

## BOOK REVIEW

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### THE POLITICS OF STATUTORY INTERPRETATION

READING LAW: THE INTERPRETATION OF LEGAL TEXTS.  
By Antonin Scalia and Bryan A. Garner. St. Paul:  
West. 2012. Pp. 567. \$49.95.

*Reviewed by Margaret H. Lemos\**

#### ABSTRACT

*In a new book, Reading Law: The Interpretation of Legal Texts, Justice Antonin Scalia and Bryan Garner describe and defend the textualist methodology for which Justice Scalia is famous. For Scalia and Garner, the normative appeal of textualism lies in its objectivity: by focusing on text, context, and canons of construction, textualism offers protection against ideological judging—a way to separate law from politics. Yet, as Scalia and Garner well know, textualism is widely regarded as a politically conservative methodology. The charge of conservative bias is more common than it is concrete, but it reflects the notion that textualism narrows the scope of federal law in ways that are attractive to Republicans but not to Democrats. Scalia and Garner hotly deny that charge. Like their critics, however, they fail to develop the argument, or to confront the association of textualism and conservatism in contemporary legal and political rhetoric.*

*This Review explores the connections between textualist methodology and conservative politics, and between methodological and political argument more generally. It shows that textualism is not inherently conservative in design, nor does it reliably produce conservative results. Instead, I argue,*

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\* Professor, Duke University School of Law. Thanks to Curt Bradley, Guy-Uriel Charles, Max Minzner, Rafael Pardo, Dana Remus, Neil Siegel, Kevin Stack, and participants at faculty workshops at the University of Pennsylvania and Emory Law Schools, for helpful comments on earlier drafts. Thanks as well to Douglas Dreier, and to Jane Bahnson of the Duke Law Library, for terrific research assistance.

*the link between textualism and conservatism is historically contingent. It was fused in the rise of the New Right in the 1980s, when conservative judges and politicians embraced textualism in statutory interpretation (together with originalism in constitutional interpretation) as antidotes to the “judicial activism” of the Warren and Burger Courts. Adopting the language of methodology gave Reagan-era pundits an efficient—and legal—means of critiquing existing law and pushing for legal change.*

*Although the story here is about textualism, the lesson is broader. To understand the relationship between textualism and conservatism is to appreciate the political potential of all methodological argument. The features that make methodology most law-like—its facial neutrality and its generality—may also, paradoxically, increase its value as a political tool. By focusing on the “how” of the law, methodology transcends individual cases and issues; it provides a basis for attacking wide swaths of judicial doctrine at once. Precisely because methodology offers a seemingly neutral basis for criticizing judges across a range of cases, it is a uniquely potent force for (and against) legal change—which, in turn, makes it an especially valuable device for popular and political contestation about the law. In this sense, debates over methodology may often, perhaps inevitably, have roots in something much bigger, something we might properly call “political.”*

#### INTRODUCTION

In *Reading Law: The Interpretation of Legal Texts*, Justice Antonin Scalia and his co-author, legal lexicographer Bryan Garner, provide a blueprint for the textualist mode of statutory interpretation for which Scalia is famous.<sup>1</sup> The bulk of the book is devoted to explaining seventy “[s]ound [p]rinciples of [i]nterpretation,”<sup>2</sup> many of them complicated canons of statutory construction. As such, the “treatise”<sup>3</sup>—as Scalia and Garner describe it—represents a valuable resource for anyone engaged in the work of statutory interpretation. Yet *Reading Law* is “unapologetically normative.”<sup>4</sup> The authors present textualism as a model of what judges should be doing when they interpret texts, not as a description of what most judges already do.<sup>5</sup>

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1 ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* (2012). As the name suggests, *Reading Law* is cast as a treatise on the interpretation of *all* legal texts, including constitutions and contracts as well as statutes. Nevertheless, the weight of the discussion is devoted to principles that are associated primarily, if not exclusively, with statutory interpretation.

2 *Id.* at 47.

3 *Id.* at 6.

4 *Id.* at 9.

5 Indeed, the final thirteen sections are devoted to “[e]xpos[ing] . . . [f]alsities” that amount to competing theories of interpretation or conventional critiques of textualism. *Id.* at 341–410.

The preface and introduction to the book make the normative case for textualism, contributing to an ever-expanding literature on the merits of competing interpretive methodologies. The appeal of textualism, for Scalia and Garner, is that it cabins the judicial role. Textualism instructs judges to give “democratically prescribed texts . . . their fair meaning,” while its rivals—interpretive theories that seek to promote the purpose or intent of the legislature—invite judges to decide cases according to their own “notions of public policy.”<sup>6</sup> Textualism, the authors argue, offers protection against ideological judging; a way to separate law from politics.<sup>7</sup>

Scalia and Garner’s insistence that textualism is politically neutral (indeed, *neutralizing*) is hardly happenstance. As the authors well know, textualism is widely regarded as a politically conservative methodology.<sup>8</sup> But, despite the prevalence of that charge, it has been relegated almost entirely to footnotes and passing barbs, and remains remarkably undertheorized. What, exactly, does it mean to say that textualism is conservative? Is it enough to observe that textualism’s most dedicated practitioners on the federal bench are overwhelmingly conservative in their political orientation?<sup>9</sup> If so, how does one explain why textualism seems to hold a unique appeal for conservatives—and, further, why many conservative judges eschew textualism

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6 *Id.* at 3.

7 *See id.* at 16–17.

8 *See* Frank H. Easterbrook, *Judicial Discretion in Statutory Interpretation*, 57 OKLA. L. REV. 1, 18–19 (2004) (“One theme you hear in the press, the halls of Congress, and the legal academy is that the move to textualism is political, a conservative reaction to laws enacted by Congresses to the left of those appointing the judges.”); Alexander Volokh, *Choosing Interpretive Methods: A Positive Theory of Judges and Everyone Else*, 83 N.Y.U. L. REV. 769, 771 (2008) (“Textualism is a ‘conservative’ method of statutory interpretation, according to the conventional wisdom.”); *infra* notes 66–69, 74, and accompanying text.

9 *See* Orin S. Kerr, *Shedding Light on Chevron: An Empirical Study of the Chevron Doctrine in the U.S. Courts of Appeals*, 15 YALE J. ON REG. 1, 28 (1998) (footnote omitted) (“[T]extualism is strongly associated with Reagan and Bush judges, and more dynamic forms of statutory interpretation are known to be more popular among appointees of Democratic Presidents.”); Thomas J. Miles & Cass R. Sunstein, *Do Judges Make Regulatory Policy? An Empirical Investigation of Chevron*, 73 U. CHI. L. REV. 823, 828–29 (2006) (“[A]s an empirical matter, the more conservative justices (Justices Antonin Scalia and Clarence Thomas) have embraced ‘plain meaning’ approaches and the more liberal justices have not.”); Caleb Nelson, *What is Textualism?*, 91 VA. L. REV. 347, 373 (2005) (noting that “today’s textualists tend to be politically conservative”); Nicholas S. Zeppos, *The Use of Authority in Statutory Interpretation: An Empirical Analysis*, 70 TEX. L. REV. 1073, 1087–88 (1992) (associating liberal judges with evolutive methods and conservatives with textualism).

in favor of other methodologies, or follow an eclectic approach that borrows from several approaches while committing to none?

Rather than seeking to explain textualism's appeal to some conservative judges, critics have focused on its consequences. Textualism, we are told, injects an anti-regulatory bias into the interpretation of statutes. It therefore tends to constrict the scope of federal law.<sup>10</sup> Although critiques of this sort rarely spell out the causal story, the implication is that conservative judges are drawn to textualism—consciously or unconsciously—because it produces results in line with their policy preferences.

The claim that textualism is a conservative methodology offers an interesting twist on familiar arguments concerning the relationship between law and politics more generally. Legal realists long have argued that judges' decisions are driven primarily by their personal policy preferences.<sup>11</sup> Today, such arguments typically are associated with the so-called "attitudinal model" of judicial decision making, which focuses on Supreme Court Justices and "holds that the Supreme Court decides disputes in light of the facts of a case vis-à-vis the ideological attitudes and values of the justices."<sup>12</sup> Attitudinalists and other realists tend to focus on outcomes while dismissing the importance of legal reasoning.<sup>13</sup> That focus has drawn fire from legal scholars who suggest that some of the patterns that attitudinalists deem ideological may, in fact, reflect the influence of methodology and other "legal" factors. For example, while attitudinalists cite Justice Black's unflagging support for First Amendment rights as evidence of his liberalism, the decisions could just as easily be explained by the Justice's commitment to a strict construction of the "unequivocal command" of the First Amendment.<sup>14</sup> The notion that methodology is itself political suggests an answer to such challenges. If Justices choose particular interpretive approaches to pave the way to desired policy results, then attitudinalists are not mistaking law for politics—instead, it is politics all the way down.

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10 See *infra* notes 66–69, 74 and accompanying text.

11 See Matthew C. Stephenson, *Legal Realism for Economists*, 23 J. ECON. PERSP. 191, 196–97 (2009) (summarizing realist arguments).

12 JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL* 65 (1993).

13 See *id.* at 66 (arguing that "opinions containing [legal] rules merely rationalize decisions; they are not the causes of them"). See generally JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* (2002) (arguing that the attitudinal model can be used to explain and predict Supreme Court decisionmaking).

14 Frank B. Cross, *Political Science and the New Legal Realism: A Case of Unfortunate Interdisciplinary Ignorance*, 92 Nw. U. L. REV. 251, 291–92 (1997).

Not surprisingly, Scalia and Garner reject the political critique of textualism as a “slander.”<sup>15</sup> They argue that textualism “will sometimes produce ‘conservative’ outcomes, sometimes ‘liberal’ ones.”<sup>16</sup> Like their critics, however, Scalia and Garner fail to develop the argument, or to confront the widespread association of textualism and conservatism in contemporary legal and political rhetoric. If textualism is apolitical, why is it so difficult to imagine Justice Kagan, for example, announcing that she has had a textualist epiphany? Why do the methodological battle lines, in both the federal judiciary and in legal academia, map so neatly along ideological divides?

This Review takes up those questions, exploring the connections between textualist methodology and conservative politics—and between methodological and political argument more generally. In an important sense, Scalia and Garner are correct: textualism is not inherently conservative in design, nor does it reliably produce conservative results. But if the *theory* of textualism is not conservative, the broader *practice* of textualism surely is. That practice encompasses not only judicial decisions but also the political and legal discourse that brought textualism to the public fore and that keep it there even as the space between textualism and its competitors continues to shrink. The link between textualism and conservatism was fused in the rise of the New Right in the 1980s, when conservatives embraced textualism in statutory interpretation (together with originalism in constitutional interpretation) as the antidotes to the “judicial activism” of the Warren and Burger Courts. Textualism and originalism were united in their appeal to judicial restraint and their challenge to the legal status quo. Adopting the language of methodology therefore gave Reagan-era politicians an efficient—and legal—means of critiquing existing law and pushing for legal change.

As it became clear that the “new textualism”<sup>17</sup> was a force for moving the law to the right, judges, academics, and others on the left responded with their own methodological prescriptions. The battle lines were drawn and, once in place, they demanded defenses. After more than two decades of methodological conflict, it is still commonplace to see the Justices divided over method as well as outcomes. Methodological disagreements spill over into cases that are otherwise unanimous, separating the Justices even when they agree on results. Academics continue to debate questions of abstract interpretive the-

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15 SCALIA & GARNER, *supra* note 1, at 16.

16 *Id.*

17 See generally William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621 (1989).

ory, even as the differences between the competing methodologies fade away. Such methodological cleavages on the bench and in the academy almost always replicate ideological divides. The result is deeply ironic: touted as a way to separate law from politics, the new textualism and the responses it provoked have made statutory interpretation appear more political, by creating and then perpetuating a persistent source of disagreement between liberals and conservatives.

Importantly, however, there is nothing unique about textualism in this respect. Instead, to understand the relationship between textualism and conservatism is to appreciate the political potential of all methodological argument. The features that make methodology most law-like—its facial neutrality and its generality—may also, paradoxically, enhance its value as a political tool. Precisely because methodology offers a seemingly neutral basis for criticizing judges across a broad range of cases, it is a potent instrument for legal change. At the same time, methodology can be used effectively to defend the status quo. In this sense, debates over methodology may often, perhaps inevitably, have roots in something much bigger, something we might properly call “political.”

Part I of this Review provides an overview of Scalia and Garner’s vision of textualism and its rivals, and describes the conventional view that textualism skews toward politically conservative outcomes. Part II explains why the conventional view is incorrect. Even if it were true that textualism consistently worked to narrow the scope of federal law, the results would be “conservative” only when the statute in question was “liberal.” But, in any event, textualism is not reliably more restrictive than the other methodological options available to judges. It is the rare case in which textualism (or any other methodology) compels any particular result, and textualism could cut in either direction in that rare case. Rather than professing a commitment to textualism, a judge keen on maximizing conservative results would do better to remain agnostic on methodology, as most judges do.

Of course, to cast doubt on the consequences of textualism is not to exhaust the possible links between methodology and politics. As Part III details, textualism surely is flexible enough to *permit* conservative outcomes in the overwhelming majority of cases. Accordingly, some commentators have suggested that textualism’s political value lies in its ability to provide “cover” for such conservative decision making.<sup>18</sup> There is something to that charge, but ultimately it raises more questions than it answers. In fact, I argue, textualism’s political value

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18 William N. Eskridge, Jr. & Philip P. Frickey, *Foreword: Law as Equilibrium*, 108 HARV. L. REV. 26, 77 (1994).

would depreciate significantly if the public failed to grasp the connection between conservative decisionmaking and textualist rhetoric. Part IV develops that claim in more detail, situating textualism within the conservative politics of the 1980s, and describing the unique power of methodological argument as a force for change.

Recognizing the political nature of methodological argument is important in its own right, but it also sheds light on the question of interpretive consensus. Much of the discussion in *Reading Law* is motivated by the authors' insistence that United States judges commit to a single approach to interpretation. Scalia and Garner are not alone in their call for uniformity; similar themes appear with increasing frequency in academic commentary. As Part V explains, commentators interested in the question tend to stress the rule-of-law values of methodological consensus. If judges could agree on an interpretive theory, then legislators, litigants, lawyers, and lower court judges would know what sorts of arguments would be available for interpreting statutes and would be better able to predict outcomes. Appreciating the political aspects of methodological disagreement suggests an additional reason to hope for interpretive détente: persistent interpretive debates reinforce the view that judges are hopelessly divided—and divided along ideological lines—even in cases when they are otherwise in accord. At the same time, however, the politics of methodology suggest reason to doubt that consensus will emerge organically from the federal courts. More troublingly, the destabilizing nature of methodological argument suggests that any top-down imposition of methodological change could do more harm than good to the values of stability and predictability that interpretive uniformity is thought to promote.

## I. THE TERMS OF DEBATE

### A. *Textualism and Its Competitors*

More than half a century ago, Professors Henry Hart and Albert Sacks observed that “American courts have no intelligible, generally accepted, and consistently applied theory of statutory interpretation.”<sup>19</sup> The same is true today. Most judges take an eclectic approach to statutory questions, considering a changing mix of text,

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19 SCALIA & GARNER, *supra* note 1, at 8 (quoting HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 1201 (tent. ed. 1958)) (internal quotation marks omitted).

legislative intent, purpose, and policy from one case to the next.<sup>20</sup> Other judges profess allegiance to a particular methodological approach, but they are a minority and are counterbalanced by judges who are equally committed to different methodologies. Because federal courts have never given *stare decisis* effect to statements of interpretive method,<sup>21</sup> a methodological commitment in a majority opinion does not prevent any judge from following a different approach in the next case.

But while we seem no closer to interpretive consensus today than in Hart and Sacks's time, commentary on statutory interpretation has become increasingly obsessed with defining the one true method for interpreting statutes. *Reading Law* contributes to a vast literature on interpretive theory, much of which was provoked in one way or another by Justice Scalia himself.<sup>22</sup> Unlike most of his judicial brethren, Scalia is a methodological purist. From the beginning of his judicial career, he has insisted that statutory interpretation must focus on text to the exclusion of other traditional sources of meaning, particu-

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20 See William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 321 (1989) (“Judges’ approaches to statutory interpretation are generally eclectic, not inspired by any grand theory . . . .”); Thomas W. Merrill, *Faithful Agent, Integrative, and Welfarist Interpretation*, 14 LEWIS & CLARK L. REV. 1565, 1566 (2010) (“The actual practice of interpretation is characterized by a plurality of approaches to interpretation, as opposed to adherence to a unitary ideal.”); Zeppos, *supra* note 9, at 1114 (studying statutory interpretation decisions in the Supreme Court and concluding that “[t]he average case . . . is a mix of sources—textual, originalist, and governmental, but also nongovernmental, pragmatic, and dynamic”).

21 See Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 YALE L.J. 1750, 1765 (2010) (“[T]he Court does not give *stare decisis* effect to *any* statements of statutory interpretation methodology.”).

22 For a tiny sampling of the normative literature, see generally WILLIAM N. ESKRIDGE, JR., *DYNAMIC STATUTORY INTERPRETATION* (1994) (defending dynamic, purposive approach to interpretation); RICHARD A. POSNER, *LAW, PRAGMATISM, AND DEMOCRACY* 4 (2003) (defending “everyday pragmatism” for judges, including in statutory interpretation); ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* (1997) (defending textualist approach); John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673 (1997) (defending textualism’s exclusion of legislative history on non-delegation grounds); Richard A. Posner, *Statutory Interpretation—In the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 817 (1983) (advocating “imaginative reconstruction” approach to statutory interpretation). For a survey, see WILLIAM N. ESKRIDGE, JR. ET AL., *CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 689–846 (4th ed. 2007); see also Eskridge & Frickey, *supra* note 20, at 321 (observing in 1990 that “[i]n the last decade, statutory interpretation has reemerged as an important topic of academic theory and discussion”).



larly evidence of subjective legislative intent or purpose. Perhaps predictably, then, *Reading Law* begins with a call to arms: “Our legal system must regain a mooring that it has lost: a generally agreed-on approach to the interpretation of legal texts.”<sup>23</sup> For Scalia and Garner, that approach must be textualism.

“Textualism,” Scalia and Garner explain, “begins and ends with what the text says and fairly implies.”<sup>24</sup> The authors recognize that texts are often vague or ambiguous, but insist that judges should resolve uncertainties by drawing insight from other *objective* sources of meaning. Scalia and Garner describe such permissible objective clues in great detail: these are the canons that make up the bulk of the book. The canons range from technical rules like the last-antecedent canon (Principle #18: “A pronoun, relative pronoun, or demonstrative adjective generally refers to the nearest reasonable antecedent.”<sup>25</sup>), to policy-based principles like the presumption against federal preemption (Principle #47: “A federal statute is presumed to supplement rather than displace state law.”<sup>26</sup>).

Many of Scalia and Garner’s “principles” help flesh out the all-important concept of *context*. The authors emphasize that legal texts, like any communications, must be understood in context.<sup>27</sup> Context, they explain, “embraces . . . a word’s historical associations acquired from recurrent patterns of past usage, and . . . a word’s immediate syntactic setting—that is, the words that surround it in a specific utterance.”<sup>28</sup> Thirty-one of the canons are rules of thumb that help illuminate the semantic context of the statutory text. For example, the presumption of consistent usage (Principle #25) instructs courts that “[a] word or phrase is presumed to bear the same meaning throughout a text; a material variation in terms suggests a variation in meaning.”<sup>29</sup>

The remaining canons are presumptions about likely meaning; they “are based on what one would normally expect the statute . . . to say.”<sup>30</sup> Such canons also are known as “substantive” canons,<sup>31</sup> and for

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23 SCALIA & GARNER, *supra* note 1, at xxvii.

24 *Id.* at 16.

25 *Id.* at 144.

26 *Id.* at 290.

27 *Id.* at xxvii (“Neither written words nor the sounds that the written words represent have any inherent meaning. Nothing but conventions and contexts cause a symbol or sound to convey a particular idea.”).

28 *Id.* at 33.

29 *Id.* at 170.

30 *Id.* at 246.

31 See ESKRIDGE ET AL., *supra* note 22, at 880–84 (discussing substantive canons).

good reason. As Scalia and Garner acknowledge, they are “less plausibly based on a reasonable assessment of meaning than on grounds of policy adopted by the courts.”<sup>32</sup> For example, the constitutional doubt canon (Principle #38: “A statute should be interpreted in a way that avoids placing its constitutionality in doubt.”<sup>33</sup>) reflects “a judgment that statutes *ought not* to tread on questionable constitutional grounds unless they do so clearly, or perhaps a judgment that courts should minimize the occasions on which they confront and perhaps contradict the legislative branch.”<sup>34</sup>

As should be clear from this brief description, this is not your grandmother’s textualism. Unlike the older “plain meaning” approach that dominated at the turn of the twentieth century, the new textualism does not presume that statutory meaning is always (or even often) self-evident.<sup>35</sup> Context is key, and that includes statutory purpose.<sup>36</sup> Thus, the authors explain, “[*n*] *ail* in a regulation governing beauty salons has a different meaning from *nail* in a municipal building code.”<sup>37</sup> Critically, however, “the purpose is to be gathered only from the text itself, consistently with the other aspects of its context.”<sup>38</sup> In Scalia and Garner’s hands, textualism forbids any inquiry into legislative history or other evidence of the *subjective* intent of the legislators who enacted the bill.<sup>39</sup>

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32 SCALIA & GARNER, *supra* note 1, at 30.

33 *Id.* at 247.

34 *Id.* at 249.

35 *Id.* at 53 (rejecting the view that “a plain text with a plain meaning is simply applied and not ‘interpreted’ or ‘construed’” (citing *Caminetti v. United States*, 242 U.S. 470, 485 (1917) (“Where the language is plain and admits of no more than one meaning the duty of interpretation does not arise . . .”))); see Frank H. Easterbrook, *Statutes’ Domains*, 50 U. CHI. L. REV. 533, 536 (1983) [hereinafter Easterbrook, *Statutes’ Domains*] (“The invocation of ‘plain meaning’ just sweeps under the rug the process by which meaning is divined.”); Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL’Y 61, 67 (1994) (“‘Plain meaning’ as a way to understand language is silly.”); John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2456–76 (2003) (contrasting new textualism with older “plain meaning” approach).

36 SCALIA & GARNER, *supra* note 1, at 20; see also *id.* at 56–57 (“The difference between textualist interpretation and so-called purposive interpretation is not that the former never considers purpose. It almost always does.”).

37 *Id.* at 20.

38 *Id.* at 33.

39 *Id.* at 29 (“In the interpretation of legislation, we aspire to be ‘a nation of laws, not of men.’ This means (1) giving effect to the text that lawmakers have adopted and that the people are entitled to rely on, and (2) giving *no* effect to lawmakers’ unenacted desires.”); *id.* at 30 (“Subjective intent is beside the point.”).

When the new textualism emerged on the statutory scene in the 1980s, it marked a sharp challenge to prevailing judicial practice.<sup>40</sup> At the time, statutory interpretation was suffused with an “aggressive, purposivist approach” under which judges prioritized evidence of legislative intent and statutory purpose over textual exegesis.<sup>41</sup> Legislative history played a central role in lawyers’ briefs and judicial opinions,<sup>42</sup> sometimes preceding any consideration of statutory text.<sup>43</sup> Indeed, Scalia and Garner report that “[t]he frequency of citing legislative history in statutory cases [in the Supreme Court had reached] . . . 100% in 1981–1982.”<sup>44</sup>

In the intervening decades, the divide between textualism and its competitors has narrowed substantially. As Scalia and Garner emphasize, virtually everyone agrees that interpretation must begin with the relevant text. Moreover, most judges and theorists agree that interpretation must end with the text when the meaning is clear.<sup>45</sup> Most also agree on using the canons that Scalia and Garner describe in such detail.<sup>46</sup> Meanwhile, as noted above, textualists recognize that “[t]he evident purpose of what a text seeks to achieve is an essential

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40 See Eskridge, *supra* note 17, at 624 (“Justice Scalia’s approach, if adopted, would represent a significant change in the way the Court writes its statutory interpretation decisions, and probably even the way the Court conceptualizes its role in interpreting statutes.”); Caleb Nelson, *A Response to Professor Manning*, 91 VA. L. REV. 451, 455 (2005) (“[T]extualism arose as a challenge to a reigning ‘orthodoxy’ that dominated American jurisprudence after World War II, and that encouraged judges to take a ‘purposivist’ approach to the interpretation of statutes.” (footnotes omitted)).

41 Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 COLUM. L. REV. 1, 15 (2006).

42 Scalia and Garner invoke a study that found that “in 1938 the Supreme Court cited legislative history 19 times—in 1979, 405 times. The high point of 445 was reached in 1974.” SCALIA & GARNER, *supra* note 1, at 373–74 (citing Jorge L. Carro & Andrew R. Brann, *The U.S. Supreme Court and the Use of Legislative Histories: A Statistical Analysis*, 22 JURIMETRICS J. 294, 303 (1981)); see also Zeppos, *supra* note 9, at 1104–05 (reporting that citations to “[n]on-[t]ext[ ] [o]riginalist [s]ources” peaked in 1981).

43 SCALIA & GARNER, *supra* note 1, at 383–84 (“The unprincipled heyday of legislative history came in the 1970s and 1980s, reaching its lowest point in *Citizens to Preserve Overton Park, Inc. v. Volpe*, [401 U.S. 402, 412 n.29 (1971),] where Justice Thurgood Marshall wrote for the Court: ‘The legislative history . . . is ambiguous. . . . Because of this ambiguity it is clear that we must look primarily to the statutes themselves to find the legislative intent.’”).

44 *Id.* at 374 (citing Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 197–99 (1982)).

45 *Id.* at xxvii.

46 See John F. Manning, *What Divides Textualists From Purposivists?*, 106 COLUM. L. REV. 70, 90 (2006) (discussing purposivists’ embrace of the canons).

element of context that gives meaning to words.”<sup>47</sup> For their part, purposivists concede that the statute’s text is the best indication of its purpose.<sup>48</sup> Legislative history remains the primary source of disagreement between textualists and non-textualists, but even that divide should not be overstated.<sup>49</sup> Judges rarely will permit legislative history to trump clear text,<sup>50</sup> and legislative history itself will usually allow various conclusions.<sup>51</sup> Even Scalia and Garner endorse the use of legislative history to illustrate “linguistic usage” and to confirm that seemingly unthinkable statutory results were in fact not contemplated.<sup>52</sup>

The convergence of competing theories may help explain why relatively few judges and Justices are willing to commit their scarce resources to theoretical debates over interpretive methodology. Yet, as the publication of and controversy over *Reading Law* illustrate,

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47 SCALIA & GARNER, *supra* note 1, at 20; Manning, *supra* note 46, at 75 (“In any case posing a meaningful interpretive question, the very process of ascertaining textual meaning inescapably entails resorting to extrastatutory—and thus unenacted—contextual cues.”).

48 Manning, *supra* note 46, at 87 (“[I]n the most important purposivist precedent of the twentieth century, *United States v. American Trucking Ass’ns*, [310 U.S. 534, 543 (1940),] the Court emphasized that ‘[t]here is . . . no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes’ . . . . Or as Hart and Sacks themselves have stressed, ‘[t]he words of a statute, taken in their context, serve both as guides in the attribution of general purpose and as factors limiting the particular meanings that can properly be attributed.’” (quoting HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 1375 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994) (1958))). Manning concludes that the difference between textualism and purposivism boils down to a difference in emphasis: “[T]extualists and purposivists emphasize different elements of context. Textualists give precedence to *semantic context*—evidence that goes to the way a reasonable person would use language under the circumstances. Purposivists give priority to *policy context*—evidence that suggests the way a reasonable person would address the mischief being remedied.” *Id.* at 76.

49 See John F. Manning, *Second-Generation Textualism*, 98 CAL. L. REV. 1287, 1309 (2010) (observing that “[w]ith [the] synthesis of the competing positions, the ferocity of the debate over legislative history has largely receded”).

50 SCALIA & GARNER, *supra* note 1, at 29 (noting that “the cases approving the use of legislative history (as we do not) *disapprove* of it when the enacted text is unambiguous”); Molot, *supra* note 41, at 3 (“[E]ven nonadherents [of textualism] today tend to forego legislative history if the text, in context, otherwise is clear.”).

51 Molot, *supra* note 41, at 3–4 (“[W]hen a statute is sufficiently ambiguous for nontextualist judges to give legislative history serious consideration, there very likely will be ambiguity in the legislative history as well as the text. Legislative history may or may not have any bearing on the outcome of the case, even when it is considered.”).

52 SCALIA & GARNER, *supra* note 1, at 388.

those debates show no signs of slowing down.<sup>53</sup> If anything, recent developments in the academic literature are fanning the fire, as commentators increasingly are looking for ways to impose methodological consensus on the courts—either by extending precedential effect to statements of methodology, or by encouraging legislators to prescribe interpretive rules to govern statutory cases.<sup>54</sup> Such efforts rest explicitly on the notion that methodology matters, that differences among the various interpretive theories are consequential and important.

### B. *Textualism and Conservatism*

Consider this recent complaint from Justice Scalia, penned in a case in which the Justices were unanimous as to the result:

The Court's introduction of legislative history serves no purpose except needlessly to inject into the opinion a mode of analysis that not all of the Justices consider valid. And it does so, to boot, in a fashion that does not isolate the superfluous legislative history in a section that those of us who disagree categorically with its use, or at least disagree with its superfluous use, can decline to join. I therefore do not join the opinion, and concur only in the result.<sup>55</sup>

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53 See, e.g., William N. Eskridge, Jr., *The New Textualism and Normative Canons*, 113 COLUM. L. REV. 531, 531 (2013) (reviewing ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* (2012)); Richard A. Posner, *The Spirit Killeth, But the Letter Giveth Life*, NEW REPUBLIC, Sept. 13, 2012, at 18. For a thoughtful call for interpretive détente, see Molot, *supra* note 41, at 2 (“It is time for us to put the textualism-purposivism debate behind us, acknowledge areas of agreement as well as disagreement, stop talking past one another, and engage in a more productive dialogue regarding the narrow differences that remain.”).

54 See, e.g., Sydney Foster, *Should Courts Give Stare Decisis Effect to Statutory Interpretation Methodology*, 96 GEO. L.J. 1863, 1886–97 (2008) (arguing for application of stare decisis to matters of interpretive method); Gluck, *supra* note 21, at 1851–55 (emphasizing rule-of-law benefits of consensus on interpretive methodology and highlighting efforts at the state level to achieve such consensus through stare decisis); Abbe R. Gluck, *Intersystemic Statutory Interpretation: Methodology as “Law” and the Erie Doctrine*, 120 YALE L.J. 1898, 1991 (2011) [hereinafter Gluck, *Intersystemic Statutory Interpretation*] (arguing that statements of interpretive methodology should be treated as “law” for purposes of *Erie* doctrine); Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2087 (2002) (proposing that Congress remove the inconsistencies in the current regime by enacting rules of statutory interpretation applicable across statutes); cf. Stephen M. Rich, *A Matter of Perspective: Statutory Interpretation, “New” Textualism, and Federal Employment Discrimination Law*, 87 S. CAL. L. REV. (forthcoming 2014) (arguing that courts should adhere to the interpretive perspective applied to previous questions concerning the same or related statutes).

55 *Samantar v. Yousuf*, 130 S. Ct. 2278, 2293 (2010) (Scalia, J., concurring in the judgment); see also, e.g., *Mohamad v. Palestinian Auth.*, 132 S. Ct. 1702, 1704–05, 1709–10 (2012) (Justice Scalia refuses to join Part III.B of majority opinion, where majority explains that “reliance on legislative history is unnecessary in light of the

Justices Thomas and Alito also filed brief concurrences noting their objection to the use of legislative history in Justice Stevens's majority opinion.

Such methodological objections are striking in their own right. As noted, the Justices all agreed on the proper result in the case; their disagreement centered on what evidence to cite—what arguments to make—in support of the agreed-upon reading of the statute. Justice Stevens's invocation of legislative history was in no sense part of the holding of the case. Indeed, as commentators critical of the reigning methodological dissensus have emphasized, the Court has never suggested that statements of methodology are entitled to stare decisis effect.<sup>56</sup> Thus, the majority's embrace of legislative history in one case does not preclude a later court from disowning a similar inquiry in a later case.<sup>57</sup> Yet Justice Stevens made it a point to rely on an argument he knew some of his brethren would reject. And the objecting Justices saw the methodological issue as important enough to mark, publicly, as a point of contention and division within the Court.

But another feature of the concurrences is likely to jump out at even the most casual observer of the Supreme Court: the objecting Justices are three of the most conservative Justices on the current Court. At least at the federal level,<sup>58</sup> that pattern is typical. The judges who have professed a commitment to the methodology are all well-known conservatives.<sup>59</sup> As a result, critics have branded textual-

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statute's unambiguous language" but nevertheless devotes two paragraphs to explaining why petitioners' legislative history arguments are unpersuasive (internal quotation marks omitted)); *Reynolds v. United States*, 132 S. Ct. 975, 986 n.\* (2012) (Scalia, J., dissenting) (criticizing the majority's consideration of legislative history as "quite superfluous"); *DePierre v. United States*, 131 S. Ct. 2225, 2237–38 (2011) (Scalia, J., concurring in part and concurring in the judgment) (objecting to the Court's discussion of legislative history, though agreeing with result); *Milavetz, Gallop & Milavetz v. United States*, 130 S. Ct. 1324, 1341 (2010) (Scalia, J., concurring in part and concurring in the judgment) (objecting to a footnote in the majority opinion in which the majority discussed legislative history).

56 See Gluck, *Intersystemic Statutory Interpretation*, *supra* note 54, at 1902 ("Five votes in agreement with respect to the interpretive principles used to decide one case do not create a methodological precedent that carries over to the next case, even where the same statute is being construed.").

57 Rosenkranz, *supra* note 54, at 2144–45 ("[T]he Justices do not seem to treat methodology as part of the holding . . . . [M]any cases feature clear majorities that explicitly ratify the use of legislative history. But Justice Scalia never concedes that he is bound to that methodology by stare decisis." (footnote omitted)).

58 The patterns are somewhat more mixed in the state courts. See *infra* notes 267–71 and accompanying text.

59 See *supra* note 9 and accompanying text; *infra* note 68 and accompanying text; see also Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11

ism as a conservative methodology.<sup>60</sup> The balance of this Review explores that charge and Scalia and Garner's responses. But a threshold issue warrants mention, concerning the meaning of "conservative" in the context of these debates.

The term "conservative" can mean many things. It may refer to a Burkean, or "situational," desire to preserve the status quo—a "resistance to change."<sup>61</sup> "Conservative" may instead invoke a set of institutional commitments, including

the conviction that as many decisions as possible should be left to individuals rather than government; that government decision making should be overwhelmingly majoritarian in character; that state governments should enjoy relatively more power vis-à-vis the federal government than they currently do; and that within the federal government the Executive should be a strong and unitary branch.<sup>62</sup>

Particularly as applied to judging, "conservative" might simply mean the opposite of adventurous: modest, or restrained. Finally, and perhaps most obviously, "conservative" may mean *politically* conservative—i.e., associated with the substantive commitments of the modern-day Republican Party (or at least some parts of it).<sup>63</sup>

It is the final, political, sense of the word that seems to be intended when textualism's critics accuse the methodology of conservative bias. The idea is that textualism is favored by politically conservative judges at least in part because it produces politically conservative results. I adopt similar terminology in this Review in an effort to meet textualism's critics head-on. Thus, "conservative" here means politically conservative, and "conservative results" refer to results that are likely to be favored by Republicans and not by Democrats.

Definitional problems remain, to be sure. For example, it is not always easy to pinpoint the political valence of any given decision.<sup>64</sup> Moreover, the notion that textualism produces politically conservative

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HARV. J.L. & PUB. POL'Y 59, 60 (1988) (advocating textualist approach); Easterbrook, *Statutes' Domains*, *supra* note 35, at 534 (same); Kenneth W. Starr, *Observations About the Use of Legislative History*, 1987 DUKE L.J. 371, 377 (same).

60 See *infra* notes 182, 255 and accompanying text.

61 Ernest A. Young, *Judicial Activism and Conservative Politics*, 73 U. COLO. L. REV. 1139, 1183 (2002) (describing situational conservatism).

62 *Id.* at 1197 (footnotes omitted).

63 *Id.* at 1187 ("Perhaps we should understand 'conservatism' as an ideational ideology—that is, one based on a particular vision of the good society. I think it is fair to say that most people do understand it that way today—a conservative is for some combination of free markets, family values, and the like.").

64 See *id.* at 1188–92 (discussing problems of classification).

results glosses over important differences among conservatives (and Republicans), who run the gamut from libertarians to economic conservatives to social and religious conservatives and so on.<sup>65</sup> We can bracket those difficulties here, however, because the problems with the political critique of textualism run deeper still. As the next Part shows, it is far from clear that textualist methodology reliably generates *any* difference in outcome from the other methodological approaches available to judges. And where methodology does make a difference, the direction of the effect is impossible to predict at the wholesale level, given the vast and constantly shifting body of statutes judges must interpret. Regardless of how one defines political conservatism or conservative results, the idea that textualism appeals to conservatives because of the outcomes it produces does not stand up to scrutiny.

## II. CONSERVATIVE OUTCOMES

An interpretive methodology would properly be labeled “political” if it consistently generated results congenial to a particular political or ideological viewpoint. Critics have argued in this vein that textualism has a systematic anti-regulatory bias. Textualism, the argument goes, produces “relatively stingy”<sup>66</sup> readings of federal statutes because it prevents judges from “pursu[ing] . . . [statutory] purpose[s] beyond what the text clearly requires.”<sup>67</sup> “Barring judges from looking at the [legislative] history of a statute and confining them strictly to its text means that the statute will only apply in those instances that Congress explicitly passes upon. The scope of governmental regulation is thereby constricted.”<sup>68</sup>

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65 See *id.* at 1192–94 (stressing different, and in some senses conflicting, strands of conservative thought within the contemporary Republican party).

66 Glen Staszewski, *Textualism and the Executive Branch*, 2009 MICH. ST. L. REV. 143, 181 n.178 (“[Textualists’] broader package of theoretical commitments has a tendency to lead towards deregulation. . . . [T]he new textualism arguably makes it more difficult for Congress to achieve its underlying objectives because courts have a tendency to interpret the law in a relatively stingy fashion pursuant to this methodology.”).

67 Michael C. Dorf, *A Unanimous Supreme Court Decision on the Foreign Sovereign Immunities Act Highlights Ongoing Divisions Over Legislative History*, FINDLAW (June 2, 2010), <http://writ.news.findlaw.com/dorf/20100602.html>.

68 Steven R. Greenberger, *Civil Rights and the Politics of Statutory Interpretation*, 62 U. COLO. L. REV. 37, 68 (1991); see also RICHARD POSNER, *THE FEDERAL COURTS* 293 (1985) (“It is not an accident that most ‘no constructionists’ are political liberals and most ‘strict constructionists’ are political conservatives. The former think that modern legislation does not go far enough and want the courts to pick up the ball that the legislators have dropped; the latter think it goes too far and want the courts to rein



The prevailing view is captured in Judge Richard Posner's much remarked review of *Reading Law*:

A legislature is thwarted when a judge refuses to apply its handiwork to an unforeseen situation that is encompassed by the statute's aim but is not a good fit with its text. Ignoring the limitations of foresight, and also the fact that a statute is a collective product that often leaves many questions of interpretation to be answered by the courts because the legislators cannot agree on the answers, the textual originalist demands that the legislature think through myriad hypothetical scenarios and provide for all of them explicitly rather than rely on courts to be sensible. In this way, textualism hobbles legislation—and thereby tilts toward “small government” and away from “big government,” which in modern America is a conservative preference.<sup>69</sup>

In its most modest form, that argument suggests that conservative judges are attracted to textualism unconsciously because it provides a convenient blueprint for decisions they find appealing. Somewhat more cynically, one might imagine judges, presented with an array of interpretive options, choosing the method most likely to produce desirable results in the greatest proportion of cases.<sup>70</sup> In either case, the argument assumes that it is possible to predict the likely consequences of textualist methodology, and that those consequences are largely (if not entirely) conservative in substance.

#### A. *Textualism and Republican Congresses*

There are several problems with the notion that textualism reliably produces conservative results. To begin with, it conflates a conservative aversion to “big government” with an across-the-board hostility to federal statutes. But whether a “stingy” reading of statutes

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the legislators in. Each school has developed interpretative techniques appropriate to its political ends.”); Jane S. Schacter, *Metademocracy: The Changing Structure of Legitimacy in Statutory Interpretation*, 108 HARV. L. REV. 593, 636–46 (1995) (arguing that textualists tend to prefer “narrow, text-based interpretation that limits the reach of legislation by requiring exacting specificity in statutory language”); cf. Andrei Marmor, *The Immorality of Textualism*, 38 LOY. L.A. L. REV. 2063, 2066 (2005) (arguing that “the unofficial story of textualism” is “that unregulated disputes ought to remain unregulated, because regulation by the state, in any legal form, is very suspect to begin with”).

<sup>69</sup> Posner, *supra* note 53, at 18.

<sup>70</sup> See Dorf, *supra* note 67 (“[T]he choice to adopt one jurisprudential approach or another is made with awareness of where it usually leads.”); Volokh, *supra* note 8, at 774 (“[I]ndividual judges—who today have broad choice among interpretive methods—will tend to select the interpretive method that, other things being equal, minimizes the extent to which they must deviate from their preferred outcomes.”).

will appeal to political conservatives would seem to depend on the laws in question. The Republican “Contract With America,”<sup>71</sup> for example, did not merely call for repealing existing legislation. It produced new statutes that changed existing programs, like the Personal Responsibility and Work Opportunity Act (welfare reform)<sup>72</sup> and the Private Securities Litigation Reform Act (new rules for securities fraud class actions).<sup>73</sup> It is hard to understand why political conservatives would favor a grudging interpretation of those reforms.<sup>74</sup>

Consider the Prisoner Litigation Reform Act of 1995 (PLRA).<sup>75</sup> Enacted at a time when Republicans controlled both the House and the Senate, the evident purpose of the PLRA is to reduce the large number of prisoner complaints filed in federal court.<sup>76</sup> To that end, the statute makes it easier for district courts to dismiss prisoner suits early in the case (even without receiving a response from the defendant), requires prisoners to exhaust available administrative remedies before seeking relief in federal court, and imposes various limitations

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71 See CONTRACT WITH AMERICA (1994), available at <http://www.gvpt.umd.edu/jg/loekler/documents/contract.pdf>. On September 27, 1994, more than 300 Republican congressional candidates signed the list of election pledges they called the “Contract with America.” In the elections that followed, Republicans took control of the House of Representatives. See David E. Rosenbaum, *Republicans Offer Voters a Deal for Takeover of House*, N.Y. TIMES, Sept. 28, 1994, at A16, available at <http://www.nytimes.com/1994/09/28/us/republicans-offer-voters-a-deal-for-takeover-of-house.html?pagewanted=all&src=pm>.

72 Pub. L. 104-193, 110 Stat. 2105 (1996) (codified at 42 U.S.C. § 1305).

73 Pub. L. 104-67, 109 Stat. 737 (1995) (codified at 15 U.S.C. § 78).

74 Professor Eskridge has argued, along lines similar to those discussed in the text, that “formalism” in statutory interpretation is antiregulatory because it raises legislative costs and thus decreases legislative outputs. William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331, 410 (1991) (“[F]ormalism appears to be structurally biased . . . . By requiring Congress to revisit statutes that are imperfectly drafted or that do not precisely address new versions of the problem they were enacted to solve, formalism substantially raises the costs of passing statutes. If statutes are more costly to write and rewrite, fewer of them will exist. Formalism in this way embodies a relatively antigovernmental philosophy.”). It is not clear that political conservatives should favor a consistently uncooperative method of interpretation any more than they should favor a consistently stingy one. A theory of interpretation that increases legislative costs may tend toward conservative results when the legislature is predominantly Democratic, but not when Republicans are in control. Thus, one who believes that textualism is antigovernmental in this way cannot—without more—predict whether the policy consequences will be politically conservative or politically liberal. The answer depends on congressional politics.

75 42 U.S.C. § 1997 (2006).

76 See *Jones v. Bock*, 549 U.S. 199, 203 (2007) (“What this country needs, Congress decided, is fewer and better prisoner suits.”).

on permissible prisoner suits.<sup>77</sup> As Scalia and Garner remind us, however, “no statute . . . pursues its ‘broad purpose’ at all costs.”<sup>78</sup> The PLRA is no exception. The text contains some obvious limitations,<sup>79</sup> and other arguable ones. For example, the PLRA’s procedural requirements apply only to suits challenging “prison conditions.”<sup>80</sup> Does that term encompass claims concerning isolated events, such as the alleged use of excessive force by a prison guard? There is a colorable textual argument that the answer is no, as *conditions* seems to imply ongoing circumstances that affect prisoners generally.<sup>81</sup> Yet it strains reason to suggest that such a narrow reading of the statute’s text would hold special appeal for political conservatives.

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77 See 42 U.S.C. § 1997e(a) (imposing an exhaustion requirement); § 1997e(c) (requiring sua sponte dismissal); § 1997e(d) (adopting a restriction on awards of attorney’s fees); § 1997e(e) (imposing limitations on recovery).

78 SCALIA & GARNER, *supra* note 1, at 21.

79 For example, the statute applies to actions “brought” by a “prisoner confined in any jail, prison, or other correctional facility” and thus does not apply to claims by former prisoners—even though such claims may raise the same concerns about frivolous or excessive litigation that inspired the PLRA. See, e.g., *Talamantes v. Leyva*, 575 F.3d 1021, 1024 (9th Cir. 2009) (holding that “only those individuals who are prisoners . . . at the time they file suit must comply with the exhaustion requirements of 42 U.S.C. § 1997e(a),” and so the plaintiff “was not required to exhaust administrative remedies” because he “was released from custody over a year before filing his action in federal court”); *Cofield v. Bowser*, 247 F. App’x 413, 414 (4th Cir. 2007) (*per curiam*) (holding that former inmates are not “incarcerated”: “it is the plaintiff’s status at the time he filed the lawsuit that is determinative as to whether the § 1997e(a) exhaustion requirement applies”); *Norton v. City of Marietta*, 432 F.3d 1145, 1150 (10th Cir. 2005) (holding that a “plaintiff, who was not a prisoner confined in a jail, prison, or other correctional facility when he brought suit, did not have to exhaust his administrative remedies first”); *Nerness v. Johnson*, 401 F.3d 874, 876 (8th Cir. 2005) (“[T]he exhaustion requirement does not apply to plaintiffs who file § 1983 claims after being released from incarceration.”); *Ahmed v. Dragovich*, 297 F.3d 201, 210 (3d Cir. 2002) (adopting the view that the PLRA’s exhaustion defense does not apply to “a prisoner who has been released”); *Harris v. Garner*, 216 F.3d 970, 974–75 (11th Cir. 2000) (holding that statutory requirement of physical injury applies only to suits by prisoners who are confined “at the time the lawsuit is ‘brought,’ i.e., filed”); *Janes v. Hernandez*, 215 F.3d 541, 543 (5th Cir. 2000) (resolving a dispute about the attorney’s fee limit in § 1997e and holding that the PLRA “applies to only those suits filed by prisoners,” not former prisoners); *Greig v. Goord*, 169 F.3d 165, 167 (2d Cir. 1999) (“[L]itigants . . . who file prison condition actions after release from confinement are no longer ‘prisoners’ for purposes of § 1997e(a) and, therefore, need not satisfy the exhaustion requirements of this provision.”).

80 42 U.S.C. § 1997e(a).

81 See *Smith v. Zachary*, 255 F.3d 446, 452–55 (7th Cir. 2001) (Williams, J., dissenting) (advancing narrow reading based on text, and objecting to majority’s “fixing” statute to advance its purpose).

This point captures an important difference between statutory and constitutional interpretation. In the world of constitutional interpretation, the object is always the same: it is the Constitution itself, a short document that can be read in one sitting and that is extraordinarily difficult to change. It is possible, therefore, to predict with some confidence the likely consequences of any given approach to constitutional interpretation. For example, a restrictive approach will mean limited federal power, a narrower scope to the Bill of Rights, and so on. Statutory interpretation could not be more different, because the corpus of federal statutes is vast and constantly changing. So, too, is Congress. Thus, even if one were certain that a given methodology would consistently constrict (or expand) the scope of any statutes it encountered, it would still be impossible—without more—to anticipate the policy consequences of adopting that methodology. The answer would depend on the statutes themselves, including both the countless statutes already enacted and the many more to come.

Granted, Democratic control of Congress has been the rule rather than the exception since the New Deal, including an unbroken period of more than two decades immediately preceding the emergence of Scalia's new textualism.<sup>82</sup> Because of that history, a majority of litigated cases may involve statutes enacted by Democratic Congresses, even if Republicans are currently in control (as they were from 1995 to 2007),<sup>83</sup> or party control is split between the House and the Senate (as it was from 1981 to 1987).<sup>84</sup> If textualism consistently

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82 See *Party Divisions of the House of Representatives, 1789–Present* (last visited Oct. 24, 2013), <http://history.house.gov/Institution/Party-Divisions/Party-Divisions/> (showing overwhelming Democratic control of the House since 1935, and constant control from 1955 to 1981); *Party Division in the Senate, 1789–Present* (last visited Oct. 24, 2013), [http://www.senate.gov/pagelayout/history/one\\_item\\_and\\_teasers/partydiv.htm](http://www.senate.gov/pagelayout/history/one_item_and_teasers/partydiv.htm) (showing same patterns in the Senate). Note, however, that prior to the passage of the Voting Rights Act (VRA) in 1965, “Democrat” meant something very different from what it does today, and Southern Democrats more closely resembled today’s Republicans than today’s Democrats. See Richard H. Pildes, *Why the Center Does Not Hold: The Causes of Hyperpolarized Democracy in America*, 99 CAL. L. REV. 273, 289 (2011) (describing the effects of racial disenfranchisement in the pre-VRA South and explaining that “[p]olitical scientists describe the country as having a ‘four-party system,’ particularly from after 1937. During this era, the largest bloc was almost always composed of conservative Republicans, even though Democrats formally controlled the House. The liberal Democrats followed, then conservative Democrats, and finally moderate Republicans. The same was true for the Senate.” (footnote omitted)).

83 See *Party Divisions of the House of Representatives, 1789–Present*, *supra* note 82 (showing Republican control of the House from 1995 to 2007); *Party Division in the Senate, 1789–Present*, *supra* note 82 (same in the Senate).

84 See *Party Division in the Senate, 1789–Present*, *supra* note 82; cf. Michael Abramowicz & Emerson H. Tiller, *Citation to Legislative History: Empirical Evidence on*

worked to narrow the scope of Democrat-backed statutes, it might follow that textualism, on the whole, would generate outcomes congenial to political conservatives.<sup>85</sup>

There is reason to doubt, however, that textualism “tilts toward ‘small government’”<sup>86</sup> in such a reliable way. As the discussion that follows explains, a textualist reading is not necessarily more restrictive than a reading that is grounded on considerations of statutory purpose or evidence of legislative intent. In most cases, methodology is too indeterminate—and the differences between the competing theories too subtle—to drive outcomes. And where methodology does make a difference, textualism may broaden the reach of federal law rather than contract it.

### B. *Text, Purpose, and Statutory Breadth*

Textualism is not the same thing as strict or narrow construction.<sup>87</sup> Indeed, Scalia and Garner insist that “[s]trict constructionism” is “not a doctrine to be taken seriously.”<sup>88</sup> Textualism instructs judges to “seek statutory meaning in the semantic import of the enacted text.”<sup>89</sup> Whether the result is broad or narrow depends on whether the statutory text, understood in context, is broad or narrow. Textualist readings of expansive or unqualified statutory language will often be quite broad, and textualism will give federal law a wider reach than purposivism whenever text is broader than purpose.

The *Holy Trinity* case<sup>90</sup>—that venerable chestnut of statutory interpretation, reviled by textualists for the Court’s insistence that the

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*Positive Political and Contextual Theories of Judicial Decision Making*, 38 J. LEGAL STUD. 419, 428 (2009) (studying citations to legislator statements in opinions from federal cases decided from 1950 to 2003 and finding that “there are considerably more citations to Democratic legislative history than to Republican legislative history by judges of both political parties, presumably because of the Democrats’ general domination of Congress from the New Deal period onward”).

85 See William N. Eskridge, Jr., *Textualism, the Unknown Ideal?*, 96 MICH. L. REV. 1509, 1522 (1998) (noting that the “debating history of federal statutes, most of which were enacted by Democratic Congresses,” tilts “in a more regulatory-state direction,” and that textualism’s exclusion of legislative history might be a “politically conservative move by courts”).

86 Posner, *supra* note 53, at 18.

87 SCALIA, *supra* note 22, at 23 (“Textualism should not be confused with so-called strict constructionism, a degraded form of textualism that brings the whole philosophy into disrepute.”).

88 SCALIA & GARNER, *supra* note 1, at 356.

89 Manning, *supra* note 49, at 1288.

90 *Church of the Holy Trinity v. United States*, 143 U.S. 457 (1892).

text of a statute could yield to its purpose<sup>91</sup>—illustrates the point. At issue in *Holy Trinity* was a statute barring “the importation or migration of . . . any foreigner . . . into the United States . . . under contract or agreement . . . to perform labor or service of any kind in the United States.”<sup>92</sup> The question was whether the statute applied to the contract between the Holy Trinity Church of New York and its would-be rector, an Englishman. The Court acknowledged that the rector’s case fell within the text of the statute. Not only was the basic prohibition expressed in broad terms (“labor or service of any kind”), but the statute contained explicit exceptions for specified professions (professional actors, artists, lecturers, singers, and domestic servants), thereby “strengthen[ing] the idea that every other kind of labor and service was intended to be reached by the first section.”<sup>93</sup> But the Court reasoned that the purpose of the statute was more limited than its text: Congress’s aim was to stem the flow of unskilled labor into the country, not to exclude “brain toilers” like the rector.<sup>94</sup> The Court concluded, in language for which the case is (in)famous, “that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers.”<sup>95</sup>

It is hardly uncommon for statutory text to extend beyond the “mischief” the legislature sought to target. For example, the Sherman Antitrust Act prohibits “[e]very contract, combination . . . , or conspiracy[] in restraint of trade”<sup>96</sup>—a prohibition so sweeping it has prompted the Court to acknowledge that the statute cannot mean what it says.<sup>97</sup> After all, *all* contracts restrain trade; “[t]o bind, to restrain, is of their very essence.”<sup>98</sup> The Court has therefore held that

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91 Scalia and Garner devote one of their seventy “principles” to rejecting “[t]he false notion that the spirit of a statute should prevail over its letter.” SCALIA & GARNER, *supra* note 1, at 343.

92 *Church of the Holy Trinity*, 143 U.S. at 458.

93 *Id.* at 458–59 (emphasis added).

94 *Id.* at 459, 464. As Scalia and Garner describe it, “A result-oriented Court applied a ‘viperine interpretation’ that killed the statute for present purposes to achieve a desired result.” SCALIA & GARNER, *supra* note 1, at 11; *cf.* Molot, *supra* note 41, at 23 (noting that “strong purposivism had emerged during a time [in the late 1800s and early 1900s] when the Court seemed inclined to resist legislative innovations”).

95 *Church of the Holy Trinity*, 143 U.S. at 459.

96 15 U.S.C. § 1 (2006).

97 *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 885 (2007) (“[T]he Court has never ‘taken a literal approach to [the Sherman Act’s] language.’” (quoting *Texaco v. Dagher*, 547 U.S. 1, 5 (2006))).

98 *Bd. of Trade of Chi. v. United States*, 246 U.S. 231, 238 (1918).

the Act “outlaw[s] only unreasonable restraints.”<sup>99</sup> The Patent Act defines patentable subject matter as “any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof.”<sup>100</sup> The Court has described that language as “extremely broad,”<sup>101</sup> and traditionally has cabined it by reference to the history and underlying purposes of the Act.<sup>102</sup> And the Court has read federal criminal statutes to include unwritten defenses such as those of duress and necessity, on the view that longstanding common-law exceptions to criminal liability help define the class of conduct Congress sought to prohibit.<sup>103</sup>

Even in circumstances where statutory text is more limited than statutory purpose, it matters a great deal what function the text serves in the statutory scheme. Many statutory cases call upon courts to interpret statutory exceptions or provisos—i.e., textual provisions that operate to limit the scope of the relevant regulation. To the extent that textualism produces narrow constructions of such limiting provisions, the consequences will be to *expand* the reach of federal statutes.

Take, for example, the Court’s recent decision in *Christopher v. SmithKline Beecham Corp.*, which concerned an exception to the Fair Labor Standards Act (FLSA).<sup>104</sup> The FLSA imposes minimum wage (including overtime) and maximum hour requirements on employers,<sup>105</sup> but exempts workers employed “in the capacity of outside salesm[e]n.”<sup>106</sup> Department of Labor regulations define the operative term to mean “any employee . . . [w]hose primary duty is . . . making sales within the meaning of [the FLSA],”<sup>107</sup> and the relevant statutory

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99 *State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997).

100 35 U.S.C. § 101 (2006).

101 *J.E.M. Ag. Supply, Inc. v. Pioneer Hi-Bred Int’l, Inc.*, 534 U.S. 124, 130 (2001).

102 See generally Peter S. Menell, *Forty Years of Wondering in the Wilderness and No Closer to the Promised Land: Bilski’s Superficial Textualism and the Missed Opportunity to Return Patent Law to Its Technology Mooring*, 63 STAN. L. REV. 1289, 1299–1305 (2011) (describing traditional approach to interpretation of Patent Act, and more recent “textualist turn”). For example, the Court long has held that patent protection does not extend to “laws of nature, physical phenomena, and abstract ideas.” *Id.* at 1300 (quoting *Diamond v. Chakrabarty*, 447 U.S. 303, 309 (1980)). For a recent decision construing the Patent Act textually, and therefore quite broadly, see *Bilski v. Kappos*, 130 S. Ct. 3218, 3226 (2010) (holding that business methods may be patentable and cautioning “that courts should not read into the patent laws limitations and conditions which the legislature has not expressed” (internal quotation marks omitted)).

103 See, e.g., *Dixon v. United States*, 548 U.S. 1 (2006) (duress); *United States v. Oakland Cannabis Buyers’ Coop.*, 532 U.S. 483 (2001) (necessity).

104 132 S. Ct. 2156 (2012).

105 29 U.S.C. §§ 206–07 (2006).

106 *Id.* § 213(a)(1).

107 Outside Sales Employees, 29 C.F.R. § 541.500(a)(1) (2012).

definition states that “[s]ale’ or ‘sell’ includes any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition.”<sup>108</sup> The question in *Christopher* was whether the exception for “outside salesm[e]n” applied to drug company “detailers,”<sup>109</sup> who lobby physicians within an assigned sales territory to prescribe the company’s products in appropriate cases, but who do not make any actual sales. As Justice Breyer explained in his dissent (joined by Justices Kagan, Sotomayor, and Ginsburg),

A detailer might convince a doctor to prescribe a drug for a particular kind of patient. If the doctor encounters such a patient, he might prescribe the drug. The doctor’s client, the patient, might take the prescription to a pharmacist and ask the pharmacist to fill the prescription. If so, the pharmacist might sell the manufacturer’s drug to the patient, or might substitute a generic version. But it is the pharmacist, not the detailer, who will have sold the drug.<sup>110</sup>

Justice Breyer therefore argued that the detailers fell outside of the clear text of the statute and the relevant regulations.

The majority, in an opinion written by Justice Alito and joined by Chief Justice Roberts and Justices Kennedy, Thomas, and Scalia, took a broader view of the statutory exception. Justice Alito concluded that the detailers’ work was covered by the catch-all phrase “or other disposition,”<sup>111</sup> which the majority understood to “includ[e] those arrangements that are tantamount, in a particular industry, to a paradigmatic sale of a commodity.”<sup>112</sup> Moreover, given the detailers’ high pay, their uncertain and flexible hours, their independence, and the fact that they frequently work overtime, the majority reasoned that exempting the detailers would be consistent with the “apparent purpose” of the statutory exception.<sup>113</sup> Quoting the statute’s preamble, Justice Alito explained that

[t]he exemption is premised on the belief that exempt employees “typically earned salaries well above the minimum wage” and

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108 29 U.S.C. § 203(k).

109 *Christopher*, 132 S. Ct. at 2163.

110 *Id.* at 2176 (Breyer, J., dissenting).

111 29 U.S.C. § 203(k).

112 *Christopher*, 132 S. Ct. at 2171–72 (majority opinion). For Justice Breyer’s response, see *id.* at 2179 (Breyer, J., dissenting) (“Given the fact that the doctor buys nothing, the fact that the detailer sells nothing to the doctor, and the fact that any ‘nonbinding commitment’ by the doctor must, of ethical necessity, be of secondary importance, there is nothing about the detailer’s visit with the doctor that makes the visit (or what occurs during the visit) ‘tantamount . . . to a paradigmatic sale.’”).

113 *Id.* at 2173 (majority opinion).



enjoyed other benefits that “se[t] them apart from the nonexempt workers entitled to overtime pay.” It was also thought that exempt employees performed a kind of work that “was difficult to standardize to any time frame and could not be easily spread to other workers after 40 hours in a week.”<sup>114</sup>

True enough, responded Justice Breyer in dissent. But (in words that might have been penned by Justice Scalia),

[t]he problem for the detailers . . . is that the statute seeks to achieve its general objectives by creating certain categories of exempt employees, one of which is the category of “outside salesman.” . . . And the detailers do not fall within that category as defined by [the relevant] regulations.<sup>115</sup>

Reasonable minds can disagree on which set of Justices had the better arguments in *Christopher*. For present purposes, two points warrant emphasis. First, the textual argument favored by Justice Scalia was the broader of the two—perhaps because the majority was influenced by an inquiry into the purpose of the relevant provision. Such an inquiry does not violate the teachings of *Reading Law*, given that the majority relied on *textual* evidence of purpose in the statute’s preamble.<sup>116</sup> Yet Justice Breyer’s arguments in dissent plainly were textual arguments too; indeed, of the two opinions, the dissent reads as the more staunchly textualist. Consistent with the predictions of textualism’s critics, the textualism of the dissent produced a more narrow reading of the relevant statutory text. However, because the relevant text was a statutory exception, the consequence of the narrow, textual reading was to expand—not constrict—the operative reach of the FLSA.

Second, to the extent the Justices in *Christopher* disagreed over methodology, they seem to have flipped the usual roles: the most committed textualists invoked purpose, while Justice Breyer—who has become the Court’s most vocal critic of textualism since Justice Stevens’s retirement—insisted on fidelity to the operative text. But if the methodological divide in *Christopher* is somewhat surprising, the ideological divide is not. The Justices typically denoted as conservatives joined together to narrow the scope of the FLSA, while their more liberal counterparts voted to apply the statute more broadly. It is hard to walk away from *Christopher* with the sense that *methodology* was the determinative factor in the Justices’ decisions. Instead, the opinions

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114 *Id.* (alteration in original) (citation omitted).

115 *Id.* at 2180 (Breyer, J., dissenting).

116 SCALIA & GARNER, *supra* note 1, at 34 (“[I]n a fair reading, purpose—as a constituent of meaning—is to be derived exclusively from a text.”).

might suggest that the Justices' methodological commitments are thin and easily overborne by their policy preferences; or that the available tools of analysis are malleable and largely indeterminate; or that the remaining differences between textualism and purposivism are too subtle to have any palpable effect on judicial decisionmaking. Notably, not one of those likely explanations provides any support for the view that *textualist methodology*, as such, suffers from a baked-in bias for small government.

### C. *Legislative History*

The discussion thus far has focused on the supposed tension between text and statutory purpose. But perhaps the sharpest methodological division among judges today lies in debates over legislative history. Whereas Scalia and Garner concede that an inquiry into statutory purpose is central to the interpretive task, they adopt a strict exclusionary rule against any inquiry into legislative history—or, more generally, the subjective intent of the enacting legislators.<sup>117</sup>

Will a textualist aversion to legislative history tend toward a “stingy” reading of federal law? The available empirical evidence is inconclusive, but on balance suggests not. In one recent study, James Brudney and Corey Ditslear examined the Justices' use of legislative history in workplace law cases decided between 1969 and 2006.<sup>118</sup> Predictably, they found that “liberal” Justices<sup>119</sup> were far more likely than their “conservative” brethren to rely on legislative history.<sup>120</sup> More surprisingly, Brudney and Ditslear found that liberal and conservative Justices alike were *more* likely to reach pro-employer (i.e., “conservative”) results in opinions using legislative history than in opinions that relied on textualist methods of interpretation.<sup>121</sup> The authors explain that seemingly counter-intuitive result<sup>122</sup> by reference to statutory exceptions and legislative compromises: “The liberal Justices . . . repeatedly invoked legislative history to support pro-employer outcomes by demonstrating how this history reveals or confirms the

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117 See *id.* at 29 (insisting on “giving *no* effect to lawmakers' unenacted desires”).

118 James J. Brudney & Corey Ditslear, *Liberal Justices' Reliance on Legislative History: Principle, Strategy, and the Scalia Effect*, 29 BERKELEY J. EMP. & LAB. L. 117, 117 (2008).

119 The authors identify the ideological orientation of the Justices using voting scores derived from Harold Spaeth's database of Supreme Court decisions. See *id.* at 130 & nn.43–45 (describing methodology).

120 *Id.* at 120.

121 *Id.* at 120–21.

122 As the authors emphasize, the relevant statutes were overwhelmingly passed by a Democrat-controlled Congress and are, on the whole, liberal interventions into the marketplace. *Id.* at 119.

existence of a negotiated arrangement among interested groups or legislators on a particular issue.”<sup>123</sup>

In another study, Frank Cross analyzed a sample of more than 120 cases drawn from the total pool of statutory interpretation cases decided by the Court from 1994 through 2002.<sup>124</sup> Cross coded the decisions for four categories of interpretive methodology, including “textualism” (reflecting “the combination of textualism, use of the plain meaning rule, use of dictionaries, use of common understanding of textual words, and use of the whole act rule”) and “legislative intent” (reflecting “the combination of reference to legislative history, an explicit finding of ambiguity in statutory text, reliance on congressional inaction in response to a prior decision, or reliance on congressional reenactment in interpretation”).<sup>125</sup> He then coded the cases by ideological outcome.<sup>126</sup> Cross found that, “[f]or six of the nine justices, reliance on textualism is greater in cases with liberal outcomes than those with conservative outcomes. For only Justices Ginsburg, Rehnquist, and Scalia was greater use of textualism associated with more conservatism of case outcome. Moreover, all of the differences were quite small.”<sup>127</sup> Interestingly, Cross’s findings for “legislative intent” were more uniform: “For every justice, greater use of legislative intent yielded more liberal outcomes, though in significantly varying degrees.”<sup>128</sup> Again, however, “[t]he effect was quite small.”<sup>129</sup>

A larger and more recent study by David Law and David Zaring concluded that the Justices’ use of legislative history had *no* meaning-

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123 *Id.* at 149 (citing *Mohasco Corp. v. Silver*, 447 U.S. 807 (1980) (using legislative history to show that legislators compromised over the filing deadlines for Title VII, adopting a firm deadline of 300 days for the filing of a charge with the EEOC, even in states where the charge is initially brought to a state agency for consideration); *Jackson Transit Auth. v. Local Division 1285, Amalgamated Transit Union*, 457 U.S. 15 (1982) (using legislative history to resolve textual ambiguity over the existence of a federal right of action for alleged violations of the Urban Mass Transportation Act of 1964, and finding no such right); *Doe v. Chao*, 540 U.S. 614 (2004) (using legislative history of the Privacy Act of 1974 to confirm that only individuals who suffer actual damage can take advantage of the statute’s provision of \$1000 in presumed damages)).

124 FRANK B. CROSS, *THE THEORY AND PRACTICE OF STATUTORY INTERPRETATION* (2009).

125 *Id.* at 143.

126 *Id.* at 145–49.

127 *Id.* at 169.

128 *Id.*

129 *Id.* at 173; *see also id.* at 172 (cautioning that “[t]hese results are not conclusive, because they do not consider the relative frequency of the justices’ relative use of the materials of legislative history or use of other interpretive methods in the same cases”).

ful effect on the ideological direction of the Court's decisions.<sup>130</sup> Law and Zaring analyzed 1479 statutory interpretation cases decided between 1953 and 2006 and “[running] the entire gamut of federal law.”<sup>131</sup> They coded the opinions for citations to legislative history, and further distinguished between opinions that placed positive emphasis on legislative history and those that criticized the practice. Predictably, Law and Zaring found that liberal Justices were more likely to rely on legislative history and that “the Justices were more likely to consult legislative history when they were ideologically in agreement with the Congress that enacted the statute.”<sup>132</sup> However, they found “no statistically significant relationship between whether an opinion cited legislative history and whether the opinion arrived at a liberal or conservative result.”<sup>133</sup> Law and Zaring concluded that, while the decision to cite legislative history may be “influenced by ideological factors, there is little to suggest that this decision carries much consequence for the outcome of the case.”<sup>134</sup>

These findings may help explain why both Democrats and Republicans *in Congress* stress the importance of legislative history. An important new investigation of congressional practices confirms that statutory drafters rely heavily on legislative history to explain the important aspects of legislation to legislators and their staff, as well as to external audiences like interest groups, agencies, courts, and the public. Abbe Gluck and Lisa Bressman interviewed 137 congressional counsels with responsibility for drafting statutes, roughly half of whom worked for Democrats and half for Republicans.<sup>135</sup> Gluck and Bressman asked each respondent a long series of questions concerning the drafting process, including the extent to which they are aware of, and use, many of the canons of construction that Scalia and Garner endorse.<sup>136</sup> Their respondents overwhelmingly ranked legislative history materials ahead of the canons in terms of their importance to the drafting and interpretation of statutory texts.<sup>137</sup> The responses on leg-

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130 David S. Law & David Zaring, *Law Versus Ideology: The Supreme Court and the Use of Legislative History*, 51 WM. & MARY L. REV. 1653, 1726–27 (2010).

131 *Id.* at 1685; *see id.* at 1684–85 (explaining that the study is limited to statutes the Court encounters with some frequency—i.e., nine or more times during the study period).

132 *Id.* at 1726.

133 *Id.*

134 *Id.* at 1727.

135 Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901, 919–20 (2013) (describing respondents).

136 *Id.* at 926 (describing questions).

137 *Id.* at 965–66.

islative history did not break down along party lines or by association with the majority or minority party.<sup>138</sup> Among congressional staffers, at least, legislative history use does not appear to have any particular political valence. Those findings are hard to square with the notion that a textualist exclusion of legislative history will tend to promote conservative policy preferences by narrowing the reach of federal law.

#### D. Deference to Agencies

Any discussion of statutory interpretation must take account of deference to administrative agencies, as agency cases make up the majority of the federal courts' statutory dockets. Justice Scalia, moreover, has been an enthusiastic supporter of the Court's decision in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, which instructs courts to defer to agencies' "reasonable" interpretations in cases of statutory ambiguity.<sup>139</sup> Some commentators have suggested that Scalia's embrace of deference may reflect a conservative preference for executive over legislative power.<sup>140</sup>

Justice Scalia has confused this picture by suggesting that textualism might lead to less deference than other interpretive approaches, because a textualist judge is less likely to conclude that the relevant text is ambiguous.<sup>141</sup> It is not clear why that should be true; on the contrary, one might suppose that consulting legislative history and other non-textual sources would lead judges to find clarity in texts that might seem confusing or contradictory on a purely textualist

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138 *Id.*

139 467 U.S. 837, 844 (1984). See generally Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511.

140 See Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969, 1027–28 (1992) ("It is no accident that many of the principal defenders of *Chevron*—including Justice Scalia and Judges Starr and Silberman—all served in the first Reagan Administration, when an aggressively conservative executive branch sought widespread change in the law and encountered resistance from both Congress and the judiciary."); Stephen F. Ross, *Reaganist Realism Comes to Detroit*, 1989 U. ILL. L. REV. 399, 402 (suggesting that the new textualism is a conservative ploy to empower agencies promulgating Republican-friendly regulations); Patricia M. Wald, *The Sizzling Sleeper: The Use of Legislative History in Construing Statutes in the 1988–89 Term of the United States Supreme Court*, 39 AM. U. L. REV. 277, 308 (1990) ("[I]t should not pass unnoticed that the textualist version of statutory interpretation is, in fact, executive-enhancing."); cf. Lani Guinier, *Lines in the Sand*, 72 TEX. L. REV. 315, 335 n.112 (1993) ("The more vulgar explanation, at least for the attractiveness of Scalia's views [of separation of powers], is that in an era of conservative Republican Presidents and more liberal Democratic Congresses, a tilt toward the Presidency has obvious meaning . . .").

141 Scalia, *supra* note 138, at 521.

reading. But perhaps there is something about the mindset of the textualist judge that rebels against the notion that textual puzzles might be left unresolved. As Thomas Merrill has argued, “Textualism . . . tends to make statutory interpretation an exercise in ingenuity—an attitude that may be less conducive to deference to the decisions of other institutions than the dry archival approach associated with intentionalism.”<sup>142</sup>

So is Justice Scalia pro-deference or not? It is hard to know, and therefore hard to predict the consequences of a textualist approach to agency cases—leaving aside the obvious problem that agency interpretations themselves may shift from relatively liberal to relatively conservative as presidential and congressional politics shift. It should come as no surprise, then, that empirical research on the deference rates of the various Justices show no clear connections between interpretive philosophy and agency deference. According to William Eskridge and Lauren Baer’s wide-ranging study of deference at the Supreme Court, for example, Justice Scalia’s overall agency agreement rate was a relatively low 64.5%—a good bit lower than Justice Breyer’s (72%), but still higher than that of Justice Stevens’s (60.9%), the author of *Chevron* and one of the Court’s most steadfast critics of textualism.<sup>143</sup> If deference to agencies is conservative, then Justice Scalia’s commitment to textualism has robbed him of opportunities that conservative Justices Burger (who boasts an 81.3% agency agreement rate) and Rehnquist (70.6%) were able to seize.<sup>144</sup> And if a refusal to defer to agencies is conservative, then the textualist Scalia has been outdone not only by Justice Stevens, but also liberal Justices Marshall (55.6%) and Brennan (52.6%).<sup>145</sup>

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142 Thomas W. Merrill, *Textualism and the Future of the Chevron Doctrine*, 72 WASH. U. L.Q. 351, 354 (1994); cf. Richard J. Pierce, Jr., *The Supreme Court’s New Hypertextualism: An Invitation to Cacophony and Incoherence in the Administrative State*, 95 COLUM. L. REV. 749, 780 (1995) (arguing that by 1988, conservative Justices held a majority on the Court and so “abandoned the deferential approach because [they] knew that their ideological approach would prevail in most cases”).

143 William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan*, 96 GEO. L.J. 1083, 1154 tbl.20 (2008).

144 *Id.*

145 *Id.* Stevens, Marshall, and Brennan also have higher “Agreement Rate Differential[s]” (representing the difference between their rate of agreement with liberal agency decisions and conservative ones) than does Justice Scalia, suggesting that textualism is a relatively poor tool for sorting deference cases by ideological valence. See *id.* at 1156 tbl.21.

*E. Methodological Indeterminacy*

Finally, the claim that textualism works to constrict the scope of government regulation demands more faith in the determinacy of interpretive methodology in general, and textualism in particular, than is warranted. As the previous Part explained, the conceptual space between textualism and its competitors is thin, and growing thinner every day. Everyone agrees that interpretation should begin with text, and in many cases it will end there.<sup>146</sup> The most obvious practical difference between textualism and nontextualism concerns legislative history. As Scalia and Garner are quick to point out, however, legislative history will rarely be clear enough to compel a particular conclusion.<sup>147</sup> In short, it is hard to believe that the choice among the competing interpretive methodologies is outcome-determinate in many cases.

Empirical research, though limited, reinforces the intuition that methodology rarely drives results. For example, Daniel Farber's analysis of statutory decisions by Judges Posner (a self-described "pragmatist") and Easterbrook (a leading textualist) concluded that

if every judge in the country took a sincere oath of allegiance to textualism and formalism—or to dynamic interpretation and pragmatism—it seems quite possible that little or no detectable effect would exist on the outcomes of statutory cases.<sup>148</sup>

As noted above, the Law and Zaring study of legislative history usage in Supreme Court opinions found that the ideological direction of the Justices' decisions was the same regardless of whether they cited legislative history,<sup>149</sup> and other studies of legislative history reached contradictory conclusions.<sup>150</sup> Still other studies, while not focused on the question of methodological choice, have revealed similar ideologi-

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146 SCALIA & GARNER, *supra* note 1, at xxvii ("[E]ven those who are unpersuaded [by textualism] will remain, to a large degree, textualists themselves—whether or not they accept the title. While they may use legislative history, purposivism, or consequentialism at the margins, they will always begin with the text. Most will often end there.").

147 *Id.* at 377 ("With major legislation, the legislative history has something for everyone. Judge Harold Leventhal of the District of Columbia Circuit once likened its use to entering a crowded cocktail party and looking over the heads of the guests for one's friends."); *see also* Molot, *supra* note 41, at 38 ("[E]ven when a statute is sufficiently ambiguous to permit purposivist judges to give legislative history serious consideration, the legislative history itself will likely be ambiguous.").

148 Daniel A. Farber, *Do Theories of Statutory Interpretation Matter? A Case Study*, 94 Nw. U. L. REV. 1409, 1432 (2000).

149 Law & Zaring, *supra* note 130, at 1726.

150 *See supra* notes 118–29 and accompanying text.

cal voting patterns among jurists with different interpretive approaches. Justices Rehnquist and Scalia, for instance, have equally conservative voting records,<sup>151</sup> even though Justice Rehnquist made heavy use of legislative history and other extrinsic evidence of congressional intent in statutory cases, while Justice Scalia studiously ignores those materials.<sup>152</sup>

Moreover, even when judges agree about the proper approach to statutory interpretation, they often disagree about the answer to any given question. As critics long have argued, textualism—for all its emphasis on hard-edged rules of grammar and presumed usage—is remarkably indeterminate. Scalia and Garner take pains to describe textualism as an “objective” methodology,<sup>153</sup> but there is good reason to believe that interpreters’ perception of the “ordinary” meaning of text will be influenced by personal factors that will differ from judge to judge.<sup>154</sup>

Scalia and Garner argue that the canons of construction can ameliorate these difficulties, making statutory interpretation “[e]asier,” if not exactly “easy.”<sup>155</sup> Yet they acknowledge that the canons are not bright-line rules but “presumptions about what an intelligently produced text conveys.”<sup>156</sup> Moreover, the authors delight in offering examples of the canons being misapplied, suggesting that different

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151 See, e.g., Margaret H. Lemos, *The Consequence of Congress’s Choice of Delegate: Judicial and Agency Interpretations of Title VII*, 63 VAND. L. REV. 361, 409 tbl.2 (2010) (reporting that 38% of Rehnquist’s votes in Title VII cases were liberal compared to 43% for Scalia and 52% for Thomas); Jeffrey A. Segal & Albert D. Cover, *Ideological Values and the Votes of U.S. Supreme Court Justices*, 83 AM. POL. SCI. REV. 557, 560 tbl.1 (1989) (studying Justices’ votes in civil liberties cases and reporting that Rehnquist’s votes as Chief Justice were 23% liberal, while Scalia’s votes were 34.7% liberal); Nancy Staudt et al., *The Ideological Component of Judging in the Taxation Context*, 84 WASH. U. L. REV. 1797, 1811 panel B (2006) (reporting similar rates of liberal votes in tax cases (defined as votes for the government) by Rehnquist and Scalia).

152 See Law & Zaring, *supra* note 130, at 1710–11 tbl.4 (Rehnquist used legislative history in 52.9% of statutory cases studied, Burger in 60%; compare Scalia at 18.5%, and Thomas at 18.8%).

153 See, e.g., SCALIA & GARNER, *supra* note 1, at 16 (arguing that textualism “rel[ies] . . . on the most objective criterion available: the accepted contextual meaning that the words had when the law was enacted”); *id.* at 22 (describing statutory text as an “objective test” of legal meaning).

154 See Eskridge, *supra* note 53, at 533–34 (“[B]ecause the regulatory terms that generate the most intense statutory debates . . . have a variety of meanings, choosing one meaning of a word is ‘like entering a crowded cocktail party and looking over the heads of the guests for one’s friends.’” (quoting SCALIA & GARNER, *supra* note 1, at 377 (paraphrasing Judge Harold Leventhal’s quip about legislative history))).

155 SCALIA & GARNER, *supra* note 1, at xxviii.

156 *Id.* at 51.



results might obtain even among judges who agree on which of the fifty-one “valid” canons is most helpful. Making matters worse, in many cases judges will face an antecedent question of which canons to apply. “Principles of interpretation are guides to solving the puzzle of textual meaning,” Scalia and Garner explain, “and as in any good mystery, different clues often point in different directions.”<sup>157</sup> Predictably, empirical research suggests that the canons do little to constrain judicial decision making; instead, liberal Justices use canons to reach liberal decisions, and conservative Justices use canons to reach conservative decisions.<sup>158</sup> And in many cases, the Justices disagree about how to apply the same canons, with the majority invoking a canon in support of its conclusion and the dissent using the same canon to support the contrary argument.<sup>159</sup>

Consider the Court’s decision in *Ali v. Federal Bureau of Prisons*,<sup>160</sup> in which the Justices split five-to-four over the application of several well-known canons to a deceptively simple sliver of statutory text. *Ali* concerned the scope of the Federal Tort Claims Act, which makes an exception to the federal government’s waiver of sovereign immunity for any “claim arising in respect to the assessment or collection of any tax or customs duty, or the detention of any goods, merchandise, or other property *by any officer of customs or excise or other law enforcement officer*.”<sup>161</sup> The question in the case was whether Bureau of Prisons officers fell within the exception as “other law enforcement officer[s].” The courts of appeals had divided on the issue, with six circuits holding that the exception embraces all law enforcement officers, and five circuits interpreting the clause as limited to officers performing customs or excise functions. The latter interpretation, which was adopted by the dissenters in *Ali*, appears to find support in the *ejusdem generis* canon (Scalia and Garner’s Principle #32).<sup>162</sup> The canon instructs that “when a general term follows a specific one, the general term should be understood as a reference to subjects akin to the one with specific enumeration.”<sup>163</sup> Thus, Justice Kennedy argued in dissent, a proper reading of the provision attributes to the last

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157 *Id.* at 59.

158 James J. Brudney & Corey Ditslear, *Canons of Construction and the Elusive Quest for Neutral Reasoning*, 58 VAND. L. REV. 1, 103 (2005).

159 *Id.* at 104.

160 552 U.S. 214 (2008).

161 28 U.S.C. § 2680(c) (2006) (emphasis added).

162 SCALIA & GARNER, *supra* note 1, at 199.

163 *Ali*, 552 U.S. at 223 (quoting *Norfolk & W. Ry. Co. v. Am. Train Dispatchers’ Ass’n*, 499 U.S. 117, 129 (1991)) (internal quotation marks omitted).

phrase (“any other law enforcement officer”)<sup>164</sup> the discrete characteristic shared by the preceding phrases (“officer[s] of customs or excise”<sup>165</sup> and “assessment or collection of any tax or customs duty”).<sup>166</sup> Not so, explained Justice Thomas for the majority:

The phrase is disjunctive, with one specific and one general category, not . . . a list of specific items separated by commas and followed by a general or collective term. The absence of a list of specific items undercuts the inference embodied in *ejusdem generis* that Congress remained focused on the common attribute when it used the catchall phrase.<sup>167</sup>

The plaintiff in *Ali* also invoked the *noscitur a sociis* canon (Principle #31),<sup>168</sup> “according to which ‘a word is known by the company it keeps.’”<sup>169</sup> The dissenting Justices reasoned that *noscitur a sociis* supported the narrower reading of the exception,<sup>170</sup> but again the majority disagreed. According to Justice Thomas, “although customs and excise are mentioned twice in [the exceptions clause], nothing in the overall statutory context suggests that customs and excise officers were the exclusive focus of the provision.”<sup>171</sup>

The plaintiff’s appeal to the rule against superfluities (Principle #26)<sup>172</sup> was similarly unavailing. The plaintiff argued that if “other law enforcement officer” includes *all* law enforcement officers, then the preceding reference to “any officer of customs or excise” was entirely unnecessary. Justice Kennedy made a similar argument in his

164 *Id.* at 231 (Kennedy, J., dissenting) (internal quotation marks omitted).

165 *Id.* (alteration in original) (quoting 28 U.S.C. § 2680(c)) (internal quotation marks omitted).

166 *Id.* at 232 (quoting 28 U.S.C. § 2680(c)) (internal quotation marks omitted).

167 *Id.* at 225 (citing *United States v. Aguilar*, 515 U.S. 593, 615 (1995)). Scalia and Garner endorse the same reasoning. They explain that “*ejusdem generis* generally requires at least two words to establish a genus—before the *other*-phrase.” SCALIA & GARNER, *supra* note 1, at 206. Justice Thomas’s opinion in *Ali*, they continue, “rests on the premise that the phrase *officer of customs or excise* refers to a single, specific type of officer—and is not equivalent to *customs officer or excise officer*. That premise was unexamined, but it was probably correct. It is traditional to pair the two terms *custom* and *excise* in reference to officers who enforce exclusion restrictions and assess duties on imports. Great Britain and other countries have long had Bureaus of Customs and Excise.” *Id.* at 207.

168 *Id.* at 195.

169 *Ali*, 552 U.S. at 226 (quoting *S.D. Warren Co. v. Me. Bd. of Envtl. Prot.*, 547 U.S. 370, 378 (2006)).

170 *Id.* at 231 (Kennedy, J., dissenting).

171 *Id.* at 226 (majority opinion) (noting as well that “the cases petitioner cites in support of applying *noscitur a sociis* involved statutes with stronger contextual clues”).

172 SCALIA & GARNER, *supra* note 1, at 174.

dissent.<sup>173</sup> Again the majority disagreed. Justice Thomas's rebuttal was three-pronged: "Congress may have simply intended to remove any doubt that officers of customs or excise were included in 'law enforcement officer[s];'"<sup>174</sup> plaintiff's preferred reading "threaten[ed] to render 'any other law enforcement officer' superfluous;"<sup>175</sup> and, "[i]n any event, we do not woodenly apply limiting principles every time Congress includes a specific example along with a general phrase."<sup>176</sup>

The disagreement among the Justices in *Ali* cannot be chalked up to differences in grand interpretive theory. On the contrary, Justice Kennedy's dissent begins with a paean to textualism and the canons of construction:

Statutory interpretation, from beginning to end, requires respect for the text. . . . To prevent textual analysis from becoming so rarified that it departs from how a legislator most likely understood the words when he or she voted for the law, courts use certain interpretative rules to consider text within the statutory design. These canons do not demand wooden reliance and are not by themselves dispositive, but they do function as helpful guides in construing ambiguous statutory provisions.<sup>177</sup>

Instead, the disagreement turned on how to apply the canons to a relatively straightforward text. The notion that a commitment to textualism as a methodology reliably produces *any* given set of results seems fanciful in the face of such internecine battles.<sup>178</sup>

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173 *Ali*, 552 U.S. at 226; *accord id.* at 238 (Kennedy, J., dissenting).

174 *Id.* at 226 (majority opinion) (alteration in original).

175 *Id.*

176 *Id.* at 227.

177 *Id.* at 228–29 (Kennedy, J., dissenting).

178 Concededly, some of the so-called "substantive" canons may have an identifiable ideological tilt. Bradford Mank has argued that "textualist judges selectively prefer clear-statement rules that favor states' rights and private economic interests" but "are less likely to invoke canons that promote at least some types of individual rights." Bradford C. Mank, *Textualism's Selective Canons of Statutory Construction: Reinvigorating Individual Liberties, Legislative Authority, and Deference to Executive Agencies*, 86 Ky. L.J. 527, 527 (1998). Mank suggests that such selective use of substantive canons "may be due to political bias on the part of many textualist judges." *Id.* But, as that argument itself implies, the selection is not made by textualism as an interpretive methodology; it is made by the judges who happen to be textualists. Absent reason to believe that *only* textualist judges pick conservative-leaning substantive canons—that conservative judges who do not purport to commit to textualism do not engage in similar cherry picking—it would seem that conservative judges favor conservative canons (hardly breaking news), not that the choice has anything meaningful to do with textualism.

In sum, there is nothing inherent in textualism as a theory of statutory interpretation that ensures that it will work, in any reliable and predictable way, to constrict the scope of government regulation. To be sure, in the rare cases in which methodology drives outcomes, textualism sometimes may push its adherents to conservative results; it may even tilt in that direction more often than not. But the question of textualism's conservatism must be a relative one: conservative *as compared to what?* It may be the case that textualism produces more conservative outcomes than an extreme form of purposivism that pursues the core goals of each statute in their broadest form while glossing over evidence of compromises and caveats.<sup>179</sup> It is far less clear that textualism is more conservative than an intentionalist methodology that prioritizes legislative history.<sup>180</sup> And it seems impossible to conclude that textualism is more conservative in its consequences than an eclectic approach that takes each case as it finds it. It bears repeating that few judges commit to any consistent approach to statutory interpretation. Interpretive methodology is seen largely as a question of individual judicial style or philosophy, and judges face neither institutional nor reputational pressures to pledge fealty to a particular approach. Most judges dabble, drawing from legislative history in one case and focusing on text and canons in the next. Given that the eclectic approach allows interpreters to pick and choose the tools that will best serve the ends of each case, it would seem that judges keen on reaching conservative results would do better to remain agnostic as to methodology. Thus, if textualism is a tool designed to produce conservative outcomes, it is both an unnecessary and an ineffective one.

The possibility remains, of course, that conservative judges may derive some value from a textualist commitment in its own right—some benefit that Justice Scalia can claim but Justice Rehnquist could not. I explore that question below. The important point for present purposes is that textualism's link to political conservatism is neither as clear nor as straightforward as the conventional wisdom would suggest.

### III. CONSERVATIVE CAMOUFLAGE

I have argued that textualism is not necessarily conservative in its consequences, at least no more so than the methodological alternatives available to judges. Yet while textualism may not *require* conserva-

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179 See SCALIA & GARNER, *supra* note 1, at 18–20 (describing a strong form of purposivism).

180 See *supra* Section II.C.

tive outcomes, it is flexible enough to *permit* them in most cases.<sup>181</sup> This suggests a second way that methodology may be “political”: a claim of methodological commitment may help justify, and camouflage, ideologically slanted decisionmaking. William Eskridge and Philip Frickey once argued along those lines, writing that “the new, tougher version of textualism advocated by Justices Scalia and Thomas . . . serves as a cover for the injection of conservative values into statutes.”<sup>182</sup> The authors never developed that claim, but it provides the starting point for a deeper understanding of the link between interpretive methodology and political ideology.

The indeterminacy of textualism suggests that an adherent will have little trouble reaching conservative results—or liberal results, if that is his preference—in the majority of cases. Nevertheless, textualism may appear quite constraining. In other work, Justice Scalia has emphasized a general preference for sharp-edged rules over flexible standards, precisely because rules limit judicial discretion.<sup>183</sup> And in *Reading Law*, Scalia and Garner present textualism as objective and rule-bound. They endorse the view “that ‘statutory interpretation is governed as absolutely by rules as anything else in the law.’”<sup>184</sup> The very format of the book, with the bulk of its discussion broken out into numbered maxims, seems designed to reinforce that perspective. So, too, does the authors’ habit of referring to the book as a “treatise.”<sup>185</sup> Scalia and Garner insist that “most interpretive questions have a right answer,”<sup>186</sup> and bemoan the dearth of training that law students (and thus lawyers and judges) receive in the “skills of textual interpretation.”<sup>187</sup> Again and again, they suggest that the problems that plague

181 See Eskridge, *supra* note 53, at 536 (emphasizing “significant possibilities for judicial cherry-picking” among Scalia and Garner’s “fragmentary list of approved canons”); Nicholas S. Zeppos, *Justice Scalia’s Textualism: The “New” New Legal Process*, 12 CARDOZO L. REV. 1597, 1623 (1991) (“The doctrines espoused by textualism are really quite manipulable. Textualist methodology only masks the choice inevitable in difficult statutory cases.”).

182 Eskridge & Frickey, *supra* note 18, at 77.

183 See Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989); see also Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 863 (1989) (“[T]he main danger in judicial interpretation . . . of any law . . . is that the judges will mistake their own predilections for the law.”).

184 SCALIA & GARNER, *supra* note 1, at 61 (quoting JOEL PRENTISS BISHOP, COMMENTARIES ON THE WRITTEN LAWS AND THEIR INTERPRETATION § 2, at 3 (1882)).

185 *Id.* at 6 (“One object of this treatise is to remove a facile excuse for judicial overreaching—the notion that words can have no definite meaning. As we hope to demonstrate, most interpretive questions have a right answer. Variability in interpretation is a distemper.”).

186 *Id.*

187 *Id.* at 7.

modern statutory interpretation would be ameliorated if only lawyers and judges were better equipped with the tools of textual exegesis.<sup>188</sup> The strong implication is that “good” statutory interpretation is an objective skill that can be learned, as opposed to something that lies in the eye of the beholder.

The apparent “ruliness” of textualism permits its adherents to mount a plausible claim of legal constraint. Indeed, in some cases the constraint may be quite real. In *Smith v. United States*, for example, Justice Scalia concluded that a statute imposing enhanced penalties on an offender who “uses a firearm” in connection with a drug trafficking crime did not apply to a defendant who traded guns for drugs.<sup>189</sup> His argument rested on the ordinary meaning of the phrase “use[ ] a gun” (Principle #6),<sup>190</sup> which he concluded was to use the gun for its intended purpose, i.e., as a weapon,<sup>191</sup> as well as another canon (Principle #49),<sup>192</sup> the rule of lenity.<sup>193</sup> It seems fairly clear that the result in *Smith* is at odds with what Scalia describes as his “law-and-order social conservative” political ideology,<sup>194</sup> and it is entirely plausible that the result was foreordained by Scalia’s commitment to textualism.<sup>195</sup>

Justice Scalia is happy to remind us of cases like *Smith*.<sup>196</sup> Such cases substantiate the claim of constraint, thereby legitimizing the many other decisions where Justice Scalia’s votes are consistent with his conservative ideology. A Justice can plausibly claim that his hands are tied by the law—that his decision in a controversial case is more legal than political—only if he can point to other cases in which the same methodology led him to ideologically unfriendly results. This

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188 See, e.g., *id.* at 31 (“Through accurate knowledge of language and proper education in legal method, lawyers ought to have a shared sense of what meanings words can bear and what linguistic arguments can credibly be made about them.”); *id.* at 33 (“The [textualist] endeavor requires aptitude in language, sound judgment, the suppression of personal preferences regarding the outcome, and, with older texts, historical linguistic research.”).

189 508 U.S. 223, 242–43 (1993) (Scalia, J., dissenting).

190 SCALIA & GARNER, *supra* note 1, at 69.

191 *Smith*, 508 U.S. at 242–43 (Scalia, J., dissenting).

192 SCALIA & GARNER, *supra* note 1, at 296.

193 *Smith*, 508 U.S. at 246 (Scalia, J., dissenting).

194 SCALIA & GARNER, *supra* note 1, at 17.

195 It is worth noting, however, that Justice Breyer’s majority opinion (holding that the statute applied to the defendant) also made heavy use of textual argument and concluded that the ordinary meaning of the operative language cut in the opposite direction. *Smith*, 508 U.S. at 228–31.

196 Justice Scalia uses such examples to rebut “the slander that [textualism] is a device calculated to produce socially or politically conservative ends.” SCALIA & GARNER, *supra* note 16, at 16–17.

captures the familiar idea that signals of commitment are credible only if they are costly.<sup>197</sup>

Thus, there is something to the notion that textualism serves as a cover for the injection of conservative values into statutory interpretation. But important questions remain—and on closer inspection, the claim has more to do with methodology in general than with textualism in particular. As the discussion in the previous Part should make clear, it is not necessarily *textualism* that is responsible for the “injection” of conservative values. Textualism could be used by liberals to equal (albeit opposite) effect, and non-textualist conservative judges could (and do) use other methodologies to reach the same results as their textualist brethren. If conservative textualist judges are injecting conservative values into statutes, the driving force would seem to be their conservatism, not their textualism.<sup>198</sup>

Nor is textualism unique in its ability to provide “cover” for unconstrained and ideological judging. Most judges who deviate from textualism’s strictures (which is to say, most judges) purport to use legislative history to reveal evidence of the intent or purpose of the enacting legislators.<sup>199</sup> Those judges insist that reliance on legisla-

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197 See McNollgast, *Legislative Intent: The Use of Positive Political Theory in Statutory Interpretation*, 57 LAW & CONTEMP. PROBS. 3, 25 (1994) (describing general theory of signaling and explaining that “[t]he economics of signaling . . . suggests that an action is informative if it is taken by an informed person who pays a fee, expends effort, or foregoes some valuable alternative activity in order to take the action”).

198 See Volokh, *supra* note 8. As Professor Volokh reminds us, it is a mistake to assume that textualism *as a methodology* is conservative simply because the voting record of today’s self-proclaimed textualist judges is conservative. It is equally possible that textualism is politically neutral, and flexible enough to permit judges of different political stripes to reach whatever results they choose. But, because there are no well-known liberal textualists on the federal bench, we see only one side of the picture and mistake it for the whole.

199 Scalia and Garner focus their ire on the interpretive theories that most affirmatively embrace judicial discretion and common sense. SCALIA & GARNER, *supra* note 1, at 16–17 (“If any interpretive method deserves to be labeled an ideological ‘device,’ it is not textualism but competing methodologies such as purposivism and consequentialism, by which the words and implications of text are replaced with abstractly conceived ‘purposes’ or interpret-desired ‘consequences.’ Willful judges might use textualism to achieve the ends they desire . . . . But in a textualist culture, the distortion of the willful judge is much more transparent, and the dutiful judge is never *invited* to pursue the purposes and consequences that he prefers.”). Such approaches are popular among academic commentators, but few judges explicitly endorse them. *Id.* at 12–13 (“We do not mean to suggest that what has assertedly become the theorists’ ‘preferred style of interpretation’ has achieved predominance within the judiciary.”).

tive history exerts a constraining force on interpretation.<sup>200</sup> After all, the judge who seeks guidance in legislative history uses all the textual clues available to the textualist, and then *also* consults another set of materials that were produced by the legislature itself. Non-textualist judges therefore can claim to be even more constrained than their textualist brethren, because their opinions must make sense of more evidence, leaving them less room to maneuver.<sup>201</sup> Those claims are debatable, of course; like other critics, Scalia and Garner argue that legislative history is infinitely malleable.<sup>202</sup> Yet similar arguments long have been levied against textualist approaches, dating back at least to Llewellyn's well-known demolition of the canons in 1950.<sup>203</sup> The operative question is whether non-textualist judges can argue plausi-

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200 See, e.g., *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 572 (2005) (Stevens, J., dissenting) (“I believe that we as judges are more, rather than less, constrained when we make ourselves accountable to *all* reliable evidence of legislative intent.”); *Koons Buick Pontiac GMC, Inc. v. Nigh*, 543 U.S. 50, 65 n.1 (2004) (Stevens, J., concurring) (“We execute our duty as judges most faithfully when we arrive at an interpretation only after seeking guidance from every reliable source.” (internal quotation marks omitted)); see also Peter L. Strauss, *The Courts and the Congress: Should Judges Disdain Political History?*, 98 COLUM. L. REV. 242, 252–53 (1998) (“Language is imprecise and manipulable. Often we can do no better than identify a possible range of meanings a particular expression evokes. . . . Once we have identified a range of possible meanings, however, we are outside the realm where language alone can answer the question of meaning for us. Why would we prefer a judge operating within such a range to be indifferent or oblivious to information about the political history of that legislation?”).

201 William Buzbee uses the metaphor of data points on a graph to illustrate the point:

The primary statute's text creates data points to which any interpretation must conform. . . . Legislative history data points will frequently provide different potential arguments about appropriate interpretations, but when a judge who considers historical context interprets a disputed provision, that judge will need to examine text, historical context, and legislative history and then craft a judicial response that is defensible, taking all of these data points into account. . . . Mere text-to-text comparisons, in contrast, provide virtually no constraining data points that a judge must evaluate and explain in reaching a result.

William W. Buzbee, *The One-Congress Fiction in Statutory Interpretation*, 149 U. PA. L. REV. 171, 239 (2000); see also Merrill, *supra* note 142, at 373 (“Having fewer tools to work with, the textualist . . . necessarily has to become more imaginative in resolving questions of statutory interpretation.”).

202 SCALIA & GARNER, *supra* note 1, at 377 (arguing that “legislative history has something for everyone. . . . Moreover, because there are no rules about which categories of statements are entitled to how much weight, the history can be either hewed to as determinative or disregarded as inconsequential . . .”).

203 Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons about How Statutes Are to Be Construed*, 3 VAND. L. REV. 395 (1950).



bly that legislative history is constraining. Plainly they can, and they do—just as textualists claim to be constrained by canons, even in the teeth of Llewellyn’s critique.

To be sure, as I have emphasized throughout, few judges pledge fealty on any one theory of interpretation. Most muddle through without spilling much ink on grand theory, taking each case on its own terms. Methodological promiscuity may weaken claims of constraint, given that judges who decline to commit on methodology are not wedded to any particular sources of statutory meaning. Perhaps, then, Justice Scalia’s public commitment to textualism (like any other methodological commitment) offers him more “cover” than the eclectic approach favored by Chief Justice Rehnquist.

The question remains, however, cover from what? If textualism is a methodological shell game, who exactly is being fooled? The answer surely is not academics and other legal elites. Anyone who follows statutory interpretation with even a glancing interest is well aware that textualism’s claim of determinacy is hotly contested. Opponents of the new textualism have argued from the outset that its ruliness is more apparent than real,<sup>204</sup> and the legal community has seen countless decisions in which a claim of textual clarity is belied by sharp divisions among the Justices.<sup>205</sup> Indeed, Scalia and Garner come close to conceding textualism’s indeterminacy when they argue that its advantage over competing methods lies in its *aspiration* to objectivity and constraint.<sup>206</sup> If textualism’s political value is that it effectively camouflages conservative decision making, that value depreciated long ago.

Another possibility is that textualist judges themselves are “fooled,” in the sense that they persuade themselves of the determinacy of the theories they espouse.<sup>207</sup> Perhaps textualism serves not so

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204 See *supra* note 182 and accompanying text.

205 See, e.g., *Exxon Mobil Corp.*, 545 U.S. at 567 (concluding that text is unambiguous, and therefore rejecting reliance on legislative history, notwithstanding four-Justice dissent pressing contrary reading).

206 SCALIA & GARNER, *supra* note 1, at 22 (“The common response of purposivists and consequentialists to criticisms of their theories is that textualism, with its cross-cutting canons and competing principles, does not always provide a clear answer and hence can also be subjectively manipulated. Yet there is a world of difference between an objective test (the text)—which sometimes provides no clear answer, thus leaving the door open to judicial self-gratification—and tests that invite judges to say that the law is what they think it ought to be.”).

207 Cf. Dan M. Kahan et al., “*They Saw a Protest*”: *Cognitive Illiberalism and the Speech-Conduct Distinction*, 64 STAN. L. REV. 851, 853 (2012) (discussing “‘motivated cognition,’ the ubiquitous tendency of people to form perceptions, and to process factual information generally, in a manner congenial to their values and desires”).

much to *camouflage* ideological judging as to *facilitate* it, making its adherents believe that they are relying on “legal” rather than “attitudinal” considerations and thereby emboldening them. But if that were true, why would we expect the dynamic to be limited to textualists—or to committed methodologists, for that matter? Why not also suppose that a dabbler like Justice Rehnquist sincerely believed that “the law” was dictating the result in each case, albeit through different clues as to statutory meaning?

The most promising answer, I suggest, is that the general public are the consumers of the shell game—though this, too, requires significantly more elaboration. It strains reason to suggest that the average citizen is able to distinguish in a meaningful way between a Scalia and a Rehnquist. Media coverage of Supreme Court decision making (not to mention decision making in the lower federal courts) rarely dwells on fiddly jurisprudential debates among the Justices who are arrayed together on the same side of the case. And few members of the general public have the time, interest, or legal savvy to read and understand methodological arguments in Supreme Court opinions. To the extent that lay citizens know about Scalia-style textualism, it is not from his opinions; it is probably not from Scalia himself. It is from the politicians and pundits who repeat the story of textualism’s heroism in the battle against “activist judges.”

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The possibility that judges might be swayed by textualism’s appearance of “ruliness” suggests an additional link between textualism and conservatism—one that I do not pursue in this Review, but that warrants careful consideration. Suppose that individuals who are drawn to political conservatism also tend to be drawn to relatively bright-line rules. Suppose, further, that while the two tendencies are correlated with each other, one does not cause the other; instead, the same psychological forces that lead individuals to rules also lead many of them to adopt politically conservative views. *Cf., e.g.,* John T. Jost et al., *Political Conservatism as Motivated Social Cognition*, 129 PSYCH. BULL. 339, 344–45 (2003) (exploring the possibility “that there are observable empirical regularities that link specific psychological motives and processes (as independent variables) to particular ideological or political contents (as dependent variables)” and noting that “[s]pecific variables that have been hypothesized to predict conservatism include . . . intolerance of ambiguity, rule following . . . , uncertainty avoidance, need for cognitive closure, [and] personal need for structure” (citations omitted)). If these suppositions were correct, they might provide a decidedly non-political explanation for the political patterns we observe in the adoption and rejection of textualism among judges and academics. But a psychological explanation also would raise fascinating questions of its own. For example, why are so few conservative judges committed textualists? Why are (some) conservative judges more persuaded by textualism’s claims of determinacy than the competing claims of intentionalism? And, if individuals’ views on methodology are linked to psychological or cognitive forces largely beyond our control, what is the value of methodological debate?

It is this broader story of textualism that establishes the link between textualism and conservative politics—a story that is told not only in judicial opinions and academic articles, but also in books (like *Reading Law* and Scalia’s earlier *A Matter of Interpretation*)<sup>208</sup> that are penned for a more generalist audience, as well as even more wide-ranging appeals by political actors and advocates. Rather than obscuring the injection of conservative values into statutory decisions, textualism provides a public justification for decision making that (because of the substantive commitments of its practitioners) will tend on the whole to serve conservative ends. The next Part develops this broader public story of textualism, situating the methodology in historical and political context.

#### IV. TEXTUALISM IN HISTORICAL CONTEXT: METHODOLOGY AS AN ENGINE FOR CHANGE

Expanding our focus beyond the judges who practice textualism to the broader political context in which textualism took hold and continues to be celebrated helps illuminate the connection between textualism and conservatism, and between methodology and politics more generally. In some respects, the point should be obvious. In order to understand the “political” nature of an interpretive methodology, we need to look past judges to other participants in political discourse. An individual judge could act politically, or ideologically, on her own. But to say that a *methodology* is politically conservative is to locate the technical arguments of lawyers in a wider political movement. Ultimately, I want to suggest that textualism’s conservatism has relatively little to do with the details of the interpretive theory, or the arguments its practitioners make and the opinions they write. It has to do with textualism’s embrace by conservative activists eager to challenge the legal status quo, its pairing with originalism in constitutional theory, and the rhetoric of “judicial restraint” that developed around both methodologies. Textualism’s conservatism, in other words, is historically and politically contingent.

The new textualism gained prominence in the 1980s, during the administration of Ronald Reagan. The judges who would make textualism famous—Frank Easterbrook of the Seventh Circuit, James Buckley and Kenneth Starr of the D.C. Circuit, Alex Kozinski of the Ninth Circuit, and particularly D.C. Circuit Judge and later Justice Scalia—

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208 SCALIA, *supra* note 22, at 3 (explaining that his book is “addressed not just to lawyers but to all thoughtful Americans who share our national obsession with the law”).

were all Reagan appointees.<sup>209</sup> Of the group, only Easterbrook had expressed a preference for textualism prior to his ascendance to the bench.<sup>210</sup> But Scalia quickly made up for lost time. In 1985, while still a circuit judge, he wrote a strongly worded opinion deriding the use of legislative history in statutory interpretation.<sup>211</sup> The opinion was widely cited by other budding textualists.<sup>212</sup> Scalia also gave a series of lectures at law schools around the country in 1985 and 1986, in which he repeated his critique of legislative history and advocated a textualist approach to interpretation.<sup>213</sup> The drumbeat grew louder still after Scalia's appointment to the Supreme Court in 1986. Scalia wrote opinion after opinion challenging his colleagues' inquiries into legislative intent and insisting that statutory interpretation focus on the text, the whole text, and nothing but the text.<sup>214</sup>

Of course, textualism was not the only interpretive innovation of the 1980s: the other was originalism in constitutional interpretation. Of the two theories, originalism was, without doubt, the dominant sibling. The Reagan Administration enthusiastically endorsed originalism and helped push it into the mainstream.<sup>215</sup> Reagan's Attorney General Edwin Meese "set about making fidelity to original intent a

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209 See Eskridge, *supra* note 17, at 647 nn.94–98 (citing textualist opinions by Reagan-appointed circuit court judges).

210 See, e.g., Easterbrook, *Statutes' Domains*, *supra* note 35.

211 *Hirschey v. F.E.R.C.*, 777 F.2d 1, 7 (D.C. Cir. 1985) (Scalia, J., concurring).

212 See Eskridge, *supra* note 17, at 650–51 n.114 ("Lower court judges influenced by or sympathetic to the nascent new textualism seized onto [Scalia's *Hirschey*] opinion as a standard citation.").

213 See Daniel A. Farber & Philip P. Frickey, *Legislative Intent and Public Choice*, 74 VA. L. REV. 423, 442–43 & nn.64–65, 454–55 (1988) (discussing and quoting Scalia's unpublished speech).

214 See Eskridge, *supra* note 17, at 651–56 (citing and discussing Scalia's early opinions as a Justice and noting that his "critique [became] more radical and more formalist" after his elevation to the Supreme Court).

215 See Jamal Greene, *Selling Originalism*, 97 GEO. L.J. 657, 659–60 (2009) ("[E]xalting originalism was part of a deliberate effort by the Reagan Justice Department to rally Americans against a Federal Judiciary it perceived as frustrating its conservative political agenda."); Robert Post & Reva Siegel, *Originalism as a Political Practice: The Right's Living Constitution*, 75 FORDHAM L. REV. 545, 554–55 (2006) (describing the Reagan Administration's advocacy on behalf of originalism); Reva B. Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in Heller*, 122 HARV. L. REV. 191, 217 (2008) ("At the time of Reagan's election, conservative critiques of the Court had begun to shift from demands for 'strict construction'—a theme of the Nixon years—to an emerging call for return to the Constitution's 'original intent' . . ."); Keith E. Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL'Y 599, 604 (2004) (noting that "originalism was embraced as a comprehensive judicial philosophy by the Reagan administration"); cf. Joseph Sobran, *Un-packing the Courts*, NAT'L REV., April 11, 1986, at 30 (discussing Nixon's calls for "strict constructionists").

subject of popular political discourse.”<sup>216</sup> At the same time Scalia was delivering lectures on textualism, Meese was making well-publicized speeches in which he sang the praises of “a jurisprudence of original intention.”<sup>217</sup> The themes of Meese’s speeches were picked up in popular publications, and prompted public rebuttals from Justices Brennan and Stevens<sup>218</sup>—which in turn provoked a slew of conservative responses.<sup>219</sup>

As others have observed, there is an apparent tension between the two interpretive theories.<sup>220</sup> Particularly in its early articulations, constitutional originalism tended to focus on the intent of the Framers.<sup>221</sup> In the face of widespread criticism, conservative judges, administration lawyers, and legal scholars soon shifted the emphasis to the original *meaning* of the Constitution’s text. But in practice, originalist arguments still tend to rely on evidence of original intent to flesh out the meaning of the words.<sup>222</sup> Such a theory would pair easily with

216 Greene, *supra* note 215, at 680–81.

217 See Edwin Meese, III, Att’y Gen. of the United States, *The Supreme Court of the United States: Bulwark of a Limited Constitution*, Address Before the American Bar Association (July 9, 1985), in 27 S. TEX. L. REV. 455, 464 (1986).

218 See Justice William J. Brennan, Jr., Speech to the Text and Teaching Symposium (Oct. 12, 1985), in *THE GREAT DEBATE: INTERPRETING OUR WRITTEN CONSTITUTION* 11 (1986); Justice John Paul Stevens, Speech Before the Federal Bar Association (Oct. 23, 1985), in *id.* at 27.

219 See JOHNATHAN O’NEILL, *ORIGINALISM IN AMERICAN LAW & POLITICS: A CONSTITUTIONAL HISTORY* 155–56 (2005) (describing debate in both academic and popular presses over Meese’s speeches); Sobran, *supra* note 215, at 30, 31 (describing conservative responses to the Justices’ speeches).

220 See generally William N. Eskridge, Jr., *Should the Supreme Court Read The Federalist but Not Statutory Legislative History?*, 66 GEO. WASH. L. REV. 1301 (1998) (discussing the tension between textualism and originalism and their use in Supreme Court jurisprudence).

221 For example, the Reagan Justice Department’s *Guidelines on Constitutional Litigation* emphasized that constitutional interpreters should try to “discover” the “intended scope” of constitutional provisions and included a bibliography of “sources available for gleaning historical evidence of the Founders’ intentions.” OFFICE OF LEGAL POLICY, U.S. DEP’T OF JUSTICE, *GUIDELINES ON CONSTITUTIONAL LITIGATION* 5, 11 (1988); see also Whittington, *supra* note 215, at 603 (discussing the “emphasis on the subjective intentions of the founders” in early conservative articulations of originalism).

222 See JACK M. BALKIN, *LIVING ORIGINALISM* 101 (2011) (“[C]onservative originalist practices of arguing about original meaning tend to conflate the question of original meaning with constructions based on expected applications. When originalists face a vague or abstract provision, they look to expected applications and use this data to formulate principles that they then equate with the clause’s ‘original meaning.’”); *id.* at 103 (noting that, when asked at his confirmation hearings about the difference between original meaning and original intent, Justice Scalia responded that there was “not a big difference” between the two concepts).

intentionalism in statutory interpretation, which likewise uses evidence of the original intent of enacting legislators to clarify statutory text. It fits less comfortably with a textualist theory that bars inquiry into legislative history—which many see as the equivalent of the drafting history of the Constitution.<sup>223</sup>

Textualism also presented challenges for another Reagan-era initiative concerning the role of presidential signing statements. The Administration argued that courts should rely on signing statements reflecting the President's understanding of ambiguous statutory language.<sup>224</sup> In a 1986 speech before the National Press Club, Meese emphasized the "importance of these Presidential signing statements as legislative history."<sup>225</sup> To that end, he arranged for the President's signing statements to be published along with traditional legislative history in the United States Code Congressional and Administrative News.<sup>226</sup> Plainly, Meese's strategy assumed that courts would consider legislative history in the originalist/intentionalist manner, and would be thwarted by a textualist refusal to consider any evidence of the intentions of those (including the President) involved in enacting the bill.

Despite the contradictions between textualism and other aspects of New Right orthodoxy, conservative politicians quickly came to embrace the new methodology. By the end of the 1980s, the Reagan and first Bush Office of Legal Policy had developed a comprehensive

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223 See Zeppos, *supra* note 181, at 1630 ("Justice Scalia frequently uses the 'legislative history' of the Constitution—e.g., the *Federalist Papers* or Farrand's records of the constitutional convention—to give meaning to the open-textured provisions of the Constitution."); see also George Kannar, *The Constitutional Catechism of Antonin Scalia*, 99 YALE L.J. 1297, 1303 (1990) ("It only stands to reason, if statutes are to be construed in accordance with legislators' intentions, that the most fundamental 'statute'—the Supreme 'Law' of the Land—should be construed in a similar fashion."). But see Bryan A. Garner, *Response to Richard A. Posner*, LAWPROSE (Sept. 5, 2012), <http://www.lawprose.org/blog/?p=570> (distinguishing between legislative history (which textualism deems inadmissible) and "the history of the *times* when the legislation (or constitutional provision) was adopted, including the understandings reflected in contemporaneous legislation and scholarly commentary" (which originalism embraces)).

224 See Curtis A. Bradley & Eric A. Posner, *Presidential Signing Statements and Executive Power*, 23 CONST. COMMENT. 307, 316 (2006).

225 Edwin Meese, III, Att'y Gen., Address at the Nat'l Press Club 78 (Feb. 25, 1986), available at <http://www.justice.gov/ag/aghistorical/meese/1986/02-25-1986.pdf>.

226 See AM. BAR ASS'N, REPORT OF THE TASK FORCE ON PRESIDENTIAL SIGNING STATEMENTS AND THE SEPARATION OF POWERS DOCTRINE 10 (2006) ("President Reagan's Attorney General Edwin Meese secured an agreement from West Publishing Company to include signing statements along with traditional legislative history in the United States Code Congressional and Administrative News for easy availability by courts and implementing officials.").

defense of textualism in statutory interpretation.<sup>227</sup> Textualism, after all, had the backing of the persuasive and charismatic Justice Scalia. But it also shared with constitutional originalism two features that were central to the conservative political agenda. Differences aside, originalism and textualism were united in their appeal to judicial restraint and their rejection of the methodological status quo. Proponents of the theories blamed the reigning “judicial activism” for myriad social ills—indeed, they blamed other methodological approaches for the very existence of controversy over courts. More than two decades later, Scalia and Garner echo those arguments when they assert that “[t]he descent into social rancor over judicial decisions is largely traceable to nontextual means of interpretation, which erode society’s confidence in a rule of law that evidently has no agreed-on meaning.”<sup>228</sup>

Conservative politicians picked up the idea of judicial restraint and used it to define the Republican Party’s vision for the federal judiciary.<sup>229</sup> For example, the Republican Party platform of 1976 mentioned the judiciary only to call for more federal judgeships, U.S. Attorneys, and other court workers.<sup>230</sup> In 1980, the platform criticized President Carter’s “partisan nominations,” and pledged to “work for the appointment of judges at all levels of the judiciary who respect traditional family values and the sanctity of innocent human life.”<sup>231</sup> In 1984, the platform mentioned “judicial re-

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227 See OFFICE OF LEGAL POLICY, U.S. DEP’T OF JUSTICE, USING AND MISUSING LEGISLATIVE HISTORY: A RE-EVALUATION OF THE STATUS OF LEGISLATIVE HISTORY IN STATUTORY INTERPRETATION (1989).

228 SCALIA & GARNER, *supra* note 1, at xxviii.

229 For a history of Republican rhetoric about “judicial activism” and “judicial restraint,” see Neil S. Siegel, *Interring the Rhetoric of Judicial Activism*, 59 DEPAUL L. REV. 555, 557–71 (2010). It bears emphasis that arguments about judicial activism were not new in the 1980s; indeed, they captured criticisms lobbed by progressives in the 1930s in opposition to the *Lochner* Court. See Barry Friedman, *The Cycles of Constitutional Theory*, 67 LAW & CONTEMP. PROBS. 149, 157 (2004) (describing how progressives and conservatives have cycled back and forth between advocating judicial activism and restraint, and noting that prior to 1937, when the courts were conservative, progressives “were troubled by [judicial review while] conservatives admired its preservationist and anti-democratic character”); Whittington, *supra* note 215, at 601 (“It is an intriguing feature of conservative critiques of the Court during [the 1970s and 1980s] that they mirror the central critique of the *Lochner* Court favored by the New Dealers in the 1930s: that the justices were essentially making it up and ‘legislating from the bench.’”).

230 REPUBLICAN NAT’L CONVENTION, REPUBLICAN PARTY PLATFORM OF 1976, available at <http://www.presidency.ucsb.edu/ws/index.php?pid=25843>.

231 REPUBLICAN NAT’L CONVENTION, REPUBLICAN PARTY PLATFORM OF 1980, available at <http://www.presidency.ucsb.edu/ws/index.php?pid=25844>.

straint” for the first—but by no means the last—time.<sup>232</sup> Some variation on the need for judicial restraint,<sup>233</sup> or criticism of “activist judges” who “make up laws and invent new rights”<sup>234</sup> has appeared

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232 REPUBLICAN NAT’L CONVENTION, REPUBLICAN PARTY PLATFORM OF 1984, *available at* <http://www.presidency.ucsb.edu/ws/index.php?pid=25845> (“We commend the President for appointing federal judges committed to the rights of law-abiding citizens and traditional family values. We share the public’s dissatisfaction with an elitist and unresponsive federal judiciary. . . . In his second term, President Reagan will continue to appoint Supreme Court and other federal judges who share our commitment to judicial restraint.”).

233 *See* REPUBLICAN NAT’L CONVENTION, REPUBLICAN PARTY PLATFORM OF 1988, *available at* <http://www.presidency.ucsb.edu/ws/index.php?pid=25846> (“Our Constitution provides for a separation of powers among the three branches of government. In that system, judicial power must be exercised with deference toward State and local authority; it must not expand at the expense of our representative institutions. . . . That is why we commend the Reagan-Bush team for naming to the federal courts distinguished women and men committed to judicial restraint, the rights of law-abiding citizens, and traditional family values.”); REPUBLICAN NAT’L CONVENTION, REPUBLICAN PARTY PLATFORM OF 2000, *available at* <http://www.presidency.ucsb.edu/ws/index.php?pid=25849> (“Governor Bush is determined to name only judges who have demonstrated respect for the Constitution and the processes of our republic.”); REPUBLICAN NAT’L CONVENTION, REPUBLICAN PARTY PLATFORM OF 2004, *available at* <http://www.presidency.ucsb.edu/ws/index.php?pid=25850> (“President Bush has established a solid record of nominating only judges who have demonstrated respect for the Constitution and the democratic processes of our republic . . .”).

234 REPUBLICAN NAT’L CONVENTION, REPUBLICAN PARTY PLATFORM OF 1996, *available at* <http://www.presidency.ucsb.edu/ws/index.php?pid=25848> (“Some members of the federal judiciary . . . make up laws and invent new rights as they go along, arrogating to themselves powers King George III never dared to exercise. . . . A Republican president will ensure that a process is established to select for the federal judiciary nominees who understand that their task is first and foremost to be faithful to the Constitution and to the intent of those who framed it. . . . Any other role for the judiciary, especially when personal preferences masquerade as interpreting the law, is fundamentally at odds with our system of government in which the people and their representatives decide issues great and small.”); REPUBLICAN NAT’L CONVENTION, REPUBLICAN PARTY PLATFORM OF 2000, *supra* note 233 (“In the federal courts, scores of judges with activist backgrounds in the hard-left now have lifetime tenure. . . . At the expense of our children and families, they make up laws, invent new rights, free vicious criminals, and pamper felons in prison.”); REPUBLICAN NAT’L CONVENTION, REPUBLICAN PARTY PLATFORM OF 2004, *supra* note 233 (“In the federal courts, scores of judges with activist backgrounds in the hard-left now have lifetime tenure. . . . We believe that the self-proclaimed supremacy of these judicial activists is antithetical to the democratic ideals on which our nation was founded.”); REPUBLICAN NAT’L CONVENTION, REPUBLICAN PARTY PLATFORM OF 2008, *available at* <http://www.presidency.ucsb.edu/ws/index.php?pid=78545#axzz2gW0KqDDo> (“Judicial activism is a grave threat to the rule of law because unaccountable federal judges are usurping democracy, ignoring the Constitution and its separation of powers, and imposing their personal opinions upon the public. This must stop.”); REPUBLICAN NAT’L CONVENTION, REPUBLICAN PARTY PLATFORM OF 2012, *available at* <http://www.presidency.ucsb.edu/>



prominently in the Party's platform in all but one year since 1984.<sup>235</sup>

Similar refrains were repeated in the popular press, as conservative magazines, newspapers, and television and radio talk shows took up the battle cry against judicial activism. Conservative opinion pieces explicitly linked the problems with existing law to questions of interpretive methodology. Such arguments tended to focus on constitutional originalism and the big-ticket constitutional issues of the time—abortion, crime control, affirmative action<sup>236</sup>—but they often contained parallel references to statutory interpretation.<sup>237</sup> Attorney General Meese, for example, promised that it would be the policy of the Reagan Justice Department “to resurrect the original meaning of constitutional provisions *and statutes* as the only reliable guide for judgment.”<sup>238</sup>

Reagan's nomination of Robert Bork for the Supreme Court seat formerly occupied by Lewis Powell—and the highly publicized confir-

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ws/index.php?pid=101961#axzz2gW0KqDDo (“A serious threat to our country's constitutional order, perhaps even more dangerous than presidential malfeasance, is an activist judiciary, in which some judges usurp the powers reserved to other branches of government. . . . The sole solution, apart from impeachment, is the appointment of constitutionalist jurists, who will interpret the law as it was originally intended rather than make it.”).

235 Although the 1992 Republican Party platform did not mention judicial restraint or activism, President George H.W. Bush sounded similar themes in his campaign. See Siegel, *supra* note 229, at 562 (“[D]uring his . . . acceptance speech at the Republican National Convention in Houston, President George [H.] W. Bush said that ‘Clinton and Congress will stock the judiciary with liberal judges who write laws they can’t get approved by the voters.’” (quoting George H.W. Bush, Remarks Accepting the Presidential Nomination at the Republican National Convention in Houston (Aug. 20, 1992), available at <http://www.presidency.ucsb.edu/ws/print.php?pid=21352>)).

236 See, e.g., Robert H. Bork, *The Case Against Political Judging*, 41 NAT'L REV., Dec. 8, 1989, at 23, 26 (explaining that originalist methodology would deny liberals their “entitlements agenda for the future—things like constitutional rights to welfare and to education”); Sobran, *supra* note 214, at 32 (criticizing Warren and Burger Court decisions on “segregation, abortion, pornography, school prayer, and the like”); see also Post & Siegel, *supra* note 215, at 556 (explaining that Meese explicitly linked originalism to “such hot-button conservative issues as affirmative action, public welfare assistance, law and order, abortion, suppression of gays, and so on”).

237 See, e.g., Bork, *supra* note 236, at 23 (“When we speak of ‘law,’ we ordinarily refer to a rule that we have no right to change except through prescribed procedures. . . . Statutes . . . may be changed by amendment or repeal. The Constitution may be changed by amendment pursuant to the procedures set out in Article V. It is a necessary implication of the prescribed procedures that neither statute nor Constitution should be changed by judges.”).

238 Meese, *supra* note 216, at 465–66 (emphasis added).

mation battle that followed—helped cement these issues in the public consciousness, galvanizing both supporters and opponents of the new methodologies. As Jamal Greene, Robert Post, Reva Siegel, and others have detailed, the Bork nomination focused the public’s attention on interpretive methodology in ways that had never been seen before<sup>239</sup>: “Americans spent the summer of 1987 debating constitutional methodology, precisely as Meese and his allies wanted.”<sup>240</sup> But while the emphasis on methodology in the Bork confirmation hearings and surrounding debates was novel, it was by no means a passing fad. On the contrary, “judicial philosophy” remains the “Holy Grail” of confirmation hearings today.<sup>241</sup> Judicial restraint, moreover, remains one of the catch-phrases of the political right, an ideal embodied by jurists “like Scalia.”<sup>242</sup>

Why all the emphasis on methodology? I argued above that the interpretive alternatives in the statutory field are too similar to one another, and too malleable, to drive outcomes in meaningful and predictable ways. If that is correct, then what was all the fuss about in the 1980s—and why are we still fighting the same battles today? The answer, I suggest, has to do with the unique nature of methodological argument. By focusing on the *how* of the law, methodology transcends individual cases and issues; it provides a basis for attacking wide swaths of judicial doctrine at once. And, importantly, methodology speaks the neutral language of procedure, not substance. It generalizes across cases, focusing on process rather than policy. Accordingly, the methodological innovations of the 1980s enabled conservative critics of the Warren and Burger Courts to challenge entire categories of decisions on purportedly non-ideological grounds. By framing their arguments in terms of methodology, conservative politicians, academics, and judges were able to mount a broad-brush critique of the legal status quo. Originalism and textualism offered their adherents *legal* justifications for deciding cases differently—and not just new cases; old ones too.

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239 See Greene, *supra* note 215, at 681, 690–91; Post & Siegel, *supra* note 215, at 554–56.

240 Greene, *supra* note 215, at 681.

241 CHRISTOPHER L. EISGRUBER, *THE NEXT JUSTICE: REPAIRING THE SUPREME COURT APPOINTMENTS PROCESS* 98 (2007); see also Greene, *supra* note 215, at 660 (“As confirmation fights have become more contentious, politicized, and popularized, so too has the discourse around methodology that was—deliberately—so central to the pivotal Robert Bork hearing of 1987.”).

242 Terry Eastland, *Bush’s Justice*, WKLY. STANDARD, JUNE 23, 2003 (discussing President Bush’s options for Supreme Court nominees and arguing that “[s]omeone like Scalia, assuming all other qualifications are met, would be the best choice for the Court”).

Indeed, despite all the talk of restraint, the Scalia-led charge for a change in statutory and constitutional methodology<sup>243</sup> was, in fact, profoundly liberating. This point is well-worn in the context of constitutional interpretation, as countless scholars have argued that originalism has paved the way for a new wave of conservative judicial activism.<sup>244</sup> At their core, however, such arguments are not really about originalism, or constitutional interpretation more generally; they are about *methodology*, full stop—including textualism and other approaches to statutory interpretation.

A disciple of a new interpretive methodology has a ready-made reason to limit, even overrule, prior decisions, and to take the law in new directions.<sup>245</sup> Rather than rehashing old debates over the meaning of legislative history, for example, the textualist can dismiss the entire question as inappropriate—and constitutionally so. It should come as no surprise that Justice Scalia has been willing to overturn or severely prune statutory precedents, even in the face of the “super strong” version of *stare decisis* the Court purports to apply to its statutory decisions.<sup>246</sup> Consider, for example, his dissent in *Johnson v. Transportation Agency*, in which he advocated overruling *United Steelworkers v. Weber*<sup>247</sup> and abandoning the rule that voluntary affirmative action may, in appropriate circumstances, be permissible under Title VII.<sup>248</sup> In support of that argument, Justice Scalia emphasized that the *Weber* majority “disregarded the text of the statute, invoking instead its ‘spirit’ . . . and ‘practical and equitable [considerations] only partially perceived, if perceived at all, by the 88th Congress.’”<sup>249</sup>

243 Michael C. Dorf, *The Undead Constitution*, 125 HARV. L. REV. 2011, 2011 (2012) (book review) (“When [Scalia] was appointed to the Supreme Court in 1986, . . . originalism[ ] was still a mostly insurgent position within constitutional theory. Since then, and in no small part thanks to Justice Scalia’s own influence, originalism has become a leading approach to constitutional interpretation.” (citing RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION* 91 (2004))).

244 See Young, *supra* note 61, at 1149–51 (describing charges of conservative judicial activism linked to the Rehnquist Court’s departures from precedent); cf. Richard A. Posner, *The Rise and Fall of Judicial Self-Restraint*, 100 CAL. L. REV. 519, 547 (2012) (discussing originalists’ penchant for overruling constitutional precedents and explaining that “[i]t’s no fun to be the conservator of a constitutional tradition one abhors, especially when the overruling of activist decisions can be defended as restoring a true judicial restraint”).

245 See Bork, *supra* note 236, at 28 (arguing for a limited role for *stare decisis* as applied to constitutional decisions that ignored original meaning).

246 William N. Eskridge, Jr., *Overruling Statutory Precedents*, 76 GEO. L.J. 1361, 1362 (1988) (describing super-strong statutory *stare decisis*).

247 443 U.S. 193 (1979).

248 480 U.S. 616, 669–741 (1987) (Scalia, J., dissenting).

249 *Id.* at 670.

Justice Thomas, joined by Justice Scalia, has used similar textual arguments to support his push for a “systematic reassessment” of the Court’s Voting Rights Act jurisprudence.<sup>250</sup>

Outright overrulings, while undoubtedly important, do not capture the full consequences of a change in interpretive methodology. A new methodology also can justify sharp turns in statutory development—moves that leave all the relevant precedents in place while veering away from them in both reasoning and result. Such doctrinal swerves may have far-reaching effects, but they are far easier to defend than explicit overrulings. As Stephen Rich has demonstrated in the employment discrimination field, some of the Court’s most destabilizing decisions have taken the law in new directions while distinguishing, limiting, or simply ignoring older cases.<sup>251</sup> The methodological tools offered by the new textualism have been instrumental in those cases,<sup>252</sup> as textualism’s exclusion of any inquiry into legislative intent or subjective purpose renders irrelevant much of the reasoning in earlier opinions.

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250 *Holder v. Hall*, 512 U.S. 874, 892 (1994) (Thomas & Scalia, JJ., concurring in the judgment). Frank Cross and Stefanie Lindquist report that Justices Scalia and Thomas vote to overrule precedents at significantly higher rates than other Justices, though their study does not distinguish between statutory and constitutional cases. FRANK B. CROSS & STEFANIE A. LINDQUIST, *MEASURING JUDICIAL ACTIVISM* 127–28 (2009); see also Stephen Wermiel, *Scrappy Jurist: Justice Antonin Scalia, On the Court 2 Years, Points Way to Future*, WALL ST. J., July 1, 1988, at 1 (“In his first two years on the court, Justice Scalia has urged overruling five major legal precedents.”).

Cases like *Johnson* and *Holder* notwithstanding, battles over stare decisis have been less heated in the context of statutory interpretation than in the constitutional arena. Perhaps because of the “super strong” version of stare decisis that the Court sometimes applies to statutory precedents, overrulings—and arguments about overrulings—are less common in statutory cases. Saliency may also play a role in explaining the difference between constitutional and statutory interpretation: *Roe v. Wade*, 410 U.S. 113 (1973), is capable of raising the temperature on any question of stare decisis; most statutory precedents fall significantly lower on the saliency meter. Some of the most significant statutory decisions from the pre-textualist Court were in the field of civil rights. Scalia’s opinions in *Johnson* and the Voting Rights Act cases demonstrate his willingness to overturn such precedents, but such cases are relatively rare.

251 See Rich, *supra* note 54, at 43–74.

252 See *id.*; see also, e.g., *BedRoc Ltd. v. United States*, 541 U.S. 176, 183 (2004) (Rehnquist, C.J., joined by O’Connor, Scalia & Kennedy, JJ.) (using textualist analysis to distinguish statutory precedent); *id.* at 188–89 (Thomas, J., concurring) (rejecting the plurality’s proffered distinction and “declin[ing] to extend [the precedent’s] faulty reasoning beyond” the specific issue addressed in that case); *Local 144 Nursing Home Pension Fund v. Demisay*, 508 U.S. 581 (1993) (adopting narrow textual reading of Labor Management Relations Act’s remedial provisions, in conflict with purposive reasoning of earlier cases); *id.* at 595 (Stevens, J., concurring in the judgment) (accusing the majority of “reach[ing] out to overrule decades of case law”).

The point is not that anyone (including the general public) missed the decidedly conservative slant to the decision making of the Reagan appointees, or the decisions promoted by Republican politicians.<sup>253</sup> On the contrary, if the methodological “cover” had been effective in that sense, it would have lost much of its value. The political payoff of the new methodologies lay in their ability to justify adventurous conservative decision making within a community ostensibly committed to judicial restraint.<sup>254</sup> It would have been one thing to argue to the American people that affirmative action was bad policy, for example. Linking that argument to an authoritative theory of law, and of the role of judges in a democracy, broadened and deepened the claim. As the party platforms suggest, moreover, the methodological wars also permitted political partisans to place special emphasis on judicial appointments—to politicize the appointment process while railing against political judges.

Predictably, the rise of the new textualism provoked responses from judges and academics who favored the legal status quo. Given that those pushing textualism were political conservatives, naturally the loudest objections came from the left. And so the battle lines were drawn. Just as originalism has become code for “conservative” and living constitutionalism code for “progressive,”<sup>255</sup> textualism has become a conservative brand and purposivism its primary competitor. The strength of the brand is reinforced by what we observe in the practice of textualism: we see conservative judges advocating the methodology, and we see those same judges reaching conservative results in most cases.<sup>256</sup> I have argued that those results have little to

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253 Cf. Post & Siegel, *supra* note 215, at 554–55 (“No politically literate person could miss the point that the Reagan Administration’s use of originalism marked, and was meant to mark, a set of distinctively conservative objections to the liberal precedents of the Warren Court.”).

254 Cf. *id.* at 555–56 (“[W]hen President Reagan praised his appointees because they embraced a judicial ‘philosophy of restraint’ . . . everyone immediately understood that he was appealing to the high ground of neutrality in order to justify the appointment of judges who were ‘committed to a narrow ideological agenda.’” (citing Anthony T. Podesta, Op-Ed., *Court-Packing, Reagan-Style*, N.Y. TIMES, July 26, 1985, at A27)).

255 See Dorf, *supra* note 243, at 2044 (“[A]ny reasonably well-informed observer knows that the term ‘living Constitution’ encodes liberal sympathies, just as originalism encodes conservative ones—and not just for legal elites, but for the general public as well.”); Jamal Greene et al., *Profiling Originalism*, 111 COLUM. L. REV. 356, 360 (2011) (“Originalism is part of a bundle of ostensibly methodological commitments that opinion leaders and the media associate with the Republican Party . . .”).

256 See Nelson, *supra* note 9, at 373 (“[T]oday’s textualists tend to be politically conservative, and the complex of attitudes that they draw upon in resolving close cases may well color what we think of as ‘textualism.’” (footnote omitted)).

do with textualism *as a theory*, but the distinction between theory and practice—or between textualism and textualists<sup>257</sup>—is easy to miss, and Court watchers can be forgiven for lumping interpretive inputs with policy outputs.

Note the irony: an interpretive methodology that was touted as a way to separate law from politics has worked to fuse the two. It is commonplace today to see Supreme Court opinions divided over methodology as well as result. In cases where the Court is badly split, it is commonplace for opinions to suggest that methodology is the cause of the dissensus. Disagreements over methodology spill over into unanimous or near-unanimous cases, with Justices Scalia and later Thomas and sometimes Kennedy (and now sometimes Alito) refusing to join opinions discussing legislative history or writing separately to note their aversion to particular forms of reasoning. In an important respect, then, the new textualism and the reactions it provoked have made statutory interpretation appear more political, by creating and then perpetuating a persistent source of disagreement between liberal and conservative judges.

The story here is about textualism, but the lesson is about methodological argument more generally. I do not deny the sincerity of methodological debates on the bench and in the academy. Yet it is important to appreciate the political power of such debates. The broad-brush nature of methodological critique makes it a potent force for (or against) legal change—which, in turn, makes it an especially valuable tool for popular and political contestation. Debates like those reflected in *Reading Law* have staying power because we can all sense that something significant is at stake, even if it is hard to pin down the differences among the competing methodologies and impossible to predict how any approach will play out in cases yet to come. This helps explain why many members of the general public today have opinions about methodology<sup>258</sup> even if they have never heard of the canons of construction and couldn't tell you the difference between original meaning and original intent. Like any good brands, the competing methodologies convey a range of information in convenient shorthand. Judges and academics who engage in methodological debate in long form—in all the nuance and detail of *Reading Law* and the alternative theories it rejects—cannot ignore that

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257 See Volokh, *supra* note 8, at 775 (“[M]any statements about *textualism* may really only be statements about *textualists*.”).

258 See Greene, *supra* note 215, at 695–96 (discussing polling results and concluding that “[t]he public does not seem to understand the Court or its business with nearly the sophistication of legal professionals and academics, but it is nonetheless willing to offer an opinion on constitutional methodology”).

their arguments carry on a second life beyond the bar, in the world of politics and popular opinion. To blink that reality, as Scalia and Garner do, is to deny both the promise and the peril of methodological argument.

#### V. BEYOND TEXTUALISM: METHODOLOGICAL CHANGE AND CONSENSUS

Attention to the political potential of methodological argument is important in its own right, but it also sharpens current debates over various routes to methodological consensus. As noted in Part I, commentators increasingly are interested in the question whether the Supreme Court could or should apply *stare decisis* to statements of methodology (as some state supreme courts have done), or whether Congress could or should prescribe rules for statutory interpretation by courts (as some state legislatures have done).<sup>259</sup> Those commentators tend to emphasize the rule-of-law values of interpretive consensus. If the Supreme Court or Congress mandated a methodology for interpreting all federal statutes, then legislators, litigants, lawyers, and lower court judges would know what sorts of arguments were available for interpreting statutes, and would be better able to predict outcomes.<sup>260</sup> I confess some skepticism that any methodology attractive enough to gain consensus would be determinate enough to improve the predictability of statutory interpretation. But methodological consensus might still be desirable for the very different reason that it would eliminate a particularly unhelpful and unnecessary source of disagreement among judges and Justices. Methodological arguments are not just destabilizing; they may be politically debilitating, in that they perpetuate political divides among judges even in cases where they are otherwise in accord.

To be sure, any consensus theory would have to be cast at a high level of generality. There would still be disagreement over the details, and perhaps those disagreements would settle along the familiar ideological fault-lines. But it strikes me as unlikely that we would see pitched political battles over the appropriate use of the *noscitur a sociis* canon of construction, or the relative weight of Senate versus conference committee reports. At the very least, if disagreements over methodology were pushed down to a more granular level, it would become more difficult to use them as political slogans.

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259 See *supra* notes 53–54 and accompanying text.

260 See, e.g., Gluck, *supra* note 21, at 1851–55; State *ex rel. Kalal v. Circuit Court for Dane Cnty.*, 681 N.W.2d 110, 127–28 (Wis. 2004) (Abrahamson, C.J., concurring) (“It is important . . . that litigants, lawyers, legislators, courts, and the people of Wisconsin know and understand our approach to legislative interpretation.”).

While the political nature of methodological debates highlights the importance of consensus, it also provides reason to doubt that methodological consensus will ever emerge organically from the federal courts. The judges and Justices at the front lines of the battles have every reason to perpetuate them. Once the battle lines have been drawn, crossing over is likely to appear as an act of surrender even if nothing of substance has been conceded.<sup>261</sup> It bears repeating once again that most federal judges do not claim to follow any particular approach to statutory interpretation. Most judges use whatever tools seem helpful in the given case, without pledging themselves to an interpretive approach for all cases. For the few who *do* pledge themselves to a particular interpretive approach, going back on that pledge may seem like an act of capitulation to be avoided at all costs.

This may be why the judicial debates over textualism and its rivals show no sign of abating, even as the distance between the competing theories continues to shrink. Consider again cases like *Samantar v. Yousuf*,<sup>262</sup> quoted in Part I: the Justices all agree on the relevant statute's meaning, but they disagree on what methods to use to discern that meaning.<sup>263</sup> One might imagine that such cases would dampen methodological debates, demonstrating that the Justices can agree on results even when they differ in approach. Instead, the Justices seem intent on reinforcing the divides, suggesting that methodology is too important to let slide. The same dynamic is evident in more academic debates—including *Reading Law* and much of the responsive literature.<sup>264</sup> Rather than celebrating the increasing convergence of textualism and purposivism, commentators remain fixated on the points of difference.<sup>265</sup> Picture two opposing teams standing inches apart, prepared to fight tooth and nail over those last few bits of turf. The con-

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261 See Posner, *supra* note 244, at 549 (arguing that Justice Stevens “threw in the theoretical towel” and “implicitly conceded the legitimacy of the conservative Justices’ ‘originalist’ approach” by engaging the majority on historical grounds in *Heller*).

262 130 S. Ct. 2278 (2012).

263 See *supra* notes 55–60 and accompanying text.

264 For example, Judge Posner’s review of *Reading Law* emphasizes that many of Scalia and Garner’s prescriptions are surprisingly non-textual: the authors acknowledge the importance of statutory purpose, for example, and more than a third of their “sound principles” are based on policy rather than text. See Posner, *supra* note 53, at 8. Yet, rather than celebrating such points of apparent methodological convergence, Judge Posner pitches his observations as critiques. See *id.* (criticizing the “remarkable elasticity of Scalia and Garner’s methodology” and concluding that, while “Justice Scalia has called himself a ‘faint-hearted originalist[.]’ [i]t seems that he means the adjective at least as sincerely as he means the noun”).

265 See Molot, *supra* note 41, at 4 (bemoaning this tendency in the academic literature).



test would be too tedious to draw spectators, and the stakes too low to inspire participants, if it were just about interpretive methodology. But it is not: it also about politics and policy, and that is why it will continue.

Perhaps most importantly, the politics of methodological argument also may suggest the need for caution in treating methodology as ordinary law. The point is not to insist on a sharp division between “law” and “politics;” substantive legal rules may of course be “political” as well, yet (almost) all agree on the basic operation of *stare decisis*. But the incremental nature of judicial decision making lowers the political stakes of any one decision. To win on methodology, by contrast, is—at least potentially—to win especially big. The reason is not that methodology is outcome determinate across a broad range of cases.<sup>266</sup> Instead, as the previous Part explained, a change in methodology can be seized as an opportunity for broader legal upheaval—for overruling precedents and addressing new statutory questions in a way that veers off established pathways.

The experience in the state courts is instructive in this respect. As Abbe Gluck has shown, some state courts have reached a measure of methodological consensus by outlining a methodological framework and then treating that decision as binding precedent.<sup>267</sup> In Oregon, for example, the state Supreme Court has settled on what Gluck calls a “modified textualist” approach, under which legislative history may be considered if (and only if) the text is ambiguous, and “substantive” canons may be considered only as a last resort.<sup>268</sup> The court has followed that approach for almost twenty years, apparently without much partisan discord.<sup>269</sup> In Michigan, by contrast, debates over methodology have been much more heated, and have split along the expected ideological lines: conservative judges have pushed for textualism while progressive judges have defended a more purposive approach.<sup>270</sup> As Gluck suggests, the ongoing discord in Michigan seems to be due, in large part, to the propensity of justices on both sides of the divide to treat changes in methodology as licenses to revisit, and overrule, prior decisions.<sup>271</sup>

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266 See *supra* notes 145–81 and accompanying text (emphasizing the indeterminacy of textualism and competing interpretive methodologies).

267 See generally Gluck, *supra* note 21 (overviewing the interpretative practices of various state courts).

268 *Id.* at 1775–82, 1832.

269 *Id.*

270 *Id.* at 1803–10.

271 See *id.* at 1804, 1808 (discussing overrulings by Michigan’s textualist majority); *id.* at 1809–10 (describing similar moves by the new purposivist majority).

It may be tempting to think that one could ameliorate this problem by specifying that methodological change is not a valid basis for a departure from precedent. But it would be difficult, at best, to police such a rule. Judges intent on overruling precedents could simply emphasize reasons unrelated to methodology. Moreover, as noted in Part IV, methodological shifts may motivate not only outright overrulings but also policy shifts that leave existing precedents formally in place while taking the law in a sharply different direction. Such shifts may be even more subversive than explicit overrulings because they introduce (or exacerbate) significant inconsistencies in the relevant body of the law and leave lower courts little guidance on how to proceed.<sup>272</sup>

In short, extending precedential effect to methodological issues may do more harm than good to the rule-of-law values of notice and predictability that the doctrine of *stare decisis* is designed to promote. The notion that majority statements on methodology may be binding raises the temperature on methodological debates that are already overheated. The better approach may be to emphasize the points of consensus that already exist, and the cases where judges are able to agree on outcomes while agreeing to disagree on methods. Perhaps we can even hope that judicial and academic commentary on statutory interpretation will shift from a focus on grand unifying theories to the sort of fiddly details that Scalia and Garner revel in. Take out the introduction and tone down the rhetoric, and *Reading Law* might even be a step in the right direction.

#### CONCLUSION

Interpretive theories like textualism and purposivism have become political brands, marking judges as conservatives or liberals. It is not surprising, then, that commentators critical of textualism have argued that the methodology is hard-wired to produce conservative results. Scalia and Garner hotly, and rightly, deny that charge. As I have sought to show, there is nothing inherently conservative about textualism as a *theory* of statutory interpretation. Yet Scalia and Garner's insistence that textualism is apolitical—indeed, that it provides a way to shield law from the corrupting influence of politics—ignores the deeply political nature of the *practice* of textualism in the federal courts today. The new textualism was brought to the public fore by conservative politics, and the same political forces have kept the methodological debates alive even as textualism and its competitors have

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<sup>272</sup> See generally Rich, *supra* note 54 (arguing that the lack of interpretative consistency produces problems like statutory incoherence).

converged. To deny the political nature of contemporary textualism is to blink reality. But, by the same token, to dismiss textualism as uniquely political is to ignore that the factors that fuse textualism to conservatism have little to do with textualism as a theory and everything to do with the nature of methodological theories generally.

