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Textualism: Definition, and 20 Reasons Why Textualism is Preferable to Other Methods of Statutory Interpretation

Caroline Bermeo Newcombe

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ABSTRACT

When Justice Elena Kagan announced that "we're all textualists now," she was referring to a method of statutory interpretation known as textualism. Textualism is one of four methods of statutory interpretation. The other methods are: intentionalism, purposivism, and legal pragmatism. During the confirmation process, Justice Amy Coney Barrett was asked by Senators whether she was committed to a "textualist theory" of statutory interpretation, and whether she shared the judicial philosophy of Justice Scalia. But why is the method of statutory interpretation that a judge chooses so important? It is important because most cases that come before federal courts today involve issues of statutory interpretation, and the method of interpretation a judge chooses can determine the outcome of a case. This article will argue that textualism is preferable to the other three methods of statutory interpretation, especially legal pragmatism.

[*]J.D., University of Virginia School of Law; LL.M, (Government) American University, Washington College of Law. For many years, the author was a civil litigation and appellate attorney with the firm of Lord, Bissell & Brook (now Locke Lord). This article is dedicated to her father, Carlos Hugo Bermeo.

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INTRODUCTION

When Justice Elena Kagan announced that "we're all textualists now," she was referring to a method of statutory interpretation, pioneered by Justice Scalia, known as textualism.[1] During the Supreme Court confirmation process, Justice Amy Coney Barrett was asked about her "commitment to a textualist theory,"[2] and whether she shared Justice Scalia's judicial philosophy.[3] But why is the method that a judge chooses to decide a case so important? It is because most cases that come before federal courts today involve issues of statutory interpretation,[4] and the method of interpretation a court chooses can determine the outcome of a case.[5]

This article has three purposes. One purpose is to define textualism, as well as three other methods of statutory interpretation. Another purpose is to provide examples of textualism by quoting from judicial opinions, academic writings, and testimony before the Senate Judiciary Committee. However, the primary purpose of this article is to provide twenty reasons why textualism is preferable to other methods of statutory interpretation, especially legal pragmatism. In particular, this article will discuss five reasons why textualism is preferable to purposivism, four reasons why textualism is preferable to intentionalism, and eleven reasons why textualism is preferable to legal pragmatism.

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[1] Diarmuid F. O'Scannlain, *"We Are All Textualists Now": The Legacy of Justice Antonin Scalia*, 91 ST. JOHN'S L. REV. 303, 304–05 (2017) [hereinafter O'Scannlain, *All Textualists*].

[2] Senate Committee for the Judiciary, *Nomination of Amy Coney Barrett to the U.S. Supreme Court, Barrett Responses to Questions for the Record*, Questions from Sen. Mazie K. Hirono, at 6 (Oct. 16, 2020), https://www.judiciary.senate.gov/imo/media/doc/Barrett%20Responses%20to%20QFRs.pdf [https://perma.cc/6M5R-5C5K].

[3] Senate Committee for the Judiciary, *Nomination of Amy Coney Barrett to the U.S. Supreme Court, Barrett Responses to Questions for the Record*, Questions from Sen. Feinstein, at 1 (Oct. 16, 2020), https://www.judiciary.senate.gov/imo/media/doc/Barrett%20Responses%20to%20QFRs.pdf [https://perma.cc/3VGF-5GN7].

[4] STEPHEN BREYER, THE AUTHORITY OF THE COURT AND THE PERIL OF POLITICS 34 (2021) ("most of the cases the Court decides concern the interpretation of words in federal statutes."); Antonin Scalia, *Common Law Courts in a Civil Law System*: *The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 13–14 (Amy Gutmann ed. 1997) ("By far the greatest part of what I and all federal judges do is to interpret the meaning of federal statutes and federal agency regulations.").

[5] *See, e.g.*, West Virginia Univ. Hosp., Inc. v. Casey, 499 U.S. 83 (1991) (discussed *infra* notes 54-58) (Hospital seeking to recover expert witness fees would have won, if the Court had followed the purposivist approach Justice Stevens argued for in his dissent, rather than the textualist approach relied on by the majority).

The structure of this article is in four parts. Part I will define textualism, along with two other foundational theories of statutory interpretation. Part II will define legal pragmatism. Part III will discuss reasons why textualism is preferable to purposivism and intentionalism. Part IV will provide reasons why textualism is preferable to legal pragmatism and briefly discuss the fact that political liberals can be conservative jurists.

I. DEFINITION OF TEXTUALISM, AND OTHER FOUNDATIONAL THEORIES OF STATUTORY INTERPRETATION

Textualism is one of three foundational theories of statutory interpretation.[6] The other two foundational theories are legislative intent ("intentionalism") and legislative purpose ("purposivism").[7] These approaches are considered foundational because they each emphasize one ground, or "foundation," as a basis for statutory interpretation.[8] In addition to these foundational approaches, other judges follow a fourth approach to statutory interpretation known as legal pragmatism. Pragmatism – which has been characterized as "antifoundational"[9] –will be discussed following a discussion of the three foundational theories.

A. Definition of Textualism

Textualism is the most popular of the foundational theories of statutory interpretation.[10] Judges and scholars have emphasized a variety

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[6] JOHN F. MANNING & MATTHEW C. STEPHENSON, LEGISLATION AND REGULATION 22 (2017).

[7] *Id.*

[8] Bradford C. Mank, *Is a Textualist Approach to Statutory Interpretation Pro-Environmentalist?: Why Pragmatic Agency Decisionmaking is Better than Judicial Literalism*, 53 WASH. & LEE. L. REV. 1231, 1235 n.12 (1996).

[9] WILLIAM D. POPKIN, STATUTES IN COURT 153 (1999).

[10] John F. Manning, *Foreword*: *The Means of Constitutional Power*, 128 HARV. L. REV. 1, 73 (2014) ("the Court's predominant approach to statutory interpretation has, for the last quarter century, been textualist.") [hereinafter, Manning, *Foreword*]. Justices Thomas, Alito, Gorsuch, Barrett and Kavanaugh are textualists. *See Confirmation Hearing on the Nomination of Hon. Neil M. Gorsuch to be an Associate Justice of the Supreme Court of the United States*: *Hearing Before the S. Comm. on the Judiciary*, 115th Cong. 458 (Mar. 23, 2017) (Law Professor Jonathan Turley testified that Neil Gorsuch "is a textualist.") [hereinafter *Gorsuch Confirmation Hearing*]; *see also* Abbe R. Gluck, *Reading the ACA'S Findings: Textualism, Severability and the ACA'S Return to the Court*, 130 YALE L.J. FORUM 132, 164 (2020) (describing Justice Kavanaugh as "a noted textualist."); Thomas Jipping, *On Judge Barrett, Let's Tell the Truth*, NAT'L REV. (Sept. 26, 2020), https://www.nationalreview.com/bench-memos/on-judge-barrett-lets-tell-the-truth/ [] ("Barrett is committed to an approach to interpretation that minimizes the influence of her personal views. The heart of that approach is textualism . . . ."); Scott A.

of factors to describe textualism. One textualist judge emphasizes that "statutory text" should provide the foundation for statutory meaning.[11] A textualist Supreme Court justice emphasizes that a court's inquiry should begin and *end* with the statutory text.[12] This means that a federal statute is not merely a point of departure (or "springboard") for a court to move beyond the text into the realm of judicial lawmaking.[13] Instead, textualists believe that the job of a court is to follow the law contained in the text of the statute, not change it to conform "with the judge's view of sound policy."[14] Other textualists emphasize that only the text of the statute has been enacted into law, and extrinsic material, such as legislative history;[15] what a judge thinks a statute should say;[16] or

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Moss, *Judges' Varied Views on Textualism*: *The Roberts-Alito Schism and the Similar District Judge Divergence That Undercuts the Widely Assumed Textualism-Ideology Correlation,* 88 U. COLO. L. REV. 1, 7 (2017) ("Justice Alito has joined the Scalia/Thomas textualist camp, while Chief Justice Roberts definitely has not.").

[11] Frank H. Easterbrook, *Text, History and Structure in Statutory Interpretation*, 17 HARV. J. L. & PUB. POL'Y 61, 67 (1994) ("statutory text and structure…supply the proper foundation for meaning.")[hereinafter Easterbrook, *Text History*]; *see also* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 56 (2012) (discussing the "Supremacy-of-Text Principle").

[12] SCALIA & GARNER, *supra* note note 11, at 16.

[13] *Id.* at 17; *see also* SCALIA, *supra* note 4, at 25. In sharp contrast to textualists, great pragmatic jurists (like Justice Benjamin Cardozo), believe that the legislative *policy contained in a statute can itself be "a source of law, a new generative impulse transmitted to the legal system*." Van Beeck v. Sabine Towing Co., 300 U.S. 342, 351 (1937).

[14] Frank H. Easterbrook, *Foreword* to SCALIA & GARNER, *supra* note 11, at xxi.

[15] Exxon Mobile Corp. v. Allapattah Servs., Inc., 545 U.S. 546, 568 (2005) ("As we have repeatedly held, the authoritative statement is the statutory text, not the legislative history or any other extrinsic material."); *see also* Manning, *Foreword*, *supra* note 10, at 74 (referring to "the key textualist position that interpreters cannot use legislative history to contradict the enacted text," but also noting that "the Court still consults legislative history as a potential tool for resolving ambiguity.") However, *see* Wooden v. United States, 142 S. Ct. 1063, 1075-1076 (2022)(Kavanaugh, J. concurring) criticizing the ambiguity trigger on the ground "that ambiguity is in the eye of the beholder and cannot be readily determined on an objective basis.")

[16] Amy Coney Barrett, *2019 Sumner Canary Memorial Lecture*: *Assorted Canards of Contemporary Legal Analysis: Redux*, 70 CASE W. RES. L. REV. 855, 856 (2020) [hereinafter Barrett, *Assorted Canards*] ("textualists emphasize that words mean what they say, *not what a judge thinks they ought to say* . . . Fidelity to the law means fidelity to the text as it is written." (emphasis added)); *see also* O'Scannlain, *All Textualists*, *supra* note 1, at 304 (quoting Justice Kagan who explained that, before textualism, an early approach to statutory interpretation asked, "'what *should* this statute be,' rather than what do 'the words on the paper say.'"). Justice Kagan also explained that "the entire judicial endeavor was 'policy-

abstract notions of "doing justice,"[17] should be rejected as the basis of statutory interpretation.

As the examples above illustrate, textualists are generally opposed to relying on external sources to interpret a statute.[18] Instead, textualist analysis focuses on the objective meaning of words contained in the text of the statute.[19] This is not to say that textualists rely only on the text of a statute and nothing else. Textualists recognize that words in a statute can only be understood in context.[20] This can mean "semantic context,"[21] which includes looking at the historic, or (what this article will call) "temporal" context. Specifically, textualists believe that words used in the text of a statute should be interpreted according to what a reasonable person would have understood the words to mean at the time of a statute's enactment.[22]

However, textualists are not blind literalists.[23] Textualists rely on the "ordinary meaning rule" as a basic rule of statutory interpretation.[24] The rule provides that words in a statute are not to be interpreted according to their literal meaning, but rather according to their ordinary meaning.[25] This means that when a judge is faced with an issue of statutory interpretation, the judge should apply the meaning that

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orientated' with judges . . . pretending to be congressmen.'" *Id.* 305 (emphasis added).

[17] SCALIA & GARNER, *supra* note 11, at 57.

[18] *See supra* notes 15-17 and accompanying text.

[19] SCALIA, *supra* note 4, at 17.

[20] John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 79 (2006).

[21] *Id.* at 76.

[22] BP P.L.C. v. Mayor of Baltimore, 141 S. Ct. 1532, 1537 (2021) ("When called to interpret a statute, this Court generally seeks to discern and apply the ordinary meaning of its terms *at the time* of their adoption." (emphasis added)); *see also* New Prime Inc., v. Oliveira, 139 S. Ct. 532, 536 (2019) (which involved interpretation of an exclusion in the federal Arbitration Act). The Court ruled in favor of a truck driver, finding that when the Arbitration Act was passed in 1925, that the "term, 'contracts of employment' referred to agreements to perform work [and that the driver, who was working under an independent contractor agreement] is entitled to the benefit of that same understanding today." *Id.* at 543–44. The Court went on to explain that there are two reasons for this "at the time" or temporal characteristic of textualism. *Id.* at 539. First, "if judges could freely invest statutory terms with new meanings, we would risk amending legislation outside the 'single . . . procedure' the Constitution commands." *Id.* Second, this could risk "upsetting reliance interests in the settled meaning of a statute." *Id.* (citations omitted).

[23] SCALIA, *supra* note 4, at 24; *see also* Barrett, *Assorted Canards*, *supra* note 16, at 857 ("literalism strips language of its context").

[24] SCALIA & GARNER, *supra* note 11, at 69.

[25] *Id.*

an ordinary person would understand from the text of a statute.[26] For example, Justice Scalia dissented from a decision to allow the conviction of a defendant (who offered to trade a gun for cocaine), because the defendant was charged under a statute for using a firearm during a drug trafficking crime.[27] Justice Scalia argued that words in a statute should be given their ordinary meaning, and that the ordinary meaning of "using a firearm" means using it as a weapon, not "as an article of commerce."[28]

In addition to the ordinary meaning rule, textualists also rely on the dictionary definition of words as an aid to statutory interpretation.[29] However, this does not mean that textualists approach statutory interpretation using only a dictionary.[30] Instead, dictionaries are tools used to provide evidence that a term *can* "bear a certain meaning, not as conclusive evidence of what a term means in context."[31]

Textualists also use "canons" of statutory construction.[32] An example of a canon of construction is the "whole-text canon," which

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[26] WILLIAM N. ESKRIDGE JR.. INTERPRETING LAW: A PRIMER ON HOW TO READ STATUTES AND THE CONSTITUTION 33 (2015); *see also* 2A SUTHERLAND STATUTORY CONSTRUCTION § 47:28 (7th ed. 2009) (The focus on common or ordinary meaning is "on the statute's meaning *to people outside the legislature* . . . 'as the ordinary man has a right to rely on ordinary words addressed to him.'" (emphasis added)); SCALIA & GARNER, *supra* note 11, at 69-71. (In instances where words have more than one ordinary meaning, the rule presumes "that a thoroughly fluent reader can reliably tell…from contextual and idiomatic clues which of several possible senses a word or phrase bears."). The ordinary meaning rule has been codified by some state legislatures. *See e.g.*, MISS. CODE § 1-3-65 (2021) ("All words and phrases contained in the statutes are used according to their common and ordinary acceptation and meaning…"); *see also* FCC v. AT&T Inc., 562 U.S. 397, 403 (2011) ("When a statute does not define a term, we typically 'give the phrase its ordinary meaning.'") (citation omitted). However, when a statute does include "'an explicit definition, we must follow that definition, even if it varies from that term's ordinary meaning.'" Tanzin v. Tanvir, 141 S. Ct. 486, 490 (2020) (citations omitted).

[27] Smith v. United States, 508 U.S. 223, 241 (1993) (Scalia, J., dissenting).

[28] *Id*. at 242 n.1.

[29] *See, e.g.*, Elwell v. Bd. of Regents of Univ. of Oklahoma, 693 F.3d 1303, 1306 (10th Cir. 2012).

[30] Barrett, *Assorted Canards*, *supra* note 16, at 858.

[31] *Id*. at 859.

[32] *See* SCALIA & GARNER, *supra* note 11, at 53-339 (book provides examples and explanations of fifty-seven (57) canons of statutory construction categorized as: "fundamental principles" (*id.* at 53), "semantic canons" (*id.* at 69), "syntactic canons" (*id.* at 140), "contextual canons" (*id.* at 167), "expected-meaning canons" (*id.* at 247), "government-structuring canons" (*id.* at 278), "private-right canons" (*id.* at 295), and "stabilizing-canons" (*id.* at 318). Canons 38 through 57 are specifically "applicable to statutes . . . ." *Id.* at 243; *see also* MANNING & STEPHENSON, *supra* note 6, at 275–432 (discussing semantic canons, and substantive canons of construction); WILLIAM N. ESKRIDGE JR, ABBE R. GLUCK, & VICTORIA F. NOURSE, STATUTES, REGULATION, AND INTERPRETATION 447 (2014) (dividing canons into textual canons, substantive canons, and extrinsic canons).

provides that, in interpreting a section of a statute, a court should look at the language of the "statute as a whole."[33] Although textualists consider canons important, they are not mandatory; textualists do not regard canons as rules, but as "factors to be considered" and "tools of statutory construction."[34]

Another feature of textualism is reliance on the plain meaning rule.[35] This rule provides that if the text of a statute is clear, or "plain," then it should be applied as it is written unless this would lead to an absurdity.[36] It is important to note that although the plain meaning rule is limited by the "absurdity doctrine,"[37] absurdity does not mean "bad legislative choices."[38]

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[33] SCALIA & GARNER, *supra* note 11, at 167.

[34] Chickasaw Nation v. United States, 534 U.S. 84, 94 (2001); *see also* SCALIA & GARNER, *supra* note 11, at 51 ("canons of interpretation…are not 'rules' . . . ."); *see also id.* at 212 (a canon "is not a rule of law but one of various factors to be considered in the interpretation of a text."). An example of a textualist justice's use of canons of construction is contained in *Yates v. United States*. 574 U.S. 528, 549–50 (2015) (Alito, J., concurring). *Yates* involved the issue of whether a fisherman violated a section of the Sarbanes-Oxley Act (prohibiting the destruction of a tangible object with the intent to impede a federal investigation), by throwing undersized fish back into the ocean. *Id.* at 531. The majority ruled in favor of the fisherman, deciding that "tangible objects" only included objects that could "record or preserve information." *Id.* at 532. Textualist Justice Alito concurred in the judgment by relying on two canons of construction. *Id.* He explained that:

> traditional *tools of statutory construction* confirm that [the fisherman] has the better argument. . . . Section 1519 [of the Sarbanes-Oxley Act] refers to "any record, document, or tangible object." The *noscitur a sociis* canon instructs that when a statute contains a list, each word in that list presumptively has a "similar" meaning. A related canon, *ejusdem generis*, teaches that general words following a list of specific words should usually be read . . . to mean something "similar." Applying these canons to §1519's list of nouns, the term "tangible object" should refer to something similar to records or documents. A fish does not spring to mind—nor does an antelope . . ..

Id. at 549–50 (Alito, J., concurring).

[35] *See, e.g.*, Sebelius v. Cloer, 569 U.S. 369, 381 (2013).

[36] *Id.*

[37] John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2388 (2003) ("judges may deviate from even the clearest statutory text when a given application would otherwise produce "absurd results."); *see, e.g.*, Pub. Citizen v. Dep't of Justice, 491 U.S. 440, 471 (1989) (Kennedy, J., concurring) (a classic example of "true absurdity" is "where a sheriff was prosecuted for obstructing the mails even though he was executing a warrant to arrest the mail carrier for murder . . . .").

[38] *See* In re Miller, 493 B.R. 55, 60–61 (Bankr. N.D. Ill. 2013) (the absurdity doctrine's "concern is 'linguistic rather than substantive' . . . . The doctrine is not a

Textualists also believe in legislative supremacy.[39] Legislative supremacy is a doctrine which provides that when a court takes on the role of statutory interpreter, its role is subordinate to that of the legislature.[40] The foundation of legislative supremacy is in Article I of the Constitution.[41] The doctrine is designed to preclude "judicial policymaking" when a statute clear.[42]

An important characteristic of the doctrine of legislative supremacy (as well as textualism itself) is that textualist judges believe that they should still follow the text of a statute, even if they may not personally like the result of a decision they make.[43] Textualist Justice Gorsuch emphasized this when he testified that "a judge who likes every outcome he reaches is probably a pretty bad judge, stretching for policy results he prefers *rather than those the law compels*."[44] Similarly, about the doctrine of legislative supremacy, a law professor explained that "the court must give way, even if its own view of public policy is quite different." [45]

B. Definition of Purposivism

In addition to textualism, a second foundational theory of statutory interpretation is legislative purpose.[46] As their name suggests, purposivists go beyond the words contained in the statute's text and focus on a statute's overall purpose or "general aims."[47] Specifically,

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license to correct what appear to courts to be bad legislative choices. . . . A statute that can be applied as written must be.").

[39] MANNING & STEPHENSON, *supra* note 6, at 55–56.

[40] *Legislative supremacy*, BLACK'S LAW DICTIONARY (11th ed. 2019); *see also* Lady Justice Mary Arden, Magna Carta and the Judges-Why Magna Carta Matters, *in* MAGNA CARTA: MUSE & MENTOR 185 (Randy Holland ed. 2014) (England has a similar doctrine known as Parliamentary sovereignty which means that: "judges cannot develop the law so that it contradicts a statute.").

[41] REED DICKERSON, THE INTERPRETATION AND APPLICATION OF STATUTES 9 (1975); U.S. CONST. art. I, § 1 ("All legislative powers herein granted shall be vested in a Congress of the United States . . . .").

[42] Daniel A. Farber, *Statutory Interpretation and Legislative Supremacy*, 78 GEO. L.J. 281, 282 (1989) [hereinafter Farber, *Statutory Interpretation*]

[43] *See, e.g.*, *Gorsuch Confirmation Hearing*, *supra* note 10, at 67.

[44] *Id.* (emphasis added). *See also* .; *see also* Morgan Chalfant, *Barrett Accepts Nomination, Says Judges Must Be 'Resolute' in Setting Aside Personal Beliefs*, THE HILL (Sept. 26, 2020) (Textualist Judge Barrett announced that "A judge must apply the law as written. Judges are not policymakers and they must be resolute in setting aside any policy views they might hold[.]"), *available at* 2020 WL 5746404.

[45] Farber, *Statutory Interpretation, supra* note 42, at 292.

[46] MANNING & STEPHENSON, *supra* note 6, at 22.

[47] *See* FRANK B. CROSS, THE THEORY AND PRACTICE OF STATUTORY INTERPRETATION 60 (2009).

purposivists believe that statutes should "be interpreted to achieve the broad purposes that their drafters had in mind,"[48] and that "primacy should be given to the perceived spirit of a statute— even at the expense of the letter of the law."[49] An example of a purposivist approach to statutory interpretation was provided by a witness who appeared before the Senate Judiciary Committee to oppose the confirmation of textualist Judge Gorsuch. Witness Guerino J. Calemine is the general counsel of the Communications Workers of America.[50] In a discussion of two worker cases that then-Tenth Circuit Judge Gorsuch decided, Mr. Calemine testified that "the purpose of the laws is to protect workers' health and safety," and those purposes should guide the interpretation of those laws, not the Oxford English Dictionary.[51] In short, unlike textualists who focus on the text,[52] purposivists focus on policy context.[53]

Another example of a purposivist approach to statutory interpretation is provided in *West Virginia Univ. Hosp. Inc. v. Casey*.[54] The case involved the issue of whether expert witness fees could be recovered by a hospital under a federal statute which only provided recovery for attorney's fees.[55] Purposivist Justice Stevens argued that the Court's failure to include expert fees would be contrary to the remedial purpose of the statute,[56] and that the Court's decision that the hospital must assume the cost is "at war with the congressional purpose of making the prevailing party whole."[57] Writing for the majority, textualist Justice Scalia instead declared:

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[48] BRYAN A. GARNER ET AL., THE LAW OF JUDICIAL PRECEDENT 803 (2016).

[49] NEIL GORSUCH, A REPUBLIC IF YOU CAN KEEP IT 137 (2019).

[50] *Gorsuch Confirmation Hearing*, *supra* note 10, at 418–19.

[51] *Id.* at 442.

[52] Int'l FC Stone Fin. Inc. v. Jacobson, 950 F.3d 491, 498 (7th Cir. 2020) ("defendants ask us to do something we cannot: place a law's purpose above its text. 'We as judges of the U.S. Court of Appeals have only the power to interpret the law; it is the duty of the legislative branch to make the law.' (citations omitted) . . . 'It is our function to give the statute the effect its language suggests, however modest that may be; *not to extend it to admirable purposes it might be used to achieve.*'…[P]etitioners' *purposive* argument simply *cannot overcome* the force of *plain text.*" *id.* at 499) (emphasis added) (citations omitted).

[53] GORSUCH, *supra* note 49, at 142-143; *see also* Craig v. Bridges Bros. Trucking LLC, 823 F.3d 382, 388 (6th Cir. 2016) ("FLSA [Fair Labor Standards Act] rights cannot be abridged . . . or waived because this would *nullify the purposes of the statute and thwart the legislative policies* it was designed to effectuate.") (emphasis added) (citations omitted).

[54] 499 U.S. 83 (1991).

[55] *Id.* at 87–88.

[56] *Id.* at 107–08 (Stevens, J., dissenting).

[57] *Id*. at 111.

> West Virginia Hospital "argues that the congressional *purpose* in enacting § 1988 *must prevail* over the ordinary meaning of the statutory terms…*however,…The best evidence of that purpose is the statutory text* adopted by both Houses of Congress…Congress could easily have…[included] expert witness fees…it chose instead to enact more restrictive language, and *we are bound by that restriction*."[58]

C. Definition of Intentionalism

A third foundational theory of statutory interpretation is legislative intent, or "intentionalism."[59] Intentionalists believe that, when interpreting a statute, a court should "ascertain the legislature's intent underlying the statute,"[60] and then determine "what the legislature would have *specifically* intended if it had" been faced with the particular issue before the court.[61] This approach relies on "'imaginative reconstruction' … [which] involves the judge attempting to enter the shoes of the [original] legislators and discern their intent at the time, and how they would have wanted the statute applied to the case before the court."[62]

To do this, intentionalists go outside the text of the statute and examine extrinsic sources such as legislative history.[63] Such an approach invites attorneys and judges to inquire into whether – in choosing words to put in the text of a statute – "the legislature might have misspoken," or that the statute was not "carefully drafted" because certain words were "supposed to be there."[64]

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[58] *Id.* at 98–99 (emphasis added).

[59] WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY & ELIZABETH GARRETT, LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 690 (2007); MANNING & STEPHENSON, *supra* note 6, at 22.

[60] CROSS, *supra* note 47, at 59.

[61] MANNING & STEPHENSON, *supra* note 6, at 22 (emphasis in the original).

[62] CROSS, *supra* note 47, at 61; *see also* ESKRIDGE JR., *supra* note 59, at 214. Professor Eskridge goes on to caution that as judicial inquiry into the "*actual* specific intent" of a statute is hard to discover, it "becomes steadily more abstracted from specific intent . . . and perhaps more driven by nonlegislator *value choices, hence in tension with the rule of law*." (emphasis added). Professor Eskridge's observation is important because it shows an awareness that judges can make decisions based on judge made "value choices".

[63] Theo I. Ogune, *Judges and Statutory Construction* 30 U. BALT. LAW FORUM 4, 16 (2000) ("intentionalism thrives on the use of legislative history…") [hereinafter Ogune, *Statutory Construction*]; *see also* MANNING & STEPHENSON, *supra* note 6, at 182–89 (providing an actual example of legislative history used to discern legislative intent).

[64] SCALIA, *supra* note 4, at 16 (If one proceeds on the theory that the goal of statutory interpretation is to determine "what the legislature intended rather than what it said . . . [then one could inquire whether] [i]n selecting the words of the statute, the legislature might have misspoken."); *see, e.g.*, Transcript of Oral

Intentionalism is different from textualism, not only because it looks beyond the text of a statute to external sources (such as legislative history), but also because it is subjective.[65] The focus of intentionalists is on the *subjective* intent of legislators.[66] This is in contrast to textualism, which is *objective*; its focus is on an objective legal writing.[67] Specifically, while intentionalists focus on the intent or meaning of a statute to the members of Congress who wrote it, textualists focus on the meaning of the words to "the people" who will read it.[68] In short, intentionalism is "writer-centered", whereas textualism is "reader-centered."[69] As a result, textualists like Justice Amy Coney Barrett see themselves as "faithful to the law rather than the lawgiver."[70]

Argument, Perry v. Merit Sys. Prot. Bd., 137 S. Ct. 1975 (2017) (No. 16–399), https://www.supremecourt.gov/oral_arguments/argument_transcript/2016/16-399_3f14.pdf [hereinafter Perry Transcript]. The *Perry* case grew out of a so-called "mixed action" involving a discrimination claim and a civil service claim brought by a civil service employee named Anthony Perry. *Perry*, 137 S. Ct. at 1979. During oral argument, the employee's attorney was asked which part of a statute (5 U.S.C. § 7703) provided the authority for a district court to hear a civil service claim. Perry Transcript at 10. The employee's attorney argued that the statute at issue was not "carefully drafted," and that the statute did not contain words that are "supposed to" be there. *Id.* at 11, line 26. The intentionalist argument in *Perry* was that even though words were not put into the text of the statute stating that "mixed actions" could be tried in district courts, nevertheless, that was the intention of Congress, and that intention should be enforced by the court. *Perry*, 137 S. Ct. at 1979–80.

[65] John F. Manning, *Textualism and Legislative Intent*, 91 VA. L. REV. 419, 425 (2005). [hereinafter Manning, *Legislative Intent*]

[66] *See* Wilson v. Safelite Grp., Inc., 930 F.3d 429, 439 (6th Cir. 2019) (Thapar, J., concurring) (Textualist Judge Thapar declared that "'Congress designed the Act (ERISA) in a specific way, and it is not our proper role to redesign the statute.'. . . [T]he *subjective intent* of the elected officials who enacted the statute *is irrelevant*." (emphasis added) (quoting Henry Schein, Inc. v. Archer & White Sales, Inc. 139 S. Ct. 524, 530 (2019)).

[67] DICKERSON, *supra* note 41, at 83 (The classification of approaches to statutory interpretation as either objective or subjective is determined by "whether the pursuer of meaning [e.g., a textualist] is preoccupied with the statute itself (an objective legal writing) or [if the pursuer of meaning, e.g., an intentionalist is preoccupied] with the actual, and therefore subjective intent of the legislature.") ; *see also* Manning, *Textualism and Legislative Intent*, *supra* note 65, at 424 ("textualists focus on 'objectified intent'—the import that a reasonable person conversant with applicable social and linguistic conventions would attach to the enacted words.").

[68] Amy Coney Barrett, *Congressional Insiders and Outsiders*, 84 U. CHI. L. REV. 2193, 2195 (2017) [hereinafter Barrett, *Congressional Insiders*].

[69] Morell E. Mullins, *Tools, Not Rules: The Heuristic Nature of Statutory Interpretation*, 30 J. LEGIS. 1, 20 (2004).

[70] Barrett, *Congressional Insiders*, *supra* note 68, at 2195. A focus on the law, *rather than the intent* of the lawgiver, is also a characteristic of originalism after Justice Scalia. *See* O'Scannlain, *All Textualists*, *supra* note 1, at 309 (describing originalism as a cousin of textualism, and noting that Justice Scalia "made

As well as being different from textualism, intentionalism is also distinct from purposivism. Purposivism is more general than intentionalism. Purposivists focus on a statute's broad purpose, and on the "social problems the legislature was addressing [along with]…the *general* ends it was seeking…."[71] Intentionalists are more specific.[72] They are concerned with historical evidence showing "how legislators understood the meaning of the words" contained in the statue they were enacting.[73] Another difference is that intentionalists are backward looking, whereas purposivists are forward looking. An intentionalist judge "projects the current facts [of the case before the court] back to the now-departed legislature and asks how it would have applied the law to the facts."[74] In contrast, a purposivist judge "projects the legislature forward to make a guess about how it would apply the statute to the facts today."[75]

II. DEFINITION OF LEGAL PRAGMATISM

In addition to the three foundational approaches, legal pragmatism provides a fourth and very different method of statutory interpretation.

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originalism a respected means of analysis . . . [he emphasized] original *public meaning*, rather than what went on in the heads of the Founders…)(emphasis added).

[71] Peter L. Strauss, *The Common Law and Statutes*, 70 COLO. L. REV. 225, 227 (1999) [hereinafter, Strauss, *Common Law*]; *see also* Abby Wright, *For All Intents and Purposes: What Collective Intention Tells Us About Congress and Statutory Interpretation*, 154 U. PA. L. REV. 983, 992 (2006) [hereinafter Wright, *Statutory Interpretation*] (discussing the difference between legislative purpose and legislative intent by explaining that legislative purpose is what a legislator "hopes will change about the world by means of enacting the legislation . . . [while legislative intent is] what Congress intends the direct effect of the legislation to be." *Id.* For example, as its name suggests, the Civil Rights Attorney's Fees Award Act of 1976 (42 U.S.C. §1988 (b)) authorizes an award of attorney's fees in certain civil rights cases. As linguist and former Supreme Court law clerk, Abby Wright explains, the "[l]egislative *intent* [of the statute] . . . would be the *direct* result that attorneys be awarded fees if representing the prevailing party." *Id.* (emphasis added). The legislative *purpose* is the "secondary effect the statute seeks to bring about," such as increasing "the number of attorneys willing to take civil rights cases." *Id.*) (emphasis added).

[72] Wright, *Statutory Interpretation*, *supra* note 71, at 992; *see also* Timothy P. Terrell, *Statutory Epistemology*: *Mapping the Interpretative Debate*, 53 EMORY L.J. 523, 532–33 (2004) (describing *specific* intent as "the most legitimate basis for an 'intentionalist' theory…")(emphasis added).

[73] Strauss, *Common Law*, *supra* note 71 at 227; *see also* MANNING & STEPHENSON, *supra* note 6, at 22 ("purposivists view *specific legislative intent*-what the legislators would have done if they had confronted the precise question at issue-as *illusory* or too difficult to reconstruct.") (emphasis added).

[74] WILLIAM D. POPKIN, MATERIALS ON LEGISLATION 248 (2005).

[75] *Id.*

Although pragmatism can take a variety of forms, most forms of pragmatism are based on a preference for practical, "nonlegalistic" decision-making.[76] Instead of legal theory, pragmatists focus on the results[77] or consequences of any legal decision.[78] This focus on consequences has led some to refer to the pragmatic approach to statutory interpretation as "consequentialism."[79] In deciding a case, the goal of consequentialist judges is to choose an outcome which supports what they consider to be the best policy result.[80]

A. Judge Posner's Description of Pragmatic Decision-making

An iconic leader of the pragmatic approach to statutory interpretation is the distinguished and scholarly former Seventh Circuit Judge Richard A. Posner. Judge Posner explained his pragmatic approach to judicial decision-making when he appeared at a law school conference shortly after the Gorsuch nomination and explained the "unorthodox" (his word) way that he decided cases.[81] In response to a question, Judge Posner stated that:

> I am not actually very interested in legal doctrines[82]
>
> [portion of transcript omitted]

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[76] RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 26 (1990) [hereinafter POSNER, JURISPRUDENCE]; *see also* RICHARD A. POSNER, HOW JUDGES THINK 7–8 (2008) (in contrast to pragmatists, Judge Posner describes judges who apply pre-existing rules, do not legislate, do not exercise discretion, and do not look outside conventional legal texts as "legalists").

[77] Richard A. Posner, *What Has Pragmatism to Offer Law?*, 63 S. CAL. L. REV. 1653, 1664 (1990) [hereinafter Posner, *Offer Law*] (Pragmatists "are interested in using the legislative and constitutional text as a resource in the fashioning of a pragmatically attractive result"); *see also* David Luban, *What's Pragmatic About Legal Pragmatism*? 18 CARDOZO L. REV. 43, 45 (1996) ("legal pragmatism is . . . result-orientated");

[78] Richard A. Posner, *The Rise and Fall of Judicial Self-Restraint*, 100 CAL. L. REV. 519, 539 (2012) [hereinafter Posner, *Self-Restraint*] (Pragmatism "emphasizes consequences over doctrine.").

[79] SCALIA & GARNER, *supra* note 11, at 22 ("Another common replacement for text is consequentialism, often referred to as pragmatism . . . .").

[80] GORSUCH, *supra* note 49, at 137.

[81] *See* Pepperdine University, *Pepperdine Law Review Symposium: Hon. Richard A. Posner*, YOUTUBE (Apr. 8, 2017), https://www.youtube.com/watch?v=3Uiu27RxYWk [https://perma.cc/43VE-TE6W] at 0:56:02 (last visited Sept. 28, 2020.

[82] *Id*. at 0:56:05.

> So the way I approach a case is ask myself *what is the sensible outcome*, forget about the law, what is the sensible outcome for resolving this case in terms of one's values, values that you feel are widely held in society[83] and so on and once I have the sensible solution I ask myself is there anything that blocks this. Could there be a Supreme Court decision or *en banc* decision of my court or some really clear statute or clear constitutional provision that is still being enforced? And if I'm blocked I'm blocked.[84] But I don't start off by looking at statutes and this and that and all the what I think is just the gibberish of legal doctrine like the way people talk about legislation, the canons of construction…[85]…I have never cited a canon of construction I don't think they have the slightest value….[86]
>
> [portion of transcript omitted]
>
> But *a lot of judges are, you know, much more legalistic* and *very interested in the text*, what an official text says that leads to, you know, *textualism, and it is just not my cup of tea*.[87]

In addition to this oral explanation of legal pragmatism, Judge Posner has provided much fuller explanations of pragmatism in his books[88] and law review articles. For example, in one law review article, Judge Posner articulated three core elements of legal pragmatism: first, "a distrust of metaphysical entities…[like] 'truth'";[89] second, "that propositions be tested by their consequences, ...";[90] and third, that judging should be based on "conformity to social or other human needs rather than to 'objective,' 'impersonal' criteria."[91] In another article, he discussed "eight principles of legal pragmatism."[92] One of these

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[83] *Id*. at 0:56:09 (emphasis added).

[84] *Id*. at 0:56:43.

[85] *Id*. at 0:57:04.

[86] *Id*. at 0:57:38.

[87] *Id.* at 0:57:52 (emphasis added). Judge Posner emphasized some of the same points he made above in an interview with the *N.Y. Times* shortly after his retirement. *See* Adam Liptak, *An Exit Interview with Richard Posner, Judicial Provocateur*, N.Y. TIMES (Sept. 11, 2017), https://www.nytimes.com/2017/09/11/us/politics/judge-richard-posner-retirement.html [https://perma.cc/YJ9P-ASPG] ("I pay very little attention to legal rules, statutes, constitutional provisions. . . . The first thing you do is ask yourself—forget about the law—what is the sensible resolution of this dispute?").

[88] *See, e.g.*, RICHARD A. POSNER, LAW, PRAGMATISM, AND DEMOCRACY (2003).

[89] Posner, *Offer Law*, *supra* note 77, at 1660.

[90] *Id.*

[91] *Id*. at 1660–61.

[92] Posner, *Self-Restraint*, *supra* note 78, at 540–42.

principles states that "[l]aw is not limited to the body of orthodox legal materials, and so the judicial function cannot be limited to deciding cases in accordance with those materials. . . . ."[93]

Of course, Judge Posner is not the only jurist who is a legal pragmatist. Justices Sandra Day O'Connor and William Brennan were pragmatists too.[94] Justice Stephen Breyer is also a pragmatist. This can be seen in his scholarly writings.[95] However, it is important to emphasize, as Justice Breyer does, that there are different approaches to legal pragmatism.[96] This means that Justice Breyer's pragmatism is not necessarily the same as the pragmatism described by Judge Posner or practiced by Justice O'Connor or Justice Brennan.

Having discussed the three foundational theories of statutory interpretation, as well as a fourth theory known as legal pragmatism, this article will now provide reasons why textualism is preferable to the two foundational methods of statutory interpretation, as well as legal pragmatism.

III. WHY TEXTUALISM IS PREFERABLE TO PURPOSIVISM AND INTENTIONALISM

A. Five Reasons Why Textualism is Preferable to Purposivism

The first reason why textualism is preferable to purposivism is because Congress enacts statutes; Congress does not enact purposes independent of the statute itself.[97] Such an approach would allow a judge to unilaterally rewrite a federal statute by claiming to rely on an unenacted congressional purpose.[98]

A second problem with a purposivist approach is that it may be difficult to discern a statute's overall legislative purpose. While legislators may agree on the specific words contained in the text, they do

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[93] *Id*. at 540.

[94] Beau James Brock, *Mr. Justice Antonin Scalia: A Renaissance of Positivism and Predictability in Constitutional Application,* 51 LA. L. REV. 623, 629 (1991). Judge Posner was Justice Brennan's law clerk during the 1963 term. *Richard A. Posner*, UNIV. CHICAGO SCH. LAW, https://www.law.uchicago.edu/faculty/posner-r [https://perma.cc/9S7D-K32B] (last visited Oct. 20, 2021).

[95] STEPHEN BREYER, MAKING OUR DEMOCRACY WORK 82 (2010) ("The approach I have in mind can be described as pragmatic—as that concept is broadly used to encompass efforts that consider and evaluate consequences.").

[96] *Id*. at xiv.

[97] K-Mart Corp. v. Cartier, Inc., 486 U.S. 281, 325 (1988) (Scalia, J., concurring and dissenting).

[98] John F. Manning, *Justice Scalia and the Idea of Judicial Restraint*, 115 MICH. L. REV. 747, 756 (2017) [hereinafter Manning, *Judicial Restraint*].

so for their own purposes, and these purposes may be conflicting.[99] The only thing that legislators have agreed to when they vote to enact a bill into law are the words contained in the text of the statute itself.[100] This means that judges should owe "fidelity" to the text of a statute, since "we are governed by what the legislators enacted, not by the purposes they had in mind."[101]

A third problem with purposivism is that it appears to disregard the legislative process for enacting a bill into law contained in Article I. An important part of that process is compromise.[102] When a party tries to invoke the purpose of a statute, and disregard the text of the statute itself, this ignores the process of compromise.[103] For example, in a case involving the issue of whether the Court should authorize a private action for damages (despite the fact that the statute at issue did not contain one), the Supreme Court dismissed the claim declaring that *lawmaking "often demands compromise*. . . ."[104] The Court explained that a lawmaking body may not wish to pursue a statute's purpose, since this might disturb the "balance of interests struck by lawmakers."[105] Similarly, Professor John F. Manning wrote that before "the advent of modern textualism, purposivism threatened the integrity of any resulting legislative compromise by enforcing the spirit over the letter of the law—that is, the statute's apparent background purpose rather than the precise details bargained for in the adopted text."[106]

A fourth problem with a purposivist approach is that it can result in statutory provisions becoming "boundless," generalized purpose clauses

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[99] DICKERSON, *supra* note 41, at 90; *see, e.g.,* Specialty Equip. Mkt. Ass'n v. Ruckelshaus, 720 F.2d 124, 137 (D.C. Cir. 1983) (referring to "the competing and often conflicting purposes of the [Environmental Protection Act] statute.")

[100] Antonin Scalia & John F. Manning, *A Dialogue on Statutory and Constitutional Interpretation,* 80 GEO. WASH. L. REV. 1610, 1612 (2012) [hereinafter Scalia & Manning, *A Dialogue*] ("Nothing but the text has received the approval of the majority of the legislature and the President. . . . Nothing but the text reflects the full legislature's purpose. Nothing.")

[101] *Id.* at 1612.

[102] Bd. Of Governors of the Fed. Reserve Sys. v. Dimension Fin. Corp. 474 U.S. 361, 374 (1986); *see also* United States v. Hayes, 555 U.S. 415, 435 (2009) (Roberts, J., dissenting) ("*Invoking* . . . *Congress's manifest purpose*, however, '*ignores* the complexity of the problems Congress is called upon to address and the dynamics of legislative action.'. . . Legislative enactments are the result of negotiations between competing interests; 'the final language of the legislation may reflect hard fought *compromises.*'" (citation omitted) (emphasis added).

[103] *Id.*

[104] Hernandez v. Mesa, 140 S. Ct. 735, 742 (2020).

[105] *Id.* (emphasis added).

[106] Manning, *Legislative Intent*, *supra* note 65, at 425 n.53; *see also* Freeman v. Quicken Loans, Inc., 566 U.S. 624, 637 (2012) ("Petitioners appeal to statutory purpose. . .Vague notions of statutory purpose provide no warrant for expanding [the statute's] prohibition beyond the field to which it is unambiguously limited…")

which offer little predictability or guidance.[107] Moreover, the source of the statute's "purpose" may not be reliable. For example, in *Digital Reality Trust, Inc. v. Somers*,[108] Justice Thomas was critical of the Court for relying on "the supposed 'purpose' of the statute," which it derived primarily from a Senate committee report which members of the committee did not write or vote on, and probably did not read.[109]

Finally, a fifth problem with a purposivist approach is that when a court recognizes a claim based on the purpose of the law, it risks "arrogating (taking) legislative power."[110] In fact, one theory underlying purposivism is that judges should "partner" with the legislature to make sure that a statute's public policy purpose is achieved.[111] The problem with this theory is that it empowers purposivist judges to go beyond the text of a statute and decide cases on the basis of "a preferred public policy" (which the judge herself discerns) rather than the text.[112]

B. Four Reasons Why Textualism is Preferable to Intentionalism

There are four reasons why textualism is preferable to intentionalism. First, Congress does "not enact intents," Congress enacts

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[107] Rutledge v. Pharm. Care Mgt. Assn., 141 S. Ct. 474, 483 (2020) (Thomas, J., concurring).

[108] 138 S. Ct. 767 (2018).

[109] *Id.* at 784 (Thomas, J., concurring) (Justice Thomas included quotations from a Senate floor debate, as well as from a former Senate staffer who drafted legislative history, and wrote that: "I 'was able to write more or less what I pleased. . . .[M]ost members of Congress…have no idea at all about what is in the legislative history of a particular bill'"); *see also* Lawson v. FMR LLC, 571 U.S. 429, 460 (2014) (Scalia, J., concurring) (Any views contained in a committee report from one house of Congress do not necessarily "represent those of all the Members of that House. Many of them almost certainly *did not read the report* . . . much less agree with it . . . ." (emphasis added)).

[110] *Hernandez*, 140 S. Ct. at 741.

[111] O'Scannlain, *All Textualists*, *supra* note 1, at 305. Diarmuid O'Scannlain is a judge on the U.S. Court of Appeals for the Ninth Circuit. *The Judges of this Court in Order of Seniority*, U.S. CTS. NINTH CIR., https://www.ca9.uscourts.gov/judicial-council/judges-seniority-list [https://perma.cc/9PBE-HVG3] (last visited Oct. 20, 2021).

[112] O'Scannlain, *All Textualists*, *supra* note 1, at 305 (According to purposivist thinkers "the task of the judge [was] to serve as the legislature's partner, to ensure that such purposes were carried out. This mindset empowered judges to break free from the bonds of statutory text to ensure that a preferred public policy is achieved."); *see also* SCALIA, *supra* note 4, at 23 ("To be a textualist in good standing, one need not be too dull to perceive the broader purposes that a statute is designed . . . to serve. . . . One need only hold that judges have no authority to pursue those broader purposes or write those new laws.").

statutory texts.[113] When a president signs a bill into law, "it is only the words of the bill" that become law, not the entire Congressional Record.[114] The only legislative intentions that should be recognized are those that are part of "the final statutory text."[115] Only those intentions have survived the legislative process, not policy intentions.[116]

A second reason why textualism is preferable to intentionalism is because (in their search for legislative intent), intentionalists rely on legislative history.[117] Legislative history includes sources such as Senate and House committee reports and congressional floor debates.[118] The problem with relying on legislative history is that it can be easily manipulated.[119] Legislators and lobbyists can put comments in the record "solely to influence future interpretations."[120]

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[113] Livingston Rebuild Ctr., Inc. v. R.R. Ret. Bd., 970 F.2d 295, 298 (7th Cir. 1992).

[114] Schwegmann Bros. v. Calvert Distilling Corp. 341 U.S. 384, 396 (1951) (Jackson, J., concurring).

[115] Manning, *Legislative Intent*, *supra* note 65, at 424.

[116] *Id.* ("intentionalists believe that legislatures have coherent and identifiable but *unexpressed* policy intentions, textualists believe that the only meaningful collective legislative intentions are those reflected in the *public meaning* of the final *statutory text*.") (emphasis added).

[117] *See, supra* note 63.

[118] *Legislative History,* BLACK'S LAW DICTIONARY (11th ed. 2019) ("The proceedings leading to the enactment of a statute, including hearings, committee reports, and floor debates.")

[119] John M. Walker, Jr. *Judicial Tendencies in Statutory Construction*: *Differing Views on the Role of the Judge*, 58 N.Y.U. AM. SURV. AM. L. 203, 234 (2001) [hereinafter Walker, *Judicial Tendencies*] (legislative history "can be easily manipulated by legislators, judges, and lobbyists…"). However, U.S. Second Circuit Court Judge John M. Walker distinguishes between legislative history and *statutory* history based on the fact that statutory history is "more objectively determined and less susceptible to manipulation…than legislative history…" *id.* at 234 (emphasis on the word statutory in the original). This is because statutory history consists of "the record and results of votes taken, bills passed or not passed…[it] accounts for the *collective action of the legislature…*" *id.* at 234 (emphasis added). This makes statutory history "less susceptible to judicial and legislative manipulation than legislative history." *id.* Judge Walker adds that "to understand a statute's *ambiguous* terms, it may be helpful to look at drafts of a statute." *Id.* at 233 (emphasis on the word ambiguous in the original). The reader is asked to notice how the judge's use of history is limited. He appears to be only in favor of using specific *statutory* history— e.g.,"drafts of a statute"—and then only to understand a statute's *ambiguous* terms.

[120] Note, *Why Learned Hand Would Never Consult Legislative History Today*, 105 HARV. L. REV. 1005, 1017 (1992); *see also* Exxon Mobil Corp., v. Allapattah Servs. Inc., 545 U.S. 546, 568 (2005) (relying on legislative history may allow "unrepresentative committee members-or, worse yet, unelected staffers and lobbyists – both the power and the incentive . . . to secure results they were unable to achieve through the statutory text."); Blanchard v. Bergeron, 489 U.S. 87, 98–99 (1989)

In addition, legislative history can diminish the text of a statute which has actually been enacted into law.[121] This is because legislative history causes the words of the statute itself to be devalued, since it is precisely those committee reports and debates which have been "deliberately left out of the enacted text."[122] When a court looks beyond the text and examines legislative history, this reduces the actual text to "only one of many indicators of legislative intent."[123] This can shift a court's focus away from the legislature's actual intent (contained in the text of a statute), to an intent of the court's own choosing.[124]

Another problem with intentionalists relying on legislative history in particular, and extrinsic materials in general, is that "statutes are *law*, extrinsic materials are not."[125] The fact that legislative history is not law is why Justice Scalia believed that the greatest defect in using legislative history as a basis for statutory interpretation was its illegitimacy.[126] Illegitimacy is the third reason why textualism is preferable to intentionalism.[127] Textualist Judge Frank H. Easterbrook also objects to the use of legislative history as "illegitimate" since it is "'insufficient to constitute legislation under our system of governance.' An opinion poll among legislators does not create a legal obligation. . . ."[128]

(Scalia, J., concurring) (congressional committee reports can contain references to cases inserted "by a committee staff member at the suggestion of a lawyer-lobbyist; and the purpose of those references was…*to influence judicial construction*.")(emphasis added); *see also* Int'l Bd. of Elec. Workers, Local Union No. 474 v. N.L.R.B., 814 F.2d 697, 717 (D.C. Cir. 1987) (Buckley, J., concurring) (the use of legislative history can encourage legislators "to salt the legislative record with unilateral interpretations of statutory provisions they were unable to persuade their colleagues to accept.").

[121] Easterbrook, *Text History*, *supra* note 11, at 62.

[122] *Id.*; *see also* Schwegmann Bros. v. Calvert Distilling Corp. 341 U.S. 384, 396 (1951) (Jackson, J., concurring) (For the Court to select statements from floor debates "as a basis for making up our minds what law Congress intended to enact is to substitute ourselves for the Congress in one of its most important functions.").

[123] McIntosh v. Watkins, 441 P.3d 1094, 1105 n.23 (Okla. 2019) (Wyrick, V.C.J., dissenting).

[124] *Id.* at 1105. (The majority of the court "views the text of the statute as merely one of many pieces of evidence—and a piece that can seemingly be discarded altogether once a declaration of ambiguity is made—the Court finds itself entirely unconstrained in assigning to the Legislature the intent of its choosing.")

[125] MICHAEL B.W. SINCLAIR, GUIDE TO STATUTORY INTERPRETATION 103 (2000) (emphasis on the word "law" in the original). Professor Sinclair went on to quote Justice Holmes' famous statement that: "'We do *not* inquire what the *legislature meant*; we ask *only what the statute means.*'" *Id.* (emphasis added) (citing OLIVER WENDELL HOLMES, COLLECTED LEGAL PAPERS 207 (1920)).

[126] Conroy v. Aniskoff, 507 U.S. 511, 519 (1993) (Scalia, J., concurring).

[127] *Id.*

[128] Frank H. Easterbrook, *The Absence of Method in Statutory Interpretation*, 84 U. CHI. L. REV. 81, 91 (2017) [hereinafter Easterbrook, *Absence of Method*].

The fact that legislative history is not law is particularly important when a judge interprets a criminal statute. For example, while both textualist Justices Thomas and Scalia concurred in an opinion (that a juvenile defendant who stole a car and fatally injured a two-year-old child should be given a lesser sentence), they were critical of the majority for relying on legislative history.[129] Specifically, Justice Scalia wrote that words said in a Committee Report could cause "a criminal law to be stricter than the text of the law displays."[130] Justice Thomas wrote that statutes are law, but "*here is a rule that would also require knowledge of committee reports and floor statements which are not law*…[T]here appears scant justification for extending the 'necessary fiction' that citizens know the law, …to such extralegal material."[131]

A fourth reason why textualism is preferable to intentionalism is because legislative history might be inaccessible to pro se litigants or sole practitioners.[132] Instead, when the text is clear, judges should not "be free to replace it with an unenacted legislative intent" based on legislative history carefully selected from massive electronic data bases.[133] Indeed, D.C. Circuit Court Judge Harold Leventhal likened the use of legislative history in statutory interpretation cases to "'looking over a crowd and picking out your friends.'"[134]

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[129] United States v. R.L.C., 503 U.S. 291, 310–11 (1992) (Scalia, J., concurring) (Thomas, J., concurring).

[130] *Id.* at 308 (Scalia, J., concurring). ("Happily for *this* defendant, the plurality's extratextual inquiry is benign: It uncovers evidence that the 'better understood' reading of § 5037 is the more lenient one . . . . But this methodology contemplates as well a different ending, one in which something said in a Committee Report causes a criminal law to be stricter than the text of the law displays.") (emphasis in the original).

[131] *Id.* at 311–12 (Thomas, J., concurring) (emphasis added).

[132] Schwegmann Bros. v. Calvert Distilling Corp. 341 U.S. 384, 397 (1951) (Jackson, J., concurring) ("the materials of legislative history are not available to the lawyer who can neither afford the cost of acquisition…or the cost of repeatedly examining the whole [C]ongressional history."). In 2020, the problem of obtaining access to electronic research sources which contain legislative history, can be demonstrated by the fact that *e.g.*, the Los Angeles County Law Library restricts a person's free access to electronic research to two hours a day. Telephone Interview with Los Angeles County Law Library Librarian (July 15, 2020).

[133] INS v. Cardoza-Fonesca, 480 U.S. 421, 452–53 (1987) (Scalia, J., concurring).

[134] Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 214 n.143 (1983). Judge Wald served with Judge Leventhal on the D.C. Circuit. *Id.* at 214.

IV. ELEVEN REASONS WHY TEXTUALISM IS PREFERABLE TO LEGAL PRAGMATISM

There are also a number of reasons why textualism is preferable to legal pragmatism: (a) legal pragmatism is undemocratic; (b) pragmatic decision-making resembles legislation rather than adjudication; (c) pragmatic federal judges improperly assume the role of common law judges; (d) pragmatic decision-making by federal judges tempts politicians to avoid making controversial policy decisions themselves; (e) pragmatists believe that federal judges have the power to "update" federal statutes; (f) textualism is based on law that is pre-existing and provides fair notice; (g) textualists generally favor precedent; (h) textualist decision-making is based on "law"; (i) textualists favor constraint; (j) the foundation of pragmatism lies in a philosophy of relativism, which is egocentric and unpredictable; and (k) the roots of pragmatism also lie in a philosophy of realism which regards law as an instrumental means to an end. Each of these reasons will be discussed below.

A. Pragmatism is Undemocratic

The first reason textualism is preferable to pragmatism is because pragmatism is undemocratic. Pragmatism is undemocratic is because it allows federal judges – who are insulated from politics – to make political decisions.[135] Federal judges are not elected; they are appointed for life and enjoy salary protection.[136] In fact, isolating federal judges from politics is the reason for these protections.[137] This is in contrast to members of Congress who are elected precisely because of their support for, or against, various political issues.[138] This means that it is Congress

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[135] Frank H. Easterbrook, *Foreword* to SCALIA & GARNER, *supra* note 11, at xxii ("the more the interpretive process *strays outside a law's text*, the greater the interpreter's discretion."); and *id*. at xxii–xxiii ("*Democratic choice* under the constitutional plan depends on interpretative methods that *curtail judicial discretion.*") (emphasis added).

[136] U.S. CONST. art. III, § 1.

[137] Mark C. Weber, *Complex Litigation and the State Courts: Constitutional and Practical Advantages of the State Forum Over the Federal Forum in Mass Tort Cases*, 21 HASTINGS CONST. L.Q. 215, 228 (1994); *see also* Diarmuid F. O' Scannlain, *Politicians in Robes: The Separation of Powers and the Problem of Judicial Legislation*, 101 VA. L. REV. ONLINE 31, 37 (2017) [hereinafter O'Scannlain, *Politicians*] (salary protection and life tenure are designed to protect judges "from external influences. *The judiciary…is specifically designed to be nonresponsive to political pressures*; thus it should not be charged with effectuating broad-based policy changes.") (emphasis added).

[138] Hans A. Linde, *Courts and Torts: Public Policy Without Public Politics?* 28 VAL. U. L. REV. 821, 834 (1994).

that has the mandate for any political judgments it makes.[139] Of the two forms of law making (legislative and judicial), statutes enacted by Congress have a democratic political basis, while decisions by federal judges do not.[140] *When a judge makes a political policy decision which goes outside the text of a statute, this can make a federal judge (rather than Congress) "the real author of policy."*[141] This undermines democratic choice.[142]

Pragmatic decision-making is also undemocratic is because it bypasses the deliberative political process contained in Article I, and encroaches upon the power of Congress to make law.[143] The text of a statute which has been enacted into law is the product of a three step procedure, involving the two elected branches of government.[144] These procedures act as a "bulwark against tyranny" and do not partake of the "efficient" values of pragmatism.[145] Instead, the cumbersome process outlined in Article I results in "much debate and deliberation in both Houses of Congress,"[146] and it is the "precise text" agreed to by both the

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[139] Oregon v. Mitchell, 400 U.S. 112, 207 (1970) (Harlan, J., concurring and dissenting).

[140] Linde, *supra* note 138, at 834 ("legislating is legitimately political and judging is not."); *see also* CHARLES D. BREITEL, THE COURTS AND LAWMAKING, *in* LEGAL INSTITUTIONS TODAY AND TOMORROW 8 (Monrad G. Paulsen, ed. 1959) ("Because it is dependent politically, [the *legislative process*] *expresses…the general will and popular needs…*[judges] are more detached.") (emphasis added).

[141] Frank H. Easterbrook, *Foreword* to SCALIA & GARNER, *supra* note 11, at xxii. (To enact policy in the form of a law under the Constitution, the "legislature acts first, the executive branch . . . second, and the judiciary third. If the final decision-maker exercises significant discretion, then it (the judiciary) rather than the legislator . . . is *the real author of policy.*" (emphasis added)).

[142] *Id.* at xxii–xxiii (The real problem with judicially created rules involving statutory texts "lies in the transfer of authority from elected officials to those with life tenure."); *see also* Kenneth W. Starr, *Observations About the Use of Legislative History*, 1987 DUKE L.J. 371, 375–376 (1987) (Former D.C. Circuit Court Judge Kenneth W. Starr echoed what he labeled "democratic theory concerns" when he pointed to the "danger of introducing the voice of the federal courts – the nonpolitical branch – into the political process of legislation.").

[143] U.S. CONST. art. I.

[144] Clinton v. City of New York, 524 U.S. 417, 448 (1998). The three steps are: passage by the House of Representatives; approval by the Senate of "the same text"; and the signing into law of the text by the President. *Id.* "The Constitution explicitly requires that each of th[e] three steps be taken before a bill may 'become a law.'" *Id.*

[145] United States v. Brown, 381 U.S. 437, 443 (1965) ("separation of powers was obviously not instituted with the idea that it would promote governmental efficiency. It was, on the contrary, looked to as a bulwark against tyranny. For if governmental power is fractionalized, . . . no man or group of men will be able to impose its unchecked will.").

[146] *Clinton,* 524 U.S. at 447.

Senate and House that becomes law when it is signed by the President.[147] When a court adopts a method of statutory interpretation which allows it to effectively rewrite a statute, it encroaches on the Article I power of Congress to make law.[148] Allowing a federal judge to bypass the democratic process also invites arbitrary decision-making.[149] This is because "the judge would need only his own vote, or those of just a few colleagues, to revise the law willy-nilly in accordance with his preferences."[150]

Finally, pragmatism is undemocratic is because pragmatism is characterized by rule from above. Textualism is preferable to pragmatism because it is consistent with democratic principles of government of rule from below, rather than rule from above. Unlike King George III whose power was legitimized from above, the power of a President, and the power of Congress, is legitimized from below through popular elections.[151] This is not true of federal court judges.

Unlike legislators in Congress, federal court judges are not legitimated from below through popular elections.[152] Instead, federal judges are legitimated from above because they are appointed to life terms by the President.[153] When a federal judge decides to unilaterally amend a federal statute under the guise of "interpreting" it, this creates a situation in which the rule from below by the people's representatives in Congress is put aside in favor of rule from above by unelected federal judges appointed for life.

B. Pragmatic Decision-making Resembles Legislation Rather than Adjudication

As well as being undemocratic, pragmatic decision-making resembles legislation rather than adjudication. This is another reason why textualism is preferable to pragmatism. Although "Carl von Clausewitz wrote that war is the continuation of politics by other means,

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[147] *Id.*

[148] Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2120 (2016) [hereinafter Kavanaugh, *Fixing Statutory*].

[149] *Id.*

[150] Neil M. Gorsuch, *Of Lions and Bears, and Judges and Legislators, and the Legacy of Justice Scalia*, 66 CASE W. RES. L. REV. 905, 913 (2016) [hereinafter Gorsuch, *Lions*].

[151] *See* Mario Patrono & Justin O'Frosini, *Two Grand Old Ladies Face to Face*: *The United Kingdom and the United States of America Constitutions Compared*, 46 VICT. U. WELLINGTON. L. REV. 989, 1008 (2015).

[152] U.S. Const. art. II, § 2 (declaring that the President has the power to appoint judges) See also U.S. Const. art. III, § 1. *See also supra* note 142. (referring to the danger of "federal courts – the nonpolitical branch" having a voice in the political process.)

[153] *Id.*

… adjudication is not [supposed to be] the continuation of legislation by other means."[154]

1. Like Legislators, Pragmatic Judges Rely on Forward-Looking "Legislative Facts" to Create New Law and Policy for the Public

Pragmatists have characterized the traditional legal process as backward-looking.[155] This is in contrast to pragmatism, which they describe as a "forward-looking" policy-oriented approach.[156] Pragmatism's forward-looking approach highlights an important distinction between legislative and judicial action, in general, and between pragmatism and textualism, in particular. This is the distinction between legislative facts and adjudicative facts. In their decision-making, textualists focus on past facts involving the immediate parties before the court.[157] These are adjudicative facts. Pragmatists, on the other hand, often focus on *future* consequences for the *public*.[158] These are not adjudicative facts; they are legislative facts. Legislative facts are different from adjudicative facts:

> Adjudicative facts are facts about the parties…who did what, where, when…Legislative facts do not usually concern the immediate parties but [similar to legislation itself] are *general facts* which help the tribunal decide *questions of law and policy* and discretion.[159]

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[154] Soppet v. Enhanced Recovery Co., 679 F.3d 637, 642 (7th Cir. 2012).

[155] POSNER, JURISPRUDENCE, *supra* note 76, at 453 (A pragmatist judge is "forward-looking where the neotraditionalist is back-ward looking. . . . The pragmatist will also be less 'professional' more policy-orientated . . . less the traditional legalist.").

[156] *Id.*

[157] *Id.*

[158] J. HARVIE WILKINSON III, COSMIC CONSTITUTIONAL THEORY 82–83 (2012) ("Pragmatic judges . . . *focus on the future* . . . [and] consider *overall consequences, not just those falling on the litigants* . . . [what binds] are *outcomes* that would create the greatest *public* good."); *see also* Richard A. Posner, *Pragmatism Versus Purposivism in First Amendment Analysis*, 54 STAN. L. REV. 737, 738 (2002) (a pragmatist wants to produce "better *social consequences*")(emphasis added) [hereinafter Posner, *Pragmatism Versus*].

[159] KENNETH CULP DAVIS, ADMINISTRATIVE LAW AND GOVERNMENT 135 (2nd ed. 1975). Professor Davis developed these distinctions in an administrative law context. *Id.* Articulation of the distinction between legislative action and judicial action became necessary because significant consequences (such as the right to procedural due process), could result from whether the action an agency took was characterized as adjudicative or legislative. *See, e.g.*, the classic early cases of Londoner v. City of Denver, 210 U.S. 373 (1908) (local agency), and Bi Metallic Investment Co. v. State Bd. of Equalization, 239 U.S. 441 (1915) (state agency).

In other words, adjudicative facts (e.g., Bob hit Sam's car on May 1, 2020) are facts that have already taken place;[160] legislative facts are prospective facts that policymaking legislators generally consider.[161] An example of a legislative fact is evidence showing that "the death penalty does not deter crime," which is presented to convince a court to adopt a policy striking down the death penalty.[162] As the example above shows, a legislative fact is a prospective fact. Significantly, legislative facts do not assume the existence of any pre-existing law.[163] This is because legislative facts "are used to create law."[164]

When pragmatic judges make decisions based not on adjudicative facts related to the parties, but on general legislative facts affecting the public (along with a judge's well-meaning idea of what the law should be), they assume a legislative role. Great scholarly pragmatic jurists like Judge Richard A. Posner confirm this.[165] He writes that in cases where "the orthodox materials do not yield an answer to the legal question presented, *or* if *the answer they yield is unsatisfactory*, the *judge's role is legislative*: to *create new law* that decides cases and governs similar future ones."[166] This suggests that the goal of some pragmatic jurists is

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[160] Ann Woolhandler, *Rethinking the Judicial Reception of Legislative Facts*, 41 VAND. L. REV. 111, 113 (1988).

[161] *Id.* at 114; *see also* FED. R. EVID. 201(a) (treating legislative facts differently from adjudicative facts). Specifically, FED. R. EVID. 201(a) provides that judicial notice shall be taken of "an adjudicative fact *only*, not a legislative fact." *Id*. This is because (as the advisory committee notes attached to the statute explain), the method of establishing an adjudicative fact is different from the method of establishing a legislative fact:

> The usual method of establishing adjudicative facts is through the introduction of evidence [and] . . . a *high degree of indisputability* is the essential prerequisite. Legislative facts are quite different . . . . [Legislative facts are facts that judges] *believe* as distinguished from [adjudicative] facts which are clearly . . . within the domain of the *indisputable.*

FED. R. EVID. 201(a) 1969 advisory committee notes (emphasis added).

[162] Woolhandler, *supra* note 160, at 114.

[163] *Id.*

[164] *Id.*

[165] Posner, *Self-Restraint*, *supra* note 78, at 540.

[166] *Id.* The words "or if the answer they yield is unsatisfactory" have been emphasized to bring attention to the broad scope of the legislative role that pragmatic jurists think they should play. *Id.* Apparently, Judge Posner believes that judges should legislate, not only in those situations where orthodox materials do not provide an answer, but also if the answer is "unsatisfactory." *Id.* The obvious question this raises is, unsatisfactory to who? It appears to be the judge presiding over the case. *See also* RICHARD A. POSNER, THE FEDERAL JUDICIARY 30 (2017)

to create law, rather than apply it. In a system of separation of powers, judges are not supposed to legislate by looking forward to change the law as they want it to be for the future.[167] Instead, textualists believe that judges should apply existing law as it is.[168]

2. Like Legislators, Pragmatic Judges Rely on "Balancing"

Another reason pragmatic decision-making resembles legislation is because, like legislators, pragmatic judges rely on "balancing" as a method of decision-making.[169] Under a balancing approach, the "correct" decision is one that provides the greatest benefit.[170] Judges who use a balancing test to decide cases eschew formal legal rules and decide cases instead on the basis of the competing interests of the parties, or "the competing *interests of society* more generally."[171] The words "interests of society" have been emphasized to bring attention to the fact that any judge who decides to engage in balancing, or weighing the interests of society, "performs essentially the function of a legislator, and in a real sense makes law."[172]

A federal judge's reliance on "balancing" as a method of decision-making presents four problems. The most obvious problem is separation of powers.[173] Generally, if a decision "involves a host of considerations

("the judicial role is to a considerable extent legislative…"); *See also,* Richard A. Posner, *Judicial Opinions and Appellate Advocacy in Federal Courts-One Judge's Views*, 51 DUQ. L. REV. 3, 11–12 (2013) ("I have been criticized for including in my opinions facts drawn from Web research conducted by me . . . Besides adjudicative facts . . . There are also legislative facts which are facts that bear on the design or interpretation of legal doctrines.").

[167] Gorsuch, *Lions, supra* note 150, at 906.

[168] *Id*.

[169] Alexander Aleinikoff, *Constitutional Law in an Age of Balancing*, 96 YALE L.J. 943, 958 (1987) ("While a pragmatic instrumental view of law does not compel a balancing approach, balancing was certainly a logical doctrinal application of the new jurisprudence. Balancing openly embraced the view of the law as purposeful, as a means to an end . . . .") [hereinafter, Aleinikoff, *Balancing*].

[170] *Id.* at 943.

[171] Patrick M. McFadden, *The Balancing Test*, 29 B.C. L. REV. 585, 586 (1988) (emphasis added).

[172] Harlan F. Stone, *The Common Law in the United States*, 50 HARV. L. REV. 4, 20 (1936); *see also* Aleinikoff, *Balancing*, *supra* note 169, at 957–58. ("If the value of a legal rule was established by its consequences, . . . Where did the new [pragmatic consequentialist] legal philosophy leave judges? Certainly, they were far less constrained by legal doctrine than had been previously thought . . . most scholars recognized that, *in the new jurisprudential world, not a great deal separated the judge and the legislator.*").

[173] Aleinikoff, *Balancing*, *supra* note 169, at 984. (a cost benefit "methodology may be an appropriate model for common law adjudication. But balancing needs to

that must be weighed," such a decision should be made by Congress, not the courts.[174]

A second problem with balancing is indeterminacy.[175] When a judge takes on the role of a "pragmatic social-welfare maximizer" by weighing costs and benefits involving possible outcomes of a case, this presents a problem of indeterminacy.[176] This is because pragmatic balancing offers no way to determine which values or benefits should be preferred.[177]

A third problem with relying on balancing as a tool of statutory interpretation is that it opens the door to arbitrary decision-making.[178] Professor Martin Shapiro believes that "the only clear things about balancing are the techniques for putting the judicial thumb on the scale."[179] Similarly, Professor John F. Manning concluded that balancing tests allow judges "to come out either way in any given case."[180]

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be defended in constitutional interpretation where the decision of a court supplants a legislative decision.")

[174] U.S. v. Gilman, 347 U.S. 507, 512–13 (1954) ("the claim now asserted, . . . presents a question of policy on which Congress has not spoken. The selection of that policy is most advantageous to the whole *involves a host of considerations that must be weighed and appraised.* That *function is more appropriately for those who write the laws, rather than those who interpret them*." (emphasis added)); *see also* Ziglar v. Abbasi, 137 S. Ct. 1843, 1872 (2017) (Thomas, J., concurring in part) (in the context of recognizing a qualified immunity defense, which would necessarily involve the balancing of competing values, Justice Thomas declared that the "Constitution assigns *this kind of balancing to Congress, not the Courts.*" (emphasis added)).

[175] Aleinikoff, *Balancing*, *supra* note 169, at 963.

[176] Gorsuch, *Lions*, *supra* note 150, at 918.

[177] *Id.*; *see also* Manning, *Judicial Restraint*, *supra* note 98, at 754 ("balancing tests asked the Court to compare *incommensurable values* or make sense of multiple *unweighted* and *unranked* factors.") (emphasis added); *see also* Bendix Autolite Corp. v. Midwesco Enters., Inc., 486 U.S. 888, 897 (1988) (Scalia, J., concurring in part) ([Where the] "interests on both sides are incommensurate. It is more like judging whether a particular line is longer than a particular rock is heavy.").

[178] Aleinikoff, *Balancing*, *supra* note 175, note 169, at 973. *See also* Wooden v. United States, 142 S. Ct. 1063, 1080 (2022) (Gorsuch, J. concurring, in part) (discussing the "Court's [new] multi-factor balancing test…under the Occasions Clause [of a penalty enhancing criminal statute, 18 U.S.C. §924(e)(1)]" *id.* Justice Gorsuch noted that lower courts have already looked to the same balancing factors, and that this has "yielded a grave problem: Some individuals face mandatory 15 year prison terms while [others]…do not— with the *results depending on little more than how much weight this or that judge chooses to assign this or that factor*." *Id.* at 1080 (emphasis added).

[179] MARTIN SHAPIRO, FREEDOM OF SPEECH: THE SUPREME COURT AND JUDICIAL REVIEW 83 (1966).

[180] Manning, *Judicial Restraint*, *supra* note 98, at 754–55 (citing Rutan v. Republican Party of Ill., 497 U.S. 62, 96 (1990) (Scalia, J., dissenting) (arguing that

A fourth problem with balancing arises from the fact that when a judge decides to make a decision by balancing various factors (and essentially take on a legislative role), then any explanation for the court's decision need not meet the high doctrinal standards of adjudication.[181] Why is this important? When an appellate court fails to provide doctrinal support for its decision, it fails to provide rules for lower courts (thereby limiting the case's precedential value) and *removes a constraint on judicial discretion*. Textualist Justice Scalia referred to the importance of providing doctrinal support when he explained how he set about writing a majority opinion for the Court.[182] He stated that he begins by saying, "This is the basis of our decision."[183] He explained that he does this, "not only to constrain lower courts," but to "constrain myself as well."[184]

Significantly, Justice Scalia compared his method of decision-making to judges who announce that, "'on balance' we think the law was violated here—leaving ourselves free to say in the next case that, 'on balance' it was not… ."[185] While it may be tempting for a judge to rely on balancing as a method of decision-making , since this allows a judge more flexibility, Justice Thomas believes that this is not the best approach for an appellate court.[186] Instead, courts should adopt "bright-line rules" which provide notice and limit "the ability of judges in the future to alter the law to fit their policy preferences."[187]

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a multipart balancing test leads to results "favored by the personal (and necessarily shifting) philosophical dispositions of a majority of this Court.")).

[181] POPKIN, *supra* note 9, at 212 ("ordinary judging avoids . . . *lapsing into a descriptive pragmatism that gives up all attempts to justify judicial discretion in statutory interpretation*."); *see also* Linde, *supra* note 138, at 833 ("Because a court *adjudicates*, its explanations must meet higher standards of cogency and accuracy than a legislature's . . . Statutes may rest on uncertain knowledge and erroneous predictions."); *see also* Melvin I. Urofsky, *William O. Douglas As a Common Law Judge*, 41 DUKE L.J. 133, 138 (1991) (Discussing the problem which arises from judges who regard political ideology as "the most important factor" in their decision-making and become "uninterested in the doctrinal support" for their opinions.).

[182] Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1179 (1989) [hereinafter Scalia, *Rule of Law*].

[183] *Id.*

[184] *Id.*

[185] *Id.* at 1179–80.

[186] Clarence Thomas, *Judging*, 45 U. KAN. L. REV. 1, 7 (1996) [hereinafter Thomas, *Judging*].

[187] *Id.*

C. Pragmatic Judges Improperly Assume the Role of Common Law Judges

In addition to balancing, Fourth Circuit Court Judge J. Harvie Wilkinson has pointed to the fact that some pragmatic judges do what "their *common law* ancestors did" and *make policy*.[188] This highlights another reason why textualism is preferable to pragmatism: federal judges should not assume the role of common law judges. To understand this problem with legal pragmatism, it is important to note that, in addition to constitutional law, there are two primary sources of law in the United States: statutory law and common law.[189] Statutory law is created by legislatures. Common law, also referred to as "judge made law," is created by judges and developed through judicial decisions.[190]

There are four reasons why a federal judge should not assume the role of a common law judge and make new law and policy. First, federal courts are not common law courts, and have not been vested with a state common law court's "open-ended lawmaking powers."[191] Instead, federal courts are courts of only limited jurisdiction;[192] they are "not general common-law courts and do not possess a general power to develop and apply their own rules of decision."[193]

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[188] WILKINSON, *supra* note 158, at 88.

[189] The word "primary" is used to bring attention to the fact that other sources of law exist in the United States, such as the continental civil law system of community property brought to the United States from Spain and France, and found in ten states. Caroline Bermeo Newcombe, *The Origin and Civil Law Foundation of the Community Property System, Why California Adopted It and Why Community Property Principles Benefit Women*, 11 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 1, 2 n.3 (2011).

[190] Woodman v. Kera LLC, 785 N.W.2d 1, 21 (Mich. 2010).

[191] Nw. Airlines, Inc., v. Transp. Workers, 451 U.S. 77, 95 (1981).

[192] Alec L. v. Jackson, 863 F. Supp. 2d 11, 14 (D.C. Cir. 2012) ("Federal courts are courts of limited jurisdiction, with the ability to hear only the cases entrusted to them by a grant of power contained in either the Constitution or an act of Congress.").

[193] Milwaukee v. Illinois, 451 U.S. 304, 312 (1981) (emphasis added); *see also*, Nestle USA, Inc., v. Doe, 141 S. Ct. 1931, 1938 (2021) ("Because *Erie* denied the existence of a federal common law, 'a federal court's authority to recognize a damages remedy must rest at bottom on a statute enacted by Congress.'"). The Court added that:

> "Of course, courts at common law may have enjoyed the power to create …causes of action. But the power to create a cause of action is in every meaningful sense the power to enact a new law that assigns new rights and new legally enforceable duties. And our Constitution generally assigns *that* power to Congress. A self-governing people depends on elected representatives—not judges—to make its laws."

Id. at 1942 (emphasis in the original).

Second, not only are federal courts not common law courts, "there is 'no federal *general* common law.'"[194] The era of federal *general* common law was supposed to end after the Court's decision in *Erie Railroad v. Tompkins*.[195] Legal pragmatism appears to harken back to the pre-*Erie* freewheeling era of *Swift v. Tyson* when civil (but not criminal) general federal common law was alive and well.[196] About this era, one justice wrote: "I am aware that what has been termed the *general* law of the country—which is *often little less than what the judge* advancing the doctrine thinks at the time *should be the general law* on a particular subject."[197]

However, although federal judges do not have the power to formulate federal *general* common law, they do have the authority, in certain discrete areas, to develop what has come to be known as "federal common law."[198] Specifically, the Supreme Court has recognized that certain "limited areas exist in which federal judges may appropriately craft the rule of decision. . . ."[199] It is in unique areas, such as admiralty,[200] interstate water disputes,[201] *Bivens* Actions,[202] and antitrust

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[194] Rodriguez v. Fed. Deposit Ins. Corp., 140 S. Ct. 713, 717 (2020) (quoting Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938)).

[195] *Id*.

[196] Swift v. Tyson, 41 U.S. 1 (1842); *see also* KERMIT L. HALL, ET. AL, AMERICAN LEGAL HISTORY 166 (2011).

[197] Balt. & Ohio R.R. Co. v. Baugh, 149 U.S. 368, 401 (1893) (Field, J., dissenting) (emphasis added).

[198] Texas Indus., Inc. v. Radcliffe Materials, Inc., 451 U.S. 630, 640 (1981); *see also* Am. Elec. Power Co. v. Connecticut, 564 U.S. 410, 421 (2011) (referring to the distinction "between *'general common law' and 'specialized federal common law'*" which emerged after *Erie* (emphasis added)).

[199] *Rodriguez*, 140 S. Ct. at 717 (citation omitted). The following examples are not an exhaustive list.

[200] Air & Liquid Sys. Corp. v. DeVries, 139 S. Ct. 986, 203 (2019) ("When a federal court decides a maritime case, it acts as a federal "common law court," much as state courts do in state common-law cases."). The source of a federal judge's ability to develop a common law of admiralty is found in the Constitution, U.S. CONST. art. III, § 2, c. 1, and the Judiciary Act of 1789, § 9, 1 Stat. 73, 76–77 (1789) (codified at 28 U.S.C. § 1331).

[201] Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92, 110 (1938) ("[W]hether the water of an interstate stream must be apportioned between the two States is a question of 'federal common law'. . . .").

[202] *Bivens* actions are federal common law actions based directly on the Constitution. Stuart v. Rech, 603 F.3d 409, 411 (7th Cir. 2010); *see also* Livingood v. Townsend, 422 F. Supp. 24, 27 (D. Minn. 1976) ("[T]he Supreme Court created a new constitutional tort in *Bivens*, which has been characterized as a new form of federal 'common law' . . . ."). *Bivens* actions originated in 1971 when the Court recognized a private right of action for damages against federal officials (based directly on the Fourth Amendment of the Constitution) in a case titled *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*. 403 U.S. 388, 397 (1971).

law that a federal judge can legitimately assume the role of a common law judge and engage in common law lawmaking.[203]

The third reason why a federal judge should not assume the role of a common law judge is because – unlike state court judges – federal judges do not ordinarily have the power to make policy. While state common law judges can make new law on public policy grounds,[204] textualist Justice Thomas reminds us that "this emphatically is not the mission of the federal courts."[205] Federal judges should not decide policy;[206] instead, they should "apply authoritative texts—authoritative because they are issued by democratically elected and accountable bodies—to the facts of specific cases."[207]

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[203] Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 899 (2007) ("From the beginning the Court has treated the Sherman Act as a common-law statute . . . . 'In antitrust, the federal courts . . . act more as common-law courts than in other areas governed by federal statute.'") (quotation omitted). Another source of statutory based federal common law is the Federal Employers Liability Act ("FELA"), Pub. L. 60-100, 35 Stat. 65 (1908) (codified as amended at 45 U.S.C. §§ 51–60). *See* Schadel v. Iowa Interstate R.R., Ltd., 381 F.3d 671, 676 (7th Cir. 2004) ("[F]ederal law must set the terms of a railroad employee's right to recover against her employer for negligence. . . . Since the time of the FELA's enactment in 1908, the Court has 'develop[ed] a federal common law of negligence under the FELA . . . .'") (citation omitted); *see also* Dominic G. Biffignani, *Pomegranates and Railroads: Why POM Wonderful Suggests that the Federal Railroad Safety Act Should Never Preclude Federal Employers Liability Act Claims*, 86 MO. L. REV. 903, 905–06 (2021) ("Though FELA is a federal statute, its cause of action sounds in the theory of common-law negligence.").

[204] Farber, *Statutory Interpretation*, *supra* note 42, at 283 (state common law court judges can create new law and doctrines "embodying their own views of public policy.") For example, when the new doctrine of strict liability was first announced by the California Supreme Court, it was created by state common law judges. *See* Carlin v. Super. Ct., 920 P.2d 1347, 1349 (Cal. 1996) ("[U]nder *our* [California] doctrine of strict liability first announced in Greenman v. Yuba Power Products, Inc. . . ." (emphasis added) (citation omitted)); *see also* Isaac Montal, *The Consumer Expectations Test in New Jersey*: *What Can Consumers Expect Now?*, 54 BROOK. L. REV. 1381, 1384 (1989) (California common law state courts "have been in the forefront in *developing the common law* of strict products liability. *Greenman* . . . was the *first case to impose strict liability* upon a manufacturer . . . . [It] represents the *beginning of a 'new era'*") (emphasis added) (footnotes omitted).

[205] Thomas, *Judging*, *supra* note 186, at 5 (emphasis added).

[206] *Id.* Instead of making law and deciding policy, the "duty of the federal courts is to interpret and enforce two bodies of *positive* law: the Constitution and . . . federal statutory law." *Id.* Positive law (which consists of positive enactments by legislatures, or regulations created agencies), is distinct from judge made common law. *See, e.g.*, Sprietsma v. Mercury Marine, a Div. of Brunswick Corp., 537 U.S. 51, 69 (2002) (a statute's preemption clause might occupy the field of "state positive laws and regulations but . . . does not cover common-law claims.").

[207] Thomas, *Judging*, *supra* note 186, at 5; *see also* Nw. Airlines, Inc. v. Transp. Workers Union of Am., 451 U.S. 77, 95 (1981) ("[T]he federal lawmaking power is vested in the legislative not the judicial branch of government.").

The modest role that federal courts are supposed to play in developing federal common law was emphasized by a warning to federal judges in a unanimous 2020 Supreme Court opinion.[208] In *Rodriguez v. Federal Deposit Insurance Co*.,[209] which involved a dispute between a bank in receivership and its bankrupt corporate partner over a tax refund, the Court found that no unique federal interest was involved since the case did not involve how the federal government *receives* taxes, and that "[j]udicial lawmaking in the form of federal common law plays a necessarily modest role under a Constitution which vests the federal government's 'legislative powers' in Congress . . . ."[210] Lest there be any mistake about why the Court decided to take the *Rodriguez* case and the message it wanted to convey, the Court declared, "[W]e took this case only to underscore the care federal courts should exercise before taking up the invitation to try their hand at common lawmaking."[211]

Finally, about the common law mindset of some federal judges, textualist Justice Antonin Scalia wrote that a common law judge plays "king devising—out of the brilliance of one's own mind, those laws that ought to govern mankind."[212] While some might suggest that "playing king" may be appropriate for state court common law judges, it is not appropriate for federal court judges with no electoral mandate and only limited judicial power.

The fourth reason why a federal judge should not take on the role of a common law judge is because, under a system of separation of powers,[213] federal courts are not supposed to exercise legislative power

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[208] Rodriguez v. Fed. Deposit Ins. Corp., 140 S. Ct. 713, 718 (2020).

[209] *Id.*

[210] *Id.* at 717.

[211] *Id.* at 718. The Court also stated that "before federal judges may claim a new area for common lawmaking strict conditions must be satisfied" such as showing that new lawmaking is "'necessary to protect uniquely federal interest.'" *Id.* at 717 (quoting Texas Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 640 (1981)).

[212] SCALIA, *supra* note 4, at 7; *see also* Scalia, *Rule of Law*, *supra* note 182, at 1178 ("The common law, *discretion-conferring approach* is ill suited, moreover, to a legal system in which the supreme court can review only an insignificant proportion of decided cases.") (emphasis added).

[213] The Supreme Court's concern about separation of powers in statutory interpretation cases was emphasized in Nestle USA, Inc., v. Doe, 141 S. Ct. 1931 (2021). Plaintiffs (who claimed that they were trafficked from Mali to work on farms in Ivory Coast) filed a complaint under the Alien Tort Statute (28 U.S.C. § 1350) ("ATS"), despite the fact that the statute contained no private right of action. In dismissing the complaint, the Court stressed that: "*judicial creation of a cause of action is an extraordinary act that places great stress on the separation of powers*. Although this Court in the mid-twentieth century often assumed authority to create causes of action . . . '[i]n later years, we came to appreciate more fully *the tension between this practice and the Constitution's separation of legislative and judicial power*'. . . ." (emphasis added) *Id.* at 1935, 1938.

unless Congress has delegated that power.[214] Section 1 of the Sherman Antitrust Act (which contains a broad congressional statutory prohibition against combinations "in restraint of trade")[215] is an example of congressionally delegated lawmaking power.[216] Similarly, a section of the Consumer Product Safety Act (which provides recovery for "reasonable" attorney fees if "the court determines it to be in the interest of justice")[217] has been described as "less a matter of pure interpretation than of common law-like judging."[218]

D. Pragmatic Decisions Tempt Legislators to Avoid Making Controversial Political Choices Themselves

Another reason why textualism is preferable to pragmatism is because pragmatic decision-making by federal judges tempts politicians to avoid making controversial political choices themselves. Members of Congress are often reluctant to take a position on hot-button issues because they are afraid of not getting re-elected.[219] The result is that some policy choices are passed on to pragmatic federal judges (who may share the same important policy goals as the plaintiffs), and therefore

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[214] Martin H. Redish, *Federal Common Law, Political Legitimacy, and the Interpretive Process*: *An 'Institutionalist' Perspective*, 83 NW. U. L. REV. 761, 790 n.115 (1989) ("The Supreme Court should not be able to construe a statute to delegate common law-like power to the federal judiciary, without first carefully examining the statute in question to determine that Congress so intended, lest the court effectively usurp legislative power."); *see also* Frank Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 544 (1983) ("[U]nless the statute plainly hands courts the power to create and revise a form of common law, the domain of the statute should be restricted to cases anticipated by its framers and *expressly resolved by the legislative process*. . . . [T]he court [should] hold the matter . . . outside the statute's domain." (emphasis added)).

[215] 15 U.S.C. § 1 (2012).

[216] Frank H. Easterbrook, *Is There a Ratchet in Antitrust Law*?, 60 TEX. L. REV. 705, 706 (1982) ("The Sherman and Clayton Acts *authorized* the Supreme Court to invent and enforce a law of restraint of trade in the common law fashion." (emphasis added) (footnotes omitted)); *see also* CROSS, *supra* note 47, at 15 (The Sherman Act "appears to be a *broad delegation of discretionary authority to the* judiciary. . . . In applying the law's vague language, judges have typically evaluated a number of policy concerns . . . . This plainly seems to be the creation of a lawmaking partnership with the judiciary.") (emphasis added).

[217] 15 U.S.C. § 2072 (2012).

[218] Kavanaugh, *Fixing Statutory*, *supra* note 148, at 2120 n.12.

[219] *See, e.g.*, Susan Ferrechio, *Most Democrats Vote "Present" on Green New Deal*, WASHINGTON EXAMINER (Mar. 26, 2019, 4:52 PM), https://www.washingtonexaminer.com/tag/alexandria-ocasio-cortez?source=%2Fnews%2Fcongress%2Fmost-democrats-vote-present-on-green-new-deal [https://perma.cc/UZM7-99VY] (noting that some Senators simply voted "present" on a resolution involving the important Green New Deal).

choose to engage in "creative" decision-making.[220] For example, in *Juliana v. United States*,[221] a creative Oregon district court judge held that twenty-one young plaintiffs had a fundamental constitutional right to a "climate system capable of sustaining human life."[222] In making her decision, the judge articulated an expansive pragmatic view of public trust assets[223] which consist of certain natural resources held in trust for the public.[224] *Juliana* was appealed to the Ninth Circuit, where the case was dismissed on standing grounds.[225]

Unfortunately, when a well-meaning pragmatic federal judge decides an important public policy issue, this weakens both the judicial and legislative branches of government. First, when a federal judge accepts an invitation to engage in judicial policy making, this results in "'a lessening…of legislative responsibility.'"[226] This weakens the legislative branch. Specifically, pragmatic judicial policy making allows Congress to "shirk its constitutional duties" to make new law or change old law.[227]

Second, when federal judges stay within their constitutional role and refrain from policy making, this "enhances democracy" since it puts

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[220] Posner, *Offer Law*, *supra* note 77, at 1660 (statutory "interpretation is a *creative* rather than contemplative task" (emphasis added)); *see also,* John W. Poulos, *The Judicial Philosophy of Roger Traynor,* 46 HASTINGS L. J. 1643, 1696 (1995) (Pragmatism "asks whether existing law produces its desired goal. When these elements are employed, judges are usually contemplating the exercise of their *creative* powers." (emphasis added).

[221] Juliana v. United States, 217 F. Supp. 3d 1224 (D. Or. 2016), *rev'd*, 947 F.3d 1159 (9th Cir. 2020).

[222] *Id.* at 1250.

[223] *Id.* at 1255 n.10 (declaring that the public trust doctrine should be "extended to meet changing conditions and needs of the public . . . . The Supreme Court arguably endorsed this *pragmatic approach* to the identification of trust assets.") (emphasis added), (quotation omitted.)

[224] *See, e.g.*, Mineral City v. Walker River Irrigation Dist., 900 F.3d 1027, 1030 n.3 (9th Cir. 2018) ("Under the public trust doctrine, states hold navigable waterways within their borders in trust for the good of the public.).

[225] Juliana v. United States, 947 F.3d 1159, 1175 (9th Cir. 2020).

[226] SCALIA & GARNER, *supra* note 11, at 4 (quoting JOHN M. HARLAN, THE EVOLUTION OF A JUDICIAL PHILOSOPHY: SELECTED OPINIONS AND PAPERS OF JUSTICE JOHN M. HARLAN 291 (1969)).

[227] Robert J. Pushaw, *Talking Textualism, Practicing Pragmatism*: *Rethinking the Supreme Court's Approach to Statutory Interpretation*, 51 GA. L. REV. 121, 132 n. 49 (2016); *see also* Justice Robert P. Young, Jr., *A Judicial Traditionalist Confronts Justice Brennan's School of Judicial Philosophy*, 33 OKLA. CITY U. L. REV. 263, 284 (2008) ("political activists…have been guilty of resorting to the courts as a means of circumventing the majoritarian political process…Our judicial system, influenced by the Brennan [pragmatist school]…of judicial philosophy has encouraged the expectation that the courts will assume the constitutional role of the legislature.").

pressure "on the democratically elected body of the legislature to resist the urge to hand the difficult decisions over to the life-tenured, unelected members of the federal judiciary."[228]

Third, when important political issues are repeatedly brought into federal courts (by e.g., politically sympathetic young plaintiffs)[229] this weakens the judicial branch as an institution. Judges are no longer perceived by the public as applying of the law, but rather as its politically motivated creators. In fact, one commentator concluded that the *Juliana* climate change case is part of a "*political moment*, in which advocates are engaging in direct action and creative litigation. . . ."[230]

E. Pragmatic Judges Believe that they Should "Update" Federal Statutes

Some pragmatic judges believe that they should take on the role of sharing the legislative "burden" and update old statutes.[231] Textualist judges do not.[232] They believe that it is not the role of federal judges to update statutes to make them "better"; this would give judges too much power to make law.[233] Instead, any changes to a statute to "suit present day tastes" should be made by Congress.[234]

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[228] Walker, *Judicial Tendencies*, *supra* note 119, at 220 (discussing the argument that "judges help legislators do their constitutionally charged tasks better when judges refuse to engage in judicial lawmaking in the guise of statutory interpretation. . . . This in turn *enhances democracy* by putting the *onus on the democratically elected body of the legislature to make hard policy choices* and resist the urge to hand the difficult decisions over to the life-tenured, unelected members of the federal judiciary.") (emphasis added).

[229] *See* Alec L. v. Jackson, 863 F. Supp. 2d 11, 12 (D.D.C. 2012), *aff'd*, 561 F. App'x 7 (D.C. Cir. 2014). Similar to the plaintiffs in *Juliana*, plaintiffs in the *Jackson* case were politically sympathetic "young citizens." *Id.* at 12. They sued various agencies and officers of the federal government "to reduce greenhouse gas emissions." *Id.*

[230] Nathaniel Levy, *Juliana and the Political Generativity of Climate Litigation*, 43 HARV. L. REV. 479, 506 (2019); s*ee also* Young, *supra* note 227, at 283 (discussing use of the judiciary as "an alternate forum to achieve political ends")

[231] *See, e.g.*, Hively v. Ivy Tech. Cmty. Coll. of Ind., 853 F.3d 339, 357 (en banc) (7th Cir. 2017) (Posner, J., concurring). In *Hively*, the court expanded the scope of Title VII of the Civil Rights Act of 1964 to include two additional classes of potential plaintiffs. *Id.* at 351. Pragmatic Judge Richard A. Posner wrote a concurrence in which he appeared to suggest that what he and the other judges did in *Hively* was legislate (by sharing the legislative "burden" and "imposing" a new meaning on an old 1964 statute), and that the court should embrace what they did by "openly" acknowledging it. *Id.* at 357 (Posner, J., concurring) (emphasis added).

[232] SCALIA, *supra* note 4, at 22.

[233] Soppet v. Enhanced Recovery Co., 679 F.3d 637, 642 (7th Cir. 2012).

[234] Nat'l Broiler Mktg. Ass'n v. United States, 436 U.S. 816, 827 (1978) ("Petitioner suggests that agriculture has changed since 1922 when the Act was passed . . . . We may accept the proposition that agriculture has changed . . . [but] a

1. Statutory Law Should be Developed by the Political Branches

Even when it is apparent that a federal statute is in need of repair, textualists believe that it is the job of the political branches to make the repair, not federal judges.[235] This is because the systematic development of statutory law should be "accomplished democratically" through the constitutionally mandated procedures contained in Article I.[236] In addition, since statutes are laws enacted by Congress, any alterations should be made by "the same body."[237]

When federal judges unilaterally amend statutes, they effectively transform democratically enacted texts into "mere springboards for judicial lawmaking."[238] This diminishes statutes because (under a pragmatic approach) a statute is not "the" law, but rather a springboard for new law which a pragmatic federal judge feels might be better.[239] Not only does this diminish the legislative role of Congress, it also allows judges to become "secret legislators, declaring not what the law is but what they would like it to be."[240]

2. "Updating" a Federal Statute is a Form of Judicial Legislation and Federal Judges Should Not Engage in Judicial Legislation

When a federal judge takes on the role of substantively "updating" a federal statute, this is a form of judicial legislation. The term "judicial legislation" has a variety of definitions. One Ninth Circuit judge defines

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statute 'is not an empty vessel into which this Court is free to pour a vintage that we think better suits present-day tastes.' Considerations of this kind are for the Congress not the courts.") (quoting United States v. Sisson, 399 U.S. 267, 297 (1970).

[235] Livingston Rebuild Ctr., Inc. v. R.R. Ret. Bd., 970 F.2d 295, 298–99 (7th Cir. 1992) ("The Railroad Retirement Act is a creaky statute . . . . But reconciling the statute with current forms of corporate organization . . . is a job for the political branches."); *see also Soppet*, 679 F.3d at 642 ("Nor should a court try to keep a statute up to date. Legislation means today what it meant when enacted.").

[236] Gamble v. United States, 139 S. Ct. 1960, 1984 (2019) (Thomas, J., concurring).

[237] United States v. Johnson, 481 U.S. 681, 702 (1987) (Scalia, J., dissenting) ("There is no justification for this Court to read exemptions into the [Tort Claims] Act . . . . If the Act is to be altered that is a function for the same body that adopted it.").

[238] SCALIA, *supra* note 4, at 25.

[239] *Id.*

[240] *See, e.g.*, *Gorsuch Confirmation Hearing*, *supra* note 10, at 67. Then-Judge Gorsuch testified that "it is for this body, the people's representative to make new laws . . . and for neutral independent judges to apply the law . . . . If judges were just *secret legislators*, declaring not what the law is but what they would like it to be, the very idea of government by the people and for the people would be at risk." *Id.* at 66–67 (emphasis added).

it as "the phenomenon of judges displacing democratic policy choices in the name of their own policy preferences."[241] A law professor uses the term judicial legislation to describe what happens when a common law court, or federal agency "wrestles with a question of law or policy" and acts legislatively. [242] The problem with federal judges engaging in judicial legislation is that federal courts are not common law courts, and Article III judges are different from most Article II federal agency heads. This is because federal agency heads have been delegated legislative power by Congress[243] and can be *removed* by a *politically accountable* President. [244] This is not true of federal court judges.

3. Federal Judges Should Not Make Policy

A federal judge's decision to effectively amend a federal statute under the fiction of statutory interpretation, makes policy.[245] There are three problems with federal judges making policy. First, policy is "not the natural province of courts."[246] Courts are the only non-elected branch

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[241] O'Scannlain, *Politicians*, *supra* note 137, at 33 n.8.

[242] Kenneth Culp Davis, *An Approach to Problems of Evidence in the Administrative Process*, 55 HARV. L. REV. 364, 402 (1942) ("When an agency wrestles with a *question of law or policy, it is acting legislatively,* just as judges have created the common law through judicial legislation . . . .")(emphasis added).

[243] WILLIAM F. FUNK ET AL., ADMINISTRATIVE PROCEDURE AND PRACTICE 546 (5th ed. 2014) ("Delegation of legislative power . . . . The Constitution authorizes the delegation of rulemaking to agencies because Congress is given the power '[t]o make all Laws which shall be necessary and proper' to carry out its functions under Article I."); *see, e.g.*, Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1143 (10th Cir. 2016) (referring to "an *executive* agency, exercising delegated *legislative* authority") (emphasis in original).

[244] Kenneth W. Starr, *Judicial Review in the Post*-Chevron *Era*, 3 YALE J. ON REG. 283, 312 (1986) ("*Chevron* shifts power from the courts to the agencies . . . [T]he decision returns the *power to set policy to democratically accountable* [agency] officials . . . ." (emphasis added) [hereinafter Starr, *Judicial Review*] Federal agency officials are democratically accountable, at least in theory,

because the agencies themselves were created by Congress, and most agency heads can be removed by the President. *See infra* note 246 referring to executive and legislative oversight.

[245] Frank H. Easterbrook, Second Annual Henry Lecture: *Judicial Discretion in Statutory Interpretation*, 57 OKLA. L. REV. 1, 9 (2004) ("When *judges make policy — which is, after all, what discretion in statutory interpretation means* — you can't get rid of them. In a representative democracy, that is a powerful reason not to allow judges to make policy in the first place." (emphasis added)) [hereinafter Easterbrook, *Judicial Discretion*].

[246] Starr, *Judicial Review*, *supra* note 244, at 312 ("Policy, which is not the natural province of courts, belongs properly to the administrative agencies, and ultimately, to the *executive and legislature that oversee them*." (emphasis added)); *see also* Oregon v. Mitchell, 400 U.S. 112, 206–07 (1970) (Harlan, J., concurring and dissenting) (where a judgment "*depends ultimately on the values and*

of government, and the constitution has not authorized courts to exercise legislative power.[247] Second, unlike state court judges, members of Congress, or most Article II agency department heads, you can't "get rid of" federal judges if you don't like their policies.[248] This is a reason why judges should "not make policy in the first place."[249]

A third reason federal court judges should not make policy is because *judicial discretion is supposed to be more limited than political discretion*.[250] Specifically, while "[l]egal discretion is limited…Political discretion has a far wider range."[251] Any legal discretion that a federal judge enjoys is supposed to be constrained by law.[252] According to one court:

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perspective of the decision maker. . . . judgments of [this] sort . . . *are beyond the institutional competence and constitutional authority of the judiciary*. They are preeminently matters for *legislative* discretion, with judicial review, if it exists at all, narrowly limited." (emphasis added) (citations omitted)).

[247] Pushaw, *supra* note 227, at 131 ("[T]he Constitution . . . created a democracy based upon the separation-of-powers premise that *electorally responsible representatives make policy* through legislation . . . Article I authorizes Congress to exercise 'legislative power' . . . Significantly, *Article I excludes courts from the legislative process*.") (emphasis added); *see also* Frank H. Easterbrook, *Textualism and the Dead Hand*, 66 GEO. WASH. L. REV. 1119, 1120 (1998) ("the judicial branch serves best by enforcing enacted words rather than unenacted (more likely, imagined) intents, purposes, and wills. An interpreter who bypasses or downplays the text becomes a lawmaker without obeying the constitutional rules for making law.")(parenthesis in original).[hereinafter Easterbrook, *Dead Hand*].

[248] Easterbrook, *Judicial Discretion*, *supra* note 245, at 9–10 (explaining that the reason you can't get rid of federal judges is because they have tenure, and tenure has a "dark side" in that it can allow judges "to be more faithful to their *own* views."). Of course, a federal judge can be removed through the impeachment process contained in Article I of the Constitution; but it would be difficult to imagine that this rarely used procedure is available for policy disputes.

[249] *Id.* at 9.

[250] United States v. The William, 28 F. Cas, 614, 620 (D. Mass. 1808).

[251] *Id.*

[252] *Id.* The federal judge in the *Willliam* case explained that *legal* discretion is "defined by Lord Coke [as] 'Discretio est discerne, per legem, quid sit justum.'" *Id*. at 620. Lord Coke's sentence (in Latin) about legal discretion has been interpreted by the Supreme Court of Virginia to mean that legal discretion is not an unlimited arbitrary power; instead it is

> 'discretion *guided by law* [per legem]. It must be governed by rule: it must not be arbitrary, vague and fanciful, but legal and regular.' . . . It is *not an unlimited power* . . . . Harris v. Harris, 31 Va. (1 Gratt.) 13, 16 (1878) (emphasis in original).

The same Latin sentence has been interpreted by a law professor (now teaching at Oxford) in the following way:

> [although the term] judicial discretion' is entrenched in legal jargon, *it always should be remembered that any discretion a judge may exercise must be legal*. Indeed, judicial power as distinguished from the power of the laws, has no existence.[253]

This is in contrast to the view of some pragmatic judges who appear to believe (in addition to legal discretion) that federal judges also enjoy political discretion to "stamp the law with a personal vision."[254] This is not correct because, as explained in the next section, legal discretion is distinct from political discretion.

4. Federal Judges Should Not Update Statutes because Legislators and Judges Have Different Sources of Power, and Play Different Roles

Legal discretion is different from political discretion because *legislators and judges have different sources of power and play different constitutional roles*.[255] Legislative power is based on politics.[256] This is

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> "Coke himself was concerned . . . with the nature of the judicial discretion . . . he wrote 'Discretio est discernere per legem, quid sit justum, Discretion is to know through law that which is just that is, to *discerne by the right line of law, and not by the crooked cord of private opinion* . . .. If you depart from the law, you will go astray, all things will be uncertain to everybody…" M.R.L.L. Kelly, *Common Law Constitutionalism and the Oath of Governance "An Hieroglyphic of the Laws"*, 28 MISS. C. L. REV. 121, 127 (2009).

What this means is *that legal discretion is not unlimited*, it is supposed to be constrained by the "line of law" not the "crooked cord" of the judge's private opinion of what the law should be. *Id.* If legal discretion is not constrained "things will be uncertain to everybody…"*Id.*

[253] In re Marriage of McMahon, 403 N.E.2d 730, 738 (Ill. App. Ct. 1980) (Craven, J., dissenting) (quoting Lord Coke's Discretio est discerne per legem quid sit justum); *see also* David Skeels, *Due Process and the Massachusetts Constitution*, 84 MASS. L. REV. 76, 90 (1999) ("The authors of the Massachusetts Constitution took seriously Coke's warning that, even in misdemeanor cases, *legislatures should not substitute . . . 'Tryals by Discretion' for the precious 'Tryal Per Legem Terrae*'" (meaning trial by a judge's discretion, instead of trial according to the law of the land) (emphasis added)). Finally, the importance of Lord Coke to the development of law in the United States is demonstrated by the fact that he appears in a panel on the bronze door at the entrance to the U.S. Supreme Court. *See* Justice Sandra Day O'Connor, Magna Carta and the Rule of Law, *in* MAGNA CARTA: MUSE & MENTOR 1–2 (Randy Holland ed. 2014).

[254] RICHARD A. POSNER, OVERCOMING LAW 197 (1995) ; *see also* RICHARD A. POSNER, HOW JUDGES THINK 9 (2008) ("[J]udges have . . . recourse to other sources of judgment, *including their own political opinions or policy judgements* . . . ." (emphasis added)).

[255] U.S. CONST. art. I, §§ 1, 8–10; *id.* art. III, §§ 1–2.

not only because legislators are elected and removed based on their political positions, it is also because the Article I procedure for making law is a political process involving the two elected branches of government.[257] Significantly, courts and judges do not have a role in the political process for making law mandated by Article I.[258] While legislators can rely on their own convictions and social policy goals to "reshape the law as they think it should be in the future,"[259] federal judges *with only legal discretion* "should do none of these things in a democratic society."[260]

F. Textualism is Preferable to Pragmatism Because Textualism is Based on Law that Provides "Fair Notice" to Anyone Affected by it

The focus of pragmatic decision-making is on the future effects of a decision, "'rather than on the language of a statute or of a case, or more generally on a *pre-existing* rule.'"[261] The word "pre-existing" is italicized to emphasize that textualists decide cases based on statutory law that already exists, so as to provide fair notice to anyone affected by their decision. Fair notice of the law is another reason why textualism is preferable to pragmatism.[262]

1. Fair Notice and the Due Process Clause

During his confirmation hearing, Judge Gorsuch was asked by a Senator what a judge should be "bounded by."[263] Judge Gorsuch stated that you begin with the *text* because of due process and *fair notice considerations.*[264] He went on to explain that before he deprived

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[256] *Id.* at art. I, §§ 2–3.

[257] *Id.* at art. I, §§ 2–3, 7.

[258] Pushaw, *supra* note note 227, at 131 ("Article I excludes courts from the legislative process."); *see also* JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §§ 377–78 (1833) ("A more alarming doctrine could not be promulgated by any American court than it was at liberty . . . to decide for itself . . . It would have been justly deemed an approach to tyranny and arbitrary power, to the exercise of mere discretion, and to the abandonment of all the checks upon judicial authority.").

[259] Gorsuch, *Lions*, *supra* note 150, at 906.

[260] *Id.* Instead, judges should apply existing law as it is, "not decide cases based on their own moral convictions or policy consequences they believe might serve society best." *Id.*

[261] WILKINSON, *supra* note 158 , at 82 (citation omitted) (emphasis added).

[262] Note, *Textualism as Fair Notice*, 123 HARV. L. REV. 542, 542 (2009) ("Textualism's emphasis on the primacy of the statutory text . . . suggest[s] . . . that laws are legitimately enforced when their subjects have fair notice of them.").

[263] *Gorsuch Confirmation Hearing*, *supra* note 10, at 130.

[264] *Id.* at 131.

someone of their liberty or property, he wanted to be sure that the person was "on notice" that the law prohibited what they were doing.[265]

If a judge's new interpretation of a federal statute is applied retroactively to a defendant's past conduct, then this has the potential to violate the fair notice provision of the Due Process Clause. For example, when he was on the Tenth Circuit, Judge Gorsuch decided a case involving the issue of "fair notice" when a new statutory interpretation was applied retroactively to a man who entered the United States illegally.[266] After the man (Mr. Gutierrez-Brizuela) arrived from Mexico, he decided to seek adjustment of his immigration status based on an interpretation of the Immigration and Nationality Act in a Tenth Circuit case titled *Padilla-Caldera* v. *Gonzales*.[267] *Padilla* held that the Attorney General had the discretion to afford relief to individuals, like Mr. Gutierrez-Brizuela, "without insisting on a decade long waiting period."[268] However, a new ruling in a case decided by the Board of Immigration Appeals ("BIA") provided a new interpretation.[269] In fact, the new BIA ruling reached a "conclusion directly at odds with the one" the Tenth Circuit had reached in *Padilla*,[270] which did not insist on a decade long waiting period.

Writing for a majority of the Tenth Circuit, textualist Judge Gorsuch held that "the retroactive application of new penalties to past conduct that affected persons cannot now change denies them fair notice of the law. . . ."[271] He went on to point out that before the decision in the new BIA case, the law in place in 2009 gave individuals, like Mr. Guitierrez-Brizuela, two options: accept a ten-year waiting period outside the country or seek an adjustment of status.[272] Mr. Guitierrez-Brizuela chose to seek an adjustment.[273] In response to these facts, and out of a textualist concern for the significant "fair notice" problem arising from an interpretation of a law which was not pre-existing (and was about to be applied to Mr. Guitierrez-Brizuela retroactively), Judge Gorsuch ruled, "[t]he due process concerns are obvious: when Mr. Gutierrez-Brizuela made his choice, he had no notice of the law the BIA (Board of Immigration Appeals) now seeks to apply."[274] Justice Gorsuch's concern about "notice" can also be seen in his statement that judges should not be

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[265] *Id.*

[266] Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1146 (10th Cir. 2016).

[267] *Id.* at 1144 (citing Padilla-Cadera v. Gonzales, 426 F.3d 1294 (10th Cir.), *amended and superseded on reh'g*, 453 F.3d 1237 (10th Cir. 2005)).

[268] *Id.* (citing *Gonzalez*, 426 F.3d at 1299–301).

[269] In re Briones, 24 I. & N. Dec. 355, 371 (BIA 2007).

[270] *Gutierrez-Brizuela*, 834 F.3d at 1144.

[271] *Id.* at 1146.

[272] *Id.*

[273] *Id.*

[274] *Id.*

free to insert something into a statute that they simply "made up,"[275] and doing so raises issues of fair notice under the Due Process Clause.[276]

G. Textualists Generally Favor Precedent

Another reason why textualism is preferable to pragmatism is because textualists *generally* favor precedent;[277] some pragmatists do not.[278] Precedent is created by an earlier court decision that provides the basis for deciding later cases with similar issues.[279]

Like the text itself, precedent ordinarily operates as an external constraint on the power of a federal judge.[280] Textualists believe that precedent is important because it limits the will of a federal judge to decide cases, not on the basis of what the judge thinks the law should be,

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[275] *Gorsuch Confirmation Hearing*, *supra* note 10, at 340.

[276] *Id*. A few weeks after his confirmation hearing, Justice Gorsuch's due process concern that a defendant be given "notice" of the law was the basis for his decision to side with Justice Breyer (and a criminal defendant) in *Class v. United States*. 138 S. Ct. 798, 802 (2018).). *See also* Wooden v. United States, 142 S. Ct. 1063, 1083 (2022) (Gorsuch, J. concurring in part). (In deciding in favor of a criminal defendant, Justice Gorsuch emphasized the principle of fair notice, which he explained "is about protecting an indispensable part of the rule of law…[that an individual] can suffer penalties *only* for *violating standing rules announced in advance*.") (emphasis added).

[277] The word "generally" was emphasized because some textualist justices are willing to depart from precedent under certain circumstances. *See, e.g.*, Gamble v. United States, 139 S. Ct. 1960, 1984 (2019) (Thomas, J., concurring) (judges do not have to "adhere to an incorrect decision as precedent."). Justice Thomas explained that: "judicial decisions may incorrectly interpret the law . . . . A demonstrably incorrect judicial decision . . . is tantamount to *making* law, and adhering to it . . . perpetuates a usurpation of legislative power." *Id.* (emphasis in the original); *see also* Steven G. Calabresi & Todd W. Shaw, *The Jurisprudence of Justice Samuel Alito*, 87 GEO. WASH. L. REV. 507, 512 (2019) (while Justice Alito's jurisprudence is characterized by "a presumption in favor of precedent," he will "depart from precedent" under certain circumstances).

[278] Posner, *Pragmatism Versus*, *supra* note 158, at 739 ("The point is *not* that the judge has some kind of moral or even political duty to abide by precedent; that would be formalism." (emphasis added)).

[279] *Precedent*, BLACK'S LAW DICTIONARY (11th ed. 2019). A justification for following precedent is "notice." GARNER, *supra* note 48, at 11 ("a respect for precedent is said to advance notice and reliance interests . . . it's no small thing to ensure that citizens can determine in advance what the law will require of them and have a chance to conform their conduct to it.").

[280] June Med. Services L.L.C. v. Russo, 140 S. Ct. 2103, 2134 (2020) (Roberts, C.J., concurring) ("It has long been 'an established rule to abide by former precedents, where the same points come again in litigation; as well to keep the scale of justice even and steady, and not liable to waver with every new judge's opinion.'") (citing 1 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 69 (1765)).

but on the basis of what the law is. [281] For example, Justice Gorsuch stated that, a judge's job is to apply the law, not make it.[282] He explained that the way to do this is to "start with precedent…we apply the precedent we like, and the precedent we don't like because *our personal views have nothing to do with our job*."[283]

In addition to its role in constraining the power of federal judges, precedent is also important in preventing arbitrary decision-making based simply on the "caprice or will" of a particular judge.[284] Alexander Hamilton wrote about the need to avoid arbitrary decisions and suggested that federal judges should be bound by "precedents which serve to define and point out their duty. . . ."[285]

H. Textualist Decision-making is Based on What the Law Compels, Even if the Judge May Not Personally "Like" the Result

In defining textualism, this article has discussed the fact that sometimes textualist judges do not like the outcome of the decisions they make.[286] This is important because it tells us something about the foundation of textualism. It tells us that the basis of a textualist judge's decision is something external to what the judge personally "likes", and therefore thinks should be the "right" decision. That external basis is "the law."[287] For example, in a case involving the conviction of a man who publicly burned an American flag as a form of protest, textualist Justice Scalia and Justice Kennedy joined Justices Brennan, Marshall, and Blackmun to rule in favor of the flag burner and hold that the conviction violated the First Amendment.[288] Justice Kennedy wrote the following concurrence:

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[281] William D. Bader & David R. Cleveland, *Precedent and Justice*, 49 DUQ. L. REV. 35, 40 (2011) (characterizing precedent "as a constraint on judges to justly decide like cases alike rather than ruling according to their individual prejudices.").

[282] *Gorsuch Confirmation Hearing*, *supra* note 10, at 340 ("the job of a judge is not to make law but to interpret the law and to apply the law.").

[283] *Id*.

[284] Anastoff v. United States, 223 F.3d 898, 903–904 (8th Cir. 2000), *vacated* 235 F.3d 1054 (8th Cir. 2000) (precedents "'bind . . . cases of the same nature . . .. It is on this account, that our law is justly deemed certain, . . . and not dependent upon the caprice or will of judges.'") (quoting JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §§ 377–78 (1833)).

[285] THE FEDERALIST NO. 78, at 470 (ALEXANDER HAMILTON) (Clinton Rossiter ed., 2003) (Hamilton added that "the records of those precedents…must demand long and laborious study to acquire competent knowledge of them.").

[286] *See supra* notes 43-45, and text accompanying notes 43–45.

[287] SCALIA, *supra* note 4, at 22 ("The text [of a statute] is *the law*, and it is the text that must be observed.").

[288] Texas v. Johnson, 491 U.S. 397, 399 (1989). With respect to the "textualism" of Justices Kennedy and Scalia, "Justice Kennedy is considered a

> The hard fact is that *sometimes we make decisions we do not like*. We make them because they are *right*, right in the sense that *the law* and the constitution …*compel the result.* And so great is our commitment to the process that, except in the rare case, we do not pause to express distaste for the result, …This is one of those rare cases.[289]

What this means is that textualist judges recognize that "the law" is distinct from a judge's personal views, and that it is the job of judges to apply the law they don't like, as well as the law they like.[290]

I. Constraint is the General Reason Why Textualism Should be Favored Over Pragmatism and Other Methods of Statutory Interpretation

Textualism, like originalism, operates as a constraint on the power of a federal judges to decide a case on the basis of what the law is. The quotations from Justice Gorsuch cited throughout this article provide examples of his textualist approach to statutory interpretation. However, in addition to being a textualist, Justice Gorsuch is also an "originalist."[291] While textualism is usually discussed as a method of statutory interpretation, and originalism is discussed as a method of constitutional interpretation,[292] the two approaches share an important goal. They are both designed to provide objective and external criteria (e.g., the objective public meaning of words)[293] to constrain the power of federal judges.

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textualist, if not so strong a textualist as Justices Scalia or Thomas." Jonathan Z. Cannon, *Words and Words*: *The Supreme Court in Rapanos and Carabell*, 25 VA. ENV'T. L.J. 277, 306 (2007).

[289] *Johnson*, 491 U.S. at 420–21 (Kennedy, J., concurring) (emphasis added); *see also* Amul R. Thapar & Benjamin Beaton, *The Pragmatism of Interpretation*: *A Review of Richard A. Posner, the Federal Judiciary*, 116 MICH. L. REV. 819, 832 (2018) ("Judges of very different . . . philosophical views often reach similar results. Why? Because they accept that they are bound by the law.").

[290] *See supra* text accompanying notes 43–45.

[291] *Gorsuch Confirmation Hearing*, *supra* note 9, note 10, at 408. Former Chief Judge Tacha (who served with Judge Gorsuch on the Tenth Circuit), testified that "[h]is jurisprudence is informed by . . . originalism . . . ." *Id.*

[292] O'Scannlain, *All Textualists*, *supra* note 1, at 309.

[293] *See, e.g.*, RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION 92 (2004) (suggesting that today's originalism springs from the "*objective meaning that a reasonable listener would place on the words* used in the constitutional provision at the time of its enactment." (emphasis added)). *See also*, Amanda L. Tyler et. al, *A Dialogue with Federal Judges on the Role of History in Interpretation*, 80 GEO. WASH. L. REV. 1889, 1890 (2012) (textualist Judge Frank Easterbrook stated that: "I care about the *original public meaning of legal texts*. What binds is the text that was approved, … and not anybody's hopes or plans or intent." (emphasis added).

The need for constraint on judges who might be tempted to decide cases based, not on what the law is, but rather on what they think law should be, is one reason why even some politically liberal scholars supported Judge Gorsuch's nomination.[294] For example, when Georgetown Law School Professor Lawrence Solum appeared before the Senate Judiciary Committee to support Judge Gorsuch's nomination, he declared that the original public meaning of words "should constrain what judges do. . . ."[295] This is the foundation not only of originalism, but also of textualism, which has the goal of reducing or constraining judicial discretion.[296]

1. Political Liberals Can Be Conservative Jurists and Scholars

Professor Solum also testified that he was not a Republican and that he voted for Senator Feinstein, but he was convinced that giving judges the power to *impose their own view of law* is "dangerous for everyone."[297] Specifically, Professor Solum stated:

> If you are a Democrat, and you know that the next justice to the United States Supreme Court will be appointed by a Republican

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[294] *See, e.g.*, *Gorsuch Confirmation Hearing*, *supra* note 10, at 447.

[295] *Id,*; *see also* Lawrence B. Solum, *Originalist Methodology*, 84 U. CHI. L. REV. 269, 269 (2017) (describing the constraint principle of originalism as follows, "[C]onstitutional practice should be constrained by that communicative content of the text, which we can call the 'original public meaning' – the Constraint Principle.").

[296] Manning, *Judicial Restraint*, *supra* note 98, at 754 ("the primary concern [in constitutional interpretation] is to *constrain* the subjectivity of today's judges.")(emphasis added); *see also* Easterbrook, *Dead Hand*, *supra* note 247, at 1122 (Textualist Judge Frank Easterbrook declared that "*I took an oath to support and enforce . . . the laws*" [He goes on to ask whether anyone would surrender power to someone who cannot be] "removed from office, nor disciplined, *unless that power were constrained*? The *constraint* is the promise to abide by the rules (laws) in place . . . .")(emphasis added).

[297] *Gorsuch Confirmation Hearing*, *supra* note 10, at 447–48. Specifically, Professor Solum testified that:

> Originalism can and should be endorsed by both Democrats and Republicans, by progressives and conservatives. This point is important to me, personally. I am not a conservative; I am not a libertarian; I am not a Republican. But I do believe in originalism. Why is that? It is because I am convinced that giving power to judges to override the Constitution to impose their own vision of constitutional law is dangerous for everyone . . .. I support Judge Gorsuch's nomination because he is an originalist.
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> *Id.* at 448.

> president . . . would you prefer that an originalist like Judge Gorsuch be appointed, or would you prefer a conservative justice who is a living constitutionalist, who believes that *their values* are an appropriate ground for modifying or overriding the constitutional text?[298]

From his testimony, it appears that while Professor Solum may be a political liberal, he is also a conservative jurist.

Professor Solum is not the only great scholar or jurist who is a political liberal and a conservative jurist. Liberal Justice Hugo Black[299] and former Stanford Professor John Hart Ely were too. Professor Ely wrote that one "*can* be a genuine political liberal and at the same time believe, out of respect for the democratic process, that the *Court should keep its hands off the legislature's value judgments*."[300]

2. Approaches to Statutory Interpretation are Not Exclusive

It should be noted that the four approaches to statutory interpretation discussed in this article are not exclusive. Instead, they can blur into each other when put into actual practice.[301] For example, one federal judge commented that while the Supreme Court is predominantly textualist, "the Justices themselves happily sign pragmatic opinions written by Justice Breyer."[302] In addition, although Justice Breyer has referred to his approach to decision-making as "pragmatic,"[303] he relied on a purposivist approach in the *Massachusetts v. E.P.A.* case.[304]

Justice Kagan's majority opinion in Wooden v. United States[305] provides another example of the fact that a justice's interpretative approach to statutory interpretation is not exclusive, and can include a

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[298] *Id.* (emphasis added).

[299] Akhil Reed Amar, *Rethinking Originalism*, SLATE (Sept. 21, 2005), https://slate.com/news-and-politics/2005/09/original-intent-for-liberals.html [https://perma.cc/DC57-XJHT] ("perhaps the court's most influential *originalist* in history was the great Hugo Black – a *liberal lion*")(emphasis added).

[300] JOHN HART ELY, DEMOCRACY AND DISTRUST 72 (1980) (emphasis on the word "can" in the original, other emphasis added).

[301] CROSS, *supra* note, 47 at 176 ("the justices' use of different interpretive methods may overlap in individual cases.").

[302] Easterbrook, *Absence of Method, supra* note 128, at 105.

[303] BREYER, *supra* note 95, at 82.

[304] Jody Freeman & Adrian Vermeule, *Massachusetts v. EPA: From Politics to Expertise*, 2007 SUP. CT. REV. 51, 86 (2007) (In discussing the judicial lineup of the Court in the case, two law professors referred to "Justices Stevens and Breyer, [as] the Court's most *committed purposivists*, …").

[305] 142 S. Ct. 1063 (2022).

variety of approaches. The case involved interpretation of the word "occasion" in a section of the Armed Career Criminal Act (ACCA). [306]

The facts underlying the case began in 1997 when William Wooden broke into a storage facility, stole items from ten storage units, and pled guilty to ten counts of burglary.[307] In 2014, he was convicted for "being a felon in possession of a firearm" after a policeman saw guns in his house.[308] The punishment for this crime "varies significantly" if ACCA applies, since the statute subjects a defendant to an enhanced penalty if the defendant had three or more felony convictions "'committed on occasions different from one another'[citing] 18 U.S.C. §924e(1)."[309] The Supreme Court granted certiorari to resolve the question of whether the defendant "committed his crimes on a single occasion, or on ten separate ones."[310] Writing for the majority, Justice Kagan concluded that Wooden's burglary convictions arose from a "single criminal episode" and therefore, would only count once under the ACCA.[311]

Justice Kagan began her opinion with a discussion of how "an ordinary person" would describe Wooden's ten burglaries.[312] She concluded that the person would group his entries "as happening on a single occasion" rather than ten occasions.[313] Justice Kagan also consulted two dictionary definitions of the word occasion.[314] She concluded that the definition of "occasion" can include e.g., an "episode—which is simply to say, such an occasion—may itself encompass multiple, temporarily distinct activities."[315] In addition to relying on textualist tools like dictionaries, and the meaning of words to an ordinary person, Justice Kagan also relied on the legislative history of the occasions clause, as well as ACCA's statutory purpose.[316] All of the above reasons, taken from different methods of statutory interpretation, led Justice Kagan to hold that the defendant's ten

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[306] *Id.* at 1067 (a section of the ACCA applies to convictions " 'committed on occasions different from one another.' [citing] 18 U.S.C. 924 (e)(1).")

[307] *Id.* at 1067.

[308] *Id.* at 1067-1068.

[309] *Id.* at 1068.

[310] *Id.* at 1069.

[311] *Id.* at 1067.

[312] *Id. at* 1069. *See supra* notes 24-28 (discussing the ordinary meaning rule as a tool of textualist statutory interpretation).

[313] *Id.*

[314] *Id. See supra* notes 29-31 (discussing the dictionary definition of words as an aid to textualist statutory interpretation).

[315] *Id. See supra* notes 29-30 (discussing the dictionary definition of words as an aid to textualist statutory interpretation).

[316] *Id.* at 1072. ("Statutory history and purpose confirm our view of the occasion's clause's meaning").

convictions for burglary "were for offenses committed on a single occasion. They therefore only count once under ACCA."[317]

J. The Intellectual Roots of Pragmatism Lie in a Philosophy of Relativism

Another reason why textualism is preferable to pragmatism is because the foundation of legal pragmatism lies in the philosophy of relativism,[318] and relativism is egocentric and uncertain. Specifically, scholars describe relativism (in the context of judicial decision-making) as an approach that is egocentric, which varies "systematically with the speaker."[319] The consequences of this relativist egocentric approach for statutory interpretation purposes are significant. *It means that the outcome of judicial decisions can simply be the egocentric expressions of who the decision-maker is, not what the law is*.[320] For example, if one person states that "killing cats for sport is wrong," a relativist might state that "killing cats for sport is not compatible with the mores of *my* social *group*." The latter expression is a statement of "egocentric expression."[321]

Similarly, legal pragmatism has been described in a relativistic way as based on "*our* norms."[322] Specifically, one law professor wrote: "So how, under a pragmatist theory, do we adjudicate between conflicting norms of justification? The only possible response is that our assertions and actions are justified relative to our norms. Those on the other side can say the same thing."[323] Judge Richard Posner underlined pragmatism's relativism when he wrote that a pragmatist is skeptical about final truth or certitudes because these are simply the result of "beliefs current in whatever community we happen to belong to, beliefs that may be the uncritical reflection of our upbringing…or social milieu."[324]

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[317] *Id.* at 1074.

[318] Richard Warner, *Why Pragmatism? The Puzzling Place of Pragmatism in Critical Theory*, 1993 U. ILL. L. REV. 535, 554 (1993) (discussing pragmatism's relativism); *see also* John Mikhail, *Law, Science, and Morality: A Review of Richard Posner's the Problematics of Moral and Legal Theory*, 54 STAN. L. REV. 1057, 1061–62 (2002) (Judge "Posner rejects the existence of any such universals and affirms a version of moral relativism . . . .").

[319] Peter F. Lake, *Posner's Pragmatist Jurisprudence,* 73 NEB. L. REV. 545, 613 (1994) (citation omitted).

[320] *Id.* (emphasis added).

[321] *Id.*

[322] Warner, *supra* note 318, at 554 (emphasis added).

[323] *Id.*

[324] POSNER, OVERCOMING LAW, *supra* note 254, at 5 (1995).

As well as being egocentric, relativism is also subjective and uncertain. As the examples above show, decisions based on a philosophy of relativism vary depending on who the decisionmaker is, what "community" or social group they belong to, or what their "norms" are. Obviously, not all judges come from the same social group or embrace the same norms. These are all subjective factors. Textualism, with its emphasis on the objective ordinary meaning of the words contained in a statute's text, is preferable to pragmatism because a pragmatist's relativistic decision can be subjective and uncertain. These are consequences which undermine the rule of law.

K. The Intellectual Roots of Pragmatism Also Lie in a Philosophy of Realism. "Realists" Begin with the "Right" Outcome First, Whereas Textualists are Rule Orientated

1. Textualism is a Rule Oriented Species of Formalism

Textualism and formalism overlap.[325] As Justice Scalia declared, "[o]f all the criticisms leveled against textualism, the most mindless is that it is 'formalistic.' The answer to that is, *course it's formalistic*! The rule of law is *about* form."[326] The basis of formalistic decision-making is "decision-making according to rule."[327] Professor Thomas C. Grey has divided formalists into concept formalists and rule formalists.[328] According to Judge Richard Posner, "modern American formalists—comprising what one might call the School of Scalia—are mainly rule-formalists."[329]

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[325] Nicholas S. Zeppos, *Legislative History and the Interpretation of Statutes: Toward a Fact Finding Model of Statutory Interpretation*, 76 U. VA. L. REV. 1295, 1349 n.252 (1990)("Notice the considerable overlap between formalism and textualism.").

[326] SCALIA, *supra* note 4, at 25 (emphasis in the original).

[327] Frederick Schauer, *Formalism*, 97 YALE L.J. 509, 510 (1988).

[328] Thomas C. Grey, *Judicial Review and Legal Pragmatism*, 38 WAKE FOREST L. REV. 473, 478 (2003) [hereinafter "Grey, *Judicial Review*"] ("Legal formalists emphasize the specifically legal virtues of the clarity, determinacy, and coherence of law…they can be divided into rule-formalists and concept-formalists. The former place more value on determinacy emphasizing the importance of clear rules and strict interpretation. . . .").

[329] RICHARD A. POSNER, HOW JUDGES THINK 8 n.16 (2008) (citing but not quoting Grey, *Judicial Review*, *supra* note 328, at 479).

2. Textualists Believe that Judicial Decisions Should Be Based on General Rules of Law, Rather Than a Judge's Personal (and therefore Subjective) Discretion

In an article titled, *The Rule of Law as a Law of Rules*,[330] Justice Scalia argued in favor of decision-making based on general rules of law, rather than a "personal discretion to do justice."[331] General rules of law should be preferred because they are the product of the branch of government responsible to the people and because they promote equal treatment and predictability.[332] Predictability is important because people subject to law should know "what it prescribes."[333] This is in contrast to decision-making based on a judge's personal discretion.[334] This type of personal decision-making, rather than promoting predictability, creates uncertainty, and uncertainty is not compatible with the rule of law.[335]

3. Textualism is Based on Authoritative Sources

As well as decision-making according to rules, another foundation of formalism and textualism is the belief that law is based on "authoritative sources like legislative and judicial decisions."[336] This source-based view of law is important because these sources constrain the power of judges,[337]and therefore limit the potential for arbitrary decisions.

4. Pragmatists Believe the Law is an Instrumental Means to an End and Embrace and Philosophy of Realism

The role of statutory law for textualists is different from the role statutory law can play for pragmatists. For textualists, the words in the

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[330] Scalia, *Rule of Law*, *supra* note 182, at 1175.

[331] *Id.* at 1176.

[332] *Id.* at 1176, 1178 ("The Equal Protection Clause epitomizes justice . . . the trouble with the discretion-conferring approach . . . [like pragmatism] is that it does not satisfy this sense of justice very well.").

[333] *Id.* at 1179.

[334] *Id.* at 1178. Justice Scalia characterizes this type of discretion as a "common-law, discretion-conferring approach." *Id.*

[335] *Id.* at 1179; *see also* Thapar & Beaton, *supra* note 289, at 832 (discussing the "*fracturing effects* of pragmatism" compared to "[f]ocusing on the law as written [which] narrows disagreement in the appellate courts . . . ." (emphasis added)). The authors add that this results in judges with different philosophical views reaching similar results because "they accept that they are bound by the law." *Id.*

[336] David Lyons, *Legal Formalism and Instrumentalism-a Pathological Study*, 66 CORNELL L. REV. 949, 952 (1981).

[337] *Id.* at 953.

text of a federal statute contain rules of law to be followed, even if the judge may not personally like the result.[338] For legal pragmatists, law is an instrumental means to obtain "socially desired ends."[339]

This brings us to the fact that, as well as relativism, another philosophical component of legal pragmatism is realism.[340] Realism is based on the theory that (in reality), "it is not law that rules."[341] Realists believe that objective legal decisions are illusory since they are really the result of a judge's own "subjectively desired ends."[342] One law professor cautions that if judges base legal decisions on "their personal views" then the ideal of the rule of law would become a fraud.[343]

5. Realist Judges Often Begin with the "Right" Outcome First

When a textualist judge decides a case involving interpretation of a federal statute, the judge's discretion is supposed to be constrained by the objective meaning of the words in the text of the statute which has been enacted into a law.[344] This is in contrast to some pragmatic judges who begin with their subjective opinion of what the "right" outcome should be.[345] The judge then instructs his or her law clerk to reason backward to find cases or statutes for support.[346] This appears to be decision-making in reverse.

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[338] *See supra* notes 286-290.

[339] THOMAS C. GREY, FORMALISM AND PRAGMATISM IN AMERICAN LAW 121–22 (2014); *see also* Posner, *Offer Law*, *supra* note 77, at 1670 ("All that pragmatic jurisprudence really connotes . . . is a rejection of law as grounded in permanent principles . . . and a determination to use law as an instrument for social ends."); *see also* BRIAN Z. TAMANAHA, LAW AS A MEANS TO AN END 6 (2006) (describing the range of "ends" that instrumentalists might want to achieve).

[340] Thomas C. Grey, *Hear the Other Side: Wallace Stevens and Pragmatist Legal Theory*, 63 S. CAL. L. REV. 1569, 1571 (1990) (pragmatism has a focus on "philosophical realism . . .."); *see also* POPKIN, *supra* note 9, at 153 (characterizing pragmatism as imparting "a sense of realism to the interpretive process . . . .").

[341] Pierre Schlag, *Formalism and Realism in Ruins (Mapping the Logics of Collapse)*, 95 IOWA L. REV. 195, 211 (2009).

[342] TAMANAHA, *supra* note 339, at 236.

[343] *Id.*

[344] *Id.*

[345] Patricia Manson, *Richard Posner Announces Retirement*, CHICAGO DAILY L. BULL. (Sept. 6, 2017), https://www.chicagolawbulletin.com/archives/2017/09/01/retirement-9-1-17 []

[346] In-person interview in Washington D.C. on April 7, 2019 with an attorney who worked as a law clerk for a federal judge. The attorney wishes to remain anonymous. *See also* Posner, *Self-Restraint*, *supra* note 78, at 539. "Judges who don't insist that a legalistic algorithm will decide every case are what I call "pragmatists," . . . in the sense of an approach to decision making that emphasizes consequences over doctrine. Stated otherwise, *pragmatists fit doctrine around consequences.*" *Id.* (emphasis added). Put another way, pragmatists fit case law and

Determining the "right" outcome first, and then reasoning backward from it, is part of a philosophy of realism and an instrumental view of law which grew out of it.[347] While pragmatists are inclined to follow an instrumental view of law to arrive at a preferred result, a non-instrumental (e.g., textualist) judge "is committed to following the applicable legal rules no matter what the outcome."[348]

Perhaps the most famous practitioner of a realist approach to judicial decision-making was Justice William O. Douglas.[349] Professor Melvin Urofsky concluded that "Douglas went right from question to result with only the barest justification . . . ."[350] Professor G. Edward White believes that Douglas rejected constraints on subjective judicial lawmaking (such as "fidelity to constitutional text")[351] because of his belief that law was not a body of immutable principles, but rather "nothing more than politics,"[352] and that he was no different than a legislator.[353] As a result, Justice Douglas "was constrained only by the rightness or wrongness of his political philosophy."[354]

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statutory law around a desired result. *Id.*; *see also* RICHARD A. POSNER, HOW JUDGES THINK 84 (2008).

> It might seem that judges would legislate only after they had tried and failed to decide a case by reference to orthodox materials like legislative text and precedent . . .. But others [no doubt referring to pragmatic judges] *reverse the sequence.* They start by making the *legislative* judgment, that is, by asking themselves *what outcome* – not just who wins and who loses, but *what rule or standard or principle enunciated in their judicial opinion – would have the best consequences.* Only then do they consider whether that outcome is blocked by orthodox materials . . . [and the] costs that it would impose on impairing legalistic values such as legal stability. *Id*. (emphasis added).

See also supra, notes 81–87, which contains a similar description of Judge Posner's pragmatic way of deciding cases.

[347] Woolhandler, *supra* note 160, at 115 ("the instrumental view of law that grew out of the realist era, [embraces the view] that a good legal rule is one that causes a desirable social end."); *see also* TAMANAHA, *supra* note 339, at 6–7 ("An instrumental understanding of law means that law . . . is *consciously* viewed by people and groups as a *tool* or *means* with which to achieve *ends*. . . . [L]awyers with a non-instrumental view, in contrast, will accord greater respect for the binding quality of legal rules." (emphasis in original)).

[348] TAMANAHA, *supra* note 339, at 7.

[349] Melvin Urofsky, *William O. Douglas As A Common Law Judge*, 41 DUKE L.J. 133, 138 (1991).

[350] *Id.* at 134–35.

[351] G. Edward White, *The Anti-Judge: William O. Douglas and the Ambiguities of Individuality*, 74 VA. L. REV. 17, 18 (1988).

[352] *Id.* at 46.

[353] *Id.* at 48.

[354] *Id*.

CONCLUSION

Although he was critical of Justice Douglas, legal pragmatist Richard A. Posner echoed some of the Justice's realist philosophy when he issued the following statement on the day he announced his retirement from the Seventh Circuit:[355] "I am proud to have promoted a pragmatic approach to judging … and to have had the opportunity to apply my view that judicial opinions should be easy to understand and that judges should *focus on the right and wrong* in every case."[356]

This statement raises the question of right or wrong according to who, or according to what? Is it right or wrong according to the objective ordinary meaning of words contained in the text of a statute enacted by Congress, or is it right or wrong according to subjective criteria such as what an individual federal judge thinks the "right" outcome should to be?

Ultimately, resolution of this question becomes part of three larger questions. The first question is what role should a judge's own personal or political opinions take in deciding an issue of statutory interpretation? Textualists believe they should play no role, and that a judge should decide cases on the basis of what the law is, even though the judge may not personally like the result.

A second question is whether federal judges should undertake the task of "updating" (in reality amending) federal statutes. Pragmatists believe that the answer is yes. Textualists believe that the answer is no. This is because textualists believe that the task of making a statute "better" should be left to the political branches who created the statute, not federal court judges.[357]

Closely related is a third question. This is the question of who should decide public policy issues. Should unelected federal judges, deliberately isolated from politics by life tenure appointments and with no political mandate, be able to decide which side of a controversial political issue is right or wrong? Textualists take the position that it is

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[355] POSNER, OVERCOMING LAW, *supra* note 254, at 393. I am not suggesting that Judge Posner agreed with every aspect of Justice Douglas's decision-making. In fact, Judge Posner appeared to criticize Justice Douglas when he wrote that "[t]here were first rate legal scholars among the realists . . . but there [was] also . . . the judicial performance of William Douglas . . . ." *Id*. However, Judge Posner did place Justice Douglas on a list of justices he categorized as "pragmatists." Richard A. Posner, *Pragmatic Adjudication*, 18 CARDOZO L. REV. 1, 2 (1996).

[356] Patricia Manson, *Richard Posner Announces Retirement*, CHICAGO DAILY L. BULL., (Sept. 6, 2017), https://www.chicagolawbulletin.com/archives/2017/09/01/retirement-9-1-17 [https://perma.cc/PQ7W-M9KU] (emphasis added).

[357] *See supra* notes 231-240.

Congress, the branch of government accountable to the people, who should decide public policy issues.

No matter how well-meaning a federal judge is, and no matter how much one may "like" the result of a particular case, any tilt towards result driven decision-making (without the constraint of the objective meaning of the words contained in the text of a statute enacted by Congress) threatens to replace our nation of laws with a nation of judges. After all, as Justice Gorsuch stated, "This is a democracy at the end of the day. It is not an oligarchy of judges."[358]

[358] *Gorsuch Confirmation Hearing*, *supra* note 10, at 340.