TEXTUALISM AND THE PRESUMPTION OF REASONABLE DRAFTING

INTRODUCTION

For much of our nation's history, the Supreme Court has held that the text of a statute should yield to its purpose whenever the two appear to conflict.[1] Even when the text was unambiguous, the Court would often attempt to discern a statute's purpose from historical circumstances[2] and legislative history.[3] Near the end of the twentieth century, however, textualism emerged as a competing approach to statutory interpretation.[4] Textualists rejected inquiries into purpose and argued that judges should interpret statutes according to the meaning of the enacted text.[5] Adherence to textual meaning,

---

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

2. *See, e.g.*, Church of the Holy Trinity v. United States, 143 U.S. 457, 463 (1892) ("[A] 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.") (citations omitted).

3. *See, e.g.*, N. Haven Bd. of Educ. v. Bell, 456 U.S. 512, 526–27 (1982) ("Although the statements of one legislator made during a debate may not be controlling, Senator Bayh's remarks, as those of the sponsor of the language ultimately enacted, are an authoritative guide to the statute's construction.") (citation omitted); Steadman v. SEC, 450 U.S. 91, 101 (1981) (noting that "[a]ny doubt as to the intent of Congress is removed by the House Report"); J.W. Bateson Co. v. United States *ex rel.* Bd. of Trs. of the Nat'l Automatic Sprinkler Indus. Pension Fund, 434 U.S. 586, 591 (1978) (concluding that "the authoritative Committee Reports" "leave[] no room for doubt about Congress' intent.").

4. *See generally* William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621 (1990).

5. *See* Antonin Scalia, *Common-Law Courts in a Civil Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 17 (Amy Gutman ed., 1997); Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J.L. & PUB. POL'Y 59, 60, 65–66 (1988).

they argued, promotes judicial restraint and ensures that judges act as faithful agents of the legislature.[6] The textualist approach to statutory interpretation has been highly influential. Studies have shown that the Supreme Court's use of legislative history has decreased significantly over the past several years,[7] and even the Court's non-textualist Justices have come to agree that inquiries into purpose are unnecessary when the text is unambiguous.[8]

Defining the textualist approach to interpretation, however, has proved to be a surprisingly difficult task. Modern textualism is a far cry from literalism or strict construction.[9] Modern textualists acknowledge that words have no inherent meaning outside of context.[10] They have no problem with relying on interpretive techniques such as semantic canons[11] and structural analysis[12] to resolve textual ambiguities and arrive at meanings that may not be obvious from a plain reading of the text. Textualism "does not admit of a simple definition," but is a sophisticated, context-sensitive approach to statutory interpretation.[13]

---

6. *See* Frank H. Easterbrook, *Judges as Honest Agents*, 33 HARV. J.L. & PUB. POL'Y 915, 915 (2010) (arguing that "judges should be honest agents of the enacting legislature").

7. *See, e.g.*, James J. Brudney & Corey Ditslear, *The Decline and Fall of Legislative History? Patterns of Supreme Court Reliance in the Burger and Rehnquist Eras*, 89 JUDICATURE 220, 222 (2006); Michael H. Koby, *The Supreme Court's Declining Reliance on Legislative History: The Impact of Justice Scalia's Critique*, 36 HARV. J. ON LEGIS. 369, 386 (1999); Thomas W. Merrill, Essay, *Textualism and the Future of the* Chevron *Doctrine*, 72 WASH. U. L.Q. 351, 356 (1994); Samuel A. Thumma & Jeffrey L. Kirchmeier, *The Lexicon Has Become a Fortress: The United States Supreme Court's Use of Dictionaries*, 47 BUFF. L. REV. 227, 252–60 (1999).

8. *See* John F. Manning, *The New Purposivism*, SUP. CT. REV. 113, 129–30 (2011).

9. *See* ANTONIN SCALIA & BRIAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 356 (2012) ("strict construction . . . is not a doctrine to be taken seriously").

10. *See* Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL'Y 61, 64 (1994) ("Because interpretation is a social enterprise, because words have no natural meanings, and because their effect lies in context, we must consult these contexts.").

11. *See, e.g.*, Barnhart v. Thomas, 540 U.S. 20, 22 (2003); Barnhart v. Sigmon Coal Co., 534 U.S. 438, 452–53 (2002); United States v. Gonzales, 520 U.S. 1, 5 (1997); Russello v. United States, 464 U.S. 16, 23 (1983).

12. *See, e.g.*, General Dynamics Land Sys., Inc. v. Cline, 540 U.S. 581, 604 & n.1 (2004) (Thomas, J., dissenting); W. Va. Univ. Hosps., Inc. v. Casey, 499 U.S. 83, 89 (1991) (Scalia, J., dissenting).

13. John F. Manning, *Textualism and Legislative Intent*, 91 VA. L. REV. 419, 420 (2005).

When asked to define their interpretive methodology, textualists often state that they are discerning how an objectively reasonable reader at the time of the statute's drafting would have understood the text.[14] This description of textualism, which I shall call the "reasonable reader framework," is problematic for textualists in two ways. First, the reasonable reader framework suggests that textualism is an attempt to approximate how reasonable people actually read statutory texts. However, a recent empirical study by Professors Abbe Gluck and Lisa Schultz Bressman casts doubt on this claim. Professors Gluck and Bressman found that many textualist interpretive methods provide a poor approximation of how congressional staffers actually read statutory texts.[15] If textualism is supposed to approximate how reasonable people read statutes, these findings would undermine the validity of many interpretive methods that textualists routinely use.

The second problem with the reasonable reader framework is that it fails to describe textualism in a way that meaningfully distinguishes it from purposivism. Modern purposivists no longer assert, as the Supreme Court did in *Church of the Holy Trinity v. United States*,[16] that legislative purpose can override an unambiguous statutory text. Instead, modern purposivists agree with textualists that the text should govern when it is unambiguous, and disagree only about what to do when the text is ambiguous.[17] Because textualists and modern purposivists can both properly be characterized as describing how a reasonable reader would understand the text, the reasonable reader framework fails to describe textualism in a way that distinguishes it from purposivism.

This Note proposes a new framework for understanding textualism: the reasonable drafter framework. The reasonable drafter framework posits that textualists employ a presumption of reasonable drafting and ask what a reasonable drafter

---

14. *See, e.g.*, SCALIA & GARNER, s*upra* note 9, at 16; Easterbrook, *supra* note 5, at 65.

15. *See* Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901, 949 (2013).

16. 143 U.S. 457 (1892).

17. *See* John F. Manning, *What Divides Textualists from Purposivists*, 106 COLUM. L. REV. 70, 75 (2006).

would have intended to convey by the text, rather than what a reasonable reader would have understood the text to mean. The reasonable drafter framework conveys the idea that textualism is not a descriptive account of how reasonable people read texts, but a normative framework for resolving textual ambiguities. The framework avoids the problems of the reasonable reader framework and conveys the unique way in which textualism promotes judicial restraint through a presumption of reasonable drafting.

I. PROBLEMS WITH THE REASONABLE READER FRAMEWORK

Modern textualists typically describe their interpretive methodology according to the reasonable reader framework, which posits that judges should discern what the statutory text conveyed to a reasonable reader at the time of the statute's drafting.[18] Under this framework, textualists ask how an objectively reasonable person, or a "median legislator," would understand the statutory text.[19] The two judges most often associated with modern textualism, Justice Scalia and Judge Easterbrook, have described textualism along these lines. According to Justice Scalia, the basic interpretive principle of textualism is that judges should endeavor to discern "how a reasonable reader, fully competent in the language, would have understood the text at the time it was issued."[20] As Judge Easterbrook put it, textualists "hear the words as they would sound in the mind of a skilled, objectively reasonable user of words."[21]

The reasonable reader framework is problematic for textualists, however, in two ways. First, it characterizes textualism as a description of how reasonable people read texts, even though empirical evidence suggests that textualist interpretive methods are a poor approximation of how people read statutory texts. Second, the reasonable reader framework fails to describe textualism in a way that meaningfully distinguishes it from purposivism.

---

18. *See* SCALIA & GARNER, *supra* note 9, at 16; Easterbrook, *supra* note 5, at 65.
19. Easterbrook, *supra* note 5, at 63.
20. SCALIA & GARNER, *supra* note 9, at 33.
21. Easterbrook, *supra* note 5, at 65.

A. Many Textualist Interpretive Methods Do Not Accurately Describe How Reasonable People Read Texts

Modern textualists routinely employ context-based interpretive techniques to resolve textual ambiguities and arrive at meanings that are not obvious from a plain reading of the text. One category of textualist interpretive techniques is semantic canons. Semantic canons are rules of thumb about grammar, language use, and punctuation that approximate how a reasonable person uses language.[22] According to the reasonable reader framework, when textualists use semantic canons, they are implicitly assuming that a reasonable reader would read the statute as if it were drafted according to the rules of sensible language use.[23] Yet it is unclear why textualists should want to make this assumption.

Consider, for example, the presumption of purposeful variation of language, which counsels that when a statute includes particular language in one section and omits that language from another section, the disparate inclusion or exclusion should be presumed to be intentional and purposeful.[24] In *Jama v. Immigration and Customs Enforcement*,[25] the Attorney General attempted to deport Jama to Somalia pursuant to 8 U.S.C. § 1231(b)(2)(E)(iv), which allows the Attorney General to choose "the country in which the alien was born" as the country of destination for deportation.[26] A subsequent clause of the same subparagraph provided that "if impracticable, inadvisable, or impossible to remove the alien to each country described in a previous clause of this subparagraph," the alien may be deported to "another country whose government will accept the alien into that country."[27] Jama argued that the word "another" implied that all of the previous clauses of the subparagraph also required consent from the country of destina-

---

22. *See* Eskridge, *supra* note 4, at 663–64.

23. *See* SCALIA & GARNER, s*upra* note 9, at 51 (explaining that semantic canons are "presumptions about what an intelligently produced text conveys").

24. *See, e.g.*, United States v. Gonzales, 520 U.S. 1, 5 (1997); Russello v. United States, 464 U.S. 16, 23 (1983); Nuovo Pignone, SpA v. Storman Asia M/V, 310 F.3d 374, 384 n.16 (5th Cir. 2002).

25. 543 U.S. 335 (2005).

26. *Id.* at 337–41.

27. *Id.* at 340.

tion.[28] Writing for the majority, Justice Scalia rejected Jama's argument.[29] He applied the presumption of purposeful variation, arguing that the Court should "not lightly assume that Congress has omitted from its adopted text requirements that it nonetheless intends to apply."[30] Because the latter clause explicitly contained a consent requirement, he interpreted the lack of an explicit consent requirement in the earlier clause as a deliberate and purposeful omission.[31]

According to the reasonable reader framework's account of textualism, Justice Scalia's reliance on this interpretive canon was based on the implicit assumption that a reasonable person would read the statute as if it were drafted according to the rules of sensible language use. Yet a reasonable reader might well conclude that Congress often drafts statutes without adequately proofreading them, and refrain from assuming that Congress followed the rules of sensible language use. It is unclear, under the reasonable reader framework, why textualists should presume that reasonable readers would choose the former approach over the latter.

The same could be said about all semantic canons of interpretation. Consider the rule of the last antecedent, which counsels that a limiting clause should be read as modifying only the noun or phrase that it immediately follows.[32] In *Barnhart v. Thomas*,[33] the Court used the rule of the last antecedent to interpret the Social Security Act's definition of a disabled person as a person whose "physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy."[34] An administrative law judge found that Pauline Thomas was ineligible for

28. *Id.* at 342–43.

29. *Id.* at 341.

30. *Id.*

31. *Id.*

32. The intuition behind the rule of the last antecedent is best described by Justice Harry Blackmun: "If one wished to say that he would welcome a cat, would welcome a dog, or would welcome a cow that jumps over the moon, he would likely say 'I would like to have a cat, a dog, or a cow that jumps over the moon.'" United States v. Bass, 404 U.S. 336, 352 (1971) (Blackmun, J., dissenting).

33. 540 U.S. 20 (2003).

34. *Id.* at 22–23.

disability benefits because her impairments did not prevent her from performing her previous job as an elevator operator.[35] On appeal, Thomas argued that she nonetheless qualified for benefits because her previous job no longer existed in the national economy.[36]

Writing for a unanimous Court, Justice Scalia rejected the argument because the rule of the last antecedent counseled that the limiting clause ("which exists in the national economy") should be read as modifying only the noun that it immediately follows ("any other kind of substantially gainful work").[37] Justice Scalia explained that the rule is "quite sensible as a matter of grammar," and should be followed in the absence of indicia of contrary meaning.[38]

Under the reasonable reader framework, the rule of the last antecedent, like all other semantic canons, requires the assumption that a reasonable reader would read the statute as if it were drafted according to the rules of sensible language use. Yet it is unclear why a reasonable reader would want to make such an assumption. A reasonable reader might hesitate to presume that Congress drafts statutes according to the most sensible rules of grammar.

Indeed, there is empirical evidence suggesting that reasonable readers do not read statutes as if they were drafted according to the rules of sensible language use. Professors Abbe Gluck and Lisa Schultz Bressman recently completed a study that casts doubt on whether commonly used canons of interpretation actually approximate how a reasonable person reads statutory texts. Professors Gluck and Bressman surveyed 137 congressional staffers drawn from both political parties and asked them about a number of interpretive canons by name and by underlying concept.[39] They found that most staffers were either unaware of or rejected the use of many textualist interpretive techniques, including some of the most commonly used semantic canons, such as the *expressio unius* canon.[40] These results suggest that many semantic canons are actually

35. *Id.* at 22.
36. *Id.*
37. *Id.* at 26.
38. *Id.* (citation omitted).
39. Gluck & Bressman, *supra* note 15, at 919–24.
40. *Id.* at 949.

a poor approximation of how a reasonable person or median legislator would read a statute.

The study by Professors Gluck and Bressman also casts doubt on another category of textualist interpretive tools known as structural analysis. One type of structural analysis examines how a word has been used in other statutes in the U.S. Code. In *West Virginia University Hospitals, Inc. v. Casey*,[41] the Supreme Court considered whether expert witness fees may be awarded under 42 U.S.C. § 1988, which permits an award of "attorney's fees" for the prevailing party in certain civil rights suits.[42] Justice Scalia held that the words "attorney's fees" did not include expert witness fees because at least thirty-four statutes in the U.S. Code explicitly provide for both attorney's fees and expert witness fees.[43] If Congress had wanted to include expert witness fees, Justice Scalia reasoned, it would have explicitly mentioned them in the text of the statute.[44] Under the reasonable reader framework's account of textualism, Justice Scalia implicitly assumed that an objectively reasonable person would read the ambiguous statute as if it were carefully woven into the tapestry of existing federal law.

It is questionable, however, whether a reasonable reader would actually have examined how the phrase "attorney's fees" had been used in previous statutes. While consistency with the U.S. Code is ideal in legislative drafting, an ordinary reasonable reader most likely would not look at the entire U.S. Code when reading a statute. Most legislators lack the resources to consult the entire U.S. Code when studying a bill, and attributing such thoroughness to a statute's drafters would be wishful thinking. The empirical study by Professors Gluck and Bressman supports this view. Of the 137 congressional staffers surveyed, only nine percent believed that drafters often or always intended for terms to apply consistently across statutes in the U.S. Code.[45] This suggests that a reason-

41. 499 U.S. 83 (1991).

42. *Id.* at 84.

43. *Id.* at 89.

44. *Id.* at 99 ("Congress could easily have shifted 'attorney's fees and expert witness fees,' or 'reasonable litigation expenses,' as it did in contemporaneous statutes; it chose instead to enact more restrictive language, and we are bound by that restriction.").

45. Gluck & Bressman, *supra* note 15, at 936.

able reader most likely would not rely on the U.S. Code as a tool for resolving ambiguities.

A different type of structural analysis examines how a possible meaning of an ambiguous term fits within the statute as a whole. In *General Dynamics Land Systems, Inc. v. Cline*,[46] the Court had to determine whether a ban on discrimination "because of . . . age" prohibited preferential treatment for the relatively old.[47] Writing for the majority, Justice Souter examined the legislative history, concluding that the word "age" referred only to old age and that favoring the relatively old was permissible.[48] Justice Thomas dissented, arguing that the majority's interpretation of the word "age" was incorrect because it rendered another statutory provision incoherent and superfluous.[49] Justice Thomas's analysis relied on two premises. First, he employed the presumption of consistent usage, presuming that the word "age" had a consistent meaning throughout the statute.[50] Second, he presumed that the statute did not contain any superfluous provisions.[51] Based on these two premises, Justice Thomas argued that the majority's interpretation of "age" was incorrect because it rendered superfluous a provision that provided a defense for when "age is a bona fide occupational qualification."[52]

Under the reasonable reader framework, Justice Thomas's presumptions would have to be explained in terms of how an objectively reasonable person would read the statute. While the presumption of consistent usage and the presumption against superfluity represent sensible rules for drafting a coherent statute, a reasonable reader would probably hesitate to presume that a statute was actually drafted according to these

---

46. 540 U.S. 581 (2004).

47. *Id.* at 585.

48. *Id.* at 584, 586–91.

49. *Id.* at 604 & n.1 (Thomas, J., dissenting). The Age Discrimination in Employment Act provides a defense for discrimination when "age is a bona fide occupational qualification." *Id.* Thus, if the word "age" was limited to "older age," as the majority argued, the statute would only provide a defense for when *older age* is a bona fide occupational qualification—for example, if a movie producer prefers older actresses for the role of a grandmother. However, such a defense would be completely unnecessary if the majority's argument were correct, because discrimination in favor of the relatively old would not be prohibited by the statute.

50. *Id.* at 604.

51. *Id.*

52. *Id.* at 604 & n.1.

rules. Modern statutes are often drafted as massive omnibus bills, consisting of a conglomeration of the work of multiple committees working in isolation.[53] Members of Congress frequently do not read the entirety of the bills on which they vote.[54] A reasonable reader might therefore hesitate to presume internal consistency and coherence.

Less than half of the staffers surveyed by Professors Gluck and Bressman were even aware that courts employed a presumption of internal consistency.[55] Professors Gluck and Bressman also found that staffers explicitly rejected the presumption against superfluities for two reasons.[56] First, legislative drafters often err on the side of redundancy to ensure that statutes fully cover their intended terrain.[57] Second, legislative drafters often include redundant language to satisfy political stakeholders.[58] One survey respondent, for example, described how a statute drafted to cover "medical service providers" was amended to include a specific, redundant reference to "hospitals" in order to satisfy political stakeholders.[59]

The results of the study by Professors Gluck and Bressman suggest that textualist interpretive methods do a poor job of approximating how reasonable people actually read statutes. They cast doubt on whether the interpretive techniques set forth by Justice Scalia in his treatise on statutory interpretation actually accomplish his stated goal of endeavoring to discern "how a reasonable reader, fully competent in the language, would have understood the text at the time it was issued."[60] The reasonable reader framework, by characterizing textualism as an approximation of how reasonable people read statutes, paints a picture of textualism as a descriptive, empirical enterprise that ultimately fails to accomplish its purported goal.

---

53. *See* Gluck & Bressman, *supra* note 15, at 936 ("Our respondents told us that congressional committees are 'islands' that limit communication between committees drafting different parts of the same statutes").

54. *See Meet the Press* (NBC television broadcast Nov. 17, 2013) (questioning Representative Nancy Pelosi about the prudence of stating that "we have to pass the [Affordable Care Act] so that you can find out what is in it").

55. Gluck & Bressman, *supra* note 15, at 931.

56. *Id.* at 934.

57. *Id.*

58. *Id.*

59. *Id.*

60. SCALIA & GARNER, *supra* note 9, at 33.

B. The Reasonable Reader Framework Fails to Distinguish Textualism From Purposivism

A second problem with the reasonable reader framework is that it provides an overbroad description of textualism that fails to distinguish it from purposivism. Modern purposivists agree with textualists that the statutory text should govern when it is unambiguous.[61] Due to the success of the textualist critique of purposivism, purposivists have distanced themselves from the excesses exemplified in *Church of the Holy Trinity v. United States*,[62] in which the Court openly admitted to contradicting the statutory text.[63] As Professor Jonathan Siegel put it, "In a significant sense, we are all textualists now."[64] Today, modern purposivists believe that evidence of purpose should only be examined when the text is ambiguous.[65] By giving primacy to the text and using evidence of purpose only to resolve ambiguities, modern textually-constrained purposivists can also be characterized as discerning how a reasonable reader would understand the text of the statute.

Where modern textualists and modern purposivists disagree is in how they approach the resolution of textual ambiguities.[66] When textualists encounter ambiguities, they examine semantic context through interpretive tools such as canons of interpretation and structural analysis.[67] When purposivists encounter ambiguities, they look to policy context by examining historical circumstances and the statute's legislative history.[68] Unlike purposivists, textualists refuse to examine non-textual sources of meaning, believing that judicial pronouncements about the

---

61. *See* Manning, *supra* note 8, at 117 ("Under the new purposivism . . . ulterior purpose plays a decisive role if and only if Congress has framed the text at a high enough level of generality to accommodate it. Given this textually-structured approach to purposivism, all that distinguishes new purposivists from textualists is the new purposivists' willingness to invoke legislative history in cases of genuine semantic ambiguity.").

62. 143 U.S. 457 (1892).

63. *See, e.g.*, Jonathan Molot, *The Rise and Fall of Textualism*, 106 COLUM. L. REV. 1, 35–43 (2006).

64. Jonathan Siegel, *Textualism and Contextualism in Administrative Law*, 78 B.U. L. REV. 1023, 1057 (1998).

65. *See* Manning, *supra* note 8, at 116–17.

66. *See id.*

67. *See* Manning, *supra* note 17, at 76.

68. *See id.*

purported policy purposes of the legislature too often reflect the personal preferences of the deciding judge.[69]

This difference between textualists and purposivists, however, is not conveyed by a characterization of textualism as the discernment of how reasonable people read texts. That description can validly be used to describe both textualists and modern purposivists. Ambiguous texts are by definition susceptible to multiple interpretations by reasonable people. Neither textualism nor purposivism provides a self-evidently reasonable method for resolving ambiguities, and a reasonably skilled speaker of the English language could conceivably use either approach. By characterizing textualism as an attempt to discern how a reasonable person would understand the text, the reasonable reader framework fails to describe textualism in a way that distinguishes it from purposivism.

II. THE REASONABLE DRAFTER FRAMEWORK

The reasonable reader framework does not accurately describe how reasonable people read texts and fails to convey the difference between textualism and purposivism. As such, textualists should abandon the reasonable reader framework and adopt a new framework for describing their approach to statutory interpretation: the reasonable drafter framework. Rather than asking how a reasonable person would understand the text, textualists should ask the following question: What would an objectively reasonable drafter have intended to convey by the statutory text? This framework avoids the problems of the reasonable reader framework by conveying the unique way in which textualists seek to resolve ambiguities by employing a presumption of reasonable drafting.

Textualists resolve ambiguity by applying a wide variety of interpretive conventions that are based on the shared presumption of reasonable language use.[70] Semantic canons, for instance, are based on the presumption that reasonable drafters express their intentions according to the rules of sensible language use, such as the rule of the last antecedent. Structural analysis is based on the presumption that reasonable drafters

69. *See* John F. Manning, *Competing Presumptions About Statutory Coherence*, 74 FORDHAM L. REV. 2009, 2035–41 (2010).

70. *Id.* at 2035–36.

produce statutes that are internally coherent and coherent with the U.S. Code. The presumption of reasonable drafting is not an empirical description of how reasonable people read texts. Rather, it is an interpretive tool for resolving ambiguities which posits that judges should read statutes as if they were written by an objectively reasonable drafter.[71]

Textualists employ the presumption of reasonable drafting to ensure that judges do not depart from their role as the faithful agents of the legislature.[72] Textualists believe that the level of generality at which a statute is drafted is frequently the deliberate result of legislative bargaining.[73] When the text of a statute seems vague, overinclusive, underinclusive, or otherwise awkward in comparison to its apparent policy purpose, textualists are reluctant to presume that the difference is due to an error in drafting that should be adjusted by the courts.[74] For example, in *Oncale v. Sundowner Offshore Services, Inc.*,[75] the Court considered whether a statute's prohibition of "discriminat[ion] . . . 'because of . . . sex'" included male-on-male sexual harassment.[76] Writing for the Court, Justice Scalia held that the statute prohibited same-sex harassment, explaining:

> [M]ale-on-male sexual harassment in the workplace was assuredly not the principal evil Congress was concerned with when it enacted Title VII. But statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.[77]

Textualists err on the side of presuming that the legislature carefully and deliberately chose its words in order to express the bargain that it reached, instead of presuming sloppy draft-

---

71. *See id.*

72. *See id.* at 2039–41.

73. *See id.*

74. *See* Manning, *supra* note 17, at 104 ("Respect for the details of semantic meaning enables legislators to express the level of generality at which they wish to articulate the policies to which they have agreed. Legislators may compromise on a statute that does not fully address a perceived mischief, accepting half a loaf to facilitate a law's enactment.").

75. 523 U.S. 75, 79 (1998).

76. *Id.* at 76.

77. *Id.* at 79.

ing in need of correction by the courts.[78] To make the opposite presumption, as purposivists do, would allow judges to take it upon themselves to decide what the enacting legislature meant to say and open the door for judicial intrusion on the legislature's prerogative. By presuming that the text accurately expresses the legislature's will and follows the basic rules of sensible language use, textualists err on the side of respecting the level of generality at which the legislature spoke. They do so in order to preserve legislators' ability to express their bargain through the language of the statute. The presumption of reasonable drafting accomplishes this goal, regardless of whether it is an accurate description of how reasonable people actually read statutes. When there is a doubt as to whether awkward statutory language should be attributed to deliberate bargaining or sloppy draftsmanship, textualists presume the former as a way of preventing judges from imposing their preferred policies on the public under the guise of "correcting" a perceived mistake by the legislature.

The presumption of reasonable drafting is only a presumption. It can, in some instances, be overcome when there is compelling evidence of a genuine mistake in drafting. When the text of a statute would produce a result so absurd that the enacting legislature could not possibly have intended it, textualists are willing to depart from the text's meaning by applying the absurdity doctrine.[79] Both Justice Scalia and Judge Easterbrook accept the use of the absurdity doctrine in cases where the legislature appears to have misspoken,[80] and even Professor John

78. *See* Manning, *supra* note 69, at 2035–41.

79. As Chief Justice Marshall described the doctrine: "But if, in any case, the plain meaning of a provision . . . is to be disregarded, because we believe the framers of that instrument could not intend what they say, it must be one in which the absurdity and injustice of applying the provision to the case, would be so monstrous, that all mankind would, without hesitation, unite in rejecting the application." Sturges v. Crowninshield, 17 U.S. (4 Wheat.) 122, 202–03 (1819).

80. *See, e.g.*, City of Columbus v. Ours Garage & Wrecker Serv., Inc., 536 U.S. 424, 450 n.4 (2002) (Scalia, J., dissenting) ("A possibility so startling (and unlikely to occur) is well enough precluded by the rule that a statute should not be interpreted to produce absurd results."); INS v. Cardoza-Fonseca, 480 U.S. 421, 452 (1987) (Scalia, J., concurring) (implying that courts may depart from the plain meaning of the language to avoid a "patent absurdity"); United States v. Seaboard Sur. Co., 236 F.3d 883, 885 (7th Cir. 2001) (Easterbrook, J.) (suggesting that courts can supplement statutory text when the text "would produce absurd results if enforced as written"); Kerr v. Puckett, 138 F.3d 321, 323 (7th Cir. 1998) (Easterbrook, J.) (commenting that "a court should implement that language

Manning, who has argued that the absurdity doctrine is incompatible with the theoretical rationale for textualism, recognizes an exception for "scrivener's errors," in which there has been an obvious clerical or typographical error.[81] Apart from these rare occurrences, however, textualists will presume that the statutory text accurately expresses the legislature's will.

Some textualists might object to the characterization of textualism as the discernment of legislative intent. Textualists are famous for excoriating judges who inquire about the legislature's intentions.[82] Textualism, however, has never truly been divorced from inquiries into legislative intent. As many scholars have noted, the very act of interpreting language requires the discernment of authorial intent.[83] Professors Larry Alexander and Saikrishna Prakash illustrate this point with the following thought experiment. Suppose some people discover markings on the ground that are shaped like a "c," an "a," and a "t."[84] If it turned out that those markings were made by water dripping off a building, the markings would be meaningless.[85] Similarly, if they were created by a person marking out patches of a vegetable garden without any intention of making letters,

---

actually enacted—provided the statute is not internally inconsistent or otherwise absurd.").

81. *See* John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2459–60 n. 265 (2003) ("[W]hen an internal textual inconsistency or an obvious error of grammar, punctuation, or English usage is apparent from reading a word or phrase in the context of the text as a whole, there is only the remotest possibility that any such clerical mistake reflected a deliberative legislative compromise.").

82. *See* Easterbrook, *supra* note 5, at 59 ("This rump legislature, sitting in the mind of the court, then gives an authoritative answer. The judges are its oracles.").

83. *See* Larry Alexander & Saikrishna Prakash, *"Is that English You're Speaking?" Why Intention Free Interpretation is an Impossibility*, 41 SAN DIEGO L. REV. 967, 986 (2004) ("[S]upplying the idealized reader the 'context' of the statute is but a backdoor means of reintroducing the author's intent . . . [T]he idealized reader will search for clues illuminating the actual author's intent . . . This raises the possibility that textualists, in creating a construct to generate an 'objective' meaning, have instead just created an abstraction that merely filters authorial intent."); Stanley Fish, *There Is No Textualist Position*, 42 SAN DIEGO L. REV. 629, 635 (2005) ("[L]exical items and grammatical structures by themselves will yield no meaning—will not even been seen as lexical items and grammatical structures—until they are seen as having been produced by some intentional agent."); Caleb Nelson, *What is Textualism?*, 91 VA. L. REV. 347, 354 (2005) ("[B]oth the 'objectified' intent sought by Justice Scalia and the 'reasonable import of the language' sought by Judge Easterbrook do reflect some sort of inquiry into the meaning intended by the members of the enacting legislature.").

84. Alexander & Prakash, *supra* note 83, at 977.

85. *Id.*

they would also be meaningless.[86] The very act of reading a text presupposes the existence of an author who intended to communicate through written language.

What makes textualism unique from purposivism is not that it ignores intent. Ignoring intent is impossible. Rather, textualists uniquely seek to divine legislative intent without examining evidence of the legislature's subjective policy intentions. Textualists eschew evidence of subjective intent because legislatures are comprised of many members with differing motives that are often impossible to aggregate into a coherent collective intention.[87] They see statutes as the products of careful negotiation and compromise over language that does not reflect a coherent policy goal.[88] Textualists therefore refuse to go beyond the legislature's textually-recorded intent, a concept Justice Scalia has called "objectified intent."[89] The only intention we can safely attribute to a legislative body is the intention for the statutory text to be read according to prevailing interpretive conventions, as Joseph Raz has explained.[90] When judges depart from textually-recorded objectified intent and speculate about subjective intentions motivated by policy purposes, they inevitably attribute their own policy preferences to the legislature, according to textualists. By focusing on textually-recorded intent and eschewing inquiries into subjective intent, textualists seek to ensure that judges limit themselves to the modest role of serving as the faithful agents of the legislature.

The reasonable drafter framework conveys the foregoing account of textualism by characterizing textualism as the discern-

---

86. *Id.*

87. *See* Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 547 (1983) ("Because legislatures comprise many members, they do not have 'intents' or 'designs,' . . . This follows from the discoveries of public choice theory. Although legislators have individual lists of desires, priorities, and preferences, it turns out to be difficult, sometimes impossible, to aggregate these lists into a coherent collective choice."). Textualists' arguments about the incoherency of collective intent are based on the findings of public choice theory. *See generally* KENNETH ARROW, SOCIAL CHOICE AND INDIVIDUAL VALUES (2d ed. 1963); DUNCAN BLACK, THE THEORY OF COMMITTEES AND ELECTIONS (1958); DENNIS C. MUELLER, PUBLIC CHOICE (1979); Kenneth A. Shepsle, *Congress is a "They," Not an "It": Legislative Intent as Oxymoron*, 12 INT'L REV. L. & ECON. 239 (1992).

88. *See* Manning, *supra* note 69, at 2035–36.

89. *See* Scalia, s*upra* note 5, at 17; Manning, *supra* note 17, at 79.

90. *See* Joseph Raz, *Intention in Interpretation*, *in* THE AUTONOMY OF LAW: ESSAYS ON LEGAL POSITIVISM 266–67, 274–75 (Robert P. George ed., 1996).

ment of what a reasonable drafter would have intended the statutory text to mean. This framework conveys that textualists do seek to discern a form of legislative intent, but limit their inquiry to the objectified intent expressed in the statute's language. The reference to a "reasonable drafter" conveys the textualist presumption of reasonable drafting, which is not an empirical approximation of how legislators understand statutes, but an interpretive technique used to ensure that judges do not depart from their role as the faithful agents of the legislature. By conveying these important concepts, the reasonable drafter framework avoids the problems of the reasonable reader framework and effectively communicates the distinction between textualism and purposivism.

III. CONCLUSION

Textualists have described their approach to statutory interpretation as the discernment of what a reasonable reader, or what a median legislator, would understand the statutory text to mean. This description of textualism is problematic because empirical evidence suggests that textualist interpretive techniques, such as semantic canons and structural analysis, are not reliable approximations of how ordinary legislators understand statutes. Furthermore, the reasonable reader account of textualism fails to convey the difference between textualism and purposivism.

Textualists should abandon the reasonable reader framework and replace it with the reasonable drafter framework, which asks what an objectively reasonable person would have intended the statutory text to mean. Textualists should not fear the label of "intentionalist," and indeed, they should embrace it. Adherence to legislative intent is the cornerstone of the faithful agent vision of the judicial role. What distinguishes textualists from purposivists is that textualists look to the statutory text for legislative intent while employing a presumption of reasonable drafting. The presumption of reasonable drafting is the unique way in which textualists seek to promote judicial restraint and respect for the democratic process.

Cory R. Liu