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THE MISUNDERSTOOD HISTORY OF TEXTUALISM

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ABSTRACT—This Article challenges widespread assumptions about the history of textualism. Jurists and scholars have sought for decades to distinguish "modern textualism" from the so-called "plain meaning school" of the late nineteenth and early twentieth centuries—an approach that both textualists and non-textualists alike have long viewed as improperly "literal" and "wooden." This Article shows that this conventional historical account is incorrect. Based on a study of statutory cases from 1789 to 1945 that use the term "plain meaning" or similar terms, this Article reveals that, under the *actual* plain meaning approach, the Supreme Court did not ignore context but looked to surrounding text and structure to determine if an operative text was clear. The Article also offers an intellectual history, showing how in the early twentieth century, legal realists and legal process theorists created the myth of a "literal" and "wooden" "plain meaning school." More surprisingly, modern textualists later accepted this account—a decision that, this Article suggests, had an important impact on the development of textualism. To distinguish their brand from (what they saw as) the "literal" old plain meaning school, modern textualists defined "textualism" so capaciously as to create the conditions for divisions within textualism that we see today. This Article not only clears up a historical misunderstanding but also has two broader lessons. First, the account here offers a cautionary tale about reliance on "conventional wisdom." Second, the analysis suggests that theorists should set aside debates over "literalism" in statutory interpretation. The question is not—and has never been—whether interpreters should look to context but rather which context they should consider.

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INTRODUCTION

"Literalism" is an epithet in modern interpretive theory.[1] Critics have long used the label to cast aspersions on textualism,[2] while textualists have

[1] *See, e.g.*, HENRY M. HART JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 91 (William N. Eskridge Jr. & Philip P. Frickey eds., 1994) (doubting that an interpreter should ever read a "general expression[] literally"); LEARNED HAND, THE SPIRIT OF LIBERTY 157 (2d ed. 1953) ("[O]ne certain way of [misreading a statute] is by reading it literally . . . ."); ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 356 (2012) (distinguishing "the *fair meaning*" and "the hyperliteral meaning" of the text); Arthur W. Murphy, *Old Maxims Never Die: The "Plain-Meaning Rule" and Statutory Interpretation in the "Modern" Federal Courts*, 75 COLUM. L. REV. 1299, 1301, 1317 (1975) ("[T]here is no surer way to misread any document than to read it literally.").

[2] *See, e.g.*, W. Va. Univ. Hosps., Inc. v. Casey, 499 U.S. 83, 102 (1991) (Marshall, J., dissenting) ("[T]he Court uses the implements of literalism to wound, rather than to minister to, congressional intent . . . ."); Matthew R. Christiansen & William N. Eskridge Jr., *Congressional Overrides of Supreme Court Statutory Interpretation Decisions, 1967-2011*, 92 TEX. L. REV. 1317, 1401–02, 1409 (2014) (criticizing the Supreme Court's "'literalist' interpretation" in a few different cases, and suggesting that

resisted the charge, repeatedly invoking Justice Scalia's mantra that "the good textualist is not a literalist."[3] It is therefore striking that the use of "literalism" as an epithet has taken a new turn. In recent years, as we have seen growing divisions within textualism,[4] self-proclaimed textualists have begun to use the label to attack one another.

In recent decisions, Justice Kavanaugh condemned opinions authored by fellow textualist Justice Gorsuch as overly "literal." In *Bostock v. Clayton County* and *Niz-Chavez v. Garland*, Justice Gorsuch wrote for the majority, concluding on textualist grounds that Title VII of the Civil Rights Act of 1964 protects gay, lesbian, and transgender individuals from employment discrimination[5] and that federal immigration law places strict requirements on the "notice" that suffices for removing an individual from the country.[6] In each case, Justice Kavanaugh's dissent complained that the majority adopted a "literalist approach."[7] Notably, Justice Kavanaugh is not alone. Scholars have likewise criticized the "formalist" and "mechanical" approach on display in cases such as *Bostock* and *Niz-Chavez* as overly "literal."[8]

"judicial literalism constantly misinterpreted statutes and imposed undue burdens on Congress, as it had to spend scarce resources correcting the Court" by overriding such decisions); Philip P. Frickey, *From the Big Sleep to the Big Heat: The Revival of Theory in Statutory Interpretation*, 77 MINN. L. REV. 241, 253–54, 258 (1992) (equating "new textualism" with "literalism"); Patricia M. Wald, *The Sizzling Sleeper: The Use of Legislative History in Construing Statutes in the 1988-1989 Term of the United States Supreme Court*, 39 AM. U. L. REV. 277, 303–04 (1990) (stating that often the best way to "*gut* words of their intended meaning" is "by simply reading them literally"). This Article focuses on statutory interpretation, but a similar charge has been leveled against constitutional originalism. *See* Lawrence B. Solum, *Surprising Originalism: The Regula Lecture*, 9 CONLAWNOW 235, 248 (2018).

[3] ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 24 (Amy Gutman ed., 1997); *see also* Caleb Nelson, *What Is Textualism?*, 91 VA. L. REV. 347, 376, 376 n.87 (2005) ("[N]o mainstream judge is interested solely in the literal definitions of a statute's words."). To be sure, not every interpretive theorist uses the term "literal" as an epithet. But most agree that a "literal" interpretation is incomplete. *See* Lawrence B. Solum, *Originalism and the Unwritten Constitution*, 2013 U. ILL. L. REV. 1935, 1938 (2013) ("Lawyers sometimes call the semantic content of a statute its 'literal meaning.' . . . But the semantic content of an utterance does not do all the work. The meaning of a sentence is not always its 'literal meaning.'").

[4] *See* Tara Leigh Grove, *Which Textualism?*, 134 HARV. L. REV. 265, 266–71, 279–90 (2020); *see also* Jeremy K. Kessler & David E. Pozen, *Working Themselves Impure: A Life Cycle Theory of Legal Theories*, 83 U. CHI. L. REV. 1819, 1821, 1823, 1848–54 (2016) (noting that legal theories like textualism have "shed many . . . core commitments").

[5] Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1737, 1754 (2020).

[6] Niz-Chavez v. Garland, 141 S. Ct. 1474, 1478–80 (2021).

[7] *Bostock*, 140 S. Ct. at 1737, 1824–29 (Kavanaugh, J., dissenting) ("Statutory Interpretation 101 instructs courts to follow ordinary meaning, not literal meaning . . . ."); *Niz-Chavez*, 141 S. Ct. at 1490–93 (Kavanaugh, J., dissenting) ("The Court here . . . relies heavily on literal meaning.").

[8] *E.g.*, Larry Alexander, *Formalist Textualism and the* Cernauskas *Problem*, 23 J. CONTEMP. LEGAL ISSUES 169, 170, 172 (2021) (arguing that *Bostock* "took a formalist (literalist) approach to the text"); Justin Blount, *Sex-Differentiated Appearance Standards Post-*Bostock, 31 GEO. MASON U. CIV. RTS. L.J. 217, 218–19, 225–26 (2021) (stating that *Bostock* applied a "literalist" and "mechanical approach"); Bill

This charge runs deep for textualists. Jurists and scholars coined the term "modern textualism" to distinguish the brand from what they called the old "'plain meaning' school."[9] According to the conventional narrative, in the late nineteenth and early twentieth centuries, judges applied a "literal" and "mechanical" approach to statutory interpretation.[10] Such literalism, we are told, is the old—and bad—way to do textualism. It is therefore unsurprising that Justice Gorsuch was at pains to deny the "literalist" charge: "[W]hen interpreting this or any statute, we do not aim for 'literal' interpretations . . . . We simply seek the law's ordinary meaning."[11]

This Article challenges the conventional historical account of textualism, which has lessons for recent charges of "literalism." Importantly, modern scholars do *not* claim that the early Supreme Court—overseen by Chief Justice John Marshall in the first half of the nineteenth century—was improperly literal. Instead, scholars assert that those early Justices applied a properly contextual approach to statutory interpretation, taking into account at least semantic context (that is, the text and structure surrounding the

Watson, *Literalism in Statutory Interpretation: What Is It and What Is Wrong with It?*, 2021 U. ILL. L. REV. ONLINE 218, 229–30 (2021) ("[T]he majority opinions in *Bostock*, and to a lesser extent in *Niz-Chavez*, were literalistic . . . ."); *see also* Erik Encarnacion, *Text Is Not Law*, 107 IOWA L. REV. 2027, 2056–62 (2022) (suggesting that Justice Gorsuch's opinion in *Bostock* can be seen as "opportunistic literalism"). Some scholars agree that *Bostock* was "literal" but still view it as normatively beneficial. *See* Ann C. McGinley, Nicole Buonocore Porter, Danielle Weatherby, Ryan H. Nelson, Pamela Wilkins & Catherine Jean Archibald, *Feminist Perspectives on* Bostock v. Clayton County, 53 CONN. L. REV. ONLINE 1, 17–18 (2020); Marc Spindelman, Bostock*'s Paradox: Textualism, Legal Justice, and the Constitution*, 69 BUFF. L. REV. 553, 567–68, 633 (2021).

[9] *E.g.*, John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 108 (2001) [hereinafter Manning, *Equity*] ("Modern textualists . . . are not literalists. In contrast to their early-twentieth-century predecessors in the 'plain meaning' school . . . modern textualists acknowledge that language has meaning only in context."); John David Ohlendorf, *Textualism and Obstacle Preemption*, 47 GA. L. REV. 369, 377 (2013) (stating that "[w]hile the earlier 'plain meaning' formalists had relied on an unsophisticated, mechanical theory," "new textualists" understand that "words have meaning only in context"); Ryan D. Doerfler, *Late-Stage Textualism*, 2021 SUP. CT. REV. 267, 279 ("Contrasting their view with earlier 'plain-meaning' textualists who placed emphasis on 'literal meaning,' modern textualists purported to incorporate insights from philosophers of language such as Ludwig Wittgenstein and Paul Grice, recognizing that words only gather meaning in a context of use."); Richard H. Fallon Jr., *Three Symmetries Between Textualist and Purposivist Theories of Statutory Interpretation—And the Irreducible Roles of Values and Judgment Within Both*, 99 CORNELL L. REV. 685, 687 (2014) ("In . . . acknowledging [the importance of context], new textualists break with an older 'plain meaning' school . . . ."); Abigail R. Moncrieff, *Statutory Realism: The Jurisprudential Ambivalence of Interpretive Theory*, 72 RUTGERS U. L. REV. 39, 83–84 (2019) (arguing that the "old textualist school" was "a mechanical and robotic methodology" which sought "literal meaning," while "a modern textualist" looks to "broader 'semantic context'"). Interestingly, one piece of scholarship that aims to investigate the history of statutory interpretation, WILLIAM D. POPKIN, STATUTES IN COURT: THE HISTORY AND THEORY OF STATUTORY INTERPRETATION (1999), does not comment on this story about the plain meaning school.

[10] *See supra* note 9.

[11] *Niz-Chavez*, 141 S. Ct. at 1484.

operative text at issue).[12] But, the argument goes, the Supreme Court lost its way in the late nineteenth and early twentieth centuries. The Court applied a "plain meaning rule," neglecting even such semantic clues to determine statutory meaning. Although not the only method of the late nineteenth and early twentieth centuries,[13] the plain meaning school is said to have persisted until around 1940.[14]

To investigate this historical account, I put together (with the help of research assistants) a database of cases from 1789 through 1945 that use the term "plain meaning" or similar terms. We identified over 270 cases that involved the interpretation of a federal statute. We then read through the cases to discern if and when there was a transition from the "good" textualism of the Marshall Court era to a "bad" textualism. There was no such transition. The Supreme Court of the late nineteenth and early twentieth centuries continued to apply the same tools—text and structure—to discern whether a federal statute had a plain meaning. If the Justices found a plain meaning, they would not look beyond that clear, operative text to contextual evidence such as the title, legislative history, or practical consequences.

The Article also offers an intellectual history to explain how the era nevertheless got the "literalism" label. Beginning in the early twentieth century, scholars became deeply critical of the plain meaning rule precisely because it barred contextual evidence that they deemed essential to understanding Congress's handiwork. Legal realists and legal process theorists condemned decisions that refused to look at sources such as legislative history as "wooden," "mechanical," and "literal."[15] Over time, this characterization took hold: scholars equated the late nineteenth and early twentieth centuries with a (bad) literal method. Modern textualists, in turn, accepted this characterization.

This acceptance was not only historically inaccurate but also deeply consequential for the development of textualism. In their efforts to distinguish their brand from the bad "plain meaning" days, modern textualists have emphasized that they take account of the "context" of a congressional enactment.[16] But they have offered very different (indeed, wide-ranging) notions of context: Prominent textualists have at times advocated a focus on "semantic context," while other textualist writings have

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[12] *See infra* Section II.A.

[13] The Justices also at times applied the strong purposivism associated with *Church of the Holy Trinity v. United States*, 143 U.S. 457, 458–59 (1892). *See* Manning, *Equity*, *supra* note 9, at 14–15 (stating that *Holy Trinity* "remains the leading precedent" for strong purposivism).

[14] *See infra* Parts II–III.

[15] *See infra* Part III.

[16] *See supra* note 9.

been much more expansive—suggesting that the interpretive inquiry extends to "social context," "social and linguistic context," and even "full context."[17] Textualism became so capacious that some scholars have argued that it is almost indistinguishable from purposivism, while others insist that textualism is overly rigid.[18] As these competing arguments suggest, textualism is not one single coherent method.

This Article argues, building on prior work,[19] that modern textualists' efforts to distinguish their method from the old plain meaning school—and to define textualism capaciously—made possible the divisions within textualism that we see today.[20] Some opinions apply a more "flexible textualism," taking into account policy and social context as well as the practical consequences of a decision. But in other cases, such as the majority opinions in *Bostock* and *Niz-Chavez*, the Justices employ a more "formalistic textualism," focusing on semantic context and avoiding resort to other considerations. Notably, this more "formalistic" version, which I have championed, has been the target of recent charges of literalism.[21] Some scholars contend that "[f]ormalist textualism is really another term for literalism."[22]

This Article seeks to clear away the historical and conceptual underbrush surrounding claims of literalism—and thereby to make a few contributions. First, the *actual* history of the plain meaning school teaches us that charges of "literalism" paper over far more fundamental disagreements about *which context* should be relevant in statutory interpretation—and, relatedly, whether there should be a rule of law that bars resort to certain context. Jurists and scholars would be well-advised to set aside the "literalism" label and focus on those more foundational questions—

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[17] *See, e.g.*, SCALIA & GARNER, *supra* note 1, at 15–16, 33 (stating that textualism is a principle that "[i]n their full context, words mean what they conveyed to reasonable people at the time they were written"); John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2457 (2003) [hereinafter Manning, *Absurdity*] (noting "the modern emphasis on understanding language in its social context"); Manning, *Equity*, *supra* note 9, at 107 ("[T]extualists believe that language has meaning only in its social and linguistic context.").

[18] *See, e.g.*, Doerfler, *supra* note 9, at 269 (describing some recent textualist opinions as displaying a "wooden" approach to interpretation, particularly in the use of interpretive canons); Jonathan R. Siegel, *The Inexorable Radicalization of Textualism*, 158 U. PA. L. REV. 117, 120–21 (2009) (arguing textualism is overly rigid).

[19] *See* Grove, *supra* note 4, at 266–71. My past work argues that there *are* divisions within textualism but does not explore the history of textualism to ascertain how those divisions arose. Nor does that work discuss charges of literalism. This Article takes up those tasks.

[20] To be clear, I do not claim that this historical misunderstanding is the only reason for the divisions within textualism today. But I do assert that this historical error was a contributing factor.

[21] *See supra* note 8 and accompanying text.

[22] Alexander, *supra* note 8, at 169, 172 (arguing that "[f]ormalist textualism is . . . thoroughly wrongheaded").

issues that matter to textualists and nontextualists alike. Second, the account here shows how an inaccurate or incomplete historical story can become "conventional" as the story is accepted and repeated by jurists and scholars from otherwise differing methodological perspectives. The Article thus provides a cautionary tale about the use of history in interpretive debates.

The Article proceeds as follows. Part I introduces the concept of "literalism," emphasizing that the label necessarily applies differently in statutory interpretation than in ordinary conversation. Part II explores the history of the plain meaning school and demonstrates, contrary to the conventional account, that there was no transition from a careful textualism of the early nineteenth century to a mechanical, acontextual method in the late nineteenth and early twentieth centuries. Part III discusses how legal realists and legal process theorists nevertheless created the narrative of a "wooden" plain meaning school. Part IV examines how modern textualists' acceptance of that narrative contributed to present-day divisions within textualism. And Part V turns to some lessons of this historical account for our understanding of both historical myths and issues of interpretive theory.

I. THE CONCEPT OF "LITERAL" MEANING

What does literalism mean when it comes to the interpretation of legal texts? The question turns out to be a conceptual challenge. Charges of "literalism" seem to assume that an interpretation is "acontextual." But no effort to interpret a federal statute can be entirely acontextual.[23] The fact that a written document is a congressional enactment is part of the relevant context—and rules out certain types of literalism. This point becomes clearer if we first consider "literal meaning" outside the context of legal instruments, and then return to charges of "literalism" in the law.

A. Literalism Outside the Law

In ordinary conversation, one might distinguish literal from figurative speech.[24] For example, following a successful trick-or-treating venture on

[23] Some theorists argue that no communication can be entirely acontextual. *See infra* note 24. That broader argument about language is beyond the scope of this Article.

[24] *See* Hugh Bredin, *The Literal and the Figurative*, 67 PHIL. 69, 69 (1992); Jerrold J. Katz, *Literal Meaning and Logical Theory*, 78 J. PHIL. 203, 221–22, 226–27 (1981). Some scholars doubt that "literal meaning" can ever be truly acontextual, even in ordinary conversation. *See* John R. Searle, *Literal Meaning*, 13 ERKENNTNIS 207, 207, 210 (1978); *accord* FREDERICK SCHAUER, PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE 56–58, 57 n.6 (1991) (agreeing with Searle that "some number of . . . contextual understandings" are "understood by both speaker and listener just because they inhabit the same planet and speak the same language"); *see also* FRANCOIS RECANATI, LITERAL MEANING 4 (2004) (criticizing Literalism and arguing for

Halloween, my six-year-old daughter asked my husband if he would put some of the candy in her lunchbox. My husband replied, "Maybe. But I don't want you bouncing off the walls at school." My daughter began to laugh: "Daddy!! I can't bounce off a wall!!" My daughter took the phrase "bounce off the walls" literally—and was amused at the thought of herself horizontally suspended in the air at school. My husband, of course, was using the phrase "bounce off the walls" figuratively (as an idiom)—to mean that he didn't want our daughter to misbehave in the classroom.

Nonlegal communication contains other examples of literalism. In puns or other humor, one might take a word entirely out of context for effect. The children's books starring Amelia Bedelia are full of such examples of literalism. When Amelia Bedelia was asked to "draw the drapes when the sun comes in," she dutifully—as soon as light shone through the windows—sat down and drew a picture of the drapes.[25] When Amelia Bedelia played baseball and was told to "run home," she dutifully ran, *not* to the pointy white plate by the catcher, but out of the baseball stadium entirely—all the way to her own house.[26] Both scenarios are funny because the actual meaning is so obvious to readers (my daughter typically *does* get the meaning in these books!). *Amelia Bedelia* books, by design, are full of what one might call "hyper-literalism."

But these examples of literalism do not carry over to legal instruments. As jurist Francis Lieber observed in 1839, legal texts are different from ordinary conversation or other genres of communication.[27] In "low comedy," Lieber noted, "[t]he greater part of the jokes, by which these personages make the hearers laugh, rest on literal interpretation and the contrast between the sense which the spectator attaches to a sentence, and that in which the [merrymaker] takes it."[28] Lieber mentioned theatrical performances from his day; *Amelia Bedelia* books offer more modern-day examples of the same point. But as Lieber emphasized, "[T]he object of law and politics is neither

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Contextualism, the view that "the contrast between what the speaker means and what she literally says is illusory, and the notion of 'what the sentence says' incoherent"); Stanley E. Fish, *Normal Circumstances, Literal Language, Direct Speech Acts, the Ordinary, the Everyday, the Obvious, What Goes Without Saying, and Other Special Cases*, 4 CRITICAL INQUIRY 625, 629–32, 638–39 (1978) (suggesting that "*all* utterances are understood" through "shared background information"). For my purposes, the important point is that many distinctions between literal and nonliteral communication in ordinary conversation do not carry over to federal statutes.

[25] PEGGY PARISH, AMELIA BEDELIA 19–21 (First An I Can Read Picture Book ed. 1999).

[26] PEGGY PARISH, PLAY BALL, AMELIA BEDELIA 54–55 (First Harper Trophy ed. 1978).

[27] *See* FRANCIS LIEBER, LEGAL AND POLITICAL HERMENEUTICS 96 n.1 (1839); *see also* Brian Flanagan, *Revisiting the Contribution of Literal Meaning to Legal Meaning*, 30 OXFORD J. LEGAL STUD. 255, 261 (2010) (observing that there may be "a convention whereby [legislative utterances] lack ironic, counter-attributive or metaphorical meanings").

[28] LIEBER, *supra* note 27, at 96 n.1.

to amuse or touch."[29] Statutes and other legal texts do not communicate in figurative language; they do not use metaphor or irony.[30] Nor are congressional enactments designed to make us laugh.[31]

B. The Charge of "Literalism" in Statutory Interpretation

This discussion underscores that "literal meaning" in the statutory context is necessarily different than in other forms of communication. Federal statutory interpretation cannot be entirely acontextual. At a minimum, an interpreter must know something about the context of enactment to determine that the series of words before her is a *federal statute*, rather than another legal instrument or some other written document entirely. Relatedly, and importantly, once an interpreter knows that a document is a federal statute, that rules out some types of "literalism" that may be quite common in ordinary conversation, fiction books, or theatrical performances.

One might therefore wonder whether (and how) interpreters may engage in a "literal" approach to statutory interpretation. But jurists and scholars have long insisted that the Supreme Court in the late nineteenth and early twentieth centuries did just that. According to the conventional wisdom, the Justices of that era often applied a "literal" approach by focusing exclusively on the operative text at issue and ignoring even the surrounding text and structure in decoding Congress's handiwork. For example, in the 1950s, leading purposivists Henry Hart and Albert Sacks described the interpretive approach of that earlier era—the plain meaning rule—as "declar[ing] that if the operative words of the statute were 'plain,' whatever

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[29] *Id.*

[30] *See* Brian G. Slocum, *Replacing the Flawed* Chevron *Standard*, 60 WM. & MARY L. REV. 195, 252–53 (2018) ("Natural '[l]anguage is full of nonliteral meanings, such as metaphors, idioms, slang, and polite talk.' . . . [S]uch usages of language are far less common in legal texts." (quoting BRIAN G. SLOCUM, ORDINARY MEANING: A THEORY OF THE MOST FUNDAMENTAL PRINCIPLE OF LEGAL INTERPRETATION 26 (2015))); *cf.* Ofra Magidor, *Category Mistakes and Figurative Language*, 174 PHIL. STUD. 65, 66 (2017) (stating that "it is very common for sentences which are used figuratively to be such that, if taken literally, they would constitute category mistakes," such as metaphor, "[t]he poem is pregnant," or metonymy, a waiter says, "[t]he ham sandwich is angry").

[31] *See* Ryan D. Doerfler, *Can a Statute Have More than One Meaning?*, 94 N.Y.U. L. REV. 213, 220 (2019) (noting that "legislative language typically lacks" "humorous effect"); Jonathan R. Siegel, *The Polymorphic Principle and the Judicial Role in Statutory Interpretation*, 84 TEX. L. REV. 339, 366–67 (2005) ("Humor is not a quality one typically associates with statutes . . . ."). The discussion here aligns with critiques of the use of conversational examples more generally. *See, e.g.*, Mark Greenberg, *Legal Interpretation and Natural Law*, 89 FORDHAM L. REV. 109, 122–23 (2020) ("Lawmaking has very different goals, presuppositions, and circumstances from ordinary conversation."). In recent work, I raise questions about textualists' (and other interpreters') use of "homey examples"—that is, examples drawn from everyday conversation. *See* Tara Leigh Grove, *Testing Textualism's "Ordinary Meaning"*, 9 GEO. WASH. L. REV. 1053, 1082–84 (2022); *id.* at 1056–57 (arguing that "ordinary meaning" can be understood as a legal concept, rather than simply as an empirical fact, and that prominent textualists have long understood "ordinary meaning" in legal terms).

that might mean, all other aids to interpretation were to be ignored. In extreme application this seemed to *exclude consideration of even related parts of the statute and the scheme as a whole*."[32]

Several decades later, modern textualists concurred in that depiction of the old plain meaning school. Dean John Manning has suggested that the Justices of the late nineteenth and early twentieth centuries often applied a "literalist" approach that failed to "acknowledge that language has meaning only in context."[33] Modern textualists thus aimed to distinguish their approach from (what they perceived as) the literal and wooden method of the past. I discuss the academic literature and the development of modern textualism in more detail in Parts III and IV. The next Part examines the historical claim.

II. THE STORY OF THE PLAIN MEANING SCHOOL

Modern textualists have long sought to distinguish their brand from the old plain meaning school, which scholars describe as a literal and mechanical approach to interpretation that the Supreme Court applied from the 1890s until 1940.[34] Importantly, scholars do not assert that the Court adopted this literal approach at the outset. Prominent textualists argue that the early Supreme Court—under the watchful eye of Chief Justice Marshall—applied a properly contextual approach to statutory interpretation. Accordingly, the claim is that the Court transitioned from the good textualism of the early nineteenth century to a bad textualism many decades later.[35] To support this claim, scholars point to specific language in the opinions of the late nineteenth and early twentieth centuries: jurists declared that "interpretation can occur 'within the four corners' of a statute," and that "'the duty of interpretation does not arise' when a text is 'plain.'"[36]

To investigate this account, I created a database of Supreme Court cases from 1789 to 1945, which used the term "plain meaning" or similar terms. Over 270 such cases involved federal statutory interpretation. My research suggests that there was no transition from a "good" to a "bad" textualism. In fact, phrases very similar to those attacked as overly literal—such as "[w]here the intent is plain, nothing is left to construction"—can be found in the very Marshall Court opinions that modern textualists have praised, as

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[32] HART & SACKS, *supra* note 1, at 1236 (emphasis added).

[33] Manning, *Equity*, *supra* note 9, at 108.

[34] *See supra* notes 9–10 and accompanying text; Bradley C. Karkkainen, "*Plain Meaning": Justice Scalia's Jurisprudence of Strict Statutory Construction*, 17 HARV. J.L. & PUB. POL'Y 401, 436 (1994).

[35] *See supra* note 9.

[36] Manning, *Equity*, *supra* note 9, at 108–09 (first quoting White v. United States, 191 U.S. 545, 551 (1903); and then quoting Caminetti v. United States, 242 U.S. 470, 485 (1917)).

well as many other cases that predate the 1890s.[37] These phrases, it turns out, were not a mark of wooden interpretation. Instead, they were used to express that, when the operative text of a statute was clear (as determined by looking at the surrounding text and structure), judges should not resort to other contextual evidence, such as the title, concerns about practical consequences, or (eventually) legislative history.[38]

Before I discuss the results of my historical survey, I want to clarify the nature and scope of my claims. First, this is primarily a historical project. I looked at many (over 270) cases because the Article challenges a generalization about an entire era of Supreme Court history; it was important to look broadly. Second, I do not assert that the Justices relied primarily on textualist modes of analysis—either in the early nineteenth century or later on. My own research suggests that the early Court (much like the Court today) was pluralist in its approach to statutory interpretation.[39] My goal here is to show that, *when* the Court applied more text-focused methods (as it often did), it did not apply a literal approach. The Supreme Court of the late nineteenth and early twentieth centuries continued to apply the methods of the Marshall Court.

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[37] United States v. Fisher, 6 U.S. (2 Cranch) 358, 386 (1805); *see also* Thornley v. United States, 113 U.S. 310, 310, 313 (1885) (stating, in a case involving the pay of retired navy officers, that "[w]here the meaning of a statute is plain it is the duty of the courts to enforce it according to its obvious terms" and that "[i]n such a case there is no necessity for construction"); Hilton v. Merritt, 110 U.S. 97, 104 (1884) (concluding that the relevant statutes gave customs officials "final" authority to appraise certain items for taxation purposes and stating "[t]his language would seem to leave no room for doubt or construction"); Lewis v. United States, 92 U.S. 618, 620–21 (1875) (explaining in a case involving the Bankruptcy Act of 1867 that "[w]here the language of a statute is transparent, and its meaning clear, there is no room for the office of construction"); Morton v. Nebraska, 88 U.S. (21 Wall.) 660, 671, 674–75 (1874) (holding that an individual was not entitled to a land grant and stating "[t]here is no authority to . . . subtract from the general words of the section" and "[t]he language of the section is imperative and leaves no room for construction"); United States v. Hartwell, 73 U.S. (6 Wall.) 385, 393–96 (1867) (holding that the defendant was properly charged with embezzlement, and after discussing "[t]he context . . . and the language" of the relevant provisions, stating that "[i]f the language be clear it is conclusive," as "[t]here can be no construction where there is nothing to construe"); Evans v. Jordan, 13 U.S. (9 Cranch) 199, 202–03 (1815) (stating that "[t]he language of this last proviso is so precise, and so entirely free from all ambiguity, that it is difficult for any course of reasoning to shed light upon its meaning" and thus declining to extend a statutory defense because injustice to defendants "can never sanction a construction at variance with the manifest meaning of the legislature, expressed in plain and unambiguous language"). Many early cases use the term "construction," and some readers may wonder whether there was a distinction between "interpretation" and "construction." I discuss that possibility below. *See infra* note 63 and accompanying text.

[38] The Supreme Court did not rely on legislative history much during this early era, likely because it was not readily available until the late nineteenth century. *See infra* note 62 and accompanying text.

[39] For a debate over whether the early Court favored textualist methods, compare William N. Eskridge Jr., *All About Words: Early Understandings of the "Judicial Power" in Statutory Interpretation, 1776-1806*, 101 COLUM. L. REV. 990, 993–95, 997 (2001), with Manning, *Equity*, *supra* note 9, at 6–7, 9.

A. The Textualism of the Early Supreme Court

Modern textualists have praised the Marshall Court for its approach to statutory interpretation. According to Manning, the early Court was properly attentive to the text but not "literal in its approach to statutes."[40] Likewise, Professor John Yoo contends that the Marshall Court "emphasized a statute's text, structure, and legal context."[41] Scholars assert that the Marshall Court's textualist method is exemplified by *United States v. Fisher* (1805)[42] and *United States v. Wiltberger* (1820),[43] so I examine each case in turn.

Fisher was a bankruptcy case that raised the question of whether the United States government could recover before the debtor's other creditors.[44] The relevant 1797 statute provided that "where any revenue officer, *or other person* hereafter becoming indebted to the United States . . . shall become insolvent, . . . *the debt due to the United States shall be first satisfied*."[45] In an opinion by Chief Justice Marshall, the Court declared that this "enacting clause . . . plainly [gave] the United States the preference they claim[ed]."[46] This interpretation was supported by the overall text and structure of the statute. Although some sections of the law enabled the government to recover only from public officials who were "accountable for public money," the provision here referred not only to "[a]ny revenue officer" but also "other person, hereafter becoming indebted to the United States" and thereby "comprehend[ed] every debtor of the public, however his debt might have been contracted."[47]

Chief Justice Marshall acknowledged that this plain meaning appeared to be in some tension with the apparent purpose of the federal statute, as reflected in the title to the 1797 law. The title—"An Act to Provide More Effectually for the Settlement of Accounts *Between the United States, and Receivers of Public Money*"—suggested that the law was designed to give the federal government priority *only* when the debtor was a public official

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[40] Manning, *Equity*, *supra* note 9, at 89–102, 91 n.348; *see* Manning, *Absurdity*, *supra* note 17, at 2388.

[41] John Choon Yoo, Note, *Marshall's Plan: The Early Supreme Court and Statutory Interpretation*, 101 YALE L.J. 1607, 1615–26, 1629 (1992).

[42] 6 U.S. (2 Cranch) 358 (1805); Manning, *Equity*, *supra* note 9, at 94–95 (noting that *Fisher* is "[p]erhaps the leading example of the Marshall Court's overall approach"); Yoo, *supra* note 41, at 1621 ("*Fisher* illustrates the Marshall Court's general approach . . . .").

[43] 18 U.S. (5 Wheat.) 76 (1820); *see* Manning, *Equity*, *supra* note 9, at 91 & n.348 (asserting that *Wiltberger* shows the Court was not "literal in its approach to statutes"); Yoo, *supra* note 41, at 1608, 1622 (asserting that *Wiltberger* shows how Marshall "consulted [a] statute's structure").

[44] 6 U.S. at 385.

[45] Act of 1797, ch. 20, § 5, 1 Stat. 512, 515 (emphasis added).

[46] *Fisher*, 6 U.S. at 386, 397.

[47] *Id.* at 385–86, 388–89 ("This change of language strongly implies an intent to change the object of legislation.").

whose job was to collect taxes or otherwise keep track of the government's money.[48] But, the Chief Justice admonished, the Court should not rely on sources such as the title when the operative text was plain: "Neither party contends that the title of an act can controul plain words in the body of the statute; and neither denies that, taken with other parts, it may assist in removing ambiguities. *Where the intent is plain, nothing is left to construction*."[49] Nor would the Court reject the plain language because of the practical consequences—"mischiefs"—that could follow from a decision that gave priority to the government.[50]

Wiltberger involved whether the federal courts had jurisdiction over a criminal case for manslaughter when the crime was committed on an American ship docked off the Tigris River in China.[51] A 1790 statute gave the federal courts jurisdiction "if any seaman or other person shall commit manslaughter upon the high seas."[52] The question was whether the crime in this case had occurred on the "high seas."[53] Again in an opinion by Chief Justice Marshall, the Court found that the answer was no: "If the words be taken according to the common understanding . . . , the 'high seas,' if not in all instances confined to the ocean which washes a coast, can never extend to a river about half a mile wide, and in the interior of a country."[54] The Chief Justice further asserted that this interpretation made sense in light of the structure of the statute. Other sections extended beyond the "high seas," so "[t]he conclusion seems irresistible, that Congress has not in [the manslaughter] section inserted the limitation of place inadvertently."[55]

The federal government argued that the Court's application of the statute here would lead to disturbing consequences. The government attorney explained: "China herself disclaims jurisdiction" over crimes involving foreigners on foreign ships, so "[t]he offence here . . . is dispunishable, unless it be punishable in the Courts of this country."[56] Chief Justice Marshall acknowledged that it was "extremely improbable" that Congress

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[48] Act of 1797, ch. 20, §§ 1, 5, 1 Stat. 512, 512, 515 (emphasis added); *Fisher*, 6 U.S. at 386–87 ("The title . . . is unquestionably limited to 'receivers of public money;' a term which undoubtedly excludes . . . the present case.").

[49] *Fisher*, 6 U.S. at 386 (emphasis added).

[50] *Id.* at 389–90.

[51] U.S. v. Wiltberger, 18 U.S. (5 Wheat.) 76, 76–77, 105–06 (1820).

[52] Act of April 30, 1790, ch. 9, § 12, 1 Stat. 112, 115.

[53] *Wiltberger*, 18 U.S. at 93–94.

[54] *Id.* at 94, 105.

[55] *Id.* at 94, 96–104. Other sections did extend beyond "the high seas" to "any river." *See, e.g.*, Act of April 30, 1790, ch. 9, § 8, 1 Stat. 112, 113-14 (applying to murder or robbery committed "upon the high seas, or in any river, haven, basin or bay, out of the jurisdiction of any particular state").

[56] *Wiltberger*, 18 U.S. at 82–84 (outlining the statement of C.J. Ingersoll, counsel for the United States).

would so limit the reach of the manslaughter section.[57] But the Court had to adhere to the plain text: "The intention of the legislature is to be collected from the words they employ. *Where there is no ambiguity in the words, there is no room for construction*."[58]

These cases offer a few important lessons. First, the Marshall Court used phrases such as "[w]here the intent is plain, nothing is left to construction."[59] Such phrases are unfamiliar to a modern-day audience, but they were not an effort to avoid a contextual examination of a statutory provision. As *Fisher* and *Wiltberger* demonstrate, the Marshall Court did not read words in isolation but looked to the overall text and structure—for example, comparing and contrasting sections of the relevant statute—in discerning the ordinary meaning of statutory language.[60]

Second, and relatedly, one can see in these early decisions an assumption that statutory interpretation involved (at least) a two-step analysis.[61] First, the Court would consider, based on the text and structure of the statute, whether the operative text was plain. If the Court found that it was, the analysis would stop there. The Court would not look to either the title or the practical consequences to depart from that plain meaning; that is what the Court meant when it said there was "no room for construction." But second, if the Court found ambiguity, it could engage in "construction" by relying on such other contextual evidence. Notably, the Marshall Court did not focus on legislative history, which was not as readily available in the early nineteenth century;[62] debates over this evidentiary source would develop later.

In his 1839 treatise, Lieber encouraged judges to view statutory analysis as consisting of two stages, with "interpretation" encompassing an effort to determine statutory meaning, and "construction" as "the drawing of conclusions respecting subjects[] that lie beyond the direct expression of the

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[57] *Id.* at 105.

[58] *Id.* at 95–96 (emphasis added).

[59] United States v. Fisher, 6 U.S. (2 Cranch) 358, 386 (1805); *Wiltberger*, 18 U.S. at 95–96.

[60] The early Court also often read statutory language *in pari materia*—comparing current and past statutes. *See Fisher*, 6 U.S. at 395; Yoo, *supra* note 41, at 1625.

[61] I do not mean to suggest that each case analyzed statutory language in this precise order. But one can see this general approach in the early cases—both from the Marshall Court era and, as discussed below, from the decisions of the late nineteenth and early twentieth centuries.

[62] *See* Nicholas R. Parrillo, *Leviathan and Interpretive Revolution: The Administrative State, the Judiciary, and the Rise of Legislative History, 1890-1950*, 123 YALE L.J. 266, 271–74 (2013) (stating that legislative history was published more reliably beginning in the latter half of the nineteenth century, so then "federal courts had to decide whether to use the legislative history that was proliferating," and that judges began to do so "in a handful of cases" in the 1870s and 1880s, although the use became more common in subsequent decades).

text."[63] Although the judiciary of the nineteenth century did not carefully distinguish the terms interpretation and construction, one can see Lieber's basic idea at work in these decisions.[64] In subsequent decades, the plain meaning rule would continue to serve as a rule of exclusion—one that would also bar resort to legislative history, when the Court determined, after looking at the surrounding text and structure, that the operative text was plain.

B. No Transition to a New Plain Meaning School

According to the conventional story, beginning in the late nineteenth century, there was a transition to a "plain meaning school": From the 1890s until 1940, when the Supreme Court applied text-based methods, its approach was improperly literal and mechanical, neglecting even the surrounding statutory text and structure. But I found no such transition. Instead, when the Court purported to adhere to the "plain meaning" of a law, it applied the same principles as the Marshall Court in *Fisher* and *Wiltberger*.[65] To be sure, not every decision sought to adhere to a statutory text. The strong purposivism of *Church of the Holy Trinity v. United States* was a competing theme of this era.[66] But when the Court applied a text-based method, the Court attended to statutory text and structure—and declined to look beyond a clear operative text to, for example, the title, consequences, or legislative history.

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[63] LIEBER, *supra* note 27, at 55–56. Some originalists have used the terms in constitutional debates. *See* KEITH E. WHITTINGTON, CONSTITUTIONAL CONSTRUCTION 6 (1999); Randy E. Barnett & Evan D. Bernick, *The Letter and the Spirit: A Unified Theory of Originalism*, 107 GEO. L.J. 1, 10–13 (2018); Lawrence B. Solum, *The Fixation Thesis: The Role of Historical Fact in Original Meaning*, 91 NOTRE DAME L. REV. 1, 9–10 (2015); *see also* Curtis A. Bradley & Neil S. Siegel, *Constructed Constraint and the Constitutional Text*, 64 DUKE L.J. 1213, 1217 (2015) (raising questions about the interpretation–construction distinction). This terminology seems not to have (yet) had a strong impact on the statutory literature. For two articles that do draw the distinction between interpretation and construction in the statutory context, see Lawrence B. Solum & Cass R. Sunstein, Chevron *as Construction*, 105 CORNELL L. REV. 1465, 1468–70 (2020), and Lawrence B. Solum, *Disaggregating* Chevron, 82 OHIO ST. L.J. 249, 264–70 (2021).

[64] Later treatises noted Lieber's distinction but asserted that nineteenth-century courts largely used the terms interpretation and construction interchangeably. *See* HENRY CAMPBELL BLACK, HANDBOOK ON THE CONSTRUCTION AND INTERPRETATION OF THE LAWS 2–4 (1896); J.G. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 236, 311 & n.8 (1891).

[65] Indeed, the Court often expressly relied on those cases. *See* Osaka Shosen Kaisha Line v. United States, 300 U.S. 98, 101 (1937); United States v. Mo. Pac. R.R., 278 U.S. 269, 277–78 (1929); United States v. Harris, 177 U.S. 305, 309–10 (1900).

[66] 143 U.S. 457, 459 (1892) ("It is a familiar rule, 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.").

1. The Nonmechanical Plain Meaning School

To illustrate the plain meaning approach of the era, I offer several cases that cover a range of legal issues and that span several decades. *Crawford v. Burke* (1904) illustrates the Court's reliance on text and structure in determining a statute's plain meaning. Plaintiff John Burke brought suit against two stock brokers, alleging that they had "fraudulently, and without [his] knowledge or consent, sold [his] stock and converted the proceeds of such sales to their own use."[67] The defendants asserted that any such debt had already been discharged in bankruptcy.[68] The Bankruptcy Act of 1898 provided that "[a] discharge in bankruptcy shall release a bankrupt from all of his provable debts, except such as . . . (2) are judgments in actions for frauds . . . or (4) *were created by his fraud*, embezzlement, misappropriation, or defalcation *while acting* as an officer, or *in any fiduciary capacity*."[69]

The Court unanimously held that the debt had indeed been discharged. The fourth exception, the Court reasoned, did not "apply to *all* debts created by the fraud, embezzlement, [or] misappropriation of the bankrupt" but "only to such as were created while he was acting as an officer or in some fiduciary capacity."[70] Otherwise, it would be hard to make sense of the separate exception for "judgments in actions for frauds."[71] And the Court noted that, under longstanding precedent, a stockbroker was "not indebted in a fiduciary capacity within the bankruptcy acts."[72]

The Court asserted that its conclusion was "fortified" by a comparison to past bankruptcy laws.[73] Under an 1867 statute, "[n]o debt created by the fraud or embezzlement of the bankrupt, . . . or while acting in any fiduciary character, shall be discharged" under the act.[74] The Court stated: "The language of this [1867 law] is so clear as to require no construction. It is plain and explicit . . . that the fraud and embezzlement . . . need not have been committed . . . in a fiduciary character."[75] The "different language" in the 1898 statute suggested "a change of meaning."[76] Although it was not

[67] 195 U.S. 176, 177–78 (1904) ("It was averred in each of said counts that such representations were false and fraudulent, and by means thereof defendants obtained from the plaintiff the aggregate sum of $10,800.").

[68] *See id.* at 178.

[69] Bankruptcy Act of July 1, 1898, ch. 541, § 17, 30 Stat. 544, 550–51 (emphasis added).

[70] *Crawford*, 195 U.S. at 188 (emphasis added).

[71] *Id.* at 188.

[72] *Id.* at 189 (noting that this rule emerged in *Chapman v. Forsyth*, 43 U.S. (2 How.) 202 (1844)).

[73] *Id.* at 188.

[74] *Id.* at 189 (quoting Bankruptcy Act of 1867, ch. 176, § 33, 14 Stat. 517, 533).

[75] *Id.* ("Under the bankruptcy act of 1867 the list of debts excluded from the operation of the discharge was considerably larger.").

[76] *Id.* at 190.

"altogether clear" why Congress would enable someone like these stockbrokers to discharge their debts, the Court found that the statute required that result.[77]

Strathearn Steamship Co. v. Dillon (1920) demonstrates the Supreme Court's emphasis on statutory structure in determining plain meaning—and its unwillingness to allow a title to override a clear operative text.[78] In *Strathearn*, British seaman John Dillon brought suit against a British steamship company under the Seamen's Act of 1915.[79] Dillon had contracted to receive all of his wages at the end of the voyage but, relying on this federal statute, argued that he was entitled to half his wages when the ship docked in Pensacola, Florida.[80] The 1915 law provided that "[e]very seaman on a vessel of the United States shall be entitled to receive on demand . . . one-half part of the wages which he shall have then earned . . . and all stipulations in the contract to the contrary shall be void . . . ."[81] The law further provided: "[T]his section shall apply to seamen on foreign vessels while in harbors of the United States, and the courts of the United States shall be open to such seamen for its enforcement."[82] The central question was whether the statute applied only to American seamen or also to foreign seamen such as Dillon.

The Court unanimously held that Dillon was entitled to his wages.[83] The Court noted that the text expressly extended the law to "seamen on foreign vessels."[84] And protecting foreign seamen made sense in light of the surrounding text: the provisions enabling suit in federal court would be "wholly superfluous" if the law did not encompass foreigners, given that American seamen had alternative ways to sue.[85] The shipping company, however, insisted that applying the law to assist a *British* seaman made little sense "because of the title of the act in which its purpose is expressed 'to promote the welfare of *American* seamen in the merchant marine of the United States.'"[86] The Court rejected that claim: "[T]he title of an act cannot limit the plain meaning of its text, although it may be looked to to aid in construction in cases of doubt."[87]

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[77] *Id.* at 191–92.

[78] 252 U.S. 348, 354 (1920).

[79] *Id.* at 351–52.

[80] *See id.* (noting Dillon claimed $125.00 in wages).

[81] Seamen's Act, ch. 153, § 4, 38 Stat. 1164, 1165 (1915).

[82] *Id.*

[83] *Dillon*, 252 U.S. at 352, 357.

[84] *See id.* at 356.

[85] *See id.* at 354.

[86] *Id.* at 354–55.

[87] *Id.* at 354.

United States v. Missouri Pacific Railroad Co. (1929) shows how the Court would adhere to plain statutory language, notwithstanding the legislative history or the practical consequences of a decision.[88] The case involved the authority of the Interstate Commerce Commission (ICC) to establish a "through route" in Arkansas.[89] A "through route" is a line of railway that is shared by two or more railroads.[90] The ICC granted the request of a small Arkansas-based railroad for a through route with the Missouri Pacific Railroad—apparently to enable the smaller railroad to stay afloat financially.[91] The Missouri Pacific argued that the agency decision violated the Interstate Commerce Act, which authorized the ICC to establish through routes "in the public interest" but specifically prohibited it from doing so "without [a railroad's] consent" when the through route would "embrace . . . substantially less than the entire length of its railroad which lies between the termini of such proposed through route," unless "one of the carriers is a water line" or the railroad's existing route was "unreasonably long."[92]

The Court unanimously agreed that the ICC's order was "plainly repugnant to the rule" in the Interstate Commerce Act.[93] The order, the Court reasoned, would impose upon the Missouri Pacific "without its consent," a through route that would "embrace . . . substantially less than the entire length" of a passage that the railroad already operated through Arkansas, even though neither statutory caveat applied: there was no water line, and the ICC had made no finding that the existing route was "unreasonably long."[94] But the government insisted that such an interpretation would be at odds with the purpose of the Act "to promote an efficient transportation service" and that it would have unfortunate consequences because it would give large railroad companies a veto power over through routes.[95] The government pointed to legislative history that, in the government's view, suggested that the statute had a narrower reach.[96] But relying on *Fisher* and *Wiltberger*, the Court declared:

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[88] 278 U.S. 269, 277–78 (1929). The Court in other cases declined to depart from the plain text despite potential negative consequences. *See* Crooks v. Harrelson, 282 U.S. 55, 58, 61 (1930); *see also* United States v. Brown, 206 U.S. 240, 243–44 (1907) ("[W]hatever the consequences we must accept the plain meaning of plain words.").

[89] *Mo. Pac.*, 278 U.S. at 273–74.

[90] Through Routes and Through Rates, 12 I.C.C. 163, 163 (1907).

[91] *Mo. Pac.*, 278 U.S. at 274–75.

[92] 49 U.S.C. § 15(3)–(4) (1925–1926).

[93] *Mo. Pac.*, 278 U.S.at 276–77.

[94] *Id.* at 273–74, 276–77; *see* Brief for Missouri Pacific Railroad Co., Appellee, at 3–6, 17–18, 21, *Mo Pac.*, 278 U.S. 269 (1929) (No. 607) (showing a map to illustrate the overlapping routes).

[95] Brief for the Interstate Commerce Commission at 11, 18, 30–33, *Mo. Pac.*, 278 U.S. 269 (1929) (No. 607).

[96] *See id.* at 30–33 (discussing the legislative history).

> It is elementary that where no ambiguity exists there is no room for construction. Inconvenience or hardships, if any, that result from following the statute as written must be relieved by legislation. . . .
>
> . . . [W]here the language of an enactment is clear . . . legislative history may not be used to support a construction that adds to or takes from the significance of the words employed.[97]

Weiss v. United States (1939) further illustrates how, under the plain meaning rule, the Court looked at the surrounding text and structure to determine whether an operative text was clear; if so, the Court would not rely on a title or legislative history.[98] *Weiss* involved a federal criminal prosecution for insurance fraud.[99] The criminal defendants alleged that wiretap evidence of their phone conversations was inadmissible, relying on Section 2 of the Federal Communications Act, which declared that "no person not being authorized by the sender shall intercept any communication and divulge or publish . . . such intercepted communication to any person."[100] The federal government responded that this provision "must be more narrowly interpreted to cover *only* interstate and foreign communications."[101] Because the communications in this case took place within one state, the prohibition did not apply.[102]

The Court unanimously held that the government's position was at odds with the plain meaning of the law.[103] The Court relied on the structure of the Communications Act. Although some sections applied only to "interstate or foreign communication," Clause 2 contained no such restriction.[104] But the government urged that the title—"An Act [t]o provide for the *regulation of interstate and foreign communication* by wire or radio, and for other purposes"—demonstrated "an intent to regulate *only* interstate and foreign communication."[105] The government further insisted that "if Congress had

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[97] *Mo. Pac.*, 278 U.S. at 277–78 (first citing United States v. Wiltberger, 18 U.S. (5 Wheat.) 76, 95–96 (1820); then citing United States v. Fisher, 6 U.S. (2 Cranch) 358, 366 (1805); and then citing Caminetti v. United States, 242 U.S. 470 (1917)). The Court also doubted that the legislative history supported the government's position. *See id.* at 278–79.

[98] 308 U.S. 321, 329 (1939).

[99] *See id.* at 324.

[100] Communications Act of 1934, ch. 652, § 605, 48 Stat. 1064, 1104. The defendants also raised objections under the Fourth and Fifth Amendments. *See Weiss*, 308 U.S. at 326.

[101] *Weiss*, 308 U.S. at 326–27 (emphasis added).

[102] *See id.* at 326–27 (noting "[a]ll of the communications" were "intrastate save one").

[103] *See id.* at 328, 331.

[104] *See id.* at 327–28; *see also* Communications Act of 1934 § 605 (the first and third clauses applied only to "any interstate or foreign communication").

[105] Communications Act of 1934, ch. 652, 48 Stat. 1064, 1064; *Weiss*, 308 U.S. at 329 (emphasis added).

intended to make so drastic a change as to regulate intrastate as well as interstate communication, both the legislative history of the Act and its phraseology would so indicate."[106] The Court, however, held that "the broad and inclusive language of [Clause 2] is not to be limited by construction so as to exclude intrastate communications from the protection against interception and divulgence."[107]

These decisions illustrate that, in the late nineteenth and early twentieth centuries, the Supreme Court did not apply an acontextual interpretive method. Much like their predecessors in the Marshall Court, the Justices examined the text and structure of a statute—for example, as in *Weiss* and *Crawford*, comparing and contrasting statutory sections, or comparing a present and a past statute—to determine if the provision at issue had a plain meaning. If so, the Court would not look beyond that clear operative text to other contextual evidence such as the title, legislative history, or practical consequences.

To be sure, some readers might object on normative grounds to the approach of the plain meaning school. One might argue that a statutory title should be part of the relevant context[108] or insist on the value of considering legislative history or the practical consequences of a decision; as discussed below, such issues have long been at the heart of disputes over statutory methodology. My goal in this Section is not to defend the plain meaning school as a normative matter but to document the reality that I found after surveying hundreds of cases: when the Supreme Court of the late nineteenth and early twentieth centuries applied the plain meaning rule, the Court narrowed the relevant context but did not (as assumed by modern scholars) apply an acontextual approach.

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[106] *Weiss*, 308 U.S. at 328–29.

[107] *Id.* at 329. The Court also rejected the government's argument that the wiretaps had been "authorized by the sender" within the meaning of the statute. *Id.* at 329–31 ("The participants were ignorant of the interception . . . and did not consent . . . .").

[108] Statutory titles may be enacted as part of the text of a statute, much like a preamble or a statement of purpose. *See infra* note 153 and accompanying text; *cf.* Jarrod Shobe, *Enacted Legislative Findings and Purposes*, 86 U. CHI. L. REV. 669, 672 (2019) (exploring "how Congress drafts findings and purposes"). Thus, one might argue that the Court should treat such enacted material as part of the relevant semantic context. That is certainly plausible. The Court's reluctance to give greater weight to the title seems to be analogous to the canon that the specific governs the general. *See* RadLAX Gateway Hotel, LLC v. Amalgamated Bank, 566 U.S. 639, 645 (2012). When the specific operative text is clear (in light of the surrounding structural provisions), the more general title may not be used to override it. By contrast, a title may be considered when the operative text is ambiguous. *See* SCALIA & GARNER, *supra* note 1, at 222. Interestingly, as discussed briefly below, some statutory or section titles may be entitled to *less* weight today, because of modern-day congressional drafting and codification practices. *See infra* note 330.

2. A Competing Method: Spirit Over the Letter

The plain meaning approach was not the only method used by the Supreme Court in the late nineteenth and early twentieth centuries. In a number of cases, the Court was willing to depart from the "letter" of the law to adhere to its "spirit."[109] The most prominent example was *Church of the Holy Trinity v. United States* (1892).[110] Interestingly, it is in this line of cases that the Supreme Court most often talked about "literal" meaning.[111] It is not clear that "literalism" was during this era quite the epithet that it became in subsequent years. But it does seem at least notable that the Justices referred to "literalism" primarily when they sought to *avoid* what they took to be the literal meaning.[112]

Holy Trinity involved an 1885 statute that prohibited "any person" from entering a "contract or agreement" to bring "any foreigner . . . into the United States . . . to perform labor or service of any kind."[113] The question in the case was whether the law prohibited the Holy Trinity Church from contracting with a pastor from England.[114] The Supreme Court acknowledged that the statutory language was "broad enough to reach" the pastor.[115] But, the Court admonished, "[i]f a literal construction of the words

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[109] *See, e.g.*, Church of the Holy Trinity v. United States, 143 U.S. 457, 459 (1892).

[110] *See* Manning, *Equity*, *supra* note 9, at 14 (stating that *Holy Trinity* "remains the leading precedent" for strong purposivism). Some recent scholarship, relying on corpus linguistics methods, has argued that the Court in *Holy Trinity* may have properly construed the text. *See* Tammy Gales & Lawrence M. Solan, *Revisiting a Classic Problem in Statutory Interpretation: Is a Minister a Laborer?*, 36 GA. ST. U. L. REV. 491, 533 (2020). A full exploration of this issue, and corpus linguistics more generally, is beyond the scope of this Article. For purposes of this historical study, it is important that the Court in *Holy Trinity itself* did not claim that its decision rested on the plain meaning of the text. That is, the Court did not purport to apply the plain meaning rule. *See infra* notes 113–119 and accompanying text. Accordingly, *Holy Trinity* should be treated, as a historical matter, as applying an alternative interpretive method—however scholars may seek to justify the decision today.

[111] *See, e.g.*, *Holy Trinity*, 143 U.S. at 460 ("If a literal construction . . . be absurd, . . . [t]he court must restrain the words."); *see also* Fleischmann Constr. Co. v. United States *ex rel.* Forsberg, 270 U.S. 349, 361 (1926) (opining that the Court would not "take[] literally" the Materialmen's Act given that "[t]he strict letter" must "yield to its evident spirit and purpose"); Ozawa v. United States, 260 U.S. 178, 194 (1922) (noting that, although the naturalization law would literally allow an individual born in Japan to become a naturalized citizen, "[w]e may . . . sacrific[e], if necessary, the literal meaning"). One can find examples that predate *Holy Trinity*. *See* Heydenfeldt v. Daney Gold & Silver Mining Co., 93 U.S. 634, 638 (1876) (reasoning that if a "literal interpretation of any part of [a statute] would . . . lead to absurd results, . . . it should be rejected").

[112] *See supra* note 111. On occasion, the Court did use the term "literal" in a nonpejorative sense. *See* Crooks v. Harrelson, 282 U.S. 55, 59–60 (1930) (noting that the *Holy Trinity* principle could "override the literal terms of a statute only under rare and exceptional circumstances").

[113] Act of Feb. 26, 1885, ch. 164, § 1, 23 Stat. 332, 332 (repealed 1952) (entitling the law as "An Act [t]o prohibit the importation and migration of foreigners and aliens under contract or agreement to perform labor in the United States").

[114] *See Holy Trinity*, 143 U.S. at 458.

[115] *Id.* at 472.

of a statute be absurd, the act must be so construed as to avoid the absurdity. The court must restrain the words."[116] Turning to the title and legislative history of the statute, the Court found that the title—"An Act [t]o prohibit the importation and migration of foreigners and aliens under contract or agreement to perform *labor* in the United States"—"[o]bviously" indicated that the law was meant to "reach[] only to the work of the manual laborer, as distinguished from that of the professional man."[117] The legislative history was, in the Court's view, to the same effect.[118] Accordingly, the Court held that the Act prohibited only contracts for "cheap unskilled labor" and thus did not apply to "Christian ministers."[119]

The late nineteenth and early twentieth centuries were thus characterized by two competing methods. Many decisions, such as *Crawford* and *Weiss*, sought to adhere to the plain meaning of statutes, as reflected in the text and structure. Other decisions, as in *Holy Trinity*, concluded that an application of a statute was so problematic or "absurd" (or so at odds with the apparent congressional intent or purpose) that the Court should treat the law as ambiguous and look to other contextual evidence, such as the title or legislative history, to depart from the most straightforward meaning.[120] The opinions in *Helvering v. New York Trust Co.* (1934) nicely capture the competing approaches of the era.[121]

Helvering involved the proper capital gains tax on stock held in trust.[122] The revenue would be taxable at a lower 12.5% rate (as the trustee preferred) only if the shares qualified as "capital assets" within the meaning of the Revenue Act of 1921.[123] That statute provided that "[t]he term 'capital assets' . . . means property acquired and *held by the taxpayer* for profit or investment *for more than two years*."[124] There was no question that the

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[116] *Id.* at 460.

[117] *Id.* at 461–63 (emphasis added) (internal quotation marks omitted).

[118] *See id.* at 464–65.

[119] *See id.* at 464, 465–72 ("[T]his is a religious nation.").

[120] Another phrase emphasized by modern scholars—that interpretation should occur only "within the four corners" of a statute—also comes from the *Holy Trinity* line of reasoning. In *White v. United States*, an officer appointed in 1877 sought increased pay under an 1899 statute. 191 U.S. 545, 548–50 (1903). Relying on the title and citing *Holy Trinity*, the Court held that the law did not apply retroactively. *Id.* at 550–55. The "four corners" language (which, incidentally, suggested that the Court should look to the full semantic context) was largely beside the point in the case. *Id.* at 551 ("It is true that if the language used is free from ambiguity it is the best evidence of the thing intended, and it is the duty of the courts to find, if possible, within the four corners of the act, and from the language used, the scope and meaning of the law.").

[121] 292 U.S. 455 (1934).

[122] *Id.* at 460–61.

[123] *Id.*

[124] Revenue Act of 1921, ch. 136, § 206(a)(6), 42 Stat. 227, 233 (emphasis added).

trustee was the relevant "taxpayer."[125] Nor was there any doubt that the trustee held the property for less than two years (from December 1921 until 1922).[126]

In an opinion by Justice Butler, the Court acknowledged that "[t]he time between the creation of the trust and the sale was less than the specified period and, if the words alone are to be looked to, the shares were not by the taxpayer 'held . . . for more than two years.'"[127] But, the Court cautioned, "the expounding of a statutory provision strictly according to the letter without regard to other parts of the Act and legislative history would often defeat the object intended to be accomplished."[128] The Court found evidence in the legislative history (a report by the Committee on Ways and Means) suggesting that Congress generally wanted to cap the capital gains tax at the lower rate.[129] Accordingly, the Court held that the lower rate applied.[130]

Dissenting, and joined by Justices Brandeis and Stone, Justice Roberts argued that the majority opinion was at odds with the plain language. The statute "allows payment at a lower rate only to a 'taxpayer' who . . . has held [the asset] . . . *for over two years*."[131] "Under the recognized rules of construction we should give the words of the statute their ordinary and common meaning. *If the language be plain, there is nothing to construe*."[132] Justice Roberts admonished: "[T]his court is not at liberty, because it thinks the provisions inconsistent or illogical, to rewrite them in order to bring them into harmony with its views as to the underlying purpose of Congress."[133]

3. Understanding Caminetti

This background helps us better understand the case that is most closely associated with the plain meaning school—and the most heavily criticized: *Caminetti v. United States* (1917).[134] The decision has been characterized as

[125] *See id.* § 2(9) ("The term 'taxpayer' includes any person, trust or estate . . . ."); *Helvering*, 292 U.S. at 462 ("[T]he trustee properly may be regarded as the taxpayer . . . .").

[126] *Helvering*, 292 U.S. at 460. The case documents do not specify in what month in 1922 the trustee sold the property.

[127] *Id.* at 463.

[128] *Id.* at 464.

[129] *See id.* at 466–67 (citing H.R. REP. NO. 67-350, at 10 (1921)).

[130] *See id.* at 469.

[131] *Id.* 469, 473 (Roberts, J., dissenting) (emphasis added).

[132] *Id.* at 469 (emphasis added) (citation omitted).

[133] *Id.* at 472.

[134] 242 U.S. 470 (1917); *see, e.g.*, HART & SACKS, *supra* note 1, at 1236 (describing *Caminetti* as "[a] classic formulation and application of the plain meaning rule").

the epitome of the "literal" and "mechanical" approach of that era.[135] The case involved the White-Slave Traffic Act, more commonly known as the Mann Act after its sponsor Representative James Mann.[136] The Act prohibited "any person" from "knowingly transport[ing] . . . in interstate or foreign commerce, . . . any woman or girl for the purpose of prostitution or debauchery, or for any other immoral purpose."[137]

At the outset, I want to be clear that there is a good deal to criticize, particularly about the law at issue. Under present-day constitutional law, the Mann Act, as then written, would violate equal protection principles—because of both the statutory text limiting the protection to "any woman or girl,"[138] and the title and legislative history making clear that the law was designed to protect only "*white* women."[139] To the extent the law restricted intimate conduct between consenting adults, it would also violate modern-day substantive due process principles.[140] (The statute was amended several decades after *Caminetti* to remove some of these constitutional problems.)[141]

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[135] *See, e.g.*, WILLIAM N. ESKRIDGE JR., DYNAMIC STATUTORY INTERPRETATION 212 (1994) ("*Caminetti* was Exhibit A for the progressives' argument that literalism led to spurious interpretation and judicial activism."); Hans W. Baade, "*Original Intent" in Historical Perspective: Some Critical Glosses*, 69 TEX. L. REV. 1001, 1086 (1991) (stating that, as formulated in *Caminetti*, the plain meaning rule "reflected what was increasingly regarded as an over-simplifying (not to say, a simplistic) view of semantics" and that it "all but expressly invited evasion through invocation of the 'impractical consequences' of literal construction"); Robert W. Barker, *Recent Decisions*, 35 GEO. L.J. 395, 409 (1947) (claiming that "the *rule of literalness* was laid down in the *Caminetti* case"); Murphy, *supra* note 1, at 1299–1300 (describing *Caminetti* as a "vintage example" of the plain meaning rule which denies "the need to 'interpret' unambiguous language"); Richard R. Powell, *Construction of Written Instruments—Part II*, 14 IND. L.J. 309, 326–27 (1939) (stating that in *Caminetti*, "[l]iteralism had again won the victory").

[136] *Mann Act*, CORNELL L. SCH. LEGAL INFO. INST. (July 2020), https://www.law.cornell.edu/wex/mann_act [https://perma.cc/FFW6-TK2F].

[137] An Act to Further Regulate Interstate and Foreign Commerce by Prohibiting the Transportation Therein for Immoral Purposes of Women and Girls, and for Other Purposes, ch. 395, § 2, 36 Stat. 825, 825 (1910) (codified as amended at 18 U.S.C. §§ 2421–2424).

[138] *Id.* § 2; *see* United States v. Virginia, 518 U.S. 515, 531 (1996) (stating that "gender-based government action" requires an "exceedingly persuasive justification").

[139] Mann Act § 8; H.R. REP. NO. 61-47, at 10 (1909) ("This traffic . . . is referred to . . . as 'the trade in white women.'"). The Act might have been facially discriminatory because of the provision calling it "the White-slave traffic Act." But even if the Act were deemed facially neutral, the legislative history makes clear that lawmakers endeavored to protect only "white women." *See* Hunter v. Underwood, 471 U.S. 222, 227–33 (1985) (holding an Alabama constitutional provision had a racially discriminatory purpose despite being facially neutral).

[140] *See* Lawrence v. Texas, 539 U.S. 558, 578 (2003).

[141] The law was revised in 1986 to replace "debauchery" and "any other immoral purpose" with "any sexual activity for which any person can be charged with a criminal offense." DAVID J. LANGUM, CROSSING OVER THE LINE: LEGISLATING MORALITY AND THE MANN ACT 250 (1994). The law also replaced "woman or girl" with "individual." Act of Nov. 7, 1986, Pub. L. No. 99-628, § 5(b)(1), (c), 100 Stat. 3510, 3511. It is unclear whether Congress formally amended the provision entitling the law "the White Slave Traffic Act."

But in 1917, the Supreme Court had not recognized these constitutional principles. The only constitutional question surrounding the Mann Act in that era was whether the law fell within Congress's power to regulate interstate commerce; the Court held that it did (and for that reason, the early Mann Act continues to appear in constitutional law casebooks).[142]

a. The Caminetti *decision*

The criminal prosecution arose after F. Drew Caminetti and Maury Diggs traveled by train from Sacramento, California to Reno, Nevada with Lola Norris and Marsha Warrington.[143] It was widely known that the couples were engaged in an extramarital affair; the affair itself garnered a good deal of media attention because Caminetti and Diggs came from prominent families.[144] The federal government prosecuted Caminetti and Diggs for "knowingly transport[ing] . . . any woman or girl for the purpose of prostitution or debauchery, *or for any other immoral purpose*."[145] The primary question was whether the phrase "any other immoral purpose" encompassed noncommercial vice.

Notably, in examining this question, the Court was not writing on a clean slate. In an earlier case, *United States v. Bitty*, the Court had dealt with a statute that prohibited "the importation into the United States of any alien woman or girl for the purpose of prostitution, *or for any other immoral purpose*."[146] The Court held that John Bitty violated that statute when he brought a woman to the United States from England to serve as "his concubine."[147]

In *Caminetti*, the government argued that *Bitty* had already found the phrase "any other immoral purpose" to encompass noncommercial vice and that "under accepted rules Congress must be held to have adopted that interpretation when it later adopted that language in the White-slave traffic Act."[148] The defendants in *Caminetti*, for their part, did not deny that their

[142] *See* Hoke & Economides v. United States, 227 U.S. 308, 322–23 (1913); *see, e.g.*, NOAH R. FELDMAN & KATHLEEN M. SULLIVAN, CONSTITUTIONAL LAW 122 (21st ed. 2022).

[143] Caminetti v. United States, 242 U.S. 470, 482–83 (1917); LANGUM, *supra* note 141, at 98–99.

[144] The fathers of both had been California state senators, and Caminetti's father had recently been appointed by President-elect Wilson to serve as Commissioner of Immigration. *See* LANGUM, *supra* note 141, at 98–99. There was also a third defendant, who was charged in part with a "commercial vice" (inducing prostitution). *See Caminetti*, 242 U.S. at 483–84. The commentary about the case has not focused on this defendant.

[145] White-Slave Traffic (Mann) Act, ch. 395, § 2, 36 Stat. 825, 825 (1910) (emphasis added).

[146] 208 U.S. 393, 398 (1908); Act of Feb. 20, 1907, ch. 1134, § 3, 34 Stat. 898, 899.

[147] *Bitty*, 208 U.S. at 398–99, 402–03.

[148] Brief for the United States at 17–18, *Caminetti*, 242 U.S. 470 (1917) (Nos. 139, 163 & 464).

conduct fell within the statutory text.[149] Instead, they relied on the title—the White Slave *Traffic* Act—and statements of the sponsor Representative Mann in arguing that "the act of Congress is intended to reach only 'commercialized vice.'"[150]

Writing for the majority (and joined by Justices Holmes, Van Devanter, Pitney, and Brandeis), Justice Day agreed with the government that the defendants had violated the statute.[151] Quoting at length from *Bitty*, Justice Day declared that "[t]his definition of an immoral purpose" as encompassing more than commercial vice "must be presumed to have been known to Congress when it enacted the law here involved."[152] Nor could the defendants rely on the title or the legislative history to "overcome the meaning of plain and unambiguous words."[153] The Court declared: "Where the language is plain and admits of no more than one meaning, the duty of interpretation does not arise, and the rules which are to aid doubtful meanings need no discussion."[154] Although the Court recognized that a broad interpretation of the law could lead to negative consequences, such as blackmail, "[s]uch considerations [were] more appropriately addressed to the legislative branch."[155]

In a dissenting opinion joined by Chief Justice White and Justice Clarke, Justice McKenna suggested that the majority was interpreting the statute in an overly "literal" way.[156] He argued that "'[i]mmoral' is a very

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[149] The defendants said they would not "detain[] the court with an attempt to analyze the language of the statute" and instead focused on the title and legislative history. Petition for the Issuance of a Writ of Certiorari Requiring the Circuit Court of Appeals for the Ninth Circuit to Certify to the Supreme Court of the United States for Its Revision and Determination the Appeal Taken by F. Drew Caminetti in the Above-Entitled Cause at 5–6, *Caminetti*, 242 U.S. 470 (1917) (No. 139) [hereinafter *Caminetti* Petition].

[150] *Caminetti*, 242 U.S. at 484–85 (noting the defendants' contention); *see Caminetti* Petition, *supra* note 149, at 5–6 (quoting H.R. REP. NO. 11-47, at 9 (1909)).

[151] *Caminetti*, 242 U.S. at 484–86 (rejecting the contention that "the act of Congress is intended to reach only 'commercialized vice'"). Justice McReynolds did not participate; he had overseen the prosecution as Attorney General. *See* LANGUM, *supra* note 141, at 113.

[152] *Caminetti*, 242 U.S. at 486–88.

[153] *Id.* at 489–90 ("[T]he name given to an act . . . or the report which accompanies it, cannot change the plain import of its words."). Notably, the title at issue here—the "White-slave traffic Act"—was enacted as a provision of the law. *See* White-Slave Traffic (Mann) Act, ch. 395, § 8, 36 Stat. 825, 827 (1910) (codified as amended at 18 U.S.C. §§ 2421–2424) ("That this Act shall be known and referred to as the 'White-slave traffic Act.'"). Thus, one might argue that the Supreme Court should have treated the title as part of the semantic context. But the Court generally did not rely on a statutory title to override what it took to be the plain meaning of an operative text. *See supra* note 108 and accompanying text, which discusses the Court's treatment of statutory titles.

[154] *Caminetti*, 242 U.S. at 485.

[155] *Id.* at 490–91.

[156] *See id.* at 499–500 (McKenna, J., dissenting) ("[T]he words . . . should be construed to execute [the purpose], . . . even if their literal meaning be otherwise.").

comprehensive word" and must be limited by "context."[157] The relevant context, in Justice McKenna's view, included both the title and the statements of Representative Mann, which "ma[de] distinctive the purpose of the statute" to reach only "commercialized vice."[158] Justice McKenna also argued that *Bitty* was distinguishable because the statute at issue had a very different purpose: there, "[T]he act was directed against the importation of foreign corruption."[159]

Invoking *Holy Trinity*, Justice McKenna insisted that "the words of the statute should be construed to execute" the purpose of stopping commercial vice, "even if their literal meaning be otherwise."[160] After all, in *Holy Trinity*, "the language of the statute [was] very comprehensive, fully as much so as the language of the act under review" here, and yet the Court had adhered to the "spirit" rather than the "letter" of the law.[161] It was crucial that the Court do the same here, particularly given the potential consequences of a broad interpretation: blackmail.[162] Although none of the Justices in *Caminetti* were very clear about this "blackmail" concern, contemporary scholarship reveals the (often gendered) assumption—that a woman might "entice" a young man into a romantic relationship and subsequently "blackmail" him.[163] Justice McKenna admonished: "There is danger in extending a statute beyond its purpose, even if justified by a strict adherence to its words."[164]

b. Examining Caminetti

It is important to recognize the considerable points of agreement among the litigants and the Justices in *Caminetti*. No one argued that the conduct of the defendants fell outside the statutory language "any other immoral purpose." Indeed, Justice McKenna's dissenting opinion described the Mann

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[157] *Id.* at 496–98.

[158] *Id.* at 497–98.

[159] *Id.* at 502–03.

[160] *Id.* at 500.

[161] *Id.*

[162] *Id.* at 502 ("Blackmailers of both sexes have arisen . . . . [L]egal authority justifies the rejection of a construction which leads to mischievous consequences . . . .").

[163] *See, e.g.*, William E. Norvell Jr., *Extreme Sentences for Offenses* Mala Prohibita, 52 ANN. REP. A.B.A. 570, 577 (1929) (arguing that the "main effect [of *Caminetti*] is to put a potent weapon for blackmail or revenge in the hands of immoral women"); Oscar J. Smith, *The Mann White Slave Law*, 33 MEDICO-LEGAL J. 4, 5–6 (1917) (asserting that, after *Caminetti*, "the outlook for the professional blackmailers is roseate in the extreme" and criticizing the application of the law to situations when "the woman in the case may have . . . deliberately enticed some foolish man from his home and fireside"); *see also* LANGUM, *supra* note 141, at 9, 77–96 ("From the beginning there were warnings that the Mann Act would lead to extortion by women who would lure men across a state line for the express purpose of blackmail.").

[164] *Caminetti*, 242 U.S. at 502 (McKenna, J., dissenting).

Act as "very comprehensive, fully as much so as" the law in *Holy Trinity*.[165] Accordingly, the primary interpretive dispute in *Caminetti* was the same as that in *Fisher*, *Holy Trinity*, *Helvering*, *Weiss*, and other cases: whether the Court should adhere to (concededly broad) statutory language or look to other sources—such as the title, legislative history, or practical consequences—to narrow the reach of the congressional enactment. This nuance, however, would soon be lost. *Caminetti* would become the poster child for what scholars would describe as the mechanical and literal "plain meaning school."[166]

There is an interesting twist, given how much of the debate in *Caminetti* focused on legislative history. Soon after the decision was announced, Representative Mann sent a private letter to Justice Day to congratulate him on the majority opinion.[167] Representative Mann informed Justice Day that the Court "construed the law the way I intended . . . , and while I think there probably was no public statement to that effect, yet in private statements" on the House floor, "I explained to a good many Members the bill as going fully as far as is stated in your valuable opinion."[168]

III. DEVELOPING THE STORY OF THE PLAIN MEANING SCHOOL

The Supreme Court's plain meaning approach did not change dramatically from the early nineteenth century to the early twentieth century. But in the early twentieth century, some scholars mounted an attack on the plain meaning rule. Legal realists took aim at Supreme Court decisions that left out (what the scholars viewed as) crucial context, particularly by ignoring legislative history and downplaying the practical consequences of a decision. Some of this literature also used the terms "literal" or "mechanical" in describing the plain meaning rule. That label took hold. Indeed, even after the Supreme Court signaled its rejection of the plain meaning rule—and its preference for a more purposive approach to statutory interpretation—legal process theorists continued to disparage the plain meaning approach as improperly literal and wooden. As discussed in Part IV, textualists would later accept this characterization of the plain meaning school—a historical error that would impact the development of modern textualism.

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[165] *Id.* at 500.

[166] *See supra* note 135.

[167] LANGUM, *supra* note 141, at 119.

[168] *Id.* at 119 (quoting the letter).

A. The Legal Realist Attack on the Plain Meaning Rule

In the 1920s and 1930s, scholars were increasingly critical of the plain meaning rule. This development was linked to the rise of legal realism.[169] The Supreme Court's common law and constitutional decisions during this era (often called the *Lochner* era) were closely associated with a way of thinking about law—that law was a science and that legal principles could be "found" to answer any question.[170] Legal realists insisted that law was not "found" but "made"; much like political actors, judges had considerable discretion in choosing how to rule in each case.[171]

Although much of the legal realist critique focused on common law and constitutional decision-making,[172] a few scholars, such as Max Radin, Harry Willmer Jones, and Frederick de Sloovère, believed that "judicial interpretation of statutes often exhibited pathologies similar to those of conventional common-law reasoning."[173] These legal realists argued that, under the plain meaning rule, judges often "made a pretense of reasoning in a neutral and objective manner from the statute's literal words, without reference to its policies."[174] Scholars objected in part to the inconsistent manner in which the judiciary applied the plain meaning rule;[175] as we have seen, in cases such as *Holy Trinity*, the Court did not view itself as bound by the text. But scholars primarily challenged the Supreme Court's failure to (openly) take into account a statute's broader context, such as the title, legislative history, and practical consequences, when the Court found that a text was plain.

1. Practical Consequences

As we have seen, the Supreme Court repeatedly declared that it would not depart from the plain meaning of a statutory text to avoid negative consequences. For example, in *Wiltberger*, the Court held that it had

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[169] For background on legal realism, see GARY MINDA, POSTMODERN LEGAL MOVEMENTS 25 (Despina Gimbel, Niko Pfund & David Updike eds., 1995).

[170] *See id.* at 24–25 ("The legal realist movement of the 1920s and 1930s . . . revolted against both Langdellian and constitutional law formalism."); *see generally* Lochner v. New York, 198 U.S. 45 (1905) (exemplifying the *Lochner* era's jurisprudence). There were links between legal realism and the political progressive movement. *See* LAURA KALMAN, THE STRANGE CAREER OF LEGAL LIBERALISM 17 (1996).

[171] MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, *1870-1960*, at 190 (1992); *see* KALMAN, *supra* note 170, at 15–16 ("[T]he realists saw that for each legal rule that led to one result, at least one more rule pointed to another result.").

[172] *See* MINDA, *supra* note 169, at 26–27.

[173] Parrillo, *supra* note 62, at 295, 305, 308.

[174] *Id.* at 305.

[175] *See* Harry Willmer Jones, *The Plain Meaning Rule and Extrinsic Aids in the Interpretation of Federal Statutes*, 25 WASH. U. L.Q. 2, 11–19, 25–26 (1939) (highlighting decisions in which the Court at times disregarded the plain meaning rule).

jurisdiction only over crimes committed on the "high seas," even though that left the manslaughter in that case "dispunishable": "Where there is no ambiguity in the words, there is no room for construction."[176] Likewise, in *Caminetti*, the Court acknowledged that a broad construction of the law could lead to blackmail but insisted that "[s]uch considerations are more appropriately addressed to the legislative branch."[177]

In the wake of *Caminetti*, however, this inattention to practical consequences seemed increasingly unacceptable.[178] In 1930, prominent legal realist Max Radin argued that practical consequences should be at the heart of the interpretive inquiry.[179] In legal realist fashion, Radin was skeptical that any interpretive method or source—text, drafting history, legislative history, canons, or purpose—could constrain judicial discretion.[180] Given that judges had to make a policy choice, Radin reasoned, they should openly consider the "probable consequences" of their decisions.[181]

Radin cited, as "[p]erhaps the best examples" of the importance of consequences, both *Holy Trinity* and *Caminetti*.[182] In *Holy Trinity*, Radin argued, "there was not an atom of evidence" to support the Supreme Court's decision that "the employment of an English clergyman by a wealthy and distinguished Protestant Episcopal church" was not covered by the statutory language.[183] But the Court's decision could be explained by a "desire[] to support religion in every way."[184] In *Caminetti*, Radin argued, the Court was apparently "influenced by the disinclination to seem to condone a moral dereliction," but its analysis was incomplete: "If the Court had considered probable consequences, it might perhaps have foreseen that such an interpretation made the statute a ready instrument of blackmail . . . ."[185]

2. Other Evidentiary Sources: Title and Legislative History

Other scholars criticized the plain meaning rule for excluding extrinsic evidence such as the title or legislative history.[186] Indeed, the Supreme Court's plain meaning decisions gradually became almost synonymous with

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[176] United States v. Wiltberger, 18 U.S. (5 Wheat.) 76, 94–96 (1820); *id.* at 82–84 (statement of C.J. Ingersoll, counsel for the United States).

[177] Caminetti v. United States, 242 U.S. 470, 490–91 (1917).

[178] *See supra* note 163 (noting commentators' concerns about blackmail).

[179] *See* Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 882 (1930).

[180] *See id.* at 866–69, 872–81.

[181] *Id.* at 882 (observing that this approach was "the commonest in practice, if the least announced").

[182] *Id.* at 882 & n.38.

[183] *Id.*

[184] *Id.*

[185] *Id.*

[186] *See, e.g.*, Jones, *supra* note 175, at 23 (criticizing the failure to rely on these sources).

a refusal to engage with legislative history.[187] As Nicholas Parrillo observes, some legal realists strongly favored legislative history "to ensure that judges would consciously confront legislators' intent, rather than hide behind the false determinacy and objectivity of the text (as they did when invoking the plain meaning rule)."[188] Legal realists condemned decisions that refused to look at legislative history as "mechanical" and "literal."[189]

One prominent critic, Harry Willmer Jones, complained in 1939 that the plain meaning rule operated as a "rule of exclusion," barring the presentation of "otherwise admissible extrinsic aids."[190] *Caminetti* was "[p]robably the clearest" example of this "literal" approach.[191] Both "[t]he title of the enactment" and the statements of Representative Mann "suggest[ed] that Congress was striking solely at the interstate ramifications of commercialized vice."[192] But the Court applied the plain meaning rule, which barred the use of such evidence and favored "a supposed literal meaning borne by the words of [the] statute, over the sense in which the legislature intended them to be understood."[193] Jones insisted that "[j]udicial reference to . . . legislative history . . . is the prerequisite to intelligent comprehension" of what the statutory drafters were attempting to do.[194] Accordingly, he argued, "the Supreme Court should openly discard the rule of literalness" and rely on "extrinsic aids . . . at the outset, in every case, in

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[187] *See* Clarence A. Miller, *Value of Legislative History of Federal Statutes*, 73 U. PA. L. REV. 158, 159 (1925) ("[T]he legislative history . . . cannot be used as a probative force to change the plain meaning . . . ."); *see also* Kenmore M. McManes, *Effect of Legislative History on Judicial Decision*, 5 GEO. WASH. L. REV. 223, 236 (1937) (pointing out that the plain meaning rule barred the use of "committee reports" to construe the statute contrary to its plain meaning); Warren H. Wagner, *The Use and Abuse of Legislative History in the Construction of a Statute*, 5 I.C.C. PRAC.'S J. 485, 486 (1937–1938) ("[W]here the words are plain there is no room for construction. Consideration of the history of legislation is not permissible . . . .").

[188] Parrillo, *supra* note 62, at 305–06; *see, e.g.*, James M. Landis, *A Note on "Statutory Interpretation,"* 43 HARV. L. REV. 886, 888, 890 (1930) (complaining that "barbaric rules of interpretation too often exclude" the "records of legislative assemblies"); Frederick J. de Sloovère, *Extrinsic Aids in the Interpretation of Statutes*, 88 U. PA. L. REV. 527, 528, 531 (1940) (complaining that "extrinsic aids are regarded as irrelevant and hence inadmissible . . . if the court feels that the statute is 'plain and explicit', because, it is said, . . . a statute that is plain needs no construction").

[189] *See, e.g.*, Harry Willmer Jones, *Statutory Doubts and Legislative Intention*, 40 COLUM. L. REV. 957, 959 (1940) (contrasting the use of legislative history with a more "mechanical" approach); Powell, *supra* note 135, at 322, 326–27, 336 (describing the plain meaning rule, which forbids "resort[ing] to extrinsic evidence," as "literalism"); Frederick J. de Sloovère, *Textual Interpretation of Statutes*, 11 N.Y.U. L.Q. REV. 538, 549 (1934) (equating a search for plain meaning with "literalness").

[190] Jones, *supra* note 175, at 5–6.

[191] *Id.* at 7–8.

[192] *Id.* at 7.

[193] *Id.*

[194] *Id.* at 4.

order to reveal, if possible, what the statute meant to those responsible for its enactment."[195]

3. Characterizing "No Duty of Interpretation"

Legal realists also took aim at the Supreme Court's declarations that, where the text is plain, "there is no room for construction" or "the duty of interpretation does not arise."[196] As we have seen, the Supreme Court had since the Marshall Court era used this language to signal a two-stage analysis. First, the Court would determine the meaning of the operative provision based on the surrounding text and structure of the law, and sometimes in comparison with past statutes. If the Court determined that the meaning was clear, it would stop there. But, second, if the Court found ambiguity, it would go on to examine other evidence such as the title, practical consequences, and (especially beginning in the late nineteenth century) legislative history. Much of the legal realist literature understood that the plain meaning rule was a "rule of exclusion" that barred resort to certain types of context.[197] But legal realists sometimes—and somewhat ironically—took the "no room for construction" language out of context and suggested that such phrases demonstrated the wooden and mechanical nature of the plain meaning rule.

In 1930, Radin argued that "in most cases when courts say that a statute is plain and therefore needs no interpretation, they do so in the inverted fashion which marks so much of the judicial process. They have already interpreted, and they then declare that so interpreted the statute needs no further interpretation."[198] Six years later, Frederick J. de Sloovère complained that the principle "that if a statute is plain and explicit it needs no interpretation" is "meaningless, for one can hardly ever say that a statute is plain and explicit until it has been subjected to the traditional techniques and processes of interpretation."[199]

Notably, legal realists may have been particularly inclined to assume that the Supreme Court of the early twentieth century would apply a "mechanical" approach to statutory interpretation because that is what they

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[195] *Id.* at 21, 23 ("[N]o adequate case can be made out to justify the employment of the plain meaning doctrine as a flat rule of exclusion . . . .").

[196] United States v. Mo. Pac. R.R., 278 U.S. 269, 277 (1929); Caminetti v. United States, 242 U.S. 470, 485 (1917).

[197] *See, e.g.*, Jones, *supra* note 175, at 5–6 (noting that "the Supreme Court has employed the plain meaning doctrine as a rule of exclusion").

[198] Radin, *supra* note 179, at 869.

[199] Frederick J. de Sloovère, *Contextual Interpretation of Statutes*, 5 FORDHAM L. REV. 219, 219 (1936).

found it to be doing in the realms of common law and constitutional law.[200] More surprising, perhaps, is the willingness of subsequent scholars, including modern textualists, to take this "no room for construction" language at face value—that is, out of context.

B. The Rise of Legal Process Theory and the Rejection of the Plain Meaning Rule

The attacks launched by the legal realists seemed to have a considerable impact on statutory interpretive debates. The Supreme Court signaled its rejection of the plain meaning rule in its 1940 decision in *United States v. American Trucking Ass'ns*.[201] One might have expected the scholarly commentary about the rule to quiet down after that decision. But a new school of thought—legal process theory—emerged and treated the plain meaning rule as the antithesis of the theorists' preferred approach: purposivism. The "literalism" of the plain meaning rule, legal process scholars suggested, was "deserving of nothing but contempt."[202]

1. Background: American Trucking

American Trucking involved the authority of the Interstate Commerce Commission to establish maximum hours for "employees" under the Motor Carrier Act of 1935.[203] The ICC interpreted the statute to enable it to regulate the hours only of "employees whose functions in the operation of motor vehicles make such regulations desirable because of safety considerations" (for example, bus and truck drivers).[204] The American Trucking Association brought suit, arguing that under the plain language of the Motor Carrier Act, the ICC had the power to regulate all employees of motor carriers.[205]

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[200] Scholars have challenged the narrative surrounding the Court's constitutional jurisprudence during this era. *See* DAVID E. BERNSTEIN, REHABILITATING *LOCHNER* 3, 47 (2011); HOWARD GILLMAN, THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF LOCHNER ERA POLICE POWERS JURISPRUDENCE 10–12 (1993). This Article does not take up that debate.

[201] 310 U.S. 534, 543–44 (1940); *see also* HART & SACKS, *supra* note 1, at 1237–38 ("The landmark case in the overthrow of the plain meaning rule" was *American Trucking*). Some lower federal courts continued to apply the plain meaning rule. *See* Murphy, *supra* note 1, at 1304–05.

[202] HART & SACKS, *supra* note 1, at 1124.

[203] 310 U.S. at 538; *see* Motor Carrier Act of 1935, 40 U.S.C. § 304(2)–(3) (Supp. I 1935) ("[T]he Commission may establish reasonable requirements with respect to . . . qualifications and maximum hours of service of employees . . . .").

[204] *Am. Trucking Ass'ns*, 310 U.S. at 539–40.

[205] It may seem odd that a regulated party would seek to expand the scope of an agency's regulatory authority. The impetus was the enactment of the Fair Labor Standards Act (FLSA), which generally established minimum wage and maximum hour requirements for employees but exempted "any employee with respect to whom the [ICC] has power to establish qualifications and maximum hours of service pursuant to . . . the Motor Carrier Act, 1935." The trucking companies sought to avoid the requirements of the FLSA. *See id.* at 540–41.

The lower federal court held that the ICC's interpretation violated the plain language of the statute.[206] Applying the traditional plain meaning approach, the court reasoned that, in the Motor Carrier Act, "the word 'employees' is inclusive. There is nothing . . . to indicate only a particular class of employees."[207] This interpretation was supported by the statutory structure: a separate provision governing private carriers "expressly limit[ed]" the ICC's power over hourly wages to "those employees whose work relates to safety of operation."[208] The Motor Carrier Act also differed from a prior statute, which had permitted regulation of hours only of train operators.[209] The lower court acknowledged the ICC's concern that, under the court's reading, "the Commission will have to prescribe qualifications and hours for . . . employees of whose duties and qualifications it has no special knowledge" or expertise, such as "stenographers [or] clerks."[210] But the court would not depart from the statutory language out of concern for the "inconvenience to the Commission. . . . *If the words are clear, there is no room for construction*."[211]

The Supreme Court reversed.[212] In a crucial passage, the Court signaled the demise of the plain meaning rule. First, the Court declared that it had "[f]requently . . . followed [the] purpose, rather than the literal words" of a statute, "even when the plain meaning did not produce absurd results but merely an unreasonable one 'plainly at variance with the policy of the legislation as a whole.'"[213] Then, quoting *Helvering* and relying on some of the legal realist critiques discussed above, the Court announced an end to that rule of exclusion:

> 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."[214]

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[206] *See* Am. Trucking Ass'ns v. United States, 31 F. Supp. 35, 39 (D.D.C. 1939).

[207] *Id.* at 37.

[208] *Id.* at 37–38; *see* Motor Carrier Act of 1935, 40 U.S.C. § 304(a)(3) (Supp. I 1935) (stating that the ICC shall "establish for private carriers . . . reasonable requirements to promote safety of operation, and to that end prescribe . . . maximum hours of service of employees").

[209] *Am. Trucking Ass'ns.*, 31 F. Supp. at 37 & n.7.

[210] *Id.* at 37.

[211] *Id.* (emphasis added).

[212] United States v. Am. Trucking Ass'ns, 310 U.S. 534, 553 (1940).

[213] *Id.* at 543 (quoting Ozawa v. United States, 260 U.S. 178, 194 (1922)).

[214] *Id.* at 543–47, 544 nn.22–23 (first quoting Boston Sand Co. v. United States, 278 U.S. 41, 48 (1928); and then quoting Helvering v. N.Y. Trust Co., 292 U.S. 455, 464–65 (1934)); *see id.* at 543 n.17 (first citing Radin, *supra* note 179; then citing Landis, *supra* note 188; then citing Powell, *supra* note 135, at 324; and then citing Jones, *supra* note 175).

The Court thus rejected "a literal interpretation dogma which withholds from the courts available information for reaching a correct conclusion."[215]

With these principles in mind, the Court held that "the meaning of employees" in the Motor Carrier Act "is limited to those employees whose activities affect the safety of operation."[216] The Court was "especially hesitant" to hold otherwise, given "the absence in the legislative history . . . of any discussion of the desirability of giving the Commission broad and unusual powers over all employees."[217] In fact, the legislative history suggested that members of Congress assumed the ICC would have a more limited power.[218]

Four Justices—Chief Justice Hughes, as well as Justices McReynolds, Stone, and Roberts—dissented, announcing that they would "affirm[] for the reasons stated in the [lower court] opinion."[219] As William Eskridge and Philip Frickey have observed, these four Justices—who endorsed the plain meaning approach of the lower court—were the most senior members of the Court.[220] The five most junior members—Justices Reed, Black, Frankfurter, Douglas, and Murphy—formed the Court majority, which rejected the plain meaning rule and endorsed a more purposive approach. *American Trucking* accordingly seemed to signal a "'changing of the guard' at the Court."[221]

2. Legal Process Theory and the Rise of Purposivism

As *American Trucking* suggests, an academic and judicial consensus was emerging in support of purposivism. Indeed, by 1947, Justice Frankfurter noted the "proliferation of purpose" in statutory interpretation.[222] This consensus corresponded to the development in the late 1930s and 1940s of legal process theory. In keeping with the insights of legal realism, legal process scholars acknowledged that judges have discretion when they make decisions.[223] But legal process scholars insisted that judicial discretion could be properly confined through procedure, including the use of reasoned

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[215] *Am. Trucking Ass'ns*, 310 U.S. at 544.

[216] *Id.* at 553.

[217] *Id.* at 546–47.

[218] *See id.* at 548–49 (noting statements suggesting the Commission would have "authority over common and contract carriers similar to that given over private carriers").

[219] *Id.* at 553 (dissenting).

[220] William N. Eskridge Jr. & Philip P. Frickey, *An Historical and Critical Introduction to* The Legal Process, *in* HART & SACKS, *supra* note 1, xvii–xviii.

[221] *Id.*

[222] Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 529, 538–44 (1947). Even former legal realist Max Radin became a purposivist. *See* Max Radin, *A Short Way with Statutes*, 56 HARV. L. REV. 388, 410–11, 421–22 (1942).

[223] *See* HORWITZ, *supra* note 171, at 254–55; MINDA, *supra* note 169, at 35, 37.

decision-making.[224] These scholars argued that statutory interpretation could be rational and cabined through a focus on statutory purpose.

The most influential work on purposivism was that of Professors Henry Hart and Albert Sacks. In *The Legal Process*, Hart and Sacks urged that judges should "assume, unless the contrary unmistakably appears, that the legislature was made up of reasonable persons pursuing reasonable purposes reasonably."[225] Hart and Sacks also sought to put some boundaries around the use of legislative history, which jurists and scholars had begun to recognize was subject to abuse.[226] Such material should typically "be examined for the light it throws on general purpose," and only rarely to identify a "specific intention with respect to particular applications."[227] Hart and Sacks argued, for example, that the legislative history in *American Trucking* was "inconclusive" on the specific question whether "employees" extended beyond bus and truck drivers.[228] But, the authors asserted, the Court's decision was "entirely sound" at a higher level of generality.[229] Given that the regulation of other employees would be "wholly foreign to the Commission's sphere of competence," the Court should not assume—absent compelling evidence in the legislative history—that "Congress contemplated so drastic a break with everything . . . the Commission had done in the past."[230]

The Legal Process not only endorsed purposivism but also cast considerable doubt on the plain meaning rule. Hart and Sacks described the rule in the following way:

> In substance, the [plain meaning] rule declared that if the operative words of the statute were "plain," whatever that might mean, all other aids to interpretation were to be ignored. In extreme application this seemed to exclude consideration of even related parts of the statute and the scheme as a whole. It required a title to be disregarded, as well as prior acts and other elements of the general historical context . . . . *A fortiori* it shut off resort to legislative history even of the weightiest kind.[231]

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[224] *See, e.g.*, NEIL DUXBURY, PATTERNS OF AMERICAN JURISPRUDENCE 236, 238 (1995) (introducing process jurisprudence and the scholarly promotion of "reasoned elaboration"); MINDA, *supra* note 169, at 34–37 (describing the development of legal process theory).

[225] HART & SACKS, *supra* note 1, at 1378.

[226] *See* Parrillo, *supra* note 62, at 305–06 (progressives recognized that "the charge of indeterminacy . . . could also apply to" interpreting legislative history); *see, e.g.*, Frankfurter, *supra* note 222, at 543 (asserting that "[s]purious use of legislative history must not swallow the legislation").

[227] HART & SACKS, *supra* note 1, at 1379.

[228] *Id.* at 1237–38, 1243–44.

[229] *Id.* at 1245.

[230] *Id.* at 1244–45.

[231] *Id.* at 1236.

The discussion of the plain meaning rule in *The Legal Process* was nuanced in some respects. Hart and Sacks acknowledged that the plain meaning approach was, in large part, a rule of exclusion: if the Court determined that the operative text had a plain meaning, the Court would not look to the title or legislative history.[232] Moreover, in discussing *Caminetti*—which they described as "[a] classic formulation and application of the plain meaning rule"—Hart and Sacks stated that the Court's decision was supported by *both* the text *and* the decision in *Bitty*.[233]

But *The Legal Process* also laid the seeds for modern assumptions about the plain meaning school. Hart and Sacks stated that, under the plain meaning rule, "all other aids to interpretation were to be ignored. In extreme application this seemed to *exclude consideration of even related parts of the statute and the scheme as a whole*."[234] Hart and Sacks also picked up on the legal realists' complaints about phrases such as "the need for interpretation does not arise" when a text is clear.[235] "In a just analysis," the authors asserted, "interpretation seems always to be involved when meaning is communicated."[236]

Other parts of *The Legal Process* even more directly condemned the plain meaning rule. Hart and Sacks questioned "the extent to which statutes can be soundly interpreted by looking only to their 'plain meaning,' in the sense of the literal or linguistically most probable meaning of the words . . . , without regard to . . . the purpose which they are designed to accomplish."[237] The authors suggested that "[a]ny judicial opinion . . . which finds a plain meaning in a statute without consideration of its purpose, condemns itself on its face. The opinion is linguistically, philosophically, legally, and generally ignorant. It is deserving of nothing but contempt."[238]

Over the next several decades, scholars continued to criticize the plain meaning school for having adopted a "literal" and "mechanical" approach to

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[232] *See id.* at 1236–37 (claiming that "[t]he crucial sentence" in *American Trucking* was the declaration that "there can certainly be no 'rule of law'" prohibiting extrinsic aids).

[233] *Id.* at 1236, 1240–42 (criticizing *Caminetti*'s rejection of legislative history but stating the Mann Act's history was "of little value in answering" the specific issue).

[234] *Id.* at 1236 (emphasis added).

[235] *Id.* at 1375.

[236] *Id.*

[237] *Id.* at 1116.

[238] *Id.* at 1124. Hart and Sacks did preface this "contempt" declaration with a question for students: "Are the following conclusions well-founded?" *Id.*

interpretation,[239] and the term "literalism" gradually became an epithet.[240] Moreover, one can see the beginnings of what became the conventional historical story about the plain meaning rule. In his 1947 article, Justice Frankfurter commented that Chief Justice Marshall had a "commonsensical way of dealing with statutes," but this approach "fell into disuse," and the Supreme Court subsequently opted for "a more wooden treatment of legislation."[241]

IV. THE MAKING (AND FRACTURING) OF MODERN TEXTUALISM

Modern textualism arose in the 1980s as a response to the strong purposivism exemplified by cases such as *Holy Trinity* and *American Trucking*. Textualists argued that judges should respect the compromises embodied in a statutory text, even when the language seemed to conflict with the purpose of the law. Modern textualists denied that this method was a throwback to the discredited plain meaning school; modern textualism was not "literalism" but sought to examine statutory language in "context." But textualists were notably unclear as to how they defined the relevant context. This uncertainty made possible divisions within textualism—divisions that later led to charges that one version of textualism amounts to "literalism."

A. Textualists' Acceptance of the Conventional Tale

The campaign for modern textualism began in earnest after Justice Scalia joined the Supreme Court in 1986. Interestingly, Justice Scalia initially suggested that his preferred method would restore the traditional plain meaning rule. But textualists quickly abandoned any such argument. Instead, they sought to differentiate their method from that earlier approach,

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[239] *See supra* notes 134–135 and accompanying text; Ronald H. Israelit, *The Plain Meaning Rule in the Reflection of Current Trends and Proclivities*, 26 TEMP. L.Q. 174, 179 (1952); Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 197–99 (1983) (praising the Court's failure to use the "plain meaning rule," because "[t]o stop at the purely literal meaning . . . ignores reality"); *see also* OFFICE OF LEGAL POLICY, U.S. DEP'T OF JUST., USING AND MISUSING LEGISLATIVE HISTORY: A RE-EVALUATION OF THE STATUS OF LEGISLATIVE HISTORY IN STATUTORY INTERPRETATION 62 (Jan. 5, 1989) (the rule is associated with "a rigid, literalistic method"); *cf.* Jerome Frank, *Words and Music: Some Remarks on Statutory Interpretation*, 47 COLUM L. REV. 1259, 1262–63, 1265 n.31 (1947) (noting "a literal interpretation" can be correct, but "[o]ften . . . yield[s] a grotesque caricature of the legislature's purpose").

[240] *See supra* notes 1–3; *see, e.g.*, Pub. Citizen v. U.S. Dep't of Just., 491 U.S. 438, 440, 453–55, 463–65, 467 (1989) (rejecting "[a] literalistic reading" of the Federal Advisory Committee Act); United Steelworkers v. Weber, 443 U.S. 193, 201 (1979) (rejecting a "literal" interpretation of Title VII); Tenn. Valley Auth. v. Hill, 437 U.S. 153, 202 (1978) (Powell, J., dissenting) (stating the majority's interpretation of the Endangered Species Act was "an extreme example of a literalist construction").

[241] Frankfurter, *supra* note 222, at 542.

emphasizing that modern textualism, in contrast to the plain meaning school, cared about "context."

1. The Theoretical Premises of Textualism

Textualists took aim at what they called "strong purposivism"—the notion that the "spirit" could prevail over the "letter" of a statute. Under this approach, a court could "alter even the clearest statutory text," when a case would otherwise lead to a result at odds with congressional intent, expectations, or the apparent "policy of the legislation as a whole."[242] Textualists argued in part that, under Article I, only the text voted upon by the House of Representatives and the Senate and signed by the President (or passed over presidential veto) constitutes the law.[243] But that was only a starting point;[244] textualists further insisted that it was crucial to adhere to the specific terms of that law. The bicameralism and presentment process of Article I creates a supermajority requirement for every piece of legislation, and thus also grants "political minorities extraordinary power to block legislation or insist upon compromise as the price of assent."[245] Textualists argued that interpreters should respect the (at times messy and unknowable) compromises reached through this process by enforcing the specific provisions of a statute, even when those provisions seemed to conflict with some background policy or purpose.[246]

Textualists objected in particular to the use of legislative history.[247] Whether judges relied on general implications or statements on the specific issue before the court, legislative history could be used to override the bargains embodied in the text.[248] Relatedly (and in this respect similar to legal

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[242] Manning, *Equity*, *supra* note 9, at 11. One can separate "intent" from "purpose." *See* Archibald Cox, *Judge Learned Hand and the Interpretation of Statutes*, 60 HARV. L. REV. 370, 370–71 (1947) (treating "intent" as a wish for how a law will be applied in a case, and "purpose" as the law's "general aim or policy"). But I treat the concepts as falling under "strong purposivism" because that is how modern textualists initially treated them.

[243] *See* U.S. CONST. art. I, § 7; SCALIA, *supra* note 3, at 25; Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 539 (1983).

[244] The notion that the text is the law does not tell us how to interpret that law. *See* Manning, *Equity*, *supra* note 9, at 71 (stating that Article I "provides . . . merely . . . a rule of recognition").

[245] John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 77 (2006) [hereinafter Manning, *What Divides*]; *see* U.S. CONST. art. I, § 7.

[246] Manning, *What Divides*, *supra* note 245, at 76–77.

[247] John F. Manning, *Foreword: The Means of Constitutional Power*, 128 HARV. L. REV. 1, 68 (2014) [hereinafter Manning, *Foreword*] ("The Court's new textualism . . . rejects legislative history when it conflicts with the statutory text."); *see also* Conroy v. Aniskoff, 507 U.S. 511, 519 (1993) (Scalia, J., concurring) ("The greatest defect of legislative history is its illegitimacy. We are governed by laws, not by the intentions of legislators."). Textualists objected in part on constitutional grounds. *See* John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673, 719 (1997).

[248] *See* SCALIA & GARNER, *supra* note 1, at 376–77; Nelson, *supra* note 3, at 365.

realists and legal process theorists), textualists worried about judicial discretion. But unlike their predecessors, modern textualists believed that legislative history would expand, rather than constrain, judicial creativity. Legislative history was so vast and mixed that a judge could virtually always find something to support a given interpretation. So "[j]udicial investigation of legislative history has a tendency to become . . . an exercise in 'looking over a crowd and picking out your friends.'"[249] Although textualists did not entirely foreclose reliance on this interpretive source,[250] modern textualism became closely associated with a general prohibition on legislative history.[251]

2. Not Resurrecting the Plain Meaning School?

Because modern textualism served in large part as a rule of exclusion, it was quite reminiscent of the plain meaning rule. That rule was not, of course, originally about legislative history—a source that was not readily available in the early nineteenth century. During the Marshall Court era, the plain meaning approach worked primarily to bar the consideration of other contextual evidence, such as a title or practical consequences, when the operative text was clear. But by the early twentieth century, the plain meaning rule was closely associated with a rejection of legislative history.[252] Accordingly, modern textualists might have argued that their approach was not so "modern" after all, but instead a return to an earlier and well-worn method of interpretation.

In fact, that is precisely what Justice Scalia suggested in one of his first opinions advocating textualism on the Supreme Court.[253] In *INS v. Cardoza-Fonseca* (1987), the Supreme Court held that under "the plain language" of the Immigration and Nationality Act, different standards governed claims for asylum and withholding of deportation.[254] The Court also found that the

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[249] Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546, 568 (2005) (Kennedy, J.) (quoting Wald, *supra* note 239, at 214).

[250] *See* SCALIA & GARNER, *supra* note 1, at 382 (noting legislative history may help determine the specialized meaning of a technical term).

[251] *See, e.g.*, Stuart Minor Benjamin & Kristen M. Renberg, *The Paradoxical Impact of Scalia's Campaign Against Legislative History*, 105 CORNELL L. REV. 1023, 1026 (2020) ("The attacks on legislative history were the key methodological element" of textualists' "attacks on purposivism . . . ."); Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 YALE L.J. 1750, 1758 (2010) ("Textualists generally have eschewed use of legislative history . . . ."); Victoria Nourse, *Misunderstanding Congress: Statutory Interpretation, the Supermajoritarian Difficulty, and the Separation of Powers*, 99 GEO. L.J. 1119, 1124 (2011) ("[T]extualism in the academy defines itself in opposition to legislative history . . . .").

[252] *See supra* Part III; HART & SACKS, *supra* note 1, at 1236 ("The use of internal legislative materials . . . is closely entangled with the history of the 'plain meaning rule . . . .'").

[253] *See* William N. Eskridge Jr., *The New Textualism*, 37 UCLA L. REV. 621, 623 (1990) (noting that Scalia launched "the new textualism" in this concurrence).

[254] 480 U.S. 421, 449 (1987).

legislative history was consistent with this holding.[255] In explaining its reliance on legislative history, the Court commented that "the plain language of this statute appears to settle the question before us," but it would "look to the legislative history" to discern "whether there is [a] 'clearly expressed legislative intention' contrary to that language."[256]

Justice Scalia concurred separately, stating that he agreed with the majority's textual analysis but objected to its "exhaustive investigation of the legislative history," particularly its reliance on a "doctrine" that legislative history could override a plain text.[257] Justice Scalia declared: "Although . . . the Court in recent times has expressed approval of this doctrine, [it] is to my mind an ill-advised deviation from the venerable principle that if the language of a statute is clear, that language must be given effect—at least in the absence of a patent absurdity."[258] As support for this "venerable principle," Justice Scalia cited both *Wiltberger* and *Caminetti*.[259] In sum, as a few scholars at the time observed, Justice Scalia seemed to advocate a return to the plain meaning rule.[260]

But the plain meaning rule had been thoroughly discredited by legal realists and legal process theorists. As T. Alexander Aleinikoff observed in 1988, "In the first half of the twentieth century, the plain meaning approach was undermined by the realist critique of 'mechanical jurisprudence' and the rise of an instrumental theory of law. Scholars ridiculed the idea that words had implicit meaning that could simply be read off the page . . . ."[261] "[T]he legal realists' critique of interpretive formalism," Philip Frickey underscored

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[255] *See id.* at 432.

[256] *Id.* at 432 n.12 ("[T]he plain language of this statute appears to settle the question before us. Therefore, we look to the legislative history to determine only whether there is [a] 'clearly expressed legislative intention' contrary to that language . . . .") (quoting Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc., 477 U.S. 102, 108 (1980)).

[257] *Id.* at 452 (Scalia, J., concurring).

[258] *Id.*

[259] *Id.* at 452 (first citing United States v. Wiltberger, 18 U.S. (5 Wheat.) 76, 95–96 (1820); and then citing Caminetti v. United States, 242 U.S. 470, 485 (1917)).

[260] *See, e.g.*, William N. Eskridge Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 340 & n.71 (1990) ("[S]everal judges . . . urg[ed] . . . the return to some version of the old 'plain meaning rule' . . . ."); Eskridge, *supra* note 253, at 624 n.12 ("Justice Scalia in *Cardoza-Fonseca* . . . argues that what this Article calls the 'new' textualism is actually a return to the Court's traditional approach before World War II.").

[261] T. Alexander Aleinikoff, *Updating Statutory Interpretation*, 87 MICH. L. REV. 20, 27 (1988); *see* Frickey, *supra* note 2, at 248 ("[M]any Supreme Court decisions of the early twentieth century seemed to view statutory interpretation as the mechanical application of either statutory text or legislative intent to the interpretive problem at hand. During the 1930s, the so-called legal realists that dominated legal scholarship effectively attacked these formalistic approaches. . . . By the 1950s, the legal realists' critique of interpretive formalism had become deeply rooted.").

in 1992, "had become deeply rooted."[262] So, commentators suggested, if the "new textualism" was resurrecting that approach, it was just a "modern form of literalism."[263]

Modern textualists did not attempt to challenge this depiction of the plain meaning approach. Instead, they countered these attacks by distancing their method from the old "'plain meaning' school."[264] Thus, by 1997, Justice Scalia distinguished his textualism from the "degraded" method of the past, insisting that "the good textualist is not a literalist."[265] Manning, textualism's leading academic defender, has been the most careful to distinguish "modern textualism" from the old "'plain meaning' school."[266] In article after article, Manning has insisted that "[i]n contrast to their early-twentieth-century predecessors in the 'plain meaning' school," "[m]odern textualists . . . are not literalists. . . . Rather, modern textualists acknowledge that language has meaning only in context."[267]

Other scholars, including skeptics of textualism, have likewise recognized the extent to which modern textualism was crafted in response to assumptions about the plain meaning school.[268] For example, Professor Richard Fallon has observed that "modern textualists disassociate

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[262] Frickey, *supra* note 2, at 248.

[263] Veronica M. Dougherty, *Absurdity and the Limits of Literalism: Defining the Absurd Result Principle in Statutory Interpretation*, 44 AM. U. L. REV. 127, 159 (1994); *see* Frickey, *supra* note 2, at 252–54, 258 (equating in 1992 the "new textualism" of Justice Scalia and Judge Easterbrook with "literalism"); Robert J. Martineau, *Craft and Technique, Not Canons and Grand Theories: A Neo-Realist View of Statutory Construction*, 62 GEO. WASH. L. REV. 1, 11–12 (1993) (noting that "new textualism" seems to be a return to the "harsh" plain meaning rule); *see also supra* notes 135, 239.

[264] Manning, *Equity*, *supra* note 9, at 108; *see, e.g.*, Herrmann v. Cencom Cable Assocs., 978 F.2d 978, 982 (7th Cir. 1992) (Easterbrook, J.) (suggesting that "[s]tatutes have meanings, sometimes even 'plain' ones," but "ignoring their contexts . . . is a formula for disaster"); Jerry L. Mashaw, *Textualism, Constitutionalism, and the Interpretation of Federal Statutes*, 32 WM. & MARY L. REV. 827, 835–36 (1991) (contesting the view that "the new textualism" would "inevitably tie us to a rigid" and "disfunctionally acontextual" method (internal quotation marks omitted)); Frederick Schauer, *The Practice and Problems of Plain Meaning: A Response to Aleinikoff and Shaw*, 45 VAND. L. REV. 715, 740 (1992) (noting that "plain meaning" does not "commit the interpreter" to reading words "in isolation").

[265] SCALIA, *supra* note 3, at 23–24.

[266] Manning, *Equity*, *supra* note 9, at 108 ("Modern textualists . . . are not literalists. In contrast to their early-twentieth-century predecessors in the "plain meaning" school, they do not claim that interpretation can occur 'within the four corners' of a statute . . . . Rather, modern textualists acknowledge that language has meaning only in context."); Manning, *Absurdity*, *supra* note 40, at 2458 ("In contrast with the plain meaning school's emphasis on literal meaning, modern textualism . . . account[s] for the contextual nuances of language . . . ."); Manning, *What Divides*, *supra* note 245, at 79 & n.28 ("In contrast with their ancestors in the 'plain meaning' school of the late nineteenth and early twentieth centuries, modern textualists . . . assert that language is intelligible only by virtue of a community's shared conventions for understanding words in context.").

[267] Manning, *Equity*, *supra* note 9, at 108.

[268] *See supra* note 9 and accompanying text.

themselves from an earlier 'plain meaning' school of statutory interpretation" by insisting that "the semantic meaning of legal texts must be understood 'in context.'"[269] Likewise, Professor Ryan Doerfler writes: "Contrasting their view with earlier 'plain-meaning' textualists who placed emphasis on 'literal meaning,' modern textualists purported to incorporate insights from philosophers of language . . . recognizing that words only gather meaning in a context of use."[270] "In its modern form," Doerfler continues, "textualism promised to be less wooden than its earlier manifestations through careful attention to interpretive context."[271]

B. Divisions Within Textualism

But which context counts? In their efforts to distinguish modern textualism from the "bad" "plain meaning" days, scholars have been remarkably unclear on this point. Prominent textualists have variously pointed to the importance of "semantic context,"[272] "social context,"[273] "social and linguistic context,"[274] and "full context."[275] Textualists appear to agree that legislative history is typically *not* part of the relevant context. But beyond that, textualists seem uncertain about the proper approach.

1. Textualism or Purposivism?

Some scholars argue that "textualists have been so successful in updating their own philosophy[] and in distinguishing modern textualism from the old 'plain meaning' school" by considering "context" that textualism is almost indistinguishable from purposivism.[276] Reflecting the

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[269] Richard H. Fallon Jr., *The Meaning of Legal "Meaning" and Its Implications for Theories of Legal Interpretation*, 82 U. CHI. L. REV. 1235, 1281 & n.144 (2015); *see also* Richard H. Fallon Jr., *Why Abstention Is Not Illegitimate: An Essay on the Distinction Between "Legitimate" and "Illegitimate" Lawmaking*, 107 NW. U. L. REV. 847, 857–58 (2013) (explaining that "[w]ithin the textualist camp, scholars have come to distinguish between a 'plain meaning' approach" and a "so-called 'new textualism,'" with "[n]ew textualist theories . . . acknowledg[ing] that texts can have meaning only in context").

[270] Doerfler, *supra* note 9, at 279.

[271] *Id.* at 313.

[272] Manning, *What Divides*, *supra* note 245, at 76.

[273] Manning, *Absurdity*, *supra* note 40, at 2457 ("[G]iven the modern emphasis on understanding language in its social context, textualists believe that meaning is a function of the way speakers use language in particular circumstances.").

[274] Manning, *Equity*, *supra* note 9, at 107 ("[T]extualists believe that language has meaning only in its social and linguistic context.").

[275] SCALIA & GARNER, *supra* note 1, at 15–16, 33 ("In their full context, words mean what they conveyed to reasonable people at the time they were written . . . .").

[276] Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 COLUM. L. REV. 1, 3 (2006); *see* Anita S. Krishnakumar, *Backdoor Purposivism*, 69 DUKE L.J. 1275, 1286–87, 1351–52 (2020) (observing that

conventional understanding of the plain meaning school, Professor Jonathan Molot asserts: "[A]s textualist arguments came to rest on postrealist understandings of law and language," they could "no longer claim that statutory texts had an inherent meaning that could be gleaned without any consideration of context. . . . They do not portray the interpretive enterprise in so passive a light as their plain meaning school predecessors . . . ."[277] But, Molot asserts, once both textualists and purposivists "alike place great weight on statutory text and look beyond text to context, it is hard to tell what remains of the textualism-purposivism debate."[278]

In response, Manning has insisted that textualists do not consider all types of context but focus on semantic context—that is, the text and structure surrounding the operative text at issue.[279] In this respect, Manning refined his own position; his earlier work expressed openness to considering "social context" and "social and linguistic context" as well.[280] But Manning has since argued for an emphasis on semantic context: While "[p]urposivists give priority to *policy context*—evidence that suggests the way a reasonable person would address the mischief being remedied," "[t]extualists give precedence to *semantic context*—evidence that goes to the way a reasonable person would use language under the circumstances."[281] As support for this idea, Manning refers back to the constitutional premises of textualism: "Giving precedence to semantic context (when clear) is necessary to enable legislators to set the level of generality at which they wish to express their policies" and thereby "to strike compromises that go so far and no farther."[282] Courts must enforce such statutory deals, even when they lead to

"textualists are not . . . confining themselves to pure literalism or plain meaning analysis" and that textualist Justices tend to make "indirect assumptions about purpose and intent"); Margaret H. Lemos, *The Politics of Statutory Interpretation*, 89 NOTRE DAME L. REV. 849, 859–60 (2014) (reviewing SCALIA & GARNER, *supra* note 1, and claiming that, in recent decades, "the divide between textualism and its competitors has narrowed substantially," and that textualists "recognize that '[t]he evident purpose of what a text seeks to achieve is an essential element of context that gives meaning to words'" (quoting SCALIA & GARNER, *supra* note 1, at 20)); Henry Paul Monaghan, *Supremacy Clause Textualism*, 110 COLUM. L. REV. 731, 732–34 (2010) (noting that the tension between textualists and purposivists has largely subsided and that "many textualist judges are willing to consider legislative purpose").

[277] Molot, *supra* note 276, at 35.

[278] *Id.* at 3. Molot also emphasizes changes within purposivism—increased attention to the text. *See id.*; John F. Manning, *The New Purposivism*, 2011 SUP. CT. REV. 113, 115.

[279] Manning, *What Divides*, *supra* note 245, at 76, 91.

[280] *See supra* notes 272–274 and accompanying text (citing sources showing that prior to his 2006 piece *What Divides Textualists from Purposivists?*, Manning himself had suggested a more expansive definition of the relevant context).

[281] Manning, *What Divides*, *supra* note 245, at 76.

[282] *Id.* at 99.

"awkward . . . results."[283] In sum, Manning argues, "[S]emantic meaning is the currency of legislative compromise."[284]

2. Textualism v. Textualism

The above debate may reflect less the convergence of textualism and purposivism than the emergence of divisions within textualism. As textualism has gained prominence in the judiciary,[285] the approach has split into at least two camps.[286] Both camps are "textualist" in that they treat the text as the focal point of analysis and generally avoid resort to legislative history. But they differ a good deal in the context that they treat as relevant. Some opinions apply a more flexible textualism, seeking to make sense of the text in light of social and policy context and practical consequences. This version of textualism shares a good deal in common with purposivism; one major distinction is the attitude toward legislative history.[287] By contrast, other opinions display a more formalistic textualism, focusing on the semantic context of a statute and, when that semantic context appears to provide a clear result, declining to consider other contextual evidence. This approach seems to accord more with the vision in Manning's recent work (and, as discussed below, shares a good deal in common with the actual plain meaning school). But this more formal version of textualism has also met with renewed charges of "literalism"—this time, by other self-proclaimed textualists.

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[283] Manning, *Absurdity*, *supra* note 40, at 2417.

[284] Manning, *What Divides*, *supra* note 245, at 99.

[285] *See* Elena Kagan, *The Scalia Lecture: A Dialogue with Justice Kagan on the Reading of Statutes*, YOUTUBE 8:28 (Nov. 17, 2015) https://www.youtube.com/watch?v=dpEtszFT0Tg [https://perma.cc/SRW6-WJ92] ("[We are] all textualists now."); Thomas R. Lee & Stephen C. Mouritsen, *Judging Ordinary Meaning*, 127 YALE L.J. 788, 793 (2018) (underscoring textualism's influence); *see also* Gillian E. Metzger, *The Roberts Court and Administrative Law*, 2019 SUP. CT. REV. 1, 54 (noting this common description but questioning its accuracy).

[286] *See* Grove, *supra* note 4, at 265–71, 279–90 (describing "formalistic" and "flexible" textualism). One can treat these versions of textualism not as distinct camps, but as ends of a spectrum—from a more formalistic to a more flexible method. *See id.* at 271; *see also* Doerfler, *supra* note 9, at 269 (suggesting that "[i]n terms of theory, modern textualism always contained within it an argumentative tension," given that "modern textualism" distinguished itself "from its 'plain meaning' predecessors" through its incorporation of linguistic pragmatism," while also promising "predictability" in statutory cases).

[287] Some scholars have forcefully questioned whether what this Article calls "flexible textualism" qualifies as textualism. *See infra* note 331 and accompanying text. But one can see the more flexible approach as offering "a rational, forgiving reading of [a] statute, but using textualist tools." Abbe R. Gluck, *Justice Scalia's Unfinished Business in Statutory Interpretation: Where Textualism's Formalism Gave Up*, 92 NOTRE DAME L. REV. 2053, 2075 (2017). And proponents of the more flexible version describe it as the "true" textualism. *See, e.g.*, Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1755–56, 1767 (2020) (Alito, J., dissenting) ("[W]hen textualism is properly understood, it calls for an examination of the social context in which a statute was enacted . . . ."). So, as discussed below, I believe the choice of method should be based on normative values, not a battle over which version is the "true" textualism.

a. Charges of literalism

Two recent decisions illustrate this textualist divide. *Bostock v. Clayton County* (2020)[288] involved whether discrimination against a gay, lesbian, or transgender employee qualifies as "discriminat[ion] . . . because of such individual's . . . sex" under Title VII of the Civil Rights Act of 1964.[289] The Court held that, under the "plain language" of Title VII, the answer was yes.[290] The majority opinion exemplifies the more formalistic approach to textualism.

Writing on behalf of the Court (and joined by Chief Justice Roberts, as well as Justices Ginsburg, Breyer, Sotomayor, and Kagan), Justice Gorsuch focused on the semantic context, noting that Title VII was written in broad terms.[291] After carefully parsing the statutory language,[292] the Court found that "taken together," the phrase "discriminat[ion] . . . because of such individual's . . . sex" prevents an employer from "intentionally treat[ing] a person worse because of sex—such as by firing the person for actions or attributes it would tolerate in an individual of another sex."[293] Justice Gorsuch then reasoned that if an employer fires a male employee "for no reason other than the fact he is attracted to men, the employer discriminates against him for traits or actions it tolerates in [a] female colleague."[294] Likewise, if an employer "fires a transgender person who was identified as a male at birth but who now identifies as a female," and yet "retains an otherwise identical employee who was identified as female at birth, . . . the individual employee's sex plays an unmistakable and impermissible role in the discharge decision."[295]

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[288] 140 S. Ct. at 1738.

[289] 42 U.S.C. § 2000e-2(a)(1).

[290] *See Bostock*, 140 S. Ct. at 1753.

[291] *Id.* at 1747, 1753 ("[W]hen Congress chooses not to include any exceptions to a broad rule, courts apply the broad rule. And that is exactly how this Court has always approached Title VII.").

[292] The Court assumed that the term "sex" in 1964 referred to "biological distinctions between male and female." *Id.* at 1739. With this assumption, the Court avoided debates about alternative understandings of sex and sexuality (and whether those meanings existed in 1964). *Cf.* Jessica A. Clarke, *They, Them, and Theirs*, 132 HARV. L. REV. 894, 974–77 (2019) (discussing how analysis of sex-based discrimination might differ where an employee identifies as nonbinary). The Court then found that "discriminat[ion]" referred to intentional differences in treatment and that "because of" meant that "sex" had to be a but-for cause of the employer's decision. *Bostock*, 140 S. Ct. at 1739–40. The dissents did not take issue with the Court's causation analysis. For commentary on that point, see Mitchell N. Berman & Guha Krishnamurthi, Bostock *was Bogus: Textualism, Pluralism, and Title VII*, 97 NOTRE DAME L. REV. 67, 94 (2021); Katie Eyer, *The But-for Theory of Anti-Discrimination Law*, 107 VA. L. REV. 1621, 1684 (2021); and Benjamin Eidelson, *Dimensional Disparate Treatment*, 95 S. CAL. L. REV. 785, 794–96 (2022).

[293] *Bostock*, 140 S. Ct. at 1739–40.

[294] *Id.* at 1741.

[295] *Id.* at 1741–42.

Important for present purposes, the *Bostock* Court was careful to state what was *not* relevant to its analysis. The Court would not "displace the plain meaning of the law" simply because many individuals in 1964 may not have expected Title VII to protect gay, lesbian, or transgender individuals.[296] Any focus on "expected applications" would be strikingly similar to the strong purposivist emphasis on congressional intent or expectations; the analysis would simply switch from lawmakers to the broader public.[297] Nor would the Court entertain "naked policy appeals" claiming that applying the statute's "plain language" could lead to "any number of undesirable policy consequences," such as changes to sex-segregated bathrooms or dress codes.[298] In language reminiscent of *Wiltberger*, the *Bostock* Court declared: "The place to make new legislation, or address unwanted consequences of old legislation, lies in Congress."[299]

In separate dissents, Justices Alito and Kavanaugh accused the majority of engaging in bad textualism.[300] The dissents acknowledged that terminating a male employee because he is romantically attracted to men, or dismissing an employee after she announces her transition from male to female, *could* as a literal matter be deemed "discriminat[ion] . . . because of such individual's . . . sex."[301] But Justice Kavanaugh chastised the Court for such "literalism": "Under this literalist approach, sexual orientation discrimination automatically qualifies as sex discrimination, and Title VII's prohibition against sex discrimination therefore also prohibits sexual orientation discrimination—and actually has done so since 1964, unbeknownst to everyone."[302]

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[296] *Id.* at 1749–50 (rejecting the contention that "because few in 1964 expected today's *result*, we should not dare to admit that it follows ineluctably from the statutory text" (citing SCALIA & GARNER, *supra* note 1, at 101)).

[297] *Id.* (noting that "the concepts are closely related"); Katie R. Eyer, *Statutory Originalism and LGBT Rights*, 54 WAKE FOREST L. REV. 63, 65–69 (2019).

[298] *Bostock*, 140 S. Ct. at 1753–54. Justice Gorsuch did hint that the Court might decide to protect religious liberty in the event of a conflict. *See id.* at 1753–54.

[299] *Id.* at 1753.

[300] *See id.* at 1828 (Kavanaugh, J., dissenting) ("Statutory Interpretation 101 instructs courts to follow ordinary meaning, not literal meaning . . . ."); *id.* at 1755–56 (Alito, J., dissenting) ("The Court's opinion is like a pirate ship. It sails under a textualist flag, but [in fact represents] . . . the theory that courts should 'update' old statutes . . . .").

[301] *See id.* at 1824–25 (Kavanaugh, J., dissenting) ("For the sake of argument, I will assume that firing someone because of their sexual orientation may, as a very literal matter, entail making a distinction based on sex. . . . . [But courts should look to] ordinary meaning . . . not just the literal meaning . . . ."); *id.* at 1772 (Alito, J., dissenting) ("Even if discrimination based on sexual orientation or gender identity could be squeezed into some arcane understanding of sex discrimination, the context in which Title VII was enacted would tell us that this is not what the statute's terms were understood to mean at that time.").

[302] *Id.* at 1824–25 (Kavanaugh, J., dissenting) (citing SCALIA, *supra* note 3, at 24) ("[C]ourts must follow ordinary meaning, not literal meaning . . . .").

In identifying problems with the majority's analysis, the dissents displayed a preference for a more flexible textualism. First, relying on textualist scholarship that emphasized the importance of "social context," the dissents complained that the Court "ignor[ed] the social context in which Title VII was enacted," which made clear that the public in 1964 would not have understood the law to protect gay, lesbian, or transgender individuals.[303] Second, the Court's reading of the statute would have (what the dissenters viewed as) unfortunate consequences. Justice Kavanaugh worried about unfair surprise to employers, urging that the Court's "literalist approach . . . disrespects ordinary meaning and deprives the citizenry of fair notice of what the law is."[304] Justice Alito argued that the Court's decision would have "far-reaching consequences," potentially transforming the interpretation of "[o]ver 100 federal statutes" that also "prohibit discrimination because of sex," and "threaten[ing] freedom of religion, freedom of speech, and personal privacy and safety."[305] Justice Alito viewed as "irresponsible" the Court's "brusque refusal to consider the consequences of its reasoning."[306]

Niz-Chavez v. Garland (2021) was, in many respects, a replay of the textualist battle in *Bostock*. *Niz-Chavez* involved provisions governing relief from removal under the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA).[307] Under the statute, an undocumented immigrant may qualify for relief from removal if she meets certain requirements, including "physical[] presen[ce] in the United States for a continuous period of not less than 10 years."[308] Any such period of

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[303] *Id.* at 1766–67 (Alito, J., dissenting). Justice Alito asserted that, according to Justice Scalia, "[t]he words of a law . . . 'mean *what they conveyed to reasonable people at the time*.'" *Id.* at 1766 (quoting SCALIA & GARNER, *supra* note 1, at 16). He continued:

> Leading proponents of Justice Scalia's school of textualism have expounded on this principle . . . . As Dean John F. Manning explains, . . . '[O]ne can make sense of others' communications only by placing them in their appropriate social and linguistic context." . . .
>
> Thus, when textualism is properly understood, it calls for an examination of the social context in which a statute was enacted . . . . In 1964, ordinary Americans . . . would not have dreamed that discrimination because of sex meant discrimination because of sexual orientation, much less gender identity.

(quoting Manning, *What Divides*, *supra* note 245, at 77–78) (relying also on Manning, *Absurdity*, *supra* note 40, at 2397–98, 2457). *See Bostock*, 140 S. Ct. at 1828 (Kavanaugh, J., dissenting) (arguing that "common parlance matters . . . because courts heed how most people would have understood the text of a statute when enacted" and that "common parlance" treats "sex discrimination and sexual orientation discrimination as two distinct categories" (internal quotation marks omitted)).

[304] *Bostock*, 140 S. Ct. at 1828 (Kavanaugh, J., dissenting).

[305] *Id.* at 1778 (Alito, J., dissenting); *see also id.* at 1778–83 (examining areas of the law in which the majority's decision would have an impact).

[306] *Id.* at 1778.

[307] 141 S. Ct. 1474, 1478–79 (2021).

[308] 8 U.S.C. § 1229b(b)(1).

"continuous physical presence . . . shall be deemed to end" when the individual "is served a notice to appear."[309] The question in *Niz-Chavez* was whether "a notice to appear" must be a single document or could be several documents.[310]

Writing for the Court (this time joined by Justices Thomas, Breyer, Sotomayor, Kagan, and Barrett), Justice Gorsuch announced that under the "plain statutory command," the government had to provide a single document.[311] Once again, the Court applied a formalistic approach, emphasizing the semantic context. Justice Gorsuch reasoned: "To an ordinary reader—both in 1996 and today—'a' notice would seem to suggest just that: 'a' single document . . . , not a mishmash of pieces with some assembly required."[312] This interpretation was supported by "a wider look at IIRIRA's statutory structure and history."[313] Under past immigration laws, the government began removal proceedings with an "order to show cause" and could "specify the place and time for an alien's hearing 'in the order to show cause or *otherwise*.'"[314] But "[n]ow time and place information must be included in a notice to appear, not 'or otherwise.'"[315] The Court recognized that, in the government's view, it would be administratively "taxing" in many cases to provide a single notice.[316] But again in language reminiscent of *Wiltberger*, the Court declared: "[N]o amount of policy-talk can overcome a plain statutory command."[317]

Justice Kavanaugh dissented (joined by Chief Justice Roberts and Justice Alito), again accusing the majority of "rel[ying] heavily on literal meaning: The Court interprets the word 'a' in the phrase 'a notice to appear' to literally require the Government to serve one (and only one) document."[318] In the dissent's view, the statute simply required "written notice," which the government could provide "in more than one document, so long as the

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309 *Id.* § 1229b(d)(1); *see id.* § 1229(a)(1) (specifying the contents of that "written notice (in this section referred to as a 'notice to appear')").

310 *See* 141 S. Ct. at 1478–79 (identifying the issue as whether the government's practice of sending multiple "notice[s] to appear" was consistent with the statute).

311 *Id.* at 1478, 1486.

312 *Id.* at 1480; *see id.* at 1481 (stating that although the term notice "can refer to *either* a countable object ('a notice,' 'three notices') *or* a noncountable abstraction ('sufficient notice,' 'proper notice')[,] Congress's decision to use the indefinite article 'a' . . . supplies some evidence that it used the term in the first of these senses—as a discrete, countable thing").

313 *Id.* at 1482–84 (noting that other provisions likewise require a single notice).

314 *Id.* at 1484 (quoting 8 U.S.C. § 1252b(a)(2)(A) (1994)).

315 *Id.*

316 *Id.* at 1485.

317 *Id.* at 1486.

318 *Id.* at 1491 (Kavanaugh, J., dissenting).

notice encompasse[d] all the statutorily required information."[319] Justice Kavanaugh warned that the Court's "literal" interpretation would have negative consequences: "[T]he Court's decision will impose substantial costs and burdens on the immigration system" because "many more people . . . may be eligible for cancellation of removal," and processing "those extra applications . . . will impose costs on the immigration system and create backlogs and delays for other noncitizens trying to get their day in court."[320]

b. Divisions within textualism

One can see similar divisions in other prominent cases. In *McGirt v. Oklahoma* (2020), Justice Gorsuch wrote for the Court, applying a formal version of textualism to hold that a considerable portion of Oklahoma is "Indian country" for purposes of the federal Major Crimes Act.[321] In dissent (joined by Justices Alito, Kavanaugh, and Thomas), Chief Justice Roberts accused the Court of analyzing the relevant statutory language in a "vacuum" and ignoring the "significant" and "drastic" consequences of the decision.[322] As Maggie Blackhawk has observed, the dissenters viewed the majority's analysis of the statutory language "as a brutish form of 'magic words' literalism."[323]

Although formalistic textualism carried the day in *Bostock*, *Niz-Chavez*, and *McGirt*, the Justices have opted for a more flexible approach in other prominent cases. For example, in *Bond v. United States* (2014), the Court declined to adhere to the statutory definition of "chemical weapon" and blocked the criminal prosecution of a woman who had attempted to poison her husband's mistress with two toxic substances.[324] The *Bond* majority expanded its outlook significantly beyond the semantic context to consider the "deeply serious consequences" of a broad reading of the law, substantive federalism concerns, and (much like the *Bostock* dissenters) social context—

[319] *Id.*

[320] *Id.* at 1491, 1497.

[321] 140 S. Ct. 2452, 2459 (2020); *see id.* at 2462–65 (concluding that Congress had failed to enact legislation to withdraw the Muscogee (Creek) Nation reservation at issue); *see also* 18 U.S.C. § 1153(a) (giving the federal government "exclusive" jurisdiction over certain crimes committed by "[a]ny Indian . . . within the Indian country").

[322] *McGirt*, 140 S. Ct. at 2485, 2502 (Robert, C.J., dissenting) ("[I]mportant context is missing from the Court's opinion . . . .").

[323] Maggie Blackhawk, *On Power and the Law:* McGirt v. Oklahoma, 2020 SUP. CT. REV. 367, 385. The Court later cut back on the impact of *McGirt* by holding that the federal and state governments have concurrent jurisdiction over crimes committed in "Indian country." *See* Oklahoma v. Castro-Huerta, 142 S. Ct. 2486, 2504–05 (2022) (holding that federal statutes did not preempt state criminal jurisdiction).

[324] 572 U.S. 844, 859–60, 866 (2014).

how an "ordinary person" might apply the term "chemical weapon."[325] In *Yates v. United States* (2015), the plurality and a concurrence relied on a statutory title and practical consequences to construe the term "tangible object" not to include fish.[326] And in *King v. Burwell* (2015), the Court interpreted the phrase "an Exchange established by the State" in the Affordable Care Act to encompass a *federal* exchange—to avoid a decision on the availability of tax credits that could have had severe consequences for health insurance markets.[327]

In each case, other Justices advocated a more formalistic approach. In *Bond*, Justice Scalia (joined by Justices Thomas and Alito) chided the Court for relying on the "ordinary meaning" of "chemical weapon," when "the statute's own definition—however expansive—is utterly clear."[328] In *King*, Justice Scalia led the same group to insist 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.'"[329] And in *Yates*, Justice Kagan (joined by Justices Scalia, Kennedy, and Thomas) insisted that "[t]he term 'tangible object' is broad, but clear," and chastised the plurality for "rel[ying] on a title to override the law's clear terms."[330]

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[325] *See id.* at 859–62, 866 (insisting "in this curious case . . . on a clear indication that Congress meant to reach purely local crimes" and stating that "an ordinary person" would not view this crime as "involving a 'chemical weapon'").

[326] *See* 574 U.S. 528, 539–40, 546, 552 (2015) (rejecting an enforcement action under the Sarbanes–Oxley Act against a fisherman who tossed undersized red grouper to avoid a finding, during a federal inspection, that he violated federal regulations); *see also* William Baude & Ryan D. Doerfler, *The (Not So) Plain Meaning Rule*, 84 U. CHI. L. REV. 539, 541–42 (2017) (noting that both the plurality and Justice Alito's concurrence found the title relevant).

[327] 576 U.S. 473, 487–98 (2015) ("[W]hen read in context . . . the meaning of the phrase 'established by the State' is not so clear."); *see* 42 U.S.C. § 18024(d); *see also* Ryan D. Doerfler, *High-Stakes Interpretation*, 116 MICH. L. REV. 523, 562 (2018) (noting the challenge could have exempted "a huge number" from the individual mandate "on grounds of financial hardship," which could have kept many healthy people out of the risk pool); Kevin M. Stack, *The Enacted Purposes Canon*, 105 IOWA L. REV. 283, 300–03 (2019) ("If the challengers prevailed, the tax credits which make the mandate to purchase health insurance financially viable for individuals with low income would not have been available in the majority of states.").

[328] 572 U.S. at 871 (Scalia, J., concurring). Justice Scalia would have found that the prosecution exceeded federal power. *Id.* at 867, 873–82.

[329] 576 U.S. at 500 (Scalia, J., dissenting).

[330] 574 U.S. at 552–53, 558–59 (Kagan, J., dissenting). Interestingly, as some commentators have observed, the Justices in *Yates* overlooked a potentially important consideration. Congress did include the provision on "tangible objects" in a section entitled "§ 1519. Destruction, alteration, or falsification of records in Federal investigations and bankruptcy." Sarbanes–Oxley Act of 2002, Pub. L. 107-204, § 1519 116 Stat. 745, 800 (codified at 18 U.S.C. § 1519). But Congress has specifically stated in legislation that the judiciary should draw "[n]o inference of a legislative construction" from the "place[ment]" of a provision in Title 18 of the U.S. Code "nor by reason of the catchlines used in such title." Act of June 25, 1948, ch. 645, § 19, 62 Stat. 683, 862. *See* Jarrod Shobe, *Codification and the*

c. Divisions and history

As these cases illustrate, modern textualism has become a big tent. Some self-proclaimed textualist opinions apply a more flexible approach, seeking to make sense of statutory language by looking at various contextual evidence, including a title, social context (that is, original public understandings or expectations), and practical consequences. Other textualist opinions apply a more formal approach, emphasizing semantic context and declining to consider other contextual evidence when the text and structure seem to offer a clear answer. Perhaps unsurprisingly, there are now debates about which version is the "true textualism." Some commentators argue that what I have dubbed "flexible textualism" is not really textualism at all.[331] Others insist that the formalistic version on display in the *Bostock* majority opinion is not textualism—or is, at best, a bad or "halfway" version of the method.[332]

But both versions have some basis in the scholarship and jurisprudence of modern textualism. As discussed, to distinguish their brand from the plain

Hidden Work of Congress, 67 UCLA L. REV. 640, 691–92 (2020) (discussing *Yates* as an example of how "courts have sometimes ignored enacted rules of construction"); Tobias A. Dorsey, *Some Reflections on* Yates *and the Statutes We Threw Away*, 18 GREEN BAG 2D 377, 379–80, 382, 386–89 (2015) (noting this error in *Yates* and urging courts to "honor [such] chapter-and-heading instructions," and also observing that some statutes do not contain any such instruction).

[331] *See, e.g.*, Katie Eyer, *Disentangling Textualism and Originalism*, 13 CONLAWNOW 115, 136 n.91 (2022) ("[O]nce textualism and originalism are appropriately disaggregated, it becomes plain that the arguments that were made by the dissenters in *Bostock* are inconsistent with textualism—although they are consistent with some originalist approaches."); Richard M. Re, *The New* Holy Trinity, 18 GREEN BAG 2D 407, 407–15 (2015) (characterizing the Court's reasoning, which considers nontextual factors to determine the clarity of the text, as a deviation from true textualism); *see also* Manning, *Foreword*, *supra* note 247, at 73 & n.414 (observing that recent cases "recall at least the flavor of *Holy Trinity*—trimming or expanding the conventional meaning of the text in order to serve extratextual values or purposes"); Grove, *supra* note 4, at 285–90 (discussing whether flexible textualism is textualism); *supra* note 287 (discussing this issue).

[332] *See* Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1755–56, 1767 (2020) (Alito, J., dissenting) (arguing that "when textualism is properly understood, it calls for an examination of the social context in which a statute was enacted" and that "[t]he Court's opinion is like a pirate ship" in that it "sails under a textualist flag" but in fact represents "the theory that courts should 'update' old statutes"); *see also* Josh Blackman & Randy Barnett, *Justice Gorsuch's Halfway Textualism Surprises and Disappoints in the Title VII Cases*, NAT'L REV. (June 26, 2020), https://www.nationalreview.com/2020/06/justice-gorsuch-title-vii-cases-half-way-textualism-surprises-disappoints/ [https://perma.cc/ZJ5Z-GERP] (suggesting that "discriminat[ion] against" in Title VII must involve "bias or prejudice" against women or men, rather than against gay, lesbian, or transgender individuals, and writing that the *Bostock* majority mistakenly incorporated precedent into the textual interpretation of the law itself); John O. McGinnis, *Errors of Will and of Judgment*, LAW & LIBERTY (June 25, 2020), https://lawliberty.org/errors-of-will-and-of-judgment/ [https://perma.cc/XN28-AT8J] (arguing that the Court's analysis was "a conceivable interpretation of the [statutory] words in some world" but "certainly not" the best interpretation given "the world in which Title VII was enacted"); Nelson Lund, *Unleashed and Unbound: Living Textualism in* Bostock v. Clayton County, 21 FEDERALIST SOC'Y REV. 158 (2020) (arguing that the Court paid insufficient attention to how "because of sex" would "have been understood in 1964"); *supra* note 287 (discussing flexible textualism).

meaning school, modern textualists emphasized the importance of context—and at various points seemed open to virtually all, if not all, of the forms of context that we see on display in the competing opinions in *Bostock*, *Niz-Chavez*, and other cases. Leading textualists such as Justice Scalia and Manning referred variously to the importance of "social context," "social and linguistic context," and "full context," even as those same textualists elsewhere emphasized "semantic context."[333] And notably, both the majority and dissenting opinions in *Bostock* rooted their versions of textualism in this literature, relying on the work of Scalia or Manning (or both) to support their (very different) approaches to statutory interpretation.[334]

I do not mean to suggest that the historical error about the plain meaning school is the exclusive reason for the divisions within textualism. There are likely multiple explanations, and it may not be possible to provide a complete account. Notably, no self-proclaimed textualist on the Supreme Court seems to have adopted a consistent approach; the Justices vacillate between a more formal and a more flexible textualism.[335] This reality complicates any effort to provide a comprehensive account of the division. But the historical error identified here does appear to be a contributing factor. As the Article recounts, modern textualists' effort to distinguish their method from the plain meaning school is one major reason modern textualism was defined in capacious terms. That capacious definition made possible the divisions within textualism. Modern textualism endeavored for decades to distinguish itself from an (assumed) literal, mechanical method of the past.

V. LESSONS OF THE HISTORICAL MISUNDERSTANDING

This Article seeks primarily to correct a historical misunderstanding about the Supreme Court's interpretive practices of the late nineteenth and

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[333] *See supra* notes 272–275 and accompanying text. As noted, Manning's views seemed to evolve over time to prefer a narrower vision of the appropriate context. Justice Scalia may have moved in the opposite direction. His 1997 work *A Matter of Interpretation* advocated a strict textualism, one that was skeptical of substantive canons. *See* SCALIA, *supra* note 3, at 28 (describing substantive canons as "dice-loading rules" and stating that "[t]o the honest textualist, all of these preferential rules and presumptions are a lot of trouble," because it is "virtually impossible" to provide "uniformity and objectivity" in answering interpretive questions "when there is added . . . a thumb of indeterminate weight"). By contrast, Scalia's 2012 treatise with Bryan Garner seemed much more open to different types of context and substantive canons. *See* SCALIA & GARNER, *supra* note 1, at 247–339 (endorsing many substantive canons).

[334] *See supra* notes 296, 303 and accompanying text.

[335] For example, Justice Thomas joined the Court's formalistic opinion in *Niz-Chavez* but signed on to the dissents in *Bostock* and *McGirt*. Chief Justice Roberts joined the majority in *Bostock* but wrote *Bond*, *King*, and the *McGirt* dissent and joined the *Niz-Chavez* dissent. And Justice Kagan joined the flexible opinions in *King* and *Bond*, yet she also joined the majority in *Bostock* and *Niz-Chavez* and authored the *Yates* dissent.

early twentieth centuries. Contrary to the conventional wisdom, the Court did not apply a literal and wooden ("acontextual") method but—under the actual plain meaning rule—looked to the surrounding text and structure to determine if an operative text was plain. The Article also asserts that this misunderstanding impacted the development of modern textualism. To distinguish their brand from (what they perceived as) the literal plain meaning school, modern textualists offered a capacious definition of textualism, which helped make possible the divisions that we see today.

In this Part, I discuss two broader lessons. First, the historical account here offers a cautionary tale about reliance on conventional wisdom in interpretive debates (as well as other contexts). Second, the Part discusses the recent charges of "literalism" that self-proclaimed textualists have leveled against fellow textualists. Such accusations—much like past claims of "literalism"—paper over far more fundamental disagreements about which context should be part of the interpretive inquiry.

A. *A Cautionary Tale*

This Article's account suggests how myths can become (gradually) embedded in our legal culture as historical truths. In the 1920s and 1930s, legal realists often attacked the plain meaning school on its own terms, complaining that the Court was wrong to apply a rule of law that excluded certain types of context, particularly legislative history. In this way, the legal realists accurately characterized the method. But the legal realists also set the stage for the myth, both by describing the plain meaning rule as "mechanical" and "literal" and by taking out of context the Supreme Court's declarations that, where the text is plain, "there is no room for construction"[336] or "the duty of interpretation does not arise."[337] Although the Court had used that language to signal a two-stage analysis (with the Court first considering the operative provision in light of surrounding text and structure), legal realists pointed to this language as evidence that the plain meaning school involved a "meaningless" approach that bypassed "the traditional techniques and processes of interpretation."[338]

Legal process scholars went further, describing the plain meaning rule as a "literal" approach that "declared that if the operative words of a statute were 'plain,' whatever that might mean, all other aids to interpretation were to be ignored. In extreme application this seemed to *exclude consideration of even related parts of the statute and the scheme as a whole*."[339] Hart and

[336] United States v. Mo. Pac. R.R. Co., 278 U.S. 269, 277–78 (1929).

[337] Caminetti v. United States, 242 U.S. 470, 485 (1917).

[338] De Sloovère, *supra* note 199, at 219; *see* Radin, *supra* note 179, at 869.

[339] HART & SACKS, *supra* note 1, at 1236 (emphasis added).

Sacks further disparaged the method by suggesting that "[a]ny judicial opinion . . . which finds a plain meaning in a statute without consideration of its purpose, condemns itself on its face. The opinion is linguistically, philosophically, legally, and generally ignorant. It is deserving of nothing but contempt."[340] Over time, this vision of the plain meaning school as a mechanical and literal method—one that avoided even semantic context—became the conventional wisdom.

It may seem surprising that prominent scholars were so mistaken. But as Robert Gordon has recounted, it is not uncommon for a new legal movement to exaggerate the mistakes of—or even misrepresent—its predecessors.[341] Gordon teaches that a new legal movement—whether classical liberalism, progressivism, or originalism—tends to situate itself in history in two respects. The new movement presents itself both as consistent with some traditional (perhaps Founding-era) principles and as a symbol of forward progress—a significant improvement over theories of the past.[342] In the process, the new legal movement may well overstate (or perhaps misstate) the errors of its predecessors.[343]

More puzzling is the acceptance of this myth by modern textualists. As discussed, when modern textualism came on the legal scene, Justice Scalia initially tried to associate his approach with the plain meaning school. But textualists soon abandoned that argument and accepted that the plain meaning rule was an example of bad textualism.[344]

To be sure, modern textualism thereby in many respects followed the playbook of other legal movements. Modern textualism proclaimed its consistency with history and tradition—by emphasizing its roots in Article I and arguing that its approach was in line with at least some of what the Marshall Court had done in the early nineteenth century. And modern textualism also presented itself as superior to previous legal movements—more sensitive to congressional bargains than legal process purposivism,

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[340] *Id.* at 1124–25.

[341] *See* ROBERT W. GORDON, TAMING THE PAST: ESSAYS ON LAW IN HISTORY AND HISTORY IN LAW 303–05, 327, 333–34 (2017).

[342] *See id.* at 335 ("To summarize: American legal argument from the Founding onward consistently relied upon a core narrative of liberal progress . . . . To reconcile this dynamic narrative with the need to assert continuity with fundamental principles, the story was often told in a teleological mode, as the gradual fulfillment of perfection of principles already immanent at the time of the Founding.").

[343] *Id.* at 303–05, 327, 333–34 (describing how revisionist historians have found that Progressive critics "unduly demonized" the "Classical lawyers and judges . . . as partisan ideologues of big capital" and "tended to misrepresent [the Classical system] as basically anti-historical in its modes of thought," and declaring that "[t]his view is pretty plainly mistaken—the classical period was saturated in historical thinking").

[344] *See* Section IV.A.2.

while still far more attentive to context than the (assumed) plain meaning school.

Still, modern textualism could have presented itself as consistent with a much longer history and tradition if textualists had challenged the conventional narrative of the plain meaning school. It is puzzling that textualists did not do so. Yet modern textualists' decision to accept the conventional wisdom may be understandable. It takes a good deal of time and effort to challenge a historical myth, so accepting the story of the plain meaning school was the path of least resistance. Moreover, the plain meaning school had been almost entirely discredited—indeed, "ridiculed"—for decades as an example of "mechanical jurisprudence."[345] So modern textualism may have gained more credibility by accepting the narrative of the plain meaning school and offering an alternative.

Once the myth of the old plain meaning school was accepted by both textualists and non-textualists alike, it had immense staying power. Yet it was also a story that never made a great deal of sense. According to the conventional wisdom, the Supreme Court in the early nineteenth century—under the supervision of Chief Justice Marshall—often applied a careful textualist approach; then a few decades later, the Justices somehow forgot how to read statutory texts. So this was a conventional narrative that warranted revisiting. I hope one lesson of this Article's account will be to encourage us to question historical "truths" and to dig a bit deeper.

B. Understanding Charges of "Literalism"

This Article's historical account also sheds light on the recent charges of "literalism" leveled by Justice Kavanaugh and others.[346] In the view of some, "Formalist textualism is really another term for literalism."[347] This argument hits hard for modern textualists, who have spent decades arguing that the method is *not* literalism. In *Niz-Chavez*, Justice Gorsuch was clearly bothered by the dissent's accusation that the Court was engaged in literalism. Justice Gorsuch responded: "[W]hen interpreting this or any statute, we do not aim for 'literal' interpretations . . . . We simply seek the law's ordinary meaning."[348]

As the majority opinions in *Bostock* and *Niz-Chavez* illustrate, formalistic textualism does not ignore context. The approach focuses on

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345 Aleinikoff, *supra* note 261, at 27 (internal quotation marks omitted); *see supra* Section IV.A.2.

346 *See supra* notes 7–8 and accompanying text.

347 Alexander, *supra* note 8, at 169.

348 Niz-Chavez v. Garland, 141 S. Ct. 1474, 1484 (2021).

semantic context—the surrounding text and structure.[349] Thus, in *Bostock*, Justice Gorsuch's opinion emphasized both the terms and the structural breadth of Title VII.[350] In *Niz-Chavez*, the Court examined the ordinary meaning of "a notice to appear," the surrounding text, and the contrast with past statutes.[351] That was also true, for example, of Justice Kagan's dissent in *Yates*, which carefully parsed the terms of the Sarbanes–Oxley Act in determining that Congress enacted (however unwisely) a statute that would encompass "those who alter or destroy" *any* "tangible object" "with the intent of thwarting federal law enforcement."[352]

But this more formalistic approach does avoid resort to other context—such as a statutory title, social context, and practical consequences—when the operative text is clear.[353] Thus, in *Yates*, Justice Kagan insisted that the Court should not "rel[y] on a title to override the law's clear terms."[354] In *Bostock*, the Court declined to look beyond semantic context to social context: public understandings or expectations in 1964.[355] Likewise, in *Bond*, Justice Scalia rejected the idea that social context—how an ordinary person would use the term "chemical weapon"—could override an express statutory definition.[356] And in *Bostock*, *Niz-Chavez*, and *McGirt*, the Court's formalistic analysis declined to depart from the statutory text despite "dire warnings" about the potential consequences of the decision.[357] Under the more formalistic approach, "whatever the wisdom or folly" of a statutory provision, the Court "does not get to rewrite the law."[358]

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[349] One question is whether, under a formal textualist approach, interpreters may consider any other contextual evidence, such as judicial precedent, to determine whether an operative text is clear. That topic is beyond the scope of this Article, but I examine it in separate work.

[350] Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1740–41, 1752–54 (2020).

[351] 141 S. Ct. at 1480, 1482–84.

[352] Yates v. United States, 574 U.S. 528, 552–53 (2015) (Kagan, J., dissenting) ("The term 'tangible object' is broad, but clear. . . . [C]ontext confirms what bare text says."). As discussed, there were good reasons to disregard the statutory title in *Yates*. *See supra* note 330.

[353] I want to clarify that my argument here as to statutory titles is tentative. For discussions of the complexity of considering titles, see *supra* notes 108 and 330.

[354] *See* 574 U.S. at 558–59.

[355] 140 S. Ct. at 1739, 1750–51.

[356] Bond v. United States, 572 U.S. 844, 871 (2014).

[357] McGirt v. Oklahoma, 140 S. Ct. 2452, 2481 (2020) (asserting that "dire warnings" about practical consequences are "not a license for us to disregard the law"); Niz-Chavez v. Garland, 141 S. Ct. 1474, 1486 (2021) ("[N]o amount of policy-talk can overcome a plain statutory command."); *Bostock*, 140 S. Ct. at 1753 (refusing to entertain "naked policy appeals").

[358] *Yates*, 574 U.S. at 570 (Kagan, J., dissenting).

In this way, formalistic textualism is reminiscent of the actual plain meaning rule applied by the Supreme Court throughout much of its history.[359] In cases such as *United States v. Fisher* (1805),[360] *United States v. Wiltberger* (1820),[361] *Crawford v. Burke* (1904),[362] and *Weiss v. United States* (1939),[363] the Court first looked at the semantic context—the ordinary meaning of the text at issue, comparing and contrasting that text with surrounding provisions and, sometimes, past statutes. If the Court determined, based on this structural check, that the operative text was plain, the Court would stop there—and not rely on other contextual evidence, such as the title, practical consequences, or (eventually) legislative history. But the plain meaning approach did not (as Hart and Sacks would later suggest) "exclude consideration of even related parts of the statute and the scheme as a whole."[364]

When Justice Kavanaugh and others claim "literalism," the objection appears to be that the Court did not look at *sufficient* context. Moreover, the critics suggest—much like the legal realist and legal process critics of the old plain meaning school—that there should be no "rule of law" prohibiting

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[359] In past work, I have suggested that formalistic textualism instructs jurists to focus on semantic context, "downplaying" other contextual evidence. *See, e.g.*, Grove, *supra* note 4, at 267. I seek now to refine that definition. Building on the history of the plain meaning school, I argue that formal textualism should be seen as a set of legal rules that allow certain contextual evidence—such as the surrounding text and structure, and past statutes—to determine whether a statutory provision is clear. (In separate work, I plan to explore whether other contextual evidence, such as judicial precedent, should be examined at this first stage.) The method then also serves as a rule of exclusion, barring consideration of certain other contextual evidence when the operative text is clear. Notably, other scholarship has recognized that statutory methodology can be considered as legal rules. *See* William Baude & Stephen E. Sachs, *The Law of Interpretation*, 130 HARV. L. REV. 1079, 1083 (2017); *cf.* Abbe R. Gluck, *Intersystemic Statutory Interpretation: Methodology as "Law" and the* Erie *Doctrine*, 120 YALE L.J. 1898, 1907–18 (2011) (exploring "the unresolved legal status of federal statutory interpretation methodology"); Abbe R. Gluck, *The Federal Common Law of Statutory Interpretation:* Erie *for the Age of Statutes*, 54 WM. & MARY L. REV. 753, 757 (2013) (suggesting that "statutory interpretation methodology is some kind of judge-made law").

I do not want to overstate the historical analogy between formalistic textualism and the plain meaning rule. Those who support a more formal textualism tend to reject the absurdity doctrine, which permits a court to avoid an interpretation that would lead to "absurd results." *See* Grove, *supra* note 4, at 303–04; Manning, *Absurdity*, *supra* note 40, at 2391; John C. Nagle, *Textualism's Exceptions*, 2002 ISSUES IN LEGAL SCHOLARSHIP, at 3. In the nineteenth and early twentieth centuries, although the Justices differed dramatically on when that doctrine applied (that is, how "absurd" a result had to be), they did at least acknowledge this exception. *Compare* Crooks v. Harrelson, 282 U.S. 55, 59–60 (1930) (stating that the absurdity doctrine may "override the literal terms . . . only under rare and exceptional circumstances"), *with* Church of the Holy Trinity v. United States, 143 U.S. 457, 459 (1892) (inviting a finding of absurdity when it seems "unreasonable to believe that the legislator intended to include the particular act").

[360] United States v. Fisher, 6 U.S. (2 Cranch) 358, 358–59 (1805).

[361] United States v. Wiltberger, 18 U.S. (5 Wheat.) 76, 93–94 (1820).

[362] Crawford v. Burke, 195 U.S. 176, 186–87 (1904).

[363] Weiss v. United States, 308 U.S. 321, 326–29 (1939).

[364] HART & SACKS, *supra* note 1, at 1236.

resort to certain types of context. That is in fact the heart of the divide in cases such as *Bond*, *Yates*, *King*, *McGirt*, *Bostock*, and *Niz-Chavez*. The self-proclaimed textualists on the Court seem to agree that "textualism" generally forecloses resort to one type of context: legislative history.[365] But those who prefer a more flexible textualism insist that interpreters should be free to rely on *other* contextual evidence, such as practical consequences or social context (that is, original public understandings or expectations). That is an important debate—which context should be relevant in statutory interpretation—and it is discussed in the next Section. But it is not a debate about "literalism" versus "nonliteralism."

Indeed, it does not appear that the Supreme Court has ever adopted a "literalist approach" to statutory interpretation, "exclud[ing] consideration of even related parts of the statute and the scheme as a whole."[366] That historical reality makes a great deal of sense. Given the differences between ordinary conversation and congressional enactments, it would be odd to take a statutory term utterly out of context—as one might do in a pun. Such literalism makes sense in comedies or children's books such as the *Amelia Bedelia* series.[367] But once a judge (or other interpreter) understands that the series of words before her is a congressional enactment, the judge—likely without even thinking about it—rules out such literalism.

C. Beyond the Literalism Debate: Normative Concerns

Once we get past the "literalism" label, we can consider the more fundamental question: How does one select the proper interpretive approach? This Article shows that, throughout our history, much of the debate has involved two (related) questions: First, which context should be relevant to statutory interpretation? Second, should there be legal rules prohibiting resort to certain types of context?

History does not provide a decisive guide. My own research suggests that the Supreme Court's approach to statutory interpretation has been mixed throughout much of its history. That is, there has not been a single predominant interpretive approach that might offer a "law of

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[365] In *Bostock*, Justice Alito briefly discussed legislative history but did not claim that was part of his textual analysis. *See* Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1776 (2020) (Alito, J., dissenting). Likewise, in *Yates*, Justice Kagan touched on legislative history "for those who care about it" to assert that it supported her textual reading. Yates v. United States, 574 U.S. 528, 557–58 (Kagan, J., dissenting) (describing the history as "extra icing on a cake already frosted").

[366] HART & SACKS, *supra* note 1, at 1236.

[367] *See supra* notes 25–26 and accompanying text.

interpretation."[368] Instead, the decision as to the proper approach, in my view, depends primarily on normative assumptions about the judicial role.

Notably, the discussion below focuses on present-day divisions within textualism—that is, the division between a more formalistic and flexible version. But this discussion should be of interest even to those who reject textualism in any form. That is true not only because of the growing prominence of the textualist methodology on the federal judiciary but also because the central questions here—pertaining to context and the judicial role—implicate interpretive debates more broadly.

1. The Case for Broadening Context

One may wish to give judges discretion to look at a broader range of contextual evidence in a subset of hard cases. Thus, a proponent of a more flexible textualism may focus on semantic context in many cases. The dispute in *Helvering* over a capital gains tax offers an illustration; any textualist (and, indeed, many purposivists) today would likely find that "two years" means *two years*—notwithstanding contrary evidence in the legislative history.[369] But flexible textualism would allow a more forgiving approach in more difficult disputes.

First, the Justices seem drawn to a more flexible approach in part out of concerns about "fair notice"—that is, when the text leads to a surprising result in a particular case. That seemed to be part of the concern in *Bond*; an "ordinary person" would not expect a domestic dispute to turn into a federal criminal prosecution for use of a "chemical weapon." And in *Bostock*, Justice Kavanaugh suggested that employers would be astounded to learn that Title VII protected gay, lesbian, and transgender employees.[370] The focus on social context—original public understandings—seems to be an effort to address this "fair notice" concern. If the Justices can expand their focus beyond the semantic context—and consider how the public likely would have expected

[368] *Cf.* Baude & Sachs, *supra* note 359, at 1082 ("Interpretation isn't just a matter of language; it's also governed by law.").

[369] *See* Section II.B.2; Molot, *supra* note 278, at 3 (noting purposivists today focus more on text).

[370] *See* 140 S. Ct. at 1823 n.1, 1828 (Kavanaugh, J., dissenting) ("A literalist approach to interpreting phrases disrespects ordinary meaning and deprives the citizenry of fair notice of what the law is. It destabilizes the rule of law and thwarts democratic accountability. . . . On occasion, it can be difficult for judges to assess ordinary meaning. Not here. Both common parlance and common legal usage treat sex discrimination and sexual orientation discrimination as two distinct categories of discrimination—back in 1964 and still today. . . . [F]ew in 1964 (or today) would describe a firing because of sexual orientation as a firing because of sex."); *id.* at 1824 ("Under [the majority's] literalist approach, sexual orientation discrimination automatically qualifies as sex discrimination, and Title VII's prohibition against sex discrimination therefore also prohibits sexual orientation discrimination—and actually has done so since 1964, unbeknownst to everyone.").

the law to apply at the time of enactment—that may guard against such "unfair surprise."

Second, the Justices seem inclined to apply a more flexible approach when they are concerned about the "far-reaching consequences" of a formal analysis—a point emphasized by the dissenters in *Bostock*, *Niz-Chavez*, and *McGirt*.[371] One of the most powerful examples is *King*, where a more formalistic reading of a subsection of the Affordable Care Act could have upended health-insurance markets.[372] There may be good reasons, as Doerfler has forcefully argued, to give judges leeway in such "high stakes" cases to find ambiguity to avoid potentially disastrous results.[373]

The more flexible version of textualism may be desirable precisely because it rejects a "rule of law" that prohibits judges from looking to certain forms of context (outside of legislative history). Under this view, federal judges *should* have the discretion to look beyond the semantic context to other interpretive sources—such as a statutory title, social context, and practical consequences—to avoid surprising or seemingly harsh results.

2. The Case for Limiting Context

A more formalistic textualism also has strong normative underpinnings, particularly for those who seek to constrain judicial discretion (as many scholars and jurists do[374]). To be sure, one can debate whether text can ever

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[371] *Id.* at 1778 (Alito, J., dissenting); *see* Niz-Chavez v. Garland, 141 S. Ct. 1474, 1497–98 (2021) (Kavanaugh, J., dissenting) (warning that a literal interpretation would "impose substantial costs and burdens on the immigration system"); McGirt v. Oklahoma, 140 S. Ct. 2452, 2502 (Roberts, C.J., dissenting) (emphasizing the "significant" and "drastic" consequences of treating much of Oklahoma as Indian country).

[372] *See* King v. Burwell, 576 U.S. 473, 494 (2015). I assume, for present purposes, that formal textualism supports the dissent in *King v. Burwell*. Notably, other scholars have recognized that the Court in *King* did not apply a "strict textualism." *See, e.g.*, Abbe R. Gluck, Mark Regan & Erica Turret, *The Affordable Care Act's Litigation Decade*, 108 GEO. L.J. 1471, 1530 (2020) (noting that the *King* Court did not "apply the Court's preferred interpretive method of strict textualism to a likely mistake in the ACA"); *see also* Stephanie Hoffer & Christopher J. Walker, *Is the Chief Justice a Tax Lawyer?*, 43 PEPP. L. REV. 33, 37 (2015) (describing the Court's approach in *King* as "contextualism"); Kessler & Pozen, *supra* note 4, at 1853–54 (noting that the Court did not apply "a stringent form of textualism" in *King v. Burwell*).

[373] *See* Doerfler, *supra* note 327, at 527–28.

[374] *See* Section IV.A.1; *see also* ADRIAN VERMEULE, JUDGING UNDER UNCERTAINTY 4–5, 150, 181, 186–87 (2006) (advocating textualism based on concerns about the judiciary's limited institutional capacities); Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL'Y 61, 67, 69 (1994); Frederick Schauer, *Statutory Construction and the Coordinating Function of Plain Meaning*, 1990 SUP. CT. REV. 231, 253–55 (emphasizing that plain meaning can serve a coordinating function). *But see* Adam M. Samaha, *Looking Over a Crowd—Do More Interpretive Sources Mean More Discretion?*, 92 N.Y.U. L. REV. 554, 558 (2017) (doubting that "discretion increases as sources increase").

constrain—that is, whether there is ever a "plain meaning" of a statute.[375] But it is important to recognize that in many of the cases discussed in this Article—such as *Fisher*, *Holy Trinity*, *American Trucking*, as well as *Bond*, *King*, and *Bostock*—there was a good deal of agreement among the Justices about the semantic meaning of the text. For example, in *Holy Trinity*, the Court acknowledged that the text encompassed the pastor.[376] Likewise, in *King*, the majority recognized that a federal exchange would not seem to be "established by the State."[377] And in *Bostock*, the dissenters admitted (albeit grudgingly) that terminating a male employee who is romantically attracted to men, or dismissing a female employee after she announces her transition from male to female, could be "discriminat[ion] . . . because of such individual's . . . sex."[378] The disagreement in these cases seemed to stem less from doubts about the semantic meaning than from a deeper "hunch" that the apparent result *could not be right*. That is, the heart of the dispute was whether to stop at the semantic context—or to look beyond it to avoid what some may find to be an uncomfortable outcome.

There are reasons to favor a rule of law—akin to the traditional plain meaning rule—that cuts off resort to certain context and thereby makes it more difficult for judges to follow that "hunch." First, consider the concerns about "fair notice" in a case such as *Bostock*. As Justice Gorsuch pointed out, Title VII was a "major piece of federal civil rights legislation" that was written in "starkly broad terms"; such a law should put employers on notice that it could transform the workplace.[379] Conversely, consider the ramifications of a reading that emphasizes "social context"—and confines a statute such as Title VII to the public expectations of 1964. At that time, some officials assumed that employers could reject female workers who got married or had young children; such actions were deemed to be distinctions on the basis of marriage or parenthood, not "sex"—and, moreover, were viewed as reasonable employment decisions because (under the thinking of the time) women who had such familial distractions would not be able to do

[375] *See* Cary Franklin, *Living Textualism*, 2020 SUP. CT. REV. 119, 125–28 (arguing that textualism does not constrain judicial discretion more than its interpretive counterparts). For a thoughtful discussion of legal clarity, see Richard M. Re, *Clarity Doctrines*, 86 U. CHI. L. REV. 1497, 1505–09 (2019).

[376] Church of the Holy Trinity v. United States, 143 U.S. 457, 458–59 (1892) ("It must be conceded that the act of the corporation is within the letter of this section, for the relation of rector to his church is one of service, and implies labor on the one side with compensation on the other.").

[377] 576 U.S. at 487 (internal quotation marks omitted) ("[T]he Act defines 'State' to mean 'each of the 50 States and the District of Columbia'—a definition that does not include the Federal Government."); *see* 42 U.S.C. § 18024(d).

[378] Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1740, 1772, 1824–25 (2020) (Alito, J., and Kavanaugh, J., dissenting).

[379] *Id.* at 1753 (majority opinion).

the job.[380] Likewise, almost no one in 1964 would have viewed sexual harassment as sex discrimination.[381] So to the extent judges go beyond semantic context to the "social context" of 1964, a good deal more than *Bostock* could be on the table.

Some readers might suggest that judges today would never interpret Title VII to allow employers to fire women who are married or have young children, or to permit sexual advances in the workplace. But if judges can pick and choose when they find original public understandings to be relevant, that simply adds to the judicial creativity. The search for "social context" could become "an exercise in 'looking over a crowd and picking out your friends.'"[382]

Second, there may be good reason for a rule of law that prohibits judges from departing from the text out of concern for what they view as "far-reaching consequences."[383] Judges have varying perceptions of wise policy. In *Bostock*, Justice Alito worried that the Court's analysis would transform the interpretation of "[o]ver 100 [other] federal statutes" that also "prohibit discrimination because of sex."[384] In *Niz-Chavez*, Justice Kavanaugh fretted that, due to the Court's decision, "many more people . . . may be eligible for cancellation of removal."[385] And in *McGirt*, the dissenters were appalled by the "improbable" decision that "unbeknownst to anyone for the past century, a huge swathe of Oklahoma is actually a Creek Indian reservation."[386] Although such results strike some as "unthinkable" and "absurd,"[387] for

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[380] *See* Cooper v. Delta Air Lines, Inc., 274 F. Supp. 781, 782–83 (E.D. La. 1967) (upholding airline policy of firing female flight attendants upon marriage); Vicki Schultz, *Taking Sex Discrimination Seriously*, 91 DENV. U. L. REV. 995, 1026 (2015) (noting that the EEOC initially approved the airlines' practice); *see also* Phillips v. Martin Marietta Corp., 411 F.2d 1, 4 (5th Cir. 1969) (upholding refusal to hire women with young children). The Supreme Court vacated the *Phillips* decision but left room for the employer to show that hiring only men with young children was a "bona fide occupational qualification." Phillips v. Martin Marietta Corp., 400 U.S. 542, 544 (1971); *see* Cary Franklin, *Inventing the "Traditional Concept" of Sex Discrimination*, 125 HARV. L. REV. 1307, 1356 (2012) (stating that "what the Court gave [in *Phillips*], it then took away").

[381] *See* Corne v. Bausch & Lomb, Inc., 390 F. Supp. 161, 163 (D. Ariz. 1975) (holding that Title VII provides no basis for relief when a female employee experiences verbal and physical sexual advances by a supervisor); Grove, *supra* note 4, at 295 (collecting sources).

[382] Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546, 568 (2005) (quoting Wald, *supra* note 239, at 214).

[383] *Bostock*, 140 S. Ct. at 1778 (Alito, J., dissenting).

[384] *Id.*

[385] Niz-Chavez v. Garland, 141 S. Ct. 1474, 1491, 1497–98 (2021) (Kavanaugh, J., dissenting).

[386] McGirt v. Oklahoma, 140 S. Ct. 2452, 2482 (2020) (Roberts, C.J., dissenting).

[387] *See, e.g.*, Blackhawk, *supra* note 323, at 371, 397 (noting that many viewed *McGirt* as "unthinkable" or "absurd"); Grove, *supra* note 4, at 269, 302 (noting that the Trump administration suggested that a plaintiff victory in *Bostock* would be "absurd").

many others, those results are not problematic at all, but rather happy consequences of the Court's formalistic reading.

Accordingly, one may prefer a firm rule that requires judges to adhere to the statutory text despite their concerns about notice to regulated parties or perceptions about practical consequences. This more formal approach accords with many of the theoretical premises of textualism. Modern textualists have long argued that the method preserves Article I values by enforcing the (often unknowable) bargains in federal legislation, even when those statutory deals lead to "awkward results."[388] By contrast, if judges have a license to depart from semantic context—based on evidence from past public understandings or concerns about practical consequences—that could upset statutory deals just as easily as a march through legislative history. "[S]emantic meaning," after all, "is the currency of legislative compromise."[389]

Moreover, as I have argued in past work, formalistic textualism can serve Article III-based values.[390] By precommitting to a more formal approach, federal judges can force themselves to focus on semantic context and attempt to minimize the influence of (often politically contested and divisive) consequentialist arguments. That is, judges can tie themselves to the mast of the text. This constraint is particularly valuable in a politically polarized environment, where a Justice is expected to rule in salient cases in accordance with the preferences of the President who nominated her.[391] With a text-centric approach, a Justice may be difficult to predict in such ideological terms; she may issue some statutory decisions (such as *Bostock* or *Niz-Chavez*) that please progressive forces, and others that may satisfy more conservative or libertarian voices.

I want to underscore this latter point. For many readers, formalistic textualism may seem unappealing because it can lead to results that one finds highly problematic in a particular case. But I argue that this aspect of the approach can be seen as a feature, rather than as a bug. To the extent that the text drives a Justice to issue politically mixed and "surprising" decisions, that can help promote judicial legitimacy—that is, the public reputation of the Supreme Court as a whole.[392] Notably, despite the considerable

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[388] Manning, *Absurdity*, *supra* note 40, at 2392, 2417.

[389] Manning, *What Divides*, *supra* note 245, at 99.

[390] *See* Grove, *supra* note 4, at 296–307 (arguing that formalistic textualism can help to promote judicial legitimacy).

[391] *See* NEAL DEVINS & LAWRENCE BAUM, THE COMPANY THEY KEEP 2–3, 121–28, 132–40, 150–57 (2019) (noting that the Justices are often perceived to be on partisan "teams").

[392] *See* RICHARD H. FALLON JR., LAW AND LEGITIMACY IN THE SUPREME COURT 21 (2018).

controversy surrounding the Supreme Court in recent years,[393] public perceptions of the Court improved considerably in the wake of Justice Gorsuch's opinion in *Bostock*.[394]

These normative choices—about the proper judicial role in high-profile cases—are not simple. But that should be the ground of the debate. Charges of "literalism" are not only inaccurate but distracting. Throughout our history, the question has never been whether the Supreme Court should look to context in interpreting federal statutes, but *which context* it should consider.

CONCLUSION

Modern textualists have long sought to distinguish their brand from the "plain meaning school" of the late nineteenth and early twentieth centuries—an approach that both textualists and nontextualists alike have viewed as improperly literal and wooden. But this conventional historical account is incorrect. Under the actual plain meaning approach, the Supreme Court for much of its history looked to surrounding text and structure to determine if an operative text was clear. If so, the Court declined to look at other contextual evidence, such as a title, practical consequences, or (especially beginning in the late nineteenth century) legislative history. This Article not only clears up this historical misunderstanding but also has implications for modern debates over interpretive theory. Theorists should set aside debates over "literalism" in statutory interpretation. The question is not—and has never been—whether interpreters should look to context but rather which context they should consider.

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[393] The controversy prompted President Biden to create a Commission to study Supreme Court reform. *See* FINAL REPORT, PRESIDENTIAL COMMISSION ON THE SUPREME COURT 12–17 (2021), https://www.whitehouse.gov/wp-content/uploads/2021/12/SCOTUS-Report-Final-12.8.21-1.pdf [https://perma.cc/SXR8-BD7J] (discussing the events that led to reform proposals).

[394] *See* Sarah Elbeshbishi, *Gallup Poll Finds Highest Supreme Court Approval Rating Since 2009*, USA TODAY (Aug. 5, 2020, 4:12 PM), https://www.usatoday.com/story/news/politics/2020/08/05/gallup-poll-finds-highest-supreme-court-approval-rating-since-2009/3301010001/ [https://perma.cc/H5F9-JY7K] (noting a July 2020 poll that found a 58% approval rating, with considerable support among Republicans, Independents, and Democrats). The Court's public approval rating fell in 2021 in the wake of disputes over a Texas abortion law and remained low in 2022 after the Court overruled *Roe v. Wade*, 410 U.S. 113 (1973), and *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), in *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022). *See* Meghan Roos, *Supreme Court Approval Hits Record Low in Gallup Poll Done After Texas Abortion Law Upheld*, NEWSWEEK (Sept. 24, 2021, 6:41 PM), https://www.newsweek.com/supreme-court-approval-hits-record-low-gallup-poll-done-after-texas-abortion-law-upheld-1632623 [https://perma.cc/9TZD-BK3X]; Mohamed Younis, *Democrats' Approval of Supreme Court at Record-Low 13%*, GALLUP (Aug. 2, 2022), https://news.gallup.com/poll/395387/democrats-approval-supreme-court-record-low.aspx [https://perma.cc/6ALV-WXUC].