

A LEAST BAD APPROACH FOR INTERPRETING ESA STEALTH PROVISIONS

MADLINE JUNE KASS*

ABSTRACT

Scholars have come to recognize the existence of certain stealth-like provisions neatly tucked within the text of the federal Endangered Species Act (“ESA”). At the time of enactment, these provisions—if not invisible to Congress—appeared at most innocuous or insignificant. As originally written, section 7 of the ESA constitutes one such stealth provision. Inconspicuously titled “Interagency cooperation,”¹ the provision seemed little more than a humble procedural hoop to agency action. Judicial statutory interpretation, however, clarified that this seemingly docile procedural requirement in fact contained a formidable substantive mandate of the Act. A second stealth provision resides in section 8a of the ESA. Modestly titled “Convention implementation,”² the name suggests little more than administrative direction. However, closer inspection reveals that the provision potentially packs more than procedural minutia. With escalating species losses worldwide, there seems little doubt that future litigants will look to apply this provision in aid of biodiversity protection and species conservation. At such time, the federal courts will be forced to grapple, yet again, with the interpretive dilemma of an ESA stealth provision. This Article sets out an approach for how ESA stealth provisions might be interpreted to achieve principled outcomes in such situations.

* Assistant Professor of Law, Thomas Jefferson School of Law. I am grateful to Teresa Salamone and JoAnne Dunec, editors of *NATURAL RESOURCES & ENVIRONMENT*, and to Professor Robert Whitman for their valuable input.

¹ 16 U.S.C. § 1536 (2000).

² *Id.* § 1537a.

INTRODUCTION

*'When I use a word,' Humpty Dumpty said, in rather a scornful tone, 'it means just what I choose it to mean—neither more nor less.'*³

Scholars have come to recognize the existence of stealth provisions neatly tucked within the text of the federal Endangered Species Act⁴ (“ESA”). By “stealth” provisions, I mean something akin to “sleepers”—legislative provisions that garner little congressional or public attention at the time of enactment, but achieve importance in response to either subsequent strategic litigation initiatives⁵ or with application to seemingly new or previously unidentified environmental problems.⁶ With stealth provisions, however, I intend a particular subset of sleepers—provisions strategically inserted to empower future litigants and yet fall below congressional radar. At the time of enactment, these provisions—if not invisible to Congress—appear at most innocuous or insignificant.⁷

³ *TVA v. Hill*, 437 U.S. 153, 174 n.18 (1978)(quoting Lewis Carroll, *Through the Looking Glass*, in *THE COMPLETE WORKS OF LEWIS CARROLL* 196 (1939)).

⁴ Pub. L. No. 93-205, 87 Stat. 884 (1973) (codified as amended at 16 U.S.C. §§ 1531-1544 (2000)).

⁵ Examples of these types of sleeper provisions are the total maximum daily load (“TMDL”) provisions in section 303(d) of the Clean Water Act (“CWA”), 33 U.S.C. § 1313(d) (2000). Section 303 of the CWA garnered scant attention in Congress at adoption, but took on significance after a barrage of citizen lawsuits. See Erin Tobin, Pronsolino v. Nastri: *Are TMDLs for Nonpoint Sources the Key to Controlling the “Unregulated” Half of Water Pollution?*, 33 ENVTL. L. 807, 813 (2003); Oliver A. Houck, *The Clean Water Act TMDL Program V: Aftershock and Prelude*, 32 Env'tl. L. Rep. (Env'tl. Law Inst.) 10,385, 10,405 (2002).

⁶ An example of this type of sleeper provision is section 13 of the Rivers and Harbors Act of 1899 (“RHA”), 33 U.S.C. § 407 (2000). Section 13 of the RHA began as a seemingly narrow regulation for addressing navigational obstructions, but came to be used more expansively for the regulation of water pollution. See ROBIN KUNDIS CRAIG, *THE CLEAN WATER ACT AND THE CONSTITUTION: LEGAL STRUCTURE AND THE PUBLIC'S RIGHT TO A CLEAN AND HEALTHY ENVIRONMENT* 10-12 (2004); William H. Rodgers, Jr., *Industrial Water Pollution and the Refuse Act: A Second Chance For Water Quality*, 119 U. PA. L. REV. 761, 766-77 (1971).

⁷ The idea that stealth provisions might be hidden away within the “nooks and crannies” of the act is not a novel one. Zygmunt J.B. Plater, *Endangered Species Act Lessons Over 30 Years, and the Legacy of the Snail Darter, a Small Fish in a Pork Barrel*, 34 ENVTL. L. 289, 292 (2004).

As originally written, section 7 of the ESA constituted one such stealth provision. Inconspicuously titled “Interagency cooperation,”⁸ the provision seemed little more than a humble procedural hoop to agency action. Judicial statutory interpretation, however, quickly clarified (or transformed, depending on your perspective) that the seemingly docile procedural requirement in fact contained a formidable substantive mandate of the Act. This provision is more commonly, and perhaps more appropriately, referred to as the “no jeopardy” provision,⁹ and even as amended retains substantive bite.

A second stealth provision resides in section 8a of the ESA. Modestly titled “Convention implementation,”¹⁰ the name suggests little more than administrative direction. However, closer inspection reveals that the provision potentially packs more than procedural minutia. Consequently, it seems likely that future litigants will seek to rouse this provision in aid of biodiversity and species conservation.¹¹ At such time, the federal courts will be forced to grapple, yet again, with the scope and meaning of an ESA stealth provision.

My objective here is to identify an approach to statutory interpretation of such ESA stealth provisions worthy of application in these endeavors—an interpretive approach that allows rational and just results or at least avoids perverse pernicious ones. Towards this goal, Part I of this Article reviews prevailing approaches to statutory interpretation along with some basic critiques of ESA, as background to discussion in the later parts of the Article. Parts III and IV, respectively, discuss specific interpretative approaches taken with respect to the ESA’s “no jeopardy” stealth provision and provide some observations about how other ESA stealth provisions might be interpreted to achieve principled outcomes.

⁸ 16 U.S.C. § 1536 (2000).

⁹ See, e.g., J.B. Ruhl, *Is the Endangered Species Act Eco-pragmatic?*, 87 MINN. L. REV. 885, 910, 913 (2002).

¹⁰ 16 U.S.C. § 1537a (2000).

¹¹ As one commentator notes: “Despite the fact that the international provisions of the ESA are little known and underused, they continue to be a vital part of the act. Although long in the background of endangered species efforts in this country, the international provisions of the act are bound to increase in importance.” Carlon A. Balistrieri, *International Aspects of the Endangered Species Act*, in *ENDANGERED SPECIES ACT: LAW, POLICY, AND PERSPECTIVES* 485, 499 (Donald C. Baur & Wm. Robert Irvin eds., 2002).

I. PREVAILING THEORIES OF STATUTORY INTERPRETATION

Academics have advanced more than a few theoretical explanations as to how federal courts ought to and actually do interpret statutes.¹² Although no one theory prevails,¹³ the three predominant statutory interpretation approaches embrace legislative intent, textual meaning, and dynamic assessment to construe statutory provisions.¹⁴ In the administrative context, often at play in environmental and natural resource cases, courts explicitly overlay a fourth interpretive approach for resolving statutory ambiguity: deference to administrative agency interpretations.¹⁵ This section briefly describes each of these statutory interpretation approaches, their theoretical underpinnings, and their respective deficiencies.¹⁶

¹² In fact, Professor Eskridge notes that theories of statutory interpretation have “blossomed like dandelions in spring.” WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 1 (1994) [hereinafter ESKRIDGE, DYNAMIC STATUTORY INTERPRETATION 1994]. In sync with the dandelion hypothesis, Professor Mullins surmises that “[i]f anything, we have today a surplus of theories.” Morell E. Mullins, Sr., *Tools, Not Rules: The Heuristic Nature of Statutory Interpretation*, 30 J. LEGIS. 1, 16 (2003). Professor Mullins lists, among others theories, originalism, intentionalism, modified intentionalism, imaginative reconstruction, purposivism, textualism, new textualism, structural textualism, pragmatic textualism, radical textualism, sympathetic textualism, dynamic statutory interpretation, and practical reasoning. *Id.* at 17-18, 22.

¹³ Mullins, *supra* note 12, at 19 (“[N]o single theory has yet achieved consensus among academics or the courts.”).

¹⁴ WILLIAM N. ESKRIDGE, JR. ET AL., LEGISLATION AND STATUTORY INTERPRETATION 211 (2d ed. 2006) [hereinafter ESKRIDGE ET AL., LEGISLATION AND STATUTORY INTERPRETATION].

¹⁵ Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 444-46 (1989) [hereinafter Sunstein, *Interpreting Statutes*].

¹⁶ Apart from, yet related to, the *how to* problems of statutory interpretation, the very notion of legal interpretation is subject to *what is it* problems. Accordingly, Richard Posner asserts that activity of interpretation is “a chameleon” limited in usefulness by its ambiguity. RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 271 (1990). Posner argues that:

A word of broad, even indefinite, meaning, interpretation can mean as little as working within a tradition, as opposed to taking a God’s-eye view of things. It can signify even less: it can function merely as a reminder that our understanding of ‘the world’ is mediated, perhaps even constituted, by language. It is the latest in a long, long list of words abused by lawyers.

Id. at 247. Is *interpretation* merely synonymous with explanation, a determination of meaning similar to translation, a decision procedure, the completion of a command, and/or a form of self-expression, or a “search for legislative meaning in the context of the particular question before the court?” ABNER J. MIKVA & ERIC LANE, AN INTRODUCTION TO STATUTORY INTERPRETATION AND THE LEGISLATIVE PROCESS 6 (1997). To some extent, this Article considers both the *what is it* and the *how to* question.

A. *Legislative Intent*

Intentionalist interpreters seek to “discover or replicate the legislature’s original intent as the answer to an interpretive question.”¹⁷ According to William Blackstone, interpretation seeks to uncover the “will of the legislator . . . by exploring his intentions” as manifested in “signs the most natural and probable.”¹⁸ The intentionalist approach posits that legislative intent represents the object and touchstone of statutory interpretation¹⁹ and sees courts as mere agents of the legislature.²⁰ In pursuit of the holy grail of original intent, intentionalists may rely on a specific intent approach (what were the original legislators’ actual beliefs regarding the provision),²¹ an imaginative reconstruction approach (what would the original legislators have decided had they considered the issue),²² and/or purposivism (consistency with the original legislators’ general objective or purpose for enacting the legislation).²³ Intentionalists typically examine and give weight to a statute’s text in combination with its context and background.²⁴

The cachet of legislative intent approaches rests on their democratic appeal. As succinctly described by Professor Eskridge, “[i]f the legislature is the primary lawmaker and interpreters are its agents, then requiring interpreters to follow the legislature’s intentions constrains their

¹⁷ ESKRIDGE, DYNAMIC STATUTORY INTERPRETATION 1994, *supra* note 12, at 14.

¹⁸ WILLIAM BLACKSTONE, 1 COMMENTARIES *1 (emphasis omitted).

¹⁹ See ESKRIDGE, DYNAMIC STATUTORY INTERPRETATION 1994, *supra* note 12, at 14 (citing NORMAN J. SINGER, STATUTES AND STATUTORY CONSTRUCTION § 45.05 (5th ed.1984)); RICHARD A. POSNER, THE FEDERAL COURTS: CRISIS AND REFORM 286-93 (1985). Professor Stanley Fish puts it this way: “Think about it: if interpreting a document is to be a rational act, if its exercise is to have a goal . . . , then it must have an object to aim at, and the only candidate for that object is the author’s intention.” Stanley Fish, Op-Ed., *Intentional Neglect*, N.Y. TIMES, July 19, 2005, at A25.

²⁰ See Sunstein, *Interpreting Statutes*, *supra* note 15, at 415. But Sunstein has also suggested that such sentiments, particularly with respect to Blackstone’s thinking, may merely reflect a “ceremonial bow” to legislative supremacy. Cass R. Sunstein & Adrian Vermeule, *Interpretation and Institutions*, 101 MICH. L. REV. 885, 891 (2003).

²¹ ESKRIDGE, DYNAMIC STATUTORY INTERPRETATION 1994, *supra* note 12, at 16 (“The meaning colloquially suggested by the invocation of legislative intent is the actual intentions of the legislative coalition that enacted the statute.”).

²² *Id.* at 22; POSNER, *supra* note 16, at 273.

²³ ESKRIDGE, DYNAMIC STATUTORY INTERPRETATION 1994, *supra* note 12, at 25-26.

²⁴ Bradford C. Mank, *Textualism’s Selective Canons of Statutory Construction: Reinvigorating Individual Liberties, Legislative Authority, and Deference to Executive Agencies*, 86 KY. L.J. 527, 529 (1997-98); see also Sunstein, *Interpreting Statutes*, *supra* note 15, at 424.

choices and advances democracy by carrying out the will of the elected legislators.”²⁵ Simply put, the intentionalist approaches fit (or appear to fit) the basic conception of our representative tri-partite democracy: Congress makes laws, the Executive implements the laws, and the Judiciary interprets the laws.

Disenchantment with the legislative intent approaches stems both from pragmatic and theoretical considerations. Critics condemn the pursuit of specific intent as unknowable or unreliable because legislators have no shared intent;²⁶ because such shared intent, if it exists at all, is not readily discoverable; because the legislative history that does exist is too readily manipulated by strategic behavior;²⁷ and because judges might simply get it wrong.²⁸ Similar concerns plague the more ambitious, imaginative reconstruction approach, which by its very nature is more indeterminate than actual intent, and, therefore, susceptible to derision as “more ‘imaginative’ than ‘reconstructive’”²⁹ and more prone to judicial policymaking than to objective evaluation.³⁰

²⁵ ESKRIDGE, DYNAMIC STATUTORY INTERPRETATION 1994, *supra* note 12, at 14.

²⁶ See, e.g., Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 547 (1983) (“Because legislatures comprise many members, they do not have ‘intents’ or ‘designs,’ hidden yet discoverable. Each member may or may not have a design. The body as a whole, however, has only outcomes.”); Daniel A. Farber, *Statutory Interpretation and Legislative Supremacy*, 78 GEO. L.J. 281, 290 (1989) (“The idea of legislative intent . . . is notoriously slippery. If it is taken to require that a majority of the legislators share the same subjective view of the statute, the condition will rarely be met.”); Mullins, *supra* note 12, at 25 (“‘Intention’ strongly connotes a state of mind. This makes any theory christened ‘intentionalism’ vulnerable to criticisms that conglomerate legislative bodies do not have ‘intentions.’”).

²⁷ ESKRIDGE, DYNAMIC STATUTORY INTERPRETATION 1994, *supra* note 12, at 16.

²⁸ See Sunstein & Vermeule, *supra* note 20, at 892 (noting that common law intentionalism and purposivism “show remarkably little awareness of several relevant possibilities” including, among others, “that judges might mistake legislative purposes”).

²⁹ ESKRIDGE, DYNAMIC STATUTORY INTERPRETATION 1994, *supra* note 12, at 23. See Easterbrook, *supra* note 26, at 537 (“If the question of a statute’s domain may not often be resolved by reference to actual design, it may never properly be resolved by reference to imputed design.”); POSNER, *supra* note 16, at 273-76 (noting that imaginative reconstruction imposes upon the interpreter the “impossible task” of imagining how persons differently historically situated and with different values (e.g., differences in “training, upbringing, and experiences”) would decide a question if they knew what the interpreter knows now, and how in doing so, the interpreter changes the original legislators into different people: ourselves).

³⁰ See POSNER, *supra* note 16, at 273-74 (noting that the risk of imaginative reconstruction “is that of making a statute appear to say what the judges think it ought to say”).

Another criticism of legislative intentionalism objects to its static nature. By exclusively focusing on the particular intent of the enacting legislature, the interpreter fixes statutory interpretation to a single moment in history,³¹ regardless of interim scientific advancements, new or unforeseen ecological events, or sociopolitical realignments. To combat concerns of stagnancy and purposivism, the third legislative intent approach³² adopts a more robust, evolutionary strategy. As described by Henry Hart and Albert Sacks, interpretation involves deciding “what purpose ought to be attributed to the statute and to any subordinate provision of it which may be involved” and interpreting “the words of the statute . . . in question so as to carry out the purpose as best it can.”³³ Purposivism allows the interpreter to identify the general purpose of the statute and then choose the specific interpretation most consistent with that purpose.³⁴ “Purposivism is an attractive alternative to intentionalism because it allows a statute to *evolve* to meet new problems while ensuring legitimacy by tying interpretation to original legislative expectations.”³⁵

Nevertheless, purposivism remains burdened with some of the same pragmatic considerations as other legislative intent approaches. Critics assert that, just as uncovering specific intent may not be realistically achievable, so too the interpreter’s search for a unifying statutory objective or goal may be akin to searching for the holy grail:

Even if there is agreement as to which purpose should be attributed to a statute, the analysis in the hard cases must still be indeterminate. An attributed policy purpose is too general and malleable to yield interpretive closure in spe-

³¹ ESKRIDGE, DYNAMIC STATUTORY INTERPRETATION 1994, *supra* note 12, at 9-10.

³² Although I discuss purposivism as a subcategory of intentionalism, purposivism may equally be classified as a stand-alone foundational theory of statutory interpretation apart from intentionalism. See Mank, *supra* note 24, at 529.

³³ HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 1374 (William N. Eskridge, Jr. & Philip P. Frickey eds., Foundation Press 1994) (1958).

³⁴ The interpreter finds the statute’s purpose by “comparing the new law with the old” and asking whether reasonable persons, “confronted with the law as it was, [would] have enacted this new law to replace it[.]” *Id.* at 1378.

³⁵ ESKRIDGE, DYNAMIC STATUTORY INTERPRETATION 1994, *supra* note 12, at 26 (emphasis added). Arguably, purposivism goes beyond intentionalism by moving from legislative intentions to legislative expectations. See Mank, *supra* note 24, at 529.

cific cases, for its application depends on context and the interpreter's perspective.³⁶

Yet another argument against purposivism, along these same lines, contends that the presence of political compromise in statutory drafting "makes the discernment of purpose difficult and often impossible."³⁷ Lastly, there is the problem that judicial discretion in characterization of judicial purposes will be inappropriately affected by political or ideological leanings of judges.³⁸

In sum, some scholars maintain that "the purposes behind rules can usually, although not always, be discovered, and once discovered they provide reliable guidance in applying the rule to a new situation,"³⁹ while others remain concerned that a statute's attributed general purpose may simply be too general (squishy, indeterminate, and vague) to adequately constrain the interpreter's preferences to original legislative (majority-based) preferences.⁴⁰

B. *Textualism*

Another statutory interpretation approach rejects legislative intent as the focal point of statutory interpretation and, instead, opts for textualism. Textualism starts with, relies on, and frequently ends with, the language of the statute itself to determine meaning. Interpretation emphasizes the text itself, and its advocates look to dictionary meanings, grammatical rules, canons of interpretation,

³⁶ ESKRIDGE, DYNAMIC STATUTORY INTERPRETATION 1994, *supra* note 12, at 29. Professor Eskridge posits that purposivism shares the same theoretical vulnerabilities as other theories of intentionalism: "purposivism cannot connect its results with original legislative expectations because it has no robust positive theory of enacting coalitions." *Id.* at 31-32.

³⁷ POSNER, *supra* note 16, at 278. A reciprocal criticism posits that reliance on purposivism can too easily undo legislatively-fought and strategically-entered compromises. *Id.* at 276-77; *see also* Rodriguez v. United States, 480 U.S. 523, 526 (1987) ("[I]t frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law."). According to Professor Posner, the alternative to both arguments would enforce the legislative deal contained within the statute, an alternative rife with its own difficulties. POSNER, *supra* note 16, at 277-78.

³⁸ *See* Sunstein & Vermeule, *supra* note 20, at 901.

³⁹ POSNER, *supra* note 16, at 255.

⁴⁰ *See* ESKRIDGE, DYNAMIC STATUTORY INTERPRETATION 1994, *supra* note 12, at 32 (stating that "purposivism founders on the unwieldy generality of its questions."); Sunstein & Vermeule, *supra* note 20, at 901.

and consistency with other provisions within the statute as their interpretive guides.⁴¹

Textualists tend to fall within one of two camps: soft and hard plain meaning advocates (or textualists and new textualists).⁴² Those who simply start with the language of the statute, but may go on to consider other types of evidence, including legislative history, represent soft plain meaning textualists. Justice Day, writing the majority opinion in *Caminetti v. United States*, explained:

It is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, and if the law is within the constitutional authority of the law-making body which passed it, the sole function of the courts is to enforce it according to its terms.⁴³

Nevertheless, Justice Day allowed—albeit somewhat hesitantly—that extrinsic evidence may at times be considered and that even plain language may at times be rejected:

Reports to Congress accompanying the introduction of proposed laws may aid the courts in reaching the true meaning of the legislature in cases of doubtful interpretation. But, as we have already said, and it has been so often affirmed as to become a recognized rule, when words are free from doubt they must be taken as the final expression of the legislative intent In other words, the language being plain, and not leading to absurd or wholly impracti-

⁴¹ See Mullins, *supra* note 12, at 21.

⁴² See ESKRIDGE ET AL., LEGISLATION AND STATUTORY INTERPRETATION, *supra* note 14, at 223-30. Textualists of both camps apply the “plain meaning rule.” Plain meaning advocates ask “given the ordinary meanings of words and accepted precepts of grammar and syntax, what does the provision signify to the reasonable person?” ESKRIDGE, DYNAMIC STATUTORY INTERPRETATION 1994, *supra* note 12, at 38. A close cousin of the plain meaning rule is Justice Holmes’s “normal English speaker” test. Under the Holmes test the interpreter asks “not what [the author] meant, but what those words would mean in the mouth of a normal speaker of English, using them in the circumstances in which they were used.” Oliver Wendell Holmes, *The Theory of Legal Interpretation*, 12 HARV L. REV. 417, 417-18 (1899).

In addition to the two camps identified, several additional theories of textualism exist, including: structural textualism, pragmatic textualism, radical textualism, and sympathetic textualism. Mullins, *supra* note 12, at 22.

⁴³ *Caminetti v. United States*, 242 U.S. 470, 485 (1917).

cable consequences, it is the sole evidence of the ultimate legislative intent.⁴⁴

Although appealing, a flaw of the soft plain meaning approach is that it may not take us very far. As the *Caminetti* decision acknowledged, if the language is indeed unambiguous, there really is no need for interpretation at all: that is, “[w]here the language is plain and admits of no more than one meaning, the duty of interpretation does not arise and the rules which are to aid doubtful meanings need no discussion.”⁴⁵ And, if the language of the statute is ambiguous,⁴⁶ in light of the context or otherwise, the soft plain meaning approach tends to fall back on legislative intent.

Unlike the soft plain meaning approach, those who use plain meaning as the beginning and end of statutory interpretation fall into the hard plain meaning camp (often referred to as the “new textualists”).⁴⁷ Prominent new textualists, such as Justice Antonin Scalia and Judge

⁴⁴ *Id.* at 490 (citations omitted).

⁴⁵ *Id.* at 485. In dissent, Justice McKenna raised this concern directly:

Undoubtedly in the investigation of the meaning of a statute we resort first to its words, and when clear they are decisive. The principle has attractive and seemingly disposing simplicity, but that it is not easy of application or, at least, encounters other principles, many cases demonstrate. The words of a statute may be uncertain in their signification or in their application. If the words be ambiguous, the problem they present is to be resolved by their definition; the subject-matter and the lexicons become our guides. But here, even, we are not exempt from putting ourselves in the place of the legislators. If the words be clear in meaning but the objects to which they are addressed be uncertain, the problem then is to determine the uncertainty. And for this a realization of conditions that provoked the statute must inform our judgment.

Id. at 496 (McKenna, J., dissenting). Moreover, from a practical perspective, the *easy* cases—where “the statutory text provides a plain or clear answer” to a controversy—“generally do not reach the appellate courts.” MIKVA & LANE, *supra* note 16, at 10. Important exceptions exist where rigid application leads to unconstitutional or senseless (or in some cases unreasonable) consequences. *Id.*; see also Farber, *supra* note 26, at 289; POSNER, *supra* note 16, at 265 (referring to the latter exception as “civilizing interpretations”).

⁴⁶ Frequent statutory ambiguities may arise from the legislative drafting process because (1) there are multiple drafters, each with different perspectives, strategies, and goals; (2) statutory drafting is “often a rushed and careless process”, POSNER, *supra* note 16, at 268; and (3) in at least some cases, some drafters seek to add rather than avoid ambiguity. See ESKRIDGE, DYNAMIC STATUTORY INTERPRETATION 1994, *supra* note 12, at 38.

⁴⁷ See ESKRIDGE ET AL., LEGISLATION AND STATUTORY INTERPRETATION, *supra* note 14, at 228.

Frank Easterbrook, focus predominantly on what Congress said (the words of the statutory text) and give very little, if any, weight to what Congress had in mind (legislative intent).⁴⁸ Professor Stanley Fish explains that these textualists “insist that what an interpreter seeks to establish is the meaning of the text as it exists apart from anyone’s intention.”⁴⁹

Textualism’s appeal rests on its apparent transparency, objectivity and concrete practicality; while its legitimacy rests, at least in part, on its conformity with democratic process values. As to the first quality, Professor Eskridge explains that “textualism appeals to the rule of law value that citizens ought to be able to read the statute books and know their rights and duties.”⁵⁰ As for objectivity, a powerful draw of the new textualist approach turns on its ability (or seeming ability) to constrain judicial law and policymaking by limiting judicial imposition of subjective preferences.⁵¹ Judges who follow well-established rules of grammar, syntax, and judicial cannons of construction are less free to contrive policy. Further, textualism may avoid the fruitless task of searching for legislative meaning where none exists.⁵² Finally, on the point of legitimacy, only the statutory text itself has gone through the mandated democratic procedural rigors of legal enactment.⁵³

Nevertheless, textualism, particularly the renaissance of new textualism, has spawned a considerable bevy of critics. The harshest critics argue new textualism, by putting the cart (meaning) before the horse (intention), makes little sense. According to Professor Stanley Fish, the textualists have it “backwards”⁵⁴. “[i]ntention comes first; language,

⁴⁸ Judge Easterbrook writes: “The meaning of statutes is to be found not in the subjective, multiple mind of Congress but in the understanding of the objectively reasonable person.” Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J.L. & PUB. POL’Y 59, 65 (1988). A distinction between intentionalists and textualists is that textualists embrace a “reader-centered” strategy for attributing meaning to statutory text, whereas intentionalists adopt a “writer-centered” strategy. See Mullins, *supra* note 12, at 25.

⁴⁹ Along these lines, Professor Fish cites Justice Scalia in saying “it is what is ‘said,’ not what is ‘meant,’ that is ‘the object of [the court’s] inquiry.’” Fish, *supra* note 19, at A25.

⁵⁰ ESKRIDGE, DYNAMIC STATUTORY INTERPRETATION 1994, *supra* note 12, at 34.

⁵¹ See ESKRIDGE ET AL., LEGISLATION AND STATUTORY INTERPRETATION, *supra* note 14, at 229; Sunstein, *Interpreting Statutes*, *supra* note 15, at 416.

⁵² See ESKRIDGE, DYNAMIC STATUTORY INTERPRETATION 1994, *supra* note 12, at 16, 34.

⁵³ Sunstein, *Interpreting Statutes*, *supra* note 15, at 416 (“Statutory terms—not legislative history, not legislative purpose, not legislative ‘intent’—have gone through the constitutionally specified procedures for the enactment of law.”).

⁵⁴ Fish, *supra* note 19, at A25.

and with it the possibility of meaning, second.”⁵⁵ As a consequence, Professor Fish asserts “there can be no ‘textualist’ method, because there is no object—no text without writerly intention—to which would-be textualists could be faithful.”⁵⁶ Less harsh critics, relying on similar arguments, argue that the textualists’ failure to consider context will, in any case, occasionally result in “interpretive blunders.”⁵⁷

Along similar lines, Professor Posner points out that the plain meaning approach ignores arguments of *external ambiguity*,⁵⁸ and in so doing “artificially truncates the interpretive process.”⁵⁹ In this view, the problem for plain meaning advocates is that:

A normal English speaker does not interpret a message merely by consulting the dictionary definitions of each word . . . and the relevant grammatical and syntactical principles. He does not ignore . . . external ambiguity. He consults the totality of his relevant experience . . . Meaning depends on context as well as on the semantic and other formal properties of sentences. The effort to avoid grappling with the things of the world in ascertaining meaning is a formalist dodge⁶⁰

⁵⁵ *Id.*

⁵⁶ *Id.* As an example, Professor Fish offers us the example of a rock formation with markings that appear to spell the word “help.” Assuming the interpreter is convinced the marks are language, the interpreter still cannot know, even by closely scrutinizing the word, whether it’s “a message from a person in distress,” directions for assistance (look here for help), “a petition to God,” or “a reference to a Beatles song.” *Id.* Accordingly, he concludes that “while the text as written can be a piece of evidence, it cannot—just as that rock formation cannot—be self-sufficient and conclusive evidence.” *Id.* See also Sunstein, *Interpreting Statutes*, *supra* note 15, at 416 (noting that the “central problem [with new textualism] is that the meaning of words (whether ‘plain’ or not) depends on both *culture* and *context*”) (emphasis in original).

⁵⁷ Sunstein, *Interpreting Statutes*, *supra* note 15, at 417. Professor Sunstein argues that “[s]tatutory terms are not self-defining, and words have no meaning before or without interpretation.” *Id.* at 416. Like Fish, he asserts that we need background norms to make reliance on text an intelligible concept, but also that simple reliance on text can result in blunders. *Id.* at 416-17.

⁵⁸ An “external ambiguity” exists “when the sentence, though clear to a normal English speaker ignorant of its background, is unclear, garbled, or means something different from what the normal English speaker thinks to someone who *does* know the background.” POSNER, *supra* note 16, at 264 (emphasis in original).

⁵⁹ *Id.*

⁶⁰ *Id.* at 268-69.

In essence, statutory meaning does not reside in the text alone.⁶¹

On a less theoretical level, Professor Posner points out a temporal conundrum of textualism. Should interpreters rely on a word's well-understood meaning at the time of the enactment or at the time of the legal controversy? Looking back gives weight to the original legislature's meaning (how the original drafters wrote the law), but over time can impose rigidity in the statute's application and constrains current readers' ability to read for plain meaning.⁶² On the flip side, giving text its contemporary meaning may correlate better with current public understanding (how the targeted community reads the law) and present-day conditions, but may have little connection to the meaning of the text as enacted.⁶³ Furthermore, textualism provides no consistent answer for choosing which temporal option should prevail,⁶⁴ fostering indeterminacy and leading directly to the next criticism.

Critics assert that new textualism engenders a false sense of objective determinacy. That is, in hard cases textualism can be equally as subjective and indeterminate as intentionalism and yet all the while seem fixed and transparent.⁶⁵ In this sense textualism is arguably nothing but a wolf in sheep's clothing.⁶⁶ For example, the new textualists lean

⁶¹ According to Richard Posner, this is the central objection to the plain-meaning rule. *Id.* at 296. Contrary to the plain meaning rule, "[m]eaning is what emerges when linguistic and cultural understandings and experiences are brought to bear on the text." *Id.*

⁶² Professor Posner provides the following relevant example: "A statute imposes a duty on imported vegetables but not on imported fruits, and the question arises whether the duty applies to tomatoes." *Id.* at 263. Further, he supposes that "in 1883, when the statute was passed, everyone classified tomatoes as fruits, [but] today everyone classifies them as vegetables." *Id.* Which definition should govern the interpretation? Reliance on the 1883 meaning gives today's reader little chance to understand the statutory directives as the public at large would not be expected to research the definitions at the time of enactment. *Id.*

⁶³ Again using Professor Posner's tomato fruit-versus-vegetable example, the interpreter's reliance on today's meaning gives short shrift to the statute's meaning when enacted. *Id.* Professor Posner describes this problem as "semantic drift." *Id.* at 264. *See also* Sunstein, *Interpreting Statutes*, *supra* note 15, at 422-23.

⁶⁴ POSNER, *supra* note 16, at 263; Sunstein, *Interpreting Statutes*, *supra* note 15, at 419; *see* Farber, *supra* note 26, at 312-13.

⁶⁵ Professor Eskridge argues that, "[l]ike intentionalism and purposivism, textualism . . . does not yield determinate answers or meaningfully constrain the interpreter in hard cases." ESKRIDGE, *DYNAMIC STATUTORY INTERPRETATION* 1994, *supra* note 12, at 34. Moreover, Professor Eskridge asserts that "textualism cannot rigorously be tied to majority preferences . . . and is not an accurate description of what agencies and courts actually do when they interpret statutes." *Id.*

⁶⁶ For example, in *Rapanos v. United States*, the dissenters mock Justice Scalia's plurality opinion for relying heavily on dictionary meanings to narrow statutory

heavily on canons of statutory construction as a means to apply fixed rules to decipher text in accordance with the rule of law.⁶⁷ The canons, however, have long held the notorious reputation of being both subjective as well as indeterminate.⁶⁸ In the 1950's, Karl Llewellyn famously attacked the canons as a façade for judicially imposed statutory meaning (judicial policymaking) by asserting that “there are two opposing canons on almost every point.”⁶⁹ More recently, Professor Eskridge pointed out that for most every general canon there exists a counter-canon, or exception, leading to indeterminacy.⁷⁰ Thus, according to Professor Posner,

like their counterparts, the maxims of ordinary life (‘haste makes waste,’ but ‘he who hesitates is lost’), the canons are the collective folk wisdom of statutory interpretation and they no more enable difficult questions of interpretation to be answered than the maxims of everyday life enable the difficult problems of everyday living to be solved.⁷¹

For these reasons, despite its initial appeal, textualism can come across not only as indeterminate but also as intellectually dishonest.

meaning of “waters of the United States” while overlooking other dictionary meanings that contradict their approach:

It is unclear how the plurality reached this conclusion, though it plainly neglected to consult a dictionary. Even its preferred Webster’s Second defines the term [adjacent] as “[l]ying near, close, or contiguous; neighboring; bordering on” and acknowledges that “[o]bjects are Adjacent when they lie close to each other, but *not necessarily in actual contact.*” In any event, the proper question is not how the plurality would define ‘adjacent,’ but whether the Corps’ definition is reasonable.

126 S. Ct. 2208, 2263 (2006).

⁶⁷ Mank, *supra* note 24, at 527 (“Textualist judges often use traditional ‘canons’ of statutory construction when interpreting a statute’s text.”).

⁶⁸ See POSNER, *supra* note 16, at 279 (“The plain-meaning rule and the other ‘canons of construction’ are the subject of a large and, on the whole, negative literature.”).

⁶⁹ Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395, 401 (1950). Similarly, Professor Mank argues that textualist judges selectively and inappropriately favor some canons at the expense of others. Mank, *supra* note 24, at 527.

⁷⁰ ESKRIDGE, DYNAMIC STATUTORY INTERPRETATION 1994, *supra* note 12, at 280.

⁷¹ POSNER, *supra* note 16, at 280.

C. *Dynamic Statutory Interpretation*

Dynamic statutory interpretation represents yet a third category of approaches. Dynamic statutory interpretation encompasses, for its adherents, both a descriptive explanation of what courts actually do and a prescriptive theory of what courts should do with respect to statutory interpretation.⁷² As described by Professor Eskridge,

interpretation is dynamic, in the sense that the meaning of a statute will change as social context changes, as new interpreters grapple with the statute, and as the political context changes . . . the story of a statute becomes a small part of the larger web of institutions and practices in a society.⁷³

Professor Eskridge, therefore, offers guidelines for appropriate ordering of interpretive models along a continuum and places the “evolutionary context” first when “neither the text nor the historical context of the statute clearly resolves the interpretive question, and the societal and legal context of the statute has changed materially,” especially where the statute is old, the language general, and the societal changes drastic.⁷⁴ As a result, “[t]he interpretation of a statutory provision . . . is not necessarily the one which the original legislature would have endorsed, and as the distance between enactment and interpretation increases, a pure originalist inquiry becomes impossible and/or irrelevant.”⁷⁵

Under a dynamic approach, statutory interpretation is not static (nor should it be), but rather flexible and fluid in application over time.⁷⁶ Statutes—“like the Constitution and the common law—[are to] be interpreted ‘dynamically,’ . . . in light of their present societal, political, and legal context.”⁷⁷ As professors Sunstein and Vermeule so succinctly describes it, “[r]ather than adhering either to ordinary meaning at the time of enactment, or even to legislative intent conceived in strictly originalist terms,” dynamic interpretation would have courts “‘update’ statutes by

⁷² ESKRIDGE, DYNAMIC STATUTORY INTERPRETATION 1994, *supra* note 12, at 6. For an expansive list of scholarship supporting these various theses, see *id.* at 336 n.19.

⁷³ *Id.* at 199.

⁷⁴ William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1496 (1987) [hereinafter Eskridge, *Dynamic Statutory Interpretation* 1987].

⁷⁵ *Id.* at 1497.

⁷⁶ ESKRIDGE ET AL., LEGISLATION AND STATUTORY INTERPRETATION, *supra* note 14, at 237.

⁷⁷ Eskridge, *Dynamic Statutory Interpretation* 1987, *supra* note 74, at 1479.

intelligent adaptation of original purposes to new social circumstances, and by taking account of changes in the overall fabric of public law” while restraining themselves within the “clear contrary instructions” of the legislature.⁷⁸ Professor Aleinikoff likens this approach to that of a ship at sea:

Congress builds a ship and charts its initial course, but the ship's ports-of-call, safe harbors and ultimate destination may be a product of the ship's captain, the weather, and other factors not identified at the time the ship sets sail. This model understands a statute as an on-going process (a voyage) in which both the shipbuilder and subsequent navigators play a role. The dimensions and structure of the craft determine where it is capable of going, but the current course is set primarily by the crew on board. (Of course, Congress may send subsequent messages to the ship or change the waters in which the ship is sailing.)⁷⁹

Accordingly, dynamic statutory interpretation makes most sense where the textual meaning is uncertain and the statute out of date (due to the passage of time and major shifts in societal norms and values).⁸⁰ Nevertheless, even advocates of the dynamic model retain statutory text as determinative where the statute is recent, the text detailed, “and the context of enactment represents considered legislative deliberation and decision on the interpretive issue.”⁸¹

The major criticisms of dynamic interpretation include its encroachment into legislative branch authority,⁸² its apparent antidemocratic, “countermajoritarian” bias;⁸³ and its failure to take into account the fallibility of judges and the limited capabilities of courts.⁸⁴ And, going one

⁷⁸ Sunstein & Vermeule, *supra* note 20, at 905.

⁷⁹ T. Alexander Aleinikoff, *Updating Statutory Interpretation*, 87 MICH. L. REV. 20, 21 (1988).

⁸⁰ See Eskridge, *Dynamic Statutory Interpretation* 1987, *supra* note 74, at 1484.

⁸¹ *Id.* at 1496.

⁸² *Id.* at 1497 (“The formalist argument is that the creation of law by federal judges is beyond the authority given them in the Constitution, for it trenches upon the lawmaking power given to Congress.”).

⁸³ *Id.* at 1498 (“The traditional legal process argument is that such judicial lawmaking is ‘countermajoritarian’ and so ought to be avoided in a democracy, where important policy decisions ought to be made by the majoritarian branches of government.”).

⁸⁴ Sunstein & Vermeule, *supra* note 20, at 905. In this regard, Professors Sunstein and Vermeule assert that “[d]ynamic statutory interpretation, it turns out, embodies the

step further, that even defensible judicial updating might have pernicious side effects on legislative behavior.⁸⁵

D. *Administrative Agency Deference*

Yet a fourth approach to statutory interpretation places great and often controlling weight on administrative agency determinations of statutory meaning.⁸⁶ Administrative agency deference represents, in a sense, an overlay applied in concert with other approaches (in situations where intentionalism and/or textualism approaches fail).

Agency deference has roots in the Administrative Procedure Act (“APA”),⁸⁷ which sets forth a standard of review for courts hearing challenges to agency regulations. According to the APA, courts review administrative agency rulemaking under an arbitrary, capricious, or an abuse of discretion standard.⁸⁸ The Supreme Court confirmed the deferential nature of this standard in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*.⁸⁹ According to *Chevron*, reviewing courts look first to the express intent of Congress regarding the precise question, which if clear and unambiguous controls the outcome.⁹⁰ However, “if the statute

nirvana fallacy—the juxtaposition of an idealized picture of judicial capacities with a grudging picture of the capacities of other actors in the interpretive system.” *Id.*

⁸⁵ *Id.*

⁸⁶ See Sunstein, *Interpreting Statutes*, *supra* note 15, at 444-46.

⁸⁷ Public Law No. 89-554, 80 Stat. 381 (1966) (codified as amended at 5 U.S.C. §§ 551-559 (2000)). Note the weight given to agency interpretations is not always controlling and the courts can and do reject them on occasion. See, e.g., *Northern Spotted Owl v. Hodel*, 716 F. Supp. 479, 483 (W.D. Wash. 1988) (“The Court will reject conclusory assertions of agency ‘expertise’ where the agency spurns unrebutted expert opinions without itself offering a credible alternative explanation.”).

⁸⁸ 5 U.S.C. § 706(2)(A) (2000). Under the APA, the courts’ roles are further constrained by review on the administrative record. See Vic Sher, *Breaking Out of the Box: Toxic Risk, Government Actions, and Constitutional Rights*, 13 J. ENVTL. L. & LITIG. 145, 147 (1998).

First, the APA limits the court to determining only whether the agency’s action was ‘arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, or was taken without observance of procedures required by law.’ Second, the APA limits the court’s inquiry to the appropriateness of the agency’s decision in light of the record before the agency.

Id.

⁸⁹ 467 U.S. 837 (1984). The Court’s approach to judicial review has been at times referred to as the “*Chevron* two-step.” JAMES SALZMAN & BARTON H. THOMPSON, JR., *ENVIRONMENTAL LAW AND POLICY* 62 (2d ed. 2007).

⁹⁰ *Chevron*, 467 U.S. at 842-43 (“If the intent of Congress is clear, that is the end of the

is silent or ambiguous with respect to the specific issue," the court defers to the administrative interpretation, unless the agency's construction is "arbitrary, capricious, or manifestly contrary to the statute."⁹¹

Justifications for agency deference rest on two, somewhat conflicting, notions: agency expertise and participatory government. According to the popular "scientific expertise" model of administrative law, agency scientists and technocrats (e.g., agency chemists, biologists, statisticians and managers) consider statutes based on professional judgment rather than, and insulated from, partisan political influence.⁹² This model envisions rational decisionmaking by impartial experts. Especially in the field of environmental law, the model ideally generates statutory interpretations grounded in objective scientific principles rather than the vagaries of partisan politics. Although federal judges also serve independently of the electorate, in most cases they lack the knowledge of chemical, biological, and physical sciences of administrative experts.⁹³

Another justification for administrative agency deference rests on notions of democratic accountability. First, in contrast to judicial decisions, informal agency rulemaking (the primary forum for agency statutory interpretation) opens decisionmaking to public scrutiny and public input *before* statutory interpretations become final.⁹⁴ Second, administrative agencies are at least arguably more accountable to the public than unelected judges by virtue of being situated within the executive branch of government, where high ranking agency officials serve at the will of the elected President, the Chief Executive.⁹⁵ Along similar lines, congressional

matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.").

⁹¹ *Id.* at 843-44.

⁹² SALZMAN & THOMPSON, *supra* note 89, at 59-60.

⁹³ In *Chevron*, the Court expressly asserts this point by stating, "Judges are not experts in the field . . ." 467 U.S. at 865.

⁹⁴ Specifically, the APA requires public notice of proposed rulemaking and opportunity for public comment prior to final adoption. 5 U.S.C. § 553 (2000).

⁹⁵ The *Chevron* Court relied, in part, on this rationale for deference:

Judges . . . are not part of either political branch of the Government. . . . In contrast, an agency to which Congress has delegated policymaking responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments. While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices . . .

467 U.S. at 866. Agency actions are also subject to presidential review pursuant to executive orders and informal pressures.

oversight of administrative agency rulemaking arguably makes administrative agency action more democratically accountable than determinations by unelected judges, even if only indirectly so.

Academic scholars have identified several defects in both the expert and the accountability rationales for agency deference. First, although “expert” agencies ideally act as objective, impartial professionals, critics perceive a systematic bias by agencies in favor of the regulated community and against the public good.⁹⁶ Scholars explain this bias (often referred to as agency capture), as the result of individual and institutional self-interest (e.g., self-promotion or agency turf battles) and/or by public choice theory.⁹⁷ Second, it is disputable whether agencies are demonstrably more accountable to the public than the judiciary given that agency scientists and staff—like judges—are not elected and often stay on with an agency beyond the terms of any particular party’s control over governmental affairs.⁹⁸

These oppositional criticisms—agencies are neither truly independent nor truly democratically accountable—suggest that administrative agencies do not fit neatly within either the agency as “expert” or agency as “mini-legislature” models, but rather fall somewhere between the two.

⁹⁶ Scholars even question the independence of “independent” agencies, those seemingly buffered from the President’s influence. See Cass R. Sunstein, *Paradoxes of the Regulatory State*, 57 U. CHI. L. REV. 407, 426-27 (1990) [hereinafter Sunstein, *Paradoxes*].

[T]he fact is that independent agencies are not independent at all. Indeed, such agencies are highly responsive to shifts in political opinion and even to the views of the President. . . . The independent agencies have generally been highly susceptible to the political pressure of well-organized private groups—perhaps even more susceptible, on balance, than executive agencies.

Id.

⁹⁷ SALZMAN & THOMPSON, *supra* note 89, at 59-60. Public choice theory rests heavily on the assumption that humans are “self-interested utility maximizers and that maximization may be measured economically.” BRIAN CZECH & PAUL R. KRAUSMAN, *THE ENDANGERED SPECIES ACTS: HISTORY, CONSERVATION BIOLOGY, AND PUBLIC POLICY* 35 (2001). In the regulatory context, Professor Sunstein has noted that “[a] large literature, inspired by public choice theory and welfare economics, has grown up around the theory that purportedly public-interested regulation is almost always an effort to create a cartel or to serve some private interest at the public expense.” Sunstein, *Paradoxes*, *supra* note 96, at 407.

⁹⁸ For some back and forth on this issue, see Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 HARV. L. REV. 1511, 1550 (1992) (discussing limited political branch oversight of agency decisions and the professional rather than political nature of career staff influence over agency action, but nevertheless finding courts more politically insulated than agencies).

As a consequence, the rationales for agency deference—being neither here nor there—lose much of their forcefulness.

Even if either rationale strongly justified adoption of agency interpretations, judicial application of agency deference arguably suffers from deficiencies applicable to other methods of interpretation. Agency deference, seemingly objective and rational, may be readily adopted by judges when the agency outcome matches the desired outcome or easily rejected when it does not. Specifically, judges may adopt an agency interpretation they favor by citing to *Chevron* deference or reject an agency interpretation they disfavor either by stopping at *Chevron*'s step one,⁹⁹ or simply failing to apply *Chevron* at all.¹⁰⁰

II. A SHORT HISTORY OF THE ESA

The history of the federal government's endangered species conservation efforts began tentatively in the late 1800s and emerged more emphatically, close to a century later, with passage of endangered species legislation.¹⁰¹ In 1872, Congress preserved Yellowstone National Park¹⁰² in response, at least in part, to the extirpation of bison from most of their historic range.¹⁰³ Several decades later, Congress passed the Lacey Act of 1900¹⁰⁴ in response to concern about the precipitous decline of formerly abundant bird species, including the passenger pigeon.¹⁰⁵ In 1940, the

⁹⁹ See SALZMAN & THOMPSON, *supra* note 89, at 64.

¹⁰⁰ See Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969, 970 (1992).

¹⁰¹ Between British colonization and passage of the ESA, more than 500 North American species became extinct, including certain populations and subspecies of beaver, elk, auk, duck, sea mink, pigeon, and parakeet. CZECH & KRAUSMAN, *supra* note 97, at 8-11.

¹⁰² Act of May 7, 1894, ch. 72, 28 Stat. 73, 73-75 (1894).

¹⁰³ See CZECH & KRAUSMAN, *supra* note 97, at 8 ("The destruction of the buffalo herds made wildlife protection a public issue. In fact, Yellowstone National Park was created in 1872 partly for the purpose of preserving bison and other ungulates that had become rare elsewhere.") (citation omitted). For a closer examination of the relationship between the plight of the bison, federal wildlife law, and the history of endangered species protections in the United States, see SHANNON PETERSEN, *ACTING FOR ENDANGERED SPECIES: THE STATUTORY ARK* 3-20 (2002).

¹⁰⁴ Lacey Act of 1900, ch. 553, 31 Stat. 187 (current version at 16 U.S.C. §§ 3371-3378 (2000 & Supp. III 2003) and 18 U.S.C. § 42 (2000)).

¹⁰⁵ MICHAEL J. BEAN & MELANIE J. ROWLAND, *THE EVOLUTION OF NATIONAL WILDLIFE LAW* 193 (3d ed. 1997) ("Debates that preceded passage of the Lacey Act in 1900 reveal that Congress was distressed about the virtual extermination of the passenger pigeon and the drastic depletion of many other bird species."); see also Michael J. Bean, *Historical*

United States entered into a prescient and rather innovative treaty to protect species and habitats in the Western Hemisphere,¹⁰⁶ but implementation faltered and fell dormant following the outbreak of World War II shortly thereafter.¹⁰⁷ A quarter century later, Congress put forward three increasingly stringent legislative efforts expressly targeting endangered species. First came the Endangered Species Preservation Act of 1966,¹⁰⁸ closely followed by the amendments of the Endangered Species Conservation Act of 1969.¹⁰⁹ Both gave way to a third and more radical¹¹⁰ legislative effort: passage of the Endangered Species Act of 1973.¹¹¹

A. *Endangered Species Act Precursors*

Congress enacted the Endangered Species Preservation Act of 1966¹¹² (“ESPA”) to put in place a program for “conserving, protecting, restoring, and propagating selected species . . . threatened with extinction.”¹¹³ Towards these goals, core provisions of the ESPA formally authorized federal agency habitat conservation through land acquisition¹¹⁴ and the putting together of a list of native endangered species.¹¹⁵ However, this early precursor to the current ESA neither restricted taking of at-risk species nor barred sale of such species in interstate commerce.¹¹⁶ Further, the ESPA neither prohibited destruction of habitat essential to such species nor did it provide protection to any non-native species.¹¹⁷ Even to the extent the ESPA called for other federal agency efforts, it

Background to the Endangered Species Act, in ENDANGERED SPECIES ACT: LAW, POLICY, AND PERSPECTIVES, *supra* note 11, at 11, 12-13; PETERSEN, *supra* note 103, at 11.

¹⁰⁶ Convention on Nature Protection and Wild Life Preservation in the Western Hemisphere, *opened for signature* Oct. 24, 1940, 56 Stat. 1354, 161 U.N.T.S. 193).

¹⁰⁷ See Bean, *supra* note 105, at 11, 14.

¹⁰⁸ Pub. L. No. 89-669, 80 Stat. 926 (1966) (repealed 1973).

¹⁰⁹ Pub. L. No. 91-135, 83 Stat. 275 (1969).

¹¹⁰ Holly Doremus, *The Story of TVA v. Hill: A Narrow Escape for a Broad New Law, in* ENVIRONMENTAL LAW STORIES 109, 113 (Richard J. Lazarus & Oliver A. Houck eds., 2005) [hereinafter Doremus, *Narrow Escape*] (describing passage of the ESA as a radical change in strategy).

¹¹¹ Pub. L. No. 93-205, 87 Stat. 884 (codified as amended at 16 U.S.C. §§ 1531-1544 (2000)).

¹¹² Pub. L. No. 89-669, § 1(a), 80 Stat. 926 (1966) (repealed 1973).

¹¹³ *Id.* § 2(a), 80 Stat. at 926.

¹¹⁴ *Id.* § 2(b)-(c), 80 Stat. at 927.

¹¹⁵ *Id.* § 2(c), 80 Stat. at 926.

¹¹⁶ BEAN & ROWLAND, *supra* note 105, at 195-96.

¹¹⁷ See Bean, *supra* note 105, at 15.

softened these calls by including as “practical” and “consistent with” caveats.¹¹⁸ As consequence, the ESPA was “a broad but toothless policy.”¹¹⁹

Congress addressed some of these program gaps with passage of the Endangered Species Conservation Act of 1969 (“ESCA”).¹²⁰ The ESCA expanded the listing process to cover species in danger of “worldwide extinction” (adding coverage for non-native species)¹²¹ and expanded federal agency authority for acquiring lands for habitat conservation purposes.¹²² In short, the ESCA shifted federal policy toward a more stringent and more global effort by adding a broad prohibition on imports of many listed species¹²³; requiring listing decisions in accord with federal APA rulemaking procedures¹²⁴; and directing the Secretary of the Interior to work internationally for species conservation.¹²⁵

B. *Endangered Species Act of 1973*

Congress made several large leaps towards a comprehensive program of species conservation with passage of the Endangered Species Act of 1973. Upon signing the Act into law, then-President Nixon opined that the lives of future generations would be richer and the country “more beautiful in the years ahead” due to passage of the ESA.¹²⁶ The Supreme Court described the ESA as “the most comprehensive legislation for the preservation of endangered species ever enacted by any nation.”¹²⁷ The

¹¹⁸ CZECH & KRAUSMAN, *supra* note 97, at 21.

¹¹⁹ *Id.* (quoting DANIEL J. ROHLF, *THE ENDANGERED SPECIES ACT: A GUIDE TO ITS PROTECTIONS AND IMPLICATION* 21 (Stanford Environmental Law Society 1989).

¹²⁰ Pub. L. No. 91-135, 83 Stat. 275 (repealed 1973).

¹²¹ *Id.* § 2, 83 Stat. at 275. Congress did not, however, prohibit all imports of endangered wildlife. For example, the Act expressly allowed importation of species for certain zoological, educational, scientific, propagation and hardship reasons. *Id.* § 3(b), 83 Stat. at 276.

¹²² *Id.* § 12(b)-(c), 83 Stat. at 282.

¹²³ *Id.* § 2, 83 Stat. at 275.

¹²⁴ *Id.* § 3(a), 83 Stat. at 275.

¹²⁵ *Id.* § 5(b), 83 Stat. at 278. The United States signed the resulting Convention on International Trade in Endangered Species of Wild Fauna and Flora (“CITES”) on March 3, 1973. Convention on International Trade in Endangered Species of Wild Fauna and Flora, *opened for signature* Mar. 3, 1973, 27 U.S.T. 1087, 993 U.N.T.S. 243 (entered into force July 1, 1975). As a consequence of the timing of the convention negotiations, many definitions contained in the ESA were influenced by and/or come directly from UN and IUCN (International Union for the Conservation of Nature) glossaries, including but not limited to CITES definitions. See BEAN & ROWLAND, *supra* note 105, at 200.

¹²⁶ See Bean, *supra* note 105, at 17.

¹²⁷ *TVA v. Hill*, 437 U.S. 153, 180 (1978). See also Holly Doremus, Comment, *Patching the Ark: Improving Legal Protection of Biological Diversity*, 18 *ECOLOGY L.Q.* 265, 265 (1991)

ESA is also described in less lofty terms as “something like a pit bull on a firm leash.”¹²⁸ The 1973 Act stands out today both for its purportedly toothy conditions in the service of species protection¹²⁹ and for its reputation for generating vicious controversy.¹³⁰

As amended, the ESA contains a dozen or so program elements, with the listing, consultation and restrictive take provisions of sections 4, 7, and 9 considered by many to be the heart and soul of the Act.¹³¹ For the purpose of generating some context for the latter parts of this Article, this Part provides a brief description of ESA sections 7 and 8(a).

C. Section 7 of the Endangered Species Act of 1973

The ESA’s now-famed section 7 “no jeopardy” requirement falls under the seemingly innocuous title of “Interagency cooperation.”¹³² As originally enacted, section 7 established an interagency consultation process for federal actions with the potential to jeopardize the existence

[hereinafter Doremus, *Patching the Ark*] (noting ESA is “widely regarded as the strongest legislation ever devised for the protection of nonhuman species”).

¹²⁸ J.B. Ruhl, *Is the Endangered Species Act Eco-pragmatic?*, 87 MINN. L. REV. 885, 886 (2003). Less-reserved scholars simply refer to the ESA as the “pit bull” of environmental law sans any mention of a restraining leash. JAMES RASBAND ET AL., NATURAL RESOURCES LAW AND POLICY 341 (2004) (“The ESA has been called ‘the pit bull’ of environmental law and it is controversial for the simple reason that it has real teeth that can bite hard, though how hard the law actually bites in practice is strongly contested.”). Authors Donald Baur and William Robert Irvin attribute the “pit bull” analogy to Assistant Secretary of the Interior Donald Barry. Donald C. Baur & William Robert Irvin, *Introduction*, in ENDANGERED SPECIES ACT: LAW, POLICY, AND PERSPECTIVES, *supra* note 11, at xviii. Shannon Petersen credits Senator Bob Graham with similar comments. PETERSEN, *supra* note 103, at ix (“Although the ESA may be the ‘crown jewel of the nation’s environmental laws,’ it has also been the ‘pit bull of environmental laws.’”) (citing *Endangered Species Act Amendments of 1993: Hearing on S. 921 Before the Subcomm. on Clean Water, Fisheries and Wildlife of the S. Comm. on Environment and Public Works*, 103d Cong. 2 (1994) (statement of Sen. Bob Graham, Chairman, S. Subcomm. on Clean Water, Fisheries and Wildlife)).

¹²⁹ The Endangered Species Act is “widely regarded as the strongest legislation ever devised for the protection of nonhuman species.” Doremus, *Protecting the Ark*, *supra* note 127, at 265.

¹³⁰ Since its enactment, “the ESA has become the center of bitter debate among environmentalists, farmers, resource users, and landowners.” Nancy Kubasek et al., *The Endangered Species Act: Time for a New Approach?*, 24 ENVTL. L. 329, 329-30 (1994).

¹³¹ See PETERSEN, *supra* note 103, at ix (identifying sections 4, 7, and 9 as foundational); J.B. Ruhl, *Section 4 of the ESA: The Keystone of Species Protection Law*, in ENDANGERED SPECIES ACT: LAW, POLICY, AND PERSPECTIVES, *supra* note 11, at 19 (identifying section 4 as the keystone of the ESA).

¹³² 16 U.S.C. § 1536 (2000).

of either listed species or their critical habitat. In exact terms, the provision stated:

All other Federal departments and agencies *shall*, in consultation with and with the assistance of the Secretary, utilize their authorities in furtherance of the purposes of this chapter by carrying out programs for the conservation of endangered species and threatened species listed pursuant to section 1533 of this title and by taking such action necessary to *insure that actions* authorized, funded, or carried out by them *do not jeopardize the continued existence* of such endangered species and threatened species *or result in the destruction or modification of habitat of such species* which is determined by the Secretary, after consultation as appropriate with the affected States, to be critical.¹³³

Although as highlighted, the compulsory nature of the statutory language of this provision appears straightforward, many scholars concede that most of the legislators were not aware of the broad scope of the provisions of the Act at the time of enactment.¹³⁴ Although Congress passed the ESA virtually unanimously,¹³⁵ it “debated little over the various provisions.”¹³⁶ The “few congressional concerns” that did arise did not center on sections 4, 7, 8, or 9, but rather on “issues relatively inconsequential to later developments.”¹³⁷ Potential explanations for the lack of congressional attention include the social context of the times (broad public support of environmental initiatives at a time of national divisiveness),¹³⁸ little to

¹³³ 16 U.S.C. § 1536 (Supp. III 1973) (emphasis added).

¹³⁴ See Doremus, *Narrow Escape*, *supra* note 110, at 113 (“[I]t is widely agreed that most legislators were not aware of the full scope of the ESA when they voted for it.”); PETERSEN, *supra* note 103, at 31 (“Members of Congress . . . failed to anticipate many of the act’s consequences.”) Along these lines are the comments of the legislators themselves. Don Young (R-Alaska), former chairman of the House Resources Committee, said, “[We] envisioned trying to protect, you know, pigeons and things like that. We never thought about mussels and ferns and flowers and all these subspecies of squirrels and birds.” B. J. Bergman, *Leader of the Pack*, *SIERRA MAGAZINE*, Nov.-Dec. 1995, at 51, 54.

¹³⁵ The ESA passed unanimously in the Senate and overwhelmingly in the House (a mere twelve dissenters). 119 Cong. Rec. 25694, 30167-68 (1973).

¹³⁶ PETERSEN, *supra* note 103, at 28.

¹³⁷ *Id.*

¹³⁸ *Id.* at 30; see also CZECH & KRAUSMAN, *supra* note 97, at 23 (“The early 1970s saw a wave of environmental regulatory lawmaking, of which ESA represented the crest.”).

non-existent corporate or other opposition,¹³⁹ a certain level of scientific ignorance,¹⁴⁰ and a view that the ESA would be largely symbolic.¹⁴¹ With respect to section 7 in particular, Congress paid little if any attention to the language of the bill before it.¹⁴² For these reasons, section 7 may be categorized as a *sleep*er provision.

A number of commentators, however, have also recognized the *stealthiness* of section 7.¹⁴³ It has come to light that staffers strategically worked in the strong language, under cover of otherwise convoluted procedural wording, unbeknownst to many of the enacting legislators. Thus, in its legislative promulgation,

the ESA's action provisions were formulated in a process of legislative obscurity by a small group of scientists and legislative activists . . . who saw a need and an opportunity for more effective protections and went about building them into the nooks and crannies of an otherwise rather innocuous and generalized regulatory law focused on poaching and trade restrictions.¹⁴⁴

For instance, although early versions of the consultation provision called only for "'practicable' steps to conserve listed species[,] . . . a handful of White House and Congressional staffers reworked the bill, introducing a firm prohibition on federal actions that would jeopardize listed species."¹⁴⁵ Nevertheless, members of Congress "almost completely

¹³⁹ See PETERSEN, *supra* note 103, at 30-31.

¹⁴⁰ *Id.* at 34.

¹⁴¹ Specifically, Petersen notes that "[m]ost individuals in Congress and the Nixon administration believed the ESA to be a largely symbolic effort to protect charismatic megafauna representative of our national heritage, like bald eagles, bison, and grizzly bears." *Id.* at 34. According to Petersen, "[f]ew if any [members of Congress] believed at the time that the ESA would protect seemingly insignificant species irrespective of economic considerations, halt federal development projects, and regulate private property." *Id.*

¹⁴² Petersen notes that "Congress almost completely ignored section 7's requirement of interagency cooperation, presumably because they found that section relatively unimportant or uncontroversial." *Id.* at 33. Petersen concedes, however, that a question concerning section 7's scope did arise at least once in committee, but was apparently put to rest by Senator Tunney's understanding that section 7 mandated consultation, but not agency action. *Id.*

¹⁴³ See, e.g., Plater, *supra* note 7, at 292. The implications of the provision fell not only below the radar of Congress, but also of special interests groups and entities likely to have opposed it. See Petersen, *supra* note 103, at 31.

¹⁴⁴ Plater, *supra* note 7, at 292.

¹⁴⁵ Doremus, *Narrow Escape*, *supra* note 110, at 113.

ignored section 7's requirement of interagency cooperation, presumably because they found that section relatively unimportant or uncontroversial."¹⁴⁶ Apparently, the full regulatory implications and extent of the provision avoided close (or any meaningful) congressional scrutiny by design.¹⁴⁷ Consequently, the ESA's original consultation provision also falls squarely within the sub-category of a *stealth* provision.

D. Section 8a of the Endangered Species Act of 1973

Sections 8 and 8a set forth international components of the ESA. Of particular relevance for this Article, section 8a mandates implementation of the Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere ("Western Convention").¹⁴⁸ By marrying federal and international authorities, section 8a calls for regulatory initiatives to conserve wildlife and habitat in partnership with other nations. Specifically, section 8a provides:

The Secretary of the Interior . . . , in cooperation with the Secretary of State, *shall* act on behalf of, and represent, the United States in all regards as *required* by the Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere. . . .

The Secretary and the Secretary of State *shall*, in cooperation with the contracting parties to the Western Convention and, to the extent feasible and appropriate, with the participation of State agencies, *take such steps as are necessary to implement the Western Convention*.¹⁴⁹

Long overlooked and underutilized, section 8a appears to be not only a temporarily-dormant sleeper imbued with great potential for

¹⁴⁶ Petersen, *supra* note 103, at 33.

¹⁴⁷ See Plater, *supra* note 7, at 292. "According to Curtis Bohlen, Undersecretary of Interior at the time, '[T]here were probably not more than four of us who understood its ramifications.'" Doremus, *Narrow Escape*, *supra* note 110, at 113-14 (quoting CHARLES C. MANN & MARK L. PLUMMER, *NOAH'S CHOICE: THE FUTURE OF ENDANGERED SPECIES* 160 (1995)). Similarly, speaking at a national conference held at Lewis & Clark School of Law, Gerard A. Bertrand, one of the provision drafters, disclosed that the stealth wording existed by design. Dr. Gerard A. Bertrand, Presentation at the Lewis & Clark Law School Symposium: The ESA Turns 30 (October 2003).

¹⁴⁸ 16 U.S.C. § 1537a(e) (2000).

¹⁴⁹ *Id.* (emphasis added) (citations omitted).

tackling worldwide species declines, but yet another stealth provision hidden in plain sight and lying in wait for judicial activation.¹⁵⁰

III. INTERPRETATIONS OF AN ESA STEALTH PROVISION

This part of the Article examines a vast array of approaches used to interpret just one of the ESA's stealth provisions in just one case before the federal courts. The provision is section 7. The statutory interpretations arise in none other than the legendary *Tennessee Valley Authority v. Hill* ("*TVA v. Hill*") case,¹⁵¹ and its associated lower court rulings,¹⁵² where, as the story goes, a few tiny fish blocked the opening of the mighty Tellico Dam (at least for a short while).¹⁵³ The federal court decisions, taken together, illustrate the unpredictable and seemingly fickle approaches to interpretation of statutory stealth provisions.

A. *Interpreting the ESA's Section 7 Stealth Provision*

The controversy in *TVA v. Hill* centered on discovery of a small fish (the snail darter, *Percina (Imostoma) tanasi*) immediately downstream of the nearly completed, multimillion dollar federal dam project.¹⁵⁴ In 1966 Congress approved, and in 1967 Congress appropriated funds for, a "multipurpose regional development project" on the scenic Little Tennessee River to encourage shoreline development, generate electricity, provide recreation, enhance flood control, and improve local economic conditions.¹⁵⁵ The Tennessee Valley Authority ("*TVA*")

¹⁵⁰ Speaking at a national conference held at Lewis & Clark School of Law, Dr. Gerard A. Bertrand, one of the primary drafters, declared that aside from section 7, the ESA contained hidden, powerful, yet-to-be-discovered statutory language. Dr. Gerard A. Bertrand, Presentation at the Lewis & Clark Law School Symposium: The ESA Turns 30 (October 2003). In follow-up correspondence, Dr. Bertrand identified one yet-untapped provision as section 8a. E-mail from Gerard A. Bertrand, President Emeritus, Massachusetts Audubon Society, to Madeline June Kass, Assistant Professor of Law, Thomas Jefferson School of Law (Jan. 27, 2004, 18:24 PST) (on file with author).

¹⁵¹ 437 U.S. 153 (1978).

¹⁵² *Hill v. TVA*, 419 F. Supp. 753 (E.D. Tenn. 1976), *rev'd*, *Hill v. Tenn. Valley Auth.*, 549 F.2d 1064 (6th Cir. 1977).

¹⁵³ Although the Supreme Court enjoined operation of the dam to save the snail darter, Tellico opened in 1980 pursuant to a congressional rider. CZECH & KRAUSMAN, *supra* note 97, at 102.

¹⁵⁴ *TVA v. Hill*, 437 U.S. at 158.

¹⁵⁵ *Id.* at 157. See Act of Oct. 15, 1966, Pub. L. No. 89-689, 80 Stat. 1002, 1014.

endeavored to construct the Tellico Dam shortly thereafter despite growing opposition and a "tangle of lawsuits" retarding its progress.¹⁵⁶ As the legend goes, just months prior to dissolution of an injunction preventing the dam's completion¹⁵⁷ an ichthyologist exploring the project area discovered the previously unknown fish species,¹⁵⁸ setting the stage for the listing and challenge under the soon-to-be-enacted Endangered Species Act of 1973.

In 1975, the Secretary of the Interior formally listed the snail darter as an *endangered species*,¹⁵⁹ which triggered the protections of ESA generally. Next, the Secretary determined the area to be inundated by the dam to be snail darter *critical habitat*,¹⁶⁰ thereby bringing to bear the provisions of section 7 in particular.¹⁶¹ Not long thereafter, an array of concerned environmental groups and individuals ("Plaintiffs")¹⁶² filed suit to enjoin TVA's completion of the dam based on violations of the ESA¹⁶³ vis-à-vis the little fish. Plaintiffs specifically alleged, among other things, that TVA had violated section 7 of the ESA.¹⁶⁴

B. The District Court Ruling: Imaginative Reconstruction

The trial court denied the Plaintiffs' request for an injunction to prevent completion of Tellico Dam and dismissed the lawsuit.¹⁶⁵ Despite

¹⁵⁶ 437 U.S. at 158.

¹⁵⁷ Prior to the Endangered Species Act lawsuit, opponents had successfully argued for an injunction based on TVA's failure to prepare an environmental impact statement ("EIS") pursuant to the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321 et. seq. ("NEPA"). *Envtl. Def. Fund v. Tenn. Valley Auth.*, 339 F. Supp. 806 (E.D. Tenn. 1972), *aff'd*, 468 F.2d 1164 (6th Cir. 1972). When TVA later completed its environmental review to the satisfaction of the court, the injunction terminated. *Envtl. Def. Fund v. Tenn. Valley Auth.*, 371 F. Supp. 1004 (E.D. Tenn. 1973), *aff'd*, 492 F.2d 466 (6th Cir. 1974).

¹⁵⁸ *TVA v. Hill*, 437 U.S. at 158.

¹⁵⁹ 40 Fed. Reg. 47,505, 47,506 (Oct. 9, 1975).

¹⁶⁰ 41 Fed. Reg. 13,926, 13,927 (Apr. 1, 1976).

¹⁶¹ *Id.* The Secretary, relying on the language of section 7, instructed all federal agencies to "take such action as is necessary to insure that [their] actions . . . do not result in the destruction or modification of" the snail darter's critical habitat. *Id.* at 13,928.

¹⁶² The plaintiff group included the Association of Southeastern Biologists, the Audubon Council of Tennessee, Inc., Hiram G. Hill, Jr., Zygmunt J.B. Plater and Donald Cohen. *Hill v. Tenn. Valley Auth.*, 419 F. Supp. 753, 754 (E.D. Tenn. 1976).

¹⁶³ *Id.*

¹⁶⁴ *Id.* Plaintiffs also argued that TVA had violated section 9 of the ESA, however, the court chose not to decide the question. *Id.* at 755 n.1.

¹⁶⁵ *Id.* at 764.

finding that operation of the dam would jeopardize the continued existence of the snail darter and modify its critical habitat¹⁶⁶ (seemingly contravening the mandatory language of section 7), the court ruled that the ESA neither compelled issuance of an injunction nor could it be construed to prevent completion of the dam.¹⁶⁷

In reaching its holding, the trial court relied on intentionalism as its primary approach to statutory interpretation, an approach subsequently adopted by two of the Supreme Court's three dissenters. The trial court framed the issue as follows: under the circumstances presented, "is it reasonable to conclude that *Congress intended* the Act to halt the Tellico Project at its present stage of completion?"¹⁶⁸

Given the stealth nature of section 7 (as originally enacted) and given that the ESA nowhere refers to the Tellico Dam project, there was no specific congressional intent for the court to rely on. So, in order to answer the question of intent, the court needed to, and did, engage in a certain amount of imaginative reconstruction. In its imaginative reconstruction exercise, the trial court primarily relied on two avenues of support: subsequent legislative appropriations and a canon of reasonable construction.

With respect to appropriations, the trial court viewed continued congressional funding of the Tellico Project—occurring after enactment of the ESA and after listing of the snail darter—as evidence of congressional intent not to halt the project.¹⁶⁹ Despite acknowledging the general

¹⁶⁶ *Id.* at 757. Regarding jeopardy of extinction, the court found as follows:

[W]e conclude that it is highly probable that closure of the Tellico Dam and the consequent impoundment of the river behind it will jeopardize the continued existence of the snail darter. Almost all of the known population of snail darters will be significantly reduced if not completely extirpated, either due to the impoundment itself or the snail darter's potential loss of reproductive ability if it is unable to adapt to a new environment.

Id. Regarding adverse modification of critical habitat, the court concluded that "the preponderance of the evidence demonstrates that closure of the Tellico Dam in January 1977 and the consequent creation of the Tellico Reservoir will result in the adverse modification, if not complete destruction, of the snail darter's critical habitat." *Id.*

¹⁶⁷ *Id.* at 761-64.

¹⁶⁸ *Id.* at 760 (emphasis added).

¹⁶⁹ For example, the trial court stated, "When the snail darter was listed on the endangered species list in November 1975, TVA was fairly close to completion of *the project which has been consistently funded by Congress since 1966*," and "[a]fter being so advised through its committees [of the snail darter situation], *Congress appropriated over \$29 million for the project* though September 1976." *Id.* at 758 (emphasis added).

rule disfavoring repeal by later congressional appropriations, the court found the continued appropriations convincing as to congressional intent:

Nevertheless we believe that *additional funding* of the Tellico Project and a House Committee's direction to complete the project "in the public interest" after being informed by TVA that it did not construe the Endangered Species Act as preventing the project's completion is *persuasive that such an interpretation of the Act is consistent with congressional intent*.¹⁷⁰

Following this same line of reasoning, Supreme Court Justices Powell and Blackmun ran with the later appropriations approach in their dissent.¹⁷¹

The trial court also relied heavily on a canon of reasonableness in determining legislative intent. Essentially, the court viewed stopping a project so long in the making, so costly to the public (including irretrievable losses of around \$53 million),¹⁷² and so close to completion, a preposterous and, therefore, unreasonable outcome. Along these lines, the trial judge stated:

The Act should be *construed in a reasonable manner* to effectuate the legislative purpose.

....

At some point in time a federal project becomes so near completion and so incapable of modification that a court of equity should not apply a statute enacted long after inception of the project to produce an unreasonable result.¹⁷³

In essence, the court ruled it would be absurd for Congress to have intended the ESA to operate so as to halt so significant and costly a project¹⁷⁴ to prevent the extinction of a single species, and so it did not so

¹⁷⁰ *Id.* at 761-62 (emphasis added).

¹⁷¹ *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 200-01 (1978) (Powell, J., dissenting, Blackmun, J., joining).

¹⁷² *TVA v. Hill*, 419 F. Supp. at 759-60 (majority opinion).

¹⁷³ *Id.* at 760 (emphasis added) (citations omitted). Similarly, the court notes that "[a] far different situation would be presented if the project were capable of reasonable modifications that would insure compliance with the Act or if the project had not been underway for nearly a decade." *Id.* at 763.

¹⁷⁴ *Id.* at 760. According to the trial court, "[t]he nature of the project is such that there are no alternatives to impoundment of the reservoir, short of scrapping the entire project. . . .

intend.¹⁷⁵ In their dissent, Supreme Court Justices Powell and Blackmun again found this interpretive approach persuasive: “Nor can [we] believe that Congress could have intended this Act to produce the ‘absurd result’— in the words of the District Court—of this case.”¹⁷⁶

The decision is also illustrative in view of the statutory interpretation roads not taken. The trial court neither seriously considered the plain language of section 7 (thereby rejecting a textualists approach)¹⁷⁷ nor did it rely on legislative history of the enacting Congress (passing up the ordinary evidentiary proof method of intentionalists). Moreover, although the court raised the issue of administrative agency deference, it declined to defer to the U.S. Fish and Wildlife Service, the administering agency with expertise concerning endangered species.¹⁷⁸

The trial court’s approach may be criticized on various grounds. First, there are process concerns. The trial court’s legislative intent reasoning essentially boils down to an argument of implied repeal by subsequent appropriations. The courts typically disfavor such claims¹⁷⁹ because appropriations approvals do not clearly or necessarily reflect any actual intent by Congress to amend or repeal prior legislation. For these very reasons, the Supreme Court rejects the trial court’s position on appeal:

There is nothing in the appropriations measures, as passed,
which states that the Tellico Project was to be completed

Requiring TVA to consult with other agencies about alternatives not reasonably available to it would be to require TVA to perform a useless gesture.” *Id.* at 758.

¹⁷⁵ The court’s ruling also relied on agency deference to some extent.

¹⁷⁶ *TVA v. Hill*, 437 U.S. at 196 (Powell J., dissenting, Blackmun, J., joining). The Powell dissent in good measure embraced both the rationale and conclusion of the trial court. The dissenters applied the same canon of statutory interpretation calling for rejection of “absurd results” as the trial judge to parse the plain meaning. *Id.* at 204-5. As for the ultimate conclusion, Justice Powell’s dissent states, “[I]t seems clear that District Judge Taylor correctly interpreted § 7 as inapplicable to the Tellico Project.” *Id.* at 199 n.5.

¹⁷⁷ The trial court did set forth the relevant language of section 7, but only to present the Plaintiffs argument before dismissing it. *Hill v. TVA*, 419 F. Supp. at 754-55.

¹⁷⁸ *See id.* at 761. The court explicitly declined to give deference to Fish and Wildlife guidelines concerning section 7 responsibilities, but it also implicitly declined to give deference in refusing to enforce the Service’s listing and critical habitat determinations establishing the violation of section 7.

¹⁷⁹ The appellate court makes this point explicitly: “(I)t is well settled that repeal by implication is disfavored, and the doctrine applies with full vigor when, as here, the subsequent legislation is an *appropriations measure*, and when the prior Act is to continue in its general applicability” *Hill v. Tenn. Valley Auth.*, 549 F.2d 1064, 1072 (6th Cir. 1977) (quoting *Committee for Nuclear Responsibility, Inc. v. Seaborg*, 463 F.2d 783, 785 (1971)) (emphasis added).

irrespective of the requirements of the Endangered Species Act. These appropriations, in fact, represented relatively minor components of the lump-sum amounts for the *entire* TVA budget. To find a repeal of the Endangered Species Act under these circumstances would surely do violence to the 'cardinal rule . . . that repeals by implication are not favored.' . . . In practical terms, this 'cardinal rule' means that '(i)n the absence of some affirmative showing of an intention to repeal, the only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable.'¹⁸⁰

In such situations, the constitutional safeguards of Article I may be technically fulfilled, but only ambiguously or dubiously satisfied.

A related concern turns on *which* legislature's intent counts. In *Hill v. TVA*, the trial court's approach to statutory interpretation failed to examine the actions and legislative history of the *enacting* Congress, and instead focused on the legislative intent of a *post-enactment* Congress.¹⁸¹ For intentionalists, it is the enacting Congress's intent that matters for purposes of statutory interpretation. The reason has to do with the essential rationales for using legislative intent: that of maintaining separation of powers and democratic government. Aside from the obvious process concerns, consideration of *post-enactment* congressional intent gives judges even greater freedom to make policy unbound by legislative process in the name of statutory interpretation (or puts the judiciary in the untenable position of mind-reading one or more subsequent congresses). It can be argued that the trial court in *Hill v. TVA* attempted to do just that. If left standing, the ruling would have transformed a strictly-written statutory prohibition against jeopardy into a permissive cost-benefit (or balancing)

¹⁸⁰ *TVA v. Hill*, 437 U.S. at 189 (citations omitted). Regarding legislative intent to repeal, the Court specifically noted:

The Appropriations Acts did not themselves identify the projects for which the sums had been appropriated; identification of these projects requires reference to the legislative history. Thus, unless a Member scrutinized in detail the Committee proceedings concerning the appropriations, he would have no knowledge of the possible conflict between the continued funding and the Endangered Species Act.

Id. at 189 n.35 (citation omitted).

¹⁸¹ The provision of the Endangered Species Act relied on by the Plaintiffs took effect in December 1973, whereas the legislative history cited by the trial court as indicative of legislative intent dates to 1975 and 1976. See *Hill v. TVA*, 419 F. Supp. at 758-60.

regulation. In so doing, the trial court arguably substituted its judgment of what the law *should be* for the judgment of the democratically-elected representatives who put into effect the Endangered Species Act of 1973.

The trial court exacerbated the separation of powers problem with its “absurd consequences” approach to statutory interpretation.¹⁸² This interpretive approach seizes from Congress its power to make unreasonable and purportedly unreasonable laws (despite Congress’s authority to do so), while it offers Congress political cover for shirking unpopular policy decisions (contrary to Congress’s responsibility for doing so). Although a reasonableness interpretation of statutory meaning may be justified in cases where a universal meaning or common understanding exists, it is less so where rational minds may differ. As the trial court readily admitted, *Hill* represented the latter situation: opinion could, and likely would, differ.¹⁸³ Where differences of opinion within the court itself are probable and even expected, the court’s rationale is weakest because it is essentially a policy substitution rather than an oversight correction.

These criticisms aside, the trial court’s holding—based on a legislative intent analysis—logically comports with the provision’s stealth character. Congress can have no specific intent with respect to a stealth provision because, by definition, Congress was unaware of the provision’s existence and/or potential application. Moreover, the very fact that the drafters covertly included the statutory language implies that congressional support for explicit/outright inclusion was lacking (or thought to be lacking). Thus, the trial court’s refusal to interpret section 7 as prohibiting a dam operation was logically consistent with its reliance on legislative intent: legislative intent did not support Plaintiff’s claim because there was no legislative intent on the part of the enacting Congress.

Nevertheless, even if there is logical consistency between the ultimate holding and the stealth nature of the provision, the court never explicitly addresses this point. Rather than noting a lack of congressional intent on the part of the enacting congress, the court simply argues its point based on later congressional action. As a consequence, the court must engage in the equivalent of a “full court press” exercise of imagination to counter the plain language of the statute.

¹⁸² The appellate court criticized Judge Taylor’s decision on this very issue. See *Hill v. TVA*, 549 F.2d at 1069.

¹⁸³ The trial court explained its thorough recitation of facts as follows: “Since this case involves novel questions of law, about which there may be differences of opinion, fairly detailed factual finding have been made . . .” *Hill v. TVA*, 419 F. Supp. at 755 n.2.

C. *The Appellate Court Ruling: Deference, Purposivism & Plain Language*

On appeal, the Sixth Circuit reversed and remanded. According to the appeals court, TVA had violated section 7 of the Endangered Species Act, no grounds existed for an exemption, and the trial court abused its discretion in refusing an injunction.¹⁸⁴ In reaching its holding, the circuit court relied on a combination of agency deference, purposivism, and plain language to interpret section 7's stealth provision.

Regarding the issue of whether TVA had violated the ESA, the appellate court deferred to the Secretary of Interior's regulatory definition by finding the administrative interpretation both reasonable and worthy of judicial ratification.¹⁸⁵ Justifying its deference, the court noted that "[a]lthough we are not compelled to follow agency constructions of a regulatory measure, courts have traditionally shown 'great deference to the interpretation given the statute by the officers or agency charged with its administration' . . . particularly as to technical matters committed by statute to [agency] expertise."¹⁸⁶ Additionally, the appellate court relied on the agency's interpretation because it found deference advantageous for promoting expeditious resolutions through consistent application of the law with minimal intrusion to the judicial branch.¹⁸⁷

The appellate court next relied on a combination of purposivism and plain language to reject TVA's request for an exemption based on grounds of expediency and economic exigencies:

To countenance so restrictive a construction . . . in the absence of positive reinforcement from the Act's legislative history, would, in our view, be *inimical to achieving its objectives*. We choose instead to give the term "actions" its *plain meaning* in the belief that this will best effectuate the will of Congress.¹⁸⁸

¹⁸⁴ *Hill v. TVA*, 549 F.2d at 1064.

¹⁸⁵ *Id.* at 1070.

¹⁸⁶ *Id.* (citations omitted). Of note, the case was decided seven years prior to the infamous *Chevron* decision in which the Supreme Court validated and confirmed its commitment to agency deference. See *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837 (1984).

¹⁸⁷ *Hill v. TVA*, 549 F.2d at 1070.

¹⁸⁸ *Id.* at 1070-71 (emphasis added).

The court explicitly referenced the statutory congressional declaration of purposes to fortify its holding by stating, “Nor will we expurgate an important federal policy statute designed to foreclose all activities anti-thetic to the preservation of the ‘esthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people’ of vulnerable species of fish, wildlife and plants.”¹⁸⁹ This court used the combination of purposivism and plain language to achieve its highest priority, that of safeguarding separation of powers among the judicial, executive and legislative branches of government.¹⁹⁰

The appellate court’s interpretive approach offers a key advantage over that of the trial court decision. It limits congressional duck-and-cover maneuvers. Scholars such as Professor David Schoenbrod have persuasively argued that Congress strategically adopts sweeping language on statutory aims to generate broad constituent support, while leaving implementing provisions vague and nebulous to foist off hard and/or controversial decisions to the administrative agencies and courts.¹⁹¹ In this way, legislators take credit for acting, but shirk their constitutional responsibilities to legislate in the public interest. In refusing to judicially exempt the TVA project, the court would stick the hot potato back in the lap of Congress to legislatively amend unequivocal language of section 7.¹⁹² In addition, Congress would have to take a stand on the policy conflict between the Act’s popular species conservation mandate and a favored economic development project. In other words, Congress would have to clean up its own mess.

¹⁸⁹ *Id.* at 1073 (quoting 16 U.S.C. § 1531(a)(3)). The court references the purpose and spirit of the Act in several other passages of the decision. *Id.* at 1072 (“The meaning and spirit of the Act are clear on its face.”).

¹⁹⁰ “Our abiding interest in preserving the functional independence of the coordinate branches of government, as ordained by the constitutional separation of their enumerated powers, compels us to reverse the District Court and grant the relief requested.” *Id.* at 1069. And, in conclusion, “[t]he separation of powers doctrine is too fundamental a thread in our constitutional fabric for us to be tempted to preempt congressional action in the name of equity or expediency.” *Id.* at 1074.

¹⁹¹ See generally DAVID SCHOENBROD, *SAVING OUR ENVIRONMENT FROM WASHINGTON: HOW CONGRESS GRABS POWER, SHIRKS RESPONSIBILITY, AND SHORTCHANGES THE PEOPLE* (2005).

¹⁹² The court’s “responsibility under § 1540(g)(1)(A) is merely to preserve the status quo where endangered species are threatened, thereby guaranteeing the legislative or executive branches sufficient opportunity to grapple with the alternatives.” *Hill v. TVA*, 549 F.2d at 1071.

Nevertheless, the appellate court's holding may be criticized for blatantly ignoring the stealth nature of the provision at issue. There is no mention of the possibility of congressional oversight or ignorance of the potency of the language adopted, despite an obvious disconnect between the title of the provision and its content. There is no hint that Congress might have overlooked compulsory wording tucked within rambling and overly wordy sentence structure. To the contrary, the appellate court decision makes no effort to reconcile the stealth nature of the provision with its effort to "effectuate the will of the Congress."¹⁹³

D. *The Supreme Court Ruling: Plain Language and Statutory Purpose*

The Supreme Court took a somewhat different tack. The Court opted for a textual approach grounded by statutory purpose. The Court's keen reliance on textualism can be summed up best by the Chief Justice's own words:

One would be hard pressed to find a statutory provision whose terms were any plainer than those in § 7 of the Endangered Species Act. Its very words affirmatively command all federal agencies 'to *insure* that actions *authorized, funded, or carried out* by them do not *jeopardize* the continued existence' of an endangered species or '*result in the destruction or modification of habitat of such species . . .*' This language admits of no exception.¹⁹⁴

Thus, in answer to the question whether *TVA would be in violation of the ESA if it completed and operated the dam*, the Court concluded that "the explicit provisions of the Endangered Species Act require" an answer in the affirmative.¹⁹⁵ To rule otherwise and sustain petitioner's position, the Court "would be forced to ignore the ordinary meaning of plain language."¹⁹⁶

¹⁹³ *Id.*

¹⁹⁴ *TVA v. Hill*, 437 U.S. at 173 (quoting 16 U.S.C. § 1536 (1976)) (emphasis in original).

¹⁹⁵ *Id.* at 172-73 (emphasis added).

¹⁹⁶ *Id.* at 173.

Additionally, the Court gave weight to the general purposes of the Act.¹⁹⁷ The Court considered the ESA's expressly enumerated purposes:

As it was finally passed, the Endangered Species Act of 1973 represented the most comprehensive legislation for the preservation of endangered species ever enacted by any nation. Its stated purposes were 'to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved,' and 'to provide a program for the conservation of such . . . species' In furtherance of these goals, Congress expressly stated . . . that 'all Federal departments and agencies *shall seek to conserve endangered species and threatened species . . .*'¹⁹⁸

And, it is against these purposes which the Court would measure TVA's claim: "The plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, whatever the cost. This is reflected not only in the *stated policies* of the Act, but in literally every section of the statute."¹⁹⁹

Why a textual/purposivism approach? It was because the majority cared first and foremost about preservation of separation of powers and judicial integrity. The Court explained: "[I]n our constitutional system the commitment to the separation of powers is too fundamental for us to pre-empt congressional action by judicially decreeing what accords with 'common sense and the public weal.' Our Constitution vests such responsibilities in the political branches."²⁰⁰ Thus, the majority chides the dissent:

Our individual appraisal of the wisdom or unwisdom of a particular course consciously selected by the Congress is to be put aside in the process of interpreting a statute. Once the meaning of an enactment is discerned and its constitutionality determined, the judicial process comes to an

¹⁹⁷ The Court considered the language, structure, legislative evolution of the statute to assess purpose. *Id.* at 173-195. However, the Court made clear that, but for countering the dissent's assertions, when confronted with an unambiguous statute legislative history ordinarily would not be "a guide to its meaning." *Id.* at 184 n. 29.

¹⁹⁸ *Id.* at 180 (emphasis in original) (citations omitted).

¹⁹⁹ *Id.* at 184 (emphasis added).

²⁰⁰ *Id.* at 195.

end. We do not sit as a committee of review, nor are we vested with the power of veto.²⁰¹

And, in a footnote responding to the dissent's position that the meaning of section 7 was "far from 'plain,'" the majority mocks the dissent's approach as unprincipled:

Aside from this bare assertion, however, no explanation is given to support the proffered interpretation. This recalls Lewis Carroll's class advice on the construction of language:

'When *I* use a word,' Humpty Dumpty said, in rather a scornful tone, 'it means just what *I* choose it to mean—neither more nor less.'

Aside from being unexplicated, the dissent's reading of § 7 is flawed on several counts.²⁰²

The majority, perhaps a bit defensively, portrays the case as a slam dunk for the snail darter.

Interestingly, but unpersuasively, the majority goes out of its way to suggest conscious and deliberate drafting by Congress.²⁰³ Yet nothing in Congress's response (continued funding of the dam project²⁰⁴ and subsequent congressional statements) indicates this to be true; to the contrary, the subsequent brouhaha and ultimate amendment of section 7 forcefully contradict it. Not surprisingly, Justice Powell's dissent comes to the opposite conclusion on this very point: "This unfortunate litigation . . . may have been invited by *careless draftsmanship* of

²⁰¹ *Id.* at 194-95.

²⁰² *Id.* at 173 n.18.

²⁰³ The Court not only referred to a "particular course consciously selected by the Congress" but purposeful drafting of section 7. *Id.* at 194. Specifically, the Court noted that "the House manager of the bill, Representative Dingell, provided an interpretation of what the Conference bill would require, making it clear that the mandatory provisions of § 7 were *not casually or inadvertently* included . . . [.]" *Id.* at 183 (emphasis added).

²⁰⁴ Congress continued appropriations for the Tellico project in 1976 and 1977 after the Secretary of Interior's listing of the snail darter as endangered in November 10, 1975, notification of the species' plight, and the initiation of litigation. *Hill v. TVA*, 437 U.S. at 197-200 (Powell, J., dissenting, Blackmun, J., joining). As the dissenters noted, the Senate Committee on Appropriations repeatedly indicated that it did not view the ESA as prohibiting project completion. *Id.* at 200-02 (Powell, J., dissenting, Blackmun, J., joining); S. Rep. No. 94-960, at 104 (1977).

otherwise meritorious legislation.”²⁰⁵ The dissent further tore down the majority’s position by pointing out the following:

While the Court’s review of the legislative history establishes that Congress intended to require governmental agencies to take endangered species into account . . . , *there is not even a hint* in the legislative history that Congress intended to compel the undoing or abandonment of any project or program later found to threaten a newly discovered species.²⁰⁶

But perhaps more telling are certain internal deliberations and statements of the Chief Justice. It has been suggested that Chief Justice Burger took on the drafting of the opinion (and voted for reversal) to scold Congress for irresponsibly accepting stealth language and to convey displeasure at such serious legislative inattention.²⁰⁷ Apparently, the real message conveyed was to Congress. And the message was: Say what you mean²⁰⁸ and mean what you say.²⁰⁹

²⁰⁵ *TVA v. Hill*, 437 U.S. at 203 n.11 (Powell, J., dissenting, Blackmun, J., joining) (emphasis added).

²⁰⁶ *Id.* at 207-08 (emphasis added). In the long and raucous aftermath of the *Tellico Dam* controversy, Congress amended the ESA so as to, among other things, tame some of the section 7 requirements. Shannon Peterson, *Congress and Charismatic Megafauna: A Legislative History of the Endangered Species Act*, 29 ENVTL. L. 463, 485 (1999). Thus, the dissenters correctly predicted the congressional response: immediate amendment of the Act. See *TVA v. Hill*, 437 U.S. at 210.

²⁰⁷ See Holly Doremus, *The Story of TVA v. Hill: A Narrow Escape for a Brand New Law*, in ENVIRONMENTAL LAW STORIES 109, 131 (Oliver A Houck & Richard J Lazarus eds., 2005) (“Burger may have been trying to goad Congress into action. His memo assigning himself the case had noted that he planned to ‘serve notice’ on Congress that it should take care of its own ‘chestnuts.’ He went out of his way to point out in a footnote exactly how trivial this species was”); Zygmunt J.B. Plater, *In the Wake of the Snail Darter: An Environmental Law Paradigm and Its Consequences*, 19 U. MICH. J.L. REFORM 805, 826 n.71 (1986) (“Chief Justice Burger, who assigned himself the opinion and made many caustic references to the snail darter,” also gave an oral delivery “marked by a tone of sarcasm, inviting Congress to amend the Act quickly.”). Along these same lines, in a compilation of Chief Justice Burger’s speeches, the introduction to section three states that “His opinion made the odd—and expensive—result of this unwise law so clear that it was virtually a challenge to Congress to ‘clean up its own act.’” WARREN E. BURGER, DELIVERY OF JUSTICE 217 (1990).

²⁰⁸ Something along the lines of the Dispatch lyrics which go:

Say what you want,
Say what you mean,
Question yourself,
Are you really what you seem?

IV. A LEAST BAD APPROACH

The prior sections bring us inexorably to the *what-does-this-all-mean* part of the Article. What should courts do when faced with a statutory challenge of an ESA provision which evidences stealth characteristics? Building on the earlier discussions, this section suggests a least bad approach for such statutory challenges.

As noted in the general discussion of statutory interpretation approaches in Part I, there is no perfect approach; all are indeterminate to some degree and each has certain other weaknesses vis-à-vis the democratic process, and pragmatic criteria against which they are typically judged.²¹⁰ Further, the dramatic array of interpretations of section 7's consultation requirement described in Part III reflect the confounding nature of stealth provisions and the apparent theoretical disarray absent a common or preferred approach for attacking this interpretive conundrum. Recognizing these inherent limits and situational realities, this Part offers a least bad approach for interpretation of stealth ESA provisions.

The proposed least bad approach for interpreting ESA stealth provision relies on plain language interpretation grounded in purposivism and informed by contemporary contextual considerations. The touchstone for interpreting ESA stealth provisions, as with all statutory provisions, must remain the plain language of the law. But, unlike "the cheese," the plain language cannot "stand alone."²¹¹ This is a soft, not new, textualism

Say who you are,
 Say what you mean,
 Question yourself,
 Are you really what you dream?

DISPATCH, HEY . . . HEY . . . (Bomber Records 1996).

²⁰⁹ It is a message that the Court itself could have been more mindful of, for the decision smacks a bit of intellectual dishonesty. Despite the arguments to the contrary, the majority's true rebuke suggests understanding that Congress never consciously intended such an outcome. The majority may have been better off by openly tackling the stealth nature of the provision and then placing responsibility for correction squarely on legislative shoulders, rather than crediting Congress with deliberative action and then rebuking it for not saying what it meant. If the Court wants Congress to say what it means, it should do so too.

²¹⁰ The governmental, process, and pragmatic criteria derive from the concerns and criticisms of the existing approaches set forth in Part I. See discussion *supra* Part I.

²¹¹ "The cheese stands alone" refers to the final verse in the classic nursery rhyme "The Farmer in the Dell," in which the farmer takes a wife who takes a child and on and on before finally reaching out for and taking the last alone item, the cheese. Interestingly, even the cheese joins the rest of the farm group and only then stands alone to restart the

approach. It calls for contextual reinforcement based on the reason for and the spirit of the ESA. Additionally, in a nod to pragmatism, the least bad approach acknowledges temporal socio-cultural-political changes and advances in scientific knowledge and methodology.

A. *The Starting Point: Plain Language*

The plain language constitutes the traditional starting point for statutory interpretation chiefly because it confers important safeguards for judicial interpretation. First, by centering attention on the actual text (what the legislature said), plain language interpretation encourages transparency. Transparency, in turn, holds both legislators and judges accountable to the public (for what they say and what they say was said, respectively). Second, consistent with constitutional design, tying meaning to the actual words of a statute constrains would-be judicial policymakers from straying too far afield from the role of the judiciary and too far into the role the legislature.²¹²

Moreover, the plain language constitutes the logical starting point for stealth provision interpretation because there is *no* legislative intent with respect to the specific provision at issue. Stealth provisions, by definition and design, are provisions of which few, if any, legislators took serious note. They are stealthy in large part *because* most legislators failed to consider, ponder, deliberate, or debate their significance at the time of enactment. Moreover, the drafters²¹³ need for concealment of (or perceived need to conceal) their intended meaning regarding a provision's legal significance suggests that had the drafters' true intentions been known to Congress as a whole the provision would have, at the very least, generated sufficient controversy to make passage questionable. Why else cloak their significance? It makes little sense, in fact it would be oxymoronic, to have the courts rely on legislative intent absent any such

game. THE FARMER IN THE DELL, available at <http://kids.niehs.nih.gov/lyrics/farmer.htm>.

²¹² See William S. Blatt, *The History of Statutory Interpretation: A Study in Form and Substance*, 6 CARDOZO L. REV. 799, 812 (1984-1985) (arguing that courts adopting a plain meaning approach "emphasized their duty to follow the will of the legislature under the principle of separation of powers").

²¹³ Note that "drafter" here refers to legislative staff and/or persons other than specific legislators who contributed to and influenced the precise wording of particular statutory provisions.

intent or to pretend otherwise by means of judicially-manufactured legislative intent.²¹⁴

It could be countered that a lack of legislative intent is itself significant for interpretive purposes. Lack of intent could arguably justify a particularly narrow interpretation that would imbue a stealth provision with little or no significant legal or regulatory meaning. Such an approach comports with those who view legislative intent as the touchstone of interpretation and would serve as a deterrent to those inclined to draft stealth provisions. The trouble with this approach is threefold. First, it lets Congress off the hook for its own inattentiveness to legislative detail. Second, in cases where a narrow interpretation runs counter to an apparent plain meaning, it undermines fundamental process values associated with formal constitutional procedures for legislative enactment. Third, lack of specific intent does not necessarily correlate with a narrow interpretation. Had Congress focused its attention on the matter in question, it may have chosen some moderate or intermediate meaning rather than an extremely narrow one (even if was unlikely to adopt the measure exactly as the drafters intended).

B. The Necessary Context: Purposivism

The plain language constitutes the starting point, but not the end point, of stealth language interpretation. Language derives meaning, at least in part, from context.²¹⁵ For ESA stealth provisions, purposivism best performs this service. Specifically, purposivism confers important safeguards for judicial interpretation by taking a holistic perspective in contrast to focusing solely on the letter of the law, which can leave interpreters in a contextual vacuum.²¹⁶ Grounding the plain language approach in the fundamental purposes, goals, and objectives of the Act, moreover, constrains would-be judicial policymakers from straying too far from the will of Congress and offers legitimacy for judicial interpretations.²¹⁷

²¹⁴ For the court to rely on legislative intent to justify the meaning of stealth language would require both pure speculation and whole-cloth invention. The very notion makes little sense other than to maintain some false sense of legislative attentiveness to legislative detail.

²¹⁵ See discussion *supra* Part I.B.

²¹⁶ See Blatt, *supra* note 212, at 834 (“Statutory purpose is sufficiently all-embracing to permit examination of all the facts and circumstances of the particular case. This in turn, improves judicial decisionmaking.”).

²¹⁷ See *id.* at 808-09 (“Like other early classical doctrines, legislative intent offered a middle

Although some might argue that purposivism itself opens the door to judicial activism, this view ignores the reality that plain language—along with its associated canons—can be equally subjective and malleable to desired policy outcomes, only less transparently so.²¹⁸ Grounding provides interpretive checks and balances because neither approach alone avoids indeterminate results, but together they circumscribe the interpretive universe within appropriate bounds.

With respect to the ESA in particular, Congress set forth certain overarching purposes, including:

to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, to provide a program for the conservation of such endangered species and threatened species, and to take such steps as may be appropriate to achieve the purposes of the treaties and conventions set forth [therein].²¹⁹

Congress further “declared [it] to be the policy of Congress that all Federal departments and agencies shall seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of the purposes of this chapter.”²²⁰ In its findings, Congress also declared that “the United States has pledged itself as a sovereign state in the international community to conserve to the extent practicable the various species of fish or wildlife and plants facing extinction” with respect to certain then-existing treaties and conventions.²²¹ These congressional statements reveal an unusually unequivocal and singularly focused commitment to domestic species and ecosystem conservation with only a moderately less fervent international commitment.

This rather self-evident and focused purpose has not escaped judicial notice. Over the last three-plus decades the federal courts have often recognized and reiterated this unifying statutory destination.²²² As

ground between judicial activism and complete deference to the will of others, between unabashed paternalism and unconditional nonintervention.”)

²¹⁸ Textualism and the canons of construction in conveying an objective air, mask their inherent subjectivity, making them arguably more deceptive/disingenuous than purposivism. Meaning freed from context and opposing canons for every view leave judges to pick and choose among meanings they prefer. *See supra* note 69 and accompanying text.

²¹⁹ 16 U.S.C. § 1531(b) (2000).

²²⁰ *Id.* § 1531(c).

²²¹ *Id.* § 1531(a)(4).

²²² *See, e.g.,* *Strahan v. Coxe*, 127 F.3d 155, 161 (1st Cir. 1997) (“The Endangered Species

a consequence, the grounding of plain language in purposivism translates to a finger on the scale for threatened and endangered species.²²³ That is, the fundamental contextual consideration for ESA stealth provision interpretation must be conserving species and the ecosystems upon which they depend. For the ESA at least, the congressionally-determined purposes and policies of the Act set the outer contours for judicial interpreters; the lines of the drawing that all the coloring should fall within. Regardless of the level of congressional inattention paid any particular implementing stealth provision, all can and should be evaluated in the context of these end goals of the Act and all can and should be interpreted as a means towards conserving endangered species and threatened species and the ecosystems upon which they depend, unless and until Congress explicitly states otherwise.²²⁴

Secondary benefits of this approach include an incentive for careful congressional scrutiny of future amendments and a disincentive for future stealth drafting of the worst type of stealth provisions—those contrary to the Act's fundamental purposes.

C. *A Nod to Pragmatic Considerations: Adaptive Statutory Interpretation*

In applying the proposed least bad approach, the interpreters of ESA stealth provisions would additionally consider scientific, technological, and societal changes since the ESA's enactment. An evolutive perspective, however, would be secondary in importance to the textual and purposivism interpretive elements. This least bad approach element might be

Act was enacted with the purpose of conserving endangered and threatened species and the ecosystems on which they depend. The ESA is 'the most comprehensive legislation for the preservation of endangered species ever enacted by any nation.'" (quoting *Tenn Valley Auth. v. Hill*, 437 U.S. 153 (1978)) (other citations omitted).

²²³ Federal courts have taken a similar approach in determining the availability of injunctive relief in ESA cases. *See, e.g., Strahan*, 127 F.3d at 160 ("Under the ESA . . . the balancing and public interest prongs have been answered by Congress' determination that the 'balance of hardships and the public interest *tips heavily in favor of protected species.*'" (quoting *Nat'l Wildlife Fed'n v. Burlington Northern R.R.*, 23 F.3d 1508, 1510 (9th Cir. 1994)) (emphasis added).

²²⁴ This approach may also discourage congressional duck-and-cover maneuvers. First, if consistently adopted, the approach provides Congress advance warning as to how courts will likely rule in the case of stealth drafting. Second, it constrains Congress from promising the world in statutory pronouncements, unless that is what it truly intends. Third, it discourages the leave-it-to-the-courts-to-work-out approach to statutory drafting.

called adaptive statutory interpretation²²⁵ (or, perhaps, dynamic statutory interpretation lite²²⁶). A court applying such an adaptive interpretative approach would take account of interpretations of the stealth provision that best comport with current scientific understanding regarding biodiversity and proven strategies for conservation of species and the ecosystems upon which they depend. However, adaptive statutory interpretation would not attempt to gauge or account for shifts in political or public values, nor would it be controlling. Thus, the ordering of priorities for the interpreter would first and foremost be text and purpose and only secondarily adaptive considerations for purposes of minor statutory updating and fine-tuning adjustments.

1. An Adaptive Approach for Stealth Provisions

An adaptive approach to ESA stealth provision interpretation makes sense for a number of reasons. First, an adaptive approach can avoid unnecessary statutory obsolescence. According to advocates of evolutive approaches, an adaptive interpretive approach makes most sense for old, generally worded statutes that lack congressional deliberation and for which “the societal or legal context of the statute has changed materially.”²²⁷ The ESA, with more than thirty years under its belt, certainly meets the “old” criterion. Also, stealth provisions by their very nature

²²⁵ The notion of “adaptive statutory interpretation” derives from the ecological concept of “adaptive management.” As defined by biologist Simon Levin, adaptive management refers to “maintaining flexibility in management structures and adjusting rules and regimes on the basis of monitoring and other sources of new data.” SIMON A. LEVIN, *FRAGILE DOMINION: COMPLEXITY AND THE COMMONS* 200 (1999). See also KAIN. LEE, *COMPASS AND GYROSCOPE: INTEGRATING SCIENCE AND POLITICS FOR THE ENVIRONMENT* 53 (1993) (defining adaptive management as the application of “the concept of experimentation to the design and implementation of natural-resource and environmental policies”); J.B. Ruhl, *Thinking of Environmental Law as a Complex Adaptive System: How to Clean Up the Environment by Making a Mess of Environmental Law*, 34 *HOUS. L. REV.* 933, 996 (1997) (“The point [of adaptive management] is to move decision making out of the laboratory modeling approach and into the field, and to open the process up to continuous change based on a continuous input of information and analysis.”). Similar to dynamic statutory interpretation, the concept of adaptive management encourages flexible management policies that incorporate new information as it becomes available.

²²⁶ For a comprehensive discussion of dynamic statutory interpretation, I refer readers to the numerous writings of Professor William N. Eskridge, Jr. See, e.g., ESKRIDGE, *DYNAMIC STATUTORY INTERPRETATION*, *supra* note 12.

²²⁷ Eskridge, *Dynamic Statutory Interpretation* 1987, *supra* note 74, at 1484. See also discussion *supra* Part I.C.

lack legislative deliberation, meeting yet a second criterion for dynamic interpretation. Moreover, since the ESA's enactment, scientific thinking has shifted rather dramatically. The classic ecology paradigm of the "Balance of Nature," with its ideal natural state has been challenged by "Nonequilibrium Ecology," a dynamic state theory of nature;²²⁸ conservation strategies focused on individual species protections have moved toward more holistic concepts of biodiversity protection and ecosystem-based management;²²⁹ extinction rates have escalated rather than dissipated;²³⁰ habitat modification has overtaken over-harvest as the primary culprit of species decline;²³¹ and a scientific consensus has emerged that global climate change exists with potentially perilous consequences for species worldwide.²³² Over the course of this same time period, academics describe

²²⁸ See Daniel Botkin, *Adjusting Law to Nature's Discordant Harmonies*, 7 DUKE ENVTL. LAW & POL'Y F. 25-37 (1996).

²²⁹ See Robert B. McKinstry Jr. et al., *Legal Tools that Provide Direct Protection for Elements of Biodiversity*, 16 WIDENER L.J. 909 (2007) (discussing evolution of biodiversity regulation). See, e.g., Arlo H. Hemphill & George Shillinger, *Casting the Net Broadly: Ecosystem-Based Management Beyond National Jurisdiction*, 7 SUSTAINABLE DEV. L. & POL'Y 56 (2006) (promoting shift to ecosystem-based management approach for fisheries protection); J.B. Ruhl, *Biodiversity Conservation and the Ever-Expanding Web of Federal Laws Regulating Nonfederal Lands: Time For Something Completely Different?* 66 U. COLO. L. REV. 555, 561 (1995) (recognizing a shift to biodiversity regulation on nonfederal lands).

²³⁰ See EDWARD O. WILSON, *THE DIVERSITY OF LIFE* 280 (1992) (reporting the rate of species loss as 27,000 per year, conservatively). A substantial number of scientists now believe that we are in the midst of a "mass extinction." Joby Warrick, *Mass Extinction Underway, Majority of Biologists Say*, WASH. POST, April 21, 1998, at A4; see also Dana Clark & David Downes, *What Price Biodiversity? Economic Incentives and Biodiversity Conservation in the United States*, 11 J. ENVTL. L. & LITIG. 9, 9 (1996) ("We are currently experiencing an extinction crisis analogous to the one in which the dinosaurs disappeared millions of years ago. An important distinction, however, is that this time we are the cause of the crisis.").

²³¹ See BRIAN CZECH & PAUL R. KRAUSMAN, *THE ENDANGERED SPECIES ACT: HISTORY, CONSERVATION BIOLOGY AND PUBLIC POLICY* 10-11 (2001) (explaining historical transition from "blatant overharvest" to habitat alteration as primary cause of endangerment); see also, George Cameron Coggins, *A Premature Evaluation of American Endangered Species Law*, in *ENDANGERED SPECIES ACT: LAW, POLICY, AND PERSPECTIVES* 1, 3-4 (Donald C. Baur & Wm. Robert Irvin eds., 2002) (explaining by way of example: "bald eagles were not just being shot by disgruntled shepherders, their entire milieu had been poisoned by DDT. The recently listed salmon runs were not just being overfished, their riverine (and marine) habitat was in wretched condition from multiple causes. Few want to shoot red-cockaded woodpeckers for sport; their decline is attributable to the conversion of climax forest into monoculture tree farms.")

²³² For example, the *New York Times* recently reported that two-thirds of the world's polar bear population will likely disappear by 2050 due to melting sea ice as a result of green-

a series of societal viewpoint transformations coinciding with as many as four different stages of environmental law development.²³³ Ideally, by acknowledging scientific maturation and permitting some contextual updating, judicial interpreters facilitate the ESA's continuing relevance and effectiveness. Through interpretive fine-tuning, occasional course adjustments, and periodic adaptive updating, courts can thwart unnecessary statutory obsolescence.²³⁴ As a practical matter, because political motivations,²³⁵ procedural and resource obstacles to lawmaking, and political process biases tend to coalesce to create legislative ennui and make statutory updating by Congress exceptionally rare, courts can²³⁶ and should step up to fill this gap.²³⁷

Second, adaptive interpretation discounts anti-democratic, constitutionally suspect stealth provisions. In giving greater weight to current contextual considerations, interpreters necessarily reduce the significance given to hidden plain language. Consequently, congressionally-unexamined textual pronouncements would justly wield less authority. As an added

house gas accumulations. John M. Broder & Andrew C. Revkin, *Warming May Wipe Out Most Polar Bears*, *Study Says*, N.Y. TIMES, Sept. 8, 2007.

²³³ See ROBERT V. PERCIVAL ET AL., ENVIRONMENTAL REGULATION: LAW, SCIENCE, AND POLICY 88 (5th ed. 2006) (stating that four of six stages in the history of U.S. environmental law occurred between 1962 and 2006).

²³⁴ Asserting these very policy positions, several thousand biologists petitioned Congress as follows:

As Earth has changed and as science has progressed since the Endangered Species Act was authorized in 1973, the ESA has served our nation well, largely because of its flexibility and its solid foundation in science. It is crucial to maintain these fundamental principles. The challenges of effective implementation of the Act should not be interpreted to require substantive rewriting of this valuable, well-functioning piece of legislation.

Letter from 5,738 Biologists to the United States Senate Concerning Science in the Endangered Species Act (March 2006), *available at* <http://www.earthjustice.org/library/signon/letter-from-biologists.pdf>.

²³⁵ Individual legislators, motivated by the desire to be reelected, will “want to do nothing when there is no organized demand for legislation,” which results in “too little policy addressing common problems.” Eskridge, *Dynamic Statutory Interpretation* 1987, *supra* note 74, at 1519.

²³⁶ Institutionally, the courts have authority to share this role with Congress. *See id.* at 1500 (“[T]he fact remains that the structure of the Constitution, the apparent expectations of the Framers, and two hundred years of Supreme Court practice establish the authority of federal courts to make law, subject to legislative override.”).

²³⁷ Depending on the circumstances, administrative agencies may be as suited to this role and so share an updating and statutory construction function with courts. *See discussion infra* Part IV.D.

benefit, discrediting of illegitimate stealth plain language may deter future stealth drafters and thereby improve legitimacy of legislative branch lawmaking.²³⁸

Lastly, adaptive interpretation of stealth provisions shores up judicial branch institutional integrity and legitimacy. Stealth provisions lack specific intent and so judicial reliance on historical, intent-based interpretive rationales necessarily comes across not only as artificial, but also as dishonest. For example, given the stealth nature of section 7, the majority's strenuous assertions of conscious drafting in *TVA v. Hill* appear not merely contrived, but intellectually dishonest.²³⁹ In contrast, adaptive approaches can be pragmatic, contextually relevant, and transparent. The gut appeal of the trial court's argument of the absurdity of shutting down a multi-million dollar dam just days from completion bears this out.²⁴⁰ By substituting a dynamic approach for imaginative reconstruction, judicial interpreters have an opportunity to reduce contempt for and enhance legitimacy of judicial branch determinations.

2. Only a Nod to Adaptive Approaches

Nevertheless, under the proposed least bad approach adaptive interpretation takes a back seat to more traditional approaches. This holds true even where a material contextual schism exists between the original purposes of the ESA and current policy norms and public values. With all the sound reasons for adaptive interpretation of stealth provisions, why only a nod to contextual considerations? One reason is that stealth provisions are clearly worded directives carefully wordsmithed by drafters. In unambiguous language situations, even strong advocates of dynamic interpretation would likely require greater respect for statutory language and lean towards a textual, rather than a dynamic interpretation.²⁴¹

²³⁸ Just as congressional duck-and-cover maneuvers (which allow legislators to take credit for action and avoid blame for policy failures) and pork barrel politics detract from congressional legitimacy, so too does inattentive and careless law crafting.

²³⁹ For similar reasons, the trial court's exercise in imaginative reconstruction also holds little persuasive authority.

²⁴⁰ See discussion *supra* Part III.B.

²⁴¹ In Professor Eskridge's model, stealth provisions seem to fit into the category of older text specifically addressing the issue, where textual perspectives control interpretation. See Eskridge, *Dynamic Statutory Interpretation* 1987, *supra* note 74, at 1496. "In general, the more detailed the text is, the greater weight the interpreter will give to textual considerations." *Id.* at 1497.

Limited support for adaptive interpretation of stealth provisions also turns on respect for the bedrock constitutional principle of separation of powers, esteem for the rule of law, and caution in the face of lingering concerns regarding countermajoritarian risks²⁴² associated with judicial lawmaking power. In *TVA v. Hill*, the Supreme Court asserted this point vigorously and persuasively.²⁴³

Finally, over-reliance on an adaptive interpretation approach for stealth provisions might inadvertently exacerbate legislative branch dysfunction. The more public policy responsibility the courts take on, the less responsible Congress need be.²⁴⁴ Problems of legislative duck-and-cover, lackadaisical law crafting, and strategic dodging of needed legislative reform, all would seem encouraged, rather than discouraged, by ramping up the role of courts (and/or administrative agencies). In the face of legislative branch shortcomings, and especially in the face of dramatic shifts in public values and priorities, corrective measures should first attempt to improve congressional responsiveness to citizen voters and shared public concerns. Reform efforts should aim at promoting congressional accountability (e.g., lobbying and election reforms, and public education campaigns) rather than passing on responsibility to unelected judges.

The governmental responsibilities established by the Constitution are neither black and white fixed boundaries, nor completely gray demarcations. And, in the face of these real but overlapping divides, adaptive statutory interpretation should be used cautiously and conservatively. Giving just a nod to adaptive considerations respects the primacy of legislative lawmaking and yet allows for pragmatic statutory interpretation that is not completely blind to contextual realities.

D. Some Things Stay the Same: Agency Deference

²⁴² See ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16 (1962) (discussing counter-majoritarian difficulties with judicial review).

²⁴³ See discussion *supra* Part III.D.

²⁴⁴ The argument here is that, left to their own devices, legislators motivated by personal reelection interests and/or captured by special interests would prefer to pass generic legislation and pass along the difficult policymaking responsibility to judges and administrative agencies. Moreover, with respect to environmental law, the system Congress established is "political in a different and invidious sense: the legislators shaped it to make themselves look good rather than to serve the interests of their constituents." SCHOENBROD, *supra* note 191, at x.

Under the proposed least bad approach, administrative agency deference continues as an interpretive overlay applied in concert with previously identified elements of stealth interpretation. This is primarily because there are no good reasons to depart from *Chevron's* ingrained and institutionalized approach to interpretation with respect to ESA stealth provisions.²⁴⁵ The rationales and justifications for administrative deference tend to apply equally well (or poorly) to stealth provisions as to other enactments.²⁴⁶

This is certainly a practical approach given the widespread acquiescence towards the precedent of the *Chevron* two-step. *But is it a least bad approach?* The prickly part of this analysis arises as a consequence of the very nature of stealth provisions. How can Congress have “directly spoken” to a matter²⁴⁷ if it gave it little or no consideration whatsoever? And yet, how can a court deem a provision unclear where it is straightforward and certain on its face? Reconciliation demands closer attention to guiding principles.

Integrating the least bad approach with the *Chevron* two-step compels the following interpretive analysis. A court finding a stealth provision unambiguous *after* application of the threshold interpretive elements of the least bad approach (plain language, statutory purpose, and adaptive interpretation) would *not* be required to defer to an agency interpretation.²⁴⁸ However, if application of the threshold principles

²⁴⁵ See *Nat'l Assn. of Home Builders v. Def. of Wildlife*, 127 S. Ct. 2518, 2534 (2007) (“We have recognized that ‘[t]he latitude the ESA gives the Secretary in enforcing the statute, together with the degree of regulatory expertise necessary to its enforcement, establishes that we owe some degree of deference to the Secretary’s reasonable interpretation’ of the statutory scheme.” (quoting *Babbitt v. Sweet Home Chapter, Communities for Great Or.*, 515 U.S. 687, 703 (1995))).

²⁴⁶ This is not to say that judicial deference as an interpretive device can be easily applied, nor should it be taken to mean judicial deference might not benefit from a more textured analytical refinement, but merely that stealth provisions can be treated the same as other statutory interpretation situations. For a discussion of the pros and cons of a general rule of judicial deference, see Sunstein, *Interpreting Statutes*, *supra* note 15, at 445.

²⁴⁷ *Chevron, U.S.A. v. Natural Res. Def. Council*, 467 U.S. 837, 842 (1984).

²⁴⁸ This approach does not take any real leap beyond existing practice:

In making the threshold determination under *Chevron*, ‘a reviewing court should not confine itself to examining a particular statutory provision in isolation.’ Rather, ‘[t]he meaning—or ambiguity—of certain words or phrases may only become evident when placed in context. . . . It is a ‘fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.’”

Nat'l Assn. of Home Builders, 127 S. Ct. at 2534.

yields ambiguity, the court's approach would depend on the type of the ambiguity at issue.

1. Harmless Error Stealth Situations

Where the plain meaning derived from statutory language easily aligns with the statutory purposes of the ESA, judicial review stops at *Chevron* Step One. In these situations, the court gives effect to the meaning derived from application of the least bad approach. Despite the lack of specific intent and a failure of deliberative lawmaking, the unambiguous meaning of the stealth provision corresponds with unambiguous general intentions deliberated and expressed by the legislature. This approach departs from the traditional *Chevron* approach only in delineating certain factors for the initial evaluation of meaning, and does so only to tailor review to the peculiar nature of stealth provisions.

I view these stealth provisions cases essentially as harmless enactment errors (Harmless Error Stealth Situations) because the least bad approach merely narrows interpretive outcomes within reasonably acceptable bounds. The stealth drafters prevail, but only because their strategically inserted language was clearly worded, passed muster under the Constitution's formal procedural safeguards, and aligned with expressed purposes of the Act.

Moreover, an additional check on interpretive errors and judicial extremism exists by way of post-facto legislative corrective action. If the current Congress deems the judicial interpretation at odds with some unexpressed original intent, current legislative priorities, or prevailing

Note that although the majority in *National Association of Home Builders* set the rule out nicely, I believe the dissenters had the more muscular argument on its application. The strongest reasons being: (1) nothing in the wording of section 7's stealth provision carves out mandatory agency actions from other federal actions, which not only pulls the rug out from under the majority's conclusion, but also against its analysis for agency deference; (2) the conservation purposes of the ESA (and the environmental purposes of CWA, for that matter) weigh heavily against the majority's either/or approach to a perceived statutory conflict; and (3) because the responsibility for such a potentially enormous substantive statutory change (an exemption for all nondiscretionary and quasi-discretionary federal actions) belongs to Congress, not the agencies, and not five justices. *See id.* at 2538-53 (Stevens, J., dissenting).

For more of a generic discussion of *Chevron* in the regulatory arena, see A GUIDE TO JUDICIAL AND POLITICAL REVIEW OF FEDERAL AGENCIES, ch. 3 (John F. Duffy & Michael Herz eds., 2005).

public sentiment, it may amend. This is exactly the situation which came about following the *TVA v. Hill* decision. Congress, immensely displeased with the ruling, amended section 7 to its liking. As a practical matter, given the time and resources at stake, a congressional response seems unlikely unless the judicial interpretation departs radically from the current political agenda.²⁴⁹ Acknowledging that legislative action would be unlikely, the primary justification for putting the question back to Congress is to tip the scales in favor of plainly written stealth provisions in accord with the originally expressed conservation and biodiversity aspirations of the ESA. As an added benefit, the approach may encourage closer future attention to legislative drafting generally.

2. Dangerous Stealth Situations

When dealing with ambiguities that result from contradictions or tension between ESA stealth provisions and the ESA's enumerated purposes, independent judicial review appears most advisable. I refer to these cases as Dangerous Stealth Situations because inattentive lawmaking inadvertently produced measures contrary to expressed legislative priorities.

In these situations, an interpreting court would apply the least bad interpretive principles to reconcile, to the greatest extent possible, the stealth provision with the enumerated conservation and biodiversity goals of the ESA. The suggested approach discourages judicial sanction of unintentional legislative disconnects. Where statutory program elements resulting from stealth drafting contradict statutory ambitions adopted by deliberative drafting, the deliberated provisions should receive substantially greater interpretive weight. Again, Congress retains a post-facto check on radical or outdated judicial interpretations. However, by putting the issue back to Congress to clarify or specify a contradictory meaning, the court forces formal legislative deliberation on provisions at odds with the general intent expressed by the enacting legislature.

In Dangerous Stealth Situations, the least bad approach strays somewhat from the traditional *Chevron* approach. Several justifications support this departure. First, the strongest cases for deference to administrative interpretations arise where Congress explicitly left statutory gaps

²⁴⁹ See Eskridge, *Dynamic Statutory Interpretation* 1987, *supra* note 74, at 1525 (noting that "legislative inertia means that only occasionally and adventitiously will Congress respond to judicial statutory interpretations at odds with original intent or purpose" and offering several examples).

to be filled by agency experts.²⁵⁰ Yet, with stealth provisions, no agency delegation exists; if Congress did not consider the terms of the stealth provision itself, odds are neither did Congress decide the agency's role in interpreting and/or implementing it. Lacking "clear legislative displacement of judicial review,"²⁵¹ stealth interpretive questions prudently fall within the judicial realm. To defer to administrative agencies in such situations only exacerbates non-deliberation and non-delegation problems.²⁵²

Second, courts appear to be the least bad institution for interpreting such stealth provisions. Although ideally unbiased objective experts, National Oceanic and Atmospheric Administration Fisheries personnel and Fish and Wildlife Service personnel are overseen by, and highly sensitive to, the political agendas of the current executive and legislative branches.²⁵³ An agency interpretation of a stealth provision resulting from informal legislative and executive (and/or special interest lobbying) pressures biases outcomes toward current rather than original legislative priorities while skirting constitutional safeguards.²⁵⁴

Third, democratic process values benefit.²⁵⁵ The stealth drafters' strategy gets rebuffed because the interpretive approach offsets, or at least serves to dampen, language strategically inserted to weaken explic-

²⁵⁰ See A GUIDE TO JUDICIAL AND POLITICAL REVIEW OF FEDERAL AGENCIES, *supra* note 248, at 56; Sunstein, *Interpreting Statutes*, *supra* note 15, at 445, 476. In addition to academic recognition, a number of courts have adopted this rationale as well. See, e.g., *United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001).

²⁵¹ See Sunstein, *Interpreting Statutes*, *supra* note 15, at 476.

²⁵² *Id.* at 446.

²⁵³ Although theoretically buffered from politics, federal judges feel heat from the other branches of government and public displeasure. However, even accounting for outside pressures and personal ideology, on balance, it seems that individual judges will be less influenced by and one step further removed from politics and special interest pressures than administrative agencies.

²⁵⁴ Agencies must also be concerned that their implementation strategies and interpretive choices do not irritate members of Congress who control their budgets and can repeal or alter regulatory statutes. Therefore, agencies necessarily consider legislative history (although perhaps to discern the intent of the current Congress rather than that of the enacting one).

A GUIDE TO JUDICIAL AND POLITICAL REVIEW OF FEDERAL AGENCIES, *supra* note 248, at 66. That said, another issue is whether greater distance is a good or a bad thing. Why should the decision be left to the least democratically-accountable interpreter? One reason is to retain and encourage acceptance of the "Administrative Agency as Expertise Model" rather than the "Representational Model" even if it is somewhat flawed in practice.

²⁵⁵ *Id.* at 72 (discussing democratic process values, statutory interpretation and interpretive canons).

itly stated ESA priorities. Additionally, this approach may discourage future stealth drafters.

3. Fuzzy Stealth Situations

A third least bad approach applies where a fuzzily worded stealth provision yields various meanings, all or some of which comport with ESA's expressed goals. When dealing with such ambiguities (which I will refer to as Fuzzy Stealth Situations), the interpreting court would proceed to *Chevron* Step Two and defer to any reasonable, non-arbitrary agency interpretation to resolve the interpretive question.

The real craftiness of stealth provisions derives from their plain, unequivocal-but-hidden meanings. To the extent the wording turns out to be vague, uncertain, or wooly, it fails as a stealth provision and exists merely as a poorly drafted proviso. In such cases the stealth interpretive question closely resembles ordinary interpretive dilemmas and the *Chevron* rationales for deference—agency expertise and regulatory competence—operate as well as for flawed stealth provisions as for non-stealth provisions.

Again, this is a less than perfect solution. It has the practical benefit of consistency with the traditional and accepted interpretive approach.²⁵⁶ Yet there are shortcomings as well. It allows for agency interpretation absent any clear legislative delegation of authority and replaces deliberative congressional lawmaking with executive branch rulemaking simply by virtue of congressional inattention to its constitutional duties. Here, judicial rejection of arbitrary and capricious agency rules and congressional amendment provide rather minimal constraints on agency lawmaking.

In sum, interpretation of *true* stealth provisions would likely end with judicial interpretation under *Chevron* Step One. The least bad approach would reinforce the intended objectives of the ESA and simultaneously encourage legislative branch deliberation to improve political accountability. On balance, while the approach does not entirely discourage stealth provision drafting, it does put stealth drafters, along

²⁵⁶ Arguably, there is also an accountability benefit if one views agencies as more democratically accountable than courts by virtue of their institutional geography within the executive branch. However, this approach contradicts and detracts from the notion of agencies as collectives of objective professionals applying their scientific expertise in an objective fashion. Agencies can not simultaneously behave as objective scientists and as political representatives. As I prefer the agency expertise model, I argue that agencies should not be expected to respond to elected officials.

with Congress, on notice that congressional inattentiveness will not automatically be resolved by agency bureaucrats, but by courts favoring protective interpretations.

CONCLUSION

At a time when worldwide biodiversity losses appear to be rapidly escalating at exponential rates,²⁵⁷ the federal ESA remains one of the few laws with teeth for protecting biodiversity. In coming years, as species continue to disappear, many will look to the ESA in hope of stemming such losses. In particular, some may seek to invoke the international provisions of section 8a to compel additional U.S. governmental preservation efforts at home and abroad. In their efforts, these advocates will no doubt seek to discover and to apply any hidden powers within the ESA. As a result, the courts will again be forced to confront the interpretive issue of ESA stealth provisions.

Moreover, the stealth provision interpretive dilemma exists beyond the realm of environmental law. Participants in the legislative drafting process slip both large and small stealth provisions past legislators in budget bills and other major pieces of legislation as a matter of course. Witness language included in wiretapping and energy legislation in 2007 and the cries of foul play thereafter.²⁵⁸ Given historic and ongoing stealth drafting efforts, the judicial branch will no doubt be called upon to interpret stealth provisions in the future. Hopefully the courts will do so in the least bad way.

²⁵⁷ See *supra* note 230 and accompanying text.

²⁵⁸ See Edmond L. Andrews & Matthew L. Wald, *Energy Bill Aids Expansion of Atomic Power*, N.Y. TIMES, July 31, 2007, at A1 (noting that “[a] one-sentence provision buried in the Senate’s recently passed energy bill, inserted without debate at the urging of the nuclear power industry, could make builders of new nuclear plants eligible for tens of billions of dollars in government loan guarantees.”); James Risen, *Bush Signs Law to Widen Reach for Wiretapping*, N.Y. TIMES, Aug. 6, 2007, at A1 (noting that “seemingly subtle changes in legislative language [of wiretapping law] would sharply alter the legal limits on the government’s ability to monitor millions of phone calls and e-mail messages going in and out of the United States.”).