

# THREE SYMMETRIES BETWEEN TEXTUALIST AND PURPOSIVIST THEORIES OF STATUTORY INTERPRETATION—AND THE IRREDUCIBLE ROLES OF VALUES AND JUDGMENT WITHIN BOTH

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*This Article illuminates an important, ongoing debate between “textualist” and “purposivist” theories of statutory interpretation by identifying three separate stages of the interpretive process at which textualists, as much as purposivists, need to make value judgments. The Article’s analysis, which reveals previously unrecognized symmetries between the two theories, is consistent with, but does not depend upon, empirical studies indicating that judicial ideology matters more than methodology in determining interpretive outcomes. It rejects the frequent claim of textualists that their theory much more stringently restrains value-based decision making than does purposivism.*

*Of the three interpretive stages at which textualists rely on value-based judgments as much as purposivists do, one stands at the threshold when “interpretive dissonance”—reflecting a partly value-based experience of discordance between what a statute at first blush seems to mean and an interpreter’s expectations concerning what well-written legislation would likely direct—triggers an initial resort to interpretive theory. Then, symmetrically, both textualists and purposivists need to specify the context within which a statute should be interpreted. Although textualists emphasize a statute’s “semantic context” and purposivists its “policy context,” making specific determinations of what is contextually relevant and irrelevant frequently draws values into play. Finally, after an interpretive context is specified, textualist as much as purposivist interpreters must make judgments of “reasonableness.” Purposivists inquire what reasonable legislators would have intended. For textualists, the comparable question involves how a reasonable person would understand statutory language in context. The construct of a reasonable interpreter is inherently value laden.*

*Because both textualist and purposivist theories require partly value-based decision making, there is no escaping the conclusion that good judging requires good judgment—even when reasonable disagreement exists*

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*about what good judgment requires. Normative debates about theories of statutory interpretation will remain incomplete until textualists, in particular, reckon adequately with this reality.*

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## INTRODUCTION

A central ambition of most theories of statutory interpretation<sup>1</sup> is to ensure that judges act as faithful agents of the legislature<sup>2</sup>—a role that requires courts to subordinate their own values to those of their principals. “Purposivist” theories demand that judges do so by deciding statutory cases in accordance with the purpose or intent of the legislature.<sup>3</sup> “Textualist” theories agree, and sometimes affirm

<sup>1</sup> For a brisk survey of the leading modern theories, see RICHARD H. FALLON, JR., JOHN F. MANNING, DANIEL J. MELTZER & DAVID L. SHAPIRO, *HART & WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 622–26 (6th ed. 2009) [hereinafter *HART & WECHSLER*].

<sup>2</sup> See John F. Manning, *The New Purposivism*, 2011 SUP. CT. REV. 113, 120. *But cf.* RONALD DWORKIN, *LAW’S EMPIRE* 313 (1986) (characterizing the judicial “role as fundamentally the creative one of a partner continuing to develop, in what [the judge] believes is the best way, the statutory scheme Congress began”); William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1482 (1987) (depicting judges as agents “who must often update their orders to meet changing circumstances”).

<sup>3</sup> See, e.g., Stephen Breyer, *Our Democratic Constitution*, 77 N.Y.U. L. REV. 245, 266 (2002) (arguing that “purposive” interpretation “reminds the judge . . . that it is in Congress, not the courts, where the Constitution places the authority to enact a statute”); Peter L. Strauss, Essay, *The Courts and the Congress: Should Judges Disdain Political History?*, 98 COLUM. L. REV. 242, 252–53 (1998) (arguing that purposivism makes courts the most effective agents of the legislature). In using the term “purposivism” as I do, I link two approaches that sometimes have been separated by subsuming what might be called “intentionalism” under the rubric of purposivism. As a conceptual matter, there is undoubtedly a clear difference between two varieties of statutory purpose: the specific intentions of the statute’s enacting legislature and the more “general aim or policy which pervades a statute.” Archibald Cox, *Judge Learned Hand and the Interpretation of Statutes*, 60 HARV. L. REV. 370, 370–71 (1947); see John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673, 677 & n.11 (1997) (discussing this distinction). For an approach centered on the former kind of purpose, or what might be labeled legislative

even more ardently, that judges should strive to exclude their own values from the interpretive process.<sup>4</sup> According to textualists, purpose-based inquiries invite courts to smuggle in their personal preferences by imputing their views to the lawmaking authority.<sup>5</sup> In textualists' estimation, courts best act as faithful agents by enforcing the fair meaning of the words that the legislature enacted.<sup>6</sup>

Besides converging in their aspirations to make courts the faithful agents of the legislature, modern or "new" textualists and purposivists concur on another point of central importance: the meaning of the words of a statute, as of other texts, depends on context.<sup>7</sup> In so acknowledging, new textualists break with an older "plain meaning" school, which maintained that the implications of statutory language are often unmistakable to any competent speaker of English, with no need for specialized knowledge about legal history or traditions.<sup>8</sup> Nevertheless, as John Manning has emphasized, textualist and purposivist theories postulate that different kinds of contexts ought to

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"intent," see Richard A. Posner, *Statutory Interpretation—in the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 817 (1983) ("The 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."). For the classic statement of the latter, more general approach, see HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 1374, 1378 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994) (urging interpreters to "[d]ecide what purpose ought to be attributed to the statute and to any subordinate provision of it which may be involved" on the assumption that the legislature consisted of "reasonable persons pursuing reasonable purposes reasonably," and to "[i]nterpret the words of the statute immediately in question so as to carry out the purpose" as well as possible).

<sup>4</sup> See, e.g., Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL'Y 61, 63 (1994) (arguing that judges "are supposed to be faithful agents, not independent principals"); John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 18 (2001) ("The root of the textualist position is . . . in straightforward faithful agent theory").

<sup>5</sup> See, e.g., 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 3, 17–18 (Amy Gutmann ed., 1997) ("The *practical* threat is that, under the guise or even the self-delusion of pursuing unexpressed legislative intents, common-law judges will in fact pursue their own objectives and desires . . .").

<sup>6</sup> See John F. Manning, *Textualism and Legislative Intent*, 91 VA. L. REV. 419, 419–20 (2005).

<sup>7</sup> See John F. Manning, *What Divides Textualists From Purposivists?*, 106 COLUM. L. REV. 70, 73, 79–80 (2006) (discussing the importance of context for textualism and purposivism); see also ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 16, 32–33 (2012).

<sup>8</sup> See John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2456 (2003) [hereinafter *Absurdity Doctrine*] ("In contrast with their literalist predecessors in the 'plain meaning' school, modern textualists reject the idea that interpretation can occur 'within the four corners' of a statute." (quoting *White v. United States*, 191 U.S. 545, 551 (1903))); Manning, *supra* note 7, at 79 & n.28; Frederick Schauer, *Statutory Construction and the Coordinating Function of Plain Meaning*, 1990 SUP. CT. REV. 231, 252 ("Plain meaning . . . is a blunt, frequently crude, and certainly narrowing device, cutting off access to many features of some particular conversational or communicative or interpretive context that would otherwise be available to the interpreter or conversational participant").

matter.<sup>9</sup> “Textualists,” he writes, “give primacy to” what he calls a statute’s “*semantic context*”<sup>10</sup> or to those features of context that give rise to what philosophers of language refer to as *pragmatic meaning*<sup>11</sup>—“evidence about the way a reasonable person conversant with relevant social and linguistic practices would have used the words.”<sup>12</sup> By contrast, Manning emphasizes, “[p]urposivists give precedence to *policy context*—evidence that goes to the way a reasonable person conversant with the circumstances underlying enactment [of a statute] would suppress the mischief [at which the statute aims] and advance the remedy.”<sup>13</sup>

In this Article I shall argue that textualists’ acknowledgment that interpretation necessarily occurs in context generates an important set of symmetries between textualist and purposivist theories that textualists, in particular, have frequently failed to recognize.<sup>14</sup> At each of three stages of an unfolding interpretive process, textualist and purposivist interpreters both need to make value judgments of closely parallel kinds, at least in some cases. As I shall discuss, a number of empirical studies have found that judicial ideology matters more than methodology in determining interpretive outcomes.<sup>15</sup> This Article’s noncynical analysis would help to explain, though it does not depend on, those findings.

Of the three points at which both textualists and purposivists necessarily make value judgments, the first stands at the threshold of the interpretive process. Many occasions for the application of theories of statutory interpretation involve a phenomenon that I shall refer to as “interpretive dissonance.”<sup>16</sup> Interpretive dissonance arises from a felt

<sup>9</sup> See Manning, *supra* note 7, at 90–91.

<sup>10</sup> See *id.* at 91; see also SCALIA & GARNER, *supra* note 7, at 16.

<sup>11</sup> In standard usage within the philosophy of language, semantics is concerned with the meaning of words and sentences in a language, without regard to complexities arising from the context of their utterance. See PATRICK GRIFFITHS, AN INTRODUCTION TO ENGLISH SEMANTICS AND PRAGMATICS 21 (2006) (“Semantics is the study of context-independent knowledge that users of a language have of word and sentence meaning.”). Pragmatics, by contrast, is concerned with the meaning of words and sentences in context. See *id.* at 153 (“Pragmatics is about the use of utterances in context, about how we manage to convey more than is literally encoded by the semantics of sentences.”).

<sup>12</sup> See Manning, *supra* note 7, at 91; see also SCALIA & GARNER, *supra* note 7, at 16 (“In their full context, words mean what they conveyed to reasonable people at the time they were written . . .”).

<sup>13</sup> Manning, *supra* note 7, at 91.

<sup>14</sup> For an important previous exploration of convergences between textualist and purposivist theories, see Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 COLUM. L. REV. 1, 34–43 (2006).

<sup>15</sup> See *infra* notes 204–10 and accompanying text.

<sup>16</sup> There may be some similarities to the psychological theory of cognitive dissonance, according to which “we have, built into the workings of our mind[s], a mechanism that creates an uncomfortable feeling of *dissonance*, or lack of harmony, when we become aware of some inconsistency among the various attitudes, beliefs, and items of knowledge that

experience of discordance between what might be thought of as a statute's first-blush meaning—what its words, construed relatively acontextually,<sup>17</sup> would seem to require<sup>18</sup>—and an interpreter's immediate, equally provisional expectations concerning what well-written legislation by either an actual or a reasonable legislature would likely direct.<sup>19</sup> Looking at what a statute at first blush seems to prescribe, the interpreter responds by wondering whether the first-blush meaning is correct.<sup>20</sup>

The resulting question requires precise statement. At issue is not whether a purported interpreter should craft an exception to a

constitute our mental store." PETER GRAY, *PSYCHOLOGY* 520 (4th ed. 2002). The theory traces to LEON FESTINGER, *A THEORY OF COGNITIVE DISSONANCE* 3 (1957) ("The existence of dissonance, being psychologically uncomfortable, will motivate the person [experiencing it] to try to reduce the dissonance and achieve consonance."). For overviews of research on cognitive dissonance, see, for example, *COGNITIVE DISSONANCE: PROGRESS ON A PIVOTAL THEORY IN SOCIAL PSYCHOLOGY* (Eddie Harmon-Jones & Judson Mills eds., 1999) (evaluating studies on cognitive dissonance in various settings); 1 DANIEL T. GILBERT ET AL., *THE HANDBOOK OF SOCIAL PSYCHOLOGY* 335–37 (4th ed. 1998) (surveying studies on cognitive dissonance).

<sup>17</sup> Acontextuality could never be more than relative. Cf. Martha Minow & Elizabeth V. Spelman, *In Context*, 63 S. CAL. L. REV. 1597, 1651 (1990) ("[T]he call to make judgments in context . . . seems misleading if it implies that we could ever make judgments outside of a context; the question is always what context matters or what context should we make matter for this moment.").

<sup>18</sup> An analogy involves what philosophers of language sometimes refer to as "default meaning." "[D]efault interpretation of the speaker's utterance is normally understood to mean salient meaning intended by the speaker, or presumed by the addressee to have been intended, and recovered (a) without the help of inference from the speaker's intentions or (b) without conscious inferential process altogether." Katarzyna M. Jaszczolt, *Defaults in Semantics and Pragmatics*, in *THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY* (Edward N. Zalta ed., 2010), <http://plato.stanford.edu/archives/win2010/entries/default-semantics-pragmatics>. But the literature contains "no one, unique 'default model' of utterance interpretation." *Id.*

<sup>19</sup> See Marcelo Dascal & Jerzy Wroblewski, *Transparency and Doubt: Understanding and Interpretation in Pragmatics and in Law*, 7 LAW & PHIL. 203, 220 (1988) ("A legal text which formulates legal rules is always understood in the context of the legal system to which these rules belong. It is usually assumed that such system has—or should have—the properties of consistency, coherence and eventually completeness and lack of redundancy. Whenever the direct reading of a legal text does not conform to such assumed properties, one can say that the systemic context generates a doubt that prompts a search for a more appropriate interpretation."); cf. DWORKIN, *supra* note 2, at 350–54 (arguing that an interpreter's values frequently play a role in determinations of whether a statute is ambiguous, vague, or unclear); Eskridge, *supra* note 2, at 1483 (observing that "an apparently clear text can be rendered ambiguous by . . . highly unreasonable consequences").

<sup>20</sup> Generally, to resolve cognitive dissonance, a person will either alter one or more of her beliefs so that they become consonant with one another, alter her belief to accord with her behavior, or alter her behavior to conform to her beliefs. See FESTINGER, *supra* note 16, at 6; GILBERT ET AL., *supra* note 16, at 336 ("The most obvious solution to dissonance is to engage in cognitive work to modify one of the dissonant elements (i.e., self-generated attitude change).").

statute's plain meaning after having identified it,<sup>21</sup> perhaps on the assumption that the statute, if accorded its actual meaning, would produce an absurd result.<sup>22</sup> The question instead is whether someone's initial, provisional, and possibly unthinking assumption about a statute's meaning or implication was in fact correct when the statute's words are seen in context. Two examples will illustrate the kind of response that I associate with interpretive dissonance. One, which is notorious in the literature on statutory interpretation, may encourage the view that interpretive dissonance—however real as a psychological phenomenon—could and should be accorded no significance in the application of faithful agent, and especially textualist, theories of statutory interpretation. But I expect the second to pull instincts to the more accurate, nearly opposite view.

*Church of the Holy Trinity v. United States*<sup>23</sup> famously held that the Alien Contract Labor Act, which made it unlawful to assist the immigration of an alien under contract to perform “labor or service of any kind,”<sup>24</sup> did not apply to the efforts of Holy Trinity Church to engage a foreign clergyman as its minister. The face of the statute contained no obvious ambiguity or vagueness.<sup>25</sup> Read without further information about the background against which Congress had acted or its likely values and purposes, the law would have covered a contract for the services provided by a clergyman.<sup>26</sup> But that first-blush interpretation provoked interpretive dissonance: the Supreme Court found it inconceivable that reasonable legislators could have meant to interfere with a religious congregation's choice of its minister.<sup>27</sup> Interpretive dissonance thus marked the first stage of an interpretive process resulting in the conclusion that the Alien Contract Labor Act did not apply. Textualists routinely denounce *Holy Trinity*.<sup>28</sup>

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<sup>21</sup> As Professor Molot notes, “textualist scholars often criticize purposivists for employing context in order to adjust or even contradict a statute's clear textual meaning.” Molot, *supra* note 14, at 37.

<sup>22</sup> Cf. Manning, *Absurdity Doctrine*, *supra* note 8, at 2471 (“The absurdity doctrine comes into play only *after* a court provisionally identifies the statute's clear social meaning . . .”). To refuse to enforce a statute's actual meaning on the grounds that doing so would produce an absurd result is not so much to interpret as to revise.

<sup>23</sup> 143 U.S. 457 (1892).

<sup>24</sup> *Id.* at 458.

<sup>25</sup> See Manning, *Absurdity Doctrine*, *supra* note 8, at 2424 (describing the Alien Contract Labor Act as being of “unforgiving breadth”).

<sup>26</sup> See *Holy Trinity*, 143 U.S. at 458 (“It must be conceded that the act of the [church] is within the letter of this section, for the relation of rector to his church is one of service, and implies labor on the one side with compensation on the other.”).

<sup>27</sup> See *id.* at 459 (“[W]e cannot think Congress intended to denounce with penalties a transaction like that in the present case.”).

<sup>28</sup> See, e.g., *Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ.*, 550 U.S. 81, 116 (2007) (Scalia, J., dissenting) (derisively describing the majority opinion as adopting the approach of “that miraculous redeemer of lost causes, *Church of the Holy Trinity*”); SCALIA & GARNER, *supra* note 7, at 11–13, 222–23 (scorning *Holy Trinity*); SCALIA, *supra* note 5, at 18

The second example of a resort to interpretive theory triggered by interpretive dissonance, which has received less discussion in the literature on statutory interpretation but possesses greater contemporary importance, comes from 42 U.S.C. § 1983, a Reconstruction-era statute that creates a cause of action against state officials who violate federal rights.<sup>29</sup> Read literally, § 1983 makes no exception for suits seeking to enjoin state tax collection on the ground that a tax violates the Constitution. Nor would it leave room for the application of traditional doctrines of official immunity<sup>30</sup> that bar suits for damages against judges and prosecutors acting in those capacities and that also preclude recovery of money from most other state officials unless they violated “clearly established” federal rights.<sup>31</sup>

Nevertheless, a § 1983 suit to enjoin state tax collection produced evident interpretive dissonance among the Justices in *National Private Truck Council, Inc. v. Oklahoma Tax Commission*<sup>32</sup> that ultimately led to the recognition of an implied statutory exception. Writing for a unanimous Court, Justice Clarence Thomas, a recognized textualist,<sup>33</sup> began by noting that the Court has “long recognized that principles of

(characterizing *Holy Trinity* as “the prototypical case involving the triumph of supposed ‘legislative intent’ (a handy cover for judicial intent) over the text of the law”); ADRIAN VERMEULE, *JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION* 93–102 (2006) (arguing that the Court erred in both the framing and the execution of its inquiry).

<sup>29</sup> The text of § 1983 provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983 (2006 & Supp. V 2011).

Section 1983 has not been wholly ignored in the literature on statutory interpretation. See, e.g., Eskridge, *supra* note 2, at 1484–88. For discussions of interpretive methodology focused specifically on § 1983, see generally Harry A. Blackmun, *Section 1983 and Federal Protection of Individual Rights—Will the Statute Remain Alive or Fade Away?*, 60 N.Y.U. L. REV. 1 (1985) (discussing the proper scope of federal protection of individual rights under § 1983); Theodore Eisenberg, *Section 1983: Doctrinal Foundations and an Empirical Study*, 67 CORNELL L. REV. 482 (1982) (discussing the Court’s contributions to current confusion in interpreting § 1983); Seth F. Kreimer, *The Source of Law in Civil Rights Actions: Some Old Light on Section 1983*, 133 U. PA. L. REV. 601, 604–11 (1985) (discussing how federal courts have sketched out the details of § 1983).

<sup>30</sup> See Eisenberg, *supra* note 29, at 492 (observing that “the statute affords no exceptions for special classes of persons”).

<sup>31</sup> See *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Although *Harlow* was a case involving the immunities of federal officials sued directly under the Constitution in *Bivens* actions, see *id.* at 805, the Court, in crafting immunity rules for *Bivens* actions, announced that it would apply the same immunity standards in suits against state officials under § 1983, see *id.* at 818 n.30.

<sup>32</sup> 515 U.S. 582 (1995).

<sup>33</sup> See, e.g., John F. Manning, *Competing Presumptions About Statutory Coherence*, 74 FORDHAM L. REV. 2009, 2029 (2006); Manning, *supra* note 2, at 114 & n.7.

federalism and comity generally counsel that courts should adopt a hands-off approach with respect to state tax administration” and that “[s]ince the passage of § 1983, Congress and this Court repeatedly have shown an aversion to federal interference with state tax administration.”<sup>34</sup> The Court responded similarly in *Tenney v. Brandhove*, a § 1983 case in which the plaintiffs sought damages from state legislators who had allegedly violated the Constitution in their legislative capacities.<sup>35</sup> In effect explaining the basis for its interpretive dissonance, the Court began with a recitation of the long American tradition of protecting “speech and action in the legislature” and the policy reasons that support legislative immunity.<sup>36</sup> Responding to the interpretive dissonance that thus arose, Justice Felix Frankfurter, speaking for the Court, concluded that “[w]e cannot believe that Congress—itself a staunch advocate of legislative freedom—would impinge on a tradition so well grounded in history and reason by covert inclusion in the general language before us.”<sup>37</sup> Justice Hugo Black, who is often labeled as a textualist,<sup>38</sup> concurred in the result.<sup>39</sup>

In identifying and explicating the role of interpretive dissonance in furnishing occasions for applications of theories of statutory interpretation, by purposivists and textualists alike, I shall argue that such experiences are frequently value driven, sometimes in a controversial, ideologically charged sense. In an important range of cases, different interpreters either will or will not experience interpretive dissonance, or will experience it in different degrees, due to differences in their values,<sup>40</sup> regardless of whether they are textualists or purposivists. Sometimes an interpreter’s values will be engaged directly. At a minimum, an interpreter’s values will play a role in his or her ascription of reasonable values to the legislature for purposes of assessing what the legislature plausibly could have meant to direct.

Although my claim that an interpreter’s values will prove relevant at this threshold step might appear to represent a banal restatement

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<sup>34</sup> *Nat'l Private Truck Council*, 515 U.S. at 586.

<sup>35</sup> 341 U.S. 367, 369 (1951).

<sup>36</sup> *Id.* at 372–73.

<sup>37</sup> *Id.* at 376.

<sup>38</sup> See, e.g., Michael J. Gerhardt, *A Tale of Two Textualists: A Critical Comparison of Justices Black and Scalia*, 74 B.U. L. REV. 25, 26 (1994) (noting the “intense and persistent proclamations of fidelity to the constitutional text” of Justices Black and Scalia).

<sup>39</sup> See *Tenney*, 341 U.S. at 379 (Black, J., concurring) (invoking “the long-standing and wise tradition that legislators are immune from legal responsibility for their intra-legislative statements and activities”). According to David Achtenberg, the legislative history of § 1983 is consistent with the recognition of legislative immunity, though of a narrower scope than the immunity that exists under modern doctrine. See David Achtenberg, *Immunity Under 42 U.S.C. § 1983: Interpretive Approach and the Search for the Legislative Will*, 86 Nw. U. L. REV. 497, 502–11 (1992).

<sup>40</sup> Cf. DWORKIN, *supra* note 2, at 354 (noting that people with different values will sometimes differ in their judgments of whether a statute is unclear).

of a familiar realist insight, more is at stake. When faithful agent theories emphasize that interpretation must occur in context, ideologically inflected judgments that language may not mean what at first blush it might appear to mean cannot be labeled categorically as regrettable seepages of an interpreter's values into a process that ideally would be value neutral. Instead, I shall argue, the role of values is irreducible in triggering apprehensions that statutory language really may not mean what at first blush it might appear to mean—as any theory that insists that interpretation necessarily occurs in context must acknowledge, even if textualists have often refused to do so.<sup>41</sup>

The second underappreciated role that interpreters' values inevitably play in both textualist and purposivist theories of statutory interpretation emerges in the process through which uncertainties, including those created by interpretive dissonance, are resolved. With all agreeing that interpretation must occur in context, and with Professor Manning's distinction between semantic contexts and policy contexts having achieved broad acceptance,<sup>42</sup> another, less frequently noted aspect of the debate about appropriate interpretive contexts has largely escaped attention: both semantic and policy contexts can be defined either relatively broadly or relatively narrowly.<sup>43</sup> Viewed in a narrow semantic context defined mostly by dictionaries and grammar books, the statute involved in *Holy Trinity* would have brooked no

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<sup>41</sup> See Molot, *supra* note 14, at 37 (citing textualist sources).

<sup>42</sup> The vocabulary may have some tendency to confuse. Although textualists say that they are concerned with semantic context, what they seek to ascertain is not limited to a legal text's "semantic meaning" insofar as the semantic content of an expression "is fully determined by the lexical meaning of the words used and the syntactical structure of the sentence." Andrei Marmor, *Textualism in Context* 6 (U.S.C. Gould Sch. of Law Legal Studies Research Paper Series, Paper No. 12-13, 2012), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2112384](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2112384). Rather, textualists seek to identify a legal text's pragmatic or contextual, rather than its purely semantic, meaning. See *supra* note 11 and accompanying text; see also Marmor, *supra*, at 7 ("[T]here are many cases in which the speaker asserts something different from the semantic content of the expression used (e.g., a doctor in the emergency room telling a patient with a gunshot wound, 'Don't worry, you are not going to die.' The doctor is not promising the patient eternal life; she is just saying that this particular wound is not life-threatening).").

<sup>43</sup> See Richard H. Fallon, Jr., *Why Abstention Is Not Illegitimate: An Essay on the Distinction Between "Legitimate" and "Illegitimate" Statutory Interpretation and Judicial Lawmaking*, 107 Nw. U. L. REV. 847, 878–79 (2013); cf. David Charny, *Hypothetical Bargains: The Normative Structure of Contract Interpretation*, 89 MICH. L. REV. 1815, 1830 (1991) ("Nothing about the necessary contexts that provide the basis for interpretation can tell one how far one should go in getting information about that context."). Issues arising from the need to frame the context within which statutory interpretation properly occurs may exemplify the more profound claim that in continuous relationships played out over time, such as those involving the government and its citizens or Congress and the courts, "constitutional law has no criteria for isolating transactions from . . . background relationship[s]" and that the "framing" of transactions or contexts for analysis is therefore frequently outcome determinative in legal controversies. Daryl J. Levinson, *Framing Transactions in Constitutional Law*, 111 YALE L.J. 1311, 1313 (2002).

ministerial exception,<sup>44</sup> nor would the language of § 1983 have excluded suits to enjoin state tax collection or actions to recover damages from state legislators. Nor could such exceptions plausibly have emerged if the statutes were viewed in a narrow policy context, characterized by a rough-and-ready identification of the primary problem that the legislature sought to address, without attention to other, leavening concerns that reasonable legislators likely would also have had. In order to reach the conclusions that it did, the Supreme Court needed to broaden the interpretive context—as I shall explain more fully below—to include a richer informational background including historic patterns of respect for religious autonomy, federal noninterference with state taxes, and recognition of official immunity. Only in light of that expanded background did it become plausible to conclude that reasonable legislators would have wanted exceptions to the statutes' literal language and that reasonable interpreters should construe the statutes as including exceptions.

If both textualists and purposivists need to specify the breadth of the context within which statutes should be interpreted, and if the judgments as to appropriate breadth will sometimes determine the outcome of cases, then issues bearing on the specification of semantic and policy contexts assume vital importance.<sup>45</sup> As I shall explain, the specification of the appropriate semantic or policy context for interpreting statutes is often driven, and indeed inevitably so, by partly value-based judgments. In the case of § 1983, for example, the broadening of the interpretive context to recognize that Congress legislated against a background in which officials sued at common law sometimes enjoyed immunity defenses was almost certainly influenced by recognition that such defenses serve important policy goals.<sup>46</sup>

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<sup>44</sup> See *supra* notes 24–26 and accompanying text.

<sup>45</sup> See Abner S. Greene, *The Missing Step of Textualism*, 74 *FORDHAM L. REV.* 1913, 1923 (2006) (characterizing the absence of a principled method for distinguishing relevant from irrelevant aspects of background knowledge as “the missing step of textualism”); Jonathan R. Siegel, *Textualism and Contextualism in Administrative Law*, 78 *B.U. L. REV.* 1023, 1029–32 (1998) (emphasizing the importance of the question of what constitutes relevant context for administrative law adjudication and calling attention to background principles).

<sup>46</sup> Judge Learned Hand gave a classic explanation often quoted by the Supreme Court:

It does indeed go without saying that an official, who is in fact guilty of using his powers to vent his spleen upon others, or for any other personal motive not connected with the public good, should not escape liability for the injuries he may so cause; and, if it were possible in practice to confine such complaints to the guilty, it would be monstrous to deny recovery. The justification for doing so is that it is impossible to know whether the claim is well founded until the case has been tried, and that to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their

Again, I want to emphasize, my argument is not that textualists are unfaithful to their own theories whenever they allow their views about sound policy to influence their judgments about the appropriate breadth of an interpretive context. There is, and could be, no purely non-normative criterion precisely marking what should be deemed relevant or irrelevant.

The third occasion for judges' values to affect their interpretive decisions then comes to the fore. Having specified the appropriate interpretive context, both purposivists and textualists must make determinations of "reasonableness." Purposivists inquire what reasonable legislators would have intended.<sup>47</sup> For textualists, the comparable question involves how a reasonable person would understand statutory language within an interpretive context that makes it plausible to think that that language should not be given its relatively acontextual semantic meaning.<sup>48</sup> As I shall explain, the reasonable interpreter is a construct,<sup>49</sup> and it cannot be a value-free construct. As the philosopher Donald Davidson put it, "when anyone, scientist or layman, ascribes thoughts to others, he necessarily employs his own norms in making the ascriptions."<sup>50</sup> Under these circumstances, I shall argue, a hypothetical reasonable person's determination about how a statute that occasions interpretive dissonance ought to be interpreted will inevitably reflect judgments about what would be morally, politically, and practically provident or improvident.

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duties. Again and again the public interest calls for action which may turn out to be founded on a mistake, in the face of which an official may later find himself hard put to it to satisfy a jury of his good faith. There must indeed be means of punishing public officers who have been truant to their duties; but that is quite another matter from exposing such as have been honestly mistaken to suit by anyone who has suffered from their errors. As is so often the case, the answer must be found in a balance between the evils inevitable in either alternative. In this instance it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation. Judged as *res nova*, we should not hesitate to follow the path laid down in the books.

Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949).

<sup>47</sup> See, e.g., Manning, *supra* note 7, at 102 ("In brief, Legal Process-style purposivism rests on the assumption that interpretation should proceed as if a reasonable person were framing coherent legislative policy.")

<sup>48</sup> See, e.g., Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J.L. & PUB. POL'Y 59, 65 (1988) ("We should look at the statutory structure and hear the words as they would sound in the mind of a skilled, objectively reasonable user of words."); Manning, *Absurdity Doctrine*, *supra* note 8, at 2392-93 ("[Textualism] ask[s] how a reasonable person, conversant with the relevant social and linguistic conventions, would read the text in context.")

<sup>49</sup> See Manning, *supra* note 7, at 83 (acknowledging that the "reasonable" reader whose understanding of a statute is the touchstone of textualism is a hypothetical, "idealized" construct).

<sup>50</sup> DONALD DAVIDSON, *Representation and Interpretation*, in PROBLEMS OF RATIONALITY 87, 97 (2004).

In arguing that values affect the application of both textualist and purposivist theories of statutory interpretation in ways that participants in debates about those theories—and especially textualists—have often failed to grasp, my purposes are neither cynical nor debunking. Throughout, I assume that the choice of either a textualist or a purposivist theory can have consequences.<sup>51</sup> Yet I do not seek to defend one in preference to the other,<sup>52</sup> even though I argue that textualism lacks some of the comparative, value-excluding advantages that its proponents have sometimes claimed for it. The sole aspiration of this Article is to promote an enriched understanding of how the parallel structures of textualism and purposivism result in symmetrical roles for value judgments in the application of the two theories.

The remainder of this Article develops as follows. Part I discusses the circumstances that provoke appeals to theories of statutory interpretation and gives a fuller exposition of the role of interpretive dissonance as a triggering phenomenon. Part II, which forms the Article's heart, describes the basic tenets of textualist and purposivist theories of statutory interpretation, explains the significance that they respectively assign to statutes' interpretive context, and discusses how both theories require judgments of "reasonableness." Part II also demonstrates that the breadth with which the relevant interpretive context is specified—the semantic context for textualists and the policy context for purposivists—in conjunction with value-laden judgments of reasonableness, will often prove decisive in determining a statute's meaning. Part III seeks to avoid misunderstanding by clarifying some limitations on the relatively bold theses that Parts I and II advance. It also anticipates and rebuffs the objection that the judicial opinions on which I rely in revealing the necessary role of value judgments within

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<sup>51</sup> Cf. Abbe R. Gluck, *The States As Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 *YALE L.J.* 1750, 1768 (2010) (conceding that "one cannot prove that methodology dictates outcomes in cases" but emphasizing that "it surely affects opinion writing"). But cf. James J. Brudney & Corey Ditslear, *Canons of Construction and the Elusive Quest for Neutral Reasoning*, 58 *VAND. L. REV.* 1, 58–60 (2005) (concluding that Justices' reliance on either substantive or language canons of construction is driven by ideology, not methodology); Frank B. Cross, *The Significance of Statutory Interpretive Methodologies*, 82 *NOTRE DAME L. REV.* 1971, 1991–95 (2007) (finding that convergence upon textualist and purposivist methodologies does not produce consensus among the Justices with respect to results).

<sup>52</sup> I also make no effort to compare the relative merits of either textualism or purposivism with theories that call for statutory interpreters to play roles other than that of a faithful agent of the enacting legislature. In the domain of constitutional interpretation, I have elsewhere defended an approach in which precedent, among other factors, sometimes calls for interpretive conclusions other than those that a faithful agent of the framers and ratifiers of relevant constitutional provisions might have reached. See RICHARD H. FALLON, JR., *IMPLEMENTING THE CONSTITUTION* 111–26 (2001); Richard H. Fallon, Jr., *Constitutional Precedent Viewed Through the Lens of Hartian Positivist Jurisprudence*, 86 *N.C. L. REV.* 1107, 1116 (2008) (arguing that overturning some settled but mistaken precedents "would exceed [the Court's] lawful authority").

textualist as well as purposivist theories represent betrayals, rather than applications, of textualist principles.

## I

## THE OCCASIONS OF INTERPRETATION

The term “interpretation” can be used in either of two senses. In the more capacious, “every application of a rule is also an interpretation,”<sup>53</sup> as is every successful grasping of the meaning of another’s words.<sup>54</sup> But this is seldom the sense in which the word “interpretation” figures in legal debates.

In legal discourse, the term “interpretation” typically refers to a reflective, problem-solving process triggered by an uncertainty or puzzle.<sup>55</sup> Most of the time, we understand perfectly well what laws mean, or how they apply to particular facts, without need for what we would normally think of as interpretation<sup>56</sup> and certainly without applying a prescriptive theory such as textualism or purposivism. Someone who drives through a stop sign cannot ordinarily present a recognizable question of interpretation by saying that she had not interpreted the stop sign to mean “stop.” Similarly, if a statute imposes a tax of 15%, there will ordinarily be no interpretive question of whether it might mean 10%. We need prescriptive theories of interpretation, and debate them, only as means of resolving uncertainties in our typically un-self-conscious, largely atheoretical efforts to achieve linguistic understanding. (Indeed, if we needed a prescriptive theory of interpretation to know that a stop sign meant stop, we would presumably also need a prescriptive theory of interpretation to interpret that first-order theory of interpretation, and it would be, so to speak, “prescriptive theories of interpretation all the way down” in an endless regress.<sup>57</sup>)

Recognizing that we need prescriptive theories of statutory interpretation only when our ordinary, typically un-self-conscious means of

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<sup>53</sup> FREDERICK SCHAUER, *PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE* 207 (1991).

<sup>54</sup> See, e.g., DONALD DAVIDSON, *Radical Interpretation*, in *INQUIRIES INTO TRUTH AND INTERPRETATION* 125, 125 (2d ed. 2001) [hereinafter DAVIDSON, *Radical Interpretation*] (“All understanding of the speech of another involves radical interpretation.”); DONALD DAVIDSON, *Belief and the Basis of Meaning*, in *INQUIRIES INTO TRUTH AND INTERPRETATION*, *supra*, at 141, 141 (“We interpret a bit of linguistic behaviour when we say what a speaker’s words mean on an occasion of use.”).

<sup>55</sup> See SCHAUER, *supra* note 53, at 207 (recognizing that “we ordinarily do not think” of most applications as interpretations “for there is a sense in which to interpret a text or a rule is to deal with a *quandary*”).

<sup>56</sup> See DENNIS PATTERSON, *LAW AND TRUTH* 86–88 (1996) (criticizing Dworkin as making “far too much of the work of interpretation”).

<sup>57</sup> See RONALD BEINER, *POLITICAL JUDGMENT* 131 (1983); PATTERSON, *supra* note 56, at 88; Charny, *supra* note 43, at 1819.

understanding leave us uncertain or puzzled,<sup>58</sup> I would distinguish three characteristic, but partly overlapping and not necessarily exclusive, occasions for resort to such theories.<sup>59</sup> The first involves ambiguity. Ambiguity exists when language might have either of two relatively clearly specifiable meanings, but we are unsure which applies.<sup>60</sup> For example, does a regulation of “banks” refer to property that abuts rivers or to financial institutions?<sup>61</sup>

A second type of occasion for puzzlement involves vagueness. Many terms or linguistic usages include a fringe of uncertain applications.<sup>62</sup> A well-worn example involves an ordinance dictating “no vehicles in the park.”<sup>63</sup> Although it plainly applies to cars and trucks, doubt may arise about whether it encompasses baby carriages or bicycles.

A third kind of trigger for appeals to theories of statutory interpretation involves what I have called interpretive dissonance between first-blush statutory meaning and implicit assumptions about what the legislature would have wished to achieve. Frequently, a sense of interpretive dissonance may arise relatively directly from a judge’s own convictions if a first-blush meaning yields what she would regard as a troubling outcome and if she assumes that she and the legislature have a significant core of shared values. In some cases, of course, a judge might recognize a sharp divergence on some issues between her

<sup>58</sup> As Duncan Kennedy emphasizes, there may be occasions on which a sense of uncertainty or puzzlement emerges from a prior, instrumentally or ideologically motivated effort to discover vagueness or ambiguity that a first-blush meaning would not otherwise have displayed. See Duncan Kennedy, *Freedom and Constraint in Adjudication: A Critical Phenomenology*, 36 J. LEGAL EDUC. 518, 547–48 (1986). It is, for example, a familiar role of lawyers to attempt to generate doubts where judges would not otherwise have felt them. Professor Kennedy points out that judges, spurred by ideological commitment, might assume a similar role. See *id.*

<sup>59</sup> For a similar categorization, see DWORKIN, *supra* note 2, at 351.

<sup>60</sup> As so defined, ambiguity is different from, and does not subsume all cases of, vagueness. See Ralf Poscher, *Ambiguity and Vagueness in Legal Interpretation*, in THE OXFORD HANDBOOK OF LANGUAGE AND LAW 128, 129 (Peter M. Tiersma & Lawrence M. Solan eds., 2012) (“Ambiguous expressions have multiple meanings, as in the case of the homonym ‘bank’ which can mean both ‘river bank’ and ‘commercial bank.’ . . . In contrast, an expression is vague if it has borderline cases.”); Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 CONST. COMMENT. 95, 97–98 (2010) (“In the technical sense, ambiguity refers to the multiplicity of sense: a term is ambiguous if it has more than one sense. . . . The technical sense of vagueness refers to the existence of borderline cases: a term is vague if there are cases where the term might or might not apply.”).

<sup>61</sup> See Manning, *supra* note 2, at 171; Poscher, *supra* note 60, at 129.

<sup>62</sup> See TIMOTHY A.O. ENDICOTT, VAGUENESS IN LAW 9 (2000) (describing a law as “vague if the boundaries of the area affected by [it] are unclear”); see also H.L.A. HART, THE CONCEPT OF LAW 126 (3d ed. 2012) (“There will indeed be plain cases . . . to which general expressions are clearly applicable . . . but there will also be cases where it is not clear whether they apply or not.”).

<sup>63</sup> This much-discussed example apparently originated with H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 607 (1958). For more recent discussion, see SCALIA & GARNER, *supra* note 7, at 36–39.

moral and policy views and those of the legislature. If so, she might experience no jolt of surprise at the appearance that the legislature had directed an outcome that she finds repugnant. Yet even an alienated judge will experience some first-blush meanings that seem to her to prescribe unreasonable results as a trigger for further interpretive inquiry.

Like the cases that I discussed in the Introduction, many of the most controversial cases in the literature on statutory interpretation involve readily identifiable interpretive dissonance. This is true, for example, of *Riggs v. Palmer*, in which the court held that a grandson who had murdered his grandfather<sup>64</sup> should not receive the grandfather's estate under a statute prescribing inheritance in accordance with formally valid wills.<sup>65</sup> Interpretive dissonance also provoked an interpretive analysis—though one that ultimately resulted in the statute's literal, exceptionless application—in a case involving the habitat of the endangered snail darter, *Tennessee Valley Authority v. Hill*.<sup>66</sup> There, though the jarring implications led to a showdown about statutory interpretation methodology, a majority of the Justices held that a statute barring government funding of projects that threatened endangered species barred the completion of a large and important dam.<sup>67</sup>

What deserves emphasis, however, is that interpretive dissonance plays a central role in many cases that have excited little controversy. As I have noted, the Supreme Court agreed unanimously that § 1983 includes an unwritten exception for suits to enjoin state tax collection,<sup>68</sup> and its initial decision to uphold an immunity defense in § 1983 cases came by 8–1.<sup>69</sup> Many cases that courts resolve by applying well-accepted canons of statutory interpretation—including those establishing presumptions that criminal statutes should not be read to impose liability for serious offenses in the absence of mens rea<sup>70</sup> and that limitations periods are “subject to ‘equitable tolling’”<sup>71</sup>—exhibit a similar logic. Any first-blush appearance that the legislature had imposed criminal liability in the absence of mens rea, particularly with regard to a serious offense, or established a statute of limitations that

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<sup>64</sup> 22 N.E. 188, 189 (N.Y. 1889).

<sup>65</sup> *Id.* at 191.

<sup>66</sup> 437 U.S. 153 (1978).

<sup>67</sup> *See id.* at 172.

<sup>68</sup> *See supra* notes 32–34 and accompanying text.

<sup>69</sup> *See Tenney v. Brandhove*, 341 U.S. 367 (1951).

<sup>70</sup> *See Staples v. United States*, 511 U.S. 600, 619 (1994); SCALIA & GARNER, *supra* note 7, at 303.

<sup>71</sup> *Young v. United States*, 535 U.S. 43, 49 (2002) (quoting *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 95 (1990)).

countenanced no equitable exceptions, would provoke surprise and thus interpretive uncertainty.

That experiences of interpretive dissonance number among the occasions for the application of interpretive theory should elicit no resistance. Legal interpretation almost necessarily reflects an assumption similar to what philosophers have labeled the “principle of charity,”<sup>72</sup> which “says that, other things being equal, we ought to interpret a person as having reasonable beliefs.”<sup>73</sup> In encountering utterances in nearly all linguistic contexts, we characteristically proceed on the basis of assumptions about the intelligence, good faith, and likely interests, values, and concerns of the speaker.<sup>74</sup> Without such assumptions, some of which involve the ascription of values, we could not communicate with each other nearly as effectively as we do. Although legislatures are of course multimember bodies, lacking the mental attributes and preferences of natural persons, textualists as well as purposivists postulate that legislation is the coherent expression of a rational lawmaker and reflects what some textualists describe as an “objective” or “objectified” even if not a subjective legislative intent.<sup>75</sup> As Professor Manning puts it, “textualists have sought to devise a constructive intent that satisfies the minimum conditions for meaningfully tracing statutory meaning to the legislative process.”<sup>76</sup>

When statutory language’s first-blush meaning appears discordant with what we would expect reasonable legislators to have directed, or what we would expect the law to prescribe in light of culturally based understandings and what we take to be widely shared

<sup>72</sup> Dascal & Wroblewski, *supra* note 19, at 205.

<sup>73</sup> Christopher Gauker, *The Principle of Charity*, 69 SYNTHESE 1, 1 (1986). For two influential and heavily cited works on the principle of charity, see DAVIDSON, *Radical Interpretation*, *supra* note 54, at 136–37; WILLARD VAN ORMAN QUINE, *WORD AND OBJECT* 59 & n.2 (1960).

<sup>74</sup> In a particularly well-known example, H.P. Grice identifies a number of normative “maxims” that are conventionally at work in human conversation and that function to facilitate cooperation in the communication of thought and information, including “[m]ake your contribution as informative as is required,” “[t]ry to make your contribution one that is true,” “[b]e relevant,” and “[a]void obscurity of expression.” PAUL GRICE, *STUDIES IN THE WAY OF WORDS* 26–28 (1989). According to Grice, we normally trust others to observe these maxims and feel entitled to draw inferences about the meaning of their utterances in reliance on them. *See id.* For the argument that Grice’s theory functions better as a theory of communication than as a theory of meaning, see Heidi M. Hurd, *Sovereignty in Silence*, 99 YALE L.J. 945, 965 & n.52 (1990) (“Contrary to what Grice contended, we must look to the conventions which govern the meaning of sentences to determine what a speaker means rather than look to what the speaker means to determine what his or her sentences mean.”).

<sup>75</sup> *See, e.g.,* SCALIA, *supra* note 5, at 17 (“We look for a sort of ‘objectified’ intent—the intent that a reasonable person would gather from the text of the law, placed alongside the remainder of the *corpus juris*.”); Caleb Nelson, *What is Textualism?*, 91 VA. L. REV. 347, 353–57 (2005) (discussing textualists’ search for statutes’ “objectified intent”).

<sup>76</sup> Manning, *supra* note 6, at 423.

values, the deepest implicit assumptions underlying linguistic communication—which involve “the attribution of massive agreement”<sup>77</sup> about many matters of fact and value—thus cause mental alarm bells to sound.<sup>78</sup> As noted above, the result will prove uncontroversial in many cases. For example, nearly every informed observer might register surprise at any first-blush appearance that Congress had enacted a statute that purported to regulate the conduct of non-Americans outside the United States,<sup>79</sup> notwithstanding language that included no explicit limitations. Even in uncontroversial cases, however, an interpreter’s values inescapably play a role in the ascription of assumptions or purposes or an objective intent to Congress. All else equal, the principle of charity calls for ascribing reasonable beliefs, purposes, or intents;<sup>80</sup> and the idea of reasonableness, as I shall explain shortly, has an irreducibly normative aspect.<sup>81</sup>

If it should not be controversial that experiences of interpretive dissonance will occasion interpretive inquiries into possible disparities between statutes’ first-blush and actual meanings, neither should it be surprising that people with different ideological views will sometimes experience different first-blush interpretations as jarring. For example, conservatives maintain that first-blush interpretations that would strip the states of their sovereign immunity from suit or alter traditional patterns of state-federal relations require further interpretive examination within a broader interpretive context than that supplied by dictionaries, grammar books, and otherwise bare statutory language.<sup>82</sup> Reflecting their somewhat different ideological

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<sup>77</sup> Jonathan E. Adler, *Charity, Interpretation, Fallacy*, 29 PHIL. & RHETORIC 329, 330 (1996). Adler not only ascribes this view to Davidson but also ultimately defends it.

<sup>78</sup> See Dascal & Wroblewski, *supra* note 19, at 205 (“The meaning of a legal text is usually described as the will . . . of the historical law-maker. Therefore, the search for the meaning in question ought to use all means relevant for reconstructing that will. On this view, however, the law-maker is not only the alleged historical agent, but also a normative construct, for he is endowed with the properties of a ‘rational agent.’ This means that the interpretation must follow a ‘principle of charity[,]’ i.e., it must ascribe to the text that meaning that maximizes its ‘rationality.’” (citation omitted)).

<sup>79</sup> See *Brogan v. United States*, 522 U.S. 398, 406 (1998) (citing *United States v. Palmer*, 16 U.S. (3 Wheat.) 610, 631 (1818)) (invoking interpretive presumption that statutes do not apply extraterritorially); SCALIA & GARNER, *supra* note 7, at 268–72 (describing and defending an interpretive canon presuming that statutes do not apply extraterritorially).

<sup>80</sup> See *supra* notes 72–73 and accompanying text.

<sup>81</sup> See *infra* notes 105–09 and accompanying text.

<sup>82</sup> See, e.g., *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 55–56 (1996) (quoting *Blatchford v. Native Vill. of Noatak*, 501 U.S. 775, 786 (1991)) (stating that, as a result of “the important role played by the Eleventh Amendment and the broader principles that it reflects,” a congressional intent to abrogate state sovereign immunity “must be obvious from ‘a clear legislative statement’”); *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991) (quoting *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985)) (relying on a presumption that “if Congress intends to alter the usual constitutional balance between the States and the Federal Government, it must make its intention to do so unmistakably clear in the

predispositions, liberals are more likely to see the need for a broader-gauged interpretive process when first-blush interpretations would strip federal jurisdiction over suits alleging constitutional violations<sup>83</sup> or classify affirmative action as a forbidden species of race discrimination.<sup>84</sup> In *Brown v. Plata*,<sup>85</sup> Justices Antonin Scalia and Clarence Thomas concluded in dissent that an interpretation of the Prison Litigation Reform Act that authorized a lower court to mandate the release of 46,000 state prisoners if the state did not end unconstitutional prison overcrowding entailed such “absurd” consequences that the Court should “bend every effort to read the law in such a way as to avoid that outrageous result.”<sup>86</sup> Given the indignities to which prisoners were subjected, the majority opinion written by Justice Anthony Kennedy and joined by four more liberal Justices saw no absurdity whatsoever.<sup>87</sup>

My point, I emphasize, is analytical, not critical. It arises not from any feature peculiar either to textualism or purposivism, which might be derided or embraced, but from a characteristic way in which language functions as a mechanism of human communication and in law. Indeed, I do not mean to characterize interpretive dissonance as a constitutive element of either textualism or purposivism. Rather, it is a phenomenon intrinsic to human psychology and linguistic communication that forms part of the context within which textualism and purposivism both operate. To put the point slightly differently, every prescriptive theory of statutory interpretation presupposes the existence of a triggering mechanism or mechanisms even if it does not supply one. And interpretive dissonance is one such mechanism. Against this claim, it does not suffice to assert—as textualists sometimes do—that judges should never appeal to context to contradict a

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language of the statute” in concluding that a federal statute barring age discrimination by employers, including States, did not apply to state judges (internal quotation marks omitted)).

<sup>83</sup> See, e.g., *Webster v. Doe*, 486 U.S. 592, 603 (1988) (demanding a “heightened showing” of congressional intent to preclude judicial review of constitutional claims in light of the “serious constitutional question” that a denial of review would raise).

<sup>84</sup> See, e.g., *United Steelworkers of Am. v. Weber*, 443 U.S. 193, 200–08 (1979) (holding that a provision of Title VII making racial discrimination unlawful did not forbid private affirmative action plans because the “background of the legislative history of Title VII and the historical context from which the Act arose” revealed an intent to benefit historically disadvantaged groups).

<sup>85</sup> 131 S. Ct. 1910 (2011).

<sup>86</sup> *Id.* at 1950–51 (Scalia, J., dissenting). Justice Scalia acknowledged that his preferred interpretation “would severely limit the circumstances under which a court could issue structural injunctions to remedy allegedly unconstitutional prison conditions, although it would not eliminate them entirely.” *Id.* at 1958.

<sup>87</sup> See *id.* at 1947 (describing the result as constitutionally and statutorily mandated under the circumstances).

plain text.<sup>88</sup> Once again, interpretive dissonance occasions a consideration of context to determine whether a text really does plainly mean what at first blush it appears to mean.

## II

### TEXTUALISM AND PURPOSIVISM: DEFINITIONS AND COMPARISONS

Over the past twenty-five years, scholars have labored to distinguish purpose-based and text-based theories of statutory interpretation.<sup>89</sup> As the Introduction emphasized, however, modern textualists concur with purposivists in assigning a crucial role to the context in which the legislature enacted a statute.<sup>90</sup> This agreement highlights the common challenge that textualists and purposivists face in needing to specify, or define precisely, the context within which to gauge statutory meanings. They also share another challenge. Once an interpretive context is specified, both rely on a largely unanalyzed notion of reasonableness to determine ultimate meaning. For purposivists, the touchstone for identifying statutory meaning is the construct of a reasonable legislator.<sup>91</sup> For textualists, the relevant actor is an imagined reasonable person who must determine not what the legislature intended, but what its words mean, in context.<sup>92</sup>

Behind these structural parallels lie deeper commonalities. Neither purposivism nor textualism possesses the resources to specify, in advance, the appropriate breadth of the relevant interpretive context for resolving all issues of statutory meaning. In making that determination in particular cases, interpreters cannot be value neutral. Similarly, for both purposivists and textualists, ascriptions of reasonableness require normative judgments.

In talking about textualists and purposivists, I necessarily paint with a broad brush. Disagreements undoubtedly exist within both camps.<sup>93</sup> Moreover, there may be purer versions of those theories

<sup>88</sup> See, e.g., SCALIA, *supra* note 5, at 16 (“[W]hen the text of a statute is clear, that is the end of the matter.”).

<sup>89</sup> On the awakening of interest in theories of statutory interpretation, see Philip P. Frickey, *From the Big Sleep to the Big Heat: The Revival of Theory in Statutory Interpretation*, 77 MINN. L. REV. 241, 248–49 (1992).

<sup>90</sup> See *supra* note 7 and accompanying text.

<sup>91</sup> See, e.g., HART & SACKS, *supra* note 3, at 1378 (urging interpreters to presume that the legislature consists of “reasonable persons pursuing reasonable purposes reasonably”); Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 539 (1947) (arguing that “the judge must seek and effectuate” a statute’s “aim” or “policy”).

<sup>92</sup> See, e.g., Manning, *supra* note 7, at 75.

<sup>93</sup> Among textualists, for example, Justice Scalia accepts the traditional canon that courts will not read statutes to dictate plainly “absurd” results, see SCALIA & GARNER, *supra* note 7, at 234, while Professor Manning argues on textualist grounds for abandoning the absurdity canon, see Manning, *Absurdity Doctrine*, *supra* note 8, at 2391.

than the practice of judges, Justices, and commentators who are familiarly associated with them reflects.<sup>94</sup> In Part III.B, I shall discuss questions framed by claims that avowedly purposivist and especially textualist Justices have betrayed rather than applied their methodologies in particular cases. Here, temporarily putting those questions to one side, I assume that the decisions reached in practice by textualist and purposivist judges, like the positions adopted by scholars who align themselves with textualist or purposivist methodologies, illustrate plausible applications of those theories.

### A. Purposivism

For purposivists, the relevant context for the interpretation of statutes is what Professor Manning calls their “policy context,” involving evidence of the demonstrable and likely aims of the presumptively reasonable legislators who enacted a provision in the first place.<sup>95</sup> Modern purposivists characteristically draw their inspiration from, and seek to refine, an approach initially developed by Professors Henry Hart and Albert Sacks.<sup>96</sup> In Hart and Sacks’s approach, judges should begin by reading statutes carefully and “then conjure up plausible organizing purposes for” them,<sup>97</sup> predicated on the assumption “that the legislature was made up of reasonable persons pursuing reasonable purposes reasonably.”<sup>98</sup>

In cases involving interpretive dissonance, purposivists face obvious questions about the appropriate breadth of the relevant interpretive context. As is well known, many purposivists will sometimes examine legislative history to find evidence of what the legislators who enacted a statute sought to achieve.<sup>99</sup> Even in the absence of specifically on-point legislative history, moreover, purposivists can broaden

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<sup>94</sup> See Jonathan R. Siegel, *The Inexorable Radicalization of Textualism*, 158 U. PA. L. REV. 117, 121 (2009) (arguing that a “pure” version of textualism would allow “absurd” results).

<sup>95</sup> See Manning, *supra* note 7, at 91.

<sup>96</sup> See HART & SACKS, *supra* note 3.

<sup>97</sup> Frickey, *supra* note 89, at 249.

<sup>98</sup> HART & SACKS, *supra* note 3, at 1378.

<sup>99</sup> See, e.g., *Zuni Pub. Sch. Dist. No. 89 v. Dep’t of Educ.*, 550 U.S. 81, 106 (2007) (Stevens, J., concurring) (“Analysis of legislative history is . . . a traditional tool of statutory construction. There is no reason why we must confine ourselves to, or begin our analysis with, the statutory text if other tools of statutory construction provide better evidence of congressional intent with respect to the precise point at issue.” (footnote omitted)); *Wis. Pub. Intervenor v. Mortier*, 501 U.S. 597, 611 n.4 (1991) (“As for the propriety of using legislative history[,] . . . common sense suggests that inquiry benefits from reviewing additional information rather than ignoring it. As Chief Justice Marshall put it, ‘[w]here the mind labours to discover the design of the legislature, it seizes every thing from which aid can be derived.’” (alteration in original) (quoting *United States v. Fisher*, 6 U.S. (2 Cranch) 358, 386 (1805))); Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845, 848 (1992) (arguing that “[l]egislative history helps a court understand the context and purpose of a statute”).

the information base that defines a statute's policy context to encompass the entire range of values—some of which might stand in tension with one another—that reasonable legislators presumably would have held. In *Riggs v. Palmer*, for example, the court acknowledged the legislature's aim of giving effect to testators' expressed wishes but surmised that reasonable lawmakers would also have wanted to exclude murderers from profiting from their crimes.<sup>100</sup>

The *Riggs* court's decision to look to a relatively broad interpretive context reflected a value judgment. As Professor Manning has recently emphasized, however, modern purposivists, or what he calls "new purposivists," begin with a strong presumption in favor of a narrowly defined interpretive context.<sup>101</sup> Philip Frickey has cautioned that "if I ask what 'reasonable people pursuing reasonable purposes reasonably' would have wanted in a given context, am I not likely to assume that those reasonable people are similar to the reasonable person I know best—myself—and, thus, would want what I think is the right answer?"<sup>102</sup> Many, if not most, modern purposivists have taken this concern to heart by emphasizing that a statute's language almost invariably furnishes the best evidence of its purpose,<sup>103</sup> including sometimes a purpose to dictate the appropriate means for pursuing policy goals.<sup>104</sup> Nevertheless, appeal to a broader context remains an option when normatively inflected considerations militate sufficiently powerfully in favor of doing so.

When, as in *Riggs v. Palmer*, the interpretive context is broadened to encompass multiple values, some potentially in conflict with others, the concept of reasonableness assumes central importance in purposivist inquiries. The notion of reasonableness has psychological and sociological aspects but also a normative component.<sup>105</sup> So emphasizing, moral philosophers frequently draw a distinction between the "rational," which can be understood in purely instrumental, self-interested terms, and the "reasonable," which imports a disposition to behave in ways that give due consideration to the interests of others.<sup>106</sup> Especially in light of the well-recognized phenomenon of

<sup>100</sup> See 22 N.E. 188, 189–90 (N.Y. 1889).

<sup>101</sup> See Manning, *supra* note 2, at 152–65 ("[T]he new purposivism takes a crucial cue about purpose more directly from Congress's choice of words.").

<sup>102</sup> Frickey, *supra* note 89, at 251.

<sup>103</sup> See Manning, *supra* note 2, at 130–31 & nn.83–86 (collecting examples).

<sup>104</sup> See, e.g., *id.* at 140 (discussing a case where "the Court understood [a] key provision's open-endedness . . . to invite development of . . . common law").

<sup>105</sup> See, e.g., Alan D. Miller & Ronen Perry, *The Reasonable Person*, 87 N.Y.U. L. REV. 323, 391 (2012) (maintaining that "a positive definition of reasonableness is a logical impossibility" because "no positive definition can satisfy" all of the axioms that a positive definition would need to embrace).

<sup>106</sup> See, e.g., JOHN RAWLS, POLITICAL LIBERALISM 49 n.1 (1993) ("[K]nowing that people are rational we do not know the ends they will pursue, only that they will pursue them

reasonable disagreement about many matters of fact and value,<sup>107</sup> a court determining how a reasonable person would resolve such disagreement must ascertain what would be most reasonable under the circumstances—an inherently value-laden determination. The doctrine associated with *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, which calls for courts to defer to any reasonable agency determination of a vague or ambiguous statute,<sup>108</sup> implicitly so recognizes. In the absence of an administrative agency, a court would need to determine which reasonable interpretation was best or most reasonable. Even with perfect empirical knowledge, no purely statistical aggregation of what the people within a society actually think could resolve the normative issue.<sup>109</sup>

Modern purposivists seldom deny that the construct of a reasonable legislator is necessarily value laden. Aharon Barak has prominently argued that statutes have “objective” purposes inhering in “the interests, values, objectives, policy, and functions that the law should realize in a democracy.”<sup>110</sup> Yet the concepts that he invokes are so plainly contestable as to betray any pretension of value neutrality.<sup>111</sup> Justice Stephen Breyer, a leading modern purposivist, comes close to acknowledging the point explicitly:

Instead of deriving an artificial meaning through the use of general canons, the [purposivist] judge will ask instead how a (hypothetical) reasonable member of Congress, given the statutory language, structure, history, and purpose, *would have* answered the question, had it been presented. . . . Why refer to a hypothetical congressional desire? Why produce the complex and fictional statement, “it seems unlikely *Congress* would have wanted courts to defer here?” The reason is that the fiction provides guidance of a kind roughly similar to that offered by Professor Corbin’s “reasonable contracting party” in

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intelligently. Knowing that people are reasonable where others are concerned, we know that they are willing to govern their conduct by a principle from which they and others can reason in common; and reasonable people take into account the consequences of their actions on others’ well-being.” (citing W.M. Sibley, *The Rational Versus the Reasonable*, 62 PHIL. REV. 554, 560 (1953)); T.M. SCANLON, WHAT WE OWE TO EACH OTHER 191–92 (1998) (suggesting that rationality entails a simple capacity for means-ends analysis while reasonableness involves “tak[ing] others’ interests into account”).

<sup>107</sup> Issues arising from reasonable disagreement are endemic both to law, *see, e.g.*, JEREMY WALDRON, LAW AND DISAGREEMENT 4–6 (1999) (“Law . . . represents the aspiration to justice of a community . . . not of those who think similarly, but of those who think differently, about matters of common concern.” (emphasis omitted)), and to moral and political philosophy, *see, e.g.*, RAWLS, *supra* note 106, at 54–58 (discussing possible sources of reasonable disagreement in political life).

<sup>108</sup> 467 U.S. 837, 843–44 (1984).

<sup>109</sup> *See* Miller & Perry, *supra* note 105, at 326–27.

<sup>110</sup> Aharon Barak, *A Judge on Judging: The Role of a Supreme Court in a Democracy*, 116 HARV. L. REV. 19, 75 (2002).

<sup>111</sup> *See* Stanley Fish, *Intention Is All There Is: A Critical Analysis of Aharon Barak’s Purposive Interpretation in Law*, 29 CARDOZO L. REV. 1109, 1135–36 (2008).

contract cases. It focuses the judge's attention on the fact that democratically elected individuals wrote the statute in order to satisfy certain human purposes. And it consequently increases the likelihood that courts will ask what those individuals would have wanted in light of those purposes.<sup>112</sup>

## B. Textualism

In contrast with their predecessors in the “plain meaning” school, modern textualists emphasize that Congress invariably legislates against the background of a number of linguistic and cultural understandings that influence, and indeed determine, what a linguistically competent person would understand a statute to say.<sup>113</sup> In an exemplification of the new textualist position, Judge Frank H. Easterbrook maintains that statutes defining criminal offenses and prescribing penalties traditionally have been, and today should continue to be, read as presupposing the availability of defenses such as insanity and necessity:

For thousands of years, and in many jurisdictions, criminal statutes have been understood to operate only when the acts were unjustified. The agent who kills a would-be assassin of the Chief Executive is justified, though the killing be willful; so too with the person who kills to save his own life. . . . The process [by which courts interpret statutes in light of historical context] is cooperative: norms of interpretation and defense, like agreement on grammar and diction, make it easier to legislate at the same time as they promote the statutory aim of saving life.<sup>114</sup>

Justice Scalia has similarly maintained that “Congress must be presumed to draft . . . in light of . . . background principle[s].”<sup>115</sup> He strongly defends judicial reliance on a variety of canons of statutory interpretation.<sup>116</sup> His favorites include those that call for criminal statutes to retain the common law requirement of *mens rea*,<sup>117</sup> for statutes not to apply extraterritorially to noncitizens,<sup>118</sup> and for

<sup>112</sup> Breyer, *supra* note 3, at 266–67 (footnote omitted).

<sup>113</sup> See SCALIA & GARNER, *supra* note 7, at 33–34; Manning, *supra* note 7, at 92–93, 100–01.

<sup>114</sup> Frank H. Easterbrook, *The Case of the Speluncean Explorers: Revisited*, 112 HARV. L. REV. 1876, 1913–14 (1997). *But cf.* United States v. Oakland Cannabis Buyers' Coop., 532 U.S. 483, 490 (2001) (describing as “an open question whether federal courts ever have authority to recognize a necessity defense not provided by statute”).

<sup>115</sup> Young v. United States, 535 U.S. 43, 49–50 (2002).

<sup>116</sup> See SCALIA & GARNER, *supra* note 7, at 69–339 (discussing interpretive canons and their proper application).

<sup>117</sup> See *Brogan v. United States*, 522 U.S. 398, 406 (1998); SCALIA & GARNER, *supra* note 7, at 303.

<sup>118</sup> See *Brogan*, 522 U.S. at 406; SCALIA & GARNER, *supra* note 7, at 268–72.

limitations periods to be “subject to ‘equitable tolling.’”<sup>119</sup> Like Judge Easterbrook, moreover, Justice Scalia sometimes views legal traditions and background understandings that have not been distilled into canons of interpretation as crucial elements of the context from which statutes derive their meaning. For example, as I have noted, he has relied on a tradition of federal noninterference with state tax collection to justify an exception to the § 1983 cause of action.<sup>120</sup> He has similarly assumed that § 1983 incorporates doctrines of official immunity, apparently because at least some state officials enjoyed immunity from damages liability in suits at common law.<sup>121</sup> In *Gregory v. Ashcroft*, Justice Scalia joined an opinion that relied on traditional legal understandings to conclude that a federal statute barring age discrimination by employers, specifically including states, did not apply to state judges.<sup>122</sup> According to the Court, traditional understandings supported a presumption that if “Congress intends to alter the usual constitutional balance between the States and the Federal Government, it must make its intention to do so unmistakably clear in the language of the statute.”<sup>123</sup>

With Congress presumed to legislate in light of background social and legal practices, and with reasonable interpreters determining statutory meaning in light of the same practices and understandings, it becomes important to specify what a reasonable interpreter should be deemed to know and to regard as relevant. In pondering this question, one might wonder whether there are conceptual limits to the kinds of background information that textualists could—consistent with the logic of their own theory—classify as part of a statute’s semantic context.

As I noted earlier, when textualists recognize that meaning depends on context, they move from the domain of what philosophers of language call semantics—which is largely concerned with dictionary meanings and rules of grammar—to that of pragmatics, which

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<sup>119</sup> *Young*, 535 U.S. at 49–50 (quoting *Irwin v. Dep’t of Veterans Affairs*, 498 U.S. 89, 95 (1990)).

<sup>120</sup> See *Nat’l Private Truck Council, Inc. v. Okla. Tax Comm’n*, 515 U.S. 582, 589 (1995) (“[W]e must interpret § 1983 in light of the strong background principle against federal interference with state taxation.”). Justice Scalia joined Justice Thomas’s opinion for the Court. *Id.* at 582.

<sup>121</sup> See, e.g., *Burns v. Reed*, 500 U.S. 478, 497 (1991) (Scalia, J., concurring in the judgment in part and dissenting in part).

<sup>122</sup> 501 U.S. 452, 473 (1991).

<sup>123</sup> *Id.* at 460 (quoting *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985)) (internal quotation marks omitted). In a concurring opinion in *Nixon v. Missouri Municipal League*, Justice Scalia, joined by Justice Thomas, relied on the *Gregory* presumption to conclude that a federal statute did not “limit the power of States to restrict the delivery of telecommunications services by their political subdivisions.” 541 U.S. 125, 141 (2004) (Scalia, J., concurring).

deals with issues of meaning that depend on further considerations.<sup>124</sup> Within that domain, textualists almost invariably insist that information about legislators' psychological intentions and expectations is irrelevant.<sup>125</sup> For them, what matters is "the way a reasonable person conversant with relevant social and linguistic practices would have used the words."<sup>126</sup> But apart from textualists' exclusion of information about speakers' or legislators' intentions, the very point of reference to a legal text's semantic context is frequently to explain that its words do not mean what someone equipped only with dictionary definitions and knowledge of the rules of grammar could well take them to mean—for example, that a statute making it unlawful to engage in specified activities should not apply extraterritorially or that the statute of limitations does not apply because of the doctrine of equitable tolling. Once the notion of semantic context is expanded to include more information than dictionaries and grammar books can supply and to authorize rejections of what otherwise would appear to be statutes' "plain meanings,"<sup>127</sup> it becomes difficult to formulate even moderately determinate rules for saying in advance which bits of information about the context of a statute's enactment should be deemed contextually relevant and irrelevant.<sup>128</sup>

Professor Manning suggests otherwise in an article in which he criticizes "the absurdity doctrine."<sup>129</sup> In that article, Manning maintains that it would be objectionable for courts, in specifying the relevant semantic context for interpreting a statute, to rely on "social values whose content and method of derivation are both unspecified ex ante."<sup>130</sup> He distinguishes, and defends, judicial reliance on "conventions" that have congealed into previously recognized canons of

<sup>124</sup> See *supra* note 11 and accompanying text.

<sup>125</sup> See, e.g., Easterbrook, *supra* note 48, at 61 ("What any member of Congress thought his words would do is irrelevant. We do not care about his mental processes."); William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 623 (1990) ("The new textualism posits that once the Court has ascertained a statute's plain meaning, consideration of legislative history becomes irrelevant. Legislative history should not even be consulted to confirm the apparent meaning of a statutory text."); Manning, *supra* note 7, at 84 (noting that "textualists generally forgo reliance on legislative history as an authoritative source of [statutory] purpose"). Occasionally, textualists are willing to consult legislative history for certain narrow purposes. See, e.g., *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 527 (1989) (Scalia, J., concurring in the judgment) (relying on legislative history "to verify that what seems to us an unthinkable disposition . . . was indeed unthought of"); Nelson, *supra* note 75, at 360 nn.37–38 (citing examples).

<sup>126</sup> Manning, *supra* note 7, at 91.

<sup>127</sup> See *supra* note 8 and accompanying text (discussing new textualists' divergence from an older plain meaning school).

<sup>128</sup> See Greene, *supra* note 45, at 1923 (asserting that textualists' "combination of reliance on unexamined background knowledge plus the cutting off of additional knowledge is an error").

<sup>129</sup> Manning, *Absurdity Doctrine*, *supra* note 8.

<sup>130</sup> *Id.* at 2471.

statutory interpretation<sup>131</sup> but says that if textualists are to “follow their premises to a logical conclusion, then they must . . . treat[ ] the existing set of background conventions as a closed set.”<sup>132</sup>

Manning’s suggestion that the appropriate semantic context for interpreting statutes consists entirely of conventions specified *ex ante* is not only inconsistent with the practice of textualist judges such as Judge Easterbrook and Justices Scalia and Thomas—who have not maintained that the substantive background understandings relevant to statutory interpretation reside exclusively in previously recognized interpretive conventions<sup>133</sup>—but also unworkable. Consider, for example, how a textualist should address the interpretive issues that would arise under an ordinance barring “vehicles” from a park. In discussing whether baby strollers would come within that prohibition, the textualist Justice Scalia sorts through a range of definitions from different dictionaries before concluding that “[t]he proper colloquial meaning . . . is simply a *sizable* wheeled conveyance” and that baby strollers do not come within the exclusion.<sup>134</sup> This analysis may be defensible,<sup>135</sup> but it surely does not rely solely on conventions or other precepts that the defender of a particular theory of statutory interpretation could sensibly be asked to include, *ex ante*, in an exclusive compilation of available, reasonably determinate interpretive premises. One might, I suppose, maintain that Justice Scalia’s analysis simply applies the “ordinary-meaning canon,” which posits that “[w]ords are to be understood in their ordinary, everyday meanings—unless the context indicates that they bear a technical sense.”<sup>136</sup> But this maneuver would postpone the problem, not solve it. In law as elsewhere, the functioning of language in producing ordinary, everyday meanings is too complex, fluid, and intuitive to be reduced to a determinate list of rules set out in advance.

An illustration of the need for context-by-context judgment comes from the recent case of *Arizona v. Inter Tribal Council of Arizona, Inc.*,<sup>137</sup> which presented the question of whether a federal statute mandating that states “accept and use” a federal form in registering

<sup>131</sup> See *id.* at 2473–74 & n.317.

<sup>132</sup> *Id.* at 2474.

<sup>133</sup> They did not, for example, take this position in either the *National Private Truck Council* case, discussed in *supra* notes 32–34 and accompanying text, nor did Justice Scalia do so in *Gregory v. Ashcroft*, described in *supra* notes 122–23 and accompanying text.

<sup>134</sup> See SCALIA & GARNER, *supra* note 7, at 37–38.

<sup>135</sup> But see William N. Eskridge, Jr., *The New Textualism and Normative Canons*, 113 COLUM. L. REV. 531, 561 (2013) (reviewing ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* (2012)) (characterizing Justice Scalia’s purportedly purely textual analysis as “crazy” insofar as it purported to exclude the purpose of the statute).

<sup>136</sup> SCALIA & GARNER, *supra* note 7, at 69.

<sup>137</sup> 133 S. Ct. 2247 (2013).

voters precluded Arizona from demanding more than that form required.<sup>138</sup> Writing for the majority, Justice Scalia concluded that “the implication of” the “accept and use” requirement was that the state must treat satisfaction of the form’s demands as sufficient for registration.<sup>139</sup> Dissenting, Justice Samuel Alito thought that the state had complied with the federal statute as long as it had “use[d] the form as a meaningful part of the registration process.”<sup>140</sup> Regardless of how one judges this argument, surely no one could have thought that the Justices, in resolving the dispute, were limited to consulting a settled list of conventions of language use that they could have stated in advance. When Manning says that if textualists are to “follow their premises to a logical conclusion, then they must . . . treat[ ] the existing set of background conventions as a closed set,”<sup>141</sup> he asks for more than any theory could possibly deliver.<sup>142</sup>

Indeed, if a theory (such as textualism) tried to incorporate within itself rules for its own application, then someone could always demand to see the principles specifying how those prescriptions should in turn be interpreted<sup>143</sup>—and could further ask for a specification of the relevant semantic or policy context for interpreting the rules purportedly dictating how the theory’s first-order interpretive principles should be applied. At this point, the demand for prescriptive interpretive rules and rules for the specification of relevant interpretive contexts would pose a threat of infinite regress.<sup>144</sup>

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<sup>138</sup> See *id.* at 2251.

<sup>139</sup> *Id.* at 2254.

<sup>140</sup> *Id.* at 2274 (Alito, J., dissenting).

<sup>141</sup> Manning, *Absurdity Doctrine*, *supra* note 8, at 2474.

<sup>142</sup> Cf. JOSEPH RAZ, BETWEEN AUTHORITY AND INTERPRETATION 118–20 (2009) (asserting the dependence of theories of legal interpretation on moral theory and denying the possibility of “a general theory of legal interpretation” or an “operational” moral theory that would prescribe correct conclusions to someone who did not already have good moral judgment).

<sup>143</sup> See *supra* note 57 and accompanying text.

<sup>144</sup> In order to determine how precepts and theories apply to particular cases, we ordinarily count not on proliferating layers of interpretive rules but, instead, on the availability of a foundational human capacity such as that of “understanding” with respect to utterances that require no clarification, see ANDREI MARMOR, INTERPRETATION AND LEGAL THEORY 22 (1992); PATTERSON, *supra* note 56, at 86–87, or to a faculty such as that of “judgment,” see BEINER, *supra* note 57, at 130–31. According to Professor Ronald Beiner’s account, “[j]udgment is a natural capacity of human beings that . . . enables us to appraise particulars without dependence upon rules or rule-governed technique . . . .” BEINER, *supra*, at 8. A large, complex philosophical literature on judgment aims to explain both the possibility conditions for the existence and application of such a faculty and the empirical constituents of sound practical decision making. See *id.* at 129–52 (discussing theories of judgment including those of Aristotle, Immanuel Kant, Hannah Arendt, and Hans-Georg Gadamer). Putting the metaphysics of judgment to one side, I would emphasize that conclusions concerning how prescriptive rules or principles are best applied in particular cases depend not only on the apprehension of facts but also on determinations of the relative priority of sometimes competing values in particular contexts. See *id.* at 95 (noting that for Aristotle,

In sum, lacking the resources to offer algorithmic prescriptions regarding the content of interpretive contexts, textualists, like purposivists, face choices about how narrowly or broadly to define the interpretive context for the resolution of particular puzzles about statutory meaning. And it is a fair generalization, I think, that they—in parallel with purposivists—tend to broaden the context to admit more information about background understandings and expectations when failure to do so would produce normatively jarring consequences. Although I cannot prove this point, suggestive evidence comes from the cases that I discussed earlier in which textualist judges have invoked background understandings to justify their readings of statutes as including nontextual exceptions.<sup>145</sup> In so saying, I do not mean to imply that textualist interpreters routinely admit just enough information into the interpretive context to reach the result that they would have preferred if they occupied the capacity of legislators. Frequently, I assume, they could not plausibly do so, even if they wished. Sometimes, however, a broadening of the interpretive context will make it plausible to reach interpretive conclusions that would not otherwise have been plausible. When this is so, textualists have no basis for deciding what is in and what is out without making some sort of normative judgment. I shall say more about this point below.

A second challenge for textualists emerges when decisions about how to interpret a statute hinge on the judgments of a reasonable interpreter. Textualists then must determine what a reasonable interpreter—when apprised, for example, that § 1983 was enacted against a background of historic noninterference with state tax collection or of official immunity in suits for damages—would make of this

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practical judgment is “geared to determination of the proper ends”); *id.* at 106 (pointing out that Aristotle and Kant agree on “the elusiveness of principles upon which to judge particulars” because “there are no fixed universals for the subsumption of such particulars”). Accordingly, appeals to the existence of a shared capacity of judgment leave us far short of a determinate formula for how interpretive contexts should be specified or what considerations should influence the determination.

Another problem with assuming that a shared faculty of human judgment could solve the problem of determining how broadly or narrowly a statute’s interpretive context should be defined—without need for interpreters to make contestable value judgments—involves the psychological phenomenon of “motivated reasoning.” See Dan M. Kahan, *Neutral Principles, Motivated Cognition, and Some Problems for Constitutional Law*, 125 HARV. L. REV. 1, 19 (2011) (defining “motivated reasoning” as “the unconscious tendency of individuals to process information in a manner that suits some end or goal extrinsic to the formation of accurate beliefs”). Modern psychological research has confirmed what common sense has always suggested: human beings have a powerful psychological propensity to determine facts and appraise arguments in ways that accord with their preexisting, ideologically inflected beliefs and preferences. See *id.* at 19–26. If asked whether a narrow semantic or policy context was too narrow to yield the proper answer to a particular interpretive question, most people would probably say yes if, but only if, they hoped that a broader context would license a conclusion that they adjudged more attractive.

<sup>145</sup> See *supra* notes 32–39 and accompanying text.

information. This inquiry may be partly sociological, but it is also, as I have said, partly normative. It requires the ascription to the reasonable interpreter of normative beliefs as well as factual knowledge.<sup>146</sup> Moreover, in order to make sense of a statute as the utterance of a legislature, the reasonable textualist interpreter will need, in turn, to ascribe at least an objective intent—and presumably a reasonable objective intent—to the enacting body.<sup>147</sup>

The search for such an objective intent presents formidable challenges. H.P. Grice's influential theory<sup>148</sup> holds that in ordinary conversation, "the content asserted by a speaker just *is* the content that the speaker *intended* to convey to the hearer by expressing the utterance in the particular context that she did."<sup>149</sup> But textualists of course reject any account of statutory meaning that depends straightforwardly on either the actual intentions of the legislature or the hypothesized intentions or purposes of reasonable legislators (beyond the minimal purpose or intent of enacting meaningful legislation written, in the United States, in English).<sup>150</sup> When textualists instead direct attention to the alternative construct of a reasonable listener, the difficulty is that a reasonable listener normally seeks to understand a speaker's utterances based partly on assumptions about the speaker. When textualism insists that only the most minimal assumptions can be made, it may threaten to deprive the reasonable listener of information or assumptions about the speaker that the reasonable listener may need in order to grasp the meaning of the speaker's words in the context of their utterance. When textualists, at the same time, maintain that the words of a statute reflect an objective intent, it is not clear to what the phrase "objective intent" might refer unless textualists are in fact making assumptions about the knowledge and purposes of some actual or imagined speaker.<sup>151</sup> The difficulty becomes sharply visible when textualists, such as Justice Scalia, avowedly reject proposed interpretations on the ground that they compel results "that no sensible person could have intended."<sup>152</sup>

In maintaining that textualists, in parallel with purposivists, must make value-laden ascriptions of reasonableness, I do not mean to imply that the ascribed values will always prove controversial. The canons of statutory construction, which can be grouped variously into

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146 See *supra* note 50 and accompanying text.

147 See Manning, *supra* note 7, at 79.

148 See *supra* note 74.

149 Marmor, *supra* note 42, at 7 (describing "a neo-Gricean view").

150 See *supra* note 125 and accompanying text.

151 See Nelson, *supra* note 75, at 354.

152 Cal. Div. of Labor Standards Enforcement v. Dillingham Constr., N.A., Inc., 519 U.S. 316, 335–36 (1997) (Scalia, J., concurring).

categories,<sup>153</sup> furnish an instructive range of examples. The “surplusage canon,” which holds that “[i]f possible, every word and every provision is to be given effect,”<sup>154</sup> assumes that the actual or hypothesized speaker—of whom the interpreter strives to act as a faithful agent—valued economy of expression and, accordingly, should be understood as having uttered only words that make a difference. The “harmonious-reading canon,” which prescribes that “[t]he provisions of a text should be interpreted in a way that renders them compatible, not contradictory,”<sup>155</sup> ascribes comparably thin or noncontroversial values involving a preference for noncontradiction and practical efficacy. Yet, sticking for the moment solely to the canons, a textualist interpreter begins to ascribe more plainly substantive and potentially more controversial values when assuming that statutes should be presumed not to apply extraterritorially.<sup>156</sup> Plainly, moreover, the imputed values grow still more ideologically charged when a court applies the rule of lenity<sup>157</sup> or the presumptions against waivers of sovereign immunity<sup>158</sup> and federal statutory abrogation of state sovereign immunity.<sup>159</sup>

When canons are long established, textualists sometimes say, Congress is well aware of them, and its failure to legislate around them provides important evidence of “what might be considered the genuine intent of the statute.”<sup>160</sup> But the assumption that reasonable legislators draft with the canons of interpretation in mind itself depends on a normatively inflected conception of reasonableness. According to a recent empirical study, most Senate and House staffers have little awareness of some of the canons and often consciously

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<sup>153</sup> For example, Professor William N. Eskridge, in categorizing the canons championed by Justice Scalia, arranges them under different headings. Compare SCALIA & GARNER, *supra* note 7, at ix (listing the canons in the table of contents), with Eskridge, *supra* note 135, at 552–60.

<sup>154</sup> SCALIA & GARNER, *supra* note 7, at 174.

<sup>155</sup> *Id.* at 180.

<sup>156</sup> See, e.g., *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1664 (2013) (noting that the canon presuming that statutes do not apply extraterritorially “serves to protect against unintended clashes between our laws and those of other nations which could result in international discord” (quoting *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991))). Justice Scalia, who joined the majority opinion in *Kiobel*, has argued in favor of stricter enforcement of the canon, which he acknowledges is “sometimes ignored,” SCALIA & GARNER, *supra* note 7, at 272, presumably on the ground that it embodies good sense. Scalia argues that “[l]egislators must know what to expect,” *id.*, but for that purpose the opposite presumption would serve as well.

<sup>157</sup> See SCALIA & GARNER, *supra* note 7, at 296 (explicating the rule of lenity as prescribing that “[a]mbiguity in a statute defining a crime or imposing a penalty should be resolved in the defendant’s favor”).

<sup>158</sup> See *id.* at 281.

<sup>159</sup> See *id.* at 288–89. For discussion of “the normativity” of a number of the canons that textualists favor, see Eskridge, *supra* note 135, at 552–60.

<sup>160</sup> *McQuiggin v. Perkins*, 133 S. Ct. 1924, 1941 (2013) (Scalia, J., dissenting).

reject others, rather than drafting in light of them, in response to political or other considerations.<sup>161</sup> If so, most members of Congress seem likely to be similarly unaware of some of the canons and to be equally disposed to reject others as drafting guides<sup>162</sup>—even if more “reasonable” members would be better informed and would frame legislation differently.

The point, moreover, is not limited to the canons of interpretation. It involves a more pervasive, ultimately ineradicable phenomenon in the interpretation of statutory language: statutory interpretation requires the ascription of values, whether to legislators or reasonable interpreters of legislation, and the choice of which values to ascribe—including those that help to constitute reasonable-ness—cannot itself be value free.

In ascribing values, I again hasten to add, a textualist interpreter does not need to assume, and indeed should not assume, that every statute will reflect the views of a speaker who is, by the interpreter’s lights, correct in every normative respect.<sup>163</sup> As I have recognized, judges can recognize that their own values likely diverge from those of the legislature. Nevertheless, the prospect of rule-based, advance resolution of all issues of reasonableness in the interpretation of statutes is plainly illusory. Frequently, textualist interpreters, as much as purposivists, must determine how to apply statutes—and indeed how to apply the canons of interpretation—in interpretive contexts in which reasonable people can differ and judgments need to be made about what is *most* reasonable.

An example comes from *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, in which the Supreme Court divided 6–3 over whether the Department of the Interior permissibly interpreted a provision that makes it an offense to “take” an endangered species as applying to actions by private landowners that destroy endangered species’ habitats.<sup>164</sup> According to Professor Eskridge’s tally, “[t]here were more than a dozen [applicable] canons [of interpretation] available for the Justices, and they deployed them like battlefield weapons.”<sup>165</sup> For the majority, Justice John Stevens held that the agency’s interpretation was a reasonable one and therefore

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<sup>161</sup> See Abbe R. Gluck & Lisa Shultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901, 926–64 (2013).

<sup>162</sup> See *id.* at 923.

<sup>163</sup> Cf. David K. Henderson, *The Principle of Charity and the Problem of Irrationality (Translation and the Problem of Irrationality)*, 73 SYNTHÈSE 225, 226–27 (1987) (arguing that the principle of charity disfavors but should not preclude some ascriptions of irrationality).

<sup>164</sup> 515 U.S. 687, 690 (1995).

<sup>165</sup> Eskridge, *supra* note 135, at 545.

commanded judicial deference.<sup>166</sup> Writing in dissent for the Court's three most conservative Justices, Justice Scalia began his opinion with what Eskridge describes as a "normative *cri de coeur*"<sup>167</sup> that may reveal the ultimate foundation for the dissenters' judgment about how the statute would most reasonably be read: "The Court's holding that the hunting and killing prohibition incidentally preserves habitat on private lands imposes unfairness to the point of financial ruin—not just upon the rich, but upon the simplest farmer who finds his land conscripted to national zoological use."<sup>168</sup>

Textualists sometimes insist that any background principle be formulated at the lowest possible level of generality.<sup>169</sup> As some of the cases that I discussed will have illustrated, however, that is not an approach that the textualist Justices have consistently taken. Another example comes from *Kiobel v. Royal Dutch Petroleum Co.*, in which Justices Scalia and Thomas joined an opinion (by Chief Justice John Roberts) that applied the canon disfavoring extraterritorial

<sup>166</sup> *Sweet Home*, 515 U.S. at 708.

<sup>167</sup> Eskridge, *supra* note 135, at 548.

<sup>168</sup> *Sweet Home*, 515 U.S. at 714 (Scalia, J., dissenting). *McQuiggin v. Perkins*, 133 S. Ct. 1924 (2013), furnishes another, more recent example of normatively charged disagreement about interpretive reasonableness in a relatively broad interpretive context. In *McQuiggin*, Justice Ruth Bader Ginsburg's majority opinion for five Justices held, over Justice Scalia's dissent for four, that the statute of limitations for federal habeas corpus petitions under the Antiterrorism and Effective Death Penalty Act (AEDPA) includes an implicit equitable exception for cases in which the petitioner makes a showing of actual innocence. *See id.* at 1928. Both majority and dissent agreed that "Congress legislates against the backdrop of existing law," *compare id.* at 1935 n.3 (majority opinion), *with id.* at 1942 n.2 (Scalia, J., dissenting); that given the background of existing law, AEDPA's statute of limitations was plausibly interpreted as being subject to equitable tolling, *compare id.* at 1934 (majority), *with id.* at 1941–42 (dissent); and that the background also included decisions in which the Court had treated judicially developed limitations on access to habeas as subject to a "miscarriage of justice" exception encompassing cases in which petitioners could make adequate demonstrations of actual innocence, *compare id.* at 1931 (majority), *with id.* at 1938–39 (dissent). With this much agreed, Justice Scalia thought that the majority's conclusion that Congress had legislated against the background of a "miscarriage of justice exception to . . . various threshold barriers to relief" occurred "only at an uninformative level of generality" and that no precisely specified background principle applied to the case at hand, which involved a statutory rather than a judge-made barrier to habeas relief. *Id.* at 1942 & n.2 (Scalia, J., dissenting). Justice Ginsburg countered by querying why, given the dissent's concession that "equitable tolling 'can be seen as a reasonable assumption of genuine legislative intent,'" and given the existence of judge-made exceptions to other barriers to habeas relief to avoid miscarriages of justice, "is it not an equally reasonable assumption that Congress would want a limitations period to yield when what is at stake is a State's incarceration of an individual for a crime . . . no reasonable person would find he committed?" *Id.* at 1935 n.3 (majority opinion).

<sup>169</sup> *Cf.* Michael H. v. Gerald D., 491 U.S. 110, 127 n.6 (1989) (plurality opinion of Scalia, J.) (maintaining that the appropriate "level of generality" at which to identify a constitutionally pertinent tradition is "the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified"). For discussion of the pertinence of levels of generality and the difficulties in establishing them without making value judgments, *see generally* Laurence H. Tribe & Michael C. Dorf, *Levels of Generality in the Definition of Rights*, 57 U. CHI. L. REV. 1057 (1990).

application of U.S. law to a statute that was “strictly jurisdictional” and did “not directly regulate conduct or afford relief,” despite acknowledging that the canon ordinarily applies only to statutes that “regulat[e] conduct.”<sup>170</sup> Nor is it always clear what a prescription to formulate background principles at their lowest levels of generality would mean. In *Arizona v. Inter Tribal Council of Arizona, Inc.*, Justice Alito’s dissenting opinion would have applied the “presumption against pre-emption” of state law to hold that the National Voter Registration Act did not displace a state requirement that prospective registrants present documentary proof of citizenship.<sup>171</sup> For the majority, Justice Scalia held that canon inapplicable because “[w]e have never mentioned such a principle in our Elections Clause cases.”<sup>172</sup> I would not know whether this reasoning applies the background presumption against preemption at the lowest level of generality or whether it carves out an exception to that presumption.

Ultimately, however, there is no need to belabor the point. Even if one could make sense of the idea that background principles should be stated at the lowest level of generality, and could apply it consistently, it seems clear that that precept, by itself, could not eliminate the need for more substantive judgments of reasonableness in many cases. For example, I have no idea how it would apply to such puzzles as whether baby strollers would come within a rule dictating “no vehicles in the park.”

Issues about whether one federal statute has impliedly repealed or displaced another further illustrate the need for textualists and purposivists to make comparably value-based judgments,<sup>173</sup> involving either what a reasonable legislator would have intended or a reasonable person would understand. In *Hoffman Plastic Compounds, Inc. v. NLRB*,<sup>174</sup> for example, the question was whether the Immigration Reform and Control Act of 1986<sup>175</sup> (IRCA), which made it a crime for an employee knowingly to tender or for an employer knowingly to accept false identification documents in connection with hiring, impliedly barred reinstatement and backpay remedies for undocumented workers whose discharges for engaging in union organizing constituted clear violations of the National Labor Relations Act

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<sup>170</sup> 133 S. Ct. 1659, 1664 (2013).

<sup>171</sup> 133 S. Ct. 2247, 2271 (2013) (Alito, J., dissenting).

<sup>172</sup> *Id.* at 2256.

<sup>173</sup> Such issues arise nearly ubiquitously in the modern administrative state, in which new legislation routinely threatens to conflict with existing statutory regulation touching the same domain. See David J. Barron & Todd D. Rakoff, *In Defense of Big Waiver*, 113 COLUM. L. REV. 265, 302–03 (2013).

<sup>174</sup> 535 U.S. 137 (2002).

<sup>175</sup> Pub. L. No. 99-603, 100 Stat. 3359 (codified as amended in scattered sections of 8 U.S.C.).

(NLRA). The Court's five-member conservative majority, which included the textualist Justices Scalia and Thomas, ruled that "awarding backpay to illegal aliens runs counter to policies underlying IRCA,"<sup>176</sup> which it evidently regarded as plainly inferable from the statute's text. Dissenting, Justice Breyer thought it more reasonable to find no displacement of the NLRA's reinstatement and backpay remedies, partly because the preclusion of remedies would reduce deterrence of obvious NLRA violations.<sup>177</sup> There is no need to judge the merits of these competing arguments. For present purposes, all that matters is this: the disagreement between the majority and the dissenting opinions pervasively reflected conflicting, normatively laden judgments of reasonableness, even if the Justices did not explicitly use that term.

To cite just one more example of how textualists must decide which values to ascribe to reasonable interpreters as much as purposivists must ascribe values to hypothesized reasonable legislators, the question occasionally arises whether a statute's provision of a remedy merely creates that particular remedy or, alternatively, whether it also precludes other possible remedies, such as the cause of action provided by § 1983 against state officials who violate federal statutory rights.<sup>178</sup> Language that provides a remedy might be regarded as ambiguous in this respect: it is either a grant, with no other implications, or it is a grant combined with an implied preclusion. And resolution of the ambiguity, which requires a judgment about how statutory language is most reasonably read in context, frequently involves an element of normative evaluation. In § 1983 cases, textualists who are also conservatives are thus predictably more prone than liberals to read a statute's provision of one remedy as impliedly excluding the cause of action that § 1983 otherwise generically provides for violations of federal statutory rights,<sup>179</sup> probably because they would regard the

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<sup>176</sup> *Hoffman Plastic*, 535 U.S. at 148–49.

<sup>177</sup> *Id.* at 154 (Breyer, J., dissenting) ("Without the possibility of the deterrence that backpay provides, the Board can impose only future-oriented obligations upon law-violating employers—for it has no other weapons in its remedial arsenal. And in the absence of the backpay weapon, employers could conclude that they can violate the labor laws at least once with impunity." (citation omitted)). Justice Breyer also argued that the majority's holding contravened the purposes of the IRCA, one of which was to create disincentives for employers to hire undocumented workers. *See id.* at 155–56. According to Justice Breyer, allowing employers to fire undocumented workers with impunity in retaliation for labor organizing would make such workers more attractive as prospective employees than legal workers. *See id.*

<sup>178</sup> *See* HART & WECHSLER, *supra* note 1, at 970–72 (discussing statutory supersession of § 1983 remedies).

<sup>179</sup> *See, e.g., City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 121 (2005) ("The provision of an express, private means of redress in the statute itself is ordinarily an indication that Congress did not intend to leave open a more expansive remedy under § 1983."); *Middlesex Cnty. Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 20 (1981) ("When the remedial devices provided in a particular Act are sufficiently comprehensive,

provision of duplicate remedies as so improvident that (they think) no reasonable observer would view Congress, absent some explicit indication of intent to do so, as having made such a provision. From a liberal perspective, duplicative remedies would sometimes seem more reasonable.

### C. Two Parallels Further Illustrated: Interpretive Contexts and Judgments of Reasonableness

A further discussion of the cases finding implied exceptions to the § 1983 cause of action, when juxtaposed with the much-discussed *Holy Trinity* decision, will highlight the parallelism of the challenges for purposivists and textualists in specifying the context within which statutory interpretation should occur and in determining what it would be most reasonable to infer within those contexts.

Both textualists and purposivists have avoided the conclusion that § 1983 creates an exceptionless cause of action that renders state officials liable for all constitutional violations. Textualists have done so by taking a broad view of the semantic context in which Congress enacted the statute.<sup>180</sup> In *National Private Truck Council, Inc. v. Oklahoma Tax Commission*, the textualist Justice Thomas, joined by Justice Scalia, reasoned that historical practice supported a “presumption that federal law generally will not interfere with administration of state taxes.”<sup>181</sup> Similar processes of reasoning apparently underlie textualist Justices’ support for the availability of official immunity in § 1983 actions. Broadening the interpretive context to include the background of limitations on common law causes of action against state officials<sup>182</sup> and of related immunity doctrines against which § 1983

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they may suffice to demonstrate congressional intent to preclude the remedy of suits under § 1983.”).

<sup>180</sup> Although Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 421–22 (1989), characterizes § 1983 as “delegat[ing] power to make common law,” the Court does not consistently treat § 1983 as a de facto, across-the-board delegation to it of common lawmaking authority, on a par, for example, with the Sherman Antitrust Act. *Compare, e.g.,* *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 899–900 (2007) (“From the beginning the Court has treated the Sherman Act as a common-law statute.”), *with* *Nat’l Private Truck Council, Inc. v. Okla. Tax Comm’n*, 515 U.S. 582, 588 (1995) (“Congress did not authorize injunctive or declaratory relief under § 1983 in state tax cases . . .”), *and* *Patsy v. Bd. of Regents*, 457 U.S. 496, 507 (1982) (“[T]he 1871 Congress did not intend that an individual be compelled in every case to exhaust state administrative remedies before filing an action under § 1 of the Civil Rights Act.”). In any event, a textualist who believed that § 1983 could be appropriately characterized as a “common law statute,” subject to special interpretive principles, would need to explain that conclusion by reference to a very broad, and contestable, specification of the statute’s interpretive context.

<sup>181</sup> 515 U.S. 582, 588 (1995).

<sup>182</sup> *See, e.g.,* *Heck v. Humphrey*, 512 U.S. 477, 483–84 (1994) (Scalia, J.) (“[T]o determine whether there is any bar to [a § 1983] suit, we look first to the common law of torts.”).

was enacted,<sup>183</sup> a number of Supreme Court opinions—some of them written or joined by textualist Justices—have concluded that § 1983 should not be understood as creating particular causes of action not recognized at common law<sup>184</sup> and as presumptively retaining common law immunity defenses.<sup>185</sup>

To cite just one more example, the Court has also assumed that § 1983 creates no right to federal injunctive relief against a variety of pending state judicial proceedings.<sup>186</sup> In an attempt to rationalize its precedents in *Quackenbush v. Allstate Insurance Co.*, in an opinion joined by the textualist Justices Scalia and Thomas, the Court noted that the historical practice of courts in sometimes declining to exercise equity jurisdiction “informs our understanding of the jurisdiction Congress has conferred upon the federal courts.”<sup>187</sup>

Even with the interpretive context broadened, the conclusion that § 1983 retains common law and equitable limitations on suits against state officials requires a further analytical step, involving a determination of what a reasonable interpreter would infer from the context of the statute’s enactment. On this point, the Court’s reasoning invites an obvious challenge. A clear purpose of § 1983—or, in the vocabulary preferred by textualists, a plain aspect of its “objective

<sup>183</sup> See, e.g., *Buckley v. Fitzsimmons*, 509 U.S. 259, 279–80 (1993) (Scalia, J., concurring) (citing “a well-established common-law privilege [that existed] in 1871, when § 1983 was enacted”); *Burns v. Reed*, 500 U.S. 478, 497–98 (1991) (Scalia, J., concurring in the judgment in part and dissenting in part) (arguing that “the common-law practice, which governs whether absolute immunity exists under § 1983, is that this prosecutorial action would have enjoyed only qualified immunity”).

<sup>184</sup> See, e.g., *Heck*, 512 U.S. at 483–84 (holding that § 1983 was unavailable for bringing a plaintiff’s wrongful imprisonment claim because common law malicious prosecution actions required “termination of the prior criminal proceeding in favor of the accused”).

<sup>185</sup> See, e.g., *Pierson v. Ray*, 386 U.S. 547, 554–55 (1967) (“The legislative record [of § 1983] gives no clear indication that Congress meant to abolish wholesale all common-law immunities.”). In *Rehberg v. Paulk*, the Court noted that while its “approach is tied to the common law’s identification of the functions that merit the protection of absolute immunity, the Court’s precedents have not mechanically duplicated the precise scope of the absolute immunity that the common law provided to protect those functions,” but instead have innovated where necessary to accommodate modern policy concerns. 132 S. Ct. 1497, 1503–04 (2012). Due in part to *stare decisis*, Justice Scalia and Justice Thomas have acquiesced in an approach that strays from the common law in certain instances. See, e.g., *Kalina v. Fletcher*, 522 U.S. 118, 132–35 (1997) (Scalia, J., concurring); *Heck*, 512 U.S. at 491 (Thomas, J., concurring).

<sup>186</sup> See, e.g., *Younger v. Harris*, 401 U.S. 37, 54 (1971) (holding that “the possible unconstitutionality of a statute ‘on its face’ does not in itself justify an injunction against good-faith attempts to enforce it” and declining to consider whether any Act of Congress authorizes such an injunction). But see Martin H. Redish, *Abstention, Separation of Powers, and the Limits of the Judicial Function*, 94 YALE L.J. 71, 84 (1984) (“The language of the relevant statutes leaves no room for judicial limitation or modification . . . . Moreover, the very purpose of [the Reconstruction] legislation [often involved in abstention cases] was to interpose the federal judiciary between the state and individual, largely because of concern about the functioning of state judiciaries.”).

<sup>187</sup> 517 U.S. 706, 717 (1996).

intent<sup>188</sup>—was to alter the prior legal landscape by subjecting state officials to suits that the common law did not authorize.<sup>189</sup> Nevertheless, moved by a sense of interpretive dissonance and the value judgments that underlie it, the Court’s textualists have concluded that a reasonable interpreter would understand § 1983 as not having displaced some common law and equitable limitations on suits against state officials in the absence of a clear statement to that effect.

In a number of leading cases, purposivists—presumably animated by the same sense of interpretive dissonance—have not disagreed. The Court’s ruling in *National Private Truck Council* was unanimous. It could have been explained as easily by reference to Congress’s likely purposes as by a tradition-based presumption about the meaning of statutory language. Without always being explicit about their reasoning, even purposivist Supreme Court Justices—beginning in *Tenney v. Brandhove*<sup>190</sup> and continuing into the present day—have also consistently assumed that the considerations often invoked to justify official immunity from damages liability formed part of the policy context in which Congress enacted § 1983. Although Congress’s most central animating purpose was to authorize suits against officials who violated constitutional rights,<sup>191</sup> reasonable legislators pursuing reasonable goals in reasonable ways might also have recognized, and wanted to accommodate, the values that would tend to support officials’ immunity from personal liability in damages actions<sup>192</sup> and counsel federal

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<sup>188</sup> See *supra* note 75 and accompanying text.

<sup>189</sup> See Eisenberg, *supra* note 29, at 485–86, 493–94.

<sup>190</sup> 341 U.S. 367, 376–77 (1951).

<sup>191</sup> In one famously unguarded description of § 1983’s policy context, the Supreme Court said:

Th[e] legislative history makes evident that Congress clearly conceived that it was altering the relationship between the States and the Nation with respect to the protection of federally created rights; it was concerned that state instrumentalities could not protect those rights; . . . and it believed that these failings extended to the state courts. . . . Section 1983 was thus a product of a vast transformation from the concepts of federalism that had prevailed in the late 18th century . . . . The very purpose of § 1983 was to interpose the federal courts between the States and the people, as guardians of the people’s federal rights.

*Mitchum v. Foster*, 407 U.S. 225, 242 (1972).

<sup>192</sup> Either the ultimate example of interpretive purposivism or its limiting case came in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), in which the Court self-consciously reformulated the standard for defining the qualified immunity that most officials enjoy. The Court’s analysis was almost wholly policy driven. If the Court’s opinion can be squeezed into the framework of any theory of statutory interpretation at all, it reflected the Justices’ assumptions about what “reasonable persons pursuing reasonable purposes reasonably,” HART & SACKS, *supra* note 3, at 1378, would have wanted immunity doctrine to be in light of the realities of modern litigation.

judicial abstention from equitable interference with pending state judicial proceedings.<sup>193</sup>

In *Holy Trinity*,<sup>194</sup> as in the § 1983 immunity cases, the propriety of the Court's recognition of an implied ministerial exception to the Alien Contract Labor Act—analogueous to the § 1983 exception for cases subject to judge-made official immunity doctrines—hinges partly on the breadth of the interpretive context in which the statute is read and partly on judgments of reasonableness. Purposivists could easily divide about the statute's application, depending on whether they take a broad or a narrow view of its policy context. On a narrow view, the driving aim of the Alien Contract Labor Act was to preserve American jobs for Americans and, as the statute said, to bar efforts by American employers to entice foreigners here "to perform labor or service of any kind."<sup>195</sup> Nevertheless, in a leading example of purposivist analysis, the Court famously adopted a broader characterization of the policy context. In addition to citing legislative history suggesting that Congress was predominantly concerned with "the influx of . . . cheap unskilled labor,"<sup>196</sup> the Court noted the religious character of the nation and specifically reasoned that Congress, presumably sharing in a historically widespread solicitude for religious organizations and practices, would not have intended to impede a congregation's choice of a minister.<sup>197</sup>

Although it may be less obvious, textualists would confront a parallel choice about whether to adopt a narrow or a broad view of the Alien Contract Labor Act's semantic context. Abundant historical evidence existed—indeed, as the Court put it, "the whole history and life of the country" affirmed—that "this is a religious nation"<sup>198</sup> whose people and legislators have traditionally accorded religious institutions extraordinary respect.<sup>199</sup> If textualists postulate that nontextual

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<sup>193</sup> As David Shapiro has put it, the Court reads jurisdiction-conferring statutes against the background of "experience and tradition"—which might be redescribed as either a semantic or a policy context—in light of which it has felt free to identify circumstances in which statutes should be "read as an authorization to the court to entertain an action but not as an inexorable command" to do so. David L. Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. REV. 543, 574–75 (1985).

<sup>194</sup> 143 U.S. 457 (1892).

<sup>195</sup> *Id.* at 458 (quoting the language of the Alien Contract Labor Act). Professor Manning thus emphasizes that modern "nontextualist" Justices of the Supreme Court, or what he calls "new purposivists," have joined the Court's textualists in "the rejection of *Holy Trinity*." Manning, *supra* note 2, at 115, 129.

<sup>196</sup> *Holy Trinity*, 143 U.S. at 465. *But see* VERMEULE, *supra* note 28, at 93–102 (arguing that the Court misapprehended the legislative history, which in fact supported the conclusion that the statute applied to the facts of the case).

<sup>197</sup> *See* 143 U.S. at 471–72.

<sup>198</sup> *Id.* at 470, 472.

<sup>199</sup> *See* William N. Eskridge, Jr., *Textualism, The Unknown Ideal?*, 96 MICH. L. REV. 1509, 1518 (1998) (reviewing ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* (1997)) (asserting that in its historical context the Alien Contract Labor Act's

background conditions can justify the recognition of nontextually based “necessity” defenses against criminal prosecutions and a variety of nonstatutory exceptions to the § 1983 cause of action, then the refusal to treat background conditions as relevant in the *Holy Trinity* case reflects a choice.<sup>200</sup>

Support for the proposition that textualism includes the resources to recognize an implied “ministerial exception” to a facially unqualified statutory prohibition—if not in *Holy Trinity* then in cases involving different statutes<sup>201</sup>—comes from a modern, partly

reference to “labor or service” would have been understood to mean “physical and helper work”).

<sup>200</sup> I do not mean to imply that textualists should necessarily regard *Holy Trinity* as a hard or contestable case. Other considerations of concern to textualists would undoubtedly have cut strongly against the Court’s decision, with the most important being a provision of the statute that made “specific exceptions” for, among others, “professional actors, artists, lecturers, singers and domestic servants.” 143 U.S. at 458–59. Among the canons of interpretation much favored by textualists is one prescribing that “*expressio unius est exclusio alterius*”—when one or more things of a class are expressly mentioned, others of the same class are excluded. SCALIA & GARNER, *supra* note 7, at 107–11.

<sup>201</sup> In *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, a unanimous Supreme Court followed what it characterized as the uniform practice of the courts of appeals with regard to modern antidiscrimination legislation by recognizing a “ministerial exception” to the Americans with Disabilities Act (ADA). See 132 S. Ct. 694, 705 & n.2, 706 (2012). In the first of the modern cases finding a ministerial exception to Title VII of the 1964 Civil Rights Act, the Fifth Circuit relied on the canon counseling construction of statutes to avoid “a serious doubt of constitutionality” in holding that “Congress did not intend, through the nonspecific wording of the applicable provisions of Title VII, to regulate the employment relationship between church and minister.” *McClure v. Salvation Army*, 460 F.2d 553, 560–61 (5th Cir. 1972). Following *McClure*, eight other circuit courts explicitly adopted a ministerial exception, see Note, *The Ministerial Exception to Title VII: The Case for a Deferential Primary Duties Test*, 121 HARV. L. REV. 1776, 1778 & n.19 (2008), which they also extended to statutes such as the Age Discrimination in Employment Act (ADEA), the Americans with Disabilities Act, and state common law claims against religious employers, see *Hollins v. Methodist Healthcare, Inc.*, 474 F.3d 223, 225 (6th Cir. 2007) (collecting cases). But the Fourth Circuit broke with *McClure* by concluding that the statutory language would not support a construction that exempted suits by ministers from its coverage and by putting its decision squarely on constitutional grounds. See *Rayburn v. Gen. Conference of Seventh-Day Adventists*, 772 F.2d 1164, 1165, 1167 (4th Cir. 1985). Thereafter, other circuits seem generally to have followed *Rayburn* in characterizing their conclusions as constitutionally dictated, see Benton C. Martin, Comment, *Protecting Preachers from Prejudice: Methods for Improving Analysis of the Ministerial Exception to Title VII*, 59 EMORY L.J. 1297, 1304–06 (2010), though the Ninth Circuit, in *Bollard v. Cal. Province of the Soc’y of Jesus*, 196 F.3d 940, 945 (9th Cir. 1999), said it was adopting a “narrowing construction of Title VII.” See also *Petruska v. Gannon Univ.*, 462 F.3d 294, 303 n.4 (3d Cir. 2006) (“Whereas some courts have derived the ministerial exception from the doctrine of constitutional avoidance, others have determined that, under its plain language, Title VII applies to ministerial employment decisions, but they have nevertheless concluded that such an application is unconstitutional.” (citations omitted)).

In establishing that “the Courts of Appeals have uniformly recognized the existence of a ‘ministerial exception’ . . . that precludes application of [antidiscrimination] legislation to claims concerning the employment relationship between a religious institution and its ministers,” *Hosanna-Tabor*, 132 S. Ct. at 705, the Supreme Court did not distinguish among lower court cases that had based the exception on grounds of statutory interpretation pursuant to the “avoidance canon” and those that had held statutes unconstitutional insofar as

analogous case, *Egelhoff v. Egelhoff*, in which the textualist Justice Thomas contemplated the possibility that a federal statute otherwise mandating adherence to employees' designation of their intended beneficiaries under employee benefit plans might tolerate an implied exception for cases involving "murdering heir[s]."<sup>202</sup> Citing *Riggs v. Palmer*, Justice Thomas noted that "the principle underlying" state statutes that preclude murderers from receiving property as a result of their killing "is well established in the law and has a long historical pedigree predating" the federal statute.<sup>203</sup> As a result, Justice Thomas suggested, that background principle arguably formed a part of the social context in which the federal statute would need to be interpreted if a case involving a murderous designated beneficiary should actually arise.

Even as he made this concession, however, Justice Thomas's opinion in *Egelhoff* refused to broaden the relevant interpretive context to include background principles of state law recognizing that divorces alter previously professed desires to benefit divorced spouses. If decisions to broaden an interpretive context are bound up with value-laden judgments of reasonableness, then so are refusals to do so. In neither case could the determination of the appropriate interpretive context be wholly value neutral.

#### D. Corroborating Empirical Studies

Also supporting my thesis that judges' values tend to play parallel, ineradicable roles within textualist and purposivist methodologies—both in defining the breadth of relevant interpretive contexts and in making related judgments of reasonableness—are empirical studies indicating that, regardless of the methodology that Supreme Court Justices employ, their ideological predispositions strongly influence their voting patterns in statutory interpretation cases. In one such study, Professor William Eskridge and Lauren Baer examined cases

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they failed to provide a ministerial exemption. Nor did the Court wholly resolve the ambiguity in its own analysis. It began by stating "[w]e agree there is . . . a ministerial exception." *Id.* at 706. Although this language might suggest an "avoidance" approach, the Court then spoke of a plain constitutional dictate. *See id.* ("By imposing an unwanted minister, the state infringes the Free Exercise Clause, which protects a religious group's right to shape its own faith and mission through its appointments. According the state the power to determine which individuals will minister to the faithful also violates the Establishment Clause, which prohibits government involvement in such ecclesiastical decisions."). *See also id.* at 709 n.4 (holding that the ministerial exception "operates as an affirmative defense to an otherwise cognizable claim, not a jurisdictional bar").

<sup>202</sup> *Egelhoff v. Egelhoff*, 532 U.S. 141, 152 (2001).

<sup>203</sup> *Id.* Justice Thomas appeared to contemplate that state rather than federal law might govern, with the federal statute's preemption clause including an implied exception for state "'slayer' statutes," rather than directly precluding murderers from benefiting from their wrongs. *See id.*

decided from 1984 to 2006 involving judicial review of federal administrative agencies' statutory interpretations.<sup>204</sup> They found that Justice Scalia, who is both a textualist and a conservative, affirmed agency decisions 71.6% of the time when the decisions were "conservative," but only 53.8% of the time when the decisions were "liberal"—a disparity of 17.8%.<sup>205</sup> For Justice Thomas, the differential was an even larger 29%: although he upheld 75.8% of the conservative agency rulings that came before the Court, the figure dropped to 46.8% when agencies issued liberal interpretations.<sup>206</sup> By comparison, the avowedly purposivist Justice Breyer, a liberal, went along with conservative agency rulings 64.9% of the time, while he voted to affirm 79.5% of the liberal agency interpretations that he reviewed in the period that Eskridge and Baer examined.<sup>207</sup>

As Eskridge emphasizes, these findings tend more to refute than to support claims that textualism better constrains judges from voting in accord with their ideological preferences than does purposivism.<sup>208</sup> Justice Breyer not only upheld conservative agency rulings more often than either Justices Scalia or Thomas did liberal ones, but also had a smaller liberal/conservative differential rate of 14.6%.

Another study by Professor Cross concluded that "[t]he probability of conservative votes from a Justice using the plain meaning rule conforms pretty closely to [her] overall ideological preferences."<sup>209</sup> Yet another survey, by Professors Brudney and Ditslear—this one involving the use of canons of interpretation as a means of defining the interpretive context in cases presenting issues of workplace law—found that "the liberals and conservatives seem to have relied on both [statutory] language and substantive canons as support for their pre-existing ideological preferences."<sup>210</sup>

I do not mean to make too much of these studies. My claim that textualism, like purposivism, requires value-based decisions at crucial points in the interpretive process would stand even if critics refuted the empirical claims that these studies' authors make. For what it is worth, however, the empirical literature suggests that judicial ideology matters, to some extent, regardless of whether a judge is a textualist or a purposivist. My aim has been to show how and why, wholly apart

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<sup>204</sup> William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Difference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan*, 96 GEO. L.J. 1083 (2008).

<sup>205</sup> *Id.* at 1154 tbl.20.

<sup>206</sup> *Id.*

<sup>207</sup> *Id.*

<sup>208</sup> See Eskridge, *supra* note 135, at 551.

<sup>209</sup> Cross, *supra* note 51, at 1994.

<sup>210</sup> Brudney & Ditslear, *supra* note 51, at 58.

from self-conscious judicial manipulation, the structure of both textualist and purposivist theories might permit that result.

### III

#### CLARIFICATION AND DEFENSE

With Parts I and II having laid out my thesis about the significance of an interpreter's values—in parallel fashion for textualist and purposivist theories—in (1) triggering self-conscious interpretation in cases of interpretive dissonance, (2) specifying the appropriate contexts for statutes' interpretation, and (3) making determinations of reasonableness within those contexts, I now want to clarify the limits of my claims and to respond to a possible objection.

#### A. Some Limits and Qualifications

I have insisted, and now want to insist even more firmly, that my arguments do not imply that either a purposivist's or a textualist's naked policy preferences will determine her interpretive judgment in every case. Both new textualist and purposivist theories affirm that statutory language matters crucially and that interpreters should never reach an interpretive judgment that a statute's language will not bear.<sup>211</sup> An example of the bite of this precept may come from a recent case in which the government contended that an exception to the Freedom of Information Act for agency records "related solely to internal personnel rules and practices" applied to data that the Navy used in designing munitions storage facilities.<sup>212</sup> However great the Navy's policy interests in resisting disclosure, a unanimous Court concluded that the statutory language simply would not bear the interpretation that the government sought to impose on it.<sup>213</sup>

To be sure, the Court's conclusion must itself be seen in context. First-blush meanings do not always prevail. Nevertheless, as I have said, I assume that adherents of both textualist and purposivist theories typically work within relatively narrowly specified interpretive contexts, even when their resulting interpretive conclusions would diverge from their pure policy preferences.<sup>214</sup> In the study by Eskridge and Baer cited earlier, the authors found that both conservative textualist and liberal purposivist Justices voted to affirm agency rulings contrary to their presumed political values more often than not.<sup>215</sup> Nothing in Parts I and II suggests that interpreting statutes

<sup>211</sup> See HART & SACKS, *supra* note 3, at 1375; SCALIA & GARNER, *supra* note 7, at 31.

<sup>212</sup> *Milner v. Dep't of the Navy*, 131 S. Ct. 1259, 1262–63 (2011).

<sup>213</sup> See *id.* at 1262 (holding that the language "does not stretch so far").

<sup>214</sup> See *supra* note 101 and accompanying text (discussing new purposivists' preference for a narrow interpretive context).

<sup>215</sup> See Eskridge & Baer, *supra* note 204, at 1154 tbl.20.

within either a purposivist or a textualist theory is like playing tennis without a net. Rather, I imagine that both textualists and purposivists apply their theories in a way that approximates what Fred Schauer has called “presumptive positivism”—a theory holding that legal rules are “presumptively controlling,” but a “rule will be set aside when the result it indicates is egregiously at odds with the result that is indicated by [a] larger and more morally acceptable set of values.”<sup>216</sup> Analogously, I assume that in the absence of severe interpretive dissonance, both purposivists and textualists will normally adhere to statutes’ first-blush meanings or interpret statutes within relatively narrow interpretive contexts.

Nor have I argued that the choice between a purposivist and a textualist approach to statutory interpretation has no consequences.<sup>217</sup> Adherents of textualist theories normally deny themselves the resource of legislative history as a ground for decision.<sup>218</sup> In addition, conscientious textualists may bear a greater burden of specificity than do purposivists in citing past or ongoing practices that should inform the interpretation of statutes with jarring or improvident first-blush meanings. Nonetheless, my analysis suggests that it would be difficult to gauge in the abstract exactly how constraining either purposivism or textualism is. Anyone seeking to predict case outcomes would also need to attend to the values and the remainder of the judicial philosophies of particular purposivist or textualist judges or Justices.

## B. Meeting an Anticipated Objection

Even when my claims are carefully stated and qualified, they will predictably provoke objections, especially from textualists. In particular, proponents of textualism—who have often characterized their methodology as a buttress against value-based judicial decision making<sup>219</sup>—may contend that many of the judicial opinions on which I have relied to show the ineradicable role of value judgments in statutory interpretation represent betrayals rather than applications of textualist premises. The foundational commitment of textualism, they may argue, holds that judges must honor the legislature’s clear directives: although judges may look at context for aid in resolving statutory ambiguity or vagueness, they must not rely on context to call

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<sup>216</sup> SCHAUER, *supra* note 53, at 204–05.

<sup>217</sup> *But cf.* sources cited *supra* note 51 (suggesting that ideology matters more than methodology).

<sup>218</sup> For a qualification, *see supra* note 125.

<sup>219</sup> *See, e.g.,* SCALIA & GARNER, *supra* note 7, at 16–18 (depicting purposivism as inviting judges to rely on their own values and textualism as imposing more constraints).

plain statutory meanings into question.<sup>220</sup> And if avowedly textualist Justices have recognized unwritten exceptions to the § 1983 cause of action, for example, their willingness to do so does not establish that textualism can support such results; it only shows that Justices who are both conservative and textualist have sometimes unjustifiably subordinated their textualism to their conservatism.<sup>221</sup>

To separate the fallacy in this objection from the germs of truth that it contains requires some unpacking. In identifying what new textualist and new purposivist methodologies require or permit, I have relied on a strategy—which is common in the literature—of citing the positions of self-proclaimed or widely acknowledged practitioners of those methodologies.<sup>222</sup> In particular, I have often treated the stances of Justices Scalia and Thomas as exemplifying a new textualist approach. Although it would be aridly artificial to talk about theories of statutory interpretation without reference to how their practitioners apply them, my imagined objectors are right about an important point: nothing guarantees that a self-proclaimed textualist will always follow textualist principles. Betrayals are possible. Moreover, more exacting versions of the current theories may emerge. As I have noted, Professor Manning writes that textualists who followed their principles to their logical conclusions would “treat[ ] the existing set of background conventions as a closed set,”<sup>223</sup> even though he does not argue that textualists have done so. Adopting a similarly stringent though more critical view, Professor Siegel argues that the “inexorable” logic of textualism is one of “radicalization” in which “textualist purity must inevitably squeeze out the contrary pragmatic accommodations that textualism has traditionally allowed” and force the adoption even of “absurd” results.<sup>224</sup>

Although I disagree with Professor Siegel about the immanent logic of the so-called new textualism, for reasons that I shall explain presently, I do not doubt that some textualists would plausibly adhere

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<sup>220</sup> Cf. *Rose v. Rose*, 481 U.S. 619, 644 (1987) (Scalia, J., concurring in part and concurring in the judgment) (criticizing the Court for assuming “a broad power to limit clear text on the basis of apparent congressional purpose”); Manning, *Absurdity Doctrine*, *supra* note 8, at 2421 (describing the “most familiar applications of strong intentionalism” as those “decisions that adjust a clear statute on the basis of authoritative legislative history”); *id.* at 2434 n.179 (“[T]he modern textualists’ concerns come into play only when courts use background statutory purpose to contradict or vary the clear meaning of a specific statutory provision.” (emphasis omitted)).

<sup>221</sup> Cf. Richard H. Fallon, Jr., *The “Conservative” Paths of the Rehnquist Court’s Federalism Decisions*, 69 U. CHI. L. REV. 429, 462 (2002) (maintaining that the conservatism of the majority Justices of the Rehnquist Court sometimes trumped their commitment to judicial federalism in statutory preemption cases).

<sup>222</sup> See, e.g., Manning, *supra* note 6, at 438–39 (citing opinions of Justice Scalia and Judge Easterbrook to exemplify textualist methodology).

<sup>223</sup> Manning, *Absurdity Doctrine*, *supra* note 8, at 2474.

<sup>224</sup> Siegel, *supra* note 94, at 120–21.

to more first-blush meanings, even when the consequences prove jarring, than Justices Scalia and Thomas characteristically have.<sup>225</sup> But I can cheerfully concede that point without retreating an inch from my claims about the nature of the judgments that textualists need to make once they recognize that the idea of plain meaning is frequently chimerical and that actual statutory meaning always depends on context—as all so-called new textualists, according to Professor Manning’s definition, avowedly do.<sup>226</sup>

Once this foundational commitment is accepted, the critics’ objection to my thesis in the blunt form in which I have stated it simply crumbles. In the absence of further argument, unelaborated assertions that particular decisions ignore statutes’ clear directives are immediately unmasked as question-begging. As I have emphasized, the need for express reliance on theories of statutory interpretation typically arises only when a plausible doubt exists—often following an experience of interpretive dissonance—about what exactly the legislature directed.<sup>227</sup> And once it is recognized that meaning depends on context, contestable judgments must be made about what the relevant context includes.<sup>228</sup> Then, after the relevant context is identified, there again can be no doubt that textualists as much as purposivists must make judgments of reasonableness that are also contestable.

Against this background, claims that particular judges or Justices have betrayed textualist principles in the cases that I have discussed in this Article need to be established—if they can be established—on a

<sup>225</sup> For example, some commentators have maintained that these two Justices have frequently joined their colleagues in failing to abide by textualist commitments in many statutory preemption cases, *see, e.g.*, Daniel J. Meltzer, *Preemption and Textualism*, 112 MICH. L. REV. 1, 22 (2013), at least prior to Justice Thomas’s apparently nearly total renunciation of implied preemption analysis in *Wyeth v. Levine*, 555 U.S. 555, 604 (2009) (Thomas, J., concurring in the judgment) (“I can no longer assent to a doctrine that pre-empts state laws merely because they stand as an obstacle to . . . the full purposes and objectives of federal law . . . .” (internal quotation marks and citations omitted)). *Cf.* John David Ohlendorf, *Textualism and Obstacle Preemption*, 47 GA. L. REV. 369, 427–38, 442 (2013) (identifying implicit textualist assumptions about meaning in context that permit “a rapprochement between textualism and obstacle preemption”). For the argument that Justice Thomas’s stance in implied preemption cases fits uneasily with his readiness to employ broadly purposive analysis in interpreting preemption and savings clauses, *see* Catherine M. Sharkey, *Against Free-wheeling, Extratextual Obstacle Preemption: Is Justice Clarence Thomas the Lone Principled Federalist?*, 5 N.Y.U. J.L. & LIBERTY 63, 95–98 (2010).

<sup>226</sup> *See* Manning, *supra* note 7, at 79–80.

<sup>227</sup> *Cf.* Todd D. Rakoff, *Statutory Interpretation as a Multifarious Enterprise*, 104 Nw. U. L. REV. 1559, 1585 (2010) (maintaining that “[t]o assert that a statute has a clear meaning . . . is to claim that one particular interpretive frame . . . should be used” and that “ambiguity very often results precisely from the fact that there is more than one frame of reference with a decent claim to being relevant”).

<sup>228</sup> *Cf.* Ohlendorf, *supra* note 225, at 439 (arguing that “textualism has the capacity to take into account a rich set of contextual implications generated by a statutory text”).

case-by-case basis. Absent such case-specific arguments, any blanket assertion that all or even most of my doctrinal examples represent betrayals of new textualist methodology should evoke deep skepticism.

Adrian Vermeule may exemplify a partial rejoinder to this argument, but one that lies mostly beyond the scope of my ambitions in this Article. Vermeule proffers a normative, rather than a linguistic or conceptual, argument in support of a particular, very narrow brand of textualism.<sup>229</sup> According to him, courts should “stick close to” what he calls the “surface or apparent meaning”<sup>230</sup>— what I would call the first-blush meaning—of statutes for “consequentialist” reasons,<sup>231</sup> rather than for reasons inherent in the nature of language or the meaning of “interpretation.” “Given the informational baseline of clear and specific text,” he writes, “the further question” involves “the marginal benefits of additional sources”<sup>232</sup> in providing a richer context for determining what a statute actually means. In general, he argues, the costs of looking beyond first-blush or “surface” meanings exceed the benefits because the acquisition of additional information is burdensome and because courts may misapprehend its significance.<sup>233</sup>

On the most natural interpretation of this argument, Professor Vermeule accepts—as I have assumed throughout this Article—not only that statutes have a “meaning” but also that a relatively broad interpretive context might sometimes help to constitute it.<sup>234</sup> If so, a

<sup>229</sup> See VERMEULE, *supra* note 28, at 183–229.

<sup>230</sup> *Id.* at 183.

<sup>231</sup> *Id.* at 44.

<sup>232</sup> *Id.* at 186.

<sup>233</sup> See *id.* at 190–205. Vermeule’s argument is largely concerned with the costs and benefits of inquiries into legislative history, but he also discusses, and disfavors reliance on, both the canons of construction and “the collateral text of related statutes” that “[t]extualists are prone to use.” *Id.* at 202–03.

<sup>234</sup> Another possible interpretation of Vermeule’s argument also bears mention. Notwithstanding the language that I quoted above, some of his arguments might be understood as suggesting that statutory meaning is something that judges make, rather than find, at least in the kinds of cases that trigger resort to interpretive theories. Taking this view, Vermeule or others might maintain that the question of how judges should give meaning to statutes when they intrinsically have none is a straightforward normative question. *Cf. id.* at 198 (arguing that “judges should pick a clear and limited set of defaults and use them inflexibly over time, rather than . . . indulging in case-specific, fine-grained adjustments of the interpretive regime”). From that premise, someone might further argue that in exercising what is at bottom a lawmaking role, judges should, again for instrumental reasons, adopt statutes’ first-blush meanings as the law. Although this is a possible version of a theory that might plausibly be characterized as textualism, its bold insistence that statutory meaning is a fiction, at least in cases subject to reasonable interpretive debate, marks it as a position not easily squared with the more familiar textualist insistence that meaning depends on, but typically emerges to a reasonable interpreter in, context. See also RAZ, *supra* note 142, at 238–40 (explaining that legal interpretation assumes the authority of the legal text being interpreted and thus inherently includes “conservative” as well as “innovatory” aspirations).

statute's meaning is what a reasonable interpreter of its language would understand it to be in light of whatever features of linguistic and historical context a reasonable person would deem relevant, potentially including, for example, traditional assumptions that statutes do not apply extraterritorially, that Congress rarely interferes with the states' collection of taxes, and so forth. If so, Vermeule's argument is not about the defining premises of textualism as a theory of statutory meaning. Instead, he offers a normative argument for restricting what otherwise would count as textualist inquiries.

Others might offer similar, and similarly normative, arguments for ignoring interpretive dissonance in some cases or for blinding oneself to otherwise relevant elements of context, but the most important point that emerges from consideration of Vermeule's position would remain valid and generalizable: although sophisticated textualists acknowledge that they need normative arguments to support textualism over rival theories,<sup>235</sup> they have not always recognized so clearly that they also need to offer normative arguments to support particular *versions* of textualism. If textualists assume that reasonable interpreters ascertain the meaning of statutes in roughly the same way that competent speakers of English identify the meaning of other texts, the problem is that competent speakers of English ordinarily do so in context by relying on and ascribing—often wholly un-self-consciously—a number of what they reasonably assume to be shared normative values. Accordingly, insofar as some textualists want to preclude interpreters from relying on some bits of cultural or linguistic context, or on some values that a competent user of English would otherwise assume to be widely shared (even if tacitly), they need to advance specific normative arguments to support specific exclusions.<sup>236</sup>

Among the implications of the need for specificity, one has special pertinence for claims that self-avowed textualists have betrayed textualism, not applied it: there could be innumerable versions of

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<sup>235</sup> See, e.g., SCALIA, *supra* note 5, at 17 (“[I]t is simply incompatible with democratic government, or indeed, even with fair government, to have the meaning of a law determined by what the lawgiver meant, rather than by what the lawgiver promulgated.”); *id.* at 25 (“[T]o abandon textualism” is “to render democratically adopted texts mere springboards for judicial lawmaking.”); Easterbrook, *supra* note 4, at 63–64 (arguing that textualism serves the objectives of giving the legal system “understandable commands, consistently interpreted,” of confining judges to the role of “faithful agents, not independent principals,” of empowering Congress by “adhering [to] rather than shifting” from its selection of rules or standards, and of constraining Congress from “[e]nacting a vaporous statute and winking”).

<sup>236</sup> Indeed, insofar as some of the substantive canons of statutory interpretation reflect values that competent speakers of English would not otherwise take to be so widely shared as to constitute relevant elements of a statute's interpretive context, see Eskridge, *supra* note 135, at 552, then textualists who champion reliance on those canons would need to provide normative justification for that practice, too.

textualism, each defined by its own proposed exclusions of particular facts, values, or considerations that a reasonable speaker of English might otherwise take to be relevant in trying to understand what a legal text means in context. If successfully advanced, persuasive arguments for particular exclusions would support further arguments that avowedly textualist judges and Justices have deviated from, rather than applied, the *best* version of textualism. But establishing the requisite foundation for claims of betrayal would require extensive intellectual labor that I have not yet seen performed.

To sum up, regardless of whether particular decisions and even doctrines are ultimately adjudged defensible, all textualists who agree that meaning depends on context must also agree that first-blush meanings are not always correct; that the contexts in which statutory language has its meaning can be defined more or less broadly; and that determining statutes' meanings within their interpretive contexts frequently requires judgments of reasonableness. Against the background of these shared premises, it would take either meticulous case-by-case analysis or a normatively successful defense of a particular subspecies of textualism to establish that the examples on which I have relied in explicating textualism actually represent betrayals, rather than applications, of textualist premises.

#### CONCLUSION

The key to understanding the subtlety and context dependency of the interpretive enterprise lies in recognition that statutory interpretation, as an aspect of law, is necessarily a cooperative endeavor. Courts must cooperate with the legislature, not frustrate or impede its efforts. On the one hand, as sophisticated textualists have noted, if courts define the context in which they interpret legislation too narrowly, they will make it difficult, if not impossible, for the legislature to do its job effectively.<sup>237</sup> Legislatures cannot realistically be asked to replicate as much of the legal universe as they wish to retain, nor can they be expected to specify precisely what they mean to change and not to change, whenever they enact new laws.

On the other hand, if courts conceive the relevant contexts too broadly, and thereby license themselves to determine what a reasonable legislator would have intended or a reasonable interpreter would understand in light of too diverse an array of considerations, they

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<sup>237</sup> See, e.g., SCALIA & GARNER, *supra* note 7, at 355–63 (“Strict constructionism understood as a judicial straitjacket is a long-outmoded approach deriving from a mistrust of all enacted law.”); Easterbrook, *supra* note 114 (explaining that “norms of interpretation . . . make it easier to legislate” since “[n]ew statutes fit into the normal operation of the legal system unless the political branches provide otherwise”).

again make it impossible for the legislature to do its job.<sup>238</sup> Courts with a virtual license to interpret statutes to conform to their own standards of reasonableness would usurp the legislative function.

New textualist and purposivist theories of statutory interpretation both constitute, and indeed present themselves as, responses to these opposing pitfalls. To avoid these pitfalls, and to discharge their cooperative obligation, courts must identify pertinent interpretive contexts neither too narrowly nor too broadly. Yet there is frequently no way for courts to define a statute's semantic or policy context without making value judgments, often beginning when a statute's first-blush meaning generates interpretive dissonance. And once an interpretive context is broadened in response to felt interpretive dissonance, judgments of what reasonable legislators would intend or reasonable interpreters would infer will often require further, value-based assessments of what is most normatively reasonable. Along these dimensions, new textualist theories do not differ greatly from purposivist ones.

In maintaining that new textualists and purposivists face closely analogous challenges in defining statutes' interpretive contexts, and that they cannot do so without making value judgments in some cases, I do not question that the choice between a textualist and a purposivist theory of interpretation will sometimes prove consequential for some interpreters. Nevertheless, for many practical purposes, two other lines of division will often have more salience than the distinction between textualism and purposivism. One is value based: interpreters with different values will experience interpretive dissonance, and begin to consider whether the interpretive context should be broadened to include information that could potentially justify rejection of a statute's first-blush meaning, in different cases. Another line of division involves the strength of the presumption that interpretive contexts—whether they be semantic contexts or policy contexts—should be defined narrowly.

When courts experience interpretive dissonance and must decide how much additional information to take into account in specifying the semantic or policy context within which a statute ought to be interpreted, all we can ask is that judges display good judgment—recognizing, as we do so, that what counts as good judgment will sometimes be a matter of reasonable, value-based disagreement. In my estimation, the conclusion that statutes' interpretive contexts could not be specified formulaically in advance, and that judicial values will have a

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<sup>238</sup> See Manning, *supra* note 2, at 176 (“[U]nless interpreters give priority to the shared semantic conventions that make it possible for legislators to communicate their policies to the law’s implementers, a legislature cannot predictably use language as a tool to define the scope and limits of the background legislative policies that the statutory text carries into effect.”).

role to play in fixing their bounds, is, on balance, more welcome than disturbing. Nor do I regard it as disturbing that resort to theories of statutory interpretation is often triggered in the first instance by a judge's partly value-based experience of interpretive dissonance between a statute's first-blush meaning and what the judge regards as sensible or desirable. In my view, it is nearly self-evident that good judging requires good judgment, even when due allowance is made for the fact that judgment will provoke value-based, reasonable disagreement in some cases.

But little hinges on the persuasiveness of this normative appraisal. Whether one agrees or disagrees, the crucial analytical and empirical points that I have sought to develop in this Article remain unmodified. The experience of partly value-based interpretive dissonance often supplies the trigger for appeals to theories of statutory interpretation, including both textualist and purposivist theories. And within both textualist and purposivist theories, the ultimate outcome will frequently depend on the breadth or narrowness with which the relevant context for a statute's interpretation is specified. To put the point only slightly more strongly, the specification of an interpretive context—which is irreducibly value driven at least in part—may frequently matter as much, in practice, as the seemingly more consequential decision whether to adopt a textualist or a purposivist theory in the first place. Debates about theories of statutory interpretation will remain misleadingly incomplete until they reckon adequately with this insight.