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The Immorality of Textualism

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Textualism is a doctrine of statutory interpretation. In fact, there are two versions of textualism. One branch of textualism is simply a negative view: it maintains that in statutory interpretation judges should not strive to consult legislative intent or legislative history. Let me call this view *negative textualism*, since it allows courts to interpret legislation in countless ways, as long as their interpretation does not purport to retrieve the actual intentions or purposes of the legislature.[1] *Negative textualism* is not the kind of textualism I will discuss in this essay. My concern here is *positive textualism* (often referred to as "new textualism"). The latter encompasses negative textualism, but also maintains that statutes and statutory regulations should be interpreted, according to the *ordinary meaning* of the language of the relevant statutory provision. Since the plain meaning of statutory provisions is not always clear enough, textualism would have judges rely on canons of statutory interpretation, as long as those canons are clear bright-line rules that courts consistently apply.[2] Hereafter in this essay, "textualism" will refer to this

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1. Jeremy Waldron, for example, defends such a view on the basis of an account of the values associated with legislative procedures in democratic assemblies. JEREMY WALDRON, LAW AND DISAGREEMENT 19–118 (1999). Deference to legislative intent, Waldron argues, undermines the values and political ideals that confer dignity and moral respectability on the process of law making in democratic assemblies. *Id.* at 145. I have argued against Waldron's version of textualism in ANDREI MARMOR, POSITIVE LAW AND OBJECTIVE VALUES ch. 5 (2001).

2. Here is one of Justice Scalia's formulations of the official doctrine: "I thought we had adopted a regular method for interpreting the meaning of language in a statute: first, find the ordinary meaning of the language in its textual context; and second, using established canons of construction, ask whether there is any clear indication that some permissible meaning other than

positive version of it.

Textualism in this positive sense is increasingly popular in federal courts, and perhaps even more so, in certain neo-conservative political-ideological circles in the United States.[3] This connection between statutory interpretation and politics should not be surprising. Views about statutory interpretation are partly views about the role of judges in making law and their authority in determining what the law is. To the extent that law matters to us—politically, morally, and otherwise—it matters a great deal who gets to determine what the law actually is. Textualists, like others, are rightly concerned about the close connection between the *how* and *who* questions—how judges determine what statutes mean significantly determines who gets to make the law. The intuitive idea is this: the more discretion or interpretative freedom judges have in statutory interpretation, the greater their role, personally and institutionally, in determining what the law is. And this is the upshot of textualism: textualists do not want judges to make the law.

This, at least, is the official doctrine, and it sounds very democratic. Lawmaking should be left to the legislature, textualists maintain, because it is a political business, and as such, it should be left to the elected representatives of the people. The judiciary is not a democratic institution, and thus it should not be allowed to usurp the power of making law by using various "liberal" or "creative" means of statutory interpretation.[4] But there is also an unofficial view, one that is more complex. In fact, one should suspect that there is some hidden story here since it is not evident why distrust of common law and the judiciary should be part of a neo-conservative political agenda. On the contrary, at least from a historical perspective, one might have expected that a distrust of judicial power

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the ordinary one applies. If not—and especially if a good reason for the ordinary meaning appears plain—we apply that ordinary meaning." Chisom v. Roemer, 501 U.S. 380, 404 (1991) (Scalia, J., dissenting).

3. I use the term "neo-conservative" in a rather loose fashion here, only to indicate the contemporary dominant strand in American conservative ideology. It is a difficult question, and one that I cannot answer here, how these new conservatives, largely in control of the government these days, differ from their traditional ancestors.

4. *See* Jane S. Schacter, *Metademocracy: The Changing Structure of Legitimacy in Statutory Interpretation*, 108 HARV. L. REV. 593, 597–99 (1995) (describing this rationale of textualism).

should come from liberals and progressive political movements, not from conservatives. After all, the judiciary is typically a rather conservative institution, hardly ever at the forefront of social radicalism. Why would conservatives like Justice Scalia, President Bush, and countless other neo-conservatives find themselves aligned with a rigid doctrine about separation of powers that originates in the social radicalism of the French Revolution? What is the source of this neo-conservative deep distrust of the judiciary in the United States?[5]

I believe that the underlying motivation of textualism derives from a neo-conservative conception of the regulatory state, much more so, anyway, than from a concern with principles of democracy and separation of powers. The upshot of this concern is the familiar libertarian ideal of the "minimal" state and its deep distrust of the "big government."[6] Essentially, the connection is this: textualism urges judges to interpret statutes and statutory regulations as literally as possible. Judges should apply the plain literal meaning of the statute to the case at hand. But, of course, this is deceptive. Judges typically need to interpret statutes—and cases get to higher courts—precisely because the meaning of the relevant statutory provision is not clear enough to yield a particular outcome (or, sometimes, because the literal meaning entails results that are plainly unjust or otherwise unacceptable). In other words, from the perspective of a

5. Is textualism just a reaction, albeit somewhat delayed, to the progressive liberalism of the Warren Court? Perhaps it is, but I doubt that this goes deep enough. This shallow political explanation does not fully explain the neo-conservative's particular focus on statutory interpretation. The legacy of the liberal Warren Court, to the extent that it still exists, is mostly in the constitutional domain, not in the field of statutory interpretation. Some commentators have argued that textualism is a reaction to the Hart and Sacks legal process theory, rather than a reaction to the Warren Court liberalism. *See, e.g.*, Nicholas S. Zeppos, *Justice Scalia's Textualism: The "New" Legal Process*, 12 CARDOZO L. REV. 1597, 1599 (1991). At an academic level, I think that this is right. But it still doesn't quite capture the politics of textualism and its conservative motivation.

6. This account of the motivation behind textualism is not entirely unofficial: Frank Easterbrook made it quite explicit in *Statutes' Domain*, 50 U. CHI. L. REV. 533, 549–50 (1983) ("Those who wrote and approved the Constitution thought that most social relations would be governed by private agreements, customs, and understandings, not resolved in the halls of government. . . . A rule declaring statutes inapplicable unless they plainly resolve or delegate the solution of the matter respects this position.").

theory of interpretation, just telling judges that a statutory provision means what it literally states is mostly quite unhelpful. Unless, that is, one also assumes a default rule, whereby unresolved interpretative issues ought to remain unresolved by judges. And this, I submit, is precisely the unofficial story of textualism: that unregulated disputes ought to remain unregulated, because regulation by the state, in any legal form, is very suspect to begin with. In other words, I will argue that textualists cannot be blind to the logical absurdity of their interpretative position. They must know perfectly well that difficult cases reach higher courts primarily because the language of the relevant statute is not clear enough to resolve the issues at hand. Their underlying political agenda, however, is to leave those unregulated issues as they find them. By advocating a theory of statutory interpretation that is preoccupied with literal meaning, and purportedly relies on bright-line rules or canons of statutory interpretation, textualism strives to effectuate a broader ideological agenda that seeks to reduce the state and its regulatory functions to the necessary minimum. The deep distrust of neo-conservatives is not really a distrust of judges, it is a distrust of regulation and state intervention.

I. ORDINARY MEANING & UNINTENDED CONSEQUENCES

The effect of textualism is most clearly present in the familiar types of cases where the literal meaning of a statutory regulation would lead to unacceptable results. These cases typically raise the problem of unintended consequences: the legislature enacts a statute without realizing that under a certain set of circumstances, a literal or straightforward application of the statute would lead to consequences that were neither intended nor, typically, would make much sense. A wonderful case in point is *United States v. Marshall*.[7] According to a law that sets mandatory punishment for various drug offenses, the weight of the drugs sold, defined by the statute in terms of "a mixture or substance containing a detectable amount of the relevant drug,"[8] triggers the mandatory minimums. As it turns out however, sellers distribute LSD on a particularly heavy carrier viz., typically sprayed

7. 908 F.2d 1312 (7th Cir. 1990) (en banc), *aff'd sub nom.* Chapman v. United States, 500 U.S. 453 (1991), *superseded by statute*, U.S. SENTENCING GUIDELINES MANUAL § 2D1.1 n.H (2000).

8. 21 U.S.C. §§ 841(b)(1)(A), (b)(1)(B)(v) (2000).

over paper or gelatin.[9] The defendants in this case sold relatively small amounts of LSD, but the weight of the mixture of LSD with its carrier substance triggered the mandatory minimum sentence.[10] Marshall, one of the defendants, sold fewer than 12,000 doses of LSD, but the court sentenced him to 20 years in prison.[11] As Judge Posner pointed out, however, to receive a comparable sentence, Marshall would have had to sell ten kilograms of heroin, more than a million doses(!); or in the case of cocaine, he would have had to sell fifty kilograms, or approximately 325,000 doses.[12] Judge Posner rightly noted that this must have been an unintended consequence: "Congress simply did not realize how LSD is sold."[13] And then he poses the relevant question here: "Well, what if anything can we judges do about this mess?"[14] The majority, headed by Judge Easterbrook, provided the standard Textualist answer: nothing at all. The meaning of "mixture of or substance containing a detectable amount" clearly applies, Easterbrook held, to the drug with the weight of its carrier, and not only to the pure drug.[15] To be sure, Judge Easterbrook did not deny that the legal consequence here is somewhat absurd; he simply did not think that it was his judicial responsibility to rectify it.[16] Indeed, this is what the debate is about: should judges clear up the mess created by poor legislative drafting? Textualists reply that they should not.[17]

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9. *Marshall*, 908 F.2d at 1315.

10. *Id.* In fact, the weight issue is even more absurd: the weight of the pure LSD is so light compared to the carrier that most of the weight for sentencing is the weight of the carrier, and the choice of the carrier is pretty much arbitrary. So, the weight is completely arbitrary, as it depends almost entirely on whether the LSD was distributed on sugar cane, or gelatin, or blotter paper. *See Chapman*, 500 U.S. at 458 n.2.

11. *Marshall*, 908 F.2d at 1314.

12. *Id.* at 1334 (Posner, J., dissenting).

13. *Id.* at 1333 (Posner, J., dissenting).

14. *Id.* at 1334 (Posner, J., dissenting).

15. *Id.* at 1317.

16. *See id.* at 1318, 1324–26. The Supreme Court agreed. *See* Chapman v. Untied States, 500 U.S. 453, 461–63 (1991).

17. There is a widespread debate about textualism's willingness, or unwillingness, to correct a scrivener's error. *See, e.g.*, John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2420, 2459 n.265 (2003). I will not deal with this particular debate here. To the extent that textualism is committed to ignore even such technical errors, my arguments in the text would be more forceful, and to the extent that textualism allows for an exception with

The argument supporting this stance has both a backward looking and a forward looking aspect. Textualism seems to maintain that if the legislature is unhappy with the particular judicial result, it can always rectify the situation by legislative amendments that may, if the legislature deems necessary, apply retroactively.[18] As to the forward looking argument, textualism advocates a kind of educational policy: the more the courts consistently apply textualism, the more legislators will realize that courts will not correct drafting errors, and thus lawmakers will become more vigilant and meticulous when drafting legislation.[19]

Both of these arguments raise several difficulties. The backward looking argument is particularly weak. First, it assumes that the legislature can find the time, resources, and political will to monitor and, if necessary, rectify judicial decisions whenever courts apply such unintended consequences. This is both unrealistic and morally questionable. It is unrealistic because legislative resources are very limited. Given the number of courts and the vast number of judicial decisions, it is naïve at best, if not deliberately deceptive, to assume that the legislature can correct every unintended consequence of a legislative act. Even when the information becomes available and the problem salient (which is not often the case), the legislature may lack the political will to interfere in judicial decisions and make the necessary amendments, especially if it requires retroactive application.[20]

More importantly, however, the textualist position is morally problematic. Litigation is not a theoretical exercise; there are particular parties to the dispute whose fates are at stake. Consider the case of Mr. Marshall. He ended up in prison at least a decade longer than he should have. The court effectively told him that if the legislature so wishes, it can amend the law retroactively and set it

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respect to a scrivener's error, its consistency may be in some doubt. *See, e.g.*, Philip P. Frickey, *Interpretive Regime Change*, 38 LOY. L.A. L. REV. 1971 (2005).

18. *See* Schacter, *supra* note 4, at 597-99.

19. Elizabeth Garrett, *Legal Scholarship in the Age of Legislation*, 34 TULSA L.J. 679, 685-86 (1999); Schacter, *supra* note 4, at 644-45.

20. In fact, the problem is even more troubling since there are some *legal* constraints on the ability of Congress to rectify such problems retroactively, some of them imposed by the court itself! *See, e.g.*, Landgraf v. Usi Film Prods., 511 U.S. 244, 264–66 (1994).

right for him. It is difficult to see how this can be morally justified. Nobody claimed that Marshall actually deserved this harsh sentence. Does it make moral sense to put the responsibility on the United States Congress to solve this by an act of retroactive legislation? That hardly seems fair.

But the main moral concern here is not fairness—it is the concern of using people only as a means to an end. A textualist strategy that puts the responsibility on the legislature to eliminate inequities resulting from poor legislative drafting actually amounts to using the particular litigants only as a means to an end, without due respect for their personhood and moral agency. It is a blunt violation of the famous Kantian principle that one should never treat another person as a means only, but also as an end in itself.[21]

I am not trying to suggest here that the Kantian principle is unproblematic or that its application is always as clear as we could have wished. But, at least at its core, it is one of the basic principles of humanist morality, and there are many clear cases of immorality in its violation. Consider, for example, the case of a nanny who deliberately neglects to feed the child in her care, in order to make a point to her employers that next time they should leave her with instructions about the food that the child likes. Surely, we would say, there must be other means for the nanny to make her point without using the suffering of the child as a means to an end. And, crucially, this remains the case even if the parents have neglected their own responsibility in leaving clear instructions for the nanny. Similarly, in the case of Marshall and his codefendants, they were used as a means to a political end, without respecting their personhood—that is, without respecting the principle that they ought to be punished according to the severity of their deeds.

And this brings us to the second issue: the forward looking argument. Some commentators have focused on the empirical aspects of this argument, claiming that textualism's working assumption—that Congress can be induced to be more meticulous in its legislative drafting—is problematic, at best, and most likely, unrealistic.[22] But even if we assume that these commentators are

21. IMMANUEL KANT, GROUNDWORK FOR THE METAPHYSICS OF MORALS 38 (Mary Gregor ed., 1998) (1785).

22. *See, e.g.*, Garrett, *supra* note 19, at 688 nn.41–42 (1999); Schacter, *supra* note 4, at 644, 645 n.280.

wrong, and textualism's educational project is empirically feasible, difficult moral-political questions remain.

First, there is a moral question about the role of the courts here: Why should it be the business of the courts to educate the legislature on how to draft statutes and enact laws? Is it because nobody else is there to do it? Surely that is false. Countless interest groups, watchdogs, lobbyists, the general press, and eventually, the public at large scrutinize legislators during campaigns and elections. Ample institutions are out there to tell the legislature how to do its job and how to improve it. I am not suggesting that all these institutions have an interest in particularly clear and unambiguous legislative drafting. But surely, clarity is only one of the virtues of good legislation. Legislation often has to reach a compromise between conflicting considerations, and then other institutions, like agencies and courts, should fill in the gaps. In any case, it is surely false to assume that the courts are the only institution that scrutinizes legislative drafting. Many other institutions fulfill a similar function, and they all have an important advantage over the courts: they do not need to sacrifice the interest of individuals in order to make their point.

Note that this question about the courts' role in educating the legislature is even more pressing when considered on textualism's own political grounds. If textualists are so concerned about respect for democratic procedures, it must be because they attach a high value to the respect we owe to the authority of legislative institutions. But one does not normally express respect for the authority of another by trying to educate the latter. In this respect, textualism displays a certain arrogance towards the legislature that is not easy to reconcile with its alleged respect for the authority of democratic institutions.[23]

Secondly, and more importantly, this educational project is at odds with the duty that courts owe to the legislature and thus, indirectly, to all of us. Courts have the precious task of applying the law and determining authoritatively what the law is in particular cases. In fulfilling this role, courts must assume a fiduciary duty to carry it out in good faith and to the best of their judgment. Consider

23. And this is particularly the case if the legislature's institutional ability to live up to the textualist ideal is very limited. *See* WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY & ELIZABETH GARRETT, CASES AND MATERIALS ON LEGISLATION 381–90 (3d ed. 2001).

this analogy with employment relations: an employer entrusts the employee with certain tasks. Of course, a good employer will give instructions and try to make it as clear as desirable under the circumstances what the employer expects the employee to do. But both parties know, as they should, that there is a limit to the detail and accuracy of such instructions. The expectation is that when the employee lacks explicit directions, he should use his own judgment and act in good faith to fulfill his tasks.[24] In short, we do not expect the employee to act like a textualist. Imagine yourself having to work with a textualist employee who is constantly pressuring you to give him the clearest instructions; and, when the instructions are not clear enough, he does nothing at all in order to induce you to be more precise in the future. My guess is that you would fire him. Textualist employees tend to lose their jobs very quickly, and rightly so, because they breach the duties that form an essential part of any employment relationship.

Textualists are bound to object that the courts do not work for the legislature. That is partly true, but not entirely. In a moral, political sense, to some extent courts do work for the legislature, and thus indirectly, for all of us. In the context of statutory interpretation, the courts are entrusted with an important task: to carry out the "instructions" of the legislature in applying the law to particular cases. Though not, of course, a straightforward employment relationship, such a task does carry with it a similar fiduciary-like duty to act in good faith and fulfill the responsibilities according to the agent's best judgment. In any case, I believe that the analogy holds in this crucial respect: just as employers expect employees to know that there is a limit to the instructions they can receive and, once on their own, they must use their best judgment in fulfilling their employment tasks, we must also expect the courts to know that there is a limit to the legislative instructions they can get. At some point, the courts must act like good employees when the instructions have run out; they must use their own judgment and solve the problem as best as they can.

To sum up, textualism's educational project, even if feasible, is

24. Note that the level of detail for such instructions typically depends on the relative expertise and seniority of the employee; high level employees are typically expected to act on their own without detailed instructions. After all, that is what they are paid to do.

morally unjustified. It should not be the business of the courts to enlighten the legislature on how to make laws or how to make them more precise. The moral obligation of the court is first and foremost to do justice to the litigants in front of them, and, to the extent their rulings have the force of binding precedent, the courts' duty is to make the law the best it can be (given the conventional constraints of the legal practice). Trying to teach the legislature how to make legislation better should not be the business of the courts, especially when it involves injustice to the litigating parties or when it entails bad law.

II. ORDINARY MEANING AND THE LIMITS OF LANGUAGE.

First year law students are taught that legal results often depend on the meaning of words and sentences in a statute. If a statute prescribes, to use a worn out example, that "No vehicles are allowed in the public parks," then, students are told, the law depends on what the word "vehicles" means: does it include, for instance, electric wheelchairs, roller skates, bicycles, etc.? But how can we determine whether the word "vehicle" means, among other things, bicycles or electric wheelchairs? Is it really a question about *the meaning of a word in English*? Textualists would have us believe that the answer is basically yes, and that judges have only to verify what words or linguistic expressions mean in the ordinary use of language. The result of this attitude (strangely shared by non-textualist judges as well) is that judges find themselves quarrelling over dictionary definitions of words, running word checks in literature or, sometimes, using sheer wit to convince us that their grasp of the English language is correct and thus mandates the legal result they seek. Allow me to demonstrate this using Justice Scalia's dissent in *Smith v. United States*.[25] In that case, the defendant exchanged a firearm for drugs in a barter deal.[26] Section 924(c)(1) mandates a sentence enhancement for any defendant who "during and in relation to any crime . . . uses . . . a firearm."[27] The majority held that section 924 applies, even if the defendant did not use the firearm as a weapon.[28] Scalia noted:

25. 508 U.S. 223 (1993).
26. *Id.* at 225–26.
27. *Id.* at 227–28.
28. *Id.* at 228–37.

> In the search for statutory meaning, we give nontechnical words and phrases their ordinary meaning. To use an instrumentality ordinarily means to use it for its intended purpose. When someone asks, "Do you use a cane?," he is not inquiring whether you have your grandfather's sliver-handled walking stick on display in the hall; he wants to know whether you *walk* with a cane. Similarly, to speak of "using a firearm" is to speak of using it for its distinctive purpose, *i.e.*, as a weapon.[29]

A noble result, perhaps, but the argument is a *non-sequitur*. The phrase "use an x" is ambiguous. To use an object can either mean "use" in a narrow sense, namely, for its intended purpose, or it can mean "use" in a broader sense, for whatever purpose context may allow. Consider another example: if somebody asks me, "Are you taking drugs?" the answer is both yes and no, depending on what you mean by "drugs." Yes, I regularly take prescription medicine. But no, I do not take illicit drugs such as marijuana or cocaine. This is a typical form of ambiguity, whereby a word or phrase can either be used in a narrow sense, or a broader one, depending on the context of its expression. Whether one uses an ambiguous term in a narrow or broad sense entirely depends on context. Consider Justice Scalia's example: suppose A tells B that he "used a cane." Is it obvious that A meant "use" in the narrow sense, such as using a cane for walking? That just cannot be determined without the contextual background. Consider the following conversation between A and B:

A: How did you break the window?

B: I used a cane.

Now we know that B did not walk with a cane, he used it to break the window; a perfectly sensible use of "use" (though perhaps not a very sensible deed).

We cannot resolve ambiguities by dictionary definitions or by any other means of verifying what words mean in a natural language. Natural languages are abundant with ambiguous terms, and we normally disambiguate particular utterances by relying on the knowledge of the relevant context. The question of whether we understand "using a firearm" in the narrow sense (using it as a weapon), or in the broader sense (using it for whatever crime related

29. *Id.* at 242 (Scalia, J., dissenting).

purpose), cannot be determined by a better grasp of what the word "use" means in English. In English it can mean either, depending on the context of its expression.[30]

Similar considerations apply to the problem of vagueness, perhaps even more evidently so. Most concept words we use in a natural language are vague. In the application of the word to concrete instances, there are bound to be borderline cases. Can we tell whether John, weighing 240 pounds is "obese"? Is John "tall" if he is 6 feet? And is he "bald" if he has 200 strands of hair on his head? The problem of borderline cases due to vagueness is that they are inquiry resistant. No amount of further information can determine whether John is really bald, or tall, or obese, etc.[31] But what if a legal decision depends on it? Judges should try to determine why does it depend on the relevant factor, and then they should strive to reach an adequate result on the merits of the case. An attempt to figure out what "tall" or "bald" really means in ordinary English can only reveal that these terms are vague and thus would necessarily have borderline cases. If you happen to face a borderline case, no further amount of knowledge of English can tell you how to classify such a case.

One might be tempted to reply that in such cases judges should rely on canons of statutory interpretation like, for example, *espressio unius* (expression of one thing suggests the exclusion of others), *noscitur a sociis* (terms in a series should be interpreted according to the surrounding terms) and such. But the assumption that application

30. In fairness to Justice Scalia, I should mention that he proposed another argument in his dissent that is much more sensible: he argued that if "using a firearm" is ambiguous in this case, *the rule of leniency* in criminal law requires courts to interpret the ambiguity in favor of the defendant. *Id.* at 246–47 (Scalia, J., dissenting). I am not suggesting that this is an appropriate application of the rule of leniency, only that the argument is much better. Notably, however, this line of reasoning undermines the first argument.

31. I should qualify this somewhat: According to one philosophical theory about vagueness, borderline cases are inquiry resistant only in an epistemic sense. *See* TIMOTHY WILLIAMSON, VAGUENESS 3 (1994). Such philosophers claim that there is a truth of the matter about borderline cases, even if those truths are not knowable. *See id.* at 212-15. This so called epistemic theory of vagueness, however, is very controversial, and in any case, hardly affects my argument in the text. For all practical purposes, it remains true that borderline cases are inquiry resistant, even if it is true that in some deep metaphysical sense there is a truth of the matter about borderline cases. *See id.*

of canons of interpretation would solve the problems left open by linguistic indeterminacies is too naïve to be taken seriously. Let me state the obvious: First, canons of statutory interpretation are formulated in a natural language (impressive Latin phraseology notwithstanding), and thus all the indeterminacies of natural language would plague them as well. Second, canons of statutory interpretation often conflict—and the more such canons you employ, the more likely it is that they will conflict.[32] One canon stipulates, for example, that later statutory provisions ought to prevail over earlier ones; and another canon dictates that specific provisions should prevail over general ones. What are we to do if the later provision is more general?[33]

But of course the problem goes deeper than this. Vagueness, ambiguity, and other linguistic indeterminacies cannot be eliminated. Consider vagueness, for example. In some cases, particular borderline cases can be legally resolved, as it were. The law could stipulate that concept X, under circumstances C, would include (or exclude) borderline cases a, b, and c. But then a, b, and c would have their own borderline cases, so the vagueness of X would not be eliminated, or even reduced; it would only be shifted to other potential cases.[34] It is true that in some limited areas, the law purports to have a margin of safety, phasing out borderline cases as if they are "no" cases. A good example is the *rule of leniency* in criminal law, which basically prescribes that unless an action falls well within the meaning of the offense, it should be regarded as if it does not. This

32. One recent casebook counted over 120 canons allegedly used by the Supreme Court during the period of 1986–1993. *See* ESKRIDGE, FRICKEY, & GARRETT, *supra* note 23, app. B.

33. To be sure, I am not claiming that canons of statutory interpretation are completely useless. They may be very useful in numerous contexts for various specific purposes of statutory interpretation. My only claim in the text is that it is mistaken to believe that such canons can generally solve the deep problems that stem from the indeterminacy of language. There is nothing new about this observation—it has been made dozens of times before. *See, e.g.*, Symposium, *A Reevaluation of the Canons of Statutory Interpretation*, 45 VAND. L. REV. 529 (1992).

34. Here is an example: Consider the "no vehicles in the park" rule. Suppose the legislature stipulates that for the purposes of this rule, "vehicle" will not include (*inter alia*) "bicycles." So then the question might arise whether "bicycles" includes, for example, tricycles, bicycles with a small electric engine, etc.

is a noble attempt to phase out borderline cases, but as a general strategy, it cannot work. Even if the law employs a generous margin of safety, we are still left with second-order vagueness viz.,—vagueness about where the borderline cases begin.[35]

To be sure, I am not claiming that the meaning of legal rules does not profoundly depend on the semantics of the relevant natural language. Of course it does. We can only understand the law because we understand the language. Furthermore, I have long argued that there are necessarily "easy cases" in law, cases in which there is no doubt that the law applies, or not, to the particular case at hand simply because it is what the relevant linguistic expression means.[36] Had Mr. Smith pointed the loaded gun to the face of the drug dealer and demanded the drugs by threatening to shoot him, there would have been no doubt that he "used a firearm" according to section 924(c)(1). This would have been an "easy" case, precisely because such a use of a gun is exactly what "using a firearm" means. The point is, however, that such easy cases rarely get to be litigated, especially in higher courts. Litigation typically reaches appellate courts in "hard cases," where statutory language is indeterminate due to ambiguity, vagueness, or other semantic or syntactic indeterminacies.[37] And then it would be absurd to say that in such cases the law should depend on what words and sentences mean; there is nothing one can further inquire about the meaning of such expressions in English. Courts cannot resolve ambiguities, or borderline cases due to vagueness, by a better grasp of natural language. There is nothing more about language one can possibly know that would resolve such cases on the basis of "ordinary meaning," to use Justice Scalia's expression.

One might suspect that this is too obvious to have been overlooked by textualists. This I am happy to concede. Textualism

35. On the idea that vagueness in law cannot be eliminated, see TIMOTHY A.O. ENDICOTT, VAGUENESS IN LAW 185–90 (2000); *see also* Andrei Marmor, *Should Like Cases be Treated Alike?*, *in* 11 LEGAL THEORY (2005), 37-48

36. ANDREI MARMOR, INTERPRETATION AND LEGAL THEORY ch. 2, 7 (2d ed. 2005).

37. To be sure, I do not intend to claim here that all "hard cases" in statutory interpretation necessarily derive from linguistic indeterminacies. There are many possible reasons for the need to interpret statutory law, besides those that derive from language. Conflict between different statutory provisions, or between them and other parts of the law, would be another example.

is not a theory about the semantics of statutory language; as such it would have been too obviously mistaken. The preoccupation with "ordinary meaning" reflects a political stance, one which is mostly concerned with the desirable limits of statutory regulation. The more courts confine judicial interpretation of statutes to their "ordinary meanings," (real or imagined) the more courts constrain the legislature's ability to achieve broad regulatory policies. In any complex organization, broad policy changes can only be accomplished if those who determine the policy and those who are supposed to carry it out act in concert and share the spirit of the general goals to be advanced. Imagine, for example, a large corporation that strives to implement a new policy. It is difficult to imagine how the corporation could implement the new policy if the mid and low-level executives required very detailed instructions for their every move, and then tried to follow those instructions to the letter in a textualist fashion. Textualism is motivated precisely by denying the legislature the spirit of cooperation that is necessary to implement broad regulatory policies.[38] Vulgar semantics is just one more casualty in this war against "big government."

III. CONCLUSION.

You may think that I have been unfair to textualism. After all, there is nothing new about the phenomenon; courts have always acted in an ideological fashion, often driven by ideological and political commitments of the prevailing judiciary. Liberal courts strove to advance a liberal political agenda, and now conservative courts work to advance their own agenda in a different direction. The fact that every judicial political agenda requires adjustments of theories of statutory interpretation is hardly news.

I certainly agree with both of these observations. The problem is that textualism is actually different from previous theories, in two respects. First, as I have tried to argue here, textualism involves an impoverished theory of interpretation, one which simply ignores the

38. I realize that there may be exceptions to this. Sometimes the cooperation that the legislature needs is actually a literalist attitude. For instance, if the legislature is forced to enact a very uncomfortable compromise, it may actually rely on the courts to interpret the compromise as literally as possible. *See* Easterbrook, *supra* note 6, at 540. But these are exceptional cases, and they do not undermine the general point.

obvious complexities of language. Second, and more troubling from a moral point of view, textualism differs from previous politically-driven theories in its ideological opacity.

Admittedly, courts are often in a very delicate political situation. Higher courts typically have more political power than people assume. Courts determine what the law is, often prevailing over the democratically-elected legislature. This disparity between actual power and public perception has always put considerable pressure on the courts to conceal some of the power they actually have, typically by presenting judge-made law (that is often inevitable) as an act of law application. This is understandable and not necessarily a bad thing. The problem I see with textualism is that its theory of statutory interpretation is ideologically opaque, not to say straightforwardly deceptive. With very few exceptions, its adherents present textualism as an interpretative practice that respects the authority of legislatures, and that respects democracy and the democratic division of labor between the courts and the legislature. But, as I have tried to show here, textualism does the exact opposite. The whole point of textualism is to undermine the ability of the legislature to pursue broad regulatory goals. When you make a point of strictly abiding by the letter of the directives, you actually behave in an uncooperative fashion. Authorities do not want to be understood literally. Authorities purport to govern, and complex, large-scale governance requires cooperation in the spirit of its goals, not a strict adherence to the letter of its directives.

But now you may wonder, why do we need this ideological opacity at all? Why not make the ideological goal explicit, especially now, when the executive branch and the majority of Congress largely share this textualist ideology anyway? I venture to guess that the answer resides in the following: one of the ironies of neo-conservativism is that in the complex world we live in, it takes a substantial amount of legal regulation to implement its anti-regulatory ideology. This is true mostly because governance is no longer the exclusive domain of a central administration that sits in Washington and dictates to citizens across the country how to live. Governance has long spread to low-level political institutions, local authorities and bureaucracies, and grassroots organizations that often utilize the courts and these entities generate a huge amount of legal regulation. It is simply no longer the case (if it ever has been) that a

libertarian government can avoid excessive regulation by abstention, as it were. Libertarians find themselves in the uncomfortable position whereby they need to use regulation by a central government to curb the regulatory regime of local authorities and numerous agencies.[39]

If I am right about this, it would seem that textualism is bound to fail on its own terms. But this is not necessarily the case. Nothing prevents the courts from acting in a way that is theoretically incoherent. Textualism is a tool, and it can be used selectively, only when it serves an ideological purpose. But then, when you rely on an incoherent theory, opacity is the price you have to pay for it; an incoherent theory is difficult to make transparent. In other words, neo-conservatives cannot easily proclaim that their theory of statutory interpretation is simply designed to curb the regulatory means of government because they know that they often need that regulatory mechanism to curb regulation that originates elsewhere. So I do not think that textualism is bound to fail. But on its own ideological grounds, textualism is bound to be a flip-flop theory, one that cannot be applied consistently across the board. Textualism is thus inherently deceptive and consequently immoral.

39. Not to speak of the conservative agenda to dismantle the welfare state that takes a lot of legislating.