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BOOK REVIEW

NO FRILLS TEXTUALISM


Reviewed by William N. Eskridge, Jr.*

In 1979, a youth driving a motorcycle accidentally ran into Washington lawyer Mike Giannotto (HLS 1978) while he was taking a walk in a federal park.1 Alarmed members of Congress held hearings that documented a rising tide of accidents caused by motorcycles and motorscooters in parks. House and Senate committees issued reports concluding, in identical language: "Vehicles have no place in a park. They spew exhaust; make noise; and create safety hazards for children, senior citizens, and others who frequent parks." The reports noted a 1960 federal statute providing that "bicycles cannot be brought into a federally owned park in the District of Columbia unless they are operated safely." The committees' reports concluded that this law was insufficient because its focus was too narrow and its rule too vague. "What is needed," the committees wrote, "is a prophylactic rule banning the activities posing the greatest risk: operating vehicles, namely, motorcycles, cars, and even motorscooters."

Based upon these findings, Congress in 1980 enacted the following statute:

Sec. 1. No vehicles of any kind shall be allowed in any federally owned park in the District of Columbia.

Sec. 2. Any person who brings or drives a vehicle into one of these parks shall be guilty of a misdemeanor, which may be punished by a fine not exceeding $500 or by a two-day incarceration, or both.

Sec. 3. "Vehicle" for purposes of this law means any mechanism for conveying a person from one place to another.

The statute rid parks of motorcycles, but citizens later complained that parks were becoming cluttered with skateboarders and the like. Re-

* John A. Garver Professor of Jurisprudence, Yale Law School. I appreciate comments from James Brudney, Richard Posner, and Adrian Vermeule, as well as the excellent research assistance of Daniel Freeman and Darsana Srinivasan, both Yale Law School Class of 2007. Professor Vermeule's assistance was gracious as well as valuable, because I was so dilatory in offering comments on earlier drafts of his book.

1 This incident, and the subsequent statutory history, are hypothetical. Some names have been changed to protect the guilty.
sponding to these criticisms, Parks Commissioner Karl Rover announced a "no tolerance" policy in enforcing the statute. A week later, Rover arrested a seven-year-old girl for riding her tricycle in a federal park. Would a judge interpret the Vehicles in the Park statute to cover tricycler activity?

There has long been an accepted method for interpreting federal statutes such as this one. Federal judges will decide the meaning of statutory language in light of:

(1) its textual plain meaning, as gleaned from ordinary usage, dictionaries, grammar, and linguistic canons (plain meaning sources);

(2) statutory structure and the content of other relevant statutes (holistic sources);

(3) the statute's legislative history, especially as it pertains to statutory purpose(s) and the compromises made (legislative history sources);

(4) authoritative judicial and agency interpretations (precedential sources);

(5) the evolution of the statutory scheme, including new practices and norms (evolutive sources); and

(6) substantive canons of statutory interpretation, including the rule of lenity and the canon for avoiding absurd or constitutionally troublesome applications (normative sources).

Such a methodology is complicated in the "hard cases," but for ordinary problems it works pretty simply because the factors will usually be mutually reinforcing.

In the Case of the Tricycle, Commissioner Rover focused on (1) the broad definition of "vehicle"; a tricycle does convey a person from one place to another. It is also relevant, however, that (2) the 1960 statute allows bicycles into the park, so long as they are operated "safely." By leaving in place this exception for bicycles, the 1980 law assumes that bicycles, and therefore also tricycles, are not "vehicles." Most importantly, (3) the legislative history demonstrates that Congress was using "vehicle" in its prototypical sense, meaning motorized mechanisms like the one that ran into Giannotto. The legislature's concern with safety suggests, consistent with the statutory structure, the following range of prohibitions: motor vehicles are barred because their size or speed renders them hazardous; bicycles are allowed but regulated for safe handling because they can be hazardous; and tricycles are allowed because their small size and slow speed render them relatively safe. The inter-

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preter might check this last rule against (4) the agency’s pattern of (non)enforcement and evidence of private reliance on that pattern, as well as (5) current facts: have tricycles been causing accidents in the parks? If there remains any doubt, (6) it should be resolved against the prosecutor, according to the rule of lenity. Also, a court should not strain to criminalize activities engaged in mainly by young children.

The Case of the Tricycle illustrates the virtues of the traditional approach. First, it yields predictable answers in all but the hardest cases. This is a rule-of-law advantage. Second, this approach respects the Congress that enacted the law. By consulting legislative history, judges see how legislators used language (like “vehicle”), what problems they were trying to solve and what purposes they were pursuing, and perhaps what deals were made to enact the law. This is a democracy advantage. Third, the traditional approach considers the reasonable expectations of those subject to the statute, as well as the factual and normative context for applying the statute. This is a fairness advantage: statutes will not be applied in ways that are unreasonable.

Notwithstanding these virtues, the traditional approach has come under fire in the last generation. Speaking for an increasingly numerous band of judges and law professors, Justice Scalia’s new textualism urges judges to ignore Items (3) and (5), legislative history and evolutive sources. He believes these sources create opportunities for too much judicial discretion, allowing judges to “look over the heads of the crowd and pick out [their] friends.”

Professor Adrian Vermeule now argues for a newer and more parsimonious textualism. In Judging Under Uncertainty, he maintains that judges should (4) follow agency interpretations unless clearly inconsistent with (1) the plain meaning of the statutory provisions on point. For the most part, judges should ignore Items (2)–(3) and defer to agencies as to Items (5)–(6).

The purpose of this Review is to situate Professor Vermeule’s “no frills” textualism historically and to evaluate its cogency. Part I identifies previous statutory theorists who have anticipated the institutionalist methodology and the central argument in Judging Under Uncer-

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4 Scalia, supra note 3, at 36.
5 Professor Vermeule would exclude “related statutes” (pp. 202–04) and would consider only the “directly dispositive clauses or provisions at hand” (p. 204), apparently excluding most intratextual analysis.
6 Although resort to linguistic canons and some substantive canons is inevitable (p. 200), agencies, not courts, should pick the canonical default rules (p. 204). This approach would collapse (6) normative sources into (4) precedential ones.
7 Professor Vermeule also offers a no frills theory of judicial review, urging federal judges to defer to legislative judgments about constitutional limits in all but the clearest cases (pp. 230–88). Due to space constraints, this Review will focus on the statutory interpretation theory.
tainty — that agencies and not judges should enjoy primacy in statutory interpretation. Professor Vermeule is much more dismissive of judicial capabilities and more enthusiastic about agency lawmaking than earlier theorists, however. Rejecting the relevance of constitutional norms and traditional practice, he argues that the country will save money and enjoy better policy decisions if federal judges ratify agency rules unless they are flatly inconsistent with statutory text read through the lens of agency-approved principles of interpretation.

Professor Vermeule presents his case for a no frills textualism in an engaging, sometimes brilliant, but ultimately unpersuasive way. His argument fails to consider important constitutional norms (Part II of this Review) and the full range of institutional consequences of such a significant change in judicial practice (Part III). There is also reason to doubt whether his proposed methodology would actually induce judges to be more deferential to good agency decisions; the results are essentially unpredictable (section IV.C). If it actually had an effect on judicial decisions, no frills textualism would be just as likely to generate significant costs by tolerating bad agency decisions (section IV.A), encouraging policy instability (section IV.B), and unmooring statutory policy from legislative purposes (Part V). It also would alter the shape of judicial reasoning, making its presentation more mechanical and less normative than it is now (Part VI). This last feature, however, might yield advantages for no frills textualism from some perspectives.

I. THREE INSTITUTIONAL TURNS: STATUTORY INTERPRETATION SCHOLARSHIP, 1915-2005

The primary theoretical claim of Judging Under Uncertainty is that statutory interpretation must be grounded upon a proper appreciation of institutional capabilities (pp. 15–16). Professor Vermeule suggests that previous statutory interpretation theorists have been beset by various “blindnesses” to institutional context: philosophers such as Professor Ronald Dworkin ignore institutional capability questions; legal process theorists like Professors Henry Hart and Albert Sacks rely upon stylized assumptions about institutions; and pragmatists such as Judge Richard Posner and I take a realistic view of legislatures but romanticize courts. Professor Vermeule dismisses all three groups of vision-impaired theorists: philosophy is too abstract to yield answers to methodological questions; traditional process theory is in need of a realistic, preferably empirically based, understanding of the relevant institutions; and pragmatists must yield to theories that better appreciate the incapacities of courts (pp. 16–18). To overthrow these blind approaches, Professor Vermeule announces an “institutional turn” in
statutory interpretation theory (p. 63). His precise institutional analysis would require courts to defer to agencies on issues of statutory interpretation, except in cases in which the agency construction violates the plain meaning of the statutory provision.

The institutional turn started almost a century ago, with the recognition that judges should consider relative institutional competence when interpreting statutes or even the common law. As early as 1918, Justice Brandeis argued that judges were incapable of making complicated policy judgments and should defer to the policy lines drawn by legislatures. During the New Deal, Dean James Landis maintained that legislatures should delegate most statutory line-drawing to agencies and that judges should defer to lines drawn by administrators.

The next generation of theorists developed the details of a legal process theory for the modern regulatory state: government is purposive, for it exists to solve social problems, and legislation has replaced judicial decisions as our primary source of law, with agencies supplanting courts as the primary elaborators of regulatory norms. The Hart and Sacks materials on *The Legal Process* grew out of this theorizing.

Contrary to Professor Vermeule, these early theorists were far from institutionally blind. It is particularly unfair for him to say that Professor Hart wrote about legislatures, courts, and agencies in "stereotyped, stylized" ways "that correspond only hazily to the facts of American government" (p. 17). A top official in the Office of Price Administration during World War II, Professor Hart wrote from deep firsthand knowledge of agencies as well as courts. *The Legal Process* accepted the "shortcomings" of adjudication and tried to lay a "foundation for an understanding of the frequent need for . . . one of the more sophisticated types of administered regulation." The legal process materials are filled with problems reflecting the primary role of legislatures in policymaking and agencies in law elaboration. Unlike many recent scholars, the authors engaged in serious, reliable investigation.

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12 See Eskridge & Frickey, *supra* note 9, at lxix–lxxvii (discussing the unpublished materials developed by Professors Willard Hurst and Henry Hart).

13 HART & SACKS, *supra* note 9, at 342.
into how things actually operate in the real world of legislated statutes and agency regulations.\textsuperscript{14}

To be sure, legal process theory has not been static since Professor Hart. Scholars in the 1970s and 1980s were more critical of the capacities of legislatures and agencies to create public-regarding rules. Most of these scholars advocated an activist role for federal judges to correct dysfunctions in the modern regulatory state through representation-reinforcing judicial review,\textsuperscript{15} dynamic judicial interpretations,\textsuperscript{16} and hard-look review of agency rules and interpretations.\textsuperscript{17} In the 1980s and 1990s, however, some scholars returned to the older legal process point that courts are structurally limited in their ability to handle polycentric problems. Accordingly, these authors argued that judicial review is often wasteful or counterproductive;\textsuperscript{18} they also advocated more cautious statutory interpretation and greater judicial deference to agency decisionmaking and interpretation.\textsuperscript{19}

Judging Under Uncertainty extends this strand of traditional legal process theory, with a more forceful institutionalist criticism of courts. Professor Vermeule charges a variety of scholars with the fallacy of "nirvana" (romanticizing judicial capabilities) (pp. 40–59). Ironically, he levels the charge primarily at scholars who have developed some of the most detailed critiques of judicial performance.\textsuperscript{20} Because he thinks federal judges should abandon most of their independent role in statutory interpretation and should defer more to agencies, Professor Vermeule (even more than Justice Scalia) would deny judges access to contextual materials and limit their jobs to applying surface meanings of statutory and constitutional texts. Yet he offers little empirical or theoretical reason to think that unmonitored agencies will be good for the country, and the book as a whole suffers from "agency nirvana."

Legal scholarship took a second institutional turn in the wake of the civil rights revolution. Early legal process scholars said little about

\textsuperscript{14} See, e.g., id. at 10–68 (an excellent treatment of agency rulemaking and the primary role it plays); id. at 1271–1312 (discussion of deference courts owe to decisions when agencies have superior expertise); see also id. at 696–1007 (detailed treatment of legislation).

\textsuperscript{15} See, e.g., John Hart Ely, Democracy and Distrust (1980).


the legitimacy issues involved in the operation of our government. They ignored or underappreciated the pervasive subordination of women and minorities. Their instrumentalist approach was an insufficient framework once people of color, women, and gay people insisted upon their integration into full and equal national citizenship. The indignities and violence suffered by these Americans, endorsed by the state and sometimes carried out by state officials, threatened the legitimacy of the government itself.\textsuperscript{21}

The desegregation cases changed the face of American jurisprudence. A post-1950s generation of "new legal process" scholars insisted that state legitimacy is not just a function of competent institutions acting under the proper procedures, but also requires meaningful participation by all groups and the integration of equality and other norms into public law.\textsuperscript{22} Most of these second-turn scholars have been openly progressive, constitutionalizing a vision of a more just and multicultural America, but others have developed different normative groundings for statutory interpretation. Professor John Manning, for example, maintains that a textualist understanding of statutory interpretation is mandated by the bicameralism and presentment requirements in Article I, Section 7 of the Constitution and perhaps by the Framers' understanding of the "judicial Power" in Article III.\textsuperscript{23}

In this spirit, Professor Jeremy Waldron's \textit{Law and Disagreement} argues that the legitimacy-conferring features of deliberation in legislatures suggest that judges should follow a textualist approach to statutory interpretation and should abandon judicial review altogether.\textsuperscript{24} \textit{Judging Under Uncertainty} has similar punchlines, although it is a little more radical in its prescriptions for statutory interpretation (Professor Waldron would retain holistic and normative sources) and a little less radical for constitutional interpretation (Professor Vermeule would

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allow courts to apply plain constitutional texts). Theoretically, however, the two books are worlds apart. Professor Waldron grounds judicial interpretation in a process norm — the conditions of politics and majority-decision process that inspire even the losers to obey the law. In contrast, Professor Vermeule dismisses questions of state legitimacy as well as constitutional norms and revives the instrumentalism characteristic of earlier legal process thinkers. He believes the constitutional debate will never produce workable guidelines for judges (pp. 32-34). We should give up, then, on first-order arguments about proper statutory methodology and engage in a frank institutional cost-benefit calculation — not unlike the one pioneered in the 1920s and 1930s, but carried out in a more sophisticated way. Unfortunately, Professor Vermeule gives no satisfactory defense for ignoring normative analysis and legitimacy concerns.

Such cost-benefit analysis is related to a third institutional turn, which draws from economics and game theory to model the complex costs and benefits of judicial and agency law elaboration.25 Professors Hart and Sacks modeled institutions as cooperating to carry out important collective projects; subsequent scholars saw courts as correcting for the dysfunctions of other institutions. Third-turn theorists have considered a broader range of institutional consequences that could follow from different approaches the Supreme Court might bring to statutory interpretation. Some scholars have suggested that several of the substantive canons of statutory construction can be defended as forcing democratic or legislative deliberation about important public law issues, such as what crimes there should be and their appropriate punishments.26 Others have suggested that the Court’s still-extensive reliance on legislative history creates massive costs for agencies, law firms, and litigants that might not be justified by the benefits generated by reliance on such history.27 Also writing in the third-turn mode, Professor James Brudney responds that institutional costs of legislative history reliance must be balanced against benefits, notably Congress’s ability to manage its lawmaking agenda efficiently and to deliberate

26 Under the rule of lenity, narrow constructions are likely to trigger congressional review and updating of criminal statutes; broad constructions constitute judicial lawmaking in a sensitive area and are unlikely to be reviewed by Congress. See William N. Eskridge, Jr., Overriding Supreme Court Statutory Interpretation Decisions, 101 YALE L.J. 331, 361-62, 413-14 (1991). For other examples in which the Court elicits congressional responses, see id. at 388-89; and Einer Elhauge, Preference-Eliciting Statutory Default Rules, 102 COLUM. L. REV. 2162 (2002).
27 See SCALIA, supra note 3, at 36-37; Eskridge, supra note 3, at 685. But see Ira C. Lupu, Time, the Supreme Court, and The Federalist, 66 GEO. WASH. L. REV. 1324, 1325-26 (1998) (responding to a subsequent, more elaborate version of my original cost-benefit argument).
effectively in the face of finite resources. Justices who ignore legislative history contribute to ideologically polarized results that frustrate Congress’s goals and expectations.

Third-turn authors approach institutional cost-benefit analysis in a more systematic way than earlier legal process thinkers did. Professor Neil Komesar, for example, argues that judicial decisionmaking is limited by the structure of adjudication, the kinds of parties who will litigate, and the constrained resources of the court system. He does not draw any conclusions for statutory interpretation, but others have deployed his approach to do so. Dismissing Congress as gridlocked and courts as incompetent to make complex policy judgments, Professor Frank Cross maintains that agencies alone are capable of updating public policy in a rational and expeditious way. Judging Under Uncertainty seeks to implement Professor Cross’s “agencies should govern the country” policy by narrowing the range of sources judges can invoke to override agency interpretations.

Is there a factual basis for believing that more agency lawmaking is good for the country and that no frills textualism would free agencies from excessive judicial intervention? As to the latter inquiry, the leading empirical analyses suggest, provisionally, that a narrow textualism (as opposed to the traditional approach) threatens to undermine the rule of law, legislative expectations, and even agency efficacy. Professor Vermeule disregards these analyses (pp. 159–62), yet his book introduces no fresh empirical evidence. How do you conduct an institu-

30 See KOMESAR, supra note 25, at 123–50.
32 See, e.g., Brudney & Ditslear, supra note 29, at 6–7 (arguing that the outcomes of workplace-related cases in which Justices relied on canons of construction to the exclusion of legislative history “suggest that the canons are regularly used in an instrumental if not ideologically conscious manner,” casting doubt on claims that textualism “can promote either impartiality or consistency in judicial reasoning”); Linda R. Cohen & Matthew L. Spitzer, Solving the Chevron Puzzle, 57 LAW & CONTEMP. PROBS. 65, 109 (1994) (suggesting, based on preliminary analysis, that judicial deference to agency decisions is driven in part by Supreme Court Justices’ policy preferences); Thomas W. Merrill, Judicial Deference to Executive Precedent, 101 YALE L.J. 969, 990–93 (1992) (suggesting that, in using a textualist approach, Justices would “dramatically transform Chevron from a deference doctrine to a doctrine of antideference” and in fact did not often defer to agency interpretations in post-Chevron cases); Victoria F. Nourse & Jane S. Schacter, The Politics of Legislative Drafting: A Congressional Case Study, 77 N.Y.U. L. REV. 575, 597–605 (2002) (finding that congressional drafters generally do not consider and often are unaware of the textual and substantive canons the Court uses).
tional cost-benefit analysis when you have, essentially, no usable data about costs and benefits?

Professor Vermeule's ingenious answer is to admit that we are clueless and then turn to theories that guide individual decisionmakers acting under conditions of uncertainty. He starts with the principle of insufficient reason (pp. 173–75), developed to model events, such as a coin flip, for which no reasonable evidence exists that would favor one outcome over another. Under this principle, judges interpreting statutes might assume that both the costs and benefits of considering (2) collateral statutes, (3) legislative history, and (6) substantive norms are substantial and indeterminate in each case, and that therefore the costs equal the benefits. This move does not tell us whether judges should consider other statutory texts, legislative history, and substantive canons, but it has the effect of rendering the available data irrelevant.

Next, Professor Vermeule invokes the "maximin" criterion, under which decisionmakers maximize the minimum payoff, namely, the net benefit under worst-case assumptions (pp. 175–76). He argues that the traditional approach to statutory interpretation yields a lot of judicial errors and incurs a large social expense (researching legislative history and other things). This is inferior to a no frills approach of sticking to the surface meaning of clear and specific text; with no frills textualism, there will still be judicial errors, but much less social expense. Professor Vermeule supports the maximin conclusion with other theories of decisionmaking under uncertainty: "satisficing" (choosing the first available alternative that is "good enough") (pp. 176–79), just picking something (pp. 179–80), and "fast-and-frugal heuristics" (pp. 180–81). Overall, the institutional calculus reflects an underlying (but undefended) assumption that "[i]nflexible, rule-bound behavior is often the best response" when "the decisionmaker has very poor information or a very low capacity to process the information" (p. 285). It is also unclear whether theories of individual decisionmaking under uncertainty should be applied to institutional decisionmaking.

This deployment of decision theory is the most original feature of Judging Under Uncertainty. Does it justify an interpretive revolution? As I argue in Parts II and III, the book offers no persuasive reason to abandon traditional normative criteria for debating statutory methodology. Its institutional cost-benefit analysis suffers from unrealistic op-

33 For a general discussion of the principle of insufficient reason, see Hans-Werner Sinn, A Rehabilitation of the Principle of Insufficient Reason, 94 Q.J. ECON. 493 (1980).
34 Professor Vermeule draws this assumption from Ronald A. Heiner, The Origin of Predictable Behavior, 73 AM. ECON. REV. 560 (1983), which argues that, theoretically, simple rules produce more predictable behavior than complex standards. I know of no empirical support for this hypothesis, and Professor Heiner does not suggest that his insight applies to institutional competence issues. Part III of this Review questions whether no frills textualism produces simple rules.
timism about the utility of a no frills, agency-deferring approach, as discussed in Part IV, and from unrealistic pessimism about judicial ability to handle legislative materials, as shown in Part V. Yet I suggest in Part VI and in the Conclusion that there may be a number of potential institutional advantages to a regime of no frills textualism, especially as applied to certain kinds of statutes.

II. SHOULD COURTS IGNORE THE CONSTITUTION AND PUBLIC NORMS WHEN THEY INTERPRET STATUTES?

Law is saturated with concerns of legitimacy and social morality. When the judge interprets the Vehicles in the Park statute, she is pronouncing a judgment that not only reflects social morality as deliberated and voted upon by the legislature, but also constitutes our nation’s public morality. To reduce statutory interpretation to an institutional cost-benefit analysis threatens, especially in criminal cases, to anesthetize an arena of public inquiry that is relentlessly moral, normative, and socially constitutive. If constitutional principle or meaning supports a certain methodology, that methodology ought to be the presumptive baseline for federal judges. Indeed, Professor Vermeule provides an argument for this precept. He says that courts should defer to Congress’s understanding of the Constitution so as to encourage legislators to focus on the constitutional limits of their authority (pp. 235–36, 246, 259–62). The same reasoning suggests that federal courts should focus on the constitutional limits of and guidelines for their exercise of Article III’s “judicial Power” when they formulate a general approach to statutory interpretation.

Several constitutional principles suggest weaknesses in the no frills textualist approach. Professor Manning, for example, maintains that the Constitution’s procedures for lawmaking and the Framers’ understanding of the “judicial Power” require a more contextual textualism, one that considers holistic and normative sources. Professor Vermeule relies on my constitutional work to dismiss these arguments as ultimately indeterminate (pp. 32–33), but my debate with Professor Manning about the original meaning of Article III is most notable for our agreements. We both find that the Framers expected judges to consider not just the plain meaning of statutory texts, but also reasonable meaning (in light of statutory purpose), the common law, constitutional norms, substantive canons of statutory construction, and the whole act as well as related statutory provisions. Professor Vermeule

35 See sources cited supra note 23.
would give most of this contextual evidence a heave-ho, without any constitutional analysis.

Justice Breyer argues that the Constitution's commitment to representative democracy supports the traditional approach.\(^{37}\) This argument also speaks to the legitimacy of judicial practice. Even most textualists insist that judges must behave as faithful agents of congressional majorities. Professor Vermeule considers this kind of argument, as he does the original meaning debate, too abstract to guide judges in selecting an approach to statutory interpretation, but Justice Breyer's prescriptions are supported by deep experience in public administration and by recent empirical evidence. Systematically surveying workplace-related cases, Professors Brudney and Corey Ditslear find that the most conservative Justices (such as Scalia) deploy plain meaning canons to trump legislative expectations with their own pro-employer or pro-market preferences, while more liberal Justices (such as Breyer) respect congressional preferences more often, in part because they consider legislative materials.\(^{38}\) Thus, when the more liberal Justices rely on legislative history, that history disproportionately leads them to conservative results.\(^{39}\) These findings constitute preliminary evidence that the traditional approach encourages judges to accord due respect to democratic deliberation and that abandoning the traditional approach may contribute to less-fettered judicial activism.

Finally, the Constitution commits the judiciary to particular norms of fairness. The Federalists who defended Article III emphasized the role life-tenured judges would play in combating the evils of "unjust and partial laws" through ameliorative interpretations, as well as through invalidation.\(^{40}\) This is a norm of substantive fairness. Other constitutional provisions instruct judges to be procedurally fair. Interpreting a vague criminal law to penalize conduct not clearly within the legislature's or citizens' reasonable expectations of what is proscribed would contravene the Due Process Clause's directive to judges. If the law were applied in a discriminatory way, it would raise concerns under the Equal Protection Clause.


\(^{38}\) See Brudney & Ditslear, supra note 29, at 57-69, 77-95.


\(^{40}\) See The Federalist No. 78 (Alexander Hamilton) (Clinton Rossiter ed., 1961), discussed in Eskridge, supra note 36, at 1049-53.
The Case of the Tricycle illustrates the importance of constitutional guideposts when federal judges interpret criminal statutes. Constitutional principle requires judges to consider the compromises Congress made when it enacted the Vehicles in the Park statute, and a judge cannot fully appreciate those compromises unless she considers the context of the statute, including the 1960 law that was the backdrop for the 1980 legislation, the explanation of the deal in the committee reports, and the statute’s purpose. A quick-and-dirty textualism that screens out such evidence is in tension not only with Article I, Section 7 of the Constitution and with democracy norms, but also with the due process and equal protection norms underlying the rule of lenity. It is illegitimate to apply the statute to the tricycle perp because she did not have adequate notice that her activity was criminal and, more deeply, because our elected representatives did not aim the moral force of the criminal law against this child.

However grounded, the legitimacy of exercising state power against citizens is highly relevant even under Professor Vermeule’s instrumentalist assumptions. An institutional cost-benefit analysis must consider potential loss-of-legitimacy costs. Citizens expect the exercise of state power to proceed under the positive terms and conditions set by the Constitution, they expect criminal laws to be limited to those offenses clearly targeted for moral sanction by the legislature, and they expect dignified treatment from the state.41 A state that arrests and detains a tricycle-riding girl under a statute not aimed at her is a state whose legitimacy is potentially in peril. If that state followed with further arrests of skateboarders, roller skaters, and even parents pushing baby carriages (all of which could be justified under a no frills textualism), the legitimacy of the criminal law and perhaps of the rule of law itself would decline over time. Such gargantuan social costs would dwarf the benefits Professor Vermeule claims for his approach.

In addition, without a theory of state legitimacy, Professor Vermeule has no metric for determining whether an interpretation is good or bad. Sometimes, Judging Under Uncertainty seems to assume that inexpensive judicial decisionmaking is an end in itself (p. 287). If that end carried enough weight, there would be no role for judicial review of agency interpretations at all, or the role might be carried out by summary opinions or even by flipping coins. Elsewhere, the book assumes that an interpretation is good if it is formulated by the institution most competent to make such decisions (p. 2). But determining which institution is most competent requires normative as well as em-

empirical assessments: Do courts make more "mistakes" than agencies? How does one determine whether a decision is mistaken without the kind of "high-level conceptual commitments" (p. 2) that Professor Vermeule avoids?

III. DOES DECISION THEORY SUPPORT A RADICAL TRANSFORMATION OF JUDICIAL PRACTICE?

Assume that constitutional baselines are not relevant and that some sort of institutional cost-benefit analysis should be deployed to pick a theory of statutory interpretation. Assume, in addition, the more plausible proposition that the traditional approach to statutory interpretation imposes substantial but indeterminate costs, including judicial errors (however they might be determined) and substantial research expenses. Professor Vermeule admits that replacing the traditional approach with his no frills textualism would also impose substantial but indeterminate costs on our legal system.

Under these assumptions, it is hard to understand why theories of decisionmaking under conditions of uncertainty require us to throw over the traditional approach for no frills textualism. Even if the principle of insufficient reason were to kick in, and the costs of the traditional approach and the no frills approach were assumed to be the same, we would have a tie. Faced with this situation, we should stick with the traditional approach to statutory interpretation. This has the following advantages: no transition costs (p. 266), the endowment effect that goes with an established status quo, and proven legitimacy under rule-of-law, democracy, and fairness criteria. Because the weight federal courts give to legislative history has varied somewhat from era to era, Professor Vermeule denies that there is a "status quo" in federal statutory interpretation (pp. 190–91). But his book asks only what sources can be considered when federal judges interpret statutes. At such a general level, there is a longstanding status quo: five of the six sources identified above have been staples of American statutory interpretation since the founding era, and the sixth (legislative history) has been a staple for the last hundred years or more.

Maximin also supports the traditional approach. We have every reason to believe that the minimum payoff of the status quo is signifi-

43 See Hans W. Baade, "Original Intent" in Historical Perspective: Some Critical Glosses, 69 Tex. L. Rev. 1001, 1068–84 (1991) (describing nineteenth-century use of legislative background to interpret statutes). While the Court's use of legislative history has "waxed and waned" in the last century (p. 191), the number of citations is not the point. Since the New Deal, legislative history has been an essential source of statutory meaning. For several generations, it has been legal malpractice for a Supreme Court brief to ignore relevant legislative history.
cant and positive, because the traditional approach has worked satisfactorily for decades.\textsuperscript{44} It has served the country well, albeit with great legal research costs. The drastic step of reeducating judges and attorneys in no frills textualism seems unnecessary unless there is some statutory interpretation disaster — something beyond “this costs a lot of money and does not always reach the right answer.” Ironically, the primary example Professor Vermeule provides of an incorrect statutory interpretation under the traditional approach is a Supreme Court decision handed down 114 years ago, in a case that I think was correctly decided (discussed below in Part V). Such an old and problematic example does not stir the heart to support a revolution.

Following the maximin criterion, contrast the worst-case scenario for no frills textualism: the Supreme Court hands down a series of ridiculous decisions, such as applying the Vehicles in the Park statute to tricycle riders, skateboarders, and parents pushing baby carriages; these decisions undermine the trust We the People have that the Court will apply the rule of law sensibly. A legal system hemorrhaging legitimacy in the eyes of ordinary Americans and their legislators is the kind of public nightmare that aggressive textualism might deliver. This is worse than anything the traditional approach has produced in the last century or is likely to produce in the current one.\textsuperscript{45}

To be sure, I do not think the worst-case scenario would occur, because even a Court adventurous enough to adopt Professor Vermeule’s theory would not be bold enough to apply it rigorously, and surely lower courts would not. In the Case of the Tricycle, many Vermeulean judges would not convict the little girl, even though the statute defines “vehicle” broadly enough to include a tricycle and even if the administering agency insisted upon that plain meaning. These judges would consult the bicycle statute, peek into the legislative history, and smuggle in lenity concerns against aggressive constructions of this criminal statute. Inspired by any of these (disapproved) sources, the reasonable judge could overrule the police by announcing that the statute is limited to motorized transport. And the judge could justify her no frills

\textsuperscript{44} Lawyers are quick to complain when legal institutions do not work. In response to the Court’s traditional approach to statutory interpretation, the lawyers’ silence is deafening.

\textsuperscript{45} Professor Vermeule’s other decisionmaking guidelines also support the status quo. A satisfying decisionmaker who stops looking when she has found a strategy that is good enough for government work (pp. 176–77) can stop with the traditional approach. If it was good enough for Justices John Harlan, Lewis Powell, and Sandra Day O’Connor, then it is good enough for the Roberts Court. Likewise, the strategy of picking an approach (p. 179) seems tailor-made for sticking with the status quo. The most obvious and familiar box on the shelves is the traditional approach, and the busy shopper is likely to pick it and proceed to checkout.
decision by shopping for support in various dictionaries, among linguists, and in other approved sources.\footnote{Dictionary shopping is already proliferating. See Ellen P. Aprill, The Law of the Word: Dictionary Shopping in the Supreme Court, 30 ARIZ. ST. L.J. 275 (1998); Samuel A. Thumma & Jeffrey L. Kirchmeier, The Lexicon Has Become a Fortress: The United States Supreme Court’s Use of Dictionaries, 47 BUFF. L. REV. 227 (1999).}

Hence, no frills textualism could rapidly become just as complicated and costly as the traditional approach has become. Rather than dueling over the weight to be given to particular committee report language, advocates and judges could duel over etymology, syntax and grammar, and the ordinary usage of language — topics that are potentially just as complicated as legislative history.\footnote{Compare Muscarello v. United States, 524 U.S. 125, 127–32 (1998) (interpreting “carries a firearm” by reference to dictionaries and an online survey of use in magazines), with id. at 142–44 (Ginsburg, J., dissenting) (responding with references to the Bible, literature, and the TV show M*A*S*H).} No frills textualism would also produce a cottage industry of increasingly complicated legal doctrine pertaining to the stare decisis effect of pre-revolution decisions, the kind of agency interpretations entitled to deference, and other issues. If many lower court judges surreptitiously consulted legislative history, the practice of statutory interpretation in the federal system could become less predictable as well. Accordingly, even a better-case scenario for no frills textualism could be costlier than the worst-case scenario for the status quo.

Invoking insufficient reason, maximin, and satisficing, Professor Vermeule reaches completely different conclusions (pp. 192–95). But he does so by ignoring the (potential) costs of his approach and overstating its (probable) benefits. Thus, he makes the following maximin argument:

If legislative history is excluded the worst possible outcome is that the judges will get statutory cases wrong with indeterminate frequency. If legislative history is consulted the worst possible outcome is that the judges get statutory cases wrong with indeterminate frequency, and the enormous expense of legislative-history research will be incurred. (p. 194)

This is an almost comical way of stating the balance. If legislative history sources were excluded, the worst possible outcome would be more judicial errors caused by the failure to consider congressional compromises, greater imposition upon the limited congressional agenda, diminished legitimacy of the Court’s statutory jurisprudence, and more costs associated with the dictionary-shopping and expert linguist reports that would replace the excluded legislative history in judicial opinions, and everyone would still look at legislative history. Professor Vermeule would not accept this cost-benefit analysis, but my point is that his decision-theory mechanism is so manipulable and unencum-
bered by empirical or other supporting evidence that it could support any approach to statutory interpretation — and hence, supports none persuasively.

IV. WOULD NO FRILLS TEXTUALISM ALLOW AGENCIES GREATER FREEDOM FROM JUDICIAL MEDDLING? DO WE WANT THAT?

Professor Vermeule’s central institutional claim is that federal courts should step down in statutory cases and leave agencies substantially free to apply statutes as they see fit, subject to plain meaning restrictions (pp. 198–229). This is a stronger version of the thesis that Professors Jerry Mashaw, Edward Rubin, and Frank Cross have been suggesting for two decades. Compared with judicial lawmaking, agency lawmaking has much to recommend it. First, it can make the rule of law more predictable: agencies can flesh out statutory standards with detailed rulemaking, and their rules have immediate national application, unlike the slower process of circuit-by-circuit adjudication by federal courts. Second, agencies have access to experts and deep experience in applying the statutes they are charged with enforcing. Hence, they often make better policy choices than either judges or legislators. For me, agencies are particularly attractive, because they can update statutes more rapidly and often more effectively than judges can. Third, agencies are typically more democratically accountable than judges. Their dynamic applications of statutes are subject to congressional oversight and budget pressures and are thus more likely to reflect current legislative preferences than judicial dynamism.

Professor Vermeule presses agency-driven statutory interpretation much harder than Professors Mashaw and Rubin do. Under his theory, judges must defer to agency interpretations unless they violate the plain meaning of a statutory provision, judges may not consult legislative history or related statutes to override agency interpretations, and agencies set canonical rules for construing their own statutes. Professor Vermeule maintains that no frills textualism, combined with strong agency deference, would be a Magna Carta for the modern administrative state — freeing Americans from those pesky and incompetent judges so that agency experts can give us the efficient public-regarding rules we deserve.

This exciting hypothesis remains unproven. Professor Vermeule assumes that judges often override good agency interpretations and impose significant and unnecessary costs on government. But he never

48 See, e.g., Cross, supra note 31; Mashaw, supra note 19; Edward L. Rubin, Law and Legislation in the Administrative State, 89 COLUM. L. REV. 369 (1989).

makes clear the criteria that describe what a good agency interpretation is and does not demonstrate that political agencies ought to be liberated from searching judicial review. Judging Under Uncertainty suffers from what might be called an "agency nirvana" fallacy in general. Moreover, there is no connection between the perceived problem and the proposed solution. There is no reason to believe that judges applying no frills textualism will override only bad agency interpretations or that the country would be better off (whatever that might mean) if agencies were less strictly monitored. No frills textualism, if seriously implemented, could just as easily be the Treaty of Versailles (which initially appeared to bring peace but ultimately set the stage for World War II) as the Magna Carta of the modern state.

A. The Agency Nirvana Problem

Following Professor Cross, Professor Vermeule assumes that the country would be better off if judges essentially left agencies alone, except when agency lawmaking violates a statute's plain meaning. There is a significant literature examining problems with agency lawmaking, and it is a needed corrective for the agency nirvana fallacy at the heart of Judging Under Uncertainty. The status quo, which allows federal judges to review agency interpretations under traditional criteria, is far from perfect but does offer a workable system for setting limits on dynamic agency interpretations such as Commissioner Rover's aggressive stance toward tricycular traffic in federal parks. Stated another way, there are significant problems with a legal system that leaves agency interpretations essentially unmonitored.

First, there is a problem of agency bias. Some agencies, at least some of the time, exhibit features of capture by the interests they are supposed to be regulating. The National Labor Relations Board is one example. Many factors can contribute to agency capture, including postgovernment employment opportunities, the agency's need for industry cooperation, and political pressure from the White House and congressional subcommittees. The capture scenario is dynamic. Some agencies, like the EPA, have been able to resist capture under some

50 For an institutional cost-benefit analysis supporting the traditional approach, see, for example, Bernard W. Bell, Using Statutory Interpretation To Improve the Legislative Process: Can It Be Done in the Post-Chevron Era?, 13 J.L. & POL. 105, 141-60 (1997).

51 See PAUL J. QUIRK, INDUSTRY INFLUENCE IN FEDERAL REGULATORY AGENCIES (1981); Michael E. Levine & Jennifer L. Forrence, Regulatory Capture, Public Interest, and the Public Agenda: Toward a Synthesis, 6 J.L. ECON. & ORG. (SPECIAL ISSUE) 167 (1990) (providing an overview of the capture literature).

administrations, only to succumb under others.\textsuperscript{53} If agencies are captured by special interests, agency interpretations are unlikely to reflect the larger public interest upon which regulatory statutes are grounded. Because life-tenured federal judges typically have no post-judicial job aspirations, do not develop deep day-to-day connections with the parties before them, and are not as responsive to normal politics, they are in a good position to review agency interpretations that either disregard or distort congressionally established policy guidelines.\textsuperscript{54} This observation does not suggest, however, that judges will always have the opportunity to review biased agency decisions or will exercise the best judgment in those cases. My point is that by ignoring the agency bias problem and the possibility that judicial review can ameliorate that problem, Professor Vermeule’s institutional cost-benefit model reflects an agency nirvana that is not always realistic.\textsuperscript{55}

Even uncaptured agencies will often bend statutes to suit their institutional interests instead of the public interest. Agencies tend to expand their authority, and the most public-regarding agencies are often the most aggressive turf grabbers.\textsuperscript{56} Although Commissioner Rover in the Case of the Tricycle may be admirable in his zeal to clean up federal parks, we need not defer to his text-based interpretation of the Vehicles in the Park law. One of the virtues of the rule of lenity is that it slows down aggressive police and assures citizens that their liberties will not be curtailed without legislative deliberation. For similar reasons, \textit{Chevron}\textsuperscript{57} should not and probably does not require deference to an agency’s claims about its own jurisdiction.\textsuperscript{58}

A second problem is that even uncaptured expert decisionmakers might benefit from outside monitoring. The most public-regarding agency will make standard decisionmaking errors that are exacerbated by agency officials’ reliance on their own expertise. Professor Mark Seidenfeld argues that agencies systematically fall prey to overconfidence, egocentrism, and other cognitive heuristics characteristic of ex-

\textsuperscript{53} See, e.g., Christopher Drew & Richard A. Oppel, Jr., \textit{Friends in the White House Come to Coal’s Aid}, N.Y. TIMES, Aug. 9, 2004, at A1 (describing a new policy of calling upon industry lobbyists to revise environmental regulations developed by EPA experts). Indeed, the second Bush Administration seems to be a hotbed of agency capture. See Theodore W. Ruger, \textit{Left to Their Own Devices}, LEGAL AFF., Sept.–Oct. 2005, at 24 (arguing that the FDA, long considered an exemplary agency, is being captured by drug manufacturers).

\textsuperscript{54} See Stewart, supra note 17. \textit{But cf.} Spence & Cross, supra note 31, at 121–22 (arguing that interest groups prefer judicial review to agency decisionmaking).

\textsuperscript{55} Professor Vermeule discusses principal-agent problems in general (pp. 69–70, 77–78, 209) but neither cites the extensive literature on agency capture nor incorporates it into his analysis.


\textsuperscript{58} See, e.g., Thomas W. Merrill, \textit{Chevron’s Domain}, 89 GEO. L.J. 833 (2001).
pert decisionmaking. Thus, Rover will defend his aggressive construction of the Vehicles in the Park statute like a tigress defending her cubs and will dismiss criticisms as meddlesome. A judicial second look, in light of the entire statutory context, is a useful and often necessary corrective, particularly in criminal cases. What psychologists call "cognitive loafing," an unwillingness to engage in self-critical thinking, is a general problem in the modern regulatory state. Professor Seidenfeld argues, based on scientific evidence in this field, that judicial monitoring of agency rules ought to ameliorate this problem. To be sure, the monitoring advantages of judicial second-guessing might be offset by countervailing judicial biases. As before, my point is that an institutional cost-benefit analysis must consider this kind of evidence. Judging Under Uncertainty would have benefited from analysis of Professor Seidenfeld’s thoughtful article.

Third, there would be systemic and maybe even constitutional costs to a shift toward more agency lawmaking. In addition to being driven by demands from institutional or client group self-interest, dynamic agency interpretations of statutes are often driven by pressure from congressional subcommittees, including appropriations subcommittees. And increasingly, White House organs press dynamic interpretations upon independent as well as executive agencies, often over the objections of agency experts. Policy pressure from the White House is part of a larger shift of lawmaking power from Congress to the President. For interstitial lawmaking, such pressures are cause for some concern, but when they shift policy dramatically, they alter the fundamental structure of lawmaking in our polity. Specifically, congressional or even executive subgroups can now revise statutory policy without going through the Article I, Section 7 process. This phenomenon should be troubling to legal commentators.

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60 See id. at 508–26; see also Jennifer S. Lerner & Philip E. Tetlock, Accounting for the Effects of Accountability, 125 PSYCHOL. BULL. 255 (1999).
There is a practical effect that an institutional cost-benefit analysis must consider. It is much easier for an agency to change its interpretation of a statute than for a court to alter its own previous interpretation. Professor Vermeule celebrates this for reasons laid out by Justice Scalia’s excellent dissent in *United States v. Mead.* The Mead Court ruled that *Chevron* deference usually does not apply to agency interpretations when Congress has not formally delegated substantive rulemaking responsibilities. Professor Vermeule deems the decision “disastrous on institutional grounds” (p. 215) because it requires lower courts to make ad hoc judgments as to whether *Chevron* applies and, more importantly, leaves federal judges free to disagree with agency interpretations in many more cases (pp. 215–23). Justice Scalia also argued that a broader *Chevron* rule would allow agencies to update their interpretations — which less deferential regimes do not allow, as when the courts have settled on a meaning that the agency cannot change. In most cases, no frills textualism would not allow judicial predecessors to prevent further agency updating.

I have long maintained that agencies, not courts, should be the primary institutions that update statutes. But a thorough institutional analysis requires consideration of the costs as well as benefits of Justice Scalia’s and Professor Vermeule’s broad understanding of deference. One cost of an agency-driven dynamism would be a yo-yo effect, with some legal rules changing every time a new President is elected. Most dynamic theorists agree that there needs to be a balance of stability and evolution in statutory law and that the balance should be weighted in favor of stability, with change coming gradually or interstitially. This balance may reflect an outdated common law bias, but an institutional cost-benefit analysis must find better tools for analyzing the consequences of upsetting this traditional balance.

C. The Hydraulic Problem

Assume that Professor Vermeule is right in believing that agencies are the best policy implementers and that federal judges overturn a lot of good agency rules. I am doubtful that no frills textualism would solve this problem. It might even make it worse.

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65 *Id.* at 221 (majority opinion).
66 See *id.* at 243–44 (Scalia, J., dissenting).
Whatever the interpretive method, federal judges will usually find some way to exercise authority over agency decisions. An example is *K Mart Corp. v. Cartier, Inc.*, the "model opinion" for Vermeulean statutory interpretation (pp. 227–28). Enacted to override a judicial decision allowing foreign imports fraudulently competing with American goods, the Tariff Act of 1922 barred importations of "merchandise of foreign manufacture if such merchandise...bears a trademark owned" by an American citizen or firm; the Tariff Act of 1930 carried over this provision. Subsequently, "gray market" imports entered this country under conditions that did not defraud the American mark holder but fell within the terms of the statute. The Customs Service created a "common-control" exception for goods manufactured abroad by the American trademark holder or its affiliate (division, subsidiary, or parent) and an "authorized-use" exception when the imported goods were licensed by an American owner. Foreign companies seeking to charge higher prices for goods sold by their American subsidiaries challenged both agency exceptions. Delivering the disposition for the Court, Justice Kennedy upheld the Service's common-control exception and invalidated its authorized-use exception.

*K Mart* is an odd model for Professor Vermeule to celebrate. Justice Kennedy's opinion, allowing the Service to exempt products bearing a domestic trademark and manufactured abroad by the owner or its subsidiary, carved out of the law goods falling within its plain meaning — "merchandise of foreign manufacture" bearing a trademark "owned" by an American firm. In a linguistic stretch, Justice Kennedy opined that "merchandise of foreign manufacture" might mean merchandise manufactured by "a foreign company." Justice Kennedy's reading of the statutory term is not the meaning it ordinarily conveys, however; the antonym of "foreign manufacture" is "domestic manufacture," not "citizen manufacture," as Justice Scalia tartly observed in dissent. Indeed, the Customs Service had never used the term in Justice Kennedy's way and had not argued this linguistic point before the Court, presumably because such an idiosyncratic reading could render the common-control exception unavailable to goods manufactured by foreign subsidiaries (as opposed to divisions) of

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72 Id. § 526(a), 42 Stat. at 975.
75 19 C.F.R. § 133.23(d)(1)-(2) (2005) (formerly codified at 19 C.F.R. § 133.21(c)(1)-(2) (1987)).
77 *K Mart*, 486 U.S. at 292.
78 Id. at 319 (Scalia, J., concurring in part and dissenting in part).
American companies.\textsuperscript{79} Finally, Justice Kennedy’s construction, if taken seriously, would exempt goods that every Justice believed were covered — namely, those for which a foreign firm has licensed its trademark to two American firms, one for manufacture in this country and the other for manufacture abroad.\textsuperscript{80} This is, in fact, close to the fraud scenario that had been the original impetus for the statutory bar.

Justice Kennedy’s acceptance of the common-control exception is an example of agency deference contrary to the statutory text, but his invalidation of the authorized-use exception is an example of non-deferential review. Justice Kennedy found the authorized-use exception inconsistent with statutory plain meaning.\textsuperscript{81} In dissent, Justice Brennan raised an interesting point. In 1922 and 1930, when the relevant tariff statutes were enacted, the “source theory” required mark holders to sell, and not license, their marks to third parties; some cases ruled that a mark holder who licensed a third party to use a mark had abandoned ownership. Not until the 1930s did licensing trademarks (without abandoning ownership) become legally acceptable.\textsuperscript{82} In or before 1930, lawyers could have read the statutory text to permit the authorized-use exception, for they would not have assumed that a licensed trademark could have been “owned” by an American firm. Justice Brennan’s argument makes a better textual case for the authorized-use exception than Justice Kennedy’s makes for the common-use exception. Moreover, this example illustrates the possibly wooden limits imposed by no frills textualism. Given the state of trademark law, Congress in 1922 could not have anticipated the authorized-use case, and it makes policy sense to give the agency leeway to adapt the statutory bar to new legal circumstances.

\textit{K Mart}, the model opinion of a no frills, deferential textualism, is a mess. As a result of Justice Kennedy’s disposition, the Customs Service can allow importation of foreign gray market goods if they are

\textsuperscript{79} A foreign subsidiary of an American firm is, literally, a foreign entity. Under Justice Kennedy’s understanding of “foreign manufacture,” the common-control exception would not apply to goods manufactured by the foreign subsidiary unless the Court declared that “foreign” subsidiaries are actually “American” for purposes of the statute. See Eskridge, \textit{supra} note 20, at 119.

\textsuperscript{80} See \textit{K Mart}, 486 U.S. at 319–20 (Scalia, J., concurring in part and dissenting in part). Professor Vermeule writes that the dissent relied only on the argument that collateral statutes and regulations used the term differently than did the Customs Service (p. 227). That is wrong. Justice Scalia’s core argument focused on the statute itself and its regulations. Only after he made the points I summarize in the text did he link them to other regulations. See \textit{id.} at 321. Hence, Professor Vermeule’s suggestion that “most of the work in anti-deferential textualism is done by recourse to collateral statutes and provisions” (p. 228) is inconsistent with the \textit{K Mart} dissent, which is the only reference he gives for this proposition.

\textsuperscript{81} \textit{id.} at 293–94 (majority opinion).

\textsuperscript{82} See \textit{id.} at 312–15 (Brennan, J., concurring in part and dissenting in part). But see \textit{id.} at 323–25 (Scalia, J., concurring in part and dissenting in part) (providing an excellent response to Justice Brennan’s analysis).
manufactured by a foreign division of the American mark holder, but not by a foreign company licensed to use the mark, and perhaps not by a foreign subsidiary of the mark holder. This resolution rests upon neither a linguistically correct understanding of the statutory text nor an intelligible or coherent policy.

The *K Mart* mess also suggests a general hydraulic problem with Professor Vermeule’s belief that no frills textualism plus strong agency deference will remove judicial interference with important statutory questions. If judges are as mistake-ridden as Professor Vermeule believes, will they shape up just because they follow his approach? I doubt it. The hydraulic problem suggests that the bad practices Professor Vermeule highlights — good agency rules trumped by mistake-prone judges — will pop up under his approach as well. Rather than saying that the agency is violating the statutory compromise or the purpose suggested by its legislative history, agency-trumping federal judges can assert, as Justice Scalia did in *K Mart*, that the agency’s rule is inconsistent with statutory plain meaning. Judges inclined against invalidating an interpretation will assert, as Justice Kennedy did for the common-use exception and Justice Brennan did for the authorized-use exception, that there is linguistic ambiguity.83

There is no logical correlation between a plain meaning methodology and deference to agency rulemaking. Nor is there a connection in practice. For example, even though Justice Scalia is the Court’s most avid supporter of agency deference and its most insistent textualist, he is the Justice who was least deferential to agency interpretations between 1994 and 2005; the most deferential Justice was Justice Breyer, who religiously follows the traditional approach.84 Moreover, politics may have made a difference in deference rates. According to an analysis by Professors Thomas Miles and Cass Sunstein, Justice Scalia deferred only 48% of the time in Clinton Administration cases, but about 68% of the time when the Bush Administration was defending agency interpretations.85 Justice Breyer’s numbers show the reverse pattern: about 95% (Clinton) versus about 81% (Bush).86 But note that even the liberal Justice Breyer, who follows the traditional ap-

83 My analysis does not suggest that Congress cannot control or limit willful judges. But the mechanism for control would have to be structural (such as stripping courts of jurisdiction) rather than interpretive (such as telling judges to focus on plain meaning rather than legislative history).

84 See Thomas J. Miles & Cass R. Sunstein, *Do Judges Make Regulatory Policy? An Empirical Investigation of Chevron*, 73 U. CHI. L. REV. (forthcoming Summer 2006) (manuscript at 34 tbl.1, on file with the Harvard Law School Library) (reporting that Justice Scalia deferred 59% of the time in cases decided between 1995 and 2005, the lowest rate on the Court and that the most deferential Justices were Breyer, 89.5%; Ginsburg, 86%; Souter, 80.8%; and Stevens, 73.3%, all of whom follow the traditional approach to statutory interpretation).

85 Id.

86 Id.
proach, has deferred much more often to the Bush Administration than conservative Justice Scalia, a strict textualist and outspoken defender of deference.

V. ARE FEDERAL JUDGES INCOMPETENT TO HANDLE COMPLICATED LEGISLATIVE MATERIALS?

The statutory case discussed at greatest length in *Judging Under Uncertainty* is *Church of the Holy Trinity v. United States*, in which the Supreme Court held that the importation of an Episcopalian minister from England did not violate section 1 of an 1885 immigration law prohibiting contracts for transporting an alien into this country for "labor or service of any kind." In a captivating chapter, Professor Vermeule concludes that the Court got the result wrong even under conventional criteria, that the error was induced by the Court's misreading of legislative history, and that *Holy Trinity* is evidence of systematic problems with judges' ability to use legislative history skillfully enough to reach correct results (pp. 86-117).

The Court's examination of the legislative history contained a big mistake. Specifically, the Court relied on an 1884 Senate committee report stating that the drafters would have phrased the statutory bar in section 1 as applicable only to "manual labor" or "manual service" had there been time to amend the bill. In fact, as Professor Vermeule demonstrates, the Senate carried the bill over to the 1885 session yet still failed to clarify section 1 in this way; indeed, the Senate sponsor admitted that section 1 remained too broadly drafted and ought to have been amended (pp. 93-98). However, it is not clear that this was a material error, because the Court's main argument rested upon the statute's overall purpose. As Professor Carol Chomsky has shown, the Court correctly found that the purpose of the statute was to stop the wholesale importation of cheap labor driving down wages for American workers and that there was no surfeit of ministers and other "brain toilers." Convicting the Church for bringing a minister from abroad would not serve this purpose and could justify a narrow construction of "labor or service of any kind" in section 1 of the statute.

Professor Chomsky's research also casts doubt on Professor Vermeule's argument that section 5, which excepted "actors, artists, lec-

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87 143 U.S. 457 (1892).
88 Id. at 458 (quoting Act of Feb. 26, 1885, ch. 164, § 1, 23 Stat. 332, 332).
89 Id. at 464 (quoting 15 CONG. REC. 6059 (1884)) (internal quotation marks omitted).
91 The primary definition of "labor" in 1885 was manual work; "service" was work under another's direction. See William N. Eskridge, Jr., *Textualism, the Unknown Ideal?*, 96 MICH. L. REV. 1509, 1518 (1998).
turers, or singers" from the statute, confirms the breadth of section 1. It is not apparent that the legislation's supporters considered section 5 an exhaustive list. For instance, Senator John Sherman, a key supporter, characterized sections 1 and 5, read together, as limiting the statute to "the importation of men who come here under special contracts, mostly in large numbers, to work at largely reduced pay."

Moreover, the legislative history helps the interpreter understand a structural argument that also lends support to the Court's interpretation of "labor or service" as excluding ministers. Section 4 of the statute made it a crime for the master of a ship to knowingly bring over "any alien laborer, mechanic, or artisan" for "labor or service" in this country. Section 4 is text-based evidence that Congress was only focusing on certain classes of workers — artisans and mechanics as well as manual workers (but not ministers and other "brain toilers"). Professor Vermeule believes that section 4’s narrower ambit confirms the breadth of section 1 (p. 101), but he is probably mistaken. The legislative history suggests that section 1 and section 4 were in pari materia — they were meant to cover the same classes of imported workers. Because the category of workers covered by section 4 includes manual laborers and some skilled workers, but clearly not ministers, there is further textual evidence that the pastor fell outside section 1, as conventionally understood. (Section 4 also suggests a reason why the sponsors were ultimately unwilling to limit section 1 to "manual" labor or service: they believed "artisans" and "mechanics" were also being imported in excessive numbers.)

Holy Trinity is the only evidence Professor Vermeule presents for the abstract proposition that courts are incapable of analyzing legislative history accurately. The Court's mistaken reference was occasioned by the government's failure to brief the legislative history issue

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92 § 5, 23 Stat. at 333.
93 Chomsky, supra note 90, at 931 (quoting 16 CONG. REC. 1635 (1885) (statement of Sen. Sherman)). Professor Vermeule points to a colloquy between Senators Henry William Blair (the floor manager) and John Tyler Morgan (an opponent) in which each legislator asserted that he intended to introduce an amendment to enlarge the section 5 list of exceptions (pp. 97–98). That neither introduced such an amendment suggests that this exchange was a classic example of "cheap talk," which judges properly discount when reading legislative history. Daniel B. Rodriguez & Barry R. Weingast, The Positive Political Theory of Legislative History: New Perspectives on the 1964 Civil Rights Act and Its Interpretation, 151 U. PA. L. REV. 1417, 1445–48 (2003). Senator Sherman’s remarks, quoted in the text, were a response to the Blair-Morgan exchange.
94 § 4, 23 Stat. at 333.
95 Senator Blair, the floor manager, said that section 4 was aimed at "the man who knowingly brings an immigrant from foreign shores to our own, who comes here under and by virtue of a contract such as is prohibited by [section 1 of] the bill." 16 CONG. REC. 1630 (1885) (statement of Sen. Blair); accord id. at 1785 (statement of Sen. Blair); id. at 1629 (statement of Sen. McPherson); id. at 1626 (statement of Sen. Blair).
96 See Eskridge, supra note 91, at 1517–19, 1533–41.
This was an understandable error of advocacy, for the Court did not give committee reports such decisive weight before 1892.97 This is not an error the government or other repeat-player litigants have often made in the century since Holy Trinity. Nonetheless, Professor Vermeule argues that the structure of adjudication creates systematic problems with judicial use of legislative history.98 Because modern legislative histories are voluminous and heterogeneous (pp. 110–14), the adversarial parties can cherry-pick sources that the opinionated judge can use to distort the statute (pp. 114–15). It is worth noting, however, that advocates will cherry-pick, and opinionated judges will seize upon, almost any kind of interpretive source — including dictionaries, linguistic canons of interpretation, and judicial precedent. Legislative history might be distinctive in its greater volume, but Professor Vermeule presses this reasonable suggestion too far when he claims that, given the constraints of the adjudicative process, judges simply cannot handle legislative history competently.

Professor Vermeule’s point would be more cogent if there were more recent examples and systematic data of the sort that Professors Brudney and Ditslear are generating for the proposition that consulting legislative history curtails judicial discretion.99 K Mart illustrates how far judges have come in this regard. Although Justice Kennedy’s willingness to affirm the agency’s common-control exception was grounded upon an unsatisfactory textual analysis, Justice Brennan’s case for the exception was grounded upon an illuminating analysis of the legislative history.100 Similar to the Holy Trinity statute, the K Mart statute was enacted to solve a particular issue, namely, fraud against an American company that purchased a foreign trademark only to see the market flooded by goods manufactured by the foreign seller, but the broad statutory phrasing led to anomalous applications over time.101 The Customs Service sought to limit the policy damage through the common-control and authorized-use exceptions, which left the statutory bar available for the core abuse but allowed nonfraudulent imports to proceed.102 One reason Justice Brennan’s legislative analysis was so sharp is that the legislative history was well briefed by

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97 See Chomsky, supra note 90, at 944–46 (noting that Holy Trinity is seen as a modest innovation in the Court’s deployment of legislative sources to trump an apparent plain meaning).
98 Cf. Cross, supra note 31, at 1054 (arguing that the structure of the “adjudication process exacerbates the ill-informed nature of judicial review” of agency rules).
99 See supra notes 38–39 and accompanying text.
101 See id. at 300–02.
102 See Brief for the Federal Petitioners at 37–43, K Mart, 486 U.S. 281 (No. 86-495) (surveying the evolution of the Customs Service regulation).
the Government (unlike in *Holy Trinity*). Because agencies are well-versed in legislative history and are involved in so many statutory cases, the adjudicative process usually does a good job of handling this complicated material — with one important side effect: it gives agency interpretations an advantage, even when litigants on the other side are well financed, as in *K Mart*. This side effect suggests why Justice Breyer, a consumer of legislative history, is more deferential to agency interpretations than is Justice Scalia, who usually will not read a word of it. This poses a dilemma for Professor Vermeule, who dislikes legislative history but wants judges to be more deferential to agencies.

Even in the cases in which the legislative history is complicated, it is rarely intractable and, read judiciously, can be educational. In cases like *Holy Trinity*, such history can helpfully show judges:

(a) how language (such as "labor or service") was used when the statute was enacted;

(b) the relationship of various provisions or parts of the statute to one another and to the overall design (for example, the relationship among sections 1, 4, and 5 of the alien contract law);

(c) the legislative purpose (to prevent the flooding of labor markets);

(d) compromises and deals made to secure needed votes for enactment (the argument that section 5 was carefully bargained for and therefore an exhaustive list);

(e) the values and assumptions held by the legislators; and

(f) decisions that were not made or even contemplated (it never occurred to any member of Congress in 1884–1885 that the statute would be applied to ministers).

Today’s judge would not even need comprehensive briefing to research and learn from the legislative history, especially the committee report, of the Vehicles in the Park statute. In the Case of the Tricycle, the report provides important context for the judge — a stranger to the statute — to understand what Congress meant by terms like "vehicle," what problem it was trying to solve by banning vehicles from federal parks, and how the vehicles law relates to the previously enacted bicycle law. Even if initially persuaded that the law’s definition of vehicle is broad enough to include a tricycle, any reasonable

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103 See *id.* at 13–31 (surveying the legislative history of section 526 of the Tariff Act).

104 Although the Solicitor General believed statutory interpretation issues had been waived in the recent Solomon Amendment litigation, and therefore did not brief the 2004 amendment to the statute, see *Reply Brief for the Petitioners at 20 n.4*, Rumsfeld v. Forum for Academic & Institutional Rights, Inc., 74 U.S.L.W. 4159 (Mar. 6, 2006) (No. 04-1152), 2005 WL 2841654, Chief Justice Roberts had no difficulty locating relevant legislative history, which decisively supported Secretary Rumsfeld. See *Forum for Academic & Institutional Rights*, 74 U.S.L.W. at 4161–62. Every participating Justice (including Scalia) joined the Chief Justice's legislative history analysis.
judge would reconsider in light of this evidence. Committee reports are easy to find, have a high educational value, and are usually given sufficient context by the adversarial parties (especially if the government is involved in the case). There are many examples of skilled judicial analysis of committee reports and other legislative history from recent Terms of the Court, \(^{105}\) illustrating a high level of judicial competence in analyzing legislative materials today. \(^{106}\)

There is a larger point to be made. Much scholarship in the last generation has taken the Court to task for particular statutory opinions or lines of statutory cases. The criticisms have generally not been that the Justices are incapable of a sophisticated understanding of legislative history and related statutes (key sources purged under a no frills textualism), but rather that the Justices and the relevant agencies brought too little substantive or historical understanding to the economic or social problems Congress was regulating. \(^{107}\) This observation lends support to Professor Vermeule’s skepticism with respect to federal judges’ skill as policy analysts. But are they any better as textual analysts? Not necessarily. According to scholars in many fields, the Court’s performance has been particularly dismal, even under rule-of-law criteria, when the Justices (including Justice Scalia) have deferred to agencies or asserted textual plain meanings. \(^{108}\) In his book on judicial interpretation, Justice Scalia vigorously argues that *Holy Trinity* should have been decided by reference to statutory plain meaning and structure, yet he ignores contemporary definitions of “labor”

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108 See, e.g., John H. Langbein, What ERISA Means by “Equitable”: The Supreme Court’s Trail of Error in Russell, Mertens, and Great-West, 103 COLUM. L. REV. 1317 (2003) (providing a scathing analysis of Justice Scalia’s textualist ERISA jurisprudence as ignorant of the common law context for ERISA and the practical problems facing pension programs); Alan Schwartz, The New Textualism and the Rule of Law Subtext in the Supreme Court’s Bankruptcy Jurisprudence, 45 N.Y.L. SCH. L. REV. 149 (2000) (providing a skeptical analysis of textualism in bankruptcy cases); see also Richard A. Posner, The Federal Courts: Crisis and Reform 287 (1985) (arguing that some judges are incapable of handling legislative history competently, but that they are no more competent to engage in textual or other forms of legal analysis because they are either politically motivated or cognitively challenged).
and "service" and does not consider the relevance of section 4.\textsuperscript{109} While the \textit{Holy Trinity} Court did not read the entire legislative history, it also bears noting that \textit{Holy Trinity}'s primary judicial critic, and the champion of the new textualism, failed to read the statute.

VI. WHAT WOULD A VERMEULEAN REGIME LOOK LIKE?

\textit{Judging Under Uncertainty} presents no entirely cogent reason to adopt no frills textualism as the federal courts' mode of interpreting statutes. But more convincing reasons to support such a theory may exist. Consider the interesting consequences that may result from no frills textualism as it might play out over time.

Assume that the Vermeulean Court interprets the Vehicles in the Park law to include tricycles. This absurdity would probably not lead to a stable result. Under criticism, the Parks Commission might change its mind, which the Vermeulean Court would allow unless the prior opinion had interpreted the statute to include tricycles as a matter of law. If the Commission does nothing, congressional subcommittees or executive officials might bring pressure to bear. This is a potential cost of no frills textualism, for the political system would be expending energy on an issue that could have been settled by the courts. But it is also a potential benefit, because it could render the political branches more firmly accountable for the evolution of statutory policy. No longer could the Commission or Congress avoid responsibility for park safety by passing the buck to the courts.\textsuperscript{110}

If the Court rules that the statute necessarily includes tricycles, Congress might override the result by amending the statute, perhaps by adding a proviso at the end of section 3: "Provided that, 'vehicle' shall not include tricycles or bicycles." No frills textualism would probably trigger more congressional overrides of judicial interpretations of federal statutes — maybe a lot more.\textsuperscript{111} This could be another cost of no frills textualism, as frequent legislative overrides might consume too much of the limited legislative agenda. But it could also be a benefit, because it is often more appropriate for the executive and legislative branches to correct broad textual commands than for the courts. A Vermeulean revolution might even motivate Congress to create a process by which its committees would systematically review

\textsuperscript{109} SCALIA, \textit{supra} note 3, at 18–23.

\textsuperscript{110} In a world in which courts correct unreasonable consequences of applying statutory plain meanings, legislators might have more ways to avoid accountability for bad policies: "The reason parks are not safer is that judicial activists have rewritten the statute to exempt unsafe vehicles!"

\textsuperscript{111} See Eskridge, \textit{supra} note 26, at 350–51 (finding that Congress overrode a disproportionate number of Supreme Court decisions relying on textual plain meaning from 1978 to 1984).
judicial constructions; less controversial overrides (like my tricycle example) might be handled on a procedural fast track.112

Another potential benefit is closer executive or congressional monitoring of implementing agencies, such as the Parks Commission in my hypothetical. The tricycle episode might spell the end of Karl Rover’s tenure as Parks Commissioner. Imagine that the new commissioner, Mary Sheney, only goes after kids who pose more serious park safety risks. Thus, she arrests a boy rollerskating and a girl skateboarding in the park. Defense attorneys protest that roller skates and skateboards are not within the statute’s ambit. Under the traditional approach, the defense would argue that it is idiosyncratic to use “vehicle” to include roller skates and skateboards, the legislative history of the statute and the new proviso suggest a congressional intent to focus on motor vehicles, roller skates and skateboards pose less of a threat to the statutory safety purpose, and there is enough ambiguity in the law or absurdity in the application to trigger the rule of lenity. The defendants would probably win under the traditional approach but ought to lose under no frills textualism. The prosecutor could demonstrate that skateboards and roller skates are “mechanism[s] for conveying a person from one place to another,” as “vehicle” is defined in section 3. Because the proviso’s exceptions do not include skateboarding or rollerskating, this case falls within Professor Vermeule’s analysis of Holy Trinity. If there is any doubt, it should be resolved in favor of the agency, for the rule of lenity has been reversed.

The Case of the Forbidden Roller Skates is another example in which the traditional approach is predictable and reaches a sensible result, in contrast to the silly result seemingly dictated by no frills textualism. Herein lies another dimension of no frills textualism: on a Vermeulean Court, the Justices’ focus would be narrower than under the traditional approach. To discern whether “vehicle” includes roller skates and skateboards, the Justices would ignore the legislative history, the statutory purpose, and other contextual factors. Some Justices would uphold the convictions, for the reasons described in the previous paragraph. Alarmed at the unreasonableness of that result, others would wonder whether there might be a no frills way to acquit the rollerskating boy. They would examine dictionaries, linguistic histories, newspapers, and magazines to see if “vehicle” has ever been used to describe roller skates and skateboards. Finding insufficient evidence, they could vote to overturn.113 The upholding Justices

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112 See also Robert A. Katzmann, Bridging the Statutory Gulf Between Courts and Congress: A Challenge for Positive Political Theory, 80 GEO. L.J. 653 (1992) (describing a process by which selected federal appellate opinions were forwarded to congressional committees for review).

113 The fact that the statute defines “vehicle” is not necessarily the end of the inquiry under a textualist approach. See, e.g., Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or., 515 U.S.
would then conduct their own searches. Some might change their minds; others might support the skateboard conviction but overturn the rollerskating conviction; others might still uphold both. The Vermeulean Court would issue a decision, with dueling opinions resembling the text-based debate between Justices Breyer and Ginsburg over the meaning of "carry a firearm" in *Muscarello v. United States.*

*Muscarello* gives us some notion of what a no frills legisprudence might look like. It would be very different from the traditional legisprudence, but not necessarily in the ways that Professor Vermeule thinks. Simplicity would not replace complexity, research would not necessarily become easier, agency deference would not replace agency defiance, and bad decisions would not give way to good ones. The biggest difference would be that statutory interpretation would look more technical (and boring) and less normative than it looks now. "In" would be dictionaries, expert linguists, and online surveys of popular publications. "Out" would be normative canons like the rule of leniency, discussions of fairness and absurdity, and statutory purpose.

A legisprudence of dictionaries and such would be an unfortunate charade, more because the Justices would be closeting the normative influences on their judgments than because they would repeatedly reach squalid results or squeeze policy into ridiculous boxes. From the Court’s perspective and perhaps, as Professor Vermeule would insist, the country’s as well, a legisprudence of dictionaries and close textual analysis could have advantages over current practice: it might engage federal judges in enterprises they are most capable of pursuing, the opinions might appear more neutral and lawyerly, the public might perceive the federal courts to be less political, and judges might even come to see themselves as less political. My initial impression, however, is that federal judges are no better analysts of statutory texts than of legislative history, the opinions would remain highly political, the public that follows such matters would not be fooled, and judges who see textualism as unpolitical would be deluding themselves.

687, 717-18 (1995) (Scalia, J., dissenting) (interpreting “take” by reference to both the statutory definition and common law and ordinary usage).

114 524 U.S. 125 (1998). The issue in *Muscarello* was whether a sentence enhancement for a defendant who "carries a firearm" in connection with another crime should cover situations in which the defendants had engaged in illegal drug transactions with guns in the trunk or glove compartment of their cars. The majority held that "carry a firearm" includes carting it around in one’s car, see id. at 126-27; the dissenting opinion limited the term to "packing heat" on one’s person, id. at 148 (Ginsburg, J., dissenting).

115 These are on full display in *Muscarello.* In her dissenting opinion, joined by Justice Scalia, Justice Ginsburg disputed the majority’s evidence — drawn from a wide range of dictionaries, a survey of newspapers and magazines, and the Bible — and relied on her own array of sources, including the television show *M*A*S*H.* See id. at 142-44 (Ginsburg, J., dissenting).

116 Justice Scalia, for example, says that textualism requires judges to consider "whether you could use the word in that sense at a cocktail party without having people look at you funny."
So even this attractive feature of no frills textualism fails to move me (and the pretension of deference to agencies alarms me), but I have sufficient questions to suggest an experiment. The Supreme Court should decidedly not throw over the traditional approach in favor of no frills textualism, but a state supreme court might do so, preferably in a state where judges routinely refer to legislative history. The state's judges could fill in the details of Professor Vermeule's approach and adapt it to address problems they encounter. If scholars, judges, and lawyers find success in this experiment, other states might follow. Only after extensive and successful road testing in the state courts should the Supreme Court move toward this significant change in federal practice.

**CONCLUSION: QUO VADIS, STATUTORY INTERPRETATION?**

*Judging Under Uncertainty* illustrates how statutory interpretation theory risks becoming ungrounded. Earlier theorists, such as Professor Hart, and many recent ones, such as Professors Brudney, Elizabeth Garrett, Victoria Nourse, Stephen Ross, and Jane Schacter, have propounded ideas about statutory interpretation that are informed by extensive experience in the legislative or administrative process (or both). Justice Scalia's views about statutory interpretation in *Mead* are powerful because they reflect his deep experience as a former executive department official and a leading scholar of administrative law. The career model represented by these thinkers is in decline, as most law professors now enter teaching with little or no experience in the legislative or administrative process. Younger scholars have introduced interesting new ideas, but ideas without a deep grounding in the legislative and administrative processes may not be the best way to develop this field.

*Judging Under Uncertainty* reflects this risk. Although fresh and interesting, its deployment of decision theory has little payoff for our deeper understanding of statutory interpretation. In my view, a more productive contribution would be to combine institutional analysis with a richer empirical base. This is the project that Professors Brudney and Ditslear are carrying out in labor law and that Professors Daniel Schneider, Lee Epstein, Nancy Staudt, and Peter Wiedenbeck...
are initiating in tax law.\textsuperscript{117} Although I doubt that empirical surveys will settle the normative issues raised by the new textualism and dynamic theories of statutory interpretation, such work gives us a richer grounding for theoretical discussion.

Another risk is overgeneralization. Professor Vermeule's no frills textualism presents itself as a transsubstantive theory: whatever the subject area, judges should defer to agency interpretations unless those interpretations are inconsistent with the surface meaning of the statutory text. In contrast, Professor Jon Siegel argues that theories of statutory interpretation should be substance specific.\textsuperscript{118} A scholar pursuing a substance-specific approach should study the history of statutory interpretation in a particular subject area and extract from that study and from normative authorities the kinds of rules, norms, and practices that interpreters should apply in that field. Thus, proper construction of the statutes relating to corporate governance, bankruptcy, and secured transactions should be informed by scholarship laying out the transactional realities of those fields and the efficiency criteria that ought to drive such regulations.\textsuperscript{119} The Delaware Supreme Court has been a successful interpreter of corporations law not because the judges faithfully follow statutory plain meanings, but because they understand the business and legal dynamics that undergird the statutory scheme.\textsuperscript{120}

As the Case of the Tricycle reflects, no frills textualism is not an appropriate approach for criminal statutes.\textsuperscript{121} To cart the tricycle girl or the rollerskating boy off to jail because the statutory definition of "vehicle" is sufficiently broad would be unfair and would bring the moral authority of criminal law to bear on conduct Congress did not mean to criminalize. The worst fields for a no frills textualism would

\textsuperscript{117} See Lee Epstein et al., Judging Statutes: Thoughts on Statutory Interpretation and Notes for a Project on the Internal Revenue Code, 13 WASH. U. J.L. & POL'Y 305 (2003); Schneider, supra note 2.


\textsuperscript{121} But see Dan M. Kahan, Is Chevron Relevant to Federal Criminal Law?, 110 HARV. L. REV. 469 (1996). Professor Kahan's article anticipates Professor Vermeule's argument that judges should defer to Department of Justice interpretations of criminal laws. In a recent conversation, however, Professor Kahan called the article a "youthful indiscretion." Cf. Lawrence M. Solan, Should Criminal Statutes Be Interpreted Dynamically?, ISSUES IN LEGAL SCHOLARSHIP, Nov. 2002, art. 8, http://www.bepress.com/ils/iss3/art8 (supporting the rule of lenity).
be those, like criminal, antitrust, and civil rights law, that are dominated by values of interest to the general population.¹²²

I should expect an agency-deferring textualist methodology to have a better chance of success in fields that (1) are technical and generate detailed statutory texts on which private parties rely, (2) are administered by competent agencies with good reputations, and (3) are of little normative interest to generalist judges.¹²³ For example, I originally thought that textualism would be a more workable method for courts to interpret the Internal Revenue Code: the main compromises are reflected in the text of the statute, and further details and updates are provided by regulations crafted by the Internal Revenue Service, which is fairly independent and well respected.¹²⁴ Unfortunately, my reading of the tax literature leads me to hesitate. Most tax experts believe plain meaning analysis must be supplemented with legislative history and purpose, as well as other contextual considerations.¹²⁵

Consider a final possibility. Congress often utilizes omnibus legislation, which addresses numerous (typically unrelated) issues in one huge logroll.¹²⁶ Professor Garrett argues that judges interpreting omnibus legislation should hew closely to the statutory language, with as little fancy canonwork as possible, because of the ad hoc or unknowably complex features of these megadeals.¹²⁷ No frills textualism, then, might be cogently applied to omnibus legislation, but legal scholars need to investigate this phenomenon more deeply.¹²⁸


¹²⁴ See, e.g., John F. Coverdale, Text as Limit: A Plea for a Decent Respect for the Tax Code, 71 TUL. L. REV. 1501 (1997). But see Mary L. Heen, Plain Meaning, the Tax Code, and Doctrinal Incoherence, 48 HASTINGS L.J. 771 (1997) (critically discussing the Supreme Court's increasing reliance on plain meaning in tax cases).


¹²⁶ See BARBARA SINCLAIR, UNORTHODOX LAWMAKING 70-81 (2d ed. 2000).

