Ohio Northern University Law Review

Volume 39 | Issue 1 Article 5

2023

Debiasing Statutory Interpretation

Alexander I. Platt

Follow this and additional works at: https://digitalcommons.onu.edu/onu_law_review

Part of the Law Commons

Recommended Citation

Platt, Alexander I. (2023) "Debiasing Statutory Interpretation," *Ohio Northern University Law Review*: Vol. 39: Iss. 1, Article 5.
Available at: https://digitalcommons.onu.edu/onu_law_review/vol39/iss1/5

This Article is brought to you for free and open access by the ONU Journals and Publications at DigitalCommons@ONU. It has been accepted for inclusion in Ohio Northern University Law Review by an authorized editor of DigitalCommons@ONU. For more information, please contact digitalcommons@onu.edu.

Debiasing Statutory Interpretation

ALEXANDER I. PLATT*

> [Y]ou have a tough decision to make, really tough, and you think, my goodness, this is evenly balanced. Oh my goodness, what will I do? But I'm sorry, time is passing. You'd better make up your mind. And so you do and you think this side has a slight edge. Now time passes. Do you think I might have been wrong? No. As time passes, you begin to think: I think I was probably right. More time. Yeah, I was right. More time. I sure was right. More time. How did I think the opposite? That is called the self-protective psychology of human nature.[1]
>
> - U.S. Supreme Court Justice Stephen Breyer

The prospects of judicial coherence, much less uniformity, in statutory interpretation methodology have long been regarded as faint.[2] For decades, scholarly consensus lined up behind Professors Henry Hart and Albert Sacks's conclusion: "American courts have no intelligible, generally accepted, and consistently applied theory of statutory interpretation."[3] But recent scholarship has forced a reevaluation of this prevailing wisdom.[4] Professor Abbe Gluck's 2010 study of state supreme courts showed that many state courts have actually attained a remarkable degree of internal stability via methodological *stare decisis* and uncovered the beginnings of a consensus regarding interpretive method across state lines.[5] This emerging

---

* Law Clerk, Chief Judge Royce C. Lamberth, United States District Court for the District of Columbia. J.D. 2012 Yale Law School. Thanks to Professor Christine Jolls, Rob Cobbs, Mike Knobler and the Editors of this Journal. Special thanks to Professor Amitai Etzioni for introducing me to the subject of Behavioral Psychology/Economics.

1. *Justice Breyer: The Court, the Cases and Conflicts*, NAT'L PUB. RADIO (Sept. 14, 2010), http://www.npr.org/templates/story/story.php?storyId=129831688 [hereinafter Justice Breyer Interview] (author's transcription of audio recording of an interview of Justice Stephen Breyer conducted by Terry Gross).

2. Sydney Foster, *Should Courts Give Stare Decisis Effect to Statutory Interpretation Methodology?*, 96 GEO. L.J. 1863, 1864-65 (2008).

3. HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 1169 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994); *see also* sources cited *infra* notes 22-25.

4. *See generally* Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 YALE L.J. 1750 (2010).

5. *See id.* at 1758, 1775, 1785-87, 1797-98, 1807, 1811, 1822-24; *see also infra* Part I.B.

Published by DigitalCommons@ONU, 2023

Ohio Northern University Law Review, Vol. 39 [2023], Iss. 1, Art. 5

consensus method organizes statutory interpretation into discrete hierarchical stages, beginning with text and related canons of construction, and moving on to legislative history and other tools only where application of the first set of interpretive tools produces ambiguous results.[6]

Given the reigning understanding that methodological consistency was all but unattainable, it is unsurprising that scholars who have discovered this emerging consensus have not pressed further into its foundations or implications.[7] Now that the Hart-Sacks bubble has been burst, it is appropriate to ask whether there are features of this method—which the Article will refer to as "staging"—that may explain its stickiness.

One possible explanation is that staging fosters methodological uniformity by *constraining* judicial choice: by reducing the menu of available options for judges, staging reduces the cognitive burden on judges, and thus bolsters consistency.[8] But this explanation is incomplete: staging does not only constrain and limit judicial decision making by taking away options, it also contributes affirmatively to the structure of the interpretive decision, supplying new options.[9]

This Article identifies a richer psychological explanation for staging's success—one that has gone heretofore unrecognized—derived from staging's affirmative function as a method of structuring judicial decision making. A growing body of research on "coherence-based reasoning" shows that as people move toward a decision, that decision itself exerts an irrational force on their evaluation of the evidence before them.[10] A polarized decisional menu (i.e., the choice between "for defendant" and "for plaintiff") itself polarizes the evidence in the mind of the decision maker so that when she turns to explain her decision—e.g., recording it in a written opinion—her evaluation of any discrete piece of evidence will reflect this skew. Even if her overall decision is rational, her evaluation of a piece of evidence will reflect the polarizing effect of this bias—that is, she is likely to overstate the support provided by friendly evidence, understate (or ignore) the weight or value of countervailing evidence, and to misread ambiguous evidence as supporting her chosen result.[11]

In the indeterminate system governing federal judicial statutory interpretation, coherence bias is likely to have particularly destabilizing

---

6. *Id.* at 1758; *see also infra* Part I.B.

7. *See generally* Gluck, *supra* note 4; *see also infra* Part I.B.

8. *See infra* Part I.B. *See also generally* ADRIAN VERMEULE, JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION (2006); *see also* Part II.A.

9. *See infra* Part I.B.2.

10. *See infra* Part II.A; *see also* Dan Simon, *A Third View of the Black Box: Cognitive Coherence in Legal Decision Making*, 71 U. CHI. L. REV. 511 (2004).

11. *Id.*

Platt: Debiasing Statutory Interpretation

effects.[12] In any given statutory interpretation case, coherence-based reasoning may lead a judge to accord undeserved authority to some piece of evidence. Later judges confronting evidence in the same category will be forced to adopt strategies to deal with inconsistently reasoned prior opinions. Over time case law becomes ever more polluted with inconsistencies, confusing distinctions, and a diminished expectation among litigants and judges that courts should reason consistently. Coherence bias helps to perpetuate methodological instability by leading judges to accord inconsistent value to the same piece of evidence in different decisional contexts.[13]

Staging methodology applies a partial "brake" to this spiral towards methodological instability by mitigating coherence bias. It reframes statutory interpretation by adding "ambiguous" to the decisional menu so that judge's perception of the evidence is realigned along three poles instead of two: "for plaintiff," "for defendant," and "ambiguous."[14] By promoting judicial equivocation, staging helps ensure that the same type of evidence or argument will be accorded a more consistent weight in successive cases, and limits the need for judges to creatively distinguish or ignore previous deviations.[15] In short, staging debiases statutory interpretation.

This argument is a novel "positive psychological theory"[16] that links two phenomena that have attracted significant recent attention in statutory interpretation scholarship: the proliferation of staging and methodological *stare decisis*. Rather than wielding psychological research as a bludgeon to criticize legal rules, this Article uses psychological research to posit that the law has evolved intelligently to accommodate the limits of judicial cognition. This theory contributes both to statutory interpretation scholarship's understanding of these two phenomena, as well as to a growing "psycho-evolutionary" branch of Law and Behavioral Economics ("LBE") scholarship, which aspires to better understand the law by showing that "[t]he law has adapted well to the fallibility of human judgment."[17] As may be typical of this subgenre of LBE, however, the difficulty of disaggregating the effects of cognitive bias from potentially innumerable other factors renders this account somewhat abstract. But this does not

12. *See infra* Part III.A.
13. *See infra* Part III.B.
14. *See infra* Part IV.A.
15. *See infra* Part IV.B.
16. *See generally* Jeffrey J. Rachlinski, *A Positive Psychological Theory of Judging in Hindsight*, 65 U. CHI. L. REV. 571 (1998).
17. *Id.* at 575; *see also generally* Christine Jolls, *Rationality and Consent in Privacy Law* (Dec. 10, 2010) (working paper), *available at* http://www.law.yale.edu/documents/pdf/Faculty/Jolls_RationalityandConsentinPrivacyLaw.pdf.

Published by DigitalCommons@ONU, 2023

deprive this project of all merit. By recasting the proliferation of staging and methodological *stare decisis* in light of the psychological findings on the effects of coherence bias and the debiasing potential of staging-like, equivocation-fostering mechanisms, this Article provides a way to understand statutory interpretation as an area where the law is actively engaged in adaptation to the cognitive short-comings of judges.

Finally, though its primary thrust is positive, this Article also contributes to three normative debates in statutory interpretation scholarship.[18] First, by presenting staging methodology as an evolutionary adaptation to cognitive limitations, this Article intervenes in a jurisprudential debate over what statutory interpretation is—i.e., whether it is "law" or something else.[19] Second, the Article intervenes modestly in the grand statutory interpretation methodological dispute: while textualists have long appealed to the values of stability and predictability as advantages of their preferred methodology, the account here suggests that staging's debiasing function gives it some advantages over textualism in promoting these ends.[20] And third this Article's identification of methodological instability as, in part, a product of cognitive bias introduces a new, complicated element to the debate over the *desirability* of methodological consensus in statutory interpretation.[21]

This Article proceeds in five parts. The first two parts provide background. Part I reviews the state of judicial statutory interpretation methodology in the federal and state systems. Part II briefly surveys two bodies of research from cognitive psychology: coherence-based reasoning and framing. The next two parts draw on this background to establish the Article's positive psychological theory. Part III presents the first half of the theory by showing how coherence-based reasoning fosters methodological instability in the highly indeterminate federal system. Part IV presents the second half by showing how staging methodology reframes statutory interpretation to mitigate this bias and partially enables methodological *stare decisis*. Finally, Part V considers implications of this account for three normative debates in statutory interpretation scholarship.

---

18. *See infra* Part V.
19. *See infra* Part V.A
20. *See infra* Part V.B.
21. *See infra* Part V.C.

I. CHAOS AND UNIFORMITY IN STATUTORY INTERPRETATION METHODOLOGY

This part reviews the methodological dissensus in the federal system, and the surprising stability in state courts.

A. Dissensus in the Federal System

Scholars have long been pessimistic about the prospects for methodological cohesion.[22] One scholar recently noted: "all agree . . . that a single controlling approach does not currently exist . . . ."[23] Textualism has undoubtedly exerted a significant influence,[24] yet has "failed to emerge as the dominant methodology in the U.S. Supreme Court's interpretive battles."[25] Legislative history—anathema to orthodox textualists[26]—continues to be cited both prominently and frequently.[27]

The Supreme Court's 2007 decision in *Zuni Public School District No. 89 v. Department of Education*[28] exemplifies this methodological confusion.[29] In that case, the Court interpreted a provision codifying the calculation method to be used by the Secretary of Education to determine whether a state's funding of its school districts satisfied a statutory

---

22. *See, e.g.*, Gluck, *supra* note 4, at 1765-66 (citing William N. Eskridge, Jr. & Philip P. Frickey, *The Supreme Court, 1993 Term—Foreword: Law as Equilibrium*, 108 HARV. L. REV. 26, 57 (1994); Adrian Vermeule, *The Cycles of Statutory Interpretation*, 68 U. CHI. L. REV. 149, 149 (2001)); *see also* Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 865 (1989) ("We do not yet have an agreed-upon theory for interpreting statutes.").

23. Gluck, *supra* note 4, at 1765-66 (citing Eskridge & Frickey, *The Supreme Court*, *supra* note 22, at 57).

24. *See* James J. Brudney & Corey Ditslear, *The Decline and Fall of Legislative History? Patterns of Supreme Court Reliance in the Burger and Rehnquist Eras*, 89 JUDICATURE 220, 229 (2006) (discussing the reduced use of legislative history in the late twentieth century); *see also* Gluck, *supra* note 4, at 1765 & n.50 (collecting sources for the proposition that textualism has exerted a significant influence over statutory interpretation methodology in the Supreme Court).

25. Gluck, *supra* note 4, at 1758.

26. Textualism is diverse as are its critiques of legislative history. *See, e.g.*, ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 31-33 (Amy Guttmann ed., 1997) (criticizing congressional reports as fabricated for judicial consumption, not read, much less voted on by all the members of Congress, and thus unreliable as an insight into legislative intent); *see also* Frank Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J. L. & PUB. POL'Y 59, 61 (1988) ("What any member of Congress thought his words would do is irrelevant. We do not care about his mental processes."); John F. Manning, *Textualism and Legislative Intent*, 91 VA. L. REV. 419, 419 (2005) (dismissing "legislative intent" as a misleading construct); John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673, 677-95 (1997) (arguing that legislative history is unconstitutional because Congress is not permitted to sub-delegate the legislative function to a portion of itself, or to legislate without bicameralism and presentment).

27. *See, e.g.*, Victoria F. Nourse, *A Decision Theory of Statutory Interpretation: Legislative History by the Rules*, 122 YALE L.J. 70, 72 n.1 (2012) (collecting evidence).

28. 550 U.S. 81 (2007).

29. *Id.*

"equalization" threshold—a prerequisite for certain federal funding determinations.[30] While legislative history suggested that Congress intended to codify the method that the Secretary had already been using for several decades,[31] the plain meaning of the provision indicated a departure.[32] After enactment, the Secretary ignored the statute's text and continued using the traditional calculation method until a savvy school district objected.[33]

Justice Breyer's opinion for the Court upholding the Secretary's method began with legislative history and purpose—not the text. [34] Justice Breyer justified this approach by pointing to the "technical nature" of the language in the statute.[35] In this context, he suggested, consideration of background and purpose would "provide [the Court] with unusually strong indications that Congress intended to leave the Secretary free to use the calculation method before us . . . ."[36]

Justice Kennedy's concurrence criticized the majority for departing from the standard text-first order of operations.[37] Kennedy worried about the "impression" created by the majority's inversion of the usual order—that "agency policy concerns, rather than the traditional tools of statutory construction, are shaping the judicial interpretation of statutes."[38] He emphasized the Court's "obligation to set a good example" by arranging opinions in the proper order.[39] Still, he concluded that "the point [did] not affect the outcome," and endorsed the majority's ruling.[40]

---

30. *See* Zuni Public Sch. Dist. No. 89 v. Dep't of Educ., 550 U.S. at 84. The statute specified that the equalization calculation was to exclude the top and bottom five percent of school districts. The dispute in *Zuni* hinged on the proper method for determining the five percent and ninety-five percent cut-offs: while the statute's language stated that the calculation was to be based on "per-pupil expenditures," the Secretary of Education's calculation also took into account the total number of a district's pupils. While the text suggests excluding from the equalization calculation all *schools* which fell above/below the threshold based on their level of *per-pupil spending* (regardless of what percentage of total *students* this exclusion amounted to), the Secretary's method ensured the exclusion a total of ten percent of *students* (*i.e.* five percent of total students from the bottom per-pupil spending schools, five percent from the top-spending schools). *See id.* at 84-86.

31. *See Zuni*, 550 U.S. at 90 ("As far as we can tell, no Member of Congress has ever criticized the method the 1976 regulation sets forth nor suggested at any time that it be revised or reconsidered.").

32. *See id.* at 94-96.

33. *See id.* at 88-89 ("Zuni's strongest argument rests upon the literal language of the statute.").

34. *See id.* at 90.

35. *Id.*

36. *Zuni*, 550 U.S at 90.

37. *Id.* at 107 (Kennedy, J., concurring).

38. *Id.*

39. *Id.*

40. *Id.*

In contrast, Justice Stevens lauded the majority's departure from the text-first method.[41] He denied any reason to "confine ourselves to, or begin our analysis with, the statutory text if other tools of statutory construction provide better evidence of congressional intent with respect to the precise point at issue."[42] Citing *Holy Trinity Church v. United States*,[43] a landmark of purpose- (rather than text-) driven statutory interpretation, Stevens openly embraced an approach that enabled judges to elevate a statute's purpose over plainly-contradicting text.[44]

Justice Scalia dissented, rebuking the majority for "elevati[ng] . . . judge-supposed legislative intent over clear statutory text."[45] The majority's structure was a "cart-before-the-horse approach" and was "most suspicious."[46] Rejecting the "policy-driven" majority opinion, Scalia called for a return to "Statutory Interpretation 101"—where courts *always* begin with the text.[47]

In this case, the Justices not only disagreed vehemently about what constitutes a legitimate method of statutory interpretation, they could not even agree about what was at stake.[48] Kennedy treated interpretive methodology as sort of question of style—of setting a "good example" for the lower courts—without substantive significance.[49] Scalia suggested that the majority's departure meant it was no longer engaging in a legitimate judicial function.[50] And Stevens seemed to reject the possibility that any single or uniform methodology should or could guide a judge in a statutory case.[51]

41. *Zuni*, 550 U.S at 104-07 (Stevens, J., concurring).

42. *Id.* at 106.

43. 143 U.S. 457 (1892).

44. *Zuni*, 550 U.S. at 106-07 & 123 n.3 (Stevens, J., concurring) (quoting *Holy Trinity Church*, 143 U.S. at 459); *see also* WILLIAM N. ESKRIDGE, JR. ET AL., CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 701 (4th ed. 2007) ("*Holy Trinity Church* seems to be the first case where the Supreme Court rewrote the statute based upon evidence from the legislative record.").

45. *Zuni*, 550 U.S. at 108 (Scalia, J., dissenting).

46. *Id.* at 109.

47. *Id.*

48. *See Zuni*, 550 U.S. at 106 (Stevens, J., concurring); *id.* at 107 (Kennedy, J., concurring); *id.* at 108 (Scalia, J., dissenting). However, viewed in a different light, this opinion also symbolizes the degree to which textualism has become entrenched in the federal system. Even though the majority departed from the text-first order of operations, the fact that it found it necessary to make an excuse—i.e. that the statute was particularly "technical"—is telling. *Id*. at 82 (majority opinion). Only Justice Stevens insisted on proceeding without apology. *Id.* at 106 (Stevens, J., concurring).

49. *See Zuni*, 550 U.S. at 107 (Kennedy, J., concurring). There is tension inherent in this view: if *nothing* hinges on the order of operations, why bother setting a "good example"?

50. *See id.* at 108 (Scalia, J., dissenting).

51. *See id.* at 106 (Stevens, J., concurring).

Ohio Northern University Law Review, Vol. 39 [2023], Iss. 1, Art. 5

B. Emerging Consensus in the States: the Rise of Staging

In light of this confusion, many scholars had all but given up hope for coherence, much less uniformity, in statutory interpretation methodology.[52] But recent scholarship has upset this conventional wisdom.[53] Abbe Gluck's study of interpretive methodology in state courts showed that scholars' focus on the Supreme Court led them to "overstat[e] the intractability of methodological divides and the 'softness' of interpretive methodology."[54] In fact, in several states "courts and legislatures are participants in unanticipated efforts to increase predictability in statutory interpretation."[55] This section reviews these findings, their impact on conventional debates, and the new questions they raise.

1. 'Compromise' Textualism

Gluck found that by "exercis[ing] interpretive leadership," some state Supreme Courts have "imposed, both on themselves and on their subordinate courts, controlling interpretive frameworks for all statutory questions."[56] For instance, in the 1993 decision in *Portland General Electric Co. v. Bureau of Labor & Industries* ("*PGE*"),[57] the Oregon Supreme Court issued an opinion establishing a mandatory staging methodology for all statutory interpretation opinions.[58] Oregon courts were commanded to conduct statutory analysis in three stages. At the first stage, courts were to consider only the text of the statute and related canons of construction.[59] The court may proceed to the second stage and consideration of legislative history of the statute *only* if these first stage tools fail to resolve the issue.[60] Finally, only if the legislative history evidence also fails to resolve the issue, then courts may turn to the third stage: substantive canons.[61]

This staging method "stuck": for nearly sixteen years, the *PGE* framework controlled the Court's own statutory interpretation

52. *See* sources cited *supra* notes 2, 3, 22-26.
53. Gluck, *supra* note 4, at 1756.
54. *Id.* at 1757.
55. *Id.* at 1756.
56. *Id.* at 1757.
57. 859 P.2d 1143 (Or. 1993).
58. *See id.* at 1145-47; *see also* Gluck, *supra* note 4, at 1775.
59. *Portland Gen. Elec. Co. v. Bureau of Labor & Indus.*, 859 P.2d at 1146.
60. *Id.*
61. *Id.* at 1146-47.

jurisprudence, without a single dissenting opinion as to methodology.[62] After being relegated to stage two, citations to legislative history decreased dramatically.[63] And, several substantive canons—relegated to stage three—nearly disappeared altogether.[64] Two other states studied by Gluck revealed similar, but less dramatic, results.[65]

More striking than this *intra*state stability is the apparent emergence of staging as a methodological consensus *across* numerous states.[66] This consensus method roughly mirrors that promulgated by the Oregon Supreme Court in the *PGE* case; organizing textualist and purposivist interpretive tools into a strict hierarchy.[67] Gluck's 'preliminary' canvass of state supreme court rulings indicates that some version of a staging method has acquired some traction across most states.[68] She writes, "the majority of state courts may now routinely apply the basic modified textualist rule: first step, text only; if ambiguity is found, then second step, legislative history."[69]

Staging is hardly a recent innovation and is likely familiar to students of federal statutory interpretation. In the early twentieth century case of *Caminetti v. United States*,[70] the Supreme Court employed a "plain meaning rule," whereby it would not consider legislative history unless the text of a statute was first found to be ambiguous.[71] Unlike *Caminetti*, the staging method that Gluck suggests is emerging as a consensus across states is, to some degree, *comprehensive* and *exclusive*. While *Caminetti* specifies the relationship between text and legislative history, it leaves unresolved the relationship with other tools.[72] In contrast, the staging method that has been implemented in the states defines where all tools fit (or do not).[73] And, in the Federal System *Caminetti* survives, but so (apparently) do *Holy Trinity*

---

62. *See* Gluck, *supra* note 4, at 1775. The decision's perfect run came to an end in 2009, when the Court split over whether legislatively-enacted interpretive rules applied. *Id.* at 1776 (citing State v. Gaines, 206 P.3d 1042 (Or. 2009)).

63. *Id.* at 1779 (noting that in the five years before *PGE*, legislative history was cited in more than half of the statutory interpretation cases, but since the decision in only a small fraction of cases).

64. *See id.* at 1779, 1846.

65. *Id.* at 1799-1811 (discussing Michigan and Wisconsin).

66. Gluck, *supra* note 4, at 1756.

67. *See id.* at 1758, 1778.

68. *See id.*

69. *Id.* at 1844, 1844 n.353 (collecting evidence). The Connecticut Supreme Court echoed this empirical claim when it observed that it was in a tiny minority of state supreme courts in rejecting this modest form of staging. *See* State v. Courchesne, 816 A.2d 562, 582, 585 (Conn. 2003).

70. 242 U.S. 470 (1917).

71. *Id.* at 489-90.

72. *See* Caminetti v. United States, 242 U.S. at 490.

73. *See* Gluck, *supra* note 4, at 1758.

Church,[74] *United States v. American Trucking Associations*,[75] and other cases willing to circumvent textual plain meaning.[76] In contrast, the staging methods used in Oregon and other states are mandatory.[77]

2. How Did This Happen?

In addition to disrupting long-held assumptions about methodological consensus, this recent scholarship also raises new questions for statutory interpretation scholars. What is driving this methodological uniformity in the states? Are there features of staging that are particularly uniformity-inducing?

Gluck raises the possibility that staging induces uniformity simply by constraining judicial choice. By "[r]anking interpretive tools and limiting the number of tools that may be used," she writes, staging "offer[s] clarity to lower courts, litigants, and legislators," which "increase[s] predictability and maximize[s] coordination."[78] Perhaps channeling Professor Adrian Vermeule—whose project of creating a streamlined, stripped-down version of textualism is oriented towards minimizing decisional costs[79]—Gluck suggests that staging contributes to methodological stability by eliminating various interpretive tools or relegating them to lower rungs of the

---

74. 143 U.S. 457, 465 (1892); *see, e.g.*, *Zuni*, 550 U.S. at 104-07 (Stevens, J., concurring) (citing *Holy Trinity* and invoking its methodological approach).

75. 310 U.S. 534, 543-44 (1940); *see, e.g.*, Koons Buick Pontiac GMC, Inc. v. Nigh, 543 U.S. 50, 65 n.1 (2004) (Stevens, J., concurring) (citing with approval *American Trucking* for a broad acceptance of legislative history in statutory interpretation).

76. *See* ESKRIDGE, JR. ET AL., *supra* note 44, at 704 (noting that "one might worry that unarticulated judicial values" could drive the choice between following the "mischief approach" of *Holy Trinity* or the "literalism" of *Caminetti* depending on which outcome "better matched [a judge's] sensibilities").

77. *See* Gluck, *supra* note 4, at 1832. Unfortunately because Gluck's study did not comprehensively investigate the systems of all 50 states there is no evidence as to what degree the staging systems adopted by other states have been treated as *exclusive* and *mandatory* along the lines of *PGE*. *Id.* at 1756, 1771-1811. Nevertheless, because Gluck's other findings are so surprising and suggestive, and because she is so convincing that the federal-lens has to this point skewed statutory interpretation scholarship into a belief that methodological consistency is impossible, it seems plausible that these non-Oregon state staging regimes may be exerting more force than *Caminetti*. *Id.* at 1753-60. If that is so, then it is surely a worthwhile goal to inquire whether there is something about *staging* itself that is related to the phenomenon of methodological consistency—the project of the rest of this Article.

But, even if it turns out that only Oregon and the other well-documented states in Gluck's study have attained methodological stability and that the other states to adopt a kind of 'staging-lite' have done so only in the manner that *Caminetti* does, it is still worthwhile to inquire about whether staging is related to methodological consensus because these well-documented states have themselves embraced staging-type methodology. *See generally* Gluck, *supra* note 4.

78. *Id.* at 1856.

79. *See* VERMEULE, JUDGING UNDER UNCERTAINTY, *supra* note 8, at 200-04 (advancing a mode of textualism without consideration of related statutes or of the "whole act" in the name of minimizing institutional costs and judicial errors); *see also* William N. Eskridge, Jr., *No Frills Textualism*, 119 HARV. L. REV. 2041, 2043-44 (2006) (reviewing VERMEULE, JUDGING UNDER UNCERTAINTY, *supra* note 8).

interpretive hierearchy.[80] On this view, staging produces methodological consistency by *constraining* judges.

But this is an incomplete picture and a richer explanation is possible. Staging also has a flip side. By adding ambiguity to the decisional-menu for judges in statutory interpretation cases, staging reshapes the context in which these decisions take place.[81] Staging is not only choice-constraining; it is also an example of "debiasing through law."[82]

The law and behavioral economics scholar Oren Bar-Gill noted that "[b]ehavioral law and economics is a two-way street. Not only do cognitive biases affect the operation of legal rules, but the legal rules themselves influence the type and magnitude of the prevailing cognitive biases."[83] The following parts develop this insight by tracking the way in which staging, by contributing *positively* to the structure of the interpretive decisional menu, actually debiases statutory interpretation and partially enables methodological stability. Before doing so, the paper first turns to review some findings on the psychology of decision making.

II. COGNITIVE BIASES

Cognitive and behavioral psychologists have shown that human decision making is encumbered by biases causing systematic departures from rationality.[84] Some of these insights are by now quite famous and well integrated into legal scholarship,[85] while others have failed to gain much

---

80. Gluck, *supra* note 4, at 1856.

81. *See infra* Part III.A.

82. *See* Christine Jolls & Cass R. Sunstein, *Debiasing Through Law*, 35 J. LEGAL STUDS. 199, 234 (2006).

83. Oren Bar-Gill, *The Evolution and Persistence of Optimism in Litigation*, 22 J.L. ECON. & ORG. 490, 492 (2006); *see also* Rachlinski, *supra* note 16, at 575 ("Judicial opinions display a terrific understanding of the implications of a biased assessment of liability. Rules have evolved that reduce the bias's impact, and when its influence cannot be purged, sensible second-best rules have emerged. The law has adapted well to the fallibility of human judgment.").

84. The literature on cognitive biases is vast. For a definitive early work, see Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, 185 SCI. 1124, 1124 (1974).

85. For instance, the "endowment effect"—the systematically greater sensitivity to losses over gains—has been widely incorporated into legal scholarship:

> In 1990, only two law journal articles mentioned either of the terms "endowment effect" or "status quo bias." In 2001, sixty-seven law journal articles contained at least one of these terms. As of January 2003, 373 law journal articles had mentioned either the endowment effect or the status quo bias, with nearly half of these appearing in print since the year 2000.

Russell Korobkin, *The Endowment Effect and Legal Analysis*, 97 NW. U. L. REV. 1227, 1229 (2003). It is safe to assume that this trend has only continued in the last decade. The framing effect is another example of a familiar and well-integrated bias. *See infra* Part II.B.

Ohio Northern University Law Review, Vol. 39 [2023], Iss. 1, Art. 5

traction.[86] This part briefly reviews two cognitive biases that help explain how staging has fostered methodological uniformity in state statutory interpretation. First, it surveys coherence-based reasoning, which is related—as both symptom and cause—to the interpretive dissensus in the federal system. Second, it reviews the framing effect, which acts as the "delivery mechanism" for staging's debiasing effect.

A. Coherence-Based Reasoning

Coherence-based reasoning is the theory that the cognitive system "imposes coherence on complex decision tasks."[87] Whereas a rational decision maker proceeds in the direction prescribed by formal logic—beginning with evidence and ending with a decision—cognitive coherence posits that "decisions are the product of a cognitive mechanism that operates bidirectionally, both in the prescribed and the reverse directions of reasoning."[88] Coherence-based reasoning is "encapsulated by the Gestaltian notion that what goes together, must fit together," and means that assessments of evidence will be "non-independent" from the final decision.[89]

Consider some collection of evidence $E_1 - E_N$. Facing a choice as to whether this evidence supports decision D or $\neg D$, rational theory posits that the decision should proceed uni-directionally—the rational decision maker would add up the evidence and come up with a result (either D or $\neg D$).[90] It may be rational to move "horizontally" within the evidence—i.e., to interpret discrete evidence E_X in light of related evidence E_{X+1}, or a collection of background evidence $E_{X+1} - E_{X+N}$. But, the process ought to remain uni-directional: proceeding from evaluation of evidence to final decision.

Cognitive coherence theory posits that the decision maker's interpretation of E_X will also be shaped by the decision itself.[91] As the decision maker weighs $E_1 - E_N$ and moves towards a decision, the decisional menu itself exerts a force on E_X. The possible choices (D or $\neg D$) polarize the decision maker's view of the evidence into two coherent schemes supporting either possible decision. "The decision-maker's mental

86. Coherence-based reasoning, which is discussed throughout this Article, is perhaps an example of a less-familiar and less-well-integrated bias. *See infra* Part II.A.

87. Simon, *A Third View*, *supra* note 10, at 517.

88. *See id.* at 514-16.

89. Dan Simon, *The Limited Diagnosticity of Criminal Trials*, 64 VAND. L. REV. 143, 195 (2011).

90. *See* Simon, *A Third View*, *supra* note 10, at 514.

91. *See id.* at 516.

model is skewed toward conformity with the emerging decision."[92] Suppose the decision maker chooses $\neg D$. She may be rational in concluding $\neg D$ based on $E_1 - E_N$, but she ascribes a value to E_X that has been irrationally skewed by her decision itself. Even if her final decision based on the sum of underlying evidence may conform with rationality, her assessment of a discrete piece of evidence and her explanation of how she arrived at decision will not. As Professor Dan Simon, a leading scholar of cognitive coherence, writes, the result of this bias is that, in the mind of the decision maker, "the hard case morphs into an easy one."[93]

Several lab experiments support this theory.[94] In two experiments conducted by Simon and colleagues,[95] participants were first given a 'pre-test' in which they were presented with a series of (seemingly) unrelated vignettes and asked to rate the strength of their agreement or disagreement with inferences drawn from that vignette. Participants were then asked to decide "a case." They were asked to determine a general verdict ("for plaintiff" or "for defendant"), and then to rate the strength of their agreement/disagreement with the discrete arguments raised by the litigants. Unbeknownst to the participants, these arguments were each parallel to one of the inferences presented in the pre-test.

In both experiments, whether they found for plaintiff or for defendant, the participants exhibited *heightened* confidence in their evaluations of the discrete arguments compared to how they had evaluated the equivalent inference in the pre-test. Participants' "ratings of the facts shifted considerably and consistently toward coherence with the eventual verdict."[96] Within the group, coherence-based reasoning exerted a polarizing effect such that those who found for the defendant and those who found for the plaintiff were *both* more confident that each piece of evidence supported their view after they had issued their general verdict.[97]

Scholars have suggested that coherence-based reasoning affects judicial and jury decision making in various legal areas including trademark

92. *Id.* at 517.

93. *Id.*

94. *See, e.g.*, Simon, *Diagnosticity*, *supra* note 89, at 196 (collecting studies); Dan Simon, *In Praise of Pedantic Eclecticism: Pitfalls and Opportunities in the Psychology of Judging*, *in* THE PSYCHOLOGY OF JUDICIAL DECISION MAKING, 131, 132-42 (David Klein & Gregory Mitchell eds., 2010).

95. Simon, *A Third View*, *supra* note 10, at 523-33.

96. *Id. at* 530.

97. *Id.* at 531-32. *See also* Dan Simon et al., *The Redux of Cognitive Consistency Theories: Evidence Judgments by Constraint Satisfaction*, 86 J. PERSONALITY & SOC. PSYCHOL. 814, 817 (2004) (presenting the findings of another lab experiment, in which participants changed their evaluation of evidence *after* they were asked to make a decision in the context of a criminal trial simulation).

Ohio Northern University Law Review, Vol. 39 [2023], Iss. 1, Art. 5

infringement,[98] eyewitness evidence,[99] jury verdicts,[100] social science testimony,[101] criminal trials,[102] and stereotypes.[103] Professor Dan Kahan recently suggested that coherence-based reasoning provides an explanation for the "notoriously—even comically—unequivocal" nature of judicial opinions, which only rarely "acknowledge that an issue is difficult, much less that there are strong arguments on both sides."[104] He concludes that coherence-based reasoning is partially to blame: judges "tend to be averse to persistent uncertainty, and hence adjust their assessments of more equivocal pieces of evidence to match their assessment of more compelling ones . . . ."[105]

Coherence-based reasoning is related to other cognitive biases.[106] Research on "confirmatory bias" or "hindsight bias" suggests that after forming "strong hypotheses, people are often too inattentive to new information contradicting their hypotheses."[107] Not only do people tend to ignore additional evidence that cuts against their commitments, they also "tend to misread evidence as additional support for initial hypotheses."[108] Thus, studies show the same ambiguous information provided to two individuals with divergent initial positions is likely to drive them further apart because they both will (mis)interpret the evidence as confirming their (opposing) positions.[109]

---

98. *See* Barton Beebe, *An Empirical Study of the Multifactor Tests for Trademark Infringement*, 94 CALIF. L. REV. 1581, 1607, 1617 (2006).

99. *See* Steven E. Clark, *Blackstone and the Balance of Eyewitness Identification Evidence*, 74 ALB. L. REV. 1105, 1134 (2010-2011).

100. Jennifer K. Robbennolt et al., *Symbolism and Incommensurability in Civil Sanctioning: Decision Makers as Goal Managers*, 68 BROOK. L. REV. 1121, 1148-57 (2003).

101. *See* Maxine D. Goodman, *A Hedgehog on the Witness Stand—What's the Big Idea?: The Challenges of Using* Daubert *to Assess Social Science and Nonscientific Testimony*, 59 AM. U. L. REV. 635, 672 (2010).

102. *See* Simon, *Diagnosticity*, *supra* note 89, at 195-200.

103. *See* Gary Blasi, *Advocacy Against the Stereotype: Lessons from Cognitive Social Psychology*, 49 UCLA L. REV. 1241, 1259-66 (2002).

104. Dan M. Kahan, *Foreword: Neutral Principles, Motivated Cognition, and Some Problems for Constitutional Law*, 125 HARV. L. REV. 1, 59-60 (2011) (noting that this phenomenon is especially odd at the Supreme Court, where "the main criterion for granting certiorari is a division of authority among lower courts . . . .").

105. *Id.* at 60 (citing Simon, *A Third View*, *supra* note 10, at 512-13).

106. *See* Simon, *A Third View*, *supra* note 10, at 517; *see also* Matthew Rabin, *Psychology and Economics*, 36 J. ECON. LITERATURE 11, 26 (1998).

107. Rabin, supra note 106, at 26.

108. *Id.* (emphasis in original).

109. *Id.* at 26-27 (citing Matthew Rabin & Joel L. Schrag, *First Impressions Matter: A Model of Confirmatory Bias*, 114 Q. J. OF ECON. 1, 38 (Feb. 1999)); *see also* Kahan, *Neutral Principles*, *supra* note 104, at 59-61.

The epigraph from Justice Breyer describes the effect of hindsight bias on judicial thinking.[110] Over time, Breyer suggests, as a judge looks back on a particular decision, she will grow more confident, forgetting any doubts that plagued her, along with any possibility that she might have gone the other way.[111] But, contrary to Breyer's implicit assumption, there is no reason to believe that this mode of bias is restricted to the period *following* publication. Rather, coherence-based reasoning also affects judicial decision making as the judge is evaluating the evidence and moving toward a decision.

Coherence bias is also related to group polarization. As Simon notes, coherence-based reasoning is associated with two kinds of polarizing effects—both within the mind of a decision maker, and within a group (i.e., a rift between dissent and majority).[112]

Importantly, coherence bias is distinct from theories of "motivated" reasoning. These theories posit that decision making begins with a preferred conclusion, and works backwards to construct legal rationalizations to support that decision, which is in fact driven by some value external to the judicial process.[113] *Bush v. Gore*[114] is often discussed as an example of "motivated-reasoning": commentators argue or assume that the Justices' own partisan affiliations drove the outcome, rather than the legal reasons provided in the opinion.[115]

Unlike these theories, cognitive coherence operates entirely within the confines of the judicial process.[116] It does not depend on the identity, background, or motives of any individual judge, or other extrinsic values beyond the essential cognitive machinery that every human being brings to

---

110. *See* Justice Breyer Interview, *supra* note 1.

111. *See id.*

112. Simon, *A Third View*, *supra* note 100, at 517-18.

113. *See, e.g.*, Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 846 (1935) (suggesting that "the political, economic, and professional background and activities of our various judges" are the "the motivating forces which mold legal decisions . . ."); *see also* Chris Guthrie et al., *Inside the Judicial Mind*, 86 CORNELL L. REV. 777, 779-80 (2001) (collecting sources which adopt or explain the history of this position). Dan Kahan's theory of cultural cognition is best classified as a theory of "motivated reasoning." Kahan, *Neutral Principles*, *supra* note 104, at 2. This theory "refers to the tendency of individuals to conform their perceptions of risk and other policy-consequential facts to their cultural worldviews." *Id.* at 23-24; *see also, e.g.*, Dan M. Kahan et al., *'They Saw a Protest': Cognitive Illiberalism and the Speech-Conduct Distinction*, 64 STAN. L. REV. 851, 884-85 (2012); Dan M. Kahan et al., *Whose Eyes Are You Going to Believe?* Scott v. Harris *and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 837, 895-98 (2009).

114. 531 U.S. 98 (2000).

115. *See, e.g.*, Jack M. Balkin, *Bush v. Gore and the Boundary Between Law and Politics*, 110 YALE L.J. 1407, 1408 (2001) ("That the conservative Justices acted as they did suggested that their partisanship was so thorough and pervasive that it blinded them to their own biases.").

116. *See* Guthrie et al., *Inside the Judicial Mind*, *supra* note 113, at 779-84.

complex decision tasks.[117] In other words, "wholly apart from political orientation and self-interest, the very nature of human thought can induce judges to make consistent and predictable mistakes in particular situations."[118]

B. The Framing Effect

The second bias relevant to the argument that follows is the framing effect, which serves as the delivery system for staging's debiasing affirmative function.

Psychologists Amos Tversky and Daniel Kahneman famously obtained different results for the same decision by framing the question differently.[119] Their "Asian Disease Problem" provides the classic illustration. Tversky and Kahneman asked subjects to "[i]magine that the U.S. is preparing for the outbreak of an unusual Asian disease, which is expected to kill 600 people."[120] One group chose between Program A, under which (they were told) 200 people would be saved, or Program B, under which there was a 1/3 probability that all 600 people would be saved, but a 2/3 probability that no people will be saved. The second group chose between Program C, under which 400 people will die, and Program D, under which there would be a 1/3 probability that nobody will die, and 2/3 probability that 600 people will die. A little math reveals that the two sets of choices are identical in terms of results: Program A is the same as Program C (100% chance of 200 alive, 400 dead), and Program B is the same as Program D (33% chance 600 alive, none dead; 66% chance none alive, 600 dead). However, Tversky and Kahneman found that the difference in framing (i.e., saving vs. letting die) produced vastly different results: nearly three-quarters of the subjects in the first group choose Program A, while a similar percentage in the second group chose Program D.[121] The logically meaningless distinction between

117. *See id.* at 778-80.

118. *Id.* at 780; *see also* Dan Simon, *A Psychological Model of Judicial Decision Making*, 30 RUTGERS L.J. 1, 135-37 (1998) (distinguishing his psychological model of judging from critical legal theory). But, although these theories are distinct, they are not entirely disconnected. Coherence bias has greater effects on individuals who bring strong extrinsic motivations into decision making. *See, e.g.*, Simon, *A Third View*, *supra* note 10, at 541-42.

119. *See* Amos Tversky & Daniel Kahneman, *The Framing of Decisions and the Psychology of Choice*, 211 SCI. 453, 453-57 (1981). Many researchers, beginning with Tversky and Kahneman themselves, have focused on a second-order phenomenon within framing—finding that there was a systematic pattern by which frames bias human decision-making, coming from "contradictory attitudes towards risks involving gains and losses." *Id.* Namely, "choices involving gains are often risk averse and choices involving losses are often risk taking." *Id*. However, for purposes of this paper, this second-order phenomenon is not relevant.

120. *Id.* at 453.

121. *Id.*

saving 200 out of 600 and letting 400 people die created a very significant practical difference. Other researchers have expanded this research into a variety of contexts, tracing systematic patterns in the ways it was possible to channel decisions simply by changing decisional framing.[122]

C. Applicability to Judges and Expertise as a (Limited) Constraint

Judges are highly trained legal experts, not college students in a psychology lab. Are there reasons to suppose that judges are immune or less susceptible to coherence-based reasoning or framing biases?

In fact, findings suggest that judges are no different than the rest of us when it comes to these biases. In one empirical study, Professor Guthrie and colleagues found that judges, like the rest of us, are susceptible to both hindsight bias (related to coherence-based reasoning),[123] and the framing bias.[124] Other studies confirm that judges are susceptible to framing and related biases.[125] Still others suggest that judicial decisions are systematically biased by judges' personal attitudes.[126] One experiment found that judges made decisions that were influenced by information that they had ruled inadmissible.[127] Finally, studies have also shown that the

122. *See, e.g.*, Rabin, *Psychology and Economics*, *supra* note 106, at 29.

123. Guthrie et al., *Inside the Judicial Mind*, *supra* note 113, at 799-805 (discussing hindsight bias).

124. *Id.* at 781-82 (collecting sources for the proposition that, as of 2001, very little psychological research had been conducted on judges), 794-99 (discussing framing); *see also* Chris Guthrie et al., *Blinking on the Bench: How Judges Decide Cases*, 93 CORNELL L. REV. 1, 19-29 (2007) (advancing and supporting a Kahnemanian "two-systems" theory of judicial decision-making based on a body of empirical research conducted on federal and state trial judges around the nation).

125. *See, e.g.*, Birte Englich et al., *Playing Dice with Criminal Sentences: The Influence of Irrelevant Anchors on Experts' Judicial Decision Making*, 32 PERSONALITY & SOC. PSYCH. BULL. 188, 196 (2006) (anchoring); Birte Englich & Thomas Mussweiler, *Sentencing Under Uncertainty: Anchoring Effects in the Courtroom*, 31 J. APPLIED SOC. PSYCHOL. 1535, 1538, 1545-46 (2001) (anchoring); Reid Hastie & W. Kip Viscusi, *What Juries Can't Do Well: The Jury's Performance as a Risk Manager*, 40 ARIZ. L. REV. 901, 906 (1998) (hindsight); *see also* Daniel M. Isaacs, Note, *Baseline Framing in Sentencing*, 121 YALE L.J. 426, 435 n.28 (2011) (collecting sources for the proposition that judges are susceptible to biases and heuristics). Note that many of these studies trace the effects of the "anchoring" bias, which is closely related to the framing effect. Anchoring theory posits that when making decisions under uncertainty, individuals sometimes begin with an "anchor" —some kind of baseline information that somehow comes to mind—and then "adjust" away from it to arrive at an estimation. Studies have shown that the "anchor" may be manipulated (just as the "frame" may be) and adjustments away can be inadequate. *See generally* Rabin, *Psychology and Economics*, *supra* note 106, at 29.

126. *See* JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL 64-65 (1993); JEFFREY A. SEGAL & HAROLD. J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED 86 (2003). *See generally* DAVID E. KLEIN, MAKING LAW IN THE UNITED STATES COURTS OF APPEALS 81 (2002).

127. Andrew J. Wistrich et al., *Can Judges Ignore Inadmissible Information?: The Difficulty of Deliberately Disregarding*, 153 U. PA. L. REV. 1251, 1292 (2005).

Ohio Northern University Law Review, Vol. 39 [2023], Iss. 1, Art. 5

professional community from which judges are drawn—namely, lawyers—is also susceptible to a variety of biases.[128]

Yet judicial expertise might operate as a constraint on coherence-bias in at least one important, but limited respect.[129] Coherence-bias depends on some amount of uncertainty.[130] Where a decision problem implicates arguments and evidence that have determinate values (e.g., a math problem: 2 + 2 = ?), decision makers who have access to those determinate values (i.e. expertise) will be less susceptible to coherence bias.[131] Simon's experiments found coherence shifts regarding the participants' evaluation of arguments for which both sides had plausible reasoning, and for which there was no single right answer.[132] If Simon had, instead, asked participants to evaluate the weights of competing arguments about something with a determinate value to which the participants had access, the coherence shifts would undoubtedly have been less severe.[133] Imagine a version of Simon's experiments where, instead of some ambiguous legal/moral issue, the initial vignette presented a choice between two arguments (i.e., 2 + 2 = 4, or 2 + 2 = 5). Imagine that, after choosing between these and ranking the strength of their views, participants were then asked to make a composite decision that implicated simple addition—perhaps to decide who prevailed in a dispute over splitting the dinner check. When these imaginary decision makers were again asked to evaluate the strength of the rival sub-arguments, no significant coherence shift would occur. The irrational bias exerted by coherence thrives where determinacy is lacking—whether because of some characteristic of the object of the decision, or of its subject.[134]

---

128. *See, e.g.*, Zev J. Eigen & Yair Listokin, *Do Lawyers Really Believe Their Own Hype and Should They?: A Natural Experiment* J. LEGAL STUDIES (2012) (overconfidence); *see* Linda Babcock et al., *Forming Beliefs About Adjudicated Outcomes: Perceptions of Risk and Reservation Values*, 15 INT'L REV. L. & ECON. 289, 294-97 (1995) (framing). *But see* Russell Korobkin & Chris Guthrie, *Psychology, Economics, and Settlement: A New Look at the Role of the Lawyer*, 76 TEX. L. REV. 77, 99-101 (1997) (finding that lawyers are *less* susceptible than non-lawyers to framing effects).

129. *See, e.g.*, Simon, *A Third View*, *supra* note 10, at 516; *see also* Dan Simon, *Freedom and Constraint in Adjudication: A Look Through the Lens of Cognitive Psychology*, 67 BROOK. L. REV. 1097, 1131 (2002) (explaining that judges' reasoning is not that different from a lay persons', while noting that practice entails expertise).

130. Simon, *A Third View*, *supra* note 10, at 516 ("Coherence-based reasoning applies to mental tasks in which the person must make a discrete decision or judgment in the face of complexity.").

131. *See id.* at 516-17 (as coherence-based reasoning applies to complex and ambiguous issues, when one knows information that makes the issue less complex or ambiguous, coherence-based reasoning takes less effect).

132. *Id.* at 525 (noting that both sides of all of the pre-trial vignettes and litigants' discrete arguments were "plausible and balanced so as to create a complex decision.").

133. *See id.* at 516-17.

134. *See id.* at 516; Simon, *A Psychological Model*, *supra* note 118, at 127-28 (noting that the malleability of legal texts allows coherence bias to have stronger effects). On the other hand, it stands to reason that coherence-bias also has significant effects in circumstances where decision makers have

III. Coherence-Based Reasoning and Methodological Dissensus

This Part advances the first half of a novel positive psychological theory by showing how cognitive coherence helps to perpetuate methodological instability. First, I suggest that coherence-based reasoning leads judges to accord inappropriate weight to certain evidence in statutory interpretation opinions. Then I suggest that over time, as these opinions accumulate, judges develop strategies to deal with inconsistencies and conflicts, which inhibit methodological stability.

A. Coherentism in Statutory Interpretation Decisions

Consider a statutory interpretation case in a world of rational decision makers. A rational judge would evaluate each argument or piece of evidence, determining both (1) *whether* it favored the plaintiff, the defendant, or neither; and (2) by how much. For instance: "E_X strongly supports the plaintiff," or "E_Y weakly supports the defendant." Adjustments to these values might occur in light of other evidence as it comes into focus. For instance: E_X considered on its own strongly favored the plaintiff, but in light of E_Z, its weight must be reduced, so that it only weakly favors the plaintiff. After weighing all the evidence, whichever side has accumulated the most value wins the case. The resulting opinion would catalogue each piece of evidence, explaining the value accorded to each, and why one side accrued more value than the other. And, future litigants and courts would rely on these opinions for a reliable accounting of how much weight certain varieties of evidence or arguments receive, as compared with other types of evidence.[135]

But in a world where judges engage in coherence-based reasoning, the statutory interpretation decision itself factors into the value judges accord each argument or piece of evidence offered. As she considers the evidence, a judge evaluates it not only in terms of its own merit but in light of the decisions available to her. Suppose that, when rationally considered, E_X weakly favored the plaintiff. Coherence theory posits that, because of the

more expertise, where decision makers may be inclined to be overconfident in their evaluation of evidence. *See, e.g.*, Dan Kahan et al., *The Polarizing Impact of Science Literacy and Numeracy on Perceived Climate Change Risks*, 2 NATURE CLIMATE CHANGE 732 (2012), *available at* http://ssrn.com/abstract=2193133 (finding that increased scientific literacy correlated with increased polarization of views regarding the seriousness of the threat posed by climate change).

135. *See* John N. Drobak & Douglass C. North, *Understanding Judicial Decision-Making: The Importance of Constraints on Non-Rational Deliberations*, 26 WASH. U. J.L. & POL'Y 131, 134 (2008) (explaining the rational model of judicial decision making and its application to statutory interpretation).; s*ee also* Simon, *A Third View*, *supra* note 10, at 511, 567-68 (explicating the rational model of decision making); SEGAL & SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED, *supra* note 126, at 97-98.

Ohio Northern University Law Review, Vol. 39 [2023], Iss. 1, Art. 5

polarized context in which the evaluation occurs in the context of litigation, the judge's evaluation of E_X will be skewed. When she settles on a decision and turns to draft an opinion, the value she accords to E_X will be different than what it would have been in the rational model. If her decision is "for plaintiff" she might write that E_X "strongly favors plaintiff" instead of "weakly." Or, if her decision is "for defendant," she might instead dismiss the evidence as "ambiguous" rather than acknowledge that it has any force at all.

Research suggests that coherence-based reasoning afflicts many types of complex decision making, but statutory interpretation litigation possesses two features that likely make it particularly susceptible to this bias. First, statutory interpretation methodology in the federal system remains, as Hart and Sacks long ago pointed out, a highly indeterminate project.[136] Thus, litigants tend to adopt what Oregon Supreme Court Justice Jack L. Landau has called the "cooked pasta" method of argumentation.[137] Each side advances as many statutory arguments as they can, in whatever order best suits their case, and hope that something "sticks."[138]

Consider briefs filed before the Supreme Court in a recent case, *Federal Aviation Administration v. Cooper*.[139] The issue presented to the Court was whether the Privacy Act allowed damages claims against the United States based on purely emotional injuries.[140] The Petitioner FAA's opening brief began with a substantive canon,[141] moved to the structure and plain meaning of the Act,[142] then to a survey of relevant lower court decisions,[143] an investigation of common-law meanings,[144] administrative interpretations,[145]

136. *See* HART & SACKS, *supra* note 3, at 1169.

137. Jack L. Landau, *Oregon as a Laboratory of Statutory Interpretation*, 47 WILLAMETTE L. REV. 563, 566-67 (2011) (reflecting on the pre-*PGE* statutory interpretation regime in Oregon, Justice Landau explained that "[l]awyers would throw at the court anything they could find--text, rules, history, dictionaries--in the hope that one of them would stick.").

138. *Id.* at 567.

139. 132 S. Ct. 1441 (2012). *See generally* Brief for Petitioner, Federal Aviation Admin. v. Cooper, 132 S. Ct. 1441 (No. 10-1024), 2011 WL 3678806; Brief for Respondent, Federal Aviation Admin. v. Cooper, 132 S. Ct. 1441 (No. 10-1024), 2011 WL 4520531.

140. *See Cooper*, 132 S. Ct. at 1446.

141. *See* Brief for Petitioner, *supra* note 139, at 10 ("The question is not whether the statutory text could be read to authorize such claims, but instead whether the statutory text clearly and unequivocally compels that conclusion."); *see also id.* at 13-21.

142. *See id.* at 10.

143. *See id.* ("Every court of appeals to have addressed the question has agreed that the term 'actual damages' has no fixed meaning and could refer exclusively to damages other than damages for mental or emotional distress.").

144. *See id.* at 11 ("[T]he Privacy Act's damages remedy is likely modeled on certain common law defamation torts that required proof of pecuniary harm as a precondition for recovery."); *see also id.* at 22-24.

the need to protect the public fisc,[146] and congressional floor statements and other legislative history,[147] before turning to refute the decision of the Ninth Circuit.[148] The Respondent Mr. Cooper's brief opens by invoking the broad statutory purpose,[149] moves to the structure of the statute,[150] then specific text,[151] dictionary definitions,[152] common-law meanings,[153] judicial constructions of other related federal statutes,[154] an interpretive rule about the breadth of sovereign immunity waivers,[155] the rule against absurdities,[156] congressional floor statements on early versions of the bill,[157] the evolution of the relevant provision through versions of and amendments to the bill,[158] and the compromise between house and senate versions.[159]

For Justices other than Justice Scalia, all of this evidence was on the table, but all without any agreed-upon mechanism for sorting through or prioritizing it.[160] Which side ought to prevail if, for instance, common-law meaning points one way, but related federal statutes point another? The Justices were left to their own devices to make sense of this conflicted and ambiguous body of evidence, and then to defend a decision to prioritize certain types of information over others.[161]

---

145. *See* Brief for Petitioner, *supra* note 139, at 11 ("As the Privacy Protection Study Commission . . . concluded, Congress incorporated the pecuniary-harm limitation in the Act."); *see also id*. at 25-29.

146. *Id.* at 29.

147. *See id.* at 11.

148. *See id.* at 12.

149. Brief for Respondent, *supra* note 139, at 1.

150. *Id.* at 1; *see also id.* at 8, 13-14.

151. *Id.* at 2, 12 ("The starting point for the analysis of 'actual damages' . . . is the plain, ordinary, and contemporary meaning of the words used by Congress, read in context and with a view to the 'place' of the words 'in the overall statutory scheme.'").

152. *Id.* at 12-13.

153. Brief for Respondent, *supra* note 139, at 18-25.

154. *Id.* at 25-32.

155. *Id.* at 32-33.

156. *Id.* at 33-35.

157. *Id.* at 36-38.

158. Brief for Respondent, *supra* note 139, at 38.

159. *Id.* at 40.

160. While Justice Scalia rejects the use of legislative history, other Justices have not joined him. *See* Wis. Pub. Intervenor v. *Mortier*, 501 U.S. 597, 610 n.4, 621-22 (1991) (eight Justices rejecting Scalia's rejection of legislative history); Brudney & Ditslear, *supra* note 24, at 222 (discussing the reduced but not discontinued use of legislative history in the late twentieth century); Nourse, *supra* note 27, at 72-79 (discussing the continued prominent and frequent citation of legislative history); *see also* ESKRIDGE, JR. ET AL., *supra* note 44, at 793.

161. In the *Cooper* decision, the majority opinion followed the government's litigating position, relying on an inflated, expansive reading of the sovereign immunity canon to justify its rejection of the compelling arguments on the other side, based on common law, legislative history, related statutes, and the purpose of the statute. *See Cooper*, 132 S. Ct. at 1448-52. For an excellent discussion of a similar, earlier decision in which the court was confronted with a staggering array of arguments and sub-arguments, see Dan Simon's discussion of *Ratzlaf v. United States*, 510 U.S. 135 (1994) in Simon, *A Psychological Model*, *supra* note 118, 62-77.

The lack of agreed-upon methodology enables coherence-based reasoning to have especially dramatic effects.[162] Statutory interpretation is far removed from the kind of determinate decision problem (e.g., 2 + 2 = ?) where certain forms of expertise might mitigate or limit the bias.[163] Rather, the system's indeterminacy makes statutory interpretation decisions resemble the problems designed by Simon in experiments: where a given piece of evidence might plausibly take on a broad range of values, decision makers are less likely to resist the skewing effect of coherence-based reasoning.[164]

The second feature of statutory interpretation that likely makes it particularly susceptible to cognitive coherence is the relative ignorance of most lawyers, judges, and law clerks of the details of legislative process.[165] As scholars have pointed out, even many of the best-trained judges and lawyers are relatively untutored in the realities of legislative process, so that when they confront legislative materials of different kinds, they are unable to evaluate it appropriately, and make errors that would be unheard of with judicial or executive materials.[166] For instance, Supreme Court Justices have treated legislative dissenting views as authoritative, privileged legislative statements about early versions of a bill over those made about final versions, and many more similar errors.[167] In other words, where there might be some semblance of an objective and determinate value in statutory interpretation—e.g., views of supporters are more significant than dissenters, final versions more significant than early versions, etc.—many judges and lawyers display a lack of expertise needed to access and implement these values.

Coherence-based reasoning is pervasive throughout decision making and statutory interpretation is likely to be particularly susceptible to this bias. The next section turns from individual decisions to consider the cumulative, system-wide effect of coherence-biased opinions on statutory interpretation methodology.

162. *See id.* at 127-28.
163. *See supra* Part II.A.
164. *See* Simon, *A Third View*, *supra* note 10, at 523-49; Simon, *A Psychological Model*, *supra* note 118, at 127-28 (noting that the malleability of legal texts allows coherence bias to have stronger effects).
165. Nourse, *supra* note 27, at 72-73.
166. *Id.* at 72-73, 76-77, 107.
167. *Id.* at 72-73.

B. Coherence-Based Reasoning's Destabilization of Statutory Interpretation Methodology

In federal statutory interpretation cases, judicial opinions are likely to accord irrationally inflated value to discrete pieces of evidence as a result of coherence-based reasoning.[168] By increasing the frequency of biased reasoning in judicial opinions, coherence bias might also be expected to have an effect on the body of statutory interpretation case law as these opinions accumulate over time. As cases present similar evidence in new decisional contexts, courts may be forced to depart from previously biased evaluations of that type of evidence.[169] In the course of these repeated confrontations with contrary reasoning from previous opinions, courts develop strategies to deal (or not deal) with these doctrinal inconsistencies.[170] As Simon suggested, "finding acceptable ways to ignore, dismiss, or interpret away second-order rules is yet another facet of judicial expertise."[171]

For this Article, these strategies may be usefully broken down into three categories: obliviousness, diplomacy and confrontation. The first two of these strategies, obliviousness and diplomacy, both feed off and amplify the self-perpetuating momentum of methodological instability by further polluting the doctrinal landscape with mutually incompatible lines of reasoning. The third strategy, confrontation, would exert a stabilizing effect, but, for reasons described below, it is also likely the rarest of the three.

In systems where methodological instability is a pre-existing condition, the accretion of a body of inconsistently reasoned cases perpetuates instability. Coherence-based reasoning is thus merely one cause of methodological instability but certainly not its sole cause. The decisional strategies surveyed below not only help to shape the interpretive scheme but are also themselves already partially determined by it. Thus, the causal

168. *See* Simon, *A Psychological Model*, *supra* note 118, at 130 ("As readers [of decisions influenced by coherence bias] we are deprived of any possibility of distinguishing between good and bad arguments, between vital and trivial claims, and between propositions that deserve to bear gravitational force and those that will be blown in the wind of the next case.").

169. *See id.* at 132 ("Cluttered and inflated decisions stock up the arsenal of available arguments and thus offer a putative basis for virtually any thinkable argument. This creates a self perpetuating cycle . . . ."); *see also* Foster, *supra* note 2, at 1881.

170. *See* Simon, *Pedantic Eclecticism*, *supra* note 94, at 136; Simon, *A Psychological Model*, *supra* note 118, at 132 ("the more arguments presented to the judge, the more conflict and ambiguity exist in the case, and the greater the need to impose coherence on all arguments indiscriminately"); *see also id.* (suggesting that one possible effect of this proliferation of incompatible precedent is that judicial selection may become biased "towards promoting people who are more capable of, and more inclined to, attain high degrees of closure in the face of complexity—viz., mentally agile jurists.").

171. Simon, *Pedantic Eclecticism*, *supra* note 94, at 136.

Ohio Northern University Law Review, Vol. 39 [2023], Iss. 1, Art. 5

relationship between cognitive coherence and methodological instability is neither unidirectional nor exclusive. This section presents methodological instability as partially fueled by a mixture of its own momentum and coherence-based reasoning.

Consider the following scenario. Lawyer *L* is hoping to advance ambiguous evidence E_X as strongly favoring his client in a statutory interpretation case. In this case, *L* is in luck—the court recently evaluated an analogous piece of evidence $E_{X'}$ and found that it strongly supported an analogous position. But, that earlier evaluation was inflated, skewed by coherence-based reasoning. A rational, non-coherence-biased evaluation of $E_{X'}$ would have found the evidence provided only weak support, at best. Nonetheless, because the rest of his case is weak, *L* chooses to make E_X his central argument; his brief quotes the strong language from the previous case on $E_{X'}$, and he urges the court to follow its recent precedent.

Suppose the court (rationally) rules against *L* and treats E_X as only weakly supporting *L*'s argument. In dealing with this contradictory reasoning from an earlier decision, the court will adopt one of the following strategies to deal (or not deal) with the previous opinion's contradictory reasoning. These may be usefully broken down into three familiar sorts of strategies: obliviousness, diplomacy, and confrontation.[172]

1. Obliviousness

The easiest and most attractive response for a court in this situation is also perhaps the most common: the court will simply ignore the previous decision's contrary (and erroneous) treatment of analogous evidence.[173] The appeal and widespread use of this technique is in part a product of methodological instability's own momentum. This strategy is bound to be attractive for judges in the federal system where there is officially no "methodological stare decisis."[174] A court seeking to accord a value to a

172. This trichotomy is not intended as a complete theory of judging in statutory interpretation cases. Instead, it is only a very rough approximation designed only to explicate how cognitive coherence both feeds off and fosters dissensus in interpretive methodology. *See generally* Foster, *supra* note 2, at 1872-84. Foster's analysis of the modalities of Supreme Court treatment of methodological precedents informs my discussion. *See id.* But, Foster's analysis was directed at an analytically distinct and somewhat more sophisticated project of tracking whether the Court uses *stare decisis* principles in dealing with its statutory precedent cases (answer: it does not). *See id.* In contrast, my aim in constructing this trichotomy is to sketch out how inconsistent precedents can build-up and become a self-perpetuating force, fostering yet more inconsistent lines of precedent, and forestalling any methodological stability. *See also* Simon, *A Psychological Model*, *supra* note 118, at 132 (drawing similar conclusions about the cumulative effect of judicial cognitive bias on legal precedent).

173. Many have noted the Court's rapid vacillation between methods. *See, e.g.*, sources cited *supra* notes 2, 3, 22-26.

174. *See supra* Part I.A.

Platt: Debiasing Statutory Interpretation

type of evidence that diverges from the weight it (or a higher court) previously accorded to the same type of evidence may do so freely without even noting any methodological departure. As Foster notes, "Justices who disagree with an interpretive principle established in a particular case appear to feel unconstrained by that precedent in subsequent cases."[175] The obliviousness strategy is bound to be popular.

It is also certainly familiar to students of statutory interpretation and of federal courts more generally. The Court's inconsistent use of substantive canons exemplifies this approach. In *Gregory v. Ashcroft*,[176] the Court announced a clear statement rule for statutes which "upset the usual constitutional balance of federal and state powers . . . ."[177] Before a court could construe a statute to alter this balance, it now would have to first find that Congress has spoken clearly to the point at issue, and could no longer construe an ambiguous statute in light of its purpose to do anything that altered this balance. Yet the Court itself has subsequently construed statutes that unquestionably alter this balance without invoking the canon, much less requiring a clear statement. For example, in *AT&T Mobility LLC v. Concepcion*,[178] the Court rejected state unconscionability doctrines as preempted by the Federal Arbitration Act without even mentioning the federalism canon.[179]

The strategy of obliviousness is ubiquitous in cases reviewing agency interpretation of statutes: though many courts and commentators describe the two-step *Chevron* method as binding precedent, Connor Raso and William Eskridge showed that the Court has failed to apply or cite *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*[180] in many cases where it could have been applied.[181] In other words, the Court frequently ignores conflicting reasoning or methods announced in previous cases.

Deliberate or not, such obliviousness is a judicial strategy well calibrated to deal with significant conflicts between present and past reasoning. But ignoring a previous contrarily reasoned opinion is not only a product of methodological instability it is also a perpetuating cause of that

175. Foster, *supra* note 2, at 1881.
176. 501 U.S. 452 (1991).
177. *Id.* at 452.
178. 131 S. Ct. 1740, 1753 (2011).
179. *Id.* at 1753.
180. 467 U.S. 837 (2008).
181. Connor N. Raso & Willian N. Eskridge, Jr., *Chevron as a Canon, Not a Precedent: An Empirical Study of What Motivates Justices in Agency Deference Cases*, 110 COLUM. L. REV. 1727, 1740 (2010).

Ohio Northern University Law Review, Vol. 39 [2023], Iss. 1, Art. 5

instability.[182] Because this strategy of ignoring the previous reasoning leaves the previous inconsistent treatment of the type of evidence "on the books," it remains available for future litigants and judges to draw upon (or deliberately ignore) in future cases. The doctrinal landscape becomes polluted with irreconcilably conflicted lines of opinions, all of which may continue to be cited for authority. The heightened frequency of inconsistent reasoning produced by coherence-based judicial reasoning adds fuel to the self-perpetuating momentum of methodological dissensus. The result, over time, is that coherence-based reasoning indirectly, but significantly impedes methodological stability.

2. Diplomacy

Rather than wholly ignoring its previous inconsistent reasoning, a court might also partially address the disparity in the new case without recognizing it as such. For instance, a court may reinterpret earlier reasoning, providing a new gloss that renders it consistent with the new (and, in this hypothetical case, rational) interpretive logic. Alternatively, a court may distinguish the previous case by identifying some contextual factor that makes the type of evidence particularly (non)compelling in one case, but not the other. Both of these diplomatic strategies also perpetuate methodological instability, though not as severely as the first strategy of ignoring previous case altogether.

Rapanos v. United States[183] exemplifies the technique of creative reinterpretation to erase a conflict in reasoning.[184] In that case, the Court rejected the Army Corps of Engineers' assertion of regulatory jurisdiction under the Clean Water Act over a parcel of wetlands that was up to twenty miles away from the nearest body of navigable waters.[185] Justice Scalia's plurality opinion focused on a statutory term—"waters of the United States"—and advanced a variety of textualist arguments for limiting that term to "continuously present, fixed bodies of water, as opposed to ordinarily dry channels through which water occasionally or intermittently flows."[186] But in an earlier case, *United States v. Riverside Bayview Homes, Inc.*,[187] the Court had upheld a regulation issued under the same provision

182. Vermeule, *The Cycles of Statutory Interpretation*, *supra* note 22, at 149-50; *see also, e.g.*, Simon, *A Psychological Model*, *supra* note 118, at 123.
183. 547 U.S. 715 (2006).
184. *Id.* at 722-57.
185. *Id.* at 719-20, 742.
186. *Id.* at 724-26, 730-34.
187. 474 U.S. 121 (1985).

Platt: Debiasing Statutory Interpretation

that purported to cover some wetlands.[188] The *Bayview* Court's reasoning was avowedly purpose- and policy-driven.[189] Indeed, the *Bayview* Court openly dismissed textualist evidence as "simplistic" and inapplicable:

> On a purely linguistic level, it may appear unreasonable to classify 'lands,' wet or otherwise, as 'waters.' Such a simplistic response, however, does justice neither to the problem faced by the Corps in defining the scope of its authority under [the provision] nor to the realities of the problem of water pollution that the Clean Water Act was intended to combat.[190]

This Court was plainly not engaged in textual analysis.[191]

Nevertheless, Justice Scalia's opinion in *Rapanos* did not confront the incongruity between his text-driven approach and the virtually anti-textualist approach in *Bayview*; rather, he paved over methodological departure by re-characterizing the earlier opinion.[192] His opinion quotes the passage above from *Bayview* introducing the results of what a "purely linguistic" approach would find.[193] But, critically, Justice Scalia leaves out the key next sentence that goes on to explain that the "linguistic" approach was entirely inappropriate for the case at hand, which instead hinged upon the policies and purposes of the statute.[194] His opinion goes on to assert that the Court's decision in *Bayview* was driven not by purposive concerns, but by the Court's recognition of the inherent ambiguities built into the statutory term "waters."[195] By reconstructing *Bayview* as a textualist opinion, Justice Scalia avoids an overt methodological discontinuity in *Rapanos*.

Justice Breyer's opinion in *Zuni*, discussed earlier, also exemplifies this second technique—justifying methodological departure based on some type of contextual distinction.[196] Justice Breyer explained that the majority's unorthodox maneuver of treating legislative history and purpose before text was necessary in light of the "technical" language of the statute in question.[197]

Though these approaches do not completely ignore the previous precedent, they nevertheless fail to erase the methodological inconsistency.

---

188. *Id.* at 139.
189. *Id.* at 131-33.
190. *Id.* at 132.
191. *See id.* at 132.
192. *See* Rapanos v. United States, 547 U.S. at 740-42.
193. *Id.* at 740-42 (quoting United States v. Riverside Bayview Homes, Inc., 474 U.S. at 132).
194. *Id.* at 740 (quoting *Bayview*, 474 U.S. at 132).
195. *Rapanos*, 547 U.S. at 740-41.
196. *See Zuni*, 550 U.S. at 98-99.
197. *Id.* at 90-91.

Published by DigitalCommons@ONU, 2023

This type of response discredits the previous reasoning without destroying it. It is still possible for future courts and litigants to revert to the earlier method or model.

Thus, *Zuni*'s reasoning implies that text should ordinarily be considered first, but leaves room for future departures from the default text-first method wherever similar "technical" language is at issue. And, *Rapanos* discredits the purposive approach in *Bayview* by re-characterizing the opinion in textualist terms, but does not foreclose the possibility that litigants will rely on the purposive reasoning from that opinion in future Clean Water Act cases.

The result in the end is the same as produced by the strategy of obliviousness: a proliferation of inconsistent and un-reconciled lines of reasoning, which may continue to be relied upon and cited in future cases. Once again, through these diplomatic strategies, coherence-based reasoning adds fuel to the self-perpetuating momentum of methodological instability.

3. Confrontation

Finally, the Court might overtly reach back to correct the reasoning error of the previous case.[198] Whether or not this requires overruling the previous case, it would require making explicit that evidence in the E_X category should not be accorded that weight. This approach would make it difficult for a future court or litigator to make the same error with respect to that type of evidence, and would have a stabilizing effect on doctrine.

Consider the Court's line of decisions on implying private rights of action in federal statutes. In *J.I. Case Co. v. Borak*,[199] the Court found an implied private cause of action based on a judicial assessment of the policies favoring such a remedy, without requiring any specific intent of the legislature to have created such a remedy in the statute.[200] In *Cort v. Ash*,[201] the Court recognized a departure from *Borak* without overruling that case, introducing a four-factor test, including legislative intent as one factor.[202] Finally, in *Touche-Ross & Co. v. Reddington*,[203] the Court moved to an even narrower approach, requiring a demonstration of legislative intent to create an implied cause of action.[204] Though perhaps short of "overt"

198. *See* Jerold H. Israel, *Gideon v. Wainwright: The Art of Overruling*, 1963 SUP. CT. REV. 211, 213-14, 219-16 (1963).
199. 377 U.S. 426 (1964).
200. *Id.* at 430-32.
201. 422 U.S. 66 (1975).
202. *Id.* at 78-79.
203. 422 U.S. 560 (1979).
204. *Id.* at 576-78.

Platt: Debiasing Statutory Interpretation

confrontation, each of these decisions went a long way toward recognizing the conflict with preceding opinions, and has made it fairly difficult for courts or litigants to rely on anything but the earlier method.[205]

Though not an empty set, confrontation is likely rare in the statutory interpretation context.[206] It is unusual for judges to revisit and expressly reverse the reasoning of earlier opinions unless the substantive holdings of those opinions have also been challenged.[207] Rejecting previous opinions is costly and rare.[208] As Jerold Israel argued in *The Art of Overruling* about Supreme Court decisions overruling constitutional precedents, an "overruling decision represents a source of danger to both professional and popular acceptance of the Court as the disinterested interpreter of the Constitution."[209] In the statutory interpretation context, a cost-sensitive court need not face these dangers.[210] Because there is no official obligation to reason consistently across cases in the federal system, judges confronting erroneous reasoning in previous cases will be unlikely to engage in the messy and dangerous business of overruling a previous decision's erroneous reasoning when they can simply ignore it, or, at most, diplomatically distinguish it in some way.[211] While confrontation remains a possible strategy, it is likely rare.

Coherence-based reasoning in statutory opinion cases forces courts to regularly depart from their earlier decisions. The strategies courts adopt to deal with these repeated confrontations are both symptomatic and perpetuating causes of methodological instability.

IV. DEBIASING STATUTORY INTERPRETATION

This Part turns to present the second half of the positive psychological theory, by showing how staging breaks this cycle of instability by debiasing cognitive coherence in statutory interpretation decision making. Section A surveys debiasing mechanisms studied and proposed by law and behavioral economics scholars to counteract coherence-based reasoning in other areas.

---

205. *See* MARTIN H. REDISH ET AL., FEDERAL COURTS: CASES, COMMENTS AND QUESTIONS 974-78 (7th ed. 2012) (presenting the law of implied statutory causes of action as requiring a demonstration of legislative intent).

206. *See* Foster, *supra* note 2, at 1877-84.

207. *See* Israel, *supra* note 198, at 213-14, 219-16.

208. *See id.* at 213-14 (noting that "the Supreme Court in fact has directly overruled prior decisions on no more than a hundred occasions in over a century and a half of judicial review" through 1963).

209. *Id*. at 218; *see also id.* at 219-26 (reviewing the techniques that the Court has used to minimize this danger in overruling decisions, including changed conditions, the lessons of experience, and citing inconsistent later cases).

210. *See id.* at 219-26.

211. *See* Israel, *supra* note 198, at 223-26.

Ohio Northern University Law Review, Vol. 39 [2023], Iss. 1, Art. 5

Section B shows how staging's affirmative function operates in an analogous way to these mechanisms; it debiases statutory interpretation decision making by reframing the interpretive task to foster equivocation. Section C addresses counterarguments.

A. Debiasing Coherence-Based Reasoning

Coherence-based reasoning can be mitigated and rationality bolstered by getting decision makers to consider the weaknesses in their own positions and the merits of the opposition.[212] Simon conducted a version of the "coherence shift" experiment described above in which some participants were given an extra instruction "imploring them to 'be unbiased,'" others to "'take some time to seriously consider the possibility that the opposite side has a better case,'" and a third group given no extra instruction.[213] While the "'be unbiased'" instruction had little effect, the "consider-the-opposite" instruction reduced the effect of coherence shifts by about fifty percent.[214] A study of attorney overconfidence found that this bias could be mitigated by asking lawyers to consider "the weaknesses in their [side] or reasons that the judge might rule against them . . . ."[215]

Building on this research, scholars have prescribed similar "debiasing" mechanisms to mitigate coherence-based reasoning in other legal areas.[216] For instance, finding that coherence-based reasoning leads criminal juries to assess evidence in a way that makes them more likely to find guilt beyond a reasonable doubt, Simon proposed a "debiasing" moderating jury instruction, modeled on the successful experimental version above: "'please take some time to seriously consider the possibility that the opposite side has a better case.'"[217] Such an instruction might reframe the jury's decision making, pull jurors away from overconfident guilty verdicts, and lead to verdicts that are both more rational and more fair.[218]

Similarly, Professor Dan Kahan has advocated the use of deliberative devices in the Supreme Court designed to get the Justices to "reveal latent

---

212. *See* Linda Babcock et al., *Creating Convergence: Debiasing Biased Litigants*, 22 LAW AND SOC. INQUIRY 913, 920-21 (1997); Simon, *A Third View*, *supra* note 10, at 543-44.

213. *See supra* note 132 and accompanying text; *see also* Simon, *A Third View*, *supra* note 10, at 543-44.

214. Simon, *A Third View*, *supra* note 10, at 543-44 (noting that "[m]ore studies are required to gain a better sense of the effects of the debiasing intervention.").

215. Babcock et al., *supra* note 212, at 920-21; *see also* Jolls & Sunstein, *supra* note 82, at 201.

216. *See* Babcock et al., supra note 212, at 920-21 (debiasing biased litigants); Simon, *A Third View*, *supra* note 10, at 571 (jury deliberations).

217. Simon, *A Third View*, *supra* note 10, at 570-71.

218. *Id.*

equivocation."[219] Devices such as "[o]bliging every participant to identify . . . the strongest counterargument [to his position]" would mitigate the effect of coherence-based reasoning.[220] In his 2011 *Harvard Law Review* foreword, Kahan recommended that Supreme Court Justices cultivate "judicial idioms of aporia"—"rhetorical device[s] involving the professed expression of uncertainty or doubt" whose "distinctive feature is acknowledgment of complexity."[221] Equivocation in judicial opinions would "reduce the culturally polarizing effects of opinions in constitutional law."[222]

Each of these examples aims to address the costs imposed by coherence-based reasoning by mitigating the bias itself—pulling decision makers away from the poles and toward the middle through imposed equivocation.[223] As the next section shows, staging has played a similar role in combating coherence bias in statutory interpretation.

B. Staging as a Debiasing Mechanism

The staging methodology that has emerged as a dominant regime in several states, and which has apparently begun to emerge as a consensus method across many more states, possesses the same key feature as the debiasing mechanisms studied and recommended by scholars. Staging frames the analysis of statutory interpretation evidence as a choice between three, instead of two, options: "for plaintiff," "for defendant" or "ambiguous." Unlike the unguided federal system, where coherence-based reasoning draws decision makers to evaluate evidence in light of either opposing possible decision, staging expressly invites decision makers to find that E_X supports neither side in the case.[224] By supplying of the possibility of ambiguity, staging encourages judicial equivocation and thereby frames statutory interpretation decision making to reduce the pull of coherence bias toward either pole.

To be clear: a staging system is not a logical prerequisite for a judge to find that ambiguous evidence is ambiguous. A rational judge would find this evidence to be ambiguous regardless of the decisional context. Rather, like the proposed debiasing mechanisms on other legal areas surveyed above, staging works sub-rationally through the framing effect, whereby a

219. Kahan, *Neutral Principles*, *supra* note 104, at 61.
220. *Id.* (citing David K. Sherman et al., *Naïve Realism and Affirmative Action: Adversaries are More Similar than They Think*, 25 BASIC & APPLIED SOC. PSYCHOL. 275, 287 (2003)).
221. *Id.* at 62.
222. *Id.* at 64.
223. *See id.* at 61; Simon, *A Third View*, *supra* note 10, at 570-71.
224. *See supra* Part III.A.

superficial change can have systematic and important effects on how people make decisions. The staging system, in this respect, operates like the change in Tversky and Kahneman's "Asian Disease Problem" from options A & B to options C & D: a change without any rational difference, but with a significant practical one.[225] By overtly sanctioning findings of ambiguity, staging restrains the polarizing effects of cognitive coherence.

By doing so, staging also cuts off the cycle toward methodological instability.[226] Under a staging regime, judges will confront fewer previous skewed decisions and will have fewer occasions to adopt strategies of obliviousness or diplomacy. By blocking the proliferation of mutually conflicting lines of reasoning that are the inevitable offspring of a regime encumbered by coherence-biased, statutory-interpretation decisions, staging fosters methodological stability.

Under a non-staging regime, I have argued,[227] the two possible results a judge might reach in a case exert polarizing forces over the evidence she evaluates. This coherence effect skews her attribution of value in the resulting opinion. In a staging regime, the third possibility—that evidence is "ambiguous"—promotes a kind of judicial equivocation. Like Simon's proposed moderating jury instruction, or Kahan's suggestion of judicial expressions of aporia, staging invites judges to pause and consider the weakness in the support for their own arguments before proceeding. In this way, the framing effect of the third possibility, "ambiguity," counteracts this polarization force, and pulls the judge back closer to a rational valuation of the evidence.

This account of staging's effects on individual decisions is distinct from Gluck's Vermeulian explanation.[228] Gluck emphasized staging's negative choice-constraining function, suggesting that its proliferation hinged on its success at minimizing judicial decision making costs.[229] In contrast, the account offered here focuses on staging's affirmative function, suggesting that staging restructures statutory interpretation in a way that mitigates the pervasive bias of coherence-based reasoning.

---

225. Actually, unlike the Asian Disease problem, the staging system *does* make a rational difference by subjugating legislative history to stage 2 of the analysis. The point I make here is restricted to the narrower, hidden feature of the staging system; namely, the way it supplements the decisional menu with the possibility that a piece of evidence is ambiguous. A rational judge would be no more likely to find a given piece of evidence ambiguous in a staging system or a non-staging system, just a rational decider would not be swayed by the different framings presented in the Asian Disease problem.

226. *See supra* Part III.B.

227. *See supra* Part III.A.

228. *See supra* Part I.B.2.

229. *See* Gluck, *supra* note 4, at 1857-58.

Platt: Debiasing Statutory Interpretation

As debiased cases accumulate, staging's benefits counteract the effects of spiraling instability. Under a staging regime, statutory interpretation decisions are less burdened by coherence-based reasoning, and thus also less likely to include over-inflated arguments. Courts will have fewer occasions on which they are forced to adopt one of the strategies of obliviousness or diplomacy to deal with contrarily reasoned prior opinions. By debiasing statutory interpretation, staging puts a partial brake on the self-perpetuating momentum of methodological instability and facilitates uniformity.

C. Counterarguments

The positive psychological theory provides a new way to understand two phenomena that have attracted significant attention in recent statutory interpretation scholarship—methodological stare decisis and the rise of staging—as closely linked. This section turns to address counterarguments.

1. Oh Yeah? Prove It!

Critics may complain that the theory is limited by its abstraction. Neither prong of the theory musters the kind of specific and direct empirical support that, for example, forms the core of Gluck's Article.[230] Part III argues that coherence-bias skews the evaluation of evidence in federal statutory interpretation cases inferentially by pointing to: (1) the background fact of methodological dissensus in the un-staged federal system, as contrasted with the apparent correlation of methodological *stare decisis* and the rise of staging in state systems chronicled by Gluck;[231] (2) psychological findings that coherence bias is pervasive even among judges;[232] (3) several key features of statutory interpretation in the federal system that make it an area likely to be particularly susceptible to the bias;[233] and (4) a catalogue of the types of strategies judges adopt to deal with inconsistencies between present and prior reasoning that, over time, transform individual biased opinions into a significant obstacle to methodological consensus.[234] It does not point to specific, direct evidence showing coherence bias in action in statutory interpretation cases.[235] Similarly, Part IV argues that staging facilitates methodological *stare decisis* by debiasing statutory interpretation inferentially by pointing to: (1) (again) the background fact of

230. *See generally* Gluck, *supra* note 4.
231. *See supra* Part I.
232. *See supra* Part II.
233. *See supra* Part III.A.
234. *See supra* Part III.B.
235. *See supra* Part III.

Published by DigitalCommons@ONU, 2023

methodological dissensus in the unstaged federal system as contrasted with the apparent correlation of methodological *stare decisis* and the rise of staging in state systems chronicled by Gluck;[236] (2) the first half of the theory articulated in part III;[237] (3) psychological findings that coherence bias can be effectively mitigated by equivocation-fostering mechanisms;[238] (4) an analogy between these mechanisms and staging's supplying of the possibility of ambiguity (i.e., staging's "affirmative function").[239] Part IV does not point to direct empirical or specific anecdotal evidence showing that staging debiased judges engaged in statutory interpretation.

But the lack of direct specific evidence should not be taken as a knock-out blow.[240] In this context, specific and direct evidence may be fundamentally elusive. While there are undoubtedly examples of statutory interpretation opinions attributing questionable or even downright indefensible value to discrete evidence, such evidence would be unconvincing support for the claim that coherence bias was driving a decision. Behind any apparent departure from rationality lurk innumerable complex factors. Disaggregating the effects of a single-form of bias (e.g., coherence-based reasoning) or a single framing device (e.g., staging) from all of the other inputs in the context of a single specific statutory interpretation decision might be accomplished by a well-designed psychological study, but not from any perusal of the law reporters. (Indeed, it is one hope of this Article to inspire such an experiment.)

Finally, the skepticism reflected in these critics' demand for specific empirical support seems misplaced. The theory is not an attack or a call to reform such as might justify a skeptical demand for robust proof, but a theory of reconciliation—a way to understand the law as already reflecting an intelligent (but heretofore unrecognized) adaptation to reality. The Article portrays statutory interpretation as an area where the law is actively engaged in adaptation to respond to cognitive biases built into judging. The theory aspires to show the ways "[t]he law has adapted well to the fallibility

236. *See supra* Part I.
237. *See supra* Part III.A.
238. *See supra* notes 219-23 and accompanying text.
239. *See supra* Part IV.B.
240. To borrow a metaphor from pragmatist philosopher Charles Sanders Peirce, this Article advances its theory through reasoning that resembles a "cable whose fibers may be ever so slender, provided they are sufficiently numerous and intimately connected," rather than a chain "which is no stronger than its weakest link." 5 CHARLES SANDERS PEIRCE, *Some Consequences of Four Incapacities*, *reprinted in* THE COLLECTED PAPERS OF CHARLES SANDERS PEIRCE: PRAGMATISM AND PRAGMATICISM 156, 157 (1974).

of human judgment."[241] Given the modest nature of the project, a heightened "burden of proof" seems unjustified.

2. Oregon as Counterexample?

Critics might point to the fact that in Oregon, after the *PGE* case imposed a rigorous staging system for statutory interpretation, there were fewer citations to legislative history and conclude that under a staging regime judges were reluctant to find textual evidence ambiguous.[242] And this, critics might suggest, refutes this Article's claim about staging's affirmative function as making ambiguity a more attractive choice.

But this criticism is misdirected and based on a misunderstanding of the theory articulated here. The argument is not that staging will produce more findings of ambiguity, but that by supplying the possibility of ambiguity, it reframes the decision making process and promotes rationality and consistency. There is nothing in the theory that suggests staging should lead to an increase in actual findings of ambiguity.

3. The Backwards Induction Problem

Finally, critics might propose that judges frequently fail to obey the rules of a rigorous staging regime. For instance, judges might 'peak' into stage-two legislative history evidence, which may influence their decision even where they purport to resolve the case only on stage-one textualist evidence. Moreover, stage-two evidence will almost always be presented in the same brief as textualist evidence, which means judges will review this evidence before making a decision about stage-one evidence.

This criticism is valid but marginal. That staging is permeable does not strip it of all psychological power as a framing device. Even if stage-two evidence frequently exerted a stealth effect on assessments of stage-one evidence, this would not necessarily diminish the effect of staging's affirmative function.

V. IMPLICATIONS

This Article's primarily positive agenda allows it to avoid many of the normative pitfalls that sometimes overshadow behavioral law and economics' paternalistic policy prescriptions.[243] It is unlike much

241. *See, e.g.*, Rachlinski, *supra* note 16, at 575; *see also* Jolls & Sunstein, *supra* note 82, at 234.

242. *See* Gluck, supra note 4, at 1775-85.

243. Jolls and Sunstein argue that strategies which aim to "debias through law" preserve a greater degree of freedom of choice for individuals than those which target the effects of the bias, and thus raise fewer normative concerns. *See* Jolls & Sunstein, *supra* note 82, at 202. Still, even these strategies are not without libertarian critics. For a general and impassioned critique of the "substantial threat to indi-

Ohio Northern University Law Review, Vol. 39 [2023], Iss. 1, Art. 5

behavioral law and economics scholarship, where authors describe a bias, trace the costs it imposes, and then prescribe a legal or policy solution—either curtailing choice,[244] or debiasing through law (i.e., mitigating the incidence of the bias itself).[245] Yet the Article is not without normative implications. Specifically, it intersects with three questions about methodological uniformity in statutory interpretation: (1) what kind of thing is statutory interpretation; (2) which interpretive method maximizes stability and predictability; and (3) are stability and predictability worthy goals?

A. What Is Statutory Interpretation Methodology?

Is statutory interpretation methodology "law" or something else? In the *Zuni* case summarized above, the Justices not only disagree on the proper methodology, but also as to the nature of the subject of the dispute itself.[246] Justice Kennedy implies that it is merely a question of style.[247] Justice Stevens insists on the judicial prerogative of unimpeded interpretive flexibility.[248] Justice Scalia insists on the opposite.[249] Gluck concludes: "The U.S. Supreme Court generally does not treat its statements about statutory interpretation methodology as law."[250]

The positive psychological theory of staging provided in this Article follows Gluck by portraying statutory interpretation as a critical and evolving site for promoting coordination and planning in the legal system.[251] Staging, here, is a kind of evolutionary adaptation, which combats judicial cognitive limitations and thereby enables methodological stability.[252] Assuming that methodological stability also fosters predictability in judicial outcomes, then staging, by making decisions more determinate, enhances planning and coordination.

---

vidual liberty" posed by all of law and behavioral economics see Joshua Wright & Douglas Ginsburg, *Free to Err?: Behavioral Law and Economics and its Implications for Liberty*, LIBR. OF LAW AND LIBERTY (Feb. 16, 2012), *available at* http://libertylawsite.org/liberty-forum/free-to-err-behavioral-law-and-economics-and-its-implications-for-liberty.

244. "Boundedly rational behavior might be, and often is, taken to justify a strategy of insulation, attempting to protect legal outcomes from people's bounded rationality." Jolls & Sunstein, *supra* note 82, at 200 (characterizing law and behavioral economics literature in this vein, and collecting examples).

245. *Id.* ("[L]egal policy may respond best to problems of bounded rationality not by insulating legal outcomes from its effects, but instead by operating directly on the boundedly rational behavior and attempting to help people either to reduce or to eliminate it.").

246. *See Zuni*, 550 U.S. at 81-83; *see also supra* Part I.A.

247. *See Zuni*, 550 U.S. at 107 (Kennedy, J., concurring).

248. *See id.* at 104-07 (Stevens, J., concurring).

249. *See id.* at 108 (Scalia, J., dissenting).

250. *See* Abbe R. Gluck, *Intersystemic Statutory Interpretation: Methodology as 'Law' and the Erie Doctrine*, 120 YALE L.J. 1898, 1902 (2011).

251. *See* Gluck, *supra* note 4, at 1856.

252. *See supra* notes 12-20 and accompanying text.

https://digitalcommons.onu.edu/onu_law_review/vol39/iss1/5

Platt: Debiasing Statutory Interpretation

This debate over the nature of statutory interpretation has concrete implications—triggered when federal courts apply state law and vice versa.[253] In those cases, should federal courts be required, under *Erie v. Thompkins*,[254] to apply corresponding rules of statutory interpretation?[255] Most federal courts have answered "no"—more precisely, they have not recognized the question—applying their own methods of interpretation, even in states that have adopted determinate methodologies.[256] Gluck criticizes this, insisting that statutory interpretation methodology be accorded the same respect as other methodological principles, such as rules of evidence in contract law cases.[257]

This Article's theory might inform this debate insofar as it shows a new way in which statutory interpretation methodology can be a valuable site for enhancing consistency. Where states have adopted particular interpretive schemes that promotes this value, federal courts might be well-advised to respect the state's judgment and apply the scheme, where relevant, in *Erie* cases.[258]

B. Which Method Promotes Stability And Predictability?

Textualists often appeal to the values of stability and predictability.[259] This Article's account of staging's debiasing effect on statutory interpretation suggests a new route to criticize textualists on this front: that its claims to enhancing stability and predictability are, in fact, predicated on faulty assumptions about the psychology of judicial decision making.[260] For boundedly rational judges (i.e., all judges), staging possesses predictability-promoting features that textualism lacks.

The textualist argument of superior predictability takes on a variety of forms. The theory's core impulse and structure seem directed at facilitating stability.[261] Simply by informing all parties that the interpretation of statutes will be constrained to the meaning of text, textualism purports to

253. Gluck, *Intersystemic*, *supra* note 250, at 1902.
254. 304 U.S. 64 (1938).
255. *See* Gluck, *Intersystemic*, *supra* note 250, at 1902-04.
256. *See id.*
257. *See id.* at 1898, 1902-05.
258. More abstractly, some jurisprudes have identified planning and coordination—values arguably promoted by staging methodology—as core values of "law." *See generally* SCOTT J. SHAPIRO, LEGALITY (2011); Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359, 1359-62 (1997). *But see* Frederick Schauer, *The Best Laid Plans*, 120 YALE L.J. 586, 586-601 (2011) (reviewing SCOTT J. SHAPIRO, *supra* note 401 LEGALITY (2011)); Gluck, *supra* note 4, at 1758-60.
259. *See* Eskridge, Jr., *No Frills Textualism*, *supra* note 79, at 2041-45.
260. *See id.*
261. *See id.* at 2041-44.

enhance stability in the legal system.[262] Unlike purposivism, which hinges results on a particular judge's 'best guess' about the 'reasonable purpose' of the statute—a highly indeterminate venture, according to critics—textualism does not cast litigants and parties into the arbitrary and capricious whims of judicial imagination.[263] Instead, textualists propose that judges be restricted to the cold, hard, and unbending reality of statutory text.[264]

Moreover, textualists explain their rejection of legislative history in terms of enhancing stability and predictability.[265] When Justice Scalia argues that legislative history is an inherently unreliable and easily game-able source, and that judges who rely on it can easily find support for their preferred theories, he is also suggesting that by excluding legislative history from the judicial analysis, textualism achieves a victory for stability and predictability in the legal system.[266] Instead of looking out over the crowd to "pick out friends," judges will base their decisions on more determinate and predictable sources.[267] Indeed, textualism seems driven by a desire to constrain judges.[268] Textualists reject the common-law model of creative judicial interpretation.[269] And, as Justice Scalia reminds us, in a democracy, judgments about what the law should be are supposed to be made by legislators, not judges.[270] Textualism's rhetorical appeals to anxieties about unbounded judicial power are bound up with its methodological focus on stability and predictability.[271]

This Article introduces a new way to challenge textualism's emphasis on predictability and stability by suggesting that these claims depend on an

262. SCALIA, A MATTER OF INTERPRETATION, *supra* note 26, at 25.

263. *See id.* at 31-33.

264. *See* Gluck, *supra* note 4, at 1762-63.

265. *See* Eskridge, Jr., *No Frills Textualism*, *supra* note 79, at 2041-45.

266. SCALIA, A MATTER OF INTERPRETATION, *supra* note 26, at 31-33 (criticizing legislative history as fabricated for judicial consumption, not read, much less voted on by all the members of Congress, and thus unreliable as an insight into legislative intent); *see also id.* at 18 (arguing that judges searching for legislative intent usually end up finding their own preferences baked into the statute because "your best shot at figuring out what the legislature meant is to ask yourself what a wise and intelligent person *should* have meant; and that will surely bring you to the conclusion that the law means what you think it *ought* to mean – which is precisely how judges decide things under common law.").

267. *Id.* at 59 ("It is simply not compatible with democratic theory that laws mean whatever they ought to mean, and that unelected judges decide what that is.").

268. *See id.* at 22 (a theory of interpretation that demands that a law that must not be used to "mean whatever [it] ought to mean" cannot be said to free judges of constraint).

269. *See id.* at 9-14 (criticizing the common law method of judging as judicial lawmaking and anti-democratic).

270. SCALIA, A MATTER OF INTERPRETATION, *supra* note 26, at 9-14; *see also id.* at 59 ("It is simply not compatible with democratic theory that laws mean whatever they ought to mean, and that unelected judges decide what that is.").

271. *See id*. at 59.

inaccurate view of how judges make decisions. That is, textualism may be the most conducive methodology for predictability in a world of fully rational judges, but that is not the world in which these methods are implemented. For a world where judges are boundedly rational, this Article shows that staging possesses stability-enhancing qualities that textualism lacks.

A textualist may respond by disclaiming the relevance of psychological theories of judging for their theoretical enterprise. Such "second-best" reasoning is not the domain of theoreticians, whose concern is exclusively in articulating a "first-best" theory of interpretation. On this view, textualists should be free to theorize the superiority of their theory without taking account of any of the numerous real-world constraints that might limit the theory's effectiveness in practice—institutional, resource, or psychological.

But, this response fails to convince. Textualists themselves insisted upon pragmatically-based evaluation of their method through their repeated grounding of their theory—expressly and implicitly—in claims about stability and predictability. Textualism's appeal to these ends showcases the supposed pragmatic benefits of the theory. Having introduced this metric, textualists might be forced to abandon, or at least temper, the rationale of stability and predictability.[272]

Textualists also might adapt their own method to incorporate the advantages traced in this Article. That is, it is theoretically possible to have a staging method that is "purely" textualist. For instance, stage one: the plain meaning and dictionaries; stage two: the whole act; stage three: related statutes, common-law meanings, and public law history; stage four: substantive canons, etc. Such a method might capture the debiasing mechanisms of staging without yielding any ground to purposivists on legislative history.[273]

272. This "beat them at their own game" argument parallels an argument hinted at by Gluck with respect to the reduction of citations to legislative history. Gluck, *supra* note 4, at 1835-36. Gluck contrasts the Oregon Supreme Court, which since adopting the staging model has witnessed a dramatic decline in the use of legislative history, with the Supreme Court, where despite the 'pure' textualists' best efforts, legislative history continues to be cited in forty-two percent of statutory cases. *See id.*

273. That such a regime has not proliferated brings into focus the limits around staging's debiasing function as an *incomplete* explanation. Gluck, *supra* note 4, at 1758. As Gluck emphasizes, the staging mechanisms that have succeeded conform to "a *compromise* version of textualism." *Id.* The consensus method "offer[s] a middle way in the methodological wars," and is a "sufficiently satisfying theoretical compromise that . . . also enhance[s] coordination and stability in a complex and (for lower courts) overworked legal system." *Id.* at 1856.

C. Are Stability And Predictability Worthy Goals?

Overtly or otherwise, many scholars of statutory interpretation treat stability and predictability as a desideratum for statutory interpretation. Sydney Foster claimed to find "widespread consensus that increased consistency would be superior to the status quo."[274] Indeed, it seems as though much of the scholarly literature on statutory interpretation in the last decade has been directed at finding novel methods toward reversing Hart and Sacks' "hard truth" that courts have "no intelligible, generally accepted, and consistently applied theory."[275] As two scholars noted, finding new paths toward methodological stability is "all the rage these days."[276]

For instance, Nicholas Rosenkranz proposed that Congress should enhance predictability by legislating rules of interpretation.[277] Sydney Foster argued that courts "can bring more consistency and predictability to statutory interpretation methodology by giving statutory interpretation doctrine stare decisis effect."[278] Adrian Vermeule's stripped-down version of textualism is motivated, in part, by a desire to enhance consistency in decision making.[279] And, though Gluck does not advance any methodological fixes, her article tracing the emergence of methodological *stare decisis* in the states treats stability and predictability as praiseworthy and important goals.[280]

Not everyone agrees that stability and predictability are unassailably desideratum for statutory interpretation methodology.[281] Ethan Leib and Michael Serota claim that Gluck and her predictability-focused colleagues systematically ignore the advantages of interpretive dissensus.[282] They defend dissensus for making statutory interpretation decisions more

---

274. Foster, *supra* note 2, at 1863.

275. HART & SACKS, *supra* note 3, at 1169; *see* Foster, *supra* note 2, at 1863; Ethan J. Leib & Michael Serota, *The Costs of Consensus in Statutory Construction*, 120 YALE L.J. ONLINE 47, 47 (2010). *See generally* Gluck, *supra* note 4.

276. Leib & Serota, *supra* note 275, at 47.

277. Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085, 2151-53 (2002).

278. Foster, *supra* note 2, at 1867; *see also id.* at 1884-1910 (arguing for methodological *stare decisis*).

279. VERMEULE, JUDGING UNDER UNCERTAINTY, *supra* note 8, at 118-19.

280. *See* Gluck, *supra* note 4, at 1848 ("A premise of this Article has been that settling on a consistent approach is a worthy goal for statutory interpreters."); *see also* Leib & Serota, *supra* note 275, at 47 (noting that Gluck is "essentially" committed to the view that "interpretive consensus in statutory interpretation is an important value . . . .").

281. *See, e.g.*, William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 353, 364 (1990) (supporting a looser model that openly enables judges to engage in a "to and fro movement among the considerations"); *see also* Gluck, *supra* note 4, at 1767 & n.61.

282. Leib & Serota, *supra* note 275, at 47.

deliberative.[283] "Dissensus creates a system of open deliberation" which "makes each judge work hard to find compromises, render the strongest argument utilizing all credible sources available, and take seriously all types of arguments to achieve the best result within the range of permissible interpretations."[284] Uniformity would foreclose this process. The "quick and easy" decisions in a methodologically predictable system would "exact their own costs on judicial legitimacy—and society more broadly—because difficult statutory questions often require the consideration of a variety of circumstances for which interpretive uniformity cannot account."[285]

Leib and Serota also suggest that dissensus enables judges "to tailor interpretive regimes to the variety of statutes . . . ."[286] Under the chaotic and open-ended federal system, for instance, judges can mix and match approaches in a way that corresponds with the diversity of legislative products they are interpreting. Under a methodologically uniform system, such diversity would be foreclosed.

This Article introduces a new element to this debate over the desirability of methodological stability. By suggesting that methodological instability in the federal courts is related to coherence-based reasoning, this Article, to a limited extent, identifies methodological uniformity and consistency with rationality. Insofar as rationality is an end in itself in judicial decision making, this identification provides some (albeit limited) alternative support for advocates of stability as a desideratum.

This additional support is quite modest, because rationality in judicial decision making is not necessarily an end in itself.[287] Indeed one criticism leveled at law and behavioral economics is that it may too readily identify departures from rationality as constituting sufficient justification for legal intervention.[288] As a general principle, this is not justifiable. The fact that certain types of decisions (e.g., decisions about saving for retirement, or donating to charity) may be systematically distorted does not provide sufficient justification for intervening in that arena. Even aside from the potential cost of the intervention itself, it is perfectly possible that systematically-biased decisions produce systematically-better results. A decision that is cognitively biased or which constitutes a departure from rationality is not necessarily bad.

283. *Id.*
284. *Id.* at 49.
285. *Id.* at 50.
286. *Id.* at 53.
287. Jolls & Sunstein, *supra* note 82, at 200.
288. "Boundedly rational behavior might be, and often is, taken to justify a strategy of insulation, attempting to protect legal outcomes from people's bounded rationality." *Id.* (characterizing law and behavioral economics literature in this vein, and collecting examples).

But, without making a facile identification between 'biased' results and 'bad' ones, there are nevertheless certain contexts where rationality may be a normatively desirable feature, and thus worthy of protection in its own right. Systematic departures from rationality may make us justifiably wary—even aside from an evaluation of the costs or benefits that accrue. Judicial decision making seems to be such a context. Unlike an individual's personal financial planning decisions, judicial decision making is a public service. The general public has a political and social expectation that the judicial system will provide legal decision making services, which makes it categorically distinct from an individual's financial decisions.[289] More specifically, the commitment to rationality in the sense of consistency (i.e., applying the same rules in the same manner to all parties) is at the core of the political justification of judicial function.[290] While departures from rationality in the individual decision making context are only problematic if they impose costs on that individual or on society at large, departures from rationality in the judicial decision making context are cause for concern in their own right.[291] Insofar as rationality correlates with stability (as this Article has proposed), then stability is a worthy goal.[292]

This qualified support for stability as a worthy end is further (moderately) bolstered by the fact that these debiasing mechanisms (in the form of staging) were self-imposed by state court systems.[293] This self-imposition suggests that for these actors stability may have been an important goal. Though attributing motive and purpose to institutions is difficult, here the act of methodological self-restriction taken by several state court systems suggests some support for the goal of methodological stability by those systems. To the extent staging mechanisms are widespread, this may suggest a broad-based support for a move toward methodological consistency among the majority of state courts in the nation. While this takes nothing away from the claims of critics of methodological stability, it suggests a consensus view in favor of stability not just among scholars, but also among state court systems in favor of some degree of increased stability.

By linking methodological instability with systematic departures from rationality (occasioned by coherence-bias), this Article adds some weight to the arguments in favor of methodological stability. Insofar as rational

289. *See generally* Simon, *A Third View*, supra note 10.
290. *See generally* Foster, *supra* note 2 (discussing *stare decisis* and consistency).
291. *See supra* Part II.A.
292. *See* Simon, *A Third View*, *supra* note 10, at 543-44.
293. *See* Gluck, *supra* note 4, at 1758; *see supra* notes 57-66 and accompanying text.

judicial decision making is itself an important value, methodological stability (via staging debiasing) is a sound value as well.

CONCLUSION

Much recent statutory interpretation scholarship has been concerned with two phenomena: methodological *stare decisis* and the rise of staging methodology. This Article has proposed a novel positive psychological theory that links these two phenomena based on the interaction of the affirmative function of staging with the psychology of complex decision making. Federal statutory interpretation decisions are plagued by coherence-based reasoning, which led to attribution of inappropriate weight to sub-arguments in judicial opinions. Over time, these inconsistently reasoned opinions accrued in such a way as to constitute an independent and severe obstruction to methodological consensus. Staging reframes statutory interpretation by supplying the possibility that judges find certain evidence ambiguous. Staging helps clear the way for methodological consensus by debiasing statutory interpretation.

The relationship between textualism and purposivism may be similar to that of neoclassical microeconomics and other behavioral social sciences in the mid-twentieth century. Like criticisms of the impoverished neoclassical homo economicus model of human decision making, scholars have made devastating normative and descriptive criticisms against textualism—as mechanistic, unrealistic, constitutionally unsound, and as a tool primarily serving to mask the exercise of power. But, textualism retained its popularity because the technique critics would substitute cannot stand up to the expectations shaped by textualists for what kind of tractability a method of interpretation must have. There is something almost quaint about purposivism's open reliance on judges to attribute a reasonable purpose to statutes as a method of interpretation. The faith in the wisdom of judges that is built into purpovism's techniques is anathema in the age of textualism's focused pursuit of judicial constraint. Purposivism's techniques are, of course, valid methods and may provide a more accurate accounting of what judges actually do. Yet they are out of sync with contemporary demands—fueled by textualism itself—for an aura of determinacy and tractability around the exercise of judicial power.

Before Tversky and Kahneman, proposed alternatives to the homo economicus model were similarly doomed to fail because they were out-of-step with the demands for determinacy and tractability that were formed and conditioned by the rise of the targeted model itself. Ultimately, non-economistic theories of human behavior have always presented a more accurate view of individual human decision making (it would be hard not

Ohio Northern University Law Review, Vol. 39 [2023], Iss. 1, Art. 5

to!). But because these methods were not methodologically tractable, they could not compete.

It seems likely that Tversky and Kahneman's work in the 1970s was path-breaking not because they were the first to discover that human beings were not behaving in line with the homo economicus model but because their studies uncovered systematic biases in human decision making which could be incorporated into the determinate and tractable models. Once Tversky and Kahneman began to open the door for this kind of research, others followed, and began the still-unfolding process of incorporating what many social scientists (including economists) have long known—that decision making was often irrational and complicated—into economic models.

Perhaps staging does for statutory interpretation what systematic biases did for economics.

https://digitalcommons.onu.edu/onu_law_review/vol39/iss1/5