

SPEECH ACT THEORY AND TEXTUALISM'S UNFAITHFUL AGENCY PROBLEM

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CIVILL LAW, Is to every Subject, those Rules, which the
Common-wealth hath Commanded him, by Word, Writing,
or other sufficient Sign of the Will, to make use of, for the
Distinction of Right, and Wrong; that is to say, of what is
contrary, and what is not contrary to the Rule.

—Thomas Hobbes¹

The object of genuine interpretation is to discover the rule
which the law-maker intended to establish; to discover the
intention with which the law-maker made the rule, or the
sense which he attached to the words wherein the rule is
expressed. Its object is to enable others to derive from the
language used “the same idea which the author intended to
convey.”

—Roscoe Pound²

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1. THOMAS HOBBS, *LEVIATHAN* 203 (Oxford Univ. Press 1909) (1651).

2. Roscoe Pound, *Spurious Interpretation*, 7 COLUM. L. REV. 379, 381 (1907) (quoting FRANCIS LIEBER, *LEGAL AND POLITICAL HERMENEUTICS* 23 (Boston, Charles C. Miller & James Brown eds., 3d ed. 1839)).

ABSTRACT

Over the past several decades, textualism has become the dominant mode of statutory interpretation for the Supreme Court, almost entirely displacing traditional purposivism. Textualists have defended this development in several ways. They often argue that democratic theory requires a focus on text as the only way to show fidelity to the legislature's place of priority as a norm-making institution in a democratic society. They also often argue that legislative intent does not exist in any meaningful sense, because results within social choice theory and other considerations often mean that there is no way to aggregate the beliefs and desires of individual legislators into a coherent, unique legislative purpose.

In this Article, I argue that these arguments are conceptually confused. First, textualism is not an acceptable way to serve as Congress's faithful agent. If serving as an agent means to follow the norms laid down by one's principal, faithful agency always involves taking into consideration the principal's intended goals. An agent who refuses to take these purposes into consideration is in dereliction of their duty. Second, the notion of legislative intent relevant to traditional purposivist theory is not the product of aggregating the beliefs and desires of individual legislators, so social choice theory and related concerns are largely beside the point. Instead, purposivism is about imparting into the act of legislative volition a set of beliefs and desires which justifies the statute as something worthy of faithful agency. This involves a search for "objectified intent," albeit of a sort very different from textualism's objectified intent. It is a version of the familiar reasonable person standard. If my arguments are right, the drive toward textualism has been, from its inception, a philosophical error. I conclude with a brief historical discussion of the virtues of traditional purposivism in relation to the concerns discussed in this Article.

INTRODUCTION

This Article is intended to shed some light on the question of how we should interpret legal texts—particularly statutes. However, my discussion here should have some implications for other enactments, such as administrative regulations and statute-like provisions in written constitutions. My starting point will be a discussion of textualism in Justice Antonin Scalia’s *Tanner Lecture on Human Values*,³ delivered at Princeton University on March 8 and 9, 1995. In that lecture, Justice Scalia attempted to distinguish between two forms of textualism, what we might call strict textualism and reasonable textualism.⁴ Strict textualism follows the words of the text even when their application to the facts of the case is absurd and clearly outside the statute’s intent.⁵ It is reminiscent of long-discredited versions of legal formalism. Reasonable textualism, Justice Scalia’s proposed alternative, was intended as a means of avoiding the possible absurdity when judges behave as strict textualists, but without letting the judiciary off the leash of its constitutional mandate,⁶ which Justice Scalia and other textualists believe will occur if textualism is abandoned altogether.

Justice Scalia believed that his adherence to textualism was required by democratic theory commitments in the realm of what I have elsewhere called the “mythology of liberal constitutionalism.”⁷ He thought that the judge’s unique role within a democratic, political and legal system placed stringent constraints on what could count as a judge’s faithful interpretation of the law.⁸ This contrasts Justice Scalia with those who see judges as something other than faithful agents of Congress—say, as co-equal partners in making and applying law⁹—or to those with more pragmatic conceptions of judging which do not rely on democratic theory to get off the ground.¹⁰

In this Article, I begin by taking Justice Scalia’s side in that dispute, arguing that an act of statutory interpretation must show a certain kind of fidelity to the act being interpreted. However, I then argue that Justice Scalia’s distinction between strict and reasonable textualism is misguided because the focus on legal enactments *qua* texts is wrongheaded. My primary analytical frame will be work in the philosophy of language and

3. *See infra* Part I.

4. *See infra* Part I.

5. *See infra* Part I.

6. *See infra* Part I.

7. Jordan L. Perkins, *Conservative Jurisprudence and Liberal Constitutionalism* 63, 183–84 (2023) (Ph.D. dissertation, Columbia University) (on file with author).

8. *See infra* Part I.

9. *See infra* Part I.

10. *See infra* Part I.

action theory on the interpretation of actions and speech acts more generally. My presupposition is that, to an important extent, we can treat the enactment of a statutory text much like we can treat any other writing or verbalization which uses language to *do* something in the world. The enactment of a statute is the primary form of action by which a legislature attempts to exercise its constitutionally derived authority to do something to the background life of the political community—to get people to do something, refrain from doing something, change the way they do something, or the like.¹¹ It is a distinct kind of speech act: the act of setting a general command. General commands are special because to understand that a speech act is a general command is to recognize the command-giver as an authority figure. This comes with a duty of fidelity to interpret the command in light of the command-giver's purposes, at least for those (like judges interpreting statutes) who owe a duty of fidelity to the command-giver's authority. Strict textualism, in my view, is an attempt to interpret the action completely apart from its context, divorcing the speech act from its status as an *action* and thereby rendering it unintelligible.

The problem, as I see it, is that Justice Scalia's reasonable textualism is undertheorized insofar as it attempts to distinguish itself from strict textualism. We may understand, as a matter of common sense, that a criminal statute which punishes "using a gun in the commission of a felony" is not intended to cover situations where the gun is being used as a paperweight, hammer, or means of barter exchange, as opposed to as a weapon.¹² However, this is no more than a somewhat commonly shared intuition, unsupported by rational argument, until we stop viewing the statute as a *text* to be pulled off the shelf and studied with a magnifying glass, as opposed to an *action* to be historically contextualized and interpreted in the way that we have no choice but to interpret any other action or utterance in order to render it intelligible: in light of the most plausible purposes for which the action was undertaken, within the context in which it was undertaken. Thus, Justice Scalia was right to reject strict textualism, but he was in error to believe he could abandon strict textualism and remain a *textualist*, at least anything like the kind of textualist he wanted to be. If this is true, textualism is a sort of category mistake as a theory of textual interpretation; if it is to be defended, it is to be defended as something else entirely, as something we do *instead of* faithfully interpreting the text, because, say, we do not trust judges to interpret past speech acts in their own native languages. This is a coherent view—it is, indeed one with some plausibility—but it is one which abandons the faithful

11. *See infra* Part II.

12. *See infra* Part I.

agent theory of interpreting the law as our lodestar. It should be understood in those terms, and not in the terms that “[t]he text is the law, and it is the text that . . . must be observed.”¹³ My disagreement with Justice Scalia here is directly relevant to arguments made by contemporary textualists, who wish to allow some forms of context into the act of statutory interpretation but not the full ranges of contexts which are necessary to interpret legislation and other speech acts through which general commands are issued. To let in enough context to be reasonable interpreters of an authority figure’s commands, they can no longer be textualists.

Aside from the faithful agent theory, textualists make other arguments that purposivism is confused. For example, relying on mid-20th century results in social choice theory, textualists often argue that there exists no such thing as a legislative purpose of the sort needed by purposivism.¹⁴ I suggest that these arguments miss the mark. This is because the proper understanding of legislative purpose is not purely aggregative, the result of head-counting the intentions of individual legislators. Instead, “legislative purpose” is a combination of the act of volition made by the legislature as a collective entity and the interpreter’s need to make sense of the legislative act as a rational and normatively justifiable act,¹⁵ given our democratic theory commitments concerning the source, nature, and justification of legislative authority.

This Article has five Parts. In the first, I summarize the version of textualism presented by Justice Scalia in his *Tanner Lecture* and his attempt to distinguish strict from reasonable textualist interpretation. I also distinguish Justice Scalia’s faithful agent means of legitimating textual interpretation from those of theorists who, for one reason or another, reject the faithful agent theory. In Part II, I summarize work in action theory and the philosophy of language concerning the interpretation of actions and, particularly, of *speech* acts. My discussion, drawn primarily from the writings of Ludwig Wittgenstein and J.L. Austin, is intended to present an alternative understanding of what it means to interpret utterances or writings, one which, contrary to the presuppositions of Justice Scalia, does not focus entirely on the words used, but what the words *mean* interpreted in the context of their status as an action undertaken by an agent to effectuate some purpose. I also introduce the concept of a general command and the idea that those engaged in the practice of interpreting general commands have a duty

13. Antonin Scalia, Justice, Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws, *The Tanner Lectures on Human Values* (Mar. 8–9, 1995), in 18 *THE TANNER LECTURES ON HUMAN VALUES* 97 (Grethe B. Peterson ed., 1997).

14. *See infra* Part III.

15. *See infra* Part IV.

of fidelity to the *purposes* of the command-giver, not merely to the words used, which are themselves little more than an artifact produced through the undertaking of the relevant speech act.

In Part III, I argue that legal interpretation presents special puzzles for speech act theory, owing somewhat to the problem of collective agency, but, more particularly, to the unique purpose of statutes and similar legal enactments: The enactment of an authoritative legal text is undertaken for the purpose of having some effect on the body of norms which serves as a standard of conduct for the citizens of the legal community. Just as speech acts have no meaning divorced from their use to effectuate a particular purpose in a particular context (say, marrying someone or issuing a threat), statutes are meaningless apart from the context in which they are enacted and the goals for which they are enacted.

In Part IV, I attempt to clarify this point, distinguishing two ways that we can think of law—as individual enactments, such as a given statute (“a law”), versus the nexus of norms which are enacted, interpreted, and enforced by legal institutions and obeyed by citizens (“the law”).¹⁶ I intend to provide a framework for understanding how a law is meaningless outside its status as an attempt to change the law, undertaken by some institution with the sort of authoritative status which provides it with the legitimate power to change the law. I then attempt to explain and defend a more purpose-driven theory of textual interpretation.

In Part V, I show that my version of statutory interpretation, while perhaps phrased uniquely regarding the context of a conceptual argument in the philosophy of language, is closely aligned to versions of purposive interpretation which were alive, and largely dominant, in the United States from the founding through the mid-20th century. My focus is on two late 19th century cases in which courts interpreted statutes in light of the intention of the legislature as reflected by the context and purposes which endow the statute with meaning.¹⁷ Considering this, the move from purposivism to textualism over the past several decades appears to be the intentional casting aside of a commonsense and reasonable way of doing law which was abandoned in favor of a philosophically indefensible alternative, almost

16. The distinction somewhat parallels that between the Latin words *lex* and *ius* and which is preserved in many European languages. However, both *lex* and *ius* can be ambiguous when used in the real world. See Jeffrey A. Pojanowski & Kevin C. Walsh, *Recovering Classical Legal Constitutionalism: A Critique of Professor Vermeule's New Theory*, 98 NOTRE DAME L. REV. 403, 411–12 (2022) (reviewing ADRIAN VERMEULE, *COMMON GOOD CONSTITUTIONALISM: RECOVERING THE CLASSIC LEGAL TRADITION* (2022)) (charging Vermeule with invoking the *ius/lex* distinction to refer to a number of different distinctions, depending precisely on how *ius* and *lex* are used in a given context).

17. See *infra* Part V.

certainly (although this stands outside the scope of this Article) as a move in the larger game of legal conservatism's war against the Warren and Burger Courts.

I. JUSTICE ANTONIN SCALIA ON STRICT AND REASONABLE TEXTUALISM

When one tells the story of the rise of textualism in the 1980s and 1990s, there is no more central a figure than Justice Scalia. "Textualism" is the view that a statute means what the text *says*, generally construed through a set of canons of construction whose purpose is to reasonably fix the meaning of legal enactments when they are vague or ambiguous.¹⁸ To use Justice Scalia's own example, under the canon *ejusdem generis*, general terms contained within a list of items should be read considering the other items in the list.¹⁹ Thus, in a list of "tacks, staples, screws, nails, rivets, and other things," the *ejusdem generis* canon would mandate that "other things" refers only to other fasteners.²⁰ Textualists often speak as if the overall goal is to settle on an objective, intersubjectively verifiable meaning of text, relying on canons of construction and a relatively limited menu of other interpretive clues to eliminate interpretive degrees of freedom.²¹

Textualism's focus on canons of construction as a guide for resolving hard cases is generally contrasted with the use of legislative history, a practice Justice Scalia crusaded against during his time on the Court. Up until the last decades of the 20th century, lawyers and judges relied heavily on the written records of legislative institutions, such as floor debates and committee reports, as interpretive guides.²² Under an approach that heavily

18. See Scalia, *supra* note 13, at 100.

19. *Id.* at 101.

20. *Id.* Unfortunately, as William Eskridge has noted, the textualist canons themselves often rely on purposivist considerations to operate. See William N. Eskridge, Jr., *The New Textualism and Normative Canons*, 113 COLUM. L. REV. 531, 558–60 (2011) (reviewing ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* (2012)).

21. See *infra* note 37 and accompanying text (discussing the relevant context to objectified intent accounts of statutes).

22. See, e.g., *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 480–81 (1951) (discussing the legislative history of the Administrative Procedure Act and Taft-Hartley Act, including the expressed dissatisfaction of some members of Congress with judicial interpretation of prior statutory provisions concerning judicial review of agency action, in interpreting the substantial evidence test for judicial review); *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 n.9, 845–48 (1984) (imploping courts to use the "traditional tools of statutory construction" and then considering, at length, the legislative history of amendments to the Clean Air Act). For an interesting twist, see *Babbitt v. Sweet Home Chapter of Cmty. for a Greater Or.*, 515 U.S. 687 (1995). There, the majority concluded that the agency's interpretation of the Endangered Species Act was not prohibited under the *Chevron* analysis, based on the text, purpose, and amendment history of the statute, before devoting a separate section to legislative history as confirming its initial analysis. *Id.* at 703–08. In his dissent, Justice Scalia disputed

relies on legislative history, a statement by a bill's sponsor or a report by the committee with authority over the bill regarding the bill's purpose might be considered highly probative of that purpose, and, therefore, of interpreting the statute itself.²³ Justice Scalia rejected the value of legislative history as an interpretive guide, on the grounds that: (a) one comment or another in the voluminous history behind any significant legislation could be used to support just about any plausible interpretation of a bill, rendering the use of legislative history pointlessly indeterminate and potentially misleading; and (b) relatedly, once the use of legislative history became a common practice in the mid-20th century, it became incredibly common for lobbyists and interest groups to have "friendly" remarks inserted into the official record even when the ideas contained therein had no significant impact on the legislative process or the bill's interpretation by its supporters, rendering legislative history purposefully misleading.²⁴ From the textualist perspective, then, the use of legislative history (and other tools for ascertaining legislative purpose) frustrates the quest for uniquely and objectively correct statutory interpretations.

Closely related to Justice Scalia's textualism was his originalism. According to the leading strand of contemporary originalism, "legislative" intent (here, the intention of the framers of the Constitution) is no more useful than legislative history in the statutory context.²⁵ Nor, under the originalist view, should developments after the era in which the constitutional text was enacted be relevant, in contrast to what Justice Scalia disparages as a "living Constitution" view.²⁶ What matters, instead, is how the constitutional text would have been understood by reasonably well-educated members of the political community which enacted it.²⁷ This is supposedly an objective inquiry, with the answer ascertainable from guides such as dictionaries and historical sources.²⁸ In both cases, then, the core focus is not on the speaker or writer of the legal enactment, whether Congress or a constituent assembly, but the intended audience of the act of communication.

Justice Stevens's majority opinion on the relevant conclusions to be drawn from legislative history, although only after registering his general aversion to using legislative history in the first place. *Id.* at 722-38 (Scalia, J., dissenting).

23. See *Babbitt*, 515 U.S. at 704-06.

24. See Scalia, *supra* note 13, at 104-11, for an extended attack on the use of legislative history.

25. On the distinction between original intent originalism, for which Founders' intent is relevant to interpretation, and original public meaning originalism, for which it is not, see, for example, John O. McGinnis & Michael B. Rappaport, *Unifying Original Intent and Original Public Meaning*, 133 Nw. U. L. REV. 1371, 1373 (2019).

26. See Scalia, *supra* note 13, at 112.

27. See *id.* at 111-13.

28. Hence a search for "objectified" intent. See *id.* at 92-93.

Justice Scalia defended both his textualism and his originalism on the basis of his conception of democratic theory, and particularly his views regarding the appropriate role of judges in a legal system which operates, unlike the old English common law (where judges made up the law largely as they went along, unencumbered by Acts of Parliament or other such written texts), as the interpreters of legal norms enacted by institutions with much higher levels of democratic legitimacy.²⁹ Insofar as the People or their representatives enact a law, through either statutory or constitutional text, the job of the judge is to faithfully interpret that enactment, not to engage in some independent act of judicial problem solving. The judge serves as an agent of the legislature.

Related to this is Justice Scalia's apprehension regarding the tension between the way that judges and lawyers are trained (primarily in common law reasoning) and the inappropriateness of this methodology to the contexts of statutory and constitutional interpretation³⁰: The judge, trained as a common law lawyer, will by nature seek to effectuate the (morally) "right" or "wise" legal rule and disposition of the case, and the more degrees of freedom we leave to the judge, the more tempted he will be to enact his own preferences in opposition to those encapsulated within the legal text itself.³¹ An interpretive philosophy which gives the judge too much discretion, such as one which embraces the use of legislative history, is thus inherently suspect: The less constrained the judge is in how he seeks out and interprets extrinsic guides to the law's meaning, the more likely he will step outside his role as adjudicator and play legislator, in direct violation of principles of democratic legitimacy, the rule of law, and the separation of powers. Simply put, under a faithful agent theory like Justice Scalia's, it is part of what it means to live under a democracy that the legislator writes general norms of conduct, and the judge has no business usurping that role except in cases where it is absolutely necessary that he do so (e.g., cases of indeterminacy

29. See *id.* at 79–89, for Justice Scalia's discussion of the common law judge's methodology and its inappropriateness to textual interpretation within a system of government which embraces a fundamental separation between the legislative and judicial functions. Justice Scalia's "faithful agent" theory of interpretation matches that of other leading textualists. See, e.g., John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 18 (2001) ("The root of the textualist position is . . . in straightforward faithful agent theory."); Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL'Y 61, 63 (1994) [hereinafter Easterbrook, *Text, History, and Structure*] ("We [judges] are supposed to be faithful agents, not independent principals."). But see Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109, 125–26 (2010) (arguing that, while textualists generally hold to a theory of faithful agency, there traditionally existed an exception in judicial practice regarding substantive canons of construction which were imposed by judges in statutory interpretation).

30. Scalia, *supra* note 13, at 88.

31. *Id.* at 83, 85, 87.

over the content of the relevant norms in a specific case or controversy). Hence, textualism and originalism: The more tightly we constrain the judge to the application of the legal text, read through some commonly shared principles of interpretation, the more limited the opportunity for the judge to go rogue and play philosopher king instead of faithful agent—at least in theory.³²

There is a great deal to be admired in both Justice Scalia's interpretive philosophy and in the clarity and conviction with which he espoused it. Of particular importance in Justice Scalia's writings is his understanding that there are crucial conceptual ties between the proper defense of a theory of adjudication and democratic theory.³³ My view, which I do not intend to defend here, is that there is no meaningful justification for a theory of adjudication or legal interpretation which is not ultimately grounded in a theory of political legitimacy.³⁴ State power can be legitimated in several ways—based on which decision maker will make the best decisions based on a number of extrinsic standards (say, the idea that technocrats can make decisions which best promote general utility, an argument central to the early development of the American administrative state). However, the simplest justificatory story in a contemporary western democracy, the one which will meet the least resistance from citizens as well as political theorists, will always be that the ultimate decision maker is entitled to rule because he or she is elected through mechanisms involving democratic accountability, with legislation enacted by a majoritarian legislature as the gold standard, and with the possibility of recalling lawmakers who betray their constituents.³⁵ From

32. Molot distinguishes between aggressive textualists, who are closer to legal formalists, such as Justice Scalia, and more pragmatic interpreters, such as Judge Easterbrook. See Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 COLUM. L. REV. 1, 46–48 (2006). Judge Easterbrook is also much more open than Justice Scalia was to linguistic indeterminacy. See Easterbrook, *Text, History, and Structure*, *supra* note 29, at 68. Easterbrook says:

Let us not pretend that texts answer every question. Instead we must admit that there are gaps in statutes, as in the law in general. When the text has no answer, a court should not put one there on the basis of legislative reports or moral philosophy—or economics! Instead the interpreter should go to some other source of rules, including administrative agencies, common law, and private decision.

Id. (citing Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 553 (1983) [hereinafter Easterbrook, *Statutes' Domains*]).

33. See *supra* notes 30–32 and accompanying text.

34. Jonathan Molot put this slightly differently when he stated that “prevailing views of judging,” and therefore of statutory interpretation, “depend on prevailing views of the constitutional structure and, specifically, on whether judges are viewed as ‘faithful agents’ or ‘coequal partners’ of Congress.” Molot, *supra* note 32, at 6 (citations omitted).

35. See, e.g., ROBERT DAHL, POLYARCHY: PARTICIPATION AND OPPOSITION 5 (1971) (explaining that most countries recognize the legitimate right of the people to participate in the government).

that perspective, it is highly valuable that Justice Scalia at least attempted to articulate a species of democratic theory justification made explicit in his own writings. Our focus, however, will be on how several conceptual sleights (and perhaps outright confusions) undercut the power of his argument.

One important point is that Justice Scalia's understanding of the connection between legislative enactments and legal norms applied in practice fails to take account of the difference between the law, as a body of norms governing a political community, and a law, as a set of written symbols recorded in the pages of a statute book. This is often apparent in the explicit language used in his 1995 *Tanner Lecture*. Thus, in attacking non-textualist statutory interpretation theories such as those of Guido Calabresi and William Eskridge, Justice Scalia remarks:

*It may well be that the result reached by the Court in Church of the Holy Trinity was a desirable result; and it may even be (though I doubt it) that it was the unexpressed result actually intended by Congress, rather than merely the one desired by the Court. Regardless, the decision was wrong because it failed to follow the text. The text is the law, and it is the text that must be observed.*³⁶

Earlier in the lecture, in justifying why legislative intent is not an appropriate guidepost for statutory interpretation, Justice Scalia said that, in statutory interpretation:

We do not really look for subjective legislative intent. We look for a sort of "objectified" intent—the intent that a reasonable person would gather from *the text of the law, placed alongside the remainder of the corpus juris*. As Bishop's old treatise nicely put it, elaborating upon the usual formulation: "[T]he primary object of all rules for interpreting statutes is to ascertain the legislative intent; *or, exactly, the meaning which the subject is authorized to understand the legislature intended.*" And the reason we adopt this objectified version is, I think, that it is simply incompatible with democratic government—or indeed, even with fair government—to *have the meaning of a law*

36. Scalia, *supra* note 13, at 97 (emphasis added). Justice Scalia had just finished an extended criticism of *Church of the Holy Trinity v. United States*, 143 U.S. 457 (1892), in which the Supreme Court arguably circumvented the plain text of an immigration statute which otherwise would have prevented the church from importing an Englishman to be its pastor. Scalia, *supra* note 13, at 93–97. *Holy Trinity* will be discussed at length in Part V.

*determined by what the lawgiver meant, rather than by what the lawgiver promulgated.*³⁷

While the immediate context of the first remark is an attack on non-textualist theories—and thus on theories which hold the text of a statute to be at least somewhat less important for interpretive purposes—the latter is targeted more directly at a more textualist theory which regards the text as important, but important only as one of the indicia of the lawmaker's intent.³⁸ The text is to be placed alongside, in Justice Scalia's language, the remainder of the *corpus juris*; what is to be interpreted is a world of texts and not of purposes or intentions.

A complication here is that Justice Scalia was not *really* committed to a form of pure or strict textualism, which looks merely at the text, canons of construction, and the dictionary meanings of the words used.³⁹ He wanted a form of textualism that is not *too* textualist. Like most modern textualists, Justice Scalia believed he was able to defend a philosophically coherent mode of interpretation which avoids the wooden literalism of a four-corners

37. Scalia, *supra* note 13, at 92 (alteration in original) (first and third emphasis added) (quoting JOEL PRENTISS BISHOP, COMMENTARIES ON THE WRITTEN LAW AND THEIR INTERPRETATION 57–58 (1882)). We will discuss this later, but note the move explicitly made in this passage. Justice Scalia is noting that, in at least some cases, it would be unfair, presumably as a consequence of the rule-of-law notice function, for citizens to be bound by the legislator's wishes where those wishes are not sufficiently recoverable from the text of the law itself. The duty of faithful agency is thus, by Justice Scalia's own argument, outweighed by other considerations, not only sometimes, but whenever sufficient disparity exists, as a matter of general theory. Also, for an on-the-ground example of Justice Scalia's method in searching for objectified intent, there may be no better example than his majority opinion in *Alexander v. Sandoval*, refusing the argument that there exists a private right of action to enforce disparate impact regulations under Title VI. 532 U.S. 275, 293 (2001). There, Justice Scalia wrote that “[t]he judicial task is to interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy. Statutory intent on this latter point is determinative.” *Id.* at 286 (citations omitted).

38. Compare Scalia, *supra* note 13, at 92 (attacking non-textualist theories), with Richard Ekins, *Objects of Interpretation*, 32 CONST. COMMENT. 1, 1 (2017) (criticizing Sustain's intentionalism). Professor Ekins seems to be uninterested in the speech act theory which serves as the dominant lens of this chapter. In addition, his argument targets Cass Sunstein's nihilism about there being anything interpretation “just is,” and thereby comes indirectly to a discussion of Justice Scalia's originalism instead of his textualism. See Cass R. Sunstein, *There Is Nothing That Interpretation Just Is*, 30 CONST. COMMENT. 193, 193 (2015). However, the basic thrust of his argument, that we should focus on “an intentional lawmaking act rather than a text floating in the world,” that is, on an act of sovereign volition instead of the text of the document, is very similar to that defended later in this Article. Ekins, *supra*, at 1.

39. I would interpret Justice Gorsuch and many of the more modern textualists appointed during the Trump Administration as closer to strict textualists, willing to embrace interpretations that Justice Scalia would find ludicrous, but that is an argument for another day. For more discussion of the textualists' move away from the linguistic pragmatism of Justice Scalia's *Tanner Lecture* (and other textualist writings of that era), see Ryan Doerfler, *Late-Stage Textualism*, 2021 SUP. CT. REV. 267, 280 (2021).

approach, allowing for certain kinds of contextual information to shed light on intent.⁴⁰

This, also, can be seen in his *Tanner Lecture*, in the section in which he tried to distinguish his textualist theory from strict constructionism.⁴¹ Justice Scalia's textualist-pragmatist argument was based on a discussion of his dissent in the case of *Smith v. United States*.⁴² *Smith* concerned the interpretation of a statute which mandated enhanced jail terms for criminals who use a firearm "during and in relation to . . . [a] drug trafficking crime."⁴³ The defendant against whom the provision was applied was attempting to use a firearm not as a weapon, but as a form of barter in that he attempted to trade it for cocaine.⁴⁴ The majority held, over Justice Scalia's dissent, that the defendant had "use[d] a firearm" in the commission of the attempted purchase.⁴⁵ Justice Scalia argued that "uses a firearm" should be restricted to using it for its ordinary purpose, and not using it in any manner whatsoever.⁴⁶

Justice Scalia's point is obvious: It is arguably absurd to think that the statute could fairly be interpreted to apply to defendants who were using a firearm not as a weapon, but as a form of exchange in the same way that one might use livestock or an expensive wristwatch in barter. To read the statute "reasonably, to contain all it fairly means,"⁴⁷ would clearly seem to exclude application of the enhanced penalty provision to the defendant in *Smith*, at least on the view that the statute was intended to deter the use of firearms as weapons and not means of exchange. He contrasted this "reasonable" interpretation of the statute with a strict constructionist interpretation under which "uses . . . a firearm" would include using it for the purpose of barter, simply because bartering with a firearm is, as a matter of dictionary meanings, a way to "use" it.⁴⁸ In other words, Justice Scalia attempted to

40. *See id.*

41. Scalia, *supra* note 13, at 98.

42. 508 U.S. 223, 241–42 (1993) (Scalia, J., dissenting). *See* Scalia, *supra* note 13, at 98. A defense of Justice Scalia's methodology might be found in another case—his majority opinion in *District of Columbia v. Heller*, 554 U.S. 570 (2008). Here, he is willing to countenance idiomatic interpretations of expressions such as "keep and bear Arms" should there exist evidence that such idioms were in sufficiently common usage at the relevant time. *Id.* at 581, 584–86. Perhaps "use a firearm" is something like an idiom. A willingness to embrace idioms and similar forms of speech might bridge the gap between reasonable and strict textualism in at least some cases, although now undertheorized is what contextual information allows the judge to decide when an idiom is being used and when a straighter interpretation is called for.

43. 18 U.S.C. § 924(c)(1).

44. *Smith*, 508 U.S. at 225–26.

45. *Id.* at 241.

46. *Id.* at 241–43 (Scalia, J., dissenting).

47. Scalia, *supra* note 13, at 98.

48. *Id.* (alteration in original).

defend a version of textualism which is not simply four-corners literalism but is somehow sensitive to context.

The problem is that it is difficult to see how Justice Scalia can defend this distinction between the “reasonable” and the “strict” interpretation of legal texts if one means to interpret what the *text* says as opposed to what the *writer* said or intended when writing it. The most obvious way to make the distinction Justice Scalia sought in *Smith* is to simply note that the relevant statute was *intended* to combat violent crime, not illicit barter exchanges. This comports with the traditional, purposivist means of statutory interpretation, by which a statute is intended to confront some specific kind of evil, as discussed below.⁴⁹ There is nothing in Justice Scalia’s short discussion of *Smith* to suggest how such a principled distinction between reasonable and strict interpretation can be made without analyzing intent. Authorial intent and the contextual clues available for ascertaining this intent is the general means of distinguishing between “reasonable” and “unreasonable” interpretations of human language, because to interpret, say, a legal text is to understand how it is an artifact generated in the process of undertaking an attempt to change the nexus of legal norms binding the social community. It is an action undertaken deliberately by human beings with agency—human beings who are attempting to *do* something when they write or utter the words they chose—and it is intelligible only in this context.⁵⁰ Thus, my basic argument in what follows is that we should look for a sort of objectively ascertainable intention of the statute, but that doing so will necessarily lead us away from the text to contextual information concerning legislative purpose because a legal text is a certain kind of invocation of language, and because this is the way that linguistic utterances make sense in the first place. To make this argument, however, I must beg the reader’s pardon and take an extended detour into the weeds of analytic philosophy in the next Part of this Article.

I just noted that Justice Scalia’s conception of legal interpretation, like the conceptions of many other leading textualists, is rooted in a theory of democratic legitimacy. I also expressed the opinion that this is one of the strengths of his theoretical enterprise. Here, Justice Scalia’s view can be

49. *See infra* Part IV.

50. We might, as in a normal case of originalism, look at the effect that the text would have on its initial audience. This might sever the interpretation of the text from the lawmaker’s intentions, except for the obvious problem that the initial audience was likely just as concerned with interpreting the text in light of its goals and intended effects as I am suggesting we should be. In other words, a citizen attempting to understand the text of a new statute he read about in the newspaper will normally seek to interpret it in light of the problem the legislature was attempting to address. An initial audience-focused theory of interpretation, under normal circumstances, will thus be a one-step-removed purposive interpretation.

usefully contrasted with that of Cass Sunstein who has argued that, in the context of legal interpretation, “there is nothing that interpretation ‘just is.’”⁵¹ For Sunstein, legal interpretation must show “fidelity to authoritative texts,” because otherwise, the interpreter “cannot claim to be interpreting” those texts.⁵² This is, obviously, a minimalist criterion: There are countless ways to show fidelity to the text, to take seriously what the text says as the object of interpretation. For Sunstein, there is no fundamental nature of legal interpretation, so anything which meets the requisite quantum of “fidelity” to the legal sources is an “interpretation.” The choice between different modes of interpretation is based on “the claim that [the interpretive framework chosen] makes our constitutional system better rather than worse.”⁵³ Choice of interpretive frame is thus necessarily a big-picture consequentialist enterprise. Sunstein’s argument proceeds largely through an analysis of how actual people, largely originalists such as Justice Scalia, conceive interpretation and what they say about why their interpretation is chosen—for example, that ordinary public-meaning originalism is mandated as a methodological framework in constitutional interpretation because of the effect that it will have in cabining judicial discretion.

The view developed below, to foreshadow, is that the appropriate mode of interpretation of a speech act is a function of the category of speech act we are dealing with.⁵⁴ Under standard conditions, a work of performance art is a very different type of thing than a statute, and a work of journalism is different from both. In order, we might think that the intended effects are to entertain, to place on notice of one’s legal obligations, and to inform about an upcoming or past event. There might be a range of defensible ways to interpret, say, an interpretive dance, but recognizing the type of thing being interpreted sets limits on what can count as an interpretation of it, and those limits, pace Sunstein, are not all entailed by what it means to make the dance performance the best it can possibly be. So too for legal texts. The fact that it is a statute we are interpreting sets limits on what can count as a faithful interpretation, albeit not those limits Justice Scalia argued for. This view is not consequentialist in Sunstein’s sense. On this limited point, Justice Scalia wins.

We will see that Wittgenstein’s builder’s game showcases a distinct type of speech act, and so does the interpretation of a general command given by

51. Sunstein, *supra* note 38, at 193.

52. *Id.*

53. *Id.* at 194.

54. *See infra* Part IV.

an authority.⁵⁵ To take a non-statutory general command, the employee does not search for the employer's subjective intention in giving workplace instructions because it "makes the supervisor-employee relationship work best."⁵⁶ What matters is that we are interpreting a certain kind of purposive human action, and the nature of that action (and the intentions behind why it was undertaken) sets fundamental constraints on what can count as a faithful interpretation of it. The next Part deals with providing the conceptual tools necessary to flesh out this argument and argue that the enactment of a statute is a distinct species of speech act, that of issuing a general command, and defending the idea that the proper interpretation of a general command is a specific kind of activity which places specific demands on the interpreter (contrary to Sunstein), but that those constraints are not the ones Justice Scalia defended.

II. THE INTERPRETATION OF SPEECH ACTS

Over the past half-century, fields as diverse as the philosophy of language, intellectual history, literary criticism, and legal theory have been strongly influenced by the insights of philosophers Ludwig Wittgenstein and J.L. Austin.⁵⁷ The core insight, laid out somewhat cryptically in Wittgenstein's *Philosophical Investigations* (1953) and largely developed into the speech act theory of Austin in *How to Do Things with Words* (1962), is that linguistic utterances can often be made most intelligible when they are analyzed not on the basis of semantic meaning, but instead through a focus on what they *do* within the context of a set of social practices (a "language game," roughly, within Wittgenstein's terminology).⁵⁸ Thus, for large classes of linguistic expressions, to look for meaning is to look at what the agent is

55. By "general command" I mean the setting of a standing norm of conduct. Compare "Go over there," a specific command, with "Always be at your desk by 9:00 AM," a general command. A general command sets a standard of conduct which the authority expects the subordinate to obey in any circumstances in which the relevant conditions are triggered—in the example given, that it is a workday, that the employee is not taking sick or vacation leave, and so on. General commands are intended to set norms of conduct which shape behavior on an ongoing basis. They are different in kind from one-shot orders. An employee may discern how the employer wants him to behave from a sequence of one-shot orders which provide evidence of how the employee is expected to behave on an ongoing basis, but this does not amount to a general command—an announced, standing rule of conduct—unless the employer engages in the appropriate speech act of issuing a general command.

56. Sunstein, *supra* note 38, at 196 (discussing the interpretation of a command in the employment context).

57. See, e.g., Anat Biletzki & Anat Matar, *Ludwig Wittgenstein*, STAN. ENCYC. OF PHIL. ARCHIVE (Oct. 20, 2021), <https://plato.stanford.edu/archives/fall2023/entries/wittgenstein>.

58. J.L. AUSTIN, *HOW TO DO THINGS WITH WORDS* J.O. Urmson & Marina Sbisa eds., 2d ed 1975); LUDWIG WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* § 7, at 5 (G.E.M. Anscombe trans., 2d ed. 1986).

trying to accomplish within that context. “Watch out!” may thus best be understood as a warning, and “With this ring I thee wed” as the *action* of marrying, and so on. In such cases, a traditional analysis of the “meaning” of the expression—a search for some sort of propositional content which the words possess, divorced from intention to act—is futile. The utterance does not *say* anything, but it instead *does* something. I repeat, for emphasis: When an utterance is part of a speech act, it generally does not mean anything when removed from the speaker’s intent to marry someone, to issue a threat, to enter into a binding contract, and so on.⁵⁹ For a speech act, what matters is not what was said, but *how* what was said was a component of something that was done. The insight, while simple, was a departure from earlier philosophy of language and set the stage for a revolution in theories of interpretation within a wide range of fields.

Particularly useful as an illustration, I think, is a basic analysis of Wittgenstein’s builder’s game, a thought experiment which occurs early in *Philosophical Investigations*,⁶⁰ and which can be viewed as a spur to the “meaning as use” ideas developed later in the book. To paraphrase, suppose Adam and Bob are building a structure from stone. They have four basic pieces with which to work: slabs, blocks, pillars, and beams. The entire language game we observe between Adam and Bob is as follows: Adam calls out the name of a piece, “Slab!” Bob goes to the pile of building blocks and removes a slab, carrying it to Adam. Adam then places the piece within some appropriate place, then calls for another piece, “Block!” Bob returns to the pile, retrieves a block, and brings it to Adam, who then adds it to the wall. This makes up the entirety of the activity by the two builders, presumably ending with a finished wall.

The point of Wittgenstein’s analysis of the builder’s game, as I take it, is that we cannot possibly understand the primitive, four-word language employed by Adam or Bob with a more traditional linguistic analysis regarding only the items in the world to which Adam and Bob are referring and the propositional content attributed thereto. The language can be understood only within the context of the activity of building the wall. It only makes sense with the understanding that Bob is serving as Adam’s assistant in the process of building, with the utterances not statements about things in

59. One might marry someone without intending to do so, in a sort of comedy of errors. However, this is a nonstandard case parasitic on the understanding that “With this ring I thee wed” is usually uttered only with the intention of entering into marriage or to intentionally undertake the speech act of marrying someone in a context which does not result in a marriage (e.g., while acting in a play).

60. WITTGENSTEIN, *supra* note 58. The builder’s game is introduced as a simple language at the beginning of the *Investigations*, with the linguistic analysis becoming more complicated as the work proceeds. *See id.* § 2, at 3.

the world, but commands or requests concerning them. The key to understanding the language is to understand the practice, and outside the context of that practice, the language is meaningless.

There is no meaningful interpretation of the builder's game which does not take into account the nature of the game being interpreted (i.e., there is no worthwhile "four corners" interpretation of the words used). A textualist analysis of the game would represent a serious category error. Further, because what is being interpreted is Adam's *commands* to Bob, the specific example is a useful analogy to law in another sense, which will become relevant later: There is no interpretation of the game which does not make sense of Adam's intention or purpose that a specific piece be brought. If Adam calls for a slab, the only meaningful interpretation of the utterance is that he intended that a slab be brought (or, perhaps, as a nonstandard case, that he mistakenly called for a slab when he intended that a block be brought, as something like a Freudian slip). Any interpretation of what Adam says—or, perhaps more accurately, what he does when he says something—which does not include understanding that Adam *intends* for Bob to take a particular course of action is deficient. To put it in Austin's later framework, to determine what the speakers *mean* is to understand what they are *doing* in uttering their words.⁶¹

This Article is certainly not the first to attempt to apply the insights of Wittgenstein and Austin to questions of legal interpretation.⁶² Perhaps, the first serious attempt was H.L.A. Hart's *The Concept of Law* (1961).⁶³ Hart's book married the legal positivism of Jeremy Bentham⁶⁴ and the 19th century jurist John Austin⁶⁵ (not to be confused with J.L.—John Langshaw—Austin, already discussed) to the analysis of linguistic rules in Wittgenstein's *Investigations*. Hart resolved the difficulties with the theories of Bentham and Austin, which saw law as the commands of an uncommanded sovereign, through an interpretation of social rules as practices which, for the community to which they belong, serve as both guides for conduct and standards for criticizing conduct.⁶⁶

61. See AUSTIN, *supra* note 58, at 8–9.

62. For a brief discussion of the literature, see Julie Dickson, *Interpretation and Coherence in Legal Reasoning*, STAN. ENCYC. OF PHIL. ARCHIVE (Feb. 10, 2010), <https://plato.stanford.edu/archives/win2016/entries/legal-reas-interpret>. I proceed with caution in light of Dickson's admonition against the employment of "ill-digested Wittgenstein to dubious ends." *Id.*

63. H. L. A. HART, *THE CONCEPT OF LAW* 18 (2d ed. 1994).

64. See JEREMY BENTHAM, *OF LAWS IN GENERAL* (H.L.A. Hart ed., 1970).

65. See JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* (1832).

66. Hart extensively details the defects of Austin's command theory as he saw them in the early chapters of *The Concept of Law*. See HART, *supra* note 63, at 18 (discussing Austin's Command Theory);

What typifies law, according to Hart, was not that law emanates from the will of a sovereign, but that it is derived from a master social rule—a “rule of recognition,” in his terminology—which sets the standards for a legal community for how legal rules can be abrogated, created, or changed purposively.⁶⁷ Some other systems of social rules which set binding norms of conduct, such as the rules of conventional morality, are on Hart’s account distinguished from law because there is no set of rules under which they can *deliberately* be changed⁶⁸: They can only evolve organically over time. However, on Hart’s account, it is anathema to the concept of a moral rule that there can be something like a moral legislature with the power to change these rules as acts of volition: The idea of changing theft or murder from “bad” to “good” by an act of legislative will is in some sense incoherent because it fails to consider the fundamental nature of morality.⁶⁹ Of the rules of a legal system, only the rule of recognition is a purely conventional rule (akin to the rules of substantive morality). The rest are products of the *secondary rules* of the system, rules about how duty creating *primary rules* are to be created and changed by rulemaking institutions whose powers are derived from the rule of recognition.⁷⁰

Hart’s adaptation of Wittgenstein and Austin is relevant because of what it means for a builder’s game-type analysis of the practice of law: Just as it is a core part of the builder’s game that Bob owes a certain duty to act in accordance with Adam’s commands (not because Adam’s commands have some metaphysical validity, like the commands of a God-king, but because the specific rules of the language game being played require that Bob bring the object named by Adam), legal systems function as they do in part because the practice grants certain individuals or institutions the power to issue commands which define the duties placed on others. Hence the legislature’s authority over judges discussed by Justice Scalia.

One way to clarify the connection between conceptual philosophy and normative political theory here is to say that I see the interpretation of legislation as involving a picture of the court’s role within a practice, where “practice” has a more specific meaning than laid out thus far. By practice, I mean a general form of conduct with the defining feature that normative

HART, *supra*, at 26 (discussing some of Hart’s objections to Austin’s theory). In my view, rescuing Austin from Hart’s criticisms is a task bordering on the trivial, but that is, again, a topic for a different discussion.

67. *Id.* at 94.

68. *Id.* at 175.

69. *Id.* at 176.

70. Thus, the rule of recognition may be based on a constitutional text as interpreted by an authoritative constitutional court, specifying precisely how the legislative power for altering primary rules is to be exercised.

standards of rightness and wrongness are encapsulated in the very nature of the activity. It may, in some cases, make sense to say that some speech acts merely misfire when they go wrong and that they are therefore not constitutive of practices. I may fail to threaten or warn you, for example, because you do not understand what I am doing as the issuance of a threat or warning.

Contrast this with Wittgenstein's builder's game: To understand the activity is to understand that there are specific ways that Adam's speech act of calling out "Slab!" can misfire which exist only within the context of the practice constituted by the game. That is, there are ways in which Adam and Bob can get it wrong which are not possible for non-practice speech acts. Bob, acting passive-aggressively, may intentionally bring a block when Adam calls for a slab. This represents a failure to adhere to the norms of the practice which does not include a failure of uptake. Within the context of a practice, in the way that I am using the term here, the participants are assigned roles, in much the way that actors have roles to play in a film or the starting quarterback on a football team.

Importantly, to identify lawmaking, football, or filmmaking within the context of a practice entails setting certain constraints on the range of available interpretations of the moves made within the context of that practice. If we want to understand the behavior of people playing such roles, we must grasp that the participants have undertaken, as participants, a certain kind of normative imperative to make a good faith effort at getting the interpretation correctly by some standard internal to the practice. To take a trivial example, to understand a quarterback's behavior within the context of the practice of the game of football, we must make sense of the imperative to score points by advancing the ball, not merely to have the most perfect throwing motion. While those outside the practice may choose to interpret and evaluate the behavior of the quarterback based *solely* on the perfection of his throwing motion, those inside it—his teammates, his coach, his opponents, and the announcers calling the game—generally act outside the role assigned to them by the practice when they choose to do so. Something has gone wrong within the practice if the game's announcer spends three hours praising Jones over Smith because Jones has a better throwing motion, even though he has thrown five interceptions in comparison to Smith's five touchdowns and zero interceptions over the course of the game. To participate in the practice is to adopt the view that Smith has performed far better than Jones by the normative standards which are internal to the practice of playing football. Perhaps, an ordinary reader can interpret a novel in an infinite number of ways without breaking some duty of fidelity owed to the author (this, at least, seems to me to be the case), but judges owe duties to

legislatures which fall out of the nature of the practice of giving and receiving general commands, just as quarterbacks owe duties to their coaches and coaches to their quarterbacks.⁷¹ This seems sufficient to rebut Sunstein-like interpretive theories. Absent such a duty of fidelity owed by courts to legislatures—Justice Scalia himself made this point—we would not live in a democracy, ruled principally by those elected by the people themselves, but by a juristocracy.

A practice is thus a subtype of speech act, an activity with its own internal standards of conduct, so that those who take part in the practice are expected to behave in ways specified by the rules of the game governing those in their role. Legislation, our current topic, is the practice of legislatures giving general legal commands which others in the legal system are obligated to faithfully interpret. Like Bob in the builder's game, the court is looking to the prior action of someone else—here, the legislature—to determine the normative standards governing the next steps it should take.

The interpretation of a general standard of conduct by someone who is, like Bob, required to show fidelity to the actions of another, is in this sense more than the reception of a mere speech act. It is to play a specific role within the context of a practice, a role which he or she can play well or poorly as judged by a measuring stick internal to the practice itself. It is the practice-like nature of interpreting general commands which creates the requirement for those in the Bob-like role of the law game (most obviously, citizens and judges) to attempt a good faith interpretation of the motivations of the speaker, as well as the requirement to attempt to act in accordance with that interpretation. This is what creates normative standards for correctness which are not consequentialist in Sunstein's sense.

To engage in a practice, in the way I am now using the term, transforms what would otherwise be the mere interpretation of the speech act into something else. It generates certain duties of fidelity owed by those engaged in the practice, duties which set standards on those interpretations which are available to make sense of the actions of those engaged in the practice.

My contention here is thus that there exists a general category of speech act: that of giving a general command and of setting a standard of conduct that others are obliged to follow. Statutes are a kind of general command, but there are plenty of others. Parents set standards, such as curfews, for their children, and bosses set similar standards, such as work hours, for their employees. The creation of a law consists of the setting of a standard of

71. Similarly, while the audience of a film can (again, perhaps) interpret the director's intentions in whichever way it pleases, the actors in the film certainly cannot, because the actor is bound by the nature of a practice in the way that the audience is not.

conduct by one empowered by the secondary rules of a legal system to create such standards. With general commands, what it means to give a faithful interpretation is derived from the command-giver's authority over the intended audience.

Importantly, in all these contexts, the duty of fidelity exists to the command-giver, not to the words of the command in any disembodied sense. A child who follows the strict letter of his parent's instructions in a circumstance where he has good reason to know that following the instructions would not effectuate the parent's intentions (would, in fact, constitute the exact opposite of what the parent wanted) would likely be disciplined, and an employee who engaged in such conduct habitually would likely be fired.⁷² The basic point, again, is that something goes awry when the recipient of a valid general command does something other than what the authority wishes, for the reason that he instead follows an overly literal interpretation of the language through which the command is issued, so as to frustrate the actual intentions of the authority. If both speaker and listener here understand the speaker's intention, and if the listener owes such a duty of fidelity, we have an obvious example of a dereliction of duty by the command's recipient insofar as the command's recipient does what the words meant as opposed to what the speaker meant. Conversely, there is no misfire when the listener does what the speaker wishes, even if the speaker has inadvertently said something other than what he meant. We, in fact, have an example of a felicitous success story despite the existence of a condition which would usually frustrate the normal operation of the practice.

In cases of misfire, the subordinate to whom the instructions are given cannot be legitimately held responsible for secret intentions the authority

72. Imagine a parent, exasperated by his or her child's overconsumption of soft drinks, instructing him that he is "Not to have another Coke. Not another Pepsi. Not another Mountain Dew, Sprite, Dr. Pepper, RC Cola, Ski, Crush, Fanta, Sierra Mist, 7 Up, or Sunkist. Not one more!" The child may escape on a technicality if he finds a store brand cola in the refrigerator and drinks it, but has he properly respected the parent's authority, at least if he has the means available to understand the parent's intention? And will the grandparent who gives the child a Diet Coke *really* be disobeying the parent's wishes, given the purpose of the command? Here the child stands in the role of the citizen following the law, and the grandparent stands in the role of the court interpreting the general command and applying it to another's conduct. Whatever the answers are to these questions, they seem to be the sort of questions we ask in interpreting commands in everyday life. Suppose a boss demands that her employees be available by email to deal with emergencies "24 hours a day, 365 days a year, no exceptions," when both boss and employee understand the boss to mean "Be available at all times." Is the employee who is out of touch on February 29 of a leap year really respecting the command given, where doing so has catastrophic consequences for the employer's business? The idea here is that escaping on a technicality is a certain kind of excuse for misperformance, especially if the technicality causes a true failure to understand the authority's intentions. However, it is not in the fullest sense fulfillment of the duty created by the general command by one with authority to issue it.

possessed but did not express.⁷³ However, he is justly held responsible to an interpretation of the command consistent with the reason for the speech act to the extent that is recoverable from the context clues available. If the enactment of a law is the same category of speech act, there would seem to be little reason that we should interpret it differently. Thus, it appears that we should use legislative history and similar context clues even in the extreme case where they “override” the text of the statute, provided, again, that the context was sufficiently available to the subordinate and is thereby reasonably recoverable by the intended audience.⁷⁴

Recall that Justice Scalia thought that his textualism fell out of a theory of what it meant for judges to respect what the legislature has enacted,⁷⁵ in much the same way that Bob must respect what Adam has commanded. The claim here, as clearly as I can state it, is that to consider textualism an application of faithful agent theory is confused because of the description of what it means to be a faithful agent which falls out of the understanding of a general command and the nature of fidelity owed to it. If a boss, a parent, or a legislature gives a general command, the agent is obliged to ascertain what the principal is actually intending to accomplish, to the extent that the intent is recoverable from what is said and other contextual information. To focus on anything else is to forsake the duty of faithful agency to pursue some other

73. Caleb Nelson notes that intentionalists would exclude evidence of secret intent—say, a secret affidavit signed by all members of the enacting legislative majority of a statute which provides a non-intuitive interpretation of statutory terms—because of such considerations as the need for citizens attempting to follow a law to be on fair notice of what the law requires. Caleb Nelson, *What Is Textualism?*, 91 VA. L. REV. 347, 351, 360 n.36 (2005). Any reasonable interpretation will consider both legislative intent and the extreme injustice of applying legal standards against citizens where the citizen has not been provided with adequate notice of those standards, at least where what the legislature meant and what it said are sufficiently divergent. Here, I would not say that intentionalists, in their focus on legislative intent, choose to disregard the secret document as probative of the legislature’s intent. I would say that intentionalists are here willing to allow other values to trump purposivism in cases where a single-minded focus on the duty of fidelity to the legislature would risk injustice.

74. See, e.g., *Crooks v. Harrelson*, 282 U.S. 55, 60 (1930). The Court noted:
 [A] consideration of what is there [in *Holy Trinity*] said will disclose that the [*Holy Trinity*] principle is to be applied to override the literal terms of a statute only under rare and exceptional circumstances. . . . [T]o justify a departure from the letter of the law upon that ground, the absurdity must be so gross as to shock the general morality or common sense. . . . And there must be something to make plain the intent of Congress that the letter of the statute is not to prevail.

Id. (citations omitted); see also *Treat v. White*, 181 U.S. 264, 268 (1901) (stating that the *Holy Trinity* principle requires “that there is something which makes clear an intent on the part of Congress against enforcement according to the letter [of the statute]”). A side issue in the disagreement between Chief Justice Burger’s majority opinion and Justice Powell’s dissent in *TVA v. Hill* was whether the facts of the case were sufficiently extreme to trigger a *Holy Trinity*-like outcome. Compare 437 U.S. 153, 194 (1978), with *id.* at 204–05 (Powell, J., dissenting).

75. See *supra* Part I.

goal—such as, in the case of legislation, to preserve law's guidance function for the citizen. Preserving the guidance function is a fundamental requirement of the rule of law where the principal is a legal authority, in those cases where the principal's commands are unclear and where it would be unjust to hold the citizen to a standard not at all consonant with the enactment on the statute book. However, whether this is done for good reason or not, to decide to focus on textual meaning as opposed to speaker meaning is to decide not to be a faithful agent, to subvert the legislature's or parent's wishes, which are sometimes fully ascertainable by the agent, to do other than what they wished. It is to decide that more important values are at play than the value of respecting the principal's authority. If legislatures cannot have purposes of the sort which makes legislation sufficiently like the issuance of a general command by a natural person (a topic addressed in the next Part), then the faithful agent theory can have no valid role in a theory of adjudication, because the line between fidelity and faithlessness cannot be defined to wall off permissible from impermissible patterns of conduct consistent with the commands given. It is somewhat bewildering that public law theory has gone on so long without recognizing that textual arguments—that purposivism is impossible because there is no such thing as a meaningful legislative intent—are, in fact, disguised arguments that legislature-centric democracy is conceptually impossible.

All of this is at least the skeleton of a conceptual argument that the interpretation of a statute must be a quest for legislative intent. This conceptual argument, to have traction, should, like Justice Scalia's, be married to a normatively attractive picture of the legitimacy of law and legal institutions. When we flesh out what the issuance and interpretation of general commands means as a practice, we must inevitably fall back on ideas concerning how general commands play into hierarchical authority relationships between principals and agents and the overall purposes of these relationships to the society. My difference with Sunstein, then, is somewhat one of degree: Fidelity to the norms and standards internal to the practice itself place significantly tighter constraints on what can and cannot constitute a valid interpretation of it. We need not merely *somehow* show fidelity to what participants in the practice have done and are doing, as if any function whatsoever which takes those as inputs is sufficient. The standards internal to the practice itself are often dispositive in resolving interpretive questions regarding that practice.

The normative framework for this Article is thus predicated on the notion that, if we take seriously the superior role of the legislature, we must focus on what the legislature *intended*, just as we focus on what a boss, general, or parent intended in laying down general rules, and not on what the

audience understood the command to be. Focusing on what the hearer reasonably would have understood the command to be is a category mistake, in terms of misplacing the object of interpretation. When the speaker uses confusing language and is misunderstood by the hearer, this may cause a failure of uptake. It may excuse the speaker's failure to obey the command as the speaker intended it. What it does not do is transform the practice of giving and following commands into something else entirely.

III. WHAT IS SPECIAL ABOUT LEGAL INTERPRETATION?

As I have already suggested, the philosophical problems involved in interpreting human language and actions are not unique to the legal realm. Laws are, of course, generally expressed in language. Legislative enactments take the form of bills which are written, voted on, and then recorded in some authoritative compendium of statutes. Administrative regulations are written and recorded in much the same fashion. Courts announce their decisions via written opinions which not only decide the case at hand, but also contain legal principles which serve as positive law to constrain future adjudication. This is to say that we should expect most, if not all, normal philosophical puzzles regarding linguistic interpretation to somehow translate into puzzles regarding the interpretation of legal texts more generally, because law takes the form of language.

Legal enactments, however, pose special interpretative problems not seen with most linguistic utterances, and these differences have been central to the debate over the comparative merits of textualism and purposivism which has developed over the past several decades. Many of these debates are concerned with the problems posed by the fact that legal enactments are generally not made by natural persons, but by institutions composed of numerous persons of disparate interests and intentions. Using the language of the philosopher Donald Davidson, when we say that a natural person has (purposefully) *acted*, we generally mean that she has done something because (a) she desired to have some sort of effect on the world (a "pro attitude," in his terminology), and (b) she believed that what she has done will bring about that effect.⁷⁶ This nexus of desire and belief is what Davidson

76. See DONALD DAVIDSON, *Actions, Reasons, and Causes*, in *ESSAYS ON ACTIONS AND EVENTS* 3-4 (2d ed. 2001). Crucially, Davidson suggests that one usage of "interpretation" is to understand the agent's reason for which an action was done. *Id.* at 9-10. The interpretation includes some of the beliefs and attitudes of the agent, as well as perhaps "goals, ends, principles, general character traits, virtues or vices." *Id.* at 10. To redescribe an action in this way can "place the action in a wider social, economic, linguistic, or evaluative context." *Id.* "To learn . . . that the agent conceived his action as a lie . . . is to grasp the point of the action in its setting of rules, practices, conventions, and expectations."

calls the “primary reason” for the action, and it roughly corresponds to what we mean when we speak of the purpose or intention behind the action.⁷⁷ To borrow Davidson’s example, suppose that I flip a light switch which, unbeknownst to me, alerts a burglar in my home to my presence. We can intelligibly describe salient aspects of that action in numerous ways: “I turned on the light,” or “I alerted the burglar to my presence,” or “I flipped the switch,” and so on. Each of these is a valid description of the action I have undertaken. According to Davidson, what it means to *understand* the reason behind the action is to understand the primary reason with which it was done, exemplified by the “I turned on the light” description of the action.⁷⁸ The primary reason *explains* the action, and if the belief component of the primary reason is true—if my belief that flipping the switch will, in fact, turn on the light is true—it also *justifies* the action. Thus, in understanding the actions of a natural person, an analysis of the beliefs and goals of that person is paramount. If legislatures were like natural persons, the primary reason for action would, in an obvious way, be the description of the action which conveys legislative intent.

The present point is rather simple: What it means to act for a natural person sometimes cannot stand for the actions of multi-member institutions such as legislatures or collegial courts.⁷⁹ Such institutions do not, in the usual sense, have beliefs or intentions. Their members do, and the beliefs and intentions of some members will invariably conflict. Thus, while we can explain the actions of the natural person members of the body along Davidsonian lines, the institution generally wills and acts only based on formalized procedures which define what it means to will or act for that institution.⁸⁰ Outside the context of such an abstraction, “action” and “belief” are largely meaningless. Because the “intention” of such an institution is not

Id. Davidsonian interpretation thus appears to be inherently purposivist, as the relevant inquiry cannot be undertaken without ascertaining the agent’s own beliefs and expectations.

77. *Id.* at 4–8.

78. *See id.* at 4–5.

79. I say sometimes because collective agency poses no special problems in the simple case where all members of the institutions have the same beliefs and desires. I ignore such easy cases in most of the analysis that follows. However, the existence of such easy cases means that arguments that it is *never* meaningful to look for legislative intent are obviously mistaken.

80. Kelsen took this approach when he posited, “Parliamentarism . . . is the formation of the directive will of the State [generated] by a collegial organ elected by the people” Adam Przeworski, *Kelsen and Schumpeter on Democracy*, in HANS KELSEN ON CONSTITUTIONAL DEMOCRACY: GENESIS, THEORY, LEGACIES (Sandrine Baume & David Ragazzoni eds.) (forthcoming 2024) (manuscript at 1, 3) (quoting HANS KELSEN, *LA DÉMOCRATIE, SA NATURE, SA VALEUR* (Charles Eisenmann trans., Econ. 1988) (1929)). In other words, the State *has no will* other than that which is generated through formal parliamentary procedure.

specified in the same way, when we speak of the intent of the legislature, we can be speaking only in some metaphorical, derivative sense.

One derivative sense is just to sum up the beliefs and utility functions of the meanings of the individual legislators. Social choice theory shows that mere aggregation will sometimes not lead to a meaningful, collective will.⁸¹ Some leading textualists believe that the fact that legislatures do not have primary reasons for action in the normal way is itself a reason to reject legislative intent for the “objectified intent” derived from a textualist reading of the document.⁸² The difference between the views advocated here and those of, for example, John Manning, may thus depend on the extent to which one thinks the lack of Davidsonian reason for actions eviscerates the possibility of having anything like legislative intent. For Judge Frank Easterbrook, the fact that the mere aggregation of the beliefs of individual legislators *may*, for reasons of social choice theory, not lead to anything like a group Davidsonian primary reason is sufficient to reject the notion of legislative intention entirely.⁸³

81. An obvious example occurs with what the literature calls the discursive dilemma or doctrinal paradox. *See, e.g.*, Christian List & Philip Pettit, *Aggregating Sets of Judgments: Two Impossibility Results Compared*, 140 SYNTHESIS 207, 208 (2004). In situations which display the conditions of the doctrinal paradox, there exists no one meaningful way to aggregate even the *beliefs* of a set of individuals, much less their desires. Suppose John has committed a murder only if he intended to kill the victim and actually did it. Three judges must decide whether he was guilty by majority vote (not the case with our legal system, obviously). Judge A believes both conditions are met. Judge B believes John wished to kill the victim but was not the one to actually do it. He believes James beat John to the punch. Judge C believes that John did not intend to kill the victim but did so by accident. If we merely ask whether John committed the crime, the panel of Judges A to C say “no” by a vote of 2-1, for only Judge A believes John committed the *actus reus* while possessing the relevant *mens rea*. However, if we aggregate over each component separately, by a vote of two judges to one, the panel believes both that John committed the relevant *actus reus* and possessed the relevant intent to kill, each by (separate) 2-1 votes. It would thus appear, by this method of aggregation, that the panel believes John to be guilty by majority vote. As there is no principled reason to choose one method of aggregation over the other, there is no real answer to whether the group of judges “believe” that John is guilty. The question of what the group believes has no answer in a manner with no parallels to the beliefs of a natural person.

82. *See, e.g.*, John F. Manning, *Textualism and Legislative Intent*, 91 VA. L. REV. 419, 421, 424, 433, 438 (2005) (quoting 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., 6th prtg. 1998).

83. Easterbrook, *Statutes’ Domains*, *supra* note 32, at 547–48 (stating that, as a consequence of modern public choice theory, legislatures simply have no “intents” or “designs” behind statutory enactments because “it turns out to be difficult, sometimes impossible, to aggregate [individual legislative preferences] into a coherent collective choice” (citations omitted)). The answer given by Kelsen to the problem raised by Easterbrook, Justice Scalia, Manning and other textualists (half a century before they began to press the argument) would seem to be that collective intentions and wills are of a different kind than those of individuals. If legislative intent is a metaphysically different thing than a head-counting aggregation of the wills of the individual members, then Judge Easterbrook’s argument would seem to be clearly beside the point.

Note, however, that it is not always the case that an arbitrary or undefined legislative intention renders a quest for aggregative legislative purpose meaningless. First, the social choice results important to Judge Easterbrook's argument are impossibility results, in that they show that it is impossible to *guarantee* that certain desirable properties will fall out of collective decision making no matter the preferences of individual (in our case) legislators.⁸⁴ Paradoxes of collective choice, even in cases covered by these impossibility results, may not occur, simply because the distribution of preferences or beliefs do not line up so as to create the kind of problem presented by, for example, the discursive dilemma.⁸⁵ Such cases will be like a situation in which all members of a city council vote to lower the speed limit on Main Street in response to a string of recent automobile accidents. It may be the case that every single member (or at least most of them) had both the same belief—that lowering the speed limit will lower the incidence of accidents—and the same desire—to lower the incidence of accidents—and thereby the same Davidsonian primary reason for action. Unanimity of will in this sense mitigates the problem of collective agency, although, for such complicated cases as congressional voting on legislation as comprehensive as the Affordable Care Act, we cannot expect any sort of parallel to this simplified example.⁸⁶

84. The most important of these results is Arrow's Impossibility Theorem, which states that, when there exist three or more options, there exists no ranked choice voting system which can guarantee a complete and transitive ranking over the alternatives which displays four important indicia of rationality: unrestricted domain, Pareto efficiency, non-dictatorship, and independence from irrelevant alternatives. See, e.g., Michael Morreau, *Arrow's Theorem*, STAN. ENCY. OF PHIL. ARCHIVE (Nov. 26, 2019), <https://plato.stanford.edu/archives/win2019/entries/arrows-theorem>. Other important social choice theorems cover different restrictions and limitations on guaranteed outcomes or sacrifice the goal of a complete ranking, for example, seeking only a single winner. See Christian List, *Social Choice Theory*, STAN. ENCY. OF PHIL. (Oct. 14, 2022), <https://plato.stanford.edu/archives/win2022/entries/social-choice>.

85. See *supra* note 81, for a discussion of the discursive dilemma. Note that if A and B voted yes for both the *actus reus* and the *mens rea*, there would be no problem aggregating beliefs into an unambiguous, coherent whole. The problem emerges wholly from the specific distribution of preferences concocted.

86. To some readers, it may be puzzling that I would utilize the conceptual frameworks of Davidson and Austin in this essay, as opposed to that of Gricean pragmatics. See, e.g., John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 72 & n.7 (suggesting that purposivist focus on the potential for legislative misstatement of intended meaning can be based on Gricean pragmatics). For a very quick explanation of Gricean pragmatics, see Kepa Korta & John Perry, *Pragmatics*, STAN. ENCYC. OF PHIL. (Aug. 21, 2019), <https://plato.stanford.edu/entries/pragmatics/#Far 1.2>. While I am far out of my depth here as a philosopher of language, my understanding is that, crudely, Gricean pragmatics is still a theory of the *meaning* of an utterance, even if we have to look beyond anything remotely contained in the words used, into the background circumstances of the utterance, in order to extract meaning. It is hopefully clear at this point that I wish to direct focus away from the meaning of the words on the page to an action—an attempt to have a substantial effect of one kind or another on the form of life of a legal and political community, through a change in the norms of behavior

In other cases, even when legislative intentions or purposes would aggregate in undesirable ways, there would be no special problem for purposivism. Take the situation in which preferences in the legislature present a Condorcet cycle: A legislative majority prefers Option A to B. A separate majority prefers B to C, and another prefers C to A.⁸⁷ By the current legal rule, A would easily be beaten if B was brought to a vote (suppose we know this with absolute certainty). However, if what mattered was pure legislative intent, we also know that B cannot be the legislature's true intent, nor could C. Any of the three would be beaten by one of the others. Thus, it does not make sense to say that the legislature prefers any of the three options.

We must remember here that what the legislature wills is not law. Only that which is properly enacted in the form of a statute is law. The existing statute dictates that A is the law of the land. The electoral coalition which voted for the statute which dictates A had reasons for doing so. There is no difference in kind between these reasons for acting and those behind any other statute. The situation is not unique to the extent that, looking at the current distribution of preferences in the legislature, we know that the current law would be overturned were a new statute enacted today. Throughout the enacted law of a sufficiently advanced legal system, there will be plenty which would not be enacted were the legislature to enact a law on the same topic now. This is especially true in a system, like that of the United States, where multiple veto points prevent the seamless transition of bare legislative majorities into legislation.⁸⁸ This also holds for systems without this feature—for example, because no legislative will would exist for writing and enacting a bill of any kind on a given topic at a given time, perhaps because the legislature feels it is busy with more important things at the moment. We can think of countless fact patterns which present problems where the legislature would not enact the current law today, perhaps even cases in

which are enforced upon that community by legal institutions. The focus should not be on the meaning of the words used, but what the words used evidence with regard to the action that the legitimate lawmaking authority has attempted to undertake. If the reader will forgive the analogy, the words of the statute are evidence left at the scene of the crime; we worry less about what they *say* than what we can gather from them about what has already *happened*.

87. This would occur with the following three voters and preference profiles: John prefers A to B to C. James prefers B to C to A. Jennifer prefers C to A to B. C beats A by a vote of 2-1, A beats B by the same margin, and B beats C similarly. For any given alternative, that alternative beats exactly one other possibility and is beaten by the other.

88. See, e.g., KEITH KREHBIEL, PIVOTAL POLITICS: A THEORY OF U.S. LAWMAKING (1998) (discussing the need for agreement between "pivotal" actors, such as the median voter in the House and the 60th voter in the Senate, needed to overcome a filibuster, to break legislative gridlock).

which it enacted the law yesterday which would not be enacted today (say, because two legislators who would have voted against it were out sick).

The solution to the puzzle must be found in the fact that only those acts of legislative volition which are properly enacted as statutes are an appropriate topic for intent-based interpretation, so that the relevant intent is something like that of the enacting coalition, not of the current majority. If A is the law today, it is, as a matter of brute statutory interpretation, the intent of the enacting coalition of A, which matters, precisely because A is what has properly been enacted as law. It does not matter that, for whatever reason, there exists a legislative majority which would prefer B to A but which has not yet had the opportunity to enact its preferences as law.

In other words, the Condorcet cycle, despite being a particularly acute problem in social choice theory which destroys the usual notion of collective intent, presents no conceptual problem regarding legislative intent. It shows that some of the problems of social choice theory are not damning for purposivism even where the preference profile at issue displays undesirable features from the perspective of collective rationality. It does, however, present a problem concerning political morality. To borrow the language of Dworkinian constructive interpretation, I hesitate to say whether legislative intent, viewed in my sense, is a matter of fit or of justification. As a reminder, Dworkin thought that legal interpretation was the balancing of two tasks: fitting extant legal sources and justifying those sources as a sort of coherent and morally justified whole.⁸⁹ An interpretation which better fits the sources is preferable, all else equal, and so is a morally superior justification, with the interpreter forced to sometimes make an all-things-considered judgment as to whether, in a given context, fit or justification is more relevant. Sometimes justification of the law will require disregarding what best fits the sources, in our example, currently enacted A.

In the argument that I am making, legislative history is almost itself a matter of analyzing the brute social facts which led to the legislature enacting what it did, with limited exercise of practical reason involved.⁹⁰ The relevant

89. See, e.g., RONALD DWORKIN, *LAW'S EMPIRE* 176 (1986).

90. I say "limited" and not "no" exercise of practical reason, because there will be information regarding the motivations and beliefs of the relevant parties which are not available to us, and, therefore, where we must reconstruct their own exercises of practical reason, which cannot be done without utilizing our own faculties. That is, I think that our strongest tool for understanding the beliefs, desires, motivations, and so on of another person is to use our imagination to put ourselves in their position and ask what we ourselves would want were we sufficiently like them (e.g. would I want x instead of y if my preferences and beliefs were as I understand the person whose intentions I am predicting to be). Gaps in our predictive knowledge will naturally be filled in by what we believe, wish, etc., or, very commonly, what we believe any reasonable person in such circumstances would believe, wish, etc. when placed in the position we imagine ourselves to be in. This is, of course, central to Justice Scalia's argument against purposivism, an

faculties are those of, say, the historian, analyzing the motives of the interest groups and politicians involved in assembling a majority coalition for the legislative enactment. However, the Dworkinian dimension of fit must be considered here as well. Suppose the statute is very old, written in a time where legislators had views on, say, race relations which would be considered abhorrent by a large majority of today's citizens and legislators. Should the court follow the intentions of the enacting coalition or the intentions of the current legislative majority, when, we will say for the sake of argument, the judge knows with absolute certainty the current legislature would overturn the statute if it had the opportunity to do so? The purpose of my placing the prior legislature's intent in the domain of past sources to be "fit" is to be clear that, as a matter of constructive interpretation, the judge may feel bound to ignore the wishes which constitute legislative intent and side with contemporary morality. Construing legislative intent in this way thus renders the problem analogous to the problem with whether the judge should follow the most obvious reconstruction of the logic of a line of morally wicked precedent or creatively reinterpret it, a problem familiar to any theorist familiar with Dworkinian legal theory.

Again, I make the distinction to stress that this is not a specific problem with purposivism or legislative intent. The Condorcet cycle merely presents one class of reasons for thinking that following the statute, properly constructed, may sometimes bind courts and citizens to a substantially lower duty of fidelity than it might in the ordinary case, because the current legislative *status quo* is morally arbitrary and less worthy of respect than were no such problem present. Precisely because we have a Condorcet cycle, we cannot say that what the legislature really wants is B (it would prefer C to B and so on). The case for overturning what the legislature that enacted the *status quo* legislation intended at the time of its enactment as a matter of Dworkinian justification thus weakens from "extraordinarily strong," in the case of the wicked old statute, to "non-existent" in the case of the Condorcet cycle. The lesson here is that the problem has almost nothing to do with the nuances of social choice theory and preference aggregation quirks, as judges face the same sort of moral dilemma for completely different reasons on a regular basis.

Another conceptual difficulty concerns dealmaking in the legislature. Take a recurrent situation in American politics: brinkmanship over the raising of the debt limit between a congress of one party and a president of

attack I attempted to blunt earlier in this essay. See *supra* Part I, for a discussion of Justice Scalia's argument.

the other.⁹¹ The Democrats, say, wish for the debt limit to be raised with as little violence as possible coming out of the negotiations for past spending programs, while the Republicans wish to extract concessions, largely in terms of reduced spending on these programs, as the price of averting economic catastrophe. The only real legislative intent may be to make a deal minimally acceptable to both sides, with each side of approximately equal power. Here, aside from the weak agreement that some deal is to be made at all, the “interests” involved are a composite of two sets of considerations moving in opposite directions—one to preserve, say, Social Security as is, the other to cut it. A given word choice may be the only thing the two sides could agree on. Fleshing out how the word was to be interpreted, one way or another, might entail taking a position that a majority of the enacting coalition would have voted down had it been before them. What can we say about the legislature’s intent? This problem is substantially more complicated than the Condorcet cycle problem and presents a failure of legislative intent which has potentially very little to do with the abstractions of social choice theory. The next Part deals with developing a version of purposivism sufficient to deal with it.

IV. “THE LAW” AND “A LAW”

The last Part dealt with complications of attempting to understand legislatures as agents with beliefs and intentions like those of natural persons. That question is important, because the argument thus far is that legislatures are sufficiently like parents or bosses—natural persons with primary reasons for action in the usual sense—to draw important lessons for how we should interpret their speech acts. Namely, I argued that the usual and proper interpretation of the commands (general or otherwise) of an authority figure takes into consideration the purposes for which the command was given.

This necessarily focuses our discussion on the nature of the object of interpretation for a legislative speech act. Various legal philosophers have noted that we use the word law, in a number of different ways, but if we fail to grasp precisely how one usage of “law” is related to another, philosophical confusion results.⁹² For present purposes, I believe only one such distinction to be crucial. I hope to capture this distinction by treating my usage of “the

91. The debt ceiling has been raised 78 times since 1960. *Debt Limit*, U.S. DEP’T OF THE TREASURY, <https://home.treasury.gov/policy-issues/financial-markets-financial-institutions-and-fiscal-service/debt-limit> (last visited May 12, 2024). At the time of this writing, the national debt ceiling is suspended through January 2025, as a consequence of the Fiscal Responsibility Act of 2023, § 405(a), Pub L. No. 118-5, 137 Stat. 10, 48 (codified as amended at 31 U.S.C. § 3101).

92. See, e.g., *Introduction to RONALD DWORKIN, JUSTICE IN ROBES* 1–6 (2006).

law” and “a law” differently. By “the law,” I mean the system of social rules and practices which have binding force over a particular legal community. The law consists of rules for conduct that bind individuals insofar as members of a shared legal community take these rules as (a) more-or-less authoritative reasons to act one way instead of another; and (b) standards of criticism for the conduct of themselves and other members of the legal community. This is the law of a legal community, just as we might speak of the law of morality of a social community. The law maintains continuity with and either reinforces or exists in tension with other normative systems, such as the rules of morality and social norms of conduct, although the strength of this continuity is an open question depending on one’s theory of jurisprudence.⁹³

If “the law” refers to the entirety of such a system of rules and practices, “a law” has a dual meaning, referring both to a particular social artifact generated by legal institutions (legislatures, administrative agencies, courts, etc.) for the purpose of somehow effectuating a change in the law and to the act of volition which gave rise to that artifact, say, the taking of a vote in a legislature. In other words, when we speak of a law passed by Congress, we can refer either to the statute itself, a social artifact, or the set of norms enacted as an act of legislative volition. The connection between the two senses is that the statute itself is both the mechanism through which the legislature exercises volition and the way it expresses what norms it wishes to enact.

When a legislature legislates it produces a statute for the purpose of effectuating some sort of change in the system of norms and practices governed by the “the law” sense of law. Thus, if it is the case in a given legal community that people drive on the right side of the road (by either custom or existing law), the legislature can enact a statute stating: “Henceforth, vehicles are to drive on the left side of the road” in order to change the social practice. In a centuries-old way of speaking, the interpretation of the act of legislative volition must presume two things. First, the legislature had some situation it sought to address—some “evil” it wanted to remedy—through the enactment of a law. Second, it decided on some mechanism, in the form of a change in human behavior, which it thought would combat this evil in a relevant way. Borrowing Davidson’s terminology,⁹⁴ we might, in a somewhat metaphorical way (again, because of collective agency problems

93. For further discussion of the connection between moral and legal normativity, see Jordan L. Perkins, *Social, Legal, and Moral Norms*, (Dec. 12, 2022) (unpublished manuscript), https://papers.ssm.com/sol3/papers.cfm?abstract_id=4299547.

94. See *supra* notes 85–86 and accompanying text.

in non-trivial cases), say that the *primary reason* for the enactment of the statute was to change the underlying social practice—cars will switch from driving on the right side to the left, in order to, say, reduce the number of traffic fatalities caused by people driving toward the sun during rush hour traffic.

Such purposes are built into the very concept of legislation and into the justification for having a legislature in the first place. Legislatures are simply the institutions empowered by democratic societies to engage in the kind of norm-making just described. In the simple example just provided, I take for granted that we can say, without too much mystery, that the legislature *intended* to modify the system of social practices of the legal community over which it has authority. This is true even if some individual legislators did not intend any such change, but instead were promised a bribe conditional on their affirmative vote. The evil that the legislature intended to remedy, and the strategy taken for remedying it, are recoverable no matter the subjective intentions of individual legislators. Recall the obvious point that a natural person must believe that doing (action) X will cause (outcome) Y and intend for Y to occur for us to say that he or she has purposefully acted, that is, has undertaken a course of action guided by reason. In the same sense, it is part of the speech act of legislation that there must be both an intended outcome Y and a belief that doing X will cause Y for there to be a rational act of legislative volition. The old way of speaking is, in a strong sense, built into the fundamental concept of an action.

Importantly, it need not be the case that all—or even any—legislators individually willed the primary reason for action so defined. This is another reason to doubt that legislative purpose should be defined as an aggregation of those of individual legislators. Take the same example as before, but suppose that all members of the majority coalition voted only to receive a bribe. Receiving a bribe still could not possibly be the legislative purpose of the appropriate sort. For one thing, it is exceedingly unlikely that any member of the enacting coalition would publicly admit that he voted for the bill for that reason. The corrupt legislator would publicly profess a more respectable reason for voting for it when pressed by their constituents or the media, one which at least purports to explain how the statute is supposed to advance the common good. As another basic point, the legislature itself cannot receive a bribe. Only individual legislators receive bribes, and this is true even if *every* legislator receives a bribe.

“Objectified intent” exists here in a quintessentially purposivist way: The legislative intent is recoverable if we presume that the legislature “was made up of reasonable persons pursuing reasonable purposes reasonably”

and interpret what it has done accordingly.⁹⁵ We are not performing psychoanalysis on individual legislators, pace with Judge Easterbrook's understanding of what legislative intent must look like,⁹⁶ but instead we are looking for an interpretation of the speech act by which that act makes sense as an act of legislative volition. We treat the legislator as a reasonable person (and a respectable one) and interpret his intentions accordingly, even where he has accepted a bribe or is too derelict in his responsibilities to have any idea what is in the bill he votes for.

This reasonable, publicly professed reason is the one which ultimately grounds the vote as something worthy of respect as a matter of democratic theory. The acceptable reason for supporting a law is to support its likely effects on the background norms and practices of a social community as somehow making the world a better place than it would be were the law not enacted. Law makes sense only as an intelligible human action—the sort of thing which can be interpreted at all—only through the presupposition that something like a primary reason for action is behind it, and it makes sense as something worthy of a duty of fidelity only insofar as it was arrived at through a good-faith attempt to make society better through serving the interests of citizens. Legislators act not as ultimate sovereigns, but as agents to whom part of the sovereign power of the political community has been delegated, and their duty is to exercise their power only to advance the welfare of the governed. The fundamental logic of our democratic system may thus force us at times to attribute to the legislator reasons for action which are more public-spirited and reasonable than those he actually possessed. In partial defense of this, I reiterate only that the further this reasonable legislature abstraction diverges from the beliefs and interests of members of the majority coalition, the more the duty of faithful agency to the legislature is weakened, and the more creativity the judge must exercise to make of the existing statute what she can.

Textualists sometimes concede that the interpretation of contested statutory language requires attributing to the legislature a form of purpose or intent, which they call “objectified intent,”⁹⁷ that is, the intent recoverable from the fair meaning of the statute devoid of legislative history and other extrinsic context. I agree. What I am saying here is that, in order to both make sense of legislation as part of the basic machinery of a pluralistic society and to conceive a given statute as an object of rational interpretation at all, we

95. HENRY M. HART, JR. & ALBERT M. SACHS, *THE LEGAL PROCESS* 1378 (William Eskridge, Jr. & Phillip Frickey eds., The Found. Press, Inc. 1994) (1958).

96. *See supra* note 83 and accompanying text.

97. *See supra* note 37 and accompanying text.

may be forced to interpolate one intent or another onto the legislature that was not actually there, either the objective intent of the textualist or the intent of the purposivist as just outlined. In some cases, neither form of purpose will reflect something actually attributable to the act of legislative volition embodied by the act of lawmaking, if that is what we truly care about. Attributing either of these purposes to the legislature will thus sometimes be fiction. My labeling them as *constitutive* fictions is deliberate: They are fictions without which the entire game of analyzing legislation by a collective body as an output both worthy of respect and susceptible to rational analysis—for example, to analysis by the traditional tools of the judge—sometimes cannot get off the ground at all. At any rate, as Hart and Sachs emphasized, the fiction of searching for the purposivist's kind of legislative intent may be no more than to look for what a reasonable legislature would have intended had it enacted what the legislature actually enacted.⁹⁸ This presumes the statute is worthy of the dignity of legislation, appearances sometimes to the contrary, because, otherwise, there is no reason to afford it that dignity and care what it says at all. Viewed in this light, purposivism is part and parcel of what it means to care about legislature-centric democracy as normatively valuable, a point already made, in another way, when I argued that Justice Scalia's faithful agent theory is not faithful enough to count as a *faithful* agent theory precisely because it is not purposivist.

Now, any resolution to the important, unique problems for the philosophical analysis of law and language depends on our analysis of the connections between law in the “the law” and “a law” senses. The interpretive puzzle is precisely how a social artifact composed of a set of linguistic signs can be used to purposefully modify a social practice which is itself largely non-linguistic, by which I mean only that most of the conduct regulated by the law consists of actions which are not themselves merely the creation and use of linguistic signs.⁹⁹ The people of a society do things in a given way, or, at least, to the extent they understand and internalize the legal norms of the system, they understand failure to do things in that way as a justification for criticism and censure.

The puzzle is one of two levels of translation, by which I mean a transformation from one type of thing into something which is, metaphysically, fundamentally different. Some subsets of the political or legal officials of a community wish to have some sort of effect on the law.

98. Manning, *supra* note 86, at 76 n.22 (discussing HART & SACHS, *supra* note 95, at 1374–81).

99. Even if we execute a contract, a form of legal writing, the purpose of doing this is to have some sort of effect on a body of commercial practices; the relevant conduct being regulated is not the contractual language itself.

As in the “driving on which side of the road” analogy above, there may be an explicit legal norm that they want to *change* to some other norm, say, instructing the community to start driving on the other side for one reason or another. There may be an existing legal norm whose content is uncertain in at least some subset of cases whose content they wish to clarify, as in a case where it has hitherto been unclear which side of the road people are to drive on. Conversely, the lawgiver may worry that an extant norm that he prefers will at some point change, perhaps that a given social custom will evolve into something else. Here, he can use the enactment of a law in an attempt to *preserve* an extant norm against future change.¹⁰⁰ We might *create* a norm in an entirely new area where none existed beforehand. For example, it may have once been the case that people drove on whichever side of the road they wished, causing a number of preventable accidents, so that a norm of driving on the right side was established by legislative fiat. Slightly differently, it may be clear that we have one norm or another which governs the situation at hand, but there may be reasonable disagreement regarding the content of that norm. We might then use the force of law to clarify a hitherto ambiguous social norm. The reader can perhaps think of other examples of types of concrete effects a positive law may be enacted to effectuate. This is, again, in the old way of speaking, a combination of an evil or problem that the legislature sought to address and the means the legislature has chosen to fight that problem.

The important point is that there exists a background set of norm-governed social practices on which some set of lawmaking agents intend to have some sort of effect, but that having this effect in a direct sense, through, say, directly altering the patterns of behavior of the citizens of the society, is impossible. Thus, our lawmakers put some words on a page, give those words legal sanction, and hope that doing so will, through some intended causal pathway, have the intended effect on the underlying body of social norms, and thereby, of behavior. Once this social artifact is generated, both individuals in the legal community bound by the law and officials—primarily judges, who serve institutionally as the official interpreters of the law—must determine precisely how this social artifact should modify the system of rule-governed standards and practices binding on the legal community. Thus, there is an intended effect on a body of norms in the minds of some set of agents, which is translated into a legal text, which is translated into the actual

100. An important and obvious example exists where a statute-like legal norm is written into a constitutional text to protect it from being changed by a future legislative majority. Law thus may be used to protect norms against change by other laws as well as to protect norms from being altered through changes to conventional morality or social customs.

body of norms, which is applied to discrete persons by courts and other legal institutions. The primary reason for action is a connection between present norms and a text, and between that text and future norms.

The causal connection between, first, the desired change in the system of standards and practices which the enacting subset of the law-making body intended and, second, the actual change (if any) in the system of rules and practices which make up the law, is based on a complicated set of often strategic interactions between individuals and institutional actors well beyond the scope of this Part. The purpose of this Part is to note the oft-ignored point that successful lawmaking is a function of the interplay between these two stages of translation: The lawmaking body can effectuate its desires regarding the law only through producing a law, and whatever change actually results within the law involves the purposive action of numerous other institutions and persons with regard to the particular law. To the extent that a lawmaking exercise is authoritative, these institutions must engage in good faith interpretation of the lawmaking act, an interpretation, I have argued, which involves both the typical philosophical puzzles of interpretation, which Wittgenstein and Austin addressed, and the special problems of interpretation of an institutionalized collective will familiar to any student of the social choice literature. Here, our picture of the speech act is complicated: We look to the intentions of the legislature, as the institution with the power to act with authority, but we recognize that the legislature takes into its reasons for action the effects that any command it gives will have on both the executive and courts, as the institutions responsible for effectuating its will, and on the citizens to whom it gives authoritative commands in the first place.

We now have the tools to return to Justice Scalia's *Tanner Lecture* and explain why the distinction between strict and rational textualism is unstable. The problem, in light of my analysis above, is the divide between law in its "a law" and "the law" senses. A legislature enacts a law, a social artifact which consists of a set of printed signs. It is incorporated into the law only insofar as these signs are authoritatively interpreted so as to shape that set of social rules and practices. A law becomes part of the law only in accordance with the application of an interpretive methodology by judges. Furthermore, Justice Scalia failed to reason through this point, so he seems to fail to recognize that his argument for textualism at times begs the question: If the argument is how best to amalgamate a law into the law, one cannot treat his interpretive philosophy as if a law, in its uninterpreted, social artifact form, has the force of the law. The text itself is of the wrong type of object to play the role that Justice Scalia took for granted. It is not itself a norm of conduct to be applied to the specific cases which come before the judge. It must be

translated, in the language I have used, and the text itself cannot govern the act of translation.

To restate the point as succinctly as I can, Justice Scalia's language suggests that he failed to grasp that a law cannot bind until interpreted—it cannot be “observed” in itself, to use the quoted expression above—and thus to suggest that a law binds anyone (judge or citizen), if intended as anything other than a rebuttal of strongly anti-textualist philosophies, places the interpretive cart before the horse.¹⁰¹ What is needed, as I put it above, is a metaphysical translation from one type of entity, a set of verbal signs recorded into the pages of a statute book, into another, a set of norms of conduct binding individuals in the real world. Precisely what is needed to effectuate this translation in a principled way is an interpretive theory which takes us from text to normative standards governing social practice. Our question then becomes what our theory of proper translation should be, taking into account both our commitments at the level of democratic theory and what it means to meaningfully interpret text, speech, and human action more generally in the first place. The first requirement is of political morality, the second is what it means to take seriously the words of someone with legitimate authority over us as a conceptual matter. An implicit premise of Justice Scalia's argument seems to be that formalism allows for a sufficiently bare-bones interpretive theory that need not be elaborated in detail at all.

There is, of course, a colorable argument that I am poorly interpreting Justice Scalia here. The pro-Justice Scalia argument I have in mind can be adapted, perhaps ironically from my perspective, from Quentin Skinner's ruminations on the implications of J. L. Austin's philosophy of language for the interpretation of historical texts.¹⁰² To use one of Skinner's examples, we

101. Justice Gorsuch frequently makes the same error explicitly. See *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1737 (2020) (“When the express terms of a statute give us one answer and extratextual considerations suggest another, it's no contest. *Only the written word is the law*, and all persons are entitled to its benefit.” (emphasis added)).

102. See 1 QUENTIN SKINNER, *Interpretation and the Understanding of Speech Acts*, in VISIONS OF POLITICS 103, 103 (2002) [hereinafter SKINNER, *Interpretation*]. I use *ironic* because of Skinner's general approach to interpretive methodology. See 1 QUENTIN SKINNER, *Meaning and Understanding in the History of Ideas*, in VISIONS OF POLITICS 57, 86–87 (2002) [hereinafter SKINNER, *Meaning*]. Skinner states:

The understanding of texts, I have suggested, presupposes the grasp of what they were intended to mean and of how that meaning was intended to be taken. To understand a text must at least be to understand both the intention to be understood, and the intention that this intention be understood, which the text as an intended act of communication must have embodied. The question we accordingly need to confront in studying such texts is what their authors—writing at the time when they wrote for the specific audience they had in mind—could in practice have intended to communicate by issuing their given utterances. . . . The social context figures as the ultimate framework for helping to decide what conventionally recognisable

might ask what Daniel Defoe meant in *The Shortest-Way with the Dissenters*, when he suggested “[t]hat religious dissenters [should] be suppressed and preferably executed.”¹⁰³ We might ask what the words on the page, as a social artifact, meant, to which the answer is trivially obvious: The words Defoe wrote mean that Defoe thought religious dissenters should be suppressed, and preferably executed.¹⁰⁴ It is quite another question to ask what Defoe himself meant in writing those words. To understand this, we need to know the context in which Defoe was writing, in which exhortations to persecute religious apostates were somewhat common, as well as the conventions of literary irony. What Defoe meant was thus precisely the opposite of what he wrote: In writing that religious dissenters should be suppressed, he intended to ridicule and discredit those who wrote the same in a sincere fashion.¹⁰⁵

In this light, there may be some sense to what Justice Scalia said in his insistence that the text means what it says, particularly in the way he expressed the argument against advocates of legislative intent. It would be completely unfair to enforce against citizens (especially the legally uneducated mass of citizens) norms against them which are different from those which are most consistent with what the legislature actually wrote, on the ground that the legislature, in context, surely meant something other than what it said. Justice Scalia made precisely this point in one of the quoted passages from his *Tanner Lecture* above.¹⁰⁶ While Justice Scalia stated this interpretive constraint as one placed by “democratic” and “fair” government, we would be justified to state it in stronger terms: It would be a gross abrogation of the principles of legality to interpret legal norms in a manner inconsistent with a fair reading of the enacting text, on the presupposition that the legislature had in mind something like an ironic meaning.¹⁰⁷ Thus, we can focus on an acontextual reading of the text, in the way that we can focus on the meaning of what Defoe wrote—this is exactly what it means to be a textualist.¹⁰⁸ Of course, legislatures do not enact statutes ironically or

meanings it might in principle have been possible for someone to have intended to communicate.

Id. at 86–87.

103. SKINNER, *Interpretation*, *supra* note 102 at 112.

104. *Id.*

105. *Id.*

106. *See supra* note 37 and accompanying text.

107. *See* LON FULLER, *THE MORALITY OF LAW* 33–39 (rev. ed. 1969) (laying out the “Eight Ways to Fail to Make [a] Law,” and the forms of failure regarding the principles of legality).

108. Textualists sometimes try to allow certain kinds of context to enter their interpretive apparatus. *See, e.g.*, *Biden v. Nebraska*, 143 S. Ct. 2355, 2378–83 (2023) (Barrett, J., concurring) (arguing at length that textualists utilize context regarding the meaning of words within the context they are used); Doerfler, *supra* note 39, at 269 (discussing that modern textualists see themselves as embracing linguistic pragmatism with regard to interpreting statutory language in context, in opposition to earlier four-corners

use other literary devices which create the sort of cleavage between what Defoe meant and what the words Defoe wrote meant, eliminating some of the possibilities for a disconnect between what the author meant and what the words he wrote meant.

The answer to this objection is that it's unclear how Justice Scalia could leverage it, given both his attempt to distinguish between strict and reasonable construction and his aversion to legislative history. Return to Justice Scalia's example from *Smith*: the statute says it is an offense to "use a firearm" during the commission of a crime.¹⁰⁹ Does it violate the statute to use a gun for purposes of barter? What resources would we consult to determine which interpretation is most reasonable? Surely, we *must* take into account the existing status quo of human behavior prior to the enactment of the statute, the sort of concerns that members of the legislature had in mind when they proposed the statute, and the way they intended for the statute to address whatever specific concerns they had. These considerations are the context which render the words on the page an *action* in the first place. Without these considerations, the legislative act cannot be understood, and we are left, to return to our analogy, with little more than Defoe's suggestion that perhaps religious dissenters should be killed. We have no way of ascertaining whether this is really what he *meant*. Even the anti-legislative intent crusader needs a version of legislative intent—or, more precisely, a jurisprudential theory which answers the question of how the process of *translation* (in the sense I introduced the term earlier) from legal text to legal norm should be undertaken. Further, as already suggested in several threads of argumentation above, the mode of translation chosen must also make sense of why we care what the statute says at all, an argument which is by far more easily made when we treat legislation as the general command of someone given democratic mandate to issue general commands.

The natural way of leveraging the distinction between using a gun as a means of barter and using it as a weapon is to reflect back on the primary

literalists); Molot, *supra* note 32, at 34–36 (discussing modern textualism's break with the legal formalism and its early 20th century ancestors). To retain a meaningful line between textualism and purposivism, the kind of context textualists allow in must preserve a line between context regarding the meaning of the words used and context regarding the purposes of the speaker. It would border on absurd to insist on analyzing Wittgenstein's builder's game while refusing to inquire into Adam's purposes when he calls for a slab or a block. And, even where doing so was not conceptually absurd, it will often, as in the case of the interpretation of legislation, be normatively undesirable to sever the link to speaker's intent. This is, again, because the only reason either the citizen or the judge is expected to show fidelity to the words spoken is because they represent the expression of the will of a principal with the authority to issue commands. Aside from its status as an expression of a principal's will, there is no normative reason to care what the statute says.

109. For an extensive discussion of this, see *supra* pp. 457–58.

reason for the speech act of enacting the standard in the first place. If the purpose of the statute was to reduce the number of violent crimes, then a strong reason should be necessary to override the presumption that “using a gun” should not be extended to cover nonviolent uses. My thesis here is that strict constructionism, of the sort Justice Scalia attacked above, is the danger we face when we do not fully contextualize the enactment of a law within the full body of social practices of the community which it is intended to govern, as the legislator himself understood them. The legal text’s salience is that it is the legal community’s best evidence regarding both the problem the lawgiver seeks to address through the exercise of legal authority and the solution the lawgiver intended to effectuate. It is, as per my last point, also the social artifact which puts citizens on notice of their legal obligations. The text of the statute is thus the best evidence the listener has as to the speaker’s intent, and the “original public meaning” of the statute is however the initial listener would have interpreted the speaker’s intent, presuming the cultural, moral, and linguistic norms the speaker and listener are presumed to have shared. It is precisely these shared norms which allow speaker and listener to come to a common understanding regarding what the speaker meant to convey, and it is arbitrary to cut off any of this context from the communicative enterprise.

This represents the conceptual argument for a certain kind of purposive interpretation. The category of speech act which we are interpreting cannot be interpreted as the kind of thing that it is without treating the legislature somewhat analogously to a natural person, and that goes for whether the interpreter is a citizen contemporary to the enactment or a judge interpreting it decades later. I should also say a few words about what I mean by a “certain kind” of purposivism. It is not what textualists sometimes call purposivism, or especially, “strong purposivism.” John Manning describes strong purposivism as if it always entails the possibility of overriding the meaning of clear statutory text with purported legislative purposes.¹¹⁰ This supposedly contrasts with the textualist, who will consult purposes in ambiguous cases, but not ones which would be clear to competent members of the interpretive community.¹¹¹ This does not track the distinction between textualism and purposivism in my argument.

First, I am arguing that the proper object of interpretation is not the text, but the act of legislative volition which produced it. I have already pursued this point at length. However, we can set this aside for the sake of clarifying a more fundamental disagreement about the nature of interpretation as such,

110. *See, e.g.*, Manning, *supra* note 29, at 10–12, 15–16.

111. *Id.* at 17.

one which in some way recapitulates the way that modern positivists misconceive traditional arguments for natural law theory. In no situation is the interpretation of a text self-executing. With any term, sentence, or paragraph within a larger work, whether a legislative code or a novel, we might ask whether the full context available concerning what the author was trying to do would have been best effectuated through the words chosen or some other permutation of words. It is conceivable that some combination of legislative history, background cultural history concerning the legislature and the society from which the statute arose, and the overall tenor of the statutory scheme will convince us that a straightforward, literal reading of, say, a specific sentence, given what we know about the beliefs and values of the enacting coalition and its constituents, does not best convey what the legislature was attempting to accomplish. This is not solely limited to drafter's error type cases. Any reader of novels, newspaper articles, or academic research will find situations where they question whether the writer's words adequately convey what we think the writer meant, given other contextual information available to us about the author and about the subject of the work.

With a writer at the level of Shakespeare, we might (perhaps erroneously!) think that odd word choices signal a deeper purpose we are meant to uncover, but not every writer of drug store novels or legislative draftsman is a Shakespeare. Where we inquire into the context behind the words chosen by the majority coalition in the legislature, we are not overriding the clear meaning of the text with legislative history, for example, but by using legislative history to achieve a fuller understanding of the text within the broader context from which it was produced than would be available from within the four corners of the document alone. It is precisely this sort of contextualization which allows us to determine, first, whether we are dealing with the deliberateness of a Shakespeare, and, second, what we should make of Shakespeare-the-legislator's words. In other words, there is no pre-interpretive interpretation of the statute, entailing that we cannot know what a statute really means before we consult contextual information concerning legislative purpose. If there exists a fiction behind assigning Davidsonian rationality to the subjective motivations of a legislature, there exists a fiction no more justifiable behind the idea that every word choice which, if read literally would produce counterintuitive or absurd results, nonetheless represents a deliberate legislative choice which must be respected. In many cases, absurd results will follow not from hard-fought

bargains, but from inartful drafting.¹¹² Of course, to the extent that there is information relevant to whether a deliberate deal was struck, the purposivist, in his quest for actual legislative intent, must decide whether the statute really means what it seems to say.

This is related to another argument made by Manning, based in contemporary public choice theory: Our constitutional structure creates numerous veto points which create opportunities for minorities to enact concessions in dealmaking with majority groups. These concessions will be reflected, at least sometimes, in carefully drafted legislative text that would not make sense absent the compromise made. Smoothing out inconsistencies, view-from-nowhere arbitrariness, and so on risks eliminating a fundamental feature of legislation baked into our constitutional structure.¹¹³ Of course, Manning's textualism does not entail that in *every* instance in which statutory text, taken literally, would lead to absurd results, we should assume that there existed a hard-fought bargain amongst legislators which created the absurdity and which must be respected as a matter of democratic theory. He merely argues that in *some* cases such statutory language will exist because of such a bargain and that an interpretive presumption in favor of respecting statutory language, as opposed to overriding it for purposive reasons, is the only method for respecting such bargains in those cases where they have in fact been made.¹¹⁴

Even if this is true, we cannot know that any particular language was the result of such a legislative deal or compromise absent the sort of context cues for which legislative history might be the best available source. A floor speech or debate might be precisely the best place to learn that the text of a statute has been modified to address the concerns of specific interest groups or constituencies. I am thus unsatisfied with the combination of views that we must cut off access to legislative history *and*, because we must cut off access to legislative history, textualism gets the nod over purposivism. This is largely because, unlike most textualists, I am not hesitant to allow courts to use legislative history amongst other context clues. It also might be worth noting that Manning's argument here relies on the particular nuances of the American system (and other closely related presidential systems),¹¹⁵ so his argument cannot suggest that textualism is superior to purposivism as a general matter of interpretive theory. Indeed, I am not sure that modern textualists such as Manning could leverage their arguments to suggest that

112. Scrivener's errors are one form of ambiguity which can be introduced through inartful drafting. See, e.g., Ryan D. Doerfler, *The Scrivener's Error*, 110 NW. L. REV. 811 (2016).

113. See Manning, *supra* note 86, at 99–109 (summarizing older arguments of his).

114. *Id.* at 105.

115. See *id.* at 73 (discussing bicameralism and presentment).

textualism has any advantages whatsoever over purposivism for Westminster systems.

Further, the idea that we simply cannot know when statutory language reflects a careful bargain (as opposed to being merely a mistake or the result of legislative carelessness) seems to me implausible. Newspapers may report the legislative wrangling over a bill which would evidence a good reason, on the interpreter's part, to be on watch for such a situation, and the legislative history could easily include a clear statement that such a deal was struck. Of course, it may be the case that the legislators involved may not wish to admit that such a deal was struck if it really would lead to foreseeable, absurd (or otherwise indefensible) results in certain cases. In this situation, we might wonder whether there does, in fact, exist a normative imperative to respect the deal struck: Supposedly, the legislature acts as an agent of the electorate, and there is little grounding for a plausible argument in democratic theory that courts and other interpreters must respect actions taken by an agent which the agent believes he could not justify to his principal without being fired. Contrary to Manning, we may find that a presumption *against* such deals—or a presumption that would allow courts to override them in favor of legislative purpose absent clear evidence of their existence—best serves democratic theory through the maxim that sunlight is the best disinfectant and that the legislature should be candid about its internal maneuvers which lead to results indefensible from the perspective of *a priori* principles. Again, one cannot merely reify the text as an artifact to be respected without reflecting on the reason we respect statutory text in the first place: In our system of law, the legislature is given a place of priority in deciding, on behalf of the people themselves, what the general norms of conduct citizens are expected to follow will be. The statute matters because it is the expression of legislative will, and the argument for respecting legislation from democracy is severed when one denies the existence of that will or suggests that we need not consult it to decide what a statute means. Textualism can preserve rule-of-law arguments for respecting statutory text, but it risks cutting off access to faithful agency arguments entirely.

Note that, to Manning's credit, he does not argue that the core distinction regarding the use of textual history is between those who inquire into purpose and those who do not. Instead, he argues that the hostility to legislative history is a distinct issue, with the textualist position best justified in the norm against legislative self-delegating.¹¹⁶ This, too, would seem unable to cut off the path I am trying to take here, whatever merit it might have had against

116. See John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673, 675 (1997).

his contemporary targets. The goal of using legislative history I am proposing is not for the purpose of applying missing principles or rules which have the same stature as the statute itself. Legislative history is but one sign of what was happening in the hustle and bustle of the legislative process. In some cases, it will be more useful than what contemporary newspapers reported about the bargaining over significant pieces of legislation. In other cases, it will be substantially less useful. One can imagine a situation where a bitter floor exchange between two representatives over the merits of the bill makes very clear both the mischief the bill was intended to fight and the method by which it intended to fight it, the gold standard for purposive contextual information, in which each side disagrees whether the mischief is really mischievous (or whether the means chosen to fight it will plausibly be effective), but neither has good reason to misrepresent the other's point of view on these matters. My position is simply that whether the relevant materials are analogously probative should, and in one way or another perhaps must, be left to the sound discretion of the court serving as interpreter of last resort. This is, I believe, the correct view to take as a matter of general principles, and only evidence that the courts of a given legal system are too incompetent or biased to carry out the exercise appropriately would lead me to temper the position.

Now, a question may arise whether, in a statute regulating animals raised to be used as food, "chickens" should be read more broadly to include all other birds raised for food, such as turkeys. Perhaps there is literally no reason grounded in public health to interpret "chickens" to mean "only chickens." From my perspective, the question is what the legislature actually intended. If, say, the turkey-for-food lobby was able to flex its muscle in order to get itself removed from the statute's explicit scope, respecting pure legislative volition will involve respecting the legislative compromise actually reached. This is a sound contextual reason to interpret "chicken" as "chicken," although perhaps one which cuts against the heroic mythology of parliamentary deliberation. One distinction between myself and textualists is that I am willing to invite the courts to undertake such an investigation into whether this is, in fact, the situation which led to the statute's passage with the language it contains. My understanding is that an Easterbrook or Manning would simply presume that it is without argument, as the principled best way to cut through the brute fact that legislatures are not Davidsonian actors. The present point may best be summarized by reiterating that a legislative intent to make a deal, even a deal whose concrete terms would look arbitrary from the point of view of Philosopher King Hercules (with apologies to Dworkin),

is still an intent which must be respected.¹¹⁷ However, before the court respects Congress's intention to behave arbitrarily (from the perspective of a realm of pure principle, unaffected by legislative horse trading), it should look for evidence that arbitrariness is what Congress intended. The strength of this evidence must be weighed against the extent of the arbitrariness of the interpretation: The weaker the evidence that Congress intended to behave arbitrarily, the less credence the court should give to the view that it must respect Congress's decision to do so. In effect, this creates something of a clear statement rule: If Congress wishes to concoct a deal which produces absurd or counterintuitive results, the circumstances and its actions should make entirely clear its intent to do so.

Recall that both Justice Scalia and I think that the reason for adopting one interpretation or another in the realm of statutory interpretation is found in the realm of a theory of political legitimacy.¹¹⁸ Justice Scalia's focus, in

117. A recurring problem exists where (a) there exists a legislative intent to pass a statute, but (b) there exists no majority coalition which would have enacted a statute specifying any particular interpretation. In such circumstances, the only recoverable legislative "intent" involved would seem to be that each side in the majority coalition compromise is willing to take its chances with an implied delegation to the implementing agency or court that its preferred interpretation will carry the day. *See, e.g., A Bill to Amend the Agricultural Marketing Act so as to Include Naval Stores: Hearing on S. 2354 Before the S. Comm. on Agric. and Forestry*, 71st Cong. 4 (1930) (memorandum of Frederic P. Lee, Legislative Counsel) (noting explicitly that vague language refusing to specify whether specific items were excluded from "agricultural commodities" for purposes of the Agricultural Marketing Act of 1929 was due to perceived pushback both on the Senate floor and at the presidential veto stage should any concrete interpretation be mandated). The *Chevron* two-step inquiry here makes particular sense as a purposivist move: if Congress has not clearly spoken to the specific issue, using the traditional tools of statutory interpretation (which, at the time of the *Chevron* decision, still meant the traditional tools of *purposivist* interpretation), any interpretation which is not clearly foreclosed by statutory text is allowable as within the authority delegated by the statute. *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984). Here an attempt by the delegee to effectuate the overall statutory goals to the best of its ability is likely the best way to effectuate whatever intent the legislature possessed, since kicking an insolvable controversy down the road for the delegee to solve is the only recoverable legislative intent on point. *Chevron* itself recognized this possibility when it considered the possibility that "Congress was unable to forge a coalition on either side of the question, and those on each side decided to take their chances with the scheme devised by the agency." *Id.* at 865. There, of course, exists a clear conceptual difference between a legislative intent to foreclose a given interpretation and a legislative intent to fail to specify whether that interpretation is foreclosed. Despite this, deciding which the legislature "intended" may be difficult in any particular case. In such situations of ambiguity, a default of expansive interpretive license to achieve overall statutory purposes makes sense, whether interpretive discretion is vested in the agency or the courts. I thank Beau Baumann for the specific legislative history example.

118. Or, as Caleb Nelson helpfully put it, statutory interpretation can be a quest for one of three things: speaker's intent, reader's understanding, or something else based on policy (or other) goals extrinsic to the speaker-reader relationship. Nelson, *supra* note 73, at 351. Any morally sensible theory of statutory interpretation will take all three into consideration. Standard forms of liberal constitutionalism take seriously both the legislature's primacy as a norm-making institution, which requires a focus on speaker meaning, and rule-of-law notice values with regard to citizens, which entails a focus on reader's understanding. *See Perkins, supra* note 7, at 185–86. And no sensible judge will be blind to whether a

the *Tanner Lecture*, was on cabining the discretion of judges by binding them to the statute, as the act of legislative will.¹¹⁹ However, I think Justice Scalia would agree that the reason that we respect the statute is because it is the embodiment of how the legislature, as the democratically legitimate institution for encoding normative judgments into law, has instructed us—lawyer and citizen—as to what those normative judgments are. Thus, we may ask whether it is important to give our best effort to the task of faithfully interpreting what the legislature was trying to do, even if this may at times run up against the goal of cabining judicial discretion by limiting degrees of interpretive freedom. Suppose that we get more information of relevance to this inquiry by considering legislative history and other contextual evidence of the sort Justice Scalia denigrated. The question then arises: Does democratic theory demand that we give our best effort at obeying the commands of those who have the authority to give them or that we restrict the discretion that agents such as judges have in interpreting and executing those commands? As a matter of general principal agent theory, we might think it more important that the agent successfully do what the principal wills than that the agent's discretion is as tightly limited as possible, especially where limiting the agent's discretion may come at the cost of frustrating the principal's intent. To return to the analogy, there are circumstances in which it might *really* matter what Defoe meant, and in which we might not want to be strictly limited to the four corners of the text. If we think that democratic legitimacy actually requires judges and other officials to obey the authoritative commands of legislatures as embodied by enacted statutes, my argument is that we should prioritize what the legislator *meant*, as a matter of the kind of purposive interpretation just suggested.

There exist a number of open questions worth briefly exploring here. One concerns the level of generality at which the statute should be interpreted. An important point, drawn from the textualist criticism of purposivism, is that legal enactments can be read at multiple levels of generality, endowing the interpreter with a great deal of interpretive freedom. Particular statutes may be read to embody either rules or standards.¹²⁰ Thus,

purported interpretation is grossly unjust or would cause significant harm to the economy without advancing other substantive values. In other words, one can argue, as a theory of adjudication, or of executive power, or of something else, that someone (say, judges) should not engage in faithful interpretation because the risks of doing so outweigh the benefits. Such an argument does not transform a theory of adjudication which argues against faithful interpretation into a theory of faithful interpretation. However, Justice Scalia (and other interlocutors), as we have seen, seem to be at times offering a theory of what interpretation itself just is.

119. See Scalia, *supra* note 13, at 89.

120. On the distinction, see, for example, Nelson, *supra* note 73, at 374–75. Nelson writes:

in the classical law framework, every law (properly so called) has the aim of advancing the common good of the political community.¹²¹ Where two rival interpretations stand in a state of perfect equipoise, it might make sense to prefer the interpretation which best advances the common good. However, if this presumption is taken as strong as possible, any statute can be read as setting forth the standard that the judge should do whatever best advances the common good, regardless of the actual statutory text, rendering the statute's explicit text meaningless. A speed limit of 35 miles per hour can thus be read as a rule, as a principle intended to reduce automobile fatalities, as a principle advancing public safety generally, or as a principle advancing the common good in general. Textualists such as Justice Scalia rightly worry that giving the interpreter complete freedom to choose the level of generality strongly restricts the legislature's ability to set norms dispositively.

The answer, in accordance with the model of faithful agency laid out in this Article, is that the interpreter must seek to respect the level of generality actually chosen by the legislature. I have argued that where the legislature wishes to have the precise terms of a deal respected, it has ample resources to provide the contextual information to show its "intent," including whether compromises were struck which render its intent arbitrary from the perspective of pure principle. Where Congress wishes to empower the courts (or, often in the context of the modern administrative state, agencies) to pursue legislative purposes with minimal concrete directives, it can write open-ended statutory language and leave the details to be filled in through administrative regulations or common law reasoning.¹²² Congress can also

A "standard" might simply state those goals [those the law is intended to advance] and leave implementing officials in charge of describing how best to promote them under each individual set of facts that might arise. A more "rule-like" principle or directive will itself incorporate some advance judgments on that score—generalizations that the implementing officials might think unfounded in a particular case, but that they are nonetheless supposed to accept.

Id. (citing FREDERICK SCHAUER, PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE 51–52 (1991)).

121. See, e.g., THOMAS AQUINAS, THE SUMMA THEOLOGICA Pt. I-II, Question 90, Art. 2 (Fathers of the Engl. Dominican Province trans., 1915). Aquinas states:

Now in every genus, that which belongs to it chiefly is the principle of the others, and the others belong to that genus in subordination to that thing: thus fire, which is chief among hot things, is the cause of heat in mixed bodies, and these are said to be hot in so far as they have a share of fire. Consequently, since the law is chiefly ordained to the common good, any other precept in regard to some individual work, must needs be devoid of the nature of a law, save in so far as it regards the common good. Therefore, every law is ordained to the common good.

Id.

122. As an example of the *new purposivism*, John Manning cites *Fox v. Vice*, 563 U.S. 826 (2011), a case concerning statutory fee shifting provisions related to Section 1988. See John F. Manning,

specify, such as in the preamble of the statute, the relevant factors and purposes that the interpreter should bear in mind when applying statutory language to specific situations. Conversely, incredibly detailed statutory language is one way for the legislature to signal that it wishes for statutory language to be applied more mechanically, with limited lease for interpretive creativity and discretion. Other mechanisms exist, such as providing clear definitions of statutory terminology where that terminology has been the result of a hard-fought bargain, making it clear that the legislature had a specific meaning in mind that courts should faithfully apply. Contrary to textualists such as Manning, I believe that, where legislatures have such considerations clearly in mind, they have sufficient tools to signal their intentions to courts and agencies without the need for a strong default presumption that enactments should be interpreted as embodying rules and not principles. Simply put, where the legislature has not provided strong evidence that it thought carefully about certain categories of cases, it should not be interpreted to have issued a general command which controls those cases with zero room for interpretive discretion.

A related point concerns the importance of promulgation to the relevant legislative purpose. Take again the case of an employer. When the employee

The New Purposivism, 2011 SUP. CT. REV. 113, 117 & n.21 (2011). There, writing for a unanimous court, Justice Kagan undertook a highly purposivist discussion of Congress's intentions in fee-shifting arrangements which effectively generated private attorneys general and how these arrangements should differ depending on whether the prevailing party seeking fee-shifting was the plaintiff or the defendant. *Fox*, 563 U.S. at 5–11. As Manning notes, one way to explain why even Justice Scalia went along with the purposivist decision is that Congress's invocation of "reasonable" attorney fees was the sort of open-ended statutory language which effectively calls for courts to exercise discretion, including on purposivist grounds, to develop the statute's applications through common law reasoning. See Manning, *supra*, at 137–40. The take-home point, for my purposes, is that the statute itself is often a signal, likely a decisive one, of whether Congress intended to allow or prevent interpretive creativity on purposivist grounds. Unlike strong textualists—and on Manning's reading, perhaps even Justice Kagan-type purposivists—I am willing to allow even the definiteness of reasonably clear word choice to be overridden by apparent purposes if there is little contextual information from which one could conclude that the words used were highly deliberately chosen. *Cf. id.* at 167 (arguing that in cases of clear conflict between legislative history and statutory text, statutory text should control to advance the value of "institutional settlement"). My general stance is that we do not know whether the legislature intended an institutional settlement—that is, intended for interpreters to have zero degrees of freedom in the level of generality at which the statute is read as embodying rules or principles—until we consult contextual information. To return to an example derived from the general case, if I have reason to believe that my boss's words were not so deliberately chosen as to require that they be interpreted perfectly literally, it makes no sense to interpret them in a way which would seem to frustrate the apparent purposes the command was intended to advance. See also *MCI Telecomms. Corp. v. Amer. Tel. & Tel. Co.*, 512 U.S. 218, 244 (1994) (Stevens, J., dissenting) ("[T]his is surely a paradigm case for judicial deference to the agency's interpretation, particularly in a statutory regime so obviously meant to maximize administrative flexibility." (emphasis added)).

interprets the employer's intent, he could be searching for either one of two things. First, he could be looking for a general command, a standing rule of conduct that the employer expects the employee to follow. If there is a rule that certain reimbursement requests are to be filed in triplicate, the rule is triggered whenever the employee has reason to request reimbursement for expenses, and the behavior mandated is that the written request be filed in triplicate. Second, the employee could be looking at the command as no more than evidence for the general patterns of behavior of which the employer will approve, in order to get a sense of what the employer may want when applied to any scenario in which the employee may find himself.¹²³ According to this view, the employee is not looking for a norm in the act of interpretation, but merely to whatever action the employer is likely to give assent to. If what matters is the subjective state of mind of the employer, there may be circumstances in which something like the second view makes sense. Everything the employer says in giving general and specific orders provides the employee with information concerning how the employer wishes for him to respond to any situation he may encounter on the job.

The distinction brings up the key point that, in interpreting a statute or other general command, we are not searching for "intention" insofar as it means whatever the authority figure subjectively has in mind. A statute, or any other general command, is not merely something the legislature wills, but something it has willed and properly *enacted* as a general command. The interpretation of a general command is not the interpretation of whatever the lawmaker wills, but that which it wills subject to two conditions: (a) the intention must be within the range of the lawmaker's authority and not *ultra vires*; and (b) the intention must be expressed in a speech act of appropriate form.¹²⁴ Even that which the authority clearly has in mind is not an object of interpretation as a general command unless it is enacted in appropriate form.

123. Easterbrook makes essentially the same distinction. See Easterbrook, *Text, History, and Structure*, *supra* note 29, at 64–65. In his telling, the heart of the distinction is whether we should be looking for what the words of a statute mean, consulting context only in cases of ambiguity, or what the legislature really wants us to do, with the words chosen as a rough and imperfect vehicle for getting to intent. *Id.* In other words, for Easterbrook, the question is whether the object of interpretation is the text or the intent in legislators' heads. I have already discussed my objection to Easterbrook's notion that legislative intent, even on the second view, is really something in the head of any particular person (or set thereof). See *supra* note 83 and accompanying text.

124. We can imagine that an employer can express general commands to employees in several appropriate ways—orally, through posting notices on a bulletin board, through email, and so on. Where the command is effectuated through a statute, it has only one proper form, specified by the rule of recognition of the legal system, so that even the legislature's clearly expressed intention cannot become a general command within the system unless it is expressed through the prescribed mechanism.

V. ANTI-TEXTUALISM'S LONG HISTORY

This Part has one primary goal: to suggest that there is not anything particularly new or original about the purposive, anti-textualist mode of interpretation just described. Despite the fact that it is adapted from contemporary linguistic philosophy (and a dash of democratic theory), it is wholly in sync, in both methodology and justification, with the purposivism which represented perhaps the dominant strand of statutory interpretive philosophy until the past few decades.¹²⁵ The basic thrust of my argument is obvious enough from *Church of the Holy Trinity v. United States*.¹²⁶ While *Holy Trinity* may have misconstrued some of the facts regarding the actual legislative intent behind the statute at issue in that case, the basic framework the Court adopts for how a statute should be interpreted seems to comport better with my understanding of legal interpretation than the textualism of Justice Scalia. This is salient if *Holy Trinity* is not some outlier, an example of the judiciary run amok, but if it actually has ties to a broad and coherent mode of textual interpretation in American jurisprudence.

Like probably many in the legal profession, I most remember *Holy Trinity* as a target of textualist criticism; Justice Scalia clearly saw the case as an example of pernicious anti-textualism. Factually, the case concerned an interplay between a New York City church's attempt to hire a pastor from England and the United States's then extant immigration laws.¹²⁷ The crux of the case was whether importing an English pastor into the United States for employment violated the following statutory section:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That from and after the passage of this act it shall be unlawful for any person, company, partnership, or corporation, in any manner whatsoever, to prepay the transportation, or in any way assist or encourage the importation or migration, of any alien or aliens, any foreigner or foreigners, into the United States, its territories, or the District of Columbia, under contract or agreement, parol or special, express or implied,

125. I say "perhaps" dominant because I am by no means a legal historian. It is, however, often remarked in the statutory interpretation literature that purposivism was the dominant method of statutory interpretation until the successes of Judge Easterbrook, Justice Scalia, and others in crusading against it in the final decades of the 20th century. *See, e.g.,* Manning, *supra* note 122, at 113 ("Throughout much of the twentieth century, the Court subscribed to the traditional purposivist framework of *Holy Trinity* The Court, however, has not cited *Holy Trinity* positively for more than two decades.").

126. 143 U.S. 457 (1892).

127. *Id.* at 457–58.

made previous to the importation or migration of such alien or aliens, foreigner or foreigners, to perform labor or service of any kind in the United States, its Territories, or the District of Columbia.¹²⁸

The Court immediately ceded that, by the plain language of the statute, viewed completely outside the context of its enactment, the pastor was a laborer being imported into the country for the purpose of employment, so that the church's actions violated the statute.¹²⁹ From Justice Scalia's textualist point of view, there was absolutely no question regarding the right answer to the case.¹³⁰ The Court, however, unanimously found that the statute was not violated.¹³¹

The Court began its justification of this outcome by citing the broad principle that, "[i]t is a familiar rule that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit nor within the intention of its makers."¹³² The Court explained that it was not intending to substitute its own judgment for the legislature's.¹³³ Instead the judge's job is to ascertain whether "consideration of the whole legislation, or of the circumstances surrounding its enactment, or of the absurd results which follow from giving such broad meaning to the words, makes it unreasonable to believe that the legislator intended to include the particular act."¹³⁴ Thus, while the text of the statute may have pointed to one resolution, the Court needed to additionally inquire into whether it made sense to think that Congress intended the strictly textualist outcome.

The Court's discussion, drawing examples from Lord Coke and elsewhere, further elaborated on the principle: Sometimes a statute may appear to punish some broad class of individuals, where a consideration of the logic of the statute would entail that some strictly within its letter had not committed any sort of "wrong" of the sort the law was intended to prevent or remedy.¹³⁵ Thus, a police officer should not be construed as guilty of "obstruct[ing] or retard[ing] the passage of the mail" for arresting an individual on a valid bench warrant who, as a matter of coincidence, happens

128. Alien Labor Act of 1885, ch. 164, 23 Stat 332, 332 (1885); *see also* 143 U.S. at 458.

129. 143 U.S. at 458.

130. *See supra* note 36 and accompanying text.

131. *Church of the Holy Trinity*, 143 U.S. at 472.

132. *Id.* at 459. Compare with my discussion of the speech act of setting a standard of conduct above. *See supra* Part II.

133. *Church of the Holy Trinity*, 143 U.S. at 472.

134. *Id.* at 459. Note the category of extratextual considerations to be consulted. Whether a given interpretation is absurd would seem to necessarily involve a consideration of extralegal norms and values.

135. *Id.*

to be a letter carrier.¹³⁶ Furthermore, according to the Court's reasoning, "another guide to the meaning of a statute is found in the evil which it is designed to remedy; and for this the court properly looks at contemporaneous events, the situation as it existed, and as it was pressed upon the attention of the legislative body."¹³⁷

The Court then concluded, after an analysis of the statute's legislative history, that it meant to prohibit the immigration of manual laborers, not "professional" men, such as clergy.¹³⁸ Famously, the Court also reasoned that Americans are "a religious people," apparently announcing a canon of construction that statutes should not be read to impair the free practice of religion.¹³⁹

Of course, the argument has been made that *Holy Trinity* badly construed the legislative history at issue in the case.¹⁴⁰ There may indeed be a strong argument that we should not trust judges to undertake complicated historical analyses of, for example, the social conditions which prompted the legislature to create a given statute. However, we can separate questions of what it means to most faithfully interpret a given category of speech act from questions of whether we should adopt an error theory stating that certain institutional actors—say, courts—are so systematically bad at faithful interpretation that they should not be trusted to undertake the inquiry at all.¹⁴¹ The present point is that courts in the old cases, such as *Holy Trinity* and *United States v. Kirby*, have essentially the same understanding of what it would mean to be a faithful agent that I have already defended.

Importantly, *Holy Trinity* is not a unique case. It is part of a family of statutory interpretation which was alive, and perhaps dominant, in the

136. *Id.* at 460–61 (citing *United States v. Kirby*, 74 U.S. (7 Wall.) 482, 486 (1868)). The *Kirby* Court wrote:

All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence. It will always, therefore, be presumed that the legislature intended exceptions to its language which would avoid results of this character. *The reason of the law in such cases should prevail over its letter.*

Id. at 461 (emphasis added) (quoting *Kirby*, 74 U.S. (7 Wall.) at 486–87).

137. *Id.* at 463. The "evil it was designed to remedy" perfectly matches the old way of speaking referenced several times above. *See supra* Part IV.

138. *Church of the Holy Trinity*, 143 U.S. at 463.

139. *Id.* at 465.

140. *See, e.g.*, Adrian Vermeule, *Legislative History and the Limits of Judicial Competence: The Untold Story of Holy Trinity Church*, 50 STAN. L. REV. 1833, 1837 (1998).

141. I confess that I cannot see how this sort of historical interpretation is any more complicated than the purely linguistic sort—the contemporary meanings of words and expression—that textualist judges are more than happy to engage in and which textualist and originalist judges undertake as a matter of course.

Anglophone world from early sources through the end of the 19th century.¹⁴² As another example famous from the jurisprudential literature, we could take *Riggs v. Palmer*.¹⁴³ In *Riggs*, a man, whose will left almost the entirety of his estate to his teenage grandson, remarried and made known his plan to change his will.¹⁴⁴ The grandson murdered his grandfather via poison in order to prevent his disinheritance.¹⁴⁵ The court of appeals famously refused to apply the letter of the will, citing some of the same classical sources as *Holy Trinity*, including a famous example of Puffendorf.¹⁴⁶ Justice Earl explained in *Riggs* that:

It is a familiar canon of construction that a thing which is within the intention of the makers of a statute is as much within the statute as if it were within the letter; and a thing which is within the letter of the statute is not within the statute, unless it be within the intention of the makers. The writers of laws do not always express their intention perfectly, but either exceed it or fall short of it, so that judges are to collect it from probable or rational conjectures only, and this is called “rational interpretation.”¹⁴⁷

142. The sort of counterfactual reasoning discussed here, which asks what the legislature would have done were the facts before the court available at the time the statute was enacted, is sometimes traced to Edmund Plowden’s argument in *Eyston v. Studd*, 2 Plowd. 463, 463 (1574). Bentham referred to this form of statutory interpretation as “liberal interpretation,” to be contrasted with “strict interpretation,” a practice to be avoided where possible, but sometimes rendered necessary. See Xiaobo Zhai, *Bentham on the Interpretation of Laws*, 38 J. LEGAL HIST. 282, 299–300 (2017).

143. 22 N.E. 188 (N.Y. 1889).

144. *Id.* at 188–89.

145. *Id.* at 189.

146. The classical sources cited in *Holy Trinity* and *Riggs*, including Puffendorf, Blackstone, Aristotle, Bacon, Coke, and Chief Justice Marshall would be worth quoting in entirety were the amount of space taken up by the exercise not so excessive. See *Riggs*, 22 N.E. at 189; *Church of the Holy Trinity v. United States*, 143 U.S. 457, 459–63 (1892). A short discussion of Coke, however, might be especially illustrative. See *Heydon’s Case*, 3 Co. Rep. 7a, 7b (1584). Coke laid out four considerations to guide statutory interpretation: (1) “What was the common law before the making of the act?”; (2) “What was the mischief and defect for which the common law did not provide?”; (3) “What remedy the parliament hath resolved and appointed to cure the disease of the commonwealth.”; and (4) “The true reason of the remedy?” Frank Edward Horack, Jr., *Statutory Interpretation—Light from Plowden’s Reports*, 19 KY. L. J. 211, 216 n.18 (1930) (quoting *Heydon’s Case*, 3 Co. Rep. at 7b). The idea that the legislature sought to do something regarding some defect it detected in the common law’s treatment of a social problem is essentially the approach taken by this Article, as instantiated within a context in which the supplantation of common law with statute was still in an early stage of development. While Coke’s discussion in *Heydon’s Case* is canonical of the approach, Horack notes that the approach predated Coke’s discussion by two decades, descending from the case of *Willion v. Berkeley*, 1 Plow. 227 (1562). Horack, *supra*, at 217.

147. *Riggs*, 22 N.E. at 189.

Justice Earl provided a counterfactual question to cabin literalist statutory interpretation: “If the law-makers could, as to this case, be consulted, would they say that they intended by their general language that the property of a testator or of an ancestor should pass to one who had taken his life for the express purpose of getting his property?”¹⁴⁸ Again, the emphasis is not what the words of the text mean drained from the context of life, but what they meant viewed in light of what the legislature could fairly be construed as having intended to do with regard to the legal community’s nexus of norm-governed behavior; the statute is not to be viewed as a mere document, but as an artifact generated through the act of legislative volition, with the act of volition the appropriate subject of judicial analysis. Applying this standard, Justice Earl concluded:

What could be more unreasonable than to suppose that it was the legislative intention in the general laws passed for the orderly, peaceable, and just devolution of property, that they should have operation in favor of one who murdered his ancestor that he might speedily come into the possession of his estate? Such an intention is inconceivable. *We need not, therefore, be much troubled by the general language contained in the laws.*¹⁴⁹

Like the *Holy Trinity* court, the *Riggs* majority did not conclude the case with its analysis of the general principles of statutory interpretation. In what has now perhaps become the most famous part of the opinion, the court further cited the general principle that “[n]o one shall be permitted to profit [from] his own fraud, or to take advantage of his own wrong, or to found any claim upon his own iniquity, or to acquire property by his own crime,” a “fundamental maxim[] of the common law” which governs even the interpretation of statutory language.¹⁵⁰ Further, the court compared the laws of several civil law jurisdictions to common law jurisdictions, concluding that common law jurisdictions, with a rich history of reasonable and equitable interpretation of statutory text, did not see it necessary to enact so obvious a statute as to dictate that a man should not be able to profit as beneficiary under the will of one who he has murdered.¹⁵¹ This is because “[i]t was evidently supposed that the maxims of the common law were sufficient to regulate such a case, and that a specific enactment for that purpose was not

148. *Id.*

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

150. *Id.*

151. *Id.*

needed.”¹⁵² The court thus suggested that the legislature’s *failure* to enact clarifying statutory text should be interpreted in light of the prevailing state of mind of the would-be enactor.¹⁵³ Why, then, might the legislature fail to enact explicit, on-point statutory text in such circumstances? The other norms governing the community were sufficiently on point and important to render obvious that the legislature intended that its enactments be read in accordance with those background norms.¹⁵⁴ As I have argued above, if the legislature intended that the court interpret statutes in this way, to read them any other way would be a dereliction of duty similar to the employee who deliberately misinterprets what the boss has asked for.

The line of anti-textualism running through *Holy Trinity* and *Riggs*, as well as the wealth of eminent sources cited therein, strongly suggest a form of statutory interpretation which better matches the interpretive theory drawn from contemporary analytic philosophy already developed above. The same goes for the versions of purposivism which were outcompeted by textualists in the final decades of the 20th century.¹⁵⁵ Enacting a statute is viewed as a

152. *Id.*

153. *Id.* The suggestion that we can interpret a statute in light of what was never said is interesting and has obvious import in the interpretation of natural language. The words I fail to speak in a context in which they may be expected can convey meaning just as certainly as any words used. Think of the old story in which Sherlock Holmes was able to deduce who took a racehorse from the fact that a specific dog did not bark at the culprit, which would be expected if the culprit was a stranger. This implied that the dog must have known the person who did it. ARTHUR CONAN DOYLE, *Adventure I: Silver Blaze*, in THE MEMOIRS OF SHERLOCK HOLMES 10, 39 (The Elec. Book Co. 2001) (1894). Justice Powell’s dissent, in the case of *TVA v. Hill*, contained a similar invocation of the idea of what we can infer from what was not said by Congress. 437 U.S. 153, 208–09 (1978) (Powell, J., dissenting). In *Hill*, the question was whether preservation of the snail darter, a relatively unexceptional and unimportant species of fish, under the provisions of the Endangered Species Act (ESA), should halt construction on a dam project which was underway for years before the ESA’s passage, and where scrapping the project would constitute a waste of millions of taxpayer dollars. *Id.* at 156. While the majority found in both the statutory language and the legislative history a clear congressional intent to authorize such a waste of resources for the preservation of an endangered species, Justice Powell reasoned that, if it was contemplated that the ESA would threaten numerous public works projects already approved by Congress, there surely would have been heated debate on the issue had Congress intended such an extreme result. Hence, Powell argued, we could presume that Congress never intended such a result from the fact that no such alarm was raised. *Id.* at 208–09.

154. See *Riggs v. Palmer*, 22 N.E. 188, 191–92 (N.Y. 1889) (comparing the statute to “testamentary succession” in the Napoleonic Code, the Roman law, and other state statutes).

155. For a late (and clear) example of purposivism, see *Koons Buick Pontiac GMC, Inc. v. Nigh*, 543 U.S. 50, 65–66 (2004) (Stevens, J., concurring). Justice Stevens writes:

In recent years the Court has suggested that we should only look at legislative history for the purpose of resolving textual ambiguities or to avoid absurdities. It would be wiser to acknowledge that it is always appropriate to consider all available evidence of Congress’ true intent when interpreting its work product. Common sense is often more reliable than rote repetition of canons of statutory construction. It is unfortunate that wooden reliance on those canons has led to unjust results from time to time.

specific category of action, a speech act, and, like any action, it can be rendered fully intelligible only through an analysis of the beliefs and desires of the agents who undertook it. Just as fully understanding my action of turning on a light switch requires both knowledge that I wish for the room to be better lit (knowledge of my desires) and that I understand that flipping the switch will have the intended effect (knowledge of my beliefs), the legislative act is to be understood primarily through an analysis of how the enacting coalition understood the form of social life of the community it represented and the body of social and legal norms governing that community. Only once these inputs are taken into account along with an interpretation of what the legislature intended to produce as an effect on the life of the community can the statute be rendered intelligible.

The *Holy Trinity* Court explicitly disaffirmed that it intended to substitute its own will for the legislature's, and we at least have an understanding now of how that could conceivably be the case, Justice Scalia's misgivings notwithstanding.¹⁵⁶ It did not trouble the Court that it was analyzing the legislative will as opposed to the statute enacted by the legislature, and ultimately, why should it have? Is it necessarily—or even generally—harder to interpret the *purpose* of a law which bars riding skateboards on the sidewalks of a park generally filled with senior citizens than it is to interpret the letter of the ordinance? Are the borderline fact patterns which make for hard cases systematically more likely to occur? Is it really harder to ascertain whether the judge has faithfully interpreted the statute? If consulting purpose was more intrinsically dangerous in a past era addicted to the misuse of legislative history, it certainly does not hold that consideration of legislative purpose—that interpreting the language of statutes more in accord with the interpretation of language in general—is suspect as a matter of general legal theory. The choice between strict textualism and purposive interpretation—purposive textualism, if you like—is a choice between one way of understanding the judge's job in applying a statute to specific factual contexts as opposed to another. I confess that I find

Id. (footnotes omitted).

156. *Church of the Holy Trinity v. United States*, 143 U.S. 457, 459 (1892). The Court stated:

It is a familiar rule that a thing may be within the letter of the statute and yet not within the statute because not within its spirit nor within the intention of its makers This is not the substitution of the will of the judge for that of the legislator, for frequently words of general meaning are used in a statute, words broad enough to include an act in question, and yet a consideration of the whole legislation, or of the circumstances surrounding its enactment, or of the absurd results which follow from giving such broad meaning to the words, makes it unreasonable to believe that the legislator intended to include the particular act.

Id.

purposive interpretation superior, both as a theory of linguistic interpretation and as a matter of democratic theory.

CONCLUSION

This Article sets its sights on a familiar mode of textualist interpretation of statutes, best typified by Justice Scalia. The mode of textualism I have in mind has had enormous influence on American statutory interpretation for the past several decades, in no small part due to the influence of Justice Scalia and his followers. This mode of textualism makes two basic claims: (a) that when the legislature acts, the statutory text is the important interpretive object; and (b) that the statute as a text must be obeyed by courts and other legal interpreters as a matter of democratic theory. I have questioned each of these claims. My first criticism targets the total primacy of the statutory text as the focus of legislative action. I argued that we should largely focus on the *enactment* of the statute, a speech act intended to have one sort of effect or another on the norm-governed behavior of the legal community. The statute itself is a part of this action, but only a part, and a focus on the text of the statute to the exclusion of all else is myopic. The nature of interpreting speech acts requires that we take into account what the speaker was trying to say. Second, I targeted the democratic theory argument pressed by Justice Scalia. While Justice Scalia argued that the way to appropriately respect the separation of powers and hold the judge subordinate to the legislature as a lawmaking body is to engage in statutory textualism, I argued that, if we properly understand the legislature as a principal undertaking the speech act of setting forth a standard of conduct, the judge's job should be to enforce the principal's will as best as the agent understands it, not merely to obey the words used divorced from context. I argued that Justice Scalia, in attempting to distinguish between strict and reasonable statutory construction, actually needs to fall back on some conception of legislative intent, pushing away from textualism and toward purposivism. I suggested that, if my arguments in this Article are valid, we should look at old cases like *Holy Trinity* and *Riggs v. Palmer* in a new light, not as derelictions of duty by courts who refuse to obey the legislature's textually embodied will, but as courts doing their best to properly respect what legislatures are *doing* in enacting statutes in the first place.