
RESPONSE

OPPORTUNISTIC TEXTUALISM

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In response to Jonathan R. Siegel, *The Inexorable Radicalization of Textualism*, 158 U. PA. L. REV. 117 (2009).

In his interesting and provocative article, *The Inexorable Radicalization of Textualism*, Jonathan Siegel argues that the textualist approach to statutory interpretation has gone off the deep end.¹ Driven largely by Justice Scalia's judicial philosophy,² textualism instructs interpreters of statutes to focus on the language of the statute and to reject certain other often-used interpretive tools, especially the legislative history that led to the enactment, and the purpose of the legislation. The former is illegitimate because it is undemocratic to aggrandize the unenacted words of committees or individual members who happen to have spoken up;³ the latter is illegitimate because the unenacted purpose of a statute cannot serve as a suitable replacement for the law itself, whose language is the product of a constitutionally mandated process.⁴ On the other hand, such clues as judicially

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¹ Jonathan R. Siegel, *The Inexorable Radicalization of Textualism*, 158 U. PA. L. REV. 117 (2009).

² See Antonin Scalia, *Common-Law Courts in a Civil Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws* (arguing that legislative history should not be used as an authoritative interpretive source), in *A MATTER OF INTERPRETATION* 3, 29-37 (Amy Gutmann ed., 1997).

³ See John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2421 n.127 (2003) (arguing that "[t]he views of legislative gatekeepers . . . are not necessarily good proxies for general social attitudes" or the view "of the legislature as a whole").

⁴ See Scalia, *supra* note 2, at 29-37 (arguing that legislative history is unhelpful because there is often no legislative intent, the intent of individual legislators is often unexpressed, and legislative histories are often inconclusive).

crafted canons of construction, the stare decisis effect of earlier decisions interpreting the same or related language, coherence in interpretation (both within the provision and more broadly within the code), and certain background social history are still fair game.⁵

As Siegel accurately states,

Textualists believe that a statute's passage through the constitutional process—the passage of the same statutory text by the two houses of Congress and either its signature by the President or the overriding of the President's veto—imbues *that text* with legal force, regardless of what anyone intended and regardless of what purpose anyone tried to achieve. Again, as the textualists put it, “[w]e do not inquire what the legislature meant; we ask only what the statute means.”⁶

The radicalization to which Siegel refers concerns some exceptional situations in which even ardent textualists have been willing to look beyond a statute's language—until recently, that is. When the legislature clearly has made a drafting error, or when a reading of a statute's plain language would lead to an absurd result, even textualists have relied upon inferences as to legislative intent and have looked beyond statutory language.⁷ But these sensible limits on the text are coming to an end, Siegel argues. They are coming to an end because textualists, influenced by scholars who have taken an extreme position on judges' minimalist roles in interpreting statutes⁸ and finding comfort in judicial statements about the primacy of the text, have moved away from exercising judgment when the text is clear—even if this means knowingly thwarting legislative intent for the sake of promoting a formalistic methodology. To use the title of Steven Smith's article, the textualists are turning more and more to “[l]aw [w]ithout [m]ind.”⁹

⁵ These factors are also fair game among intentionalists and purposivists. For a discussion of the commonalities and differences among the various philosophies, see Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 COLUM. L. REV. 1, 30-43 (2006); Caleb Nelson, *What Is Textualism?*, 91 VA. L. REV. 347, 351-73 (2005); and Lawrence M. Solan, *The New Textualists' New Text*, 38 LOY. L.A. L. REV. 2027, 2027-30 (2005).

⁶ Siegel, *supra* note 1, at 131 (quoting OLIVER WENDELL HOLMES, *The Theory of Legal Interpretation*, in COLLECTED LEGAL PAPERS 203, 207 (1920)).

⁷ See, e.g., *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 509-11 (1989) (“[A]s far as civil trials are concerned, [Federal Rule of Evidence] 609(a)(1) ‘can’t mean what it says.’” (quoting *Campbell v. Greer*, 831 F.2d 700, 703 (7th Cir. 1987))). *Green* is discussed in greater depth below. See *infra* notes 13-17 and accompanying text.

⁸ See, e.g., ADRIAN VERMEULE, *JUDGING UNDER UNCERTAINTY* 185-87 (2006) (arguing that when a statute is clear, judges should not consult external sources, and that agency interpretations should be the only guide to ambiguous statutory language).

⁹ Steven D. Smith, *Correspondence*, *Law Without Mind*, 88 MICH. L. REV. 104, 104 (1989). My thanks to Professor Bill Eskridge for discussion of this point.

Thus, Siegel gives a friendly scolding to those who criticize textualism yet do not appreciate how far it has strayed from common sense. The recipients of this criticism are Caleb Nelson¹⁰ and Jonathan Molot,¹¹ each of whom has written that textualism is unreasonable at the margins but that there is enough common ground between the textualists and everyone else for there to be some reciprocal learning at the very least. Siegel calls such scholars “accommodationists”¹² and suggests that, at least for now, their efforts at rapprochement are futile—in much the same way that Democrats criticize President Obama for caring too much about bringing Republicans into the fold.

Siegel is certainly correct that Justice Scalia’s tenure on the Supreme Court has had sufficient influence on like-minded judges and scholars to inspire a body of quotable statements large enough to enable a judge bent on a formalist approach to write an opinion that appears lawlike and respectful of precedent, but that ignores the moderating influences that Scalia himself accepts. Yet, I do not share Siegel’s concern about textualism’s radicalization as a general matter, although he certainly makes his argument with telling illustrations. The most important reason not to believe that a radical form of textualism is gaining strength is that it is virtually impossible to be a true textualist on the ground. It is easy enough to talk a good game, but when it comes to real cases, most judges will often enough subordinate their bent toward formalism in favor of what they believe to be a result more consistent with the legislative will, the purpose of the statute (whether they mention it or not), their own political beliefs, other public law values, or some combination of the above.

Let us examine a preradicalized example of textualism. Consider Justice Scalia’s concurrence in *Green v. Bock Laundry Machine Company*.¹³ The plaintiff, a prison inmate on work release, was operating a laundry machine when “[a] heavy rotating drum caught and tore off his right arm.”¹⁴ He sued in a products liability action. At the time, Federal Rule of Evidence 609(a) provided as follows:

For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime shall be admitted if elicited

¹⁰ See Nelson, *supra* note 5, at 351-73 (arguing that differences in methodology between the two camps “might relate less to the basic goals of interpretation than to the assumptions and attitudes that interpreters bring to their common task”).

¹¹ See Molot, *supra* note 5, at 30-43 (“[T]extualism has had a measurable impact on judges and Justices who do not include themselves among textualism’s adherents.”).

¹² Siegel, *supra* note 1, at 125.

¹³ 490 U.S. 504, 527 (1989) (Scalia, J., concurring).

¹⁴ *Id.* at 506 (majority opinion).

from the witness or established by public record during cross-examination but only if the crime (1) was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant, or (2) involved dishonesty or false statement, regardless of the punishment.¹⁵

Obviously, evidence of Green's past crimes would be prejudicial and hardly relevant to the question whether the laundry machine was defective. But the Rule, as then written, contained an error: it required only a finding that the probative value of the evidence outweighed its prejudice to the defendant.¹⁶ Since the defendant was Bock Laundry, the Rule as written did not call for the prejudicial effect of the evidence on Green to be taken into account.

Not a single Supreme Court Justice took the position that the Rule should be applied literally. Rather, the Justices argued either that the Rule should be construed to apply only to criminal defendants, thereby allowing the evidence to be admitted against both sides in a civil litigation, or that it should be applied to parties generally in both criminal and civil cases. A majority of the Court took the former path, with Justice Scalia arguing in his concurrence that such an interpretation avoided an absurd result while causing less damage to the language of the Rule as written. Justice Scalia's interpretation required only that the word "defendant" be limited to a defendant in a criminal case.¹⁷

Now compare Justice Scalia's concurrence in *Green* to Judge Bybee's dissent in *Amalgamated Transit Union Local 1309 v. Laidlaw Transit Services, Inc. (Amalgamated II)*,¹⁸ a 2006 case decided by the Ninth Circuit, which Siegel uses to illustrate the radicalization of textualism.¹⁹ In a prior proceeding, *Amalgamated I*, a labor union had filed a class action against an employer in state court, and the employer's application to remove the case to federal court was granted.²⁰ The Class

¹⁵ FED. R. EVID. 609(a) (1989).

¹⁶ Siegel also wrote the leading article on legislative error. *See generally* Jonathan R. Siegel, *What Statutory Drafting Errors Teach Us About Statutory Interpretation*, 69 GEO. WASH. L. REV. 309, 310 (2001) (discussing how errors influence statutory interpretation, particularly weakening the textualist method).

¹⁷ *Green*, 490 U.S. at 528-29 (Scalia, J., concurring).

¹⁸ 448 F.3d 1092, 1094 (9th Cir. 2006) (Bybee, J., dissenting).

¹⁹ I will not discuss the other examples that Siegel cites, in part because of space limitations and in part because I do not find them as difficult to explain on grounds other than a pure commitment to textualism.

²⁰ *Amalgamated Transit Union Local 1309 v. Laidlaw Transit Servs.*, 435 F.3d 1140, 1142 (9th Cir. 2006).

Action Fairness Act of 2005 (CAFA)²¹ liberalizes removal and calls for removal decisions to be appealed as follows: “A court of appeals may accept an appeal from an order of a district court granting or denying a motion to remand a class action to the State court from which it was removed *if application is made to the court of appeals not less than 7 days after entry of the order.*”²²

The statutory language, however, makes no sense. Relying on both legislative history and common sense, the Ninth Circuit held that the purpose of this provision was to limit the time for appeal so that a case can move forward expeditiously.²³ Congress, however, mistakenly wrote “less” instead of “more” into the statute.²⁴ Under a literal reading, an appellant must wait one week and then can appeal at any time at all—forever.²⁵

The Ninth Circuit corrected the error. This decision might have led to the union being out of luck since its application for appeal was properly filed more than seven days after entry of the order—within the literal language of the statute but outside the court’s interpretation. The court, however, ruled that it would deem the procedures exercised by the appellant adequate by exercising the discretion granted it by the Federal Rules of Appellate Procedure,²⁶ thus rendering its decision to correct the statutory language prospective in nature.²⁷ As a result, the court enforced the intended meaning of the legislature without doing individual injustice in this particular case.

A circuit judge asked that the matter be reheard en banc.²⁸ The judges voted against this request, and Judge Bybee dissented from this decision in an opinion that Siegel regards as an example of radical textualism.²⁹ Quoting precedent that itself relied on *Caminetti v. United States*,³⁰ a 1917 Supreme Court decision, Judge Bybee wrote,

²¹ Pub. L. No. 109-2, 119 Stat. 4 (codified as amended in scattered sections of 28 U.S.C.).

²² 28 U.S.C. § 1453(c)(1) (2006) (emphasis added).

²³ *Amalgamated I*, 435 F.3d at 1145.

²⁴ *Id.*

²⁵ For a discussion of the debate between textualists and intentionalists with respect to this CAFA provision, see Adam N. Steinman, “Less” Is “More”? *Textualism, Intentionalism, and a Better Solution to the Class Action Fairness Act’s Appellate Deadline Riddle*, 92 IOWA L. REV. 1183, 1187-89 (2007).

²⁶ FED. R. APP. P. 2.

²⁷ *Amalgamated I*, 435 F.3d at 1146-47.

²⁸ See *Amalgamated Transit Union Local 1309 v. Laidlaw Transit Servs., Inc.*, 448 F.3d 1092, 1093 (9th Cir. 2006).

²⁹ Siegel, *supra* note 1, at 141.

³⁰ 242 U.S. 470 (1917).

[o]nce it recognized that the statute is unambiguous, the panel should have stopped, for it is a paramount principle of statutory construction that “[w]here[a statute’s] [sic] language is plain and admits of no more than one meaning the duty of interpretation does not arise, [sic] and the rules which are to aid doubtful meanings need no discussion.”³¹

For Judge Bybee, neither correction of a legislative error nor absurdity is an excuse for deviating from this rule, a departure from Justice Scalia’s more temperate position illustrated above. Moreover, had Judge Bybee prevailed, the same result would have been reached in this case, albeit through different means. Thus, it appears that Judge Bybee intended only to make a formalistic statement defending a mechanical version of textualism.

With this as background, why do I not accept Siegel’s conclusion that Judge Bybee is an example of textualism gone radical? For one thing, notwithstanding this opinion, Judge Bybee is not a textualist—at least not consistently. Consider the following excerpt from one of Judge Bybee’s statutory opinions examining the whistleblower provision of the Sarbanes-Oxley Act:³²

*The plain language of this section, as well as the statute’s legislative history and case law interpreting it, suggest that to trigger the protections of the Act, an employee must also have (1) a subjective belief that the conduct being reported violated a listed law, and (2) this belief must be objectively reasonable.*³³

In a similar vein, Judge Bybee analyzed a provision of the Immigration and Nationality Act:³⁴

Finally, *there is no indication in the legislative history that Congress specifically intended the courts to apply tolling principles to § 245(i). Rather, the legislative history appears to recommend that the agencies responsible for enforcing the statute should accept petitions filed after the deadline in the exercise of their executive discretion.*³⁵

In another context, Judge Bybee noted that “[n]othing in the statutory language or legislative history of [42 U.S.C.] § 1981 even hints that Congress wanted to exempt Native Hawaiian preferences from its provisions.

³¹ *Amalgamated II*, 448 F.3d at 1096 (alterations in original) (internal quotation marks omitted) (quoting *Caminetti*, 242 U.S. at 485).

³² 18 U.S.C. § 1514A (2006).

³³ *Van Asdale v. Int’l Game Tech.*, 577 F.3d 989, 1000 (9th Cir. 2009) (emphasis added).

³⁴ 8 U.S.C. § 1255 (2006).

³⁵ *Balam-Chuc v. Mukasey*, 547 F.3d 1044, 1050 (9th Cir. 2008) (first emphasis added).

Finding an exemption here is beyond any accepted method of statutory interpretation.”³⁶ In a habeas case interpreting a provision of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA),³⁷ Judge Bybee argued in dissent that “[t]o rule otherwise is to ignore the clear congressional intent in AEDPA to curtail our second-guessing of state court habeas decisions.”³⁸ In a case construing the Fair Credit Reporting Act’s statute of limitations,³⁹ Judge Bybee noted in dissent that

*[t]he majority’s construction would frustrate these congressional purposes by permitting entities to obtain an individual’s credit report via misrepresentation so long as no misrepresentation is made to the individual. This behavior is fundamentally at odds with the congressional goals of avoiding improper disclosures and respecting the consumer’s right to privacy.*⁴⁰

When it suits him, Bybee is perfectly willing to look at legislative history, intent, or statutory purpose—the hallmarks of an intentionalist or a purposivist. This does not mean that Bybee generally prefers arguments based on legislative history or legislative purpose to arguments based on statutory language or statutory structure. But even when he examines statutory language, he sometimes sees it as the best evidence of legislative intent. He does not use the text as the basis for a principled rejection of legislative intent as irrelevant:

We agree with the Tenth Circuit’s conclusion that, had Congress intended to restrict the [certificate of appealability] requirement for state detainees to petitions brought pursuant to [28 U.S.C.] § 2254, it would have simply employed the same straightforward language that it used in § 2253(c)(1)(B).⁴¹

This is true of judges generally, textualist or otherwise. In fact, Justice Scalia makes a standard textualist argument in *Green* in favor of interpreting statutes in a manner that will create coherence within the code, and he does so in intentionalist terms:

The meaning of terms on the statute books ought to be determined, not on the basis of which meaning can be shown to have been understood by

³⁶ *Doe v. Kamehameha Sch./Bernice Pauahi Bishop Estate*, 470 F.3d 827, 879 (9th Cir. 2006) (en banc) (Bybee, J., dissenting) (emphasis added).

³⁷ Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of 18, 28 & 49 U.S.C.).

³⁸ *Richter v. Hickman*, 578 F.3d 944, 978 (9th Cir. 2009) (Bybee, J., dissenting) (emphasis added).

³⁹ 15 U.S.C. § 1681p (2006).

⁴⁰ *Williams v. County of Santa Barbara*, 152 F. App’x 628, 631 (9th Cir. 2005) (Bybee, J., dissenting) (emphasis added).

⁴¹ *Wilson v. Belleque*, 554 F.3d 816, 825 (9th Cir. 2009) (emphasis added). For a similar example of Bybee’s willingness to look at legislative intent, see *In re Digimarc Corp. Derivative Litig.*, 549 F.3d 1223, 1231 (9th Cir. 2008).

a larger handful of the Members of Congress; but rather on the basis of which meaning is (1) most in accord with context and ordinary usage, and thus most likely to have been understood by the *whole* Congress which voted on the words of the statute (not to mention the citizens subject to it), and (2) most compatible with the surrounding body of law into which the provision must be integrated—a *compatibility which, by a benign fiction, we assume Congress always has in mind.*⁴²

Notwithstanding his writings to the contrary, Justice Scalia uses coherence not as a value in its own right, but rather as a good proxy for intent (what Congress had in mind), the establishment of which is his goal.

None of this should be too surprising. As I have written elsewhere, people understand the world by projecting the intentions of others onto their experiences.⁴³ It is impossible to resolve an ambiguity in language without asking what someone meant to say, and once one asks that question, one abandons the principal tenet of the textualist mission. One can avoid doing this some of the time, especially when the language of a statute is both clear and consistent with the intended communicative content. But when meaning is uncertain, or when the clear meaning is the result of an error or would lead to absurdity, judges—including textualist judges—often speak in terms of the legislature’s intent.

Thus, I, too, am an accommodationist in Siegel’s sense. Like Motel and Nelson, I believe that the differences between the textualists and just about everyone else are not as great as the rhetoric might suggest.⁴⁴ In particular, just about everyone who writes about statutory interpretation writes that legislative primacy is an important goal, at least most of the time; just about everyone believes that one should begin with the text of the statute; and just about everyone uses contextual information, even if there is some disagreement about which contextual information is appropriate.⁴⁵

Returning to Judge Bybee’s dissent in *Amalgamated II*, how can we explain the opinion if he is not wedded to the methodology he es-

⁴² *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 528 (1989) (Scalia, J., concurring) (second emphasis added).

⁴³ See Lawrence M. Solan, *Private Language, Public Laws: The Central Role of Legislative Intent in Statutory Interpretation*, 93 GEO. L.J. 427, 450-51 (2005) (noting that meaning is in large part influenced by our “conclusions about what is in the minds of others”).

⁴⁴ See Solan, *supra* note 5, at 2030 (“[T]extualist practice can internalize a great deal of contextual information while at the same time maintaining procedures less likely to lead courts into a decision-making process that conflicts with basic values such as separation of powers.”).

⁴⁵ See *id.* at 2028-30 (“[B]oth sides in the debate agree upon almost everything when it comes to statutory interpretation.”).

pouses? Consider *United States v. Locke*,⁴⁶ a case on which Bybee relies. In that case, Justice Thurgood Marshall (by no means a textualist), writing for the majority, held that a statutory deadline of “prior to December 31”⁴⁷ for the registration of mining claims meant just that.⁴⁸ A miner who snapped at the bait and filed his registration on the last day of the year did not comply with the statute and was subject to losing his mine. However, the Court remanded the case for further proceedings because it appeared that some government officials with whom the miners had been dealing made the same mistake and had misinformed the miners of the deadline.⁴⁹ The government settled the case, giving the Locke family back their mine.⁵⁰

Judges weigh formalist values against other values all the time. As Justice Marshall did in *Locke*, Judge Bybee found a vehicle for espousing these values in a case in which he would do no harm to a fair outcome, since he agreed with the result. Thus, Bybee added to his toolkit without causing harm to any party when he dissented in *Amalgamated II*.

Like Siegel, I do not think very highly of Bybee’s dissent. Had he prevailed, future cases in the Ninth Circuit would have thwarted the will of Congress, unless Congress issued a technical correction. But I do not think that the opinion presages an era of mindless adherence to accidents of language whatever the consequences.

I agree with Siegel that a quarter century of textualism has made it easy for judges to employ the methodology opportunistically, whether or not they employ a radical version of it. Empirical research has begun to bear this claim out. James Brudney and Corey Ditslear, who looked at 632 “work law cases” that used one or another interpretive canon, found that there is a relationship between a Justice’s ideology and the strategic use of various interpretive devices.⁵¹ Both liberal and conservative judges make use of various canons, but liberal judges tend to use them for reaching liberal ends, and conservative judges

⁴⁶ 471 U.S. 84 (1985).

⁴⁷ 43 U.S.C. § 1744(a) (2006).

⁴⁸ See *Locke*, 471 U.S. at 90 (noting that the required date of filing was “quite clear”).

⁴⁹ *Id.* at 89-90, 90 n.7.

⁵⁰ See Lawrence M. Solan, *Learning Our Limits: The Decline of Textualism in Statutory Cases*, 1997 WIS. L. REV. 235, 242 (reporting information obtained through an interview with Locke’s lawyer).

⁵¹ See James J. Brudney & Corey Ditslear, *Canons of Construction and the Elusive Search for Neutral Reasoning*, 58 VAND. L. REV. 1, 57-60 (2005) (examining the linkage between ideology and the canons of construction employed).

tend to use them for reaching conservative ends.⁵² In another study, Brudney and Ditslear found that Justice Scalia is tougher on the use of legislative history to achieve liberal ends than he is when it is used to achieve conservative ends.⁵³ Similarly, Stefanie Lindquist and Frank Cross found that judges pay less attention to precedent and more attention to their own values over time in their disposition of cases decided under 42 U.S.C. § 1983.⁵⁴ And Miranda McGowan found Justice Scalia's textualist approach used selectively in his dissenting opinions.⁵⁵

None of this makes these judges hypocrites. Rather, it suggests that they are people with many values, which sometimes reinforce each other but at other times are at odds with each other. Because loyalty to the enacted language can be but one such value, it is unlikely that any judge will forsake all other values in the service of formalism as a general matter. Thus, I share Siegel's response to the cases he discusses and express additional concern about the opportunistic use of textualist methods.⁵⁶ But I do not believe these cases to represent a radical movement toward law without mind.

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⁵² See *id.* at 59-60 (explaining that canons of construction “are more likely to be associated with liberal results in the hands of liberal judges and conservative results in the hands of conservative judges”).

⁵³ See James J. Brudney & Corey Ditslear, *Liberal Justices' Reliance on Legislative History: Principle, Strategy, and the Scalia Effect*, 29 BERKELEY J. EMP. & LAB. L. 117, 168 (2008) (describing the correlation between Scalia's votes and the majority's reliance on legislative history).

⁵⁴ Stefanie A. Lindquist & Frank B. Cross, *Empirically Testing Dworkin's Chain Novel Theory: Studying the Path of Precedent*, 80 N.Y.U. L. REV. 1156, 1200 (2005) (noting increasingly proplaintiff decisions despite adverse precedent).

⁵⁵ Miranda McGowan, *Do as I Do, Not as I Say: An Empirical Investigation of Justice Scalia's Ordinary Meaning Method of Statutory Interpretation*, 78 MISS. L.J. 129, 188 (2008) (describing Scalia as purposivist despite the teachings of the ordinary meaning theory).

⁵⁶ This concern is consistent with the legal realist approach to statutory interpretation being developed by Victoria Nourse. See Victoria Nourse, *Misunderstanding Congress: Statutory Interpretation, the Supermajoritarian Difficulty, and the Separation of Powers*, 99 GEO. L.J. (forthcoming 2011).