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## RESPONSE

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### IS TEXTUALISM DOOMED?

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

In a provocative recent article, Jonathan Siegel argues that textualism is ultimately doomed to irrelevance because its “inexorable radicalization . . . will cause it to lose the interpretation wars.”<sup>1</sup> Siegel contends that textualism’s commitment to the “axiom” that “the statutory text *is* the law” renders it blind to all competing considerations, thereby forcing textualist judges to enforce “absurd” interpretations of statutes and ones based on “scrivener’s errors.”<sup>2</sup> Over time, textualism will “work itself pure,” eliminating any constraints on its inherent logic.<sup>3</sup> This in turn is likely to make the results of textualism so unattractive that it will lose out to rival approaches such as purposivism and intentionalism.<sup>4</sup>

Siegel has made a compelling argument and identified some possible genuine weaknesses of textualism. I believe he is correct to conclude that textualism is unlikely to win a decisive victory in the longstanding debate over interpretation. But both his normative critique of textualism and his positive prediction about textualism’s future are overdrawn.

In Part I of this Response, I take issue with elements of Siegel’s normative analysis. I argue that textualism’s adherence to text is

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<sup>1</sup> Jonathan R. Siegel, *The Inexorable Radicalization of Textualism*, 158 U. PA. L. REV. 117, 178 (2009).

<sup>2</sup> *Id.* at 144-45.

<sup>3</sup> *Id.* at 153.

<sup>4</sup> *Id.* at 177-78.

compatible with eliminating scrivener's errors. On the other hand, it may not be compatible with allowing judges to strike down what they consider to be "absurd" interpretations of statutes that are dictated by the text. This, however, may be a strength of textualism rather than a weakness in a society with deep ideological disagreements over what counts as "absurd."

Part II argues that Siegel understates the importance of textual ambiguity. Where the text is ambiguous, resort to extrinsic evidence of meaning is compatible with textualist premises and may sometimes even be required by them. The purpose of a statute and its legislative history may shed light on the meaning of ambiguous language by revealing the context in which it was enacted. So long as this type of evidence is used to interpret the meaning of an ambiguous text rather than override the meaning of a clear one, textualists need not categorically reject it.

Part III takes up the question of textualism's future. Even if Siegel is correct about the radicalizing logic of textualism, textualist judges may not follow it to its limits. Unlike legal scholars, judges are chosen by a political process that does not emphasize adherence to broad theories of interpretation. Few judges feel a strong imperative to push logical consistency to its limits. They may well be content to make use of textualist methodology without acting on all the logical implications of doing so.

Given the intuitive appeal of textualism and the weaknesses of its rivals, textualism might well remain influential even if it is flawed for the reasons Siegel suggests. On the other hand, it is unlikely to completely vanquish the opposition. The same pragmatic mindset that leads judges to embrace a relatively moderate version of textualism is likely to prevent judges from rejecting alternative methodologies completely. Ultimately, most judges place less value on methodological consistency than academics do. For that reason, we may have to wait a long time for "the interpretation wars" to reach any definitive resolution.

## I. HOW RADICAL IS TEXTUALISM?

Siegel's key argument is that the textualist principle that "[t]he text *is* the law"<sup>5</sup> precludes recognition of any competing considera-

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<sup>5</sup> *Id.* at 120 (quoting Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 3, 22 (Amy Gutmann ed., 1997)).

tions. He takes issue with recent attempts by Jonathan Molot,<sup>6</sup> Caleb Nelson,<sup>7</sup> and John Manning<sup>8</sup> to reconcile textualism with elements of other interpretive methodologies.<sup>9</sup> Siegel contends that if the text really is the law, then no other considerations can be allowed to override it. Thus, he believes that textualists are required to enforce the text even if doing so leads to absurd results or to the perpetuation of “scrivener’s errors.”<sup>10</sup> Textualists must enforce even “[f]lat-out statutory errors” if they remain true to their methodology.<sup>11</sup>

In reality, textualism need not be as rigid as Siegel suggests. There is no inconsistency between adherence to text and correcting scrivener’s errors.

Textualists are indeed committed to the proposition that the text is the law. But which text? The text that is “the law” is that which has been duly enacted in accordance with the procedures outlined in the Constitution, which require it to be voted on by a majority of both houses of Congress and then presented to the president.<sup>12</sup> As prominent textualist Judge Frank Easterbrook put it, textualism rests “on the constitutional allocation of powers. The political branches adopt texts through prescribed procedures; what ensues is the law.”<sup>13</sup> That is the root of what Siegel calls the “textualists’ formalist axiom.”<sup>14</sup>

But if the text in the United States Code contains a clerical error that makes it different from the one that members of Congress thought they had before them when they voted, it is not in fact the same text that was enacted in accordance with constitutionally mandated procedures. In such a case, the text would not actually be “the law” for precisely the formalist reasons that Siegel claims ultimately require textualists to enforce scrivener’s errors.

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<sup>6</sup> See generally Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 COLUM. L. REV. 1 (2006) (arguing that textualism has triumphed over purposivism and that scholars should focus on the few remaining areas of disagreement).

<sup>7</sup> See generally Caleb Nelson, *What Is Textualism?*, 91 VA. L. REV. 347 (2005) (arguing that textualists and intentionalists share the common goal of identifying and enforcing the legislature’s intent and differ only on the best way to do so).

<sup>8</sup> See generally John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70 (2006) (claiming that textualists and intentionalists agree on many issues); John F. Manning, *Textualism and Legislative Intent*, 91 VA. L. REV. 419 (2005) (arguing that the “intent” textualists seek to discern is the intent that a reasonable person would infer from the text of the law, not the specific intent of the legislators).

<sup>9</sup> Siegel, *supra* note 1, at 131-44.

<sup>10</sup> *Id.* at 142-53.

<sup>11</sup> *Id.* at 143.

<sup>12</sup> U.S. CONST. art. I, § 7.

<sup>13</sup> *In re Sinclair*, 870 F.2d 1340, 1344 (7th Cir. 1989).

<sup>14</sup> Siegel, *supra* note 1, at 144.

To be sure, an error in transcription of this sort must be distinguished from a situation where there is no question that the text in the United States Code is the same as that which Congress voted on, but the legislators simply overlooked the ways in which that text might defeat their purposes.<sup>15</sup> In some instances, it may be difficult to tell the difference between a scrivener's error and legislation that is poorly drafted. Textualists as well as nontextualists may disagree among themselves as to whether a scrivener's error has actually occurred. Where one clearly has happened, however, judicial repudiation of the error does not conflict with textualism's formalist axiom. Indeed, such correction may even be required by it. After all, adhering to a text created by a clerical error means imposing a "law" that has not actually been enacted by the processes required by the Constitution.

Siegel is on firmer ground in arguing that textualism requires judges to uphold statutes that lead to seemingly "absurd" results.<sup>16</sup> Even if a duly enacted statutory text leads to such outcomes, it has still passed through the procedural requirements mandated by the Constitution and is therefore still law as textualists define it. Where Siegel errs is in assuming that this result is intolerable. While it may sometimes lead to the enforcement of flawed policies, it is not clear that judicial efforts to root out absurdity will on balance prevent more harm than they cause.

In practice, the absurdity doctrine leads judges to root out statutory language that seems absurd to *them*. As Lord Bramwell famously put it, "what seems absurd to one man does not seem absurd to another."<sup>17</sup> In an ideologically diverse society such as our own, what seems absurd to conservatives may not seem so to liberals or libertarians, and vice versa. Judges' interpretations of "absurdity" will inevitably be influenced by their own ideological predispositions.

Some laws that seem absurd to judges because of their ideological perspectives may actually be beneficial. There is no reason to expect that allowing judges to eliminate what they perceive to be absurd laws will remove more harmful statutory texts than good ones. My point is

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<sup>15</sup> This is what may have happened in the case of the Class Action Fairness Act of 2005, Pub. L. 109-2, 119 Stat. 4 (codified in scattered sections of 28 U.S.C.), discussed by Siegel, in which a probable clerical error changed the phrase "not more than seven days" to "not less than seven days." See Siegel, *supra* note 1, at 138-42.

<sup>16</sup> See *id.* at 145-47 (arguing that the absurdity exception conflicts with "textualism's fundamental tenet").

<sup>17</sup> Hill v. E. & W. India Dock Co., (1884) 9 App. Cas. 448, 464-65 (H.L.) (appeal taken from Eng.).

not that eliminating such “absurdities” is necessarily harmful. I merely wish to question Siegel’s assumption that failure to do so will lead to terrible results, so much so that it discredits textualism.

To be sure, one could try to limit the ideological bias that infects the absurdity doctrine by confining it to cases where “all mankind would, without hesitation, unite in rejecting the application.”<sup>18</sup> But such cases are likely to be extremely rare in an ideologically diverse society.<sup>19</sup> That which seems absurd to conservatives may often seem desirable to liberals for precisely the reasons that the former believe it to be absurd. In the rare instances where a statutory text really does meet with such universal disapprobation, the legislature might well correct the error itself, especially if that error has any substantial effect on important policies.

## II. STATUTORY AMBIGUITY AND METHODOLOGICAL CONVERGENCE

A key element of Siegel’s case against textualism is that it supposedly cannot assimilate any of the insights of rival theories.<sup>20</sup> Because textualism insists that only the text can be the law, he argues that it is necessarily blind to the possible utility of purpose-based statutory analysis, legislative history, and other alternative tools.

Siegel may be correct with respect to cases where the statutory text is clear. In such situations, textualists cannot consistently permit the text to be trumped by other considerations. In situations where the text is ambiguous, however, textualists can use other methodologies to interpret it without sacrificing their fundamental axiom. Siegel himself concedes that “[g]ood textualists do not insist that text must be interpreted literally and without consideration of context. . . . Rather, textualists recognize that where a statutory term has multiple meanings, context should inform an interpreter’s understanding of which meaning applies.”<sup>21</sup> As Siegel notes, textualist judges and legal scholars such as Justice Scalia and Professor John Manning have also recognized the relevance of context.<sup>22</sup>

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<sup>18</sup> *Sturges v. Crowninshield*, 17 U.S. (4 Wheat.) 122, 203 (1819).

<sup>19</sup> The incidence of such cases is likely to be even lower if we remember that the relevant universe is limited to absurd statutory texts that are not scrivener’s errors. For reasons explained above, even strict textualist judges can consistently “correct” the latter.

<sup>20</sup> *Siegel*, *supra* note 1, at 168-71.

<sup>21</sup> *Id.* at 154.

<sup>22</sup> *See id.* (citing *Smith v. United States*, 508 U.S. 223, 241-44 (1993) (Scalia, J., dissenting); John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2461-62 (2003)).

He insists, however, that “[c]onsideration of purpose is different.”<sup>23</sup> Textualists, he contends, cannot give it any weight without sacrificing the axiom that the text is the law.

It is difficult to see why textualists can consider the “context” of an ambiguous statute but not its intended purpose. After all, the purpose intended by the statute’s drafters is itself a *part* of the context in which the text was enacted. Textualists argue that an ambiguous text should be interpreted in accordance with the meaning understood at the time of enactment. For example, Justice Scalia contends that judges’ “job begins with a text that Congress has passed and the President has signed,” and they must “read the words of that text as an ordinary Member of Congress would have read them.”<sup>24</sup> Presumably, the ordinary member’s reading would at least to some extent be influenced by the purpose for which the statute was enacted. For that reason, statutory purpose may be a part of the historical context that textualists may refer to in interpreting an ambiguous statute.

Siegel cites several textualist judges for the proposition that textualists “look on consideration of statutory purpose with suspicion.”<sup>25</sup> However, these judges’ suspicions seem to be focused on cases where consideration of purpose is disconnected from the text. Thus, Justice Scalia condemns courts that consider “purpose, *independent of the language in a statute*,”<sup>26</sup> and Judge Easterbrook denounces the “[t]he invocation of *disembodied purposes*, reasons *cut loose from the language*” of the text.<sup>27</sup> These statements are perfectly consistent with using evidence of purpose to illuminate the meaning of an ambiguous statute. There is a distinction between using intent in a way that overrides or ignores the statutory text and using it to shed light on the meaning of unclear text.

The same consideration can even be used to provide a textualist justification for using legislative history when interpreting vague text. After all, legislative history could potentially provide evidence of the historical context of the text and how it was interpreted at the time of enactment. It can do so in much the same way as evidence of language usage from contemporary dictionaries and other sources that

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<sup>23</sup> *Id.* at 154-55.

<sup>24</sup> *Chisom v. Roemer*, 501 U.S. 380, 405 (1992) (Scalia, J., dissenting).

<sup>25</sup> Siegel, *supra* note 1, at 155.

<sup>26</sup> *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 325 (1988) (Scalia, J., concurring in part and dissenting in part) (emphasis added).

<sup>27</sup> *Walton v. United Consumers Club, Inc.*, 786 F.2d 303, 310 (7th Cir. 1986) (emphasis added).

textualists do not object to using.<sup>28</sup> Contra Justice Scalia, textualists need not “object to the use of legislative history on principle.”<sup>29</sup> Even as strong a textualist as Judge Easterbrook has recognized this, noting that “judges may learn from the legislative history even when the text is ‘clear.’ Clarity depends on context, which legislative history may illuminate.”<sup>30</sup>

Textualists cannot allow purpose or legislative history to trump the text. But they can use either or both to illuminate the meaning of an otherwise unclear statute by shedding light on the historical context in which it was enacted.

As both Siegel and the textualists agree, such uses of purpose and legislative history sometimes mislead more than they help. For example, legislative history may reflect only the views of a few unrepresentative legislators and staffers and purpose-based analysis may sometimes attribute a unitary purpose to a fractious legislature where none exists.<sup>31</sup>

It is possible that these dangers of considering purpose and legislative history outweigh the possible benefits. For present purposes, I take no position on this longstanding debate. However, textualism does not categorically rule out the use of these tools merely because it insists that only the statutory text can be law. Rather, that textualist axiom leaves open the possibility that legislative history and purpose might shed light on the context in which an ambiguous statute was enacted. Whether the costs of pursuing that possibility outweigh the benefits is a different question.

### III. WHY TEXTUALISM WILL NOT “WORK ITSELF PURE”

Even if I am wrong to argue that the logic of textualism is less radical than Siegel supposes, textualism is unlikely to fade away as he predicts. He claims that “it is difficult to sustain a contradiction within judge-made doctrine indefinitely” because “[i]f a judicial doctrine contains an illogical contradiction, judges and scholars will point it out, and the force of their criticism will create pressure to reform the doctrine.”<sup>32</sup> For this reason, “judge-made law works itself pure over time.”<sup>33</sup>

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<sup>28</sup> See, for example *MCI Telecomm. Corp. v. AT&T Co.*, 512 U.S. 218, 224-29 (1994), a well-known Scalia opinion where he uses dictionary definitions to interpret a key statutory term.

<sup>29</sup> Scalia, *supra* note 5, at 31.

<sup>30</sup> *In re Sinclair*, 870 F.2d 1340, 1342 (7th Cir. 1989).

<sup>31</sup> Cf. Siegel, *supra* note 1, at 132-33, 171 (endorsing, at least partially, the validity of these arguments).

<sup>32</sup> *Id.* at 148-49.

<sup>33</sup> *Id.* at 149.

Siegel therefore predicts that textualism is likely to become more and more radical over time because of the supposed logical incompatibility between textualism and other methodologies of interpretation.<sup>34</sup>

I do not deny that such “pressure” for consistency exists. But it is weaker than Siegel supposes. As Richard Posner has recently emphasized, “Judges [a]re [n]ot [l]aw [p]rofessors.”<sup>35</sup> They are nominated and confirmed through a political process that emphasizes ideology, connections to politicians, and general professional competence, not methodological consistency of the sort valued by academic theorists. Most judges have at best a limited interest in issues of legal theory. They have what Posner calls a “pragmatic” orientation.<sup>36</sup> Thus, they are less likely to be bothered by occasional inconsistencies than are scholars.

Siegel himself notes that “[e]ven stalwart textualists such as Justice Scalia permit . . . exceptions to the textualist dogma that enacted text simply *is* the law.”<sup>37</sup> If even the most committed textualists in the judiciary have not allowed their methodology to “work itself pure” as Siegel expects, it is likely that less dedicated textualists (and those less interested in legal theory than a former academic such as Scalia) will continue to tolerate even greater impurities.

To be sure, Siegel predicts that such contradictions will be eliminated over time and cites a few cases that he believes are indicative of this process.<sup>38</sup> But in a judiciary that produces thousands of opinions each year, it is possible to find a few examples of almost any use of jurisprudential methods. If textualism is indeed “working itself pure” after decades of tolerating what Siegel regards as internal contradictions, we need more evidence than this to prove it.

In noting the pragmatic, atheoretical orientation of most judges, I do not mean to praise it. To the contrary, I believe that judicial pragmatism has important shortcomings.<sup>39</sup> But whether defensible or

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<sup>34</sup> See *id.* at 148.

<sup>35</sup> RICHARD A. POSNER, HOW JUDGES THINK 204 (2008).

<sup>36</sup> *Id.* at 207.

<sup>37</sup> Siegel, *supra* note 1, at 146.

<sup>38</sup> *Id.* at 138-44, 157-67 (citing *Zuni Pub. Sch. Dist. No. 89 v. Dep’t of Educ.*, 550 U.S. 81 (2007); *Limtiaco v. Camacho*, 549 U.S. 483 (2007); *Amalgamated Transit Union Local 1309 v. Laidlaw Transit Servs., Inc.*, 435 F.3d 1140, 1146 (9th Cir. 2006), *reh’g denied*, 448 F.3d 1092 (9th Cir. 2006)).

<sup>39</sup> See Ilya Somin, *Richard Posner’s Democratic Pragmatism*, 16 CRITICAL REV. 1 (2004) (reviewing RICHARD A. POSNER, LAW, PRAGMATISM, AND DEMOCRACY (2003)). The published title of this article was *Richard Posner’s Democratic Pragmatism and the Problem of Ignorance*. However, the last five words were mistakenly added by the editors of *Critical Review*; by the time the error was discovered, that issue of the journal was already in print.



not, the prevalence of pragmatism reduces the likelihood that textualism will “work itself pure” as Siegel predicts.

A further reason why textualism is likely to persist is its intuitive appeal. Textualism comports with many lay understandings of law as a system of rules laid down in an authoritative text that all citizens can access to determine whether a proposed course of action is legal. This intuition has its flaws. But it is nonetheless widely held, including by many lawyers and judges. Its intuitive appeal helps ensure that textualism will continue to influence judicial decisions.

#### CONCLUSION

Despite Professor Siegel’s cogent analysis, I remain skeptical that textualism has an “inexorable logic” as radical as he claims. It can consistently incorporate more insights from other methodologies than he gives it credit for. Even if the logic of textualism is as radical as he describes, it does not necessarily follow that it will “work itself pure” in a judiciary filled with judges who have far less interest in grand theories of interpretation and methodological consistency than academics do.

None of this proves that textualism is the best possible theory of interpretation or that it will ever “win” the interpretive wars. To the contrary, I doubt that any clear winner will emerge anytime soon. In an ideologically diverse judiciary and legal profession, it is unlikely that any one theory will command a clear consensus. Textualism may never definitively triumph over its rivals. But it is nonetheless here to stay as a major player in the debate.

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