

WHAT DIVIDES TEXTUALISTS FROM PURPOSIVISTS?

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Recent scholarship has questioned whether there remains a meaningful distinction between modern textualism and purposivism. Purposivists traditionally argued that because Congress passes statutes to achieve some aim, federal judges should enforce the spirit rather than the letter of the law when the two conflict. Textualists, in contrast, have emphasized that federal judges have a constitutional duty to give effect to the duly enacted text (when clear), and not unenacted evidence of legislative purpose. They have further contended that asking how a reasonable person would understand the text is more objective than searching for a complex, multimember body's purpose.

Writing from a textualist perspective, Professor Manning suggests that the conventional grounds for textualism need refinement. Modern textualists acknowledge that statutory language has meaning only in context, and that judges must consider a range of extratextual evidence to ascertain textual meaning. Sophisticated purposivists, moreover, have posited their own "reasonable person" framework to make purposive interpretation more objective. Properly understood, textualism nonetheless remains distinctive because it gives priority to semantic context (evidence about the way a reasonable person uses words) rather than policy context (evidence about the way a reasonable person solves problems). Professor Manning contends that the textualist approach to context is justified because semantic detail alone enables legislators to set meaningful limits on agreed-upon compromises. In contrast, he argues that by authorizing judges to make statutory rules more coherent with their apparent overall purposes, purposivism makes it surprisingly difficult for legislators to define reliable boundary lines for the (often awkward) compromises struck in the legislative process.

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INTRODUCTION

For a not inconsiderable part of our history, the Supreme Court held that the “letter” (text) of a statute must yield to its “spirit” (purpose) when the two conflicted.¹ Traditionally, the Court’s “purposivism” rested on the following intuitions: In our constitutional system, federal courts act as faithful agents of Congress; accordingly, they must ascertain and enforce Congress’s commands as accurately as possible.² Statutes are active instruments of policy, enacted to serve some background purpose or goal.³ Ordinarily, a statutory text will adequately reflect its intended purpose.⁴ Sometimes, however, the text of a particular provision will seem incongruous with the statutory purpose reflected in various *contextual* cues—such as the overall tenor of the statute, patterns of policy judgments made in related legislation, the “evil” that inspired Congress to act, or express statements found in the legislative history.⁵ Since legislators

1. See, e.g., *Church of the Holy Trinity v. United States*, 143 U.S. 457, 459 (1892). Much of the present discussion of the Court’s rationale for purposivism builds on John F. Manning, *Textualism and the Equity of the Statute*, 101 *Colum. L. Rev.* 1, 10–15 (2001) [hereinafter Manning, *Equity of the Statute*].

2. I have previously defended in detail the traditional view that federal courts must act as faithful agents of Congress. See Manning, *Equity of the Statute*, *supra* note 1, at 56–105. For a contrasting perspective, see William N. Eskridge, Jr., *All About Words: Early Understandings of the “Judicial Power” in Statutory Interpretation, 1776–1806*, 101 *Colum. L. Rev.* 990 (2001) [hereinafter Eskridge, *All About Words*].

3. See, e.g., Archibald Cox, *Judge Learned Hand and the Interpretation of Statutes*, 60 *Harv. L. Rev.* 370, 370 (1947) (noting that some “purpose lies behind all intelligible legislation”); Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 *Colum. L. Rev.* 527, 538–39 (1947) (“Legislation has an aim; it seeks to obviate some mischief, to supply an inadequacy, to effect a change of policy, to formulate a plan of government.”).

4. See, e.g., *Park ‘N Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. 189, 194 (1985) (“Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose.”); *Richards v. United States*, 369 U.S. 1, 9 (1962) (“[W]e must . . . start with the assumption that the legislative purpose is expressed by the ordinary meaning of the words used.”).

5. See, e.g., *United Steelworkers v. Weber*, 443 U.S. 193, 201–07 (1979) (relying on legislative history to discern Title VII’s general purpose to improve racial imbalances in traditionally segregated job categories); *Comm’r v. Estate of Sternberger*, 348 U.S. 187, 206 (1955) (“[I]n interpreting statutes when isolated provisions would produce results ‘plainly at variance with the policy of the legislation as a whole,’ we follow the purpose rather than the literal words.” (quoting *Ozawa v. United States*, 260 U.S. 178, 194 (1922))); *Keifer & Keifer v. Reconstruction Fin. Corp.*, 306 U.S. 381, 389 (1939) (“The Congressional will must be divined, and by a process of interpretation which, in effect, is the ascertainment of policy immanent not merely in the single statute . . . but in a series of statutes . . . and drawing significance from dominant contemporaneous opinion . . .”); *United States v. Katz*, 271 U.S. 354, 357 (1926) (“In ascertaining . . . purpose, we may examine the title of the Act, the source in previous legislation of the particular provision in question, and the legislative scheme or plan by which the general purpose of the Act is to be carried out.” (citations omitted)); *Holy Trinity*, 143 U.S. at 463 (“[A]nother guide to the meaning of a statute is found in the evil which it is designed to remedy; and for this the court properly looks at contemporaneous events, the situation as it existed, and as it was pressed upon the attention of the legislative body.”).

act under the constraints of limited resources, bounded foresight, and inexact human language, unanticipated problems of fit have long been viewed as unavoidable.⁶ It is said that just as individuals sometimes inadvertently misstate their intended meaning,⁷ so too does Congress. Accordingly, the Court long assumed that when the clear import of a statute's text deviated sharply from its purpose, (1) Congress must have expressed its true intentions imprecisely, and (2) a judicial faithful agent could properly adjust the enacted text to capture what Congress would have intended had it expressly confronted the apparent mismatch between text and purpose.⁸

6. See, e.g., 1 William Blackstone, *Commentaries* *61 (“[I]n laws all cases cannot be foreseen or expressed.”); *The Federalist* No. 37, at 229 (James Madison) (Clinton Rossiter ed., 1961) (“[I]t must happen that however accurately objects may be discriminated in themselves, and however accurately the discrimination may be considered, the definition of them may be rendered inaccurate by the inaccuracy of the terms in which it is delivered.”).

7. This idea is reflected in a strand of modern language theory known as pragmatics. Paul Grice contends that the norms of communication should reflect the reality that most conversations are cooperative. See Paul Grice, *Studies in the Way of Words* 26 (1989). To implement this “Cooperative Principle,” Grice proposes norms of conversation that include: “Make your conversation as informative as is required” (quantity); “[t]ry to make your contribution one that is true” (quality); “[b]e relevant” (relation); and “[a]void obscurity of expression” (manner). *Id.* at 26–28. Grice argues that if a speaker seems to flout the cooperative principle, a listener may at times appropriately assign an unconventional meaning to the utterance, interpreting it as if the cooperative principle had been observed. *Id.* at 30–31.

8. See, e.g., *Pub. Citizen v. U.S. Dep’t of Justice*, 491 U.S. 440, 452–53 (1989) (concluding that consideration of the Federal Advisory Committee Act’s “purposes, as manifested by its legislative history and as recited in . . . the Act, reveals that it cannot have been Congress’ intention” to adopt conventional import of the word “utilize”); *Comm’r v. Brown*, 380 U.S. 563, 571 (1965) (“Unquestionably the courts, in interpreting a statute, have some ‘scope for adopting a restricted rather than a literal or usual meaning of its words where acceptance of that meaning would lead to absurd results . . . or would thwart the obvious purpose of the statute.’” (quoting *Helvering v. Hammel*, 311 U.S. 504, 510–11 (1941))); *Int’l Longshoremen’s & Warehousemen’s Union v. Juneau Spruce Corp.*, 342 U.S. 237, 243 (1952) (“[L]iteralness is no sure touchstone of legislative purpose. The purpose here is more closely approximated, we believe, by giving the historic phrase a looser, more liberal meaning in the special context of this legislation.”); *United States v. Carbone*, 327 U.S. 633, 637 (1946) (“[N]ot every person or act falling within the literal sweep of the . . . Act necessarily comes within its intent and purpose. That language must be read and applied in light of the evils which gave rise to the statute and the aims which the proponents sought to achieve.”); *Sorrells v. United States*, 287 U.S. 435, 446 (1932) (“[C]an an application of the statute having such an effect—creating a situation so contrary to the purpose of the law and so inconsistent with its proper enforcement as to invoke such a challenge—fairly be deemed to be within its intendment?”); *Ozawa*, 260 U.S. at 194 (“We may . . . look to the reason of the enactment and inquire into its antecedent history and give it effect in accordance with its design and purpose, sacrificing, if necessary, the literal meaning in order that the purpose may not fail.”); *Pickett v. United States*, 216 U.S. 456, 461 (1910) (“The reason of the law, as indicated by its general terms, should prevail over its letter, when the plain purpose of the act will be defeated by strict adherence to its verbiage.”); *United States v. Rio Grande Dam & Irrigation Co.*, 174 U.S. 690, 706–07 (1899) (refusing to accept a construction that “ignores the spirit of the legislation and

Near the close of the twentieth century, however, the “new textualism” challenged the prevailing judicial orthodoxy by arguing that the Constitution, properly understood, requires judges to treat the clear import of an enacted text as conclusive, even when the text fits poorly with its apparent background purposes.⁹ The textualist critique—which took shape largely in judicial opinions written by Justice Scalia and Judge Easterbrook—initially stressed two related themes: First, textualists emphasized that the statutory text alone has survived the constitutionally prescribed process of bicameralism and presentment.¹⁰ Accordingly, they argued that when a statute is clear in context, purposivist judges disrespect the legislative process by relying upon unenacted legislative intentions or purposes to alter the meaning of a duly enacted text.¹¹

Second, building upon the intent skepticism of the legal realists, the new textualists contended that the purposivist judge’s aspiration to identify and rely upon the *actual* intent of any multimember lawmaking body

carries the statute to the verge of the letter and far beyond what under the circumstances of the case must be held to have been the intent of Congress”).

9. See William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. Rev. 621, 623 (1990) (examining the premises of modern textualism).

10. See, e.g., Frank H. Easterbrook, *What Does Legislative History Tell Us?*, 66 Chi.-Kent L. Rev. 441, 445 (1990) [hereinafter Easterbrook, *Legislative History*] (“What distinguishes laws from the results of opinion polls conducted among legislators is that the laws survived a difficult set of procedural hurdles and either passed by a two-thirds vote or obtained the President’s signature.” (emphasis omitted)).

11. See, e.g., *Conroy v. Aniskoff*, 507 U.S. 511, 519 (1993) (Scalia, J., concurring) (“We are governed by laws, not by the intentions of legislators. . . . ‘The law as it is passed is the will of the majority of both houses, and the only mode in which that will is spoken is in the act itself’” (emphasis omitted) (quoting *Aldridge v. Williams*, 44 U.S. (3 How.) 9, 24 (1845))); *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 325 (1988) (Scalia, J., concurring in part and dissenting in part) (“The principle of our democratic system is not that each legislature enacts a purpose, independent of the language in a statute, which the courts must then perpetuate, assuring that it is fully achieved but never overshoot by expanding or ignoring the statutory language as changing circumstances require.”); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 452–53 (1987) (Scalia, J., concurring) (“Judges interpret laws rather than reconstruct legislators’ intentions. Where the language of those laws is clear, we are not free to replace it with an unenacted legislative intent.”); *NAACP v. Am. Family Mut. Ins. Co.*, 978 F.2d 287, 294 (7th Cir. 1992) (Easterbrook, J.) (“We must determine what Congress meant by what it enacted, not what Senators and Representatives said, thought, wished, or hoped.” (emphasis omitted)); *Livingston Rebuild Ctr., Inc. v. R.R. Ret. Bd.*, 970 F.2d 295, 298 (7th Cir. 1992) (Easterbrook, J.) (“Congress does not enact ‘intent’ . . . ; it enacts texts, which may differ from the expectations of the sponsors.” (citations omitted)); *Walton v. United Consumers Club, Inc.*, 786 F.2d 303, 310 (7th Cir. 1986) (Easterbrook, J.) (“We interpret texts. The invocation of disembodied purposes, reasons cut loose from language, is a sure way to frustrate rather than implement these texts.”); Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 Harv. J.L. & Pub. Pol’y 61, 68 (1994) [hereinafter Easterbrook, *Text, History, and Structure*] (“[T]he structure of our Constitution . . . requires agreement on a text by two Houses of Congress and one President. No matter how well we can know the wishes and desires of legislators, the only way the legislature issues binding commands is to embed them in a law.” (emphasis omitted)).

is fanciful.¹² In brief, textualists have contended that the final wording of a statute may reflect an otherwise unrecorded legislative compromise, one that may—or may not—capture a coherent set of purposes.¹³ A statute's precise phrasing depends, moreover, on often untraceable procedural considerations, such as the sequence of alternatives presented (agenda manipulation) or the effect of strategic voting (including logrolling).¹⁴ Given the opacity, complexity, and path dependency of this process, textualists believe that it is unrealistic for judges ever to predict with accuracy what Congress would have "intended" if it had expressly confronted a perceived mismatch between the statutory text and its apparent

12. See, e.g., Easterbrook, *Text, History, and Structure*, *supra* note 11, at 68 ("Intent is elusive for a natural person, fictive for a collective body."); Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 *Duke L.J.* 511, 517 [hereinafter Scalia, *Judicial Deference*] ("[T]he quest for the 'genuine' legislative intent is probably a wild-goose chase anyway.").

This intent skepticism implicitly builds on the work of Max Radin, a noted legal realist. See William N. Eskridge, Jr., *Legislative History Values*, 66 *Chi.-Kent L. Rev.* 365, 372–73 (1990) (noting textualists' debt to Radin). More than seventy years ago, Radin published a powerful critique of using legislative intent or purpose as a tool of statutory construction. Max Radin, *Statutory Interpretation*, 43 *Harv. L. Rev.* 863 (1930) [hereinafter Radin, *Statutory Interpretation*]. Radin denied the possibility that a multimember lawmaking body could share a coherent specific "intent" on a matter not clearly resolved by the statute itself. See *id.* at 870 ("That the intention of the legislature is undiscoverable in any real sense is almost an immediate inference from a statement of the proposition. The chances that of several hundred [legislators] each will have exactly the same determinate situations in mind . . . are infinitesimally small."). Radin also argued that even if some actual legislative intent existed, the legislative process was too opaque to permit its recovery. The only evidence for such intent would be "the external utterances or behavior of [hundreds of legislators], and in almost every case the only external act is the extremely ambiguous one of acquiescence, which may be motivated in literally hundreds of ways." *Id.* at 870–71.

13. See John F. Manning, *The Absurdity Doctrine*, 116 *Harv. L. Rev.* 2387, 2410–12 (2003) [hereinafter Manning, *Absurdity Doctrine*] (discussing modern textualists' reliance on interest-group theory to question traditional purposivism); see also Frank H. Easterbrook, *The Court and the Economic System*, 98 *Harv. L. Rev.* 4, 46 (1984) [hereinafter Easterbrook, *Economic System*] ("What Congress wanted was the compromise, not the objectives of the contending interests."); Frank H. Easterbrook, *The State of Madison's Vision of the State: A Public Choice Perspective*, 107 *Harv. L. Rev.* 1328, 1346–47 (1994) ("[W]hen faction dominates the creation of laws," such laws merely "reflect the outcome of a bargaining process among factions (and their representatives).").

14. See Frank H. Easterbrook, *Statutes' Domains*, 50 *U. Chi. L. Rev.* 533, 547 (1983) [hereinafter Easterbrook, *Statutes' Domains*] ("[I]t turns out to be difficult, sometimes impossible, to aggregate [legislators' preferences] into a coherent collective choice. Every system of voting has flaws. The one used by legislatures is particularly dependent on the order in which decisions are made."); *id.* at 548 ("[W]hen logrolling is at work the legislative process is submerged and courts lose the information they need to divine the body's design."); Kenneth A. Shepsle, *Congress Is a "They," Not an "It": Legislative Intent as Oxymoron*, 12 *Int'l Rev. L. & Econ.* 239, 244 (1992) (noting that success of a piece of legislation often depends on "idiosyncratic, structural, procedural, and strategic factors, which are at best tenuously related to normative principles embraced by democratic theorists and philosophers"). This aspect of textualism builds most directly on the work of Kenneth J. Arrow, particularly as articulated in *Social Choice and Individual Values* (2d ed. Yale Univ. Press 1963) (1951).

purpose. In place of traditional conceptions of “actual” legislative intent, modern textualists urge judges to focus on what they consider the more realistic—and objective—measure of how “a skilled, objectively-reasonable user of words” would have understood the statutory text in context.¹⁵

Despite the significant differences thus championed by textualists, recent scholarship has sought to minimize the division between textualism and the (related) approaches that it has sought to displace: intentionalism and purposivism.¹⁶ Proceeding along that line, Professor Molot’s thoughtful and reflective Article in this Issue argues that the line separating textualists from purposivists has grown fainter over time.¹⁷ Modern textualists, he states, are sensitive to context as well as text.¹⁸ He also suggests that modern purposivists, with whom his allegiance more closely lies, feel the pinch of the statutory text more sharply than purposivists of the past.¹⁹ Based on these trends, he argues that we should conclude that text and purpose are both always relevant and that interpreters should proceed by calibrating how strong the respective textual and purposive cues appear in any particular interpretive case.²⁰ In effect, Professor Molot proposes an approach more holistic than that of modern textualism—one that recalls Chief Justice Marshall’s admonition that “[w]here the mind labours to discover the design of the legislature, it seizes every thing from which aid can be derived.”²¹

Writing from a textualist perspective, I argue here that textualism and purposivism do in fact share more conceptual common ground than textualists (myself included) have sometimes emphasized. Nonetheless, salient differences remain in the two methods’ philosophies and approaches that trace back to quite distinctive conceptions of the legislative process. In Part I, I survey the common ground. First, because modern textualists understand that the meaning of statutory language (like all language) depends wholly on context, their asserted distinction between enacted text and unenacted intentions or purposes is somewhat imprecise. In any case posing a meaningful interpretive question, the very process of ascertaining textual meaning inescapably entails resorting to extrastatutory—and thus unenacted—contextual cues. Indeed, when modern textualists find a statutory text to be ambiguous, they believe that

15. Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 *Harv. J.L. & Pub. Pol’y* 59, 65 (1988) [hereinafter Easterbrook, *Original Intent*].

16. See, e.g., Larry Alexander & Saikrishna Prakash, “Is That English You’re Speaking?” Why Intention Free Interpretation Is an Impossibility, 41 *San Diego L. Rev.* 967, 974–78 (2004) (arguing that textualism is, at root, a form of intentionalism); Caleb Nelson, *What Is Textualism?*, 91 *Va. L. Rev.* 347, 353 (2005) (same).

17. Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 *Colum. L. Rev.* 1 (2006).

18. See *id.* at 35 (“[M]odern textualists do not, in principle, object to the notion that judges should look to context as well as text.”).

19. See *id.* at 3 (“[T]extualism has so succeeded in discrediting strong purposivism that it has led even nonadherents to give great weight to statutory text.”).

20. See *id.* at 64–69.

21. *United States v. Fisher*, 6 U.S. (2 Cranch) 358, 386 (1805).

statutory purpose—if derived from sources other than the legislative history—is itself a relevant ingredient of statutory context. Second, although textualists criticize purposivism as involving a fruitless search for subjective legislative intent, that characterization may reflect the fact that textualism originated in reaction to the Court’s traditional (and perhaps anachronistic) understanding of purposivism. As Hart and Sacks took pains to demonstrate in their influential Legal Process materials, one can also plausibly cast purposivism as an objective framework that aspires to reconstruct the policy that a hypothetical “reasonable legislator” would have adopted in the context of the legislation, and not the search for a specific policy that Congress *actually* intended to adopt.²²

In Part II, I isolate what continues to distinguish textualism from purposivism and then offer a refinement of the legislative process justification for textualism. In particular, I first suggest that textualists and purposivists emphasize different elements of context. Textualists give precedence to *semantic context*—evidence that goes to the way a reasonable person would use language under the circumstances. Purposivists give priority to *policy context*—evidence that suggests the way a reasonable person would address the mischief being remedied. To be sure, practitioners of each methodology will consider both forms of contextual evidence in cases of ambiguity. But textualists give determinative weight to clear semantic cues even then they conflict with evidence from the policy context. Purposivists allow sufficiently pressing policy cues to overcome such semantic evidence.

Part II next considers competing normative justifications for the two approaches, and ultimately offers a defense of the textualists’ primary reliance on semantic context. I acknowledge that purposivist theory rests on the serious intuition that legislators enact statutes to achieve policy aims, and that legislators simply do not focus on the semantic fine points of (what is often complex and lengthy) legislation. For purposivists, therefore, subordinating a statute’s semantic detail to its background purpose respects legislative supremacy while also promoting the normatively attractive goals of policy coherence and adaptability.

Despite the obvious appeal of the foregoing attributes, I suggest that modern textualism offers a convincing rejoinder: Certainly, focusing on the way a reasonable user of language employs words reflects a meaning-

22. See Henry M. Hart, Jr. & Albert M. Sacks, The Legal Process 1374–81 (William N. Eskridge, Jr. & Philip P. Frickey eds., Foundation Press 1994) (1958). Although surely the most influential, Hart and Sacks were by no means the only significant proponents of attributing a purpose to a statute based on the surrounding circumstances, rather than trying to ascertain in each case the legislature’s subjective intent. See, e.g., Cox, *supra* note 3, at 374 (arguing that even though legislatures form no specific intent concerning many interpretive controversies, judges may nonetheless resolve doubtful cases by reference to “the general purpose” that lies “behind the statutory words”); Frankfurter, *supra* note 3, at 539 (arguing that judges should seek an objective understanding of purpose that “is evinced in the language of the statute, as read in the light of other external manifestations of purpose,” and not in “tests that have overtones of subjective design”).

ful theory of legislative supremacy; even if legislators do not collectively form any specific subjective intention about the way they would apply a statute to any given fact situation, a court can at least ascribe to them the plausible intention to adopt what a reasonable person conversant with applicable social conventions would have understood them to be adopting. From this starting point, textualists contend that semantic detail offers a singularly effective medium for legislators to set the level of generality at which policy will be articulated—and thus to specify the limits of often messy legislative compromises. Because the lawmaking procedures prescribed by Article I, Section 7 of the Constitution and the congressionally prescribed rules of legislative procedure unmistakably afford political minorities extraordinary power to block legislation or insist upon compromise as the price of assent, textualists believe that adjusting a statute's semantic detail unacceptably risks diluting that crucial procedural right. If judges transform awkward but precise semantic formulations into reasonably coherent policy outcomes, then the legislators who occupy Congress's many and diverse veto gates cannot rely upon statutory wording as a predictable means for setting the desirable limits on bills that they are willing to let through only upon the acceptance of bargained-for conditions.

Before turning to this analysis, however, I should note that my effort here to recast what in fact divides the two camps may reflect mere changes in tone and nuance from the prevailing textualist position (including, as I have said, my own writings). In the end, I am merely trying to give a more precise account of what textualists mean when they say that they will enforce the text rather than the purpose when the statutory text is clear in context. But because serious and thoughtful commentators have wondered of late whether there is anything left of textualism, I believe that it is important to offer a clarifying explanation that might solve the following puzzle: If a textualist believes that language has meaning only in context, and that statutory purpose is a relevant ingredient of context, how can textualists say (as they often do) that judges should follow the text rather than the purpose when the text is clear in context?²³ By seeking to explain here why textualists think it proper to emphasize some elements of context (semantic usage) rather than others (policy considerations), I attempt to demonstrate what textualists really mean by what they say. In doing so, I attempt here to advance a freestanding analysis of the differences that remain between textualism and purposivism rather than a point-by-point refutation of Professor Molot's characteristically thoughtful analysis.²⁴

23. I am grateful to Philip Frickey for articulating the problem in such clear terms.

24. The reader will, however, find specific responses to some of Professor Molot's more important contentions in the margins (rather than the body) of this Article. See *infra* notes 92, 111, and 137.

I. TEXTUALISM AND LEGAL PROCESS PURPOSIVISM: COMMON GROUND

The distinction between textualism and purposivism is not, as is often assumed, cut-and-dried.²⁵ Properly understood, textualism is not and could not be defined either by a strict preference for enacted text over unenacted context, or by a wholesale rejection of the utility of purpose. Because the meaning of language depends on the way a linguistic community uses words and phrases in context, textualists recognize that meaning can never be found exclusively within the enacted text. This feature of textualism, moreover, goes well beyond the often subconscious process of reading words in context in order to pinpoint the “ordinary” meaning of a word that may mean several things in common parlance. Rather, because legal communication often entails the use of specialized conventions, textualists routinely consult unenacted sources of context whose contents might be obscure to the ordinary reader without further inquiry. Moreover, because textualists understand that speakers use language purposively, they recognize that evidence of purpose (if derived from sources other than the legislative history) may also form an appropriate ingredient of the context used to define the text.

Conversely, certain features of purposivism reflect textualist practices and assumptions more deeply than textualists sometimes acknowledge. Although Professor Molot properly notes that this trend has perhaps become more pronounced in the judicial opinions of avowedly purposivist judges in recent years,²⁶ many important conceptual similarities were already present in the (now canonical) mid-twentieth-century account of purposivism developed in the Legal Process materials of Professors Hart and Sacks. Although Legal Process purposivists believe that interpretation entails the attribution of purpose, they do not deny that semantic meaning of the text casts light—perhaps the most important light—on the purposes to be attributed. Nor do they deny that, in such a pursuit, the judge should carefully consult the technical conventions that distinctively pertain to legalese. Perhaps most important, much like modern textualists, Hart-and-Sacks-style purposivists recognize that a judge’s task, properly conceived, is not to seek actual legislative intent; rather, their method of interpretation poses the objective question of how a hypothetical “reasonable legislator” (as opposed to a real one) would have resolved the problem addressed by the statute.

In considering the similarities discussed in this Part, the reader should keep in mind that, in contrast with Professor Molot,²⁷ I believe

25. On this point, Professor Molot and I share common ground. See Molot, *supra* note 17, at 3 (“Conventional wisdom has it that textualists emphasize statutory text and purposivists emphasize statutory purposes. But when one considers *how* modern textualists go about identifying textual meaning and *how* purposivists go about identifying statutory purposes, the differences . . . begin to fade.”).

26. See *id.* at 32–33.

27. See *id.* at 36–43 (suggesting that no conceptually significant differences remain between modern textualism and modern purposivism if both are properly understood).

that significant practical and theoretical differences continue to separate textualism from purposivism, however enlightened the two philosophies have become in relation to each other. Accordingly, the objective here is to highlight the key similarities between the two in a way that will help to define more sharply (in Part II) the differences that remain.

A. *Textualism and Extrastatutory Context (Including Purpose)*

In contrast with their ancestors in the “plain meaning” school of the late nineteenth and early twentieth centuries, modern textualists do not believe that it is possible to infer meaning from “within the four corners” of a statute.²⁸ Rather, they assert that language is intelligible only by virtue of a community’s shared conventions for understanding words in context.²⁹ While rejecting the idea of subjective legislative intent,³⁰ they contend that the effective communication of legislative commands is in fact possible because one can attribute to legislators the minimum intention “to say what one would be normally understood as saying, given the circumstances in which one said it.”³¹ Textualists thus look for what they call “‘objectified’ intent—the intent that a reasonable person would gather from the text of the law, placed alongside the remainder of the corpus juris.”³² Because one can make sense of others’ communications

28. *White v. United States*, 191 U.S. 545, 551 (1903). Often, the formalist decisions of the late nineteenth and early twentieth centuries spoke as if the determination that a statute had a “plain meaning” foreclosed any necessity to consider context. See, e.g., *United States v. Gudger*, 249 U.S. 373, 374–75 (1919) (“No elucidation of the text is needed to add cogency to this plain meaning, which would . . . be reinforced by the context if there were need to resort to it”); *Caminetti v. United States*, 242 U.S. 470, 485 (1917) (“Where the language is plain and admits of no more than one meaning the duty of interpretation does not arise”); *Procter & Gamble Co. v. United States*, 225 U.S. 282, 293 (1912) (“No resort to exposition can add to the cogency with which the conclusion stated is compelled by the plain meaning of the words themselves. But if it be conceded . . . that the language . . . is ambiguous a consideration of the context . . . will at once clarify the subject.”).

29. Modern textualism thus resonates with Wittgenstein’s insights about language. See *Cont’l Can. Co. v. Chi. Truck Drivers*, 916 F.2d 1154, 1157 (7th Cir. 1990) (Easterbrook, J.) (“You don’t have to be Ludwig Wittgenstein or Hans-Georg Gadamer to know that successful communication depends on meanings shared by interpretive communities.”); see also Ludwig Wittgenstein, *Philosophical Investigations* §§ 134–142 (G.E.M. Anscombe trans., 3d ed. 1958) (emphasizing the use of words in linguistic interactions within the relevant community).

30. See, e.g., Frank H. Easterbrook, *Understanding the Law Through the Lens of Public Choice*, 12 *Int’l Rev. L. & Econ.* 284, 284 (1992) (“[T]he concept of ‘an’ intent for a person is fictive and for an institution hilarious.”); see also *supra* note 12 and accompanying text.

31. Joseph Raz, *Intention in Interpretation*, in *The Autonomy of Law: Essays on Legal Positivism* 249, 268 (Robert P. George ed., 1996); see also *infra* text accompanying notes 106–111.

32. Antonin Scalia, *Common-Law Courts in a Civil Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in *A Matter of Interpretation: Federal Courts and the Law* 16, 17 (1997) [hereinafter *Scalia, Common-Law Courts*]; see also Easterbrook, *Original Intent*, *supra* note 15, at 65 (“We should look

only by placing them in their appropriate social and linguistic context, textualists further acknowledge that "[i]n textual interpretation, context is everything."³³

The resulting recognition of the importance of context makes it more difficult for textualists to distinguish themselves from purposivists on the straightforward ground that textualism relies exclusively on the *enacted text* when that text is clear. To highlight this point, it is helpful to consider different ways in which context may be brought to bear. Because context of course is essential even to determine the way words are used in everyday parlance,³⁴ textualists (like everyone else) necessarily resort to context even in cases in which the meaning of the text appears intuitively obvious. In such cases, contextual understandings may be so routinely accepted that their application occurs at a subconscious level that may feel "automatic."³⁵ For instance, even though social and linguistic context is essential to the conclusion that a "no dogs in the park" ordinance would not ordinarily apply to a domesticated pet pig, it is forgivably intuitive (if technically inaccurate) to state that applying that ordinance to a pig sacrifices the plain meaning of the enacted text.³⁶

at the statutory structure and hear the words as they would sound in the mind of a skilled, objectively reasonable user of words.").

33. Scalia, *Common-Law Courts*, *supra* note 32, at 37; see also, e.g., *United States v. Alvarez-Sanchez*, 511 U.S. 350, 358 (1994) (Thomas, J.) ("In short, it is evident 'from the context in which [the phrase] is used,' that the 'arrest or other detention' of which the subsection speaks must be an 'arrest or other detention' for a violation of federal law." (emphasis omitted) (quoting *Deal v. United States*, 508 U.S. 129, 132 (1993))); *Deal*, 508 U.S. at 132 (Scalia, J.) (arguing that it is a "fundamental principle of statutory interpretation (and, indeed, of language itself) that the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used"); Easterbrook, *Text, History, and Structure*, *supra* note 11, at 64 ("Because interpretation is a social enterprise, because words have no natural meanings, and because their effect lies in context, we must consult these contexts.").

34. At a minimum, because commonly used words frequently have multiple meanings depending on the context of their use, interpreters must consult context to ascertain the relevant meaning. If someone declares, "I took the boat out on the bay," the word "bay" obviously refers to a body of water; but if the same person states, "I put the saddle on the bay," it is equally obvious that he or she means a horse. Scalia, *Common-Law Courts*, *supra* note 32, at 26.

35. Frederick Schauer, *Playing by the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life* 57 & n.6 (1991) (observing that "a large number of contextual understandings will be assumed by all speakers of a language," and that many such understandings will be "largely invariant across English speakers at a given time" (citing John R. Searle, *Literal Meaning*, 13 *Erkenntnis* 207-24 (1978))).

36. Judge Easterbrook has suggested that a statute's meaning may be plain to readers even though such meaning inescapably depends on external context:

Statutes have meanings, sometimes even "plain" ones, but these do not spring directly from the page. Words are arbitrary signs, having meaning only to the extent writers and readers share an understanding. A mark such as ↑ has a meaning without language, but "up" must be decoded according to rules and cultural norms. Language in general, and legislation in particular, is a social enterprise to which both speakers and listeners contribute, drawing on background understandings and the structure and circumstances of the

Barring the presence of some idiosyncratic term of art (a matter to be addressed shortly), nearly all users of English, including legislators, would reflexively understand that the social meaning of “dog,” however elastic, does not reach that far.³⁷

As I have discussed in detail in earlier writings,³⁸ however, modern textualism necessarily—and quite properly—draws upon contextual cues far less obvious to the ordinary user of language. Because textualists want to know the way a reasonable user of language would understand a statutory phrase in the circumstances in which it is used, they must always ascertain the unstated “assumptions shared by the speakers and the intended audience.”³⁹ In particular, when operating within the realm of legal parlance (a relevant linguistic subcommunity), textualism’s premise requires that interpreters consider specialized conventions and linguistic practices peculiar to the law.⁴⁰ A given statutory phrase may reflect the often elaborate (but textually unspecified) connotations of a technical term of art.⁴¹ Or by dint of some settled common law practice, unstated

utterance. Slicing a statute into phrases while ignoring their contexts—the surrounding words, the setting of the enactment, the function a phrase serves in the statutory structure—is a formula for disaster.

Herrmann v. Cencom Cable Assocs., 978 F.2d 978, 982 (7th Cir. 1992).

37. See Easterbrook, *Statutes’ Domains*, *supra* note 14, at 535 (“Most people would say that the statute does not go beyond dogs, because after all the verbal torturing of the words has been completed it is still too plain for argument what the statute means.”); Manning, *Absurdity Doctrine*, *supra* note 13, at 2396 (discussing the conventional import of a “no dogs” ordinance).

38. See Manning, *Absurdity Doctrine*, *supra* note 13, at 2456–76; Manning, *Equity of the Statute*, *supra* note 1, at 108–14.

39. Easterbrook, *Legislative History*, *supra* note 10, at 443.

40. Even within the realm of ordinary meaning, textualists must be sensitive to the fact that words sometimes have colloquial meanings that are widely understood but too obscure to have made their way into standard dictionaries. Context is essential to unearthing such nuance. Consider the following examples. First, although an airplane may technically satisfy the dictionary definition of “vehicle,” no English speaker would refer to a motorized airplane as a “motor vehicle.” In common parlance, the latter term has come to mean a car, truck, or perhaps a motorcycle. Thus, in *McBoyle v. United States*, 283 U.S. 25, 26 (1931), the Court refused to apply the National Motor Vehicle Theft Act to the theft of an airplane. Writing for the Court, Justice Holmes started by observing that “[n]o doubt etymologically it is possible to use the word [‘vehicle’] to signify a conveyance working on land, water or air.” *Id.* “But,” he added, “in everyday speech ‘vehicle’ calls up the picture of a thing moving on land.” *Id.* Second, although water literally falls within the “mineral” kingdom (it is not an animal or vegetable), few would use the term “mineral rights” to describe the right to exploit water reserves, as opposed to coal, oil, gas, and shale. See *Andrus v. Charleston Stone Prods. Co.*, 436 U.S. 604, 610–11 (1978).

41. See, e.g., *Babbitt v. Sweet Home Chapter of Cmty. for a Great Or.*, 515 U.S. 687, 717–18 (1995) (Scalia, J., dissenting) (defining the word “take” in Endangered Species Act in light of its technical meaning in wildlife law); *Dir., Office of Workers’ Comp. Programs v. Newport News Shipbuilding & Dry Dock Co.*, 514 U.S. 122, 126 (1995) (Scalia, J.) (“The phrase ‘person adversely affected or aggrieved’ is a term of art used in many statutes to designate those who have standing to challenge or appeal an agency decision, within the agency or before the courts.” (quoting 33 U.S.C. § 921(c) (1994))).

exceptions or qualifications may form part of the background against which lawyers understand the workings of a given category of statute.⁴² Textualists also rely on off-the-rack canons of construction peculiar to the legal community,⁴³ including some substantive (policy-oriented) canons that have come to be accepted as background assumptions by virtue of longstanding prescription.⁴⁴ Such interpretive techniques inevitably re-

42. So, for example, textualists read otherwise unqualified statutes of limitations in light of the settled judicial practice of equitable tolling. See, e.g., *Young v. United States*, 535 U.S. 43, 49–50 (2002) (Scalia, J.) (“It is hornbook law that limitations periods are ‘customarily subject to equitable tolling,’ unless tolling would be ‘inconsistent with the text of the relevant statute.’ Congress must be presumed to draft limitations periods in light of this background principle.” (citations omitted) (quoting *Irwin v. Dep’t of Veterans Affairs*, 498 U.S. 89, 95 (1990); *United States v. Beggerly*, 524 U.S. 38, 48 (1998))). They also read criminal statutes in light of customary but textually unspecified state-of-mind requirements and defenses. See, e.g., *Brogan v. United States*, 522 U.S. 398, 406 (1998) (Scalia, J.) (“Criminal prohibitions do not generally apply to reasonable enforcement actions by officers of the law.”); *Staples v. United States*, 511 U.S. 600, 605 (1994) (Thomas, J.) (“[W]e must construe the statute in light of the background rules of the common law, in which the requirement of some *mens rea* for a crime is firmly embedded.” (citations omitted)); Frank H. Easterbrook, *The Case of the Speluncean Explorers: Revisited*, 112 Harv. L. Rev. 1876, 1913 (1999) (noting that interpreters should read criminal statutes in light of “the legal system’s accepted procedures, evidentiary rules, burdens of persuasion—and defenses”).

43. See, e.g., Easterbrook, *Statutes’ Domains*, *supra* note 14, at 540 (defending canons of construction as “off-the-rack provisions that spare legislators the costs of anticipating all possible interpretive problems and legislating solutions for them”); Scalia, *Common-Law Courts*, *supra* note 32, at 26 (arguing that many canons of construction “are so commonsensical that, were [they] not couched in Latin, you would find it hard to believe that anyone could criticize them”).

44. See, e.g., *United States v. Nordic Vill., Inc.*, 503 U.S. 30, 33–34 (1992) (Scalia, J.) (requiring clear statement of intent to waive federal sovereign immunity); *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 841 (1990) (Scalia, J., concurring) (stating that statutes are presumptively prospective in application unless a given statute clearly indicates the contrary); *Dellmuth v. Muth*, 491 U.S. 223, 233 (1989) (Scalia, J., concurring) (stressing Congress’s ability to eliminate sovereign immunity only if the statutory text “clearly subjects” state to suit for damages). Although Justice Scalia has described such “dice-loading” canons as generally problematic for textualists, Scalia, *Common-Law Courts*, *supra* note 32, at 28–29, he nonetheless purports to accept them when, by virtue of deeply rooted practice, they have become part of the background against which legislators enact, and lawyers understand, statutory language in context. See Antonin Scalia, *Assorted Canards of Contemporary Legal Analysis*, 40 Case W. Res. L. Rev. 581, 583 (1990). Some commentators have questioned whether modern textualist judges, in fact, restrict themselves to well-settled substantive canons or, instead, develop them in an ad hoc fashion that contradicts the core premises of textualism. See William N. Eskridge, Jr., *Textualism, The Unknown Ideal?*, 96 Mich. L. Rev. 1509, 1545–46 (1998) (arguing that if textualists develop substantive canons “common law style,” then “as new canons are created or strengthened and old ones narrowed as Supreme Court composition changes, the honest textualist [will] become[] just as unpredictable as, and may even come to resemble, her doppelganger the willful judge”); Bradford C. Mank, *Textualism’s Selective Canons of Statutory Construction: Reinvigorating Individual Liberties, Legislative Authority, and Deference to Executive Agencies*, 86 Ky. L.J. 527, 527 (1998) (“[T]extualist judges selectively prefer clear-statement rules that favor states’ rights and private economic

quire judges to go well beyond the four corners of the text to determine the often abstruse details of technical meaning.

Consider, for example, how far outside the text modern textualists may sometimes have to travel to decipher an obscure legal term of art. Thus, in *Moskal v. United States*,⁴⁵ the Court construed a statute that made it a crime to transport in interstate commerce “any falsely made, forged, altered, or counterfeited securities.”⁴⁶ At issue was whether an automobile title (concededly a “security”) was “falsely made” because someone had filled in a fraudulent odometer reading. Invoking its understanding of “ordinary meaning,” the Court held that such titles were “‘falsely made’ in the sense that they [were] made to contain false, or incorrect, information.”⁴⁷ In a carefully researched dissent, Justice Scalia concluded that the term “falsely made” was a term of art that referred only to forgeries, not to authentic documents containing false information. In so doing, he culled that unobvious meaning from (a) Blackstone’s *Commentaries*; (b) numerous state forgery statutes that had used “falsely made” as a synonym for forgery; (c) the decisions of several federal courts (including dicta from the Supreme Court) and eight state courts; and (d) the “apparently unanimous” understanding of all the major criminal law treatises published prior to the relevant federal enactment.⁴⁸ However convincingly this evidence demonstrates the background understanding of a term of legal art, the important point is that Justice Scalia’s avowedly textualist analysis invoked authoritative evidence from outside the enacted text.

Decisions such as *Moskal* underscore the fact that the statutory meaning derived by textualists is a construct. Textualists do not (and, given their assumptions about actual legislative intent, could not) claim that a constitutionally sufficient majority of legislators *actually* subscribed to the meaning that a textualist judge would ascribe to a hypothetical reasonable legislator conversant with the applicable social and linguistic conventions. Even if Justice Scalia’s dissent in *Moskal* accurately captures the technical meaning of “falsely made” (as I believe it does), his reasoning highlights the fact that textualists necessarily *impute* meaning to a statute. Even if a meaningful proportion of legislators formed an actual intent about the meaning of “falsely made,” one cannot know whether a majority subscribed to (or even knew of) the specialized legal meaning found in the external sources cited by the dissent. This uncertainty does not, however, make the dissent’s approach illegitimate; it merely underscores the fact that Justice Scalia’s “reasonable” legislator purports to capture the understanding of an idealized, rather than an actual, legislator.

interests, and usually narrow a statute’s meaning.”). Whether and in what circumstances textualists properly rely on substantive canons is beyond this Article’s scope.

45. 498 U.S. 103 (1990).

46. 18 U.S.C. § 2314 (2000).

47. 498 U.S. at 108–09 (quoting 18 U.S.C. § 2314).

48. *Id.* at 122–25.

There is an additional wrinkle: Because speakers use language purposively, textualists recognize that the relevant context for a statutory text includes the mischiefs the authors were addressing.⁴⁹ Thus, when a statute is ambiguous,⁵⁰ textualists think it quite appropriate to resolve that ambiguity in light of the statute's apparent overall purpose.⁵¹ To be sure, textualists generally forgo reliance on legislative history as an authoritative source of such purpose, but that reaction goes to the reliability and legitimacy of a certain type of evidence of purpose rather than to the use of purpose as such.⁵² In fact, in cases of ambiguity, textualists are sometimes willing to make rough estimates of purpose from sources such as

49. See Easterbrook, *Text, History, and Structure*, *supra* note 11, at 61 ("Words take their meaning from contexts . . . [including] the problems the authors were addressing.").

50. As used here, the concept of ambiguity refers to circumstances in which the usage indicated by the semantic context does not speak decisively, but rather leaves more than one reasonable alternative understanding on the table. See *infra* text accompanying notes 76–78 (discussing what textualists mean when they assert that a statutory text is "clear" in context).

51. See, e.g., *Asgrow Seed Co. v. Winterboer*, 513 U.S. 179, 192 (1995) (Scalia, J.) ("While the meaning of the text is by no means clear, this is in our view the only reading that comports with the statutory purpose."); *Nat'l Tax Credit Partners, L.P. v. Havlik*, 20 F.3d 705, 707 (7th Cir. 1994) (Easterbrook, J.) ("Knowing the purpose behind a rule may help a court decode an ambiguous text, but first there must be some ambiguity." (citations omitted)); Easterbrook, *Legislative History*, *supra* note 10, at 443 ("Because laws themselves do not have purposes or spirits—only the authors are sentient—it may be essential to mine the context of the utterance out of the debates, just as we learn the limits of a holding from reading the entire opinion."); Scalia, *Judicial Deference*, *supra* note 12, at 515 ("Surely one of the most frequent justifications courts give for choosing a particular construction is that the alternative interpretation would produce 'absurd' results, or results less compatible with the reason or purpose of the statute.").

52. In previous writing, I have argued that the textualists' rejection of legislative history is best explained by reference to the constitutional norm against legislative self-delegation. See John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 *Colum. L. Rev.* 673, 710–25 (1997) [hereinafter Manning, *Textualism as Nondelegation*]. The constitutionally ordained legislative process of bicameralism and presentment is designed to check factional influence, promote caution and deliberation, and provoke public discussion. See *id.* at 708–09. To prevent the circumvention of that process, the Court has consistently forbidden Congress to reserve delegated authority for its own components, agents, or members. See, e.g., *Metro. Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 275–77 (1991) (holding that individual members of Congress may not serve on a tribunal exercising delegated power); *Bowsher v. Synar*, 478 U.S. 714, 726 (1986) (holding that Congress may not reserve power to remove an officer exercising delegated lawmaking authority); *INS v. Chadha*, 462 U.S. 919, 944–59 (1983) (invalidating one-House legislative veto). In recent years, some textualists have justified their reluctance to credit internal legislative history on the ground that it effectively transfers authority from the body as a whole to the committees or sponsors who, under established judicial practice, are capable of producing particularly "authoritative" expressions of legislative intent. See Manning, *Textualism as Nondelegation*, *supra*, at 694–95 (discussing this refinement of the textualist position). Whatever the proper rationale (if any) for the textualists' rejection of legislative history, the important point for present purposes is this: Rejecting legislative history merely eliminates one potential basis for inferring purpose. It does not require a categorical rejection of purpose as an organizing principle in statutory interpretation.

the overall tenor or structure of the statute, its title, or public knowledge of the problems that inspired its enactment.⁵³ This practice is significant for two reasons. First, it shows that modern textualists consider purpose to be part of the relevant interpretive landscape. Second, it reveals their concomitant belief that interpreters can (at least sometimes) draw a suitably objective inference of purpose—presumably one that a “reasonable user of words” would arrive at after reading the entire text in context.⁵⁴ Accordingly, when semantic ambiguity creates the necessary leeway, textualists will try to construct a plausible hypothetical purpose (if possible) not because they believe that it “is what the lawmakers must have had in mind . . . , but because it is [the judiciary’s] role to make sense rather than nonsense out of the *corpus juris*.”⁵⁵

B. *Legal Process Purposivism and the Enacted Text*

Contrary to popular perception, prevailing methods of purposivism rely on many of the methods that textualists hold dear. In determining what purpose to attribute to a statute, purposivists pay close attention to text, structure, sources of technical or specialized meaning, and maxims of construction (both semantic and substantive). In addition, the most influential version of purposivism also purports to filter these sources through an objective construct that does not seek actual legislative intent, but rather invokes an idealized, hypothetical legislator as the benchmark

53. See, e.g., *City of Columbus v. Ours Garage & Wrecker Serv., Inc.*, 536 U.S. 424, 450 (2002) (Scalia, J., dissenting) (“[E]vidence of pre-emptive purpose is sought in the text and structure of the statute at issue.” (internal quotation marks and alteration to original omitted)) (quoting *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993)); *United States v. Fausto*, 484 U.S. 439, 449 (1988) (Scalia, J.) (holding that the nonreviewability of adverse personnel actions under the Civil Service Reform Act derives “not only from the statutory language, but also from . . . the structure of the statutory scheme”); Easterbrook, *Text, History, and Structure*, supra note 11, at 61 (noting that part of the relevant context for understanding a statute consists of “the problems the authors were addressing”).

54. Although the case does not directly involve a federal statute, Judge Easterbrook’s opinion in *In re Erickson*, 815 F.2d 1090 (7th Cir. 1987), offers a particularly illuminating example of the way the textualists’ “reasonable user of words” might derive purpose. At issue was a Wisconsin state statute making certain farm-related assets unavailable to satisfy civil judgments (a statute within the purview of the federal courts by virtue of having been incorporated with like state statutes into a federal bankruptcy exemption). In determining, *inter alia*, whether a modern “haybine” was a “mower” within the meaning of the state statute, Judge Easterbrook sought to resolve the ambiguity by reference to “the function of the designation” of the items to be shielded from civil judgment. *Id.* at 1092. Looking at the “statute’s structure and function,” he concluded that the statute was designed “to enable farmers to keep a minimal set of equipment to work the fields.” *Id.* at 1094. He rested that conclusion on the types of farm assets the statute made unavailable to civil judgments, including small amounts of livestock and the very type of equipment needed to keep a small farm in operation. See *id.* at 1091. Rather than searching for subjective legislative intent (the statute, in any case, had “no legislative history”), Judge Easterbrook instead inferred what “function” (purpose) a reasonable person would ascribe to a statute that contained the particular pattern of exclusions. *Id.* at 1094.

55. *W. Va. Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 100–01 (1991) (Scalia, J.).

for understanding what legislation means. A brief consideration of these similarities will further illuminate the remaining differences (examined in Part II).

Although Professor Molot (quite perceptively, I believe) finds potent evidence of an increasingly text-based approach in the opinions of contemporary purposivists on the Supreme Court,⁵⁶ I take as my main point of departure the work of Professors Hart and Sacks, whose celebrated Legal Process materials developed a highly influential rationalist approach to legal analysis in general and statutory interpretation in particular.⁵⁷ I do so for several reasons. First, for many, their materials have come to represent the canonical statement of purposivism.⁵⁸ Second, their work offers a rich account of the conceptual basis for purposivism. Third, they provide a particularly apt point of comparison with textualism because their purposivism eschews any inquiry into subjective legislative intent and instead proposes an objective criterion for reading legislative commands.⁵⁹ Accordingly, while occasionally buttressing my analysis with judicial opinions (old and new), I use the Legal Process materials as an

56. See Molot, *supra* note 17, at 32–33.

57. See generally Hart & Sacks, *supra* note 22, at 1374–80.

58. See, e.g., T. Alexander Aleinikoff, Updating Statutory Interpretation, 87 Mich. L. Rev. 20, 26–28 (1988) [hereinafter Aleinikoff, *Statutory Interpretation*] (discussing the intellectual influence of the Hart and Sacks materials); William N. Eskridge, Jr. & Philip P. Frickey, Legislation Scholarship and Pedagogy in the Post-Legal Process Era, 48 U. Pitt. L. Rev. 691, 698–99 (1987) (same); William N. Eskridge, Jr. & Philip P. Frickey, The Making of *The Legal Process*, 107 Harv. L. Rev. 2031, 2046–47 (1994) (same).

59. See Hart & Sacks, *supra* note 22, at 1374 (disclaiming the notion that “the court’s function is to ascertain the intention of the legislature with respect to the matter in issue”). In addition, the Legal Process materials suitably reflect the strong form of atextual, purposive interpretation that has troubled textualists. Although Hart and Sacks did admonish judges to avoid giving words “a meaning they will not bear,” *id.*, their analysis also emphasized that “[t]he meaning of words can almost always be narrowed if the context seems to call for the narrowing.” *Id.* at 1376. Accordingly, their approach would readily encompass the many important cases that use purpose to confine the semantic breadth of a statute. See, e.g., *Pub. Citizen v. U.S. Dep’t of Justice*, 491 U.S. 440, 452–53 (1989) (narrowing the meaning of the term “utilized” in the Federal Advisory Committee Act); *Sorrells v. United States*, 287 U.S. 435, 446–48 (1932) (recognizing an entrapment defense that conditioned the otherwise unqualified language of the National Prohibition Act); *Church of the Holy Trinity v. United States*, 143 U.S. 457, 458–59 (1892) (narrowing the Alien Contract Labor Act’s prohibition against encouraging migration of foreign nationals to perform “labor or service of any kind” (citing Act of Feb. 26, 1885, ch. 164, 23 Stat. 332, repealed by Act of June 27, 1952, ch. 4, § 403(a)(2), 66 Stat. 163, 279)). Although more ambiguous in their endorsement, Hart and Sacks also seem to favor extending the reach of a statute to situations “seemingly within its purpose but not within any accepted meaning of its words.” Hart & Sacks, *supra* note 22, at 1194. Implicitly rejecting the idea that such a move could be grounded on a reading of the particular legislative command, Hart and Sacks suggested that “it may nevertheless be proper for the court to rely upon the policy expressed in the statute in formulating, upon its own responsibility, a parallel ground of decision in the case at bar.” *Id.* In short, the Legal Process materials nicely represent both the relevant similarities and tensions that purposivism shares with modern textualism.

appropriate proxy for the now generally dominant version of purposivism.⁶⁰

While purposivism is characterized by the conviction that judges should interpret a statute in a way that carries out its reasonably apparent purpose and fulfills its background justification, purposivists start—and most of the time end—their inquiry with the semantic meaning of the text. For example, in the most important purposivist precedent of the twentieth century, *United States v. American Trucking Ass'ns*, the Court emphasized that “[t]here is . . . no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes,” and that deciphering the conventional meaning of statutory language is frequently (though not always) “sufficient . . . to determine the purpose of the legislation.”⁶¹ Or as Hart and Sacks themselves have stressed, “[t]he words of a statute, taken in their context, serve both as guides in the attribution of general purpose and as factors limiting the particular meanings that can properly be attributed.”⁶² Of course, as discussed below, purposivists are far less willing than textualists to adhere to the conventional social meaning of a given statutory provision when contrary indications of purpose cut strongly against such meaning.⁶³ But that does not alter the fact that the first impulse of even

60. In drawing examples from Supreme Court opinions, I rely on opinions written by Justices Stevens, Souter, and Breyer—the present Court’s most enthusiastic proponents of the type of reasoning that underlies purposivism. See, e.g., *Koons Buick Pontiac GMC, Inc. v. Nigh*, 125 S. Ct. 460, 470 (2004) (Stevens, J., concurring) (“[T]he Court has suggested that we should only look at legislative history for the purpose of resolving textual ambiguities or to avoid absurdities. It would be wiser to acknowledge that it is always appropriate to consider all available evidence of Congress’s true intent.”); *FCC v. Nextwave Pers. Commc’ns. Inc.*, 537 U.S. 293, 311 (2003) (Breyer, J., dissenting) (“It is dangerous . . . in any actual case of interpretive difficulty to rely exclusively upon the literal meaning of a statute’s words divorced from consideration of the statute’s purpose. . . . General terms as used on particular occasions often carry implied restrictions as to scope.”). In this vein, Justice Souter has written:

[I]n relying on an uncommon sense of the word, we are departing from the rule of construction that prefers ordinary meaning. But this is exactly what ought to happen when the ordinary meaning fails to fit the text and when the realization of clear congressional policy . . . is in tension with the result that customary interpretive rules would deliver.

Johnson v. United States, 529 U.S. 694, 706 n.9 (2000) (citation omitted).

61. 310 U.S. 534, 543 (1940). Hart and Sacks aptly describe *American Trucking* as the “landmark case in the overthrow of the plain meaning rule.” Hart & Sacks, *supra* note 22, at 1237.

62. Hart & Sacks, *supra* note 22, at 1375. Leading purposivist scholars who laid the groundwork for the Legal Process approach also recognized the importance of the text. See, e.g., Cox, *supra* note 3, at 375 (“[T]he words of a statute are chosen by the legislature to express its meaning”); Frankfurter, *supra* note 3, at 539 (“[P]olicy is not drawn, like nitrogen, out of the air; it is evinced in the language of the statute, as read in light of the other external manifestations of purpose.”).

63. See *infra* Part II.A. In the more famous part of its analysis, the *American Trucking* Court went on to explain:

the strongest purposivist is to try to read the statute in light of the accepted semantic import of the text.⁶⁴

When [plain] meaning has led to absurd or futile results, . . . 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.”

310 U.S. at 543–44 (footnotes omitted).

64. Indeed, even though purposivists are quick to admonish against “mak[ing] a fortress out of the dictionary,” *Cabell v. Markham*, 148 F.2d 737, 739 (2d Cir. 1945) (L. Hand, J.), leading purposivists also recognize that the dictionary sometimes provides a useful historical record of usage in context. See Hart & Sacks, *supra* note 22, at 1190 (“Judges answer many questions of the linguistically correct meaning of particular words out of their own experience and judgment. . . . It is nice, however, when such questions can be answered by reference to impersonal authority. Such an authority is provided by reputable dictionaries.”). Similarly, purposivists on the present Court presume that a word’s ordinary or dictionary meaning supplies at least a useful starting point for discerning the purposes they seek. See, e.g., *Muscarello v. United States*, 524 U.S. 125, 127–32 (1998) (Breyer, J.) (determining the “primary meaning” of “carry” based on its dictionary definition); *Dunn v. Commodity Futures Trading Comm’n*, 519 U.S. 465, 470 (1997) (Stevens, J.) (relying on *Black’s Law Dictionary* to determine that the agency’s interpretation “violates the ordinary meaning of the key word ‘in’”); *MCI Telecomms. Corp. v. AT&T Co.*, 512 U.S. 218, 240–42 (1994) (Stevens, J., dissenting) (noting that dictionaries can be “useful aids in statutory interpretation” if words are also considered in context).

A recent Supreme Court opinion highlights the importance of semantic meaning to modern purposivists. In *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 584 (2004), the Court considered whether the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. § 621–634 (2000), prohibits discrimination against younger workers in favor of older ones. In his opinion for the Court, Justice Souter found that the Act only protects older workers against younger ones, even though the text unqualifiedly bans “discriminat[ion] . . . because of [an] individual’s age.” 29 U.S.C. § 623(a)(1); see *Cline*, 540 U.S. at 585 (citing the text of the ADEA). Although he relied heavily on the ADEA’s apparent purpose to protect older workers (as evidenced by both the legislative history and the enacted findings of purpose), see *id.* at 588–90, Justice Souter took pains to show that, in our society, the phrase “age discrimination” has come to have an idiomatic meaning that comports with that background purpose:

[T]he testimony, reports, and congressional findings simply confirm that Congress used the phrase “discriminat[ion] . . . because of [an] individual’s age” the same way that ordinary people in common usage might speak of age discrimination any day of the week. One commonplace conception of American society in recent decades is its character as a “youth culture,” and in a world where younger is better, talk about discrimination because of age is naturally understood to refer to discrimination against the older.

Id. at 591. In other words, in ordinary usage, “age” might be understood “either as pointing to any number of years lived, or as common shorthand for the longer span and concurrent aches that make youth look good.” *Id.* at 596. The important point is this: Although he ultimately rested his opinion on inferences of purpose, Justice Souter felt it necessary to justify that result in terms of accepted understandings of the text.

It is also significant that purposivists take seriously the obligation to examine the semantic context carefully to ascertain colloquial or technical nuances in the usage of statutory language; they do not treat the text as a mere place holder for concocting plausible inferences about purpose.⁶⁵ They realize that “[w]ords of art bring their art with them,” and that any good interpreter must seek the often “recondite connotations” of the technical terms that Congress sometimes borrows from the legal, scientific, business, or other subcommunities.⁶⁶ Again, much like modern textualists, purposivists accept “the recurrent possibilities of reading general language as subject to assumed but unexpressed qualifications in terms of customary defenses or other limiting policies of the law.”⁶⁷ As compared with textualists, purposivists tend to worry more about the potential indeterminacy of the traditional canons of construction—including the risk (made famous by Karl Llewellyn) that two or more conflicting canons may apply to the same interpretive question.⁶⁸ Nonetheless, they

65. For discussion of this analogous textualist practice, see *supra* notes 38–48 and accompanying text. For discussion of a potential contrast between textualist and purposivist practice along this dimension, see *infra* note 111 (discussing Professor Molot’s contention that modern textualists mine semantic context too aggressively).

66. Frankfurter, *supra* note 3, at 537; see also *Evans v. United States*, 504 U.S. 255, 259 (1992) (Stevens, J.) (“[W]here Congress borrows terms of art . . . it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed.” (internal quotation marks omitted) (quoting *Morissette v. United States*, 342 U.S. 246, 263 (1952))).

67. Hart & Sacks, *supra* note 22, at 1192. Among other things, the Legal Process approach gave unflinching effect to the sort of substantive canons that judges have developed over time “to promote objectives of the legal system which transcend the wishes of any particular session of the legislature.” *Id.* at 1376. That facet of Legal Process purposivism resonates with at least some modern purposivist practice. See, e.g., *Bates v. Dow Agrosciences LLC*, 125 S. Ct. 1788, 1801 (2005) (Stevens, J.) (invoking the canon requiring a clear statement of congressional intent to supplant state law in an area of “traditional state regulation”); *Landgraf v. USI Film Prods.*, 511 U.S. 244, 263–80 (1994) (Stevens, J.) (invoking the canon disfavoring retroactive application of new statutory liability rules and explaining the traditional boundaries of that canon).

68. Llewellyn, of course, published a highly influential essay purporting to show that every canon has an equal and opposite countercanon and that invocation of the canons masks judicial decisionmaking on more substantive grounds. See Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 Vand. L. Rev. 395, 401 (1950). Among the present Justices, Justice Breyer appears to be the most skeptical of using canons to ascertain definitive answers to interpretive questions. See, e.g., *Chickasaw Nation v. United States*, 534 U.S. 84, 94 (2001) (Breyer, J.) (“Specific canons ‘are often countered . . . by some maxim pointing in a different direction.’” (quoting *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 115 (2001))); *Varsity Corp. v. Howe*, 516 U.S. 489, 511 (1996) (Breyer, J.) (“Canons of construction, however, are simply ‘rules of thumb’ which will sometimes ‘help courts determine the meaning of legislation.’” (quoting *Conn. Nat’l Bank v. Germain*, 503 U.S. 249, 253 (1992))). The difference between purposivists and textualists on this point should not be overstated. Judges who tend to favor textualism also understand that canons do not mechanically decide cases and that judges must be sensitive to the way a reasonable user of language would use a particular canon in context. See *Circuit City Stores*, 532 U.S. at

rely on those canons to help determine “whether a particular meaning is linguistically permissible, if the context warrants it.”⁶⁹ In other words, even if purposivists define the task of interpretation as that of attributing a sensible purpose to the legislature, they take seriously the entire range of semantic cues in doing so.

Perhaps most importantly, purposivism has not always sought its justification in the Court’s traditional premise that following the spirit rather than the letter of the law will more likely capture the *subjective* intent of the legislature. Although this is not the occasion for a comprehensive account of their work, it is significant that Hart and Sacks urged interpreters to consider a broad variety of sources, such as the statutory language and structure, well-settled background legal assumptions, accepted maxims of interpretation, any relevant canons of clear statement, and the political context surrounding the enactment (including “general public knowledge” of “the mischief” that inspired the legislation and any “legislative history” suggesting the “*general purpose*” of the statute).⁷⁰ None of this material, however, was to be considered with an eye toward ascertaining the subjective “intention of the legislature with respect to the matter in issue.”⁷¹ Rather, in considering all of these matters, the judge was to presume “that the legislature was made up of reasonable persons pursuing reasonable purposes reasonably.”⁷² Interpreters were to derive a constructive rather than subjective legislative purpose by asking how a *reasonable person* familiar with the operative text, the background rules of

115 (2001) (Kennedy, J.) (“Canons of construction need not be conclusive and are often countered, of course, by some maxim pointing in a different direction. The application of the rule *ejusdem generis* in this case, however, is in full accord with other sound considerations bearing upon the proper interpretation of the clause.”); Scalia, Common-Law Courts, *supra* note 32, at 27 (“Every canon is simply one indication of meaning; and if there are more contrary indications (perhaps supported by other canons), it must yield.”). Conversely, modern purposivists have at times suggested that the Court might help to clarify apparent ambiguities or inconsistencies in the canons’ application by explaining the contextual factors that govern their use. See *Landgraf*, 511 U.S. at 263–65 (1994) (Stevens, J.) (acknowledging indeterminacy and resolving to identify distinctive criteria for triggering the canon against retroactive legislation and the competing canon directing courts to apply law in effect at time of decision).

69. Hart & Sacks, *supra* note 22, at 1191; see, e.g., *Chevron U.S.A. Inc. v. Echazabal*, 536 U.S. 73, 81 (2002) (Souter, J.) (“The canon [*expressio unius est exclusio alterius*] depends on identifying a series of two or more terms or things that should be understood to go hand in hand, which is abridged in circumstances supporting a sensible inference that the term left out must have been meant to be excluded.”); *Gutierrez v. Ada*, 528 U.S. 250, 255 (2000) (Souter, J.) (“To ask the question is merely to apply an interpretive rule as familiar outside the law as it is within, for words and people are known by their companions.”); *Varsity Corp.*, 516 U.S. at 511 (Breyer, J.) (“To apply a canon properly one must understand its rationale. This Court has understood the present canon (‘the specific governs the general’) as a warning against applying a general provision when doing so would undermine limitations created by a more specific provision.”).

70. Hart & Sacks, *supra* note 22, at 1374–80 (summarizing their preferred interpretive framework).

71. *Id.* at 1374.

72. *Id.* at 1378.

interpretation, and the full context of the legislation would have resolved the interpretive problem at hand.⁷³ Accordingly, the theory of Legal Process purposivism, much like that of modern textualism, treats the attribution of meaning as a construct.

II. TEXTUALISM, PURPOSIVISM, AND LEGISLATIVE SUPREMACY

Despite the apparent similarities described above, significant practical and theoretical differences persist between textualists and purposivists. Why? Each side gives priority to different elements of statutory context. Textualists give primacy to the *semantic* context—evidence about the way a reasonable person conversant with relevant social and linguistic practices would have used the words. Purposivists give precedence to *policy* context—evidence that goes to the way a reasonable person conversant with the circumstances underlying enactment would suppress the mischief and advance the remedy. This difference accounts for the distinct questions that each methodology poses for the hypothetical reasonable interpreter. As noted, textualists ask how “a skilled, objectively reasonable user of words” would have understood the text, in the circumstances in which it was uttered.⁷⁴ Legal Process purposivists ask how “reasonable persons pursuing reasonable purposes reasonably” would have resolved the policy issue addressed by the words.⁷⁵

Ultimately, the justifications for their disparate preferences are rooted in competing understandings of the legislative process as it relates to the constitutional ideal of legislative supremacy. Purposivists in the Legal Process tradition think it unrealistic and arbitrary to suppose that Congress collectively knows or cares about the semantic detail of often complex statutes. For them, enforcing the overarching policy of a statute rather than the minutiae of its semantic detail better serves legislative supremacy while also promoting the independently valuable aims of policy coherence and adaptability of the law to unforeseen circumstances.

73. See, e.g., Aleinikoff, *Statutory Interpretation*, supra note 58, at 26 (“By asking interpreters to assume, ‘unless the contrary unmistakably appears,’ that ‘the legislature was made up of reasonable persons pursuing reasonable purposes reasonably,’ [the Legal Process] approach hardly guarantees identification of the actual purposes behind a statute.” (footnotes omitted) (quoting Hart & Sacks, supra note 22, at 1410, 1415)); Henry Paul Monaghan, *Taking Bureaucracy Seriously*, 99 Harv. L. Rev. 344, 354 & n.30 (1985) (book review) (citing Hart and Sacks for the proposition that statutory interpretation “should proceed on the premise that Congress has enacted the legislation to foster the public interest,” whether or not that premise captures actual legislative outcomes); Daniel B. Rodriguez, *The Substance of the New Legal Process*, 77 Cal. L. Rev. 919, 930 n.65 (1989) (book review) (“Hart and Sacks’ theory of statutory interpretation is the most notable example of an avowedly intentionalist approach which, in contrast to the historical approach most prevalent in modern judicial doctrine, directs the interpreter to follow the purpose of the statute instead of the ‘intention of the legislature.’”).

74. Easterbrook, *Original Intent*, supra note 15, at 65.

75. Hart & Sacks, supra note 22, at 1378.

Textualists (again, myself included) believe that the purposivist approach disregards the central place of legislative compromise embedded in both the constitutional structure and the corresponding congressional rules of legislative procedure. Textualists contend that once one gives up the idea of ascertaining subjective legislative intent, as Legal Process purposivists do, legislative supremacy is most meaningfully served by attributing to legislators the understanding that a reasonable person conversant with applicable conventions would attach to the enacted text in context. From that starting point, textualists argue that purposivism cannot deal adequately with legislative compromise because semantic detail, in the end, is the only effective means that legislators possess to specify the limits of an agreed-upon legislative bargain. When interpreters disregard clear contextual clues about semantic detail, it becomes surpassingly difficult for legislative actors to agree reliably upon terms that give half a loaf.

This Part considers first the descriptive claim that textualists and purposivists divide over what forms of context merit priority in cases where semantic and policy cues point in different directions. It next considers the legislative process justifications that underpin both approaches.

A. *Semantic Versus Policy Context*

Starting from the sort of *prima facie* ambiguity that troubles interpreters,⁷⁶ each side of the debate emphasizes different aspects of the context that lies beyond the face of any statute. Textualists start with contextual evidence that goes to customary usage and habits of speech; they believe that a statute may have a clear semantic meaning, even if that meaning is not plain to the ordinary reader without further examination. They try “to assemble the various pieces of linguistic data, dictionary definitions, and canons into the best (most coherent, most explanatory) account of the meaning of the statute.”⁷⁷ This inquiry, as I have noted, also includes consideration of specialized trade usage, substantive canons of clear statement (including the rule of lenity), and colloquial nuances that may be widely understood but that are unrecorded in standard dictionaries.⁷⁸ When textualists state that background purpose is beside the point when the text of a statute is clear in context, that is shorthand for a technically more accurate, but less intuitively worded, observation: When

76. See Frankfurter, *supra* note 3, at 527–28 (“When we talk of statutory construction we have in mind cases in which there is a fair contest between two readings, neither of which comes without respectable title deeds. A problem in statutory construction can seriously bother courts only when there is a contest between probabilities of meaning.”).

77. Thomas W. Merrill, *Textualism and the Future of the Chevron Doctrine*, 72 Wash. U. L.Q. 351, 372 (1994).

78. See Manning, *Absurdity Doctrine*, *supra* note 13, at 2456–76 (advocating consideration of linguistic usage and context beyond dictionary definitions); Manning, *Equity of the Statute*, *supra* note 1, at 108–14 (same); see also *supra* notes 38–48 and accompanying text.

contextual evidence of semantic usage points decisively in one direction, that evidence takes priority over contextual evidence that relates to questions of policy. The latter category includes matters such as public knowledge of the mischief the lawmakers sought to address; the way competing interpretations of a discrete statutory provision fit with the policy reflected in the statute's preamble, title, or overall structure; and the way alternative readings of the statute fit with the policy expressed in similar statutes. For purposivists, of course, the converse is true: Even when clear contextual evidence of semantic usage exists, priority is accorded to (sufficiently powerful) contextual evidence of the policy considerations that apparently justified the statute.

West Virginia University Hospitals, Inc. v. Casey boldly illustrates this line of division.⁷⁹ Under 42 U.S.C. § 1988, prevailing plaintiffs in certain types of civil rights actions are entitled to recover "a reasonable attorney's fee." In *Casey*, the prevailing plaintiff sought to recover as part of its fees under § 1988 the fees of experts engaged to assist in preparing the lawsuit and to testify at trial.⁸⁰ Under the premises of modern textualism, of course, one could not say that the matter begins and ends with the conclusion that an "expert fee" falls outside the plain meaning of an "attorney's fee." One would at least need to consider whether the phrase "attorney's fee" comprises a term of the trade, referring to a concept broader than a lawyer's billable hours. As used in the legal profession, that term might in fact encompass many items essential to a representation—such as paralegal services, secretarial services, messengers, photocopying, Westlaw charges, and so forth.⁸¹ Hence, the operative phrase has an ambiguity that requires further consideration of the context.

Justice Scalia's opinion for the Court in *Casey* found resolving clarity in the semantic context. His opinion emphasized the fact that countless other fee-shifting statutes—some enacted before and some after § 1988—had explicitly provided for "attorney's fees" and "expert fees" as separate items of recovery.⁸² Under the maxim *expressio unius est exclusio alterius*, "it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion" of particular statutory language.⁸³ Accordingly, *Casey* found that the relevant "statutory *usage* shows beyond question that attorney's fees and expert fees are distinct items of expense."⁸⁴ Although acknowledging that the resulting emphasis on usage made the *policy* of § 1988 incongruent with that of similar fee shifting statutes, the Court explained that interpreting a statute to promote policy

79. 499 U.S. 83 (1991).

80. *Id.* at 84.

81. See *Missouri v. Jenkins*, 491 U.S. 274, 285–86 (1989) (holding that various items other than billable attorney hours, including paralegal fees, could be recovered as traditional elements of attorney's fees).

82. See *Casey*, 499 U.S. at 88–91.

83. *Russello v. United States*, 464 U.S. 16, 23 (1983) (internal quotation marks omitted) (quoting *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972)).

84. *Casey*, 499 U.S. at 92 (emphasis added).

coherence was a permissible judicial function only when “a statutory term . . . is ambiguous.”⁸⁵ Where consideration of the semantic context points clearly to a fixed meaning, the Court stressed that “it is not our function to eliminate clearly expressed inconsistency of policy and to treat alike subjects that different Congresses have chosen to treat differently.”⁸⁶ In short, the phrase “attorney’s fee” lacks any intrinsic meaning; Justice Scalia favored coherent congressional usage over coherent congressional policy in determining which elements of context to treat as determinative.

For the purposivist, the preferred method of resolving such ambiguity entails examining the term “attorney’s fee” against the policy context of the civil rights legislation of which § 1988 forms a part. Proceeding along these lines, Justice Stevens’s dissenting opinion in *Casey* reasoned that if a prevailing plaintiff could recover a reasonable “attorney’s fee,” it made no sense to deny the plaintiff similar recovery for an expert, whose services merely provided a lower-cost substitute for attorney time.⁸⁷ Moreover, because the Court had previously recognized that a prevailing plaintiff could recover paralegal fees and other ancillary costs of representation under § 1988, it would surely appear arbitrary if the statute did not also allow the recovery of experts fees needed to make the legal representation effective.⁸⁸ No one, moreover, doubted that Congress had enacted § 1988 to overturn *Alyeska Pipeline Service Co. v. Wilderness Society*,⁸⁹ which had rejected the federal courts’ common law practice of shifting litigation costs in certain federal cases. Because the pre-*Alyeska* regime had shifted attorney’s fees and expert fees, Justice Stevens thought it fair to infer that § 1988’s purpose was to restore the full status quo ante.⁹⁰ Finally, although the dissent did not mention the point, because Congress had provided for the recovery of expert fees in virtually every other important fee shifting statute, one might think it odd to read into § 1988 an unexplained departure from an otherwise clear pattern of congressional policy preferences.⁹¹

In short, textualists give precedence to contextual evidence concerning likely semantic usage while purposivists do the same with contextual

85. *Id.* at 100.

86. *Id.* at 101.

87. *Id.* at 106–07 (Stevens, J., dissenting)

88. See *id.* at 107–08 (“To allow reimbursement of these other categories of expenses, and yet not to include expert witness fees, is both arbitrary and contrary to the broad remedial purpose that inspired the fee-shifting provision of § 1988.”).

89. 421 U.S. 240, 269 (1975).

90. *Casey*, 499 U.S. at 108–11 (Stevens, J., dissenting). The purpose to overturn *Alyeska* and provide full recovery of litigation expenses, moreover, found support in the committee reports in both Houses. See *id.*

91. See T. Alexander Aleinikoff & Theodore M. Shaw, *The Costs of Incoherence: A Comment on Plain Meaning*, *West Virginia University Hospitals, Inc. v. Casey*, and *Due Process of Statutory Interpretation*, 45 Vand. L. Rev. 687, 696–97 (1992) (arguing that Court in *Casey* provided no tenable reason for distinguishing fee-shifting in other types of cases).

cues that reflect policy considerations.⁹² Although it may be a mere matter of characterization rather than substance, reframing the textualists' position in this way casts textualists' burden of explanation differently. In cases such as *Casey*, they cannot simply rely on the straightforward notion that they prefer the clear terms of the duly enacted text, for that description begs the question of how best to attribute meaning to a text with a *prima facie* ambiguity. Instead, starting from the longstanding constitu-

92. Professor Molot questions whether significant distinctions between the two methods, properly understood, can be explained by reference to when textualists and purposivists consider context, which aspects of context they consider, or whether they should consider context. Molot, *supra* note 17, at 36–43. I agree with Professor Molot that the two approaches cannot be distinguished by questions of when or whether to consult context. As discussed, textualists now recognize that language has meaning only in context, and that context must always be consulted as part of the process of ascertaining textual meaning. See *supra* text accompanying notes 29–44. But as the previous discussion indicates, I believe that there are significant differences in which aspects of context each side emphasizes. See *supra* text accompanying notes 76–90. Professor Molot at one point suggests that such differences rest largely upon textualists' unwillingness to consider "one particular piece of evidence: legislative history." Molot, *supra* note 17, at 38. And he finds that distinction inconsequential because purposivists now exclude legislative history when the text is clear and because legislative history will typically be ambiguous when the text is ambiguous. See *id.*

Whatever the merits of Professor Molot's position on legislative history, the more important point is that his analysis elsewhere concedes that at least "some leading textualists" emphasize distinctive elements of context in ways that transcend questions about the source of such context. *Id.* at 44; see also *id.* at 38 n.163 (acknowledging distinctive uses of context by textualists). Professor Molot attempts to minimize the resulting disparate treatment of semantic and policy context by casting it as a matter of intramural dispute among textualists. See *id.* at 38 n.163, 43 n.184. Yet he has not identified any textualist who would put evidence from the policy context on a par with clear contrary evidence of semantic meaning. In fact, although typically framed in terms of a conflict between clear text and background purpose, prevailing textualist practice holds that when the semantic context of a given statutory provision points unambiguously in one direction, the resultant meaning will prevail against contrary contextual cues about purpose—without regard to whether those cues come from within or without the legislative history. See, e.g., *Pa. Dep't of Corr. v. Yeskey*, 524 U.S. 206, 212 (1998) (Scalia, J.) ("[T]he title of a statute . . . [is] of use only when [it] shed[s] light on some ambiguous word or phrase." (first, third, and fourth alterations in original) (quoting *Bhd. of R.R. Trainmen v. Balt. & Ohio R.R. Co.*, 331 U.S. 519, 528–29 (1947))) (internal quotation marks omitted)); *Casey*, 499 U.S. at 100–01 (Scalia, J.) (emphasizing that a federal judge may properly construe an "ambiguous" statutory phrase in a way that "fits most logically and comfortably into the body of both previously and subsequently enacted law," but that it exceeds the judge's "function to eliminate clearly expressed inconsistency of policy" when an unambiguous statute is out of step with the policies adopted in related statutes); *Nat'l Tax Credit Partners, L.P. v. Havlik*, 20 F.3d 705, 707 (7th Cir. 1994) (Easterbrook, J.) (rejecting the district court's inference of an organizing purpose from the statute as a whole and emphasizing that "[k]nowing the purpose behind a rule may help a court decode an ambiguous text, but first there must be some ambiguity" (citations omitted)); Molot, *supra* note 17, at 45 n.191 (citing opinions by Justices Scalia and Thomas purporting to enforce clear text over background purpose); see also *supra* text accompanying notes 76–86 (recharacterizing the traditional textualist practice as a choice between different elements of context). For consideration of the justification for textualists' differential treatment of semantic and policy context, see *infra* Part II.B.2.

tional premise that federal judges must act as faithful agents of Congress, textualists must show why semantic rather than policy context constitutes a superior means of fulfilling the faithful agent's duty to respect legislative supremacy. It is to that question that I now turn.

B. *Coherence, Compromise, and Legislative Supremacy*

Both textualists and purposivists acknowledge that their approaches attribute meaning to a statute based on what purport to be objective criteria for ascertaining legislative instructions. Neither side seeks to justify its interpretive results as the reflection of some subjective congressional understanding. For textualists, the metric is the understanding of a hypothetical reasonable person conversant with applicable social and linguistic conventions. For purposivists in the Hart and Sacks tradition, the metric is the understanding of a hypothetical reasonable policymaker conversant with all of the circumstances surrounding the enactment. Even if the textualist approach more accurately reflects the semantic meaning of the enacted text, the question of which approach to prefer cannot be answered by reference to language theory. Since each approach rests on a construct that captures a plausible way to make sense of the instructions issued by the legislature, the choice between them must rest on political theory.

In particular, the choice will ultimately depend on which criterion more appropriately describes the duties of federal judges who, under the premises of our system of government, operate subject to the constraints of legislative supremacy (within constitutional boundaries). Purposivists argue that legislative supremacy is better served not by the judge who attends to every last clue about the social usage of the chosen words, but rather by someone who is sensitive to the policy concerns underlying the legislative choice—even when they contradict the apparent import of the text. Properly understood, textualism rests on the competing idea that the accepted semantic meaning of the enacted text represents a meaningful—indeed, superior—basis for implementing legislative supremacy. In particular, textualists believe that judicial adherence to semantic detail (when clear) is essential if one wishes legislators to be able to strike reliable bargains. In the end, I believe that the latter position is easier to square with important features of both constitutionally and congressionally prescribed rules of legislative procedure that demonstrably give political minorities the right to block legislation or to condition their assent upon compromise. To set the stage for that analysis, I first offer a sympathetic account of the legislative supremacy justification for purposivism.

1. *Purposivists and Legislative Supremacy.* — Purposivists have offered a highly thoughtful defense of the position that policy context assures greater fidelity to legislative supremacy in our constitutional system. Max Radin, a prominent legal realist who had a late-career conversion to purposivism, offered a particularly crisp defense of using policy rather

than semantic context.⁹³ Radin started from the premise that “[t]he legislature that put the statute on the books had the constitutional right and power to set [the statute’s] purpose as a desirable one for the community, and the court or administrator has the undoubted duty to obey it.”⁹⁴ Because the words in a statute have been selected “primarily to let us know the statutory purpose,”⁹⁵ they must be read with that function in mind:

To say that the legislature is “presumed” to have selected its phraseology with meticulous care as to every word is in direct contradiction to known facts and injects an improper element into the relation of courts to the statutes. The legislature has no constitutional warrant to demand reverence for the words in which it frames its directives. If the purposes of the statute cannot be learned except by examining the precise words and by troubling our ingenuity to discover why this word was used rather than another of approximately similar effect, then this process of anxious cogitation must be employed. But it is rarely necessary.⁹⁶

In other words, in our constitutional system, courts have responsibility for seeing that a statute’s apparent purposes are fulfilled.⁹⁷ Their job is not simply to decode each semantic detail recorded in the enacted text. Rather, “if the purpose is clear, the implemental part of the statute should be subordinated to it.”⁹⁸

Radin’s premise that legislative supremacy does not lie in judicial adherence to semantic detail must be taken seriously. As discussed, the textualists’ approach to constructing semantic meaning will sometimes produce results that cannot easily be ascribed to the actual understanding of the requisite legislative majority. To return to Justice Scalia’s *Moskal* dissent, one cannot suppose that most (or even many) legislators bothered to ascertain that the statutory term in question (“falsely made”) had a technical meaning (“forged”) that could be discovered by excavating old state statutes, dusty criminal law treatises, and scattered federal and state case law.⁹⁹ Nor can one assume that legislators peruse statutes (if at all) with a conscious awareness of technical grammatical rules such as the recently dispositive “‘rule of the last antecedent,’ according to which a limiting clause or phrase . . . should ordinarily be read as modifying only

93. Max Radin, *A Short Way with Statutes*, 56 Harv. L. Rev. 388, 407–08 (1942) (arguing that statutes are “ground design[s]” or “instruction[s]” to administrators and courts to maintain “social, political, or economic values” and that semantic interpretation is “largely fantasy”).

94. *Id.* at 398.

95. *Id.* at 400.

96. *Id.* at 406.

97. See *id.* at 394–95 (“It was the business of the legislature to get the statute on the books. When that was completed, the task of the coordinate branches began.”).

98. *Id.* at 407.

99. See *Moskal v. United States*, 498 U.S. 103, 122–26 (1990) (Scalia, J., dissenting) (relying on the sources described in text).

the noun or phrase that it immediately follows.”¹⁰⁰ Nor can one maintain that all of the canons of construction readily invoked by textualists—such as the presumption against linguistic surplusage or the maxim disfavoring implied repeals¹⁰¹—reflect legislators’ actual knowledge of the contents of legislation.¹⁰²

Most textualists, of course, would have little difficulty accepting the foregoing conclusions, given their embrace of “objectified intent” and their concomitant rejection of the utility and relevance of subjective legislative intent.¹⁰³ But by acknowledging the constructive nature of the meaning they attribute to statutes, textualists do leave themselves open to the basic question posed by Radin’s analysis: Why should one presume that legislative supremacy entails pursuing semantic meaning to the far

100. *Barnhart v. Thomas*, 540 U.S. 20, 26 (2004) (Scalia, J.); see also *Evans v. United States*, 504 U.S. 255, 288 (1991) (Thomas, J., dissenting) (construing provision of Hobbs Act in a way that “comports with correct grammar and standard usage by setting up a parallel between two prepositional phrases”); *Crandon v. United States*, 494 U.S. 152, 170 (1990) (Scalia, J., concurring in the judgment) (“I acknowledge that this interpretation of the second clause means that the comma after the phrase ‘the salary of’ should instead have been placed after the word ‘supplements.’ But a misplaced comma is more plausible than a gross grammatical error, plus the destruction of an apparently intended parallelism . . .”). Of course, textualists also recognize that a grammatical norm such as the “rule of the last antecedent” “is not an absolute and can assuredly be overcome by other indicia of meaning.” *Barnhart*, 540 U.S. at 26. Some grammatical rules, moreover, are sufficiently intuitive to English speakers that they can be applied without conscious consideration of the formal rule. Nonetheless, it is safe to assume that textualists sometimes rely on technical principles of grammar that would not form part of the typical legislator’s actual understanding of what he or she was voting for.

101. See, e.g., *Regions Hosp. v. Shalala*, 522 U.S. 448, 467 (1998) (Scalia, J., dissenting) (“The interpretation that the Court accepts treats [certain statutory language] ‘essentially as surplusage—as words of no consequence,’ which, of course, we avoid when possible.” (citation omitted) (quoting *Ratzlaf v. United States*, 510 U.S. 135, 140–41 (1994))); *J.E.M. AG Supply, Inc. v. Pioneer Hi-Bred Int’l, Inc.*, 534 U.S. 124, 137 (2001) (Thomas, J.) (applying established principle of construction requiring “overwhelming evidence . . . to establish repeal by implication” (citing *Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367, 381 (1996))).

102. Judge Posner thus argues that “the canon that . . . nothing in the statute can be treated as surplusage” runs counter to known realities of legislative drafting. Richard A. Posner, *Statutory Interpretation—in the Classroom and in the Courtroom*, 50 U. Chi. L. Rev. 800, 812 (1983). Similarly, he notes that the presumption against implied repeals of earlier legislation rests on the apparent assumption that “whenever Congress enacts a new statute it combs the United States Code for possible inconsistencies with the new statute, and when it spots one, it repeals the inconsistency explicitly.” *Id.* As he notes, this conception, too, is unrealistic. *Id.* Such canons, however, fit nicely within the textualists’ reasonable-user-of-language approach because the canons serve “as off-the-rack provisions that spare legislators the costs of anticipating all possible interpretive problems and legislating solutions for them.” Easterbrook, *Statutes’ Domains*, *supra* note 14, at 540.

103. See Easterbrook, *Original Intent*, *supra* note 15, at 61, 65 (“What any member of Congress thought his words would do is irrelevant.”); Easterbrook, *Text, History, and Structure*, *supra* note 11, at 67 (“In interesting cases, meaning is not ‘plain’; it must be imputed . . .”). This point is perhaps most famously reflected in Holmes’s observation: “We do not inquire what the legislature meant; we ask only what the statute means.” Oliver Wendell Holmes, *The Theory of Legal Interpretation*, 12 Harv. L. Rev. 417, 419 (1899).

corners of a hoary treatise, technical rule of grammar, or obscure canon of construction, rather than reading a statutory phrase in a way that will best serve the overall policy that the legislation evidently aimed to accomplish? Apart from the purposivists' guiding premise that legislators vote for policies rather than semantic details, their approach claims various normative benefits that stand independent of the legislative process justification. Reading a given phrase in light of the likely statutory purpose should make any given statute more internally coherent. Focusing on policy rather than semantic context will also make any given statute more coherent with the policy aims of other statutes.¹⁰⁴ And, of course, emphasizing the policy rather than the semantic context will enable judges and administrators to adapt a statute more readily to unforeseen circumstances over time.¹⁰⁵ Quite plainly, therefore, textualists must provide affirmative reasons for their belief that giving priority to semantic rather than policy context better respects Congress's primacy in framing legislative policy.

2. *Semantic Import and Legislative Compromise.* — Properly understood, textualism rests upon three related premises. First, searching for semantic meaning represents a theoretically sound basis for attributing statutory outcomes to legislative choice, thereby satisfying the minimum requirement for legislative supremacy. Second, because the approach advanced by purposivists does not itself plausibly capture *actual* legislative preferences, purposivism has no superior claim to the attention of judges acting as faithful agents. Third, and most important, the legislative process prescribed by Article I, Section 7 of the Constitution and the rules of procedure prescribed by each House place an obvious emphasis on giving political minorities the power to block legislation or, of direct relevance here, to insist upon compromise as the price of assent. Giving precedence to semantic context (when clear) is necessary to enable legislators to set the level of generality at which they wish to express their policies. In turn, this ability alone permits them to strike compromises that go so far and no farther. Ultimately, then, the affirmative justification for textualism lies in the idea that semantic meaning is the currency of legislative compromise. Let me elaborate briefly on each of those points.

First, it is necessary to establish (*contra* Radin) that the textualists' reasonable-user-of-language framework provides a theoretically justifiable

104. Certainly, as Aleinikoff and Shaw point out, reading § 1988 in light of the policy rather than the wording of other fee-shifting statutes would have prevented the Court from having to implement an unexplained departure from the prevailing policy norms in fee shifting. See Aleinikoff & Shaw, *supra* note 91, at 693–97 (“It seems senseless for the courts to ignore or frustrate a clearly discernible statutory scheme and purpose simply because Congress, for context-specific or idiosyncratic reasons, has adopted varying linguistic formulas in related statutes in other areas of law.”).

105. See William N. Eskridge, Jr., *Spinning Legislative Supremacy*, 78 Geo. L.J. 319, 326–28 (1989) (arguing that proper understanding of judge as a purposively oriented relational agent more appropriately allows courts to adapt legislative commands to circumstances unforeseen at the time of the law's enactment).

method of implementing the constitutional principle of legislative supremacy. Although not a textualist himself, Joseph Raz has convincingly shown why textualists can forswear the idea of actual legislative intent yet still claim to enforce statutory results that are meaningfully attributable to legislative choice.¹⁰⁶ Raz has emphasized that even if actual legislative intent is implausible, some minimum of intentionality is essential to any proper conception of legislative supremacy.¹⁰⁷

[T]o assume that the law made by legislation is not the one intended by the legislator, we must assume that he cannot predict what law he is making when the legislature passes any piece of legislation. But if so, why does it matter who the members of the legislature are . . . ? Since the law they will end by making does not represent their intentions, the fact that their intentions are foolish or wise, partial or impartial, self-serving or public spirited, makes no difference.

. . . .

. . . [T]he notion of legislation imports the idea of entrusting power over the law into the hands of a person or an institution, and this imports entrusting voluntary control over the development of the law, or an aspect of it, into the hands of the legislator.¹⁰⁸

Starting from that premise, Raz further explains that the minimal condition for meaningful legislative supremacy is satisfied if legislators intend to enact a law that will be deciphered according to the interpretive conventions prevailing in the legal culture. Whether or not legislators formed any specific intention concerning the details of legislative policy, the demands of legislative supremacy are met if one plausibly assumes that those legislators intend “to say what one would be normally understood as saying, given the circumstances in which one said it.”¹⁰⁹ By emphasizing that legislators have the means to establish the contents of the text for which they are voting, Raz’s minimal intention thesis provides an intelligible way to hold legislators accountable for whatever bill they have passed, whether or not they have actually mastered its details.¹¹⁰ And such premises explain why textualists quite reasonably believe that a federal court fulfills its obligation as Congress’s faithful agent by trying to

106. See Raz, *supra* note 31, at 258–59, 264–69.

107. See *id.* at 258 (“It makes no sense to give any person or body law-making power unless it is assumed that the law they make is the law they intended to make.”).

108. *Id.* at 258–59, 265–66.

109. *Id.* at 268.

110. *Id.* at 267 (“Th[at] minimal intention is sufficient to preserve the essential idea that legislators have control over the law. Legislators who have the minimal intention know that they are, if they carry the majority, making law, and they know how to find out what law they are making.”); see also Gerald C. MacCallum, Jr., *Legislative Intent*, 75 *Yale L.J.* 754, 758–59 (1966) (“The words [a legislator] uses are the instruments by means of which he expects or hopes to effect . . . changes [in society]. What gives him this expectation or this hope is his belief that he can anticipate how others (e.g., judges and administrators) will understand these words.”).

“hear the words [of the statute] as they would sound in the mind of a skilled, objectively reasonable user of words.”¹¹¹

111. Easterbrook, *Original Intent*, supra note 15, at 65. Professor Molot argues that certain textualists carry this approach too far, drifting into what might be called “hypertextualism.” Molot, supra note 17, at 43, 45–47; accord Richard J. Pierce, Jr., *The Supreme Court’s New Hypertextualism: An Invitation to Cacophony and Incoherence in the Administrative State*, 95 *Colum. L. Rev.* 749, 750–52 (1995) (making a similar point); Peter L. Strauss, *On Resegregating the Worlds of Statute and Common Law*, 1994 *Sup. Ct. Rev.* 429, 444–45 (same). In Molot’s view, these textualists spend more than optimal energy examining dictionaries, chasing down terms of art, considering canons of construction, and the like. See Molot, supra note 17, at 45–47. Professor Molot is surely correct when he observes that textualists tend both to scour the semantic context more thoroughly than purposivists and to attach more dispositive significance to the results of such an inquiry. See Merrill, supra note 77, at 372 (identifying and documenting that phenomenon). If, however, one believes (as textualists do) that semantic context provides a normatively desirable foundation for implementing the background constitutional principle of legislative supremacy, see *infra* notes 121–140 and accompanying text, then it is difficult to see how one could make do with a partial examination of the semantic context for any given text. Indeed, short of a full exploration of relevant semantic cues, I am hard pressed to articulate a principled criterion for interpreters to identify the proper stopping point.

In fact, as Professor Molot admirably acknowledges, see Molot, supra note 17, at 46, one might alternatively characterize the hypertextualism point as a concern that the Court’s textualists sometimes simply misread or overread the semantic cues, lending more definiteness to them than the semantic context truly warrants. He suggests, for example, that in *MCI Telecommunications Corp. v. AT&T Co.*, 512 U.S. 218 (1994), Justice Scalia’s opinion for the Court relied too confidently on (multiple) dictionaries to conclude that the Federal Communication Commission’s statutory authority to “modify” the so-called filed-rate doctrine allowed only incremental changes, rather than “basic and fundamental” ones. *MCI*, 512 U.S. at 225–26; Molot, supra note 17, at 66–67 (criticizing Justice Scalia’s approach). But if (as purposivists acknowledge) dictionaries sometimes do provide useful insight into the range of available meanings in context, see supra note 64, it would be helpful for Professor Molot to suggest a metric for understanding when the consultation of dictionaries constitutes disfavored “hypertextualism,” rather than acceptably moderate textualism. In the case of *MCI*, Professor Molot’s concern seems to be not that Justice Scalia relied on dictionaries *per se*, but rather that his “textualist evidence was not all that strong.” Molot, supra note 17, at 67. More specifically, Professor Molot complains that Justice Scalia rejected the FCC’s interpretation “of the term ‘modify’ even though at least one standard dictionary definition of the term would have covered a change of the magnitude that the FCC proposed.” *Id.* Although this is not the occasion to revisit the soundness *vel non* of *MCI*, it suffices to note that Professor Molot’s objection is apparently that Justice Scalia misread the available semantic evidence by not adequately crediting “conflicting dictionary definitions,” and that this error, in turn, caused him to slight the policy context. *Id.* While I certainly agree that textualists (like any other interpreters) should accurately read contextual cues and avoid “find[ing] linguistic precision where it does not exist,” *id.* at 46 (quoting Pierce, supra, at 752), I do not see in that example—or, for that matter, in any other example offered by Professor Molot—a principled way of distinguishing textualism from hypertextualism, other than to say that textualists should not make mistakes. With that proposition no textualist will disagree. As for Professor Molot’s implicit point that the textualists presently on the Court have a propensity to overread semantic cues, establishing that proposition would require a comprehensive, case-by-case empirical study that lies beyond the scope of either Professor Molot’s paper or my own.

Second, because purposivists are unable to show that their approach reliably captures *actual* legislative preferences, there is no reason to think that purposivism better serves legislative supremacy along the dimensions usually associated with that claim.¹¹² In earlier writing, I have extensively discussed this textualist assumption and critically examined its foundation in the game-theoretic and interest-group branches of public choice theory.¹¹³ I will not rehearse that analysis here. In brief, Legal Process-style purposivism rests on the assumption that interpretation should proceed as if a reasonable person were framing coherent legislative policy. But measured against the true workings of the legislative process, that is an unreasonably optimistic view. For purposivism to claim that deviation from semantic meaning better captures actual legislative preferences, one must be able to conclude the following: If legislators had become aware that a specific (semantic) outcome failed to capture the statute's apparent background purpose, Congress could (and would) have altered the text to make it coherent with that purpose.¹¹⁴ The legislative process, however, is too complex, path-dependent, and opaque to provide a basis for any such assurance.¹¹⁵ As Judge Easterbrook has emphasized, bills must "run the gamut of the process," which involves "committees, fighting for time on the floor, compromise because other members want some unrelated objective, passage, exposure to veto, and so on."¹¹⁶ All policy impulses, however coherent they might seem at the outset, must pass through those complex filters. And no issue is considered in isolation. Accordingly, even if a large legislative majority wanted a bill's language to include or exclude a particular policy application, the bargaining necessary to pass legislation would transcend any such application, and the drafting question would be more complicated than any discrete policy issue that inspired it.¹¹⁷ As I have previously suggested, "[t]he reality is that a statutory turn of phrase, however awkward its results, may well reflect an unrecorded compromise or the need to craft language broadly or narrowly to clear the varied veto gates encountered along the way to enactment."¹¹⁸ Given these inherent complexities in the legislative process, purposivism cannot be justified as a demonstrably more reliable measure of what a constitutionally sufficient legislative majority actually would have wanted—or, more important, would have been able to achieve—in

112. See *supra* text accompanying notes 12–14.

113. See Manning, Absurdity Doctrine, *supra* note 13, at 2408–19.

114. See *id.* at 2400. This process is sometimes called "imaginative reconstruction." Posner, *supra* note 102, at 817. It calls upon interpreters "to project [themselves], as best [they] can, into the position of those who uttered the words, and to impute to them how they would have dealt with the concrete occasion." *United States v. Klinger*, 199 F.2d 645, 648 (2d Cir. 1952) (L. Hand, J.), *aff'd per curiam* by an equally divided Court, 345 U.S. 979 (1953).

115. See Manning, Absurdity Doctrine, *supra* note 13, at 2410.

116. Easterbrook, Original Intent, *supra* note 15, at 64.

117. See Manning, Absurdity Doctrine, *supra* note 13, at 2409.

118. *Id.* at 2417.

passing any given bill.¹¹⁹ Again, one must acknowledge that a great virtue of Legal Process-style purposivism is its refusal to rest on the claim that it more accurately measures subjective legislative preferences. Nonetheless, the absence of such a claim of superiority leaves open the question whether the construct of imputed semantic meaning reflects a more defensible conception of legislative supremacy than does the construct of imputed policy coherence.

Third, for textualists, the answer to that open question lies in the following proposition: By giving priority to semantic context (when clear), textualism offers a more defensible account of legislative supremacy because semantic meaning uniquely enables interpreters to respect the centrality of legislative compromise in the design of the constitutional structure and in the legislative rules of procedure that complement it. As I have noted in previous writing,¹²⁰ by dividing the constitutional structure into three distinct institutions answering to different constituencies, the bicameralism and presentment requirements of Article I, Section 7 effectively create a supermajority requirement.¹²¹ The legislative process thus affords political minorities extraordinary power to stop the enactment of legislation and, therefore, to insist upon compromise as the price of assent.¹²² This emphasis, moreover, is reinforced by important rules of legislative procedure adopted by each House.¹²³ By erecting many and diverse veto gates, the design of the legislative process betrays a distinct bias in favor of the status quo, making it difficult for any majority to translate its policy impulses seamlessly into legislation.¹²⁴ Some legislative procedures—most notably, Senate rules concerning the filibuster and requirements of unanimous consent—quite obviously seek

119. Though not herself a textualist, Justice O'Connor not long ago recognized as "hopeless" the task "of ascertaining what the legislators who passed the law would have decided had they reconvened to consider [the] particular cases [before the Court]." *Beecham v. United States*, 511 U.S. 368, 374 (1994).

120. See Manning, *Absurdity Doctrine*, *supra* note 13, at 2437–38; Manning, *Equity of the Statute*, *supra* note 1, at 70–78.

121. See James M. Buchanan & Gordon Tullock, *The Calculus of Consent* 233–48 (1962) (explaining the way bicameralism effectively results in supermajority requirements).

122. Indeed, by requiring equal representation of states in the Senate, the Constitution gives quite explicit protection to the political minority consisting of small-state residents. See U.S. Const. art. I, § 3; see also *id.* art. V ("[N]o State, without its Consent, shall be deprived of its equal Suffrage in the Senate."). For an important discussion of this feature of the Constitution, see Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 *Tex. L. Rev.* 1321, 1371–72 (2001).

123. The Constitution, of course, provides that "[e]ach House may determine the Rules of its Proceedings." U.S. Const. art. I, § 5, cl. 2.

124. See Manning, *Absurdity Doctrine*, *supra* note 13, at 2390 ("[L]egislative preferences do not pass unfiltered into legislation; they are distilled through a carefully designed process that requires legislation to clear several distinct institutions, numerous veto gates, the threat of a Senate filibuster, and countless other procedural devices that temper unchecked majoritarianism.").

to protect minority interests and preference outliers.¹²⁵ Other procedures—such as the requirement of committee approval—are somewhat more ambiguous, but potentially have a similar effect.¹²⁶ Whatever else might be said of the legislative process, it is quite clear that, in aggregate, the complex legislative procedures create many opportunities for legislators, committees, or minority coalitions to slow or stop the progress of legislation, often if not always making some form of compromise essential to the bill's ultimate passage.¹²⁷

Given the emphasis that constitutional and legislative rules of procedure place on legislative compromise, judicial adherence to semantic meaning (when clear) assumes central importance in making sense of the legislative process. Respect for the details of semantic meaning enables legislators to express the level of generality at which they wish to articulate the policies to which they have agreed. Legislators may compromise on a statute that does not fully address a perceived mischief, accepting half a loaf to facilitate a law's enactment.¹²⁸ Or they may forgo potentially disruptive bargaining over qualifications or exceptions to broad statutory terms.¹²⁹ Semantic meaning provides the most—if not the only—reliable way for legislators to identify the scope and limits of the policies they wish to adopt.

Proceeding along these lines, Judge Easterbrook has explained that semantic meaning enables legislators to frame directives as rules rather than standards, or vice versa.¹³⁰ This possibility is vital to the process of

125. Professors Shepsle and Weingast note that “veto groups are pervasive in legislatures.” Kenneth A. Shepsle & Barry R. Weingast, *The Institutional Foundations of Committee Power*, 81 *Am. Pol. Sci. Rev.* 85, 89 (1987). See also *id.* (nothing that “[a] small group of senators . . . may engage in filibuster and other forms of obstruction. Any individual senator may refuse unanimous consent to procedures that would expedite passage of a committee bill.”).

126. Although political scientists debate the question rather vigorously, a good deal of evidence supports the view that many standing committees are imperfectly representative of the chamber from which they are drawn. See, e.g., John R. Boyce & Diane P. Bischak, *The Role of Political Parties in the Organization of Congress*, 18 *J.L. Econ. & Org.* 1, 2–3 (2002) (summarizing the scholarly debate).

127. As Jeremy Waldron has explained, one would generally expect legislative compromise simply because legislation is “the product of a multi-member assembly, comprising a large number of persons of quite radically differing aims, interests, and backgrounds.” Jeremy Waldron, *Law and Disagreement* 125 (1999). Accordingly, any statute’s “specific provisions” should reflect “the result of compromise and line-item voting.” *Id.*

128. See *infra* notes 131–133.

129. See Manning, *Absurdity Doctrine*, *supra* note 13, at 2424–29 (discussing the process of bargaining over exceptions in course of Alien Contract Labor Act negotiations).

130. This concern is prominent in Judge Easterbrook’s writing. As he notes, “[s]ometimes Congress specifies values or ends, things for the executive and judicial branches to achieve, but often it specifies means, creating loopholes but greater certainty.” Easterbrook, *Text, History, and Structure*, *supra* note 11, at 68. Relying on “an imputed ‘spirit’ to convert one approach into another dishonors the legislative choice as effectively as expressly refusing to follow the law.” *Id.* For an illuminating description of the distinction between rules and standards, see, for example, Kathleen M. Sullivan, *The*

reaching and recording compromise. If interpreters pay attention to the way a reasonable person would understand language in context, then legislative drafters can choose to convey policy directives with greater or lesser degrees of specificity. Consider a frequently used example of the statutory generality problem: Instead of a statute that requires the public leashing of “animals” or “potentially dangerous animals” or even “canines,” a legislative drafter might choose to adopt a leash law that applies to “dogs.”¹³¹ If a legislative stakeholder wished to bargain to limit the effect of a leash law to “dogs,” then abstracting from that semantic category to the apparent purposes behind it (protecting park goers against potentially dangerous or disruptive animals) would transform the precisely worded prohibition into a more general one that reaches all other animals who fall within its plausible organizing purpose. That shift would of course dishonor an apparent legislative choice to adopt a precise rule rather than an open-ended standard.¹³² By asking what policy a reasonable person would adopt (rather than how a reasonable person would understand the words), purposivist judges make it surpassingly difficult for legislators to bargain over the choice of rules rather than standards within the legislative process.¹³³

None of the foregoing analysis, of course, denies that statutory wording may, at times, reflect the random, mistaken, or shortsighted act of a legislative drafter. That is, the wording of a statute may not reflect a conscious legislative decision about the desired scope of a statutory policy. But if sentient beings with the requisite legislative bargaining authority

Supreme Court, 1991 Term—Foreword: The Justices of Rules and Standards, 106 Harv. L. Rev. 22, 58 (1992) (“A legal directive is ‘rule’-like when it binds a decisionmaker to respond in a determinate way to the presence of delimited triggering facts. . . . A legal directive is ‘standard’-like when it tends to collapse decisionmaking back into the direct application of the background principle or policy to a fact situation.”).

131. See Manning, Absurdity Doctrine, *supra* note 13, at 2396.

132. As Judge Easterbrook has explained:

A legislature that seeks to achieve Goal X can do so in one of two ways. First, it can identify the goal and instruct courts or agencies to design rules to achieve the goal. In that event, the subsequent selection of rules implements the actual legislative decision, even if the rules are not what the legislature would have selected itself. The second approach is for the legislature to pick the rules. It pursues Goal X by Rule Y. The selection of Y is a measure of what Goal X was worth to the legislature, of how best to achieve X, and of where to stop in pursuit of X. Like any other rule, Y is bound to be imprecise, to be over- and under-inclusive. This is not a good reason for a court, observing the inevitable imprecision, to add to or subtract from Rule Y on the argument that, by doing so, it can get more of Goal X. The judicial selection of means to pursue X displaces and directly overrides the legislative selection of ways to obtain X. It denies to legislatures the choice of creating or withholding gapfilling authority.

Easterbrook, *Statutes’ Domains*, *supra* note 14, at 546–47.

133. See Easterbrook, *Original Intent*, *supra* note 15, at 63 (“[T]he fear of Congress that its words will come back with meanings that it could not have passed will stifle new legislation. Members will vote no for fear that what they have done will be turned on its head.”).

did wish to impose limits as the price of their assent to legislation, selecting appropriate semantic detail supplies the only effective way of articulating the resulting bargain. Conversely, if courts exercise authority to move from the wording to the background purpose even when the semantic import is clear in context, then it becomes difficult to see how legislators bent on framing their policies in broader or narrower terms can reliably effectuate that goal. While still in his realist mode (before his late-career conversion to purposivism), Max Radin wrote that background purpose is an unreliable metric for statutory interpretation because “nearly every end is a means to another end,” and the purpose of a statute can therefore reasonably be described at many levels of generality.¹³⁴ If, as Justice Scalia has suggested, “[t]he final form of a statute . . . is often the result of a compromise among various interest groups, resulting in a decision to go so far and no farther,”¹³⁵ then a set of legislators with the authority to exact a compromise must possess the means to specify just how far the agreed-upon decision has gone. Certainly, in cases in which wording reflects happenstance, there will be social costs associated with enforcing the directive as written rather than adjusting it to reflect more accurately the apparent legislative aims. But given the previously discussed difficulties associated with reconstructing the outcomes of a complex legislative process, the opposite strategy—sacrificing semantic integrity for policy coherence—would avoid that cost only by imperiling the legislative capacity to reduce conflicting policy impulses to reliable compromises, especially when those compromises split the difference in

134. Radin, *Statutory Interpretation*, *supra* note 12, at 876; see also Stephen F. Williams, *Rule and Purpose in Legal Interpretation*, 61 U. Colo. L. Rev. 809, 811 (1990) (“Notice that as soon as the analysis of purpose is divorced from the means selected, all limits are off. Every purpose can always be restated at a higher level of generality.”).

135. *E. Associated Coal Corp. v. United Mine Workers*, Dist. 17, 531 U.S. 57, 68–69 (2000) (Scalia, J., concurring in the judgment); see also *Heath v. Varity Corp.*, 71 F.3d 256, 258 (7th Cir. 1995) (Easterbrook, J.) (“Legislation reflects compromise among competing interests. . . . It upsets the legislative balance to push the outcome farther in either direction.”); *Hrubec v. Nat’l R.R. Passenger Corp.*, 49 F.3d 1269, 1270 (7th Cir. 1995) (Easterbrook, J.) (“Many laws are compromises, going thus far and no further in pursuit of a goal.”); *Contract Courier Servs. v. Research & Special Programs Admin., U.S. Dep’t of Transp.*, 924 F.2d 112, 115 (7th Cir. 1991) (Easterbrook, J.) (“Statutes do more than point in a direction, such as ‘more safety.’ They achieve a particular amount of that objective, at a particular cost in other interests.”); Easterbrook, *Original Intent*, *supra* note 15, at 63 (“[L]aw is like a vector. It has length as well as direction. We must find both, or we know nothing of value. To find length we must take account of objectives, of means chosen, and of stopping places identified.”). Judge Easterbrook also observes:

If legislation grows out of compromises among special interests, . . . a court cannot add enforcement to get more of what Congress wanted. . . . When a court observes that Congress propelled Group X part way to its desired end, it cannot assist Group X farther along the journey without undoing the structure of the deal.

Easterbrook, *Economic System*, *supra* note 13, at 46.

ways that might seem arbitrary or incoherent to a court.¹³⁶ To opt for coherence rather than semantic integrity would reflect an odd understanding of legislative supremacy, given the central place that legislative compromise occupies in the design of bicameralism and the existence of legislatively adopted procedural rules that accentuate the impulses for compromise embedded in the constitutional design.¹³⁷ Textualists, in

136. Of course, a purposivist might argue that the lines of compromise can be discerned from sources other than the enacted text. For example, Professors McCubbins, Noll, and Weingast (who publish collectively under the name McNollgast) contend that committee chairs and floor managers explain legislative intent or purpose as “appointed agent[s] of the legislative majority that passed the chamber’s version of the statute.” McNollgast, *Legislative Intent: The Use of Positive Political Theory in Statutory Interpretation*, *Law & Contemp. Probs.*, Winter 1994, at 3, 24. And if the relevant legislative history does not accurately describe the aims of the enacting coalition, “[a] legislator acting as an agent for the majority can be subject to sanctions and loss of reputation.” *Id.* If that is true, then one might argue that the lines of compromise may also be evident in the legislative history. Although that argument raises an important empirical question, two considerations blunt its force for present purposes. First, and most basically, under McNollgast’s theory, rank-and-file legislators understand committees and sponsors to be setting forth an authoritative account of a particular bill on behalf of the legislative majority. I have previously argued that such an arrangement violates constitutional norms against legislative self-delegation. See Manning, *Textualism as Nondelegation*, *supra* note 52, at 710–25. Second, even if McNollgast’s theory were constitutionally acceptable, its adoption would not alter my central conclusions about the importance of semantic meaning to the expression of legislative compromise. The legislative history would then itself become an authoritative form of textual expression, and the semantic import of that material would, in turn, become critical to understanding the limits of any embedded compromise.

137. I must acknowledge at least two major objections to this reading of the constitutional structure and the legislative rules. Although both objections are serious, neither is ultimately persuasive. First, one might argue that the goals of Article I, Section 7 and the corresponding legislative rules of procedure should have no interpretive consequences. After all, if the various procedural norms are meant to empower political minorities or varied legislative gatekeepers to stop legislation, then the purpose of those procedures may be fully exhausted by the fact that they enable some legislation to be stopped outright. However, denying the relevant procedures any interpretive significance seems to drain them of much of their force by imperiling the objectors’ capacity to insist upon enforceable compromises. For political minorities, agreeing to legislation would become an all-or-nothing proposition because judges could read agreed-upon limits out of a statute in the name of greater policy coherence. Barring some specific reason to read the constitutional structure or legislative rules in that way, it makes far greater sense of the relevant structure to assume that the greater power to stop legislation logically includes the lesser power to agree to a bill subject to limiting conditions. Were the constitutional understanding to the contrary, it is difficult to see why legislators in our system have traditionally gone to such efforts to bargain over the precise wording of legislative policy.

Second, Professor Molot argues that focusing on bicameralism and presentment ignores other elements of the constitutional structure. In particular, building on the work of William Eskridge, he argues that because the “separation of powers” contemplates an independent checking function for the judiciary, the federal courts should act as “yet another obstacle to unwise or unjust government action.” Molot, *supra* note 17, at 58. See also Eskridge, *All About Words*, *supra* note 2, at 998–1057 (developing historical case for proposition that “the judicial Power” includes power to engage in equitable interpretation to make federal statutes more consistent with their background purposes and with external

short, take the semantic meaning seriously because they believe that the obligation of the faithful agent is to respect not the legislature in the abstract, but rather the specific outcomes that were able to clear the hurdles of a complex and arduous legislative process.

Ultimately, this intuition about semantic meaning and compromise underlies the very textualist assumptions that have had the greatest impact on the modern Supreme Court. In particular, the Court now starts from the premise that “[s]tatutes are seldom crafted to pursue a single goal, and [that] compromises necessary to their enactment may require adopting means other than those that would most effectively pursue the main goal.”¹³⁸ And while recognizing that dissatisfaction with a statute’s final shape “is often the cost of legislative compromise,” the Court has made plain that “[t]he deals brokered during a Committee markup, on the floor of the two Houses, during a joint House and Senate Conference, or in negotiations with the President . . . are not for [the courts] to judge or second-guess.”¹³⁹ Judges, in other words, “are bound, not only by the ultimate purposes Congress has selected, but by the means it has

principles of law and morals). I have addressed this broad conception of the original understanding of “the judicial Power” at great length in earlier writing. See John F. Manning, *Deriving Rules of Statutory Interpretation from the Constitution*, 101 *Colum. L. Rev.* 1648, 1653–80 (2001) [hereinafter Manning, *Deriving Rules*]; Manning, *Equity of the Statute*, *supra* note 1, at 56–105. For present purposes, it suffices to make the following observations. First, the broad conception of judicial power upon which Professor Molot rests was an artifact of an English common law tradition that had substantially conflated the legislative and judicial powers; hence, it did not prove suitable to, and did not long survive, the adoption of a constitutional structure that contemplated an independent judiciary. See Manning, *Equity of the Statute*, *supra* note 1, at 36–52 (discussing blurring of judicial and legislative powers in English common law tradition); *id.* at 58–70 (discussing differences in United States constitutional structure); *id.* at 85–102 (tracing early judicial shift away from English interpretive assumptions). Second, contrary to Professor Molot’s suggestion, the precise separation of powers tradition associated with an independent judiciary reflects a quite specific premise found in the writings of Locke, Montesquieu, and Blackstone—namely, that separating lawmaking from law application gives lawmakers the incentive to draft clear and constraining laws and thereby to limit any judicial impulse to recognize ad hoc exceptions from general laws. See *id.* at 58–70 (describing that tradition).

Third, Professor Molot draws inferences from the separation of powers at a high level of generality, arguing that the founders expected judicial independence to help mitigate the effect of unwise and unjust legislative impulses. See Molot, *supra* note 17, at 56–58. Nothing in Professor Molot’s account, however, indicates whether they expected courts to exercise such mitigation when semantic context was clear rather than exclusively when ambiguity allowed them interpretive leeway. See Manning, *Deriving Rules*, *supra*, at 1655 & n.41 (arguing that many early judicial cases allowed mitigation of harsh results only when semantic context left room for it). In contrast, the imperative to protect the compromises that flow from a legislative process obviously designed to encourage them reflects a more specific implication of the constitutional structure.

138. *Landgraf v. USI Film Prods.*, 511 U.S. 244, 286 (1994).

139. *Barnhart v. Simon Coal Co., Inc.*, 534 U.S. 438, 461 (2002) (“[N]egotiations surrounding enactment of this bill tell a typical story of legislative battle among interest groups, Congress, and the President. . . . [A] change in any individual provision could have unraveled the whole.”).

deemed appropriate, and prescribed, for the pursuit of those purposes.”¹⁴⁰ Such themes have become common in the Court’s statutory decisions.¹⁴¹

140. *MCI Telecomms. Corp. v. AT&T Co.*, 512 U.S. 218, 231 n.4 (1994) (Scalia, J.).

141. See, e.g., *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 125 S. Ct. 577, 584 (2004) (Thomas, J.) (“Given the clear meaning of the text, there is no need to resolve this dispute or to consult the purpose of CERCLA at all.”); *Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81, 93–94 (2002) (Kennedy, J.) (“Like any key term in an important piece of legislation, the [relevant] figure was the result of compromise between groups with marked but divergent interests in the contested provision. . . . Courts and agencies must respect and give effect to these sorts of compromises.”); *Artuz v. Bennett*, 531 U.S. 4, 10 (2000) (Scalia, J.) (refusing to consider various “policy arguments” while embracing what the Court viewed as “the only permissible interpretation of the text—which may, for all we know, have slighted policy concerns on one or the other side of the issue as part of the legislative compromise that enabled the law to be enacted”); *Pa. Dep’t of Corr. v. Yeskey*, 524 U.S. 206, 212 (1998) (Scalia, J.) (“[A]ssuming . . . that Congress did not envisio[n] that the [Americans with Disabilities Act] would be applied to state prisoners, in the context of an unambiguous statutory text that is irrelevant.” (second alteration in original) (citation and internal quotation marks omitted)); *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998) (Scalia, J.) (“[S]tatutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.”); *Brogan v. United States*, 522 U.S. 398, 403 (1998) (Scalia, J.) (observing “the reality that the reach of a statute often exceeds the precise evil to be eliminated” and explaining that “it is not, and cannot be, our practice to restrict the unqualified language of a statute to the particular evil that Congress was trying to remedy—even assuming that it is possible to identify that evil from something other than the text of the statute itself”); *W. Va. Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 98 (1991) (Scalia, J.) (“[T]he purpose of a statute includes not only what it sets out to change, but also what it resolves to leave alone. The best evidence of that purpose is the statutory text adopted by both Houses of Congress and submitted to the President.” (citation omitted)). Nontextualist Justices have articulated similar premises. See, e.g., *Bates v. United States*, 522 U.S. 23, 29 (1997) (Ginsburg, J.) (“The text of § 1097(a) does not include an ‘intent to defraud’ state of mind requirement, and we ordinarily resist reading words or elements into a statute that do not appear on its face.”); *Nat’l Org. for Women, Inc. v. Scheidler*, 510 U.S. 249, 262 (1994) (Rehnquist, C.J.) (“The fact that [the Racketeer Influenced and Corrupt Organizations Act] has been applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth.” (internal quotation marks and alteration omitted) (quoting *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 499 (1984))); *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 646–47 (1990) (Blackmun, J.) (“Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice—and it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute’s primary objective must be the law.” (internal quotation marks omitted) (quoting *Rodriguez v. United States*, 480 U.S. 522, 526 (1987))); *Hallstrom v. Tillamook County*, 493 U.S. 20, 29 (1989) (O’Connor, J.) (“Giving full effect to the words of the statute preserves the compromise struck by Congress.”); *Cnty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 748 n.14 (1989) (Marshall, J.) (“Strict adherence to the language and structure of the Act is particularly appropriate where, as here, a statute is the result of a series of carefully crafted compromises.”). Indeed, the Court recently made the same point about state laws in terms suggesting that the Court regards messiness and compromise as an inescapable reality of the legislative process. See *Fitzgerald v. Racing Ass’n of Cent. Iowa*, 539 U.S. 103, 108 (2003) (Breyer, J.) (noting that the state law under review, “like most laws, might predominantly serve one general objective . . . while containing subsidiary provisions that seek to achieve other desirable

CONCLUSION

When modern textualism first emerged near the end of the past century, textualists tended to cast their approach as a challenge to the strong form of atextual, purposive interpretation that the Court had long practiced. Textualists argued that judges should read the words of a statute as a reasonable person familiar with applicable social and linguistic conventions would read them. Contrary to the tenets of purposivism, textualists further contended that when the text was clear in context, judges should not adjust it to make it more consistent with the apparent background purposes that could be gleaned from extrinsic circumstances. Textualists asserted that this approach was more faithful to the background constitutional notion of legislative supremacy because it favored the enacted text—the only thing that had cleared the constitutional process of bicameralism and presentment—over unenacted evidence of purpose. Moreover, whereas focusing on the text was said to represent an objective measure of statutory meaning, focusing on purpose unrealistically sought to discover the unknowable subjective intentions of a complex, path-dependent, and opaque multimember lawmaking body.

As the debate over interpretation has deepened, however, it has become increasingly clear that the straightforward account of what divides textualists from purposivists requires refinement. Textualists of course believe that language has meaning only in context. This recognition requires them routinely to consult extratextual sources. (Indeed, in cases of ambiguity, textualists are even willing to treat indicia of purpose as legitimate parts of the relevant context.) And the most sophisticated version of modern purposivism plausibly defends the search for purpose as the objective pursuit of how “reasonable persons pursuing reasonable purposes reasonably” would have resolved the issue before the court. Because these considerations are somewhat in tension with the traditional account of modern textualism, the standard justification for that approach is incomplete.

Properly understood, textualism means that in resolving ambiguity, interpreters should give precedence to semantic context (evidence about the way reasonable people use words) rather than policy context (evidence about the way reasonable people would solve problems). Purposivists claim that this approach is backwards. There is no reason, they assert, to believe that legislators vote on the basis of semantic minutiae. Rather, Congress passes laws for a reason, and the dictates of legislative supremacy obligate the interpreter to help the legislature realize the statute’s overarching goals. Under that perfectly plausible conception of legislative supremacy, law is likely to be more coherent, better tailored to the problem at hand, and more adaptable to unforeseen circumstances.

(perhaps even contrary) ends as well, thereby producing a law that balances objectives but still serves the general objective when seen as a whole”).

In the end, I believe that textualism continues to represent a superior account of legislative supremacy, despite the need for a more nuanced form of justification. Surely, it is hard to deny that one plausible version of legislative supremacy ascribes to legislators an intention to adopt texts that will be interpreted according to the accepted social and linguistic conventions for reading language (in context). If so, then giving precedence to (clear) semantic detail fits more tightly with the framework of constitutional and congressional rules of procedure that lay heavy emphasis on the right to insist upon compromise. Article I, Section 7's requirements of bicameralism and presentment, and the congressional rules of procedure that flesh out that process, empower political minorities to block or slow legislation or, more important, to exact compromise as the price of their assent. By allowing legislators to set the level of generality at which they express their policies, semantic detail enables legislators with leverage in the process to express the limits that are necessary to secure their assent. Let me be clear: Not every turn of phrase is bargained for; many are surely the product of happenstance or insufficient foresight. But if legislators are to be able to record their compromises in a predictable and effective way, they must have the capacity to use words to do so. If the Court feels free to adjust the semantic meaning of statutes when the rules embedded in the text seem awkward in relation to the statute's apparent goals, then legislators cannot reliably use words to articulate the boundaries of the frequently awkward compromises that are necessary to secure a bill's enactment.