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# Text or Consequences?

Jane S. Schacter<sup>†</sup>

## I. INTRODUCTION

The magnetic pull of taxonomy is a well-worn feature of scholarship in the realm of statutory interpretation and beyond. Casting competing theories in bold relief and in terms of what separates them produces sharp and lively exchanges. And so it has been with textualism in statutory interpretation. The approach was once dubbed the “new textualism,”<sup>1</sup> though presumably the moniker of novelty can be dropped now that twenty years have passed since textualism first appeared, close on the heels of its avatar, Justice Antonin Scalia, taking his seat on the Supreme Court. In those two decades, textualism has been set against intentionalism, purposivism, dynamic interpretation, pragmatism, and other worthy competitors in a vigorous normative debate.<sup>2</sup>

As part of this contest over interpretive first principles, Justices Scalia and Stephen Breyer have engaged one another repeatedly, and they show no sign of fatigue as they continue a long-running interpretive road show that has brought this debate to various venues and to C-SPAN viewers.<sup>3</sup> The lines of

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<sup>1</sup> See William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 623 (1990).

<sup>2</sup> See generally WILLIAM N. ESKRIDGE, JR. ET AL., *CASES AND MATERIALS ON LEGISLATION* 765-98 (4th ed. 2007).

<sup>3</sup> Justice Scalia’s core ideas are concisely laid out in ANTONIN SCALIA, *A MATTER OF INTERPRETATION* (1997). Justice Breyer’s competing views on legislative history are laid out in Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845 (1992), and his broader views on the centrality of statutory purpose are laid out in STEPHEN BREYER, *MAKING OUR DEMOCRACY WORK* 88-105 (2010). The two have debated each other numerous times. See, e.g., Brooke Bellomy, *Justices Scalia, Breyer Speak at Lecture Series*, DAILY TOREADOR (Nov. 14, 2010), [http://www.dailytoreador.com/news/article\\_7bf7c942-f04a-11df-b524-0017a4a78c22.html](http://www.dailytoreador.com/news/article_7bf7c942-f04a-11df-b524-0017a4a78c22.html); *Constitutional Conversation* (C-SPAN television broadcast Apr. 21, 2005), available at <http://www.c-spanvideo.org/program/Conversation>; *Constitutional Issues* (C-SPAN television broadcast Dec. 5, 2006), available at <http://www.c-spanvideo.org/program/ConstitutionalIss>; *Original Intent and a Living Constitution* (C-SPAN television

the overall debate are, by now, familiar.<sup>4</sup> Scalia stresses the singular legitimacy and crisp constitutional pedigree of statutory text, and the imperative of suppressing judicial policymaking.<sup>5</sup> Breyer trumpets the greater commitment of his approach to values like meaningful legislative supremacy, the functional value of consulting legislative history, and the pragmatic virtues of a nondogmatic approach that is open to an eclectic range of interpretive resources.<sup>6</sup>

It has become somewhat common for observers of this debate to proclaim that “we are all textualists now.”<sup>7</sup> Indeed, some commentators have flatly declared the triumph of textualism, though it is uncertain just what that means in light of the distinctions drawn by some of the same observers between “moderate” and “aggressive” textualism, and associated arguments about the convergence of text- and intent-based theories.<sup>8</sup> The convergence hypothesis has been resisted in some quarters based on the belief that textualism is implacably “radical” at its conceptual core.<sup>9</sup> This radicalism, however, has been ascribed more to scholarly proponents of textualism than to those who practice it as judges.

It is the gap between theory and practice that I would like to reflect on in this short essay. To borrow from the law and society framework and adapt the idea for our purposes, let us call it the gap between textualism on the books (its formal theory) and textualism in action (how it is actually applied in

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broadcast Mar. 23, 2010), available at <http://www.c-spanvideo.org/program/Intenta>; *Principles of Constitutional and Statutory Interpretation* (C-SPAN television broadcast Oct. 26, 2009), available at <http://www.c-spanvideo.org/program/Statuto>.

<sup>4</sup> For a concise overview, see Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 YALE L.J. 1750, 1761-68 (2010).

<sup>5</sup> See generally SCALIA, *supra* note 3.

<sup>6</sup> See generally BREYER, *supra* note 3; Breyer, *supra* note 3.

<sup>7</sup> See Jonathan R. Siegel, *Textualism and Contextualism in Administrative Law*, 78 B.U. L. REV. 1023, 1057 (1998) (“In a significant sense, we are all textualists now.”); see also, e.g., William N. Eskridge, Jr., *All About Words: Early Understandings of the “Judicial Power” in Statutory Interpretation, 1776-1806*, 101 COLUM. L. REV. 990, 1090 (2001) (“[T]he proposition that statutory text . . . ought to be the primary source of statutory meaning . . . needs little defense today. We are all textualists.”); Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 COLUM. L. REV. 1, 43 (2006) (“[W]e are all textualists in an important sense.”); Marjorie O. Rendell, *2003—A Year of Discovery: Cybergenics and Plain Meaning in Bankruptcy Cases*, 49 VILL. L. REV. 887, 887 (2004) (“We are all textualists now.”).

<sup>8</sup> See, e.g., Molot, *supra* note 7, at 43; Caleb Nelson, *What Is Textualism?*, 91 VA. L. REV. 347, 348-49 (2005).

<sup>9</sup> See generally Jonathan R. Siegel, *The Inexorable Radicalization of Textualism*, 158 U. PA. L. REV. 117 (2009).

cases). I have no quarrel with the idea that textualism on the books can be quite radical. I would like to suggest, though, that textualism in action can be, and often is, deployed in a far more pragmatic way, and that highlighting that point can suggest some new normative inquiries. To develop this point, I will use as my frame of reference the interpretation of federal statutory law,<sup>10</sup> and focus on textualism's most famous adherent. That seems only appropriate as this symposium coincides with Justice Scalia's twenty-fifth anniversary on the Supreme Court. The particular point I would like to press is this: while textualism on the books conspicuously eschews the legitimacy of consequentialism in statutory interpretation, textualism in action often uses strikingly consequentialist methods. In other words, it can and does argue for and against particular interpretations of statutory language based explicitly on the policy consequences that would follow—consequences that are *not* imputed to Congress as part of the legislative purpose.

I mean something less global and more refined than a general claim that “textualism is as activist as anything else.” In particular, I mean the specific idea that judicially determined policy consequences can, and often do, figure quite prominently in textualist reasoning and method. This idea is, of course, anathema to the intellectual claims and premises of textualist theory. Indeed, on occasion, Justice Scalia has gone out of his way to dissociate himself explicitly from this style of argument, saying, for example, “I do not think . . . that the avoidance of unhappy consequences is adequate basis for interpreting a text.”<sup>11</sup> Revealing and probing this aspect of textualism in practice can give us a fuller and more accurate picture of the method, and open up an important set of prescriptive questions that are missed when we take textualism at face value and debate its wisdom only as an abstraction.

## II. DISCUSSION

Textualism's consequentialist tendencies are apparent at three levels of analysis: general claims of substantive goods it supposedly produces; the textual canons it accommodates

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<sup>10</sup> The idea of looking at textualism in action ought to extend to state courts as well, though that question is beyond my scope here. *See generally* Gluck, *supra* note 4 (gathering empirical evidence suggesting “modified textualism” is alive and well in the state courts).

<sup>11</sup> *Nixon v. Mo. Mun. League*, 541 U.S. 125, 141 (2004) (Scalia, J., concurring).

and employs; and particular statutory readings related to policy consequences.

First, at the most general level, textualism is itself conceived and justified in strikingly consequentialist terms. Consider the many salutary results claimed by its proponents. Among other things, textualism is said to encourage judicial restraint;<sup>12</sup> promote democratic values;<sup>13</sup> avoid the particular “harm” that results from permitting courts to “psychoanalyze[] Congress rather than read[] its laws”;<sup>14</sup> curb the undue influence of lobbyists, interest groups, and unelected staffers;<sup>15</sup> and further the rule of law by making the meaning of statutory law more accessible to citizens.<sup>16</sup> And the list might go on.<sup>17</sup>

To be fair, the justification for textualism might be restated as more intrinsic than instrumental by focusing on the familiar claim that the Constitution demands textualist methodology.<sup>18</sup> But that claim depends on a contestable view of the Constitution—and one that is itself bound up with, and inspired by, the institutional consequences it is said to produce. Moreover, the other, and more obviously consequentialist, claims for textualism enumerated above persist. Rather than have a somewhat metaphysical debate about the difference between a consequence and a claim of inherent worth, then, let us simply stipulate that proponents of textualism commonly tout several desirable consequences that they claim their approach will produce.

Second, Justice Scalia’s textualism accepts and accommodates a number of canons that can be, and have been,

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<sup>12</sup> SCALIA, *supra* note 3, at 17-18 (arguing that intentionalism allows judges to “pursue their own objectives and desires” and should thus be replaced by textualism, which will confine them to “what the legislature said,” not “what it *meant*”).

<sup>13</sup> See *Chisom v. Roemer*, 501 U.S. 380, 417 (1991) (Scalia, J., dissenting) (arguing that textualism will give Congress “a sure means by which it may work the people’s will”).

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

<sup>15</sup> See *Blanchard v. Bergeron*, 489 U.S. 87, 98-99 (1989) (Scalia, J., concurring); SCALIA, *supra* note 3, at 32-37.

<sup>16</sup> See SCALIA, *supra* note 3, at 17 (comparing intentionalism to Nero’s “posting edicts high up on the pillars, so that they could not easily be read”).

<sup>17</sup> See generally John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2476 & n.319 (2003) (citing portions of Lon L. Fuller, *The Case of the Speluncean Explorers*, 62 HARV. L. REV. 616, 636 (1949), as a defense of formalism of the textualist sort in terms of its costs and consequences).

<sup>18</sup> SCALIA, *supra* note 3, at 34-35.

deployed in consequentialist fashion.<sup>19</sup> As a general matter, Scalia has criticized substantive canons as questionable “dice-loading rules.”<sup>20</sup> But he has approved the use of what he calls “established canons of construction,” which he suggests can be properly employed to show that “some permissible meaning other than the ordinary one applies.”<sup>21</sup> The mother of all consequentialist canons is undoubtedly the rule that statutes should not be construed to produce absurd results. By definition, the absurdity doctrine is oriented precisely to avoiding bad policy consequences. In a textualist critique of this canon, John Manning collected a number of opinions in which Scalia (as well as textualist Judge Frank Easterbrook) employed it or approved of its use.<sup>22</sup> Manning argues that textualism ought to banish the absurdity canon—or, on my reading of his argument, drive the canon underground by reframing it in terms of background conventions.<sup>23</sup> His own critique notwithstanding, however, Manning freely acknowledges that neither Justice Scalia—nor for that matter Judge Easterbrook—have jettisoned absurdity in the name of textualism.<sup>24</sup> Interestingly, Scalia has not only applied the absurdity canon on its own, but has, on occasion, linked it with more semantically oriented canons, such as *expressio unius*,<sup>25</sup> thus giving those kinds of canons their own consequentialist twist.

The consequentialist use of canons as part of textualism is not limited to absurdity. Other canons deemed “established”

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<sup>19</sup> On the general ways in which canons are associated with the justices’ ideologies, see James J. Brudney & Corey Ditslear, *Canons of Construction and the Elusive Quest for Neutral Reasoning*, 58 VAND. L. REV. 1 (2005).

<sup>20</sup> SCALIA, *supra* note 3, at 28-29.

<sup>21</sup> *Chisom v. Roemer*, 501 U.S. 380, 404 (1991) (Scalia, J., dissenting).

<sup>22</sup> See Manning, *supra* note 17, at 2419 nn.122-23 (citing *Burns v. United States*, 501 U.S. 129, 135 (1991) (Scalia, J., joining majority opinion); *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 527-28 (1989) (Scalia, J., concurring); *City of Columbus v. Ours Garage & Wrecker Serv., Inc.*, 536 U.S. 424, 449 n.4 (2002) (Scalia, J., dissenting); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 452 (1987) (Scalia, J., concurring); *United States v. Seaboard Sur. Co.*, 236 F.3d 883, 885 (7th Cir. 2001) (Easterbrook, J.); *Kerr v. Puckett*, 138 F.3d 321, 323 (7th Cir. 1998) (Easterbrook, J.)).

<sup>23</sup> Manning, *supra* note 17, at 2419-31; see also John C. Nagle, *Textualism’s Exceptions*, ISSUES IN LEGAL SCHOLARSHIP, Nov. 2002, <http://www.bepress.com/cgi/viewcontent.cgi?article=1035&context=ils>.

<sup>24</sup> Manning, *supra* note 17, at 2419-20, 2471.

<sup>25</sup> *Expressio unius est exclusio alterius* reflects the idea that including particular things in a statute implies the exclusion of others. See BLACK’S LAW DICTIONARY 620 (8th ed. 2004). Justice Scalia has indicated support for the idea that the absurdity principle imposes a limitation on *expressio unius*. See *Pauley v. Bethenergy Mines, Inc.*, 501 U.S. 680, 719-20 (1991) (Scalia, J., dissenting); *Burns v. United States*, 501 U.S. 129, 136-38 (1991) (Scalia, J., joining majority opinion).

by Scalia have also been used in this way.<sup>26</sup> For example, Scalia has invoked clear statement rules in ways explicitly calibrated to preventing policy consequences deemed inconsistent with the normative tenets underlying such rules. In the realm of federalism, for example, he argued in *Rapanos v. United States* against an interpretation of the Clean Water Act that would “authorize an unprecedented intrusion into traditional state authority.”<sup>27</sup> There are substantial questions about whether the clear statement rule employed in *Rapanos* can credibly be considered well established given its recent vintage, but the pertinent point for our purposes is the manner in which it was used, not the fact of use itself.

In the realm of disability law, Justice Scalia has used a clear statement rule to argue against the application of Title III of the Americans with Disabilities Act to foreign-flag ships. In this context, he appealed to, among other things, the risk of subjecting ships to inconsistent international regulatory requirements.<sup>28</sup> These arguments can be reframed as matters of reasonable meaning (as in, “what sensible Congress would trample state prerogatives or create the risk of international commercial chaos in this fashion?”), but that strikes me as a thin defense against the claim of canonical consequentialism. We can go through a similar exercise with respect to other canons as well.<sup>29</sup>

Third, and perhaps most significant for my analysis, textualism can be deployed in a consequentialist fashion when, without regard to canons, particular readings of a statutory term are preferred or disfavored based on the policy consequences that such readings are thought likely to produce. I am thinking here of instances in which the relevant policy consequences are *not* attributable in a specific way to congressional choice. Take, for example, Justice Scalia’s

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<sup>26</sup> For a discussion of canons deemed “established” by Scalia, and a critique of the category itself, see Philip P. Frickey, *Interpretive-Regime Change*, 38 LOY. L.A. L. REV. 1971, 1987-92 (2005).

<sup>27</sup> *Rapanos v. United States*, 547 U.S. 715, 738 (2006).

<sup>28</sup> *Spector v. Norwegian Cruise Line Ltd.*, 545 U.S. 119, 149 (2005) (Scalia, J., dissenting).

<sup>29</sup> See Brudney & Ditslear, *supra* note 19, at 13 nn.48-51 (listing examples of opinions that utilize canons, several of which are authored or joined by Justice Scalia, including: *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 452-53 (2002) (*expressio unius*); *Circuit City Stores v. Adams*, 532 U.S. 105, 114-15 (2001) (*esjudem generis*); *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 482, 487 (1999) (Whole Act Rule); and *Ford Motor Co. v. EEOC*, 458 U.S. 219, 225-26, 226 n.8, 233 n.19 (1982) (*in pari materia*)); see also *supra* text accompanying note 22.

*Rapanos* opinion interpreting the Clean Water Act. He not only invoked the clear statement rule alluded to above, but also launched a screed against the excesses of federal regulation, citing \$1.7 billion in annual costs incurred by those seeking wetlands permits and helping to make a consequentialist case for his reading of the statutory terms.<sup>30</sup>

Consider, as well, Scalia's dissent in *Babbitt v. Sweet Home*.<sup>31</sup> In vigorously disputing the majority's construction of the term "take" in the Endangered Species Act to include habitat modification, Scalia made many arguments, including that

it produces a result that no legislature could reasonably be thought to have intended: A large number of routine private activities—for example, farming, ranching, roadbuilding, construction and logging—are subjected to strict-liability penalties when they fortuitously injure protected wildlife, no matter how remote the chain of causation and no matter how difficult to foresee (or to disprove) the "injury" may be (e.g., an "impairment" of breeding).<sup>32</sup>

Note that this argument collects and emphasizes a set of consequences thought to be beyond the pale, but does not attempt to impute this concern to the enacting Congress in any specific or factual sense. It loosely invokes a hypothetical Congress, but employs a rhetorical device that, in previous work, I have argued is akin to "the Court more or less play[ing] ventriloquist to a hypothetical congressional dummy" because "[t]he important move here is the one made by the Court, not Congress: the identification of the policy baseline against which the range of plausible legislative meanings is gauged."<sup>33</sup>

In an article about the 1998 Supreme Court term, I called this category of interpretive resources "judicially-selected policy norms."<sup>34</sup> When Justice Scalia argued in various cases during that term, for example, that a proffered reading of a statute should be rejected because it would undermine settlement incentives, lead to expensive factual inquiries, generate boondoggles, create a zany system, or produce perverse policy results of various stripes,<sup>35</sup> he chose the critical

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<sup>30</sup> *Rapanos*, 547 U.S. at 721.

<sup>31</sup> *Babbitt v. Sweet Home Chapter of Cmty. for a Great Or.*, 515 U.S. 687, 714 (1995) (Scalia, J., dissenting).

<sup>32</sup> *Id.* at 721-22.

<sup>33</sup> Jane S. Schacter, *The Confounding Common Law Originalism in Recent Supreme Court Statutory Interpretation: Implications for the Legislative History Debate and Beyond*, 51 STAN. L. REV. 1, 25 (1998).

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

<sup>35</sup> *See id.* at 63-71 app. B.

policy norm, used it to guide interpretation, and did so in a straightforwardly consequentialist way.

Nor was he alone in using this mode of analysis. To the contrary, I found that mode to be utterly routine—it appeared in 73% of that term’s statutory interpretation opinions—and to cross conventional interpretive divides.<sup>36</sup> The regular use of these consequentialist arguments, along with an eclectic array of other resources, prompted me to suggest that the idea of “common law originalism” described the Supreme Court’s interpretive practices better than any of the conventional “isms” could.

My own analysis looked only at a single Supreme Court term, but the evidence suggests it was no outlier. Nick Zeppos’s analysis of a random sample of Supreme Court cases decided between 1890 and 1990 reflected an eclectic range of resources, as well as significant use of what he called “[c]onsequentialist or practical considerations.”<sup>37</sup> He found these considerations to be used in nearly one-third of the cases. That is less frequent usage than I found, though still substantial.<sup>38</sup>

More relevant for our purposes, perhaps, is that subsequent scholarly analyses of the Supreme Court’s practices in statutory cases have also found frequent use of judicial policy norms.<sup>39</sup> Indeed, it has persisted in a variety of substantive contexts.<sup>40</sup> And recent work sheds some new light on the use of these judicial norms. Anita Krishnakumar has disaggregated the category by distinguishing between norms

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<sup>36</sup> *Id.* at 18 tbl.1.

<sup>37</sup> Nicholas Zeppos, *The Use of Authority in Statutory Interpretation: An Empirical Analysis*, 70 TEX. L. REV. 1073, 1097 (1992).

<sup>38</sup> I suspect the difference is attributable to our having defined the category differently. The operative categories here can be somewhat slippery because, as I suggested above, the rhetoric can be deployed to impute the consciousness of consequences to Congress, not the interpreter. An argument that simply invokes *x* consequence to defeat an interpretation might be counted differently than one that says, “It simply could not have been Congress’s intent to produce *x*.” In substance, however, they are often the same, and I would treat them as such, unless the opinion cites some specific evidence of congressional concern with the relevant consequence.

<sup>39</sup> See Anita S. Krishnakumar, *Statutory Interpretation in the Roberts Court’s First Era: An Empirical and Doctrinal Analysis*, 62 HASTINGS L.J. 221, 224-25, 228-29, 235-38 (2010); Miranda McGowan, *Do as I Do, Not as I Say: An Empirical Investigation of Justice Scalia’s Ordinary Meaning Method of Statutory Interpretation*, 78 MISS. L.J. 129, 173 (2008); Alan Schwartz, *The New Textualism and the Rule of Law Subtext in the Supreme Court’s Bankruptcy Jurisprudence*, 45 N.Y.L. SCH. L. REV. 149, 150-55, 192-97 apps. A-B (2000); Nancy Staudt et al., *Judging Statutes: Interpretive Regimes*, 38 LOY. L.A. L. REV. 1909, 1911, 1960 (2005). Frank Cross found less frequent usage of practical considerations, but also appears to have used a more restrictive understanding of the term. See FRANK B. CROSS, *THE THEORY AND PRACTICE OF STATUTORY INTERPRETATION* 134-43, 147-48 (2009).

<sup>40</sup> See, e.g., Schwartz, *supra* note 39 (bankruptcy); Staudt, *supra* note 39 (tax).

oriented toward “legal landscape coherence” and those oriented toward “statute-specific coherence,” and has noted that Justice Scalia favors the former category.<sup>41</sup> Her analysis of the early Roberts Court supplies many examples of these kinds of consequentialist arguments, including arguments by Scalia, for whom she found “[p]ractical [c]onsequences” to be the third-most used interpretive tool, following only “[t]ext/[p]lain [m]eaning” and “Supreme Court [p]recedent.”<sup>42</sup>

Similarly, in an extended analysis of Scalia’s dissents, Miranda McGowan documented that he regularly employed a consequentialist style of argument.<sup>43</sup> In her data, this style of argument appeared in some 70% of the dissenting opinions.<sup>44</sup> She also somewhat disaggregated the category. Canvassing the various dissents, she separated out, for example, what she called “absurdity-lite” arguments that stressed the policy anomalies that would result from a given interpretation; the approach of “[p]utting [p]urposes in Congress’s [m]outh”; the appeal to what Justice Scalia often calls “common sense”; and the frequent concern with the “[w]orkability” of different interpretations of the statute.<sup>45</sup> These are recurring interpretive themes, each one in some way focusing on the results thought to flow from a particular reading of statutory language.

### III. CONCLUSION

Given that I am not, myself, a textualist, this might be the point in the paper where you expect me to say “gotcha.” And while that is always an attractive possibility, I confess, I think the better response might be something more like “phew.” Textualism’s ability to be deployed in a consequentialist way is a virtue, not a vice. This hardly cures all of textualism’s ills, but the fact that the approach can be, and sometimes is, used with a pragmatic sensitivity to policy consequences is a source of some reassurance against the fears of textualist mindlessness.<sup>46</sup> But

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<sup>41</sup> See Krishnakumar, *supra* note 39, at 225-27.

<sup>42</sup> See *id.* at 250-51 tbl.2.

<sup>43</sup> McGowan, *supra* note 39, at 175.

<sup>44</sup> *Id.* at 173.

<sup>45</sup> *Id.* at 176, 183-88.

<sup>46</sup> See *W. Va. Univ. Hosps. v. Casey*, 499 U.S. 83, 113 (1991) (Stevens, J., dissenting) (criticizing textualism for interpreting laws through “thick grammarian’s spectacles”); BREYER, *supra* note 3, at 91 (textualism is missing necessary context for language); Philip P. Frickey, *From the Big Sleep to the Big Heat*, 77 MINN. L. REV. 241, 250, 258 (1992) (textualism as literalism).

its concern with consequences should be acknowledged more forthrightly so that it can be analyzed more systematically. When textualism's defenders—including Justice Scalia—deny this trait and seek shelter in formalist justification alone, productive normative analysis of this sort is more easily avoided. The basic question to be addressed, I suggest, is not *whether* an interpretive approach is consequentialist, but *how* it is. We ought, then, to move from the mode of revelation to one of evaluation—that is, to a mode in which the particular ways that different interpretive methodologies that encourage interpreters to weigh policy consequences can be compared, contrasted, and assessed in careful relation to one another. That is an important set of comparative questions to which scholars might productively turn.

Textualism, intentionalism, purposivism, and virtually any credible approach to statutory interpretation will begin with the language, but the approach will be crucially shaped by how it selects from among the plausible interpretations. That is where, we have seen, the consideration of consequences enters the analysis. Plainly, textualism does not consider consequences in the same way that intentionalism or purposivism does, for it does so by using text and canons as the launching pad for this analysis. Is that the best way to consider consequences? Setting aside questions of candor, it is quite threadbare. It gives the interpreter little with which to work to identify and assess the policy consequences likely to flow from different understandings of the contested statutory language.

Given the ubiquity of some form of consequentialist concern across interpretive methods, then, judges, scholars, and lawyers might begin to think more systematically about the appropriate *source* of the norms that will guide interpreters as they sort through arguments about consequences. One obvious source of norms is Congress itself. On this point, the ability of intent- or purpose-based approaches to assimilate information about the policy consequences that Congress sought or feared gives those approaches a functional advantage over textualism. And it suggests the particular utility of legislative history. Moreover, legislative history has a role to play in assessing policy consequences even *without* fully embracing intentionalist or purposivist methods. Putting aside the question of what members of Congress may have wanted, congressional reports and debates reflect a sustained analysis of the relevant policy area. Irrespective of which interpretive theory is chosen, in other words, these reports and debates are

likely to be a relatively rich source of information about the policy area, and therefore about the possible consequences associated with different interpretations of the statute.

Legislative history is not, however, the only plausible source of information about the relevant policy consequences. Briefing by lawyers, including Brandeis briefs, might productively address that issue. Similarly, the view of relevant administrative agencies about likely consequences might be sought out and considered by judges, even in cases in which the agency's own interpretation of the statute is not at issue. In this way, interpretive litigation might function in appropriate cases as a forum for developing evidence, in a focused way, about the results likely to flow from different interpretations. Questions of fact will not and should not replace questions of law, but they might usefully inform them. Treating the policy consequences of different interpretations as a factual matter bearing on interpretation would likely have some procedural implications. For example, encouraging policy analysis of this sort might entail loosening the grip of the traditional distinction between legislative and adjudicative facts in appropriate cases.<sup>47</sup> And this idea might affect how and when summary judgment motions are used in statutory interpretation cases. These implications—and others—ought to be identified and examined in a thoughtful way.

To have any shot at improving matters, all of these possibilities would require some willingness on the part of judicial interpreters to be forthright about the role of consequentialist analysis, among other interpretive tools. Formidable institutional and cultural forces work against openly embracing the idea that judges ought to function as, essentially, problem solvers with some necessary policy latitude to work through the implications of plausible interpretations of a statute. Scholars might play a useful role in encouraging that shift by probing less the theory, and more the practice, of interpretive methodology.

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<sup>47</sup> On the distinction between legislative and adjudicative facts, see 2 KENNETH C. DAVIS & RICHARD J. PIERCE, JR., *ADMINISTRATIVE LAW TREATISE* § 10.5 (3d ed. 1994).