

April 1991

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Jerry L. Mashaw

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Jerry L. Mashaw, *Textualism, Constitutionalism, and Federal Statutes*, 32 Wm. & Mary L. Rev. 827 (1991), <https://scholarship.law.wm.edu/wmlr/vol32/iss4/2>

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William and Mary Law Review

VOLUME 32

SUMMER 1991

NUMBER 4

TEXTUALISM, CONSTITUTIONALISM, AND THE INTERPRETATION OF FEDERAL STATUTES

JERRY L. MASHAW*

I. THE CONTEMPORARY CONTROVERSY OVER STATUTORY INTERPRETATION

Academic ferment concerning "interpretation" has clearly reached the "heady brew" stage. And, with particular reference to statutory interpretation, commentators have recently staked out positions representing most of the major currents and cross-currents of legal scholarship. As with most topics that become "hot" in the law journals, there is thunder on the right,¹ lightning on the left,² as well as attempts to do more than muddle in the middle.³ Yet, whether commentators emphasize the potentially chaotic or self-interested nature of legislation,⁴ the internally contradictory or radically subjective nature of norms,⁵ or the

* Gordon B. Tweedy Professor of Law and Organization, Yale University. B.A., Tulane University, 1962; LL.B., Tulane University, 1964; Ph.D., University of Edinburgh, 1969.

This Essay was first delivered as the George Wythe Lecture at the Marshall-Wythe School of Law at the College of William and Mary, October 29, 1990, under the title, *So That's What We Meant?: A Legislator's Guide to the Supreme Court's New Constitutionalism and to the Interpretation of Federal Statutes*. It has benefitted from discussion at the Faculty Workshop at the University of Michigan Law School.

1. R. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* 261-93 (1985).

2. R. DWORKIN, *LAW'S EMPIRE* 313-54 (1986).

3. See, e.g., Eskridge & Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321 (1990); Popkin, *The Collaborative Model of Statutory Interpretation*, 61 S. CAL. L. REV. 541 (1988).

4. E.g., Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223, 227-33 (1986).

5. E.g., Levinson, *Law as Literature*, 60 TEX. L. REV. 373, 396-403 (1982).

necessity of tradition-based,⁶ communitarian,⁷ or pragmatic⁸ solutions to interpretive puzzles, one underlying message seems the same: attempts to link the interpretation of statutes to the commands of an identifiable legislature are doomed. If we ever believed in the naive "faithful agent" model of statutory interpretation,⁹ we can no longer.

Legal academic ferment is often a function of things that are happening in the world outside the academy—legal innovations that cause commentators to rethink or gain a different perspective on perennial legal issues. Most of the events mentioned to this point, however, are part of what I call the "tertiary" legal literature: a literature prompted largely by the actions or analyses of other commentators who are themselves often developing legal theory out of ideas and perspectives imported from other academic fields.¹⁰ In this increasingly common literature, commentators use primary legal materials only for illustration, if at all. Primary legal materials—cases, statutes, regulations, and administrative adjudications—neither motivate the legal analyses in the tertiary literature nor supply or reorient the commentator's theoretical perspective.

The return of academic legal commentators to issues of statutory interpretation has occurred, however, concurrently with another set of disputes over statutory interpretation. These disputes have also engaged legal commentators, but in their traditional reactive mode of responding to the behavior of primary legal actors, particularly the federal courts and Congress. At the base of these controversies are potential changes in both the methodological presuppositions and the substantive commitments that have previously structured the United States Supreme Court's interpretation of federal statutes.

On the methodological side, a group of doctrines or commitments of three basic types frames the interpretive debate: requirements of clear statement; attachment to "plain meaning" analysis; and increased deference to administrative agency policy choice in the absence of explicit statutory direction to the contrary. A brief description of these three domains of new or revised interpretive approach will explain why commentators

6. Dworkin, *Law as Interpretation*, 60 TEX. L. REV. 527, 540-50 (1982).

7. Fish, *Interpretation and the Pluralist Vision*, 60 TEX. L. REV. 495, 498-99 (1982).

8. E.g., J. HURST, *DEALING WITH STATUTES* 31-65 (1982).

9. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 415, 460-62 (1989).

10. See, e.g., Eskridge, *Gadamer/Statutory Interpretation*, 90 COLUM. L. REV. 609 (1990).

sometimes refer to the new doctrines as elements of a "new textualism"¹¹ in statutory construction.

Clear statement rules arose primarily in connection with the determination of whether Congress should attach implied remedies to federal statutes and whether Congress intended to waive the states' traditional eleventh amendment immunity from suit.¹² The doctrinal shift here has been dramatic. Twenty-five years ago, one might have said with some confidence that, in case of doubt, federal courts should create private remedies for the putative beneficiaries of federal regulatory statutes whenever those remedies would effectuate the broad purposes of a statute.¹³ Few demands for implied remedies would fail to meet this criterion. Similarly, one might have argued that these extensions of federal protection were as necessary when the parties acting contrary to federal law were states and localities as when they were private actors. Hence, congressional action extending federal rights against those acting "under color of state law"¹⁴ would almost necessarily entail a concomitant intent to waive eleventh amendment immunity from suit.¹⁵

In 1990, one can as confidently assert that the interpretive presuppositions of federal remedial law are precisely to the contrary. Courts are not to imply rights on federal statutes unless Congress clearly expresses an intent to do so, usually in the statute itself.¹⁶ The requirements of textual demonstration of intent are even stronger when claiming that Congress intends to waive state eleventh amendment immunity.¹⁷ Not only are these changes dramatic, but they tend to exalt the statutory text over other sources of legislative intent, particularly legislative history.

11. See, e.g., Eskridge, *The New Textualism*, 37 UCLA L. REV. 621 (1990).

12. See discussion in Note, *Intent, Clear Statements and the Common Law: Statutory Interpretation in the Supreme Court*, 95 HARV. L. REV. 892 (1982).

13. See *J.I. Case Co. v. Borak*, 377 U.S. 426, 433-35 (1964) (a federal district court has the power to grant damages or to rescind a corporate merger in a shareholder derivative suit even though the Securities and Exchange Act of 1934 is silent concerning specific remedies).

14. See 42 U.S.C. § 1983 (1988).

15. See *Parden v. Terminal Ry.*, 377 U.S. 184, 186 (1964) (operation of a railroad in interstate commerce by the State of Alabama constituted a waiver of sovereign immunity and consent to suit by employees under the Federal Employees Liability Act).

16. See generally Mashaw, "Rights" in the Federal Administrative State, 92 YALE L.J. 1129 (1983); Stewart & Sunstein, *Public Programs and Private Rights*, 95 HARV. L. REV. 1195 (1982).

17. See *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 243 (1985).

A similar development is evident with respect to the enhancement of agency interpretive power under the so-called *Chevron*¹⁸ doctrine. The standard teaching of American administrative law has long been that the interpretation of statutory terms is an issue of law within the de novo jurisdiction of a reviewing court.¹⁹ However much courts might have used prior agency interpretation as a guide, they retained the power to substitute their interpretive judgment for the judgment of administrative agencies whenever they believed agency constructions were erroneous. *Chevron* altered this conventional wisdom by asserting that reviewing courts should defer to the policies that agencies adopt unless the courts believe that Congress had spoken "to the precise question at issue."²⁰ To be sure, the Supreme Court advised reviewing courts not to support agency interpretations unless the courts believed them to be "reasonable."²¹ But review for reasonableness is a far cry from de novo review for correctness. Although the Court required deference by reviewing courts only in cases in which the congressional intent was not clear, the opinion in *Chevron* counsels against overturning an agency decision unless the agency interpretation is contrary to the "unambiguously expressed intent of Congress."²²

While one might have thought that "unambiguous" expressions on "precise" questions normally would be available only in the text of a statute, the Supreme Court in *Chevron* itself went on to discuss the legislative and administrative history of the statute.²³ The Court, however, found both to be at least as ambiguous or "unstable" as the text.²⁴ The Court therefore returned to the language of the statute to determine whether the agency's construction was unreasonable.²⁵ Finding that the text would bear the meaning that the agency gave it, the Court counseled the

18. See *Chevron USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-66 (1984).

19. This standard teaching is incorporated in the Administrative Procedure Act's provision on judicial review, which reads in part: "To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action." 5 U.S.C. § 706 (1988).

20. *Chevron*, 467 U.S. at 842.

21. *Id.* at 844.

22. *Id.* at 843.

23. *Id.* at 845-66.

24. *Id.* at 862-63.

25. *Id.* at 863-64.

objecting parties to address their "policy" arguments either to the agency or to Congress, not to the Court.²⁶

Although in later cases the Supreme Court has urged that the determination of whether a text is "ambiguous" under the *Chevron* doctrine is a question addressed in terms of the "traditional tools" of statutory interpretation,²⁷ the third prong of textualism—plain meaning analysis—tends to redefine those tools by limiting analysis to the examination of statutory texts. Whereas the plain meaning methodology, as currently employed, does not exclude aids to interpretation beyond the bare words of the statute, it has a decided antipathy to the use of prestatutory materials, materials usually referred to as the "legislative history" of the statute.

As with *Chevron* deference, to the extent that the Court, or a majority of the Court, comes to affirm the anti-legislative history presumptions of the plain meaning approach, it rejects decades (perhaps a century) of practice to the contrary.²⁸ Notwithstanding much language in Supreme Court opinions announcing that the Court always starts with the text, the Court has generally rejected any strict requirement that courts consult other sources, and legislative history in particular, only when the text is ambiguous.²⁹ Indeed, analysis of legislative history has been such a routine characteristic of statutory construction in the United States that some courts have even suggested that putting language in the statute or in the committee reports was largely a question of "drafting style."³⁰

Outside of confirmation hearings, Congress seldom becomes involved in methodological disputes concerning statutory interpretation either in the legal literature or in the text of judicial opinions. The Supreme Court's new textualism, however, has coincided with substantive developments in the interpretation of federal law that have sharpened congressional interest. Over the last decade, Congress has perceived that its political preferences

26. *Id.* at 864.

27. *See, e.g., INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 (1987).

28. *See generally* Jones, *Extrinsic Aids in the Federal Courts*, 25 IOWA L. REV. 737, 737 (1940) (presenting a "critical analysis of the use of extrinsic aids in statutory construction").

29. *See, e.g., Wald, Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 195 (1983) (stating baldly that "[n]o occasion for statutory construction now exists when the Court will not look at the legislative history").

30. *See, e.g., Automotive Parts & Accessories Ass'n v. Boyd*, 407 F.2d 330 (D.C. Cir. 1968).

might be at odds with those of an increasingly conservative Court. Minor controversies have erupted over a number of judicial decisions, but civil rights statutes have been a matter of continuous concern. In the late 1980's, the Court handed down a series of decisions concerning workplace discrimination that produced cries of outrage in Congress. In 1990, legislators attempted to overturn no less than nine of the Supreme Court's recent antidiscrimination decisions—attempts that failed given the dynamics of partisan politics and the veto power.³¹

It goes almost without saying that a Congress that has passed statutes to overturn judicial decisions by majority votes in both Houses is likely to feel itself frustrated, if not ill-used, by the Supreme Court and, of course, the President. In 1990, that sense of frustration led to hearings before a subcommittee of the Senate Judiciary Committee. The subcommittee sought to determine the appropriate methodology for interpreting federal statutes and the techniques, if any, that Congress might use to protect itself from the misconstruction of its intentions.³² This ferment and controversy within, between, or among legal institutions prompts my inquiry into the new textualism, its meaning, and its possible justification.

II. SO WHAT IS REALLY HAPPENING OUT THERE?

A first question is surely in order: Is textualism dominant, or at least a major new direction in the approach to statutory interpretation? My tentative answer is "yes." To be sure, the clear statement principles that the Court has adopted strongly emphasize the text as the sole source of guidance. But implied rights of action and eleventh amendment waiver controversies are a modest portion of the jurisprudence interpreting federal statutes. Clear statement requirements hardly dominate the landscape of statutory construction.

The *Chevron* "agency deference" approach obviously covers much more ground. Most federal statutes have agency implementors, and much of what agencies do qualifies to some degree as an interpretation of the governing statutes. Nevertheless, the

31. For a discussion of these developments, see Eskridge, *The Court/Congress Dynamics of Interpreting Civil Rights Statutes* (forthcoming).

32. See generally Biskupic, *Scalia Takes a Narrow View In Seeking Congress' Will*, 1990 CONG. Q. WEEKLY REP. 913-19 (presenting an overview of the growing debate over the textualist approach to statutory interpretation).

Chevron approach (which, strictly speaking, applies only to rule-making), even if generalized to all agency interpretations, will reinforce textualism only to the extent that the Court or courts rely on the text as the sole basis for determining ambiguity.

My guess, however, is that text will increasingly dominate this sort of analysis. Not only is this the general direction that "plain meaning" presses the court (a question to which we will soon turn), but this is also an arena in which legislative history is likely to be insufficiently crystalline to overcome an agency assertion of power that has plausible grounding in the statutory language. Cases pitting agency interpretations against clear legislative history are rare. Agencies do not notoriously fail to honor congressional intent embodied in legislative history. Indeed, their affection for discerning congressional intent through legislative history has given rise to the Washington aphorism, "Federal administrative agencies consult the text of statutes only to the extent that the legislative history is ambiguous."

Whatever the reach of clear statement principles or the capacities of *Chevron* deference to exalt text over other interpretive sources, the plain meaning approach clearly has that capacity and applies to the whole of statutory interpretation jurisprudence. The question then is to what extent the Court is now, or is soon likely to be, wedded to that approach.

Only Justices Scalia and Kennedy seem firmly attached to the plain meaning approach, but they are often joined in plain meaning opinions by the Chief Justice and by Justices White and O'Connor. Given the ideological affinities of these Justices on substantive issues, the extent of methodological agreement is hard to discern. Commentators have found a statistically small shift in the Court's use of plain meaning methodology over the last few terms, and its use has been at the expense of routine utilization of legislative history to bolster textual analysis. Yet, the numbers are too small and the shifts too minor to argue that a major change has taken place.³³

One should not discount, however, the way in which the dynamics of majority-making may push litigants, lower courts, and other Justices in the direction staked out by Justices Scalia and Kennedy. After all, there are two votes to be had by emphasizing strong textual analysis. This emphasis may not cause others to abandon all use of legislative history, but it is likely to press

33. See Eskridge, *supra* note 11, at 656-60.

both their analyses and their rhetoric in the direction of an increasing focus on text.

The ideological convergence of plain meaning methodology and the conservative wing of the Court leads to another obvious question: Is this retreat to the text merely a conservative plot to undermine liberal statutes? Some evidence obviously suggests an affirmative response. The 1990 political imbroglio concerning the Court's restrictive interpretation of civil rights statutes is a case in point, but plenty of contrary evidence exists as well.

The *Chevron* approach, for example, leads to a conventionally liberal position; it supports the broad policy discretion of the implementors of the positive or welfare state. Indeed, the Court seems to have written its opinion in *Chevron* as if to drive the last nail in the sporadically reopened casket of the nondelegation doctrine.³⁴ With this firm rejection of the nondelegation doctrine go many conservatives' hopes for constitutional retrenchment on the burgeoning administrative state.

Nevertheless, here, as elsewhere, "methodology" could lose its more general political coloration when assessed in a particular substantive context. Deference to agency policy judgments can be either a liberal extension of the power of the welfare state in liberal administrations or a license for retrenchment in situations in which conservative administrators are dominant. Hence, one could claim that *Chevron* takes a position that plays into the hands of conservatives in a polity that in recent decades has featured a conservative President facing a more liberal Congress.

To make out that case, however, one would have to say much more about effective presidential power over both the executive branch and independent regulatory agencies and about the patterns of agency statutory interpretation in particular periods.

34. The Court in *Chevron* ended its opinion with this striking, penultimate paragraph: "Judges are not experts in the field, and are not part of either political branch of the Government. Courts must, in some cases, reconcile competing political interests, but not on the basis of the judges personal policy preferences. In contrast, an agency to which Congress has delegated policymaking responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments. While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices—resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities."

Chevron USA, Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 865-66 (1984).

Moreover, because the *Chevron* approach leaves open the possibility that a reviewing court will view an administrator's significant change of direction as unreasonable, this is not a conservative strategy that leaves a more liberally oriented lower federal judiciary without tools to restrain revisionist administrators. And, of course, should a liberal enter the White House again, the *Chevron* methodology works in favor of that executive as well.

Hence, one should probably imagine that the same methodological commitments can lead in either liberal or conservative substantive directions depending on many other contextual factors. Indeed, one finds Justice Scalia, both the high priest of the new textualism and a traditional conservative, being led to conventionally liberal results by his attachment to the plain meaning methodology.³⁵ Moreover, because the liberal wing of the Court joined Scalia in many of these cases whereas his conservative colleagues abandoned him, these opinions may also evidence that Scalia has the strongest attachment to textualism as a purely interpretive methodology.

In assessing the new textualism, therefore, we should do better to attempt to think about new textualism in its own terms, rather than merely as a part of strategic warfare, either internal to the Court or between the Court and the Congress (and sometimes involving the executive branch as well). Furthermore, when looked at as a methodological premise or set of premises, a quite different set of issues comes into focus. To put the matter pejoratively, do not clear statement rules, requirements that courts find statutes unambiguous in order to constrain agency discretion, and the restriction of interpretive inquiry to the "plain meaning" of words describe a disfunctionally "acontextual" view of the power of language? Will not the "new textualism" inevitably tie us to a rigid, text-based view of law, thereby producing outdated statutes and poorly informed interpretive results?

I am not at all convinced that we should so easily dismiss textualism. First, we should be clear that this approach does not exclude all other "contexts" except the syntax of the words in question. Indeed, it could not if it tried. The real danger of this view is its necessary reliance on contexts that the methodology apparently makes nondiscussable. Yet, outside of the clear statement rule cases, the Court, even when espousing the plain mean-

35. See Eskridge, *supra* note 11, at 669 n.193.

ing approach, explicitly puts the statutory language in several potentially revealing contexts. Those contexts include the statute as a whole (including its overall structure and purposes); the prior structure, purposes, and language of other statutes in related areas; administrative interpretations implementing the statute; and prior judicial constructions of the statute. Hence, while eschewing legislative history, but even letting it in when all else fails, the plain meaning rule as applied to date has not been acontextual.³⁶

Moreover, the exclusion of legislative history is more likely to increase the flexibility of statutes than to render them static or rigid. After all, inquiry is directed necessarily away from pre-statutory history and toward later text including administrative decisions, judicial decisions, and later statutes. Suppressing the working documents, or *travaux préparatoires*, of codes or constitutions is a common technique for ensuring that texts have a long, useful life. Thus were the records of our own Constitutional Convention suppressed, as were the working documents respecting most Western civil codes.³⁷

The association of working document suppression with increased textual flexibility is a function of linguistic convention. Studies of language over the last decade refined, if not revolutionized, our understanding of the way language concepts are constructed. The basic building blocks of language, that is, those concepts around which we organize most of our information, seem not to be the most concrete or rudimentary images, but instead appear to be midlevel concepts.³⁸ For example, one learns and tends to organize the world more around concepts like "cat" than around the more abstract "animal" or the more concrete and particularistic "tiger."³⁹ We think and speak more of "automobiles" than of either "vehicles" or "sport coupes."⁴⁰

One can expect these linguistic conventions to be followed in situations in which statements are oral and the context of utterance is not radically unconventional. As one looks at statutory expressions, however, one is struck by the degree to which statutes organize information with either core concepts or concepts at the next higher level of abstraction. By contrast, talk

36. See *id.* at 656-66.

37. See *id.* at 666-68.

38. See, e.g., G. LAKOFF, *WOMEN, FIRE AND DANGEROUS THINGS: WHAT CATEGORIES REVEAL ABOUT THE MIND* 31-57 (1987).

39. *Id.* at 46-50.

40. *Id.*

on the floor of legislatures, or even in committee meetings, is likely to be by reference to core concepts and a set of examples or a principal case that is more concrete. Take an example with which I have recently become intimately familiar:⁴¹ legislators addressing safety legislation talk about cars or particularly troublesome models (remember the Corvair?); the statutes they draft speak of "motor vehicles."⁴² Congressmen talk of seatbelts or airbags, but motor vehicle legislation speaks of "occupant protection" or "passive restraints."⁴³

Hence, it seems reasonable to presume that the language of statutes will be systematically more inclusive than the language of legislative histories. The language of statutes will therefore give statutes greater flexibility and reach unless construed to include only those examples or concrete cases that legislative discussions specifically called to mind. To be sure, legislatures draft civil codes and constitutions with this need for abstraction self-consciously in mind. But this use of abstract concepts is the tendency of statutory formulation as a whole.

Nevertheless, we might ask whether the new textualism does not cut us off from some potentially useful sources of data about meaning, legislative history in particular, that could be adverted to without loss and with some possibility of gain. On that question I will pass, for now. By analogy to a familiar theorem of welfare economics, it seems trivially true that interpreters should be better able to give an accurate or an appropriate meaning to a statute by using all possible sources of instruction rather than by using only some of them. Yet, scholars also widely believe that some sorts of evidence, although potentially enlightening, are nevertheless so likely to be misleading that the errors induced more than offset the potential gains of the evidence. Stories emphasizing the reliability or the treachery of legislative history are so plausible that I find it difficult to choose among them. And my purpose here is not to attempt to adjudicate a dispute about the *accuracy* of one or another interpretive techniques.

Interestingly enough, the reasons given for the new textualism by its most vigorous judicial proponent⁴⁴ have often had to do, not with the usefulness of extrinsic evidence, but with the con-

41. See J. MASHAW & D. HARFST, *THE STRUGGLE FOR AUTO SAFETY passim* (1990).

42. See *id.* at 47-58.

43. National Traffic and Motor Vehicle Safety Act, 15 U.S.C. §§ 1381-1431 (1966), as amended by Act of Oct. 27, 1974, Pub. L. No. 93-492 (1974).

44. See Eskridge, *supra* note 11, at 650-56.

stitutional appropriateness of using evidence outside the text to aid interpretation.⁴⁵ The case to be made for clear statement principles,⁴⁶ *Chevron* deference,⁴⁷ or the plain meaning rule seems to be a case more about constitutional values than interpretive accuracy. To that degree, I think the case for textualism is being made in exactly the right way.

III. THE CASE FOR CONSTITUTIONALISM IN INTERPRETATION

Most of the words in the majority of statutes cause no interpretive difficulty. They all may be potentially troublesome, but situations never arise to cast doubt on a conventional reading shared by literally everyone who encounters the text. For these nonproblematic words, methodology is of no moment. Choose any methodology you want; it will lead you in the same direction.

Our concern in statutory interpretation, then, is always with words that have somehow become troublesome. They suggest different things to different readers, and an argument must be made about how to read the text. In law, when we give an authoritative interpretation, that is, one that is to be backed by the authority and power of the State, we presume interpretation is efficacious whether it is the true or the best or the most correct understanding of the text. In our law, however, the exercise of a power to speak authoritatively as an interpreter carries with it an obligation to explain the grounds upon which the interpreter gives that authoritative judgment.⁴⁸ If we begin with the notion that giving such reasons will occur to us only in circumstances in which different approaches produce different results, the argument moves back a step. We, or the authoritative interpreter, must be able to state why some particular approach

45. *Id.* at 653-56.

46. *See, e.g.,* *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 237-47 (1985) (giving a series of constitutional reasons to require the clearest possible expression of congressional intention to abrogate state immunity); *Cannon v. University of Chicago*, 441 U.S. 677, 730-49 (1979) (Powell, J., dissenting) (finding remedies not expressed in the statute invades the congressional power).

47. *See supra* note 34.

48. I make this statement knowing full well that one cannot find this proposition stated so boldly save, perhaps, by dissenting Justices. *See, e.g.,* *Board of Regents v. Roth*, 408 U.S. 564, 587-92 (1972) (Marshall, J., dissenting) (demanding that the government justify the denial of any government job with sound reasons). Nevertheless, the statement makes sense of much of our practice and lies behind the relentless demands by courts that officials explain the bases for their actions. *See also* *Dunlop v. Bachowski*, 421 U.S. 560, 568-72 (1975) (demanding an explanation of a decision that the Court seemingly had no power otherwise to control).

to reason-giving is a legitimate way to give authoritative meaning to the words of the text.

In my view, the only way to ground such a methodological commitment, even to such seemingly noncontroversial ideas as the notion that interpretation should lend coherence to the law, is through constitutional argument. To put the matter another way, we must ground all methodological commitments in the Constitution before we can recognize them as legitimate. By this I mean simply that it must be possible to explain, by relying explicitly on some vision of the constitutional polity, why that method of interpretation is appropriate for that interpreter with respect to that text.

I make this claim, not because it is anywhere so written, nor because it appears to be generally accepted, but because I cannot discern any other way to argue about the methodology of interpretation that would legitimate any particular approach. To return, for example, to the notion of lending coherence to the law, one cannot rest with the simple assertion that coherence of the legal order is a good thing. One has to go on to say why coherence is important to a legal order—meaning a constitutional order—like ours. After all, in a despotic legal order, incoherence might be a good way for tyrants to keep their subjects off balance.

To be sure, the requirement that methodological commitment be grounded in constitutional argument only moves the conversation back one more step. We must then argue about how to interpret the Constitution, or more broadly, how to understand the constitutional order. I do not mean to claim that legitimate methodological grounding is easy or that it leads inexorably to consensus about either interpretive methodology or particular decisions. Indeed, I mean quite the opposite. I want to argue only that although we have no way to decide definitively on the best interpretive methodology, it is always essential to claim, and when contested, to argue about, the constitutional legitimacy of the methodology we utilize.

To some degree, this idea is familiar.⁴⁹ After all, we expect courts occasionally to invoke the “canon of interpretation” that statutes should be interpreted to avoid constitutional difficulties. The invocation of “legislative supremacy” in judicial decisions interpreting and applying statutes is ubiquitous. These are not,

49. Indeed, both Cass Sunstein and I have argued this point before. See Mashaw, *As If Republican Interpretation*, 97 YALE L.J. 1685 (1988); Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405 (1989).

however, the sorts of constitutional groundings for the methodological commitments that I am envisioning. The canon urging avoidance of constitutional difficulties is itself radically incomplete and perhaps incoherent. A court that sustains and applies a statute interpreted by reference to this canon surely shows no greater solicitude for legislative preferences than does a court that attempts to understand what was meant and then engages in a serious constitutional analysis of the validity of the statute. After all, sustaining and applying a statute that Congress never intended to enact is hardly a lesser usurpation of the legislative power than is overturning a statute on constitutional grounds. Indeed, because the Constitution warrants the latter and not the former, this seems to be a constitutional canon in grave need of either refurbishing or rejection.⁵⁰

One can say the same about the standard eighth grade civics invocations of "legislative supremacy." That the legislature is supreme does not assist in understanding what the invocation means. Moreover, the proposition that the legislature is supreme in the United States constitutional system is simply false. If there is any substance to these homilies about legislative supremacy, we must further develop these concepts before we can understand how they articulate or ground an appropriate interpretive methodology.

I nevertheless believe that revealing and confronting the constitutional bases for interpretive norms is a move in the right direction. To the extent that the Supreme Court, in enunciating its new textualist principles, is driven in that direction—or moves there without coercion—it is engaging in an activity that should be applauded.

Given more time and space, I might here attempt to persuade you further that the provision of a constitutional formulation for interpretive methodology is what the battle over legislative interpretation is necessarily about. One way to do this, and I believe it can be done, would be to show that every interpretive theory offered in the large and growing contemporary literature on statutory interpretation is either "foundational" in this sense or unpersuasive. That applies to pragmatists and other antifoun-

50. For similarly unhappy views of this canon, see R. POSNER, *supra* note 1, at 285 (arguing that this canon enlarges the number of constitutional prohibitions beyond the most extravagant modern interpretations of the Constitution). *But see* Sunstein, *supra* note 49, at 469 (arguing that the canon promotes protection of "underenforced" constitutional rights).

dationalists too. This subject, however, is a task for another essay.

IV. THE EXTENT AND LIMITS OF THE NEW CONSTITUTIONALISM

The question that this Essay must address as we move toward its close is this: Is our increasingly textualist Supreme Court getting the constitutional law right? Are its methodological commitments not only legitimately grounded in the Constitution, but also grounded in a persuasive vision of the constitutional order? Whether the Court is getting the constitutional law right is, of course, infinitely debatable, but I find myself increasingly sympathetic with some of the basic approaches that the Justices have developed.

Let us begin with what seems to be the most well-articulated case: the Court's progressive limitations on implying rights of action on federal statutes absent a clear textual basis for the implication.⁵¹ Indeed, this movement can be explained in terms of four different ideas, all of which are of constitutional moment.

The first idea is legislative supremacy, but not of a naive or unqualified sort. After all, an interpretive rule that says, "We will assume, unless otherwise instructed, that Congress prefers that courts develop remedies where they seem needed," is just as respectful of congressional power as a rule taking the opposite position. Abstractly considered, any firm baseline will do.

Apparently, however, the style of federal statutes has changed markedly over the course of the twentieth century. Whereas nineteenth- and early twentieth-century Congresses sometimes enacted legislation containing only primary rules of conduct with no implementing apparatus or remedial instructions,⁵² late twentieth-century Congresses are highly attentive to remedial and procedural detail.⁵³ Hence, although *any* baseline proposition ab-

51. See generally Mashaw, "Rights" in the Federal Administrative State, 92 YALE L.J. 1129 (1983).

52. See, e.g., Rivers and Harbors Appropriation Act of 1886, ch. 929, § 3, 24 Stat. 310, 329-30 (1887) (current version at 33 U.S.C. § 441 (1990)) (prohibiting the throwing of any refuse matter into New York Harbor but providing no penalties or remedies for what the statute makes "unlawful").

53. Indeed, Congress may be so attentive to remedial structures that the Court is unwilling to preserve explicit remedies found in more general statutes, *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1, 19-21 (1981), or in state or federal common law, *Milwaukee v. Illinois*, 451 U.S. 304, 317-32 (1981), unless explicitly preserved by the federal regulatory statute in question, *International Paper Co. v. Ouellette*, 479 U.S. 481, 497-500 (1987).

stractly satisfies a demand that the Supreme Court honor clear legislative expressions, it has seemed more and more likely in recent years that Congress was attending to remedial issues.

In this context, respect for legislative supremacy may include adopting baseline interpretive principles that reduce the burden on legislative corrective action. Whereas respect for legislative supremacy in the nineteenth and early twentieth centuries (perhaps up until the last two or three decades) probably entailed judicial remedial creativity, asserting that a different rule now better fits the facts is fair. The case is not overwhelming, but it is surely sensible.

Second, the increasing creation and use of complex regulatory or administrative machinery in modern statutes strongly suggests a congressional purpose to move implementation out of the hands of ordinary litigants and generalist courts. In the Court's clear statement principle concerning implied rights of action, a plausible purpose thus exists to avoid interference with the exercise of regulatory and prosecutorial discretion by those to whom Congress has delegated enforcement authority. Indeed, implied rights of action are radically discontinuous with such a purpose in many circumstances. We may believe that the putative beneficiaries of these statutes would be better off if rights of action were more generally implied. That, however, is not an answer to the claim that Congress seems often to compromise its substantive aspirations via procedural details.⁵⁴

Third, implication of remedies on federal statutes has quite different constitutional connotations than does state court use of statutory norms as per se rules in deciding contract or tort claims. Each implication of a remedy on a federal statute is simultaneously the creation of a right and the creation of federal question jurisdiction to adjudicate that right. Federal courts thus have a different, indeed, almost opposite, position in developing remedies on federal statutes than do generalist state courts with respect to fleshing out common law actions through the selective incorporation of statutory norms. Moreover, the Supreme Court

54. Although I would dispute any claim that a congressional desire to mold the direction of administrative behavior *principally* explains administrative procedure in general, there is surely much to the idea that desires to reign in potentially wayward bureaucrats often motivate the procedures that Congress adopts legislatively. Effectuating this desire for political control is quite inconsistent with a highly decentralized enforcement mechanism, such as private law suits which might be brought in either federal or state courts. See generally Mashaw, *Explaining Administrative Process: Normative, Positive, and Critical Stories of Legal Development*, 6 J.L. ECON. & ORG. 267 (1990).

has clearly observed, through some years of experimentation, that its concerns about judicial aggrandizement—at the expense of either legislative remedial discretion or executive or administrative prosecutorial discretion—is not shared uniformly, and perhaps not even widely, by the lower federal judiciary. Given the limited number of cases that the Supreme Court can itself subject to supervisory review, a bright line rule—the clear statement principle—may well have seemed necessary in order to make the Supreme Court's vision of separation of powers effective.⁵⁵

Finally, one must recognize that every implication of a remedy on a federal statute will tend to displace some segment of state common or statutory law. As federal statutes come to inhabit more and more of the regulatory space that previously was populated only by state common law rules or, perhaps, state regulatory systems, the process of implication obviously affects the preservation of state authority. Of course, this federalism argument can run both ways. Federalism entails both a proper respect for subnational political prerogative *and* a proper respect for uniform national policy. Once again, however, there is a reasonable position that urges caution in the displacement of state power in situations in which Congress has not done so explicitly.

None of these arguments is airtight. Together, however, they suggest a posture about the implication of private remedies on federal statutes that is respectful of diverse aspects of the constitutional order. It may not be the correct or the best view. Nevertheless, that posture grounds a methodological commitment to restrictive interpretation of federal statutes in constitutional values that those who believe that the commitment is wrong-headed can expose and debate. These constitutionally oriented arguments respond to the question why *this* court takes *that* approach with respect to *those* issues in a way that legitimates its stance, even while the correctness of the court's position is disputed.

Constitutional reasons of a different sort are given for suppressing the use of legislative history in interpretation. The primary, articulate reason is the protection of the values of bicameralism and presentment which were at the heart of the

55. See, e.g., *Cannon v. University of Chicago*, 441 U.S. 677, 730-49 (Powell, J., dissenting) (arguing that the Court's implication of a right of action that Congress did not clearly authorize denigrates the democratic process).

Court's opinion in *INS v. Chadha*.⁵⁶ In short, the argument is that continuous and constant referral to legislative history tends to engage the Court in the interpretation of texts—committee reports or the utterances of various senators and representatives—that have never been enacted by both Houses of Congress or presented to the President.

Like *Chadha* itself, this constitutionalist rationale is open to serious challenge. Courts presumably use legislative history as evidence of legislative intent, not as a substitute for the text. Moreover, courts may preserve the "process fairness" or "equal respect" values of bicameralism and presentment by making certain that they consider the legislative history in both Houses of Congress and further by giving "legislative history" status to the signing statements of presidents or to other presidential or executive branch communications in connection with the progress of a bill through Congress.⁵⁷

These objections, however, may miss the point. To be sure, courts often investigate and rely on legislative history only as evidence, not as text. It is child's play, however, to find cases that articulate long lines of jurisprudence on the basis of language that has been conjured up from the legislative history and that appears nowhere in the statutes.⁵⁸

Moreover, although considering the legislative history made in both Houses of Congress and by presidential utterances would produce a "level playing field," achieving that result is not necessarily the point of the *Chadha* approach. The textualist views the enterprise of giving meaning through interpretation not as the carrying out of a collective intent that everyone had a fair chance to shape, but as the authoritative application of a text that has an appropriate constitutional pedigree. The power of interpretation is, after all, the power to use the coercive means of the state to shape human behavior.

In the formalist view of the Constitution, the state cannot exercise that coercive power save as it is called upon to adjudicate the meaning of an authoritative document. To use legislative history to generate a legislative intent that is then enforced

56. 462 U.S. 919 (1983).

57. For a fuller discussion, see Eskridge, *supra* note 11, at 670-78.

58. Labor law doctrine concerning "managerial employees," for example, endlessly debates the meaning of a term that appears nowhere in the statutes governing collective bargaining. For a window into this jurisprudence, see *NLRB v. Bell Aerospace Co.*, 416 U.S. 267 (1974) (holding that Congress intended to exclude all "managerial employees" from the protections of the National Labor Relations Act).

through judicial implementation is to engage in an unconstitutional practice. As modern political and interpretive theories rightly and constantly claim, we will never know the intent of the legislature. But in answering the question, "By what right . . .," which is the fundamental question to be asked about authoritative legal interpretation, textualists would argue that courts and other official interpreters must at least assure us that they are wielding a power embodied in authoritative texts. Otherwise, at least in our constitutional culture, their pronouncements do not demand assent.

Once again, these points are disputable, as is any constitutional analysis. But there are arguments here that we can take seriously. They ask the right questions about interpretive methodology, not "Who is right?" or "What is best?"—questions that we shall never answer. The issue instead is, "What is constitutionally legitimate?" And in a polity such as ours, only the attempt to ask and answer these questions keeps interpreters within the constraints of law. In this sense, the "new textualism" lies both at the cutting edge of interpretive theory and at the heart of constitutionalism.