ESSAYS

Congressional Insiders and Outsiders

Amy Coney Barrett†

INTRODUCTION

When Justice Antonin Scalia began writing about statutory interpretation, he attacked the then-dominant proposition that the point of statutory interpretation is to identify and enforce Congress's unenacted purposes. He argued that the existence of congressional intent is pure fiction and that it would not control even if it could be found. Because the Court cited legislative history as authoritative evidence of legislative intent, he rejected its use as illegitimate. He focused on the text and insisted that its meaning controlled. His arguments were so successful that today, one would be hard pressed to find anyone willing to say that a court should depart from statutory text to better serve Congress's purpose. There is a general consensus that the text constrains.

With everyone talking text and rejecting intent, it can sometimes seem that almost all of the differences lie in application. Judges might have different thresholds for ambiguity, for example, or disagree about the utility of canons. Such disagreements are important and can affect the outcome of cases, but they do not inevitably reflect conflicting first-order principles about the aims of statutory interpretation.

Fundamental differences, however, do remain, and the process-based turn in statutory interpretation underscores the point. Recently, scholars have begun arguing that interpretive doctrines should account for the on-the-ground realities of the legislative process. Considering how their arguments might influence textualism draws attention to textualism's own assumptions. The process-based arguments assume that everyone, including textualists, strives to calibrate interpretive

† Diane and M.O. Miller II Research Chair in Law and Professor of Law, Notre Dame Law School.

doctrines to actual drafting practices. Textualists, however, strive to calibrate interpretive doctrines to actual reading practices. The disagreement is not about statutory meaning versus congressional intent, as it was in the old days, but about which set of linguistic conventions determine what the words mean.

In this Essay, I explore the implications of the new process-based theories for textualism. Part I describes the process-based turn in statutory interpretation, which maintains that courts should take their interpretive cues from congressional practices and procedures. Members of Congress (and their drafters) rely heavily on legislative history but put much less stock in dictionaries and canons. Courts should follow suit, the argument goes, because doing so would better reflect Congress's understanding of the language it enacts.

Part II claims that these process-based arguments do not require textualists either to abandon dictionaries and canons or to begin using legislative history. While textualists have not always made their assumptions clear, they approach language from the perspective of an ordinary English speaker—a congressional outsider. In contrast, the process-based theories approach language from the perspective of a hypothetical legislator—a congressional insider. Congressional insiders may reject particular canons, eschew dictionaries, and treat certain legislative history as a guide to statutory meaning. Textualists, however, do not use canons and dictionaries in an effort to track the linguistic patterns of the governors; they use them because they reflect the linguistic patterns of the governed. And if the conventions of legislative history or the legislative process reveal that Congress used language in something other than its natural sense, a textualist court should not necessarily defer to that meaning. What matters to the textualist is how the ordinary English speaker—one unacquainted with the peculiarities of the legislative process—would understand the words of a statute. Congressional insiders and outsiders share common ground as English speakers, but there may be some respects in which their linguistic conventions differ. When they do, the outsider's perspective controls.

Part III sketches reasons why textualists interpret language from the perspective of an ordinary English speaker rather than an ordinary member of Congress. Process-based theories argue that courts, as faithful agents, should adopt interpretive

methods to track the drafting practices of Congress, their principal. Part III suggests that textualists would reject this approach because they subscribe to a different conception of faithful agency. While textualists have not fully developed the point, they view themselves as agents of the people rather than of Congress and as faithful to the law rather than to the lawgiver. The lines of their loyalty thus run differently. Textualists consider themselves bound to adhere to the most natural meaning of the words at issue because that is the way their principal—the people—would understand them.

I. THE PROCESS-BASED TURN

Purposivism and textualism have moved closer together in the decades since Justice Scalia launched his campaign for textualism.[1] The claim that it is permissible to depart from clear text in the service of congressional purpose—an approach epitomized by *Church of the Holy Trinity v United States*[2]—has fallen into disrepute.[3] There is general agreement on the Court that statutory text is both the focal point of and a constraint on statutory interpretation. As Justice Elena Kagan observed when she delivered the Scalia Lecture at Harvard Law School, "we're all textualists now."[4]

Yet disagreement remains about how to interpret the text. A recent, important line of scholarship has argued that the Court should shape its approach to account for the realities of the complex legislative process.[5] Studying how Congress works,

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1 See John F. Manning, *The New Purposivism*, 2011 S Ct Rev 113, 114 ("[T]he Court in the last two decades has mostly treated as uncontroversial its duty to adhere strictly to the terms of a clear statutory text, even when doing so produces results that fit poorly with the apparent purposes that inspired the enactment.").

2 143 US 457 (1892).

3 See Abbe R. Gluck, *Imperfect Statutes, Imperfect Courts: Understanding Congress's Plan in the Era of Unorthodox Lawmaking*, 129 Harv L Rev 62, 90 (2015) ("*Church of the Holy Trinity v. United States*—oft-maligned for its statement that statutory 'spirit' may trump the plain 'letter of the statute'—is long since dead.") (citation omitted).

4 *The Scalia Lecture: A Dialogue with Justice Elena Kagan on the Reading of Statutes* 8:28 (Harvard Law School, Nov 18, 2015), online at http://today.law.harvard.edu/in
-scalia-lecture-kagan-discusses-statutory-interpretation (visited Mar 26, 2017) (Perma archive unavailable).

5 See, for example, Gluck, 129 Harv L Rev at 62 (cited in note 3). See also generally Abbe R. Gluck, Anne Joseph O'Connell, and Rosa Po, *Unorthodox Lawmaking, Unorthodox Rulemaking*, 115 Colum L Rev 1789 (2015); Lisa Schultz Bressman and Abbe R. Gluck, *Statutory Interpretation from the Inside—an Empirical Study of Congressional Drafting, Delegation, and the Canons: Part II*, 66 Stan L Rev 725 (2014); Abbe R. Gluck and Lisa Schultz Bressman, *Statutory Interpretation from the Inside—an*

these scholars say, indicates that textualists, who reject legislative history and embrace the canons, have it exactly backwards. Drafters prioritize legislative history and minimize the utility of canons. A faithful agent should try to understand the text as Congress did, and doing so requires using the tools it used.

Legislative history tops the list of tools important to Congress. Professors Abbe Gluck and Lisa Bressman's influential survey of 137 congressional staffers involved in drafting legislation found that "legislative history was emphatically viewed by almost all of our respondents—Republicans and Democrats, majority and minority—as the *most important* drafting and interpretive tool apart from text."[6] To be sure, a process-based approach requires courts to be smart about how they use legislative history.[7] Professor Victoria Nourse says that judges, who are typically unschooled in the way Congress works, have been guilty of cherry-picking statements unlikely to reflect the way that supporters of a statute understood its language.[8] But, she argues, if they view legislative history through the lens of Congress's procedural rules, it can serve as a powerful tool for clarifying statutory text.[9]

In contrast, some say, dictionaries and canons risk distorting text because they run contrary to the way Congress drafts statutes. A majority of the respondents in the Gluck-

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Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I, 65 Stan L Rev 901 (2013); Victoria F. Nourse, *A Decision Theory of Statutory Interpretation: Legislative History by the Rules*, 122 Yale L J 70 (2012); Robert A. Katzmann, *Judging Statutes* (Oxford 2014).

6 Gluck and Bressman, 65 Stan L Rev at 965 (cited in note 5) (citation omitted).

7 In using the term "process-based approach," I do not mean to invoke the Legal Process method associated with Henry Hart and Albert Sacks. See generally Henry M. Hart Jr and Albert M. Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* (Foundation 1994) (William N. Eskridge Jr and Philip P. Frickey, eds). The Hart and Sacks approach instructs a judge to assume "that the legislature was made up of reasonable persons pursuing reasonable purposes reasonably." Id at 1378. It does not, however, attempt to calibrate interpretation to the details of the legislative process. See John F. Manning, *Inside Congress's Mind*, 115 Colum L Rev 1911, 1928–29 (2015) (pointing out that in contrast to empirical approaches like Gluck and Bressman's, "Legal Process purposivism reflects 'a normative statement prescribing proper attitudes for judges in their dealing with the work of legislatures, rather than a positive one describing what legislatures are'"), quoting Peter L. Strauss, *The Common Law and States*, 70 U Colo L Rev 225, 242 (1999).

8 See Nourse, 122 Yale L J at 99, 106–09, 114–18, 120–28 (cited in note 5) (giving examples).

9 Id at 85–87 (criticizing textualists for paying more attention to the canons of interpretation than to the rules of Congress). See also Gluck and Bressman, 65 Stan L Rev at 989 (cited in note 5) (arguing that their study is a guide to "how to separate the useful [legislative history] from the misleading").

Bressman study expressly (and in some cases vehemently) disclaimed reliance on dictionaries.[10] The linguistic canons fared only slightly better. A majority agreed that the concepts of *ejusdem generis* and *noscitur a sociis* accurately reflected drafting practices.[11] But *expressio unius* and the rule against superfluities garnered much less support,[12] and respondents largely rejected the presumption that words have consistent meaning through a whole act, much less the whole code.[13]

Renewed confidence in legislative history and skepticism about dictionaries and canons are not the only implications of the process-based view. Professors Gluck, Anne Joseph O'Connell, and Rosa Po maintain that faithful agency may require sensitivity to the variety of ways in which Congress legislates.[14] Traditionally, courts have deployed a one-size-fits-all set of interpretive presumptions to statutes; they situate language within the context of judicially created doctrines rather than within the particular process that produced it. Yet the legislative process is not itself one-size-fits-all. Modern lawmaking increasingly proceeds in unorthodox fashion rather than along the straightforward route depicted in the classic *Schoolhouse Rock!* cartoon.[15] For example, the omnibus appropriations process no longer serves simply as a mechanism

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[10] Gluck and Bressman, 65 Stan L Rev at 938 & n 111 (cited in note 5) (noting that more than 50 percent said they were "never or rarely used" and that only 15 percent said they "were always or often used"). See also id at 938 (quoting one respondent's assertion that "no one uses a freaking dictionary").

[11] Id at 932–33. Approximately 70 percent of respondents endorsed *noscitur a sociis* (the principle that the meaning of terms may be ascertained by reference to the meaning of surrounding terms) and *ejusdem generis* (the principle that when a general term follows a list of specific items, the general term refers to the same kind of things specifically listed). Id.

[12] Approximately 33 percent of respondents said that the *expressio unius* canon—the rule that the inclusion of specific terms signifies the exclusion of others—"always or often applies." Id. See also id at 934 (noting that 18 percent said that the rule against superfluities rarely applies and that 45 percent said that it only sometimes does).

[13] See id at 936 (reporting that while consistent usage within the same act is desirable, institutional barriers related to committee structure are an obstacle and that a majority of respondents "vigorously disputed" the proposition that Congress even tries to use words consistently throughout the US Code). I put aside here substantive canons because those do not purport to track either how Congress actually drafts or how an ordinary reader understands language. See note 39 and accompanying text.

[14] See Gluck, O'Connell, and Po, 115 Colum L Rev at 1851 (cited in note 5).

[15] Id at 1794 ("And so it seems that the *Schoolhouse Rock!* cartoon version of the conventional legislative process is dead. It may never have accurately described the lawmaking process in the first place."), citing *Schoolhouse Rock: America—I'm Just a Bill Music Video* (Disney Educational Productions, 1975), online at http://www.youtube.com/watch?v=FFroMQlKiag (visited Sept 1, 2017) (Perma archive unavailable).

for distributing money to a variety of existing programs, but also as a means of bundling unrelated substantive policies.[16] Legislation frequently bypasses committees altogether and is instead pushed through the process by party leadership or even the White House.[17] Statutes passed in response to an emergency may be overly brief, general, or ill considered because of time pressure.[18] Tailoring interpretive methods to the circumstances of a statute's passage might better capture the meaning Congress intended. For example, courts might decline to apply canons like the presumption of consistent usage and the rule against surplusage to omnibus and emergency laws. Or they might "pay less attention to legislative history for statutes that did not go through committee or that are the product of different bills drafted at different times."[19]

These arguments might have penetrated the Court in *King v Burwell*,[20] the last major statutory interpretation case decided before Scalia's death. Gluck, O'Connell, and Po characterize *King* as "a watershed moment—the most explicit recognition ever from the Court that unorthodox lawmaking may require alterations in common interpretive presumptions."[21] The Court interpreted the phrase "established by the State" in light of the unorthodox process that produced the statute. The Court observed:

> The Affordable Care Act contains more than a few examples of inartful drafting. . . . Several features of the Act's passage contributed to that unfortunate reality. Congress wrote key parts of the Act behind closed doors, rather than through "the traditional legislative process." And Congress passed much of the Act using a complicated budgetary procedure known as "reconciliation," which limited opportunities for debate and amendment, and bypassed the Senate's normal 60-vote filibuster requirement. As a result, the Act does not reflect the type of care and deliberation that one might expect of such significant legislation.[22]

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16 See Gluck, O'Connell, and Po, 115 Colum L Rev at 1803–07 (cited in note 5).

17 See id at 1800.

18 See id at 1807–10.

19 Id at 1851.

20 135 S Ct 2480 (2015).

21 See Gluck, O'Connell, and Po, 115 Colum L Rev at 1847–48 (cited in note 5).

22 *King*, 135 S Ct at 2492 (citations omitted).

Scalia criticized the majority for "chang[ing] the usual rules of statutory interpretation for the sake of the Affordable Care Act."[23] But the Court's willingness to tailor its interpretive rules to account for Congress's process is precisely the reason why some praise the opinion.

It is too soon to say whether the process-based turn will have a broader impact than its influence on the occasional extraordinary case. But it is important to see its potential to change the terms of the debate. *King* could easily have been written as a straightforwardly purposive opinion: the Court could have said that interpreting the Affordable Care Act[24] to limit insurance subsidies to state-run exchanges was "within the letter of the statute and yet not within the statute, because [such a limitation is] not within its spirit, nor within the intention of its makers."[25] That reasoning, however, rests on the now-maligned argument that congressional purpose can trump unambiguous statutory text.[26] The process-based approach, in contrast, remains tethered to the statutory language. It acknowledges the importance of text but offers reasons for accepting arguably unorthodox interpretations of it.

II. CONGRESSIONAL INSIDERS AND OUTSIDERS

In a Special Issue dedicated to Justice Scalia, it is fitting to consider how the recent process-based turn bears on textualism, a key part of Scalia's legacy. Insofar as process-based arguments are geared toward interpreting text rather than justifying departures from it, they reflect textualism's influence on the terms of the statutory interpretation debate. And because they share textualism's emphasis on text, legislative supremacy, and faithful agency, they appear—at least at first blush—to give textualists reason to adjust the interpretive tools they deploy. Indeed, the process-based theorists expressly contend that empirical evidence about how Congress works requires all interpreters committed to legislative supremacy and faithful

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[23] Id at 2506 (Scalia dissenting).

[24] Patient Protection and Affordable Care Act, Pub L No 111-148, 124 Stat 119 (2010).

[25] *Holy Trinity*, 143 US at 459.

[26] See Gluck, 129 Harv L Rev at 90 (cited in note 5) (arguing that "*King* is not *Holy Trinity*"). But see Richard M. Re, *The New Holy Trinity* 18 Green Bag 2d 407, 413–15 (2015) (arguing that *King* is a variation of *Holy Trinity*, albeit one that pays lip service to text).

agency, including textualists, to rethink their use of tools like canons, dictionaries, and legislative history.

Confronting these arguments underscores a feature of textualism whose importance may be unappreciated: its insistence that the relevant user of language be *ordinary*. Textualists do not only reject the once-popular notion that a subjective congressional intent actually exists. They also insist that the hypothetical reader of language—the construct they use in the task of interpretation—be a congressional outsider. The new process-based theories, by contrast, employ the construct of a congressional insider. This is a significant choice. While congressional insiders and outsiders share common ground as English speakers, there may be some respects in which their linguistic conventions differ.

It bears emphasis that the process-based theorists, in contrast to traditional purposivists, do not propose using legislative history or unenacted congressional intent to supplant statutory text. Insofar as textualism disciplines interpreters to acknowledge that words constrain, its victory holds. Nor does a process-based approach necessarily depend on the proposition that a court can identify and rely on actual congressional intent.[27] In this respect, a process-based theory generally shares the intent skepticism that characterizes modern theories of statutory interpretation, including textualism.[28]

But textualism and the process-based approach diverge from there. If one rejects the existence of *actual* intent, one must construct some sort of *objective* intent.[29] Textualists focus on "the ring the words would have had to a skilled user of words at the time."[30] Process-based theorists focus on "the ring the words

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[27] See Gluck and Bressman, 65 Stan L Rev at 915 (cited in note 5) (describing "the notion of a single 'congressional intent'" as "most certainly false"); Nourse, 122 Yale L J at 83 (cited in note 5) (looking at "decisions" Congress makes rather than its "subjective desires").

[28] See Manning, 115 Colum L Rev at 1917–24 (cited in note 7) (explaining the intent skepticism characteristic of both textualism and its rivals). Manning doubts whether Gluck and Bressman are truly intent skeptics. See id at 1935 (contending that while they reject classic intentionalism, Gluck and Bressman "plainly invoke intentionalist reasoning—the subjective expectations of legislative drafters").

[29] See Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* 17 (Princeton 1997) (Amy Gutmann, ed) (arguing that a court should look for "'objectified' intent," the meaning that a reader would glean from the text, not "subjective [ ] intent," the meaning that resides in the legislative mind). See also note 32 and accompanying text.

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

would have had" to a skilled legislator at the time.[31] Put differently, textualists use the construct of a hypothetical *reader*, and the process-based theorists use the construct of a hypothetical *writer* of a statute.

Saying that process-based theorists read the statute through the eyes of a hypothetical legislator is not to say that they endorse the intentionalist technique of imaginative reconstruction. A court engaged in imaginative reconstruction asks how the enacting legislature would have wanted the statute to apply to the problem at hand. The process-based theorist, in contrast, does not try to assume the perspective of a legislator (or staffer) who *actually* participated in the drafting of the relevant statute. She assumes the perspective of a hypothetical insider who knows how Congress works. In using congressional preferences to guide the choice of interpretive tools, the process-based theorist assumes that the relevant linguistic conventions are those of the typical legislator. That, after all, is the basis of the argument that courts should abandon reliance on canons and dictionaries. The linguistic community of those within Congress—members, staff, and professional drafters—do not use language that way.

Scalia described the relevant linguistic community differently. He explained that textualists "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*."[32] Judge Frank Easterbrook has similarly expressed it: "We should look at the statutory structure and

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[31] See, for example, Nourse, 122 Yale L J at 95–96 (cited in note 5) (arguing that the interpreter should interpret words "precisely as a member of Congress would"). See also Katzmann, *Judging Statutes* at 22 (cited in note 5) (arguing that judges should interpret language so as to better capture Congress's understanding of the language it enacted).

[32] Scalia, *A Matter of Interpretation* at 17 (cited in note 29). See also Antonin Scalia and Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 33 (Thomson/West 2012) (endorsing the "'fair reading' method," which asks "how a reasonable reader, fully competent in the language, would have understood the text at the time it was issued"). Admittedly, Scalia occasionally described "members of Congress" as the relevant interpretive community. In *Chisom v Roemer*, 501 US 380 (1991), he asserted that an interpreter should "read the words of [a statutory] text as any ordinary Member of Congress would have read them." Id at 405 (Scalia dissenting), citing Oliver Wendell Holmes, *The Theory of Legal Interpretation*, 12 Harv L Rev 417 (1899). He was not, however, distinguishing between an "ordinary member of Congress" and an "ordinary member of the public." On the contrary, the Holmes article that Scalia cites argues that words should be interpreted as the "normal speaker of English" would understand them. Holmes, 12 Harv L Rev at 417–18 (cited in note 32).

hear the words as they would sound in the mind of a skilled, objectively reasonable user of words."[33] To be sure, Scalia was not always clear about whether the prototypical reader is an ordinary member of the public or a lawyer. He once colorfully said that "the acid test of whether a word can reasonably bear a particular meaning is whether you could use the word in that sense at a cocktail party without having people look at you funny."[34] On other occasions, he treated lawyers as the relevant linguistic community—one can hardly claim that the ordinary guest at a cocktail party would be aware of the ancient principles of common law that form the backdrop against which Scalia presumed Congress to legislate.[35]

It is not clear to me that textualists must pick a single perspective applicable across all statutes. Sometimes the relevant reader may be a layperson, and sometimes she may be a lawyer, just as terms are sometimes used in their ordinary and sometimes in their technical sense. Whatever the resolution of that issue, however, the point for present purposes is that the textualist describes the hypothetical reader in a way that necessarily includes congressional outsiders. Members of Congress are skilled English speakers who are presumed to understand the language of the law. As such, members of Congress are included within the prototype of an English speaker, typically conversant in legal conventions, who serves as the textualist construct.[36] But the textualist construct does not privilege the way legislative drafters as a subclass use language.

To be sure, if legislative outsiders familiarized themselves with the internal workings of Congress, the prototypical ordinary lawyer-reader might share the hypothetical legislator's understanding of language. But textualism's presumptions charge Congress with accommodating the linguistic expectations of the regulated, rather than the other way around. Textualists do not presume that the regulated are familiar with Congress's own, sometimes idiosyncratic, linguistic conventions and would

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33 Easterbrook, 11 Harv J L & Pub Pol at 65 (cited in note 30).

34 *Johnson v United States*, 529 US 694, 718 (2000) (Scalia dissenting).

35 See, for example, *Moskal v United States*, 498 US 103, 121–26 (1990) (Scalia dissenting) (using old cases and treatises to determine the meaning of "falsely made").

36 For example, in *King*, Scalia explained that the rule against surplusage does not always apply, because "[l]awmakers sometimes repeat themselves—whether out of a desire to add emphasis, a sense of belt-and-suspenders caution, or a lawyerly penchant for doublets[.]" *King*, 135 S Ct at 2498 (Scalia dissenting). He thus did not treat repetition as a uniquely legislative pattern, but rather as one that careful lawyers often follow.

thus understand language that way. Rather, textualists presume that Congress communicates with the regulated according to the conventions that the two share as skilled users of English. As Scalia put it in rejecting the existence of actual congressional intent, "[A]ll we can know is that they voted for a text that they presumably thought would be read the same way any reasonable English speaker would read it."[37] And if the relevant English speaker is a lawyer, textualists assume that Congress speaks the lawyer's language: Scalia, writing with Professor John Manning, once cautioned that "[i]f legislators didn't look up the materials needed to define a technical term, they should have—because that's the meaning the persons subject to the law will understand."[38]

Textualists use dictionaries and canons as a way of identifying the linguistic expectations of the regulated. Dictionaries are useful to the textualist not because the textualist assumes that legislators use them but because they offer some evidence of the meaning attributed to words by ordinary English speakers. In a similar vein, the linguistic canons are designed to capture the speech patterns of ordinary English speakers and, in some cases, of the subclass of lawyers. (I put substantive canons aside because, as I have argued elsewhere, substantive canons are not designed to interpret text

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[37] Antonin Scalia and John F. Manning, *A Dialogue on Statutory and Constitutional Interpretation*, 80 Geo Wash L Rev 1610, 1613 (2012). See also John F. Manning, *Textualism and the Role of* The Federalist *in Constitutional Adjudication*, 66 Geo Wash L Rev 1337, 1341 & nn 16–17 (1998) ("Even if we cannot know the actual intent of the legislature, we can at least charge each legislator with the intention 'to say what one would be normally understood as saying, given the circumstances in which one said it.'"), citing Joseph Raz, *Intention in Interpretation*, in Robert P. George, ed, *The Autonomy of Law: Essays on Legal Positivism* 249, 264–65, 266 (Oxford 1996); Raz, *Intention in Interpretation* at 267 (cited in note 37):

> Legislators who have the minimal intention know that they are, if they carry the majority, making law, and they know how to find out what law they are making. All they have to do is establish the meaning of the text in front of them, when understood as it will be according to their legal culture assuming that it will be promulgated on that occasion.

See also Jeremy Waldron, *Legislators' Intentions and Unintentional Legislation*, in Andrei Marmor, ed, *Law and Interpretation: Essays in Legal Philosophy* 329, 339 (Oxford 1995) ("A legislator who votes for (or against) a provision . . . does so on the assumption that—to put it crudely—what the words mean to him is identical to what they will mean to those to whom they are addressed (in the event that the provision is passed).").

[38] Scalia and Manning, 80 Geo Wash L Rev at 1616 (cited in note 37).

but rather to advance substantive policies.)[39] Thus, the treatise that Scalia wrote with Professor Bryan Garner describes canons as "principles of expression that are as universal as principles of logic."[40] To be sure, Congress can override these linguistic patterns or dictionary definitions by dictating interpretive instructions or statutory definitions. But absent such an override, textualists effectively hold Congress to speaking in the manner most natural to congressional outsiders.

If the linguistic canons simply reflect ordinary, sometimes lawyerly, English usage, one might wonder why it is necessary to systematize them. The community of English speakers—both congressional insiders and outsiders—would presumably follow such rules unconsciously. Textualists explain the canons' systemization by pointing out that it supplies a useful list of presumptions for legislators to use in drafting.[41] Language can be unwieldy, and speakers sometimes employ language in ways that—while they may make sense—depart from common patterns of usage and are thus subject to misunderstanding. Recall that textualists presume that Congress uses language "the same way any reasonable English speaker would read it."[42] The canons, by making linguistic conventions explicit, offer Congress an accessible way of confirming how ordinary English speakers will understand the text.

Whether the canons actually capture patterns of ordinary usage is an empirical question.[43] If they do not track common usage, then the textualist rationale for using them is undermined. But it is not undermined by evidence that *Congress* rejects them as linguistic defaults. Professor Gluck has argued that "most of the Court's justifications for deploying the canons are grounded in purported empirical understandings of how Congress actually works or what rules Congress actually

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39 See Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 BU L Rev 109, 120–21 (2010) (arguing that despite the Court's frequent protestations to the contrary, canons like avoidance, lenity, and clear-statement rules cannot plausibly be characterized as attempts to capture the ordinary use of language).

40 Scalia and Garner, *Reading Law* at 51 (cited in note 32). See also id (asserting that canons "are not 'rules' of interpretation in any strict sense but presumptions about what an intelligently produced text conveys").

41 See id at 61 ("The canons influence not just how courts approach texts but also the techniques that legal drafters follow in preparing those texts.").

42 See note 37 and accompanying text.

43 See Bressman and Gluck, 66 Stan L Rev at 784–85 (cited in note 5) (pointing out the absence of empirical work substantiating the idea that "average citizens interpret language in accordance with the canons").

knows."[44] The textualist justification, however, is that they reflect the linguistic rules that the *ordinary speaker* actually employs. Again, they may not, and if they do not, textualists should reconsider them. But the fact that the hypothetical congressional insider would not read statutory language against the backdrop of the canons does not pull the rug out from under the textualist. Scalia's response would likely be a variation on his response to Congress's potential lack of knowledge of background legal principles: "If legislators didn't [take linguistic canons into account], they should have—because that's the meaning the persons subject to the law will understand."[45]

Note that Scalia's likely answer suggests that reliance on canons would improve the drafting process, a goal that might justify the canons wholly apart from their ability to capture ordinary linguistic patterns.[46] Yet that answer is not rooted in a judicial ambition to discipline Congress by holding it to judicially crafted rules that will impose coherence on the law. It is rooted in the principle that courts are entitled to adopt a default presumption that Congress legislates in the language of the ordinary reader, and that presumption would hold even in the face of evidence that Congress's own defaults are different. That position requires a justification, and I sketch one in Part III. For now, however, my aim is simply to describe it.

I have said that process-based arguments about how Congress uses dictionaries and canons would not cause textualists to rethink them. Legislative history is trickier. Textualists have long objected to the use of legislative history on the ground that it is designed to uncover a nonexistent, and in any event irrelevant, legislative intent.[47] In addition, to the

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44 Gluck, 129 Harv L Rev at 83 (cited in note 3) (emphasis omitted).

45 Scalia and Manning, 80 Geo Wash L Rev at 1616 (cited in note 37).

46 See Gluck and Bressman, 65 Stan L Rev at 905 (cited in note 5) (suggesting that "judges might use the canons for more dialogical reasons, such as to encourage Congress to draft more precisely or in other ways that judges think would be preferable"). See also Gluck, O'Connell, and Po, 115 Colum L Rev at 1847 (cited in note 5):

> [S]ome statutory interpretation doctrines aim to reflect how Congress drafts; others aim to influence, or improve, the drafting process; still others impose policy presumptions atop legislation that Congress may not have considered; and still others are about imposing a coherence and rationality on the U.S. Code that Congress did not.

47 See *Lawson v FMR LLC*, 134 S Ct 1158, 1176–77 (2014) (Scalia concurring in principal part and concurring in the judgment) (rejecting reliance on legislative history because a statute means what it said, not what Congress intended it to say, and because there is no actual congressional intent to find in any event).

extent that the Court treats committee reports as an authoritative way of resolving statutory ambiguity, it permits Congress to delegate lawmaking authority to a subset of itself in violation of the constitutional prohibition against self-delegation.[48] A process-based approach to legislative history does not necessarily run into these well-known objections. It does, however, proceed from the perspective of the hypothetical congressional insider and for this reason is unlikely to move textualists.

Consider Professor Nourse's proposal that courts use legislative history according to Congress's own rules.[49] Her theory does not assume that Congress can functionally authorize a committee to fill in statutory details that the text leaves open. Nor does it depend on the proposition that members of Congress *actually* consulted and assented to the relevant legislative history. Instead, her approach interprets language from the perspective of the hypothetical legislator familiar with Congress's conventions.[50] The relevant legislative history functions in at least some instances like an internal glossary, enabling a court to determine how a reasonable member of Congress would have understood the statutory language.[51]

Nourse offers *Public Citizen v Department of Justice*[52] as an example. In that case, the Court had to decide whether the American Bar Association's Standing Committee on the Federal Judiciary, which advised the president on judicial nominations, was "utilized" by the president and therefore subject to the sunshine requirements imposed by the Federal Advisory Committee Act.[53] The case is controversial because the Court, asserting that the straightforward meaning of "utilize" would lead to absurd results (like bringing the president's consultation with his own political party within the Act), cited *Holy Trinity*

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48 See John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 Colum L Rev 673, 701–31 (1997) (developing this argument).

49 See Nourse, 122 Yale L J at 73–75 (cited in note 5).

50 See id at 92 ("[J]ust as Congress is presumed to know and follow the 'surrounding body of law,' there should be an even stronger presumption that Congress knows and follows its *own* rules.") (citation omitted).

51 Nourse also addresses scholarly and judicial misuses of the legislative history "glossary"—for example, she points out that interpreters sometimes erroneously rely on "losers' history" to define statutory terms. See id at 121–28 (discussing this misuse of legislative history in the *Holy Trinity* debate about the meaning of "labor or service of any kind").

52 491 US 440 (1989).

53 Pub L No 92-463, 86 Stat 770 (1972), codified at 5 USC App 2 §§ 1–15. See also *Public Citizen*, 491 US at 440.

and essentially read the word "utilize" out of the statute.[54] Nourse maintains that the Court could have reached the same result without provoking the criticism that it had performed "judicial surgery."[55] Had the Court consulted the conference committee report, she says, it would have learned that Congress used the word "utilize" to mean "established or organized."[56] Those were the words in the House and Senate bills that went to the conference committee, which, under Congress's own rules, had no power to substantively change them.[57] "[A] judge," Nourse argues, "should interpret 'utilize' precisely as a member of Congress would interpret it—as making no significant change to 'established or organized.'"[58] When a word like "'utilize' can be read in a prototypical ordinary-meaning sense or a technical meaning-for-this-statute sense," Nourse contends that a court should choose the latter.[59]

Interpreting language according to Congress's own rules thus clearly takes the perspective of a congressional insider. To be sure, legislative history is not categorically unhelpful for an interpreter taking the ordinary-reader perspective. Even Scalia did not object to using legislative history to shed light on how ordinary speakers use words in a particular context.[60] So used, legislative history provides evidence of "how a reasonable person uses language" because "the way legislators use language is some evidence of that."[61] A textualist, however, would not privilege the legislative perspective by adopting a strained usage that complies with congressional conventions that do not map

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54 Id at 452–56. See also Nourse, 122 Yale L J at 93 (cited in note 5) ("Today, *Public Citizen* is taught as a controversial case.").

55 Nourse, 122 Yale L J at 93 (cited in note 5) (noting that textualists criticize the case for, among other things, its "apparent judicial surgery").

56 Id at 95.

57 Id at 94–95 (noting that the House bill used the word "establish" and the Senate bill used the phrase "established or organized" and that both House and Senate rules prohibit conferees from changing the text "in any significant way").

58 Id at 95. See also id at 96 ("A faithful member of Congress would assume that, when both Houses pass the same language, that any added language must be read as making no substantive change in the bill."). Because Nourse "propose[s] this as a principle to resolve ambiguity, not to supplant the statute's text," id at 95 n 101, the argument depends on the conclusion that the word "utilize" can bear the meaning "established or organized."

59 Nourse, 122 Yale L J at 96 (cited in note 5).

60 See Scalia and Manning, 80 Geo Wash L Rev at 1616 (cited in note 37) ("If you want to use [legislative history] just to show that a word could bear a particular meaning—if you want to bring forward floor debate to show that a word is sometimes used in a certain sense—that's okay.").

61 Id.

onto ordinary uses of English. Congress must be presumed to play by the linguistic rules ordinary English speakers follow rather than its own special set.

III. COMPETING CONCEPTIONS OF FAITHFUL AGENCY

Process-based theorists ground their approach in the principle of faithful agency. They describe faithful agency as "a theory under which the ostensible goal of interpretive doctrine is to reflect how Congress drafts."[62] Courts, as Congress's faithful agents, must filter language through Congress's linguistic rules, which are sometimes peculiar to the legislative context, because that serves the principal.[63] The textualist commitment to the ordinary-reader perspective might be explained by a competing conception of faithful agency—one that understands courts to be the faithful agents of the people rather than of Congress.

Textualists have routinely described courts as the faithful agents of Congress.[64] I have done it myself.[65] Justice Scalia, however, put it differently. He took a relatively strong view of legislative supremacy, consistently arguing that courts must follow Congress's will, as expressed in the text, and denying any judicial power to alter the text. At the same time, he did not think that a commitment to legislative supremacy casts courts in the role of Congress's agents. He characterized courts as agents of the people rather than agents of Congress,[66] and he depicted the duty of fidelity as one owed to enacted texts rather than to

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[62] Bressman and Gluck, 66 Stan L Rev at 735 (cited in note 5) (identifying this as the meaning of faithful agency). See also id at 736 (asserting that it is a conventional assumption of both textualists and purposivists that "the only democratically legitimate theory of interpretation for unelected federal judges is one that is linked to congressional intent or practice"). See also Gluck and Bressman, 65 Stan L Rev at 950 (cited in note 5) (observing that "[a]lthough most theorists have couched the faithful-agent paradigm only in terms of the courts-Congress relationship, a few have advanced versions of [the view that courts are faithful agents of the public]").

[63] See Katzmann, *Judging Statutes* at 29 (cited in note 5) ("Judicial respect for Congress . . . means using the interpretive materials the legislative branch thinks important to understanding its work."). See also Nourse, 122 Yale L J at 96 (cited in note 5) (arguing that a faithful agent must interpret statutory language as Congress would have understood it).

[64] See, for example, John F. Manning, *Textualism and the Equity of the Statute*, 101 Colum L Rev 1, 15 (2001) (asserting that both textualists and purposivists understand themselves to be the faithful agents of Congress).

[65] See Barrett, 90 BU L Rev at 112–17 (cited in note 39) (asserting that textualists and purposivists share the premise that courts are the faithful agents of Congress).

[66] See Scalia and Garner, *Reading Law* at 138 (cited in note 32) (asserting that "courts are assuredly not agents of the legislature . . . [t]hey are agents of the people").

the legislature itself.[67] Scalia maintained, moreover, that a statute is not a command to a court (as it would be if one treated Congress as the principal and the court as the agent), but a command "to the executive or the citizenry."[68]

On this theory of faithful agency, courts engaging in statutory interpretation are justified in adopting the perspective of the people because they are agents of the people. If, moreover, a legislative command is directed to the citizenry, it is both sensible and fair for the courts to interpret that command as its recipients would. In this respect, textualists might refuse to adopt the sometimes-unorthodox linguistic conventions of the hypothetical drafter for the same fairness reason they reject the idea of giving legal effect to unenacted congressional intent. In the latter context, Scalia insisted that "it is simply incompatible with democratic government, or indeed, even with fair government, to have the meaning of a law determined by what the lawgiver meant, rather than by what the lawmaker promulgated."[69] Fairness requires that laws be interpreted in accordance with their ordinary meaning, lest they be like Nero's edicts, "post[ed] high up on the pillars, so that they could not easily be read."[70] This is reason both to employ sources that capture ordinary meaning, such as usage canons and dictionaries, and to refuse to strain ordinary meaning to account for the vagaries of the legislative process.

The idea that courts are agents of the people is perhaps in some tension with the textualist's occasional use of the perspective of the "ordinary lawyer" rather than the ordinary English speaker.[71] This is a point that a fully developed defense of Scalia's conception of faithful agency would have to address in more detail than space permits here. For present purposes, I note simply that a court interpreting statutes as one familiar with legal conventions does not function as a faithful agent of lawyers. Lawyers are themselves agents of the people they represent, and in that role they interpret the law on behalf of clients to whom it might not be otherwise accessible. In reading

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67 Scalia and Manning, 80 Geo Wash L Rev at 1610 (cited in note 37) (asserting that "the people and agents of the people owe fidelity to democratically enacted texts").

68 Scalia and Garner, *Reading Law* at 138 (cited in note 32). Scalia and Garner except the "relatively few statutes that deal with the jurisdiction and procedures of the courts themselves" from this description. Id.

69 Scalia, *A Matter of Interpretation* at 17 (cited in note 29).

70 Id.

71 See notes 32–35 and accompanying text.

a statute as a lawyer would, a court is not betraying the ordinary people to whom it owes fidelity, but rather employing the perspective of the intermediaries on whom ordinary people rely. Moreover, the fiction that the people are on constructive notice of the law—and must therefore conform to it regardless of whether they are actually aware of it—does not depend on the proposition that the language of the law is accessible to all people. On the contrary, this fiction assumes that the people are capable of deciphering language that is sometimes specialized and technical. Attributing that ability to the ordinary person by positing familiarity with legal conventions is thus consistent with the fiction that the law otherwise employs. More should be said about whether and when a court should interpret statutes through the eyes of an ordinary lawyer rather than an ordinary person. Adopting the former perspective, however, is not inherently inconsistent with the idea that courts are faithful agents of the people.

The power of the House and Senate to adopt rules governing their proceedings is not a constitutional barrier to Scalia's conception of faithful agency. Process-based theorists invoke congressional rulemaking power as a reason for interpreting language within its procedural context.[72] The Constitution empowers each chamber to organize its participation in the lawmaking process, and pursuant to this authority, each makes choices about, among other things, how bills progress and the role of legislative history in internal deliberations. Interpreting language in light of Congress's own rules, the argument goes, honors Congress's authority over its own affairs and preserves the integrity of the legislative process.[73]

Textualists have a different understanding of what that respect requires, and on their account they also respect Congress's procedural choices. They do not argue that Congress must use committees in any particular way or that it cannot generate legislative history for its own purposes. From the point

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[72] See US Const Art I, § 5, cl 2 ("Each House may determine the Rules of its Proceedings[.]"). See also Gluck, 129 Harv L Rev at 105 (cited in note 5) (emphasizing that "the Constitution entrusts *Congress*, not the Court, with control over legislative procedures"); Katzmann, *Judging Statutes* at 12–17 (cited in note 5) (emphasizing significance of this grant); Nourse, 122 Yale L J at 92–97 (emphasizing importance of "Congress's own rules").

[73] See Katzmann, *Judging Statutes* at 4 (cited in note 5) ("[H]ow Congress makes its purposes known, through text and reliable accompanying materials constituting legislative history, should be respected, lest the integrity of the legislative process be undermined.").

of view of the textualist, the House and Senate may structure their internal deliberations as they see fit. But Congress's power over its internal deliberations does not control how courts, external to Congress, interpret the statutes that emerge from the legislative process. Indeed, the only power that Congress has to control others is to use words to enact texts via the specific lawmaking process prescribed by Article I, § 7—and nothing in that process gives (or can give) legal status to internal norms or practices that do not run that gauntlet. All that process produces is a text, and fidelity to that lawmaking process and fairness to the people require the words of that law to be interpreted in their ordinary sense. The details of the legislative process—whether it was hasty or careful, complex or ordinary—do not justify departures from the text's natural meaning.[74]

CONCLUSION

Considering the implications of the process-based turn in statutory interpretation exposes the unappreciated textualist assumption that its prototypical ordinary reader is a congressional outsider. Because earlier debates in statutory interpretation pitted text against intent, textualists had no need to be particularly precise about the perspective they employed to determine statutory meaning. They identified their construct as a skilled user of language, typically familiar with legal conventions, but they did not say much more than that.

Process-based theories proceed from the perspective of a hypothetical legislator, and that focus requires textualists to look more closely at their own assumptions. It is clear that textualists have almost always defined the relevant linguistic community to include congressional outsiders, but they have not made that explicit. The choice to define the relevant community as including congressional outsiders is significant because it determines how elastically courts will treat language. The peculiarities of the legislative process mean that congressional insiders sometimes understand language in something other

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[74] See text accompanying notes 21–23. See also *King*, 135 S Ct at 2506 (Scalia dissenting):

> It is not our place to judge the quality of the care and deliberation that went into this or any other law. A law enacted by voice vote with no deliberation whatever is fully as binding upon us as one enacted after years of study, months of committee hearings, and weeks of debate.

than its most natural sense. If courts employ an outsider's perspective, those less natural readings are off the table.

Textualists must, of course, defend their choice of perspective. Scholars who advocate a focus on congressional procedure say that faithful agency requires courts to comply with Congress's linguistic conventions. Justice Scalia's work, which emphasizes fidelity to the text and duty to the people, offers textualists the beginning of a response. It remains to them to develop it.