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REGULATORY TEXTUALISM

JENNIFER NOU[†]

ABSTRACT

This Article proposes a textualist approach to regulatory interpretation. Regulatory textualism, however, should be distinct from statutory textualism. Judges should interpret regulations armed not with dictionaries or other general linguistic aids, but rather with a hierarchy of sources that sheds light on the text's public meaning. Methodologically, this approach tailors positive political theory insights to the rulemaking process. That process features a number of pivotal actors, or veto-gates, who must sign off on a regulation before it can proceed. The court's interpretive task is to privilege those statements that are more likely to be credible—sincere, not strategic—reflections of the text's public meaning.

Specifically, the judge should first consider the preamble's provision-by-provision explanations, which frequently respond to public comments raising potential ambiguities. If ambiguity persists, the judge should then consult the regulatory analyses, which predict the rule's consequences under specific factual scenarios. Both congressional and presidential veto-gates, as well as the public more generally, rely on these analyses when engaging with the regulatory process. Finally, if these materials conflict, the court should then defer to the agency's interpretation—provided that the agency provides a reasoned explanation. In this manner, regulatory textualism asks how the reasonable reader of a rule would have understood its meaning as negotiated by the President, Congress, and other politically legitimate actors.

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INTRODUCTION

Regulatory texts often result from fierce negotiations during the rulemaking process. These fights can be just as heated as those that occur over statutes. Indeed, when Congress delegates rulemaking authority to an agency, it empowers administrators to engage in binding lawmaking.¹ Consider, for example, recent battles over whether the Federal Communications Commission (FCC) should regulate Internet providers as a public utility² or whether the Environmental Protection Agency (EPA) should curb carbon emissions from existing power plants.³ Each of these debates featured

1. See, e.g., *Ariz. Grocery Co. v. Atchison, Topeka & Santa Fe Ry. Co.*, 284 U.S. 370, 386 (1932) (characterizing a rulemaking agency as a body that “speaks as the legislature” with “pronouncement[s] that have] the force of a statute”); Randy J. Kozel & Jeffrey A. Pojanowski, *Administrative Change*, 59 UCLA L. REV. 112, 116 (2011) (“An agency with authority to issue these regulations acts as a delegate of Congress, and a lawfully enacted legislative rule binds the public, the courts, and the agency itself with the force of a statute.”).

2. See Jonathan Weisman, *F.C.C. Net Neutrality Rules Clear Hurdle as Republicans Concede to Obama*, N.Y. TIMES, Feb. 24, 2015, at A1.

3. See Suzanne Goldenberg, *Obama Defends New Carbon Emission Rules in Face of Mounting Backlash*, THE GUARDIAN (June 2, 2014, 6:43 PM), <http://www.theguardian.com/>

presidential pronouncements⁴ and legislative threats,⁵ alongside heated discussions within and with agencies—involving the President, Congress, interest groups, and the courts. Lower-profile legislative rules garner less attention, to be sure, but emerge in the shadow of these political debates.

Contrary to the conventional view of rulemaking as a coherent and rationalized process of reason-giving, regulatory drafting is often an exercise in political compromise. Given the stakes involved, interested parties have thus become increasingly savvy about the many levers available to influence the process.⁶ These avenues could include informal meetings with agency staff, phone calls with White House officials, participation in congressional oversight hearings, and aggressive litigation threats.⁷ Each of these junctures presents renewed opportunities to lobby drafters for changes to the final regulatory text and accompanying materials. Indeed, the modern rulemaking process departs in many ways from the idealized version often presented in administrative-law casebooks and centered on the Administrative Procedure Act (APA).⁸

environment/2014/jun/02/obama-defends-epa-coal-climate-change-rules-backlash [http://perma.cc/UZ6G-35NG].

4. See, e.g., Ezra Mechaber, *President Obama Urges FCC to Implement Stronger Net Neutrality Rules*, THE WHITE HOUSE BLOG (Nov. 10, 2014, 9:15 AM), <https://www.whitehouse.gov/blog/2014/11/10/president-obama-urges-fcc-implement-stronger-net-neutrality-rules> [http://perma.cc/5HTY-TXLE]; Press Release, The White House, Statement by the President on the Ozone National Ambient Air Quality Standards (Sept. 2, 2011), <https://www.whitehouse.gov/the-press-office/2011/09/02/statement-president-ozone-national-ambient-air-quality-standards> [http://perma.cc/CKQ2-VNFR].

5. See, e.g., Tom Risen, *Lawmakers Grill FCC Chair on Internet Regulation*, U.S. NEWS (Sept. 17, 2014, 6:18 PM), <http://www.usnews.com/news/articles/2014/09/17/congress-challenges-fcc-chairman-on-net-neutrality> [http://perma.cc/2LLG-RVHE]; Cat Zakrzewski, *Republicans Continue Fight Against Net Neutrality with Three New Proposals*, TECHCRUNCH (Apr. 22, 2015), <http://techcrunch.com/2015/04/21/republicans-continue-fight-against-net-neutrality-with-three-new-proposals/#.zyuvhz:k8dV> [http://perma.cc/LF25-FGCJ].

6. See Thomas O. McGarity, *Administrative Law as Blood Sport: Policy Erosion in a Highly Partisan Age*, 61 DUKE L.J. 1671, 1679 (2011) (“The roster of [regulatory] players has expanded beyond agency and OIRA staffs, advocates for the regulated industry and beneficiary groups, and congressional aides to include individuals and organizations with broad policy agendas, such as the U.S. Chamber of Commerce, think tanks, grassroots organizations, media pundits, and Internet bloggers.”).

7. See *id.* at 1703–19 (surveying various tactics of “blood sport” regulatory policy making).

8. See Daniel A. Farber & Anne Joseph O’Connell, *The Lost World of Administrative Law*, 92 TEX. L. REV. 1137, 1140 (2014) (“[T]he actual workings of the administrative state have increasingly diverged from the assumptions animating the APA and classic judicial decisions that followed.”).

The interpretation of regulations, in turn, requires attention to these rulemaking realities.⁹ Regulations are bargains struck at pivotal points in the rule-drafting process. These negotiations occur between interested parties and politically accountable actors such as the agency head, the President, and Congress.¹⁰ What legitimates this dynamic is not the ensuing private agreements, but rather the collective rationales that accompany the resulting texts. Since these rationales inform how the public understands the final regulation, judges should look to these materials as valid sources of interpretation.

Accordingly, this Article develops an approach—what it calls *regulatory textualism*—that focuses on the public meaning of the rule’s legally binding text. In doing so, it offers a distinctly textualist approach for the still-nascent literature on regulatory interpretation, which has been recently reinvigorated by Professor Kevin Stack.¹¹ Regulatory textualism, however, is distinct from statutory textualism: the judge should interpret the codified text armed not with dictionaries or other general linguistic aids, but rather by structured reference to select materials generated by the regulatory drafting process. This approach views rulemaking as the product of procedures imposed by the President, Congress, and the courts to imbue the rulemaking with legitimacy. The method thus draws upon these review processes to generate a hierarchy of sources based on their public accessibility, reliability, and relevance to the interpretive question. Different forms of regulatory history can be ranked

9. See Lars Noah, *Divining Regulatory Intent: The Place for a “Legislative History” of Agency Rules*, 51 HASTINGS L.J. 255, 281 (2000) (observing that “it is far easier to ascribe an intent to an agency when it issues a rule than to a legislature when it enacts a statute, both because of differences in their decisionmaking routines and because of the greater reliability of the materials that document the bases for their decisions”); Kevin M. Stack, *Interpreting Regulations*, 111 MICH. L. REV. 355, 380 (2012) (noting that distinctive features of the regulatory process such as “the APA’s procedural requirement that the agency issue a statement of basis and purpose, the arbitrary and capricious review’s standard of rationality, and *Chenery’s* timing rule” justify regulatory purposivism); *id.* at 392–94 (noting that “the critical difference between regulations and statutes is how the court discerns purposes”); Russell L. Weaver, *Judicial Interpretation of Administrative Regulations: An Overview*, 53 U. CINN. L. REV. 681, 711 (1984) (“Courts must treat regulations differently than statutes because agencies generate different types of interpretive materials than do legislatures. Instead of committee reports, explanations of committee chairmen, records of debate and the other materials that legislatures typically create, agencies prepare notices of proposed rulemakings, draft rules, regulatory analyses and other documents.”).

10. Such bargains, of course, are not to be confused with the wholly distinct procedure of negotiated rulemaking, which raises a different set of issues not addressed here.

11. See generally Stack, *supra* note 9.

according to the source's likelihood to shed credible light on the public meaning of a text with the appropriate level of generality.

Specifically, judges should first consider the preamble's detailed provision-by-provision analysis of the regulation, which frequently responds to public comments raising potential ambiguities in the proposed regulation.¹² This source is the best evidence of the regulatory text's public meaning because it results from the agency's back-and-forth with external commenters and political monitors. If ambiguity persists, the judge should then consult the regulatory analyses, which apply the regulation to specific factual scenarios to predict the rule's consequences. Congressional and presidential reviewers, as well as the public more generally, rely on these analyses when engaging in the regulatory process. This hierarchy of interpretive sources tracks the most reliable and accessible materials likely to reflect, in varying degrees, how a reasonable reader of the regulation would have understood the meaning of the regulation as negotiated by the President, Congress, and other authoritative regulatory actors.¹³ If these materials conflict with each other or

12. To maintain consistency with other scholars' terminology, this Article will also define "preamble" as the agency's statement of basis and purpose. *See, e.g.*, Stack, *supra* note 9, at 360–61 & n.22 (equating "preamble" with the "statement[s] of basis and purpose" required by the APA) (alteration in original). Note, however, that the term is sometimes used differently by other scholars to include other materials that agencies publish in the Federal Register alongside the text and statement of basis and purpose, such as the regulatory analyses required by various executive orders and statutes. *See, e.g.*, CORNELIUS M. KERWIN & SCOTT R. FURLONG, *RULEMAKING: HOW GOVERNMENT AGENCIES WRITE LAW AND MAKE POLICY* 75–86 (4th ed. 2011) (observing that agencies "report in preambles the results of the reviews they are required to conduct under a variety of statutes and executive orders"); *id.* at 63 ("[A]gencies report in preambles the results of the reviews they are required to conduct under the Paperwork Reduction Act, the Regulatory Flexibility Act, and Executive Order 12,866."); *see also* KEVIN M. STACK, *GUIDANCE IN THE RULEMAKING PROCESS: EVALUATING PREAMBLES, REGULATORY TEXT, AND FREESTANDING DOCUMENTS AS VEHICLES FOR REGULATORY GUIDANCE* 11, http://www.acus.gov/sites/default/files/documents/Guidance%20in%20the%20Rulemaking%20Process%20Revised%20Draft%20Report%205_16_14%20ks%20final.pdf [<http://perma.cc/7L57-WGBQ>] (noting that preambles include "engagement with commentators"); Noah, *supra* note 9, at 311 (observing that "a preamble may have included reassurances in response to comments that expressed concerns about particular applications of a proposed rule").

13. For a sample of the statutory-interpretation literature drawing on positive political theory, see, for example, Cheryl Boudreau, Arthur Lupia, Mathew D. McCubbins & Daniel B. Rodriguez, *What Statutes Mean: Interpretive Lessons from Positive Theories of Communication and Legislation*, 44 *SAN DIEGO L. REV.* 957, 958 (2007); William N. Eskridge, Jr. & John Ferejohn, *The Article I, Section 7 Game*, 80 *GEO. L.J.* 523, 523–24 (1992); McNollgast, *Legislative Intent: The Use of Positive Political Theory in Statutory Interpretation*, 57 *L. & CONTEMP. PROBS.* 3, 5–6 (1994) [hereinafter McNollgast, *Legislative Intent*] (describing how positive political theory approaches "overlap[] the legal scholarship that instructs the court to

otherwise cannot resolve the ambiguity, however, the court should then defer to the agency's interpretation—provided that the agency offers a reasoned explanation.

Methodologically, this approach attempts to tailor positive political theory insights to help identify the regulatory text's public meaning. Indeed, the rulemaking process features a number of pivotal actors, or *veto-gates*, who must sign off on a regulation before it can proceed further.¹⁴ Once these pivotal actors have been identified, the court's task is to privilege those statements in the rulemaking record that are most likely to be credible reflections of the public meaning to which regulatory actors agreed.¹⁵ Put differently, judges should rely on materials that are likely to be sincere, as opposed to strategic attempts to misstate the terms of the agreement.¹⁶ Statements are sincere when they would incur some cost if the speaker misrepresented the bargain.¹⁷

This approach balances a number of institutional considerations for selecting among alternative interpretive methods.¹⁸ By restricting the degrees of freedom to choose sources, it attempts to reduce judicial decision costs. In contrast to an approach that would consult only linguistic aids, however, regulatory textualism also seeks to minimize judicial discretion by identifying narrow contexts in which

ascertain as accurately as possible the 'original intent' of legislation"); McNollgast, *Positive Canons: The Role of Legislative Bargains in Statutory Interpretation*, 80 GEO. L.J. 705, 707 n.5 (1992) [hereinafter McNollgast, *Positive Canons*]; Daniel B. Rodriguez & Barry R. Weingast, *The Positive Political Theory of Legislative History: New Perspectives on the 1964 Civil Rights Act and Its Interpretation*, 151 U. PA. L. REV. 1417, 1418–21 (2003).

14. The term "veto-gate" seems to have first appeared in the legal literature in McNollgast, *Positive Canons*, *supra* note 13, at 707 & n.5. Variations of the core idea are also sometimes referred to as "pivot points," "veto players," or the politics of "negative power"—terms which this Article will use interchangeably. See, e.g., CHARLES CAMERON, VETO BARGAINING 3 (2000) (defining the politics of "negative power" as the "consequences of an institutionalized ability to say no"); KEITH KREHBIEL, PIVOTAL POLITICS 23–24 (1998) (drawing on dictionary definition to specify a "pivot" as "a person or thing on or around which something turns or depends").

15. See KREHBIEL, *supra* note 14, at 23–24 (defining actors that serve as "pivot[s]").

16. See McNollgast, *Positive Canons*, *supra* note 13, at 707 ("A positive political theory approach also offers guidance in sorting out meaningful or sincere evaluations of legislative language from strategic or opportunistic posturing by legislators or the President.").

17. McNollgast, *Legislative Intent*, *supra* note 13, at 26 ("Observing costly actions can help judges exclude some alternative interpretations.").

18. See ADRIAN VERMEULE, JUDGING UNDER UNCERTAINTY 111 (2006); Cass R. Sunstein & Adrian Vermeule, *Interpretations and Institutions*, 101 MICH. L. REV. 885, 886 (2003) (arguing that "debates over legal interpretation cannot be sensibly resolved without attention to [institutional] capacities").

potentially specialized terms should be understood. Moreover, unlike intentionalist and purposivist approaches that encourage judges to further what they perceive to be the relevant policy goals, regulatory textualism instead calls for judges to defer to agencies that are better suited to the task. In doing so, it allows flexibility for the current agency's well-reasoned interpretation when the regulatory text is otherwise ambiguous.

Part I discusses how various scholars thus far have proposed interpreting regulations by reference to the agency's intent or purpose. It then evaluates intentionalist and purposivist approaches against various criteria: the need to constrain judicial discretion, comparative institutional competencies between agencies and courts, and the minimization of strategic agency incentives to subvert rulemaking procedures. Part II then explores the rationales for a textualist theory, but rejects a plain-meaning approach based solely on the regulatory text and linguistic sources. Instead, it proposes a method based on sources most likely to shed light on the rule's public meaning as authorized by politically accountable actors. Finally, Part III asks how and when a court should defer to an agency's construction of an ambiguous provision and concludes that deference is due when the agency provides a sufficiently reasoned explanation.

I. JUDICIAL REGULATORY INTERPRETATION

Regulatory interpretation requires judges to choose among competing interpretive methods based on considerations unique to the rulemaking process.¹⁹ The most well-developed scholarly approaches currently advocate some version of intentionalism or purposivism. The resulting debate features nuanced disagreements about the appropriate goals and sources of regulatory interpretation.²⁰

19. A judge could be a purposivist in statutory interpretation based on one set of reasons, for example, but a textualist in regulatory interpretation (or vice versa), due to a distinctive set of concerns. See John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 689 (1996) (“[I]mportant differences between the regulatory and legislative processes offer agencies the opportunity to produce explanatory materials that courts may consult in ascertaining regulatory meaning.”); Stack, *supra* note 9, at 361 (arguing that “a theory of regulatory interpretation must be grounded in the distinctive character of regulations and the institutions that issue them”).

20. See Stack, *supra* note 9, at 358 (“We lack a debate over, much less an account of, the basic elements of regulatory interpretation, including ‘the overall *goal* of interpretation,’ ‘the admissible *sources* the interpreter may consider in attempting to achieve that goal,’ and the relationships among those sources.”); *id.* at 377 (noting that “two key elements in a theory of legal interpretation” include “the privileged sources of interpretation” as well as the “goals” of

Though applying labels to these proposed methods can be hazardous given their overlapping premises,²¹ labels can nonetheless help to highlight the stakes involved.²² This Part critically examines this debate and concludes that both purposivism and intentionalism are ultimately ill-suited to judicial regulatory interpretation.²³

A. *Competing Approaches*

Despite the fact that regulations overwhelm statutes in number and scope,²⁴ neither judges nor scholars have confronted regulations

interpretation); cf. WILLIAM N. ESKRIDGE, JR., PHILIP R. FRICKRY & ELIZABETH GARRETT, LEGISLATION AND STATUTORY INTERPRETATION 219 (2006) (distinguishing “between the overall *goal* of instated or implied, of the ends, aims, or goals of statutory interpretation” as well as “[w]hat sources are admissible” and whether “those sources [should] be arranged in some hierarchy and consulted sequentially”).

21. See, e.g., John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 75 (2006) (acknowledging that “textualism and purposivism do in fact share more conceptual common ground than textualists . . . have sometimes emphasized”); Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 COLUM. L. REV. 1, 3 (2006) (arguing that “when one considers how modern textualists go about identifying textual meaning and how purposivists go about identifying statutory purposes, the differences between textualism and purposivism begin to fade”); Caleb Nelson, *What Is Textualism?*, 91 VA. L. REV. 347, 349 (2005) (arguing that the differences between textualism and purposivism “are less categorical than either textualists or their critics generally acknowledge”); Jonathan R. Siegel, *The Inexorable Radicalization of Textualism*, 158 U. PA. L. REV. 117, 125 (2009) (referring to “the accommodationists” that have “focused on similarities among, rather than differences between, the rival methods” of textualism and intentionalism).

22. Cf. Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 YALE L.J. 1750, 1832 (2010) (“Labels are unfortunately important in statutory interpretation.”). This insight is particularly true when specified with attention to an authors’ own self-characterizations.

23. Importantly, the focus here is on how judges—as opposed to agencies with different institutional competencies—should engage in regulatory interpretation. Cf. Jerry L. Mashaw, *Agency-Centered or Court-Centered Administrative Law? A Dialogue with Richard Pierce on Agency Statutory Interpretation*, 59 ADMIN. L. REV. 889, 889–93 (2007); Jerry L. Mashaw, *Between Facts and Norms: Agency Statutory Interpretation as an Autonomous Enterprise*, 55 U. TORONTO L.J. 497, 497–501 (2005); Peter L. Strauss, *When the Judge is Not the Primary Official with Responsibility to Read: Agency Interpretation and the Problem of Legislative History*, 66 CHI.-KENT L. REV. 321, 321–22 (1990). *But see* Richard J. Pierce, Jr., *How Agencies Should Give Meaning to the Statutes They Administer: A Response to Mashaw and Strauss*, 59 ADMIN. L. REV. 197, 197–205 (2007). Relatedly, some argue that administrative agencies are better situated (and more likely) to interpret statutes purposively, while courts are better suited to apply textualist premises. This Article argues that such arguments are even stronger when it comes to the agencies’ interpretation of their own regulations. See VERMEULE, *supra* note 18, at 111; Michael Herz, *Purposivism and Institutional Competence in Statutory Interpretation*, 2009 MICH. ST. L. REV. 89, 92; Sunstein & Vermeule, *supra* note 18, at 928.

24. See KERWIN & FURLONG, *supra* note 12, at 13–21 (documenting increase since the 1970s in number of rules and pages in the Federal Register far exceeding that of statutory texts);

with the level of interpretive sophistication applied to constitutions, statutes, or contracts.²⁵ Instead, most judicial approaches can best be described as erratic;²⁶ worse, some judges blithely apply statutory-interpretation methods to regulations without any reflection at all.²⁷ Previous precedents themselves provide inconsistent guidance. On the one hand, some call for courts to consult the “plain words” of the regulation’s text when interpreting it.²⁸ Other courts have instead looked to the “Secretary’s intent at the time of the regulation’s promulgation” and have consulted an array of materials such as versions of the regulation over time, interpretations of other agencies with similar words in their regulations, and public comments.²⁹

Noah, *supra* note 9, at 259 (noting the “far greater prevalence of legislative rules issued by agencies than by Congress”).

25. See, e.g., Noah, *supra* note 9, at 258–59 (noting that “[a] few scholars have applied insights gleaned from the intense debate over methods of statutory interpretation to other texts having the same force and effect as legislation” but that “[t]he same interpretative issues involving legislative rules promulgated by administrative agencies have gone largely unnoticed”); Stack, *supra* note 9, at 357 (“While all agree that regulations are primary sources of law, strikingly little attention has been devoted to the method of their interpretation.”); Russell L. Weaver, *Judicial Interpretation of Administrative Regulation: The Deference Rule*, 45 U. PITT. L. REV. 587, 589 (1984) (“Although commentators have lavished attention on the subject of statutory construction, they have virtually ignored the problem of how to interpret regulations.”).

26. See Stack, *supra* note 9, at 359 (observing that “courts have not developed a consistent approach to regulatory interpretation”); *id.* at 376 (noting that decisions involving regulatory interpretation exhibit an “ad hoc quality”); Weaver, *supra* note 9, at 683 (“Courts have not . . . evolved a uniform interpretive theory to apply to regulations.”).

27. See Frank C. Newman, *How Courts Interpret Regulations*, 35 CALIF. L. REV. 509, 509–10 (1947) (observing that “lawyers have often treated regulations as statutes, particularly when interpretive questions arise”); Stack, *supra* note 9, at 368–70 (noting that “courts rely on principles of statutory interpretation without pausing or commenting on the justification for applying those principles to regulations and without situating their approach in relation to other decisions in which courts have construed regulations”); Weaver, *supra* note 9, at 682 (“Most courts assume that regulations should be interpreted using principles of statutory construction.”); see also, e.g., Nat’l Ass’n of Home Builders v. Defs. of Wildlife, 551 U.S. 644, 669 (2007) (applying statutory “canon against implied repeals” to regulation); Rucker v. Wabash R.R., 418 F.2d 146, 149 (7th Cir. 1969) (citing II SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 4007 (3d ed. 1943)) (“Administrative regulations, like statutes, must be construed by courts, and the same rules of interpretation are applicable in both cases.”).

28. *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945); see also *Chase Bank USA, N.A. v. McCoy*, 562 U.S. 195, 203–08 (2011); *Christensen v. Harris Cnty.*, 529 U.S. 576, 586–88 (2000); *Auer v. Robbins*, 519 U.S. 452, 461 (1997); *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 514 (1994); *Sec’y of Labor v. W. Fuels-Utah, Inc.*, 900 F.2d 318, 321 (D.C. Cir. 1990).

29. See, e.g., *Gardebring v. Jenkins*, 485 U.S. 415, 430 (1988); *In re Transcon Lines*, 89 F.3d 559, 567 (9th Cir. 1996); *SSM Rehab. Inst. v. Shalala*, 68 F.3d 266, 269–71 (8th Cir. 1995); *United States v. Boynton*, 63 F.3d 337, 342, 344 (4th Cir. 1995); *Knapp Shoes, Inc. v. Sylvania Shoe Mfg. Corp.*, 640 N.E.2d 1101, 1105 (Mass. 1994).

One likely explanation for this interpretive lethargy is the decades-long influence of *Bowles v. Seminole Rock*,³⁰ which gives “controlling weight” to an agency interpretation so long as it is not “plainly erroneous or inconsistent with the regulation.”³¹ Accordingly, the judge is called upon first to interpret the regulation to determine whether it is indeed “plainly erroneous” or otherwise “inconsistent” with the agency’s interpretation; only then should she consider deferring to the agency’s construction.³² In practice, however, many judges have understood their review of an agency’s interpretation of its own regulations as requiring more deference than that granted to an agency’s interpretation of a statute.³³ As a result, some judges have avoided the interpretive inquiry altogether, or else halfheartedly gestured toward tools drawn from the statutory context before simply capitulating to the agency’s view.³⁴ The effect is that the overwhelming majority of cases of regulatory interpretation have resulted in an agency victory.³⁵

More recently, however, some academics and several members of the Supreme Court have begun to question such practices and have

30. *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945).

31. *Auer v. Robbins*, 519 U.S. 452, 461 (1997); *Seminole Rock*, 325 U.S. at 414. *Seminole Rock* deference is also sometimes referred to as *Auer* deference, though this Article will only refer to the former for consistency’s sake. See Stack, *supra* note 9, at 371 (“The most obvious place to turn for assistance with regulatory interpretation is the long-standing doctrine that an agency’s construction of its own regulation is controlling unless plainly erroneous or inconsistent with the regulation,” a doctrine “referred to as *Seminole Rock* deference.”).

32. *Seminole Rock*, 325 U.S. at 414.

33. See, e.g., *Cathedral Candle Co. v. U.S. Int’l Trade Comm’n*, 400 F.3d 1352, 1363–64 (Fed. Cir. 2005) (“Deference to an agency’s interpretation of its own regulations is broader than deference to the agency’s construction of a statute, because in the latter case the agency is addressing Congress’ intentions, while in the former it is addressing its own.” (citing *Am. Express Co. v. United States*, 262 F.3d 1376, 1382–83 (Fed. Cir. 2001))).

34. See *supra* note 27; Noah, *supra* note 9 (noting that courts “frequently deflect[] the [interpretive] task altogether by simply deferring to an agency’s post-promulgation interpretation”); Stack, *supra* note 9, at 369 (“Even when the interpretation of a regulation receives explicit attention, an uncanny detachment characterizes the interpretive exercise: courts rely on principles of statutory interpretation without pausing or commenting on the justification for applying those principles to regulations . . .”).

35. See William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan*, 96 GEO. L.J. 1083, 1099 (2008) (observing a 90.9 percent agency win rate in a dataset of *Seminole Rock* cases from 1983 to 2005); Richard J. Pierce, Jr. & Joshua Weiss, *An Empirical Study of Judicial Review of Agency Interpretations of Agency Rules*, 63 ADMIN. L. REV. 515, 519 (2011) (determining that lower courts applying *Auer* and *Seminole Rock* upheld agency interpretations about 76 percent of the time in a sample of district and circuit court cases from January 1, 1999 to December 31, 2001, and from January 1, 2005 to December 31, 2007).

noted the need for independent interpretive principles to govern regulatory texts.³⁶ Much of their hesitation about the current state of affairs stems from the sense that an unreflective rule of deference has facilitated tenuous agency interpretations at the expense of fair notice and process.³⁷ As a result, some scholars have advanced freestanding theories of regulatory interpretation, the most developed of which are currently either intentionalist or purposivist in orientation, though some have begun to consider textualist accounts as well.³⁸

Professor Kevin Stack, for example, has recently advanced a sophisticated interpretive method that he calls “regulatory purposivism.”³⁹ Regulatory purposivism adapts Hart and Sacks’s statutory legal process theory to the rulemaking context.⁴⁰ Because administrative law “requires regulators to act as reasonable persons, pursuing reasonable purposes within the permissible range of their discretion,”⁴¹ Stack argues that the role of the judge is to interpret a

36. See, e.g., *Perez v. Mortg. Bankers Ass’n*, 135 S. Ct. 1199, 1213 (2015) (Scalia, J., concurring) (advocating that *Auer* deference be “abandon[ed]”); *id.* at 1219 (Thomas, J., concurring) (arguing that “the entire line of precedent beginning with *Seminole Rock* raises serious constitutional questions and should be reconsidered”); *Decker v. Nw. Envtl. Def. Ctr.*, 133 S. Ct. 1326, 1338 (2013) (Roberts, C.J., concurring) (noting that “[i]t may be appropriate to reconsider [*Auer* and *Seminole Rock*] in an appropriate case”); *Talk Am., Inc. v. Mich. Bell Tel. Co.*, 131 S. Ct. 2254, 2266 (2011) (Scalia, J., concurring) (announcing that “while I have in the past uncritically accepted [the *Auer*] rule, I have become increasingly doubtful of its validity”); Michael P. Healy, *The Past, Present and Future of Auer Deference: Mead, Form and Function in Judicial Review of Agency Interpretations of Regulations*, 62 U. KAN. L. REV. 633, 635 (2014) (arguing for a nondeferential standard of review of regulatory interpretation); Manning, *supra* note 19, at 617 (arguing “that the Justices’ new doubts about *Seminole Rock* are well founded, and that the Court should replace *Seminole Rock* with a standard that imposes an independent judicial check on the agency’s determination of regulatory meaning”).

37. See, e.g., *Decker*, 133 S. Ct. at 1341 (Scalia, J., concurring in part and dissenting in part) (noting that “when an agency interprets its own rules . . . the power to prescribe is augmented by the power to interpret; and the incentive is to speak vaguely and broadly, so as to retain a ‘flexibility’ that will enable ‘clarification’ with retroactive effect”); *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2168 (2012) (expressing concern that strong judicial deference “creates a risk that agencies will promulgate vague and open-ended regulations that they can later interpret as they see fit, thereby ‘frustrat[ing] the notice and predictability purposes of rulemaking’” (quoting *Talk Am., Inc.*, 131 S. Ct. at 2254)).

38. See, e.g., Manning, *supra* note 19, at 659 (“Detailed consideration of the relative legitimacy and utility of particular approaches to textual construction is for another day.”).

39. See Stack, *supra* note 9, at 363.

40. See *id.* (defending “a purposive method of regulatory interpretation modeled on Hart and Sacks’s approach to statutory interpretation”); Kevin M. Stack, *The Interpretive Dimension of Seminole Rock*, 22 GEO. MASON L. REV. 669, 684 (2015) (further developing purposivist approach); cf. HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS* (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994).

41. Stack, *supra* note 9, at 397.

rule consistently with its statement of basis and purpose, otherwise known as the rule's preamble.⁴² In his view, the statement of basis and purpose is not only a product of the rulemaking process, but also anchors the rule's validity.⁴³ As such, both the regulatory text and statement of basis and purpose should be understood as part of the same "regulatory act," much like an enacted statutory statement of purpose.⁴⁴ Stack accordingly calls for judges to consider the text with reference to the agency's own understanding of its policy goals as reflected in "the rationale, objectives, and limits of the regulation" provided in the preamble.⁴⁵ This approach, he argues, has numerous virtues including promoting judicial deference to the agency's own "authoritative statement" of its aims,⁴⁶ providing notice to regulated entities,⁴⁷ optimizing the balance between agency flexibility and predictability,⁴⁸ as well as reducing the possibility for "strategic manipulation" by agencies.⁴⁹

Purposive approaches like Stack's generally recognize that rulemaking agencies may not be able to foresee every situation in which the regulation should be applied nor anticipate every changed circumstance. Thus, the judge should attempt to implement what the enacting agency was initially attempting to achieve.⁵⁰ Proponents divide, however, as to the appropriate sources judges should consider to discern that purpose. For example, unlike Stack's exclusive focus on the text and preamble, Professor Russell Weaver's purposivism

42. *Id.* at 392 (arguing that "a goal of regulatory interpretation is to implement the purpose or aim of the regulation, and that the privileged interpretive sources are the regulatory text and accompanying statement of basis and purpose"); see also Kevin M. Stack, *How to Interpret a Regulation: First Principles*, REGBLOG (Feb. 11, 2013), <http://www.regblog.org/2013/02/11/11-stack-regulation-interpretation> [<http://perma.cc/9V8S-8MED>].

43. See Stack, *supra* note 9, at 380 ("[T]he statement of basis and purpose is not only joined to the text of the rule as the other principal product of the rulemaking proceeding, but it also provides the grounds for the validity of the rule.").

44. See *id.* at 395.

45. *Id.* at 398.

46. See *id.* (arguing that his purposive approach "allocates a strong form of judicial deference, in the sense of judicial acceptance, to the agency's own authoritative statement of the rationale, objectives, and limits of the regulation").

47. *Id.* at 401 (noting that approach "avoids the central objections that textualists have made to purposivism, including . . . problems of fair notice").

48. See *id.* at 414–16.

49. *Id.* at 416.

50. See Noah, *supra* note 9, at 264–65 (noting that "[p]roponents of dynamic interpretation start with the static text but strive to effectuate the purpose of the legislation and adapt it as necessary to deal with changed circumstances").

welcomes a broader array of interpretive materials. Although he agrees that the text and preamble provide the best evidence of an agency's regulatory objectives,⁵¹ Weaver argues that such sources can be indeterminate. Thus, he also invites judges to reference the "nature of the regulatory scheme," the notice of proposed rulemaking, internal agency documents and memoranda, environmental impact statements, cost-benefit analyses, testimony by agency drafters, and canons of construction, among other materials.⁵²

Intentionalist approaches, by contrast, focus more heavily on the specific factual scenarios originally considered by the agency enacting the regulation. In this sense, proponents of intentionalism like Professor Lars Noah are more wary of the dangers of "dynamic" interpretation by judges "empowered to effectuate" the rule's "purpose and adapt it as necessary to deal with changed circumstances."⁵³ Intentionalists are thus more eager to confine judicial regulatory interpretation to the actual circumstances initially considered by the agency as opposed to what judges perceive as the regulation's broader objectives.

One goal of this approach is to rein in the judge's ability to adapt a regulation to new facts at higher levels of generality. As a result, Noah's "original intent" approach privileges what the enacting agency explicitly considered in the record.⁵⁴ Specifically, he first points to the final rule's preamble as the "best" evidence of original intent, noting that such preambles have become more detailed as judicial scrutiny of them has increased over time.⁵⁵ He then presents a hierarchy of other sources appropriate for the task, including regulatory analyses,

51. Weaver, *supra* note 9, at 696 ("To the extent that a regulation is 'purposive,' it is because an agency acted 'purposively' in creating it This fact is reflected in the APA, which requires that every final rule promulgated during an informal rulemaking set forth its 'basis and purpose.'"); *see id.* at 698 ("The relevant purposes, whether immediate or ulterior, are those held by the agency In the informal rulemaking process, the agency typically will state the 'purpose'—the primary ulterior purpose—of the regulation in a document accompanying the final rule."); *see also id.* at 711 (stating that, as he had "noted above," "the preamble to the final rule must contain a 'concise statement [of its] basis and purpose'"(alteration in original)).

52. *See id.* at 709–21.

53. Noah, *supra* note 9, at 264–65.

54. *See id.* at 260.

55. *Id.* at 306 (observing that "when they do inquire about the agency's original intent, courts usually refer only to the preamble accompanying the final rule, which represents the best but hardly only useful source of guidance"); *id.* at 309–10 (noting that "[a]s courts became more demanding in their substantive review of rules adopted through notice-and-comment procedures . . . [p]reambles for especially controversial rules may respond in detail to public comments in anticipation of defending against a judicial challenge").

notices of proposed rulemaking, internal agency memoranda, and even the “recollections” of those involved in the rule’s formulation.⁵⁶

B. Evaluating Intentionalism and Purposivism

Both intentionalism and purposivism, however, fall prey to a number of regulation-specific worries that ultimately counsel against their adoption. These concerns include the court’s inability to locate regulatory intent or purpose consistently, the comparative competencies between agencies and courts, and the general potential for strategic interpretive behavior by rulemaking agencies. Accordingly, one way to understand the relevant problem is in terms of determining which interpretive method is likely to best balance or trade off among these various considerations.⁵⁷

1. *The Identification Problem.* Legal realists and public choice theorists alike have effectively undermined the notion that multimember institutions like administrative agencies possess a singular, identifiable intent or purpose.⁵⁸ In this view, it is unlikely for the myriad actors involved in the regulatory process to possess some collective intent when issuing a regulation, and even less likely that judges could discover this intent, even if it existed. This insight is perhaps most straightforward as applied to independent agencies

56. *Id.* at 307; *see also id.* at 320–21 (discussing how “agency officials may have to testify about their decisionmaking where necessary to provide a record for judicial review”).

57. Given that optimizing over all of these dimensions may be impossible due to resource-related or other constraints, the search may ultimately be for second-best interpretive solutions. *See* VERMEULE, *supra* note 18, at 80–81 (arguing that it “is impossible to derive interpretive rules directly from first-best principles without answering second-best questions about institutional performance”); Frederick Schauer, *Statutory Construction and the Coordinating Function of Plain Meaning*, 1990 SUP. CT. REV. 231, 256 (when interpreting statutes, turning attention “to the contingent optimality of sub-optimizing decision procedures, and to the circumstances in which the second-best is the best we can do”).

58. *See* Noah, *supra* note 9, at 280–81 (“Much like the criticized fiction of a discoverable legislative intent, the notion of a single and authoritative administrative intent encounters some conceptual difficulties” such as the fact that “[m]any agency officials may have a hand in the formulation of a legislative rule” and with “multi-member commissions, these problems become still trickier.”); Stack, *supra* note 9, at 401 (“Relying on public choice theory, textualists argue that legislation frequently lacks a purpose other than that ascertainable in the text.”); *cf.* KENNETH J. ARROW, *SOCIAL CHOICE AND INDIVIDUAL VALUES* 22–24 (2d ed. 1963); Herz, *supra* note 23, at 94–104; Saul Levmore, *Ambiguous Statutes*, 77 U. CHI. L. REV. 1073, 1075–76 (2010); Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 869–72 (1930); Kenneth A. Shepsle, *Congress is a ‘They,’ Not an ‘It’: Legislative Intent as Oxymoron*, 12 INT’L REV. L. & ECON. 239, 239 (1992).

headed by multimember commissions or boards.⁵⁹ Individual commissioners may vote for a regulation for any number of reasons—to change a policy, to curry favor with a colleague, or to appease a potential future employer. Thus, to impute some subjective intent to their aggregate vote would indulge a legal fiction; legal fictions, in turn, can foster judicial creativity.

Perhaps less obviously, the concern is also relevant to single-headed executive agencies, particularly those required by executive order to submit significant regulations to the Office of Information and Regulatory Affairs (OIRA) for review. Although the hierarchical structure of such agencies renders the notion of intent more plausible,⁶⁰ the concept is complicated by the realities of the OIRA-coordinated review process. The interactions between the agency head and White House actors can result in changes to a regulation that render it difficult for an external actor, like a judge, to separate the subjective intent of the agency head from other members of the President's administration.⁶¹ An agency head signing off on a regulation could have a different intent than that of the President or OIRA administrator because of bureaucratic capture, her relationship with Congress, or diverging amounts of information and expertise.⁶² Although some might argue that it should be the intent of the statutory delegate that should ultimately matter,⁶³ others would point out that, even still, the lines between the intent of the agency

59. See Noah, *supra* note 9, at 280–81 (noting difficulties of discerning intent from multimember commissions)

60. See *id.* at 281 (noting that a “hierarchical structure and duty of explanation distinguishes all administrative agencies from the collective decisionmaking process of a legislature”).

61. See Lisa Heinzerling, *Who Will Run the EPA?*, 30 YALE J. ON REG. ONLINE 39, 39 (2013) (noting that through the “longstanding practice of White House control over EPA rules . . . EPA rules deemed major by OMB are not issued without OMB’s imprimatur,” thus allowing “the OMB director [to] become the EPA Administrator’s boss”).

62. See Nicholas Bagley & Richard L. Revesz, *Centralized Oversight of the Regulatory State*, 106 COLUM. L. REV. 1260, 1302–03 (2006); Michael E. Levine & Jennifer L. Forrence, *Regulatory Capture, Public Interest, and the Public Agenda: Toward a Synthesis*, 6 J.L. ECON. & ORG. 167, 169 (1990).

63. Cf. Kevin M. Stack, *The President’s Statutory Powers to Administer the Laws*, 106 COLUM. L. REV. 263, 267 (2006) (arguing that “as a matter of statutory construction the President has directive authority—that is, the power to act directly under the statute or to bind the discretion of lower level officials—only when the statute expressly grants power to the President in name”). But see Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2319–31 (2001). This is, of course, not to confuse a potential extension of Stack’s views on presidential directive authority with his views on regulatory interpretation, which are discussed in more detail here.

head and the President are often blurred in practice.⁶⁴ Such worries would be compounded by the wealth of regulatory history upon which some, like Noah, would allow judges to rely as evidence of agency intent. The broader the palette from which the judge can draw, the more convincing the resulting picture.

Confronted with these concerns, some intentionalists and purposivists would respond that what is important is not the subjective intent of particular regulatory actors, but rather the agency's objective intent or purpose. Stack makes this argument perhaps more forcefully, recall, contending that judges should attempt to discern the objective public purpose of the agency as found in the rule's statement of basis and purpose.⁶⁵ In his view, such statements are akin to "enacted statement[s] of purpose in a statute" in that they have been "duly agreed-upon" by actors within the agency.⁶⁶ The preamble can thus be thought of as part of the regulatory text, which has also gone through the appropriate authorizing procedures.⁶⁷ As a result, the judge has a readily available source from which to identify the rule's explicit official purpose, thus mitigating the criticism that a search for regulatory purpose is an incoherent and ultimately fruitless exercise.

Though Stack convincingly demonstrates that regulatory purposivism is more immune to the criticisms often leveled at statutory purposivism, he has not rebutted them sufficiently to counsel full-scale adoption. First, his attempt to analogize agency statements of basis and purpose to enacted statutory statements of purpose fails to leave conceptual room for statements of purpose that are actually codified into the regulatory text itself—a more precise

64. See Peter L. Strauss, *Foreword: Overseer, or "The Decider"?* *The President in Administrative Law*, 75 GEO. WASH. L. REV. 696, 704 (2007) ("The difference between oversight and decision can be subtle, particularly when the important transactions occur behind closed doors and among political compatriots who value loyalty and understand that the President who selected them is their democratically chosen leader."); Cass R. Sunstein, *The Office of Information and Regulatory Affairs: Myths and Realities*, 126 HARV. L. REV. 1838, 1874 n.126 (2013) (noting "[t]here is a great deal of academic discussion about whether the President may 'overrule' those within the executive branch, including Cabinet heads, who may be delegated a degree of statutory discretion" but arguing that the "issue has more theoretical interest than practical importance" since "those who work for the President want to act consistently with his goals, priorities, and views").

65. See Stack, *supra* note 9, at 361–62.

66. *Id.* at 402.

67. *Id.*; see also *id.* at 407 ("In a sense, the suggestion is that both regulatory text and the regulation's statement of basis and purpose count as part of the 'text' on which a textualist should center her interpretive inquiry.").

analogy. Indeed, agencies often place statements of purpose directly into the codified regulatory text to clarify the purpose of the regulation beyond the general, abstract language found in the APA-required statement of basis and purpose.⁶⁸ In these circumstances, the judge is once again confronted with the problem of how to choose among competing statements of purpose.

Second, as a descriptive matter, agencies often list multiple purposes in their preambles, both in the general introductory language as well as in the particular provision-by-provision explanations. Sometimes, these various stated objectives will track the multiple perceived goals of the authorizing statute.⁶⁹ They could also reflect the agency's attempt to trade off between many conflicting considerations or, more generally, to balance various benefits and costs.⁷⁰ Though administrative-law doctrines undoubtedly "press" agencies to rationalize regulations,⁷¹ the rulemaking process is frequently dominated by rent-seeking interest groups that often succeed in wresting concessions from captured administrators.⁷²

68. See, e.g., Standards for Accredited Veterinarians, 51 Fed. Reg. 45,874, 45,876 (Dec. 23, 1986) (to be codified at 9 C.F.R. pt. 161) (presenting "Statement of Purpose" as part of the regulatory text); Assessment of Mediation and Arbitration Procedures, 78 Fed. Reg. 29,071, 29,080 (May 17, 2013) (to be codified at 49 C.F.R. pt. 1108) (same).

69. See STACK, *supra* note 12, at 36 ("Rather than providing an independent assessment of the purpose of the rule in light of the statute, some preambles state the purpose of their regulations in terms that largely mirror statutory language."); see, e.g., Applications for FDA Approval to Market a New Drug: Patent Listing Requirements and Application of 30-Month Stays on Approval of Abbreviated New Drug Applications Certifying That a Patent Claiming a Drug Is Invalid or Will Not be Infringed, 67 Fed. Reg. 65,448, 65,459 (Oct. 24, 2002) (to be codified at 21 C.F.R. pt. 314) (noting that the rule had "multiple objectives" that attempted to "preserv[e] the balance struck in the Hatch-Waxman Amendments between encouraging innovation and encouraging the availability of generic drugs").

70. See, e.g., Food Labeling; Health Messages and Label Statements; Reproposed Rule, 55 Fed. Reg. 5176, 5178–79 (Feb. 13, 1990) (to be codified at 21 C.F.R. pt. 101) (describing the rules as "intended to help achieve . . . multiple objectives" and strike the right "balance" between the various goals of preventing consumer misleading, protecting the public health, as well as ensuring equal treatment of all competitors); Standards for Remedial Actions at Inactive Uranium Processing Sites, 48 Fed. Reg. 590, 590 (Jan. 5, 1983) (to be codified at 40 C.F.R. pt. 192) ("We have therefore made it our objective to establish standards that take account of the tradeoffs between costs and benefits in a way that assures adequate protection of the public health, safety, and the environment; that can be implemented using presently available techniques and measuring instruments; and that are reasonable in terms of overall costs and benefits.").

71. Stack, *supra* note 9, at 403.

72. See Kimberly D. Krawiec, *Don't "Screw Joe the Plummer": The Sausage-Making of Financial Reform*, 55 ARIZ. L. REV. 53, 58–59 (2013) (finding that financial institutions and trade groups dominated early meetings with the agencies responsible for implementation of the Dodd-Frank Act); Wendy E. Wagner, *Administrative Law, Filter Failure, and Information*

Administrators can nonetheless still justify the resulting regulation as a reasonable effort to balance a number of statutorily authorized considerations. As a result, a judge could characterize the purpose of a regulation or a specific provision in many different ways, all of which seem consistent with the regulatory preamble.⁷³

Finally, given that rulemaking preambles contain both abstract statements of purpose as well as provision-by-provision descriptions, there are also still-remaining questions of how to relate the specific justifications to the more general.⁷⁴ Should the general provisions be used when only the specific justifications are otherwise ambiguous? Should the specific explanations always be read in light of the broader statements of purpose, in which case the latter could potentially expand the relevant level of generality? In this manner, purposivism suffers from an identification problem and the resulting risk that a judge will invoke a regulation's purpose to implement a favored policy preference.

2. *Institutional Capacity.* Intentionalism and purposivism will also increase decision costs—the time and resources required for judges to engage in regulatory interpretation—as well as the risk of interpretive errors, the probability that an interpretation will be flawed.⁷⁵ Indeed, approaches that invite judges to consult a capacious array of sources will require higher decision costs relative to more restrictive interpretive methods, since rulemaking records are usually voluminous. They are replete with documents on narrow subjects

Capture, 59 DUKE L.J. 1321, 1333–34 (2010) (“Even when agency staff can withstand the technical minutia coming at them at high speed and under tight time constraints, they face an administrative record that is badly lopsided, and threats of lawsuits against the substance of their regulation that come predominantly from only one sector (industry).”).

73. Cf. Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 428 (1989) (“In some cases, the purpose might be characterized in many ways, all of which are faithful to the original enactment. The act of characterization is therefore one of invention rather than discovery.”).

74. Stack, *supra* note 9, at 405–06 (stating that “[t]o the extent that a statement of basis and purpose typically includes both a general statement of the purpose of the regulation as well as provision-by-provision justifications they will inform the level of generality of the regulation or its particular provisions” but acknowledging that “[i]nterpretive work will remain”).

75. See NEIL K. KOMESAR, *IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY* 123–50 (1994); VERMEULE, *supra* note 18, at 129–30; Stack, *supra* note 9, at 403 (discussing considerations related to the “distinctive risks of error for time-pressed generalist judges”); Cass R. Sunstein, *Problems with Rules*, 83 CALIF. L. REV. 953, 972–73 (1995); Emerson H. Tiller & Pablo T. Spiller, *Strategic Instruments: Legal Structure and Political Games in Administrative Law*, 15 J.L. ECON. & ORG. 349, 351 (1999); Adrian Vermeule, *Interpretive Choice*, 75 N.Y.U. L. REV. 74, 129–30 (2000).

likely unfamiliar to the generalist judge: staff memoranda, proposed rules, the final regulatory text, advisory committee hearings, regulatory and environmental impact analyses, preambles, public comments, presidential statements, and more.⁷⁶ Some of these materials appear early in the rulemaking process, but are later superseded. Some reflect views that have been outright rejected by authoritative decision makers.⁷⁷ These institutional dynamics are likely to be difficult for judges (or other outsiders) to appreciate, especially if they have never worked in an administrative agency.

Intentionalist and purposivist approaches also create more opportunities for judicial error because they ask judges to engage in inquiries for which they are ill-suited. Specifically, both methodologies require judges to determine whether the current agency's action indeed furthers the agency's implied or stated objective. These decisions require knowledge and data about the expected consequences of the challenged agency action—information which judges are unlikely to have access to, let alone be equipped to evaluate competently. As a result, these approaches ask judges to engage in a form of means-end reasoning that implicates complicated questions of fact⁷⁸ and policy judgments that stretch beyond the kinds of determinations that judges should make.

Judges, like all interpreters, have fixed resource constraints as well as limited institutional capacities. By contrast to agency actors, judges are generalists who lack the training and resources to gather and analyze large amounts of data or otherwise adapt regulatory policies to new circumstances. In addition, the judge may also have to determine questions of degree: would granting the permit advance the purpose of the regulation to the same extent as the initial rulemaking contemplated and, if not, how much more or less, and

76. See Noah, *supra* note 9, at 306–21 (surveying examples of regulatory history).

77. See *San Luis Obispo Mothers for Peace v. U.S. Nuclear Regulatory Comm'n*, 789 F.2d 26, 33–34 (D.C. Cir. 1986) (rejecting staff documents as interpretive sources for a Nuclear Regulatory Commission rule on the grounds that the agency's commission was “required to make its own [authoritative] finding”).

78. See Cass R. Sunstein, Commentary, *On Analogical Reasoning*, 106 HARV. L. REV. 741, 758 (1993) (arguing that “[m]eans-ends rationality should play a large role in law . . . for example, legislatures and judges should anticipate the effects of their decisions on, among other things, the allocation and distribution of resources,” but also noting that “[c]onventional legal tools are ill-suited to this task”); cf. Herz, *supra* note 23, at 99 (regarding statutory interpretation, observing that “even if there is such a thing as an identifiable legislative purpose, courts are ill-equipped to determine which interpretation of a statute will most effectively advance that purpose”).

what amount is acceptable? As courts have observed in the statutory context, “no legislation pursues its purposes at all costs.”⁷⁹ The same is true of regulations.

Such error and decision costs are likely to be exacerbated by the fact that judges also face a number of other epistemic constraints unique to the regulatory context. Under the Freedom of Information Act, for instance, predecisional and deliberative materials within administrative agencies are protected from disclosure.⁸⁰ Agencies do not routinely publish internal staff memoranda and messages, although they can be placed voluntarily into the regulatory docket.⁸¹ Judicial doctrines also shield agency interactions with the White House.⁸² Although executive orders require agencies to “make available to the public all documents exchanged between OIRA and the agency during the review by OIRA,” the provision is not robustly followed or enforced in practice.⁸³ The disclosure requirements also only apply after the final rule has been published in the Federal Register and exclude any communications before the formal review process begins.⁸⁴ As a result, any judicial inquiry into an agency’s actual intent or purpose is likely to be stymied by the limited kinds of information available in the rulemaking record.

Relatedly, judges must often examine the materials that do make it into the record without the knowledge required to comprehend that agency’s specific procedural idiosyncrasies. Some agencies, for example, use different naming practices to denote various stages in the rulemaking process. The Department of Treasury, for instance, labels general-authority regulations as “interpretative rules,” even though they are legally binding and thus “legislative” in administrative law terminology, a quirk that has caused a great deal

79. See, e.g., *Rodriguez v. United States*, 480 U.S. 522, 525–26 (1987) (per curiam) (“[N]o legislation pursues its purposes at all costs.”); see also David M. Driesen, *Purposeless Construction*, 48 WAKE FOREST L. REV. 97, 148 (2013) (“The Court has offered plausible reasons to give statutory goals little weight in statutory construction cases. Congress never pursues its goals to the exclusion of all competing considerations.”).

80. 5 U.S.C. § 552(b)(5) (1994).

81. Noah, *supra* note 9, at 320.

82. See *Sierra Club v. Costle*, 657 F.2d 298, 403, 406–08 (D.C. Cir. 1981) (holding that courts could determine only whether an agency decision was supported by its public record and explanation, and not by the agency’s informal ex parte deliberations with the White House).

83. See Nina A. Mendelson, *Disclosing “Political” Oversight of Agency Decision Making*, 108 MICH. L. REV. 1127, 1148–54, 1164 (2010).

84. Exec. Order No. 12,866 § 6(b)(4)(D), 3 C.F.R. 638, 645 (1993).

of jurisprudential confusion in tax litigation.⁸⁵ Such confusion is only augmented by the technical jargon and acronyms that litter the rulemaking landscape, spurring one recent, frustrated D.C. Circuit panel to issue an order to parties to “submit briefs that eliminate uncommon acronyms used on their previously filed briefs.”⁸⁶ Broad consultation of the rulemaking record also raises aggregate litigation costs as parties will be forced to grapple with voluminous administrative materials and to rebut evidence drawn from them. The resulting strategic presentations of the records, in turn, will be costly for judges to independently evaluate and sort.

To be sure, some of these institutional concerns are mitigated for specialized courts like the D.C. Circuit, which has more experience reading regulatory materials than other circuits and thus may require less effort to comb through rulemaking records. Even then, at least in recent years, the D.C. Circuit has only heard about 40 percent of cases involving agency review, still leaving 60 percent to be heard by less-experienced courts.⁸⁷ Moreover, agency personnel and procedures are constantly evolving alongside technological or other substantive policy changes, thus mitigating the benefits of specialization over time.

3. *Strategic Self-Delegation.* Finally, competing theories of regulatory interpretation should also consider the extent to which alternative approaches can reduce the ability of agencies to strategically self-delegate rulemaking power.⁸⁸ In particular, as Professor John Manning has emphasized, two aspects of

85. See Kristin E. Hickman, *Coloring Outside the Lines: Examining Treasury’s (Lack of) Compliance with Administrative Procedure Act Rulemaking Requirements*, 82 NOTRE DAME L. REV. 1727, 1761–73 (2007) (providing examples).

86. See Order, Ill. Pub. Telecoms. Ass’n v. FCC, 752 F.3d 1018 (D.C. Cir. 2014) (No. 13-1059), <http://www.scribd.com/doc/214437589/Ipta-v-Fcc-Order> [<http://perma.cc/PP6S-GCPZ>].

87. Douglas H. Ginsburg, *Remarks Upon Receiving the Lifetime Service Award of the Georgetown Federalist Society Chapter*, 10 GEO. J.L. & PUB. POL’Y 1, 3 (2012) (“[P]etitions for review of administrative decisions filed in the D.C. Circuit have increased from twenty-eight percent of the national total in 1986 to a high of thirty-eight percent in 2007 and thirty-six percent in 2010.”); John M. Golden, *The Federal Circuit and the D.C. Circuit: Comparative Trials of Two Semi-Specialized Courts*, 78 GEO. WASH. L. REV. 553, 553 n.2 (2010); John G. Roberts, Jr., *What Makes the D.C. Circuit Different? A Historical View*, 92 VA. L. REV. 375, 376–77 (2006).

88. See Manning, *supra* note 19, at 657 (stating that “if an agency issues an imprecise or vague regulation, it does so secure in the knowledge that it can insist upon an unobvious interpretation, so long as its choice is not ‘plainly erroneous’”); Matthew C. Stephenson & Miri Pogoriler, *Seminole Rock’s Domain*, 79 GEO. WASH. L. REV. 1449, 1460–61 (2011).

administrative law currently facilitate an agency's ability to draft intentionally ambiguous regulatory texts with the hopes of refining or changing its regulatory policies with minimal judicial oversight.⁸⁹ First, the APA exempts "interpretative rules" and "general statements of policy" from traditional notice-and-comment requirements.⁹⁰ These exempted documents, sometimes referred to as "non-legislative rules," often construe agency regulations in manuals or by simple postings on the agency's website.⁹¹ Although some agencies will voluntarily engage in some minimal form of public comment before issuing such documents, most are released without any formal procedure.⁹² Second, recall that *Seminole Rock* affords considerable deference to the agency's interpretation of its own regulations. When an agency interprets a legislative rule that it promulgated, there is relatively minimal judicial oversight. Because of these two features of the current legal landscape, the agency faces few *ex ante* procedural requirements to issue a regulatory interpretation, as well as a minimal judicial check on the interpretations it issues.⁹³

As a result, after an agency promulgates a legislative rule through notice and comment, it can then continuously revise its interpretations without meaningful notice to regulated entities and with little judicial accountability. Such concerns echo the more constitutionally grounded critiques highlighted by Manning and other

89. See Manning, *supra* note 19, at 657; Stephenson & Pogoriler, *supra* note 88, at 1461 ("Seminole Rock could enable agencies to adopt legally binding norms without either the *ex ante* constraint of meaningful procedural safeguards or the *ex post* check of rigorous judicial review.").

90. 5 U.S.C. § 553(b)(3)(A) (2012); see also Stephenson & Pogoriler, *supra* note 88, at 1460–61 (discussing relevant features of APA).

91. Nonlegislative rules are often also referred to as "guidance documents." See, e.g., Nina A. Mendelson, *Regulatory Beneficiaries and Informal Agency Policymaking*, 92 CORNELL L. REV. 397, 399 (2007) ("Guidance documents can closely resemble legislative rules, leading some to call them 'nonlegislative rules.'"). Legislative rules, in turn, are understood as those required to undergo notice and comment, whether or not such procedures were actually used. See Robert A. Anthony, "Interpretive" Rules, "Legislative" Rules and "Spurious" Rules: *Lifting the Smog*, 8 ADMIN. L.J. AM. U. 1, 2–3 (1994); David L. Franklin, *Legislative Rules, Nonlegislative Rules, and the Perils of the Short Cut*, 120 YALE L.J. 276, 286 (2010).

92. See, e.g., Lars Noah, *The FDA's New Policy on Guidelines: Having Your Cake and Eating It Too*, 47 CATH. U. L. REV. 113, 138 n.100 (1997) (noting FDA's "voluntary adherence to notice-and-comment procedures" for its interpretive rules and statements of policy).

93. See Manning, *supra* note 19, at 618 ("By providing the agency an incentive to promulgate imprecise and vague rules, *Seminole Rock* undercuts important deliberative process objectives of the APA, and it creates potential problems of inadequate notice and arbitrariness in the enforcement of agency rules."); Stephenson & Pogoriler, *supra* note 88, at 1461.

legal scholars.⁹⁴ Manning’s assessment starts from the premise that when agencies issue legislative rules, they are engaging in a lawmaking function.⁹⁵ Allowing the same agency to then interpret and apply those rules—what Manning calls “law-exposition”—violates important separation-of-powers principles that serve to protect against arbitrary coercion.⁹⁶ Ensuring that different institutional actors engage in lawmaking and law-exposition, by contrast, gives rule writers the incentive to write clear and specific limits on that power.⁹⁷ Thus, courts should play a more robust role in policing the agency’s ability to combine these distinct powers.

To illustrate, consider *Decker v. Northwest Environmental Defense Center*,⁹⁸ a case challenging the EPA’s interpretation of its own regulation regarding the application of an exception from the Clean Water Act for stormwater discharges alongside logging roads.⁹⁹ Suffice to say that the regulatory text was ambiguous.¹⁰⁰ During the course of litigation, however, the EPA was able to amend the regulatory text quickly to conform to its litigating position and provide greater clarity, a fact that Justice Antonin Scalia noted when he declined to defer to the EPA’s interpretation.¹⁰¹ Specifically, the lower court handed down an adverse decision in May 2011, but by December 2012, the EPA had amended the regulations after a full notice-and-comment process.

Given the backdrop of the APA and *Seminole Rock* deference, regulatory interpretation should thus consider the extent to which competing interpretive approaches can reduce the ability of agencies to self-delegate strategically. A theory of interpretation should be

94. See, e.g., Manning, *supra* note 19, at 631–80; see also Stephenson & Pogoriler, *supra* note 88, at 1460–61.

95. See Manning, *supra* note 19, at 655; see also *Ariz. Grocery Co. v. Atchinson, T. & Santa Fe Ry.*, 284 U.S. 370, 386 (1932) (characterizing a rulemaking agency as a body that “speaks as the legislature” with “pronouncement[s that have] the force of a statute”).

96. See Manning, *supra* note 19, at 631 (“By permitting agencies both to write regulations and to construe them authoritatively, *Seminole Rock* effectively unifies lawmaking and law-exposition—a combination of powers decisively rejected by our constitutional structure.”).

97. *Id.* at 647.

98. *Decker v. Nw. Envntl. Def. Ctr.*, 133 S. Ct. 1326 (2013).

99. *Id.* at 1330–31.

100. See *id.* at 1334.

101. More specifically, Justice Scalia objected to what he perceived as the agency’s initial attempt to subvert the notice-and-comment process through interpretation. *Id.* at 1341–42 (Scalia, J., concurring in part and dissenting in part) (citing 77 Fed. Reg. 72,974 (Dec. 7, 2012) (to be codified at 40 C.F.R. pt. 122)).

sensitive to the ways in which it could permit agencies to promulgate textual “mush,” and then allow such ambiguities to justify later deference.¹⁰² Put in doctrinal terms, different kinds of interpretive approaches can enlarge or truncate the number of seemingly “consistent” interpretations later granted “controlling weight” under *Seminole Rock*. The more an interpretive approach can reduce the discretion available to subsequent interpreters, the more it can reduce an agency’s ex ante ability to issue overly broad regulatory texts.¹⁰³

Whether or not intentionalism or purposivism will result in greater permissible interpretations will depend on many factors, including both the number of conflicting statements among the available interpretive sources as well as their respective degrees of ambiguity. The concern is particularly acute for those interpretive approaches that invite broad consultation of the regulatory history, as the modern administrative record often spans different and likely conflicting administrators and various levels of an agency’s hierarchy. Although the average rulemaking time currently hovers at just above a year,¹⁰⁴ some regulations, like the Occupational Safety and Health Administration’s ergonomics rule, have required more than a decade to promulgate.¹⁰⁵ As a result, those documents not shielded by deliberative privilege¹⁰⁶ can often reflect disagreements between regulatory actors with varying partisan affiliations or otherwise clashing views of the evidence.

By contrast, the more specific, consistent, and structured the set of available sources, the less the amount of interpretive leeway. Thus, Stack’s version of regulatory purposivism, for example, mitigates the potential for strategic self-delegation relative to broader forms of

102. *Paralyzed Veterans of Am. v. D.C. Arena L.P.*, 117 F.3d 579, 584 (D.C. Cir. 1997) (“A substantive regulation must have sufficient content and definitiveness as to be a meaningful exercise in agency lawmaking. It is certainly not open to an agency to promulgate mush and then give it concrete form only through subsequent less formal ‘interpretations.’”).

103. *See* Stack, *supra* note 9, at 412 (observing that “[i]f the interpretive approach increases the requirements for what counts as a permissible construction of the regulation, deference under *Seminole Rock* will be triggered less often”).

104. *See* Anne Joseph O’Connell, *Agency Rulemaking and Political Transitions*, 105 Nw. U. L. REV. 471, 513 (2011) (finding that, between the fall of 1983 and the spring of 2010, the average rulemaking took 462.79 days to complete).

105. *See* Stuart Shapiro, *The Role of Procedural Controls in OSHA’s Ergonomics Rulemaking*, 67 PUB. ADMIN. REV. 688, 691 (2007) (describing OSHA’s efforts to require employers to reduce musculoskeletal disorders).

106. 5 U.S.C. § 552(b)(5) (1994) (providing an exception to the Freedom of Information Act for “inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency”).

intentionalism and purposivism.¹⁰⁷ At the same time, however, his approach is still subject to the overarching concern that agencies could attempt to self-delegate by increasing the level of generality at which judges consider the regulatory text. Specifically, agencies could choose to insert broad language into the preamble, particularly in the normally abstract language found in the introduction, or else the statements of purpose that agencies often place directly into the codified regulatory text. Though Stack's approach would consider the specific provisions to help "inform the level of generality of the regulation or its particular provisions,"¹⁰⁸ it would still require "synthetic" judgments on the part of the interpreter when relating the specific to the general provisions, or when more specific provisions are otherwise unavailable for addressing the particular ambiguity at issue.¹⁰⁹ Thus, reliance on the entire statement of basis and purpose continues to raise concerns about the ability of agencies to strategically self-delegate.

II. REGULATORY TEXTUALISM

Because intentionalism and purposivism suffer from identification problems, misconceive judicial capacities, and fail to mitigate sufficiently agencies' abilities to self-delegate, they should be rejected in favor of a stricter theory more suited to the institutional capacity of the courts. Such an approach should better cabin judges' discretion, reduce their decision and error costs, and help to police substantive policy changes that amount to new legislative rules. One natural alternative to consider is a method that centers on the semantic meaning of the regulatory text. This Part examines what form of textualism is the most appropriate for regulatory interpretation and why. With its focus on the public understanding of

107. See Stack, *supra* note 9, at 412 (noting that attention to regulatory interpretation at the first step of *Seminole Rock* "clearly reduces the set of permissible interpretations of a regulation," while interpreting the regulation in light of the statement of basis and purpose "does so in a way that enhances fair notice" because "[r]egulated parties and regulatory beneficiaries have access to the agency's statements justifying the regulation"); *id.* at 416 (discussing potential for agencies to engage in "strategic manipulation").

108. *Id.* at 405–06.

109. *Id.* at 403 (acknowledging objections to purposivism's potential demand for "synthetic and creative judgment" but arguing that objection does "not apply with the same force to purposive interpretation of regulation" given greater specificity of preamble); *id.* at 414–15 ("Because the agency creates the rule's statement of basis and purpose, it can choose to impose greater or lesser constraints on the rule's scope by the way in which it crafts the statement of basis and purpose.").

the words ratified by multiple regulatory actors, textualism rightly draws the interpreter's attention to the objective meaning of the regulation's legally binding words.¹¹⁰ Regulatory textualism, as understood here, also leaves agencies to pursue more intentionalist or purposivist interpretations through *Seminole Rock's* rule of judicial deference when the regulatory text is otherwise ambiguous.

A. *Reassessing the Stakes*

Textualism, like intentionalism and purposivism, is best understood as an interpretive orientation rather than as a reference to a single method or source. There are, in other words, many textualist approaches with family resemblances.¹¹¹ Analogizing from the statutory arena, one school of textualists argues that judges should seek to disambiguate language by discerning the abstract meaning of every word, despite any conflicting contextual evidence suggesting more appropriate usages. Such textualists generally search for a single, correct linguistic meaning, which is self-evident or otherwise "plain."¹¹² Because "plain" meaning refers to a text's semantic content, judges are often directed to discern such meaning only by reference to dictionaries, textual canons, or other similar tools.¹¹³

110. Cf. Larry Kramer, *Two (More) Problems with Originalism*, 31 HARV. J.L. & PUB. POL'Y 907, 910 (2008) (drawing analogy between "public meaning" arguments in statute and constitutional contexts, which concern "how those [constitutional and statutory] words are or ought to be understood by the relevant audience").

111. See LUDWIG WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* 32 (P.M.S. Hacker & Joachim Schulte eds., G.E.M. Anscombe trans., Wiley-Blackwell rev. 4th ed. 2009) (1953) (deeming it unnecessary to identify one single feature of a "game" and instead noting that many instantiations of the term share "family resemblances"); Molot, *supra* note 21, at 37 (discussing the intellectual history of textualism as a product of changing "views of judging," "constitutional structure," and whether "law is viewed as indeterminate or determinate"). See generally Andrew Tutt, *Fifty Shades of Textualism*, 29 J.L. & POL. 309 (2014).

112. See Frederick Schauer, *The Practice and Problems of Plain Meaning: A Response to Aleinikoff and Shaw*, 45 VAND. L. REV. 715, 729–32 (1992).

113. See Ellen P. Aprill, *The Law of the Word: Dictionary Shopping in the Supreme Court*, 30 ARIZ. ST. L.J. 275, 280 (1998) (observing that "when the Justices see the statutory language as unambiguous, textualist opinions . . . refer to 'plain meaning,' sometimes citing to dictionaries to show the meaning is plain, and sometimes simply asserting it as such"); William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 660 (1990) ("Traditionally, plain meaning signified that under ordinary principles of grammar and dictionary definitions of its words, the statutory provision has only one meaning."); Frederick Schauer, *Statutory Construction and the Coordinating Function of Plain Meaning*, 1990 SUP. CT. REV. 231, 231 (observing that members of the Court have "been spending their time reading (Noah) Webster, relying, both in fact and in articulated justification, on notions of plain meaning"); cf. Noah, *supra* note 9, at 292 ("In searching for the plain meaning of a regulation, courts sometimes deploy textualist conventions such as canons of construction.").

As many have recognized, however, such literal approaches are subject to many of the same objections lodged against intentionalists and purposivists. Just as textualists attack multimember intent as an incoherent fiction, for example, so too would intentionalists and purposivists reject the notion of an objective, linguistic meaning of the regulatory text free of any contact with the interpreter.¹¹⁴ Instead, the very nature of language requires the interpreter to consider the text's context.¹¹⁵ As a result, textualist judges must inevitably exercise their own discretion while purporting to rely on semantic meaning alone. Opportunities for judicial activism thus abound. Judges who desire a specific outcome, for example, can choose among various textual canons of construction,¹¹⁶ which Professor Karl Llewellyn famously demonstrated could be selectively used to reach diametrically opposed results.¹¹⁷ Judges also introduce selection biases by choosing inconsistently among different dictionaries.¹¹⁸ The empirical evidence regarding which method—intentionalism, purposivism, or textualism—more effectively constrains the political proclivities of judges is currently mixed at best.¹¹⁹

Plain-meaning textualism also unduly introduces a number of opportunities for interpretive errors in the regulatory context. Specialized administrative agencies issue legislative rules to

114. Cf. Jerry L. Mashaw, *Textualism, Constitutionalism, and the Interpretation of Federal Statutes*, 32 WM. & MARY L. REV. 827, 835–36 (1991) (applying the concept to a statutory context); Stephen A. Plass, *The Illusion and Allure of Textualism*, 40 VILL. L. REV. 93, 110, 124–25 (1995) (same); David A. Strauss, *Statutes' Domains and Judges' Prerogatives*, 77 U. CHI. L. REV. 1261, 1273 (2010) (same).

115. See Lawrence M. Solan, *The New Textualists' New Text*, 38 LOY. L.A. L. REV. 2027, 2050 (2004).

116. See Russell L. Weaver, *Challenging Regulatory Interpretations*, 23 ARIZ. ST. L.J. 109, 154 (1991).

117. See Karl N. Llewellyn, *Remarks on the Theory of Appellate Decisions and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395, 401–06 (1950). But see Sunstein, *supra* note 73, at 452 (criticizing Llewellyn's critique as overstated).

118. See Aprill, *supra* note 113, at 334.

119. Compare James J. Brudney & Corey Ditslear, *Canons of Construction and the Elusive Quest for Neutral Reasoning*, 58 VAND. L. REV. 1, 6–7 (2005) (examining a database of 632 workplace-related suits from 1969 to 2003 and arguing that the outcomes of the cases in which Justices relied on textual canons exclusively “suggest that the canons are regularly used in an instrumental if not ideologically conscious manner”), with Mark Seidenfeld, *A Syncopated Chevron: Emphasizing Reasoned Decisionmaking in Reviewing Agency Interpretations of Statutes*, 73 TEX. L. REV. 83, 95 n.69 (1994) (examining a survey of *Chevron* decisions and finding that purposivist courts that rely on “all the traditional tools of statutory construction” are more likely to “take an active role in determining the meaning of a statute”).

implement often complex programs. Consider, for example, the Food and Drug Administration's definition of a "color additive":

A color additive is any material . . . that is a dye, pigment, or other substance made by a process of synthesis or similar artifice, or extracted, isolated, or otherwise derived, with or without intermediate or final change of identity, from a vegetable, animal, mineral, or other source and that, when added or applied to a food, drug, or cosmetic or to the human body or any part thereof, is capable (alone or through reaction with another substance) of imparting a color thereto Food ingredients such as cherries, green or red peppers, chocolate, and orange juice which contribute their own natural color when mixed with other foods are not regarded as color additives; but where a food substance such as beet juice is deliberately used as a color, as in pink lemonade, it is a color additive An ingested drug the intended function of which is to impart color to the human body is a color additive. For the purposes of this part, the term color includes black, white, and intermediate grays, but substances including migrants from packaging materials which do not contribute any color apparent to the naked eye are not color additives.¹²⁰

Regulations are often filled with such technical and industry-specific jargon that departs from standard dictionary definitions or linguistic conventions. Several observers have characterized regulatory texts as "byzantine" and complicated in various substantive areas ranging from Medicaid and tax regulation to mineral rights and federal contracting.¹²¹ Dispiritingly, a recent federal statute requiring executive agencies to use "plain writing" for public documents explicitly excludes regulatory texts.¹²² Some evidence in the statutory context also suggests that textualist approaches are more likely to be subject to legislative overrides due to interpretive errors; such risks

120. 21 C.F.R. § 70.3 (2013).

121. See *Hobbs ex rel. Hobbs v. Zenderman*, 579 F.3d 1171, 1186 (10th Cir. 2009) (characterizing Medicaid regulation as an "extraordinarily complex set of interlocking" regulations); David Freeman Engstrom, *Agencies as Litigation Gatekeepers*, 123 YALE L.J. 616, 712 (2013) (calling "Federal Acquisition Regulations" a "byzantine set of rules regarding government contracting"); Edmund L. Andrews, *As Profits Soar, Companies Pay U.S. Less for Gas Rights*, N.Y. TIMES (Jan. 23, 2006), <http://query.nytimes.com/gst/fullpage.html?res=980CE1DA133FF930A15752C0A9609C8B63&smid=pl-share> [<http://perma.cc/929V-2QN7>] (similar characterization for mineral leasing regulations).

122. Plain Writing Act of 2010, Pub. L. No. 111-274, 124 Stat. 2861 § 2(c) (stating that a "covered document" under the statute "does not include a regulation").

are only compounded in the regulatory context given the specialized language often found in legislative rules.¹²³

Accordingly, other textualists have increasingly embraced the notion that textualism need not accept the premise that meaning is an abstract form awaiting judicial discovery. Instead, they posit that judges should consult the text's shared meanings in their appropriate semantic settings.¹²⁴ These "new" textualists in the statutory arena acknowledge the importance of context and thus reject overly wooden, literalist interpretations.¹²⁵ In this vein, Professor John Manning, for example, suggests a textualist approach to regulatory interpretation that focuses on the "meaning" of the regulatory text as understood in the context of its statement of basis and purpose.¹²⁶ Though his account is not yet fully developed,¹²⁷ Manning notes that such texts can be semantically specialized, and that agencies often

123. See Matthew R. Christiansen & William N. Eskridge Jr., *Congressional Overrides of Supreme Court Statutory Interpretation Decisions, 1967–2011*, 92 TEX. L. REV. 1317, 1401–04 (2014).

124. See John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 108–09 (2001) (arguing that modern textualists "believe that statutory language, like all language, conveys meaning only because a linguistic community attaches common understandings to words and phrases, and relies on shared conventions for deciphering those words and phrases in particular contexts").

125. See Eskridge, *supra* note 113, at 667 ("By focusing on the plain meaning a statute would have for the ordinary, reasonable reader, the new textualism has the intuitive appeal of looking at the most concrete evidence of legislative expectations and at the material most accessible to the citizenry."); Molot, *supra* note 21, at 47 (noting that "[a]s a modern textualist, even Justice Scalia has rejected the 'plain meaning' school's refusal to consider context"); Samuel C. Rickless, *A Synthetic Approach to Legal Adjudication*, 42 SAN DIEGO L. REV. 519, 520–21 (2005) ("For the Old Textualists, the relevant kind of meaning is the 'plain meaning' elucidated in the dictionary (word meaning). For the New Textualists, the relevant kind of meaning is what any reasonable and competent hearer would understand the word to mean in context (hearer meaning)."); see also *In re Sinclair*, 870 F.2d 1340, 1342 (7th Cir. 1989) (Easterbrook, J.) (indicating that statutory texts must be understood in light of "their contexts—linguistic, structural, functional, social, historical").

126. See Manning, *supra* note 19, at 690.

This may well distract agencies from using the statement of basis and purpose as a device for coherent explanation of regulatory meaning. However, it does not foreclose the potential use of statements of basis and purpose in their intended role as interpretive aids. In a *Skidmore* regime, if the Court looked to statements of basis and purpose for evidence of the linguistic and cultural environment in which a regulation was adopted, agencies would presumably respond by tailoring such statements to that application. If so, the resulting explanations of agency regulations would simultaneously enhance the clarity of agency decisionmaking and the accuracy of judicial review.

Id. (citations omitted); *id.* at 688 (noting that regulatory texts "like all language, derive meaning from a 'linguistic and cultural' environment").

127. *Id.* at 688 n.359 ("Detailed consideration of the relative legitimacy and utility of particular approaches to textual construction is for another day.").

possess the expertise to be able to explain such texts to more generalist readers like a court.¹²⁸

B. *Toward Public Meaning*

To evaluate these claims, it is important first to ground a theory of regulatory interpretation in an antecedent account of the political legitimacy of rulemaking.¹²⁹ Without one, it would be difficult even to determine the relevant objects of interpretation—which texts or documents should be considered authoritative and why. When Congress grants rulemaking ability to an agency, it authorizes that agency to exercise a quasi-lawmaking power with the effect of a statute.¹³⁰ With this authority, an agency can promulgate generally applicable rules with binding, legal consequences—on the public, courts, and the agency itself.¹³¹ Despite constitutional prohibitions on the congressional delegation of legislative power, however, courts have been loath to police this proscription.¹³² As a result, many administrative innovations can be understood as searches for

128. *Id.* at 688 (“When confronted with a technical term ‘drawn by specialists,’ an agency’s ‘expertness comes into play’ in explaining specialized terms to a generalist court, whose strong suit is ordinary meaning.”).

129. *Cf.* RONALD DWORKIN, *JUSTICE FOR HEDGEHOGS* 133 (2011) (“[Lawyers interpreting statutes] must decide . . . what division of political authority among different branches of government and civil society is best, all things considered.”); Frank H. Easterbrook, *Textualism and the Dead Hand*, 66 *GEO. WASH. L. REV.* 1119, 1119–20 (arguing that notions of “political obligation” and “political legitimacy” must inform statutory interpretation); Jerry Mashaw, *As If Republican Interpretation*, 97 *YALE L.J.* 1685, 1686 (1988) (“Any theory of statutory interpretation . . . must . . . assume a set of legitimate institutional roles and legitimate institutional procedures that inform interpretation.”).

130. *See* Kenneth Culp Davis, *Administrative Rules—Interpretative, Legislative, and Retroactive*, 57 *YALE L.J.* 919, 919 (1948) (defining a “rule” as “the product of rule-making, and rule-making is the part of the administrative process that resembles a legislature’s enactment of a statute”).

131. *See* *Ariz. Grocery Co. v. Atchinson, T. & Santa Fe Ry.*, 284 U.S. 370, 386 (1932) (“When under this mandate the Commission declares a specific rate to be the reasonable and lawful rate for the future, it speaks as the legislature, and its pronouncement has the force of a statute.”).

132. U.S. CONST. art. I, § 1 (“All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.”); *see* Paul Diller, *Habeas and (Non-) Delegation*, 77 *U. CHI. L. REV.* 585, 588 (2010) (remarking on “the nondelegation doctrine’s descent into desuetude in the area of administrative law”); Kagan, *supra* note 63, at 2364 (observing that it is “commonplace” to note “that the nondelegation doctrine is no doctrine at all”).

substitute sources of accountability,¹³³ often through procedures imposed by Congress and the President.¹³⁴

The most important congressional requirements are those found in the APA, which generally require agencies to engage in a process of public notice and comment before promulgating a legislative rule.¹³⁵ Specifically, the rulemaking agency must prepare a notice for the Federal Register, which informs the public of “either the terms or substance of the proposed rule or a description of the subjects and issues involved.”¹³⁶ In practice, most agencies provide both the full text of the proposed rule as well as an explanatory preamble including various required analyses.¹³⁷ A number of cross-cutting statutes in addition to the APA demand that agencies provide information about the rule’s anticipated impacts on the environment, states, small businesses, and paperwork obligations.¹³⁸

Presidents have also issued executive orders that require certain agencies to undertake additional procedures supervised by the executive branch. Some governing orders, for example, call for executive agencies to submit to OIRA statements regarding the need for the regulation and its alignment with presidential priorities, as well as assessments demonstrating that the benefits of the

133. See Lisa Schultz Bressman, Essay, *Schechter Poultry at the Millennium: A Delegation Doctrine for the Administrative State*, 109 YALE L.J. 1399, 1402 (2000) (observing that “[s]ince the effective demise of the original nondelegation doctrine in 1935, the Court has searched for ways to assuage its abiding worry about broad delegations”).

134. See *Amalgamated Meat Cutters v. Connally*, 337 F. Supp. 737, 759 (D.D.C. 1971) (Leventhal, J.) (“The claim of undue delegation of legislative power broadly raises the challenge of undue power in the Executive and thus naturally involves consideration of the interrelated questions of the availability of appropriate restraints through provisions for administrative procedure and judicial review.”); Scott A. Keller, *How Courts Can Protect State Autonomy from Federal Administrative Encroachment*, 82 S. CAL. L. REV. 45, 59 (2008) (arguing that “given the underenforcement of the nondelegation doctrine, the Court should apply procedural limits in the administrative law context ‘as a second-best surrogate’ for the substantive enforcement of the nondelegation doctrine”).

135. 5 U.S.C. § 553(b) (2012).

136. *Id.*

137. See KERWIN & FURLONG, *supra* note 12, at 64 (stating that “[n]otices of proposed rulemaking nearly always contain not only the full text of the rule that the agency has developed to that point but a preamble as well”); *id.* (“Notices of proposed . . . rules often contain a great deal of additional information” such as the “results of the reviews they are required to conduct under a variety of statutes and executive orders.”).

138. See 2 U.S.C. § 1532 (2012) (unfunded mandates on state, local, tribal governments, or private sector); 5 U.S.C. § 604(b) (2012) (regulatory flexibility analyses); 42 U.S.C. § 4332(2)(C) (2012) (environmental impact statements); 44 U.S.C. § 3507(e) (2012) (paperwork burden analyses).

regulation “justify” the costs.¹³⁹ Additional executive orders also demand that agencies gather data on the rule’s expected impacts on states,¹⁴⁰ energy use,¹⁴¹ small businesses,¹⁴² and Indian tribes,¹⁴³ among other potentially affected groups. In preparing such analyses, agencies must, in effect, interpret the regulation to predict its consequences: what is the regulation’s scope and to whom and when does it apply such that aggregate costs and benefits can be determined? Once the agency has submitted the draft notice and required analyses to OIRA, the office will then coordinate a process whereby it will solicit comments from executive-branch reviewers, and then help to resolve any disagreements that arise.¹⁴⁴

After this OIRA-coordinated review process is complete, the agency head must then sign the proposed regulatory text and preamble for publication in the Federal Register.¹⁴⁵ Agencies then give interested persons an opportunity to comment on the proposed rule by submitting their views, supporting or opposing arguments, and any relevant evidence.¹⁴⁶ After considering these comments, the agency can then issue a revised final rule in the Federal Register, which courts have determined must be a “logical outgrowth” of the

139. Exec. Order No. 12,866 § 3(b), 3 C.F.R. 638, 639 (1994). This executive order, with minor exceptions, covers all agencies except those “considered to be independent regulatory agencies,” *id.* § 1(b)(6), 3 C.F.R. at 641, as defined by a provision of the Paperwork Reduction Act, 44 U.S.C. § 3502(10) (1988). *See also* Exec. Order No. 13,563 §§ 1(b), 2–6, 3 C.F.R. 215, 215–17 (2012) (“reaffirm[ing] the principles, structures, and definitions governing contemporary regulatory review that were established in Executive Order 12866” and modernizing many of its provisions).

140. Exec. Order No. 13,132, 3 C.F.R. 206 (2000).

141. Exec. Order No. 13,211, 3 C.F.R. 767 (2002).

142. Exec. Order No. 13,272, 3 C.F.R. 247 (2003).

143. Exec. Order No. 13,175, 3 C.F.R. 304 (2001).

144. *See* Sunstein, *supra* note 64, at 1844–59 (describing OIRA-coordinated review process).

145. By signing the text of the regulation, the agency head has taken responsibility for the rule’s authorship. *See* David J. Barron & Elena Kagan, *Chevron’s Nondelegation Doctrine*, 2001 SUP. CT. REV. 201, 238 (“Authorship is a familiar concept in agency practice; indeed, agencies today are admirably (if surprisingly) punctilious about this feature of their interpretive rulings and other actions.”). Depending on how the agency is structured, there is sometimes a subagency head as well. Prominent examples of this relationship include the Patent and Trademark Office within the Department of Commerce, or the Food and Drug Administration within the Department of Health and Human Services. *See* Kirti Datla & Richard L. Revesz, *Deconstructing Independent Agencies (and Executive Agencies)*, 98 CORNELL L. REV. 769, 784 n.90, 817–18 (2013).

146. 5 U.S.C. § 553(c) (2012) (“After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation.”).

proposed rule.¹⁴⁷ The APA further requires that the final rule be accompanied by a “concise and general statement” of the rule’s “basis and purpose.”¹⁴⁸ In practice, however, such statements of basis and purpose are hardly “concise” given that agencies generally prepare them in anticipation of judicial, executive, and legislative review.¹⁴⁹

Courts, for their part, now extend a “hard look” to the agency’s preamble when determining whether a regulation is arbitrary or capricious under the APA.¹⁵⁰ What is important to note about this standard of rationality is that it is framed exclusively in terms of technocratic factors.¹⁵¹ Agencies cannot justify their regulatory changes by reference to purely political factors, but must be able to explain them with respect to evidence in the rulemaking record.¹⁵²

147. See, e.g., *CSX Transp., Inc. v. Surface Transp. Bd.*, 584 F.3d 1076, 1081 (D.C. Cir. 2009) (“[O]ur cases finding that a rule was not a logical outgrowth have often involved situations where the proposed rule gave no indication that the agency was considering a different approach, and the final rule revealed that the agency had completely changed its position.”); *Nw. Tissue Ctr. v. Shalala*, 1 F.3d 522, 528 n.7 (7th Cir. 1993) (“To determine if a final rule is a logical outgrowth of the proposed one, the court must decide ‘whether the purposes of notice and comment have been adequately served.’”); see also Phillip M. Kannan, *The Logical Outgrowth Doctrine in Rulemaking*, 48 ADMIN. L. REV. 213 (1996) (discussing the development of the logical outgrowth doctrine).

148. 5 U.S.C. § 553(c) (2012) (“After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose.”).

149. See 5 U.S.C. § 801(a)(1)(A) (2012) (requiring agencies to “submit to each House of the Congress and to the Comptroller General a report containing . . . a copy of the rule . . . [and] a concise general statement relating to the rule, including whether it is a major rule”); Curtis W. Copeland, *The Role of the Office of Information and Regulatory Affairs in Federal Rulemaking*, 33 FORDHAM URB. L.J. 1257, 1273 (2006) (describing the “regulatory review package to OIRA” as “consisting of the rule, any supporting materials, and a transmittal form”).

150. 5 U.S.C. § 706(2)(A) (2012); see Noah, *supra* note 9, at 309–10, 309 n.203 (observing that “[a]s courts became more demanding in their substantive review of rules adopted through notice-and-comment procedures” and adopted a “hard look” approach, “agency prolixity increased” with “[p]reambles for especially controversial rules . . . [that] respond in detail to public comments in anticipation of defending against a judicial challenge”); Stack, *supra* note 9, at 396 (“Hard-look review imposes a higher standard of rationality as a condition of validity than the minimum standard applied in constitutional review of legislation.”).

151. See Kathryn A. Watts, *Proposing a Place for Politics in Arbitrary and Capricious Review*, 119 YALE L.J. 2, 7, 19–20 (2009).

152. *Id.* at 19–20. This is not, of course, to say that expertise can be hermetically sealed from politics; to the contrary, different administrations are likely to have different understandings of the same information and data. See Dan M. Kahan, Ellen Peters, Maggie Wittlin, Paul Slovic, Lisa Larrimore Ouellette, Donald Braman & Gregory Mandel, *The Polarizing Impact of Science Literacy and Numeracy on Perceived Climate Change Risks*, 2 NATURE CLIMATE CHANGE 732, 732 (2012); Dan M. Kahan, *Ideology, Motivated Reasoning, and Cognitive Reflection*, 8 JUDGMENT & DECISION MAKING 407, 407 (2013). But even when political changes

Consequently, agencies attempt to show they have “examine[d] the relevant data” they received through public comment and then “articulate a satisfactory explanation for [their] actions,” including “rational connection[s] between the facts found and the choice[s] made” in their final rules.¹⁵³ In other words, agencies usually attempt to provide a well-reasoned explanation for their policy choices with reference to the evidence received through notice and comment. In addition to these explanations, agencies also often publish or summarize the various final analyses required by statute and executive order in the Federal Register as well.¹⁵⁴ Publication, in turn, provides formal notice to the public of the rule’s existence and content; an agency’s failure to publish the regulation would render it ineffective.¹⁵⁵

Either before or shortly after publication, agencies then send their final rules to Congress as part of the report-and-wait procedures of the Congressional Review Act (CRA).¹⁵⁶ The CRA demands that both executive and independent agencies send a copy of every new “major” final rule to each congressional house as well as the Government Accountability Office.¹⁵⁷ The rules must be accompanied by their cost-benefit analyses, if any, as well as “any other relevant information or requirements” under statute or executive order.¹⁵⁸ As such, Congress has available to it the operative regulatory text, statement of basis and purpose, and any regulatory analyses before deciding whether or not to pass a joint resolution of disapproval.¹⁵⁹

are the most likely explanation for a policy shift, administrative law only allows such shifts when accompanied by a reasoned explanation grounded in factual data.

153. *Motor Vehicle Mfrs. Ass’n of the U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (citation omitted).

154. See 44 U.S.C. § 1503 (1982 & Supp. II 1985); Legislation, *The Federal Register Act*, 49 HARV. L. REV. 1209, 1209 (1936) (“All documents authorized to be published must be filed with the Division, and they are not valid until so filed and made available for public inspection.”).

155. See 44 U.S.C. § 1507 (1982); Noah, *supra* note 9, at 285–86 (describing evolving standards of agency publication in the Federal Register); Randy S. Springer, Note, *Gatekeeping and the Federal Register: An Analysis of the Publication Requirement of Section 552(a)(1)(D) of the Administrative Procedure Act*, 41 ADMIN. L. REV. 533, 544 (1989) (“Agency documents that fall within the provisions of the publication rule of section 552(a)(1)(D) and are not so published are ineffective against a party without actual notice.”).

156. 5 U.S.C. §§ 801–808 (2012).

157. *Id.* § 801(a)(1)(A)–(B). “Major” rules are defined as those with an annual impact on the economy of \$100 million or more, a “major increase in costs or prices” or other “significant adverse” effect on the economy. *Id.* § 804(2).

158. *Id.* § 801(a)(1)(B).

159. *Id.* § 801(a)(1)(A)–(B). Beyond replicating bicameralism and presentment, the statute’s main innovation is that the CRA reduces the costs of nullifying a rule by fast-tracking joint

Both the Senate and the House then have sixty days in which to pass such a resolution,¹⁶⁰ which if issued, would then need to be signed by the President to take effect, or if vetoed, passed by a two-thirds overriding vote.¹⁶¹ If Congress fails to pass a joint resolution within the required time frame, then the final rule goes into effect.¹⁶²

As this overview of the rulemaking process demonstrates, administrative agencies have multiple political principals, including Congress and the President.¹⁶³ Agencies cannot promulgate binding, legislative rules without surviving the various procedural chokepoints that can effectively prevent a regulation from going into effect.¹⁶⁴ These procedures, in turn, help to legitimate the regulations promulgated by unelected administrators by ensuring review by more politically accountable actors. Moreover, the information produced as a result of these procedures—through notice-and-comment, OIRA-coordinated review, as well as congressional oversight—facilitates political monitoring.¹⁶⁵ At each of these junctures, interest groups can

resolutions. These expediting features include the bypass of many potentially obstructive congressional committees as well as a prohibition on Senate filibusters and fixed time limits on legislative debates. *Id.* §802(c)–(f) (discussing the expediting process). The CRA also extends the time period during which a major rule cannot go into effect, from thirty to sixty days, thus allowing for longer legislative reconsideration. See Note, *The Mysteries of the Congressional Review Act*, 122 HARV. L. REV. 2162, 2166–67 (2009).

160. 5 U.S.C. § 801(a)(3).

161. *Id.*

162. *Id.*

163. See Evan J. Criddle, *Fiduciary Foundations of Administrative Law*, 54 UCLA L. Rev. 117, 164–65 (2006) (characterizing agencies as “agents of the executive branch, Congress, or the people as a whole”); Elizabeth Magill, *Agency Self-Regulation*, 77 GEO. WASH. L. REV. 859, 872 (2009) (describing an agency as an “agent . . . formally controlled by other principals, like Congress, the courts, or the President”).

164. See William N. Eskridge, Jr., *Norms, Empiricism, and Canons in Statutory Interpretation*, 66 U. CHI. L. REV. 671, 677 n.13 (1999) (defining “vetogate” as “a place within a process where a statutory proposal can be vetoed or effectively killed”). The term “veto gate” appears to have first appeared in the legal literature in McNollgast, *Positive Canons*, *supra* note 13, at 707. Variations of the core idea are also sometimes referred to as “pivot points,” “veto players,” or the politics of “negative power”—terms which this Article will use interchangeably. See, e.g., *id.* at 707 n.5 (defining “veto players”); CAMERON, *supra* note 14, at 3 (defining the politics of “negative power” as the “consequences of an institutionalized ability to say no”); KREHBIEL, *supra* note 14, at 23–24 (drawing on dictionary definition to specify a “pivot” as “a person or thing on or around which something turns or depends”).

165. See David Epstein & Sharyn O’Halloran, *Administrative Procedures, Information, and Agency Discretion*, 38 AM. J. POL. SCI. 697, 699 (1994) (discussing ongoing oversight of agencies); Mathew D. McCubbins, Roger G. Noll & Barry R. Weingast, *Administrative Procedures as Instruments of Political Control*, 3 J.L. ECON. & ORG. 243, 261–62 (1987) (describing “tools available to political actors to control administrative outcomes through process, rather than through substantive guidance in legislation”).

actively attempt to influence the process by, for example, submitting comments, scheduling meetings with executive-branch actors, or lobbying legislators. Such “fire-alarm” oversight, however, is premised on the public’s understanding of what the text of the regulation means and how it could affect the various interests implicated.¹⁶⁶

C. Method

Regulatory textualism thus asks the judge to ascertain the public meaning of the operative regulatory text in light of a hierarchy of select sources generated and legitimated by the regulatory procedures just described. Unlike competing theories, which also invoke the distinctive nature of the rulemaking process to justify their respective approaches,¹⁶⁷ regulatory textualism emphasizes the importance of a text’s public meaning as ratified by political principals like the President and Congress, and subject to judicial review.¹⁶⁸

This perspective has statutory and constitutional analogues,¹⁶⁹ though it is specifically tailored to the procedures through which the

166. Mathew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms*, 28 AM. J. POL. SCI. 165, 166 (1984).

167. See Noah, *supra* note 9, at 281 (observing that “it is far easier to ascribe an intent to an agency when it issues a rule than to a legislature when it enacts a statute, both because of differences in their decisionmaking routines and because of the greater reliability of the materials that document the bases for their decisions”); Stack, *supra* note 9, at 380 (noting that distinctive features of the regulatory process such as “the APA’s procedural requirement that the agency issue a statement of basis and purpose, the arbitrary and capricious review’s standard of rationality, and *Chenery’s* timing rule” justify regulatory purposivism); *id.* at 392–94 (noting that “the critical difference between regulations and statute[s] is how the court discerns purposes”); Weaver, *supra* note 9, at 711 (“Courts must treat regulations differently than statutes because agencies generate different types of interpretive materials than do legislatures. Instead of committee reports, explanations of committee chairmen, records of debate and the other materials that legislatures typically create, agencies prepare notices of proposed rulemakings, draft rules, regulatory analyses and other documents.”).

168. Cf. John F. Manning, *Textualism and Legislative Intent*, 91 VA. L. REV. 419, 420 (2005) (noting that the basic premise of textualism is “that judges must seek and abide by the public meaning of the enacted text, [as] understood in context”); Lawrence B. Solum, *Originalism and the Unwritten Constitution*, 2013 U. ILL. L. REV. 1935, 1956 (characterizing “public-meaning originalism” as both “go[ing] beyond semantic content; if the meaning of the Constitution were limited to its semantic content, its meaning would be very sparse—we would read the Constitution as if we knew nothing about the context in which it was framed and ratified” and seeking “the linguistic meaning as enriched by the publicly available context of constitutional communication”).

169. See, e.g., Manning, *supra* note 168, at 419–50; Victoria Nourse, *Misunderstanding Congress: Statutory Interpretation, the Supermajoritarian Difficulty, and the Separation of Powers*, 99 GEO. L.J. 1119, 1166 (2011) (developing an interpretive theory in statutory context

executive, legislature and the courts imbue regulations with legitimacy. Specifically, the approach draws upon the nature of these review processes to generate a hierarchy of sources based on their public accessibility, reliability, and relevance to the interpretive issue in question.¹⁷⁰ Different forms of regulatory history can be ranked according to the source's likelihood to shed credible light on the public meaning of a text as well as to address the interpretive question with appropriate specificity.

To aid in this task, positive political theories developed in the statutory context invite a conception of regulations as bargains struck between various regulatory actors and interest groups at different veto-gates of the drafting process—involving the agency head, the President during OIRA-coordinated review, and legislators pursuant to the CRA.¹⁷¹ Veto-gates are junctures in an institutional process during which an authoritative actor can effectively prevent a regulation from proceeding further.¹⁷² The judge's task is to privilege sincere rather than strategic statements from these actors as evidence

that “supports a public meaning approach toward statutory interpretation, one which demands that courts not blind themselves to legislative history as evidence of ordinary or public meaning”); Michael Stokes Paulsen, *Does the Constitution Prescribe Rules for Its Own Interpretation?*, 103 NW. U. L. REV. 857, 882 (2009) (in constitutional context, equating “objective, original-public-meaning” with “in-context, written textualism”); Solum, *supra* note 168, at 1955 (“For public-meaning originalists, the public meaning of the text is produced by the semantic content of the text as enriched by the publicly available context of constitutional interpretation.”).

170. Cf. ESKRIDGE ET AL., *supra* note 20, at 310 (positing that “legislative history should be used only when it is accessible, relevant, and reliable” and arguing that “there ought to be—and we think there is—a hierarchy of sources for that history”). Bernard Bell's statutory-interpretation theory also calls for the privileging of particular sources of legislative history based on the extent to which such materials are available to all legislators and considered authoritative by them, and all legislators are all able to respond. Because the rulemaking process directly invites the public to participate in its drafting, interpretive materials that are available to the wider public should similarly be considered as privileged sources in the regulatory context. See Bernard W. Bell, *Legislative History Without Legislative Intent: The Public Justification Approach to Statutory Interpretation*, 60 OHIO ST. L.J. 1, 83 (1999) (arguing that the “text of the statute must be interpreted in light of the public justification provided” by Congress).

171. See STEVEN P. CROLEY, *REGULATION AND PUBLIC INTERESTS* 97 (2008) (noting that “whereas the president lacks the ability to veto selective pieces of legislation, he enjoys a ‘line-item veto,’ so to speak, of agencies’ regulatory initiatives”); Jack M. Beermann, *Congressional Administration*, 43 SAN DIEGO L. REV. 61, 84 (2006) (“By enacting [the Congressional Review Act], Congress has taken responsibility for supervising agency rulemaking and, in a sense, is lending its authority to those rules that it does not overrule under the procedure.”).

172. Cf. Eskridge, *supra* note 164, at 677 n.13 (defining “veto gate” as “a place within a process where a statutory proposal can be vetoed or effectively killed”).

of the public meaning to which they agreed. Statements are sincere if the speakers would suffer some cost by misrepresenting the bargain.¹⁷³ If a committee report, for instance, misstates the meaning of the bill, then there is a risk that the median legislator would reject the bill. Thus, a committee would be better off communicating its true preferences; as such, the committee report is often a valuable interpretive source in statutory interpretation.¹⁷⁴

Although these insights are often framed in intentionalist terms,¹⁷⁵ when coupled with a publicity requirement, they can also help guide the search for regulatory meaning as well—by shedding light on how the public was most likely to comprehend the meaning of the text as reflected in the most reliable and accessible statements by authoritative regulatory actors. Because the rulemaking process, even more so than the statutory or constitutional contexts, depends on the ability of the public to directly participate, there is a close nexus between what the public understands and the materials that are furnished by regulatory actors for comment. What legitimates the rulemaking process is not the private preferences of pivotal regulatory actors, but rather their public rationales, which form the basis for interest-group participation.

Applying these premises, the interpretive materials that are the most likely to be credible are those that are made public and subject to multiple forms of oversight by pivotal actors. Accordingly, regulatory textualism first calls for the judge to read the regulatory text in light of the relevant explanatory provision in the regulation's statement of basis and purpose, or preamble. Preambles are structured documents that often address each provision of the regulatory text; thus, locating the appropriate section is often a straightforward task.¹⁷⁶ In addition, these explanations usually

173. McNollgast, *Legislative Intent*, *supra* note 13, at 26 (“Observing costly actions can help judges exclude some alternative interpretations.”).

174. *Id.* at 27–28 (discussing committee report example).

175. *See id.* at 3 (seeking to “identify aspects of the legislative history that are more reliably informative about the *intent* of the majority coalition that enacted a statute” (emphasis added)).

176. *See* STACK, *supra* note 12, at 34, 37–38 (observing that although agency practices can vary, they often “organize background discussions of preambles in a section-by-section format”); *id.* at 48 (noting that “a well-organized preamble reduces the costs of locating its guidance”); Stack, *supra* note 9, at 404 (observing that “statements of basis and purpose generally appear in a single, highly organized document”); *id.* at 406 (noting that “at a practical level . . . statements of basis and purpose are typically much more specific than statutory statements of purpose”).

respond to material public comments in detailed ways,¹⁷⁷ as, for example, when commenters ask how particular terms are defined and the agency attempts to clarify.¹⁷⁸

Provision-by-provision analyses in preambles are the most reliable sources of the text's public meaning because they are subject to review by multiple veto-gate actors, including the President, Congress, and the courts. Consequently, it would be costly for the agency to attempt to strategically skew the meaning of a text away from what it publicly conveyed earlier, or to otherwise self-delegate through intentionally vague explanations.¹⁷⁹ Not only could such efforts result in the rejection or revision of a regulation if the agency is subject to OIRA-coordinated or congressional review, but the preamble could also be vulnerable to judicial challenge as arbitrary or capricious,¹⁸⁰ as failing to provide sufficient notice to allow for adequate comment,¹⁸¹ or as otherwise not constituting a "logical outgrowth" of the final rule.¹⁸²

Moreover, some have aptly observed that these materials are to a final rule much like what ratified legislative history is to a statute.¹⁸³ Indeed, Congress will occasionally formally adopt and approve selections of its drafting history directly in the enacted statutory text.

177. See STACK, *supra* note 12, at 37 ("Agencies also provide guidance in the course of responding to comments through a section-by-section analysis.").

178. *Id.* at 36–37 ("Agencies frequently provide guidance about the meaning and application of their regulations in a dialogue with commenters in the preamble."); *id.* at 11 (noting that preambles include "engagement with commentators"); Noah, *supra* note 9, at 311 (observing that "a preamble may have included reassurances in response to comments that expressed concerns about particular applications of a proposed rule").

179. *Cf.* Stack, *supra* note 9, at 416 (considering administrative law doctrines that would mitigate the "prospect for strategic manipulation by agencies if courts treated statements of basis and purpose as privileged interpretive sources" by "making their policy resistant to change, issue only obscure statements in the hopes of preserving their future flexibility, or attempt to smuggle policies into statements of basis and purpose").

180. See *supra* notes 150–153 and accompanying text.

181. See *supra* note 147 and accompanying text; Stack, *supra* note 9, at 417 (observing that "agencies have been tempted to smuggle important policies into their statements of basis and purpose that were not previously subjected to the notice-and-comment process" but that these temptations are mitigated by "enforcement of the procedural core of notice-and-comment rulemaking: that the public has an adequate opportunity to comment on the agency's proposed policy").

182. See Stack, *supra* note 9, at 418 n.308 (discussing the "logical outgrowth" doctrine).

183. See Noah, *supra* note 9, at 311–12. To illustrate, he offers the example of the Civil Rights Act of 1991, which states that "[n]o statements other than the interpretive memorandum appearing at Vol. 137 Congressional Record S 15276 (daily ed. Oct. 25, 1991) shall be considered legislative history . . ." See *id.* (citing Pub. L. No. 102-166, § 105(b), 105 Stat. 1071, 1075).

Such ratified legislative history is distinct from ordinary legislative history because it has been signed by the President and adopted by Congress as a whole, rather than one of its committees. Similarly, the preamble's provision-by-provision explanations and responses to comments have also been officially approved and ratified by the agency as an institution after review by multiple authoritative actors. But, unlike legislative history, these materials have also undergone public comment and thus the scrutiny of interested parties.

By contrast to Stack's purposivist approach,¹⁸⁴ regulatory textualism rejects reliance on the broad statements of purpose often found in preambles in favor of the more specific explanatory provisions. Such broad statements are pitched at too high a level of abstraction to inform the court's specific interpretive task.¹⁸⁵ These statements, as discussed, also often admit of multiple purposes or simply mirror the language of the statute in ways that do not shed any independent interpretive light.¹⁸⁶ At best, they might be understood as guidance for future agency interpretations, given that agencies are more institutionally capable of applying purposivist approaches relative to courts.¹⁸⁷

If the specific preamble provision is silent or otherwise unable to yield sufficient insights to resolve the ambiguity, then the judge should next proceed to the regulatory analyses published or referenced in the Federal Register. These analyses usually apply the regulation to specific factual scenarios to determine the various consequences of the regulation. Should the agency strategically misstate the impacts of the rule, it could face a potential veto by the executive branch, Congress, or the courts. To predict these consequences, agency staff must, in effect, interpret the regulation

184. See Stack, *supra* note 9, at 395 (noting that when a statement of basis and purpose lacks a "specific justification," nevertheless "the more general grounding of the regulation in protecting the integrity of the markets suggests a guidepost for interpretation").

185. For example, the roadless rule contained the following broad statement of purpose:

This final rule prohibits road construction, reconstruction, and timber harvest in inventoried roadless areas because they have the greatest likelihood of altering and fragmenting landscapes, resulting in immediate, long-term loss of roadless area values and characteristics Additionally, the size of the existing forest road system and attendant budget constraints prevent the agency from managing its road system to the safety and environmental standards to which it was built.

Special Areas; Roadless Area Conservation, 66 Fed. Reg. 3244, 3244 (Jan. 12, 2001) (to be codified at 36 C.F.R. pt. 294).

186. See *supra* note 69.

187. See STACK, *supra* note 12, at 3; see also VERMEULE, *supra* note 18, at 209; Herz, *supra* note 23, at 92; Sunstein & Vermeule, *supra* note 18, at 928.

with some degree of specificity in order to collect the requisite data. For executive branch agencies, the most commonly available analysis is the regulatory impact analysis of significant rules required by executive order.¹⁸⁸ These analyses contain the agency's description of the rule's anticipated costs and benefits, net benefits, and the potential alternatives considered.¹⁸⁹ As such, the documents often communicate the various regulatory options considered and rejected by the agency. Readers of the regulatory text would thus reasonably understand the accompanying text as not applying to the rejected options.¹⁹⁰ Judicial regulatory interpretation should, in turn, align with this public understanding.

To illustrate, take a regulation from the U.S. Department of Agriculture (USDA) revising the definition of "retail pet store" to narrow the class of parties exempt from various licensing, recordkeeping, and maintenance requirements.¹⁹¹ The previous exemption had covered most retail outlets including those that sold animals over the Internet, or else through mail or telephone sales, sight unseen. With the rise of such sales, however, came numerous public complaints about the lack of oversight in the health and treatment of these animals, especially given the inability of consumers to personally observe them.¹⁹² In response, the USDA sought to restrict the exemption so that the rule would now cover these entities. So the USDA changed the text of the exemption to cover only those "place[s] of business" in which the "seller, buyer, and the animal available for sale are physically present so that every buyer may personally observe the animal" before sale.¹⁹³ In other words, the

188. See Exec. Order No. 12,866 § 6(a)(3)(B), 3 C.F.R. 638, 645 (1994).

189. *Id.* § 3(c)-(d), 3 C.F.R. at 641.

190. See Noah, *supra* note 9, at 314-15 ("Obviously, if an agency specifically considers and rejects such alternatives to a regulation that it promulgates, it should not subsequently interpret the regulation as if it encompassed one or more of those alternatives all along."). Indeed, commenters on agency action regularly do rely on such analyses when submitting their comments. See, e.g., Ronald E. Wyzga & Annette C. Rohr, Electric Power Research Institute (EPRI), Comment on EPA Proposed Rule on National Ambient Air Quality Standards for Particulate Matter (Apr. 18, 2006), <http://www.regulations.gov/contentStreamer?documentId=EPA-HQ-OAR-2001-0017-1538&attachmentNumber=1&disposition=attachment&contentType=pdf> [<http://perma.cc/6Z55-BWKD>] (commenting on rule in light of regulatory impact analysis).

191. Animal Welfare; Retail Pet Stores and Licensing Exemptions, 78 Fed. Reg. 57,227 (Sept. 18, 2013) (to be codified at 9 C.F.R. pt. 1).

192. *Id.* at 57,227.

193. *Id.* at 57,249. The full text of the definition reads:

exemption now only applied to places of business where the buyer could actually inspect the animals.

The regulatory impact analysis for the rule, in turn, presented the other options that the USDA had considered, but rejected.¹⁹⁴ One of those options included the possibility of including hybrid operations—retailers who sold animals both in physical stores as well as some sight unseen—from the definition of exempt “retail pet stores.”¹⁹⁵ Because hybrid operators still posed heightened risks to animals given that some of the purchasers could not personally inspect the animals, however, the agency explicitly decided not to exempt such operators.¹⁹⁶ The rule’s resulting regulatory analyses, as required by executive order and by the Regulatory Flexibility Act (RFA), then applied this definition in calculating the number of entities potentially affected by the rule.¹⁹⁷ Because the public relied upon the regulatory impact analysis as an indication of the predicted regulatory consequences, regulatory textualism calls for the text to be read consistently with the regulatory impact analysis. Accordingly, in future cases, the regulatory text defining “retail pet stores” should not be read to include hybrid operators.

As for their reliability and public availability, regulatory analyses are generally not as accessible as regulatory preambles. Relative to such preambles, they tend to have less standardized format and content.¹⁹⁸ Although many agencies do make the full results of such

Retail pet store means a place of business or residence at which the seller, buyer, and the animal available for sale are physically present so that every buyer may personally observe the animal prior to purchasing and/or taking custody of that animal after purchase, and where only the following animals are sold or offered for sale, at retail, for use as pets: Dogs, cats, rabbits, guinea pigs, hamsters, gerbils, rats, mice, gophers, chinchillas, domestic ferrets, domestic farm animals, birds, and coldblooded species.

Id.

194. See U.S. DEP’T OF AGRIC., ANIMAL & PLANT HEALTH INSPECTION SERVICE, REGULATORY IMPACT ANALYSIS AND FINAL REGULATORY FLEXIBILITY ANALYSIS FOR FINAL RULE REVISION OF THE DEFINITION OF RETAIL PET STORE 51–55 (2013), http://www.aphis.usda.gov/publications/animal_welfare/2013/APHIS-2011-0003-15371%20RIA.pdf [<http://perma.cc/Q282-CH52>].

195. *Id.* at 52.

196. *Id.*

197. *Id.* at 3–9 (estimating number of potentially affected entities).

198. See Robert W. Hahn, *How Changes in the Federal Register Can Help Improve Regulatory Accountability*, 52 ADMIN. L. REV. 927, 947 (2000) (observing that “Federal Register notices that present regulatory analysis currently exhibit a great deal of variation in the kind of information that is presented”).

analyses available in the Federal Register,¹⁹⁹ agencies also vary greatly with regard to how much of their analyses they publish as opposed to summarize or incorporate by reference.²⁰⁰ Many agencies simply make their regulatory analyses available online, even if not published in the Federal Register.²⁰¹ For these reasons, regulatory analyses are not as consistently accessible as statements of basis and purpose in the Federal Register and thus should reside lower in the interpretive hierarchy.

At the same time, regardless of their form, agencies are required by executive order to “[m]ake available to the public the information” contained in the regulatory impact analyses submitted to OIRA.²⁰² Many statutes like the RFA also require agencies to “make copies of the . . . analysis available to members of the public” and, at a minimum, to include a simple “summary” in the Register.²⁰³ As a result, such analyses still remain valid interpretive sources as they are usually publicly accessible in some way, and like statements of basis and purpose, are also subject to review by multiple politically authoritative actors. Regulatory impact analyses required by executive order, for example, are considered by multiple entities within the executive branch, and then submitted to Congress for

199. See KERWIN & FURLONG, *supra* note 12, at 75–86 (observing that agencies “report in preambles the results of the reviews they are required to conduct under a variety of statutes and executive orders”); Matthew D. Adler, *Welfare Polls: A Synthesis*, 81 N.Y.U. L. REV. 1875, 1903 (2006) (observing that “the EPA, having relied on a [contingent valuation] survey in conducting its cost-benefit analysis of a rule, may then publish this analysis in the Federal Register”).

200. See GOV’T ACCOUNTABILITY OFFICE, REGULATORY REFORM: AGENCIES COULD IMPROVE DEVELOPMENT, DOCUMENTATION, AND CLARITY OF REGULATORY ECONOMIC ANALYSIS 17, GAO-RCED-98-142 (1998) [hereinafter GAO, REGULATORY REFORM], <http://www.gao.gov/archive/1998/rc98142.pdf> [<http://perma.cc/58AH-ZL9B>] (“Some of the analyses [in the studied sample] contained executive summaries, while others relied on the preambles to the proposed and final rules, published in the Federal Register, to summarize their results.”); Hahn, *supra* note 198, at 939 (concluding, based on study of economically significant rules from 1996 through February 10, 1998, that it is “quite likely that the Federal Register notices are not taking advantage of important information contained in RIAs”).

201. See Robert W. Hahn and Mary Beth Muething, *The Grand Experiment in Regulatory Reporting*, 55 ADMIN. L. REV. 607, 626 (2003) (discussing the Office of Management and Budget’s efforts to increase the amount of regulatory analyses made available online).

202. Exec. Order No. 12,866, § 6(a)(3)(E)(i), 3 C.F.R. 638, 645 (1993).

203. 5 U.S.C. § 604(b) (2012) (“The agency shall make copies of the final regulatory flexibility analysis available to members of the public and shall publish in the Federal Register such analysis or a summary thereof.”).

review as well.²⁰⁴ The same is true of studies prepared under statutes such as the RFA and Paperwork Reduction Act.²⁰⁵

As Noah points out, the statement of basis and purpose and the regulatory analyses are thus analogous to the advisory committee notes for the Federal Rules of Procedure as well as the application notes published alongside the Federal Sentencing Guidelines²⁰⁶—both interpretive sources to which courts give “great weight”²⁰⁷ or treat as “authoritative,” respectively.²⁰⁸ Like these materials, regulatory analyses are often published contemporaneously with the final rules and guidelines after a report-and-wait procedure with Congress.²⁰⁹ They are also adopted by the agency before they are sent to Congress. Consequently, these materials are less susceptible to the worry that an unelected civil servant could usurp the agency’s quasi-legislative function.²¹⁰ Given that regulatory analyses must be approved by an agency head after multiple review processes, it is more difficult for unaccountable staff members to sneak in sources without authoritative oversight.²¹¹

204. See *supra* notes 139–144 & 163–168 and accompanying text; Sunstein, *supra* note 64, at 1842 (noting that “[e]specially for economically significant rules, the analysis of costs and benefits receives careful attention” during OIRA-coordinated review, though “most of OIRA’s day-to-day work is usually” not “spent . . . on costs and benefits”).

205. See *id.* at 1870–71 (“OIRA spends a great deal of time helping to promote compliance with various statutory requirements, including those associated with the Regulatory Flexibility Act . . . and the Paperwork Reduction Act”).

206. See Noah, *supra* note 9, at 316 (noting that “at least since Congress began reviewing new agency rules in 1996, preambles and regulatory analyses may have a better pedigree by virtue of that report-and-wait system and, therefore, deserve closer attention from the courts than they have received in the past, more akin to the respect given to the advisory committee notes that accompany the federal rules of procedure”).

207. See *Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 316 (1988); *Miss. Publ’g Corp. v. Murphree*, 326 U.S. 438, 444 (1946); *United States v. Navarro*, 169 F.3d 228, 237 (5th Cir. 1999); *United States v. Anderson*, 942 F.2d 606, 611 (9th Cir. 1991).

208. See *Melendez v. United States*, 518 U.S. 120, 127–30 (1996); *Williams v. United States*, 503 U.S. 193, 201 (1992) (observing that Sentencing Commission policy statements that interpret guidelines are “authoritative”); *United States v. Hill*, 645 F.3d 900, 907–08 (7th Cir. 2011); Catherine T. Struve, *The Paradox of Delegation: Interpreting the Federal Rules of Civil Procedure*, 150 U. PA. L. REV. 1099, 1113 (2002).

209. See Noah, *supra* note 9, at 316 (“Like the federal rules of procedure, sentencing guidelines do not take effect until after surviving a report-and-wait process.”).

210. See Manning, *supra* note 19, at 732.

211. See Noah, *supra* note 9, at 323 (noting that regulatory history generally “pose[s] less of a risk of manipulation or circumvention of procedures for legislating than do legislative histories”); Stack, *supra* note 9, at 416–18 (analyzing various “incentives for strategic manipulation” by agency actors).

Another useful parallel here is that between regulatory analyses and cost estimates provided by the Congressional Budget Office (CBO) with respect to legislation. By statute, the CBO provides Congress with estimated budgetary impacts of bills approved by certain congressional committees.²¹² Because Congress often “drafts in the shadow” of these CBO budget scores, Professors Abbe Gluck and Lisa Bressman have proposed an “interpretive presumption” that statutory ambiguities be construed consistently with these scores given their “centrality” to the drafting process.²¹³ Whatever the strength of their argument in the context of statutory interpretation, the case for consulting relevant analogues in regulatory interpretation is even stronger. Although the CBO produces cost estimates for almost every bill approved by a full congressional committee, such estimates are not formally subject to public notice and comment.²¹⁴ By contrast, the regulatory analyses that accompany a proposed rule are generally vetted and supplemented by interest groups and other rulemaking participants, thus rendering the public understanding of such analyses that much more integral to the regulatory drafting process. In addition, such analyses form the basis for what can amount to a veto by the President and Congress before the regulation can be promulgated; such analyses can also be subject to judicial arbitrary-and-capricious review in a way that CBO budget scores are not.²¹⁵

212. Section 402 of the Congressional Budget and Impoundment Control Act of 1974 directs the CBO to estimate the budgetary effects of bills and resolutions approved by various congressional committees. Congressional Budget and Improvement Control Act of 1974, Pub. L. No. 93-344, §§ 201–203, 88 Stat. 297, 302–05 (2012) (codified as amended at 2 U.S.C. §§ 601–603 (2012)).

213. See Lisa Schultz Bressman & Abbe R. Gluck, *Statutory Interpretation from the Inside: An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part II*, 66 STAN. L. REV. 725, 763–65 (2014); Abbe Gluck, *The “CBO Canon” and the Debate Over Tax Credits on Federally Operated Health Insurance Exchanges*, BALKINIZATION (July 10, 2012, 8:55 PM), <http://balkin.blogspot.com/2012/07/cbo-canon-and-debate-over-tax-credits.html> [<http://perma.cc/6FD5-LPBA>].

214. See *Processes: What Methodology Does CBO Use in its Analyses?*, CONGRESSIONAL BUDGET OFFICE, <http://www.cbo.gov/about/our-processes> [<http://perma.cc/7A8L-7BBE>] (describing informational sources for cost estimates, which include “the government’s statistical agencies . . . data and information from numerous outside experts” as well as informal and formal consultations).

215. See Thomas O. McGarity, *Regulatory Analysis and Regulatory Reform*, 65 TEX. L. REV. 1243, 1323 (1987) (“Because substantive judicial review focuses upon whether the agency exercised reasoned decision making, given the evidence in the rule-making record, a well-crafted regulatory analysis in the rule-making record may persuade a reviewing court that the agency did reach its decision rationally.”).

In short, regulatory textualism calls for the judge to discern the semantic meaning of the regulatory text by reference to, first, the preamble's provision-by-provision analysis, and then the regulatory analyses. Both of these sources are sufficiently accessible and reliable to serve as valid bases of textual interpretation. As later discussed, if none of these materials in the preamble resolve the ambiguity, then the court should defer to an agency's interpretation as long as it provides a sufficiently reasoned explanation.

Structuring the interpretive inquiry accordingly will likely appeal to textualists who generally prefer a more rule-like interpretive approach to minimize judicial discretion,²¹⁶ one that favors formalism over functionalism.²¹⁷ Many state courts, for example, employ a tiered methodology for statutory interpretation that Professor Gluck refers to as "modified textualism," which privileges the text first and foremost; if the statutory text alone cannot resolve the ambiguity, then the judge is allowed to consider the legislative history, followed by judicial presumptions such as substantive canons.²¹⁸ Gluck hypothesizes that this structured, textualist approach helps to serve as a coordinating device between litigants and various courts in addition to fostering potential methodological consensus between avowed textualists and nontextualists.²¹⁹

Similarly, explicit hierarchical approaches like regulatory textualism can also have a restraining effect that helps to promote traditional rule-of-law values such as judicial fidelity.²²⁰ Because judges can only consult a limited number of interpretive materials

216. See Nelson, *supra* note 21, at 351 (arguing that the "rules and standards . . . distinction is a surer guide to the systematic differences between textualist and intentionalism than more highfalutin talk about the fundamental goals of interpretation or the distinction between 'objective' meaning and 'subjective' intent").

217. See VERMEULE, *supra* note 18, at 72 (describing one version of formalism in which "courts make a second-order decision to decide cases, where possible, according to rules rather than standards, sticking close to the apparent or surface meaning of legal texts and placing great emphasis upon the value of legal certainty and the value of adhering to common understandings of constitutional and statutory commands"); Daniel A. Farber, *Do Theories of Statutory Interpretation Matter? A Case Study*, 94 Nw. U. L. REV. 1409, 1411-16 (distinguishing "textualism" or "formalism" from "dynamic interpretation" or "pragmatism"); Gluck, *supra* note 22, at 1834 (characterizing as at the "heart" of textualism a "predictable, formalized approach that can clarify the interpretive process").

218. See Gluck, *supra* note 22, at 1758, 1829 ("[T]he drive to interpretive consensus in each of the states studied centers around a 'modified textualist' approach that state courts expressly derive from Justice Scalia's textualism, but which is not identical to it.").

219. *Id.* at 1856-57.

220. *Id.* at 1820-21.

with the same relative priority, it is more difficult for them to scour the regulatory history in search of sympathetic sources.²²¹ For a textualist, the ideal type of regulatory history is “an objective, unmanufactured history of a [regulation’s] context” that sheds light on whether a regulation, say, “codifies an established term of art.”²²² The regulatory preamble and analyses are sources that come closest to fulfilling this ideal.

D. Applications

To illustrate regulatory textualism in practice, this Section now considers more concrete examples applying the method.

1. *The Forest Service Roadless Rule.* The Forest Service, a subagency within the USDA, passed a legislative rule prohibiting the building of any new “road” in inventoried areas of designated national forests.²²³ The Forest Service interpreted the rule to permit a company to build a thirty-year right-of-way for motorized vehicles involved in the construction of a pipeline. Specifically, the permit allowed for a ten-mile, fifty-foot right-of-way alongside the proposed pipeline intended for a “variety of motor vehicles” such as “pickup trucks, bulldozers, backhoes, and other heavy machinery.”²²⁴ The right-of-way would result in the necessary destruction of trees to allow for these vehicles to bring equipment and supplies to build the pipeline and, once built, to then allow such vehicles to use the right-of-way on a case-by-case basis for emergency repairs to the pipeline.²²⁵ In the agency’s view, the right-of-way did not constitute a prohibited “road” under the regulation.

Environmental groups, however, challenged the issuance of the permit as a violation of the legislative rule. In their view, a “road” constituted any area over which a motor vehicle could traverse from point to point. Thus, the Forest Service violated its own rule by

221. See *Conroy v. Aniskoff*, 507 U.S. 511, 519 (1993) (Scalia, J., concurring) (invoking Judge Harold Leventhal’s metaphor describing “the use of legislative history as the equivalent of entering a crowded cocktail party and looking over the heads of the guests for one’s friends”).

222. John Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673, 731 (1997).

223. This example is drawn largely from *Wilderness Workshop v. U.S. Bureau of Land Management*, 531 F.3d 1220 (10th Cir. 2008), with some simplifications.

224. Appellants’ Supplemental Brief at 11, *Wilderness Workshop*, 531 F.3d 1220 (No. 08-1165) (citing the record).

225. *Wilderness Workshop*, 531 F.3d at 1222–26.

permitting the building of a right-of-way to facilitate motor-vehicle movement for pipeline development.

Regulatory textualism would first focus the judge's attention on the operative text of the regulation which provides the following definition of a "road":

Road. A motor vehicle travelway over 50 inches wide, unless designated and managed as a trail. A road may be classified, unclassified, or temporary.²²⁶

A prohibited "temporary" road, in turn, is defined as a "road authorized by contract, permit, lease, other written authorization, or emergency operation, not intended to be part of the forest transportation system and not necessary for long-term resource management."²²⁷ Thus, in this case, the fact that the Forest Service's permit was temporary, lasting only for thirty years, would not resolve the interpretive ambiguity.

The next immediate semantic question that arises would be whether the fifty-foot pipeline right-of-way is a "travelway" or else an excluded "trail." Neither term is explicitly defined in the operative regulatory text.²²⁸ So the textualist judge would then move on to the provision-by-provision explanation in the regulatory preamble. There, the judge would see that in the subsection discussing the definition of a "road," the agency directly acknowledged commenters' concerns that the definition could be ambiguous. In response, the Forest Service noted that "[f]or agency consistency, this final rule includes the same definitions of 'road,' . . . and 'temporary road' that are contained in the National Forest System Road Management regulations."²²⁹ In other words, the definition of "road" in the roadless rule was clarified to match the Forest Service's already existing road-management regulations.

From this observation, it would be reasonable for the judge to then attempt to read the definition *in pari materia* with the existing regulations, that is, consistently and with reference to the agency's

226. Special Areas; Roadless Area Conservation, 66 Fed. Reg. 3244, 3272 (Jan. 12, 2001) (to be codified at 36 C.F.R. pt. 294).

227. *Id.*

228. *Id.* at 3267.

229. *Id.* at 3251; see also Administration of the Forest Development Transportation System; Prohibitions; Use of Motor Vehicles Off Forest Service Roads, 66 Fed. Reg. 3206, 3217 (Jan. 12, 2001) (to be codified at 36 C.F.R. pt. 212).

other regulations.²³⁰ If the Forest Service had interpreted its previous regulatory definition of a road, for example, not to apply to rights-of-way for construction-related motor vehicles, then, perhaps the court could interpret the definition accordingly. Unfortunately, however, the opinions in the case are unclear as to how the Forest Service had interpreted its other regulations in the past, leaving the matter still unresolved.

Pressing on with the agency's explanation of how "road" was defined, the judge would then see that the agency had further clarified the definition of a "trail" in the regulatory preamble: "A trail is established for travel by foot, stock, or trail vehicle, and can be over, or under, 50 inches wide."²³¹ According to the record, the permit was not granted for a right-of-way that would be created by foot or stock, such as by horse or cattle.²³² Would the right-of-way be established by a "trail vehicle"? Although the meaning of "trail vehicle" is not self-evident, the record in the case suggested that the right-of-way would be cleared by a bulldozer, which is unlikely to fall into the ordinary definition of a "trail vehicle."²³³ From this language, the judge would likely be able to conclude that the right-of-way for construction vehicles did not fall into the "trail" exception.

To the extent that "trail" and "travelway" nevertheless remain ambiguous, the judge should then look at the regulatory analyses that were prepared for the rule to see what light they could shed on the meaning of "travelway" in particular.²³⁴ In the regulatory impact analysis, for example, the judge would see that an explicit cost of the rule was identified as "special-use authorizations (such as communications sites, electric transmission lines, *pipelines*)."²³⁵ The costs associated with this consequence were then qualitatively

230. Statutes can be read *in pari materia*, by reference to related statutes, when the statutes "pertain to the same subject matter—when they relate to the same person or thing, to the same class of persons or things, or have the same purpose or object." 2B NORMAN J. SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 51:3 (7th ed. 2007).

231. Special Areas; Roadless Area Conservation, 66 Fed. Reg. at 3272.

232. See Appellants' Supplemental Brief at 11, *Wilderness Workshop v. U.S. Bureau of Land Mgmt.*, 531 F.3d 1220 (10th Cir. 2008) (No. 08-1165) (citing the record's indication that the right-of-way would be "cleared" and "graded to provide for safe and efficient operation of construction equipment and inspection vehicles").

233. *Id.* at 2 (citing the record indicating the right-of-way would be "bulldoz[ed]").

234. Indeed, the roadless rule was anticipated to have an annual impact of more than one hundred million dollars and was thus deemed economically significant and submitted to OIRA. Special Areas; Roadless Area Conservation, 66 Fed. Reg. at 3267.

235. *Id.* at 3269 (emphasis added).

estimated: “Current use and occupancies not affected, future developments requiring roads excluded in inventoried roadless areas unless one of the exceptions applies.”²³⁶ As none of the exceptions applied, the analysis accordingly contemplated that the final rule would impose costs on the future development of pipelines.²³⁷ Other stated costs of the rule included various activities that would be limited because “roads are often needed for these activities.”²³⁸ These activities included gas development and “energy-related transmission uses (such as ditches and *pipelines* . . .).”²³⁹

The environmental impact assessment identified similar consequences of the rule:

An additional optional exception was considered in detail . . . as a social and economic mitigation measure and was available for selection with any alternative. This exception would have allowed road construction or reconstruction where a road is needed for prospective mineral leasing activities in inventoried roadless areas

The Department has decided not to adopt the exception for future discretionary mineral leasing . . . because of the potentially significant environmental impacts that road construction could cause to inventoried roadless areas. Existing leases are not subject to the prohibitions.²⁴⁰

In other words, the final environmental impact assessment specifically considered the rule’s prohibitive effects on new mineral leases. Regulatory textualism would prohibit the judge from interpreting “road” to allow a right-of-way specifically for oil- and gas-pipeline construction vehicles. In particular, the interpretation is difficult to reconcile with the rejected regulatory alternatives that the agency had considered, including options to exempt the kinds of rights-of-way

236. *Id.*

237. The rule’s only explicitly carved-out exceptions included situations that posed an imminent threat to public health and safety; those when it would be necessary to engage in environmental cleanup activities such as the cleanup of toxic chemicals from an abandoned mine; those in which a preexisting right was reserved by statute, treaty, or other legal entitlement; and those when it would be necessary to correct irreparable resource damage. *Id.* at 3255. Finally, the rule allowed for road construction to implement a road-safety-improvement project if necessary to respect existing mineral leases and it also allowed for “infrequent” timber harvesting of small-diameter trees. *Id.* at 3258.

238. *Id.* at 3268.

239. *Id.* (emphasis added).

240. *Id.* at 3256.

that would likely be necessary for new pipeline and other mineral-related developments. Thus, the reasonable reader would likely have understood “road” to prohibit the kind of pipeline-related rights-of-way contemplated in the case.

Now contrast the regulatory textualist method with how the Tenth Circuit actually approached the question. The court first looked at dictionaries and concluded that the term “travelway” was ambiguous.²⁴¹ While citing the resulting need for deference to the current agency’s interpretation,²⁴² the panel then took pains to determine whether that interpretation was “consistent” with the regulation.²⁴³ Instead of first considering other aspects of the codified regulatory text or the agency’s direct explanation for the term, however, the court instead looked to whether the agency’s interpretation aligned with “two provisions of the roadless rule’s preamble”—select excerpts of the court’s choosing.²⁴⁴ The first provision explicitly distinguished between wilderness areas and protected inventoried areas, and stated that the latter could be used for a “multitude of activities including motorized uses, grazing, and oil and gas development.”²⁴⁵ The second excerpt indicated that the rule was adopted in part due to “budget constraints” that made it impossible for the Forest Service to manage “the existing forest road system . . . to the safety and environmental standards to which it was built.”²⁴⁶ Both of these statements appeared in the agency’s abstract and untethered discussions of the rule’s purpose.²⁴⁷

From these materials, the majority concluded that the preamble “clearly” favored the Forest Service’s interpretation because it indeed

241. *Wilderness Workshop v. U.S. Bureau of Land Mgmt.*, 531 F.3d 1220, 1226–27 (10th Cir. 2008) (“The key term in this definition, ‘travelway,’ is not defined in the Roadless Rule, nor does it appear to have any commonly accepted meaning, since it is not found in any contemporary dictionaries that we are aware of.”).

242. *Id.* at 1227 (citing *Auer v. Robbins*, 519 U.S. 452, 463 (1997); *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994)).

243. *Id.*

244. *Id.*

245. *Id.* (quoting *Special Areas; Roadless Area Conservation*, 66 Fed. Reg. at 3249).

246. *Id.* (quoting *Special Areas; Roadless Area Conservation*, 66 Fed. Reg. at 3244).

247. Specifically, the first declaration appeared in the agency’s provision-by-provision explanation of the codified purpose of the rule, in response to commenters who questioned whether the rule allowed for multiple uses of the inventoried roadless areas. *Special Areas; Roadless Area Conservation*, 66 Fed. Reg. at 3249. The second appeared in the preamble’s broad discussion of the “[p]urpose and [n]eed” of the regulation. *Id.* at 3244.

aligned with the “purpose” of the rule.²⁴⁸ Specifically, the rights-of-way were simply “construction zones” and “nothing in the record” suggested they would be “considered part of the forest road system.”²⁴⁹ Moreover, the court also surmised that authorizing such construction zones would not burden the Forest Service’s road-maintenance budget.²⁵⁰ In other words, the judges reasoned that because the purpose of the rule was to entertain uses like oil and gas development, the pipeline right-of-way aligned with one of the Forest Service’s goals. At the same time, the right-of-way could simply be characterized as a construction area rather than a “road” to facilitate motor-vehicle movement. As a result, the panel concluded that “travelway” need not be interpreted to include the right-of-way at issue—leading to the Forest Service’s victory.²⁵¹

The court’s approach illustrates just some of the potential problems with intentionalist and purposivist methods of interpretation. By picking and choosing selectively from the preamble’s broad statements of purpose instead of prioritizing only the specific, explanatory provision and the regulatory analyses, the panel was able to reach a policy conclusion contradicted by more specific and salient sources. Even at the level of broad generalities, the panel failed to acknowledge other language stating that the rule “prohibits road construction . . . in inventoried roadless areas because they have the greatest likelihood of altering and fragmenting landscapes.”²⁵² In other words, the rule specified multiple policy goals of the regulation, such as environmental protection in addition to oil and gas development. Moreover, the judges engaged in analyses for which they were institutionally incompetent, including speculation about the determinants of the agency’s budget.

Furthermore, even while invoking the rule’s purpose, the majority failed to prioritize or even mention the agency’s codified statement of purpose in the regulatory text, relying instead on the preamble’s broad and uncodified statements of purpose.²⁵³ That text was much clearer that the rule was written to balance multiple policy goals and not only oil and gas development. Specifically, the codified

248. *Wilderness Workshop*, 531 F.3d at 1227 n.5.

249. *Id.* at 1227.

250. *Id.*

251. *Id.* at 1227–28.

252. Special Areas; Roadless Area Conservation, 66 Fed. Reg. at 3244.

253. *Wilderness Workshop*, 531 F.3d at 1227.

regulatory text declared that “[t]he purpose of this subpart is to provide, within the context of multiple-use management, lasting protection for inventoried roadless areas within the National Forest System.”²⁵⁴ In fact, the Forest Service explicitly explained in its provision-by-provision analysis that it had revised that text to clarify that environmental protection had to be balanced against other potential uses for the inventoried roadless areas.²⁵⁵ Had the court focused on the codified regulatory text first, it would have had to engage in a more focused inquiry to demonstrate the consistency of the agency’s interpretation with the text of the rule itself.

2. *The FCC Minority-Control Broadcasting Rule.* Now consider another example, this time from an independent agency with a multimember commission not subject to OIRA-coordinated presidential review: the FCC.²⁵⁶ In 1985, the FCC issued a final rule that limited commercial television broadcasters to twelve licenses with an explicit exception permitting two additional licenses for “minority-controlled” stations.²⁵⁷ The regulatory text stated that “‘minority-controlled’ means more than 50 percent owned by one or more members of a minority group.”²⁵⁸ About fourteen years after the initial regulation was issued, the FCC interpreted this regulatory text as requiring an applicant to show a numerical majority–minority interest as well as to demonstrate the actual control of such

254. Special Areas; Roadless Area Conservation, 66 Fed. Reg. at 3272.

255. Indeed, in response to public comments, the Forest Service decided to change the final codified purpose to “emphasize that the goal of providing lasting protection of roadless areas must occur within the context of multiple-use management.” *Id.* at 3250.

256. See Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15, 18 (2010) (“Removal protection for agency heads is the touchstone [for identifying independent agencies], but independent agencies are also typically characterized by their multimember structure and the fact that, unlike executive agencies, they do not have to submit cost-benefit analyses of proposed rules for review by the President’s Office of Information and Regulatory Affairs.”); Datla & Revesz, *supra* note 145, at 772 (observing that although “[i]ndependent agencies are almost always defined as agencies with a for-cause removal provision,” there are actually multiple “indicia of independence: removal protection, specified tenure, multi-member structure, partisan balance requirements, litigation authority, budget and congressional communication authority, and adjudication authority”). The Paperwork Reduction Act also includes the Federal Communications Commission among its statutory definition of “independent regulatory agencies.” 44 U.S.C. § 3502(5) (2000).

257. Multiple Ownership of AM, FM and Television Broadcast Stations, 50 Fed. Reg. 4666 (Feb. 1, 1985) (to be codified at 47 C.F.R. pt. 73).

258. 47 C.F.R. § 73.3555(d)(3)(iii) (1990).

minorities.²⁵⁹ Pursuant to this interpretation, the Commission denied an application to renew a commercial television-broadcast license as a sanction for the applicant's earlier claim to a minority preference.²⁶⁰ That earlier claim was based only on a numerical majority-minority board without a showing of de facto minority control (for example, in terms of the day-to-day management operations).²⁶¹ The applicant filed suit, arguing that the FCC's interpretation was invalid because the text defined "minority control" only as "more than 50 percent owned by one or more members of a minority group."²⁶²

Regulatory textualism privileges the agency's operative regulatory text. Here, the text clearly stated that the regulation's definition of "minority-control" was a numerical one. The provision-by-provision justification in the preamble confirmed this interpretation. There, the reader would have seen the agency's further explanation:

A question arises as to the proper definition of a minority owned station for the purposes of our multiple ownership rules. In this regard, we note that the Commission has adopted different standards of minority control depending on the mechanism used to foster its minority policies. In the context of the multiple ownership policies, we believe that a greater than 50 percent minority ownership interest is an appropriate and meaningful standard for permitting increases to the rules adopted herein.²⁶³

In this manner, the enacting FCC explicitly sought to clarify any ambiguity in the regulatory text introduced by the agency's previous "different standards of minority control"—which had sometimes recognized an actual-control test²⁶⁴—in favor of a bright-line numerical rule. Put differently, the final rule made clear that the FCC's previous policies had sometimes defined minority control as

259. See *Trinity Broad. of Fla., Inc. v. FCC*, 211 F.3d 618, 625 (D.C. Cir. 2000) ("For these reasons, we agree . . . that majority-minority boards of directors of non-profit entities must exercise *de facto* control.").

260. See *id.* at 624.

261. *Id.*

262. *Id.* at 625 (quoting 47 C.F.R. § 73.3555(d)(3)(iii)).

263. *In re* Amendment of Section 73.3555 [formerly Sections 73.35, 73.240 and 73.636] of the Comm'n's Rules Relating to Multiple Ownership of AM, FM and Television Broad. Stations, 100 F.C.C.2d 74, 95 (1985) [hereinafter *Amendment of Section 73.3555*] (citation omitted).

264. For example, the rule cited an FCC policy document to illustrate its previous "different standards of minority control." That document provided that preferential treatment for a tax certificate would be granted "where minority ownership is in excess of 50% or *controlling*." *Trinity Broad. of Fla.*, 211 F.3d at 626 (emphasis added) (quoting 47 C.F.R. § 73.3555(d)(3)(iii)).

part of a functional test regarding evidence of actual control, and it explicitly rejected that definition in the rule's preamble.²⁶⁵ For these reasons, a court employing regulatory textualism would have rejected the FCC's interpretation in the case.

Despite the regulatory text, the D.C. Circuit took a decidedly purposivist approach and found that the FCC's interpretation was not "inconsistent" with the underlying purpose of the regulation.²⁶⁶ In the majority's view, it was "hard to imagine . . . how an entity controlled by minorities in name only or in which the minorities' interests are totally passive could foster *the objective of the Commission's policies to broaden minority voices and spheres of influence over the airwaves.*"²⁶⁷ In other words, the panel found that the broadcasting rule's policy goal was to increase minority influence in commercial broadcasting. Accordingly, in the court's view, only a de facto control test could properly further the FCC's objective and was therefore an appropriate interpretation of the regulation. Whether true as an empirical matter or not, the court's conclusion was a policy judgment rendered without access to the relevant data or expertise.

Oddly, the D.C. Circuit then determined that the FCC's interpretation nevertheless failed to provide fair notice to the applicants precisely because the relevant text and other agency statements failed to inform the public that a control test would be applied. The panel therefore vacated the denial of the agency's license application.²⁶⁸ In other words, it concluded that the regulation could be interpreted to require minority control, but that such an interpretation violated basic due process. Indeed, these concerns go to the heart of the problems with intentionalist and purposivist approaches. In effect, then, the D.C. Circuit interpreted the definition of "minority-control" to require de facto control, but then applied

265. This textual interpretation is further bolstered by a dissent to the rule filed by a commissioner. Although not dispositive, that dissent interpreted the regulation as not requiring de facto minority control:

Under the majority's scheme, the right to purchase broadcast stations over the established ceiling turns upon the race of the proposed owners alone. No further showing is required with respect to how these new owners may contribute to diversity. No concern is given as to whether the 51% minority owners will exert any influence on the station's programming or will have any control at all.

Amendment of Section 73.3555, 100 F.C.C.2d at 104 (Comm'r Patrick, dissenting in part).

266. *Trinity Broad. of Fla.*, 211 F.3d at 625 ("The question [in this case], then, is this: Does the Commission's interpretation 'sensibly conform' to both the purpose and the text of the regulation?").

267. *Id.* (emphasis added).

268. *Id.* at 619.

this flawed interpretation prospectively. In doing so, however, the court allowed the creation of a new legal obligation without the requisite notice and comment. By permitting the FCC's interpretation to stand, the court essentially facilitated an amendment to the rule without the required rulemaking process.

E. Alternatives and Objections

Despite regulatory textualism's concern with semantic meaning, its constraint on interpretive sources, and relatively rule-like approach, one might nevertheless remain unconvinced that the approach is sufficiently textualist. Isn't it really a form of weak intentionalism or purposivism? Ultimately, the charge boils down to one of definition. Nevertheless, if one wants to recharacterize regulatory textualism as something else, the substance of the theory remains. Thus, it will now be fruitful to put the labels temporarily aside to more sharply highlight the differences with competing approaches.

The theory that would be the most useful to compare would be Professor Kevin Stack's approach, as it shares some superficial similarities; namely, they both restrict the judge's interpretive sources, albeit in different ways and for different reasons.²⁶⁹ Stack's purposivist method, recall, asks the interpreter to consult the rule's statement of basis and purpose as if it were part of the enacted regulatory text. In doing so, Stack argues, the judge should attempt to understand the enacting agency's objectives when promulgating the regulation and to interpret the regulation consistently with those objectives.²⁷⁰ Stack's regulatory purposivism, however, largely conceives of rulemaking procedures focused on the requirements of the APA as well as federal common law requirements such as hard

269. By contrast, Noah's intentionalist approach relies on a hierarchy of regulatory history that takes into account materials produced as a result of presidential and legislative oversight, but does not offer any explicit ranking criteria; as a result, he allows for the consideration of some materials such as agency-official depositions, which are generally unreliable. *See* Noah, *supra* note 9, at 314 (observing as possible sources of interpretation the materials resulting from the fact that "Congress has added a series of analytical demands that agencies consider the possible consequences of their actions on such things as the environment, small businesses, and paperwork burdens; in addition, executive orders over the years have called on agencies to pay special attention to possible impacts on inflation, business, and federalism"); *see also id.* at 320 ("Regulated parties may attempt to depose agency officials who were responsible for drafting the regulation or else seek discovery of documents reflecting internal deliberations.").

270. *See* Stack, *supra* note 9, at 398.

look review and *Chenery's*²⁷¹ demand that the agency rely on its original rationale.²⁷² Because he views these elements as central to the rulemaking process, Stack argues that the regulatory text and APA-required statement of basis and purpose are the most relevant sources of interpretation. Though Stack does acknowledge the role of presidential review in helping to rationalize regulations,²⁷³ the public materials prepared by agencies as part of this legitimating process are not valid sources in his approach.

By comparison, regulatory textualism draws much of its normative force from the political authority of regulations and the veto-gate procedures that elected officials have imposed to monitor them. The interpretive method accordingly takes structural cues from the rulemaking process beyond judicial review to shed light on what the public would have understood as the meaning of the regulations accepted by Congress and the President. Put differently, the approach searches for the meaning of the regulatory text as informed by the publicly available materials that elected actors have furnished as the bases for their ratification of the regulation.

As such, regulatory textualism seeks to build upon Stack's and other scholars' insights regarding the utility of the regulatory preamble as an interpretive source, but attempts to do so with some distinct premises regarding the nature of the rulemaking process. Instead of focusing on the judicial elaboration of the APA, regulatory textualism emphasizes the role of the President and Congress in negotiating regulatory texts within the permissible range of discretion left open by arbitrary-and-capricious review. As a result, the approach identifies other interpretive sources such as the regulatory analyses required by executive order and statute as appropriate evidence of the text's public meaning.

In addition, regulatory textualism also resists Stack's invitation to treat the statement of basis and purpose as analogous to an enacted statutory statement of purpose and thus a coequal part of the

271. *SEC v. Chenery Corp.*, 318 U.S. 80 (1943).

272. *Id.* at 87–88; Stack, *supra* note 9, at 380; *see also* Gillian E. Metzger, *Embracing Administrative Common Law*, 80 GEO. WASH. L. REV. 1293, 1298 (2012) (giving as an example of administrative common law “the reasoned decisionmaking requirement” required by hard look review); Ernest A. Young, *The Constitution Outside the Constitution*, 117 YALE L.J. 408, 473 n.34 (2007) (characterizing *Chenery* as “requiring, as a matter of administrative common law, that an agency action can only be upheld by a reviewing court on the same grounds that the record discloses the agency’s action was originally based”).

273. Stack, *supra* note 9, at 397.

regulatory text itself. For regulatory textualists, the codified regulatory text is the only relevant object of interpretation.²⁷⁴ The regulatory text alone is published in the Code of Federal Regulations, an important legal touchstone for determining whether an agency has issued a substantive, legislative rule.²⁷⁵ Moreover, as discussed, Stack's conception fails to take into account codified statements of purpose that agencies regularly include in the text itself.

Nevertheless, many purposivists and intentionalists would likely respond that they too believe in the primacy of the text, and that any conflict between the text and extratextual sources should be resolved in favor of the former.²⁷⁶ Although textualists and nontextualists are indeed likely to agree in the easy cases—when there are clear conflicts between the text and external sources—many litigated situations will involve alleged ambiguities that could be resolved in different ways. These hard cases, such as those involving the Forest

274. One self-professed regulatory textualist is Justice Scalia, who confines his method to the meaning of the codified regulatory text as well as textual canons of construction. In interpreting the regulation at issue in *Decker*, for example, he sought to “us[e] the familiar tools of textual interpretation to decide: Is what the petitioners did here proscribed by the fairest reading of the regulations?” *Decker v. Nw. Env'tl. Def. Ctr.*, 133 S. Ct. 1326, 1342 (2013) (Scalia, J., dissenting). In parsing the meaning of the EPA regulation at issue, Justice Scalia applied the textual canon known as the rule of the last antecedent, whereby the “limiting clause or phrase . . . should ordinarily be read as modifying only the noun or phrase that it immediately follows.” *Id.* at 1343 (citing *Barnhart v. Thomas*, 540 U.S. 20, 26 (2003)). In addition, Justice Scalia also considered the ambiguous regulatory provision at issue alongside other provisions in the codified regulatory text to determine the text's best reading. *Id.* at 1344.

275. *See, e.g., Am. Min. Cong. v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1112 (D.C. Cir. 1993) (considering publication of a rule in the Code of Federal Regulations as a factor for giving the regulation legal effect); *Brock v. Cathedral Bluffs Shale Oil Co.*, 796 F.2d 533, 539 (D.C. Cir. 1986) (observing that “the real dividing point between regulations and general statements of policy is publication in the Code of Federal Regulations, which . . . statut[ory] [law] authorizes to contain only documents ‘having general applicability and legal effect,’ and which the governing regulations provide shall contain only ‘each Federal regulation of general applicability and current or future effect’”); *see also Preamble, THE REGULATORY GRP.*, http://www.regulationwriters.com/regulatory_glossary?id=41 [<http://perma.cc/ER23-5MKT>] (“A preamble is not a part of the regulatory text, and therefore does not appear in the Code of Federal Regulations. A preamble is not legally enforceable . . .”).

276. *See, e.g., Newman, supra* note 27, at 542–44 (“The essential rule, perhaps, is not to violate plain words.”); Noah, *supra* note 9, at 290 (arguing that, before granting deference, courts should “pay[] closer attention to the text of an existing rule”); Stack, *supra* note 9, at 391–92 (arguing for an interpretive method that would “track those of a purposive approach to statutes: the court's aim is to discern the purpose of the regulation and its provisions, and to interpret the regulation to carry out those purposes to the extent permitted by its text while remaining consistent with policies and principles of clear statement”); Weaver, *supra* note 9, at 698–99 (“Courts do not, and should not, relentlessly attempt to effectuate the purpose of an enactment. Rather, they must be sensitive to its words.”).

Service's roadless rule or the FCC's minority-control regulation, are the ones that will expose the consequences of various interpretive commitments. What is really at stake between textualism and its alternatives is how judges identify and resolve ambiguities, what questions they ask when attempting to do so, and with what objectives in mind.

In addition to these contested dimensions, intentionalists and purposivists are likely to raise a number of other objections to regulatory textualism as well. One of the strongest may be to the use of regulatory analyses as interpretive sources because the consideration of such analyses would raise judicial decision costs. Because such analyses can be lengthy, asking judges to pore over these studies would stretch judicial resources too thinly. Note, however, that many agencies often reference the same regulatory analyses to fulfill multiple statutory and presidential mandates.

Consider, for example, the Unfunded Mandates Reform Act (UMRA), which requires agencies to provide economic assessments of government mandates affecting state governments, local governments, and the private sector.²⁷⁷ According to one former OIRA Administrator, “[a]gencies generally meet UMRA requirements with reference to regulatory impact analyses prepared pursuant to [e]xecutive [o]rder . . . but rarely do more.”²⁷⁸ In other words, agencies often prepare regulatory analyses to submit to OIRA, and then refer to the same analyses to fulfill multiple analytical requirements imposed by statute or executive order. As another example, the Securities and Exchange Commission often prepares cost-benefit analyses that simply cross-reference their statutorily required estimates of paperwork burdens.²⁷⁹ Consequently, the number of independent analyses that actually accompany a final rulemaking in the Federal Register is usually fairly limited.

277. Unfunded Mandates Reform Act of 1995, Pub. L. No. 104-4, 109 Stat. 48 (codified in scattered sections of 2 U.S.C.).

278. See Susan E. Dudley, *Prospects for Regulatory Reform in 2011*, 12 ENGAGE: J. FEDERALIST SOC'Y PRAC. GROUPS 7–8 (2011); see also GAO, *REGULATORY REFORM*, *supra* note 200, at 17 n.8 (“Because agencies rarely prepare separate analyses when UMRA is applicable . . . our findings reflect the extent to which the nine analyses called for under UMRA satisfy the act's as well as the executive order's requirements for economic analyses.”).

279. See Bruce Kraus & Connor Raso, *Rational Boundaries for SEC Cost-Benefit Analysis*, 30 YALE J. ON REG. 289, 297 (2013) (“SEC CBA did not quantify expected benefits, and its quantified costs were typically limited to a subset of the direct compliance burden, estimated for an entirely different purpose: a mandate under the Paperwork Reduction Act (PRA).”).

Another possible objection might arise from an attempt to analogize the regulatory impact analysis required by executive order to presidential signing statements in the statutory context. Presidential signing statements are essentially documents that Presidents sometimes issue upon the signing of a bill. They vary in substance but, as relevant here, can describe a bill, explain its purpose, or advance a particular interpretation of the statute.²⁸⁰ One objection to these statements is that they threaten to undermine bicameralism and presentment.²⁸¹ The concern is that judicial acknowledgement of them allows the President to legislate while subverting constitutional strictures either by insulating his views from a supermajority veto or else by allowing him a line-item veto.²⁸²

Extending this critique to the regulatory context, one might argue that asking a judge to interpret a regulation in light of the materials generated by the OIRA-coordinated presidential review process would essentially allow the President to exert more influence than allowed by statute. Those who are skeptical of the legitimacy of the President's rulemaking role in the first place might reject regulatory textualism for granting the President's understanding of the regulation undue weight. The distinctive institutional dynamics of regulatory drafting, however, dispel such concerns. All of the published materials arising from the presidential review process are approved by the agency head before publication²⁸³—unlike presidential signing statements which are not considered by Congress before the bill is signed.²⁸⁴ As a result, regulatory analyses are better understood as the product of a back-and-forth between the President and the agency head, rather than a unilateral statement of the

280. See Curtis A. Bradley & Eric A. Posner, *Presidential Signing Statements and Executive Power*, 23 CONST. COMMENT. 307, 308 (2006).

281. See William D. Popkin, *Judicial Use of Presidential Legislative History: A Critique*, 66 IND. L.J. 699, 700 (1991) (addressing the concern that judicial use of legislative history is improper because legislative history is not formal law and can be easily manipulated by competing political factions). There is a sizeable literature on statements in which the President expresses his constitutional concerns about a signed bill—raising different issues that are not directly implicated here. See, e.g., Gary Lawson & Christopher D. Moore, *The Executive Power of Constitutional Interpretation*, 81 IOWA L. REV. 1267, 1279–80 (1996); Marc N. Garber & Kurt A. Wimmer, *Presidential Signing Statements as Interpretations of Legislative Intent: An Executive Aggrandizement of Power*, 24 HARV. J. ON LEGIS. 363, 366–68 (1987).

282. See U.S. CONST. art. I, § 7; *Clinton v. City of New York*, 524 U.S. 417 (1998).

283. See *supra* note 211 and accompanying text.

284. Bradley & Posner, *supra* note 280, at 338.

President alone.²⁸⁵ In addition, all of the relevant materials are also sent to back to the agency head for his signature after OIRA has completed its review, and then to Congress during its wait-and-see periods under the CRA.²⁸⁶ As such, any incentives for the President to strategically misstate his understanding of the rule would be mitigated.²⁸⁷ For these reasons, any concerns that could arise from an analogy to presidential signing statements fade in the rulemaking arena.²⁸⁸

Similar dynamics also help to mitigate another set of concerns that might arise, this time from the potential dynamic effects of regulatory textualism. Perhaps most obvious is a worry about regulatory ossification. Because the approach allows judges to

285. See Sunstein, *supra* note 64, at 1848 (noting that “there are countless instances in which the process of interagency comment during OIRA review, or the agency’s own continuing consideration of the underlying issues, leads the agency to make changes quickly and with enthusiasm”).

286. See *supra* notes 156–162 and accompanying text.

287. Cf. McNollgast, *Legislative Intent*, *supra* note 13, at 28 (“Presidential signing statements, for example, cannot be rejected or overturned by Congress, and are not negotiated with members of the legislative coalition. Hence, the potential for unchecked opportunistic behavior by the president is great.”).

288. Furthermore, as a constitutional matter, the President also has a legitimate role to play in exercising regulatory oversight consistently with underlying authorizing statutes. Such oversight authority is exemplified by the President’s power to appoint officers not otherwise provided for by heads of departments or the court, to coordinate agency actions, and to emphasize his political priorities. Despite much academic debate about the significance of a specific delegation to an agency head instead of the President, most agree that some degree of oversight by agency heads is constitutional. See Sunstein, *supra* note 64, at 1874 n.126 (noting that “[t]here is a great deal of academic discussion about whether the president may ‘overrule’ those within the executive branch, including Cabinet heads, who may be delegated a degree of statutory discretion” but arguing that “[t]he issue has more theoretical interest than practical importance” since “those who work for the President want to act consistently with his goals, priorities, and views”). Moreover, in practice, the line between presidential direction and oversight is often unclear. Strauss, *supra* note 64, at 704 (“The difference between oversight and decision can be subtle, particularly when the important transactions occur behind closed doors and among political compatriots who value loyalty and understand that the president who selected them is their democratically chosen leader.”). The President’s primary recourse against a recalcitrant agency head remains removal, but presidents shape agency rulemaking in myriad ways, whether through ex parte informal communications, strong norms of loyalty, or budgetary carrots and sticks. See *Sierra Club v. Costle*, 657 F.2d 298, 404–05 (D.C. Cir. 1981) (stating that informal meetings between the President and members of executive-branch agencies are generally permitted during the rulemaking process). Furthermore, parties seeking judicial review of an agency action are usually unable to prove that the President or his staff overrode an agency head’s decision. As a result, constitutional challenges to the President’s rulemaking involvement are often unlikely to succeed. See Robert V. Percival, *Who’s in Charge? Does the President Have Directive Authority Over Agency Regulatory Decisions?*, 79 *FORDHAM L. REV.* 2487, 2535 (2011) (calling such scenarios “extremely rare”).

consider the regulatory analyses and preambles, rulemaking could become even costlier than it currently is since regulatory drafters will now have to spend more time than they already do bargaining over the relevant language.²⁸⁹ Relatedly, regulatory textualism could also result in agencies becoming less willing to publicize their reasoning in order to preserve their flexibility.²⁹⁰ One could also be concerned that an increasing judicial focus on the regulatory preamble would politicize the analyses as regulatory actors attempt to skew them in a way that would be favorable to an interpretation they later desire.²⁹¹

Although the magnitude of these dynamic effects is an empirical question, there are some reasons to think that the marginal incentives created by regulatory textualism will be minimal since many of these incentives already exist under current review procedures. For example, the OIRA-coordinated review process already requires multiple internal and external agency actors to comb through multiple drafts of the preamble and negotiate its language. Moreover, as others have noted, the ability of agencies to withhold information relevant to the rulemaking is also constrained due to hard-look judicial review's requirement that the agency disclose all the relevant data and evidence relied upon by the agency.²⁹² Finally, the risks of politicization under current review procedures are already well known, and many have called for innovations such as peer review to mitigate such risks.²⁹³ Consequently, the strategic dynamic effects of calling upon judges to interpret regulations by reference to the regulatory analyses and preamble are likely to be limited.

III. DEFERENCE

Given that regulatory textualism supplies a method for courts to determine whether an agency's construction is "plainly erroneous" or

289. See Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 DUKE L.J. 1385, 1419 (1992).

290. See Stack, *supra* note 9, at 417 (noting the risk that interpretive approaches that rely on the statement of basis and purpose could "encourage an agency to be less explicit in its statement of basis and purpose in order to preserve its future flexibility").

291. See *id.*

292. See *id.* (observing that the incentive for agencies to issue vague statements of basis and purpose are "checked" by the fact that "[t]he agency's rule . . . will . . . have to survive hard-look review and the demand for agency reason-giving").

293. See Final Information Quality Bulletin for Peer Review, 70 Fed. Reg. 2664, 2674 (Jan. 14, 2005); Fred Anderson et al., *Regulatory Improvement Legislation: Risk Assessment, Cost-Benefit Analysis, and Judicial Review*, 11 DUKE ENVTL. L. & POL'Y F. 89, 92 (2000); Sidney A. Shapiro, *OMB and the Politicization of Risk Assessment*, 37 ENVTL. L. 1083 (2007).

“inconsistent” under *Seminole Rock*’s first step, the next issue is how, and to what extent, a court should give an interpretation “controlling weight” when the text is otherwise ambiguous.²⁹⁴ This Part argues that deference is due to the agency’s interpretation as long as the agency provides a sufficiently reasoned explanation for the interpretation.

A. *Why Deference?*

When the regulatory text is ambiguous, *Seminole Rock* deference subordinates judicial interpretation to agency interpretation in that it privileges the agency’s construction over that of the court—even though the court may have read the regulation differently on its own. Some have referred to this concept as “binding” deference, emphasizing the primacy of the agency’s resolution of any regulatory ambiguity.²⁹⁵ The opinion in *Seminole Rock* itself did little to justify such deference, though a number of rationales have since been invoked by later courts,²⁹⁶ and further elucidated by scholars.²⁹⁷ One possible basis for judicial deference, for example, is that Congress’s delegation of rulemaking authority to an agency necessarily includes the authority to interpret those regulations.²⁹⁸ In other words, when Congress grants an agency rulemaking power, it also grants the agency the authority to interpret the resulting regulations. Judicial deference follows from this presumed legislative choice.²⁹⁹

294. *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945).

295. *See* Manning, *supra* note 19, at 617, 621–23.

296. *See id.* at 629 (“Perhaps because of the perceived common sense appeal of *Seminole Rock* deference, it took many years for the Court to offer any detailed rationale for the doctrine.”); Stephenson & Pogoriler, *supra* note 88, at 1454 (noting that *Seminole Rock* “offered no explanation whatsoever—nor even a citation to any other authority” for its principle).

297. *See, e.g.*, Manning, *supra* note 19, at 629–31 (surveying rationales for *Seminole Rock* deference); Stephenson & Pogoriler, *supra* note 88, at 1444–45 (same).

298. *See, e.g.*, *Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 681 (1991) (“From this congressional delegation [to promulgate regulations] derives the Secretary’s entitlement to judicial deference [to the interpretation of those regulations].”); *Martin v. Occupational Safety & Health Review Comm’n*, 499 U.S. 144, 151 (1990) (“Because applying an agency’s regulation to complex or changing circumstances calls upon the agency’s unique expertise and policymaking prerogatives, we presume that the power authoritatively to interpret its own regulations is a component of the agency’s delegated lawmaking powers.”).

299. *See* Stephenson & Pogoriler, *supra* note 88, at 1444–45 (noting that courts’ pragmatic rationales for *Seminole Rock* generally deploy—either implicitly or explicitly—a legal fiction about congressional intent: “the presumption that when Congress delegated the agency the authority to make rules with the force of law, it implicitly delegated to the agency the authority to clarify those rules with subsequent (reasonable) interpretations that should themselves be treated by courts as authoritative”).

On the one hand, this argument seemingly parallels the basis for *Chevron* deference to an agency's statutory as opposed to regulatory interpretation.³⁰⁰ That doctrine requires judicial deference to an agency's reasonable construction of a statute that the agency itself administers when the statute is ambiguous.³⁰¹ Courts presume that the ambiguity reflects a legislative desire to delegate that interpretive authority to the rulemaking agency, and not the courts.³⁰² On the other hand, as Manning and others have pointed out, there are important differences between statutory and regulatory interpretation that render this reasoning suspect for *Seminole Rock* deference.³⁰³ Namely, when a regulation is ambiguous, that ambiguity is not created by Congress, but rather by the rule-drafting agency. In essence, by promulgating an ambiguous regulation, agencies are "self-delegating" the power to engage in future lawmaking through enforcement actions, adjudication, or nonlegislative rules.³⁰⁴ By contrast, when Congress drafts legislation, it cannot reserve the power to control its enforcement.³⁰⁵ Nor can Congress attempt to change or veto the interpretation of its own statute unless it passes another statute to modify the previous statutory text.³⁰⁶ Thus, it is unclear how Congress can delegate a power that it does not itself possess.

300. See Stack, *supra* note 9, at 371–92 (drawing a parallel between *Chevron* and *Seminole Rock*).

301. Manning, *supra* note 19, at 627 ("*Seminole Rock* adopts an approach to agency interpretations of regulations that, in important respects, is quite similar to *Chevron*'s framework for statutes."); *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984). Its two-part test is a familiar one: in Step One, the judge must ask "whether Congress has directly spoken to the precise question at issue." If Congress's intent is "clear," then that intention governs. If, however, the statute is ambiguous or silent, then in Step Two, courts ask whether the agency's interpretation is "permissible" and, if so, defer accordingly. *Id.* at 842–43; Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 370 (1986); Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 517; Cass R. Sunstein, *Law and Administration After Chevron*, 90 COLUM. L. REV. 2071, 2086 (1990).

302. See *United States v. Mead Corp.*, 533 U.S. 218, 241 (2001) ("When, *Chevron* said, Congress leaves an ambiguity in a statute that is to be administered by an executive agency, it is presumed that Congress meant to give the agency discretion, within the limits of reasonable interpretation, as to how the ambiguity is to be resolved.").

303. See Manning, *supra* note 19, at 619–30.

304. Stephenson & Pogoriler, *supra* note 88, at 1471.

305. See *Bowsher v. Synar*, 478 U.S. 714, 734 (1986) ("By placing the responsibility for execution of the [Act] in the hands of an officer who is subject to removal only itself, Congress in effect has retained control over the execution of the Act and had intruded into the executive function.").

306. See *Immigration & Naturalization Serv. v. Chadha*, 462 U.S. 919, 958 (1983).

Beyond the delegation argument for deference is yet another rationale that has been invoked by various courts, which acknowledges the agency's unique status as the regulatory drafter. Because agency actors themselves were involved in the writing of the rule, this argument goes, the agency is better situated relative to a court to interpret its meaning. Matthew Stephenson and Miri Pogoriler refer to this as the "originalist rationale" for *Seminole Rock* deference.³⁰⁷ As they have also pointed out, however, the rationale's plausibility decreases the more years have gone by since the initial rulemaking. The more time that passes, the more likely the original political appointees and career staff involved are to have departed the agency.³⁰⁸ The remaining career staff may now also face different political overseers such that they are unlikely to sincerely reveal the original meaning of or impetus for the enacted regulation.

Alternatively, one might acknowledge that the originalist and delegation rationales are simply legal fictions and instead justify deference to an agency's interpretation of its own regulation on more baldly pragmatic grounds. This is likely the strongest basis for agency deference, if any, as well as the most prevalent.³⁰⁹ In this view, the best foundation for *Seminole Rock* deference arises from the recognition that agencies are engaging in interstitial policy making when interpreting an ambiguous regulation. Thus, judicial deference is appropriate given the comparative institutional assessment that agencies are superior policy makers compared to courts.³¹⁰ As in *Chevron*, such arguments are grounded in familiar arguments about the agency's superior political accountability and expertise relative to a court.³¹¹ Although agency heads are not elected, they are presidentially appointed, Senate confirmed, and subject to continuing oversight. Agencies also possess technical expertise as well as

307. See Stephenson & Pogoriler, *supra* note 88, at 1454.

308. *Id.* at 1472–73.

309. *Id.* at 1457 (“As between these two justifications for *Seminole Rock* deference, the pragmatic justification is ascendant, while the originalist rationale has been in decline.”).

310. *Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 697 (1991); see also *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512–13 (1994).

311. See Manning, *supra* note 19, at 617–18 (explaining that “the Court justifies *Seminole Rock* deference on the basis of an agency's superior political accountability [and] policymaking competence”); Jonathan T. Molot, *The Judicial Perspective in the Administrative State: Reconciling Modern Doctrines of Deference with the Judiciary's Structural Role*, 53 STAN. L. REV. 1, 100–01 (2000) (“Just as it did in justifying deference to agency interpretations of statutes in *Chevron*, the Supreme Court has relied upon agency accountability and agency expertise to justify judicial deference to agency interpretations of regulations.”).

knowledge about how complicated regulatory schemes interact and fit together.³¹² Thus, when a legislative rule is ambiguous, judges should defer to the agency's construction rather than impose their own.

Perhaps in a nod to *Seminole Rock*'s shifting moorings, a number of Supreme Court members—most vocally Justices Scalia, Roberts, and Alito—have expressed doubt about the viability of the doctrine as recently as last Term.³¹³ A few years before that, in *Christopher v. SmithKline Beecham Corp.*,³¹⁴ a majority (including the same three Justices as well as Justices Kennedy and Thomas) refused to grant deference to the Department of Labor's interpretation of its own regulation.³¹⁵ They did so on the grounds that the agency had announced its new interpretation for the first time in amicus briefs and in a manner that was inconsistent with its previous interpretations.³¹⁶ Instead of applying *Seminole Rock* deference, the Court instead applied a more independent approach drawn from *Skidmore v. Swift*.³¹⁷ Under *Skidmore*, courts generally analyze

312. Though the often-inextricable relationship between politics and expertise in regulatory policy helps to ground the dual underpinnings of deference, in cases where the two factors seemingly pull in different directions, note that arbitrary-or-capricious review continues to require agencies to justify their policy decisions in terms of expertise. See *Motor Vehicle Mfrs. Ass'n of the U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *supra* notes 151–153 and accompanying text. In other words, when a change in political leadership results in a regulatory interpretation that cannot be justified with reference to the available information, then such agency decisions are less likely to be upheld despite any political official's desire to take responsibility. As such, agencies always remain subject to the requirement to give reasons for new regulatory policies by reference to the best available data and information in the record, with variations in scrutiny depending on the nature of the agency action. Merely invoking the fact of new political leadership is currently insufficient on its own as a valid reason for regulatory change. Instead, such a change must be publicly explained and justified with respect to the available evidence. See *Watts*, *supra* note 151, at 18–20 (describing how arbitrary-or-capricious review focuses only on apolitical explanations grounded in expertise).

313. See, e.g., *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1213 (2015) (Scalia, J., concurring) (advocating that *Auer* deference be “abandon[ed]”); *id.* at 1225 (Thomas, J., concurring) (arguing that “the entire line of precedent beginning with *Seminole Rock* raises serious constitutional questions and should be reconsidered”). Justice Roberts and Justice Alito also wrote separately in a case, for example, to state that “[t]he bar is now aware that there is some interest in reconsidering [the *Seminole Rock*] cases, and has available to it a concise statement of the arguments on one side of the issue.” *Decker v. Nw. Env'tl. Def. Ctr.*, 133 S. Ct. 1326, 1338 (2013) (Roberts, C.J., concurring). Justice Scalia, for his part, continued to reiterate his case for *Seminole Rock* deference's overdue demise. *Id.* at 1339 (Scalia, J., concurring in part and dissenting in part).

314. *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156 (2012).

315. *Id.* at 2169.

316. *Id.*

317. See *id.* at 2168–69; see also *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) (setting out this standard).

whether they find an agency's interpretation to be persuasive. More specifically, they look at a number of factors such as the "thoroughness" of the agency's consideration; the reasoning's "validity" and "consistency"; and, more generally, any factors which give an interpretation the "power to persuade, if lacking power to control."³¹⁸ By applying *Skidmore* instead of *Seminole Rock*, without overruling or otherwise distinguishing the latter, the Court appeared to be engaging in a threshold analysis of when *Seminole Rock* would even apply.

A critical defining feature of the *Skidmore* deference regime is that the court remains the authoritative interpreter that must be swayed by the agency for the agency to win deference.³¹⁹ In the statutory-interpretation context, courts usually invoke such deference when the agency has not been granted lawmaking authority, or when the agency does not exercise such authority through formalized procedures like formal adjudication or notice-and-comment rulemaking.³²⁰ When the agency does not use such procedures to issue its statutory interpretation, the reasoning goes, courts should be more skeptical of the result and thus must be independently persuaded that the interpretation is correct. A related rationale for the *Skidmore* regime is that the court is a superior interpreter in situations when the agency has not used deliberative procedures that provide fair notice and invite public input.³²¹

Extending this logic to regulatory interpretation, one could argue that *Seminole Rock* deference should similarly be restricted to particular forms of agency action that use certain procedures such as

318. *Id.* John Manning has defended the *Skidmore* approach to regulatory deference on a number of grounds. Most importantly, he argues that *Skidmore* supplies a critical "independent interpretive check" on agency regulatory interpretation by contrast to *Seminole Rock*'s relative capitulation. See Manning, *supra* note 19, at 687. Because an agency would no longer be able to determine definitively the meaning of its own ambiguous rule, it would have greater incentive to regulate more clearly in the text, thus providing clearer notice to regulated entities. *Id.* In addition, because *Skidmore* depends on the persuasiveness of the agency's explanation, it would also spur agencies to provide more carefully considered justifications for the rule in their statements of basis and purpose. *Id.* at 689. Finally, the approach duly recognizes that agencies may have semantic insights into the specialized meaning of regulatory terms of art. *Id.* at 688.

319. See Thomas W. Merrill & Kristin E. Hickman, *Chevron's Domain*, 89 GEO. L.J. 833, 856 (2001) ("*Skidmore* . . . makes clear that the weight given to the agency interpretation is always ultimately up to the court.>").

320. *United States v. Mead Corp.*, 533 U.S. 218, 230 (2001).

321. *Id.*

formal adjudication.³²² One limitation of this approach, however, is that the bulk of agency interpretive actions do not occur through such procedures, but rather through more informal means, leaving most agency interpretations to *Skidmore* deference as a practical matter.³²³ Taken on its own terms, however, *Skidmore* does not fully appreciate the pragmatic justifications for deference to an agency's regulatory interpretation when the text is otherwise ambiguous. As previously discussed, an agency is more likely than a court to possess the requisite expertise, experience, and accountability with which to resolve better the textual ambiguity.³²⁴ In terms of institutional capacity, agencies are also better situated to engage in interstitial policy making that does not otherwise conflict with the regulatory text; internally, they will have access to rulemaking materials such as staff memoranda, public comments, and reports that courts will not.³²⁵ Furthermore, *Skidmore's* multifactor test also threatens interpretive unpredictability and instability in providing notice to regulated entities.

B. *Regulatory Hard Look*

For these reasons, regulatory textualism calls for an intermediate approach between *Seminole Rock* and *Skidmore* deference. Given regulatory textualism's primacy on politically authorized texts from the enacting agency, courts should create strong incentives for clear regulatory drafting and supply a stronger judicial check on a subsequent agency's interpretation of the text's public meaning. Specifically, courts should require that later agencies supply a reasoned explanation for their interpretation akin to that required under arbitrary-and-capricious review.³²⁶ Such an approach would draw upon an already-familiar concept in administrative law that accords deference to the agency's superior expertise and political ties,

322. See Stack, *supra* note 9, at 410–11 (discussing how *Seminole Rock* could be restricted “to particular policymaking form”); Stephenson & Pogoriler, *supra* note 88, at 1484 (exploring complexities in how “*Mead's* rationale might also extend to *Seminole Rock*”).

323. Stephenson & Pogoriler, *supra* note 88, at 1490 (noting that “many statutory schemes do not require formal adjudication”). As Stephenson & Pogoriler also point out, agencies could voluntarily undertake additional procedures for otherwise informal actions, but it would be unclear how much more procedure would merit *Seminole Rock* deference under *Mead's* logic. *Id.* Of course, if agencies undertook full notice-and-comment, they would simply be able to amend the rule itself.

324. See *supra* notes 310–312 and accompanying text.

325. See *supra* note 23 and accompanying text.

326. See *supra* notes 150–153 and accompanying text.

while at the same time, extending a judicial check on the proffered justifications.³²⁷

This proposed approach recognizes that when the enacted text is ambiguous or silent with respect to the interpretive question, agencies are better equipped than courts to fill in the gaps of the regulation through adjudication and enforcement of the rule.³²⁸ Agency heads are not only more technically competent than judges, but may also incrementally develop the rule against changing circumstances and specific facts. Any arbitrary agency interpretations, by contrast, would be invalid. Such actions would essentially be legislative in character and would therefore need to go through the notice-and-comment process. At the same time, a hard look for regulatory interpretations at the second step of *Seminole Rock* analysis would also spur judges to regard such interpretations with more scrutiny than they currently do. Consequently, the approach would facilitate interpretations that stayed within the textual bounds of the legislative rule and were developed through reason-giving.

Of course, the requisite reasons would differ from those demanded of the agency when it originally promulgated the rule, because the agency would now be attempting to resolve a narrower ambiguity left open by the initial regulatory text. In addition, there would not be a full rulemaking record that the agency would have to justify. Nevertheless, this regime would help to promote a more common-law-like evaluation of the agency's proffered interpretation against the regulatory text.³²⁹ Moreover, unlike a wholesale extension of *Skidmore* deference, it would also not require an overruling or extreme modification of *Seminole Rock*, which demands that courts give an agency's interpretation "controlling" weight.³³⁰ A hard look for agency's interpretations when the text is otherwise ambiguous balances the need for agency flexibility to update regulatory policy,

327. *Motor Vehicle Mfrs. Ass'n of the U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (emphasizing that, despite hard look, "scope of review under the 'arbitrary and capricious' standard is narrow and a court is not to substitute its judgment for that of the agency").

328. Indeed, some commenters have noted that administrative agencies are better situated—and more likely—to act purposively when engaging in statutory interpretation; such arguments are even stronger when it comes to an agency's own regulations. See VERMEULE, *supra* note 18, at 111; Herz, *supra* note 23, at 118; Sunstein & Vermeule, *supra* note 18, at 928.

329. See Richard W. Murphy, *Hunters for Administrative Common Law*, 58 ADMIN. L. REV. 917, 927 (2006).

330. *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945).

on the one hand, against the countervailing needs for fair notice and accountability, on the other.

CONCLUSION

This Article has developed a theory of regulatory interpretation grounded in the unique character of regulatory texts as products of various procedures imposed by politically authoritative actors with veto-gate power. Agency regulations are subject to oversight by the President, Congress, and the courts through procedures that invite the active participation of interest groups and the public. These actors and mechanisms supply political and legal legitimacy to the binding lawmaking activities of otherwise-unelected bureaucrats. Any theory of regulatory interpretation must take these dynamics into account.

Regulations also implement statutes in narrow policy arenas and thus use language that is necessarily complex and specialized. Considerations of judicial capacity and agency constraint thus counsel the rejection of intentionalism and purposivism as methods of judicial regulatory interpretation. Instead, regulatory textualism calls for the structured judicial consideration of materials within the ratified preamble in order to discern the semantic meaning of the regulatory text: the provision-by-provision explanations in the statement of basis and purpose, followed by the regulatory analyses. If these materials are ambiguous or otherwise conflict, then the court should defer to the agency as long as the agency gives a reasoned explanation for its interpretation. In this manner, regulatory textualism attempts to vindicate the need for flexibility alongside the agency and other political actors' duty to publicly explain their regulatory decisions. At the same time, it seeks to leave the development of regulatory policy to administrators who, unlike judges, are more capable of reacting to changed circumstances and fitting regulatory means to ends.