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## The Missing Step of Textualism

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## The Missing Step of Textualism

### Cover Page Footnote

Professor, Fordham University School of Law. Many thanks to Kent Greenwalt, John Nagle, Caleb Nelson, Aaron Saiger, Fred Schauer, and participants at the Fordham conference on the Jurisprudence of Justice Stevens for helpful comments. I am also forever grateful to Justice Stevens for teaching me so much during my clerkship, and through the years, especially, for purposes of this Essay, his wise lessons about how to read statutes.

# THE MISSING STEP OF TEXTUALISM

*Abner S. Greene\**

## I

Throughout his more than thirty years on the U.S. Supreme Court, Justice John Paul Stevens has been a consistent proponent of a purposive, as opposed to textualist, brand of statutory interpretation. Of course his statutory interpretations begin with statutory text, but he understands and explains that the judicial role is to capture what Congress was up to when it wrote the statute, and that much evidence beyond statutory text is often necessary to accomplish this end.

Here is a sampling of Justice Stevens's view on going beyond statutory text in doing statutory interpretation. In the remainder of the Essay, I advance an overlooked argument for Justice Stevens's brand of statutory interpretation.

\* \* \*

In final analysis, any question of statutory construction requires the judge to decide how the legislature intended its enactment to apply to the case at hand. The language of the statute is usually sufficient to answer that question, but "the reports are full of cases" in which the will of the legislature is not reflected in a literal reading of the words it has chosen.<sup>1</sup>

\* \* \*

I have quoted at length from the legislative history of the [Act] because this history reveals the supposedly "plain" language of the statute to be not so plain after all.<sup>2</sup>

\* \* \*

In the domain of statutory interpretation, Congress is the master. It obviously has the power to correct our mistakes, but we do the country a disservice when we needlessly ignore persuasive evidence of Congress's

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1. *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 577 (1982) (Stevens, J., dissenting).

2. *Pittston Coal Group v. Sebben*, 488 U.S. 105, 145 (1988) (Stevens, J., dissenting).

actual purpose and require it “to take the time to revisit the matter” and to restate its purpose in more precise English whenever its work product suffers from an omission or inadvertent error.<sup>3</sup>

\* \* \*

Legislators, like other busy people, often depend on the judgment of trusted colleagues when discharging their official responsibilities. If a statute such as the Expedited Funds Availability Act has bipartisan support and has been carefully considered by committees familiar with the subject matter, Representatives and Senators may appropriately rely on the views of the committee members in casting their votes. In such circumstances, since most Members are content to endorse the views of the responsible committees, the intent of those involved in the drafting process is properly regarded as the intent of the entire Congress.<sup>4</sup>

\* \* \*

There are occasions when an exclusive focus on text seems to convey an incoherent message, but other reliable evidence clarifies the statute and avoids the apparent incoherence. In such a case—and this is one—we should never permit a narrow focus on text to obscure a commonsense appraisal of that additional evidence.<sup>5</sup>

\* \* \*

In recent years the Court has suggested that we should only look at legislative history for the purpose of resolving textual ambiguities or to avoid absurdities. It would be wiser to acknowledge that it is always appropriate to consider all available evidence of Congress’s true intent when interpreting its work product.<sup>6</sup>

\* \* \*

Because ambiguity is apparently in the eye of the beholder, I remain convinced that it is unwise to treat the ambiguity *vel non* of a statute as determinative of whether legislative history is consulted. Indeed, I believe that we as judges are more, rather than less, constrained when we make ourselves accountable to *all* reliable evidence of legislative intent.<sup>7</sup>

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3. *W. Va. Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 115 (1991) (Stevens, J., dissenting) (citation omitted).

4. *Bank One Chi. v. Midwest Bank & Trust Co.*, 516 U.S. 264, 276-77 (1996) (Stevens, J., concurring).

5. *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 472 (2002) (Stevens, J., dissenting).

6. *Koons Buick Pontiac GMC, Inc. v. Nigh*, 543 U.S. 50, 65 (2004) (Stevens, J., concurring).

7. *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 125 S. Ct. 2611, 2628 (2005) (Stevens, J., dissenting) (citation omitted).

## II

Most academic theories of statutory interpretation, and perhaps all judicial ones, see judges as agents of Congress.<sup>8</sup> Although there is a minority view that the judiciary should update statutes to accord more easily with contemporary mores, i.e., that judges should engage in “dynamic” statutory interpretation,<sup>9</sup> the mainstream position is still that judges should be faithful agents of the legislature.<sup>10</sup> I join the mainstream here, although for constitutional interpretation I believe a much less agentic judicial role is warranted. In the final section of this Essay I offer some brief reflections on this distinction. But the rest of my argument is part of an intramural dispute among faithful agent theorists.

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8. See Daniel A. Farber, *Statutory Interpretation and Legislative Supremacy*, 78 Geo. L.J. 281, 282, 292 (1989); Richard A. Posner, *Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution*, 37 Case W. Res. L. Rev. 179, 181, 189-90 (1986); see also T. Alexander Aleinikoff, *Updating Statutory Interpretation*, 87 Mich. L. Rev. 20, 21 (1988) (describing a certain version of the agentic theory as “archeological”); Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 Harv. L. Rev. 405, 415 (1989) (noting that the agency view of statutory interpretation “is usually defended by a claim of judicial legitimacy”).

9. See Aleinikoff, *supra* note 8, at 57-58; William N. Eskridge, Jr., *Legislative History Values*, 66 Chi.-Kent L. Rev. 365, 409, 418, 438 (1990) [hereinafter Eskridge, *Legislative History*]; William N. Eskridge, Jr., *Textualism, The Unknown Ideal?*, 96 Mich. L. Rev. 1509, 1523, 1529 (1988) [hereinafter Eskridge, *Unknown Ideal*]; William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. Rev. 621, 667 (1990) [hereinafter Eskridge, *New Textualism*]; William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 Stan. L. Rev. 321, 345, 358 (1990); Sunstein, *supra* note 8, at 423, 428, 439-41, 493-95. See generally William N. Eskridge Jr., *Dynamic Statutory Interpretation* (1994) [hereinafter Eskridge, *Dynamic*]. For a modified dynamic statutory interpretation view, see Farber, *supra* note 8, at 309. Einer Elhauge argues that when the meaning of a statutory term is unclear, and the political preferences of the enacting legislature and current legislature differ regarding how the term should be understood, a court should use interpretive default rules that maximize the enactable political preferences of the current legislature. See Einer Elhauge, *Preference-Estimating Statutory Default Rules*, 102 Colum. L. Rev. 2027, 2037, 2081 (2002). This view is different from dynamic statutory interpretation in that it does not look to “loose understanding about current public opinion,” *id.* at 2082, or allow judges to “make their own normative judgments,” but rather requires ascertaining whether the current legislature has preferences that are “truly enactable” (i.e., that would be able to survive the Article I, Section 7, lawmaking process), *id.* at 2106, and ensuring that such preferences have been “memorialized in official action,” *id.* at 2107, even if such action falls short of a statutory amendment to clarify the unclear term. Although Elhauge’s view differs from dynamic statutory interpretation in several ways, there is some affinity between the two views, as Elhauge acknowledges. See *id.* at 2039.

10. For critiques of the “dynamic” or updating view of statutory interpretation, see John F. Manning, *The Absurdity Doctrine*, 116 Harv. L. Rev. 2387, 2432 (2003) [hereinafter Manning, *Absurdity Doctrine*]; Richard A. Posner, *Statutory Interpretation—in the Classroom and in the Courtroom*, 50 U. Chi. L. Rev. 800, 810, 818 (1983); Antonin Scalia, *Common-Law Courts in a Civil Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in *A Matter of Interpretation: Federal Courts and the Law* 22 (Amy Gutmann, ed., 1997); Cass R. Sunstein & Adrian Vermeule, *Interpretation and Institutions*, 101 Mich. L. Rev. 885, 905-06 (2003). See generally John F. Manning, *Textualism and the Equity of the Statute*, 101 Colum. L. Rev. 1 (2001) [hereinafter Manning, *Textualism*].

The dispute is about whether, how, and to what extent judges should look beyond statutory text in their role as agents of the legislature. Textualists, or “new” textualists, cordon off much material outside of statutory text; although they explicitly warn against seeking legislative intent or purpose, they are not “updaters” or “dynamic” interpreters, but rather instruct courts to follow the ordinary meaning of the statutory term, as it was understood when enacted. Purposivists, or intentionalists, look at much more—legislative history and other background social understandings—in an effort to figure out what Congress was up to. The textualist argument, I contend, elides a crucial step, and once we understand the missing step, the case for purposivism becomes much stronger.

### III

Let’s begin with the grounding claim of textualism, that judges should look to the ordinary meaning, at the time of enactment, of the statutory term in question. For example, David Strauss says that we begin interpreting a statute with the “ordinary meaning of its words.”<sup>11</sup> John Manning, perhaps the leading academic textualist, maintains that we should ask “what one would ordinarily be understood as saying, given the circumstances in which one said it.”<sup>12</sup> Justice Antonin Scalia, the leading judicial textualist, argues that the “proper rule of construction” that is “customary for statutory provisions in general” is that “[t]heir language should be given its ordinary meaning.”<sup>13</sup> As Fred Schauer puts the argument, in his characteristically precise and helpful way, members of a linguistic community “are members of that community precisely because they are able to make minimal sense out of some number of signs standing alone.”<sup>14</sup> Plain meaning, he says, “is a blunt, frequently crude, and certainly narrowing device, cutting off access to many features of some particular conversational or communicative or

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11. David A. Strauss, *Why Plain Meaning?*, 72 Notre Dame L. Rev. 1565, 1565 (1997).

12. Manning, *Textualism*, *supra* note 10, at 2397-98 (citation omitted); *see also* W. David Slawson, *Legislative History and the Need to Bring Statutory Interpretation Under the Rule of Law*, 44 Stan. L. Rev. 383, 416 (1992) (noting that statutory interpretation is like contract interpretation; judges should look to what a reasonable person would think the text means rather than what the parties would have thought).

13. *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 548 (1992) (Scalia, J., concurring in the judgment in part and dissenting in part); *see also* Frank Easterbrook, *Statutes' Domains*, 50 U. Chi. L. Rev. 533, 535 n.3 (1983) (supporting ascertaining the meaning of the enactment and not the intent of the framers); Scalia, *supra* note 10, at 17 (noting that judges look to “the intent a reasonable person would gather from the text of the law, placed alongside the remainder of the *corpus juris*”); *cf.* Eskridge, *Legislative History*, *supra* note 9, at 374 (pointing to Scalia’s argument that we should interpret statutory text according to its ordinary meaning at the time of the enactment, as most likely understood by members of Congress and citizens).

14. Frederick Schauer, *Statutory Construction and the Coordinating Function of Plain Meaning*, 1990 Sup. Ct. Rev. 231, 251. As Kent Greenawalt explains it, Schauer describes the semantic autonomy of language, i.e., that there are shared understandings that allow language to work, and Schauer refers to a universal or baseline context, which allows us to understand meaning as literal or plain. *See* Kent Greenawalt, *The Nature of Rules and the Meaning of Meaning*, 72 Notre Dame L. Rev. 1449, 1459 (1997).

interpretive context that would otherwise be available to the interpreter or conversational participant.”<sup>15</sup> I will have more to say later about Manning’s invocation of the “circumstances” of statutory language, and about Schauer’s explicit acknowledgment that judicial reliance on ordinary (or plain) meaning requires cutting off information. Indeed, my primary goal is to show that this cutting off of information is a mistake and misses a critical point about how judges know what words mean.

For now, consider how the ordinary meaning approach would operate in its *reductio ad absurdum* version. The question in each case would be what is the most likely meaning of a statutory term. Perhaps we could think of a statutory term in a setting wholly stripped of context: Imagine shells washing up on the shore in the shape of the letters “CAT.”<sup>16</sup> There we could ask what would be the most likely understanding of those letters, and the answer would be, the household pet. But this method raises a few hard questions. First, how do we know what the culture in question believed to be the most likely meaning? Second, for many words, there will be several possible meanings, and picking the most likely one, although fine for our seashells example, will seem awfully silly in the context of specific statutes. For example, reading “CAT” to refer to the household pet works for the most likely meaning, but if the setting involves a girl named Catherine whose nickname is “Cat,” or if it involves “the fur of a domestic cat” or “a cat-o’-nine tails” or “a catfish” or “a catamaran” or “a player or devotee of jazz music”—all acceptable definitions of “cat” in the American Heritage Dictionary<sup>17</sup>—then reading “CAT” to mean the household pet would seem odd, missing something we all learn very early on about language—that the same word can have different meanings. Furthermore, some serious problems are raised, in the statutory setting, by arguing that we should always interpret words according to their most likely meaning as a default rule, forcing the legislature to further specify a term’s meaning if it doesn’t want the most likely meaning. Is the legislature going to conduct a linguistic analysis of every word in every statute, determine the most likely meaning of each, and then write elaborate subsections and definition sections each time it wants to define a term differently? This seems extraordinarily costly, highly unlikely, and it still wouldn’t account for the unforeseen circumstances problem (although in theory this kind of “strict liability” approach could force legislatures, at the margins, to write more carefully).

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15. Schauer, *supra* note 14, at 252; see also Sunstein, *supra* note 8, at 430 (arguing that legislative history should not trump “statutory words as they are ordinarily understood”).

16. The “CAT” discussion is drawn from Abner S. Greene, *The Work of Knowledge*, 72 Notre Dame L. Rev. 1479, 1484-87 (1997); see also Frederick Schauer, *Playing by the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life* 127-28 (1991).

17. See American Heritage Dictionary 291 (4th ed. 2000).

## IV

So it is not surprising that no one holds the view that we should interpret statutes simply according to the most likely meaning, from the time of enactment, of a statutory term. Textualists, who advance “ordinary” or “plain” meaning theories, all acknowledge that we must examine a word’s meaning in context.<sup>18</sup> As Judge Frank Easterbrook writes, “Words do not have natural meanings; language is a social enterprise. Textualists, like other users of language, want to know its context, including assumptions shared by the speakers and the intended audience.”<sup>19</sup> John Manning acknowledges the contextual nature of textualism in many ways. He says that the statutory interpretation question is “how a reasonable person, conversant with the relevant social and linguistic conventions, would read the text in context.”<sup>20</sup> He would account for “settled nuances or background conventions.”<sup>21</sup> In other words, judges may rely upon “the existence of a relevant and *established* social nuance to the usage of the word or phrase in context.”<sup>22</sup> We will often need to look to “shared conventions of linguistic subcommunities”;<sup>23</sup> statutory terms may have “specialized (rather than ordinary) meanings.”<sup>24</sup> Even Justice Scalia disclaims strict constructionism, arguing instead that a text “should be construed reasonably, to contain all that it fairly means.”<sup>25</sup>

Thus, textualists and nontextualists alike will be able to know whether “CAT” refers to the household pet, a girl named Catherine, or any of the other meanings given above. They will be able to distinguish among the possible meanings of the term because they are looking to background facts

18. Purposivists also, of course, talk of interpreting statutory terms in context, rather than according to ordinary or plain meaning in the sense of a “most likely” meaning. *See, e.g.*, Posner, *supra* note 8, at 205; Posner, *supra* note 10, at 808; *see also* Sunstein, *supra* note 8, at 416 (noting that “the meaning of words . . . depends on both *culture* and *context*”). (Although Cass Sunstein’s earlier work suggested that he was actually more of a dynamic statutory interpreter, *see id.* at 439-41, 493-95, his more recent work suggests a movement toward textualism, *see* Sunstein & Vermeule, *supra* note 10, at 905, 921-22.) Robin Craig has written an excellent piece discussing, in part, the specialized audiences that statutes address and the legal subcultures within which Congress speaks. *See* Robin Kundis Craig, *The Stevens/Scalia Principle and Why It Matters: Statutory Conversations and a Cultural Critical Critique of the Strict Plain Meaning Approach*, 79 *Tul. L. Rev.* 955, 965-70, 996 (2005); *see also* Stephen F. Ross, *The Limited Relevance of Plain Meaning*, 73 *Wash. U. L.Q.* 1057 (1995).

19. Frank H. Easterbrook, *What Does Legislative History Tell Us?*, 66 *Chi.-Kent L. Rev.* 441, 443 (1990); *see also* Easterbrook, *supra* note 13, at 536 (invoking Wittgenstein: “sets of words do not possess intrinsic meanings and cannot be given them”).

20. Manning, *Textualism*, *supra* note 10, at 107; Manning, *Absurdity Doctrine*, *supra* note 10, at 2392-93; *see also id.* at 2455 (approving “properly contextual readings”).

21. Manning, *Textualism*, *supra* note 10, at 113 (noting that textualists “draw upon settled background conventions of the legal system”); Manning, *Absurdity Doctrine*, *supra* note 10, at 2393; *see also id.* at 2457 (deeming it proper to look to “shared background conventions for understanding how particular words are used in particular contexts”).

22. Manning, *Absurdity Doctrine*, *supra* note 10, at 2463.

23. *Id.* at 2464.

24. Manning, *Textualism*, *supra* note 10, at 107; *see also id.* at 112.

25. Scalia, *supra* note 10, at 23.



about how the term is used—the social context, established conventions of usage, and the like. This might seem so obvious as to not warrant the amount of ink I am spilling here or that many others have spilled elsewhere. But it is important, I believe, to point out the concession that textualists make to context, to make clear that they are not advancing an ordinary/plain meaning view that would look to a generic “most likely” meaning of the term at the time of its enactment. This concession will be most important later, when I explore how textualists cut off aspects of context in seeking the meaning of statutory terms.

But despite their admirable (and, one might add, necessary) willingness to go beyond “most likely” meaning and to embrace a contextual understanding of statutory language, textualists remain opposed to a broader purposivism or intentionalism.<sup>26</sup> Here, they not only oppose resting statutory interpretation on what individual legislators intended by a statutory term, but they also reject the Legal Process-driven quest for ascertaining statutory purpose in a more objective sense, as in, “what was the purpose of the legislature, as a public corporate body, in enacting this particular statutory term or section?” So, they reject specific intentionalism; according to Judge Easterbrook, “The text of the statute—and not the intent of those who voted for or signed it—is the law.”<sup>27</sup> Quoting Justice Oliver Wendell Holmes, Justice Scalia concurs: “We do not inquire what the legislature meant; we ask only what the statute means.”<sup>28</sup> Read to mean we shouldn’t look at how legislators thought their statutes would be applied, this view attracts support from both the left (Ronald Dworkin) and the right (Justice Scalia).<sup>29</sup> Textualists also reject purposivism more broadly: We can’t know the purpose of a multimember body;<sup>30</sup> even if we could know such purpose, only the statutory words are enacted into law, as a constitutional matter,<sup>31</sup> and purposivism opens the door to judges’ imposition of their own values.<sup>32</sup> In sum, the argument is that we are looking for the ordinary meaning of the statutory terms, in context, and not the purpose the legislature was seeking to advance through choosing such terms.

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26. For arguments against intentionalism and purposivism from the dynamic statutory interpretation camp, see Eskridge & Frickey, *supra* note 9, at 326-37.

27. Easterbrook, *supra* note 19, at 444; *see also* Scalia, *supra* note 10, at 16, 31; Slawson, *supra* note 12, at 395-96.

28. Scalia, *supra* note 10, at 23 (quoting O.W. Holmes, *Collected Legal Papers* 207 (1920)). Part of the problem is that often legislators did not think about problems that yield the hard cases that make up much of the appellate docket. *See* Strauss, *supra* note 11, at 1571.

29. *See* Ronald Dworkin, *Comment, in A Matter of Interpretation: Federal Courts and the Law, supra* note 10, at 118; Scalia, *supra* note 10, at 144.

30. *See infra* text accompanying note 58.

31. *See infra* text accompanying note 61.

32. *See infra* text accompanying note 60.

## V

But it is impossible to seek contextual meaning without attention to the purpose of the speaker(s) or drafter(s) of the words in question.<sup>33</sup> We might not need to (or want to) know the specific intentions of the statutory drafters to know what their chosen words mean, in the context of the given statute, but we can't distinguish an appropriate contextual meaning from an inappropriate one without some attention to the purpose of the enactment, or (sub)section of the enactment. Although textualists resist this point as a matter of theory, they tacitly concede the point when they discuss examples of how sensible (or "new") textualism works.<sup>34</sup> Consider *Smith v. United States*.<sup>35</sup> The federal law in question required "the imposition of specified penalties if the defendant, 'during and in relation to any crime of violence or drug trafficking crime[,] uses or carries a firearm.'"<sup>36</sup> Smith had neither fired nor brandished a gun; rather, he had sought to trade it for drugs. The Court said this counted as "using" a firearm.<sup>37</sup> Justice Scalia, noted textualist, dissented (joined by Justices Stevens and Souter). He explained that we look at statutory terms in context, and give them their ordinary meaning. He set forth several examples of how we use the word "use," and concluded that "to speak of 'using a firearm' is to speak of using it for its distinctive purpose, *i.e.*, as a weapon."<sup>38</sup> John Manning supports Scalia's position here, making the point that textualists aren't literalists, but rather view meaning in context.<sup>39</sup> And in context, we know that "using" a firearm means firing it or brandishing it, but not using it for barter; lots of things can be used for barter, but what's dangerous about a firearm—its capacity to cause harm—wasn't at stake in Smith's using the firearm for barter. Similarly, Manning argues (following Scalia) that we would not say that someone was "using" a firearm, for purposes of this statute, if he or she

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33. For arguments supporting a purposive inquiry, see Larry Alexander & Saikrishna Prakash, "*Is That English You're Speaking?*" *Why Intention Free Interpretation Is an Impossibility*, 41 San Diego L. Rev. 967 (2004); Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. Cal. L. Rev. 845, 864 (1992) (noting that we often ascribe purposes to groups); Eskridge, *Legislative History*, *supra* note 9, at 393, 405-06 (describing, though not supporting, the Legal Process argument for viewing statutes as the reasonable products of reasonable people acting reasonably, and for viewing the judiciary as "relational" agents of the legislature); Philip P. Frickey, *From the Big Sleep to the Big Heat: The Revival of Theory in Statutory Interpretation*, 77 Minn. L. Rev. 241, 258 (1992); Greenawalt, *supra* note 14, at 1473 (endorsing purposiveness in statutory interpretation); Posner, *supra* note 10, at 810 (noting that courts should "adhere to the enacting legislature's purposes"); *id.* at 817 (suggesting that courts engage in "imaginative reconstruction" and that "[t]he judge should try to think his way as best he can into the minds of the enacting legislators and imagine how they would have wanted the statute applied to the case at bar"); see also Posner, *supra* note 8, at 190 (similar counterfactual argument).

34. See Alexander & Prakash, *supra* note 33, at 978-79.

35. 508 U.S. 223 (1993).

36. *Id.* at 227 (quoting 18 U.S.C. § 924(c)(1) (1988)).

37. *Id.* at 234-35.

38. *Id.* at 242; see also Scalia, *supra* note 10, at 23-24 (discussing his *Smith* dissent).

39. See Manning, *Textualism*, *supra* note 10, at 109-11; Manning, *Absurdity Doctrine*, *supra* note 10, at 2460-61.

used it as a doorstep in a drug den.<sup>40</sup> Rather than ask what Congress intended, or what the statute's purpose is, however, Manning argues that "modern textualists would view the text, in context, as not reaching that case in the first place."<sup>41</sup> But how do textualists reach this conclusion? Because "using" in a literal or broad sense could apply to both the facts of *Smith* and the doorstep case, we need to know why, precisely, it should not apply to these cases. The reason, I suggest, is that Congress wanted to increase penalties for criminals who elevated the level of danger in the interaction by firing or brandishing a firearm, a purpose that would be absent in the doorstep case and (arguably)<sup>42</sup> in the barter case. Acknowledging that context matters and that it leads to the result of "no application" is another way of acknowledging the relevance of inquiring into statutory purpose. Understanding the meaning of a statement or writing by a human being or group of human beings is inextricably linked to the reasons that the person or persons had for using the word(s) in question.

Here's another example of how Manning implicitly concedes this point: William Eskridge poses a hypothetical of an instruction to "gather all the ashtrays in the public areas of the hotel."<sup>43</sup> Manning argues that even though, literally, this would include ripping ashtrays off of walls, even a textualist wouldn't apply the instruction in this way, because "no reasonable user of language would use or understand the phrase 'gather all ashtrays from the public spaces,' in context, to mean movable and nonmovable ashtrays."<sup>44</sup> But what it means to understand the instruction "in context" is to ask about what the principal was after when he or she gave the instruction. It is to understand that "all" in the "gather all the ashtrays" instruction does not really mean "all," and we know that because we reason about the purpose of the instruction.<sup>45</sup>

Finally, Manning argues that it's okay to look at statutory purpose if the judge first determines that the statutory meaning is unclear.<sup>46</sup> The problem with this argument is that determining whether the meaning of a statutory term is clear or not depends, as Manning and other textualists acknowledge, on context, and as I have argued here, reliance on context is impossible without appreciation of purpose. One cannot first determine whether

40. See Manning, *Absurdity Doctrine*, *supra* note 10, at 2461.

41. *Id.*

42. As David Sosa points out, the gun's value as barter, in *Smith*, was because of its usefulness as a firearm, i.e., it was not just any old item for barter. See David Sosa, *The Unintentional Fallacy*, 86 Cal. L. Rev. 919, 926 (1998). And a gun used for barter carries a risk of danger that other items used for barter do not.

43. See Manning, *Textualism*, *supra* note 10, at 111 n.434 (referring to Eskridge, *Unknown Ideal*, *supra* note 9, at 1549).

44. Manning, *Textualism*, *supra* note 10, at 111 n.434.

45. We should not let this case turn on whether the instruction uses the word "all." An instruction to "gather the ashtrays in the public areas of the hotel," omitting the word "all," would lead to the same analysis.

46. See Manning, *Absurdity Doctrine*, *supra* note 10, at 2408, 2434 n.179.

meaning is clear or not and then look at purpose, for a purposive inquiry is entailed by the acceptance of meaning as contextual.

Some textualists (though not Manning)<sup>47</sup> give away their ultimate commitment to a purposive inquiry by accepting the absurdity doctrine. For example, in *Green v. Bock Laundry Machine Co.*,<sup>48</sup> which I discuss below,<sup>49</sup> Justice Scalia concluded that “defendant,” in the setting of Federal Rule of Evidence 609(a), means “criminal defendant,” because he appreciated the purpose of the rule and knew that he had to add the modifier “criminal” to make sense of the word “defendant” in that setting.<sup>50</sup> And once one accepts (even if tacitly) this kind of purposive inquiry, it is hard to avoid looking to purpose more generally, for one cannot know if the proffered reading is absurd unless one understands the point of the legal provision in question.<sup>51</sup>

## VI

Once we have established that we look not at “most likely” meaning but at ordinary meaning in a contextual sense, and once we have established that understanding meaning in context entails understanding the goal or end or purpose of the statutory provision in question, we then must ask what evidence of purpose-meaning should judges examine? This is the key question, and it is where textualism misses a step in the argument. For although textualism offers many arguments for cutting off judicial access to information that might help determine statutory purpose-meaning, textualism fails to consider how judges know what they know in the first place, when they first pick up the briefs and papers in a case, when they first read the statutory sections at issue, and when they first begin to formulate a sense of what the statutory terms mean. By accepting extant judicial knowledge, and cordoning off much additional knowledge, textualism establishes a baseline that cannot be defended.<sup>52</sup>

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47. Manning rejects the absurdity doctrine, both on the ground that it reflects a kind of strong intentionalism, and on the ground that it inappropriately grants judges authority to make statutes more consistent with widely shared social values. *See id.* at 2390-91. John Nagle rejects both the absurdity doctrine and the scrivener’s error doctrine. He deems it best to leave these matters to Congress to fix, and wants to provide an incentive for Congress to write (and think) more clearly. *See generally* John C. Nagle, *Textualism’s Exceptions*, *Issues in Legal Scholarship*, Nov. 2002, <http://www.bepress.com/ils/iss3/art15>.

48. 490 U.S. 504 (1989).

49. *See infra* text accompanying notes 79-82.

50. *See Bock Laundry*, 490 U.S. at 528-29 (Scalia, J., concurring in the judgment); *see also* Scalia, *supra* note 10, at 20-21. David Slawson makes an argument for allowing the use of legislative history to “correct mistakes in statutory language,” Slawson, *supra* note 12, at 423, thus also, I contend, opening the door to a purposive inquiry, for how else are we know what counts as a mistake?

51. *See* Eskridge, *Legislative History*, *supra* note 9, at 378; Manning, *Absurdity Doctrine*, *supra* note 10, at 2420; Nagle, *supra* note 47, at 4.

52. Supporting this view that judges must both lay bare their preconceptions about linguistic conventions and gain more information once the case comes before them are Posner, *supra* note 8, at 191 (“A text is clear only by virtue of linguistic and cultural competence. . . . Interpretation is no less a valid method of acquiring knowledge because it

Good examples of textualists making critical early interpretive assumptions without stopping to explore how such assumptions are possible include Justice Scalia's opinions in *Green v. Bock Laundry Machine Co.*,<sup>53</sup> and *Smith v. United States*.<sup>54</sup> Justice Scalia defends his *Bock Laundry* approach in an important essay on interpretation, defending the scrivener's error doctrine, to depart from ordinary or plain meaning, "where on the very face of the statute it is clear to the reader that a mistake of expression (rather than of legislative wisdom) has been made. For example, a statute may say 'defendant' when only 'criminal defendant' (i.e., not 'civil defendant') makes sense."<sup>55</sup> In such "extreme cases," Justice Scalia says he will "give the totality of context precedence over a single word."<sup>56</sup> In his essay on interpretation, Justice Scalia backs his *Smith* opinion this way: "The phrase 'uses a gun' fairly connoted use of a gun for what guns are normally used for, that is, as a weapon."<sup>57</sup> What is remarkable is Justice Scalia's lack of curiosity about how he knows, in *Bock Laundry*, that it is "clear" from the face of the statute that "defendant" means "criminal defendant," or how he knows, in *Smith*, that "uses a gun" "fairly connoted" use of a gun as a weapon and not as an item for barter. In the excerpts from Manning's work discussed above, the same problem occurs; he reaches conclusions in *Smith* and in the ashtrays hypothetical, in both cases narrowing the possible scope of the words in question, without ever stopping to ask how he knows that "uses" and "all" mean "uses as a weapon" and "all except the fixed ashtrays."

After failing to ask how they know what they know about context, about purpose-meaning, and after instead reaching various conclusions from what seems intuitively right to them based on unexamined background knowledge, textualists then develop a set of arguments to cordon off further acquisition of knowledge about statutory purpose-meaning. This combination of reliance on unexamined background knowledge plus the cutting off of additional knowledge is an error, and it constitutes the missing step of textualism. I will describe the textualist arguments for cutting off additional knowledge, explain why judges should seek additional knowledge, beyond what they believe they know about the purpose-meaning of the statutory terms based on already acquired information, and respond to some critiques of using legislative history as a component of such additional knowledge.

Textualists make several arguments for cordoning off additional judicial acquisition of knowledge in statutory interpretation cases. Some of the arguments are about cutting off access to legislative history, but do not

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necessarily ranges beyond the text"), and Sunstein, *supra* note 8, at 417 (explaining that background interpretive principles are often invisible).

53. 490 U.S. 504; *see supra* text accompanying notes 48-50; *infra* text accompanying notes 79-82.

54. 508 U.S. 223 (1993); *see supra* text accompanying notes 35-42.

55. Scalia, *supra* note 10, at 20.

56. *Id.* at 20-21.

57. *Id.* at 24.

cover access to other sources of statutory meaning. To the extent that a textualist would look at such nonlegislative sources of meaning, my arguments in the sections that follow critiquing the textualist cordoning off of judicial knowledge are limited to the dispute over legislative history. But some of the textualist arguments below are cast more broadly, evincing concerns about judicial use of extratextual materials other than legislative history. Moreover, textualists often seem quite limited in using other extratextual sources—perhaps limiting themselves to dictionaries from the time of enactment. A deeper understanding of social history can provide important insights into the legislative purpose behind the statute, and to the extent that purposivist judges are willing to scavenge more broadly and deeply than are textualist judges, my critiques in the sections that follow apply to the textualists' broader cutting off of extratextual knowledge, as well as to the disagreement about legislative history.

Here are seven textualist arguments:

(i) Legislative history is unreliable.<sup>58</sup> The arguments here include—we can't ascertain the purpose of a multimember body; such purposes are often mixed or muddled; statements of committees or individual members don't stand for the whole; congresspersons might not know what is in the legislative history; statements are often consciously manufactured in the hope that a future court will look to them, rather than to the statutory text.

(ii) Judicial research into legislative history and other possible sources of statutory purpose-meaning is too costly.<sup>59</sup> Especially given the points made in (i), the argument here is that the amount of time and money needed for parties and their counsel, and judges and their clerks, to play the role of legal historians, is not worth it, considering that we will often not be able to determine a clearly correct answer.

(iii) The possibility is too great that judges will manipulate additionally acquired knowledge toward the result they want to reach, including

58. See Easterbrook, *supra* note 13, at 547; Easterbrook, *supra* note 19, at 446-47; Eskridge, *Legislative History*, *supra* note 9, at 379-81, 383-84, 397; Eskridge, *New Textualism*, *supra* note 9, at 642; Daniel A. Farber & Philip P. Frickey, *Legislative Intent and Public Choice*, 74 Va. L. Rev. 423, 426-27 (1988) (describing public choice insights into legislative cycling and logrolling); Manning, *Textualism*, *supra* note 10, at 7; John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 Colum. L. Rev. 673, 684-89 (1997) (describing these arguments to set up their rejection and then a rejoinder); Manning, *Absurdity Doctrine*, *supra* note 10, at 2412; Caleb Nelson, *What Is Textualism?*, 91 Va. L. Rev. 347, 362 (2005); Scalia, *supra* note 10, at 32, 34-35; Slawson, *supra* note 12, at 397; Sunstein, *supra* note 8, at 426-28, 433; Nicholas S. Zeppos, *Legislative History and the Interpretation of Statutes: Toward a Fact-Finding Model of Statutory Interpretation*, 76 Va. L. Rev. 1295, 1304, 1309-10 (1990) (describing but later rejecting these arguments).

59. See Easterbrook, *supra* note 13, at 550; Nelson, *supra* note 58, at 453; Sunstein & Vermeule, *supra* note 10, at 892, 911, 917-18; Adrian Vermeule, *Interpretive Choice*, 75 N.Y.U. L. Rev. 74, 123-26, 128-29 (2000) [hereinafter Vermeule, *Choice*]; Adrian Vermeule, *Legislative History and the Limits of Judicial Competence: The Untold Story of Holy Trinity Church*, 50 Stan. L. Rev. 1833, 1866-68, 1878, 1891 (1998) [hereinafter Vermeule, *Holy Trinity*].

construing statutory purpose in a willful fashion.<sup>60</sup> For example, judges might select portions of legislative history that help their argument but neglect those that don't.

(iv) Constitutional concerns.<sup>61</sup> Article I, Section 7, stipulates how federal law is made. The use of legislative history materials to determine statutory meaning is extraconstitutional, because Congress may not give itself or a subset of itself authority to create binding law outside of the I, 7, process. Part of the argument here is based in public choice theory—the text is the outcome of legislative bargaining, and courts must respect the bargain.

(v) Coordination/settlement.<sup>62</sup> For judges to reach agreement, especially in hard and/or technically difficult cases, reliance on the ordinary/plain meaning of statutory text can serve as a coordinating device, whereas reliance on additionally gathered information would exert centrifugal pressure, making coordinated (and therefore settled) judicial determinations more difficult.

(vi) A kind of clear statement rule, sharply limiting the gathering of knowledge outside the statutory text, will force Congress to write more clearly in the future and reduce its reliance on legislative history.<sup>63</sup>

(vii) When Congress chooses rules over standards, courts should toe the line and enforce the letter of the law-as-rule, rather than seeking opportunities to see vagueness and thus standard-like law in statutes that are written in a more confined manner.<sup>64</sup>

I will have more to say in a bit about how some of these arguments fail, or are weaker than they seem, and about why judges should not rest on the knowledge they have entering a case, but rather should seek additional knowledge. For now, though, consider what statutory interpretation would look like if judges truly entered cases like blank slates, *tabula rasae*, like a runner, stripped of clothing like shedding biases and preconceptions.<sup>65</sup>

60. See Aleinikoff, *supra* note 8, at 28-29; Eskridge, *New Textualism*, *supra* note 9, at 646, 654 (describing Justice Scalia's views); Vermeule, *Holy Trinity*, *supra* note 59, at 1885.

61. See Easterbrook, *supra* note 19, at 444; Eskridge, *Legislative History*, *supra* note 9, at 373 (describing but later rejecting this argument); Eskridge, *New Textualism*, *supra* note 9, at 647-49; Manning, *Textualism*, *supra* note 10, at 7; Manning, *supra* note 58, at 675-76, 696, 706-07; Manning, *Absurdity Doctrine*, *supra* note 10, at 2410; Scalia, *supra* note 10, at 22, 35; Slawson, *supra* note 12, at 404-06, 409; Laurence H. Tribe, *Comment, in A Matter of Interpretation: Federal Courts and the Law*, *supra* note 10, at 74; Zeppos, *supra* note 58, at 1300-04 (describing but later rejecting this argument).

62. See Frederick Schauer, *The Practice and Problems of Plain Meaning: A Response to Aleinikoff and Shaw*, 45 Vand. L. Rev. 715, 724 (1992); Schauer, *supra* note 14, at 232, 254; Strauss, *supra* note 11, at 1579-82.

63. See Aleinikoff, *supra* note 8, at 29; Eskridge, *New Textualism*, *supra* note 9, at 654 (describing Justice Scalia's views); Manning, *Absurdity Doctrine*, *supra* note 10, at 2439; Nagle, *supra* note 47, at 3-4; Sunstein & Vermeule, *supra* note 10, at 892, 921.

64. See Manning, *Textualism*, *supra* note 10, at 7; Nelson, *supra* note 58, at 349.

65. See David Broder, *Thomas Backs Democrats Into a Corner*, Chi. Trib., Sept. 15, 1991, at C3 (reporting an answer from Judge Clarence Thomas during his Senate confirmation hearings to the United States Supreme Court). Thomas stated,

Justice Scalia would not be able to argue that the sentence-enhancement statute in *Smith* covered only the firing and brandishing of firearms, because he would be stripped of his background knowledge that the point of such statutes is usually to deter increased dangerousness during crime. He would have to, instead, accept a more vernacular, unqualified meaning of “uses,” which covers the gun-as-barter fact pattern of the case. Similarly, in *Bock Laundry*, he would not be able to argue that “defendant” means only “criminal defendant,” because he would be stripped of his background knowledge that civil litigation does not usually advantage defendants over plaintiffs regarding the introduction of evidence. He would have to, instead, accept a more vernacular, unqualified meaning of “defendant,” which covers both criminal and civil defendants. Manning would have to yield in the same way, on these cases, and on the ashtrays hypothetical, as well, for he would be stripped of his background knowledge that an instruction to gather all ashtrays in the public areas of the hotel usually is an effort to collect and clean the loose ones, and then put them back, while the ones fixed to walls must be emptied and cleaned on site. He would have to, instead, accept a more vernacular, unqualified meaning of “all,” covering both loose and fixed ashtrays.

Our statutory interpretation (thankfully) doesn't look like this, and that is because meaning is contextual, it requires evaluation of purpose, and it relies on background knowledge that interpreters bring to cases. The textualist refusal to grapple with the full force of the last point—about judicial use of extant, background knowledge—and their insistence on cordoning off the gathering of additional knowledge, cannot be defended.

## VII

There are two ways to attack this missing step of textualism, this tacit reliance on background judicial knowledge while simultaneously cutting off access to the gathering of additional knowledge. One way, which I turn to in the next part, is to show the weakness of some of the arguments described above for such cutting off. The other way, which I turn to now, involves demonstrating the importance of rounding out judicial knowledge, with newly gained information supplementing what judges already know.<sup>66</sup>

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Senator, I think it's important for judges not to have . . . baggage. I think . . . it is important for us . . . to eliminate agendas, to eliminate ideologies. And when one becomes a judge . . . you start putting the speeches away. You start putting the policy statements away. You begin to decline forming opinions in important areas that could come before your court because you want to be stripped down like a runner. So I have no agenda, Senator.

*Id.*

66. An additional argument for reliance on legislative history is that legislators have a duty to explain and offer public justification for their statutes, and that courts should give effect to such public justifications, rather than viewing statutes as private deals. See generally Bernard W. Bell, *Legislative History Without Legislative Intent: The Public Justification Approach to Statutory Interpretation*, 60 Ohio St. L.J. 1 (1999); cf. Breyer, *supra* note 33, at 873; Jonathan R. Macey, *Promoting Public-Regarding Legislation Through*



Given that judges will, as I have demonstrated, inevitably determine purpose-meaning through reliance (often backgrounded or invisible) on what the judges already know, there are several good arguments for insisting that judges supplement what they know with new information to understand better the statutory setting of the words in question.<sup>67</sup> First, cutting off new knowledge will lead to unreliable and inconsistent outcomes across judges and across cases, and this variation will be morally and legally problematic. Judicial background knowledge will vary. Depending on the domain of the statute, some judges will have deep familiarity with the terminology and subject matter, others no familiarity, and others will fall in between. If we tell judges that they may determine the ordinary meaning of the statutory term (even in context) based only on what they already know (plus the text of the statute in question and other statutes and perhaps some limited outside sources such as dictionaries),<sup>68</sup> some judges will know that the backdrop of the statute's enactment requires that a word be understood (in context) in a way that might seem odd to judges unfamiliar with the social or legislative background of the statute. The same statutory term will be understood one way by a judge who practices in the area of law in question or who lives or works in a community affected by the law in question, and understood another way by

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*Statutory Interpretation: An Interest Group Model*, 86 Colum. L. Rev. 223 (1986); Sunstein, *supra* note 8, at 448.

67. See generally Greene, *supra* note 16. Note that the debate on this issue—should generalist judges seek to gain as much information as they can about the various statutory domains they must interpret?—has a parallel in the administrative law debate on the D.C. Circuit in the 1970s between Judge Harold Leventhal and Judge David L. Bazelon. Judge Leventhal argued for a substantive “hard look” doctrine in administrative law, asking generalist judges to learn the substantive details behind the cases in question, to determine whether agencies are acting reasonably. Judge Bazelon resisted this, arguing that such an exercise is too time-consuming and that coordination values would be lost. Instead, he pushed for courts to back off of “hard look” and instead to demand increased agency procedures, when necessary, something he argued courts are good at determining. See P. Strauss, T. Rakoff & C. Farina, Gellhorn and Byse’s *Administrative Law: Cases and Comments* 512-14 (10th ed. 2003) (describing the Leventhal-Bazelon debate); see also *Greater Boston Television Corp. v. FCC.*, 444 F.2d 841, 851 (D.C. Cir. 1970) (Judge Leventhal describing the agency hard look needed to ensure reasoned decision making), *cert. denied*, 403 U.S. 923 (1971). At the Supreme Court, Judge Leventhal won this debate decisively. See *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983) (endorsing substantive hard look review); *Vt. Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519 (1978) (rejecting the power of courts to enhance agency procedures beyond what the Constitution, statutes, or regulations require). Sunstein and Vermeule, advancing an argument for limiting judicial use of extratextual materials, critique the Leventhal victory and the “hard look” doctrine precisely because of the concern that generalist judges cannot in a cost-effective and consistent manner go much beyond statutory text. See Sunstein & Vermeule, *supra* note 10, at 932. But as do Schauer and Strauss, so do Sunstein and Vermeule neglect the point about the variations in extant judicial knowledge and the argument for gaining additional knowledge to even the judicial playing field.

68. As I discussed above, see *supra* paragraph preceding note 58, the textualist case for cutting off judicial knowledge about statutory meaning (and thus about statutory purpose, for as I have argued, determining statutory meaning requires understanding statutory purpose) sometimes seems limited to excluding legislative history, but sometimes also excludes other evidence of the social and political context behind the enactment.

a judge who lacks the background of the first judge, and who accordingly reads the word in a more ordinary or natural or vernacular way. The problem of differential background knowledge could exist as well on a multimember court. These differences of background knowledge should be morally and legally irrelevant to the outcome of a case, and the way to ensure that they are morally and legally irrelevant is to insist that the knowledge base be leveled, for all judges. Thus, judges with less background information in a given statutory area will have to do more work to learn the social and legislative background, to understand how the statutory terms were used. The alternative method of leveling the judicial knowledge base—asking judges to put aside what they already know regarding statutory terms—is not possible. How can we ask people (a) to determine which aspects of their knowledge base are somewhat specialized and which accord with more common understandings, and (b) to rule in the face of what they believe, from background knowledge, that words mean?

Second, insisting that judges look just at ordinary meaning of statutory text (even in context), without seeking additional extratextual information about what the text means, can open a gaping hole for judicial willfulness.<sup>69</sup> Public choice theorists and other opponents of using legislative history often argue that judges either consciously or subconsciously select which portions of legislative history appeal to them. But such willfulness is equally possible with a textualist approach. Because judicial background knowledge of statutory terms will vary, judges can insist that their readings of a statute are correct based on partial or selective background knowledge. The main point here is that if one is concerned about judicial willfulness, excluding extratextual, new sources of knowledge cannot serve better to constrain judges, because the background knowledge will vary both in detail and in the degree to which the judge is conscious of how she gained the knowledge and how she employs it in interpreting statutes.

Third, cutting off additional knowledge through legislative history or other sources cannot serve the coordinating function for which Fred Schauer and David Strauss argue. In many ways Schauer's argument for this (which Strauss supports) offers the best reason for excluding additional, extratextual information. Many statutory interpretation cases are so complex that reliance on legislative history, or other historical sources, is likely to lead judges in various directions, says Schauer. Better to accept that generalist courts cannot become experts in each statutory area, and instead to focus judges on something they can all, in theory, do equally well and in a similar fashion—determine the ordinary meaning (in context) of statutory terms. But Schauer's argument improperly assumes that judges start from the same baseline of knowledge. If that were true, then the argument for cutting off new, extratextual information would at least be able to serve a coordinating function (although we would still have to

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69. See Eskridge, *New Textualism*, *supra* note 9, at 674; Strauss, *supra* note 11, at 1577-78; Zeppos, *supra* note 58, at 1323; see also *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 125 S. Ct. 2611, 2628 (2005) (Stevens, J., dissenting).

determine whether such coordination and cutting off of information outweighs gaining a perhaps more refined understanding of the statute through examination of extratextual sources). Judges do not, though, start from the same baseline of knowledge, and thus coordination cannot occur if we cut off newly gained knowledge. In this regime, some judges will be left knowing very little about a statutory term, while others will have, from their differing backgrounds, greater knowledge. We will not have coordination. If coordination is what we are seeking, the way to achieve it is to try to get all judges on the same page, to even out their knowledge base. The way to do that is to admit (subject to qualifications discussed in the next part) legislative history and other extratextual evidence of what statutory terms mean, so that the judges who know less about the statutory domain in question can come up to speed with those who know more.

Manning acknowledges the necessarily context-dependent nature of statutory interpretation, and also acknowledges that judges do and should examine settled or established background conventions for the meaning of statutory terms.<sup>70</sup> And he is open to a scrivener's error doctrine under which judges would correct obvious clerical or typographic errors.<sup>71</sup> But he never explains how he would determine what counts as a settled or established background convention, or how he would determine what is an obvious clerical or typographic error. The concession to context and background thus replicates the textualist blindness to extant judicial knowledge, relying instead only on what judges (and the culture) appear to share in terms of understanding, but overlooking that judges will inevitably rely as well on their own founts of background knowledge.

Here is an example of how a judge relying, implicitly, on his extant, background knowledge, but refusing to examine new, extratextual information, will reach results that bear all of the troubling qualities discussed earlier in this part.<sup>72</sup> In *Pittston Coal Group v. Sebben*,<sup>73</sup> the Court interpreted a statutory directive in a black lung benefits case, which authorized the Secretary of Labor to establish new medical test standards for future claims, but which also required the Secretary to apply "criteria" to pending claims that were "no[t] . . . more restrictive than the criteria applicable" to claims subject to prior regulations.<sup>74</sup> The case turned on whether "criteria" meant medical criteria only (i.e., the ways in which black lung disease is physically measured), or whether "criteria" meant both medical and evidentiary criteria (i.e., the "system of presumptions through which the medical criteria were utilized").<sup>75</sup> If "criteria" meant medical criteria alone, then the Secretary's regulations would be upheld; if "criteria"

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70. See Manning, *Textualism*, *supra* note 10, at 107, 113; Manning, *Absurdity Doctrine*, *supra* note 10, at 2393, 2457-58, 2463-64.

71. See Manning, *Absurdity Doctrine*, *supra* note 10, at 2459 n.265.

72. The following discussion of *Pittston Coal Group v. Sebben* and *Green v. Bock Laundry Machine Co.* is drawn from Greene, *supra* note 16, at 1480-84.

73. 488 U.S. 105 (1988).

74. *Id.* at 107.

75. *Id.* at 134 (Stevens, J., dissenting).

meant medical and evidentiary criteria, then the regulations would have to be modified.

The Court ruled against the agency, in an opinion by Justice Scalia. He reasoned that the statute doesn't modify "criteria" with "medical,"<sup>76</sup> and pointed out that at another place in the same statutory section, Congress used the term "criteria for all appropriate medical tests," showing that it knew how to modify "criteria" when it wanted to.<sup>77</sup> Justice Stevens, in dissent, demonstrated that participants in the legislative process—witnesses at hearings, members of Congress, and administrative agents—all used the term "criteria" interchangeably with the term "medical criteria."<sup>78</sup> And this was a point about unselfconscious legislative history, i.e., the way words were used. It was not a point about manufactured or self-conscious legislative history. In sum, it was the most probative type of legislative history we have. But Justice Scalia was impervious to this newly gathered information, newly gathered in the sense that Justice Stevens didn't know anything in advance about how "criteria" was used in this statute, so set out on a path of historical knowledge-gathering.

In *Green v. Bock Laundry Machine Co.*,<sup>79</sup> however, Justice Scalia brought to bear much that he knew about the relevant area of the law, in departing from the otherwise ordinary/plain meaning of a legal term. Federal Rule of Evidence 609(a) allows impeachment of a witness through introduction of prior felony convictions if "the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant."<sup>80</sup> In a civil case, this would apparently require a balance before admitting prior felony convictions of the defendant, but not of the plaintiff. The Court, per Justice Stevens, held otherwise; the Rule covers only criminal cases, even though it doesn't say so. Perhaps surprisingly, Justice Scalia concurred in the judgment, agreeing that the statute should not be understood as written. He deemed it absurd to treat civil defendants differently from civil plaintiffs for the purpose of introducing prior felony convictions into evidence.<sup>81</sup> He knew to do this not from any extra knowledge-gathering,<sup>82</sup> but rather from his underlying knowledge of the Rules of Evidence and of the way in which civil litigation is conducted.

But Justice Scalia was not willing to do the work to gain extra knowledge in *Pittston Coal*. The only difference between the two cases is that the knowledge in *Pittston Coal* had to be obtained now, at the time of

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76. *Id.* at 115.

77. *Id.*

78. *Id.* at 131-46.

79. 490 U.S. 504 (1989); see *supra* text accompanying notes 48-50, 55 (discussing *Bock Laundry*).

80. *Bock Laundry*, 490 U.S. at 509 (quoting Fed. R. Evid. 609 (a)(1)).

81. See *id.* at 527 (Scalia, J., concurring in the judgment).

82. He did examine legislative history, but only to rule out the possibility that Congress really had intended a civil plaintiff/defendant distinction here. *Id.* at 527-28. The examination of legislative history was not the motivating factor in deeming the ordinary/plain meaning absurd.

adjudication over the meaning of the term in question, whereas the knowledge in *Bock Laundry* had already been obtained. As argued above, this cannot be a legally relevant distinction for how judges determine the meaning of statutes.

## VIII

Perhaps, though, some of textualism's critiques of the judicial use of legislative history in statutory interpretation can explain why it is permissible to rely on extant, background knowledge of what words mean, but not to gain new information for the case at hand, or at least not to use legislative history as part of the inquiry. None of these critiques prevail, however, and a judicious use of legislative history (and other forms of gaining knowledge of the purpose-meaning of statutory terms) should be used to supplement what judges already know.

First, consider the public choice arguments that legislative history is unreliable, because of strategic matters such as cycling and logrolling, because of the difficulty of ascertaining the purpose of a multimember body, and because of the presence of mixed or conflicting purposes.<sup>83</sup> We can, though, be careful about how we examine and use legislative history, just as we should be careful about examining historical materials for legal analysis generally.<sup>84</sup> We can, as we always do in law, attend to both relevance and weight.<sup>85</sup> Some legislative history materials will be more probative than others—committee reports and sponsor statements are likely to reflect more serious attention to the matters at hand, and are more likely to be looked to by members of Congress, sometimes perhaps even more than a bill's text itself.<sup>86</sup> Congress, as a body, delegates work to committees, and the output of such committees, and of bill sponsors, is no less probative and weighty than similar work from any larger body's committee or individual sponsor in the public or private sector. We rely

83. *But see* Farber & Frickey, *supra* note 58, at 426-35; *id.* at 435 (“[W]e have very strong reasons, both empirical and theoretical, for believing that actual legislatures do not suffer from the instability and incoherence some public choice theories have predicted.”).

84. *See* Martin S. Flaherty, *History “Lite” in Modern American Constitutionalism*, 95 *Colum. L. Rev.* 523 (1995).

85. *See* Elhauge, *supra* note 9, at 2064; Eskridge, *Legislative History*, *supra* note 9, at 401; Farber & Frickey, *supra* note 58, at 448; Zeppos, *supra* note 58, at 1349. *But see* Nelson, *supra* note 58, at 363; Vermeule, *Holy Trinity*, *supra* note 59, at 1877-78 (noting that caution in using legislative history doesn't address the problem of time and the cost of doing legislative history).

86. *See* Breyer, *supra* note 33, at 863-64; Eskridge, *Legislative History*, *supra* note 9, at 377 (“There is substantial evidence from political science that members are more likely to read the committee report than the bill itself.”); Farber & Frickey, *supra* note 58, at 445; Posner, *supra* note 10, at 810, 818; Zeppos, *supra* note 58, at 1311-13. *But see* Vermeule, *Choice*, *supra* note 59, at 136-37; Vermeule, *Holy Trinity*, *supra* note 59, at 1880 (describing the hierarchy of sources argument as “poorly theorized and practically unstable”). Vermeule's arguments, though, don't seriously impeach the point that the Houses of Congress look to committees and key players in understanding bills under consideration, and the instability concern is more one about judges needing to give the same kind of care to matters of relevance and weight here that they do in other places in the law.

heavily on representations from such intra-body delegation because the larger bodies operate through such sub-delegation.<sup>87</sup> And the more courts look—cautiously and judiciously, one would hope—to such key indications of what the body is up to, the more the body itself can reliably maintain its intra-delegation structure, knowing the courts will look to it.<sup>88</sup> This is not to say that committee reports and sponsor statements should replace statutory text as the key aspect of statutory interpretation; it is only to say that when hard cases arise, these key aspects of statutory history (plus, at times, other aspects, especially if they reveal how words were used, rather than the specific intent of how a problem was meant to be solved) can reliably help in understanding what Congress was up to when it wrote the statute. On the other hand, some legislative history materials, even if probative, should get less weight—perhaps isolated statements on the floor by opponents of a bill seeking to portray it in some ludicrous fashion. Additionally, we can discount apparently manufactured legislative history, of the staged colloquy variety (and others), especially if there is no indication that the floor statements represent an accepted norm of intra-legislative delegation for the bill or type of bill in question. At the same time, we can pay close attention to how members of Congress (and other participants in the legislative process) used certain terms, unselfconsciously, in their discussions and writings.<sup>89</sup>

Second, as to the argument that textualism is needed to provide an incentive for Congress to write more clearly, consider that Congress will likely continue to pass the buck when it doesn't have the votes for a clearer statute, and that many hard cases are the result of unforeseen circumstances.<sup>90</sup> Of course here, as elsewhere, a "strict liability" approach will, at the margins, force some greater clarity, but here, as elsewhere, the question is whether the benefits of such marginally greater clarity outweigh the costs of failing to attend to probative, weighty evidence, especially when judges are already attending to knowledge they had before considering the case at bar. Also, consider whether it is appropriate for courts to be forcing Congress's hand in this way. Clear statement rules to help achieve constitutional ends are one thing—consider requiring Congress to speak clearly before forcing a court to consider hard questions in the areas of federalism<sup>91</sup> or habeas corpus.<sup>92</sup> And canons of construction that help to track the standard use of language—consider *ejusdem*

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87. See Breyer, *supra* note 33, at 859, 863-64; Elhauge, *supra* note 9, at 2072; Farber, *supra* note 8, at 290; Manning, *supra* note 58, at 676, 683, 690-95, 706 (describing, though not adopting, this argument); Zeppos, *supra* note 58, at 1345; see also *Bank One Chi. v. Midwest Bank & Trust Co.*, 516 U.S. 264, 276-77 (1996) (Stevens, J., concurring).

88. See Bell, *supra* note 66, at 85-87; Eskridge, *New Textualism*, *supra* note 9, at 683; Manning, *supra* note 58, at 676, 683, 690-95, 706 (describing, though not adopting, this argument).

89. See Breyer, *supra* note 33, at 851-52, 856; Manning, *supra* note 58, at 731.

90. See Eskridge, *New Textualism*, *supra* note 9, at 677; Strauss, *supra* note 11, at 1574-77.

91. See, e.g., *Gregory v. Ashcroft*, 501 U.S. 452 (1991).

92. See, e.g., *INS v. St. Cyr*, 533 U.S. 289 (2001).

*generis*<sup>93</sup>—are another thing. But for the courts to tell Congress “we’re going to refuse to examine extratextual evidence of statutory purpose-meaning so that you will write your statutes more clearly” raises a difficult separation of powers question, about the propriety of judicial tinkering with the legislative process in this fashion.<sup>94</sup>

Third, John Manning makes the following constitutional argument against judicial use of legislative history in statutory interpretation:<sup>95</sup> Let’s assume, *arguendo*, that Congress delegates to committees a law elaboration function. And we know that agencies and courts sometimes specify the meaning of unclear texts, relying on sources of meaning that do not include legislative history. So, shouldn’t courts rely as well on legislative history, when it does exist, especially the most probative types, for example, committee reports, which (we have assumed *arguendo*) reflect a conventional delegation internal to the legislature? No, says Manning, because reliance on internal congressional delegation for law elaboration raises a constitutional problem that reliance on extra-legislative sources does not raise. Article I, Section 7, of the Constitution specifies how laws are to be made, and it requires bicameralism and presentment. As *INS v. Chadha*<sup>96</sup> taught us, congressional attempts to make binding law outside of the I, 7, process, through delegation to a part of itself or even through bicameralism but without presentment, improperly aggrandize Congress’s power. Our liberty is protected by depriving Congress of the power to make law outside the I, 7, process and by depriving it of the power to control the interpretation of the law (apart from proper I, 7, statutory revisions). If Congress can write unclear laws and then through a non I, 7, process specify their meaning, it can help its friends and harm its enemies. Legislation must be appropriately general and prospective, with legislators on notice that they too will be subject to the full sweep of the laws without the ability, outside the I, 7, process, to specify statutory meaning. Judicial reliance on legislative history, as a tracing of internal congressional delegation of law-elaboration power, violates this constitutional principle. It allows Congress to control the interpretation of law through a backdoor mechanism outside the I, 7, process.

Manning’s major premise is correct—Congress may not make law outside the I, 7, process, and it may not control the interpretation of its statutes outside of I, 7, revisions. But the minor premise—that judicial reliance on legislative history in interpreting statutes constitutes either

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93. “Of the same kind, class, or nature.” See Black’s Law Dictionary 464 (8th ed. 2004).

94. *Cf. W. Va. Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 115 (1991) (Stevens, J., dissenting) (criticizing the Court for ignoring “persuasive evidence of Congress’ actual purpose” and instead using a textualist approach that needlessly forces Congress to revisit matters); Eskridge, *Unknown Ideal*, *supra* note 9, at 1550-51 (noting that there is a cost from imposing clear statement rules on Congress’s limited agenda, and that it is hard to know if Congress is “institutionally capable of responding to the new textualism by anticipating more issues and resolving them more clearly in statutes”).

95. See generally Manning, *supra* note 58.

96. 462 U.S. 919 (1983).

congressional lawmaking outside the I, 7, process or improper control of the interpretation of the law—is incorrect, for two reasons.<sup>97</sup> First, even if Congress and the courts are engaged in a conventional dialogue, with internal congressional delegation to committees as an accepted part of the interpretive process, this still does not constitute congressional control, of either lawmaking or law interpreting. The courts retain control, to determine the probativeness and weight of the proffered legislative history, and that makes all the difference.<sup>98</sup> The uncertainty of how the judicial branch will use legislative history is enough to keep Congress on its toes. Only by actually controlling lawmaking or law interpreting outside the I, 7, process does Congress circumvent the Constitution's carefully elaborated structural checks. Second, there's a timing problem with Manning's argument.<sup>99</sup> The concern in *Chadha* regarding congressional control of lawmaking outside the I, 7, process, and a similar concern with Congress controlling law interpretation, is that Congress is seeking a kind of final, unchecked check<sup>100</sup> that the Constitution fails to give it. If Congress is delegating to its committees a law elaboration function, which the courts might or might not deem probative and weighty in any given instance, the committee reports are still subject to the proper I, 7, process—considering both a bill's text and the committee report, a member of Congress can vote yea or nay on the bill, and the President can sign or veto the bill.<sup>101</sup>

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97. For a different critique of Manning's constitutional argument for textualism, suggesting that if textualism is to be defended, it must be through arguments about institutional capacity, see Sunstein & Vermeule, *supra* note 10, at 908.

98. See Breyer, *supra* note 33, at 863; Elhauge, *supra* note 9, at 2071; Eskridge, *New Textualism*, *supra* note 9, at 672; Eskridge, *Unknown Ideal*, *supra* note 9, at 1527-28. Manning acknowledges that there's a distinction between Congress trying to control what the law is outside the I, 7, process and judicial use of legislative history to figure out what law means, but he gives little weight to this acknowledgment. See Manning, *supra* note 58, at 683-84. The problem, he says, is that courts often give authoritative weight to bits of legislative history, rather than engaging in the kind of careful evaluation of probativeness and weight that I have suggested. But this is a rejoinder about judicial misuse of legislative history (I agree with Manning it should not be "authoritative"); the rejoinder does not resuscitate Manning's argument about congressional control of lawmaking or law interpretation outside the I, 7, process.

99. See Bell, *supra* note 66, at 45, 53-54, 85, 88; Eskridge, *New Textualism*, *supra* note 9, at 673-74; Jonathan R. Siegel, *The Use of Legislative History in a System of Separated Powers*, 53 Vand. L. Rev. 1457, 1479-80 (2000); see also Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 Harv. L. Rev. 1085, 2134-36 (2002) (supporting my timing argument, and adding that Manning's argument would work only if Congress purported to make post-enactment legislative history authoritative).

100. See Stephen L. Carter, *Constitutional Adjudication and the Indeterminate Text: A Preliminary Defense of an Imperfect Muddle*, 94 Yale L.J. 821, 862-63 (1985) (discussing the constitutional problem with any branch of the federal government creating a "fresh check").

101. Manning recognizes this timing problem with his argument, and responds that it "understates the possibility of strategic behavior by legislators." Manning, *supra* note 58, at 720. But now we are back in the realm of critiquing the legislative process, not making a constitutional argument. The constitutional argument depends upon Congress actually controlling lawmaking or law interpreting outside the I, 7, process, and Manning's point about strategic behavior does not undercut my timing point—that both Houses of Congress and the President still have an opportunity to approve the bill, or not, with all that is included



Legislative history (however probative and weighty) cannot, therefore, serve as a final, unchecked check;<sup>102</sup> the conventional dialogue between Congress and the courts regarding the use of legislative history does not, therefore, represent congressional aggrandizement.

Fourth, one could acknowledge my points about purpose-meaning and about the timeline of judicial knowledge acquisition, and still argue that the cost of gaining new knowledge outweighs any benefit from a more accurate ascertainment of what Congress was up to when it wrote the statute. This is the core of Adrian Vermeule's theory.<sup>103</sup> He acknowledges that his argument against judicial use of legislative history is largely formalist, based on the difficulty of getting the answer right and the clear saving of decision costs by cutting off much extratextual information.<sup>104</sup> He further admits the possibility of sharply limiting the available sources of legislative history, to committee reports and sponsor statements, but responds that the promise to control decision costs in this way "is never fulfilled, because in practice such intermediate solutions prove highly unstable over any extended period, and inevitably collapse back into plenary consideration of legislative history."<sup>105</sup>

Vermeule is undoubtedly right about the increased decision costs from examining materials (such as legislative history) outside the statutory text. But the appropriate rejoinder to his argument regarding the control of decision costs is to insist that courts follow rules about comparative probativeness of legislative history, as I discussed above.<sup>106</sup> Furthermore, Vermeule's principal contention fails to grapple with the concern about judicial reliance on extant knowledge while cutting off newly acquired knowledge—that cutting off access to newly acquired knowledge is itself unreliable and inconsistent, morally and legally problematic in skewing outcomes based on the vagaries of extant judicial knowledge, and not coordinating, because of this skewing.

## IX

Finally, a few thoughts on why one might adopt a relatively agentic view of statutory interpretation, while advancing a less judicially tethered view of

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in the background of the bill, including committee reports that they know courts might later use in their interpretive role. One could fall back on arguments about the unreliability of legislative history, as opposed to statutory text, but once again we would be out of the realm of constitutional structural argument.

102. This is true of pre-enactment legislative history. For a point about post-enactment legislative history, see Rosenkranz, *supra* note 99.

103. See generally Vermeule, *Choice*, *supra* note 59; cf. Sunstein & Vermeule, *supra* note 10, at 921-23. For a critique of Vermeule's argument, see Michael Sinclair, *The Proper Treatment of "Interpretive Choice" in Statutory Decision-Making*, 45 N.Y.L. Sch. L. Rev. 389 (2002).

104. See Vermeule, *Choice*, *supra* note 59, at 128-29.

105. *Id.* at 136.

106. See *supra* text accompanying notes 83-89.

constitutional interpretation. As I have argued elsewhere,<sup>107</sup> we can be legal positivists without being constitutional positivists. That is, we can accept a gap between law generally—statutes, regulations, the common law—and what morality would require. In so doing, we are accepting that law generally—law made on the lower track of ordinary lawmaking<sup>108</sup>—is the often imperfect manifestation of political desire. Our Constitution, on the other hand, in both its text and interpretation, aspires not to ordinary politics, but rather to ascertaining what political justice requires. Part of the distinction between an agentic view of statutory interpretation and a less tethered view of constitutional interpretation can be linked to the nature of the text under interpretation—the grand, vague clauses of the Constitution (“due process,” “equal protection,” and the like) versus the often more specific dictates of statutes. There’s simply less room to be agentic with much of the Constitution. But that’s not my main argument—one could still argue for close attention to the framers’ purpose in constitutional law, and many do, even those who argue for a rather broad, loose understanding of such purpose and how it translates over time. My argument is less tethered to the past than this. It sees our constitutional text, history, and culture as aspirational rather than limited to working out specified goals that might or might not match what political justice would require. Whether the aspiration to match constitutional practice to political justice can be achieved through the courts is a separate question. But the distinction between the higher law, aspirational nature of our Constitution, and the lower law, more pedestrian goals of statutes and the like, grounds my view that while seeking the purpose-meaning of statutes, we should seek a more forward-looking, constructivist<sup>109</sup> understanding of the Constitution.

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107. See Abner S. Greene, *Can We Be Legal Positivists Without Being Constitutional Positivists?*, 73 *Fordham L. Rev.* 1401 (2005).

108. See Bruce Ackerman, *Constitutional Politics/Constitutional Law*, 99 *Yale L.J.* 453 (1989).

109. See James E. Fleming, *Securing Constitutional Democracy* (2006); John Rawls, *Political Liberalism* (1993); James E. Fleming, *Constructing the Substantive Constitution*, 72 *Tex. L. Rev.* 211 (1993); James E. Fleming, *Securing Deliberative Autonomy*, 48 *Stan. L. Rev.* 1 (1995).