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Is a Textualist Approach to Statutory Interpretation Pro-Environmentalist?: Why Pragmatic Agency Decisionmaking Is Better than Judicial Literalism

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Is a Textualist Approach to Statutory Interpretation Pro-Environmentalist?: Why Pragmatic Agency Decisionmaking Is Better than Judicial Literalism

Bradford C. Mank*

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I. Introduction

Since the late 1980s, there has been a vigorous debate among both judges and academics about the appropriateness of a textualist approach to statutory interpretation and of the use of legislative history.¹ Justices Scalia and Thomas, the leading proponents of textualism on the Supreme Court, have frequently written or joined decisions that anger environmental advocacy groups.² In *City of Chicago v. Environmental Defense Fund*,³ however, their textualist approach to statutory interpretation resulted in a victory for the Environmental Defense Fund.

1. See *infra* notes 12-43 and accompanying text.

2. See, e.g., *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1019 (1992) (Scalia, J., joined by Thomas, J.) (finding that South Carolina's Beachfront Management Act, which prohibited building of any structure in designated "coastal zone," constituted per se taking of property by depriving owner of all economically viable use of land); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 571-73 (1992) (plurality opinion) (Scalia, J., writing plurality opinion and joined by Thomas, J.) (denying standing to challenge Department of Interior action under citizen suit provision of Endangered Species Act without showing that agency's action affected "concrete interest" of plaintiffs); *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 206 (D.C. Cir. 1991) (Thomas, J.) (finding that Federal Aviation Administration could limit discussion of alternatives in environmental impact statement to those proposed by private applicant); Richard J. Lazarus & Claudia M. Newman, *City of Chicago v. Environmental Defense Fund: Searching for Plain Meaning in Unambiguous Ambiguity*, 4 N.Y.U. ENVTL. L.J. 1, 2 n.3 (1995) (citing Justice Scalia's allegedly anti-environmentalist decisions); *infra* notes 128-29, 181-85, and accompanying text.

3. 511 U.S. 328 (1994).

As a result, Professor Lazarus, who argued the *City of Chicago* case before the Supreme Court on behalf of the Environmental Defense Fund,⁴ and Ms. Newman, who worked with Lazarus on the case,⁵ contend that, contrary to the expectations of environmentalists who believe that most judges associated with textualism are hostile to environmentalism, a plain meaning approach to statutory construction is more likely to result in victories for environmentalists because environmental statutes on their face usually contain broad aspirational language and no exceptions.⁶ Most often, it is industry rather than environmental groups that seek exceptions from a statute's text by trying to find flexibility in its legislative history, "the content of which tends to be the product of hard-fought and lengthy debate among committee staff members and interest groups."⁷ Professor Lazarus and Ms. Newman concede that in some cases a statute's legislative history is more favorable to environmental plaintiffs than its text, but they conclude that a textualist approach to statutory construction "is likely to inure frequently (but not exclusively) to the benefit of environmental plaintiffs."⁸

This Article provides both anecdotal evidence and a more theoretical argument for why textualist statutory interpretation is not the best approach to address environmental issues. Part IV provides some counterexamples that show it is not clear that a textualist approach will lead to more victories for environmental plaintiffs. More importantly, textualism does not provide the best method to resolve the frequent conflict in environmental statutes between protecting the public health and limiting the cost of regulation, especially because textualists tend to slight the balance struck by the environmental agency. Judges applying a textualist approach often read environmental statutes narrowly to limit the authority of environmental agencies. Moreover, the textualist method is sufficiently indeterminate that a textualist judge could have decided even the *City of Chicago* case either for or against environmental advocacy groups. Even if textualist statutory interpretation resulted in more victories for environmental advocacy groups, the tendency of textualists to place so little value on the interpretations of the environmental agencies that have greater practical experience with the

4. See Lazarus & Newman, *supra* note 2, at 1 n.a.

5. *Id.*

6. See *id.* at 23. See generally James A. Henderson, Jr. & Richard N. Pearson, *Implementing Federal Environmental Policies: The Limits of Aspirational Commands*, 78 COLUM. L. REV. 1429 (1978) (discussing frequent use of aspirational language in environmental statutes and problems often caused by such language).

7. Lazarus & Newman, *supra* note 2, at 23.

8. *Id.*

underlying issues raises serious questions about whether textualism is the best way to decide environmental policies.

In addition, Professor Lazarus and Ms. Newman suggest that courts should ignore a statute's legislative history because such material is more likely to contain pro-industry provisions than the text.⁹ Even assuming they are right, Part V demonstrates that interpreters ought to consider a statute's legislative history because such material is often essential in understanding Congress's intent in enacting a bill.

Part VI explains that a fundamental problem with textualism is that it downplays the role of administrative agencies in interpreting complex regulatory statutes. Thus, textualist judges too often ignore the *spirit* of the Supreme Court's decision, *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,¹⁰ which emphasized that agencies generally are more competent at interpreting complex regulatory statutes than are generalist Article III judges, and as a result, these textualists fail to give sufficient deference to the expertise of environmental agencies. Even if the Lazarus-Newman thesis that environmentalist groups would win more often if courts consistently employed a textualist approach is correct, it is better policy to allow environmental agencies to consider both Congress's intent in adopting the statute and the agency's assessment of the costs and benefits of various interpretations. Sometimes society is better off if an agency ignores a text's apparent meaning and allows industry a cost-saving exemption or exception from the statute's literal requirements.¹¹

Part II discusses the textualist approach to statutory interpretation and its critics. Part III examines the impact of textualism on judicial application of the *Chevron* doctrine. Part IV provides some anecdotal evidence for why textualism will not always lead to victories for environmentalists and makes the broader argument that textualist judges often disregard the delicate balance struck by agencies between cost and safety. Part IV.A shows that Congress often limits broad aspirational language in an environmental statute with more restrictive terms in its implementing provisions and maintains that agencies are more adept at balancing conflicting textual language than textualist judges. Part IV.B demonstrates how courts can use a textualist approach to limit the authority of environmental agencies. Part IV.C illustrates why the textualist method is sufficiently indeterminate that a textualist judge can decide many cases either for or against environmental advocacy groups. Part V discusses why interpreters should consider a

9. *Id.*

10. 467 U.S. 837 (1984).

11. See *infra* text accompanying note 289.

statute's legislative history. Part VI explains why a narrow textualist approach to statutory interpretation is inconsistent with the essence of the *Chevron* doctrine and proposes that courts should give considerable weight to an environmental agency's expertise in interpreting complex environmental statutes.

II. *The Impact of Textualist Statutory Interpretation*

It is important to understand the major theories of statutory interpretation before examining how these different approaches can affect how courts or agencies interpret environmental statutes. There are three major or "foundationalist" theories of statutory interpretation: (1) intentionalism, (2) purposivism, and (3) textualism.¹² Intentionalists traditionally examine both a statute's text and legislative history to determine the original intent of the enacting legislature.¹³ By contrast, purposivists go beyond the legislature's original intent to estimate the statute's spirit or purpose because either it may be difficult to determine the statute's original intent or a court must apply a statute to circumstances that the enacting legislature did not foresee.¹⁴ If there are ambiguities in a statute, many purposivists try to

12. See William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 324-25 (1990) (arguing that three major theories of statutory interpretation are "foundationalist" because "each seeks an objective ground ('foundation') that will reliably guide the interpretations of all statutes in all situations"); Blake A. Watson, *Liberal Construction of CERCLA Under the Remedial Purpose Canon: Have the Lower Courts Taken a Good Thing Too Far?*, 20 HARV. ENVTL. L. REV. 199, 211 n.46 (1996) (citing numerous articles on statutory construction); see also WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 13-47 (1994) (discussing weaknesses of intentionalism, purposivism, and textualism).

13. See ESKRIDGE, *supra* note 12, at 14-25 (describing and criticizing intentionalism); John P. Dwyer, *The Pathology of Symbolic Legislation*, 17 ECOLOGY L.Q. 233, 298-99 (1990); Eskridge & Frickey, *supra* note 12, at 327; Watson, *supra* note 12, at 211-12; see also Dwyer, *supra*, at 298 n.267 (listing intentionalist scholars). Dwyer lists the following as examples of articles by leading intentionalists: Daniel A. Farber & Philip P. Frickey, *Legislative Intent and Public Choice*, 74 VA. L. REV. 423, 424 (1988) (stating that "[i]n our view, public choice theory is consistent with a flexible, pragmatic approach to statutory construction, in which legislative intent plays an important role"); Richard A. Posner, *The Jurisprudence of Skepticism*, 86 MICH. L. REV. 827 (1988); Kenneth W. Starr, *Of Forests and Trees: Structuralism in the Interpretation of Statutes*, 56 GEO. WASH. L. REV. 703 (1988).

14. See ESKRIDGE, *supra* note 12, at 25-34 (describing and criticizing purposivism); Watson, *supra* note 12, at 212, 214-15; see also HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING & APPLICATION OF LAW 1378 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994) (discussing classic formulation of purposivist approach to statutory interpretation). For example, the Massachusetts

construe the statute in light of the assumption that the legislature was acting for the public good rather than for some narrow interest group.¹⁵

More recently, some scholars have proposed to go beyond intentionalism or purposivism. Some proponents of "dynamic" statutory interpretation urge judges to reformulate statutes, especially those concerned with civil rights, in light of "public values."¹⁶ Other scholars have proposed various modified versions of intentionalism or purposivism that emphasize the need for statutory interpreters to apply a "practical reason" that appropriately fits general or ambiguous language to specific contexts¹⁷ or takes into account "how statutory interpretation will improve or impair the performance of governmental institutions."¹⁸

Justice Holmes, an early advocate of a textualist approach to statutory interpretation, argued that courts should be concerned only with what

Supreme Judicial Court's Chief Justice Oliver Wendell Holmes, Jr. concluded that a statute requiring "written votes" allowed the use of voting machines which used no paper at all because the general purpose of the statute was to prevent oral or hand voting. See *In re House Bill No. 1291*, 60 N.E. 129, 130 (Mass. 1901); RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 267 (1990).

15. See HART & SACKS, *supra* note 14, at 1378 (noting how "reasonable [legislators] pursu[e] reasonable purposes reasonably"); Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 HARV. L. REV. 381, 407 (1993); Jonathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223, 250-56 (1986) (arguing that courts in interpreting statutes should not enforce "hidden-implicit" bargains favoring special interest groups, but rather should treat statutes as having public meaning); Watson, *supra* note 12, at 212, 215. But see POSNER, *supra* note 14, at 276-78 (arguing that it is difficult for courts to know whether legislature's purpose in enacting statute was to serve public interest or to reach compromise among interest groups).

16. See ESKRIDGE, *supra* note 12, at 148-51; Dwyer, *supra* note 13, at 299 n.273. See generally William N. Eskridge, Jr., *Public Values in Statutory Interpretation*, 137 U. PA. L. REV. 1007 (1989).

17. See Eskridge & Frickey, *supra* note 12, at 322 n.3 (explaining that "[b]y 'practical reason,' we mean an approach that eschews objectivist theories in favor of a mixture of inductive and deductive reasoning (similar to the practice of the common law), seeking contextual justification for the best legal answer among the potential alternatives"); Farber & Frickey, *supra* note 13, at 469 (proposing "public choice theory" as practical reasoning approach to understanding legislative intent that would allow judges "as many tools as possible to help them in the difficult task of applying statutes"). See generally Daniel A. Farber, *The Inevitability of Practical Reason: Statutes, Formalism, and the Rule of Law*, 45 VAND. L. REV. 533 (1992) (criticizing formalist approaches to statutory interpretation, including textualism, and arguing in favor of practical reason or Llewellyn's situation sense that examines problem of statutory interpretation in light of statutory context or purpose).

18. Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 466 (1989); see CASS R. SUNSTEIN, *AFTER THE RIGHTS REVOLUTION: RECONCEIVING THE REGULATORY STATE* 113-17 (1990).

Congress said and not what it meant.¹⁹ Since the late 1980s, Justices Scalia,²⁰ Thomas,²¹ and to a lesser extent, Kennedy²² have emphasized a "new textualist" approach to statutory interpretation.²³ Textualists generally oppose both intentionalist and purposivist theories of statutory construction because intentionalists and purposivists give the judiciary too great a role in deciding the meaning of a statute.²⁴ Instead, textualists argue that a statute's text alone provides the best evidence of the enacting legislature's original intent.²⁵ Textualists commonly oppose the use of extrinsic sources, such as legislative history, when judges interpret statutory text.²⁶ Rather,

19. See OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 41, 44 (Mark DeWolfe Howe ed., 1963); Oliver Wendell Holmes, *The Theory of Legal Interpretation*, 12 HARV. L. REV. 417, 419 (1899). On occasion, however, Justice Holmes went beyond his textualist theory to look at a statute's purpose. See, e.g., *In re House Bill No. 1291*, 60 N.E. 129, 130 (Mass. 1901) (finding that statute's requirement of "written votes" allowed use of voting machines which used no paper at all because general purpose of statute was to prevent oral or hand voting); POSNER, *supra* note 14, at 267.

20. See *INS v. Cardoza-Fonesca*, 480 U.S. 421, 452 (1987) (Scalia, J., concurring) (advocating textualist approach to statutory interpretation).

21. See *infra* notes 128-29 and accompanying text.

22. See *Public Citizen v. United States Dep't of Justice*, 491 U.S. 440, 472-78 (1989) (Kennedy, J., concurring). Although he was initially Justice Scalia's closest ally on the Court, in recent years Justice Kennedy has been willing on some occasions to join opinions relying upon legislative history. See, e.g., *Wisconsin Public Intervenor v. Mortier*, 510 U.S. 601, 610 n.4 (1991); Farber, *supra* note 17, at 546 n.76.

23. See ESKRIDGE, *supra* note 12, at 120 (contrasting "Kennedy's lenient textualism" with "Scalia's dogmatic textualism"); *id.* at 226-34 (discussing and criticizing Scalia's "new textualism"); Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969, 990-91 (1992) [hereinafter Merrill, *Deference*]; Thomas W. Merrill, Essay, *Textualism and the Future of the Chevron Doctrine*, 72 WASH. U.L.Q. 351, 351 (1994) [hereinafter Merrill, *Textualism*] (concluding that Justice Thomas appears to share same views about textualist interpretation as Justice Scalia). See generally William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621 (1990) (describing Justice Scalia's approach to statutory interpretation as "new textualism").

24. See Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1176 (1989). But see ESKRIDGE, *supra* note 12, at 232-33 (criticizing Scalia's argument that textualism imposes more reliable restraints on judicial discretion).

25. See SUNSTEIN, *supra* note 18, at 113 (describing textualist view that "the statutory language is the only legitimate basis for interpretation"); *id.* at 113-17 (criticizing textualist statutory interpretation); see also ESKRIDGE, *supra* note 12, at 34-47, 232-33 & *passim* (describing and criticizing textualism); Dwyer, *supra* note 13, at 298-99; Eskridge & Frickey, *supra* note 12, at 327; Watson, *supra* note 12, at 212-13.

26. Justice Scalia believes that the constitutionally mandated role of the federal courts is to interpret the actual statutory text approved by both chambers of Congress and presented to the President and, therefore, that courts should not look at legislative history written by committees or individual members of Congress. See, e.g., *West Va. Univ. Hosps., Inc.*

textualists argue that judges should focus on the statutory text itself, which they should read in light of the statute's structure, the canons of statutory construction, administrative norms underlying the statute's implementation, comparisons with the accepted interpretations of comparable statutory provisions, and the dictionary meanings most congruous with ordinary English usage and applicable law.²⁷ Many textualists believe that if a statute's text has a plain meaning, it is unnecessary or improper for judges to examine either its legislative history or the legislature's implicit purposes in enacting the measure.²⁸

Justice Scalia and other new textualists often recognize that the meaning of words depends upon their context,²⁹ but they seek whenever possible

v. Casey, 499 U.S. 83, 98-99 (1991); *Thompson v. Thompson*, 484 U.S. 174, 192 (1988) (Scalia, J., concurring); Muriel Morisey Spence, *The Sleeping Giant: Textualism as Power Struggle*, 67 S. CAL. L. REV. 585, 586 (1994); Nicholas S. Zeppos, *Legislative History and the Interpretation of Statutes: Toward a Fact-Finding Model of Statutory Interpretation*, 76 VA. L. REV. 1295, 1300-01 (1990) (discussing textualist argument that Presentment Clause of Constitution requires judges to look at statutory text only); *cf. INS v. Chadha*, 462 U.S. 919, 925-32 (1983) (finding one-house legislative veto violates requirements of bicameralism and presentment set forth in Article I). *But see* ESKRIDGE, *supra* note 12, at 230-32 (criticizing Scalia's bicameralism and presentment arguments); Arthur Stock, Note, *Justice Scalia's Use of Sources in Statutory and Constitutional Interpretation: How Congress Always Loses*, 1990 DUKE L.J. 160, 190-92 (criticizing Justice Scalia for not considering legislative history). Although Justice Scalia's academic writings consistently take the position that it is improper for judges to consider legislative history, at times his judicial opinions have been willing to consider the intent of Congress in enacting a text. *See* Carlos E. Gonzalez, *Reinterpreting Statutory Interpretation*, 74 N.C. L. REV. 585, 604 n.66 (1996).

27. *See Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 528 (1989) (Scalia, J., concurring) (arguing that judges should glean statutory meaning from interpretation "(1) most in accord with context and ordinary usage . . . and (2) most compatible with the surrounding body of law into which the provision must be integrated"); Spence, *supra* note 26, at 587.

28. *See INS v. Cardoza-Fonesca*, 480 U.S. 421, 452-53 (1987) (Scalia, J., concurring) (arguing that if statutory text has "plain meaning" it is unnecessary to examine statute's legislative history); *United States v. Missouri Pacific R.R. Co.*, 278 U.S. 269, 278 (1929) (providing classic statement of plain meaning rule); Bradley C. Karkkainen, "Plain Meaning": *Justice Scalia's Jurisprudence of Strict Statutory Construction*, 17 HARV. J.L. & PUB. POL'Y 401, 433-39 (1994) (arguing that Justice Scalia frequently uses plain meaning rule to exclude use of legislative history); Watson, *supra* note 12, at 213 n.53 (same). *But see United States v. American Trucking Ass'ns*, 310 U.S. 534, 543-44 (1940) (stating that courts may consult extrinsic materials such as legislative history even if statute's text has clear meaning after "superficial examination").

29. *See Smith v. United States*, 508 U.S. 223, 241 (1993) (Scalia, J., dissenting) (stating that "fundamental principle of statutory construction (and, indeed, of language itself) is that the meaning of a word cannot be determined in isolation, but must be drawn from

to use canons of construction or other interpretive principles to provide a fixed, "objective" meaning.³⁰ Although Scalia recognizes that Congress does not always write clear statutes, he contends that a textualist approach to statutory construction, including the adoption of clear interpretive rules, will lead Congress to be more diligent and precise in drafting statutes.³¹ Proponents of a plain meaning canon argue that Congress should write a statute so that the average English speaker could understand its meaning.³²

Textualists are usually less policy oriented than most proponents of purposivism, modified intentionalism, or dynamic statutory interpretation. If the text requires unpalatable results, a judge should normally enforce the textual commands and leave it to Congress to fix any mistakes.³³ Some textualists might refuse to enforce a text's commands if doing so would produce absurd results,³⁴ but they would be less likely to substitute alternative language for flawed statutory language because only Congress may enact corrective legislation.³⁵

Even critics of textualism acknowledge "that the statutory text is the most authoritative interpretive criterion."³⁶ To some extent, the revival of

the context in which it is used"); Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL'Y 61, 61 (1994); Merrill, *Textualism*, *supra* note 23, at 352.

30. See Karkkainen, *supra* note 28, at 403-04, 428-30, 445-49 (discussing and criticizing Justice Scalia's use of grammatical and structural canons to resolve apparent ambiguities in statutory language); Merrill, *Textualism*, *supra* note 23, at 352 (explaining that new textualists seek objective method to determine how ordinary reader of statute would have understood statute's words at time of enactment).

31. See *Finley v. United States*, 490 U.S. 545, 556 (1989) (Scalia, J.). But see ESKRIDGE, *supra* note 12, at 230-32 (criticizing Scalia's "democracy enhancing" argument).

32. See, e.g., Frederick Schauer, *Statutory Construction and the Coordinating Function of Plain Meaning*, 1990 SUP. CT. REV. 231, 250 (stating that plain meaning approach enables Schauer to "converse with an English speaker with whom I have nothing in common but our shared language").

33. See Carolyn McNiven, Comment, *Using Severability Clauses to Solve the Attainment Dilemma in Environmental Statutes*, 80 CAL. L. REV. 1255, 1302 (1992).

34. See *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 324 n.2 (1988) (Scalia, J., concurring in part and dissenting in part) ("[I]t is a venerable principle that a law will not be interpreted to produce absurd results.").

35. See McNiven, *supra* note 33, at 1302. But see ESKRIDGE, *supra* note 12, at 134 ("[B]y allowing an 'absurd result' exception to his dogmatic textualism, Scalia allowed for just as much indeterminacy, and just as much room for judicial play, as he accused Brennan of creating with his context-dependent approach to statutory meaning.").

36. Eskridge & Frickey, *supra* note 12, at 354; see also Frickey, *supra* note 15, at 408 n.119 (observing that while many judges are not textualists, all judges are "presumptive

textualism during the 1980s was a healthy reaction to the misuse of legislative history by many judges.³⁷ Nevertheless, a majority of the Supreme Court has remained open to nontextualist interpretation.³⁸

Numerous commentators have attacked the textualist approach to statutory construction and argued that judges should examine extrinsic sources, such as legislative history, as a means to reconstruct congressional intent in enacting a statutory provision, especially if the textual terms are ambiguous.³⁹ In many cases, statutes do not have a single meaning based on dictionary definitions or ordinary English usage.⁴⁰ In addition, changes in social circumstances may make it impractical or unwise to implement a statute pre-

textualists" who "follow relatively clear statutory language absent some strong reason to deviate from it"); Watson, *supra* note 12, at 243 n.191.

37. See *ACLU v. FCC*, 823 F.2d 1554, 1583 (D.C. Cir. 1987) (Starr, J., dissenting) ("We in the judiciary have become shamelessly profligate and unthinking in our use of legislative history. . . ."); Richard J. Pierce, Jr., *The Supreme Court's New Hypertextualism: An Invitation to Cacophony and Incoherence in the Administrative State*, 95 COLUM. L. REV. 749, 751 (1995) (arguing that revival of textualism during 1980s was to some extent healthy development counteracting improper use of legislative history); Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 197, 214 (1983) (discussing ability of judges to use selective portions of legislative history). See generally Jorge L. Carro & Andrew R. Brann, *Use of Legislative Histories by the United States Supreme Court: A Statistical Analysis*, 9 J. LEGIS. 282 (1982) (presenting statistical study showing Supreme Court increasingly used legislative history from 1938 to 1979 and that increase in usage was especially rapid after 1970).

38. See, e.g., *West Va. Univ. Hosp., Inc. v. Casey*, 499 U.S. 83, 102 (1991) (Marshall, J., dissenting) (arguing that "the Court uses the implements of literalism to wound, rather than to minister to, congressional intent"); *id.* at 112-16 (Stevens, J., dissenting) (arguing that Congress is more likely to override textualist interpretations of statutes and that majority's textualist interpretation is less consistent with Congress's intent than dissent's less verbatim reading); see also Karkkainen, *supra* note 28, at 401 ("Only Justices Anthony Kennedy and Clarence Thomas can be called adherents of Justice Scalia's plain meaning approach.").

39. See Abner J. Mikva, *A Reply to Judge Starr's Observations*, 1987 DUKE L.J. 380, 386; Patricia M. Wald, *The Sizzling Sleeper: The Use of Legislative History in Construing Statutes in the 1988-89 Term of the United States Supreme Court*, 39 AM. U. L. REV. 277, 309 (1990).

40. See ESKRIDGE, *supra* note 12, at 38-47 (criticizing textualist approaches to statutory interpretation on grounds that in difficult cases there are always textual ambiguities); LAWRENCE M. SOLAN, *THE LANGUAGE OF JUDGES* 113-17 (1993) (showing how ineptly judges use statutory language to define meaning of statute and criticizing Justice Scalia in particular); Stephen F. Ross, *The Limited Relevance of Plain Meaning*, 73 WASH. U. L.Q. 1057, 1064-65 (1995) (arguing that English language alone cannot supply definitive meaning). See generally Clark D. Cunningham et al., *Plain Meaning and Hard Cases*, 103 YALE L.J. 1561 (1994) (arguing that words often have multiple meanings and therefore attempts to define single plain language interpretation are flawed).

cisely as Congress wrote it.⁴¹ Furthermore, although a textualist approach is supposed to increase the fidelity of courts to congressional intent, textualist statutory interpretation may actually decrease legislative power by reading the plain language of a statute too narrowly in a way that thwarts the intent of most members of Congress.⁴² Although Congress overrides only a small number of judicial decisions each year, there is some empirical evidence to support Justice Stevens's view that textualist decisions by the Supreme Court are disproportionately rejected by Congress.⁴³

III. *Chevron and Textualism*

Although most discussions of statutory interpretation focus on the role of the judiciary, an executive agency is almost always the initial interpreter of an environmental statute. Usually, the crucial question is whether a court should accept the agency's interpretation. The Supreme Court's *Chevron* decision emphasized judicial deference to agency interpretations. Textualists, however, tend to be less deferential to agency interpretations, especially those interpretations that broadly construe the authority of environmental agencies to regulate private property.

A. *The Chevron Decision*

In 1984, the Supreme Court decided the landmark case of *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,⁴⁴ which fundamentally changed the law regarding when a court should defer to an agency's construction of a statute.⁴⁵ During the beginning of the Reagan administra-

41. See ESKRIDGE, *supra* note 12, at 125-28 (discussing hypothetical involving directive to "fetch five pounds of soup meat every Monday" and using hypothetical to illustrate need to consider changed circumstances).

42. See, e.g., *West Va. Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 102 (1991) (Marshall, J., dissenting) (arguing that "the Court uses the implements of literalism to wound, rather than to minister to, congressional intent"); *id.* at 112-16 (Stevens, J., dissenting) (arguing that Congress is more likely to override textualist interpretations of statutes and that majority's textualist interpretation is less consistent with Congress's intent than dissent's less verbatim reading); Michael Herz, *Judicial Textualism Meets Congressional Micromanagement: A Potential Collision in Clean Air Act Interpretation*, 16 HARV. ENVTL. L. REV. 175, 204 (1992); Spence, *supra* note 26, at 588 & *passim*; Stock, *supra* note 26.

43. See *infra* notes 222-26 and accompanying text.

44. 467 U.S. 837 (1984).

45. See Robert Glicksman & Christopher H. Schroeder, *EPA and the Courts: Twenty Years of Law and Politics*, 54 LAW & CONTEMP. PROBS., Autumn 1991, at 249, 286-92 (arguing that although Court may not have intended to do so, *Chevron* revolutionized issue of when courts defer to agencies); Merrill, *Deference*, *supra* note 23, at 975-76 (same);

tion, the Environmental Protection Agency (EPA) reversed a policy adopted during the Carter administration and issued a revised rule interpreting the term "stationary source" in the Clean Air Act to allow operators of polluting facilities to treat all emitting devices as if they were under a single "bubble."⁴⁶ The Supreme Court chastised the court of appeals for failing to defer to the EPA's interpretation of the statute despite the fact that the EPA's definition of stationary source arguably represented a "sharp break with prior interpretations of the Act."⁴⁷

Chevron established a two-part test for determining when courts should defer to an agency's construction of a statute. First, a court must examine "whether Congress has directly spoken to the precise question at issue."⁴⁸ If Congress has so spoken to the issue, then the court must effectuate that intent regardless of the agency's interpretation.⁴⁹ If the statute is ambiguous, however, the court in the second level of analysis must defer to the agency's interpretation if it is "permissible," or in other words, if it is reasonable.⁵⁰ The Supreme Court in *Chevron* concluded that courts ought to defer to reasonable agency interpretations of silent or ambiguous statutes if Congress has expressly or *implicitly* delegated policymaking or law-interpreting power to the agency.⁵¹ The Court did not provide a clear explanation or formula

Mark Seidenfeld, *A Syncopated Chevron: Emphasizing Reasoned Decisionmaking in Reviewing Agency Interpretations of Statutes*, 73 TEX. L. REV. 83, 94-99 (1994) (same); Kenneth W. Starr, *Judicial Review in the Post-Chevron Era*, 3 YALE J. ON REG. 283, 284 (1986) (same).

46. See *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 840 (1984) (stating that revised rule allowed "bubbles" even if source was located in area that did not attain national ambient air quality standards).

47. *Id.* at 862; see Merrill, *Deference*, *supra* note 23, at 977; Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 517 (noting that under *Chevron*, "there is no longer any justification for giving 'special' deference to 'long-standing and consistent' agency interpretations of law").

48. *Chevron*, 467 U.S. at 842.

49. See *id.* at 843 n.9 ("The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent.").

50. See *id.* at 840, 843-45; Starr, *supra* note 45, at 288 (noting that *Chevron's* inquiry whether agency interpretation is "permissible" is equivalent to whether agency action is reasonable); Keith Werhan, *Delegalizing Administrative Law*, 1996 U. ILL. L. REV. 423, 457 (same).

51. See *Chevron*, 467 U.S. at 843-44. If a court finds "an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation," the court must accept the regulation unless it is "arbitrary, capricious, or manifestly contrary to the statute." *Id.* On the other hand, if the legislative delegation is "implicit rather than explicit," the "court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency." *Id.* at 844; see also

for what constitutes an implicit delegation, but the close of Justice Stevens's opinion suggested that a gap in congressional intent or statutory language might be enough in some cases to create such an implicit delegation.⁵²

Justice Stevens suggested that agencies are usually better equipped than judges at filling in gaps in complex statutory schemes because agencies are closer to the political branches and possess greater expertise. The Court observed that "considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer" and further stated that "an agency to which Congress has delegated policymaking responsibilities may, within the limits of that discretion, properly rely upon the incumbent administration's views of wise policy to inform its judgments."⁵³ The *Chevron* Court also mentioned the EPA's expertise as a reason for deference.⁵⁴

B. *The Chevron Era of Judicial Deference?*

Many commentators initially believed that the *Chevron* decision was revolutionary and established a new framework for administrative law.⁵⁵ Before *Chevron*, courts were inconsistent about the degree of deference due to administrative statutory interpretations,⁵⁶ but some decisions stated that there was a presumption that courts ought to exercise independent judgment

Robert A. Anthony, *Which Agency Interpretations Should Bind Citizens and the Courts?*, 7 YALE J. ON REG. 1, 25 (1990) (discussing *Chevron's* distinction between explicit and implicit delegations).

52. See *Chevron*, 467 U.S. at 865-66; Anthony, *supra* note 51, at 32-35 (discussing what constitutes implicit delegation under *Chevron*).

53. *Chevron*, 467 U.S. at 844, 865.

54. See *id.* at 865; Merrill, *Deference*, *supra* note 23, at 977 n.39.

55. See Merrill, *Deference*, *supra* note 23, at 969-70 ("Indeed, read for all it is worth, the decision would make administrative actors the primary interpreters of federal statutes and relegate courts to the largely inert role of enforcing unambiguous statutory terms."); Cass R. Sunstein, *Law and Administration After Chevron*, 90 COLUM. L. REV. 2071, 2075 (1990) ("*Chevron* has become a kind of *Marbury*, or counter-*Marbury*, for the administrative state."); Panel Discussion, *Judicial Review of Administrative Action in a Conservative Era*, 39 ADMIN. L. REV. 353, 367 (1987) (documenting Professor Sunstein's discussion that contrasted "strong" versus "weak" readings of *Chevron*).

56. See RICHARD J. PIERCE, JR. ET AL., ADMINISTRATIVE LAW AND PROCESS § 7.4, at 348-49 (2d ed. 1992) (noting that prior to *Chevron* decision in 1984, "the Supreme Court maintained two inconsistent lines of cases that purported to instruct courts concerning the proper judicial role in reviewing agency interpretations of agency-administered statutes"); Seidenfeld, *supra* note 45, at 93-94 (suggesting that before *Chevron*, courts were inconsistent about amount of deference they paid to agency statutory interpretations; some courts were quite deferential, others paid little heed to agency interpretations).

about the meaning of statutes, and those decisions also stated that deference to executive interpretations required special reasons.⁵⁷ After *Chevron*, a court apparently may exercise independent judgment only if Congress has spoken to the precise question at hand, and deference to executive interpretations of statutes appears to be the norm.⁵⁸ *Chevron* justified this shift in presumptions by invoking democratic theory.⁵⁹ Judges "are not part of either political branch," and they "have no constituency."⁶⁰ On the other hand, although agencies are "not directly accountable to the people," they are subject to the general oversight and supervision of the President, who is a nationally elected public official.⁶¹ In addition, *Chevron* appeared to presume that whenever Congress delegated authority to administer a statute, it also delegated authority to the agency to fill in any gaps present in the statute, rather than leaving that role to the judiciary.⁶² Thus, although the traditional approach to administrative law viewed the interpretation of ambiguous statutes as a question of law,⁶³ *Chevron* transformed such interpretations into a question of an agency "policy choice."⁶⁴

Commentators disagreed about the extent to which *Chevron* required judicial deference to an agency's statutory interpretations.⁶⁵ Commentators

57. See Merrill, *Deference*, *supra* note 23, at 977. See generally *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944) (establishing doctrine of cautious deference with regard to agency statutory interpretations).

58. See Merrill, *Deference*, *supra* note 23, at 977.

59. See *id.* at 978; Richard J. Pierce, Jr., *The Role of the Judiciary in Implementing an Agency Theory of Government*, 64 N.Y.U. L. REV. 1239, 1239 n.1 (1989) (claiming that *Chevron* provides best example of Supreme Court's increasing willingness to construct public law doctrines designed to maximize power of people to control their agents). But see ESKRIDGE, *supra* note 12, at 290 (arguing that *Chevron* wrongly relies upon democratic theory to justify judicial deference to agencies; instead, courts should try to enforce intent of Congress, "whose members are elected by and accountable directly to the people").

60. See *Chevron*, 467 U.S. at 865-66.

61. See *id.*; Merrill, *Deference*, *supra* note 23, at 978 n.44 ("*Chevron*'s democratic theory thesis appears to presuppose a unitary executive, i.e., an interpretation of separation of powers that would place all entities engaged in the execution of the law — including the so-called independent regulatory agencies — under Presidential control.>").

62. See *Chevron*, 467 U.S. at 843-44 (finding that Congress sometimes implicitly delegates to agency authority to fill gap in statute); Merrill, *Deference*, *supra* note 23, at 979 ("*Chevron* in effect adopted a fiction that assimilated all cases involving statutory ambiguities or gaps into the express delegation or 'legislative rule' model."); Scalia, *supra* note 47, at 516-17 (suggesting that *Chevron* presumes that ambiguities entail delegation of interpretative power).

63. See 5 U.S.C. § 706 (1994); Werhan, *supra* note 50, at 457.

64. See *Chevron*, 467 U.S. at 844-45; Werhan, *supra* note 50, at 457.

65. Compare ESKRIDGE, *supra* note 12, at 162-63 ("Stevens's opinion in *Chevron* is

have debated about whether *Chevron* announces a new paradigm in administrative law in which agencies would have the leading role in interpreting statutes and formulating policy with limited judicial supervision,⁶⁶ or whether *Chevron* merely establishes voluntary or flexible prudential limitations.⁶⁷

C. Empirical Evidence

Although many commentators initially assumed that *Chevron* would substantially increase the likelihood that courts would affirm agency decisions,⁶⁸ significant evidence reveals that the rate of affirmance of agencies in the Supreme Court⁶⁹ and circuit courts⁷⁰ is approximately the same or even

a legal process exemplar. . . . *Chevron* delivers the punch line for Hart and Sack's purpose-oriented approach to statutory interpretation: especially in complicated technical regulatory statutes, Congress cannot anticipate most problems of application.", with SUNSTEIN, *supra* note 18, at 143, 224 (arguing that *Chevron* undermines traditional role of courts as ultimate interpreter of statutes and allows agencies too much discretion to define scope of their own authority).

66. See Seidenfeld, *supra* note 45, at 96-97 (arguing that strong reading of *Chevron* "essentially transfers the primary responsibility for interpreting regulatory statutes from the courts to the agency authorized to administer the statute"). See generally Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452 (1989) (asserting that *Chevron* implicitly redefines separation of powers); Douglas W. Kmiec, *Judicial Deference to Executive Agencies and the Decline of the Nondelegation Doctrine*, 2 ADMIN. L.J. 269 (1988) (arguing that *Chevron* is logical corollary to courts' acceptance of extremely liberal delegations of authority to executive agencies despite nondelegation doctrine).

67. See Seidenfeld, *supra* note 45, at 94-99 (stating that while courts have disagreed to some extent about how to read *Chevron*, most "lower courts have applied its dictates with unusual consistency and often with an almost alarming rigor"). See generally Maureen B. Callahan, *Must Federal Courts Defer to Agency Interpretations of Statutes?: A New Doctrinal Basis for Chevron*, U.S.A. v. Natural Resources Defense Council, 1991 WIS. L. REV. 1275 (arguing that *Chevron* is best interpreted as voluntary, prudential limitation on Supreme Court's review of agencies and, therefore, should be applied flexibly, on case-by-case basis); Sunstein, *supra* note 55 (arguing that *Chevron* should be re-interpreted so that reviewing court may reject reasonable agency interpretations if court believes agency interpretation is wrong).

68. See *supra* notes 45, 55, and accompanying text.

69. See William N. Eskridge, Jr. & Philip P. Frickey, *Forward: Law as Equilibrium*, 108 HARV. L. REV. 26, 72 (1994) (stating that Supreme Court affirmed only 62% of agency civil cases in 1993 term); Merrill, *Deference*, *supra* note 23, at 984 (stating that Supreme Court affirmed agency decisions about 70% of time for five years following *Chevron* as compared to 75% for three years prior to that case).

70. See Linda R. Cohen & Matthew L. Spitzer, *Solving the Chevron Puzzle*, LAW & CONTEMP. PROBS., Spring 1994, at 65, 103 (concluding that affirmance rate in federal appellate courts dropped from mid-70% range in 1983-1987 to mid-60% range in 1988-1990); Peter H. Schuck & E. Donald Elliott, *To the Chevron Station: An Empirical Study*

lower than before *Chevron* was decided in 1984.⁷¹ Furthermore, the Supreme Court itself has continued to apply the *Chevron* framework in only about one-third of the cases presenting a deference question.⁷² As a result of this empirical evidence, a growing number of commentators have questioned whether *Chevron* has resulted in a significant increase in judicial deference to agency interpretations.⁷³ Even some lower court decisions have cast doubt on whether judges consistently employ *Chevron*.⁷⁴ Some commentators argue that *Chevron* has not produced greater judicial deference to

of *Federal Administrative Law*, 1990 DUKE L.J. 984, 1038 (finding that rate of affirmance in federal appellate courts was 75.5% three years after *Chevron* as compared to 70.9% for year preceding decision and concluding that *Chevron* significantly reduced rate at which federal courts of appeals remanded cases based upon rejection of administrative agency's interpretation of own statutes; however, effect had weakened somewhat by 1988).

71. See Sidney A. Shapiro & Richard E. Levy, *Judicial Incentives and Indeterminacy in Substantive Review of Administrative Decisions*, 44 DUKE L.J. 1051, 1070-71 (1995); *supra* notes 69-70 and accompanying text. There are significant limitations in all evidence about the impact of *Chevron* because scholars disagree about how to measure when courts affirm agency decisions, and there is the fundamental problem of comparing apples to oranges because post-*Chevron* decisions do not necessarily pose the same issues as those decided in *Chevron*. See Cohen & Spitzer, *supra* note 70, at 91-92 ("Although Merrill's data were suggestive, they did not support his conclusions. Because the cases reviewed by the Supreme Court change over time, the overall Supreme Court uphold rates reveal little about changes in the Court's preferences for agency discretion and judicial deference.").

72. See Merrill, *Deference*, *supra* note 23, at 982; see also Merrill, *Textualism*, *supra* note 23, at 361-62 (arguing that Supreme Court largely ignored *Chevron* framework during 1992 term); Shapiro & Levy, *supra* note 71, at 1071 (citing Merrill's work). But see Cohen & Spitzer, *supra* note 70, at 91-92 (questioning Merrill's data).

73. See Paul L. Caron, *Tax Myopia Meets Tax Hyperopia: The Unproven Case of Increased Judicial Deference to Revenue Rulings*, 57 OHIO ST. L.J. 637, 658 n.123, 657-60 (1996) (citing sources); Merrill, *Textualism*, *supra* note 23, at 361-62 (finding that *Chevron* appeared to be playing "an increasingly peripheral role in the decisions" of Supreme Court during its 1991 and 1992 terms and that *Chevron* was employed as "just another pair of pliers in the statutory interpretation tool chest"). But see Pierce, *supra* note 37, at 749-50 ("The *Chevron* test has largely realized its potential at the circuit court level. Appellate courts routinely accord deference to agency constructions of ambiguous language in agency-administered statutes."); Seidenfeld, *supra* note 45, at 84 n.5 ("Although [Merrill's *Deference* article, *supra* note 23] has led some commentators to question whether *Chevron* represents the revolution in administrative law that many have proclaimed, the lower courts' consistent application probably has a greater day-to-day impact on the administrative operation of the state." (citation omitted)).

74. See *Mississippi Poultry Ass'n v. Madigan*, 31 F.3d 293, 299 n.34 (5th Cir. 1994) (observing that "*Chevron* is not quite the 'agency deference' case that it is commonly thought to be by many of its supporters (and detractors)"); *Ohio State Univ. v. Secretary, United States Dep't of Health & Human Servs.*, 996 F.2d 122, 123-24 n.1 (6th Cir. 1993); *Combee v. Brown*, 5 Vet. App. 248, 257-58 n.22 (1993) (Steinberg, J., dissenting); Caron, *supra* note 73, at 659-60.

agency determinations because the decision's framework is inherently indeterminate and manipulable.⁷⁵ As a result, judges can use *Chevron* to justify decisions based on their ideological preferences.⁷⁶

If courts, including the Supreme Court itself, have not always followed the deferential approach seemingly set forth in *Chevron*, it is important to understand why and when courts are unlikely to be deferential. One important answer is that courts are concerned with fairness in individual cases. Whatever the Supreme Court might announce as its test for judicial deference to an agency's permissible interpretation of ambiguous statutes, lower court judges are unlikely to defer to an agency interpretation of a statute that they strongly believe is wrong.⁷⁷ Although a judge's perception of fairness is undoubtedly important in determining the outcome in an individual case, that factor alone does not appear to be enough to explain the unexpectedly limited impact of the *Chevron* decision.

Some commentators argue that a conservative Supreme Court in *Chevron* sought to force more liberal lower court judges to defer to the conservative Reagan agenda; however, during the Bush presidency, the Court encouraged an increasingly conservative judiciary, dominated by Reagan and Nixon appointees, to reverse politically moderate agency policies.⁷⁸ In 1992, the election of President Clinton, a Democrat, increased the incentive for conservative judges to transfer power from agencies to courts.⁷⁹ During the late 1980s and early 1990s, it is notable that the Supreme Court increasingly used a textualist approach to statutory interpretation to justify such a shift in power from agencies to courts.⁸⁰ Undoubtedly, textualist judges like Justice

75. See Caron, *supra* note 73, at 658-59; Shapiro & Levy, *supra* note 71, at 1069-72.

76. See Caron, *supra* note 73, at 659; Richard J. Pierce, Jr., *Legislative Reform of Judicial Review of Agency Actions*, 44 DUKE L.J. 1110, 1110-11 (1995); Shapiro & Levy, *supra* note 71, at 1071-72; see also Zeppos, *supra* note 26, at 1333 n.179 ("[T]he effect of *Chevron* may have been more in the area of judicial rhetoric than actual judicial decisionmaking.").

77. Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 379-81 (1986).

78. See Cohen & Spitzer, *supra* note 70, at 68 & *passim*; see also Pierce, *supra* note 37, at 779-80 (discussing Cohen's and Spitzer's hypothesis).

79. See Cohen & Spitzer, *supra* note 70, at 108-09 (predicting that conservative Supreme Court Justices would tend to affirm decisions that give less deference to administrative agencies); Eskridge & Frickey, *supra* note 69, at 76 (discussing how 1993 Supreme Court term provides "some evidence" to support Cohen's and Spitzer's prediction); Pierce, *supra* note 37, at 780 (discussing Cohen's and Spitzer's prediction about judicial review of Clinton administration decisions).

80. See Merrill, *Deference*, *supra* note 23, at 970 & *passim*; Merrill, *Textualism*, *supra* note 23, at 353-55, 372-73; Pierce, *supra* note 37, at 750-52; *infra* notes 92-93 and

Scalia are motivated by more than purely political considerations, and their commitment to textualist theory sometimes leads them to results at odds with their political philosophies — but at least during the past several years, textualist statutory interpretation has often served to weaken the powers of administrative agencies.⁸¹

D. Textualism and Chevron

The *Chevron* framework raises questions about how courts should interpret statutes and when courts should defer to an agency's initial reading of the relevant statute.⁸² Since the late 1980s, the Supreme Court has increasingly applied *Chevron* in light of a textualist approach to its reviewing role⁸³ and has often used textualism to reject agency statutory interpretations.⁸⁴ In theory, a textualist approach can result in either greater or less deference to agency views, depending on whether the court finds that the text is clear or ambiguous.⁸⁵ In practice, however, most textualist judges are inclined to believe that they can find the proper interpretation of a statute in its text without any assistance from an administrative agency.⁸⁶ Judges

accompanying text.

81. See *infra* notes 83-93 and accompanying text.

82. Anthony, *supra* note 51, at 18-25 (finding that court's approach to statutory interpretation affects how it applies *Chevron* test); Merrill, *Deference*, *supra* note 23, at 990 (same); Pierce, *supra* note 37, at 750-52, 777-79 & *passim* (same); Seidenfeld, *supra* note 45, at 95-96 (observing that judges are much more likely to reverse agency interpretation at *Chevron*'s first step than its second, but proposing more stringent "reasonableness" review at second step).

83. See *National R.R. Passenger Corp. v. Boston & Maine Corp.*, 503 U.S. 407, 417-18 (1992) (Kennedy, J.) ("If the agency interpretation is not in conflict with the plain language of the statute, deference is due. In ascertaining whether the agency's interpretation is a permissible construction of the language, a court must look to the structure and language of the statute as a whole. If the text is ambiguous and so open to interpretation in some respects, a degree of deference is granted to the agency, though a reviewing court need not accept an interpretation which is unreasonable.") (citations omitted); Werhan, *supra* note 50, at 459.

84. See Merrill, *Deference*, *supra* note 23, at 970 & *passim*; Merrill, *Textualism*, *supra* note 23, at 353-55, 372-73; Pierce, *supra* note 37, at 750-52.

85. Compare Merrill, *Deference*, *supra* note 23, at 991 (arguing textualism undermines *Chevron* framework by making judges less deferential to agency statutory interpretations), and Merrill, *Textualism*, *supra* note 23, at 353-54 (same), with Werhan, *supra* note 50, at 459-60 ("The textualist understanding of *Chevron* review, however, is consistent with the delegatization impulse of the decision.").

86. See *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 259-61 (1991) (Scalia, J., concurring) (rejecting agency interpretation of statute as not reasonable); *INS v. Cardoza-Fonesca*, 480 U.S. 421, 452 (1987) (Scalia, J., concurring in the judgment); Herz, *supra*

applying a textualist approach to statutory construction often believe they can usually find the proper meaning of statutes through judge-made canons of construction.⁸⁷ Judges applying a textualist approach may believe that questions of interpretation are like solving a puzzle and that they are clever enough to solve most of these puzzles without help from an agency.⁸⁸

In principle, most proponents of textualism are inclined to defer to an agency's statutory interpretation because they usually prefer that judges not overrule policies made by the executive branch.⁸⁹ Justice Scalia, however, is more likely to defer to an agency interpretation that construes a statute narrowly and to find that a broad agency interpretation conflicts with the statute's plain meaning and, therefore, is not entitled to *Chevron* deference.⁹⁰ A partial explanation of this tendency may stem from Justice Scalia's view that a regulated firm claiming an injury from a regulation that exceeds an agency's statutory authority is more likely to meet standing criteria than an environmental group complaining that its individual members are being harmed by an agency's underenforcement of a statutory mandate.⁹¹

note 42, at 198-99; Karkkainen, *supra* note 28, at 460; Merrill, *Deference*, *supra* note 23, at 980-85 (noting that Supreme Court's use of textualist approach to statutory interpretation resulted in less *Chevron* deference during 1988-1990 terms); Merrill, *Textualism*, *supra* note 23, at 355-63 (noting that Supreme Court's use of textualist approach to statutory interpretation resulted in less *Chevron* deference during 1992 term); Pierce, *supra* note 37, at 754-63 (arguing that Supreme Court during 1993-1994 term applied "hypertextualist" approach that led to insufficient application of *Chevron* deference principle).

87. See Merrill, *Textualism*, *supra* note 23, at 353, 372; Scalia, *supra* note 47, at 521; *supra* notes 27, 30, and accompanying text; *infra* notes 173-76 and accompanying text.

88. See Merrill, *Textualism*, *supra* note 23, at 372; Pierce, *supra* note 37, at 779. On the other hand, critics of textualism have argued that judges are often inept at understanding the meaning of words. See ESKRIDGE, *supra* note 12, at 134 (arguing textualism sometimes reduces statutory interpretation "to a linguistic shell game played by amateurs"); Solan, *supra* note 40, at 113-17 (showing how ineptly judges use statutory language to define meaning of statute and criticizing Justice Scalia in particular).

89. See Herz, *supra* note 42, at 198-99.

90. See Karkkainen, *supra* note 28, at 461.

91. See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 562-68 (1992) (Scalia, J.) (holding that environmental group whose members only occasionally view endangered species in foreign countries cannot show concrete "injury in fact" and, therefore, lack standing to challenge agency action under Endangered Species Act); Karkkainen, *supra* note 28, at 462-64; Gene R. Nichol, Jr., *Justice Scalia, Standing and Public Law Litigation*, 42 DUKE L.J. 1141, 1167-68 (1993) (contending that Justice Scalia's approach to standing "threatens to constitutionalize an unbalanced scheme of regulatory review" in which "courts can protect the interests of regulated entities" while "regulatory beneficiaries" are left to the political process"). See generally Cass R. Sunstein, *What's Standing After Lujan? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163 (1992) (arguing Justice Scalia's approach to standing in *Lujan* favors private economic interests and disfavors mere "beneficiaries" of

There is evidence that the rise of Justice Scalia's textualist approach to statutory interpretation coincided with a decline in the Court's willingness to apply the *Chevron* deference model. During the 1988, 1989, and 1990 terms, just as Justice Scalia's textualist approach began to influence the Court strongly, the Supreme Court was less likely to defer to agency statutory constructions than it had been during the 1985 and 1986 terms.⁹² From 1990 to 1994, the Supreme Court often used a textualist approach to find that a statute had a plain meaning and, therefore, that an agency's interpretation of the statute was not entitled to *Chevron* deference.⁹³

IV. Why Textualists Miss the Policy Dilemmas of Environmental Law

This Part provides counterexamples that show it is not clear that a textualist approach will necessarily lead to more victories for environmental plaintiffs. Additionally, Part IV makes the broader argument that textualist judges often disregard the delicate policy balances struck by agencies between cost and safety. Part IV.A shows that Congress often enacts environmental statutes with broad aspirational goals,⁹⁴ but also frequently includes exemptions contained in the text's implementing provisions. Textualism does not provide the best method to resolve the conflict in environmental statutes between aspirational and limiting language. Rather, environmental agencies are better suited to strike this balance. Part IV.B explains how a textualist approach can be used to thwart environmental goals by reading the authority of environmental agencies narrowly. Part IV.C illustrates why the textualist method is sufficiently indeterminate that a textualist judge can decide many cases either for or against environmental advocacy groups and maintains that agencies are better situated to strike a balance among competing statutory goals.

public interest statutes).

92. See Merrill, *Deference*, *supra* note 23, at 990-93. *But see* Cohen & Spitzer, *supra* note 70, at 91-92 ("Although Merrill's data were suggestive, they did not support his conclusions. Because the cases reviewed by the Supreme Court change over time, the overall Supreme Court uphold rates reveal little about changes in the Court's preferences for agency discretion and judicial deference.").

93. See Merrill, *Textualism*, *supra* note 23, at 355-63, 372-73 & *passim* (noting that Supreme Court's use of textualist approach to statutory interpretation resulted in less *Chevron* deference during 1992 term); Pierce, *supra* note 37, at 750-52, 762-63 & *passim* (arguing that Supreme Court during 1993-1994 term applied hypertextualist approach that led to insufficient application of *Chevron* deference principle).

94. See Dwyer, *supra* note 13, at 236-50 (analyzing aspirational language in Section 112 of Clean Air Act); Henderson & Pearson, *supra* note 6, at 1429-70 (discussing frequent use of aspirational language in environmental statutes and problems often caused by such language).

A. The Nature of Environmental Statutes

Congress often enacts environmental statutes by overwhelming majorities and with ambitious goals,⁹⁵ but placates economic interests by placing more restrictive language or exceptions in the legislation's implementing provisions or legislative history.⁹⁶ Congress frequently passes environmental bills during periods of broad public enthusiasm, so-called "republican moments."⁹⁷ Since the late 1960s, public support for environmentalism has varied somewhat, but has remained relatively strong.⁹⁸ Environmental advocacy groups have enjoyed a fair amount of success at influencing legislation.⁹⁹ Yet, most of the political controversy surrounding the enactment of environmental law stems from the redistributive impact of such statutes,

95. Most major federal environmental statutes begin with a statement of congressional findings about why the measure is needed or a declaration of its rationales, purposes, or goals. *See, e.g.*, Toxic Substances Control Act, 15 U.S.C. § 2601 (1994); Endangered Species Act, 16 U.S.C. § 1531 (1994); Clean Water Act, 33 U.S.C. § 1251 (1994); Solid Waste Disposal Act, 42 U.S.C. §§ 6901-6902 (1994); Clean Air Act, 42 U.S.C. § 7401 (1994); Watson, *supra* note 12, at 202 n.10 (citing additional statutes). Neither the Comprehensive Environmental Response and Liability Act, 42 U.S.C. § 9601 (1994), nor the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. §§ 136-136y, contain a statement of findings or purpose. Watson, *supra* note 12, at 202 n.10.

96. *See* Richard J. Lazarus, *Meeting the Demands of Integration in the Evolution of Environmental Law: Reforming Environmental Criminal Law*, 83 GEO. L.J. 2407, 2427 (1995); Watson, *supra* note 12, at 250-51.

97. *See* Daniel A. Farber, *Politics and Procedure in Environmental Law*, 8 J.L. ECON. & ORG. 59, 66-67 (1992) (arguing that passage of many environmental statutes can be attributed to "republican moments" of popular enthusiasm rather than to interest group politics or actions of political elites); Donald T. Hornstein, *Lessons from Federal Pesticide Regulation on the Paradigms and Politics of Environmental Law Reform*, 10 YALE J. ON REG. 369, 418-19, 422-27 (1993) (discussing "republican moment" explanation of pesticide regulation).

98. *See* Farber, *supra* note 97, at 74-75. *See generally* Riley E. Dunlap, *Public Opinion and Environmental Policy*, in ENVIRONMENTAL POLITICS AND POLICY 63-114 (James P. Lester ed., 2d ed. 1995) (discussing public opinion data on public support for environmental programs). *But see* Richard J. Lazarus, *The Tragedy of Distrust in the Implementation of Federal Environmental Law*, 54 LAW & CONTEMP. PROBS., Autumn 1991, at 314, 342-45 (arguing that there is persistent public schizophrenia between public aspirations for environmental quality and public's unwillingness to take steps necessary to achieve such quality).

99. *See* Farber, *supra* note 97, at 60 ("Environmental groups manage to organize quite effectively."); *id.* at 70-72 (stating that environmental groups play important role in legislative process by providing credible information that politicians can use); *id.* at 73-75 (discussing formation and growth of environmental groups); *see also* Helen M. Ingram et al., *Interest Groups and Environmental Policy*, in ENVIRONMENTAL POLITICS AND POLICY, *supra* note 98, at 115-45.

which create winners and losers among various industries and individual firms within a particular industry.¹⁰⁰ This subpart will focus on compromise language found in an environmental statute's text, and Part V will address such limitations in its legislative history.

Because environmental statutes often contain subtle political compromises buried amidst bold aspirational language, courts must be sensitive to the restrictive implementation provisions in the text and to the views of the environmental agency in charge of implementing the statute. For instance, in the purposes section of the Federal Water Pollution Control Act (Clean Water Act), Congress declares that "[t]he objective of this chapter is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."¹⁰¹ Some courts have relied on this purposes section to construe other provisions of the Clean Water Act.¹⁰² For example, in *National Wildlife Federation v. Gorsuch*,¹⁰³ the district court relied on this broad aspirational language in interpreting other sections of the Act, declaring that Congress intended the statute's permit program to be comprehensive and to cover any situation encompassed by the statutory language, whether or not the particular application was contemplated by Congress at the time of enactment.¹⁰⁴ The term "discharge of a pollutant" is defined as "any addition of any pollutant to navigable waters from any point source."¹⁰⁵ The district court held that any adverse dam-induced water quality changes constitute a "discharge of a pollutant" under the Act and ordered the EPA to designate dams as a point source category for permitting requirements; in so holding, the court rejected the agency's argument that many types of dams do not add pollutants to navigable waters because the pollutants involved are already in the reservoir water and, therefore, that dams are generally nonpoint sources of pollution subject to less stringent regulation.¹⁰⁶ The

100. See Richard J. Lazarus, *Pursuing "Environmental Justice": The Distributional Effects of Environmental Protection*, 87 NW. U. L. REV. 787, 792-96 (1993); Lazarus, *supra* note 96, at 2427.

101. 33 U.S.C. § 1251(a) (1994).

102. See *Sierra Club v. Colorado Refining Co.*, 838 F. Supp. 1428, 1434 (D. Colo. 1993) ("[T]he Tenth Circuit has chosen to interpret the terminology of the Clean Water Act broadly to give full effect to Congress[s] declared goal and policy"); Watson, *supra* note 12, at 265 n.275 (citing cases in which courts relied on preambles of environmental law statutes); *infra* note 109 and accompanying text.

103. 530 F. Supp. 1291 (D.D.C. 1982).

104. *National Wildlife Fed'n v. Gorsuch*, 530 F. Supp. 1291, 1304 (D.D.C.), *rev'd*, 693 F.2d 156 (D.C. Cir. 1982).

105. 33 U.S.C. § 1362(12).

106. See *Gorsuch*, 530 F. Supp. at 1295-97, 1306-07, 1311-13. The EPA acknowl-

district court refused to defer to the EPA's view that the dams were nonpoint sources because that interpretation "runs counter to expressed congressional intent" and was "[in]consistent with the purpose and policies of the Act."¹⁰⁷

However, the Court of Appeals for the District of Columbia Circuit reversed the lower court, concluding that the EPA's interpretation — which excluded certain varieties of dam-caused pollution from the Section 402 permit program — was reasonable, did not frustrate congressional intent, and was entitled to "great deference."¹⁰⁸ Judge Wald warned that it was dangerous for a court to rely on aspirational language in an environmental statute when construing the implementation language in another section of the statute because "it is one thing for Congress to announce a grand goal, and quite another for it to mandate full implementation."¹⁰⁹ The court of appeals observed that "[c]aution is always advisable in relying on a general declaration of purpose to alter the apparent meaning of a specific provision" and, therefore, that "Congress's expressed goal to eliminate 'the discharge of pollutants' does not necessarily require that we expansively construe the term 'pollutant,' which Congress itself specifically defined."¹¹⁰ The Clean Water Act contains numerous provisions mandating that cost be considered in establishing effluent limitations and various exemptions from such limitations that were all arguably inconsistent with at least the spirit of the purposes

edged that nonpoint sources, including dams, are considered point sources when they emit pollutants from discernible, discrete conveyances. *Id.* at 1312. Conversely, Judge Green recognized that her order "will not force [the] EPA to require a permit for every dam in the United States." *Id.* at 1313. She pointed out that "[m]any dams may cause no pollution problems whatsoever, and there are administrative options available to EPA, such as categorical exemptions, areawide permits and general permits, which can minimize the burden on both the [a]gency and dam owners and operators." *Id.*

107. *Id.* at 1311.

108. *National Wildlife Fed'n v. Gorsuch*, 693 F.2d 156, 183 (D.C. Cir. 1982). The EPA successfully argued that when water is aerated in excess of normal concentration, dam-induced water quality changes involving low dissolved oxygen, cold, and supersaturation are not point source pollutants under Section 502(6) subject to the Section 402 permit program, but are nonpoint sources of pollution under Section 208. *See id.* at 161-66, 171-83; *see also* 33 U.S.C. §§ 1288, 1342, 1362(6) (1994).

109. *Gorsuch*, 693 F.2d at 178; *see also* *United States v. Plaza Health Lab., Inc.*, 3 F.3d 643, 647 (2d Cir. 1993) (recognizing that while "broad remedial purpose" of Clean Water Act is to restore and maintain integrity of Nation's waters, "[t]he narrow questions posed by this case, however, may not be resolved merely by simple reference to this admirable goal"); *Watson, supra* note 12, at 252 n.222 (same). *But see* *Sierra Club v. Colorado Refining Co.*, 838 F. Supp. 1428, 1434 (D. Colo. 1993) (noting that Tenth Circuit's broad interpretation gives full effect to Congress's goals); *Watson, supra* note 12, at 265 n.275 (citing cases in which courts relied on preambles of environmental law statutes).

110. *Gorsuch*, 693 F.2d at 178.

section of the Act.¹¹¹ Furthermore, "Congress hedged the purposes section by making it apply only as 'consistent with the provisions of this [Act].'"¹¹² Judge Wald concluded that the EPA's interpretation did not plainly contradict the text of the Act, that the statute's legislative history was ambiguous, and "that the district court erred in relying on the legislative goals expressed in § 101(a) to invalidate EPA's otherwise reasonable construction" of the statute.¹¹³

Professor Lazarus's and Ms. Newman's observation that the texts of environmental statutes often contain fewer pro-industry exemptions than their legislative histories may be correct, but even the texts of such statutes frequently include limiting language.¹¹⁴ Accordingly, the fundamental problem with textualism is that its use by courts is likely to lead to a flawed approach when balancing aspirational and narrow economic language in a statute. When interpreting an environmental statute, courts and agencies must be sensitive to conflicts within the text between broad public goals (e.g., protecting human health and environmental quality) and qualifications that allow agencies to grant exemptions for industry when the costs of regulation exceed its benefits.¹¹⁵ Textualist courts applying traditional statutory canons (e.g., a specific provision overcomes a general provision)¹¹⁶ are unlikely to come to grips with the policy dimensions of achieving a workable balance between health and cost issues. In *National Wildlife Federation v. Gorsuch*,¹¹⁷ the court of appeals appropriately deferred to the EPA's balancing of conflicting statutory language in addressing the specific problem of regulating dams, but a textualist judge might believe that she could read the text as well as the EPA.

B. Textualism Can Be Used to Limit the Authority of Environmental Agencies

Despite Professor Lazarus's and Ms. Newman's optimism about the beneficial results of textualist interpretation, judges applying a textualist

111. *See id.*

112. *Id.* (quoting 33 U.S.C. § 1311(a)).

113. *Id.* at 179-81.

114. *See supra* notes 96, 109-11, and accompanying text.

115. *See* McNollgast, *Positive Canons: The Role of Legislative Bargains in Statutory Interpretation*, 80 GEO. L.J. 705, 739-40 (1992) ("Most regulatory legislation contains conflicts between a broad, public-regarding, and unqualified mandate and implementing sections that introduce qualifications."); Watson, *supra* note 12, at 251 n.217.

116. *See* SUNSTEIN, *supra* note 18, at 235-36 (listing statutory canons).

117. 693 F.2d 156 (D.C. Cir. 1982).

approach have often given a constricted reading to the text of an environmental statute and thereby concluded that an agency lacked the authority to impose regulations on industry. For example, in *Adamo Wrecking Co. v. United States*,¹¹⁸ the Court applied a textualist reading to the term "emission standard" and concluded that an emission standard is a numerical limit on the level of permissible emissions, as from a smokestack.¹¹⁹ In addition, the Court held that the EPA did not have the authority to impose controls over work practices such as requiring that asbestos-containing materials be wetted down before a building is demolished to reduce the amount of asbestos escaping into the ambient air.¹²⁰ In his dissenting opinion, Justice Stevens criticized the majority for ignoring the EPA's contrary interpretation, important legislative history, and the practical reasons for the EPA's policy.¹²¹ *Adamo Wrecking* was a pre-*Chevron* decision, but the same restrictive approach to statutory interpretation is still possible after *Chevron* if a court concludes that the plain meaning of a statute does not allow the EPA to engage in a particular type of regulation.¹²²

For instance, Justice Thomas's dissenting opinion in *PUD No. 1 v. Washington Department of Ecology*,¹²³ illustrates that a textualist approach to

118. 434 U.S. 275 (1978).

119. See *Adamo Wrecking Co. v. United States*, 434 U.S. 275, 285-89 (1978).

120. See *id.*; 42 U.S.C. § 1857c-7(b)(1)(B) (1970) (amended 1978) (current version at 42 U.S.C. § 7412 (1994)); Herz, *supra* note 42, at 185 n.58 (noting that Congress swiftly amended statute to reject Court's interpretation by enacting Pub. L. No. 95-623, § 13(b), 92 Stat. 3443, 3458 (1978), and asserting that 1990 Amendments to Clean Air Act have drastically amended Section 112 of statute (citing Pub. L. No., 101-549, § 301, 104 Stat. 2399 (1990), codified at 42 U.S.C. § 7412 (1994))).

121. *Adamo Wrecking Co.*, 434 U.S. at 294-307 (Stevens, J., dissenting); accord 1 WILLIAM H. RODGERS, JR., ENVIRONMENTAL LAW: AIR AND WATER 231, 345-47 (1986) (criticizing *Adamo Wrecking* Court for its narrow reading of statute, failure to consider relevant legislative history, and poor policy consequences of decision); Herz, *supra* note 42, at 185 n.60 (same).

122. See *American Petroleum Inst. v. EPA*, 52 F.3d 1113, 1119-20 (D.C. Cir. 1995) (finding Section 211(k)(1) of Clean Air Act has "plain meaning" and that EPA had no authority to promulgate 30% renewable oxygenate requirement for its regulations for reformulated gasoline to be used in nonattainment areas); *Ethyl Corp. v. EPA*, 51 F.3d 1053, 1058-62 (D.C. Cir. 1995) (finding "plain language" of Section 211(f)(4) of Clean Air Act allowed waivers based only on fuel additive's effect on emission standards and, therefore, EPA had no authority to consider health effects); Patricia M. Wald, *Environmental Postcards From the Edge: The Year That Was and the Year That Might Be*, 26 ENVTL L. REP. (Envl. L. Inst.) 10182, 10184-85 (April 1996) (noting that courts applying plain meaning approach to statutory construction often refuse to look at broad statutory goals or purposes and therefore frequently decline to presume delegation of congressional power to agency).

123. 114 S. Ct. 1900, 1915-19 (1994) (Thomas, J., dissenting).

statutory interpretation will not always lead to favorable results for environmentalists.¹²⁴ In *PUD*, the Supreme Court held that the Washington State Department of Ecology could condition certification of hydroelectric power plants on the applicant's meeting minimum stream flow rates that the Department had imposed pursuant to Section 401 of the Clean Water Act.¹²⁵ Justice O'Connor's majority opinion concluded that the EPA's interpretation of Section 401, which authorized the Department's imposition of minimum stream flow requirements, was a "reasonable interpretation" of an ambiguous statute and, therefore, entitled to deference under *Chevron*.¹²⁶ Justice O'Connor also stated that "the literal terms of the statute" required such an interpretation.¹²⁷

In dissent, Justice Thomas, joined by Justice Scalia, argued that the majority had misinterpreted the statute by too broadly reading language in Section 401(d) allowing a state to impose "other limitations" beyond the effluent limitations required by Section 301 of the Act, and also argued that the Court's interpretation would allow states to impose virtually any condition on applicants for a permit under the Act.¹²⁸ Justice Thomas demonstrated a palpable pro-development bias when he argued that stream flow levels established by the Federal Energy Regulatory Commission (FERC) ought to prevail over state-imposed levels because "[i]n issuing licenses, FERC must balance the *Nation's* power needs together with the need for energy conservation, irrigation, flood control, fish and wildlife protection, and recreation. State environmental agencies, by contrast, need only consider *parochial environmental interests*."¹²⁹

In a brief concurring opinion, Justice Stevens argued that "[f]or judges who find it unnecessary to go behind the statutory text to discern the intent

124. See *PUD No. 1 v. Washington Dep't of Ecology*, 114 S. Ct. 1900, 1915-19 (1994) (Thomas, J., dissenting).

125. See *id.* at 1910-11; see also 33 U.S.C. § 1341(a)-(d) (1994); Debra L. Donahue, *The Untapped Power of Clean Water Act Section 401*, 23 *ECOLOGY L.Q.* 201, 207-17 (1996) (discussing *PUD*).

126. *PUD*, 114 S. Ct. at 1909.

127. *Id.* at 1910; see *Pierce*, *supra* note 37, at 754 n.26.

128. *PUD*, 114 S. Ct. at 1915-19 (Thomas, J., dissenting).

129. *Id.* at 1920 (first emphasis in original) (citation omitted). It is noteworthy that Justices Scalia and Thomas normally are favorably disposed to protecting the interests of State governments against federal intrusion except apparently in the case of state environmental regulation. See generally *Seminole Tribe of Florida v. Florida*, 116 S. Ct. 1114 (1996) (Justices Scalia and Thomas joining in majority holding that Congress lacks power under Indian Commerce Clause to abrogate states' Eleventh Amendment immunity from suit in federal court and thereby to subject states to federal court jurisdiction in suits by Indian tribes under Indian Gaming Regulatory Act).

of Congress, this is (or should be) an easy case" both because nothing in the Act restricts the power of states to regulate the quality of their waters more stringently than federal law might require and because "the Act explicitly recognizes states' ability to impose stricter standards."¹³⁰ Even if textualism is in theory more favorable to environmental interests, a judge who is hostile to environmental values can easily manufacture a textualist argument for ruling against the environment.

C. Textualist Interpretation Is Indeterminate

This subpart examines two recent Supreme Court decisions, *City of Chicago* and *Sweet Home*, to demonstrate that the textualist method is sufficiently indeterminate that a textualist judge could have decided these two cases either for or against environmental advocacy groups. Although other methods of statutory interpretation may not provide a clearer answer to a statute's meaning, it is notable that textualists tend to be convinced about the trustworthiness of their methodology and are predisposed to deprecate the views of the implementing agency.

1. *City of Chicago v. Environmental Defense Fund*

a. Background

Although *City of Chicago* provides the strongest evidence for the Lazarus-Newman thesis that textualist statutory interpretation is pro-environmentalist, a textualist judge could have easily ruled the other way. In light of this indeterminacy, the Supreme Court ought to have given more weight to the EPA's interpretation. Subtitle C of the Resource Conservation and Recovery Act "empowers" the EPA to establish a comprehensive "cradle to grave" system to regulate the generation, transport, storage, treatment, and disposal of hazardous wastes.¹³¹ In 1980, the EPA exempted "household waste" from Subtitle C regulation because household waste usually contains only a very small percentage of hazardous waste materials, but the cost to municipalities of segregating that small amount for separate disposal would be extremely high.¹³² However, municipalities wanted to expand the ash

130. *PUD*, 114 S. Ct. at 1915 (Stevens, J., concurring).

131. See *City of Chicago v. Environmental Defense Fund*, 114 S. Ct. 1588, 1590 (1994); *Chemical Waste Management, Inc. v. Hunt*, 504 U.S. 334, 337 n.1 (1994) (defining hazardous waste and its regulation procedures); see also 42 U.S.C. §§ 6921-6949 (1994) (including no specifications about which wastes are Subtitle C hazardous wastes and directing Administrator of EPA to develop criteria for "identifying the characteristics of hazardous waste" and for "listing hazardous waste").

132. See *Hazardous Waste Management System: Identification and Listing of Hazardous*

exemption to mixed household and other nonhazardous waste because collectors often do not separate these types of waste and because large municipal resource recovery facilities need huge volumes of mixed waste to be economical.¹³³

In 1984, Congress added a number of amendments to the statute, including Section 3001(i), which was entitled "Clarification of Household Waste Exclusion."¹³⁴ Section 3001(i) declared that a "resource recovery facility" burning "municipal solid waste" — which includes both household waste and nonhazardous waste from commercial and industrial sources — "shall not be deemed to be treating, storing, disposing of, or otherwise managing hazardous wastes" under Subtitle C.¹³⁵ In addition, a Senate report accompanying the 1984 amendment stated that "[a]ll waste management activities of such a facility, including the generation, transportation, treatment, storage and disposal of waste shall be covered by the exclusion."¹³⁶ The EPA initially appeared to take the view that ash from the burning of mixed household and nonhazardous waste could be hazardous waste, but after several years of taking conflicting positions in congressional testimony, the EPA finally sided with the exemption position favored by municipal incinerators of mixed waste.¹³⁷

Waste, 45 Fed. Reg. 33,084, 33,104 (1980); *City of Chicago*, 114 S. Ct. at 1590-91. Beyond declaring that household waste is not hazardous waste, the 1980 regulations provided a "waste stream" exemption for household waste that exempted household wastes from generation through treatment (including incineration) to final disposal of residues (including ash). *Id.* at 1591. Thus, an incinerator that burned only household waste was exempt from Subtitle C regulations for both hazardous waste treatment, storage, and disposal facilities as well as those regulations for generators of hazardous waste and was therefore free to dispose of its ash in a Subtitle D nonhazardous waste landfill. *Id.*; Lazarus & Newman, *supra* note 2, at 7.

133. Lazarus & Newman, *supra* note 2, at 8. The critical question apparently was whether the ash residue from such incinerated mixed waste was exempt from Subtitle C. The 1980 regulations did not exempt municipal waste combustion ash from Subtitle C coverage if the incinerator that produced the ash burned anything in addition to household waste, including nonhazardous industrial waste. *City of Chicago*, 114 S. Ct. at 1591. If the mixed ash was sufficiently toxic, a facility such as petitioner's would fall within the scope of Subtitle C hazardous waste generator regulations. *Id.* Such a facility would not fall within the ambit of Subtitle C treatment, storage, and disposal facilities regulations because all the waste it burned would be characterized as nonhazardous. *Id.* An ash can be hazardous, however, even if the product from which the ash is generated is not hazardous because contaminants in the new medium are more concentrated and readily leachable. *Id.*

134. Hazardous and Solid Waste Amendments of 1984, Pub. L. 98-616, § 223, 98 Stat. 3221, 3252 (1984).

135. 42 U.S.C. § 6921(i).

136. S. REP. NO. 98-284, at 61 (1983).

137. On September 18, 1992, just seven weeks before the presidential election, EPA

The City of Chicago could win either if the Court held that the plain meaning of Section 3001(i) required an exemption for mixed household and nonhazardous waste, or if the Court concluded that the statute was ambiguous and that the EPA's construction of the statute was permissible within the meaning of *Chevron*.¹³⁸ The City argued that Section 3001's plain meaning required an exemption for ash because it stated that a resource recovery facility "shall not be deemed to be . . . disposing of . . . hazardous wastes";¹³⁹ because ash is the only material that such a facility would be "disposing of," the statute must intend to exempt such material from the definition of hazardous waste. The Environmental Defense Fund, however, argued that the exemption applied only to the facility itself and not to the ash the facility generated.¹⁴⁰

b. *The Supreme Court*

Justice Scalia's majority opinion, which all members of the Court except Justices Stevens and O'Connor joined, adopted the Environmental Defense Fund's plain meaning argument.¹⁴¹ According to Justice Scalia, "[t]he plain meaning of [Section 3001(i)] is that as long as a facility recovers energy by incineration of the appropriate waste, *it (the facility)* is not subject to Subtitle C regulation as a facility that treats, stores, disposes of, or manages hazardous waste."¹⁴² On the other hand, Section 3001(i) "quite clearly does *not*

Administrator William Reilly sent a memorandum to all agency regional offices announcing that he interpreted the text and legislative history of Section 3001(i) to exempt municipal combustion ash from Subtitle C regulation even if the material failed the agency's toxicity characteristic analysis, and further argued that such an exemption best served both environmental and resource recovery goals for nonhazardous solid waste. See Lazarus & Newman, *supra* note 2, at 9-10 (citing Memorandum from the EPA Administrator to Regional Administrators Regarding Exemption for Municipal Waste Combustion Ash from Hazardous Waste Regulation (Sept. 18, 1992)).

138. Most commentators thought that the City would win, and that its stronger claim was the *Chevron* deference argument. See Lazarus & Newman, *supra* note 2, at 2-3, 10-11. The City, however, emphasized its plain meaning argument because a *Chevron* deference victory might be pyrrhic if the EPA later changed its interpretation of the statute. See *id.* at 11.

139. Brief for the City of Chicago at 14-18, *City of Chicago v. Environmental Defense Fund*, 114 S. Ct. 1588 (1994) (No. 92-1639) [hereinafter *Chicago Brief*]; Lazarus & Newman, *supra* note 2, at 12. The City also relied on the 1984 Senate report as further evidence that Congress intended to exclude municipal combustion ash from Subtitle C because ash is the only material "generated" by a resource recovery facility. *Chicago Brief*, *supra*, at 23-28; Lazarus & Newman, *supra* note 2, at 12.

140. Lazarus & Newman, *supra* note 2, at 9.

141. See *id.* at 19-20.

142. *City of Chicago*, 114 S. Ct. at 1591.

contain any exclusion for the *ash itself*. Indeed, the waste the facility produces (as opposed to that which it receives) is not even mentioned."¹⁴³ In addition, the Court concluded that Section 3001(i) "does not even exempt the *facility* in its capacity as a *generator* of hazardous waste" because the statute does not include the word "*generating*" among the list of resource recovery facility activities that are exempt from Subtitle C regulation.¹⁴⁴ According to the Court: "We think it follows from the carefully constructed text of [S]ection 3001(i) that while a resource recovery facility's management activities are excluded from Subtitle C regulation, its generation of toxic ash is not."¹⁴⁵

In accordance with his textualist approach to statutory interpretation, Justice Scalia characteristically refused to consider legislative history in the Senate committee report that included "generation" among the list of exempt activities.¹⁴⁶ The Court cautioned that "it is the statute, and not the Committee Report, which is the authoritative expression of the law, and the statute prominently *omits* reference to generation."¹⁴⁷

The Court acknowledged that the Resource Conservation and Recovery Act's "twin goals of resource recovery and protecting against contamination sometimes conflict."¹⁴⁸ The Court stated that the statutory text was "the most reliable guide" for reconciling diverse statutory purposes.¹⁴⁹ The Court rejected the Solicitor General's plea for deference under *Chevron* to the EPA's interpretation of the statute because, in the majority's view, the agency's interpretation "goes beyond the scope of whatever ambiguity [Section] 3001(i) contains. . . . Section 3001(i) simply cannot be read to contain the

143. *Id.*

144. *Id.* at 1592. The statute exempts facilities "treating, storing, disposing of, or otherwise managing hazardous wastes." *Id.*; see 42 U.S.C. § 6921(i) (1994).

145. *City of Chicago*, 114 S. Ct. at 1592. The Court also concluded that Section 3001(i) had overruled the waste stream exemption in the EPA's 1980 regulations and, therefore, that ash generated exclusively from household waste was now subject to Subtitle C generator requirements. *Id.* at 1593; see Lazarus & Newman, *supra* note 2, at 22-23 (stating that City had probably assumed that likely worst case scenario if it lost was that it would have to burn only household waste; thus, Court's determination that Section 3001(i) preempted EPA's pre-existing 1980 rule was stunning defeat for City).

146. See *City of Chicago*, 114 S. Ct. at 1593 (refusing to rely upon word "generation" in committee report, S. REP. NO. 98-294, at 61 (1983), that was not included in statutory text).

147. *Id.* at 1593. The Court observed that nothing in the dissent or legislative history "convinces us that the statute's omission of the term 'generation' is a scrivener's error." *Id.* at 1593 n.3.

148. *Id.* at 1594.

149. *Id.*

cost-saving waste stream exemption petitioners seek."¹⁵⁰

Justice Stevens's dissent, in which Justice O'Connor joined, argued that "[t]he relevant statutory text is not as unambiguous as the Court asserts,"¹⁵¹ and that the 1984 Senate report's inclusion of the term "generation" was more representative of Congress's probable intent than the text's omission of that same word.¹⁵² The dissent essentially argued that Section 3001(i) could reasonably be read to extend the reach of the EPA's 1980 waste stream exemption for household waste to the incineration of mixtures of household wastes and nonhazardous commercial and industrial wastes, while at the same time preserving the 1980 rule's scope.¹⁵³ Justice Stevens's dissent concluded that Congress wanted the EPA rather than the judiciary to balance environmental, recovery, and cost issues.¹⁵⁴

c. Analysis

While the *City of Chicago* decision provides significant support for the Lazarus-Newman thesis that a textualist approach often allows fewer exceptions from environmental statutes for regulated industries than a method of statutory construction that relies heavily upon legislative history, there are aspects of the decision that ought to be troubling to environmentalists. First, Justice Scalia's opinion tends to read the authority of the EPA restrictively and to deny the agency regulatory flexibility. In a different context, a narrow textualist interpretation of a statute could leave the EPA or another agency without power to protect the environment or public health. Furthermore, textualism can be a double-edged sword because many statutes could plausibly be read two different ways: either for or against the environment. Looking at the text of Section 3001(i) alone, Justice Scalia may well have

150. *Id.* Because the Court concluded that the statute was clear and *Chevron* deference to the EPA's interpretation was not warranted, the Court did not consider the interesting question of whether "an agency interpretation expressed in a memorandum like the Administrator's in this case is entitled to any less deference under *Chevron* than an interpretation adopted by a rule published in the Federal Register, or by adjudication." *Id.* at 1594 n.5. That issue is beyond the scope of this Article. For the purposes of this Article, the important point is that the Court should have deferred to the EPA's interpretation if it had been duly promulgated through notice-and-comment rulemaking in the Federal Register pursuant to the Administrative Procedure Act. See 5 U.S.C. § 553 (1994) (setting forth requirements for notice-and-comment rulemaking).

151. *City of Chicago*, 114 S. Ct. at 1593 (Stevens, J., dissenting).

152. See *id.* at 1596-97 n.7 (Stevens, J., dissenting).

153. See *id.* at 1594-98 (Stevens, J., dissenting); Lazarus & Newman, *supra* note 2, at 22.

154. See *City of Chicago*, 114 S. Ct. at 1598 (Stevens, J., dissenting).

had the better argument, as six other justices agreed, but some lower court judges and commentators thought the statutory language could be read to mean the exact opposite — that municipal waste combustion ash was automatically exempt from Subtitle C regulation.¹⁵⁵ Even Professor Lazarus and Ms. Newman recognized in a subsequent law review article that "the definition of 'plain meaning' is itself anything but plain" and that there were "certainly ample superficial signs of ambiguity" concerning Section 3001(i).¹⁵⁶ Because textualist analysis often does not yield a determinate interpretation, courts ought to consider a statute's legislative history. The 1984 Senate report provided a more definite explanation of Section 3001(i)'s intent than did its text.

Most importantly, the majority erred in asserting that the text provided "the most reliable guide" for reconciling the statute's sometimes conflicting "twin goals of resource recovery and protecting against contamination."¹⁵⁷ In light of the statutory scheme's mind-numbing complexity,¹⁵⁸ Justice Stevens's dissent appropriately argued that Congress wanted the EPA rather than the courts to answer the question of whether the costs of requiring municipal incinerators to comply with Subtitle C are justified by the additional benefits gained.¹⁵⁹

2. *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*

One year after *City of Chicago*, the Supreme Court abandoned rigid textualism and took a more deferential view toward agency decisionmaking in *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*.¹⁶⁰

155. See *Environmental Defense Fund v. Wheelabrator Techs., Inc.*, 931 F.2d 211, 213 (2d Cir. 1991) (holding that Section 3001(i) exempts municipal combustion ash from Subtitle C hazardous waste regulation); Lazarus & Newman, *supra* note 2, at 3 n.10 (noting that most commentators thought *City of Chicago* was more likely to prevail on plain meaning argument than *Environmental Defense Fund*); *id.* at 15-19 (describing *Environmental Defense Fund* attorneys' discussion of objections to their plain meaning argument).

156. Lazarus & Newman, *supra* note 2, at 15-16.

157. *City of Chicago*, 114 S. Ct. at 1594.

158. See *American Mining Congress v. EPA*, 824 F.2d 1177, 1189 (D.C. Cir. 1987) (describing process of interpreting statute as "mind-numbing journey").

159. See *City of Chicago*, 114 S. Ct. at 1598 (Stevens, J., dissenting); see also Diane L. Hughes, Note, *Justice Stevens's Method of Statutory Interpretation: A Well-Tailored Means for Facilitating Environmental Regulation*, 19 HARV. ENVTL. L. REV. 493, 495-96 (1995) (arguing that Justice Stevens only applies *Chevron* deference to agency interpretations when good case exists for interstitial agency lawmaking).

160. 115 S. Ct. 2407 (1995).

Justice Stevens wrote the majority opinion and Justice Scalia dissented in a six-to-three decision.¹⁶¹

a. Background

Section 9(a)(1)(B) of the Endangered Species Act of 1973 (ESA) makes it unlawful for any person to "take" an endangered species,¹⁶² and Section 3(19) defines "take" to mean to "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in any such conduct."¹⁶³ The Fish and Wildlife Service of the Interior Department, acting under the authority of the Secretary of Interior, defined the word "harm" in Section 3(19) to include "significant habitat modification or degradation where it actually kills or injures wildlife."¹⁶⁴ The timber industry and property rights activists contended that the regulation's definition was broader than Congress had intended when it enacted the statute.¹⁶⁵

b. The Supreme Court

Justice Stevens's majority opinion argued that the text of the statute provided three reasons for concluding that the Secretary of Interior's interpretation of the statute was reasonable.¹⁶⁶ First, the Court used the dictionary definition of the verb form of "harm," which is "to cause hurt or damage to: injure," to find that the agency's definition was consistent with the "ordinary understanding" of the word and that such a "definition naturally encompasses habitat modification that results in actual injury or death to members of an endangered or threatened species."¹⁶⁷ Second, the Court

161. Justice Stevens wrote the majority opinion, which was joined by Justices O'Connor, Kennedy, Souter, Ginsburg, and Breyer. Justice O'Connor also filed a concurring opinion. Justice Scalia wrote a dissenting opinion joined by Chief Justice Rehnquist and Justice Thomas. *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 115 S. Ct. 2407, 2409 (1995).

162. 16 U.S.C. § 1538(a)(1)(B) (1994); see Starla K. Dill, Note, *Animal Habitats in Harm's Way: Sweet Home Chapter of Communities for a Great Oregon v. Babbitt*, 25 ENVTL. L. 513, 516 (1995).

163. 16 U.S.C. § 1532(19); Dill, *supra* note 162, at 516.

164. 50 C.F.R. § 17.3 (1994); Dill, *supra* note 162, at 516.

165. See generally Craig Robert Baldauf, Comment, *Searching for a Place to Call Home: Courts, Congress, and Common Killers Conspire to Drive Endangered Species Into Extinction*, 30 WAKE FOREST L. REV. 847 (1995).

166. *Sweet Home*, 115 S. Ct. at 2412.

167. *Id.* at 2412-13. The Court rejected the argument that the word "harm" in the Act should be limited to direct attempts to kill an endangered species and not apply to indirect harms resulting from habitat destruction; the Court pointed out that the dictionary definition does not limit itself to direct injuries and, furthermore, that the word "harm" as used in the

found that "the broad purpose of the ESA supports the Secretary's decision to extend protection against activities that cause the precise harms Congress enacted the statute to avoid."¹⁶⁸ Third, the Court concluded that Congress's addition of Section 10, the "incidental take" permit provision, to the 1982 amendments¹⁶⁹ evidenced that Congress understood the Act to apply to indirect as well as direct harm.¹⁷⁰ The Court reached this conclusion because it found that the most likely use for such a permit, which the Secretary grants as an exception to Section 9(a)(1)(B)'s prohibition against takings of endangered species to an individual whose activities will cause incidental harm to an endangered species if the applicant provides a satisfactory conservation plan for minimizing any such harm, was to avert liability for habitat modification.¹⁷¹ In addition, the Court stated that the plain meaning of Section 10's requirement of a conservation plan makes sense only as "an alternative to a known, but undesired, habitat modification."¹⁷²

In addition, the Court criticized the court of appeals' use of the *noscitur a sociis* canon of statutory construction¹⁷³ to conclude that "'harm' must refer to a direct application of force because the words around it do," given that "[s]everal of the words that accompany 'harm' in the [Section] 3 definition of 'take,' especially 'harass,' 'pursue,' 'wound,' and 'kill,' refer to actions or effects that do not require the direct applications of force"; the Court also criticized the court of appeals for giving the word "'harm' essentially the same function as other words in the definition, thereby denying it independent meaning."¹⁷⁴ Although textualists try to rely on canons of construction to resolve the meaning of ambiguous words,¹⁷⁵ courts, as in this case, often disagree about which canon is most suitable for understanding a text's meaning.¹⁷⁶

statute would be mere surplusage unless it encompassed indirect harms. *Id.* at 2413.

168. *Id.* The Supreme Court reaffirmed the reasoning from *TVA v. Hill*, which stated that "[t]he plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, whatever the cost. This is reflected not only in the stated policies of the Act, but in literally every section of the statute." *Id.* at 2413 (quoting *TVA v. Hill*, 437 U.S. 153, 184 (1978)).

169. 16 U.S.C. § 1539(a)(1)(B) (1994).

170. *Sweet Home*, 115 S. Ct. at 2414.

171. *See id.*

172. *Id.* at 2414 n.14.

173. According to the *noscitur a sociis* canon of statutory construction, words tend to have the same meaning as their surrounding statutory language.

174. *Sweet Home*, 115 S. Ct. at 2414-15.

175. *See supra* notes 30, 116, and accompanying text.

176. *See* ESKRIDGE, *supra* note 12, at 275 (noting that courts can choose among

Finally, the Court, invoking the *Chevron* deference principle, found that the definition of the word "harm" in the statute was ambiguous and that the Secretary's interpretation was reasonable.¹⁷⁷ Citing a 1986 law review article by Justice Breyer written before his appointment to the Supreme Court,¹⁷⁸ the majority asserted that "[t]he latitude the ESA gives the Secretary in enforcing the statute, together with the degree of regulatory expertise necessary to its enforcement, establishes that we owe some degree of deference to the Secretary's reasonable interpretation" and that "[w]hen it enacted the ESA, Congress delegated broad administrative and interpretive power to the Secretary. . . . The proper interpretation of a term such as 'harm' involves a complex policy choice."¹⁷⁹ The Court concluded: "When Congress has entrusted the Secretary with broad discretion, we are especially reluctant to substitute our views of wise policy for [the Secretary's]."¹⁸⁰

In his dissenting opinion, Justice Scalia argued that the words "take" and "harm" as used in the Act could not possibly mean "habitat modification."¹⁸¹ Furthermore, Justice Scalia contended that even if the Secretary's regulation served the broad purpose of the statute, the majority had failed to demonstrate that the whole text of the statute justified a ban on significant habitat modification by private persons.¹⁸²

Notably, Justice Scalia argued that the majority's approach was inconsistent with the plain meaning approach to statutory interpretation in his *City of Chicago* decision. First, Justice Scalia asserted that it was inappropriate for the majority to examine the legislative history of the 1973 Act "when the enacted text is as clear as this."¹⁸³ In addition, Justice Scalia conceded that

different statutory canons to reach desired result); KARL N. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 521-35 (1960) (compiling list to demonstrate that every canon has countercanon).

177. *Sweet Home*, 115 S. Ct. at 2416. In addition, according to the Court, the legislative history of the statute supported the conclusion that the Secretary's definition of harm was based upon a permissible construction of the Act. *Id.* at 2416-17.

178. *Id.* at 2416 (citing Breyer, *supra* note 77, at 373). Breyer joined the Supreme Court after the *City of Chicago* decision, but in time for the *Sweet Home* decision.

179. *Id.* at 2416, 2418.

180. *Id.* at 2418 (citing *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 865-66 (1984)).

181. *Id.* at 2421-26 (Scalia, J., dissenting).

182. *Id.* at 2426 (Scalia, J., dissenting).

183. *Id.* at 2426-27 (Scalia, J., dissenting) (citing *City of Chicago v. Environmental Defense Fund*, 114 S. Ct. 1588, 1593 (1994)). Justice Scalia also disagreed with the majority's interpretation of the legislative history of the 1973 Act, arguing that Congress intended that the Section 5 land acquisition program would be the sole means to address the destruction of critical habitat by private persons on private land. *Id.* at 2427-28 (Scalia, J.,

the legislative history of the 1982 amendments "clearly contemplate[s] that it will enable the Secretary to permit environmental modification," but he strongly contended that it was inappropriate to consider this legislative history when "the *text* of the amendment cannot possibly bear that asserted meaning, when placed within the context of an Act that must be interpreted (as we have seen) not to prohibit private environmental modification."¹⁸⁴ Citing the *City of Chicago* decision, Justice Scalia maintained that "[t]he neutral language of the amendment cannot possibly alter that interpretation, nor can its legislative history be summoned forth to contradict, rather than clarify, what is in its totality an unambiguous statutory text."¹⁸⁵

c. Analysis

The majority opinion in *Sweet Home* was inconsistent with the spirit and tone of Justice Scalia's narrow textualist majority opinion in *City of Chicago*.¹⁸⁶ Even to the extent that Justice Stevens applied a textualist approach to reading the ESA, he read the word "harm" more broadly than Justice Scalia, illustrating that the use of a plain meaning or textualist approach to statutory construction does not always result in a consensus. In any difficult case involving statutory construction, a judge applying a textualist approach easily could rule either in favor of or against an environmental advocacy group. Other methods of statutory interpretation may produce equally indeterminate results, but textualists are perhaps more inclined to think they can solve interpretation issues without deferring to the experience of administrative agencies.

One may speculate that Justice Breyer's addition to the Court was a factor in the Court's shift from a plain meaning statutory interpretation approach that rejected the EPA's interpretation of whether ash is hazardous waste to a deferential application of *Chevron* in approving the Fish and Wildlife Service's definition of "take" and "harm."¹⁸⁷ Probably because three members of the *City of Chicago* majority had joined his majority opinion in *Sweet Home*,¹⁸⁸ Justice Stevens avoided the delicate issue of

dissenting).

184. *Id.* at 2428 (Scalia, J., dissenting) (emphasis added).

185. *Id.* (Scalia, J., dissenting) (citing *City of Chicago*, 114 S. Ct. at 1593).

186. See *supra* notes 141-50 and accompanying text.

187. See Lazarus & Newman, *supra* note 2, at 22 ("Indeed, one could speculate that if Justice Breyer had been on the Court at the time of [the *City of Chicago*] litigation, the case might have been decided differently.").

188. Justices Kennedy, Souter, and Ginsburg were in the majority in both *City of Chicago* and *Sweet Home*.

whether the two cases were consistent, but his silence on the issue means that one can only guess whether and how the Supreme Court will apply *Chevron* in future cases. The Supreme Court needs to develop a consistent approach for reading complex regulatory statutes and for employing *Chevron*.

D. Textualists Devalue Environmental Agencies

It is not clear whether adopting a consistently textualist approach to statutory interpretation would result in a greater or lesser number of victories for environmental advocacy groups, but considerable evidence indicates that textualists tend to devalue the policy balances struck by environmental agencies between broad pro-environmental aspirational language and narrow pro-industry exceptions. In particular, the Supreme Court's *Adamo* decision, Justice Thomas's dissenting opinion in *PUD*, and Justice Scalia's dissenting opinion in *Sweet Home* demonstrate how a narrow textualist reading of environmental statutes can result in courts allowing agencies too little authority to regulate environmental harm. If textualist analysis frequently produced clear answers about Congress's statutory intent, then it might be appropriate for courts to override the views of agencies. However, environmental statutes often contain conflicting or ambiguous provisions, and agencies are in the best position to adopt an interpretation that addresses a wide range of policy concerns.

V. Why Both Courts and Agencies Should Consider Legislative History

Professor Lazarus and Ms. Newman concede that textualist statutory interpretation will sometimes lead courts to ignore legislative history that favors the environment, but they are willing to forgo such favorable material to keep out information indicating that the legislature intended to allow exceptions to aspirational textual language.¹⁸⁹ Although a statute's legislative history sometimes does not reflect congressional intent and judges can misuse such material to reach a result at odds with the legislature's intent or purpose, interpreters should consider both a statute's text and its relevant legislative history as the best means to ascertain the intent of the legislature. As Part VI explains, only after a court or agency determines which interpretation most probably captures a statute's intent should it possibly allow policy considerations to outweigh that intent.¹⁹⁰

189. Lazarus & Newman, *supra* note 2, at 23.

190. See *infra* notes 298-300, 309-11, and accompanying text.

A. General Principles of Legislative History

For most of the nineteenth century, judges focused on statutory texts, policy concerns, and canons of construction, but during the twentieth century, courts came to rely quite extensively on legislative history materials.¹⁹¹ In theory, judges generally agree that consultation of legislative history is unnecessary if the statutory text has a plain and unambiguous meaning.¹⁹² In practice, judges have often relied on contradictory legislative history to justify an interpretation of a statute that appears to be at odds with its textual meaning.¹⁹³ In 1983, Judge Patricia Wald remarked that "[n]o occasion for statutory construction now exists when the [Supreme] Court will *not* look at the legislative history."¹⁹⁴

1. The Textualist Critique of Legislative History

Beginning in the late 1980s, a critical mass of judges and scholars, most notably Justice Scalia, began to castigate the use of legislative history in interpreting statutes and instead advocated some type of textualist approach to statutory interpretation.¹⁹⁵ Because Justices Scalia and Thomas are generally unwilling to join any part of another Justice's opinion that relies upon legislative history, they have been able to influence other Justices who want their votes and who are willing to drop references to legislative history.¹⁹⁶ The majority of Justices on the Court, however, have remained willing to consider legislative history and have rejected a rigid textualist approach to legislative history.¹⁹⁷

191. See ESKRIDGE, *supra* note 12, at 207. See generally Carro & Brann, *supra* note 37 (providing statistical study showing that Supreme Court increasingly used legislative history from 1938 to 1979 and that increase in usage was especially rapid after 1970). In 1892, the Supreme Court used evidence from a committee report to conclude that a statute's general prohibition against labor contracts to assist immigration did not apply to clergy. See *Holy Trinity Church v. United States*, 143 U.S. 457, 464-65 (1892); ESKRIDGE, *supra* note 12, at 208-10.

192. See *Caminetti v. United States*, 242 U.S. 470, 485 (1917) (citing *Hamilton v. Rathbone*, 175 U.S. 414, 421 (1899)); Spence, *supra* note 26, at 590.

193. See Spence, *supra* note 26, at 590; Wald, *supra* note 37, at 197-99.

194. Wald, *supra* note 37, at 195; see also ESKRIDGE, *supra* note 12, at 207.

195. See generally Orrin Hatch, *Legislative History: Tool of Construction or Destruction*, 11 HARV. J.L. & PUB. POL'Y 43 (1988); Jerry L. Mashaw, *Textualism, Constitutionalism, and the Interpretation of Federal Statutes*, 32 WM. & MARY L. REV. 827 (1991); W. David Slawson, *Legislative History and the Need to Bring Statutory Interpretation Under the Rule of Law*, 44 STAN. L. REV. 383, 383-84 (1992).

196. See Merrill, *Textualism*, *supra* note 23, at 365-66.

197. See *Wisconsin Pub. Intervenor v. Mortier*, 501 U.S. 597, 610-11 n.4 (1991)

Textualists frequently argue that it is improper to rely upon material that was never voted on by the House or Senate and never presented to the President as legislation.¹⁹⁸ Some textualists allege that legislators rarely read committee reports, which judges usually regard as the most reliable form of legislative history¹⁹⁹ and, therefore, claim that judges ignore reality in most instances if they treat such reports as embodying the intent of Congress.²⁰⁰ Even worse, textualists often contend that special interest groups, congressional staff, or individual legislators try to influence subsequent judicial interpretation of a statute by deliberately manipulating legislative history.²⁰¹

In addition, critics of legislative history usually assert that there is no intent of the legislature because most members of Congress do not have a specific intent about all the issues in a bill, the intent of members may change in the give-and-take of legislative compromise, and it is usually impossible to know the aggregate intent of large groups of people.²⁰² More-

(Justice White, joined by every member of Supreme Court except Justice Scalia, responding to Scalia's concurring opinion and briefly defending use of legislative history in "good-faith effort to discern legislative intent"); Merrill, *Textualism*, *supra* note 23, at 363-65 (noting that majority of Justices on Court have remained willing to consider legislative history); Slawson, *supra* note 195, at 383 (same).

198. See U.S. CONST. art. I, § 7, cl. 2; *Thompson v. Thompson*, 484 U.S. 174, 192 (1988) (Scalia, J., concurring) (citing and relying on *INS v. Chadha*, 462 U.S. 919 (1983)); Mashaw, *supra* note 195, at 843 (arguing that federalist principles support textualism); Slawson, *supra* note 195, at 406, 417; Spence, *supra* note 26, at 591-92; Zeppos, *supra* note 26, at 1300-01.

199. Justice Scalia, however, believes that amendments defeated on the floor and extended floor debates which alter the final text are the most reliable form of legislative history and, contrary to traditional wisdom, that committee reports are the least reliable. Farber & Frickey, *supra* note 13, at 442 n.64 (quoting unpublished address by Judge Antonin Scalia, Speech on Use of Legislative History (delivered between fall 1985 and spring 1986 at various law schools in varying forms)).

200. See George A. Costello, *Average Voting Members and Other "Benign Fictions": The Relative Reliability of Committee Reports, Floor Debates, and Other Sources of Legislative History*, 1990 DUKE L.J. 39, 41-43; Spence, *supra* note 26, at 592-93.

201. See *Blanchard v. Bergeron*, 489 U.S. 87, 97-99 (1989) (Scalia, J., concurring) (charging that committee reports are often drafted by staff members at their own initiative or at suggestion of lawyer-lobbyist); *In re Sinclair*, 870 F.2d 1340, 1343 (7th Cir. 1989) (Easterbrook, J.) ("[L]egislative history is a poor guide to legislators' intent because it is written by the staff rather than members of Congress"); see also ESKRIDGE, *supra* note 12, at 220-22 (discussing textualist charge that committee staff or even lobbyists write biased legislative history); Slawson, *supra* note 195, at 397 (alleging that agency staff and members of Congress "manufacture" legislative history); Zeppos, *supra* note 26, at 1302-03 (discussing charge that committee staff or even lobbyists write biased legislative history).

202. See *Edwards v. Aguillard*, 482 U.S. 578, 636 (1987) (Scalia, J., dissenting) ("[W]hile it is possible to discern the objective 'purpose' of a statute . . . or even the formal

over, textualists point out that courts sometimes rely on the comments of a single legislator, especially the sponsor of a bill, to determine its meaning, but that reliance on a single legislator is likely to be misleading.²⁰³ Furthermore, the legislative record is often incomplete or misleading about the intentions of either individuals or groups, especially because legislators or staff members may consciously try to manipulate legislative history.²⁰⁴ Many textualists are also proponents of "public choice" theory, which emphasizes the role of economic interest groups in the legislative process,²⁰⁵ and often argue that the only reliable evidence of the deals struck by interest groups in Congress is the actual text of a statute.²⁰⁶

Textualists also argue that the use of legislative history can allow judges to impose their value preferences and political beliefs in contradiction to the apparent meaning of the statutory text.²⁰⁷ Because judges are frequently able

motivation for a statute where that is explicitly set forth, . . . discerning the subjective motivation of those enacting the statute is, to be honest, almost always an impossible task."); Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 548-49 (1983) (arguing that it is impossible to assess aggregate intent of Congress); Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 870-71 (1930) (same); see also Kenneth A. Shepsle, *Congress Is a 'They,' Not an 'It': Legislative Intent as Oxymoron*, 12 INT'L REV. L. & ECON. 239, 239-56 (1992) (arguing that existence of cyclical majorities renders legislative intent altogether irrelevant to statutory interpretation and, therefore, courts should look only at text and not at legislative history). *But see* ESKRIDGE, *supra* note 12, at 212-13 (noting that since 1930s, Congress has been on notice that courts consider legislative history); James Landis, *A Note on "Statutory Interpretation,"* 43 HARV. L. REV. 886, 888-92 (1930) (arguing that judge may ascertain probable intent of Congress from majority's assent to committee reports and legislative amendments).

203. See, e.g., *North Haven Board of Educ. v. Bell*, 456 U.S. 512, 524-27 (1982) (relying extensively on remarks by Senator Birch Bayh, the bill's sponsor, to determine meaning of prohibition against gender discrimination in Title IX); Slawson, *supra* note 195, at 397 ("All it takes is one member of Congress declaring on the floor his or her 'understanding' of what some vague portion of the bill is 'intended to mean.'"); Zeppos, *supra* note 26, at 1302 (noting that courts sometimes rely on remarks of sponsor to determine statute's intent). Slawson notes: "Normally, however, two members, one of whom is a sponsor of the bill, cooperate. The second member asks the sponsor what the bill is intended to mean, and the sponsor answers." Slawson, *supra* note 195, at 397.

204. See ESKRIDGE, *supra* note 12, at 212; Pierce, *supra* note 37, at 741; Spence, *supra* note 26, at 592.

205. See Watson, *supra* note 12, at 216.

206. See, e.g., Easterbrook, *supra* note 202, at 540-45 (arguing that courts should only enforce deals clearly expressed in language of statute). *But see* Richard A. Posner, *Economics, Politics, and the Reading of Statutes and the Constitution*, 49 U. CHI. L. REV. 263, 274-75 (1982) (noting that terms of interest group deal in Congress are as likely to be reflected in committee reports and floor comments as in text of statute).

207. See Scalia, *supra* note 24, at 1176; Spence, *supra* note 26, at 13.

to choose from among conflicting portions of legislative history, they can cite only those portions that suit their predilections.²⁰⁸ Thus, judges may misuse legislative history to impose an interpretation that is contrary to the intent of the congressional majority that enacted the legislation.²⁰⁹

2. *The Argument for Legislative History*

Defenders of the use of legislative history in statutory interpretation often acknowledge that it can be misused,²¹⁰ but argue that it can be useful in ascertaining the intent or purpose of Congress in enacting a particular statute.²¹¹ The textualist argument that legislators and their staff persistently misuse legislative history is greatly overstated because competition among conflicting interest groups tends to keep the system honest.²¹² Many legislators avow that they do read committee reports, and some claim that they are more likely to read the committee report than the text of the statute.²¹³

208. See *ACLU v. FCC*, 823 F.2d 1554, 1583 (D.C. Cir. 1987) (Starr, J., dissenting) ("We in the judiciary have become shamelessly profligate and unthinking in our use of legislative history . . ."); Pierce, *supra* note 37, at 751; Wald, *supra* note 37, at 214 (discussing ability of judges to use selective portions of legislative history).

209. See Pierce, *supra* note 37, at 741 (arguing that revival of textualism during 1980s was to some extent healthy development counteracting improper use of legislative history).

210. See, e.g., Mikva, *supra* note 39, at 384; Pierce, *supra* note 37, at 751; Spence, *supra* note 26, at 599; Wald, *supra* note 37, at 214 (discussing ability of judges to use selective portions of legislative history).

211. See *American Hosp. Ass'n v. NLRB*, 899 F.2d 651, 657-58 (7th Cir. 1990) (Posner, J.).

212. See DANIEL A. FARBER & PHILIP P. FRICKEY, *LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION* 98-99 (1991); James J. Brudney, *Congressional Commentary on Judicial Interpretations of Statutes: Idle Chatter or Telling Response?*, 93 MICH. L. REV. 1, 51-52 (1994); Spence, *supra* note 26, at 607. *But see* Slawson, *supra* note 195, at 397-98 (arguing that it is difficult for opposing members of Congress to respond to or even learn about biased legislative history).

213. See Joan Biskupic, *Scalia Takes a Narrow View in Seeking Congress' Will*, 48 CONG. Q. 913, 917 (1990) (relating Senator Specter's view that he is more likely to read committee report than text of statute); Brudney, *supra* note 212, at 28; Farber & Frickey, *supra* note 13, at 445 ("[A]ccording to a principal study of congressional policymaking procedures, legislators outside the committee and their staffs focus primarily upon the report, not the bill itself."); Abner J. Mikva, *Reading and Writing Statutes*, 28 S. TEX. L. REV. 181, 184 (1986) (former Congressman and then Judge on the Court of Appeals for the District of Columbia Circuit commenting on legislators' reading of committee report rather than statutory text); Slawson, *supra* note 195, at 404 ("Legislators rarely read the entire text of a bill on which they vote, and sometimes they do not read any of it, relying instead on committee reports, staff summaries, and discussions and debates with other legislators.").

On the other hand, even if the textualist argument that legislators pay little attention to committee reports is at least partly correct, that contention raises questions about whether slothful legislators even read the statutory texts that textualists consider so important.²¹⁴ Furthermore, the criticism that legislative history may be written by an unrepresentative minority applies equally well to the text itself.²¹⁵ Textualists implicitly create a false dichotomy between an objective, reliable, and clear text and manipulable legislative history.²¹⁶

In addition, Scalia's argument that courts should look at the text because it alone has been passed by both Houses and presented to the President erroneously confuses the Article I limits on congressional power to make laws with the Article III powers employed by courts in applying and interpreting laws.²¹⁷ Legislative history itself is not "the law," but it can help judges and agencies interpret a statute's language.²¹⁸ Thus, judges or agencies can and should look at both the text and its legislative history to understand what Congress meant.

Although textualists often argue that judges can use legislative history to disregard the intent of the congressional majority, ignoring legislative history is more likely to enhance judicial power at the expense of Congress because textualists refuse to consider one of the most important ways that Congress actually communicates its policy views — through legislative history.²¹⁹ As long as Congress continues to rely on committee reports and floor debates to explain legislation to members who do not belong to a committee that was involved in drafting a bill, courts should treat legislative history with a degree of respect.²²⁰

214. See Zeppos, *supra* note 26, at 1311-13. *But see* Slawson, *supra* note 195, at 404-05 (arguing that even if legislators are more likely, on average, to read bill's legislative history than its actual text, fact that text is always available to members while certain types of legislative history may not be available means that text has more democratic legitimacy than legislative history).

215. See Brudney, *supra* note 212, at 53; Zeppos, *supra* note 26, at 1311-13.

216. See Zeppos, *supra* note 26, at 1323.

217. Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845, 862-63 (1992); Brudney, *supra* note 212, at 42; Eskridge, *supra* note 23, at 671-72.

218. See Brudney, *supra* note 212, at 42-43.

219. See *id.* at 40; Spence, *supra* note 26, at 593-94; Zeppos, *supra* note 26, at 1313-14, 1331-32.

220. See Brudney, *supra* note 212, at 45-46 (arguing that courts should respect Congress's use of legislative history); Spence, *supra* note 26, at 593-94, 604-07 (same). *But see* Hatch, *supra* note 195, at 44-45 (expressing concern about role of staff in creating legislative history relied upon by courts).

Moreover, despite the difficulties in getting a cumbersome institution such as Congress to override a judicial decision,²²¹ some empirical studies suggest that Congress is more likely to override textualist judicial interpretations of statutes than ones that consider the relevant legislative history.²²² Congressional reversals of statutory decisions appear to have increased significantly during the 1980s.²²³ There are a number of possible explanations for the rise in such overrides, including Professor Eskridge's thesis that such reversals resulted in large part during the 1980s from conflict between a conservative president and Supreme Court on one hand and an increasingly liberal Congress on the other.²²⁴ It may be significant, however, that Professors Solimine and Walker found that "a disproportionate number of overridden cases used a 'plain meaning' analysis."²²⁵ One difficulty in assessing the finding that Congress is more likely to override the Supreme Court's textualist interpretations of statutes is whether the choice of textualism alone is significant or whether textualism is often associated with conservative political views that influence how courts decide issues and how a liberal Congress might respond to a textualist opinion.²²⁶ One study found that judges ap-

221. See Herz, *supra* note 42, at 204; Spence, *supra* note 26, at 602-03. But see John Copeland Nagle, *Corrections Day*, 43 UCLA L. REV. 1267, 1281-86, 1290-1315, 1319 (1996) (acknowledging that current congressional procedures for correcting statutory mistakes are inadequate, but arguing that "Corrections Day" process can enable Congress to pass corrective legislation more easily). Between 1967 and 1990, Congress overrode 121 Supreme Court statutory interpretations or more than an average of 5 per year. See William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretations*, 101 YALE L.J. 331, 344 (1991).

222. See *West Va. Univ. Hosp., Inc. v. Casey*, 499 U.S. 83, 112-16 (1991) (Stevens, J., dissenting); Eskridge, *supra* note 221, app. I at 424-41, app. III at 450-55 (finding relatively strong evidence that Congress is more likely to override textualist Supreme Court decisions by amending or enacting new legislation); Michael E. Solimine & James L. Walker, *The Next Word: Congressional Response to Supreme Court Statutory Decisions*, 65 TEMP. L. REV. 425, 451 (1992) (finding that empirical data on statutory overrulings of Supreme Court decisions "lends some mild support to the view expressed by Justice Stevens that textual decisions by the Court are often overturned by Congress").

223. See Eskridge, *supra* note 221, at 395-96; Solimine & Walker, *supra* note 222, at 435, 451.

224. See William N. Eskridge, Jr., *Reneging on History? Playing the Court/Congress/President Civil Rights Game*, 79 CAL. L. REV. 613, 616-17 (1991); Eskridge, *supra* note 221, at 395-96.

225. See Solimine & Walker, *supra* note 222, at 448 (finding that whether Supreme Court employed plain meaning test was statistically significant at .001 level in explaining congressional overrides of Court's statutory decisions based on random sample of 80 cases).

226. See Eskridge, *supra* note 221, at 405-06 (equating textualism with formalist and conservative political theory); Eskridge, *supra* note 23, at 646-50 (same); Solimine & Walker, *supra* note 222, at 448 (arguing that conclusion that Congress is more likely to

pointed by President Reagan tended to use a plain meaning approach to impose their own political preferences rather than the preferences of the then Democratic congressional majority.²²⁷ Regardless of textualism's political implications, if Congress is more likely to override judicial decisions based on a textualist approach to statutory interpretations, courts would be wise at least to consider a statute's legislative history.²²⁸

Although legislative history is often useful in understanding a statute, Congress does not intend nonstatutory legislative history to be the equivalent of a statute, and judges should not treat it as such.²²⁹ However, courts can continue to treat certain types of legislative history as being more authoritative than others, with contemporaneous committee reports usually seen as the most reliable and subsequent legislative history as the least reliable.²³⁰ Even Judge Easterbrook, who strongly supports a textualist approach and is highly critical of the way many judges use legislative history,²³¹ has stated that legislative history may be used to explicate the meaning of a text as long as "it is not a source of legal rules competing with those found in the U.S. Code."²³² Judge Easterbrook has also argued that although a narrow textualist approach to statutory interpretation should be used when a statute affects only private interest groups, a broader, more remedial reading of statutes is often appropriate for statutes that primarily affect the general public.²³³ Although some environmental statutes affect only a particular industry or even one firm, most are concerned with broad,

override Supreme Court statutory interpretations based upon plain meaning approach "gives little support to the ideology assumptions, unless one is prepared to believe that the Court is merely using plain language as a subterfuge for imposing either its ideological preference or the wishes of some interest group" (citation omitted)).

227. See Stephen F. Ross, *Reaganist Realism Comes to Detroit*, 1989 U. ILL. L. REV. 399, 401-02, 420-33; see also Spence, *supra* note 26, at 601 n.80.

228. See Spence, *supra* note 26, at 601.

229. *Id.* at 598.

230. See *American Hosp. Ass'n v. NLRB*, 899 F.2d 651, 657-58 (7th Cir. 1990); Eskridge, *supra* note 12, at 222; Eskridge, *supra* note 23, at 630-40; Spence, *supra* note 26, at 593 n.35. See generally Costello, *supra* note 200 (offering examples).

231. See *In re Sinclair*, 870 F.2d 1340, 1341-44 (7th Cir. 1989) (Easterbrook, J.); Easterbrook, *supra* note 202, at 540-46 (proposing "clear statement principle" as general rule of statutory interpretation); Karkkainen, *supra* note 28, at 454-55 (comparing and contrasting Judge Easterbrook's "clear statement principle" with Justice Scalia's less activist, canon-based approach).

232. *Sinclair*, 870 F.2d at 1344.

233. See Frank H. Easterbrook, *The Supreme Court, 1983 Term — Foreword: The Court and the Economic System*, 98 HARV. L. REV. 4, 15-16 (1984); Easterbrook, *supra* note 202, at 541-44.

public questions and, therefore, require a broader approach than Scalia's narrow textualism.

Finally, *Chevron's* search for the "intent of Congress"²³⁴ is best served in most cases by considering legislative history. Although Justice Scalia has contended that a textualist methodology is more likely to find that a statute is not ambiguous than an approach to statutory interpretation that allows extensive examination of legislative history,²³⁵ legislative history is more likely to address a specific issue than the text in most cases.²³⁶ Furthermore, the Court has held that legislative history may trump even plain statutory language if the statutory language would produce "an odd result."²³⁷ Despite the ways agency staff or members of Congress can misuse legislative history, examining both a statute's text *and* its relevant legislative history is more likely to indicate the probable intent of Congress about a specific issue than simply scrutinizing the plain meaning of the text.

234. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984).

235. In a law review article, Justice Scalia argued that he seldom needs to defer to agency statutory interpretations under *Chevron* because he usually finds a clear meaning in the statute's text:

One who finds *more* often (as I do) that the meaning of a statute is apparent from its text and from its relationship with other laws, thereby finds *less* often that the triggering requirement for *Chevron* deference exists. It is thus relatively rare that *Chevron* will require me to accept an interpretation which, though reasonable, I would not personally adopt.

Scalia, *supra* note 24, at 521; see also Edward C. Donovan, *The Interstate Commerce Commission and the Boundaries of Agency Discretion in Statutory Interpretation*, 60 GEO. WASH. L. REV. 1357, 1379-84 (1992) (arguing that use of legislative history in first step creates more ambiguity and deference to agency). *But see infra* note 236 and accompanying text.

236. See Breyer, *supra* note 77, at 856-61; Farber & Frickey, *supra* note 13, at 457-58; Merrill, *Deference*, *supra* note 23, at 992 n.101 (disagreeing with Justice Scalia's argument and arguing that "textualism will answer the 'precise question' at issue in so few cases that it leads courts to abandon the quest for specific congressional answers, thus allowing a dramatically expanded judicial role at step one"); Merrill, *Textualism*, *supra* note 23, at 366-70 (arguing that use of legislative history does not, contrary to Justice Scalia's argument, result in greater uncertainty about meaning of statutes); Slawson, *supra* note 195, at 400 (noting that legislative history is more likely to address specific issue than text); Wald, *supra* note 39, at 301-02.

237. *Public Citizen v. United States Dep't of Justice*, 491 U.S. 440, 454 (1989) (quoting *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 509 (1989)); Gonzalez, *supra* note 26, at 607; Slawson, *supra* note 195, at 396, 400. *But see Public Citizen*, 491 U.S. at 473 (Kennedy, J., concurring) (arguing that courts should follow statutory text unless interpretation produces "absurd result"); Nagle, *supra* note 221, at 1288 (asserting that absurd results doctrine is unclear).

B. Using Legislative History to Interpret the Clean Water Act

An environmental statute's meaning is sometimes better explained by its legislative history than its text. For instance, in *Train v. Colorado Public Interest Research Group, Inc.*,²³⁸ a citizen suit was brought against the EPA to compel the agency to perform an allegedly nondiscretionary duty to regulate the discharges of certain radioactive materials into navigable waters under the Clean Water Act.²³⁹ The Atomic Energy Commission (AEC) and its successors had regulated these materials for many years under the Atomic Energy Act of 1954.²⁴⁰ "The Court of Appeals resolved the question exclusively by reference to the language of the statute"²⁴¹ and easily concluded that the EPA had the authority under the Act to regulate such materials because "the statute is plain and unambiguous and should be given its obvious meaning."²⁴² The Tenth Circuit observed that the legislative history was "conflicting and inconclusive," but concluded that it did not even have to consider the legislative history because "the legislative intent is clearly manifested in the language of the statute itself, and we need not resort to legislative history."²⁴³ The Clean Water Act forbids the discharge of pollutants into navigable waters unless the discharger has a permit issued either by the EPA or by a state that has a permit program approved by the EPA.²⁴⁴ "The term 'pollutant' is defined by the [Act] to include, *inter alia*, 'radioactive materials,'"²⁴⁵ and neither of the two explicit exceptions to the definition of "pollutant" in the statutory text applies to radioactive materials.²⁴⁶ From its analysis of the statutory language, the court of appeals concluded that Congress, by referring to "radioactive materials," meant to include "all radioactive materials, and we so hold."²⁴⁷

238. 426 U.S. 1 (1976).

239. *Train v. Colorado Pub. Interest Research Group, Inc.*, 426 U.S. 1, 4 (1976); Zeppos, *supra* note 26, at 1364-65.

240. *Train*, 426 U.S. at 5. See generally Atomic Energy Act of 1954, Pub. L. No. 83-703, 68 Stat. 919 (1954) (codified as amended at 42 U.S.C. §§ 2011-2297 (1994)).

241. *Train*, 426 U.S. at 9.

242. *Colorado Pub. Interest Research Group, Inc. v. Train*, 507 F.2d 743, 748 (10th Cir. 1974), *rev'd*, 426 U.S. 1 (1976).

243. *Id.*

244. 33 U.S.C. §§ 1311(a), 1342 (1994); *Train*, 426 U.S. at 7.

245. *Train*, 426 U.S. at 7.

246. 33 U.S.C. § 1362(6); see also *Train*, 426 U.S. at 7-9; *Colorado Pub. Interest Research Group*, 507 F.2d at 747-48. The two exceptions apply to "sewage from vessels" and material injected into an oil or gas well. 33 U.S.C. § 1362(6); see also *Train*, 426 U.S. at 7 n.7.

247. *Colorado Pub. Interest Research Group*, 507 F.2d at 747; see also *Train*, 426 U.S.

The Supreme Court, however, unanimously reversed the court of appeals,²⁴⁸ concluding that attention to the relevant legislative history was proper, that consideration of the legislative history demonstrated that Congress intended to keep regulation of radioactive material exclusively within the jurisdiction of the Nuclear Regulatory Commission, the successor to the AEC and, therefore, that the EPA had no authority to regulate the discharge of the source, byproduct, and special nuclear materials covered by the Atomic Energy Act.²⁴⁹ In *Train*, a pre-*Chevron* decision, the Court "d[id] not depend upon the EPA interpretation of the Act in reaching [its] conclusion."²⁵⁰ The Court stated that it was proper to consider a statute's legislative history as an "aid to construction of the meaning of words, as used in the statute," even if the text appeared to be "clear" upon "superficial examination."²⁵¹ The House committee report explicitly exempted radioactive materials regulated by the AEC and expressly stated that only radioactive substances not subject to the Commission's jurisdiction were within the scope of the proposed Clean Water Act.²⁵² Both the House and Senate floor debates, especially a colloquy between Senator Pastore, the Chairman of the Joint Committee on Atomic Energy, and Senator Muskie, the primary author of the Clean Water Act, emphasized that the proposed Act did not affect the AEC's exclusive control over the discharge of source, byproduct, and special nuclear materials.²⁵³ Furthermore, the House rejected an amendment to the Clean Water Act that would have effectively eliminated the AEC's control over these materials.²⁵⁴ In light of the statute's legislative history, it was reasonable for the Court to reject the obvious textualist reading of the Act and to place regulatory authority over these materials where Congress intended — with the AEC.²⁵⁵

In retrospect, Congress's decision to give the AEC and its successors control over these radioactive materials may have been an unsound policy choice. Because the EPA regulates many different industries with compet-

at 9.

248. Justice Stevens did not take part in the case. *Train*, 426 U.S. at 25.

249. *See id.* at 10-25.

250. *Id.* at 8 n.8.

251. *Id.* at 10 (citations omitted).

252. *Train*, 426 U.S. at 11 (quoting H.R. REP. NO. 92-911, at 131 (1972)).

253. *Id.* at 14. A ranking member of the Conference Committee, Representative Harsha, reaffirmed that "[t]he conference report does not change the original intent as it was made clear in the colloquy between Senators Muskie and Pastore in the course of the debate in the other body." *Id.* at 22 (quoting S. CONF. REP. NO. 92-1236, at 226 (1972)).

254. *See id.* at 17-22.

255. *See Zeppos, supra* note 26, at 1365.

ing interests, it is less vulnerable to "capture" or disproportionate influence by industry than the AEC and its successors, whose very bureaucratic existence depends on the continuing viability of the nuclear power industry.²⁵⁶ Nevertheless, the *Train* Court's conclusion that the AEC and its successors retained exclusive control over the discharge of certain radioactive materials was probably the most accurate reading of Congress's intent in enacting the Clean Water Act.

On the one hand, *Train* supports the Lazarus-Newman thesis that the legislative histories of environmental statutes often contain pro-industry exceptions not found in the text. On the other hand, *Train* illustrates how misleading it can be to try to determine Congress's intent from the text alone. Although there is an argument for just considering the text because it is the only material that Congress has formally enacted and presented to the President, there is a stronger case for considering both the text and the legislative history as a means to reconstruct Congress's intent. Professor Lazarus and Ms. Newman might argue that the policy consequences of adopting a textualist approach that favors environmental advocacy groups outweigh the importance of using legislative history to ascertain congressional intent. Environmental agencies, however, are better suited to address the full range of policy issues than a judge trying to deduce the "ordinary understanding" of a complex environmental statute.

VI. *Why Textualism Downplays Agency Expertise*

A. *Chevron and Statutory Interpretation*

By refusing to defer to any agency interpretation that diverges from the plain language of the statutory text, strict textualist judicial review may comply with the letter of *Chevron's* two-part test, but undermines *Chevron's* basic premise that agencies are better equipped than judges to interpret statutes within the agency's policymaking jurisdiction.²⁵⁷ Traditionally, many scholars and judges have believed that courts have a special compe-

256. See Dwyer, *supra* note 13, at 236, 309-10 (suggesting that EPA is not captured agency because many different interest groups monitor its actions); Jonathan R. Macey, *Organizational Design and Political Control of Administrative Agencies*, 8 J.L. ECON. & ORG. 93, 93-94 (1992) (observing that agencies that regulate multiple industries are less vulnerable to agency capture than agencies that regulate single industry); Bradford C. Mank, *Superfund Contractors and Agency Capture*, 2 N.Y.U. ENVTL. L.J. 34, 49-52 (1993) (arguing that EPA is less vulnerable to agency capture because it regulates multiple industries).

257. See *Chevron U.S.A., Inc. v. National Resources Defense Council, Inc.*, 467 U.S. 837, 865-66 (1984); Herz, *supra* note 42, at 199.

tence in interpreting statutes and should supervise agency statutory interpretations to make sure they are consistent with congressional intent.²⁵⁸ Both *Chevron* and some recent scholarship have suggested, however, that agencies may be more adept at discerning statutory meaning because they have a closer relationship to the political branches.²⁵⁹ Furthermore, if Congress has delegated significant policymaking powers to an agency, then courts should generally defer to the agency's interpretation of statutes falling within the scope of that policymaking function.²⁶⁰ On the other hand, if a question is outside the agency's policymaking domain, a court should give the agency's interpretation no more weight than that of any other litigant, and the court should exercise the lawfinding function to determine what the statute says.²⁶¹ Of course, drawing the line between these two functions raises many questions.²⁶² In addition, courts must still examine whether decisions within an agency's policymaking function are reasonable or consistent with the underlying statute's purposes.²⁶³ Nevertheless, courts should "consciously restrict their independent judgments to the 'cognitive' core of interpretation where constitutional notions of legislative supremacy and conventional notions of institutional competence conspire most strongly against administrative hegemony."²⁶⁴

Chevron suggested that agencies have a comparative advantage over courts in policymaking because agencies possess greater technical expertise than judges.²⁶⁵ Some commentators, however, have questioned whether agency bureaucrats and scientists actually possess useful technical knowledge that would enable them to make better and more informed decisions

258. See *supra* notes 56-57 and accompanying text.

259. See Colin S. Diver, *Statutory Interpretation in the Administrative State*, 133 U. PA. L. REV. 549, 574-76 (1985); *supra* text accompanying notes 59-61.

260. See Diver, *supra* note 259, at 593.

261. See *id.*

262. See *id.* at 593-98 (discussing difficulties in drawing line between policymaking and lawfinding). But see GLEN O. ROBINSON, *AMERICAN BUREAUCRACY: PUBLIC CHOICE AND PUBLIC LAW* 179-81 (1991) (discussing Diver's criteria for determining degree of judicial deference to agency decisions and arguing that "[i]n the end, Diver's criteria, though useful to some degree, turn out to be so ambiguous in application that they fail to provide us with much more than the vaguest of guidelines").

263. See Diver, *supra* note 259, at 597.

264. See *id.* at 598.

265. See Herz, *supra* note 42, at 199; see also *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 865-66 (1984). See generally NEIL K. KOMESAR, *IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY* (1994) (discussing concept of comparative institutional competence).

than members of the general public.²⁶⁶ The EPA and other agencies have often overstated the ability of science to resolve issues like the acceptable risk from nonthreshold carcinogens that pose some risk in even minute amounts.²⁶⁷ Ultimately, decisions about the distribution and amount of societal risk in society are political in nature.²⁶⁸

Nevertheless, experienced EPA engineers, scientists, and managers possess a "techno-bureaucratic" expertise based on practical experience with a large number of highly complex regulatory issues involving scientific, engineering, and policy components that allows them to understand the interplay between technical issues and congressional statutes better than the general public or most judges.²⁶⁹ Textualism is based on the flawed premise that courts can use dictionary definitions and the understanding of ordinary users of the English language to interpret complex regulatory statutes. Most noncriminal federal statutes, however, are directed "at a

266. See Clayton P. Gillette & James E. Krier, *Risk, Courts, and Agencies*, 138 U. PA. L. REV. 1027, 1061-85 (1990) (questioning whether expert quantitative risk assessment produces better evaluation of risk than public's concern with various qualitative factors); Donald T. Hornstein, *Reclaiming Environmental Law: A Normative Critique of Comparative Risk Analysis*, 92 COLUM. L. REV. 562, 562-65, 610-11 (1992) (same).

267. See Wendy E. Wagner, *The Science Charade in Toxic Risk Regulation*, 95 COLUM. L. REV. 1613, 1631-40 (1995).

268. See Lisa Heinzerling, *Political Science*, 62 U. CHI. L. REV. 449, 472-73 (1995) (reviewing STEPHEN BREYER, *BREAKING THE VICIOUS CIRCLE* (1993) and noting need to harmonize citizen involvement in regulation with expertise of scientific community).

269. Professor McGarity has sought to explain how most EPA engineers, scientists, and managers make decisions by coining the concept of "techno-bureaucratic rationality":

Techno-bureaucratic rationality is a rationality built on a unique understanding of the regulatory universe that is born out of frustrating hands-on experience with unanswerable questions of extraordinary complexity. It is, in a sense, a "second best" rationality that recognizes the limitations that inadequate data, unquantifiable values, mixed societal goals, and political realities place on the capacity of structured rational thinking, and it does the best that it can with what it has.

THOMAS O. MCGARITY, *REINVENTING RATIONALITY: THE ROLE OF REGULATORY ANALYSIS* 5-6 (1991); see also BREYER, *BREAKING THE VICIOUS CIRCLE* 61-62 (discussing advantages of bureaucratic rationalization and substantive expertise). There is evidence, however, that experts are little better than laypersons at making predictions, and that statistical formulas are better predictors of, for instance, medical school performance than individualized judgments of admissions experts. See Farber, *supra* note 17, at 557 n.113. Because of time and information limitations, there is a tendency on the part of agency staff and managers to use familiar regulatory approaches rather than innovative ones. See MCGARITY, *supra*, at 14-16 (noting that regulatory decisionmaking is subject to time and information limitations). In recent years, however, the EPA has experimented with a hybrid model of decisionmaking that emphasizes interdisciplinary teams and the early involvement of senior administrators to insure that a wide range of policies are in fact considered. See *id.* at 239-62.

small community of lawyers, regulators, and people subject to their specific regulations" and, therefore, courts should defer to this small community's understanding of the statute rather than what might be the plain meaning to ordinary users of the English language.²⁷⁰

Chevron also stated that agencies are more democratically accountable than judges because executive agencies are subject to the ultimate control of the President,²⁷¹ through the appointment and removal power,²⁷² and also are subject to the congressional oversight and budget process.²⁷³ Although "regulatory agencies are not as representative as the legislature,"²⁷⁴ notice-and-comment rulemaking in the Federal Register frequently furnishes agencies with a far broader perspective on political interests than the litigation process and often provides their decisions with a semimajoritarian

270. Ross, *supra* note 40, at 1057-62, 1067; see also Farber, *supra* note 17, at 552-53 (stating that most statutes are addressed to specialized audiences); Edward L. Rubin, *Modern Statutes, Loose Canons, and the Limits of Practical Reason: A Response to Farber and Ross*, 45 VAND. L. REV. 579, 580-87 (1992) (same); Slawson, *supra* note 195, at 420 (same). A small interpretive community may be able to agree on the meaning of a statutory text when ordinary users of the language would find a variety of possible meanings or would find that the text makes no sense at all. See Ross, *supra* note 40, at 1057-58, 1067; Rubin, *supra*, at 579-80, 585-87, 591; see also POSNER, *supra* note 14, at 436-39, 450-51 (discussing and criticizing idea of interpretive community of lawyers). See generally Owen M. Fiss, *Conventionalism*, 58 S. CAL. L. REV. 177 (1985) (arguing texts have objective meanings as defined by interpretive community of lawyers and judges). Professor Stanley Fish has used the term "interpretive community" in the sense of a like-thinking group imposing an arbitrary meaning on an indeterminate text and, therefore, has at least implicitly raised questions about the legitimacy of such communities. See POSNER, *supra* note 14, at 450 (discussing Fish's approach). See generally STANLEY FISH, IS THERE A TEXT IN THIS CLASS? THE AUTHORITY OF INTERPRETIVE COMMUNITIES (1980).

271. See Dwyer, *supra* note 13, at 284 (recognizing that agencies have more legitimate political basis than do courts).

272. See Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 590 (1984) (arguing that President enjoys control over only limited layer of top staff in executive agencies and that political factors often make it difficult to exercise control over even top staff who have political constituency).

273. See Richard J. Lazarus, *The Neglected Question of Congressional Oversight of EPA: Quis Custodiet Ipsos Custodes (Who Shall Watch the Watchers Themselves)?*, 54 LAW & CONTEMP. PROBS., Autumn 1991, at 206 (stating that "Congress appears to engage in more intense and pervasive oversight of EPA than it does of other agencies"); Nagle, *supra* note 221, at 1285-86 ("Members of Congress make their views known to agency officials at oversight hearings, through letters to an agency, and by staff contacts with agency employees. . . . [T]hese methods frequently prove the most successful in convincing a reluctant but intimidated agency to comply with congressional wishes (or at least the wishes of some members of Congress).").

274. Dwyer, *supra* note 13, at 284.

level of political legitimacy.²⁷⁵ In addition, Congress can easily expand the ability of the public to participate in agency decisionmaking beyond the notice-and-comment procedures in Section 553 of the Administrative Procedure Act²⁷⁶ by requiring agencies to hold public hearings; adopting hybrid rulemaking procedures, such as giving the public the right to cross-examine agency or industry expert witnesses; requiring agencies to survey public opinion; providing citizens with technical assistance grants to research issues; encouraging regulatory negotiation prior to the issuance of rules; or even paying citizens to participate.²⁷⁷ By contrast, courts sometimes get a sense of the political realities of an issue from the litigants or amicus briefs, but it is normally inappropriate for a judge to discuss pending litigation with legislators, members of the White House staff, or influential lobbyists in the same manner as the Administrator of the EPA.²⁷⁸ In a few instances, it may be necessary for courts to reverse an agency policy that appears to be biased in favor of a special interest group and against the public interest, as defined by the applicable statute, but the involvement of public interest groups, competition among competing industries, and the professional training of agency staff make agencies less vulnerable to "capture" than commentators have occasionally suggested.²⁷⁹

275. See *id.* (suggesting that agencies often possess "semimajoritarian cast"); Jerry L. Mashaw & David L. Harfst, *Regulation and Legal Culture: The Case of Motor Vehicle Safety*, 4 YALE J. ON REG. 257, 272 (1987) (noting that feedback from numerous sources can make agencies acutely aware of public opinion and political currents surrounding regulatory issues).

276. 5 U.S.C. § 553 (1994).

277. See Bradford C. Mank, *What Comes After Technology: Using an "Exception Process" to Improve Residual Risk Regulation of Hazardous Air Pollutants*, 13 STAN. ENVTL. L.J. 263, 338-43 (1994) (discussing several ways to increase public participation in administrative decisionmaking including mandating formal or informal public hearings and providing technical assistance grants to allow citizens to research complex issues); see also Richard H. Pildes & Cass R. Sunstein, *Reinventing the Regulatory State*, 62 U. CHI. L. REV. 1, 72-86 (1995) (discussing use of quantitative survey techniques for gauging public opinion about issues). See generally Ellen Siegler, *Regulatory Negotiations: A Practical Perspective*, 22 ENVTL. L. REP. (News & Analysis) 10647 (1992) (discussing regulatory negotiation); Carl Tobias, *Great Expectations and Mismatched Compensation: Government Sponsored Public Participation in Proceedings of the Consumer Product Safety Commission*, 64 WASH. U. L.Q. 1101 (1986) (discussing how agency experimented with reimbursing nonregulated individuals and organizations for costs of their involvement in administrative proceedings).

278. See ESKRIDGE, *supra* note 12, at 124 (stating that judges are not supposed to talk with enacting legislators); see also Dwyer, *supra* note 13, at 284, 288 (observing that agencies are in regular communication with congressional committees, White House, and various interest groups); Mashaw & Harfst, *supra* note 275, at 272 (same).

279. See Dwyer, *supra* note 13, at 236, 309-10 (noting that EPA is not captured agency

Because agencies, unlike courts, are often involved in the drafting of statutes *and* the creation of legislative history, agencies are better suited than courts, which are third parties to the legislative process, to know when the use of legislative history is truly appropriate in reading the statutory text.²⁸⁰ Agencies are also more likely than courts to know whether a particular portion of legislative history is relevant because agency administrators make regular appearances before Congress.²⁸¹ Moreover, as *Chevron* stated, Congress often explicitly or implicitly delegates policymaking authority to an agency.²⁸² If Congress has delegated such authority, it is fair for the agency to consider a statute's legislative history when interpreting a statute because an agency has more freedom than a court to consider factors beyond the statutory text, even including the political views of the incumbent administration.²⁸³ Although it may be proper for courts to treat postenactment legislative statements and actions with caution so as to adhere to the original intent of the enacting legislature,²⁸⁴ it is more appropriate for agencies to consider such materials because Congress expects them to consult regularly with congressional oversight committees and because the current Congress always has control over the necessary budget resources.²⁸⁵

because many different interest groups monitor its actions); Lazarus, *supra* note 98, at 364-66 (arguing that interest group competition and values of typical EPA employee make capture of EPA unlikely); Mank, *supra* note 256, at 51 (same); Mark Seidenfeld, *A Civic Republican Justification for Bureaucratic Decisionmaking*, 105 HARV. L. REV. 1511, 1554-55 (1992) (suggesting that professional training of agency staff decreases possibility of agency capture).

280. See Dwyer, *supra* note 13, at 283 (observing that agencies are often involved in drafting and amending statutes); Herz, *supra* note 42, at 199 (commenting that agencies are often involved in drafting statutes and creating legislative history). *But see* Slawson, *supra* note 195, at 401-02, 406-07 (arguing that agencies often use legislative history to justify decisions that have little basis in powers delegated by Congress in text).

281. See generally Lazarus, *supra* note 273, at 205-39 (discussing congressional oversight of EPA).

282. See *supra* notes 51-52 and accompanying text.

283. See *supra* text accompanying note 53; *supra* note 61 and accompanying text.

284. Intentionalists generally believe that postenactment legislative statements and actions are the least reliable form of legislative history because the goal of the interpreter is to find the intent of the original enacting legislature rather than to survey current legislative preferences. See Brudney, *supra* note 212, at 61-66 (discussing when it is appropriate for court to consider postenactment legislative history); Dwyer, *supra* note 13, at 301; Farber & Frickey, *supra* note 13, at 466-68 (noting arguments against use of subsequent legislative history); Richard A. Posner, *Statutory Interpretation — in the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 809-10 (1983) (evaluating drawbacks of postenactment legislative materials).

285. See Dwyer, *supra* note 13, at 301-02; see also Hazardous Waste Treatment

Postenactment legislative information is especially helpful when an agency must implement aspirational or symbolic statutory language that has no definite original meaning.²⁸⁶

Agencies are better equipped to address the practical realities of regulatory policy than are courts, which often focus on abstruse principles.²⁸⁷ The ability of regulatory agencies to reformulate policies and interpretations as political administrations change is often a tremendous advantage in achieving an interpretation that can maintain majoritarian political support.²⁸⁸ Although the administrative costs of variance procedures can be high and there is the danger of political bias, environmental agencies can often achieve better individual justice by granting an exemption to a firm if a general regulation imposes unreasonable costs on it in relationship to the social benefits gained.²⁸⁹ The relative isolation of federal judges makes them better suited for the role of a check against agency behavior that exceeds the bounds of the agency's delegated authority than for the role of interpreter of the first resort.²⁹⁰ Because courts are not institutionally suited to make regulatory policy choices, the judiciary should generally defer to agency interpretations that are within the scope of the agency's jurisdiction and allow the Congress or the President to use political or budgetary power to change policies that appear to be ill-advised.²⁹¹

Council v. EPA, 886 F.2d 355, 365 (D.C. Cir. 1989) (declaring that EPA should consider post-enactment legislative comments on same basis as any other comment, but cannot treat them as part of statute's legislative history).

286. See Dwyer, *supra* note 13, at 301-02.

287. See Diver, *supra* note 259, at 574-78, 583-85; Dwyer, *supra* note 13, at 311.

288. See Diver, *supra* note 259, at 579-80; Dwyer, *supra* note 13, at 311-12; Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J.L. ECON. & ORG. 81, 95-99 (1985).

289. See Mank, *supra* note 277, at 313-26 (discussing advantages and disadvantages of variance procedures in environmental decisionmaking).

290. See MARTIN SHAPIRO, WHO GUARDS THE GUARDIANS? JUDICIAL CONTROL OF ADMINISTRATION 171 (1988) (arguing for deferential judicial review unless agency exceeds bounds of its congressionally delegated authority); Dwyer, *supra* note 13, at 312-13 (same).

291. See Michael Herz, *Imposing Unified Executive Branch Statutory Interpretation*, 15 CARDOZO L. REV. 219, 271 (1993) ("The President has the constitutional authority to insist on his own reading of Congress's statutes rather than the agency's."); Seidenfeld, *supra* note 279, at 1551-52 (discussing power of Congress to use budget process to control agencies); Seidenfeld, *supra* note 45, at 117-18 n.184, 136 (discussing power of Congress to use budget or confirmation process to control agencies). *But see* ESKRIDGE, *supra* note 12, at 164-71 (arguing that judicial review is needed to prevent President or agency from interpreting statute in way that majority of Congress would reject).

B. *An Agency Theory of Statutory Interpretation*

Agencies are not the same as judges. Under *Chevron*, agencies may make policy choices or fill in statutory gaps if Congress has implicitly or explicitly delegated authority to the agency and the statute is ambiguous.²⁹² Accordingly, even if one believes the judiciary should adopt a textualist approach to statutory interpretation, courts should not expect agencies to employ that methodology within the range of the agency's policymaking discretion.²⁹³

Judge Posner has proposed a theory of "imaginative reconstruction" that calls on judges to interstitially fill in statutory gaps by "imagin[ing] as best [one] can how the legislators who enacted the statute would have wanted it applied to situations they did not foresee."²⁹⁴ Subsequently, Judge Posner has argued that judges interpreting statutes are like platoon commanders in battle who are sometimes unable to communicate with superior officers, but must face unanticipated circumstances that their orders did not contemplate.²⁹⁵ "[R]esponsible platoon commander[s] will ask [themselves] what [their] captain[s] would have wanted [them] to do if communications should fail, and similarly judges should ask themselves, when the message imparted by a statute is unclear, what the legislature would have wanted them to do in such a case of failed communication."²⁹⁶ Judge Posner recognizes that some versions of imaginative reconstruction would allow judges to impose their views of what constitutes the "public good" when there is a statutory gap, but also argues that "judges must make a good-faith effort to effectuate legislation regardless of their agreement or disagreement with its means or ends."²⁹⁷

Professors Farber and Frickey have criticized Judge Posner's approach to statutory interpretation because they believe that judges should not

292. See *supra* notes 51-52, 62, and accompanying text.

293. See Herz, *supra* note 42, at 199. But see *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 260 (1991) (Scalia, J., concurring) ("[D]eference is not abdication, and it requires us to accept only those agency interpretations that are reasonable in light of the principles of construction courts normally employ.").

294. RICHARD A. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* 287 (1985); González, *supra* note 26, at 607-11 (discussing Judge Posner's theory of imaginative reconstruction of statutory intent).

295. POSNER, *supra* note 14, at 270; see Farber & Frickey, *supra* note 13, at 461-65 (discussing Posner's platoon commander model of statutory interpretation).

296. POSNER, *supra* note 14, at 270; see Farber & Frickey, *supra* note 13, at 461-65.

297. See POSNER, *supra* note 14, at 272-74; see also HART & SACKS, *supra* note 14, at 1378 (arguing that judges interpreting statute may assume it was written by "reasonable [legislators] pursuing reasonable purposes reasonably").

always choose the statutory interpretation that most probably represents Congress's intent in enacting the statute, although judges always should follow a clear directive from the legislature.²⁹⁸ Even if interpretation *A* is slightly more likely to represent the legislature's probable intent than interpretation *B*, Farber and Frickey would have a judge select *B* if the policy results of adopting *B* are significantly better than selecting *A*.²⁹⁹ They suggest that judges or agencies need to use a "situation sense" or "practical reason" based on their experience and expertise to enable them to choose the best interpretation among several competing, plausible choices in light of both Congress's most probable intent *and* the policy consequences of various plausible interpretations.³⁰⁰

Professor Eskridge's theory of "dynamic statutory interpretation" would allow judges to go beyond Congress's probable intent to re-interpret a statute in light of changed circumstances. Eskridge argues that Posner's platoon commander analogy understates the problem facing judges in interpreting statutes because judges, unlike platoon commanders and their superior officers, are not normally allowed to communicate with Congress, and many statutory orders are decades old, unlike frequently updated military orders and, therefore, even more susceptible to unanticipated circumstances.³⁰¹ Eskridge contends that judges should act as "relational agent[s]" whose "primary obligation[s] [are] to use [their] best efforts to carry out the general goals and specific orders over time."³⁰² Although courts have sometimes implicitly employed dynamic methods of statutory construction when changed circumstances made it impractical or impossible to effectuate the original intent of a statute,³⁰³ no court has openly adopted this method of statutory interpretation and Congress has never approved of this approach.³⁰⁴

298. See Farber & Frickey, *supra* note 13, at 461-65.

299. *Id.* at 462-63.

300. See *id.* at 461-65 (proposing that judges should exercise "practical reason" in considering both Congress's most probable intent and policy consequences of various plausible interpretations); see also LLEWELLYN, *supra* note 176, at 121-54 (proposing judges rely upon "situation sense" about circumstances of life in deciding difficult legal issues); Farber, *supra* note 17, at 533-59 (criticizing formalist approaches to statutory interpretation, including textualism, and arguing in favor of practical reason or Llewellyn's situation sense that examines problem of statutory interpretation in light of statutory context or purpose).

301. See ESKRIDGE, *supra* note 12, at 124-25.

302. See *id.* at 125.

303. See *id.* at 48-80 & *passim* (proposing dynamic theory of statutory interpretation and arguing that courts in many cases implicitly apply such approach).

304. See McNiven, *supra* note 33, at 1300-01 (asserting that judicial correction of

Most textualists would disagree with Posner's, Farber's and Frickey's, and Eskridge's theories of statutory interpretation on the grounds that judges or agencies ought to follow the objective statutory intent embodied in the language of the statute.³⁰⁵ Adherence to the statutory text must be the norm in a democratic society, and therefore, if a text mandates an unpopular result, it is up to Congress, rather than unelected judges or bureaucrats, to make a new policy choice.³⁰⁶ As a practical matter, it is difficult for either courts or agencies to formulate a test to determine when circumstances have changed sufficiently or when a statute's goals are too financially impractical to enforce.³⁰⁷ Once a court or agency is cut loose from the text of a statute, it may be difficult for it to decide how to reformulate congressional policy.³⁰⁸

If Congress has delegated policymaking discretion to an agency and a statute is ambiguous, *Chevron* implies that agencies can follow Farber's and Frickey's approach by selecting a less probable interpretation of a statute if that interpretation best serves current policy interests.³⁰⁹ Posner's search for the legislature's probable intent might be an appropriate model for a judge, but it is too confining for an agency that must be concerned with policy results and the views of the current Congress. Congress often expects an agency to go beyond a statute's original intent to make its own judgments about unanticipated circumstances as long as the agency periodically consults with Congress.³¹⁰ An environmental agency is most likely to be effective if it uses its techno-bureaucratic practical reasoning powers to balance a reading of Congress's probable intent in enacting a statute with

statutory errors is "more modest" than that proposed by advocates of dynamic statutory interpretation); Nagle, *supra* note 221, at 1287-88 (same).

305. See Anthony D'Amato, *The Injustice of Dynamic Statutory Interpretation*, 64 U. CIN. L. REV. 911, 926-27, 929-32 (1996) (using textualist approach to criticize Posner's and Eskridge's theories of statutory interpretation).

306. See Dwyer, *supra* note 13, at 285.

307. See *id.*

308. See *id.*

309. See Nagle, *supra* note 221, at 1289-90 ("*Chevron* does not say that an agency must interpret a statute in the manner most faithful to the enacting Congress; an agency need only show that its preferred interpretation is not contrary to the original legislative intent.").

310. See Dwyer, *supra* note 13, at 283 (arguing that EPA and Congress often engage in dialogue about how to reformulate environmental statutes); McNiven, *supra* note 33, at 1298-99 (discussing role of dialogue between agencies and Congress); Daniel B. Rodriguez, *The Substance of the New Legal Process*, 77 CAL. L. REV. 919, 928 (1989) ("In the modern administrative state, the process of law creation, implementation, and interpretation is a synergistic process involving an ongoing dialogue among all branches of government, including the headless fourth branch — the administrative agencies.").

an examination of the technical, political, and policy issues surrounding different plausible interpretations of the statute.³¹¹ The relational agent theory makes most sense if an agency is interpreting an old statute and does not regularly meet with congressional oversight committees, but environmental agencies such as the EPA are in regular contact with both Congress and the White House.³¹² The textualist objection that judges should seek an objective interpretation of a statute is less persuasive when applied to agencies to which Congress has implicitly or explicitly delegated policymaking authority. Some commentators have argued that it is improper for Congress to delegate substantial legislative authority to agencies,³¹³ but since 1937 the Supreme Court has consistently rejected such nondelegation challenges.³¹⁴

Congress could eliminate many of the disagreements between textualists and proponents of "dynamic" or "modified intentionalist" approaches to statutory interpretation if the legislature made it clear when an agency has discretion to deviate from a statutory command that is impossible or impractical to implement as written. For instance, Congress can make it easier for agencies and courts to address the problem of unrealistic goals or deadlines by including explicit severability clauses which would allow the EPA to ignore a deadline that proves impracticable to achieve as long as the agency is reducing air pollution in a nonattainment area as "expeditiously as possible."³¹⁵ By expressly providing for the possibility that an agency may have to address changed circumstances, Congress can provide legitimacy for an agency's actions as a relational agent that may satisfy even strict textualists.

The danger of a textualist approach is that courts will prevent agencies from making needed adjustments. There has been a tendency in recent years for Congress to write highly specific legislation, especially environmental statutes.³¹⁶ For instance, the 1990 amendments to the Clean Air Act

311. See MCGARTY, *supra* note 269, at 5-6 & *passim* (proposing and discussing concept of techno-bureaucratic expertise); *supra* note 269 and accompanying text.

312. See Dwyer, *supra* note 13, at 284, 288 (noting that agencies are in regular communication with congressional committees, White House, and various interest groups); Mashaw & Harfst, *supra* note 275, at 272 (same).

313. See generally DAVID SCHOENBROD, *POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION* (1993) (arguing that Congress and President, rather than agencies, should make law).

314. See Richard B. Stewart, *Beyond Delegation Doctrine*, 36 AM. U. L. REV. 323, 326 n.20 (1987) ("The year 1937 signalled the end of the brief *Schechter* era during which the Court invoked the delegation doctrine to invalidate broad delegations of power.").

315. See McNiven, *supra* note 33, at 1308.

316. See Herz, *supra* note 42, at 175-82.

contain many highly detailed and specific provisions.³¹⁷ Some environmental statutes are so specific that an agency must implement the statute's terms as embodied in the text, but in other instances an agency may re-interpret a statutory phrase so that it makes more sense and still fulfills Congress's general purpose in enacting the legislation.³¹⁸

Although Professor Lazarus and Ms. Newman apparently believe that a textualist approach is useful in part because it prevents the EPA from making too many exceptions in favor of industry,³¹⁹ such victories may be pyrrhic if the EPA must take a rigid approach to environmental problems that results in the agency ignoring obvious political problems with a statute and, ultimately, in Congress repealing or weakening the provision.³²⁰ As Part V.A discussed, there is some empirical evidence suggesting Congress is more likely to override textualist judicial statutory interpretations.³²¹ Indeed, representatives of local governments and the combustion industry quickly proposed compromise legislation to overturn the *City of Chicago* decision, although those efforts did not bear immediate results.³²²

To fulfill *Chevron's* essence, courts should give considerable weight to an environmental agency's expertise in interpreting complex environmental statutes unless the agency is ignoring Congress's intent or purpose in

317. *See id.* at 180-82.

318. *See id.* at 194-203 (arguing that EPA should re-interpret term "average vehicle occupancy" in Clean Air Act Section 182(d)(1)(B) to instead mean "average ridership" because former interpretation "fails to give credit for some conduct that furthers the statutory goal, i.e., switching to nonautomotive modes of transportation, but gives credit for some conduct that conflicts with statutory goals, i.e., switching from nonautomotive modes to high-occupancy carpools with a resulting increase in the number of cars").

319. *See supra* notes 6-8 and accompanying text.

320. For example, Congress has already allowed states to ignore Clean Air Act Section 182(d)(1)(B), which required large employers in severe and extreme ozone nonattainment areas to limit vehicle use by their employees, as long as the same emission reductions are achieved in some other manner. *See Clean Air Act: Optional Mandated Trip Reduction*, Pub. L. No. 104-70, 109 Stat. 773 (1995) (codified at 42 U.S.C.A. § 7511a(d)(1)(B) (West Supp. 1996)); Nagle, *supra* note 221, at 1301-02. Even EPA's willingness not to enforce sanctions against states that failed to enforce Section 182(d)(1)(B)'s trip-reduction provisions was not enough to save the provision from repeal. *See H.R. REP. NO. 104-387*, at 3 (1995) (noting that six states during 1995 attempted to avoid implementing carpooling program); *Air Pollution: States Must Enforce Trip-Reduction Plans, But EPA Says It Will Not Impose Sanctions [Current Developments]*, 25 Env't Rep. (BNA), at 1862 (Feb. 3, 1995) (reporting announcement of policy giving assurance that EPA would not sanction states failing to enforce carpooling programs).

321. *See supra* notes 222-26 and accompanying text.

322. *See Lazarus & Newman, supra* note 2, at 26-27.

enacting the legislation.³²³ While textualist statutory interpretation can be squared with the letter of the *Chevron* decision, textualists too often fail to recognize the spirit of *Chevron*, which emphasized that agencies are usually more competent at interpreting complex regulatory statutes than are generalist Article III judges.³²⁴ Agencies possess greater technical expertise, are closer to the political branches, and are more familiar with the practical problems of implementation than are courts.³²⁵ Because statutory language in complex regulatory statutes is often directed at a small interpretive community rather than the public at large, a textualist interpretation is less likely than an agency's interpretation to embody the probable intent of Congress or to reach the best policy result.

VII. Conclusion

It may be true, as Professor Lazarus and Ms. Newman argue, that a textualist approach on average will result in more victories for environmentalists. Nonetheless, Part IV provides a number of counterexamples. More importantly, textualism is an unsatisfactory method for reconciling aspirational goals in environmental statutes with other provisions that promote flexibility or cost-saving for industry. Even worse, textualists often disregard the careful balancing of such diverse purposes by environmental agencies or go out of their way to narrow the authority of agencies.

Professor Lazarus and Ms. Newman may be right that the legislative histories of environmental statutes contain more pro-industry exemptions than their texts and, therefore, that environmental advocacy groups are more likely to win if judges do not consider such material. There are serious theoretical objections, however, that they do not address. To best determine Congress's intent, courts and agencies ought to be able to examine a statute's legislative history.

Finally, textualists often fail to honor the spirit of *Chevron* even if they follow its explicit dictates. A textualist approach to interpreting complex regulatory statutes makes little sense because Congress has written the legislation for a particular agency to interpret in light of its experience and expertise. One should not expect that ordinary users of the English language, including judges, will understand the text, legislative history, or practical problems of a complex regulatory statute as well as the administra-

323. See ESKRIDGE, *supra* note 12, at 171 (arguing that even after *Chevron*, courts should reject agency statutory interpretations that are based on "political whim" or inadequate factual record).

324. See *supra* notes 53-54, 257, 265, and accompanying text.

325. See *supra* notes 269-78, 287-89, and accompanying text.

tive agency in charge of the statute's implementation. As a result, agencies are usually better equipped than courts to address the inevitable gaps and ambiguities in complex regulatory statutes. Courts should not apply a textualist approach to regulatory statutes that implicitly or explicitly grant considerable discretion to an agency and rely on the agency's expertise to fill in gaps in the statutory scheme. Instead, judges should allow environmental agencies to balance both probable congressional intent and policy considerations in interpreting a statute unless the interpretation frustrates Congress's intent or purpose in enacting the legislation. Although courts should prevent agencies from exceeding their delegated authority, the judiciary should recognize that agencies are often comparatively better suited to understand the political, technical, and policy ramifications of different plausible interpretations of a statute.

The *Sweet Home* decision may indicate that the Supreme Court will not apply a narrow textualist approach in future environmental cases or may merely illustrate how divided the Court is over its approach to legislative history and to statutory interpretation. In his *Sweet Home* dissent, Justice Scalia quite correctly pointed out that Justice Stevens's majority opinion was inconsistent with the textualist approach in *City of Chicago*.³²⁶ The *City of Chicago* and *Sweet Home* decisions sent mixed signals to the lower courts and left open the possibility that many judges will continue to apply a flawed textualist approach to statutory interpretation. President Clinton's appointment of Justice Breyer may tilt the Court against a narrow textualism and in favor of greater deference to administrative agencies, but the issue may not be resolved unless and until there are further appointments to the Court in President Clinton's second term.

In the conclusion of their article, Professor Lazarus and Ms. Newman acknowledge that textualist judicial decisions often must be followed by legislative and regulatory actions to address practical implementation problems left unanswered by the Court.³²⁷ They believe, however, that strict textualist decisions can force agencies and Congress to confront difficult problems that they have avoided in the past.³²⁸

Although textualist decisions can generate positive political fallout, there is the potential danger that literalist judicial interpretations of aspira-

326. *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 115 S. Ct. 2407, 2426-27 (Scalia, J., dissenting) (citing *City of Chicago v. Environmental Defense Fund*, 114 S. Ct. 1588, 1593 (1994)).

327. See Lazarus & Newman, *supra* note 2, at 28-29.

328. See *id.* (noting that *City of Chicago* forced EPA to address previously avoided issues).

tional language will lead to radical legislative reform weakening existing environmental laws, especially if the current Congress is hostile to environmental values.³²⁹ Instead of trying to convince courts to use textualist statutory interpretation as a sledgehammer to force legislative or regulatory change, environmentalists should work within the political process to achieve incremental change. In light of the environmental movement's long success in winning public support and the relative efficacy of environmental advocacy groups,³³⁰ environmentalists should trust agencies in most cases to reach fair decisions without always binding agencies to the deceptively clear aspirational language in environmental statutes.

329. In 1995, many environmental groups charged that the newly elected Republican Congress intended to gut existing environmental laws. See NATURAL RESOURCES DEFENSE COUNCIL, BREACH OF FAITH: HOW THE CONTRACT'S FINE PRINT UNDERMINES AMERICA'S ENVIRONMENTAL SUCCESS 4-17 (1995) (arguing H.R. 9, 104th Cong. (1995) would seriously weaken several important environmental laws).

330. See *supra* notes 97-99 and accompanying text. For example, public support for environmentalism forced the Republican-dominated 104th Congress to abandon most of its efforts to weaken environmental laws and lead Republicans in 1996 to support bipartisan legislation to better protect drinking water, fisheries, and food safety. See S. 39, 104th Cong. (1996) (fisheries legislation); S. 1316, 104th Cong. (1996) (safe drinking water legislation); H.R. 1627, 104th Cong. (1996) (regulation of pesticides and food safety); Allan Freedman, *Accomplishments, Misssteps Mark Congress' Record*, 54 CONG. Q. 2918, 2918-19 (1996).