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IS TEXTUALISM REQUIRED BY CONSTITUTIONAL SEPARATION OF POWERS?

*Ofer Raban**

This article examines the often-heard claim that textualism in statutory interpretation is mandated by constitutional separation of powers. The claim is examined using both the formalist and the functionalist approaches to separation of powers doctrine under the Federal Constitution. As we shall see, these doctrinal inquiries quickly devolve into examinations of the purposes and justification of textualism, and of separating the three branches of government. The article concludes not only that standing constitutional doctrine fails to support the textualist claim, but also that, as a matter of fact, textualism is a judicial philosophy that runs counter to the most basic principles of constitutional separation of powers.

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I. INTRODUCTION

Advocates of textualism have long claimed that textualism is mandated by constitutional separation of powers.¹ Simply put, the argument alleges that judicial deviations from statutory texts amount to legislative amendments that encroach on the power of the legislature. This Article is an examination of that claim. It follows the accepted division of constitutional separation of powers doctrine into a formalist and a functionalist approach, beginning with the former.

The Article concludes that the textualist claim is untenable under both approaches: non-textualist statutory interpretation is in perfect agreement with the best understanding of standing separation of powers doctrine. In fact, as we shall see, the claim that non-textualism is unconstitutional, and that textualism is the way to go, is—paradoxically—in direct conflict with the most basic objectives of constitutional separation of powers.

II. THE FORMALIST APPROACH

A. *The Formalist Methodology*

Commentators classify Supreme Court separation of powers precedents into two categories: those employing a formalist approach, and those employing a functionalist approach.² Formalist opinions begin by classifying some government action as legislative, executive, or judicial, and proceed by examining whether the challenged action was performed by the appropriate branch. *INS v. Chadha*,³ which invalidated the so-called legislative veto, and *Clinton v. City of New York*,⁴ which invalidated the presidential

1. See, e.g., *King v. Burwell*, 135 S. Ct. 2480, 2505 (2015) (Scalia, J., dissenting); *Cameron v. Auto Club Ins. Ass'n*, 718 N.W.2d 784 (Mich. 2006), *overruled by* *Regents of the Univ. of Mich. v. Titan Ins. Co.*, 791 N.W.2d 897 (Mich. 2010), *overruled by* *Joseph v. Auto Club Ins. Ass'n*, 815 N.W.2d 412 (Mich. 2012); ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* xxvii–xxx (2012); John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673 (1997); Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533 (1983).

2. See Kathleen M. Sullivan, Comment, *Dueling Sovereignties: U.S. Term Limits, Inc. v. Thornton*, 109 HARV. L. REV. 78, 91–101 (1995); Peter L. Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions—A Foolish Inconsistency?*, 72 CORNELL L. REV. 488, 488–94 (1987) (rejecting formalism in favor of functionalism for the administrative levels of government).

3. 462 U.S. 919 (1983).

4. 524 U.S. 417 (1998).

budgetary line-item veto, are two paradigmatic examples of the formalist approach.⁵

In *Chadha*, the Supreme Court invalidated a statutory provision that allowed one house of Congress to cancel an executive decision-exempting individual from deportation.⁶ Chadha, a Kenyan national who graduated from an American medical school, was granted an exemption from deportation by the executive branch, in accordance with that statutory provision.⁷ But the House of Representatives, exercising its own prerogative under that same statute, voted to cancel the exemption.⁸ Chadha then challenged the legislative cancelation of his exemption as a violation of constitutional separation of powers. The Supreme Court agreed.⁹ The cancelation, said the Court, was legislative in nature. But legislative actions can be taken, per Article I of the Constitution, only with the consent of both houses of Congress and the possibility of a presidential veto—whereas here the action was taken, in accordance with the statutory provision, only by the House of Representatives, and without presentment to the president.¹⁰

In *Clinton*, the Supreme Court invalidated a statute that allowed the president to cancel specific items of discretionary spending enacted by Congress, if the president found that the cancelation met certain specified conditions.¹¹ The Court held that such line-item cancelations were legislative in nature since the president was, in effect, making changes to legislative enactments.¹² The president was therefore exercising legislative power, in violation of constitutional separation of powers.¹³

Thus, in both cases, the Court began by identifying an action as legislative in nature, and then declared that such action must be exercised by the legislative branch, and in accordance with the

5. Compare *Bowsher v. Synar*, 478 U.S. 714 (1986), and *Chadha*, 462 U.S. at 919 (formalist cases), with *Mistretta v. United States*, 488 U.S. 361 (1989), and *Morrison v. Olson*, 487 U.S. 654 (1988) (functionalist cases).

6. *Chadha*, 462 U.S. at 928.

7. *Id.* at 923–25.

8. *Id.* at 926–27.

9. *Id.* at 928.

10. *Id.* at 945–59.

11. These conditions were “(i) reduce the Federal budget deficit; (ii) not impair any essential Government functions; and (iii) not harm the national interest.” Line Item Veto Act, 2 U.S.C. § 691 (1994), *invalidated by Clinton v. City of N.Y.*, 524 U.S. 417 (1998).

12. *Clinton*, 524 U.S. at 438–41.

13. *Id.* at 448–49.

legislative procedures specified in the constitution. The formalist approach therefore presupposes that the three branches of government engage in essentially different *sorts* of action.

That presupposition has been subjected to some scorching criticism.¹⁴ There are, of course, paradigmatic examples of legislative, executive, and judicial actions: defining criminal offenses is a paradigmatic example of legislative power, just as prosecuting those who committed them is quintessentially executive, and deciding their guilt or innocence is a clear judicial function. But separation of power cases rarely present such neatly packaged questions: most cases present some midway function whose classification is uncertain (as in *Chadha* and *Clinton*). Indeed, the Supreme Court has failed to formulate definitions that could distinguish among purported legislative, executive, and judicial actions. In *Chadha*, for example, the Court declared that the one-house veto was “legislative” because legislative actions were those that “had the purpose and effect of altering the legal rights, duties, and relations of persons”¹⁵ But surely executive and judicial actions also have the “purpose and effect of altering the legal rights, duties, and relations of persons.” Indeed while the *Chadha* majority claimed that Congress’ action in the case was legislative in nature, a concurring opinion claimed that it was in fact *judicial* in nature, because “[t]he House did not enact a general rule” but instead made specific determinations under an existing legal standard.¹⁶ In fact, it may be just as reasonable to regard Congress’ action as executive in nature, since it dealt with the execution of an immigration law vis-à-vis a particular individual.¹⁷

Notwithstanding this potentially devastating criticism, the formalist approach to separation of powers is alive and well, and our doctrinal examination of the textualist claim begins with it.

14. See, e.g., *Chadha*, 462 U.S. at 998–1002 (White, J., dissenting); *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 221, 258 n.10 (1995) (Stevens, J., dissenting); Strauss, *supra* note 22, at 488–94.

15. *Chadha*, 462 U.S. at 952.

16. *Id.* at 964–65 (Powell, J., concurring) (“On its face, the House’s action appears clearly adjudicatory. The House did not enact a general rule; rather it made its own determination that six specific persons did not comply with certain statutory criteria. It thus undertook the type of decision that traditionally has been left to other branches. Even if the House did not make a *de novo* determination, but simply reviewed the Immigration and Naturalization Service’s findings, it still assumed a function ordinarily entrusted to the federal courts.”).

17. It was also argued in the case that the executive’s grant of exemption from deportation was a form of “lawmaking.” *Id.* at 956.

B. The Formalist Approach and Textualism

The formalist textualist argument is based on the claim that non-textualist statutory interpretation is, in essence, legislative in nature. Since the Supreme Court has so far failed to offer persuasive definitions separating legislative from judicial actions, support for that claim must come from some larger thesis about the difference between legislative and judicial functions. That thesis proceeds as follows: In a democracy, policy decisions are properly made by representatives of the people elected in free periodic elections. These elected representatives reduce their policy decisions into statutory texts. When judges follow those texts, they therefore follow the policy decisions of the legislature. But when judges deviate from a statutory text, they essentially replace that statute with a different one—because the decision now accords with a differently worded statute, rather than with the words approved by the legislature. Whenever a judge renders a decision that fails to accord with the text of a statute, she is engaged in legislative action because, in practical terms, she is rewriting the law.

But the argument, as it stands, is clearly insufficient: the argument begs the question by assuming that statutory law is nothing more than statutory text (and that judges therefore change statutory law whenever they deviate from the statutory text). Not so, say many legal theorists: statutory law consists of much more than the texts of statutes. It also consists of legislative purpose, which can trump and override statutory language; of some background morality, or equity, which judges must take into account when deciding what statutes actually require; or of the factual assumptions underlying the statutory enactment, so that a change in those circumstances may bring about a change in the statutory requirements even as the text remains unchanged.¹⁸ There are other factors, above and beyond the mere literal text, that go into determining what a statute requires. And this means that judges who fail to follow a statutory text do not necessarily amend or rewrite the law; to the contrary—sometimes they may have to deviate from the statutory text in order to follow the statute.

18. See, e.g., *Tenn. Valley Auth. v. Hill*, 437 U.S. 153 (1978); *United States v. Seeger*, 380 U.S. 163 (1965); *Holy Trinity Church v. United States*, 143 U.S. 457 (1892); *United States v. Kirby*, 74 U.S. 482 (1868); *People v. Ford*, 128 N.E. 479 (Ill. 1920).

This debate between textualists and non-textualists is a subset of a larger debate about the nature of law—a long-standing dispute that implicates fundamental philosophical questions, including questions about the nature of truth itself (including whether moral reasoning can be true or false¹⁹). The claim that non-textualist statutory interpretation amounts to amending statutory law therefore relies on a complicated, wide-ranging, and deeply controversial philosophical argument. Unsurprisingly, I will not attempt to tackle this argument here; but I mention its complexity in order to point to the scale of the challenge facing the textualists’ doctrinal claim. Constitutional separation of powers doctrine may, of course, revolve around deep and contentious theoretical questions; constitutional doctrines sometimes do. Still, a controversial, complicated, sometimes abstruse (and, in my opinion, utterly misguided) theoretical thesis certainly makes for a challenging argument.

In any event, the characterization of non-textual judicial reasoning as a form of legislation—i.e., the claim that judges either follow statutory texts to a ‘T,’ or else usurp legislative power—takes an astoundingly expansive view of what counts as “legislation” for purposes of constitutional separation of powers. The textualist claim regards as “legislative” any judicial deviation from the literal statutory text in the name of such time-honored judicial considerations as legislative intent, the coherence of the law, fairness, equity, or the expected consequences of the decision.²⁰ But there seem to be enormous differences between such non-textual interpretation and legislative policy-making.²¹ Unlike legislators—

19. See generally, e.g., RONALD DWORKIN, *JUSTICE FOR HEDGEHOGS* (2011) (where Dworkin undertakes the philosophical debate between moral realism and anti-realism, to which he was led in defense of his theory of law).

20. See William N. Eskridge, Jr., *Spinning Legislative Supremacy*, 78 GEO. L.J. 319 (1989); William N. Eskridge, Jr., *Public Values in Statutory Interpretation*, 137 U. PA. L. REV. 1007 (1989) [hereinafter Eskridge, *Public Values*]; Daniel A. Farber, *Statutory Interpretation and Legislative Supremacy*, 78 GEO. L.J. 281 (1989); Nicholas S. Zeppos, *Judicial Candor and Statutory Interpretation*, 78 GEO. L.J. 353 (1989); T. Alexander Aleinikoff, *Updating Statutory Interpretation*, 87 MICH. L. REV. 20 (1988); William D. Popkin, *The Collaborative Model of Statutory Interpretation*, 61 S. CAL. L. REV. 541 (1988); William N. Eskridge Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479 (1987) [hereinafter Eskridge, *Dynamic Statutory Interpretation*]; Dennis M. Patterson, *Interpretation in Law—Toward a Reconstruction of the Current Debate*, 29 VILL. L. REV. 671 (1984).

21. For further elaboration of this claim, see, e.g., Ofer Raban, *Real and Imagined Threats to the Rule of Law: On Brian Tamanaha’s Law as Means to an End*, 15 VA. J. SOC. POL’Y & L. 478 (2008); Ofer Raban, *The Supreme Court’s Endorsement of a Politicized Judiciary: A Philosophical Critique*, 8 J. L. SOC’Y 114 (2007); Eskridge, *Dynamic Statutory Interpretation*, supra note 20; Lon L. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71

who simply opt for what they consider the best course of action—judges must have principled explanations, grounded in the relevant legal materials; and their decisions must be consistent with the purported policy determinations of the legislature, and also with past judicial decisions on the matter. Indeed judges are often led to conclusions that are diametrically opposed to their own personal policy choices. (For example, it would be odd to regard Chief Justice John Roberts’ non-textualist opinion in *King v. Burwell*²²—which saved the Affordable Care Act from practical demise—as a judicial policy choice, given that Roberts is, in all likelihood, a staunch policy opponent of the Affordable Care Act.²³) But if you do not buy the idea that judicial reasoning amounts to the exercise of policy-making powers, you also do not buy the textualists’ formalist separation of powers argument—because that is its crux.

Moreover, the formalist argument has at least two additional formidable obstacles: first, the undeniable fact that non-textualism is commonly practiced by American courts, including the U.S. Supreme Court; and second, the equally unsurprising fact that non-textualist statutory interpretation has been validated by a number of related constitutional doctrines.

1. Supreme Court Practice

Actual government practices are given great deference in separation of powers cases: “we put significant weight upon historical practice,” declared the Supreme Court in a separation of powers challenge.²⁴ Indeed, a long line of separation of powers cases recognizes that “traditional ways of conducting government . . . give meaning to the Constitution,”²⁵ and “longstanding ‘practice of the

HARV. L. REV. 630 (1958). *But see, e.g.*, RICHARD A. POSNER, LAW, PRAGMATISM, AND DEMOCRACY 63 (2003) (“Pragmatism may tend to dissolve law into policy analysis”) (arguing that while judges are duty-bound to consider non-textual considerations, their decisions do amount to legislative policy-making). Posner does not think this presents a violation of constitutional separation of powers.

22. 135 S. Ct. 2480 (2015).

23. *See Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2577, 2579 (2012) (Roberts, J., concurring in part) (“We do not consider whether the [Affordable Care Act] embodies sound policies. That judgment is entrusted to the Nation’s elected leaders Members of this Court are vested with the authority to interpret the law; we possess neither the expertise nor the prerogative to make policy judgments.”).

24. *Nat’l Labor Relations Bd. v. Noel Canning*, 134 S. Ct. 2550, 2559 (2014) (emphasis omitted).

25. *Mistretta v. United States*, 488 U.S. 361, 400–01 (1989) (“While these extrajudicial activities spawned spirited discussion and frequent criticism, and although some of the judges

government . . .’ can inform our determination of ‘what the law is.’”²⁶ And “[t]hese precedents show that this Court has treated practice as an important interpretive factor even when the nature or longevity of that practice is subject to dispute, and even when that practice began after the founding era.”²⁷

As regarding non-textualist judicial practice, let us postulate that the vast majority of statutory cases reach conclusions that accord with statutory texts. But this does not mean that the vast majority of statutory cases employ a textualist methodology. Indeed as soon as courts *take into account* something other than the statutory text in cases where that text is clear and determinate—as they practically always do—they are no longer engaged in a textualist interpretation. Thus, courts’ conclusions often accord with the literal text for reasons that go well beyond that text (including the conclusion that legislative intent also calls for that result—indeed it is only to be expected that the statutory text and the legislative intent would go hand-in-hand in most cases.)

However, since it is preferable to make a point with the strongest evidence possible, the following are three recent U.S. Supreme Court cases that not only engaged in non-textualist reasoning, but also reached conclusions that, in fact, were clearly at odds with the literal statutory texts.

*Hamilton v. Lanning*²⁸ involved the statutory formula for calculating debtors’ future earnings under the federal Bankruptcy Act.²⁹ The calculated figure determines debtors’ monthly payments when under bankruptcy protection.³⁰ A 2005 amendment to the Code specifies that a debtor’s future earning is “the average monthly income” during a specified 6-month period.³¹ The case before the Court involved a debtor who received an exceptional one-time buyout during that 6-month period. The buyout boosted her expected

who undertook these duties sometimes did so with reservation and may have looked back on their service with regret, ‘traditional ways of conducting government . . . give meaning’ to the Constitution.”) (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610 (1952) (Frankfurter, J., concurring)).

26. *Noel Canning*, 134 S. Ct. at 2560.

27. *Id.* (citations omitted).

28. 560 U.S. 505 (2010).

29. *Id.* at 508–09 (citing 11 U.S.C. §§ 1306(b), 1321, 1322(a)(1), 1328(a) (2010)).

30. *See id.* at 509.

31. *Id.* at 510 (citing 11 U.S.C. §§ 101(10A)(A)–(B)).

income under the statutory formula, resulting in a projected monthly income that was more than double the actual one.³²

The Supreme Court held that the calculated expected income needed to be corrected, notwithstanding the clear statutory language: “the method outlined [in the statutory formula] should be determinative in most cases,” wrote the Court, “but . . . where significant changes in a debtor’s financial circumstances are known or virtually certain, a bankruptcy court has discretion to make an appropriate adjustment.”³³ Justice Scalia, the leading textualist on the Supreme Court (and a leading proponent of the textualist separation of powers thesis), alone dissented from that decision.³⁴ The Court, he wrote, “can arrive at its compromise construction only by rewriting the statute.”³⁵

Scalia also disagreed with the majority’s non-textualist interpretation in the recent *Bond v. United States*,³⁶ which involved a criminal prosecution under the Chemical Weapons Convention Implementation Act—a federal statute implementing the Chemical Weapons Convention in the United States.³⁷ The Act forbids any person to “own, possess, or use . . . any chemical weapon[.]”³⁸ defined as “any chemical which through its chemical action on life processes can cause death, temporary incapacitation or permanent harm to humans or animals.”³⁹ The prosecution involved a domestic feud where a microbiologist spread a potentially lethal chemical on the car, mailbox, and doorknob of her husband’s lover.⁴⁰

A majority of the Court held that the statute did not apply to this domestic dispute. According to the opinion, Congress could not have intended to regulate local criminal matters, usually preserved for the states, when it implemented an international convention dealing with chemical warfare.⁴¹ Thus, notwithstanding the clear statutory

32. *Id.* at 511.

33. *Id.* at 513.

34. *See id.* at 524–32 (Scalia, J., dissenting) (explaining that a “mechanical” application of the statute is the way to go).

35. *Id.* at 527.

36. 134 S. Ct. 2077 (2014) (joined by two other justices).

37. *Id.* at 2083.

38. 18 U.S.C. § 229(a)(1) (2012).

39. *Id.* § 229F(8)(A).

40. *Bond*, 134 S. Ct. at 2085.

41. *See id.* at 2090–93.

language, the statute was not violated.⁴² Justice Scalia denounced the Court's "result-driven antitextualism:" "It is the responsibility of the legislature, not the Court, . . . to define a crime, and ordain its punishment Today, the Court shirks its job and performs Congress's," he wrote.⁴³

Finally, *King v. Burwell*⁴⁴ involved the Affordable Care Act's healthcare subsidies, which the Act made available to those who purchased their health insurance on a "[healthcare] Exchange established by the State."⁴⁵ The Court held that the IRA properly interpreted the Act to provide subsidies also for those who purchased their insurance in exchanges established by the federal government. The Court reasoned that, notwithstanding the seemingly clear statutory language, other sections of the law cast doubt on the assertion that the provision meant what it seemed to say: "when deciding whether the language is plain, the Court must read the words in their context with a view to their place in the overall statutory scheme."⁴⁶ The provision was therefore "ambiguous."⁴⁷ The Court then resolved the ambiguity against the statutory language by relying on the legislative purpose of the Affordable Care Act.⁴⁸ Justice Scalia's dissent accused the majority of a violation of constitutional separation of powers:

[The Court's judicial] philosophy ignores the American people's decision to give Congress "[a]ll legislative Powers" enumerated in the Constitution. Art. I, § 1. They made Congress, not this Court, responsible for both making laws and mending them. This Court holds only the judicial power—the power to pronounce the law as Congress has enacted it.⁴⁹

For the majority, this was just another day at the office. Notwithstanding Justice Scalia's recurrent separation of powers claims, the dominant American practice of statutory interpretation is,

42. *Id.* at 2089 ("[I]t is incumbent upon the federal courts to be certain of Congress' intent before finding that federal law overrides' the 'usual constitutional balance of federal and state powers.'" (citations omitted)).

43. *Id.* at 2094–95 (Scalia, J., concurring).

44. 135 S. Ct. 2480 (2015).

45. *Id.* at 2482 (interpreting 42 U.S.C. § 18031).

46. *Id.* at 2483 (citations omitted).

47. *Id.*

48. *Id.* at 2496.

49. *Id.* at 2505.

and always has been, non-textualist.⁵⁰ Given this brute fact, and the significance of actual practices for separation of power questions, it is hard to see how non-textualism can be considered improper.

2. Precedent

One would expect constitutional doctrine to reflect the fact that non-textualism is the dominant judicial practice; and it does. There is, of course, no direct constitutional ruling dealing with the constitutionality of non-textualist statutory interpretation; but there are a number of constitutional precedents that engage the subject indirectly. These include important constitutional doctrines dealing with statutory interpretation on the part of administrative agencies, as well as cases grappling with the retroactive application of criminal statutes.

a. Administrative Law

Administrative agencies regularly interpret and apply statutes, and their interpretations are often challenged in the courts. The Supreme Court's principal test for the validity of those interpretations was announced in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*⁵¹ Under *Chevron*, a reviewing court must first determine whether the relevant statute governs the matter at hand unambiguously.⁵² If it does not, the agency's interpretation must be given deference.⁵³

Ambiguity, however, is not a function of statutory language but of Congressional *intent*: “[courts] must give effect to the unambiguously expressed *intent* of Congress,” declared the *Chevron* opinion.⁵⁴ And intent may or may not be fully captured by the statutory text: “[s]ometimes the legislative delegation to an agency on a particular question is implicit rather than explicit.”⁵⁵ Indeed, the Court was “not persuaded that parsing of general terms in the text of the statute will reveal an actual intent of Congress.”⁵⁶ Instead, *Chevron* calls for a comprehensive analysis that employs the “traditional tools of statutory construction”—including a review of

50. See, e.g., ROBERT A. KATZMANN, *JUDGING STATUTES* (2014).

51. 467 U.S. 837 (1984).

52. *Id.* at 842.

53. See *id.* at 843–44.

54. *Id.* at 843 (emphasis added).

55. *Id.* at 844.

56. *Id.* at 861.

legislative history (a known anathema for textualists⁵⁷)—when ascertaining Congress’ intent.⁵⁸

Subsequent decisions demonstrated the extent to which statutory language can at times be disregarded in proper statutory interpretation. In *FDA v. Brown & Williamson Tobacco Corp.* the Court held that the Food and Drug Administration wrongly interpreted a statute authorizing it to regulate “drugs” and “devices” as authority to regulate cigarettes.⁵⁹ The statute defined drugs as “articles (other than food) intended to affect the structure or any function of the body.”⁶⁰ It defined “a device” to include “an instrument, apparatus, implement . . . intended to affect the structure or any function of the body.”⁶¹ And the statute explicitly granted the FDA the authority to regulate so-called “combination products,” which “constitute a combination of a drug, device, or biological product.”⁶² Acting in reliance of the statutory text, the FDA classified cigarettes as devices for the delivery of the drug nicotine, and claimed power to regulate them.⁶³ Yet, despite the unambiguous statutory text, the Court refused to recognize an unambiguous grant of regulative power. And it then went further and held that, in fact, Congress unambiguously *withheld* such regulatory power from the FDA: “It is . . . clear, based on the FDCA’s overall regulatory scheme and the subsequent tobacco legislation, that Congress has directly spoken to the question at issue and precluded the FDA from regulating tobacco products.”⁶⁴ Thus, Congress has precluded the FDA from regulating tobacco products when, in “subsequent tobacco legislation,” it expressed its intent to allow the market in cigarettes.⁶⁵ Indeed if the FDA had the power to regulate cigarettes, reasoned the Court, it would be obligated to ban them, because it was statutorily obligated to certify products as “safe” before allowing their sale.⁶⁶ Thus, allowing the FDA to regulate cigarettes would have

57. See, e.g., ANTONIN SCALIA, A MATTER OF INTERPRETATION 29–37 (Amy Gutman et al. eds., 1998).

58. *Chevron*, 467 U.S. at 843 n.9; see *United States v. Haggard Apparel Co.*, 526 U.S. 380, 392–93 (1999); *Holly Farms Corp. v. Nat’l Labor Relations Bd.*, 517 U.S. 392, 398–99 (1996).

59. 529 U.S. 120, 125 (2000).

60. 21 U.S.C. § 321(g)(1)(C) (2012).

61. *Id.* § 321(h).

62. *Id.* § 353(g)(1).

63. *Brown & Williamson Corp.*, 529 U.S. at 127.

64. *Id.* at 160.

65. *Id.* at 137 (citing 7 U.S.C. § 1311(a)).

66. *Id.* at 136.

contradicted Congress' unambiguous intent to allow the market in cigarettes, even though the statutory language supported that regulative power.⁶⁷

Admittedly, subsequent decisions were not always consistent on this subject—and for an obvious reason: the same Justice who claimed that nontextualism was a violation of constitutional separation of powers also sought to inject textualism into this area of the law. Justice Scalia joined the Supreme Court in 1986, two years after *Chevron* was decided.⁶⁸ A year later he was already pushing for a textualist reorientation of *Chevron*.⁶⁹ As more conservative justices joined the Court, Scalia's efforts bore more fruit. Although never entirely successful (the Supreme Court never repudiated *Chevron*'s focus on legislative intent), Scalia's advocacy produced more and more cases where *Chevron*'s first step (determining whether Congress addressed the matter at hand unambiguously) was measured by the clarity of the statutory text. In *Yellow Transportation, Inc. v. Michigan*,⁷⁰ for example, the Court described *Chevron*'s first step as “the question . . . whether the text of the statute resolves the issue.”⁷¹

At the same time, however—and arguably precisely because of this textualist reorientation of *Chevron*—the Court reintroduced a non-textual focus on congressional intent via a new preliminary step (dubbed *Chevron*'s “step zero”) which asks whether the *Chevron* analysis should apply at all.⁷² The question is whether “Congress intended [administrative ruling in this area] to carry the force of law”⁷³ If Congress did *not* have such intention, the validity of the agency's interpretation does not receive *Chevron* deference, and is measured, instead, via (non-textualist) considerations that include “the degree of the agency's care, its consistency, formality, and

67. For other examples of non-textualist statutory interpretations in the context of administrative law, see *Gonzales v. Oregon*, 546 U.S. 243 (2006), and *Chem. Mfrs. Ass'n v. Nat. Res. Def. Council, Inc.*, 470 U.S. 116 (1985).

68. *Biography of Associate Justice Antonin Scalia*, SUPREME COURT OF THE UNITED STATES, <https://www.supremecourt.gov/about/biographyScalia.aspx> (last visited Jan 7, 2016).

69. See *INS v. Cardoza-Fonseca*, 480 U.S. 421, 454 (1987) (Scalia, J., concurring).

70. 537 U.S. 36 (2002).

71. *Id.* at 45; see Linda Jellum, *The Impact of the Rise and Fall of Chevron on the Executive's Power to Make and Interpret Law*, 44 LOY. U. CHI. L.J. 141, 173–74 (2012); Linda Jellum, *Chevron's Demise: A Survey of Chevron from Infancy to Senescence*, 4 ADMIN. L. REV. 725, 761–71 (2007).

72. See Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187 (2006).

73. *United States v. Mead Corp.*, 533 U.S. 218, 221 (2001).

relative expertness, and . . . the persuasiveness of the agency’s position.”⁷⁴ (Indeed *King v. Burwell*, discussed above as an example of the U.S. Supreme Court’s anti-textualism, was also a non-textualist *Chevron* Step Zero case.⁷⁵)

In short, Supreme Court reviews of agencies’ statutory interpretations recognize that the validity of such interpretations does not depend on fidelity to statutory texts. Moreover, although *Chevron* itself did not even mention constitutional separation of powers, the decision is certainly about the separation of powers among the legislature (Congress), the executive (administrative agencies), and the courts—and is regularly discussed in the literature as a decision dealing with constitutional separation of powers.⁷⁶

b. The Due Process Clause

The Constitution’s two Ex Post Facto clauses forbid the federal government and the states to impose criminal punishment on acts committed before the criminal punishment at issue was enacted.⁷⁷ But the Ex Post Facto clauses apply only to the legislature (they prohibit the “pass[ing]” of Ex Post Facto laws).⁷⁸ Accordingly, the Supreme Court developed a Due Process doctrine that prohibits the retroactive application of *judicial* decisions.⁷⁹ Just as the Ex Post Facto clauses forbid the imposition of criminal sanctions on acts committed before the enactment of that criminal penalty, so does the Due Process Clause forbid judicial imposition of criminal sanctions through a novel judicial interpretation announced after the conduct had occurred.⁸⁰ Thus, this Due Process doctrine draws a distinction between judicial interpretations that merely apply a pre-existing statute, and interpretations that amount to something like novel

74. *Id.* at 228.

75. *King v. Burwell*, 135 S. Ct. 2480 (2015). The Court explained its refusal to apply a *Chevron* analysis by stating that “[i]t is especially unlikely that Congress would have delegated this decision to the IRS, which has no expertise in crafting health insurance policy of this sort.” *Id.* at 2489.

76. *See, e.g.*, David J. Barron & Elena Kagan, *Chevron’s Nondelegation Doctrine*, 2001 SUP. CT. REV. 201 (2001); John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612 (1996).

77. U.S. CONST. art. I, §§ 9–10 (“No . . . ex post facto Law shall be passed No state shall . . . pass any . . . ex post facto law . . .”).

78. *Id.*

79. *E.g.*, *Bouie v. City of Columbia*, 378 U.S. 347, 353–54 (1964).

80. *Id.*

legislation—the same distinction that, according to the textualist separation of power thesis, revolves around fidelity to statutory texts.

But this Due Process doctrine does not revolve around textual fidelity. Instead, the doctrine draws the distinction by asking whether the application of the statute is “unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue.”⁸¹ And “the law” is “expressed” not only in the statutory text but also in any previous decision applying that text, whether that decision did or did not faithfully follow the text.⁸² Only if a criminal sanction is “clearly at variance with the statutory language” and “has not the slightest support in prior . . . decisions” is it barred from retroactive application.⁸³ A less inclusive standard, said the Supreme Court, “would place an unworkable and unacceptable restraint on normal judicial processes”⁸⁴

Lower court decisions demonstrate that judicial interpretations that deviate from the statutory language can be applied retroactively. *Niederstadt v. Nixon*,⁸⁵ for example, dealt with the application of Missouri’s sodomy statute, which criminalized “intercourse . . . by the use of forcible compulsion.”⁸⁶ The statute defined “forcible compulsion” as “[p]hysical force that overcomes reasonable resistance.”⁸⁷ Notwithstanding this clear statutory language, the Missouri Supreme Court held that the term “forcible compulsion” also included the penetration of a sleeping victim who (for obvious

81. *Rogers v. Tennessee*, 532 U.S. 451, 457 (2001).

82. *See id.* at 457–58.

83. *See Bouie*, 378 U.S. at 356–57 (Accordingly, *Bouie* relied on the fact that previous “cases construing the statute” had not given the “slightest indication” that the statute meant what the new interpretation said that it did.); *see also* *United States v. Lanier*, 520 U.S. 259, 266 (1997) (“[D]ue process bars courts from applying a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope.”).

84. *Rogers*, 532 U.S. at 461. The *Rogers* decision added: “That is particularly so where, as here, the allegedly impermissible judicial application of a rule of law involves not the interpretation of a statute but an act of common law judging”—thus making clear that its concern with “unworkable and unacceptable restraint on normal judicial processes” encompassed statutory interpretation as well. Our separation of powers inquiry, of course, is restricted to statutory interpretation (regarding which textualism stakes its claims), not with common law decision-making.

85. 505 F.3d 832 (8th Cir. 2007).

86. *Id.* at 834.

87. *Id.* (“*Niederstadt* was charged with sodomy in violation of § 566.060(1). The statute prohibited ‘deviate sexual intercourse with another person without that person’s consent by the use of forcible compulsion.’ It is conceded that *Niederstadt*’s digital penetration constituted ‘deviate sexual intercourse’ as defined in § 566.010(1). As relevant here, ‘forcible compulsion’ was defined as ‘[p]hysical force that overcomes reasonable resistance.’”).

reasons) did not resist.⁸⁸ The decision was challenged as a retroactive application forbidden by the Due Process Clause, but the Eighth Circuit rejected the challenge: this (non-textualist) interpretation of the sodomy statute, reasoned the court, did not “change the law,” because the decision conformed with “common sense,” and because older case law dealing with a related offense (and predating the applicable statute) also found forcible compulsion where a sleeping victim was penetrated.⁸⁹

To summarize, there is no proper definition of judicial action that leaves non-textualism out; the philosophical argument to that effect is problematic and unconvincing; and precedents dealing with administrative agencies’ statutory interpretation and with the application of criminal statutes demonstrate the validity—indeed the correctness—of non-textual statutory interpretations. These facts reflect a simple truth that even the textualists do not deny: non-textualist statutory interpretation is common judicial practice in the United States, not the least on the U.S. Supreme Court itself. And given the importance of customary conduct for separation of powers cases, it is simply difficult to imagine how non-textualist interpretation could ever be regarded as legislative rather than judicial action. The formalist approach to constitutional separation of powers cannot support the textualist separation of powers argument. But the functionalist approach offers even less help.

III. THE FUNCTIONALIST APPROACH

A. *The Functionalist Methodology*

Recall that in *Chadha*, the Justices divided over the nature of the Congressional action at issue in the case. The majority claimed that it was legislative action, whereas a concurring opinion claimed that it was judicial in nature. That concurring opinion went on to make the following remark: “The Court concludes that Congress’ action was legislative in character But reasonable minds may disagree over the character of an act[,] and the more helpful inquiry, in my view, is

88. *Id.* at 835.

89. *Id.* at 837–39 (“This historical review makes crystal clear what common sense teaches—it was neither unexpected nor indefensible for the Supreme Court of Missouri to construe the Missouri rape and sodomy statutes in effect when Niederstadt committed his offense as applying to the unconsented penetration of a sleeping woman . . .”).

whether the act in question raises the dangers the Framers sought to avoid.”⁹⁰

This is the gist of the functionalist approach. The approach recognizes that the three branches necessarily partake in actions that cannot be neatly separated into distinct conceptual categories, and that practical necessities often require overlaps of function. Thus, instead of seeking to classify actions into legislative, executive, or judicial in nature—often something of a fool’s errand—the functionalist approach revolves around the *purposes* of separating the government into three separate branches. It asks not what is the nature of the challenged action, but whether that action conflicts with the purposes of separating the power of government into three separate branches.

The main purpose behind constitutional separation of powers is the prevention of tyranny and oppression, which it seeks to achieve by preventing excessive concentration of power.⁹¹ The idea is simple: separating powers makes it more difficult to exercise power, and hence more difficult to abuse it. If the same government entity could define criminal offenses, investigate and prosecute potential offenders, and then determine their innocence or guilt, the potential for oppression and abuse would be exponentially greater than if separate bodies were responsible for each of those steps.

A secondary purpose sometimes mentioned in the literature is the interest in institutional specialization and efficiency: assigning different functions to different branches of government promotes expertise, as institutions become more adept at performing their assigned tasks.⁹² Separating the powers therefore assures that decisions are made by the institution most suitable for making them.⁹³ (This secondary purpose, however, may sometimes collide

90. *INS v. Chadha*, 462 U.S. 919, 964 n.7 (1983) (Powell, J., concurring).

91. See THE FEDERALIST NO. 47, at 324 (James Madison) (Jacob Ernest Cooke ed., 1961) (“The accumulation of all powers legislative, executive and judiciary in the same hands, whether of one, a few or many, and whether hereditary, self appointed, or elective, may justly be pronounced the very definition of tyranny.”).

92. See, e.g., Cass Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 423, 443 (1987) (“Even though the distribution of national power can be understood as an efficient division of labor, the best-known justification for the distribution is the need to diminish the risk of tyranny.”).

93. See Letter from John Adams to Richard Henry Lee, NAT’L ARCHIVES (Nov. 15, 1775), <http://founders.archives.gov/documents/Adams/06-03-02-0163> (“A [l]egislative, an [e]xecutive and a judicial [p]ower comprehend the whole of what is meant and understood by [g]overnment. It is by balancing each of these [p]owers against the other two, that the [e]fforts in human [n]ature towards [t]yranny can alone be checked and restrained”); see, e.g., Bruce G. Peabody & John

with the primary focus of the separation of powers requirement: preventing excessive concentration of power may come at the cost of *decreased efficiency*.⁹⁴)

When applying the functionalist approach to *Chadha*, for example, the principal question would be whether the challenged action (here, the House of Representatives' invalidation of an executive exemption from deportation) is a Congressional power-grab that risks excessive concentration of power in the legislature. The dissenters in *Chadha* (who, unlike the majority, opted for the functionalist approach) thought that the answer was clearly "no." After all, Congress was under no obligation to allow the executive to grant exemptions from deportation to begin with. Congress was presumably willing to grant that privilege to the executive under the condition that *it*, Congress, reserved the right to step in and revoke any unwarranted use of it.⁹⁵ Thus, far from aggrandizing the power of the legislature, the one-house veto mechanism allowed Congress to *share* its power with the executive.⁹⁶ The dissenters therefore concluded that there was no violation of constitutional separation of powers.

B. *The Functionalist Approach and Textualism*

Ab initio, the functionalist approach appears far less accommodating to the claim that non-textualist interpretation is in violation of the Constitution. After all, functionalism is based on the recognition that no clear lines separate executive, legislative, and judicial actions—or, as a Supreme Court case once put it, that all three branches “exercise, in some respects, functions in their nature executive, legislative and judicial.”⁹⁷ (It is no coincidence that Justice Antonin Scalia, the leading advocate of that claim on the

D. Nugent, *Toward a Unifying Theory of the Separation of Powers*, 53 AM. U. L. REV. 1, 12 (2003) (“[T]he dominant view holds that [separation of powers was] intended to serve the ‘negative’ purpose of creating multiple and mutual checks to avoid the tyrannical accumulations of power.”); Sunstein, *supra* note 92, at 432–33; Sullivan, *supra* note 22, at 93.

94. See, e.g., *Myers v. United States*, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting) (“The doctrine of the separation of powers was adopted by the Convention of 1787, not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy.”).

95. See *Chadha*, 462 U.S. at 968–74 (White, J., dissenting).

96. See *id.* at 968.

97. *Mistretta v. United States*, 488 U.S. 361, 386 (1989) (quoting *Myers v. United States*, 272 U.S. 52 (1926)).

Court, is also a proponent of the formalist approach.⁹⁸) Proclaiming that non-textualist interpretation is ‘legislative in nature’ therefore makes little impression on the functionalist approach. What the functionalist approach requires is some demonstration that non-textualist interpretation concentrates excessive power in the judiciary—or, as a less forceful alternative, that non-textualism falls outside the usual expertise or know-how of the judicial branch.

These are difficult claims to sustain. As an initial matter, the claim that the American judiciary is unsuitable for non-textualist interpretation as a matter of institutional specialization is highly improbable: if anything, American judges are the foremost experts in developing the law by applying its principles and purposes, rather than blindly following a text (an interpretive approach that resonates more with the ethos of European civil law⁹⁹). Non-textualist statutory interpretation is the traditional judicial practice inherited from the English common law.

The textualist claim, it seems, must stand or fall with the central purpose of constitutional separation of powers: preventing excessive concentration of power in one branch of government. But the claim that non-textualist statutory interpretation usurps the role of the legislature clashes with the fact that deviations from statutory texts are almost always justified by reference to legislative purpose or intent—that is, by a purported *deference* to the power of the legislature.

Take the three cases discussed above—*Hamilton v. Lanning*, *Bond v. United States*, and *King v. Burwell*—where the U.S. Supreme Court reached statutory conclusions that were at odds with the statutory language.¹⁰⁰ In *Hamilton*, the Court concluded that Congress could not have intended that a person be deprived of bankruptcy protection simply because of a fluke—i.e., because she just happened to receive a one-time payment during the statutory calculation period.¹⁰¹ In enacting the Bankruptcy Act, reasoned the Court, Congress evidenced the intent to allow debtors to manage

98. *E.g.*, *Mistretta*, 488 U.S. at 413 (Scalia, J., dissenting); *Morrison v. Olson*, 487 U.S. 654, 697 (1988) (Scalia, J., dissenting).

99. Although, one should add, not with actual practice Even in the Civil Law context, literal textualism is, arguably, more honored in the breach.

100. *Bond v. United States*, 134 S. Ct. 2077 (2014); *King v. Burwell*, 135 S. Ct. 2480 (2014); *Hamilton v. Lanning*, 560 U.S. 505 (2010).

101. *See Hamilton*, 560 U.S. at 519.

their debt through bankruptcy protection,¹⁰² allowing the textually-mandated formula to deny that protection for no good reason would sabotage Congress' principal policy choice in enacting the Bankruptcy Act.¹⁰³ In *Bond*, the Court concluded that Congress could not have intended to invade the province of the states and regulate local criminal matters when it implemented the Chemical Weapons Convention.¹⁰⁴ Congress, said the Court, has repeatedly shown its disinclination to regulate local criminal matters—which are often beyond its constitutional powers anyhow.¹⁰⁵ And in *Burwell*, the Court reasoned that not allowing federal subsidies for insurance plans purchased on federally established health care exchanges would unravel the entire subsidies scheme, in direct contradiction of Congress' policy choice.¹⁰⁶ Thus, in all three cases the very purpose of deviating from the statutory text was the wish to respect legislative power.

Indeed, statutory language can be at odds with legislative intent for many reasons. For one thing, there is simply the ill-conceived or unintentionally confusing use of statutory language. This was the apparent problem in *Burwell*.¹⁰⁷ Even more common is the failure to anticipate circumstances that may make the statutory language misfire. This was presumably what happened in both *Hamilton* (where the legislative formula neglected to take into account circumstances that could result in an unrealistic calculation), and in *Bond* (where it was not anticipated that the Chemical Weapons Convention Implementation Act would be used by a local prosecutor filing criminal charges over a domestic dispute). And so, when literal enforcement of statutory language results in legal resolutions that thwart, obstruct, or directly contradict the policy choices of elected representatives, non-textualist interpretation actually increases legislative power rather than usurp it.¹⁰⁸

102. *See id.* at 517–18.

103. *See id.* at 520–21.

104. *Bond*, 134 S. Ct. at 2083.

105. *Id.* at 2086.

106. *Id.* at 2496.

107. *King v. Burwell*, 135 S. Ct. 2480 (2014); *see* Robert Pear, *Four Words That Imperil Health Care Law Were All a Mistake, Writers Now Say*, N.Y. TIMES (May 25, 2015), <http://www.nytimes.com/2015/05/26/us/politics/contested-words-in-affordable-care-act-may-have-been-left-by-mistake.html>.

108. For whatever it is worth, it should be noted that any concern over excessive concentration of power in the judiciary in statutory matters is mitigated by the fact that final

1. The Debate over Legislative Intent

Advocates of textualism offer a number of rebuttals. One argument disputes the factual accuracy of the non-textualist claim: deviations from the statutory text, imply some textualists, more often than not do violence to the real legislative intent.¹⁰⁹

This is an empirical claim. It alleges that judges who deviate from literal statutory language in order to comply with legislative intent are often mistaken in doing so. (If judges were mostly correct, conformity with legislative policy choices would only *improve* by non-textualist interpretations.) But why think that judges mostly get things wrong? Or that the number of mistakes they make exceeds the number of failures to comply with the legislative intent that would result from blind textualism? After all, the textualist strategy makes no effort to align judicial decisions and legislative policy choices: it simply calls for textual fidelity, irrespective of legislative wishes. By contrast, an interpretive strategy that consciously seeks to align legal outcomes with legislative policy choices would presumably maximize the correspondence between these choices and judicial rulings.

It is difficult to see how the claim that judges are usually mistaken could be supported. Naturally, practically all decisions involving judicial deviations from statutory texts contain detailed explanations as to why they accord with the legislative policy choice. And the arguments why they don't have already failed to convince the majority of the judges who heard them.

One possible response is that non-textualists operate in professional bad faith: they opt to implement their own preferred policies instead of the policies of elected representatives. No doubt, some textualists subscribe to this view.¹¹⁰ But the suggestion of bad

authority over statutory law remains with the legislature, which is free to overrule, for all future cases, any judicial interpretation with which it disagrees, as it occasionally does.

109. See, e.g., *Cameron v. Auto Club Ins. Ass'n*, 718 N.W.2d 784, 799 (Mich. 2006) (Markman, J., concurring) (“[W]hat I discern as the principal purpose of the [statute] cannot be allowed to trump its actual language. To allow such a result would enable the judge to impose on the law his own characterization of its unstated ‘purpose . . .’”), *overruled by* *Regents of the Univ. of Mich. v. Titan Ins. Co.*, 791 N.W. 2d 897 (Mich. 2010), *overruled by* *Joseph v. Auto Club Ins. Ass'n*, 815 N.W.2d 412 (Mich. 2012); SCALIA, *supra* note 57, at 35–36 (“On balance, [the use of legislative history] has facilitated rather than deterred decisions that are based upon the courts’ policy preferences.”).

110. See, e.g., *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1682 (2015) (Scalia, J., dissenting) (“A free society, accustomed to electing its rulers, does not much care whether the rulers operate through statute and executive order, or through judicial distortion of statute,

faith is not the explanation favored by most textualists, and for an obvious reason: if the problem is one of judicial bad faith, the solution can hardly be textualism. Judicial bad faith may perhaps be more *visible* if textualism were the common method of legal interpretation (though how much more is unclear, given common disagreements among textualists),¹¹¹ but textualism offers no remedy for deliberate breaches of official duty. In any event, it is highly doubtful that American judges regularly betray their professional obligations in order to advance their own favorite policies.

In fact, most textualists object to judicial appeals to legislative intent on different grounds: they do not think that judicial decisions regularly misidentify the legislative intent, but that there simply is no such thing as legislative intent. Justice Scalia's objections in *Hamilton*, *Bond*, or *Burwell*, for example, did not argue that the Court was wrong in its identifications of Congress' policy choices, but that no alleged policy choice should be allowed to trump textual fidelity.¹¹² This argument is not rooted in the attribution of judicial

executive order, and constitution. The prescription that judges be elected probably springs from the people's realization that their judges can become their rulers . . .").

111. *Compare* *Smith v. United States*, 508 U.S. 223 (1993) (exchanging a firearm for drugs falls squarely within the everyday meaning and dictionary definitions of the word "use" in a federal statute penalizing the "use" of a firearm in relation to a drug trafficking crime), *with id.* at 241 (Scalia, J., dissenting) (The ordinary meaning of the word "use" excludes the exchange of a firearm for drugs as the "use" of a firearm under the statute.).

112. *Hamilton v. Lanning*, 560 U.S. 505, 531–32 (2010) (Scalia, J., dissenting) ("Unable to assemble a compelling case based on what the statute says, the Court falls back on the 'senseless results' it would produce—results the Court 'do[es] not think Congress intended.' Even if it were true that a 'mechanical' reading resulted in undesirable outcomes that would make no difference. For even assuming (though I do not believe it) that we could know which results Congress thought it was achieving (or avoiding) apart from the only congressional expression of its thoughts, the text, those results would be entirely irrelevant to what the statute means."); *see also* *Bond v. United States*, 134 S. Ct. 2077, 2095–96 (2014) (Scalia, J., concurring) ("[The Court] starts with the federalism-related consequences of the statute's meaning and reasons backwards, holding that, if the statute has what the Court considers a disruptive effect on the "federal-state balance" of criminal jurisdiction, that effect causes the text, even if clear on its face, to be ambiguous Imagine what future courts can do with that judge-empowering principle: Whatever has improbably broad, deeply serious, and apparently unnecessary consequences . . . is ambiguous! . . . In this case . . . the ordinary meaning of the term being defined is irrelevant, because the statute's own definition—however expansive—is utterly clear"); *King v. Burwell*, 135 S. Ct. 2480 (2014) (Scalia, J., dissenting) ("Words no longer have meaning if an Exchange that is not established by a State is 'established by the State.' It is hard to come up with a clearer way to limit tax credits to state Exchanges than to use the words 'established by the State.' And it is hard to come up with a reason to include the words 'by the State' other than the purpose of limiting credits to state Exchanges. '[T]he plain, obvious, and rational meaning of a statute is always to be preferred to any curious, narrow, hidden sense that nothing but the exigency of a hard case and the ingenuity and study of an acute and powerful intellect would discover.'").

mistakes or bad faith, but in the claim that there is no “legislative policy choice” or “legislative intent” to speak of independently of the statutory text.¹¹³ even if judges operated in perfect good faith, they would still impose their own predilections on the law whenever they deviated from the statutory text in the name of legislative intent.¹¹⁴

a. Messy legislative compromises

The argument as to why there can be no legislative policy choice, or legislative intent—independently of the statutory text—starts with the proposition that legislative bodies are made out of many individual members, each with her own policy choices.¹¹⁵ Individual legislators vote for bills for many different, sometimes contradictory, reasons—sometimes for no reason at all (perhaps their party leadership asked them to do so). There is no reliable way either to determine these reasons, or to aggregate them into a coherent policy choice. Indeed the legislative process—with its manipulable agenda-setting (which may change the ensuing statute even as legislators’ policy preferences remain fixed), its practice of logrolling (‘you’ll roll my log and I’ll roll yours’), and its many unprincipled compromises¹¹⁶—may not reflect *any* rational or

113. For an examination of judicial bad faith in constitutional cases, see Jack Wade Nowlin, *Conceptualizing the Dangers of the “Least Dangerous” Branch: A Typology of Judicial Constitutional Violation*, 39 CONN. L. REV. 1211 (2007).

114. See, e.g., SCALIA, *supra* note 57, at 17–18 (“Under the . . . self-delusion of pursuing unexpressed legislative intents, common-law judges will in fact pursue their own objectives and desires”); see also Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 863 (1989) (“Now the main danger in judicial interpretation of the Constitution—or, for that matter, in judicial interpretation of any law—is that the judges will mistake their own predilections for the law Nonoriginalism, which under one or another formulation invokes ‘fundamental values’ as the touchstone of constitutionality, plays precisely to this weakness. It is very difficult for a person to discern a difference between those political values that he personally thinks most important, and those political values that are ‘fundamental to our society.’”).

115. See, e.g., Easterbrook, *supra* note 1, at 547 (“Because legislatures comprise many members, they do not have ‘intents’ or ‘designs,’ hidden yet discoverable. Each member may or may not have a design. The body as a whole, however, has only outcomes This follows from the discoveries of public choice theory. Although legislators have individual lists of desires, priorities, and preferences, it turns out to be difficult, sometimes impossible, to aggregate these lists into a coherent collective choice.”).

116. Some scholars derive these conclusions from Public Choice theory, since a centerpiece of that theory is the idea that although individuals are coherent and rational, a collective of individuals may well be incoherent and irrational as it aggregates its preferences. See, e.g., DENNIS C. MUELLER, *PUBLIC CHOICE* (Phyllis Deane & Mark Perlman eds., 1979); KENNETH J. ARROW, *SOCIAL CHOICE AND INDIVIDUAL VALUES* (Murray Printing Co., 2d ed. 1973) (1963); DUNCAN BLACK, *THE THEORY OF COMMITTEES AND ELECTIONS* (1958); sources cited *supra* notes 22–26. It should be noted, however, that some public choice theorists dispute this orthodoxy, and have focused on institutional mechanisms that help produce coherent policies,

coherent policy determination, only “messy legislative compromises.”¹¹⁷ It is a simple consequence of democratic politics, say the textualists, that there is no legislative intent or policy choice that judges can unearth and rely upon to guide their decisions. Deviations from the literal statutory text in the name of legislative intent “rest . . . on the assumption that interpretation should proceed as if a reasonable person were framing coherent legislative policy. But measured against the true workings of the legislative process, that is an unreasonably optimistic view.”¹¹⁸ As Justice Scalia once put it: “There are pretty absurd statutes out there. That is what you get from legislative compromise Legislation is often the product of unseen and unknowable compromise.”¹¹⁹

The response to the non-textualists is that the assumption of a reasonable and coherent legislative policy choice is not a factual one. Judicial appeals to legislative intent are *not* appeals to some empirical, psychological fact about why individual legislators voted for a particular bill. Such appeals sometimes make use of empirical facts (like legislative history, or the statements of the statute’s legislative sponsors); but they never wholly depend on such facts, and they are not reducible to them. Legislative intent is an idealized judicial construction.¹²⁰ It is what Lon Fuller called “the intention of the design.”¹²¹ But it is a necessary construction: it is the working hypothesis of any statutory construction. Statutory interpretation necessarily begins with a conception of a coherent policy choice that the statute represents.

Moreover, these judicial constructions are often noncontroversial, even trivial. In *Hamilton*, for example, the decision

notwithstanding the problems plaguing the combination of voting preferences. See MAXWELL L. STEARNS & TODD J. ZYWICKI, *PUBLIC CHOICE CONCEPTS AND APPLICATIONS IN LAW* (2009); Daniel A. Farber, *Public Choice Theory and Legal Institutions*, U.C. BERKELEY PUB. L. RES. PAPER No. 2396056 (2014), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2396056. But see BRYAN CAPLAN, *THE MYTH OF THE RATIONAL VOTER* (2007) (arguing that democracy produces irrational policies because voters’ choices are themselves irrational).

117. John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 77 (2006).

118. *Id.* at 102.

119. Antonin Scalia & John F. Manning, *A Dialogue on Statutory and Constitutional Interpretation*, 80 GEO. WASH. L. REV. 1610, 1614–15 (2012).

120. This point is in fact acknowledged by a number of textualists, including Justice Scalia. See SCALIA, *supra* note 57, at 37 (“The evidence suggests that . . . we do not really look for subjective legislative intent. We look for a sort of ‘objectified’ intent—the intent that a reasonable person would gather from the text of the law . . .”).

121. LON FULLER, *THE MORALITY OF THE LAW* 86 (1964).

hypothesized that the Bankruptcy Act was intended to provide the benefits of bankruptcy protection, and that the statutory formula was intended to arrive at realistic monthly payments.¹²² Perhaps the Bankruptcy Act was part of some messy legislative deal, and many of the legislators who voted for it secretly hoped that no debtor would ever enjoy the benefits of bankruptcy protection. Perhaps the statutory formula malfunctioned precisely because it was the result of some unprincipled and irrational legislative compromise. Perhaps. But such legislative facts should not prevent the judiciary from inferring some coherent, reasonable policy choice and having it guide its statutory interpretation. This is what the Rule of Law is about: making sure that legal requirements are not arbitrary or irrational, but that their applications are reasonably justified.¹²³

The textualists respond that, in that case, the concept of legislative intent is endlessly manipulable: it simply allows judges to follow their own desires.¹²⁴ Such “judicial construction,” they say, is judicial policy-making short and simple; and policy-making is, properly speaking, the job of democratically elected representatives. Indeed some textualists argue that even when the statutory text leads to an unreasonable policy decision, judges must follow it. Justice Scalia once praised a 2002 Supreme Court case by remarking that “[t]he [legislative] compromise in [the case] was quite absurd—made no sense . . .”¹²⁵ and the result reached by the Supreme Court was “certainly absurd as a matter of substance. But we enforced [the statute] as written because the text was clear, and we presumed that the opposing factions in Congress had bargained for just such a result.”¹²⁶ Congress enacted a statute that was “absurd as a matter of substance” and the Court had to take that absurd substance and dish it out to the litigants.¹²⁷ Acting otherwise would have amounted to

122. See *Hamilton v. Lanning*, 560 U.S. 505, 520–21 (2010).

123. See Ofer Raban, *The Rationalization of Policy: On the Relation Between Democracy and the Rule of Law*, 18 N.Y.U. J. LEGIS. & PUB. POL’Y 45 (2015).

124. See, e.g., SCALIA, *supra* note 57, at 17–18.

125. *Id.* (discussing *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438 (2002), an opinion written by Justice Thomas, the second foremost textualist on the Court).

126. *Id.* at 1614; see also *Barnhart*, 534 U.S. at 460–61 (“Where the statutory language is clear and unambiguous, we need neither accept nor reject a particular ‘plausible’ explanation for why Congress would have written a statute The deals brokered during a Committee markup, on the floor of the two Houses, during a joint House and Senate Conference, or in negotiations with the President are not for us to judge or second-guess.”).

127. Scalia & Manning, *supra* note 119119; see also *King v. Burwell*, 759 F.3d 358 (4th Cir. 2014), *aff’d*, 135 S. Ct. 2480, 2500 (2015) (Scalia, J., dissenting) (“The Court persists that these

judicial policymaking. But the judiciary is the wrong branch for making policy.

When the legislature enacts legal requirements that “make no sense” or are “absurd,” it does so in accordance with its constitutional role. But when judges substitute those absurd policy choices for their (albeit sensible) own, they usurp legislative power. Frank Easterbrook, a federal appeals court judge, made that point as follows:

The price principals pay for reducing the discretion of their agents includes the lost opportunities to carry out the principals’ goals in ways the principals could not have anticipated when they issued their commands. Yet it is well understood that a decision to grant or withhold discretion from agents requires a careful balancing of costs. A reduction in discretion may mean lost opportunities, but an increase in discretion may mean that agents distort or deviate from the principals’ plans. The choice between the costs of too much and too little discretion properly lies with the legislature.¹²⁸

According to Easterbrook, the legislature may decide to sacrifice the occasional case in order to avoid granting judges discretion in applying the statute. Another textualist scholar echoed the claim when he wrote: “[E]nforcing the background purpose, rather than the details, of a precise text may, in fact, defeat Congress’s evident choice to legislate by rule rather than by standard.”¹²⁹ “[T]he deals brokered during a Committee markup, on the floor of the two Houses, during a joint House and Senate Conference, or in negotiations with the President, . . . are not for us to judge or second-guess,” declared Justice Scalia.¹³⁰ If so wishes, the legislature may,

provisions ‘would make little sense’ if no tax credits were available on federal Exchanges. Even if that observation were true, it would show only oddity, not ambiguity.”).

128. Easterbrook, *supra* note 1, at 552.

129. John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 7 (2001) (“Drawing upon the insights of interest-group and game theory, textualists maintain for several reasons that variance between a clear text and its apparent purpose does not show that Congress, in some sense, poorly communicated its intent. First, because lawmaking often entails compromise among interest groups with diverse goals, legislators do not necessarily pursue a statute’s background purpose to its logical end. Second, in a complex legislative process that includes agenda manipulation and logrolling, it is impossible to reconstruct what a legislature would have ‘intended’ if put to a choice between the letter and purpose of the law. Third, enforcing the background purpose, rather than the details, of a precise text may, in fact, defeat Congress’s evident choice to legislate by rule rather than by standard.”).

130. Scalia & Manning, *supra* note 119119, at 1615.

of course, (textually) grant judges the ability to deviate from a specified statutory text, or it may use statutory language that leaves judges with ample discretion. But to the extent it hasn't, judges are under a strict obligation to follow that language, even when the result in the particular case serves no reasonable policy goal. Such are the requirements of the Constitution's separation of powers: judges should never be allowed to invent imaginary policy choices and run with them.

In short, textualism's functionalist separation of powers argument boils down to this: judicial deviations from statutory texts cannot be justified by appeals to legislative intent, since, as a factual matter, such legislative intent does not exist, so that appeals to a legislative intent amount to appeals to the judiciary's own imaginary policy choices. Hence, the judicial branch must faithfully follow statutory texts—even in cases where these produce results that appear to serve no reasonable policy goal. Conversely, judicial failures to follow statutory texts constitute judicial usurpation of legislative power, and amount to excessive concentration of power in the judiciary.

Is this a convincing claim of unconstitutional concentration of power?

2. Tyranny

One problem with the claim that the judiciary must follow statutory texts even when the results are senseless or incoherent is that separation of powers is ultimately about the prevention of tyranny, and, senseless or arbitrary exercises of power are the very definition of tyranny.¹³¹ Indeed the dictionary defines Tyranny, *inter alia*, as “[u]nreasonable, or arbitrary use of power or control . . .”¹³² while “arbitrary,” in turn, means “[b]ased on random choice or personal whim, rather than any reason . . .”¹³³

Friedrich Hayek, discussing the origins of the Rule of Law and the emergence of separation of powers in England, noted that during the 17th Century, the prevention of arbitrary action of government became a central concern. “[Soon] it came to be realized,” writes Hayek, “as Parliament began to act as arbitrarily as the king, that whether or not an action was arbitrary depended not on the source of

131. See THE FEDERALIST NO. 47, *supra*, note 91.

132. *Tyranny*, OXFORD ENGLISH DICTIONARY (2d ed. 1989).

133. *Arbitrary*, OXFORD ENGLISH DICTIONARY (2d ed. 1989).

the authority but on whether it was in conformity with pre-existing general principles of law.”¹³⁴ Those “pre-existing general principles of law” included precepts like the prohibition on retrospective punishments; but mostly, these principles were identified with “reason.” Students of jurisprudence are well familiar with Sir Edward Coke’s proclamation in 1610 that “when an act of parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will control it, and adjudge such act to be void.”¹³⁵ “Tyranny” consisted in the imposition of unreasonable laws; and the imposition of unreasonable laws is precisely what separation of powers (and, specifically, judicial independence) came to prevent.

Indeed, complaints about arbitrary and tyrannical abuses of power often center around the absence of reasonableness and rationality. Consider, for instance, the 2013 *New York Times* op-ed by the Chinese novelist Yu Hua, which contained a litany of government abuses of power in China:¹³⁶

In late 2010, Chinese customs officials imposed an import tax of 1,000 yuan (about \$150 then) on every iPad brought into the country. Ignoring the fact that iPads differ in features and prices, officials set a single tariff: 20 percent of the tablet’s listed 5,000-yuan value. People who paid 3,000 yuan for an iPad in Hong Kong—where smartphones and other electronics are much cheaper than on the mainland—were charged the same tariff. Even Chinese tourists returning home with their own iPads, bought in China, were taxed! In 2001, hospital officials in the southern city of Shenzhen specified that nurses should show precisely eight teeth when smiling. In 2003, Hunan Province, in central China, stipulated that the breasts of female candidates for civil-service positions should be symmetrical¹³⁷

These laws are tyrannical because they are unreasonable. But then again, this is precisely the sort of power that, according to textualists, the legislature possesses and the judiciary lacks power to mitigate (absent any constitutional violation). And the purported authority for

134. F. A. HAYEK, *THE CONSTITUTION OF LIBERTY* 169 (1960).

135. *Dr. Bonham’s Case*, 8 Co. Rep. 107a, 114a C.P. (1610).

136. See Yu Hua, *In China, Power Is Arrogant*, N.Y. TIMES (May 8, 2013), <http://www.nytimes.com/2013/05/09/opinion/you-in-china-power-is-arrogant.html>.

137. *Id.*

this claim is, perversely enough, the prevention of excessive concentration of power.

3. Faithful Agency

The textualist position is in direct conflict with the conventional theory of separation of powers for a simpler and a more fundamental reason. The textualist usurpation of power thesis boils down to the claim that the judiciary is nothing more than the legislature's faithful agent in all matters of statutory interpretation. Unless a statute is unconstitutional, separation of powers requires that judges follow statutory texts, no matter how unjust or oppressive or counter-productive or even unreasonable the result might be.

Far from preventing excessive concentration of power, this thesis advocates excessive concentration of power in the legislature. But excessive concentration of power in the legislative branch was a primary concern of the drafters of the U.S. Constitution. They certainly did not think that the judiciary should act as a mere faithful agent of the legislature:

["T]here is no liberty, if the power of judging be not separated from the legislative and executive powers." . . .
[F]rom the natural feebleness of the judiciary, it is in continual jeopardy of being overpowered, awed, or influenced by its co-ordinate branches; . . . [the judiciary is] the citadel of the public justice and the public security
[I]t is not with a view to infractions of the Constitution only, that the independence of the judges may be an essential safeguard against the effects of occasional ill humors in the society. These sometimes extend no farther than to the injury of the private rights of particular classes of citizens, by unjust and partial laws. Here also the firmness of the judicial magistracy is of vast importance in mitigating the severity and confining the operation of such laws. It not only serves to moderate the immediate mischiefs of those which may have been passed, but it operates as a check upon the legislative body in passing them; who, perceiving that obstacles to the success of iniquitous intention are to be expected from the scruples of

the courts, are in a manner compelled, by the very motives of the injustice they meditate, to qualify their attempts.¹³⁸

Alexander Hamilton clearly believed that the judiciary is no mere faithful agent of the legislature in matters of statutory interpretation. Judges were supposed to mitigate “unjust and partial laws,” wrote Hamilton, even when those were not in violation of the Constitution. Indeed judges were “the citadel of the public justice”—and justice was therefore a guiding consideration in their application of statutes. In other words, Hamilton thought that the judiciary may properly act in contravention of both the statutory text *and the legislative intent*. In fact, this was the whole point of separating their powers.

Consider, for example, the archaic practice of some legislative assemblies, in the newly independent American states, to review and sometimes overrule judicial decisions.¹³⁹ That practice—the result of lingering suspicion towards courts previously controlled by the English Crown—is widely recognized today as a violation of constitutional separation of powers, because it concentrates too much power in the legislature. But is it also unconstitutional under the textualist separation of powers thesis? After all, if the judiciary is nothing more than an agent of the legislature, why shouldn’t the legislature be able to review and overrule the statutory judgments of courts? If judicial power adds nothing to the mix—neither reason nor coherence nor justice—nothing seems lost by allowing the legislature to act as a court of last resort. Faithful agency is simply at odds with our most basic understanding of the purpose and operation of constitutional separation of powers.

IV. CONCLUSION

James Madison called constitutional separation of powers “essential to the preservation of liberty.”¹⁴⁰ What he had in mind was a constitutional structure that made it difficult to wield the powers necessary to tyrannize and oppress. There is little of this in the

138. THE FEDERALIST NO. 78 (Alexander Hamilton) (citing MONTESQUIEU, THE SPIRIT OF THE LAWS 181 (1749)).

139. HENRY STEELE COMMAGER, THE EMPIRE OF REASON: HOW EUROPE IMAGINED AND AMERICA REALIZED THE ENLIGHTENMENT 214 (1977) (“[Early state legislatures] played fast and loose with the very structure of the judiciary; meddled constantly in judicial affairs, nullified court verdicts, vacated judgments, remitted fines, dissolved marriages, and relieved debtors of their obligations almost with impunity.”); see *Calder v. Bull*, 3 U.S. 386, 395 (1798).

140. THE FEDERALIST NO. 51, at 348 (James Madison) (Jacob Ernest Cooke ed., 1961).

textualist conception of separation of powers. The central preoccupation of the textualist thesis is not concern with excessive concentration of power, but concern for the power of legislators and their policy-making prerogatives. Textualists seem interested in separating the powers of government in order to make sure that judicial officials do not assume powers that, they say, properly belong to elected representatives. That may be a logical reason for separating the powers of government; but it is certainly not the theory of separation of powers we find in the Federal Constitution. In fact, the textualist thesis puts the Federal Constitution's separation of powers theory on its head: concern over excessive concentration of power in the legislature is precisely what brought the framers of the Constitution to establish an unelected and independent judiciary. Indeed it is difficult to see how fervent defense of representative democracy can amount to the constitutional structure we have—where one branch of government consists of designedly unelected officials who are appointed for life.

This is not an originalist argument: it is a philosophical one. The Federal Constitution is rooted in two grand political theories: democracy, and political liberalism—the political philosophy concerned with the preservation of liberty.¹⁴¹ The impulse behind the textualist separation of powers thesis derives, of course, from (a version of) democracy. But the Federal Constitution's separation of powers is intended to protect liberalism, not democracy. Indeed it is intended to protect liberalism *from* democracy. That is what's so perverse about the textualist separation of powers thesis: not only is it indefensible as a matter of standing constitutional doctrine, it is also in direct contradiction with the very purpose of our constitutional separation of powers. For it claims for the legislature what amounts, in the end, to excessive concentration of power—the power to turn another branch of government into its mere agent, and the ability to enforce unreasonable and hence tyrannical policies.

141. See Ofer Raban, *Capitalism, Liberalism, and the Right to Privacy*, 86 TULANE L. REV. 1243 (2012).