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# Faithful Agency Versus Ordinary Meaning Advocacy

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## FAITHFUL AGENCY VERSUS ORDINARY MEANING ADVOCACY

JAMES J. BRUDNEY\*

### INTRODUCTION

William Eskridge in his Childress Lecture observed that Justice Scalia—call him a positivist or a textualist—“sees the role of the judge as being a faithful agent, applying the authorized statutory texts according to [their] ordinary meaning . . . .”<sup>1</sup>

This asserted link between ordinary meaning and faithful agency is in part constitutionally based. Justice Scalia and fellow ordinary meaning advocates contend that the text and only the text reflects the Article I-sanctioned will of the legislature as a whole.<sup>2</sup> Accordingly, fidelity to Congress’s lawmaking supremacy as a principle demands that courts as agents focus on interpreting that text. Courts should derive ordinary meaning through careful attention to linguistic clarification of the contested words and integration of those words into the law’s overall structure. Professor John Manning adds a pragmatic dimension to the ordinary meaning-faithful agent camp. He argues that because congressional actors bargain “in complex and often unknowable ways over a statute’s wording,” courts’ best (and perhaps only) hope as faithful agents is to search for those underlying legislative preferences in the bargained-for text itself.<sup>3</sup>

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\* Professor of Law, Fordham University School of Law. I am grateful to St. Louis University School of Law for organizing this Lecture, and to keynote lecturer William Eskridge and my fellow panelists for their insights. Steve Della Fera provided valuable research support and Cynthia Lamberty-Cameron furnished first-rate secretarial assistance. Fordham Law School contributed generous financial support.

1. William N. Eskridge, Jr., *Nino’s Nightmare: Norms and Purposes in Legisprudence* 5 (October 2012) (unpublished manuscript) (on file with *Saint Louis University Law Journal*). Like Professor Eskridge, my focus is on the “hard case,” where the text is inconclusive and the judge must make new law interstitially. *Id.*; see also text accompanying *infra* notes 28–31.

2. See, e.g., *Conroy v. Aniskoff*, 507 U.S. 511, 518–19 (1993) (Scalia, J., concurring); *Wis. Pub. Intervenor v. Mortier*, 501 U.S. 597, 622 (1991) (Scalia, J., concurring); Alex Kozinski, *Should Reading Legislative History Be an Impeachable Offense?*, 31 *SUFFOLK U. L. REV.* 807, 813 (1998); Kenneth W. Starr, *Observations About the Use of Legislative History*, 1987 *DUKE L. J.* 371, 375.

3. John F. Manning, *Justice Scalia and the Legislative Process*, 62 *N.Y.U. ANN. SURV. AM. L.* 33, 38 (2006); see also John F. Manning, *What Divides Textualists from Purposivists?*, 106

The Court's twenty-first century ordinary meaning analysis relies primarily on two interpretive assets that represent contributions from or creations of the judicial branch: dictionaries and language canons. In justifying their role as faithful agents, ordinary meaning advocates typically do *not* invoke congressionally-created interpretive assets distinct from the contested statutory text. I refer most obviously to their discounting or rejecting legislative history.<sup>4</sup> In addition, the ordinary meaning camp has at times minimized certain separate textual provisions outside the contested statutory language but still within the statute, such as purpose statements and statutory definitions.<sup>5</sup>

This Article contends that ordinary meaning analysis based on dictionaries and language canons cannot be reconciled with the faithful agent model. Fidelity to Congress as a principal entails fidelity to its lawmaking enterprise, not to words or sentences divorced from that enterprise. Congress has indicated that it does not value dictionaries as part of its lawmaking process, and it ascribes at most limited weight to language canons in that process.<sup>6</sup> Further, Justices advocating ordinary meaning analysis too often use dictionary definitions, and language canons such as the rule against surplusage, the whole act rule, and *ejusdem generis*, in ways that are indifferent to Congress's background understandings when drafting and voting on statutory text.<sup>7</sup> Indeed, 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. The interpretive asset most consistent with the Court's role as a faithful agent is instead legislative history.

Part I explains why the Court acts as something other than a faithful agent when it engages in dictionary-based or canon-based ordinary meaning analysis. Part II attempts to account for the Court's substantial and growing interest in ordinary meaning as the primary basis of its interpretive approach. Part II also contends that the Court's faithful agent role is better fulfilled through use of the congressionally created and endorsed asset of legislative history.

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COLUM. L. REV. 70, 99, 102–03 (2006); John F. Manning, *Textualism and Legislative Intent*, 91 VA. L. REV. 419, 438 (2005).

4. See generally ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 369–90 (2012); sources cited *supra* note 2.

5. See *Pub. Emps. Ret. Sys. of Oh. v. Betts*, 492 U.S. 158, 161, 168, 191 (1989) (ignoring purpose provision); *Gustafson v. Alloyd Co., Inc.*, 513 U.S. 561, 568–76 (1995) (discounting statutory definition).

6. See Parts I.A.1 and I.B.1 *infra*.

7. See Parts I.A.2 and I.B.2 *infra*.

## I. THE DISCONNECT BETWEEN ORDINARY MEANING AND FAITHFUL AGENCY

When today's Supreme Court seeks to determine the meaning of a disputed statutory word or phrase, it relies on two interpretive tools that were far less commonly employed a generation earlier. Although the Justices' use of dictionaries was virtually non-existent prior to the Rehnquist era,<sup>8</sup> the Court now invokes dictionary definitions in about one-third of its statutory interpretation majority opinions.<sup>9</sup> The increase in language canon usage over recent decades is less dramatic but still striking, with the modern Court relying on language canons in over one-fourth of its statutory interpretation majorities.<sup>10</sup>

The Court's newfound interest in these two resources is due to their central role in enabling the Court to examine and discern ordinary meaning. Setting aside for the moment other explanations for the Court's focus on ordinary meaning analysis,<sup>11</sup> any attempt to link this approach to the Court's role as faithful agent is highly problematic.

### A. Dictionaries

#### 1. Congress's Perspective

In deciding whether judicial use of dictionary definitions promotes faithful agency, it is worth paying some attention to how Congress regards this resource in relation to its drafting of statutory language. Lawmakers have not chosen to incorporate dictionaries as an approved or presumptive source of

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8. The Court used dictionaries in eighty-nine total opinions during the Burger Court era, from 1969 to 1986; this amounts to less than 1.5% of all Court opinions during that period. See Samuel A. Thumma & Jeffrey L. Kirchmeier, *The Lexicon Has Become a Fortress: The United States Supreme Court's Use of Dictionaries*, 47 BUFF. L. REV. 227, 252–60, n.181–82 (1999) [hereinafter Thumma & Kirchmeier, *Lexicon*]; United States Supreme Court Database, <http://scdb.wustl.edu> (last visited Feb. 19, 2012) (disclosing that Burger Court issued 6,013 total opinions).

9. See James J. Brudney & Lawrence Baum, *Oasis or Mirage: The Supreme Court's Thirst for Dictionaries in the Rehnquist and Roberts Eras*, 55 WM. & MARY L. REV. (forthcoming 2013) (manuscript at 32–33), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2195644](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2195644) (calculating Roberts Court usage for 2008–2010 terms in statutory cases from criminal law, workplace law, and business and commercial law).

10. See James J. Brudney & Corey Ditslear, *The Warp and Woof of Statutory Interpretation: Comparing Supreme Court Approaches in Tax Law and Workplace Law*, 58 DUKE L.J. 1231, 1256 (2009) [hereinafter Brudney & Ditslear, *Warp & Woof*] (calculating Court's usage from 1987 to 2008 in statutory cases from tax law and workplace law).

11. See *infra* Part II.A (discussing possible additional reasons for the Court's new emphasis on ordinary meaning).

textual meaning.<sup>12</sup> They often include their own definitions of key terms as a separate section of a particular statute,<sup>13</sup> but the U.S. Code includes no default to dictionary definitions where the statute has failed to define a given word. This silence does not seem inadvertent. In its so-called Dictionary Act,<sup>14</sup> setting forth presumed meanings for certain recurring words and verbal formulations, the default is not to Webster's Third New International or the Oxford English Dictionary. Rather, the meanings specified by Congress apply "unless the context indicates otherwise."<sup>15</sup>

Moreover, a new study of Congress's drafting processes strongly suggests that members and staff do not consult dictionaries when they draft statutory text.<sup>16</sup> Scholars had long maintained this to be the case in the absence of evidence to the contrary.<sup>17</sup> But the study by Professors Abbe Gluck and Lisa Bressman indicates that dictionaries are "mostly irrelevant to the drafting process," based on interviews they conducted in 2011–2012 with over 130 attorneys responsible for writing statutes while serving as committee counsels or in the offices of House and Senate Legislative Counsel.<sup>18</sup> More than half of those interviewed stated that dictionaries are almost never used when Congress is drafting, even as staff acknowledged that the Court often relies on them.<sup>19</sup>

## 2. The Court's Approach

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12. See Ellen P. Aprill, *The Law of the Word: Dictionary Shopping in the Supreme Court*, 30 ARIZ. ST. L. J. 275, 299 (1998); Nicholas S. Zeppos, *Legislative History and the Interpretation of Statutes: Toward a Fact-Finding Model of Statutory Interpretation*, 76 VA. L. REV. 1295, 1320–21 (1990).

13. See, e.g., Securities Act of 1933, 15 U.S.C. § 77b (2006); Toxic Substances Control Act of 1976, 15 U.S.C. § 2602 (2006); National Labor Relations Act of 1935, 29 U.S.C. § 152 (2006); Civil Rights Act of 1964, 42 U.S.C. § 2000e (2006).

14. 1 U.S.C. § 1 (2006); see also *United States v. Reid*, 206 F. Supp. 2d 132, 138 (D. Mass. 2002) (explaining that the Dictionary Act "provides general definitions for a handful of words appearing within the code, along with general rules of construction, that apply to the entire code in the absence of a more specific indication within the statute being analyzed").

15. 1 U.S.C. § 1 (2006). The Supreme Court at times has identified the canon of ordinary meaning as a default. See, e.g., *Perrin v. United States*, 444 U.S. 37, 42 (1979). But the Court has also proclaimed the opposite canon of honoring Congress's unconventional or more limited meaning. See, e.g., *Johnson v. United States*, 529 U.S. 694, 706 n.9 (2000); *Bos. Sand & Gravel Co. v. United States*, 278 U.S. 41, 48 (1928).

16. See 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. (forthcoming 2013) (on file with *Saint Louis University Law Journal*).

17. See Aprill, *supra* note 12, at 299; Zeppos, *supra* note 12, at 1320–21.

18. Gluck & Bressman, *supra* note 16 (manuscript at 27). The study devotes primary attention to how drafters view the canons and legislative history. Its findings on those issues are discussed *infra* at Parts I.B and II.B.

19. See Gluck & Bressman, *supra* note 16 (manuscript at 27).

A number of legal scholars have noted that the Court's use of dictionaries has risen dramatically starting with the Rehnquist Court.<sup>20</sup> In a forthcoming coauthored article analyzing the Court's dictionary usage, Lawrence Baum and I identify numerous decisions in which Rehnquist and Roberts Court majorities rely on dictionary-based ordinary meaning to discount or reject consideration of congressionally created interpretive resources.<sup>21</sup> Several illustrative cases warrant brief discussion.

In *Gross v. FBL Financial Services, Inc.*, Justice Thomas for the majority relies on the dictionary definitions of a key antidiscrimination phrase ("because of") in the Age Discrimination in Employment Act (ADEA) to justify rejecting Congress's quite different construction of that very same phrase in Title VII.<sup>22</sup> Congress had deliberately copied its 1964 Title VII language into the 1967 ADEA, and the Court in 1989 had given the Title VII phrase a meaning that Congress two years later approved in the text and legislative history that were part of its 1991 additions to Title VII.<sup>23</sup> But in 2009, the Court in *Gross* determined that the dictionary-based ordinary meaning of the phrase should govern under the ADEA, as opposed to the congressionally expressed understanding.<sup>24</sup>

This past term, in *Taniguchi v. Kan Pacific Saipan, Ltd.*, Justice Alito for the majority concluded that the ordinary meaning of "interpreter," in a federal statute authorizing district courts to award costs to prevailing parties for "compensation of interpreters," covers oral translation but *not* the costs of translating documents.<sup>25</sup> The majority relied primarily on definitions from numerous dictionaries, choosing not to credit Congress's apparent background understanding of the term "interpreter."<sup>26</sup> District judges—the audience at which the statute is aimed—had awarded document translation as well as oral translation costs in cases prior to the 1978 enactment specifically authorizing compensation for these interpreters.<sup>27</sup> And the congressional committee that

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20. See, e.g., Aprill, *supra* note 12, at 277–78; Craig Hoffman, *Parse the Sentence First: Curbing the Urge to Resort to the Dictionary When Interpreting Legal Texts*, 6 N.Y.U. J. LEGIS. & PUB. POL'Y 401, 415 (2003); Jeffrey L. Kirchmeier & Samuel A. Thumma, *Scaling the Lexicon Fortress: The United States Supreme Court's Use of Dictionaries in the Twenty-First Century*, 94 MARQ. L. REV. 77, 79 (2010); Thumma & Kirchmeier, *Lexicon*, *supra* note 8, at 252–60; Note, *Looking It Up: Dictionaries and Statutory Interpretation*, 107 HARV. L. REV. 1437, 1437 (1994).

21. See Brudney & Baum, *supra* note 9 (manuscript at 68–78).

22. 557 U.S. 167, 175–77 (2009) (addressing "because of").

23. *Id.* at 183–86 (Stevens, J., dissenting).

24. *Id.* at 176.

25. 132 S. Ct. 1997, 2000 (2012).

26. *Id.* at 2002–04.

27. *Id.* at 2008–09 (Ginsburg, J., dissenting).

drafted the 1978 Court Interpreters Act, presumably aware of this practice, emphasized Congress's expansive purpose of assuring meaningful access to federal courts.<sup>28</sup> Notwithstanding the Court's thorough dictionary-based ordinary meaning analysis, it is difficult to argue that the refusal to credit congressional sources or understandings fulfills a faithful agent role.

Ordinary meaning advocates are not just prepared to reject or ignore evidence of congressional understanding from closely analogous statutes or legislative history. They also are willing to downplay or reject *statutory* definitions from the law in question. Professor Eskridge points to an instance of this downplaying in Justice Scalia's *Sweet Home* dissent, where Scalia urges that a congressional definition be read narrowly when it is in derogation of established meanings.<sup>29</sup> Assuming *arguendo* that most of the other verbs in Congress's definition of "take" entail direct targeting of the endangered species, Congress included the effects-oriented verb "harm" as part of that definition.<sup>30</sup> It surely does not reflect faithful agency to maintain that congressionally enacted definitions should be subordinated to judicially constructed ordinary meaning. A faithful agent perspective is more likely to suggest that when the statutory definition includes one or more examples of an unconventional or uncommon sense of the word defined, that definitional sense should prevail as Congress's will.<sup>31</sup>

Rejecting congressional definitions in favor of dictionary-based ordinary meaning extends beyond minority views like Scalia's. In *Gustafson v. Alloyd Co., Inc.*, Justice Kennedy for the Court held that the term "prospectus" in the 1933 Securities Act referred only to documents describing a public offering of securities, even though Congress had unequivocally defined that term broadly enough to cover private sales.<sup>32</sup> The Court relied heavily on 1930s dictionary definitions of "prospectus" to narrow the scope of the statutory term.<sup>33</sup> In doing so, the majority effectively ignored Congress's intent as set forth not only in its own definition but also in the statute's extensive drafting history and in contemporaneous understandings expressed by legal scholars who helped draft

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28. *Id.* at 2009 (Ginsburg, J., dissenting) (citing to Senate committee report).

29. William N. Eskridge, Jr., *Nino's Nightmare: Legal Process Theory as a Jurisprudence of Toggling Between Facts and Norms*, 57 ST. LOUIS U. L.J. 865 (2013) (text accompanying note 44) (relying on *Babbitt v. Sweet Home Chapter of Cmty. for a Great Or.*, 515 U.S. 687, 718–19 (1995) (Scalia, J., dissenting)).

30. In fact, Congress included several other non-targeting, effects-oriented verbs in the same definition, such as "harass," "wound," and "kill." The inclusion of "harm" is not therefore unique or even rare. 16 U.S.C. § 1532(19) (2006).

31. *See Johnson v. United States*, 529 U.S. 694, 706–07, n.9 (2000) (adopting an unconventional meaning of a key statutory term in order to fulfill clear congressional policy).

32. 513 U.S. 561, 568–84 (1995).

33. *See id.* at 575–76.

the language, including then-law professors Felix Frankfurter and William O. Douglas.<sup>34</sup> In *Gustafson* as well as the two other dictionary-based decisions discussed above, it was conservative Justices who invoked ordinary meaning to preclude reliance on congressionally generated resources.<sup>35</sup>

One further element indicates a disconnect between the Court's patterns of dictionary use and faithful agency. Both liberal and conservative Justices are strikingly subjective and ad hoc in their dictionary choices. The Justices typically invoke one or at most two dictionaries; they have adopted individualized brand preferences that they then apply unevenly; they use general and legal dictionaries interchangeably and with no apparent rationale; and they similarly lack any predominant practice regarding use of dictionaries published close to statutory enactment date, to case-filing date, or neither.<sup>36</sup> The Justices' casually opportunistic approach suggests that they use dictionaries to buttress their own independently preferred positions. That approach hardly seems consistent with a role as faithful implementer of congressional preferences or priorities.

## B. *Language Canons*

### 1. Congress's Perspective

The conventional understanding of scholars and at least some federal judges is that members of Congress are largely unaware of the canons' existence, much less their role in judicial construction of statutes.<sup>37</sup> Until recently, available empirical evidence indicated that canons are a peripheral

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34. See *id.* at 584–86 (Thomas, J., dissenting) (invoking Congress's broad statutory definition); *id.* at 599–601 (Ginsburg, J., dissenting) (invoking drafting history and contemporaneous understandings).

35. Similarly, for examples of conservative decisions using dictionary-based ordinary meaning to foreclose reliance on longstanding agency interpretations acquiesced to by Congress, see *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2170–71 (2012) (Alito, J.); *Janus Capital Grp., Inc. v. First Derivative Traders*, 131 S. Ct. 2296, 2302 (2011) (Thomas, J.); *Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 367 (1998) (Scalia, J.). Liberal Justices employ ordinary meaning analysis in their majorities as well, but not in order to ignore or diminish evidence from the politically accountable branches. Instead, dictionary-based ordinary meaning for these liberal Justices tends to play a distinctly subsidiary, even ornamental, role alongside reliance on other factors including legislative history, purpose, and agency deference. See Brudney & Baum, *supra* note 9 (manuscript at 83–85).

36. See Brudney & Baum, *supra* note 9 (manuscript at 23–24, 40–48).

37. See, e.g., RICHARD A. POSNER, *HOW JUDGES THINK* 193 (2008); Robert A. Katzmann, *Bridging the Statutory Gulf Between Courts and Congress: A Challenge for Positive Political Theory*, 80 GEO. L. J. 653, 662–65 (1992); Abner J. Mikva, *Reading and Writing Statutes*, 48 U. PITT. L. REV. 627, 629–31 (1987); Richard A. Posner, *Statutory Interpretation—in the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 806 (1983).



asset in the statutory drafting process; committee counsel and House and Senate legislative drafters invoke them infrequently when composing and negotiating over text.<sup>38</sup>

The Gluck and Bressman study presents a more nuanced picture regarding the role of language canons. Counsel engaged in drafting generally do pay some attention to the semantic canons that address the negative implication from expressing certain things (*expressio unius*) and the positive implications from lists of associated words (*ejusdem generis* and *noscitur a sociis*).<sup>39</sup>

On the other hand, Gluck and Bressman report that structural canons, disfavoring superfluous or redundant language or promoting consistent usage like the whole act and whole code rules, are largely ignored in the drafting process.<sup>40</sup> Congressional counsel know that courts tend to apply these structural canons, but counsel still don't follow them when drafting, primarily because of conflict with Congress's own institutional needs. Drafters prefer to err on the side of redundancy both to guard against inadvertent omissions and to satisfy the political interest of key swing members, lobbyists, or constituents.<sup>41</sup> And counsel reject canons promoting consistent usage because committees are insulated from one another, they often draft different parts of a single statute, and omnibus statutes reflect contributions by multiple committees.<sup>42</sup> Consequently, there is little interest in having particular terms apply consistently across unrelated statutes or even a single statute.<sup>43</sup>

Congress's perspective on the canons as a guide to textual drafting is less uniformly hostile or indifferent than was the case for dictionaries. Still, the fact that presumptions against redundancy and in favor of consistent usage are consciously ignored, discounted, or rejected by congressional drafters tends to undermine any suggestion that the canons' widely accepted judicial role is a matter of faithful agency.

## 2. The Court's Approach

A defining feature of both the semantic canons that Congress to some extent cares about and the structural canons that it evidently ignores is their malleability. Canon proponents like Justice Scalia defend this malleability by noting that a canon's persuasive force may properly be overcome by an

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38. See Victoria F. Nourse and Jane S. Schacter, *The Politics of Legislative Drafting: A Congressional Case Study*, 77 N.Y.U. L. REV. 575, 600–04 (2002).

39. Gluck & Bressman, *supra* note 16 (manuscript at 22–23).

40. *Id.* at 23–25.

41. See *id.* at 31–33.

42. See *id.* at 33–34.

43. See *id.* at 31–34.

interpretive factor that is *more* persuasive under the circumstances.<sup>44</sup> Skeptical observers, from Professor Karl Llewellyn to Judge Richard Posner, refer to the language canons' malleability as closer to an indeterminacy that enables or encourages creative interpretation in furtherance of judicially preferred values.<sup>45</sup>

A previous co-authored study addressing the Court's use of the canons in workplace law cases over thirty-five years concludes that whatever else may be true regarding their malleability, the language canons are frequently used to frustrate or undermine Congress's intent and purpose.<sup>46</sup> The study identifies numerous Rehnquist Court decisions in which the majority relied on language canons without legislative history and the dissent relied on legislative history.<sup>47</sup> Because the dissent in these cases embraced legislative record evidence, the study hypothesized that the canons were being used to frustrate or undermine Congress's discoverable preferences.<sup>48</sup>

With respect to the language canons cases, eight of the nine decisions refusing to consider legislative history involved pro-employer or conservative opinions authored by conservative Justices.<sup>49</sup> Two examples illustrate how the majority used language canon analysis to determine that the ordinary meaning of text was so clear the Court should not even consider legislative history pointing in the opposite direction.

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44. See ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 25–27 (1997).

45. See RICHARD A. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* 277–82 (1985); Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to be Construed*, 3 VAND. L. REV. 395, 401–06 (1950).

46. James J. Brudney & Corey Ditslear, *Canons of Construction and the Elusive Quest for Neutral Reasoning*, 58 VAND. L. REV. 1 (2005) [hereinafter Brudney & Ditslear, *Canons*].

47. See *id.* at 68, 78–79 (discussing nine such language canon cases as well as ten substantive canon cases). For a language canon example from the Roberts Court, see *Chamber of Commerce of the United States v. Whiting*, 131 S. Ct. 1968, 1980–82, 1985 (2011) (Roberts, J., majority opinion) (relying on canons of consistent usage and *expressio unius* and rejecting reliance on legislative history); *id.* at 1993–94 (Breyer, J., dissenting) (relying on legislative history); *id.* at 1999–2001 (Sotomayor, J., dissenting) (relying on legislative history).

48. Brudney & Ditslear, *Canons*, *supra* note 46, at 68.

49. See *id.* at 68–69, 78–79. Because federal workplace law is broadly unidirectional in favor of employees, one might infer that legislative history accompanying laws such as Title VII, the NLRA, ERISA, or the ADA will be liberal or pro-employee. However, liberal Justices authoring majority opinions in these same workplace law cases are actually somewhat more likely to reach conservative pro-employer results when they *rely* on legislative history than when they *do not*. This set of findings reflects the fact that the legislative record evidence includes a range of compromise-related materials taken seriously by liberal Justices. See James J. Brudney & Corey Ditslear, *Liberal Justices' Reliance on Legislative History: Principle, Strategy, and the Scalia Effect*, 29 BERKELEY J. EMP. & LAB. L. 117, 146–60 (2008) [hereinafter Brudney & Ditslear, *Legislative History*].

Probably the most notorious instance is Justice Kennedy's majority opinion in *Circuit City Stores, Inc. v. Adams*.<sup>50</sup> The issue presented was the scope of the Federal Arbitration Act's exemption for "contracts of employment . . . of workers engaged in . . . commerce."<sup>51</sup> The Court had earlier held that the FAA's basic coverage language, providing for the enforceability of written arbitration provisions in "a contract evidencing a transaction involving commerce,"<sup>52</sup> signified Congress's intent to regulate to the full extent of its commerce power.<sup>53</sup> But the Court in *Circuit City* relied on *ejusdem generis* to hold that the "workers" engaged in commerce under the employment exemption language were limited by specific listed examples to transportation-related enterprises.<sup>54</sup> The FAA legislative history, which the majority deemed irrelevant in light of the Act's plain meaning, made clear that the FAA drafters and supporters never anticipated or intended that the law would cover any employment contracts at all. Bill proponents, led by Secretary of Commerce Herbert Hoover, added the employment exemption at the request of organized labor simply to reaffirm this prior understanding, and the amendment led the labor movement to withdraw its opposition.<sup>55</sup>

The second illustrative case is *Sutton v. United Air Lines, Inc.*, in which the issue was whether corrective or mitigating measures should be considered when determining if an individual is disabled under the Americans With Disabilities Act.<sup>56</sup> Justice O'Connor, writing for the Court, rejected as impermissible the approach adopted by the Justice Department and EEOC that individuals were to be evaluated in their uncorrected state (e.g., without hearing aids, prosthetic limbs, or diabetes medications).<sup>57</sup> The Court relied heavily on the whole act rule, emphasizing the ADA findings section declaration that "some 43,000,000 Americans have one or more physical or mental disabilities."<sup>58</sup> The majority concluded that this figure could not possibly be squared with an "uncorrected" approach that would cover at least

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50. 532 U.S. 105 (2001).

51. *Id.* at 109; 9 U.S.C. § 1 (2006) (emphasis added).

52. 9 U.S.C. § 2 (2006) (emphasis added).

53. *See Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 277 (1995).

54. *See Circuit City*, 532 U.S. at 114–15 (reasoning that the residual phrase "any other class of workers engaged in [interstate] commerce" is preceded by reference to seamen and railroad employees). Justice Kennedy invoked additional ordinary meaning analysis to explain why "commerce" meant something different in the basic coverage section. He reasoned that the phrase "involving commerce" in the basic coverage section was a passive formulation to be construed broadly, whereas the phrase "engaged in commerce" in the employment exemption section required active participation and therefore had a more limited jurisdictional scope. *Id.* at 115–16.

55. *See id.* at 126–28 (Stevens, J., dissenting).

56. *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 475 (1999).

57. *See id.* at 482.

58. 42 U.S.C. § 12101(a)(1) (1990); *see Sutton*, 527 U.S. at 484–87.

one hundred million people.<sup>59</sup> In order to avoid rendering the forty-three million figure meaningless, the Court held that the figure “gives content to the ADA’s terms, specifically the term ‘disability.’”<sup>60</sup> Further, under this language canon analysis, the text was so clear that the Court declined to consider extensive and uniformly contrary legislative history.<sup>61</sup>

The Court’s reliance on language canons to establish an unambiguously plain or ordinary meaning is not the province of conservative Justices alone. In the criminal law area, liberal Justices have invoked language canons to reach pro-defendant results while precluding consideration of contrary indications from the legislative record. In *Ratzlaf v. United States*,<sup>62</sup> the issue was what the government must prove to convict an individual of “willfully violating” the anti-structuring provision of the Money-Laundering Control Act.<sup>63</sup> Justice Ginsburg for the Court relied heavily on the rule against surplusage to hold for the defendant, reasoning that there could be no conviction unless the person who structured the transaction had specific knowledge that structuring was illegal, not simply that evading a bank’s reporting requirements was unlawful activity.<sup>64</sup> Ginsburg concluded that because the text was so clear, she would not resort to contrary legislative history to “cloud” the Court’s textual analysis.<sup>65</sup>

Similarly, in *Begay v. United States*,<sup>66</sup> the issue was whether the state felony offense of driving under the influence (DUI) qualifies as a “violent felony” under the Armed Career Criminals Act.<sup>67</sup> Justice Breyer for the Court relied heavily on *ejusdem generis* and the rule against surplusage to conclude that the federal statute’s listed examples of violent felonies—burglary, arson, extortion, or using explosives—illustrate and limit the range of included

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59. *Sutton*, 527 U.S. at 486–87.

60. *Id.* at 487.

61. Justice Stevens in his dissent found that the text was not unambiguously clear and he therefore consulted the ADA legislative history, which established the exact opposite understanding within the House and Senate committee reports from the conclusion reached by the majority. *See id.* at 499–501 (Stevens, J., dissenting). Moreover, the committee report understanding was identical to the position taken by all three executive branch agencies charged with construing the ADA. *See id.* at 496, 501.

62. 510 U.S. 135 (1994).

63. 31 U.S.C. § 5324 (1986); *see also Ratzlaf*, 510 U.S. at 139–40.

64. *Ratzlaf*, 510 U.S. at 140–41, 144–46.

65. *Id.* at 147–48. Justice Blackmun in dissent relied heavily on legislative history to show that Congress meant to criminalize individual behavior like *Ratzlaf*’s. *See id.* at 157–60 (Blackmun, J., dissenting) (relying on two committee reports plus hearing testimony from the Deputy Attorney General).

66. 553 U.S. 137, 139 (2008).

67. 18 U.S.C. § 924(e)(2)(B) (2006).

misconduct, and the DUI offense is outside that limit.<sup>68</sup> The dissent objected *inter alia* that the Court was ignoring the clear judgment of Congress in its construction of the Act's enhanced sentencing framework.<sup>69</sup>

Semantic canons such as *eiusdem generis* and structural canons like the rule against surplusage are not inherently conservative or liberal. But in the Court's hands they often turn out to be anti-legislative. The presumption that statutes should be understood as structurally integrated with no surplus phrases or provisions is at odds with the drafting realities that produce Congress's complex statutory schemes such as ERISA, Title VII, or the Securities Exchange Act, schemes that are often replete with linguistic residues and repetitions.<sup>70</sup> And the more beguiling presumption that general words following an enumeration of specifics are limited by the class specifically mentioned is subject to principled disagreement as well as manipulative abuse. In many instances, these language canons happen to point in the same direction as direct, tangible evidence of legislative intent.<sup>71</sup> But when they point in the opposite direction, as in the illustrative cases described above and numerous others, the Court's determination to rely on the canons and refuse even to consider available legislative evidence cannot be justified under a faithful agent rationale.

## II. LIMITING JUDICIAL DISCRETION

### A. *Alternative Explanations for Ordinary Meaning*

Despite these faithful agency problems, the Court's ordinary meaning focus has become a primary factor in its approach to statutory interpretation. Reliance on dictionaries and language canons to discern ordinary meaning is promoted by liberals and conservatives, purposivists as well as textualists. Ordinary meaning is almost always the initial element in the Court's analysis of a contested statutory provision, and it is often the dispositive element, as well. If faithful agent status cannot justify this approach, how then should we account for it?

One factor is the abiding influence of Justice Scalia. From the moment he joined the Court, Scalia has forcefully articulated a distinctive vision of how

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68. *See Begay*, 553 U.S. at 142, 144–45. Breyer does not name these two canons, but he is utilizing them in substance.

69. *See id.* at 161 (Alito, Souter, & Thomas, JJ., dissenting).

70. *See* Brudney & Ditslear, *Canons*, *supra* note 46, at 104.

71. *See, e.g.*, *New Process Steel, L.P. v. NLRB*, 130 S. Ct. 2635, 2640–41 (2010) (majority relies on whole act rule and legislative history); *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 62–63 (2006) (majority relies on *expressio unius* and legislative history); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623, 625 (1997) (majority relies on *in pari materia* and legislative history).

courts should interpret statutes. He was the first Rehnquist Court Justice to author numerous opinions invoking dictionary definitions as a positive interpretive resource,<sup>72</sup> just as he took the lead in authoring separate opinions condemning any reliance on legislative history as a resource.<sup>73</sup> And Scalia has emphasized the central role of language canons both in his Court opinions<sup>74</sup> and in his separate high-profile writings about interpretation.<sup>75</sup> Justice Scalia's relentless pursuit of ordinary meaning rather than intended meaning has clearly had an impact on some of his colleagues—due to the persuasive force of his reasoning, the chilling effect from his censorious opinions, or perhaps both.<sup>76</sup>

A second factor is the accessibility and convenience of these two resources. Dictionaries are easy for judges to consult and language canons are off-the-rack rules of thumb that judges can invoke *sua sponte*. Unlike legislative history, there is little research or complexity involved in calling upon ordinary meaning interpretive assets. Nor does the Court need to depend on the parties to present arguments in their briefs regarding these resources. Indeed, judges regularly invoke dictionary definitions that the parties have not raised at all.<sup>77</sup>

A third factor is the Court's interest in ordinary meaning as a coordination tool. Judges following this approach from the start can promote the consistency and content-neutrality of results reached across different subject matter areas.<sup>78</sup> This coordination function becomes stronger when ordinary meaning analysis is viewed as presumptively sufficient, not just a necessary starting point.

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72. Thumma & Kirchmeier, *Lexicon*, *supra* note 8, at 261 (“Justice Scalia has relied on the dictionary more times than any other justice in the history of the Supreme Court.”); *id.* at 253–56 n.181 (identifying thirteen separate Scalia opinions using dictionary in 1986 to 1991 terms plus eleven Scalia-authored majorities during same period).

73. Brudney & Ditslear, *Legislative History*, *supra* note 49, at 161 (listing twelve separate opinions criticizing majority's use of legislative history from 1987–89); Brudney & Baum, *supra* note 9 (manuscript at 11 n.20) (listing three more separate opinions in 1990 and 1991).

74. *See, e.g.*, *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 257–59 (1993) (relying on consistent usage and whole act rule); *Chan v. Korean Air Lines, Ltd.*, 490 U.S. 122, 132–33 (1989) (relying on *expressio unius*).

75. *See* SCALIA, *supra* note 44, at 25–27; SCALIA & GARNER, *supra* note 4, at 69–233 (discussing approvingly more than thirty semantic and structural canons).

76. *See generally* Brudney & Ditslear, *Legislative History*, *supra* note 49, at 160–68.

77. *See* Brudney & Baum, *supra* note 9 (manuscript at 45) (reporting that twenty-eight percent of the words with dictionary citations in a majority opinion did not have such citations in briefs submitted by parties or the United States as an amicus).

78. *See* Alexander Volokh, *Choosing Interpretive Methods: A Positive Theory of Judges and Everyone Else*, 83 N.Y.U. L. REV. 769, 833 (2008) (contending that repeated use of and advocacy for textualist method leads to increased entrenchment of that method because future jurists find the method more trustworthy and because consistency with past practice diminishes scrutiny from Congress and minimizes opposition in general).

Finally, there is an institutional self-protection rationale. During the 1970s and the 1980s, the Supreme Court was repeatedly criticized in the media and law reviews as activist and ideological.<sup>79</sup> Congress also overrode Supreme Court decisions during this period substantially more often than it had in prior years.<sup>80</sup> Faced with a barrage of attacks on its neutrality and willingness to exercise restraint, the Court may have sought to insulate itself going forward. Citing dictionary definitions as “linguistic authority” for language-based conclusions subtly analogizes dictionaries to judicial precedent.<sup>81</sup> And disputes over the meaning of abstract Latin phrases or venerable structural maxims may seem respectably neutral and law-like to judges and the attorneys who argue before them.<sup>82</sup> In addition, the notion of ordinary meaning resources as objective and precise contrasts with the assertedly political and messy nature of legislative history, which is said to create greater risks of judicial misuse.<sup>83</sup>

Each of these factors has likely contributed to the ascent of ordinary meaning analysis. With respect to the rationale involving institutional self-protection, however, a word of caution is in order. The claim that the interpretive turn from intended meaning to ordinary meaning creates more neutral or objective or authoritative judicial reasoning rests in large part on a

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79. For illustrations of concern expressed in the press, see, for example, Daniel Chu & Diane Camper, *The Supreme Court: Days of Decision*, NEWSWEEK, July 4, 1976, at 83, 83–84; Richard L. Strout, *Social Issues Fall to Court*, CHRISTIAN SCIENCE MONITOR, July 7, 1980, at 3, 3; Stuart Taylor, Jr., *The ‘Judicial Activists’ are Always on the Other Side*, N.Y. TIMES, July 3, 1988, at E5, E5. For concerns voiced by legal scholars, see, for example, John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920, 924–26 (1973); Robert F. Nagel, *A Comment on the Burger Court and “Judicial Activism”*, 52 U. COLO. L. REV. 223, 230–31 (1981). See also J. Harvie Wilkinson III, *Is There a Distinctive Conservative Jurisprudence?*, 73 U. COLO. L. REV. 1383, 1383 (2002) (federal appellate court judge describing the Warren and Burger Courts as periods of “excessive activism”). The Court was criticized for its policymaking activism by presidents as well, including Ronald Reagan and George H.W. Bush in the late 1980s and early 1990s. See Donald H. Zeigler, *The New Activist Court*, 45 AM. U. L. REV. 1367, 1368 (1996).

80. See William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331, 338 (1991) (reporting increase from six Supreme Court overrides per congressional session from 1967–74 to twelve overrides per session from 1975–90).

81. See Hoffman, *supra* note 20, at 412; James L. Weis, Comment, *Jurisprudence By Webster’s: The Role of the Dictionary in Legal Thought*, 39 MERCER L. REV. 961, 963 (1988).

82. See R. N. Graham, *In Defence of Maxims*, 22 STATUTE L. REV. 45, 46 (2001) (suggesting that language canons, while not hard and fast rules, be viewed as “a code of ‘statutory grammar’ that helps us understand patterns of language found in legislative texts”).

83. These risks are, first, that legislators or staff will “craft statements in the legislative record with an eye toward manipulating or misleading judges as to the meaning of text” and, second, that “judges reviewing the abundant legislative commentary from bill proponents and opponents may selectively invoke portions” to help justify their preferred outcomes. See Brudney & Ditslear, *Legislative History*, *supra* note 49, at 119.

false dichotomy between law and politics. Courts regularly exercise considerable discretion when applying dictionaries and language canons, just as they do when applying legislative history. Part B below discusses how the Supreme Court's approach to legislative history reflects genuine faithful agent status when construing contested statutory text. But apart from our faithful agent focus, it is worth noting that the objective standards available to monitor and assess judicial misuse of legislative history are stronger than anything that exists with respect to the canons or dictionaries. The Court has long recognized a presumptive hierarchy of reliable legislative history resources based on the structure of congressional lawmaking.<sup>84</sup> By contrast, the Court has never identified a framework of authoritative priorities that might limit judicial discretion when invoking either of these two ordinary-meaning assets.<sup>85</sup>

### B. *Legislative History and Faithful Agency*

#### 1. Congress's Perspective

As noted at the outset, two core textualist contentions are that reliance on ordinary meaning rather than statements from congressional subgroups signals respect for legislative supremacy, and that bargained-for text rather than legislative history is the best—if not the only—evidence reflecting genuine congressional preferences.<sup>86</sup> One might ask whether members of Congress and their key staffs have voiced similar observations discounting the importance of legislative history. In fact, their observations run in the exact opposite direction.

Starting in the late 1980s, a range of current and former members of Congress began endorsing from a faithful agency perspective the importance of relying on legislative history to help discern the meaning of statutes. Democrats with extensive experience in the House have identified committee reports as the “bone structure” of a federal statute, performing a “central explanatory function” and resolving ambiguities.<sup>87</sup> They contend that for “most” members, “legislative history can explain and amplify legislative

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84. See notes 106–20 *infra* and accompanying text.

85. See Brudney & Baum, *supra* note 9 (manuscript at 30–50, 80) (addressing dictionaries); James J. Brudney, *Canon Shortfalls and the Virtues of Political Branch Interpretive Assets*, 98 CAL. L. REV. 1199, 1202–05, 1229–32 (2010) (addressing language canons).

86. See text accompanying notes 2–3 *supra*.

87. Mikva, *supra* note 37, at 631. Democratic Rep. Mikva served in Congress from 1969 to 1973 and 1975 to 1979. He was an appellate judge on the D.C. Circuit from 1979 to 1997, and served as White House Counsel from 1994 to 1995. BIOGRAPHICAL DIRECTORY OF THE U. S. CONG., MIKVA, ABNER JOSEPH, <http://bioguide.congress.gov/scripts/biodisplay.pl?index=m000703> (last visited Jan. 21, 2013).



language in ways that are instructive to the courts” as well as colleagues.<sup>88</sup> Perhaps more important, prominent Republicans from the Senate and House have concluded that it would be inappropriate if courts followed the Scalia approach and refused to consider legislative record evidence.<sup>89</sup> Republicans in Congress emphasized that even as members of the minority they often looked to majority committee report explanations to understand what they were voting on,<sup>90</sup> and that legislative history can help provide focus for generally worded statutory text, contribute context and meaning when a provision is produced during floor debate, and prevent slippage from agreements reached within Congress.<sup>91</sup>

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88. *Statutory Interpretation and the Uses of Legis. History: Hearing Before Subcomm. On Courts, Intellectual Prop. and the Administration of Justice of the Comm. on the Judiciary*, 101st Cong. 2 (1990) [hereinafter *Stat. Interp. Hearing*] (Statement of Chairman Robert Kastenmeier). Rep. Kastenmeier served in Congress from 1959 to 1991, and chaired the Judiciary Committee's Subcommittee on Courts from 1969 to 1991. Short Biography of Robert W. Kastenmeier, WISCONSIN HISTORICAL SOCIETY, [http://www.wisconsinhistory.org/dictionary/index.asp?action=view&term\\_id=2084&search\\_term=kastenmeier](http://www.wisconsinhistory.org/dictionary/index.asp?action=view&term_id=2084&search_term=kastenmeier) (last visited Oct. 29, 2012); see also Senator Joseph R. Biden, Jr., *Who Needs the Legislative Veto?*, 35 SYRACUSE L. REV. 685, 695–701 (1984) (invoking legislative history in the foreign policy context).

89. Orrin Hatch, *Legislative History: Tool of Construction or Destruction*, 11 HARV. J.L. & PUB. POL'Y 43, 45–48 (1988). See *Stat. Interp. Hearing*, supra note 88, at 65, 67–68 (statement of Rep. Carlos J. Moorhead); Republican Senator Hatch has been a member of the Senate since 1979, and served as chair or ranking member of the Judiciary Committee from 1993 to 2005. BIOGRAPHICAL DIRECTORY OF THE U. S. CONG., HATCH, ORRIN GRANT, <http://bioguide.congress.gov/scripts/biodisplay.pl?index=H000338> (last visited Jan. 21, 2013). Republican Rep. Moorhead served in the House from 1973 to 1997 and was ranking minority member of the Judiciary Committee's Subcommittee on Courts from 1982 to 1994, and chair from 1995 to 1996. Interview with Representative Carlos Moorhead, THE THIRD BRANCH, [http://www.uscourts.gov/News/TheThirdBranch/95-03-01/Interview\\_with\\_Representative\\_Carlos\\_J\\_Moorhead.aspx](http://www.uscourts.gov/News/TheThirdBranch/95-03-01/Interview_with_Representative_Carlos_J_Moorhead.aspx) (last visited Oct. 29, 2012). See also *infra* note 93 (identifying support for legislative history expressed by several Republican senators at confirmation hearings from 1993 to 2010).

90. See *Stat. Interp. Hearing*, supra note 88, at 21 (statement of Judge James Buckley); Joan Biskupic, *Scalia Takes a Narrow View in Seeking Congress' Will*, 48 CONG. Q. 913, 917 (1990) (reporting Senator Specter's view). Judge Buckley served as a Conservative U.S. Senator from 1971 to 1977 prior to being appointed to the D.C. Circuit. BIOGRAPHICAL DIRECTORY OF THE U. S. CONG., BUCKLEY, JAMES LANE, <http://bioguide.congress.gov/scripts/biodisplay.pl?index=B001026> (last visited Jan. 21, 2013). Senator Specter served as a U.S. Senator, first for the Republican party and then later the Democrats, from 1981 to 2011, and was an influential member of the Judiciary Committee. BIOGRAPHICAL DIRECTORY OF THE U. S. CONG., SPECTER, ARLEN <http://bioguide.congress.gov/scripts/biodisplay.pl?index=S000709> (last visited Jan. 21, 2013).

91. Hatch, supra note 89, at 45–48; see also Robert A. Katzmann, *Statutes*, 87 N.Y.U. L. REV. 637, 653–54 (2012) [hereinafter Katzmann, *Statutes*] (discussing how legislators and staff from off the committee “accept the trustworthiness of statements made by their colleagues . . . [in committee reports] about what the proposed legislation means,” and observing that “[t]he system works because committee members and their staffs will lose influence with their colleagues as to

Although some members of Congress have complained that committee report language goes unnoticed by other legislators,<sup>92</sup> the fact that members of both parties have continued to participate in creating, negotiating, and relying on these reports as well as other legislative history suggests that such comments are isolated voices of protest. Further evidence that members of Congress believe strongly in the relevance of legislative history is apparent in statements by senators from both parties during numerous Supreme Court confirmation hearings since 1993.<sup>93</sup> To be sure, the *probative weight* of particular legislative history with respect to a given statutory dispute requires a sifting of the enactment record to determine which history is truly on point or is “most proximate” to the text itself.<sup>94</sup> But the challenges involved in this judicial undertaking are challenges that Congress expects the Court will attempt to meet in good faith as its agent.

Stepping back, bipartisan support for the value of legislative history is not surprising given the complex realities of the democratic lawmaking process. The ambiguities and incompleteness of statutory language reflect in part Congress’s understanding of the need to draft certain rules in general terms so

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future bills if they do not accurately represent the bills under consideration within their jurisdiction.”).

92. See e.g., 128 CONG. REC. 16,802, 16,918–19 (1982) (statement of Sen. William Armstrong); 98 CONG. REC. 7,273, 7,299 (1952) (statement of Rep. Thomas Jenkins). Justice Scalia has regularly invoked the critique offered by Republican Senator Armstrong, who served from 1979 to 1991. BIOGRAPHICAL DIRECTORY OF THE U. S. CONG., ARMSTRONG, WILLIAM LESTER <http://bioguide.congress.gov/scripts/biodisplay.pl?index=A000219> (last visited Jan. 21, 2013). As I have previously pointed out, Scalia’s edited reproduction of Senator Armstrong’s floor exchange with Senate Finance Committee Chairman Robert Dole omits key remarks from Dole that emphasize the bipartisan and interbranch collaborative nature of committee reports in the tax law area. See Brudney & Ditslear, *Warp & Woof*, *supra* note 10, at 1292–93.

93. See, e.g., *Nomination of Ruth Bader Ginsburg, to be Assoc. Justice of the Supreme Court of the U. S. Before the Comm. on the Judiciary*, 103d Cong. 223–25 (1993) (statement of Sen. William Cohen) (republican); *id.* at 325–26 (statement of Sen. Dennis DeConcini, D); *Nomination of Stephen G. Breyer to be an Assoc. Justice of the Supreme Court of the U. S. Before the Comm. on the Judiciary*, 103d Cong. 170–74 (1994) (statement of Sen. Charles Grassley, R); *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the U. S. Before the Comm. on the Judiciary*, 109th Cong. 318–19 (2005) [hereinafter *Roberts Hearing*] (statement of Sen. Charles Grassley, R); *Confirmation Hearing on the Nomination of Samuel A. Alito, Jr. to be an Assoc. Justice of the Supreme Court of the U. S. Before the Comm. on the Judiciary*, 109th Cong. 503 (2006) (statement of Sen. Charles Grassley, R); *The Nomination of Elena Kagan to be an Assoc. Justice of the Supreme Court of the U. S. Before the Comm. on the Judiciary*, 111th Cong. 219–20 (2010) (statement of Sen. Alan Franken, D); *The Nomination of Elena Kagan to be an Assoc. Justice of the Supreme Court of the U. S. Before the Comm. on the Judiciary*, 111th Cong. 507–09 (statement of Sen. Jeff Sessions, R).

94. Victoria F. Nourse, *A Decision Theory of Statutory Interpretation: Legislative History by the Rules*, 122 YALE L.J. 70, 109–10 (2012).

as to minimize the risk of erroneous or absurd applications of an overly detailed text. Such drafting flexibility also provides agencies with sufficient room to perform their delegated interpretive responsibilities.<sup>95</sup>

One subject-specific example of how legislative history contributes to Congress's operational processes involves major tax legislation. Committee reports accompanying such tax bills have typically featured hundreds of pages of explanatory material produced in a bipartisan fashion with substantial input from the Executive Branch.<sup>96</sup> These committee reports can perform a mini-regulation function if, as often occurs, it takes years for the Treasury Department to issue formal rules in specific subject areas.<sup>97</sup> A second instance of how legislative history reflects Congress's lawmaking habits involves labor and civil rights statutes, where the legislative process tends to be far more partisan. Rather than performing a mini-regulatory role, committee reports—and then floor debates and conference reports—often reveal or confirm the existence of compromise arrangements on a particular issue, negotiated among interested legislators and affected constituencies.<sup>98</sup>

Finally, recent studies involving congressional staff primarily responsible for drafting statutory language make clear that, like their elected bosses, committee counsel and legislative attorneys view legislative history as a central part of the lawmaking enterprise. Professors Victoria Nourse and Jane Schacter interviewed Senate Judiciary Committee counsel from both parties in the late 1990s and found that these key players regarded legislative history as integral to their efforts—in explaining textual meaning and in securing collective action through negotiated agreement.<sup>99</sup> The more recent study by Professors Gluck and Bressman amplifies and deepens these earlier findings.<sup>100</sup> Based on interviews with over 130 attorneys, they concluded that “legislative history was emphatically viewed by almost all of our respondents—Republican and Democrat alike—as *the most important drafting and interpretive tool apart from text*.”<sup>101</sup> These counsel recognized that some forms of legislative history can be less reliable, and that legislative history in general serves certain

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95. See Peter L. Strauss, *When The Judge Is Not the Primary Official With Responsibility to Read: Agency Interpretation and the Problem of Legislative History*, 66 CHI.-KENT L. REV. 321, 337–38 (1990).

96. See Brudney & Ditslear, *Warp & Woof*, *supra* note 10, at 1280–83 and sources cited therein.

97. Michael S. Livingston, *Congress, the Courts, and the Code: Legislative History and the Interpretation of Tax Statutes*, 69 TEX. L. REV. 819, 841 (1991).

98. See Brudney & Ditslear, *Legislative History*, *supra* note 49, at 149–51 and sources cited therein.

99. See Nourse & Schacter, *supra* note 38, at 606–07.

100. Gluck & Bressman, *supra* note 16.

101. *Id.* at 51 (emphasis added).

functions separate from guiding judicial interpretation—notably as a tool of agency oversight and as a form of political communication with the public.<sup>102</sup> Still, over ninety percent of those surveyed stated that drafters use legislative history to explain a statute’s purpose and to indicate the meaning of specific terms in the text, as well as to set forth in layman’s terms, for other members and staff, what the proposed statute does and how it fits in with older legislation.<sup>103</sup>

In sum, for both members of Congress and their key staff, legislative history contributes in essential ways to the enactment process. Congressional actors who draft, negotiate, and vote on text are well aware of Justice Scalia’s contentions that legislative history is illegitimate, unreliable, and unworthy of consideration by courts.<sup>104</sup> But as lawmaking principals, they remain committed to the relevance and probative value of this legislative record evidence.<sup>105</sup> Judges who refuse to consider such evidence in the name of ordinary meaning analysis can hardly be said to act as faithful agents.

## 2. The Court’s Approach

Unlike Justices Scalia and Thomas, most Justices do not categorically disregard legislative history. Rather, the Court as a whole has long understood that the value of legislative record evidence is best approached as a matter of weight rather than admissibility, of more or less rather than all or nothing.<sup>106</sup> Moreover, and importantly, the Court’s presumptive hierarchy of reliable legislative history sources depends heavily on what it understands to be the structure of congressional lawmaking.

Thus, standing committee and conference committee reports traditionally are accorded the most weight.<sup>107</sup> This priority reflects awareness that busy legislators trust their colleagues on the committees responsible for drafting and negotiating about the contested text,<sup>108</sup> and that committee reports explaining

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102. *Id.* at 55–57; see also Katzmann, *Statutes*, *supra* note 91, at 659–60 (discussing the high value that agencies place on reliable legislative history when implementing legislation).

103. Gluck & Bressman, *supra* note 16 (manuscript at 56–57).

104. See, e.g., *Roberts Hearing*, *supra* note 93, at 318–19 (statement of Sen. Charles Grassley); Nourse & Schacter, *supra* note 38, at 607; Gluck & Bressman, *supra* note 16 (manuscript at 27).

105. See Nourse & Schacter, *supra* note 38, at 607.

106. See generally Brudney & Ditslear, *Legislative History*, *supra* note 49, at 146–60, and cases cited therein.

107. See, e.g., *Garcia v. United States*, 469 U.S. 70, 76 (1984); *Simpson v. United States*, 435 U.S. 6, 17 (1978) (Rehnquist, J., dissenting); *United States v. Int’l Union United Auto., Aircraft, & Agric. Implement Workers of Am.*, 352 U.S. 567, 585–86 (1957).

108. *Bank One Chi., N.A. v. Midwest Bank & Trust Co.*, 516 U.S. 264, 276–77 (1996) (Stevens, J., concurring).

and justifying this text “presumably are well considered and carefully prepared.”<sup>109</sup> Explanatory floor statements by bill or amendment sponsors receive almost as much attention, because timely explanations by the sponsor of the language ultimately enacted are deemed “an authoritative guide to the statute’s construction.”<sup>110</sup> Conversely, the Court considers statements by bill opponents and also subsequent legislative history to be unreliable.<sup>111</sup> These participants lack authoritative status, either because as opponents, or “losers,” their explanations carry no more weight than a dissenting appellate court opinion,<sup>112</sup> or because as post-hoc observers their remarks could not have influenced colleagues who were considering how to vote.<sup>113</sup>

The Court’s presumptive hierarchy of legislative history is based on which sources members of Congress, acting individually and institutionally, regard as trustworthy.<sup>114</sup> By relying on its assessment of what Congress as principal considers more, or less, trustworthy, the Court would seem to be operating as an agent when construing legislative record evidence.

In addition to following the same basic hierarchy as legislators and their staffs, the Court also seems to understand how certain types of legislative history may serve distinct purposes in different subject areas. Thus, in tax law, where legislation tends to be reported out of committee as a bipartisan, inter-

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109. *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 395 (1951) (Jackson, J., concurring).

110. *N. Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 526–27 (1982); *see also Corley v. United States*, 556 U.S. 303, 318 (2009); *Pub. Emps. Ret. Sys. of Oh. v. Betts*, 492 U.S. 158, 190 (1989) (Marshall, J., dissenting).

111. *See, e.g., Bryan v. United States*, 524 U.S. 184, 196 (1998) (discounting opposition statements); *Shell Oil v. Iowa Dep’t of Revenue*, 488 U.S. 19, 29 (1988) (same); *see also Heintz v. Jenkins*, 514 U.S. 291, 298 (1995) (rejecting post-enactment legislative history); *Consumer Prod. Safety Comm’n v. GTE Sylvania, Inc.*, 447 U.S. 102, 117–18 (1980) (same).

112. Nourse, *supra* note 94, at 118–20.

113. The Court’s rankings are strong presumptions rather than hard rules. Committee reports may be of limited value if the report commentary is silent with respect to the provision in dispute or if the provision was added to the bill as a floor amendment. *See* Nourse, *supra* note 94, at 98–109 (discussing why history accompanying later textual provisions should trump history explaining earlier-drafted portions or versions of the text). And post-enactment history may be more reliable in certain limited circumstances if it represents an integral part of the shared understanding reached by Congress as a whole. *See* James J. Brudney, *Congressional Commentary on Judicial Interpretations of Statutes: Idle Chatter or Telling Response?*, 93 MICH. L. REV. 1, 90–91, 97–99 (1994) [hereinafter Brudney, *Congressional Commentary*] (discussing two such instances). Importantly, these departures from the Court’s presumptions also are grounded in perceptions of what legislators regard as trustworthy or reliable statements in furtherance of the enactment process.

114. *See* Cheryl Boudreau et al., *What Statutes Mean: Interpretive Lessons From Positive Theories of Communication and Legislation*, 44 SAN DIEGO L. REV. 957, 974 (2007).

branch collaborative effort,<sup>115</sup> the Court, when it invokes legislative history, relies on standing committee reports three-fourths of the time while largely ignoring or discounting floor statements and even conference reports.<sup>116</sup> These committee reports reflect an accumulated body of expertise from all key players, and the Court often relies on the reports essentially for expertise-borrowing purposes.<sup>117</sup> By contrast, in labor and employment law, legislation is typically reported from committee with lengthy minority views and is often modified on the floor or in conference.<sup>118</sup> The Court, when relying on legislative history, is far more likely to consult Senate or House floor debates and conference reports, while invoking committee reports substantially less than in the tax area.<sup>119</sup> Its pattern of reliance in these labor and civil rights decisions reflects an effort to understand the precise contours of the legislative bargain that was struck.<sup>120</sup> In both the tax law and labor law examples, the Court's use of legislative history displays a nuanced, albeit unarticulated, appreciation for the different ways in which Congress approaches the process of building a sufficient lawmaking consensus.

As was the case with ordinary meaning, faithful agency is not the only basis from which to assess or understand the value of legislative history as a judicial resource. There are criticisms of its value or reliability based on other factors such as its accessibility, its complexity, and its susceptibility to misuse by staff or members with their own agendas.<sup>121</sup> Those arguments warrant serious consideration, and they have been addressed elsewhere by judges and legal scholars.<sup>122</sup> What matters for present purposes, however, is the concept of faithful agency. In contrast to the dictionary and language canons that form the foundation of ordinary meaning analysis, invoking legislative history as an interpretive resource is fundamentally consistent with the role of the judge as a faithful agent.

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115. See *supra* notes 96–97 and accompanying text.

116. See Brudney & Ditslear, *Warp & Woof*, *supra* note 10, at 1260–65.

117. *Id.* at 1283–91 (reviewing a number of the Court's expertise-borrowing majority opinions between 1970 and 1990).

118. *Id.* at 1262, 1282.

119. *Id.* at 1263–65.

120. Brudney & Ditslear, *Legislative History*, *supra* note 49, at 146–53.

121. See, e.g., Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845, 861–62, 864–69 (1992) (considering various practical arguments for devaluing or disregarding legislative history); George A. Costello, *Average Voting Members and Other "Benign Fictions": The Relative Reliability of Committee Reports, Floor Debates, and Other Sources of Legislative History*, 1990 DUKE. L.J. 39, 60–72 (same).

122. See, e.g., Breyer, *supra* note 121, at 861–62, 864–69; Brudney, *Congressional Commentary*, *supra* note 113, at 47–56; Costello, *supra* note 121, at 60–72; Zeppos, *supra* note 12, at 1310–35.

## CONCLUSION

Ordinary meaning jurists and their supporters contend that courts are acting as faithful agents because the text is both the one legitimate and the one knowable product of the lawmaking process. With respect to faithful agency, the legitimacy of the text is something of a red herring. All major approaches to statutory interpretation recognize that the text is the only manifestation of “law” and is therefore the starting point for any responsible analysis. But in the hard cases where the meaning of that text is inconclusive or reasonably disputed, courts consult legislative history for the same legitimate reasons they consult the dictionary, the canons, or prior agency practice. All these resources can help a court to attribute meaning to the contested text by offering a more complete understanding of the written communication that Congress has enacted.

As for what is knowable about legislative bargains, this Article has reviewed considerable evidence from those who consummate the bargains and from the Court’s own practices in construing them. Based on that evidence, reliance on dictionaries and language canons—the twin pillars of ordinary meaning analysis—is difficult to justify in terms of advancing the Court’s role as faithful agent. Congress’s self-conscious practices when drafting and agreeing upon text, practices regularly explained by legislators and key staff, indicate that neither resource contributes seriously to lawmaking processes or to the final product. And the Court’s record of invoking dictionaries and language canons indicates that the Justices often use each resource to ignore or reject the terms of a legislative bargain.

Judicial reliance on dictionaries or language canons may be defended on other grounds, such as their accessibility, their asserted objectivity, and their attempt to promote clarity or predictability.<sup>123</sup> We should recognize, however, that for Congress these interpretive assets do not occupy a favored position in the enactment or interpretive processes.

Reliance on legislative history comes closer to reflecting Congress’s preferences as lawmaking principal. Legislators and staff use this history to explain, and at times enhance, the statutory work product by avoiding an unnaturally confining quest for linguistic precision as Congress strives for sufficient consensus to secure passage. And the Court’s record of nuanced appreciation for legislative history—its presumptive hierarchy of specific sources and its identifiably distinct use of those sources with respect to different subject matter areas—reflects that most Justices understand the

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123. *But cf.* Brudney & Baum, *supra* note 9 (manuscript at 5, 7–8) (questioning whether dictionaries as used by the Justices promote objectivity or predictability); Brudney & Ditslear, *Canons*, *supra* note 46, at 9–10 (raising similar questions about the canons).

relationship between the legislative record and Congress's processes for drafting, negotiating, and enacting a statutory bargain.

Problems of misuse or abuse exist for legislative history as they do for all interpretive resources. Thus, there is every reason for judges to be vigilant about applying this history,<sup>124</sup> something both legislative staff and courts understand.<sup>125</sup> In the end, such vigilance is worth the candle if the Court is to respect legislative supremacy and perform as Congress's agent in this interpretive endeavor.

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124. *See generally* Nourse, *supra* note 94.

125. *See generally* Gluck & Bressman, *supra* note 16.