ Second, the "new source review" (NSR) program requires new stationary sources with emissions that exceed certain thresholds (the particular thresholds vary according to the severity of existing air pollution where the new facility will be located) to obtain a permit before commencing construction or operation. One set of NSR requirements applies in clean air areas under the PSD program that grew out of the *Sierra Club v. Ruckelshaus* litigation; a corresponding but more stringent set applies to new sources in dirty air areas. In clean air areas, the PSD provisions require new facilities to meet certain requirements in order to obtain a permit, including the use of Best Available Control Technology (BACT) for regulated pollutants. Existing facilities are not subject to the permit requirement and thus not subject to the BACT requirement.

Both the NSPS and the NSR program are classic examples of the old/new division in environmental regulation. Existing facilities are grandfathered in; they need not shut down or improve their levels of control. New facilities are subject to much more stringent requirements. This disparity is not crazy. On the one hand, the cost of retrofitting an existing facility to limit emissions is generally far higher than the cost of designing a new facility with such controls in the first place. On the other hand, the benefits of controlling pollution from existing facilities are likely to be less since they have shorter expected useful lives than new facilities. However, such a dual regulatory regime creates significant incentives to hold on to existing facilities rather than replace them with new ones. Repairs, maintenance, and upgrades cost money, but may still be a lot cheaper than building a new state-of-the-art plant. Accordingly, an older facility's "useful

77. *Env'tl. Def. v. Duke Energy Corp.*, 549 U.S. 561 (2007).

78. Clean Air Act § 111(a)(1), 42 U.S.C. § 7411(a)(1) (2006).

79. The standards have some potential application to existing facilities as well; *see* Clean Air Act § 111(d), 42 U.S.C. § 7411(d) (2006), but that is irrelevant to the issues in *Duke Energy*.

life” may prove much longer than anyone would ever have guessed at the time it was built. Grandfathering thus threatens to undermine the regulatory regime altogether. If facility owners never actually shut down an old facility, but over time constantly repair and upgrade it, the stricter requirements for new facilities never kick in.⁸⁰ The statute attempts to avoid this problem by requiring a permit not only for construction of a new facility, but also for the “modification” of an existing facility.

What, then, is a modification? Section 111 has a definition: “The term ‘modification’ means any physical change in, or change in the method of operation of, a stationary source which increases the amount of any air pollutant emitted by such source or which results in the emission of any air pollutant not previously emitted.”⁸¹ The PSD provisions do not include a separate definition; instead, they incorporate the NSPS definition by reference. The permit requirement applies to any source the “construction” of which begins after August 1977, and section 169 defines that key term: “The term ‘construction’ when used in connection with any source or facility, includes the modification (as defined in section 111(a)) of any source or facility.”⁸²

So, a modification must involve two things: (a) some sort of physical change or change in the method of operation and (b) an increase in the amount of pollution. A change without an increase, or an increase in pollution without a physical change or change in the methods of operation, does not constitute a modification. So then one must figure out what counts as a physical change, what counts as a change to a method of operation, and what counts as an increase. Here the plain meaning gives out. *Duke Energy* grew out of the fact that the EPA defined “increase” in one way in its NSPS regulations and in another way in its PSD regulations.

In 1975, the EPA promulgated regulations clarifying the definition of “modification” for purposes of NSPS’s. The regulations defined an “increase” in “the amount” of pollution as an increase in the *hourly rate* of emissions.⁸³ If a plant made a change that enabled it to operate sixteen hours instead of eight, its actual emissions would double but there would not be an “increase” (and, accordingly, the change would not constitute a

80. For a full discussion, see Jonathan Remy Nash & Richard L. Revesz, *Grandfathering and Environmental Regulation: The Law and Economics of New Source Review*, 101 Nw. U. L. REV. 1677, 1708-18 (2007).

81. Clean Air Act § 111(a)(4), 42 U.S.C. § 7411(a)(4) (2006).

82. Clean Air Act § 169(2)(C), 42 U.S.C. § 7479(2)(C) (2006).

83. Under the regulations, “any physical or operational change to an existing facility which results in an increase in the emission rate to the atmosphere of any pollutant to which a standard applies shall be considered a modification within the meaning of section 111.” 40 C.F.R. § 60.14(a) (2008). Accordingly, an NSPS modification is a change that “increase[s] . . . the emission rate,” which “shall be expressed as kg/hr of any pollutant discharged into the atmosphere.” *Id.* § 60.14(a)-(b).

modification) because the *rate* of pollution did not go up. On the other hand, a change that increased the *rate* of pollution—the amount of pollution per hour—*would* be an increase (and, accordingly, would constitute a modification) even if the plant ran fewer hours in a day, or year, and thus the total amount of pollution was unchanged.

In 1980, the EPA promulgated regulations under the PSD provisions.⁸⁴ These defined “modification” differently, requiring a “net emissions increase of [any] pollutant” subject to regulation under the Act.⁸⁵ A “[n]et emissions increase” is defined as an increase *in actual emissions* resulting from the change, net of other contemporaneous “increases and decreases in actual emissions at the . . . source.”⁸⁶ “[A]ctual emissions” are “the average rate, in tons per year, at which the unit actually emitted the pollutant during a [two-year] period which precedes the particular date and which is representative of normal source operation.”⁸⁷ They are calculated “using the unit’s actual operating hours [and] production rates.”⁸⁸

Thus, the NSPS regulations look to the hourly rate as the baseline; the PSD regulations look to total actual emissions as the baseline. (This too is a sort of a “rate,” but an annual one.)

The statutory difficulty at issue in *Duke Power* was whether the statute permits divergent definitions of the same term. The statutory text inescapably suggests that the term means the same thing in both settings. The same word, “modification,” is used both places and, of course, it is generally presumed that if a term appears more than once in a statute (or, under a more extreme version of this approach, more than once in the U.S. Code) it has the same meaning each time it appears.⁸⁹ To be sure, courts often abandon this intratextualist presumption.⁹⁰ But here the argument for reading “modification” identically in these two sections is particularly strong. The PSD and NSPS sections do not merely share the *word* “modification”; they share its *definition*. The statute directly says that the word shall have the same

84. These were in fact the third set of PSD regulations; the highly complex regulatory history is not worth reviewing here but is discussed in the Court’s opinion and in Nash & Revesz, *supra* note 80.

85. 40 C.F.R. § 51.166(b)(2)(i) (2008).

86. *Id.* § 51.166(b)(3)(i)(b).

87. *Id.* § 51.166(b)(21)(ii).

88. *Id.*

89. *See, e.g.,* *Powerex Corp. v. Reliant Energy Servs., Inc.*, 551 U.S. 224, 232 (2007) (referring to the “standard principle of statutory construction . . . that identical words and phrases within the same statute should normally be given the same meaning”).

90. *See, e.g.,* *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 595-96 (2004); *Atl. Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427, 433 (1932); *Abbott Labs. v. Young*, 920 F.2d 984, 987 (D.C. Cir. 1990); *Weaver v. U.S. Info. Agency*, 87 F.3d 1429, 1437 (D.C. Cir. 1996).

meaning in both settings: “The term ‘construction’ . . . includes the modification (as defined in section 7411(a) of this title) of any source or facility.”⁹¹

The Court of Appeals could not get past this text. It held that the term had to carry the same meaning in both settings.⁹² The Supreme Court disagreed.⁹³ With only Justice Thomas declining to join the relevant portion of the opinion,⁹⁴ it concluded that the same defined term does not have to mean the same thing each place it appears. “Context counts.”⁹⁵ Along the way, it made a passing, opaque, and isolated reference to statutory purposes: “Absent any iron rule to ignore *the reasons for regulating PSD and NSPS ‘modifications’ differently*, EPA’s construction need do no more than fall within the limits of what is reasonable, as set by the Act’s common definition.”⁹⁶

The decision can be understood in either of two ways. First, it may be a *Chevron* step-two decision. Oddly, the Court does not cite *Chevron* (other than in a passing reference in a background discussion of the Act’s history⁹⁷), but much of its reasoning and vocabulary (i.e., “need do no more than fall within the limits of what is reasonable”⁹⁸) resonates with step two. The Court does not make the analogy, but it is accepting an apparent inconsistency in just the same way it accepts agency flip-flops over time.⁹⁹ Here the disagreement is “spatial” rather than temporal, involving simultaneous inconsistent readings of two provisions rather than sequential inconsistent readings of a single provision. But for similar, though not identical, reasons agency inconsistencies are acceptable over either time or space. Congress used an ambiguous term, “modification,” and the task of fleshing out the term’s meaning was a pure policy decision that should be made by the agency. The EPA’s divergent ways of filling the gap were each reasonable in light of the purposes of the Act as a whole and specific sections under which they arose.

The second view of the decision sounds more in traditional understandings of interpretation, that is, of finding rather than making law. The text is identical; one section cross-references the other. There is no helpful legislative history. There are no real linguistic contextual clues; indeed, if

91. Clean Air Act § 169(2)(C), 42 U.S.C. § 7479(2)(C) (2006).

92. *United States v. Duke Energy Corp.*, 411 F.3d 539, 550-51 (4th Cir. 2005). Having found the statutory text unbending, the Court of Appeals showed itself much less constrained by the *regulatory* text, instructing the EPA to give the PSD regulations an impossibly tortured reading to bring them in line with the NSPS regulations. *Id.* at 550.

93. *Env’tl. Def. v. Duke Energy Corp.*, 549 U.S. 561, 574-76 (2007).

94. *Id.* at 582 (Thomas, J., concurring in part).

95. *Duke Energy*, 549 U.S. at 576.

96. *Id.* (emphasis added).

97. *Id.* at 566.

98. *Id.* at 576.

99. *See, e.g., Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 981-82 (2005).

anything the strong similarity of the surrounding terms and the basic approach (a technology-based limit on pollution for new sources that generally grandfather in existing sources unless they make a change that counts as a modification) suggests that the term should receive identical readings in both settings. Yet when one considers the nature and purpose of the two provisions, the textual argument for using the same definition weakens. New Source Performance Standards do not limit total pollution, all they ensure is that any given facility will restrict its emissions to the amount that the best demonstrated technology allows. The regulations have no bearing on whether there are two facilities or ten in a given area. Section 111 does not “care.” The statute says nothing about how much a plant can operate; implicitly it is unconcerned if it runs twenty-four hours a day, as long as it is at all times limiting its emission to the extent technology allows.¹⁰⁰ The standards are not aimed at, and limit only indirectly and haphazardly, total pollution. Accordingly, it makes perfect sense to define an “increase” in pollution in terms of the hourly *rate*, not total emissions. The hourly rate is the thing being regulated. The *purpose* of an NSPS is to restrict the hourly rate.¹⁰¹ The PSD provisions, in contrast, are an effort to prevent air quality in an area from getting meaningfully worse. The provisions are focused on total emissions, because overall local air quality is a function of total emissions. PSD seeks to restrict the significant worsening of ambient conditions; therefore, the sensible trigger for controls would be changes that have that effect.¹⁰² A change in the hourly rate of emissions may or may not affect total emissions, and so ambient conditions. In contrast, an increase in actual annual emissions inescapably worsens ambient air quality.

In short, the agency adopted rules that correlate precisely with and are justified by the overall approach and purposes of the two separate regimes within which this single term operates. One cannot tell this from the opinions written in this litigation. Generalist judges, even guided by expert lawyers, will not necessarily have an ear for the “music” of the regulatory regime in this way. But here the agency had been in the thick of the legislative process and its definitions were closely contemporary with the enactment of the relevant provisions. It produced a coherent body of law, sensitive to what Congress was doing in these two different regulatory regimes, taking the approach that most effectively furthered that goal, without blindly

100. Clean Air Act § 111(a)(7), 42 U.S.C. § 7411(a)(7) (2006).

101. Note that this account is an illustration of the way in which every means is also an end and every end also a means. Restricting the hourly rate is a goal, but it is also a means to a larger end, namely, reducing total pollution. PSD has the same ultimate goal, but a different means of achieving it.

102. See Brian H. Potts, *The U.S. Supreme Court's New Dukedom: The Hour and Year, or a Proposal Quite Near*, 33 *ECOLOGY L.Q.* 517, 538-40 (2006) (arguing that using the NSPS, hourly-rate definition of “increase” would be “in direct conflict with NSR’s purpose”).

pursuing its mission regardless of countervailing considerations. In short, most or all of the ways in which an agency has an institutional advantage over courts in purposive interpretation were in play.¹⁰³

III. JUDICIAL REVIEW, *CHEVRON*, DEFERENCE, AND CONFLICTING METHODOLOGIES

Suppose, then, that agencies and courts were to adopt different interpretive methodologies. Is that a problem? If the different approaches lead to the same result, then it is not. And in many cases, they will.

First, as a purely theoretical matter, the first-best, second-best analysis suggests that they should generally lead to the same outcome, i.e., the “right” interpretation. The whole point is that in light of the interpreters’ differing capacities, the approach most likely to achieve the correct outcome will vary from interpreter to interpreter, so taking *different* approaches will produce more consistent outcomes. Concededly, that theoretical proposition seems pretty unconvincing in this setting.

Setting theory aside, practical experience suggests that different methodological commitments in statutory cases produce different outcomes less often than one might think.¹⁰⁴ This may say something about the degree to which methodology fails to constrain ideology or other determinants of outcomes. A hint that this is the case is provided by the fact that courts, and agencies, so often find that all indicators of meaning (text, purpose, history, policy) all point the same way in tidy mutual reinforcement. Because those with differing interpretive commitments so often end up in the same place,

103. Though it undermines this happy story, the full picture in *Duke Energy* is not quite as I have described it. The Bush EPA did two things that are inconsistent with the foregoing. First, after losing in the Fourth Circuit, it did not seek Supreme Court review. It was the private parties that filed for cert; the EPA (or at least, the administration) was willing to live with the loss. See *Env'tl. Def. v. Duke Energy Corp.*, 549 U.S. 561, 573 (2007). Second, after the decision, the EPA announced plans to change the PSD regulation to make it consistent with the NSPS regulation, exactly the result that I have argued is inconsistent with the purposes of these two distinct regulatory regimes. See *Supplemental Notice of Proposed Rulemaking for Prevention of Significant Deterioration and Nonattainment New Source Review: Emission Increases for Electric Generating Units*, 72 Fed. Reg. 26202, 26204 (proposed May 8, 2007) (to be codified at 40 C.F.R. pts. 51-52). In March 2009, with the Obama Administration in office, the EPA withdrew this proposal. USEPA, *Semiannual Regulatory Agenda 73* (Spring 2009). Thus *current* EPA regulations and policies are consistent with my discussion. Nonetheless, the EPA’s plan to abandon the longstanding PSD definition undercuts my account of fluent agency purposivism. In response, two thoughts. First, were the agency able to make this change, it would mean that this is actually a *Chevron* step-two situation, in which case it does not really involve “purposive *interpretation*” at all. (I return to this point in the next section.) Second, even Homer nods; happily, he has now snapped back to attention.

104. See generally Daniel A. Farber, Essay, *Do Theories of Statutory Interpretation Matter? A Case Study*, 94 NW. U. L. REV. 1409, 1410-11 (2000).

methodological differences can often be papered over as “incompletely theorized agreements.”¹⁰⁵ Nonetheless, different methodologies do sometimes produce different outcomes.¹⁰⁶ That is why there is so much fuss.

To the extent textualism and purposivism produce different outcomes, then there is a built-in awkwardness in having these incongruent approaches relied on by the agency and the reviewing court. The agency would reach one result interpreting the statute in the first instance, and then be reversed when the court adopted a different interpretive approach. The threat of such an outcome would create an incentive for agencies to mimic judicial methodology, not because it is “right,” but in order to increase the survivability of its decisions. If the agency will only be upheld if the textualist court ends up the same place, then the agency should be using textualist methods itself. Anything else is a waste of time. (Except in those cases where it is not subject to judicial review—and it is hardly the apotheosis of rule of law values to say that the agency can do X (or get away with X) only if no court is looking.) Yet if we value agency purposivism, then we should not allow courts to run roughshod over the results of such an interpretation through textualist judicial review, which is justified by shortcomings specific to courts.

I think there are two ways out of this problem. They are not mutually exclusive. They are, in essence, *Skidmore*¹⁰⁷ and *Chevron*.¹⁰⁸

A. *Skidmore*

The premise of *Skidmore* is that the agency and the court are engaged in the *same* process. Both are trying to determine the meaning of the statute, the meaning that Congress put there. It is “interpretation” in a narrower and more traditional sense than that term in the *Chevron* setting. The aspects of the agency interpretation that give it the “power to persuade”¹⁰⁹—consistency, contemporaneousness, etc.—are reasons to think the agency

105. See generally Cass R. Sunstein, Commentary, *Incompletely Theorized Agreements*, 108 HARV. L. REV. 1733, 1735 (1995).

106. See Alexander Volokh, *Choosing Interpretive Methods: A Positive Theory of Judges and Everyone Else*, 83 N.Y.U. L. REV. 769, 786-89 (2008) (describing cases in which different interpretive approaches did lead to different outcomes and concluding that methodological commitments do to some extent control decisions).

107. *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) (reversing lower court for failure to take agency’s view of statute’s meaning into account, since the agency’s interpretation was persuasive, though “not controlling”).

108. A third way out, of course, would be for courts to pursue purposive interpretation as aggressively as do agencies. I have some sympathy for purposive interpretation by courts. But the premise of this article is that there are reasons to allow greater reliance on purpose by agencies than by courts, and I am working from that premise here.

109. *Skidmore*, 323 U.S. at 140.

has got the answer right, and what makes an answer “right” is the same for both courts and agencies.¹¹⁰

If court and agency are trying to do the same thing, the agency’s use of a completely different interpretive approach than that taken by a court seems, at first blush, to be an argument against affording it any deference. Can an agency’s reasoning be “persuasive” if it relies on all the wrong factors? In fact, it can. An agency interpretation based on inputs that are off-limits to a court *does* merit deference as long as it constitutes an answer *to the question the court is asking*. Indeed, it deserves precisely the deference that *Skidmore* accords. If consideration of purpose by the agency is a useful tool in reaching the right understanding of the statute, but for various reasons it is inappropriate for a court to use that tool, then it is appropriate for (a) a court to downplay or ignore purpose when interpreting a statute on its own, but (b) nonetheless to give weight to an agency interpretation that rests on considerations of purpose. If we “trust” agency purposive interpretations, but not judicial purposive interpretations, then a reviewing court *should* grant the agency some deference. The court should take advantage of the agency’s comparative advantage in purposive interpretation.

Indeed, the whole idea of deference *assumes* that the agency knows something or has a skill that the court lacks. Compare appellate review of a trial court opinion. With regard to fact finding, the trial court really is just better at it, not because of innate skill, but by virtue of having heard all the testimony and lived with the case. Trial court findings of fact, therefore, merit deference. On questions of law, the lower court has no comparative advantage. The appellate court has an edge both in the formal hierarchy¹¹¹ and in the sense that it is a multi-member body, and thus statistically more likely to be “correct,” and the two courts have the same skills and insights. In that setting, there is no deference. If courts and agencies likewise brought the same background, knowledge base, approach, and expertise to the task of statutory interpretation, then the former would also, and *a fortiori*, owe the latter no deference. It is because they do not that deference makes sense. Indeed, if courts and agencies both took a firmly textualist approach to statutory interpretation, then there would be no justification for

110. See generally Michael Herz, *Judicial Review of Statutory Issues Outside of the Chevron Doctrine*, in *A GUIDE TO JUDICIAL AND POLITICAL REVIEW OF FEDERAL AGENCIES* 125, 134, 138 (John F. Duffy & Michael Herz eds., 2005).

111. As Justice Scalia put it in explaining why, as a Supreme Court justice, he would not defer to Judge Learned Hand:

[I]t would . . . have been . . . desirable for me to accept his views in all of his cases under review, on the basis that he is a lot wiser than I, and more likely to get it right. But that would hardly have been theoretically valid. Even if Hand would have been *de facto* superior, I would have been *ex officio* so.

Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 514 (1989).

judicial deference, because agencies have nothing to offer that courts do not already possess.¹¹²

B. *Chevron*

The *Chevron* step-two setting presents a different situation. The premise of *Chevron* is that step two does not involve “interpretation” in the standard, *Skidmore* sense of discovering the meaning that resides in the text. Instead, it involves policymaking, or gap filling, or providing an answer where Congress did not do so. Step two is where law gives out. When courts are faced with a step-two sort of question *in the absence* of an agency “interpretation” (e.g. no agency interpretation yet, or none with the force of law, or no agency at all), they are doing the same thing as the agency: trying to come up with a sensible, coherent answer without significant congressional guidance. (Courts are not as well-equipped as agencies to do this, which is why agencies are not bound by prior judicial decisions in step-two settings.¹¹³) But if an agency has spoken, the court and the agency are doing different things. Neither is trying to figure out what the statute means. The agency is making policy; the court is ensuring that the agency has not abused its discretion in doing so. The court defers not because the agency has some sort of superior insight into statutory meaning, but because there is no statutory meaning to be had and the agency is the superior policymaker. In short, under *Chevron* step two, what the agency is doing is not traditional statutory interpretation, and the reviewing court is not second-guessing an “interpretation.” The tension from having the two institutions adopt different techniques therefore disappears.¹¹⁴

Ironically, purpose remains relevant. Indeed, *Chevron* step two forces courts to adopt a form of purposivism, albeit a dilute one. For an agency “interpretation” to be “reasonable” under step two, the agency must be able to articulate how its decision is consistent with, or furthers, the overall purpose of that statute. An inability to do so, or the pursuit of a goal at odds with statutory purposes, would make the agency decision unreasonable. This is black-letter administrative law. The prevailing, and preferable, understanding of the step-two inquiry is that it is essentially congruent with arbitrary and capricious review.¹¹⁵ And one basic aspect of arbitrary and

112. Michael Herz, *Textualism and Taboo: Interpretation and Deference for Justice Scalia*, 12 CARDOZO L. REV. 1663, 1673-74 (1991). Adrian Vermeule agrees that “agencies need not be required to interpret statutes in the same way as courts.” VERMEULE, *supra* note 1, at 213.

113. Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs., 545 U.S. 967, 980 (2005).

114. See generally Pierce, *supra* note 4, at 204-05.

115. See M. Elizabeth Magill, *Step Two of Chevron v. Natural Resources Defense Council*, in A GUIDE TO JUDICIAL AND POLITICAL REVIEW OF FEDERAL AGENCIES 85, 93-102

capricious review is ensuring that the agency decision furthers rather than conflicts with statutory purposes.¹¹⁶ In this sense, statutory purpose is very much on the table in step two. Indeed, one of the few constraints on the agency in a world of broad delegations is the requirement that it act consistently with statutory purposes. But it is misleading to speak of what the agency is doing as “statutory interpretation,” and so its decision does not involve purposivism of the sort at issue here.

C. *Skidmore* within *Chevron*

I have written elsewhere that *Skidmore* deference should apply within *Chevron*'s step one.¹¹⁷ For a textualist, that must be wrong, because courts must limit themselves to text in resolving questions of statutory meaning. For a textualist such as Adrian Vermeule, it is not only wrong but laughably so, since judges not only must limit themselves to text, but must defer as soon as they find any meaningful ambiguity,¹¹⁸ which means that the circumstances in which *Skidmore* might be relevant are already the circumstances in which the court should not be making the decision. But those who think that statutory interpretation within step one should be more capacious, that it permits grappling with some ambiguity, would—even if they are wary of judicial reliance on purpose—appropriately give weight to an agency's purposive interpretation in the course of asking whether Congress has spoken to the question at issue within step one. The greater legitimacy of agency reliance on purpose can be accommodated through something like *Skidmore* deference within step one, prior to, and possibly obviating the need for, step-two type deference.

CONCLUSION

Purposivism in statutory interpretation has been under sustained and effective attack for a generation. On the whole federal judges approach statutes quite differently than in the heyday of Hart and Sacks. Yet the

(John F. Duffy & Michael Herz eds., 2005); Ronald Levin, *The Anatomy of Chevron: Step Two Reconsidered*, 72 CHI.-KENT L. REV. 1253 (1997).

116. See, e.g., *Athens Cmty. Hosp., Inc. v. Shalala*, 21 F.3d 1176 (D.C. Cir. 1994); *Verizon Commc'ns, Inc. v. FCC*, 535 U.S. 467, 542 (2002) (Breyer, J., concurring in part and dissenting in part) (arguing that regulations were arbitrary and capricious because they would actually harm rather than advance overall statutory goals); Section of Administrative Law & Regulatory Practice, American Bar Association, *A Blackletter Statement of Federal Administrative Law*, 54 ADMIN. L. REV. 1, 42 (2002) (noting that a court will set aside an agency “action [that] does not bear a reasonable relationship to statutory purposes”).

117. See Herz, *supra* note 110, at 142-43; Michael Herz, *Deference Running Riot: Separating Interpretation and Lawmaking Under Chevron*, 6 ADMIN. L.J. AM. U. 187, 208-09 (1992).

118. See VERMEULE, *supra* note 1, at 205-13.

standard critiques of purposivism have been articulated with judges, not administrators, in mind. Almost without exception, they lose much of their force when applied to agencies. I do not mean to endorse that critique as applied to courts, nor do I mean to say it is wholly inapplicable to agencies. In relative terms, however, agencies are in a better position to interpret statutes in light of their purpose than are courts.