TEXTUALISM'S THEORETICAL BANKRUPTCY AND ITS IMPLICATION FOR STATUTORY INTERPRETATION

MARK SEIDENFELD[*]

ABSTRACT

Textualism's possible theoretical justifications cannot sustain a preferred position for the inquiry into the best objective meaning of a statutory provision as the mechanism for statutory interpretation. In fact, careful analysis shows that textualists' proffered theoretical justifications for this approach to statutory interpretation are essentially bankrupt. When subjective legislative intent, as defined in this Article, exists and is discernible by compelling evidence, Article I of the U.S. Constitution requires that courts interpret statutes in accordance with that intent. Even when such intent is not discernible, textualism's impoverished theoretical foundation counsels against resort to the textualist inquiry as the sole legitimate mechanism for statutory interpretation. For this reason, although this Article does not deny much of textualism's critique of nontextualist judicial practices of statutory interpretation, it counsels that courts should not simply presume the propriety of the textualist mechanism. Rather, courts should consider whether, for any interpretative issue, textualist critiques render other mechanisms of interpretation sufficiently problematic that courts should resort to textualism as the best evidence of the most likely meaning that a legislator would give to statutory text. But courts should also consider whether for a particular statutory interpretation issue, such other mechanisms are likely to result in interpretations that better serve the public interest in light of current societal values, and apply such nontextualist mechanisms in instances in which they are likely to lead to superior legislative outcomes.

[*] Patricia A. Dore Professor of Administrative Law, Florida State University College of Law. I am grateful for discussions with and comments by Rob Atkinson, Shawn Bayern, William Buzbee, Abbe Gluck, Tara Grove, David Landau, Michael Morley, Peter Strauss, and the participants in the AALS Legislation Section panel on "21st Century Textualism" at the 2019 annual meeting of the AALS, all of whom helped me greatly improve this Article from its initial inception. I would also like to thank Hana Bilicki, Steven Kahn, and Barbara Kaplan for their invaluable help with research for this Article.

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INTRODUCTION

According to Supreme Court Justice Elena Kagan, "we're all textualists now."[1] Academics who write about statutory interpretation would essentially agree that attempting to find the best reading of the text of statutes is the dominant method of statutory interpretation today, even if courts and scholars do not always apply the teachings of textualism as strictly as some of its strongest proponents advocate.[2] What I find interesting about this observation is that, while some might reasonably argue that textualism embodies attractive attributes for the practice of statutory interpretation, its theoretical footing is essentially bankrupt.

I begin this Article by refuting the textualist assertion, made most pointedly in Dean John Manning's recent essay, that legislative intent is an incoherent concept that should be irrelevant to statutory interpretation.[3] Next, I show that the claim that textualism allows Congress to control the precise meaning of statutes fails because it imposes on Congress the impossible burden of evaluating every provision of every bill using textualist interpretive techniques. From there, I proceed to argue that the claim that textualism better constrains judges from imposing their policy preferences than do other approaches to interpretation is empirically contested. Furthermore, I argue that even if these claims are true, in many instances, allowing judges the leeway to consider policy when interpreting statutes will better serve the public interest than does textualism. Finally, I reject any assertion that textualism can be premised on providing notice to the public of statutory meaning. Having dispelled all potential theoretical justifications for textualism, I conclude by suggesting some practical implications of textualism's bankrupt theoretical foundation for how judges should go about interpreting statutes.

Before beginning to explore the weakness in textualism's theoretical foundation, however, let me clarify what I mean by textualism. I accept what is essentially the definition advocated by the founders of what may be termed the

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[1] Harvard Law School, *The 2015 Scalia Lecture: A Dialogue with Justice Kagan on the Reading of Statutes*, YOUTUBE at 8:29 (Nov. 25, 2015), https://www.youtube.com/watch?time_continue=509&v=dpEtszFT0Tg.

[2] *See, e.g.*, John F. Manning, *Foreword: The Means of Constitutional Power*, 128 HARV. L. REV. 1, 73 (2014) (asserting that "the Court's predominant approach to statutory interpretation has, for the past quarter century, been textualist"); Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 COLUM. L. REV. 1, 43 (2006) (stating that "we are all textualists in an important sense" but arguing that to the extent that textualists take context into account the distinction between textualist and purposivist inquiry into meaning is not great in practice).

[3] John F. Manning, *Without the Pretense of Legislative Intent*, 130 HARV. L. REV. 2397, 2425-31 (2017) [hereinafter Manning, *Without the Pretense*].

"New Textualist School" of interpretation.[4] Positing that the role of the judge is merely to find the objective meaning of the words enacted into law, textualism assumes that statutory text is the reification of the law that results from the legislative process. Therefore, to be true to that process, the job of courts is to provide the most likely meaning a member of the relevant linguistic community—usually the general public[5]—would have given to the text at the time the legislature enacted it.[6]

[4] Although textualists do not characterize themselves as a school of interpretive thought, others have labelled them as such. *See, e.g.*, Philip P. Frickey, *From the Big Sleep to the Big Heat: The Revival of Theory in Statutory Interpretation*, 77 MINN. L. REV. 241, 256 (1992); Brian D. Galle, *Can Federal Agencies Authorize Private Suits Under Section 1983?: A Theoretical Approach*, 69 BROOK. L. REV. 163, 196 n.153 (2003); Steve R. Johnson, *After* Drye*: The Likely Attachment of the Federal Tax Lien to Tenancy-by-the-Entireties Interests*, 75 IND. L.J. 1163, 1189 (2000). The founding of this school is most usually attributed to Justice Scalia, although Judge Easterbrook was also an influential jurist, and John Manning its leading academic. Frickey, *supra*, at 252-54; Philip P. Frickey, *Interpetive-Regime Change*, 38 LOY. L.A. L. REV. 1971, 1972 (2005).

[5] Some statutes address conduct of members of a community that gives specialized meaning to words or phrases. For such statutes, textualism would look for the most likely meaning attributable to the text by members of that particular community. *See, e.g.*, Corning Glass Works v. Brennan, 417 U.S. 188, 201 (1974) (stating that phrase "working conditions" in Equal Pay Act is an industry term of art and that by including that phrase in statute, Congress intended for regulated industry's specialized meaning of the phrase to control as "where Congress has used technical words or terms of art, 'it [is] proper to explain them by reference to the art or science to which they [are] appropriate'" (alterations in original) (quoting Greenleaf v. Goodrich, 101 U.S. 278, 284 (1880))); Nix v. Hedden, 149 U.S. 304, 306 (1893) (explaining that because terms "fruit" and "vegetables" in Tariff Act of 1883 do not carry specialized meaning in either trade or commerce, they should be interpreted according to their ordinary meanings); United States v. Balde, 943 F.3d 73, 82-83 (2d Cir. 2019) (holding that phrase "in the United States" is not ambiguous and that by using word "in" in statute rather than word "entered," Congress intended for phrase to be read according to its common meaning instead of its special meaning used by immigration law practitioners).

[6] Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J.L. & PUB. POL'Y 59, 61 (1988) [hereinafter Easterbrook, *The Role of Original Intent*]; Antonin Scalia & John F. Manning, *A Dialogue on Statutory and Constitutional Interpretation*, 80 GEO. WASH. L. REV. 1610, 1613 (2012) [hereinafter Manning, *A Dialogue*]; *see also* Amy Coney Barrett, *Countering the Majoritarian Difficulty*, 32 CONST. COMMENT. 61, 82-83 (2017) (reviewing RANDY E. BARNETT, OUR REPUBLICAN CONSTITUTION: SECURING THE LIBERTY AND SOVEREIGNTY OF WE THE PEOPLE (2016)). Furthermore, as Judge Easterbrook has explained: "Laws are designed to bind, to perpetuate a solution devised by the enacting legislature, and do not change unless the legislature affirmatively enacts something new. This implies that the right interpretive community is the one contemporaneous with the enacting Congress." Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL'Y 61, 69 (1994) [hereinafter Easterbrook, *Text, History, and Structure*]; *see also* Hillel Y. Levin, *Contemporary Meaning and Expectations in Statutory Interpretation*, 2012 U. ILL. L. REV. 1103, 1109.

Textualism, unlike some other approaches to statutory interpretation including purposivism and dynamic statutory interpretation, rejects any notion that judges are partners in effectuating the goals of the legislative enterprise.[7] And unlike intentionalists, textualists contend that the intent of the legislature, or more precisely, the intent of the legislators who voted for the statute, should have no bearing on the meaning that courts give the statute.[8] For textualists, statutes reflect compromises and deals between legislators that enable the text to garner sufficient support to be enacted but which may reflect different, even inconsistent, purposes.[9] Textualism posits that judges are to be faithful agents of the legislature by determining the meaning of the words that emerged from the legislative process.[10] Although this brings linguistic coherence to statutes, the role of judges is not to provide overarching policy coherence. Nor is their role to update a statute to make it more consistent with changes in the values of the polity or to reflect preferable outcomes in light of greater knowledge about the impact of the statute from the time it was enacted.[11] Proceeding from this understanding of textualism, I explain why textualism must give way to other forms of interpretation in some cases and cannot be justified theoretically as a basis for statutory interpretation.

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[7] ROBERT A. KATZMANN, JUDGING STATUTES 34 (2014) (arguing that if judges implement the purpose of legislation, Congress "will view the [judiciary] as a cooperating partner"); William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1482 (1987) [hereinafter Eskridge, *Dynamic Statutory Interpretation*].

[8] *Compare* Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3, 17 (1997) [hereinafter Scalia, *Common-Law Courts*] ("It is the *law* that governs, not the intent of the lawgiver."), *and id.* at 31 (asserting, as leading textualist jurist, that intent of legislature is not proper criterion of law), *with* Stephen Breyer, *Our Democratic Constitution*, 77 N.Y.U. L. REV. 245, 267 (2002) (describing, as leading intentionalist jurist, how judges use fictional account of what enacting legislature would have wanted as means of reminding judges that "democratically elected individuals wrote the statute in order to satisfy certain human purposes").

[9] *See* John F. Manning, *Second-Generation Textualism*, 98 CALIF. L. REV. 1287, 1290 (2010) [hereinafter Manning, *Second-Generation Textualism*] ("[C]ourts risk upsetting a complex bargain among legislative stakeholders if judges rewrite a clear but messy statute to make it more congruent with some asserted background purpose.").

[10] *See* John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 18 (2001).

[11] *Compare* Manning, *Second-Generation Textualism*, *supra* note 9, at 1290 ("[T]extualism emphasizes that judges in our system of government have a duty to enforce *clearly worded* statutes as written, even if there is reason to believe that the text may not perfectly capture the background aims or purposes that inspired their enactment."), *with* Eskridge, *Dynamic Statutory Interpretation*, *supra* note 7, at 1482-83 (describing dynamic statutory interpretation as an evolutionary approach in which judges consider changing public values in society as well as updates in factual understanding).

At the outset, I also want to clarify that I am not arguing that textualist critiques of how judges often go about implementing alternative approaches to statutory interpretation are unpersuasive. Nor am I even arguing against the application of textualist methods of interpretation as a pragmatic means of implementing alternative theoretical justifications for judicial interpretation of statutes. But, as will become clear, I believe that in such circumstances, the use of textualism actually depends on invocation of a theoretical role for judges that textualists have disavowed. For example, textualism might be the best means of having judges determine the most likely intent of the legislature when the text provides the only meaningful evidence of such intent, textualist assertions to the contrary notwithstanding.[12] Or, as another example, textualism might provide the best means of curtailing judges from incorrectly identifying the purpose of a statute, even though textualists strongly object to the premise that judges should read a statute explicitly to further its purpose.

I. THE SIGNIFICANCE OF LEGISLATIVE INTENT

To begin, I argue that the search for the most likely public interpretation of the text of a statute is, in some circumstances, theoretically inconsistent with the notion that the legislature is responsible for the substance of the law it enacts. As the philosopher Joseph Raz stated: "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."[13] In other words, the legislature cannot be said to have authority to enact law without the ability to ensure that the law is given the meaning that the legislature itself envisions. Therefore, any interpretation contrary to the intent of the legislature usurps the legislative responsibility and power to create statutory law.[14]

A simple, though perhaps unlikely, hypothetical illustrates the theoretical inconsistency of textualism and legislative supremacy. Suppose that there is evidence that every interpreter would agree indicates that every member of Congress understood the language it enacted to mean *X*. Furthermore, all agree that this was an honest understanding by legislators and not one that reflected an attempt to fool fellow legislators, judges, or the public about the meaning of the

[12] *See* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 397-98 (2012) (labelling understanding that textualism is based on statutory text being best evidence of legislative intent as falsity).

[13] Joseph Raz, *Intention in Interpretation*, *in* THE AUTONOMY OF LAW: ESSAYS ON LEGAL POSITIVISM 249, 258 (Robert P. George ed., 1999).

[14] *See* Levin, *supra* note 6, at 1107-08; *cf.* Caleb Nelson, *What is Textualism?*, 91 VA. L. REV. 347, 354 (2005) ("[O]nce one gets past disputes about which sources of information can be used for which purposes, the reasonable reader imagined by Justice Scalia and Judge Easterbrook has the same basic mission as the typical intentionalist: he is trying to figure out 'what Congress meant by what it said.'" (quoting *In re* Sinclair, 870 F.2d 1340, 1343 (7th Cir. 1989))).

text. Suppose further, however, that a textualist judge, applying the usual tools of textualist interpretation, determines that the most likely public meaning of the statute is *Y*. If the judge interprets the statute to mean *Y*, that is clearly inconsistent with what the legislators thought they were enacting. This essentially substitutes the judge's reading of the words for the law the legislature understood itself to have enacted. Legislative supremacy over making law[15] requires that the meaning of the statute comport with the legislative intent, *X*, and not the best meaning as interpreted by the judge, *Y*.

Admittedly, there is some purchase to the textualist position that it is the text of a statute that the legislature enacts. One does not have to be a textualist to agree that the text of the statute is of paramount importance;[16] the meaning of a statute cannot be the preferred interpretation of a majority of legislators divorced from the language of the statute. Rather, legislative intent must refer to the understanding of the meaning of the enacted text that the legislators had rather than a purely subjective inquiry into what legislators desired. For example, a standard explanation[17] for how the prohibition on sex discrimination found its way into Title VII of the Civil Rights Act of 1964[18] posits that conservative southern Democrats teamed up with the most liberal members of Congress to amend the initial bill to add that prohibition.[19] Southern Democrats, who by this account did not desire a prohibition on sex discrimination, added the provision strategically to render Title VII sufficiently unpalatable to moderates, so that

[15] By "legislative supremacy," I refer to the understanding that the power to enact statutes is vested in the legislature. For the federal government, that understanding is expressed in the very first words of Article I of the U.S. Constitution, which states: "All legislative Powers herein granted shall be vested in a Congress of the United States . . . ." U.S. CONST. art. I, § 1. Virtually all state constitutions contain similar provisions authorizing the legislatures of each respective state to enact statutes. *See, e.g.*, CAL. CONST. art. IV, § 1; FLA. CONST. art. III, § 1; N.Y. CONST. art. III, § 1. For the remainder of this Article, I will discuss legislation by the federal government. The arguments in this Article, however, apply to any system in which the legislature is granted the exclusive right to enact statutes. Note, however, that the point of this Article is not relevant to textualist approaches to constitutional interpretation.

[16] *See* William Baude & Ryan D. Doerfler, *Arguing with Friends*, 117 MICH. L. REV. 319, 334 (2018); Molot, *supra* note 2, at 38.

[17] Recent scholarship has challenged this standard explanation. *See generally* Rachel Osterman, Comment, *Origins of a Myth: Why Courts, Scholars, and the Public Think Title VII's Ban on Sex Discrimination Was an Accident*, 20 YALE J.L. & FEMINISM 409, 410 (2009). Whether this account is accurate is not important for this Article because I only use it to illustrate that intent cannot mean simply what the legislature desired. I could have posited a purely hypothetical account to illustrate this point.

[18] Civil Rights Act of 1964, Pub. L. No. 88-352, § 701, 78 Stat. 241, 255 (codified at 42 U.S.C. § 2000e (2018)).

[19] For a thorough description of the addition of the prohibition on sex discrimination as a strategic ploy to kill the entire bill, see CHARLES WHALEN & BARBARA WHALEN, THE LONGEST DEBATE: A LEGISLATIVE HISTORY OF THE 1964 CIVIL RIGHTS ACT 115-17, 121 (1985).

Congress would vote against the entire bill.[20] When moderates voted for the bill despite the added prohibition, the result was a statute that prohibited sex discrimination despite the fact that a majority of members of both houses of Congress would have preferred a bill without that prohibition.[21] Nonetheless, no one could plausibly argue that Title VII does not prohibit sex discrimination based on evidence in the legislative history that a majority of legislators opposed that prohibition.

Textualists nonetheless oppose intentionalism as a legitimate goal of statutory interpretation. They respond to the assertion that judges must consider legislative intent in order to be true to legislative supremacy in making law by arguing that the very notion of such intent is conceptually problematic and that the search for it is theoretically wrong and pragmatically senseless, if not counterproductive.[22] First, textualists assert that there is no sensible alternative to judicial search for objective meaning because a multimember body cannot have an intent.[23] Of course, a multimember body cannot have an intent in the same sense as an individual.[24] But, one can define concepts for a multimember body that serve the same purpose as individual intent for any one person: to distinguish between actions that the body would take over other choices. The least controversial definition would define the intent of the legislature as the understanding shared by every legislator. While it might be exceedingly rare that intent exists under that definition, when it does exist, the above hypothetical illustrates that virtually everyone would agree that the shared intent of all the legislators is the intent of the legislature as a body. There are other concepts that are somewhat more likely to exist that seem to capture what I argue should count

[20] *See* 110 CONG. REC. 2577 (1964) (statement of Rep. Smith); *id.* at 2578 (statement of Rep. Celler) (remarking that addition of prohibition of sex discrimination was strategic ploy to kill entire bill); *id.* at 2581-82 (statement of Rep. Green) (same).

[21] *See* WHALEN & WHALEN, *supra* note 19, at 121; Nicholas S. Zeppos, *Legislative History and the Interpretation of Statutes: Toward a Fact-Finding Model of Statutory Interpretation*, 76 VA. L. REV. 1295, 1322 n.113 (1990).

[22] *See* Easterbrook, *Text, History, and Structure*, *supra* note 6, at 68-70; Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 517 ("[T]he quest for the 'genuine' legislative intent is probably a wild-goose chase anyway.").

[23] According to Judge Easterbrook,

> Intent is empty. Peer inside the heads of legislators and you find a hodgepodge. Some strive to serve the public interest, but they disagree about where that lies. Some strive for re-election, catering to interest groups and contributors. Most do a little of each. And inside some heads you would find only fantasies challenging the disciples of Sigmund Freud. Intent is elusive for a natural person, fictive for a collective body. The different strands produce quite a playground—they give the judge discretion, but no "meaning" that can be imputed to the legislature.

Easterbrook, *Text, History, and Structure*, *supra* note 6, at 68 (emphasis omitted) (footnote omitted); *see also* Scalia, *supra* note 22, at 517.

[24] John F. Manning, *Textualism and Legislative Intent*, 91 VA. L. REV. 419, 431 (2005) [hereinafter Manning, *Textualism and Legislative Intent*].

as the understanding of meaning of a legislative body. One such concept would define the intent of the legislature in accordance with Condorcet's criterion: the understanding of the text that would garner enough votes from those favoring enactment to defeat any other understandings in any pairwise vote between the two.[25] The easiest way to discern such intent is to look for compelling evidence of a fairly universal consensus—one that is shared by at least enough legislators who voted for the statute to comprise a majority of all those voting.

Even if no such understanding exists, the Condorcet criterion for intent will be satisfied by the median voter's understanding of the statute.[26] Note that when a majority of legislators share and favor an understanding of what the statute means, the median voter with respect to this understanding will be any of the legislators in that majority. Thus, the median voter concept includes the special case when such a majority exists. Nonetheless, I find it helpful to state the

[25] This definition of intent is based on the Condorcet criterion for aggregating the preferences of voters in an election, which would choose as a winner the choice that would defeat all other choices in a pairwise comparison. *See* Paul H. Edelman, *The Myth of the Condorcet Winner*, 22 SUP. CT. ECON. REV. 207, 210 (2015). As Professor William Riker noted, this seems to satisfy criteria of fairness and consistency as well as the assumption that all voters' votes count equally. WILLIAM H. RIKER, LIBERALISM AGAINST POPULISM 100 (Waveland Press, Inc. 1988) (1982). Most public choice scholars support the Condorcet criterion for determining the outcomes of collective choices decided by majority voting. *See, e.g.*, Michael D. Gilbert, *Interpreting Initiatives*, 97 MINN. L. REV. 1621, 1634 & n.86 (2013). *But see generally* Edelman, *supra* (noting stability of Condorcet winners in majority voting systems but arguing that there may be reasons for not relying on Condorcet criterion to choose winner, as it can lead to perverse results when order of voting is specified). Professor Saul Levmore has suggested that Congress's rules tend to choose a Condorcet winner when there is such a winner among the competing alternatives. Saul Levmore, *Public Choice Defended*, 72 U. CHI. L. REV. 777, 781 (2005) (book review).

[26] *See* Andrew D. Martin, Kevin M. Quinn & Lee Epstein, *The Median Justice on the United States Supreme Court*, 83 N.C. L. REV. 1275, 1280-81 (2005) (describing Duncan Black's proof that median voter "will defeat any other point under a majority voting regime," which is the definition of a Condorcet winner); *see also* Duncan Black, *On the Rationale of Group Decision-Making*, 56 J. POL. ECON. 23, 26-28 (1948). Although there is no guarantee that a median voter with respect to the meaning of a statutory provision exists, a median voter will exist whenever legislators' preferences are "single-peaked." That is, a media voter will exist as long as each legislator has a best preference about the meaning of the statute regarding the particular interpretation at issue and each legislator's preference decreases the farther an interpretation gets from the legislator's best preference. *See* Keith Krehbiel, *Spatial Models of Legislative Choice*, 13 LEGIS. STUD. Q. 259, 263, 266 (1988). Unstable voting equilibria in a body of one hundred or more members, whose preferences will be mediated by party loyalty and ideology, will be extremely rare. *See* Richard G. Niemi, *Majority Decision-Making with Partial Unidimensionality*, 63 AM. POL. SCI. REV. 488, 492-94 (1969). A Condorcet winning outcome is likely even if thirty percent of the members of Congress do not evaluate issues on the liberal-to-conservative scale. *Cf.* GERRY MACKIE, DEMOCRACY DEFENDED 17, 86 (2003). Preferences that can be aligned along such a scale, however, will not be single peaked if legislators engage in vote trading or strategic voting.

narrower, consensus-based conception of legislative intent separately because legislative history almost always is more useful for revealing a broadly shared understanding of statutory meaning than it is for identifying a particular median voter. In limited situations, however, legislative history might directly reveal the understanding of the median voter, so recognizing the more general conception of intent is also important. For example, according to Professors Abbe Gluck and Lisa Schultz Bressman's comprehensive survey of legislative staff's understanding of the significance of interpretive tools, a scripted colloquy between a bill sponsor and another member of the legislative chamber is significant because it often is used to clarify a contentious issue of interpretation in order to secure a necessary vote for enactment of a statutory provision.[27]

Textualists would not credit any definition of legislative intent because, as "intent skeptics," they would not accept any interpretation that one could not say for certain Congress would have voted into law.[28] But, this skepticism fails to take into account that rejection of an interpretation that Congress would have embodied in the statute is just as erroneous as acceptance of an interpretation that Congress would not have enacted.[29] I accept the textualist concern that it may be difficult to muster sufficiently compelling evidence of the various definitions of intent. But if one can muster such evidence, each of the above definitions of intent indicate that it is more likely that Congress would have enacted the statute with language clarifying that intent than that it would have understood the statute in accordance with a textualist interpretation.

In the face of otherwise compelling evidence of any of the above definitions of intent, there remains the question that textualists posit: why did Congress not clarify the language to clearly embody that intent? The absence of an explanation for Congress's failure to clarify the language undermines otherwise compelling evidence of intent. Yet, there are valid explanations for Congress's failure to clarify the text of a statute to reflect its intent. Generally, if legislators are

[27] Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901, 986 (2013); *see also* Daniel B. Rodriguez & Barry R. Weingast, *The Positive Political Theory of Legislative History: New Perspectives on the 1964 Civil Rights Act and Its Interpretation*, 151 U. PA. L. REV. 1417, 1437-39 (2003) (suggesting that, when interpreting statutes, courts should look to agreements necessary to secure votes of pivotal legislators).

[28] *See* John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2410 (2003) [hereinafter Manning, *The Absurdity Doctrine*]. If everyone who was involved in the enactment process (i.e., all legislators in both houses and the President) shared the same meaning of the statute, then the fact that they enacted the statute would indicate that they would have done so had the language more clearly communicated that understanding. Hence, at the very least, textualists' intent skepticism should not reject the relevance of intent as embodied in my first definition of the term.

[29] *See* Ryan D. Doerfler, *The Scrivener's Error*, 110 NW. U. L. REV. 811, 813 (2016) (making this point with respect to scrivener's error that court refuses to recognize).

unaware of any potential disparity between the text and their understanding of the language, they have no reason to consider clarifying the language. In such circumstances, faced with compelling evidence of legislative intent, a judge would be more true to the likely understanding of members of Congress and the President by interpreting the statute in accordance with that intent.[30]

Textualists next argue that even if intent can be defined and found for some issues of statutory interpretation, the search for intent is theoretically misplaced because legislators do not vote on intentions; rather, they vote on the text of the statute.[31] And under our Constitution, a statute is enacted only when both houses of Congress have passed a bill with identical language and the President has signed the text of that bill into law.[32] These assertions are all true, but they fail to comprehend that the language is a means by which a speaker communicates their ideas. By analogy, enactment of the text of a statute is merely the means by which the legislature communicates what those who voted for it thought the law should be.[33] Thus, while it is necessary for both houses to pass identical language and the President to sign the bill with that language for a statute to be enacted, the interpreter must still decode the message that the body enacting the statute understood the statute to embody.

The doctrine of scrivener's error, which textualists will apply, albeit narrowly,[34] illustrates that the fact that the meaning of the statute is not

[30] *See* Mark Seidenfeld, *A Process Failure Theory of Statutory Interpretation*, 56 WM. & MARY L. REV. 467, 487-89 (2014).

[31] *See* Molot, *supra* note 2, at 27; *see also* Easterbrook, *Text, History, and Structure*, *supra* note 6, at 68-69; John Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673, 695 (1997); Scalia, *Common-Law Courts*, *supra* note 8, at 25.

[32] U.S. CONST. art. I, § 7, cl. 2; *see also* Molot, *supra* note 2, at 27 ("To favor a statute's purposes over its text, [textualists] argued, was to ignore the constitutionally prescribed lawmaking procedures and to aggrandize the judiciary's role in the constitutional design.").

[33] There are various conceptions of how language communicates meaning, but all agree that language itself is a symbolic way of communicating some meaning that exists beyond the language itself. *See, e.g.*, Lee Farnsworth, Comment, *Inferentialism, Title VII, and Legal Concepts*, 85 U. CHI. L. REV. 1775, 1791-93 (2018) (describing two concepts of how language communicates meaning).

[34] *See, e.g.*, SCALIA & GARNER, *supra* note 12, at 234-35; Manning, *The Absurdity Doctrine*, *supra* note 28, at 2459 n.265 (explaining that textualism accepts use of scrivener's error doctrine "when an internal textual inconsistency or an obvious error of grammar, punctuation, or English usage is apparent from reading a word or phrase in the context of the text as a whole," and "there is only the remotest possibility that any such clerical mistake reflected a deliberate legislative compromise"); *see also* John David Ohlendorf, *Textualism and the Problem of Scrivener's Error*, 64 ME. L. REV. 119, 154 (2011) (arguing that scrivener's error doctrine properly applied is consistent with textualism because "if there is near-conclusive evidence that a particular, concrete value choice *did in fact* survive the procedural hurdles and that the legislative majority that passed the statute *did in fact* take itself to be embedding that choice in the text it enacted, the reasons that generally counsel deference to the outcomes of the legislative process also counsel deference to these value choices,

necessarily the most accepted reading of the enacted text simply because language is what legislators vote on. As the name implies, a scrivener's error occurs when the agent responsible for translating the legislators' intended meaning of a statute into statutory text makes an error.[35] Often the error is one that might be termed typographical—a technical error of grammar or punctuation that changes the most likely meaning of the text. The document containing the error is then voted on, thereby giving it legal force. Courts apply the doctrine narrowly, invoking it only when there is an obvious explanation for the error and when the error leads to an outcome that the legislature was extremely unlikely to have intended.[36] When a court invokes the doctrine, it essentially ignores the actual language and substitutes the meaning of language that accurately reflects what it determines the legislature thought the statute meant.[37] Textualists' acceptance of the doctrine of scrivener's error demonstrates that the mere voting on language does not necessarily grant any special significance to the language that was enacted. The key is what those voting understood the language to signify.

Although evidence that the enacted text's best meaning deviates from the understanding of those who voted on the text is often most persuasive when the error is typographical, there is no reason in theory to limit the doctrine to examples of "small errors" like a misplaced comma or an omission of one or two words. If the doctrine of scrivener's error makes sense, then the courts should similarly give the words enacted the meaning that was understood by those who voted on them—with words that accurately express the understanding of the voters—whenever the story of how the language got to be voted on provides persuasive evidence of inaccuracy of the enacted text's meaning.[38]

despite the fact that they were not communicated in the ordinarily exclusive way, through the conventional meaning of the enacted text").

[35] The term "scrivener's error" postdates the actual use of scriveners to write down the text of bills considered by the legislature. It refers more generally to any error that translates what legislators indicate a statute means into language that does not convey that meaning. *See* Doerfler, *supra* note 29, at 816-17.

[36] *See id.* at 834; Michael S. Fried, *A Theory of Scrivener's Error*, 52 RUTGERS L. REV. 589, 614-15 (2000) (arguing that scrivener's error doctrine is similar to strict scrutiny because it rarely results in courts ignoring statute as codified).

[37] *See* Fried, *supra* note 36, at 614-15 ("The doctrine of scrivener's error effectively permits courts to deviate from [Article I's required procedures for enacting statutes] under extraordinary circumstances, and to apply language (i.e., the 'corrected' language) that was not passed by Congress or signed by the President.").

[38] *See* Doerfler, *supra* note 29, at 814 (arguing that "the problem with the rationale for the current [narrow application of the] doctrine is that it ignores that courts can misinterpret both by recognizing an error and by failing to do so"); Seidenfeld, *supra* note 30, at 515-16; *see also* Raz, *supra* note 13, at 270 (explaining that "the normal way of finding out what a person intended to say is to establish what he said" but noting an exception when there is an explanation of what went wrong in act of speaking "which establishes either that one was

A third textualist criticism of courts' searching for legislative intent is that in most cases there is no legislative intent even using the possible concepts of intent of a multimember body I describe above. There simply may not be sufficiently many members of the legislature who share an understanding of the text, and there may not be a median voter regarding the meaning the legislators ascribed to that text. Further, textualists assert, even for the few interpretive issues for which legislative intent might exist, it is virtually never reliably ascertainable. As Manning recently put it: "However attractive the idea of 'legislative intent' might seem, there is good reason to doubt whether a judge can find any such thing in any case worth worrying about."[39]

These criticisms, I contend, are somewhat overstated. Although I agree that, for the vast majority of interpretive issues with which courts wrestle, legislative intent probably does not exist or cannot be discerned with sufficient certainty, there are still important and controversial cases in which it can.[40] According to my reading of Article I, in such a case, a court would act beyond its authority by rejecting such intent in favor of what it determines to be the best reading of the statutory text.

Such cases can arise when there is hidden ambiguity in a statute—when the statute is ambiguous but that ambiguity is not the focus of the legislative debate. In those cases, the legislative history of the statute may reveal that essentially every legislator shared a particular understanding of the ambiguous provision. The statutorily required hearing for a nuclear power plant to receive a license provides one example of such hidden ambiguity.

Section 189(a) of the Atomic Energy Act ("AEA") mandates a hearing before a nuclear power plant obtains a construction permit and another hearing whenever an interested person requests one in order for the power plant subsequently to obtain an operating license.[41] Prior to its 1962 amendment, the AEA required a hearing before the plant could obtain a license, regardless of whether anyone requested one.[42] At that time, the word "hearing," when required

trying or had formed an intention to say something and failed, or that one did not mean what one said").

[39] Manning, *Without the Pretense*, *supra* note 3, at 2405.

[40] For example, Manning questions the legitimacy of any way of aggregating an individual's intentions across all the actors who must vote on the text that becomes statutory law. *Id.* at 2406. He then states: "With so many different kinds of legislative, executive, and private actors contributing to the final output, exactly whose intentions should count in the tabulation of 'Congress's intent?'" *Id.* But his statement concedes that if one could prove that all who voted for the statute agreed on its meaning, then that meaning would be the legislature's intent. *Id.*

[41] *See* 42 U.S.C. § 2239(a)(1)(A) (2018).

[42] The requirement that the Commission hold a hearing for issuance of a construction permit and an operating license for a nuclear power plant even when one was not requested by any interested party was added to the AEA by the amendments of 1957. Price-Anderson Act, Pub. L. No. 85-256, § 7, 71 Stat. 576, 579 (1957) (current version at 42 U.S.C. § 2239(a))

in an adjudicatory proceeding, was generally understood to mean a formal, trial-type proceeding under the Administrative Procedure Act ("APA"),[43] and the agency's procedural rules required that kind of hearing.[44] In 1960, the nuclear power industry complained to Congress that the two sets of formal hearings imposed onerous procedural requirements before a power plant could be built and licensed, and the House and Senate Joint Committee on Atomic Energy asked the Commission to respond to that criticism.[45] In 1962, after rejecting proposed legislation changing the hearing requirements to make them more informal, Congress amended the AEA to eliminate the second hearing unless an interested person requested one.[46] Notably, although the Joint Committee held extensive hearings between 1960 and 1962 regarding the perceived unnecessary formality of the required procedures, virtually no one raised the possibility that the procedures in the AEA did not require formal procedures laid out in §§ 554, 556, and 557 of the APA.[47] All the reports on the proposed legislation and all discussion in the congressional record clearly assumed that both hearings must be formal.

Fast forward about thirty years to a time well after the establishment of the environmental movement and the partial meltdown at the Three Mile Island nuclear power plant, which rendered laughable the notion that the licensing of a nuclear power plant might be so uncontroversial that no person would request a licensing hearing.[48] Essentially, the 1962 amendment was no longer helpful in

("The Commission shall hold a hearing after thirty days notice and publication once in the Federal Register on each application . . . for a license for a [nuclear] testing facility." (internal quotation marks omitted)).

[43] *See* U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 42 (1947); *see also* Administrative Procedure Act, 5 U.S.C. §§ 554, 556-557 (2018).

[44] *See, e.g.*, 10 C.F.R. § 2.102 (1959).

[45] STAFF OF J. COMM. ON ATOMIC ENERGY, 87TH CONG., IMPROVING THE AEC REGULATORY PROCESS 587 (Comm. Print 1961) (letter from James T. Ramey, Executive Director of the U.S. Atomic Energy Commission, November 16, 1960).

[46] Act of Aug. 29, 1962, Pub. L. No. 87-615, § 2, 76 Stat. 409, 409.

[47] *See* 5 U.S.C. §§ 554, 556-557. One person who testified at the hearing, administrative law scholar Kenneth Culp Davis, mentioned in his testimony that the word "hearing" could be interpreted to be informal and thereby obviate the protracted procedure about which the industry and the AEC complained. *See Radiation Safety and Regulation: Hearings Before the J. Comm. on Atomic Energy*, 87th Cong. 386 (1961) (statement of Kenneth Culp Davis, Professor, University of Minnesota School of Law). But no one referred to this possibility elsewhere in the hearings, committee reports, or discussions on the floor of the House or Senate.

[48] *See* Jonathan Kahn, *Keep* Hope *Alive: Updating the Prudent Investment Standard for Allocating Nuclear Plant Cancellation Costs*, 22 FORDHAM ENVTL. L. REV. 43, 78 (2010) (arguing that "grassroots public opposition to nuclear power grew to significant proportions as an off-shoot of the vigorous environmental movement of the late 1960s and early 1970s"

streamlining the licensing process because there would always be some group that would demand the second hearing. Also, in *United States v. Florida East Coast Railway Co.*,[49] the Supreme Court had held that the word "hearing" in a rulemaking proceeding only required informal notice and comment procedures, despite the fact that the agency and virtually all the entities involved in that proceeding thought that formal procedures were required for ratemaking.[50] Thus, the industry and the Nuclear Regulatory Commission contended that the hearing required by § 189(a) of the AEA need not be a formal, trial-type hearing. But, it is clear from the legislative history that no one who voted to amend the statute in 1962 thought that the word hearing referred to an informal proceeding.

Even more problematic from a textualist standpoint, there are even some situations in which legislative history reliably signals a shared universal understanding of a statutory provision that is different from *relatively clear meaning* that would emerge from a textualist analysis. The legislative history may be replete with discussion indicating that all the legislators understood a statutory provision in a particular manner, despite the discussion not identifying that the provision has a different "clear meaning." Perhaps the most salient example of this occurred in *Zuni Public School District No. 89 v. Department of Education*,[51] which addressed criteria for determining when a state may redistribute federal funds provided to a local school system to alleviate costs created by a significant federal presence in the locale.[52] The Secretary of Education proposed an amendment to align the statute's text with the method of determining when redistribution was permitted that the Department of Education had used for the previous eighteen years.[53] The statutory language, which involved statistics, was somewhat technical, and the legislative history manifested that the members of Congress simply accepted that the amendment

and that "the major accident at Pennsylvania's Three Miles [sic] Island nuclear power plant in 1979 . . . led to greater concerns for safety and more aggressive regulatory oversight"); *see also* Edward J. Markey, *Congress to Administrative Agencies: Creator, Overseer, and Partner*, 1990 DUKE L.J. 967, 979.

[49] 410 U.S. 224 (1973).

[50] The Interstate Commerce Commission ("ICC") had invoked the provision in § 556(d) of the APA allowing an agency in a formal rulemaking to adopt procedures for submission of evidence in written form when no party would be prejudiced thereby, and the lower courts had ruled that the ICC could not do so. *Id.* at 226; *see also* 5 U.S.C. § 556(d). The Supreme Court instead asked the parties to brief whether the APA's formal procedures apply at all, even in ratemaking, when the statute required a hearing but did not specify that the decision needed to be based on the record. *Fla. E. Coast Ry. Co.*, 410 U.S. at 234. The Court then decided that the proceeding was governed by § 553's informal procedures. *Id.* at 227-28; *see also* 5 U.S.C. § 553.

[51] 550 U.S. 81 (2007).

[52] *Id.* at 89.

[53] *Id.* at 90-91.

authorized the practice used by the Department of Education.[54] After all, the Secretary had indicated that that was the entire purpose of the bill. Six years after the statutory amendment, (and twenty-four years after the Department adopted the regulation specifying its practice), the method that the Department used to determine whether states could redistribute federal funds was challenged on grounds that the Department's practice was inconsistent with the amendment that was enacted specifically to authorize that practice. A careful parsing of the language indicated that only a greatly stretched semantic interpretation could read the statute to authorize that practice. A majority of the Court, after straining to conclude that the statute was ambiguous, used an intentionalist argument to conclude that the statute authorized the Department's practice.[55] Most significantly for this Article, Justice Souter dissented, stating that although he was certain that Congress's intent was to authorize the Department's practice, the language could not reasonably be read to do so.[56] In essence, Justice Souter used a textualist reading to displace what even he conceded was the understanding of virtually every member of Congress. It seems to me that Justice Souter's opinion represents a blatant judicial override of Congress's Article I power to create the law it desires.

In short, the textualists' objections to legislative intent do not warrant rejecting it in favor of textualism when there is compelling evidence of such intent. In so concluding, I do not mean to challenge the validity of textualist critiques of the all-too-common judicial practice of finding legislative intent based on unreliable legislative history.[57] Assertions in debates and even in committee reports do not require affirmation by members of Congress and hence cannot guarantee that the interpretive understanding that they express reflects a consensus of the full body rather than attempts by a subset of the body to obtain by judicial interpretation what they cannot achieve through the legislative process.[58] I am certain that judges, on occasion, have credited such assertions as

[54] The majority stated (and the dissent did not deny), "As far as we can tell, no Member of Congress has ever criticized the method the 1976 regulation sets forth nor suggested at any time that it be revised or reconsidered." *Id.* at 90.

[55] The majority reasoned that the statute did not specify the distribution from which the top and bottom five percent of school districts were to be chosen. *Id.* at 95-96. But the list specified by the statute was a list of districts ordered by per-pupil expenditures, not a list of students in the districts. *See id.* at 111-12 (Scalia, J., dissenting). Thus, the majority's finding of linguistic ambiguity is not very persuasive.

[56] *Id.* at 123 (Souter, J., dissenting).

[57] *See* Blanchard v. Bergeron, 489 U.S. 87, 98-99 (1989) (Scalia, J., concurring in part and concurring in the judgment) (contending that members of Congress were almost certainly unaware of holdings and significance of district court cases cited by Senate Committee Report that majority relied on to support its interpretation of statute at issue).

[58] *See* John F. Manning, *The Role of the Philadelphia Convention in Constitutional Adjudication*, 80 GEO. WASH. L. REV. 1753, 1763 (2012). For an example of a blatant, if ultimately unsuccessful, attempt by a legislator to import into a statute a meaning that the

indicating legislative intent as a means of interpreting the statute as the judges would prefer.[59]

Moreover, textualist objections do indicate that intent is an incomplete theory of interpretation in that it does not provide a basis for interpreting statutory provisions when there is insufficient evidence of any shared understanding of them. And I agree with the textualist observation that, in most cases, there is no credibly ascertainable intent. By the same token, however, textualist critiques of intent do not provide an affirmative basis for using textualism when legislative intent cannot be credibly discerned. Hence, I turn now to evaluate other affirmative arguments that textualism is the best means for courts to interpret statutes in the absence of clearly discernible legislative intent.

II. TEXTUALISM AS EMPOWERING CONGRESS TO CONTROL THE MEANING OF STATUTES

Once a judge concludes that a statute lacks clearly discernible legislative intent, the force of Article I's assignment to Congress of the power to make statutory law no longer supplies the justification for how courts should interpret statutes. Instead the law reverts to what Professor Henry M. Hart and Dean Albert M. Sacks called "institutional settlement."[60] This concept calls for the legal system to establish "regularized and peaceable methods of decision,"

legislator could not get Congress to enact, see Cont'l Can Co. v. Chi. Truck Drivers, Helpers & Warehouse Workers Union (Indep.) Pension Fund, 916 F.2d 1154, 1156-57 (7th Cir. 1990) (refusing to credit Senator Durenberger's remark in legislative history made after Senate had voted that term "substantially all" in statute meant bare majority).

[59] Given that judges would attempt to hide that they are crediting legislative history to reach their preferred outcomes, citing clear examples of this practice is difficult. Perhaps the most likely example is Judge Norris's initial opinion in Mont. Wilderness Ass'n v. U.S. Forest Serv., Docket No. 80-3374 (9th Cir. May 14, 1981), *withdrawn*, 655 F.2d 951 (9th Cir. 1981), *reprinted in* WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY & ELIZABETH GARRETT, CASES AND MATERIALS ON LEGISLATION 1027-34 (4th ed., 2007). In that case, Judge Norris initially interpreted a provision of the Alaska Lands Act in favor of environmental groups by discounting legislative history supporting the opposite meaning. While the appellate panel was reconsidering the case, however, Congress relied on that very legislative history in enacting subsequent legislation, clearly demonstrating that Judge Norris had misinterpreted the provision. *See Mont. Wilderness Ass'n*, 655 F.2d at 955-58. That led Judge Norris to withdraw his initial opinion and issue one crediting the legislative history and reversing his initial interpretation. *Id.*; *see also* ESKRIDGE, FRICKEY & GARRETT, *supra*, at 1033-35 (criticizing Norris's use of legislative history in withdrawn opinion). Some have intimated that Judge Norris was influenced by his ideological leanings to issue his initial opinion. *See, e.g.*, *Conversation*, 7 N.Y.U. J. LEGIS. & PUB. POL'Y 43, 66-67 (2003) (statements of William N. Eskridge, Jr.).

[60] HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 4-6 (William N. Eskridge, Jr. and Philip P. Frickey eds., Foundation Press 1994) (1958); *see also* Manning, *Without the Pretense*, *supra* note 3, at 2413.

chosen to "advance the larger purposes" of the public.[61] These methods are then accepted as providing legitimacy to the decisions of the various branches of government.

With respect to statutory interpretation, institutional settlement requires the legal system to consider the abilities and appropriate roles of the courts and Congress with respect to making statutory law.[62] According to proponents of institutional settlement, interpretive theory must consider such matters as whether it is best to view the legislature as identifying problems that the law should address and laying out general approaches for how to solve them rather than as providing detailed rules to address such problems.[63] It must also consider the proper nature of judicial power and its relationship to legislative power. Thus, interpretive theory must consider, given the process that judging entails, which approach to interpretation would best serve the public interest.[64] The possibilities historically have included, at least, considering judges as partners in the lawmaking process[65] or as agents of the legislature with discretion to implement the general purposes for which the legislature enacted the statute,[66]

[61] HART & SACKS, *supra* note 60, at 4-6.

[62] *See* Manning, *Without the Pretense*, *supra* note 3, at 2413.

[63] *See id.*

[64] *See id.*

[65] Two of the prime proponents of having judges act as partners in the legislative process were legal scholars Roscoe Pound and James Landis. *See, e.g.*, ROSCOE POUND, AN INTRODUCTION TO THE PHILOSOPHY OF LAW 105 (1922) (stating that judicial power included "supplementing, developing and shaping" statutes); James McCauley Landis, *Statutes and the Sources of Law*, *in* HARVARD LEGAL ESSAYS 213, 215 (Roscoe Pound ed., 1934) (asserting that American judges, like their English predecessors, had power to "do equity and so mould the law to conform more closely to its recognized aims"); Roscoe Pound, *Common Law and Legislation*, 21 HARV. L. REV. 383, 385 (1908) (opining that judges should have inherent ability to treat legislation as "not only a rule to be applied but a principle from which to reason"); *see also* RONALD DWORKIN, LAW'S EMPIRE 313 (1986); Manning, *Without the Pretense*, *supra* note 3, at 2415-18.

[66] The purposivist approach is associated with Hart and Sacks's Legal Process jurisprudence, which viewed the legislature's role as being to solve problems and judicial interpretation's role as being to help the legislature implement the solutions to the problem at which the statute aimed. *See, e.g.*, HART & SACKS, *supra* note 60, at 1374; *see also* Manning, *Without the Pretense*, *supra* note 3, at 2418-21. In addition to these approaches, one might also consider "dynamic statutory interpretation," which, like the Legal Process School, sees judges' roles as agents trying to enable the statute to solve a problem but which gives the interpreting judge more leeway to modify the purposes of the statute to take into account changes in factual circumstances and widely held values of the citizenry after the statute was enacted. *See generally* Eskridge, *Dynamic Statutory Interpretation*, *supra* note 7.

as well as the current textualist view of judges as implementers of the detailed provisions laid out in statutory text.[67]

Textualism views the legislature, being electorally accountable, as responsible for making the value judgements that underlie statutes and translating these judgments into rules that govern behavior. Value judgments inherently involve compromises and trade-offs between potentially competing purposes. The legislative process—the process by which the actual language of a statute is passed by both houses of Congress and signed by the President—is the means by which such value judgments become legally binding. Hence, textualists seek to respect potential legislative bargains between competing interests that may be reflected in statutory text and that usually cannot be reduced to coherent pursuit of broad principles.[68]

From the perspective of institutional settlement, textualists claim that their approach to statutory interpretation is best because it relies on rules that are shared by both the legislature and the courts for deciphering the meaning of text.[69] Thus, although textualists eschew notions of subjective legislative intent, they essentially assert that the interpretation arrived at via the textualist mechanism provides meaning on which all legislators and judges will agree. Therefore, one can attribute an objective legislative intent "to enact a law that will be decoded according to prevailing interpretive conventions."[70] This reliance on objective intent asserts that because the legislature, courts, and the public all fall within a single linguistic community, all can be held to understand the text of the statute to be the meaning that the community would ascribe to the

[67] *See* Manning, *Without the Pretense*, *supra* note 3, at 2421-25 (describing textualist approach as premised on Congress's role of drawing precise lines for how a statute will operate by enacting legislative text).

[68] According to Justice Scalia, textualism allows Congress "to specify what policies it wishes to adopt or, as important, to specify just how far it wishes to take those policies." Scalia & Manning, *supra* note 6, at 1613.

[69] John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 81 (2006) ("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.'" (quoting Frank H. Easterbrook, *What Does Legislative History Tell Us?*, 66 CHI.-KENT L. REV. 441, 443 (1990))). Thus, textualists use legal norms of interpretation that they believe to be shared by courts and legislatures. *See* Richard H. Fallon, Jr., *The Statutory Interpretation Muddle*, 114 NW. U. L. REV. 269, 299-300 (2019).

[70] Manning, *Textualism and Legislative Intent*, *supra* note 24, at 432-33. According to Justice Scalia, courts look for "a sort of 'objectified intent'—the intent that a reasonable person would gather from the text of the law, placed alongside the remainder of the *corpus juris*." Scalia, *Common-Law Courts*, *supra* note 8, at 17; *see also* Manning, *Textualism and Legislative Intent*, *supra* note 24, at 432-33 (describing "demands of legislative supremacy" that are imposed on notion of objective intent).

text.[71] If one objects that the legislature might have had a subjective understanding different from that revealed by the community's interpretive conventions, the textualist responds that it is the legislature's obligation (as it is for every member of the linguistic community) to determine the objective meaning of the text it enacts.[72] If that objective meaning fails to convey the meaning the legislature subjectively desires, the legislature is free to amend the text so that the meaning determined by linguistic conventions comports with the legislature's subjective desire.[73]

In other words, textualists contend that their interpretive approach is most true to legislative supremacy by crediting the precise choices made by the legislature when they enact the particular words of a statute. "By presuming that Congress meant what it said, that it chose its word with care, a court that practices textualism made it *possible* for Congress to write down bargains that went so far and no farther and to make them stick."[74] This explanation essentially assumes that were courts to apply textualism consistently when interpreting statutes, members of Congress could apply textualism to a proposed bill and determine the meaning that a reviewing court would give to it. Then members could either vote in favor of the bill if they desired that meaning or seek to amend it to give it their desired effect. In essence, by providing a mechanism for Congress to ascertain the meaning courts would give to the text if enacted, textualism allows the legislature to control the meaning of statutes it enacts. Textualists do not deceive themselves into believing that Congress always, or even usually, considers the precise interpretive question facing a court.[75] But, by relying on

[71] Manning *supra* note 24, at 424; *see also* Jeremy Waldron, *Legislators' Intentions and Unintentional Legislation*, *in* LAW AND INTERPRETATION 329, 339 (Andrei Marmor ed., 1995) (asserting that textualist's objectified intent takes as its premise that "[a] legislator who votes for . . . a [statutory] provision . . . does so on the assumption that . . . what the words mean to him is identical to what they will mean to those to whom they are addressed").

[72] Easterbrook, *The Role of Original Intent*, *supra* note 6, at 65.

[73] William N. Eskridge, Jr., *Reneging on History? Playing the Court/Congress/President Civil Rights Game*, 79 CALIF. L. REV. 613, 677 (1991) [hereinafter Eskridge, *Reneging on History?*] ("If the plain meaning of the words runs counter to current legislative preferences, textualism's adherents reason, Congress can always amend the statute. New textualists believe it is better (and indeed constitutionally required) for Congress to do the amending than for the Court to do so through 'interpretation.'"); *see also* JOHN F. MANNING & MATTHEW C. STEPHENSON, LEGISLATION AND REGULATION 75 (3d ed. 2017) ("[T]extualists often respond to accusations that their interpretations lead to unwise or unjust results by insisting that 'if Congress doesn't like it, Congress can fix it.'").

[74] Manning, *Without the Pretense*, *supra* note 3, at 2424.

[75] Antonin Scalia, Speech on the Use of Legislative History 5 (delivered between Fall 1985 and Spring 1986 at various law schools) (on file with the Boston University Law Review) ("With regard to the vast majority of issues of statutory construction that I have confronted . . . , th[e] assumption [that there was a congressional intent] is utterly implausible. Most of th[e] issues involve points of relative detail, compared with the major sweep of the

preset linguistic rules of interpretation, textualism claims to empower the legislature to communicate a specific understanding of how it chose to resolve a particular legal issue, when the legislature does actually consider and resolve that issue.

One problem with textualists' arguments that their approach comprises the best institutional settlement for statutory interpretation is that it implies that textualism results in a determinate meaning when applied to a contested issue of interpretation.[76] This is implicit in the textualist assertion that textualism allows the legislature to control the meaning of the statutes it enacts. If application of textualist tools of interpretation can lead to different meanings, it would then be possible for the legislature to apply the tools to the text it enacts and conclude that the text supports one meaning, while the court applying the same tools could find a meaning different from the one the legislature thought it was enacting. But, "given the extreme subjectivity of the Court's dictionary approach and the intrinsic malleability of the language canons, ordinary meaning analysis reflects broad judicial discretion more than a commitment to the principal-agency relationship."[77]

One might contend that although textualism does not reveal the meaning of a statute with certainty, it reduces the bounds of allowable interpretations in a more acceptable manner than other interpretive approaches. This implies that by committing to textualism, courts allow Congress to accurately signal the meaning that legislators had in mind more frequently than it could using other approaches. Of course, whether this is true is an empirical question that is pragmatically difficult to answer.[78] Even if it is accurate, however, there is a more fundamental problem with the assertion that textualism allows the

statute in question. That a majority of both houses of Congress (never mind the President, if he signed rather than vetoed the bill) entertained any view with regard to such issues is utterly beyond belief. For a virtual certainty, the majority of Members were blissfully unaware of the existence of the issue, much less had any preference as to how it should be resolved.").

[76] *See* Anita S. Krishnakumar, *Textualism and Statutory Precedents*, 104 VA. L. REV. 157, 203 (2018) ("[T]extualist Justices appear prone to a 'correct answer' mindset, . . . [a] jurisprudential commitment to precision and belief in a single correct statutory meaning . . . .").

[77] James J. Brudney, *Faithful Agency Versus Ordinary Meaning Advocacy*, 57 ST. LOUIS U. L.J. 975, 976 (2013); *see also* Philip P. Frickey, *Revisiting the Revival of Theory in Statutory Interpretation: A Lecture in Honor of Irving Younger*, 84 MINN. L. REV. 199, 207-08 (1999) (expressing skepticism that textualism has increased predictability and certainty of statutory interpretation); Robert G. Vaughn, *A Comparative Analysis of the Influence of Legislative History on Judicial Decision-Making and Legislation*, 7 IND. INT'L & COMP. L. REV. 1, 2, 40-41 (1996).

[78] Many critics of textualism argue that it is no more constraining of judges' discretion to impose interpretations to reach their preferred outcomes than are other approaches to statutory interpretation. *See* William N. Eskridge, Jr., *The New Textualism and Normative Canons*, 113 COLUM. L. REV. 531, 533 n.13, 534-35 (reviewing SCALIA & GARNER, *supra* note 12).

legislature to control the meaning of the statutes that it enacts with respect to the issues that the legislature foresees.

Given the nature of the legislative task, it is pragmatically impossible for the legislature to perform the analysis of virtually any statute that would be necessary to reveal whether a textualist judge would interpret the statute as legislators desire.[79] The burdens of having to determine the meaning of a statute using such textualist conventions when the statute is being drafted would be prohibitive.[80] Any lawyer who engages in statutory interpretation knows that language is a complex system and that deriving meaning using textualist tools is extremely time and resource intensive.[81] One need not be a policy wonk to recognize that it often takes hundreds of hours of textual analysis by judges and their clerks (who tend to be among the best legal minds in the country) to derive a best "objective meaning" of a statutory provision.

Of course, legislatures could emulate courts and hire the brightest legal minds to parse statutory texts to determine the best objective meaning of each provision of each statute that the legislature considers.[82] Armed with such analysis, the legislature could decide whether the best reading of the language conveys the meaning that the legislature intends to signal or instead whether the legislature needs to amend the bill. But there is a crucial difference between the burden facing courts in applying accepted conventions for determining statutory meaning and the burdens legislatures would face. The legislature would have to determine the objective meaning of the text before the statute is enacted and applied. Hence, unlike courts, the legislature cannot rely on members of the affected public to identify interpretive uncertainties and difficulties raised by the

[79] *See* Gluck & Bressman, *supra* note 27, at 972-73; *see also id.* at 969 ("If one were to construct a theory of interpretation based on how members themselves engage in the process of statutory creation, a text-based theory is the *last* theory one would construct."). A possible exception to legislators' separation from drafting of text occurs when a particular legislator demands a specific phrase be included in the statute, usually to placate an important supporter. *See id.* (summarizing staff member reports that "members [of Congress] participate in drafting only at a high level of generality and rarely at the granular level of text itself").

[80] *See* Seidenfeld, *supra* note 30, at 503-05.

[81] *See* Victoria F. Nourse & Jane S. Schacter, *The Politics of Legislative Drafting: A Congressional Case Study*, 77 N.Y.U. L. REV. 575, 619-20 (2002) ("[T]he sheer diversity of approaches to the drafting process, the multiplicity of drafters, and the different points in time at which text is drafted suggest the limited disciplinary effect of judicial rulings.").

[82] The closest thing to staff members who might devote themselves to interpreting statutes to see how courts might construe them would be each chamber's Office of Legislative Counsel. Robert A. Katzmann, *Madison Lecture: Statutes*, 87 N.Y.U. L. REV. 637, 655-56 (2012). But attorneys in Legislative Counsel do not analyze most statutory provisions in the manner that a textualist judge would if the meaning of the provision were raised as an issue in a case. *See* Nourse & Schacter, *supra* note 81, at 603-05 (describing how Office of Legislative Counsel attorneys report that they "do not believe they have to do interpretive research in order to" assess how courts might construe language that they draft).

statute as it is applied. The quest for objective intent would require legislative staff to apply a full textualist analysis to every provision of every statute under consideration to ensure that the "best reading" as determined by such analysis comports with legislators' understanding. Even for a relatively short statute, the burden of identifying ex ante all instances in which the objective meaning might deviate from the legislature's desired understanding would be enormous.[83] For statutes like omnibus budget bills and the Affordable Care Act ("ACA"), the burden of having to do so would shut down the legislative process.

With respect to significant legislation, which Congress presumably takes the most care in enacting, the legislative process reacts to that burden by trying to harness the same power of public scrutiny that courts take advantage of when plaintiffs present judges with particular cases.[84] To the extent possible within the time frame for enacting legislation, legislatures provide interested entities an opportunity to read and react to draft bills.[85] Such vetting by lobbyists and interest groups, including government agencies and the White House, often will identify problematic provisions in a bill—that is, provisions for which the statute's operation may not accord with legislators' understanding.[86] But such ex ante vetting inevitably will miss some problematic language that might be included in a bill. In short, the nature of the legislative process is such that the legislature, when drafting legislation, is really part of a different linguistic community that cannot fully analyze the texts it enacts using the decoding tools

[83] *See* Nourse & Schacter, *supra* note 81, at 600 ("While staffers [of the Senate Judiciary Committee] are well aware of the general principles of statutory interpretation and do have in mind generally how a court would interpret language they are writing, in the ordinary course of drafting they do not spend substantial time anticipating or attempting to research the judicial application of particular interpretive law to the bill being drafted.").

[84] Many bills are drafted in a great hurry and with little care. *See id.* at 590-93. For such bills, the drafting process is less likely to identify potential deviations of textualist interpretations from what legislators understood the bill to mean than for the process described below.

[85] *See* ABNER J. MIKVA & ERIC LANE, AN INTRODUCTION TO STATUTORY INTERPRETATION AND THE LEGISLATIVE PROCESS 150-51 (1997) (discussing need for "legislators, legislative staff, representatives of the executive branch, lobbyists, and . . . professional bill drafting services" to help draft and vet bills to be enacted by Congress, providing similar services in New York State Legislature as an example); Nourse & Schacter, *supra* note 81, at 591; Jarrod Shobe, *Intertemporal Statutory Interpretation and the Evolution of Legislative Drafting*, 114 COLUM. L. REV. 807, 848 (2014) ("Legislative counsel and committee staff acknowledged that even the considerable number of professional staff in the modern Congress is not enough to recognize and resolve every potential issue in a bill and that lobbyists often provide a different perspective on how a law will be applied.").

[86] *See* Shobe, *supra* note 85, at 847-49.

that courts use to address challenges to statutory meaning after the statute goes into effect.[87]

III. TEXTUALISM AS A CONSTRAINT ON JUDGES IMPOSING THEIR POLICY PREFERENCES BY INTERPRETATION

The textualist premise that value judgments are best made by the politically accountable legislature implies that, to the extent possible, judges should not set policy.[88] Interpreting a statute always has policy implications. But, while interpretation is within the core of what judges do, the textualist basis for judicial interpretation is legal analysis rather than what the judge thinks is best policy.[89] By standard accounts of comparative institutional advantage, courts are institutionally inferior to the legislature for making policy, not only because they are much less politically accountable[90] but also because they have less ability to inform themselves about the substantive implications of their interpretations. Judges are trained in law and not in the substance of the particular regulatory matter that gives rise to the interpretive question.[91] Unlike the legislature,

[87] *See* Seidenfeld, *supra* note 30, at 500-01; *see also* Gluck & Bressman, *supra* note 27, at 928 fig.2 (noting that although congressional staff members are not aware of many semantic canons by name, their consideration of the meaning of statutory language is consistent with most such canons); Nourse & Schacter, *supra* note 81, at 603 (reporting that attorneys in Office of Legislative Counsel felt that they had internalized canons of interpretation). Gluck and Bressman, however, suggest that some judicial canons are not consistent with how drafting occurs. *See generally* Gluck & Bressman, *supra* note 27.

[88] *See* Richard H. Fallon, Jr., *Three Symmetries Between Textualist and Purposivist Theories of Statutory Interpretation—and the Irreducible Roles of Values and Judgment Within Both*, 99 CORNELL L. REV. 685, 686-87 (2014) ("'Textualist' theories . . . affirm . . . more ardently [than purposivist theories] that judges should strive to exclude their own values from the interpretive process."); *see also, e.g.*, Easterbrook, *Text, History, and Structure*, *supra* note 6, at 63. Disfavoring judicial policy making, however, is not unique to textualists; it is arguably a position shared by most mainstream scholars and jurists for most issues of statutory interpretation. *See, e.g.*, Thomas W. Merrill, *Faithful Agent, Integrative, and Welfarist Interpretation*, 14 LEWIS & CLARK L. REV. 1565, 1586-90 (2010) (raising concerns with nonoriginalist welfarist approach to statutory interpretation).

[89] *See, e.g.*, Scalia, *Common-Law Courts*, *supra* note 8, at 17-18.

[90] *See* John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 626 (1996) ("[F]ederal judges—who have no constituency—have a duty to respect legitimate policy choices of those who do." (quoting Chevron, U.S.A., Inc., v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 866 (1984))); Note, *A* Chevron *for the House and Senate: Deferring to Post-Enactment Congressional Resolutions that Interpret Ambiguous Statutes*, 124 HARV. L. REV. 1507, 1510 (2011).

[91] *See* Hans A. Linde, *The Judge as Political Candidate*, 40 CLEV. ST. L. REV. 1, 3 (1992) ("In the classic model, the judicial power is something other than the legislative or the executive power. The responsibility of judges is not that of legislators or law enforcement officials. A judge's responsibility is to decide disputes impartially according to law, not according to prior commitments, political inducements, or the popular demands of the

moreover, judicial proceedings are reactive. Judges cannot call their own witnesses to inform themselves about the policy implications of their interpretive decisions; they are dependent on the witnesses called by the parties to create the record on which they must base their interpretation and by the briefs of the parties to lay out the possible ramifications of those decisions. Congress, however, is free to hold hearings and call witnesses so that it can proactively learn the policy implications of the statutes it enacts.[92]

Thus, implicit in textualist arguments against purposivist interpretation is an assertion that textualism provides an interpretive method that does not invite judges to be swayed illegitimately by their ideology or values. Other approaches, whether seeing judges as partners or agents of the legislature, do envision judges exercising discretion that depends to some extent on the values that they bring to the interpretive endeavor. And it seems reasonable at first blush that the more discretion an approach invites for a judge to rely on policy considerations explicitly, the more likely that the interpretation the approach generates reflects the judge's value-laden outlook on the problem, if not the judge's actual preference for how the law should address it.[93] To the extent that the nature of judging and the processes by which it is carried out suggest that consideration of policy is inappropriate, textualists conclude that their approach to interpretation is the preferable interpretive method.

But counterbalancing the concerns of judges exercising policy discretion is the fact that the legislature usually did not foresee the precise interpretive issue that the judge confronts.[94] Moreover, as the issues get further afield from those which the legislature considered when enacting the statutory text, the operation of that text becomes more arbitrary as a means of resolving the interpretive matters. Perhaps circumstances have changed so that the balance struck by the enacted text leads to outcomes that do not serve the interests that prompted enactment of the legislation. In such instances, purposivism is likely to lead to a more accurate assessment of the outcome that the legislature would have envisioned had it known the particular circumstances of the case.[95] More

moment."); *see also* Mark Seidenfeld, *The Irrelevance of Politics for Arbitrary and Capricious Review*, 90 WASH. U. L. REV. 141, 159 (2012) ("[R]egulatory value judgments are not dictated by legally discernible standards and are therefore inherently political.").

[92] *See* William W. Buzbee, *Standing and the Statutory Universe*, 11 DUKE ENVTL. L. & POL'Y F. 247, 279-80 (2001); Mark Seidenfeld & Allie Akre, *Standing in the Wake of Statutes*, 57 ARIZ. L. REV. 745, 750-52 (2015) (noting Congress's institutional superiority at recognizing likely impact of alleged injuries from statutory violations and causal connections between those violations and alleged injuries).

[93] Some critics of textualist interpretation, however, argue that it involves much the same value judgments as the purposivist alternative. *See e.g.*, Fallon, *supra* note 88, at 688.

[94] *See* Scalia, *supra* note 75, at 5.

[95] *See* Michael C. Dorf, *Foreword: The Limits of Socratic Deliberation*, 112 HARV. L. REV. 4, 26 (1998) ("[T]he backward-looking cast of [textualism/originalism] limits its ability to adapt to changing circumstances. . . . [P]urposivism pays somewhat greater attention to the

generally, language written with particular circumstances in mind is less likely to lead to outcomes that solve the problem that prompted the legislature to enact the statute the more that circumstances have changed in relevant ways. Thus, from the standpoint of furthering the public interest, the threat of a judge relying on their personal policy preferences might be more than offset in many cases by the fact that the judge is interpreting the statute with the precise issue revealed and the circumstances known.[96]

In addition, judges are not entirely unconstrained in their choices of interpretation, which means that the social cost from judges promoting their subjective values is limited. Judges' discretion is tempered by the need to justify the interpretation on grounds other than their mere personal preferences.[97] This is reflected in their training and experience. In fact, a study reported by Professor Dan Kahan and others

> strongly support[s] the hypothesis that *professional judgment* can be expected to counteract "identity-protective cognition," the species of motivated reasoning known to generate political polarization over risks and myriad policy and legally consequential facts. Legal training and experience, on this view, endows judges and lawyers with a specialized form of cognitive perception—what Karl Llewellyn called "situation sense"—that reliably focuses their attention on the features of a case pertinent to its valid resolution. The results of our experiment support the

likely future consequences of decisions, while textualism/originalism often seems to celebrate its inattention to such matters.").

[96] *See* Hively v. Ivy Tech Cmty. Coll., 853 F.3d 339, 352 (7th Cir. 2017) (Posner, J., concurring). The cost of judges imposing personal values when they interpret statutes will depend on how far those values are from those generally held by the American policy. At times, such as during the New Deal, the values of the Supreme Court have deviated greatly from those of the public. But because federal judges are appointed by the President and approved by a majority vote of members of the Senate, all of whom are elected more or less by popular vote, the drift between the values of the federal courts and the political bodies of Congress and the President usually is not too great. *See generally* BARRY FRIEDMAN, THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION (2009) (arguing that court is held accountable to American public). *But see* John O. McGinnis, *Public Choice Originalism: Bork, Buchanan, and the Escape from the Progressive Paradigm*, 10 J.L. ECON. & POL'Y 669, 684 (2014) (suggesting that courts will follow "elite opinion" and hence be "particularly out of step with the will of the people when elite opinion sharply diverges from popular opinion").

[97] For example, a survey of how federal appellate judges interpret statutes indicated that most attempted to resolve ambiguity by reading the statute so it was sensible. Abbe R. Gluck & Richard A. Posner, *Statutory Interpretation on the Bench: A Survey of Forty-Two Judges on the Federal Courts of Appeals*, 131 HARV. L. REV. 1298, 1341 (2018). Although what makes a statute sensible easily could be influenced by a judge's ideological perspective and values, the notion of making a statute sensible suggests an endeavor that would mollify tendencies to simply impose one's personal values.

> conclusion that "situation sense" is sufficiently robust to fix judges' attention on such decision-relevant features of a case notwithstanding the tug of influences that might systematically focus the attention of the public on facts that are irrelevant—and indeed inimical—to impartial legal decisionmaking.[98]

More instrumentally, to the extent that judges value an internal commitment to the art of judging properly[99] or value their judicial reputations,[100] they are apt to try to find some jurisprudentially accepted means justifying how they factor policy into their interpretations rather than simply imposing their own preferences.[101] And if a judge has neither a commitment to judging according to neutral principles nor is concerned with their judicial reputation, textualism is not likely to provide meaningful constraint because they are likely to find sufficient discretion within textualist techniques to interpret the statute in accordance with their own gut feeling about what is best for the public interest.[102]

Textualists recognize that judges using textualism can get interpretations wrong or be out of sync with current political preferences. But textualists view the remedy for such interpretation as legislative amendment of the statute to

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[98] Dan M. Kahan et al., *"Ideology" or "Situation Sense"? An Experimental Investigation of Motivated Reasoning and Professional Judgment*, 164 U. PA. L. REV. 349, 354-55 (2016) (footnotes omitted).

[99] *See generally* MICHAEL A. BAILEY & FORREST MALTZMAN, THE CONSTRAINED COURT: LAW, POLITICS, AND THE DECISIONS JUSTICES MAKE (2011) (presenting evidence that legal and ideological factors influence judicial decisionmaking).

[100] *See generally* LAWRENCE BAUM, JUDGES AND THEIR AUDIENCES: A PERSPECTIVE ON JUDICIAL BEHAVIOR (2006). If reputation is dependent on pleasing an ideological audience such as the President or members of the Senate who would be responsible for appointing a judge to an elevated position, it might motivate a judge to interpret statutes in accordance with the audience's ideology rather than their own legal reasoning. *See generally* LEE EPSTEIN, WILLIAM M. LANDES & RICHARD A. POSNER, THE BEHAVIOR OF FEDERAL JUDGES (2013).

[101] *See* Donald Braman & Dan M. Kahan, *Legal Realism as Psychological and Cultural (Not Political) Realism*, *in* HOW LAW KNOWS 93, 94 (Austin Sarat, Lawrence Douglas & Martha Merrill Umphrey eds., 2007) ("It's not that political values *motivate* legal actors to reach particular outcomes but rather that cultural values *orient* them in determining what outcome is dictated by the law and evidence at hand. Legal actors with differing values will decide culturally sensitive cases differently not because they want to impose their values on others but because the mechanisms of cultural cognition move them to view the facts and the law differently.").

[102] *See* Anita S. Krishnakumar, *Backdoor Purposivism*, 69 DUKE L.J. 1275, 1331 (2020) ("[B]ecause the work that judicial discretion and speculation perform in the context of traditional textualist interpretive tools is largely hidden and unelaborated, the likelihood that textualist jurists will conflate their own policy preferences with those of Congress may be intensified.").

reverse the judicial interpretation.[103] Legislative inertia, however, is substantial; it is often the case that Congress will fail to enact legislation to reverse a judicial interpretation even if a majority of legislators in both houses and the President disagree with that interpretation.[104] This is especially true in the current era because Congress has become so partisan that members of one party will not vote for a provision proposed by those in the other party lest they act in a manner that gives the opposing party credit for actually accomplishing something.[105] In addition to the costs of taking up such legislative reversals in terms of time and effort, once legislation is introduced into Congress, there is a possibility that what emerges will entirely change the statute rather than just simply amending it to undo the problematic judicial decision. Therefore, even legislators who would favor an amendment to overrule a specific judicial interpretation might hesitate to correct an erroneous interpretation. In short, while legislative correction of mistaken judicial statutory interpretations do occur, one cannot count on the legislature to correct all or even many such mistakes. Finally, if the ultimate check on mistaken interpretation is legislative override, that remedy would be just as available to undo intolerable nontextualist interpretations as for textualist ones.[106]

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[103] *See* Eskridge, *Reneging on History?*, *supra* note 73, at 677; Daniel A. Farber, *The Hermeneutic Tourist: Statutory Interpretation in Comparative Perspective*, 81 CORNELL L. REV. 513, 524 (1996) (reviewing INTERPRETING STATUTES: A COMPARATIVE STUDY (D. Neil MacCormick & Robert S. Summers eds., 1991)) (stating that for formalist judges, if a court interprets a statute in a manner that Congress dislikes, "[Congress] is always free to legislate again.").

[104] *See* John Copeland Nagle, *Corrections Day*, 43 UCLA L. REV. 1267, 1268 (1996); Richard A. Posner, *Statutory Interpretation—in the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 816 (1983) ("Congress's practical ability to overrule a judicial decision misconstruing one of its statutes, given all the other matters pressing for its attention, is less today than ever before, and probably was never very great.").

[105] *See generally* THOMAS E. MANN & NORMAN J. ORNSTEIN, IT'S EVEN WORSE THAN IT LOOKS: HOW THE AMERICAN CONSTITUTIONAL SYSTEM COLLIDED WITH THE NEW POLITICS OF EXTREMISM (2012); THOMAS E. MANN & NORMAN J. ORNSTEIN, THE BROKEN BRANCH: HOW CONGRESS IS FAILING AMERICA AND HOW TO GET IT BACK ON TRACK (2006).

[106] There is some evidence that Congress overrides more interpretations made using textualism than using purposivism. *See* Daniel J. Bussel, *Textualism's Failures: A Study of Overruled Bankruptcy Decisions*, 53 VAND. L. REV. 887, 889 (2000); William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331, 334 (1991). *But see* Matthew R. Christiansen & William N. Eskridge, Jr., *Congressional Overrides of Supreme Court Statutory Interpretation Decisions, 1967-2011*, 92 TEX. L. REV. 1317, 1401-09, 1413 (2014) (identifying five factors that contribute to likelihood that Congress will override statutory decision). This suggests that, at least in terms of current political sensitivities, textualist judges are more apt to reach erroneous—that is, politically intolerable—interpretations than are judges using other interpretive approaches.

However, even if the data did show that textualist interpretations are more likely to be overridden by statutory amendment than are purposvist ones, that might reflect how the

The absurdity doctrine of statutory interpretation illustrates how textualism can result in interpretations that undermine the public interest. Under this doctrine, courts ignore the unambiguous language of a statute if that leads to an absurd outcome in the context of a particular case.[107] That textualists apply the absurdity doctrine, albeit narrowly,[108] demonstrates that they recognize the potential costs of applying textualist analysis without exception. Textualism justifies applying the doctrine by referring back to its goal of recognizing legislative bargains even when they create tension in how a statute operates and when they lead to results that seem to undermine the purpose of the statute. They consider a result absurd only if the outcome is so universally repulsive that the court concludes that no legislator could have desired it. In that case, it could not be the result of a legislative bargain.[109] Having so concluded, almost all textualists are willing to rely on rejecting absurdity to trump the best reading of the statutory text.[110]

various interpretive approaches square with the legislative process for enacting statutes rather than with the propensity of each approach to make an error. For example, textualists claim to be more respectful of legislative bargains, which means that their interpretations are more likely to credit the influence of a veto gate than are purposivist interpretations. Therefore, when a textualist erroneously interprets a statute, the misinterpretation is likely to reflect a misperceived veto gate. Congress then has an incentive to amend the statute to reflect the majority understanding. The fact that there really was no veto gate driving the enacted text means that there would not be anyone interested in preventing the amendment. If a purposivist court erred in interpreting a statute, it more likely neglected the influence of an actual veto gate. But once the statute has been adopted, the veto gate has no leverage to reassert its preferred position. Hence, there would be no incentive for Congress to correct the error.

[107] *See* Manning, *The Absurdity Doctrine*, *supra* note 28, at 2388 (describing absurdity doctrine as allowing judges to "deviate from even the clearest statutory text when a given application would otherwise produce 'absurd' results").

[108] *See* Charles L. Barzun, *The Genetic Fallacy and a Living Constitution*, 34 CONST. COMMENT. 429, 438 (2019) (noting that most textualists carve out narrow exception to reading statutes in accordance with public meaning of text when such reading leads to absurd results); *see also, e.g.*, SCALIA & GARNER, *supra* note 12, at 234.

[109] Manning has explained some textualists acceptance of the absurdity doctrine as follows.

> Based on the apparent premise that legislators either constitute or at least represent a cross section of society, the absurdity doctrine assumes that if a particular statutory outcome sharply contradicts society's "common sense," then the statute's wording must reflect a lapse in expression or foresight, which legislators could and would have corrected had the problem come to their attention.

Manning, *The Absurdity Doctrine*, *supra* note 28, at 2401 (footnote omitted). In other words, although the doctrine depends on subjective intent attributed to the legislature, the very nature of the outcomes it avoids ensures that the court has not rejected a reading that might have reflected a legislative bargain. *See id.* at 2409-12.

[110] Manning is the exception. He argues that the absurdity doctrine is based on "strong intentionalism" and that truly absurd statutory interpretations usually could be avoided by considering the context surrounding the enactment of the legislation. *See id.* at 2395-408.

The rationale behind textualists' acceptance of the absurdity doctrine, however, has the potential to apply more broadly than textualists would admit. For example, it justifies the Supreme Court's decision in *King v. Burwell*,[111] which addressed the issue of whether tax subsidies under the ACA are available to individuals who purchased insurance from exchanges set up by the federal government in states that failed to set up their own exchanges.[112] The statute requires each state to establish "an Exchange" to sell ACA-compliant health insurance plans.[113] The statute, however, also provides that the federal government shall establish "such Exchange" in any state which refused or otherwise failed to establish its own Exchange under the Act.[114]

The ACA provides premium subsidies to help low-income individuals and families afford health insurance.[115] In the detailed provisions of the ACA specifying how subsidies are to be calculated for each individual, the text stated that the subsidy was to be paid to any income-qualified person who purchased insurance on "an Exchange established by the State."[116] The question the Supreme Court had to answer was whether individuals who purchased insurance on Exchanges established by the federal government were entitled to the premium subsidies.

Without premium subsidies, the vast majority of Americans who needed to buy insurance policies on the ACA-required Exchanges would be unable to afford them and in fact would be relieved of their obligation to pay a penalty for failing to purchase insurance.[117] Without the subsidies, the health insurance markets in states that did not create their own exchanges could collapse because of the prohibition on considering preexisting conditions when offering and pricing insurance, along with an insufficient number of healthy individuals who would purchase insurance.[118] In addition, the ACA provisions subjecting employers to fines for failing to provide their employees adequate health insurance depended on one of their employees obtaining subsidized insurance from an exchange.[119] Hence, interpreting the term "Exchange established by the

[111] 576 U.S. 473 (2015).

[112] *Id.* at 478-79.

[113] 42 U.S.C. § 18031(b)(1) (2018).

[114] 42 U.S.C. § 18041(c)(1).

[115] *See* 26 U.S.C. § 36B(b)-(c).

[116] The Act provides: "[T]he amount of the tax credit depends in part on whether the taxpayer has enrolled in an insurance plan through 'an Exchange *established by the State* under section 1311 of the Patient Protection and Affordable Care Act.'" *King*, 576 U.S. at 483 (quoting 26 U.S.C. §§ 36B(b)-(c)).

[117] *See id.* at 493-94.

[118] *Id.* (noting that death spiral for insurance markets would not be limited to individuals purchasing insurance on ACA exchanges).

[119] *See* Mark Seidenfeld, *Tax Credits on Federally Created Exchanges: Lessons from a Legislative Process Failure Theory of Statutory Interpretation*, 99 MINN. L. REV. HEADNOTES

State" literally would remove the mechanism for enforcing the mandate that employers provide adequate health insurance.

Despite the huge significance of this issue,[120] the legislative history of the ACA did not expressly address the question.[121] In fact, no one seemed to be aware of the potential problem until two opponents of the ACA, Professor Jonathan Adler and Michael Cannon, after searching for almost a year, identified the issue and realized that it held the potential to upend the operation of the entire exchange system.[122] It seems incongruous to include in the Act a provision that would undermine the Act in its entirety.[123] Adler and Cannon reasoned, however, that the limitation of subsidies to individuals purchasing insurance on state-created exchanges might have been meant to provide a powerful incentive for states to create exchanges.[124] Given this potential rationale for this provision, the fact that it would threaten to undermine the most fundamental purpose of the Act if states did not cooperate in implementing the ACA would not be sufficient to eliminate the possibility that it was part of the bargain Congress struck when voting for the Act.

The history of the ACA's enactment, however, provides a more meaningful indication that restriction of premium subsidies was not part of the bargain in enacting the ACA and therefore an absurd outcome even by textualist standards. In essence, Adler and Cannon read the detailed provision as a cudgel to force uncooperative states to comply with the Act's direction to establish health insurance exchanges. But there is a problem with this explanation for reading the limitation on subsidies literally. One does not wield a cudgel as a threat to induce behavior by hiding the cudgel. The fact that no one was aware of the potential threat to the ACA created by the provision buried in the details of how to calculate subsidies entirely undermines the only legitimate explanation for why anyone in Congress might have wanted to limit subsidies to purchasers of

101, 103-04, 104 nn.15-16 (2015), http://www.minnesotalawreview.org/wp-content/uploads/2015/02/Seidenfeld_1fmt.pdf [https://perma.cc/P7GQ-XD6G].

[120] "The tax credits are among the Act's key reforms, involving billions of dollars in spending each year and affecting the price of health insurance for millions of people." *King*, 576 U.S. at 485.

[121] Seidenfeld, *supra* note 119, at 112-16.

[122] *See generally* Jonathan H. Adler & Michael F. Cannon, *Taxation Without Representation: The Illegal IRS Rule to Expand Tax Credits Under the PPACA*, 23 HEALTH MATRIX 119 (2013).

[123] As the majority in *King* put it: because the effect of limiting the subsidies would essentially destroy the operation of the entire Act, Congress would not have intended that the subsidies not be available to purchasers of insurance on federally-created exchanges. *King*, 576 U.S. at 475-76.

[124] Adler & Cannon, *supra* note 122, at 151 ("Making credits and subsidies available solely through state-run Exchanges is consistent with the [ACA]'s modus operandi of using financial incentives to elicit a desired behavior.").

insurance on exchanges actually created by a state.[125] Thus, one could conclude that there is no reason anyone would have bargained to include the limitation in the ACA. Hence, by the rationale textualists use to justify their invocation of the absurdity doctrine, this literal reading of the ACA would qualify as absurd.

IV. TEXTUALISM AS A GUARANTEE THAT THE PUBLIC HAS NOTICE OF THE MEANING OF THE LAW

Another potential argument in favor of textualism is that the law should provide notice to members of the public of what is required of their behavior.[126] Thus, the meaning of a statute should be consistent with how the public would read the text. This goal of statutory interpretation, however, would best be served by nonoriginalist textualism, in which courts would read a statute according to its most likely public meaning at the time that the statute is applied to the conduct at issue in the case. This would credit changes in the meaning of words, or other usages of language, in determining statutory meaning.[127]

This is, however, not the approach of the textualist school of statutory interpretation[128] and, to some extent, with good reason. First, updating statutory meaning for changes in current usage renders the law uncertain because people could not rely on prior interpretation as a guide to what conduct is allowed.[129] It

[125] Seidenfeld, *supra* note 119, at 128-29.

[126] In reality, few individuals know the text of statutes that proscribe their behavior, so the desire that the law provide notice of what it requires is often aspirational and symbolic. Nonetheless, the legal system's demand for due process of law takes seriously this aspirational and symbolic demand. *See* Cass R. Sunstein, Chevron *as Law*, 107 GEO. L.J. 1613, 1639 n.120 (2019) ("[I]nterpretations . . . would raise due process questions . . . if they result[ed] in the imposition of penalties without providing fair notice.").

[127] Lawrence B. Solum, *The Fixation Thesis: The Role of Historical Fact in Original Meaning*, 91 NOTRE DAME L. REV. 1, 23 (2015) ("Conventional semantic meanings are time-bound: because of the phenomenon of linguistic drift, the words that I am using now . . . could change—as could the syntactic regularities that we sometimes call 'rules of grammar.'").

[128] According to Judge Easterbrook, "Words don't have intrinsic meanings; the significance of an expression depends on how the interpretive community *alive at the time of the text's adoption* understood those words." Frank H. Easterbrook, *Foreword* to SCALIA & GARNER, *supra* note 12, at xxi, xxv (emphasis added); *see also, e.g.*, SCALIA & GARNER, *supra* note 12, at 78-79.

[129] Written laws are meant to be understood and lived by. If a fog of uncertainty surrounded them, if their meaning could shift with the latest judicial whim, the point of reducing them to writing would be lost. That is why it's a "fundamental canon of statutory construction" that words generally should be "interpreted as taking their ordinary, contemporary, common meaning . . . at the time Congress enacted the statute." Congress alone has the institutional competence, democratic legitimacy, and (most importantly) constitutional authority to revise statutes in light of new social problems and preferences. Until it exercises that power, the people may rely on the original meaning of the written law.

also introduces the potential to undermine the "rule of law" as accepted semantic meaning changes.[130] But perhaps most problematically, changes in usage of language are independent of the reasons the text of the statute was enacted.[131] Thus, updating for such changes will result in arbitrary changes in statutory meaning that are overwhelmingly likely to worsen the operation of the law from anyone's standpoint.

Because the different meaning perceived by the interpreting judge using the most likely current public meaning does not reflect the context of the problem the statute is trying to solve, differences in meaning will not relate to the matter the statute addresses. One can analogize such differences to the effects of a genetic mutation on an individual organism.[132] The genetic makeup of an organism has been honed by natural selection to serve that individual organism well so long as its environment remains stable.[133] It is possible that a genetic mutation might actually provide an advantage for survival of the mutated

Wisconsin Cent. Ltd. v. United States, 138 S. Ct. 2067, 2074 (2018) (alteration in original) (citation omitted) (quoting Perrin v. United States, 444 U.S. 37, 42 (1979)).

[130] Although textualists eschew reliance on current public meaning of text out of respect for certainty and the rule of law, perhaps surprisingly they are more willing than purposivists to override well-established prior interpretations, which undermines the rule of law to which textualists otherwise seem wedded. *See* Krishnakumar, *supra* note 76, at 160.

[131] In essence, "[t]he semantic content of a writing is fixed by linguistic facts about patterns of usage at the time the text is authored. Subsequent linguistic drift does not change the meaning of a prior writing, although it could result in changing beliefs about that meaning." Solum, *supra* note 127, at 24 (footnote omitted). Thus, if one wants to credit the communicative content of the text of a statute, it is necessary to read the language as it would have been read by the legislators who voted on it.

[132] Genetic mutation is a biological process that occurs when copies of an organism's genetic material deviate from their original sequencing. Mutation can either occur naturally during cell division or due to imperfect repairs to an organism's DNA after it is exposed to radiation or mutagenic chemicals. *The Causes of Mutations*, UNDERSTANDING EVOLUTION, https://evolution.berkeley.edu/evolibrary/article/evo_20 [https://perma.cc/795L-846U] (last visited Sept. 16, 2020). In addition, much like the arbitrariness introduced where an audience attributes a different meaning to a text than does the speaker, traditional evolutionary theory posits that the changes in traits caused by mutation are random and arbitrary. The fact that a mutation has occurred says nothing about if it will have a positive or negative bearing on the organism's overall fitness. *Mutations*, UNDERSTANDING EVOLUTION, https://evolution.berkeley.edu/evolibrary/article/evo_18 [https://perma.cc/2NPY-JJ2T] (last visited Sept. 16, 2020).

[133] Systemic changes in an organism's habitat, however, may ultimately serve to be beneficial or detrimental to the organism. *Environmental Change*, CORNELL U. DEP'T OF ECOLOGY & EVOLUTIONARY BIOLOGY, https://ecologyandevolution.cornell.edu/environmental-change-biodiversity [https://perma.cc/S8CE-4GN4] (last visited Sept. 16, 2020).

organism over its unmutated progenitors. But any genetic mutation is random,[134] and because the genetics of the organism have been developed to maximize its chance of survival and reproduction, a random change in its genetics that has any noticeable effect is overwhelmingly likely to change the genetic makeup of the organism away from a form that provides greater probability of survival.[135] Similar to the genetic makeup of an organism, the text of a statute is the culmination of a process meant to signal some meaning that those who voted for the statute had in mind. But if there is no reason that any difference between how the language might be understood by the audience and the legislators who voted for it would relate to the matter the legislature meant to address, then, like a mutation, such a difference will be an arbitrary change in meaning. It is most likely to drive the perceived meaning of the text to a state which is less helpful to solving whatever problem prompted the legislature to enact the legislation in the first place.

As for the functional goal that law serve the public interest, the desire that law put people on notice of what it requires from them requires some balance between the need for the public to be able to accurately read the text of statutes and the potential for uncertainty and arbitrariness that would result from textual updating of statutory meaning. And this balance will depend on the nature of the statute at issue: such notice is less important for what H.L.A. Hart termed

[134] Some geneticists question the assumption of traditional evolutionary theory that mutations are random with respect to an organism's traits. These geneticists believe that organisms sometimes respond to changes in their environments with biased mutations—mutations that improve the chances of the species' survival in its new environment. *See* Barbara E. Wright, *A Biochemical Mechanism for Nonrandom Mutations and Evolution*, 182 J. BACTERIOLOGY 2993, 2998-99 (2000). The theory of biased mutation is controversial. *See* P.D. Sniegowski & R.E. Lenski, *Mutation and Adaptation: The Directed Mutation Controversy in Evolutionary Perspective*, 26 ANN. REV. ECOLOGY & SYSTEMATICS 553, 553 (1995). In any case, it is not relevant to my analogy between mutations and changes in the meaning of language because the mechanisms that might cause biased mutations do not apply to changes in the language that would affect the meaning of a particular statutory provision.

[135] "[B]eneficial mutations with big effects are rare . . . because when an organism is already living in a particular environment . . . [it] is already adapted to it, and so does not need (or can even go through [i.e., survive]) radical changes." Catarina Amorim, *Beneficial Bacterial Mutations Happen More Often Than Thought*, SCIENCE 2.0 (Aug. 14, 2007, 2:00 AM), https://www.science20.com/amorca/beneficial_bacterial_mutations_happen_more_often [https://perma.cc/V723-8QWQ]; *see also* Lydia Robert, et al., *Mutation Dynamics and Fitness Effects Followed in Single Cells*, 359 SCI. 1283, 1283 (2018) (reporting controlled study showing that among mutations of single-cell bacteria, vast majority had no effect on organism (i.e., were neutral) but one percent were lethal); Laurence Loewe, *Genetic Mutation*, SCITABLE BY NATURE EDUC. (2008), https://www.nature.com/scitable/topicpage/genetic-mutation-1127/ [https://perma.cc/8XRE-URGY] (stating that beneficial mutations do not happen often because usually organism cannot benefit from them, and further noting that "biological systems go to extraordinary lengths to keep [mutations] as low as possible, mostly because many mutational effects are harmful").

secondary rules of law, as compared to primary rules of law.[136] And even within primary rules of law, the need for individuals to be able to know what the law requires of them is weightier for criminal statutes than the rules of civil law. In fact, in our legal system, this balance has been struck by several substantive principles of law rather than by fundamentally altering statutory interpretation to reflect changes in the meaning of language. Thus, due process excuses individuals from punishment when the statute which they are alleged to have violated does not give them sufficiently clear notice of the conduct it requires.[137] And the rule of lenity requires courts to resolve ambiguities in criminal statutes in favor of the accused.[138] What is key about both of these doctrines, which are accepted by textualists,[139] is that they accept the potential for imperfection in how the text of a statute communicates what the statute requires.

V. IMPLICATIONS OF TEXTUALISM'S TROUBLED THEORETICAL FOUNDATION

Given my conclusion that intent should trump the best meaning of the statute, the first implication of textualism's weak foundation is that courts should give statutes the meaning the legislature intended when such intent exists and can be reliably discerned. In questioning the theoretical foundation for textualism, however, I do not mean to suggest that the textualist critique of judicial use of legislative history is misguided or useless. Certainly examples of judges parsing legislative history to find tidbits that support the outcome they prefer abound.[140]

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[136] H.L.A. HART, THE CONCEPT OF LAW 94 (1961) (defining primary rules of law as those that permit, prohibit or regulate person's conduct and secondary rules as those that govern establishment and enforcement of primary rules).

[137] [T]he void for vagueness doctrine addresses at least two connected but discrete due process concerns: first, that regulated parties should know what is required of them so they may act accordingly; second, precision and guidance are necessary so that those enforcing the law do not act in an arbitrary or discriminatory way.

FCC v. Fox Television Stations, Inc., 567 U.S. 239, 253 (2012).

[138] Thus, the Supreme Court has noted that one of the "purposes underlying the rule of lenity [is] to promote fair notice to those subject to the criminal laws." United States v. Kozminski, 487 U.S. 931, 952 (1988).

[139] For example, Justice Scalia was a strong proponent of using the rule of lenity to interpret what otherwise is an ambiguous criminal statute. David S. Romantz, *Reconstructing the Rule of Lenity*, 40 CARDOZO L. REV. 523, 561-65 (2018). He also suggested that he would strike down the Racketeering Influence and Corrupt Organizations Act term "pattern of racketeering activity" as unconstitutionality vague had the issue been raised in the particular case. H.J. Inc. v. Nw. Bell Tel. Co., 492 U.S. 229, 254-56 (1989) (Scalia, J., concurring in the judgment).

[140] Some judges appear to have recognized their brethren's tendency to use legislative history to reach a desired outcome. *See* Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 214 (1983) ("It sometimes seems that citing legislative history is still, as my late colleague [Judge] Harold Leventhal once observed, akin to 'looking over a crowd and picking out your friends.'").

Similarly, judges liberally crediting legislative history as accurately indicating the meaning of a statute gives legislators incentives to salt that history with purported meaning that they prefer but which they could not get through the legislative process.[141] As I argued above, however, one cannot expect the legislature to use textualism to ensure that the meaning that judges give to the texts they enact agree with the understanding of the legislators who voted on them. Only by subjecting every potentially ambiguous or misleading provision of every bill to a textualist analysis can legislators be confident that the best objective meaning of the statute comports with their understanding of the language. And identifying every provision for which the best meaning of the statutory text might not reflect a consensus understanding of that provision would impose an insurmountable burden on the legislature.

Once the legislature becomes aware of the likelihood that a textualist reading of a particular statutory provision may implement a different understanding than that of the legislators who plan to vote for it, however, the barrier to clarifying or correcting that language is not particularly high.[142] The greatest barrier at that point is the burden of overcoming the inertia of getting both houses of Congress and the President to agree to clarification or correction of the problematic provision. That inertia, however, is part of the nature of the legislative process specified by the Constitution. Hence the burden of overcoming legislative inertia is a barrier that the Constitution intentionally imposes for enacting legislation.[143]

Textualists also argue—cogently, I think—that legislative history can be manipulated by nonmajority factions or even individuals in Congress, or perhaps even by members of congressional staff.[144] Thus, one valid lesson that

[141] *See* Blanchard v. Bergeron, 489 U.S. 87, 97-100 (1989) (Scalia, J., concurring in part and concurring in the judgment).

[142] *See* Seidenfeld, *supra* note 30, at 507-08.

[143] The legislative process includes many barriers to making these changes, such as competing legislative priorities, veto gates, filibusters, and a host of other procedural hurdles that inhere Congress's current system of enacting legislation. But the textualist point that inserting language in legislative history to circumvent the framers' intentional design that the legislative process be difficult, even for legislation that a majority of legislators in both houses might favor, explains why Congress should bear the burden of amending a statutory provision to clarify known problems with its text. *See* Manning, *The Absurdity Doctrine*, *supra* note 28, at 708-09; *see also* Thompson v. Thompson, 484 U.S. 174, 191-92 (1988) (Scalia, J., concurring in the judgment) ("An enactment by implication cannot realistically be regarded as the product of the difficult lawmaking process our Constitution has prescribed. Committee reports, floor speeches, and even colloquies between Congressmen are frail substitutes for bicameral vote upon the text of a law and its presentment to the President." (citation omitted)).

[144] Nina A. Mendelson, *Change, Creation, and Unpredictability in Statutory Interpretation: Interpretive Canon Use in the Roberts Court's First Decade*, 117 MICH. L. REV. 71, 74 (2018); Thomas W. Merrill, *Learned Hand on Statutory Interpretation: Theory and Practice*, 87 FORDHAM L. REV. 1, 15 (2018). This critique of use of legislative history has clearly affected mainstream (nontextualist) statutory interpretation. For example, in *Exxon*

textualism teaches is that judges should be much more careful than they often are about using legislative history.[145] For instance, given the low cost of amending statutes to clarify meaning that legislators have recognized is at odds with their understanding, courts should be especially skeptical of legislative history that clearly identifies problematic text in a bill and asserts what that text should mean.[146] Inclusion of such assertions as a substitute for amending the statute can reasonably be viewed as evidence of manipulation of legislative history that should not be credited in discerning legislative intent.

Once a court determines that it cannot reliably discern congressional intent with respect to a particular interpretive question—which is the circumstance in by far the majority of cases—textualism has significant appeal as an approach to statutory interpretation. Lacking compelling nontextual evidence of legislative consensus about the meaning of the text, a court has no guidance about how to interpret the statute other than its text, taking the structure, the statute, and the context in which it was passed into account.[147] But crucially, the reason for doing so is not some inherent legitimacy of text over intent.[148] Nor does the need for a mechanism of institutional settlement between legislative and judicial understanding of the statute provide a theoretical basis for crediting the most likely public meaning of the text as the proper interpretive inquiry.[149] Therefore, if legislative supremacy is to be respected, the argument for textualism in such a case has to be that in the absence of other evidence of legislative intent, the public meaning of the statutory text at the time of

Mobil Corp. v. Allapattah Services, Inc., 545 U.S. 546 (2005), Justice Kennedy's opinion for the Court made clear that he would use legislative history in appropriate circumstances but warned: "[J]udicial reliance on legislative materials . . . may give unrepresentative committee members—or, worse yet, unelected staffers and lobbyists—both the power and the incentive to attempt strategic manipulations of legislative history to secure results they were unable to achieve through the statutory text." *Id.* at 568.

[145] *See, e.g.*, United States v. Fields, 500 F.3d 1327, 1331 n.5 (11th Cir. 2007); United States v. Awadallah, 349 F.3d 42, 54 (2d Cir. 2003).

[146] *See, e.g.*, Cont'l Can Co. v. Chi. Truck Drivers, Helpers & Warehouse Workers Union (Indep.) Pension Fund, 916 F.2d 1154, 1158-59 (7th Cir. 1990) (rejecting statement contrary to clear meaning of bill's text that Senator Durenberger inserted into record after House and Senate had agreed on relevant language); FEC v. Rose, 806 F.2d 1081, 1089-90, 1090 n.15 (D.C. Cir. 1986) (noting that House Committee Report included statement contrary to language of Act accompanied by no analysis and was rejected by numerous statements by bill sponsors on floor of both House and Senate), *rev'd sub nom. In re* Nat'l Cong. Club, Nos. 84-5701, 84-5719, 1984 WL 148396 (D.C. Cir. Oct. 24, 1984) (per curiam).

[147] There may, however, be an alternative to resort to textualism to discern legislative intent. A court might read the staute to call for another institution—usually a court or agency—to interpret the statute applying the tools that the institution has traditionally used. *See infra* notes 151-53 and accompanying text.

[148] *See supra* Part I.

[149] *See supra* Part II.

enactment represents the most probable understanding harbored by any particular legislator who voted on the statute. Because Congress and federal judges both speak English as a common language, even though legislators cannot perform a complete textualist analysis ex ante to verify the likely textualist interpretation of all provisions of a bill, all else being equal, the commonly understood meaning of the text is most likely to reflect legislative intent if in fact such intent existed.[150]

Given that much of the textualist warning about judicial abuse of legislative history is valid, and the potential propriety of using textualist techniques to resolve interpretive issues when reliable legislative history is not available to reveal congressional intent, one might ask whether I have essentially created a strawman. Textualism may be theoretically bankrupt, but if there is not a reliable indication of congressional intent on the vast majority of questions and much of the substance of legislative history is suspect and therefore should not be considered, then pragmatically textualist interpretation and intentionalist interpretations collapse into the same inquiry. Nonetheless, even if textualists are correct that in practice legislative history is usually unreliable, the theoretical weakness of textualism's foundation has implications for how courts should interpret statutes in many cases.

First, in the absence of reliable nontextual evidence of a consensus understanding of a statutory provision, the legislators may have harbored an expectation that courts would use some decoding mechanism other than the ordinary linguistic rules and other tools on which textualists rely.[151] In particular, the willingness to enact statutory language without a shared consensus about its meaning may reflect an understanding by a majority of legislators who voted for the statute to authorize the interpreter to use nontextualist judicial approaches to resolve statutory uncertainty—essentially a metaintent regarding interpretive methodology.[152] For example, legislators may have been content simply to cabin

[150] *See* Caleb Nelson, *A Response to Professor Manning*, 91 VA. L. REV. 451, 453 (2005) (arguing that the notion of legislative bargain, on which textualists rely, requires some intent of collective legislative body and that one "could view textualism as the interpretive approach likely to produce the best match between judicial outcomes and the collective legislative intentions that do in fact exist").

[151] The Legal Process purposive approach to statutory interpretation, though grounded in the view that courts should facilitate Congress in its role as problem solver, *see* Manning, *Without the Pretense*, *supra* note 3, at 2419-20, can easily be recast as based on the congressional expectation that this is what courts would do. *Cf.* ADRIAN VERMEULE, JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION 31 (2006).

[152] *See* Gluck & Posner, *supra* note 97, at 1311 (noting that older judges "were more forthright about the quasi-legislative activity that statutory interpretation by judges entails, and discussed openly whether gaps in statutes could be understood as delegation by Congress to the courts"); *cf.* Ethan J. Leib & Michael Serota, *The Costs of Consensus in Statutory Construction*, 120 YALE L.J. ONLINE 47 (2010), https://www.yalelawjournal.org/forum/the-costs-of-consensus-in-statutory-construction [https://perma.cc/F3JC-WCGL] ("In the world

potential interpretation of an ambiguous provision and leave the ultimate interpretation within those bounds to the reasoned judgment of another institution such as a court or an agency,[153] whose job requires such interpretation. If one accepts that Congress has authority to dictate the mechanism by which courts are to interpret statutes,[154] then by my view of the significance of intent, such a metaintent would trump textualist methodology and in fact would call into question textualism's entire perception of the role of judges in statutory interpretation.

Justice Scalia has stated that he did not accept that Congress has the authority to instruct judges how to interpret statutes.[155] But the authority to enact statutes cannot easily be separated from the authority to tell courts how to interpret them. Instructions on how to construe statutes provide signals about the meaning that Congress understands the statute to have, which performs the same function as the specification of the text itself. Even Justice Scalia recognized congressional authority to tell courts how to interpret statutes in some contexts. For example, he consistently stated that when a statute includes a definition, that definition overrides the generally understood meaning of the word that the statute

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of what are sometimes known as common law statutes, broad delegation to the judiciary is uncontroversial, and the legislature expects judges to develop the law over time by utilizing a free-form common law method. This is what might be called the enactor's 'meta-intent.'").

[153] This essentially is the kind of justification the Supreme Court and several scholars have provided for the Chevron doctrine. *See, e.g.*, United States v. Mead Corp., 533 U.S. 218, 226-31 (2001); John F. Duffy, *Administrative Common Law in Judicial Review*, 77 TEX. L. REV. 113, 189-207 (1998); Thomas W. Merrill, *Rethinking Article I, Section 1: From Nondelegation to Exclusive Delegation*, 104 COLUM. L. REV. 2097, 2171-75 (2004); Thomas W. Merrill & Kristin E. Hickman, Chevron*'s Domain*, 89 GEO. L.J. 833, 837 (2001).

[154] In viewing such a metaintent as delegating the interpretive exercise to the courts or an agency, I accept the premise that Congress has the authority to instruct how it wishes statutes to be interpreted. *See* Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085, 2086-88 (2002) (defending generally accepted view that Congress can tell courts how to interpret statutes).

[155] [A] legislature's prescription of how courts are to interpret its own product is quite different.

> An interpretive command applicable to *all* statutes is . . . problematic—more likely to be an intrusion upon the courts' function of interpreting the laws, rather than an exercise of the legislature's power to clarify the meaning of its product. . . . Since fair interpretation is what the Constitution requires, instructing the courts to interpret fairly may make Congress a busybody, may be ultra vires, but does not have any effect.

SCALIA & GARNER, *supra* note 12, at 244-46; *see also* Mistretta v. United States, 488 U.S. 361, 417 (1989) (Scalia, J., dissenting) ("[A] certain degree of discretion, and thus of lawmaking, *inheres* in most executive or judicial action, and it is up to Congress, by the relative specificity or generality of its statutory commands, to determine—*up to a point*—how small or how large that degree shall be." (second emphasis added)).

defines.[156] In addition, Justice Scalia signed on to numerous opinions reading the enactment of an ambiguous statute to imply a congressional delegation of authority to interpret the statute to an agency acting to implement that statute.[157]

Of course, the problem of determining whether the members of Congress generally shared an understanding about how a statute was to be decoded remains. For example, how should a judge determine whether a statute allows them leeway to use traditional purposivist methods of statutory interpretation? One factor that might bear on a court's choice between textualism and purposivism to resolve a particular interpretive controversy is the precision versus breadth of the term that is being construed. A broad term signals an invitation for courts to use their judgment about how to best fill in the details of the statute to achieve its purposes, while a more narrow term indicates that members of Congress had in mind a particular outcome and therefore understood that the language alone would resolve issues of interpretation. Thus, on the one hand, it seems reasonable for the Court in *Yates v. United States*[158] to have relied on the purposivist approach of looking at the problem that prompted the legislation to answer the question: does a provision making it a crime to conceal "any record, document, or tangible object with the intent to impede" a federal investigation, enacted as part of a statute that imposed financial regulations prompted by the Enron fraud scandal, apply to the captain of a fishing boat who ordered a crew member to throw fish overboard to avoid detection of catching undersized fish?[159] On the other hand, in *West Virginia University Hospitals, Inc. v. Casey*,[160] the particularized nature of the term "attorney's fee" suggests that textualism was appropriate for resolving the question of whether a statute that allowed "attorney's fees" to a party that prevails in civil rights actions authorizes recovery of expert witness fees.[161]

The consistency and reliability of the legislative history also provides some basis for the courts to consider that history rather than technical arguments about language or statutory structure to resolve statutory ambiguity. For example,

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[156] *See, e.g.*, Johnson v. United States, 529 U.S. 694, 715 (2000) (Scalia, J., dissenting) ("The term 'revoke' is not defined by the statute, and thus should be construed 'in accordance with its ordinary or natural meaning.'" (quoting FDIC v. Meyer, 510 U.S. 471, 476 (1994))); Smith v. United States, 508 U.S. 223, 228 (1993) ("When a word is not defined by statute, [the Court] normally construe[s] it in accord with its ordinary or natural meaning.").

[157] *See e.g.*, City of Arlington v. FCC, 569 U.S. 290, 296 (2013) ("*Chevron* is rooted in a background presumption of congressional intent: namely, 'that Congress, when it left ambiguity in a statute' administered by an agency, 'understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows.'" (quoting Smiley v. Citibank (S.D.), N.A., 517 U.S. 735, 740-41 (1996))); Negusie v. Holder, 555 U.S. 511, 523 (2009).

[158] 574 U.S. 528 (2015).

[159] *Id.* at 531 (quoting 18 U.S.C. § 1519 (2018)).

[160] 499 U.S. 83 (1991).

[161] *Id.* at 83-84.

judicial reliance on legislative history seemed proper in *Corning Glass Works v. Brennan*,[162] because: the House and Senate Committee hearings included consistent criticism that the initial draft of the bill, which eventually became the Equal Pay Act of 1963, failed to take account of industry standards for pay based on widely used industry job evaluation plans; the bill was subsequently amended to include the precise language used by virtually all such plans; and the House Committee Report indicated that this amendment incorporated factors "found in a majority of the job classification systems."[163] Furthermore, there did not appear to be any discussion in the legislative history of the precise meaning of the terms, which suggests that their addition did not reflect an attempt to induce a court to incorporate a meaning that a subset of legislators may not have been able to get Congress to enact into law. In that case, the legislative history seems convincingly to manifest the propriety of reading the term "working conditions" consistently with its meaning within job evaluation plans and therefore not to include day versus night shift.[164] Sharply contrasting with that use of legislative history is the majority's reliance on it in *Blanchard v. Bergeron*,[165] in which a Senate Committee Report included an esoteric reference to three district court cases that had held that the statutorily prescribed award of "reasonable attorney's fees" did not cap that award by the amount the plaintiff had agreed to pay its attorney.[166] Justice Scalia, in his concurrence, noted convincingly that it was almost certain that few, if any, of the members of Congress read the cases mentioned in the Report to understand their significance.[167]

Of course, textualists remind all who will listen that legislative history is subject to manipulation by a minority of legislators or possibly even a mere member of the staff of the committee responsible for bringing the bill to the floor of the chamber.[168] Thus, judges should be wary of lightly assuming that a statute expects them to use such legislative history and other potentially nontextualist tools to determine the meaning of a narrow statutory phrase. But by the same token, the lack of a legitimate theoretical underpinning for textualism

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[162] 417 U.S. 188 (1974).

[163] *Id.* at 201 (quoting H.R. REP. NO. 88-309, at 3 (1963)).

[164] *Id.* at 189.

[165] 489 U.S. 87 (1989).

[166] *Id.* at 87.

[167] *Id.* at 98-99 (Scalia, J., concurring in part and concurring in the judgment).

[168] Justice Scalia expressed his concern about manipulation of legislative history colorfully in one of his most famous textualist opinions, stating:

> As anyone familiar with modern-day drafting of congressional committee reports is well aware, the references to the cases were inserted, at best by a committee staff member on his or her own initiative, and at worst by a committee staff member at the suggestion of a lawyer-lobbyist; and the purpose of those references was not primarily to inform the Members of Congress what the bill meant . . . , but rather to influence judicial construction.

Id.

concomitantly warns judges to consider that Congress might have preferred that courts not rely blindly on the textualist meaning of a statute independent of current context of the issue the statute addresses.[169] And this warning sounds especially loudly when a court uses strict textualism to reject a longstanding and well-functioning interpretation of a statute that incorporated the legal understandings of the time when it was enacted to further the purposes of the statutory provision.[170] The warning rings even louder when that longstanding interpretation was accepted by every circuit court[171] and when Congress has amended the statute since the original lower court interpretations without altering those interpretations.[172]

A second implication of the weakness of textualism's theoretical underpinnings stems from recognizing that well-placed legislators or even staff members whose preferred understanding of the language of a statute is not shared by a majority of legislators can manipulate statutory text as well as legislative history. Stories are commonplace of a member of Congress benefitting her constituents by surreptitiously slipping provisions into enormous and complex omnibus bills in a manner that evades detection during the legislative vetting process.[173] I assume that, in some instances, drafters

[169] *See, e.g.*, Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164, 188 (1994) ("Policy considerations cannot override our interpretation of the text and structure of the Act . . . ."); *see also id.* at 195 (Stevens, J., dissenting) (noting that Congress enacted § 10(b) of Securities and Exchange Act of 1934 against background assumption "that a statute enacted for the benefit of a particular class conferred on members of that class the right to sue violators of that statute").

[170] *See, e.g.*, *id.* at 192-93 (Stevens, J., dissenting) (noting that courts had consistently interpreted § 10(b) of Securities and Exchange Act of 1934 to authorize tort suits against aiders and abettors of statutory violators to effectuate statute's remedial purposes in compensating victims of securities fraud for first sixty years after statute was enacted); *see also* Krishnakumar, *supra* note 76, at 215; Adrian Vermeule, *Interpretive Choice*, 75 N.Y.U. L. REV. 74, 74 (2000).

[171] *See, e.g.*, *Cent. Bank of Denver*, 511 U.S. at 192-93 (Stevens, J., dissenting) (noting that all eleven circuits had held or opined that § 10(b) of Securities and Exchange Act of 1934 authorized tort suits against aiders and abettors of statutory violators).

[172] *See, e.g.*, *id.* at 196-97 (noting that Congress had amended Securities and Exchange Act of 1934 without changing interpretation of circuit courts).

[173] For many statutes, the drafting process is somewhat haphazard and not careful enough to ensure against inclusion of language with which a majority of legislators might not agree. *See* MIKVA & LANE, *supra* note 85, at 96 ("Legislators may vote on amendments to a bill solely on the basis of a quick staff briefing."); Katzmann, *supra* note 82, at 655 ("[L]obbyists, businesses, and state and local governments . . . may assist in drafting bills . . . but not necessarily with the care that the Office of Legislative Counsel provides."); Nourse & Schacter, *supra* note 81, at 592-93. For drafting in conference committee, time constraints often prompt unvetted insertion of language. Nourse & Schacter, *supra* note 81, at 593. Congressional staffers indicated that such last minute drafting raised fears of "provisions

surreptitiously word a provision of a bill so that the meaning likely to emerge from a textualist analysis is not the shared understanding of a majority of legislators. Textualists would not hesitate to give the best objective meaning to such language because, for them, the language, having been voted upon, takes on significance in its own right.[174] But if legislative intent is the true compass for statutory interpretation—if statutory language is significant only as evidence of legislative intent—then a court should be careful before crediting the objectively best reading of such language when there is evidence that a legislator introduced it into the statute to subvert the consensus will of the legislature. By a similar argument, observers should be skeptical of a judge who would read isolated text, easily glossed over in the messy and complicated process of enacting a complicated statute, in a manner that would undermine the effective operation of the entire statute.[175]

CONCLUSION

Textualism's theoretical justifications cannot sustain a preferred position for the inquiry into the best objective meaning of a statutory provision as the mechanism for statutory interpretation. When subjective legislative intent, as I define it in this Article, exists and is discernible by compelling evidence, Article I of the U.S. Constitution requires that courts interpret statutes in accordance with that intent. Even when such intent is not discernible, textualism's bankrupt theoretical foundation counsels against resorting to textulism as the sole legitimate mechanism for statutory interpretation. For this reason, although this Article does not deny much of textualism's critique of nontextualist statutory interpretation, it counsels that courts should not simply presume the propriety of the textualist mechanism. Rather, courts should consider whether, for any interpretative issue, textualist critiques render other mechanisms of interpretation sufficiently problematic such that courts should resort to textualism as the best evidence of the most likely meaning that legislators gave to statutory text. But courts should also consider whether for a particular statutory interpretive issue, such other mechanisms are likely to result in interpretations that better serve the public interest in light of current societal values and apply such nontextualist mechanisms in instances where they are likely to lead to superior legislative outcomes.

being 'slipped in,' people losing track of whether one provision squared with another, or a provision being added to satisfy the needs of a [particular] senator." *Id.*

[174] *See supra* notes 4-5 and accompanying text.

[175] It is conventional wisdom, by now, in statutory interpretation theory, to argue that the use of legislative history is unwise because it allows judges to pick and choose their friends in the legislative record. What is not so conventional wisdom, but should be, is that *it is also possible to pick and choose one's friends in statutory text*.

Victoria Nourse, *Picking and Choosing Text: Lessons for Statutory Interpretation from the Philosophy of Language*, 69 FLA. L. REV. 1409, 1410 (2017) (footnote omitted).