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abstract


In her Yale Law Review article, Intersystemic Statutory Interpretation: Methodology as “Law” and the Erie Doctrine, Abbe R. Gluck explores the question whether techniques for interpreting statutes asserted by the US Supreme Court are themselves ‘law.’ But, if legal decision making methodologies are to be considered ‘law’, if decision making methodologies are to rise above what Pierre Schlag in Formalism and Realism in Ruins (Mapping the Logics of Collapse) might call mere aesthetic guideposts, then they must be articulated more precisely so that a deliberator, i.e., judge, can know and another, i.e., a member of the legal community, can determine whether he or she is deciding cases appropriately/lawfully. Whereas more precisely describing judicial decision-making is already an endeavor useful to academics interested in judicial decision making, adherents and subjects of the case method of law teaching, and appellate advocates, the notion of decision making methodology as law raises the stakes considerably.

Ultimately, the deliberative formula I construct describes the Supreme Court as algorithmic. The formula describes a Supreme Court that attempts first to resolve legal questions based on textual analysis, but if a textual disposition quotient is unsatisfied, the Court then prefers to rely on formally promulgated Treasury regulations, but if where there is no formal Treasury regulation, the Court resorts to a balance of less formal indicia of legislative intent with immediate and objective legislative purposes and perhaps some modern dynamics. However, no one has specified what level of precision decision making methodology as law would require. And thus it cannot be known in advance whether the formula I am attempting to construct would, even if proven accurate, help or hurt the case for decision making methodology as law. For some, this article may show that, even if one disagrees with my particular framework and conclusions, decision making methodologies can be described in greater precision using mathematical terminology and formula. For others, it may reify the notion that mechanical jurisprudence is neither possible nor desirable. Or, this article may show that the level of mathematical sophistication required for methodology as law is beyond the institutional capacity of the judiciary, perhaps even academics.
I. Introduction

This article presents an attempt to construct a loose mathematic formula based on the Supreme Court’s 21st century federal tax cases. If debates about statutory construction and judicial deliberation are to be at all productive, legal decision makers and commentators must be more precise when discussing decision making methodologies. Formulaically describing judicial deliberation over issues of law is designed to make the discussion more precise by developing a means for empirically studying judicial opinions. First, it identifies a set of deliberative factors that comprise the whole of legal justifications (text, intent, purpose and modern dynamics) and draws sharp distinctions between them. Second, it identifies as sub-factors the necessary components for determining when a deliberative choice is consistent with text, intent, purpose and modern dynamics. Third, it deploys mathematic terminology (coefficients, quotients, etc.) to represent the relationship between factors, sub-factors and the relative consistency a deliberative choice has with those factors and sub-factors. Ultimately, the Court’s 21st century tax cases show that, although the Court does not announce a precise, one size fits all deliberative methodology, the Court is noticeably formulaic in its deliberation. I have suggested after examining the Court’s 2001-2005 federal tax cases that a formula representing the Court’s deliberative process at least with respect to tax might look something like:

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\text{If } [f(\text{text}_1) - f(\text{text}_2)] < \text{Textual Disposition Quotient}, \text{ then } F[\text{Deliberation}] = F[\text{EC(intent)} + \text{EC(purpose)} + \text{EC(modern dynamics)}], \text{ where } \text{ECintent}, \text{ECpurpose} > \text{ECdynamics}.
\]

The Court can be considered an algorithmic textualist. Rather than consider all factors together, the Court considers text first, and if a textual disposition quotient goes unmet, it will consider official executive or judicial pronouncements as the putative intent of the legislature as well as other indicia of intent, purpose and modern dynamics to determine which deliberative choice best fits. The purposes that are most often discussed include horizontal equity, tax avoidance, judicial economy, administrative efficiency, notice to taxpayers and taxpayer convenience. Interestingly, the protection of women as a modern dynamic is introduced, but only in dissent, and neither race relations nor macroeconomic efficiency were mentioned at all. Thus, after examining the Court’s 2006-2010 federal tax cases, we adjust the formula to account for these specific considerations:

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\text{If } [f(\text{text}_1) - f(\text{text}_2)] < \text{Textual Disposition Quotient}, \text{ then } F[\text{Deliberation}] = F[\text{EC(intent)} + \text{EC(purpose)} + \text{EC(modern dynamics)}], \text{ where } \text{ECintent}, \text{ECpurpose} > \text{ECdynamics}.
\]

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F[\text{intent}] = f[(\text{EC(formal administrative pronouncements)}) + (\text{EC(judicial precedents)}) + (\text{EC(congresional work papers)}) + (\text{EC(informal administrative pronouncements)})], \text{ where } \text{ECfap}, \text{ECjp} > \text{ECwp}, \text{ECiap}.
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2 See Pierre Schlag, *Formalism and Realism in Ruins* (Mapping the Logics of Collapse), 95 Iowa L. Rev. 195 (2009) (arguing that formalism and realism do not represent strict decision making methodologies but rather as aesthetics that merely canalize the decision making process).
3 See Ronald Dworkin, *LAW’s EMPIRE* 10 (1986) (“[W]hen judges finally decide one way or another they think their arguments better than, not merely different from, arguments the other way; though they may think this with humility, wishing their confidence were greater or their time for decision longer, this is nevertheless their belief”.)
F[purpose] = f[(ec)(horizontal equity) + (ec)(tax avoidance) + (ec)(judicial economy) + (ec)(administrative efficiency) + (ec)(taxpayer due process)], where EChe > ECje, ECae, ECtdp > ECta.

F[modern dynamics] = f[(ec)(protection of women) + (ec)(race relations) + (ec)(macroeconomic efficiency)], where ECpow > ECrr, ECme

Yet, if the Supreme Court’s deliberative methodology might be seen as law⁴, more precision is necessary in order for legal decision makers to actually follow the Court’s methodology as a rule. It is not clear whether the process I’ve identified for deciding federal tax cases is indeed the process the Court intends to engage in when deciding federal tax cases. It is not clear whether the process I’ve identified for deciding federal tax cases is the process for deciding non-tax cases. And even if the process I’ve identified is intended by the Court to be a mandatory legal norm, either for tax cases or all cases, there remain myriad empirical questions that the fourteen 21st century tax cases obviously leave unresolved. And, thus, in 2015, we will seek more instruction from the Court in Formulaically Describing 21st Century Supreme Court Tax Jurisprudence, Part III.

In Part II, this article further discusses the concept of formulaic deliberation as a framework for conducting empirical research on statutory construction. Part III presents observations relating to the Court’s use of text, intent, purpose and modern dynamics in 21st century tax cases. Part IV situates these observations in the context of historical debates over statutory construction. And Part V concludes with an attempt to construct a mathematic formula representing the Court’s deliberative process. Finally, appendices A and B present the 14 Supreme Court federal tax cases since 2001.

II. Formulaic Deliberation as a Framework for Empirical Research on Statutory Construction

A. Formulaically Melding Legal Scholarship and Pedagogy

Formulaically describing 21st century Supreme Court Tax Jurisprudence is designed to meld my tax research with tax teaching. It requires an investigation into the Court’s tax law cases and an understanding of each cases substantive import into the tax world. But instead of dwelling on so-called tax logic, as the Court does not, its grander task is to identify the Court’s methodology for resolving tax disputes as a microcosm or example of how the Court decides all cases. And since the Court tends not to consider so-called tax logic, it is especially important thus to teach students both the architecture of taxation and general legal decision-making methodologies.

I teach that a judge in an appellate case is confronted with two or more competing deliberative choices and chooses the one which is most consistent with most of our most important formal and social principles.⁵ What I call formulaic deliberation is my attempt to explicate the Court’s consideration of these formal and social principles. Here, I am using the Supreme Court’s 21st century federal tax law cases to further that investigation.

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⁵ See Ronald Dworkin, LAW’S EMPIRE 10 (1986)
The Court’s tax cases demonstrate that the U.S. law thinks in terms of text, intent, purpose and modern dynamics; although the cases also demonstrate that these deliberative factors are not considered equally. If each of text, intent, purpose and modern dynamics can be considered a factor within a deliberative formula, text as a deliberative factor would receive the highest coefficient, whereas modern dynamics would receive the lowest, and the coefficients for text and purpose would lie somewhere in between.

I submit that if law schools are to continue relying primarily upon the appellate model of legal training, then we should more precisely investigate the Court’s methodology. To be more precise when speaking of legal decision making, it is not necessary to construct a mathematical formula, as I am attempting to do. However, I contend that we should at least identify the distinct methods deployed by the Court when it is deliberating over questions of law and increase our reliance on mathematical terminology in describing the relationships between those methods.

Currently, a small cadre of law professors is indeed trying to more precisely describe judicial decision making methodology. In fact, Professor Abbe Gluck poses the question whether judicial decision making methods are ‘law’. If decision making methods are law, to which I have serious reservations, then they would need to be particularized enough so that people can follow them. I believe this is a useful conversation to have in the 21st century, particularly after 20th century scholars exhausted arguments over methodological legitimacy.

B. Of Text, Intent, Purpose and Modern Dynamics

After suggesting that U.S. law thinks in terms of text, intent, purpose and modern dynamics, it is incumbent upon me to describe more precisely what each of these terms mean. Sometimes judges say they are considering text, and sometimes they declare something to be against the intent of the legislature. But oftentimes, there is a lot going on in a judicial opinion, and much of it is hard to classify or categorize. Here, I intend to describe my process for classifying and categorizing the justifications used by most judges in most judicial opinions. To put it shortly, text represents the meaning of a word as understood by those who come upon it, intent represents the meaning of a word as understood by the legislature, purpose represents the consequences the legislature intends for legal decision makers to consider, and modern dynamics represents consequences untethered to legislative expectations.

1. Textualism

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6 William N. Eskridge, Jr., Dynamic Statutory Interpretation, 135 U. Pa. L. Rev. 1479, 1479 (1987) (“Statutes...should...be interpreted ‘dynamically,’ that is, in light of their present societal, political, and legal context.”).
7 Christopher Columbus Langdell
8 ADRIAN VERMEULE, JUDGING UNDER UNCERTAINTY (2006)
12 Stanley Fish, There is No Textualist Position, 42 SAN DIEGO L. REV. 629, 649 (2005).
13 AHARON BARAK, PURPOSIVE INTERPRETATION IN LAW (2005)
14 See, e.g., WILLIAM N. ESKRIDGE, DYNAMIC STATUTORY INTERPRETATION (1994); RICHARD POSNER, LAW, PRAGMATISM AND DEMOCRACY (2003).
There are two components to a text-based analysis, or textualism. They are plain meaning and related context. Plain meaning represents the meaning most likely ascribed by a person who comes upon the text. Empirical issues relating to the consideration of plain meaning include determining which interpretive community matters most in determining whether a meaning is plain and determining what percentage of that community is required to see a word the same way in order for it to be considered sufficiently plain. Judges also consider the statutory context in which words are found. A word that would be interpreted broadly under the plain meaning rule might be narrowed by statutory context. The idea that a word should not be construed so as to make other statutes superfluous is an example of a judge considering statutory context.

2. Intentionalism

If intent represents the meaning of a term as understood by the author or the legislature, the trick is determining which sources best identify that intent. So-called legislative history had been thought of as the hallmark of legislative intent, but it has fallen into disfavor and relative disuse as an indicator of legislative intent. In terms of formulaic deliberation, the coefficient relating to that factor nears zero. Judicial and executive pronouncements on the other hand are on the rise as indicia of legislative intent. We have come to recognize, especially in taxation, that statutory law leaves substantial gaps which subordinates of the legislature are authorized to fill. In an analogy drawn from copyright law, judicial opinions and executive interpretations are works for hire that represent the putative intent of the legislature. Thus, the Chevron doctrine gives primacy (i.e., highest coefficient) to interpretations promulgated through formal means and the doctrine of stare decisis assigns and almost equally high coefficient to judicial opinions. The reenactment doctrine certifies this view, as it assumes that Congress is aware of and acquiesces to all judicial opinions and regulations under all statutes and approves of them to the extent it is unwilling to repeal them legislatively.

3. Purposivism

Purpose represents the consequences a legislature intends for a judge to consider. Whereas intent focuses on the meaning a legislature has in mind, purpose deals with the consequences the legislature sought to promote or avoid. Because it requires an investigation of intent, prior judicial opinions and executive pronouncements are also highly privileged sources for legislative purpose. However, in his book Purposive Interpretation of Law, Aharon Barak argues that judges should consider not only those consequences identified positively but also those objective purposes a reasonable legislature would want a judge to consider. Let’s assume he is talking about such mundane

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17 Philadelphia Park Amusement Co. v. United States, 126 F. Supp. 184, 130 Ct. Cl. 166 (1954) (counter-textually construing the term “cost” to mean that which is received rather than that which is given).
18 The reenactment doctrine stands for the proposition that legislatures are aware and approve of judicial interpretations if they reenact the statute without altering it. WILLIAM N. ESKRIDGE, JR., LEGISLATION AND STATUTORY INTERPRETATION 221 (2000); Paul Caron, Tax Myopia, or Mamas Don’t Let Your Babies Grow Up to Be Tax Lawyers, 13 VA. TAX REV. 517 (1994) (discussing the re-enactment doctrine in a federal tax context). See also Flood v. Kuhn, 407 U.S. 258 (1972) (upholding a judicially created anti-trust exemption for Major League Baseball on the grounds that Congress is aware and approves of it).
19 AHARON BARAK, PURPOSIVE INTERPRETATION IN LAW (2005).
20 AHARON BARAK, PURPOSIVE INTERPRETATION IN LAW (2005).
considerations as judicial economy. Well, these objective purposes are hard to distinguish from our next category, modern dynamics.

4. Dynamism

Modern dynamics as consequences untethered to legislative expectations are hard to distinguish from objective purposes.\(^{21}\) A judge who considers modern dynamics does not consider every modern dynamic but only those consequences he or she believes are sufficiently present and important to the case at hand.\(^{22}\) How might this judge determine whether such consequences are truly untethered to legislative expectations and those which an objective and reasonable legislature would want a judge to consider?

5. Everyday Pragmatism

In Law, Pragmatism and Democracy, Judge Posner suggests that a pragmatic judge might deploy a particular methodology in one case and a distinctly different methodology in another type of case.\(^{23}\) A judge who might favor text in a tax case because Congress writes a new tax bill every year and can ‘fix’ in absurd consequences emanating from a rigid text-based analysis might, on the other hand, favor intent when dealing with a criminal statute so as not to imprison those whose actions the legislature did not mean to prescribe. The same judge, in an anti-trust case, might consider the degree with which each choice might promote the free market or maximize gross national product, i.e., modern dynamics.

6. Comprehensive versus Algorithmic Deliberation

Pragmatism might also suggest that a judge comprehensively consider text, intent, purpose and modern dynamics in all cases. What some might call situation sense or common sense. The 21st century tax cases may show that Court does in fact consider text, intent, purpose and modern dynamics; but it does not show that they are all considered equally or even comprehensively. Rather its quite algorithmic. 21st Century Supreme Court tax study will show that the Court is what I would consider an algorithmic textualist, that the Court algorithmically considers text first, and if a textual disposition quotient goes unmet, it will consider an official executive or judicial pronouncement, and if there is no official executive or judicial pronouncement it will weigh indicia of intent, purpose and modern dynamics to determine which deliberative choice best fits.

III. 21st Century Supreme Court Tax Cases

Of 14 tax law cases decided by the Supreme Court, nine were decided between 2001 and 2005 (Gitlitz, Cleveland Indians Baseball, United Dominion Industries, United States v. Craft, United States v. Fior D’Italia, Boeing v. US, US v. Galletti, Banks v. Commissioner and Ballard v. Commissioner), and five were decided between 2006-2010 (EC Term of Years v. US, Hinck v. US, Clintwood Elkwood v. US, Knight v. US, and Boulware v. US). Of the 14 cases, 4 were decided on the basis of text (Gitlitz, Galletti, Knight, and Boulware), 7 were decided based on intent (Craft, Fior D’Italia, Boeing, EC Term of Years, Hinck, Clintwood), 3 were decided based on purpose (United Dominion, Ballard, Banks) and none were decided

\(^{21}\) WILLIAM N. ESKRIDGE, DYNAMIC STATUTORY INTERPRETATION (1994)

\(^{22}\) RICHARD POSNER, LAW, PRAGMATISM AND DEMOCRACY (2003).

\(^{23}\) RICHARD POSNER, LAW, PRAGMATISM AND DEMOCRACY (2003).
on modern dynamics (though a modern dynamic, the protection of married women, is mentioned in dissent in Craft)

Of the 4 text based cases, one (Knight) relied on plain meaning while the other 3 (Gitlitz, Galletti, Boulware) relied on statutory context. Of the 8 intent based cases, (_ _) were decided based on a Treasury regulation, (_ _) were decided based on past judicial precedent. (_ _) cases also cited legislative inaction and the re-enactment doctrine as evidence of intent. Of the 14 cases, all discuss purposivism. The purposes most often cited are horizontal equity, administrative efficiency, taxpayer convenience and tax avoidance. Horizontal equity carried the day in Banks. Taxpayer convenience won out in United Dominion and Ballard. Only one case (Craft) discussed modern dynamics, in dissent, by Justice Scalia. Race relations were not discussed, even though they were implicated in Banks. Macroeconomic efficiency was not mentioned in any case.

A. Textualism

Textualism is a two step process which requires a court to determine the degree with which a deliberative choice is consistent with plain meaning and statutory context. However, it is less clear about what interpretive community determines a meaning plain, how many in the community must see it the same way in order to be plain, how to determine which statutes are relevant as statutory context, or whether to emphasize the plain meaning however derived more than statutory context.

Galletti (2004) and Knight (2008) represent cases decided on plain meaning, while Craft (2002) informs further on which interpretive community is relevant when determining whether a meaning is sufficiently plain. Gitlitz (2001) and Boulware (2008) represents a case where the immediate statutory term is ambiguous standing alone, but seems much clearer after considering its relationship to other relevant statutes. In fact, statutory context seems to trump plain meaning. EC Term of Years (2007) and Hinck (2007) stand for the proposition that even when the meaning of a term is clear, it will not be construed plainly if to do so would confound other relevant statutes.

1. Plain Meaning

Plain meaning is a device for determining which deliberative choice is more consistent with what people understand a word to mean. Two major concerns with respect to plain meaning are 1) selecting an interpretive community to represent the people, and 2) the empirical nature of determining what those people think a term means.

The 21st century Supreme Court tax cases use dictionaries as proof of what people understand a term to mean. But if different dictionaries relate to different interpretive communities, it is unclear as to which dictionary one should use. In US v. Galletti (2004)24, the Court held that once the IRS timely assesses a tax liability with respect to a partnership, it need not reassess the liability in respect of each taxpayer who may have secondary liability. Specifically, where the IRS timely assessed employment tax liabilities relating to a partnership, it need not make an assessment against each partner before attempting to collect. In determining what ‘assessment’ meant in Galletti (2004), the Court used Black’s law dictionary, which suggests that lawyers are the community to be evaluated.

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24 US v. Galletti (2004) stands for the proposition that an assessment relates only to the determination of a tax liability and not towards who owes it.
But in determining the meaning of “would” the Court in Knight (2008)\(^{25}\) relied on Webster’s Dictionary and the American Heritage Dictionary, which suggests that the body politic is the relevant interpretive community. In Knight v. US, 552 U.S. 181 (2008), the Court was confronted with three different tests among the Circuit Courts of Appeal for determining whether a taxpayer has incurred “costs which are paid or incurred in connection with the administration of the estate or trust and which would not have been incurred if the property were not held in such trust or estate.” Such costs are not subject to the 2% floor related to itemized deductions, so long as they “would not have been incurred” by an individual. The cost at the crux of the matter here is investment advisory fees. Because the statute “looks to the counterfactual question of whether individuals would have incurred such costs in the absence of a trust[,] ... the question whether a trust-related expense is fully deductible turns on a prediction about what would happen if ... the property were held by an individual rather than by a trust.” Citing Webster’s Third New International Dictionary and the American Heritage Dictionary, the Court held that the statutory term “would” plainly encompasses “custom, habit, natural disposition, or probability.” The taxpayer argues that Congress could have used the term customarily in the statute, had it wanted it to be the standard. The Court, however, held that the term “would” naturally invokes to the reader a prediction, “and predictions are based on what would customarily or commonly occur.”

State officials, on the other hand, are not a good indicator of what the relevant community understands a statutory word to mean. Justice Thomas’ dissent in Craft (2002) complained that state law limitations on tenancies of the entirety plainly meant that such tenancies were not property belonging to the taxpayer.\(^{26}\) According to Justice Thomas, a word means what any one of the secretaries of the several States thinks it means. A legal decision maker could in the abstract consider his or her interpretation as that of the body politic of that state. It is similar to Allan Madison’s “The Tension Between Textualism and Substance over Form Doctrines in Tax Law.”\(^{27}\) But, this argument over meaning has been rejected in the realm of federal taxation since Gregory v. Helvering.\(^{28}\)

However, the 21st century Supreme Court tax cases also show that there are some words for which the meaning is entirely plain, yet statutory context prevents the Court from deciding the case on the basis of plain meaning. In EC Term of Years (2007) and Hinck (2007) the Court had to determine whether plain meaning of the term ‘any’ was confounded (or complimented) by a relevant statute. In both cases, a statute which seemed to grant unlimited jurisdiction by using the term “any action” was limited in scope by another jurisdiction statute relating to specified matters. The presence of another statutory scheme made the term “any” ambiguous such that the Court resorted then to considerations of intent and purpose.

2. Statutory Context

When examining text to determine what people would most likely understand a word to mean, the Court, in addition to considering whether the statutory term is plainly understood, considers the degree with which each deliberative choice is consistent with statutes that are related to the one at issue. Thus, when a statutory term has no plain meaning, it is not necessarily ambiguous (yet), its

meaning may be revealed by context. Before resorting to intent and purpose, the Court may rely strictly on whether one of the deliberative choices is more consistent with statutory context, i.e., related statutes. A fine example is Gitlitz v. Commissioner.

In Gitlitz (2001), the Court permitted a taxpayer whose S Corp had discharge of indebtedness income, but which was excluded from gross income because of the taxpayer’s insolvency, to increase his basis in his S Corp stock by the amount of such income and thusly deduct previously suspended net operating losses. Relying on the statutory context, the Court rejected the argument that income, even before one gets to the concept of gross income, does not include discharge of indebtedness from an insolvent taxpayer. The Court also rejected the argument that Congress did not intend for taxpayer’s to receive such a ‘windfall.’ The Court reasoned that ‘item of income’ included an insolvent taxpayer’s discharge of debt because elsewhere in the Code Congress provides tax relief for discharge of debt of an insolvent taxpayer within a statute designed to exclude forms of income from gross income and furthermore because that statute was amongst numerous others specifically designed to exclude forms of income from gross income.29 According to the Court, income must include discharge of an insolvent taxpayer’s indebtedness because the statutory context in which Congress deals with the issue suggests as much.

Similarly, the Court in Boulware (2008)30 determined whether there was a “deficiency” by reference, of course, to the relevant statutes which go towards computing an entity’s tax liability. But, while resort to tax statutes in Boulware seems obvious from a tax standpoint, one of the lower courts attempted to define ‘deficiency’ to include an element of taxpayer intent. According to the Court, section 301 and 316 determine the character of a corporate distribution without referring at all to the shareholder or the corporation’s intentions. Rather than rest on the text of the statute, however, the Court cites several IRS documents on the subject, employing them as a means for identifying the putative intent of congress, and the Court cites a treatise and a law review article.

In Knight (2008), the Court found the Second Circuit’s construction inconsistent not only with plain meaning, but with statutory context as well. Section 67(e) also requires that the costs be “paid or incurred in connection with the administration of the ... trust.” This portion of the statute is rendered redundant by a construction of 67(e) that covers only costs that an individual is incapable of incurring. As the Court noted, “We can think of no expense that could be incurred exclusively by a trust but would nevertheless not be ‘paid or incurred in connection with’ its administration.” The Court in Knight criticized the taxpayer’s construction for essentially the same reasons, its inconsistency with related statutory text. The taxpayer contends that the proper test is “whether a particular expense of a particular trust or estate was caused by the fact that the property was held in the trust or estate.” The taxpayer would exempt for the 2-percent floor any cost that a trustee obligated to incur, “the statute operates only to distinguish costs that are incurred by virtue of a trustee’s fiduciary duties from those that are not.” However, this too is inconsistent with a statute that requires both “that costs are incurred in connection with the administration of the trust” and “that the cost also be one which would not have been incurred if the property were not held in trust.” Under the taxpayer’s construction all costs fitting the first requirement automatically satisfy the second, rendering the second superfluous.

30 Boulware v. United States, 552 U.S. 421 (2008) (standing for the proposition that in both civil and criminal contexts the determination of whether a corporation has distributed dividends is purely mechanical and the intent of the taxpayer when making the distribution is irrelevant).
In United Dominion Industries (2001), the Court used the entire structure of the Code as statutory context. The Court acknowledged there was no plain meaning for ‘product liability losses’, since Congress made the word up. However, the Court noted that a reader would not likely conceive of ‘separate product liability losses’ (as the IRS had) because there was no statute that identified ‘separate net operating losses’ as a related and relevant concept. Like in Knight, however, the Court did not strictly rely on this inconsistency with statutory context.

But just as the Court implicitly determines the degree of conventional understanding that makes a meaning legally plain, it must also implicitly determine the degree of relevance to attribute to a related statute. Clintwood Elkhorn (2008) speaks to the difficulty of assigning a degree of relevance to statutory context. The Court in Clintwood Elkhorn (2008) limited the scope of a general jurisdiction granting statute (the Tucker Act) because of a relevant statute that required the taxpayer to properly exhaust an administrative remedy before petitioning the court. The taxpayer believed that the identifiable administrative remedy was irrelevant with respect to the Tucker Act, or with respect to Constitutional challenges under the Tucker Act. Section 7422 states with no less than five absolute terms that, “No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax ..., or of any penalty ..., or of any sum ..., until a claim for refund or credit has been duly filed with the IRS.” Because the taxpayer did not file a claim within the time period prescribed by section 6511, the taxpayer’s claim would not admit under section 7422. The Court found the import of the two sections plain, “[U]nless a claim for refund of a tax has been filed within the time limits imposed by section 6511(a), a suit for refund ... may not be maintained in any court.” Despite the absolute nature of the language, Clintwood Elkhorn attempted to sue the government under the Tucker Act.

In terms of describing legal decision making in a formulaic manner, this consideration is represented by an ‘emphasis coefficient’ that a Court must assign to each legal source in respect of its relevance to the case at hand. “The companies argue that these statutory provisions are ambiguous, but we cannot imagine what language could more clearly state that taxpayers seeking refunds of unlawfully assessed taxes must comply with the Code’s refund scheme before bringing suit, including the requirement to file a timely administrative claim.”

Consider also that in Gitlitz (2001) some tax scholars would discount the statutes relied on by Justice Thomas because an intimate knowledge of tax would they suggest lead to the conclusion that discharge of an insolvent taxpayer’s debt is never income, but that there is no other logical place to put it in the Code other than the section that excludes discharges of indebtedness for solvent taxpayers, which all agree constitutes income.

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31 United States v. Clintwood Elkhorn Mining Co. 553 U.S. 1, along with EC Term of Years and Hinck form a trilogy of cases standing for the proposition that where Congress provides for a specific administrative and judicial remedy litigants may not avoid the strictures of such a scheme by attempting to proceed under a more general (and presumably more favorable) jurisdiction statute. EC Term of Years involved a challenge to an IRS levy of property from a person other than the owing taxpayer, Hinck concerned a taxpayer challenge to an IRS refusal to abate interest, and Clintwood Elkhorn extends the principle to constitutional challenges. In Clintwood Elkhorn, the taxpayer paid taxes erroneously assessed but did not file an administrative claim ‘within three years of the filing of a return or two years of payment of the tax’ because the tax collected in 1978 was not found unconstitutional until 1998. Although their claim for refund fit under the literal terms of the “more forgiving” Tucker Act, the Court held that when Congress enacts precise, detailed administrative and judicial remedies, like section 7422, it intends to foreclose resort to more general procedures.
In Fior D'Italia (2002) the Court refused to give much or any deliberative weight to a statute relied on by the taxpayer. The dispute concerned section 6201, the statute authorizing the IRS to make an ‘assessment.’ The taxpayer argued that the IRS’ ability to deploy reasonable methods to assess a tax liability was limited by another statute which relieved restaurants of the legal responsibility to police their waiters and waitresses with regard to tip income by allowing the restaurant when computing employment taxes to rely on the reports of the waiters and waitresses. Ultimately, that statute could not militate against duly promulgated regulations, either because it was irrelevant or the weight given to it by the Court was low. 

Consider also that in Hinck (2007) the Court could have simply stated that statutes intended to guide U.S. Tax Court jurisprudence are irrelevant to cases within the US Court of Federal Claims.

3. Textual Disposition Quotient

The Court presents itself as an algorithmic textualist purports to consider text first and then decide whether there is anything to be gained by considering intent and purposes. This can be referred to as a textual disposition quotient, and United Dominion Industries and Cleveland Indians Baseball shows how hard it is to precisely identify this quotient with respect to the Court’s tax cases.

United Dominion Industries (2001) represents a case where all the Justices, even Justice Thomas, agreed that the text of the statute could not provide a clear answer. Though it credited the taxpayer’s contention as being more consistent with statutory text than the IRS, the Court would not rest its decision on text. Its textual disposition quotient was left unsatisfied, and the Court resorted to considerations over intent and purposes. Justice Thomas, of course, would there rely on a canon of statutory construction rather than consider intent and purposes.

Cleveland Indians Baseball (2001) also speaks to the presence of a textual disposition quotient. In Cleveland Indians (2001) the text of the statute seems to require taxpayers to compute their employer tax liability based on the year in which wages were actually paid rather than year when they should have been paid. However, the Court’s textual disposition quotient was unsatisfied because of a precedent interpreting the same statutory words in a Social Security statute to require a computation based on the reverse, the year in which wages should have been paid. If the Court deployed the precedent, Norietko, as evidence of what people thought that related statute meant, then Cleveland Indians is only remarkable as an example of how a conflict between plain meaning and statutory context produces an ambiguity which will lead the Court to consider intent and purposes. However, if the Court found an ambiguity based on a comparison between plain meaning and intent, that would denigrate the notion that the Court considers text first and then considers intent and purpose. It could not be considered an algorithmic textualist (though it could still be considered textualist in a different sense so long as text is the fact receiving the highest coefficient). This is an example of why the Court should be more precise by expressly declaring which of text, intent, purpose or modern dynamics they are considering at any given time.

32 See, e.g., ANTONIN SCALIA, A MATTER OF INTERPRETATION 16 (1997) (“When the text of a statute is clear, that is the end of the matter . . . Another accepted rule of construction is that ambiguities in a newly enacted statute are to be resolved in such a fashion as to make the statute, not only internally consistent, but also compatible with previously enacted laws.”); Karl N. Llewellyn, Remarks on the Theory of Appellate Decision and the Rules or Cannons about How Statutes are to be Construed, 5 GREEN BAG 297, 302 (2002)

33 See for good example the legal writing deployed in Chevron v. NRDC.
4. Text as Evidence of Intent, Purpose and Modern Dynamics

One thing the Roberts Court may attempt to clear up is whether text is considered because, as Justice Scalia has stated previously, it and not legislative intent is the law, or, is it because, as Justice Scalia has also stated previously, text is the best evidence of legislative intent. In Fior D'Italia (2002), the Court reviewed the text of a ‘related’ statute to determine specifically if it evinced legislative intent. Thus demonstrates the commutative properties of text. Text could stand on its own. Text can be evidence of intent. And text based deliberation may produce consequences like stability or consistency, which may considered purposive or dynamic.

For the proposition that dividends and returns of capital do not depend on intent, the Court in Boulware (2008) cited a treatise and a law review article. These two items are harder to classify as indicia of legislative intent. If the Court examined these texts towards estimating what readers of the statute would customarily think it means, then citation of these sources supports textualism. If the Court examined these texts for the purpose of estimating what the legislature understands the law to be, then they are indicia of intent. But if the Court examined them for the purpose of showing that the taxpayer’s contention is consistent with so-called tax logic, then that is at best a purposive inquiry, and perhaps dynamic.

B. Intentionalism

Intentionalists and textualists are both attempting to discern the proper breadth and scope of a statutory term, but they use different premises to determine a word’s meaning. According to Stanley Fish, textualism emphasizes the meaning assigned to a text by people who would come upon it, whereas intentionalism emphasizes the meaning intended by the author(s) of the text.34 A parent scolding a child who has slyly avoided a prohibition responds to the plea, ‘that’s not what you said’ with ‘you know what I meant.’ In matters of taxation, the hard legal issues surrounding tax shelters often relate to the distinction between what was said and what was meant.

As much as they can produce different meanings, they can also agree, if what the author intended and what people usually understand a word to mean are the same; and a fairly easy case is had when they do. Less obviously, text can be the best evidence of intent, in that an author, especially one in a position of authority, might intend that her words be understood as people generally understand them.35 “I meant what I said and I said what I meant.”36 Here we seek to observe to what extent the Court seems to emphasize particular indicia of legislative intent, including text, but not limited to, legislative work papers, administrative pronouncements and judicial opinions.

The 21st century Supreme Court tax cases demonstrate that the Court determines which deliberative choice is most consistent with legislative intent most often by assessing the degree of consistency each has with relevant judicial precedents and administrative pronouncements. While not described by the Court as such, these cases amplify and reinforce the notion that the legislature is aware of interpretations made in its name and approves or acquiesces to them by not repealing them through corrective legislation, i.e., the re-enactment doctrine. In Cleveland Indians (2001), Craft (2002), Boeing

34 STANLEY FISH, IS THERE A TEXT IN THIS CLASS? THE AUTHORITY OF INTERPRETIVE COMMUNITIES 338 (1980).
36 Horton Hatches the Egg, by Dr. Seuss.
the Court considered the degree with which each deliberative choice was consistent with judicial precedents as indicia of Congressional intent. In Cleveland Indians (2001), United Dominion Industries (2001), Fior D’Italia (2002), Boeing (2003) and Boulware (2008), the Court determined which deliberative choice was most consistent with administrative pronouncements as indicia of Congressional intent. Very interestingly, Banks (2005) presented the Court with the opportunity to consider legislation enacted during the pendency of the case (the AJCA) as indicia of legislative intent, but it refused.

1. Judicial Precedents as Indicia of Legislative Intent

The Supreme Court citing its own jurisprudence, under the doctrine of stare decisis, is hardly noteworthy except in respect of the claim that such citations represent indicia of legislative intent. Under the so-called command theory of law, the judiciary acts as the agent of legislature, filling in the interstices of statutory law. Command theory of law is attractive to many because it is designed to support democracy, by subordinating non-elected decision makers to elected ones. Under this theory, the judiciary's pronouncements can be conceived of as representing the putative intent of the legislature. That the legislature is at liberty to overturn court cases decided ‘wrongly’ supports this conception.

Of course, the legislature is not actually aware of all laws and all interpretations of law under each statute. And there are other reasons why we might doubt whether judicial precedents in the aggregate truly and perfectly represents the intent of the legislature. And we can doubt whether any one particular precedent should be viewed as representing legislative intent, and apply discounts to it in relation to those doubts. And we can debate how far and wide (or precise and narrow) each holding in a case should be extended and extrapolated (or curbed and cabined) as a matter of legislative intent. But if legislative intent exists and it is what judges are supposed to be after, as command theory suggests, then citing Supreme Court precedent towards gleaning legislative intent and purpose should be viewed as a matter of course. The same is true for administrative pronouncement, as will be discussed later.

37 Richard A. Posner, Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution, 37 CASE W. RES. L. REV. 179, 189-90 (1986-87) (“In our system of government the framers of statutes and constitutions are the superiors of judges. The framers communicate orders to the judges through legislative texts (including, of course, the Constitution). If the orders are clear, the judges must obey them. Often however, because of passage of time and change of circumstance the orders are unclear and normally the judges cannot query the framers to find out what the order means. The judges are thus like the platoon commander in my example. It is irresponsible for them to adopt the attitude that if the order is unclear they will refuse to act. They are part of an organization, an enterprise – the enterprise of governing the United States – and when the orders of their superiors are unclear, this does not absolve them from responsibility for helping to make the enterprise succeed. The platoon commander will ask himself, if he is a responsible officer: what would the company commander have wanted me to do if communications failed? Judges should ask themselves the same type of question when the ‘orders’ they receive from the framers of statutes and constitutions are unclear: what would the framers have wanted us to do in this case of failed communication?”). Also see H.L.A. Hart, Positivism and the Separation of Law and Morals, 71 HARV. L. REV. 593, 601 (1958) (“The other doctrine was the famous imperative theory of law—that law is essentially a command.”); Roscoe Pound, Mechanical Jurisprudence, 8 COLUM. L. REV. 605, 607 (1908) (“[I]n the first and second stages of a period of legislation the mechanical character of legal science is aggravated by the imperative theory, which is a concomitant of legislative activity. Austin’s proposition that law is command so complete that even the unwritten law must be given this character, since whatever the sovereign permits he commands, was simply rediscovered during the legislative ferment of the reform-movement in English law.”).

38 JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 1980.

39 Informality

Relying on several precedents in a variety of contexts, the Court in EC Term of Years (2001)\(^\text{41}\) held that, whenever Congress enacts general jurisdiction statutes, Congress intends to except cases where there is a “more precisely drawn, detailed statute,” and whenever it enacts “precisely drawn, detailed statutes” it intends to foreclose jurisdiction from more general ones. The IRS, believing that certain taxpayers transferred funds to EC Term of Years Trust for the purpose of avoiding their respective individual tax debts, levied upon bank accounts belonging to EC Term of Years. EC Term of Years sought to challenge the IRS levy under sections 7426 and 1346, respectively. The lower courts held that their petition under section 7426 was untimely, and that section 1346 was unavailable as Congress intended for section 7426 only to apply to third-party actions regarding levy. “It braces the preemption claim when resort to a general remedy would effectively extend the limitations period for the specific one.”\(^\text{42}\) The taxpayer, relying on US v. Williams,\(^\text{43}\) 514 U.S. 527, contended that Congress intends for section 1346 to have wide, almost unlimited application, certainly enough to cover challenges to allegedly erroneous IRS levies. However, the taxpayer’s reconstruction of congressional intent is, according to the Court, incomplete. Williams and Brown\(^\text{44}\) synthesized mean Congress intends for section 1346 to confer jurisdiction as wide as its literal terms except where a conflicting, more precisely drawn, detailed statute preempts it.

In Hinck (2007)\(^\text{45}\), the Court cited EC Term of Years, decided that same day, as well as Brown v. GSA\(^\text{46}\) and Block v. North Dakota\(^\text{47}\), for the proposition that, when Congress enacts a precisely drawn,  

\(^{41}\) EC Term of Years Trust v. United States, 550 U.S. 429 (2007). The IRS, believing that certain taxpayers transferred funds to EC Term of Years Trust for the purpose of avoiding their respective individual tax debts, levied upon bank accounts belonging to EC Term of Years. EC Term of Years sought to challenge the IRS levy under sections 7426 and 1346, respectively. The lower courts held that their petition under section 7426 was untimely, and that section 1346 was unavailable as Congress intended for section 7426 only to apply to third-party actions regarding levy. EC Term of Years conceded the issue of timeliness under section 7426, but, relying on US v. Williams, 514 US 527, maintained that a refund action remained available pursuant to section 1346. The Court held that section 1346 is unavailable to third-party challenges to an IRS levy, because otherwise section 7426’s more stringent limit on administrative and judicial remedy would be meaningless. Relying on several precedents in a variety of contexts, the Court held that where general jurisdiction statutes avail courts to “any civil action” Congress intends for them to hear any civil action except those that are the subject of a “more precisely, drawn detailed statute”, and especially where “resort to a general remedy would effectively extend the limitations period for the specific one.” The Court also noted that 7426’s more stringent time limitation is “no accident ... since after seizure of property for nonpayment of taxes [an IRS] district director is likely to suspend further collection activities against the taxpayer” and allowing taxpayers to resort to section 1346 would entirely frustrate Congress’ intent to ease the IRS’ administrative burden.


\(^{45}\) In Hinck v. U.S., 127 S.Ct. 2011 (2007), the Court held that when Congress supplements general jurisdictional statutes with a more precisely drawn, detailed one it intends to exclude those cases fitting within the terms of the latter statute from the grant of general jurisdiction in the former. Prior to the enactment of section 6404(h), both the district courts and the Court of Federal Claims having jurisdiction over IRS determinations of tax refused to review the IRS’ refusal to abate interest, finding the determination to abate interest to be committed to the discretion of the Secretary of the Treasury as there was no law to apply. In enacting section 6404(h), Congress limited the Secretary’s discretion by providing for review of IRS interest abatement decisions in the Tax Court under an abuse of discretion standard. The taxpayer contended that Congress presumably knew before passing section 6404(h) that the US Court of Federal Claims had jurisdiction over interest abatement claims and that the standard of review for interest abate cases Congress chose in section 6404(h) would apply to all interest abatement cases regardless whether in the US Tax Court or the US Federal District Court or the US Court of Federal Claims. Relying strictly on precedent, EC Term of Years, GSA v. Brown and Block v. North Dakota, the Court decided that Congress
detailed statute after having previously enacted a general statute it intends for matters covered by the precisely drawn statute to be excepted from the general one. Thus, even if the text of the general jurisdiction statute is clearly broad enough to cover “any” situation, Congress does not intend for its words to be taken literally. Or it means for them to be taken literally until a more precisely detailed statute is enacted. Although the Court in Hinck cites EC Term of Years, the issue in Hinck was far more complex and could have been distinguished.

The taxpayer in Hinck, along with the Fifth Circuit, contended that Congress when it enacted section 6404(h) intended to provide all courts with jurisdiction over tax cases with a standard for reviewing interest challenges. This intent of Congress is not identified through the text of the operative or related statute. It is imputed to Congress by virtue of their assumed awareness of all court cases interpreting the United States Code, see the reenactment doctrine and Flood v. Kuhn. The taxpayer and the Fifth Circuit thus contend that Congress when it enacted section 6404(h) knew the court of federal claims claimed jurisdiction over interest abatement challenges, knew also that the court of federal claims had no standard for reviewing such challenges, gave concurrent jurisdiction over such challenges to the Tax Court, did not strip the district courts or the court of federal claims of jurisdiction, and therefore must have intended for those courts already possessing jurisdiction over such claims to use the standard of review identified in section 6404(h). Instead of attacking the taxpayer’s contention as it related to legislative intent, the Court deployed what looked like purpose against it.

The Hinck Court, by relying on EC Term of Years, Brown v. GSA and Block v. North Dakota, seemed to rest their decision on legislative intent. However, this case demonstrates the difficulty in distinguishing intent based justifications and purpose based justifications. In addition to citing precedents, the Court found the taxpayer’s contention that both forums were available for interest abatement challenges inconsistent with a specific outcome Congress was seeking when it enacted the statute, forcing taxpayer’s to abide by the shorter time limitation. This is an appeal to purpose, rather than intent.

Similarly, the Court in Clintwood Elkhorn (2008) marshaled a string of cases, focusing on two, US v. Kreider and Blick v. North Dakota, which suggest that Congress is aware of the hardships and importance relating to constitutional challenges but maintains a strong intention to foreclose judicial proceedings if legislatively imposed administrative requirements are unmet. The Court declared that US v. Kreider, decided in 1941, already foreclosed resort to the Tucker Act for tax challenges that did not satisfy section 7422. Being on the books for over “six decades,” Kreider receives heightened emphasis as an indicator of legislative intent. Clintwood Elkhorn contended that Congress even in acquiescing to Kreider for all these years did not intend to foreclose challenges to taxes assessed in violation of the US
Constitution. But Blick v. North Dakota, et. al., stand for the proposition that when Congress requires the exhaustion of administrative remedies as a precursor to article III jurisdiction such unmet requirements will bar even a constitutional challenge. The Court also cited its interpretation of section 7421 in Alexander v. Americans United, where it held that the constitutional nature of a tax case is of no import when determining jurisdiction. The Court also found “no basis for treating taxes collected in violation of [the Export Clause] differently from taxes challenged on other [constitutional] grounds.”

But so ingrained is our sense of citing precedent for proof of what the law is or means, resort to it is ubiquitous in all 14 Supreme Court tax cases since 2000. For example, the Boulware Court (2008) supported its primarily text based analysis with an appeal to purpose. The taxpayer’s contention in Boulware (2008) is also consistent with one of the longest standing principles in tax, that “tax classifications like ‘dividend’ and ‘return of capital’ turn on ‘the objective economic realities of a transaction.” Citing a 1937 case, Palmer v. Commissioner, the Court states that “in economic reality a shareholder’s informal receipt of corporate property may be as effective a means of distributing profits among stockholders as the formal declaration of a dividend, or as effective a means of returning a shareholder’s capital.” Thus, it would be inconsistent with Congress’ intent in tax matters for courts to prevent taxpayers from presenting relevant facts that go to the substance of the transaction at issue; in this case, whether the corporation at issue had earnings and profits such that a distribution can be considered a taxable dividend.

In Craft (2002), the Court cited US v. Rodgers for the proposition that Congress intends to lien and levy on Texas homesteads and substantially similar property, including a tenancy by the entirety. The Court also noted that Congress failed to codify Rodgers only because Congress thought codification to be unnecessary. This notation by the Court about legislative codification suggests that the Court is indeed citing the case because it is strong evidence of legislative intent.

Judicial pronouncements also serve to indicate how Congress intends for its statutes to be construed. The Knight Court (2008) cited Cooper Industries for the proposition that Congress intends for all of its text to have significance. The Knight Court also cited Commissioner v. Clark for the proposition that Congress intends for Courts to narrowly construe exceptions to general statements of policy. The taxpayer’s contention in Knight was inconsistent with both of these notions regarding the general intent of Congress.

2. Administrative Pronouncements as Indicia of Legislative Intent

60 United States v. Craft (2002) held that a federal tax lien can attach to property held as a tenancy of the entirety. Although they acknowledged that property held by the entirety is burdened by restrictions on alienation, the Court found that property held by a tenancy by the entirety is not unlike property held in the form of a partnership or a Texas homestead, each of which may support a lien by the federal tax collector. In dissent, Justice Scalia noted that the Court’s ruling is likely to have a detrimental impact on married women.
Cleveland Indians Baseball (2001), United Dominion Industries (2001), Fior D’Italia (2002), and Boeing (2003) represent cases in which a computation was to be made and the Court determined whether and which Treasury regulation best represented the putative intent of Congress for how such computations should be made. Consistent with the Chevron/Skidmore doctrine, those regulations formally promulgated via notice and comment rulemaking receive the highest emphasis coefficient, while those promulgated less formally receive a lesser emphasis coefficient.

Fior D’Italia may stand for the proposition that intent trumps purpose. In Fior D’Italia (2002), the Court shows a strong affection for administrative pronouncements as indicia of legislative intent. The Court permitted the IRS when assessing a restaurant’s employment tax liability to estimate the amount of tips using an aggregation of credit card receipts, rather than restricting them to using employee reports. Even though Congress in a related statute relieved restaurants of the administrative burden of policing its staff over the issue of tip reporting, the Court held that Congress did not intend to limit the range of duly promulgated methods the IRS might deploy in determining a deficiency. The taxpayer’s argument was seemingly consistent with some clearly identified legislative purposes, yet the Court would not disturb the IRS’ use of long-standing methods for making assessments presumably because Congress is aware of them and did not anywhere explicitly limit the Treasury’s ability to continue making assessments in the same manner. Thus, when intent and purpose are clear but in conflict, intent wins.

Determining which of several regulations best evinces legislative intent can be a challenge in itself, and admits interpretive discretion. In Boeing v. US (2003), the Court permitted the IRS to adjust the return of a parent and subsidiary domestic international sales corporation using an administrative rule that requires research and development costs to be allocated to all of the parent’s product lines regardless whether those R&D costs were dedicated to one product line. The Court held that a proposed (but not duly promulgated) regulation that would allow dedicated costs to be distributed in respect of their product lines did not apply because the Commissioner had already determined that the benefits from R&D costs are inherently speculative and may inure to all areas of production. The Court interpreted two IRS regulations to complement each other in forming the putative intent of the legislature, while the dissent argued that the regulations contradicted each other. If the regulations were to found to have conflicted, it would have been a contest between a duly promulgated regulation under a related statute versus a proposed but yet to be promulgated regulation under the operative statute. The dissent would have emphasized the regulation under the operative statute even though it had not been duly promulgated. The majority avoided that question by finding that the regulations complemented each other, and that the taxpayer had to satisfy both.

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67 In Boeing v. US (2003), the Court permitted the IRS to adjust the return of a parent and subsidiary domestic international sales corporation using an administrative rule that requires research and development costs to be allocated to all of the parent’s product lines regardless whether those R&D costs were dedicated to one product line. The Court held that a proposed (but not duly promulgated) regulation that would allow dedicated costs to be distributed in respect of their product lines did not apply because the Commissioner had already determined that the benefits from R&D costs are inherently speculative and may inure to all areas of production. The dissent argued that the two administrative pronouncements were in direct conflict and that it was more reasonable for the taxpayer to rely on the more specific regulation than the more general one, even if the more specific regulation had not yet been duly promulgated.
In Cleveland Indians Baseball (2001)\textsuperscript{68}, an administrative pronouncement since repealed was evidence of what the legislature did not intend. An old Treasury regulation required taxpayers to compute employment taxes in respect of the year in which performance was rendered rather than when wages were paid.\textsuperscript{69} The Court noted that Congress subsequently amended the statute and assumed that the amendment was intended to eschew the ‘old’ meaning. Also, a new Treasury regulation supporting the IRS was duly promulgated and fully credited by the Court.\textsuperscript{70}

In United Dominion Industries (2001)\textsuperscript{71}, the Treasury Regulation purporting to represent Congress intent had not been duly promulgated and thus only received little credit as the intent of Congress, see Skidmore v. Swift/Mead v. U.S.\textsuperscript{72} However, pursuant to Skidmore/Swift, a court may choose to certify an administrative pronouncement as the putative intent of the legislature, whereas under Chevron they have little choice. The issue concerned the computation of product liability losses. Such losses may only be taken into account for the year if there is no net operating loss. United Dominion sought to compare the product liability losses of all the companies in its group to the total net operating loss for the group.\textsuperscript{73} The Commissioner sought to exclude product liability losses from all companies within the group that had a net operating loss by itself. Ultimately, the Court sided with the taxpayer’s contention because it was more consistent with text and legislative purposes and because the Court discounted informal Treasury guidance as an unreliable source of legislative intent. The Court sided with the taxpayer because the Commissioner’s method was harder to administer, less consistent with the text and structure of the Code, and lacked the formality required for judicial deference.

Rather than rest on the text of the statute, the Court in Boulware (2008) cited several IRS documents on the subject, employing them as a means for identifying the putative intent of Congress.\textsuperscript{74} Here, though, the pronouncements were neither federal court opinions nor formal regulations promulgated by the Treasury, so the deliberative weight assigned to them in a typical case is unclear.

3. Legislative Work Papers

Consistent with the disdain heaped upon legislative work papers (committee reports and such), only one of the 21st century Supreme Court tax cases cites to traditional legislative history as a justification. In Boeing (2003), the Court buttressed its decision with a citation to a Senate Report suggesting that Congress did not want taxpayers to abuse the statute at issue.

\textsuperscript{68} In \textit{U.S. v. Cleveland Indians Baseball}, 532 US 200 (2001), the Court required a taxpayer who owed back wages to his employees to calculate their federal employment tax liability by reference to the year the wages were actually paid, rather than the year they should have been paid. The Sixth Circuit, relying on Nierotko, a case interpreting identical language contained in the Social Security Act, held that FUTA and FICA are to be calculated using the effective rates for the year in which the wages should have been paid. The Fourth and Tenth Circuit rejected Nierotko and the Social Security context and instead relied on IRS regulations requiring the taxpayer to use the effective rates for the year in which the wages were actually paid. Agreeing with the Fourth and the Tenth, the Court required the taxpayer to calculate the liability in the manner specifically contemplated by the administering agency, the IRS.


\textsuperscript{73} \textit{United Dominion Industries v. US}, 532 US 822 (2001).

\textsuperscript{74} Boulware v. United States, 552 U.S. 421 (2008).
4. Legislative Action/Inaction as Indicia of Legislative Intent

Sometimes the Court recognizes when a legislature acts or attempts to act upon standing legislation. Deborah Geier once pointed out that a judge should not interpret basis to include an adjustment for inflation because Congress had sought several times to provide for that in the statute but failed each time. Action and inaction of the legislature means something, even if we are not 100% sure what. In Boeing (2003), the Court states, “the fact that Congress did not legislatively override [the regulation] in enacting the FSC provisions in 1984 serves as persuasive evidence that Congress regarded that regulation as a correct implementation of its intent.” Consider that in Craft (2002), the Court credited a particular interpretation as the likely putative intent of the legislature because of evidence that Congress’ failure to codify the interpretation was only because it was thought to be unnecessary.

Legislative action/inaction raises a hugely important temporal question, are judges in search of legislative intent limited to considering only the minds of the enacting legislature? Consider that in Banks v. Commissioner (2005), the Court ignored the fact that during the pendency of the case Congress passed the American Jobs Creation Act which provided an above the line deduction for litigation expenses in a discriminations suit, thereby clearly expressing its opinion that the litigant owns the case and receives all of the income and ‘needs’ an unlimited deduction for the expense. The Court here suggests that the views of the current legislature are irrelevant.

C. Purposivism

The distinction between intent and purpose relates to the distinction between meaning and consequences, deduction and induction, form and function, past and future. The intended meaning of a word relates to the form imagined by the author, whereas purposes relate to consequences the author intended to avoid or promote when she chose to use the word. For example, in the case of “No Vehicles in the Park,” intent would relate to the form of vehicle the legislature intended to prohibit—those that emit carbon, that are motorized, over a certain weight or height, etc.—whereas purpose limits the prohibition to those vehicles that produce adverse consequences the legislature sought to avoid—noise pollution, air pollution, accidents, etc. A motorized wheelchair that can reach speeds of 25 miles per hour should certainly be prohibited if the legislature passed the law so as to prevent accidents, but the case is much weaker if they desired to prevent air pollution and the speedy wheelchair is electric. Intent relates to a form thought of in the past, purpose requires an estimation of the likely or foreseeable consequences.

81 AHARON BARAK, PURPOSES INTERPRETATION IN LAW (2005)
Because both intent and purpose require an inquiry into the mind of the legislature, the same sorts of evidence are probative, executive and judicial pronouncements, legislative work papers, legislative action/inaction, even the text of the statute. Justice Stephen Breyer argues that the text of the Constitution as a whole evinces a purpose towards greater and fuller democratic participation. Deborah Geier suggests that the structure of the Internal Revenue Code itself evinces certain purposes, income and deduction matching, the progressive rate structure, etc. On the less ‘positive’ side, Aharon Barak argues that judges should consider those consequences a reasonable legislature would want a judge to consider. The ethereal nature of these ‘objective purposes’ makes them almost indistinguishable from modern dynamics, or those consequences untethered to legislative expectations, i.e., public policy or judicial activism. However, the 21st century tax cases show that there within tax law there are some purposes like administrative efficiency or taxpayer notice that can reasonably be placed in the realm of consequences a reasonable legislature would expect a judge to consider without that judge finding evidence to so in legislative history or some like positive representation.

21st century Supreme Court tax cases decided on the basis of consistency with legislative purposes include United Dominion Industries (2001) (administrative efficiency and taxpayer convenience), Banks v. Commissioner (2005) (horizontal equity) and Ballard v. Commissioner (2005) (taxpayer convenience). Purposive concerns were also discussed in almost all the other cases, including Galletti, Gitlitz, Cleveland Indians, Craft, Hinck, Boullware, Boeing, EC Term of Years, Clintwood Elkhorn, Knight, Fior D’Italia and Ballard. When considering legislative purposes, the Court most often considers the notion that a particular deliberative choice will facilitate or exacerbate tax avoidance, but it also considers whether a deliberative choice is consistent with horizontal equity, judicial and administrative efficiency, and taxpayer convenience and notice. However, because in most cases the Court did not cite to legislative work papers to identify these concerns, they are ‘objective’ purposes at best, or perhaps even modern dynamics.

1. Horizontal Equity

Two cases seemed to turn on the longstanding tax fairness concern that similarly situated taxpayers be taxed similarly: Craft (2002) and Banks (2005).

In Craft (2002), the Court examined the bundle of rights relating to a tenancy by the entirety and determined that they were substantially similar to those relating to a partnership or Texas homestead, and should be treated accordingly. Unfortunately for this project, the Court does not identify this concern expressly. Instead, the Court cited a case which dealt with a Texas homestead. On one hand, it can be said that the Court cited Palmer for the proposition that Congress is already aware of the matter and that the present case fits within a decision already made. On the other hand, the Court could have cited Palmer to say that holders of tenancies by the entirety are horizontally equivalent—similarly situated—to owners of Texas homesteads. A subtle difference to be sure, it would nevertheless help a project such as this for the Court to more precisely identify why it cited this particular case.

85 AHARON BARAK, PURPOSIVE INTERPRETATION IN LAW (2005)
The Banks Court more precisely discusses precedent. In Banks (2005)\textsuperscript{87}, the Court invoked the assignment of income doctrine and held that litigants have complete dominion and control over lawsuits, regardless of state law and regardless the fee arrangement, such that all proceeds are received by them and then distributed to their legal representatives. That a deduction may not be available for some litigants was immaterial. Interestingly, the American Jobs Creation Act anticipated and ameliorated the harsh consequences the assignment of income doctrine placed upon civil rights litigants.\textsuperscript{88} The Court rejected the idea that characterizing the relationship between litigants and their lawyers for federal tax purposes depended on a combination of state law and the specifics of the fee arrangement.\textsuperscript{89} It agreed with Judge Posner of the 7th Circuit that a litigant in a court case stands in roughly the same position with their contingency fee lawyer as a storeowner with a commission sales person.\textsuperscript{90} However, resort to horizontal equity admits sizable discretion. The Court rejected arguments that the litigant and lawyer were instead like partners in a partnership or like a farmowner and sharecropper.\textsuperscript{91}

The Court in Boulware (2008) rejected the government’s claim, as expressed in US v. Miller (9th Cir.) that horizontal equity is promoted by adding an intent element to the computation of dividends in a criminal tax evasion case.\textsuperscript{92} The Court determined that two taxpayers one who diverts money from a profitable company and one who diverts money from an unprofitable company are not similarly situated with respect to evading income tax, because the latter has not received ‘dividends’ which could support a deficiency if unreported. On the other hand, the Court fully credited the taxpayer’s contention, that criminal and civil defendants must be treated the same with respect to whether they in fact received and reported dividends.

Of course, any legislative commitment to horizontal equity is not absolute. In Hinck (2008), the Court discounted the taxpayer’s claim that restricting interest abatement challenges to the Tax Court would promote horizontal inequities.\textsuperscript{93} While it is true that taxpayers worth over $2 million are foreclosed from interest abatement challenges, Congress expressly excludes them from Tax Court entirely and, thus, it is an inequity that Congress explicitly chose to create.\textsuperscript{94}

2. Administrative Efficiency

In the following cases, the Court considered whether and the degree with which a deliberative choice was consistent with efficient administration of the tax laws. In United Dominion Industries (2001), the Court rejected the Commissioner’s method for making a computation because of its complexity and credited the taxpayer’s construction with being ‘easy to understand and apply.’ The Court in Galletti (2004) supported its decision not to require the IRS to assess a partnership tax liability separately against each partner by emphasizing Congress’ desire that the tax laws be administered efficiently.

In EC Term of Years (2007), the Court believed that allowing taxpayers to resort to a general jurisdiction statute rather than the stricter but more precisely drawn statute would frustrate legislative intent to ease the IRS’ administrative burden. 95 According to the Court, Congress intended to impose a stricter time limit on taxpayers because ‘after seizure of property for nonpayment of taxes the district director is likely to suspend further collection activities against the taxpayer.’ 96 Similarly, the Court in Clintwood Elkhorn (2008) held that Congress intended for time bars on tax challenges to “insure an orderly administration of the revenue...to provide that refund claims are made promptly, and to allow the IRS to avoid unnecessary litigation by correcting conceded errors.” 97

Knight v. Commissioner suggests that the Court applies the same level of emphasis to administrative efficiency and taxpayer convenience. In Knight v. Commissioner (2008), the taxpayer sought to define the term “would not have been incurred” in a way that would be convenient for taxpayers, while the Commissioner sought to define the term in such a way that would support administrative efficiency. The Knight Court based its decision strictly on text and rejected both the taxpayer’s and the government’s resort to purpose. The Court ‘appreciate[d] that the inquiry into what is common may not be easy in other cases, particularly given the absence of regulatory guidance.” 98

3. Taxpayer Convenience

In the following cases, the Court considered whether and the degree with which a deliberative choice was consistent with taxpayer convenience in the form of notice to the taxpayer and ease of compliance.

In United Dominion Industries (2001), the Court rejected the Commissioner’s method for computing product liability expenses (PLE’s), stating that, “Even if separate entity treatment was appropriate it is unclear how a member with PLEs would compute its separate NOL.” 99 However, even though it might appear that consistency with legislative purpose trumped the putative intent of the legislature as evidenced by an executive pronouncement, it is more precise to say that consistency with legislative purpose may trump the putative intent of the legislature as evidenced by an informal executive pronouncement, but according to Fior D’Italia (2002) does not trump a formally promulgated executive pronouncement. In Fior D’Italia (2002), the Court accepted the Commissioner’s method for assessing a restaurant’s employment tax liability even though it conflicted with a clearly identifiable and immediate purpose of Congress to reduce the administrative burden on restaurants with respect to reporting tip income. 100

Buttressing its text based decision in Boulware (2008), the Court considered the government’s proposed construction to be overly burdensome to taxpayers because it would require taxpayers to produce evidence from the time of a distribution to a shareholder that the corporation intended to return shareholder capital versus issuing a dividend even though the corporation cannot know until the end of the year whether it had sufficient earnings and profits such that a transfer during the year could possibly be characterized as dividends versus a return of capital. 101

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4.  Judicial Efficiency

Judicial efficiency or judicial economy were considered but not emphasized much. In Ballard v. Commissioner (2005)\(^{102}\), the Court admonished the Tax Court for concealing from the taxpayer and the Circuit Courts of Appeal the reports of Special Trial Judges, who are similar to magistrate judges in that they hear the presentation of facts in some cases. “The Tax Court’s practice of not disclosing the special trial judge’s original report, and of obscuring the Tax Court judge’s mode of reviewing that report, impedes fully informed appellate review of the Tax Court’s decision... Absent access to the special trial judge’s Rule 183 (b) report in this and similar cases, the appellate court will be at a loss to determine (1) whether the credibility and other findings made in the report were accorded ‘due regard’ and were ‘presumed ... correct’ by the Tax Court judge, or (2) whether they were displaced without adherence to those standards.”\(^{103}\)

The Court in Boulware (2008) mentioned but discounted the claim that the government’s interpretation would prevent jury confusion, noting that preventing jury confusion cannot come at the expense of ignoring an element of the crime (an element found in text). The Hinck Court (2008) also discounted the taxpayer’s judicial economy argument.

5.  Tax Avoidance

Almost all of the cases discuss at some point the prospect that a particular deliberative choice will promote or exacerbate tax avoidance. In Gitlitz (2001), the Court’s textual disposition quotient was satisfied and so they dispensed with a discussion of whether the formal interpretation produced a ‘windfall.’\(^{104}\) However, in Craft (2002), the Court supplemented its text based decision with a claim that its chosen construction would help prevent tax avoidance.\(^{105}\) In Boeing (2003), the Court also noted that the construction it chose was more consistent with preventing tax avoidance.\(^{106}\)

In United Dominion Industries (2001), Justice Stevens dissented on account of the government’s claim that its construction was designed to prevent tax avoidance,\(^{107}\) but the majority discredited that concern, noting that the government’s construction would favor the government in some instances and the taxpayer in others.\(^{108}\) Similarly, in Cleveland Indians Baseball (2001), the Court determined that the IRS construction had minimal effect on tax avoidance as it would favor the government in some instances and the taxpayer in others.\(^{109}\)

D.  Modern Dynamics

1.  Protection of Women?

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\(^{102}\) In Ballard v. Commissioner (2005), the Court held that the Tax Court Rules of Practice and Procedure do not permit the Tax Court to withhold special trial judge reports that include findings of fact from the taxpayer.


In Craft (2004) and Banks (2005), the majority of the Court refused the opportunity to consider modern dynamics—consequences untethered to legislative expectations. Justice Scalia’s dissent in Craft (2004) expressed concern for married women whose husbands run into tax problems without their knowledge.\footnote{U.S. v. Craft, 535 U.S. 274 (2002).} In Banks (2005), the Court ignored the burdensome consequences their chosen interpretation would produce for civil rights litigants, perhaps because the AJCA, a statute enacted during the pendency of the case, purported to alleviate civil rights litigants of that burden.\footnote{Banks v. Commissioner and Banaitas v. Commissioner, 543 US 426 (2005).} At first glance, the cases might suggest that neo-formalism has cemented and dynamism is nearly extinct. However, that one of the more formalistic Justices expressed the dynamic concern suggests that modern dynamics is irrepressible and expressing such a concern is not only appropriate but it may be the deciding factor if all else is equal.

2. Macroeconomic Efficiency?

Another interesting tidbit about the Court’s consideration of modern dynamics or lack thereof is that the degree with which a deliberative choice was consistent with group subordination was at least mentioned by at least one member of the Court while the degree with which a deliberative choice promotes or discourages macroeconomic growth or efficiency was not.

IV. Theoretical Conclusions: Formulaic Deliberation versus the Art of Judging

In the Twentieth Century, legal scholars debated over the legitimacy of judicial decision making techniques. In the Nineteenth Century it seems that the debate was over natural law versus positive law, and positive law won out.\footnote{Brian Tamanaha, Law as a Means to an End: Threat to the Rule of Law (2006)} Thus, in the twentieth century, the debate shifted to a discussion about the legitimate ways (or legal ways, in the loose sense) one might interpret or construe positive law. At first, deductive legal reasoning, deriving the correct result from mandatory forms and norms which in the law is represented by text and intent, was contrasted with inductive legal reasoning, deriving the correct result from an estimation that a particular legal choice will better promote either the purposes of the law or good results generally. Justifications offered for each were both philosophic and political. This I believe is the essence of formalism versus realism.\footnote{Pierre Schlag, Formalism and Realism in Ruins (Mapping the Logics of Collapse, 95 Iowa L. Rev. 195 (2009)}

And both formalism and realism stand in contrast to critical legal theory, developed in the latter half of the twentieth century and which denies in large part that judicial decisionmaking is at all accurately represented by the logic of judicial opinions, that judicial opinions represent mere post hoc justifications and are as much attributable to that which is unspoken, that both formalist and realist statutory construction techniques only pretend to be a method of decisionmaking.\footnote{Hayman, Levit & Delgado, Jurisprudence: Classical and Contemporary: From Natural Law to Postmodernism (2002)}

Nearer to the end of the twentieth century, after feeling the import of critical theory, there seemed to emerge some consensus that form is useful even if not perfect. Those considering themselves formalists seemed to praise the strictness of textualism over the looseness of legislative history as an indicia of intent. Some even suggested that one searching for intent should begin and end with the text.\footnote{Hon. Antonin J. Scalia, A Matter of Interpretation (1997).} Those perhaps considering themselves realists seemed to latch on to the strictness of
purpose over the looseness of modern dynamics. Still, the debate between textualism and purposivism was, especially in the 1990s, very chauvinistic, with each side holding that the other’s technique was illegitimate.

In the twenty-first century, however, the legal academy is coming to realize that formalism and realism, meaning and consequences, rigidity and flexibility, are all indispensable and, perhaps more importantly, irrepressible. Even last century, Ronald Dworkin attempted in Law’s Empire to draw on a jurisprudence of ‘fit’ which incorporated both consistency with the past and estimations of best practices for the future. What Law’s Empire leaves out, however, is a mechanism or standard for determining how much emphasis to give accounts of the past versus predictions of the future.

Similarly, Richard Posner’s Law, Pragmatism and Democracy, published at the turn of the century, called explicitly for a blending of form and realism, and, moreover, a blend which would assign varying levels of emphasis on either form or consequences depending on what type of case was at hand. Posner’s ‘everyday pragmatist’ judge might emphasize text in tax cases, intent in criminal cases, purpose in regulatory matters, and modern dynamics in anti-trust cases.

Brilliantly conflating matters, Adrian Vermeule and Cass Sunstein demonstrated that textualism can comport with both formalism and realism. If an important objective purpose of all legislatures is that law be understandable and predictable and stable, the rigidity of textualism promotes these consequences even if it does not perfect them. And if these consequences (notice, stability) are thought to be of greater value than other important societal consequences such as race relations or macroeconomic growth, then a realist judge may commit to the formality of textualism.

Formality and reality conflate in other legally cognizable ways. Whereas law and economics is clearly a form of legal realism, it seems to enjoy a privileged place among formalists because (aside from its political nature as doctrine for support of the wealthy) its’ fairly well developed structure provides for a convention-izable discussion of potential consequences. By contrast, race is discussed by theorists in a very loose structure, perhaps purposefully, and it is thusly harder to have a fruitful conversation about race because all the words and terms and concepts deployed mean different things one person to another. In fact, some critical race theorists caution strongly against creating a rigid form for (or essentializing) racial characteristics, as those within a particular race who do not fit the form will be further or doubly marginalized. Yet how can one discuss race if we are not even sure who is a member. The point is that formality and reality cannot be entirely detached from one another, nor should we want to.

In Formalism and Realism in Ruins (Mapping the Logics of Collapse), Pierre Schlagg discusses the irrepressibility of both formality and reality in legal decision making. It is difficult to talk about any particular thing if we disagree about which things are necessary for a thing to be a thing. At the same time, it is an act of extreme hubris for us to believe we have indentified the perfect construction or conception of any one thing and eschew any and all attempts to better our understanding of the thing and come up with a more useful construction or conception through inductive means. For Schlagg,

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116 ELY, DEMOCRACY AND DISTRUST (1980); STEPHEN BREYER, ACTIVE LIBERTY (2004)
117 Jonathon Mollot
118 Ronald Dworkin, LAW’S EMPIRE 10 (1986)
119 RICHARD POSNER, LAW, PRAGMATISM AND DEMOCRACY (2003).
120 Adrian Vermeule & Cass Sunstein, Interpreting Statutes in the Regulatory State
121 Angela Harris, Race and Essentialism in Feminist Legal Theory, 42 STANFORD LAW REVIEW 581 (1990)
neither formalism nor realism represents hardcore deliberative methods for making legal decisions. Instead, they are better understood as aesthetics, consistency with which furthers the judicial legitimation project.\textsuperscript{122}

A sympathetic but slightly different take is offered by Guenther Tuebner and also by Niklas Luhmann as they offer that law, like all other discursive social systems, is an autopoietic system which can observe reality but which requires structures within itself to digest those observations and convert or transubstantiate them into legally cognizable discourse.\textsuperscript{123} An autopoietic legal system is autonomous, that is it justifies itself. Decisions made within the law are held against a standard the law itself provides. But it must also observe its environment and adapt for its survival by sometimes adjusting those internal processes. Otherwise it will lose its utility. In an autopoietic system, reality and formality are indispensable and irreplaceable.

Whereas for Schlag legal decision making is a post hoc legitimation process most successfully done by declaring consistency with formality and reality, for Tuebner the law observes reality but is limited to thinking about it in a certain way only until its internal structures adapt to meet the challenge. Each of them, however, finds a legitimate place for considerations of text, intent, purpose and modern dynamics. Neither, however, discusses at a ground-level whether to emphasize reality more than formality or vice versa in particular cases.

Returning to Dworkin and Posner’s pragmatism, both of them sanction the consideration of past legal phenomenon (statutory text, cases, etc.) and estimations of future consequences (economic growth, better race relations). But neither provides a judge with a rule, guide or standard as to how much emphasis any one consideration should receive at one time. Dworkin’s ideal judge is thus named Hercules.\textsuperscript{124} Posner advises judges to do “the best they can.”\textsuperscript{125} Clearly, the conversation cannot just end there. And it hasn’t.

Once we sanction the consideration of multiple factors and shift the discussion to how much emphasis a particular factor should receive and whether the consideration of one should trump another, we begin to invoke the language of measurement and mathematics. Some have already embraced this challenge.

I believe Adrian Vermeule is at the forefront of this line of scholarship. First, Vermeule along with Sunstein made an attempt to identify which purposive factors should consistently receive some degree of emphasis in judicial deliberations.\textsuperscript{126} Second and more important to the cause of injecting greater precision into the discussion of legal decision making, Vermeule asks the legal community to decide whether the legal decision making process is or should be one of optimizing the goodness of law, satisficing a standard of good law, or maximizing the law as between two competing choices.\textsuperscript{127} A judge who considers only the choices presented by the parties is attempting to maximize what has been presented, while a judge as optimizer might inject a third option without the parties. The Supreme Court seems to act as satisficer when it refuses certiorari until it has some idea of what a good rule

\textsuperscript{122}Pierre Schlag, *Formalism and Realism in Ruins (Mapping the Logics of Collapse*, 95 IOWA L. REV. 195 (2009).
\textsuperscript{123}GUNTER TUEBNER, *LAW AS AN AUTOPOIETIC SYSTEM* (1993).
\textsuperscript{124}RONALD DWORFIN, *LAW’S EMPIRE* (1986)
\textsuperscript{125}RICHARD POSNER, *LAW, PRAGMATISM AND DEMOCRACY* (2003).
\textsuperscript{127}Vermeule, Adrian, *Three Strategies of Interpretation*, 42 SAN DIEGO LAW REVIEW 607 (2005).
would be. The importance of this last work is not in making the choice of standard, but in recognizing that mathematical terminology is necessary if we are committed to more precise discussions about legal decision making.

It is in this vein that I first wrote Formulaically Expressing 21st Century Supreme Court Jurisprudence I and The Deliberative Stylings of Leading Tax Law Scholars. I attempted in those pieces to construct a deliberative formula that would more precisely describe the Supreme Court’s justificatory process. Since then, exciting work by Abbe Gluck and others has been done to ‘map’ the justification process of both federal and state courts in a way that may not be entirely formulaic, but because of her commitment to mathematic terminology is clearly more precise than discussions of the past.\footnote{Abbe R. Gluck, The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualim, 119 Yale L.J. 1750 (2010).}

V. Empirical Conclusions

An examination of ten years of Supreme Court tax cases loosely demonstrates the Court’s deliberative formula. Those cases show the Court as an algorithmic textualist who considers text first, intent and purpose next, and modern dynamics last and only when considerations over text and intent are equivocal. Whether a process for making legal decisions or a post hoc justification for those decisions, Supreme Court opinions in tax cases begin by considering the degree with which each proffered interpretation is consistent with the text of the statute (if their be one), then, if a textual disposition quotient is not met, they determine which interpretation is most consistent with administrative pronouncements, prior court cases and other indicia of legislative intent and purposes, and, the Court may consider dynamic consequences if each proffered interpretation claims some consistency with legislative intent and purposes. Ultimately, these cases stand for the proposition that lower courts in the federal system must either follow a somewhat mechanized ‘legal process’ formula or justify their decisions made any other way (see Max Radin) by deploying the structure of legal process theory.

More specifically, ten years of Supreme Court tax cases informs on how to consider text, intent, and purpose. Those cases show that legal deliberating over text requires a two factored process, assessing consistency with plain meaning and statutory context. The cases also show that the Court must make a determination after assessing competing interpretations claims to consistency with plain meaning and statutory context whether to move forward and consider intent and purpose. In other words, the cases show that the Court utilizes a textual disposition quotient, satisfaction of which eschews any need to consider intent, purpose or modern dynamics. Predictably, Justice Thomas’ textual disposition quotient in Gitlitz is quiet low. The textual disposition quotient for the Court as a whole is somewhat higher, as intent and purpose is at least considered in almost every case, even if the decision is said to rest on text. Neo-formalism is confounded in at least one other respect, the irrepressibility of modern dynamics. Though the Court never deployed modern dynamics as the deciding factor in any 21st century tax case, it appeared predictably in the margins, but from an unpredictable source: Justice Scalia who criticized the Court in Craft for choosing an interpretation he believed would burden married women.

In only one case, Banks, did the Court hinge its decision on so-called tax logic. But there, the Court was faced with a case of almost pure federal common law, as Congress since passing the income tax has never expressed in a statute how to determine who has dominion and control over such and
income and is thus required to pay it. This suggests that tax law is not an autonomous branch or organ of law, but is an integral part of the jurisprudential system as a whole.
Appendix A: 2001-2005 Supreme Court Tax Cases

A. Gitlitz v. Commissioner (2001)

In Gitlitz (2001), the Court permitted a taxpayer whose S Corp had discharge of indebtedness income, but which was excluded from gross income because of the taxpayer’s insolvency, to increase his basis in his S Corp stock by the amount of such income and thusly deduct previously suspended net operating losses. The Court rejected the argument that income, even before one gets to the concept of gross income, does not include discharge of indebtedness from an insolvent taxpayer. The Court also rejected the argument that Congress did not intend for taxpayer’s to receive such a ‘windfall.’

B. Cleveland Indians Baseball v. US (2001)

In Cleveland Indians (2001), the Court required a taxpayer who owed back wages to his employees to calculate their federal employment tax liability by reference to the year the wages were actually paid, rather than the year they should have been paid. The Sixth Circuit, relying on Nierotko, a case interpreting identical language contained in the Social Security Act, held that FUTA and FICA are to be calculated using the effective rates for the year in which the wages should have been paid. The Fourth and Tenth Circuit rejected Nierotko and the Social Security context and instead relied on IRS regulations requiring the taxpayer to use the effective rates for the year in which the wages were actually paid. Agreeing with the Fourth and the Tenth, the Court required the taxpayer to calculate the liability in the manner specifically contemplated by the administering agency, the IRS.

C. United Dominion Industries v. US (2001)

United Dominion Industries (2001) involved the calculation of “product liability losses.” Such losses may only be taken into account for the year if there is no net operating loss. United Dominion sought to compare the product liability losses of all the companies in its group to the total net operating loss for the group. The Commissioner sought to exclude product liability losses from all companies within the group that had a net operating loss by itself. The Court sided with the taxpayer because the Commissioner’s method was harder to administer, less consistent with the text and structure of the Code, and lacked the formality required for judicial deference.


United States v. Craft (2002) held that a federal tax lien can attach to property held as a tenancy of the entirety. Although they acknowledged that property held by the entirety is burdened by restrictions on alienation, the Court found that property held by a tenancy by the entirety is not unlike property held in the form of a partnership or a Texas homestead, each of which may support a lien by the federal tax collector. In dissent, Justice Scalia noted that the Court’s ruling is likely to have a detrimental impact on married women.


In US v. Fior D’Italia (2002), the Court permitted the IRS when assessing a restaurant’s employment tax liability to estimate the amount of tips using an aggregation of credit card receipts, rather than restricting them to using employee reports. Even though Congress in a related statute relieved restaurants of the administrative burden of policing its staff over the issue of tip reporting, the
Court held that Congress did not intend to limit the range of duly promulgated methods the IRS might deploy in determining a deficiency.


In Boeing v. US (2003), the Court permitted the IRS to adjust the return of a parent and subsidiary domestic international sales corporation using an administrative rule that requires research and development costs to be allocated to all of the parent’s product lines regardless whether those R&D costs were dedicated to one product line. The Court held that a proposed (but not duly promulgated) regulation that would allow dedicated costs to be distributed in respect of their product lines did not apply because the Commissioner had already determined that the benefits from R&D costs are inherently speculative and may inure to all areas of production. The dissent argued that the two administrative pronouncements were in direct conflict and that it was more reasonable for the taxpayer to rely on the more specific regulation than the more general one, even if the more specific regulation had not yet been duly promulgated.


US v. Galletti (2004) stands for the proposition that an assessment relates only to the determination of a tax liability and not towards who owes it. Thus, once the IRS timely assesses a tax liability, it need not reassess the liability in respect of taxpayers who may have secondary liability. Specifically, where the IRS timely assessed employment tax liabilities relating to a partnership, it need not make an assessment against each partner before attempting to collect.

H. Banks v. Commissioner (2005)

In Banks v. Commissioner and Banaitas v. Commissioner (2005), the Court invoked the assignment of income doctrine and held that litigants have complete dominion and control over lawsuits, regardless of state law and regardless the fee arrangement, such that all proceeds are received by them and then distributed to their legal representatives. That a deduction may not be available for some litigants was immaterial. Interestingly, the American Jobs Creation Act anticipated and ameliorated the harsh consequences the assignment of income doctrine placed upon civil rights litigants.

I. Ballard v. Commissioner (2005)

In Ballard v. Commissioner (2005), the Court held that the Tax Court Rules of Practice and Procedure do not permit the Tax Court to withhold special trial judge reports that include findings of fact from the taxpayer.
Appendix B: 2006-2010 Supreme Court Tax Cases


The IRS, believing that certain taxpayers transferred funds to EC Term of Years Trust for the purpose of avoiding their respective individual tax debts, levied upon bank accounts belonging to EC Term of Years. EC Term of Years sought to challenge the IRS levy under sections 7426 and 1346, respectively. The lower courts held that their petition under section 7426 was untimely, and that section 1346 was unavailable as Congress intended for section 7426 only to apply to third-party actions regarding levy. EC Term of Years conceded the issue of timeliness under section 7426, but, relying on US v. Williams, 514 US 527, maintained that a refund action remained available pursuant to section 1346. The Court held that section 1346 is unavailable to third-party challenges to an IRS levy, because otherwise section 7426's more stringent limit on administrative and judicial remedy would be meaningless. Relying on several precedents in a variety of contexts, the Court held that where general jurisdiction statutes avail courts to “any civil action” Congress intends for them to hear any civil action except those that are the subject of a “more precisely, drawn detailed statute”, and especially where “resort to a general remedy would effectively extend the limitations period for the specific one.” The Court also noted that 7426’s more stringent time limitation is “no accident ... since after seizure of property for nonpayment of taxes [an IRS] district director is likely to suspend further collection activities against the taxpayer” and allowing taxpayers to resort to section 1346 would entirely frustrate Congress' intent to ease the IRS' administrative burden.


Like EC Term of Years Trust, Hinck v. U.S., 127 S.Ct. 2011 (2007), the Court held that when Congress supplements general jurisdictional statutes with a more precisely drawn, detailed one it intends to exclude those cases fitting within the terms of the latter statute from the grant of general jurisdiction in the former. Prior to the enactment of section 6404(h), both the district courts and the Court of Federal Claims having jurisdiction over IRS determinations of tax refused to review the IRS’ refusal to abate interest, finding the determination to abate interest to be committed to the discretion of the Secretary of the Treasury as there was no law to apply. In enacting section 6404(h), Congress limited the Secretary’s discretion by providing for review of IRS interest abatement decisions in the Tax Court under an abuse of discretion standard. The taxpayer contended that Congress presumably knew before passing section 6404(h) that the US Court of Federal Claims had jurisdiction over interest abatement claims and that the standard of review for interest abate cases Congress chose in section 6404(h) would apply to all interest abatement cases regardless whether in the US Tax Court or the US Federal District Court or the US Court of Federal Claims. Relying strictly on precedent, EC Term of Years, GSA v. Brown and Block v. North Dakota, the Court decided that Congress intended for abatement cases to be handled exclusively by the U.S. Tax Court. Without citing legislative history as it had in EC Term of Years, the Court found the taxpayer’s contention that both forums were available for interest abatement challenges inconsistent with the legislative purpose of forcing taxpayer’s to abide by the shorter time limitation.


Clintwood Elkhorn, 533 US ___ (2008), along with EC Term of Years and Hinck form a trilogy of cases standing for the proposition that where Congress provides for a specific administrative and judicial remedy litigants may not avoid the strictures of such a scheme by attempting to proceed under a more
general (and presumably more favorable) jurisdiction statute. EC Term of Years involved a challenge to an IRS levy of property from a person other than the owing taxpayer, Hinck concerned a taxpayer challenge to an IRS refusal to abate interest, and Clintwood Elkhorn extends the principle to constitutional challenges. In Clintwood Elkhorn, the taxpayer paid taxes erroneously assessed but did not file an administrative claim ‘within three years of the filing of a return or two years of payment of the tax’ because the tax collected in 1978 was not found unconstitutional until 1998. Although their claim for refund fit under the literal terms of the “more forgiving” Tucker Act, the Court held that when Congress enacts precise, detailed administrative and judicial remedies, like section 7422, it intends to foreclose resort to more general procedures.


In Knight v. US, 552 U.S. ____ (2008), the Court was confronted with three different tests among the Circuit Courts of Appeal for determining whether a taxpayer has incurred “costs which are paid or incurred in connection with the administration of the estate or trust and which would not have been incurred if the property were not held in such trust or estate.” Such costs are not subject to the 2% floor related to itemized deductions, so long as they “would not have been incurred” by an individual. The cost at the crux of the matter here is investment advisory fees. The Sixth Circuit held that if state law required the trustee to incur the cost of investment advisory fees those fees qualify under section 67(e) as costs that would not have been incurred by an individual. The Second Circuit restricted costs which would not have been incurred by an individual to those “that individuals are incapable of incurring.” The Fourth and Federal Circuits held that costs “commonly or customarily incurred outside trusts” do not qualify under section 67(e). The Court held in favor of the test employed by the Fourth and Federal Circuits, because it was consistent with the obviously empirical nature of the determination. Because the statute “looks to the counterfactual question of whether individuals would have incurred such costs in the absence of a trust[,] … the question whether a trust-related expense is fully deductible turns on a prediction about what would happen if … the property were held by an individual rather than by a trust.” Citing Webster’s Third New International Dictionary and the American Heritage Dictionary, the Court held that the statutory term “would” plainly encompasses “custom, habit, natural disposition, or probability.” The Solicitor General contended that could and would were essentially synonymous. The Court disagreed, reasoning that “the fact that an individual could not do something is one reason he would not, but not the only possibly reason.”


Boulware v. US, 552 US ___ (2008) stands for the proposition that in both civil and criminal contexts the determination of whether a corporation has distributed dividends is purely mechanical and the intent of the taxpayer when making the distribution is irrelevant. According to the Court, section 301 and 316 determine the character of a corporate distribution without referring at all to the shareholder or the corporation’s intentions. Rather than rest on the text of the statute, however, the Court cites several IRS documents on the subject, employing them as a means for identifying the putative intent of congress, and the Court cites a treatise and a law review article.