

# BACKDOOR PURPOSIVISM

ANITA S. KRISHNAKUMAR<sup>†</sup>

## ABSTRACT

*It has become standard among statutory interpretation commentators to declare that, “We are all textualists now.” The comment stems from the observation that in the modern, post-Scalia era, all of the Justices on the U.S. Supreme Court pay significant attention to statutory text when construing statutes and, relatedly, that legislative history use by the Court as a whole has declined since its heyday in the 1970s. The account of textualism’s triumph is so prevalent that some scholars have declared purposivism—or at least traditional purposivism—essentially defunct. Two prominent textualist scholars in particular have suggested that there is a “new purposivism” at work on the modern Court and that this purposivism is textually constrained, limiting its focus to the means identified in the text of the statute rather than the underlying policy objectives motivating the statute—or, alternately, using purpose as a threshold consideration in determining whether a statute’s text is ambiguous in the first place.*

*This Article challenges the conventional “purposivism is dead or dying” narrative in two important ways. First, relying on data from an empirical analysis of 499 Roberts Court statutory interpretation cases decided between 2006 and 2017, it argues that traditional purposivism is alive and well on the modern Supreme Court. That is, while purposivist Justices in the modern era do pay attention to text and invoke textual canons in a way that their 1970s purposivist counterparts*

---

Copyright © 2020 Anita S. Krishnakumar.

<sup>†</sup> Mary C. Daly Professor of Law and Associate Dean for Faculty Scholarship, St. John’s University School of Law. I owe deep thanks for valuable insights and conversations to Aaron-Andrew Bruhl, William Buzbee, Ryan D. Doerfler, William N. Eskridge, Margaret H. Lemos, Kate Levine, Victoria F. Nourse, Richard Re, Anna Roberts, Brian Slocum, and Lawrence Solum. I am especially indebted, as always, to my husband, Ron Tucker, for his patience with this project. Thanks also to Dean Michael A. Simons and St. John’s Law School for generous research assistance and to participants at workshops and seminars at the Georgetown, Arizona State, and Yale Law Schools for their comments on earlier drafts of this article. Kathryn Baldwin, Danielle DelGrosso, Thomas Combs, Christina Corcoran, Brian Dolan, Sade Forte, Kim Friedman, Ilya Mordukhaev, Vince Nibali, Melissa Parres, Barbara Reilly, Jennifer Roseman, Peter Ryan, Christine Sammarco, Jonathan Sclar, Ashleigh Shelton, Samuel Sroka, Jennifer Thomas, Rita Wang, and Lissa Yang provided excellent research assistance, and Janet Ruiz-Kroll provided invaluable assistance with the tables. All errors are my own.

*did not, modern purposivists have not abandoned the traditional purposive approach of identifying a statute's policy objective and adopting the construction that best fits that objective. On the contrary, modern purposivists regularly invoke statutory purpose, intent, and legislative history—even if the Court as a whole does not. Second, and perhaps more importantly, the Court's textualist Justices have been quietly engaging in a form of purposive analysis that comes closer to traditional purposivism than scholars and jurists have recognized. That is, the textualist Justices regularly have been using pragmatic reasoning, as well as traditional textual canons such as *noscitur a sociis* and the whole act rule, to impute a specific intent or policy goal to Congress. This practice, which I call “backdoor purposivism,” goes beyond using text as the best evidence of statutory purpose and entails significant judicial guesswork and construction of legislative purpose and intent.*

*The Article suggests that, in the end, there may be less distance between textualists and purposivists than the old debates suggest—but because textualists have embraced purpose and intent in unexpected ways, rather than because, or merely because, purposivists have become more text focused. It concludes by advocating that both textualists and purposivists employ interpretive resources outside their preferred toolkit to check the accuracy of their initial statutory readings and to curb the influence of their inherent personal biases.*

#### TABLE OF CONTENTS

Introduction .....	1277
I. How Textualists Talk About Purpose and Intent.....	1281
A. The “Best Evidence” Theory.....	1284
B. The New Purposivism .....	1288
II. The Data.....	1291
A. Methodology.....	1292
B. Purposivism Lives On.....	1295
III. Textualists’ Purpose by Other Means .....	1304
A. <i>Noscitur a Sociis</i> and <i>Ejusdem Generis</i> .....	1305
B. The Whole Act Rule.....	1313
C. Practical Consequences .....	1319
1. <i>Absurd Results</i> .....	1320
2. <i>Presumed Legislative Objectives</i> .....	1324
IV. Some Implications .....	1329
A. Judicial Discretion.....	1330
B. Hidden Normative Baselines.....	1339
C. What (Really) Divides Textualists and Purposivists?....	1342
Conclusion.....	1352

## INTRODUCTION

In the thirty-some years since the late Justice Scalia joined the U.S. Supreme Court and began waving the textualist flag, it has become in vogue to chronicle the Court's move toward a highly textualist approach to statutory interpretation. Scholars have, for example, noted a discernible decline in the rate at which the Court invokes legislative history,<sup>1</sup> a marked increase in its use of dictionary definitions to interpret statutes,<sup>2</sup> and a rise in its use of both linguistic and substantive canons of construction.<sup>3</sup> Indeed, the primacy of text in modern statutory interpretation has led some commentators to proclaim that purposivism has lost the interpretive battle to textualism, suggesting that even the Court's purpose-preferring Justices have tamped down their reliance on interpretive tools disfavored by textualists—namely, purpose, legislative history, and intent—in favor of a “textually-constrained” approach to purposive analysis.<sup>4</sup> Modern purposivism, they contend, looks distinctly different from the purposivism that prevailed in the 1970s, during the heyday of purposive analysis. One prominent scholar, for example, argues that purposivist Justices have shifted their focus from the statute's “spirit” or “ulterior purpose” to a much narrower inquiry: identifying the statute's “implemental

---

1. See, e.g., James J. Brudney & Corey Ditslear, *The Decline and Fall of Legislative History? Patterns of Supreme Court Reliance in the Burger and Rehnquist Eras*, 89 JUDICATURE 220, 220 (2006); Michael H. Koby, *The Supreme Court's Declining Reliance on Legislative History: The Impact of Justice Scalia's Critique*, 36 HARV. J. ON LEGIS. 369, 369–70 (1999); Charles Tiefer, *The Reconceptualization of Legislative History in the Supreme Court*, 2000 WISC. L. REV. 205, 220; Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 207 (1983); see also James J. Brudney & Corey Ditslear, *Canons of Construction and the Elusive Quest for Neutral Reasoning*, 58 VAND. L. REV. 1, 35–36 (2005) [hereinafter Brudney & Ditslear, *Canons of Construction*] (describing a decline in the Court's use of legislative history and a corresponding increase in the use of canons of construction).

2. See, e.g., James J. Brudney & Lawrence Baum, *Oasis or Mirage: The Supreme Court's Thirst for Dictionaries in the Rehnquist and Roberts Eras*, 55 WM. & MARY L. REV. 483, 486 (2013); Jeffrey L. Kirchmeier & Samuel A. Thumma, *Scaling the Lexicon Fortress: The United States Supreme Court's Use of Dictionaries in the Twenty-First Century*, 94 MARQ. L. REV. 77, 80 (2010).

3. See, e.g., Brudney & Ditslear, *Canons of Construction*, *supra* note 1, at 5.

4. See, e.g., John F. Manning, *The New Purposivism*, 2011 SUP. CT. REV. 113, 118, 129 [hereinafter Manning, *New Purposivism*]; see also Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 COLUM. L. REV. 1, 35–36 (2006) (“[W]e have all become textualists.”); Jonathan R. Siegel, *Textualism and Contextualism in Administrative Law*, 78 B.U. L. REV. 1023, 1057 (1998) (“In a significant sense, we are all textualists now.”); Harvard Law Sch., *The Scalia Lecture: A Dialogue with Justice Elena Kagan on the Reading of Statutes*, YOUTUBE (Nov. 25, 2015), <https://www.youtube.com/watch?v=dpEtszFT0Tg> [<https://perma.cc/DPZ8-F48D>] (including Justice Kagan's statement that, thanks to Justice Scalia's influence, “we're all textualists now”).

purpose.”<sup>5</sup> Another contends that the Court uses purpose as a threshold tool for identifying textual ambiguity, rather than as an independent interpretive inquiry that can trump clear statutory text.<sup>6</sup>

This Article breaks from the emerging consensus about modern purposivism in two important ways. First, it argues that while those Justices commonly considered purposivists do pay significant attention to statutory text in a way that was less common in the pre-Scalia era, they do so as a supplement, rather than a substitute, to traditional purposivism.<sup>7</sup> Second, and more critically, it reveals through doctrinal analysis that those Justices commonly considered textualist or textualist leaning<sup>8</sup> at times engage in a form of backdoor purposivism, or at least speculation about legislative intent, that looks surprisingly similar to the intent speculation inherent to traditional purposivism.

This Article is the first to expose and chronicle the decidedly purposivist and intentionalist<sup>9</sup> undertones to the Roberts Court’s use of textualist canons, interpretive tools, and practical consequences arguments.<sup>10</sup> Other scholars have noted that the Court has taken a

---

5. See Manning, *New Purposivism*, *supra* note 4, at 146–48. As discussed in Part I.A, *infra*, Manning defines “implemental purpose” to refer to the legislature’s choices about how much discretion the statute gives interpreters to carry out its “ulterior” purpose or “spirit.” *Id.*

6. See Richard M. Re, *The New Holy Trinity*, 18 GREEN BAG 2D 407, 417 (2015) (explaining that whereas “the Old Holy Trinity maintained that even concededly clear statutory text must give way to legislative purpose,” under the New Holy Trinity theory, the “key move is to view purposive and pragmatic considerations as relevant to the identification of textual clarity or ambiguity”).

7. See *infra* Part II.B.

8. For a detailed explanation of which Justices fall into this category, see *infra* Part II.B.

9. Here, and elsewhere in this Article, the terms “purposivist” and “intentionalist” are used in tandem, although they represent two distinct interpretive philosophies. Purposivism seeks to identify Congress’s policy goal or aim and to select the statutory reading that best fulfills that goal or aim. Intentionalism seeks to identify Congress’s specific intent regarding whether the facts at issue in the case are meant to fall within the statute’s scope. Although these two interpretive approaches are theoretically distinct, in practice they often tend to bleed into one another. That is, purposivists and intentionalists tend to rely on the same interpretive resources—e.g., legislative history, background mischief motivating the statute—to identify Congress’s purpose or intent, and, particularly where a specific congressional intent regarding the statutory application at issue in the case is lacking, the two inquiries can overlap significantly. Because this Article is concerned with examining how the Supreme Court practices statutory interpretation on the ground, rather than with how purposivism or intentionalism theoretically instructs the Court to interpret statutes, these two interpretive approaches—and their corresponding searches for Congress’s purpose versus intent—are treated together.

10. Because this Article focuses in part on the practices of individual Justices, many of the citations to the Court’s cases will identify the author of the opinion.

purposivist turn in some of its recent, high-profile cases;<sup>11</sup> that the Court as a whole regularly relies on precedent and practical considerations when interpreting statutes;<sup>12</sup> and that prominent textualist Justice Scalia regularly referenced purpose and practical consequences in his dissenting opinions.<sup>13</sup> This Article reveals a different judicial practice, one more subtle than openly employing purpose or intent to evade a seemingly clear statutory text, and more expansive than using text to limit or constrain purpose: the Court, and its textualist Justices in particular, regularly employ pragmatic reasoning as well as supposedly neutral textualist tools to divine—or manufacture—congressional purpose and intent. This is significant because it goes beyond merely relying on text as the best evidence of legislative purpose or intent—a practice textualists have long advocated—and ventures into the realm of speculation, where judges simply guess at, or assert, Congress’s actual purpose or intent based on personal intuition. This in turn suggests that far from textualism constraining purposivism, textualist jurists may in fact be engaging in purposivism by other, hidden means. This hidden purposivism, moreover, may actually be more dangerous—in the sense of empowering judges to decide cases in accordance with their own ideological or policy preferences—than traditional purposivism, because it is untethered to external constraints such as statements documented in the legislative record or the preamble of a statute.

---

11. See Re, *supra* note 6, at 409–15; Rick Hasen, King v. Burwell: *The Return of “Purpose” in Statutory Interpretation*, ELECTION L. BLOG (June 25, 2015, 8:33 AM), <https://electionlawblog.org/?p=73760> [<http://perma.cc/KK47-332P>]; Marty Lederman, *Supreme Court 2015: John Roberts’ Ruling in King v. Burwell*, SLATE (June 25, 2015, 4:26 PM), <https://slate.com/news-and-politics/2015/06/supreme-court-2015-john-roberts-ruling-in-king-v-burwell.html> [<http://perma.cc/44HE-QKR3>]; see also Michael C. Mikulic, *The Emergence of Contextually Constrained Purposivism*, 91 NOTRE DAME L. REV. 128, 128 (2016) (“After years of the Court’s drift towards new textualism, *King v. Burwell* reaffirms that purposivism still has relevancy . . . .” (footnote omitted)).

12. See, e.g., Anita S. Krishnakumar, *Reconsidering Substantive Canons*, 84 U. CHI. L. REV. 825, 886–87 (2017) [hereinafter Krishnakumar, *Reconsidering Substantive Canons*]; Jane S. Schacter, *The Confounding Common Law Originalism in Recent Supreme Court Statutory Interpretation: Implications for the Legislative History Debate and Beyond*, 51 STAN. L. REV. 1, 1 (1998) [hereinafter Schacter, *Confounding Common Law*]; Nicholas S. Zeppos, *The Use of Authority in Statutory Interpretation: An Empirical Analysis*, 70 TEX. L. REV. 1073, 1093–97 (1992).

13. See Miranda McGowan, *Do As I Do, Not As I Say: An Empirical Investigation of Justice Scalia’s Ordinary Meaning Method of Statutory Interpretation*, 78 MISS. L.J. 129, 171–76 (2008); Jane S. Schacter, *Text or Consequences?*, 76 BROOK. L. REV. 1007, 1010–14 (2011) [hereinafter Schacter, *Text or Consequences?*].

The Article proceeds in four parts. Part I reviews textualism's position on legislative purpose and intent and examines recent commentary about the changing face of purposive analysis on the modern Supreme Court. Part II provides empirical and doctrinal data from the Roberts Court's first twelve terms, revealing that, contrary to recent speculation by some scholars, purposivist Justices still regularly rely on straightforward, "ulterior" purpose and intent analyses in the cases they author. Part III shows that although the textualist Justices do not explicitly invoke statutory purpose or intent at high rates, they often employ practical reasoning, language canons,<sup>14</sup> and the whole act rule<sup>15</sup> in ways that impute purpose and intent to Congress. That is, the textualist Justices regularly speculate about legislative purpose and intent *through other interpretive tools*—a practice that this Article terms "backdoor purposivism."

Part IV then explores the theoretical implications of textualist Justices' backdoor inferences about statutory purpose and intent. It argues that such indirect purposive analysis enables just as much judicial discretion as the purposivist interpretive tools that textualists decry—but under the guise of neutral, objective linguistic or canon-based analyses. Part IV also suggests that, in the end, there may be less distance between textualists and purposivists than the old debates suggest—but because textualists have embraced purpose and intent in unexpected ways, rather than because, or merely because, purposivists have become more text focused. Part IV concludes with the recommendation that, given the speculation inherent in the application of even the most text-based interpretive canons, textualists should check the accuracy of their statutory interpretations against interpretive resources such as the legislative history and mischief or problem that motivated the statute *even when they think the text is clear*.

---

14. By "language canons" I refer primarily to the Latin maxims *eiusdem generis* and *noscitur a sociis*, which are defined in *infra* notes 94–95 and accompanying text.

15. The "whole act rule" refers to a canon that directs interpreters to construe individual provisions of a statute in light of the whole statute and its larger structural context. WILLIAM N. ESKRIDGE JR., PHILIP P. FRICKEY, ELIZABETH GARRETT & JAMES J. BRUDNEY, *CASES AND MATERIALS ON LEGISLATION AND REGULATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 674 (5th ed. 2014). The whole act rule is based on a "holistic" approach to interpretation:

A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme—because the same terminology is used elsewhere in a context that makes its meaning clear, or because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law.

*United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs.*, 484 U.S. 365, 371 (1988) (citations omitted).

Likewise, purposivist Justices should use textual canons and tools to supplement and check the interpretive inferences they draw from the legislative record or the mischief that motivated the statute.

### I. HOW TEXTUALISTS TALK ABOUT PURPOSE AND INTENT

Because the contours of textualism and purposivism are not always precisely agreed upon, it is necessary at the outset to define how this Article employs these terms. Textualism, as used throughout the Article, refers to a formalist method of statutory interpretation that regards the enacted text of a statute as the primary source of statutory meaning. Textualists view the legislative process with cynicism, emphasizing that a multimember body cannot have a single, discernible “intent”;<sup>16</sup> that statutes are difficult to enact and are often the product of messy legislative compromises that courts should not unsettle;<sup>17</sup> and that legislative history is unreliable because legislators and their staff have powerful incentives to manipulate it.<sup>18</sup> Accordingly, textualists seek to identify the plain, objective meaning of the statute’s official language using text-based interpretive tools such as dictionary definitions, linguistic and grammar canons, or structural inferences about how different sections of a statute fit together—and reject judicial inquiry into atextual sources of meaning such as legislative history, intent, and statutory purpose.<sup>19</sup> Many textualists also argue that only the enacted text of a statute is a legitimate source of law because only the enacted text is the product of the constitutionally mandated processes of bicameralism and presentment—and refuse to consider external evidence of a statute’s purpose or legislative intent for this reason as well.<sup>20</sup>

---

16. See Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 3, 30 (Amy Gutmann ed., 1997).

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

18. See Scalia, *supra* note 16, at 30–36.

19. See, e.g., John F. Manning, *Second-Generation Textualism*, 98 *CALIF. L. REV.* 1287, 1288 (2010) (“Textualism maintains that judges should seek statutory meaning in the semantic import of the enacted text and, in so doing, should reject the longstanding practice of using unenacted legislative history as authoritative evidence of legislative intent or purpose.”); Scalia, *supra* note 16, at 16–17, 34–35 (“The committee report has no claim to our attention . . . . A statute, however, has a claim to our attention simply because . . . it is a law.”).

20. See Scalia, *supra* note 16, at 22, 35 (“The text is the law, and it is the text that must be observed.”).

The term purposivism, by contrast, is used in this Article to describe an interpretive approach that directs courts to “[i]nterpret the words of the statute . . . so as to carry out the purpose as best [they] can.”<sup>21</sup> Purposivism has historically been associated with the Legal Process movement<sup>22</sup> and differs from textualism both in its focus on identifying a statute’s underlying purpose or policy objectives and in its willingness to consider a range of extrinsic interpretive aids, including legislative history. As Professor Abbe Gluck notes, “purposivists generally feel freer to go beyond the confines of statutory text and will not necessarily find that text trumps contradictory evidence of purpose.”<sup>23</sup> Despite this willingness to prioritize purpose over text when the two conflict, the purposivism discussed here is not the equivalent of legal realism—in which the interpreter essentially makes up a purpose that she deems appropriate or necessary.

As with many dichotomies, the differences between textualism and purposivism are less stark than their classic portrayal suggests. Thus, although textbook textualism emphasizes interpreters’ constitutional duty to give effect to the duly enacted text rather than unenacted evidence of the legislature’s purpose,<sup>24</sup> modern defenders of textualism note the need for context when construing statutes—and embrace a range of extratextual aids that provide such context.<sup>25</sup>

---

21. See HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 1374 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994).

22. See Peter L. Strauss, *The Courts and the Congress: Should Judges Disdain Political History?*, 98 COLUM. L. REV. 242, 246–47 (1998).

23. Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 YALE L.J. 1750, 1764 (2010).

24. See Scalia, *supra* note 16, at 16–18, 23, 25; see also *United States v. Gudger*, 249 U.S. 373, 374–75 (1919) (“No elucidation of the text is needed to add cogency to this plain meaning . . .”); *Caminetti v. United States*, 242 U.S. 470, 485 (1917) (“Where the language is plain and admits of no more than one meaning, the duty of interpretation does not arise . . .”); *Proctor & Gamble Co. v. United States*, 225 U.S. 282, 293 (1912) (“No resort to exposition can add to the cogency with which the conclusion stated is compelled by the plain meaning of the words themselves.”).

25. See, e.g., *In re Sinclair*, 870 F.2d 1340, 1342 (7th Cir. 1989) (Easterbrook, J.) (explaining that statutory texts must be understood in light of “their contexts—linguistic, structural, functional, social, historical”); John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 80 (2006) [hereinafter Manning, *What Divides*] (“Because context of course is essential even to determine the way words are used in everyday parlance, textualists (like everyone else) necessarily resort to context even in cases in which the meaning of the text appears intuitively obvious.” (footnote omitted)); *id.* at 81 (stating that textualism requires interpreters to “consider specialized conventions and linguistic practices peculiar to the law,” including terms of art, common law understandings, and off-the-rack canons of construction recognized by the legal community); Scalia, *supra* note 16, at 17 (explaining that judges should “look for a sort of

Further, although modern textualists criticize judicial reliance on interpretive tools such as legislative history, statutory purpose, and congressional intent, they do not deny that legislative purpose is a relevant and important consideration in statutory interpretation.<sup>26</sup> Rather, they contend that judges should derive such purpose from the statute's text and the surrounding *corpus juris* instead of from legislative history or guesses about legislative intent.<sup>27</sup> Similarly, although classic purposivism is often characterized as directing courts to privilege the spirit over the letter of the statute,<sup>28</sup> modern purposivists regularly pay close attention to statutory text.<sup>29</sup> The most salient remaining difference between the two interpretive approaches appears to be that purposivists are willing to reject a statute's seemingly

---

'objectified' intent—the intent that a reasonable person would gather from the text of the law, placed alongside the remainder of the *corpus juris*").

26. See ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 20, 56 (2012) (“The difference between textualist interpretation and so-called purposive interpretation is not that the former never considers purpose. It almost always does.”); Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL’Y 61, 61 (1994) (“Words take their meaning from contexts . . . [including] the problems the authors were addressing.”); John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2408 (2003) [hereinafter Manning, *Absurdity Doctrine*] (“Textualism does not purport to exclude all consideration of purpose or policy from statutory interpretation.”); Manning, *What Divides*, *supra* note 25, at 84 (“Because speakers use language purposively, textualists recognize that the relevant context for a statutory text includes the mischiefs the authors were addressing.”); Caleb Nelson, *What Is Textualism?*, 91 VA. L. REV. 347, 355 (2005) (describing how textualists defend interpreting statutory provisions “in light of their apparent purposes”).

27. See SCALIA & GARNER, *supra* note 26, at 34 (“[I]n a fair reading, purpose—as a constituent of meaning—is to be derived exclusively from a text.”); Manning, *What Divides*, *supra* note 25, at 79 (explaining that textualists look for an “‘objectified’ intent—the intent that a reasonable person would gather from the text of the law, placed alongside the remainder of the *corpus juris*” (quoting Scalia, *supra* note 16, at 17)); Nelson, *supra* note 26, at 355 (“[T]extualists freely admit that statutory provisions should be interpreted in light of their apparent purposes, as long as those purposes can be gleaned from evidence of the sort that textualists permit interpreters to consider.”).

28. See, e.g., *Church of the Holy Trinity v. United States*, 143 U.S. 457, 459 (1892) (stating that the “letter” of a statute must yield to its “spirit” when the two conflict); see also *Ozawa v. United States*, 260 U.S. 178, 194 (1922) (“We may . . . look to the reason of the enactment and inquire into its antecedent history and give it effect in accordance with its design and purpose, sacrificing, if necessary, the literal meaning in order that the purpose may not fail.”); *Pickett v. United States*, 216 U.S. 456, 461 (1910) (“The reason of the law, as indicated by its general terms, should prevail over its letter, when the plain purpose of the act will be defeated by strict adherence to its verbiage.”).

29. Part II explores in detail the specific interpretive tools relied upon by the Roberts Court’s purposivist Justices, revealing both that traditional purposivism is alive and well on the modern Court and that the purposivist Justices regularly weave textual analysis into their purposive arguments.

plain meaning when contrary indications of purpose cut strongly against such meaning.<sup>30</sup>

This Part focuses on textualism's approach to statutory purpose in two important ways. Section A examines what textualist jurists and theorists have said about the role that statutory purpose and intent should play in the judicial interpretation of statutes, focusing specifically on the argument, made by some sophisticated textualists, that the "best evidence" of a statute's purpose and intent is the statute's text rather than external sources. Section B explores two arguments advanced by prominent textualist scholars speculating about a "new purposivism" that they suggest has evolved in the text focused, post-Scalia era. In contrast to traditional purposivism, which directs interpreters to identify the purpose or problem the statute was designed to address and select the construction that best fits with that purpose,<sup>31</sup> "new purposivism" theories alternately suggest that the Court has (1) shifted the focus of the purposive inquiry away from a statute's underlying purpose to its implemental purpose, or (2) that it now uses statutory purpose to determine, as a threshold matter, whether a statute is clear or ambiguous. Parts II and III will argue that the theoretical pictures of textualism and modern purposivism painted by the existing literature are incorrect, or at least incomplete. But first, it is important to review the existing literature on textualism's relationship to legislative intent and the "new purposivism."

#### A. *The "Best Evidence" Theory*

As academic textualists have been at pains to explain, textualism has a more nuanced relationship to legislative purpose and intent than a surface-level understanding of textualism might suggest. In fact, some textualists advocate that the statute's text should be the focus of the interpretive analysis precisely because *the text provides the best*

---

30. See Manning, *What Divides*, *supra* note 25, at 87–88 & n.63 (identifying *United States v. American Trucking Ass'ns*, 310 U.S. 534 (1940), as a prime example). In *American Trucking Ass'ns*, the Court espoused the view that when a statute's plain meaning produces a result that is "plainly at variance with the policy of the legislation as a whole," the Court "follow[s] that purpose, rather than the literal words." 310 U.S. at 543 (quoting *Ozawa*, 260 U.S. at 194). "When aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no 'rule of law' which forbids its use, however clear the words may appear on 'superficial examination.'" *Id.* at 543–44 (footnote omitted) (quoting *Boston Sand & Gravel Co. v. United States*, 278 U.S. 41, 48 (1928); *Helvering v. N.Y. Tr. Co.*, 292 U.S. 455, 465 (1934)).

31. See HART & SACKS, *supra* note 21, at 1374.

evidence of a statute's purpose and intent.<sup>32</sup> Further, as Professor Caleb Nelson explains, the fact that textualists criticize legislative history use does not necessarily "prove" that textualists are uninterested in enforcing a statute's intended meaning.<sup>33</sup> Rather, such criticisms may simply reflect a view that judicial efforts to identify a statute's intended meaning will be more successful if judges presume that members of Congress use statutory words in their conventional sense, instead of "combing the legislative history for signs that members of Congress agreed upon some other meaning."<sup>34</sup> In other words, textualists may view legislative history as a misleading guide to legislative intent without altogether shunning the endeavor to interpret statutes in light of that intent. Indeed, Nelson contends that textualists do care about legislative intent—but a different kind of legislative intent than intentionalists and purposivists care about. Specifically, he maintains that whereas intentionalists and purposivists tend to seek out the legislature's intent regarding the motives or policy objectives underlying the enacted words, textualists view the legislative process as designed to achieve agreement on words—and therefore seek to identify the legislature's intent regarding the meaning of the words it chose.<sup>35</sup>

In a similar vein, Professor John Manning and Justice Scalia have argued that textualism, like purposivism, recognizes the need to consider context when interpreting statutes.<sup>36</sup> According to Manning, however, the two interpretive approaches emphasize different *forms* of context.<sup>37</sup> That is, textualism gives priority to *semantic* context—evidence about the way a reasonable person uses words; whereas purposivism gives priority to *policy* context—evidence about the way a reasonable person solves problems.<sup>38</sup> Manning further contends that the textualist approach to context is justified because semantic detail is what enables legislators to set meaningful limits on a statute's reach and to effectuate bargained-for compromises.<sup>39</sup> He argues that

---

32. See, e.g., Nelson, *supra* note 26, at 364.

33. *Id.*

34. *Id.*

35. See *id.* at 370–71.

36. Manning, *What Divides*, *supra* note 25, at 79–80 (“[O]ne can make sense of others’ communications only by placing them in their appropriate social and linguistic context . . . .”); Scalia, *supra* note 16, at 37 (“In textual interpretation, context is everything . . . .”).

37. Manning, *What Divides*, *supra* note 25, at 76.

38. *Id.*

39. *Id.* at 70, 92.

purposivist judges, by finessing statutory meaning to make laws more coherent with their apparent overall purposes, render it “surpassingly difficult” for legislators to define reliable boundary lines for the compromises struck during the legislative process.<sup>40</sup>

As noted above, textualist theory maintains that the best evidence of a statute’s purpose and intent is the statute’s text itself—understood in light of how a reasonable person uses words. The reasonable person standard marks another key difference between textualism and purposivism: textualism focuses on the objective meaning that the text of the statute conveys to a reasonably informed reader;<sup>41</sup> purposivism, by contrast, focuses on the policy goals held by the legislators who enacted the statute. Thus, while modern textualism acknowledges the importance of context and purpose to the interpretive endeavor, it also insists that such context and purpose be derived from the text of the statute. Justice Scalia once commented, for example, that “in a fair reading, purpose—as a constituent of meaning—is to be derived exclusively from a text.”<sup>42</sup> Along the same lines, Manning heralds the Supreme Court’s statement that “[t]here is . . . no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes.”<sup>43</sup>

In maintaining that text provides the best evidence of a statute’s purpose and intent, textualists are not, however, confining themselves to pure literalism or plain meaning analysis. Rather, they are willing to consider additional interpretive resources that can shed light on the meaning that a reasonably informed reader would attribute to the statute’s text—including linguistic rules or conventions about how language is used, dictionary definitions, common law conventions, and

---

40. *Id.*

41. Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J.L. & PUB. POL’Y 59, 65 (1988) [hereinafter Easterbrook, *Original Intent*] (“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. . . . The meaning of statutes is to be found . . . in the understanding of the objectively reasonable person.”); Scalia, *supra* note 16, at 17 (distinguishing between “subjective legislative intent” and what Justice Scalia calls “a sort of ‘objectified’ intent”).

42. SCALIA & GARNER, *supra* note 26, at 34. Scalia and Garner do take issue with the specific formulation that “the plain language of a statute is the ‘best evidence’ of legislative intent” on the ground that the statute is the law, not merely *evidence* of the law. *Id.* at 397. But they also subscribe to the general notion, common to textualists, that the statute’s text is the best guide to its purpose and intent. *Id.* at 34.

43. Manning, *What Divides*, *supra* note 25, at 87 (alteration and omission in original) (quoting *United States v. Am. Trucking Ass’ns*, 310 U.S. 534, 543 (1940)).

the meaning given to similar statutory terms in other statutes.<sup>44</sup> This is because in order to determine the way a reasonable user of language would understand a statutory phrase or word, textualists must ascertain the unstated “assumptions shared by the speakers and the intended audience.”<sup>45</sup> As Manning, Scalia, and Nelson have explained, interpretive tools such as dictionary definitions, common law conventions, off-the-rack canons, and other similar contextual aids shed light on the assumptions shared by the relevant legal community and thereby help clarify the most likely meaning of the words that Congress enacted into law.<sup>46</sup>

In short, textualist theorists have set up a nuanced dichotomy between the textualist and purposivist approaches to legislative intent: textualists seek to identify the objective meaning that a reasonably informed reader would attribute to a statute; purposivists, by contrast, seek to identify the statutory meaning that best effectuates Congress’s actual intent, purpose, or policy goals. Textualists regularly charge that purposivists, in relying on imprecise, manipulable resources such as legislative history and statutory purpose, leave themselves significant wiggle room to select statutory constructions that achieve policy goals that align with their own personal preferences.<sup>47</sup> But as we shall see in Part III, it is equally possible that textualism’s “reasonably informed reader” approach and use of other supposedly neutral canons of statutory construction leave textualist judges similarly ample discretion to choose a statutory meaning that accords with their personal views about the best or most “reasonable” policy.

---

44. See, e.g., *id.* at 81–82 (listing contextual resources textualists “necessarily—and quite properly” draw upon when interpreting statutes); Nelson, *supra* note 26, at 360–61 (stating that textualists will consult other statutes with similar language as a source of context).

45. Manning, *What Divides*, *supra* note 25, at 81 (quoting Frank H. Easterbrook, *What Does Legislative History Tell Us?*, 66 CHI.-KENT L. REV. 441, 443 (1990) [hereinafter Easterbrook, *What Does Legislative History Tell Us?*]).

46. See SCALIA & GARNER, *supra* note 26, at 69–239 (discussing thirty-one “semantic” and “contextual” canons that help illuminate the semantic context of the statutory text); Manning, *What Divides*, *supra* note 25, at 81–82, 94 & n.78; Nelson, *supra* note 26, at 389 (“To a large extent, those canons can be seen as entrenched generalizations about the likely intent of the enacting legislature.”).

47. See, e.g., William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 674 (1990) [hereinafter Eskridge, Jr., *New Textualism*] (explaining that new textualists posit that legislative history creates increased opportunities for judicial discretion); Scalia, *supra* note 16, at 35–36 (“[Legislative history] has facilitated rather than deterred decisions that are based upon the courts’ policy preferences . . .”).

### B. *The New Purposivism*

At the same time that modern textualist theorists have endeavored to clarify what kind of context (semantic) and intent (objective) textualism pay attention to, questions have abounded about the continued role of textualism's rival philosophy—purposivism—in the modern, text-dominated era. Notably, two prominent textualist scholars have developed novel theories suggesting that purposivism has essentially reinvented itself in response to the modern Court's text-centric approach—by becoming text focused or inserting itself into threshold inquiries about textual ambiguity. Academic textualist John Manning, for example, argues that the Court as a whole, including most of its purposivist Justices, has adopted a textually constrained form of purposivism that no longer privileges the “spirit” of a statute over its text but, rather, pays attention to Congress's specific choices about the means by which the statute's purposes are to be achieved.<sup>48</sup> Manning distinguishes between what he calls a statute's “ulterior” purpose—essentially the “spirit” or substantive goal of the statute—and its “implemental” purpose, which refers to Congress's choice of means for achieving the statute's substantive goals.<sup>49</sup> He argues that the latter, implemental purpose is textually constrained because the Court takes its cues about Congress's choice of means from the “level of generality at which Congress frames its statutory commands.”<sup>50</sup> That is, the Court uses the text to delimit the outer contours of the statute's purpose—to indicate just how far Congress has authorized the law to go in furthering the statute's underlying objective.<sup>51</sup>

---

48. See Manning, *New Purposivism*, *supra* note 4, at 115, 129 (“[A]ll but two of the Court's nontextualist Justices seem to have gone along with this change in approach . . .”).

49. *Id.* at 115.

50. *Id.* at 132.

51. In an effort to make this claim more concrete, Manning points to Justice Kagan's majority opinion in *Milner v. Department of the Navy*, 562 U.S. 562 (2011), as an example. See Manning, *New Purposivism*, *supra* note 4, at 133. *Milner* involved Exemption 2 of the Freedom of Information Act (“FOIA”), which excludes from FOIA's compelled disclosure any agency records that are “related solely to the internal personnel rules and practices of an agency.” 562 U.S. at 565 (quoting 5 U.S.C. § 552(b)(2)). At issue was whether Exemption 2 shields from disclosure documents that contain Explosive Safety Quantity Distance (“ESQD”) information used by the Navy to design storage facilities to house munitions at safe distances from each other. *Id.* at 568. The Ninth Circuit had upheld the Navy's use of Exemption 2 to withhold the ESQD documents, reasoning that such documents relate to “predominantly internal” matters whose “disclosure presents a risk of circumvention of agency regulation.” *Milner v. U.S. Dep't of the Navy*, 575 F.3d 959, 967–68 (9th Cir. 2009). The Ninth Circuit's ruling was based on a traditional purposive analysis sourced from a D.C. Circuit opinion, which reasoned that while FOIA's

In Manning’s view, it is only in those rare cases where the statute is open-ended and invites judicial elaboration in common law fashion—that is, where the implemental purpose lacks limiting features and delegates discretion to the judiciary to determine how to achieve the statute’s substantive goals—that the modern Court seeks the statute’s ulterior purpose.<sup>52</sup> In this sense, Manning’s focus on implemental purpose echoes Justice Scalia’s repeated exhortations that “[n]o legislation pursues its purposes at all costs”<sup>53</sup> and that “[e]very statute proposes, not only to achieve certain ends, but also to achieve them by particular means.”<sup>54</sup>

---

“primary purpose” was disclosure, Congress also had “a secondary purpose . . . of preserving the effective operation of governmental agencies” and that Congress could not have intended to mandate disclosures that “undermined . . . the effectiveness of law enforcement agencies.” *Crooker v. Bureau of Alcohol, Tobacco & Firearms*, 670 F.2d 1051, 1074 (D.C. Cir. 1981) (en banc).

In *Milner*, Justice Kagan’s majority opinion rejected this reasoning as inconsistent with the language of Exemption 2. Focusing on the key term “personnel,” the majority opinion found that the exemption applied only to documents that “concern the conditions of employment in federal agencies—such matters as hiring and firing, work rules and discipline, compensation and benefits.” *Milner*, 562 U.S. at 570. In so ruling, the majority claimed that its reading gave effect to FOIA’s background goal of broad disclosure “through the simple device of confining the [exemption]’s meaning to its words,” *id.* at 572, and noted that “[i]n enacting FOIA, Congress struck the balance it thought right—generally favoring disclosure, subject only to a handful of specified exemptions,” *id.* at 571 n.5. Manning maintains that this example shows that Justice Kagan “does not reject legislative purpose, but rather embraces it at a deeper level” by recognizing that “in a system of legislative supremacy, Congress must have the capacity, through the relative specificity or generality of its chosen language, to set meaningful boundaries on the purposes it wishes courts and agencies to pursue.” Manning, *New Purposivism*, *supra* note 4, at 137. Manning contrasts the *Milner* Court’s approach with traditional purposivism, noting that unlike the classic purposivist approach exemplified by the Court’s holding in *Holy Trinity*, the *Milner* Court “declined to deviate” from the boundaries established by the text “in order to pursue the goals that Congress apparently sought to achieve but that did not make their way into the final text.” *Id.*

52. Manning, *New Purposivism*, *supra* note 4, at 137–40 (discussing, for example, Justice Kagan’s opinion in *Fox v. Vice*, 563 U.S. 826 (2011), which read open-ended language in a fee-shifting statute “almost entirely in light of the Court’s perception of the statute’s ulterior purposes”).

53. See, e.g., *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 234 (2013) (Scalia, J.) (quoting *Rodriguez v. United States*, 480 U.S. 522, 525–26 (1987) (per curiam)); *Freeman v. Quicken Loans, Inc.*, 566 U.S. 624, 637 (2012) (Scalia, J.) (same); see also *MCI Telecomms. Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 231 n.4 (1994) (Scalia, J.) (“[Judges] . . . are bound, not only by the ultimate purposes Congress has selected, but by the means it has deemed appropriate, and prescribed, for the pursuit of those purposes.”).

54. *Dir., Office of Workers’ Comp. Programs v. Newport News Shipbuilding & Dry Dock Co.*, 514 U.S. 122, 136 (1995) (Scalia, J.); see also SCALIA & GARNER, *supra* note 26, at 21 (reasoning that all statutes contain bargained-for limits and these limits are as much a part of the statute as its purpose).

Manning's fellow textualist, Professor Richard Re, offers a decidedly different take on the status of modern purposivism, at least on the Roberts Court. If Manning's claim is essentially that *Holy Trinity*<sup>55</sup>-style "spirit of the law" purposivism is dead,<sup>56</sup> Re's is that the Roberts Court has subtly revived *Holy Trinity*'s purposive approach—albeit in a modified form which he dubs "The New Holy Trinity."<sup>57</sup> Specifically, Re argues that whereas the "Old Holy Trinity" asserted that even a concededly clear statutory text must give way to the legislature's purpose, the modern Court's new purposivism takes legislative purpose and pragmatic considerations into account in determining whether a statute's text is clear or ambiguous in the first place.<sup>58</sup> Once the Court concludes that a statute is ambiguous, however, it may again use legislative purpose and practical consequences, among other tools, to aid in its ultimate construction of the statute.<sup>59</sup> In this manner, purpose can play a crucial role in the statute's interpretation at *two* stages of the interpretive inquiry—but without openly trumping statutory text in the way made infamous by the original *Holy Trinity* decision.<sup>60</sup> Indeed, Re suggests that modern purposivism has "evolved" in a manner that has enabled it to gain "the upper hand" over textualism.<sup>61</sup>

This Article suggests that the Roberts Court's textualist and textualist-leaning Justices are doing something quite different than what Manning and Re posit—something that could almost be described as the mirror image of Manning's "implemental purpose"

---

55. *Church of the Holy Trinity v. United States*, 143 U.S. 457 (1892). In *Holy Trinity*, the Supreme Court held that the importation of an Anglican minister from England did not violate an 1885 immigration statute prohibiting contracts for transporting an alien into the United States for "labor or service of any kind." *Id.* at 458, 472. Although the text of the statute seemed to clearly cover any labor or service, including those performed by a church minister, the Court famously declared that "a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers" and concluded that the statute did not prohibit the church's action. *Id.* at 459.

56. See Manning, *New Purposivism*, *supra* note 4, at 113 ("The Court . . . has not cited *Holy Trinity* positively for more than two decades.").

57. Re, *supra* note 6, at 407–08.

58. *Id.* at 417 (noting that when a text has multiple potential readings, "the [New Holy] Trinitarian would consider purpose and pragmatism when deciding how high to set the bar for textual clarity").

59. *Id.* ("And if the [New Holy] Trinitarian concluded that the relevant law is ambiguous, then an additional purposive reason, or some other way of resolving the ambiguity, would have to come into play.").

60. See *Holy Trinity*, 143 U.S. at 459.

61. Re, *supra* note 6, at 407.

theory: rather than use statutory text to limit or define the outer boundaries of a statute's purpose, the textualist Justices are using other interpretive tools—including language canons, the whole act rule, and even pragmatic reasoning—to construct or simply assert, and sometimes even to expand, a statute's purpose.<sup>62</sup> That is, they are using textual canons and practical consequences as *launch pads* for assuming or constructing legislative purpose and intent. And they are doing so for statutes of all ilks, not just those that might be considered common law statutes designed to invite judicial elaboration. This backdoor purposivism goes beyond using textual cues to identify a statute's objective intent or semantic context and crosses the line into substantive judicial conjecture about Congress's specific purpose and intent—but it does so quietly and under the radar. This secretive feature is troubling because it increases the risk that textualist Justices will—perhaps inadvertently—conflate their own intuitions and normative policy judgments with the legislature's. This risk is examined further in Part III. For now, the Article simply notes that although the textualist and textualist-leaning Justices speak about the textualist canons as though they incontrovertibly dictate a particular statutory reading, close attention to the application of these canons shows that they leave significant room for judicial discretion and speculation.

## II. THE DATA

This Part presents data from my study of all statutory cases decided by the Roberts Court between January 31, 2006 and July 1, 2017. Section A describes the methodology used to code cases and Section B reports data from the study. As Section B explains, the data demonstrate that traditional purposivism is alive and well on the Roberts Court—although it has been supplemented by close textual analysis. In particular, the Court's purposivist Justices—and even some textualist-leaning Justices—continue to employ traditional purposive interpretive tools—including legislative history, congressional intent, and statutory purpose—regularly in the opinions they author, as well as seek to identify the statutory reading that best fulfills a statute's broad overarching goals. Further, even some textualist-leaning Justices turn out to be frequent users of certain purposive interpretive tools.

---

62. See *infra* Part II.B.

### A. Methodology

The findings and conclusions presented below are based on quantitative and qualitative analysis of all statutory interpretation cases decided by the Roberts Court from January 31, 2006,<sup>63</sup> through July 1, 2017. Every case decided during that period was examined through the Supreme Court's online database to determine whether it dealt with a statutory issue. Any case that substantially discussed<sup>64</sup> statutory meaning was included in the study. Cases interpreting the Federal Rules of Civil Procedure were not included,<sup>65</sup> but a handful of constitutional cases in which the Court construed the meaning of a federal statute before deciding the constitutional question were included.<sup>66</sup> This selection methodology yielded 499 statutory cases over eleven and one-half terms. Of these, 255 cases were decided unanimously and 244 were decided by a divided vote.<sup>67</sup> Collectively, these cases yielded 995 opinions: 499 majority or plurality opinions, 200 concurring opinions, 266 dissenting opinions, 28 part-concurring or part-dissenting opinions, and two part-majority or part-concurring opinions.

Each of these cases was coded for certain criteria. The primary focus of the coding was to determine the frequency with which the Court referenced different interpretive sources when construing federal statutes. Specifically, each opinion in each case was examined

---

63. This is the date that Justice Alito joined the Court. *Current Members*, SUP. CT. U.S., <https://www.supremecourt.gov/about/biographies.aspx> [<https://perma.cc/CU8H-7S2Z>]. “For ease of reference, I refer to the half-term from January 31, 2006, through June 2006 as the “2005 Term.”

64. By “substantial discussion” I mean that the Court considered the meaning of the statute an open question and engaged in some interpretive analysis to determine what the provision at issue meant or covered.

65. I made this judgment call because the Federal Rules of Civil Procedure (“FRCP”) are drafted by judges rather than Congress and do not require the president’s approval. 28 U.S.C. §§ 2072(a), 2074(a) (2018). Accordingly, several of the tools of statutory construction do not apply to the FRCP.

66. In such cases, the opinion was coded as unanimous, close margin, or wide margin based on the Justices’ votes regarding the statutory interpretation question *only*. Thus, if the Justices agreed unanimously that the statute should be read to mean X, but split regarding the constitutional question, the opinion was still coded as unanimous. *See, e.g.*, *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 197, 212 (2009) (unanimously resolving the statutory question but splitting on the constitutional question—coded unanimous).

67. This figure counts as unanimous all decisions in which there were no dissenting opinions, even if concurring opinions offering different rationales were issued. By comparison, for the 2006–2016 Terms, there were 381 unanimously decided cases (including constitutional cases) and 451 divided-vote cases. *See Stat Pack Archive*, SCOTUSBLOG, <http://www.scotusblog.com/reference/stat-pack> [<https://perma.cc/948G-DNUW>].

for references to the following interpretive tools: (1) clarity of the text, including appeals to plain meaning; (2) dictionary definitions; (3) grammar rules; (4) the whole act rule; (5) other federal or state statutes; (6) common law precedent; (7) substantive canons;<sup>68</sup> (8) Supreme Court precedent; (9) statutory purpose; (10) practical consequences; (11) legislative intent; (12) legislative history; (13) language canons such as *expressio unius*; and (14) references to some form of agency deference.<sup>69</sup> References to the whole act rule and language canons were coded separately as well as together, in one combined variable, in order to allow comparisons with earlier studies in which some scholars coded all text-based canons together under one variable. When reporting rates of usage, the Article will indicate whether it is referencing the combined figure for language/whole act canons or separate figures for each of these two forms of text-based interpretive tools.

The interpretive resources coded for in this study are consistent with those that have been examined in other empirical studies of the Court's statutory interpretation practices.<sup>70</sup> A few differences in definitions for the different sources were inevitable and will be pointed out where notable. For example, some early empirical studies of the Supreme Court's statutory cases lumped language and substantive canons together, rather than measure references to these different forms of canons separately, as this study did.<sup>71</sup> Other studies coded practical consequences, agency-deference rules, common law practices, and/or substantive policy canons together, rather than treat these as separate interpretive resources, as was done in this study.<sup>72</sup>

---

68. For a detailed list of the substantive canons found and coded, see Krishnakumar, *Reconsidering Substantive Canons*, *supra* note 12, app. at 901–09 (listing all of the substantive canons found in an earlier study of the Court's 2005–2012 terms).

69. In order to reduce the risk of inconsistency, I and at least one research assistant separately read each opinion and separately recorded the use of each interpretive resource. In the event of disagreement, I reviewed the case and made the final coding determination. For a detailed explanation of my coding methodology, see Anita S. Krishnakumar, *Statutory Interpretation in the Roberts Court's First Era: An Empirical and Doctrinal Analysis*, 62 HASTINGS L.J. 221, codebook at 291–96 (2010) [hereinafter Krishnakumar, *First Era*].

70. See, e.g., FRANK B. CROSS, *THE THEORY AND PRACTICE OF STATUTORY INTERPRETATION* 143 (2009); Nina A. Mendelson, *Change, Creation, and Unpredictability in Statutory Interpretation: Interpretive Canon Use in the Roberts Court's First Decade*, 117 MICH. L. REV. 71, 90–95 (2018); Schacter, *Confounding Common Law*, *supra* note 12, at 11–12; Zeppos, *supra* note 12, at 1089.

71. See, e.g., Schacter, *supra* note 12, *Confounding Common Law*, at 12.

72. See, e.g., CROSS, *supra* note 70, at 144 (coding absurd-results arguments and *Chevron* deference together as a form of pragmatic interpretation); Mendelson, *supra* note 70, at 100

In recording the Court's reliance on particular interpretive tools, this study counted only references that reflected substantial judicial reliance on the tool in reaching an interpretation. Where an opinion mentioned an interpretive canon or tool, but rejected it as inapplicable, I did not count that as a reference to the canon or tool.<sup>73</sup> Secondary or corroborative references to an interpretive tool, on the other hand, were counted; thus, where the Court reached an interpretation based primarily on one interpretive source but went on to note that X, Y, and Z interpretive tools further supported that interpretation, the references to X, Y, and Z were coded along with the primary source.<sup>74</sup>

In addition, the vote margin in each case was recorded, and each case and opinion was recorded as unanimous, close margin, or wide margin (cases with six or more Justices in the majority). Each Justice's vote in each case also was recorded, as were the authors of each opinion. This methodology was the same as that followed in my previous empirical studies.<sup>75</sup>

---

(coding absurd results and common law references as substantive canons); Schacter, *Confounding Common Law*, *supra* note 12, at 63 (listing in Appendix B coding parameters for “[j]udicially-[s]elected [p]olicy [n]orms” that include both practical consequences arguments and substantive canons dealing with preemption and federalism).

73. A few examples may help illustrate. In *Richlin Security Service Co. v. Chertoff*, 553 U.S. 571 (2008), the Court considered whether the Equal Access to Justice Act entitles prevailing parties to recover paralegal fees from the government at market rates, or merely at the cost to the law firm of the paralegal's time. *Id.* at 573. The Court concluded that the statute authorized recovery at market rates, relying primarily on the statute's text and a precedential case interpreting an analogous statute. *Id.* at 577–81. The Court also discussed and rejected two arguments raised by the government—one based on legislative history and another based on a substantive canon. *Id.* at 583–85, 589. The opinion was coded for reliance on text, precedent, and other statutes; it was not coded for reliance on legislative history or substantive canons. Similarly, in *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142 (2012), the Court held that the Fair Labor Standards Act (“FLSA”) does not require employers to pay overtime wages to pharmaceutical-sales representatives. *Id.* at 147. In so ruling, the majority declined to defer to the Department of Labor's interpretation on the ground that the agency changed its long-standing interpretation without “fair warning” to regulated parties. *Id.* at 154–59 (quoting *Gates & Fox Co. v. Occupational Safety & Health Review Comm'n*, 790 F.2d 154, 156 (D.C. Cir. 1986)). The opinion was *not* coded for reliance on agency deference.

74. For example, in *Richlin*, the Court noted at the end of its opinion that it “also question[ed] the practical feasibility” of the rejected interpretation because calculating the cost to the firm of the paralegal's services would involve complex accounting considerations. 553 U.S. at 587–88. Although this reference to practical consequences was made in passing, the opinion was coded for reliance on practical consequences. Opinions referencing practical consequences then were further disaggregated to record whether they placed “minimal,” “some,” or “heavy” weight on practical considerations. See *infra* note 211 and accompanying text.

75. See Anita S. Krishnakumar, *Dueling Canons*, 65 DUKE L.J. 909, 924 (2016) [hereinafter Krishnakumar, *Dueling Canons*]; Krishnakumar, *First Era*, *supra* note 69, at 233; Krishnakumar, *Reconsidering Substantive Canons*, *supra* note 12, at 844.

Before reporting the data, it is important to note some limitations of this study. First, the study covers eleven and one-half Supreme Court terms and 499 statutory interpretation cases decided by some combination of the same 12 Justices. While this dataset is large enough to teach us some things about the Court's use of various interpretive resources, the data reported may reflect trends specific to the Roberts Court. Second, great significance should not be placed on the precise percentages reported; the number of cases reviewed is large enough to provide some valuable insights, but the focus should be on the patterns that emerge rather than on specific percentages. Justice Gorsuch's rates of reference should be viewed with particular caution, as the dataset contains only three opinions authored by him. Third, in noting the frequency with which the Court or its individual members invoked particular interpretive tools, I make no claims to have discovered the Justices' underlying motivations for deciding a case; the data do not reveal whether a particular opinion referenced an interpretive canon or tool because the author was persuaded by the canon or merely because the author thought the canon or tool was one that would convince others. The study's empirical and doctrinal claims are confined to describing how the Justices publicly engage various interpretive canons and tools as justifications for their statutory constructions and to theorizing about discernible patterns in their public engagement of such canons and tools.

### *B. Purposivism Lives On*

Table 1 reports the frequency with which the members of the Roberts Court as a whole referenced various interpretive canons and tools. For ease of comparison, the first column lists rates of reliance by textualist or textualist-leaning Justices, the second column reports the Court's overall rates of reliance, and the third column reports rates of reliance for the Court's purposivist Justices.<sup>76</sup> For purposes of this Article, Justices Scalia, Thomas, and Gorsuch are labeled as "textualists," while Justices Alito, Roberts, and Kennedy are identified as "textualist-leaning."<sup>77</sup> Justices Scalia, Thomas, and Gorsuch have self-identified as textualists and clearly follow or followed a textualist interpretive methodology—seeking to identify the plain meaning of statutory text as informed by dictionary definitions, language canons,

---

76. See *infra* Table 1.

77. I have not included Justice Kavanaugh as he had not yet joined the Court during the period studied (2006–2017) and did not author any opinions in the dataset.

and the whole act rule and eschewing reliance on legislative history, intent, and purpose. Justices Alito, Roberts, and Kennedy, although less purist in their use of textualist interpretive tools, also emphasize these tools when construing statutes.<sup>78</sup> This labeling is consistent with how other scholars and commentators have depicted these Justices.<sup>79</sup>

Conversely, Justices Breyer, Stevens, Ginsburg, Souter, Sotomayor, and Kagan are treated as “purposivists.” Justices Breyer and Stevens have openly advocated for a purposivist approach to interpreting statutes<sup>80</sup> and have regularly invoked statutory purpose, legislative history, and intent in the opinions they authored. Similarly, although Justices Ginsburg, Kagan, Sotomayor, and Souter have not embraced the purposivist label so explicitly, they likewise regularly employed statutory purpose, legislative history, and intent in the opinions they authored. Again, this labeling of purposivist Justices is consistent with how other scholars and commentators have described these Justices.<sup>81</sup>

---

78. See *infra* Table 2.

79. See Ernest Gellhorn, *Justice Breyer on Statutory Review and Interpretation*, 8 ADMIN. L.J. AM. U. 755, 758 (1995) (“Justices Kennedy and Scalia have led a ‘textualist’ movement claiming that the ‘plain meaning’ of the statute should be given effect.”); Manning, *Textualism and the Equity of the Statute*, *supra* note 17, at 125 (referring to Justice Kennedy as a textualist or, at the least, as a “fellow traveler[]” of more acknowledged textualists); Peter J. Smith, *Textualism and Jurisdiction*, 108 COLUM. L. REV. 1883, 1887 (2008) (“[I]t appears that several Justices—clearly Justices Scalia and Thomas, and perhaps Chief Justice Roberts and Justices Alito and Kennedy—on the Supreme Court now consider themselves textualists.”); Charlie D. Stewart, *The Rhetorical Canons of Construction: New Textualism’s Rhetoric Problem*, 116 MICH. L. REV. 1485, 1486 (2018) (noting that Justice Gorsuch is a textualist); John F. Duffy, *In re Nuijten: Patentable Subject Matter, Textualism and the Supreme Court*, PATENTLY-O (Feb. 5, 2007), [http://patentlyo.com/patent/2007/02/in\\_re\\_nuijten\\_p.html](http://patentlyo.com/patent/2007/02/in_re_nuijten_p.html) [<https://perma.cc/J9MH-473Z>] (describing Justices Roberts, Scalia, Kennedy, Thomas, and Alito as “adher[ing] to some form of fairly rigorous textualism in statutory interpretation”); see also Neil M. Gorsuch, *Of Lions and Bears, Judges and Legislators, and the Legacy of Justice Scalia*, 66 CASE W. RES. L. REV. 905, 909 (2016) (“[A]n assiduous focus on text, structure, and history is essential to the proper exercise of the judicial function.”).

80. See *W. Va. Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 115 (1991) (Stevens, J., dissenting) (noting that statutes are likely to be imprecise and that “we do the country a disservice when we needlessly ignore persuasive evidence of Congress’ actual purpose and require it ‘to take the time to revisit the matter’ and to restate its purpose in more precise English whenever its work product suffers from an omission or inadvertent error” (footnote omitted) (quoting *Smith v. Robinson*, 468 U.S. 992, 1031 (1984) (Brennan, J. dissenting))); STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION 99 (2005) (describing Justice Breyer’s approach toward statutory construction: a purpose-based method that uses “whatever tools best identify congressional purpose in the circumstances”).

81. See, e.g., Brudney & Baum, *supra* note 2, at 490 (calling Justices Breyer, Stevens and Souter purposivists); William N. Eskridge, Jr., *The New Textualism and Normative Canons*, 113 COLUM. L. REV. 531, 551 (2013) [hereinafter Eskridge, Jr., *Normative Canons*] (book review)

**Table 1**  
**Roberts Court Overall Rates of Reliance on Individual Interpretive Tools and Canons (2005–2016 Terms)**

<b>Canons / Interpretive Tools</b>	<b>Opinions Authored by Textualist or Textualist-Leaning Justices (n=523)</b>	<b>Opinions Authored by All Justices<sup>82</sup> (n=995)</b>	<b>Opinions Authored by Nontextualist / Purposivist Justices (n=442)</b>
<b>Text / Plain Meaning</b>	47.4% (n=248)	41.1% (n=409)	35.7% (n=158)
<b>Sup. Court Precedent</b>	55.1% (n=288)	56.6% (n=563)	56.3% (n=249)
<b>Practical Consequences</b>	31.2% (n=163)	33.9% (n=337)	38.7% (n=171)
<b>Lang. Canons / Whole Act Rule</b>	32.5% (n=170)	30.2% (n=300)	28.7% (n=127)
<b>Whole Act Rule</b>	28.9% (n=151)	27.0% (n=269)	26.7% (n=118)
<b>Dictionary Definitions</b>	22.2% (n=116)	20.5% (n=204)	19.9% (n=88)
<b>Common Law</b>	12.8% (n=67)	12.4% (n=123)	12.7% (n=56)
<b>Other Statutes</b>	21.2% (n=111)	20.1% (n=200)	19.9% (n=88)
<b>Substantive Canons</b>	15.3% (n=80)	15.3% (n=152)	15.8% (n=70)

(same for Justices Breyer and Ginsburg); Asher Hawkins, *The Least “Constructive” Provisions?: Analyzing the Bankruptcy Code’s Codified Canons*, 59 N.Y. L. SCH. L. REV. 625, 638 (2014) (same for Justices Stevens, Breyer, and Kagan); Manning, *New Purposivism*, *supra* note 4, at 128 (calling Justices Stevens and Breyer “the Court’s strongest purposivists”).

82. This column contains 30 per curiam opinions that are not included in the counts of textualist- and nontextualist-authored opinions in the other two columns, as the authors of these 30 opinions are unknown.

<b>Purpose</b>	17.8% (n=93)	24.9% (n=248)	34.4% (n=152)
<b>Intent</b>	6.1% (n=32)	11.9% (n=118)	19.5% (n=86)
<b>Legis. Hist.</b>	12.6% (n=66)	22.7% (n=226)	36.0% (n=159)

As the Table reveals, the Justices' overall rates of reference to individual interpretive tools are remarkably consistent, irrespective of their interpretive philosophies. Notably, the interpretive tools most frequently invoked by the Court as a whole—Supreme Court precedent, text or plain meaning, and practical consequences—were the same as those most frequently invoked by the textualist-leaning and purposivist Justices as subgroups. The combined whole act rule and language canons, other statutes, and dictionary definitions also featured regularly in the opinions authored by the Court as a whole and by the textualist and purposivist Justices as subgroups—appearing in roughly 20 to 25 percent of the opinions studied. However, the Court's purposivist Justices also frequently invoked statutory purpose and legislative history, and, to a lesser extent, legislative intent; the Court's textualist and textualist-leaning Justices, by contrast, employed these interpretive tools at far lower rates.<sup>83</sup> The other interpretive tools were invoked at lower rates across the board, typically in less than 15 percent of the opinions studied.

Table 2 reports individual Justices' rates of reliance on particular interpretive tools in the 965 opinions decided during the 2005–2016 terms whose authorship is known.<sup>84</sup> Again, the data reveal that Supreme Court precedent, text or plain meaning, and practical reasoning were employed at high rates across the board: most Justices invoked precedent and plain meaning over 40 percent of the time and

---

83. The purposivist Justices as a group referenced legislative history in 36 percent of the opinions they authored, as compared to 12.6 percent for the textualist Justices as a group; purposivists likewise referenced statutory purpose in 34.4 percent of the opinions they authored, compared to 17.8 percent for the textualists; finally, purposivists referenced legislative intent in 19.5 percent of the opinions they authored, compared to 6.1 percent for the textualists. *See supra* Table 1.

84. This excludes 30 per curiam opinions decided during the period studied because the opinions' authors are unknown.

practical consequences in more than 30 percent of opinions.<sup>85</sup> The whole act rule and language canons also were invoked frequently by all of the Justices, while dictionary definitions and other statutes were invoked regularly by some Justices and infrequently by others, and the common law was referenced at relatively low rates across the board.<sup>86</sup>

The Justices diverged, however, in their use of purposive and intentionalist tools. Notably, the purposivist Justices invoked the legislative record, statutory purpose, and legislative intent at markedly higher rates than their textualist and textualist-leaning counterparts: most of the purposivist Justices openly invoked legislative purpose in over one-third of the opinions they authored;<sup>87</sup> among the textualist-leaning Justices, only Justice Kennedy invoked purpose at a high rate (45.1 percent). Similarly, the purposivist Justices openly referenced legislative intent at noticeably higher rates<sup>88</sup> than did the textualist and textualist-leaning Justices.

Thus, contrary to some recent commentary about the Court's trajectory,<sup>89</sup> the purposivist Justices on the Roberts Court do *not* appear to have retreated from traditional purposive analysis or reliance on traditional purposivist tools such as legislative history. However, they do appear to have embraced several textualist interpretive tools, such as language canons and the whole act rule, other statutes, and dictionary definitions.

---

85. Most of the Justices relied on plain meaning in 40.8 to 66.7 percent of the opinions they authored. Justices Breyer and Ginsburg were the only outliers, and even they invoked the statute's plain meaning in 25.4 and 27.7 percent of the opinions they authored, respectively. The Justices also referenced Supreme Court precedent in 48 to 66.2 percent of the opinions they authored (excepting Justice Gorsuch, who authored only three opinions in the dataset). Finally, the Justices' rates of reference to practical consequences ranged from 28.3 to 50.7 percent (excepting Justice Thomas, who referenced such consequences in only 16.8 percent of his opinions).

86. Most of the Justices invoked the common law in less than 15 percent of the opinions they authored.

87. Justice Souter was the exception, referencing purpose in 17.1 percent of the opinions he authored. Justices Breyer and Kagan openly referenced purpose in 40.7 and 43.8 percent of the opinions they authored, respectively.

88. The exception was Justice Kagan, who referenced legislative intent in only 4.2 percent of the 48 opinions she authored.

89. See, e.g., Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 COLUM. L. REV. 1, 2 (2006) (commenting that textualists have been "successful [in] discrediting strong purposivism" and that there is little "remaining territory between textualism's adherents and nonadherents").

**Table 2**  
**Individual Justices' Rates of Reliance on All Interpretative Tools**  
**by Opinion Author<sup>90</sup> (n=965)<sup>91</sup>**

<b>Canons/ Interpretive Tools</b>	<b>Scalia (n=127)</b>	<b>Thomas (n=143)</b>	<b>Alito (n=108)</b>	<b>Roberts (n=71)</b>	<b>Kennedy (n=71)</b>	<b>Souter (n=35)</b>
<b>Text / Plain Meaning</b>	52.8%	50.3%	42.6%	40.8%	45.1%	45.7%
<b>Sup. Court Precedent</b>	48.0%	53.8%	52.8%	64.8%	66.2%	54.3%
<b>Dictionary Definitions</b>	20.4%	23.8%	24.1%	16.9%	23.9%	17.1%
<b>Lang. Canons / Whole Act Rule</b>	29.9%	33.6%	29.6%	39.4%	35.2%	31.4%
<b>Other Statutes</b>	19.7%	16.1%	26.9%	26.8%	21.1%	22.9%
<b>Common Law</b>	11.8%	11.2%	18.5%	16.9%	5.6%	14.3%
<b>Substantive Canons</b>	13.4%	15.4%	12.0%	21.1%	18.3%	14.3%
<b>Practical Consequences*</b>	28.3%	16.8%	38.9%	33.8%	50.7%	31.4%
<b>Purpose*</b>	10.2%	11.2%	21.3%	12.7%	45.1%	17.1%
<b>Intent*</b>	3.9%	2.1%	13.0%	7.0%	22.9%	14.9%
<b>Legis. Hist.*</b>	6.3%	6.3%	17.6%	14.1%	28.2%	28.6%

90. Percentages reported in each row represent the number of opinions authored by each Justice that invoked the listed interpretive canon, divided by the total number of statutory interpretation opinions each Justice authored (that total number is reported below each Justice's name as n= X).

91. The total number of opinions reflected in the Table is 965, rather than 995 because the Table omits 30 per curiam opinions issued during the period studied.

<b>Canons/ Interpretive Tools</b>	<b>Ginsburg (n=101)</b>	<b>Breyer (n=118)</b>	<b>Stevens (n=61)</b>	<b>Sotomayor (n=79)</b>	<b>Kagan (n=48)</b>	<b>Gorsuch (n=3)</b>
<b>Text / Plain Meaning</b>	27.7%	25.4%	42.6%	44.3%	47.9%	66.7%
<b>Sup. Court Precedent</b>	53.5%	55.9%	54.1%	64.6%	54.2%	0.0%
<b>Dictionary Definitions</b>	10.9%	14.4%	16.4%	31.6%	39.6%	33.3%
<b>Lang. Canons / Whole Act Rule</b>	23.8%	21.2%	24.6%	46.8%	31.3%	33.3%
<b>Other Statutes</b>	21.8%	16.9%	16.4%	25.3%	16.7%	0.0%
<b>Common Law</b>	6.9%	14.4%	16.4%	16.5%	8.3%	0.0%
<b>Substantive Canons</b>	17.8%	9.3%	24.6%	13.9%	20.8%	0.0%
<b>Practical Consequences*</b>	38.6%	44.9%	29.5%	41.8%	35.4%	33.3%
<b>Purpose*</b>	33.7%	40.7%	29.5%	31.6%	43.8%	0.0%
<b>Intent*</b>	16.9%	41.0%	40.0%	20.3%	4.2%	0.0%
<b>Legis. Hist.*</b>	31.7%	42.4%	37.7%	38.0%	29.2%	0.0%

\* Indicates that a one-way ANOVA test, using a Bonferroni multiple-comparison test, reveals a significant difference between rates of reliance by different Justices in the opinions they authored at  $p < .05$ . (For Text or Plain Meaning  $p=.000$ ; Practical Consequences  $p=.0091$ ; Purpose  $p=.000$ ; Intent  $p=.000$ ; and Legislative History  $p=.0001$ ). In other words, for these particular interpretive tools, the patterns or differences in rates of reference across Justices were less than 5 percent likely to have occurred merely by chance.

Moreover, some textualist-leaning Justices openly referenced purposive interpretive tools on a regular basis in the opinions they authored: Justices Kennedy and Alito referenced legislative history in 28.2 percent and 17.6 percent of the opinions they authored, respectively, and statutory purpose in 45.1 percent and 21.3 percent of the opinions. In addition, Justice Kennedy referenced legislative intent in 22.9 percent of the opinions he authored.<sup>92</sup> As discussed further in Part IV.C, these data suggest that there may be a textualist–purposivist continuum on the modern Court, rather than a strict textualist–purposivist divide.

Finally, Table 3a reports the frequency with which the members of the Roberts Court openly referenced statutory purpose and intent *in conjunction with* other interpretive tools. The data reveal that in those cases in which the members of the Roberts Court invoked the statute’s purpose or intent, they also often referenced precedent, practical consequences, and the ordinary or plain meaning of the statute’s text. In addition, references to purpose and intent were regularly—and predictably—accompanied by citations to the legislative history. Interestingly, purpose and intent also were linked to use of the whole act rule—a traditional textualist tool. This demonstrates a tendency to supplement purposive analysis with text-focused arguments. In short, the data suggest that the Court’s purposivist Justices—who were responsible for the majority of open references to purpose and intent—were pluralistic in their use of interpretive resources, often weaving their purpose- and intent-based analysis together with more text-based tools.

---

92. See *supra* Table 2.

**Table 3a**  
**Use of Other Interpretative Tools in Opinions that Openly**  
**Referenced Purpose and Intent**

<b>Interpretative Tool</b>	<b>Purpose (n=248)</b>	<b>Intent (n=118)</b>
<b>Text / Plain Meaning</b>	48.4% (n=120)	47.5% (n=56)
<b>Dictionary Definitions</b>	27.4% (n=68)	16.9% (n=20)
<b>Other Statutes</b>	24.2% (n=60)	30.5% (n=36)
<b>Common Law</b>	12.9% (n=32)	11.9% (n=14)
<b>Substantive Canons</b>	16.5% (n=41)	18.6% (n=22)
<b>Precedent</b>	59.3% (n=147)	55.9% (n=66)
<b>Practical Consequences</b>	48.4% (n=120)	44.9% (n=53)
<b>Purpose</b>	N/A	44.9% (n=53)
<b>Intent</b>	21.4% (n=53)	N/A
<b>Legis. History</b>	44.8% (n=111)	50.0% (n=59)
<b>Whole Act Rule</b>	37.1% (n=92)	38.1% (n=45)
<b>Lang. Canons</b>	6.5% (n=16)	3.4% (n=4)
<b>Grammar Canons</b>	2.0% (n=5)	5.1% (n=6)

In one sense, this may all seem rather unextraordinary. Aside from textualist Justices' high rate of references to practical consequences and purposivist Justices' continued use of purposive interpretive tools in the face of the Court's pronounced move toward text-based analysis, we might well have predicted that textualist-leaning Justices would reference text, precedent, the whole act rule, language, and grammar canons frequently. Indeed, we might even applaud them for sticking to their theoretical guns and refraining, for the most part, from relying frequently on legislative history, purpose, or intent. But if we look closely at the textualist Justices' opinions in these cases, we find some surprising trends at work. Notably, we see purpose and intent creeping in through the back door. For although the textualist Justices' opinions did not directly or expressly rely on purpose or intent, their use of practical consequences, the whole act rule, and language canons contained notable speculation about, and even construction of, legislative purpose and intent. The next Part examines this phenomenon in greater detail, suggesting that this practice goes beyond the mere use of text as the "best evidence" of intent and purpose or identifying the meaning that a reasonable reader would attribute to a statute.

### III. TEXTUALISTS' PURPOSE BY OTHER MEANS

Once we move beyond surface statistics and examine closely the Court's references to practical consequences, the whole act rule, and language canons such as *noscitur a sociis*, we find that there is more than a little hidden purpose and legislative intent at work. This is true of opinions authored by textualist, textualist-leaning, and purposivist Justices, although the purposivist Justices also frequently invoked purpose and intent outright in the opinions they authored. The textualist and textualist-leaning Justices, by contrast, tended not to expressly invoke purpose or intent but, rather, engaged in oblique purposive analysis and deductions through other interpretive tools. In so doing, the textualist and textualist-leaning Justices used traditional textualist tools, and even pragmatic reasoning, not merely to identify how "a skilled, objectively-reasonable user of words' would have understood the statutory text in context,"<sup>93</sup> but to insist that X reading

---

93. Manning, *What Divides*, *supra* note 25, at 75 (quoting Easterbrook, *Original Intent*, *supra* note 41, at 65).

could not be correct because it contravenes Congress’s actual purpose or intent. That is, they regularly went beyond using textual canons and tools to decipher what an ordinary reasonable person would understand the language of the statute to mean and traversed into guessing or asserting that Congress had X specific intent or Y specific purpose in mind when it enacted the statute.

#### A. *Noscitur a Sociis* and *Ejusdem Generis*

Perhaps the most interesting doctrinal discovery is that the textualist and textualist-leaning Justices on the Roberts Court regularly used two tried-and-true textualist canons, *noscitur a sociis* and *ejusdem generis*, to infer an underlying statutory purpose. *Noscitur a sociis* directs that when a word or phrase in a list is unclear, its meaning “should be determined by the words immediately surrounding it.”<sup>94</sup> *Ejusdem generis* similarly dictates that “when a general word or phrase follows a list of specifics, the general word or phrase will be interpreted to include only items of the same class as those listed.”<sup>95</sup> This Article’s finding that the Court’s textualist and textualist-leaning Justices use these canons to infer statutory purpose is significant because the linguistic canons are widely heralded as “rule-like,” “predictable,” and “objective” interpretive tools that point clearly to one correct statutory meaning and “constrain” judicial discretion<sup>96</sup>—not as open-ended interpretive guides that invite judicial speculation into amorphous concepts such as legislative purpose or

---

94. *Noscitur a sociis*, BLACK’S LAW DICTIONARY (10th ed. 2014). *Noscitur a sociis* translates as “it is known by its associates.” *Id.*

95. *Ejusdem generis*, BLACK’S LAW DICTIONARY (10th ed. 2014). *Ejusdem generis* translates as “of the same kind or class.” *Id.* While my coding did not separately measure the Court’s reliance on these two Latin canons, the overall reference rate for all language and grammar canons combined was 8.3 percent.

96. See, e.g., SCALIA & GARNER, *supra* note 26, at xxviii–xxix (claiming that the canons “will curb—even reverse—the tendency of judges to imbue authoritative texts with their own policy preferences” and provide “certainty” and “predictability” in statutory interpretation); LAWRENCE M. SOLAN, THE LANGUAGE OF JUDGES 38 (1993) (considering judicial treatment of syntax canons as “hard and fast rule[s] of law”); Gorsuch, *supra* note 79, at 917 (“[Canons] confine the range of possible outcomes and provide a remarkably stable and predictable set of rules . . . .”); Bradford C. Mank, *Is a Textualist Approach to Statutory Interpretation Pro-Environmentalist?: Why Pragmatic Agency Decisionmaking Is Better than Judicial Literalism*, 53 WASH. & LEE L. REV. 1231, 1238–39 (1996) (“Justice Scalia and other new textualists . . . use canons of construction . . . to provide a fixed, ‘objective’ meaning.”); Mendelson, *supra* note 70, at 76, 87 (noting that many defenders of textual canons argue that “canons are rule-like” and “represent clear interpretive rules that can coordinate and constrain judicial decisionmaking and render interpretation more predictable”).

intent.<sup>97</sup> This Section examines some illustrative cases and notes that the *noscitur a sociis* and *ejusdem generis* canons by their nature confer significant discretion on judges and virtually require judicial identification of a statutory purpose—so it should come as little surprise that the Court’s textualists have been using them to construct or assert a statutory purpose in a number of cases.

Consider the following examples:

*Dolan v. United States Postal Service*<sup>98</sup> involved the Federal Tort Claims Act (“FTCA”), which generally waives the United States’ sovereign immunity for negligent acts committed by federal government employees.<sup>99</sup> The FTCA contains thirteen exceptions, including an exception for “[a]ny claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter.”<sup>100</sup> *Dolan* raised the question whether a private citizen who was injured when she tripped over a package negligently left on her porch by a postal service employee could sue the United States—or whether such a lawsuit was barred because it arose out of the “negligent transmission” of postal matter.<sup>101</sup> In an opinion authored by Justice Kennedy, the Court ruled that the “negligent transmission” exception did not bar the lawsuit.<sup>102</sup> In so ruling, it emphasized that “the words ‘negligent transmission’ . . . follow two other terms, ‘loss’ and ‘miscarriage,’” and insisted that those terms “limit the reach” of the third term, “transmission.”<sup>103</sup> The Court then invoked the *noscitur a sociis* canon—although without naming it explicitly—explaining that “[a] word is known by the company it keeps”<sup>104</sup> and that “[w]ords

---

97. Scalia and Garner have acknowledged the potential “indeterminacy” of the *ejusdem generis* canon, but not the inherently purposive nature of the act of identifying a common thread connecting list terms. SCALIA & GARNER, *supra* note 26, at 207. However, they caution against “exaggerat[ing]” the difficulty of identifying the correct connecting thread and endorse the canon nonetheless. *Id.* at 208. Justice Kavanaugh similarly has noted that the *ejusdem generis* canon is indeterminate, but not that it invites judicial construction of a statutory purpose. Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2160–61 (2016) (book review). Unlike Scalia and Garner, he recommends abandoning the canon because it confers too much discretion on judges. *See id.* Neither Scalia and Garner nor Kavanaugh has noted the indeterminacy of the *noscitur a sociis* canon.

98. *Dolan v. U.S. Postal Serv.*, 546 U.S. 481 (2006).

99. *Id.* at 484.

100. *Id.* at 485 (alteration in original) (quoting 28 U.S.C. § 2680(b)).

101. *Id.*

102. *Id.* at 483.

103. *Id.* at 486.

104. *Id.* (quoting *Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307 (1961)).

grouped in a list should be given related meaning.”<sup>105</sup> Reasoning that “mail is ‘lost’ if it is destroyed or misplaced and ‘miscarried’ if it goes to the wrong address,” the Court concluded that these terms “refer to failings in the postal obligation to deliver mail in a timely manner to the right address.”<sup>106</sup> Because “negligent transmission” follows these two words, “it would be odd” if that term “swept far more broadly” to bar recovery for injuries that are “caused by postal employees but involve neither failure to transmit mail nor damage to its contents.”<sup>107</sup>

This is a classic application of the *noscitur a sociis* canon—and one that quietly divines Congress’s organizing purpose and intent. By defining the common thread that connects the terms “loss” and “miscarriage” narrowly to encompass “failings in the postal obligation to deliver mail in a timely manner to the right address”<sup>108</sup>—rather than broadly to cover, say, “mistakes made by postal service employees”—the Court effectively decided that Congress’s specific *intent* was to retain sovereign immunity for the government against damages resulting from a citizen’s failure to *receive* mail, but not against all damages caused by postal service employees. This conclusion was not inevitable. Indeed, the Third Circuit had unanimously found just the opposite, citing the statute’s “expansive language” as evidence of “Congress’s intent to broaden rather than limit” the reach of the statutory exception.<sup>109</sup> Justice Thomas’s dissent similarly argued that reading the listed statutory terms to cover only claims arising from “failings in the postal obligation to deliver mail” was an unnecessarily narrow move that would lead to confusing and arbitrary line drawing.<sup>110</sup> Instead, he, like the Third Circuit, would have defined the common denominator connecting those terms more broadly—and thereby expanded the statute’s intended reach—to cover any tort committed by a postal service employee.<sup>111</sup>

---

105. *Id.* at 487 (quoting *Dole v. United Steelworkers of Am.*, 494 U.S. 26, 36 (1990)).

106. *Id.*

107. *Id.*

108. *Id.*

109. *Dolan v. U.S. Postal Serv.*, 377 F.3d 285, 288 (3d Cir. 2004).

110. *Dolan*, 546 U.S. at 495–97 (Thomas, J., dissenting).

111. *Id.* at 494. There are several other similar examples of cases in which the Court’s textualist-leaning Justices used the *noscitur a sociis* canon to impute purpose or intent to Congress. See *Paroline v. United States*, 572 U.S. 434, 448 (2014) (“The first five categories provide guidance to district courts as to the specific types of losses *Congress thought* would often be the proximate result of a Chapter 110 offense . . . .” (emphasis added)); *Maracich v. Spears*, 570 U.S. 48, 62–64 (2013) (holding that the common thread connecting the terms “service of process, investigation in anticipation of litigation, and the execution or enforcement of judgments

The textualist-leaning Justices similarly have employed the *ejusdem generis* canon in a manner that imputes a specific purpose or intent to Congress. In *James v. United States*,<sup>112</sup> for example, the Court considered the residual clause of a sentencing-enhancement provision of the Armed Career Criminals Act (“ACCA”), which imposed a mandatory sentence of fifteen years for a defendant convicted of possessing a firearm “if the defendant ha[d] three prior convictions ‘for a violent felony or a serious drug offense.’”<sup>113</sup> At the time, the ACCA defined a “violent felony” as “any crime punishable by imprisonment for a term exceeding one year . . . that . . . is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.”<sup>114</sup> The statutory question was whether *attempted* burglary qualified as “conduct that presents a serious potential risk of physical injury to another.”<sup>115</sup> The defendant argued that it did not, invoking the *ejusdem generis* canon and arguing that the “common attribute” of the offenses specifically enumerated in the statute was that all were “*completed* offenses.”<sup>116</sup> The Court, in an opinion authored by Justice Alito, rejected that reading, finding instead that the “most relevant common attribute” of the enumerated offenses was that all “create significant risks of bodily injury or confrontation that might result in bodily injury.”<sup>117</sup> Justice Scalia dissented, offering a third *ejusdem generis* common denominator—that the “otherwise” clause should be read to encompass “conduct that resembles, insofar as the degree of such risk is concerned, the previously enumerated crimes.”<sup>118</sup>

As in *Dolan*, the act of identifying a common theme connecting the listed items required a fair amount of guesswork about Congress’s underlying purpose in enacting the statute. And such guesswork, as

---

and orders” in 18 U.S.C. § 2721(b)(4) is that they involve attorney’s conduct when acting as an officer of the court conducting litigation, not as a commercial actor soliciting client business); *Crawford v. Metro. Gov’t of Nashville & Davidson Cty.*, 555 U.S. 271, 282 (2009) (Alito, J., concurring) (“It is noteworthy that all of the other conduct protected by this provision—making a charge, testifying, or assisting or participating in an investigation, proceeding, or hearing—requires active and purposive conduct.”).

112. *James v. United States*, 550 U.S. 192 (2007), *overruled by Johnson v. United States*, 135 S. Ct. 2551 (2015).

113. *Id.* at 195 (quoting 18 U.S.C. § 924(e)(1) (2000 & Supp. IV)).

114. *Id.* at 196 (quoting 18 U.S.C. § 924(e)(2)(B)).

115. *Id.* at 197.

116. *Id.* at 199 (emphasis added).

117. *Id.*

118. *Id.* at 218 (Scalia, J., dissenting).

elaborated in Part IV, almost inevitably empowers judges to identify a purpose or intent that is consistent with their own views about what is reasonable or sensible. Indeed, each of the three “common attributes” identified in *James* reflected a different judgment about the sentencing enhancement’s intended goal: the defendant’s reading suggested a purpose or intent to cover only completed crimes but not attempted ones; the majority’s construction speculated that punishing *confrontations* that could lead to bodily injury was the statute’s objective; and Justice Scalia’s interpretation assumed a statutory intent to sweep in only those crimes that posed an equal or greater degree of risk than the enumerated crimes. None of these presumed goals or common attributes were obviously or inevitably correct. Indeed, the connecting themes selected by the majority and by Justice Scalia added significantly to the text of the statute—which does not contain the terms “confrontation” or “resembles” or “least dangerous.” Thus, far from pointing neatly and precisely to the one correct meaning that a reasonable reader would attribute to the statute, the *ejusdem generis* canon afforded the Justices in *James* significant discretion and interpretive license to define the statute’s scope and purpose as they saw fit.<sup>119</sup>

Purposivist Justices also impute purpose and intent to Congress when they employ the *noscitur a sociis* and *ejusdem generis* canons, but when they do so, the work that statutory purpose performs tends not to be so hidden or oblique. This is because the purposivist Justices often openly invoke statutory purpose or legislative intent alongside their *noscitur* and *ejusdem* arguments, so that these language canons fit into a broader overall discussion about purpose and intent—rather than using such canons indirectly, and perhaps even unintentionally, to

---

119. Additional cases illustrate the inherent discretion and purposive analysis entailed in applying the *ejusdem generis* canon. *See, e.g.*, *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 163 (2012) (declining to apply the *ejusdem generis* canon to an FLSA overtime exception because it “would defeat Congress’ intent to define ‘sale’ in a broad manner” and would render the “other disposition” clause “meaningless”); *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 109, 114–15 (2001) (holding that *ejusdem generis* suggests that an FAA exemption excluding “contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce” applies only to transportation workers). Conflicting interpretations of the same statute also help to illuminate the discretion involved in applying the canon. *Compare Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 230, 232 (2008) (Kennedy, J., dissenting) (concluding that the common thread connecting terms in the 28 U.S.C. § 2680(c) phrase “any officer of customs or excise or any other law enforcement officer” is officers involved in enforcing revenue laws or conducting border searches), *with id.* at 225–26 (majority opinion) (Thomas, J.) (stating that another plausible “common attribute” could be officers involved in “the assessment and collection of taxes and customs duties and the detention of property”).

construe a statutory theme on their own. In other words, when the purposivist Justices identify a common denominator connecting the words in a statutory list, they often do so in light of a legislative purpose or intent that *they have already identified* through other interpretive resources, whereas the textualist and textualist-leaning Justices are more likely to rely on the language canons alone.<sup>120</sup>

The plurality and concurring opinions in *Yates v. United States*<sup>121</sup> provide a good example of this difference between purposivist and textualist Justices' use of the *noscitur* and *eiusdem* canons to identify a statute's purpose. *Yates* involved a criminal evidence-tampering statute that punishes one who "knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence [an] investigation."<sup>122</sup> The statute was enacted as part of the Sarbanes-Oxley Act in the wake of the Enron financial scandal.<sup>123</sup> *Yates* was a commercial fisherman who caught undersized red grouper and instructed his crew to throw the fish overboard after being cited and told by a federal agent to retain the fish.<sup>124</sup> The statutory question was whether a "fish" is a "tangible object" within the meaning of the evidence-tampering statute.<sup>125</sup> Justice Ginsburg's plurality opinion concluded that a "fish" is not the kind of "tangible object" the statute was designed to reach.<sup>126</sup> The plurality opinion invoked numerous tools of statutory construction, including dictionary definitions, several whole-act-rule arguments, the rule of lenity, legislative history, the purpose of the statute, and the *noscitur a sociis* canon. Significantly, the opinion *opened* by noting that the evidence-tampering statute was enacted as part of the Sarbanes-Oxley Act in response to the Enron scandal.<sup>127</sup> It observed that prior to the Sarbanes-Oxley Act, there was a "conspicuous omission" in the law regarding document destruction and that Congress enacted the provision at issue to cure that

---

120. When textualist and textualist-leaning Justices do supplement their language-canon analysis, they tend to do so with precedent or practical-consequences arguments rather than purposivist-favored interpretive tools such as legislative history.

121. *Yates v. United States*, 574 U.S. 528 (2015).

122. *Id.* at 531 (plurality opinion) (quoting 18 U.S.C. § 1519).

123. *Id.* at 532.

124. *Id.* at 532–34.

125. *Id.* at 534.

126. *Id.* at 532.

127. *Id.*

omission.<sup>128</sup> The opinion reasoned that “it would cut [the statute] loose from its financial-fraud mooring to hold that it encompasses any and all objects, whatever their size or significance, destroyed with obstructive intent.”<sup>129</sup> Instead, the plurality concluded that, because “Congress trained its attention on corporate and accounting deception and cover-ups,” the Court should adopt “a matching construction” of the statute.<sup>130</sup> Having thus established that the statute’s purpose was limited to preventing document destruction in the course of financial fraud, the opinion then turned to several textual canons, including *noscitur a sociis*.

Specifically, the opinion noted that “tangible object” was the last in a list of terms that began with “any record [or] document.”<sup>131</sup> Accordingly, the plurality insisted, the term is “appropriately read to refer, not to any tangible object, but specifically to the subset of tangible objects involving records and documents, *i.e.*, *objects used to record or preserve information*.”<sup>132</sup> As in *Dolan* and *James*, the act of identifying a common denominator connecting the terms in the statutory list was inescapably purposive, in that it required the Court to decide what Congress’s goal was in enacting the statute. The difference is that in *Yates*, unlike in *Dolan* and *James*, the plurality had already identified Congress’s goal earlier in the opinion, when it discussed the statute’s financial-fraud-related roots and its focus on preventing document destruction. The act of finding a common denominator connecting the list terms was thus part and parcel of a larger, open, and express project of discerning the statute’s purpose and design.<sup>133</sup>

---

128. *Id.* at 536.

129. *Id.* at 532.

130. *Id.*

131. *Id.* at 544 (alteration in original).

132. *Id.* (emphasis added).

133. The case law is full of examples of purposivist Justices employing *noscitur a sociis* or *ejusdem generis* to derive statutory purpose. *See, e.g.*, *Life Tech. Corp. v. Omega Corp.*, 137 S. Ct. 734, 740 (2017) (concluding that in 35 U.S.C. § 271(f)(1) the term “substantial” should be interpreted in light of its neighboring terms “all” and “portion,” both of which convey a quantitative meaning); *Bullock v. BankChampaign, N.A.*, 569 U.S. 267, 274–75 (2013) (Breyer, J., dissenting) (looking to the neighboring terms “embezzlement” and “larceny” to provide context for “defalcation”); *Graham Cty. Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 559 U.S. 280, 303–04 (2010) (Sotomayor, J., dissenting) (interpreting 31 U.S.C. § 3730(e)(4)(A) and concluding that “Congress’ choice of two ‘clearly federal terms [to] bookend the not-so-clearly federal term’ [is] a ‘very strong contextual cue’” that the third term is also meant to apply only to federal agencies (first alteration in original) (quoting *United States ex rel. Wilson*

Justice Alito's concurring opinion, by contrast, employed the *noscitur a sociis* canon in a far less *openly* purposive manner—but one that contained inferences about statutory purpose all the same. Justice Alito's short opinion focused exclusively on the statute's text, and began with the *noscitur a sociis* and *ejusdem generis* canons, treating them together.<sup>134</sup> The opinion briefly explained what each canon means and then straightforwardly asserted that, “[a]pplying these canons to § 1519’s list of nouns, the term ‘tangible object’ should refer to something similar to records or documents.”<sup>135</sup> Although Justice Alito did not explain what features records and documents have in common, he turned to the statute’s list of verbs—“alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in”—and identified a common thread of “filekeeping.”<sup>136</sup> Next, he concluded that the phrase “makes a false entry in” must be limited in scope to items that can be filed because it “makes no sense outside of filekeeping.” He then reasoned that the term “alters” and especially the term “falsifies” are also “closely associated with filekeeping.”<sup>137</sup> Justice Alito’s *noscitur* and *ejusdem* analysis ended there, with no specific discussion about Congress’s purpose or the Enron-related origins of the statute. Yet despite the brevity of his analysis, it is difficult to view Justice Alito’s conclusion that the list items share a common thread of “filekeeping” as nonpurposive, purely textual analysis. The “filekeeping” common denominator indisputably limits the statute’s scope to written items that can be put in a file or in which a “false entry” can be made and imputes to Congress an intent to cover only such written, falsifiable items. It is difficult to imagine Justice Alito identifying “filekeeping” as the common thread connecting the verbs listed in the statute *absent a background understanding* that the statute was designed to prevent document destruction in the wake of the Enron scandal. In other words, although not explicitly mentioned, Enron and the statute’s financial-fraud-defeating purpose seem to be lurking in the shadows of Justice Alito’s conclusion that “alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in” *must* refer to filekeeping. Thus, purpose and intent seem to be playing some role in his opinion, although that role is hidden and unelaborated.

---

v. Graham Cty. Soil & Water Conservation Dist., 528 F.3d 292, 302 (4th Cir. 2008), *rev’d*, 559 U.S. 280 (2010)).

134. *Yates*, 574 U.S. at 549–50 (Alito, J., concurring).

135. *Id.* at 550.

136. *Id.* at 551.

137. *Id.*

And such backdoor purposivism often seems to have been at work when the textualist and textualist-leaning members of the Roberts Court employed the *noscitur a sociis* and *ejusdem generis* canons. In a sense, this should be unsurprising, because any time a court seeks to identify the common thread or theme connecting the words in a statutory list, it necessarily will end up determining—even if only indirectly—the goal it believes the legislature intended to accomplish. Indeed, the very task of articulating a common denominator is an exercise in searching for—and perhaps manufacturing—statutory purpose. Further, it is an exercise that leaves significant discretion in judges’ hands: judges are free to decide what common feature they think does, or should, connect the items in the list, to articulate that feature at whatever level of generality they deem appropriate, and to assert that the feature they identify is the one Congress had in mind when it wrote the statute. This is precisely the kind of discretionary free-for-all that textualists complain attends purposivist judges’ efforts to identify statutory purpose through traditional purposive tools such as legislative history and preambles: by articulating a broad, general connecting thread, a textualist judge can ensure that a statute is given a wide reach (or vice versa), just as a purposivist judge can ensure that a statute is given a broad or narrow reach by articulating a statutory purpose at a high or low level of generality.<sup>138</sup> Part IV explores the theoretical implications of this surprising parallel in how both textualists and purposivists supplement ordinary meaning.

### B. *The Whole Act Rule*

The whole act rule refers to a series of inferences that courts may draw about the meaning of one section of a statute based on how other sections of the statute are structured.<sup>139</sup> The members of the Roberts Court referenced whole-act-rule arguments in 27 percent (269 of 995) of the opinions they authored during the period between January 31, 2006 and July 1, 2017.<sup>140</sup> In many of these cases and opinions, the Court or its textualist and textualist-leaning Justices used the whole act rule in a manner that evoked or presumed Congress’s intent.

---

138. Cf. SCALIA & GARNER, *supra* note 26, at 18–19 (criticizing purposivists for manipulating the level of generality at which they articulate the statute’s purpose in order to reach their preferred reading of the text).

139. ESKRIDGE JR. ET AL., *supra* note 15, at 674–79.

140. See *supra* Table 1.

The most common formulation was as follows: the Court noted that X provision did not contain A limitation or requirement, while Y neighboring, similar provision of the statute did contain A limitation or requirement; the Court then reasoned that where one provision of a statute expressly states A, and another similar provision of the statute does not expressly state A, that difference should be viewed as deliberate and intentional—or, in a stronger version, should be taken to demonstrate that Congress did not intend for X provision to contain A limitation or requirement. This is sometimes referred to as the “meaningful variation” subset of the whole act rule.<sup>141</sup> The Court is essentially arguing that Congress *must not have intended*—or that *it does not make sense* for—X statutory provision to include A.<sup>142</sup> The meaningful-variation formulation is a standard logical inference, but it is by no means the only, inevitable inference one could draw from such statutory differences—nor does it necessarily accurately reflect Congress’s actual method of drafting statutes.<sup>143</sup> Indeed, members of the Roberts Court regularly disagreed with each other about what precise inference should be drawn from the inclusion of limitation A in one provision but not another.<sup>144</sup>

---

141. See, e.g., ESKRIDGE JR. ET AL., *supra* note 15, at 678 (describing the meaningful-variation maxim as imposing a “presumption that a change of wording denotes a change in meaning” (quoting P. ST. J. LANGAN, *MAXWELL ON THE INTERPRETATION OF STATUTES* 282 (12th ed. 1969)); Matthew R. Christiansen & William N. Eskridge, Jr., *Congressional Overrides of Supreme Court Statutory Interpretation Decisions, 1967–2011*, 92 TEX. L. REV. 1317, 1447–48 (2014); Krishnakumar, *Dueling Canons*, *supra* note 75, at 967; Deborah A. Widiss, *Undermining Congressional Overrides: The Hydra Problem in Statutory Interpretation*, 90 TEX. L. REV. 859, 873 (2012).

142. It is also possible to understand the Court to be saying that, given the statutory structure, “a reasonable reader” could *not* read the provision to include A. But even that formulation presumes congressional deliberateness and, more importantly, enables the Court to exercise significant judicial discretion over statutory meaning because meaningful variation is hardly the only, inevitable inference one could draw from Congress’s disparate treatment of provisions X and Y.

143. Cf. Christiansen & Eskridge, Jr., *supra* note 141, at 1448 (concluding that the meaningful-variation presumption is difficult to apply, even when congressional staff are aware of the canon, because different congressional committees are often involved in drafting different parts of the statute); Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901, 936 (2013) (reporting that judicial presumptions about internal consistency across statutory provisions fail to account for how Congress actually drafts statutes).

144. See Krishnakumar, *Dueling Canons*, *supra* note 75, at 967–70 (describing how competing opinions in the same case sometimes “duel” over the meaning of such discrepancies between similar statutory provisions and providing as examples *Carcieri v. Salazar*, 555 U.S. 379 (2009), and *Dean v. United States*, 556 U.S. 568 (2009)).

The Court's competing statutory constructions in *Dean v. United States*<sup>145</sup> provide a good example. *Dean* involved a sentencing-enhancement statute with three subparts: the first imposes a five-year mandatory-minimum enhancement if a firearm is “use[d] or carrie[d]” during and in relation to a violent crime, the second increases the enhancement to seven years “if the firearm is brandished,” and the third increases the enhancement to ten years “if the firearm is discharged.”<sup>146</sup> At issue was whether the ten-year mandatory enhancement applies if the gun is discharged accidentally, or whether there is an intent requirement for the ten-year enhancement.<sup>147</sup> A majority of the Court, in an opinion authored by Chief Justice Roberts and joined by all of the other textualist-leaning Justices, interpreted the statute not to contain an intent requirement, relying significantly on a “meaningful variation” argument.<sup>148</sup> Justice Roberts's opinion pointed to the “is brandished” clause immediately preceding the “is discharged” clause and noted that the former expressly includes an intent requirement because the brandishing must be done “*in order to intimidate*.”<sup>149</sup> The majority presumed that Congress's failure to include a similar intent requirement in the “is discharged” clause was intentional and deliberate.<sup>150</sup>

Justice Stevens's dissenting opinion in *Dean* also relied heavily on the whole act rule and the contrast between the express-intent requirement in the “is brandished” clause versus the lack of such a requirement in the “is discharged” clause—but drew very different inferences from this disparate drafting. In contrast to the majority, Justice Stevens began with an intent-through-statutory-structure argument, maintaining that the three enhancement clauses, taken together, evinced a congressional intent to provide escalating mandatory sentences for increasingly culpable conduct.<sup>151</sup> Accordingly, he read the intent requirement in the “is brandished” provision as evidence that the “is discharged” clause also must contain an intent requirement—because unintentional discharges are less culpable than intentional brandishing, and it would be nonsensical for clause (iii) to

---

145. *Dean v. United States*, 556 U.S. 568 (2009).

146. *Id.* at 571 (quoting 18 U.S.C. § 924(c)(1)(A)).

147. *Id.*

148. *Id.* at 572–73, 577.

149. *Id.* at 572–73 (emphasis in original) (quoting 18 U.S.C. § 924(c)(4)).

150. *Id.* at 573.

151. *Id.* at 578–79 (Stevens, J., dissenting).

impose a higher sentence for conduct that is less culpable than that described in clause (ii).<sup>152</sup> This intent argument was backed up with legislative history about how the statute came to be enacted, as discussed below.<sup>153</sup>

Notably, the majority opinion also made another language-canon argument that linked to congressional intent—one based on grammar rules and the fact that the “discharge” clause is written in the passive voice. Noting that “[t]he passive voice focuses on an event that occurs without respect to a specific actor, and therefore without respect to any actor’s intent or culpability,” the majority insisted that Congress’s decision to frame the “discharge” clause in the passive voice demonstrated that the clause did not require proof that the discharge was intentional.<sup>154</sup> In other words, the majority used a grammar principle—that the passive voice focuses on the action rather than the actor—to infer that Congress must not have cared about the mental state of the defendant when it drafted the clause at issue.

Ultimately, the inferences that Justices Roberts and Stevens drew from the statutory text seem to depend less on grammar rules or logical inferences than on the Justices’ personal views about the level of culpability associated with an accidental discharge of a gun. Indeed, the opposing opinions in the case appear to impute to Congress the purpose or design that each Justice believed made the most sense or worked the fairest result *in light of his own views about the blameworthiness of the defendant’s conduct*. Chief Justice Roberts’s majority opinion, for example, contains several clues that he viewed the accidental discharge at issue as highly culpable. Specifically, he noted that “[t]he fact that the actual discharge of a gun covered under § 924(c)(1)(A)(iii) may be accidental *does not mean that the defendant is blameless*”; “[a]n individual who brings a loaded weapon to commit a crime runs the risk that the gun will discharge accidentally”; and “*the defendant is already guilty of unlawful conduct twice over.*”<sup>155</sup> Conversely, Justice Stevens’s dissenting opinion contains comments indicating that he viewed the accidental discharge as less blameworthy, including the criticism that the majority’s ruling subjects the petitioner to an increased sentence “*for an accident that caused no harm*”<sup>156</sup> and

---

152. *Id.* at 579.

153. *Id.*; see *infra* note 165 and accompanying text.

154. *Dean*, 556 U.S. at 572.

155. *Id.* at 576 (emphasis added).

156. *Id.* at 578 (Stevens, J., dissenting) (emphasis added).

the insistence that a crime requires the “concurrency of an evil-meaning mind with an evil-doing hand.”<sup>157</sup> Thus, as with the *noscitur a sociis* and *ejusdem generis* canons, the Court’s application of the whole act rule left significant room for judicial discretion and presumption of a legislative intent that corresponded to the Justices’ own normative preferences.<sup>158</sup>

Textualist Justices also use other forms of the whole act rule, in addition to the meaningful-variation test, to make inferences and assumptions about congressional intent. They sometimes, for example, combined observations about a statute’s structure with a negative-inference language canon<sup>159</sup> to argue that Congress’s attention to detail or express coverage of certain subjects indicated its intent not to cover other subjects.<sup>160</sup> Similarly, they sometimes employed the rule against superfluities to assume that Congress could not have intended an interpretation that would cause overlap, or duplicative coverage, by two separate sections of the same statute.<sup>161</sup> Importantly, textualist and purposivist Justices continue to employ the whole act rule to impute intent to Congress despite evidence indicating that Congress is frequently repetitive in its drafting and often *does* intend for two different statutory provisions to overlap in their coverage. Indeed, a recent empirical study of congressional drafting practices based on interviews with congressional staffers found that drafters sometimes

---

157. *Id.* at 580 (quoting *Morissette v. United States*, 342 U.S. 246, 251–52 (1952)).

158. *See Carcier v. Salazar*, 555 U.S. 379, 384, 389–90, 409–10 (2009) (containing majority and dissenting opinions that draw opposing inferences based on the whole act rule).

159. The canon, known as *expressio unius est exclusio alterius*, provides that the expression of one thing indicates the exclusion of others. *See* ESKRIDGE JR. ET AL., *supra* note 15, at 668.

160. *See, e.g., Sandoz Inc. v. Amgen Inc.*, 137 S. Ct. 1664, 1675 (2017) (“The BPCIA’s ‘carefully crafted and detailed enforcement scheme provides strong evidence that Congress did not intend to authorize other remedies that it simply forgot to incorporate expressly.” (quoting *Great-W. Life & Annuity Ins. v. Knudson*, 534 U.S. 204, 209 (2002))); *Elgin v. Dep’t of Treasury*, 567 U.S. 1, 11–12 (2012) (“Given the painstaking detail with which the CSRA sets out the method for covered employees to obtain review of adverse employment actions, it is fairly discernible that Congress intended to deny such employees an additional avenue of review in district court.”); *CSX Transp., Inc. v. McBride*, 564 U.S. 685, 708 (2011) (Roberts, C.J., dissenting) (concluding that where a statute expressly abrogated numerous common law doctrines, its failure to expressly abrogate a proximate cause requirement shows that Congress intended to retain that common law doctrine); *Bruesewitz v. Wyeth LLC*, 562 U.S. 223, 232–33 (2011) (similar); *Credit Suisse Sec. (USA) LLC v. Billing*, 551 U.S. 264, 289–90 (2007) (“Other provisions in both Acts . . . suggest that Congress explicitly referred to States when it intended to impose a state-law limitation.”).

161. *See, e.g., Water Splash, Inc. v. Menon*, 137 S. Ct. 1504, 1509 (2017) (“[I]n order for Article 10(a) to do any work, it *must* pertain to sending documents for the purposes of service.”); *Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 232 (2008) (Kennedy, J., dissenting).

intentionally err on the side of redundancy.<sup>162</sup> Staffers gave several reasons for such deliberate repetitiveness, including the need to “capture the universe,” “because you just want to be sure you hit it,” or because “politically for compromise they must include certain words in the statute—that senator, that constituent, that lobbyist wants to see that word.”<sup>163</sup> This disconnect between the whole act rule’s directive and the way statutes are actually drafted is markedly at odds with the Justices’ insistence that Congress “must have” or “could not have” intended X interpretation of provision A because it is inconsistent with how provision B is drafted.<sup>164</sup>

Equally troubling, when the Court employs whole-act-rule arguments, it tends to do so in a manner that gives the appearance that the reading it is adopting is the one inevitably dictated by the statute’s structure—that X structural pattern inexorably reflects Y intent or meaning—and tends to downplay the work that inferences and assumptions about the statute’s scope and Congress’s intent are performing. Such claims to objectivity and inevitability are problematic because they cast a false aura of neutrality over the Court’s interpretation and obscure the judicial discretion and speculation inherent in the Court’s analysis.

Purposivist Justices also inevitably used the whole act rule to assert or speculate about congressional intent and statutory purpose. But when they did so, they tended to ground their arguments about statutory purpose or intent in other interpretive tools, and to be open about their reliance on purpose or intent, instead of giving the impression that their statutory construction was based on the application of neutral, objective textual canons alone. In the *Dean* case discussed above, for example, Justice Stevens’s dissenting opinion cited legislative history to support its contention that Congress intended for the statute to impose increasingly harsh punishments on increasingly culpable conduct.<sup>165</sup> Similarly, Justice Ginsburg’s plurality opinion in *Yates*, discussed earlier, married numerous whole-act-rule arguments—based on the evidence-tampering provision’s title, overlap

---

162. See Gluck & Bressman, *supra* note 143, at 934.

163. See *id.* at 934 (quoting respondents in a survey of congressional staffers).

164. See sources cited *supra* note 160.

165. See *Dean v. United States*, 556 U.S. 568, 579 (2009) (noting that a sentencing enhancement was enacted to override the Court’s ruling in *Bailey v. United States*, 516 U.S. 137 (1995), by imposing a five-year enhancement for simple possession of a firearm and additional penalties for more culpable behavior described in *Bailey*, including brandishing and actual discharge).

with a neighboring provision, and even its position within the criminal code<sup>166</sup>—with an open and frank emphasis on the provision’s purpose and citations to the legislative history.<sup>167</sup> By contrast, textualist-leaning Justice Alito’s concurring opinion in *Yates* simply asserted that the terms “alters” and “falsifies” *must be* “closely associated with filekeeping”—relying on the *noscitur a sociis* canon, without supporting legislative history or motivating mischief, to reach the same outcome.<sup>168</sup>

This is not to say that textualist-leaning Justices never openly link whole-act-rule arguments to statutory purpose, only that it is rare for them to do so.<sup>169</sup> In fact, when textualist or textualist-leaning Justices do rely openly on statutory purpose, this unusual behavior tends to get noticed. Chief Justice Roberts’s majority opinion in *King v. Burwell*,<sup>170</sup> for example, garnered significant attention from scholars and commentators—and drew sharp criticism from textualists<sup>171</sup>—precisely because of its unusually frank reliance on a purposive interpretive methodology.<sup>172</sup> While this kind of open linkage between statutory purpose and the whole act rule is rare, it serves as further evidence that textualist and textualist-leaning Justices regularly use whole-act-rule arguments to go beyond the mere text of the statute—and to opine about Congress’s intent.

### C. Practical Consequences

The textualist and textualist-leaning Justices on the Roberts Court regularly invoked practical reasoning in the opinions they authored—

---

166. *Yates v. United States*, 574 U.S. 528, 539–43 (2015) (plurality opinion).

167. *Id.* at 535 (discussing the statute’s Enron-related origins); *id.* at 540–42 (citing a Senate Report and the Congressional Record); *see also* *Howard Delivery Serv., Inc. v. Zurich Am. Ins. Co.*, 547 U.S. 651, 658–59 (2006) (Ginsburg, J.) (discussing the legislative history of the 1978 Bankruptcy Act amendments).

168. *Yates*, 574 U.S. at 551 (Alito, J., concurring).

169. There were 151 opinions in the dataset in which a textualist or textualist-leaning Justice employed the whole act rule; of these only 39 (25.8 percent) openly referenced the statute’s purpose. Twenty-four of these 39 were opinions authored by Justices Kennedy (14) or Alito (10).

170. *King v. Burwell*, 135 S. Ct. 2480 (2015).

171. *See supra* note 11.

172. *King* raised the question whether the Affordable Care Act (“ACA”) authorizes payment of health-insurance subsidies to qualified individuals who purchase health insurance through an exchange established by the *federal*—as opposed to state—government. 135 S. Ct. at 2487–88. Chief Justice Roberts’s majority opinion began with a purposive foray into the background history of the ACA, including lessons Congress learned from states’ experiences with health-insurance regulation during the 1990s, and then tied those lessons to the statute’s specific provisions. *Id.* at 2485–86.

referencing the practical consequences that an interpretation would produce in 31.2 percent of their opinions.<sup>173</sup> This in itself is significant, because practical considerations are entirely external to the statutory text and because textualists regularly denounce consequentialism as an inappropriate basis for judicial decision-making.<sup>174</sup> But what is more interesting, for our purposes, is that the textualist Justices often deployed practical consequences arguments in a manner that, at least implicitly and sometimes explicitly, presumed or imputed a specific purpose or intent to Congress.

The Court's intent-through-practical-consequences reasoning has tended to take one of two forms: (1) an absurd-results argument in which the Court insists that Congress could not have intended for the statute to mean X because X produces nonsensical results; or (2) a practical-consequences-with-a-dash-of-purpose argument in which the Court contends that a statute cannot mean X because X interpretation would be inconsistent with the statute's (presumed) underlying policy objectives. This Section discusses each of these forms of practical consequences arguments in turn.

1. *Absurd Results*. The absurd-results form of intent-imputing-practical-consequences argument has typically followed this pattern: the Court declares that it is adopting Y construction of a statute—explaining that X alternate construction would lead to absurd, incoherent, or otherwise unacceptable results—and then pivots to insist that these results would be so “topsy-turvy,” “calamitous,” or nonsensical, or would undermine Congress's statutory design so significantly, that *Congress could not possibly have intended* for the statute to mean X.

Consider a few examples:

In *Burlington Northern & Santa Fe Railway Co. v. White*,<sup>175</sup> the Court interpreted Title VII's antiretaliation provision, which forbids “discriminat[ion] against” an employee who has “made a charge, testified, assisted, or participated in” a Title VII proceeding or investigation.<sup>176</sup> The plaintiff was the only female employee who

---

173. See *supra* Table 1.

174. See, e.g., *Nixon v. Mo. Mun. League*, 541 U.S. 125, 141 (2004) (Scalia, J., concurring) (“I do not think, however, that the avoidance of unhappy consequences is adequate basis for interpreting a text.”); Manning, *Absurdity Doctrine*, *supra* note 26, at 2388–89 (criticizing the absurd-results exception to the plain meaning rule).

175. *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006).

176. *Id.* at 56 (quoting 42 U.S.C. § 2000e–3(a)).

operated the forklift at Burlington Northern's Tennessee Yard. She alleged that after she complained of sexual harassment by her supervisor, she was transferred from forklift duty to standard track-laborer tasks.<sup>177</sup> The statutory issue was whether a plaintiff alleging retaliation is required to show that the employer took an "adverse employment action"—as is required for substantive employment discrimination claims under Title VII—or whether retaliation can take other forms, such as reassigning an employee's duties.<sup>178</sup> The Court, in an opinion authored by Justice Breyer, ruled that retaliation claims, unlike substantive discrimination claims, can take other forms besides adverse employment action.<sup>179</sup> In so ruling, it articulated the following test for evaluating retaliation claims: "a plaintiff must show that a reasonable employee would have found the challenged action materially adverse, 'which in this context means it *well might have dissuaded a reasonable worker from making or supporting a charge of discrimination.*'"<sup>180</sup> It then concluded that the plaintiff had met this test.<sup>181</sup>

Justice Alito concurred, agreeing that the plaintiff had met the conditions necessary for asserting a retaliation claim, but disagreed with the Court's test.<sup>182</sup> After faulting the majority's statutory construction for lacking a "sound [textual] basis,"<sup>183</sup> he compared the language and purpose of the antiretaliation and substantive discrimination provisions and criticized the practical consequences that the Court's construction would produce. Along the way, he made several assumptions about Congress's intent.<sup>184</sup> Specifically, Justice Alito argued that the majority's test "leads logically to perverse results" because it sets up a situation in which the degree of protection afforded a retaliation victim is "inversely proportional to the severity of the original act of discrimination."<sup>185</sup> He reasoned that employees

---

177. *Id.* at 57–58.

178. *Id.* at 57, 60 (discussing the extent of the phrase "discriminate against" in Title VII's antiretaliation provision).

179. *Id.* at 64–65 ("[T]he antiretaliation provision, unlike the substantive provision, is not limited to discriminatory actions that affect the terms and conditions of employment.").

180. *Id.* at 68 (emphasis added) (quoting *Rochon v. Gonzales*, 438 F.3d 1211, 1219 (D.C. Cir. 2006)).

181. *Id.* at 70 (finding sufficient evidence to support the jury's determination that the challenged actions were materially adverse).

182. *Id.* at 80 (Alito, J., concurring).

183. *Id.* at 77.

184. *See id.* at 77–78.

185. *Id.*

who had faced severe discrimination would not easily be dissuaded from filing discrimination charges because the benefits of filing are high in such cases, and that such employees therefore would have a hard time meeting the “only those retaliatory acts that would dissuade a reasonable worker” standard.<sup>186</sup> By contrast, employees who faced milder forms of discrimination might more easily be dissuaded from filing charges because the costs of filing might outweigh the benefits when the discriminatory harm is mild.<sup>187</sup> “These topsy-turvy results,” he argued, “make no sense.”<sup>188</sup> Justice Alito also criticized the majority’s test on the ground that it created a “loose” and “unclear” causation standard that would prove difficult to implement.<sup>189</sup> Taken together, he insisted, “[t]he practical consequences of the test that the majority adopts strongly suggest that this test *is not what Congress intended*.”<sup>190</sup>

Justice Alito’s practical-reasoning-infused-with-intent argument goes far beyond the semantic context that Manning described as the defining feature of modern textualism. It focuses not on what meaning an objectively reasonable user of words would understand the statutory term “discriminate against” to mean but rather on the policy consequences that the majority’s construction of that statutory term would engender. In that sense, Justice Alito’s reasoning is very much based on the kind of “policy context” that Manning contends purposivist judges privilege<sup>191</sup>—rather than on the “semantic context” that is supposed to be at the core of textualist analysis. Moreover, it substitutes Justice Alito’s intuition about what constitutes a “topsy-turvy” or unacceptably confusing test for Congress’s.

Justice Thomas’s dissenting opinion in *Gonzalez v. United States*<sup>192</sup> made a similar absurd-results argument that indirectly circled around to congressional intent. *Gonzalez* raised the question whether the Federal Magistrate Act (“FMA”) delegates authority to magistrate judges to preside over juror selection in felony criminal trials, or whether the defendant’s personal consent is required.<sup>193</sup> A majority of

---

186. *Id.*

187. *Id.* at 78.

188. *Id.*

189. *Id.* at 79.

190. *Id.* at 77 (emphasis added).

191. See *supra* notes 36–40 and accompanying text.

192. *Gonzalez v. United States*, 553 U.S. 242 (2008).

193. *Id.* at 244–45.

the Court ruled that consent by defense counsel alone is enough.<sup>194</sup> Justice Thomas dissented, noting among other things that another section of the FMA required the defendant's express, informed consent before a magistrate judge may conduct a *misdemeanor* trial.<sup>195</sup> Justice Thomas called it "ironic" to conclude that Congress permitted delegation of felony jury selection upon a *lesser showing* of consent than that required for delegation in a misdemeanor trial.<sup>196</sup> Rather, he argued, "Congress' silence is particularly telling,"<sup>197</sup> and "Congress undoubtedly would have adopted something akin to [the misdemeanor provision's] requirements" if it had in fact meant to authorize delegation of felony jury selection.<sup>198</sup> In other words, Justice Thomas reasoned that the incongruity of differential treatment for felony and misdemeanor trials constituted powerful evidence that *Congress did not in fact mean to delegate* the right to preside over felony trials to magistrate judges. As in *Burlington Northern*, this type of "X reading would produce a nonsensical result, that I do not think Congress could have intended" reasoning does more than merely infer legislative intent from the statute's text or identify the meaning that a reasonably informed reader would attribute to the language at issue. Instead, it ignores the absence of an express informed-consent requirement in the statute's text and fashions one out of whole cloth in order to make sense of the statute.<sup>199</sup> This is the kind of move that purposivist judges

---

194. *Id.* at 250.

195. *Id.* at 262 (Thomas, J., dissenting).

196. *Id.* at 264.

197. *Id.* at 262.

198. *Id.* at 265.

199. *See, e.g.,* Cal. Pub. Emps.' Ret. Sys. v. ANZ Sec., Inc., 137 S. Ct. 2042, 2054 (2017) (determining that the petitioner's reading would allow actions filed decades after an original securities offering and concluding that "Congress would not have intended this result"); *Kellogg Brown & Root Servs., Inc. v. United States*, 135 S. Ct. 1970, 1979 (2015) (determining that the petitioner's interpretation "would lead to strange results that Congress is unlikely to have wanted"); *King v. Burwell*, 135 S. Ct. 2480, 2496 (2015) (showing that the adopted construction is necessary "to avoid the type of calamitous result that Congress plainly meant to avoid"); *POM Wonderful LLC v. Coca-Cola Co.*, 573 U.S. 102, 116 (2014) (finding that an alternate construction "would lead to a result that Congress likely did not intend"); *Horne v. Dep't of Agric.*, 569 U.S. 513, 528 (2013) (similar); *Brown v. Plata*, 563 U.S. 493, 516 (2011) ("This unnecessary period of inaction would delay an eventual remedy and would prolong the courts' involvement . . . . Congress did not require this unreasonable result . . . ."); *Cullen v. Pinholster*, 563 U.S. 170, 203 (2011) (Alito, J., concurring) (similar); *Sykes v. United States*, 546 U.S. 1, 17–21 (2011) (using crime statistics and the Court's own views about dangerousness to conclude that Congress intended a sentencing enhancement to apply to vehicular-flight offenses); *Hamilton v. Lanning*, 560 U.S. 505, 520 (2010) ("[T]he mechanical approach would produce senseless results that we do not think Congress intended."); *Magwood v. Patterson*, 561 U.S. 320, 356 (2010) (Kennedy, J.,

typically make and that textualists usually criticize as inconsistent with the judicial role.<sup>200</sup>

2. *Presumed Legislative Objectives.* Absurd-results arguments are not the only form of practical consequences reasoning that textualist Justices used to impute or assume congressional purpose or intent. A second form focused more closely on a presumed legislative objective. In these cases, the Court tended to describe certain consequences that X interpretation would produce, and then assert that those consequences would undermine a specific policy goal. The typical formulation was as follows:

- X interpretation would produce B practical consequences, and
- B practical consequences are inconsistent with goal A, which the statute at issue is designed to achieve, and
- X interpretation therefore cannot be correct.

In other words, the problem with X interpretation is not that it produces absurd or illogical results but, rather, that it produces results that conflict with a statutory goal or aim that the Court imputes to the statute. An example should help illustrate. In *Credit Suisse Securities (USA) LLC v. Simmonds*,<sup>201</sup> the Court considered § 16(b) of the Securities Exchange Act of 1934, which authorizes security holders to bring suit against the officers, directors, and certain beneficial owners of a corporation who realize any profits from the purchase or sale of the corporation's securities.<sup>202</sup> The statute requires that suits be brought within "two years after the date such profit was realized."<sup>203</sup> The question at issue was whether § 16(b)'s limitations period is tolled until the insider discloses his transactions in a § 16(a) filing, or whether it begins to run when the plaintiff knows or should know of the conduct at issue.<sup>204</sup>

---

dissenting) ("The Court is mistaken in concluding that Congress . . . would have intended this irrational result."); *Corley v. United States*, 556 U.S. 303, 316 (2009) (similar).

200. See, e.g., SCALIA & GARNER, *supra* note 26, at 22 (criticizing purposivists for "purport[ing] to give effect to . . . the sensible, workable outcomes that [the legislature] surely intended").

201. *Credit Suisse Sec. (USA) LLC v. Simmonds*, 566 U.S. 221 (2012).

202. *Id.* at 223.

203. *Id.* (quoting 15 U.S.C. § 78p(b)).

204. *Id.* at 225.

In a unanimous opinion authored by Justice Scalia, the Court held that the limitations period begins to run when the plaintiff knows or should know of the corporate officer's conduct, even if the officer has not yet filed the disclosures required under the statute.<sup>205</sup> In so ruling, the Court noted the practical potential for "endless tolling" that would result if the limitations period were tolled pending disclosure, even when plaintiffs knew of defendants' profiteering conduct in the interim.<sup>206</sup> Such "endless tolling," the Court argued, would be "inconsistent" and "out of step" with the purpose of statutes of limitations—which, the Court maintained, is to protect defendants against stale or unduly delayed claims.<sup>207</sup> Notably, this type of practical-consequences-based purposive argument is different from the manner in which purposivist Justices typically invoke statutory purpose in that it does not begin with or spend significant time developing the statute's purpose; rather, it begins with practical reasoning and backs into an inference about the statute's design or scope. Part IV explores this difference in greater detail.

Academic textualist John Manning has argued that judicial invocation of the absurd-results doctrine is a version of strong intentionalism, and that in order to stay true to their core commitments, textualists must cease using it as an interpretive escape hatch.<sup>208</sup> This Article's observation is related to but broader than Manning's in two important ways. First, the cases coded as containing practical-consequences reasoning in my dataset encompass more than merely "absurd results" arguments—they also include arguments that

---

205. *Id.* at 225–28.

206. *Id.* at 227.

207. *Id.* at 227–28. There are several other similar examples in which the Court wove together purposive and practical consequences arguments. *See* *Conkright v. Frommert*, 559 U.S. 506, 507 (2010) (finding that deferential review of the ERISA plan administrator's interpretations promotes efficiency, predictability, and consistency of interpretations across jurisdictions—in keeping with ERISA's goal of ensuring uniformity in plan administration); *Perdue v. Kenny A. ex rel. Winn*, 559 U.S. 542, 558–59 (2010) (finding that attorneys' fees enhancements above a "lodestar" amount would "serve only to enrich attorneys" and conflict with the statute's aim of ensuring that litigants without means can vindicate their rights); *Gonzalez v. United States*, 553 U.S. 242, 249–50, 252 (2008) (noting that "[t]he adversary process could not function effectively if every tactical decision required client approval" and the Federal Magistrates Act "evinces a congressional belief that magistrates are well qualified to handle matters of similar importance to jury selection" (first quoting *Taylor v. Illinois*, 484 U.S. 400, 418 (1988), and then quoting *Peretz v. United States*, 501 U.S. 923, 935 (1991))).

208. *See, e.g.*, Manning, *Absurdity Doctrine*, *supra* note 26, at 2390 ("Textualists therefore believe that the only safe course for a faithful agent is to enforce the clear terms of the statutes that have emerged from [the legislative] process.").

a rejected statutory interpretation would produce results that are “ironic” or inconsistent with a statute’s design or goals. Second, this Article has sought to show that there is more than just intentionalism at work when the Court invokes practical reasoning to justify its statutory reading; there is also usually some judicial speculation about or construction of a statutory purpose or policy objective.

The intent-through-practical-consequences and pragmatic-reasoning-with-a-dash-of-purpose arguments described in this Section also are employed by the purposivist Justices in a number of cases—indicating that this is a Court-wide phenomenon.<sup>209</sup> But purposivist Justices’ use of intent and purpose, even indirectly through practical consequences arguments, is to be expected. By contrast, the textualist Justices’ backdoor references to purpose and intent are far more interesting and unanticipated because textualism decries the legitimacy of non-text-based speculation about legislative intent and purpose.<sup>210</sup> And while pragmatic considerations always are about whether an interpretation is reasonable in the judge’s eyes, what the cases discussed above demonstrate is that textualist judges are taking their reasonableness arguments one step further—and connecting them to Congress’s intent or design. At times, when employing an absurd-results argument, their nod to legislative intent appears to be more of a throwaway assertion, perhaps designed to demonstrate that despite their atextual, pragmatic musings, textualist Justices are being faithful agents of the legislature. When the Court’s textualists follow the XYZ-practical-consequences-would-undermine-the-statute’s-purpose form of reasoning, by contrast, their attempt to connect their reasoning to the legislature’s specific purpose seems to be a key component of the practical argument itself, used to justify or convince readers that the

---

209. See, e.g., *Mississippi ex rel. Hood v. AU Optronics Corp.*, 571 U.S. 161, 171 (2014) (discussing how the Court’s rejected interpretation would have rendered the statute’s requirement “an administrative nightmare that Congress could not possibly have intended”); *Moncrieffe v. Holder*, 569 U.S. 184, 200 (2013) (arguing that the government’s approach “leads to consequences Congress could not have intended”); *Sebelius v. Auburn Reg’l Med. Ctr.*, 568 U.S. 145, 163 (2013) (Sotomayor, J., concurring) (“[A] contrary approach could have odd practical consequences and would attribute a strange intent to Congress . . .”); *Bruesewitz v. Wyeth LLC*, 562 U.S. 223, 250 (2011) (Sotomayor, J., dissenting) (“Because nothing . . . remotely suggests that Congress intended such a result, I respectfully dissent.”); *Greenlaw v. United States*, 554 U.S. 237, 251 (2008) (“We resist attributing to Congress an intention to render a statute so internally inconsistent.”); *Osborn v. Haley*, 549 U.S. 225, 248 (2007) (rejecting an interpretation that “would make scant sense”).

210. See, e.g., SCALIA & GARNER, *supra* note 26, at 343–46, 369–96 (labeling the use of legislative history, purpose, and intent as a “false notion”).

negative consequence identified is in fact disqualifying. The theoretical implications of textualists' indirect use of purpose and intent are explored in further detail in Part IV.

\* \* \*

Some might question how much work backdoor inferences about congressional purpose or intent are actually doing in the cases in which they are used by textualist Justices. That is, they might wonder whether purpose-infused Latin canons, the whole act rule, or practical consequences arguments are driving the interpretation at issue, or are merely secondary arguments made to support an interpretation arrived at primarily through other interpretive resources. In order to account for this possibility, each opinion involving a language canon, whole-act-rule argument, or practical consequences argument was coded for the weight it placed on that interpretive tool: “minimal,” “some,” or “heavy.” While this coding necessarily involved some judgment calls, I believe that it adds valuable texture to our understanding of how the Court uses these canons and tools.

The coding parameters were as follows: an opinion was coded as containing “passing or minimal reliance” on the whole act rule, a language canon, or practical reasoning if it made minimal reference to the canon or mentioned it as a fallback or add-on argument; an opinion was coded as involving “some reliance” on the relevant interpretive tool if it made more than minimal reference to the canon or tool, but did not rely on the canon or tool as the main justification for the construction it adopted; finally, an opinion was coded as containing “heavy or primary reliance” if it relied primarily or heavily on the canon or tool to justify the result reached.<sup>211</sup> Table 3b below reports the

---

211. An example may help illustrate. In *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142 (2012), the Court relied prominently on comparisons to other sections of the FLSA, the meaning of the term “any,” and the *ejusdem generis* canon to interpret a provision of the FLSA that defined “sale” to “include[] any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition.” *Id.* at 148, 162–64 (quoting 29 U.S.C. § 203(k)). Based on these linguistic and whole act considerations, the Court concluded that “the catchall phrase ‘other disposition’ is most reasonably interpreted as including those arrangements that are tantamount, in a particular industry, to a paradigmatic sale of a commodity,” and found that the pharmaceutical-sales detailers whose employment was at issue in the case thus constituted “outside salesmen” whose work was exempt from the overtime wage provisions of the FLSA. *Id.* at 164–65. The Court also noted, at the end of its opinion, that it would be “anomalous” to require overtime compensation for the pharmaceutical-sales detailers while at the same time exempting other employees who perform identical work except for the fact that the drugs they sell are administered by physicians rather than sold through a pharmacy with a prescription. *Id.* at 166.

results of this coding for opinions authored by the textualist and textualist-leaning Justices.

**Table 3b**  
**Relative Weight Placed on Language Canons, Whole Act Rule,**  
**and Practical Consequences by Textualist Justices**

	<b>Minimal Reliance (n=35)</b>	<b>Some Reliance (n=27)</b>	<b>Heavy Reliance (n=25)</b>
<b>Opinions That Reference Language Canons (n=54)</b>	16.7% (n=9)	42.6% (n=23)	40.7% (n=22)
<b>Opinions That Reference the Whole Act Rule (n=150)</b>	18.0% (n=27)	43.3% (n=65)	38.7% (n=58)
<b>Opinions That Reference Practical Consequences (n=164)</b>	25.6% (n=42)	45.7% (n=75)	28.7% (n=47)

As Table 3b shows, in the vast majority—over 75 percent—of the opinions in which textualist and textualist-leaning Justices employed language canons, the whole act rule, or practical consequences to construe a statute, they placed either “heavy” or “some” weight on these interpretive tools. Based on this crude measure, it appears that when the textualist and textualist-leaning Justices invoked the canons or tools that this Article has highlighted as susceptible to backdoor purposivism, they tended to rely on those tools in a meaningful way—and only occasionally to use them as secondary or “bonus” arguments.

This still begs the question of how frequently textualist Justices actually invoke the interpretive canons and tools that invite judicial speculation about purpose, intent, or both. That is a fair question; some of the canons discussed in this Part—such as the Latin canons—are

---

The Court’s opinion was coded as placing “heavy or primary” reliance on language canons and the whole act rule and as placing “passing or minimal” reliance on practical consequences.

available in only a subset of the statutory cases that come before the Court and may be used only infrequently. The data reveal that the textualist Justices employed the language canons as a whole, including both the Latin canons and grammar canons, in 10.3 percent of the opinions they authored; they employed the whole act rule in 28.9 percent of the opinions they authored; and employed practical consequences in 31.2 percent of the opinions they authored.<sup>212</sup> Notably, arguments based on the whole act rule and practical reasoning are available in nearly every case—with the result that purposivism can creep into the textualist analysis more frequently than one might think, even if not in every case.

#### IV. SOME IMPLICATIONS

As the cases discussed in Part III demonstrate, there is more to the story of how the U.S. Supreme Court uses purpose and intent in the age of textualism than statutory interpretation theory has thus far acknowledged. Textualists have not simply succeeded in confining purpose-based inquiries to a narrow analysis of the means that Congress provided for the statute's implementation, as John Manning suggests.<sup>213</sup> Nor is it the case that the Court as a whole has simply shifted its focus from interpreting statutes in light of their underlying purposes to using purpose and practical reasoning to evaluate ambiguity in a statute's text, as Richard Re has suggested.<sup>214</sup> While some cases undoubtedly follow these patterns, there is more at work in the Court's—and particularly textualist Justices'—treatment of purpose and intent than such theories account for. Indeed, the cases described in Part III suggest that textualist Justices sometimes articulate Congress's ulterior purpose and intent based on their own personal views about a statute's sensibility or their own judgment calls about what a statutory provision is designed to achieve.

These revelations stand in stark contrast to textualism's standard criticism of purposive interpretive tools—that they confer excessive

---

212. See *supra* Table 1. A recent study that searched Westlaw's database of all federal court opinions found that between January 1, 2000, and September 29, 2015, federal judges employed the *ejusdem generis* canon 458 times, the *noscitur a sociis* canon 296 times, and the whole act rule 4291 times. See John M. Golden, *Redundancy: When Law Repeats Itself*, 94 TEX. L. REV. 629, 653–54 & nn. 94 & 97 (2016). The figures for the Latin canons are likely understated, moreover, because the study captured only those cases that *explicitly* referenced the canons, and it is not uncommon for judges to employ the *noscitur* and *ejusdem* concepts without naming them.

213. See *supra* notes 48–54 and accompanying text.

214. See *supra* notes 55–61 and accompanying text.

discretion on judges and empower them to decide cases based on personal preferences rather than objective, neutral rules. Section A of this Part posits that textualist Justices' use of practical reasoning and language canons to infer purpose confers just as much discretion on judges as do purposivist-preferred interpretive tools such as legislative history or the mischief rule. Section B cautions that traditional textual canons often obscure the hidden normative baselines that influence how the Justices construe a statute, throwing a neutral, objective façade over policy-based or even ideological opinions. Section C turns to the question of what divides textualists from purposivists and suggests that the answer may be less than we think. That is, what separates textualists from purposivists may be merely their level of comfort with particular interpretive sources and the *order* in which they invoke legislative purpose in their statutory reasoning. In other words, there may be a divide, or more accurately a continuum, with respect to the sources individual Justices are willing to consult in their *common* search for Congress's specific intent—rather than a clean break between textualists' emphasis on objective meaning versus purposivists' emphasis on legislative policy goals and sensible outcomes. Further, there may be a difference among the Justices regarding whether they lead with statutory purpose or merely back into it as an interpretive aid or justification. The Section ends by evaluating whether these differences are material.

#### A. *Judicial Discretion*

As discussed in Part I, textualism is a formalist theory that focuses on the ordinary meaning of a statute's text and prides itself on its ability to cabin judicial discretion through the use of neutral, objective interpretive tools.<sup>215</sup> And yet the cases discussed in Part III reveal that textualist Justices regularly venture beyond the bounds of neutral, objective analysis to speculate and make judgment calls about Congress's purpose, intent, and the sensibility of particular interpretive

---

215. See, e.g., Eskridge, Jr., *New Textualism*, *supra* note 47, at 674 (“According to the new textualists, consideration of legislative history creates greater opportunities for the exercise of judicial discretion. . . . A focus on the text alone, it is argued, is a more concrete inquiry which will better constrain the tendency of judges to substitute their will for that of Congress.”); Peter J. Smith, *Textualism and Jurisdiction*, 108 COLUM. L. REV. 1883, 1902 (2008) (“In elevating statutory language over legislative history and statutory purposes by limiting the range of potentially ambiguous sources to which judges can properly refer, textualists hope to ‘constrain the tendency of judges to substitute their will for that of Congress.’” (quoting Eskridge, Jr., *New Textualism*, *supra* note 47, at 674)).

choices. In other words, textualism in practice often involves just as much judicial discretion and guesswork as does purposivism. Moreover, because the work that judicial discretion and speculation perform in the context of traditional textualist interpretive tools is largely hidden and unelaborated, the likelihood that textualist jurists will conflate their own policy preferences with those of Congress may be intensified.

Indeed, when textualist Justices infer congressional purpose or intent from textual canons or practical reasoning, the line between the inferred purpose and the Justices' personal intuitions can be awfully blurry. After all, judgments about what Congress logically, consistently, or rationally must have done are likely to bear a strong correlation to what seems logical, consistent, or rational to the Justice herself. Inferences about statutory purpose drawn from other interpretive tools—whether those tools are text based, like *noscitur* and the whole act rule, or normative, like practical consequences—necessarily require some guesswork and dot-connecting that inevitably create space for subjective judgment. In this sense, textualists' backdoor purposivism leaves just as much room for judicial discretion as traditional purposivist tools like legislative history, or the mischief that motivated Congress to enact a statute. Indeed, such backdoor references to purpose and intent may even create *more* space for judicial discretion than do traditional tools of purposive analysis—because whereas the traditional purposive tools tend to rely on external evidence such as the legislative record or documentation about the social problem Congress sought to redress, textualists' backdoor purposivism relies on extrapolations from the statute's text that are often based on judges' personal intuitions.

Consider, for example, the *noscitur a sociis* and *eiusdem generis* canons, two traditional text-based canons. The empirical study of congressional drafting practices cited earlier found that although staffers were not familiar with these Latin canons by name, they reported that the concepts underlying the canons accurately reflect how the terms in a statutory list relate to one another.<sup>216</sup> This suggests that the *noscitur* and *eiusdem* canons may in fact be useful, accurate guides to Congress's intent; and I confess to being partial to them myself as interpretive aids. However, there are some important limitations to relying on *noscitur* and *eiusdem* as the *exclusive*

---

216. Gluck & Bressman, *supra* note 143, at 933.

indicators of Congress's purpose or intent. First, even if these canons accurately capture Congress's practice of listing together items that share a common denominator, they leave significant room for judicial discretion in articulating what that common denominator is. In fact, it is common for majority and dissenting opinions in the same case to disagree about the common denominator that connects the items in a particular statutory list.<sup>217</sup> Further, judges retain significant discretion to articulate the common denominator that connects list items at whatever degree of generality they choose—and in so doing can control whether particular conduct is swept in or out of the statute's coverage. This is precisely the same criticism that Justice Scalia has leveled against traditional purposive analysis.<sup>218</sup> All of this means that while *noscitur a sociis* or *ejusdem generis* may accurately reflect a congressional choice to list together items that share a common connecting feature, the canons cannot tell us clearly what that connecting feature is—or how broad or narrow it is.<sup>219</sup> Not only are *noscitur a sociis* and *ejusdem generis* incapable, then, of eliminating judicial discretion—they may even invite it.

Further, there is little indication that the whole act rule—also regularly used by the Roberts Court's textualist Justices to infer congressional intent—accurately reflects congressional drafting practices or captures congressional purpose or intent. In fact, there is some compelling evidence that it does not.<sup>220</sup> Moreover, like the *noscitur* and *ejusdem* canons, the whole act rule leaves significant room

---

217. *Dolan* provides one such example. Compare *Dolan v. U.S. Postal Serv.*, 546 U.S. 481, 486–87 (2006) (finding that the common denominator connecting the list terms “loss, miscarriage, or negligent transmission” in 28 U.S.C. § 2680(b) is “failings in the postal obligation to deliver mail in a timely manner to the right address”), with *id.* at 495 (Thomas, J., dissenting) (arguing that the list term “negligent transmission” “encompass[es] more ground than the decidedly narrower terms ‘loss’ and ‘miscarriage’”). *Yates* provides another. Compare *Yates v. United States*, 574 U.S. 528, 532 (2015) (plurality opinion) (holding that the common theme connecting “tangible object” with “record [or] document” in 18 U.S.C. § 1519 is objects “used to record or preserve information”), with *id.* at 564 (Kagan, J., dissenting) (presenting the common theme as “things that provide information, and thus potentially serve as evidence”).

218. See, e.g., SCALIA & GARNER, *supra* note 26, at 18–19 (“The purposivist, who derives the meaning of text from purpose and not purpose from the meaning of text, is free to climb up this ladder of purposes and to ‘fill in’ or change the text according to the level of generality he has chosen.”); see also Easterbrook, *What Does Legislative History Tell Us?*, *supra* note 45, at 449 (“Shifting the level of generality—emphasizing the anticipated effects of a rule while slighting the rule itself—is a method of liberating judges from rules.”).

219. See *supra* Part III.A.

220. See Gluck & Bressman, *supra* note 143, at 906–08 (describing the results of a survey of congressional staffers regarding the drafting process).

for judicial discretion in application and, as the discussion of *Dean v. United States* in Part III demonstrated, majority and dissenting opinions regularly reach different interpretive conclusions while invoking the rule.<sup>221</sup>

Practical-consequences-based reasoning, which textualist Justices also invoked regularly, is no more likely to cabin judicial discretion and identify Congress's true purpose or intent than are the language canons. On the contrary, practical reasoning is notoriously open-ended and dependent on the intuitions and judgment of the individual judge. As scholars have pointed out, what is absurd to one judge may be merely strange or unusual to another; and what is absurd to one or more judges may be completely reasonable, or a price worth paying, to members of Congress.<sup>222</sup> For these reasons, it is difficult to conclude that textualists' practice of deriving legislative intent and purpose via other interpretive tools leads to a more accurate assessment of Congress's intent, or to less judicial discretion in defining that intent, than do traditional purposive interpretive tools.

Ultimately, then, the Court's textualist Justices may be doing the very thing they criticize purposivist Justices for—i.e., selecting statutory constructions that correlate with their own personal policy views and assuming that Congress shares their perspective. In so doing, they may be engaging in an exercise that is reminiscent of Professors Hart and Sacks's Legal Process school of thought, which presumed that legislatures are composed of "reasonable persons pursuing reasonable purposes reasonably" and directed interpreters to identify a statute's purpose and then construe the statute to effectuate that purpose.<sup>223</sup> Although the textualist Justices on the Roberts Court do not typically begin with the statute's purpose and extrapolate out from there, as Hart and Sacks advocated, they do assume that Congress is a rational actor and they do choose statutory readings that they believe will produce rational results. Moreover, like Hart and Sacks, they rely on

---

221. See *supra* Part III.B; see also Krishnakumar, *Dueling Canons*, *supra* note 75, at 967–71 (detailing numerous ways in which majority and dissenting opinions in the same case reach different interpretations while both employing the whole act rule).

222. See, e.g., Manning, *Absurdity Doctrine*, *supra* note 26, at 2431 (arguing that the absurdity doctrine "risks disturbing the outcomes of the legislative process by 'correcting' wording that Congress itself might have been unable—or at least unwilling—to correct"); Jonathan R. Siegel, *What Statutory Drafting Errors Teach Us About Statutory Interpretation*, 69 GEO. WASH. L. REV. 309, 326 (2001) ("[W]hat seems absurd to one judge may seem merely unexpected to another.").

223. HART & SACKS, *supra* note 21, at 1378.

their own individual intuitions and judgment to determine what is rational.

Textualists might offer several possible rejoinders to the suggestion that they are employing just as much (or more) judicial discretion and policy-driven decision-making as their purposivist counterparts. One such rejoinder is that textualist Justices are not actually placing much stock in congressional purpose or intent in these cases—or even seeking to uncover Congress’s *actual* intent. That is, the Justices could simply be *asserting* consistency with congressional intent in order to bolster their claims that the interpretation they have chosen is the correct one. This explanation seems plausible in the context of the absurd-results cases in which the Justices simply insist that Congress *must have—or could not have—intended* a particular interpretation because that interpretation would produce illogical, anomalous, or otherwise unsound results. The work in those cases appears to be performed primarily by the Justices’ pragmatic reasoning, and the link to congressional intent could be made merely to justify that pragmatic reasoning, rather than a serious attempt to discover and follow Congress’s likely intent.

However, in cases where textualist Justices assert that a particular interpretation cannot be correct because it would produce results that undermine a statute’s goals—for example, that the interpretation would allow “endless tolling” that is “out of step” with the general purpose of statutes of limitations<sup>224</sup>—they seem to be doing more than merely nodding at legislative purpose to justify their reasoning. Rather, in such cases the text-oriented Justices seem to be attempting to uphold what they perceive to be Congress’s actual purpose or policy goals. Likewise, when textualist Justices rely on the *noscitur a sociis* and *eiusdem generis* canons, they seem to be seeking the common thread or purpose that Congress actually had in mind when it chose the particular list words at issue, even if they fail to appreciate the discretion they are exercising in defining that common thread or purpose.

A second possible counter is that in inferring congressional purpose and intent through other interpretive tools, textualist Justices are serving as the *real* faithful agents of the legislature. As noted earlier, many textualists take the view that the enacted text is the best available evidence of Congress’s intent and that close attention to the

---

224. See *Credit Suisse Sec. (USA) LLC v. Simmonds*, 566 U.S. 221, 227–28 (2012).

text is the only way to accurately effectuate that intent.<sup>225</sup> Language canons such as *noscitur a sociis* and the whole act rule pay very close attention to the statute's text; thus, using such canons to derive legislative purpose could be considered entirely consistent with textualist theory. That is, language canons and the whole act rule could be viewed as quintessential mechanisms for using text as the "best evidence" of the statute's purpose or to identify the objective meaning that a "reasonably informed reader" would attribute to the statute. The problem with this argument, however, is that *noscitur* and *ejusdem* are not neutral, objective guides to the one inevitably correct construction of a statutory term. Indeed, as the cases discussed in Part III demonstrate, the Justices regularly disagree over the relevant common denominator between list terms—with normative and policy considerations often appearing to tip the scales in one direction or another. In short, relying on *noscitur* and *ejusdem* is more than an exercise in straightforward textual analysis or identification of the inevitable objective meaning that a reasonable reader would attribute to a statutory term. Rather, it is an exercise in *constructing* a common denominator and, in so doing, speculating about Congress's organizing purpose—in a manner similar to that called for by traditional purposive analysis. The same critique applies to the whole act rule, which lacks the legitimating feature of reflecting Congress's actual drafting practices.

In highlighting the above, this Article does not mean to suggest that textualist Justices engage in backdoor purposivism for nefarious reasons. In fact, it is possible that textualist jurists simply may not be fully cognizant, or deliberate, in their indirect construction of legislative purpose and intent when applying textual canons. Because textualist Justices are backing into purposive inferences rather than looking for Congress's intent and reasoning from the start, they may be somewhat unwitting about the role that purpose and intent are playing in their statutory constructions. When using the *noscitur a sociis* and *ejusdem generis* canons, for example, the purposive analysis conducted by the interpreter can be obscured or hidden: identifying a

---

225. See *supra* note 27 and accompanying text; see also, e.g., Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 544 (2012) ("[T]he best evidence of Congress's intent is the statutory text."); William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1480 n.3 (1987) (noting that textualists can argue that text is "the best evidence of what the legislature actually meant when it enacted the statute"); Carlos E. González, *Reinterpreting Statutory Interpretation*, 74 N.C. L. REV. 585, 597 (1996) (observing that some textualists look to statutory text as the best guide of legislative intent).

common denominator requires judges to think indirectly about what goal or aim Congress had in mind when it chose the terms in the list; it does not force them to do so openly or conscientiously. As a result, the Justices may not be fully mindful of the fact that they are essentially engaging in purpose-finding when they apply these canons. Rather, they may gesture at a perceived common thread connecting the list items at issue without giving thorough consideration to the larger implications that common thread has for the statute's purpose or considering how it fits into the larger picture.

Textualists might also take issue with the suggestion that backdoor purposivism could allow for *more* judicial discretion than does consulting legislative history. Specifically, they might argue that the sheer volume of legislative history available for any given statute is such as to allow the Justices to cherry-pick statements that support their preferred interpretations and that reliance on legislative history thus affords Justices *more* leeway than reliance on textual canons and tools. This is a long-standing textualist criticism of legislative history.<sup>226</sup> In the end, whether one views legislative history or textual canons as posing the greater danger for expanding judicial discretion turns largely on how courts employ legislative history in practice. If judges use legislative history as an outcome-determinative tool, and if all forms of legislative history—including statements by a bill's opponents—are treated as equally authoritative and relevant, then legislative history may indeed provide judges with greater leeway to decide cases as they see fit. If, however, courts constrain their use of legislative history to a few highly relevant and authoritative forms, as some scholars have recommended they do,<sup>227</sup> or if judges treat

---

226. See, e.g., Scalia, *supra* note 16, at 36 (“In any major piece of legislation, the legislative history is extensive, and there is something for everybody.”); Adrian Vermeule, *Legislative History and the Limits of Judicial Competence: The Untold Story of Holy Trinity Church*, 50 STAN. L. REV. 1833, 1874 (1998) (“If there is something for everyone in a legislative history, a judge may select the material that suits his preconceptions even if the dominant tenor of the legislative history, taken as a whole, fairly suggests a different result.” (footnote omitted)).

227. See, e.g., WILLIAM N. ESKRIDGE, JR., *DYNAMIC STATUTORY INTERPRETATION* 222 (1994) (proposing a hierarchy of different forms of legislative history); George A. Costello, *Average Voting Members and Other “Benign Fictions”*: *The Relative Reliability of Committee Reports, Floor Debates, and Other Sources of Legislative History*, 1990 DUKE L.J. 39, 41–42 (recounting the standard hierarchy); Victoria F. Nourse, *A Decision Theory of Statutory Interpretation: Legislative History by the Rules*, 122 YALE L.J. 70, 90–134 (2012) (advocating that legislative history generated late in the enactment process should trump legislative history generated before a bill reaches its final version, that statements made by a bill's opponents should not be cited at all, and that congressional rules should determine which legislative history is most relevant and authoritative).

legislative history as merely a corroborative factor, rather than a definitive trump card in the interpretive analysis, then legislative history use may not expand judicial discretion nearly as much as textualists fear.

Empirical evidence supports the latter, more constrained vision of legislative history use: as Table 3c shows, a majority of the 2005–2016 term Roberts Court opinions that referenced legislative history did so to corroborate a meaning arrived at through other interpretive resources, rather than rely on such history as an independent or primary source of meaning. Further, the majority of the opinions in the dataset (60.8 percent) that invoked legislative history referenced committee or conference-committee reports, which do not lend themselves to cherry-picking as easily as statements made by individual legislators or testimony provided by interested parties with competing views. Indeed, only a handful of the opinions in the dataset referenced floor statements, testimony provided at committee hearings, or other, less authoritative and manipulable forms of legislative history.<sup>228</sup>

In addition, my earlier “dueling canons” study of the extent to which majority and dissenting opinions invoke the same interpretive tools to reach different statutory constructions found that the members of the Roberts Court employed competing, contradictory references to legislative history in less than one-fifth of the cases (17.6 percent) in which they invoked legislative history. This rate is roughly equal to the rate at which they employed competing references to dictionary definitions, the whole act rule, or language canons, and is *lower* than the rate at which they employed competing references to other similar statutes, the statute’s plain meaning, and analogous precedents.<sup>229</sup>

---

228. There were 227 opinions in the dataset that referenced one or more kinds of legislative history. Several of these opinions cited more than one kind of legislative history. The percentage of opinions in which different legislative history types were cited was as follows: 60.8 percent referred to committee or conference committee reports; 23.8 percent made inferences about the statute’s meaning based on how it evolved from its initial proposal to its final version—a form of legislative history that even the most ardent textualists, including Justice Scalia, find unproblematic; 9.7 percent referred to floor statements or debates—and more than half of these opinions also referenced other forms of legislative history, most typically committee reports; 9.3 percent referred to hearings—and again, more than half of these opinions also referenced other forms of legislative history, especially committee reports; 6.6 percent referred to the absence of legislative action and/or invoked the “dog that did not bark” canon; and 9.3 percent referenced other forms of legislation, including rejected proposals and reports issued by administrative agencies.

229. Krishnakumar, *Dueling Canons*, *supra* note 75, at 929 tbl.1. That study found that judicial dueling—where majority or concurring opinions employ the same interpretive tool as a dissenting opinion in the same case but reach opposing statutory constructions—occurred in 18.2 percent of the cases in which at least one opinion cited dictionary definitions, 14.1 percent of cases in which

Overall, the data suggest that the Court's recent on-the-ground use of legislative history as an interpretive tool has been significantly more restrained than the picture of an unbridled, legislative history free-for-all that textualists long have painted.

**Table 3c**  
**Manner in which Legislative History was Employed**  
**(in Opinions that Referenced Internal<sup>230</sup> Legislative History)**  
**2005–2016 Terms (n=170)**

Opinion Type	Internal Legislative History Used to <i>Corroborate</i>	Internal Legislative History <i>Relied Upon</i>
<b>Overall</b>	55.3% (n=94)	44.7% (n=76)
<b>Majority</b>	30.6% (n=52)	21.8% (n=37)
<b>Concurring</b>	4.7% (n=8)	4.1% (n=7)
<b>Dissenting</b>	17.6% (n=30)	18.2% (n=31)
<b>Part Concurring / Part Dissenting</b>	2.4% (n=4)	0.6% (n=1)

Finally, textualists might counter that even if their interpretive approach does not cabin judicial discretion better than a purposivist one, it is nevertheless preferable for formalist reasons. That is, because only the text duly enacted by both houses of Congress and signed by the president is the law, efforts to interpret statutes in light of

---

at least one opinion invoked the whole act/language canons, 25.3 percent of the cases in which at least one opinion cited plain meaning; 32.6 percent of the cases in which at least one opinion referenced precedent, and 21.1 percent of the cases in which at least one opinion cited other statutes. *Id.*

230. This Table does not include 42 opinions that discussed how a statute evolved over time, from one version to the next. References to that “evolution of the statute” form of legislative history were coded separately from references to statements in the legislative record reflecting the views of drafters and other legislators as expressed in committee reports, floor statements, and the like.

Congress's actual purpose or intent are arguably illegitimate, whereas efforts to infer meaning directly from the statute's text are appropriate.<sup>231</sup> However, as the doctrinal analysis in Part III shows, inferring meaning from the statute's text is not the straightforward, mechanical task that textualism often makes it out to be. Nor is it one that tends to be constrained by the statute's text. Indeed, it is essentially impossible to apply the whole act rule, *noscitur a sociis*, or *ejusdem generis* canons without venturing beyond, or adding something external to, the duly enacted statutory text. Thus, a formalist emphasis on the enacted text often winds up privileging judicial inferences and guesswork that did not go through bicameralism and presentment and that—unlike legislative history—bear no direct connection to the process by which the statute was enacted.

In the end, whether textualist Justices evoke statutory purpose and intent wittingly or unwittingly, these concepts are playing a nontrivial role in the Justices' statutory constructions. This matters for two reasons. First, it highlights a glaring disconnect between textualism's rhetoric and its actual practice, in keeping with earlier studies.<sup>232</sup> Second, and more importantly, because textualist Justices refuse to consult external sources—such as the background mischief leading to a statute's enactment, or the legislative record—their presumptions about purpose and intent may be more prone to reflect individual Justices' personal biases than are their purposivist counterparts' attempts to identify a statute's purpose. The next two sections explore these concerns in detail.

### B. Hidden Normative Baselines

One upshot of the finding that supposedly neutral, objective textualist tools such as *noscitur a sociis* and the whole act rule leave

---

231. See, e.g., *Conroy v. Aniskoff*, 507 U.S. 511, 519 (1993) (Scalia, J., concurring) (“The law as it passed is the will of the majority of both houses, and the only mode in which that will is spoken is in the act itself . . . .” (omission in original) (emphasis omitted) (quoting *Aldridge v. Williams*, 44 U.S. (3 How.) 9, 15 (1845))); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 453 (1987) (Scalia, J., concurring) (explaining that enacted text always trumps “unenacted legislative intent”); Easterbrook, *Original Intent*, *supra* note 41, at 64–65 (“[T]he whole process of interpretation from intent is an end run around process. It is a translation from intent to law that we would find repulsive if proposed explicitly.”).

232. See, e.g., McGowan, *supra* note 13, at 175 (explaining that Justice Scalia often made consequentialist arguments in his dissents); Schacter, *Confounding Common Law*, *supra* note 12, at 19–22 (describing how the Court's originalism relies on common law principles); Schacter, *Text or Consequences?*, *supra* note 13, at 1009–15 (discussing “[t]extualism's consequentialist tendencies”).

significant room for judicial discretion is that textualist Justices may conflate their own normative policy preferences with Congress's purpose or intent, just as they accuse purposivists of doing. We saw this in *Dean v. United States*, discussed in Part III.B, where Chief Justice Roberts's textual-canon-based argument tracked closely with an underlying normative judgment that the defendant's behavior was highly culpable and worthy of enhanced punishment, while Justice Stevens's whole-act-rule-supplemented-by-purpose-and-legislative-history construction tracked his underlying normative judgment that the accidental discharge of a gun was not so blameworthy and did not justify a sentencing enhancement.

This was also the case in *King v. Burwell*, which raised the question whether the Affordable Care Act ("ACA") authorizes the payment of health-insurance subsidies to qualified individuals who purchase health insurance through an exchange established by the federal government.<sup>233</sup> The relevant statutory provision makes such subsidies available to qualified individuals who purchase insurance on "an exchange established by the State."<sup>234</sup> Chief Justice Roberts's opinion for the Court used numerous whole-act-rule arguments, as well as openly purposive references to the mischief the statute was designed to address, to insist that the only sensible reading of the ACA was that the tax credits must apply to exchanges established by the federal government. Notably, the opinion began by discussing the evolution of health-insurance regulation in several states during the 1990s, explaining that the precursors to the ACA "were designed to" pursue the "goal" of expanding health-insurance coverage by, among other things, providing subsidies to people of limited means who were legally obligated to purchase insurance.<sup>235</sup> The opinion then noted that a statutory construction which reads "established by the State" to limit insurance subsidies to those who purchased insurance only on state exchanges would contradict other provisions of the statute that "assume" subsidies will flow to health-care markets established by the federal government<sup>236</sup> and require that all exchanges "make available qualified health plans to qualified individuals."<sup>237</sup>

---

233. *King v. Burwell*, 135 S. Ct. 2480, 2485 (2015).

234. *Id.* at 2487 (quoting 26 U.S.C. § 36B(b)-(c)).

235. *Id.* at 2485-86.

236. *Id.* at 2491-92.

237. *Id.* at 2490 (quoting 42 U.S.C. § 18031(d)(2)(A)).

Justice Scalia and the other textualist and textualist-leaning Justices dissented, marshaling plain meaning and whole-act-rule arguments to insist that the relevant tax-credit provision must be read to apply only to exchanges established by state governments.<sup>238</sup> The dissent argued, for example, that it should “be obvious” that someone who buys insurance on an exchange established by the federal government does not receive tax credits<sup>239</sup> and that “[i]t is hard to come up with a clearer way to limit tax credits to state Exchanges than to use the words ‘established by the State.’”<sup>240</sup> It also noted that “other parts of the Act sharply distinguish between the establishment of an Exchange by a State and the establishment of an Exchange by the Federal Government”<sup>241</sup> and complained that “[w]ords no longer have meaning if an Exchange that is *not* established by a State is ‘established by the State.’”<sup>242</sup>

Despite its close attention to text and ordinary meaning, however, Justice Scalia’s dissenting opinion gives the impression of being about more than just the meaning of the phrase “Exchange established by the State.” Indeed, the opinion’s scathing textual analysis<sup>243</sup> reflects an underlying hostility toward the ACA and a normative preference for invalidating the statute. Likewise, although technical and purposive arguments received prime billing in Chief Justice Roberts’s majority opinion, that opinion also conveyed a powerful normative preference for upholding Congress’s work product.<sup>244</sup> Similar normative baselines undergird other opinions that appear strictly textualist on their face.<sup>245</sup>

I am hardly the first to note that textualist opinions often reflect their authors’ underlying normative preferences. Indeed, Professor Bill Eskridge has argued that the textual canons *cannot* be applied without some normative baseline, and that even the strictest textual opinion

---

238. *Id.* at 2499 (Scalia, J., dissenting).

239. *Id.* at 2496.

240. *Id.* at 2497.

241. *Id.* at 2498.

242. *Id.* at 2497.

243. *See, e.g., id.* (“Impossible possibility, thy name is an opinion on the Affordable Care Act!”); *id.* (“Today’s interpretation is not merely unnatural; it is unheard of.”); *id.* at 2502 (referring to the majority’s opinion as “interpretive jiggery-pokery”).

244. *See, e.g., id.* at 2496 (majority opinion) (“[W]e must respect the role of the Legislature, and take care not to undo what it has done.”).

245. *See, e.g., James v. United States*, 550 U.S. 192, 215–16, 219 (2007) (Scalia, J., dissenting) (citing due process and ease-of-administrability concerns as factors influencing the selection of an *ejusdem generis* common denominator).

ultimately rests on some normative underpinning.<sup>246</sup> Based on my findings at this stage, I would not go so far as to say that *every* application of textual canons is at bottom normative. But I would certainly agree that the textual canons do not *constrain* or *prevent* the Justices from importing their own normative preferences into their statutory constructions. Moreover, the aura of neutrality currently associated with the language canons in particular tends to mask the work that normative preferences and judicial discretion play in textualist Justices' statutory interpretations. As Professor Dan Kahan has shown in a series of articles, human beings—including judges—are demonstrably poor at recognizing when their perceptions of fact are being motivated or shaped by their preexisting values or normative commitments.<sup>247</sup> This can lead to a form of “decision-making hubris” which assumes that the decision-maker's perception constitutes the single, inevitably correct perception.<sup>248</sup> This Article's aim is to bring to light the discretion and normativity inherent in textualist Justices' use of practical reasoning, language canons, and the like, so that that discretion and normativity can be properly acknowledged—and perhaps checked against other interpretive resources.

### C. *What (Really) Divides Textualists and Purposivists?*

As the data reported in Part II demonstrate, the textualist Justices on the Roberts Court regularly construct indirect purpose and intent arguments through other interpretive tools, including some that are not

---

246. See Eskridge, Jr., *Normative Canons*, *supra* note 81, at 552 (contending Scalia and Garner's preferred canons demand normative judgments and leave significant room for judicial discretion). Eskridge also comments that many of Scalia and Garner's approved canons require judicial judgments about statutory purpose, although his discussion of the language canons is limited to *noscitur* and *expressio unius* and focuses on the discretion these canons confer; he does not argue that textualists actually use language canons to impute statutory purpose and intent. *Id.* at 576–78.

247. See Dan M. Kahan et al., “*They Saw a Protest*”: *Cognitive Illiberalism and the Speech-Conduct Distinction*, 64 STAN. L. REV. 851, 883–85 (2012) (describing the results of an experiment in which groups with different normative commitments drew opposing conclusions from an identical video of demonstrators protesting); Dan M. Kahan & Donald Braman, *The Self-Defensive Cognition of Self-Defense*, 45 AM. CRIM. L. REV. 1, 44–46 (2008) (similar); see also Robert J. Robinson, Dacher Keltner, Andrew Ward & Lee Ross, *Actual Versus Assumed Differences in Construal: “Naive Realism” in Intergroup Perception and Conflict*, 68 J. PERSONALITY & SOC. PSYCHOL. 404, 414–16 (1995) (describing the results of a study examining the social construal of partisan issues).

248. See Dan M. Kahan, David A. Hoffman & Donald Braman, *Whose Eyes Are You Going To Believe? Scott v. Harris and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 837, 841–42 (2009) (describing the results of an experiment in which different cultural groups drew markedly different conclusions after viewing identical video footage of a police car chase).

text or canon based. Moreover, they exercise significant judicial discretion and normative judgment even when employing supposedly “rule-based” textual canons and tools. At the same time, the Court’s purposivist Justices regularly weave textual, whole act rule, and language-canon arguments together with statutory purpose and intent. In addition, the data reported in Tables 1 and 2 show that none of the Justices are purely textualist or purposivist in practice: all of the Justices referenced all of the interpretive resources in at least some of the opinions they authored and even Justices Scalia and Thomas employed atextual tools such as purpose and practical consequences at noteworthy rates. This suggests that perhaps there is less that actually divides textualists and purposivists than most scholars have recognized—and not just because purposivists have embraced textual analysis, but also because textualists have quietly been employing atextual interpretive tools and engaging in backdoor purposivism. In light of this finding scholars should consider reconceptualizing the theoretical approaches taken by the Justices as falling along a continuum, with some Justices closer to the textualist end, others closer to the purposivist end, and still others falling in between.

The question thus arises: Are there any meaningful differences left between textualism and purposivism as practiced on the ground? Does the order in which judges arrive at purpose and intent—beginning the interpretive inquiry with these concepts in mind and addressing them directly versus backing into them and addressing them only indirectly—make a noteworthy difference in the judicial interpretation of statutes? Are these differences that judges and scholars should care about? Or should we just throw up our hands and declare that textualists and purposivists are essentially on the same page—both paying attention to Congress’s purpose and intent, after all—and quit there?

Ultimately, I think these differences do matter, and are important, for several reasons. First, textualist Justices often do not acknowledge that they are imputing purpose or intent to Congress—which increases the likelihood that they will conflate their own intuitions about the statute’s aims with the legislature’s. This danger seems particularly acute when textualist Justices use the whole act rule or language canons such as *noscitur a sociis* to infer purpose, because in such cases, the Justices tend to couch their comments about purpose and intent in terms of what the statute’s structure inexorably dictates, without acknowledging that there may be more than one plausible purpose or

intent that could be inferred from the structure.<sup>249</sup> In other words, they convey—and may believe—that they are reaching the inevitable conclusion that the textual canons dictate, without recognizing and accounting for the role that personal intuition or speculation is playing. Second, because textualist Justices refuse to consult external sources—such as the mischief leading to a statute’s enactment or the legislative record—their assumptions about the statute’s purpose and intent may reflect individual Justices’ gut reactions without the sobering check of independent, external clues. In this sense, textualist and textualist-leaning Justices’ estimations of legislative purpose and intent could be even *more* prone to reflect individual biases than are their purposivist counterparts’ estimations of legislative purpose and intent—because purposivist Justices’ estimations are at least tethered to a written legislative record created by legislators and external to themselves.<sup>250</sup>

The argument that purposivist Justices’ search for legislative purpose and intent is not as dangerous as textualists paint it to be because purposivist Justices are cabined by their reliance on a written record created by others is not new.<sup>251</sup> What is new is the recognition that the textualist Justices are engaging in a similar, although perhaps unwitting, search for legislative purpose and intent—and that they are doing so through neutral interpretive tools that give the appearance of providing an objective, discretion-free guide to statutory meaning. That is, in at least some nontrivial subset of the statutory cases that come before them, textualist and textualist-leaning Justices are not merely following textual canons and tools to their logical, inevitable outcomes, but are speculating and making inferences about congressional purpose and intent in the course of applying textualist

---

249. See, e.g., *Dean v. United States*, 556 U.S. 568, 572–73 (2009) (mechanically applying the whole act rule and passive-voice arguments); *Dolan v. U.S. Postal Serv.*, 546 U.S. 481, 487 (2006) (treating the common theme of “failings in the postal obligation to deliver mail” as inevitable); cf. SCALIA & GARNER, *supra* note 26, at 6 (“[M]ost interpretive questions have a right answer. Variability in interpretation is a distemper.” (footnote omitted)).

250. Cf. James J. Brudney & Corey Ditslear, *Liberal Justices’ Reliance on Legislative History: Principle, Strategy, and the Scalia Effect*, 29 BERKELEY J. EMP. & LAB. L. 117, 138–41 (2008) (reporting that liberal Justices relying on legislative history in employment law cases tend to find in favor of employers—against their ideological preferences—more often than when they do not use legislative history).

251. See, e.g., John Paul Stevens, *Judicial Predilections*, 6 NEV. L.J. 1, 1–2 (2005) (“I believe judges are more, rather than less, constrained when we make ourselves accountable to all reliable evidence of legislative intent.”); see also William N. Eskridge, Jr., *Textualism, the Unknown Ideal?*, 96 MICH. L. REV. 1509, 1548–49 (1998) (“[T]he new textualist is less responsive to democratic desires than the faithful agent, . . . who tries to figure out what the principal would have her do under the circumstances.”).

tools to particular statutes. Also new is the finding that not only do textualist Justices invoke practical consequences in one-third of the opinions they author, but they speculate about legislative intent and purpose in so doing, further blurring the lines between their own intuitions and judgments and those of the legislature.

Once we realize that textualist Justices are making inferences about purpose and intent too—even when using textual canons—the question becomes: Do we want them to do so without checking their inferences against available evidence of Congress’s actual intent? Much of the theoretical debate so far has focused on the use of legislative history as a dispositive trump card that provides conclusive evidence of legislators’ subjective intent and the use of such legislative history to contradict a statute’s clear text. This, however, is a false dichotomy—or at least the wrong debate to be having at this point. Textualism has successfully highlighted the limits of relying on legislative history in a dispositive, text-defeating manner, and the members of the Roberts Court rarely seek to invoke legislative history in this manner. Indeed, as Table 3c shows, the majority of legislative history references in the modern Supreme Court are corroborative in nature.<sup>252</sup> Moreover, a close examination of the 117 opinions in the dataset in which a majority or ancillary opinion *relied* on legislative history, rather than merely used legislative history to corroborate, reveals that only 23 opinions (19.7 percent) arguably can be said to employ legislative history *in a manner that contradicts* the statute’s plain meaning.<sup>253</sup>

---

252. See *infra* Table 3c (reporting that during the 2005–2016 terms, over 55 percent of the Roberts Court’s references to the legislative record, or “internal” legislative history, were of a corroborative nature); see also James J. Brudney, *Confirmatory Legislative History*, 76 BROOK. L. REV. 901, 901–02 (2011) (“On numerous occasions since 2006, the Roberts Court has invoked legislative history as a confirmatory asset.”).

253. The 23 opinions were as follows: *Husky Int’l Elecs., Inc. v. Ritz*, 136 S. Ct. 1581 (2016); *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm’n*, 135 S. Ct. 2652 (2015); *Oneok, Inc. v. Learjet, Inc.*, 135 S. Ct. 1591 (2015); *Tex. Dep’t of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 135 S. Ct. 2507 (2015); *Yates v. United States*, 574 U.S. 528 (2015); *Abramski v. United States*, 573 U.S. 169 (2014); *Util. Air Regulatory Grp. v. Env’tl. Prot. Agency*, 573 U.S. 302 (2014) (Breyer, J., concurring in part and dissenting in part); *Hall v. United States*, 566 U.S. 506 (2012) (Breyer, J., dissenting); *Chamber of Commerce of U.S. v. Whiting*, 563 U.S. 582 (2011) (Breyer, J., dissenting); *Id.* (Sotomayor, J., dissenting); *Carcieri v. Salazar*, 555 U.S. 379 (2009) (Breyer, J., concurring); *Id.* (Stevens, J., dissenting); *Corley v. United States*, 556 U.S. 303 (2009); *Harbison v. Bell*, 556 U.S. 180 (2009) (Scalia, J., dissenting); *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193 (2009); *Ali v. Fed. Bureau of Prisons*, 552 U.S. 214 (2008) (Kennedy, J., dissenting); *CBOCS W., Inc. v. Humphries*, 553 U.S. 442 (2008); *Riegel v. Medtronic, Inc.*, 552 U.S. 312 (2008) (Ginsburg, J., dissenting); *Powerex Corp. v. Reliant Energy Servs., Inc.*, 551 U.S. 224 (2007) (Breyer, J., dissenting); *Zuni Pub. Sch. Dist. No. 89 v. Dep’t of Educ.*, 550 U.S. 81

In other words, the Court typically cites legislative history to confirm a statutory construction it has arrived at through other, more textual, interpretive tools—not as the driving factor in interpreting a statute, and not in the face of clearly contradictory statutory text. Given that reality, the debate going forward should be about whether those jurists who practice a pure form of textualism should continue to reject all legislative history use as illegitimate or whether they should be willing to check their backdoor inferences about the organizing purpose behind a statutory list or the intent reflected in the legislature’s structural choices against record evidence of the legislature’s intent.

For a number of reasons, I think it preferable that *all* judges—textualist and purposivist alike—check their inferences about legislative intent and purpose against as many external sources as possible, including the legislative record. In other words, purposivists should use textual canons such as the whole act rule, *noscitur*, and grammar rules to check the inferences they draw from legislative history or the circumstances surrounding a statute’s enactment; and textualists likewise should use legislative history and the circumstances leading to a statute’s enactment to check inferences they arrive at through the use of traditional textualist tools.

This approach would help correct for biases that all interpreters are subject to. As Professor Victoria Nourse has powerfully highlighted in her book, *Misreading Law, Misreading Democracy*, the human mind is prone to certain cognitive biases that are often implicit and unknown to us.<sup>254</sup> One of these is the “focusing illusion,” which refers to the fact that when the mind focuses on one particular element of a situation, it risks overvaluing that element and undervaluing the surrounding context or competing explanations.<sup>255</sup> As Nourse explains, the lesson from the cognitive-bias research is that we should resist stopping at a single bit of information and should instead look for *disconfirming* information—information that could falsify our initial impressions.<sup>256</sup> Legislative history, or other evidence from the legislative record, as

---

(2007); *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291 (2006) (Breyer, J., dissenting); *Howard Delivery Serv., Inc. v. Zurich Am. Ins. Co.*, 547 U.S. 651 (2006); *Rapanos v. United States*, 547 U.S. 715 (2006) (Stevens, J., dissenting).

254. See VICTORIA NOURSE, *MISREADING LAW, MISREADING DEMOCRACY* 116–24 (2016) (describing research on “bounded rationality,” “bounded awareness,” and related concepts of “focusing illusion” and “fast-thinking,” which illuminate our minds’ tendency to believe that what we see or focus on is all there is and to ignore our own implicit biases).

255. *Id.* at 118–19.

256. *Id.* at 122.

Nourse argues, can serve as powerful disconfirming evidence for a judge's gut instincts about a statute's meaning—or, I submit, for a judge's inferences about how different terms in a statutory list fit together, or what the legislature's structural choices mean.<sup>257</sup>

I am not suggesting, as Nourse does, that judges necessarily must treat legislative history as superior to text-based canons like *noscitur*, but only that courts and individual Justices should not stop their interpretive inquiry after applying text-based canons. Instead, they should consult the legislative record or the background circumstances, often referred to as the “mischief,” that led to the statute's enactment to check whether the inferences they have drawn from text-based canons are incorrect or “disconfirmed.” If the legislative record and background mischief reveal nothing that contradicts the inferences drawn by the court, then the court should feel comfortable interpreting the statute in light of its initial inferences; but if the legislative record suggests a different organizing purpose—and therefore a different common denominator or structural inference than the one surmised by the court—then the court should revise its inferred common denominator or structural conclusion accordingly.

A second reason to prefer that jurists check their text-based inferences about purpose and intent against the legislative record is one first suggested by Professors Bill Eskridge and Philip Frickey several years ago: the metaphor of the chain versus the cable.<sup>258</sup> Drawing on a concept discussed by pragmatist philosopher Charles Peirce, Eskridge and Frickey noted that chains are no stronger than their weakest links because a break in any single link will cause a break in the chain as a whole. By contrast, cables, which depend on the cumulative strength of several threads woven together, can withstand a break in an individual thread.<sup>259</sup> Legal arguments, they contend, are most successful when they are cable-like, weaving together numerous interpretive resources.<sup>260</sup> Each individual interpretive tool—or thread—standing alone may be subject to quarrel and objection, but the cable woven from numerous such tools pointing in the same

---

257. *See id.* at 122–23 (“Focalism’s lesson is that one must resist stopping at a single bit of information—a word or a phrase, let us say—stamping it as plain and ending the analysis.”).

258. William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 351 (1990).

259. *Id.*

260. *Id.*

direction is difficult to quarrel with or break.<sup>261</sup> Likewise, a statutory construction based on textual cues, and inferences about those cues that are backed up by components of the legislative record, will be stronger than one based only on textual cues or only on inferences drawn from the Justices' intuitions.

The *noscitur a sociis*, *eiusdem generis*, and whole act canons are important and valuable tools in the construction of statutes; and I do not mean to suggest that judges should stop using them—although greater caution may be warranted with respect to the whole act rule given its tension with the messy, chaotic process by which statutes are drafted.<sup>262</sup> But when such canons are employed, it is important that courts and commentators recognize the discretion and room for judicial guesswork these seemingly mechanical linguistic canons inevitably invite. And given that discretion and guesswork, this Article submits that when employing such canons and textual tools, jurists should check whether anything in the legislative record supports or contradicts the statutory readings they arrive at. Indeed, I would advocate that judges check their statutory constructions against the legislative record even when the statute's text appears, in their view, to have a plain meaning.<sup>263</sup> If the legislative record contains nothing on point or nothing that contradicts the reading arrived at through the use of language canons, then the court should stick with that reading. But if there is something on point in the legislative record, then courts should pay attention to that evidence to help give scope to the statutory list or structure. The same goes for practical-consequences-based judicial reasoning in statutory cases; indeed it is especially important that judges check their practical reasoning against the legislative record because such reasoning is untethered to the statute's text, unlike

---

261. *Id.* The principle of “total evidence” for rational actors similarly recommends the use of all available evidence. See I.J. Good, *On the Principle of Total Evidence*, 17 BRIT. J. PHIL. SCI. 319, 319 (1967).

262. See *supra* notes 162–64 and accompanying text.

263. While such a practice may appear, at first glance, to impose significant efficiency costs by expanding the universe of cases in which courts must examine legislative history, in practice such efficiency costs are likely to be minimal. This is because litigants who file briefs in statutory cases tend to conduct legislative history research and bring relevant legislative history to the court's attention even in cases where the text seems clear—because they cannot predict whether the judge assigned to their case will find the textual arguments convincing or will be interested in what the legislative history says. As a result, courts already tend to be briefed on legislative history as well as textual arguments in cases where the legislative history is relevant, and the only additional costs likely to be generated by this Article's recommendations should involve the additional time spent discussing legislative history in the courts' opinions.

inferences based on the *noscitur a sociis* canon or the whole act rule. As a result, it is even more imperative that such practical reasoning fit with legislative-record evidence if available.

To illustrate how this approach might work, let us conclude by reconsidering how two cases discussed in Part III might have fared if textualist or textualist-leaning Justices had checked their application of the *noscitur a sociis* or whole-act-rule canons against available legislative history. Recall *Dolan v. United States Postal Service*, which involved an FTCA exemption that barred “[a]ny claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter.”<sup>264</sup> The majority opinion relied in part on a *noscitur a sociis* argument, concluding that the common denominator connecting the list terms was “damages and delay of the postal material itself” and that the statutory exemption therefore did not extend to the negligent placement of a package that caused physical injury to a postal customer.<sup>265</sup> Significantly, the legislative record for the FTCA contained material that supported this inference about the statute’s scope and that could have been used to confirm the Court’s reading and to discredit Justice Thomas’s and the Third Circuit’s broad reading of “negligent transmission.” First, a committee report stated that the purpose of the FTCA exception was to exclude “certain classes of claims for which satisfactory relief is available under existing law.”<sup>266</sup> Second, testimony by Alexander Holtzoff, an executive branch official heavily involved in drafting the FTCA, explained that “[e]very person who sends a piece of postal matter can protect himself by registering it, as provided by the postal laws and regulations.”<sup>267</sup> This legislative history made clear that ample remedies already existed to protect customers whose mail is lost, including insurance and registration—thus there was no need for an FTCA waiver allowing suits against the government in such cases. I submit that Justice Kennedy’s opinion, and the common attribute he identified, would have been even more compelling if it had referenced this legislative-record evidence as corroboration for his *noscitur a sociis* argument.

---

264. *Dolan v. United States Postal Serv.*, 546 U.S. 481, 485 (2006) (alteration in original) (quoting 28 U.S.C. § 2680(b)).

265. *Id.* at 486 (quoting *Raila v. United States*, 355 F.3d 118, 121 (2d Cir. 2004)).

266. H.R. REP. NO. 69-206, at 4 (1926).

267. *Tort Claims Against the United States: Hearing Before a Subcomm. of the S. Comm. on the Judiciary*, 76th Cong. 38 (1940) (statement of Alexander Holtzoff, Special Assistant to the Attorney General).

Let us also reconsider *Yates v. United States*. Recall that Justice Ginsburg's plurality opinion relied significantly on the *noscitur a sociis* canon as well as the whole act rule to conclude that the phrase "record, document, or tangible object" did not cover "fish" because the provision encompassed only objects that can be used to record or preserve information.<sup>268</sup> Justice Alito's concurring opinion similarly relied on the *noscitur* and *ejusdem* canons to conclude that only objects capable of being filed are "tangible object[s]."<sup>269</sup> By contrast, Justice Kagan's decidedly textualist opinion,<sup>270</sup> joined by archtextualist Justices Scalia and Thomas, found that the "laundry list of verbs" in the relevant provision—"alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry"—"shows that Congress wrote a statute with a wide scope."<sup>271</sup> In the textualist dissent's view, those surrounding words "are supposed to ensure" that the provision "covers the whole world of evidence-tampering, in all its prodigious variety."<sup>272</sup>

As it turns out, there was powerful legislative-record evidence that supported the plurality's and Justice Alito's readings and called Justice Kagan's reading into question. A Senate Judiciary Committee report observed that the provision at issue was enacted to "capture[] a small category of criminal acts which are not currently covered under existing laws—for example, acts of destruction committed by an individual acting alone and with the intent to obstruct a future criminal investigation" and expressed "concern that section 1519 . . . could be interpreted more broadly than we intend."<sup>273</sup> An amicus brief submitted by Senator Oxley, the statute's cosponsor, similarly emphasized that Congress intended the provision to operate "as a scalpel" rather than "a hatchet"<sup>274</sup> and explained that in order to avoid overbroad application of the criminal laws, Congress chose to legislate

---

268. See *supra* notes 126–33 and accompanying text.

269. See *supra* notes 134–37 and accompanying text.

270. Many commentators have characterized the opinion as "textualist." See, e.g., John M. Garvin, *Intangible Fish and the Gulf of Understanding: Yates v. United States and the Court's Approach to Statutory Interpretation*, 92 IND. L.J. SUPPLEMENT 77, 80 (2016) ("Justice Kagan's dissent hews closely to the textualist approach more typically associated with the other dissenting Justices . . ."); Note, *The Rise of Purposivism and Fall of Chevron: Major Statutory Cases in the Supreme Court*, 130 HARV. L. REV. 1227, 1237 (2017) (noting that Justice Kagan dissented "on textualist grounds").

271. *Yates v. United States*, 574 U.S. 528, 555–56 (2015) (Kagan, J., dissenting).

272. *Id.* at 556.

273. S. REP. NO. 107-46, pt. VIII, at 27 (2002).

274. Brief for the Honorable Michael Oxley as Amicus Curiae in Support of Petitioner at 21, *Yates*, 574 U.S. 528 (No. 13-7451).

against specific kinds of fraud separately, passing independent laws for health-care fraud, securities fraud, computer fraud, and accounting fraud. In this vein, the provision at issue was directed specifically at accountants and lawyers and was not a general evidence-tampering statute applicable to destruction of all evidence of any kind.<sup>275</sup> Oxley's explanation was supported by the floor statements of Senator Leahy, the author of § 1519, who stated that the provision "closes loopholes and toughens penalties for shredding documents as we learned had occurred at Arthur Andersen."<sup>276</sup> Again, explicit reference to this legislative-record material would have lent considerable weight to Justice Ginsburg's construction of the statute and powerfully refuted Justice Kagan's competing argument that the statute was designed to cover "the whole world of evidence-tampering."<sup>277</sup>

Justice Ginsburg's decision not to foreground this legislative history is itself a testament to how modern purposivism has adjusted to the textualist revolution. While we can only speculate, it seems probable that she refrained from citing the legislative history more prominently in order to avoid a backlash from the Court's textualist Justices. Resting her opinion on *noscitur a sociis*, the whole act rule, and the obvious Enron-related impetus for the statute may have seemed the less controversial and more unassailable approach. But I submit that it is not the ideal approach. Instead, on-point legislative materials should be used to check, or disconfirm, inferences based on textual canons (and vice-versa).

Ultimately, this Article's aim in highlighting textualist Justices' surprising tendency to make indirect assumptions about purpose and intent—and the extent to which canons such as *noscitur a sociis* invite such purpose and intent inferences—is not to undermine the use of textual canons or to suggest that they be abandoned in favor of legislative history references. In fact, I am a fan of the *noscitur a sociis* and *eiusdem generis* canons, in part because these canons are closely tied to Congress's choice of words and appear to reflect how congressional drafters actually think about statutory lists.<sup>278</sup> This Article's goal, instead, has been to: (1) underscore the extent to which

---

275. *Id.* at 8.

276. 148 CONG. REC. S6767 (daily ed. July 9, 2002) (statement of Sen. Leahy).

277. *Yates*, 574 U.S. at 556 (Kagan, J., dissenting).

278. See Gluck & Bressman, *supra* note 143, at 933 (describing a survey where 71 percent of 137 congressional staffers believed that "terms in a statutory list always or often relate to one another").

textual canons that have long been heralded as objective, neutral formulas which lead inexorably to the one correct reading of a statute have in practice proved to entail judicial discretion and presumptions about legislative purpose and intent; and (2) suggest that these textual canons therefore should not operate in isolation, but should be checked against other available evidence of legislative purpose and intent. Put differently, this Article suggests that employing textual canons and their corollary inferences *without more* gives judges significant leeway to construct statutory purpose and significant opportunity to get that statutory purpose wrong. To minimize that danger, judges should look to external evidence of legislative purpose and intent to help define the scope of the common denominator connecting items in a statutory list or to confirm that the inferences they draw from a statute's structure are not off base. In other words, the textual canons should be used in tandem with the purposive tools rather than in isolation.

#### CONCLUSION

This Article has sought to shed light on the underappreciated manner in which textualist and textualist-leaning Justices indirectly invoke the decidedly nontextualist concepts of legislative purpose, policy sensibility, and specific legislative intent in the statutory opinions they author. It argues that some of the most popular textual canons either inherently invite judicial guesswork about legislative policy objectives or have been used by textualist Justices to speculate about legislative purpose and intent. Moreover, it suggests that textualist Justices' indirect, backdoor use of other interpretive tools to impute legislative purpose and intent entails at least as much judicial discretion and room for normative decision-making as the more straightforward, traditional purposive mode of analysis that textualism decries. Ultimately, the Article suggests that there may be less dividing textualism from purposivism than scholars or jurists have appreciated and that practitioners of all interpretive philosophies can enhance their efforts to arrive at an unbiased, accurate statutory reading by expanding the universe of interpretive tools they are willing to consider—and seeking to check, or disconfirm, their initial interpretive conclusion.