Scott Pruitt has taken to talking about environmental originalism – going back to the original intent of our environmental laws. But he's got the original intent completely backwards. The statutes weren't intended to protect jobs or grow the economy. They were intended to protect the environment, with cost at best a secondary consideration.

This is exactly why economists have long criticized our environmental statutes. Obama has been constantly attacked by conservatives for going too far, but in fact he could be criticized from the opposite direction: for basing decisions on cost-benefit analysis rather than prioritizing environmental protection over cost.

In fact, some of the key provisions of our environmental laws preclude consideration of cost or even technological feasibility. For instance, the Clean Air Act requires EPA to set national air quality standards based entirely on possible risks to public health – and "with an adequate margin of safety." As Justice Scalia himself was forced to admit in *Whitman v. American Trucking Ass'n*, the statute "unambiguously bars cost considerations." In fact, he said in a footnote, EPA would be reversed in court there was proof that it secretly did take cost into account. (Pruitt might want to take note of this, given the number of leaks from the government these days.) As Scalia also recognized, these cost-oblivious air quality standards are the linchpin of the Clean Air Act.

Moreover, as the Supreme Court held in the 1976 *Union Electric* case, these standards are binding even if it is technologically or economically impossible for states to meet the standards. In a concurrence, Justice Powell lamented that the statute required a utility "either to embark upon the task of installing allegedly unreliable and prohibitively expensive equipment or to shut down." Implementing the statute could "sacrifice the well-being of a large metropolitan area through the imposition of inflexible demands that may be technologically impossible to meet." Still, Powell conceded that the statute actually did place a higher priority on the environment than on feasibility or cost.

This is not the only statutory provision that ignores costs. The Endangered Species Act prohibits agencies from jeopardizing the survival of species in absolute terms, with only a rarely used exception for extraordinary cases, requiring approval by a special cabinet-level committee. OSHA requires that standards for toxic chemicals in the workplace be set to eliminate any significant risk to workers, unless doing so would bankrupt the industry.

Of course, Congress recognized that it was impractical to clean up the environment overnight. The statutes do contain many provisions based on the best available pollution controls for an industry, and obviously a pollution control technology isn't "available" if it is prohibitively expensive. With some ingenuity, it's possible to find footholds for cost-benefit

analysis into the statutory text, but this is not originalism. it's a form of revisionism that is far from the original intent, and if it's justified at all, that's because of a theory called "dynamic interpretation," not originalism. Economists who begged for a more cost-effective approach were ignored by Congress, and they made it clear afterwards that the environmental statutes were not at all to their liking.

It's important to recognize that the federal environmental laws were passed in a time of remarkable public ferment over the environment. Don't forget this was the era of the first Earth Day, of Rachel Carson's *Silent Spring*, and of a public shocked by a fire on the Cuyahoga River and the Love Canal toxic dump. As I discuss in a recent paper, even arch-conservatives like Barry Goldwater and William F. Buckley were calling for much stricter pollution control. The public today remains broadly supportive of environmental regulation but the issue is no longer a top priority for most people. But it *was* an urgent priority in the 1970s when these laws were passed. The original intent was about as far away from current Republican views as humanly possible. If they could see that Scott Pruitt had become head of the EPA, the framers of these laws would have been appalled.