PEPPERDINE UNIVERSITY

Pepperdine Law Review

Volume 49 | Issue 2 Article 1

2-15-2022

Whither the Lofty Goals of the Environmental Laws?: Can Statutory Directives Restore Purposivism When We Are All Textualists Now?

Stephen M. Johnson

Whither the Lofty Goals of the Environmental Laws?: Can Statutory Directives Restore Purposivism When We Are All Textualists Now?

Stephen M. Johnson*

Abstract

Congress set ambitious goals to protect public health and the environment when it enacted the federal environmental laws through bipartisan efforts in the 1970s. For many years, the federal courts interpreted the environmental laws to carry out those enacted purposes. Over time, however, courts greatly reduced their focus on the environmental and public health purposes of the environmental laws when interpreting those statutes due to the rise in textualism, the declining influence of the Chevron doctrine, and the increasing willingness of courts to defer to agency underenforcement of statutory responsibilities across all regulatory statutes.

In 2020, the Environmental Protection Network, a coalition of former Environmental Protection Agency (EPA) employees from across the political spectrum, issued a report identifying the priorities for resetting the course of EPA. At the top of the list of priorities, the group urged EPA to "reaffirm its commitment to fully protect public health and the environment." Even if EPA were to follow that advice and sought to aggressively interpret and enforce the environmental laws to achieve their enacted purposes, the agency could be thwarted by the judicial trends outlined above were its actions challenged in court. Congressional action may be required to counter these trends and reinvigorate the federal environmental laws.

---

* Professor of Law, Mercer University Law School. B.S., J.D. Villanova University, LL.M. George Washington University School of Law.

The very simple, straightforward tool that Congress could use to reinvigorate the laws would be a statutory directive. Congress could amend the Clean Water Act, Clean Air Act, RCRA, Superfund, and the Endangered Species Act to explicitly provide that the laws should be interpreted to carry out their enacted purposes to protect public health and the environment. Through such statutory directives, Congress could send a clear message to courts that it remains committed to the goals articulated in the environmental laws. Textualist judges would find it difficult to ignore the statutory purposes when interpreting the environmental laws, as the text of the laws would require the laws to be interpreted to advance those purposes. Similarly, judges who ignore Chevron to avoid deferring to an agency's environmentally friendly interpretation would be unable to reject the agency's position through their own statutory interpretation without addressing the statutory directive in the law requiring an interpretation of the law to carry out its public health and environmental purposes.

Although Congress has underutilized statutory directives, state legislatures routinely enact them, and other academics have advocated for the creation of Federal Rules of Statutory Interpretation or other tools to standardize statutory interpretation by courts. While some commentators have raised separation of powers concerns regarding statutory directives, many commentators assert that courts do not have a monopoly on statutory interpretation and that the statutory interpretation rules adopted by courts are federal common law rules that can be adopted or amended by Congress. Accordingly, a directive like the one proposed in this Article that focuses on a limited number of statutes and only directs courts to interpret the statutes consistently with enacted purposes provisions in the statutes should be consistent with Congress's Article I powers.

TABLE OF CONTENTS

I. INTRODUCTION

Over the past four years, federal agencies took unprecedented steps to dismantle environmental protections established under the nation's environmental laws.[1] In response to the magnitude of those actions, a coalition of former Environmental Protection Agency (EPA) employees from across the political spectrum joined together to form the Environmental Protection Network to oppose the draconian actions.[2] In a report issued in 2020 that addressed resetting the course of EPA, the group identified as the top priority that "EPA must reaffirm its commitment to fully protect public health and the environment."[3] After he was elected in 2020, President Biden pledged to restore environmental protections and reverse many of the former Administration's policies.[4]

President Biden may, however, encounter some roadblocks in his efforts to reinvigorate federal environmental protections due to major shifts in statutory interpretation approaches in the federal judiciary.[5] The major federal environmental laws, adopted by strong bipartisan majorities almost a half century ago, generally include broad statements indicating Congress's primary purpose in enacting the laws—protecting health and the environment.[6] In the decades immediately following the enactment of the laws, the Supreme Court and lower federal courts, in cases like *Tennessee Valley Authority v. Hill*[7] and

1. *See infra* Part II.

2. *See About Us*, ENV'T PROT. NETWORK, https://www.environmentalprotectionnetwork.org/about/ (last visited Dec. 26, 2021).

3. *See* ENV'T PROT. NETWORK, RESETTING THE COURSE OF EPA: RECOMMENDATIONS FROM THE ENVIRONMENTAL PROTECTION NETWORK 1, 4 (2020), https://www.environmentalprotectionnetwork.org/wp-content/uploads/2020/08/Resetting-the-Course-of-EPA-Report.pdf [hereinafter EPN REPORT]. In addition, the group recommended that "[i]n fulfilling its mission, EPA should prioritize its commitment to communities that suffer disproportionate environmental burdens." *Id.* at 6.

4. *See* Juliet Eilperin, Brady Dennis & John Muyskens, *Tracking Biden's Environmental Actions*, WASH. POST: CLIMATE & ENV'T (Oct. 14, 2021, 11:46 AM), https://www.washingtonpost.com/graphics/2021/climate-environment/biden-climate-environment-actions/ ("Beginning from his first day in office, Biden has moved quickly to undo the environmental track record of his predecessor, and to center climate action as a key priority.").

5. *See id.*; *see also infra* Part III (analyzing the shift towards textualism within the federal judiciary).

6. *See* Richard J. Lazarus & Sara Zdeb, *Environmental Law & Politics*, 19 INSIGHTS ON L. & SOC'Y 11, 13 (2018) (noting Congress's enactment of environmental laws "with overwhelming bipartisan majorities"); *see also infra* notes 86–94 and accompanying text.

7. 437 U.S. 153 (1978).

United States v. Riverside Bayview Homes, Inc.,[8] routinely interpreted the laws expansively to carry out those purposes.[9] Over time, however, the federal courts have greatly reduced their focus on the environmental and health protection purposes of those statutes in interpreting their meaning and scope.[10] Indeed, if the courts consider statutory purposes at all, they are frequently more likely to focus on the states' rights provisions in the laws than the environmental and health protection purposes of the laws.[11] They are also increasingly likely to find that the laws authorize or require the government to balance the health and environmental protection goals of the statutes against their costs.[12]

Several trends have contributed to this shift in federal judicial interpretation of the environmental laws.[13] First, in interpreting statutes, federal courts have increasingly embraced textualism and rejected consideration of statutory purposes and legislative history.[14] That trend is likely to continue or accelerate with the unprecedented rate of federal judicial appointments by former President Trump between 2016 and 2020.[15]

---

8. 474 U.S. 121 (1985).

9. *See infra* notes 97–112 and accompanying text.

10. *See* David M. Driesen, Thomas M. Keck & Brandon T. Metroka, *Half a Century of Supreme Court Clean Air Act Interpretation: Purposivism, Textualism, Dynamism, and Activism*, 75 WASH. & LEE L. REV. 1781, 1785 (2018) [hereinafter Driesen et al., *Half a Century*] (analyzing the argument "that the Court has shifted from an approach to statutory interpretation that relied heavily on purposivism—the custom of giving statutory goals weight in interpreting statutes—toward one that relies more heavily on textualism").

11. *See* Stephen M. Johnson, *From Protecting Water Quality to Protecting States' Rights: Fifty Years of Supreme Court Clean Water Act Statutory Interpretation*, 74 SMU L. REV. 359, 359 (2021) [hereinafter Johnson, *Clean Water Act*] ("[T]o the limited extent that the Court focuses on the purposes of the [Clean Water Act], it cites the language in § 101(b) of the law that discusses a Congressional policy to preserve and protect states' rights.").

12. *See* Driesen et al., *Half a Century*, *supra* note 10, at 1841 (noting the Supreme Court's shift toward "requiring EPA to consider costs").

13. *See id.*; Chevron, U.S.A., Inc. v. NRDC, Inc., 467 U.S. 837 (1984); Daniel E. Walters, *Symmetry's Mandate: Constraining the Politicization of American Administrative Law*, 119 MICH. L. REV. 455, 456 (2020) (arguing that "symmetry plays . . . an important role in depoliticizing administrative law").

14. *See* Driesen et al., *Half a Century*, *supra* note 10, at 1787 ("The standard accounts of statutory interpretation suggest that the Supreme Court's approach shifted from a heavy reliance on purpose to a much heavier reliance on text.").

15. *See generally* Mark Sherman, Kevin Freking & Matthew Daly, *Trump's Court Appointments Will Leave Decades-Long Imprint*, ASSOCIATED PRESS (Dec. 26, 2020), https://apnews.com/article/joe-biden-donald-trump-judiciary-coronavirus-pandemic-us-supreme-court-

Second, the federal courts are moving away from deferring to the statutory interpretation of federal agencies under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc*.[16] From 1984 through the beginning of the twenty-first century, federal courts routinely deferred to agency statutory interpretation under the *Chevron* doctrine to uphold actions by federal agencies that often advanced the environmental and public health protection purposes of the environmental laws.[17] However, courts have created exceptions to *Chevron* and are frequently finding ways to avoid applying the test or to avoid deferring to agencies under the test.[18] In addition, in the years since the Supreme Court decided *National Cable & Telecommunications Ass'n v. Brand X Internet Services*,[19] the federal appellate courts have been less deferential to EPA in *Chevron* cases and have been more likely to rely on the text of the statutes when interpreting the federal environmental laws.[20]

Third, several scholars have demonstrated that federal courts routinely defer to environmental agencies' decisions to underenforce the federal environmental laws, even as those courts adopt a more aggressive approach toward judicial review when the agencies are carrying out the health and environmental protection purposes of the laws.[21]

All of these trends undercut Congress's overriding purposes in enacting the federal environmental laws a half century ago to protect public health and the environment, so it may be necessary for Congress to intervene to reverse these trends.[22] Although Congress has made very few revisions to the federal

c37607c9987888058d3d0650eea125cd ("[Trump] has left an imprint on federal courts that will outlast his one term in office for decades to come.").

16. 467 U.S. 837 (1984).

17. *See* Stephen M. Johnson, *The* Brand X *Effect: Declining* Chevron *Deference for EPA and Increased Success for Environmental Groups in the 21st Century*, 69 CASE W. RES. L. REV. 65, 67 (2018) [hereinafter Johnson, Brand X *Effect*] (noting "a change in the judicial attitude towards agencies after *Chevron*").

18. *See id.* at 77–78.

19. 545 U.S. 967 (2005).

20. *See* Johnson, Brand X *Effect*, *supra* note 17, at 78–79.

21. *See, e.g.*, Walters, *supra* note 13, at 491 (stating that in light of "[t]he presumption of unreviewability for agency enforcement decisions announced in *Heckler v. Chaney*," courts have employed a "hands-off" approach to challenges of underenforcement).

22. *See* Lazarus & Zdeb, *supra* note 6; Kevin M. Stack, *The Enacted Purposes Canon*, 105 IOWA L. REV. 283 (2019) [hereinafter Stack, *Enacted Purposes Canon*] (explaining that most federal environmental laws have "enacted purposes" provisions that outline the true purpose and goal of the laws to protect public health and the environment); *see also infra* Part V.

environmental laws over the last few decades,[23] it may be necessary for Congress to act in order to reinvigorate those laws.[24] The very simple, straightforward tool that Congress could use to reinvigorate the laws would be a statutory directive, a tool that is frequently used by state legislatures but underutilized at the federal level.[25] Congress could amend the Clean Water Act, Clean Air Act, Resource Conservation and Recovery Act (RCRA), Superfund, and the Endangered Species Act to explicitly provide that the laws should be interpreted to carry out their enacted purposes to protect public health and the environment.[26]

By including such a directive in the laws, it would be clear to textualist judges that the statutory language should always be interpreted in a way that advances the health and environmental goals of the statutes.[27] Purposivism would not be a theory of interpretation but rather a requirement of the statutory text.[28] Similarly, whether courts deferred to agencies under *Chevron* or sought to review an agency's statutory interpretation more aggressively, judges would be constrained in their interpretation by the textual mandate to interpret

23. The most recent legislation that amended any of the major federal laws addressed in this Article in any significant way was the 1990 Clean Air Act Amendments. *See* Act of Nov. 15, 1990, Pub. L. No. 101-549, 104 Stat. 2399. The only other law that made significant amendments to any federal environmental laws over the past three decades was the Frank R. Lautenberg Chemical Safety for the 21st Century Act, enacted in 2016, which amended the Toxic Substances Control Act. *See* Frank R. Lautenberg Chemical Safety for the 21st Century Act, Pub. L. No. 114-182, 130 Stat. 448 (2016).

24. *See infra* Part VI.

25. *See infra* Part VI.

26. *See* 42 U.S.C. § 7401; 33 U.S.C. § 1251; 16 U.S.C. § 1531; 42 U.S.C. § 6901; 42 U.S.C. § 9601. Although the proposal in this Article is simple and straightforward, the era of bipartisan support for environmental legislation, or any legislation, has long passed. *See, e.g.*, Noel Rubinton, *In a Polarized Era, Efforts To Boost Bipartisanship in Congress*, HEWLETT FOUND. (Oct. 13, 2016), https://hewlett.org/making-bipartisanship-stick-in-congress/ (discussing the decline in bipartisanship in Congress over the past several decades). Without bipartisan support, the proposal that is the subject of this Article would likely only be advanced by the Democratic Party, which currently has a very narrow margin of control in Congress. *See* James Arkin, *Democrats Plot To Defend Fragile Senate Majority*, POLITICO (Jan. 21, 2021), https://www.politico.com/news/2021/01/21/democrats-defend-senate-majority-460984 (describing the Democrats' efforts to defend their position in the Senate after winning "the narrowest possible majority"); Philip Bump, *Here's How Narrow the Democratic House Majority Is*, WASH. POST (Apr. 7, 2021), https://www.washingtonpost.com/politics/2021/04/07/heres-how-narrow-democratic-house-majority-is/.

27. *See infra* Section III.B (explaining the principles of textualism and the shift towards this method of interpretation in the federal judiciary).

28. *See infra* Part VI (proposing that Congress implement statutory directives in environmental laws).

the statute to carry out its enacted purposes.[29] Finally, if the directives were coupled with requirements that *agencies* interpret and implement those laws to carry out the enacted purposes to protect health and the environment, that could reduce the likelihood that courts would defer to agency underenforcement while aggressively second-guessing agency actions that enforce the statutory goals.[30]

Although Congress has underutilized statutory directives, state legislatures routinely enact them, and other academics have previously advocated for the creation of Federal Rules of Statutory Interpretation or other tools to create a more uniform federal approach to interpreting statutes to advance particular policies.[31] While some commentators have raised separation of powers concerns about statutory directives, a directive that focuses on a limited number of statutes and only directs courts to interpret the statutes consistently with enacted purposes provisions in the statutes should be within Congress's Article I powers.[32] Indeed, some commentators have suggested that an "enacted purposes" canon already exists for regulatory statutes (such as the environmental laws).[33] However, such a canon, if it does exist, has not been adequate to prevent the judicial erosion of the consideration of the enacted purposes of the federal environmental laws.[34]

This Article advocates for the creation of a statutory directive or directives to interpret the major federal environmental laws to advance their enacted purposes to protect health and the environment. Part II of the Article explores the erosion of federal environmental protections in the Executive Branch over the past four years and the efforts that are being made to reaffirm a commitment to public health and the environment in the new

29. *See* Chevron, U.S.A., Inc. v. NRDC, Inc., 467 U.S. 837 (1984); *see also infra* Part VI.

30. *See generally* 16 U.S.C. § 1536 (a)(1). The Endangered Species Act already includes a provision that requires federal agencies to "utilize their authorities in furtherance of the purposes of [the Endangered Species Act] by carrying out programs for the conservation of endangered species and threatened species." *Id.*

31. *See* Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085 (2002) (proposing the codification of federal rules regarding "certain interpretive tools and techniques").

32. Linda D. Jellum, *"Which Is To Be Master," the Judiciary or the Legislature? When Statutory Directives Violate Separation of Powers*, 56 UCLA L. REV. 837 (2009) (exploring how statutory directives can "violate separation of powers").

33. *See* Stack, *Enacted Purposes Canon*, *supra* note 22.

34. *See infra* Parts VI, VII.

Administration. Part III explores the bipartisan adoption of the federal environmental laws, the early focus on statutory purpose in judicial review of challenges to agency actions under those laws, and the shift to textualism over time. Part IV examines the decline in *Chevron* deference as another impediment to interpreting the federal environmental statutes to carry out their broad goals. Part V outlines the deference that federal courts continue to accord to agencies when they underenforce the federal environmental laws, in contrast to the aggressive judicial review that they impose on agency actions that advance the statutory health and environmental protection goals. Part VI describes statutory directives in general and the previous proposals for federal rules of statutory interpretation or other uniform tools of federal statutory construction and outlines a proposal for limited statutory directives for the federal environmental statutes. Part VII defends the proposal against constitutional criticisms that have been leveled against federal statutory directives by some commentators in the past and discusses the need for statutory directives as opposed to other alternatives.

II. TIME TO RESET

In the four years of his Administration, President Trump presided over an unprecedented dismantling of federal environmental protections.[35] His agencies reversed, revoked, or rolled back more than one hundred environmental rules.[36] Significantly, EPA weakened carbon dioxide emissions limits on

35. *See* Nadja Popovich, Livia Albeck-Ripka & Kendra Pierre-Louis, *The Trump Administration Rolled Back More Than 100 Environmental Rules. Here's the Full List*, N.Y. TIMES (Jan. 20, 2021), https://www.nytimes.com/interactive/2020/climate/trump-environment-rollbacks-list.html.

36. *Id.* Harvard Law School also maintains a website that tracks the environmental rollbacks adopted by the Trump Administration and the efforts that the Biden Administration is making to roll back the rollbacks. *See Regulatory Tracker*, HARV. L. SCH.: ENV'T & ENERGY L. PROGRAM, https://eelp.law.harvard.edu/regulatory-rollback-tracker/ (last visited Dec. 29, 2021). President Trump also aggressively sought to reduce the size of EPA's budget and workforce. *See* Stephen M. Johnson, *Indeconstructible: The Triumph of the Environmental "Administrative State*,*"* 86 U. CIN. L. REV. 653, 667–68 (2018) [hereinafter Johnson, *Indeconstructible*]. In its 2020 report on resetting the course of EPA, the Environmental Protection Network noted that EPA is now spending, "in real dollars, less than half what the agency spent in 1980." *See* EPN REPORT, *supra* note 3, at 12. Consequently, EPN identified "investing in EPA's workforce" as another priority, finding that "[c]omplex challenges of the 21st century cannot be successfully addressed unless EPA leadership rebuilds the capabilities, productivity, and morale of the EPA workforce[] and creates a more inclusive workforce that reflects the communities EPA serves." *Id.* at 13.

power plants[37] and motor vehicles,[38] removed protections for half of the nation's wetlands,[39] and adopted regulations to limit the type of scientific evidence that the agency uses to make decisions.[40] EPA also promulgated rules to limit the agency's ability to adopt guidance to overturn the changes implemented during the Trump Administration.[41] In addition, the Administration withdrew from the Paris Climate Accord,[42] revoked California's authority to set more stringent auto emissions standards,[43] and revamped membership on scientific advisory boards across all agencies to increase representation of regulated entities and decrease representation of academic scientists.[44] EPA, however, did not act alone in dismantling environmental protections.[45] President Trump's Interior Department finalized a plan to allow drilling in the Arctic National Wildlife Refuge,[46] lifted a freeze on new coal leases on federal lands,[47] rescinded regulations for fracking on federal lands and Indian lands,[48] and rolled back protections for threatened species under the Endangered

37. *See* 40 C.F.R. § 60 (2019) (finalizing the Affordable Clean Energy rule).

38. *See* Mid-Term Evaluation of Greenhouse Gas Emissions Standards for Model Year 2022–2025 Light-Duty Vehicles, 83 Fed. Reg. 16,077 (Apr. 13, 2018) (withdrawing 2017 standards following a finding by the Administration "that more recent information suggests that the current standards may be too stringent").

39. *See* 33 C.F.R. § 328 (2020) (Navigable Waters Protection Rule).

40. *See* 40 C.F.R. § 30 (2021) (scientific transparency rule).

41. *See* 40 C.F.R. § 2 (2020) (guidance rule).

42. *See* Matt McGrath, *Climate Change: U.S. Formally Withdraws from Paris Agreement*, BBC NEWS (Nov. 4, 2020), https://www.bbc.com/news/science-environment-54797743.

43. *See* 40 C.F.R. §§ 85–86 (2019); 49 C.F.R. §§ 531, 533 (2019) (Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule).

44. *See* John McQuaid, *Trump Officials Act To Tilt Federal Science Boards Toward Industry*, SCI. AM. (May 16, 2017), https://www.scientificamerican.com/article/trump-officials-act-to-tilt-federal-science-boards-toward-industry/.

45. *See* Popovich et al., *supra* note 35.

46. *See* Notice of 2021 Coastal Plain Alaska Oil and Gas Lease Sale, 85 Fed. Reg. 78,865 (Dec. 7, 2020) (providing notice of lease sale for "tracts in the Coastal Plain of the Arctic National Wildlife Refuge").

47. *See* Devin Henry, *Trump Administration Ends Obama's Coal-Leasing Freeze*, HILL (Mar. 29, 2017, 3:20 PM), https://thehill.com/policy/energy-environment/326375-interior-department-ends-obamas-coal-leasing-freeze.

48. *See* Hydraulic Fracturing on Federal and Indian Lands, 43 C.F.R. § 3160 (2017) (rescinding 2015 rule).

Species Act[49] and migratory birds under the Migratory Bird Treaty Act.[50] In addition, the White House drastically reduced the borders of two national monuments in Utah,[51] weakened National Environmental Policy Act (NEPA) regulations that had been in force for almost half a century,[52] and relaxed the environmental review process for federal infrastructure projects.[53]

Fortunately for the environment, many of the Administration's efforts were invalidated when they were challenged in court.[54] Although federal courts uphold agency decisions about 70% of the time when challenged,[55] federal agencies during the Trump Administration prevailed in only about 20% of the cases in which their decisions were challenged.[56] In many of these

49. *See* Revision of the Regulations for Prohibitions to Threatened Wildlife and Plants, 50 C.F.R. § 17 (2019) (removing prospectively the blanket protection that existed for threatened wildlife and plant species once designated as threatened).

50. *See* Regulations Governing Take of Migratory Birds, 50 C.F.R. § 10 (2021) (redefining "take" under the Migratory Bird Treaty Act so that prohibitions under the act "reach only actions directed at migratory birds, their nests, or their eggs").

51. *See* Julie Turkewitz, *Trump Slashes Size of Bears Ears and Grand Staircase Monuments*, N.Y. TIMES (Dec. 4, 2017), https://www.nytimes.com/2017/12/04/us/trump-bears-ears.html.

52. *See* Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, 40 C.F.R. §§ 1500–1508, 1515–1518 (2020) (detailing the Council on Environmental Quality updates to the National Environmental Policy Act rules).

53. *See* Accelerating the Nation's Economic Recovery from the COVID–19 Emergency by Expediting Infrastructure Investments and Other Activities, Exec. Order No. 13,927, 85 Fed. Reg. 35,165 (June 9, 2020). *But see* Protecting Public Health and the Environment and Restoring Science To Tackle the Climate Crisis, Exec. Order No. 13,990, 86 Fed. Reg. 7037 (Jan. 25, 2021) [hereinafter Exec. Order No. 13,990] (revoking Executive Order 13,927 under the Biden Administration).

54. *See* Cary Coglianese & Daniel E. Walters, *Litigating EPA Rules: A Fifty-Year Retrospective of Environmental Rulemaking in the Courts*, 70 CASE W. RES. L. REV. 1007, 1026–27 (2020) (reviewing eleven studies that found EPA success ranging from 45%–79% and generally around 70% in cases involving *Chevron* deference); *see also* Tucker Higgins, *The Trump Administration Has Lost More Than 90 Percent of Its Court Battles over Deregulation*, CNBC (Jan. 24, 2019, 6:51 PM), https://www.cnbc.com/2019/01/24/trump-has-lost-more-than-90-percent-of-deregulation-court-battles.html (noting that the government typically wins about 69% of the time in cases involving challenges to agency action).

55. Higgins, *supra* note 54.

56. *See Roundup: Trump-Era Agency Policy in the Courts*, N.Y.U. SCH. OF L. INST FOR POL'Y INTEGRITY, https://policyintegrity.org/trump-court-roundup (Apr. 1, 2021). According to the N.Y.U. Institute for Policy Integrity, as of April 1, 2021, agencies under the Trump Administration were successful in fifty-eight of the 258 cases (22.5%) in which their decisions were challenged in court. *Id.* For purposes of tracking the success rate of the agencies, the N.Y.U. website says:

> An outcome is considered unsuccessful for the Trump [A]dministration if (1) a court ruled against the agency or (2) the relevant agency withdrew the action after being sued. If there are different rulings on the same agency action, the

cases, the agencies acted hastily to overturn environmental protections and failed to follow procedures required by law, such as providing opportunities for public participation and adequately explaining the reasons for rejecting their prior environmentally protective positions.[57] The federal courts generally enforced long-standing principles of administrative law to invalidate the agencies' actions.[58] It is not clear whether the Administration's widespread violation of core administrative law principles was based on intentional disregard of those principles, indifference to those principles, ignorance of those principles, or attempts to "push" the law to change those principles.[59] Regardless of the underlying motivations, the agencies' procedural missteps compromised the legal validity of many of the Administration's deregulatory efforts.[60] Nevertheless, by the end of the Trump Administration, many of the antienvironmental rules and deregulatory actions had not been overturned in court.[61]

> entry is assigned an "X" [indicating that it was unsuccessful] as long as one court ruled against the agency.

Id. (footnotes omitted). *See also* Higgins, *supra* note 54; Coglianese & Walters, *supra* note 54, at 1032–33. Earthjustice claims to have prevailed in 80% of the judicial challenges it brought against the Trump Administration. *See When We Win*, EARTHJUSTICE, https://earthjustice.org/features/environmental-lawsuits-trump-administration (Feb. 22, 2021). The Center for Biological Diversity claims to have a 90% success rate in suits brought against the Trump Administration. *See Administration Lawsuit Tracker*, CTR. FOR BIOLOGICAL DIVERSITY, https://www.biologicaldiversity.org/campaigns/trump_lawsuits/ (last visited Dec. 22, 2021).

57. *See* Coglianese & Walters, *supra* note 54, at 1033–34. Professors Coglianese and Walters note that EPA ignored staff recommendations in many of the cases where courts invalidated its regulations, which the authors suggest supports "a strong endorsement of the view that expert staff work has had something to do with the rough equilibrium between EPA and the courts over the last half century." *Id.* at 1034; *see also* Robert L. Glicksman & Emily Hammond, *The Administrative Law of Regulatory Slop and Strategy*, 68 DUKE L.J. 1651, 1653–54, 1669–70 (2019) (noting that Trump Administration agencies' actions have been invalidated because agencies improperly suspended the effective dates of final rules, failed to provide for notice and comment for rules, failed to meet mandatory deadlines in statutes, failed to make findings required by statutes before taking actions, and failed to sufficiently justify or support their actions).

58. *See* Glicksman & Hammond, *supra* note 57, at 1656.

59. *Id.* at 1654–56. Professors Glicksman and Hammond refer to the blatant disregard of administrative law principles based on intent or indifference as "regulatory slop," which they view to be "extremely concerning." *Id.* Ultimately, however, the authors suggest that more research is necessary before it can be determined whether the agencies during the Trump Administration were ignoring settled principles of administrative law intentionally or whether the agencies' decisionmakers were simply inexperienced or attempting to "push" the law in new directions. *Id.* at 1713–14.

60. *See supra* notes 54–56 and accompanying text.

61. *See* Eilperin et al., *supra* note 4 (identifying over one hundred actions taken during the Trump

President Biden acted swiftly and aggressively almost immediately after taking office to attempt to reverse many of the environmentally harmful actions taken during the Trump Administration.[62] On his first day in office, the President temporarily halted oil and gas drilling in the Arctic National Wildlife Refuge, revoked a permit for the Keystone XL oil pipeline, and announced that the United States would rejoin the Paris Climate Accord.[63] Shortly after that, he required federal agencies to review more than one hundred rules that were adopted during the previous four years to weaken protections for the environment and natural resources.[64] Where President Trump adopted policies through executive orders and guidance, President Biden can rescind those policies through similar expedient measures.[65] However, where the Trump Administration weakened environmental protections through legislative rules, President Biden can only restore those protections by revoking those rules or adopting new rules, both of which would require time-consuming notice and comment rulemaking.[66]

Administration that adversely affect the environment and were still in effect at the time that President Trump left office).

62. *See id.* (tracking the actions taken by the Biden Administration to address the environmental rollbacks from the Trump Administration); Coral Davenport, *Restoring Environmental Rules Rolled Back by Trump Could Take Years*, N.Y. TIMES (Jan. 22, 2021), https://www.nytimes.com/2021/01/22/climate/biden-environment.html.

63. *See* Eliza Relman, *Biden Reverses Trump's Major Environmental Rollbacks with Executive Orders Rejoining the Paris Accord, Cancelling the Keystone Pipeline, and Ending Drilling in the Arctic Wildlife Refuge*, BUS. INSIDER (Jan. 20, 2021, 2:30 PM), https://www.businessinsider.com/biden-takes-immediate-action-climate-rejoins-paris-accord-keystone-2021-1; *see also* Exec. Order No. 13,990, *supra* note 53, §§ 4, 6 (addressing the moratorium on leases in the Arctic National Wildlife Refuge (ANWR) in Section 4 and revoking the Keystone XL Permit in Section 6).

64. *See* Exec. Order No. 13,990, *supra* note 53, § 2; *see also* Davenport, *supra* note 62.

65. *See* Eilperin et al., *supra* note 4; Davenport, *supra* note 62. However, the Trump Administration made it more difficult for EPA to replace guidance documents when the Administration adopted a rule that requires the agency to follow new procedures when adopting guidance documents. *See* 40 C.F.R. § 2 (2020).

66. *See* Am. Mining Cong. v. Mine Safety & Health Admin., 995 F.2d 1106, 1109 (D.C. Cir. 1993) (explaining how a legislative act is necessary to amend agency-created rules); Nat'l Fam. Plan. & Reprod. Health Ass'n v. Sullivan, 979 F.2d 227, 235 (D.C. Cir. 1992) (discussing the need for a legislative act to amend a regulation and stating that where a "subsequent interpretation [of a statute] runs 180 degrees counter to the plain meaning of the regulation[, it] gives us at least some cause to believe that the agency may be seeking to constructively amend the regulation"); *see also* Davenport, *supra* note 62. Even if the agency only plans to repeal the rule rather than replace the rule, it must use notice and comment rulemaking. *See* Am. Hosp. Ass'n v. Bowen, 834 F.2d 1037, 1044 (D.C. Cir. 1987) (discussing general notice and comment requirements, including those for "amendment, modification, or repeal," and the exceptions that do not need to adhere to these requirements, including "interpretive

In some ways, the tools are in place to enable President Biden to rescind many of the Trump Administration's rules or to adopt new rules to expand protections for the environment and natural resources.[67] The federal environmental statutes include broad statements of goals to protect public health and the environment and to provide the federal government with broad discretion to carry out those goals.[68] However, the Biden Administration will likely encounter some roadblocks, both administratively and in the courts, in revoking Trump-era rules and adopting new rules to expand protections for the environment and natural resources.[69]

Administratively, EPA lost many career employees at the senior staff level (and the institutional memory that they possessed) during the Trump Administration.[70] The reduction in the agency's budget and staff between 2016 and 2020 will present some roadblocks to swift rulemaking action on many fronts.[71] Judicial roadblocks may, however, be of greater concern.[72] Although the Biden Administration is unlikely to make the same procedural and substantive errors that the Trump Administration made in adopting rules, new rules adopted by the Biden Administration will surely be challenged in court and will face scrutiny from a federal judiciary that increasingly ignores

rules, general statements of policy, or rules of agency organization, practice or procedure"); Env't Def. Fund v. Gorsuch, 713 F.2d 802, 815 (D.C. Cir. 1983) (highlighting APA Section 551(5)'s inclusion of "repeal of a rule" as a form of rulemaking). There was a small window of opportunity for Congress to reverse some of the rules that were adopted at the end of the Trump Administration through the Congressional Review Act, 5 U.S.C. §§ 801–808, but most of the major rules that the Biden Administration targeted for review fell outside of that window. *See* Davenport, *supra* note 62. Ultimately, Congress only chose to review one environmental rule through the Congressional Review Act. *See* Rebecca Beitsch, *Democrats Target Trump Methane Rule with Congressional Review Act*, HILL (Mar. 25, 2021, 11:02 AM), https://thehill.com/policy/energy-environment/544886-democrats-to-target-trump-methane-rule-with-congressional-review (discussing the joint resolution introduced in the House and Senate to disapprove an EPA rule that withdrew limits on methane emissions from oil and gas production).

67. *See* Davenport, *supra* note 62 (discussing that the Biden Administration has among its "array of legal tools to reinstate environmental protections" Biden's executive authority and congressional action through the Congressional Review Act and noting that the Biden Administration can also issue new environmental regulations).

68. *See* Stack, *Enacted Purposes Canon*, *supra* note 22, at 327.

69. *See* Popovich et al., *supra* note 35 (noting that EPA's administrative staff and budget were reduced during the Trump Administration); *see also Bowen*, 834 F.2d at 1044 (detailing the requirements courts demand an administration must meet to repeal a previous administration's rules).

70. *See* Popovich et al., *supra* note 35.

71. *See* Davenport, *supra* note 62.

72. *See generally* Johnson, Brand X *Effect*, *supra* note 17, at 78–79.

the purposes and goals of laws when interpreting statutory language.[73] The federal judiciary is also deferring less frequently to agencies under *Chevron* when reviewing their statutory interpretation[74] and is being more aggressive when reviewing agencies' actions to enforce a statute's goals and purposes than when reviewing agencies' failure to enforce those goals and purposes.[75] All of these judicial trends may make it difficult for the Biden Administration to achieve the 70% success rate in court that was the norm prior to the Trump Administration.[76]

III. FROM PURPOSIVISM TO TEXTUALISM

A. The Early Years of the Federal Environmental Laws

The 1970s and early 1980s was an era of unparalleled bipartisan congressional support for environmental protection.[77] During that period, Congress adopted more than two dozen environmental laws with broad support across the political spectrum.[78] During that time, "environmental bills pass[ed] the Senate by an average vote of 76 to 5 and the House by an average of 331 to 30."[79] It was during that era that most of the major federal environmental laws

73. *See id.*

74. *See id.*

75. *See id.*

76. *See* Coglianese & Walters, *supra* note 54, at 1026–27.

77. *See* David M. Uhlmann, *Back to the Future: Creating a Bipartisan Environmental Movement for the 21st Century*, [2020] 50 Envtl. L. Rep. (Envtl. Law Inst.) 10,800, 10,801 (Oct. 2020) (explaining how environmental disasters motivated bipartisan support for the passage of new regulations).

78. *See id.*; *see also* Johnson, *Indeconstructible*, *supra* note 36, at 654; Madeline June Kass, *Presidentially Appointed Environmental Agency Saboteurs*, 87 UMKC L. REV. 697, 701 (2019) (illustrating how EPA was created through bipartisan support); Joel A. Mintz, *Thinking Beyond Gridlock: Towards a Consistent Statutory Approach to Federal Environmental Enforcement*, 46 ENV'T L. 241, 242 (2016) (explaining how regulations created in the 1970s and 1980s with bipartisan support remain largely unchanged); Robert V. Percival, *Environmental Law in the Twenty-First Century*, 25 VA. ENV'T L.J. 1, 2–3 (2007) (explaining how safeguarding the environment used to be an "exciting," bipartisan field).

79. *See* Christopher H. Schroeder, *Global Warming and the Problem of Policy Innovation: Lessons from the Early Environmental Movement*, 39 ENV'T L. 285, 306 (2009) (arguing for policy changes under the current climate circumstances). The Clean Water Act, for instance, passed unanimously in the Senate and passed the House with only eleven dissenters. *See* COMM. ON PUB. WORKS, 93D CONG., A LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972, at 222–23 (1973) (Comm. Print 1973) [hereinafter 1972 LEGISLATIVE HISTORY]. *See also* Drew Caputo, *A*

were enacted, including the modern Clean Air Act,[80] Clean Water Act,[81] Endangered Species Act,[82] Resource Conservation and Recovery Act,[83] and the Superfund law.[84] Over the subsequent half century, Congress has not taken any steps to diminish significantly the protections provided by those laws or reduce the powers provided to federal agencies to interpret and enforce those laws.[85]

Most of the major federal environmental laws were enacted in response to national crises, such as the Santa Barbara oil spill, the burning Cuyahoga River, and the environmental and health hazards posed by toxic waste to residents in Love Canal, Times Beach, and other communities across the United States.[86] Consequently, at the center of most of the federal environmental laws are "enacted purposes" provisions that outline the overriding goals of the laws to protect public health and the environment.[87]

The Clean Water Act, for example, provides that the objective of the law is "to restore and maintain the chemical, physical, and biological integrity of the [n]ation's waters."[88] To achieve that objective, Congress set a national goal to eliminate the discharge of pollutants into navigable waters by 1985.[89] The Clean Air Act identifies a major purpose of the law: "to protect and enhance the quality of the [n]ation's air resources so as to promote the public

Job Half Finished: The Clean Water Act After 25 Years, [1997] 27 Envtl. L. Rep. (Envtl. Law Inst.) 10,574 (1997) (providing a more detailed history of the enactment of the law and the events that predated it).

80. 42 U.S.C. § 7401.

81. 33 U.S.C. § 1251.

82. 16 U.S.C. § 1531.

83. 42 U.S.C. § 6901.

84. 42 U.S.C. § 9601.

85. *See* Johnson, *Indeconstructible*, *supra* note 36, at 654.

86. *See* Uhlmann, *supra* note 77, at 10,801.

87. *See* Stack, *Enacted Purposes Canon*, *supra* note 22, at 290 (stating that enacted purposes provisions are provisions in statutes that are enacted as part of the statute and "make statements regarding the aims, goals, or ends of the statute they accompany[] and . . . purport to speak to the entire statute in which they are enacted"). Modern congressional legislative drafting guidelines discourage the inclusion of purpose provisions unless the purpose provision addresses a specific section of the legislation. *See* HOUSE LEGISLATIVE COUNSEL'S MANUAL ON DRAFTING STYLE, H.R. MISC. DOC. NO. 104-1, at 28 (1995) (Section 325 specifically discourages "the inclu[sion] [of] findings and purposes"). According to the manual, purpose provisions "are more appropriately and safely dealt with in the committee report than in the bill." *Id.*

88. 33 U.S.C. § 1251(a).

89. *Id.*

health and welfare and the productive capacity of its population."[90] Congress identified the objectives of RCRA to be "to promote the protection of health and the environment"[91] and indicated that the objectives should be met by "assuring that hazardous waste management practices are conducted in a manner which protects human health and the environment."[92] In the Endangered Species Act, Congress indicated that the purposes of the law are "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved[and] to provide a program for the conservation of such endangered species and threatened species."[93] Although the Superfund law does not include a separate enacted purposes provision, the short title of the law indicates that Congress adopted it "[t]o provide for liability, compensation, cleanup, and emergency response for hazardous substances released into the environment and the cleanup of inactive hazardous waste disposal sites."[94]

After outlining the primary purposes of the laws to protect public health and the environment, many of the federal environmental statutes identify retention of state authority over matters addressed in the statutes as an additional goal.[95] Occasionally, some of the federal environmental laws include

90. 42 U.S.C. § 7401(b)(1).

91. 42 U.S.C. § 6902(a).

92. *Id.*

93. 16 U.S.C. § 1531(b).

94. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, Pub. L. No. 96-510, 94 Stat. 2767. Some of the other federal environmental laws are more equivocal about advancing health and environmental goals. *See, e.g.*, National Environmental Policy Act, 42 U.S.C. § 4331(a), (c); Toxic Substances Control Act, 15 U.S.C. § 2601(b)(3). In the National Environmental Policy Act (NEPA), for instance, although Congress provided that "each person should enjoy a healthful environment," 42 U.S.C. § 4331(c), it also provided that governments and public and private organizations should "use all practicable means and measures . . . to create and maintain conditions under which man and nature can exist in *productive harmony*[] and fulfill the *social*, *economic*, *and other requirements* of present and future generations of Americans." *Id.* § 4331(a) (emphasis added). Similarly, in the Toxic Substances Control Act, Congress directed that "authority over chemical substances and mixtures should be exercised in such a manner as not to impede unduly or create unnecessary economic barriers to technological innovation." 15 U.S.C. § 2601(b)(3).

95. *See, e.g.*, 16 U.S.C. §1535(a) (requiring the federal government to "cooperate to the maximum extent practicable with the [s]tates" in carrying out the Endangered Species Act); 16 U.S.C. § 1535(f) (authorizing states to adopt requirements that are more protective of endangered and threatened species than the federal requirements); 33 U.S.C. § 1251(b) (identifying a Congressional policy "to recognize, preserve, and protect the primary responsibilities and rights of [s]tates to prevent, reduce, and eliminate pollution[and] to plan the development and use . . . of land and water resources" under the Clean Water Act); 33 U.S.C. § 1370 (authorizing states to adopt and enforce water pollution standards unless

provisions allowing the consideration of costs in setting some standards under the laws, but most of the laws are silent or ambiguous on that point.[96]

In the first few decades after Congress adopted the major federal environmental laws, federal courts frequently interpreted the laws broadly to carry out the health and environmental protection purposes of the laws.[97] *Tennessee Valley Authority v. Hill*,[98] *United States v. Riverside Bayview Homes, Inc.*,[99] and *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*[100] typify the approach taken by the Supreme Court during those years.[101] In *Tennessee Valley Authority*, the Court was faced with the question of whether it was appropriate to enjoin the completion of a hundred-million-dollar dam that would destroy the critical habitat and jeopardize the continued existence of an endangered fish.[102] Although the statute's plain language made it clear that completion of the dam would violate the Endangered Species Act, the law did not explicitly address whether a court was required to enjoin any violation of the statute regardless of the costs that would be imposed on a developer by such an injunction.[103] Nevertheless, the Supreme Court thoroughly examined

---

they are less stringent than the federal standards); 42 U.S.C. § 6902(a)(1) (identifying a goal of providing technical and financial assistance to states for the development of solid waste management plans under the RCRA); 42 U.S.C. § 6929 (authorizing states to adopt hazardous waste laws that are at least as stringent as the federal requirements); 42 U.S.C. § 7401(b)(3) (setting out a purpose "to provide technical and financial assistance to [s]tate and local governments in connection with the development and execution of their air pollution prevention and control programs"); 42 U.S.C. § 7416 (authorizing states to adopt air pollution control standards unless they are less stringent than the federal standards).

96. *See, e.g.*, 33 U.S.C. § 1314(b)(1) (authorizing EPA to consider costs in determining the best practicable control technology limits under the Clean Water Act); 33 U.S.C. § 1314(b)(4) (authorizing EPA to consider costs in determining the best conventional control technology under the Clean Water Act).

97. *See* Richard J. Lazarus, *The Greening of America and the Graying of United States Environmental Law: Reflections on Environmental Law's First Three Decades in the United States*, 20 VA. ENV'T L.J. 75, 95 (2001) ("[D]uring the 1970s the federal judiciary served as a significant catalyst in support of sweeping, far-reaching, and stringent environmental protection law.").

98. 437 U.S. 153 (1978).

99. 474 U.S. 121 (1985).

100. 515 U.S. 687 (1995).

101. *See id.*; Tenn. Valley Auth. v. Hill, 437 U.S. 153 (1978); United States v. Riverside Bayview Homes, Inc., 474 U.S. 121 (1985).

102. 437 U.S. at 153–54, 172.

103. *See id.* at 193–95. The decision is frequently cited as an example of textualism because the Court focused heavily on the plain meaning of the language in the statute when determining that the construction of the dam would violate the statute. *See, e.g.*, Neil H. Buchanan & Michael C. Dorf, *A Tale of Two Formalisms: How Law and Economics Mirrors Originalism and Textualism*, 106

the enacted purposes section of the statute and the legislative history of the statute and concluded that the "plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, whatever the cost."[104]

A few decades later, in *Babbitt*, the Court reviewed a challenge to the Department of Interior's interpretation of the Endangered Species Act by regulation to prohibit habitat modification that indirectly injured endangered species.[105] In upholding the agency's rule, the Court relied on the "broad purpose" cited in the enacting clause of the statute, which it referred to as "the most comprehensive legislation for the preservation of endangered species ever enacted by any nation."[106] The Court explicitly relied on *Tennessee Valley Authority* in finding that the goal of the Endangered Species Act "was to halt and reverse the trend toward species extinction, whatever the cost," and the Court upheld the agency's rule as a reasonable interpretation of the statute.[107]

The Supreme Court's purposivist approach to interpreting federal environmental laws was not limited to the Endangered Species Act.[108] In *Riverside Bayview Homes*, the Court reviewed a challenge to regulations adopted by the U.S. Army Corps of Engineers that defined wetlands adjacent to traditional navigable waters to be "waters of the United States" that are subject to jurisdiction under the Clean Water Act.[109] While the Court suggested that,

---

CORNELL L. REV. 591, 595 (2021) ("Consider *Tennessee Valley Authority v. Hill* . . . . Chief Justice Warren Burger's opinion for the Court sounded themes that we would now associate with textualism . . . ."). However, since the language of the statute did not address whether courts were *required* to issue injunctions to prevent actions that violated the statute, the Court adopted a purposivist approach to resolve that question. *See Tennessee Valley Authority*, 437 U.S. at 184 ("It is against this legislative background that we must measure TVA's claim that the Act was not intended to stop operation of a project which, like Tellico Dam, was near completion when an endangered species was discovered in its path. While there is no discussion in the legislative history of precisely this problem, the totality of congressional action makes it abundantly clear that the result we reach today is wholly in accord with both the words of the statute and the intent of Congress.").

104. 437 U.S. at 184. Parsing the legislative history closely, the Court wrote that "the repeated expressions of congressional concern over what it saw as the potentially enormous danger presented by the eradication of *any* endangered species suggest how the balance would have been struck had the issue been presented to Congress in 1973." *Id.* at 186.

105. 515 U.S. at 696–97.

106. *Id.* at 698 (quoting Tenn. Valley Auth. v. Hill, 437 U.S. 153, 180 (1978)).

107. *Id.* at 699–700 (quoting Tenn. Valley Auth. v. Hill, 437 U.S. 153, 184 (1978)).

108. *See* 33 U.S.C. § 1251.

109. United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 123 (1985).

"[o]n a purely linguistic level, it may appear unreasonable to classify 'lands,' wet or otherwise, as 'waters,'" the Court ultimately upheld the agency's regulations.[110] The Court supported its conclusion by focusing on the enacted purposes provision of the law, which indicated that Congress intended "to restore and maintain the chemical, physical, and biological integrity of the [n]ation's waters."[111] The Court interpreted the enacted purposes provision to "incorporate[] a broad, systemic view of the goal of maintaining and improving water quality," which justified the regulation of adjacent wetlands, since "[w]ater moves in hydrologic cycles" and "[t]he regulation of activities that cause water pollution . . . must focus on all waters that together form the entire aquatic system."[112]

B. The Shift to Textualism and the Focus on Secondary Purposes

While federal courts frequently examined the purposes of the federal environmental laws to interpret their meaning over the first few decades after their enactment, there has been a significant shift from purposivism towards textualism as the predominant method of statutory interpretation adopted by federal courts over the last few decades.[113] The purposivist approach to statutory interpretation grew out of the "legal process" movement of the 1950s

110. *Id.* at 132–35.

111. *Id.* at 132 (quoting 33 U.S.C. § 1251).

112. *Id.* at 132–34 (quoting 42 Fed. Reg. 37,128 (July 19, 1977)).

113. *See* Driesen et al., *Half a Century*, *supra* note 10, at 1785–87; John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 7 (2001) (arguing that the rejection of textualism "will not lead to rigid and literal interpretive methods"); *see also* VALERIE C. BRANNON, CONG. RSCH. SERV., R45153, STATUTORY INTERPRETATION: THEORIES, TOOLS AND TRENDS 10–16 (2018), https://crsreports.congress.gov/product/pdf/R/R45153 ("The two predominant theories of statutory interpretation today are purposivism and textualism."); WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 9–10 (1994); David M. Driesen, *Purposeless Construction*, 48 WAKE FOREST L. REV. 97, 115–17 (2013) [hereinafter Driesen, *Purposeless Construction*] ("The modern Court . . . avoids giving purpose any weight in cases where not even its most aggressive textualists squarely claim that the statute's 'plain meaning' provides useful guidance."); Thomas W. Merrill, *Textualism and the Future of the Chevron Doctrine*, 72 WASH. U. L.Q. 351, 357 (1994) ("[T]here can be no doubt that textualism has asserted a powerful hold over the Supreme Court's statutory interpretation jurisprudence."); Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 COLUM. L. REV. 1 (2006) (describing the rise of textualism and arguing for a new approach that reconciles textualism and purposivism); Adrian Vermeule, *The Cycles of Statutory Interpretation*, 68 U. CHI. L. REV. 149, 183 (2001) (arguing that the Court's more recent approach finds "that clear statutory text is all-but-conclusive evidence of legislative intent").

and '60s, championed by Henry Hart and Albert Sacks, among others.[114] In purposivism, the interpreter resolves ambiguities in statutory language by identifying the statute's purpose and interpreting the statute in the manner that best advances that purpose.[115] Adherents of purposivism have traditionally been willing to examine the legislative history of statutes to assist in identifying the purposes of the statutes.[116] Importantly, though, purposivist interpreters will not adopt interpretations of statutes that conflict with the plain meaning of statutes.[117] Over the last few decades, a "new purposivism" has evolved, in which the interpreter relies much more heavily on enacted purposes provisions and other statutory text, rather than legislative history and other contextual clues, to discern a statute's purposes.[118]

---

114. *See* Stack, *Enacted Purposes Canon*, *supra* note 22, at 296.

115. *Id.*; HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 1378 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994); Kevin M. Stack, *Purposivism in the Executive Branch: How Agencies Interpret Statutes*, 109 NW. U. L. REV. 871, 876 (2015) [hereinafter Stack, *Purposivism in the Executive Branch*] (urging that agencies have greater legislative knowledge than courts); *see also* BRANNON, *supra* note 113, at 11–12 (explaining that purposivists argue interpreters should construe statutes to execute their legislative purpose).

116 *See* BRANNON, *supra* note 113, at 13 ("Purposivists are more willing than textualists to consider legislative history.").

117. *See* BRANNON, *supra* note 113, at 12–13; Stack, *Purposivism in the Executive Branch*, *supra* note 115, at 876; HART & SACKS, *supra* note 115, at 1378.

118. *See* Stack, *Purposivism in the Executive Branch*, *supra* note 115, at 879–80, 929–30; *see also* Anita S. Krishnakumar, *Backdoor Purposivism*, 69 DUKE L.J. 1275 (2020) (discussing the "new purposivism" that has emerged in today's Court); John F. Manning, *The New Purposivism*, 2011 SUP. CT. REV. 113, 132 (2011) ("[T]he Court now takes its cues directly from Congress about how and to what degree to take background purpose or policy into account."); Kevin M. Stack, *Interpreting Regulations*, 111 MICH. L. REV. 355, 362 (2012) [hereinafter Stack, *Interpreting Regulations*] (arguing in favor of a "regulatory purposivism" that gives greater weight to statements of purpose in judicial interpretation); Note, *The Rise of Purposivism and the Fall of* Chevron*: Major Statutory Cases in the Supreme Court*, 130 HARV. L. REV. 1227, 1228 (2017) [hereinafter *The Rise of Purposivism*] (discussing that there is "a new brand of purposivism that places greater weight on the text's semantic meaning"). Critics of purposivism often argue that the approach inappropriately assumes that Congress acts with specific purposes in mind or that the traditional approach provides judges with too much discretion to identify purposes of a statute in a way that supports their preferred interpretation. *See* BRANNON, *supra* note 113, at 13; ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 18 (2012); John F. Manning, *Textualism and Legislative Intent*, 91 VA. L. REV. 419, 430 (2005) (asserting that textualists do care about legislative intent); Stack, *Purposivism in the Executive Branch*, *supra* note 115, at 879–80. Professor Kevin Stack argues that the focus in new purposivism on enacted purposes provisions in statutes and the text of statutes is actually at the heart of Hart and Sacks's earlier theories. *See* Stack, *Enacted Purposes Canon*, *supra* note 22, at 296. The new purposivism narrows the gap between textualism and purposivism. *See* BRANNON,

Purposivism has been significantly supplanted as a method of statutory interpretation over the years by textualism.[119] Textualists focus on the words of a statute—rather than the purposes, legislative history, or evidence of the history of enactment—to ascertain the meaning of ambiguous language in the statute.[120] Textualists focus on the ordinary meaning of words (or, in some cases, dictionary meaning), rules of grammar or similar canons of construction, and the context in which the language in question is used in the statute or in similar statutes.[121] Occasionally, textualists will examine enacted purposes provisions of statutes to aid in interpreting ambiguous language since the provisions are enacted as text within the statute.[122]

While the trend toward textualism predominates across all types of statutes, Professors Robert Glicksman and Christopher Schroeder documented the shift in a study of judicial review of environmental laws almost three decades ago.[123] In their study, Glicksman and Schroeder analyzed the decisions of federal courts reviewing actions by EPA over the first twenty years of the agency's existence.[124] They concluded that the courts aggressively reviewed the agency's actions during the early years of the agency, interpreting the environmental statutes according to their broad purposes and declining to accord deference to the agency.[125] However, by the end of the study period, they concluded that the courts adopted a more deferential view toward EPA's decisionmaking and focused less on the purposes of the statutes in review of the agency's decisions.[126] They hypothesized that the change was based on several factors, including a change in the judicial attitude toward agencies after

supra note 113, at 16; Molot, *supra* note 113, at 3; Lawrence M. Solan, *The New Textualists' New Text*, 38 LOY. L.A. L. REV. 2027, 2028, 2030–31 (2005) ("The shift from focusing on dictionaries to ordinary usage should be seen as an additional step toward reconciling textualist methodology with the goal of providing an interpretation that reflects a statute's purpose.").

119. *See* Driesen, *Purposeless Construction*, *supra* note 113, at 111–12 ("As many commentators have noted, the Court became increasingly textualist, purporting to resolve cases by discovering directly applicable provisions' 'plain meaning,' often with no resort to statutory purpose at all.").

120. *See* BRANNON, *supra* note 113, at 13–14; Stack, *Purposivism in the Executive Branch*, *supra* note 115, at 881.

121. *See* BRANNON, *supra* note 113, at 13–15.

122. *Id.* at 13–14.

123. *See* Robert Glicksman & Christopher H. Schroeder, *EPA and the Courts: Twenty Years of Law and Politics*, 54 LAW & CONTEMP. PROBS. 249 (1991).

124. *Id.*

125. *Id.* at 249, 256.

126. *Id.* at 249, 256–57.

the Supreme Court's decision in *Chevron v. NRDC*.[127] They followed up their initial study with an empirical study of all of the federal circuit court cases decided between 1991 and 1999 in which EPA or the EPA Administrator appeared as a party.[128] Based on their review of the cases, they concluded that courts were continuing to defer more frequently to agencies and that courts were relying more heavily on textualism and less frequently on nontextual tools, including legislative history, during the study period.[129]

Recent analyses of judicial interpretation of the Clean Air Act and Clean Water Act over time confirm the prevalence of the trend from purposivism to textualism in the context of judicial review of the federal environmental laws.[130] David Driesen, Thomas Keck, and Brandon Metroka demonstrated the trend in the Clean Air Act context when they reviewed the twenty cases decided by the Supreme Court interpreting the Act over a half century.[131] Professor Driesen and his colleagues found that during the 1970s the Court "tended to follow statutory purpose":

> [It] freely relied upon structure and legislative history . . . . And the Court only acted contrary to statutory purpose where specific text or a constitutional value pushed in that direction. . . . Purposivism seems to have led the Court to decisions that often followed the [Clean Air Act's] philosophy.[132]

Driesen and his colleagues found that as the Burger Court shifted to the

127. *Id.* at 256, 295 (noting how "the centerpiece of this recent shift in judicial emphasis" has been the *Chevron* test).

128. *See* Christopher H. Schroeder & Robert L. Glicksman, Chevron*,* State Farm *and the EPA in the Courts of Appeals During the 1990s*, [2001] 31 Envtl. L. Rep. (Envtl. Law Inst.) 10,371 (2001). They also reviewed a sampling of cases decided in the federal circuit courts in which EPA or the EPA Administrator was a party, in order to compare the decisionmaking over time. *Id.* at 10,372.

129. *Id.* at 10,372, 10,390–91. They found that in the 1990s courts used textual analyses of the plain meaning of statutes in 88% of the cases and examined legislative history in only 33% of the cases. *Id.* at 10,390–91.

130. *See* Driesen et al., *Half a Century*, *supra* note 10, at 1785, 1787 (addressing how statutory interpretation of the Clean Air Act has shifted from purposovism to textualism).

131. *See id.*

132. *Id.* at 1807, 1810.

Rehnquist Court it "turned to textualism"[133] and that many of the decisions in the 1980s were in tension with the policies of the statute.[134] Finally, during the era of Justice Roberts, Driesen concluded that the Court adopted a dynamic method of interpreting the statute that was not based on purpose or text but on ideology.[135]

Inspired by the work of Professor Driesen and his colleagues, the author of this Article reviewed the thirty opinions that the Supreme Court issued over the last half century that focused on statutory interpretation questions under the Clean Water Act.[136] As with the Driesen study, the review demonstrated a significant shift towards textualism over the study period.[137] While the Court supported its decisions during the Burger era with citations to the Clean Water Act's purposes in nine of the thirteen cases interpreting the statute, the Court only cited the law's purposes in three of the ten cases decided during the Roberts era.[138] In addition, while the Burger and Rehnquist Courts frequently attempted to justify decisions that departed from the water quality protection goals of the Clean Water Act by citing clear statement canons or arguing that the decisions were somehow consistent with statutory purposes, the Roberts Court simply ignored the purposes of the statute in its opinions and did not seem to feel compelled to justify the departure from the statute's goals.[139] The review of the Court's Clean Water Act opinions also demonstrated that the Court drastically reduced its reliance on legislative history over the study period.[140]

The review of the Court's Clean Water Act opinions identified another disturbing trend in judicial review, at least under that statute.[141] While the Burger Court frequently cited the water quality protection purposes of the statute to support its decisions, to the extent that the Rehnquist and Roberts Courts have discussed the purposes of the statute in interpreting the statute, they have

133. *Id.* at 1819, 1824–25.
134. *Id.* at 1810.
135. *Id.* at 1835–42.
136. *See* Johnson, *Clean Water Act*, *supra* note 11.
137. *Id.* at 362, 376–77.
138. *Id.* at 377–78.
139. *Id.* at 381–82.
140. *Id.* at 362, 376–77. While the Burger and Rehnquist Courts cited legislative history in fifteen of the twenty cases decided during those Terms, the Roberts Court cited legislative history in only two of the ten cases decided during the Term. *Id.* at 377–78.
141. *See* Johnson, *Clean Water Act*, supra note 11, at 362, 376, 379–82.

increasingly cited the secondary goal of the law to protect states' rights, even when the Court's interpretation seems to conflict with the primary goal of the statute to protect water quality.[142]

C. Increased Focus on Costs in Interpreting the Federal Environmental Laws

As the federal courts have de-emphasized the focus on the health and environmental protection purposes of the federal environmental statutes when interpreting them, they have increased their willingness to interpret the statutes in a manner that authorizes the consideration of costs in implementation of the statutes.[143] Professor Driesen and his colleagues noted this shift in their review of the Supreme Court's Clean Air Act cases, finding that the Court's recent decisions embody a dynamic interpretation of the law to incorporate cost-benefit analysis, based primarily on ideological considerations.[144]

Congress frequently identified broad health and safety purposes for the federal environmental laws and none of the major laws discussed at the outset of this Article explicitly authorizes or requires agencies to engage in cost-benefit analysis.[145] In fact, provisions in the Clean Air Act and Endangered Species Act prohibit consideration of costs for various types of

142. *See id.* Other than a footnote in one opinion, in every case in which the Burger Court discussed the purposes of the Clean Water Act, the Court focused on the water quality goals of Section 101(a). *Id.* at 379 (discussing the Court's treatment of the Clean Water Act Section 101(a), 33 U.S.C. § 1251(a)). However, during the Rehnquist era, the Court cited Section 101(b), the states' rights provision, in almost as many cases as the Court cited the water quality goals of Section 101(a). *Id.* at 380–81. Finally, though, to the extent that the Roberts Court has focused on the water quality goals of Section 101(a), it has only done so when the interpretation of the law also advances the policies of Section 101(b), and the Court has routinely stressed the importance of *both* provisions in interpreting the law. *Id.* at 381.

143. *See* Driesen et al., *Half a Century*, *supra* note 10, at 1787, 1837 (discussing the increased willingness to consider cost in implementation of statutes).

144. *See* Driesen et al., *Half a Century*, *supra* note 10, at 1835–42.

145. *See* Lisa Heinzerling, *Cost-Nothing Analysis: Environmental Economics in the Age of Trump*, 30 COLO. NAT. RES. ENERGY & ENV'T L. REV. 287, 288 (2019) (providing an economic analysis of environmental policy and concluding cost-benefit analysis "dominate[s] federal environmental policy"); Paul R. Noe & John D. Graham, *The Ascendancy of the Cost-Benefit State?*, 5 ADMIN. L. REV. ACCORD 85, 114 (2020) (noting that, of the ten major federal environmental laws enacted in the 1970s and '80s, only the Federal Insecticide Fungicide and Rodenticide Act (FIFRA) and the Toxic Substances Control Act (TSCA) contain provisions that require cost-benefit analysis). An amendment to the Safe Drinking Water Act in 1996 added a cost-benefit analysis requirement as well. *See* 42 U.S.C. § 300g-1(b)(3)(C)(i)–(iii).

decisionmaking.[146] The technology-forcing provisions of many of the laws also seem to de-emphasize cost considerations.[147] However, outside of those examples, the laws are frequently silent or ambiguous regarding whether the federal government should consider the costs imposed by the laws when interpreting and implementing them.[148]

For many decades following the enactment of the federal environmental laws, federal courts adopted something akin to a presumption against consideration of costs in interpreting those laws.[149] Prior to 2009, courts frequently held that agencies should not use cost-benefit analysis in decisionmaking under the environmental laws unless the laws clearly authorized that balancing.[150] However, the Executive Branch routinely utilized cost-benefit analysis for decisionmaking under those laws,[151] and the trend in the federal courts eventually shifted.[152]

In 2009, in *Entergy Corp. v. Riverkeeper Inc.*,[153] the Supreme Court held that it was appropriate for EPA to consider cost in setting standards for cooling water intake structures based on "the best technology available for minimizing adverse environmental impact[s]" even though the Clean Water Act did not

146. *See* Noe & Graham, *supra* note 145, at 114–15 (citing Section 109 of the Clean Air Act and Section 4 of the Endangered Species Act) (listing endangered or threatened species); *see also* Cass R. Sunstein, *Cost-Benefit Default Principles*, 99 MICH. L. REV. 1651, 1664 (2001) (stating that "the national ambient air quality standards set under [the Clean Air] Act have been understood to be based on 'public health' alone").

147. *See* Sunstein, *supra* note 146, at 1656–57.

148. *See* Noe & Graham, *supra* note 145, at 115.

149. *Id.* at 86.

150. *Id.* at 85–86. Noe and Graham cite the Supreme Court's decisions in *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978), *American Textile Manufacturers Institute v. Donovan*, 452 U.S. 490 (1980), and *Whitman v. American Trucking Ass'ns*, 531 U.S. 457 (2001), as examples of the Supreme Court "presumption" against cost-benefit analysis. *See* Noe & Graham, *supra* note 145, at 95. In *Whitman*, the Court emphasized that the challengers "must show a textual commitment of authority to the EPA to consider costs in setting [national ambient air quality standards]" and "that textual commitment must be a clear one." 531 U.S. at 468. "Congress . . . does not . . . hide elephants in mouseholes." *Id.*

151. *See* Heinzerling, *supra* note 145, at 290–91.

152. *See* Aaron Sanders, *Decades of Uncertainty End with Error*, 17 MO. ENV'T L. & POL'Y REV. 588, 594–97 (2010) (illustrating the shift in the Court when it "held that 'it was well within the bounds of reasonable interpretation for the EPA to conclude that cost-benefit analysis was not categorically forbidden'" (quoting Entergy Corp. v. Riverkeeper, Inc., 556 U.S. 208, 209 (2009))).

153. 556 U.S. 208 (2009).

explicitly authorize the agency to consider costs in setting the standards.[154] The Court held that Congress's silence regarding the consideration of costs was "meant to convey nothing more than a refusal to tie the agency's hands as to whether cost-benefit analysis should be used."[155] Six years later, the Supreme Court decided *Michigan v. EPA*,[156] a case that focused on EPA's refusal to consider cost in deciding whether it was "appropriate and necessary" to regulate hazardous air pollutants from power plants.[157] While the statute did not explicitly require EPA to consider cost in deciding whether to regulate the hazardous air pollutants, the Court held that cost is a relevant factor to be considered in determining whether regulation is "appropriate and necessary" and determined that the agency acted arbitrarily by failing to consider cost.[158] After *Entergy* and *Michigan*, several commentators have suggested that the Court has established a presumption in favor of interpreting statutes to authorize consideration of cost unless statutes explicitly prohibit such consideration.[159] Some academics are even calling on the Executive Branch to adopt an approach to statutory interpretation that always considers cost unless statutes explicitly prohibit consideration of cost.[160]

154. *See id.* at 217–18 (citing 33 U.S.C. § 1326(b)). EPA set the standards based on the use of cost-benefit analysis. *See* 40 C.F.R. §§ 9, 122–25 (2004).

155. *Entergy Corp.*, 556 U.S. at 222–23.

156. 576 U.S. 743 (2015).

157. *Id.* at 743–44.

158. *Id.* at 751–57. To the extent that the earlier *Whitman v. American Trucking Ass'ns*, 531 U.S. 457 (2001), decision appeared to create a presumption against considering cost unless Congress explicitly authorized consideration of cost, the *Michigan* Court indicated that *Whitman* "establishe[d] the modest principle that where the Clean Air Act expressly directs EPA to regulate on the basis of a factor that on its face does not include cost, the Act normally should not be read as implicitly allowing the Agency to consider cost anyway." *Id.* at 756–57.

159. *See* Noe & Graham, *supra* note 145, at 85–86, 95; Heinzerling, *supra* note 145, at 291–92 (noting the broad reach of the *Michigan* Court's decision in light of the fact that the term "appropriate" appears more than 10,000 times in the U.S. Code).

160. *See* Noe & Graham, *supra* note 145, at 112–13. The call was sounded by John Graham, former Administrator in the Office of Information and Regulatory Affairs (OIRA), U.S. Office of Management and Budget (OMB). *Id.* at 85. OIRA oversees federal agencies' compliance with executive orders, including those requiring cost-benefit analysis. *See Information and Regulatory Affairs*, WHITE HOUSE, https://www.whitehouse.gov/omb/information-regulatory-affairs/ (last visited Dec. 26, 2021). Graham asserts that, following the decisions in *Entergy*, *Michigan*, and their progeny, "all agencies, including independent agencies, should reinterpret their statutes to require benefit-cost balancing, unless clearly prohibited by statute." *Id.* at 87. Further, he argues that the President should issue an executive order that requires agencies to reinterpret their statutes along those lines and precludes agencies from adopting regulations that do not follow that approach. *Id.*

To the extent that courts move toward default rules of statutory interpretation that permit the consideration of costs unless explicitly prohibited, courts will be more likely to interpret the federal environmental statutes in ways that do not advance the health and environmental protection purposes of those statutes.[161] As many critics have noted, in practice cost-benefit analysis disfavors environmental protection in many important ways.[162] Professor Lisa Heinzerling notes that cost-benefit analysis often fails to advance environmental protection goals because it requires agencies to balance costs of agency regulation against environmental and health benefits—which frequently cannot be quantified or monetized, so are not adequately considered in cost-benefit balancing.[163] She also points out that cost-benefit analysis greatly discounts the value of benefits of policies that reduce future harms, which is what most environmental policies attempt to achieve.[164] Therefore, if courts increasingly

161. *See* Noe & Graham, *supra* note 145, at 111–14.

162. *See, e.g.*, Karl S. Coplan, *The Missing Element of Environmental Cost-Benefit Analysis: Compensation for the Loss of Regulatory Benefits*, 30 GEO. ENV'T L. REV. 281 (2018) (recommending people affected by environmental harms be considered in the cost-benefit analysis); Shi-Ling Hsu, *The Identifiability Bias in Environmental Law*, 35 FLA. ST. U. L. REV. 433 (2008) (noting there are more important considerations than monetary concerns when evaluating environmental laws); Amy Sinden, *In Defense of Absolutes: Combating the Politics of Power in Environmental Law*, 90 IOWA L. REV. 1405 (2005) (arguing that cost-benefit analysis does not fix the power imbalance that causes environmental issues); Heinzerling, *supra* note 145, at 292–97.

163. *See* Heinzerling, *supra* note 145, at 293–97. Heinzerling notes that many water pollution and toxic substances rules are sidelined by cost-benefit analysis because it is difficult to quantify and monetize their benefits. *Id.* at 296–97. She notes that the one area where cost-benefit balancing has not adversely affected environmental rulemaking is in the air pollution area, where many of the rules adopted by EPA target particulate pollution to some extent, and particulate pollution can be quantified and monetized. *Id.* at 296. As Heinzerling notes, "[p]articulate matter kills people, in significant numbers." *Id.* At the end of his Administration, President Trump took steps to make it more difficult for EPA to justify regulating pollutants under the Clean Air Act by adopting a regulation that imposes additional limits on the agency's consideration of environmental benefits of air pollution rules. *See* 40 C.F.R. § 83 (2020). Critics argue that the rule could prevent EPA from considering important indirect benefits of rules and cause the agency to disproportionately underestimate benefits of a rule. *See* Melissa Horne, Mack McGuffey & Mandi Moroz, *EPA Promulgates Final Cost-Benefit Analysis Rule for Clean Air Act Regulations*, JD SUPRA (Jan. 12, 2021), https://www.jdsupra.com/legalnews/epa-promulgates-final-cost-benefit-6479987/.

164. *See* Heinzerling, *supra* note 145, at 297. Professor Heinzerling also criticizes cost-benefit analysis because it implements a policy that prioritizes efficiency over fairness. *Id.* at 292. As she notes, cost-benefit analysis implements "Kaldor-Hicks" efficiency, which provides that a decision is efficient "if the winners in the decision come out far enough ahead that they could compensate the losers[, but] . . . the winners need not actually compensate the losers . . . [so the method] shunts fairness to the side in its pursuit of overall wealth." *Id.* (emphasis omitted).

interpret the federal environmental statutes to authorize cost-benefit analysis, it is likely that the statutes will be interpreted in ways that do not advance the health and environmental protection purposes of the statutes.

D. No End in Sight

The trends in federal courts toward textualism and consideration of costs in interpreting ambiguous provisions of regulatory statutes are likely to continue or accelerate in light of the unprecedented number of judges that were appointed by President Trump.[165] In four years, former President Trump filled almost 30% of the positions on the federal appellate and trial courts and three of the nine seats on the Supreme Court.[166] The President coordinated his nominations with the Federalist Society, and most of the judges appointed during his tenure were members of the Society, which advocates for textualist interpretation of statutes and limited government regulation.[167]

---

165. *See* John Gramlich, *How Trump Compares with Other Recent Presidents in Appointing Federal Judges*, PEW RSCH. CTR. (Jan. 13, 2021), https://www.pewresearch.org/fact-tank/2021/01/13/how-trump-compares-with-other-recent-presidents-in-appointing-federal-judges/. It is unlikely that President Biden will be able to do much to reverse that trend through judicial appointments, as every seat on the federal courts of appeals was full until Justice Amy Coney Barrett was elevated from the Seventh Circuit to the Supreme Court. *See* Madison Alder, *Georgia Opens Path for Bold Push on Judges—If Biden Wants It*, BLOOMBERG L. (Jan. 7, 2021, 12:54 PM), https://news.bloomberglaw.com/us-law-week/georgia-opens-path-for-bold-push-on-judges-if-biden-wants-it. As of March 22, 2021, there were only seven vacancies out of 179 positions on the federal appellate courts and sixty-one vacancies out of 677 positions on the federal district courts. *See Judicial Vacancies*, U.S. CTS., https://www.uscourts.gov/judges-judgeships/judicial-vacancies (Dec. 26, 2021). Biden is also unlikely to be able to significantly impact the direction of the Supreme Court jurisprudence, as President Trump's three Supreme Court nominees were all fifty-five or younger when they were nominated, and a Pew Research Center study in 2017 found that justices who were appointed to the Supreme Court when they were fifty-five or younger generally served for an average of almost twenty years. *See* Gramlich, *supra*.

166. *See* Gramlich, *supra* note 165 (finding that Trump appointed 30% of appellate judges and 27% of trial judges); Ann E. Marimow & Matt Viser, *Biden Moves Quickly To Make His Mark on Federal Courts After Trump's Record Judicial Nominations*, WASH. POST (Feb. 3, 2021, 7:00 AM), https://www.washingtonpost.com/local/legal-issues/biden-judge-nominations/2021/02/02/e9932f3a-6189-11eb-9430-e7c77b5b0297_story.html.

167. *See* Muri Assunção, *Analysis of Trump's Judicial Appointments Finds Nearly 40% of Confirmed Appellate Judges Have Shown Anti-LGBTQ Bias*, N.Y. DAILY NEWS (Jan. 6, 2021, 5:21 PM), https://www.nydailynews.com/news/politics/ny-trump-judicial-appointees-confirmed-appellate-judges-anti-lgbtq-20210106-6pjd33k2hrcdlkp67drx7go3k4-story.html (stating that 85% of Trump's circuit court nominees are or were affiliated with the Federalist Society); Marimow & Viser, *supra* note 166; Sherman et al., *supra* note 15; *see also About Us*, FEDERALIST SOC'Y,

The trends toward textualism and consideration of costs are at odds with the strong public support for environmental protection and environmental regulation.[168] According to several recent polls, most Americans believe that stricter environmental laws and regulations are worth their cost[169] and that EPA's powers should be preserved or expanded.[170]

IV. THE EROSION OF *CHEVRON*

The federal judiciary's approach to statutory interpretation is changing in another important way that reduces the likelihood that federal courts will interpret environmental laws to advance their health and environmental protection purposes.[171] For decades after the Supreme Court's decision in *Chevron*,[172] federal courts accorded great deference to federal agencies when they were interpreting statutes, upholding the agencies' decisions in about 70% or more of the cases reviewed by scholars.[173] To the extent that EPA and other

https://fedsoc.org/about-us (last visited Dec. 26, 2021) (outlining the Federalist Society's principles); Senator Ted Cruz, *Second Annual Gregory S. Coleman Memorial Lecture*, 24 TEX. REV. L. & POL. 283, 286 (2019) (identifying textualism and originalism as founding principles of the Federalist Society).

168. *See* Kristen Bialik, *Most Americans Favor Stricter Environmental Laws and Regulations*, PEW RSCH. CTR. (Dec. 14, 2016), http://www.pewresearch.org/fact-tank/2016/12/14/most-americans-favor-stricter-environmental-laws-and-regulations/ (citing a Pew Research survey conducted between November 30, 2016, and December 5, 2016, in which 59% of respondents indicated that "stricter environmental laws and regulations are worth the cost").

169. *See id.*

170. *See* Chris Kahn, *Unlike Trump, Americans Want Strong Environmental Regulator—Reuters/Ipsos*, REUTERS (Jan. 17, 2017, 3:13 AM), https://www.reuters.com/article/us-usa-trump-environment-idUSKBN1511DU (citing a Reuters/Ipsos poll conducted between December 16, 2016, through January 12, 2017, in which "[m]ore than 60[%] of [respondents indicated that they] would like to see the U.S. [EPA]'s powers preserved or strengthened under . . . President Donald Trump"). In a separate March 2017 Gallup poll, 56% of respondents indicated that protection of the environment should be given priority over protection of the economy, 69% of respondents indicated that they favor "more strongly enforcing federal regulations," 59% said that the government was doing "too little to protect the environment," and 57% said that they thought that the quality of the environment was getting worse. *See Environment*, GALLUP, http://www.gallup.com/poll/1615/environment.aspx (last visited Dec. 26, 2021).

171. *See* Johnson, Brand X *Effect*, *supra* note 17, at 114–15 (noting that between 2000 and 2016, federal courts have shifted away from the *Chevron* deference standard "as judicial and political skepticism toward agencies and the *Chevron* decision has grown").

172. 467 U.S. 837 (1984), *reh'g denied*, 468 U.S. 1227 (1984).

173. *See* Johnson, Brand X *Effect*, *supra* note 17, at 69–70; *see also* Kent Barnett & Christopher J. Walker, Chevron *in the Circuit Courts*, 116 MICH. L. REV. 1, 6 (2017) (noting federal circuit courts

agencies interpret the federal environmental laws to carry out their health and environmental protection purposes, therefore, *Chevron* deference increases the likelihood that courts will uphold those interpretations.[174] However, over the past few decades, the Supreme Court and lower federal courts have been creating exceptions to *Chevron*, agencies have been disavowing reliance on the doctrine,[175] and courts have been increasingly avoiding the use of *Chevron* to review agency statutory interpretations.[176] In some cases, the Supreme Court has created exceptions explicitly, as with the "major questions doctrine" applied most recently in *King v. Burwell*.[177] In many cases, though, the

upheld agency interpretations in 77.4% of *Chevron* cases decided between 2003 and 2013); Orin S. Kerr, *Shedding Light on* Chevron*: An Empirical Study of the* Chevron *Doctrine in the U.S. Courts of Appeals*, 15 YALE J. ON REGUL. 1, 30–31 (1998) (stating federal agencies prevailed in 73% of *Chevron* challenges in federal appellate courts between 1995 and 1996); Schroeder & Glicksman, *supra* note 128, at 10,376 fig. 1 (highlighting that EPA prevailed in 75.7% of *Chevron* challenges in federal appellate courts in the 1990s). In *Chevron*, the Supreme Court established a two-part test for determining whether to defer to an agency's interpretation of a statute when the agency adopts that interpretation through a legislative rule. 467 U.S. at 842–43 (1984). At Step One, the court decides "whether Congress has directly spoken to the precise question at issue." *Id.* at 842. Courts use the "traditional tools of statutory construction" at Step One. *Id.* at 843 & n.9. If Congress's intent is clear, the court interprets the statute in accordance with that intent, but if the statute is silent or ambiguous regarding the interpretive question, the court, at Step Two, defers to the agency's interpretation of the statute if it is reasonable. *Id.* at 843.

174. *See* Barnett & Walker, *supra* note 173, at 6. Kent Barnett and Christopher Walker conducted the most ambitious and comprehensive study of the way federal courts utilize and apply *Chevron*, reviewing all of the published decisions from the federal circuit courts between 2003 and 2013 that refer to the doctrine. *Id.* at 5. Their study was not limited to review of EPA actions but focused on review of actions of all federal agencies. *Id.* at 5, 21. They found that application of *Chevron* was a very significant factor in the resolution of the cases, as agencies' interpretations were upheld in 77.4% of the cases when *Chevron* was applied, as opposed to 56% of the cases where *Skidmore* deference was applied and 38.5% of cases where the courts applied de novo review. *Id.* at 6.

175. *See* Glob. Tel*Link v. FCC, 866 F.3d 397, 407–08 (D.C. Cir. 2017). Agencies during the Trump Administration disavowed *Chevron* deference when defending policies adopted by prior Administrations that the agencies had not yet repealed or rescinded. *See* Note, *Waiving* Chevron *Deference*, 132 HARV. L. REV. 1520, 1533–34 (2019) (stating that during the Trump Administration the FCC did not seek *Chevron* deference in litigation over an Obama-era rule in *Global Tel*Link* and that because the FCC declined to defend its own rule, the D.C. Circuit vacated the rule).

176. *See* Johnson, Brand X *Effect*, *supra* note 17, at 77–78, 80–81 (discussing the erosion of *Chevron* deference in the Supreme Court and lower federal courts, as well as judicial criticism of the doctrine and legislative attempts to rescind it); *The Rise of Purposivism*, *supra* note 118, at 1238–43 (discussing the "major questions doctrine" and the Court's increasing practice of ignoring *Chevron* without comment); *see also* Sandra Zellmer, *Treading Water While Congress Ignores the Nation's Environment*, 88 NOTRE DAME L. REV. 2323, 2384 (2013) (noting that federal courts are now "more sympathetic to conservative, anti-regulatory arguments than progressive ones").

177. 576 U.S. 473, 486 (2015). The Court created the exception in 2000, in *FDA v. Brown &*

Supreme Court and lower federal courts simply ignore *Chevron* without acknowledging the precedent or justifying the decision to ignore it.[178] Several Supreme Court Justices have expressed skepticism of the precedent.[179]

At the same time that the federal courts are creating *Chevron* exceptions or ignoring *Chevron*, they are deferring less to EPA—in the wake of the Supreme Court's decision in *National Cable & Telecommunications Ass'n v. Brand X Internet Services*[180]—in cases where they apply *Chevron*.[181] In *Brand X*, the Court held that a court should accord an agency *Chevron* deference even when an agency's statutory interpretation conflicts with a prior judicial interpretation of a statute unless the court, in the prior decision, concluded that the meaning of the statute was clear and unambiguous.[182] Although the decision, on its face, seems like an expansion of deference to agencies, the real world impact of the decision has been just the opposite.[183] The obvious way for federal courts to maintain the power to interpret statutes after *Brand X* is to decide statutory interpretation questions at *Chevron* Step One when first

Williamson Tobacco Corp., when the Court refused to accord deference to the FDA, noting that there may be statutory interpretation questions of such significance that "there may be reason to hesitate before concluding that Congress . . . intended" to delegate resolution of the questions to an agency. 529 U.S. 120, 159 (2000).

178. *See* William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from* Chevron *to* Hamdan, 96 GEO. L.J. 1083, 1124–25 (2008); Johnson, Brand X *Effect*, *supra* note 17, at 78 (citing Michael Kagan, *Loud and Soft Anti-*Chevron *Decisions*, 53 WAKE FOREST L. REV. 37 (2018)); Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969, 970, 982 (1992) ("[T]he *Chevron* framework is used in only about half the cases that the Court perceives as presenting a deference question."). In their study of Supreme Court decisions between 1984 and 2006, William Eskridge and Lauren Baer concluded that the Court applied *Chevron* deference only about one quarter of the time that it should have been applied. *See* Eskridge & Baer, *supra*, at 1131.

179. *See* Johnson, Brand X *Effect*, *supra* note 17, at 80–81 (discussing the constitutional objections raised by Justices Gorsuch and Thomas and Justice Breyer's advocacy for a more contextualized usage of *Chevron*); City of Arlington v. FCC, 569 U.S. 290, 312 (2013) (Roberts, J., dissenting) (expressing skepticism toward *Chevron*). Despite these criticisms, it does not appear that a majority of Justices on the Court would vote to overturn the precedent in the near future. *Id.*

180. *See* 545 U.S. 967 (2005).

181. *See* Johnson, Brand X *Effect*, *supra* note 17, at 67–70 (reviewing federal circuit court decisions between 2000 and 2016 in which EPA or the EPA Administrator appeared as a party and the courts were applying *Chevron* to review the agency's interpretations and finding that it appears that the "'*Chevron* effect' . . . is fading after *Brand X*").

182. *See* 545 U.S. at 982–83.

183. *See* Johnson, Brand X *Effect*, *supra* note 17, at 70 (noting that the rate at which courts affirmed EPA decisions following *Brand X* dropped nearly 10%).

faced with the questions, negating any *Chevron* deference for agencies if they reinterpret the statutes after the courts' decisions.[184] Subsequent to *Brand X*, that is precisely what has happened, as the federal circuit courts have increasingly decided cases involving *Chevron* challenges to EPA decisions at Step One, finding the statutes clear and unambiguous and refusing to defer to the agency.[185] The rate at which federal appellate courts upheld EPA decisions after *Brand X* fell by almost 10% compared to the rate at which the courts upheld those decisions before *Brand X*.[186] As a result of the increase in *Chevron* exceptions and the decrease in *Chevron* deference to EPA after *Brand X*, federal courts are more aggressively reviewing EPA's interpretations of the federal environmental statutes, and they are doing so under the lens of textualism and increased consideration of costs, as noted above.[187]

Even in cases where federal courts are willing to apply *Chevron*, traditional *Chevron* deference might not be sufficient to increase the likelihood that the federal environmental laws will be interpreted to carry out their health and environmental protection purposes because EPA and other federal agencies have increasingly been ignoring those purposes in their interpretation and implementation of the laws for at least the past four years.[188]

184. *See id.* at 79 (noting that "if a court finds that a statute is clear [at *Chevron* Step One], then an agency cannot subsequently adopt a[] [conflicting] interpretation").

185. *See id.* at 69–71.

186. *Id.* In cases decided between 2000 and 2005, when the Supreme Court issued its *Brand X* opinion, federal courts affirmed EPA's decisions about 76.6% of the time, while in cases decided after *Brand X,* the courts upheld EPA's decisions about 67.5% of the time. *Id.* at 70. Significantly, while courts decided about 33% of the challenges at *Chevron* Step One before *Brand X* was decided, they decided almost 50% of the challenges at Step One after *Brand X* was decided. *Id.* at 70–71, 106–07.

187. *See* Johnson, Brand X *Effect*, *supra* note 17, at 114–15 (noting that circuit courts defer less to EPA and that the *Brand X* decision may have motivated circuit courts to interpret statutes at Step One more aggressively in ways that cannot be changed by agencies). During the era of Chief Justice Burger, about 40% of the Court's decisions interpreting the Clean Water Act "could be characterized as 'pro-environment' in the sense that the opinion advance[d] the water quality protection goals of the [statute] or adopt[ed] a position advocated by environmental groups." *See* Johnson, *Clean Water Act*, *supra* note 11, at 385. However, during the Roberts era, only about 20% of the Court's Clean Water Act opinions have been "pro-environment." *See id.* at 386.

188. *See* Johnson, *Clean Water Act*, *supra* note 11, at 363, 396–97. In the Clean Water Act context, for instance, EPA has "increasingly emphasized the protection of states' rights" under Section 101(b), 33 U.S.C. § 1251(b), "at the expense of the water quality protection goals of [Section] 101(a)." *Id.* at 360. The Navigable Waters Protection Rule adopted by EPA, see 33 C.F.R. § 328 (2020), and the U.S. Army Corps and "EPA's policy reversal regarding discharges to groundwater in the *County of Maui v. Hawaii Wildlife Fund*[, 140 S. Ct. 1462, 1472–73 (2020),] case are just a few examples of the agenc[y']s policy shift." *Id.*

V. UNDERENFORCEMENT AND ASYMMETRIC JUDICIAL REVIEW

At the same time that courts are deferring less to agencies under *Chevron* and are aggressively reviewing statutes using textualism instead of purposivism, they continue to defer to agencies when agencies underenforce statutory requirements.[189] Since EPA and other agencies interpreting the federal environmental laws frequently interpret them against their health and environmental protection purposes to provide for exemptions or other relief to regulated entities, the trend toward deferring to underenforcement makes it more likely that the federal environmental laws will not be applied and interpreted to carry out those primary purposes.[190]

Professor Daniel Walters recently highlighted the asymmetrical approach taken by federal courts when reviewing statutory interpretation by regulatory agencies.[191] Walters points out that overregulation by an agency, which he refers to as a "Type I error," and underregulation by an agency, which he refers to as a "Type II error,"[192] are "two sides of the same coin" and are both

> Even before the Trump Administration took power, though, there was a significant change in the nature of the actions that the Supreme Court reviewed under the Clean Water Act . . . . During the early years of the Clean Water Act in the Burger era, almost half of the cases heard by the Supreme Court involved either challenges to strict government regulation or limits on challenges to government action . . . . During the Roberts era, most of the Court's cases involved challenges to government action that reduced regulatory burdens.

Johnson, *Clean Water Act*, *supra* note 11, at 397. In addition, a review of the federal appellate court decisions between 2000 and 2016 involving challenges to EPA actions reviewed under the *Chevron* test indicates that, while EPA was sued nearly as often by regulated entities as it was sued by public interest groups, the agency was much less successful defending challenges brought by public interest groups than challenges brought by regulated entities. *See* Johnson, Brand X *Effect*, *supra* note 17, at 71–72. "Those findings should prompt EPA to consider whether it is devoting sufficient attention to the purposes of the environmental statutes and the issues raised by parties other than regulated entities during the agency's decisionmaking process." *Id.* at 72. The Endangered Species Act includes a provision that requires all agencies to use their authorities in furtherance of the purposes of the Endangered Species Act. *See* 16 U.S.C. § 1536(a)(1). Perhaps the other federal environmental laws should include provisions that require agencies to carry out their authorities to further the purposes of those laws.

189. *See* Walters, *supra* note 13.

190. *See* Johnson, Clean Water Act, *supra* note 11, at 363 (stating that EPA and U.S. Army Corps of Engineers have increasingly underenforced the Clean Water Act in deference to states' rights "at the expense of the water quality protection goals" stated in the statute).

191. *See* Walters, *supra* note 13, at 455.

192. *See id.* at 458–59. Walters suggests that agencies can err in statutory interpretation through "interpretive underreach, whether by indefinitely declining to take action prescribed, by disclaiming

errors in statutory interpretation.[193] Until recently, he argues, courts treated Type I errors and Type II errors similarly, deferring to agencies in both scenarios.[194] For Type I errors, courts relied on *Chevron* to uphold agency overregulation by applying a deferential standard of review to the agencies' statutory interpretation.[195] For Type II errors, in addition to relying on *Chevron*,[196] courts relied on cases like *Norton v. Southern Utah Wilderness Alliance*[197] and *Heckler v. Chaney*[198] to defer to Type II errors by finding challenges to such errors largely unreviewable.[199]

Walters observes that, as noted above, over time federal courts have begun applying *Chevron* deference less frequently and that courts are according agencies less deference when reviewing actions that are challenged as overregulation.[200] At the same time, though, he points out that courts have continued to apply *Norton*, *Heckler*, and related precedent to limit challenges to agency actions that result in underenforcement of statutes.[201]

---

their authority altogether, or by simply refusing to undertake action in cases where the statutory language is clearly applicable." *Id.* at 458. He identifies exemptions, exceptions, exclusions, waivers, and variances as frequent sources of Type II errors. *Id.* at 476. In addition, he argues that agency inaction is "for all practical purposes, an interpretation that the statute does not require that action." *Id.* at 477 (emphasis omitted).

193. *Id.* at 480 (quoting Eric Bilber, *Two Sides of the Same Coin: Judicial Review of Administrative Agency Action and Inaction*, 26 VA. ENV'T L.J. 461, 461–62 (2008)). According to Walters, "when an agency adopts an interpretation of a statute that is overinclusive . . . that overextension is equivalent in all pertinent respects to an agency's failure to implement the full meaning anticipated by the enacting Congress." *Id.* at 463.

194. *Id.* at 463, 479. Walters notes that even though the level of deference to agencies has varied over time, courts historically have generally accorded agencies the same level of deference regardless of whether they were overregulating or underregulating. *Id.* at 484.

195. *Id.* at 463.

196. *Id.* at 474. Walters notes that *Chevron* itself involved a Type II error, in that EPA was arguably underenforcing the Clean Air Act when it interpreted the term "stationary source" to be defined on a plant-wide basis. *Id.* at 475. *See also* Chevron, U.S.A., Inc. v. NRDC, Inc., 467 U.S. 837 (1984).

197. 542 U.S. 55 (2004) (refusing to hear challenge to Department of Interior's decision to allow off-road vehicle use in wilderness areas, based on a finding that to make a claim under the Administrative Procedure Act a plaintiff must assert that an agency failed to take a required discrete action).

198. 470 U.S. 821, 837 (1985) (creating a presumption of nonreviewability for challenges to an agency's decision to not bring an enforcement action).

199. *See* Walters, *supra* note 13, at 461.

200. *Id.* at 463–64.

201. *Id.* at 463–64, 487–88, 490–91, 499. Beyond *Norton* and *Heckler*, Walters also observes that courts continue to refuse to review agencies' denials of rulemaking petitions. *Id.* at 493. Walters asserts that the application of the Supreme Court's decision in *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971), to deny judicial review of agency underenforcement of statutes "may well

Walters forcefully argues that the asymmetrical treatment of Type I errors is not justified under the Administrative Procedure Act (APA)[202] or based on the challenges that are leveled against overregulation by agencies.[203] He also cogently warns that the asymmetrical treatment of Type I errors and Type II errors can delegitimize administrative law and sow scorn for the administrative process.[204] Ultimately, he argues that symmetry in the treatment of both types of errors is required and that deference in both situations is preferred.[205]

The agency trend to underenforce regulatory statutes that Professor Walters examined is part of a larger problem that was identified by Professor Walters, along with Professors Cary Coglianese and Gabriel Scheffler.[206] In a

---

be the judicial practice most at odds with the trend against deference in other contexts." *See id.* at 498. In response to the trend, Walters complains that "[i]f statutes are binding directives, and if Congress has a definite judicially determinable meaning when it speaks through legislation, there is no value-neutral reason to believe that errors of addition are more or less excusable than errors of omission." *Id.* at 464 (footnote omitted).

202. *Id.* at 482–83. Walters points out that the APA defines "action" to include a "failure to act" and that the statute "creates a cause of action for parties aggrieved when an agency 'unlawfully withheld or unreasonably delayed' action." *Id.* at 479–80.

203. *See id.* at 460–61, 475. Regarding Justice Thomas's concern in *Michigan v. EPA*, 576 U.S. 743 (2015), that deference "wrests from [the] [c]ourts the ultimate interpretive authority to 'say what the law is' . . . and hands it over to the Executive," *id.* at 761, Walters argues that Thomas's concern

> would seem to apply with equal force when executive agencies exploit statutory imprecision to avoid taking actions consistent with the judiciary's best understanding of the statute's directive. Operating on these formalist foundations, the meaning of a statute just is what it is[;] . . . it is not conventionally understood to be only a ceiling.

Id. at 460 (footnote omitted). Walters observes that the asymmetry in judicial review of Type I and Type II errors "imports a libertarian default rule into administrative law, preventing judges from holding agencies to Congress's expectation of policy implementation while simultaneously empowering courts to stop agencies whenever the latter's activities move beyond what Congress has mandated." *Id.* at 461. He also notes that while criticisms of deference to agency decisionmaking often focus on concern with agency overregulation, Type II errors by agencies are likely far more pervasive. *Id.* at 475.

204. *Id.* at 461–62. Walters notes:

> While administrative law has at times been subject to criticism for asymmetrically distributing outcomes in favor of regulated entities, a one-sided rethinking of deference (i.e., one that only benefits regulated entities seeking to curtail Type I errors and turns a cold shoulder to regulatory beneficiaries who would like to eliminate Type II errors that prevent the delivery of those benefits) would be a substantial escalation of polarization in regulatory policymaking.

Id. at 512 (footnote omitted).

205. *Id.* at 462–63, 465–66.

206. *See* Cary Coglianese, Gabriel Scheffler & Daniel E. Walters, *Unrules*, 73 STAN. L. REV. 885

recent article, they called attention to the increasing use of agency "unrules," which encompass individual waivers, exemptions, and variances, as well as industry-wide carveouts and exemptions, including "grandfathering" existing industry members out of new regulatory requirements.[207] Professor Coglianese and his associates note that the APA and regulatory statutes frequently authorize agencies to adopt such unrules without following many of the procedures that agencies usually follow when imposing burdens on regulated entities.[208] Frequently, the unrules are adopted in a manner that prevents members of the public from discovering that the unrules relieve specific groups from the otherwise applicable regulatory requirements.[209] Professor Coglianese and his associates also criticize the practice of courts imposing barriers to review of unrules and applying a less demanding standard of judicial review to unrules.[210] Accordingly, they warn that agency proliferation of unrules "undermine[s] important health and safety protections [in laws], enable[s] regulatory capture, and threaten[s] the rule of law."[211] To address these concerns, they recommend that agencies should be required to follow

(2021) (stating that "unrules" limit the scope of a regulatory obligation").

207. *Id.* at 888–89. The authors note that the invasion of zebra mussels and other non-native species in the Great Lakes stems, in large part, from an EPA water-pollution unrule that allowed tankers to discharge ballast water. *Id.* at 890. They argue that the debate over government regulation frequently focuses on the government's power to impose obligations and ignores its power to alleviate those obligations. *Id.* While the article focuses primarily on the problems created by unrules, the authors acknowledge that the devices provide flexibility to minimize burdens on regulated entities and undesirable side effects, encourage technological innovation, and enable regulators to conserve limited resources. *Id.* at 909–10.

208. *Id.* at 941–43. Coglianese and his colleagues note that when an agency adopts an underinclusive rule that imposes burdens on some segment of the regulated community but not others, the agency is not required to provide public notice that it is not subjecting the other segment of the regulated community to the burdens. *Id.* at 943. Similarly, if an agency initially proposes to impose burdens on a segment of the regulated community in a rulemaking and decides, at the end of the rulemaking process, to exempt that segment from the requirements, the exemption will usually be held to be a "logical outgrowth" of the proposed rule, so that the agency need not solicit additional public input before exempting the segment from regulation. *Id.* at 943–44. The authors also note that agencies' rules that impose obligations on regulated entities exceeding $100 million in costs need to be reviewed by the White House Office of Management and Budget, while rules that decrease the obligations on those entities are not subject to such review. *Id.* at 944–45.

209. *Id.* at 941–43.

210. *Id.* at 952–59. The authors identify standing doctrine, limits on financial resources, and transaction costs that limit collective action as barriers to challenges to unrules that might be brought by regulatory beneficiaries. *Id.*

211. *Id.* at 893.

additional procedures when adopting unrules in order to make the effect of the agencies' deregulatory actions more transparent and to allow the public to play a greater role in the agencies' decisionmaking processes.[212]

Despite these calls for reform, federal courts continue to limit judicial review of agency unrules and Type II errors and to accord agencies deference if they review those actions.[213] That trend, like the trend away from *Chevron* deference and the trend away from purposivism, increases the likelihood that the federal environmental laws will not be interpreted and administered to achieve their health and environmental purposes unless measures are taken to counter those trends.[214]

VI. STATUTORY DIRECTIVES: THE PROPOSAL

There is a tool that could rejuvenate the federal environmental laws and transform the nature of judicial review of those laws *if* there is political will to recommit to the purposes of those laws.[215] Congress could refocus judicial review of agency actions under the federal environmental laws by enacting statutory directives that require the laws to be interpreted to carry out their public health and environmental protection purposes.[216]

A statutory directive is a provision enacted by a legislature that clearly

212. *Id.* at 959–64.

213. *See generally id.* at 952–59 (discussing judicial oversight of unrules).

214. *See* Johnson, *Clean Water Act*, *supra* note 11, at 363.

215. *See* Caleb Nelson & Kermit Roosevelt, *Common Interpretation: The Supremacy Clause*, NAT'L CONST. CTR., https://constitutioncenter.org/interactive-constitution/interpretation/article-vi/clauses/31 (last visited Oct. 24, 2021) (discussing statutory directives).

216. *See id.* ("As long as the directives that Congress enacts are indeed authorized by the Constitution, they take priority over both the ordinary laws and the constitution of each individual state."). For instance, an "interpretation clause" could be added to the Clean Water Act mandating, "The provisions in this chapter shall be interpreted and applied to advance the objectives identified in section 101(a)." *See* Clean Air Act, 42 U.S.C. § 7401; *cf.* 16 U.S.C. § 1536(a)(1) ("All other [f]ederal agencies shall . . . utilize their authorities in furtherance of the purposes of this chapter by carrying out programs for the conservation of endangered species and threatened species listed pursuant to section 1533 of this title."). Similarly, the Clean Air Act could be amended to include an "interpretation clause" that requires, "The provisions in this chapter shall be interpreted and applied to advance the purposes identified in section 101(b)(1)." *See* Clean Air Act, 42 U.S.C. § 7401; *cf.* 16 U.S.C. § 1536(a)(1). The RCRA amendment would refer to the "objectives identified in section 1003(a)," and the Endangered Species Act amendment would refer to the "purposes identified in section 2(b)." *See* Endangered Species Act, 16 U.S.C. § 1531; Resource Conservation and Recovery Act, 42 U.S.C. § 6901; *cf.* 16 U.S.C. § 1536(a)(1).

indicates to courts the legislature's intentions regarding how a statute or provisions in the statute should be interpreted.[217] State legislatures have frequently enacted canons of construction or entire codes of construction,[218] and Congress has incorporated guidance for statutory interpretation in the Dictionary Act[219] and many other laws.[220] Several academics have advocated more broadly for establishment of uniform rules of statutory construction at the federal level, either through a code of construction or other means.[221]

The proposal in this Article is more modest and simply targets the Clean Air Act, Clean Water Act, RCRA, the Endangered Species Act, and the Superfund law.[222] Congress could reinvigorate those laws by enacting, in a single law or in five separate laws, amendments to each law providing that the law should be interpreted to carry out the public health and environmental purposes outlined in the enacted purposes sections of the statutes.[223] The amendment could clarify that those purposes are the primary purposes of the statute and that, to the extent that there is a conflict between those purposes and secondary purposes of the statutes, such as protection of state authority,

217. *See* Jellum, *supra* note 32, at 847; *see also* CASS R. SUNSTEIN, AFTER THE RIGHTS REVOLUTION: RECONCEIVING THE REGULATORY STATE 153 (1990) (noting that when there are express legislative instructions about interpretation, "there can be no objection to judicial use of the relevant instructions").

218. *See* Rosenkranz, *supra* note 31, at 2089–90 n.10 (noting that all fifty states and the District of Columbia have interpretive codes and citing many of the statutory provisions); Glen Staszewski, *The Dumbing Down of Statutory Interpretation*, 95 B.U. L. REV. 209, 217 (2015) (criticizing the simplification of statutory interpretation); Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 YALE L.J. 1750, 1786 (2010) (offering a study of state courts' statutory interpretation).

219. 1 U.S.C. § 1.

220. *See* Staszewski, *supra* note 218, at 217 (citing the Dictionary Act and noting that "the Civil Rights Act of 1991 explicitly limits the material that can be used as legislative history [to interpret] the statute"); Rosenkrantz, *supra* note 31, at 2088.

221. *See* Rosenkrantz, *supra* note 31, at 2089 (advocating for "Federal Rules of Statutory Interpretation"); Gary E. O'Connor, *Restatement (First) of Statutory Interpretation*, 7 N.Y.U. J. LEGIS. & PUB. POL'Y 333 (2004) (advocating for a Restatement of Statutory Interpretation).

222. *See supra* note 26 and accompanying text.

223. *See supra* notes 88–95 (outlining the enacted purposes provisions of each of the statutes) and 216 (identifying proposed language for the directives). As the Superfund law does not include an enacted purposes provision, a statutory directive for the Superfund law would need to provide that the law should be interpreted to protect public health and the environment, rather than referencing purposes already included in an enacted purposes provision. *See supra* note 94 and accompanying text; *cf.* Jellum, *supra* note 32, at 848 ("Interpretive directives are more diverse. These directives tell judges how to interpret . . . a particular statute.").

Congress intended that courts give priority to the public health and environmental protection purposes of the laws.[224]

Statutory directives in the federal environmental laws could counter the trend away from purposivism to textualism in the federal courts because the directives would provide clear textual guidance for the courts to use in interpreting ambiguous provisions of statutes. Judges would not be interpreting the environmental statutes to achieve public health and environmental protection purposes because they adopted a purposivist theory of statutory interpretation. Instead, textualist judges would need to interpret the statutes to achieve public health and environmental protection purposes because the text of the statute directs that the statute should be interpreted in that manner.[225]

Statutory directives could also reduce the effect of the shift away from *Chevron* deference because judges who would otherwise ignore *Chevron* in order to interpret statutes without regard to agency interpretations would be required, by the text of the statute, to interpret the statute to carry out its enacted purposes.[226]

It is not clear, though, that statutory directives would address the problems caused by the asymmetric judicial review of overregulation as opposed to underregulation.[227] If challengers to agencies' underregulation were able

224. *See supra* text accompanying note 95. In light of the recent trend in federal agencies to interpret and administer the federal environmental laws in ways that seem to conflict with the purposes of those laws, it might be necessary to include, with the statutory directives, amendments similar to Section 7(a)(1) of the Endangered Species Act that require agencies to administer the laws to further their purposes. *See* 16 U.S.C. § 1536(a)(1) ("All other [f]ederal agencies shall . . . *utilize their authorities in furtherance of the purposes of this chapter* by carrying out programs for the conservation of endangered species and threatened species listed pursuant to [S]ection 1533 of this title.") (emphasis added). On the other hand, the statutory directive, in and of itself, may provide sufficient direction to the agency that additional legislative mandates are not required. *See* Jellum, *supra* note 32, at 848 ("[Statutory] directives [can] tell judges how to interpret either all statutes or a particular statute."). The desirability of such additional legislative mandates is an issue that is beyond the scope of this Article.

225. *See* Stack, *Purposivism in the Executive Branch, supra* note 115, at 924; Stack, *Enacted Purposes Canon*, *supra* note 22, at 285–86, 306, 308, 314–15 (suggesting that an enacted purposes canon exists which already requires textualist judges to interpret statutes in accordance with enacted purposes provisions of the statutes).

226. *See* Chevron, U.S.A., Inc. v. NRDC, Inc., 467 U.S. 837, 842–43 (1984) ("First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court . . . must give effect to the unambiguously expressed intent of Congress."). Similarly, judges who *applied Chevron* would be required, at Step One, to use the traditional tools of statutory interpretation, including examination of the statutory directive, to decide whether Congress clearly addressed the precise question at issue in the case. *See id.*

227. *See* discussion *supra* Part V (discussing the ramifications of asymmetrical treatment of Type I

to convince a court to hear the merits of their challenges, courts would have a harder time dismissing the challenges, as the statutes would require courts to interpret the laws to protect public health and the environment.[228] However, as noted above, courts frequently use a variety of tools to dismiss challenges to underregulation on procedural grounds, and statutory directives would not prevent courts from continuing to follow those approaches.[229]

VII. THE CONSTITUTIONAL AUTHORITY FOR THE PROPOSAL AND THE INADEQUACY OF ALTERNATIVES

The proposal in this Article was inspired by the much more ambitious proposal of Nicholas Rosenkranz, who has advocated for the adoption of the Federal Rules of Statutory Interpretation through a process similar to the process used to adopt the Federal Rules of Evidence and Civil Procedure.[230] Rosenkranz, like many, criticized the cacophony that exists in judicial interpretation of statutes,[231] where there is "no intelligible, generally accepted, and

errors and Type II errors leading to delegitimization of administrative law).

228. *See* Jellum, *supra* note 32, at 893.

229. *See id.* To the extent that courts rely on *Norton*, *Heckler*, and similar precedent to dismiss challenges to an agency's failure to take acts under the statutes that they are authorized to take, but not required to take, to protect public health and the environment, even a legislative amendment that requires agencies to interpret and administer the federal environmental laws to carry out their public health and environmental protection purposes is unlikely to prevent courts from dismissing those challenges. Such a statutory provision would probably be interpreted as requiring agencies to administer the laws to carry out public health and environmental purposes when the agencies act under the laws but would probably not be interpreted to require agencies to take affirmative actions to protect public health and the environment in cases where they have been given discretion to decide whether to act at all. *See supra* notes 192–94, 198.

230. *See* Rosenkranz, *supra* note 31. The *Federal Rules of Evidence* and the *Federal Rules of Civil Procedure* were created through procedures in both the judicial and legislative branches, and Rosenkranz proposes a similar process for creation of the Federal Rules of Statutory Interpretation. *Id.* at 2089, 2151–53.

231. *See* Rosenkranz, *supra* note 31, at 2088; O'Connor, *supra* note 221, at 334. Advocating for the creation of a Restatement of Statutory Interpretation, Gary O'Connor analogizes judicial rules of statutory interpretation to common law but argues that there are currently no treatises or other traditional tools, like Restatements, available to foster uniformity in statutory interpretation. *See* O'Connor, *supra* note 221, at 335–44. However, some commentators suggest that consensus methods of statutory interpretation are developing and that an influential book authored by Justice Antonin Scalia and Brian Garner could serve as a de facto treatise on interpreting statutes. *See* Lawrence M. Solan, *Is It Time for a Restatement of Statutory Interpretation?*, 79 BROOK. L. REV. 733 (2014) [hereinafter Solan, *Is It Time*] (identifying and rejecting those assertions); Gluck, *supra* note 218 (describing the consensus on statutory interpretation methodologies in state courts).

consistently applied theory of statutory interpretation."[232] Rosenkranz and others argue that the lack of uniformity makes it difficult to predict how courts will interpret statutes and gives courts too much discretion to interpret statutes in ways that are based on personal preferences rather than legislative preferences.[233] In light of those limitations, Rosenkranz proposed the creation of a uniform set of statutory interpretation rules to be applied in federal and state courts when interpreting federal statutes.[234]

Many scholars have asserted that only courts—not legislatures—have the power to define binding rules of statutory interpretation.[235] Critics of legislatively created rules of interpretation often argue that such rules violate separation of powers principles, as statutory interpretation is a judicial function and cannot be usurped by the legislature.[236] Critics also argue that courts,

232. *See* HART & SACKS, *supra* note 115, at 1169.

233. *See* Rosenkranz, *supra* note 31, at 2141–42. Even though courts frequently apply canons of construction to interpret statutes, Karl Llewellyn famously illustrated decades ago that most canons have a counter-canon that could be argued to apply in similar circumstances to suggest a different interpretation of the statute than the interpretation suggested by the primary canon. *See* Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are To Be Construed*, 3 VAND. L. REV. 395, 401 (1950) (commenting on doctrinal interpretation). Rosenkranz and others argue that the ad hoc application of such canons allows judges to assert authority for whatever interpretation aligns with their policy preferences. *See* Rosenkranz, *supra* note 31, at 2143; Solan, *Is It Time*, *supra* note 231, at 743–47.

234. *See* Rosenkranz, *supra* note 31, at 2088. He, and others, argue that legislative action is required because courts will not adopt a uniform, coherent approach to statutory interpretation on their own. *Id.* Rosenkranz cites the "interpretive regime" outlined by William Eskridge and Philip Frickey in *Law as Equilibrium* as inspiration for their federal rules of statutory interpretation. *Id.* at 2141 ("An interpretive regime is a system of background norms and conventions against which the Court will read statutes. An interpretive regime tells lower court judges, agencies, and citizens how strings of words in statutes will be read, what presumptions will be entertained as to statutes' scope and meaning, and what auxiliary materials might be consulted to resolve ambiguities." (quoting William N. Eskridge, Jr. & Philip P. Frickey, *The Supreme Court, 1993 Term—Foreword: Law as Equilibrium*, 108 HARV. L. REV. 26, 66 (1994))).

235. *See* Rosenkranz, *supra* note 31, at 2086, 2091; *see also* Adrian Vermeule, *Interpretive Choice*, 75 N.Y.U. L. REV. 74, 74 (2000) (concluding that judges should embrace a formalist approach to statutory interpretation and exclude legislative history).

236. *See* Abbe R. Gluck, *The Federal Common Law of Statutory Interpretation: Erie for the Age of Statutes*, 54 WM. & MARY L. REV. 753, 803–04 (2013) [hereinafter Gluck, *Federal Common Law*] (discussing the "legislated interpretive rules and the separation of powers debate"); *see also* Jonathan T. Molot, *Reexamining* Marbury *in the Administrative State: A Structural and Institutional Defense of Judicial Power over Statutory Interpretation*, 96 NW. U. L. REV. 1239, 1246–47 (2002) ("[D]emonstrat[ing] that if we wish to make sense of judicial power over statutory interpretation . . . we must ground judicial authority in the judiciary's role in the constitutional structure and its internal institutional attributes."); Stack, *Purposivism in the Executive Branch*, *supra* note 115, at 918–19 (noting

rather than legislatures, should choose statutory interpretation methods because legislatures may be driven by political motivations in their selection of preferred interpretive methodologies.[237] Supporters of legislatively created rules of interpretation counter that statutory interpretation rules adopted by federal courts are federal common law and, like other federal common law, can be changed by Congress.[238] Supporters also argue that the Judicial Branch is as likely as the Legislative Branch to adopt interpretation rules based on policy preferences.[239]

Professor Rosenkranz adopts the position taken by many supporters of legislatively created statutory interpretation rules and analogizes interpretation rules to common law, but he acknowledges that legislatures are limited, to some extent, in their authority to establish interpretation rules that are binding on courts.[240] He argues that rules of statutory interpretation come in different forms.[241] In some cases, the Constitution may require that a statute be interpreted in a particular manner or prohibit an interpretation, in which case, neither Congress nor courts can depart from the constitutionally required or prohibited interpretation.[242] In other cases, the Constitution may not express any position on the appropriate interpretation of a statute, in which case Congress can adopt rules to control the interpretation.[243] Finally, in some cases,

---

that "[s]cholars are divided on Congress's constitutional power to dictate the interpretive methods federal courts use in statutory cases").

237. *See* Chelsea A. Bunge-Bollman, *United We Stand, Divided We Fall? An Inquiry into the Values and Shortcomings of a Uniform Methodology for Statutory Interpretation*, 95 NOTRE DAME L. REV. REFLECTION 101, 108–09 (2019) (noting concerns regarding the politicization of statutory interpretation).

238. *See* Gluck, *Federal Common Law*, *supra* note 236, at 803 (citing Jonathan R. Siegel, *The Use of Legislative History in a System of Separated Powers*, 53 VAND. L. REV. 1457, 1461 (2000) and Rosenkranz, *supra* note 31, at 2156); *see also* Stack, *Purposivism in the Executive Branch*, *supra* note 115, at 918–19 (noting that those who support the view that interpretive rules are like federal common law argue that Article I grants Congress the power to create or override these rules).

239. *See* Rosenkranz, *supra* note 31, at 2142–43.

240. *Id.* at 2086–87.

241. *Id.* at 2099 (listing the different kinds of statutory interpretation rules and how to change them).

242. *Id.* at 2087 (citing LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 5–9, at 851 (3d ed. 2000)); Jerry L. Mashaw, *Textualism, Constitutionalism, and the Interpretation of Federal Statutes*, 32 WM. & MARY L. REV. 827, 843 (1991) (discussing the role the Constitution plays in interpreting federal statutes); SUNSTEIN, *supra* note 217.

243. *See* Rosenkranz, *supra* note 31, at 2099. When the Constitution takes no position on whether an interpretation of a statute is required or prohibited, Rosenkranz argues that the rules used to interpret that statute are federal common law and can be changed by courts or Congress. *Id.*

the Constitution may establish a default or starting point rule, but one which can be changed by Congress.[244] Accordingly, Rosenkranz maintains that whether Congress can codify a rule of statutory interpretation will depend, in most cases, on the constitutional status of the proposed rule, rather than on separation of powers considerations.[245]

Rosenkranz and others ground their support for congressionally created interpretation rules in the Necessary and Proper Clause in Article I of the Constitution.[246] Rosenkranz points out that rules mandating use of specific tools of statutory interpretation can be necessary and proper for the execution of legislative power "because they may improve the precision with which the legislative power may be exercised."[247] In his article, Rosenkranz distinguishes statutes that impose interpretation rules on courts "based on whether the statutes are (1) definitional or nondefinitional, (2) statute-specific or general in application, and (3) static or dynamic."[248] Regardless of the classifications, though, Rosenkranz reaches the same conclusion for all interpretive statutes.[249] Congress can adopt statutes requiring the utilization of interpretation rules as long as the Constitution does not prohibit the rule being adopted or mandate an alternative rule.[250] Although Rosenkranz defends the

244. *See* Rosenkranz, *supra* note 31, at 2092–94. Rosenkranz suggests that the rule of lenity might be a constitutional starting point rule that can be changed by Congress. *Id.* at 2093. According to Rosenkranz, a constitutional starting point rule is a rule that is required by the Constitution until Congress provides otherwise. *Id.* at 2095. Rosenkranz distinguishes constitutional starting point rules from rules that he labels "constitutional default rules." *Id.* at 2097–98. A constitutional default rule, he argues, cannot be reversed by Congress, but Congress can include a clear statement in legislation to avoid the effect of the rule. *Id.* at 2098. Citing the federalism canon as an example, Rosenkranz distinguishes starting point and default rules by suggesting that Congress can reverse starting point rules by any legislative act, while they must enact laws with clear statements to avoid the effect of default rules. *Id.* at 2098–99.

245. *See id.* at 2088, 2098–99, 2102–03.

246. *Id.* at 2102 (citing U.S. CONST. art. I, § 8, cl. 18); *see also* Michael Stokes Paulsen, *Abrogating Stare Decisis by Statute: May Congress Remove the Precedential Effect of* Roe *and* Casey*?*, 109 YALE L.J. 1535, 1567–70, 1582–90 (2000) (noting that the Necessary and Proper Clause enables Congress to alter judicially created default rules and empowers Congress to displace the rules of the judiciary if it so chooses).

247. *See* Rosenkranz, *supra* note 31, at 2102.

248. *See id.* at 2103.

249. *See id.* at 2139–40.

250. *Id.* at 2103–21. Rosenkranz argues that Congress is not only authorized to create uniform rules of statutory interpretation but also is better situated than the courts to create those rules. *Id.* at 2143–45. Courts, he explains, must wait for an appropriate case to establish rules and generally must establish them retroactively, whereas Congress can legislate holistically and prospectively. *Id.*

constitutionality of congressionally adopted interpretation rules in all of the cases outlined above, he recognizes that the adoption of interpretation rules that apply generally, rather than limited to a single or a few statutes, could result in some unanticipated interpretations when applied retroactively.[251]

Regarding *theories* of interpretation, Rosenkranz concluded that the Constitution does not mandate or prohibit the adoption of a textualist, purposivist, or other theory of statutory interpretation, so it would be appropriate for Congress to enact laws that require the interpretation of a statute or statutes in a textualist or purposivist manner.[252] Accordingly, it would be consistent with Congress's authority to enact statutory directives, like the ones outlined above, that require courts to interpret the federal environmental laws consistent with their health and environmental protection purposes.[253] Further, while Rosenkranz identified nonconstitutional concerns regarding the adoption of general retroactive interpretive statutes,[254] the scope of the statutory directives outlined in this Article is sufficiently limited such that Congress could anticipate the effect of the directives on the interpretation of the federal environmental laws in most cases.[255]

Other academics echo Professor Rosenkranz's assertion that Congress may constitutionally enact rules of interpretation to be applied by courts.[256] Professor Abbe Gluck, for instance, has argued that many statutory interpretation rules have the nature of federal common law, even though courts frequently refuse to acknowledge that they are common law or treat them as

251. *Id.* at 2113–14. Amending the entire U.S. Code with a retrospective interpretive statute, he argues, "might be foolish, but it is surely constitutional." *Id.* at 2114. Rosenkranz also acknowledges that Laurence Tribe has suggested that general interpretive statutes that apply prospectively raise constitutional concerns because they impermissibly bind future Congresses and limit their Article I legislative power. *Id.* at 2114–15. Rosenkranz is unpersuaded by Tribe's concern, though, as he notes that future Congresses could avoid the restrictions imposed on interpretation of their enactments by amending the offending interpretation rule that was adopted by the prior Congress. *Id.* at 2115–20.

252. *Id.* at 2109, 2124–25. Rosenkranz contends that "there is no constitutional objection to an . . . instruction [that]: 'The United States Code shall be interpreted in textualist fashion, without reference to legislative history.'" *Id.* at 2124–25.

253. *See id.* at 2103–21.

254. *See id*. at 2113–20.

255. *See* Robert R.M. Verchick, *Toward Normative Rules for Agency Interpretation: Defining Jurisdiction Under the Clean Water Act*, 55 ALA. L. REV. 845, 851 (2004) (proposing a model for federal agencies for interpreting statutes).

256. *See* Gluck, *Federal Common Law*, *supra* note 236, at 757.

common law.[257] She has also noted that courts frequently apply the *Chevron* two-step test (a judicially created tool of statutory interpretation) in a manner akin to federal common law.[258] If the rules of statutory interpretation created by courts are federal common law, then they can be amended or adopted by Congress, as noted above.[259] Professor Gluck has also noted that Congress has already adopted "thousands" of rules of construction, "including preemption clauses, savings clauses, and severability clauses," which courts routinely and unquestioningly apply.[260] The application of those rules is consistent with the widely espoused model of the judicial role in statutory interpretation as the "faithful agent" of the legislature.[261]

Professor Kevin Stack has advanced similar arguments in support of his proposal for a broader transformation of interpretation and application of regulatory statutes by administrative agencies and courts in light of congressional directives in those statutes.[262] Stack argues that modern "[r]egulatory statutes not only grant powers but . . . impose a duty on agencies to carry out those powers in accordance with the . . . purposes the statutes establish."[263] He finds the source of that duty in the nondelegation doctrine of the Constitution and in the Administrative Procedure Act.[264] Stack argues that since the Constitution requires Congress to provide agencies with an "intelligible principle" to guide interpretation and administration of statutes, agencies must interpret and administer those statutes to carry out the purposes established in the

257. *See id.* at 755–59, 770, 777.

258. *See id.* at 759, 770–71, 791.

259. *See id.* at 757 (highlighting that some canons of statutory interpretation may be considered federal common law, while some "might be understood as a special kind of law that enforces constitutional norms or implements the Constitution").

260. *See id.* at 791–92, 801–03. Gluck notes that a Westlaw search of the U.S. Code for the phrase "shall be construed" yields over 5,000 results. *Id.* at 802. She also indicates that she and Professor Lisa Bressman interviewed 137 congressional counsels and that more than one-third of them had "drafted or considered drafting" rules for interpretation for the courts. *Id.* at 803.

261. *Id.* at 756.

262. *See* Stack, *Purposivism in the Executive Branch*, *supra* note 115, at 871.

263. *Id.* Stack argues that agencies are "better positioned than courts to discern statutory purposes" because they are frequently involved in the drafting of the statutes, implement them on a day-to-day basis, have greater expertise than courts regarding the issues addressed in the statutes, and are more politically accountable than courts. *Id.* at 906–07, 909.

264. *See id.* at 893–94, 899.

statutes.[265] Agencies' statutory interpretation must be guided by purposivism.[266] Similarly, Stack argues that the judicial review of agency actions under the APA's "arbitrary and capricious" standard requires agencies to demonstrate that their actions are rationally connected to the purposes of the statutes they administer.[267] After outlining the case for agencies' adoption of purposivism in statutory interpretation, Stack agrees with Rosenkranz and Gluck that the judicial power to create rules of statutory interpretation, if it exists, is a federal common law power that can be modified by congressional action.[268] When Congress has directed agencies to interpret and administer laws to carry out specific purposes, Stack argues that courts must honor those legislative directives and adopt a purposivist approach when interpreting those statutes.[269]

Other commentators have agreed with Rosenkranz regarding the constitutionality of statutory directives but have raised different concerns about his proposal.[270] For instance, in an article published in response to Rosenkranz's proposal, Gary O'Connor described judicially created statutory interpretation rules as a form of common law, and like Professor Gluck, he noted that Congress has adopted statutory interpretation rules in the past that have been applied by courts.[271] However, he was skeptical that either Congress or the courts *would* adopt a uniform set of rules for statutory interpretation.[272]

265. *Id.* at 875–76, 887, 893–95.

266. *Id.* at 875.

267. *Id.* at 899–900.

268. *Id.* at 919.

269. *Id.* at 871, 877–78. Professor Stack criticizes the way the *Chevron* doctrine has been applied in that it authorizes the use of traditional tools of interpretation at Step One and has not focused sufficiently on a purposivist approach to statutory interpretation. *Id.* at 882–83. Instead of utilizing *Chevron*, Stack argues that reviewing courts should focus on whether an agency action furthers a statute's purpose(s) by means allowed by the statute or other law, looking at "(1) the agency's understanding of the statute's purpose(s), (2) the connection the agency has drawn between its actions and those purposes, (3) whether the action is otherwise permitted by existing statutory and constitutional and other law, and (4) whether the action is well-founded in fact." *Id.* at 921. Since agencies are obligated to interpret and administer statutes to carry out the purposes identified in the statute, Stack reasons that even textualist judges would have to adopt purposivist readings of regulatory statutes. *Id.* at 924. Stack asserts that the purposivist framework of judicial review is consistent with the APA review standards, which focus on the rationality of agency decisions and whether they are authorized by the Constitution and the agency's statutory authority. *Id.* at 921–22.

270. *See, e.g.*, O'Connor, *supra* note 221, at 334–36.

271. *See id.*

272. *Id.* at 347–48. Rosenkranz's proposal for the Federal Rules of Statutory Interpretation

Consequently, he argued that academics should create a Restatement of the Law of Statutory Interpretation in the same way that they have created Restatements for other areas of common law, such as contracts.[273] Professor Lawrence Solan, however, criticized O'Connor's proposal, arguing that a Restatement of Statutory Interpretation would be destructive because the rules would never really be applied uniformly, so the Restatement would create an illusion of consensus in statutory interpretation and allow judges to continue to make decisions consistent with their political preferences, cloaking the decisions in legitimacy by supporting them with "uniform" rules.[274]

Professor Glen Staszewski has leveled similar criticisms at a range of efforts to simplify and create uniformity in statutory interpretation.[275] Staszewski, like Solan, argues that uniform rules allow courts to make decisions that ignore the goals of statutes by cloaking them in the legitimacy of uniform rules, and he argues that efforts to "dumb down" statutory interpretation ignore the reality that "the central function of statutory interpretation by federal courts in the modern regulatory state is to provide individuals and groups with opportunities to contest the validity of particular exercises of governmental authority, rather than to ascertain the meaning of the law in a

envisions enactment by Congress and the President at the outset, followed by approval by the Supreme Court, all of which O'Connor views as doubtful. *Id.* He is particularly skeptical that a majority of Justices on the Supreme Court could reach consensus on uniform rules that would be binding in all of the cases that would be heard by the Court, as well as the lower federal courts. *Id.*

273. *Id.* at 334, 349–51. O'Connor argues that a Restatement would provide similar benefits as a codification of uniform rules (since Restatements are frequently viewed by courts and attorneys as authoritative) but would not require action by Congress or the courts. *Id.* at 356–57. He also argues that a Restatement would be valuable in providing uniformity because there are no treatises that otherwise adequately provide that guidance for statutory interpretation. *Id.* at 337–44. He acknowledges, however, that a Restatement would not be binding on courts. *Id.* at 360–61.

274. *See* Solan, *Is It Time*, *supra* note 231, at 733–35. Solan asserted that "an authoritative, black letter text is likely to be used by judges as yet more cover for the positions they wish to take in close cases." *Id.* at 742. In addition to fearing the illegitimate use of a Restatement as a tool to legitimize judicial activism, Solan does not believe that there is any underlying consensus regarding appropriate methods of statutory interpretation that could be incorporated into a Restatement. *Id.* at 742–43, 753–54. He argues that (1) judges might agree on the principles of interpretation but disagree upon the weight to give to various principles in individual cases; (2) most statutory interpretation cases are about vagueness, and predictive rules cannot predict results in those cases; and (3) judges vacillate, in practice, between interpreting statutory language in terms of the outer boundaries of the language or in terms of ordinary usage. *Id.* at 742–43.

275. *See* Staszewski, *supra* note 218, at 210. His article focuses on "proposals to adopt codified rules of statutory interpretation, give stare decisis effect to interpretive methodology, use simpler methods of statutory interpretation in lower courts and implement certain versions of textualism." *Id.*

vacuum."[276] He worries that "to the extent that the proposals would establish artificial decisionmaking frameworks that would resolve statutory disputes without regard to their policy consequences or Congress's apparent goals, the result would be *affirmatively undemocratic*."[277]

Regardless of whether a Restatement of the Law of Statutory Interpretation or a uniform codification of all of the rules of statutory interpretation would mask activist judicial decisionmaking, the proposal in this Article is much more moderate and would provide far fewer opportunities for courts to manipulate statutory interpretation because it does not call for a codification of the full range of statutory interpretation tools.[278] In addition, to the extent that Staszewski raises concerns that uniform interpretation tools could provide courts with resources to interpret statutes without regard to their goals,[279] the proposal in this Article would affirmatively *require* courts to interpret the federal environmental laws consistently with their enacted purposes.[280] The proposal is consistent with the vision of Professor Stack, who argues that agencies and courts should interpret regulatory statutes through purposivism, but agencies and courts have not routinely done so in the past, so more explicit congressional direction is likely required.[281]

276. *Id.* at 210. Staszewski argues that "the primary goal of statutory interpretation methodology should be to protect the people from the possibility of domination by the state." *Id.* He believes that when the democratically elected legislature has not clearly indicated its preferences in the language of a statute, the best way to avoid the potential for arbitrary domination is for courts to uphold reasonable interpretations of the statute adopted by agencies that are delegated authority to administer those statutes, rather than by relying on rigid rules of interpretation. *Id.* at 210, 241–42.

277. *Id.* at 237. According to Staszewski, "courts affirmatively promote republican democracy when they engage in hard look judicial review of agency action or otherwise provide individuals or groups with a meaningful opportunity to contest a statute's application to their conduct." *Id.* at 241–42.

278. *Compare* Staszewski, *supra* note 218, at 278 (criticizing prominent proposals "for making statutory interpretation simpler and more uniform" because of "the importance of avoiding the possibility of arbitrary domination by the state and a belief in the value of practical reasoning and diverse perspectives within the interpretive enterprise"), *with supra* notes 216–25 and accompanying text (discussing how statutory directives generally are a targeted and moderate approach to ensuring accurate statutory interpretation).

279. *See* Staszewski, *supra* note 218, at 243.

280. *Id.*; *see supra* note 26 and accompanying text; *supra* Part VI.

281. *See* Stack, *Purposivism in the Executive Branch*, *supra* note 115, at 875–76 (discussing the suggestion that Congress specifies the framework for agency statutory interpretation). As noted above, it may be necessary to provide more explicit legislative direction to agencies, as well, regarding an obligation to administer and interpret the federal environmental laws in ways that advance the enacted purposes. *See supra* note 224.

While Rosenkranz, Gluck, and others express confidence in congressional authority to adopt statutory directives, many commentators argue that statutory interpretation is a judicial function and that congressional attempts to dictate the methods of interpretation may violate separation of powers principles, infringing on the Article III powers of the Judicial Branch.[282] Few of these critics, however, assert that *all* statutory directives violate separation of powers principles.[283] Instead, most of these critics argue that specific types of statutory directives are unconstitutional.[284]

Professor Linda Jellum, for example, divides statutory directives into three categories: (1) definitional, where the legislative goal is to define a term; (2) interpretive, where the goal is to affect the *outcome* of interpretation; and (3) theoretical, where the goal is to affect the *process* of interpretation.[285] In an interpretive directive, the legislature is attempting to promote specific policy outcomes, while in a theoretical directive, the legislature is attempting to promote a specific interpretive process without regard to advancing any policy outcome.[286] Jellum identifies as interpretive a hypothetical directive that provides, "All Acts of Congress shall be broadly construed with a view to promote the Act's purposes and carry out the intent of the legislature."[287] By contrast, Jellum identifies directives that limit the sources that a court can use in interpreting a statute as theoretical.[288] The statutory directives proposed in this Article for the federal environmental laws would, therefore, be interpretive directives in Jellum's taxonomy.[289]

In analyzing whether particular directives raise constitutional concerns, Professor Jellum notes that legal scholars have adopted two distinct

282. *See* Rosenkranz, *supra* note 31, at 2086, 2091; Gluck, *Federal Common Law*, *supra* note 236, at 804–05.

283. *Compare* Stack, *Purposivism in the Executive Branch*, *supra* note 115, at 918–19 (describing the viewpoint of "judicial interpretive methodology as . . . akin in status to federal common law," and thus, "Congress's Article I powers presumptively include the power to establish [interpretive] rules[] . . . [with] no general separation of powers objection"), *with* Jellum, *supra* note 32, at 879 (describing that certain statutory directives violate separation of powers while others do not).

284. *See, e.g.*, Jellum, *supra* note 32, at 879.

285. *Id.* at 841, 847.

286. *Id.* at 882–83, 893.

287. *Id.* at 840.

288. *See id.* at 848–49. Professor Jellum notes that Congress has enacted a theoretical directive that applies to a single statute but has not yet adopted a general theoretical directive. *See id.* at 852.

289. *See* Jellum, *supra* note 32, at 893 (discussing that under "a specific interpretive directive, the legislature is attempting . . . to make its policy choice for that particular statute clear").

approaches to addressing separation of powers issues.[290] The formalist approach divides the three branches of government based on the functions assigned by the Constitution's Vesting Clauses and rigidly decides that separation of powers principles are violated when a branch is carrying out a function assigned to another branch by the Vesting Clauses.[291] The functionalist approach, on the other hand, recognizes that the functions assigned to the various branches are more fluid and condemns the exercise of power by a branch only when additional powers beyond the branch's core powers are exercised by the branch in a way that inappropriately aggrandizes the branch while withdrawing constitutionally assigned power from another branch.[292]

After outlining the two conflicting approaches to identifying unconstitutional delegations of interbranch power, Professor Jellum concludes that definitional statutory directives are constitutional under either approach,[293] while theoretical directives violate separation of powers principles under either approach.[294] Interpretive directives, though, Jellum argues, violate separation of powers under the formalist approach[295] but not under the functionalist approach.[296] Nevertheless, Professor Jellum argues that some interpretive directives are constitutional.[297] When an interpretive directive applies to a single

290. *See id.* at 854–55, 860–61.

291. *See id.* at 861–62, 867–68. Under a formalist approach, "[l]egislative power . . . is the power 'to promulgate generalized standards and requirements of citizen behavior or to dispense benefits—to achieve, maintain, or avoid particular social policy results.'" *Id.* at 862 (quoting Martin H. Redish & Elizabeth J. Cisar, *"If Angels Were To Govern": The Need for Pragmatic Formalism in Separation of Powers Theory*, 41 DUKE L.J. 449 (1991)). Judicial power is the power to interpret the law—to "say[] what [the] law means." *Id.* at 867.

292. *See id.* at 870–72, 875. Functionalism recognizes the judiciary as a partner to the legislature in lawmaking, as opposed to a "faithful agent." *See id.* at 871–72. The legislature can play a role in influencing interpretation of the law, but Professor Jellum argues that "when the legislature tries to control the process of interpretation, as opposed to trying to influence the outcome . . . to promote specific policy objectives, the legislature aggrandizes itself, . . . impermissibly intrudes into the judicial sphere, and becomes master of the interpretive process." *Id.* at 837.

293. *Id.* at 841–42, 879.

294. *Id.* at 841–42, 879, 882. Under the formalist approach, Jellum argues that when theoretical directives tell judges what evidence to consider in interpreting statutes, their purpose is not to affect legal rights but to control the judicial function. *See id.* at 882–83. The legislature is, thus, attempting to exercise judicial functions. *Id.* Under the functionalist approach, Jellum argues that theoretical directives "allow Congress to intrude into a core judicial function and aggrandize its role while simultaneously contracting the roles of the judiciary and the executive." *Id.* at 883.

295. *Id.* at 890–91.

296. *Id.* at 890, 894.

297. *See id.* at 841–42, 890, 894.

statute, Jellum argues, the legislature is trying to influence the interpretive outcome regarding a specific policy choice for that statute and is not aggrandizing its power at the expense of another branch.[298] When, on the other hand, an interpretive directive applies generally to all of the statutes in a legislative code, Jellum concludes that the legislature is attempting to control the process of statutory interpretation, which would be unconstitutional.[299]

Professor Jellum does not discuss whether she believes that an interpretive directive that applies to more than one law but does not apply generally, such as the proposal in this Article regarding the federal environmental laws, would be unconstitutional.[300] However, the proposal in this Article is much more like an interpretive directive that applies to one law than an interpretive directive that applies generally, in that the proposal is trying to influence interpretive outcomes regarding specific policy choices rather than attempting to control the process of statutory interpretation.[301] Thus, the proposal would probably be constitutional based on Professor Jellum's reasoning.[302] However, if the rule advanced by Professor Jellum is binary, in that an interpretive directive may be constitutional if it applies to a single statute but unconstitutional if it applies to more than one, any constitutional "defect" in the proposal advanced in this Article could be cured by introducing statutory directives for each of the federal environmental laws through separate legislative proposals.[303]

298. *See id.* at 841, 895–96.

299. *See id.* at 895–96. Professor Jellum acknowledges that an interpretive directive that directs courts to interpret an individual statute broadly tangentially affects the process used to interpret the statute but that the legislature is attempting "to influence the interpretive outcome regarding a specific policy choice for that statute." *See id.* at 896. However, an interpretive directive that applies generally may tangentially advance a particular policy choice, but the purpose of the directive would be "to control the judiciary's method of interpretation regardless of . . . [the] policy [outcome]." *See id.*

300. *See id.* at 895 (suggesting "that the distinction between constitutional and unconstitutional directives lies in the difference between specific interpretive directives, those that apply to one statute, and general interpretive directives, those that apply to the entire code," but not defining where a directive that applies to several laws, but not an entire code, falls along that spectrum).

301. *See id.* at 841, 895–96.

302. *See id.*

303. *Id.* at 897. Professor Jellum acknowledges as much in her article, indicating that Congress could avoid the distinction that she identifies between general and specific interpretive directives because "Congress could add the identical interpretive directive to every new or existing statute." *Id.* at 897. She is skeptical that such legislative efforts are feasible but argues that "if Congress were successful in this effort, the judiciary could, at least, have some assurance that Congress might have actually considered the effect of such a directive on the specific policy choices for each affected statute."

While Professor Jellum and others have questioned the constitutionality of statutory directives, some commentators suggest that courts already utilize canons that achieve what the proposal in this Article seeks to achieve. For instance, courts have long applied a canon that provides that remedial statutes should be liberally construed.[304] Under that canon, the federal environmental laws, as remedial statutes, should be interpreted liberally to carry out their purposes.[305] More directly on point, though, Professor Kevin Stack asserts that courts utilize an enacted purposes canon for statutory interpretation.[306] Under this canon, courts will not interpret statutes in a way that negates their enacted purposes.[307] According to Stack, the Supreme Court utilized this canon in several cases without explicitly labeling it as a canon,[308] including: *Johnson v. Robison*;[309] *Tennessee Valley Authority v. Hill*;[310] *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit*;[311] and *King v. Burwell*.[312] Stack argues that by limiting the focus of the canon to those purposes explicitly identified in the legislation's enacted purposes clauses, the canon provides a bridge between textualism and purposivism.[313]

Stack suggests that special rules of interpretation should apply to statutes with enacted statements of purpose[314] because such statutes have different meanings than statutes without statements of purpose, since a rule, in general, that is created with an accompanying statement of purpose or justification has a different meaning than the same rule created without that explanation of

Id.

304. *See* Gluck, *Federal Common Law*, *supra* note 236, at 763, 769. "The canon . . . has been described as a buffer against pressures on Congress by special interests to narrow public interest statutes." *Id.* at 769 (internal quotations and footnote omitted).

305. *See id.* at 769 (noting that statutes that are remedial in nature should be broadly construed).

306. *See* Stack, *Enacted Purposes Canon*, *supra* note 22, at 285.

307. *See id.* at 285 (citing King v. Burwell, 576 U.S. 473, 493 (2015)). The canon does *not*, however, require courts to interpret statutes to advance the enacted purposes of statutes. *See id.* at 303. Stack argues that it is evident that Congress views the enacted purposes provisions of statutes as significant parts of the statutes because Congress has amended such statements over the years in statutes. *See id.* at 307–08.

308. *See id.* at 285.

309. 415 U.S. 361 (1974).

310. 437 U.S. 153 (1978).

311. 547 U.S. 71 (2006).

312. 576 U.S. 473 (2015).

313. *See* Stack, *Enacted Purposes Canon*, *supra* note 22, at 285–86, 313–16.

314. *Id.*

purpose or justification.[315] The articulation of the purpose changes the meaning of the rule.[316] He also argues that statutes that include enacted purposes clauses are more "public-regarding" than other statutes, so they should be interpreted to advance the public-regarding goals of the statutes.[317]

Even if courts more formally recognized the enacted purposes canon as Stack asserts that they should,[318] neither that canon nor the remedial statutes canon nor any other canon would be as effective in reinvigorating the federal environmental laws as the statutory directives proposed in this Article. As academics have noted for decades, for most canons of interpretation there are counter-canons that direct courts to interpret statutes in a manner that is the obverse of the canon.[319] Opposing the remedial statutes canon, for instance, is the canon that provides that statutes in derogation of the common law should be interpreted narrowly.[320] Without concrete, uniform rules regarding the application of canons, judges will always be able to choose the appropriate canon to interpret a statute in the manner consistent with their personal views regarding the "best" reading of the statute.[321]

Even if courts applied the canons uniformly, though, an enacted purposes canon would be inferior to the statutory directives proposed in this Article.[322] An enacted purposes canon simply requires courts to avoid interpreting statutes in ways that *negate* their purposes.[323] It does *not* require courts to

315. *See id.* at 305–08.

316. *See id.* at 306.

317. *Id.* at 310–13.

318. *See id.* at 316–17, 333. Professor Stack suggests that the canon should be formally recognized as a canon because it has been relied on "scores of times over decades" for almost a century, and "by Supreme Court Justices appointed by different parties and across the ideological [spectrum]." *See id.* at 317 (citing Anita S. Krishnakumar & Victoria F. Nourse, *The Canon Wars*, 97 TEX. L. REV. 163 (2019)).

319. *See* Llewellyn, *supra* note 233, at 401; *see also* Rosenkranz, *supra* note 31, at 2143–44; Solan, *Is It Time*, *supra* note 231, at 743–44.

320. *See* Gluck, *Federal Common Law*, *supra* note 236, at 769.

321. *See* Solan, *Is It Time*, *supra* note 231, at 734 (arguing that even with a codification of rules for statutory interpretation, judges would be able to "create the illusion of certainty in a world in which they have more discretion than they are comfortable acknowledging"); *see* Rosenkranz, *supra* note 31, at 2148 (discussing how canons can be "simply a veneer for judges' policy preferences").

322. *See* Stack, *Enacted Purposes Canon*, *supra* note 22, at 303 (observing that enacted purposes serve only to exclude interpretations that conflict with the stated purpose but do not require courts to interpret statutes to carry forward that stated purpose).

323. *See* Stack, *Enacted Purposes Canon*, *supra* note 22, at 285.

interpret statutes to *advance* those purposes.[324] A statutory directive, on the other hand, *would* require courts to interpret the environmental statutes to achieve the purposes of the statute, and the directive would be embedded in the text of the statute, to be applied by textualists and purposivists alike, rather than embodied in a canon that courts might or might not utilize.

VIII. CONCLUSION

Congress set ambitious goals to protect public health and the environment when it enacted the federal environmental laws through bipartisan efforts in the 1970s.[325] For many years, the federal courts interpreted those laws to carry out those enacted purposes.[326] Over time, however, courts greatly reduced their focus on the environmental and public health purposes of the environmental laws due to the rise in textualism, the declining influence of *Chevron*, and the increasing willingness of courts to defer to agency underenforcement of statutory responsibilities across all regulatory statutes.[327]

Those trends are unlikely to be reversed in the near future, so further congressional action is required to reinvigorate the federal environmental laws. Through statutory directives that provide that the environmental laws should be interpreted to carry out their enacted purposes, Congress could send a clear message to courts that Congress remains committed to the goals articulated in the environmental laws.[328] Textualist judges would find it difficult to ignore the statutory purposes when interpreting the environmental laws, as the text of the laws would require the laws to be interpreted to advance those purposes.[329] Similarly, judges who ignore *Chevron* to avoid deferring to an agency's environmentally friendly interpretation would be unable to reject the agency's position through their own statutory interpretation without addressing the statutory directive in the law requiring an interpretation of the law that

324. *See id.* at 303.

325. *See* Lazarus & Zdeb, *supra* note 6 (stating that during the 1970s and early 1980s, Congress adopted more than two dozen environmental laws with broad bipartisan support).

326. *See supra* Section III.A (discussing federal courts' historical interpretation of major federal environmental laws in the first few decades after their passage according to the health and environmental protection purposes embedded in the laws).

327. *See* discussion *supra* Section III.B and Parts IV, V.

328. *See supra* Part VI.

329. *See* Stack, *Purposivism in the Executive Branch*, *supra* note 115, at 924; Stack, *Enacted Purposes Canon*, *supra* note 22, at 285–86, 306, 308, 314–15.

carries out its public health and environmental purposes.[330]

While statutory directives have been underutilized at the federal level, Congress has the constitutional authority to include them in legislation.[331] At this point, therefore, the question is not whether Congress *can* amend the environmental statutes to include statutory directives but whether Congress *has the will* to reinvigorate those statutes.

330. *See* Chevron, U.S.A., Inc. v. NRDC, Inc., 467 U.S. 837, 842–43 (1984).
331. *See supra* Part VII.