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# Articles

## PURPOSIVISM IN THE EXECUTIVE BRANCH: HOW AGENCIES INTERPRET STATUTES

*Kevin M. Stack*

**ABSTRACT**—After decades of debate, the lines of distinction between textualism and purposivism have been carefully drawn with respect to the judicial task of statutory interpretation. Far less attention has been devoted to the question of how executive branch officials approach statutory interpretation. While scholars have contrasted agencies’ interpretive practices from those of courts, they have not yet developed a theory of agency statutory interpretation.

This Article develops a purposivist theory of agency statutory interpretation on the ground that regulatory statutes oblige agencies to implement the statutes they administer in that manner. Regulatory statutes not only grant powers but also impose a duty on agencies to carry out those powers in accordance with the principles or purposes the statutes establish. To comply with that duty, agencies must develop a conception of the purposes that the statute requires them to pursue and select a course of action that best carries forward those purposes within the means permitted by the statute; in short, agencies must take a purposivist approach. Moreover, this Article argues that agencies’ institutional capacities—a familiar constellation of expertise, indirect political accountability, and ability to vet proposals before adopting them—make them ideally suited to carry out the task of purposive interpretation.

Understanding agency interpretation as purposive by statutory design has significant implications for long-standing debates. First, it suggests that the focus of judicial review should be on the agency’s specification of the statute’s purposes and chosen means to implement those purposes, questions that are not squarely addressed by the *Chevron* doctrine. Second, by providing an account of the character of the agency’s statutory duties, this analysis helps to distinguish appropriate from inappropriate political and presidential influences on the agency. Finally, investigating the debate between purposivism and textualism beyond the courts exposes a renewed promise—and project—for purposivism.

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INTRODUCTION

From the beginning of the Republic,<sup>1</sup> with increasing energy in the last eighty years,<sup>2</sup> Congress has been enacting statutes that vest administrative officials with the power to make laws governing many aspects of our national life. To act under such grants of statutory authority, administrative officials must interpret them. Courts review only a small percentage of administrative decisions, so administrative agencies are often not only the

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<sup>1</sup> See JERRY L. MASHAW, *CREATING THE ADMINISTRATIVE CONSTITUTION: THE LOST ONE HUNDRED YEARS OF AMERICAN ADMINISTRATIVE LAW* (2012) (excavating the wide range of administrative practice in the country’s first century); JOHN PRESTON COMER, *LEGISLATIVE FUNCTIONS OF NATIONAL ADMINISTRATIVE AUTHORITIES* 21–112 (1927) (providing a compilation of administrative delegations prior to 1927).

<sup>2</sup> See, e.g., Richard B. Stewart, *Madison’s Nightmare*, 57 U. CHI. L. REV. 335, 338–39 (1990) (noting that following the New Deal, Congress continued to create programs that delegated broad implementing authority to agencies); Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 424 & n.9 (1987) (noting the rapid rise of delegation to administrative agencies following the New Deal).

first, but also the final interpreters. As the scope of administrative agency responsibilities has grown to match those of the modern state, agency interpreters have become “the primary official interpreters of federal statutes.”<sup>3</sup>

Perhaps reflecting a nostalgic view that law exists only in the hands of courts,<sup>4</sup> the theory and practice of agency statutory interpretation has received much less attention than judicial statutory interpretation—so much so that even the phrase “judicial statutory interpretation” has an awkward, redundant ring, while “agency statutory interpretation” invites an explanatory aside.<sup>5</sup> The lively debates between textualists and purposivists in statutory interpretation have largely passed over the question of how agencies interpret statutes. We lack an account of what it means for an agency to be a faithful agent of Congress, a foundational question for theories of judicial statutory interpretation.<sup>6</sup>

The slender but careful scholarly literature on agency statutory interpretation has made incremental contributions to understanding agencies’ interpretive practices. It has revealed interpretive norms that

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<sup>3</sup> Jerry L. Mashaw, *Norms, Practices, and the Paradox of Deference: A Preliminary Inquiry into Agency Statutory Interpretation*, 57 ADMIN. L. REV. 501, 502–03 (2005) [hereinafter Mashaw, *Norms*]. For an early expression of the same, see Marshall E. Dimock, *The Role of Discretion in Modern Administration*, in THE FRONTIERS OF PUBLIC ADMINISTRATION 45, 56 (John M. Gaus, Leonard D. White & Marshall E. Dimock eds., 1936), explaining “[t]he initial responsibility for enforcing the law falls to administrative officials; it is only when extraordinary circumstances require it that the enforcement agencies of the judicial department are brought into operation. There is no intrinsic difference between law which the administrator carries out and the law which the judge enforces; the principal difference is that the judge usually has the last word in case of a conflict of interpretation.” For more recent expressions, see, for example, Robert A. Katzmann, Madison Lecture, *Statutes*, 87 N.Y.U. L. REV. 637, 656 & n.111 (2012), in which Judge Katzmann documents recent recognition of agencies as the first and frequently primary interpreters of statutes, and sources discussed in *infra* Part I.

<sup>4</sup> Scholars have been railing against this perception for some time. In 1936, Marshall Dimock complained, “[j]udges still talk about law as if it were the monopoly of the legal profession. They assume that all judge-made law consists of rules and principles, whereas administrative discretion is arbitrary in its very nature.” Dimock, *supra* note 3, at 52. This theme finds prominent expression in Edward Rubin’s work. See, e.g., EDWARD L. RUBIN, BEYOND CAMELOT: RETHINKING POLITICS AND LAW FOR THE MODERN STATE 212 (2005) (providing an account of the conceptual awkwardness of early judge-centered conceptions of law for the modern state); see also JEREMY WALDRON, THE DIGNITY OF LEGISLATION 11 (1999) (questioning why common law developed by judges and courts remains central focus of jurisprudence in the age of legislation); Nestor M. Davidson & Ethan J. Leib, *Regleprudence—At OIRA and Beyond*, 103 GEO. L.J. 259 (2015) (calling for development of a jurisprudence attentive to law beyond the courts, and providing a case study of OIRA’s practice of stare decisis).

<sup>5</sup> See Trevor W. Morrison, *Constitutional Avoidance in the Executive Branch*, 106 COLUM. L. REV. 1189, 1190 & n.2 (2006) (noting both the dearth of literature on executive branch statutory interpretation and the importance of the issue). This Article addresses only federal agencies and follows the dominant trend of treating them as part of the Executive Branch. See *id.* at 1191 nn.3–4 (noting that locating agencies within the Executive Branch is the dominant trend).

<sup>6</sup> See Jane S. Schacter, *Metademocracy: The Changing Structure of Legitimacy in Statutory Interpretation*, 108 HARV. L. REV. 593, 593–95 (1995) (noting that a fundamental project of theories of statutory interpretation is reconciling the judicial role with fidelity to legislative supremacy).

apply to agencies but not courts,<sup>7</sup> and gestured at ways in which agencies' institutional competences<sup>8</sup> and occasions for interpretation<sup>9</sup> distinguish their approaches from those of courts.<sup>10</sup> While this comparative exercise has usefully isolated some contrasting norms, it has not sought to bundle or ground the norms of agency interpretive practice. In short, it has not yet developed a theory of agency statutory interpretation.

This Article develops such a theory based on a simple but ambitious claim: Congress, in its statutory delegations, directs agencies to adopt a purposive interpretive method. This argument builds on the idea that regulatory statutes—that is, statutes that delegate lawmaking power to administrative agencies—are legally distinctive. Not only do they vest agencies with authority, but they also impose obligations to exercise that authority in accordance with purposes or principles that Congress has established in the statute. Congress sometimes specifies the purposes or principles to guide the agency in great detail, and at other times sets forth the principles or purposes the agency must pursue at a high level of generality. But even when regulatory statutes lack specificity, constitutional law provides a distinctive backstop: A constitutionally valid delegation of lawmaking power to an administrative agency must include an “intelligible principle”<sup>11</sup> to guide the agency's action. While the Supreme Court has been extremely permissive as to what counts as an intelligible principle, the doctrine still requires that there is some principle,

<sup>7</sup> See Mashaw, *Norms*, *supra* note 3, at 522 tbl.1; 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, 347 (1990) [hereinafter Strauss, *Agency Interpretation*]; KENT GREENAWALT, *STATUTORY AND COMMON LAW INTERPRETATION* 141–74 (2013).

<sup>8</sup> ADRIAN VERMEULE, *JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION* 213–14, 226 (2006) (suggesting that agencies' superior expertise may justify wider-ranging interpretive methods than apply for courts); Michael Herz, *Purposivism and Institutional Competence in Statutory Interpretation*, 2009 MICH. ST. L. REV. 89, 94–106 (arguing that agencies' institutional competences justify a purposive approach to statutory interpretation); see also GREENAWALT, *supra* note 7, at 146–53 (examining implications of agency and court institutional differences for their interpretive approaches); William N. Eskridge, Jr., *Expanding Chevron's Domain: A Comparative Institutional Analysis of the Relative Competence of Courts and Agencies to Interpret Statutes*, 2013 WIS. L. REV. 411, 420–27 [hereinafter Eskridge, *Expanding Chevron's Domain*] (arguing that agencies comparative expertise and accountability better suit them to interpret statutes broadly in accordance with their purposes, taking into account political preferences).

<sup>9</sup> Mashaw, *Norms*, *supra* note 3, at 525; Kevin M. Stack, *Agency Statutory Interpretation and Policymaking Form*, 2009 MICH. ST. L. REV. 225, 226 [hereinafter Stack, *Agency Policymaking Form*].

<sup>10</sup> And the literature has questioned the extent to which an authentic and independent agency practice is possible given the structures of agency representation in the Supreme Court. See Margaret H. Lemos, *The Solicitor General as Mediator Between Court and Agency*, 2009 MICH. ST. L. REV. 185, 187.

<sup>11</sup> *J. W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928); accord *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472 (2001) (invoking the “intelligible principle” standard in reviewing congressional delegations of lawmaking power).

however general, to which the agency must conform. That gives regulatory statutes a constitutional distinctiveness. For the agency, complying with the obligation to conform its conduct to the purposes and principles that Congress has established in the regulatory statutes the agency administers—whether those purposes are articulated with great specificity or at a high level of generality—requires the agency to adopt a purposive framework of interpretation. By a purposive framework for interpretation, I mean a framework in which the interpreter has a duty to (1) develop an understanding of the purposes or principles of the statute, (2) evaluate alternatives for action in relation to those purposes or principles, (3) act in ways, other things equal, that best furthers those purposes or principles, and (4) adopt only interpretations permitted by the statute’s text.<sup>12</sup>

Beyond arguing that regulatory statutes require agencies to adopt a purposive approach, this Article also contends that administrative agencies, perhaps uniquely among government institutions, have the institutional capacities to implement this interpretive framework. Where, as is often the case, statutory purposes are established at a high level of generality, an agency’s greater political responsiveness, expertise, and ability to vet proposals, make the agency better equipped to implement purposivism than generalist courts. All told, my claim here is that purposivism is not only required by regulatory statutes, but also preferable to textualism for agencies on institutional and functional grounds.

This suggestion that Congress specifies the basic framework for agency statutory interpretation—that agencies are purposive by statutory design—stands in sharp contrast to most theory building for federal judicial statutory interpretation. Notwithstanding the provocative prospect that Congress may enact rules or methods of statutory interpretation for courts,<sup>13</sup> and the recently highlighted practices of some states doing just that,<sup>14</sup> Congress has remained decidedly inactive in explicitly legislating norms of statutory interpretation for courts. As a result, it is generally viewed as impractical for theories of statutory interpretation for federal courts to be

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<sup>12</sup> Students of statutory interpretation will notice that this framework tracks the basic “technique” of statutory interpretation set forth by Henry Hart and Albert Sacks in their materials, HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 1378 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994).

<sup>13</sup> Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085, 2086 (2002).

<sup>14</sup> Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 YALE L.J. 1750, 1771–1811 (2010) [hereinafter Gluck, *Laboratories*].



grounded on legislative directions.<sup>15</sup> Scholars have looked instead to ground interpretive methods in the Constitution,<sup>16</sup> consequentialist considerations alone,<sup>17</sup> positive understandings of the legislature,<sup>18</sup> or the character of law itself.<sup>19</sup> Part of the burden of this Article, then, is to show that regulatory statutes carry distinctive interpretive directions for agencies. While the thrust of the argument is normative—it seeks to show both that regulatory statutes require agencies to engage in purposive interpretation and that agencies have relatively strong capacities to do so—at various points it also highlights how this approach is reflected in current agency (best) practices.

This purposivist understanding of agencies has powerful implications for two of the most important issues in administrative law: the structure of judicial review of agency action and the President’s authority over agency interpretation. As to judicial review, our “appellate model” of judicial review revolves around determining the level of deference to accord different types of determinations made by an agency, thus making distinctions among issues of fact, law, and policy judgment.<sup>20</sup> The *Chevron*

<sup>15</sup> See, e.g., Cass R. Sunstein & Adrian Vermeule, *Interpretation and Institutions*, 101 MICH. L. REV. 885, 890 n.13 (2003) (“Although the possibility [that doctrines of statutory interpretation might be legislated] is both important and interesting, past history shows that it is most unlikely that Congress will enact rules of interpretation that will generally resolve the disputed issues of interpretive choice. For good reason, the literature on statutory interpretation, both past and present, focuses on the question of what interpretive rules judges should use absent legislative intervention; that is our focus here as well.”); Colin S. Diver, *Statutory Interpretation in the Administrative State*, 133 U. PA. L. REV. 549, 570 (1985) (“Congress seldom provides explicit guidance, even in legislative history, on how it wishes courts to interpret statutory language.”).

<sup>16</sup> Either as a necessary ground for methodological commitments, see Jerry L. Mashaw, *Textualism, Constitutionalism, and the Interpretation of Statutes*, 32 WM. & MARY L. REV. 827, 838–39 (1991), or as defining appropriate judicial methods. Compare John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 56–70 (2001) (arguing “judicial Power” in Article III of the Constitution bars “equitable” interpretation of statutes), with William N. Eskridge, Jr., *All About Words: Early Understandings of the “Judicial Power” in Statutory Interpretation, 1776–1806*, 101 COLUM. L. REV. 990 (2001) (defending equitable interpretation of statutes by courts on faithful agency and historical grounds).

<sup>17</sup> See VERMEULE, *supra* note 8, at 5 (arguing that interpretive approaches should be determined by those that produce the best consequences).

<sup>18</sup> 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, 749, 775–96 (2014); Jerry L. Mashaw, *The Economics of Politics and the Understanding of Public Law*, 65 CHI.-KENT L. REV. 123, 152 (1989); Victoria F. Nourse, *A Decision Theory of Statutory Interpretation: Legislative History by the Rules*, 122 YALE L.J. 70, 74–75 (2012).

<sup>19</sup> See, e.g., RONALD DWORKIN, *LAW’S EMPIRE* 313–54 (1986) (justifying an interpretive approach to statutes based on a conception of law as integrity); HART & SACKS, *supra* note 12, at 148 (justifying a purposive approach to statutory interpretation on grounds that law itself is a purposive activity); SCOTT J. SHAPIRO, *LEGALITY* 382 (2011) (defending a purposivist approach to interpretation based on a conception of law as a type of social plan).

<sup>20</sup> Thomas W. Merrill, *Article III, Agency Adjudication, and the Origins of the Appellate Review Model of Administrative Law*, 111 COLUM. L. REV. 939, 975 (2011).

inquiry (which now includes whether *Chevron* deference or *Skidmore*<sup>21</sup> review applies)<sup>22</sup> governs questions of statutory interpretation, while arbitrary and capricious review (and substantial evidence) purports to govern issues of fact and policy judgment.<sup>23</sup> This structure has a host of problems; perhaps most fundamentally, it remains detached from an understanding of the obligations Congress imposes on agencies. The purposive understanding of the agency addresses that detachment. Based on the premise that agencies have a statutory obligation to interpret their statutes in a purposive manner, it makes sense that the primary task of a reviewing court should be to ask whether they have done so validly. Accordingly, the purposive account suggests that the basic question of judicial review should be *whether the agency's action furthers the statute's purposes within allowable means*. Because this theory grounds the agency's interpretive stance in the agency's statutory obligations, not prudential or consequentialist concerns, it requires courts to approach review of agency statutory interpretation from the perspective evaluating the agency's compliance with its own interpretive duties. Based on the statutory grounding for purposivism, even textualist courts should review agency action to assess whether the agency complied with its purposive obligations. At a doctrinal level, this approach could be thought of as treating determination of the statute's purposes and issues of means-ends rationality, which are currently part of arbitrary and capricious review,<sup>24</sup> as the gateway and framing question of judicial review, displacing *Chevron* from its current position as the ordering principle of judicial review of agency action.

The purposive understanding also clarifies the difficult problem of determining the type of presidential preferences that play a legitimate role in agency deliberations. Agencies live in a political environment in which the President, other executive branch officials, and members of Congress continually direct, encourage, cajole, and threaten administrators to take (or to not take) particular actions. One of the most difficult problems facing the

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<sup>21</sup> *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

<sup>22</sup> See *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837 (1984). Under *United States v. Mead Corp.*, 533 U.S. 218, 234–35 (2001), if *Chevron* deference is not warranted, the agency's interpretation will be reviewed under *Skidmore*.

<sup>23</sup> See Merrill, *supra* note 20, at 941–42. “Arbitrary and capricious review” is a standard of review specified by the Administrative Procedure Act (APA), 5 U.S.C. § 706(2)(A) (2012) (requiring a reviewing court to hold unlawful agency action that is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law”).

<sup>24</sup> As explained below, under well-established doctrine, arbitrary and capricious review requires the agency to demonstrate a rational connection between the choices made and the statutes' aims. See *infra* Part II.D (discussing *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

agency in the first instance, and eventually reviewing courts, is distinguishing legitimate from illegitimate political influences. But to make that distinction requires an understanding of the obligations regulatory statutes impose on the agency. If a garden-variety statutory delegation were simply understood as creating a zone of discretion for the agency, then political influence would be an acceptable basis for agency action. Alternatively, if a statute precisely specified the factors the agency must consider, and in what measure, political preference alone would not count as an acceptable basis for agency action. The purposive account offers an explanation of the character of the agency's obligations: the agency has obligations to pursue the statute's ends. As a result, the purposive account explains why political influences must, in order to serve as a basis for agency action, be framed in terms of the statute's aims and purposes. Interestingly, by clarifying that the agency's purposive obligation is grounded in statutory obligation, not merely prudential or policy concerns, this Article also exposes the limits on the President's power to direct agencies to adopt an alternative interpretive approach.

Finally, this Article exposes an important foothold in the ongoing rethinking of purposivism. Critics have challenged purposivism, and Henry Hart and Albert Sacks's classic account of it in *The Legal Process*,<sup>25</sup> on the ground that it adopts an unrealistic and naïve view of the legislature.<sup>26</sup> This theory of agency purposivism sidesteps those critiques. It does not require taking a position on the nature of law, or even on whether all statutes have purposes or whether courts should be in the business of deciding the level of generality of those purposes. Rather, this approach is more particularist; it suggests that the purposive orientation of agency statutory interpretation follows the distinctive character of regulatory statutes and the agency's institutional capacities, and is not grounded in more general claims about the inherent features of statutes as a whole. This opens up the prospect that purposivism might have its strongest application to agencies' interpretation of statutes they administer. This attention to the foundation of purposivism in positive law extends recent work recognizing the "new," "structured," or "textually constrained" positivist purposivism in judicial practice,<sup>27</sup> which

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<sup>25</sup> See HART & SACKS, *supra* note 12.

<sup>26</sup> Informed by public choice theory, critics also argue legislation is a product of compromise and so frequently lacks purposes, and that the legislative text alone provides the best guidance on the compromise the legislature reached. See John F. Manning, *What Divides Textualists and Purposivists?*, 106 COLUM. L. REV. 70, 99–101 (2006) [hereinafter Manning, *What Divides*]; see also *infra* Part III.B.

<sup>27</sup> John F. Manning, *The New Purposivism*, 2011 SUP. CT. REV. 113 *passim* (articulating new purposivism reflected in Supreme Court statutory interpretation) [hereinafter Manning, *New Purposivism*]; see also Gluck, *Laboratories*, *supra* note 14, at 1842–46 (giving account of "modified textualism" or "structured purposivism" in state statutory interpretation); Kevin M. Stack, *Interpreting*

relies more heavily on statutory text as a basis for understanding purpose and views purposivist interpretations as constrained by statutory text.

This Article is organized as follows. Part I situates agency statutory interpretation in the context of interpretive tasks in the administrative state, summarizes what we do and do not know about it, and suggests why we should look to Congress as a source of interpretive direction. Part II turns to regulatory statutes and argues that they impose duties on agencies to interpret them in a purposivist manner. It isolates the formal or positive features of statutes that impose purposive obligations on agencies. Part III argues that agencies have the institutional competence to engage in purposive interpretation. It also responds to general critiques of purposivism mounted by textualists and argues that they do not have the same force with regard to agency statutory interpretation. Part IV discusses the implications of a purposive understanding for judicial review, presidential influence on agencies, and the future of purposivism.

Before turning to these arguments, it is important to highlight that talk of “agency” statutory interpretation involves a generalization. Agencies and the statutes they administer differ in many ways.<sup>28</sup> Just as clearly, agencies’ occasions for interpretation—whether in a rulemaking, adjudication, permitting, or otherwise—and the officers within the agency doing the interpreting also have implications for the menu of their interpretive options.<sup>29</sup> Given the diversity of agencies and their occasions for interpretation, talk of “agency” or “executive branch” statutory interpretation may involve even greater generalization than consideration of “judicial” statutory interpretation.<sup>30</sup> But if there is a useful contrast between agency and judicial statutory interpretation, it is worth isolating

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*Regulations*, 111 MICH. L. REV. 355, 362 (2012) [hereinafter Stack, *Interpreting Regulations*] (defending positively grounded purposivism as the method for interpreting regulations).

<sup>28</sup> For a concise overview of the variety of agency forms, see DAVID E. LEWIS & JENNIFER L. SELIN, ADMIN. CONFERENCE OF THE U.S., SOURCEBOOK OF UNITED STATES EXECUTIVE AGENCIES (2012).

<sup>29</sup> See Stack, *Agency Policymaking Form*, *supra* note 9, at 226 (arguing that agency statutory interpretation is in part a function of the form through which it acts).

<sup>30</sup> See Caleb Nelson, *Statutory Interpretation and Decision Theory*, 74 U. CHI. L. REV. 329, 360 (2007) (reviewing VERMEULE, *supra* note 8 and arguing that while it is possible to consider in general terms the capacities of the federal judiciary, agencies are more heterogeneous, and that a thoroughgoing institutional analysis would require moving beyond such general referents). Some scholars have investigated how a court’s position within the federal judiciary matters to statutory interpretation. See Amy Coney Barrett, *Statutory Stare Decisis in the Courts of Appeals*, 73 GEO. WASH. L. REV. 317, 318 (2005) (arguing that a super strong stare decisis canon should not apply in courts of appeals); Aaron-Andrew P. Bruhl, *Hierarchy and Heterogeneity: How to Read a Statute in a Lower Court*, 97 CORNELL L. REV. 433, 472–79 (2012) (arguing that lower courts should heed more closely the text and largely avoid legislative history). The different modes of appointment may also have interpretive implications. See Aaron-Andrew P. Bruhl & Ethan J. Leib, *Elected Judges and Statutory Interpretation*, 79 U. CHI. L. REV. 1215, 1237–54 (2012).

those broader gauge differences and their grounds, even if the theory will be later subject to specification for different types of agencies or occasions for interpretation.

## I. AGENCY STATUTORY INTERPRETATION IN CONTEXT

To understand the need for a theory of agency statutory interpretation, it is first useful to situate agency statutory interpretation within the landscape of interpretive tasks in the administrative state. This background helps to illustrate the importance of agency statutory interpretation. It also provides a context for examining existing treatments of agency statutory interpretation in which scholars have usefully isolated differences between courts and agencies, but not yet developed a principled theory of agency statutory interpretation.

### A. *Interpretation in the Administrative State*

Over the last thirty years, a sophisticated understanding of judicial statutory interpretation has emerged.<sup>31</sup> The debate over how courts do and should interpret statutes has narrowed to two primary interpretive approaches: textualism and purposivism.<sup>32</sup> These approaches represent different theories of interpretation in the sense that they offer different accounts of the goals of interpretation,<sup>33</sup> the sources of interpretation,<sup>34</sup> and the relationship among those sources. Textualists take understanding the meaning of enacted text as the sole object of interpretation.<sup>35</sup> In contrast,

<sup>31</sup> One strain of this literature provides a positive account of how judges use various tools of statutory interpretation, such as canons and legislative history, and the extent to which those sources constrain them to reach outcomes that would not be predicted by their political background. See, e.g., FRANK B. CROSS, *THE THEORY AND PRACTICE OF STATUTORY INTERPRETATION* 160–77 (2009) (testing plain meaning and legislative history and finding legislative history more constraining); James J. Brudney & Corey Ditslear, *Canons of Construction and the Elusive Quest for Neutral Reasoning*, 58 *VAND. L. REV.* 1 (2005) (providing an account of use and relatively thin constraint imposed by substantive and linguistic canons); James J. Brudney & Corey Ditslear, *Liberal Justices' Reliance on Legislative History: Principle, Strategy, and the Scalia Effect*, 29 *BERKELEY J. EMP. & LAB. L.* 117 (2008) (offering an empirical study of the constraining effects and strategic uses of legislative history in employment decisions); James J. Brudney & Corey Ditslear, *The Warp and Woof of Statutory Interpretation: Comparing Supreme Court Approaches in Tax Law and Workplace Law*, 58 *DUKE L.J.* 1231 (2009) (showing distinctive use and role of legislative history in these areas).

<sup>32</sup> See Manning, *What Divides*, *supra* note 26, at 78 (engaging the distinction); Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 *COLUM. L. REV.* 1, 2–3 (2006) (framing the statutory interpretation debate as between textualist and purposivists); see also Gluck, *Laboratories*, *supra* note 14, at 1761–62 (noting the same).

<sup>33</sup> WILLIAM N. ESKRIDGE, JR. ET AL., *LEGISLATION AND STATUTORY INTERPRETATION* 219 (2d ed. 2006).

<sup>34</sup> *Id.*; see also Caleb Nelson, *What is Textualism?*, 91 *VA. L. REV.* 347, 357–58 (2005) (invoking this distinction in comparison between textualism and its alternatives).

<sup>35</sup> Manning, *What Divides*, *supra* note 26, at 73–75; see *infra* Part III.B.

purposivists treat the text as the best evidence of statutory purposes and a source of constraint, but understand interpretation as a process of implementing statutory purposes, not merely adhering to statutory text.<sup>36</sup>

At the same time that the lines of distinction between textualism and purposivism have been refined, there has been a robust debate over how courts should review an agency's interpretation of a statute that grants the agency lawmaking power. *Chevron* provides a common shorthand for this issue, in reference to the Supreme Court's decision in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*<sup>37</sup> *Chevron* famously requires a reviewing court to accept an agency's construction of a statute the agency administers so long as it is permissible under the statute and reasonable,<sup>38</sup> as opposed to imposing the court's own construction on the statute as it would do for statutes not administered by the agency.<sup>39</sup> But to judge the permissibility of an agency's interpretation under *Chevron* requires an approach to statutory interpretation.<sup>40</sup> The methodology of judicial statutory interpretation has thus become a critical question for administrative law—and how a court is to judge the permissibility of the agency's interpretation under *Chevron* has become a critical flashpoint for debates over statutory interpretation.<sup>41</sup>

For all the prominence and color of these debates, they overlook much of the interpretive activity in the federal administrative state. This neglect can be classified along two primary dimensions. First, as to the sources of law, the traditional focus on judicial statutory interpretation overlooks

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<sup>36</sup> See Manning, *What Divides*, *supra* note 26, at 73–75; see also sources cited *infra* Part III.B.

<sup>37</sup> 467 U.S. 837 (1984).

<sup>38</sup> See *id.* at 843–44. This speaks to a fundamental premise of *Chevron*: that statutes fall into two basic types: those administered by agencies and those administered by courts. See *id.* at 843 (“The power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress.”) (quoting *Morton v. Ruiz*, 415 U.S. 199, 231 (1974)); *id.* at 844 (“We have long recognized that considerable weight should be accorded to an executive department’s construction of a statutory scheme it is entrusted to administer . . .”). The reviewing court’s duty of deference under *Chevron* applies only to those statutes the agency administers. See *id.* at 844.

<sup>39</sup> *Id.* at 843 (admonishing that when the statutory delegation is ambiguous, the reviewing court “does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation” (footnote omitted)).

<sup>40</sup> The *Chevron* decision itself took the view that the reviewing court should assess the permissibility of an agency’s interpretation by “employing traditional tools of statutory construction.” *Id.* at 843 n.9.

<sup>41</sup> For lively, and now canonical, exemplars, compare *Babbitt v. Sweet Home Chapter of Cmty. for a Great Or.*, 515 U.S. 687, 697–98 (1995) (Stevens, J.) (consulting both text and purpose in review of agency’s decision), with *id.* at 717 (Scalia, J., dissenting) (arguing that legislative text clearly prohibits the agency’s interpretation); compare also *MCI Telecomms. Corp. v. AT&T Co.*, 512 U.S. 218, 227–28 (1994) (Scalia, J.) (reversing agency interpretation based on textualist sources), with *id.* at 242 (Stevens, J., dissenting) (arguing that the Court should uphold agency interpretation in view of statutory scheme and purposes).

notice-and-comment regulations, which are widely viewed as creating more legal obligations than federal statutes.<sup>42</sup> Recent scholarship has begun to address the interpretive issues posed by regulations.<sup>43</sup> Second, as to the identity of the interpreter, scholars have long recognized that administrative agencies make many more statutory interpretations than federal courts, and that agencies' decisions are frequently not reviewed by courts, and thus are often final. But how do agencies interpret the statutes they administer? In other words, how do agencies reach the very interpretations that courts review, whether under the *Chevron* standard or otherwise?

Scholars addressing agency statutory interpretation have proceeded by isolating contrasts between agency and judicial practices. In this literature—which we might chart as beginning with Peter Strauss's insightful 1990 article<sup>44</sup>—the primary approach has been to identify a difference in the institutional role or capacity between agencies and courts, and then to trace the implications for interpretive method. Because courts and agencies are such different institutions, the work has been plentiful. To start, agencies are political institutions by design in ways that courts are not.<sup>45</sup> As a result, it is widely accepted that executive branch officials' and Congress's preferences have a legitimate role in agency statutory interpretation.<sup>46</sup> Likewise, as members of the Executive Branch, agencies

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<sup>42</sup> See CORNELIUS M. KERWIN & SCOTT R. FURLONG, *RULEMAKING: HOW GOVERNMENT AGENCIES WRITE LAW AND MAKE POLICY* 13–21 (4th ed. 2011) (documenting, in terms of the number of rules and pages of the Federal Register devoted to federal regulations, a level of production of regulations beginning in the 1970s that far exceeds comparable measures for statutes).

<sup>43</sup> See Stack, *Interpreting Regulations*, *supra* note 27 (providing an overview of literature and a defense of purposive methodology of regulatory interpretation); Jennifer Nou, *Regulatory Textualism*, 64 *Duke L.J.* (forthcoming 2015) (providing an overview of literature and defending a textualist methodology of regulatory interpretation).

<sup>44</sup> See Strauss, *Agency Interpretation*, *supra* note 7.

<sup>45</sup> See *id.* at 329; Matthew C. Stephenson, *Statutory Interpretation by Agencies*, in *RESEARCH HANDBOOK ON PUBLIC CHOICE AND PUBLIC LAW* 285, 294–300 (Daniel A. Farber & Anne Joseph O'Connell eds., 2010) (providing a concise summary of the extent and character of congressional and presidential political influence on agencies).

<sup>46</sup> GREENAWALT, *supra* note 7, at 143 (noting that agencies have more direct responsibilities to the President and Congress than courts have); ROBERT A. KATZMANN, *JUDGING STATUTES* 26 (2014) (“Agency responsiveness to congressional signals [in addition to] statutory text makes sense from a policy and good-governance perspective of trying to interpret and implement the law consistent with legislative meaning. It also makes sense from the perspective of practical politics.”); Frank H. Easterbrook, *Judicial Discretion in Statutory Interpretation*, 57 *OKLA. L. REV.* 1, 3 (2004) (“Everything an agency is likely to rely on—political pressure, the President’s view of happy outcomes . . . legislative history (including letters or tongue-lashings from members of the Congress, as well as the committee reports), and other tools of policy wonks—is off limits to textualist judges.”); Mashaw, *Norms*, *supra* note 3, at 506 (“[W]e should expect agencies to interpret statutes in the context of presidential direction.”); Strauss, *Agency Interpretation*, *supra* note 7, at 329 (observing that agencies are “concededly political”). We know that political experience influences selection and decisions of federal judges, too; scholars have just begun the project of incorporating that understanding into approaches to judicial statutory interpretation. See James J. Brudney, *Recalibrating Federal Judicial Independence*,

are expected to be effective in adopting good policy, and to be called to account when they are not; as Judge Frank Easterbrook writes, “‘good’ outcomes are exactly what an agency sets out to achieve when exercising discretion.”<sup>47</sup>

Moreover, agencies’ multilevel and ongoing relationship with Congress<sup>48</sup> has been understood as transforming the role of legislative history for the agency.<sup>49</sup> Whereas courts confront particular regulatory statutes at most episodically, and thus come to any given regulatory statute “cold,” agencies “essentially *live* the process of statutory interpretation.”<sup>50</sup> Agencies participate extensively in the legislative drafting process.<sup>51</sup> That can give the agency firsthand knowledge of the critical debates and the character of their resolution, knowledge a court could never have firsthand<sup>52</sup> and that would be extremely costly to acquire secondhand, making agencies more reliable readers of legislative history. For these and other reasons, many scholars have taken the view that different interpretive methodologies apply to agency and judicial statutory interpretation.<sup>53</sup>

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64 OHIO ST. L.J. 149, 161–66 (2003) (documenting influence of political background on judicial decisions and suggesting how those influences may call for greater candor and self-conscious judicial attitudes).

<sup>47</sup> Easterbrook, *supra* note 46, at 3.

<sup>48</sup> See KATZMANN, *supra* note 46, at 24–27 (describing the ways in which Congress expects agencies will follow its directives outside of those in statutory text, including the special importance of congressional committee communications in implementing their statutory powers); Stephenson, *supra* note 45, at 294–97 (providing a compact account of congressional vehicles for ex post influence over agency statutory interpretation).

<sup>49</sup> See KATZMANN, *supra* note 46, at 26–27 (noting congressional oversight heightens the importance of committee reports to agencies interpreting statutes); Katzmann, *supra* note 3, at 646 (justifying use of legislative history, in part, on grounds of congressional practice); Strauss, *Agency Interpretation*, *supra* note 7, at 347–49 (explaining how the relationship between agency and congressional overseers transforms the place of legislative history in agency practice); see also Bressman & Gluck, *supra* note 18, at 768 (documenting that congressional staffers anticipate agencies evaluating legislative history); Christopher J. Walker, *Inside Agency Statutory Interpretation*, 67 STAN. L. REV. 999, 1038 (2015) (reporting that 76% of rule drafters surveyed viewed legislative history as a useful tool for interpreting statutes).

<sup>50</sup> Strauss, *Agency Interpretation*, *supra* note 7, at 329, 346. Interestingly, Nicholas Parrillo’s recent work suggests that federal agencies’ and federal litigators’ unique capacities to marshal legislative history in arguments to the Supreme Court may have contributed to the Supreme Court’s increased reliance on legislative history in upholding agency power. See Nicholas R. Parrillo, *Leviathan and Interpretive Revolution: The Administrative State, the Judiciary, and the Rise of Legislative History, 1890–1950*, 123 YALE L.J. 266, 342–51, 374 (2013).

<sup>51</sup> Bressman & Gluck, *supra* note 18, at 738 fig.2; Walker, *supra* note 49, at 1037 (reporting that 78% of rule drafters surveyed indicated that their agencies always or often participate in technical statutory drafting, and 59% said that their agencies always or often participate in policy or substantive drafting).

<sup>52</sup> Strauss, *Agency Interpretation*, *supra* note 7, at 347.

<sup>53</sup> See, e.g., GREENAWALT, *supra* note 7, at 146–58 (explicating how role and function make agencies’ interpretive mission different from that of courts); VERMEULE, *supra* note 8, at 213 (arguing that agencies can apply a “richer interpretive palette” than courts); Easterbrook, *supra* note 46, at 3



These contrasting norms of interpretation are nicely brought together by Jerry Mashaw in a preliminary summary of the interpretive canons that apply exclusively or with greater force to agency interpretation,<sup>54</sup> and those that apply exclusively or with greater force to courts.<sup>55</sup> Mashaw makes clear that this set of contrasts does not amount to a defense of “any particular methodology of statutory interpretation for administrators.”<sup>56</sup> This qualification makes sense. Identifying contrasting canons or norms, while providing a starting point for further analysis, does not itself offer a theory of agency statutory interpretation because this identification does not provide an account of how these (or other) canons fit together, nor of their relative priority, the aims of agency interpretation, its permissible sources, or its ultimate grounds. With these observed contrasts in place, it is now time to develop a theory of agency statutory interpretation.

### B. Grounds for an Interpretive Approach

The first question is what might ground an interpretive theory for agencies. Consider three possibilities: the Constitution, statutes, or institutional and consequentialist considerations. Adrian Vermeule is one of the few scholars to have staked out a position on these issues. He argues that interpretive choice for agencies, as for courts, should be made based on institutional and consequentialist grounds. Regarding statutory interpretation by courts, Vermeule argues that “[b]ecause the Constitution does not speak to interpretive method, the decisive considerations are

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(arguing that Article II officers’ greater political accountability entitles them to more interpretive discretion than life-tenured Article III judges); Mashaw, *Norms*, *supra* note 3, at 522–23 (providing a preliminary account of different norms of interpretation); Strauss, *Agency Interpretation*, *supra* note 7, at 328–31 (describing how the institutional position of agencies distinguishes their interpretive obligations, especially vis-à-vis legislative history, from those of judges). Not all scholars agree that agency and judicial interpretation diverge. Professor Richard Pierce, for instance, has argued that agency statutory interpretation should not differ from judicial statutory interpretation because both are essentially about discerning the meaning of statutory provisions. 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, 204–05 (2007). For a discussion of this view, see *infra* text accompanying notes 128–35.

<sup>54</sup> For canons that apply to agencies, Mashaw includes: “Follow presidential directions unless clearly outside your authority.”; “Use legislative history as a primary interpretive guide.”; “Interpret to give energy and breadth to all legislative programs within your jurisdiction.”; “Engage in activist lawmaking.”; “Pay particular attention to the strategic parameters of interpretive efficiency.”; and “Interpret to insure hierarchical control over subordinates.” Mashaw, *Norms*, *supra* note 3, at 522 tbl.1.

<sup>55</sup> For canons that apply to courts, Mashaw includes: “Interpret to avoid raising constitutional questions.”; “Respect all judicial precedent.”; and “Interpret to lend coherence to the overall legal order.” *Id.* Mashaw offers this list as a prompt for debate, and other scholars have bolstered and whittled away at its contents. See, e.g., Morrison, *supra* note 5, at 1222–26 (challenging Mashaw’s suggestion that agency actors should not apply the canon of constitutional avoidance).

<sup>56</sup> Mashaw, *Norms*, *supra* note 3, at 521.

institutional.”<sup>57</sup> Vermeule reaches the same conclusion for agencies.<sup>58</sup> Based on the premise that institutional considerations ground interpretive choice for both courts and agencies, Vermeule argues that limitations on judicial competence suggest that courts should adopt formalist methods of interpretation, whereas agencies’ wider capacities justify granting them “[a] richer interpretive palette,” including purposive principles.<sup>59</sup> In this regard, Vermeule adopts a similar position to those scholars just discussed who view agency statutory interpretation as diverging from judicial statutory interpretation because of the agency’s greater technical competence, knowledge of the legislative history and legislative preferences, and political responsiveness.<sup>60</sup>

Even if one agrees that the Constitution does not provide direction as to agencies’ interpretive method,<sup>61</sup> turning directly to institutional considerations moves too quickly past statutes as a possible source of interpretive direction to agencies. To be sure, as noted, agencies have very different competences and institutional positions than courts. Those differences may well inform their interpretive approach;<sup>62</sup> indeed, I turn to assess those differences below.<sup>63</sup> But we cannot conclude that these institutional considerations are decisive without first asking whether congressional statutes directed agencies’ interpretive approach. Congress has wide constitutional authority to structure the implementation of federal law under the Necessary and Proper Clause,<sup>64</sup> including how administrative agencies do the jobs Congress assigns them. Given basic premises of legislative supremacy and how comprehensively regulatory statutes

<sup>57</sup> VERMEULE, *supra* note 8, at 33.

<sup>58</sup> *See id.* at 213.

<sup>59</sup> *Id.*

<sup>60</sup> *See id.*

<sup>61</sup> One possible dissenting voice is Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217, 340–42 (1994) (arguing on the grounds that would also apply to statutory interpretation that the President has a constitutional duty to adopt a “restrained” interpretive methodology that privileges text, original meaning, structure, and precedent).

<sup>62</sup> *See* GREENAWALT, *supra* note 7, at 149–56; VERMEULE, *supra* note 8, at 208–11; Herz, *supra* note 8, at 96–106; Mashaw, *Norms*, *supra* note 3, at 505–16; Strauss, *Agency Interpretation*, *supra* note 7, at 329–30; *see also* Eskridge, *Expanding Chevron’s Domain*, *supra* note 8, at 421–27 (also arguing agencies’ institutional competences bear on their interpretive approach).

<sup>63</sup> *See infra* Part III.A–B.

<sup>64</sup> U.S. CONST. art. I, § 8, cl. 18 (granting Congress the power “[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof”). This Clause has been interpreted to permit Congress “discretion, with respect to the means by which the powers it confers are to be carried into execution.” *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819).

structure agencies and agency action, it makes sense to first ask whether Congress provides interpretive directions to agencies in regulatory statutes.

## II. THE AGENCY'S PURPOSIVE DUTY

Scholars have considered how Congress, and more recently, state legislatures, provide explicitly interpretive directions to courts, ranging from statutory definitions and codes of interpretation to more full-scale interpretive frameworks.<sup>65</sup> But this literature on legislative direction has not considered the extent to which congressional statutes provide interpretive directions to federal agencies.

This Part takes on that question. It argues that regulatory statutes impose a duty upon agencies to interpret the statutes they administer in a purposive manner. To some, this claim might appear too broad because it lumps together all regulatory statutes,<sup>66</sup> a vast and diverse set of laws. For that skeptical audience, the challenge is to show that there is a sufficient commonality in regulatory statutes to support this general interpretive duty. To others, the claim might appear to be commonplace in the sense that many assume agencies act in a purposive manner, seeking to carry out the ends Congress has set for the agency consistent with the means it has allowed. For the audience that understands agency interpretation as purposive, it is still worthwhile to isolate the source of this interpretive orientation as that explains who can change it and through what means.<sup>67</sup>

Section A argues that a combination of formal features of regulatory statutes—namely, vesting of power and imposing a duty to act in accordance with purpose or intelligible principles—establishes a duty for agencies to implement their statutes in a purposive manner. Section B provides a general description of the implications of this duty for the agency, and Section C suggests how well this duty describes agency practice by providing examples from agency statutory interpretation. Section D argues that foundational doctrines of administrative law reinforce and police this duty. Finally, Section E argues the agency's duty to implement also requires the agency to interpret the statutes it administers in a purposive manner.

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<sup>65</sup> See Nicholas Quinn Rosenkranz, *supra* note 13, at 2139–40; see also Gluck, *Laboratories*, *supra* note 14, at 1794–95; Linda D. Jellum, “Which Is to Be Master,” *the Judiciary or the Legislature? When Statutory Directives Violate Separation of Powers*, 56 UCLA L. REV. 837, 882–83 (2009).

<sup>66</sup> See Nelson, *supra* note 30, at 360 (suggesting that agencies' institutional diversity impedes the prospect for generalization about agency approaches to statutory interpretation).

<sup>67</sup> Cf. Abbe R. Gluck, *The Federal Common Law of Statutory Interpretation: Erie for the Age of Statutes*, 54 WM. & MARY L. REV. 753, 757 (2013) [hereinafter Gluck, *Federal Common Law*] (observing that if rules of statutory interpretation for courts have the status of common law then Congress can legislate over them).

### A. *The Elements of Statutory Obligation*

Regulatory statutes—the surviving and newly minted delegations of lawmaking authority to agencies—have a splendid variety.<sup>68</sup> They bear the marks of the political and social circumstances that prompted the creation of the agency, as well as those that prompted reorganizations, expansions, and constrictions of the agency’s powers.<sup>69</sup> They also reflect legislative compromises. Amidst that diversity, however, it is possible to identify three basic and common features: regulatory statutes (1) grant agencies powers, (2) impose a duty to exercise the powers granted, and (3) provide purposes or principles the agency must pursue and to which the agency must conform its actions.

These formal features of regulatory statutes combine to create a core obligation of administrative agencies: the duty to evaluate alternatives, justify their choices, and act to further the goals, aims, and principles—the purposes—their authorizing statutes establish. Though the statutory expression of these elements varies and frequently overlaps, it is useful to first consider them in isolation. Because statutes do not often make for compelling reading, I provide illustrative examples to support these points in the margin.

1. *Vesting of Powers.*—The most basic feature of a regulatory statute is the vesting of lawmaking and other powers in the agency. “[A]n agency literally has no power to act . . . unless and until Congress confers power upon it.”<sup>70</sup> Regulatory statutes vary widely in the powers they grant agencies—whether to make rules, adjudicate, sue, license, permit, advise, investigate, manage resources, purchase, and so on—and even more in the way in which they structure these powers. Some regulatory statutes make highly specific authorizations; for instance, an agency’s power over particular matters may be vested by a provision relating to a specific program or subagency charged with administering the task.<sup>71</sup> Others grant

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<sup>68</sup> For a narrative compilation of these delegations from the beginning of the Republic through the 1920s, see John Preston Comer’s chapter, “The History of Administrative Legislation” in COMER, *supra* note 1, at 50–112. For a description of current delegations, see LEWIS & SELIN, *supra* note 28.

<sup>69</sup> See, e.g., JERRY L. MASHAW & DAVID L. HARFST, *THE STRUGGLE FOR AUTO SAFETY* (1990) (providing a classic account of the creation of the National Highway Traffic Safety Administration, legislative and judicial responses to its actions, and the agency’s resulting regulatory approach).

<sup>70</sup> La. Pub. Serv. Comm’n v. FCC, 476 U.S. 355, 374 (1986).

<sup>71</sup> The Department of the Interior provides an example of this type of statutory scheme. The Department of the Interior is “charged” with the supervision of an enumerated list of subjects and subagencies in its authorizing statute, 43 U.S.C. § 1457 (2012), but the authorization to take specific actions in carrying out its supervision is laid out in each regulated subject’s statute. See, e.g., 16 U.S.C. § 669i (2012) (referring to wildlife restoration and providing that “[t]he Secretary of the Interior is authorized to make rules and regulations for carrying out the provisions of this chapter”); *id.* § 777i

general authority to implement the statute by delineating actions the agency is authorized to take,<sup>72</sup> or by vesting in the agency general functions or jurisdiction over a certain subject area.<sup>73</sup>

The vesting of lawmaking power typically arises with an authorization to make rules,<sup>74</sup> adjudicate disputes,<sup>75</sup> or both.<sup>76</sup> Frequently, regulatory statutes include not only specific grants of authority or jurisdiction over particular matters, but also a general “carry out” or “as may be necessary” provision. These provisions employ a variety of formulations.<sup>77</sup> Regardless

(referring to fish restoration and management projects and providing that “[t]he Secretary of the Interior is authorized to make rules and regulations for carrying out the provisions of this chapter”).

<sup>72</sup> See, e.g., 12 U.S.C. § 5492(a)(10) (2012) (“The [Consumer Financial Protection] Bureau is authorized to . . . implement[] the Federal consumer financial laws through rules, orders, guidance, interpretations, statements of policy, examinations, and enforcement actions . . .”); see also 6 U.S.C. § 112(b)(2) (2012) (“The Secretary [of Homeland Security] . . . shall have the authority to make contracts, grants, and cooperative agreements, and to enter into agreements with other executive agencies, as may be necessary and proper to carry out the Secretary’s responsibilities under this chapter . . .”); 7 U.S.C. § 2204(b) (2012) (“The Secretary [of Agriculture] is authorized to initiate or expand research and development efforts related to solution of . . . any other problem that the Secretary may determine has an effect upon the economic development or the quality of life in rural areas.”); 12 U.S.C. § 248 (2012) (providing an extensive list of functions that the Board of Governors of the Federal Reserve System “shall be authorized and empowered” to perform); 42 U.S.C. § 5842 (2012) (“[T]he Nuclear Regulatory Commission shall . . . have licensing and related regulatory authority . . . as to the following facilities of the Administration . . .”).

<sup>73</sup> See, e.g., 5 U.S.C. § 1103(a) (2012) (“The following functions are vested in the Director of the Office of Personnel Management . . .”); see also 15 U.S.C. § 1512 (2012) (“[T]o this end [the Department of Commerce] shall be vested with jurisdiction and control of the departments, bureaus, offices, and branches of the public service hereinafter specified, and with such other powers and duties as may be prescribed by law.”); 29 U.S.C. § 557 (2012) (“The following-named offices, bureaus, divisions, and branches of the public service, and all that pertains to the same, shall be under the jurisdiction and supervision of the Department of Labor . . .”).

<sup>74</sup> See, e.g., 20 U.S.C. § 3474 (2012) (“The Secretary [of Education] is authorized to prescribe such rules and regulations as the Secretary determines necessary or appropriate to administer and manage the functions of the Secretary or the Department.”).

<sup>75</sup> See, e.g., 29 U.S.C. § 651(b)(3) (2012) (authorizing the Occupational Safety and Health Review Commission to “carry[] out adjudicatory functions under this chapter”); 30 U.S.C. § 823(d)(2)(B) (2012) (“[A]fter the issuance of a decision of an administrative law judge, the [Federal Mine Safety and Health Review] Commission may in its discretion . . . order the case before it for review . . .”).

<sup>76</sup> See, e.g., 29 U.S.C. §§ 156, 160(b) (2012) (providing that “[t]he [National Labor Relations] Board shall have authority from time to time to make, amend, and rescind . . . rules and regulations as may be necessary to carry out the provisions of this subchapter” and that the National Labor Relations Board “shall have power” to issue and adjudicate complaints of unfair labor practices).

<sup>77</sup> Some provide that agencies have the authority “to make rules and regulations for the purpose of carrying out the provisions of this subchapter.” 15 U.S.C. § 46(g) (2012) (emphasis added). Others authorize agencies to “administer the provisions of this chapter, and for such purpose the Secretary is authorized (1) to make such rules and regulations . . . as may be necessary in the administration of this chapter.” 33 U.S.C. § 939(a) (2012) (emphasis added), or “to make such rules and regulations as may be necessary or appropriate . . . for the execution of the functions vested in them by this chapter.” 15 U.S.C. § 78w(a)(1) (2012) (emphasis added), or “to make, amend, and rescind . . . such rules and regulations as may be necessary to carry out the provisions of this subchapter,” 29 U.S.C. § 156 (emphasis added). For other examples of “carry out” and “as may be necessary” provisions, see, for example, 7 U.S.C. § 2(a)(12) (2012), providing that “The [Commodity Trading Futures] Commission is authorized to promulgate such rules and regulations as it deems necessary to govern the operating

of the specific statutory formulation, the basic point is the same: One of the most fundamental features of regulatory statutes is that they vest authority in the agency to take actions that bind with the force of law.

2. *Imposing Duties.*—Regulatory statutes do not only authorize but also impose duties on the agency. While most statutes grant agencies considerable discretion in organizing their actions, there is no doubt regulatory statutes impose duties on the agency to implement the powers granted. Many statutes build the expression of this duty into the vesting of power.<sup>78</sup> Others separately set out a general duty of the agency to implement the statute.<sup>79</sup> Still others impose a host of highly specific duties upon agencies—duties to oversee certain subject areas or programs,<sup>80</sup> to

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procedures and conduct of the business of the Commission,” 12 U.S.C. § 1819(a) (2012), providing that “The [Federal Deposit Insurance] Corporation . . . shall have power . . . [t]o prescribe by its Board of Directors such rules and regulations as it may deem necessary to carry out the provisions of this chapter . . . .,” 20 U.S.C. § 3474, providing that “The Secretary [of Education] is authorized to prescribe such rules and regulations as the Secretary determines necessary or appropriate to administer and manage the functions of the Secretary or the Department,” 31 U.S.C. § 321(b)(1) (2012), providing that “The Secretary [of the Treasury] may . . . prescribe regulations to carry out the duties and powers of the Secretary . . . .,” and the Reorganization Plan No. 1 of 1953, § 6, 18 Fed. Reg. 2053–54 (Apr. 11, 1953), *reprinted in* 5 U.S.C. app. at 150 (2012), stating “The Secretary [of Health, Education, and Welfare] may from time to time make such provisions as the Secretary deems appropriate authorizing the performance of any of the functions of the Secretary by any other officer, or by any agency or employee, of the Department.”)

<sup>78</sup> *See, e.g.*, 12 U.S.C. § 1811(a) (2012) (“[The] Federal Deposit Insurance Corporation . . . shall insure . . . the deposits of all banks and savings associations which are entitled to the benefits of insurance under this chapter, and . . . shall have the powers hereinafter granted.”); 15 U.S.C. § 45(a)(2) (2012) (“The [Federal Trade] Commission is hereby empowered and directed to prevent persons, partnerships, or corporations . . . from using unfair methods of competition in or affecting commerce . . . .”); 15 U.S.C. § 1512 (“It shall be the province and duty of said Department [of Commerce] to foster, promote, and develop the foreign and domestic commerce, the mining, manufacturing, and fishery industries of the United States; and to this end it shall be vested with jurisdiction and control of the departments, bureaus, offices, and branches of the public service . . . .”).

<sup>79</sup> *See, e.g.*, 6 U.S.C. § 111(b)(1) (2012) (establishing the “mission” of the Department of Homeland Security in a series of eight broad commands, including “prevent terrorist attacks within the United States”); 7 U.S.C. § 2201 (2012) (“[T]he general design and duties of [the Department of Agriculture] shall be to acquire and to diffuse among the people of the United States useful information on subjects connected with agriculture . . . .”); 12 U.S.C. § 5491(a) (2012) (“[T]he ‘Bureau of Consumer Financial Protection’ . . . shall regulate the offering and provision of consumer financial products or services under the Federal consumer financial laws.”); 31 U.S.C. § 321(a) (providing nine general functions, including “carry[ing] out services related to finances” that the Secretary of the Treasury “shall” perform); 42 U.S.C. § 901(b) (2012) (“It shall be the duty of the [Social Security] Administration to administer the old-age, survivors, and disability insurance program under subchapter II of this chapter and the supplemental security income program under subchapter XVI of this chapter.”); 47 U.S.C. § 151 (2012) (“[T]he ‘Federal Communications Commission’ . . . shall execute and enforce the provisions of this chapter.”); 49 U.S.C. § 301 (2012) (providing nine broad “[l]eadership, consultation, and cooperation” duties that the Secretary of Transportation “shall” complete).

<sup>80</sup> *See, e.g.*, 7 U.S.C. § 2204b(a) (2012) (“The Secretary of Agriculture . . . shall assume responsibility for coordinating, a nationwide rural development program . . . .”); 20 U.S.C. § 3423d(b)(3) (2012) (“The Secretary [of Education] shall ensure that limited-English-proficient and language-minority students are included in ways that are valid, reliable, and fair under all standards and

promulgate specific rules or take certain actions,<sup>81</sup> to investigate or study,<sup>82</sup> or to act based on some findings<sup>83</sup>—in addition to or instead of relying on a single general expression of duty. The consequence for the agency is the same: It has a duty to implement the powers granted.

3. *Purposes and Principles.*—Regulatory statutes have a further and distinctive feature: they include some standard or principle to guide the agency’s conduct. These may take the form of a general principle or standard,<sup>84</sup> a set of objectives,<sup>85</sup> a statement of overall aims or purposes,<sup>86</sup> or

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assessment development conducted or funded by the Department.”); 42 U.S.C. § 241(a) (2012) (“The Secretary [of Health and Human Services] shall conduct . . . the [Public Health] Service . . .”).

<sup>81</sup> See, e.g., 15 U.S.C. § 78c-3(d)(1) (2012) (“The [Securities and Exchange] Commission shall prescribe rules . . . necessary to prevent evasions of the mandatory clearing requirements under this chapter.”); 42 U.S.C. § 7409(a)(1) (2012) (“The Administrator [of the Environmental Protection Agency] . . . shall publish proposed regulations prescribing a national primary ambient air quality standard . . .”); 46 U.S.C. § 40901(a) (2012) (“The [Federal Maritime] Commission shall issue a license to a person that the Commission determines to be qualified by experience and character to act as an ocean transportation intermediary.”).

<sup>82</sup> See, e.g., 7 U.S.C. § 2(h)(4)(B) (“To the extent the [Commodity Futures Trading] Commission finds that a particular swap, group, category, type, or class of swaps would otherwise be subject to mandatory clearing . . . the Commission shall . . . investigate the relevant facts and circumstances . . .”); 12 U.S.C. § 252(a)(1) (2012) (“[O]nce every 60 months . . . the Board [of Governors of the Federal Reserve System] . . . shall conduct a study and submit a report to the Congress detailing the extent of small business lending by all creditors.”); 42 U.S.C. § 5847(a)(1) (2012) (“The [Nuclear Regulatory] Commission is authorized and directed to make . . . a national survey, which shall include consideration of each of the existing or future electric reliability regions, or other appropriate regional areas, to locate and identify possible nuclear energy center sites.”).

<sup>83</sup> See, e.g., 15 U.S.C. § 2056a(b)(1) (2012) (“The [Consumer Product Safety] Commission shall . . . examine and assess the effectiveness of any voluntary consumer product safety standards for durable infant or toddler products . . .”); 29 U.S.C. § 160(c) (2012) (“If upon the preponderance of the testimony taken the [National Labor Relations] Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall . . . issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice . . .”).

<sup>84</sup> See, e.g., 12 U.S.C. § 4513(a)(1) (2012) (“The principal duties of the Director [of the Federal Housing Finance Agency] shall be . . . to ensure that . . . each regulated entity operates in a *safe and sound manner* . . . the operations and activities of each regulated entity *foster liquid, efficient, competitive, and resilient* national housing finance markets . . . [and] the activities of each regulated entity and the manner in which such regulated entity is operated are *consistent with the public interest*.” (emphasis added)); 31 U.S.C. § 321(a) (“The Secretary of the Treasury shall . . . prescribe regulations that the Secretary considers *best calculated to promote the public convenience and security*, and to *protect the Government and individuals from fraud and loss* . . .” (emphasis added)); 42 U.S.C. § 7409(a)–(b) (“The Administrator [of the Environmental Protection Agency] . . . shall publish proposed regulations prescribing a national primary ambient air quality standard . . . which . . . allow[] an adequate margin of safety, [and] are *requisite to protect the public health*.” (emphasis added)).

<sup>85</sup> See, e.g., 6 U.S.C. § 111(b)(1) (2012) (stating that the “primary mission of the Department [of Homeland Security]” is to accomplish eight objectives, including “prevent terrorist attacks within the United States”); 12 U.S.C. § 248(a)(2) (2012) (providing that the Federal Reserve Board’s “responsibility [is] to monitor and control monetary and credit aggregates”).

<sup>86</sup> See, e.g., 7 U.S.C. § 2201 (2012) (“There shall be . . . a Department of Agriculture, the general design and duties of which shall be to acquire and to diffuse among the people of the United States useful information on subjects connected with agriculture, rural development, aquaculture, and human

a formal declaration of purpose.<sup>87</sup> Many statutes also, or primarily, set out agency purposes in specific terms connected to each subagency, program, or function the agency oversees.<sup>88</sup> The articulation of an agency's purposes is frequently interwoven with the duties imposed on the agency. Some regulatory statutes explicitly link the agency's purposes and duties by directing the agency to act in accordance with a separate statement of the agency's overall purpose.<sup>89</sup> Other statutes connect the agency's purposes and duties by stating them together in a single provision.<sup>90</sup> Thus, as one

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nutrition, in the most general and comprehensive sense of those terms, and to procure, propagate, and distribute among the people new and valuable seeds and plants."); 15 U.S.C. § 1512 (2012) ("It shall be the province and duty of said Department [of Commerce] to foster, promote, and develop the foreign and domestic commerce, the mining, manufacturing, and fishery industries of the United States . . ."); 29 U.S.C. § 551 (2012) ("The purpose of the Department of Labor shall be to foster, promote, and develop the welfare of the wage earners of the United States, to improve their working conditions, and to advance their opportunities for profitable employment."); 49 U.S.C. § 101(b) (2012) ("A Department of Transportation is necessary in the public interest . . . to . . . ensure the coordinated and effective administration of the transportation programs of the United States Government" in addition to five other general aims of the agency.").

<sup>87</sup> See, e.g., 15 U.S.C. § 631(a) (2012) (referring to the Small Business Administration and stating that "[i]t is the declared policy of the Congress that the Government should aid, counsel, assist, and protect, insofar as is possible, the interests of small-business concerns"); 15 U.S.C. § 2051 (2012) (listing the "Congressional findings" related to the area regulated by the Consumer Product Safety Commission and providing that "[t]he purposes of this chapter are . . . to protect the public against unreasonable risks of injury associated with consumer products" in addition to three other purposes); 20 U.S.C. § 3402 (2012) (stating that "[t]he Congress declares that the establishment of a Department of Education is in the public interest" and listing seven "purposes of this chapter"); 29 U.S.C. § 151 (2012) (referring to the National Labor Relations Board and providing that "[i]t is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce . . . by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association [and] self-organization . . .").

<sup>88</sup> See, e.g., 41 U.S.C. § 1101(b) (2012) ("The purposes of the Office of Federal Procurement Policy [within the Office of Management and Budget] are to . . . provide overall direction of Government-wide procurement policies, regulations, procedures, and forms for executive agencies . . ."); 42 U.S.C. § 241(a) (2012) ("The Secretary [of Health and Human Services] shall conduct in the [Public Health] Service . . . research . . . relating to the causes, diagnosis, treatment, control, and prevention of physical and mental diseases and impairments of man, including water purification, sewage treatment, and pollution of lakes and streams."); *id.* § 5843(b) ("[T]he Director of Nuclear Reactor Regulation shall perform such functions as the Commission shall delegate including . . . monitoring, testing and recommending upgrading of systems designed to prevent substantial health or safety hazards . . .").

<sup>89</sup> See, e.g., 15 U.S.C. §§ 2051(b), 2053(f)(2) (laying out the "purposes of this chapter" relating to the Consumer Product Safety Commission and providing that "[i]n carrying out any of his functions . . . the Chairman shall be governed by general policies of the Commission"); see also 12 U.S.C. §§ 1811(a), 1830 (2012) (providing that the "Federal Deposit Insurance Corporation . . . shall insure . . . the deposits of all banks and savings associations which are entitled to the benefits of insurance under this chapter" and that "[i]t is the purpose of this chapter to provide all banks and savings associations with the same opportunity to obtain and enjoy the benefits of this chapter"); 20 U.S.C. §§ 3402, 3411 (providing a congressional statement of purpose and stating that "[t]he Department [of Education] shall be administered, in accordance with the provisions of this chapter").

<sup>90</sup> See, e.g., 15 U.S.C. § 1512 (providing that the "province and duty" of the Department of Commerce is "to foster, promote, and develop" certain subject areas); see also 7 U.S.C. § 2201 (describing the Department of Agriculture's "general design and duties"); 15 U.S.C. § 631a (2012) (providing congressional declarations of purpose and stating that agencies of the federal government



might expect given the diversity of statutory delegations, some rely primarily on broad statements of principle or purpose, and others, in addition, have sets of principles or purposes formulated much more specifically as to particular functions, subunits, or tasks.

Providing a set of purposes or principles to guide the agency's conduct—even if they are articulated at a very high level of generality—is not merely a practical reality. It is also required by constitutional law: The nondelegation doctrine requires that delegations of legislative authority include an intelligible principle to guide the agency's action.<sup>91</sup> The Supreme Court has been notoriously (or judiciously) permissive regarding the level of specificity required in an intelligible principle.<sup>92</sup> Under current doctrine, these principles may be stated vaguely and generally—for instance, setting air standards that “allow[] an adequate margin of safety, [and] are requisite to protect the public health,”<sup>93</sup> or regulating radio broadcasting “as public convenience, interest, or necessity requires.”<sup>94</sup> Even if cast at a high level of generality, the nondelegation doctrine requires that the delegation of lawmaking power include a principle to guide the agency's action.<sup>95</sup>

The nondelegation doctrine thus makes regulatory statutes constitutionally distinctive. While there are some specific doctrines require statutory clarity—for instance, the void-for-vagueness doctrine requires that criminal offenses be defined with sufficient clarity to guide the conduct of ordinary people<sup>96</sup>—there is no general constitutional requirement that

including the Small Business Administration “shall use all reasonable means” to carry them out); 47 U.S.C. § 151 (2012) (describing the “purposes” for which the Federal Communications Commission is created and providing that the Commission “shall execute and enforce the provisions of this chapter”).

<sup>91</sup> *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472 (2001) (quoting *J. W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928)).

<sup>92</sup> The Supreme Court has not declared a statute in express violation of the nondelegation doctrine since 1935. See Margaret H. Lemos, *The Other Delegate: Judicially Administered Statutes and the Nondelegation Doctrine*, 81 S. CAL. L. REV. 405, 418 (2008) [hereinafter Lemos, *The Other Delegate*]; Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 315 (2000).

<sup>93</sup> 42 U.S.C. § 7409(b)(1) (2012); see also *Whitman*, 531 U.S. at 474–76 (upholding this delegation to the EPA).

<sup>94</sup> 47 U.S.C. § 303 (2012); see also *NBC v. United States*, 319 U.S. 190, 217–18 (1943) (upholding this delegation to the FCC).

<sup>95</sup> See *Mistretta v. United States*, 488 U.S. 361, 372 (1989) (“So long as Congress ‘shall lay down by legislative act an intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed to conform, such legislative action is not a forbidden delegation of legislative power.’” (alteration in original) (quoting *Hampton*, 276 U.S. at 409)).

<sup>96</sup> See *Kolender v. Lawson*, 461 U.S. 352, 357 (1983) (requiring that penal statutes be drafted “with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement”).

nonregulatory statutes include a principle or purpose.<sup>97</sup> As a result, regulatory statutes are constitutionally distinctive: to be valid, these types of statutes must include an intelligible principle to which the agency must conform.

It is worth pausing at this point to address two objections that may be raised by this discussion of the nondelegation doctrine. First, given how permissive the Supreme Court has been with regard to what counts as an intelligible principle, there is a question about what the requirement of an intelligible principle can do. As argued above, the doctrine marks a formal distinction between regulatory and nonregulatory statutes: regulatory statutes must include intelligible principles whereas nonregulatory statutes need not. In that formal sense, the doctrine makes regulatory statutes constitutionally distinctive. The question at this point is not how much guidance these principles provide the agency, but rather whether the agency has some obligation to evaluate its conduct regarding some principle or purpose, however broadly specified. Viewed that way, the nondelegation doctrine can be seen as a convenient way of illustrating the basic point that regulatory statutes impose upon agencies duties to conform their conduct to some principle or set of purposes. But that basic point is what the argument requires, and it could be made without reference to the nondelegation doctrine.

Second, one might object that it does not make sense to equate principles (even a broad set of intelligible principles) with purposes or ends. To respond to this objection, we do not need to distinguish between principles and purposes at a high level of generality. It is enough to observe that pursuing a principle—that is, trying to implement it, conform one's conduct to it, and respect it—can certainly be a purpose or end. What makes principles into purposes in this statutory context is the obligation to pursue them, to carry them forward. As a result, it is really the obligation imposed on agencies, not the distinction between what might count as a “principle” but not a “purpose,” that supports the inference that the principles in regulatory statutes establish purposes for agencies.

### *B. The Character of the Agency's Purposive Duty*

The combination of these formal features of regulatory statutes supplies administrative agencies with a distinctive duty. It is worth

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<sup>97</sup> Margaret Lemos has provocatively argued that once we recognize the lawmaking inherent in most statutory interpretation, there should be a nondelegation doctrine for statutes administered by courts. See Lemos, *The Other Delegate*, *supra* note 92, at 408, 422, 435–43 (arguing that delegations to courts are just as much a concern as delegations to agencies).

isolating the elements of this duty in the abstract before turning to illustrate them in practice.

At a basic level, the agency's duty is not simply to implement (go make rules!), but to implement in furtherance of the principles or purposes of the statute (go make rules to "protect[] the public against unreasonable risk of accidents"<sup>98</sup> or to protect consumers from "unfair, deceptive, or abusive act[s] or practice[s]"<sup>99</sup>). The agency's obligation to implement is thus an obligation to conform its conduct in accordance with the purposes Congress has established, and at a minimum, the intelligible principle that validates the statute constitutionally.

This duty of implementation structures the agency's reasoning in concrete ways. First and most obviously, the agency must develop an understanding of the principle or purposes the statute sets forth. That understanding will depend upon the level of specificity or generality of the statute, and the way in which the general aims of the statute interact with its more specific provisions. But having identified the statute's purposes or principles, the agency has an obligation to do something with them. Second, and in particular, it must evaluate alternatives in light of those purposes, and, third, ultimately select an alternative that, other things equal, best carries them forward. Of course, other things are rarely equal. Statutes may narrowly prescribe the means available or put some purposes in conflict with others. Directions from political supervisors can also reduce the range of options available to the agency. But the core *prima facie* duty a regulatory statute imposes is to carry forward its principles or purposes within the means the statute permits—a duty I refer to as "the purposive duty to implement."

Notice that nothing said thus far commits the agency to any particular approach to *how* it discerns its statute's limiting principles or purposes. That will frequently be a complex undertaking; the next Part provides an account of how an agency may do so. The point here is the more basic and fundamental one that discerning the statute's purposes or principles and seeking to implement them are necessary elements of the agency's duty to implement its statute.

But it should also be clear that this duty has important implications for the role of law for the agency. By obliging the agency to conform its action to a principle or purpose, the law does not inform the agency's decisionmaking only in a binary way—sorting actions into those that are permitted and those that are prohibited, but otherwise leaving the agency

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<sup>98</sup> 49 U.S.C. § 30102(a)(8) (2012).

<sup>99</sup> 12 U.S.C. § 5531(a) (2012).

free to exercise its discretion. Rather, regulatory statutes impose teleological obligations. They oblige agencies to pursue ends and principles, and as a result, law continues to make demands on agencies' reasoning even within the set of actions the law does not otherwise prohibit. In short, for the agency's implementation of regulatory statutes, the law does not merely authorize and prohibit—it also guides.

### C. *Agency Examples*

This basic structure of reasoning is a ubiquitous feature of agency explanations of their decisions. Still it may be useful to briefly consider two examples, one from a recent rulemaking and one from a recent formal adjudication, to give a flavor for the way in which agencies exercise this duty.

1. *FCC Rulemaking.*—A recent Federal Communications Commission (FCC) rule on the volume of broadcast commercials provides a nice illustration. In 2010, Congress enacted the Commercial Advertisement Loudness Mitigation (CALM) Act, directing the FCC to adopt rules that “prevent digital television commercial advertisements from being transmitted at louder volumes than the program material they accompany.”<sup>100</sup> In the FCC's rulemaking, industry commentators argued that the requirements of uniform volume should apply only to advertisements the distributors of digital television “inserted,” as opposed to those advertisements that cable networks “embed” in programming that they send to distributors.<sup>101</sup> The FCC invoked the purposes of the Act to resolve this issue:

Our conclusion that stations/[digital distributors] are responsible for compliance with regard to “embedded” as well as “inserted” commercials is consistent with Congressional intent as well as the language of the statute and the RP [Recommend Practices developed by industry standard setting body]. Examination of the legislative history reflects that Congress's purpose in regulating the volume of audio on commercials was to “make the volume of commercials and regular programming uniform so consumers can control sound levels.” Our reading of the statute and the RP carries out this purpose by requiring that all commercials transmitted by stations/[digital distributors] comport with the RP, regardless of whether they are “inserted” or “embedded.” The record reflects that most commercials are not inserted in programming by stations/[digital distributors], but rather upstream by broadcast or cable networks; in some cases, more

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<sup>100</sup> Implementation of the Commercial Advertisement Loudness Mitigation (CALM) Act, 77 Fed. Reg. 40,276, 40,276 (July 9, 2012) (codified at 47 C.F.R. pts. 73, 76).

<sup>101</sup> See *id.* at 40,280–81.

than 95% of the commercials transmitted are embedded within programming when it is sent to stations/[digital distributors]. Our interpretation carries out Congress's purpose by requiring compliance with the RP's provisions uniformly for all commercials transmitted by stations/[digital distributors], not just the minority they happen to insert.<sup>102</sup>

This passage shows the agency articulating an understanding of the statutory provision's purpose and evaluating alternatives in light of that purpose. In particular, the agency rejects limiting noise reduction to commercials the distributor inserted into the programming in light of its understanding the statute's purpose of eliminating variations in the volume of all commercials. Without this grounding in statutory purpose, the agency would have had less reason to exercise its powers under the statute to impose this obligation on distributors.

2. *Department of Labor Formal Adjudication.*—A recent decision of the Administrative Review Board (the Board), the highest adjudicative authority in the Department of Labor, nicely illustrates a purposive approach within the context of a formal adjudication. An accountant, Thomas Spinner, had been fired from his job with a private accounting firm after he reported accounting problems in the books of a publicly traded company.<sup>103</sup> In the appeal of his retaliation complaint, the question the Board faced was whether the whistleblower provisions of the Sarbanes–Oxley Act of 2002<sup>104</sup> provided protection from retaliation for an employee of a contractor of a publicly traded company (like Spinner) or whether those protections applied only to the employees of publicly traded companies.<sup>105</sup>

The Board concluded that the protections applied to employees of contractors as well as employees of publicly traded companies.<sup>106</sup> The Board first carefully examined the text of the provision, concluding that the

<sup>102</sup> *Id.* at 40,280 (footnotes omitted).

<sup>103</sup> *Spinner v. David Landau & Assocs.*, 33 Individual Emp. Rts. Cases (BNA) 1755, at 2 (Dep't. of Labor May 31, 2012).

<sup>104</sup> Sarbanes–Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified in scattered sections of the U.S. Code).

<sup>105</sup> *Spinner*, 33 Individual Emp. Rts. Cases (BNA) at 3–4. Section 806 provides in relevant part:

WHISTLEBLOWER PROTECTION FOR EMPLOYEES OF PUBLICALLY TRADED COMPANIES.—No company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 . . . or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 . . . or any officer, employee, contractor, subcontractor, or agent of such company . . . may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an *employee* in the terms and conditions of employment because of any lawful act done by the *employee* . . . [such as providing information about violations of the securities laws].

18 U.S.C. § 1514A(a) (2012) (emphasis added).

<sup>106</sup> *Spinner*, 33 Individual Emp. Rts. Cases (BNA) at 16.

more narrow reading would not be the most plausible,<sup>107</sup> but allowing that the provision had some ambiguity.<sup>108</sup> The Board provided a detailed analysis of the background of the enactment of the Act arising out of the Enron scandal, and concluded that the Act's purpose "to protect the investing market and the employees who blow the whistle on issuer-related activities" strongly supported the broader construction.<sup>109</sup> After discussing the Senate Committee Report on the Act, the Board reasoned that construing the Act "as only protecting employees of publicly traded companies would leave unprotected from retaliation outside accountants, auditors, and lawyers, who are the most likely to uncover and comprehend evidence of potential wrongdoing."<sup>110</sup> The broader construction, the Board noted, also comported with longstanding Department of Labor precedent that extended retaliation protection to employees of contractors under analogous whistleblower protection provisions.<sup>111</sup> For the Board, the remedial purpose of the Act, combined with the longstanding parallel practice under other whistleblower protection programs, overcame any opposing inference from the section's title, "Employees of Publically Traded Companies."<sup>112</sup>

The Board's approach, carefully attentive to the meaning the text would bear but also guided by the underlying purpose of the provision and the larger policy landscape, illustrates the way in which assessments of statutory purpose guide and ground agency decisionmaking, whether in adjudication, rulemaking, or in other policymaking formats.<sup>113</sup> While both

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<sup>107</sup> The Board reasoned that the narrower reading would limit the prohibition on retaliation to the class of contractors and subcontractors who had the power to reinstate employees of the public companies, a highly implausible restriction. *See id.* at 7.

<sup>108</sup> *Id.* at 8–9.

<sup>109</sup> *Id.* at 10.

<sup>110</sup> *Id.* at 13.

<sup>111</sup> *Id.* at 14.

<sup>112</sup> *See id.* at 9 (discussing Sarbanes–Oxley Act of 2002, Pub. L. No. 107-204, § 806, 116 Stat. 745, 802)).

<sup>113</sup> In Professor Christopher Walker's recent empirical study of agency rule drafters, building on Abbe Gluck and Lisa Bressman's study of congressional staffers, *see infra* notes 136, 140, he asked 128 rule drafters whether they considered their approach to be "strong purposivist" (3%), "moderate purposivist" (19%), "moderate textualist" (35%), or "strong textualist" (15%), with their response percentages indicated in parenthesis. *See Walker, supra* note 49, at 1017. While this is useful in understanding rule drafter's interpretive self-identifications, without definitions of these various positions as part of the survey prompt, the results do not contradict the claim here that purposive interpretation is a ubiquitous feature of agency practice. Moreover, given that the conception of purposivism identified here requires that the agency abide by the statutory text, all the responses other than perhaps "strong textualist" could be conveying adherence to a purposivist approach, especially in view of other findings of the study showing that (1) 76% concluded legislative history is a "useful tool for interpreting statutes," *id.* at 1038, and (2) 93% identified the purpose of legislative history as "explain[ing] the purpose of the statute," *id.* at 1040.

of these examples involve agencies looking to legislative history, that is not necessary to the purposive approach. As noted above, the priority of purpose for the agency is a separate matter from how the agency discerns purpose.

#### D. Reinforcement in Administrative Law

Fundamental doctrines of administrative law on the availability and standard of review of agency action reflect and reinforce the agency's duty to implement the statutes it administers in a purposive way.

Administrative law has long since overcome the distinction Chief Justice Marshall drew in *Marbury v. Madison* between, on the one hand, those actions for which executive officers must "conform precisely to the will of the President" and are "only politically examinable," and, on the other hand, ministerial duties, involving no discretion, and for which judicial review is available.<sup>114</sup> As Peter Strauss has pointed out, this distinction "obscure[s] the vast middle ground that is the home of administrative law."<sup>115</sup> A fundamental premise of contemporary administrative law is that agencies are subject to judicial review for their decisions, even when their decisions involve an exercise of discretion.<sup>116</sup>

Not only does administrative law make discretionary judgments by agencies reviewable, it also requires some demonstration that the agency's action has a rational connection to the ends established by the statute. Indeed, one of the most fundamental elements of arbitrary and capricious review under § 706 of the APA is that the agency must make some demonstration of the connection between its decision and the statute's aims. The canonical application of arbitrary and capricious review in the *State Farm*<sup>117</sup> decision illustrates this demand. Recall that in *State Farm*, the Supreme Court concluded that the National Highway and Traffic Safety Administration's decision to rescind its prior rule requiring the installation of passive restraints (such as air bags) in cars was arbitrary and

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<sup>114</sup> 5 U.S. (1 Cranch) 137, 166 (1803).

<sup>115</sup> Peter L. Strauss, *Presidential Rulemaking*, 72 CHI.-KENT L. REV. 965, 977 (1997).

<sup>116</sup> See, e.g., Administrative Procedure Act (APA), 5 U.S.C. § 702 (2012) (granting persons adversely affected by administrative action judicial review thereof); *Abbott Labs. v. Gardner*, 387 U.S. 136, 140 (1967) (stating that APA § 702 creates a presumption of reviewability). The APA's exclusion of judicial review for actions that are "committed to agency discretion by law," § 701(a)(2), does not undermine this conclusion. That exception only applies "in those rare instances where 'statutes are drawn in such broad terms that in a given case there is no law to apply,'" *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971), or in which there is "no meaningful standard against which to judge the agency's exercise of discretion," *Heckler v. Chaney*, 470 U.S. 821, 830 (1985). What that leaves available for review is the vast swath of administrative action where there is some intelligible standard against which to judge the agency's action.

<sup>117</sup> *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983).

capricious.<sup>118</sup> The purpose of the National Traffic and Motor Vehicle Safety Act of 1966—to “reduce traffic accidents and deaths and injuries to persons resulting from traffic accidents”<sup>119</sup>—was a central pillar of this analysis. The agency had rescinded its passive restraint requirement without devoting any analysis to retaining an airbag-only requirement, notwithstanding its own prior conclusions that airbags were effective in promoting the safety of vehicle occupants.<sup>120</sup> The Supreme Court reasoned, “[g]iven the effectiveness ascribed to airbag technology by the agency, the mandate of the [Safety] Act to achieve traffic safety would suggest that the logical response to the faults of detachable seatbelts would be to require the installation of airbags.”<sup>121</sup> The aim of the Act to promote occupant safety was critical to the determination that the agency failed in its duties of reasoned elaboration; it did not explain how its chosen course of action, in view of its prior findings, furthered the “mandate” of the Act.

The agency’s duty to “cogently explain why it has exercised its discretion in a given manner”<sup>122</sup> thus includes a duty of connecting the agency’s chosen course of action to the ends established by the act.<sup>123</sup> To comply with that duty, the agency needs to specify the ends of the statute. As a result, arbitrary and capricious review can be seen as policing the agency’s duty to implement the statute in a purposive manner.<sup>124</sup>

### *E. From Implementation to Interpretation*

Thus far this Part has defended the premise—likely to be commonplace to some and contested by others—that regulatory statutes impose upon agencies a duty to implement them in a purposive manner. The question, then, is what implications that duty to implement has for the agencies’ *interpretation* of the statutes they administer? That is, to what extent does the duty to implement commit an agency to interpret its statutes

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<sup>118</sup> *Id.* at 34.

<sup>119</sup> *Id.* at 33. (quoting 15 U.S.C. § 1381 (1976) (repealed 1994)).

<sup>120</sup> *Id.* at 48.

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> See Gillian E. Metzger, *Foreword: Embracing Administrative Common Law*, 80 GEO. WASH. L. REV. 1293, 1312 (2012) (arguing that arbitrariness review as interpreted by the courts is a form of administrative common law and itself “resembles forms of purposivism that read statutes with an eye to achieving some quite generalized policy goals”).

<sup>124</sup> Interestingly, Congress has also imposed crosscutting analysis duties on agencies that augment their express goal setting. See Government Performance and Results Modernization Act of 2010, Pub. L. No. 111-352, 124 Stat. 3866 (2011) (codified in scattered sections of the U.S. Code) (imposing a cluster of requirements that the agency develop mission statements, general goals and objectives, and performance plans that relate agency activities to its stated goals).



in a particular manner? These questions raise the notoriously thorny relationship between implementation and interpretation.

1. *The Duty of Purposive Interpretation.*—Perhaps the most straightforward position on this question is that the duty to implement commits the agency to a particular structure of practical reasoning. Operationally, as noted in the previous Section, to comply with its duty to implement, the agency must develop an understanding of the purposes of the statute, evaluate alternatives in light of those purposes, and select a course of action that, other things equal, best furthers those purposes within the scope of textually permitted actions. This structure of practical reasoning is the basic structure of reasoning that purposive interpretive theories commend.<sup>125</sup> In a sense, the point is that once this purposive duty to implement is understood in these terms, it clearly commits the agency to a purposive method of interpretation.

For many, this short answer will be sufficient. It reflects the widely held view that implementation and interpretation are difficult to pull apart. On this view, both interpretation and implementation describe the processes by which agencies and courts specify the requirements of a statute. Moreover, as Kent Greenawalt writes, “every agency-created rule rests on some combination of interpretation and implementation.”<sup>126</sup> To make decisions about implementation, the agency must make interpretive judgments. In particular, it must make judgments about its goals, the limitations on its powers, the factors it may rely upon, the weight among those factors, the level of certainty it should have about the likely consequences of its action, the alternatives that are reasonable,<sup>127</sup> and the scope of its responsibility to accommodate different interests. These and many other judgments are interpretive, and provide a framework of practical reasoning within the agency, that is, a framework for evaluation of the alternative courses for implementing the agency’s powers. For those who lump interpretation and implementation together—pragmatically treating the specification of the requirements of a statute as an

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<sup>125</sup> See Stack, *Interpreting Regulations*, *supra* note 27, at 384–88 (providing an account of Hart & Sacks’s interpretive technique).

<sup>126</sup> GREENAWALT, *supra* note 7, at 167.

<sup>127</sup> See *id.* at 168 (noting that what may be reasonable under one interpretation may not be reasonable under another). Professor Mashaw points out that implementation is an “instrumentally rational exercise” in which the agency must determine its goals as well as the constraints that have been placed on its development and implementation of policy. Jerry L. Mashaw, *Agency-Centered or Court-Centered Administrative Law? A Dialogue with Richard Pierce on Agency Statutory Interpretation*, 59 ADMIN. L. REV. 889, 898 (2007). Those questions are “saturated with interpretive issues,” and more generally, “[t]he notion that policy choice is not interpretive simply ignores many of the necessary mental operations involved in administrative implementation.” *Id.* Interpretation is called for in judging the reasonable.

“interpretation”—there is little reason to object to the idea that a duty to implement commits the agency to an interpretive stance: If interpretation saturates implementation, then a duty to implement a statute in a particular way would also involve interpretive commitments.

Others draw a sharp distinction between agency interpretation and agency implementation.<sup>128</sup> In this vein, Richard Pierce emphasizes that to interpret means to explain the meaning of a statute, and argues that interpretation is a fair description of what a court (or an agency) would do in the first step of the *Chevron* analysis.<sup>129</sup> But, Pierce argues, the second step of *Chevron* “does not instruct or authorize agencies to ‘interpret’ statutes in any way that fits within the dictionary definition of ‘interpret.’”<sup>130</sup> Rather, for Pierce, making an institutional choice among a range of options can “only [be] engaging in a policymaking process.”<sup>131</sup>

There are two different types of responses. The first, which takes the objection head-on, reasserts that conceptually and practically it does not make sense to distinguish agency implementation and interpretation because interpretation is so infused in implementation that they cannot be usefully pulled apart and the ultimate object of interest is how the statute is specified by the court or agency. The second line of response concedes that, at the extremes, one might distinguish some tasks as purely policymaking, and even that some duties to implement do not carry with them interpretive commitments. But that concession alone does not pose an objection to the claim here that the purposive duty to implement is the kind of duty that involves interpretive commitments.

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<sup>128</sup> See Pierce, *supra* note 53, at 199–200.

<sup>129</sup> *Id.* at 199.

<sup>130</sup> *Id.* at 200.

<sup>131</sup> *Id.* In a similar vein, Elizabeth Foote argues that the *Chevron* framework mistakenly treats administrative action as statutory construction, suggestive of judicial-style methodologies for affixing meaning to a statutory text, as opposed to reviewing agency action for whether it was a sound or nonarbitrary exercise of administrative power. Foote argues that categorizing agency action as primarily a matter of statutory construction ignores the distinctive influences, from political pressures to the extensive reliance on experts, which shape the agency’s decisionmaking process. See Elizabeth V. Foote, *Statutory Interpretation or Public Administration: How Chevron Misconceives the Function of Agencies and Why It Matters*, 59 ADMIN. L. REV. 673, 691–703 (2007); see also Michael Herz, *Deference Running Riot: Separating Interpretation and Lawmaking under Chevron*, 6 ADMIN. L.J. AM. U. 187, 190–99 (1992) (arguing that *Chevron* commands deference to agency lawmaking, not agency interpretation, and that when an agency acts pursuant to a delegation of lawmaking power, interpretation is “merely to define the boundaries of the zone of indeterminacy” for the agency). One could agree with the analysis that too much agency action is reviewed through the lens of judicial tools of statutory construction without taking the further position that implementation is not interpretive. In other words, one could embrace the general critique that too much of what agencies do is understood by courts to be analogous to (and perhaps a poor exemplar of) judicial construction of statutes without denying the point that implementation involves interpretive choices at many turns.

2. *Evidence from Congress.*—It is also useful to ask what evidence there is that Congress makes a distinction between implementation and interpretation. Congress attends to whether it charges courts or agencies with power to administer a statute,<sup>132</sup> and also is sensitive to the design, processes, and modes of accountability when it delegates to an agency.<sup>133</sup> But, perhaps to the disappointment of legal scholars, Congress has shown a notorious disinterest in the allocation of *interpretive* authority between courts and agencies.<sup>134</sup> Outside of an occasional bill introduced to overrule aspects of *Chevron*, legislation rarely expressly addresses whether the delegation of lawmaking power carries with it a delegation of interpretive authority, as the *Chevron* doctrine presumes.<sup>135</sup>

Abbe Gluck and Lisa Bressman's recent empirical study of congressional committee staff provides support for the long-held but little documented surmise that Congress does not show independent interest in the allocation of interpretive authority between courts and agencies because it treats that question as part and parcel of the underlying delegation. Gluck and Bressman's study shows that committee staffers are generally aware of<sup>136</sup> and draft delegations to agencies in light of *Chevron*.<sup>137</sup> Particularly interesting for our purposes here, Bressman and Gluck's study confirms that when Congress delegates power to an agency to make law, it intends to grant the agency interpretive authority, that is, authority to give the statute meaning in ways that will not be questioned *de novo* by courts.<sup>138</sup> Their study thus provides specific support for the idea that Congress views the delegation of interpretive authority as incidental to the vesting of powers in the agency. And particularly on point for our purposes, they find that committee staffers do not "distinguish between interpretive authority and implementation authority."<sup>139</sup> Indeed, Bressman and Gluck report that their

<sup>132</sup> See Matthew C. Stephenson, *Legislative Allocation of Delegated Power: Uncertainty, Risk, and the Choice Between Agencies and Courts*, 119 HARV. L. REV. 1035, 1039–49 (2006) (providing an overview of the choice to delegate to agencies or courts).

<sup>133</sup> See DAVID E. LEWIS, *PRESIDENTS AND THE POLITICS OF AGENCY DESIGN: POLITICAL INSULATION IN THE UNITED STATES GOVERNMENT BUREAUCRACY, 1946–1997*, at 3–16 (2003) (providing an overview of literature on the politics of agency design).

<sup>134</sup> See Kent Barnett, *Codifying *Chevron**, 90 N.Y.U. L. REV. 1, 6 (2015).

<sup>135</sup> Interestingly, in the Dodd-Frank Wall Street Reform and Consumer Protection Act, Congress codified a version of the *Skidmore* standard of judicial review. See 12 U.S.C. § 25b(b)(5)(A) (2012) (specifying a standard, largely tracking *Skidmore*'s, for review of the OCC's preemption determinations); see Barnett, *supra* note 134, at 26–33.

<sup>136</sup> Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901, 928–29 (2013).

<sup>137</sup> *Id.* at 941.

<sup>138</sup> See Bressman & Gluck, *supra* note 18, at 769–70.

<sup>139</sup> *Id.* at 769.

respondents “told [them] that they expected those kinds of gaps to be filled by agencies—and they did not distinguish between the agency as interpreter or implementer.”<sup>140</sup> This study thus provides some empirical support for the position that when Congress grants lawmaking powers to agencies, it does not generally distinguish between the power to implement the statute and the power to interpret it.

In sum, regulatory statutes impose a purposive obligation upon agencies—an obligation that structures agencies’ practical reasoning—to implement but also to interpret them in a purposivist manner. This account of the agency’s duties is reflected in agency practice, foundational doctrines of administrative law, and congressional staffers’ own understanding of what Congress does when it delegates authority to agencies.

### III. AGENCY PURPOSIVISM AND RESPONSE TO CRITICS

The thrust of the argument thus far has been formal; it has isolated and described a statutory duty to implement and interpret statutes in a purposivist manner and suggested that the duty is reflected in fundamental doctrines of administrative law and recent evidence of Congress’s practices. While this takes a critical step forward in identifying the grounds and overall orientation of agency statutory interpretation, it does not defend its workability in practice or suggest how the approach might be specified. Even those persuaded by this formal argument will want some reassurance that the tasks it imposes on the agency are achievable. Others will view interpretive choices as fundamentally about practical or institutional considerations.<sup>141</sup>

This Part defends the practicality of this approach by arguing that agencies’ institutional capacities make them particularly well positioned to exercise the functions that a purposive approach requires. It does so by examining agencies’ capacity to apply the classic technique of purposive interpretation set forth by Henry Hart and Albert Sacks in *The Legal Process*.<sup>142</sup> There are several reasons for specifying the approach with reference to Hart and Sacks’s theory even though courts were their primary focus. First, Hart and Sacks’s account of purposivism still provides the

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<sup>140</sup> *Id.* at 770. Congressional staffers “made no distinction, as some scholars have, between agency statutory ‘implementation’ and agency statutory ‘interpretation.’” *Id.* at 765.

<sup>141</sup> See Jeffrey A. Pojanowski, *Private Law in the Gaps*, 82 *FORDHAM L. REV.* 1689, 1741–42 (2014) (“Legal process theorists aspire to match decisionmaking authority with competence in defining the procedures due for resolving particular questions.”).

<sup>142</sup> See HART & SACKS, *supra* note 12.

classic statement of the theory.<sup>143</sup> Second, a generation of criticism of purposivism—first from legal realists and then from textualists and public choice theorists—is primarily directed toward Hart and Sacks’s conception.<sup>144</sup> A defense of purposivism, even for agencies, needs to confront those critiques. So while the agency’s basic purposive duty could be specified in ways that do not follow the outlines of Hart and Sacks’s approach, their theory provides an appropriate starting point and foil. After the institutional competence discussion, this Part responds to textualist challenges to agency purposivism, and to the objection that Congress does not have the constitutional authority to direct an agency’s interpretive method.

### *A. Agencies and Purposivist Interpretation*

Hart and Sacks’s “technique” of statutory interpretation has four basic elements, which track the definition of purposivism provided at the outset: the court is to (1) “[d]ecide what purpose ought to be attributed to the statute and to any subordinate provision of it,” (2) “[i]nterpret the words of the statute immediately in question so as to carry out [that] purpose as best it can,” (3) make sure not to give the words “a meaning they will not bear,” and finally, (4) not “violate any established policy of clear statement.”<sup>145</sup> Hart and Sacks provide a careful elaboration of the interpretive operations and sources involved in each of these steps.<sup>146</sup> Assessment of agencies’ institutional capacities suggests that they are not only better equipped than courts to implement this basic technique of interpretation, but they are the institutions in our constitutional scheme that are distinctively qualified to do so.

*1. Discerning Purpose.*—How the interpreter “attributes” purposes to a statute and its subordinate provisions constitutes “[t]he principal problem in the development of a workable technique of interpretation,”<sup>147</sup> and a principal focus of criticism of Hart and Sacks’s theory. Hart and Sacks’s approach to attributing purposes is frequently taken to be reducible to their counsel that the court should “assume, unless the contrary unmistakably appears, that the legislature was made up of reasonable persons pursuing

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<sup>143</sup> Manning, *What Divides*, *supra* note 26, at 86.

<sup>144</sup> See, e.g., *id.* at 86–87 (using Hart and Sacks’s work as the “main point of departure” for his own work).

<sup>145</sup> HART & SACKS, *supra* note 12, at 1374.

<sup>146</sup> See Stack, *Interpreting Regulations*, *supra* note 27, at 384–88 (offering an account of Hart & Sacks’s interpretive technique).

<sup>147</sup> HART & SACKS, *supra* note 12, at 1125.

reasonable purposes reasonably.”<sup>148</sup> Taking that rationalist, constructive attitude as the defining or exclusive way in which Hart and Sacks advise an interpreter to discern purpose exposes their theory to a host of objections. Based on public choice theory, scholars have argued that this reflects “an unreasonably optimistic view” of the legislature.<sup>149</sup> More generally, scholars argue that even if legislatures did seek to achieve reasonable outcomes through legislation, focusing on that point would not give useful guidance to interpreters.<sup>150</sup> As I have emphasized in other writing, this understanding misreads Hart and Sacks.<sup>151</sup> Far from launching the court into a freewheeling reconstruction of a reasonable legislative purpose as the first and primary step of discerning legislative purpose, Hart and Sacks describe the task of attributing purpose to a statute or its provisions as having two sequential steps. The first step in attributing purpose is for the court to consider any “formally enacted statement of purpose.”<sup>152</sup> So long as the enacted statement is designed to shed light on interpretation, is consistent with the text, and pertains to the question at issue, the court should “accept[.]” the formally enacted statement of purpose.<sup>153</sup> This first step is critical. By accepting Congress’s own statement of purpose, the court grants a very strong form of deference to Congress’s own articulation of the purpose of the statute. For Hart and Sacks, it is only after the court has determined that such an enacted statement of purpose is not available or not useful that it must engage in the more abstract inquiry of “inferring purpose.”<sup>154</sup>

Agencies are far better positioned than courts to discern statutory purposes. Michael Herz provides an elegant argument for agencies’ superior institutional competence to discern statutory purposes.<sup>155</sup> Herz proceeds by distinguishing two cases. In the first, Congress has been relatively specific as to the purpose of the statute. In this case, it would not be a hard question whether, even under our relaxed nondelegation doctrine,

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<sup>148</sup> *Id.* at 1378.

<sup>149</sup> Manning, *What Divides*, *supra* note 26, at 102; *see also* Nourse, *supra* note 18, at 81–85.

<sup>150</sup> *See* Richard A. Posner, *Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution*, 37 CASE W. RES. L. REV. 179, 193 (1986).

<sup>151</sup> *See* Stack, *Interpreting Regulations*, *supra* note 27, at 384–88. In *Interpreting Regulations*, I argue that agency regulations should be interpreted in light of their statements of basis and purpose, which form the bulk of the regulations’ preambles. I argue that correcting this misreading of Hart and Sacks exposes how this approach draws upon their reliance on enacted statements of purpose in interpreting statutes. *Id.*

<sup>152</sup> HART & SACKS, *supra* note 12, at 1377.

<sup>153</sup> *Id.*

<sup>154</sup> *See id.*

<sup>155</sup> Herz, *supra* note 8, at 96–98.

Congress has supplied the agency with an intelligible principle to guide its actions. In this case, discerning purpose is more a matter of “finding” than attributing. In these circumstances, the agency has no disadvantage to a court in discerning purpose. To the extent statutory purpose is discernible from statutory text (including enacted statements of purpose), agencies and courts have equal access to it, and agencies have the advantage of having more than sporadic encounters with the statutes they administer. To the extent statutory purpose is gleaned in part from nontextual sources, agencies have an even clearer advantage. Unlike courts, as noted in Part I, agencies have frequently “lived” the process of statutory drafting, have access to congressional overseers, and must make credible representations as to the compromises the legislation embodies. As a result, if statutory purpose is relatively clear, whether gleaned exclusively from statutory text or from bringing in a more general array of sources, agencies have equal or better capacities than courts.

But Congress frequently delegates broadly to agencies, establishing statutory purposes at a high level of generality. In this second case, the task of developing a working understanding of the statute’s purposes will involve a wide range of judgments, which, as Herz argues, “the agency is in a far better position . . . than is a court”<sup>156</sup> to make. The reasons go directly to familiar differences in institutional competences between agencies and courts, in terms of expertise and the political role and responsiveness of agencies,<sup>157</sup> rationales that also undergird the presumption of judicial deference to agencies under *Chevron*.<sup>158</sup> Unlike courts, agencies are specialists. Agencies can focus on designated areas, developing experience and expertise in those regulatory environments. They of course also have specialized staff, including staff capacities for investigation and technical analysis.

At the same time, agencies are also constantly engaged with political actors.<sup>159</sup> “In the interpretation and implementation of statutes, which are majoritarian . . . and subject to legislative amendment,” as Herz observes, “a connection to current political and societal preferences is a strength.”<sup>160</sup>

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<sup>156</sup> *Id.* at 97.

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

<sup>159</sup> As Jerry Mashaw observes, it “is precisely [agencies’] job as agents of past congresses and sitting politicians to synthesize the past with the present.” Mashaw, *Norms*, *supra* note 3, at 513. See also Edward Rubin, *Dynamic Statutory Interpretation in the Administrative State*, ISSUES IN LEGAL SCHOLARSHIP, Nov. 2002, art. 2, <http://www.degruyter.com/view/j/ils.2002.2.issue-2/ils.2002.2.2.1021/ils.2002.2.2.1021.xml> [<http://perma.cc/EE5E-2KYC>] (arguing that the point of delegating to an agency is to invite them to mediate between past legal language and present concerns).

<sup>160</sup> Herz, *supra* note 8, at 97–98.

The same is true for statutes with conflicting purposes, or purposes at different levels of generality that are in tension with one another. In sum, if the task of discerning a purpose is more constructive than “finding,” the task is one that will involve making value choices as well as exercising expert judgment. In both respects, agencies have decisive advantages over courts.<sup>161</sup> Indeed, the particular combination of political responsiveness and legal and policy expertise makes agencies uniquely well situated to mediate between broad statutory language and the preferences of contemporary politics in specifying the statutes’ purposes or principles in a set of concrete guidelines.

2. *Carrying Forward Purposes.*—Agencies are also better equipped than courts at selecting the best means of implementation, including when there are tensions in the goals of the statute. Hart and Sacks’s command to select actions that “best carry out”<sup>162</sup> statutory purpose(s) has always had a somewhat awkward fit for courts; on its face, it suggests an activist conception of the judicial role, with the court seeking to make wide-ranging policy determinations.

In contrast, supplying the agency with a duty to select a course of action that “best carries out” the aims of the statute is an uncontroversial directive. As suggested by the statutory arguments in Part II, Congress obliges agencies to be active to implement statutory purposes. Moreover, agencies are concededly lawmaking bodies, a concession that remains uncomfortable for some as to courts.<sup>163</sup> Perhaps more important, the broad range of synthetic judgments involved in selecting a course that “best carries out” a statute are precisely the kinds of judgments regulatory statutes require agencies to make, and go directly to agencies’ relative competence. Selecting that course of action requires understanding the operational context of the area of regulation, for which agencies have a distinct advantage over courts. For instance, to return to the FCC regulation on the volume of commercials discussed above, the agency must know it is technically possible for a cable provider to modulate the volume of advertisements that it inserts into programing as well as those that come embedded in programming from national networks. In addition, the agency

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<sup>161</sup> See Diver, *supra* note 15, at 583–85 (“Whether one takes a democratic or technocratic view of social policymaking, administrative agencies, with their greater political accountability and research tools, seem to be more appropriate vehicles for making [the value choices inherent in interpretation].”); Eskridge, *Expanding Chevron’s Domain*, *supra* note 8, at 423–26 (noting that agencies are more competent to make political decisions than courts in view of their greater political accountability).

<sup>162</sup> HART & SACKS, *supra* note 12, at 1312.

<sup>163</sup> Cf. Lemos, *The Other Delegate*, *supra* note 92, at 434–43 (suggesting that despite widespread acknowledgment that courts engage in some policymaking when interpreting statutes, judicial doctrines do not police the scope of delegation of these lawmakings to courts as such).



is in a better position to know about the state of the industry, the scope of its reliance on advertisers, and the economic impact of this new rule. More generally, the point is that the agency is in a better position to make those determinations—and scores like them—than a court.

Decisions about implementation also implicate questions of politics. For instance, which industry, or facility, should be the first to comply with a safety standard, at what level, and over what time period? On these issues, the agency's greater political accountability is an asset. That advantage is augmented by the agency's options for vetting its proposed implementations. Most obviously, notice-and-comment rulemaking requires a public vetting of the agency's proposed interpretation and implementation of the law.<sup>164</sup> This allows for input from a wide variety of sources in a way that can facilitate transparent policymaking and reasoned deliberation about the consequences of proposed policies. Courts have no similar mechanism for notice-and-comment on their proposed judgments.<sup>165</sup> In sum, agencies' familiar institutional differences from courts—their expertise, accountability, and procedural flexibility—constitute advantages over courts for the difficult but unavoidable tasks of determining how to best carry forward statutory purposes.

3. *Consistent with Text and Other Binding Norms.*—For Hart and Sacks, statutory text serves a dual role.<sup>166</sup> On the one hand, it constitutes a central source for inferring purpose.<sup>167</sup> But statutory text also operates as a separate constraint. The “court ought never to give the words of a statute a meaning they will not bear,”<sup>168</sup> and may infer a reasonable purpose for the legislation “unless the contrary unmistakably appears.”<sup>169</sup> In this second role, statutory text is understood to establish a set of permissible interpretations or outside parameters, but not to decisively compel meanings.<sup>170</sup> Accordingly, Hart and Sacks counsel that dictionaries and

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<sup>164</sup> See 5 U.S.C. § 553 (2012).

<sup>165</sup> See Michael Abramowicz & Thomas B. Colby, *Notice-and-Comment Judicial Decisionmaking*, 76 U. CHI. L. REV. 965, 967–69 (2009) (noting absence of opportunity for public comment on judicial decisions before issuance in the federal courts, and arguing that the case for notice-and-comment in the judiciary is just as strong in many respects as it is for administrative agencies); see also Richard A. Bierschbach & Stephanos Bibas, *Notice-and-Comment Sentencing*, 97 MINN. L. REV. 1, 5 (2012) (arguing that notice-and-comment provides a fruitful analogy for enhancing participation in sentencing as well as for informing prosecutors' charge and plea bargain decisionmaking).

<sup>166</sup> See HART & SACKS, *supra* note 12, at 1375 (describing “The Double Role of the Words as Guides to Interpretation”).

<sup>167</sup> *Id.* at 1377.

<sup>168</sup> *Id.* at 1375.

<sup>169</sup> *Id.* at 1378.

<sup>170</sup> *Id.* at 1191.

canons of semantic construction should only be relied upon to understand the range of permissible meanings, not to fix any particular meaning.<sup>171</sup>

With regard to agencies' own capacities to assess whether their actions fall within the range of permissible understandings of the powers granted by statute, several contrasting considerations are at play. On the one hand, agencies have specialized commitments, and "an agent with a specific substantive commitment may go further than its more neutral principal would approve" in implementing its specific end.<sup>172</sup> By taking statutory purpose as the lodestar of interpretation, especially when situated within an institution committed to those ends, the agency may "lose sight of Congress's choice of means."<sup>173</sup> Agencies may also face greater political incentives than courts to push the boundaries of Congress's choice of words to implement statutory ends. On the other hand, agencies' greater familiarity with the statutes they administer makes them more expert at determining their scope. Further, to the extent agency action is challenged in court, agencies face reversal if they do not heed how a court is likely to define what the statute permits. The process of regulatory review also frequently involves vetting agencies' construction of their statutes through an institution with distinct and more general incentives, such as with the Office of Information and Regulatory Affairs (OIRA).<sup>174</sup> Exactly how one balances these countervailing considerations depends on one's perspective and the context. Surely agencies sometimes do push beyond the boundaries of their authority as judged by courts. But just as clearly, agencies also have the institutional capacities to assess the boundaries of their statutory authority<sup>175</sup> and strong incentives to accurately do so. (Indeed, if they did not have this basic capacity, it is hard to imagine that a direction to the agency to consider only statutory text would be the right remedy.)

Finally, it is worth noting that for the agency, statutory text is not the only source of binding constraint. Because agencies are part of the Executive Branch, they must obey binding executive orders directing how

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<sup>171</sup> See Stack, *Interpreting Regulations*, *supra* note 27, at 386–87 (describing role of text for Hart and Sacks); Manning, *New Purposivism*, *supra* note 27, at 148 (defending the consistency of textually structured purposivism within the *Legal Process* tradition, especially in view of its commitment to the principle of institutional settlement).

<sup>172</sup> Herz, *supra* note 8, at 105.

<sup>173</sup> *Id.* at 104 (emphasis removed); *see, e.g.*, *North Carolina v. EPA*, 531 F.3d 896, 906–11 (D.C. Cir. 2008).

<sup>174</sup> See Cass R. Sunstein, Commentary, *The Office of Information and Regulatory Affairs: Myths and Realities*, 126 HARV. L. REV. 1838, 1871–72 (2013) (noting that OIRA is part of the White House, and that it seeks a wide variety of expert analysis from within the Executive Branch in conducting regulatory review).

<sup>175</sup> See Walker, *supra* note 49, at 1019 fig.1 (reporting survey results showing agency rule drafters' knowledge of norms of textual analysis).

they bring their statutes into effect.<sup>176</sup> This too can be explained by Hart and Sacks's theory. For Hart and Sacks, the checking role of statutory text follows from a more basic commitment, which they call the principle of institutional settlement. "[I]nstitutional settlement expresses the judgment that decisions which are the duly arrived at result of duly established procedures of this kind ought to be accepted as binding upon the whole society unless and until they are duly changed."<sup>177</sup> For Hart and Sacks, the principle of institutional settlement explains why courts should pay careful attention to statutory text. For agencies, it also explains why they need to heed other binding sources, such as executive orders.

Complying with executive orders is also within the agency's competence. To the extent that the task is to interpret the public text of an executive order, agency lawyers are as well positioned as any legal interpreter. Moreover, to the extent the order is supplemented by interpretive guidance, agency counsels are experts in administrative law, and have ready access to executive branch lawyers, from whom they may seek definitive executive branch interpretations.<sup>178</sup>

4. *Consistent with Background and Constitutional Norms.*—The final step in Hart and Sacks's purposive approach is to ensure that the prospective interpretation does not "violate any established policy of clear statement."<sup>179</sup> These policies include criminal prohibitions not thought to be morally blameworthy,<sup>180</sup> departures from generally accepted policy, and constitutional questions.<sup>181</sup> Hart and Sacks instruct the interpreter to read statutes in ways that do not impinge upon these policies and principles, unless the legislature "speak[s] with more than [the] ordinary clearness" on the issue.<sup>182</sup>

An established strain of American legal thought, clearly represented in Alexander Bickel's *The Least Dangerous Branch*,<sup>183</sup> understands federal

<sup>176</sup> I offer an account of the conditions under which an executive order is binding in Kevin M. Stack, *The President's Statutory Powers to Administer the Laws*, 106 COLUM. L. REV. 263, 312–16 (2006) [hereinafter Stack, *Statutory Powers*].

<sup>177</sup> HART & SACKS, *supra* note 12, at 4.

<sup>178</sup> See Sunstein, *supra* note 174, at 1872 (noting OIRA's legal review of agency statutory constructions).

<sup>179</sup> HART & SACKS, *supra* note 12, at 1374.

<sup>180</sup> *Id.* at 1376–77.

<sup>181</sup> *Id.* at 1377.

<sup>182</sup> *Id.*; see Ernest A. Young, *The Continuity of Statutory and Constitutional Interpretation: An Essay for Phil Frickey*, 98 CALIF. L. REV. 1371, 1383–86 (2010) (describing the role of background constitutional norms for legal process thinkers).

<sup>183</sup> ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* (2d ed. 1986).

courts as having distinctive capacities as guardians of enduring, background values. “[E]lected institutions are ill fitted, or not so well fitted as the courts,” as Bickel writes in this vein, “to support and maintain enduring general values.”<sup>184</sup> For Bickel, the relative insulation of the courts from politics makes them the best institutions to defend matters of principle.<sup>185</sup> Others have argued that courts have particular advantages over agencies in careful application of the common law.<sup>186</sup>

While it makes sense to concede Bickel’s point that the insulation of federal courts makes them particularly well suited to take unpopular positions of principle, and to acknowledge that courts have greater reason for care with the common law, agencies still have sufficient and even some special capacities to ensure that their policies comply with background values, including constitutional law. While this is not the place to engage in a full exploration of the capacities of agencies to interpret the Constitution or background values, it is worth isolating a few features of agencies that suggest their competence to constrain their own choices in light of constitutional or other background values. Many of these competences are highlighted in recent work on “administrative constitutionalism.”<sup>187</sup> First and at a most basic level, constitutional interpretation is an unavoidable feature of agency action and a necessary feature of our constitutional structure.<sup>188</sup> As Gillian Metzger writes, the obligation of agencies to take constitutional norms seriously “can be inferred simply from the structure of our constitutional order, under which the Constitution governs all exercises of government authority.”<sup>189</sup> There are also well-established institutions within the Executive Branch for vetting issues of constitutional

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<sup>184</sup> *Id.* at 27.

<sup>185</sup> *See id.* at 26–27.

<sup>186</sup> *See* Jeffrey A. Pojanowski, *Reason and Reasonableness in Review of Agency Decisions*, 104 NW. U. L. REV. 799, 833 (2010) (arguing that “[a]gencies are less likely than courts . . . to be concerned [with] careful application of common law”).

<sup>187</sup> For a helpful exploration of the challenges and capacities of agencies to engage in constitutional implementation, see Gillian E. Metzger, *Administrative Constitutionalism*, 91 TEX. L. REV. 1897 (2013) [hereinafter Metzger, *Administrative Constitutionalism*]. For nuanced case studies of agency practices implementing the Constitution, see, for example, Sophia Z. Lee, *Race, Sex, and Rulemaking: Administrative Constitutionalism and the Workplace, 1960 to the Present*, 96 VA. L. REV. 799 (2010), which explores ways in which the NLRB and FCC interpreted the Constitution in ways that extend beyond judicial doctrines, and Jeremy K. Kessler, *The Administrative Origins of Modern Civil Liberties Law*, 114 COLUM. L. REV. 1083 (2014), which excavates the civil-libertarian rights enforcement in the War Department.

<sup>188</sup> *See* Lee, *supra* note 187, at 886 (noting that an agency’s interpretation of the Constitution is an ineluctable feature of an agency’s exercise of its constitutional powers).

<sup>189</sup> Gillian E. Metzger, *Ordinary Administrative Law as Constitutional Common Law*, 110 COLUM. L. REV. 479, 522 (2010).

interpretation.<sup>190</sup> As to agencies' capacities, as Metzger emphasizes, agencies' expertise regarding their statutory powers better equips them to "integrat[e] constitutional concerns" within their statutory schemes, as well as to comprehend the effects "and thus . . . constitutional significance" of their actions.<sup>191</sup> In a similar vein, as Kenneth Bamberger argues, those same virtues justify the use of normative canons of constructions by agencies; agencies have unique capacities for comprehending the "factual details underpinning the constitutional implications of particular policies."<sup>192</sup> Further, to the extent these constitutional issues and normative canons involve questions of fundamental values, one could view the agency's greater political responsiveness as a benefit.<sup>193</sup> As noted above, agencies constantly engage with both political overseers and the public.<sup>194</sup> The procedural forms of agency action also facilitate this interaction and monitoring. They can affirmatively attempt to elicit the concerns of affected groups, just as they are required to consult with state and local authorities on the federalism implications of their regulations.<sup>195</sup> They can affirmatively notify Congress and the public when they explicitly invoke normative canons or other background values in their interpretations.<sup>196</sup> Established structures of agency reason giving facilitate monitoring by political actors and the public.<sup>197</sup>

In sum, the very institutional capacities of agencies touted above also bear on their capacities to constrain their discretion in accordance with background norms, whether from constitutional sources or otherwise. In these respects, one can acknowledge the courts' superior common law capacities and that the insulation of federal courts gives them unique protection from politics and thus the prospect for enforcing unpopular matters of principle while still acknowledging that agencies are both

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<sup>190</sup> See Trevor W. Morrison, *Constitutional Alarmism*, 124 HARV. L. REV. 1688, 1709–21 (2011) (reviewing BRUCE ACKERMAN, *THE DECLINE AND FALL OF THE AMERICAN REPUBLIC* (2010) and providing an overview and defense of the Office of Legal Counsel's capacity for independent legal advice, including on constitutional questions).

<sup>191</sup> Metzger, *Administrative Constitutionalism*, *supra* note 187, at 1922–23.

<sup>192</sup> Kenneth A. Bamberger, *Normative Canons in the Review of Administrative Policymaking*, 118 YALE L.J. 64, 96–97 (2008).

<sup>193</sup> *See id.*

<sup>194</sup> See Metzger, *Administrative Constitutionalism*, *supra* note 187, at 1928–29 (comparing agencies' constant interaction with public and political entities with the courts' "often attenuated and episodic" interactions); *see also* WILLIAM N. ESKRIDGE JR. & JOHN FERREJOHN, *A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION* 12–18 (2010) (highlighting public and political interactions with agencies as a virtue for administrative implementation of constitutional values).

<sup>195</sup> See Bamberger, *supra* note 192, at 99–100.

<sup>196</sup> *Id.* at 98–99.

<sup>197</sup> Kevin M. Stack, *The Constitutional Foundation of Cheney*, 116 YALE L.J. 952, 993–96 (2007).

capable and, in some respects, uniquely well situated to understand the bearing of background policies on their actions.

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This Section has argued that agencies have the institutional capacities to undertake purposive statutory interpretation, and specifically the purposive technique Hart and Sacks elaborated for courts. This suggests that the formal obligation to implement and interpret statutes in a purposive manner, defended in Part II, relies upon institutional capacities that agencies have. It is now time to respond to objections to this approach based on textualist and separation of powers concerns.

### *B. Purposivism v. Textualism Beyond the Courts*

Textualists have offered significant challenges to purposivism, and in particular to Hart and Sacks's legal process conception. With a few exceptions, the focus has been on judicial statutory interpretation. It is worth highlighting how the arguments made thus far address the most prominent challenges that might be raised to agency purposivism.

1. *Coherence of Purpose.*—Textualists challenge the coherence of statutory purpose. Based on the premise that Congress is a multimember body and different legislators have different purposes for enacting legislation, textualists argue that legislation frequently lacks an agreed-upon purpose.<sup>198</sup> If much legislation does not have a coherent purpose, textualists point out that it does not make sense to make discerning purpose a central feature of the interpretive task.

One response is that to be constitutionally valid, regulatory statutes must supply the agency with a purpose or purposes; as argued above, the nondelegation doctrine requires that these statutes include an intelligible principle to which the agency must conform its conduct, and that obligation gives the agency a purpose or purposes. This answer emphasizes the constitutional distinctiveness of regulatory statutes. To this, a textualist might reply that to the extent the approach merely requires an agency to discern the meaning of enacted indications of purpose, he or she has no objection. But this is a significant concession in light of the argument in

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<sup>198</sup> Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 547–48 (1983) (noting that it is difficult “to aggregate [individual [legislators’ views] into a coherent collective choice”); John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2410–13 (2003) (exploring the issue in terms of interest group theory and social choice theory). See generally Kenneth A. Shepsle, *Congress Is a “They,” Not an “It”: Legislative Intent as Oxymoron*, 12 INT’L REV. L. & ECON. 239 (1992) (describing legislative intent as “meaningless”).

Part II above. Part II sought to show that there is a broad class of statutes—regulatory statutes—for which it is coherent to talk about their purposes, at least as indicated by their text. If a textualist accepts that argument, then the question pivots from whether purpose is coherent to other more practical objections about what other sources come to bear on determining purposes, and how dynamic the understanding of purpose can be.

2. *The Priority of Purpose.*—Even if textualists concede that regulatory statutes include text that establishes the agency’s purpose(s), textualists may still object to prioritizing consistency with purpose among all the considerations that bear on the agency. What gives purpose such a strong hold on the agency’s interpretative calculus? Answering this challenge illuminates fundamental differences between purposivism and textualism.

Statutory text has a very different place for textualists and purposivists. Textualism resolves interpretive issues by seeking to discern the best interpretation of the text within its semantic context. Textualism has an intrinsic interest in statutory text in the sense that it is the exclusive subject and source for interpretation. Purposivism, in contrast, looks to statutory text instrumentally. For purposivists of the legal process strain, the text is the best evidence of statutory purpose as well as a constraint on the scope of permissible interpretations. The text thus informs and establishes outer boundaries, but the text is neither the exclusive source nor exclusive subject of interpretation.

This different orientation to statutory text has implications for how textualists and purposivists engage in reading statutory text. Because textualists focus on statutory text as the exclusive object of interpretation, they have difficulty distinguishing particular portions of a statute as particularly important to understanding the statute. In a sense, because enactedness is what makes the text the object of interpretation for textualists, textualism treats all statutory text uniformly and as equally bearing on the meaning of all other parts of the text. Purposivism has a less catholic approach to text. A basic command of purposivism is to prioritize particular features of the statutory text that establishes the aims of the statute or its provisions and to interpret other provisions in light of those purposes.

So why, then, should an agency follow the purposivist in prioritizing particular features of statutory text as opposed to adopting the more uniform approach to text of the textualist? The reason is that purposivism better fits the basic interpretive circumstances of the agency. To see this, consider the very different models of practical reasoning that textualism and purposivism supply the interpreter. A textualist has a clear practical

directive: Discern the objective public meaning of the words the legislature enacted as best understood in their context.<sup>199</sup> While textualists acknowledge that an agency may consult the purpose as discernible from allowable sources,<sup>200</sup> purpose is, at most, one among many considerations and sources of inference about the meaning of text; it has no particular priority. Purposivists, in contrast, supply the interpreter with a teleological directive: Look to the statute with an eye to determining its purpose, or the purposes of its provisions. The interpreter is then to check prospective constructions that carry forward that purpose with respect to a wide variety of constraints, including whether it is a permissible construction of the text and consistent with background constitutional values and policies. At each step in the interpretive process, the purpose or purposes of the statute guides the choice of interpretive outcome.

These differences in practical reasoning required by purposivism and textualism reveal a critical deficit for textualism as an approach to agency statutory interpretation. While statutory text is certainly the primary interpretive object for agencies, both for discerning purpose and the scope of their powers, textualism does not supply a structure of practical reasoning that fits the agency's circumstances. As noted above, textualism has no intrinsic interest in aims or purposes, whether of the statute as a whole, a statutory title, or a particular provision. Its essential command is the more minimalist one: Heed the meaning of the enacted text. For a court faced with a proposed or actual construction of a statute, this minimalist command provides a workable structure of reasoning for setting the boundaries on what is permissible.

But for an agency or other executive actor, this counsel stops too short; the agency frequently must select a course of action among a range of textually plausible and attractive alternatives. The textualist command to heed the text provides the agency no reason to select among alternatives that are equally plausible under the text. Purposivism does. It provides a criterion for the agent to invoke in selecting a course of action among those that are textually permissible: Further the statute's ends. Developing a conception of the statute's ends and evaluating alternatives in relation to them gives agencies grounds to act nonarbitrarily in exercising discretion. As a result, purposes should have priority for the agency, not only because Congress requires them to, but also because granting them priority supplies an account of practical reasoning that better fits and explains the agency's operational needs to act nonarbitrarily.

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<sup>199</sup> See Manning, *What Divides*, *supra* note 26, at 81.

<sup>200</sup> See *id.* at 78; Nelson, *supra* note 34, at 371.



3. *Discerning Purpose.*—Even if a textualist acknowledges the operational need for an agency to prioritize purpose, a textualist might object that purposes are frequently stated in such broad terms in statutes that they are difficult to discern and specify. More pointedly, the objection is that the statutory statement of purposes or principles is often so broadly stated, or stated in ways that involve contradictions, that specifying what they mean inevitably involves policy choice. The response to these points is two-fold, and draws heavily on the arguments made earlier in this Part. First, there is no reason to think that the task of discerning statutory purposes will be an easy one. Second, to the extent it involves policy choice as part of the elaboration of vaguely worded statutory purposes in the contemporary political milieu, the agency stands in a very different position than a court. A central thrust of the argument in this Part is that agencies have stronger functional capacities than courts to specify broad purposes. Moreover, as also suggested above, agency knowledge of the politics of their statutes, as well as their expertise, means that they are less subject to the error risks that might arise for courts with the task of discerning or specifying a broad and ambiguous statement of purpose or principle.

4. *The Generality Problem.*—One of the strongest objections to purposivism in judicial statutory interpretation is what John Manning has identified as a generality problem. “Giving precedence to semantic context . . . is necessary to enable legislators to set the level of generality at which they wish to express their policies.”<sup>201</sup> To facilitate a statute’s passage, “[l]egislators may compromise on a statute that does not completely address a perceived mischief” or includes exceptions that curtail the statute’s operation.<sup>202</sup> By granting precedence to statutory text, Manning argues that the court has a better chance of implementing the legislative compromise at the level of specificity or generality of the policy compromise. In contrast, “[b]y asking what policy a reasonable person would adopt (rather than how a reasonable person would understand the words),” Manning argues, “purposivist judges make it surpassingly difficult for legislators to bargain over the choice of rules” versus standards or the choice of statutory generality or specificity, in the legislative process.<sup>203</sup>

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<sup>201</sup> Manning, *What Divides*, *supra* note 26, at 99.

<sup>202</sup> *Id.* at 104.

<sup>203</sup> *Id.* at 105.

The generality problem, however, loses much of its force when applied to agency statutory interpretation.<sup>204</sup> When the agency interprets a statute the agency administers, it is interpreting a statute that includes some statement of purpose or principle; as argued in Part II, regulatory statutes must include some such statement—whether as a statement of purpose, the articulation of a standard, or some combination—to be constitutionally valid.<sup>205</sup> For legislation that includes such a statement, purposive interpretation does not face a distinctive generality problem. Both the textualist and the purposivist will need to endeavor to make inferences from the enacted statement of purpose or principle, however general that statement is. But that is not a task or problem that uniquely afflicts either purposivism or textualism—it is just part of the labor of interpretation.

Of course, when a statute's purposes or principles are highly general, one might worry about the capacity of the interpreter to discern or specify its meaning. But that is a separate objection, and indeed, gets to the very point addressed above that agencies are better positioned than courts to make inferences from general purposes.

### C. *Is This Constitutional?*

The suggestion that Congress has specified the basic framework of agency statutory interpretation confronts a constitutional question: May Congress legislate agencies' interpretive methods?

Nicholas Rosenkranz prompted interest in the question of the extent to which Congress does, could, and should prescribe rules of statutory interpretation for the federal courts.<sup>206</sup> Scholars are divided on Congress's constitutional power to dictate the interpretive methods federal courts use in statutory cases. That debate provides a helpful basis for considering the analogous question of Congress's power to set principles of interpretation for agencies.

On the one hand, some view judicial interpretive methodology as equivalent or akin in status to federal common law. "To the extent that the judicial power includes power to develop interpretive rules, that power is a federal common lawmaking power, which a contrary statute may trump."<sup>207</sup> On this view, Congress's Article I powers presumptively include the power to establish such rules, and there is no general separation of powers

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<sup>204</sup> I have previously argued that the generality problem loses force in interpretation of regulations. See Stack, *Interpreting Regulations*, *supra* note 27, at 405–06.

<sup>205</sup> See *supra* text accompanying notes 91–97.

<sup>206</sup> See generally Rosenkranz, *supra* note 13.

<sup>207</sup> *Id.* at 2140. See generally Gluck, *Federal Common Law*, *supra* note 67, at 804–11 (examining implications of viewing federal rules of statutory interpretation as federal common law).

objection based in Article III to prevent Congress from doing so. At most, Congress would face non-Article III constraints on overriding principles of statutory interpretation if, for instance, Congress sought to override constitutionally-inspired clear statement rules.<sup>208</sup> On the other hand, others argue that separation of powers principles reflected in Article III's vesting of the "judicial power" in the Supreme Court and lower courts constrains Congress's power to direct the methods that judges use in deciding statutory cases.<sup>209</sup>

Without resolving this debate, at least as it pertains to the judicial powers under Article III, it is possible to see a relatively clear course for establishing that Congress has the power to direct agencies to implement and interpret their statutes in a purposive manner. Under the Necessary and Proper Clause,<sup>210</sup> it has long been understood that Congress has the power "with respect to the means by which the powers it confers are to be carried into execution."<sup>211</sup> Under this authority, it is well established that Congress may specify the form that agency action is to take (say, rulemaking or adjudication), the procedures that the agency must follow, as well as the standards of review applicable internally within the agency. It is also well established that Congress may specify the factors an agency may or may not consider in making a determination, such as whether it may or must use cost-benefit analysis, or whether it must make decisions on particular timelines, and do so in consultation with particular officials and entities. As Justice Scalia recently wrote on behalf of the Court, both agencies' "power to act and how they are to act is authoritatively prescribed by Congress."<sup>212</sup>

Based on this major premise that Congress has power to dictate how agencies are to act, the argument needs only the minor premise that interpretation falls within that scope. That point seems hardly controversial; as suggested above, the implementation of statutes is shot through with interpretive operations, and interpretation is part and parcel of implementation. Thus, if Congress may specify the details of agency implementation, there is no general objection based on Article II to Congress giving the agency interpretive directions. This is not to say that one could not conceive of some interpretive direction that might violate

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<sup>208</sup> See Rosenkranz, *supra* note 13, at 2140 (analyzing the legal status of principles of interpretation).

<sup>209</sup> See Jellum, *supra* note 65, at 882-90; see also Jonathan T. Molot, *Reexamining Marbury in the Administrative State: A Structural and Institutional Defense of Judicial Power over Statutory Interpretation*, 96 NW. U. L. REV. 1239, 1246 (2002).

<sup>210</sup> U.S. CONST. art. I, § 8, cl. 18.

<sup>211</sup> *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819). The statutes set out in the notes in Part II.A provide nice illustrations. See *supra* notes 90-94.

<sup>212</sup> *City of Arlington v. FCC*, 133 S. Ct. 1863, 1869 (2013).

Article II (say, “interpret the statutes the agency administers exclusively as directed by the congressional committee with jurisdiction over the agency”). But the interpretive direction explicated here—to interpret the statute in a purposive manner—does not run afoul of those boundaries. Moreover, to the extent the interpretive instructions are grounded in a reading of statutes, the power necessary is not the power to prescribe a general method of interpretation for all statutes. It only requires that Congress can direct how regulatory statutes are interpreted.<sup>213</sup>

#### IV. IMPLICATIONS OF AGENCY PURPOSIVISM

Understanding that regulatory statutes oblige agencies to be purposivists, and that agencies have the capacities to meet this obligation, has implications for central issues of administrative law and statutory interpretation. For the judiciary, this understanding points to a reorientation of the framework of judicial review of agency action. For the Executive Branch, this understanding holds implications for the allocation and balance of authority between the President and those agencies or agency officials statutorily vested with power. And for interpretive theory, it suggests a new application for purposivism.

##### A. *Judicial Review of the Purposive Agency*

Doctrines of judicial review of agency action implicitly rely upon a conception of the agency and its role. At one extreme, if agencies are seen primarily as vehicles for decisions based on current political preferences, then judicial review might ask whether the agency action was *ultra vires*, but not otherwise inquire how the agency reached its decision.<sup>214</sup> At the other extreme, if agencies are viewed primarily as technocratic actors, then judicial review might be structured to treat evidence of political influence as a red flag amidst an inquiry into whether the decision reflects sound

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<sup>213</sup> One might also argue on functionalist grounds that the interpretation of federal law is not core to the constitutionally prescribed powers of the Executive Branch to the same extent that it is for the judiciary. If that is correct—and part of my overriding point is that executive branch interpretation is pervasive and unavoidable, so it is not a premise friendly to this underlying approach—then the stakes of congressional prescription of interpretive rules for the Executive Branch does not pose the same constitutional objections as it does for the judiciary. More generally, in view of the well-established power of Congress to structure the execution of the federal law, Congress has substantial authority to prescribe the interpretive approach that agencies pursue in the execution of federal law, outside of those principles of statutory interpretation that might be required by the Constitution.

<sup>214</sup> Early administrative law typically did not police the agent’s exercise of discretion. See Nicholas Bagley, *The Puzzling Presumption of Reviewability*, 127 HARV. L. REV. 1285, 1295–1301 (2014); Merrill, *supra* note 20, at 1001.

technocratic judgment.<sup>215</sup> Scholars have traced these and other conceptions of the agency in current doctrines of judicial review of agency action.<sup>216</sup>

The argument thus far provides grounds for a reorientation in the framework of judicial review of agency action. In particular, it suggests that judicial review should be structured around an understanding of the agency's statutory duties. Based on the premise that regulatory statutes require agencies to implement and interpret them in a purposive manner, the basic question of judicial review might be some formulation of the following inquiry:

*Does the agency's action further the statute's purpose(s) by means allowed by the statute and other law?*

Reviewing courts could organize this basic inquiry around the following issues: (1) the agency's understanding of the statute's purpose(s), (2) the connection the agency has drawn between its actions and those purposes, (3) whether the action is otherwise permitted by existing statutory and constitutional and other law, and (4) whether the action is well-founded in fact.

While this is not the place to offer a full-blown conception of judicial review of agency action, it is worth highlighting how this framework rationalizes current doctrines of review, relates to judicial deference, and connects judicial and agency approaches to statutory interpretation.

*1. Relationship to Current Doctrines.*—It is first worth noting that this purposivist framework of review is consistent with the APA. The APA's provision on the scope of review, § 706, mandates a reviewing court to hold agency action unlawful if it is arbitrary or capricious, an abuse of discretion, or not otherwise in accordance with law, contrary to the Constitution, or in excess of statutory jurisdiction.<sup>217</sup> The purposive framework of review includes all of these inquiries. Determining the statute's purpose(s) involves evaluating questions of law, and assessing the correctness and reasonableness of the agency's specification of statutory purpose(s). Asking about the connection between the agency's account of the statute's purpose and its chosen means is a central element of the arbitrariness review standard. Determining whether the agency's action is

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<sup>215</sup> See Lisa Schultz Bressman, *Deference and Democracy*, 75 GEO. WASH. L. REV. 761, 764 (2007) (exploring ways in which different paradigms of public administration correspond to, and help define, approaches to judicial review).

<sup>216</sup> See, e.g., Sidney Shapiro & Elizabeth Fisher, *Chevron and the Legitimacy of "Expert" Public Administration*, 22 WM. & MARY BILL RTS. J. 465, 476–95 (2013) (exploring roles of rational-instrumental and deliberative-constitutive understandings of public administration in the *Chevron* canon).

<sup>217</sup> See 5 U.S.C. § 706(2)(A)–(C) (2012) (noting these elements of review among others).

otherwise permitted by the statute and the Constitution is also part of assessing whether the agency's action is in accordance with the law and its statutory authority. And finally, determining whether the agency's action has sufficient grounding in fact is part of arbitrariness (and substantial evidence) review.<sup>218</sup> The advantage of the purposivist approach is that it builds these elements into a coherent framework based on the basic statutory duties imposed on agencies.

Just as important, the purposivist framework provides a useful reformulation of the two judicial doctrines that currently organize judicial review—the *Chevron* doctrine and the standard of arbitrariness review frequently associated with *State Farm*. Neither *Chevron* nor *State Farm* take as their ordering inquiry the character of the agency's statutory duty. Under *Chevron*, the ordering issue of judicial review is statutory ambiguity and permissibility,<sup>219</sup> not the agency's duties. If a fundamental statutory requirement of agencies is that they discern a statute's purposes, it makes sense for a reviewing court to focus on reviewing compliance with that duty. *State Farm* comes closer to recognizing the basic, purposive duty of the agency, but it does so in the midst of a compilation of considerations, without any overarching structure or rationale. *State Farm* requires the agency to articulate a "rational connection between the facts found and the choice made."<sup>220</sup> As explained above, this involves assessment of the agency's factual determinations and inferences from those facts, and consideration of alternatives.<sup>221</sup> It also involves the court assessing whether the agency's action comports with the purposes of the statute, including the agency's account of those purposes. What the purposive framework does is organize aspects of the *State Farm* inquiry; the purposivist approach asks reviewing courts to focus first on some of the issues that arise under *State Farm*—the agency's articulation of an aim and a reasonable

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<sup>218</sup> As a point of comparison, the *Chevron* doctrine has a strained relationship with the text of § 706: that section requires the reviewing court to "decide all relevant questions of law," which *Chevron* can be read as defying. See Metzger, *supra* note 123, at 1300–02 (quoting § 706 and noting tension between *Chevron* and the APA's requirements, and suggesting *Chevron*'s status as administrative common law); John F. Duffy, *Administrative Common Law in Judicial Review*, 77 TEX. L. REV. 113, 193–99 (1998). In contrast, as noted above, the basic inquiry into whether the agency's action furthers the statute's purposes within permitted means fits comfortably with the text of § 706. A court cannot judge whether the agency's action is arbitrary or capricious under § 706(2)(A) without an understanding of the basic aims of the statute and whether the agency's actions in fact further those aims. Likewise, asking whether the agency's action is permitted by the statute would appear to be required by the command in § 706(2)(C) that a reviewing court declare unlawful any agency action "in excess of statutory jurisdiction, authority, or limitations." § 706(2)(C).

<sup>219</sup> See *supra* text accompanying note 38 (describing the *Chevron* doctrine).

<sup>220</sup> *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)).

<sup>221</sup> See *id.*

connection to that aim—and then check that action against statutory permissibility. In this regard, the purposivist approach could be seen as suggesting that this rationalized *State Farm* inquiry, not *Chevron*, should provide the organizing framework of judicial review.

2. *Judicial Deference.*—It is worth nothing that the statutory arguments for the agency’s duty to engage in purposive interpretation presented in Part II do not entail taking a position on the level of deference a court would give to an agency’s position. Recognizing that the agency has a statutory duty to implement and interpret its statute in a purposive manner would be consistent with a court reviewing the agency’s action *de novo*. But the inquiry could also be formulated in a deferential way, something like the following: Has the agency *reasonably* interpreted the statute’s purposes, do the agency’s actions have a *rational connection* to those purposes, and are they *not clearly prohibited*? To the extent that the basis for agency purposivism rests only on the formal statutory grounds (as discussed in Part II), other arguments would be necessary to determine how much, if any, deference a court should give the agency. In contrast, to the extent the argument for agency purposivism also requires the institutional competence arguments in Part III, those competence arguments provide reasons why courts should accord a level of deference to the agency. Very roughly, if agencies have greater competence than courts in inferring purposes or determining how best to carry them out, courts should adopt a deferential stance in reviewing the agency’s decisions. In sum, while the statutory argument for agency purposivism may be sufficient for some, and the addition of the institutional competence arguments necessary for others, that choice has implications for whether recognizing agency purposivism also suggests judicial deference to the agency’s actions.

3. *Agency and Judicial Statutory Interpretation.*—Finally, highlighting the statutory grounds of the agency’s duty provides an interesting angle on the relationship between an agency’s and a reviewing court’s approach to statutory interpretation. As Jerry Mashaw has observed, to the extent one emphasizes the distinctiveness of the agency’s approach to statutory interpretation, it is hard to see how there might be genuine deference to the agency.<sup>222</sup> In other words, the suggestion that courts and agencies occupy “parallel universes of interpretive discourse” as Mashaw writes, “seems to undermine the very possibility of an authentically deferential judicial posture,” prompting what he calls a “paradox of

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<sup>222</sup> See Mashaw, *Norms*, *supra* note 3, at 537–38.

deference.”<sup>223</sup> The same fundamental idea operates in Caleb Nelson’s argument that *Chevron* deference does not require that a judge defer to an agency’s choice of interpretive approach with which the judge disagrees (say, a textualist judge reviewing a purposive agency, or a purposive judge reviewing a textualist agency).<sup>224</sup>

One interesting feature of the purposive understanding of the agency is that, within the context of judicial review of agency action, this account narrows the distance between the agency’s approach to statutory interpretation and the judicial approach. Based on the premise that the agency has a statutory duty to engage in a purposive interpretation of the statutes it administers, it would seem to follow that the most basic obligation of the reviewing court is to ascertain whether the agency has validly performed that duty. Put another way, the reviewing court has an obligation (absent some constitutional restriction) to review whether the agency has complied with its statutory duties, which means asking whether the agency’s purposive interpretations are valid.

This has interesting implications for a textualist judge’s review of agency action. If the basis for the agency’s duty to interpret the statute in a purposive manner would be recognized on formal statutory grounds alone (such as those discussed in Part II above), then this approach provides an argument for a textualist judge to approach review of agency action within a purposive framework. Part II argues that an agency has statutory obligations, of a kind a textualist would recognize, to interpret the statutes it administers in a purposive manner. If so, then a textualist judge, no less than a purposivist one, would have an obligation to review the agency’s compliance with its statutory duties—duties to implement and interpret the statute in a purposive manner—so long as there was no constitutional impediment to doing so. This does not imply that the court would be obliged to evaluate these issues in exactly the same way as the agency; the court might, for instance, grant less credence than the agency to a statute’s legislative history. But consideration of the bearing of legislative history would arise within a framework in which the court was evaluating the agency’s reading of the statute’s purposes, the rationality of the agency’s action in light of those purposes, and whether the agency’s action was otherwise permitted. In short, the purposive understanding of the agency’s obligations suggests that reviewing courts are also obliged to review agency action within a purposive framework (unless there is some constitutional reason for not doing so). This does not wholly solve the

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<sup>223</sup> *Id.* at 537.

<sup>224</sup> Nelson, *supra* note 30, at 362–66.



paradox of deference, but goes a significant way toward overcoming it by exposing grounds for the reviewing courts to approach review from the agency's perspective.<sup>225</sup>

To summarize, perhaps because of its superficially appealing two-step formulation, *Chevron* has come to be treated as the ordering or default structure of judicial review. Examination of the character of the agency's duty under regulatory statutes suggests a different orientation, one focused on assessing the validity of the agency's exercise of its basic purposive duty in interpretation and implementation. This approach could be more or less deferential, but its critical feature is that it corrals the reviewing court into examining the validity of agency action from within the framework of the agency's purposive statutory duties.

### B. *The President and the Purposive Agency*

At its core, the purposive understanding offers an account of the statutory power and duties created by regulatory statutes. This account holds implications for the scope of presidential and other political influence over agency action.

Presidents have strong incentives to assert control over agency action. While presidents occasionally distance themselves from agencies by blaming them for missteps,<sup>226</sup> overall presidents cannot avoid the political reality that they are held accountable for the actions of administrative agencies, not just the actions of the Executive Office of the President.<sup>227</sup> These strong incentives have created a host of enduring issues for administrative and constitutional law. The debate centers around the constitutional and statutory scope of the President's appointment and removal powers and the President's powers to review and direct agency actions, the level of disclosure of the President's contacts with agencies, and the bearing of the President's influence on agency action in judicial review.

While it is uncontroversial that the President, by virtue of his appointment power or other means, may—and indeed, should—legitimately influence agency decisions,<sup>228</sup> the critical problem is distinguishing legitimate from illegitimate types of influence. That question

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<sup>225</sup> This provides a statutory grounding for Judge Katzmman's position that courts should understand "the methodology of agency interpretation of statutes." KATZMANN, *supra* note 46, at 27.

<sup>226</sup> Stephenson, *supra* note 45, at 300–01.

<sup>227</sup> See LEWIS, *supra* note 133, at 4.

<sup>228</sup> See *id.* at 23.

turns in part, as Nina Mendelson writes, on the content of the influence.<sup>229</sup> At the extreme, as Kathryn Watts observes, purely partisan considerations stand on a very different footing than presidential inputs which “seek to implement policy considerations or value judgments tied in some sense to the statutory scheme being implemented.”<sup>230</sup>

Fundamentally, what counts as a legitimate or illegitimate influence depends on the character of the agency’s statutory duty. In other words, whether political factors are legitimate or not will depend in part on what the agency is obliged to do. If an agency were merely vested to make a decision with no guiding criteria, then presumably a wide range of political influences would have a legitimate place for the agency.<sup>231</sup> Indeed, a statute structured that way might be seen as designed to foreground political preferences. But the same does not hold when a statute specifies a hierarchy of decisional factors, findings, and aims.

The purposive reading of regulatory statutes provides an account of the duty they impose on agencies. At a basic level, the purposive account requires that the agency’s action further, and be rationalized in terms of the statute’s aims. As argued in Part II, that duty is rooted in the obligations the statute imposes, and does not depend upon the actor who asserts power under the statute. In other words, those duties apply to the officials within the agency to whom powers are subdelegated, as well as to a President asserting the agency’s statutory authority (when that is permitted). Accordingly, the purposive account gives an answer to the type of influence upon which the agency may legitimately rely: The agency may legitimately rely on the President’s views regarding the best reading of the statute’s purposes, the factors the agency may consider, the means the statute permits, as well as how the statute is best implemented. Put another way, the President’s views are a legitimate influence so long as they reflect a view of how the statute is best read in context. What this disallows is purely political justifications for action and unreasoned justifications (“[t]he President said so”<sup>232</sup>) or value-based justifications that do not follow from the factors or purposes of the statute.

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<sup>229</sup> Nina A. Mendelson, *Disclosing “Political” Oversight of Agency Decision Making*, 108 MICH. L. REV. 1127, 1141 (2010).

<sup>230</sup> Kathryn A. Watts, *Proposing a Place for Politics in Arbitrary and Capricious Review*, 119 YALE L.J. 2, 56 (2009).

<sup>231</sup> See *Dalton v. Specter*, 511 U.S. 462, 476 (1994) (noting that the Defense Base Closure and Realignment Act of 1990, Pub. L. 101-510, § 2903(e), 104 Stat. 1808, 1812 (1990), codified at 10 U.S.C. § 2687 note (2012), “does not at all limit the President’s discretion” to accept or reject the Commission’s recommendation).

<sup>232</sup> Mendelson, *supra* note 229, at 1176.

It is important to note that simply specifying what type of influence is legitimate does not imply that the agency is legally obliged to follow the President's directives. The question of what content is legitimate is distinct from the question of whether the President has authority to direct the agency's actions. The content of the President's directive could be legitimate, but the agency could have no obligation to follow the President's view; likewise, the content could be illegitimate, even if the agency has an obligation to follow (legitimate) presidential direction. The question of the scope of the President's authority to direct agency action is an issue for which there is a robust debate on both constitutional and statutory dimensions.<sup>233</sup> The point here is that the purposive account identifies the duties regulatory statutes impose, and thus what counts as a legitimate influence, without answering the separate question of allocation of authority between the agency and the President.

By clarifying that the grounds of the agency's interpretive obligations are statutory, the purposive account highlights the limits on the President's powers to override this approach. While this is not the place for a complete analysis of the scope of the President's autonomous constitutional powers in relation to Congress's powers to structure the government, it should at least be clear that a statutory foundation for the agency's interpretive approach, as opposed to merely a prudential or policy basis, dramatically restricts the power of the President to alter it. The President may still have some residual constitutional power to defy the ways in which Congress has structured the Executive Branch,<sup>234</sup> but in the main, the President must abide by Congress's choices about how agency authority is structured. Accordingly, the President will generally not have power to order an administrative agency to defy its duty to purposively implement the statutes it administers.

### *C. The Law–Politics Distinction in the Administrative State*

The purposive understanding can also be viewed as offering a more general account of the relationship between law and politics in the administrative state. A common conception is that law in a regulatory statute creates a zone of discretion, a range of permissible actions, but does not necessarily or often have anything to say about decisionmaking within

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<sup>233</sup> For an overview, see Nina A. Mendelson, *Another Word on the President's Statutory Authority over Agency Action*, 79 *FORDHAM L. REV.* 2455 (2011), Stack, *Statutory Powers*, *supra* note 176, at 274, and Peter L. Strauss, *Foreword: Overseer, or "the Decider"? The President in Administrative Law*, 75 *GEO. WASH. L. REV.* 696 (2007) [hereinafter Strauss, *Overseer*].

<sup>234</sup> See, e.g., *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 492 (2010) (declaring dual layer of for-cause protection an unconstitutional infringement on the President's executive power).

that zone. On this common view, “law” in the administrative state shares the binary qualities of judicial judgments in which criminal and civil liability is a yes-or-no conclusion, but fades from view thereafter; the decision is understood to be one of pure discretion,<sup>235</sup> to which the actors are only accountable in their political capacities. This view invites a highly political, indeed politicized, conception of the operation of administrative government. This conception of the law–politics distinction is also reflected in the reformist impulse to design discretion out of administrative government. If law leaves the agency with a zone of pure discretion, the thought is we need more “law” to confine that zone.

As suggested above, the purposive account of agency statutory interpretation conceives of the relationship between law and politics differently. To be sure, one function of law and legal considerations is to identify the scope of the agency’s powers. But, on the purposive view of interpretation, there is necessarily a continuing role for legal considerations within the zone of those actions that are within the agency’s powers. Purposive reasoning has a teleological form in the sense that it obliges the agency to carry forward the ends established by statute. As a result, on a purposive account, “law” has just as much to say about decisionmaking within a zone of authorized actions as it does about how to identify that zone. The policy or purpose of the statute remains the guide to the agency’s action all the way to its completion, and accordingly, legitimate presidential (or other political) influence must be offered as a reading of what the statute seeks to achieve.

This is not to deny that occasionally statutes do vest pure discretion in agencies to make up-or-down decisions without any criteria; but such statutory schemes are the exception, not the rule. And within that general rule, law not only prohibits but guides the agency’s practical reasoning.

#### *D. The Promise of Purposivism*

In the last few years, scholars have shown renewed interest in the promise of purposivism. This “new,”<sup>236</sup> “structured,”<sup>237</sup> or textually constrained<sup>238</sup> purposivism departs from traditional applications by giving more prominence to authoritative textual sources. Purposivism had been associated with allegiance to implementing a statute’s highest-level purposes, even if that meant an undisciplined approach to complying with

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<sup>235</sup> As Peter Strauss emphasizes with all caps to capture his intonation, “DISCRETION!” See Strauss, *Overseer*, *supra* note 233, at 708–09.

<sup>236</sup> See Manning, *New Purposivism*, *supra* note 27.

<sup>237</sup> See Gluck, *Laboratories*, *supra* note 14, at 1842–43.

<sup>238</sup> Stack, *Interpreting Regulations*, *supra* note 27, at 409.

the limits established by statutory text.<sup>239</sup> The renewed accounts of purposivism, in contrast, take as a fixed premise the idea that the text establishes the boundaries for permissible interpretations.

Regarding statutory interpretation by the Supreme Court, for instance, John Manning argues that a recent set of decisions suggests a new convergence on a textually constrained form of purposivism.<sup>240</sup> In this new strain of purposivism that Manning finds, the Court attends carefully to the level of generality of the text. On the one hand, this means implementing choices directed by precise statutory text even if they conflict with the overall purpose of the statute.<sup>241</sup> On the other hand, this approach still permits consulting broader purposes where the language itself is more general.<sup>242</sup> Either way, these new purposivist opinions take text as a critical limit on when and in what way inferences about the purpose of the statute may be drawn.<sup>243</sup> In a similar vein, Abbe Gluck identifies interpretive practices in state courts that allow for the consideration of purpose and legislative history, but only where the statutory text is unclear.<sup>244</sup> While Gluck classifies these approaches as textualist, as she notes, they could just as well be associated with purposivism.<sup>245</sup> In other work, I have argued that the interpretation of regulations should be purposivist of a textually constrained variety, restricting the interpretation to remain consistent with the purposes the agency establishes both in the text of the regulation and its authoritative accompanying statement, the statement of basis and purpose.<sup>246</sup> By asking what interpretations are both permitted by the regulation's text and consistent with its purposes, there is greater notice of the regulation's meaning than merely asking what interpretations the regulatory text permits.

These readings have firm roots in Hart and Sacks.<sup>247</sup> Recall that Hart and Sacks take as a fixed principle that the interpreter "ought never to give

<sup>239</sup> Manning, *New Purposivism*, *supra* note 27, at 121–23.

<sup>240</sup> *Id.* at 146.

<sup>241</sup> *See id.* at 132–37 (discussing Justice Kagan's opinion of the Court in *Milner v. Dep't of the Navy*, 131 S. Ct. 1259 (2011)).

<sup>242</sup> *See id.* at 137–41 (discussing Justice Kagan's opinion of the Court in *Fox v. Vice*, 131 S. Ct. 2205 (2011)).

<sup>243</sup> *See id.* at 146.

<sup>244</sup> Gluck, *Laboratories*, *supra* note 14, at 1829–32 (summarizing the components of modified textualism, which she documents in state courts).

<sup>245</sup> *See id.* at 1842–43.

<sup>246</sup> *See Stack, Interpreting Regulations*, *supra* note 27, at 409.

<sup>247</sup> For two arguments for the roots of this strain in Hart and Sacks, see Manning, *New Purposivism*, *supra* note 27, at 148–80, and Stack, *Interpreting Regulations*, *supra* note 27, at 389–90.

the words of a statute a meaning they will not bear."<sup>248</sup> Hart and Sacks's commitment to statutory text follows from one of the two core premises of their theory: their principle of institutional settlement.<sup>249</sup>

The purposive approach to agency statutory interpretation defended in this Article shares the same premises. It starts from the recognition that a wider class of statutes than previously appreciated includes textually indicated purposes—namely, regulatory statutes. It then emphasizes that agencies have a duty to heed those purposes and structure their activities in relation to them. The result is to shift the debate away from the question of whether purposes exist in regulatory statutes to the hard work of specifying statutory purposes and translating them into applications consistent with the means permitted. That is agencies' work—and also the work for renewed purposivism.<sup>250</sup>

#### CONCLUSION

Theories may almost always arrive late,<sup>251</sup> but the theory of agency statutory interpretation has been especially tardy. After decades of debate have focused on how courts interpret statutes, attention is turning to agencies, the first and frequently final interpreters of statutes. This Article contributes to this examination by defending a theory of agency statutory interpretation. That theory begins with a simple suggestion: Given how comprehensively regulatory statutes structure the manner in which agencies act, it makes sense to examine whether regulatory statutes provide interpretive direction to agencies.

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<sup>248</sup> HART & SACKS, *supra* note 12, at 1375.

<sup>249</sup> HART & SACKS, *supra* note 12, at 4; Manning, *New Purposivism*, *supra* note 27, at 154; Stack, *Interpreting Regulations*, *supra* note 27, at 389; *see also supra* text accompanying note 177 (discussing the principle).

<sup>250</sup> Interestingly, this approach also has the potential to influence the interpretation of regulatory legislation in a public-regarding way. Jonathan Macey argued in a celebrated article that the articulated purposes of statutes, even of special interest statutes, almost always have a public-regarding gloss. *See* Jonathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223, 251 (1986). The primary reason is that it is less costly to interest groups to obtain passage of special interest legislation with such a public-regarding gloss. *See id.*; *see also* SUSAN ROSE-ACKERMAN, *RETHINKING THE PROGRESSIVE AGENDA: THE REFORM OF THE AMERICAN REGULATORY STATE 44–56* (1992) (arguing for judicial enforcement of the requirement that legislation states purposes). The conclusions of this Article have obvious relevance for their line of thought. If (1) regulatory statutes should be understood as having enacted purposes and (2) agencies are viewed as obliged to pursue those purposes, as argued above, then agencies will be obliged to interpret them in accordance with their purposes. Doing so—reading statutes in light of their articulated purposes—is likely to lead agencies to implement them in more public-regarding ways. Agency purposivism thus not only clarifies the character of an agency's duty under statute, but also holds promise for combating one of the oldest problems of our Republic, the influence of faction.

<sup>251</sup> Leslie Green, *The Concept of Law Revisited*, 94 MICH. L. REV. 1687, 1715 (1996) ("Everyone admits that the theories arrive late . . .").

That examination is revealing. It shows that regulatory statutes impose distinctive obligations on administrative agencies to carry forward the powers granted in light of the purposes or principles the statutes establish. To implement that basic obligation, agencies must adopt a structure of practical reasoning in which they specify the statute's purposes, evaluate alternatives in relation to those purposes, and select an alternative that, other things equal, best carries forward those purposes. That structure of reasoning is purposivist, not textualist. Moreover, this Article argues agencies are particularly well-equipped institutions to perform these tasks required by a purposive structure of interpretation.

Understanding agencies as purposive interpreters reorients judicial review and political control of agency action. This approach exposes that agencies are obliged to pursue statutory purposes within the space of otherwise permitted actions. As a result, the basic obligation of a reviewing court is to ask whether the agency has correctly or reasonably specified the statute's purposes and chosen reasonable means of pursuing those ends, not to inquire whether a statute is ambiguous on a particular issue. While there are footholds for incorporating this approach into existing doctrines, it represents a significant simplification and reordering of current standards of judicial review of agency action. By giving an account of the agency's legal duties of implementation, this theory also informs the debate about the scope of presidential and other political influence over agencies. In particular, if the agency is bound to make choices in light of statutory ends, then presidential influence over the agency is valid only when expressed in those terms. Finally, interpretation within the agency reveals an important instance in which law serves as a source of guidance about ends, not merely a set of constraints. While we might have misgivings about courts embracing a form of interpretive perfectionism, it defines the task of agencies.

