

FORMULAICALLY DESCRIBING 21ST CENTURY SUPREME COURT TAX JURISPRUDENCE

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I. INTRODUCTION

The Supreme Court's nine federal tax cases since 2000¹ suggest the Court assigns degrees of emphasis to legal justifications in accordance with their perceived Constitutional legitimacy; it discounts those justifications in degrees relating to their relevance to a particular matter; and, it estimates the strength with which competing deliberative choices are consistent with them. In sum, the Court justifies its decisions by trying to convince the reader that it chooses the construction *most* consistent with *most* of our *most* important legal and social principles. In this article, I sketch a formula to represent the Court's justificatory process as represented by these 21st century cases.

The cases suggest that statutory text, intent, purpose, and modern dynamics comprise the Court's legal justifications. The Court assigns the highest degree of emphasis to text. Intent and purpose receive significant emphasis, but something less than text. The Court barely recognizes dynamic consequences, emphasizing them the least. Other considerations such as a litigant's race, gender, socio-economic status, etc. are not mentioned giving the impression that they are not emphasized at all.² Whether or not these 'illegitimate' factors are indeed

1. Included are all cases arising under Title 26 of the United States Code, i.e., the Internal Revenue Code. *Ballard v. Comm'r*, 544 U.S. 40 (2005); *Comm'r v. Banks*, 543 U.S. 426 (2005); *United States v. Galletti*, 541 U.S. 114 (2004); *Boeing Co. v. United States*, 537 U.S. 437 (2003); *United States v. Fior D'Italia, Inc.*, 536 U.S. 238 (2002); *United States v. Craft*, 535 U.S. 274 (2002); *United States v. United Dominion Indus., Inc.*, 532 U.S. 822 (2001); *United States v. Cleveland Indians Baseball Co.*, 532 U.S. 200 (2001); *Gitlitz v. Comm'r*, 531 U.S. 206 (2001). In *Grable & Sons Metal Prods. v. Darue Eng'g & Mfg.*, 545 U.S. 308 (2005), the central issue concerns the Internal Revenue Code, but the sole question before the Court is whether the case qualified for federal jurisdiction pursuant to 28 U.S.C. 1331.

2. While a litigant's identity is considered irrelevant, the effect a decision has on specific identity groups is not necessarily out of order, though it is rare and hardly ever persuasive. For example, the *Banks* case implicated principles relating to anti-subordination of disempowered groups. Laura Sager and Stephen Cohen assert that applying the assignment of income doctrine to litigants involved in civil rights suits will seriously discourage such suits. Laura Sager and Stephen Cohen, *How the Income Tax Undermines Civil Rights Law*, 73 S. CAL. L. REV. 1075 (2000). The *Banks* court ignored this idea, perhaps because the American Jobs Creation Act purported to resolve the issue.

considered, practitioners especially must operate within the confines of the prevailing norm. So, the deliberative formula asserted in this paper leaves them out.

The end product synthesizes the Court's deliberative process by representing classes of legal justifications as distinct functions and the justifications themselves as factors within those functions.³ In other words, it ranks what the Court feels is most important between text, intent, purpose, and modern dynamics.⁴ From here, we can estimate degrees of inter-function emphasis. The nine tax cases decided by the Court since 2000 indicate that text is more important than intent, intent is more important than purpose, and purpose more important than modern dynamics.

Intra-function emphasis is just as important as inter-function emphasis, maybe more so. Determining the proper level of emphasis inside of a function is the key to being more than just a textualist or intentionalist or purposivist or dynamist, but a good one. For example, since a textualist may consider both plain meaning and statutory context, a formula representing textualism should identify which among plain meaning and statutory context receives the most emphasis.⁵ Similarly, because a word or phrase may have concretized meaning within one interpretive community does not mean it is plain to everyone. Thus, the plain meaning textualist must determine whether a meaning is plain with respect to the general public versus the business community versus tax lawyers, etc. The plain meaning function, then, should assign degrees of emphasis to each interpretative community properly considered.⁶

Indicia of intent can be classified and assigned an emphasis coefficient. Legislative history, judicial precedents,

American Jobs Creation Act of 2004, H.R. 4520, Pub. L. No. 108-357, 118 Stat. 1418 (codified as amended in scattered sections of 26 U.S.C. and elsewhere).

3. The general formula of adding together considerations might be expressed as:

$$F[\text{deliberation}] = f(\text{ec}_t)(\text{text}) + f(\text{ec}_i)(\text{intent}) + f(\text{ec}_p)(\text{purpose}) + f(\text{ec}_d)(\text{dynamism}).$$

4. The Court emphasizes text most, intent and purpose next, and modern dynamics least, thus:

$$EC_t > EC_i, EC_t > EC_p, \text{ and } EC_p > EC_d.$$

5. That is, plain meaning and context are two subfunctions within the broader function of text, thus:

$$F[\text{text}] = f[\text{plain meaning, context}] = f(\text{ec}_{\text{pm}}(\text{plain meaning})), \\ f(\text{ec}_c(\text{context})), EC_{\text{pm}} \Leftrightarrow EC_c.$$

6. That is, different interpretive communities are represented by factors within the plain meaning subfunction, thus:

$$f[\text{plain meaning}] = f(\text{ec}) (\text{general public}), f(\text{ec})(\text{lawyers generally}), \\ f(\text{ec})(\text{tax lawyers}), f(\text{ec})(\text{secretaries of the several States}) \dots, EC_{\text{gp}} \Leftrightarrow \\ EC_{\text{lg}} \Leftrightarrow EC_{\text{tl}} \Leftrightarrow EC_{\text{ss}} \Leftrightarrow \dots$$

administrative precedents all help a deliberator discern a legislature's intentions. But a deliberator need not emphasize each equally.⁷ Even within each class, she might privilege as the putative intent of Congress formally promulgated regulations over informally promulgated ones or committee reports over floor debates.⁸ The same goes for purpose and modern dynamics. Each identifies consequences a judge might consider. But each class of consequences within either the purposive or modern dynamic function need not and will not be emphasized equally by all judges all the time.⁹ Assigning emphasis coefficients to each class helps us more precisely describe a court's deliberative method.

The nine Supreme Court tax cases since 2000 help identify how the Court emphasizes factors within each function. Within the text function, it ranks context above plain meaning.¹⁰ Within the intent function, it ranks administrative and judicial precedents far above congressional work papers.¹¹ The Court's purposive function identifies important factors a legislature expects judges to consider such as tax avoidance, horizontal equity, and fiscal administrability.¹² The Court assigns the least

7. The intent function includes as factors administrative precedents, judicial precedents, and traditionally described legislative history in the form of congressional work papers like committee reports.

$$F[\text{intent}] = f[(\text{ec})(\text{administrative precedents}) + (\text{ec})(\text{judicial precedents}) + (\text{ec})(\text{legislative history})] EC_{ap} \Leftrightarrow EC_{jp} \Leftrightarrow EC_{lh}.$$

8. For example:

$$F[\text{administrative precedents}] = f[(\text{ec})(\text{committee reports}) + (\text{ec})(\text{floor debates}) + (\text{ec})(\text{failed amendments}) + \dots], EC_{cr} \Leftrightarrow EC_{fd} \Leftrightarrow EC_{fa} \Leftrightarrow \dots$$

9. Both purposivism and dynamism call for the consideration of consequences, except that dynamism is the consideration of consequences untethered to legislative expectations. However, it is difficult figuring out what a legislature expects a judge to consider versus what a judge himself thinks is proper. For example, is bureaucratic efficiency an objective purpose of every statute, or is it a modern dynamic.

$$F[\text{purpose, modern dynamics}] = f(\text{purposive consequences}), f(\text{modern dynamics}) = f(\text{administrability, bureaucratic efficiency, macroeconomic efficiency, race relations, gender relations, } \dots).$$

10. $F[\text{text}] = f[\text{plain meaning, context}] = f[(\text{ec}_{pm})(\text{plain meaning})], f[(\text{ec}_{c})(\text{context})]$
 $EC_c > EC_{pm}.$

11. $F[\text{intent}] = f[(\text{ec})(\text{administrative precedents}) + (\text{ec})(\text{judicial precedents}) + (\text{ec})(\text{legislative history})] EC_{ap}, EC_{jp} > EC_{lh}.$

12. $F[\text{purpose}] = f[(\text{ec})(\text{clear reflection of income}) + (\text{ec})(\text{horizontal equity}) + (\text{ec})(\text{fiscal administrability}) + (\text{ec})(\text{prevention of tax avoidance})].$ Tax scholars like Richard Wood and Deborah Geier have identified purposive principles the Court sometimes considers. Richard J. Wood, *Supreme Court Jurisprudence of Tax Fairness*, 36 SETON HALL L. REV. 421, 422-23 (2006); Deborah A. Geier, *Interpreting Tax Legislation: The Role of Purpose*, 2 FLA. TAX REV. 492 (1995). They identified vertical equity as a purposive concern, but the twenty-first century Court has not yet dealt with a case where vertical equity is clearly implicated.

deliberative weight to social principles relating to justice or fairness for disempowered groups, i.e., modern dynamics.¹³

The result will be a crude illustration, but the point will be made, that a more mathematic approach to theories of statutory construction can be applied to actual cases, making study of the endeavor more precise and, thus, more useful for practitioners and students. The formula I construct here will not concern itself so much with two of the three major factors—the degree to which a principle is relevant to the controversy at hand and the degree to which a deliberative choice is consistent with the social or legal principle. The relevance of a particular justification to a particular matter and the strength of consistency with that justification vary from case to case. This article discusses them when describing each of the nine cases. But, in a deliberative formula seeking to glean tendencies with respect to legal justifications, relevance and consistency can be represented only by variables identifying their presence. Then, it is for the appellate brief writer to identify the legal justifications the Court emphasizes most, ascertain the degree of their relevance, and exaggerate the degree with which his preferred deliberative choice is consistent with them.

Section II of this article classifies legal justifications into four categories: text, intent, purpose, and modern dynamics. It ranks the perceived constitutional legitimacy of each class and the legal justifications within each class in accordance with legal process theory. Thus, it ranks the deliberative emphasis the Court is likely to assign to it. Section III examines the nine Supreme Court tax cases since 2000 to see whether the Court's decisions uphold this deliberative hierarchy. Section IV concludes that the Court does uphold this hierarchy, that it emphasizes text most, intent more than purpose, purpose more than dynamics, and constructs a deliberative formula to represent it.

II. LEGAL JUSTIFICATIONS AND THEIR PERCEIVED CONSTITUTIONAL HIERARCHY

A. *Text*

Text as a legal justification is comprised of conventions relating to the meaning people supply to words they read.¹⁴

13. See *supra* text accompanying note 2.

14. Stanley S. Fish points out that identifying the meaning most people ordinarily supply to text is not interpreting. See Stanley S. Fish, *There is No Textualist Position*, 42

These conventions include the plain meaning doctrine and various ways to examine context.¹⁵ Plain meaning as a simple deliberative function considers the meaning people most likely supply to the text they see.¹⁶ As a more complex deliberative function, plain meaning may consider and assign emphasis to various interpretive communities who may interpret the same word differently.¹⁷ Conventions relating to context, on the other hand, include various canons of statutory construction.¹⁸ They include consideration of related statutes, appeals to grammar and syntax, and other rules of thumb with Latin monikers.¹⁹

Statutory text is made law pursuant to the Presentment Clause.²⁰ It supposedly enjoys greater Constitutional imprimatur as evidence of what law “is” than legislative intent, legislative purposes, or modern dynamics.²¹ Other justifications

SAN DIEGO L. REV. 629, 649 (2005). Instead, interpreting is discovering the intent of the author. *Id.* Still, identifying the meaning people ordinarily supply to words is the hallmark of textualism. See ANTONIN SCALIA, *A MATTER OF INTERPRETATION* 16-18 (Amy Gutmann ed. 1997); see also John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 87-90 (2006); Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 COLUM. L. REV. 1, 2 (2006).

15. See, e.g., SCALIA, *supra* note 14, at 16 (“[W]hen the text of a statute is clear, that is the end of the matter. . . . Another accepted rule of construction is that ambiguities in a newly enacted statute are to be resolved in such a fashion as to make the statute, not only internally consistent, but also compatible with previously enacted laws.”); Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons about How Statutes are to be Construed*, 5 GREEN BAG 297, 302 (2002) (“Statutes in *pari materia* must be construed together.”); LINDA D. JELLUM & DAVID CHARLES HRICIK, *MODERN STATUTORY INTERPRETATION: PROBLEMS, THEORIES, AND LAWYERING STRATEGIES* 35 (2006) (“[S]tatutory interpretation: the words. It begins at the atomic level, with interpretation of individual words, punctuation, and grammar.”).

16. JELLUM & HRICIK, *supra* note 15, at 37-38 (“Where does ‘ordinary’ meaning come from? Judges often write that they simply determine the plain and ordinary meaning of the words in issue. . . . Words mean different things to different people; language is imperfect. Thus, any effort to rely on ‘ordinary’ or ‘plain’ meaning presents obvious hurdles. . . . In most cases, dictionary definitions reflect the commonly-shared understanding of the terms, so the court is not distorting the meaning of the statute by noting the dictionary definition.”) (citing Steven J. Johansen, *What Does Ambiguous Mean? Making Sense of Statutory Analysis in Oregon*, 34 WILLAMETTE L. REV. 219, 229 (1998)).

17. *Id.* at 46 (“Should the ordinary meaning apply unless the legislature has expressly adopted a technical meaning in the statute? Or, should courts use the technical meaning if the statute is directed to a technical audience?”).

18. Karl Llewellyn famously bludgeoned the concept of formalist jurisprudence based specifically on the canons of construction by showing that each canon is contradicted by another. Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons about How Statutes are to be Construed*, 5 GREEN BAG 297, 302-08 (2002).

19. See JELLUM & HRICIK, *supra* note 15 (noting how defining individual words and text helps to interpret a statute).

20. U.S. CONST. art. 1, § 7, cls. 2-3.

21. William N. Eskridge, *The New Textualism*, 37 UCLA L. REV. 621, 671 (1990) (“Justice Scalia’s main constitutional argument seems to be that an exclusive focus on the

for text as the most important legal justification include the notion that text is the best evidence of intent or that emphasizing text is most fair to legal subjects.²²

B. *Intent*

Intent as a legal justification is comprised of conventions relating to how people discern the intentions of a legislature.²³ The most controversial indicia of legislative intent are congressional work papers like committee and conference reports and records of floor debates.²⁴ Text is also evidence of intent.²⁵ The legislature may intend for its text to be interpreted in a plain, ordinary manner.²⁶ However, the most often cited and heavily emphasized indicia of intent are prior judicial and administrative constructions.²⁷

statute's text is mandated by the bicameralism and presentment clauses of article I. Under these provisions, a bill does not become a statute unless it has been accepted in the same textual form by both Houses of Congress and presented to the President for signature. Hence, the only thing that actually becomes law is the statutory text; any unwritten intentions of one House, or of one committee or of one Member, in Congress are not law unless it can be shown that they were understood and accepted by both Houses and by the President. According to Justice Scalia, relying on committee reports to determine a statute's meaning is tantamount to lawmaking by Congressional subgroups that the Court found unconstitutional in *Chadha*."); see also John F. Coverdale, *Text As Limit: A Plea For A Decent Respect For The Tax Code*, 71 TUL. L. REV. 1501, 1514 (1997).

22. JELLUM & HRICK, *supra* note 15, at 119 ("The intention of the Legislature is first to be sought from a literal reading of the act itself, but if the meaning is still not clear the intent may be ascertained from such facts and through such rules as may, in connection with the language, legitimately reveal it.") (citing N.Y. STAT. LAW § 92(a), (b) (McKinney 2005)).

23. See, e.g., *id.* at 97-99; ABNER J. MIKVA & ERIC LANE, AN INTRODUCTION TO STATUTORY INTERPRETATION AND THE LEGISLATIVE PROCESS 6, 27-41 (1997); Fish, *supra* note 14, at 649.

24. See WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY & ELIZABETH GARRETT, LEGISLATION AND STATUTORY INTERPRETATION 302 (2000) ("If we are right that legislative history should be used only when it is accessible, relevant, and reliable, there ought to be – and we think there is – a hierarchy of sources for that history. . . . *Committee reports* are the most useful legislative history The reports are also typically quite useful, for they provide an overview of the policy need for the statute (general intent) as well as analysis of each provision and how it relates to other parts of the statute (specific intent).").

25. See JELLUM & HRICK, *supra* note 15, at 119 ("The intention of the Legislature is first to be sought from a literal reading of the act itself, but if the meaning is still not clear the intent may be ascertained from such facts and through such rules as may, in connection with the language, legitimately reveal it.") (quoting N.Y. STAT. LAW § 92(a), (b) (McKinney 2005)).

26. See *id.* at 118 ("The majority of states that have enacted general approach directives have enacted directives that tell courts to focus on plain meaning.").

27. Administrative deference doctrines, like *Chevron*, *National Muffler*, *Skidmore*, etc., exemplify the concept that administrative precedents represent the putative intent of the legislature so long as we are sure the legislature indeed delegated interpretative authority and the agency properly exercised such authority. *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984).

Note how Constitutional legitimacy relates in two ways to emphasis with respect to the intent function. First, because legislative intent has no explicit grounding in Constitutional text, it receives less emphasis than text.²⁸ And, second, between judicial and administrative constructions, the very idea of administrative agencies as legitimate federal actors has only recently won wide consensus.²⁹ Thus, judicial opinions rank at the top,³⁰ with formal regulations receiving the next highest emphasis,³¹ and informal regulations are last, but better than nothing.³²

C. Purpose

Purpose as a legal justification is comprised of consequences a judge believes the legislature intended to promote or avoid.³³

If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

Id. at 843 n.9 ("The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent."). The reenactment doctrine stands for the proposition that legislatures are aware and approve of judicial interpretations if they reenact the statute without altering it. ESKRIDGE ET AL., *supra* note 24, at 281; *see also* Flood v. Kuhn, 407 U.S. 258, 283-84 (1972) (upholding a judicially created anti-trust exemption for Major League Baseball on the grounds that Congress is aware and approves of it).

28. *See* SCALIA, *supra* note 14, at 22 ("What I think is needed, however, is not rationalization of this process [legislative intent] but abandonment of it. It is simply not compatible with democratic theory that laws mean whatever they ought to mean, and that unelected judges decide what that is.").

29. *See, e.g.*, Ernest Gellhorn, *Returning to First Principles*, 36 Am. U. L. Rev. 345, 345 (1987).

30. *See, e.g.*, Flood, 407 U.S. at 282 ("It is an aberration that has been with us now for half a century, one heretofore deemed fully entitled to the benefit of stare decisis, and one that has survived the Court's expanding concept of interstate commerce."); *see, e.g.*, William N. Eskridge, Jr., *Interpreting Legislative Inaction*, 87 MICH. L. REV. 67, 109 (1988) ("One reading of the legislative inaction cases is that once courts, the executive, or an agency has interpreted a statute, the burden is upon Congress to respond to the interpretation if it disagrees with it. If Congress does nothing to disturb the interpretation, the Court is free to presume that the interpretation was correct. This reading of the legislative inaction cases often appears in their rhetoric. Thus, the Court sometimes states the reenactment doctrine: 'Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change.'").

31. *See Chevron*, 467 U.S. at 843-44; *United States v. Nat'l Muffler Dealers Ass'n*, 440 U.S. 472, 476-77 (1979).

32. *See Cottage Sav. Ass'n v. Comm'r*, 499 U.S. 554, 561 (1991); *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

33. *See United States v. Am. Trucking Ass'ns*, 310 U.S. 534, 543-44 (1940) ("There is, of course, no more persuasive evidence of the purpose of a statute than the words by

Purposivism is akin to intentionalism.³⁴ They both rely on indicia of legislative intent, except that intentionalism focuses on meaning without reference to the consequences. Purposivism focuses on the consequences of a particular legal construction without reference to a particular word's meaning within certain interpretive communities.³⁵

As they do with respect to intent, congressional work papers and judicial and administrative constructions provide indicia of purpose. Some suppose that the structure of codes, like the Internal Revenue Code (the "Code") or the Uniform Commercial Code, strongly evidence important consequences legislatures want judges to consider.³⁶ For example, Deborah Geier uses *United States v. Philadelphia Park Amusement Co.* to show that the structure of the Code evinces long standing congressional intent to tax income once and only once.³⁷ Other purposes gleaned from the structure of the Code include matching income with deductions and horizontal and vertical equity.³⁸

Purpose and intent enjoy similar constitutional sanction. The legitimacy of both relies on a belief in legislative primacy.³⁹

which the legislature undertook to give expression to its wishes. Often these words are sufficient in and of themselves to determine the purpose of the legislation. In such cases we have followed their plain meaning. When that meaning has led to absurd or futile results, however, this Court has looked beyond the words to the purpose of the act. Frequently, however, even when the plain meaning did not produce absurd results but merely an unreasonable one 'plainly at variance with the policy of the legislation as a whole' this Court has followed that purpose, rather than the literal words. When aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no 'rule of law' which forbids its use, however clear the words may appear on 'superficial examination.'")

34. See WILLIAM N. ESKRIDGE, JR., *DYNAMIC STATUTORY INTERPRETATION* 26 (1994) ("Purposivism is an attractive alternative to intentionalism because it allows a statute to evolve to meet new problems while ensuring legitimacy by tying interpretation to original legislative expectations.")

35. See JELLUM & HRICIK, *supra* note 15, at 245 ("To purposivists, the 'purpose or purposes of the legislation, and the context of the language, broadly understood, are directly relevant to the meaning of the language of the statute.' *State v. Courchesne*, 816 A.2d 562, 587 (Conn. 2003). As Justice Learned Hand explained: Of course it is true that the words used, even in their literal sense, are the primary, and ordinarily the most reliable, source of interpreting the meaning of any writing: be it a statute, a contract, or anything else. But it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning.")

36. See Geier, *supra* note 12, at 500-502.

37. See Deborah A. Geier, *Commentary: Textualism and Tax Cases*, 66 *TEMP. L. REV.* 445, 474-76 (1993); *United States v. Phila. Park Amusement Co.*, 126 *F. Supp.* 184, 188 (1954).

38. See Geier, *supra* note 37, at 473 n.107.

39. See Richard A. Posner, *Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution*, 37 *CASE W. RES. L. REV.* 179, 189-90 (1986-87) ("In our

When judges construct statutes in ways at odds with conventions relating to text, they make sure to deny that they are making law based on personal preference or caprice.⁴⁰ Instead, they suppose that they remain constrained by the legislature, acting only as its agent.⁴¹ The administrative deference doctrines and the reenactment doctrine are based on this notion.⁴²

Consistent with the renewed vitality of these doctrines, our nine 21st century tax cases show that the Court more confidently relies on purpose or intent when embodied in long standing judicial and administrative precedents.⁴³

system of government the framers of statutes and constitutions are the superiors of judges. The framers communicate orders to the judges through legislative texts (including, of course, the Constitution). If the orders are clear, the judges must obey them. Often however, because of passage of time and change of circumstance the orders are unclear and normally the judges cannot query the framers to find out what the order means. The judges are thus like the platoon commander in my example. It is irresponsible for them to adopt the attitude that if the order is unclear they will refuse to act. They are part of an organization, an enterprise – the enterprise of governing the United States – and when the orders of their superiors are unclear, this does not absolve them from responsibility for helping to make the enterprise succeed. The platoon commander will ask himself, if he is a responsible officer: what would the company commander have wanted me to do if communications failed? Judges should ask themselves the same type of question when the ‘orders’ they receive from the framers of statutes and constitutions are unclear: what would the framers have wanted us to do in this case of failed communication?”; see also H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 601 (1958) (“The other doctrine was the famous imperative theory of law – that law is essentially a command.”); Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605, 612 (1908) (“[I]n the first and second stages of a period of legislation the mechanical character of legal science is aggravated by the imperative theory, which is a concomitant of legislative activity. Austin’s proposition that law is command so complete that even the unwritten law must be given this character, since whatever the sovereign permits he commands, was simply rediscovered during the legislative ferment of the reform-movement in English law.”).

40. See JOHN HART ELY, *DEMOCRACY AND DISTRUST* 3 (1980) (“Were a judge to announce . . . that he was not content with [the text of a statute] and intended additionally to enforce, in the name of the statute in question, those fundamental values he believed America had always stood for, we would conclude that he was not doing his job, and might even consider a call to the lunacy commission.”).

41. See *id.* at 4 (“Of course courts make law all the time, and in doing so they may purport to be drawing on the standard sources of the non-interpretivist – society’s ‘fundamental principles’ or whatever – but outside the area of constitutional adjudication, they are either filling in gaps the legislature has left in the laws it has passed or, perhaps, taking charge of an entire area the legislature has left to judicial development.”).

42. See *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984) (regarding administrative deference doctrines); ESKRIDGE, *supra* note 34 (regarding the reenactment doctrine).

43. See *Ballard v. Comm’r*, 544 U.S. 40 (2005); *Comm’r v. Banks*, 543 U.S. 426 (2005); *United States v. Galletti*, 541 U.S. 114 (2004); *Boeing Co. v. United States*, 537 U.S. 437 (2003); *United States v. Fior D’Italia, Inc.*, 536 U.S. 238 (2002); *United States v. Craft*, 535 U.S. 274 (2002); *United States v. United Dominion Indus., Inc.*, 532 U.S. 822 (2001); *United States v. Cleveland Indians Baseball Co.*, 532 U.S. 200 (2001); *Gitlitz v. Comm’r*, 531 U.S. 206 (2001).

D. *Modern Dynamics*

Dynamism as a legal justification relates to a judge's estimation of whether a particular deliberative choice is consistent with the vast array of social consequences untethered to legislative expectations.⁴⁴ For example, the *United States v. Bob Jones University* Court denied tax-free status to a school that openly discriminated against black people.⁴⁵ The Court unconvincingly tried to tie its definition of "charitable"—excluding those who are openly racist—to congressional purpose.⁴⁶ But the Court likely held against Bob Jones because the Court estimated that the majority of society believed that tax-free recognition ought not promote racism.⁴⁷

With respect to statutory law, a minority of judges and scholars believe that the judiciary is equal to the legislature. According to Richard Posner, judges are neither potted plants nor automatons who mechanically apply legal principles.⁴⁸ Judges judge, which according to Posner means considering text, intent, and consequences, while privileging none of them.⁴⁹ *Bob Jones* also shows the lack of consensus with respect to this ideal in that the Court stretched the notion of purpose out of proportion in order to fit its decision within that realm.⁵⁰ Amongst the recognized deliberative techniques, estimation of dynamic consequences receives the least emphasis.⁵¹

Perhaps all is not lost with respect to modern dynamics and constitutional legitimacy.⁵² In a 1989 article, Cass Sunstein suggested that consequences tethered to the text of the Constitution, perhaps in the preamble, are more legitimate than

44. See ESKRIDGE, *supra* note 34, at 51. There are at least three circumstances in which the application of a statute can materially change the statute: 1) there are unresolved issues the legislative process could not settle; 2) the issue may be overlooked or unanticipated; 3) the statute may be met with resistance by the social and political culture. *Id.*

45. *United States v. Bob Jones Univ.*, 461 U.S. 574, 593-96 (1983) (holding that tax definition of "charitable" excludes facially discriminatory institutions).

46. *Id.*

47. See *id.* ("Over the past quarter of a century, every pronouncement of this Court and myriad Acts of Congress and Executive Orders attest a firm national policy to prohibit racial segregation and discrimination in public education.").

48. RICHARD A. POSNER, *OVERCOMING LAW* 231-32 (1995).

49. RICHARD A. POSNER, *LAW, PRAGMATISM, AND DEMOCRACY* 57 (2003).

50. See *Bob Jones*, 461 U.S. at 574, 579 (1983).

51. *Id.*

52. See POSNER, *LAW*, *supra* note 49; ESKRIDGE, *supra* note 34, at 50-52.

those that are not.⁵³ However, no one in the tax realm has yet endorsed such an approach.

III. LEGAL JUSTIFICATIONS IN 21ST CENTURY TAX CASES

In the 20th Century, the Supreme Court occasionally emphasized purpose more than text.⁵⁴ In *United States v. Philadelphia Park Amusement Company*, the word “cost” was held to mean “the amount one receives,” because to apply the common meaning—the amount one gives up—would produce consequences inconsistent with what Congress intended.⁵⁵ But since that turn, the Court has not been faced with a case where one deliberative choice was considerably more consistent with an important purpose, while at the same time, considerably less consistent with text. So far in the 21st century *Gitlitz v. Commissioner*, *United States v. Cleveland Indians Baseball Co.*, *United States v. United Dominion Industries, Inc.*, *United States v. Craft*, *United States v. Fior D'Italia, Inc.*, *Boeing Co. v. United States*, *Galletti v. Commissioner*, *Commissioner v. Banks*, and *Ballard v. Commissioner* show that the Court emphasizes text most, intent and purposes next, and dynamic consequences least.⁵⁶

More specifically, I would characterize the Court as an algorithmic textualist. If, after considering text by itself, the Court finds one proffered construction considerably more consistent with plain meaning and statutory context than another, it will end the deliberative process and render a

53. Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 415-418 (1989).

54. Lawrence Zelenak, *Thinking About Nonliteral Interpretations of the Internal Revenue Code*, 64 N. CAROLINA L. REV. 623, 640 (1986) (presenting, as a sample of non-literal interpretations by the 20th Century Court, *Hillsboro*, *Tufts*, *Paulsen* and *Bob Jones*). Noël Cunningham & James Repetti, *Textualism and Tax Shelters*, 24 VA. TAX. REV. 1, 12-13 (2004) (identifying *U.S. v. Correll*, 389 U.S. 299 (1967), as another non-literal decision).

55. *United States v. Phila. Park Amusement Co.*, 126 F. Supp. 184, 188 (1954) (noting that in a taxable exchange the fair market value of the property received should be used to determine the cost basis to avoid allowing the taxpayer to have a stepped-up basis or subjecting the taxpayer to double taxation).

56. See *Gitlitz v. Comm'r*, 531 U.S. 206 (2001); *United States v. Cleveland Indians Baseball Co.*, 532 U.S. 200 (2001); *United States v. United Dominion Indus., Inc.*, 532 U.S. 822 (2001); *United States v. Craft*, 535 U.S. 274 (2002); *United States v. Fior D'Italia, Inc.*, 536 U.S. 238 (2002); *Boeing Co. v. United States*, 537 U.S. 437 (2003); *United States v. Galletti*, 541 U.S. 114 (2004); *Ballard v. Comm'r*, 544 U.S. 40 (2005); *Comm'r v. Banks*, 543 U.S. 426 (2005).

decision.⁵⁷ *Gitlitz* and *Galletti* exemplify this deliberative technique.⁵⁸

However, in the other seven cases, the textual disposition quotient went unsatisfied. This occurred either because the statute was ambiguous⁵⁹ or there was no statute implicated.⁶⁰ When the statute is ambiguous, the Court resorts to the use of prior administrative precedents. In *United Dominion, Cleveland Indians Baseball, Fior D'Italia* and *Boeing*, the issue regarded the proper way to make a computation.⁶¹ The essential question was, how did Congress, via delegation to its agent, the Secretary of the Treasury, intend for the computation to be made? The deliberative process reflected intentionalism, not purposivism, because the determination disregarded the consequences emanating from the available choices.

When there was no computation involved, as in *Craft, Banks*, and *Ballard*, the Court emphasized purpose over modern dynamics. Principles are dynamic to the extent that the Court considers them. This is because it feels the populace believes them to be important. They are purposive to the extent that they are principles the Court gleans from its previous deliberations or other appropriate governmental interpretations or constructions on the same matter.⁶² In *Craft, Banks* and *Ballard*, the Court chose the legal construction most consistent with an identifiable purpose, rather than the construction consistent with modern dynamics.

57. SCALIA, *supra* note 14, at 16 (“[W]hen the text of a statute is clear, that is the end of the matter.”).

58. *Gitlitz*, 531 U.S. at 219-20 (“[C]ourts have discussed the policy concern. . . . [However,] [b]ecause the Code’s plain text permits the taxpayers here to receive these benefits, we need not address this policy concern.”); see *Galletti*, 541 U.S. at 120-23 (demonstrating decisions by the court where the court employs statutory definitions to settle a tax dispute).

59. *Boeing*, 537 U.S. at 446; *Fior D'Italia*, 536 U.S. at 245-53; *Craft*, 535 U.S. at 287; *United Dominion Indus.*, 532 U.S. at 839; *Cleveland Indians Baseball*, 532 U.S. at 203.

60. *Banks*, 543 U.S. at 433; *Ballard*, 544 U.S. at 42.

61. See *Cleveland Indians Baseball*, 532 U.S. at 205-06 (discussing the computation for determining federal employment taxes relating to payment of back wages); *United Dominion Indus.*, 532 U.S. at 824 (discussing the computation of product liability losses pursuant to § 172(j)(1)); *Fior D'Italia*, 536 U.S. at 240 (discussing the proper method for calculating tip wages); *Boeing*, 537 U.S. at 440 (discussing the appropriate accounting of research and development costs of consolidated taxpayer in respect of its foreign sales corporation pursuant to § 994(a)(1)-(3)).

62. This distinction between legal and social principles is based on legal process theory. See generally ESKRIDGE, *supra* note 34, at 108; BRIAN Z. TAMANAHA, LAW AS A MEANS TO AN END 101-03 (2006).

A. *Gitlitz v. Commissioner*

In *Gitlitz v. Commissioner*, an insolvent S Corporation was relieved of its debt.⁶³ Pursuant to Code § 108 (a)(1)(B), the S Corporation excluded the amount of the discharge.⁶⁴ Contending that debt relief to an insolvent taxpayer is income, even if it is excluded from gross income, the taxpayer treated the amount relieved as an “item of income” and increased his basis by that amount.⁶⁵ After increasing his basis, the taxpayer deducted his share of previously suspended net operating losses.⁶⁶ The deductibility of these losses was the ultimate issue.⁶⁷

The IRS first argued that discharge of indebtedness is not income.⁶⁸ Prior to enactment of Code § 108(a)(1)(B), there was considerable doubt whether relief from debt caused any gain at all to a taxpayer who was insolvent. Several courts decided that debt relief to an insolvent taxpayer did not produce income because an insolvent taxpayer has no assets that are freed by such relief.⁶⁹ Some believed that insolvency did not matter because money was borrowed or property was lent without repayment, which constitutes income.⁷⁰ Thus, although the text clearly excludes it from income, it is not clear whether it is income in the first place. This is similar to Code § 74, where Congress included prizes and awards as income despite the fact that without that mandate a small amount of prizes and awards would be interpreted as excludable gifts.⁷¹ The Court was

63. *Gitlitz*, 531 U.S. at 210 (2001).

64. *Id.* at 211; *see also* I.R.C. § 108(a)(1)(B) (“Gross income does not include any amount which (but for this subsection) would be includible in gross income by reason of discharge (in whole or in part) of indebtedness of the taxpayer if . . . the discharge occurs when the taxpayer is insolvent.”).

65. *Gitlitz*, 531 U.S. at 210 (“Petitioners’ theory was that the discharge of indebtedness was an ‘item of income’ subject to pass-through under § 1366(a)(1)(A).”).

66. *Id.* (“They used their increased bases to deduct corporate losses and deductions, including those suspended in previous years.”).

67. *Id.* at 208 (“[W]e must decide whether the Internal Revenue Code (Code) permits taxpayers to increase bases in their S corporation stock by the amount of an S corporation’s discharge of indebtedness excluded from gross income.”).

68. *Id.* at 212 (“The Commissioner argues that the discharge of indebtedness of an insolvent S corporation is not an ‘item of income’ and thus never passes through to shareholders.”).

69. *See, e.g., Astoria Marine Const. Co. v. Comm’r*, 12 T.C. 798, 801 (1949).

70. *See Gaudiano v. Comm’r*, 216 F.3d 524, 535 (6th Cir. 2000), *vacated in light of Gitlitz*, 513 U.S. 206 (2001); *Witzel v. Comm’r*, 200 F.3d 496, 498 (7th Cir. 2000), *vacated in light of Gitlitz*, 513 U.S. 206 (2001).

71. I.R.C. § 74 (2000) (“Except as otherwise provided in this section or in section 117 (relating to qualified scholarships), gross income includes amounts received as prizes and awards.”).

unpersuaded. Section 108(e)(1) clearly states that Congress considers all discharges of indebtedness to be income.⁷²

Not surprisingly, Justice Thomas resolved the first issue using a textualist method.⁷³ The opinion rests comfortably on the meaning of income as understood in Code §§ 1366(a)(1) and 108(e)(1), buttressed by § 108's place among *thirty six other related statutes* that exclude from gross income things that are still items of income.⁷⁴

However, an intentionalist might see things the government's way.⁷⁵ Judicial interpretations are evidence of congressional intent. This is particularly true, as the reenactment doctrine says, when Congress reenacts the same legislation without altering the judicial interpretation.⁷⁶ It stands to reason that codified judicial interpretations are considered the putative intent of Congress. The courts held that debt relief to an insolvent was not income, and Congress codified this result in the only place where it made sense to put it, with the other exclusions from gross income.⁷⁷ While almost all other exclusion sections reference items which are income but are excluded because Congress says so, Congress excluded debt relief to an insolvent because it is not income in the first place.⁷⁸ Thus, the government's contention was inconsistent with congressional intent.

The second issue in *Gitlitz* was whether the increase in tax attributes following an excluded discharge occurred at the

72. *Gitlitz*, 531 U.S. at 214 (“[T]he statute makes clear that § 108(a)’s exclusion does not alter the character of discharge of indebtedness as an item of income. Specifically § 108(e)(1) reads: ‘Except as otherwise provided in this section, there shall be no insolvency exception from the general rule that gross income includes income from the discharge of indebtedness.’”).

73. *Id.* at 212 (“Under a plain reading of the statute, we . . . conclude that excluded discharged debt is indeed an ‘item of income,’ which passes through to the shareholders and increases their bases in the stock of the S corporation.”).

74. *Id.* at 213-14.

75. Section 108(e)(1) precluded this inquiry; which unto itself is an interesting deliberative phenomenon. See JELLUM & HRICIK, *supra* note 15, at 118-22 (discussing “legislative efforts to direct an approach to interpretation”).

76. ESKRIDGE, *supra* note 34, at 67 (“One reading of the legislative inaction cases is that once courts, the executive, or an agency has interpreted a statute, the burden is upon Congress to respond to the interpretation if it disagrees with it. If Congress does nothing to disturb the interpretation, the Court is free to presume that the interpretation was correct. This reading of the legislative inaction cases often appears in their rhetoric. Thus, the Court sometimes states the reenactment doctrine: ‘Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change.’”).

77. *Gitlitz*, 531 U.S. at 212-14.

78. *Cf. id.* at 214 (“[Q]uite simply, if discharge of indebtedness of an insolvent entity were not ‘income,’ it would necessarily not be included in gross income.”).

corporate level before the shareholder could use it to increase his basis.⁷⁹ As a competition between deliberative choices, this issue failed because the Commissioner gave up the argument.⁸⁰ However, the Court also resolved it on strictly textual grounds.⁸¹

B. United States v. Cleveland Indians Baseball

In 1986 and 1987, Major League Baseball owners colluded to depress player salaries.⁸² In 1994, pursuant to a settlement with the players' union, team owners, including the Cleveland Indians, paid over to several players wages attributable to 1986 and 1987.⁸³

In *United States v. Cleveland Indians Baseball Co.*, the issue concerned whether federal employment taxes on back wages are computed using the tax rates effective the year in which the wages were paid, 1994, or when the wages should have been paid, 1986 and 1987.⁸⁴ The Cleveland Indians would owe significant taxes if the back wages were taxed pursuant to the rates and wages bases effective in 1994, the year in which they were actually paid.⁸⁵ The Cleveland Indians related the 1994 payments back to 1986 and 1987 because they had already paid the maximum amount assessable those years pursuant to the federal employment tax scheme.⁸⁶

The Cleveland Indians relied on *United States v. Bowman*.⁸⁷ In *Bowman*, the Court of Appeals for the Sixth Circuit held that

79. *Id.* at 208-09 ("In this case we must answer two questions . . . [the] second [is that], if the Code permits such an increase, we must decide whether the increase occurs before or after taxpayers are required to reduce the S corporation's tax attributes.")

80. *Id.* at 219 n.8 ("The Commissioner has abandoned his argument related to the sequencing issue before this Court.")

81. *Id.* at 218 ("The sequencing question is expressly addressed in the statute.")

82. *Arbitrator Awards Additional Damages In Baseball Owner Collusion Matter*, 16 ENT. L. REP. 36 (1994).

83. *United States v. Cleveland Indians Baseball Co.*, 532 U.S. 200, 204 (2001).

84. *Id.* at 205 ("The question presented is whether those payments, characterized as back wages, should be taxed by reference to the year they were actually paid (1994), as the Government urges, or by reference to the years they should have been paid (1986 and 1987), as the Company and its supporting *amicus*, the Major League Baseball Players Association, contend.")

85. *Id.* at 206 ("[T]reating the back wages as taxable in 1994 would subject both the Company and its former employees to significant tax liability.")

86. *Id.* ("[A]llocating the 1994 payments back to 1986 and 1987 works to the advantage of the Company and its former employees. The reason is that all but one of the employees who received back wages in 1994 had already collected wages from the Company exceeding the taxable maximum in 1986 and 1987. Because those employees as well as the Company paid the maximum amount of employment taxes chargeable in 1986 and 1987, allocating the 1994 payments back to those years would generate no additional FICA or FUTA tax liability.")

87. *Id.* at 207.

back wages “should be allocated to the periods when the regular wages were not paid as usual.”⁸⁸ The *Bowman* court relied on *Social Security Board v. Nierotko*,⁸⁹ which, for purposes of social security taxes, held that back wages are taxed using the scheme in effect the year the wages should have been paid.⁹⁰ The IRS argued in *Bowman* that the Supreme Court’s *Nierotko* decision was based on purposes attached to the social security scheme but largely irrelevant to employment taxes.⁹¹ But the Sixth Circuit resolved the case textually, apparently believing the relationship between the two statutes was strong enough that the meanings of the words in one should be consistent with the other.⁹² The Sixth Circuit’s deliberative formula thus emphasized the function representing text over the function representing purpose.⁹³

The Courts of Appeals for the Fourth and Tenth Circuits held that employment taxes are computed using the rates effective the year in which back wages are paid.⁹⁴ In *United States v. Hemelt*, the Fourth Circuit dispensed with this issue in

88. *United States v. Bowman*, 824 F.2d 528, 530 (6th Cir. 1987) (for purposes of determining social security eligibility a settlement for back wages “should be allocated to the periods when the regular wages were not paid as usual”).

89. 327 U.S. 358 (1946).

90. *Bowman*, 824 F.2d at 530; see also *Cleveland Indians Baseball*, 532 U.S. at 207.

91. *Cleveland Indians Baseball*, 532 U.S. at 216 n.13 (“Indeed, the contemporaneous understanding of the Commissioner of Internal Revenue was that the 1946 Amendments supplanted *Nierotko*’s allocation rule for backpay.”) (citing Letter from Joseph D. Nunan, Jr., Commissioner of Internal Revenue, to Social Security Administration, Bureau of Old-Age and Survivors Insurance (Mar. 6, 1947)).

92. *Id.* at 217-18 (“It is, of course, true that statutory construction ‘is a holistic endeavor’ and that the meaning of a provision is ‘clarified by the remainder of the statutory scheme . . . [when] only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law.’”).

93. Specifically, the court assigned the greatest emphasis to the context function, which includes as a factor the degree to which a deliberative choice is consistent with closely related statutes. On the other hand, the case may have turned not on a simple decision to emphasize text over purpose, but a general tendency to emphasize text along with the absence of an important and long standing, relevant purpose. The Sixth Circuit did not recognize any purpose with respect to employment taxes relevant to the matter at hand. See *Bowman*, 824 F.2d at 530.

The Sixth Circuit clearly emphasized the function representing text over the function representing intent. See *id.* The intent function includes administrative regulations as indicia of legislative intent. Reasonable, formally promulgated regulations receive extremely high emphasis coefficients. The degree of emphasis attached to the factor representing informal regulations depends on whether courts believe Congress is aware and acquiesces or approves of the administrative interpretation. The Sixth Circuit ignored the IRS regulation dealing with this matter. By not even recognizing the importance or relevance of the regulation, we can assume the Sixth Circuit’s deliberative formula placed a negligible emphasis coefficient next to the intent function.

94. *United States v. Hemelt*, 122 F.3d 204, 210-11 (4th Cir. 1997); *United States v. Walker*, 202 F.3d 1290, 1291 (10th Cir. 2000).

one paragraph.⁹⁵ The Court relied primarily on the IRS regulation which states, “[W]ages are received by an employee at the time that they are paid by the employer to the employee.”⁹⁶ The Court also declared that the alternate construction was inconsistent with judicial economy, a dynamic concern.⁹⁷ Their emphasis on text was minimal to nonexistent, their emphasis on intent was extremely strong, and they placed a slight emphasis on the judicial economy as a purposive or dynamic consequence. In *United States v. Walker*, the Tenth Circuit dealt with the back pay issue with respect to self-employment taxes.⁹⁸ Self-employment taxes are the functional equivalent of employment taxes.⁹⁹ The Court in *Walker* relied on an IRS regulation along with House and Senate committee reports, both directly on point.¹⁰⁰ It heavily discounted the relevance of the Social Security context.¹⁰¹

95. *Hemelt*, 122 F.3d at 210-11 (“Taxpayers’ final claim, that the payments they received should be allocated to the years to which they are attributable and taxed at the rate prevailing in each of those years, is also meritless. It is clear under the Treasury Regulations that “wages” are to be taxed for FICA purposes in the year in which they are received.); see 26 C.F.R. § 31.3121(a)-2(a) (as amended 2006) (“In general, wages are received by an employee at the time that they are paid by the employer to the employee.”).

96. 26 C.F.R. § 31.3121(a)-2(a).

97. *Hemelt*, 122 F.3d at 209 (“Furthermore, taxpayer have [sic] provided no evidence of how they would have us allocate their awards among the years to which they are supposedly attributable (not to mention the awards of the other five thousand class members). Thus, we could not undertake such allocation even if we were allowed to do so . . .”).

98. *Walker*, 202 F.3d at 1291 (“This case presents a single legal question: whether the Walkers are liable for SECA taxes on payments received in 1992 through 1995, where the payments are for legal services performed in 1971 through 1975. We hold that they are liable.”).

99. *Id.* (“Inasmuch as the SECA tax ‘is designed to finance social security benefits paid to self-employed individuals’ . . . it complements the FICA tax.”).

100. *Id.* at 1292 (citing Treas. Reg. § 1.1402(a)-1(c); S. Rep. No. 81-1669 (1950), reprinted in 1950 U.S.C.C.A.N. 3287; H.R. Conf. Rep. No. 81-2271 (1950), reprinted in 1950 U.S.C.C.A.N. 3482).

101. *Id.* at 1293 (“[T]he fact that the Social Security Administration attributed the Telex payments to Mr. Walker’s 1975 earnings for purposes of Social Security and Medicare benefits does not alter our conclusion. The Social Security Administration is a different agency, implementing a different statutory scheme. Indeed, as the United States points out, a specific statute excludes the Telex payments from Mr. Walker’s gross income for Social Security benefits purposes.”).

The Fourth and Tenth Circuits emphasized the function representing intent more than they emphasized functions representing text or purpose or dynamism. Both relied heavily on regulations, which represent the intent of Congress to the extent the regulations reasonably comport with congressionally prescribed processes and substance. *Walker*, 202 F.3d at 1292-93; *Hemelt*, 122 F.3d at 207, 209. The Tenth Circuit also emphasized congressional work papers as a factor representing the indicia of congressional intent. *Walker*, 202 F.3d at 1292-93. Judicial economy as a dynamic factor received some emphasis in the Fourth Circuit, but less than the indicia of intent. *Hemelt*, 122 F.3d at 208-09.

These circuit court opinions show that the issue of whether federal employment taxes are calculated using the year in which wages were paid or the year in which they should have been paid implicates text, intent, and consequences. They identified a related statute as textual context, regulations and legislative history as indicia of congressional intent, and judicial economy as a purposive or dynamic consequence to consider. The government injected another factor, plain meaning.¹⁰² Appropriately then, the Supreme Court acknowledged that *Cleveland Indians Baseball* depended on the emphasis they would place on the distinct functions and factors.¹⁰³

The Supreme Court's formula was algorithmic. Similar to a *Chevron* analysis, it sought to resolve the *Cleveland Indians Baseball* case first through text.¹⁰⁴ But if the text was equivocal, if it did not satisfy the Court's textual disposition quotient, the Court would then rely on IRS regulations if they reasonably represented congressional intent or purpose.¹⁰⁵

The text was indeed equivocal, it did not satisfy the Court's disposition quotient.¹⁰⁶ The statute refers to "wages paid during a calendar year," which the government contended clearly meant

The Tenth Circuit applied a heavy uncertainty discount to the factor representing related statutes. See *Walker*, 202 F.3d at 1292-93. The Tenth Circuit's deliberative formula may strongly emphasize closely related statutes, but the court severely discounted the relationship between the social security and the federal employment tax schemes. *Id.* at 1293.

102. *United States v. Cleveland Indians Baseball Co.*, 532 U.S. 200, 209 (2001) ("The meaning of this language, the Government contends, is plain: Wages are taxed according to the calendar year they are in fact paid, regardless of when they should have been paid.").

103. *Id.* ("Both sides in this controversy have offered plausible interpretations of Congress' design. We set out next the parties' positions and explain why we ultimately defer to the Internal Revenue Service's reasonable, consistent, and longstanding interpretation of the FICA and FUTA provisions in point. Under that interpretation, wages must be taxed according to the year they are actually paid.").

104. *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 837 (1984); *Cleveland Indians Baseball*, 532 U.S. at 212 ("[W]e agree that *Nierotko* blocks the Government's argument that the "wages paid" formulation in 26 U.S.C. §§ [3111(a), 3301] has a dispositively plain meaning . . .").

105. *Cleveland Indians Baseball*, 532 U.S. at 212-13 ("Although we agree that *Nierotko* blocks the Government's argument that the 'wages paid' formulation in 26 U.S.C. §§ [3111(a), 3301] has a dispositively plain meaning, we reject the Company's next contention Although we generally presume that 'identical words used in different parts of the same act are intended to have the same meaning,' . . . the presumption 'is not rigid,' and 'the meaning [of the same words] well may vary to meet the purposes of the law,' *ibid.* Cf. [Walter Wheeler] Cook, 'Substance' and 'Procedure' in the Conflict of Laws, 42 YALE L. J. 333, 337 (1933) ("The tendency to assume that a word which appears in two or more legal rules, and so in connection with more than one purpose, has and should have precisely the same scope in all of them . . . has all the tenacity of original sin and must constantly be guarded against.") (citations omitted).

106. *Id.*

that “wages are taxed according to the calendar year they are in fact paid.”¹⁰⁷ But, Ginsburg relied on *Nierotko*, which involved the very same words, but was construed by the Court in the social security benefits context to mean that back wages would relate to the year they should have been paid.¹⁰⁸ Because that meaning survived in the social security context, it undercut the notion that “wages paid during a calendar year” can be read only one way.¹⁰⁹ Within the text function, the plain meaning sub-function stood at odds with the contextual sub-function. With the textual disposition quotient unsatisfied, Justice Ginsburg turned to the reasonableness of the IRS regulations on point.¹¹⁰

The Court’s treatment of the social security statute illuminates my concept of formulaic deliberation. Ginsburg’s emphasis on the social security benefits statute was greater than zero, evidenced by the fact that it successfully militated against the purported plain meaning asserted by the government.¹¹¹ However, in the next step, her emphasis on this somewhat related statute was much less than that what she assigned to the Treasury regulations.¹¹² This suggests that context remains highly emphasized by the Court. However, within the context sub-function, the Court will assign a heavy irrelevance discount to statutes aimed at purposes different from the one at hand.¹¹³

Instead, the Treasury regulation was consistent with the purposes of the federal employment tax scheme.¹¹⁴ The Court determined that Congress intended for judges constructing the federal employment tax statute to consider the “fiscal administrability” of tax law.¹¹⁵ The taxpayer’s interpretation

107. *Id.* at 209 (“[T]he Government calls attention to the statute’s constant references to *wages paid during a calendar year* as the touchstone for determining the applicable tax rate and wage base The meaning of this language, the Government contends, is plain: Wages are taxed according to the calendar year they are in fact paid, regardless of when they should have been paid.”).

108. *Id.* at 212 (“Because *Nierotko* read the 1939 ‘wages paid’ language for benefits eligibility purposes to accommodate an allocation-back rule for backpay, the Company urges, the identical 1939 ‘wages paid’ language for tax purposes must be read the same way. We do not agree that the latter follows from the former like the night, the day.”).

109. *Id.* at 213 (“*Nierotko* thus does not compel symmetrical construction of the ‘wages paid’ language in the discrete taxation and benefits eligibility contexts.”).

110. *See id.* at 219-20 (discussing how regulation § 31.3111-3 is reasonable and warrants judicial deference). “The employer tax attaches at the time that the wages are paid by the employer.” Treas. Reg. § 31.3111-3 (1960).

111. *Cleveland Indians Baseball*, 532 U.S. at 212.

112. *See id.* at 218-19.

113. *Id.* at 213.

114. *Id.* at 218-19.

115. *Id.* at 218 (“Given the practical administrability concerns that underpin the tax provisions, we cannot say that the Government’s rule is incompatible with the statutory scheme. The most we can say is that Congress intended the tax provisions to be both

was inconsistent with this purpose, while the IRS regulation comported well with it.¹¹⁶ Thus, the conclusion to be drawn is that where text is equivocal, a clear purpose outranks a not-so closely related statute.

Ginsburg cited *National Muffler Dealers Association v. Commissioner* for the proposition that the Court places its heaviest emphasis on tax regulations that are both promulgated close in time to the legislative enactment and that are of long standing character.¹¹⁷ The regulations relied upon by the Government “continued unchanged in their basic substance since 1940.”¹¹⁸ These regulations are deemed to represent the intent of Congress.¹¹⁹

Congressional intent was also revealed by an amendment of statutory language.¹²⁰ As Deborah Grier points out, a change in statutory terms generally indicates a change of meaning, while failure to amend suggests that the current interpretation should stand.¹²¹ Previously, the operative statute applied federal employment taxes “with respect to employment during the calendar year”, and was interpreted “that wages are taxed at the rate in effect at the time of the performance of the services for which the wages were paid.”¹²² Changing the language of the

efficiently administrable and fair, and that this case reveals the tension that sometimes exists when Congress seeks to meet those twin aims.”).

116. *Id.* at 218-19 (“Confronted with this tension, ‘we do not sit as a committee of revision to perfect the administration of the tax laws.’”) (citation omitted).

117. *Id.* at 219 (“Congress has delegated to the [Commissioner], not to the courts, the task of prescribing all needful rules and regulations for the enforcement of the Internal Revenue Code.”) (citations omitted); *Nat’l Mufflers Dealers Ass’n v. Comm’r*, 440 U.S. 472 (1979).

118. *Cleveland Indians Baseball*, 532 U.S. at 219.

119. “A regulation may have particular force if it is a substantially contemporaneous construction of the statute by those presumed to have been aware of congressional intent.” *Nat’l Muffler*, 440 U.S. at 477.

120. *Cleveland Indians Baseball*, 532 U.S. at 215-16 n.13 (“The *Nierotko* decision requiring your Agency to make an allocation of the back pay award to prior periods was rendered on the basis of the law in effect at that time. The Social Security Act Amendments of 1946, having been enacted subsequent to the date of the *Nierotko* decision, must be interpreted in the light of the language contained in such Amendments and the Congressional intent.”).

121. Geier, *supra* note 37, at 481 (Showing how a regulation providing for inflation adjustments to a taxpayer’s cost basis would be unreasonable, evidenced by failed legislative attempts to amend the interpretation of cost for basis purposes to include indexing for inflation. “A judge who used an originalist approach, i.e., one who is not averse to using legislative history, would have no difficulty in ruling the regulation invalid. Congress has debated and considered many times whether to index the basis of assets for inflation—the Senate actually passed a bill to do so in 1982—but has declined thus far to enact a statute. That would be enough for originalist judges to conclude that the word ‘cost’ was not intended by Congress to include inflation adjustment.”).

122. *Cleveland Indians Baseball*, 532 U.S. at 209 (“In support of this reading, the Government observes that Congress chose the words in the current statute specifically to

statute to “wages paid during a calendar year” clearly contemplates changing the interpretation to taxing wages at the rate in effect at the time they should have been paid.¹²³

Ginsburg discounted the taxpayers request for emphasis on tax avoidance as a purposive concern.¹²⁴ *Cleveland Indians Baseball Company* contended that applying the federal employment tax scheme as effective in the year wages are paid rather than earned can lead to tax avoidance schemes that harm the U.S. Treasury (“the fisc”) as well as workers.¹²⁵ However, the IRS rule would sometimes advantage the fisc and sometimes the taxpayer, whereas the fiscal burden on the IRS is always implicated.¹²⁶ Tax avoidance is an important purposive concern which is relevant in almost all tax cases. But neither deliberative choice especially prevented or supported it.

C. United States v. United Dominion Industries

United States v. United Dominion Industries concerned the deductibility of product liability losses.¹²⁷ “[A] taxpayer’s product liability loss (PLL) is the total of its product liability expenses (PLEs), limited to the amount of its net operating loss A taxpayer with positive annual income, and thus no NOL, may have PLEs but can have no PLL.”¹²⁸ The Code in effect at the time of this dispute allowed product liability losses to be carried back ten years.¹²⁹

The IRS sought to calculate the taxpayer’s product liability losses by determining whether each separate company in the

replace language in the original 1935 Social Security Act providing that FICA and FUTA tax rates applied to wages paid or received ‘with respect to *employment during the calendar year*.’ The Treasury Department had interpreted this 1935 language to mean that wages are taxed at ‘the rate in effect *at the time of the performance of the services* for which the wages were paid.’”) (emphasis added) (citations omitted).

123. *Id.* at 210 (“In 1939, Congress amended the 1935 Act to provide that FICA and FUTA tax rates would no longer apply on the basis of when services were performed, but would instead apply ‘with respect to *wages paid during the calendar year*.’ Social Security Act Amendments of 1939 (1939 Amendments), §§ 604, 608, 53 Stat. 1383, 1387 (emphasis added). This 1939 language remains essentially unchanged in the current FICA and FUTA tax provisions, 26 U.S.C. §§ [3111(a), 3301].”).

124. *Id.* at 212, 218-19.

125. *Id.* at 218 (“The Government’s rule sometimes disadvantages the taxpayer, as in this case. Other times it works to the disadvantage of the fisc, as the Company’s examples show.”).

126. *Id.* (“The anomalous results to which the Company points must be considered in light of Congress’ evident interest in reducing complexity and minimizing administrative confusion.”).

127. *United States v. United Dominion Indus., Inc.*, 532 U.S. 822 (2001).

128. *Id.* at 825.

129. I.R.C. § 172(b)(1)(I).

consolidated group had product liability losses.¹³⁰ For those that did not have net operating losses, their product liability expenses would be ignored.¹³¹ The taxpayer sought to calculate the product liability losses of the consolidated group as a single entity, i.e., whether the entire group in the aggregate had a net operating and product liability loss.¹³² In contrast with the government's method, product liability expenditures from profitable members of the group would still be considered.¹³³

United Dominion Industries implicated text, intent, and consequences. In the end, the Court sided with the taxpayer's construction, finding it more consistent with text and purpose. Essentially, the taxpayer's consistency with the text and purpose of the statute exceeded the degree with which the Court usually defers to the Commissioner's interpretation of his own regulations.¹³⁴ Moreover, the Court found that the regulation was a poor representation of congressional intent.

United Dominion Industries' construction was more consistent with text, intent and purpose than the Government's; but only slightly with respect to each function. Text favored the taxpayer, but not by enough to satisfy the Court's textual disposition quotient. Justice Stevens points out in his dissent, "[t]his is a close and difficult case, in which neither the statute nor the regulations offer a definitive answer to the crucial textual question."¹³⁵ In concurrence, Justice Thomas did not deny the ambiguous nature of the Code upon the subject of PLEs: "[I]n cases such as this one, in which the complex statutory and regulatory scheme lends itself to any number of interpretations, we should be inclined to rely on the traditional canon that construes revenue-raising laws against their drafter."¹³⁶

130. *United Dominion Indus.*, 532 U.S. at 827-28 ("According to the Government's methodology, which we will call the 'separate-member' approach, PLEs incurred by an affiliate with positive separate taxable income cannot contribute to a PLL eligible for [ten]-year carryback.").

131. *Id.*

132. *Id.* at 826-27 ("AMCA answered this question by following what commentators have called a 'single-entity' approach to calculating its 'consolidated' PLL.").

133. *Id.* ("In AMCA's view, the fact that several member companies throwing off large PLEs also, when considered separately, generated positive taxable income was of no significance.").

134. In fact, the subordination of the Commissioner's interpretation of treasury regulations forms the basis of Justice Steven's dissent. His dissent identifies both intent and purpose. To the extent Congress punted the matter entirely to the Commissioner, the Commissioner's interpretation should stand as the putative intent of Congress. To the extent the Commissioner's interpretation promoted a consequence Congress sought for it to promote, tax avoidance in this case, it represents purposivism.

135. *United Dominion Indus.*, 532 U.S. at 839 (Stevens, J., dissenting).

136. *Id.* at 839 (Thomas, J., concurring).

There is no plain meaning for the term “product liability expenses.” It is a word Congress made up. But, the taxpayer’s treatment was more consistent with other words in the same statute. The Court pointed out that if there were such a thing as separate product liability expenses, it would have to be compared to separate net operating losses.¹³⁷ Since neither the Code nor its regulations supported the concept of separate net operating losses, it similarly rejected the idea of separate product liability expenses.¹³⁸ However, the Court would not rest on context alone after the Government showed that it is not hard to conceive of separate net operating losses.¹³⁹

The taxpayer’s construction was also more consistent with administrative efficiency and due process. “This approach resting on comparable treatment has a further virtue entitled to some weight in case of doubt: it is (relatively) easy to understand and to apply.”¹⁴⁰ This efficiency concern applies equally to the government and the taxpayer. Moreover, the Court cited a treatise for the proposition that, “[e]ven if separate entity treatment was appropriate it is unclear how a member with PLEs would compute its separate NOL.”¹⁴¹ Thus, to the extent the Court is concerned with the facility with which taxpayer’s read and submit to the Code, the Court’s deliberative formula includes due process among its favored consequences.¹⁴²

The Commissioner’s interpretation of treasury regulations relating to consolidated returns was considered evidence of legislative intent, but it was rejected. This case resembles the circumstances of *Chevron v. NRDC*. In both, a meaningful legal calculation depended on whether a particular entity was to be considered as a whole or whether each part of the whole must be separately evaluated.¹⁴³ In both cases, the citizen sought treatment of his operation as a whole, while the government sought to evaluate each part of the operation separately.¹⁴⁴ The

137. *Id.* at 830-31.

138. *Id.*

139. The Court ultimately dismissed the notion that Separate Taxable Income (STI), or something similar, could be used as a proxy. *Id.* at 832-33.

140. *Id.* at 831.

141. *Id.* at 831 (citing A. DUBROFF, J. BLANCHARD, J. BROADBENT, & K. DUVAL, FEDERAL INCOME TAXATION OF CORPORATIONS FILING CONSOLIDATED RETURNS § 41.04[06] 41-75 (2d ed. 2000)).

142. Of course administrative efficiency and due process could be considered dynamic concerns. They are purposive only to the extent the Court reasonably determines that the legislature expects them to be considered.

143. See *United Dominion Indus.*, 532 U.S. at 824; *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 840 (1984).

144. *United Dominion Indus.*, 532 U.S. at 827-28; *Chevron*, 467 U.S. at 840.

cases divide upon the fact that the agency wins in *Chevron* but loses in *United Dominion Industries*.¹⁴⁵ The difference, however, lies in the form of the administrative construction. *Chevron* dealt with a regulation promulgated after notice and comment,¹⁴⁶ while *United Dominion Industries* involved the agency's ad hoc interpretation of a statutory term.¹⁴⁷ The Court discounted the Commissioner's interpretation as the putative intent of Congress because the Commissioner, in forming it, had not adhered to the more arduous procedures prescribed by Congress for making regulations and interpretations.¹⁴⁸ This is consistent with the administrative deference doctrines.¹⁴⁹

Justice Stevens, in dissent, contended that the tax avoidance concern was a legitimate purpose the Court should accept and emphasize more so than administrative efficiency or due process.¹⁵⁰ Deborah Geier shows the Court has a long tradition of constructing statutes in a manner that respects congressional intent to discourage tax avoidance.¹⁵¹ According to Geier, the structure of the Code militates against tax avoidance.¹⁵² It is less concerned with its own clarity and the ability of taxpayers' to comply with its commands. Towards this purpose, Justice Stevens would "credit the Secretary of the Treasury's concerns about the potential scope of abuse."¹⁵³ However, a single entity

145. See *United Dominion Indus.*, 532 U.S. at 827-28; *Chevron*, 467 U.S. at 840.

146. *Chevron*, 467 U.S. at 840.

147. *United Dominion Indus.*, 532 U.S. at 827-28.

148. See Administrative Procedures Act, 5 U.S.C. § 553 (2000) (explaining the procedures to be followed when making regulations and interpretations).

149. See *Cottage Sav. Ass'n v. Comm'r*, 499 U.S. 554, 555 (1991) (showing the precedent set forth for administrative deference that the Court followed in *United Dominion Industries*); *Chevron*, 467 U.S. at 844; *United States v. Nat'l Muffler Dealers Ass'n*, 440 U.S. 472, 484 (1979); *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

150. *United Dominion Indus.*, 532 U.S. at 842 (Stevens, J., dissenting) ("However, the Government does forward a valid policy concern that militates against petitioner's construction of the statute: the fear of tax abuse.").

151. Geier, *supra* note 37, at 463-64.

152. *Id.* at 463.

153. *United Dominion Indus.*, 532 U.S. at 842 (Stevens, J., dissenting) ("In short, I find no answer to this case in the text of the statute or in any Treasury Regulation. However, the Government does forward a valid policy concern that militates against petitioner's construction of the statute: the fear of tax abuse. See Brief for United States at 40-42, *United Dominion Indus.*, 532 U.S. 822 (2001) (No. 00-157). Put simply, the Government fears that currently unprofitable but previously profitable corporations might receive a substantial windfall simply by acquiring a corporation with significant product liability expenses but no product liability losses. See *id.* at 40. On a subjective level, I find these concerns troubling. Cf. *Woolford Realty Co. v. Rose*, 286 U.S. 319, 330 (1932) (rejecting "the notion that Congress in permitting a consolidated return was willing to foster an opportunity for juggling so facile and so obvious"). More importantly, however, I credit the Secretary of the Treasury's concerns about the potential scope of abuse. Perhaps the Court is correct in suggesting that these concerns can be alleviated

approach favors the taxpayer this time but could favor the government in another case.¹⁵⁴

D. United States v. Craft

The issue in *United States v. Craft* concerned whether a federal tax lien attaches to property held as a tenancy by the entirety.¹⁵⁵ A tenancy by the entirety is a common law form of joint ownership available only to married couples.¹⁵⁶ Both tenants have a right to the whole and may not alienate the property without the consent of the other.¹⁵⁷ Generally, and pursuant to Michigan law, the debts of one tenant cannot attach to property held by the entirety.¹⁵⁸ Neither tenant has an interest “separable from that of the other.”¹⁵⁹

However, state law does not control federal tax law.¹⁶⁰ Whether a federal tax lien relating to the husband pursuant to Code § 6321 attaches to property held by the entirety with his wife is not determined by Michigan law, except that the property rights Michigan grants to a tenancy by the entirety determines the federal question.¹⁶¹ Resolution of the case depended on whether the husband’s tenancy constituted “property” or “a right to property” pursuant to Code § 6321.¹⁶²

The Court examined first what the law typically regards as property: the bundle of rights typically associated with ownership.¹⁶³ Tenants by the entirety, the Court found, have every right fee simple owners have, except they cannot unilaterally dispose of the property.¹⁶⁴ This bundle of rights is

through applications of other anti-abuse provisions of the Tax Code, see *ante*, at 1943, but I am not persuaded of my own ability to make that judgment. When we deal ‘with a subject that is highly specialized and so complex as to be the despair of judges,’ *Dobson v. Commissioner*, 320 U.S. 489, 498 (1943), an ounce of deference is appropriate.” (footnote omitted).

154. *United Dominion Indus.*, 532 U.S. at 837 (“[O]n the score of tax avoidance, the separate-member approach is no better (and is perhaps worse) than the single-entity treatment; both entail some risk of tax-motivated behavior.”).

155. *United States v. Craft*, 535 U.S. 276 (2002).

156. 4 THOMPSON ON REAL PROPERTY § 33.02 (David A. Thomas ed., 1994).

157. *Craft*, 535 U.S. at 281.

158. *Id.* at 282.

159. *Id.*

160. *Id.* at 278 (“[W]e look initially to state law to determine what rights the taxpayer has in the property the Government seeks to reach, then to federal law to determine whether the taxpayer’s state-delineated rights qualify as ‘property’ or ‘rights to property’ within the compass of the federal tax lien legislation.”).

161. *Id.*

162. *Id.*

163. *Id.* at 278-79.

164. *Id.* at 282.

strikingly similar to those possessed by partners in a partnership.¹⁶⁵ The absence of a right to unilaterally alienate the property is also like a Texas homestead, which the Court found to be property or a right to property pursuant to Code § 6321.¹⁶⁶ The Court also found the IRS's position consistent with preventing tax avoidance.¹⁶⁷ Moreover, the Court determined that past legislative initiatives to make tenancies by the entirety explicitly covered by § 6321 failed because that was already Congress' understanding and to codify it would be superfluous.¹⁶⁸

In dissent, Justice Thomas would have had the Court emphasize the plain meaning of property as understood by the state of Michigan and other states that have tenancy by the entirety.¹⁶⁹ He accused the majority of ignoring the "primacy of state law" and the distinction between "property" and "rights to property."¹⁷⁰ This textualist approach is similar to a suggestion made by Allen Madison.¹⁷¹

Justice Scalia added, in dissent, that the government's position is inconsistent with the protection of women.¹⁷² According to Scalia, the purpose of creating tenancies by the entirety was to protect the non-working, "innocent" spouse from the debts of the commercially active spouse.¹⁷³ Because usually the non-working spouse is female and the commercially active spouse is male, Scalia accused the Court of turning its back on women.¹⁷⁴ By contrast, the IRS's position in *Commissioner v. Banks* had a deleterious effect on civil rights generally, but no justice expressed any concern in that case.

Craft implicates text, intent, purpose, and modern dynamics. The Court severely discounted the meaning of the term "property" or "rights to property" as plainly understood by the secretaries of several states. This interpretative community

165. *Id.* at 286 ("In this case, it is instead the dissenters' theory that departs from partnership law . . .").

166. *Id.* at 284-85 (citing *United States v. Rodgers*, 461 U.S. 677 (1983)).

167. *Id.* at 285 ("[The taxpayer's interpretation] not only seems absurd, but would also allow spouses to shield their property from federal taxation by classifying it as entireties property, facilitating abuse of the federal tax system.").

168. *Id.* at 287.

169. *Id.* at 291 (Thomas, J., dissenting).

170. *Id.*

171. Allen D. Madison, *The Tension Between Textualism and Substance-Over-Form Doctrines in Tax Law*, 43 SANTA CLARA L. REV. 699, 712-13 (2002) (describing Justice Scalia's textualist argument in *Printz v. United States*, 521 U.S. 898 (1997)).

172. *Craft*, 535 U.S. at 289-90 (Scalia, J., dissenting).

173. *Id.*

174. *Id.*

agreed that interests in a tenancy by the entirety is not property belonging to any one person such that Code § 6321 could apply.¹⁷⁵ However, the federal meaning of property has long been considered vague, it is often not clear for tax purposes.¹⁷⁶

Craft also involved two indicia of legislative intent, judicial precedent and legislative inaction. The majority relied on *United States v. Rodgers* to show that a federal tax lien can attach to a similar type of property, a Texas homestead.¹⁷⁷ The fact that Congress did not act to supersede *Rodgers* evinces its intent to let federal liens attach to homesteads and similar forms of property ownership. According to the Court, Congress attempted to make this explicit and failed only because codification was thought to be unnecessary.¹⁷⁸

Horizontal equity as a purposive consequence is also represented here. Horizontal equity is the principle that similarly situated taxpayers should be taxed similarly.¹⁷⁹ The majority found a tenant by the entirety to be similarly situated to holders of community property and to partners in a partnership.¹⁸⁰ Because federal tax liens attach to the portion of partnership or community property attributable to the tax debtor, horizontal equity suggests it should attach to the portion of a tenancy by the entirety attributable to a tax debtor.

Also, the Court found the taxpayer's contention extremely inconsistent with preventing tax avoidance.¹⁸¹ If federal tax liens did not attach to property held by the entirety, there would be a huge incentive for married tax debtors to hold all property in this form.¹⁸² Since the property would belong to no one, each spouse could run up tax debts without paying so long as all of the marital property was held by the entirety.

Surprisingly, this case is the only one of nine where one of the justices candidly found a litigant's position inconsistent with a modern dynamic. The protection of women as a disempowered group was stridently asserted by Justice Scalia.¹⁸³ This stands in

175. *Id.*

176. *See, e.g.,* Caamano v. Comm'r, 879 F.2d 156, 157 (5th Cir. 1989); Comm'r v. Anders, 414 F.2d 1283, 1288 (T.C. 1969) (providing examples of courts construing the meaning of property used in different sections of the Code).

177. *Craft*, 535 U.S. at 284; *United States v. Rodgers*, 461 U.S. 677 (1983).

178. *Craft*, 535 U.S. at 284.

179. *See* MICHAEL J. GRAETZ & DEBORAH H. SCHENK, FEDERAL INCOME TAXATION: PRINCIPLES AND POLICIES 25 (4th ed. 2005).

180. *Craft*, 535 U.S. at 284-86.

181. *Id.* at 285.

182. *Id.*

183. *Id.* at 289-90 (Scalia, J., dissenting).

great contrast to the *Banks* case where the protection of many disempowered groups was tangentially at issue. Consistent with *Banks*, however, the majority ignored it.

According to the majority, then, the IRS's position, that federal tax liens attach to property held by the entirety, is more consistent than the taxpayer's with respect to intent and purpose. On the other hand, the taxpayer's is more consistent with modern dynamics and perhaps text.

E. *United States v. Fior D'Italia*

The taxpayer in *United States v. Fior D'Italia, Inc.* was a restaurant whose employees underreported the amount of tips they received from credit card customers.¹⁸⁴ The amount they reported was less than what was shown on the customers' credit card slips, exclusive of any cash tips.¹⁸⁵ The IRS adjusted the amount relating to the credit card slips and calculated the amount of tips received from cash paying customers by using the tip percentage offered by credit card customers.¹⁸⁶ The taxpayer contended that Congress intended to shield restaurants from the consequences of their employees' tax malfeasance.¹⁸⁷ IRS regulations required restaurants to report as tip wages for FICA tax purposes only those amounts the employee declared.¹⁸⁸

The taxpayer reported the employees' tip wages as the law instructed.¹⁸⁹ But the IRS sought to reassess the restaurant's liability in light of what was obviously underreporting by its employees.¹⁹⁰ In calculating the tip wages for employment tax purposes, the taxpayer contended that the IRS was limited to using essentially the same information available to the

184. *United States v. Fior D'Italia, Inc.*, 536 U.S. 238, 241 (2002) (“[T]he restaurant’s employees showed that total tip income amount to \$247,181 and \$220,845, in each year respectively The same reports, however, also showed that customers had listed tips on their credit card slips amounting to far more than the amount reported by the employees”).

185. *Id.*

186. *Id.* (“The IRS examined the restaurant’s credit card slips for the years in question, finding that customers had tipped, on average, 14.49% of their bills in 1991 and 14.29% in 1992. Assuming that cash-paying customers on average tipped at those rates also, the IRS calculated total tips by multiplying the tip rates by the restaurant’s total receipts.”).

187. *Id.* at 249.

188. *Id.* (“[A]n employer, when calculating its FICA tax, must ‘include wages received by an employee in the form of tips only to the extent of the tips reported . . . to the employer.’” (emphasis omitted) (quoting Treas. Reg. § 31.6011(a)-1(a) (as amended in 1976))).

189. *Id.* at 241.

190. *Id.* at 241.

restaurant.¹⁹¹ They argued that to determine the amount of tip wages received by the employees as a group, while arguably not an unreasonable method in the abstract, had the consequences of penalizing the restaurant for not preventing the employees' mischief in the first place.¹⁹² This consequence, according to the taxpayer, was at odds with congressional purposes with respect to restaurateurs and their tax burdens.¹⁹³

The Court found Code § 6201, providing the Commissioner with authority to make tax assessments, to be the primary statute at issue.¹⁹⁴ But § 6201 offers no method for calculating the amount of tips in respect of which an employer is liable for employment taxes.¹⁹⁵ Here, the Court faced a situation where one method – aggregate estimation – comported with legislative intent, and the other – individual determination – comported with purpose.¹⁹⁶

Like *Cleveland Indians Baseball*, *United Dominion Industries*, and *Boeing, Fior D'Italia* involved differing methods of making a computation.¹⁹⁷ In each, the statute lacked instruction leaving the Court to glean the legislature's intent, determine which deliberative choice is consistent with express or implied legislative purposes, determine which deliberative choice comports with judicial notions of good consequences, or engage in some synthesis of considerations. In each, the administrative agencies' interpretation ostensibly represented a reasonable and

191. *Id.* at 242 (“The restaurant argued that the tax statutes did not authorize the IRS to use its ‘aggregate estimation’ method; rather, they required the IRS first to determine the tips that each individual employee received and then to use that information to calculate the employers total FICA tax liability.”).

192. *Id.* at 250-51 (“*Fior D'Italia* says that the IRS’ recent use of an ‘aggregate estimate’ approach runs contrary to the understanding that underlies [§ 45B], for it ‘effectively forces the employer into . . . verifying, investigating, monitoring, and policing compliance by its employees—responsibilities which Congress and the Courts have considered, evaluated, and steadfastly refused to transfer from the IRS to the employers.’”).

193. *Id.* at 250.

194. *Id.* at 243 (“[Section 6201], by granting the IRS assessment authority, must simultaneously grant the IRS power to decide *how* to make that assessment—at least within certain limits.”).

195. *See id.*

196. *See id.* at 242. *Compare id.* at 246 (“Again, there is simply no reason to believe that Congress, in writing this provision applicable to a small corner of tax law, intended, through negative implication, to limit the IRS’s general power to assess tax deficiencies.”), *with id.* at 254 (“The practice of assessing FICA taxes against an employer on estimated aggregate tip income, however, raises anomaly after anomaly, to the point that one has to suspect that the Government’s practice is wrong.”) (Souter, J., dissenting).

197. *Boeing Co. v. United States*, 537 U.S. 437, 449-51 (2003); *Fior D'Italia*, 536 U.S. at 241; *United States v. United Dominion Indus., Inc.*, 532 U.S. 822, 829 (2001); *United States v. Cleveland Indians Baseball Co.*, 532 U.S. 200, 202 (2001).

authorized memorial of Congress's intent.¹⁹⁸ The taxpayer, on the other hand, attempted to show that its construction was more consistent with Congressional purposes.¹⁹⁹ In *Cleveland Indians Baseball* and *Boeing*, the Court upheld the IRS's method, finding it rigorously promulgated and not inconsistent with generally identifiable purposes, e.g., tax avoidance.²⁰⁰ Those cases stand for the proposition that when the Court is confronted with one choice that is consistent with legislative intent as represented by a formally promulgated regulation and another choice that is more consistent with generally identifiable purposes, the Court chooses intent over purpose.

United Dominion Industries is consistent with the Court's approach to *Cleveland Indians Baseball* and *Boeing*. While it is true, the taxpayer won in *United Dominion Industries*,²⁰¹ the difference lies in the nature of the administrative precedent and the strength of consistency with a generally identifiable purpose. The administrative precedent in *United Dominion Industries* was ad hoc. It had not been promulgated through notice and comment rule making. It was not even a long standing informal regulation. Therefore, the Court discounted it as a representation of legislative intent. The Court found the IRS's method to be clearly incompatible with notice and fiscal administrability. No reasonable taxpayer would have read the statute and performed the computation the way the IRS would later say they ought to have done it.

Fior D'Italia was important then. The Court there was faced with a reasonable method of making an assessment in the abstract. The IRS's method of determining the amount of tips in a given year comported well with its longstanding methods of making several types of assessments.²⁰² The Court found the IRS's method compatible with the reasonable exercise of their authority to putatively represent the intent of Congress.²⁰³ This is analogous to the holdings of *Cleveland Indians Baseball* and *Boeing*.

198. See *Boeing*, 537 U.S. 456-57; *Fior D'Italia*, 536 U.S. 263-65 (Souter, J., dissenting); *United Dominion Indus.*, 532 U.S. 832-33; *Cleveland Indians Baseball*, 532 U.S. at 219.

199. *Boeing*, 537 U.S. at 446; *Fior D'Italia*, 536 U.S. at 245-46; *United Dominion Indus.*, 532 U.S. at 827-28; *Cleveland Indians Baseball*, 532 U.S. at 206-07.

200. *Boeing*, 537 U.S. at 456-57 (2003); *Cleveland Indians Baseball*, 532 U.S. at 219 (2001).

201. *United Dominion Indus.*, 532 U.S. at 838 (2001).

202. *Fior D'Italia*, 536 U.S. at 243-44 (explaining the IRS's method for estimations of purchasing record, gross proceeds, personal income, cost of living, and tips).

203. *Id.* at 245-46.

However, according to Justice Souter's dissent, the IRS's method starkly conflicts with clearly identified and immediate legislative purposes.²⁰⁴ With respect to FICA, Congress intended to "create a rough parity between taxes paid and benefits received."²⁰⁵ The IRS's method therefore violates a matching principle because it disjoins "amounts presumptively owed by an employer and those owed by an employee."²⁰⁶ Second, the dissenters contend that the IRS's method is inaccurate.²⁰⁷ They are convinced the method will overestimate the amount of tips given by cash-paying customers.²⁰⁸ The statute provides a "wage band" which exempts significant amounts of tips from taxation.²⁰⁹ The IRS's method of assessment ignores this limitation.²¹⁰ Accuracy was certainly a consequence the legislature intended to produce. Third, and most revealing, is the fact that closely related statutes and legislative history support the notion that Congress specifically intended for the IRS not to create administrative burdens on restaurants.²¹¹ In fact, the single exception to Code § 6001's requirement that requires taxpayers to keep reasonable records in order to challenge IRS estimates relates to restaurants.²¹² The Court said that under § 6001, "[e]mployers are expressly excused from any effort to determine whether employees are properly reporting their tips."²¹³ Since the IRS's method typically overstates tips eligible for taxing and the only way to prevent such overestimation is for restaurants to increase their costs relating to employee oversight, the IRS's method seriously conflicts with immediate and easily identifiable legislative purposes. Fourth, the IRS's method would not likely increase the Treasury. Another statutory provision refunds to restaurants considerable amounts collected under the

204. *Id.* at 254 (Souter, J., dissenting).

205. *Id.* at 254 n.2 (Souter, J., dissenting).

206. *Id.* at 254 (Souter, J., dissenting).

207. *Id.* at 261 (Souter, J., dissenting).

208. *Id.* (Souter, J., dissenting).

209. *Id.* at 253 (Souter, J., dissenting).

210. *Id.* at 257 ("But determinations limited to an individual employee will necessarily be more tailored, if only by taking the wage band into account.") (Souter, J., dissenting).

211. *Id.* at 261 ("Congress has previously stymied every attempt the IRS has made to impose such a burden on employers.") (Souter, J., dissenting).

212. *Id.* at 256 ("[T]he provision states a single, glaring exception: employers need not keep records 'in connection with charged tips' . . .") (Souter, J., dissenting).

213. *Id.*

FICA scheme.²¹⁴ Thus, the IRS's method may in fact be a waste of federal resources.

The Court chose the interpretation most consistent with intent rather than with purpose. Congress punted the method of assessment to the IRS.²¹⁵ The IRS developed a method not unlike the way in which many other assessments are performed, through estimation. The Court respected it as the putative intent of the legislature. However, the IRS's method so clearly violated identifiable legislative purposes that Justices Scalia and Thomas joined the dissent.²¹⁶ Thus, despite the dissent, the *Fior D'Italia* Court clearly establishes that where intentions and purposes are clear but conflicted, the Court will emphasize intent more than purpose.

An important observation regarding *Fior D'Italia* relates to the Court's use of text as evidence of intent. Text as evidence of intent is real and not merely a flippant justification attributable to Justice Scalia for emphasizing the text function. Here, the Court deals with the argument that the "negative implication" with respect to some closely related statutes revealed Congress' intent to read the term "assessments" a certain way.²¹⁷ The Court did not focus on what the average person would think assessment meant after reading related statutes. Instead, it focused on what Congress intended them to mean as evidenced by these other statutes.²¹⁸ According to Deborah Geier, the purposes most easily ascertainable are those emanating from text.²¹⁹ The IRS's method of assessment in *Fior D'Italia* was plainly inconsistent with text-based purposes, yet the Court chose to support it.

F. Boeing Co. v. United States

In order for Boeing, the airline manufacturer, to take advantage of favorable treatment the Code provides with respect to its domestic international sales corporation ("DISC") it must

214. *Id.* at 261 ("[T]he collection effort will probably result in no net benefit to the Government (except, perhaps, as an interest-free loan).") (Souter, J., dissenting).

215. *Id.* at 243 ("[Section 6201], by granting the IRS assessment authority, [26 U.S.C. § 6201(a)] must simultaneously grant the IRS power to decide *how* to make that assessment—at least within certain limits.").

216. *Id.* at 252 (Souter, J., dissenting).

217. *Id.* at 245-46.

218. *Id.* at 246.

219. Geier, *supra* note 12, at 496.

compute something called combined taxable income ("CTI").²²⁰ To determine how much of the taxpayer's CTI is attributable to the subsidiary versus the parent, the taxpayer must allocate expenses between them.²²¹ This allocation is based on percentages of product sales.²²² Costs relating to research and development ("R&D") are allocated to all product lines in proportion with their respective annual sales, regardless of whether all or a portion of such costs are specifically dedicated to one product line.²²³

In spite of the Secretary of the Treasury's determination pursuant to Code § 861 that R&D costs are inherently speculative and must be allocated to all product lines,²²⁴ Boeing allocated to its subsidiary, which sold no Boeing 767s, none of the \$3.6 billion it spent on researching and developing the Boeing 767 aircraft.²²⁵ Boeing argued that the Secretary's determination with respect to research and development costs pursuant to Code § 861 did not apply to the treatment of DISC's, which Boeing contended are governed exclusively under Code § 994.²²⁶ The regulations promulgated pursuant to § 994 allow a taxpayer to group sales and allocate costs to those groups based on either

220. See I.R.C. § 994(a)(2) (2000); *Boeing Co. v. United States*, 537 U.S. 437, 441 (2003) ("The alternative used by Boeing in this suit limited the DISC's taxable income to a little over half of the parties' 'combined taxable income' (CTI).").

221. See *Boeing*, 537 U.S. at 443, 447-48 ("The statute does not define the term 'combined taxable income,' nor does it specifically mention expenditures for R&D. Congress did grant the Secretary express authority to prescribe regulations for determining the proper allocation of expenditures in computing CTI in certain specific contexts.").

222. *Id.* at 437 ("With respect to the 'what' question, the regulation includes a list of Standard Industrial Classification (SIC) categories (e.g., transportation equipment) and requires that R & D for any product within the same category as the exported product be taken into account. The regulations use gross receipts from sales as the basis for both 'how' questions.").

223. *Id.*

224. *Id.* at 443 ("The regulation explains that R&D on any product 'is an inherently speculative activity' that sometimes contributes unexpected benefits on other products, and 'that the gross income derived from successful research and development must bear the cost of unsuccessful research and development.'"); Treas. Reg. § 1.861-17 (1995).

225. *Boeing*, 537 U.S. at 444-45 ("[Boeing's] method of accounting for \$3.6 billion of 'Company Sponsored' R&D gave rise to this litigation. Boeing's accountants treated all of the Company Sponsored research costs as directly related to a single program, and as totally unrelated to any other program. Thus, for DISC purposes, the cost of Company Sponsored R&D directly related to the 767 model, for example, had no effect on the calculation of the 'combined taxable income' produced by export sales of any other models.").

226. *Id.* at 446 ("Boeing argues, in essence, that the statute and certain specific regulations promulgated pursuant to I.R.C. § 994 give it unqualified right to allocate its Company Sponsored R&D expenses to the specific products to which they are 'factually related' and to exclude any allocated R&D from being treated as a cost of any other product.").

trade usage or on the directness of the relationship between the sales item and the costs.²²⁷ This permits Boeing to allocate R&D costs specifically dedicated to one product line to the group in which that product line belongs based on trade usage. Boeing allocated \$3.6 billion of R & D costs to a product group, 767 aircrafts, which Boeing's DISCs did not sell.²²⁸ Since the DISCs sold no 767's, no R&D costs were allocated to the DISC.²²⁹ There was no dispute whether the \$3.6 billion was in fact dedicated to the 767 aircraft. Also in the taxpayer's favor was a proposed but never promulgated rule under § 994 which specifically and unequivocally permitted Boeing's method.²³⁰ Essentially, the taxpayer contended that regulations under § 994 permit their method of accounting, while the Commissioner argued that regulations under Code § 861 prohibit it.

The majority was not persuaded by Boeing's contention that the regulations under Code §§ 861 and 994 were in conflict.²³¹ It interpreted regulations under § 994 to permit a taxpayer's determination of which costs are allocated to a sales group so long as it is based on industry usage *and* so long as the Secretary had not determined elsewhere that specific cost "cannot definitely be allocated to some item or class of gross income."²³² The dissent found on the other hand that the regulations directly conflict such that the taxpayer was forced to choose one over the other and reasonably chose the regulations that specifically address the activity at hand.²³³ Justice Thomas asserted the principle that in such conflicts the specific trumps the general.²³⁴

227. Treas. Reg. § 1.994-1(c)(6) to (7) (as amended 1984).

228. *Boeing*, 537 U.S. at 445.

229. *Id.* at 438.

230. *Id.* at 458 (Thomas, J., dissenting) ("Proposed regulation § 1.861-8(e)(3), in turn, explained that where 'research and development' . . . is intended or is reasonably expected to result in the improvement of specific properties or processes, deductions in connection with such research and development shall be considered definitely related and therefore allocable to the class of gross income to which the properties or processes give rise or are reasonably *expected* to give rise.").

231. *Id.* at 453 n.13 ("[W]e find these proposed regulations to be of little consequence given that they were nothing more than mere proposals.").

232. *Id.* at 450-51 ("From the items of gross income specified in subsection (a) as being income from sources within the United States there shall be deducted the expenses, losses, and other deductions properly apportioned or allocated thereto *and a ratable part* of any expenses, losses, or other deductions *which cannot definitely be allocated to some item or class of gross income*. The remainder, if any, shall be included in full as taxable income from sources within the United States.") (quoting I.R.C. § 861(a) (2000)).

233. *Id.* at 460-61 (Thomas, J., dissenting) ("Although under § 1.991-1(c)(7) taxpayers are given three choices with respect to the proper grouping of export income (*and* the related allocation of *expenses*), and although § 1.994-1(c)(6)(iv) provides that the taxpayer's selection under § 1.991-1(c)(7) shall be 'controlling,' § 1.861-8(e)(3) takes away the very choices § 1.991-1 provides. Under § 1.861-8(e)(3), the taxpayer is told that R&D

The taxpayer's argument was very appealing, except that whether R&D costs can in fact be allocated to only one product group is a question without an absolute answer. In the vein of *Chevron*, such a determination is a job for the politically accountable.²³⁵ The Secretary determined that allocation of R&D costs are inherently speculative, which means there is no method that could avoid arbitrary results.²³⁶ Though an interpretive regulation is not entitled to *Chevron* deference,²³⁷ this opinion was reasoned and long-standing, thus it was entitled to deference pursuant to a number of administrative deference doctrines.²³⁸

Boeing is heavily intentionalist with a hint of purposivism mixed in.²³⁹ Which of the relevant regulations best embodies the putative intent of Congress? No statute directly addresses this issue, so the textual function is not strongly implicated.²⁴⁰ There is a hint or two regarding tax avoidance and fiscal administrability, which are purposive consequences.²⁴¹ But the

expenses may be allocated *solely* to items or classes of gross income resulting from products that are within the same 2-digit SIC group—which happens to be only one of the three options given under § 1.991-1(c)(7). In my view, the rule set forth in § 1.861-8(e)(3) entirely eviscerates the options given in § 1.991-1. Thus, despite the Court's efforts to show that the two regulations complement, rather than contradict, each other . . . the conflict is irreconcilable.") (citation omitted).

234. *Id.* at 448 ("Even if we regard the challenged regulation as interpretive because it was promulgated under § 7805(a)'s general rulemaking grant rather than pursuant to a specific grant of authority, we must still treat the regulation with deference.").

235. *See id.* at 447-48.

236. *Id.* at 450 n.11 (noting that "R&D 'is an inherently speculative activity' that sometimes contributes unexpected benefits on other products").

237. *See Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 865 (1984).

238. *Boeing*, 537 U.S. at 448 ("Even if we regard the challenged regulation as interpretive because it was promulgated under § 7805(a)'s general rulemaking grant rather than pursuant to a specific grant of authority, we must still treat the regulation with deference."); *see also Cottage Sav. Ass'n v. Comm'r*, 499 U.S. 554, 555 (1991); *Skidmore v. Swift & Co.*, 323 U.S. 134, 164 (1944).

239. *Boeing*, 537 U.S. at 446, 456-57 ("[Boeing] argues that [§] 1.861-8(e)(3) is so plainly inconsistent with congressional intent . . . that it cannot be validly applied If anything, what little relevant legislative history there is in this suit weighs in favor of the Government's position in two important respects. First, . . . [C]ongress did not intend to grant 'undue tax advantages' to firms. . . . Second, . . . the fact that Congress did not legislatively override 26 CFR § 1.861-8(e)(3)(1979) in enacting the FSC provisions in 1984 serves as persuasive evidence that Congress regarded that regulation as a correct implementation of its intent.").

240. *Id.* at 451 ("In sum, Boeing's arguments based on statutory text are plainly insufficient to overcome the deference to which the Secretary's interpretation is entitled."). Notice that this directly contrasts with the Court's decision in *United Dominion Industries*. There, a choice supported by both text and consequences trumped the Secretary's interpretation.

241. *Id.* at 450 ("[E]ven if Boeing's method of accounting for R&D is fully justified for management purposes, it certainly produces anomalies for tax purposes. Most obvious is the fact that it enabled Boeing to deduct some \$1.75 billion of expenditures from its

primary issue still relates to the proper emphasis accorded factors within the intent function. The majority believed the construction it chose was consistent with what the Secretary, as the legislature's designee, intended, as well as House and Senate committee reports.²⁴² This case involved final regulations promulgated under a specific statute, a proposed regulation promulgated under a specific statute, final regulations promulgated under a general statute, and House and Senate reports.²⁴³ From all this, the Court presumably gleaned the intent of the legislature. However, this intent was putative. The Court found that Congress punted to the Commissioner.²⁴⁴ Thus, it is his intent that is to be discovered. The Court may have lamented the fact that evidence of the Commissioner's intent was scattered and contradictory, but it did not find such confusion sufficient to side with the taxpayer on purposive due process grounds.

The majority found that the deliberative choice proffered by the government was consistent with the regulations under both Code §§ 861 and 994.²⁴⁵ Thus, the government's argument was more consistent with more of our more important social and legal principles than the taxpayer's argument, because the choice proffered by the taxpayer was arguably consistent with one factor of congressional intent but absolutely inconsistent with another.²⁴⁶

The majority invoked the reenactment doctrine, which places a great degree of emphasis on regulations which survive the reenactment of a statute.²⁴⁷ Inconsistency with this indicium of intent proved dispositive.²⁴⁸ In terms of formulaic deliberation, the majority placed some emphasis on all regulations within the foreign tax scheme. Whereas, the dissent

domestic taxable earnings . . . and never deduct a penny of those expenditures from its 'combined taxable earnings' under the DISC statute.").

242. See *id.* at 456-57.

243. *Id.* at 437 ("This suit concerns tax provisions enacted by Congress in 1971 to provide incentives for domestic manufacturers to increase their exports and in 1984 to limit and modify those incentives.").

244. See *id.* at 457.

245. The regulations promulgated specifically under § 994, upon which Boeing and Justice Thomas in dissent rely, specifically incorporate regulations promulgated under § 861 in which the Secretary determined that R&D as a cost is "not definitely related to a class of gross income." *Id.* at 451-53.

246. *Id.* at 456-57.

247. See *id.* at 457 ("The fact that Congress did not legislatively override 26 CFR § 1.861-8(e)(3) (1979) in enacting the FSC provisions in 1984 serves as persuasive evidence that Congress regarded that regulation as a correct implementation of its intent.").

248. See *id.* at 456-57.

assigned no emphasis at all to those regulations not promulgated under the statute directly at issue.²⁴⁹ The taxpayer's failure to be consistent with all the indicia of legislative intent lost the case.²⁵⁰

G. United States v. Galletti

In *United States v. Galletti*, a partnership failed to fully pay its federal employment tax liability.²⁵¹ Pursuant to Code §§ 6501-02, if the IRS assesses its tax liability within three years after the partnership's return is filed, the IRS has 10 years to collect.²⁵² The IRS timely assessed the tax, but it was never paid.²⁵³ The IRS then sought to collect from the partners individually.²⁵⁴

When the partners filed for Chapter 13 bankruptcy protection, the IRS filed proofs of claim against the partnership in each partner's proceeding.²⁵⁵ Each individual taxpayer defended against the proof of claim by asserting that the IRS never assessed their individual tax liability with respect to the unpaid employment taxes.²⁵⁶ They contended that since the IRS only assessed the tax with respect to the partnership, the collection period was effective only as to the partnership and not the individual partners.²⁵⁷ The IRS, each partner contended, was required to assess the tax separately with respect to each partner.²⁵⁸

The Court of Appeals for the Ninth Circuit held for the taxpayers, relying on the definition of the word "taxpayer" in § 7701(a)(14).²⁵⁹ If taxpayer means "any person subject to any internal revenue tax," then the IRS's assessment was only valid

249. See *id.* at 460-61 & n.3 (Thomas, J., dissenting).

250. Richard Lavoie suggests that taxpayers are all too often ignoring indicia of intent in order to legitimize abusive transactions. See Richard Lavoie, *Subverting the Rule of Law: The Judiciary's Role in Fostering Unethical Behavior*, 75 U. COLO. L. REV. 115, 186 (2004).

251. *United States v. Galletti*, 541 U.S. 114, 117 (2004).

252. I.R.C. §§ 6501-02 (2000).

253. *Galletti*, 541 U.S. at 117.

254. *Id.*

255. *Id.*

256. *Id.* at 117-18 (arguing that the extension of the three-year limitations period applied to the partnership only and not to the individual taxpayer).

257. *Id.*

258. *Id.* at 120 ("Respondents argue . . . that each partner is primarily liable for the debt and must be individually assessed because each partner is a separate 'taxpayer' under 26 U.S.C. § 6203.")

259. *Id.* at 118.

against the taxpayer with respect to whom the tax was assessed; in this case the partnership and not the partners.²⁶⁰

The Supreme Court held unanimously that the IRS need not separately assess the tax with respect to a partnership and each of the partners.²⁶¹ The Court found that Code § 6203 required the IRS to assess a tax only with respect to those bearing primary responsibility.²⁶² Since the tax was the primary liability of the partnership, the IRS was required to assess it with respect to the partnership alone.²⁶³ The Court also held that when the primary taxpayer fails to pay and the IRS is entitled to pursue another taxpayer for that tax debt, the IRS is not required to issue new assessments nor do those assessments have to be within three years of the original return.²⁶⁴

The Court relied most heavily on the meaning of the term assessment as defined in Black's Law Dictionary and as used in several statutes and regulations.²⁶⁵ In other words, the Court emphasized most the meaning plainly understood by lawyers, or perhaps tax lawyers. This definition of assessment related simply to ascertainment of the amount of the tax liability, not the ascertainment of who is liable for it.²⁶⁶ Thus, the IRS need only determine the tax once and notify those primarily liable.

Galletti and *Gitlitz* are two of the 21st Century Court's text-based decisions. In *Gitlitz*, the question concerned which deliberative choice was consistent with the meaning of the words "item of income."²⁶⁷ In *Galletti*, the operative word was "assessment."²⁶⁸ Justice Thomas' decisions in these two cases restrict deliberative consideration to plain meaning and context, i.e., the text function.²⁶⁹ As stated before, the Court found the

260. *Id.*

261. *Id.* at 123 ("Once a tax has been properly assessed, nothing in the code requires the IRS to duplicate its efforts by separately assessing the same tax against individuals or entities who are not the actual taxpayers but are, by reason of state law, liable for payment of the taxpayer's debt.")

262. *Id.* at 120-21 ("Section 6203 . . . indicates that the relevant taxpayer must be determined . . . [Section] 3403 makes clear that the liable taxpayer is the employer. In this case, the 'employer' was the Partnership.")

263. *See id.* at 123.

264. *Id.*

265. *Id.* at 122.

266. *Id.* at 123 ("Under a proper understanding of the function and nature of an assessment, it is clear that it is *the tax* that is assessed, not the taxpayer.")

267. *See Gitlitz v. Comm'r*, 531 U.S. 206, 212 (2001).

268. *Galletti*, 541 U.S. at 123 ("[The] fact that the act of assessment has consequences does not change the function of the assessment: to calculate and record a tax liability.")

269. *See id.* at 122 ("In its numerous uses throughout the Code, it is clear that the term 'assessment' refers to little more than the calculation or recording of a tax liability.");

IRS's interpretation consistent with the meaning plainly understood by lawyers and also consistent with several statutes relating to assessments.²⁷⁰ The taxpayers' interpretation was not only inconsistent with plain meaning, but was consistent with merely one statute which was not so closely related.²⁷¹ Indeed, the weight of the evidence favored the IRS.²⁷²

While this may be counted among the textualist cases, there is an argument that it was purposive. John Manning wrote an article asking "What Divides Textualists from Purposivists?"²⁷³ According to this case, not much. In defining "assessment," the Court looked at the function of an assessment.²⁷⁴ The Court found that in light of congressional purposes, efficient administration-assessments should only happen once.²⁷⁵

Of course, Justice Thomas is an avowed textualist.²⁷⁶ He very much attempts to avoid intents and purposes (which is what made *Fior D'Italia* so strange). In fact, one could argue that *Galletti* is the case among all eight which most implicates principles relating to prevention of tax avoidance. Tax avoidance is mentioned in almost all of the other cases dealing with purposes.²⁷⁷ Here, in *Galletti*, there is no mention of tax avoidance at all. This reinforces the notion that the Court always examines text first, and only when its textual disposition quotient is left unmet will the Court examine intent and purpose and possibly modern dynamics. Because the Court's textual disposition quotient was met in *Galletti*, purposes and intents were ignored.

H. Commissioner v. Banks

In the consolidated cases of *Commissioner v. Banks* and *Banaitas v. Commissioner* a taxpayer hired an attorney on a contingency fee basis, meaning the attorney received a predetermined percentage of any award received.²⁷⁸ Alternatively, the taxpayer sued under a civil rights statute

Gitlitz, 531 U.S. at 212 ("Under a plain reading of the statute, we reject this argument and conclude that excluded discharged debt is indeed an 'item of income,' which passes through to the shareholders and increases their bases in the stock of the S corporation.").

270. *Galletti*, 541 U.S. at 122.

271. *Id.* at 121.

272. *Id.* at 123-24.

273. Manning, *supra* note 14, at 70.

274. *Galletti*, 541 U.S. at 122-23.

275. *See id.* at 123.

276. Molot, note 14, at 29.

277. *See supra* Part I-III.

278. *Comm'r v. Banks*, 543 U.S. 426, 430-32 (2005).

which provided for the payment of attorneys' fees as part of a damages award.²⁷⁹ The issue was whether the taxpayer must include in his gross income the entire amount of the award, or if he may exclude the portion retained by his lawyer.²⁸⁰ The issue takes on greater importance when one discovers that if a litigant must recognize the entire award as income, the alternative minimum tax ("AMT") will often prevent him from deducting the amounts paid to his attorney.²⁸¹ Imagine a litigant who sues to prevent the government from practicing unlawful discrimination. If only an injunction and considerable attorneys' fees are won, the litigant may include in his gross income the entire amount of the attorneys' fees and have no deduction.²⁸² The litigant must pay his own government to stop unlawfully discriminating against him and others.

The Internal Revenue Code does not specify who is to pay tax on income.²⁸³ The Court in *Lucas v. Earl* established long ago the rule that income is taxed to the one who earns it.²⁸⁴ *Glenshaw Glass* is consistent with *Lucas*: income includes "accessions to wealth, clearly realized, and over which the taxpayers have complete *dominion*".²⁸⁵ Thus, judicial estimations of dominion and control direct the disposition of this case.²⁸⁶

The assignment of income doctrine somewhat clarifies the notion of dominion and control.²⁸⁷ It instructs judges to focus not on who has dominion and control of the realized wealth, but on who has dominion and control over the realization of that wealth.²⁸⁸ These cases turn on whether the litigant or the

279. *Id.* at 430-33; *see also* 29 U.S.C. § 626 (1994).

280. *Banks* 543 U.S. at 429 ("The question in these consolidated cases is whether the portion of money judgment or settlement paid to a plaintiff's attorney under a contingent-fee agreement is income to the plaintiff . . .").

281. *Id.* at 432 ("For the tax years in question the legal expenses in these cases could have been taken as miscellaneous itemized deductions subject to the ordinary requirements, but doing so would have been of no help to respondents because of the operation of the Alternative Minimum Tax (AMT).") (citation omitted).

282. The first to highlight this problem were Stephen B. Cohen and Laura Sager in *How the Income Tax Undermines Civil Rights Law*. Sager & Cohen, note 2, at 1099-1100.

283. *See, e.g., Banks*, 543 U.S. at 434 ("In an ordinary case attribution of income is resolved by asking whether a taxpayer exercises complete dominion over the income in question.")

284. *Lucas v. Earl*, 281 U.S. 111, 114-15 (1930).

285. *Comm'r v. Glenshaw Glass Co.*, 348 U.S. 426, 431 (1955) (emphasis added).

286. *Banks*, 543 U.S. at 435 ("Looking to control over the income-generating asset, then, preserves the principle that income should be taxed to the party who earns the income and enjoys the consequent benefits.")

287. *Helvering v. Horst*, 311 U.S. 112, 118 (1940).

288. *See Banks*, 543 U.S. at 434 ("In the context of anticipatory assignments, however, the assignor often does not have dominion over the income at the moment of

attorney or both have dominion over and control of the claim.²⁸⁹ Some courts of appeals have held that a litigant in a contingency fee arrangement relinquishes sufficient dominion and control over a portion of the claim, such that, he would recognize only the portion he receives.²⁹⁰ Other courts of appeals have held that the litigant never gives up sufficient dominion and control.²⁹¹ Another court of appeals held that it depended on state law.²⁹² If state law gave the attorney a proprietary claim over the judgment, the litigant may exclude the attorney's portion from gross income.²⁹³

Congress has for a long time acquiesced to both the *Glenshaw Glass* definition of income and the assignment of income doctrine.²⁹⁴ They have survived more than one revamp of the code without significant alteration.²⁹⁵ These judicial precedents indeed represent meanings attributable to Congress, that income is attributed to the one who earns it.²⁹⁶ However, each construction proffered in *Banks* and *Banaitas* was arguably

receipt. In that instance the question becomes whether the assignor retains dominion over the income-generating asset, because the taxpayer 'who owns or controls the source of the income, also controls the disposition of that which he could have received himself and diverts the payment from himself to others as the means of procuring the satisfaction of his wants.'").

289. *Id.* at 435 ("In the case of a litigation recovery the income-generating asset is the cause of action that derives from the plaintiff's legal injury.").

290. *Banks v. Comm'r*, 345 F.3d 373, 386 (6th Cir. 2003), *rev'd*, 543 U.S. 426 (2005); *United States v. Foster*, 249 F.3d 1275, 1280 (11th Cir. 2001); *Srivastava v. Comm'r*, 220 F.3d 353, 363-65 (5th Cir. 2000); *Cotnam v. Comm'r*, 263 F.2d 119, 126 (5th Cir. 1959).

291. *Campbell v. Comm'r*, 274 F.3d 1312, 1313-14 (10th Cir. 2001); *Kenseth v. Comm'r*, 259 F.3d 881, 883 (7th Cir. 2001) (arguing that contingent attorney's fees are included in a client's gross income); *Young v. Comm'r*, 240 F.3d 369, 378 (4th Cir. 2001); *United States v. Baylin*, 43 F.3d 1451, 1454-55 (Fed. Cir. 1995) (holding that contingent fees paid directly to an attorney by the court should be included in gross income of the law firm); *O'Brien v. Comm'r*, 38 T.C. 707, 712 (1962), *aff'd* 319 F.2d 532 (3rd Cir. 1963) (*per curiam*).

292. *Banaitis v. Comm'r*, 340 F.3d 1074, 1081-82 (9th Cir. 2003). *Cf.* *United States v. Raymond*, 355 F.3d 107, 117-18 (2d Cir. 2004) ("When a taxpayer is in sufficient control of the source of income, federal principles of taxation deem him the recipient of gross income upon its disposition.").

293. *Banaitis*, 340 F.3d at 1081-82.

294. *See Comm'r v. Glenshaw Glass Co.*, 348 U.S. 426 (1955); *Helvering v. Horst*, 311 U.S. 112 (1940); *Lucas v. Earl*, 281 U.S. 111 (1930). *Glenshaw Glass* sets out the dominion and control standard and both *Horst* and *Earl* set out the assignment of income doctrine.

295. *See, e.g.*, Internal Revenue Code (1986); Internal Revenue Code (1954).

296. *Earl*, 281 U.S. at 114-15 ("There is no doubt that the statute could tax salaries to those who earn them and provide that the tax could not be escaped . . . to prevent the salary when paid from vesting . . . in the man who earned it.") (citation omitted); *see also* MARVIN A. CHIRELSTEIN, FEDERAL INCOME TAXATION 241-42 (10th ed. 2005) ("[T]he decisional law of income-attribution can be restated as follows: (1) Personal service income is taxable to the person who does the work, no matter whom he designates to receive the pay envelope.").

consistent with this principle. The relative dominion and control of a litigant in comparison with his attorney was likened by those favoring the government to a sales office and commission-based sales person, where the sales office recognizes all of the income rather than splitting recognition with the salesperson.²⁹⁷ Those who favor the taxpayer have likened the relationship to a partnership or to sharecroppers who split their yield and recognize their share independently.²⁹⁸ Since there was no statutory text and ambiguous evidence of intent, the Court turned to a longstanding legislative tax purpose, horizontal equity.²⁹⁹

Horizontal equity represents the principle that similarly situated taxpayers should be taxed similarly.³⁰⁰ Here, the Court placed contingency fee litigants on par with flat fee litigants.³⁰¹ Since flat fee litigants recognize all of the income and deduct what payments they can, so too should contingency fee litigants.³⁰² Thus, the Court chose the construction most consistent with horizontal equity.

297. *Banks*, 543 U.S. at 436-37 (“In this respect Judge Posner’s observation is apt: “[T]he contingent-fee lawyer [is not] a joint owner of his client’s claim in the legal sense any more than the commission salesman is a joint owner of his employer’s accounts receivable.”).

298. *Id.* at 436 (“We further reject the suggestion to treat the attorney-client relationship as a sort of business partnership or joint venture for tax purposes.”); see *Kenseth v. Comm’r*, 114 T.C. 399, 404 (2000) (Beghe, J., dissenting), *aff’d*, 259 F.3d 881 (7th Cir. 2001) (analogizing the cultivation of a lawsuit to sharecropping; suggesting that both should be taxed similarly); see also Dean T. Howell, *Return to Sharecropping: Lawyers and Clients as Tenants and Landlords in the Tax Treatment of Contingency Fees*, 59 WASH. & LEE L. REV. 597, 601-02 (2002) (discussing the tax consequences of contingency fees and the characterization of attorney-client relationships under a contingency fee agreement).

299. *Banks*, 543 U.S. at 436-37 (“The attorney is an agent who is duty bound to act only in the interests of the principal, and so it is appropriate to treat the full amount of the recovery as the income to the principal . . . [A] principal relies on an agent to realize an economic gain, and the gain realized by the agent’s efforts is income to the principal.”).

300. See, e.g., GRAETZ & SCHENK, note 179, at 25.

301. See *Banks*, 543 U.S. at 435-36.

302. See *id.* at 436-37. (“In both cases a principal relies on an agent to realize an economic gain, and the gain realized by the agent’s efforts is income to the principal. The portion paid to the agent may be deductible, but absent some other provision of law it is not excludable from the principal’s gross income.”). Nevermind that contingency fee litigants give up substantial portions of their valuable claims because they do not have the upfront capital flat fee litigants apparently have. See Note, Christy B. Bushnell, *Champerty Is Still No Excuse in Texas: (and the Legislature) Should Uphold Litigation Funding Agreements*, 7 HOUS. BUS. & TAX L. J. 358, 359 (2007).

I. Ballard v. Commissioner

In *Ballard v. Commissioner* three taxpayers failed to report substantial amounts of income.³⁰³ Along with the deficiencies in tax, the Commissioner argued that the taxpayers intended to evade taxes, and as such acted fraudulently.³⁰⁴ The Commissioner had the burden of proving fraud by clear and convincing evidence.³⁰⁵

Tax Court Judge Dawson purported to adopt the report of Special Trial Judge Couvillion which concluded that based on discreditable testimony the taxpayers fraudulently failed to report their income.³⁰⁶ But the taxpayers' attorneys later, and somewhat clandestinely, discovered that Judge Couvillion's original report had not found fraudulent intent.³⁰⁷ Judges Dawson and Couvillion together amended the original report and Judge Dawson adopted those amended findings.³⁰⁸ The Tax Court denied petitioners' request to inspect the original report.³⁰⁹ Nor was the original report included in the appellate record.³¹⁰

Through the Code, Congress provides for cases to be heard by special trial judges, but it does not specify a method.³¹¹ For that it delegated its authority to the Tax Court itself.³¹² Then, the crucial question is, did Congress intend, as embodied through the actions of its putative authors, to exclude the special trial judge report from the appellate record.³¹³

The majority held that non-disclosure of the special trial judge report was inconsistent with Congressional intent as reconstructed from the Tax Court's rules.³¹⁴ Prior to 1983, the predecessor to Tax Court rule 183 provided for mandatory

303. *Ballard v. Comm'r*, 544 U.S. 40, 40 (2005) ("Petitioners Claude Ballard, Burton Kanter, and another taxpayer received notices of deficiency from respondent Commissioner of Internal Revenue (Commissioner) charging them with failure to report certain payments on their individual tax returns and with tax fraud. They filed petitions for redetermination in the Tax Court, where the Chief Judge assigned the consolidated case to Special Trial Judge Couvillion.").

304. *Id.* at 48. ("After the initial deficiency notices, the Commissioner, in 1994, additionally charged that the taxpayers' actions were fraudulent."); *see also* I.R.C. § 7201 (Supp. IV 2004).

305. I.R.C. § 7454(a) (2000); Tax Ct. R. 142 (2005).

306. *Ballard*, 544 U.S. at 50, 60.

307. *Id.* at 51.

308. *Id.* at 50-51.

309. *Id.* at 51.

310. *See id.*

311. I.R.C. § 7443A(a) (2000).

312. I.R.C. § 7453.

313. *Ballard*, 544 U.S. at 52.

314. *See id.* at 65.

disclosure of the original special trial judge report and a means for challenging the findings contained therein.³¹⁵ The rule was amended by the Tax Court, which eliminated both services for the taxpayer.³¹⁶ But it left intact the requirement that regular judges give due regard and presume correct the findings of special trial judges.³¹⁷ The Commissioner and the Tax Court contended that this eliminates any right of access to the report.³¹⁸ The majority disagreed, finding that this eliminated both the right to receive the report without asking and the right to challenge while still in the Tax Court.³¹⁹ The amendment was not intended to implicate or change any other Tax Court practice, notably inclusion of the report in the appellate record.³²⁰

According to the majority, Congress almost always intends for government-held hearings to be transparent.³²¹ Transparency is a due process concern which in this case is purposive rather than constitutional.³²² That is, transparency is a consequence the legislature intends for judges to consider when constructing a statute,³²³ as opposed to the Court deciding whether the Tax Court's practice and procedure comports with the Fifth Amendment of the Constitution. Transparency is also a jurisprudential concern related to judicial economy.³²⁴ Courts of Appeals who review whether the Tax Court has afforded due deference without the benefit of the original special trial judges report are wasting time and resources on an illusory pursuit.³²⁵ Thus, disclosure of the report comports with purposive notions of due process and judicial economy. As evidence of this lack of consistency, the Court notes other statutes and the Administrative Procedures Act which stand for the proposition that Congress intends for judges to consider notice and the

315. *Id.* at 45.

316. *Id.*

317. *Id.* at 56.

318. *Id.* at 52.

319. *See id.* at 56, 59.

320. *Id.* at 62-63.

321. *See id.* at 61-62.

322. *See generally* Cass R. Sunstein & Adrian Vermeule, *Interpretation and Institutions*, 101 MICH. L. REV. 885 (2003). Due process connotes notice and an opportunity to be heard. *Id.* Notice includes notions of transparency, consistency, predictability, etc. *Id.* When choosing between competing constructions of law, judges are not constitutionally bound to consider transparency or predictability. *Id.* Their consideration of these principles is strictly jurisprudential. *Id.* In fact, outside of separation of powers, textualism is best defended based on predictability, knowability, and consistency. *Id.*

323. *See id.*

324. *See id.*

325. *Compare id.*, with *Ballard*, 544 U.S. at 40.

opportunity to be heard when contemplating the sufficiency of a statutorily governed hearing.³²⁶

The concurring opinion of Justice Kennedy is quite interesting.³²⁷ It resolves the issue using a textualist approach to interpreting the Tax Court's rules. Since there is no statute directly implicated, use of textualism in this case cannot be based on the Presentment Clause of the United States Constitution.³²⁸ Textualism can be supported by the notion that text is the best evidence of intent.³²⁹ Administrative regulations and rules, like the Tax Court Rules, represent the putative intent of Congress. Thus, the text in these documents is strong evidence of legislative intent.

Ballard shows that textualism and intentionalism can be used interdependently rather than exclusively. The dissent contended that the majority improperly discounted the Tax Court's interpretation of its own rules.³³⁰ It cited *Cleveland Indians Baseball* for the proposition that the Court assigns great degrees of emphasis to an agency's interpretation of its own regulations.³³¹ However, the dissent makes little note of the fact that the Tax Court's rules are promulgated in a manner inconsistent with the rigorous and arduous notice and comment procedure attendant to formal regulations which receive *Chevron* and *National Muffler* deference. They are promulgated more like informal regulations, which receive relatively less emphasis.³³² Based on constitutional hierarchy, Tax Court rules are not a relatively strong indicator of legislative intent, and ad hoc interpretations of those rules receive even less deference (emphasis).

326. *Ballard*, 544 U.S. at 64.

327. *See id.* at 65 (Kennedy, J., concurring).

328. John Manning and others defend textualism based on its comportment with the Presentment Clause. *See* Manning, *supra* note 14, at 111; *see also* TAMANAHA, *supra* note 62, at 101 ("The legal process approach accepted many of the insights of Legal Realism while offering answers to its most threatening implications . . . Democracy became the defining characteristic . . .").

329. *See* SCALIA, *supra* note 14, at 23. The Constitution's text reveals an intent to further wider political representation. *See* ELY, *supra* note 40, at 5-6; *see also* STEPHEN F. BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION 101 (2005); Geier, *supra* note 12, at 519 (noting that the text of the IRC reveals legislative intent to preserve income and deduction matching, to prevent tax avoidance, and to preserve horizontal and vertical equity).

330. *Ballard*, 544 U.S. at 68 (Rehnquist, C.J., dissenting).

331. *Id.* at 70 (citing *United States v. Cleveland Indians Baseball Co.*, 532 U.S. 200, 220 (2001)).

332. *See, e.g.*, *United States v. Am. Med. Ass'n*, 887 F.2d 760 (7th Cir. 1989); *see also* *Skidmore v. Swift & Co.*, 323 U.S. 139-40 (1944).

IV. RECONSTRUCTING THE SUPREME COURT'S 21ST CENTURY DELIBERATIVE FORMULA

A. Cases Revealing Primary Emphasis on the Text Function

1. Cases Resolved Using Text

Gitlitz v. Commissioner and *Galletti v. Commissioner* reveal the Court's primary emphasis on the text function. *Galletti* turned on the meaning of "assessment."³³³ To establish its plain meaning, the Court relied on related statutes, Black's Law Dictionary, and treasury regulations.³³⁴ It did not rely on Webster's Dictionary or any other evidence of common understanding.³³⁵ The Court is emphasizing the plain meaning as understood by a particular interpretative community, in this case Congress, lawyers, or, more specifically, tax lawyers.

Gitlitz concerned whether debt relief to an insolvent taxpayer constitutes an "item of income."³³⁶ Justice Thomas, the author of *Gitlitz* and *Galletti*, relied on statutory context this time.³³⁷ He found the taxpayer's argument consistent with over thirty other related code sections.³³⁸ Because this choice was so much more the superior to the government's in terms of text, i.e., the Court's textual disposition quotient was satisfied, the Court would consider seriously neither the logic nor the evidence of intent supporting the contention that such relief is not income at all.

2. Other Cases Implicating Text

In *Cleveland Indians Baseball*, the government purported to rely on the plain language of the statute.³³⁹ But the statute was not plain at all. The meaning the government suggested had to be gleaned through the use of context.³⁴⁰ It was supported by prior amendments to statutory language and treasury regulations.³⁴¹ But, this type of support is not evidence of plain meaning. Perhaps it is 'context' to the extent it relies on what

333. See *United States v. Galletti*, 541 U.S. 114, 123 (2004).

334. See *id.* at 122.

335. See *id.* at 122.

336. *Gitlitz v. Comm'r*, 531 U.S. 206, 212 (2001).

337. *Id.* at 212.

338. See *id.* at 213.

339. *United States v. Cleveland Indians Baseball Co.*, 532 U.S. 200, 209 (2001).

340. See *id.* at 205, 218-21.

341. *Id.* at 209-11, 214, 219.

other statutes reveal to a particular reader. To the extent those regulations or amendments to statutory language reveal the intent of Congress, the Court is interpreting not textualizing. Coupled with the presence of a conflicting judicial construction of a somewhat related statute, the Court's textual disposition quotient went unmet.

Similarly, *United States v. Craft* reveals the Court's fairly high textual disposition quotient. In order for a federal tax lien to attach to property held by the entirety, the Court had to find that it was "property" or "rights to property" "belonging" to a taxpayer.³⁴² The secretaries of several states who provide for tenancies by the entirety, as an interpretative community, clearly understand those words to not apply to property held in that manner.³⁴³ But the *Craft* Court rejected the meaning of property as plainly understood by secretaries of the several States as an interpretive community.

B. *Cases Revealing Greater Emphasis on Intent than on Purpose*

1. Cases Suggesting Intent over Purpose

The Court in *United States v. Cleveland Indians Baseball Co.* and *Boeing v. United States* sided with the IRS because it found the treasury regulations the IRS relied on were relevant and reasonably embodied the putative intent of Congress.³⁴⁴ The taxpayer relied on both its understanding of legislative intent and its belief that its construction comported with the prevention of tax avoidance.³⁴⁵ Boeing also believed its interpretation comported with the legislative purpose of clearly reflecting income.³⁴⁶ But the purposes were weakly implicated. Neither interpretation was consistent or inconsistent with prevention of tax avoidance. In these two cases a deliberative formula would show that the extent to which the IRS's contention was consistent with intent was greater than the extent to which the taxpayers' contention was consistent with intent plus its consistency with legislative purposes. The consistency of the IRS's contention with intent being strong and the consistency of

342. See *United States v. Craft*, 535 U.S. 274, 276-77, 285 (2002).

343. See *id.* at 299 (Thomas, J., dissenting).

344. See *Boeing Co. v. United States*, 537 U.S. 437, 456-57 (2003); *Cleveland Indians Baseball*, 532 U.S. at 218-20.

345. See *Boeing*, 537 U.S. at 456-57; *Cleveland Indians Baseball*, 532 U.S. at 216-17.

346. See *Boeing*, 537 U.S. at 455-56.

the taxpayers' contention with intent and purpose being weak. The Court decided each case for the IRS.

The Court in *United States v. Fior D'Italia*, on the other hand, unmistakably favors intent over purpose. There, the IRS's interpretation clearly conflicted with multiple easily-found sources of immediate congressional purposes directly relevant to the taxpayer at bar.³⁴⁷ Congress has repeatedly favored the restaurant industry with respect to a lesser administrative burden for tax purposes.³⁴⁸ The IRS interpretation essentially penalizes restaurants for not adequately policing their employees, even though Congress on several occasions refused to deputize restaurant owners in the pursuit of tax-avoiding waiters and waitresses.³⁴⁹ Still, the Court emphasized the IRS interpretation as putative intent of Congress over all of the other indicia of legislative purpose, including the text of closely related statutes.³⁵⁰ This approach flies directly in the face of that suggested by Deborah Geier in *Interpreting Tax Legislation: The Role of Purpose*.³⁵¹

2. Cases Emphasizing Purpose over Intent?

United States v. United Dominion Industries, Inc. also reflects this ranking. Again, a calculation was involved and the text was ambiguous. The Court sided with United Dominion Industries, who relied on purpose.³⁵² *United Dominion Industries'* way of making the calculation was simple and obvious. It was consistent with the principle of notice to the citizenry about the requirements of law.³⁵³ But it is too much to say that the Court favored purpose over intent. Here, the IRS's interpretation was unreasonable and ad hoc. It did not and ought not receive much emphasis as the putative intent of Congress. Thus, the taxpayer's construction was more consistent than the government's with respect to intent and purpose.

347. *United States v. Fior D'Italia*, 536 U.S. 238, 257, 260-62 (2002) (tracking arguments by majority and dissent about the intent and purpose of the tax statutes).

348. *Id.* at 261 (Souter, J., dissenting).

349. *Id.*

350. *See id.* at 245-46.

351. *See Geier, supra* note 12, at 516-17.

352. *See United States v. United Dominion Indus., Inc.*, 532 U.S. 822, 824-26, 829-30 (2001).

353. *See id.* at 839 (Thomas, J., concurring). *But see id.* at 839 n.1 (Stevens, J., dissenting) (arguing that laws which provide a tax benefit should be construed in favor of the government).

C. *Cases Revealing Greater Emphasis on Purpose than on Modern Dynamics*

1. Horizontal Equity Versus Protection of Disempowered Groups

United States v. Craft, *Commissioner v. Banks*, and *Ballard v. Commissioner*, reveal, predictably, that the Court emphasizes traditional congressional purposes over appeals to modern dynamics. In *Craft* and *Banks*, both text and intent were ambiguous.³⁵⁴ The Court in each case relied on the longstanding tax principle of horizontal equity.³⁵⁵ “Similarly situated” taxpayers should be taxed similarly.³⁵⁶ In *Craft*, the Court held that a spouse to a tenancy by the entirety is as a partner to a partnership.³⁵⁷ The Court also determined that the government’s position was consistent with the legislative purpose of preventing tax avoidance.³⁵⁸ In dissent, Justice Scalia asserted that the decision imperiled some married women.³⁵⁹ In *Banks*, the Court placed a contingency fee litigant on par with a hourly fee paying litigant.³⁶⁰ This analogy is suspect, in that contingency fee litigants are typically poorer than hourly fee paying ones, which is why they would give up such a large portion of their claim. The taxpayer and amici were concerned about the effect taxing a litigant on the attorney’s fee portion would have on civil rights litigation.³⁶¹ Laura Sager and Stephen Cohen showed that it would have a discouraging effect.³⁶² However, the Court may have ignored the civil rights dimension because it believed the AJCA resolved the issue.

354. *United States v. Craft*, 535 U.S. 274, 287-88 (2002). In *Banks*, however, one may infer Congress’s statutory intent by examining the American Jobs Creation Act, which clearly indicates its intention that the litigant recognize as income the attorney’s portion of an award or settlement. See *Comm’r v. Banks*, 543 U.S. 426, 438-39 (2005).

355. See *Craft*, 535 U.S. at 288-89; *Banks*, 534 U.S. at 436-37.

356. *United States v. Kaiser*, 363 U.S. 299, 308 (1960) (Frankfurter, J., concurring) (“The Commissioner cannot tax one and not tax another without some rational basis for the difference.”).

357. See *Craft*, 535 U.S. at 285-86.

358. See *id.* at 285.

359. See *id.* at 289-90 (Scalia, J., dissenting).

360. See *Banks*, 543 U.S. at 436-37.

361. Brief for the Respondent at 41-42, *Banks*, 543 U.S. 426 (2005) (No. 03-892, 03-907); Brief *Amici Curiae* of the Lawyers’ Committee for Civil Rights Under Law, *et al.* as amici curiae supporting respondents, *Banks*, 543 U.S. 426 (2005) (No. 03-892, 03-907).

362. Sager & Cohen, *supra* note 2, at 1100.

2. Statutory Due Process Versus Judicial Economy

Ballard is similar to *United Dominion Industries* in that the Court emphasized what I have called statutory due process. The law should be knowable to its subjects so that they can conform to its strictures and avoid sanctions.³⁶³ Thus, the IRS violated this principle in *United Dominion Industries* because its method of calculation could not have been discerned by taxpayers beforehand.³⁶⁴ The government must also give the taxpayer accused of violating the law an opportunity to be heard.³⁶⁵ The Tax Court's procedures with respect to special trial judge reports violated that notion.³⁶⁶

D. Consistency with Legal Process Theory

These nine 21st Century tax cases show that the Supreme Court prefers to resolve cases by considering text alone. Only when its textual disposition quotient is unmet, i.e., two competing deliberative choices are somewhat consistent with text, neither much more than the other, will the Court resort to considering intent and purpose and modern dynamics, comprehensively. The cases show that where intent clashes with purpose, intent wins. They also show the Court's preference for purpose over modern dynamics.

The Court's decision making process comports well with legal process theory, which considers law legitimate to the extent it is made by those with authority to do so.³⁶⁷ The text of the statute having endured a constitutionally prescribed process receives the highest emphasis. The intent of the constitutionally authorized law making body ranking second, evidence of such intent is also ranked according to constitutional imprimatur. The Court emphasizes as the putative intent of Congress Article II and III precedents more than the work papers written by congressional subordinates with no explicit place in the Constitution. Purposes, because they are also attached to legislative intent, receive similar emphasis; except that, the Court in *Fior D'Italia* emphasized intent over purposes clearly implicated by closely related statutes.³⁶⁸ Least emphasized, but

363. See *supra* Part III.

364. See *United States v. United Dominion Indus., Inc.*, 532 U.S. 822, 831-32, 834 (2001).

365. *Ballard v. Comm'r*, 544 U.S. 40, 67 (2005) (Kennedy, J., concurring).

366. See *id.* at 61.

367. See Yasutomo Morigiwa, *Authority, Rationality, and Law: Joseph Raz and the Practice of Law*, 62 S. CAL. L. REV. 898, 900 (1988-89).

368. *United States v. Fior D'Italia*, 536 U.S. 238, 238 (2002).

not entirely absent from consideration, is modern dynamics. Cass Sunstein suggests that perhaps the Court can rely on modern dynamics tethered to the text of the Constitution, in the Preamble perhaps.³⁶⁹

Paul Caron previously argued against tax myopia, the notion that tax law is appreciably different from the rest of law.³⁷⁰ This study suggests that the 21st Century heeded his call. By resolving these cases consistently with legal process theory, the Supreme Court rejected reliance on pure tax logic and expertise. It performed as it does in other cases, deliberating over which choice most comports with most of our most important legal and social principles.

V. CONCLUSION

The cases confirm that, consistent with their perceived constitutional legitimacy, the Court emphasizes text most, intent more than purposes, and modern dynamics least. Within its text function, it has so far emphasized context over plain meaning and related statutes are the component of context it assigns the highest degree of emphasis within that subfunction. Within its intent function, the Court emphasizes administrative and judicial precedents much more than it does congressional work papers. Amongst administrative precedents, the Court assigns the highest weight to formal regulations, less to informal regulations, and less still to temporary ones. Within the purpose function, the Court emphasizes consequences it believes the legislature intended for it to consider. However, when considering these consequences, like horizontal equity and due process, the Court may or may not cite to any product attributable to Congress. Thus, it remains to be gleaned whether purposes derived from a congressional work product or administrative or judicial precedent trumps purposes more generally found.

In sum, a deliberative formula representing 21st century Supreme Court tax jurisprudence would look something like this:

- (1) $F[\text{Deliberation}] = f[\text{text, intent, purpose, modern dynamics}]$
- (2) $F[\text{Deliberation}] = f[\text{EC}(\text{text}) + \text{EC}(\text{intent}) + \text{EC}(\text{purpose}) + \text{EC}(\text{dynamics})]$
- (3)(a) $F[\text{text}] = f[(\text{ec})(\text{plain meaning}) + (\text{ec})(\text{context})]$

369. See Sunstein, *supra* note 53, at 495.

370. Paul Caron, *Tax Myopia, or Mamas Don't Let Your Babies Grow Up to be Tax Lawyers*, 13 VA. TAX REV. 517, 518 (1994).

- (3)(b) $F[\text{intent}] = f[(\text{ec})(\text{administrative precedents}) + (\text{ec})(\text{judicial precedents}) + (\text{ec})(\text{congressional work papers})]$
- (3)(c) $F[\text{purpose}] = f[(\text{ec})(\text{tax avoidance}) + (\text{ec})(\text{due process}) + (\text{ec})(\text{administrability}) + (\text{ec})(\text{horizontal equity})]$
- (3)(d) $F[\text{dynamics}] = f[(\text{ec})(\text{protection of disempowered groups}) + (\text{ec})(\text{macroeconomic growth})]$
- (4) $F[\text{Deliberation}] = f[(\text{EC}_{\text{text}})\{(\text{ec})(\text{plain meaning}) + (\text{ec})(\text{context})\} + (\text{EC}_{\text{intent}})\{(\text{ec})(\text{administrative precedents}) + (\text{ec})(\text{judicial precedents}) + (\text{ec})(\text{congressional work papers})\} + (\text{EC}_{\text{purpose}})\{(\text{ec})(\text{tax avoidance}) + (\text{ec})(\text{due process}) + (\text{ec})(\text{administrability}) + (\text{ec})(\text{horizontal equity})\} + (\text{EC}_{\text{dynamics}})\{(\text{ec})(\text{disempowered groups}) + (\text{ec})(\text{macroeconomic growth})\}]$
- (5) If $[f(\text{text}_1) - f(\text{text}_2)] > \text{TDQ}$, then $f(\text{text}_1)$
- (6) If $[f(\text{text}_1) - f(\text{text}_2)] < \text{TDQ}$, then $F[\text{EC}(\text{intent}) + \text{EC}(\text{purpose}) + \text{EC}(\text{dynamics})]$, where $\text{EC}_{\text{intent}} > \text{EC}_{\text{purpose}} > \text{EC}_{\text{dynamics}}$