THE PARADOXES OF A UNIFIED JUDICIAL PHILOSOPHY

AN EMPIRICAL STUDY OF THE NEW SUPREME COURT: 2020–2022

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Six Justices now share a unified judicial philosophy in constitutional and statutory cases that they call "original public meaning" analysis. This Article provides the *first empirical analysis* of the Supreme Court's new interpretive philosophy, covering the 2020–2021 Terms and over 300 opinions. Although most associate originalism with history, the Supreme Court's version of originalism depends upon finding the original public meaning of text—hence the convergence of originalism and textualist modes of analysis more familiar to statutory than constitutional interpretation. The good news for the Justices is that text and history now matter in both constitutional and statutory cases. The bad news for the Justices is that, in twice as many statutory and constitutional cases, the Justices conflicted about text, textual application, or interpretive principle. If disagreement amounts to a "distemper" as Justice Scalia once

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stated, or a "management defect" as has Justice Gorsuch,[2] then distemper and defect live on the New Court, where the Justices who hold the same original public meaning philosophy brand their fellow textualists' interpretive arguments as deeply wrong, "schizophrenic," "illusory," "science fiction," and even a "statutory shell game."[3]

This empirical study reveals two theoretical quandaries about the new "unified" philosophy. First, the "disruption paradox." Original public meaning analysis aims to serve stability and rule of law values. Both conservatives and liberals have criticized originalism for its *disruptive effects* in theory. Our data confirms that critique, finding significant empirical evidence that the original public meaning approach may lead to disruption in constitutional cases by supplanting traditional tests with historical ones, and in statutory cases by re-envisioning new doctrines (major questions), and avoiding old ones (*Chevron* deference).

Second, the "consequentialist paradox." The Justices proclaim textualism's virtues because the method prevents them from making policy or engaging in what they call "consequentialist" argument and yet, paradoxically, they often invoke consequentialist argument. By "consequentialist" argument we mean reasoning from the policy consequences of an interpretation to the best interpretation. In unanimous cases, where the Justices agree upon text, they avoid reasoning from the results of an interpretation (defined broadly as results to the parties, similarly situated persons, the courts themselves, or any other significant "results"). But in a super-majority of cases where there is textual disagreement or interpretive conflict, the Justices turn to the policy consequences of their interpretation to reason for or against particular interpretations. As Justice Kagan noted

2. ANTONIN SCALIA & BRYAN GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 16 (2012); NEIL M. GORSUCH, JANE NITZE, & DAVID FEDER, A REPUBLIC IF YOU CAN KEEP IT 136 (2019) (quoting Judge Raymond Kethledge) [hereinafter Gorsuch].

3. Torres v. Madrid, 141 S. Ct. 989, 1006–07 (2021) (Gorsuch, J., dissenting) (critiquing the majority's "schizophrenic" reading of the word "seizure" in the Fourth Amendment); PennEast Pipeline Co. v. New Jersey, 141 S. Ct. 2244, 2267 (2021) (Barrett, J., dissenting) ("The special structural principles the Court conjures are illusory."); Collins v. Yellen, 141 S. Ct. 1761, 1797 (2021) (Gorsuch, J., concurring in part) (equating the majority's interpretive methods with "science fiction"); Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1927 (2021) (Gorsuch, J., concurring in judgment) (characterizing Chief Justice Roberts' majority opinion as engaging in a "statutory shell game").

at the end of the Term: text matters, until it does not.[4] As the Court grapples with its new "unified" philosophy, these paradoxes raise serious questions about the method's claims to be a judicially restrained and internally consistent practice.

INTRODUCTION

Just a few years ago, Supreme Court Justices divided on "judicial philosophy." That has changed: judicial philosophy is now unified. Six of the Supreme Court's Justices publicly claim to follow a philosophy focusing on "original public meaning" of statutory and constitutional texts.[5] Unity has been brought about by the "Trump effect," meaning the appointment of three Justices by President Donald Trump. These appointments have solidified judicial philosophy in ways having no precise historical analogue—the entire notion of "judicial philosophy" did not exist as a public term before the late twentieth century.[6]

The "Trump effect" has had obvious judicial consequences. Consistent with original public meaning philosophy, one of the most important cases of the twentieth century, *Roe v. Wade*,[7] was overruled, yielding nationwide headlines. The decision was overturned based on the contention that there was no text or

4. West Virginia v. EPA, 142 S. Ct. 2587, 2630, 2641 (2022) (Kagan, J., dissenting) (questioning her earlier allegiance to textualism).

5. By Justice seniority appointed by a Republican President: Clarence Thomas, *Judging,* 45 U. KAN. L. REV. 1, 5 (1996) ("Federal judges do not 'make' law or policy; they only attempt to apply authoritative texts . . . "); Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1755 (2020) (Alito, J., dissenting) ("[O]ur duty is to interpret statutory terms to 'mean what they conveyed to reasonable people *at the time they were written*.'" (quoting SCALIA & GARNER, *supra* note 2, at 16 (2012)); *Confirmation Hearing on the Nomination of John G. Roberts Jr.: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 319 (2005) ("You begin with the text . . . and in many cases perhaps most cases, you end with the text."); *See* Gorsuch, *supra* note 2, at 132 ("Textualism offers a known and knowable methodology for judges to determine impartially . . . what the law is."); *Confirmation Hearing on the Nomination of Hon. Brett M. Kavanaugh: Hearing Before the S. Comm. on the Judiciary*, 115th Cong. 194–95 (2018) ("[E]very judge really cares about the words that are passed by Congress. . . . [a]nd when we depart from the words that are specified in the text of the statute, we are potentially upsetting the compromise that you all carefully negotiated."); *Confirmation Hearing on the Nomination of Hon. Amy Coney Barrett: Hearing Before the S. Comm. on the Judiciary*, 116th Cong. (2020) ("I would say that Justice Scalia was obviously a mentor, and . . . his philosophy is mine too. He was a very eloquent defender of originalism, and that was also true of textualism.").

6. A Google Ngram shows that the term starts to have significant salience in 1971, and increases thereafter, reaching a peak in 1990. GOOGLE NGRAM VIEWER, https://books.google.com/ngrams/graph?content=judicial+philosophy&year_start=1800&year_end=2019&corpus=26&smoothing=3 (last visited Nov. 23, 2022).

7. Roe v. Wade, 410 U.S. 113 (1973).

history to support a right[8]—in short, it was justified based on the new unified judicial philosophy. But that was a single case. What does the "Trump effect" mean for *all* the cases on the Court's docket? What has this new consensus added or changed in how the Court operates and is likely to operate in the future?

This is the first Article to give empirical texture to the "Trump effect" by reviewing a universe of cases from the first two Terms of the New Court.[9] Rather than focus on a few highly controversial cases, we[10] decided to look at *all* the Court's decisions for the past two Terms, beginning in October 1, 2020 and ending on June 30, 2022. We began the work at the end of the 2020 Term in 2021, and continued to code throughout 2022 as the year unfolded, reading over 300 opinions. Our focus is legal methodology rather than political leanings or judicial alliances; unlike other studies, we aim to assess how methodology affects judicial doctrine in both constitutional and statutory cases. We are aware of no prior empirical work that joins these groups of cases, particularly at such a keen moment portending considerable legal change.

Our study shows that the Supreme Court's lingua franca has changed, in both constitutional and statutory law. This is true not only for the relatively rare *constitutional* cases (only 28 cases in our universe of 124 merits cases), but also for standard *statutory* cases, the great body of the Supreme Court's day-to-day work.[11] That leads to some good news: despite end-of-Term dramas, the Justices were unanimous in a minority of cases involving textual interpretation (primarily statutory cases), sending an important signal to lower courts that text matters. It also leads to good news for original public meaning's preference for historical evidence of meaning. Twelve of the 28 constitutional merits cases (43%) had a majority opinion relying upon history and in 18 of 28 cases (64%), at least one opinion invoked history, defined as history

8. *See* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2248–49 (2022).

9. Other studies focus on statutory, as opposed to constitutional, interpretation. *See, e.g.*, Anita S. Krishnakumar, *Statutory Interpretation in the Roberts Court's First Era: An Empirical and Doctrinal Analysis*, 62 HASTINGS L.J. 221 (2010) (analyzing cases from 2005 to 2008); Anita S. Krishnakumar, *Backdoor Purposivism,* 69 DUKE L.J. 1275 (2020) (analyzing Roberts Court cases from 2006 to 2017) [hereinafter Krishnakumar, *Backdoor*].

10. Because several research assistants assisted at various points, although I read each of the cases myself, I use the term "we" to describe the research. The opinions are my own.

11. For a discussion of statutory and precedential cases, see *infra* Parts I and II.

predating the twentieth century.[12]

For some time, academics have debated whether originalism in practice would be disruptive.[13] Most recently, writing from a conservative perspective, Professor Adrian Vermeule urges that originalism, once a successful "rhetorical practice," has the undesirable normative potential for "disruption," and that originalists' claim to the contrary—that it will lead to stability—is an untested empirical claim.[14] This study is the first to consider that question. We find evidence of disruptive effects, particularly in constitutional cases. If text controls, and constitutional doctrine created before the "textualist revolution" (before the 1990s) is unconnected to the text, original public meaning methodology tells judges to refigure the doctrine. Vast reaches of constitutional doctrine—including concepts from strict scrutiny to compelling interests—have no basis in the tiny constitutional text.[15] If all doctrine must have some connection to the text (or history), then there is a vast amount of doctrine that is now potentially reversible in constitutional cases. In almost half the constitutional cases (46%, or 13 of the 28 cases), at least one Justice argued that judicial doctrine was inconsistent with the text or the proper historical understanding of the text.[16]

Looking at all interpretive cases, including statutory cases, yielded a corollary: dissension on the Court. Justices who shared a unified original public meaning philosophy conflicted among themselves about the meaning of text. There were 23 cases with unanimous opinions on statutory and constitutional interpretation; by contrast, nearly three times as many cases involving interpretation were divided, 64. Those 64 cases yielded 91 "interpretive conflicts."[17] *Self-described textualist Justices are divided among themselves* about meaning of the text, the proper

12. For a more detailed explanation of these results, see *infra* Part II and Appendix A, which lists them and their coding.

13. David A. Strauss, *The Supreme Court, 2014 Term—Foreword: Does The Constitution Mean What It Says*?, 129 HARV. L. REV. 1 (2015).

14. ADRIAN VERMEULE, COMMON GOOD CONSTITUTIONALISM 113 (2022) (arguing for a different classical version of constitutionalism and stating that there is a "basic empirical supposition underlying originalism that it "conduces to stability and durability over time, but there is little reason to think that this is true").

15. Strauss, *supra* note 13.

16. See Appendix A listing and describing these cases.

17. Cases often yielded more than one interpretive conflict. For example, the case may require interpretation of both a statute and the constitution. The measure being used here is conflict, not the case. See Appendix C for a discussion.

text to pick, or its application, 67% of the time (61/91) when facing an interpretive issue. This defies the standard realist wisdom that political party appointing the Justice accounts for the Justices' decisions. The Justices committed to original public meaning, as defined here, were appointed by Republican Presidents; if political party dominated interpretation, there should be little conflict among them. But that is not what the data shows. Evidence of significant conflict among Justices[18] committed to a unified philosophy of original public meaning defies textualism's theoretical promise that text (constitutional or statutory) will yield simple, right, answers. As Justice Scalia once wrote, "most interpretive questions have a right answer."[19] Justice Gorsuch went further to say that finding ambiguity was a "management defect."[20] If text can lead to different answers, when deployed by some of America's most committed textualists, then both its proponents and its critics must wonder whether textualism actually reduces discretion in the hard cases where it is most needed, or whether it actually increases discretion because it allows judges to "pick and choose" the proper text or meaning of the text. For some cases, where there was unanimity, text did the job, but not for most cases in our data universe. Text, in short, was about a twenty-percent solution.

Contrary to what one might expect from a unified philosophy, self-described textualist Justices, including Trump appointees, regularly disagreed, calling each other's interpretations "schizophrenic" or "science fiction."[21] Equally pointed were arguments from liberal Justices (who themselves use

18. We recognize that Justices appointed by Democratic Presidents can be textualists, and we recognize that some Republican Justices are conventionally not considered to be strict textualists. But for the purposes of this paper, we are trying to hold political party constant to avoid a confounding variable. As we explain later, adding in the liberal textualists to our definition of Supreme Court advocates of original public meaning simply increases the amount of interpretive conflict on the Court.

19. SCALIA & GARNER, *supra* note 2, at 6.

20. NEIL GORSUCH, A REPUBLIC IF YOU CAN KEEP IT 136 (2019) (quoting Judge Raymond Kethledge).

21. *See, e.g.*, Torres v. Madrid, 141 S. Ct. 989, 1006–07 (2021) (Gorsuch, J., dissenting) (critiquing the majority's "schizophrenic" reading of the word "seizure" in the Fourth Amendment.); Collins v. Yellen, 141 S. Ct. 1761, 1797 (2021) (Gorsuch, J., concurring in part) (equating the majority's interpretive methods with "science fiction"); PennEast Pipeline Co. v. New Jersey, 141 S. Ct. 2244, 2267 (2021) (Barrett, J., dissenting) ("The special structural principles the Court conjures are illusory."). For a good summary of the debate about whether text matters in constitutional law, see Curtis A. Bradley & Neil S. Siegel, *Constructed Constraint and the Constitutional Text*, 64 DUKE L.J. 1213 (2015).

textualist argument in some cases) that original public meaning methodology was deployed opportunistically (although the liberal justices themselves deployed history and text in some cases).[22] In 2021, Justice Kagan was quick to criticize textualists for "making up" text, in a voting rights case, *Brnovich v. Democratic National Committee.*[23] By the end of the 2021 Term, in the climate change case, *West Virginia v. EPA*, she wrote of the "*supposedly* textual method of reading statutes," and called the majority's reliance on the major questions doctrine, a "get-out-of-text free card."[24] She explained: "Some years ago, I remarked that '[we're] all textualists now.' . . . It seems I was wrong. The current Court is textualist only when being so suits it."[25]

Charges of hypocrisy surfaced among Justices devoted to original public meaning: Trump appointees traded insults about who was engaging in forbidden "policy analysis."[26] Original public meaning theory says that Justices are properly blind to the policy consequences of their decisions; they do not choose policy, they only apply the law.[27] But, in practice, our data shows this promise unfulfilled by the very Justices who reject consequentialist reasoning. The data tells us that meaning alone did not end the argument; in 69% of the interpretive cases in which there was any kind of interpretive conflict among self-described original public meaning Justices, the original public meaning Justices engaged in consequentialist reasoning. It also shows that consequentialism—defined as reasoning about what an interpretation would do in the world[28]—was a feature, albeit an officially illegitimate one, of these opinions. When the Justices agreed, text ended the analysis.

22. For an example of an opinion written by a Democrat-appointed or liberal Justice devoted to text, see Borden v. United States, 141 S. Ct. 1817 (2021) (Kagan. J.) (plurality opinion).

23. 141 S. Ct. 2321, 2362 (2021) (Kagan, J., dissenting) ("The majority instead founds its decision on a list of mostly made-up factors. . . .").

24. West Virginia v. EPA, 142 S. Ct. 2587, 2630, 2641 (2022) (Kagan, J., dissenting) (first emphasis added).

25. *Id.* at 2641 (citation omitted).

26. *See infra* Part I (discussing cases in which textualists disagreed and incorporated policy-based consequentialist arguments).

27. *See, e.g.,* Niz-Chavez v. Garland, 141 S. Ct. 1474, 1486 (2021) (Gorsuch, J.). ("[R]aw consequentialist calculation plays no role in our decision . . . no amount of policy-talk can overcome a plain statutory command.").

28. For a more precise definition, see Appendix G, which includes consequences to the parties, individuals similar to the parties, to the Court or courts in general, and the defensive use of consequentialism, meaning a claim that was made in response to another Justice's use of consequentialism.

When they disagreed about the choice-of-text or meaning of the text, they turned to consequentialism three quarters of the time (75%).[29] To be sure, consequentialism can cover lots of territory: it may be consequences for the parties, for the courts, or for a policy, and it can be used defensively, matters we consider in our analysis of consequentialist reasoning on an avowedly non-consequentialist Court.[30]

In an earlier era, when confronted with textual ambiguity, the Justices looked for Congress's or the President's policy or purpose—that is, to someone's else's ends, but today, both moves are suspect.[31] The Justices are left to their own judgments about their decision's consequences, even though they strenuously insist that they are not embracing "judge-empowering" rules. That, in turn, has created what the Court itself perceives as problematic and unforeseen outcomes. In 2020, the Court decided that half the state of Oklahoma, over 2 million people, lived in Indian Territory, a decision haled by those (like me) who celebrate tribal sovereignty.[32] But that led to predictable problems rationalizing the criminal justice systems across federal, state and Indian jurisdictions. By 2022, the Court responded with a wide-sweeping rule applying state criminal law to *all* Indian Territory, which met with condemnation that the Court had overcorrected.[33] The moral

29. See Appendix G for this number.

30. *See infra* text accompanying notes 166–177 and Appendix G (repeating verbatim consequentialist arguments from the Court's opinions).

31. Congressional materials were once widely used by the Supreme Court. *See* Nicholas R. Parrillo, *Leviathan and Interpretive Revolution: The Administrative State, the Judiciary, and the Rise of Legislative History* 1890–1950, 123 YALE L.J. 266 (2013). So, too, the *Chevron* doctrine asked judges to defer to the meanings of executive department actors. Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984). The current Supreme Court has shown a significant amount of hostility to *Chevron*. For an explanation of this development in political terms, see Gregory A. Elinson & Jonathan S. Gould, *The Politics of Deference*, 75 VAND. L. REV. 475 (2022). We found three merits majority opinions citing *Chevron* in the Supreme Court after the 2019 Term. *See* Salinas v. United States. R.R. Ret. Bd., 141 S. Ct. 691, 700 (2021); HollyFrontier Cheyenne Refining, LLC v. Renewable Fuels Ass'n, 141 S. Ct. 2172, 2180 (2021); Johnson v. Guzman Chavez, 141 S. Ct. 2271, 2291 n.9 (2021). In no case did the majority of the Court expressly invoke *Chevron* to defer to an agency's interpretation.

32. *See* McGirt v. Oklahoma, 140 S. Ct. 2452 (2020); *see also* Julian Brave NoiseCat, *The* McGirt *Case Is a Historic Win for Tribes*, ATLANTIC (July 12, 2020), https://www.theatlantic.com/ideas/archive/2020/07/mcgirt-case-historic-win-tribes/614071/.

33. *See* Oklahoma v. Castro-Huerta, 142 S. Ct. 2486 (2022); *see also* Graham Lee Brewer, *The Supreme Court Gave States More Power Over Tribal Land. Tribes Say That Undermines Their Autonomy*, NBC NEWS (June 30, 2022, 12:52 PM), https://www.nbcnews.com/news/us-news/supreme-court-oklahoma-castro-huerta-

of this story: if you truly do not look to interpretive consequences, those consequences may rise up in unanticipated ways, leading to disruption and instability in the world.

A note on terminology: Pundits and lawyers often characterize the Court's "judicial philosophy" as "originalist," a term with many meanings within the academy. But what we are focused on is *the Supreme Court's originalism*. And, in our view, the Court's *original public meaning* methodology depends upon a textualist baseline in both statutory and constitutional cases.[34] Focus on text remains more important overall than history across the entire range of the Supreme Court's docket because the number of statutory cases far exceeds the number of constitutional cases. As of 2022, the Justices say that they look for "original public meaning" of the text in *both* statutory and constitutional cases[35]; hence our use of that term to describe their approach. We use the shorthand term "textualism" to describe attention to the text.[36] When we discuss history, we typically use the word "history." If we are discussing an originalist approach different from the Court's "original public meaning," we will so designate it.

The roadmap. Part I argues that the "Trump effect" has solidified "original public meaning" as methodological orthodoxy in constitutional and statutory cases. We begin with three representative constitutional decisions: *Fulton v. City of Philadelphia*, *New York State Pistol & Rifle Association v. Bruen*,

decision-tribal-sovereignty-rcna35872 ("As a citizen of a tribal nation, I feel violated." (quoting Elizabeth Reese, citizen of the Nambé Pueblo)); Cheyenne Cole, *State, Tribal Officials Weigh in on SCOTUS* Oklahoma v. Castro-Huerta *Decision*, ABC 7 NEWS OKLA. (June 30, 2022, 11:24 PM), https://www.kswo.com/2022/07/01/state-tribal-officials-weigh-after-scotus-gives-states-power-prosecute-non-natives-tribal-land/ ("[T]he United States Supreme Court rendered a decision that is an affront to tribal sovereignty and erodes centuries of well-settled federal Indian law." (quoting Quapaw Nation Business Committee Chairman Joseph Byrd)).

34. ANTONIN SCALIA, A MATTER OF INTERPRETATION 17–18 (Amy Gutmann ed., 1997) ("What I look for in the Constitution is precisely what I look for in a statute: the original meaning of the text."). Originalist critics recognize continuities between the Court's approach to statutory and constitutional cases. *See, e.g.,* VERMEULE, *supra* note 14, at 99–108.

35. *See*, *e.g.*, Bostock v. Clayton County, 140 S. Ct. 1731 (2020) (Title VII); New York State Rifle Ass'n v. Bruen, 142 S. Ct. 2111 (2022) (Second Amendment).

36. Akhil Amar, *The Supreme Court, 1999 Term—Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26, 28–29 (2000) (using the term "textualism" to describe a focus on the document as well as on constitutional doctrine). It is theoretically possible to have originalism without text, but that is not how the Court is operating. *See, e.g.*, Stephen E. Sachs, Essay, *Originalism Without Text,* 127 YALE L.J. 156 (2017).

and *Dobbs v. Jackson Women's Health Organization*. We then move on to three representative statutory decisions, *Niz-Chavez v. Garland*, *Van Buren* v. *United States*, and *Borden v. United States*.[37] We identify three themes: the increasing role of history and text; conflict among self-described textualist Justices; and disruption, meaning doctrinal change based on history and text. We also find an avowed distaste for consequentialist reasoning, yet frequent recourse to consequentialism despite that distaste.

Part II moves on to data and methodology. Coding the use of history and even the disruptive use of history in constitutional cases is relatively easy, because the Court decides so few constitutional cases. But coding "conflict" about interpretation over all the Court's cases is an entirely different matter. This is the first study to attempt such an analysis of *both statutory and constitutional cases*. The Court says that it applies the same "original public meaning" methodology in both kinds of cases, so it seems right to try to measure that methodology's effects in both kinds of cases. That requires first isolating textual interpretive cases from those in which no statutory or constitutional text is considered. A small but significant portion of the Court's caseload involves *common law reasoning* from its own precedents; there is no text to interpret other than a prior judicial opinion. Typically, these involve procedural doctrines like standing or mootness or jurisdiction or qualified immunity. To isolate cases involving original public meaning, one must eliminate the cases that only address judicial doctrine, the common law precedential cases.

We first divided our data universe into two categories: unanimous cases and non-unanimous cases. We then excluded precedential cases, meaning cases that interpreted no text, whether constitutional or statutory.[38] That gave us a set of interpretive cases in which there were two kinds of conflicts. The first kind of conflict was between Justices who all ascribe to original public meaning. What we dub "*intra-original-public-meaning* Justice conflicts" are ones in which Justices ascribing to a unified theory conflict about an interpretation. We excluded from these cases what we called "traditional splits." To get a true sense of "*intra-original-public-meaning* conflict," we differentiated conflicts arising from non-originalist Justices. One

37. For citations, see *infra* Part I.

38. A list of the unanimous cases appears in Appendix B, including precedential cases. Precedential conflict cases appear in Appendix D.

would expect that liberal and conservative or Republican-appointed and Democrat-appointed Justices would split, 6–3 (although they did not). What one would not expect from a "unified" philosophy is that those supporting "original public meaning" would divide among themselves. We found significant conflict in both constitutional and statutory cases among original public meaning adherents.[39]

Part III turns from data to theory. It considers how two paradoxes emerge from an avowedly unified Supreme Court methodology. First is the "disruption paradox." Original public meaning and textualism more generally purports to be a method for achieving rule of law values, like stability. But, in fact, as we will see, there were a significant number of opinions in constitutional cases seeking to change legal doctrine based on historical or textual claims. To put it bluntly: one should not think that the celebrated cases of the 2021 Term on guns and abortion were alone. Our evidence, for example, supports Professor Vermeule's claims that disruption is a feature, not a bug, of a system that turns to history and text. Our empirical findings in the small number of constitutional cases likely understates the amount of disruption. In statutory cases, there were obvious changes in doctrine during these Terms, both adding new doctrines (major questions)[40] and ignoring others (*Chevron* deference).[41] We explore answers that originalist academics may provide to this, but conclude that the Justices on the Supreme Court have yet to address central questions about the legitimacy of history as constitutional method.

Second, Part III considers the "consequentialist paradox." Although the Justices claim that they should not consider the "consequences" of their interpretation, they do. And they do it because original public meaning's textual focus divides Justices about which text to pick or how to apply it in a particular situation, or which history to use to liquidate the meaning of the text. This Part argues that this is a feature of a system refusing to look at purposes or ends of others (Congress or the President), leaving the Justices to imagine (or not imagine) their own ends. This Part

39. A list describing these conflicts appears in Appendix C.

40. *See, e.g.,* the "major questions doctrine," West Virginia v. EPA, 142 S. Ct. 2587, 2641 (2022) (Kagan, J., dissenting) ("The current Court is textualist only when being so suits it.").

41. *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc,* 467 U.S. 837 (1984).

offers different ways in which academic theorists might or have attempted to resolve these paradoxes—consequentialism as construction, traditional Blackstonianism, or a new version of absurdity. But it concludes that the Justices themselves have not grappled with the paradoxical features of their newly unified interpretive philosophy.

I. ORGINAL PUBLIC MEANING'S MARCH

We start with case examples from the 2020 and 2021 Terms. We first address constitutional cases, then statutory cases. We consider the following themes: the increasing primacy of original public meaning, the power of text to yield conflict among Justices who adopt the mantle of original public meaning, and the role of history and text to displace established doctrine. In Part II, we show why these are not simply anecdotal conclusions, but offer empirical data to support the choice of these themes.

A. CONSTITUTIONAL CASES

In constitutional cases, text and history are on the march, and they are on a fairly obvious collision course with established constitutional doctrine. For most of my career, constitutionalists have argued that constitutional text really does not matter, that the doctrine matters more than the text in many cases.[42] By "doctrine," we mean the sub-rules courts use to implement vague text, such as ideas like "strict scrutiny" which inform many cases but have no precise textual analogue. After the 2020 and 2021 Terms, no one should be under the illusion that text does not matter to the Justices. There were 28 constitutional merits cases decided in 2021 and 2022.[43] Eighteen of those cases (64%) involved at least one opinion (majority, concurring or dissenting) focusing on text and history. Thirteen of 28 cases (46%) involved at least one opinion (majority, concurring, or dissenting) that argued for displacing doctrine with history or text. For a full description of these numbers, see Appendix A.

42. *See* Strauss, *supra* note 13.
43. *See* Appendix A.

1. *Fulton v. City of Philadelphia*

To set the stage, let us start with a model of the New Court's constitutional opinions. In 2021, the Supreme Court barred the City of Philadelphia from cancelling an adoption services contract with the Catholic Church because the Church refused to serve gay parents. Chief Justice Roberts wrote for a splintered majority to rescue the Church's religious views and save prevailing precedent.[44] That precedent, *Employment Division v. Smith*, held that laws of general applicability, like criminal laws, should in fact be generally applicable to avoid providing an "anarchy" of individual religious exemptions.[45] Joined by Justices Thomas and Gorsuch, Justice Alito concurred in the result, but wholly rejected Chief Justice Roberts' reliance on *Smith*, wanting to begin fresh.

Justice Alito wrote in blunt terms: "[We] must begin with the constitutional text."[46] Justice Alito explained that *Smith* "paid shockingly little attention to the text."[47] This was particularly odd since *Smith*'s author, the great progenitor of textualism, was Justice Scalia himself. Looking to Justice Scalia's opinion in *District of Columbia v. Heller*, Justice Alito explained: "Justice Scalia's opinion . . . is a model of what a reexamination of the Free Exercise Clause should entail. . . . [It] begins by presuming that the 'words and phrases' of the Second Amendment carry 'their normal and ordinary . . . meaning.'"[48] Justice Alito's opinion then undertakes a careful examination of all the Amendment's key terms:

> Following the sound approach that the Court took in *Heller*, we should begin by considering the "normal and ordinary" meaning of the text of the Free Exercise Clause: "Congress shall make no law . . . prohibiting the free exercise [of religion]." . . . [W]e can . . . focus on . . . the term "prohibiting" and the phrase "the free exercise of religion."
>
> Those words had essentially the same meaning in 1791 as they do today. "To prohibit" meant either "[t]o forbid" or "to hinder." . . . The term "exercise" had both a broad primary definition ("[p]ractice" or "outward performance") and a narrower secondary one (an "[a]ct of divine worship whether publick or private"). . . . And "free," in the sense relevant here,

44. Fulton v. City of Philadelphia, 141 S. Ct. 1868 (2021).
45. 494 U.S. 872 (1990).
46. *Fulton*, 141 S. Ct. at 1894 (Alito, J., concurring in judgment).
47. *Id.*
48. *Id.* at 1895 (quoting District of Columbia v. Heller, 554 U.S. 570, 576 (2008)).

> meant "unrestrained." . . . The key point for present purposes is that the text of the Free Exercise Clause gives a specific group of people (those who wish to engage in the "exercise of religion") the right to do so without hindrance.[49]

From this beginning, history followed: state free exercise clauses at the Founding, state legislatures' exemptions from generally applicable laws, including Acts predating the Constitution (e.g., 1649), a variety of cases from the nineteenth century, and the drafting history of the Bill of Rights, all of which the opinion assembles to argue that *Smith* was wrongly decided. Along the way, Justice Alito reasoned that *Smith* had to be wrong because of its doctrinal consequences: *Smith* would allow states to pass general laws banning everything from kosher food to sacramental wine and religious head coverings.[50]

Fulton offers us three potentially unexpected features of textualism in constitutional law. First, textual precision yet conflict. Trump appointees Justices Barrett and Kavanaugh did not join the Alito opinion, even though they are textualists, and authored other opinions mimicking the Scalia approach. Justice Gorsuch wrote a separate opinion (also not joined by Justices Barrett and Kavanaugh) agreeing with Justice Alito, but arguing that the majority, namely Chief Justice Roberts, had engaged in a "statutory shell game," to comply with *Smith*'s requirements. Text, in short, if methodologically necessary, was not sufficient to gain the agreement of avowed and highly skilled textualist Justices.

Second, we see the potential of text to reverse precedent. Justice Alito spends much of his textual analysis here focused on *the prior precedent*, *Smith,* a decision that he argues is inconsistent with the constitutional text, the lodestar of constitutional inquiry. Ultimately, this leads to doctrinal displacement: it is not only that Justice Alito urges overruling *Smith*, but that conventional constitutional doctrine (e.g., *Smith*'s generality requirement) should be displaced, nodding to a wealth of new historical research on the original meaning of the Free Exercise Clause,[51] as well as a prior standard requiring the state to show a "compelling

49. *Id.* at 1895–97 (citations omitted).

50. *Id.* at 1883–84.

51. *Id.* at 1923 ("Another significant development is the subsequent profusion of studies on the original meaning of the Free Exercise Clause.").

interest."[52] Justice Gorsuch's concurrence in judgment makes this effect even clearer: "any time this Court turns from misguided precedent back toward the Constitution's original public meaning, challenging questions may arise across a large field of cases and controversies."[53]

2. *New York State Rifle & Pistol Association v. Bruen*

Fulton prefigures the method we see in Justice Thomas's decision in the important Second Amendment case, *New York State Rifle & Pistol Association v. Bruen*.[54] Justice Thomas's majority opinion, joined by the Trump-appointed Justices, strikes down New York's limitations on concealed carry weapons. The opinion pays due regard to text, and the legacy of *District of Columbia v. Heller*, the canonical decision finding an individual Second Amendment right. It explains that *Heller* demands a "test rooted in the Second Amendment's text."[55] And it is on this basis that the decision rejects the near-unanimous view of the courts of appeals based on "means-end" scrutiny. "In *Heller*, we began with a 'textual analysis' focused on the 'normal and ordinary' meaning of the Second Amendment's language."[56] Justice Thomas explained:

> *Heller*'s methodology centered on constitutional text and history. Whether it came to defining the character of the right, . . . suggesting the outer limits of the right, or assessing the constitutionality of a particular regulation, *Heller* relied on text and history. It did not invoke any means-end test such as strict or intermediate scrutiny.[57]

The Court thus rejects the language of modern constitutional law. "Intermediate scrutiny" is familiar to anyone who has taken a course on constitutional law in the past 50 years: levels of scrutiny are the essence of a good deal of doctrine on everything from the Equal Protection Clause to free speech and other rights. *Bruen* explains that modern means-end analysis is disfavored because it is a "judge-empowering 'interest-balancing inquiry.'"[58]

52. *Id.* at 1924 (suggesting that the standard that comes most "readily to mind" is "narrowly tailored to serve a compelling government interest").
53. *Id.* at 1931 (Gorsuch, J., concurring).
54. 142 S. Ct. 2111 (2022).
55. *Id.* at 2127.
56. *Id.* (quoting District of Columbia v. Heller, 554 U.S., 570, 576–78 (2008)).
57. *Id.* at 2128–29.
58. *Id.* at 2129 (quoting *Heller*, 554 U.S. at 634).

Intermediate scrutiny "'asks whether the statute burdens a protected interest in a way or to an extent that is out of proportion to the statute's salutary effects upon other important governmental interests.'"[59] That inquiry looks at "effects" in the world. That, in turn, requires "judges to assess the costs and benefits of firearms restrictions" under means-end scrutiny.[60] In *Heller*, the Court had "declined to engage in means-end scrutiny because '[t]he very enumeration of the right takes out of the hands of government—even the Third Branch of Government—the power to decide on a case-by-case basis whether the right is *really worth* insisting upon.'"[61] Justice Thomas concluded by quoting *Heller* once more: "'A constitutional guarantee subject to future judges' assessments of its usefulness is no constitutional guarantee at all.'"[62]

Enter the Court's hostility to engaging in what it calls consequentialist inquiries. We will see later, when we look at statutory interpretation doctrines, that this hostility is a theme of the current Court's textualist Justices. In *Bruen*, Justice Thomas argues that the very "enumeration" of a right means that it is important and no judge may demean it by trying to decide whether it is "useful." The problem, however, with this argument is that almost all constitutional doctrine is not enumerated in the text. Unless rights are absolute, rights have limiting principles, as the *Bruen* Court itself acknowledges. Typically, those limiting principles are expressed as questions that weigh the state's interest in promoting certain general goods. But under *Bruen*, these assessments of consequential calculi are forbidden. Any limiting principle must come from history.

3. *Dobbs v. Jackson Women's Health Organization*

These cases surface obvious parallels to the blockbuster of the Term: Justice Alito's majority opinion in *Dobbs v. Jackson Women's Health Organization*.[63] We see the three methodological themes sketched out above: textual analysis, textual conflict, and disruption. The Court begins its analysis by invoking text:

59. *Id.* (quoting *Heller*, 554 U.S. at 634).

60. *Id.* (quoting McDonald v. City of Chicago, 561 U.S. 742, 790 (2010) (plurality opinion).

61. *Id.* (quoting *Heller*, 554 U.S. at 634).

62. *Id.*

63. 142 S. Ct. 2228 (2022).

> Constitutional analysis must begin with "the language of the instrument," . . . which offers a "fixed standard" for ascertaining what our founding document means. . . . The Constitution makes no express reference to a right to obtain an abortion, and therefore those who claim that it protects such a right must show that the right is somehow implicit in the constitutional text.
>
> *Roe*, however, was remarkably loose in its treatment of the constitutional text. It held that the abortion right, which is not mentioned in the Constitution, is part of a right to privacy, which is also not mentioned. . . . And that privacy right, *Roe* observed, had been found to spring from no fewer than five different constitutional provisions—the First, Fourth, Fifth, Ninth, and Fourteenth Amendments.[64]

Roe is only "loosely connected to text," just as we saw in *Fulton* that *Smith* was only loosely connected to text. From there, as in *Bruen*, the Court turns to history, following established substantive due process doctrine which calls for an analysis of whether "unenumerated rights" are deeply rooted in the history and traditions of the nation. As Justice Alito explains: "Historical inquiries of this nature are essential whenever we are asked to recognize a new component of the 'liberty' protected by the Due Process Clause because the term 'liberty' alone provides little guidance."[65] History was essential to "guard against the natural human tendency to confuse what that Amendment protects with our own ardent views about the liberty that Americans should enjoy."[66]

Roe had relied upon faulty history, Justice Alito writes. There was no right to abortion before the late twentieth century. There follows a lengthy analysis of the history of laws restricting abortion, returning to the thirteenth century. We quote an illustrative passage to give a sense of the precision and extent of early historical analysis:

> The "eminent common-law authorities (Blackstone, Coke, Hale, and the like)," . . . all describe abortion after quickening as criminal. Henry de Bracton's 13th-century treatise explained that if a person has "struck a pregnant woman, or has given her poison, whereby he has caused abortion, if the foetus be already formed and animated, and particularly if it be

64. *Id.* at 2244–45 (citations omitted).
65. *Id.* at 2247.
66. *Id.*

> animated, he commits homicide." 2 De Legibus et Consuetudinibus Angliae 279 (T. Twiss ed. 1879); see also 1 Fleta, c. 23, reprinted in 72 Selden Soc. 60–61 (H. Richardson & G. Sayles eds. 1955) (13th-century treatise).[67]

Much more history ensued, replacing any prior doctrine on the question of trimesters or undue burden. As we have seen before, despite methodological unity, the textualist Justices conflicted. Justice Thomas wrote a separate opinion suggesting that the Court had gotten the proper text wrong. Justice Thomas reasoned that all the substantive due process cases—on marriage, contraception and other matters—should be revisited.[68] The Court should have considered whether the "privileges and immunities" clause would instead be the more apt constitutional location to cover some rights and privileges currently protected by the Due Process Clause.[69] Justice Kavanaugh concurred, indicating that he did not agree with Justice Thomas that those decisions should be revisited and that the Constitution was "neutral" on abortion, which means that the decision should more properly be decided in the states.[70] Finally, Chief Justice Roberts argued that the Court had gone too far in overruling *Roe*, that it had failed to even consider the interest of a woman in choosing her medical fate, but that the Court should have upheld Mississippi's 15-week law limiting abortions as allowing a "reasonable" woman to determine whether she was pregnant.[71] This standard was excoriated as entirely unworkable by Justice Alito's majority opinion.[72]

4. Summary of Data on Constitutional Cases

Now that we have seen three highly salient cases, we can ask what our data says about how representative they may be. There is good news for advocates of original public meaning: we found that nearly two thirds of the merits cases (18/28 or 64%) involved at least one opinion with pre-twentieth century historical analysis, where that analysis was defined as history from 1787, 1868, or nineteenth-century common law.[73] Of 62 opinions written by self-

67. *Id.* at 2249 (citation omitted).
68. *Id.* at 2301 (Thomas, J., concurring).
69. *Id.* at 2301–02.
70. *Id.* at 2305–08 (Kavanaugh, J., concurring).
71. *Id.* at 2314 (Roberts, C.J., concurring in judgment).
72. *Id.* at 2281–83 (majority opinion).
73. *See, e.g.*, Torres v. Madrid, 141 S. Ct. 989, 1002–03 (2021). Justice Gorsuch decries

described advocates of original public meaning, 26 included an analysis of pre-twentieth century history (42%). No one should think that the liberal Justices were allergic to history; they wrote decidedly fewer opinions (25), but, in seven opinions, they deployed history as well. This is a significant shift from what liberal scholars have long asserted as the irrelevance of original public meaning to much constitutional doctrine.[74]

On the other hand, advocates of original public meaning must ask why history does not appear in 100% of the constitutional cases, and in less than half of the majority opinions (12 of 28, or 43%). There are some obvious replies. First, in some cases, precedent had already done the historical analysis, so that history was already embedded in precedent. For example, in Confrontation Clause cases, common law history has been part of the analysis for some time.[75] Second, some constitutional cases focused on the meaning of prior precedent or the application of undisputed precedent to new facts, particularly in complex areas involving sentencing and the death penalty.[76] Third, although "distemper" is regarded as unfortunate, original public meaning Justices do not always have the same view of the appropriate history or the meaning of the "original" law.[77]

This data raises the question raised by Justice Kagan at the end of the Term: why in some cases, but not others? This empirical study cannot answer that question; all it can do is say that original public meaning mattered to at least one Justice in over half, but not all (18 of 28), of the merits cases. Looking solely at majority opinions, the historical influence waned even further—only 12 of 28, albeit as we have seen from our case examples, these included all the blockbuster cases of the Term.

Finally, we took a look at the other factor these celebrated cases show: disruption, a distinct departure from prior doctrine,

the majority's opinion as textually "schizophrenic," and the opinions debate the proper English test for a seizure, in both debtors law and elsewhere. *See id.* at 1006–07 (Gorsuch, J., dissenting).

74. *See* Strauss, *supra* note 13; ERIC J. SEGALL, ORIGINALISM AS FAITH (2018).

75. *See, e.g.*, Crawford v. Washington, 541 U.S. 36, 42–50 (2004).

76. *See, e.g.*, United States v. Tsarnaev, 142 S. Ct. 1024 (2022) (discussing whether a lower court properly limited *voir dire* in the case of the death penalty trial for the Boston marathon bombing).

77. *See, e.g.*, Torres v. Madrid, 141 S. Ct. 989 (2021) (textual disagreement over meaning of term "seizure" under Fourth Amendment based on common law); PennEast Pipeline Co. v. New Jersey, 141 S. Ct. 2244 (2021) (textual disagreement over eminent domain power).

based on text or history. We defined textual disruption as follows: (1) an opinion arguing that a case or set of cases should be overruled based on constitutional text or history; (2) an opinion agreeing with the original public meaning method, but arguing that another Justice's opinion was inconsistent with the text or history. We found that 13 of 28 (46%) cases included at least one opinion within these two categories. In 6 of 28, or 21% of the cases, the opinions were majority opinions. In 13, or 46% percent of the cases, the opinions were concurring opinions. Adding the concurring and majority opinions together, we get 68% (19/28) of the constitutional cases in which there was at least one opinion that depended upon original public meaning. All of this suggests good news for academic originalists who seek to displace doctrine not based on history or text. But as we saw in the case of history more generally, the trend is not universal.

B. STATUTORY INTERPRETATION CASES

Original public meaning as a judicial philosophy enjoins judges to focus "careful" attention on text to respect congressional compromise. [78] Over the past twenty years,[79] statutory interpretation has moved from "strong purposivism toward a relatively strict textualism."[80] On the New Court, however, this move has calcified into a particular practice with an instinct for minute dissection of text. Largely gone are discussions of congressional purpose or intent.[81] We consider below three cases revealing analogous themes to those seen above: precise attention to text, conflict among textualists about the proper text or textualist result, a fear of consequentialist or means-ends reasoning, and potential disruption of prior non-text-based standards.

78. *See* John F. Manning, *The Eleventh Amendment and the Reading of Precise Constitutional Texts*, 113 YALE L.J. 1663, 1665 (2004).

79. *See, e.g.*, SCALIA, *supra* note 34 (a judge applying purposivism might misread a statute so to "pursue [her] own objectives and desires"); *see also* William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 674 (1990) (describing the early textualist's argument that "[a] focus on the text alone . . . is a more concrete inquiry which will better constrain the tendency of judges to substitute their will for that of Congress").

80. John F. Manning, *The Supreme Court, 2013 Term—Foreword: The Means of Constitutional Power,* 128 HARV. L. REV. 1, 8 (2014).

81. There are some exceptions to this. *See, e.g.,* Borden v. United States, 141 S. Ct. 1817, 1830 (2021) (Kagan, J., in a largely textualist opinion discussing the purpose of a statute's enactment when interpreting its meaning).

1. *Niz-Chavez v. Garland*[82]

A seemingly simple immigration case shows, in high relief, the twin axes of our analysis: extreme attention to detail and consequentialist argument. *Niz-Chavez* presented a simple procedural question: How should the government notify non-citizens about their deportation hearings? In a prior case, the Court required the government to include the hearing's date and time in a "notice to appear." Time and date were one of ten factors to be included.[83] *Niz-Chavez* raised a more nuanced question. When a proper notice is served, a separate statute stops the clock for determining whether the non-citizen qualifies for some forms of unusual deportation relief.[84] Noncitizens who have been in the United States for ten years, may seek "cancellation of removal."[85] When Niz-Chavez's notice was served, he had not been in the United States for ten years. But his lawyers argued that the notice was improper because it did not include the date and time as required by the statute.

From this procedural battle emerged a textualist war of words. Justice Gorsuch, for the majority, focused his analysis on the word "a." In fact, he spent *eight paragraphs* on the meaning of the word "a."[86] He reasoned that the "ordinary meaning" of "a" in the relevant statutory term "a notice to appear" required an "a" single document. To be sure, the majority acknowledged the hyper-focus of his approach: "Admittedly, a lot here turns on a small word."[87] The opinion explained that "[n]ormally, indefinite articles (like 'a' or 'an') precede countable nouns."[88] Someone who "agrees to buy "a car" would "hardly expect to receive the chassis today, wheels next week, and an engine to follow."[89] From this, Justice Gorsuch concluded that Congress's decision to use the indefinite article "a" "supplies some evidence that it used the

82. 141 S. Ct. 1474 (2021).

83. Pereida v. Wilkinson, 141 S. Ct. 754, 766–67 (2021).

84. The "stop time" rule was triggered when the noncitizen was "served a notice to appear under 1229(a)." *Niz-Chavez*, 141 S. Ct. at 1479 (citing 8 U.S.C. § 1229b(d)(1)).

85. "A nonpermanent resident, for example, must show that his removal would cause an 'exceptional and extremely unusual hardship' to close relatives who are U.S. citizens or lawful permanent residents; that he is of good moral character; that he has not been convicted of certain crimes; and that he has been continuously present in the country for at least 10 years." *Id.* at 1478.

86. *Id.* at 1480–82.

87. *Id.* at 1480.

88. *Id.* at 1481.

89. *Id.*

term in the first of these senses—as a discrete, countable thing."[90] He rejected the government's reliance on a canon, based on the Dictionary Act, which generally defines "a" to include more than one item.[91] The analysis moved on to other "ordinary" examples of the use of "a" in other contexts such as "an indictment, an information, or a civil complaint,"[92] as well as examples about banks[93] and cars.[94]

In dissent, Justice Kavanaugh was not to be outdone in precise textualist analysis. He moved from a single word "a" to *punctuation*. He rejected the Gorsuch interpretation, dismissing it as the "quotation-mark" theory: "The Court reasons that the quotation marks in the statutory definition appear around only the words 'notice to appear,' rather than around '*a* notice to appear.'"[95] For Justice Kavanaugh, the notice was *defined* in the statute without the "a," and statutory definitions controlled.

This linguistic battle does not end the matter however. Justice Gorsuch might have ended his opinion with the text, as original public meaning methodology suggests is proper, but he did not. He excoriated the dissent for engaging in "raw consequentialist" results-oriented cost benefit analysis,[96] and went on to argue that the dissent had actually assessed the consequences improperly.[97] Justice Kavanaugh, in dissent, was willing to spend far more time arguing that the majority's interpretation should be rejected because of its consequences. For him, Justice Gorsuch's result would help no one: neither noncitizens nor the government.

90. *Id.*
91. *Id.* at 1482.
92. *Id.*
93. *Id.*
94. *Id.* at 1481.
95. *See id.* at 1490 (Kavanaugh, J., dissenting).
96. *Id.* at 1486 (majority opinion) ("The dissent tries to predict how the government will react . . . and then proceeds to assess the resulting 'costs' and 'benefits.' But that kind of raw consequentialist calculus plays no role in our decision.").
97. *Id.* ("But the dissent's preferred construction does nothing to foreclose either of these possibilities. And even the dissent seems to think another outcome is more likely yet: It says the government may continue serving notices without time and place information in the first instance, only to trigger the stop-time rule later by providing fully compliant notices with time and place information once a hearing date is available. Nor does the dissent question that this result would help—and certainly not hurt—most aliens.") (citation omitted).

> [T]he Court's decision will not meaningfully benefit noncitizens going forward, and it will ultimately benefit few if any noncitizens who have already been notified of their removal proceedings. Meanwhile, the Court's decision will impose significant costs on the immigration system, which of course means more backlog for *other noncitizens* involved in other immigration cases.[98]

Aware of the critique that this might be considered "improper" consequentialist reasoning, Justice Kavanaugh replied: "[D]emonstrating that the Court is wrong to predict policy benefits from its decision is not ignoring a 'statutory command' in favor of policy views . . . . [T]he Court's opinion both errs as a matter of statutory interpretation *and* will not meaningfully help noncitizens, contrary to the Court's prediction."[99]

2. *Van Buren v. United States*[100]

Lest this seem like a mundane case, this pattern—considering the minutiae of text but reverting to consequentialism (or what the Justices call impermissible policy reasoning)—was repeated elsewhere. In *Van Buren*, Justice Barrett squared off against Justice Thomas in dissent. The case involved a question of computer fraud. A police officer had been caught in a sting after offering to use a computer database to find an address for a bribe.[101] He was prosecuted under the Computer Fraud and Abuse Act (CFAA). In general, the statute governs misuse of government computers. It provides a catchall provision, however, covering anyone who "intentionally accesses a computer without authorization or exceeds authorized access,"[102] and then defines "exceeds authorized access" in a separate subsection as "to access a computer with authorization and to use such access to obtain or alter information in the computer that the accesser is not entitled so to obtain or alter."[103]

In her majority opinion, Justice Barrett was deliberately precise, dissecting each part of the statute. She spent more than a

98. *Id.* at 1495 (Kavanaugh, J., dissenting).
99. *Id.*
100. 141 S. Ct. 1648 (2021).
101. *Id.* at 1653.
102. 18 U.S.C. § 1030 (a)(2).
103. § 1030 e(6).

dozen—*a dozen*—paragraphs addressing the meaning of the word "so."[104] To be sure, the litigants appear to have focused on "so," and some of her discussion repeats those arguments. But her analysis also focused on "so":

> [The defendant's] account of "so"—namely, that "so" references the previously stated "manner or circumstance" in the text of §1030e(6) itself—is more plausible than the Government's. "So" is not a free-floating term that provides a hook for any limitation stated anywhere. It refers to a stated, identifiable proposition from the "preceding" text; indeed, "so" typically "[r]epresent[s]" a "word or phrase already employed," thereby avoiding the need for repetition. Oxford English Dictionary, at 887; see Webster's Third New International Dictionary 2160 (1986) (so "often used as a substitute . . . to express the idea of a preceding phrase"). Myriad federal statutes illustrate this ordinary usage. We agree with Van Buren: The phrase "is not entitled so to obtain" is best read to refer to information that a person is not entitled to obtain by using a computer that he is authorized to access.[105]

After rejecting the dissent's interpretation—which focused on the word "entitled,"—she turned to our second distinctive feature of the New Court: consequentialism.

> To top it all off, the Government's interpretation of the statute would attach criminal penalties to a *breathtaking amount* of commonplace computer activity. . . . If the "exceeds authorized access" clause criminalizes every violation of a computer-use policy, then millions of otherwise law-abiding citizens are criminals. Take the workplace. Employers commonly state that computers and electronic devices can be used only for business purposes. So [sic] on the Government's reading of the statute, an employee who sends a personal e-mail or reads the news

104. *See Van Buren,* 141 S. Ct. at 1654–57; *id.* at 1654 ("The dispute is whether Van Buren was 'entitled so to obtain' the record."); *id.* ("But was Van Buren "entitled *so* to obtain the license-plate information, as the statute requires?"); *id.* ("Van Buren . . . notes that 'so' . . . serves as a term of reference that recalls 'the same manner as has been stated' . . . ."") (dictionary citations omitted); *id.* ("The Government . . . argues that 'so' sweeps more broadly. It reads the phrase 'is not entitled *so* to obtain' to refer to information one was not allowed to obtain *in the particular manner or circumstances in which he obtained it*."); *id.* at 1655 ("While highlighting that 'so' refers to a 'manner or circumstance,' the Government simultaneously ignores the definition's further instruction that such manner or circumstance already will 'ha[ve] been stated,' 'asserted,' or 'described.'") (dictionary citations omitted); *id.* at 1656 ("While the dissent accepts Van Buren's definition of 'so,' it would arrive at the Government's result by way of the word 'entitled.'"). For different analyses of *Van Buren*, see *infra* Part II and Part III.

105. *Id.* at 1655 (footnotes omitted).

> using her work computer has violated the CFAA. . . . If the "exceeds authorized access" clause encompasses violations of circumstance-based access restrictions on employers' computers, it is difficult to see why it would not also encompass violations of such restrictions on website providers' computers. And indeed, numerous *amici* explain why the Government's reading of subsection (a)(2) would do just that—criminalize everything from embellishing an online-dating profile to using a pseudonym on Facebook.[106]

Justice Thomas, dissenting with the Chief Justice and Justice Alito, was not happy with the emphasis on "so," or with references to consequentialism. Just because the police officer had access to the computer did not mean that he could take information from it and use it to obtain a bribe. He was not "entitled" to that information under the statute:

> Van Buren's conduct was legal only if he was entitled to obtain that specific license-plate information by using his admittedly authorized access to the database. He was not. A person is entitled to do something only if he has a "right" to do it. Black's Law Dictionary 477 (5th ed. 1979); see also American Heritage Dictionary 437 (def. 3a) (1981) (to "allow" or to "qualify"). Van Buren never had a "right" to use the computer to obtain the specific license-plate information. Everyone agrees that he obtained it for personal gain, not for a valid law enforcement purpose. And without a valid law enforcement purpose, he was forbidden to use the computer to obtain that information.[107]

Justice Thomas went on to argue that Justice Barrett had impermissibly relied upon "policy arguments" in her opinion, "stress[ing] them at length," referring to her claim of "breathtaking" consequences.[108] But, even before he rebutted those arguments,[109] Justice Thomas rejected the majority's opinion for its "awkward results," explaining that mere access for one purpose should not immunize someone from criminal liability.[110] In short, Justice Thomas engaged in his own results-based analysis:

106. *Id.* at 1661 (emphasis added).

107. *Id.* at 1663 (Thomas, J., dissenting).

108. *Id.* at 1668.

109. Justice Thomas argued that there were various limitations on liability, including *mens rea* requirements, and questioned the majority's reasoning about application to the Internet. He also noted that the criminal law was vast. *Id.* at 1668–69.

110. *Id.* at 1666.

> The majority's interpretation . . . leads to awkward results. . . . [Immune] is the person who, minutes before resigning, deletes every file on a computer. So long as an employee could obtain or alter each file in some hypothetical circumstance, he is immune. But the person who plays a round of solitaire is a criminal under the majority's reading if his employer, concerned about distractions, categorically prohibits accessing the "games" folder in Windows. It is an odd interpretation to "stak[e] so much" on the presence or absence of a single exception.[111]

3. *Borden v. United States*[112]

Statutory precision was not limited to Trump appointees or conservative Justices. Liberal Justices sometimes adopted a similar style.[113] Although a critic of textualism during the 2022 Term,[114] in *Borden*, Justice Kagan wrote for the plurality, deploying hyper-textualism married to consequentialism. She explained: "[T]he fight begins with the word 'against.'"[115] Justice Gorsuch joined her opinion, but other textualists disagreed. Does a reckless assault count as a prior crime under the Armed Career Criminal Act (ACCA)? Justice Kagan's plurality opinion focused on the "ordinary meaning" of the word "against," concluding that the statute covered "intentional" crimes against, or targeting, an individual, thus excluding the defendant's "reckless" crime.[116] And, ultimately, as liberal Justices sometimes do, she added that reckless crimes were minor crimes that did not comport with the "ACCA's purpose."[117]

In dissent, Justice Kavanaugh dismissed the majority's textual arguments. He wrote that "against" had "zero" to do with the proper question of the necessary criminal state of mind or mens rea.[118] He explained that the first part of the statute was talking about crimes against persons as opposed to the crimes

111. *Id.* (citations omitted).

112. 141 S. Ct. 1817 (2021) (plurality opinion).

113. On liberal Justices deploying textualism, see William N. Eskridge, Jr. & Victoria F. Nourse, *Textual Gerrymandering: The Eclipse of Republican Government in an Era of Statutory Populism*, 96 N.Y.U. L. REV. 1718 (2021) [hereinafter *Textual Gerrymandering*].

114. *See* West Virginia v. EPA, 142 S. Ct. 2587, 2641 (2022) (Kagan, J., dissenting) ("The current Court is textualist only when being so suits it.").

115. *Borden*, 141 S. Ct. at 1825.

116. *Id.* at 1828–30.

117. *Id.* at 1830.

118. *Id.* at 1839 (Kavanaugh, J., dissenting).

against property. "Against the person" was a term of art to distinguish between the two, it had nothing to do with the state of mind required.[119] He rejected Justice Kagan's "ordinary meaning" analysis, explaining that the plurality's opinion failed an "ordinary meaning" approach. He concluded by addressing the "consequences of the decision":

> The Court's decision today will generate a variety of serious collateral effects . . . . [T]he Court's decision will exclude from ACCA many defendants who have committed serious violent offenses . . . . [E]ven second-degree murder and some forms of manslaughter may be excluded from ACCA . . . . The idea that those offenses would fall outside of ACCA's scope is, as one judge aptly put it, "glaringly absurd."[120]

4. Summary of Findings on Interpretive Conflict

There is some good news for everyone in our findings. Some cynics argue that textualism can never yield agreement. But that is wrong, which is good news for the rule of law and the limits of disruption. We found an unexpected agreement on text in 23 interpretive cases of the total 124 cases, or 18.5%. When there was agreement upon the meaning of the text, that was typically the end of the matter.[121] This sends a signal to lower courts and agencies that they, too, must give careful attention to the text. That may be enough for many textualists to be happy with the New Court. After all, if that coordinating function were effective, then the entire federal statutory caseload would be at stake, most of what the federal courts do.

At the Supreme Court level, however, this data shows that textualism is a roughly twenty-percent solution. This is consistent with other findings that the court's unanimity rate in 2021 was "the lowest rate of unanimity in two decades."[122] If that is correct, then text alone does not decide a supermajority of cases at the

119. *Id.*

120. *Id.* at 1855–56 (quoting United States v. Begay, 934 F.3d 1033, 1047 (2019) (N.R. Smith, J., dissenting in part).

121. *But see, e.g.*, United States v. Tsarnaev, 142 S. Ct. 1024 (2022) (unanimity on interpretation of federal death penalty law but disagreement over precedential and constitutional issues).

122. Stat Pack, SCOTUSBLOG, (reporting a unanimity rate of 29% in 2021) https://www.scotusblog.com/wp-content/uploads/2022/07/SCOTUSblog-Final-STAT-PACK-OT2021.pdf (last visited on January 12, 2023). The SCOTUSBlog data covers all cases; the number in this study is focused on interpretive cases, a supermajority, but not all cases, since some cases are precedential.

Supreme Court level. The textualist Justices themselves conflicted in more than twice as many cases (61) as opposed to the unanimous cases (23). If this is correct, textualists should worry that textualist theory needs to cabin its claims about the determinacy of language and the power of its theory. There is reason to worry that there is no "right" textual answer, at least at the Supreme Court level in the vast majority of cases. The Justices—the textualist Justices—disagreed persistently, not just occasionally, about text, application of text, or textual analytic principles. If we were to add in the so-called liberal Justices who sometimes use textualism and were appointed by Democratic presidents, that simply increases interpretive conflict. We explain this in greater detail in Part II.

The most important finding: a deep divide between cases that are unanimous and those that are not. Unanimous cases were defined as ones where all the Justices agreed upon an interpretation.[123] In those cases, the textual approach started and ended with text. But in 3/4 of the interpretive conflict cases (75%), where there was a conflict about textual meaning or choice of text among the original public meaning Justices, at least one Justice wrote an opinion reverting to a conflicted consequentialism (we-are-not-supposed-to-do-this-but-we-are-doing-it-anyway) to support their arguments.[124] This finding is statistically robust and suggests that there is correlation between textual conflict and results-oriented reasoning about text.

The bottom line: the Court's unanimity on textualist philosophy has not led to unified interpretations, *even among textualist Justices.* This was true both of statutory and constitutional cases,[125] although the constitutional cases were a distinct minority, meaning that the Court's basic diet of cases are precedential or statutory. Textualism aimed to revolutionize interpretation by reducing discretion.[126] If one believes, as Justice

123. This measure is likely to differ from measures of unanimity based simply on voting. In this study if a Justice concurred in the judgment but disagreed about the proper text or interpretation, that was not coded as a unanimous case.

124. *See* Appendix G and text accompanying note 217.

125. We recognize that despite the Court's unified terminology in statutory and constitutional cases ("original public meaning"), there are significant differences between principles of constitutional and statutory interpretation. In fact, there are good arguments against convergence since the constitution is not in fact a statute (as it might be in other constitutional systems). On the other hand, as is clear from this Article, focusing on constitutional cases alone gives us a very small slice of the Court's docket.

126. *See* Tara Leigh Grove, *Which Textualism?*, 134 HARV. L. REV. 265, 279 (2020)

Scalia once wrote, that interpretive disagreement constitutes a "distemper,"[127] then there is evidence of textual "distemper" on the New Court. The Justices were not shy in calling each other out for failed methodology, dubbing each other's textual interpretations "schizophrenic," "science fiction," and "spawning a litany of absurdities."[128]

II. EMPIRICAL STUDY

The New Court provides a natural experiment to study the Supreme Court's interpretive methods, free of one of the most persistent empirical claims: that its decisions reflect nothing more than the political party of the appointing president. Now, a supermajority of six Justices nominated *by presidents of the same party* dominate the Court; and they are on the Court because they are all *avowed textualists or originalists.*[129] Our analysis reviewed a universe of cases from the 2020 and 2021 Terms.

A. METHOD IN GENERAL

Unlike other studies, this Article focuses on interpretive *conflicts*. Some studies explore the relative use of particular interpretive tools (canons, text, legislative history, dictionaries). Others focus on the political or ideological alignments of Justices. This study is the first to focus on interpretive method writ large, across statutory interpretation and constitutional law cases. When the Justices were more evenly divided in terms of interpretive philosophy, it was natural to assume division. Now, however, we have a unified judicial philosophy (original public meaning) avowed by a supermajority of Justices.

We focused on conflicts among original public meaning Justices for a reason.[130] Keeping the political party of appointing President constant eliminates the argument that party dominates interpretive choices. If the appointing party were the main

(arguing that modern textualism "turns out not to be a coherent, unified theory").

127. SCALIA & GARNER, *supra* note 2, at 6.

128. Torres v. Madrid, 141 S. Ct. 989, 1006–08 (2021) (Gorsuch, J., dissenting) ("schizophrenic"); Collins v. Yellen, 141 S. Ct. 1761, 1797 (2021) (Gorsuch, J., concurring in part) ("science fiction"); Niz-Chavez v. Garland, 141 S. Ct. 1474, 1492 (2021) (Kavanaugh, J., dissenting) ("litany of absurdities").

129. *See supra* note 5 and accompanying text.

130. See Appendix C, listing these "traditional splits," a minority of the interpretive cases this Article investigates.

determinant, the New Court would consistently release 6–3 opinions on interpretive matters. It has not.[131] Textualists and originalists have been saying for some time that their approach constrains discretion. In theory, that should lead to greater unity among those who ascribe to the approach. Unanimity should be more common. But, as the total number of unanimous cases show (29/124), that was not the case. As we will see in more detail, conflict not consensus dominated the Court's approach toward text (whether constitutional or statutory).

Some might think our definition of "original public meaning" Justices too narrow. Although she appeared to recant at the end of 2022, Democrat-appointed Justice Kagan has said that "we are all textualists now,"[132] and regularly engages in textualist analysis.[133] However, if we were to have added Justice Kagan as an advocate of original public meaning, our conflict totals would have *increased* rather than *decreased*, as we explain below and in Appendix C.[134] Some might think that our definition of "original public meaning" Justices is too broad, as it includes Chief Justice Roberts who on notable occasions[135] has appeared to stray from the text, particularly to avoid constitutional questions. And so we did a test: did Chief Justice Roberts side with other textualists? As we explain in Appendix C, in 91% of the interpretive conflicts in cases from the 2020–21 Terms, Chief Justice Roberts sided with at least two of the other textualist judges (Justices Thomas, Alito, Gorsuch, Kavanaugh or Barrett).[136]

131. Other data reports that the Court split 6–3 or 5–3 in 36% (24/67) of its cases in the 2020 Term, https://www.scotusblog.com/2021/07/in-barretts-first-term-conservative-majority-is-dominant-but-divided/ (last visited Nov. 23, 2022), and that declined to 30% in the 2021 Term. Stat Pack, SCOTUSBLOG, *supra* note 122.

132. Harvard Law School, The Scalia Lecture: A Dialogue with Justice Elena Kagan on the Reading of Statutes at 8:29 (Nov. 17, 2015), http://today.law.harvard.edu/in-scalia-lecture-kagan-discusses-statutory-interpretation.

133. *See, e.g.*, Borden v. United States, 141 S. Ct. 1817, 1825 (2021) (plurality opinion) ("[T]he fight begins with the word 'against.'").

134. Justice Kagan, like Justices Breyer and Sotomayor, joined textualist opinions, as the unanimous opinions figure shows. If we pull her out of the "traditional split" category and classify her as a textualist then some of the traditional split cases produce textualist conflict since she will be opposed to another textualist on the other side. That increases textual conflict. We explain this in Appendix C.

135. Much of this criticism has focused on the highly salient, but statistically unusual, Obamacare cases, King v. Burwell, 576 U.S. 473 (2015) and National Federation of Independent Business v. Sebelius, 567 U.S. 519 (2012).

136. Of the 91 total conflicts, we found that Chief Justice Roberts sided with *at least* two other textualist Justices in 83 of 91 conflicts. In seven conflicts, Chief Justice Roberts sided with only *one* other textualist Justice, Justice Kavanaugh. Finally, Chief Justice

B. CONSTITUTIONAL CASES: HISTORY AND DISRUPTION

We identified a universe of 28 constitutional merits cases out of a 124 case universe. From the total decisions released from October 1, 2020 until June 30, 2022, we eliminated those with no opinion (e.g., those that summarily dismissed, or agreed that a writ was improvidently granted),[137] those involving original jurisdiction disputes between states as outside the Court's traditional discretionary review, which yielded the 124 number. Within that universe of merits cases (124), we identified 28 constitutional cases (22.5%). This may appear small but reflects the common understanding among Supreme Court advocates that the Court's docket is primarily focused on statutes and the common law rather than the Constitution.[138] In our universe, more than twice as many cases involved statutory disputes (70) relative to constitutional disputes (31).[139]

The following table displays the number of cases in each interpretive category[140]:

Statutory	70
Constitutional	31
Precedential (Non-constitutional)	23

Of the 28 constitutional merits decisions, we coded cases on two questions: First, did the decision deploy pre-twentieth century history? Second, did the decision use history or text as an

Roberts was not joined by *any* textualist Justice in his concurrence in Dobbs v. Jackson Women's Health Organization, 142 S. Ct. 2228, 2310 (2022). *See* Appendix C. For a potentially important textualist opinion of Chief Justice Roberts, see Arizona State Legislature v. Arizona Independent Redistricting Commission, 576 U.S. 787, 824 (2015) (Roberts, C.J., dissenting) (focusing on the meaning of the word "legislature" in a case involving independent redistricting commissions).

137. Similarly, we did not code opinions dissenting to the denial of a writ of certiorari because they were not decided on the merits. *See, e.g.*, Malwarebytes, Inc. v. Enigma Software Grp., 141 S. Ct. 13 (2020) (Thomas, J., dissenting from denial of certiorari). For our coding instructions, see Appendix H.

138. Author interview with Prof. Irv Gornstein, Director, Georgetown Supreme Court Institute (Oct. 12, 2022).

139. For the content analysis, we added three emergency application cases that involved a constitutional claims, but are not included in the "merits" number (28). *See* Appendix A.

140. See Appendix F for the calculation of these totals and listing of cases.

argument to displace existing doctrine? Evidence of history was defined as any use that was more than a paragraph, to avoid casual references. The history had to be of the kind consistent with "original" public meaning, which is to say history relevant at the time a particular constitutional text was ratified or enacted (1787, 1868), or common law history. "Common law" history was identified as history reaching back to pre-American history (English common law authors) up to nineteenth century American cases or treatises.

We found that of our 28 cases, 64% (18 of 28 cases) included *at least one opinion* involving historical discussion. If we added in the three cases involving emergency applications for an injunction (18 of 31), that percentage dropped to 58%, reflecting the fact that these opinions typically are not full discussions of the relevant constitutional issues. In one sense this should not be surprising on a Court whose Justices are self-described adherents to original public meaning, but it does not show that history was controlling. This number (64%) reflects the fact that *one Justice indicated history was relevant*. If one looked solely at the number of *majority opinions* in which pre-twentieth century history played a role, that number was far fewer: 12/28 or 43% involved history. The large number of concurring and dissenting opinions citing history reflects, in our view, the conflict among those who aspire to a unified original public meaning philosophy. We decided to measure that conflict more precisely in the subsection that follows.

We attempted to measure the disruptive effect of history and text, by coding constitutional cases in which the Justice argued that history or text should displace existing doctrine. Evidence of displacement required a more intensive review: to be categorized as displacement, the opinion had to argue that a prior doctrine or precedent *should be replaced by history or text*. The paradigm example is Justice Thomas's opinion in *New York State Rifle & Pistol Association v. Bruen*,[141] where he argues that the near unanimous court of appeals's "intermediate scrutiny" test was wrong and that history should govern the extent of the Second Amendment right, or *Dobbs v. Jackson Women's Health Organization*, where the Court reversed *Roe v. Wade* on grounds

141. *See supra* note 35.

that the text was silent, and history showed no right to abortion.[142]

We found that there were 26 displacing opinions in 13 cases (13/28 being 46% of cases). If we were to add the 5 additional cases in which liberal dissenters argued that the majority had changed constitutional law,[143] then 18 of 28 (61%) cases contained at least one Justice arguing for the displacement of current doctrine—either in favor of replacing the current doctrine or arguing that a majority opinion had displaced the doctrine. Six majority opinions, roughly 20% of all constitutional cases, argued that history should displace current doctrine. Note that this particular measure of disruption includes only constitutional cases; it undercounts disruption appearing in statutory cases[144] by the creation of new rules, such as the major questions doctrine,[145]

142. 142 S. Ct. 2228, 2248–49 (2022).

143. *See* Collins v. Yellen, 141 S. Ct. 1761 (2021) (Sotomayor, J., concurring in part, dissenting in part) (arguing that the majority's interpretation of the Appointments Clause is out-of-step with centuries of precedent in for-cause tenure protection cases); Cedar Point Nursery, Inc. v. Hassid, 141 S. Ct. 2063, 2081 (2021) (Breyer, J., dissenting) ("The Court holds that the provision's "access to organizers" requirement amounts to a physical appropriation of property. In its view, virtually every government-authorized invasion is an 'appropriation.' But this regulation does not 'appropriate' anything; it regulates the employers' right to exclude others. At the same time, our prior cases make clear that the regulation before us allows only a *temporary* invasion of a landowner's property and that this kind of temporary invasion amounts to a taking only if it goes 'too far.'"); Jones v. Mississippi, 141 S. Ct. 1307 (2021) (Sotomayor, J., dissenting) (arguing that the majority's opinion directly contradicts prior interpretations of the application of the Eighth Amendment to minors); Americans for Prosperity Found. v. Bonta, 141 S. Ct. 2373, 2393 (2021) (Sotomayor, J., dissenting) ("Although this Court is protective of First Amendment rights, it typically requires that plaintiffs demonstrate an actual First Amendment burden before demanding that a law be narrowly tailored to the government's interests, never mind striking the law down in its entirety. Not so today. Today, the Court holds that reporting and disclosure requirements must be narrowly tailored even if a plaintiff demonstrates no burden at all."); Carson v. Makin, 142 S. Ct. 1987 (2022) (Breyer, J., dissenting) (describing the majority opinion as improperly limiting the role of the Establishment Clause in constitutional religion cases).

144. We did not attempt to measure disruption in statutory cases, but there were some cases that clearly involved a claim that when a doctrinal rule is inconsistent with the text, it can be jettisoned according to textualist theory. So, for example, in Minerva Surgical, Inc. v. Hologic, Inc., 141 S. Ct. 2298, 2307 (2021), the question was whether the equitable doctrine of estoppel would apply in a patent case. Although the majority held that it did apply, Justice Alito insisted that there was absolutely nothing in the statute suggesting that this doctrine should apply: text should trump doctrine. *Id.* at 2311 (Alito, J., dissenting). A similar division emerged in a case about the First Step Act. Concepcion v. United States, 142 S. Ct. 2389 (2022). Traditionally, district courts have enormous discretion in sentencing. The majority upheld this background principle as applied to the text, but Justice Kavanaugh in dissent said that the text said nothing about equitable discretion and therefore it did not apply. *Id.* at 2405–06 (Kavanaugh, J., dissenting).

145. *See* West Virginia v. EPA, 142 S. Ct. 2587 (2022) (applying major questions doctrine); *id.* at 2641 (Kagan, J., dissenting) ("The current Court is textualist only when

or the silent abandonment of old rules, such as the refusal to deploy deference to an agency interpretation under *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*.[146]

C. INTERPRETIVE CONFLICT IN STATUTORY AND CONSTITUTIONAL LAW

Counting and coding constitutional cases is a relatively easy enterprise because relatively few Supreme Court cases involve constitutional merits decisions. If one wants to understand the role of textual analysis, and study interpretive conflict in both constitutional and statutory cases, this is a much more difficult enterprise. First, one must isolate interpretive opinions—opinions that involved interpretation of a text *whether about interpreting a statute or the Constitution*. That requires one to eliminate that part of the Supreme Court's docket which involves common law cases where the Court interprets *its own precedents*: there is no text (other than a judicial opinion) to analyze. We call these *"precedential"* cases: as a general rule, precedential cases overwhelmingly involved procedural matters, like standing, personal jurisdiction, qualified immunity, or similar judicially created doctrines.[147] Constitutional claims in areas heavily encrusted with doctrinal precedent, such as the First and Fourth Amendments, sometimes fell in this category as long as the Court did not purport to analyze the "text" of the constitutional provisions in more than one paragraph.[148]

being so suits it.").

146. 467 U.S. 837 (1984). For a discussion of this, see *infra* text accompanying note 232.

147. Although a majority of the cases in the precedential category could be described as "procedural," one should not equate procedural cases with those that could be interpretive. For example, there was interpretive disagreement about the application of a removal statute. *See* B.P. P.L.C. v. Mayor and City Council of Balt., 141 S. Ct. 1532 (2021). But if the only question was one of judicial doctrine, then the case was considered "precedential." *See* Ford Motor Co. v. Mont. Eighth Jud. Dist., 141 S. Ct. 1017 (2021).

148. *See, e.g.*, Lange v. California, 141 S. Ct. 2011 (2021) (Fourth Amendment case on the meaning of "exigent circumstances," a judicially created exception to the warrant requirement). However, some First Amendment cases generated interpretive opinions. *See, e.g.*, Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1878–80 (2021) (Alito, J. concurring) (parsing First Amendment and arguing that City's practices violated text). So, too, was a Fourth Amendment case. *See* Torres v. Madrid, 141 S. Ct. 989, 1006–08 (2021) (Gorsuch, J., dissenting) (focusing extensively on meaning of "seizure" in Fourth Amendment by referencing "[c]ountless contemporary dictionaries," precedent, and other constitutional provisions and accusing the majority of promulgating "schizophrenic reading of the word 'seizure.'").

1. Interpretive Conflict Defined

The total number of cases is 124: There were 29 unanimous cases, meaning that there was conflict in over 3 times as many cases as were unanimous.[149] These numbers, however, may underestimate interpretive conflict because they do not reflect the fact that there can be more than one conflict in a particular case. Nor do they tell us whether these conflicts are really about *interpretation*; conflicts might arise simply because the Justices disputed the meaning of a prior precedent or application of that precedent to the facts. Finally, they do not tell us whether the conflict was among Justices who shared an interpretive philosophy or those who disagreed.

To determine whether there was *interpretive* conflict, we had to divide cases involving *textual* interpretation ("interpretive cases") from those where there was no constitutional or statutory text to be interpreted. There were twice as many interpretive conflict cases (64) as precedential conflict cases (31).[150] This may reflect what one would expect of a court with a unified judicial philosophy: text is important. It only takes 4 of the 6 self-identified textualist Justices to vote for certiorari; textualist Justices wishing to send a consistent message to lower courts will incline toward taking cases focused on text.[151] Of the total number of 28 *constitutional cases* in the merits case universe, there were significantly more interpretive cases (18/28 or 64%) than precedential cases (10/28 or 36%). Although this is a small n, it defies predictions that common law reasoning dominates constitutional decision-making;[152] text now matters in constitutional cases as well.

2. Issue-Level Analysis

To measure interpretive conflict accurately, we had to move from *case-level* analysis to *issue-level* analysis. A single case can

149. Appendix B lists the unanimous cases.

150. The 64 figure is taken from Appendix C; the 31 figure from Appendix D.

151. Intercoder reliability for this basic task was over 90 percent, which is well within the appropriate margin of error. *See* JAMES W. DRISKO & TINA MASCHI, CONTENT ANALYSIS 47 (2016) (stating that a high level of agreement is "80% or higher"). For the coding instructions, see Appendix H, as well as other "intercoder reliability" assessments, on particular Appendices.

152. *See* Strauss, *supra* note 13. Note that the 28 number does not include the requests for injunctions; those 3 cases were all precedential so including them predictably reduces the number of interpretive/textual cases.

raise more than one interpretive issue: for example, it may involve the meaning of a statute, the constitution, *and* other more general interpretive principles. For example, in *Fulton v. City of Philadelphia*,[153] Chief Justice Roberts addressed the meaning of an ordinance. Justice Gorsuch disagreed with the Chief Justice's interpretation of the ordinance and accused the Chief Justice of focusing on a different statute.[154] Justice Alito argued that the majority's constitutional analysis was atextual, violating the First Amendment.[155] This case was coded for two issues and on these two issues Justices disagreed. There were two separate disagreements among textualists: Justice Gorsuch disagreed with Chief Justice Roberts' statutory analysis; Justice Alito disagreed with Chief Justice Roberts' constitutional analysis.

Once at an issue level, we had to distinguish between conflicts among self-described textualist Justices, as opposed to "traditional splits." If one were only to look at the political-party-of-the-appointing-President, one would expect that issue splits would always lead to 6–3 votes, pitting republican appointees against democratic appointees. To identify those conflicts *in which Justices who shared a political philosophy conflicted with each other*, one had to eliminate the "traditional" splits—issue conflicts that one would expect based on appointing-party-of-the-President. Traditional splits were issues in which all or some of the conservative textualist Justices were on one side, and at least one of the liberal Justices was on the other side.[156] One would expect that there would be interpretive differences between these groups of Justices.

Contrary to what one might expect from a unified philosophy, there was a good deal of conflict among the Justices who believe in the same original public meaning approach. Our

153. 141 S. Ct. 1868, 1878 (2021) (interpreting a contract and an ordinance); *id.* at 1879–80 (interpreting an ordinance); *id.* at 1881–82 (interpreting the First Amendment).

154. *Id.* at 1927 (Gorsuch, J., concurring in judgment) ("The majority ignores [the ordinance's definition of public accommodations]. . . . Instead, it asks us to look to a *different* public accommodations law—a Commonwealth of Pennsylvania public accommodations statute.").

155. *Id.* at 1888 (Alito, J., concurring in judgment) (arguing that the majority erred in deploying the constitutional framework of Employment Division of Oregon v. Smith, 494 U.S. 872 (1990), a case that "can't be squared with the ordinary meaning of the text of the Free Exercise Clause").

156. If these were added, the overall conflict level of the court would increase. See Appendix C for the disagreeing interpretive cases and identification of the traditional liberal/conservative splits.

definition of an interpretive conflict among self-described original public meaning Justices required at least one original public meaning justice on one side of the interpretive issue and at least one similarly attuned justice on the other side.[157] Of the 91 total issue conflicts, 61 (67%) involved conflicts among the Justices who shared the original public meaning philosophy; only 30 involved traditional splits.[158] In short, there was twice as much conflict among *Justices sharing a judicial philosophy than there was between them and those who did not share that philosophy*. We have identified and *described* these conflicts *in each case* in Appendix C.

3. Conflicts Among Justices Embracing Original Public Meaning

Once we had a subset of conflicts among Justices who shared an interpretive philosophy (61), we divided these into two main categories: (1) disagreements about the controlling text (which text?) and (2) disagreements about the application of a particular text. For example, in *Van Buren*, the case involving a computer fraud statute, Justice Barrett for the majority focused on the word "so" analyzing it at length.[159] In dissent, Justice Thomas (joined by Chief Justice Roberts and Justice Alito) claimed the proper interpretive focus lay on the word "entitled."[160] The Justices disagreed about the textual inquiry's proper locus. It was possible, of course, for a different kind of disagreement: agreement on the proper term, but disagreement about its application. For example, in *Torres v. Madrid*, no Justice denied that the key term was "seizure" in the Fourth Amendment; they differed about whether a woman was seized when officers shot at her as she fled, Chief Justice Roberts in the majority and Justice Gorsuch in dissent, each claiming the mantle of common law history to resolve the case.[161]

157. The original public meaning Justices were defined as those nominated by Republican Presidents. *See supra* note 5.

158. Intercoder reliability on questions of interpretive split was close to 100 percent, given that this is not a question of content analysis, simply a question of comparing the names of the Justices on one side of the case and the other.

159. 141 S. Ct. at 1654–58.

160. *See id.* at 1664 (Thomas, J., dissenting) ("Focusing on the 'so,' the majority largely avoids analyzing the term 'entitled.'").

161. *Compare* 141 S. Ct. at 1003 (holding that "the officers seized Torres by shooting her with intent to restrain her movement"), *with id.* at 1006 (Gorsuch, J., dissenting) ("[T]he Fourth Amendment's text, its history, and our precedent all confirm that 'seizing' something doesn't mean touching it; it means taking possession.").

We added a third category of interpretive conflict: a *theory-conflict* was defined as one where the Justices wrote on an interpretive principle. For example, in two instances, textualist Justices disagreed and wrote about how to apply the interpretive principle of severance.[162] In another case, a Justice wrote an entire opinion disagreeing with the majority's application of canons.[163] Another opinion pitted Justice Alito against Justice Barrett on whether "congressional ratification" was a legitimate form of interpretation.[164] Finally, Justice Thomas wrote a concurring opinion objecting that the court's preemption law was inconsistent with textualist philosophy and too embedded in purposivist logic.[165]

4. Counting Consequentialism

Analyzing textual conflicts revealed an unexpected development. Many academics have criticized individual decisions as efforts to rationalize the Justice's own policy positions on everything from abortion to the death penalty. There is no question that a Justice might be moved by consequentialism in such highly salient areas by profound moral or political beliefs. But in our study, we actually tried to count the cases where the Justices themselves wrote about consequentialism openly. When the Justices disagreed about the meaning of text, they traded barbs with their textualist colleagues charging that they were not following the proper method and were engaged in impermissible

162. *See* Arthrex v. United States, 141 S. Ct. 1970, 1990–92 (2021) (Gorsuch, J., concurring in part, dissenting in part) (critiquing Chief Justice Roberts's attempt to "ask[] what a past Congress would have done if confronted with a contingency it never addressed" as "mysticism"); Collins v. Yellen, 141 S. Ct. 1761, 1797–999 (2021) (Gorsuch, J., concurring in part) (critiquing Justice Alito's majority opinion for its attempt to "substitute its own judgment about *which* legislative solution Congress might have adopted had it considered a problem never put to it") (emphasis added).

163. *See* Facebook, Inc. v. Duguid, 141 S. Ct. 1163, 1173 (2021) (Alito, J., concurring) ("writ[ing] separately to address the Court's heavy reliance on one of the canons of interpretation that have come to play a prominent role in [the Court's] statutory interpretation cases").

164. *Compare* Minerva Surgical, Inc. v. Hologic, Inc., 141 S. Ct. 2298, 2307 (2021) *with id.* at 2314–19 (Barrett, J., dissenting).

165. Rutledge v. Pharm. Care Mgmt. Ass'n, 141 S. Ct. 474, 483 (2020) (Thomas, J. concurring) ("[Our precedents have veered from the text, transforming the [ERISA pre-emption provision] into a "vague and potentially boundless . . . 'purposes and objectives' pre-emption clause. . . .") (citation omitted). All of the other original public meaning Justices joined Justice Sotomayor's majority opinion.

"policy" or "pragmatism."[166] We were surprised to find the latter, because, as a general rule, original public meaning Justices do not favor consequential analysis; they consider it a hallmark of a "pragmatist" approach which they reject as improper "policy-making." As Justice Scalia once wrote, "I do not think that the avoidance of unhappy consequences is [an] adequate basis for interpreting a text."[167] And as Justice Gorsuch explained: "It is hardly this Court's place to pick and choose among competing policy arguments like these along the way to selecting whatever outcome seems to us most congenial, efficient, or fair. Our license to interpret statutes does not include the power to engage in such freewheeling judicial policymaking."[168]

We have already seen some examples of these arguments above, but here are some more. In *PennEast Pipeline Co. v. New Jersey*, Justice Barrett described Chief Justice Roberts's decision as "cloak[ed]" in the Founding but really relying on "pragmatic concerns" such as the difficulty of creating interstate pipelines.[169] And in *HollyFrontier Cheyenne Refining, LLC v. Renewable Fuels Ass'n* [hereinafter *HollyFrontier*], both Justice Gorsuch for the majority[170] and Justice Barrett in dissent[171] accused each other of improper consequentialism and policy-making. Justice Gorsuch wrote that Justice Barrett agreed with the respondents' "policy arguments."[172] Justice Barrett replied that Justice Gorsuch's reading yielded its "own odd results."[173]

Put bluntly, we found that Justices who decry consequentialism or pragmatism often ended up making consequentialist arguments themselves.[174] In other words, no one

166. Perspicuous scholars have known of this gap for some time. *See, e.g.*, Jane Schacter, *Text or Consequences*, 76 BROOK. L. REV. 1007 (2011) ("[W]hile textualism on the books conspicuously eschews the legitimacy of consequentialism in statutory interpretation, textualism in action often uses strikingly consequentialist methods. . . .") [hereinafter Schacter, *Text or Consequences*]

167. Nixon v. Missouri Muni. League, 541 U.S. 125, 141 (2004) (Scalia, J., concurring in judgment).

168. Pereida v. Wilkinson, 141 S. Ct. 754, 766–67 (2021).

169. 141 S. Ct. 2244, 2270 (Barrett, J., dissenting).

170. 141 S. Ct. 2172, 2182–83 (2021).

171. *See id.* at 2189–90 (Barrett, J., dissenting).

172. *See id.* at 2181.

173. *See id.* at 2189 (Barrett, J., dissenting).

174. *See, e.g.,* Torres v. Madrid, 141 S. Ct. 989, 1016 (2021) (Gorsuch, J., dissenting) (rejecting the majority's concern about line-drawing as an improper policy concern, but arguing that the majority had refused to consider the "complications" its ruling would create and the "vanishingly small" numbers of citizens it would help). For a lengthier

need believe that the tension between textualism/original public meaning and consequentialism is merely an academic concern.[175] We used a definition of consequentialism that included: consequences to the individual parties, to similarly situated parties, to the judiciary, or to the government more broadly (see Appendix E for a lengthier explanation). This definition depends upon the Justices' own claims about what constitutes a "consequentialist" argument and their own charges against other Justices of improper policy-making.[176] Because we understand that this focus on consequentialism may be controversial, we quoted the opinions verbatim in Appendix E, consistent with the analytic demands of content analysis.[177]

D. TYPES OF INTRA-ORIGINAL-PUBLIC-MEANING JUSTICE INTERPRETIVE CONFLICTS

Now that we have the overall picture, how are we to understand conflicts between Justices who share a philosophy they call "original public meaning"? The data shows textualists clashed openly by choosing different texts and interpreting the same texts differently. These conflicts dominated over more complex theoretical complaints about canons or interpretive doctrines. We found that, in the textualist conflict cases, the Justices were more likely than in the unanimous cases, to reach out to consequentialist reasoning.

1. Conflicts Among Original Public Meaning Justices

In 91 total interpretive conflicts, Justices with the same interpretive philosophy chose different parts of statutes, different

definition and justification, see Appendix E.

175. *See, e.g.*, Jane S. Schacter, *The Confounding Common Law Originalism in Recent Supreme Court Statutory Interpretation: Implications for the Legislative History Debate and Beyond*, 51 STAN. L. REV. 1, 21 (1998) (showing a high rate of consequentialist argument); Krishnakumar, *First Era, supra* note 9, at 228–30 (discussing findings by Schacter and others on policy consequences); *Backdoor, supra* note 9, at 1320–27 (presenting findings on the Justices' deployment of practical consequences).

176. *See, e.g.*, Borden v. United States, 141 S. Ct. 1817, 1857 (Kavanaugh, J. dissenting) ("And today's decision will have significant real-world consequences."); Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1930 (2021) (Gorsuch, J. concurring in judgment) ("Nor will CSS bear the costs of the Court's indecision alone. Individuals and groups across the country will pay the price—in dollars, in time, and in continued uncertainty about their religious liberties.").

177. On the importance of providing "verbatim" quotations to strengthen context analysis, *see* DRISKO & MASCHI, *supra* note 151, at 127.

statutes, or constitutional text as governing the interpretive controversy in 61 of those conflicts (67%). By contrast, only 30 of the 91 (33%) interpretive conflicts were traditional splits.

Let us focus on the sixty-one (61) issues about which self-described textualist-Justices conflicted. In these conflicts, the Justices disagreed about the choice-of-text, the meaning of an agreed upon text, or the meaning of the absence of text. Single cases or even opinions could involve more than one interpretive dispute, so the unit of analysis here is the interpretive issue or conflict, not a case or an opinion. For example, *Fulton v. City of Philadelphia* involved a dispute about a proper text (ordinance v. statute),[178] as well as the proper constitutional analysis.[179] The constitutional and statutory issues were treated separately as two interpretive issues. Similarly, *United States v. Arthrex, Inc.,* a case about patent disputes and executive officer removal, involved a choice-of-text (the appointments clause versus the vesting clause of Article II) for Justice Thomas,[180] but raised a theoretic dispute about severance for Justice Gorsuch.[181] Both disagreed with Chief Justice Roberts' majority opinion.[182]

Given the raw numbers of Justices (6 as opposed to 3) one might expect twice as much conflict. But that is not what the Justices' theory predicts, nor is it what an analysis focused on appointing–party-of-the-president predicts. The Justices own theory, according to Justice Scalia, is that there are "right answers" to interpretive problems.[183] In short, if the theory is

178. *Fulton*, 141 S. Ct. at 1927 (Gorsuch, J., concurring in judgment) ("The majority ignores [the ordinance's] expansive definition of 'public accommodations.' . . . Instead, it asks us to look to a different public accommodations law—a Commonwealth of Pennsylvania public accommodations statute.").

179. *Id*. at 1905 (Alito, J., concurring in judgment) ("That the free-exercise right included the right to certain religious exemptions is strongly supported by the practice of the Colonies and States.").

180. United States v. Arthrex, 141 S. Ct. 1970, 2005 (2021) (Thomas, J., dissenting) (discussing the possibility that the majority was relying implicitly on the vesting clause of Article II).

181. *See id.* at 1990–92 (Gorsuch, J., concurring in part and dissenting in part) ("Asking what a past Congress would have done if confronted with a contingency it never addressed calls for raw speculation. Speculation that, under traditional principles of judicial remedies, statutory interpretation, and the separation of powers, a court of law has no authority to undertake.").

182. *Id.* at 1988 ("I am unable to join the Court's severability discussion in Part III.").

183. SCALIA & GARNER, *supra* note 2. Now it is possible that there are right answers at a different level of court most of the time. That would require analysis of lower court opinions outside the scope of this study.

correct at the Supreme Court level, it would predict that the level of conflict among Justices committed to the same original public meaning philosophy should approach 0, and that we would only see conflict between textualists and non-textualists. A similar prediction would follow if appointing-party-of-the-President dominated interpretive conflict. That is not what the data shows. Instead, it shows that Justices appointed by Presidents of the same party and avowing the same philosophy disagreed among themselves about the proper text, the meaning of that text, or its application persistently, not just occasionally.

a. Choosing Different Texts

How many of the conflicts involved choosing different texts? 15 of the 61 conflicts (24.6%) involved choosing different texts.[184] For example, in *Van Buren*, described in Part I, Justice Barrett in the majority focused on "so" while Justice Thomas in his dissent focused on "entitled."[185] Conflicts also included entire statutory provisions or constitutional grounds. In *Fulton v. City of Philadelphia*, Justice Gorsuch accused Chief Justice Roberts of applying the wrong law: a state statute rather than a municipal ordinance.[186] Finally, in two important constitutional cases, Justice Thomas disagreed with his fellow textualists about the proper constitutional text. In *Dobbs v. Jackson Women's Health Organization,* he urged that the due process clause should be jettisoned in cases involving claims of substantive rights in favor of analysis under the privileges and immunities clause,[187] and in *United States v. Vaello Madero,* he argued that the Fifth Amendment's due process clause should not govern race discrimination, as was held in *Bolling v. Sharpe*, but instead the citizenship clause of the Fourteenth Amendment.[188]

These choices raise questions about the ease with which textualism's aim to reduce discretion can be accomplished without further analytic precision. Given that these cases involve a choice

184. The full list of interpretive conflicts appears in Appendix C; the cases are broken down by type of conflict as well in Appendix which is consistent with this number.

185. *See supra* notes 97–108 and accompanying text (discussing the conflict in *Van Buren*).

186. *See supra* note 178 (quoting Justice Gorsuch's opinion in *Fulton*).

187. 142 S. Ct. 2228, 2301–03 (2022) (Thomas, J., concurring).

188. 142 S. Ct. 1539, 1544–46 (2022) (Thomas, J., concurring) (arguing that Bolling v. Sharpe, 347 U.S. 497 (1954), was wrongly decided).

of different texts by those who ascribe to the same original public meaning philosophy, the theoretical question is whether it is enough to have a theory of "semantic meaning" without a theory of choice of text.[189] If textualists are applying different laws, or different terms within a single law, the fractured results we see resemble a *conflicts of law* problem within textualism.

b. Conflicts of Meaning from the Same Text

In 38/61 (64%) of the cases in which Justices shared the same philosophy (original public meaning), the Justices agreed upon text but found it had different meanings.[190] These conflicts raise issues of meaning familiar to textual analysis in statutory interpretation, including polysemy, implicature, and legal versus ordinary meaning.

As in the earlier cases, some disagreement can be traced to the vagueness of agreed-upon texts. Interpretations of words like "final" or "extension" or "related to," "against" or even the Fourth Amendment's "seizure" reached different results.[191] Linguistics 101 tells us that words can have two or more meanings, depending upon the context, sometimes referred to as ambiguity or polysemy. As a general rule, linguists emphasize the indeterminacy of individual words, phrases, and entire sentences. Meanings might differ based on the generality or fuzziness of the categories.[192] Academic textualist theory recognizes this problem as one of construction[193] and typically argues that semantic context be consulted to resolve semantic meaning.[194] Sometimes

189. On semantic meaning and its role in constitutional originalism, see Lawrence B. Solum, *Originalist Methodology*, 84 U. CHI. L. REV. 269, 277–78 (2017) (discussing semantic meaning); on choice of text, see Victoria Nourse, *Picking and Choosing Text: Lessons for Statutory Interpretation from the Philosophy of Language*, 69 FLA. L. REV. 1409, 1415–17 (2017) [hereinafter *Picking and Choosing]*; *Textual Gerrymandering*, *supra* note 113, at 1737 (2021).

190. The list of interpretive conflicts appears in Appendix C; these numbers are also reflected in Appendix G.

191. *See* Salinas v. U.S. R&R Ret. Bd., 141 S. Ct. 691 (2021) ("final"); HollyFrontier Cheyenne Refining LLC v. Renewable Fuels Ass'n, 141 S. Ct. 2172 (2021) ("extension"); Borden v. United States, 141 S. Ct. 1817, 1825–28 (2021) ("against the person"); Rutledge v. Pharm. Care Mgmt. Ass'n, 141 S. Ct. 474, 483 (2020) (Thomas, J., concurring) ("related to"); Torres v. Madrid, 141 S. Ct. 989, 995 (2021) ("seizure").

192. *See* Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 CONST. COMM. 95, 97–98 (2010) (distinguishing between vagueness and ambiguity).

193. *See id.* at 98 (arguing that "ambiguities in legal texts can (usually) be resolved by interpretation, but constitutional vagueness always requires construction.").

194. John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2392 (2003)

that context has included not only the surrounding words, but the structure of the statute or related statutes. Cases in our database reveal that the textualist Justices were assiduous in this regard, looking at cognate provisions and structure to reach an interpretive result. But even when all that linguistic context was consulted, the interpretations of textualist Justices frequently diverged.

Vagueness is not the only problem; other disagreements involved failure to understand the role of presuppositions or implicatures (or explicatures).[195] A "presupposition denotes a background belief the truth of which is taken for granted."[196] For example, "Cass Sunstein is no longer the head of OIRA." This presupposes that Cass Sunstein *was* the head of OIRA.[197] An implicature is something that is not actually said in the text, but which an ordinary reader might infer.[198] Consider *HollyFrontier.*[199] Justices Gorsuch and Barrett squared off over the word "extension," one reading the statute to mean extension *after exemption lapse* and the other extension *after no exemption lapse*. (I have added the implicatures in italics).[200] Neither opinion really addresses which of these implicatures is the best reading. Rather, both assert that their opinions had the correct "meaning" of the word "extension."

Finally, these cases also raise questions about whether to apply "ordinary meaning" or "legal meaning." The Justices have never consciously, let alone consistently, focused on an overall approach to legal versus ordinary meaning. And, yet, case results depended upon this distinction. For example, in *Borden*, Justice Kavanaugh dissented vigorously about the meaning of the phrase

("It is now well settled that textual interpretation must account for the text in its social and linguistic context.").

195. An "explicature" is something that is not uttered in the text but logically implied; an "implicature" is defeasible. *See generally* DEIDRE WILSON & DAN SPERBER, MEANING AND RELEVANCE 13–16 (2012).

196. On presupposition, see Brian Slocum, *Rethinking the Canon of Constitutional Avoidance*, 23 U. PENN. J. CON. L. 593, 629–32 (2021).

197. *See* Solum, *supra* note 189, at 289 (using this example). There are various kinds of presuppositions as Solum explains.

198. On Gricean implicature, see John Mikhail, *The Constitution and the Philosophy of Language: Entailment, Implicature, and Implied Powers*, 101 VA. L. REV. 1063, 1069 (2015); Nourse, *Picking and Choosing*, *supra* note 189. For a more complex view, see WILSON & SPERBER, *supra* note 195, at 1–27.

199. 141 S. Ct. 2171 (2021).

200. *Compare id.* at 2177 *with id.* at 2185 (Barrett, J., dissenting).

"against the person," giving the term a legal meaning, as a "term of art," meant to distinguish crimes against persons from crimes against property. Justice Kagan, joined by Justice Gorsuch, vigorously rejected that reading as contrary to the ordinary meaning.[201] Similar questions arose in *Van Buren* and *HollyFrontier.*[202] As recent empirical work shows, however, this conflict may be more nuanced: it turns out that, in cases of ambiguity, ordinary people defer to legal, not ordinary meaning, following a division of linguistic labor.[203]

Constitutional cases raised fewer linguistic questions because the authors filtered meaning through historical sources. But that raises its own uncertainties: even if one agrees upon text, interpreters may disagree upon historical meaning.[204] In *Torres v. Madrid*, Justice Gorsuch and Chief Justice Roberts disagreed about the meaning of "seizure" in the Fourth Amendment; they also engaged in lengthy, disagreeing, historical analyses about various common law rules to operationalize the text.[205] In *Mahanoy Area Sch. Dist. v. B.L.* ex rel. *Levy,* Justice Thomas dissented, rejecting the majority opinion joined by textualist judges, arguing that the First Amendment should be read as it was when the Fourteenth Amendment was ratified (1868) and should allow state schools to discipline children for speech without violating the First Amendment.[206]

201. *Compare* Borden v. United States, 141 S. Ct. 1817, 1828 (2021) (responding to the dissent's "'term-of-art' theory") *with id.* at 1839 (Kavanaugh, J., dissenting) (arguing that the key phrase "reflects a centuries-old term of art in the criminal law"). *See also* Yellen v. Confederated Tribes of Chehalis Rsrv., 141 S. Ct. 2434, 2443 (2021) (rejecting claims that relevant language was a "term of art").

202. *HollyFrontier,* 141 S. Ct. at 2177–78 (applying "ordinary" meaning but deploying "legal" meanings, including other statutes and Black's law dictionary); Van Buren v. United States, 141 S. Ct. 1648, 1656 (2021) (rejecting the dissent's legal meaning of entitled, emphasizing ordinary meaning).

203. Kevin Tobia, Brian G. Slocum & Victoria Nourse, *Ordinary Meaning and Ordinary People*, 171 U. PENN. L. REV. 365 (2023).

204. On some of the difficulties of applying historical resources to identify original public "meanings," see Richard H. Fallon, Jr., *The Chimerical Concept of Original Public Meaning*, 107 VA. L. REV. 1421 (2021).

205. *Compare* Torres v. Madrid, 141 S. Ct. 989, 996–98 (2021) (explaining the common law's "mere touch" rule) *with id.* at 1008–14 (Gorsuch, J., dissenting) (describing the majority's history as involving inapposite civil debt-collection practices: "We have no business wandering about and randomly grabbing volumes off the shelf, plucking out passages we like, scratching out bits we don't, all before pasting our own new pastiche into the U. S. Reports.").

206. 141 S. Ct. 2038, 2059–61 (2021) (Thomas, J., dissenting) ("I would begin the assessment of the scope of free-speech rights incorporated against the States by looking to "what 'ordinary citizens' at the time of [the Fourteenth Amendment's] ratification would

c. Absence of Text: Negative Implication

In a minority of the "meaning dispute" cases (9 of the 38 meaning disputes (23%)), Justices sharing the original public meaning philosophy interpreted the "lack of text" to reject a claim, but other textualist Justices disagreed. The most prominent example of this "negative implication" rule was *Dobbs v. Jackson Women's Health Org*. There is no text on the right to abortion, reasoned the majority opinion, so it does not exist.[207] A variety of statutory cases also depended upon this kind of "absence of text" inference. Statutory interpretation specialists have long questioned whether this inference is reliable because it relies too much on unarticulated normative baselines.[208] If taken to its logical extent, the rule of negative implication could have a dramatic effect upon caselaw. Much judicial doctrine in both statutory and constitutional cases (such as the standards for standing that do not appear in the text of Article III or the various levels of scrutiny that do not appear in the text of the Fourteenth Amendment), is "extra-statutory" or "extra-constitutional" and, as such, potentially impermissible under a theory of "negative implication."[209] So, too are various equitable doctrines that form a background to law, such as the presumption in favor of mens rea and equitable principles like estoppel.

d. Theory Conflicts

Finally, conflicts emerged about the theory of textualism and original public meaning in a small number of cases (8/61 or 13%).[210] These cases suggest that there remain serious theoretic differences between textualist Justices about their approach toward basic concepts like ordinary meaning, canons, congressional ratification of judicial rulings, and severance of unconstitutional provisions.

have understood the right to encompass.").

207. 142 S. Ct. 2228, 2248–49 (2022).

208. *See* William N. Eskridge, Jr., *The New Textualism and Normative Canons*, Review of SCALIA & GARNER, *supra* note 2, at 558 (noting skepticism on behalf of Justice Scalia).

209. *But see* Solum, *supra* note 192, at 99 (arguing that these kinds of doctrines are the "legal effect" of the text and thus separate from consideration of text).

210. The full discussion of interpretive conflicts appears in Appendix C; this number can also be found in Appendix G.

E. INTERPRETIVE CONFLICT AND CONSEQUENTIALISM COMPARED

We have explained textual conflicts and the Justices' consequentialist arguments. Now, we bring these two phenomena together. First, we consider unanimous cases—cases with no textualist conflict. Second, we consider cases of textualist conflict. The results reflect good and bad news for textualists and advocates for original public meaning. The unanimous cases show that constitutional or statutory text can decide cases—even at the Supreme Court level—and the Justices did not need in those cases to resort to consequentialist argument. That is a powerful disciplining move largely disregarded by textualism's critics. However, the non-unanimous cases saw a significant amount of consequentialism or what the Justices call "policy" reasoning. Comparing them, there is a statistically significant association: *where there was textual conflict, it was robustly correlated with consequentialist reasoning*.

1. Unanimous Cases

Evidence from the unanimous cases supports the idea that textualism need not require consequentialism (or at least overt consequentialist reasoning). When there is a unified textual view, the Justices did not engage in consequentialist reasoning.[211] Only 2/23[212] (9%) of unanimous interpretive cases engaged in consequentialist argument, most prominently in a case where Justice Alito argued that there were two "reasonable interpretations,"[213] and another case where the Justices supported their reasoning because of foreign relations concerns.[214]

2. Non-Unanimous Cases

Evidence from the non-unanimous cases indicates that consequentialism was quite prevalent when the Justices disagreed about text, meaning, or method. There were 61 issue conflicts among self-described textualist Justices sharing an original public meaning philosophy. In short, there was a lot of conflict among

211. For an example, see AMG Cap. Mgmt., L.L.C. v. FTC, 141 S. Ct. 1341 (2021).

212. Appendix B shows the unanimous cases. Only 23 of the listed 29 cases involved an "interpretive clash or issue," the other cases involved only precedential or common law reasoning.

213. United States v. Briggs, 141 U.S. 467, 469 (2020).

214. *See generally* Federal Republic of Germany v. Philipp, 141 S. Ct. 703 (2021).

those who shared a unified original public meaning philosophy toward constitutional and statutory text. There was also a lot of consequentialism: there were 58 opinions by original public meaning Justices in cases involving interpretive conflict where the Justices also invoked consequentialist argument.[215] We decided to bring these two measures together by comparing the cases[216] where there was interpretive conflict among the Justices with a shared philosophy with the cases in which consequentialist argument appeared. These numbers appear in Appendix G.

When one drills down to focus on particular types of conflicts, one gets a better picture. Theory-conflicts, for example, occur when the Justices argue about theories of severance, canons of statutory interpretation, or congressional ratification. Only 2 of 8 theory cases (25%) involved an opinion relying upon consequentialist reasoning. However, of the 15 interpretations involving a choice-of-text, 12 involved one opinion reverting to consequentialism (12/15) or 80%. Of the 38 that involved meaning, 28 (73%) included consequentialist argument in one or more opinion. Overall, adding theory, choice of text and meaning conflicts, 42/61 or 69% of interpretive conflicts included the use of consequentialist reasoning. If we exclude theory conflicts, and limit our set to choice-of-text and disagreements about meaning of agreed-upon text, the result is even more stark: consequentialism occurred in 40/53 (75%) of interpretive conflicts among Justices sharing an interpretive philosophy of textualism and original public meaning.[217]

There is a statistically significant relationship between consequentialist argument and textual conflict.[218] In the unanimous cases, only 9% of the cases included significant

215. *See* Appendix E (setting forth the consequentialist arguments from the opinions to show our content analysis).

216. We recognize that the amount of conflict is measured by issue and consequentialist argument by opinion. We took the issue conflicts and asked whether there was any opinion in that case which involved consequentialist reasoning. Given that, the measure is correlational. *See* Appendix G.

217. *See* Appendix G, listing the cases by type of conflict, and numerical analysis.

218. A chi-square test yields a chi-square statistic of 28.93. The p-value is <0.00001. The result is significant at $p < .01$. The chi square statistic with Yates correction is 26.29. The p-value is <0.00001. The result is significant at $p < .01$. Fisher exact test statistic value is < 0.00001. The result is significant at $p < .05$. We also found, given the broad disparity between unanimous and nonunanimous cases, that this would not change if we were to reduce the demonstrated conflict by counting cases in which conflicts occurred rather than conflicts.

discussions of consequentialism. In the non-unanimous cases, however, that relationship was dramatically reversed. Focusing on the cases where text (rather than theory) was disputed yields a stark contrast: 75% of conflict cases deployed consequentialist argument. In cases where there was a choice of text or dispute about meaning, the Justices reverted to consequentialism—or what the Justices call "policy-reasoning" most of the time. Consequentialism appears in 75% percent of the cases involving the choice of text and disagreement about meaning.

III. THE PARADOXES OF A UNIFIED PHILOSOPHY

The data reveals good news for those who urge that history and text should play a prominent role in legal reasoning at the Supreme Court. But it also reveals two important theoretical paradoxes that deserve further work in originalist and textual theory. First, there is the *paradox of disruption*. Textualism and originalism both claim devotion to the rule of law; but the blockbuster cases of the 2021 Term made salient what the data show, which is that in a significant number of cases, text and history can be deployed to unsettle legal doctrine, raising questions about the commitments of originalism to stability in the rule of law (46% of constitutional merits cases included at least one opinion urging a disrupting strategy). Second, there is the *paradox of consequentialism*. Academics have long been aware of the awkward fit between consequentialism and textualism. In the 2020 and 2021 Terms, the Justices claimed loudly that they are not consequentialists, which they equate with impermissible policymaking. But the data shows that consequentialism lives on, despite its theoretical awkwardness, particularly when the text is not clear. This Part does not attempt to resolve these paradoxes, but focuses on ways in which these paradoxes may be addressed moving forward, and questions they leave for theorists.

A. THE DISRUPTION PARADOX

Now that originalism has grown up from a critical "rhetorical posture"[219] of dissenting judges to a unified "judicial philosophy" of majority opinions, we can ask what the actual practice of originalism on the Supreme Court shows us in fact. And the facts show, as critics on left and right have suggested for some time,

219. VERMEULE, *supra* note 14, at 92.

signs of doctrinal disruption. Some disruption is publicly salient: the most obvious case being the Court's abortion decision. Other threats to gun regulation and Indian sovereignty have found their way to the press,[220] but much of this disruption is happening below the public radar, in the realm of constitutional doctrine.

Professor Adrian Vermeule has made recent and vociferous claims that the whole point of originalism is "disruption."[221] We can now determine that this is more than surmise based on highly salient anecdotes. We now have the data. And that data tells us some interesting things. It tells us that history plays an important role in Supreme Court decisions. But it also tells us that history is disruptive to standard doctrinal forms of analysis, from means-ends inquiries to levels of scrutiny. Our data provides a firmer basis on which to understand the character of the disruption across a universe of cases, both in terms of results, over-rulings, and doctrinal understandings.

Originalists and textualists are likely to have two responses to claims that disruption has now been confirmed: (1) precedent is never as strong in constitutional cases and textualists follow rules for overturning precedent; (2) disruption, as consequence, does not matter; all that matters is that historical understandings provide the "correct" set of analytic tools. Neither claim as we will see is a sufficient answer given our data.

1. Disruption: The Data

Textualists' and originalists' first response to claims of disruption is that originalism follows a *theory for overruling precedent*. For some time, originalists have known that, if taken seriously, originalist theory could be highly disruptive to constitutional law. As Justice Barrett explained, this is precisely why Justice Scalia was branded a "faint-hearted" originalist since he deemed "precedent" an exception to originalism's mandate.[222] In short, for Scalia, precedent constituted a *methodological brake*

220. *Dobbs* was front page news throughout the country and even abroad. For the controversy over tribal sovereignty, see *supra* notes 32 and 33; on guns, see Darrell H. Miller, *The Next Front in the Fight Against Guns*, WASH. POST (July 1, 2022) https://www.washingtonpost.com/outlook/2022/07/01/bruen-guns-rights-carry-sensitive-places/.

221. VERMEULE, *supra* note 14, at 92.

222. Amy Coney Barrett, *Originalism and Stare Decisis*, 92 NOTRE DAME L. REV. 1921, 1928–29 (2017).

against major disruption. Moreover, precedent was only to be overruled after considering a number of rule-like factors. All of the recent Trump nominees testified, at length, to such a process at their confirmation hearings.[223] In fact, we see these factors discussed in the *Dobbs* decision.[224]

What does this Article's data tell us about the practice of precedential disruption? If one were to define disruption simply as a majority opinion explicitly overruling a prior case, engaging in "precedential overruling" analysis, there would be exactly *one* out of our 124 cases: Justice Alito's opinion in *Dobbs*.[225] Based on that data, one might conclude that there was little disruption in these two Terms, other than *Roe*'s reversal. But the data shows a more complicated picture. Looking at the universe of over 300 opinions, and the 88 opinions in the 28 constitutional cases, we find a number of concurring and dissenting opinions arguing that other cases should be overruled. We also find, as we will see, that even these calls are a subset of possible kinds of disruption.

Other than *Dobbs*, there were several calls by a Justice to overturn precedent in both concurring and dissenting constitutional merits cases in our 124 universe. For example, in *Fulton v. City of Philadelphia*, Justice Alito wrote a lengthy concurring opinion, arguing for the overruling of *Employment Div. Oregon v. Smith,* a religion clause case; after a textual and historical analysis, he dutifully marched through the factored "overruling" analysis.[226] Other opinions urged even larger reversals. Justice Thomas, in his *Dobbs* concurrence, argued that the Court should revisit its entire history of substantive due

223. *Confirmation Hearing on the Nomination of Hon. Neil Gorsuch: Hearing Before the S. Comm. On the Judiciary*, 115th Cong. 129–36 (2017) ("I follow precedent. . . . A Supreme Court Justice is bound by precedent. . . ."); *Confirmation Hearing on the Nomination of Hon. Brett M. Kavanaugh: Hearing Before the S. Comm. on the Judiciary*, 115th Cong. 122 (2018) ("My personal beliefs are not relevant to how I decide cases. The role of precedent in our system, which I said is rooted in Article III of the Constitution, it is not just a judicial policy. The role of precedent is to ensure stability in the law, which is critically important. It is also to ensure predictability of the law. . . . People rely on the decisions of the courts, and so reliance interests are critically important to consider as a matter of precedent. . . . Precedent also reinforces the impartiality and independence of the judiciary."); Brian Naylor, *Barrett Says She Does Not Consider* Roe v. Wade *"Super-Precedent"*, NPR (Oct. 13, 2020) https://www.npr.org/sections/live-amy-coney-barrett-supreme-court-confirmation/2020/10/13/923355142/barrett-says-abortion-rights-decision-not-a-super-precedent.

224. *See* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2261–78 (2022).

225. *Id.*

226. 141 S. Ct. 1868, 1883 (2021) (Alito, J., concurring in judgment).

process cases, including cases on gay marriage and contraception (prompting Justice Kavanaugh to write that he did not agree). But this was not the only opinion suggesting reversals of existing constitutional law. Justice Gorsuch wrote a lengthy opinion in *Vaello Madero* arguing that the Insular Cases—which govern constitutional rights in all United States territories—should be overruled because inconsistent with the Constitution's text which, as Justice Gorsuch acknowledged, would raise a whole set of new constitutional questions.[227] In that same case, Justice Thomas wrote that the rather famous constitutional civil rights decision *Bolling v. Sharpe* (barring race discrimination in the District of Columbia) was incorrectly decided under the due process clause, but might be justified under the "citizenship" clause. [228] In *Mahanoy Area Sch. Dist. v. B.L.* ex rel. *Levy*, he urged that First Amendment speech cases should be determined as they were in 1868.[229] Finally, Justice Gorsuch argued in *Shurtleff v. City of Boston* that the Court had essentially overruled the Establishment Clause case, *Lemon v. Kurtzman*.[230] Such calls are inevitably disruptive as they tell litigants that they can bring cases to the Court that reject governing precedent because there may be enough Justices to overrule a precedent or use a different historical or textual approach.

Express overruling is an insufficient measure of disruption because a good bit of doctrinal disruption comes without express overruling. Our disruptive effect category included arguments that existing doctrine should be replaced with a different text- or history-mandated rule. Such cases do not "overrule" the result in a prior case, they simply replace the doctrine. So, for example, in *Bruen*, Justice Thomas argued that the "intermediate scrutiny" rule applied by the courts of appeals was wrong, the Second Amendment right should be determined by history.[231] The implicit idea was that the "scrutiny" test—otherwise ubiquitous in constitutional law—posed a conceptual problem. This case was not alone in this approach. Justice Kavanaugh, for example, in *Ramirez v. Collier*,[232] the audible-prayer-at-execution case,

227. United States v. Vaello Madero, 142 S. Ct. 1539, 1552–57 (2022) (Gorsuch, J., concurring).

228. *Id.*

229. 141 S. Ct. 2038, 2059–2063 (2021) (Thomas, J., dissenting).

230. 142 S. Ct. 1583, 1603 (Gorsuch, J., concurring in judgment).

231. New York State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2129 (2022).

232. 142 S. Ct. 1264, 1285–89 (2022) (Kavanaugh, J., concurring).

argued in a concurring opinion that the idea of a "compelling interest," another constitutional ubiquity, was somehow suspect, and should be replaced by a historical understanding.[233] These cases, and others, suggest that the conceptual apparatus of constitutional law—the well-known vocabulary created from 1950 on and deployed since then may be in flux.

Finally, our measure of disruption is limited to constitutional cases and thus, by definition, undercounts disruption in statutory cases (which we did not attempt to measure). For example, there were statutory cases where the Justices argued that text barred well-established equitable judicial doctrines. On the other hand, there were statutory cases where the Court added new constitutionally-inflected doctrines not in statutory text, such as the major questions doctrine.[234] Finally, there were statutory cases where the Court simply *chose not to follow a particular precedent*. It is now well known that there are Justices on the Court who simply wish to ignore one of the great doctrines of administrative law: deference to agencies' statutory applications. *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*,[235] was cited only three times[236] in majority opinions in our 124 cases and over 300 opinions, despite a wealth of administrative law cases where it might have been invoked. We found no majority opinions that actually invoked *Chevron*. *Chevron* is not a constitutional doctrine, of course. But, as we noted above, our point here is to suggest that the constitutional case sample necessarily underestimates disruption of established practice on the current Court.

2. Disruption: The Need for Justification

Instead of denying disruption, some originalists are likely to say it is wrong to focus on the "consequences" of interpretation,

233. *Id.* at 1286–87 ("the compelling interest standard . . . necessarily operates as a balancing test. . . . [W]hat does compelling mean, and how does the Court determine when the State's interest rises to that level? And how does the Court then determine whether less restrictive means should still satisfy the interest? Good questions for which there are no good answers.").

234. West Virginia v. EPA, 142 S. Ct. 2587 (2022).

235. 467 U.S. 837 (1984).

236. *See supra* note 31. There was one dissenting reference in West Virginia v. EPA, 142 S. Ct. 2587, 2635 (2022) (Kagan, J., dissenting). Justice Kavanaugh also cited *Chevron* in a concurring opinion arguing against the application of the rule of lenity. Wooden v. United States, 142 S. Ct. 1063, 1075 (2022) (Kavanaugh, J., concurring).

like disruption: the law must be unsettled before it can be settled properly. Many cases that were seen as socially disruptive, in their day, we now believe to be normatively justified, such as *Brown v. Board of Education*[237] or *Loving v. Virginia*.[238] And there have been periods of time, let us say the Warren Court, where entirely new doctrines and rights emerged in similar periods of disruption. In short, the argument is that the fact of disruption is not itself important if it is normatively justified.

But what is the normative justification for a return to history or text? One cannot wish away the disruption paradox by simply disclaiming its virtues. For years, left leaning scholars claimed that academic originalism was simply a performance of conservative values, it was just the reflection of a "social movement" that preferred guns to abortion.[239] But recently, conservative theorists have entered the battle claiming that originalism is illusory and in its "decadent phase," to use Professor Vermeule's phrase.[240] As Vermeule writes, originalism fights against the normal Burkean traditionalists' view that virtue lies in the "slowing" of legal change. Originalism, by contrast, can be quick and "revolutionary." Exhibit number one, Vermuele, writing before *Dobbs*, was *Heller*, a "startling break with the Court's long-standing precedents."[241] That originalism is "disruptive," argues Vermeule, is no accident: "originalism was initially created in order to unsettle the evolving doctrine of the Warren and Burger Courts, which conservatives despised."[242] The bottom line according to Vermeule: Disruption was "baked into originalism from the beginning."[243]

We now have some data to show that the Supreme Court's deployment of history and constitutional text is in fact disruptive, and that this disruption is both broader (covering more than simply express overrulings) and deeper (covering a larger set of doctrinal moves). It is not simply that, as Professor Vermeule argues, you have to have a theory of precedent to justify this

237. 347 U.S. 483 (1954).

238. 388 U.S. 1 (1967). It is worth noting that both *Brown* and *Loving* were unanimous decisions.

239. Reva Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in* Heller, 122 HARV. L. REV. 191 (2008).

240. VERMEULE, *supra* note 14, at 92.

241. *Id.* at 93.

242. *Id.*

243. *Id.*

disruption—you have to have *a theory of history's and/or text's constitutional force* justifying its displacing effect. It does not take a genius to make this point. Even popular comedy shows lambasted the *Dobbs* opinion by suggesting that it had taken the United States back to a golden age of "moral clarity," the "dark ages," by citing thirteenth-century precedent.[244] There is no magic to the year 1868 when the Fourteenth Amendment was ratified, nor to the evidence of British common law prior to 1787. After all, the 19th century common law cited by Justice Alito in *Dobbs* referred to a period in which women were largely regarded as incapable of having a legal existence, an era when Black persons were granted freedom from slavery but were still emerging from slavery's legal, social, political, and cultural effects.

If this is correct, then it is not enough to simply "declare" historical method sound without explaining why it is sound. And that, in turn, requires defenders of Supreme Court practice to recognize that this Court is not engaged, as Vermeule suggests, in a Burkean project to slow legal change; it is engaged in something a good deal more "revolutionary" to use his word, for good or ill. As the Court moves forward on this project, its supporters must defend this "back to ancient history" move, not simply in turns of a theory of *precedent*, but also a theory of *history*'s constitutional mandate and virtues. Famously, Justice Holmes saw history a "dragon" to be tamed, looking forward to a time in the law "when the part played by history . . . shall be very small."[245] The Court's Justices today do not agree, but it will not satisfy their critics unless they are able to sustain the normative claims for their practices moving forward.

B. THE CONSEQUENTIALIST PARADOX

Disruption may well be upwardly mobile in constitutional law, but constitutional cases are relatively rare, as our data shows (only 28 cases). What of the far larger group of cases involving statutes or the court's own precedents? If disruption is limited to a relatively small universe of cases, perhaps it is not the most significant problem facing the new Court. Enter our data on the "consequentialist" paradox in statutory cases.

244. Victoria Nourse, *What SNL Got Right About What's Wrong with Alito's Leaked Opinion*, SLATE (May 10, 2022), https://slate.com/news-and-politics/2022/05/what-saturday-night-live-got-right-about-alitos-leaked-draft-opinion.html.

245. Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457 (1897).

Many years ago, Professor Jane Schacter identified what we are calling the "consequentialist" paradox of textualism.[246] She argued that textualism's theoretical allergy to consequences posed a divide between "textualism on the books and textualism in action."[247] In practice, "judicially determined policy consequences can, and often do, figure quite prominently in textualist reasoning and method."[248] More recently, Professor Tara Grove has argued that there are two kinds of textualism on the Court, one that is "formal" and the other "flexible."[249] The flexible kind looks at consequences but, as she writes, raises worries that it is not textualism at all.

The data presented here shows that the New Court is struggling with consequentialism's role.[250] The Justices chided each other for "going consequentialist" as improper policy analysis. "Stick to the law," one imagines them saying to each other. But that did not bar consequentialist argument. Like legislative history, which is now often prefaced with the caveat, "for those who are interested," consequentialism is often couched in defensive rhetorical clothing (as if the opinion's author is thinking "only for those who deign to consider its faulty logic"). The data shows that, in practice, the Justices did not stop at text: consequentialism was upwardly mobile, particularly where there were divisions about the meaning of text, in fact in a supermajority of cases where textual meaning was in dispute.

Given the data, one can easily speculate that textualism's apparent rigor is just a cover for policy analysis. If the data is correct, then it is possible that textualism's instinct for the capillary has the effect of forcing judges to do what they say that they do not want to do: consequentialist analysis. In this subpart, we consider how textualists might theoretically reconcile or defend their practice. We consider three possibilities: consequentialism as harmless additive, consequentialism as textual "construction," and consequentialism as a modern return to the ancient absurdity rule. We recognize that critics are likely to see something more ominous in this development: that this data

246. Schacter, *supra* note 166.

247. *Id.* at 1008.

248. *Id.* at 1009.

249. *See* Grove, *supra* note 126, at 267 (outlining "flexible" textualism that "attends to text[,] but permits interpreters to make sense of that text by considering policy and social context as well as practical consequences").

250. *See* Appendix E.

shows that textualism is a "front," a kind of "staged exercise," concluding that textualism is a theory-façade."[251] But that instinct is not likely to satisfy academic theorists. On the other hand, even if there are ways to explain or justify the Court's practice, the data does not show that the Justices themselves have adopted these theoretical moves.

1. Consequentialism as Harmless Addition

How can the Justices resolve the "consequentialist paradox"? One tack that a flexible textualist might take is to defend it as a harmless addition. Once the legitimate textual springboard has sprung, textualism is done. Arguments that simply add to the textual analysis are persuasive, not controlling. As Justice Kavanaugh stated in *Niz-Chavez*, the Gorsuch opinion was wrong as a matter of textual interpretation *and* would accomplish nothing.[252] Unfortunately, this approach sits poorly with the Justices' own tendency to decry consequentialism precisely because it violates the assumed posture that textualists should do "no" policy."[253] If consequentialism were mere additive, why would one have to repeatedly state the court does not engage in consequentialist analysis?

Some textualists appear to take the position that the discussion of consequences should be impermissible because it violates separation of powers ideals.[254] Under this view, the making of "policy" is a violation of the judicial role in the larger constitutional structure. Justice Gorsuch, perhaps more than any Justice, was keen to divide the world between policymaking and

251. On theory façades, see Mark Wilson, *Theory Façades,* 104 PROCS. OF THE ARISTOTELIAN SOC'Y 273 (2004) (defining theory façades as "sheets of doctrine that do not truly cohere into unified doctrine in their own rights," and as "a patchwork of incongruent claims that might very well pass for a unified theory"); MARK WILSON, WANDERING SIGNIFICANCE: AN ESSAY IN CONCEPTUAL BEHAVIOR (2006).

252. Niz-Chavez v. Garland, 141 S. Ct. 1474, 1495 (2021) (Kavanaugh, J. dissenting) ("The point here is that the Court's opinion both errs as a matter of statutory interpretation *and* will not meaningfully help noncitizens, contrary to the Court's prediction.").

253. *Id.* at 1486 ("[T]hat kind of raw consequentialist calculation plays no role in our decision"). *See also* PennEast Pipeline Co. v. New Jersey, 141 S. Ct. 2244 (2021); *id.* at 2270 (Barrett, J., dissenting) ("While the Court cloaks its analysis in the 'plan of the Convention,' it seems to be animated by *pragmatic* concerns.") (emphasis added).

254. Manning, *supra* note 194, at 2434 (arguing that absurdity doctrine "contravenes important features of the constitutional structure.").

interpretation,[255] calling one off-limits and the other the essence of the judicial role.[256] This led to a kind of conflicted-consequentialism, even a *self-hating consequentialism*, as Justice Gorsuch himself engaged in consequentialist argument, as his colleagues were quick to point out.[257]

If discussing interpretive consequences violated separation of powers ideals, then there should be a strong case for textualist judges to stop with the text, period, stop.[258] More importantly, if the proper judicial role is to stop, then the defense "he made me do it," (one regularly used by textualist Justices) seems rather weak. If one is on a formalist diet, that one's friend eats chocolate cake is no excuse for indulging. Statutes may be commands, but this does not deny the Justices' own agency to refrain from reasoning in ways they believe inconsistent with constitutional ideals. If the job of judges is not to engage in consequentialism, the Justices should stop.[259]

But the story of the "consequentialist paradox" is a good deal more complex than that. Textualists have not always been consistent in their opposition to consequentialist reasoning. Justice Scalia once held a view of consequentialism that textualists tend not to emphasize. In 1989, he wrote:

> [I]t seems to me that the "traditional tools of statutory construction" include not merely text and legislative history

255. However well known, the nostrum that it is for the courts to "say" what the law is is hopelessly vague. All the departments "say" what the law is in some meaning of the word "say." Moreover, there is no constitutional text using the word "interpretation." All the departments "interpret" the law. If there is a constitutional limit on "judicial power," it is to decide "cases or controversies." U.S. CONST. art. III.

256. *See supra* note 83 (discussing *Pereida*).

257. *See infra* notes 276–278 and accompanying text.

258. Justice Gorsuch's assumption about the line between legislating and adjudicating has a formalist response: from a constitutional formalists' point of view, interstitial lawmaking is not "legislating," because only Congress legislates. "[L]egislative power" is a term of art limited to Article I, including the President's veto; these constitutional activities are only undertaken by collective elected bodies. A court can under this understanding of the text never legislate as provided in the Constitution.

259. A more moderate approach might argue that the separation of powers ideals do not govern cases where the text runs out, so that when a judge looks at consequences they do not violate their role because there is no higher textual command. This is also more consistent with the fact that "[t]he constitution contains no Separation of Powers clause." John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1939, 1944 (2011). If, as Dean Manning argues, one should not "invalidate legislation" based on "abstract notions of the separation of powers," one might worry about reading legislation in a particular way at a retail level based on a "freestanding . . . background norm of strict separation." *Id.* at 1950.

> but also, quite specifically, the consideration of policy consequences. Indeed, that tool is so traditional that it has been enshrined in Latin: "*Ratio est legis anima; mutata legis ratione mutatur et lex.*" ("The reason for the law is its soul; when the reason for the law changes, the law changes as well.") Surely one of the most frequent justifications courts give for choosing a particular construction is that the alternative interpretation would produce "absurd" results, or results less compatible with the reason or purpose of the statute. This, it seems to me, unquestionably involves judicial consideration and evaluation of competing policies.[260]

Justice Scalia was writing about traditional eighteenth-century method. Blackstone had a list: text, context, subject matter, consequence and reason.[261] The idea was simple: interpreters should worry if their interpretation would cause the sky to fall down, not only out of judicial self-interest (it would bring disrepute on the court), but also because this was unlikely to be a faithful agent's view of the legislature's meaning. Faithful agents assume the principal's rationality. If textualists were to adopt this "original method,"[262] they would solve some of the apparent inconsistency with the deployment of consequential analysis: the argument would be that consequentialism only comes into play after all else had been exhausted. Ambiguity necessarily requires the court to enter into the area of "legislation," a necessary evil.[263] Dean John Manning once suggested this in his influential article on the absurdity canon: "When statutory ambiguity leaves room for the exercise of . . . discretion, textualists believe it is appropriate . . . to consider a statute's apparent background purpose or policy implications in choosing among competing interpretations."[264]

Unfortunately, the Justices have not appeared to follow Dean Manning's advice, first finding ambiguity and then resorting

260. Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law,* 3 DUKE L.J. 511, 515 (1989).

261. 1 WILLIAM BLACKSTONE, COMMENTARIES *59 (stating that meaning is to be gathered from "the words, the context, the subject matter, the effects and consequence, or the spirit and reason of the law").

262. There is a divide between originalists who believe in "original public meaning" and those who follow "original methods." *See, e.g.*, JOHN O. MCGINNIS & MICHAEL B. RAPPAPORT, ORIGINALISM AND THE GOOD CONSTITUTION (2013) (advocating an "original methods" approach).

263. Amy Coney Barrett, *Statutory Stare Decision in the Appellate Courts*, 73 GEO. WASH. L. REV. 317, 317 (2005).

264. Manning, *supra* note 194, at 2408.

to consequentialism. We did a test of our 2021 cases to see whether the Justices reverted to consequentialism after finding ambiguity. We found that as a general rule, they did not, as we will see in the next subsection.

2. Consequentialism as Construction

Original public meaning theorists may claim that there is no real inconsistency between textualism and consequentialist argument: they complement each other at different phases of the inquiry. Following the work of Professors Larry Solum and Randy Barnett, interpretation involves two separate inquiries. The first is a search for semantic meaning. The second is a determination of legal meaning. Semantic meaning is entirely a process of linguistics and is empirical. By contrast, in the "construction zone," normative and other considerations may come to play.[265] Textualists like Justice Kavanaugh, for example, might argue that they are "construction zone consequentialists." In the easy cases, text is sufficient. When it is not, then one can appeal to pragmatic considerations.

To give a concrete example from the Term, consider Justice Alito's decision in *United States v. Briggs*.[266] *Briggs* addressed the proper statute of limitations for rape under the Uniform Code of Military Justice (UCMJ).[267] Justice Alito confessed that there were "reasonable arguments on both sides"[268] of the interpretive question.[269] He looked to dictionaries to determine the meaning of "punishable," but concluded "definitions shed little light on the dispute."[270] In the absence of text, Justice Alito moved on to consequentialism. He argued that clarity was one of the principal benefits of statutes of limitation both to potential defendants and prosecutors. The opinion concluded by listing the practical factors that Justice Alito imagined Congress would consider in setting a statute of limitations—the evidence to be gathered, the difficulties of prosecution, and trauma of the victim—arguing that these all counseled against the defendant's interpretation."[271]

265. *See* Solum, *supra* note 192, at 104–05.
266. 141 S. Ct. 467 (2021).
267. 10 U.S.C. § 843(a).
268. *Briggs*, 141 S. Ct. at 469.
269. *Id.* at 470 (emphasis in original).
270. *Id.*
271. *Id.* at 473.

Following Professor Solum, one might think that this was an example of "consequentialism" in the construction zone. The statute was subject to two reasonable interpretations. Justice Alito might have described this as "ambiguity," but did not. He then moved on to pragmatic considerations, in what could be conceived of as the "construction zone." Unfortunately for those seeking to reconcile the data, *Briggs* was an extreme outlier, *the only case* in our set of interpretive 2021 conflicts in which the Justices clearly admitted that the statute did not answer the question, and then moved on to consequentialism.

As Justice Scalia once observed, the "supposed distinction between interpretation and construction has never reflected the courts' actual usage."[272] And the New Court's cases are consistent with that claim. Each side of a textual dispute tended to confidently assert that the statute was "clear."[273] To confirm this, we looked for the term "ambiguity" in the entire set of Supreme Court cases in a one-year sample of our database: of sixty-one cases, there were nineteen cases that used the term "ambiguity" or "ambiguous" during the relevant period; twelve of them involved ambiguities having nothing to with statutory ambiguity. Of the remaining cases, three found "ambiguities" cured by other text or ordinary meaning.[274] We then focused on our set of 2021 cases involving consequentialist reasoning (Appendix E) and we asked whether any of them deployed an "ambiguity trigger." By "ambiguity trigger" we did not require the use of the term "ambiguity" but some indication that the court was openly acknowledging that there were conflicting plausible interpretations. We found that only 2 out of 29 opinions (7%) invoking consequentialism recognized any kind of de facto ambiguity.[275]

272. SCALIA & GARNER, *supra* note 5, at 15.

273. *See, e.g.*, Niz-Chavez v. Garland, 141 S. Ct. 1474, 1485 (2021) (Gorsuch, J.) (writing that policy considerations could never be relevant when the statute was "clear"); *but see id.* at 1490 (Kavanaugh, J., dissenting) (arguing that the statute's definition was "clear" in the other direction).

274. In *Van Buren v. United States*, Justice Thomas argued that Justice Barrett's reading was wrong because any ambiguity should be cured by a "defined term." 141 S. Ct. 1648, 1667 (2021) (Thomas, J. dissenting). In *HollyFrontier Cheyenne Refining, LLC v. Renewable Fuels Ass'n*, Justice Barrett in dissent claimed that Justice Gorsuch was finding ambiguity in one part of the statute to overcome its "ordinary meaning." 141 S. Ct. 2172, 2190 (2021). In *City of Chicago v. Fulton*, Justice Alito argued that any ambiguity in one part of the bankruptcy statute was overcome by another part. 141 S. Ct. 585, 590 (2021).

275. *See, e.g.,* United States v. Briggs, 141 S. Ct. 467, 469–70 (2021).

3. Consequentialism as Revival of Absurdity Doctrine

Critics less hostile to consequentialism might describe this data in a different way: as *sub silentio* and perhaps inadvertently, reviving a robust "absurdity" doctrine. The rule would say something like this: "interpret statutes in a way that does not yield implausible or odd consequences."[276] This would explain our data pattern as follows: when text is clear and leads to reasonable results, everyone agrees; but when text leads to strange or odd or even absurd results, that produces conflict. Posnerian pragmatism (textualism's enemy) is gone, and ordinary meaning reigns, but consequentialism survives as an "escape hatch." If ordinary meaning is our lodestar, and absurd or odd meanings are not ordinary, then textualists should revisit their typical wariness of the absurdity rule.[277]

Despite academic criticism of the absurdity doctrine, the post-Scalia court has never abandoned the term "absurd." The 2020–2021 Terms were no different. In *Niz-Chavez v. United States*, the immigration case we discussed earlier, Justice Kavanaugh accused the majority's interpretation of "spawning a litany of *absurdities*."[278] In *Torres v. Madrid*, Justice Gorsuch labelled Chief Justice Roberts's textual interpretation as "schizophrenic," decrying the majority's historical "mere-touch" rule for "the *absurdity* of it all."[279] In *Borden v. United States*, Justice Kavanaugh quoted another judge for the proposition that omitting reckless homicide from the Armed Career Criminal Act was "glaringly *absurd*."[280] In *Lange v. California*, Chief Justice Roberts, concurring in the judgment, wrote that "The

276. The terms "odd" and "implausible" were frequently deployed in textual analyses. Using a standard WestLaw search, these terms appeared in 28 cases during 2021, 5 of which were memorandum decisions excluded from our database. That leaves 23 cases. 21 of those cases (91%) involved a textual conflict (18) or unanimous interpretive decision (3). See Appendix A and B for the interpretive decisions. Two of the cases were precedential cases.

277. Manning, *supra* note 194 at 2392 ("A principled understanding of textualism would necessarily entail abandoning the absurdity doctrine.").

278. *Niz-Chavez,* 141 S. Ct. at 1492.

279. 141 S. Ct. 989, 1011 (2021) (Gorsuch, J., dissenting) (absurdity); *see id.* at 1006–07 ("The majority's need to resort to such a schizophrenic reading of the word 'seizure' should be a signal that something has gone seriously wrong."); *id.* at 1012 ("No amount of rhetorical maneuvering can obscure how flat [the majority's opinion] has fallen: . . . If common law courts never contemplated the majority's odd definition of a criminal arrest—and this Court didn't for more than two centuries—that can only be further proof of its *implausibility*.") (emphasis added).

280. 141 S. Ct. 1817, 1856 (2021) (Kavanaugh, J., dissenting).

Constitution does not demand this *absurd* and dangerous result" created by the majority's rule.[281]

Even if Justices did not use the word "absurdity," they used similar words. Remember *Van Buren v. United States*, where Justice Barrett emphasized the "breathtaking" consequences of the government's interpretation of the computer fraud statute.[282] In other cases, the rhetoric was tamer, but the point more telling of a *muscular* view[283] of the absurdity doctrine: implausible[284] or "startling"[285] results, not simply absurd or breathtaking results, were invoked to reject or support textual interpretations. Justice Kavanaugh rejected Justice Kagan's interpretation in *Borden*, the ACCA case we discussed above, arguing that "it *strains credulity*." He explained that "the Court's decision today will generate a variety of serious collateral effects that further underscore the *implausibility* of the plurality's statutory interpretation."[286] More often, the rhetoric was less insistent, noting "strange" or "odd" results. For example, in *HollyFrontier Cheyenne Refining, LLC v. Renewable Fuels Ass'n*, Justice Barrett argued that the majority's interpretation was likely wrong because it violated the ordinary meaning of the term "extension." Justice Gorsuch criticized her interpretation as based on "policy" and "purpose." She went on to criticize Justice Gorsuch, arguing that the Gorsuch view led to "strange effects" and "odd results."[287]

No one should think that the Court has officially adopted an absurdity rule. Traditionally, textualist theory has seen the absurdity canon as a license for judicial discretion and willfulness, a cause for eradicating, rather than expanding, the doctrine.[288] For that reason, it is extremely doubtful that the Justices would accept such a characterization of their work. Some Justices are clearly aware of the academic critiques of absurdity. Justice Gorsuch

281. 141 S. Ct. 2011, 2028 (2021) (Roberts, C.J., concurring in judgment); *see also* Department of Homeland Security v. Regents of California, 140 S. Ct. 1891, 1928 (2020) (Thomas, J. dissenting) (arguing that the majority's interpretation was "absurd").

282. 141 S. Ct. at 1661–62 (emphasis added).

283. My thanks to a Yale student in the Eskridge Interpretation Seminar for the term "muscular" to explain this move.

284. *See supra* note 276 (counting cases using the term "odd" or "implausible").

285. Fulton v. City of Philadelphia, 141 S. Ct. 1817, 1883 (2021) (Alito, J., concurring in judgment).

286. Borden v. United States, 141 S. Ct. 1817, 1843, 1855 (2021) (Kavanaugh, J., dissenting).

287. 141 S. Ct. 2172, 2189 (2021) (Barrett, J., dissenting).

288. Manning, *supra* note 194.

suggested in a footnote that the "absurdity" canon should be refigured as a linguistic canon meant to limit grammatical "absurdity."[289] Meanwhile, Justice Kavanaugh has defended it as part of the notion that textualism embraces ordinary, not literal meaning; presumably, ordinary meaning cannot be odd or implausible.[290] Most importantly, if absurdity were to be embraced as a canon, it would be doubtful that consequentialism would appear in cases without any claim of absurdity or implausibility,[291] or that it would wear conflicted, not enthusiastic, rhetorical garb.

4. Consequentialism as Theory Facade

What is a textualist to do? As Professor Jane Schacter once wrote, this is not a "gotcha" moment; in some sense, the reaction should be "[p]hew."[292] Few want irrational judicial decisions. Formalists agree: "No one, of course, is for absurd results,"[293] urges Dean Manning. A minimal level of consequentialism is inevitable and laudable,[294] even if some Justices find it

289. Yellen v. Confederated Tribes of the Chehalis Rsrv., 141 S. Ct. 2434, 2460 n.3 (2021) (Gorsuch, J., dissenting). (Absurdity doctrine "does not license courts to improve statutes. . . . At most, it may serve a linguistic function—capturing circumstances in which a statute's apparent meaning is so 'unthinkable' that any reasonable reader would immediately (1) know that it contains a 'technical or ministerial' mistake, and (2) understand the correct meaning of the text.").

290. Bostock v. Clayton Co., 140 S. Ct. 1731, 1827 n.4 (2020) (Kavanaugh, J. dissenting) ("Another longstanding canon of statutory interpretation—the absurdity canon—similarly reflects the law's focus on ordinary meaning rather than literal meaning. That canon tells courts to avoid construing a statute in a way that would lead to absurd consequences. The absurdity canon, properly understood, is 'an implementation of (rather than . . . an exception to) the ordinary meaning rule.' . . . 'What the rule of absurdity seeks to do is what all rules of interpretation seek to do: make sense of the text.'") (citations omitted).

291. *See*, *e.g.*, Fulton v. City of Philadelphia, 141 S. Ct. 1817, 1930 (2021) (Gorsuch, J., concurring in judgment) (arguing that religious believers will suffer costs of litigating if the court does not overrule a prior case); Nestlé USA, Inc. v. Doe, 141 S. Ct. 1931, 1939 (2021) (arguing that companies will not engage in voluntary efforts in foreign countries if they are subject to suit); *id*. at 1943 (Gorsuch, J., concurring) (arguing that it would save litigation costs to admit that there were no residual tort claims covered by the Alien Tort statute).

292. Schacter, *supra* note 166, at 1015.

293. Manning, *supra* note 194, at 2392.

294. As Justice Kavanaugh has explained, consequentialism can be an antidote to an absurd literalism. Bostock v. Clayton Co, 140 S. Ct. 1731, 1827 n.4 (2020) ("[T]he absurdity canon—similarly reflects the law's focus on ordinary meaning rather than literal meaning. That canon tells courts to avoid construing a statute in a way that would lead to absurd consequences. The absurdity canon, properly understood, is "an implementation of (rather than . . . an exception to) the ordinary meaning rule.") (citations omitted); Niz-Chavez v. United States, 141 S. Ct. 1474, 1491, 1492 (2021) (rejecting the majority's view,

theoretically awkward; a truly irrational statute would be unconstitutional.[295] On the other end of the spectrum, no one wants judges willy-nilly balancing costs and benefits, or what the Court's members call "policymaking," picking and choosing their favorite norms. In fact, critics should worry that this tendency has increased precisely because the same Court has jettisoned legislative or executive evidence of consequences—evidence that might constrain judges.

Critics are likely to say that evidence of consequentialism shows that "we are all pragmatists now," pragmatism being the label associated with textualism's great enemies, like Judge Posner. This tables-turning argument is clever, but it is unlikely to persuade the Supreme Court's textualists who claim their theory opposes free-flowing "pragmatism." Judicial textualists define "pragmatism" as opposed to the text. Their bête noire, Judge Posner,[296] famously said that he ignored the text and simply made the most "reasonable" decision in the circumstances.[297] Posnerian critics, right and left, charged that Judge Posner's "form of pragmatism comes to nothing, that it is empty, because though he insists that judges should decide cases so as to produce the best consequences, he does not specify how judges should decide what the best consequences are."[298] The New Court's Justices tend to agree. They use the term "pragmatism" as a slur.[299]

If the New Court's conflicted consequentialism gives pragmatists and purposivists hope, they should be cautious. The data does not show that "we are all pragmatists now." The cases reflect a conflicted, self-hating, consequentialism married to a conflicted textualism and historicism. Any proper account of the

which "spawns a litany of absurdities," as a "literal" interpretation of the text).

295. *See, e.g.,* United States v. Marshall, 908 F. 2d 1312, 1335 (1990) (Posner, J. dissenting) (defending a "flexible" interpretation because literal application would be unconstitutional).

296. Judge Posner's pragmatism has little to do with the philosophical pragmatism of James Pierce and John Dewey. For philosophical pragmatists, there is no meaning to the statute before it is applied. We don't know whether "no-vehicles in the park" means no skateboards until we apply the statute to the skateboard case.

297. *See* Eric J. Segall, *The Constitution Means What the Supreme Court Says It Means*, 129 HARV. L. REV. F. 176, 176–77 (2016) (discussing Posner's statements).

298. *See, e.g.*, Ronald Dworkin, JUSTICE IN ROBES 24 (2006); Richard A. Epstein, *The Perils of Posnerian Pragmatism*, 71 U. CHI. L. REV. 639, 650 (2004) (describing Judge Posner's theory as "contentless").

299. *See, e.g.*, PennEast Pipeline Co. v. New Jersey, 141 S. Ct. 2244, 2270 (2021) (Barrett, J., dissenting) ("While the Court cloaks its analysis in the 'plan of the Convention,' it seems to be animated by pragmatic concerns.").

data would explain variation: the fact that textualism works in some cases and not in others, and that consequentialism appears to arise far more often in cases of textual conflict. This might mean that that textualism by its very nature, when conflicted, yields consequentialism precisely because meaning is uncertain or it could mean precisely the opposite that the consequences of an interpretation push the interpreter to embrace one rather than another meaning.

It is crucial to remember that neither textualists nor purposivists have a theory of *when and what consequences should matter*. At common law, consequentialism was not idealized as policy-making, but instead, a caution to judges that they might have misread their principal, the legislature's, instruction. Strong or unnatural consequences served an interpretive stopping function, to borrow Professor Richard Re's term.[300] In a legal process world, the stark line between consequentialism and text was blurred by purposivism. In a purposivist world, or one in which legislative materials were consulted, consequentialism was attributed to, or found in, congressional materials. It was never the Court's (or faithful agent's) ends that mattered, it was always Congress's (or the principal's) ends that counted. But that world is now largely gone. As a result, the "consequentialist paradox" has emerged: a court that hews so carefully to text has become a court openly debating policy.

CONCLUSION

This Article offers the first empirical look at the brave new world of a unified philosophy entitled "original public meaning" as deployed by the Supreme Court. We began the work two years ago, when Justice Barrett joined the Court, knowing that it would yield some insight on the Trump effect, a complement of three Justices chosen by President Trump precisely because they all adhered to what they considered a "unified" judicial philosophy. In some ways, the Court acted as predicted. The disruption on one level—overturning a major decision, *Roe v. Wade*—is obvious. But that disruption is far deeper, as we have seen, than that decision shows. As the Court forges ahead, and reshapes doctrine in the name of history, the Justices will be faced with continued

300. Samuel L. Bray, *The Mischief Rule*, 109 GEO. L.J. 967, 970 n.19 (2021) (attributing the phrase to Professor Re).

challenges that the New Court is acting as policy-maker, precisely what the Justices say that they are *not* doing.

This empirical project will continue. Its results will be posted on the new Supreme Court Information Lab's website at Georgetown Law, along with other data-focused projects. The results here may be anomalous given that we have only two Terms. The first few years of a New Court may be particularly tumultuous as a new judicial regime takes hold. Advocates of original public meaning certainly hope that their method will settle down and the Justices will work to find more agreement in the future. Continuing, large-N studies will help us to see whether the textual conflict in the years 2020–22 is simply a bump in an otherwise smooth road. Additions may be in the offing as well. Coding the so-called "liberal" or Democrat-president-nominated Justices will also give us a clearer picture of the extent to which they add or subtract from textualist and/or historical analysis in both constitutional and statutory cases. Finally, more data will help us see whether the increase of textual analysis in constitutional cases—long thought impossible or irrelevant by some constitutionalists—will continue or be limited to some highly salient political issues like abortion or religion. Future empirical work may add categories of interest to a wider audience, such as political saliency levels, to further refine the relationship between law and politics.

Future analytic work should also continue. The very idea of "consequentialism" is under-analyzed. There are many kinds of consequentialism and some kinds may be more appropriate for courts than others. For example, effects on a particular party to a lawsuit might be quite inappropriate and evidence of judicial bias (e.g., an explicit argument that "I like Harry therefore I will rule for him" is clearly inappropriate), whereas effects on the judicial system might be more appropriate for the Court. Consequentialism may have a different valence in constitutional rather than statutory cases because of more widespread popular reliance on the Court's constitutional decisions throughout the country.

Finally, the very notion of "policy" and "consequentialism" deserves more academic attention, as the term "policy" is deployed by original public meaning Justices as a swear word. As Professors David Pozen and Adam Samaha have recently written, there are anti-modalities, meaning arguments that Justices never

openly use.[301] Pozen and Samaha claim that "policy" is one of the anti-modalities.[302] But is "policy" really like the anti-modalities of religion or political party? No judge would write that a ruling "furthers my religion or my political party" and think that an appropriate "public reason" for a particular result. Pozen and Samaha are clearly right that there are anti-modalities, and have made a tremendous addition to the conversation about Supreme Court argument by conceptualizing the "anti-modalities." But it is not clear to me that all forms of consequentialism fall into the "policy" category. Under the Blackstonian view, consequentialism serves an anti-biasing function, as a brake on literalist interpretation and motivated readings. Perhaps the notion of "policy" as anti-modality is too broad. Further work on consequentialism, the modalities and anti-modalities, will profit from both empirical study and analytic precision.

301. David Pozen & Adam Samaha, *The Anti-Modalities*, 119 MICH. L. REV. 729, 746–50 (2021).

302. *Id.*