TEXTUALISM AND LEGISLATIVE INTENT

John F. Manning[*]

FOR much of our history, the Supreme Court has unflinchingly proclaimed that legislative "intent" is the touchstone of federal statutory interpretation.[1] The rationale is familiar: In a constitutional system predicated upon legislative supremacy (within constitutional boundaries), judges—as Congress's faithful agents—must try to ascertain as accurately as possible what Congress meant by the words it used. On this premise, federal judges long assumed that when a statute was vague or ambiguous, interpreters should seek clarification, if possible, in the bill's internal legislative history.[2] Thus, when a sponsor or committee expressed an understanding of the bill or the mischiefs at which it was aimed, federal courts often took that as probative evidence of the text's meaning.[3] And because a legislature—like any other user of language—might speak imprecisely, or use language loosely or idiosyncratically, federal judges long assumed that a statute's semantic detail, however clear, must yield when it conflicts sharply with the apparent spirit or purpose that inspired its enactment.[4]

For the latter half of the twentieth century, these principles—referred to herein as "classical intentionalism"—reflected the orthodoxy, at least among federal judges. Near the close of that century, however, a competing philosophy known as "textualism"

[*] Professor of Law, Harvard Law School. I am grateful to David Barron, Bradford Clark, Jack Goldsmith, Debra Livingston, and Henry Monaghan for insightful comments on an earlier draft. I thank Anton Metlitsky for excellent research assistance.

[1] See, e.g., Philbrook v. Glodgett, 421 U.S. 707, 713 (1975) ("Our objective . . . is to ascertain the congressional intent and give effect to the legislative will."); United States v. Am. Trucking Ass'ns, 310 U.S. 534, 542 (1940) ("In the interpretation of statutes, the function of the courts is easily stated. It is to construe the language so as to give effect to the intent of Congress."); ICC v. Baird, 194 U.S. 25, 38 (1904) ("The object of construction, as has been often said by the courts and writers of authority, is to ascertain the legislative intent, and, if possible, to effectuate the purposes of the lawmakers.").

[2] William N. Eskridge, Jr., Legislative History Values, 66 Chi.-Kent. L. Rev. 365, 369–70 (1990) ("Legislative history as evidence of specific intent is, historically, the main justification for examining such materials. The Court examines legislative history because it contains authoritative statements of what the sovereign legislature commands.").

[3] See infra note 29 and accompanying text.

[4] See infra note 31 and accompanying text.

emerged, producing a rather significant effect on both judicial behavior and academic writing. As discussed below, textualism does not admit of a simple definition, but in practice is associated with the basic proposition that judges must seek and abide by the public meaning of the enacted text, understood in context (as all texts must be). Hence, even in cases of ambiguity, many textualist judges typically refuse to treat legislative history as "authoritative" evidence of legislative intent.[5] Given the undeniable complexity of the legislative process, interpreters simply cannot know if a requisite majority of enactors knew of or assented to the contents of any particular piece of legislative history.[6] In addition, textualists choose the letter of the statutory text over its spirit; again, the intricacy and opacity of the legislative process make them reluctant to ascribe an apparent mismatch between text and purpose to a lapse in legislative expression rather than the ever-present possibility of an awkward legislative compromise.[7]

The leading exponents of modern textualism—Justice Scalia on the U.S. Supreme Court and Judge Easterbrook on the U.S. Court of Appeals for the Seventh Circuit—often justify these deviations from classic intentionalism with an alluring but ultimately inexact proposition: Building on the realist tradition, they emphasize that multi-member legislatures do not have an actual but unexpressed "intent" on any materially contested interpretive point; judges must therefore abandon any pretense of using such an intent as the aim of interpretation.[8] Instead, courts should listen for "the ring the

[5] See John F. Manning, Textualism As a Nondelegation Doctrine, 97 Colum. L. Rev. 673, 684–89 (1997) (discussing the textualist critique of the use of legislative history and collecting examples from judicial opinions).

[6] See, e.g., Wis. Pub. Intervenor v. Mortier, 501 U.S. 597, 620 (1991) (Scalia, J., concurring in the judgment) ("It is most unlikely that many Members of either Chamber read the pertinent portions of the Committee Reports before voting on the bill—assuming (we cannot be sure) that the Reports were available before the vote.").

[7] See John F. Manning, Textualism and the Equity of the Statute, 101 Colum. L. Rev. 1, 18–21 (2001) (describing the textualist position).

[8] See, e.g., Frank H. Easterbrook, Some Tasks in Understanding Law Through the Lens of Public Choice, 12 Int'l Rev. L. & Econ. 284, 284 (1992) ("[T]he concept of 'an' intent for a person is fictive and for an institution hilarious. A hunt for this snipe liberates the interpreter, who can attribute to the drafters whatever 'intent' serves purposes derived by other means."); Frank H. Easterbrook, Statutes' Domains, 50 U. Chi. L. Rev. 533, 547 (1983) [hereinafter Easterbrook, Statutes' Domains] ("Because legislatures comprise many members, they do not have 'intents' or 'designs,' hidden yet discoverable."); Frank H. Easterbrook, Text, History, and Structure in Statutory

words [of a statute] would have had to a skilled user of words at the time, thinking about the same problem."[9] Textualists thus aspire "to read the words of [a statutory] text as any ordinary Member of Congress would have read them, and apply the meaning so determined."[10] Such an approach, they insist, does not replicate the fanciful pursuit of Congress's true intentions; rather, it more plausibly captures "a sort of 'objectified' intent—the intent that a reasonable person would gather from the text of the law, placed alongside the remainder of the *corpus juris*."[11]

In a characteristically insightful article, Professor Caleb Nelson has suggested that the difference between new textualists and classical intentionalists may not be as cosmic as modern textualist rhetoric sometimes suggests.[12] Several considerations, he argues, demonstrate that the leading modern textualists do, in fact, care about Congress's actual rather than objectified intent. A few examples suffice to reveal the gist of his analysis: First, textualists reject internal legislative history precisely because they regard a sponsor's or committee's views as an unreliable proxy for the intentions of the body as a whole.[13] Second, modern textualists sometime sacrifice clear semantic meaning in order to avoid scrivner's errors, a practice that make sense only if one is seeking the true intention of the enacting body.[14] Third, textualists sometimes even engage in the "imaginative reconstruction" of legislative intent—that is, in some contexts they eschew close textual exegesis and try instead to imagine how the legislature would have resolved a par-

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Interpretation, 17 Harv. J.L. & Pub. Pol'y 61, 68 (1994) [hereinafter Easterbrook, Text, History, and Structure] ("Intent is elusive for a natural person, fictive for a collective body."); Antonin Scalia, Judicial Deference to Administrative Interpretations of Law, 1989 Duke L.J. 511, 517 (arguing that "the quest for the 'genuine' legislative intent is probably a wild-goose chase").

[9] Frank H. Easterbrook, The Role of Original Intent in Statutory Construction, 11 Harv. J.L. & Pub. Pol'y 59, 61 (1988).

[10] Chisom v. Roemer, 501 U.S. 380, 405 (1991) (Scalia, J., dissenting) (citation omitted).

[11] Antonin Scalia, Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws, *in* A Matter of Interpretation: Federal Courts and the Law 3, 17 (Amy Gutmann ed., 1997).

[12] See Caleb Nelson, What Is Textualism?, 91 Va. L. Rev. 347 (2005).

[13] See id. at 361–67.

[14] See id. at 356, 379–81.

ticular interpretive question under the circumstances at bar.[15] Such considerations lead Professor Nelson to conclude that textualists talk a good game but in the end want to know the same thing as do intentionalists—what the legislature subjectively intended. They just have different presuppositions about how to read—or, perhaps more accurately, how to approximate—that intent.

So what does Professor Nelson see as the salient factor that distinguishes modern textualists from classical intentionalists? Simply put, he detects a heightened tendency among textualists to prefer rules over standards.[16] For example, textualists are quick to enforce statutorily embedded rules against the claim that inevitable over- or under-inclusiveness warrants an (intent-based) exception.[17] And they enthusiastically deploy canons of construction, with special emphasis on the more rule-like of the canons.[18] Given his previous conclusion that textualists seek legislative intent, he chalks up their rule-like tendencies to an implicit judgment that rule-following will more likely approximate legislative intent. (That is, textualists appear to believe that de-

[15] See id. at 404–13. For example, in determining whether to "sever" an unconstitutional provision of a statute, the Court inquires into whether Congress would have enacted the balance of the statute without the offending provision. See id. at 404–05. In addition, the Court's approach to implied federal preemption of state law approximates the methods of analysis associated with imaginative reconstruction. See Daniel J. Meltzer, The Supreme Court's Judicial Passivity, 2002 Sup. Ct. Rev. 343, 364–68 (arguing that contrary to its default approach to statutory interpretation, the Court engages in significant interpretive lawmaking in implied preemption cases).

[16] See Nelson, supra note 12, at 372–403. For a general discussion of the distinction between rules and standards, see, for example, Isaac Ehrlich & Richard A. Posner, An Economic Analysis of Legal Rulemaking, 3 J. Legal Stud. 257, 258 (1974) (noting that "[a] rule withdraws from the decision maker's consideration one or more of the circumstances that would be relevant to decision" while "[t]he term 'standard' denotes . . . a general criterion of social choice," such as efficiency or reasonableness); Louis Kaplow, Rules Versus Standards: An Economic Analysis, 42 Duke L.J. 557, 559–60 (1992) ("[A] rule may entail an advance determination of what conduct is permissible, leaving only factual issues for the adjudicator. . . . A standard may entail leaving both specification of what conduct is permissible and factual issues for the adjudicator."); Kathleen M. Sullivan, The Supreme Court, 1991 Term—Foreword: The Justices of Rules and Standards, 106 Harv. L. Rev. 22, 58 (1992) ("A legal directive is 'rule'-like when it binds a decisionmaker to respond in a determinate way to the presence of delimited triggering facts. . . . A legal directive is 'standard'-like when it tends to collapse decisionmaking back into the direct application of the background principle or policy to a fact situation.").

[17] Nelson, supra note 12, at 381–83.

[18] Id. at 391–92.

viating from a clear text in the name of intent will typically produce more misapproximations of legislative intent than will hewing to the text, and that a strong presumption against intent-based exceptions to rules will therefore prevent more errors than it leaves in place.[19]) Similarly, their attraction to rule-based canons reflects an implicit belief that such canons accurately reflect congressional habits of mind; that their application will thus capture true congressional desires more often than case-by-case analysis of intent; and that consistent judicial deployment of such preference-estimating canons will become self-fulfilling as legislative drafters first become familiar with and then take account of predictable canons of construction.[20]

This Essay will examine Professor Nelson's central contention that, contrary to some of their rhetoric, textualist judges do care about legislative intent.[21] If by that he means that textualists believe that the legislative majority as a whole possesses a background subjective intention about the words it adopts, I believe that his conclusion misses the fact that textualists, given their assumptions about the legislative process, necessarily believe that intent is a construct. To be sure, textualists have sought to devise a constructive intent that satisfies the minimum conditions for meaningfully tracing statutory meaning to the legislative process. That much is uncontroversial. In any system predicated on legislative supremacy, a faithful agent will of course seek the legislature's intended meaning in some sense, and modern textualists do situate themselves in that tradition. But to say that they simply practice intentionalism by other means is to understate the important link for textualists between recognizing the cumbersome, chaotic, path-dependent, and opaque character of the legislative process and their rejection (in what may perhaps be overstated rhetoric) of the classical intentionalists' understanding of legislative intent.

What characterizes classical intentionalism is its tendency to anthropomorphize the legislature. In important respects, intentionalists believe that a legislative command can and should be treated as one would treat the speech of an individual human actor. That is,

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[19] Id. at 381–83.

[20] Id. at 389–93.

[21] A brief Essay is not the proper venue to pick over whatever minor disagreements I may have with the particulars of Professor Nelson's careful analysis.

they believe that a legislative majority can have coherent but unexpressed background intentions about its statutory utterances that can be used to clarify or even alter the significance that a reasonable person conversant with relevant social and linguistic conventions would otherwise attach to the chosen words in context. Textualists, by contrast, deny that Congress has a collective will apart from the outcomes of the complex legislative process that conditions its ability to translate raw policy impulses or intentions into finished legislation. For them, intended meaning never emerges unfiltered; it must survive a process that includes committee approval, logrolling, the need for floor time, threatened filibusters, conference committees, veto threats, and the like. For better or worse, only the statutory text navigates all those hurdles. Accordingly, whereas intentionalists believe that legislatures have coherent and identifiable but *unexpressed* policy intentions, textualists believe that the only meaningful collective legislative intentions are those reflected in the *public meaning* of the final statutory text.

This Essay will outline the distinctive conception of legislative intent that follows from the textualists' bedrock assumptions about the legislative process. Part I will lay the groundwork by examining the modern textualists' underlying skepticism of intent. It will then argue that despite this skepticism, textualists necessarily believe in some version of legislative intent, but one that is quite different from the version associated with classical intentionalism. In particular, textualists focus on "*objectified* intent"—the import that a reasonable person conversant with applicable social and linguistic conventions would attach to the enacted words. Part II will examine the distinction between rules and standards upon which Professor Nelson centrally relies. Although textualists may in practice have a predilection for rules, Part II will suggest that the key to understanding textualism is not such a preference; rather, textualism rests on a straightforward conviction that faithful agents must treat rules as rules and standards as standards. Textualists believe it imperative, given the complexities of the legislative process, to respect the level of generality at which Congress speaks; for them, legislative compromise is reflected in the detail of the text produced. So they subscribe to the general principle that texts should be taken at face value—with no implied extensions of specific texts or exceptions to general ones—even if the legislation will then

have an awkward relationship to the apparent background intention or purpose that produced it.

Before elaborating on this analysis, let me offer two caveats. First, much of Professor Nelson's article thoughtfully culls a definition of textualism from the judicial practices reflected in the writings and opinions of the two leading textualist judges. I will assume arguendo that certain of their practices are consistent with reliance on the subjective intent of classical intentionalism rather than the objective intent that they endorse.[22] Rather than focusing on the internal consistency *vel non* of textualist judicial practice, I will attempt to demonstrate that the construct of objectified legislative intent follows from the textualists' *articulated* theory of the legislative process. In other words, rather than reasoning from textualist practice to theory, I will approach the problem from the opposite direction. Second, in so doing, I will focus my attention on the textualists' antipathy towards sacrificing the letter of the law to its spirit, reserving only marginal discussion for the legislative history debate. Whereas the legislative history debate relates more to the admissibility of certain evidence of meaning, the conflict between letter and spirit raises broader questions about the very nature of interpretation. As I have discussed in prior writing, moreover, the textualist position on legislative history involves complications that

[22] Indeed, in previous writing, I argued that textualists' reliance on the absurdity doctrine is difficult to reconcile with their underlying theory of the legislative process and their consequent emphasis on objective legislative intent. See John F. Manning, The Absurdity Doctrine, 116 Harv. L. Rev. 2387, 2419–31 (2003). I reserved the question of whether a true "scrivener's error" doctrine might be reconciled with textualism if limited to circumstances in which the text itself revealed an obvious typographical error, rather than a failure to express a policy impulse with sufficient care. See id. at 2459 n.265. Where the text itself reveals an unmistakable error in transcription rather than expression, I suggested that correcting the scrivener's error might not risk disturbing a potential behind-the-scenes "legislative bargain over the precise way a given statutory policy should be articulated." Id. at 2460 n.265. This brief Essay is not the place to address more definitively the appropriateness for textualists of a scrivener's error doctrine. Certainly, one could make a plausible case that even a limited doctrine of that sort is inconsistent with the intent skepticism that underlies modern textualism. See John C. Nagle, Textualism's Exceptions, Issues in Legal Scholarship, at 2–4 (Nov. 2002), available at http://www.bepress.com/ils/iss3/art15 (on file with the Virginia Law Review Association). Whatever the proper resolution of that issue or other questions about specific textualist practices at the margins, it nonetheless appears worthwhile to isolate the basic interpretive framework that follows from the textualists' stated conception of how the legislature works.

do not map neatly onto questions of subjective versus objective legislative intent.[23] With those qualifications in place, I turn now to the textualists' conception of legislative intent.

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[23] Modern textualists' refusal to rely on legislative history cannot rest on their distinction between subjective and objective intent. As discussed below, textualists believe that objective intent derives from the way a person conversant with applicable social and linguistic conventions would read the words in context. Because the Court assumes that "Congress legislates with knowledge of our basic rules of statutory construction," McNary v. Haitian Refugee Ctr., 498 U.S. 479, 496 (1991), the Court's longstanding practice of relying on legislative history might suggest that a reasonable legislator conversant with applicable conventions would treat legislative history, no less than an established canon of construction, as an appropriate source of meaning. Accordingly, textualists must look beyond concepts of intent, subjective or objective, to ground their objection to legislative history.

In previous writing, I have argued that the textualists' antipathy towards legislative history is better explained as a reflection of the constitutional norm against legislative self-delegation. See Manning, supra note 5, at 710–25. Bicameralism and presentment form an essential component of the constitutional structure, designed to check factional influence, promote caution and deliberation, and provoke public discussion. See John F. Manning, Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules, 96 Colum. L. Rev. 612, 649–50 (1996); Manning, supra note 5, at 708–09. To prevent the circumvention of that process, the Court has consistently forbidden Congress from reserving delegated authority for its own components, agents, or members. See Metro. Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc., 501 U.S. 252, 275–77 (1991) ("MWAA") (holding that individual members of Congress may not serve on a tribunal exercising delegated power); Bowsher v. Synar, 478 U.S. 714, 726 (1986) (holding that Congress may not reserve power to remove an officer exercising delegated lawmaking authority); INS v. Chadha, 462 U.S. 919, 944–59 (1983) (invalidating a one-House legislative veto). If prevailing rules of interpretation enable Congress to enact vague statutes while subdelegating policy details to its own components or members, then delegation becomes highly attractive, and an important structural incentive against such a practice is compromised. See *Bowsher*, 478 U.S. at 755 (Stevens, J., concurring) ("If Congress were free to delegate its policymaking authority to one of its components, or to one of its agents, it would be able to evade 'the carefully crafted restraints spelled out in the Constitution.' That danger—congressional action that evades constitutional restraints—is not present when Congress delegates lawmaking power to the executive or to an independent agency." (footnote omitted) (quoting *Chadha*, 462 U.S. at 959)). In recent years, some textualists have justified their reluctance to credit internal legislative history on the ground that it effectively transfers authority from the body as a whole to the committees or sponsors who, under established judicial practice, are capable of producing particularly "authoritative" expressions of legislative intent. See Manning, supra note 5, at 694–95 (discussing this refinement of the textualist position).

Professor Nelson suggests that the norm against self-delegation is itself relevant only if textualists believe that the contents of a committee report or sponsor's statement do not, in fact, reflect the understanding of the legislature as a whole. See Nelson, supra note 12, at 365, n.53. But even if the elaborations of meaning found in the

I. LEGISLATIVE SUPREMACY AND LEGISLATIVE INTENT

As a matter of political theory, any conception of judging rooted in the related premises of legislative supremacy and the faithful agent theory is, quite simply, unintelligible without an underlying conception of legislative intent. As Joseph Raz has explained "[i]t makes no sense to give any person or body law-making power unless it is assumed that the law they make is the law they intended to make."[24] In particular, he emphasizes:

> [T]o assume that the law made by legislation is not the one intended by the legislator, we must assume that he cannot predict what law he is making when the legislature passes any piece of legislation. But if so, why does it matter who the members of the legislature are, whether they are democratically elected or not, whether they represent different regions in the country, or classes in the population, whether they are adults or children, sane or insane? Since the law they will end by making does not represent their intentions, the fact that their intentions are foolish or wise, partial or impartial, self-serving or public spirited, makes no difference.
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> . . . [T]he notion of legislation imports the idea of entrusting power over the law into the hands of a person or an institution, and this imports entrusting voluntary control over the development of the law, or an aspect of it, into the hands of the legislator.[25]

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legislative history potentially reflected some broader understanding, one might nonetheless wish to insist upon its expression in a format—the statutory text—that is subject to the full constitutional process of bicameralism and presentment. Only in that way would one have assurance that the norms expressed in a committee report or sponsor's statement reflected not merely the views of a hypothetical legislative majority, but also a position capable of surviving the cumbersome and elaborate process of enactment.

[24] See Joseph Raz, Intention in Interpretation, *in* The Autonomy of Law: Essays on Legal Positivism 249, 258 (Robert P. George ed., 1996).

[25] Id. at 258–59, 265–66.

Classical intentionalism of course starts from similar premises.[26] But as traditionally practiced by the Supreme Court, it refines that basic idea in a crucial respect. Consistent with an important strain of modern language theory, classical intentionalists emphasize that meaning depends on what the speaker *actually* intends to convey.[27] In that sense, classical intentionalists treat Congress much as they would treat an individual speaker: If an individual uses a term that has multiple potential meanings, the true meaning of that term as used on a particular occasion depends on the meaning intended by the speaker.[28] So when the words of a statute leave a residue of ambiguity, intentionalists find it appropriate to examine the bill's internal legislative history for further evidence of what members of Congress "intended."[29] More important, because people often

[26] See, e.g., T. Alexander Aleinikoff, Updating Statutory Interpretation, 87 Mich. L. Rev. 20, 22–25 (1988) (linking intentionalism to legislative supremacy); Philip P. Frickey, From the Big Sleep to the Big Heat: The Revival of Theory in Statutory Interpretation, 77 Minn. L. Rev. 241, 251–52 (1992) (same).

[27] See generally Steven Knapp & Walter Benn Michaels, Against Theory, 8 Critical Inquiry 723 (1982) (articulating the intent-based theory of meaning). In recent years, prominent defenders of classical intentionalism have relied centrally on such language philosophy to support their approach. See Larry Alexander & Saikrishna Prakash, "Is that English You're Speaking?" Why Intention Free Interpretation is an Impossibility, 41 San Diego L. Rev. 967, 974–78 (2004) (explaining the centrality of speaker's intention to the derivation of meaning); Paul Campos, That Obscure Object of Desire: Hermeneutics and the Autonomous Legal Text, 77 Minn. L. Rev. 1065, 1089 (1993) (same).

[28] For example, Professors Alexander and Prakash note that the word "cat" may connote, inter alia, "'domestic tabby cat,' 'any feline,' or 'jazz musician.'" Alexander & Prakash, supra note 27, at 977. If the person using the word on a particular occasion informs the reader that "he was writing an ode to his beloved tabby," then that intention settles the meaning so that "'cat' here means tabby." Id. For a similarly compelling example not grounded in modern language theory, see Frank E. Horack, Jr., In the Name of Legislative Intention, 38 W. Va. L.Q. 119, 120 (1932) ("When X says, 'A big bundle of bills came this morning,' does Y know what X received? . . . Y is only interested in learning what meaning X is trying to convey.").

[29] See, e.g., N. Haven Bd. of Educ. v. Bell, 456 U.S. 512, 526–27 (1982) ("Although the statements of one legislator made during a debate may not be controlling, Senator Bayh's remarks, as those of the sponsor of the language ultimately enacted, are an authoritative guide to the statute's construction." (citations omitted)); J.W. Bateson Co. v. United States ex rel. Bd. of Tr. of the Nat'l Automatic Sprinkler Indus. Pension Fund, 434 U.S. 586, 591 (1978) (observing that "the authoritative Committee Reports . . . squarely focus on the question at issue here" and "leave[ ] no room for doubt about Congress' intent"); Gay v. Ruff, 292 U.S. 25, 38 (1934) ("The report of the Judiciary Committee of the House which recommended the adoption of the 1916 amendment establishes that such was the sole purpose of Congress."); see also Al-

speak loosely, listeners must adjust their understanding when circumstances suggest that an individual has poorly expressed his or her intentions.[30] By the same token, intentionalists insist that judges enforce the spirit rather than the letter of the law when the enacted words fail to capture the legislature's apparent purposes, as revealed by the tenor of the legislation as a whole, the mischiefs giving rise to its enactment, the policy expressed in similar statutes, and whatever other circumstances may shed light on the policy of the enactment.[31] Classical intentionalism thus presupposes that in-

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einikoff, supra note 26, at 23 (discussing the intentionalist justification for the use of legislative history); Manning, supra note 5, at 679 (same); Daniel B. Rodriguez, The Substance of the New Legal Process, 77 Cal. L. Rev. 919, 931–32 (1989) (book review) (same).

[30] Recent legal scholarship has systematically defended atextual and purposive interpretation in light of the insights of linguistic pragmatics—a branch of linguistics that purports to explain the way people use language in conversational settings. See, e.g., Geoffrey P. Miller, Pragmatics and the Maxims of Interpretation, 1990 Wis. L. Rev. 1179 (tying certain intentionalist maxims to the premises of linguistic pragmatics); M.B.W. Sinclair, Law and Language: The Role of Pragmatics in Statutory Interpretation, 46 U. Pitt. L. Rev. 373 (1985) (same). In particular, this legal scholarship has built upon the work of Paul Grice, who contends that typical conversations are cooperative and that the norms of communication should reflect that premise. See Paul Grice, Studies in the Way of Words 26 (1989). From that starting point, Grice then suggests various maxims to implement this "Cooperative Principle." Id. These common-sense norms of conversation include: "Make your contribution as informative as is required" (quantity); "[t]ry to make your contribution one that is true" (quality); "[b]e relevant" (relation); and "[a]void obscurity of expression" (manner). Id. at 26–27. Professors Miller and Sinclair have relied on Grice's insights to justify the sort of strongly purposive interpretation reflected in the Court's traditional preference for spirit over letter and its long-standing practice of interpreting texts to avoid absurd results. See Miller, supra, at 1210–11 (invoking Grice's maxim of quality to defend the absurdity doctrine); Sinclair, supra, at 397–99 (using the maxim of quality to defend strong purposivism more generally). In previous writing, I argued that Grice's maxims do not necessarily translate from a conversational setting to "the complex, multilateral bargaining process of framing a statute." Manning, supra note 22, at 2462 n.274.

[31] See, e.g., Watt v. Alaska, 451 U.S. 259, 266 (1981) ("The circumstances of the enactment of particular legislation may persuade a court that Congress did not intend words of common meaning to have their literal effect."); Train v. Colo. Pub. Interest Research Group, Inc., 426 U.S. 1, 23–24 (1976) ("[W]e think it abundantly clear after a review of the legislative materials that reliance on the 'plain meaning' of the words 'radioactive materials' contained in the definition of 'pollutant' in the [Federal Water Pollution Control Act] contributes little to our understanding of whether Congress intended the Act to encompass the regulation of source, byproduct, and special nuclear materials."); see also Manning, supra note 7, at 10–15 (discussing the intentionalist roots of atextual and purposive interpretation).

terpreters should try to ascertain how the legislative majority would have handled a problem that the fair import of the enacted text either does not resolve or resolves in a manner that does not adequately reflect the legislature's apparent aims.[32]

Like classical intentionalists, textualists work within the faithful agent framework; they believe that in our system of government, federal judges have a duty to ascertain and implement as accurately as possible the instructions set down by Congress (within constitutional bounds).[33] To this extent, Professor Nelson and I certainly agree. But textualists deny that a legislature has any shared intention that lies behind but differs from the reasonable import of the words adopted; that is, they think it impossible to tell how the body as a whole actually intended (or, more accurately, would have intended) to resolve a policy question not clearly or satisfactorily settled by the text. Building upon the realist tradition, textualists do not believe that the premises governing an individual's intended meaning translate well to a complex, multi-member legislative process.[34] As one author has put it, Congress is a "they," not an

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[32] See, e.g., United States v. Klinger, 199 F.2d 645, 648 (2d Cir. 1952) (Learned Hand, J.) ("Flinch as we may, what we do, and must do, is to project ourselves, as best we can, into the position of those who uttered the words, and to impute to them how they would have dealt with the concrete occasion."), aff'd per curiam by an equally divided Court, 345 U.S. 979 (1953); Richard A. Posner, Statutory Interpretation—in the Classroom and in the Courtroom, 50 U. Chi. L. Rev. 800, 817 (1983) ("[T]he task for the judge called upon to interpret a statute is . . . one of imaginative reconstruction. The judge should try to think his way as best he can into the minds of the enacting legislators and imagine how they would have wanted the statute applied to the case at bar." (footnote omitted)).

[33] See Easterbrook, Text, History, and Structure, supra note 8, at 63 ("We are supposed to be faithful agents, not independent principals."); Frank H. Easterbrook, The Supreme Court, 1983 Term—Foreword: The Court and the Economic System, 98 Harv. L. Rev. 4, 60 (1984) ("Judges must be honest agents of the political branches. They carry out decisions they do not make.").

[34] Textualists implicitly build on the influential work of legal realist Max Radin. See Max Radin, Statutory Interpretation, 43 Harv. L. Rev. 863 (1930); see also, e.g., William N. Eskridge, Jr., The New Textualism, 37 UCLA L. Rev. 621, 651–52 (1990) (linking modern textualism to legal realism). Professor Radin famously doubted that a multi-member legislature could share a coherent specific "intent" on a matter not clearly resolved by the statute itself. See Radin, supra, at 870 ("That the intention of the legislature is undiscoverable in any real sense is almost an immediate inference from a statement of the proposition. The chances that of several hundred [legislators] each will have exactly the same determinate situations in mind . . . are infinitesimally small."). Professor Radin further contended that even if some unexpressed legislative intent existed, the legislative process would be too opaque to permit its recovery; the

"it,"[35] and legislative policies are reduced to law only through a cumbersome and highly intricate lawmaking process.

Invoking the economic and game-theoretic insights of public choice theory,[36] textualists thus emphasize that laws frequently reflect whatever bargain competing interest groups could strike rather than the fully principled policy judgment of a single-minded majority.[37] Moreover, a tortuous and largely opaque legislative process makes it difficult if not impossible for judges to retrace all the steps that contributed to the final wording of the enacted text.[38] Bills "must run the gamut of the process," which involves "committees, fighting for time on the floor, compromise because other members want some unrelated objective, passage, exposure to veto, and so on."[39] Legislative outcomes necessarily hinge on arbitrary (or at least nonsubstantive) factors such as the sequence in which alternatives are presented.[40] And no issue is considered in

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only available evidence would be "the external utterances or behavior of [hundreds of legislators], and in almost every case the only external act is the extremely ambiguous one of acquiescence, which may be motivated in literally hundreds of ways." Id. at 870–71.

[35] Kenneth A. Shepsle, Congress Is a "They," Not an "It": Legislative Intent as Oxymoron, 12 Int'l Rev. L. & Econ. 239 (1992).

[36] For the most lucid account of public choice theory, see generally Daniel A. Farber & Philip P. Frickey, Law and Public Choice: A Critical Introduction (1991).

[37] See William N. Eskridge, Jr., Dynamic Statutory Interpretation 26–27 (1994) (noting that modern interpretive theory assumes that "[s]ome statutes are little else but back-room deals" and that "actual or even conventional" legislative purpose or intent is, on that account, difficult to recover); Courtney Simmons, Unmasking the Rhetoric of Purpose: The Supreme Court and Legislative Compromise, 44 Emory L.J. 117, 130–31 (1995). As Judge Easterbrook puts it: "If [a given statutory outcome] is unprincipled, it is the way of compromise. Law is a vector rather than an arrow. Especially when you see the hand of interest groups." Easterbrook, Text, History, and Structure, supra note 8, at 68.

[38] This aspect of textualism relies on social choice theory developed by Kenneth Arrow and others. Arrow's social choice theory uses the insights of game theory to explain political behavior. See Kenneth J. Arrow, Social Choice and Individual Values (2d ed. 1963); see also Duncan Black, The Theory of Committees and Elections (1958). For an excellent explanation of Arrow's theorem and its implications, see Farber & Frickey, supra note 36, at 38–42.

[39] Easterbrook, supra note 9, at 64.

[40] See Easterbrook, Statutes' Domains, supra note 8, at 547–48 (footnote omitted):

> Legislators customarily consider proposals one at a time .... Additional options can be considered only in sequence, and this makes the order of decision vital. It is fairly easy to show that someone with control of the agenda can manipulate the choice so that the legislature adopts proposals that only a minority support.

isolation; indeed, legislators frequently choose their words strategically in order to elide disagreements and smooth a bill's passage.[41] Strategic voting—including logrolling across different substantive areas—further complicates matters by introducing additional nonsubstantive and untraceable considerations into the shaping of a bill.[42] Based on such factors, Judge Easterbrook thinks it is "impossible for a court—even one that knows each legislators' complete table of preferences—to say what the whole body would have done with a proposal it did not consider in fact."[43] Hence, if a bill's final shape depends to a large extent on these varied procedural idiosyncracies, textualists deem it fanciful to try to reconstruct the actual but unexpressed intent of the legislative majority on any seriously contested interpretive question.

In other writing, I have evaluated in detail the merits and demerits of textualist reliance on public choice theory.[44] For present purposes, the important point is this: While the textualists' view of the legislative process requires them to reject the classical intentionalists' anthropomorphic treatment of the legislature, it by no means necessitates a wholesale rejection of any useful conception of legislative intent. To satisfy the requirements of legislative supremacy, one need not believe, as classical intentionalists do, that a multimember legislature has a human-like capacity to form single-minded but unexpressed intentions about the words used in a statute. Rather, as Professor Raz has explained, the demands of legislative supremacy require only that legislators intend to enact a law that will be decoded according to prevailing interpretive conven-

[41] See Manning, supra note 22, at 2408–19.

[42] See Easterbrook, Statutes' Domains, supra note 8, at 548.

[43] Id. at 547–48; see also id. at 547 ("Because legislatures comprise many members, they do not have 'intents' or 'designs,' hidden yet discoverable. Each member may or may not have a design. The body as a whole, however, only has outcomes."). Thus, "the final outcome may be arbitrary (for example, a function of group fatigue) or determined by specific institutional features of decisionmaking (for example, rules governing the order of voting on motions)." Shepsle, supra note 35, at 241–42. Put another way, if one accepts these premises, the very notion "that statutes have purposes or embody policies becomes quite problematic, since the content of the statute simply reflects the haphazard effect of strategic behavior and procedural rules." Farber & Frickey, supra note 36, at 41 (discussing the implications of Arrow's public choice theory). For an excellent discussion casting doubt upon the empirical basis for Arrow's Theorem, see id. at 47–55.

[44] See Manning, supra note 22, at 2415–16

tions. If so, then society can at least attribute to each legislator the intention "to say what one would ordinarily be understood as saying, given the circumstances in which one said it."[45] Or as the leading philosophical textualist, Jeremy Waldron, has put it:

> A legislator who votes for (or against) a provision like "No vehicle shall be permitted to enter any state or municipal park" does so on the assumption that—to put it crudely—what the words mean to him is identical to what they will mean to those to whom they are addressed (in the event that the provision is passed) . . . . That such assumptions pervade the legislative process shows how much law depends on language, on the shared conventions that constitute a language, and on the reciprocity of intentions that conventions comprise.[46]

These premises closely reflect Justice Scalia's and Judge Easterbrook's commitment to "objectified intent," a concept predicated on the notion that a judge should read a statutory text just as any reasonable person conversant with applicable social conventions would read it. Ascribing that sort of objectified intent to legislators offers an intelligible way for textualists to hold them accountable for whatever law they have passed, whether or not they have *any* actual intent, singly or collectively, respecting its details.

In that sense, textualism might be understood as a judgment about the most reliable (or perhaps the least unreliable) way of discerning legislative instructions.[47] If one cannot accurately ascertain what the body as a whole would have done with matters unspecified or even misspecified by the text, then perhaps the best one can do is to approximate the way a reasonable person in the legislator's position would have read the words actually adopted. Certainly, the aspiration to decode the legislature's instructions as accurately as possible gives textualists something in common with classical intentionalists.[48] To say that textualism is just intentional-

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[45] Raz, supra note 24, at 269.

[46] Jeremy Waldron, Legislators' Intention and Unintentional Legislation, *in* Law and Interpretation 329, 340 (Andrei Marmor ed., 1995).

[47] See Nelson, supra note 12, at 353-54.

[48] As Professor Nelson notes, this impression of modern textualists is reinforced, albeit on the margins, by their willingness to depart from the clear import of the enacted text when the conventional reading reflects an apparent absurdity or scrivener's error. See Nelson, supra note 12, at 356, 378–80; see also Union Bank v. Wolas, 502

ism by other means, however, threatens to obscure the central point that for textualists intent is a construct; it does not depend on the conclusion that a hypothetical legislative majority actually subscribed to the likely meaning that a reasonable person, conversant with the relevant conventions, would attach to the enacted text. Legislative intent, to the extent textualists invoke it, is a framework of analysis designed to satisfy the minimum conditions for meaningful communication by a multi-member body without actual intentions to judges, administrators, and the public, who all form a community of shared conventions for decoding language in context.

To underscore the constructive nature of objectified intent, it is helpful to note that modern textualists are not literalists; they do not look exclusively for the "ordinary meaning" of words and phrases. Rather, they emphasize the relevant linguistic community's (or sub-community's) shared understandings and practices.[49] I have explored the implications of this position more fully in previous writing.[50] For now, it suffices to note that textualists therefore want to know how "a *skilled*, objectively reasonable user of words" would have understood the statutory text,[51] an approach that entails ascertaining the "assumptions shared by speakers and the intended audience."[52] Accordingly, where appropriate in context, textualists seek out technical meaning, including the specialized

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U.S. 151, 163 (1991) (Scalia, J., concurring in the judgment) ("Since there was here no contention of a 'scrivener's error' producing an absurd result, the plain text of the statute should have made this litigation unnecessary and unmaintainable."); Kerr v. Puckett, 138 F.3d 321, 323 (7th Cir. 1998) (Easterbrook, J.) ("[A] court should implement the language actually enacted—provided the statute is not internally inconsistent or otherwise absurd.").

[49] See Cont'l Can Co. v. Chi. Truck Drivers, 916 F.2d 1154, 1157 (7th Cir. 1990) (Easterbrook, J.) ("You don't have to be Ludwig Wittgenstein or Hans-Georg Gadamer to know that successful communication depends on meanings shared by interpretive communities."); see also Ludwig Wittgenstein, Philosophical Investigations §§ 134–142 (G.E.M. Anscombe trans., 3d ed. 1953) (emphasizing the derivation of meaning from practices and interactions within the relevant linguistic community).

[50] See Manning, supra note 22, at 2456–76; Manning, supra note 7, at 108–15.

[51] Easterbrook, supra note 9, at 65 (emphasis added); see also Chisom v. Roemer, 501 U.S. 380, 405 (1991) (Scalia, J., dissenting) ("We are to read the words of that text as any ordinary Member of Congress would have read them, and apply the meaning so determined." (citation omitted)).

[52] Frank H. Easterbrook, What Does Legislative History Tell Us?, 66 Chi.-Kent L. Rev. 441, 443 (1990).

connotations and practices common to the specialized subcommunity of lawyers.[53] Textualists assign common-law terms their full array of common-law connotations;[54] they supplement otherwise unqualified texts with settled common-law practices, where

[53] Professor Nelson provocatively suggests that if textualists merely read texts according to prevailing social and linguistic conventions, then they should in fact be purposivists, since purposivism had long represented the prevailing mode of statutory interpretation when textualism came onto the scene. See Caleb Nelson, A Response to Professor Manning, 91 Va. L. Rev. 451, 455–57 (2005). This contention, I believe, ultimately proves too much. As I have argued in detail in previous writing, modern textualism ultimately rests on several normative premises derived from the constitutional structure. See, e.g., Manning, supra note 22, at 2434–54 (relying on the constitutional separation of lawmaking from judging, the requirements of bicameralism and presentment, and the premises of modern rationality review to question the judicial practice of making exceptions to otherwise unqualified statutory texts); Manning, supra note 5, at 706–31 (explaining the textualist antipathy towards legislative history as a function of the constitutional norm against legislative self-delegation of lawmaking authority). Prominent among these structural norms is this: By adopting an effective supermajority requirement, the legislative process of bicameralism and presentment affords political minorities extraordinary authority to block legislation or to insist upon compromise as the price of assent. See Manning, supra note 22, at 2437–38; Manning, supra note 7, at 70–78. At least in the strong form that federal judges practiced prior to the advent of modern textualism, purposivism threatened the integrity of any resulting legislative compromise by enforcing the spirit over the letter of the law—that is, the statute's apparent background purpose rather than the precise details bargained for in the adopted text. See Manning, supra note 7, at 77–78; see also id. at 10–15 (describing the strongly purposivist assumptions challenged by modern textualists). If one accepts that analytical framework, textualists appropriately rejected purposivism on normative grounds, even if purposivism did constitute a previously established mode of interpretation. To suggest otherwise would be to say that textualists must treat as part of every specific compromise a convention that directs courts to ignore the precise terms of that compromise whenever there is good reason to do so. Only facetiously could one say that embracing such a convention satisfies the modern textualists' perceived constitutional duty to protect the specific compromises forged in the legislative process of bicameralism and presentment. As I previously argued along similar lines:

> If the Court applied a background convention providing that "judges shall apply the social meaning of a statute unless they can think of a better way of doing the same thing," that convention would in some sense be the basis of every legislative bargain. But more accurately understood, it would license the courts to disregard the specific bargains struck through the legislative process and to strike new balances outside the confines of bicameralism and presentment.

See Manning, supra note 22, at 2472.

[54] Moskal v. United States, 498 U.S. 103, 121 (1990) (Scalia, J., dissenting) ("'[W]here Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word . . . .'" (quoting Morrissette v. United States, 342 U.S. 246, 263 (1952))).

such practices traditionally pertained to the subject matters covered within the statute;[55] and they apply sufficiently well-settled canons of construction, including substantive canons such as the rule of lenity.[56]

What textualists do not suggest is that distilling technical meaning from trade practice, the common law, technical norms of construction, and the like necessarily reflects the actual (*viz.* subjective) understanding of a multi-person legislative majority.[57] Consider, for example, *Babbitt v. Sweet Home Chapter of Com-*

[55] See, e.g., Young v. United States, 535 U.S. 43, 49–50 (2002) (Scalia, J.) ("It is hornbook law that limitations periods are 'customarily subject to equitable tolling,' unless tolling would be 'inconsistent with the text of the relevant statute.' Congress must be presumed to draft limitations periods in light of this background principle." (citations omitted) (quoting Irwin v. Dep't of Veterans Affairs, 498 U.S. 89, 95 (1990) (internal quotation marks omitted), and United States v. Beggerly, 524 U.S. 38, 48 (1998)); Brogan v. United States, 522 U.S. 398, 406 (1998) ("Criminal prohibitions do not generally apply to reasonable enforcement actions by officers of the law."); Frank H. Easterbrook, The Case of the Speluncean Explorers: Revisited, 112 Harv. L. Rev. 1913, 1914 (1999) (arguing that otherwise unqualified criminal statutes are presumptively subject to established common-law defenses). But cf. United States v. Oakland Cannabis Buyers' Coop., 532 U.S. 483, 490 (2001) (Thomas, J.) ("[W]e note that it is an open question whether federal courts ever have authority to recognize a necessity defense not provided by statute.").

[56] See, e.g., Antonin Scalia, Assorted Canards of Contemporary Legal Analysis, 40 Case W. Res. L. Rev. 581, 583 (1990) (endorsing the rule of lenity as a rule of construction that, through long usage, has acquired "a sort of prescriptive validity, since the legislature presumably has [it] in mind when it chooses its language").

[57] Nor could they. Along these lines, consider Judge Posner's (otherwise) devastating critique of some of the technical canons of construction commonly deployed within the legal community. See Posner, supra note 32, at 805–17. In particular, he contends that most canons go wrong "because they impute omniscience to Congress," which "is always an unrealistic assumption, and particularly so when one is dealing with the legislative process." Id. at 811. Judge Posner cites, for example, "the canon that every word of a statute must be given significance; nothing in the statute can be treated as surplusage." Id. at 812. This norm, he argues, contradicts the realities of legislative drafting. Similarly, he notes that the "popular canon" disfavoring implied repeals of earlier legislation rests on the apparent presumption that "whenever Congress enacts a new statute it combs the United States Code for potential inconsistencies with the new statute, and when it spots one, it repeals the inconsistency explicitly." Id. As he notes, this conception is highly unrealistic. See id. Such canons, however, are intelligible under a textualist theory of objectified intent. As Judge Easterbrook puts it, canons of construction make sense "as off-the-rack rules that spare legislators the costs of anticipating all possible interpretive problems and legislating solutions for them." Easterbrook, Statutes' Domains, supra note 8, at 540. So understood, the canons have value not because they capture the legislature's subjective intent, but because they represent a subset of the mutually available background conventions that make communication possible.

munities for a Greater Oregon,[58] in which the Court construed a provision of the Endangered Species Act of 1973 ("ESA") making it unlawful to "*take* any [endangered] species within the United States or the territorial seas of the United States."[59] At issue was whether a "taking" occurs when a defendant *indirectly* harms an endangered species by modifying its habitat. The Court deferred to the Secretary of the Interior's interpretation that habitat modification fell within the Act's reach, noting that the ESA broadly defined "take" to mean "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect"[60]—at least some of which could surely encompass the indirect effects of habitat modification.

In dissent, Justice Scalia argued that "take" is "a term of art" in wildlife law and, as such, "describes a class of acts (not omissions) done directly and intentionally (not indirectly and by accident) to particular animals (not populations of animals)."[61] Although acknowledging that the Act's definition section broadly defined "take," the dissent emphasized that nothing in the definition precluded the Court from reading the enumerated list of prohibited acts in light of the common law tradition equating a "taking" with direct rather than indirect acts.[62] Of interest here, he identified that tradition not only by locating the technical meaning of "take" in standard dictionaries, but also by examining sources as unobvious (to the ordinary reader) as a nineteenth-century Supreme Court decision, Blackstone's *Commentaries*, a statute implementing a migratory bird treaty, and a treaty governing polar bear conservation.[63] His opinion appears to capture the technical meaning quite

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[58] 515 U.S. 687 (1995).

[59] 16 U.S.C. § 1538(a)(1) (1994) (emphasis added).

[60] Id. § 1532(19).

[61] *Babbit*, 515 U.S. at 718. (Scalia, J., dissenting).

[62] Justice Scalia thus explained:

> The Act's definition of "take" does expand the word slightly (and not unusually), so as to make clear that it includes not just a completed taking, but the process of taking, and all of the acts that are customarily identified with or accompany that process ("to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect"); and so as to include attempts.

Id. (Scalia, J., dissenting).

[63] See id. at 717–18 (Scalia, J., dissenting) (discussing, inter alia, the use of "take" in *Geer v. Connecticut*, 161 U.S. 519, 523 (1896); 2 William Blackstone, Commentaries *411; the Migratory Bird Treaty Act, 16 U.S.C. § 703 (1988 & Supp. V 1989)

admirably, but it also highlights the fact that when textualists *impute* to legislators the understanding of a reasonable member of the relevant linguistic community (here, lawyers or wildlife afficionados), they do not purport to describe what legislators actually knew when they voted for a bill. In the unlikely event that any meaningful proportion of legislators had any actual intent about what "take" means, I doubt that many in fact knew of nor assented to the specialized legal meaning reflected in the sources cited by Justice Scalia.

So while textualists do care about "legislative intent" in the refined sense described by Professor Raz, to suggest that they are classical intentionalists by other means obscures the fact that textualists reject perhaps the most important premise of classical intentionalism: the idea that behind most legislation lies some sort of policy judgment that is meaningfully identifiable, shared by a legislative majority, and yet imprecisely expressed in the public meaning of the text that has made its way through Congress's many filters. Textualists focus on the *end product of the legislative process*, as reflected in the way a reasonable person conversant with applicable conventions would read the enacted words in context.[64] Because of the fractured, tortuous, and often concealed nature of legislative bargaining, textualists believe that such a construct is the best that interpreters can do—that objectified intent provides the most, if not the only, plausible way for a faithful agent to show fidelity to his principal. In the end, this conviction maps importantly onto distinctions between rules and standards, but not in precisely the way Professor Nelson suggests. Because the modern textualists' approach to levels of statutory generality sharpens the distinct

(amended 2004); and the Agreement on the Conservation of Polar Bears, Nov. 15, 1973, art. 1, 27 U.S.T. 3918, 3921, T.I.A.S. No. 8409).

[64] Judge Easterbrook has stated this position with particular clarity. See, e.g., NBD Bank v. Bennett, 67 F.3d 629, 633 (7th Cir. 1995) (Easterbrook, J.) ("It does not matter what Congress intended in the abstract; the question is what it meant by what it enacted."); Livingston Rebuild Ctr. v. R.R. Ret. Bd., 970 F.2d 295, 298 (7th Cir. 1992) (Easterbrook, J.) ("Of course, Congress does not enact 'intents' . . . ; it enacts texts, which may differ from the expectations of the sponsors."); Cont'l Can Co. v. Chi. Truck Drivers, 916 F.2d 1154, 1157 (7th Cir. 1990) (Easterbrook, J.) ("The text of the statute, and not the private intent of the legislators, is the law. Only the text survived the complex process for proposing, amending, adopting, and obtaining the President's signature (or two-thirds of each house).").

process assumptions that inform their approach, I turn now to a brief consideration of that question.

II. LEGISLATIVE BARGAINS AND LEVELS OF STATUTORY GENERALITY

A central precept of textualism is that interpreters must respect the level of generality at which the text expresses legislative policy judgments—that is, that judges should treat rules as rules and standards as standards. Specifically, although textualists find it appropriate in cases of ambiguity to consult a statute's apparent purpose or policy (provided that it is derived from sources other than legislative history),[65] they resist altering a statute's clear semantic im-

[65] See, e.g., Nat'l Tax Credit Partners v. Havlik, 20 F.3d 705, 707 (7th Cir. 1994) (Easterbrook, J.) ("Knowing the purpose behind a rule may help a court decode an ambiguous text, but first there must be some ambiguity." (citations omitted)); Antonin Scalia, Judicial Deference to Administrative Interpretations of Law, 1989 Duke L.J. 511, 515 ("Surely one of the most frequent justifications courts give for choosing a particular construction is that the alternative interpretation would produce 'absurd' results, or results less compatible with the reason or purpose of the statute."). Professor Nelson understandably regards such reliance on apparent purpose in cases of ambiguity as evidence that textualism does indeed have roots in classical intentionalism. See Nelson, supra note 12, at 354–56. While plausible, that conclusion does not necessarily follow from the textualists' practice. First, purpose need not reflect the subjective understandings of legislators found in the legislative history; rather, textualists frequently infer legislative purpose from such sources as the overall tenor or structure of a statute. See, e.g., City of Columbus v. Ours Garage & Wrecker Serv., Inc., 536 U.S. 424, 450 (2002) (Scalia, J., dissenting) (noting that "[e]vidence of pre-emptive purpose is sought in the text and structure of the statute at issue" (alteration in original) (emphasis and internal quotation marks omitted) (quoting CSX Transp., Inc. v. Easterwood, 507 U.S. 658, 664 (1993)); Pa. Dep't of Corr. v. Yeskey, 524 U.S. 206, 212 (1998) (Scalia, J.) ("[T]he title of a statute . . . [is] of use only when [it] shed[s] light on some ambiguous word or phrase." (first, third, and fourth alterations in original) (internal quotation marks omitted) (quoting Bhd. of R.R. Trainmen v. Balt. & Ohio R.R. Co., 331 U.S. 519, 528–29 (1947)); United States v. Fausto, 484 U.S. 439, 449 (1988) (Scalia, J.) (holding that the nonreviewability of adverse personnel actions under the Civil Service Reform Act derives "not only from the statutory language, but also from . . . the structure of the statutory scheme"). Second, textualists may rely on apparent overall purpose not as a way of identifying subjective legislative intent, but rather as a theory of appropriate judicial behavior in cases of indeterminacy. Justice Scalia has thus written: "Where a statutory term presented to us for the first time is ambiguous, we construe it to contain that permissible meaning which fits most logically and comfortably into the body of both previously and subsequently enacted law." W. Va. Univ. Hosps., Inc. v. Casey, 499 U.S. 83, 100 (1991); see also *Fausto*, 484 U.S. at 453 (describing the "classic judicial task of reconciling many laws enacted over time, and getting them to 'make sense' in combination"). In contrast to classical inten-

port in order to make the text more congruent with its apparent background purpose.[66] The underlying problem of fit reflected in such a choice of course has always troubled the law of statutory interpretation. No matter how precisely framed, laws will sometimes be over- or under-inclusive in relation to their apparent background aims.[67] When a sufficiently dramatic mismatch between means and ends occurs (or, more accurately, appears to occur), classical intentionalists ascribe that divergence to legislative inadvertence.[68] Classical intentionalists think it possible for judges to identify the collective policy judgment that the legislative majority *would have* arrived at had it framed the statute to avoid imprecision in the chosen words. Hence, they are willing to adjust the level

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tionalists, textualists resolve ambiguity in that way "not because that precise accommodative meaning is what the lawmakers must have had in mind . . . , but because it is [the judiciary's] role to make sense rather than nonsense out of the *corpus juris*." *Casey*, 499 U.S. at 100–01. For a contrasting statement that more strongly supports Professor Nelson's view, see Easterbrook, supra note 52, at 443 ("Because laws themselves do not have purposes or spirits—only the authors are sentient—it may be essential to mine the context of the utterance out of the debates, just as we learn the limits of a holding from reading the entire opinion."). Full exploration of the precise basis for textualists' reliance on apparent background purpose in cases of ambiguity is a matter for another day.

[66] See, e.g., Johnson v. United States, 529 U.S. 694, 723 (2000) (Scalia, J., dissenting) ("Our obligation is to go as far in achieving the general congressional purpose as the text of the statute fairly prescribes—and no further."); Mertens v. Hewitt Assocs., 508 U.S. 248, 262 (1993) (Scalia, J.) ("[V]ague notions of a statute's 'basic purpose' are . . . inadequate to overcome the words of its text regarding the specific issue under consideration." (emphasis omitted)); Rose v. Rose, 481 U.S. 619, 644 (1987) (Scalia, J., concurring in part and concurring in the judgment) (criticizing the Court for assuming "a broad power to limit clear text on the basis of apparent congressional purpose").

[67] See Bernard W. Bell, Legislative History Without Legislative Intent: The Public Justification Approach to Statutory Interpretation, 60 Ohio St. L.J. 1, 94–96 (1999) (discussing the generality problem); Frederick Schauer, Statutory Construction and the Coordinating Function of Plain Meaning, 1990 Sup. Ct. Rev. 231, 236 ("Where decisionmakers are instructed in accordance with . . . specific directives, these directives are necessarily actually or potentially both under- and over-inclusive vis-à-vis their background justifications.").

[68] As Judge Posner has thus written:

> [J]udges realize in their heart of hearts that the superficial clarity to which they are referring when they call the meaning of a statute "plain" is treacherous footing for interpretation. They know that statutes are purposive utterances and that language is a slippery medium in which to encode a purpose. They know that legislatures, including the Congress of the United States, often legislate in haste, without considering fully the potential application of their words to novel settings.

Friedrich v. City of Chicago, 888 F.2d 511, 514 (7th Cir. 1989).

of generality at which legislation speaks in order to make the textual expression of policy more congruent with what the majority would have wanted had it confronted the precise issue.[69] Textualists, in contrast, chalk up statutory awkwardness to the (unknowable) exigencies of a legislative process with many and diverse veto points. They believe that smoothing over the rough edges in a statute threatens to upset whatever complicated bargaining led to its being cast in the terms that it was.[70] Hence, for textualists, respecting the level of generality preserves the carefully designed process in which varied gatekeepers may block or slow legislation or exact a compromise as the price of assent.

West Virginia University Hospitals v. Casey[71] supplies perhaps the clearest example of this line of demarcation. Under 42 U.S.C. § 1988 (2000), prevailing plaintiffs in certain types of civil rights actions are entitled to recover "a reasonable attorney's fee." In *Casey*, the prevailing plaintiff sought to recover as part of its fees the

[69] The cases doing so are legion. See, e.g., Pub. Citizen v. U.S. Dep't of Justice, 491 U.S. 440, 452–54 (1989); Cal. Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 272, 284 (1987); Anderson Bros. Ford v. Valencia, 452 U.S. 205, 222 n.20 (1981); United Steelworkers v. Weber, 443 U.S. 193, 202 (1979); Train v. Colo. Pub. Interest Research Group, Inc., 426 U.S. 1, 10 (1976); United Hous. Found., Inc. v. Forman, 421 U.S. 837, 849 (1975); Nat'l Woodwork Mfrs. Ass'n v. NLRB, 386 U.S. 612, 620 n.4 (1967); United States v. Pub. Util. Comm'n, 345 U.S. 295, 315 (1953); Johansen v. United States, 343 U.S. 427, 431 (1952); Int'l Longshoremen's Union v. Juneau Spruce Corp., 342 U.S. 237, 243 (1952).

[70] See, e.g., Ragsdale v. Wolverine World Wide, Inc., 535 U.S. 81, 93–94 (2002) ("Like any key term in an important piece of legislation, the [relevant] figure was the result of compromise between groups with marked but divergent interests in the contested provision. . . . Courts and agencies must respect and give effect to these sorts of compromises."); Artuz v. Bennett, 531 U.S. 4, 10 (2000) (Scalia, J.) (refusing to consider various "policy arguments" while embracing what the Court viewed as "the only permissible interpretation of the text—which may, for all we know, have slighted policy concerns on one or the other side of the issue as part of the legislative compromise that enabled the law to be enacted"); see also Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 79 (1998) (Scalia, J.) ("[S]tatutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed."); Brogan v. United States, 522 U.S. 398, 403 (1998) (Scalia, J.) (observing "the reality that the reach of a statute often exceeds the precise evil to be eliminated" and explaining that "it is not, and cannot be, our practice to restrict the unqualified language of a statute to the particular evil that Congress was trying to remedy—even assuming that it is possible to identify that evil from something other than the text of the statute itself").

[71] 499 U.S. 83 (1991).

fees of experts who were engaged to assist in preparing the lawsuit and to testify at trial. Under modern textualism, of course, one could not say that the matter begins and ends with the conclusion that an "expert fee" is literally not an "attorney's fee." At least one would need to consider whether the phrase "attorney's fee" is a term of the trade that includes more than a lawyer's billable hours. As used in the legal profession, that term might in fact encompass many items essential to a representation—such as paralegal services, secretarial services, messengers, photocopying, Westlaw charges, and so forth.[72] Hence, the operative phrase has an underlying ambiguity that must be resolved by considering the phrase in context.

Justice Scalia's opinion for the Court in *Casey* found the semantic context decisive, crediting evidence of the way a reasonable person would have *used* the relevant language in context. His opinion emphasized the fact that countless other fee-shifting statutes—some enacted before and some after § 1988—had explicitly provided for "attorney's fees" and "expert fees" as separate items of recovery.[73] Under the maxim *expressio unius est exclusio alterius*, "it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion" of particular statutory language.[74] Accordingly, the Court held that the relevant "statutory *usage* shows beyond question that attorney's fees and expert fees are distinct items of expense."[75] Although acknowledging that the resulting emphasis on usage made the *policy* of § 1988 incongruent with that of similar fee-shifting statutes, the Court explained that interpreting a statute to promote policy coherence was a permissible judicial function where "a statutory term . . . is ambiguous."[76] Where consideration of the semantic context points clearly to a particular meaning, the Court stressed that "it is not our function to eliminate clearly expressed inconsistency of policy and to treat alike subjects that different Congresses have chosen to

[72] See Missouri v. Jenkins, 491 U.S. 274, 285–86 (1989) (holding that various items other than billable attorney hours, including paralegal fees, could be recovered as "traditional" elements of an attorney's fees).

[73] See *Casey*, 499 U.S. at 88–90.

[74] Russello v. United States, 464 U.S. 16, 23 (1983) (quoting United States v. Wong Kim Bo, 472 F.2d 720, 722 (5th Cir. 1972)).

[75] *Casey*, 499 U.S. at 92 (emphasis added).

[76] Id. at 100.

treat differently."[77] In short, in ascribing meaning to the term "attorney's fee," Justice Scalia favored established congressional usage over arguments from congressional policy in determining which elements of statutory context to treat as determinative.

For the classical intentionalist, however, a clear pattern of usage would not end the matter; it would still remain necessary to measure the phrase "attorney's fee" against the policy impulses that apparently underlay the majority's enactment of the specific legislation. In his dissenting opinion in *Casey*, Justice Stevens thus criticized the Court for "put[ting] on its thick grammarian's spectacles and ignor[ing] the available evidence of congressional purpose and the teaching of prior cases."[78] In particular, he reasoned that if a prevailing plaintiff could recover a reasonable "attorney's fee," it made no sense to deny the plaintiff similar recovery for an expert, whose services merely provided a lower cost substitute for attorney time.[79] Moreover, because the Court had previously recognized that a prevailing plaintiff could recover paralegal fees and other costs of representation under § 1988, it would surely appear arbitrary not to allow the recovery of expert fees needed to make the legal representation effective.[80] In addition, no one disputed that Congress enacted § 1988 to overturn the Court's decision in *Alyeska Pipeline Service Co. v. Wilderness Society*,[81] which had rejected the federal courts' common law practice of shifting litigation costs in certain federal cases. Because the pre-*Alyeska* regime had shifted attorney's fees and expert fees, Justice Stevens thought it fair to infer that § 1988's purpose was to restore the status quo ante.[82] Finally, although the dissent did not mention the point, because Congress had provided for the recovery of expert fees in virtually every other important fee-shifting statute, one might think it arbitrary to

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[77] Id. at 101.

[78] Id. at 113 (Stevens, J., dissenting).

[79] Id. at 106–07 (Stevens, J., dissenting)

[80] See id. at 107–08 (1990) (Stevens, J., dissenting) ("To allow reimbursement of these other categories of expenses, and yet not to include expert witness fees, is both arbitrary and contrary to the broad remedial purpose that inspired the fee-shifting provision of § 1988.").

[81] 421 U.S. 240 (1975).

[82] *Casey*, 499 U.S. at 108–11 (Stevens, J., dissenting). The purpose of overturning *Alyeska* and providing full recovery of litigation expenses, moreover, found support in the committee reports in both Houses. See id. at 108–10 (Stevens, J., dissenting).

read into § 1988 an unexplained departure from an otherwise clear pattern of congressional policy preferences.[83]

Simply put, textualists believe that the impulse to make the semantic details of a statute more coherent with its apparent animating policy—the impulse that underlies classic intentionalism—poses too great a risk to whatever legislative bargain or bargains were needed to ensure enactment.[84] Put differently, they believe

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[83] See T. Alexander Aleinikoff & Theodore M. Shaw, The Costs of Incoherence: A Comment on Plain Meaning, *West Virginia University Hospitals, Inc. v. Casey*, and Due Process of Statutory Interpretation, 45 Vand. L. Rev. 687, 704–05 (1992).

[84] Although somewhat tangential to the present comparison of modern textualism and classical intentionalism, it is worth noting that the textualists' preference for a statute's letter over its spirit does not hinge on the distinction between objective and subjective intent. Rather, the legislative process concerns that inform textualism cut more deeply. In this regard, it is helpful to contrast textualism with another post-realist response to classical intentionalism—the Legal Process school founded by Henry Hart and Albert Sacks at Harvard Law School. See Henry M. Hart, Jr. & Albert M. Sacks, The Legal Process: Basic Problems in the Making and Application of Law 1378–79 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994); see also William N. Eskridge, Jr. & Philip P. Frickey, The Making of *The Legal Process*, 107 Harv. L. Rev. 2031 (1994) (discussing the strong post-war influence of the Legal Process materials). Much like modern textualists, Hart and Sacks subscribed to the faithful agent theory while simultaneously rejecting the idea that "the court's function is to ascertain the intention of the legislature with respect to the matter in issue." Hart & Sacks, supra, at 1374; see also id. (acknowledging that interpreters in our system must "[r]espect the position of the legislature as the chief policy-determining agency of the society, subject only to the limitations of the constitution"). Also like modern textualists, Hart and Sacks proposed an objective rather than subjective standard for reading the work product of the legislature. In particular, after considering a variety of interpretive resources (including the statutory text, canons of interpretation, and the general purposes revealed by any relevant legislative history), interpreters were to ask how "reasonable persons pursuing reasonable purposes reasonably" would have solved the problem addressed by the statute. Id. at 1378. Even if one could not know the subjective intent of the multi-member legislature that enacted the law, one could attempt to ascribe to the legislature the policy preferences that a reasonable person would hold in the surrounding circumstances. This approach, of course, attempts to erect an objective construct no less than does the textualists' strategy of asking how a "reasonable user of words" would have read the statute as applied to the problem at hand. Easterbrook, supra note 9, at 65. And, in contrast with textualism, the Legal Process school's focus on the "reasonable policymaker" attractively presupposes that an interpreter can respect the background constitutional precept of legislative supremacy while also making statutory law more coherent and rational. As Professor Radin explained in an influential article that helped frame the Legal Process approach, "[t]o say that the legislature is 'presumed' to have selected its phraseology with meticulous care as to every word is in direct contradiction of known facts and injects an improper element into the relation of courts to the statutes." Max Radin, A Short Way with Statutes, 56 Harv. L. Rev. 388, 406 (1942).

that the reasonable reader standard supplies the best, and indeed the only meaningful, way to take seriously a legislative process that has many twists and turns; that gives the most intensely interested or even outlying legislative actors many opportunities to stop, slow, or reshape initiatives that have apparent majority support; and that emphasizes the legislative majority's need to compromise as a way to secure a bill's passage. The results of such a process are likely to look awkward for reasons having nothing to do with failures of human foresight or lapses in drafting skill. Accordingly, for textualists, any attempt to overlay coherence on a statutory text that otherwise seems to have problems of fit unacceptably threatens to undermine the bargaining process that produced it.

A recent case sharply illustrates this more affirmative version of the legislative process justification for textualism. In *Barnhart v. Sigmon Coal Co.*,[85] the Court enforced the rules embedded in a clear statutory text even though it required an outcome that a reasonable person would assuredly find absurd in light of the statute's underlying purpose. To address the potential insolvency of coal industry retirement plans imposed by a series of collective bargaining agreements, Congress enacted the Coal Industry Retiree Health Benefit Act of 1992.[86] The Act imposed contribution requirements on two classes of businesses: first, on "signatory operators"—coal operators who had signed any of the previous pension agreements; and second, on "related persons"—companies that had enjoyed

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As I have explained in greater detail in prior writing, modern textualists believe that relying on the "reasonable policymaker" construct to impose statutory coherence undervalues the importance of respecting often-unprincipled compromises that emerge in the text from a chaotic and opaque legislative process. See Manning, supra note 22, at 2390. This conviction, as I have argued, has roots in the constitutional structure. See id. at 2434–54. By imposing an effective supermajority requirement for the enactment of legislation, the constitutionally mandated legislative process of bicameralism and presentment gives political minorities extraordinary power to block legislation or, more importantly, to insist upon compromise as the price of assent. See id. at 2437–38. This tendency, moreover, is reinforced by the previously discussed procedural hurdles inherent in existing legislative practice. See supra text accompanying notes 38–42. At least when a statute is otherwise clear in context, textualists believe that imposing coherent policy at the expense of semantic detail threatens to dilute the minority's constitutionally ordained prerogative to compel the majority to accept half a loaf.

[85] 534 U.S. 438 (2002).

[86] 26 U.S.C. §§ 9701–9722 (2000).

specified forms of business affiliation with signatory operators.[87] In *Barnhart*, the Commissioner of Social Security had imposed liability on the respondent coal company, which was neither a signatory operator nor a related person but *was* a successor in interest to a signatory operator (by virtue of having bought a signatory's mining assets). Although the Act explicitly imposed liability on successors in interest to related persons, it made no such provision for successors in interest to the signatory operators themselves.[88] Applying settled principles of statutory construction,[89] the Court reasoned that "[w]here Congress wanted to provide successor liability in the . . . Act, it did so explicitly."[90] Hence, a successor in interest to a signatory operator was not liable for retiree's pensions under the Act.

The Commissioner of Social Security, the official charged with administering the Act, argued that such an interpretation produced absurd results. Specifically, the Court's reading relieved a direct successor of any responsibility for a signatory's beneficiaries, while imposing such responsibility on "a more distantly related successor in interest of a corporate affiliate of a signatory operator."[91] Indeed, if a signatory coal operator had been affiliated with a dairy (such that the dairy was a "related person"), and if each company then sold its assets to different buyers, the Act would assign finan-

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[87] Id. § 9701(c)(2) (2000). In particular, the statute provides that "a person shall be considered to be a related person to a signatory operator if that person" falls within one of following categories:

> (i) a member of the controlled group of corporations (within the meaning of section 52(a)) which includes such signatory operator;
>
> (ii) a trade or business which is under common control (as determined under section 52(b)) with such signatory operator; or
>
> (iii) any other person who is identified as having a partnership interest or joint venture with a signatory operator in a business within the coal industry, but only if such business employed eligible beneficiaries, except that this clause shall not apply to a person whose only interest is as a limited partner.

Id.

[88] See id. § 9701(c)(2)(A) (2000) ("A related person shall also include a successor in interest to any person described in [the 'related persons' definition] in clause (i), (ii), or (iii).").

[89] See supra note 74 and accompanying text.

[90] *Barnhart*, 534 U.S. at 452–53.

[91] Id. at 459.

cial responsibility for the signatory's retirees to the dairy's successor, but not to the signatory's successor.[92]

Although it did not deny the oddity of the result, the Court did not try to justify the statutory distinction in terms of any public policy related to the Act. Instead, the Court relied directly upon the procedural considerations that might have produced the outcome in question:

> [N]egotiations surrounding enactment of this bill tell a typical story of legislative battle among interest groups, Congress, and the President. Indeed, this legislation failed to ease tensions among many of the interested parties. Its delicate crafting reflected a compromise amidst highly interested parties attempting to pull the provisions in different directions. As such, a change in any individual provision could have unraveled the whole. It is quite possible that a bill that assigned liability to successors of signatory operators would not have survived the legislative process. The deals brokered during a Committee markup, on the floor of the two Houses, during a joint House and Senate Conference, or in negotiations with the President are not for us to judge or second-guess.[93]

Hence, the Court found it imperative to respect the actual outcome of the legislative process, at least where the text was unambiguous.[94]

Again, in a sense it is fair to say that this affirmative justification for textualism belongs within some understanding of the intentionalist tradition, for it rests upon the notion that enforcing the clear semantic meaning of a statute represents the best, if not the only, way to preserve the unknowable legislative bargains that produced the final text. Indeed, textualism arguably aspires to implement a heightened form of the very impulse that underlies intentionalism; that is, it seeks to ensure that the only policy judgments attributed to the body as a whole are those reflected in (the reasonable import of) the one and only text that survived the many and intricate

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[92] Id. at 465 (Stevens, J., dissenting).

[93] Id. at 461 (citations and footnote omitted).

[94] Id. ("Our role is to interpret the language of the statute enacted by Congress. This statute does not contain conflicting provisions or ambiguous language.").

procedural hurdles of the legislative process.[95] Nonetheless, to call such process-based concerns intentionalism, at least in its classical sense, is to undervalue a fundamental reality about that philosophy: Classical intentionalism presupposes that Congress is capable of possessing meaningful and recoverable intentions that deviate from those expressed in the reasonable import of the enacted text. Modern textualists believe that a search for such knowable and identifiable legislative intention is an empty one except insofar as it has been filtered through the complicated process prescribed for agreeing upon that text.[96]

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[95] Although extended treatment of the question is beyond the scope of the present inquiry, it is useful at the close of this Essay to note that a similar premise may underlie the textualists' well-known aversion to assigning legislative history decisive weight, even in cases of textual ambiguity. Their reluctance to credit the expressions of meaning found in committee reports and sponsor statements rests upon the articulated premise that such expressions have not cleared the high hurdles for enactment prescribed by the Constitution and the rules of each chamber; therefore, they cannot accurately reflect the bargain that could actually be struck in the legislative process. As Judge Easterbrook has explained:

> The concern "is political rather than epistemological or hermeneutic. [Textualists] are worried that the gauntlet that the Constitution requires bills to run before they become law will be bypassed if judges give heed not just to the enactment itself but to what individual members of Congress said about it, perhaps in a deliberate effort to influence judicial interpretation."

Herrmann v. Cencom Cable Assocs., 978 F.2d 978, 982 (7th Cir. 1992) (quoting Cent. States Pension Fund v. Lady Balt. Foods, Inc., 960 F.2d 1339, 1346 (7th Cir. 1992)); see also Easterbrook, supra note 9, at 64 ("If we took an opinion poll of Congress today on a raft of issues and found out its views, would those views become the law? Certainly not. They must run the gamut of the process—and process is the essence of legislation."); Easterbrook, supra note 52, at 445 ("What distinguishes *laws* from the results of opinion polls conducted among legislators is that the laws survived a difficult set of procedural hurdles and either passed by a two-thirds vote or obtained the President's signature.").

[96] Professor Nelson detects "some internal tension" in my contentions (a) that textualists doubt that Congress has unexpressed but meaningful intentions on any seriously contested interpretive question, and (b) that textualists adhere closely to the level of generality at which Congress frames its directives because doing so preserves whatever unknowable bargains underlay the enactment. See Nelson, supra note 53, at 452–53. The perceived tension, however, rests on the apparent assumption that Congress can strike a bargain only if the legislative majority is somehow subjectively aware of and consciously accepts its contents. That premise is dictated neither by logical necessity nor by the practical reality of the legislative process. Rather, modern textualists maintain that legislation is the end product of a series of complex bargains—bargains that frequently occur behind the scenes and that shape statutory language in untraceable ways. See Manning, supra note 22, at 2409–17 (discussing the legislative process assumptions underlying modern textualism). The procedures governing legis-

lation—those imposed by the bicameralism and presentment requirements of Article I, § 7, as well as those prescribed by legislatively adopted rules of self-governance—place numerous and elaborately designed hurdles in the path of legislation. Certainly, textualists do not doubt that sentient actors at the various gatekeeper points in the legislative process often make conscious wording (and thus policy) choices—frequently unrecorded compromises needed to clear the high procedural hurdles. Ultimately, the legislature as a whole votes up or down on whatever text has succeeded in clearing all of the necessary obstacles—including making it through committee, securing time on the floor, undergoing amendment, surviving a potential or actual filibuster, coming out of conference, and accounting for the possibility of a presidential veto. See, e.g., Easterbrook, supra note 9, at 64 (discussing the effect of procedural obstacles to legislation); Kenneth A. Shepsle & Barry R. Weingast, The Institutional Foundations of Committee Power, 81 Am. Pol. Sci. Rev. 85, 89 (1987) (same). In order to yield a meaningful compromise that a normatively attractive version of textualism might wish to preserve, the legislative majority need have only the intention, in voting, to accept whatever textual bargains the relevant actors managed to strike using the procedures specified for crafting legislation. The legislative majority does not need a further subjective understanding and intention to accept each detail of the underlying bargains.

I should note further that the foregoing conclusion does not (as Professor Nelson could at times be taken to suggest) compel textualists to conclude that the legislature votes with utter ignorance of the contents of legislation. Contrasting my account of textualism, Professor Nelson thus writes that "it is surely desirable for there to be some connection between what members of the enacting Congress understood themselves to be doing and what judges take them to have done." Nelson, supra note 53, at 454. He adds that many legislators do more than "simply voting for the words of a bill (whatever they may be) with the intention that words will be interpreted according to prevailing conventions (whatever *they* may be)." Id. at 457. Although it is beyond this Essay's scope to address the essentially empirical question of what legislators actually know when they vote for or against a bill, I can readily accept arguendo that the legislative majority may indeed have a shared sense of a bill's broad policy goals. (Indeed, that assumption may explain the textualists' willingness to rely on apparent purpose in cases of ambiguity. See supra note 65.) It is even possible to accept, for argument's sake, that some legislators will sometimes attempt to master the wording of at least some important provisions of a statute. To focus on those possibilities in a strong way, however, understates the intent skepticism that lies at the root of modern textualism.

If one examines the many technical provisions of a federal statute of ordinary complexity (much less those of the Social Security Act or the Tax Code), it becomes difficult to assume that the "legislative majority" reliably shares a subjective policy intention or understanding about questions of detailed application, particularly in the hard cases that trouble statutory interpreters. At that level, Professor Radin was surely justified in doubting the possibility that "a given determinate, the litigated issue, will not only be within the minds of all [the legislators] but will be certain to be selected by all of them as the present limit to which the [statutory] determinable should be narrowed." Radin, supra note 34, at 870. And if Professor Radin's intuition is correct (as textualists believe), then knowing the shared sense of what Congress was "driving at" may do little real work, at least when the relevant textual details are otherwise clear in context. The process of legislative bargaining that produces a final text will invariably impose qualifications upon the majority's shared sense of general purpose. The

CONCLUSION

For many years, the Supreme Court practiced a form of intentionalism that presupposed that judges could meaningfully identify policy judgments that Congress "intended" but had not adequately expressed. Under that assumption, the Court felt free to supplement vague statutory expressions with the contents of internal legislative history and, more importantly, to correct the inevitable problems of statutory fit without perceiving itself to have violated the constitutional premises of legislative supremacy. The assumptions that modern textualists bring to understanding the legislative process make those practices harder to sustain. The legislative process is untidy and opaque; it gives those with intense and even outlying preferences numerous opportunities to slow or stop legislation and to insist upon compromise as the price of assent. The precise wording of any given statute may have been, for unknowable reasons, essential to its passage. Thus, efforts to augment or vary the text in the name of serving a genuine but unexpressed legislative intent risks displacing whatever bargain was actually reached through the complex and path-dependent legislative process. That set of legislative process assumptions not only defines modern textualism, but also makes it qualitatively different from the classical intentionalist tradition that has long dominated the Court's approach to statutes.

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precise import of the textual details need not be in the minds of the majority in order for the resulting refinements to be accepted as a necessary part of the bargains that produced the legislation. At that level, as noted, the only collective intention necessary—and plausibly recoverable—is the intention to adopt a bargained-for text that will be construed according to accepted social and linguistic conventions. The further possibility that the legislative majority also subjectively knew of and intended to endorse a shared set of specific elaborations of that text is, as Professor Radin wrote, "infinitessimally small." Id.