THE THEORY AND PRACTICE OF STATUTORY INTEPRETATION IN THE SUPREME COURT

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Statutory interpretation is surely one of the most crucial legal questions today and has accordingly received considerable attention from academics and judges. This article examines the past analyses with a new perspective and, most importantly, new quantitative empirical evidence. The theory and practice of statutory interpretation has been the subject of some excellent academic analyses over the years on which I will draw extensively.[1] Unfortunately, these analyses have focused almost exclusively upon theoretical matters, with little regard for the actual practice of statutory interpretation, save for use of anecdotal supporting examples.[2] However fine a theory may be, it has little real value outside its operationalization. A theory that cannot effectively be put into judicial practice has little value and may even produce perverse consequences. Empirical analysis is necessary to evaluate the operationalization of the theories. Empirical analysis is important in other ways as well. The theories of statutory interpretation inevitably rely upon certain descriptive presumptions that should be empirically tested.

The purpose of the empirical analysis of this article is to answer several very important questions that have plagued the academic dispute over statutory interpretation:

1. Do the justices of the Supreme Court faithfully adhere to particular theories of statutory interpretation?
2. Which theories of statutory interpretation tend to be favored by particular justices of the Supreme Court
3. Do the justices of the Supreme Court reach ideologically preferred results, regardless of particular theories of statutory interpretation?
4. Do certain theories of statutory interpretation tend to produce results consistent with a particular ideology?

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1 *See, e.g.*, Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405 (1989); T. Alexander Aleinikoff, *Updating Statutory Interpretation*, 87 MICH. L. REV. 20 (1988); John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387 (2003); Nicholas S. Zeppos, *The Use of Authority in Statutory Interpretation: An Empirical Analysis*, 70 TEX. L. REV. 1073 (1992); Bradley C. Karkkainen, *"Plain Meaning": Justice Scalia's Jurisprudence of Strict Statutory Construction*, 17 HARV. J. L. & PUB. POL. 401 (1994); William N. Eskridge, Jr., Philip P. Frickey & Elizabeth Garrett, CASES AND MATERIALS ON LEGISLATION (3rd ed. 2001).

2 An exception to this generalization is *The Use of Authority in Statutory Interpretation*, *supra* note 000, which undertook an empirical analysis of the relative use of differing interpretive resources throughout Supreme Court history).

5. Do certain theories of statutory interpretation constrain justices and prevent them from reaching their ideologically preferred outcome?

All of these questions are vital to understanding the theory and practice of statutory interpretation in the Supreme Court. The answer to the fifth question is the primary focuse of the article and perhaps the most critical, at least if we believe that Supreme Court decisions should be grounded in law, rather than the political predispositions of particular justices.

The first section of the article examines the underlying purposes of statutory interpretation, as it is difficult to evaluate differing positions with understanding the purposes they purport to achieve. While there has been much debate over the goals of the interpretive process, I argue that the most basic and crucial goal is the rule of law and that any methods of statutory interpretation must be evaluated in light of how it is applied – as a disciplined means of interpretation or as a cloak to further the ideological policy ends of the judiciary. If the interpretive method is but a cloak, it cannot advance the more principled ends that it claims to further.

The second section of the article reviews the methodologies of statutory interpretation and the critical analyses of those theories. I examine textualism, reliance on legislative intent, and use of the canons of interpretation, all of which have both defenders and critics. The criticisms of the theories commonly invoke the concern for ideological judging, as much of the debate has revolved around whether particular methods are disciplined tools for interpretation or are simply convenient tools for justices who are advancing their ideologies.

The third section of the article reports the quantitative empirical analysis, testing the approaches to statutory interpretation. The study measures the degree to which justices voted ideologically and their relative commitments to different theories of statutory interpretation. The ideological and legal variables are incorporated into a single multiple regression, to determine if and the degree to which legal principles of statutory interpretation can constrain justices from exercising their ideological preferences about statutory policy. The results are significant and contrary to what is commonly claimed. Textualism showed no power to constrain the justices, while there was evidence that principles of pragmatism and legislative constraint were constraining.

I. The Purpose of Statutory Interpretation

Before assessing statutory interpretation, it is vital to understand its purpose. Practices cannot be evaluated in the abstract, without some end or purpose that they are meant to fulfill. Historically, there has been some dispute between those who believe judges should strive to hew closely to their assessment of legislative intent based on all available evidence and those who argue that judges should interpret statutes according to their internal language and eschew extrinsic indicators of legislative intent. Today, the traditional theories are complemented by those who argue that judges should take a pragmatic and consequentialist view when interpreting statutes and complicated by a greater understanding of the ideological influences on judicial decisionmaking. Each of these theories calls for consideration of different tools. Before evaluating those tools, the purposes of statutory interpretation must be evaluated.

A. The Theoretical Purposes of Statutory Interpretation

One asserted purpose of statutory interpretation is the assessment of legislative intent. This position views judges as the faithful fiduciaries of the enacting legislature, resolving controversies as that legislature would have chosen, had it understood the facts of the controversies.[3] In the early days of our republic, Chief Justice Marshall embraced this theory.[4] "Most of the prominent treatises . . . invoke the intent of Congress as the interpretive guide."[5] Over the intervening centuries, the Supreme Court has reaffirmed this objective for statutory interpretation.[6] This legislative agency purpose is often associated with the use of legislative history, though that is not an inevitable association.

Many who are truly devoted to legislative intent interpretation rely on what might be called "imaginative reconstruction,"[7] an approach set forth by Learned Hand, among others.[8] In this process a judge "should try to think his way as best he can into the minds of the enacting legislators and imagine how they would have wanted the statute applied to the case at bar."[9] This process involves investigation of "the language and apparent purpose of the statute, its background and structure, its legislative history (especially the committee reports and the floor statements of the sponsors), and the bearing of related statutes," among other factors.[10]

A common question about the legislative intent objective involves the ability of courts to identify and implement the legislative purpose. Thus, "judges might mistake legislative purposes" or "might, by treating statutes flexibly, be purchasing case-specific benefits at the price of increased uncertainty."[11] This attempt to discern the legislature's

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[3] *See, e.g., The Absurdity Doctrine, supra* note 000, at 2388 (suggesting that due to legislative supremacy the courts are to act "as faithful agents of Congress"); *Democratic Theory and the Legislative Process, supra* note 000, at 813 (noting that "[i]ntentionalism asks how the enacting legislature would have decided the interpretive question facing the court").

[4] *See* Schooner Paulina's Cargo v. United States, II U.S. (7 Cranch) 52, 60 (1812) (Marshall, C.J.) (announcing that it is "the duty of the court to effect the intention of the legislature").

[5] *The Use of Authority in Statutory Interpretation, supra* note 000, at 1077.

[6] *See, e.g., The Absurdity Doctrine, supra* note 000 at notes 22-23 (listing several of the cases that explicitly adopt this standard.

[7] *Statutory Interpretation – in the Classroom and in the Courtroom, supra* note 000, at 817. Although this discussion is drawn from Posner, he does not currently subscribe to this particular theory of statutory interpretation.

[8] *See generally* Archibald Cox, *Judge Learned Hand and the Interpretation of Statutes*, 60 HARV. L. REV. 370 (1947).

[9] *Id.*

[10] *Id.* at 818.

[11] Cass R. Sunstein & Adrian Vermeule, *Interpretation and Institutions*, 101 MICH. L. REV. 885, 892 (2003).

intent for resolution of a particular case can be daunting in practice.[12] Searching for legislative purpose, it is argued, is a futile endeavor. Even if courts could effectively implement legislative purpose, some argue that this should not be the goal of statutory interpretation.

Another possible purpose of statutory interpretation is simply the "rule of law," with the "law" based on the language of the text of the statute itself. Those devoted to this purpose of statutory interpretation will be disinclined to use the legislative history or purpose of the statute and seek to draw interpretative guidance directly from the statutory text. The statutory text *is* the law, not the legislative history.[13] For some, including Justice Scalia, the "intent" of the legislature is not the touchstone of statutory interpretation, judicial decisions should be limited to the text of the law. Textualists "rejects the faithful agent model and instead adopts a model of courts as autonomous interpreters who seek answers to questions of statutory meaning through application of the ordinary reader perspective, supplemented by various judge-made rules of interpretation."[14] Only the text itself has "gone through the constitutionally specified procedures for the enactment of law."[15] Consequently, the argument goes, only the text itself is suited to judicial interpretation. In this view, the legislature's role is not to enact some broad policy intent, its role is to "pass statutes."[16] The only constitutional legislative authority of Congress is to enact specific laws, through constitutionally specified procedures.

While the legislative agency theory seems especially deferential to Congress as an institutional matter, those dedicated to rule of law textualism are arguably more dedicated to legislative supremacy. The statutory text itself, and not legislative history, is the product of the full legislature. The process of seeking out an extratextual legislative purpose may depart from the true wishes of the enacting Congress, while relying on the text alone might seem a surer guide to the legislature's intent.

The debate over legislative purpose vs. textualism has lasted for many decades. The Supreme Court has intermittently cycled between focus on the two different purposes

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[12] *See Updating Statutory Interpretation, supra* note 000, at 26 (observing that "we cannot sensibly determine whether a legislature that drafted a statute regulating 'vehicles' in 1875 would want it applied to automobiles, unless we can imagine the legislators knowing enough about cars to make a rational judgment").

[13] Judge Easterbrook thus emphasized that the "words of the statute, and not the intent of the drafters, are the 'law'"). Frank Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J. L. & PUB. POL'Y 61 (1988).

[14] Thomas W. Merrill, *Textualism and the Future of the* Chevron *Doctrine*, 72 WASH. U.L.Q. 351, 351, 353 (1994).

[15] *Interpreting Statutes in the Regulatory State*, *supra* note 000, at 416. *See also Updating Statutory Interpretation*, *supra* note 000, at 23 (noting that for textualists the unenacted intentions "cannot be authoritative because they have not been adopted according to constitutionally prescribed procedures").

[16] Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 871 (1930).

at different times.[17] While either legislative purpose or textualism has become ascendant for a time period, neither has knocked out the competing theory. Although the ends of the two theories seem inconsistent, they have coexisted for much of the American history of statutory interpretation. The debate between the two approaches shows no sign of imminent resolution.

Yet a third purpose of statutory interpretation advanced in recent years is a pragmatic "best policy" standard, sometimes called practical reason. The pragmatists view the judiciary as a partner in the nation's governance, capable of making independent determinations of sound policy or even correcting biases in the legislative process. Thus, pragmatism clearly rejects the legislative agency theory of statutory interpretation. Justice Holmes, in his devotion to legislative supremacy, famously wrote: "if my fellow citizens want to go to Hell I will help them."[18] For the modern pragmatist, this conclusion is not self-evident. Perhaps judges should play a role in protecting the citizenry from "going to Hell." While pragmatism may be informed by statutory text or legislative history, neither is a dispositive source of interpretation, and a pragmatist judge will look to the societal consequences of different interpretations before choosing one.[19] Contemporary pragmatism is most closely associated with Richard Posner. He argues that our judges may be considered "wise elders" to whom we may entrust discretionary judgments.[20] Such judges may use their own discretion to adopt a prudent ruling on the interpretation of contested statutory terms.[21]

Employing judges as pragmatic partners in governance has some theoretical advantages. A legislating body can at best create broad and general rules, based on

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[17] *See* Adrian Vermeule, *The Cycles of Statutory Interpretation*, 68 U. CHI. L. REV. 149 (2001) (discussing how interpretive approaches for statutes have cycled over time).

[18] I HOLMES-LASKI LETTERS 249 (M. Howe ed. 1953).

[19] *See, e.g., Interpreting Statutes in the Regulatory State, supra* note 000, at 412 (arguing that interpretation should be grounded on the effect of "improving or impairing governmental performance"). In a vivid metaphor of pragmatism:

> 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.

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

[20] *See, e.g.*, Richard A. Posner, *Pragmatic Adjudication*, 18 CARDOZO L. REV. 1, 11 -12 (1996) (referring to appellate court judges as "councils of wise elders" in whom it is "not insane" to entrust discretionary responsibility).

[21] When a court engages in common law decisionmaking, it asks the question: "What is the best policy choice?" Martin Redish, *Federal Common Law and American Political Theory: A Response to Professor Weinberg*, 83 NW. U. L. REV. 853, 857 (1989). While courts typically do not ask this same question in the context of statutory interpretation, at least explicitly, the pragmatists suggest that perhaps they should.

inevitably limited information at the time it acts.[22] Courts see those rules in application in particular cases and controversies.[23] In consequence, judges witness how the law works in practice, and where it fails to work. As litigation proceeds, judges accumulate additional knowledge about a law's functioning, and they also have an institutional position enabling them to adapt the law to differing circumstances and, at least in theory, optimize its effects.

Some have claimed other institutional pragmatic advantages for judicial decisionmaking. The courts "independence and their deliberative capacities" allegedly give them "significant advantages over a legislature that may be influenced by parochial interests and is frequently responsive to monetary demands."[24] There are degrees of pragmatism. At the extreme, some have suggested that the judiciary essentially rescind statutes that no longer make sense.[25] Pragmatism does not compel such a conclusion, as judicial rescission of statutes might not be very pragmatic as a general procedural matter.

Pragmatists reject legislative agency theory, which reduces judges to mere functionaries and which ignores the great difficulties of discerning particularized legislative intents.. Pragmatists may accept or reject rule of law textualism, depending on the circumstances and the pragmatic consequences of such an approach.[26] For interpretive purposes, pragmatists would reject the dispositive rule of any of the traditional interpretive theories regarding text or legislative history, though either could be relevant.[27] Pragmatism does not inevitably conflict with intent or textualist theories. A formalist text-based interpretive standard may even be the most pragmatic, once one considers the institutional limitations of the judiciary in ascertaining the pragmatic rule on a case-by case basis.[28] Such a pragmatic case-by-case approach may be challenged as transforming judges into legislators and introducing an "unacceptable amount of

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22 *See, e.g.*, Richard A. Posner, *Statutory Interpretation – in the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 811 (1983) (noting that theories of statutory interpretation go wrong "because they impute omniscience to Congress"). Posner notes that "a statute necessarily is drafted in advance of, and with imperfect appreciation for the problems that will be encountered in, its application." *Id.*

23 *See, Interpreting Statutes in the Regulatory State*, *supra* note 000, at 439 (observing that the "focus on the particular circumstances enables judges to deal with applications that no legislature, no matter how farsighted, could conceivably have foreseen")

24 *Interpreting Statutes in the Regulatory State*, *supra* note 000, at 440.

25 This position was put forward in Guido Calabresi, A COMMON LAW FOR THE AGE OF STATUTES (1982).

26 *See, e.g., The Use of Authority in Statutory Interpretation*, *supra* note 000, at 1084 (arguing that pragmatism does not argue for "abandonment of text" or other interpretive methods but simply adds a consideration for the judiciary).

27 *See, e.g., The Inevitability of Practical Reason*, *supra* note 000, at 545 n. 68 (noting that the "leading proponents of practical reason in statutory interpretation give considerable weight to text, though they are skeptical of the plain meaning approach").

28 *See generally* Cass R. Sunstein & Adrian Vermeule, *Interpretation and Institutions*, 101 MICH. L. REV. 885 (2003).

uncertainty . . . into the interpretive system."[29] A pragmatic approach relies not on "deductive logic" but on a "less structured problem-solving process involving common sense, respect for precedent, and an appreciation of society's needs."[30]

The above discussion makes clear that pragmatism is somewhat amorphous and therefore an uncertain guide to decisionmaking. By its nature, the theory permits considerable judicial discretion. Pragmatism is not clearly associated with any interpretive methodology, though some rules might be associated with pragmatism. The rule against absurd consequences, for example, is a longstanding pragmatic standard. A rule giving deference to the legal interpretation of administrative agencies might also be associated with pragmatism; such a rule is clearly inconsistent with both legislative agency and textualist theories.

While generally concerned a modern theory, pragmatism has traditional underpinnings. American judges have in some sense "been pragmatists when it comes to interpreting statutes," for "most of our history."[31] The legal process school suggested that "courts should attempt to 'make sense' of regulatory statutes or to treat them as would 'reasonable people acting reasonably.'"[32] Reliance on judicial "wise elders" to make sense of statutes, as applied to particular controversies, seems closely akin to contemporary theories of pragmatism. As a particular example of pragmatism, Cass Sunstein has urged that courts interpret statutes so as to promote consistency and coherence among regulatory programs and consider the systemic effects of a given interpretation.[33]

The currently controversial theory of dynamic statutory interpretation might be considered a branch of pragmatism.[34] In contrast to the other theories, dynamic statutory interpretation began as a largely descriptive matter, though it is normative as well. Descriptively, the theory suggests that courts will attend to the preferences of the contemporaneous legislature and society, not just the preferences of the enacting legislature, when interpreting statutes. Normatively, the theory approaches pragmatism in suggesting that judges can and will update statutes with an intelligent adaptation to the contemporaneous circumstances, both factual and legal.

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[29] *Id.* at 893.

[30] Daniel Farber, *The Inevitability of Practical Reason: Statutes, Formalism, and the Rule of Law*, 45 VAND. L. REV. 533, 536 (1983).

[31] Thomas W. Merrill, *Textualism and the Future of the* Chevron *Doctrine*, 72 WASH. U.L.Q. 351, 351 (1994).

[32] *Interpreting Statutes in the Regulatory State*, *supra* note 000, at 435. *See also* Philip P. Frickey, *From the Big Sleep to the Big Heat*, 77 MINN. L. REV. 241, 249 (1992) (noting that Hart and Sacks did not believe that statutory interpretation should be formalist but "functional and practical").

[33] *Interpreting Statutes in the Regulatory State*, *supra* note 000, at 479-480.

[34] *See The Use of Authority in Statutory Interpretation*, *supra* note 000, at 1074 (observing that "dynamic theories urge that statutory cases be decided on the basis of public values or practical considerations").

Considerable debate has transpired over the proper ends of statutory interpretation. Advocates for the various purposes have argued vigorously. The advocacy, though, has been largely theoretical and, perhaps for that reason, has not produced much resolution. Thesis and antithesis have struggled, with little synthesis. The introduction of more pragmatic theories of statutory interpretation has clouded the waters still further. Relatively little of the debate has been grounded in judicial practice, though the study of such practice should be crucial to the competing theories.

B. The Significance of Ideological Judging

The theoretical controversy over the purpose of statutory interpretation is compounded considerably by the prospect of ideological biases in judicial decisionmaking. Political scientists have done extensive research on these biases. The most comprehensive and best known analysis of this effect was by Segal and Spaeth.[35] They have extensively studied Supreme Court decisionmaking, using an expansive database, and produced empirical results demonstrating the importance of a justice's ideology to decisionmaking. Indeed, they argue that legal factors "serve only to rationalize the Court's decisions and to cloak the reality of the Court's decisionmaking process."[36] Segal and Spaeth's claims are bolstered by considerable additional empirical evidence.[37] The evidence that judges are at least influenced by their ideological predispositions is now compelling, and the effect of ideology is most pronounced at the Supreme Court level. This conclusion has important implications for statutory interpretation.

The findings of empirical regularities, characterized as ideological judging, do not necessarily yield conclusions about the internal thought processes or intentions of the justices. While ideological decisionmaking may reflect the oft-criticized practice of judicial willfulness, it could somewhat more innocently demonstrate nothing more than subconscious motivated reasoning.[38] The empirical researchers are generally agnostic on

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[35] *See* Jeffrey A. Segal & Harold J. Spaeth, THE SUPREME COURT AND THE ATTITUDINAL MODEL (1993) and Jeffrey A. Segal & Harold J. Spaeth, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED (2002).

[36] THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED, *supra* note 000, at 53.

[37] *See, e.g.*, Daniel R. Pinello, *Linking Party to Judicial Ideology in American Courts: A Meta-Analysis*, 20 JUSTICE SYS. J. 219 (1999) (reviewing and reanalyzing dozens of studies finding substantial ideological effect on judicial decisions); Frank B. Cross, *Political Science and the New Legal Realism: A Case of Unfortunate Interdisciplinary Ignorance*, 92 NW. U. L. REV. 251 (1997) (reviewing political science research on ideology and judicial decisionmaking).

[38] Motivated reasoning is a subsconscious psychological effect in which individuals perceive information as consistent with their preferred conclusions and construct an apparently neutral justification for that preferred conclusion. *See* Ziva Kunda, *The Case for Motivated Reasoning*, 108 PSYCHOL. BULL. 480 (1990). Judges are susceptible to motivated reasoning, like any other individuals. *See* Lawrence S. Wrightsman, JUDICIAL DECISION MAKING: IS PSYCHOLOGY RELEVANT? 55-56 (1999) (discussing how judges may be subject to motivated reasoning); Christopher H. Schroeder, *Causes of the Recent Turn in Constitutional Interpretation*, 51 DUKE L.J. 307, 352-354 (2001) (suggesting that motivated reasoning has significantly affected constitutional decisionmaking at the Supreme Court).

the explanation for the ideological pattern of outcomes. If the effect is subconscious, it might be restrained by clear legal directives to the contrary. Even a conscious bias might be so constrained. The key issue is, therefore, what legal principles or methods best restrain ideological decisionmaking.[39]

For some linguistic extremists, like critical legal studies devotees, any attempt to constrain judicial ideology is hopeless. Those who challenge the constraining power of language surely carry a measure of truth. If language were perfectly constraining on judges, they would never disagree or dissent and there would be no discernible significant pattern to their individual decisions. However, language may still be relatively constraining. One may dispute whether a tiger is within the definition of "cat," but few could place a dachshund within that definition, even if they so desired.

While some researchers suggest that the law has no effect and perhaps can have no effect on Supreme Court rulings, others contend that the law may have an effect and ameliorate ideological decisionmaking.[40] If legal standards *can* affect outcomes and avoid ideological manipulation of outcomes, it is important to understand what sort of standards may have that effect. The importance of this understanding may be particularly important for matters of statutory interpretation.

Many traditional theories of statutory interpretation have at least implicitly relied on a presumption that judges are not ideologically biased in their decisionmaking. Thus, once judges accept whether legislative history is an appropriate guide to statutory interpretation, the theories presume that they will all apply that guide faithfully and uniformly, without being influenced by ideological biases in its application. The recognition that judges may be ideologically influenced guides the proper approach to statutory interpretation. Reliance on legislative history, it has been claimed, is particularly susceptible to ideological bias.[41] Constraining judicial ideology is one of the explicit projects of textualism.[42] However, the textualists have produced little actual evidence that their interpretive approach constrains willful decisionmaking.

The appreciation of ideology and judicial decisionmaking leads us to a fourth fundamental purpose for statutory interpretation rules – the constraint of such ideological

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[39] *See Political Science and the New Legal Realism, supra* note 000, at 326 (noting that only empirical research can yield understanding as to how legal requirements actually affect judicial decisions).

[40] *See, e.g.,* Howard Gillman, *What's Law Got To Do With It? Judicial Behavioralists Test the "Legal Model" of Judicial Decision Making*, 26 LAW & SOC. INQ. 465 (2001) (critiquing Segal and Spaeth's claim that the law doesn't matter in the Supreme Court); Mark J. Richards & Herbert M. Kritzer, *Jurisprudential Regimes in Supreme Court Decision Making*, 96 AM. POL. SCI. REV. 305 (2002) (empirically finding effect of precedents on subsequent outcomes).

[41] *See Continuity and Change in Statutory Interpretation, supra* note 000, at 923 (suggesting that "grandiose analysis of statutory purposes and misuses of legislative history . . . may have served on occasion to mask the justices' imposition of their own policy preferences").

[42] *See Updating Statutory Interpretation, supra* note 000, at 23 (noting that "textualism attempts to prevent the creative judicial lawmaking that can occur when judges consult legislative materials and the social context of the statute").

judicial choice.[43] While some component of judicial ideology is not necessarily a bad thing,[44] the scope of ideological decisionmaking must be somehow cabined.[45] Giving free range to judicial ideology defeats all of the plausible theoretical goals of statutory interpretation. A judiciary that effects its own ideological ends cannot be a faithful fiduciary of the ideological ends of the enacting legislature. An ideological judiciary will not reliably advance the rule of law, because the same law will be interpreted differently by judges of different ideologies. Judicial ideology also undermines pragmatic decisionmaking, because the goal of pragmatism is not to aggrandize a particular judge's liberal or conservative ideology but rather to reach decisions that broadly benefit the society. Whatever the ultimate objective of statutory interpretation, ideological decisionmaking should be constrained.

In the presence of judicial ideology, the optimal method of statutory interpretation might be the theoretically "second best" method. For example, suppose that the legislative agent theory of search for intent was deemed the theoretically optimal interpretive method. However, suppose that in practice the use of this method did not sincerely rely upon true legislative intent but was only a mask for the judges' own ideological preferences. Use of the method would fail to advance and could easily undermine the goal of the method. In this scenario, a theoretically suboptimal interpretive method that constrained the use of judicial ideology could better approach the objective. Some arguments for textual interpretation make precisely this case, that the textual method is a more objective and constraining guide to judicial decisionmaking.

Enhancing the relative constraint imposed by statutes may be the key project of theories of statutory interpretation.[46] If language has some constraining power, textualism might seem the best interpretive approach for avoiding ideological bias. Its devotees claim that that the theory "provides legal certainty, predictability and

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[43] *See, e.g., The Use of Authority in Statutory Interpretation*, *supra* note 000, at 1120-21 (discussing the theoretical illegitimacy of ideological judicial decisionmaking and the consequent need to constrain the judiciary).

[44] *See, e.g.*, Terry Jennings Peretti, IN DEFENSE OF A POLITICAL COURT (1999) (arguing that ideological influence is an inevitable aspect of judging and that judicial ideological decisionmaking is an appropriate extension of the preferences of the President who nominated the judges and the Congress that confirmed them).

[45] Ideological decisionmaking may be considered incompatible with judging. *See* Allan C. Hutchison, IT'S ALL IN THE GAME 48-49 (2000) (suggesting that the "constitutional authority and prestige of the judiciary depends, at least in part, on the continuing belief by the community, including judges themselves, that judges are not simply ideologues but are, in some significant sense, constrained by the appropriate legal materials").

[46] *See* Anthony D'Amato, *Can Legislatures Constrain Judicial Interpretation of Statutes?*, 75 U. VA. L. REV. 561, 603 (1989) (contending that a theory of statutory interpretation may "reduce[] the degrees of interpretive freedom" of the judiciary); *Democratic Theory and the Legislative Process*, *supra* note 000, at 821 (suggesting that textualism was "perhaps best understood as an attempt to cabin judicial discretion").

objectivity."[47] This result is typically contrasted with the arguably more discretionary practice of reliance on legislative history. Reliance on the "ordinary meaning" of text supposedly enables diverse ideologies to reach consensus.[48] Indeed, this rationale for textualism is often presented and may be the truest defense of the practice.[49] Unfortunately, this claim is oft-asserted but never proved. Some suggest that a "claimed reliance on the text often disguises the actual basis for decision, which does not turn on text at all."[50]

Pragmatism and dynamic statutory interpretation might seem especially vulnerable to the effects of ideological bias. The philosophical notion of pragmatism can be neutral ideologically, represented by those from Rorty on the left to Quine on the right.[51] The ability of individuals to force all sorts of ideological approaches into

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[47] *The Inevitability of Practical Reason, supra* note 000, at 534. *See also The Use of Authority in Statutory Interpretation, supra* note 000, at 1087 (noting that for "textualists, constraint in judging can be found only in textual sources of authority").

[48] *See, e.g.*, Frederick Schauer, *Statutory Construction and the Coordinating Function of Plain Meaning*, 1990 SUP. CT. REV. 231.

[49] The overriding significance of this factor is seen from just a partial sampling of the literature. *See* Nicholas S. Zeppos, *Legislative History and the Interpretation of Statutes: Toward a Fact-Finding Model of Statutory Interpretation*, 76 VA. L. REV. 1295, 1323 (1990) (emphasizing the textualist position "that resort to legislative history subverts democratic values by allowing judges to pick and choose from the diverse opinions found in much legislative history, and thereby reach result-oriented decisions"); *The Use of Authority in Statutory Interpretation, supra* note 000, at 1086 (noting that textualists "argue that the potentially wide array of originalist sources (especially legislative history) gives judges the freedom to justify (and hide) any policy decision"); Frank H. Easterbrook, *Legal Interpretation and the Power of the Judiciary*, 7 HARV. J. L. & PUB. POL'Y 87. 92 (1984) (suggesting that even "the best judge will find that the imagined dialogues of deceased legislators have much in common with today's judges' conceptions of the good"); Joel E. Tasca, *Judicial Interpretation of the Effect of the Supplemental Jurisdicton Statute on the Complete Amount in Controversy Rule: A Case for Plain Meaning Statutory Construction*, 46 EMORY L.J. 435, (1997) (referring to the "sort of result-oriented analysis that consulting legislative history fosters"); James P. Nehf, *Textualism int eh Lower Courts: Lessons from Judges Interpreting Consumer Legislation*, 26 RUTGERS L.J. 1, 20 (1994) (arguing that textualism "makes it difficult for judges to let policy preferences influence their interpretations"); Maxwell O. Chibundu, *Structure and Structuralism in the Interpretation of Statutes*, 62 U. CIN. L. REV. 1439, 1526 (1994) (studying interpretation of securities laws and finding inconsistencies exemplifying "the use of legislative history for post hoc rationalization of a conclusion reached on other grounds").

[50] *Interpreting Statutes in the Regulatory State, supra* note 000, at 508, n.65; William N. Eskridge, *Textualism, The Unknown Ideal?*, 96 MICH. L. REV. 1509, 1531 (1998) (contending that "any judge who is determined to be willful is unaffected by methodology" and, absent legislative history "can shop dictionaries, canons of statutory construction or statutory precedents" to support a preferred outcome); *The Supreme Court's New Hypertextualism, supra* note 000, at 779 (suggesting that a textualist judge "can, in many cases, choose a result simply by choosing which dictionary, treatise, or judicial decision to use as a source of the 'plain meaning,' and by engaging in selective references to statutory and historical context"); Martin H. Redish & Theodore T. Chung, *Democratic Theory and the Legislative Process: Mourning the Death of Originalism in Statutory Interpretation*, 68 TUL. L. REV. 803, 818-819 (1994) (suggesting that "rather than disciplining judicial behavior," textualism may "indirectly condone the use of an unduly broad judicialpolicymaking prerogative").

[51] *See, e.g., The Inevitability of Practical Reason, supra* note 000, at 539 (noting that "advocates of practical reason are a diverse group, both politically and intellectually").

pragmatism, though, indicates that the theory of pragmatism is not very constraining. Pragmatism might be called "playing tennis with the net down," in its unrestrictive nature. As such, the theory might seem especially susceptible to ideological manipulation. Critics have questioned "its compatibility with the rule of law."[52] Dynamic statutory interpretation has been called "excessively expansive" in providing judicial discretion, establishing "the judiciary as a largely unaccountable ruling elite."[53] Ultimately, though, the effect of pragmatic theories of interpretation is an empirical question. It is even plausible that pragmatism might reduce ideological judicial decisionmaking, because its policy orientation is more transparent and eliminates the judge's ability to hide ideology behind a neutral principal of choice. [54]

Arguably, the contrasting theories about the purpose of statutory interpretation are not wholly incompatible. A judge could be a "pluralist" who chooses the most appropriate theory for a particular case. Such an approach could be the most theoretically appealing, as students of the legislative process have suggested that different approaches might suit different statutes.[55] The theoretical ideal, though, need not be the best approach in practice. The ideal assumes that judges are capable of discerning which approach fits which statute, an assumption that may be unrealistic. In practice, the pluralist approach has resulted in "unpredictability and confusion," as "it has become ever more difficult to predict which judge will apply which theory to which case."[56] In consequence, some have argued that rule of law values demand that judges settle on a particular interpretive regime, regardless of what that regime is.[57]

The ideal of precise pluralist interpretation also unrealistically assumes that judges are perfectly sincere in their devotion to the most accurate interpretation and not influenced by their personal ideological policy preferences. The current existence of pluralist theories about the purpose of statutory interpretation, and their associated tools,

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[52] *The Inevitability of Practical Reason, supra* note 000, at 533.

[53] Martin H. Redish & Theodore T. Chung, *supra* note ___, at 806-807

[54] *See* Stephen F. Ross, *The Location and Limits of Dynamic Statutory Interpretation in Modern Judicial Reasoning*, ISSUES IN LEGAL SCHOLARSHIP (2002), Article 6 at 3 (suggesting that "a greater transparency in judicial analysis is normatively preferred" and that the "ability of judges to willfully interpolate their personal policy preferences . . . would be constrained if judges acknowledged" when they were considering pragmatic consequences in interpretation).

[55] *See, e.g.*, Victoria F. Nourse & Jane S. Schacter, *The Politics of Legislative Drafting: A Congressional Case Study*, 77 N.Y.U. L. REV. 575, 617 (2002) (reporting survey of congressional staffers and concluding that any "monolithic" theory does not reflect the legislative process).

[56] Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085, 2086 (2002).

[57] *See* William Eskridge, Jr. & Philip P. Frickey, *The Supreme Court, 1993 Term – Foreword: Law as Equilibrium*, 108 HARV. L. REV. 26, 67 (1994) (suggesting that "it is not as important to choose the best convention as it is to choose one convention, and stick to it").

are quite convenient for ideologically minded judges.[58] The more different tools that judges may call upon in interpretation, the greater their discretion. If a text seems liberal, but the legislative history takes a more conservative position, a conservative judge can focus on legislative history to reach a conservative result. When the text is conservative and the legislative history liberal, the same conservative judge might emphasize the text. Hence, the continued controversy itself facilitates willful orideological judging.

Even if a given theory of statutory interpretation is accepted as the theoretically preferred purpose for the endeavor, that conclusion does not resolve the issue of how statutes should be interpreted. While certain purposes are typically associated with certain rules of interpretation (*i.e.*, legislative intent with the use of legislative history), that association is always presumed, rather than proved. Textualists may argue that their approach is actually more consistent with the furtherance of legislative intent. The more appropriate focus is on the effect of particular rules of interpretation, rather than the airier debate over the ultimate purposes of interpretation.

With the purpose of statutory interpretation and the significance of ideological decisionmaking as backdrop, this article will proceed to examine the theory and practice of judicial decisionmaking, with a focus on interpretive methods. Judges may not always disclose their ultimate purpose but they do justify their decisions through particular legal methods. The following section analyzes those methods, their justifications, and their common criticisms.

II. The Methods of Statutory Interpretation

There are three central potential tools for statutory interpretation. The first is the statutory text itself. The text-centered approach seeks to glean the answers to litigated disputes from the words of the statute itself. The second approach involves the use of legislative history. In this approach, the text is supplemented by a consideration of various legislative materials developed in the course of the bill's passage, in order to discern a legislative intent for the litigated dispute. The third approach uses canons of construction or heuristics for giving meaning to a statute. Some canons are linguistic, akin to the rules of grammar, while others are substantive presumptions. The three approaches are not inherently antagonistic to one another, but the typical statutory interpretation dispute involves a question of the relative importance to be placed on one or another of the different methods. This section analyzes the strengths and weaknesses of each of those methods. In the effort to be reasonably concise, the following discussion necessarily oversimplifies to a degree but captures the key theories of interpretation and the criticisms of each approach.

A. Text

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[58] *See*, *Can Legislatures Constrain Judicial Interpretation of Statutes?*, *supra* note 000, at 563 (describing the mental process of judges as: "(1) read the statute; (2) notice that your reading of the statute seems best to fine one of the large number of 'rules of statutory interpretation' that you are acquainted with; (3) tell your audience that in interpreting the statute you followed that rule").

One leading approach to statutory interpretation is commonly called textualism. It is common for judges in statutory interpretation matters to claim that they "start with the text." Strong textualists might also finish their analysis where they started, with the text. The text-centered approach generally depends on the ability to resolve interpretive disputes from words within the four corners of the statute itself. Although it is impossible to eschew all extrinsic evidence, textualism plainly rejects consideration of the legislative record for interpreting statutes.[59] The controversy over textualism revolves primarily around the issue of whether this objective is a realistic one.

1. The textualist approach

Before all else, the traditional theory of statutory interpretation typicallybegins with the statutory text. The judicial interpreter first looks to see if that text has a "plain meaning" that is clear.[60] The Supreme Court long ago declared that when "the language of an enactment is clear . . . the words employed are to be taken as the final expression of the meaning intended."[61] In determining whether the meaning of the statutory text is plain, a judge may rely simply on the common understanding of the language of the text and use sources such as dictionaries to discern the meaning of the words of the statute.

Even textualists realize that statutory words may lack a plain meaning and that they may be ambiguous, at least in the context of the particular controversy before a court. A word's dictionary definition typically contains more than one possible definition. Discerning the appropriate definition requires some consideration of context. The "free exercise" of religion is not about weight rooms. Consequently, even textualists realize that the statutory language must be considered in context.[62] Reliance on context might seem problematic for textualists, because context is external to text itself. This problem can be consistently resolved, though, insofar as the textualist relies on the text to provide the necessary context.

Textualism does not deny the possibility of linguistic ambiguity and can go beyond the mechanistic consulting of dictionaries for definitions. The "whole act rule" is a textualist recognition that context is crucial to the appreciation of a text's meaning. As Learned Hand poetically put it: "Words are not pebbles in alien juxtaposition; they have only a communal existence; and not only does the meaning of each interpenetrate the other, but all in their aggregate take their purport from the setting in which they are

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59 *See, e.g., The Supreme Court's New Hypertextualism, supra* note 000, at 750 (describing textualism as referring to the "use of a different set of tools, including dictionary definitions, rules of grammar, and canons of construction in an effort to derive the putatively objective meaning of the statutory word or phrase").

60 For discussions of the "plain meaning rule," see David A. Strauss, *Why Plain Meaning?*, 72 NOTRE DAME L. REV. 1565 (1997); Frederick Schauer, *The Practice and Problems of Plain Meaning*, 45 VAND. L. REV. 715 (1992); Frederick Schauer, *Statutory Construction and the Coordinating Function of Plain Meaning*, 1990 SUP. CT. REV. 231.

61 United States v. Missouri Pacific Railroad Co., 278 U.S. 269, 278 (1929).

62 *See, e.g., Democratic Theory and the Legislative Process, supra* note 000, at 820 (describing how textualists don't rely entirely on statutory language but consider the context of the statutory provision).

used."[63] A renowned textualist such as Justice Scalia exhibits a "broad commitment to understanding the statute in 'context'" as part of interpretation.[64]

The "whole act rule" contains various subsets of interpretive rules. For example, the rule counsels that the entire statute be read as a unified piece, which means that the title of a section casts light on the interpretation of the words within that section.[65] Another principle of the whole act rule is that the language of a section will be read in the context of the full statute. Language that might have a plain meaning in isolation might take on another meaning when other portions of the law are considered. This principle also counsels that statutory provisions should be interpreted in a way so that they do not conflict or create inconsistencies with other sections of the statute. Other aspects of the rule are a presumption of consistent usage of language throughout a statute and a presumption against interpretations that would derogate other provisions.[66]

Perhaps the most commonly used principle of the whole act rule is the rule against surplusage. A given interpretation of statutory language might render another section of the same statute superfluous. The rule against surplusage presumes that Congress does not insert unnecessary, redundant language in its statutes. It has been called a "cardinal rule of statutory interpretation that no provision should be construed to be entirely redundant."[67] Consequently, if an interpretation makes other language unnecessary surplusage, the courts conclude that the interpretation is incorrect and seek an interpretation that preserves some independent meaning for all parts of a statute.

A traditional standard for statutory interpretation that departs from textualism, yet remains a part of the textualist theory, is the absurdity doctrine. When the straightforward application of statutory text would create absurd results, judges may disregard that application and render a non-absurd interpretation. The Court has consistently reaffirmed the "legitimacy" of the absurdity doctrine, but only "infrequently invoked" it.[68]

The absurdity doctrine presumes that when the text seems to call for an outcome that "sharply contradicts commonly held social values," the Congress could not have intended such an outcome, and the text simply "reflects imprecise drafting that Congress could and would have corrected had the issue come up during the enactment process."[69] This theory, though, relies on the faithful agent theory and contradicts some textualists' position that courts apply statutes rather than legislative intent.[70] Nevertheless, the use of

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63 NLRB v. Federbush, Co., 121 F.2d 954, 957 (2nd Cir. 1941).

64 Karkkainen, *supra* note 000, at 403.

65 *See* CASES AND MATERIALS ON LEGISLATION, *supra* note 000, at 831-833 (reviewing this application of the whole act rule).

66 *See* CASES AND MATERIALS ON LEGISLATION, *supra* note 000, at 833-836.

67 Kungys v. United States, 485 U.S. 759, 778 (1988).

68 *The Absurdity Doctrine*, *supra* note 000, at 2419.

69 *The Absurdity Doctrine*, *supra* note 000, at 2388.

70 *See infra* at _____.

the absurdity doctrine "has flourished even during the most textually oriented periods of the Court's history."[71] The doctrine might be seen as creating an escape valve for the limited number of cases when pure textualism obviously produces absurd results and represent a small bow to pragmatism by the textualists. The absurdity doctrine is an exception, though, and not commonly deployed by the textualists.

2. The critique of textualism

The primary critique of exclusive reliance on text centers on linguistic indeterminacy. When interpreting the meaning of a text, it seems logical to begin with its plain meaning. Yet this approach has been called a "fallacy."[72] The meaning of language depends upon its context. Yet opening the interpretation to consideration of context inevitably goes beyond the text itself. Textualism and the plain meaning doctrine thus contain an inherent loophole that can be destructive of the theories' aims.

The indeterminacy of all language has been extensively debated in the legal literature, often by critical legal theorists. These "crits" contend that language has no inevitable intrinsic meaning, so that a text can never dictate a particular interpretation. Their position finds ample support in philosophical language theory, which demonstrates that words have no intrinsic meaning.[73] The meaning of text will inevitably vary "across different interpreters and in different contexts."[74] The text itself has no meaning, absent the context of its interpreter.[75] If textual language is so indeterminate, it cannot dictate judicial outcomes with any rigor. Judges who believe otherwise are simply fooling themselves.[76]

The indisputable presence of some indeterminacy, though, does not imply that language is utterly indeterminate.[77] Claims that statutory language is indeterminate have

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[71] *The Absurdity Doctrine*, *supra* note 000, at 2388.

[72] Richard A. Posner, THE PROBLEMS OF JURISPRUDENCE 262 (1990).

[73] *See*, *e.g.*, H. G. Gadamer, TRUTH AND METHOD (J Weinsheimer & D. Marshall trans. 2d rev. ed. 1989); Georgia Warnke, GADAMER: HERMENEUTICS, TRADITION AND REASON (1987) (discussing hermeneutic theory).

[74] William N. Eskridge, Jr. *Gadamer/Statutory Interpretation*, 90 COLUM. L. REV. 609, 625 (1990).

[75] *See* CASES AND MATERIALS ON LEGISLATION, *supra* note 000, at 801 (applying the theories to statutory interpretation and urging that a text has no meaning until it is interpreted and that interpretation is entirely a creature of the interpreter himself or herself and the historical context).

[76] *See*, *e.g.*, Jerome M. Balkin, *Taking Ideology Seriously: Ronald Dworkin and the CLS Critique*, 55 UMKC L. REV. 392, 426 (1987) (noting critical position that judges "suffer from false consciousness, and that the law thus subconsciously reflects the ideological biases of the judges, even as they believe they are following the law").

[77] *See* IT'S ALL IN THE GAME, *supra* note 000, at 209 (noting that a "dismissal of foundationalist jurisprudence does not commit the critic to such a bleak antifoundationalist stance in which adjudication is reduced to a conniving or insincere exercise in ideological manipulation").

been called "wildly overstated."[78] Language is "not radically indeterminate" because it has a meaning fixed by communities.[79] Words do have meanings within particular language communities. Textualists need not claim that words have some abstract meaning but merely that "statutes convey meaning . . . because members of a relevant linguistic community apply shared background conventions for understanding how particular words are used in particular contexts."[80] Even the "strictest modern textualists" recognize the potential indeterminacy of language, but this does not itself dejustify the approach.[81] The critique of textualism may simply reflect an assault on a straw man. The approach may be *more* determinate than the alternatives. Even strong textualists, such as Justice Scalia, have expressly recognized that statutory interpretation is not textually mechanistic and requires "a certain degree of discretion."[82] Arguably, the extent of this discretion under textualism is less than the discretion enabled by other interpretive approaches. Even if textualism cannot dictate one certain and true meaning for statutory language, it may have a constraining effect by ruling out numerous arguable meanings.

Dan Farber stresses that even pure textualism is not a "mechanical task" and questions the extent to which textualism disciplines judicial statutory interpretation.[83] Deciding the meaning of language for complex statutes passed in a particular context "requires a good deal of judgment (not to mention expertise)."[84] The cases that reach the Supreme Court are not usually the easy ones, where the plain meaning of terms is obvious.[85] Consequently, the value of textualism as an interpretive methodology at the district court level may not translate into Supreme Court decisionmaking. The Court may by its nature hear only the cases where the text does not answer the question being litigated. One need not embrace the radical indeterminacy of the crits to question textualism. Segal and Spaeth have persuasively noted:

> . . . construction through plain meaning possesses a chameleonic quality that spans the color spectrum. First, English as a language lacks precision. Virtually all words have a multiplicity of meanings, as the most nodding acquaintance with a dictionary will attest." Meanings, moreover, may directly conflict. For example, the common legal word "sanction" means to reward as well as to punish. The penumbral quality of a given word,

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78 *Interpreting Statutes in the Regulatory State*, *supra* note 000, at 441.

79 Jules L. Coleman & Brian Leiter, *Determinacy, Objectivity and Authority*, in LAW AND INTERPRETATION: ESSAYS IN LEGAL PHILOSOPHY 203, 222 (Andrei Marmor ed., 1995).

80 *The Absurdity Doctrine*, *supra* note 000, at 2458.

81 *The Absurdity Doctrine*, *supra* note 000, at note 29.

82 Mistretta v. United States, 488 U.S. 361, 417 (1989) (Scalia, J., dissenting).

83 *The Inevitability of Practical Reason*, *supra* note 000, at 547.

84 *Id.* at 547-548.

85 *Id.* at 549.

> especially in combination with others, insures wide-ranging discretion by those charged with construing the overall meaning of the pertinent set of words. Second, legislators . . . typically fail to define their terms . . . because of the need to effect a compromise . . .. Third, one statutory or constitutional provision or court rule may conflict with another. And while some language may be clearer than others, the meaning of words under construction in the types of cases heard by the Supreme Court . . . is likely to be particularly opaque. Fourth, identical words in the same or different statutes need not have the same meaning.[86]

To this list might be added the problem of a statutory gap or interstix where, by definition, there is no text to resolve the interpretive question. All these features of textualism lessen its disciplining rigor and call into question the theory's ability to produce definitive statutory interpretations.[87]

It might seem that the difficulties of textualism could be ameliorated with the obvious and seemingly mechanical means for discerning the meaning of terms by consulting a dictionary. The purpose of dictionaries is defining words, and dictionaries would seem to be an unbiased source and logical resource for textual interpretation.[88] Textualists on the Supreme Court have embraced the use of dictionaries in an "almost fanatical" fashion.[89] Yet the authors of dictionaries caution that meaning is dependent on context and that a dictionary definition cannot determine the "correctness" of an interpretation.[90] Even textualists acknowledge this limitation of dictionaries, that the meaning of words requires an appreciation of their context.[91] Even absent the contextual problem, dictionaries are not necessarily reliable guides to the meaning of words[92] and

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[86] THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED, *supra* note 000, at 54.

[87] The difficulties of relying on text and plain meaning is increasingly recognized in the analogous field of contract interpretation. *See* Margaret N. Kniffin, *A New Trend in Contract Interpretation: The Search for Reality as Opposed to Virtual Reality*, 74 OR. L. REV. 643 (1995) (discussing the demise of the plain meaning rule in contract interpretation). Extrinsic evidence on contract meaning may be considered, even when the words of the contract do not seem ambiguous. *Id.* at 649.

[88] *See* Note, *Looking It Up: Dictionaries and Statutory Interpretation*, 107 HARV. L. REV. 1437 (1994) (discussing use of dictionaries as part of textualist movement and increased use of dictionaries over time).

[89] Nicholas S. Zeppos, *Judicial Review of Agency Action: The Problems of Commitment, Non-Contractability and the Proper Incentives*, 44 DUKE L.J. 1133, 1143 (1995).

[90] Ellen P. Aprill, *The Law of the Word: Dictionary Shopping in the Supreme Court*, 30 ARIZ. ST. L.J. 275, 285 (1998)

[91] *See* Chison v. Roemer, 111 S.Ct. 2354, 2369 (1991) (Scalia, J. dissenting) (referring to the controlling principle as "ordinary meaning of the language in its textual context").

[92] *Id.* at 292 (observing that dictionaries are selective in their definitions and have a class bias that does not reflect "ordinary language").

they may differ among themselves.[93] They unavoidably have "a limited capacity to record the nuances of usage."[94] The limits of reliance on dictionaries are compounded by the existence of numerous dictionaries, containing different definitions, and enabling "dictionary shopping" for convenient definitions..[95]

The whole act rule does not cure the difficulties of purely textual interpretation. This rule, a facially logical approach to interpretation, has also been questioned as unrealistic. The rule that every word should have meaning and that statutes should be interpreted to avoid surplusage does not conform to ordinary usage. Redundancy may exist for a variety of reasons, including giving emphasis to a point. Posner notes that "a statute that is the product of compromise may contain redundant language as a byproduct of the strains of the negotiating process."[96] Other aspects of the whole act rule may also reflect an unreasonable view of the legislative process.[97] If interpreted as weak rules, or guidelines, the principles behind the whole act rule are surely logical ones.[98] Of course, as a weak rule, it offers much less benefit as a rule for resolving the difficult cases that come before the Court.

Textualism is not so simple as it might appear and not easily executed, but its defenders stress its virtue of neutrality. They contend that textualist interpretation is less susceptible to ideological manipulation than is consideration of legislative history. This contention is unproven, however. Text may just as readily manipulable as legislative history. Or textualism may even be worse in this regard. Tom Merrill suggests that reliance on textualism "tends to make statutory interpretation an exercise in ingenuity – an attitude that may be less conducive to deference to the decisions of other institutions than the dry archival approach associated with intentionalism."[99] Statutory language has been called "the wiggliest of legal creatures"[100] and as such can admit of widely varying

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93 *Id.* Consider the decision in Babbitt v. Sweet Home Chapter of Communities for a Great Oregon, 515 U.S. 687 (1995). The case involved the definition of "take," as part of a list of prohibited terms. The majority opinion cited multiple dictionaries supporting its broad definition. *Id.* at 697-698. The dissent cited other dictionaries in support of its narrower definition. *Id.* at 717.

94 *The Absurdity Doctrine*, *supra* note 000, at 2459.

95 *See, e.g.*, Sullivan v. Stroop, 496 U.S. 478 (1990) (in which the majority relies on Black's Law Dictionary to support their conclusion, while the dissenters rely on the contrary definition in Websters to support their position).

96 *Statutory Interpretation – in the Classroom and in the Courtroom*, *supra* note 000, at 812. *See also* CASES AND MATERIALS ON LEGISLATION, *supra* note 000, at 833 (suggesting that the rule against surplusage is "at odds with the legislative drafting process").

97 *See* CASES AND MATERIALS ON LEGISLATION, *supra* note 000, at 846 (suggesting that expectations of internal coherence and absence of "accidents" in legislative drafting are unrealistic).

98 The Supreme Court took this approach in Gutierrez v. Ada, 528 U.S. 250, 258 (2000), writing that "as one rule of construction among many, albeit an important one, the rule against redundancy does not necessarily have the strength to turn the tide of good cause to come out the other way").

99 *Textualism and the Future of the* Chevron *Doctrine*, *supra* note 000, at 354.

100 *From the Big Sleep to the Big Heat*, *supra* note 000, at 258.

interpretations, even absent any consideration of extrinsic factors. If so, the greater candor associated with pragmatic theories might actually constrain ideological decisionmaking.[101]

While textualism has met considerable disfavor in many theoretical academic commentaries, it remains appealing to judges.[102] Perhaps a plain meaning rule has practical value. Whatever its theoretical limitations, the plain meaning rule may still be a useful "evidentiary rule of thumb."[103] Although language is never perfectly indeterminate, alternative sources of interpretive guidance may be "more uncertain."[104] Thus, it is asserted that when "judges stick faithfully to the meaning of words as an ordinary reader would understand them, they have less opportunity to write their own proclivities into legislation."[105] This is an empirical matter, though. One can assert that textualism constrains judges to a relatively more determinate outcome, but one can counterassert that textualism simply provides an especially useful beard for whatever outcome the judge prefers.[106]

Empirical research is necessary to evaluate the claims of the textualists. Sunstein and Vermeule emphasize the critical importance of such research in evaluating interpretive methods.[107] Ironically, though, they continue to assert that formalistic text-based interpretation is more determinate than alternative methods, without so much as a whiff of empirical grounding. They imply the existence of cases "in which courts have used background purposes, not to make sense of the law, but to impose their own views about sound policy."[108] Yet they raise no comparable challenge to textualism and instead assume that it restrains the discretion of courts.[109] This assumption needs to be

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[101] *See The Use of Authority in Statutory Interpretation, supra* note 000, at 1083 (lauding the value of the candor of this approach).

[102] Judges have occasionally clearly rejected textualism, however. Even when language seems clear, some would argue that it need not necessarily be followed. In 1940, the Supreme Court announced that extrinsic sources should be used in statutory interpretation "however clear the words [of the statute] may appear on 'superficial examination.'"[102] United States v. American Trucking Ass'ns, 310 U.S. 534, 543-544 (1940).

[103] *The Absurdity Doctrine, supra* note 000, at 2398.

[104] *Id.*

[105] Kent Greenawalt, LEGISLATION: STATUTORY INTERPRETATION: 20 QUESTIONS 219 (1999).

[106] For example, Laurence Tribe is "dubious" that legislative history is any more manipulable than the "plain meaning of a text. A MATTER OF INTERPRETATION, *supra* note 000, at 74.

[107] *See Interpretation and Institutions, supra* note 000, at 971-919 (discussing the relevant questions in evaluating formalism and the need for empirical evidence on the answers).

[108] *Id.* at 919.

[109] *See* Richard A. Posner, *Reply: The Institutional Dimension of Statutory and Constitutional Interpretation*, 101 MICH. L. REV. 952 (2003) (complaining of Sunstein and Vermeule's "empirically ungrounded praise for judicial formalism").

empirically tested as well. Textualism might be just as amenable to ideological manipulation as other theories of statutory interpretation.

B. Legislative Intent

Typically juxtaposed against textualism is the reference to legislative intent for interpretation. The textualists do not universally reject the consideration of legislative intent in statutory interpretation, they simply argue that the text is the most (or only) reliable evidence of this intent. This is sometimes called "objectified intent."[110] Such objectified intent does not necessarily consistent with the actual intent of the enacting legislators. Holmes explained this concept of objectified intent when he declared: "We do not inquire what the legislature meant; we ask only what the statute means."[111] Justice Scalia has rephrased this as: "Judges interpret laws rather than reconstruct legislators' intentions."[112] The textualists generally do reject theories that go beyond this objectified intent to discern the legislature's intentions, such as the consultation of the legislative record compiled in the process of statutory enactment. It is the latter resort to legislative history that distinguishes legislative intent as an approach to statutory interpretation.

1. The legislative intent approach

Proponents of legislative intent seek to recreate the legislature's intention in order to resolve a particular statutory dispute. The interpretive approach generally associated with legislative intent is consultation of the legislative history associated with a statute's passage. A court may examine the reports of committees or other legislative materials to clarify the statutory text or elaborate it. The legislative process consists of numerous materials, of varying types, and use of legislative history has evaluated the relative importance of each.

Among the various sources of legislative history, there is an established hierarchy of importance.[113] Committee reports generally, and conference committee reports in particular, are typically regarded as the most authoritative sources of legislative history for the discernment of legislative intent. In the vast majority of cases, a bill reaches the floor of a house of Congress only after being amended and approved in a committee and

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110 *See* A MATTER OF INTERPRETATION, *supra* note 000, at 17 (discussing this concept of objectified intent). *See also The Absurdity Doctrine, supra* note 000, at 2486 n. 258 (providing theoretical argument for use of objectified intent).

111 Oliver Wendell Holmes, *The Theory of Legal Interpretation*, 12 HARV. L. REV. 417, 419 (1899).

112 I.N.S. v. Cardoza-Fonseca, 107 S.Ct. 1207, 1224 (1987) (Scalia, J. concurring). Scalia has elaborated by noting that the court's task is not "to plumb the intent of the particular Congress that enacted a particular provision" but instead to "give fair and reasonable meaning to the text of the United States Code." Pennsylvania Union Gas Co., 491 U.S. 1, 29-30 (1989) (Scalia, J., concurring). Laurence Tribe has agreed with this conclusion, noting that "thoughts and beliefs can never substitute for what was in fact *enacted as law*." *See* A MATTER OF INTERPRETATION, *supra* note 000, at 65.

113 *See, e.g.*, LEGISLATION AND STATUTORY INTERPRETATION, *supra* note 000, at 302-304 (describing this hierarchy).

in tandem with a committee report explaining the bill. As one might expect from the most authoritative source, committee reports are also the primary source of legislative history utilized by courts.[114]

Other potential sources of statutory legislative history include floor debates or hearings on a bill. These are generally granted less persuasive impact than provided to committee reports.[115] Statements by a bill's opponent may be especially unpersuasive, but statements by a bill's drafter or sponsor are given greater respect.[116] A statement interpreting the bill made by an opponent is given relatively less credence.[117] Other aspects of the legislative process may also be examined in the search for legislative intent. The explicit rejection of particular language in a proposed amendment can be used as evidence that Congress did not desire that the bill contain such a provision.

More controversial sources of legislative intent involve post-enactment developments. Post-enactment legislative history may include declarations by legislators that a court decision "got it wrong" or "got it right," oversight hearings on the implementation of statutes, or subsequent legislative action related to prior judicial decisions.[118] The conventional theory calls for generally disregarding such post-enactment legislative history, because it cannot represent the state of mind of the enacting Congress. The Court has inconsistently adhered to the conventional theory and sometimes considered this subsequent post-enactment legislative history.[119] The conventional theory is more amenable to consideration of such post-enactment legislative history when it arises in the context of the reenactment of a statute (so that the post-enactment legislative history is in a sense the enacting Congress), especially the explicit rejection of a proposal that would alter prior precedents in a particular way.

When past courts have established a record of a certain interpretation, and the legislature has apparently acquiesced in that interpretation by failing to correct it, a later court may find this acquiescence evidence that the earlier interpretations were the correct

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[114] *See* Jorge Carro & Andrew Brann, *The U.S. Supreme Court and the Use of Legislative Histories: A Statistical Analysis*, 22 JURIMETRICS J. 294, 304 (1992) (finding that over sixty percent of the Supreme Court's citations to legislative history were to committee reports).

[115] *See, e.g.*, Reed Dickerson, *Statutory Interpretation: Dipping into Legislative History*, 11 HOFSTRA L. REV. 1125, 1132-32 (1983) (critiquing reliance on these sources).

[116] *See* CASES AND MATERIALS ON LEGISLATION, *supra* note 000, at 997 (suggesting that the "statements by sponsors are given such deference in part because the sponsors are the most knowledgeable legislators about the proposed bill and in part because their representations about the purposes and effects of the proposal are relied upon by other legislators").

[117] *See, e.g.*, Shell Oil Company v. Iowa Department of Revenue, 488 U.S. 19, 284 (1988) (observing that the "Court does not usually accord much weight to the statements of a bill's opponent").

[118] *See, e.g.*, CASES AND MATERIALS ON LEGISLATION, *supra* note 000, at 1017-1020 (summarizing post-enactment legislative history).

[119] *See* William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331, 402 (1991) (observing that "the Court sometimes consults legislators' post-enactment legislative history statements about the statute" but seems to do so "arbitrarily").

one.[120] If an administrative agency or a court has adopted a particular statutory interpretation, and Congress has done nothing in response to that interpretation, the legislative inaction may be viewed as acquiescence in the accuracy of the interpretation. The court may presume that, had it misinterpreted the legislative intent, the Congress would have corrected the mistaken judicial interpretation with new legislation. Because of the congressional inaction, prior statutory rulings are given "heightened stare decisis effect."[121] This principle has greater force when the legislature has reenacted or amended the statute in question but not altered the record of judicial interpretation.[122] The presence of subsequent legislative action provides evidence that the legislature did not merely overlook the judicial interpretation but more affirmatively embraced it.

Another related interpretive method for statutes involves discernment of the general "legislative purpose" underlying the legislation and applying it to the case facts at hand.[123] While legislative purpose does not inherently require analysis of legislative history, but may be gleaned from the circumstances surrounding the legislation's passage or even from the text itself, the reference to "purpose" is still a means of going beyond straightforward textualism and getting to legislative intent. Consideration of legislative purpose is thus an intent-based interpretive rule. A court may choose its statutory interpretation based on the rule that seems to best fit the purpose of the Congress when enacting the legislation.

Of these various means to ascertain the intent of the legislature, the greatest contemporary controversy in statutory interpretation involves the use of the legislative history to ascertain the legislative intent. While the reference to legislative intent in statutory interpretation has a considerable historical pedigree, that fact has not dispelled the controversy. Use of legislative history to ascertain legislative intent to guide statutory interpretation is challenged at a purely theoretical level but also criticized for its pragmatic effects, including its facilitation of ideological judicial decisionmaking.

2. The critique of legislative intent

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120 *See, e.g.*, Caleb Nelson, *Stare Decisis and Demonstrably Erroneous Precedents*, 87 AV. L. REV. 1, 76-78 (2001) (addressing the "relevance of legislative acquiescence" in judicial statutory interpretations).

121 LEGISLATION AND STATUTORY INTERPRETATION, *supra* note 000, at 280.

122 *See, e.g.*, LEGISLATION AND STATUTORY INTERPRETATION, *supra* note 000, at 18 (describing how the "reenactment rule is like heightened stare decisis in that it creates a strong presumption that authoritative constructions of a statute become tightly bonded to the test and ought not e overruled by the Court"); Michael A. Szkodzinski, *An Analysis of the EEOC's Issuance of Early Right-To-Sue Letters: Does It Promote Judicial Efficiency or Encourage Administrative Incompetence?*, 150 U. PA. L. REV. 689, (2001) (observing that "the legislative reenactment doctrine – the absence by Congress to overturn regulations that its members are presumed to be aware of – is often relied upon in tax cases").

123 *See, e.g.*, William N. Eskridge, Philip P. Frickey & Elizabeth Garrett, LEGISLATION AND STATUTORY INTERPRETATION 220-223 (2000) (addressing "purposivism" in statutory interpretation); *The Absurdity Doctrine*, *supra* note 000, at 2450-51 (discussing use of legislative purpose in statutory interpretation).

At a theoretical level, some have questioned whether legislative intent has any meaning at all. The legislature is a "they," not an "it."[124] Aggregation of the intentions of a multimember body is a difficult, if not impossible, task.[125] In addition, social choice theorists have conclusively demonstrated that the legislature may have no purpose and the statute may have been a product of procedures rather than substantive preferences.[126] As a consequence, the "final outcome may represent only one of many possible majority outcomes," making it difficult to draw conclusions about legislative intent.[127] It can be difficult to determine (a) if a given position had majority support and also (b) if the majority support for that given position was translated into a legal command.

While this general theoretical criticism of the coherence of reference to legislative intent has received considerable academic attention, it has not been a primary feature of the general critique of reliance upon legislative history, though, and for good reason. The theoretical argument only establishes that there *may* be no clear majority legislative intent. Nothing in the theory disproves the possibility that a majority of the legislature does have a clear and discernible intent. For the theory to be a true critique, its adherents would need to demonstrate empirically that the legislature commonly has no majority intentionalist position on the interpretation of a statute for the facts of contested cases, and they have not even attempted to do so. Moreover, the coherence critique actually counsels for greater use of legislative history. Consulting the details of the legislative history would seem to be the most reliable means for ascertaining whether the legislature did have a true majoritarian intent on a particular disputed issue.

The basic principles in support of textualism argue against reliance on legislative history specifically and, at least sometimes, legislative intent more generally. This criticism generally does not focus on the relative theoretical coherence of legislative intent but rather draws upon the practical implications of use of intent and legislative history. Judicial use of legislative history is criticized as relying on an inaccurate source of intent. It is criticized as relying on an illegitimate source of intent, because the

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[124] *See* Kenneth A. Shepsle, *Congress is a "They," Not an "It": Legislative History as Oxymoron*, 12 INT'L REV. L. & ECON. 239 (1992) (arguing that one cannot discern a general preference from the multiple preferences of legislators); *Democratic Theory and the Legislative Process*, *supra* note 000, at 824-825 (discussing textualist criticism that it is impossible to translate the preferences of individual legislators into a coherent collective choice of the legislative body as a whole).

[125] Of course, when the members of a legislative body were in relative consensus, one might realistically speak of a group's intention. *See* Kent Greenawalt, *Are Mental States Relevant for Statutory and Constitutional Interpretation*, 85 CORNELL L. REV. 1609, 1627 (2000). The frequency of such consensus, though, and its presence in particular disputes, is unclear.

[126] This principle is typically known as "Arrow's Theorem."

Judge Easterbrook has emphasized the significance of the principle in statutory interpretation, against use of legislative purpose. *See* Frank Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 547-548 (1983). He argues that "[a]lthough legislators have individual lists of desires, priorities, and preferences, it turns out to be difficult, sometimes impossible, to aggregate these lists into a coherent collective choice." *Id*. at 547.

[127] *The Absurdity Doctrine*, *supra* note 000, at 2413.

legislative background is not itself law. Legislative history is criticized as so indeterminate that it enables judges to reach whatever decision they might desire and justify that outcome with reference to some bit of historic legislative record.

Some have questioned the veracity of the legislative record. Remarks in the *Congressional Record* may be amended after spoken and need not be spoken at all to be included as part of the record of floor debate. The sources of legislative history, such as committee reports, may say little about what the legislature did or intended to do and more about the preferences of some isolated, unelected congressional staffer.[128] Judge Kozinski has likewise contended that going beyond statutory text "creates strong incentives for manipulating legislative history to achieve through the courts results not achievable during the enactment process."[129] The fear is that non-legislators such as staffers can "stack the legislative history" to reach a result they favor.[130]

Well-heeled special interest groups may be empowered by use of legislative history, at the expense of the majoritarian public interest. It is such interest groups with the resources to involve themselves intimately in the legislative process that have the best opportunity to insert salient language into a committee report, when they could not get that language into a bill's text.[131] Thus, even the purportedly most authoritative source of legislative history, the committee report, may be unreliable and subject to manipulation.

While these criticisms of legislative intent are superficially logical, they are truly just circular arguments. When critics emphasize that the legislature did not pass the text of a committee report and present it to the president, that claim begs the question. If legislators know that certain legislative history will be considered when interpreting the bill and pass a bill that has certain legislative history they are functionally "passing" the use of that legislative history for textual interpretation. If a congressional staffer or interest group inserts language in a committee report that is unacceptable to the majority, nothing prevents the majority (of the committee or of the full body) from disavowing that language, in the statutory text or subsequent legislative history. If the legislative majority did not want committee reports or other sources of legislative history to be considered, they could say so. When parties entering into a private contract wish to limit its interpretation to its text alone, they include an integration clause that prevents the consideration of extrinsic interpretive resources.[132] If the legislature wanted to pass the

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128 *See Democratic Theory and the Legislative Process, supra* note 000, at 823 (describing textualists' criticism that "legislative history is often left to unelected committee staff members" who are "virtually unaccountable").

129 Wallace v. Christensen, 802 F.2d 1539, 1559 (9th Cir. 1986) (Kozinski, J., concurring).

130 LEGISLATION: STATUTORY INTERPRETATION: 20 QUESTIONS, *supra* note 000, at 181.

131 *See* CASES AND MATERIALS ON LEGISLATION, *supra* note 000, at 949 (reporting that "smuggling in" helpful language through the legislative history is a time-tested practice"). Justice Scalia believes that "committee reports, in particular, are untrustworthy legislative history." *Id.* at 953.

132 *See, e.g.*, Appling v. State Farm Mutual Automobile Insurance Company, 340 F.2d 769 (9th Cir. 2003) (using presence of integration clauses to preclude consideration of extrinsic evidence); Roxford v. Ameritech Corporation, 335 F.2d 661 (7th Cir. 2003) (emphasizing integration clause in contract interpretation); Rumsfeld v. Freedom NY, Inc., 329 F.2d 1320 (Fed. Cir. 2003) (discussing great weight given integration clauses in interpretation). Most significant for the purpose of this article is the importance

text and only the text and exclude all judicial reliance on legislative history, the legislature could make those wishes plain in the statutory text. The legislature's failure to do so would seem to imply its approval of such sources.

The practice of deferring to legislative history might be considered an implicit incorporation of those materials by reference, rather than an improper delegation of legislative authority to the staff.[133] Proponents of the unlawful delegation theory have responded that any such incorporation should be explicit to be given effect.[134] This position is insufficiently justified, though, and proves too much.[135] Should Congress be compelled to explicitly declare that its statutes are to be interpreted according to a particular dictionary, or particular rules of grammar, or subject to particular canons of construction?[136] Requiring such explicit incorporation for particular statutes would involve a considerable expenditure of legislative time and effort and yield far more complex statutes. Perhaps for this reason contracts are not required to *explicitly* list all relevant external aids to interpretation, when they may so easily be explicit in their exclusion of such external referents.

This analysis of the circularity of the critique of legislative history is supported by a social scientific understanding of the operation of Congress. Legislators, unable to examine every particularity of every bill, delegate authority to agents, such as committees and their staffs.[137] This tendency was recognized long ago by Learned Hand, who observed that "while members deliberately express their personal position upon the general purposes of the legislation, as to the details of its articulation they accept the work of the committees; so much they delegate because legislation could not go in any other way."[138] As with any delegation, the agent is expected to conform to the will of the

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that courts put on the *absence* of an integration clause in permitting consideration of extrinsic evidence. *See* Evergreen Investments LLC v. FCL Graphics, Incorporated, 334 F.2d 750 (8th Cir. 2003).

133 *See, e.g., Federal Rules of Statutory Interpretation, supra* note 000, at 2136.

134 *See, e.g.*, John F. Manning, *Putting Legislative History to a Vote: A Response to Professor Siegel*, 53 VAND. L. REV. 1529, 1541 (2000).

135 Manning argues that specific explicit incorporation of legislative history "would make legislators directly responsible for the contents of legislative history, and it would compel them to decide which parts of the legislative history they wish to incorporate – and which parts they wish to exclude." *Id.* While true, the argument does not justify why such compulsion of legislators would be constitutionally necessary. This position also might be used to require legislatures to specify particular dictionaries, canons, etc. before they should be given effect. Such an explicitness requirement would impose enormous costs on the legislature and restrain its own organizational scheme, adopted for sound reasons as elaborated by the political science research.

136 Some have argued that Congress could do precisely this. *See generally Federal Rules of Statutory Interpretation, supra* note 000. However, no one to my knowledge has suggested that such explicitness is constitutionally compelled, to avoid illegal delegation of legislative authority.

137 *See, e.g., Are Mental States Relevant for Statutory and Constitutional Interpretation?, supra* note 000, at 1643 (noting that "passive legislators actually choose to delegate to knowledgeable and active colleagues the formation of relevant mental states.")

138 SEC v. Robert Collier & Co., 76 F.2d 939, 941 (2nd Cir. 1935), *rev'd*, 298 U.S. 1 (1936).

principal or face punishment, and congressional staffers perceive that there are "grave risks in freelancing" and departing from the preferences of their legislator.[139]

Considerable political science research addresses the principal-agent relationship of the full legislative chamber and the committees.[140] Congress creates committees and authorizes committee reports for a rational reason. The committees serve as a "system for providing, by specialized and politically accurate reporting, information the chamber needs to function amid uncertainty."[141] Keith Krehbiel of Stanford has extensively investigated the organization of Congress and the important role that committees play.[142] Krehbiel's position is essentially that "committee members use their position not to satisfy parochial interests, but rather to help fulfill the chamber's need for accurate information on policy choices."[143] Committees develop specialized knowledge about particular policy problems and legislative responses, thereby avoiding the need for every single legislator to investigate every single legislative issue. The committee agents are then to use this information to formulate policies that fit the preferences of the full legislative chamber. Krehbiel has found some evidence that committees act as "microcosms of the parent chamber."[144] The actions of committees are monitored both by the "chamber majority" and by "whistle-blowers in the minority."[145] Because the full body has control over the membership on committees and the resources granted to committees, it has some power to enforce the principal-agent relationship between the full chamber and the committees producing reports.[146]

The committees, like any agents, are not perfect fiduciaries of their principal, the broader chamber. Committees, members and staff may sometimes advance their own

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139 Victoria F. Nourse & Jane S. Schacter, *The Politics of Legislative Drafting: A Congressional Case Study*, 77 N.Y.U. L. REV. 575, 609 (2002).

140 *See, e.g.*, David P. Baron, *Legislative Organization with Informational Committees*, 44 AM. J. POL. SCI. 435, 435 (2000) (noting that legislatures "choose their internal organization" and recognize that, "as in other forms of work, there are gains from the division of labor and specialization through committees").

141 *The Reconceptualization of Legislative History in the Supreme Court*, *supra* note 000, at 268.

142 The prominent writings include Keith Krehbiel, INFORMATION AND LEGISLATIVE ORGANIZATON (1991); Keith Krehbiel, *Are Congressional Committees Composed of Preference Outliers?*, 84 AM. POL. SCI. REV. 149 (1990); Thomas W. Gilligan & Keith Krehbiel, *Organization of Informative Committees by a Rational Legislature*, 34 AM. J. POL. SCI. 531 (1990).

143 Forrest Maltzman, *Meeting Competing Demands: Committee Performance in the Postreform House*, 39 AM. J. POL. SCI. 653, 654 (1995).

144 Keith Krehbiel, *Where's the Party?*, 23 BRIT. J. POL. SCI. 235, 242 (1993).

145 LEGISLATIONI AND STATUTORY INTERPRETATION, *supra* note 000, at 303.

146 *See Organization of Informative Committees by a Rational Legislature*, *supra* note 000, at 544 (noting that "the legislature controls the committee's membership and resources"); *Legislative Organization with Informational Committees*, *supra* note 000, at 489 (observing that legislature controls resources such as "budgets, staff, favors, promises of future vote trades, or other support valued by the committee and its members").

agendas at the expense of the broader interest. The presence of some infidelity does not mean that the chamber does not rely upon the committee for legislation. Congress suffers some policy infidelity as consideration for the costs in effort that committees incur in developing specialization and drafting legislation and committee reports.[147] Of course, the acceptability of infidelity will be greater when the issue is not considered an important one to the legislature and much lesser for highly salient issues. Empirical research has confirmed that this is precisely the case. "Issue salience influences committee responsiveness to the chamber."[148] The committees of the greatest importance best reflect the preferences of the full body.[149] Congressional committees do not advance their own ideological interests contrary to the chamber nor further the goals of special interest groups; rather, they tend to match the chamber's preferences.[150] Reliance on committees is a delegation of authority to the legislative subunit.

Some textualists might claim that this legislative delegation of constitutive authority to a committee is illegitimate, but that argument proves too much. Some even find it unconstitutional on the grounds that the legislative power is non-delegable.[151] Indeed, it would dejustify virtually all legislation. Even without consideration of their reports, committees have the delegated authority to draft the initial language of the legislation for the full legislature's review and, as Arrow's Theorem shows, such agenda-setting power gives considerable control over the ultimate decision.[152] Most "legislative scholars concur that the committee system within the House shapes the policies enacted by Congress."[153] Most obviously, the legislature sometimes considers bills under a "closed rule" that prohibits floor amendments[154] or other restrictions on action by the full

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147 Committees incur a variety of costs associated with developing information and expertise in policy areas.

148 *Meeting Competing Demands, supra* note 000, at 657.

149 *See id.* at 666 (noting that "prestige committees" such as appropriations, budget and ways and means and "policy committees" like education and labor, judiciary, and energy and commerce" are consistent with the preferences of the chamber, while some "constituency committees," like agriculture and public works are less representative of those preferences. Even in the case of the latter committees, though, none had truly significant differences from the preferences of the chamber as a whole. *Id.* at 669. *See also* Forrest Maltzman & Steven S. Smith, *Principals, Goals, Dimensionality, and Congressional Committees*, 19 LEG. STUD. Q. 457, 461 (1994) (noting that committees are particularly responsive to the chamber on salient legislative matters).

150 *See The Receonceptualization of Legislative History in the Supreme Court, supra* note 000, at 267 (noting that "political scientists found voting in most congressional committees did not nearly diverge from voting in full chambers to the extent the interest group critique would suggest" but instead "matched, more or less, voting in the chamber").

151 *See* A MATTER OF INTERPRETATION, s*upra* note 000, at 35; John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673, 695 (1997).

152 *See* Daniel A. Farber & Philip P. Frickey, LAW AND PUBLIC CHOICE 38-39 (1991) (discussing this agenda-setting power).

153 *Meeting Competing Demands, supra* note 000, at 653.

154 *The Reconceptualization of Legislative History in the Supreme Court, supra* note 000, at 268.

chamber.[155] Even without such a closed rule, the body as a whole typically accepts the committee language without any changes.[156] In general, the "full chambers do not, by voting, make the choices, but rather they accept choices about details already made."[157]

The argument against reliance on, or delegation to, staff undermines textualism just as it undermines legislative history. A survey found that staffers typically have the responsibility for drafting statutory language.[158] Lobbyists are also regularly involved in drafting the language of bills.[159] The legislators "generally did not read the text" of the bills drafted by the staffers.[160] Staffers were just as likely to "freelance" when drafting text as when drafting legislative history.[161] The survey of congressional staff found that there was "no strong basis" for distinguishing between text and legislative history based on staffer involvement.[162] The distinction between the two is artificial. Judge Wald has observed that when a member of Congress votes for a bill "he or she intends to give approval to and put imprimatur on both the language of the statute and the process that produced it."[163]

Individual legislators may often "vote for technical language that the legislator does not understand, knowing that committee members believe . . . it has a proper function."[164] They may not even have read the language of the bill on which they vote.[165] Justice Scalia seemingly accepts this fact, that the legislators "do not know the details of

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155 *See Legislative Organization with Informational Committees*, *supra* note 000, at 489 (noting that the "House has increasingly used restrictive rules that specify in advance the amendments allowed on the floor").

156 *See Legislative Organization with Informational Committees*, *supra* note 000, at 489 (citing study that "relatively few bills reported by House committees are amended"). The percentages for amended legislation was 6%, 30%, and 15% for the years 1955, 1974, and 1986. *Id.*

157 *Id.*

158 *The Politics of Legislative Drafting*, *supra* note 000, at 585.

159 *Id.* at 587.

160 *Id.* at 608.

161 *Id.* at 610.

162 *Id.* at 620.

163 Patricia M. Wald, *The Sizzling Sleeper: The Use of Legislative History in Construing Statutes in the 1988-89 Term of the United States Supreme Court*, 39 AM. U. L. REV. 277, 307 (1990).

164 Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845, 866 (1992).

165 *See, e.g.*, LEGISLATION: STATUTORY INTERPRETATION: TWENTY QUESTIONS, *supra* note 000, at 37 (suggesting that "few legislators review statutory language carefully, and most may have little idea what it contains"); CASES AND MATERIALS ON LEGISLATION, *supra* note 000, at 955 ("legislators do not 'read' all the statutes they enact, either").

the legislation itself."[166] He responds that this is irrelevant as it ignores "the central point that genuine knowledge is a precondition for the supposed authoritativeness of a committee report and not a precondition for the authoritativeness of a statute."[167] This response would seem to be more of an assertion of a conclusion than an argument. Actual knowledge need not be required in either case, if there is a delegation to a trusted agent. The critics have yet to explain why a delegation to committees of unchecked report-writing authority to guide interpretation would be illegitimate, when delegation to committees of unchecked statute-writing authority is of unchallenged legitimacy.

The significance of an item of legislative history, such as a committee report, is not intrinsically significant but is significant because the full Congress has delegated some authority to that committee to clarify the meaning of a bill. The committee is exercising the authority of the full chamber. Indeed, one might wonder why committees would bother to go to the trouble of writing reports, if they were of no legal significance. Dismissing the significance of such reports is dismissive of legislative choice.[168] The logical implication of the critique would call for the total elimination of many forms of legislative history, such as committee reports. This judicial intrusion on the organization of a coordinate branch is seldom if ever justified, though.

The circularity of the criticism can also be illustrated through another route. Dedicated textualists do not hesitate to use extratextual sources other than legislative history. Most typically, they will consult a dictionary or perhaps use some canon of construction. Of course, the legislature never passed the contents of the dictionary or canon into law. This does not trouble the textualist, who uses those sources only as guides to interpretation of the text that the Congress did pass, not as independent sources of law. Yet the same could be said of legislative history that is used as a guide to interpretation of the text that the Congress did pass. These common theoretical criticisms, thus, are not actually criticisms of judicial use of legislative history but only criticisms of judicial misuse of legislative history. While they appear independent, the criticisms collapse into the fundamental claim that legislative history invites misuse at the hands of ideological judges.

Even those who favor the consideration of legislative history may have theoretical questions about some categories of legislative history, such as post-enactment legislative history. Using post-enactment materials is troublesome on several levels. For those who believe in traditional textualism, post-enactment legislative history is especially troublesome, because such history is not contemporaneous with the law and entirely disconnected with the formalities of its passage. If one acknowledges that the current legislature may not share the same preferences as the enacting legislature, giving weight to post-enactment legislative history functionally creates an unconstitutional category of legislation. It allows a legislature to amend the content of prior statutes through

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166 A MATTER OF INTERPRETATION, *supra* note 000, at 34.

167 *Id.* at 34-35.

168 *See, e.g.*, *The Sizzling Sleeper*, *supra* note 000, at 306 (asking: "If we are serous about respecting the will of Congress, how can we ignore Congress' chosen methods for expressing that will?); Muriel Morisey Spence, *The Sleeping Giant: Textualism as Power Struggle*, 67 S. CAL. L. REV. 585, 588 (1994) (arguing that "[t]o denigrate legislative history is to denigrate Congress as an institution").

commentary, without going through the process of legislating. This same criticism arguably applies to any reliance on legislative acquiescence or re-enactment.

The lack of contemporaneity of post-enactment legislative history can also be troublesome for those using a legislative intent standard for statutory interpretation. Even those who argue that Congress has properly delegated some legislative authority to committees to create governing legislative history might not believe that Congress delegated its authority to unknown future committees to retrospectively interpret the law passed by an earlier Congress. Post-enactment legislative history is not necessarily troublesome to pragmatists and may be consistent with dynamic statutory interpretation, though it still has the reliability questions associated with any legislative history.

The preceding theoretical debate over the legitimacy of relying on legislative history or other evidence of legislative intent may cover up the true basis for concern about the practice. The greatest practical critique of reliance on legislative history may be based on the discretion it gives judges in interpretation and consequent facilitation of ideological bias. Segal and Spaeth question the sincerity of its use, just as they questioned textualism.[169] Justice Scalia argues that the use of legislative history "has facilitated rather than deterred decisions that are based on the courts' policy preferences, rather than neutral principles of law."[170] He analogized it to looking over the heads of the crowd to pick out your friends."[171] One can often find at least a few friends even in a generally hostile crowd just as one might find ideologically convenient legislative history in an otherwise contrary text and record.

There is nothing intrinsic in consultation of legislative history that is biased (the congressional record may be conservative or liberal), the use of the tool may invite insincere interpretation as a practical matter. The legislative history of a major law includes a substantial body of commentary, ranging from committee reports to the remarks of individual legislators. In this multitudinous commentary, an interpreter may find it easier to support a preferred position.[172] Judge Kozinski has suggested that "[l]egislative history can be cited to support almost any proposition, and frequently is."[173] The conventional wisdom is that the resort to legislative history facilitates ideological judging, and this claim may be the most common critique of reliance on legislative history.[174] Consequently, the purpose of constraining ideological judicial choice arguably counsels for rules that prevent reliance on legislative history.

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169 THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED, *supra* note 000, at 75 (suggesting that "[g]iven the variety of reasons that legislative intent may not exist, and the problems of finding it in those cases where it does exist, perhaps we ought to discard completely judicial efforts to fathom intent."

170 A MATTER OF INTERPRETATION, *supra* note 000, at 35.

171 *Id.* at 36.

172 *See id.* (noting that for "any major piece of legislation, the legislative history is extensive, and there is something for everybody").

173 *See* Robert Pear, *With Rights Act Comes Fight to Clarify Congress's Intent*," N.Y.T. Nov. 18, 1991, at A1.

174 *See note ____ supra*.

The discernment of legislative intent need not be confined to the legislative history. Courts sometimes consider the overriding purpose of the law in its interpretation. A legislature's purpose might be gleaned from the text of the statute itself, or its structure.[175] If a purpose is not apparent from the text, perhaps it should not be transformed into law. Purposes "are not transmitted frictionlessly into legislation"[176] and the legislature doubtless has many purposes that never find their way into any legislation at all.[177] The search for some definitive legislative purpose may therefore be vain.

Analysis of legislative purpose has been controversial for a number of other reasons. For a time, the evaluation of legislative purpose was ascendant in statutory interpretation.[178] Reliance on legislative purpose, though, has its own interpretive problems.[179] The purpose of a statute is not always clear from its text and context. When Congress passed the civil rights laws, was its primary purpose to prevent discrimination against minorities who had historically suffered discrimination or to prevent all discrimination based on membership in a protected class? One could argue for either. It seems plausible that Congress had *both* purposes, which is unhelpful when those two goals come into conflict.[180]

Even if a statute has but one goal, turning to legislative purpose can be problematic. Some limiting principle is required but not offered by analysis of legislative purpose. Suppose a statute is written to advance the public health through specific measures. The legislative purpose is clear and unobjectionable and without direct internal conflict. Yet Congress did not pass a law declaring: "do everything conceivable to protect the public health." The law is not unlimited. Reliance on the generalized legislative purpose in interpretive controversies, though, is unlimited. Consequently, the attempt to further the legislative purpose inevitably undermines the actual legislation, by delimiting its scope.

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175 *See infra* at ___, note 000.

176 *The Absurdity Doctrine*, *supra* note 000, at 2409.

177 *See The Absurdity Doctrine*, *supra* note 000, at 2410 (noting that textualists argue that the legislative process "is too complex, too path-dependent, and too opaque to allow judges to reconstruct whether Congress would have resolved any particular question differently from the way the clear statutory text resolves the question").

178 *See* John F. Manning, *Legal Realism and the Canons' Revival*, 5 GREEN BAG 2d 283, 288 (2002) (discussing how legislative purpose survived legal realism and was embraced by those devoted to the legal process school of theory); *Interpreting Statutes in the Regulatory State*, *supra* note 000, at 426 (noting that legislative purpose "was especially popular among academic commentators in the 1950's and 1960's").

179 *See, e.g., Interpreting Statutes in the Regulatory State*, *supra* note 000, at 428 (finding some value to analysis of legislative purpose but stressing that "the effort to characterize legislative purpose often produces serious problems, whether or not circumstances have changed").

180 *See* LEGISLATION AND STATUTORY INTERPRETATION, *supra* note 000, at 222 (noting that "[p]urpovism does not yield determinate answers when there is no neutral way to arbitrate among different purposes").

The greatest difficulty with reliance on legislative purpose may be its inherent inconsistency. Every statute has at least two conflicting purposes. Consider the Clean Air Act. The paramount purpose of this statute obviously was to provide for government regulation to prevent air pollution. Yet the statute did not call for the impossible goal of the elimination of all air pollution; it called for the reduction of pollution under certain circumstances and limits. The universal invocation of the anti-pollution purpose of the Clean Air Act would clearly defeat the legislative purpose, in cases that fell within one of the limitations on that purpose. The Supreme court has observed that "no legislation pursues its purposes at all costs."[181] Statutes rarely command absolutes and are typically compromises between conflicting purposes.[182] In the presence of such conflict, reliance on legislative purpose is either fruitless or misleading.

Legislative purpose analysis may also be amenable to ideological judging. Discerning the purpose of a statute is certainly a subjective process. Arguably, "willful, manipulative judges" will attribute "a purpose to the statute that just happens to coincide with the judges' own policy preferences."[183] Professor Ely has suggested that "only a hopelessly result-oriented judge would be able to assert that he knew which was 'the' motivation or the 'dominant' motivation underlying a statute."[184] Indeed, the concept of legislative purpose does not even require particular supporting materials of legislative history and might therefore be more discretionary and potentially ideological than reliance on legislative history.

Reliance on legislative acquiescence in past judicial interpretations is also commonly challenged. At a theoretical level, the acquiescence of a later, different legislature cannot be a reliable guide to the intent of the enacting legislature, so intentionalists would not necessarily favor this aspect of legislative history. Textualists would not be expected to weight the position of later legislatures about the earlier statutes, and acquiescence in the form of inaction obviously has not surmounted the

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181 Pension Benefit Guar. Corp. v. LTV Corp., 496 U.S. 633, 646-647 (1990).

182 *See Statutory Interpretation – in the Classroom and in the Courtroom*, *supra* note 000, at 809 (observing that "if, as is often true, the statute is a compromise between one group of legislators that holds a simple remedial objective but lacks a majority and another group that has reservations about the objective, a court that construed the statute broadly would upset the compromise that the statute was intended to embody"); *Statute's Domains*, *supra* note 000,at 541 (noting that lawmakers "seeking only to further the public interest may conclude that the provision of public rules should reach so far and o farther, whether because of deliberate compromise, because of respect for private orderings, or because of uncertainty coupled with concern that to regulate in the face of the unknown is to risk loss for little gain"); *The Absurdity Doctrine*, *supra* note 000, at 2418 (observing that "Congress may be unanimous in its intent to stamp out some vague social or economic evil; however, because its members may differ sharply on the means for effectuating that intent," so that invocation of legislative purpose "at the expense of the terms of the statute itself takes no account of the processes of compromise and, in the end, prevents the effectuation of congressional intent").

183 *From the Big Sleep to the Big Heat*, *supra* note 000,a t 251.

184 John Hart Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1204, 1214 (1970). *See also* Gil Seinfeld, *The Possibility of Pretext Analysis in Commerce Clause Adjudication*, 78 NOTRE DAME L. REV. 1251, 1318 (2003) (reporting a "significant danger that aggressive inquiry into legislative purpose" could sometimes "be perceived as transparently political").

constitutional hurdles to legislative enactment. While the Court has occasionally relied upon legislative acquiescence, it has done so carefully, describing the doctrine as "at best only an auxiliary tool," as the Court does "not expect Congress to make an affirmative move every time a lower court indulges in an erroneous interpretation."[185] Both textualists and those who use legislative history might be more amenable to legislative acquiescence, though, when the statute was reauthorized or revised, because the prior judicial interpretations could be considered part of the context of the new statute.

Legislative acquiescence might seem consistent with a pragmatic or dynamic approach to statutory interpretation, but even this association is debatable. As Posner has observed, "[l]egislative agendas are crowded, the procedural barriers to enactment formidable, and as a result legislatures usually can't undo judicial decisions they don't like."[186] Thus, legislative acquiescence does not equate with approval from more recent legislatures. Acquiescence may result from the issue being too insignificant to warrant the expenditure of legislative time, or acquiescence may result from the controversial nature of the matter and the inability to reach a subsequent legislative compromise. Hence, even pragmatists might be cautious about reliance on pure acquiescence, in the absence of statutory reauthorization or revision.

C. Interpretive Canons

Historically, certain "canons" have been used in statutory interpretation. The canons are judicially-created guidelines for the meaning of statutory language, under certain circumstances. The canons might be considered either dispositive guides to interpretation or mere presumptions. As guides to interpretation, the canonical approach is distinct from the debate over text vs. legislative history and might even be considered orthogonal to that approach. Hence, reliance on the canons cannot necessarily be predicted from a justice's view about the purposes of or appropriate tools for statutory interpretation.

1. The canonical approach

Canons may be simply interpretive rules for text. The canons of statutory interpretation are of two distinct types. The first type is the linguistic canons. These are like rules of grammar that enable textual understanding, and some are actual rules of grammar. The second type is the substantive canon, which creates a preference for a category of outcome, though not necessarily an ideological end. The linguistic canons have a considerable historical pedigree, as reflected in the Latin language in which they are often expressed.

The linguistic canons are intended as simple guides to interpretation, much like the rules of grammar. Among the best known linguistic canons is *expression unius est exclusion alterius*. Under this canon, the statutory inclusion of a particular approach or authorization is interpreted as a presumption that other approaches or authorities are

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185 Jones v. Liberty Glass Co., 332 U.S. 524, 533-534 (1947).

186 THE PROBLEMS OF JURISPRUDENCE, *supra* note 000, at 301.

excluded.[187] The linguistic canons of *ejusdem generic* and *noscitur a sociis* may be viewed in tandem. Both establish a presumption that particular words should be interpreted according to the company they keep and not viewed in isolation.[188] The literal rules of grammar themselves may also serve as interpretive canons, *e.g.*, punctuation informs interpretation.[189] These canons might be embraced by textualists as part of the essential context of statutory language. Intentionalists might also rely on the canons, on the theory that, as linguistic rules, they are presumably guides to the intent underneath the legislative language.

Another set of canons is based on substantive policy and establish presumptions for resolving unclear language. An early substantive canon was the principle that statutes should not be interpreted in derogation of the common law.[190] If a statutory text admitted of two different interpretations, this canon directed judges to choose the interpretation most consistent with the preexisting common law. The substantive canons represent built in biases for certain categories of outcomes. These canons include presumptions that statutes not be interpreted in derogation of sovereignty, that public grants be strictly limited, that statutes not have extraterritorial application, that traditional state powers be preserved, that judicial review be available, and others.[191]

The "rule of lenity" is an important substantive canon in cases involving a criminal prosecution. It holds that if the criminal statute "does not clearly outlaw private conduct, the private actor cannot be punished."[192] The effect of the rule is to allow certain defendants, whose actions may be borderline criminal, to escape punishment, with the goal of forcing the legislature to clearly prescribe the perimeters of the actions that it wishes to criminalize. The rule of lenity is commonly invoked in criminal litigation and also justified by the need to provide fair notice or warning of action that is illegal. The scope of the rule of lenity is quite flexible, though, and permits convictions in the presence of some statutory ambiguity, but not "grievous ambiguity."[193]

The principle that statutes be construed so as to avoid creating serious constitutional questions could be considered another substantive canon.[194] If a statute is

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187 *See* CASES AND MATERIALS ON LEGISLATION, *supra* note 000, at 824-825 (summarizing and critiquing this canon).

188 *See* CASES AND MATERIALS ON LEGISLATION, *supra* note 000, at 822-823 (summarizing these canons).

189 *See* CASES AND MATERIALS ON LEGISLATION, *supra* note 000, at 826-829 (discussing how rules of grammar are used in statutory interpretation).

190 *See* CASES AND MATERIALS ON LEGISLATION, *supra* note 000, at 920-921, 934-935 (addressing the common law canon).

191 CASES AND MATERIALS ON LEGISLATION, *supra* note 000, at 849-851.

192 CASES AND MATERIALS ON LEGISLATION, *supra* note 000, at 852.

193 Staples v. United States, 511 U.S. 600, 619 n.17 (1994).

194 For discussions of this canon, see generally Adrian Vermeule, *Saving Constructions*, 85 GEO. L.J. 1945 (1997); Lisa Kloppenberg, *Avoiding Constitutional Questions*, 35 B.C. L. REV. 1003 (1994).

subject to two reasonable interpretations, and one of those interpretations would create serious constitutional questions, this canon calls for the adoption of the other interpretation.

The preceding examples are only a partial list of what might be considered substantive canons of statutory interpretation. Others are less general in application and not so frequently invoked, but they may be critical in a particular case. In general, the substantive canons are not so well established as the linguistic canons, but some have a considerable history and general acceptance.

2. The critique of the canons

The linguistic canons appear on their face to be logical, uncontroversial and ideologically neutral means of accurately interpreting statutory language. This appearance was dispelled long ago by Karl Llewellyn, however.[195] Llewellyn, in his legal realism, contended that the canons themselves were highly indeterminate and could be deployed by judges to reach desired results. To demonstrate this, he produced a chart of the canons in "thrusts" and "parries," showing that, like so many aphorisms, each canon had a counterpoint.[196] A judge could simply choose the thrust or the parry in order to reach his preferred end. Llewellyn concluded that we should give up the "foolish pretense" that judges should rely on "mutually contradictory correct rules" of statutory interpretation.[197] Thus, the canons, like legislative history, simply provided convenient beards for ideological decisionmaking.

For some time, Llewellyn's claim was accepted and became the conventional wisdom.[198] The Supreme Court itself has taken notice that canons "are often countered by some maxim pointing in a different direction."[199] This tendency of the canons does not simply make them incoherent. Rather, the presence of canons pointing in opposite directions enables greater judicial discretion. A judge may pick and choose the canon he or she wishes, in order to reach the result that he or she desires. Self-contradicting canons empower the willful judge and result-oriented rulings.

Even if the canons were not self-contradictory, they may be challenged on logical grounds. Consider the *expression unius* canon. When one makes a list, it is not necessarily exclusive or comprehensive. If a person makes a list of "foods he likes," it does not imply that he dislikes every single food not contained on that list. The person

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195 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 (1950). The article has been called a "fiendishly deconstructive" attack on the canons. Robert Weisberg, *The Calabresian Judicial Artist: Statutes and the New Legal Process*, 35 STAN. L. REV. 213, 213 (1983).

196 *Id.* at 401-406.

197 *Id.* at 399.

198 *See Statutory Interpretation – in the Classroom and in the Courtroom, supra* note 000, at 805 (observing that "it has been many years since any legal scholar had a good word to say about any but one or two of the canons").

199 Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 115 (2001).

may have overlooked some foods and may not have even considered other foods that he has not yet sampled.[200] Likewise a legislature "might create an exception to a general grant without thereby wanting to prevent the courts from recognizing additional exceptions, unforeseen at the time of enactment, that would be consistent with the grant's purposes."[201] Cass Sunstein has also noted that the failure to include an item in a list "may reflect inadvertence, inability to reach consensus, or a decision to delegate the decision to the courts."[202] The rule does not even necessarily comport with ordinary language usage. As Max Radin put it, "to say that all men are mortal does not mean that all women are not or that all other animals are not."[203] Richard Posner has declared more generally that "most of the canons are just wrong" and do not reflect legislative intent or even common sense.[204]

The linguistic canons have their defenders, though. Textualists have embraced the canons as guides for interpretation that required no evaluation of legislative intent.[205] The contemporary revival of the canons has not been limited to textualists. Cass Sunstein has argued that Llewellyn's critique was "greatly overstated."[206] David Shapiro called the critique of the canons "grossly overdone."[207] Certainly, it is difficult to argue that the rules of grammar should be ignored when interpreting language. Even the contemporary defenders of the canons presented only a limited defense, however. For example, Shapiro claims only that the "maxim of inclusio unius is a useful tie-breaker."[208] The canons, even when they represent correct rules for interpretation, are thus "at best of modest utility."[209]

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200 For additional examples of the illogic of *expression unius*, see CASES AND MATERIALS ON LEGISLATION, *supra* note 000, at 824-825.

201 THE PROBLEMS OF JURISPRUDENCE, *supra* note 000, at 281.

202 *Interpreting Statutes in the Regulatory Age*, *supra* note 000, at 455.

203 Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 873 (1930). Shapiro criticizes this example, as failing to account for the difference between an observation and "a statutory mandate creating new legal rights, duties or remedies." *Continuity and Change in Statutory Interpretation*, *supra* note 000, at 928. This defense of *expression unius*, however, simply converts a linguistic canon into a substantive one, biasing interpretation in favor of the status quo just like the canon against interpretations in derogation of the common law. Indeed, the defense arguably collapses the former canon into the latter.

204 *Statutory Interpretatin – In the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 806 (1983).

205 *See Legal Realism and the Canons' Revival*, *supra* note 000, at 290 (describing how the textualists have embraced the canons as an alternative to attempts to ascertain legislative intent).

206 *Interpreting Statutes in the Regulatory State*, *supra* note 000, at 452.

207 *Continuity and Change in Statutory Interpretation*, *supra* note 000, at 925.

208 *Continuity and Change in Statutory Interpretation*, *supra* note 000, at 929.

209 THE PROBLEMS OF JURISPRUDENCE, *supra* note 000, at 279.

The substantive canons have their own theoretical critics. The canon counseling against derogation of the common law rule may have been logical in the early age of statutory regulation but makes less sense in a contemporary world, where statutes are the rule.[210] One might fairly argue that the very purpose of statutes is to derogate the common law – if the preexisting common law was deemed satisfactory, no statute would be necessary.[211] This canon may also produce an intrinsic conservative bias in statutory interpretation.[212] Regulatory statutes typically have a liberal end, somehow restraining the *laissez faire* use of private property, so any narrowing interpretation of such statutes will serve conservative purposes.[213] The substantive canons are not consistently conservative in operation, though, and may in fact tend to favor liberal outcomes.

In contrast to the conservative purposes of the common law canon, the rule of lenity appears to systematically favor liberal outcomes in favor of criminal defendants. The canon in favor of giving liberal interpretations to remedial statutes also will tend to produce ideologically liberal decisions. The canon against interpretations raising serious constitutional questions may also have a tendency to produce ideological liberal outcomes, at least in the numerous constitutional provisions considered liberal. Other canons, such as those favoring the preservation of federalism, may tend to yield relatively conservative results.

While the fact that the substantive canons have no consistent ideological bias might seem to make them ideologically neutral, this inconsistency may have the opposite result. The conservative bias of the common law canon will frequently run up against the liberal bias of the remedial statute canon, as remedial statutes typically modify the common law rule. In this case, the canons simply free the judge to pick and choose the most ideologically amenable canon and apply it. Thus, one would expect a conservative, such as Justice Scalia, to favor the common law canon and deprecate the remedial statute canon, as in fact he has.[214] With such a conflict, the canons do not serve to constrain ideological decisionmaking but actually further such imposition of judicial ideology, because they provide additional tools for the ideologically minded judge. Indeed, Scalia

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210 *See Interpreting Statutes in the Regulatory State*, *supra* note 000, at 409-411 (arguing that standards of interpretation should have "outgrown the understandings that underlay the initial period of judicial antagonism" to statutory regulation).

211 This is not always the case. Some statutes, especially those enacted before the regulatory age such as the Sherman Act, may have been written to enact common law principles. *See Statutory Interpretation – in the Classroom and in the Courtroom*, *supra* note 000, at 818 (suggesting that this was the goal of section one of the Sherman Act). The presence of some such statutes does not warrant reliance on the canon as a general rule, however. Even defenders of the canon, though, have suggested that it "seems woefully anachronistic" in the modern regulatory state. *See Continuity and Change in Statutory Interpretation*, *supra* note 000, at 949.

212 *See Statutory Interpretation – in the Classroom and in the Courtroom*, *supra* note 000, at 821 (suggesting that the canon has been used to "emasculate social legislation").

213 This conservative effect of the common law canon is not a universal one. *See, e.g.*, *Continuity and Change in Statutory Interpretation*, *supra* note 000, at 948 (discussing counterexamples). The lack of universality, though, does not mean that the canon does not have a distinctive net conservative effect.

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himself has criticized the substantive canons for adding a "thumb of indeterminate weight" to the decisionmaking scale, a practice that will not yield "uniformity or objectivity."[215]

Some reliance upon canons of interpretation is inevitable, because they are nothing more than rules for interpreting language. Without such rules, language has no meaning.[216] Absent the interpretive direction provided by canons, there is no basis for concluding that "black" does not encompass "white," or that the affirmative excludes the negative. This defense of canons in general theory, though, does not provide a defense for the actual canons in operation. While *some* set of canons is necessary and desirable as assistance in interpreting language, the current set of canons might not effectively serve this purpose. If Llewellyn is correct, the prevailing canons do not guide interpretation.

Canons are also inevitably appealing to the judiciary, because they *seem* to offer neutral principles for statutory interpretation that constrain ideological judicial decisionmaking, which may be tantamount to legislating. Canons expressed in Latin may seem particularly judicial. Even the substantive canons, which are not neutral in their implications, are at least consistent interpretive rules that should not vary with the ideological proclivities of the particular justice. This effect may be a convenient fiction, however. Posner argues that use of the canons actually promotes such judicial activism because they "do not constrain judicial decision making but they do enable a judge to create the appearance that his decisions are constrained." As such, they may facilitate ideological decisionmaking rather than constrain it.

IV. The Justices and Theories of Statutory Interpretation

In general, the Supreme Court justices have not entered the academic fray on the theories of statutory interpretation. There are exceptions to this rule, though, with Justice Scalia by far the most notable exception. Justice Scalia has bravely held forth, both in academic writings and judicial opinions, on the theories of statutory interpretation. The above discussion has drawn on Justice Scalia's views in elaborating theories, and this section will summarize that position. His position clearly favors a textualist, rule of law approach to the interpretation of statutes. He distinguishes this approach from a "literalist" approach of "strict constructionism," though, by considering the context of the text.[217] He even "delivered a series of speeches" that urged the courts "to abandon virtually any reference to legislative history."[218]

Justice Scalia is also a defender of the linguistic canons of interpretation. He has referred to them as "so commonsensical that, were [they] not couched in Latin, you

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215 A MATTER OF INTERPRETATION, *supra* note 000, at 28-29.

216 *See Legal Realism and the Canons' Revival*, *supra* note 000, at 291 (contending that legislation "is meaningless in a world without canons of construction").

217 Antonin Scalia, A MATTER OF INTERPRETATION 23 (1997)

218 CASES AND MATERIALS ON LEGISLATION, *supra* note 000, at 743.

would find it hard to believe that anyone could criticize them."[219] Scalia challenges Llewellyn's thrusts and parries, suggesting that the parries are simply the product of "willful, law-bending" judges.[220] He will depart from his devotion to plain meaning, in deference to canons, as he has held that the "ordinary meaning of the language in its textual context" should control *unless* "established canons of construction" require a different result."[221] Indeed, Scalia is said to use the canons "aggressively," even when they "carry him far afield from any plain meaning or ordinary usage that an ordinary reader, or even a member of Congress voting on the statute, might glean from the text."[222] Scalia does not embrace every canon, though.[223] His feelings on the substantive canons might be described as mixed.[224]

Scalia's approach to statutory interpretation is renowned. He is known for his "steadfast refusal ever to consider legislative history."[225] His rejection of legislative history is grounded in multiple reasons. First, he rejects the theory that judicial statutory interpretation should be grounded in the purpose of fulfilling legislative intent. Scalia notes at a basic level that the members of Congress "need have nothing in mind in order for their votes to be both lawful and effective"[226] as evidence that intent is irrelevant. Indeed, he suggests that in most cases this is the fact – that Congress didn't consider a matter or had no particular intent in mind when it did consider the matter.[227]

In addition, Scalia questions the reliability of legislative history as a guide to what legislative intent may exist. He has declared that neither statements of legislators, Executive statements or even the nonenactment of proposals "is a reliable indication of what a majority of both Houses of Congress intended when they voted for the statute before us."[228] Scalia also fears that judicial reliance on legislative history "will only

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219 A MATTER OF INTERPRETATION, *supra* note 000, at 25.

220 *Id*.

221 Chison v. Roemer, 111 S.Ct. 2354, 2369 (1991) (Scalia, J. dissenting).

222 Karkkainen, *supra* note 000, at 449.

223 *See, e.g.*, Antonin Scalia, *Assorted Canards of Contemporary Legal Analysis*, 40 CASE W. RES. L. REV. 581 (1989) (deriding the canon of liberal construction of remedial statutes as "meaningless").

224 *See* A MATTER OF INTERPRETATION, *supra* note 000, at 28-29 (questioning the basis for judicial privileging of substantive canons but suggesting that some may be only an "exaggerated statement of what normal, no-thumb-on-the-scales interpretation would produce").

225 *The Inevitability of Practical Reason*, *supra* note 000, at 546.

226 Pennsylvania v. Union Gas Co., 491 U.S. 1, 30 (1989) (Scalia, J. concurring)

227 *See* Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 515 (declaring the quest for genuine legislative intent to be a "wild-goose chase"); A MATTER OF INTERPRETATION, *supra* note 000, at 32 (contending that "with respect to 99.99 percent of the issues of construction reaching the courts, there *is* no legislative intent").

228 Crosby v. Nat'l Foreigh Trade Council, 530 U.S. 363, 390 (2000) (Scalia, J., concurring in the judgment).

encourage cynical attempts by interest groups – and their well-placed congressional allies – to tailor the legislative history to influence future court."[229] He also questions any reference to the statements or actions of any subsequent Congresses, such as reliance on legislative acquiescence, declaring it irrelevant "what committees of the 99th and 95th Congresses thought the 76th Congress intended."[230]

Scalia also derogates the reliability of the legislative record. He argues that references in congressional committee reports "were inserted, at best by a committee staff member on his or her own initiative, and at worse by a committee staff member at the suggestion of a lawyer-lobbyist."[231]

In addition to the above criticisms, Justice Scalia's central concern about the use of legislative history is its amenability to ideological manipulation. He declares it "dangerous to assume that, even with the utmost self-discipline, judges can prevent the implications they see from mirroring the policies they favor" when using legislative history.[232] Scalia sees textualism as a path that can minimize this results-oriented statutory interpretation.

Justice Scalia has also rejected substantial reliance on legislative purpose as an interpretive standard, stressing that the "principle of our democratic system is not that each legislature enacts a purpose, independent of the language of the statute, which the courts must then perpetuate."[233] Scalia does not wholly reject consideration of legislative purpose, though.[234] The purpose is surely a part of the context necessary for analyzing the textual language. He does prefer to discern the legislative purpose from the text or structure of an Act, rather than legislative commentary that is subject to the shortcomings of any analysis of legislative history.[235]

Although Scalia has presented extensive theoretical analysis of statutory interpretation, his key concern seems to involve the project of this empirical research – that the judiciary will use the tools of interpretation to reach the results they ideologically prefer. He argues that "under the guise or even the self-delusion of pursuing unexpressed legislative intents, common-law judges will in fact pursue their own objectives and desires."[236] He argues that utilization of legislative history facilitates judges' ability to

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229 Karkkainen, *supra* note 000, at 420.

230 Sullivan v. Finekstein, 496 U.S. 617, 628 n.8 (1990)

231 Blanchard v. Bereron, 489 U.S. 87, 98 (1997) (Scalia, J., concurring).

232 Thompson v. Thompson, 484 U.S. 174, 192 (1988) (Scalia, J., concurring).

233 K-Mart Corp. v. Cartier, Inc., 486 U.S. 281, 325 (1988) (Scalia, J. concurring).

234 *See* Blanchard v. Bergeron, 489 U.S. 87, 100 (1989) (declaring that the court should "develop an interpretation of the statute that is reasonable, consistent, and faithful to its apparent purpose").

235 *See* United States v. Fausto, 484 U.S. 439, 448 (1989) (inferring purpose of Civil Service Reform Act from its structure). Judge Easterbrook has likewise suggested that courts "should confine their attention to the purposes Congress sought to achieve by the words it used" in the statute. Walton v. United Consumers Club, Inc. 786 F.2d 303, 310 (7th Cir. 1986).

236 A MATTER OF INTERPRETATION, *supra* note 000, at 17-18.

make decisions grounded in their own policy preferences rather than in the law.[237] Scalia's repeated concern is about "willful judges who bend the law to their wishes."[238]

Scalia's general approach to statutory interpretation is widely known but often oversimplified. While he is stereotyped as a classic textualist, he sometimes appears to bow to pragmatism in statutory interpretation.[239] Indeed, he has even declared the "consideration of policy consequences" to be one of the "traditional tools of statutory construction."[240] Scalia has thus accepted the absurdity doctrine and demonstrated a willingness to ignore text that would produce an absurd result.[241] Scalia has also accepted *Chevron* deference to administrative agency interpretations, which might be considered a pragmatic approach.[242] He has consistently assailed reliance on legislative history.

Justice Scalia's view is typically juxtaposed against the contrasting theory of Justice Breyer, who has also written on interpretive theories for statutes, including testifying before Congress, before he was elevated to the Supreme Court.[243] Breyer does not reject reliance on statutory text but argues that textualism "does not offer much help in particular cases," because clear text is not litigated.[244] Consequently, he would rely upon extratextual sources for guidance in statutory interpretation, particularly legislative history.

Breyer has developed what might be called the "busy Congress" model, reflecting the political science understanding of delegation to committees.[245] He notes that "legislation is not spontaneously generated, but arises out of a highly complex, public, time-consuming, detailed process of hearings, debate, and negotiation, typically

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237 *Id.* at 35.

238 A MATTER OF INTERPRETATION, *supra* note 000, at 131.

239 *See* Karkkainen, *supra* note 000, at 411-412 (analyzing Scalia's opinions and finding him "endorsing the use of a purposive, policy-oriented approach" in the context of his textualism).

240 Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 515.

241 *See, e.g.*, Green v. Bock Laundry Machine Company, 490 U.S. 504 (1989) (Scalia, J. concurring).

242 *See Judicial Deference to Administrative Interpretations of Law*, *supra* note 000, at 515 (supporting *Chevron* deference due in part to agencies' better understanding of the consequences of particular interpretations).

243 *See* Statutory Interpretation and the Uses of Legislative History: Hearing before the Subcomm. On Courts, Intellectual Property, and the Administration of Justice of the House Comm. on the Judiciary, 101st Cong., 36 (1990) (statement of Stephen Breyer). Breyer's theory was subsequently presented in a 1991 lecture reprinted as Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845 (1992).

244 *Id.* at 37.

245 *See The Reconceptualization of Legislative History in the Supreme Court*, *supra* note 000, at 252 (discussing this approach).

involving most, or all, of those groups whom the future law will likely affect."[246] While this busyness might support the argument that misleading bits of legislative history could be inserted into the record, Breyer argues that those "directly involved . . . will subject, not only the text of the law but also committee reports, floor statements, and other relevant comments to scrutiny; they too may become the subject of negotiation."[247] While the elected representatives of the people are not familiar with all the legislative history, they also may be unfamiliar with particulars of statutory text.[248] In both cases, they may rely on staff and affected groups "to identify major controversial matters and to help resolve them."[249] Hence, the legislative history is an integral part of the bill, much like the text itself.

Breyer has continued his public support for reliance on legislative history and elaborated on its basis. He argues for a purposive, rather than a linguistic, approach to interpretation, in both statutory and constitutional matters. Breyer's proposed approach to a case asks "how a (hypothetical) reasonable member of Congress, given the statutory language, structure, history, and purpose, would have answered the question, had it been presented."[250] His preference is grounded in a constitutional respect for democratic governance and a pragmatic consequentialist concern. While Breyer concedes that his methodology is a subjective one, he argues that the textualist "does not escape subjectivity, for his tools, language, history, and tradition can provide little objective guidance in the comparatively small set" of important Supreme Court cases.[251] The textualist outcome will be "no less subjective" but "far less transparent than a decision that directly addresses consequences."[252]

The methodological positions of the other justices, who have not addressed the issue outside opinions, are not so clear. Justice Stevens has written very briefly on a clever Shakespearean perspective on interpretation.[253] He noted that the first rule of statutory interpretation was to "read the statute," but cautioned that the statutory text would not necessarily resolve the controversy before the Court.[254] He proceeded to declare that: "If you are desperate, or even if you just believe it may shed some light on the issue, consult the legislative history," but cautioned that such history may be an

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246 Statutory Interpretation and the Uses of Legislative History, *supra* note 000, at 46.

247 *Id.* at 46-47.

248 *Id.* at 47.

249 *Id.*

250 Stephen Breyer, *Our Democratic Constitution*, 77 N.Y.U. L. REV. 245, 266 (2002).

251 *Id.* at 270.

252 *Id.*

253 John Paul Stevens, *The Shakespeare Canon of Statutory Construction*, 140 U. PA. L. REV. 1373 (1992).

254 *Id.* at 1374.

unreliable guide.[255] He also gestured to pragmatism in calling for the use of "good sense" in judicial statutory interpretation.[256] His article is consistent with a pluralist approach to interpretation.

Other justices have not left such a paper trail, and their respective approaches are not entirely clear. In a review of the 1988-89 term, Judge Wald characterized justices Scalia and Kennedy as "true believers" in textualism, and suggested that Justices Rehnquist and O'Connor leaned in that direction.[257] At around that time, Professor Eskridge described Justices Rehnquist, Scalia, and Kennedy as "statutory nominalists," while he considered Justices Stevens and O'Connor as "pragmatists."[258] Twelve years later, he concluded that Justices Stevens, O'Connor, Souter, and Breyer were pragmatic textualists.[259] Like Stevens, many of the justices might be considered pluralists, using different theories in different cases, rather than true devotees of any one approach to statutory interpretation.[260] A review focusing on maritime decisions argued that Justices O'Connor, Kennedy, Souter, Ginsberg, and Breyer had a natural law approach that considered the purpose behind the law, while Justices Scalia and Thomas were "formalists" focused on text, Justice Rehnquist was deferential to the legislature and thus open to legislative history, and Justice Stevens was an "instrumentalist" more closely attendant to consequences.[261] These conclusions seem to be ad hoc assessments based on a reading of Supreme Court opinions. The best evidence of the justices' approaches, though, is available in a more systematic study of their opinions, which are analyzed in the following section.

V. Empirical Analysis of Supreme Court Statutory Interpretation

An enormous amount of ink has been spilled on statutory interpretation, much of it dealing with matters descriptive rather than purely normative. Academics have made claims about the types of interpretation that prevail at the court and about their effects. Some claim that the utilization of legislative intent simply empowers ideological

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255 *Id.* at 1381. Stevens warned that using legislative history "requires an ability to discount comments manufactured by staff members to appease lobbyists who were unable to persuade legislators to conform the statutory text to their clients' interests." *Id.*

256 *Id.* at 1381.

257 Patricia M. Wald, *The Sizzling Sleeper: The Use of Legislative History in Construing Statutes in the 1988-89 Term of the United States Supreme Court*, 39 AM. U. L. REV. 277, 300 (1990).

258 William N. Eskridge, Jr., *Public Values in Statutory Interpretation*, 137 U. PA. L. REV. 1007, 1075-81 (1989).

259 William N. Eskridge, Jr., *All About Words: Early Understandings of the "Judicial Power" in Statutory Interpretation, 1776-1806*, 101 COLUM. L. REV. 990, 1094 (2001).

260 *See The Reconceptualization of Legislative History in the Supreme Court*, *supra* note 000, at 272 (suggesting that these justices take an "agnostic position" between theories).

261 Major B. Harding, *Judicial Decision-Making Analysis of Federalism Issues in Modern United States Supreme Court Maritime Cases*, 75 TUL. L. REV. 1517, 1522-23 (2001).

decisionmaking, while others assert that textualism is equally vulnerable to ideological manipulation. While these claims typically have some empirical support, in the form of case examples, this evidence is anecdotal and not rigorous. This section provides a more rigorous analysis of the practice of statutory interpretation in the Supreme Court and the effect of different approaches.

There is some limited quantitative empirical study of statutory interpretation in the courts. One study quantitatively analyzed the use of statutory interpretation methodologies by the Supreme Court.[262] It analyzed the sources used in statutory interpretation over the Court's history since the 1890s. Text was the most common resource (appearing in 84.1% of the cases) and the materials of legislative history have been commonly used (reports in 32% of the cases, debates in 16.9% of the cases, and hearings in 12.6% of the cases).[263] Citations on the consideration of practical consequences, while not so frequent, consistently occurred.[264] The use of these materials remained fairly stable over time.[265] The results also found that citations to textual and legislative history sources were associated with one another, implying that the two are not in the conflict often hypothesized.

This existing empirical research is of historical significance but doesn't help much in answering the key questions regarding statutory interpretation, however. This study only coded citations, though.[266] Consequently, a majority opinion that declared certain legislative history to be unreliable would be coded as using legislative history. More significantly, the study did not consider any effects of ideology or individual justices. Understanding the role played by different approaches to statutory interpretation requires analysis of particular opinions and outcomes from particular justices.

One recent study by Howard and Segal sought to capture the intersections of interpretive theory and ideology in a rigorous fashion.[267] The authors sought to test for the justices' fidelity to the interpretive theory of originalism in both constitutional and statutory cases. They examined briefs filed with the Court and coded them as to whether the litigants made claims that the text supported their position and whether that claim was disputed by the other side in the case.[268] The authors then examined each justice's vote based on the nature of the textual arguments and the ideology of the parties. They found that the presence of legal arguments based on text or intent were not statistically

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262 *The Use of Authority in Statutory Interpretation, supra* note 000.

263 *Id.* at 1093.

264 *Id.* at 1097

265 *See id.* at 1096, Figure 3, displaying relative frequency of judicial, legislative and executive sources in Court consideration and 1097, displaying relative frequency of citations to practical consequences of decisions.

266 *Id.* at 1089.

267 Robert M. Howard & Jeffrey A. Segal, *An Original Look at Originalism*, 36 LAW & SOC'Y REV. 113 (2002).

268 *See id.* at 123-126 (describing coding method).

significant determinants of votes, when controlling for ideology.[269] These findings give cause to question the sincerity of the judicial devotion to interpretive methodologies.

The Howard and Segal research does not truly answer the important statutory interpretation questions, however. They combined constitutional and statutory cases, though the two present distinctly different theoretical approaches. Their analysis was based entirely on the briefs filed with the court and did not consider the theories that were actually employed in the opinions of the Court. Finally, they used a very two-dimensional system of coding, without considering the broader spectrum of the theories. Thus, they did not consider such arguments as the absurdity doctrine and the canons of interpretation and did not distinguish between references to legislative history and legislative purpose. The following analysis elaborates on this research to fill these gaps.

Empirical analysis cannot discern the internal reasons of a justice's thinking.[270] The data cannot demonstrate conclusively that a justice is consciously insincere and adopts a particular theory in a particular case (or generally) for the reason that it yields ideologically desirable results. Empirical results can inform our evaluation of these reasons, however. More significantly, such analysis can show the real world consequences of particular interpretive theories, which is of greater import than the internal reason, in any case.[271]

A. The Methodology of the Quantitative Empirical Analysis

The study involves Supreme Court decisions involving statutory interpretation between the years 1994 and 2002, inclusive. The time period roughly captures the natural court following Stephen Breyer's appointment. Cases were initially screened through use of West's key number system, for cases with a headnote on "statutes." These cases were then screened for decisions using one of the interpretive methods studied. Over 120 cases were sampled, providing over one thousand separate justice-votes for analysis. The vote of each justice is the basic unit of analysis for this study.

Each of these justice-votes was coded for the type of case, whether the outcome of the vote was considered to be liberal or conservative, and the theories of statutory interpretation employed (or criticized) in the opinion joined or written by that justice and whether that opinion was for the majority, a dissent or a concurrence. This provides a database that enables examination of the relative effects of personal ideologies and interpretive theories on Supreme Court decisionmaking. Cases were also coded by the year decided and the number of justices in the decisionmaking majority. Appendix A provides greater detail on the coding methods for particular variables. Appendix B contains additional information through descriptive statistics about the nature of cases in the database.

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269 *See id.* at 130-131.

270 *See, e.g.*, Howard Gillman, *What's Law Got to Do With It?*, 26 LAW & SOC. INQUIRY 465, 486 (2001) (distinguishing between the "predictable behavior of judges" and their "state of mind").

271 *See Political Science and the New Legal Realism, supra* note 000, at 281-282 (arguing that emphasis on internal reasoning should be secondary to consideration of actual outcomes when investigating decisionmaking).

B. The Justices and Ideological Decisionmaking

Given the prior research, the effects of judicial ideology must be considered. Ideology may explain the results of my research, wholly independent of theories of statutory interpretation, and the exploration of the intersection of ideology and interpretive theories is also of crucial importance. It may be important to separate out the cases where the decision was unanimous. By their very nature, unanimous decisions do not appear to be ideologically driven. If justices of very diverse political ideologies agree on an outcome, that result suggests that something other than ideology explains the outcome.

The actual significance of unanimous decisions is unclear. Some political scientists claim that these decisions can tell us nothing about ideological decisionmaking, hypothesizing that a unanimous decision simply reflects a case where a party's ideology is beyond that of even the most extreme justice. Thus, when Scalia or Thomas casts a liberal vote in a unanimous decision, it simply means that the conservative party took a position that was "too conservative" for Scalia or Thomas. An alternative explanation for unanimous decisions, though, could be found in the constraining effect of the law. A decision may be unanimous, because the law was so clear that a justice would be forced to reach a result that he or she might find ideologically undesirable. Yet a third possible explanation is that the unanimous decisions occur in "cases which are of little interest – politically, ideologically, or intellectually – to the Court,"[272] and therefore not worth the trouble of writing a dissent. These explanations are not exclusive – different unanimous decisions might be explained by different theories. This article takes no preempirical position on the dispute, but considers results both including and excluding unanimous decisions of the Court. Table 1 reports the ideological direction of the votes in the database for each of the justices.

TABLE 1
Percentage of Conservative Votes

Justice	**All Cases**	**Non-Unanimous**
Breyer	39.6%	34.4%
Ginsburg	40.2%	31.9%
Kennedy	62.8%	70.3%
O'Connor	68.9%	81.7%
Rehnquist	70.2%	82.4%
Scalia	71.4%	83.3%
Souter	45.8%	42.5%
Stevens	27.4%	14.1%
Thomas	76.5%	89.0%

[272] *The Use of Authority in Statutory Interpretation, supra* note 000, at 1112.

The data demonstrate that ideology is an important factor in judicial outcomes, and the nature of these results conform fairly well to prior research and general expectations. Justice Stevens consistently votes for the liberal outcome, overwhelmingly so in non-unanimous decisions. Justices Rehnquist, Scalia and Thomas are similarly reliable conservative votes, particularly in non-unanimous holdings. A somewhat surprising result is the degree of conservatism of Justice O'Connor in these statutory cases, as she is not so conservative in controverted constitutional decisions. Other justices, especially Justice Souter, do not appear so consistently ideological in their votes, though this may only indicate that his ideology is a moderate one.

These results cast some doubt on the ability of the law to restrain the ideological inclinations of the judges in statutory interpretation actions. If the law were consistently constraining, one would not see this pattern of ideological voting. However, the results do not exclude the possibility that the law has some influence on the justices. Even the most ideological of the justices occasionally vote contrary to their presumed preferences. The key to this study is ascertaining whether particular legal theories of statutory interpretation have a greater influence in constraining the justices.

C. The Justices and Theories of Statutory Interpretation

Analyzing statutory interpretation in the Supreme Court als requires some measure of the degree to which the justices consistently conform to a particular interpretive methodology. As discussed above, Scalia is known for a devotion to textualism, while Breyer is dedicated to the theory of legislative intent. Reputedly "Scalia is sufficiently committed to his views about legal method that he often declines to join other Justice's opinions that employ improper methods."[273] Indeed, Scalia has on occasion concurred and simply declined to join a portion of an opinion relying on legislative history.[274] However, he has also been called a "fallen textualist," who fails to practice the theory "sincerely and consistently."[275] Both these claims are based only on anecdotal examples, though, as no empirical analysis has examined the extent to which the justices consistently adhere to particular approaches. Table 2 presents a measure of the degree to which particular justices employ some of the major theories of statutory interpretation.

To create measures for particular theories, I created new variables, combining the justices' use of several variables. Textualism (TEXT) is a new variable created from the combination of textualism, use of the plain meaning rule, use of dictionaries, use of common understanding of textual words, and use of the whole act rule. Legislative intent (LEGINT) is created from the combination of a direct use of legislative history, reference to legislative history, finding of ambiguity in statutory text, reliance on congressional

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273 *Textualism and the Future of the* Chevron *Doctrine*, *supra* note 000, at 351.

274 *See, e.g.*, Chickasaw Nation v. United States, 534 U.S. 84 (2001);

275 Nicholas S. Zeppos, *Justice Scalia's Textualism: The "New" New Legal Process*, 12 CARDOZO L. REV. 1597, 1634 (1991). *See also* Karkkainen, *supra* note 000, at 403 (contending that "Justice Scalia's method cannot be properly characterized as 'textualism,' if that means . . . the exclusion of extratextual aids to interpretation").

inaction or reliance on congressional reenactment in interpretation. CANON is a combination of reliance on any of the linguistic canons. For each theory, each justice is given a score that indicates his or her use of that theory.[276] I also created a variable for pragmatic interpretation (PRAGMA) as a combination of reliance on the absurdity doctrine and reliance on deference to the executive branch.[277] Table 2 presents the measures for each of the justices and each of the general theories.

TABLE 2
Justices' Use of Interpretive Theories

	LEGINT	**TEXT**	**CANON**	**PRAGMA**
Breyer	1.21	1.05	.02	.28
Ginsburg	1.18	1.21	.04	.25
Kennedy	1.03	1.30	.04	.13
O'Connor	.76	1.34	.03	.18
Rehnquist	.89	1.37	.03	.10
Scalia	.45	1.44	.03	.06
Souter	1.20	1.18	.02	.22
Stevens	1.41	1.09	.03	.28
Thomas	.57	1.44	.02	.05

The results are roughly as expected. Breyer commonly relies on legislative intent, more than any justice other than Stevens, and Scalia is least likely to rely on legislative intent. Some might be surprised that Scalia has a positive score for legislative intent, but this is due to the fact that legislative intent includes more than simple reliance on legislative history and the fact that Scalia joined a few opinions that used legislative history, though he authored none. All of the justices rely heavily on text for interpretation, though Scalia and Thomas use text somewhat more than Breyer and Stevens (the only two justices who deploy legislative intent more than textualism). The more liberal justices tended to more

[276] The score is simply the justice's mean use of that theory. For example, if a justice relied on legislative history in sixty percent of decisions but ignored legislative history in forty percent, the justice's score would be 0.6 {1*.6 + 0*.4}. If a justice relied on legislative history fifty percent of the time, ignored legislative history twenty-five percent of the time, and affirmatively rejected reliance on legislative history twenty-five percent of the time, the justice's score would be 0.25 {1*.5 + 0*.25 + -1*.25}. Numbers can be greater than one, because a justice might refer to multiple aspects of legislative intent in an opinion.

[277] Coding for pragmatism in interpretation is more difficult, because the theory is not so directly associated with the particular interpretive methodologies invoked by courts. Some have argued that nearly all the principles of statutory interpretation are consistent with a pragmatic approach to decisionmaking. *See* Geoffrey P. Miller, *Pragmatics and the Maxims of Interpretation*, 1990 WIS. L. REV. 1179. Such a broad claim, though, is unhelpful in differentiating the effect of pragmatism. The absurdity rule, concerned as it is with consequences of interpretation is an obvious candidate for coding pragmatism. Deference is also included because it is easily understood as a delegation of interpretive authority to those who are better suited to promoting the effective functioning of a statute. *See, e.g.*, Cass R. Sunstein, *Law and Administration after Chevron*, 90 COLUM. L. REV. 2071, 2087-88 (1990) (contending that *Chevron* deference be interpreted as a recognition that agency interpretations are best suited to making extratextual "judgments about how a statute is best or most sensibly interpreted").

often invoke the approaches of pragmatism. None of the justices rely heavily on the linguistic canons. As expected, the canons may be no more than "tie-breakers" and are not particularly associated with the justices' differential overarching interpretive theories. These findings are again roughly consistent with the general reputation of the justices' interpretive approaches.

At this point in the analysis, there appears to be a rough correlation between a justice's ideology and his or her interpretive approach. The more conservative judges tend to rely on the materials textualism, while more liberal judges are more willing to turn to external materials to discern the legislature's intent. To fully understand this association, though, requires consideration of the particular justices' ideological preferences and how they integrate with the particular justices' interpretive theories.

D. The Significance of Ideology and Theories of Statutory Interpretation

At this point of the analysis, I have shown that the justices are relatively predictable in the ideology of their voting patterns, though none of the justices are perfectly predictable. Some justices have ideological tendencies, and they also show tendencies in their patterns of reliance on interpretive theories. The next questions are whether justice ideology drives choice of interpretive theory, whether interpretive theory is the cause of ideological outcomes, or whether the two have discrete and separate impacts.

Before analyzing particular justice-votes, it is important to consider whether the theories of interpretation are themselves intrinsically ideologically oriented.[278] Perhaps a given theory (*e.g.*, textualism) naturally tends to produce particular ideological outcomes (*e.g.*, conservative). A particular theory may be chosen because it conduces to a pattern of desired outcomes. This complicates the analysis. If so, a justice might adopt a particular theory because it produced ideologically preferred results, but, alternatively, a justice's predictable ideological pattern of results might simply be attributable to his or her devotion to a particular legal theory and say nothing about ideological voting.

As a preliminary test of the ideological effects of interpretive theories, all of the individual statutory interpretation variables (listed in Appendix A) were entered as independent variables in a regression, with ideology as the dependent variable. Table 3 reports the results for those variables that met the .05 standard for statistical significance. A positive sign reflects a liberal outcome effect, while a negative sign is conservative. The variables not included in the table were not statistically significant in their directional effect.

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[278] *See Federal Rules of Statutory Interpretation*, *supra* note 000, at 2143 (noting that "elements of an interpretive regime developed by the Court may appear designed to advance its substantive policy preferences," so that the "Court may actually be promoting its substantive policy goals on the pretense of creating neutral rules of the interpretive road").

TABLE 3

Interpretive Approaches and Ideological Direction

Variable	Coefficient	Significance Level
Text Use	.08	.01
Textualism	-.11	.00
Plain Meaning	.17	.00
Ambiguity	.14	.00
Technical Meaning	.13	.00
Absurdity	-.07	.03
Legislative History	.15	.00
Post Enactment	.08	.01
Reenactment	-.12	.00
Legislative Purpose	.07	.05
Chevron	.16	.00
Lenity	.20	.00
Retroactivity	-.12	.00
Noscitur	.12	.00

These preliminary results do not present a clear picture of the ideological impact of interpretive theories. Some of the results are as sometimes predicted – use of legislative history, legislative purpose, and finding ambiguity in language produced liberal results. Other results, though are contrary to prediction. While reference to textualism was conservative, the express use of statutory text was associated with liberal results. Just as one might expect, the canon against retroactive application of statutes tends to yield conservative results, while the rule of lenity tends to yield liberal outcomes. Still other results seem to simply be inexplicable. There is no apparent reason why the *noscitur* canon would be expected to yield significantly liberal results. In part, these results may simply be the product of omitted third variables. Moreover, when so many distinct independent variables are entered into a regression, statistical significance for the variables is much more likely, and particular findings may be a mere matter of chance rather than a true association.

To reduce the number of independent variables in search of a true association, the same regression was run with the grouping of interpretive approaches into theories, as discussed above.[279] Table 4 reports the results of this test.

[279] *See supra* at _____.

TABLE 4
General Approaches and Ideological Direction

	Coefficient	**Significance Level**
LEGINT	**.121**	**.000**
TEXT	-.016	.589
CANON	.047	.118
PRAGMA	**.132**	**.000**

The groupings show some significant ideological effects of particular interpretive approaches. Reference to legislative intent and pragmatism both had a significant directional effect, and both produced more liberal decisions. Textualism proved more conservative but had no statistical significance in its effect. From these results, it appears that interpretive theories have ideological implications, but these results are still too preliminary to draw any confident conclusions about their effects.

To understand the true effect of theories of statutory interpretation, additional analysis is required. The intersection of statutory interpretation theories and judicial ideology must be considered. There is no intrinsic reason why any of these theories should produce ideological results. Legislative history may come from conservative legislators, too. The results reported in Table 4 may simply reflect a fact that liberal justices like to justify their rulings with legislative history, while conservative justices prefer to justify their rulings with express reliance on textualism and eschew any reference to legislative history.

The first test of theories of statutory interpretation involves judicial consensus. The current justices of the Supreme Court clearly have varied ideological preferences, as demonstrated by past research. When these justices join together in a ruling, that may be evidence that their preferences are being constrained by legal rules, such as theories of statutory interpretation.[280] As discussed above, a unanimous ruling might be explained by the presence of overwhelming legal arguments that overrode a justice's ideological preferences. Consequently, if a particular statutory interpretive approach tends to result in higher levels of judicial consensus, that would be evidence that this approach minimizes ideological decisionmaking through traditional rule of law values. Conversely, an approach that produced dissensus might be one that permitted greater judicial ideological discretion.

Table 4 presents a regression of the theories of statutory interpretation and judicial consensus. The dependent variable is simply the breakdown of the justice-votes in the case (*e.g.*, a 7-2 decision is measured as .77, while a 5-4 decision is measured as .55). In addition to the broad categories of interpretive theories used in Table 2, Table 4 reports the results, with coefficients and levels of statistical significance.

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[280] Of course, there are other, non-legal, explanations for higher levels of judicial consensus in particular cases. *See supra* at ____.

TABLE 5
Interpretive Theories and Judicial Consensus

	Coefficient	Significance
LEGINT	-.019	.558
TEXT	.322	.747
CANON	.032	.295
PRAGMA	**.095**	**.003**

Of the interpretive theories, only pragmatism was significantly associated with greater Court consensus. The invocation of legislative intent principles was found in cases with a lower degree of consensus, but textualism, legislative intent, and the canons had no statistically significant effect on consensus. While this suggests that pragmatism may in fact be a neutral principle to constrain ideological decisionmaking and produce consensus, this test still lacks any direct ideological measure for the preferences of the justices. Consequently, the results may not show an effect of law but simply the fact that more justices prefer pragmatic methods to others, causing these methods to capture more votes.

To incorporate the effect of the justices' ideology, the next test incorporates quantitative measures of their ideology. One measure is the set of Segal-Cover scores.[281] These are ideological scores attached to justices based on press descriptions of their ideology at the time of their appointments. The Segal-Cover ideological measures are widely used but may fail accurately to capture judicial ideology. For example, they code Stevens as distinctly conservative based on press coverage at the time of his appointment by President Ford, though he is generally regarded as being quite liberal in his preferences, as confirmed by the data in this and other studies.

The Sirovich scores are a direct measure for justice ideology in the votes they cast.[282] These scores are based on actual judicial voting and whether the justices tended to vote for liberal or conservative ends. As such, their use might be criticized as circular,

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[281] Segal-Cover scores were developed to quantitatively place the Supreme Court justices on an ideological scale. *See* Jeffrey A. Segal & Albert D. Cover, *Ideological Values and the Votes of U.S. Supreme Court Justices*, 83 AM. POL. SCI. REV. 557 (1989). These scores are commonly used in analyses of Supreme Court voting. *See, e.g.*, *Norm Violation by the Lower Courts in the Treatment of Supreme Court Precedent, supra* note 000, Richard C. Kearney & Reginald S. Sheehan, *Supreme Court Decision Making: The Impact of Court Composition on State and Local Government Litigation*, 54 J. POL. 1008 (1992); William Mishler & Reginald S. Sheehan, *The Supreme Court as a Countermajoritarian Institution? The Impact of Public Opinion on Supreme Court Decisions*, 87 AM. POL. SCI. REV. 87 (1993); Jeffrey A. Segal, Charles M. Cameron, & Albert D. Cover, *A Spatial Model of Roll Call Votiong: Senators, Constituents, Presidents, and Interest Groups in Supreme Court Confirmations*, 36 AM. POL. SCI. REV. (6 (1992); Michael W. Link, *Tracking Public Mood in the Supreme Court: Cross Time Analyses of Criminal Procedure and Civil Rights Cases*, 48 POL. RES. Q. 61 (1995).

[282] The Sirovich scores of ideology are taken from the justices' voting patterns. *See* Lawrence Sirovich, *A Pattern Analysis of the Second Rehnquist U.S. Supreme Court*, 100 PROC. NAT. ACAD. SCI. 7432 (2003).

using voting patterns as an independent variable to study the dependent variable of voting patterns. However, they may better capture the true preferences of the justices, and the Sirovich scores are based on the full docket of the Court, including many constitutional decisions, while my data is limited to statutory interpretation decisions. Because each set of ideology scores has its limitations, I ran separate regressions with each. The dependent variable is the ideological outcome of the case. Independent variables are each of the two measures for justice ideology, plus the interpretive theory variables from the preceding table. Table 5 reports the results of two multiple regressions, using each of the measures for judicial ideology.

TABLE 6

Interpretive Theories and Judicial Outcomes

	Segal-Cover	Sirovich
Segal-Cover	**.166(.000)**	
Sirovich		**.302 (.000)**
LEGINT	**.105 (.001)**	**.078 (.009)**
TEXT	-.009 (.763)	.007 (.808)
CANON	.049 (.101)	.048 (.102)
PRAGMA	**.121 (.000)**	**.106 (.000)**

Both measures for justice ideology are highly significant determinants of the ideology of the justice's vote, with Sirovich being a much more powerful predictor and dwarfed the effect of any of the legal interpretive variables. If votes were purely ideological, one would expect to find no statistical significance for any of the legal variables as determinants of outcomes. If a legal variable has significance over and above the effect of ideology, that provides some evidence that its use causes justices to depart from their preferred ideology, with the associated implication that it serves to constrain judicial ideology. While textualism is often invoked as an interpretive theory to constrain ideology, it did not have this effect. The variable had no approximation of statistical significance. The legislative intent and pragmatism variables, which are often criticized for expanding judicial discretion, actually showed statistically significant effect in constraining the effects of judicial ideology. These results held for both measures of justice ideology. Rules of pragmatism also showed a constraining effect in the earlier test of Court consensus.

The significant effect of reliance on legislative intent tended to produce more liberal decisions, but its independent statistical significance suggests that it was producing relatively liberal decisions from relatively conservative justices. Those conservative justices were by no means compelled to resort to legislative intent to yield a liberal decision. Rather, they may have been persuaded by the legislative history that Congress intended a result more liberal than the conservative justices might have preferred. Of course, the external statistical analysis cannot reveal the internal thought process of the justices. An inference from this finding, though, could be that determinate legislative history persuaded conservative justices that the correct statutory interpretation in a case was the more liberal one.

There are some significant limitations to these findings that must be recognized. Both the choice of interpretive methods and outcome were within the control of the justices for each of the cases.[283] Hence, it is possible that when a conservative judge actually preferred to reach a liberal result, they chose to use legislative history to reach that outcome. The justices may simply choose the approach that best produces their desired outcomes. In this case, legislative history would not have had any actual constraining effect.[284] In addition, because it is impossible to assign one "correct" decision to any particular case, these results cannot conclusively demonstrate that the use of legislative history (or pragmatism) had this effect of driving justices to moderate their ideology to reach the "correct" outcome. The data do provide somewhat stronger evidence, though, that textualism is *not* constraining. Hence, the claim that one should prefer textualism over legislative history as a means of constraint is more clearly refuted by these results.

Perhaps the clearest and most important result of this analysis requires a broader perspective on the ideological consequences of doctrines. There may be a meta-ideological effect of interpretive regimes. If legislative history systematically tends to yield more liberal results, even for more conservative judges, that result might explain the different approaches to interpretive theory. The more conservative justices might have chosen to reject legislative history, not because it produces more ideological results but because it produces more liberal results. And the more liberal justices might prefer use of legislative history for this same reason. In this perspective, the fight over choices of interpretive doctrine is itself an ideological one, independent of the outcomes of particular cases. The battle over interpretive theories, rather than over individual cases would therefore be the true ideological battleground. Because Supreme Court decisions are more important in their precedential doctrinal effects than in their particular case outcome effects, this conclusion would suggest the importance of ideological decisionmaking and suggest that previous studies limited to the analysis of outcomes could even underestimate the role of ideology.

Conclusion

The empirical findings in this article cannot resolve the contested issues of statutory interpretation. They cannot demonstrate that a particular purpose or particular method of statutory interpretation is preferable. Nor can they validate or invalidate all of the arguments underlying the theoretical debate. The findings are, however, essential to the evaluation of this contest. The results offer strong evidence against one central claim of the textualists – that the strict textual approach to interpretation best constrains the

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[283] In Howard and Segal's study, *supra* note 000, the authors sought to avoid the problem of justice choice by examining the briefs of the parties and isolating cases where the justices were presented with only one interpretive theory to accept or reject. A sampling of the cases in this database revealed that the briefs universally made both textual arguments and references to legislative intent. Hence, it was impossible to separate cases in which the justices had only one interpretive theory to accept or reject.

[284] The fact that the more moderately conservative justices were the most likely to use legislative history is consistent with this suggestion.

ideological inclinations of the justices.[285] In fact, reliance on textualism showed no constraining effect, once justice ideology was accounted for. By contrast, legislative intent and pragmatism demonstrated some such effect, even after controlling for justice ideology.

One of the most important, if not the most important, principles in the debate over methodologies of statutory interpretation has been the need to cabin judicial discretion with law. This argument has been most frequently deployed by textualists arguing against use of legislative history, and their contention may have become the conventional wisdom of today. This wisdom, though, has been supported only by intuition rather than rigorous analysis. This quantitative empirical analysis of Supreme Court decisionmaking shows the conventional wisdom to be potentially backwards – that textualism does not constrain judicial ideology but the use of legislative intent and pragmatism may be constraining. The results show that textualism is not an effective tool for moderating willful ideological decisionmaking in the Supreme Court. Of course, if it is true that the theories have distinct ideological implications of their own, it is possible that none of the theories cabin ideology and that the choice of theories is simply another front in the ideological battle.

Far too often, the debate over statutory interpretation relies upon factual presuppositions that lack any rigorous support. This is traditionally the case with those who seek to constrain willful ideological judging. This empirical analysis sheds some light on the issue and the effect of interpretive tools on outcomes, independent of ideology. As is the case with any preliminary study, the reader should not take the findings as conclusive. Additional research on the matter, using more and different cases, with different sets of justices is important. Research on the effect of these doctrines on lower courts would also be extremely valuable. The latter study would greatly illuminate whether interpretive theories are chosen for the ideological implications of their precedential doctrinal effects.

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[285] This concern for constraint of judicial discretion has been called the "obsessive desire" of the new textualists. *See Democratic Theory and the Legislative Process, supra* note 000, at 830.

APPENDIX A

Variables and Coding

The data in this study involved coding Supreme Court decisions between 1994 and 2002. The vote of each individual justice was separately coded for variables including method of statutory interpretation, type of case, and ideological direction of the vote.

The statutory interpretation variables that were coded included:

Text Use – Was the text of the statute used in the opinion?

Textualism – Did the opinion make explicit reference to textualism?

Plain Meaning – Did the opinion expressly invoke the plain meaning rule?

Ambiguity – Did the opinion find the statutory language to be ambiguous?

Dictionary – Was a dictionary used to ascertain the meaning of statutory text?

Common Understanding – Did the opinion use common understanding of meaning?

Technical Understanding – Did the opinion use technical understanding of meaning?

Whole Act – Did the opinion invoke the whole act rule?

Absurdity – Did the opinion find an interpretation of text to be absurd?

Legislative History – Did the opinion use legislative history for statutory meaning?

Conference Committee – Was the legislative history from a conference committee?

Other Committee – Was the legislative history from an non-conference committee?

Sponsor – Was the legislative history a sponsor statement?

Other – Was the legislative history some other aspect of the record (*e.g.*, hearing)?

President – Did the opinion use a presidential statement for statutory meaning?

Post Enactment– Did the opinion use post -enactment legislative history?

Congressional Inaction – Did the opinion use congressional inaction for interpretation?

Reenactment – Did the opinion rely on a statute's reenactment for interpretation?

Legislative Purpose – Did the opinion use legislative purpose for interpretation?

Chevron Deference – Did the opinion use *Chevron* deference?

Expressio – Did the opinion use the *expressio* canon?

Ejusdam – Did the opinion use the *ejusdam* canon?

Noscitur – Did the opinion use the *noscitur* canon?

Common Law – Did the opinion use the common law canon?

Federalism – Did the opinion use the federalism canon?

Constitutional avoidance – Did the opinion use the constitutional avoidance canon?

Lenity – Did the opinion use the rule of lenity canon?

For each of these variables, a justice vote was coded as "1" if it affirmatively used the interpretive principle, "0" if it made no mention of the principle, and "-1" if it rejected the use of the principle in interpretation. Rejection could take the form of either the rejection of the validity of the interpretive standard as a general matter or the rejection of its value in the particular case.

Decisions were also coded for case type and for the ideological direction of the opinion. The case type codes were: (a) criminal, (b) civil rights, (c) first amendment, (d) due process, (e) privacy, (f) labor, (g) other economic activity and regulation, (h) civil procedure, and (i) miscellaneous. Ideological coding was based on the identity of the parties and their litigation positions. In criminal cases, a decision for the defendant was coded as liberal and one for the government as conservative. In civil rights cases, a decision for a minority or female was liberal, and a decision against such parties was conservative. A decision for application of the first amendment or due process or privacy rights was coded as liberal and the contrary was conservative. A decision for a labor union was coded liberal and a ruling for business in a labor dispute was conservative. A decision for government in regulation was liberal while a decision in favor of a regulated entity was coded as conservative. A decision for a tort plaintiff was coded liberal, and a ruling for a defendant was conservative. In cases including civil procedure disputes, a ruling for an "underdog" was coded as liberal, where this could be readily categorized.

A few cases could not be clearly coded under these principles and were excluded. For some other cases, the ideological coding is debatable. For example, the database included criminal cases involving violation of a gun possession law. A decision for the defendant in such an action was coded liberal but is arguably an ideologically conservative decision. To avoid the risk of introducing researcher bias, though, the traditional coding was used. To the extent that this coding was erroneous, it will tend to understate the effect of ideology on judicial decisionmaking.

The cases were also coded by year of decision, number of justices in the majority, and whether the justice in question was a dissenter or concurrer and whether the justice authored the opinion containing the statutory interpretation analysis.

APPENDIX B

Descriptive Statistics

This appendix provides summary data on the cases included in the database analyzed in this study. This data may be valuable in assessing the representativeness of the cases analyzed and for future research. This appendix provides the necessary data on the types of cases contained in the database, the relative frequency with which the justices employed particular tools of statutory interpretation or affirmatively rejected those tools, the relative number of justice-votes in each year of the database,

TABLE B1
Case Types in Database

Casetype	Frequency
Criminal	25.7%
Civil Rights	11.3%
First Amendment	2.5%
Due Process	0.8%
Privacy	0.8%
Labor	9.0%
Economic	29.0%
Civil Procedure	6.9%
Miscellaneous	13.8%

TABLE B2
Use of Statutory Interpretation Methodologies

	Mean	Negative	Positive
Textualism	1.09	6.0%	64.2%
Legislative History	.88	13.6%	56.8%
Canons	.05	7.0%	11.0%
Pragmatism	.15	9.7%	22.5%

TABLE B3
Number of Votes by Year

	Frequency
1994	13.8%
1995	13.3%
1996	6.6%
1997	9.2%

1998	11.8%
1999	9.7%
2000	11.3%
2001	10.8%
2002	13.5%