Formulaic Deliberation - Andre L. Smith, Asst. Prof., FIU College of Law

I. Introduction
II. Why Formulas?
  A. Attacking Indeterminacy: Resolving Ambiguity Accurately, Predictably, and Within a Democratic Context
  B. First-Best Modes of Attacking Indeterminacy: Textualism, Intentionalism, Purposivism, Pragmatism
  C. Failing to Resolve Ambiguity Accurately, Predictably, and Within a Democratic Context
  D. Constructing Second-Best Modes of Attacking Indeterminacy by Synthesizing First-Best Modes
  E. Mathematic Formulas Can More Precisely Describe First and Second Best Interpretive Theories
III. Plain Meaning
  A. Consensus Over Applying Plain Meanings When Present
  B. Determining When Words Have Plain Meanings
  C. Formulaically Describing the Plain Meaning Analysis
IV. The (Con)Textual Function
  A. Attacking Indeterminacy By Analyzing Context
  B. What's Good and Bad About Textualism
  C. Constructing a Text Function
V. The Intent Function
  A. Attacking Indeterminacy By Constructing Legislative Intent
  B. What's Good and Bad About Intentionalism
  C. Constructing an Intent Function
VI. The Consequence Function
  A. Attacking Indeterminacy By Estimating Consequences
  B. What's Good and Bad About Consequentialism
  C. Constructing a Consequence Function
VII. Interpretivism and Purposivism
  A. Interpretivism
    a. Attacking Indeterminacy Through Text and Intent
    b. Constructing an Interpretivist Function
  B. Purposivism
    a. Attacking Indeterminacy Through Intent and Consequences
    b. Constructing a Purposovist Function
VIII. Conclusion

$h(Deliberation) = h[f(Text), f(Intent), f(Consequences)]$

$$h(Deliberation) = h\,[(EC_1)\{f[(ec_1)(\text{Congruence with Related Text}) + (ec_2)(\text{Congruence with Textual Canons of Construction}) + (ec_3)(\text{Congruence with Rules of Grammar}) + (ec_4)(\text{Congruence with Specialized Context}) + \ldots]\} + (EC_2)\{f[(ec_5)(\text{Coherence with Committee Reports}) + (ec_6)(\text{Congruence with Floor Debates}) + (ec_7)(\text{Congruence with White Papers}) + (ec_8)(\text{Coherence with Judicial interpretations}) + (ec_9)(\text{Coherence with Administrative Interpretations}) + (ec_{10})(\text{Coherence with Newly Passed Statute or Resolution}) + (ec_{11})(\text{Coherence with Lessig-style Translation of Original Intent}) + \ldots]\} + (EC_3)\{f[(ec_{12})(\text{Coherence with Due Process}) + (ec_{13})(\text{Coherence with Anti-Subordination of Minorities}) + (ec_{14})(\text{Fairness Towards Disadvantaged Groups}) + (ec_{15})(\text{Promoting the Rule of Law}) + (ec_{16})(\text{Protecting Non-market Values}) + (ec_{17})(\text{Minimizing Interest Group Transfers}) + (ec_{18})(\text{Promoting Efficiency of Governance}) + (ec_{19})(\text{Promoting Consistency and Coherence Among Regulatory Programs}) + (ec_{20})(\text{Promoting Political Accountability}) + (ec_{21})(\text{Horizontal Equity}) + (e_{22})(\text{Vertical Equity}) + \ldots]\};$$

where EC_k and ec_k represent emphasis coefficients, $EC_k > 0$, and $ec_k > 0$.

I. Introduction

This paper introduces what I call formulaic deliberation, a model for mathematically representing judicial decision making. More precisely, it is a model for synthesizing theories that describe or seek to prescribe how judges determine what the law "is". Mathematically expressing judicial decision making more precisely describes to students what factors we believe judges consider and the relative emphases between them. It conceptualizes deliberation over what the law "is" as a choice between proposed meanings for a discrete decision, the one chosen being that which *most* coheres with *most* of our *most* important legal and social agreements.

Contemporary legal scholarship suggests that the three most important considerations are: 1) what the text seems to convey to people subject to it, 2) what the authors of text intended for their words to mean, and 3) an estimation of foreseeable consequences.[1] Textualists emphasize deliberation over text, intentionalists favor intent, and pragmatists evaluate consequences. Interpretive chauvinists, usually associated with the "new textualists," seek to exclude all but their favored deliberative function. Others synthesize the functions. For example, a purposivist, by attempting to discern which consequences a legislature believes to be most important, combines the intent and consequence function; she chooses the meaning that most likely inspires the desirable consequences the legislature intended to bring about. A pragmatist might evaluate consequences while ignoring text and intent, or he might restrict his evaluation to text where he believes such an approach renders desirable consequences.

Each of these approaches can be described through mathematic symbolism. My purpose is to show that such symbolism more precisely describes deliberative techniques currently employed by courts and theorized by commentators. By more precisely describing deliberative

[1] Obviously excluded from open consideration are pecuniary self-interest, chance, and, less obviously, appeals to divine guidance.

techniques, mathematic symbolism helps students of the law go beyond identifying a favorite deliberative ilk, but also how to be good at it. Thus, this paper sets out to describe each interpretive regime and then represent it formulaically:

$f(Text) = f$[(Congruence with Related Text), (Congruence with Textual Canons of Construction), (Congruence with Rules of Grammar), (Congruence with Specialized Context), …]

$f(Intent) = f$[(Coherence with Committee Reports), (Congruence with Floor Debates), (Congruence with White Papers), (Coherence with Judicial Interpretations), (Coherence with Administrative Interpretations), (Coherence with Newly Passed Statute or Resolution), (Coherence with Lessig-style Translation of Original Intent), …]

$f(Consequences) = f$[(Coherence with Due Process), (Coherence with Anti-Subordination of Minorities), (Horizontal Equity), (Vertical Equity), …]

The textual function describes the extent which a choice comports with agreements relating to how people understand text, so factors include related text and textual canons of construction. The intent function concerns the degree with which a choice of comports with an estimation of what the legislature would have decided. "The" legislature could be all of the legislatures, enacting, intermediate, current, or some combination, represented by sub-functions. And factors within these sub-functions include indicia of intent, legislative history, preambles, etc. The consequence function estimates how much a choice supports or degrades important social agreements relating to desirable outcomes. The consequence function is the newest inductee to the realm of pseudo-scientific, formal legal inquiry.[2]

Part II better explains the process of constructing deliberative formulas. Parts III through VI describe the major interpretive doctrines, identify their components, and express them with mathematic symbolism. I begin with plain meaning as a component of an algorithmic

[2] Its introduction when synthesized with traditional formal inquiry into text and intent further dissolves the mechanical and arbitrary application old interpretive norms, and replaces it with nothing resembling order until studied and allowed to settle (which at this stage of conceptual development is a long ways away from repetrifying and returning to arbitrariness). *See* Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605 (1908).

textualism, but it turns out that most people believe in the plain meaning analysis and its ability to resolve cases by itself. So it is set off by itself. When a plain meaning is absent, the statutory word or phrase is ambiguous, and consideration of the other deliberative functions avails. Part IV expresses the textual or contextual analysis occurring after a term or phrase is found to be ambiguous. It focuses on the extent to which choices of meaning cohere with the meaning People naturally attribute to words they read in a legal context. Thus, the textual function evaluates text, related text, and textual canons of construction. The choice cohering *most* with *most* texts, related texts, and canons of construction is likely the choice a textualist will make; unless she provides for a comparison against foreseeably absurd or undesirable consequences. Part V does the same for the intent function, focusing on text and legislative history as factors. Perhaps more controversial than legitimizing legislative history and foreseeable consequences by incorporating them in a formula, this paper also suggests that administrative and judicial precedents reflect the intent of intermediate legislators, and also that the views of the current legislature should be considered.[3] Part VI focuses on the most unruly function, consequences. It suggests some ways to constrain the inquiry, which might resemble a prioritization and harmonization scheme once proposed by Professor Sunstein.[4]

Part VII shows how the interpretivist approach, identified most clearly by Professor John Hart Ely, albeit in a Constitutional context, melds the text and intent functions. Part VII also expresses the purposivist approach as a combination of the intent and consequence functions, where the deliberator identifies the consequences believed to be of the highest priority to the legislature.

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[3] The Court has identified these re-writings as legitimate legislative attributions in cases like *Tufts v. Commissioner*, 461 U.S. 300 (1983), and *Flood v. Kuhn*, 407 U.S. 258 (1972).
[4] Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405 (1989).

As a conclusion, Part VIII asks several questions that by the time I make them it will be obvious why and how mathematically expressing judicial decision making will aid formal research projects on the matter. After suggesting truly grand projects, it identifies my personal agenda as a tax lawyer to symbolically express current Supreme Court tax decisions as a forerunner to making critical observations of those decisions, and for making generalizations about the Court's jurisprudence generally. Part VIII also refutes the suggestion that creating mathematic formulas to more precisely express judicial decision makings is the first step down the path of a discredited formalism.

II. Why Formulas?

According to legal scholarship on the matter, we expect legal decision makers, especially the judiciary, to be accurate and predictable within a democratic context.[5] However, the legal community has yet to convene upon a deliberative process designed to optimize attainment of these goals.[6] Formulaic deliberation, which incorporates a pseudo-scientific, neo-Langdellian ethos toward more precisely describing jurisprudential problems and hypothesized solutions, seeks to be such a process.[7]

Most scholarship regarding interpreting either the Constitution, federal statutes, or both, discusses generally the same interpretive principles, even if authors recommend different principles for interpreting the different documents. These interpretive principles are meant to constrain, to maintain the notion that only the People make the law. But, where interpretive principles fail to supply an answer to a deliberative question, that notion cannot be maintained and judges make common law.[8] Yet, in spite of sometimes vehement disagreement, modern scholarship on judicial decision commonly focuses on three techniques of legal construction,

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[5] Any cursory inspection of scholarship on the matter tracks these principles. Richard Posner, *The Problematics of Moral and Legal Theory*, 111 HARV. L. REV. 1637, 1657 (1998). *See e.g.*, STEPHEN F. BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION (2005), ROY L. BROOKS, STRUCTURES OF JUDICIAL DECISION MAKING FROM LEGAL FORMALISM TO CRITICAL RACE THEORY (2d ed. 2005), RICHARD A. POSNER, LAW, PRAGMATISM, AND DEMOCRACY (2003), ABNER J. MIKVA & ERIC LANE, AN INTRODUCTION TO STATUTORY INTERPRETATION AND THE LEGISLATIVE PROCESS (1997); ANTONIN SCALIA, A MATTER OF INTERPRETATION (1997), WILLIAM N. ESKRIDGE, DYNAMIC STATUTORY INTERPRETATION (1994), H.L.A. HART, THE CONCEPT OF LAW (2d ed. 1994), RONALD DWORKIN, LAW'S EMPIRE (1986), JOHN HART ELY, DEMOCRACY AND DISTRUST (1980).

[6] Cass Sunstein and Adrian Vermeule, in a fine attempt to be objective yet still tilting towards textualism, present the study of legal interpretation as one in its infancy. Cass R. Sunstein & Adrian Vermeule, *Interpretation and Institutions*, 101 MICH. L. REV. 885 (2003).

[7] Professor Langdell is credited with the 19th century formalist ideal of studying case law as a scientific, syllogistic enterprise. While the idea that judges actually decide cases based on deduction has been marginalized, *see* Max Radin, *The Theory of Judicial Decision: Or How Judges Think*, 11 A.B.A. J. 357 (1925), the study of decisions and deducing logical observations from them is, even with the introduction of narrative and other styles of observation, still the hallmark of legal scholarship and pedagogy.

[8] Common law not in the sense that the law must reflect the gainful interactions of commoners, but in the modern sense that judges make it without reference to the legislature.

how and the extent to which judges should consider text, intent, and consequences.[9] Commentators debate the extent of each's utility with respect to whether consideration or excluding consideration of it makes the adjudication more accurate or just, whether it makes the law more knowable or predictable, and the extent to which it comports with our notions of democracy.

Textualists emphasize the extent to which a proposed choice of meaning comports with textual representations of the law.[10] Intentionalists seek to discover what those responsible for making law intended for the word or phrase to mean.[11] Dynamists or pragmatists estimate the extent to which a deliberative choice would comport with or degrade social agreements relating to just outcomes, consequentialism.[12] Interpretivists combine the textual and intentional functions, finding the consideration of consequences undemocratic.[13] Purposivists reconstruct the intent of the legislature not for the meaning of a word or phrase, but for the identification of outcomes a judge believes the legislature wishes her to consider.[14] We disagree widely as to

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[9] Rejected as improper are decision making methods based on self interest, chance or performance tests (though the skill of opposing lawyers make cases resemble this sometimes). Decisions based on gut feeling are not admitted to. Marginalized, as well if not more so, is the concept of natural law. The chauvinistic textualist prefers that intent and outcomes join the heap. *See* John C. Coverdale, *Text as Limit*: *A Plea for a Decent Respect of the Tax Code,* 71 TUL. L. REV. 1501 (1997).

[10] ANTONIN SCALIA, A MATTER OF INTERPRETATION (1997). *See also* John F. Manning, *What Divides Textualists From Purposivists?*, 106 COLUM. L. REV. 70 (2006); Johnathan T. Molot, *The Rise and Fall of Textualism,* 106 COLUM. L. REV. 1 (2006). Later in this paper, we will discuss, too insufficiently to be truly scholarly, whether text should be considered as its own function, part of the search for intent, or as a pragmatic concern for due process of law, i.e., making the law more "knowable." These distinctions are inspired by the work of Stanley S. Fish, *There is No Textualist Position*, 42 SAN DIEGO L. REV. 649 (2005), in which he claims interpreting is limited to discovering an author's intent (even if correctly performing the exercise is impossible). Thus, considering what a text conveys to the reader is not interpreting. *Id*.

[11] LINDA D. JELLUM & DAVID CHARLES HRICIK, MODERN STATUTORY INTERPRETATION: PROBLEMS, THEORIES, AND LAWYERING STRATEGIES 97-120 (2006); ABNER J. MIKVA & ERIC LANE, AN INTRODUCTION TO STATUTORY INTERPRETATION AND THE LEGISLATIVE PROCESS 6, 27-50 (1997); Stanley S. Fish, *There is No Textualist Position*, 42 SAN DIEGO L. REV. 649 (2005).

[12] RICHARD A. POSNER, LAW, PRAGMATISM AND DEMOCRACY (2003); WILLIAM N. ESKRIDGE, DYNAMIC STATUTORY INTERPRETATION (1994).

[13] STEPHEN F. BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION (2005); JOHN HART ELY, DEMOCRACY AND DISTRUST (1980).

[14] Tax jurisprudence and scholarship used to agree on a purposive approach which identified as legislatively sanctioned consequences to consider: tax avoidance, income matching principles, horizontal and vertical equity. *See*

whether judges should exclusively consider a particular function or, if we were to synthesize theories, which one to emphasize most. The Supreme Court, despite the protestations of some of its members, refuses to adopt for itself and its inferior courts a specific method of deliberation to be used in all cases, Constitutional, statutory or otherwise.[15]

Evaluating deliberative technique depends on the goals sought to be achieved. Legal scholars seem to agree on three propositions: an accurate decision is one most or all people agree is just (whatever that means),[16] predictability is the product of people's ability to accurately foresee accurately made evaluations of deliberative functions, and the extent to which the United States is a democracy depends partly on which deliberative function judges choose.[17]

Mary L. Sheen, *Plain Meaning, The Tax Code, and Doctrinal Incoherence,* 48 HASTINGS L.J. 771 (1997); Deborah A. Greier, *Commentary: Textualism and Tax Cases,* 66 TEMP. L. REV. 445 (1993). This marriage has dissolved in the academy as well as the courts. The new textualists have made their mark. *See Gitlitz v. Commissioner*, 531 U.S. 206 (2001), and John C. Coverdale, *Text as Limit*: *A Plea for a Decent Respect of the Tax Code,* 71 TUL. L. REV. 1501 (1997).

[15] The story of an uncontroversial, conventionalized approach to statutory construction told by Judge Frank H. Easterbrook has been upset in the last twenty years. Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J.L. & PUB. POL'Y 59 (1988) ("For constitutional interpretation, a debate rages among originalists who look to history and intent; structuralists who look to the problems at hand and the structure of the document; nonoriginalists who look to 'values' implicit in the document and say that anything achieving more of an identified value is permissible; and finally to those (inventionists?) who want to treat the Constitution as a sort of floating seminar and liberate judges to whatever Plato would do with the problem . . . For statutes, however, there is no similar debate. The Supreme Court reels off unanimous opinions containing a formula that is roughly: first look to the language of the statute; if that is clear then stop; if it is not clear then turn to the legislative history; if the legislative history is not clear then do whatever the agency says; and if none of the above is clear then either go the values underlying the statute or put in a hypothetical question. Ask what the legislature that passed the bill would have done had the issue been before it explicitly. This rump legislature, sitting in the mind of the court, then gives an authoritative answer.").

[16] This is a ridiculously limited conception of correctness, used by necessity since most commentators admit that principles establishing correctness are in such a state of unreadiness as to make consensus the only manageable principle, one obviously flawed if the judiciary is to assume in some instances a countermajoritarian role. Dworkin, Posner, Vermeule, and Sunstein are more frank than others about the absence of universal or at least conventionalized principles as to what makes a decision correct or just. Yet, without a definition of justice, legal comment on what makes a decision right or wrong, or whether consequences are absurd rather than merely undesirable, continues undeterred.

[17] For high level discussions of accuracy and predictability within a democratic context *see, e.g*., STEPHEN F. BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION (2005); ROY L. BROOKS, STRUCTURES OF JUDICIAL DECISION MAKING FROM LEGAL FORMALISM TO CRITICAL RACE THEORY (2d ed. 2005); RICHARD A. POSNER, LAW, PRAGMATISM, AND DEMOCRACY (2003), ANTONIN SCALIA, A MATTER OF INTERPRETATION (1997), WILLIAM N. ESKRIDGE, DYNAMIC STATUTORY INTERPRETATION (1994), H.L.A. HART, THE CONCEPT OF LAW (2d ed. 1994), RONALD DWORKIN, LAW'S EMPIRE (1986), JOHN HART ELY, DEMOCRACY AND DISTRUST (1980).

Each deliberative method enjoys comparative advantages over the others.[18] No theory accurately describes actual decision making by the judiciary. We do not agree on which of our goals is most important. Textualism is susceptible to absurd or undesirable consequences, inaccuracy. Unbridled pragmatism is unpredictable and subjective. Intentionalism, interpretivism, and purposivism are inaccurate but less so than textualism. And they are unpredictable and subjective, though less so than pragmatism.

Even if any one of them were proven to perfect accuracy and predictability within a perfectly democratic context, the institutions responsible for implementing the techniques could not possibly perfectly perform them.[19] Advocates for specific jurisprudential theories offer little procedure on how to perform the textual, intentional, or pragmatic function; though they give some. How does one become a good textualist other than by simply focusing on the text?[20] When reconstructing the intent of the legislature, which legislative signals should legitimately be considered, and which of those are most important?[21] For those comfortable with the judiciary foreseeing consequences produced by deliberative choices, how can the public predict which

[18] Sunstein and Vermeule acknowledge that all interpretive principles fail as first best accounts of judicial decision making. Cass R. Sunstein & Adrian Vermeule, *Interpretation and Institutions*, 101 MICH. L. REV. 885, 914-918 (2003).

[19] Cass R. Sunstein & Adrian Vermeule, *Interpretation and Institutions*, 101 MICH. L. REV. 885, 914-18 (2003).

[20] ANTONIN SCALIA, A MATTER OF INTERPRETATION 23 (1997) ("To be a textualist in good standing, one need not be too dull to perceive the broader social purposes that a statute is designed, or could be designed, to serve; or too hidebound to realize that new times require new laws. One need only hold the belief that judges have no authority to pursue those broader purposes or write those new laws.").

[21] WILLIAM N. ESKRIDGE, JR., LEGISLATION AND STATUTORY INTERPRETATION 302 (2000) ("If we are right that legislative history should be used only when it is accessible, relevant, and reliable, there ought to be – and we think there is – a hierarchy of sources for that history . . . *Committee reports* are the most useful legislative history . . . The reports are also typically quite useful, for they provide an overview of the policy need for the statute (general intent) as well as analysis of each provision and how it relates to other parts of the statute (specific intent)."); Abner J. Mikva, *Reading and Writing Statutes*, 48 U. PITT. L. REV. 627, 631 (1987) ("Above all else, I wish a way could be found to tell both Congress and the courts what is not legitimate legislative history.").

consequences matter most for any one judge or panel?[22] In other words, the description of and process for applying legal decisions is woefully imprecise.

Far from purely an interesting scholarly enterprise or an attempt to criticize or evaluate real judges, the People must operate within this fuzzy context. Uncertainty as to law or even how to approach the question of what law is causes hesitancy and inefficiency.[23] Private citizens must determine what the law is in order to conform their conduct to it. Lawyers and law students, when learning or writing briefs designed to influence the courts, need to concentrate their efforts on the principles that matter most. And as Professors Sunstein and Vermeule point out, few people examine how statutory construction principles directed at the judiciary concomitantly affect (constrain or liberate) the branch of government perhaps interpreting law most, executive agencies.[24] Each of these groups has a strong, sometimes pecuniary, interest in conventionalizing the discussion if not the actual practice of legal construction.

Sunstein and Vermeule ask us then for second best theories of judicial deliberation,[25] ones that are truly performable, ones seeking to optimize our goals rather than perfectly accomplish them. Second best theories taking into account human and institutional frailties, specific and general, might synthesize the deliberative functions text, intent, and consequences; comprehensively, algorithmically, alternatively, contextually, etc. In order to construct a second

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[22] RICHARD A. POSNER, LAW, PRAGMATISM, AND DEMOCRACY 64 (2003) ("[T]here isn't too much more to say to the would-be pragmatic judge than make the most reasonable decision you can, all things considered."). Contrast Posner's statement with a classification of pragmatic factors by Cass Sunstein, in *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405 (1989).

[23] Applying the Coase Theorem to interpretive principles suggests that when legal rights are known, transaction costs are low, people act efficiently. *See* R. H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960). Thus, to the extent conventionalizing a deliberative process promotes predictability as to what law is, it promotes efficiency of a macroeconomic kind. Whether this comes at the expense of justice is a restatement of the realist critique of old-school formalism. However, as I try to explain later, the realist critique must be contextualized to be properly understood and applied to the ideas presented here. It was a response to conventions which had outlived their usefulness. Here, we have not even come to convention for it to become petrified and arbitrary. If formulaic deliberation is adopted academy wide, there will come a time when some of its conceptions will also have outlived their usefulness, and a reality check will be required then.

[24] Cass R. Sunstein & Adrian Vermeule, *Interpretation and Institutions*, 101 MICH. L. REV. 885, 887 (2003).

[25] Cass R. Sunstein & Adrian Vermeule, *Interpretation and Institutions*, 101 MICH. L. REV. 885, 914-920 (2003).

best theory, we must more specifically identify the components of each conventional technique. My hypothesis is that mathematic expressions might best represent the deliberative functions and the components of each. This way enables better study of actual decision making, hopefully leading to more precise positive and normative descriptions of when and how legal actors select and perform each deliberative function.

In furtherance of this concept, I choose mathematic symbolism to represent adjudicatory decision making as a choice between competing proposals, the correct choice being the proposed meaning or outcome which *most* supports the *most* of our *most* important legal and social agreements. The formulaic textualist, intentionalist or pragmatist accounts for the extent to which a choice comports with the relevant factors within their respective functions in a deliberative formula. The textual function depends on an estimation of which proposed choice best coheres with the ordinary understanding of the text in dispute[26], related text[27], and textual canons of construction.[28] The intentionalist function depends on coherence with legislative history and statements made by key legislators.[29] And the pragmatic one with the vast of social agreements.[30]

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[26] ANTONIN SCALIA, A MATTER OF INTERPRETATION 22 (1997) (The text is the law, and it is the text that must be observed.").

[27] ANTONIN SCALIA, A MATTER OF INTERPRETATION 16 (1997) (Another accepted rule of construction is that ambiguities in a newly enacted statute are to be resolved in such a fashion as to make the statute, not only internally consistent, but also compatible with previously enacted laws.").

[28] ANTONIN SCALIA, A MATTER OF INTERPRETATION 25 (1997) ("Textualism is often associated with rules of interpretation called the canons of construction . . . .").

[29] WILLIAM N. ESKRIDGE, JR., LEGISLATION AND STATUTORY INTERPRETATION 302 (2000) ("*Committee reports* are the most useful legislative history . . . ."; *id*. at 74 ("[C]ommittee reports are typically great weight by interpreters because they reflect the understanding of key gatekeepers. Moreover, they are representations about the meaning of statutory language on which lawmakers rely when they decide how to cast their votes.").

[30] RICHARD A. POSNER, LAW, PRAGMATISM, AND DEMOCRACY 46, 64 (2003) ("Pragmatism applied to law at most takes away from judges the claim to be engaged in neutral scientific activity of matching facts to law rather than a basically political activity of formulating and applying public policy called law."), ("It's hard to improve on Holmes's description of what drives decision for the judge who in good pragmatic fashion places 'experience' above 'logic': 'the felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men.' "); WILLIAM N. ESKRIDGE, JR., LEGISLATION AND STATUTORY INTERPRETATION 240 (2000) ("An overall problem with the big theories of statutory interpretation is that they are based on a single foundation (text of specific intent or general intent). This

In order to be more precise, however, the academy should attempt to conventionalize factors comprising deliberative functions relating to text, intent, and foreseeable outcomes.[31] For instance, text can be analyzed in at least three different ways, each one corresponding to a separate deliberative function. Text as the embodiment of law is presented by Manning, and sometimes Scalia, as the only legitimate deliberative function; the analysis focused on what the text means to the reader.[32] Analyzing text in this way, according to Professor Stanley Fish, is not interpreting and is not faithful to the theory of law as legislative command.[33] Analyzing text as evidence of what the legislature intended it to mean is.[34] Fish is not saying that what the word means to the public is unimportant, it is just not interpreting. If it is not the embodiment of the law and is not interpreting, it becomes a component of the pragmatic function as due process, to the extent it makes the law more knowable to the People, or efficiency of governmental function, to the extent it inspires legislatures to draft better statutes.[35] Most scholarship ignores these distinctions. Mathematically representing judicial decision making requires us to distinguish between analyzing text for the sake of determining what the public naturally takes it to mean and trying to discover what the legislature intended for it to mean. Once that distinction is made, formulaic deliberation requires a further distinction between analyzing what the text means to the reader as the embodiment of law and the pragmatic due process concern of considering the

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ignores the pragmatic insight that out intellectual framework is not single-minded, but consists of a 'web of beliefs,' interconnected but reflecting different understandings and values.").

[31] This should be incumbent upon each deliberative ilk, but a most necessary requirement for formulaic pragmatists who care to defeat the accusation of nihilism.

[32] *Bank One Chicago v. Midwest Bank & Trust Co*., 516 U.S. 264, 279 (1996) (Scalia, J., concurring) ("The law *is* what the law *says,* and we should content ourselves with reading it rather than psychoanalyzing those who enacted it. (citation omitted)"); John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 36-52 (2001). *See also* Sunstein and Vermeule's sideways praise of Manning in Sunstein and Vermeule's *Interpretation and Institutions*, 101 MICH. L. REV. 885 (2003).

[33] Stanley S. Fish, *There is No Textualist Position*, 42 SAN DIEGO L. REV. 649 (2005).

[34] Because Scalia emphasizes the text as the embodiment of law, and not as its representative, it is hard tell whether Scalia is serious when he says text is the best evidence of intent. ANTONIN SCALIA, A MATTER OF INTERPRETATION (1997). Whether or not he truly believes this to be the case, since he doesn't believe in legislative intent as a focus of inquiry, the statement itself might be true.

[35] Cass R. Sunstein & Adrian Vermeule, *Interpretation and Institutions*, 101 MICH. L. REV. 885, 887-88 (2003).

extent to which the public is aware of the parameters of law. Only by being this precise can the charge of widespread judicial activism, if it be true, be intelligently addressed by the legal academy as de facto representatives of the People.

Seriously trying to construct formulas more precisely describing adjudicatory decision making requires a thorough analysis and mapping of jurisprudence in a variety of contexts.[36] Identifying which factors the Supreme Court considers and, amongst those, which ones they emphasize is the first step toward expressing the adjudicatory process mathematically. As opposed to the traditional Langdellian approach, dissents and dictum become particularly important in this context. In fact, dissents, dictum, amicus briefs and scholarly comment help identify which social or legal agreements were available to the Court, but which they found unimportant. Also, with respect to the academy, deliberative formulas provide a way to synthesize the tenets of legal theories other than textualism, intentionalism and pragmatism. From democratic liberalism to critical race theory to law and economics, each theory represents an invitation to agree that certain factors in certain contexts might be recognized, and perhaps emphasized, that a deliberative choice is less correct to the extent it denigrates tenets of these theories or more correct to the extent it reinforces them.

This paper admits the perfect formula will never be discovered, to the extent perfection means absolute consensus in description, applicability, and consequences.[37] But, like the search for Pi, greater precision, even though perpetually short of absolute, begets greater productivity. Ambiguity as to legal rights causes hesitancy, inefficiency, reflected in both economic and social

[36] The difference between this and the Langdellian approach to studying law is perhaps only in the incorporation of social agreements, rather than restricting its study and application to the illusion of mechanically applied canons. *See* Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605 (1908). The realist movement has won, and perhaps it is time for law's oscillation to move in the direction of formalizing the consideration of consequences.

[37] Cass R. Sunstein & Adrian Vermeule, *Interpretation and Institutions*, 101 MICH. L. REV. 885, 894-900 (2003), (describing how Hart discredited Bentham's dream of a perfectly comprehensive code, which would eventually render perfect formula). What has wrongly assumed to be discredited is the aspiration. Westlaw and computer programmers will increasingly adopt the aim and will discover great utility in doing so.

conduct.[38] Conversely, more predictable judicial decision produces less ambiguity, and thus greater productivity.[39] Besides, formulaic deliberation is more for the legal academy as an analytical process. It is designed to be more reactionary and influential than commandeering and mechanical. I favor judges exercising judgment, and they always will. My confidence in that, buttressed by the expansion of the realist conception of law and the burgeoning of this magnificent information age, allows me to tout formulaic deliberation as a pseudo-scientific theory in pursuit of juristic regularity that is more perceptible and epistemological.[40] Now that we agree that we have a delegation doctrine, rather than a non-delegation doctrine, as it can be freely admitted that the judiciary and administrative agencies make law, it is incumbent on the academy to reevaluate what factors they consider before suggesting which they ought not.

[38] *See* R. H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).
[39] It is another, not unimportant, question for another day whether we would be efficiently moving in the wrong direction.
[40] It bears repeating, the realists like Pound and Frank and Radin objected to conceptions which had petrified and become arbitrary. *See also* RONALD DWORKIN, LAW'S EMPIRE (1986) (discussing the petrification and resulting arbitrariness of conceptions of courtesy as a social practice). However, judicial consideration of consequences is too new and unconventionalized to say now the practice and study of it has settled, much less that it has solidified or is being applied mechanically (save for particular instances like colorblind society concept being arbitrarily and mechanically applied to dilute the strength of civil rights laws).

III. Plain Meaning

Most agree the application of a plain meaning when present produces the highest degree of correctness, predictability and democratic legitimacy.[41] The suggestion that words have plain meanings is the hallmark of the textualist movement, that is, the words used in a bill passed by both houses and signed into law by the President have been imbued with a meaning waiting to be discovered.[42] Intentionalists might seek to apply the meaning plainly intended by the legislature.[43] And a pragmatist might be endeared to plain meaning as a due process concern for making the law knowable.[44]

Before applying a statute's plain meaning we must determine whether it is sufficiently plain in the first place. But the academy speaks to loosely of plain meaning. If the goal is to regulate judicial decision making, we must more precisely describe and evaluate whether a word or phrase is commonly understood.

Formulaically expressing plain meaning contemplates the extent to which people ascribe the same meaning to a particular word. The extent to which a meaning is plain depends on the percentage of people who supply the same meaning. If a judge is one hundred percent certain that one hundred percent of a relevant interpretive community (if known to have only one

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[41] WILLIAM N. ESKRIDGE, JR., LEGISLATION AND STATUTORY INTERPRETATION 223 (2000) ("[P]lain meaning might be the best guide for applying a statute, because plain meaning is the most obvious and perhaps the most objective focal point for all of us to know what the rule of law requires of us and out neighbors.").

[42] *See* John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 36-52 (2001).

[43] See Cass R. Sunstein & Adrian Vermeule*, Interpretation and Institutions*, 101 MICH. L. REV. 885, 915-17 (2003) ("[I]ntentionalists disagree sharply with textualists, at least about the right foundation for interpretation. But they agree on a great deal, and most of the time their disagreements are quite irrelevant to their resolution of cases. Both agree that the statutory text is the starting point of interpretation, and both accept the view that courts should not lightly depart form the text, which most intentionalists see as strong evidence of intentions….It is a logical blunder to suppose that interpreters must agree upon some particular theory of authority in order to agree upon interpretive doctrines. Where an overlapping consensus or incompletely theorized agreement is possible, interpreters may choose rules while bracketing, and remaining agnostic about, first-best accounts.")

[44] *Cf.* RICHARD A. POSNER, LAW, PRAGMATISM, AND DEMOCRACY (2003), *with* Cass R. Sunstein & Adrian Vermeule, *Interpretation and Institutions*, 101 MICH. L. REV. 885 (2003).

attempt) agree upon the same meaning, then that is the plain one. (Less obviously, it does not mean that this is the word's only meaning.)

Thus, the plain meaning function depends on estimations of the degree with which a proposed meaning coheres with the meaning as understood by linguistic communities. Therefore, the plain meaning function includes these relevant communities as factors:

f(Plain Meaning) = *f*[(% of People Choosing One Meaning Given One Opportunity), (% of Legislatures), (% of Judges), (% of Dictionaries), (% of Expert Linguists), ...][45]

Each factor may be isolated as the sole dependent factor,[46] two or more factors may be considered with equal emphasis on each,[47] or two or more factors may be considered with varying levels of emphasis.[48]

The plain meaning function requires a standard for determining when a meaning is sufficiently plain, a plainness quotient. If a meaning function exceeds the plainness quotient, that meaning is applied:

If $f(Meaning_k)$ > (Absolute Plainness Quotient), then $h(Applications_k)$.

Or, if one meaning function exceeds another meaning function by an amount exceeding the plainness quotient, the superior meaning is applied.[49] A deliberative formula might require

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[45] The greater the resulting numerical value, the more likely it is that that meaning is plain. *See* discussion of plainness disposition quotients, below.

[46] $f(Meaning_k)$ = *f*[% of People], or
$f(Meaning_k)$ = *f*[% of Legislators], or
$f(Meaning_k)$ = *f*[% of Judges], or
$f(Meaning_k)$ = *f*[% of Dictionaries], or
$f(Meaning_k)$ = *f*[% of Expert Linguists] or …

[47] $f(Meaning_k)$ = [(% of People) + (% of Legislators) + (% of Judges) + …)] / (Total # of Plain Meaning Factors Considered)

[48] $f(Meaning_k)$ = $[(ec_1)($ % of People) + (ec_2)(% of Legislators) + (ec_3)(% of Judges) + …] / (Total # of Plain Meaning Factors Considered); where ec_k represents emphasis coefficients and $ec_k > 0$.

[49] If *f*[$Meaning_1$] − *f*[$Meaning_2$] > (Relative Plainness Quotient), then *h*[$Applications_1$].

satisfying both the absolute and relative methods.[50] If no plain meaning is found, then the deliberative function is performed:

If f[Meaning$_1$] $\leq$ (Absolute Plainness Quotient) and
f[Meaning$_1$] $-$ f[Meaning$_2$] $\leq$ (Relative Plainness Quotient),

then h*(Deliberation)* $=$ h[(*f(Text), f(Intent), f(Consequences)*].

[50] If f[Meaning$_1$] $>$ (Absolute Plainness Quotient) and
f[Meaning$_1$] $-$ f[Meaning$_2$] $>$ (Relative Plainness Quotient), then h[Applications$_1$].

IV. The (Con)Textual Function

The textual function evaluates the degree with which a deliberative choice comports with conventions regarding understanding text. The focus is on what the words representing the law ordinarily mean to the reader, not what the legislature intended for the word to mean.[51] Often times, however, a word or phrase has no plain meaning, it is ambiguous.[52] Words can have multiple meanings, a classic homonym.[53] They can be directed at a smaller group of citizens and understood by them to mean something different than what it means to the rest of us, specialized meanings.[54] Or, the legislature might use a word about which there is innate disagreement as to the space it creates, vague nouns[55] and nearly all adjectives.[56] In these instances, the textualist

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[51] *Bank One Chicago v. Midwest Bank & Trust Co*., 516 U.S. 264, 279 (1996) (Scalia, J., concurring) ("In my view a law means what its text most appropriately conveys, whatever the Congress that enacted it might have 'intended.' The law *is* what the law *says,* and we should content ourselves with reading it rather than psychoanalyzing those who enacted it. (citation omitted)").

[52] It would be more precise to say that the word in question makes the law indeterminate, as indeterminacy results from both vagueness and ambiguity. Many times when lawyers believe a word to be ambiguous, linguistically it is vague. Lawrence M. Solan, *Vagueness and Ambiguity in Legal Interpretation*, in VAGUENESS IN NORMATIVE TEXTS 74 (2005) ("Legal analysts typically do not concern themselves with the reason that the statute or contract is susceptible to multiple interpretations, be it vagueness, ambiguity, or something else. For the most part, they use the word ambiguity as a blanket term that covers all of these problems, which the editors of this volume term 'legal indeterminacy'."). Thus, the issue is simply whether the word or phrase in a particular context looses the law to admit of more than one reasonable choice. VIJAY K. BHATIA, ET. AL., VAGUENESS IN NORMATIVE TEXTS 12 (2005) ("Legal indeterminacy only covers such cases where a question of law, or of how the law applies to facts, has no single right answer (citation omitted).").

[53] Lawrence M. Solan, *Vagueness and Ambiguity in Legal Interpretation*, in VAGUENESS IN NORMATIVE TEXTS 74 (2005) (citing Jeremy Waldron, *Vagueness in Law and Language: Some Philosophical Issues*, 82 CAL. L. REV. 509 (1994) (discussing the different meanings of the word 'blue').).

[54] 'Devices' has a very broad meaning to the average reader and can include almost anything of substance used as a tool to do something. In *Brown v. Williamson*, 530 U.S. 238 (2000), however, the Court held that a cigarette, though certainly a device, is not one of those meant for FDA regulation. Lawrence M. Solan, *Vagueness and Ambiguity in Legal Interpretation*, in VAGUENESS IN NORMATIVE TEXTS 77 (2005) (discussing *FDA v. Brown & Williamson Tabacco Corp.*, 530 U.S. 238 (2000).). I routinely ask both my Sports Law and Administrative Law classes whether baseball players using colored contact lenses to help better see the ball are using "performance enhancing substances."

[55] According to Solan, these are the biggest problems relating to legal indeterminacy, because they are vague. Lawrence M. Solan, *Vagueness and Ambiguity in Legal Interpretation*, in VAGUENESS IN NORMATIVE TEXTS 73, 75 (2005) ("By vagueness, I mean borderline situations in which it is difficult to tell whether a concept is a member of a particular category. Should a large clock count as a piece of furniture? . . . Ambiguity is far less of a problem.").

[56] *See* Ruth Vatvedt Fjeld, *The Lexical Semantics of Vague Adjectives in Normative Texts*, in VAGUENESS IN NORMATIVE TEXTS 157 (2005). Some evaluative adjectives, the ones that invoke mathematical measurement, are

must choose whether to continue limiting her analysis to text or expand it to include intent or consequences.

Textualists believe that strict judicial adherence to text will result in less judicial subjectivity[57] and better legislative drafting;[58] rendering law's application more determinate and, thus, more stable and certain.[59] To a textualist, a law using a commonly understood word or phrase applies to all things most people agree are within the space the word or phrase creates in the common mind; applied without exception for situations seriously incongruent with important social agreements, unless authoritatively provided for.[60]

Some 'new textualists' advocate performing the textual function exclusively. Professor John Manning believes the Constitution's prescriptions for making law demand it. Words are

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fairly precise. All others require precisification strategies. Formulaic deliberation seeks to be a type of precisification strategy.

[57] ANTONIN SCALIA, A MATTER OF INTERPRETATION 132 (1997) ("I concede, of course, that textualism is no ironclad protection against the judge who wishes to impose his will, but it is *some* protection. The criterion of 'legislative intent,' by contrast, positively invites the judge to impose his will; by setting him off in search of what does not exist . . . .").

[58] William Eskridge, *The New Textualism*, 37 UCLA L. REV. 621, 677 (1990) ("Justice Scalia seems to argue, if Congress is aware that its statutes will be read with a strict literalism and with reference to well-established canons of statutory construction, it will be more diligent and precise in its drafting of statutes."); *but see id.* ("The vast majority of the Court's difficult statutory interpretation cases involve statutes whose ambiguity is either the result of deliberate legislative choice to leave conflictual decisions to agencies or the courts, (footnote omitted) or the result of social or legal developments the most clairvoyant legislators could not have foreseen. (footnote omitted)").

[59] WILLIAM N. ESKRIDGE, JR., LEGISLATION AND STATUTORY INTERPRETATION 232 (2000) ("It is mildly counterintuitive that an approach asking a court to consider materials generated by the legislative process, in addition to statutory text (also generated by the legislative process), canons of construction (generated by the judicial process), and statutory precedents (also generated by the judicial process), leaves the court with *more* discretion than an approach that just considers the latter three sources. Justice Scalia's response is that legislative history is particularly soft and manipulable, while textual evidence is harder and more determinate.").

[60] *See* John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2391-93 (2003) ("[E]ven the staunchest modern textualists still embrace and apply, even if rarely, at least some version of the absurdity doctrine (footnote omitted) . . . [A] coherent account of modern textualism, properly understood, scarcely leaves judges defenseless against legislative infringement of the types of values that the absurdity doctrine now protects . . . [W]hile the absurdity doctrine traditionally measures absurdity from a baseline of 'literal' meaning, it is now well settled that textual interpretation must account for the text in its social and linguistic context. Even the strictest modern textualists properly emphasize that language is a social construct. They ask how a reasonable person, conversant with the relevant social and linguistic conventions, would read the text in context. This approach recognizes that the literal or dictionary definitions of words will often fail to account for settled nuances or background conventions that qualify the literal meaning of language and, in particular, of legal language. Accepting this more modern understanding of textual interpretation, I believe, offers a firmer and more legitimate basis for cutting off many problems of absurdity at the threshold.").

not used to express the law, they are the law.[61] Only the physical manifestation of what was deliberated in the legislature becomes law upon presentment and signing by the President.[62] The intentions of the legislature no matter how vociferously expressed, even in unanimity, are irrelevant, because they were not signed into law.[63]

The critique of textualism is two-fold, theoretical and practical.[64] The conception of law as limited to the physical, as something breathed into life, was rejected in the 20th Century.[65] Law, being metaphysical, can be anything a community decides it is, and we apparently have decided it is greater than the physical memorials of it; especially if we are to account for the fact that judges and administrative agencies make rules that operate an awful lot like laws presented to and signed by the President. Sunstein and Vermeule, textualists themselves, point out that Constitutional legitimacy for law does not demand or prohibit particular interpretive styles, that interpretive styles are to be judged on their utility.[66]

The usefulness of exclusively textual deliberation is said to be a propensity to foster judicial constraint and economy and legislative inspiration. Judges should not be allowed to estimate whether a deliberative choice comports with the vast of social agreements regarding the economy and national defense or whatever, because they will not so estimate and impose their own preference instead, they will estimate it badly, they will spend too much doing so (and still might do it badly), and they will always and more increasingly have the job of estimating

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[61] John Manning, *What Divides Textualists from Purposivists*, 106 COLUM. L. REV. 70 (2006). *See also* ANTONIN SCALIA, A MATTER OF INTERPRETATION (1997); John C. Coverdale, *A Plea for a Decent Respect of the Tax Code*, 71 TUL. L. REV. 1501 (1997).
[62] John Manning, *What Divides Textualists from Purposivists*, 106 COLUM. L. REV. 70 (2006).
[63] John Manning, *What Divides Textualists from Purposivists*, 106 COLUM. L. REV. 70 (2006).
[64] The theoretical objection is least important.
[65] H.L.A. Hart's conception of law, expanded upon by Dworkin, finds wide acceptance in the legal community. For a great discussion on the development of American legal conceptions *see*, Cass R. Sunstein & Adrian Vermeule, *Interpretation and Institutions*, 101 MICH. L. REV. 885, 890-914 (2003).
[66] Cass R. Sunstein & Adrian Vermeule, *Interpretation and Institutions*, 101 MICH. L. REV. 885, 889 (2003).

because legislature's will delegate law making responsibilities to them.[67] Textualists believe estimations of the public policy sort are the province of the legislature (sanctioning or acquiescing to the policy role of the executive because, though it is not as politically accountable as the legislature, it is more so than the judiciary, and somehow that makes a difference towards allowing executive agencies to make policy choices where the judiciary is forbidden).

The critique of textualism as to its usefulness concerns its tendency to allow consequences of the absurd or at least undesirable type. Textualism's critics have numerous examples how applying the ordinary meaning of a word results in consequences almost all would agree to be ridiculous.[68] Even some staunch advocates concede that textualism, at least in its strictest form, invites absurd consequences, which can undermine confidence in the judiciary and government as a whole.[69] Some textualists agree there should be an exception for absurd consequences.[70] In fact, a canon of construction suggests if not commands as much.[71] Others believe that allowing law, especially statutes, to produce absurd consequences inspires

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[67] Cass R. Sunstein & Adrian Vermeule, *Interpretation and Institutions*, 101 MICH. L. REV. 885, 920-32 (2003). Though they acknowledge that a specialty court, like the Tax Court, might be trusted with such a responsibility.
[68] Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405 (1989).
[69] John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2392 (2003) ("No one, of course, is for absurd consequences.").
[70] WILLIAM N. ESKRIDGE, JR., LEGISLATION AND STATUTORY INTERPRETATION 261 (2000) ("The absurd-result canon produces complications, especially for textualists. In *Bock Laundry*, Justice Scalia agreed that the canon applied and contended that it should be implemented by reformulating the state in the way that 'does least violence to the text.' (citation omitted)"; *id*. at 225 ("If the rule of law requires interpreters to apply statutes to the letter, then sometimes the cost of 'lawfulness' will be too great. If the legislature tells the Titanic to follow a course that will lead it into an iceberg, the captain is justified in departing from its plain meaning – not because he has no moral or political obligation to follow it, but because other moral or political obligations are more important under the circumstances."). Cass Sunstein and Adrian Vermeule, on the other hand, believe judges should not tailor the law to avoid absurd consequences, as such tailoring is—they believe—amending, an act which is Constitutionally prescribed and specifically assigned to the legislature. Cass R. Sunstein & Adrian Vermeule, *Interpretation and Institutions*, 101 MICH. L. REV. 885, 916 n.110 (2003).
[71] Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Cannons about How Statutes are to be Construed*, 5 GREEN BAG 297, 302 (2002) ("If language is plain and unambiguous it must be given effect . . . Not when literal interpretation would lead to absurd or mischievous consequences or thwart manifest purpose. (footnotes omitted).").

legislatures to draft more precisely written statutes.[72] The chauvinistic textualist retort points to the legislature as the institution expected or exclusively authorized to determine if the consequences are bad and whether it is worth 'fixing.'[73] Milder textualists unwilling to let stand obviously bad decisions might incorporate intentionalism or pragmatism as a means of avoiding those few times when text alone is not enough.[74]

Another practical criticism of exclusive or chauvinistic textualism points to the accepted view that no statute no matter how precisely crafted can account for all situations.[75] When an indeterminate situation eventually arises, one which text cannot conclusively resolve, courts are left without a channel to bound their policy choices.

The Manning response is that a textualist resolves problems relating to meaning by evaluating context, concentrating hardest on the degree to which proposed meaning reinforces or degrades elite legal agreements called canons of construction, at least the textual ones.[76] Canons are conventionalized techniques for creating understandings about text, many of which focus on related text within and about the statute at issue.[77] In an easy case, one available meaning

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[72] William Eskridge, T*he New Textualism*, 37 UCLA L. REV. 621, 677 (1990) ("Justice Scalia seems to argue, if Congress is aware that its statutes will be read with a strict literalism and with reference to well-established canons of statutory construction, it will be more diligent and precise in its drafting of statutes."); *but see id.* ("The vast majority of the Court's difficult statutory interpretation cases involve statutes whose ambiguity is either the result of deliberate legislative choice to leave conflictual decisions to agencies or the courts, or the result of social or legal developments the most clairvoyant legislators could not have foreseen. ").

[73] *See e.g*. John C. Coverdale, *A Plea for a Decent Respect of the Tax Code*, 71 TUL. L. REV. 1501 (1997).

[74] Jonathan T. Molot, *The Rise and Fall of Textualism,* 106 COLUM. L. REV. 1 (2006); Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405 (1989).

[75] H.L.A. Hart's critique of Bentham, as presented in Cass R. Sunstein & Adrian Vermeule, *Interpretation and Institutions*, 101 MICH. L. REV. 885 (2003).

[76] ANTONIN SCALIA, A MATTER OF INTERPRETATION 25 (1997) ("Textualism is often associated with rules of interpretation called the canons of construction . . . ."); *id*. at 27 ("Every canon is simply *one indication* of meaning; and if there are more contrary indications (perhaps supported by other canons), it must yield.").

[77] Cass R. Sunstein & Adrian Vermeule, *Interpretation and Institutions*, 101 MICH. L. REV. 885, 916 n.110 (2003); Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Cannons about How Statutes are to be Construed*, 5 GREEN BAG 297 (2002); WILLIAM N. ESKRIDGE, JR., LEGISLATION AND STATUTORY INTERPRETATION 343 (2000) ("Unlike the textual canons, which are probably relatively neutral in their allocational effects, the substantive canons reflect judicially articulated policies . . . .").

coheres best with all related text.[78] In difficult cases, each proposed meaning or interpretation reinforces some canons while breaching others, it is supported by some text, but contradicted by others.[79]

What is often forgotten in scholarship on deliberative choices is that at least two parties have come before the court, each with a proposed meaning. Even in the most indeterminate of cases, one of those meanings coheres better than the other with related text within and without the specific statutory scheme, and with rules of syntax and grammar. One way to formulaically represent the textual approach is to identify the meaning that comports with the most number of related texts. Or, one could select the meaning that degrades the least. The meaning garnering the most support prevails. Deliberative formulas might also emphasize a particular canon or text, recognizing that some canons or text might be especially pertinent while others are barely related.[80] An emphasis variable multiplies or amplifies the effect of a particular canon or text.

Thus, a deliberative formula might depend, wholly or in part, on the textual function, which depends on an estimation of the degree with which a deliberative choice comports (congrues) with statutory text, canons of construction and rules of grammar:

$$f(Text) = f[(\text{Congruence with Related Text}), (\text{Congruence with Textual Canons of Construction}), (\text{Congruence with Rules of Grammar}), (\text{Congruence with Specialized Context}), \ldots]$$

Each factor may be isolated as the sole dependent factor,[81] two or more factors may be considered with equal emphasis on each,[82] or two or more factors may be considered with

[78] In *Gitlitz v. Commissioner*, 531 U.S. 206 (2001), Justice Thomas supported the Court's choice of meaning by its supposed congruity with twenty seven related income tax statutes.
[79] ANTONIN SCALIA, A MATTER OF INTERPRETATION 27 (1997) ("Every canon is simply *one indication* of meaning; and if there are more contrary indications (perhaps supported by other canons), it must yield.").
[80] Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405 (1989).
[81] $f(Meaning_k) = f[\text{Congruence with Related Text}]$, or
$f(Meaning_k) = f[\text{Congruence with Rules of Grammar}]$, or
$f(Meaning_k) = f[\text{Congruence with Textual Canons of Construction}]$, or …
[82] $f(Meaning_k) = [(\text{Related Text}) + (\text{Canons}) + (\text{Rules of Grammar}) + \ldots]$

varying levels of emphasis.[83] Also, within each factor such as with related text, emphasis may be placed on particular text, like ones in the same chapter, part or title of a code.[84]

The strict or chauvinistic textualist decides based on this exclusively textual hypothesis. Milder textualists compare the textual resolution with the absurdness of its consequences, which requires a comparison with the pragmatic function, discussed infra. If the difference between two competing meanings fails to exceed a textual disposition quotient, mild and loose textualists evaluate the degree to which a deliberative choice comports with the reconstructed intentions of the legislature or the reasonably foreseeable consequences or both.[85]

[83] $f(Meaning_k) = [(ec_1)(\text{Related Text}) + (ec_2)(\text{Canons of Construction}) + (ec_3)(\text{Rules of Grammar}) + ...]$; where ec_k represents emphasis coefficients and $ec_k > 0$.

[84] Related Text = (ec_1)(related text in same chapter) + (ec_2)(related text in same part) + (ec_3)(related text in same title); where ec_k represents emphasis coefficients and $ec_k > 0$.

[85] If $f[\text{Meaning}_1] - f[\text{Meaning}_2] >$ (Relative Textual Disposition Quotient), then $h[\text{Applications}_1]$.
If $f[\text{Meaning}_1] - f[\text{Meaning}_2] \leq$ (Relative Textual Disposition Quotient),
then $h(Deliberation) = h[f(Intent), f(Consequences)]$.

V. The Intent Function

The intent function represents the degree with which a deliberative choice comports with the reconstructed intention of the enacting, intermediate, and current legislatures. The intent function in a deliberative formula represents an evaluation of the degree with which a choice of meaning comports with the most number of relatively important indicia of legislative intent, or degrades the least number of them.

Intentionalist theories of judicial deliberation emphasize reconstructing the legislature's intent.[86] Interpreting words or symbols means attempting to discern the intent of the author.[87] Exclusive use of this method comports with a legislative agency theory of adjudication.[88] The judiciary being subordinate to Congress seeks to carry out their mandate as a dutiful soldier

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[86] *See* LINDA D. JELLUM & DAVID CHARLES HRICIK, MODERN STATUTORY INTERPRETATION: PROBLEMS, THEORIES, AND LAWYERING STRATEGIES 97-98 (2006) ("Intentionalists believe that in interpreting language it is imperative to be truthful to the intent of the author, and to do so, one must consult extrinsic sources . . . Examining legislative history helps to achieve the goal of furthering legislative intent."); ABNER J. MIKVA & ERIC LANE, AN INTRODUCTION TO STATUTORY INTERPRETATION AND THE LEGISLATIVE PROCESS 6, 27-50 (1997).

[87] Stanley Fish, *There is No Textualist Position*, 42 SAN DIEGO L. REV. 629 (2005) ("Some years ago as I was driving my father back to his apartment, we approached an intersection with a stop light that had turned red. He said, 'Go through the light.' What did he mean? At the time I didn't take him to be telling me, 'Don't stop, just barrel on through.' Instead, I took him to be telling me, 'As soon as the light turns green, drive straight ahead; don't turn either left or right.' How did I come to that determination? The answer many would give is that I set aside a plain or literal meaning and substituted for it a meaning that corresponded to what I took to be his intention. I reasoned that my father could not have meant what he said--he could not have been directing me to break the law--and I quickly (and without much thought) settled on a meaning that 'made more sense.' This account of the matter is in line with the distinction (standard in mainstream philosophy of language), between sentence meaning and speaker's meaning, between the meaning an utterance has by virtue of the lexical items and syntactic structures that make it up, and the meaning a speaker may have intended but not achieved. It is because these are distinguishable entities (or so the standard story goes) that they can come apart, and when they do one can say, as one might in the case of the present example, my father said X, but he meant Y; his words, literally construed, say one thing, but it was his purpose to say something else. What I did could then be described as an act of choice: In stopping the car and waiting for the light, I chose to hearken to my father's purposive meaning--his intention-- rather than to the plain meaning of his sentence; and again, that choice is available because it is possible to distinguish between the two.").

[88] LINDA D. JELLUM & DAVID CHARLES HRICIK, MODERN STATUTORY INTERPRETATION: PROBLEMS, THEORIES, AND LAWYERING STRATEGIES 97 (2006) ("Proponents of intentionalism argue that it supports the separation of powers expressed in the Constitution. The legislative branch, not the judiciary, has the constitutional power to legislate. In order to avoid 'making law,' courts should strive to carry out the legislature's intent. Intentionalists view themselves as agents of the legislature that enacted the statute, who must avoid imposing their own preferences rather than furthering the choices of the legislature."); ABNER J. MIKVA & ERIC LANE, AN INTRODUCTION TO STATUTORY INTERPRETATION AND THE LEGISLATIVE PROCESS 6, 27-50 (1997).

would, their mandate being the law rather than the memorial of it.[89] Thus, the intentionalist judge seeks to discover in a word the meaning intended by the legislature.[90]

A legislature, however, is not a person, which raises the question of authorship. Of the five hundred plus members of Congress, who are the principal authors from which an intention can be ascribed? Most scholarship and judicial opinions concentrate on legislative history.[91] Some assume that descriptions of the law and its effects incorporated in the legislative histories influence other legislators in the voting process, so that these legislative histories can be relied upon in divining the intent of a collegial body.[92] Moreover, Professor Eskridge, and other

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[89] Richard A. Posner, *Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution*, 37 CASE W. RES. L. REV. 179, 189-90 (1986-87) ("In our system of government the framers of statutes and constitutions are the superiors of judges. The framers communicate orders to the judges through legislative texts (including, of course, the Constitution). If the orders are clear, the judges must obey them. Often however, because of passage of time and change of circumstance the orders are unclear and normally the judges cannot query the framers to find out what the order means. The judges are thus like the platoon commander in my example. It is irresponsible for them to adopt the attitude that if the order is unclear they will refuse to act. They are part of an organization, an enterprise – the enterprise of governing the United States – and when the orders of their superiors are unclear, this does not absolve them from responsibility for helping to make the enterprise succeed. The platoon commander will ask himself, if he is a responsible officer: what would the company commander have wanted me to do if communications failed? Judges should ask themselves the same type of question when the 'orders' they receive from the framers of statutes and constitutions are unclear: what would the framers have wanted us to do in this case of failed communication?"). *Also see* H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 601 (1958) ("The other doctrine was the famous imperative theory of law--that law is essentially a command."); Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605, 607 (1908) ("[I]n the first and second stages of a period of legislation the mechanical character of legal science is aggravated by the imperative theory, which is a concomitant of legislative activity. Austin's proposition that law is command so complete that even the unwritten law must be given this character, since whatever the sovereign permits he commands, was simply rediscovered during the legislative ferment of the reform-movement in English law.").

[90] In my account, intentionalists separate from purposivists by attempting to discern what the legislature wanted a word to mean then applying to all situations, rather than having courts give to a word whatever meaning produces consequences the legislature intended. A subtle distinction, surely.

[91] *See* LINDA D. JELLUM & DAVID CHARLES HRICIK, MODERN STATUTORY INTERPRETATION: PROBLEMS, THEORIES, AND LAWYERING STRATEGIES 98 (2006) ("Examining legislative history helps to achieve the goal of furthering legislative intent."); ABNER J. MIKVA & ERIC LANE, AN INTRODUCTION TO STATUTORY INTERPRETATION AND THE LEGISLATIVE PROCESS 6, 27-50 (1997). *But see* ANTONIN SCALIA, A MATTER OF INTERPRETATION 30-31 (1997) ("Extensive use of legislative history in this country dates only from about the 1940s . . . Resort to legislative history has become so common that lawyerly wags have popularized a humorous quip inverting the oft-recited (and oft-ignored) rule as to when its use is appropriate: 'One should consult the text of the statute,' the joke goes, 'only when the legislative history is ambiguous.' ").

[92] WILLIAM N. ESKRIDGE, JR., LEGISLATION AND STATUTORY INTERPRETATION 302 (2000) ("*Committee reports* are the most useful legislative history…for they provide an overview of the policy need for the statute (general intent) as well as analysis of each provision and how it relates to other parts of the statute (specific intent.)"); Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845, 863-64 (1992) ("[N]othing in the Constitution seems to prohibit Congress from using staff and relying upon groups and institutions . . . And, for

proceduralists, point out that reconstructing a legislature's intent might depend more specifically on the intent of key legislators, the gate keepers.[93] A deliberative formula representing intention might account for whether a given interpretation comports with the understandings of these people; although it is unclear how to ordinate the importance of each gatekeeper.[94]

I believe a deliberative formula concerned with intention should incorporate whether a choice of meaning comports with the intent of intermediate legislatures, those who acquiesced to judicial and administrative rewritings.[95] An appellate panel or agency that interprets a statute is making law, even if it is only filling the interstices of the original law.[96] This newly iterated law is a rewriting of the original one. The famous baseball exemption from anti-trust law was a judicial creation, which after passage of time lost its background moorings, that baseball was not interstate commerce, but was still 'good law' because the *Flood v. Kuhn* Court attributed its continued presence to Congressional approval via acquiescence.[97] Also consider *Chevron*,

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purposes of establishing the legislator's personal responsibility, that description does not distinguish between different kinds of documents-between committee reports, floor statements, or statutory text. Rather, it holds the legislator personally responsible for the work of staff, and it correlates the legislator's direct personal involvement, not according to the kind of document, but according to the significance of the decision at issue. That is to say, the personal involvement of the individual legislator in the statute's text itself may or may not be greater than the legislator's involvement with report language or a floor statement. Involvement is a function of the importance of the substantive, procedural, or political issue facing the legislator, not of the 'category' of the text that happens to embody that particular issue. It is not obvious that in the late twentieth century there is some better way to organize Congress's work. But regardless of the merits of this process, nothing about it makes a court's reference to legislative history seem constitutionally suspect.").

[93] WILLIAM N. ESKRIDGE, JR., LEGISLATION AND STATUTORY INTERPRETATION 216 (2000) ("Perhaps, as positive political theorists say, the intentionalist inquiry ought to focus on the preferences of the *pivotal* legislators, those participants in the enactment process whose support was critical in helping a bill go through the various vetogates that can kill legislation.").

[94] WILLIAM N. ESKRIDGE, JR., LEGISLATION AND STATUTORY INTERPRETATION 74 (2000) ("Committee reports are typically given great weight by interpreters because they reflect the understanding of key gatekeepers. Moreover, they are representations about the meaning of statutory language on which lawmakers rely when they decide how to cast their votes.").

[95] *See, e.g., Flood v. Kuhn*, 407 U.S. 258 (1972) (upholding a judicially created anti-trust exemption for Major League Baseball on the grounds that Congress acquiesced to it).

[96] JOHN HART ELY, DEMOCRACY AND DISTRUST 4 (1980) ("Of course courts make law all the time, and in doing so they may purport to be drawing on the standard sources of the non-interpretivist – society's 'fundamental principles' or whatever – but outside the area of constitutional adjudication, they are either filling in gaps the legislature has left in the laws it has passed or, perhaps, taking charge of an entire area the legislature has left to judicial development.").

[97] *Flood v. Kuhn*, 407 U.S. 258 (1972).

Mead, and *National Muffler,* each of which justifies the weight attributed on administrative decisions to the agencies role as legislative delegate.[98] It is most natural to view these cases as legislative delegations of law making power which naturally become the subject of interpretation in future cases. Which begs the question, has the judge or appellate court or Secretary or Board become an author whose intent must be reconstructed, or perhaps the intent to be reconstructed is the legislature who acquiesced to the non-Article I iteration?

Also, an intentionalist might consider which interpretation the current legislature would choose if they were attacking the problem identified by a previous legislature, described by Professor Lawrence Lessig as translation.[99] Or the inquiry could be more concrete, like in the case of *Banks v. Commissioner*, where Congress, while *Banks* was being decided by the Supreme Court, enacted a law, the American Job Creation Act, clearly indicating which interpretation it preferred.[100]

Intentionalism's harshest critics will call the exercise of divining legislative intent a sham, a way to pretend that judges are constrained by legislatures even when they are not. Professor Radin supposed that judges identify a just result first and worked their way backwards, finding conventional justifications to support a choice where the justification actually relied upon remains hidden perhaps even to the judge himself.[101] The fiction of intent constrains and

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[98] *United States v. Mead Corp*., 533 U.S. 218 (2001); *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc*., 467 U.S. 837 (1984); *National Muffler Dealers Association v. Commissioner*, 440 U.S. 472 (1979).

[99] *See* Lawrence Lessig, *Fidelity in Translation*, 71 TEX. L. REV. 1165 (1993). Lessig is discussing intentionalism in the context of interpreting the Constitution. As a statutory method, his translation resembles purposivism, where the interpreter derives purpose from the enacting legislature but then estimates which deliberative choice better effectuates that policy.

[100] In *Commissioner of Internal Revenue v. Banks*, 543 U.S. 426 (2005), the Court decided upon whom fell the initial incidence of income relating to contingent and statutorily awarded legal fees. Congress, while the Court was considering *Banks*, enacted the AJCA which amended the tax code by expressly providing for an above the line deduction to the litigant in such cases. It would have been perfectly incoherent for Congress to provide a deduction to litigants if they did not intend for the litigant to recognize income in the first place. The Court, however, did not use the AJCA as a ground for its decision. Perhaps they did not want to broach the issue of the extent to which Congress may "decide" cases. *See Plaut v. Spendthrift*, 514 U.S. 211 (1995).

[101] Max Radin, *The Theory of Judicial Decision: Or How Judges Think*, 11 A.B.A. J. 357 (1925).

liberates at the same time. It liberates because it asks judges to discover something that cannot possibly be known because it does not exist, legislative intent, and in its stead to supply one's own estimation of public policy. It constrains because many believe indeed that when there is a choice between competing proposals of meaning, one coheres better with what many legislators had and have in mind. Through this constraint we can be uneasily confident that judges are deciding cases based on estimations of public policy, which if not entirely democratically proper, it is still less problematic than decisions based on considerations now thought to be arbitrary like pecuniary self-interest or chance, our marginalized considerations like one's account of natural law or gut feeling.

The formulaic question remains, how much weight to assign to each indicia of intent? Each deliberative factor is not of equal value, though it is possible and perhaps even convenient and necessary to look at it that way, at least initially.[102] Neither is it likely a judge will be equally confident in each of his reconstructions of legislative intent, suggesting that positively constructed deliberative formulas should incorporate uncertainty discounts.[103] And perhaps the formula might as well incorporate the degree of consensus, bare majority through unanimity, surrounding the legislative writing or re-writing.

The complicated nature of the intentional function, made so by the fiction of the legislature's intent, inspires formalist to propose text as the strongest indicia of what the legislature meant.[104] If so, it does not mean the intent function swallows whole the textual function, because the textual function is concerned with what words mean to the reader not what

[102] This difficulty in accounting is why formulaic deliberation is a far better descriptive method than prescriptive. As description, the academy suffers nothing by estimating degrees of congruence and discounts for uncertainty. As prescription, degrees of congruence and uncertainty discounts reduce formulaic deliberation to a suggestion of principles only somewhat more precise than is currently available.
[103] *Id*. Again, the difficulty in accounting for uncertainty is what makes formula inherently imprecise, though more precise than a system that ignores phenomena rather than at least attempting to express it.
[104] ANTONIN SCALIA, A MATTER OF INTERPRETATION (1997).

the author intended them to mean. The textual function, if it cannot stand alone, belongs in the pragmatic function, probably under the factor for due process of law.

Thus, a deliberative formula might depend, wholly or in part, on the intent function, which depends on an estimation of the degree with which a deliberative choice comports (congrues) with the reconstructed intent of the enacting, intermediate, and current legislatures:

> *f(Intent)* = *f*[(Coherence with Reconstructed Intent of Enacting Legislature), (Coherence with Reconstructed Intent of Intermediate Legislatures), (Coherence with Reconstructed Intent of Current Legislature)]

Each factor may be isolated as the sole dependent factor,[105] two or more factors may be considered with equal emphasis on each,[106] or two or more factors may be considered with varying levels of emphasis.[107]

Deliberative formulas require conventions with respect to identifying the circumstances where legislative history is emphasized, what particles of legislative history are more important than others, and by how much. Deliberative formulas can evaluate whether or the extent to which a deliberative choice comports with the intention of certain legislative gate keepers: sponsors of the bill, committee chairpersons, majority leaders, minority whips, etc. Thus, within each of these factors are subfactors representing conventional indicia of legislative intent, such as committee reports, floor debates, judicial precedents, administrative interpretations, and other statutes.[108] Also, within each subfactor, emphasis may vary between indicia.[109] And if the

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[105] $f(Meaning_k)$ = *f*[Enacting Legislature], or
$f(Meaning_k)$ = *f*[Intermediate Legislatures], or
$f(Meaning_k)$ = *f*[Current Legislature].

[106] $f(Meaning_k)$ = [(Enacting Legislature) + (Intermediate Legislatures) + (Current Legislature)]

[107] $f(Meaning_k)$ = [(ec_1)(Enacting Legislature) + (ec_2)(Intermediate Legislatures) + (ec_3)(Current Legislature)]; where ec_k represents emphasis coefficients and $ec_k > 0$.

[108] Enacting Legislature = *f*[(coherence with committee reports), (congruence with floor debates), (congruence with white papers), …]
Intermediate Legislatures = *f*[(coherence with judicial interpretations), (coherence with administrative interpretations), …]

difference between the deliberative choices fails to exceed the intentional disposition quotient, the algorithmic, synthetic, pragmatic deliberator resorts to evaluating the desirability of outcomes thought to emanate from the competing meanings.[110]

Current Legislature = f[(coherence with newly passed statute or resolution), (coherence with Lessig-style translation of original intent), …]

[109] Enacting Legislature = [(ec_1)(coherence with committee reports) + (ec_2)(coherence with floor debates) + (ec_3)(conherence with white papers) + ...]; where ec_k represents emphasis coefficients and $ec_k > 0$.

Intermediate Legislatures = [(ec_1)(coherence with judicial interpretations) + (ec_2)(coherence with administrative interpretations) + …]; where ec_k represents emphasis coefficients and $ec_k > 0$

Current Legislature = [(ec_1)(coherence with newly passed statute or resolution) + (ec_2)(coherence with Lessig-style translation of original intent) + …]; where ec_k represents emphasis coefficients and $ec_k > 0$

[110] If $f[\text{Meaning}_1] - f[\text{Meaning}_2] >$ (Relative Intentional Disposition Quotient), then $h[\text{Applications}_1]$.
If $f[\text{Meaning}_1] - f[\text{Meaning}_2] \leq$ (Relative Intentional Disposition Quotient),
then $h(\textit{Deliberation}) = h[f(\textit{Consequences})]$.

VI. The Consequence Function

Pragmatists and dynamists fall into a camp of deliberators who unabashedly assess consequences, whether or not explicitly or implicitly commanded by the legislature or the text of a statute, the emphasis placed on each depending on when it is most useful to do so.[111] It is a common law means of adjudicating. Judges evaluate whether a choice of meaning will produce outcomes in coherence with important social as well as conventional juristic agreements.[112] These are hypotheses as to poor or good consequences resulting from a deliberative choice. Even when courts consider text and intent heavily, they often support their choice with an appeal to pragmatic factors.[113] Dictum is usually explained as a means for bolstering or elaborating a decision already made based on conventional juristic agreements. The pragmatist admits that these consequences influenced, possibly controlled, the decision in the first place.

Pragmatic factors are many, some more controversial than others, and of course some receiving more deliberative emphasis.[114] Cass Sunstein's *Interpreting Statutes in the Regulatory*

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[111] WILLIAM N. ESKRIDGE, JR., LEGISLATION AND STATUTORY INTERPRETATION 240-41 (2000) ("Pragmatism can support different theories of statutory interpretation…Most pragmatic theories, however, look to multiple goals for statutory interpretation and insist on considering multiple sources." In reference to the figure on page 241, Eskridge states, "This model also suggests the interactive process by which a practical interpreter will think about the various sources of statutory meaning: she will slide up and down the funnel, considering the strengths of various considerations, rethinking each in light of the others, and weighing them against one another using conventional criteria."); WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 50 (1994) ("The interpreter does not view the statutory text in isolation, but reads it in connection with the legislative history, statutory practice and precedents, and current norms and values."). *See also* STEPHEN J. BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION (2005); JOHN HART ELY, DEMOCRACY AND DISTRUST (1980).

[112] WILLIAM N. ESKRIDGE, JR., LEGISLATION AND STATUTORY INTERPRETATION 240 (2000) ("An overall problem with the big theories of statutory interpretation is that they are based on a single foundation (text or specific intent or general intent). This ignores the pragmatic insight that our intellectual framework is not single-minded, but consists of a 'web of beliefs,' interconnected but reflecting different understandings and values.").

[113] Max Radin, *Theory of Judicial Decision Or How Judges Think*, 11 A.B.A. J. 357, 362 (1925) ("It is an undoubted fact that the chief purpose courts fulfill in giving us not merely a judgment but a classification of the judgment by types and standards, is to make it easy for us to find out how they think.").

[114] RICHARD A. POSNER, LAW, PRAGMATISM, AND DEMOCRACY 3, (2003) ("The pragmatic judge aims at the decision that is most reasonable, all things considered, where 'all things' include both case-specific and systemic consequences, in the broadest sense . . . ."; *id.* at 64 (" 'All things' include not only the decision's specific consequences, so far as they can be discerned, but also the standard legal materials and the desirability of preserving rule-of-law values. They include even more – they include psychological and prudential considerations so various that exhaustive enumeration is impossible.").

State contains a wonderful classification of pragmatic factors entertained in fact by federal courts.[115] Each area of law may emphasize extra-interpretive factors important to it but perhaps only tangentially relevant in another context. For example, law and economics theorists encourage the consideration of efficiency, both micro and macro.[116] Critical theorists want judges to consider the effect deliberative choices have on subordinated groups.[117] Not all pragmatic factors are as sexy. Appellate panels considering tax cases routinely consider the ease or difficulties of tax administration, horizontal and vertical equity, etc.[118] The judiciary interprets anti-trust laws neither focusing on text nor considering the reconstructed intent of 19th century Congress.[119] And recall that consideration of text is a pragmatic inquiry to the extent the good consequence sought is better legislative drafting or better awareness of the law by the citizenry.

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[115] Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV L. REV. 405 (1989).

[116] Joseph William Singer, *Legal Realism Now,* 76 Cal. L. Rev. 465, 513-14 (1988) (reviewing LAURA KALAMN, LEGAL REALISM AT YALE: 1927-1960 (1986) ("Most realists recommended that judges adopt some form of utilitarianism or cost/benefit analysis. As Holmes explained in The Path of the Law, judges have a duty of weighing considerations of social advantage.' Felix Cohen referred to this method, as does Professor Kalman (p. 3), as 'functionalism.' . . . The rights theorists have attempted to modernize and revitalize social contract theory; the law and economics scholars have sought to do the same for utilitarian theory. Their goal, as Richard Posner explains, is to judge legal rules by their 'effect in promoting the social welfare.' Law and economics theorists translate the ethical goal of promoting 'the general welfare' into the concept of 'wealth maximization' or 'efficiency.' They effectuate the concept of maximizing social utility through economic cost/benefit analysis; both to make the concept of utility more measurable and to preserve the ethical goal of basing legal rights on consent. Utility to an individual is measured by that person's 'willingness to pay' to acquire an entitlement; social wealth maximization (or efficiency) is defined as maximizing 'the aggregate satisfaction of individual preferences (the only ones that have ethical weight in a system of wealth maximization) that are backed up by money, that is, that are registered in a market.' (citations omitted)").

[117] *See, e.g.,* Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411 (1989).

[118] Richard J. Wood, *Supreme Court Jurisprudence of Tax Fairness*, 36 SETON HALL L. REV. 421, 422-23 (2006) ("[T]hree areas in which the Court has used tax fairness norms in resolving tax disputes: tax administration, statutory construction, and state taxation tested against the Equal Protection and Commerce Clauses of the United States Constitution . . . I found that the Court employs both vertical and horizontal equity norms as well as subordinate equity principles such as the benefit principle and the ability to pay principle in resolving tax disputes.").

[119] Daniel A. Farber & Brett H. McDonnell, *"Is There a Text in this Class?" The Conflict Between Textualism and Antitrust*, 14 J. CONTEMP. LEGAL ISSUES 619, 620 (2005) ("[T]he statutory texts are essentially devoid of content. Or rather, they are merely an instruction to judges to use their best economic judgment."). *See also* William N. Eskridge, Jr. & John Ferejohn, *Super-Statutes*, 50 DUKE L.J. 1215, 1234 (2001).

Some go as far as to say that allowing judges to consider consequences makes law nihilistic, that the law is whatever a federal judge says it is, placing the People and their representatives subordinate to a theocratic branch of government, and, impairing the ability of people to conform their conduct to law. Evaluating consequences invites subjective decision making, which, if one agrees with the conception of judiciary as legislative subordinate, is undemocratic in spirit and as a violation of the Presentment Clause.[120] And, even if it is not undemocratic in fact, it promotes the perception of judges as rulers rather than representatives, possibly whittling common faith in our form of democracy.[121] With its acceptance of subjective evaluation, consequentialism maintains or exacerbates indeterminacy because litigants and other interested persons cannot identify which consequences are most important to any one particular judge, and thus cannot predict what the law is or will be.[122]

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[120] ANTONIN SCALIA, A MATTER OF INTERPRETATION 22 (1997) ("Another modern and forthright approach to according courts the power to revise statutes is set forth in Professor Eskridge's recent book, *Dynamic Statutory Interpretation*. The essence of it is acceptance of the proposition that it is proper for the judge who applies a statute to consider 'not only what the statute means abstractly, or even on the basis of legislative history, but also what it ought to mean in terms of the needs and goals of our present day society.' (citation omitted) The law means what it ought to mean . . . What I think is needed, however is not rationalization of this process but abandonment of it. It is simply not compatible with democratic theory that laws mean whatever they ought to mean, and that unelected judges decide what that is."); JOHN HART ELY, DEMOCRACY AND DISTRUST 4, 5 (1980) ("The second comparative attraction of an interprevist approach, one that is more fundamental, derives form the obvious difficulties its opposite number encounters in trying to reconcile itself with the underlying democratic theory of out government."), ("We will want to ask whether anything else is better, but the usual brand of noninterpretivism, with its appeal to some notion to be found neither in the Constitution nor, obviously, in the judgment of the political branches, seems especially vulnerable to a charge or inconsistency with democratic theory.").

[121] RICHARD A. POSNER, LAW, PRAGMATISM, AND DEMOCRACY 337 (2003). *But see id.* at 2-3 ("We should not be afraid of pragmatism or confuse it with cynicism or with disdain for legality or democracy.").

[122] ANTONIN SCALIA, A MATTER OF INTERPRETATION 132 (1997) ("I concede, of course, that textualism is no ironclad protection against the judge who wishes to impose his will, but it is *some* protection. The criterion of 'legislative intent,' by contrast, positively invites the judge to impose his will; by setting him off in search of what does not exist . . . ."). JOHN HART ELY, DEMOCRACY AND DISTRUST 44 (1980) ("It is important at the outset to understand just why a 'judge's own values' approach is unacceptable . . . About forty years ago people 'discovered' that judges were human and therefore were likely in a variety of legal contexts consciously or unconsciously to slip their personal values into their legal reasonings. From that earth-shattering insight it has seemed to some an easy inference that that is what judges *ought* to be doing. . . [S]uch a 'realist' theory of adjudication is not a theory of adjudication at all, in that it does not tell us which values should be imposed. (citation omitted) . . . [T]here is absolutely no assurance that the Supreme Court's life-tenured members (or the other federal judges) will be persons who share your values."); *but cf.* RICHARD A. POSNER, LAW, PRAGMATISM, AND DEMOCRACY 60-62 (2003) ("Pragmatic adjudication is not, as its ill-wishers charge, a synonym for ad hoc decisionmaking, that is, for always deciding a case in the way that will have the best immediate consequences without regard to possible future

These claims are exaggerated. All judge made law, whether blatantly outside or merely within the interstices of existing law, can be repealed either by Congress or the People.[123] As for subjectivity, the claim that judges can do whatever they want, and that no one can predict what a judge will believe important is reckless. The restraint on judges, just like the restraint on everyone else, is other people who matter: legislature, colleagues, subordinates, appellate bodies, legal institutions, local and foreign public opinion. Every judge's every ruling can be reversed somehow, and every person can be prevented from becoming a judge and removed once there. Under these constraints, convention is authoritatively made and followed, predictability ensuing.

Convention has been long in coming, however. Realists tend to divide themselves into camps for the purpose of promoting their own favored consequence as primal. While these camps provide something of a convention as to which consequences are legitimate (a consequence is illegitimate to the extent it receives no epistimologic support), they say nothing as far as prioritization and harmonization, as Sunstein does.[124] I believe conventionalizing the pragmatic inquiry is the need for which deliberative formulas serve best, positively identifying and normatively prioritizing consequences that matter.

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consequences . . . The significance of the slogan that judges are to find rather than make law is merely as a reminder that aggressive judicial law making is likely to undermine important systemic values. It is difficult to plan one's activities if the judges are liable at any moment to veer in a new direction; and judges who become too caught up in the essentially political role of making new policies are apt to lose their neutrality and become partisans . . . Partial judges may be all too predictable. (footnote omitted) Impartial judges are predictable only if their discretion is circumscribed, either by precise and detailed rules laid down by a legislature or by a commitment to deciding cases in accordance with precedent, which is how the common law is stabilized.").

[123] That Constitutional repeal is costlier than statutory makes a big difference to some, but not to me. *Cf.* JOHN HART ELY, DEMOCRACY AND DISTRUST (1980). The Founders realized the implication of combining the presence of a countermajoritarian branch and a costly amendment process. The high cost is well suited to the circumstance where the judiciary protects a political minority on moral grounds. If the majority wishes to have unethical or immoral behavior sanctioned by law, it must pay a high price for it. Also, the amendment process itself can be amended.

[124] Cass R. Sunstein, *Interpreting Statutes in Regulatory State*, 103 HARV. L. REV. 405 (1989).

Some, because of the various institutional constraints upon judges, are comfortable with their engaging in an unconstrained pragmatic inquiry, with the world of social agreements on their minds.[125] Others comfortable with pragmatism but not with absolute discretion might agree that judges should be limited to pragmatic factors identified by the parties, pragmatic factors derived from the text in the Constitution, or pragmatic factors identified by the parties that are derived from the text of the Constitution.[126]

Thus, a deliberative formula might depend, wholly or in part, on the pragmatic function, which depends on an estimation of the degree with which a deliberative choice comports (congrues) with one or more of the countless social agreements relating to just outcomes. Therefore, the pragmatic function includes as factors agreements relating to just outcomes, including due process, anti-subordination of minorities, horizontal and vertical equity, etc.:[127]

$$f(\text{Consequences}) = f[(\text{Coherence with Due Process}), (\text{Coherence with Anti-Subordination of Minorities}), (\text{Horizontal Equity}), (\text{Vertical Equity}), \ldots]$$

Each factor may be isolated as the sole dependent factor,[128] two or more factors may be considered with equal emphasis on each,[129] or two or more factors may be considered with

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[125] RICHARD A. POSNER, LAW, PRAGMATISM, AND DEMOCRACY (2003); WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION (1994).

[126] The preamble of the Constitution expressly mentions its bases and purposes, including forming a more perfect Union, establishing justice, insuring domestic tranquility, providing for the common defense, and securing the blessings of liberty. I am not sure why it is a surprise that judges would interpret laws with an eye towards these factors or subfactors within those ideals. Of our constitutional values, I believe due process encompasses concerns related to notice and equitable application of law; domestic tranquility incorporates the protection of minorities, appeasement of majority groups, promotion of deliberative democracy, or maintenance of elite democracy; common defense is concerned with external and internal threats to the union; general welfare relies on a impetus toward maximizing social welfare, the subject of most scholarly economic debate; and securing liberties certainly refers to the liberties identified in the bill of rights and elsewhere.

[127] Cass R. Sunstein, *Interpreting Statutes in Regulatory State*, 103 HARV. L. REV. 405 (1989).

[128] $f(\text{Meaning}_k) = f$[Congruence with Horizontal Equity], or
$f(\text{Meaning}_k) = f$[Congruence with Anti-Subordination of Minorities], or
$f(\text{Meaning}_k) = f$[Congruence with Due Process], or …

[129] $f(\text{Meaning}_k) =$ [Horizontal Equity + Anti-Subordination of Minorities + Due Process + …]

varying levels of emphasis.[130] The pragmatic function could purport to include whichever and however many social agreements any one judge may choose to consider, or the function can be restricted to include, for example, only those social agreements referenced by the parties or those tied to terms mentioned in the Constitution:

$f(Meaning_k) = f$[(Due Process), (Domestic Tranquility), (Common Defense), (General Welfare), (Securing Liberties), …]

Within each of these factors are subfactors representing ideals encompassed by Constitutional text[131] Each Constitutional factor and subfactor may receive varying degrees of emphasis:

$f(Meaning_k) =$ [(ec_1)(Due Process) + (ec_2)(Domestic Tranquility) + (ec_3)(Common Defense) + (ec_4)(General Welfare) + (ec_5)(Securing Liberties)]; where ec_k represents emphasis coefficients and $ec_k > 0$.

Due Process = [(ec_1)(notice) + (ec_2)(consistency) + …]; where ec_k represents emphasis coefficients and $ec_k > 0$.

Domestic Tranquility = [(ec_1)(protection of disempowered identity groups) + (ec_2)(appeasement of majority groups) + (ec_3)(ameliorating widespread pain and suffering) + (ec_4)(promoting transformative or deliberative democracy) + (ec_5)(maintaining elite democracy) + …]; where ec_k represents emphasis coefficients and $ec_k > 0$.

Common Defense = [(ec_1)(internal threats) + (ec_2)(external threats) + …]; where ec_k represents emphasis coefficients and $ec_k > 0$.

General Welfare = [(ec_1)(adjudicative efficiency) + (ec_2)(commercial efficiency) + …]; where ec_k represents emphasis coefficients and $ec_k > 0$.

Securing Liberties = [(ec_1)(freedom of speech) + (ec_2)(privacy) + (ec_3)(bodily integrity) + (ec_4)(religion) + (ec_5)(movement) +

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[130] $f(Meaning_k)$ = [(ec_1)(Horizontal Equity) + (ec_2)(Anti-Subordination of Minorities) + (ec_3)(Due Process) + …] where ec_k represents emphasis coefficients and $ec_k > 0$.

[131] f(Domestic Tranquility) = f[(protection of disempowered identity groups), (appeasement of majority groups), (ameliorating widespread pain and suffering), (promoting transformative or deliberative democracy), (maintaining elite democracy), …]
f(Common Defense) = f[(internal threats), (external threats)]
f(General Welfare) = f[(adjudicative efficiency), (commercial efficiency), …]
f(Securing Liberties) = f[(freedom of speech), (privacy), (bodily integrity), (religion), (movement), (association), …]

(ec_6)(association) + ...]; where ec_k represents emphasis coefficients and $ec_k > 0$.

VII. Intepretivism and Purposivism

A. Interpretivisim

In speaking of interpreting the Constitution, John Hart Ely spoke of those who reject the evaluation of consequences and policy as intepretivists. Those evaluating consequences are labeled non-interpretivists. I suggest that his interpretivists are deliberators who synthesize the text and intent functions:[132]

$$h(Deliberation) = h(Interpretivism) = h[f(Text), f(Intent)]$$

Therefore, the interpretivist deliberative formula incorporates both the textual and intent functions, either comprehensively or algorithmically. A comprehensive interpretivist deliberative formula expresses a combined evaluation of the textual and intentional functions, where an algorithmic formula evaluates each function in steps. Each function in a comprehensive formula may be considered with either equal[133] or varying levels of emphasis.[134] After evaluating each deliberative choice in this manner, the one scoring the highest is chosen:

$$\text{If } f[\text{Interpretivism}_a] > f[\text{Interpretivism}_b], \text{ then } h[\text{Applications}_a].$$

An algorithmic interpretivist formula evaluates the text function, but if the difference in value between deliberative choices fails to exceed a textual disposition quotient, the intent function is performed (Ex. 4):

$$\text{If } f[\text{Text}_a] - f[\text{Text}_b] > \text{(Textual Disposition Quotient), then } h[\text{Applications}_a].$$
$$\text{If } f[\text{Text}_a] - f[\text{Text}_b] \leq \text{(Textual Disposition Quotient), then } f(Intent).$$

B. Purposovism

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[132] JOHN HART ELY, DEMOCRACY AND DISTRUST 1 (1980) ("Today we are likely to call the contending sides [of constitutional theory] "interpretivism" and "noninterpretivism" – the former indicating that judges deciding constitutional issues should confine themselves to enforcing norms that are stated or clearly implicit in the written Constitution, the latter the contrary view that courts should go beyond that set of references and enforce norms that cannot be discovered within the four corners of the document."). Ely, as do some others, sharply distinguishes between constitutional and statutory deliberation. This author does not see much of a distinction. Another who holds Ely's view is STEVEN G. BREYER, ACTIVE LIBERTY (2005).

[133] $h(Interpretivism) = f(Text) + f(Intent)$

[134] $h(Interpretivism) = [(ec_1) f(Text) + (ec_2) f(Intent)]$; where ec_k represents emphasis coefficients and $ec_k > 0$.

Purposivists are similar to intentionalists in that they begin by focusing on the "mind" of the legislature. Purposivists, however, are not limited by an inquiry into what the legislature meant when it used a particular word, but what the legislature intended for the law to do. To determine whether a chosen interpretation accomplishes the purposes of the legislation, judges must consider the reasonably foreseeable consequences expected from it. While a purposive reconstruction of legislative intent is broader than an intentional one, its examination of consequences is probably restricted to those consequences non-tangentially related to the legislative purpose, a more limited set of considerations than that examined by a pragmatist.

Mary Sheen, Michael Livingston, and Deborah Geier describe 20th century tax adjudication as purposive.[135] When disputes over meaning occur, the Court has usually resolved it by identifying from the structure of the Tax Code good consequences that, presumably, Congress intended: the matching of income and deductions, prevention of tax avoidance, horizontal and vertical equity.[136] Vermeule and Sunstein, generally considered to by formalist, are open to the suggestion that the more highly structured a statutory scheme, think codes like the Tax Code or UCC, the more likely a judge can competently discern the consequences that matter.[137] They even suggest that an expert court, like the Tax Court, might properly consider purpose driven consequences even if district court judges should not.[138]

Thus, the purposivist deliberative formula incorporates both the intent and consequence functions. It expresses the degree with which a deliberative choice comports with the consequences intended by the legislature. Therefore, as opposed to unbridled pragmatism which

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[135] Mary L. Heen, *Plain Meaning, The Tax Code, and Doctrinal Incoherence*, 48 HASTINGS L.J. 771 (1997); Michael Livingston, *Practical Reason, "Purposivism," and the Interpretation of Tax Statutes*, 51 TAX L. REV. 667 (1996); Deborah A. Greier, *Commentary: Textualism and Tax Cases*, 66 TEMP. L. REV. 445 (1993).
[136] Mary L. Heen, *Plain Meaning, The Tax Code, and Doctrinal Incoherence*, 48 HASTINGS L.J. 771 (1997); Michael Livingston, *Practical Reason, "Purposivism," and the Interpretation of Tax Statutes*, 51 TAX L. REV. 667 (1996); Deborah A. Greier, *Commentary: Textualism and Tax Cases*, 66 TEMP. L. REV. 445 (1993).
[137] Cass R. Sunstein & Adrian Vermeule, *Interpretation and Institutions*, 101 MICH. L. REV. 885, 888 (2003).
[138] Cass R. Sunstein & Adrian Vermeule, *Interpretation and Institutions*, 101 MICH. L. REV. 885, 888 (2003).

places the whole matrix of social agreements under consideration, the purposivist formula concentrates on a smaller, contextualized set of consequences. It describes the degree with which a deliberative choice comports with consequences judges believe Congress finds particular important in such matters. Tax provides an example:

$$f(Meaning_k) = [(ec_1)(\text{income matching principle}) + (ec_2)(\text{horizontal equity}) + (ec_3)(\text{vertical equity}) + (ec_4)(\text{administrative burden on Treasury})];$$
where ec_k represents emphasis coefficients and $ec_k > 0$.

In substantially developed areas of law, purposes can be identified by previous decisions. Sunstein and Vermeule point out that even if judges find the correct purposes, there is still no guarantee they will competently choose the meaning comporting best with them. It will be interesting to identify the cases where the courts have been legislatively overturned in spite of their finding a purpose.

VIII. Conclusion

Contemporary legal scholarship encourages judges to consider what the words mean to those subject to it, what those who made the law intended for the words to mean, or the foreseeable consequences emanating from a given reading of the law (whatever the words may mean), or some combinations thereof. Supporters of a particular deliberative style promote their choice based on its ability to promote accuracy, predictability, or democratic legitimacy. Critics discourage the consideration of certain deliberative components, like legislative history, based on the same premises. The federal judiciary has remained non-committal, emphasizing in hard cases whichever function it finds best fits; administrative agencies are similarly agnostic.[139]

Yet, despite the study of judicial deliberation being in its infancy, we are at this point time in agreement on many factors that obviously ought not matter, pecuniary self-interest, chance, comparative wealth of the litigants. We are also in agreement that, along with text and intent, consequences matter, though we disagree staunchly as to when it matters and the degree. In fact, the relatively newly found acceptance for the consideration of consequences provides the impetus for this pseudo-mathematic, pseudo-scientific method of describing adjudicatory decision making. When do and ought we give more emphasis to text than to intention? Should text be considered first and, if not sufficiently dispositive, text second? When courts speak of text, are they trying to discern what the text means to the reader, what the legislature intended for it to mean, or what meaning is most efficiently administered by an administrative agency? When judges consider consequences, which ones trump others, and in which contexts? Must a consequence to be legitimately the subject of consideration be attached to the text of the Constitution? If not required but, nevertheless, the attachment to the Constitution's text is there, is that consequence emphasized?

[139] Cass R. Sunstein & Adrian Vermeule, *Interpretation and Institutions*, 101 MICH. L. REV. 885, 887 (2003).

Before attempting to answer grand questions, the next step for this formulaic deliberator, who also teaches federal tax law, is humbler: To examine 21st century Supreme Court tax cases and determine which functions and which factors within those functions the Court examines most. In *Gitlitz v. Commissioner*, the Court discounted appeals to purpose and administrative interpretations acquiesced to by intermediate legislatures in favor of coherence with 26 related tax statutes in the same part of the Code.[140] In *Banks v. Commissioner*, the Court is engaged in a common law, pragmatic analysis, because Congress, since the initial imposition of a federal tax on income has refused to identify by statute whose bears the responsibility for paying the tax on that income.[141] In fact, Congress and the Treasury refuse to define income itself, which begs the question how the Supreme Court's definition of income in *Glenshaw Glass* is to be read, literally, intentionally, pragmatically?[142] In *Banks*, the Court selected the deliberative choice that comported with notions of horizontal equity, though its commentators and lower courts found the prevailing interpretation in derogation of our commitment to enforcing civil rights and to a smaller degree vertical equity.[143] Most interesting, however, was that during the pendency of the case, Congress enacted a statute clearly indicating which deliberative choice they preferred (that amounts received by a plaintiff's attorney in satisfaction of a statutory award or contingency fee arrangement were constructively received, realized and recognized by the plaintiff, even if that means the tax on that amount exceeds what the plaintiff actually takes home in the case), the Court decided the case the same way, but made no mention of the Act as a grounds of support. In *Ballard v. Commissioner*, the Court interpreted the breadth and scope of the Tax Court's

[140] *Gitlitz v. Commissioner*, 531 U.S. 206, 211-20 (2001).
[141] *Commissioner of Internal Revenue v. Banks*, 543 U.S. 426 (2005).
[142] *Glenshaw Glass v. Commissioner of Internal Revenue*, 348 U.S. 426 (1955).
[143] *Commissioner of Internal Revenue v. Banks*, 543 U.S. 426 (2005).

internal rules.[144] Does the Court support its decisions there with the same deliberative considerations it uses in other cases?

These are but a few of the research projects, only in tax at that, designed to make adjudicative decision making slightly less mysterious for students, practitioners, maybe even federal administrative bureaucrats and judges. These projects are not in my opinion attempts to prove wrong Pound and Frank and Radin and other realists who successfully discredited the notion of finding the law through syllogistic deductions made from precedents. They were commenting at a time in history in which the formalist approach had staled and petrified, often producing poor results. Their victory for a more realistic approach is now coming under scrutiny by new textualists who point to the lack of predictability produced by an unmoored interpretive era. I believe Pound would find this "oscillation" in the natural course of things. I think they would find it natural for the citizenry having accepted consequences as a legitimate grounds for law to then desire regularity in that application. The desire for regularity will push towards convention, and convention towards paradigm, and the paradigm will stale and petrify and become arbitrary. But we are so, so, so far from that now.

[144] *Ballard v. Commissioner of Internal Revenue*, 544 U.S. 40 (2005).