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INTERPRETIVE-REGIME CHANGE

Philip P. Frickey*

Dissenting in *Chisom v. Roemer*, Justice Scalia provided the clearest judicial exposition of his approach to statutory interpretation:

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 the ordinary one applies. If not—and especially if a good reason for the ordinary meaning appears plain—we apply that ordinary meaning.²

Justice Scalia’s suggestion of a well-settled approach to statutory interpretation was incorrect, as he surely knew. A half-century ago, Henry Hart and Albert Sacks bluntly denied any such consensus,³ and their conclusion remains true today.⁴ Indeed, it

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2. *Id.* at 404 (Scalia, J., dissenting).
remains even truer today, in large part, because of Justice Scalia and his intellectual cousins.

Developing a theory that has been aptly labeled "the new textualism," Justice Scalia has proposed moving away from a number of practices that federal judges have routinely undertaken for the past generation in interpreting statutes. For example, since the New Deal, the Supreme Court has freely consulted legislative history in informing itself about the congressional intent surrounding a statute. Scalia and others have argued that this is not only a bad idea, it is even arguably unconstitutional because it subverts the requirements of bicameralism and presentment through which Congress must express its intent. Many of the Court's prominent opinions have taken a purposive approach to statutory interpretation, moving away from first-best textual meaning so that the statute achieves the goals envisioned by Congress. Scalia has contended that this constitutes a reprehensible rewriting of statutes contrary to constitutional structure and the ideal of judicial restraint.

Moreover, some of Scalia's compatriots would go even beyond where he has seen fit to tread. For example, Scalia has been willing to apply the absurd-result exception to textual meaning. In contrast, Professor John Manning, probably the leading scholarly textualist, would abolish the absurd-result exception as another too-malleable tool available for judicial rewriting of statutes.

7. See, e.g., John F. Manning, Textualism as a Nondelegation Doctrine, 97 COLUM. L. Rev. 673, 674–75 (1997); Scalia, supra note 3, at 29–37.
8. Perhaps the most visible, and controversial, opinion of statutory interpretation in the modern era is United Steelworkers v. Weber, 443 U.S. 193 (1979), holding that despite the literal meaning of Title VII, an employer may use a racial classification in an affirmative-action plan because doing so furthers the purpose of the statute.
10. See, e.g., Green v. Bock Laundry Mach. Co., 490 U.S. 504, 527–30 (1989) (Scalia, J., concurring in the judgment) (applying absurd-result exception to plain meaning with the limitation that the rewriting of the statute "does least violence to the text").
Moreover, when writing in a scholarly rather than judicial venue, Scalia himself has expressed strong doubts about most of the policy-based canons of statutory interpretation, even though in his *Chisom* dissent he seems to view them as essential parts of his enterprise. The new textualism's likelihood of success remains uncertain at best. Currently, there is only one other disciple on the Supreme Court, Justice Thomas. Additionally, the Court has squarely rejected the contention that it should have an exclusionary rule concerning the use of legislative history in statutory interpretation. Thus, the effect of the new textualism on the Court has been more subtle. The Court has tempered its use of legislative history and purposive interpretation, without completely abandoning them.

To be sure, there are influential lower-court federal judges—most prominently, Judge Easterbrook—who have embraced the new textualism. Moreover, in the academy, Professor Manning and a few others, such as Professor John Nagle, have aligned with the cause and contributed important scholarship. Although academe likely remains in the hands of soft-headed antiformalists for the foreseeable future, it is harder to foresee the evolution of the federal judiciary. For now, however, the new textualism tends to exist in the occasional majority opinion by Scalia or Thomas, in the relatively infrequent judicial interchange between lower-court judges like Easterbrook and their more antiformalist judicial colleagues, and in law review articles.

Despite nearly two decades of textualist assault, a longstanding cluster of eclectic interpretive practices—a balancing of textual, institutional, and purposive considerations—seems to have re-

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13. See supra note 2 and accompanying text.
14. See, e.g., Frickey, supra note 4, at 205.
17. See, e.g., Frickey, supra note 4, at 202.
mained largely intact. However, this pragmatic approach—the current "interpretive regime,"21 if you will—will undoubtedly be under continued pressure from textualism. In this essay, I consider some of the barriers that textualism will encounter as its supporters continue their attempts to implement the approach. I suggest some theoretical, doctrinal, and practical problems that could bedevil even the most committed believer in interpretive-regime change.

I. THE PROBLEM WITH PRECEDENT: AN ILLUSTRATION

*Chisom v. Roemer*,22 the case from which I quoted Scalia's textualist methodology, provides a useful place to begin the analysis. The case concerned Section 2 of the Voting Rights Act, which outlaws a state or local electoral process that "results in a denial or abridgement of the right . . . to vote on account of race or color."23 The statute goes on to explain that a violation "is established" if members of the protected class "have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice."24 *Chisom* turned on whether this language covers the election of state supreme court judges—i.e., are judges "representatives"?25

For Scalia, the evident answer is that the language does not cover judicial elections because elected judges are not "representatives." Applying his textualist approach, Scalia turned to the dictionary in concluding that "[t]here is little doubt that the ordinary meaning of 'representatives' does not include judges."26 He explained that "the word 'representative' connotes one who is not only elected by the people, but who also, at a minimum, acts on behalf of the people."27 In contrast, "the judge represents the Law—which

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24. Id.
25. I simplify here. It was conceded that judicial elections were subject to the first clause of the last quoted language concerning participation in the political process. The question was whether the second clause, involving electing "representatives," also reached such elections.
27. Id.
often requires him to rule against the People."  

Justice Stevens’s majority opinion rejected this conclusion because it was inconsistent with the broad, purposive interpretive methodology used in earlier Voting Rights Act cases. Consider this passage:


Justice Scalia responded that “Section 2 of the Voting Rights Act...is not some all-purpose weapon for well-intentioned judges to wield as they please in the battle against discrimination. It is a statute.”  

Note that Scalia did not—indeed, could not—deny the language quoted from earlier cases. Instead, he suggested that the language simply has no binding force on the Court.

Is this consistent with the doctrine of precedent? As I shall explain, strictly speaking, the answer is yes. But it is in great tension with the practices of judges and lawyers.

The place to start is with the precedent that Justice Stevens strongly relied upon when interpreting the Voting Rights Act as broadly as possible in combating racial discrimination in elections. *Allen v. State Board of Elections* is not only the first important statutory interpretation case decided under the statute, it is arguably the most important one. It arose just four years after Congress adopted the 1965 statute, long before the 1982 amendments that transformed section 2 into an important vehicle for attacking existing electoral processes that had discriminatory effects. Among other important holdings in his *Allen* majority opinion, Chief Justice Warren concluded that there was an implied private right of action for the enforcement of section 5 of the Act, which prohibits jurisdictions covered by that provision from changing electoral

28. *Id.*  
29. *Id.* at 403.  
30. *Id.* at 404 (Scalia, J., dissenting).  
processes without first obtaining federal administrative or judicial preclearance.\textsuperscript{32} Without private enforcement, the statute would likely have been far less successful in transforming racial politics in the South. Based on the "weight of the legislative history and an analysis of the basic purposes of the Act,"\textsuperscript{33} the Court in \textit{Allen} also held that preclearance applied to "any state enactment which altered the election law of a covered State in even a minor way."\textsuperscript{34} The Court supported this holding in part by understanding the legislative and drafting history of the statute as "[i]ndicative of an intention to give the Act the broadest possible scope."\textsuperscript{35}

Technically speaking, the principle of stare decisis applies only to the holdings in \textit{Allen}. In the context of statutory interpretation, the cases say this presumption of continuing validity is extremely strong.\textsuperscript{36} Thus, it is very unlikely that the Supreme Court will ever revisit the holdings in \textit{Allen} in a serious way. This remains so, even though, for example, the Court's approach to the implied-cause-of-action issue has changed dramatically, such that had \textit{Allen} been litigated today, the outcome on that question might well be different.\textsuperscript{37}

Everything else in \textit{Allen} is dictum. Thus, the very use of legislative history and purposivism in the interpretive process, much less the statements concerning how courts should give the statute "the broadest possible scope," are not binding on the Supreme Court or even on lower courts. Nonetheless, it is undeniable that the dictum in \textit{Allen} is potentially important, as illustrated by considering several examples of ever-broadening scope.

First, consider the likely effect of the dictum on later cases involving section 5 of the Voting Rights Act, the provision interpreted in \textit{Allen}. Lower courts, attorneys, and anyone else interested in that provision will read \textit{Allen} not simply for its

\textsuperscript{32} See id. at 555.
\textsuperscript{33} Id. at 569.
\textsuperscript{34} Id. at 566.
\textsuperscript{35} Id. at 566-67.
\textsuperscript{37} See, e.g., Touche Ross & Co. v. Redlington, 442 U.S. 560, 568 (1979) (moving away from free implication of private rights of action whenever they would serve statutory purposes and focusing instead on specific indications of congressional intent).
holdings, but also for its attitude. *Allen* would likely provide the paradigmatic example of what interpreting section 5 of the Voting Rights Act is supposed to involve. And so it is unsurprising that, in later section 5 cases, both the Supreme Court and lower courts have quoted the expansive language and used it to structure the analysis of other section 5 questions.38

Second, and a bit more broadly, consider the likely effect of the language in *Allen* in later cases involving other provisions of the Voting Rights Act. *Chisom* is a perfect example. *Chisom* involved section 2 of the statute as amended in 1982, thirteen years after the Supreme Court decided *Allen*. Thus, the Court in *Allen* could not have directly contemplated that its attitude about the statute would influence a provision not yet in meaningful existence.39 Yet the Court in *Chisom* fully embraced the *Allen* exuberance. Justice Stevens’s majority opinion explained why the *Allen* attitude actually had a double-barreled significance—as expressing a penumbral aspect of the statute from the start and as embodying an understanding of its nature upon which Congress likely relied in adopting the 1982 amendment. By returning to a passage already quoted, but expanding upon it a bit, we can see how Stevens’s opinion weaves together the congressional and judicial work concerning the statute into a coherent, purposive pattern:

Congress enacted the Voting Rights Act of 1965 for the broad remedial purpose of “rid[ding] the country of racial discrimination in voting.” [*South Carolina v. Katzenbach*, 383 U.S. 301, 315 (1966).] In [*Allen*], we said that the Act should be interpreted in a manner that provides “the broadest possible scope” in combating racial discrimination. Congress amended the Act in 1982 in order to relieve plaintiffs of the burden of proving discriminatory intent, after a plurality of this Court had concluded that the original Act, like the Fifteenth Amendment, contained such a requirement. See *Mobile v. Bolden*, 446 U.S. 55 (1980). Thus, Congress made clear that a violation of § 2 could be

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39. Section 2 was in the statute from its inception, but it had no independent significance before the 1982 amendment. See *Mobile v. Bolden*, 446 U.S. 55 (1980) (stating that § 2 simply mirrors the Fifteenth Amendment).
established by proof of discriminatory results alone. It is difficult to believe that Congress, in an express effort to broaden the protection afforded by the Voting Rights Act, withdrew, without comment, an important category of elections from that protection.  

Thus, as Stevens understood it, a shared congressional and judicial understanding had developed concerning the ongoing application of the Voting Rights Act. This attitude is one that Congress presumably understood and relied upon when it amended the statute in 1982, and one that remains vital to the judicial interpretation of the statute. For Stevens, none of this is binding in the strong sense of legal formalism. Instead, everything is situated, persuasive, and largely entrenched by the pragmatic, repeat-game partnership of the legislature and the judiciary in governing the country. 

And so, of course, it was perfectly legitimate for Justice Scalia, in his dissent, to condemn the majority for "transform[ing] the meaning of § 2 . . . because it does not fit the Court's conception of what Congress must have had in mind." No rule of law or judicial custom stood in the way of his uttering a further complaint: 

When we adopt a method that psychoanalyzes Congress rather than reads its laws, when we employ a tinkerer's toolbox, we do great harm. Not only do we reach the wrong result with respect to the statute at hand, but we poison the well of future legislation, depriving legislators of the assurance that ordinary terms, used in an ordinary context, will be given a predictable meaning. Our highest responsibility in the field of statutory construction is to read the laws in a consistent way, giving Congress a sure means by which it may work the people's will. We have ignored that responsibility today. 

Nor, of course, did any rule of law or custom prevent a majority of his colleagues from disagreeing with him about the outcome of the case or the path chosen to get there. 

As one encounters disputes more remote from the settings of

41. Id. at 417 (Scalia, J., dissenting).  
42. Id.
Allen and Chisom, one would expect that the gravitational pull of the interpretive regime applied to the Voting Rights Act would gradually lose force. Take, for example, the question whether the “interpretation with attitude” approach should apply to the construction of other civil rights statutes. There is no question that the Supreme Court has sometimes viewed statutes like Title VII of the 1964 Civil Rights Act through a similar attitudinal lens. But it would be somewhat surprising for those decisions to put much weight on cases like Allen or Chisom, or even to cite them. Title VII has its own local judicial knowledge, with a much greater gravitational impact.

As an illustration, consider a case that the Supreme Court decided in the same term as Chisom. West Virginia University Hospitals, Inc. v. Casey involved 42 U.S.C. § 1988, the civil rights attorney’s fee-shifting statute. Section 1988 provides that prevailing plaintiffs in civil rights cases may recover “a reasonable attorney’s fee.” The issue in Casey was whether the plaintiff could recover amounts paid to experts. Prior to Casey, in a leading lower court decision, Judge Posner took guidance from earlier Supreme Court decisions taking a purposive approach to § 1988. He concluded that the award of expert fees was consistent with the statute’s essential purpose of making prevailing civil rights plaintiffs “whole” and with an imaginative reconstruction of what the enacting Congress would have wished.

However, in Casey this purposive approach garnered the support of only three Justices. Instead, Justice Scalia’s majority opinion relied upon a “whole code” textualist approach. Some federal fee-shifting statutes refer only to attorney’s fees, while others contain targeted language authorizing the recovery of fees for attorneys and

43. See, e.g., Griggs v. Duke Power Co., 401 U.S. 424 (1971) (concluding that the generally worded prohibition on discrimination in employment forbade not just intentional discrimination, but the use of facially neutral criteria that have a disparate impact upon a protected class).
44. See id. (failing to cite Allen v. State Bd. of Elections, 393 U.S. 544 (1969)).
47. Id.
49. See Friedrich v. Chicago, 888 F.2d 511, 517–19 (7th Cir. 1989).
50. See Casey, 499 U.S. at 103–16 (Stevens, J., joined by Marshall & Blackmun, JJ., dissenting).
Thus, Justice Scalia concluded that holding attorney’s fees to include expert fees would render “dozens of statutes referring to the two separately an inexplicable exercise in redundancy.”

Taken together, Chisom and Casey illustrate many of the barriers to interpretive-regime change. Sitting side by side, they seem hopelessly inconsistent in both the method of statutory interpretation in general and the approach to be undertaken with civil rights statutes in particular.

In these cases, three groups of Justices emerged. Justice Stevens (author of Chisom) dissented in Casey, and Justices Marshall and Blackmun, who also joined the majority opinion in Chisom, joined him. “The Stevens Three” took consistent purposivist approaches to the interpretation of civil rights statutes that the Court had earlier treated with that sort of attitude. As noted, Justice Scalia dissented in Chisom and was joined by Chief Justice Rehnquist and Justice Kennedy. These three Justices were in the majority in Casey. “The Scalia Three” took consistent textualist stands.

But what of the three Justices—White, O’Connor, and Souter—who silently joined the majority opinions in both cases? The best explanation for their votes is that they were not motivated by any rigid theory of statutory interpretation. Instead, it seems that their votes are best explained by a balancing process in which text, legislative intent, purpose, and policy are all considered eclectically. For them, the inherited, embedded practice of statutory interpretation, atheoretical as it might seem, was paramount to overarching attempts to impose coherence.

Although it cannot be conclusively demonstrated empirically,
believe that the views of the Justices in the middle, though arguably muddled, represent the center of gravity in the federal and state courts. Illustratively, Chisom has not prevented later Courts from taking narrow approaches to the Voting Rights Act.\(^5\) If an interpretive regime is difficult to entrench with respect to particular statutes, it is even less likely to take hold for particular categories of statutes (here, civil rights statutes). It follows that such a regime is extremely unlikely to create a broad seismic shift in statutory interpretation.

This is not to say simply that the more things change, the more they remain the same. The new textualism has not overtaken older approaches, but it has subtly shifted those approaches. The Court relies less on legislative history today than it did before Justice Scalia arrived, and it cites dictionaries more frequently.\(^6\) Moreover, no good advocate before the Court today would focus an argument almost exclusively on the legislative history (as many good advocates did a generation ago).\(^5\) In a sense, the Court has said that while textualism is not a good all-embracing theory, it does make some good points.

II. THE PROBLEM WITH TRANSPARENCY AND TRANSITION

Any interpretive regime worthy of respect should provide transparency. The basic idea is that, from the cluster of plausible but somewhat inconsistent approaches, the highest appellate court should develop a predictable and settled methodology. If the regime’s jurisprudence is transparent to the legislature, legislative staff should be able to draft statutes so that legislators can carry out their related business. For example, legislators can develop legislative history with a reasonable degree of certainty about its likely judicial reception down the road. Indeed, for Justice Scalia, transparency in interpretive method is supposedly the fundamental idea. Recall that factors are routinely taken into account in judicial opinions involving statutory interpretation).


\(^{56}\) For an example of the abandoned strategy, note that the briefs in the famous Weber affirmative action case focused almost exclusively on the legislative history, not on statutory text. See Philip P. Frickey, Wisdom on Weber, 74 Tul. L. Rev. 1169, 1178 (2000).

\(^{57}\) See id.
in his *Chisom* dissent he stated: "Our highest responsibility in the field of statutory construction is to read the laws in a consistent way, giving Congress a sure means by which it may work the people's will."\(^{58}\) A corollary is that the method must be sufficiently transparent so that courts can predictably follow it as well.

In this light, there are significant transition costs associated with interpretive-regime change. Obviously, even the most competent legislature can only accommodate an interpretive regime that is transparent and entrenched at the time the legislature acts. From the 1940's\(^ {59}\) until at least the late 1980's,\(^ {60}\) Congress could rely on the federal courts' receptivity to legislative intent expressed in what the courts had viewed as the more authoritative and reliable sources of legislative history—primarily, committee reports and statements of officials actively involved in the legislative effort.\(^ {61}\) Ignoring the legislative history of § 1988, as Justice Scalia did in *Casey*, violated the interpretive regime that had been in place in 1976, when Congress adopted the fee-shifting statute. Justice Stevens was correct when he stated in his *Casey* dissent that Congress would have expected § 1988 to be interpreted in light of its text, purpose, and legislative history, not in light of how its text, standing alone, cohered with text on similar subject matter scattered throughout the United States Code.\(^ {62}\)

Justice Scalia's dissent in *Chisom* presents an even more dramatic challenge to an established interpretive regime. Ignoring the legislative history of the Voting Rights Act (the initial version, adopted in 1965, and the versions as amended in 1970, 1975, and 1982), as Scalia advocated in the *Chisom* case, would have done violence to every expectation Congress had in each round of legislation. Indeed, as Justice Stevens suggested in *Chisom*, when

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59. *See supra* notes 6–8 and accompanying text.
Congress "broadened the protection afforded by the [statute]," it was writing against a backdrop of judicial decisions like Allen, which could only be read as signalling that courts would interpret the statute "in a manner that provides 'the broadest possible scope' in combating racial discrimination." Although there is no way to be certain, the extreme degree to which this purposive interpretive regime was tied to the Voting Rights Act may well have helped persuade the centrist Justices to join Stevens rather than Scalia. The Voting Rights Act is widely understood to be the most effective civil rights statute adopted by Congress—a truly transformative measure that destroyed much of the de facto remnants of Jim Crow laws by promoting democratic political empowerment. It comes as no great surprise, then, that even centrist Justices seem to approach it with more than ordinary enthusiasm.

Justice Scalia has sometimes been somewhat sensitive to these problems of transition and transparency. For example, in Franklin v. Gwinnett County Public Schools, he wrote separately to conclude that his general aversion to implied rights of action should give way in a circumstance in which Congress had acted against a clear precedential backdrop where such rights were present. This approach is consistent with a basic notion of textualism—that a statute be interpreted in light of "the conventions in effect at the time of a statute's enactment." He did not explain, however, why he abandoned this approach in a later case involving implied causes of action. In any event, without some sensible approach to implementation in light of the concerns of transition and transparency, imposing the new textualism entrenches one interpretive regime at the cost of vitiating earlier reliance on its predecessor. Why the rule of law is being promoted, rather than undermined, by such change is unclear.

An excellent example of the institutional costs of regime change in the context of another civil rights statute is Dellmuth v. Muth. In

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63. 501 U.S. at 404.
64. Id. at 403 (quoting Allen v. State Bd. of Elections, 393 U.S. 544, 567 (1969)).
66. Id. at 77–78.
67. Manning, supra note 11, at 2474 n.318.
1975, Congress enacted the Education of the Handicapped Act ("EHA"), requiring local school systems to provide a free public education to disabled children. The statute provided an express grant of federal judicial jurisdiction to hear cases by dissatisfied parents, and the legislative history made clear that such private parties should be able to sue state governments. Under the precedent of the era, the statute would have most likely sufficed as a valid congressional abrogation of the state's sovereign immunity to suit in federal court under the Eleventh Amendment.

Then, in 1985, in Atascadero State Hospital v. Scanlon, the Court abandoned the jurisdictional-grant-plus-clear-legislative-history approach, replacing it with a stringent "clear statement rule." Under Atascadero, a federal statute abrogates the states' Eleventh Amendment immunity only when Congress has made "its intention unmistakably clear in the language of the statute." Four years later, in Dellmuth, the Court applied the new clear statement rule to the EHA, holding that it had not abrogated Eleventh Amendment immunity. Adding institutional insult to injury, the Court in Dellmuth pointed to a 1986 amendment where Congress, in response to Atascadero, clearly abrogated Eleventh Amendment immunity for the EHA and other statutes. The Court did so as an illustration that Congress knows how to abrogate when it wishes to do so! Justice Scalia silently joined the majority opinion in Dellmuth.

Transition and transparency are vitally important not only to Congress, but also to the lower courts. One vivid example in which the new textualism did not overcome these hurdles is Robinson v. Shell Oil Co. In that case, after Shell Oil discharged Robinson, he

75. 473 U.S. at 242.
77. Id. at 231–32.
78. 519 U.S. 337 (1997), rev’g 70 F.3d 325 (4th Cir. 1995) (en banc).
filed a complaint with the Equal Employment Opportunity Commission contending that his firing violated Title VII of the Civil Rights Act of 1964\(^79\) because it was racially motivated.\(^80\) At that point, Shell Oil, supposedly in retaliation to Robinson's filing of the complaint, gave negative job references to potential new employers.\(^81\) Robinson sued under Title VII's anti-retaliation provision, which makes it unlawful "for an employer to discriminate against any of his employees or applicants for employment" who took advantage of the statute's protections.\(^82\) A majority of the Fourth Circuit, sitting en banc, held that Robinson could obtain no relief, on the ground that the alleged retaliation was not against an "employee" or an "applicant for employment," but instead against a former employee.\(^83\) The opinion tellingly noted that Title VII defines "employee" as "an individual employed by an employer" and determined that Robinson did not easily fit within that definition when the alleged retaliation occurred.\(^85\) The judges acknowledged that the result was odd from a policy standpoint and inconsistent with a broad, purposive understanding of Title VII, but concluded that the statutory text compelled their result.\(^86\)

To my insufficiently indoctrinated eye, this approach struck me as true textualism. The unanimous Supreme Court, however, disagreed and reversed the Fourth Circuit decision.\(^87\) Justice Thomas, of all people, wrote the opinion.\(^88\) With a straight face, Thomas found the statute ambiguous.\(^89\) "[A]n individual employed by an employer," he said, could mean "is employed..." or "was employed..."\(^90\) Finding himself free to roam beyond textual confinement, Thomas concluded that, in light of the remedial purposes

\(^{80}\) Robinson, 519 U.S. at 339.
\(^{81}\) Id.
\(^{83}\) See Robinson v. Shell Oil Co., 70 F.3d 325, 332 (4th Cir. 1995) (en banc).
\(^{84}\) Id. at 329 (quoting 42 U.S.C.A. § 2000e(f) (West 1994)).
\(^{85}\) Id. at 330.
\(^{86}\) See id. at 331–32.
\(^{88}\) Id. at 338.
\(^{89}\) See id. at 341.
\(^{90}\) Id. at 342.
of Title VII, applying the anti-retaliation provision to former as well as current employees was appropriate. Justice Scalia, of all people, silently joined this opinion.

I’m confused. I would have thought the ordinary meaning of the anti-retaliation provision—step 1 in Justice Scalia’s formulation for textualism—limits the category of “employees” to current employees and applicants for employment, thus excluding former employees. As someone not significantly confined by ordinary meaning, I would cheerfully trump that source of interpretive information by consulting the purpose of Title VII, which in my view easily outweighs the importance of textual fidelity in this circumstance. But in light of Scalia’s dissent in *Chisom*, I thought recourse to purpose—to the notion that Title VII was some all-purpose engine of antidiscrimination and not merely statutory text, and to what attitude Congress and prior courts had adopted to embrace Title VII as a transformative, remedial statute—was forbidden to the textualist, at least unless the statute was convoluted enough to have no relatively straightforward, ordinary meaning. To be sure, denying a remedy to former employees like Robinson seems perverse and arbitrary. However, I think that it is no more so than saying that judicial elections are somehow not subject to the full protections that the Voting Rights Act provides to other elections.

Of course, I have selected a few examples that, in my opinion, demonstrate serious problems with implementing regime change, textualist style. A different set of examples, woven together by a more sympathetic commentator, might well present a more persuasive picture. In any event, however, lower court judges who do not have a strong ideological stake in textualism cannot help but remain puzzled—to put it politely—by this crazy-quilt pattern of statutory interpretation.

Perhaps the missing link to a logical explanation is step 2 in Justice Scalia’s formulation in *Chisom*: applying established canons of interpretation. The next Part addresses this approach.

### III. THE PROBLEM WITH CANONS

The second part of Scalia’s textualism formulation, described in

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91. *Id.* at 345.
92. *See id.* at 338.
his *Chisom* dissent, requires consideration of "established canons of construction."\(^9\) Canons come in three basic categories.\(^9\) The first set, textual canons, purport to provide guidance about the ordinary meaning of statutory language. These well-known rules of thumb, often embodied in Latinate shorthand—*expressio unius, ejusdem generis, noscitur a sociis*, etc.—are easily compatible with Scalia’s Step 1 of textualism, which concentrates on ordinary textual meaning. Unsurprisingly, Scalia frequently resorts to these phrases.\(^9\) The second set of canons, the referential canons, directs courts to rely on institutional sources of meaning that transcend the statutory text.\(^9\) Common examples include canons concerning judicial deference to administrative agency interpretation of statutes and established word meanings at common law. These canons largely rise or fall on institutional considerations that are beyond the scope of this essay. The third set of canons—substantive, or policy-based, canons—interest me here because they cause mischief for textualists.

Policy-based canons are just what you would expect: they embody policies that judges impose as side constraints on statutory meaning. These policies come from judicially accessible sources such as the Constitution, common law, and common sense.\(^9\) Well-known examples include the rule of lenity, which counsels that ambiguities in criminal statutes should be read in favor of the defendant;\(^9\) the canon that waivers of sovereign immunity should be narrowly construed;\(^9\) the canon that statutes benefiting seafarers are to be broadly construed;\(^10\) and the canon that courts should avoid a constitutional challenge to a statute if the law can be fairly interpreted in a way that avoids the constitutional question.\(^10\)

\(^9\) See, e.g., id. at 849.
\(^9\) See, e.g., id. at 848.
\(^10\) See, e.g., id. at 873–79; Philip P. Frickey, *Getting from Joe to Gene (McCarthy): The Avoidance Canon, Legal Process Theory, and Narrowing Statutory Interpretation in the Early Warren Court* 93 Cal. L. Rev. 397, 399
Policy-based canons operate as interstitial techniques of judicial lawmaking at the margin of statutory meaning. Accordingly, one would expect textualists to oppose policy-based canons just as much as they purport to oppose other techniques of judicial evasion in interpreting textual meaning. Here, however, the record is remarkably mixed.

Wearing his scholarly hat, Scalia has made the predictable complaints. He has stated that "[t]o the honest textualist, all of these preferential rules and presumptions are a lot of trouble."102 He has also contended that they increase the unpredictability of interpretation.103 Because there is no metric to decide how ambiguous a statute must be to be "ambiguous," or how clear it must be to be "clear," he has argued that one cannot easily predict when a canon will be invoked.104 When the Court applies a canon, Scalia has stated that there is no way to know how narrow is "narrow" or how broad is "broad."105 Moreover, he has suggested that there is a more fundamental problem of determining "where the courts get the authority to impose [the canon]."106 He continues: "Can we really just decree that we will interpret the laws that Congress passes to mean less or more than what they fairly say? I doubt it."107 Scalia suggests that, while some of the policy-based canons may be "validated by sheer antiquity"108 and others might be "exaggerated statement[s]" of what ordinary interpretation "would produce anyway,"109 others are just "judicial power-grab[s]."110

As a justice, however, Scalia has used a variety of the common policy-based canons, including the rule of lenity,111 the constitutional avoidance canon,112 and the sovereign immunity canon.113 He has

102. Scalia, supra note 3, at 28.
103. Id.
104. See id.
105. See id.
106. Id. at 29.
107. Id.
108. Id.
109. Id.
110. Id.
even written opinions that have used policy-based canons of the most stringent variety, "clear statement rules." Clear statement rules hold that a statute cannot be given a certain meaning—for example, that Congress intended to abrogate the states' Eleventh Amendment immunity to suit in federal court—unless that understanding is unmistakably clear in the statutory text. Thus, clear statement rules are the most abusive of ordinary textual meaning. As a justice, Scalia has never explained why any policy-based canons, much less clear statement rules, are appropriate in his interpretive scheme.

Professors Manning and Nagle have examined this tension most vividly in their recent works urging the abolition of the absurd-result exception to textual meaning. Quite logically, Manning criticizes Justice Scalia's and Judge Easterbrook's use of a canon that cannot be defended within a textualist framework.

One possible explanation for the inconsistency between Scalia’s scholarly and judicial views on policy-based canons is that judges are bound by the established rules of construction, whether they like them or not. It is a mystery to me, however, why policy-based canons should be more entrenched than the general, longstanding interpretive practices that were in place when Scalia arrived at the Supreme Court and that he has attacked at virtually every opportunity.

Moreover, even if "established" canons are for some reason entrenched, the notion that they can be distinguished from mere pretenders is dubious. First, the particulars of even longstanding canons drift over time. For example, the rule of lenity, which Scalia

116. See Manning, supra note 7; Nagle, supra note 18.
117. See Manning, supra note 7, at 685–705. Manning contends that the absurdity canon is wrong in part because it functions as a surrogate for actual legislative intent (the legislature would not have wanted an absurd outcome) and that form of "strong intentionalism" violates textualist norms. See id. My own view is that the absurdity canon is better understood as a policy-based canon in which judges avoid absurdity not based on presumed legislative intent but instead because of their own authority to make law as functional as practicable. Under either understanding of the canon, however, it remains inconsistent with true textualism.
acknowledges might be entrenched by the sheer passage of time, is sometimes expressed as a presumption at the outset of the interpretive process and, at other times, as a mere tiebreaker applied at the end of the process. Accordingly, there may be no clarity at any given time about these canonical details. To illustrate, the Supreme Court recently split 5-4 in a rule-of- lenity case. The majority upheld the conviction by viewing the canon as a mere tiebreaker, and the dissent voted to reverse the conviction by viewing the canon as a presumption. Obviously, this lack of predictability and certainty undermines the idea that canons can limit judicial discretion or channel legislative drafting. This concern is especially evident when the Supreme Court suddenly elevates a weaker canon into a clear statement rule, as the Court, with Scalia’s consent, has done with the canon concerning congressional abrogation of the states’ immunity to suit in federal court.

Second, the Court occasionally creates new canons. This obviously raises concerns about transparency and transition, as suggested earlier. A true textualist might attempt to interpret a statute by using the canons in play at the time it was enacted, as Professor Manning has suggested. The problems of figuring out just what that involves would be difficult in many situations. In any event, the Court establishes canons over time. For example, in 1989, the Court announced that a “party contending that legislative action changed settled law has the burden of showing that the legislature intended such a change.” The Court’s only citation in support of this approach was one case introduced by the signifier “Cf.,” indicating that the case only indirectly supported the idea. Six years later, the Court treated this notion as an established canon of

118. See Scalia, supra note 3, at 29.
119. In addition to clear statement rules, presumptions and tiebreakers are two other ways canons are commonly expressed. ESKRIDGE, FRICKEY & GARRETT, supra note 16, at 850–51.
121. Compare id at 138–39, with id. at 148–50 (Ginsburg, J., dissenting).
122. See supra notes 75–76 and accompanying text.
123. See discussion supra Part II.
124. See Manning, supra note 7, at 692.
126. Id.
interpretation, this time simply quoting the 1989 case.\textsuperscript{127} Presumably, the thoughtful question is not whether this canon is forbidden because it was not formally established in the time of John Marshall. Instead, the question simply should be whether it is a useful guideline for resolving an interpretive problem.

Issues of canonical entrenchment and evolution should also be informed by the sources of the values served by the particular canon in question. It is not surprising that even established canons evolve over time. After all, many of them rest on sources that are inherently evolutive, such as the common law or the Constitution. In particular, many of the most important policy-based canons relate to the Constitution. For instance, the canon that counsels to avoid constitutional questions authorizes courts to interpret a statute away from constitutional difficulty and to use statutory interpretation as a means to implement constitutional values.\textsuperscript{128} The Court's relatively recent creation of clear statement rules implemented to guard core federalism values from inadvertent congressional intrusion is designed to do the same thing.\textsuperscript{129} In fact, the canons can serve to protect "underenforced" constitutional norms\textsuperscript{130}—norms that are either not directly enforced by judicial review at all,\textsuperscript{131} or are strategically better enforced at the subconstitutional level.\textsuperscript{132} Whether such canons are appropriate raises questions as much about constitutional law as about statutory interpretation.

In short, the notion of a static set of entrenched policy-based canons is a myth. It is obviously true, however, that there is a set of policy-based canons. Although the details change, many of these canons are quite entrenched into our case law. Scholar Scalia is right to see them as problematic, yet Justice Scalia is right to use them in

\begin{itemize}
\item \textsuperscript{128} See, e.g., Frickey, \textit{supra} note 101.
\item \textsuperscript{129} See, e.g., \textit{Eskridge \\& Frickey, supra} note 20.
\item \textsuperscript{130} For a foundational discussion, see Lawrence Gene Sager, \textit{Fair Measure: The Legal Status of Underenforced Constitutional Norms}, 91 HARV. L. REV. 1212 (1978).
\item \textsuperscript{131} For example, even when Congress has the constitutional authority to enact legislation regulating core state functions, the statute will be read to that effect only if it clearly so states. \textit{See} Gregory v. Ashcroft, 501 U.S. 452, 460 (1991).
\item \textsuperscript{132} \textit{See} Frickey, \textit{supra} note 101.
\end{itemize}
his cases without much hand wringing. For better or worse, using canons is part of our normal science of statutory interpretation, a practice to which the legal interpretive community is so acclimated that it is part of what "doing statutory interpretation" is all about. Therein lies an example of one of the most fundamental problems for textualist regime change, as the next Part discusses.

IV. THE PROBLEM WITH LEGAL CULTURE


In the lecture, he deftly discusses the common-law mentality that law schools imbue in their students. Scalia stresses that the great common law judge is the person "who has the intelligence to discern the best rule of law for the case at hand and then the skill to perform the broken-field running through earlier cases that leaves him free to impose that rule." The translation of this common-law mentality to statutory interpretation piques Scalia. "All of this would be an unqualified good, were it not for a trend in government that has developed in recent centuries, called democracy." Scalia rightly states: "We live in an age of legislation, and most new law is statutory law." The work of the modern judge is the interpretation of text produced by a democratic institution, not common law broken-field running toward the end zone of good policy. This is especially true in the federal courts, he continues, "where, with a qualification so small it does not bear mentioning, there is no such thing as common law." In the context of statutory interpretation, his basic complaint is with "the attitude of the common-law judge—the mind-set that asks, 'What is the most desirable resolution of this

133. Scalia, supra note 3.
134. Id. at 9.
135. Id.
136. Id. at 13.
137. Id.
case, and how can any impediments to the achievement of that result be evaded?"138 For Scalia, this attitude is not "appropriate for most of the work that I do, and much of the work that state judges do."139

In my view, Scalia is absolutely right in getting at the core of the problem he faces. It is a problem of legal culture,140 and, I think, one that he cannot overcome. As he humorously demonstrates, the common-law mentality runs deep in American legal education.141 To be an American lawyer is to be someone who has survived boot camp in the common law before learning more specialized doctrines and skills. Scalia is correct that relatively few law students study statutory interpretation as a separate subject.142 For the vast majority

138. Id.
139. Id. Scalia never explains exactly how the system in which he works is a "civil law system." Scalia does contrast the presumptively binding nature of precedent in a common law system with the civil law system, "where it is the text of the law rather than any prior judicial interpretation of that text which is authoritative." Scalia, supra note 3, at 7. His point appears to be purely descriptive and by means of contrast, but the question remains whether, in his ideal federal system, statutory interpretation decisions should not only be governed by textual analysis, but available for reconsideration through textual analysis.

140. In commenting upon Scalia's essay, Gordon Wood, the distinguished historian, concluded:

Ultimately there seems to be no easy way to limit the judges' interpretive power except by changing the attitude of judges themselves (in effect, changing the judicial culture, which is what I suppose Justice Scalia's essay is trying to do), or by appointing to the bench only those judges having the attitude you want.

Gordon Wood, Comment, in A MATTER OF INTERPRETATION, supra note 3, at 49, 63.

141. See Scalia, supra note 3, at 9.

142. Although, in his typical, inimitable style, Scalia grossly overstates his case:

[T]he American bar and American legal education, by and large, are unconcerned with the fact that we have no intelligible theory [of statutory interpretation]. Whereas legal scholarship has been at pains to rationalize the common law . . . it has been seemingly agnostic as to whether there is even any such thing as good or bad rules of statutory interpretation. There are few law-school courses on the subject, and certainly no required ones . . . .

Scalia, supra note 3, at 14–15. This summary, largely accurate twenty years ago (that is, a dozen years or so before Scalia was writing), completely misses the explosion in statutory interpretation scholarship and pedagogy that began in the late 1980's, which has included required courses at some law schools. See, e.g., William N. Eskridge, Jr. & Philip P. Frickey, Legislation Scholarship
of students, courses in tax, bankruptcy, and so on are about substantive details and little, if at all, about how courts have used the practices of statutory interpretation to resolve ambiguities within those details. Moreover, even those law students who study statutory interpretation as a discrete topic are likely to get mixed messages—some textualist, some nontexualist. The thought that American law schools will—or even could—train students to be true textualists in the federal cases is beyond ken. The most law professors can do is attempt to train students to make textualist, intentionalist, purposivist, and canonical arguments in analyzing statutory problems. This would empower students to consider which approach(es) might be compatible with our federal and state systems. Considering their common law grounding, one should not be surprised if many, even most, students consider textualism more of a useful skill for advocates than a plausible overarching theory.

Scalia is concerned with federal statutory interpretation. Indeed, Professor Manning has extensively argued that the structure of the federal constitution counsels, if not requires, textualism in federal statutory interpretation. For purposes of argument, assume that the Constitution limits the judicial power of the United States in this fashion. What about statutory interpretation in state courts? By that rationale, statutory interpretation should vary from state to state, depending upon local constitutional structures and values. This conclusion is at once perfectly logical and simultaneously inconsistent with American legal culture. Consider the thought that a statutory interpretation brief involving a similar statute and similar issues should be structured and argued differently if filed in the state district courts for Eskridge, Kansas; Garrett, Indiana; or Manning, Iowa. This notion would strike practicing attorneys and virtually all state judges as pure nonsense. The highest courts of these states are common law courts and have settled practices of statutory

143. All of the major legislation casebooks present a variety of theoretical and practical perspectives on statutory interpretation.
145. All such towns exist. As Ring Lardner used to say, “you could look it up.”

interpretation that are inconsistent with true textualism.\textsuperscript{146} In fact, I would venture to say that law is just law for most practitioners and judges, whether they practice in federal or state court.

Expecting this common law mentality to continue need not amount to a reluctant acknowledgment of the realities of a bad situation. There is a strong theoretical basis for viewing law as just law. According to this view, associated most commonly with the legal process school, "[l]aw is a doing of something, a purposive activity, a continuous striving to solve the basic problems of social living."\textsuperscript{147} The court's role is one of "reasoned elaboration"\textsuperscript{148} promoting the policies and principles of all law. "It can be accepted as a fixed premise, therefore, that every statute and every doctrine of unwritten law developed by the decisional process has some kind of purpose or objective,"\textsuperscript{149} and "each should be applied in ways that subserve their purposes, as well as the general purposes of the law."\textsuperscript{150}

Under this construct, there is plenty of room for Scalia's bête noire, the heroic common law judge, in statutory interpretation cases. Although legal-process theory is too grandiose to attribute to the average American judge and lawyer, my sense is that it is far more consistent with American legal culture than Scalia's starkly positivistic textualism. For once, it seems, Scalia is a counter-culture figure.

Of course, perhaps our legal culture rests on flatly unconstitutional values, at least in the context of federal practice.\textsuperscript{151}

\textsuperscript{146} This is not to say that they all have exactly the same practices. Rather, there is a huge overlapping consensus. For example, legislative history in one state may be easily accessible and frequently consulted, while virtually nonexistent in another state. See generally ESKRIDGE, FRICKEY & GARRETT, supra note 16, at 963–65 (discussing the variation in state courts' reliance on committee and bill reports).

\textsuperscript{147} HART & SACKS, supra note 3, at 148.

\textsuperscript{148} See, e.g., id. at 145.

\textsuperscript{149} Id. at 148.

\textsuperscript{150} William N. Eskridge, Jr. & Philip P. Frickey, Introduction to id. at xcii (summarizing Hart & Sacks's view).

\textsuperscript{151} The complainant, rather than the traditionalist, bears the burden of persuasion on this argument. For a constitutional structure argument that would seemingly mandate textualism, see John F. Manning, Deriving Rules of Statutory Interpretation from the Constitution, 101 COLUM. L. REV. 1648, 1776–1806 (2001); Manning, supra note 7. For the contrary perspective, see William N. Eskridge, Jr., All About Words: Early Understandings of the
Perhaps our legal culture’s failure to draw a sharp distinction between federal and state practice is both mistaken and regrettable, or perhaps the legal culture will evolve in Scalian ways. Indeed, the recent presidential election may foster the nomination and confirmation of more judges with similar counter-cultural values. But it is important to recognize that in the end, justices, like presidents, have a bully pulpit more than a bull whip. Richard Neustadt’s famous phrase about the seemingly incongruous impotence of the world’s most powerful person—"[p]residential power is the power to persuade"—applies equally well to distinguished justices when they howl into the wind of the dominant legal culture.

Finally, it is ironic that, as Scalia has recognized, the legal culture provides such a formidable obstacle for the implementation of textualism. Scalia has continually expressed the view that law must be distinct from culture, lest it lose its objectivity.

V. CONCLUSION: TRANSFORMATIVE APPOINTMENTS?

I have suggested a number of reasons why interpretive-regime change, textualist style, faces major obstacles. The first three barriers—the limited role precedent plays on methodological issues, the problems of transition and transparency, and the entrenchment of policy-based canons that are inconsistent with textualism—are barriers mostly in circumstances in which a relatively small number of ideologically compatible justices and judges seemingly propose major changes that are inconsistent with the average American lawyer’s instincts. It is, therefore, the fourth obstacle—the legal


152. RICHARD E. NEUSTADT, PRESIDENTIAL POWER AND THE MODERN PRESIDENTS 11 (MacMillan Publ’g Co. 1980).


154. This is by no means an exclusive list of the barriers to textualism. For example, textualism remains rather vague and unformed in the case law. As Dan Farber has pointed out to me, it is ironic that, in light of Scalia’s essay, a "common law of textualism" would have to be elaborated. Moreover, as Ed Rubin has demonstrated, many of the most important federal regulatory
culture's entrenched nontextualist instincts about the practices of interpretation—that is key. Without changing the legal culture, interpretive-regime change is very unlikely.

Textualist warriors have at least three avenues of cultural challenge. First, they can attack the culture largely from the outside. Justice Scalia and Professor Manning, for example, epitomize this technique, contending that under our separation of powers the federal courts have a role in statutory interpretation that is far more constrained than the nontextualist common-law mentality. This is a formal, doctrinal assault on the citadel.

A second line of attack uses the insider’s pragmatic approach to change the tradition. Professor Adrian Vermeule, for example, has attempted to demonstrate that, from a more functional, less formal perspective, at least some of the conventional doctrines in statutory interpretation practice have costs that exceed their benefits. Such work attempts to persuade the dominant legal culture that, based on its own pragmatic values, much of the textualist agenda should be accepted.

The third, and presumably most effective, approach depends initially on power rather than persuasion—or, more precisely, on power eventually fueling persuasion. President Bush has had the opportunity to replace several Justices during his second term. This fact alone is unlikely to cause much of a change in legal culture.

regimes are largely the responsibility of agency, not judicial, enforcement. See Edward L. Rubin, Law and Legislation in the Administrative State, 89 COLUM. L. REV. 369, 369 (1989). Peter Strauss has built on this insight, noting that because administrative agencies enjoy political relationships with congressional committees and the like, such agencies will likely consult and follow (even if they do not cite) legislative history even if courts decide to forego that practice. See Peter L. Strauss, When the Judge Is Not the Primary Official with Responsibility to Read: Agency Interpretation and the Problem of Legislative History, 66 CHI.-KENT L. REV. 321, 322 (1990). Unless textualism abandons deference to agency interpretation, nontextualist interpretation will remain a staple of the administrative state. See also Edward L. Rubin, Dynamic Statutory Interpretation in the Administrative State, 3 ISSUES IN LEGAL SCHOLARSHIP 2 (Nov. 2002), at www.bepress.com/ils/iss3/art2/ 155. See Scalia, supra note 3, at 13; Manning, supra note 144.


157. For instance, during his confirmation hearings, John Roberts stated: "I have quoted and looked to legislative history in the past to help determine the meaning of ambiguous terms, and I would expect to follow that same
The chance of a cultural shift, however, becomes more likely when coupled with many appointment opportunities in the lower courts. To be sure, for such a cultural shift to occur, Bush's subordinates, who are in charge of proposing judicial candidates, would have to have such matters squarely on their agenda, but there is every reason to suppose that they do.158 Assuming, as is likely, that the Republican-controlled Senate confirms almost all of these ideologically cohesive nominees, the Bush administration could transform the federal courts.

As Yogi Berra, the philosopher and mystic, said, "It's tough to make predictions, especially about the future."159 Nonetheless, it seems difficult to imagine that the federal courts are poised to shift on statutory interpretation as they did during the New Deal. At that time, a solid majority of like-minded Justices and lower-court judges changed interpretive practices, eventually influencing state court practice and legal pedagogy as well. But they did not do so alone. There was the gradual emergence of an overlapping consensus among interpretive practice, legal theory, and legal pedagogy that roughly paralleled basic tenets of the legal-process school.160 This fusion of the law's culture, law's abstraction, and law's groundedness seems necessary for interpretive-regime change. Nothing like that appears to be on the current horizon.


158. As Jack Goldsmith put it, "An entire generation of lawyers have been reared and trained in Justice Scalia's philosophy.... So the Bush administration is likely to be more successful than its predecessors in finding reliably conservative nominees." Jeffrey Rosen, Can Bush Deliver a Conservative Supreme Court?, N.Y. TIMES, Nov. 14, 2004, § 4, at 12.


160. See, e.g., Eskridge & Frickey, supra note 150, at lxxvii–lxxxv; Frickey, supra note 101. This is not to say that there was a consensus about statutory interpretation theory. Hart & Sacks were right in saying that no theory adequately explained judicial practice. See HART & SACKS, supra note 3 and accompanying text. But there were areas of relative consensus: avoidance of literalism, cautious use of legislative history, purposive enthusiasm for important legislation, and pragmatic efforts to make statutes fit social context.
In this light, the question of interpretive-regime change as a fusion of law’s elements gives concrete context to one of Berra’s most famous insights. In what might be called Berra’s first existential truth, Yogi stated: “In theory there is no difference between theory and practice. In practice there is.”\textsuperscript{161} It is this exquisite conundrum—with its Derrida-esque clarity and Buddha-like revelation—that textualism must crack to achieve interpretive-regime status. At least, as a matter of (purposive) interpretation, I think it is. How a textualist would understand it, I cannot begin to guess.

\textsuperscript{161} Yogi Berra Quotes, supra note 159, at http://www.digitaldreamdoor.com/pages/quotes/yogiberra.html.