Getting into Mischief: Reflections on Statutory Interpretation and the Mischief Rule

TIMOTHY J. BRADLEY*

This Note responds to Professor Samuel L. Bray's article, The Mischief Rule*, 109 GEO. L.J. 967 (2021). Professor Bray argues that textualists should embrace the "mischief rule," which instructs an interpreter to consider the problem to which a statute was addressed and the way in which the statute is a remedy for that problem. He maintains that the mischief should be taken as part of the initial context for interpreting a statute and not just as a tool for resolving ambiguities. This Note identifies three difficulties with the mischief rule: the difficulty of separating mischief from purpose, the difficulty of identifying mischief in a principled and reliable way, and the difficulty of applying the mischief rule in a helpful way even if one can reliably identify it. It proceeds to consider the importance of context in statutory interpretation. Although the mischief rule may be an appropriate tool for resolving statutory ambiguities, this Note argues that it should not be deployed if the meaning of a law is reasonably clear when read in its semantic and structural contexts.*

INTRODUCTION

Communication is complicated. Legal communication is no exception. James Madison, in the course of defending the Constitution proposed to the American people for ratification in 1787, noted that "no language is so copious as to supply words and phrases for every complex idea, or so correct as not to include many, equivocally denoting different ideas."[1] Thus, "however accurately objects may be discriminated in themselves, and however accurately the discrimination may be conceived, the definition of them may be rendered inaccurate, by the inaccuracy of the terms in which it is delivered."[2] The limits of language often thwart effective communication between individuals. The problem is only exacerbated when collective bodies attempt to communicate about complex ideas—as when a legislature communicates a change in the legal status quo to those who will be affected by it.[3]

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[1] THE FEDERALIST No. 37, at 183 (James Madison) (George Carey & James McClellan eds., 2001).

[2] *Id.*

[3] *See, e.g.*, John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 71–72 (2006) [hereinafter *What Divides*] ("Since legislators act under the

Words alone are often not enough to convey meaning in written communication. Context is vital.[4] This holds true for statutory interpretation just as it does for other domains of communication. As textualist legal scholar John Manning noted, "[i]n any case posing a meaningful interpretive question, the very process of ascertaining textual meaning inescapably entails resorting to extrastatutory—and thus unenacted—contextual cues."[5] Yet not all contextual clues are created equal, and in surveying the contextual field, one may risk losing sight of the text itself. Acknowledging the limits of language and the importance of context raises a critical question for statutory interpretation: Which elements of a legal enactment's context should be considered by judges when interpreting the law, and how much should those elements guide judges in the process?

One response directs the judge to consider everything. Chief Justice Marshall once opined that "[w]here the mind labours to discover the design of the legislature, it seizes every thing from which aid can be derived."[6] Another response directs the judge to consider "the course of legislative development, to discover what kinds of problems were mentioned and what kinds were not."[7] This sort of context could be described as policy context.[8] A third response "gives precedence to semantic context—evidence that goes

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constraints of limited resources, bounded foresight, and inexact human language, unanticipated problems of fit have long been viewed as unavoidable."); *see also* Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085, 2146 (2002) ("When *A* and *B* communicate and embody their commitments in a contract, [for example,] it is important only that they (and the court) be on the same page. But when Congress communicates to the courts by statute, it is essential that private citizens also get the message. Statutes, in other words, have two audiences: the courts and the public.").

[4] Sometimes one cannot grasp the intended meaning of an utterance without knowledge of the context in which it took place. Context can shed light on a multivalent word's *meaning*. But context can also shed light on ambiguities that arise with respect to *reference*. Consider this example: "A woman looks first at Jones, then at Smith, and then points at the man and says: 'You are the father!'" None of the words employed are ambiguous as to their meanings, but one needs to know not only what the woman said but to whom she was pointing when she said it. Only then can one accurately grasp the proposition.

[5] *What Divides*, *supra* note 3, at 75.

[6] United States v. Fisher, 6 U.S. 358, 386 (1805). Chief Justice Marshall's point can be taken to apply in those instances where the mind must "*labour* to discover the design of the legislature," for in cases "[w]here the intent is plain, nothing is left to construction." *Id.* (emphasis added). And even when "every thing from which aid can be derived" is fair game, Chief Justice Marshall does not suggest that all contextual clues are created equal—for example, he adds that the consequences of a given interpretation can be considered "where the intent is doubful [sic]," but it must be considered "with caution." *Id.* at 390.

[7] Peter L. Strauss, *The Courts and the Congress: Should Judges Disdain Political History?*, 98 COLUM. L. REV. 242, 258 (1998).

[8] *See What Divides*, *supra* note 3, at 76 ("Purposivists give priority to *policy context*—evidence that suggests the way a reasonable person would address the mischief being remedied.").

to the way a reasonable person would use language under the circumstances."[9]

These responses illustrate common ground in the field of statutory interpretation about the importance of context. But debates regarding which elements of context are most appropriate for judicial consideration and at what point in the interpretive process those elements ought to apply remain alive.[10] A related debate concerns the sources to which a judge should resort in identifying those contextual fragments. These questions loom large in the overarching debate between textualists and purposivists, but they also figure into important intramural discussions among textualists. This Note does not purport to provide comprehensive answers to these questions. It reflects instead on one tool of statutory interpretation, the discussion of which may shed some light on answers to broader questions.

Part of the context for a legislative act is the "mischief" prompting the action. Enter the "mischief rule," which "instructs an interpreter to consider the problem to which the statute was addressed, and also the way in which the statute is a remedy for that problem."[11] Professor Samuel L. Bray argues in his recent article in *The Georgetown Law Journal* that the mischief rule can be applied in good faith by both textualists and purposivists.[12] He posits that greater transparency among judges about how the "mischief" factors into their thinking, coupled with more focused application of the rule, might help interpreters of all stripes "give a better account of what the legislature has actually decided."[13]

This Note focuses on the mischief rule's compatibility with a textualist approach to statutory interpretation.[14] Some textualists have dismissed the mischief rule.[15] Others might accept the mischief rule as a tool for resolving

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[9] *Id.* (emphasis omitted).

[10] *E.g.*, Statutory Interpretation, HARV. L. REV. (last visited Mar. 26, 2021), https://harvardlawreview.org/topics/statutory-interpretation/ [https://perma.cc/U2MB-L7GQ].

[11] Samuel L. Bray, *The Mischief Rule*, 109 Geo. L.J. 967, 967 (2021).

[12] *Id.* at 967.

[13] *Id.* at 968–69.

[14] By textualism I mean that approach to interpreting statutes that "prioritizes a reasonably clear, public semantic meaning of enacted text over unenacted purpose and background policy context." Jeffrey A. Pojanowski, *Reading Statutes in the Common Law Tradition*, 101 VA. L. REV. 1357, 1371–72 (2015). For a textualist, "interpretation" means "identifying and adhering to an objective understanding of the text's meaning at the time of enactment." *Id.* at 1372. "Interpretation" in this sense is best understood as "passive or at least derivative," in contrast to the open-ended practical reasoning engaged in by the legislature. *See* 4 John Finnis, *Reason and Authority in* Law's Empire, *in* PHILOSOPHY OF LAW: COLLECTED ESSAYS 281 (2011).

[15] Justice Scalia and Bryan Garner defined the mischief rule as the "interpretive doctrine that a statute should be interpreted by first identifying the problem (or 'mischief') that the statute was designed to remedy and then adopting a construction that will suppress the

ambiguities.[16] Professor Bray argues that textualists should employ the mischief rule not only to resolve ambiguities but also to better understand statutory texts from the beginning—as a vital part of the context giving rise to the text and in light of which the text should be read.[17] This Note concludes that although textualists may resort to the mischief rule to help resolve ambiguity in a text that is unclear when read in light of its semantic context, they should not permit it to create ambiguity where they would otherwise conclude that there is none. Further, when it comes to "the order of sources formalists prefer when interpreting unclear statutes,"[18] a textualist should typically look to inferences from statutory structure and other legislation before resorting to the mischief rule.

Part I presents a summary of Professor Bray's argument in favor of broader application of the mischief rule. Part II identifies three difficulties with using the mischief rule in statutory interpretation: the difficulty of separating mischief from purpose, the difficulty of identifying mischief in a principled and reliable way, and the difficulty of applying the mischief rule in a helpful way even if one can reliably identify the mischief. This Part presents a negative argument: it critiques Professor Bray's position but does not offer a competing account of context. Part III addresses the questions of which elements of context judges should consider when interpreting the law and at what point in the interpretive process should those elements apply and offers an alternative account of the mischief rule's proper place in that process. Part III goes on to suggest that although Professor Bray's account might accurately depict how judges sometimes decide difficult statutory interpretation cases, its acceptance by textualists would represent a significant change in theoretical approach. This Part concludes by offering some reasons to question the desirability of such a change.

I. THE MISCHIEF RULE

The mischief rule provides that "the generating problem is taken as part of the context for reading the statute."[19] What does this look like in practice? Professor Bray notes that texts are often susceptible to being given a broader or narrower scope and argues that the mischief rule can provide a helpful

problem and advance the remedy." ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 433 (2012). They equated the mischief rule with purposivism. *Id.* at 438.

[16] The mischief rule has gone undertheorized by textualists, in part due to Justice Scalia's equation of it with purposivism. *See* Bray, *supra* note 11, at 3 (manuscript at 15). But just as some textualists accept the category of "purpose" as a legitimate aid to resolving textual ambiguities, so too might textualists accept the utility of the mischief rule as a tool for resolving ambiguities. *See What Divides*, *supra* note 3, at 84.

[17] Bray, *supra* note 11, at 975 (noting that "reading the text in its legal and temporal context is not an act of violence; it is a step toward understanding").

[18] Pojanowski, *supra* note 14, at 1420.

[19] Bray, *supra* note 11, at 968.

stopping point for an interpreter faced with a text that might produce strange results if given a broad reading.[20] He introduces the problem by referencing a Tennessee statute that required railroad engineers to stop their trains whenever they observed an animal on the tracks.[21] The Tennessee Supreme Court observed that the statute was aimed at avoiding train derailments and concluded that three domesticated geese were not "animals" within the meaning of the statute because they were not large enough to cause a train derailment.[22] Had the court not considered the mischief giving rise to the statute, it might have concluded that the statute required trains to stop even for "[s]nakes, frogs, and fishing worms."[23] The reason for utilizing the mischief rule in statutory interpretation, Professor Bray explains, is "inherent in how language works: bare words are not always enough, for there may be facts an interpreter needs to know to make sense of those words."[24] In other words, "the interpreter needs not only semantics but also pragmatics," and he needs these pragmatics not only to resolve ambiguities in the text but also to understand the text from the beginning.[25]

Professor Bray situates the mischief rule by way of historical overview. He notes its origins in *Heydon's Case* (a decision of the English Court of Exchequer in 1584), traces its elaboration by Blackstone in his *Commentaries*, explains its transformation by Hart and Sacks in their "Legal Process" materials, and laments Justice Scalia's rejection of it.[26] This historical narrative serves to destabilize the reader's presumption that mischief is simply purpose by another name. The "conventional narrative" is that "*Heydon's Case* established a purposive approach to statutory interpretation, specifically in the form of the mischief rule, and that this approach was carried forward by Blackstone in the eighteenth century and by Hart and Sacks in the twentieth."[27] The history shows that theorists and practitioners often "slide between mischief and purpose, sometimes using them interchangeably."[28] But Professor Bray argues that there is daylight between the concepts of mischief and purpose and that judges' consideration of mischief is commonplace, even if mostly unnoticed.[29] As such, the mischief rule

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[20] *See id.* at 971.
[21] *See id.* at 968; *see also* Nashville & K. R. Co. v. Davis, 78 S.W. 1050, 1050 (Tenn. 1902) (citing Shannon's Code, § 1575(4)).
[22] *See Davis*, 78 S.W. at 1050.
[23] *Id.*; *see* Bray, *supra* note 11, at 968.
[24] Bray, *supra* note 11, at 969.
[25] *Id.* at 969.
[26] *See* Bray, *supra* note 11, at 976–90. Professor Bray notes that Justice Scalia's rejection of the mischief rule was based in part on Hart and Sacks' mingling of mischief and purpose, wherein they viewed mischief as "a basis for inferring purposes." *Id.* at 984.
[27] *Id.* at 989.
[28] *Id*.
[29] In their survey of forty-two federal appellate judges, Abbe Gluck and Richard Posner observe that only four of the judges they interviewed did *not* use mischief (or the problem that gave rise to the statute in the first place) as an appropriate tool of statutory

deserves greater attention and analysis, not only for the sake of transparency but also for its utility in interpretation by judges of all interpretive persuasions.

Professor Bray highlights the two main functions of the mischief rule: to provide "a rationale for an interpreter's choice about how broadly to read a term or provision in a legal text," and to "allow[] an interpreter to read a legal text a little more broadly to prevent a clever evasion that would perpetuate the mischief."[30] These functions are the stopping-point function and the clever-evasion function, respectively.

The stopping-point function's value is apparent, Professor Bray argues, in cases where the statutory text speaks broadly of "animals" in a railroad regulation,[31] of "tangible objects" in a financial fraud statute,[32] and of "sex" in an employment discrimination law.[33] Professor Bray observes that "[i]n each case, the statutory text could be given a narrower reading in line with the mischief—or not."[34] Giving these texts a narrower reading ties the results more closely to what the enacting legislature would have expected.

The clever-evasion function is demonstrated by the Supreme Court's decision to read a statute regulating the grazing of "any stock of horses, mules, or cattle" on Indian lands to regulate the grazing of sheep.[35] The Court acknowledged that it would not have read the statute the way it did if it had been presented with a new statute, but it adopted the broader reading out of respect for precedent and because "the pasturing of sheep is plainly within the mischief at which this [statute] is aimed."[36] Adopting the broader

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interpretation. *See* Abbe R. Gluck & Richard A. Posner, *Statutory Interpretation on the Bench: A Survey of Forty-Two Judges on the Federal Courts of Appeals*, 131 HARV. L. REV. 1298, 1327 (2018).

[30] Bray, *supra* note 11, at 970.

[31] *See* Nashville & K. R. Co. v. Davis, 78 S.W. 1050, 1050 (Tenn. 1902). Here the court was asked to apply the statute to domesticated geese and, relying in part on the mischief rule, declined to do so.

[32] *See* Yates v. United States, 574 U.S. 528, 536 (2015). Here the Court was asked to apply the statute to oversized grouper caught by a commercial fisherman and declined to do so.

[33] *See* Zarda v. Altitude Express, Inc., 883 F.3d 100, 111 (2d Cir. 2018). Here the court was asked to hold that discrimination on the basis of "sexual orientation" was a form of discrimination on the basis of "sex" under Title VII of the Civil Rights Act of 1964. The dissent argued, relying in part on the mischief motivating the statute, that Title VII is not so capacious. *Id.* at 165 (Lynch, J., dissenting). The question was later decided by the Supreme Court in *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020).

[34] Bray, *supra* note 11, at 1000.

[35] *See* Ash Sheep Co. v. United States, 252 U.S. 159, 169 (1920); Bray, *supra* note 11, at 1005–07.

[36] *Ash Sheep Co.*, 252 U.S. at 169. The court acknowledged that "in present day usage the word 'cattle' would rarely be used with a signification sufficiently broad to include [sheep]," but it cited dictionary definitions and other authorities suggesting that, at the time the statute was enacted, the word "cattle" could include sheep. *Id.* at 168–69. The word

reading rather than the more common narrow reading of "cattle" allowed the Court to avoid a clever evasion of the statute's prohibition.

Professor Bray argues that considering mischief as part of a statute's context has the salutary effect of putting less pressure on statutory language, reducing legislative surprise, offering more constructive notice to those whose actions are governed by statutes, and highlighting the importance of ambiguity determinations in statutory interpretation.[37]

How does one identify the mischief? It might "be indicated in the statute itself or be established by judicial notice, evidence of public debate preceding enactment, or legislative history."[38] Although knowledge of the mischief might be widespread with respect to recently enacted statutes, as time passes, the mischief will more likely be determined by documentary evidence rather than by judicial notice.[39] But even if a textualist can reliably identify the mischief, what justifies treating it differently than purpose and using it as relevant context for reading a text from the beginning rather than only for resolving ambiguity? Professor Bray argues that "mischief [is] logically anterior to the text, something the interpreter knew while reading the text itself."[40] It is both the social problem spurring legislative action and the "inadequacy in the law that allowed . . . that problem" to take shape.[41] This means that mischief is "external to the legislators," in their sights more so than in their minds.[42] Whereas purpose is imputed to the legislature as "an aim going forward," mischief is "the problem that precedes the statute and the legal deficiency that allowed it."[43] Although mischief and purpose might often converge such that the statute's purpose is no more than the removal of the mischief, statutory purpose is often not so limited. Purpose might be much more abstract than mischief.

Professor Bray offers a theory of action to illustrate the distinction between mischief and purpose. "[W]e have reasons for our actions[,] [b]ut the expression, 'such and such was my reason for acting' is ambiguous. It could refer to the initial cause, the spur to acting[,] [o]r it could refer to the aim

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"cattle" was, therefore, ambiguous. *See id.* at 169 (noting that the word "cattle" *may* be given a meaning comprehensive enough to include sheep, though it was not commonly used with such a signification).

[37] *See* Bray, *supra* note 11, at 972–75.

[38] *Id.* at 970 (manuscript at 3). Professor Bray emphasizes, however, that "there is no necessary relationship between considering the mischief and consulting legislative history." *Id.* A textualist who resists consulting legislative history thus need not necessarily reject the mischief rule.

[39] *Id.* at 994.

[40] *Id.* at 991.

[41] *Id.* at 992.

[42] *Id*.

[43] *Id.* at 973.

(or ultimate aim) that I had for acting."[44] In the sentence, "Because of *a*, the action *b*, so that *c*," where *a* is the mischief and *c* is the purpose, Professor Bray argues that mischief and purpose are analytically distinct concepts and as such can rightfully be treated as different concepts for purposes of interpretation.[45]

In emphasizing the distinction between mischief and purpose and advocating for textualists to embrace mischief as a vital element of the initial context for reading statutory texts, Professor Bray raises important considerations for the role of context in legal interpretation: "[s]tatutory interpreters of all stripes say that context is important, but textualists, especially, will sometimes in practice limit the relevant context to *laws*—that is, other provisions of the same statute, other statutes, and background principles of law."[46] Professor Bray concludes that textualists should adopt "a broader understanding of context that includes the *setting* of legal enactments, one aspect of which is the mischief."[47] He does not suggest, as a purposivist might, that the mischief determines the meaning that an interpreter should give to a legal text; the rule offers "guidance rather than determination."[48] The remainder of this Note is devoted to engaging constructively with Professor Bray's argument and offering reasons for textualists to be cautious about getting into "mischief."

II. THREE DIFFICULTIES WITH THE MISCHIEF RULE

This Part raises three difficulties with the mischief rule from a textualist perspective. Professor Bray anticipates these difficulties, but by fleshing out counterarguments, this Part identifies aspects of his argument that require a fuller defense. The three difficulties are treated in turn. First, it is difficult to separate mischief from purpose. Second, it is difficult to identify mischief in a principled and reliable way. Third, it is difficult to determine whether the mischief rule can be applied in a helpful way in today's legal context even if one grants *arguendo* that mischief is separable from purpose and that one can reliably identify it.

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[44] *Id.* at 972.
[45] *See id.*
[46] *Id.* at 973.
[47] *Id.*
[48] *Id.* at 1013 ("The mischief rule itself does not *determine* the meaning an interpreter should give to a legal text. Perhaps there is dispute about the mischief. Perhaps the mischief rule points toward one reading, while other canons of interpretation point toward some other reading. Knowing the mischief does not tell the interpreter how intensively the statute addresses it. The rule does not contain within itself any formula for the resolution of such disagreement among interpretive considerations. What the mischief rule offers is guidance rather than determination.").

A. SEPARATING MISCHIEF FROM PURPOSE

Professor Bray argues that mischief and purpose are analytically distinct. He suggests that the daylight between the concepts is enough that mischief can properly be considered part of the initial context for reading a statute. Professor Bray acknowledges that it is understandable for one to "conflate the mischief rule and purposivism" because mischief "shares several features with purposive interpretation: both are about the reasons for laws, both offer an input for decisionmaking that is distinct from the words of the statute, and both may be used to put a case inside or outside of the bare words."[49] But the importance of these shared features—that both concepts are about the reasons for laws and may be used to depart from the plain meaning of a statute—suggests that there is less daylight between mischief and purpose than Professor Bray maintains that there is.

Consider this line of reasoning: "Because I had a heart attack, I changed my diet, so that I may live a long life." The heart attack is the mischief, whereas living a long life is the aim or goal of the practical reasoner. The heart attack is an event external to the reasoning of the victim, and the goal of living a long life is an inwardly set purpose. But *both* could reasonably be offered as answers to the question, "Why did you change your diet?" Thus, the mischief and the purpose are *analytically* distinct in that the former is an event external to the reasoner, whereas the latter is an internal aim. Yet they are *operationally* linked: both form part of the same line of practical reasoning, and knowledge of both is helpful if one is to make sense of the choice of the victim to change his diet.[50] The operational link between mischief and purpose is evident in that not only the purpose but also the mischief can be defined at higher or lower levels of generality with the result that two things that are analytically distinct are nevertheless meaningfully linked for purposes of understanding purposive action.[51] The line of reasoning with which this paragraph began could be rewritten with a narrower purpose—"Because I had a heart attack, I changed my diet, so that I

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[49] *Id.* at 984.

[50] Knowledge of purpose might even be more helpful than knowledge of mischief for making sense of an action. Although "because I had a heart attack" and "so that I may live a long life" are both reasonable answers to the question why one changed one's diet, having a heart attack is not as satisfactory a *reason* for action as is wishing to live a long life—it is a fact that, in itself, does not entail a normative conclusion about what one ought to do in response without additional reasoning about what is good for one to be and to do. "Because I had a heart attack" is a reason for action only in a derivative sense and is a reasonable answer to the question why one changed one's diet because the listener is sure to infer one's further, more basic reason for acting—the desire to live a long life.

[51] Lawmaking is purposive action. Congress is "not like a coracle, buffeted by the waves, rudderless and unpaddled." *See* Bray, *supra* note 11, at 972. Textualists need not deny the reality of legislative intent. But they do typically have a different understanding than purposivists do of where that intent is manifested. For example, "[a]part from the text read in context, [Professor Bray] take[s] it that 'the intention of the legislature is undiscoverable in any real sense.'" *Id.* at 997 n.163 (citation omitted).

do not have another heart attack (and can live a long life)"—or with a broader mischief—"Because I feared that my life would be cut short (because of my heart attack), I changed my diet, so that my life is not cut short." In either case, the purpose reflects at least in part a desire to negate the mischief. There is nothing objectionable about that in the abstract—indeed, that an agent's purpose reflects a desire to negate the mischief motivating his action is to be expected if the agent is acting reasonably. But this convergence of mischief and purpose in practice problematizes Professor Bray's attempt to create meaningful separation between the two concepts. The same problems that textualists have with allowing judicial conceptions of purpose to distort an otherwise clear text also apply to allowing judicial conceptions of mischief to create ambiguity in an otherwise unambiguous statute.

The point illustrated by the heart-attack example can be put another way. Even granting that mischief and purpose are analytically distinct (that is, that *m* and *p* in "Because of *m*, the statute *s*, so that *p*" are distinct concepts), we are interested in these categories—for purposes of this discussion—as tools that shed light on the meaning of a statute. Mischief is not valuable to the interpretive enterprise if it is thought of as *merely* an external event that takes place before the legislative act. For mischief to be a helpful concept, it must be thought of as an event that prompts legislative action—not just as "some external event" but as "some external event *plus* some degree of reasoning imputed to the legislative body as a response to that external event"—and, once thought of in this way, the same subjectivity that plagues purposivism will appear in mischief-conscious textualism. A judge who considers mischief necessarily treats the mischief as *connected to* the statute, as the reason for (or *a* reason for) the statute.[52] And the *reason for* a statute is just as internal and subject to manipulation as the *purpose of* a statute.[53] In other words, the only way an interpreter may glean meaning from the mischief is by asking, if only implicitly, a variant of the question: "Faced with this mischief, what would a reasonable legislature have meant by this particular text as at least a partial solution to the mischief?"[54] This

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[52] *See* Richard Ekins, *Intentions and Reflections:* The Nature of Legislative Intent *Revisited*, 64 AM. J. JURIS. 139, 161 (2019) ("The axiom of reasonable legislative agency anchors how one reads enactments, with statutory interpretation being an attempt to understand the choice of that agent, which one cannot do without trying to follow its chain of reasoning, including the rationality of its choice of this particular semantic content in the rich context of enactment.").

[53] This point is developed more fully in Section II.B.

[54] Judge Easterbrook hints at the problem of separating mischief from purpose in the act of interpretation, regardless of whether the two concepts are analytically distinct, when he describes the temptation to "use our knowledge of the times in which the texts were written to deduce the purposes, goals, objectives, and values of the drafters," a temptation that if indulged would result in "statutory words becom[ing] devalued." Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J. L. & PUB. POL'Y 61, 62 (1994).

inquiry requires the judge to impute reasoning to the legislature in much the same way as purposivism does. It is objectionable to the textualist for the same reasons that purposivism is objectionable—primarily because it risks disregarding the complex legislative process and reasoning that resulted in this particular statute.[55]

For these reasons, textualists should resist Professor Bray's entreaty for broader application of the mischief rule. But there are additional reasons to be wary of the mischief rule.

B. IDENTIFYING MISCHIEF IN A PRINCIPLED WAY

Identifying the mischief motivating the enactment of a statute at the correct level of generality might prove to be a difficult task for a judge. If that task cannot be completed in a principled and reliable way, the mischief rule lacks utility. A first difficulty is that mischief often lies in the eye of the beholder.[56] A second difficulty relates to the materials and sources a judge may properly rely on in identifying the mischief. These difficulties will be addressed in turn.

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[55] I am indebted to Braden Murphy for helping to develop and sharpen the argument in this subpart. The textualist objection to methodologies that allow an interpreter discretion to slide too quickly or too easily into the mode of imputing reasoning to the legislature need not—and should not—reflect "a commitment to the irrationality of apparently awkward legislation." Pojanowski, *supra* note 14, at 1409. Deference to the legislature's enacted output when reasonably clear instead respects the legislature's "artificial" reason. *See id.* at 1389–95; *see also* Caleb Nelson, *A Response to Professor Manning*, 91 VA. L. REV. 451, 461 (2005) (noting that although textualists are interested in how a skilled, objectively reasonable user of words would have understood a statutory text at the time of enactment, "some textualists may be interested in this datum less as an end in itself than as the best means of generating matches between the legal directives that courts enforce and Congress's actual collective understandings of the statutes it enacts"). This deference may reflect a desire that "interpretation," so far as it goes and understood as primarily a "passive or at least derivative" undertaking, *see* Finnis, *supra* note 14, at 281, respects the *choice* made by the legislature to enact *this* law and not another one. Lawmaking typically entails a choice of one reasonable proposition over and against any number of other propositions that could reasonably have been chosen. *See* 4 John Finnis, *A Grand Tour of Legal Theory*, *in* PHILOSOPHY OF LAW: COLLECTED ESSAYS 123 (2011). Thus, the danger of a judge placing himself in the position of the lawmakers confronting the relevant mischief and considering what the lawmakers *must have thought* was a reasonable solution to the problem facing them. The judge may come to a reasonable conclusion about what the lawmakers reasonably *could* have chosen to do, but because there are typically a range of reasonable options available to the legislature to combat a given mischief or social problem, the judge may not identify the correct legislative choice as reflected in the words agreed upon by that body to convey its meaning.

[56] There is overlap between the critique offered in this subpart and that offered in the previous one because some of the same problems of accurately identifying legislative "purpose" plague the attempt to accurately identify the "mischief" motivating a statute.

1. A Matter of Perspective

Mischief is a matter of perspective. Different people can observe the exact same action-inducing event or problem and perceive different mischiefs. Imagine a basketball series in which an underdog team is pitted against the league's best team, led by the league's best player—its superstar. The underdog's only hope is that it has the league's best defensive player—a veritable "stopper." But during the series, the underdog's defense is routinely gouged for easy baskets by the superstar. In the offseason, the underdog's manager contemplates action in hopes of fielding a stronger team the following year. The mischief prompting him to act is, in a general sense, simply that his team did not perform well enough to win the championship. The *manager* perceives that the problem was that the team's defensive scheme was not suited to thwarting the superstar. Because the team's coach—an obstinate man—was responsible for drawing up the scheme, the manager intends to fire the coach so that he can hire a replacement who will install a new scheme. The *coach*, however, perceives that the problem was that his team. Despite playing stellar defense and executing the scheme well, he believes his team was simply overmatched—good defense, but better offense. He recommends that the team trade for the league's second-best player, a true offensive juggernaut, thinking that if his team cannot stop the opponent from scoring, it might be able to win by simply scoring more. A third actor, the team's *owner*, perceives that the mischief was neither that the team's defensive scheme was unsound, nor that its talent level did not permit it to score enough points to win the series, but that the team's "stopper"—another head-strong individual known for second-guessing coaches—failed to execute the scheme. He suggests that the manager trade the "stopper" for another player with a reputation as a rising star on the defensive end of the court (the "young stopper"), hoping that with better defensive execution, the team will win the championship the next season.

This illustration demonstrates that the manager, the coach, and the owner all watched the same games and observed the same phenomena, yet each one identified a different cause of the result and a different underlying mischief. One thought the cause was schematic, another thought it was a talent deficiency, and the third thought it was a failure of execution.

Further, because the mischief rule is concerned with external phenomena vis-à-vis decisionmaking acts, imagine that the manager fires the coach and hires a new one, but then tragically passes away before passing on instructions to the new coach. An outside observer (or interpreter of the manager's decision), knowing that the manager had publicly stated on television after the team lost the championship that he was upset with the team's defensive scheme, might conclude that the real mischief in this situation—the reason for the lost championship—was the team's poor defensive scheme. But behind the scenes and unbeknownst to this outside observer, the

manager had learned that the league's second-best player and the "young stopper" both would refuse to accept a trade to his team unless the old coach was fired. It thus turns out that firing the old coach was merely a means to further ends and that the manager had been persuaded by the old coach's and the owner's accounts of the mischief and intended to trade for these new players but retain the same defensive scheme under the new coach. The outside observer might interpret the firing of the old coach and the hiring of the new one against the backdrop of the deceased manager's public statements and conclude that the mischief here was the team's defensive scheme. This would be a misreading of the situation, though, and would fail to reflect the behind-the-scenes processes that led to the ultimate decision to fire the old coach. This added wrinkle in the hypothetical example illustrates not only the difficulty of accurately identifying and defining the mischief motivating an action but also the difficulty to then rely on that mischief to accurately interpret that action's meaning.

Professor Bray acknowledges the perspectival and partly subjective nature of mischief.[57] But he does not view this as a problem for its use in interpretation because it remains the case that "what is being sought is exterior to the legislator."[58] That the mischief is external to the legislator is relevant to the question of what sources might reliably identify mischief, but that alone does not suffice to render unproblematic the subjectivity and difficulty of identifying its content and scope. "Context is not for dabblers,"[59] and judges should be cautious when it comes to taking judicial notice of or relying on documentary evidence for the mischief motivating a given statute and relying on that perceived mischief to interpret a statute. Adding the mischief rule to the interpreter's toolbox may increase judicial discretion and expand the variability of interpretive outcomes—a result that stands in tension with the premises of textualist interpretation.[60]

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[57] *See* Bray, *supra* note 11, at 993 ("[M]ischief is perspectival: one person could see the mischief one way, and another could see it differently. The bill under consideration might reflect an incompletely theorized agreement about the mischief.").

[58] *Id.*

[59] Frederick Schauer, *Statutory Construction and the Coordinating Function of Plain Meaning*, 1990 SUP. CT. REV. 231, 253 (1990).

[60] Professor Bray does not suggest that the mischief rule decreases judicial discretion. But he argues that "if the interpreter considers the mischief as part of the context for the statute, the enacting legislature is less likely to be surprised by the effect given to its work." Bray, *supra* note 11, at 974. This may sometimes be the case, but it will not always be so. Sometimes legislatures formulate laws that are meant to reach beyond the immediate mischief, whatever it might be, and set forth a rule to govern a multitude of circumstances. That is, lawgivers, at least in the focal sense, "spend a long time considering what should be imposed by law" and "make judgments that apply to all cases . . . and are future-oriented." THOMAS AQUINAS, TREATISE ON LAW: THE COMPLETE TEXT (SUMMA THEOLOGIAE I-II, QUESTIONS 90–108) 51 (Alfred J. Freddoso trans., St. Augustine's Press 2009) (1485) [hereinafter AQUINAS]. Narrowing the meaning of a law to accord with the mischief that prompted the lawgiver's action is not necessarily a guide to the law's proper meaning.

2. A Matter of Sources

A second difficulty with identifying the mischief is the issue of sources. Professor Bray notes that the method for identifying mischief is likely to vary depending on the age of the statute in question. When a statute is enacted, the mischief might be common knowledge. Courts might take judicial notice of this common-knowledge mischief.[61] The issues identified above relating to the perspectival nature of mischief suggest that judges should be hesitant to take judicial notice of mischief, however, given the difficulty of reliably identifying it and the potential costs of making a mistake. But as time passes and first-hand knowledge of the events preceding a statute's enactment fades, interpreters will need to turn to documentary evidence.

One source of this evidence is "the statute itself, especially if there are enacted findings."[62] For example, in *Adoptive Couple v. Baby Girl*, the Supreme Court noted that "[t]he statutory text expressly highlights the primary problem that the statute was intended to solve."[63] Other possibilities are "sources that show the popular debate preceding the enactment, . . . the findings of committee reports or government commissions[,] . . . [or] legislative history more broadly . . . ."[64]

Enacted mischief—such as in the findings section of a statute—represents an unobjectionable source of statutory context from the textualist point of view. But one might wonder whether it is a mistake for judges to give substantial weight to their own determinations of mischief when gleaned from unenacted sources if Congress can—and sometimes does—make "mischief findings" in statutes. These sources may be of questionable utility to judges who are skeptical of their ability to discern the "true" mischief given its in-the-eye-of-the-beholder nature. In this respect, identifying the mischief might risk becoming an exercise in "looking over a crowd and

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[61] For example, in *Smith v. Townsend* the Supreme Court noted that "it is *a matter of public history, of which we may take judicial notice*, that as [Kansas and Texas] began to be filled up with settlers, longing eyes were turned by many upon this body of land lying between them, occupied only by Indians, and though the Territory was reserved by statute for the occupation of the Indians, there was great difficulty in restraining settlers from entering and occupying it." 148 U.S. 490, 495 (1893) (emphasis added).

[62] Bray, *supra* note 11, at 994. Justice Scalia, relatedly, admitted that the purpose of the text is a vital part of its context but should "be gathered only from the text itself." SCALIA & GARNER, *supra* note 15, at 33.

[63] 570 U.S. 637, 649 (2013).

[64] Bray, *supra* note 11, at 995. Peter Strauss argues that legislative history is a particularly apt tool for understanding the mischief to which a statute responds. *See* Strauss, *supra* note 7, at 258. John Manning acknowledges that legislative history might validly be used by a textualist judge "to identify the events that precipitated the enactment of legislation," so long as the material is evaluated critically and not simply accepted as accurate on faith. John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673, 733 (1997).

picking out your friends."[65] There is also the risk that an interpreter might identify a mischief and use it to guide her interpretive inquiry when in fact there was no mischief, or there was a mischief, but it was "sufficiently broad . . . that it is basically indistinguishable from a general purpose."[66]

C. IS MISCHIEF HELPFUL TODAY?

Finally, one might question whether mischief may be applied in a helpful way in today's legal context even if one grants *arguendo* that mischief is practically separable from purpose and that one can reliably identify it. First, it is unclear what standard governs the determination of when a statute is *so* clear that the best explanation for it is that its text is broader or narrower than the mischief and, thus, that the mischief is not a helpful guide to determining its scope. Second, the mischief rule seems to do the same work as the absurdity doctrine in difficult cases,[67] and if that is so, similar arguments against using absurdity—or at least for having a high bar for finding absurdity—might apply against using mischief. Third, as Professor Bray notes, the mischief rule best fits the legal culture that produced it, which was a common-law culture different in important respects from our own. The rule is thus probably an inapt tool for many statutory interpretation cases. The arguments advanced in this section are not arguments for absolute exclusion of the mischief rule in principle but rather prudential arguments counseling for its limited applicability in practice.

1. The Clarity Question

In *Church of the Holy Trinity v. United States*, the Supreme Court held that a statute prohibiting any person from assisting or encouraging the migration of any foreigner into the United States under contract to perform "labor or service of any kind" did not prohibit a Christian church from contracting with a foreign minister to migrate to the United States to serve as its pastor.[68] The case is much reviled by textualists.[69] Its use in this context is not meant to suggest that Professor Bray's theory of the mischief rule resembles the Court's approach in *Holy Trinity*. Rather, in discussing that case, Professor Bray acknowledges that "sometimes the words [of a statute] are so clear that the best account of the legislative decision is simply that it

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[65] *See* Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 214 (1983) (attributing this saying to Judge Harold Leventhal in the context of a discussion on the use of legislative history in statutory interpretation).

[66] *See* Bray, *supra* note 11, at 1008.

[67] *See infra* Section II.C.2.

[68] 143 U.S. 457, 458 (1892) (quoting Act of Feb. 26, 1885 (Alien Contract Labor Law), ch. 164, 23 Stat. 332).

[69] *See, e.g.*, Adrian Vermeule, *Legislative History and the Limits of Judicial Competence: The Untold Story of* Holy Trinity Church, 50 STAN. L. REV. 1833, 1835 (1998).

is broader or narrower than the mischief."[70] In *Holy Trinity*, therefore, the Court came out the wrong way—the Alien Contract Labor Law should have been held to prohibit the church's contract with the foreign minister. Unfortunately, "[t]here is no meta rule" for making a judgment as to when the words of a statute are so clear that the mischief does not do any work.[71]

But absent some framework for making these clarity determinations, it is difficult to know when the mischief rule should apply and when it should not. What makes the words "labor or service of any kind" so clear that a Christian pastor's work falls within their scope, whereas the words "tangible object" and "chemical weapon" are ambiguous enough that fish and rash-inducing chemicals, respectively, do not fall within their scope?[72] After all, the ostensible mischief giving rise to the statute at issue in *Holy Trinity* was an influx of foreign manual labor crowding out work for citizens.[73] Why does that mischief not render the phrase "labor or service of any kind" ambiguous, but the mischiefs of financial fraud and chemical warfare do render the phrases "tangible object" and "chemical weapon" ambiguous? Uncertainty about how clear a text needs to be such that the mischief cannot ambiguate it renders use of the mischief rule problematic.[74]

2. Absurdity by Another Name?

The absurdity doctrine "counsels that a statute should not be interpreted to produce an objectively absurd result."[75] In hard cases, the mischief rule appears to do the same work as the absurdity doctrine—by avoiding outcomes that seem incongruous with what a statute appears to be about. For instance, it may well be absurd for a litigant to argue that punishing a commercial fisherman for catching oversized grouper violates a statute about financial fraud. The mischief rule's application to this fact pattern from *Yates* leads the interpreter to the same result as the application of the absurdity doctrine—"tangible object," in that context, does not include fish. But some textualists are wary of the absurdity doctrine, arguing that the "reality is that a statutory turn of phrase, however awkward its results, may

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[70] Bray, *supra* note 11, at 1004.
[71] *See id.*
[72] On whether a fish is a tangible object, see *Yates v. United States*, 574 U.S. 528, 532 (2015). On whether a rash-inducing chemical used by a spurned lover to hurt an ex-husband constitutes a chemical weapon, see *Bond v. United States*, 572 U.S. 844, 848 (2014).
[73] The Court in *Holy Trinity* noted that one "guide to the meaning of a statute is found in the evil which it is designed to remedy" and observed that the situation that called for the statute was a matter of common knowledge of which a judge could take notice. 143 U.S. at 463.
[74] *See* Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2136 (2016) ("Unfortunately, there is often no good or predictable way for judges to determine whether statutory text contains 'enough' ambiguity to cross the line beyond which courts may resort to" ambiguity-dependent canons and tools such as legislative history.).
[75] *Id.* at 2156.

well reflect an unrecorded compromise or the need to craft language broadly or narrowly to clear the varied veto gates encountered along the way to enactment."[76] These "uncertainties of the legislative process make it safer [for the interpreter] simply to respect the language that Congress selects, at least when that language is clear in context."[77]

Textualists should be wary of the mischief for similar reasons. At a minimum, just as "the alleged absurdity must surmount a high bar to be truly absurd,"[78] the mischief should surmount a high bar for it to alter the application of the most natural reading of the text. Both the absurdity doctrine and the mischief rule reflect a desire to "get things right" in terms of substantive outcomes, or at least to reach reasonable outcomes consistent with what a reasonable legislature would intend. But "'[g]etting things right' may be a principal goal of *law* without its being a principal . . . goal of legal interpretation,"[79] and a court that seeks to "get things right" in that sense risks displacing the legislature's choice of one answer from among a variety of reasonable options.

3. Out of Place in the Contemporary Lawmaking Landscape?

Professor Bray notes that the legal world in which the mischief rule developed is different from our own in ways that affect its use. "In that world, there was less demand for courts to update statutes, not because the legislature would, but because the statutes themselves were less important."[80] If the statute did not apply to a given situation, the common law would. Statutes were also relatively narrow, making their mischiefs "easier to identify."[81] Given that our legal culture is different from the one that nurtured the mischief rule, the rule's application in contemporary circumstances is limited. Professor Bray recognizes the limits, but his response is susceptible to criticism.

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[76] John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2417 (2003).
[77] *Id.* at 2419.
[78] Kavanaugh, *supra* note 74, at 2156–57.
[79] Easterbrook, *supra* note 54, at 64. Judicial interpretation is different from the open-ended practical reasoning properly engaged in by the legislature when crafting laws. Law is "an ordinance . . . of reason, for the common good, made by one who is in charge of the community, and promulgated." AQUINAS, *supra* note 60, at 7 (enumeration omitted). The lawmaker should be concerned with "getting things right," but the interpreter may be constrained by many factors from deciding, in the first instance, what constitutes "getting things right" in a particular case in terms of the "substantive" result. *Cf.* 4 John Finnis, *Critical Legal Studies*, *in* PHILOSOPHY OF LAW: COLLECTED ESSAYS 314–15 (2011) (explaining that legal reasoning is constrained by "coherence—of the integrity of the system").
[80] Bray, *supra* note 11, at 1008.
[81] *See id.*

What are those limits? First, not all statutes and statutory provisions will have a mischief. Second, "for some statutes, the mischief will be sufficiently broad and composite that it is basically indistinguishable from a general purpose."[82] Third, some modern statutes do not attempt to directly remedy a mischief because they instead create frameworks for agencies to develop their own remedies for doing so. Lastly, "statutes prompted by a narrow mischief may have a broad array of purposes."[83] Modern omnibus legislation typifies the sort of statute for which the mischief rule is inapt—omnibus bills may not be motivated by any particular mischief, or they may simply have a much broader array of purposes than whatever mischief prompted their sponsors to act.

As Professor Bray sees it, "[t]hese limits suggest the mischief rule will not be useful for all modern statutes[, but] they do not give any reason to abandon the mischief rule where a statute or statutory provision does indeed have a mischief."[84] But perhaps these limits do offer a reason to resist the mischief rule's application in practice. If the mischief rule only adds value to the interpretive enterprise in a narrow subset of cases, its legitimization by textualists might do more harm than good given that its increased acceptance might foster its misapplication in those many cases in which the tool is not suitable.

III. ON TEXT AND CONTEXT

Parts I and II of this Note identified aspects of Professor Bray's argument that call for further development if the argument is to become persuasive to textualists. This Part first emphasizes the importance of context for a textualist approach to interpretation and discusses which elements of context matter and at what point in the interpretive process they begin to matter. In doing so, this Part builds on the critiques of the mischief rule developed earlier in the Note and serves to illustrate the mischief rule's uneasy fit with textualist views of context's role in interpretation. Second, this Part compares Professor Bray's account to two recent theories of how the Supreme Court has decided difficult statutory interpretation cases. This Note concludes by offering some reasons to question the normative desirability of these approaches.

A. WHICH ELEMENTS OF CONTEXT? AT WHAT POINT?

Textualists do not neglect the importance of context. Justice Scalia, who rejected the mischief rule, nevertheless maintained that "[i]n textual

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[82] *Id.*
[83] *Id.* at 1009.
[84] *Id.*

interpretation, context is everything."[85] Judge Easterbrook similarly acknowledged that "[w]ords take their meaning from contexts . . . [including] the problems the authors were addressing."[86] The meaning of language depends on the way a linguistic community uses words and phrases in context, John Manning noted, and as such, "textualists recognize that meaning can never be found exclusively within the enacted text."[87] Context helps interpreters understand what Congress intended when it changed the law.[88] Textualists do not question the importance of context, but they do focus on certain elements of context and exclude others unless a text is ambiguous.[89]

Although the mischief rule may be used appropriately as a tool to help resolve ambiguity, this Note argues that it should not be deployed if the meaning of the text is reasonably clear when read in its semantic and structural contexts. In that latter case, relying on the mischief is unlikely to aid the interpreter in reaching the right result and might mislead her.

A central reason why interpreters should not rely on mischief as part of the initial context when interpreting a statute is that knowledge of the mischief does not equate to knowledge of how far a legislative decision goes to stop the mischief. Knowledge of the mischief also does not tell the interpreter whether a statute adds new propositions to the law that are unrelated

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[85] 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 37 (1997).

[86] Easterbrook, *supra* note 54, at 61.

[87] *What Divides*, *supra* note 3, at 78.

[88] Textualists tend to acknowledge the reality of legislative intent, but they mean something specific by it. *See id.* at 79 (quoting Joseph Raz, *Intention in Interpretation*, *in* THE AUTONOMY OF LAW: ESSAYS ON LEGAL POSITIVISM 249, 268 (Robert P. George ed., 1996)) ("[T]he effective communication of legislative commands is in fact possible because one can attribute to legislators the minimum intention 'to say what one would be normally understood as saying, given the circumstances in which one said it.'"). Besides this "minimum intention" view, there are others. *Compare* Ekins, *supra* note 52, at 157 ("[I]n enacting statutes, the legislature forms a complex lawmaking intention, which it aims to convey to the subjects of law by way of the intended meaning of the statutory text it promulgates."), *with* Kenneth A. Shepsle, *Congress Is a "They," Not an "It": Legislative Intent as Oxymoron*, 12 INT'L REV. L. & ECON. 239, 239 (1992) ("Legislative intent is an internally inconsistent, self-contradictory expression. Therefore, it has no meaning."). "Statutory formalism is not limited to textualists who preclude any strong role for legislative intent in interpretation," and a "number of intentionalists advocate formalist interpretive methods—prioritizing text as evidence of intent, rejecting the use of legislative history, and resisting calls to interpret statutes in light of 'purpose' understood at a high level of generality." Pojanowski, *supra* note 14, at 1374. Addressing tensions within so-called statutory formalism between intentionalists and "minimum intention" textualists is beyond the scope of this Note.

[89] In other words, textualists place different weight on different tools in the interpretive toolkit, establishing a preferred "order of sources." *Cf.* Pojanowski, *supra* note 14, at 1420 (noting the order of sources typically preferred by formalists, including "inferences from statutory structure, other legislation, and interpretive canons").

to the mischief. Utilizing mischief to guide one's understanding of the scope of a statute, therefore, risks upsetting the compromises and reasoned choices made during the legislative process that produced the law.[90]

This problem can be illustrated by a hypothetical. Recall the Tennessee statute that required railroad engineers to attempt to stop their trains whenever an animal appeared on the tracks.[91] The court was asked to determine what counted as an "animal" for purposes of the statute and seized, in part, upon the mischief giving rise to the statute—train derailments—to conclude that domesticated geese were not "animals" under the statute because they were not large enough to cause a train to derail.[92]

But one can contrive an imaginary history of the statute that demonstrates pitfalls of the mischief rule. Imagine that several freight trains derail in one week because they collide with cattle on the tracks, spoiling some valuable goods in the process. Some state legislators with ties to commercial freight interests and motivated by these calamities introduce legislation requiring that trains stop when animals of at least a certain size (deer, cattle, and sheep, for example) appear on the tracks. Now imagine that upon introduction of this bill, a group of legislators with close ties to the farming community objects to the proposed language and moves to have it changed such that trains must stop only when domesticated farm animals are on the tracks—these legislators are upset when trains kill cattle, but they view deer as pests and would not mind seeing the local deer population reduced by way of a few train collisions. Further, imagine that a third group of legislators—devotees of wildlife preservation—objects to this line-drawing and insists, as a condition of securing its support for the bill, that the language be changed such that trains must stop for "all animals" on the tracks. The legislators value all animal life (and despise big business), and the death of a squirrel is just as upsetting to them as the death of deer or cattle. They promise the initial sponsors of the bill that in return for the sponsors' votes on the bill with this new broad language, they—the animal-loving contingent—will vote for other legislation that the business-loving legislators are trying to pass.[93]

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[90] *Cf. What Divides*, *supra* note 3, at 77 (noting that satisfying the lawmaking procedures prescribed by Article I, Section 7 of the Constitution and Congress's rules of legislative procedure often require "messy legislative compromises").

[91] *See* Nashville & K. R. Co. v. Davis, 78 S.W. 1050, 1050 (Tenn. 1902) (analyzing the interpretation of "animal or obstruction" within Shannon's Code, § 1575(4)).

[92] *See id.* The court relied on whether an animal could cause a train to derail as part of its analysis of whether that animal should count as an "animal" under the statute, but nowhere did the court explain how it determined that the mischief motivating the statute was a problem of train derailments. *See id.*

[93] This "logrolling" is one example of the ways in which behind-the-scenes actions might influence a law's final form, including in ways that attenuate the final form from simply resolving the mischief initially prompting legislative action. *See* John F. Manning, *Inside Congress's Mind*, 115 COLUM. L. REV. 1911, 1919 (2015).

In light of this legislative process, what does the hypothetical mischief—that several trains derailed due to collisions with runaway cattle—tell us about the scope of the phrase "all animals"? Knowing the mischief and even knowing what the sponsors of the bill initially hoped to accomplish via the law does not inform us, in this hypothetical case, how best to interpret "all animals." Thus, even where there is an identifiable mischief, identifying it may not be of great use to a judge.

Textualists generally favor semantic context over policy context when it comes to understanding a statute. This approach takes into account the realities of the legislative process. "[S]emantic detail," John Manning noted, "offers a singularly effective medium for legislators to set the level of generality at which policy will be articulated—and thus to specify the limits of often messy legislative compromises."[94] As a result, "[w]hen contextual evidence of semantic usage points decisively in one direction, that evidence takes priority over contextual evidence that relates to questions of policy," including "public knowledge of the mischief the lawmakers sought to address."[95] This is as it should be. In the Tennessee train hypothetical, if the court had credited contextual policy evidence, such as the mischief, more than semantic context, it would have narrowed the meaning of the statute, upsetting the compromises made during the legislative process.[96]

Textualists give precedence to semantic context because doing so enables legislators to "set the level of generality at which they wish to express their policies."[97] This gives the legislature a choice between rules or standards and results in courts respecting that choice. Of course, "[n]o one could say that rules are always preferable to standards, or the reverse,"[98] but constitutional structure, separation of powers, and the procedures specified for lawmaking require that the choice between the two lies with the legislative branch. The mischief rule risks thwarting this structure by operating in practice to reduce rules to standards in hard cases.

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[94] *What Divides*, *supra* note 3, at 77.

[95] *Id.* at 92–93.

[96] An interpreter need not resort to the hypothetical legislative history of the Tennessee train statute to determine that "all animals" should not be read to mean "only those animals capable of derailing a train." The hypothetical presented here serves to illustrate that an appreciation for the way in which legislation is produced provides good reasons to prioritize the reasonably clear, public semantic meaning of end-result text over pre-enactment policy and temporal context.

[97] *What Divides*, *supra* note 3, at 99; *see* Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109, 165 (2010) ("Whatever the reason that a statute emerged from the legislative process in unqualified form, reading qualifications into it after the fact risks disturbing the very compromise that made its passage possible.").

[98] Easterbrook, *supra* note 54, at 63. Judge Easterbrook explains the difference between standards and rules this way: "Sometimes Congress specifies values or ends, things for the executive and judicial branches to achieve, but often it specifies means, creating loopholes but greater certainty." *Id.* at 68.

For example, the court in the Tennessee train case, *Nashville & K. R. Co.*, was not able to articulate a rule as to what counts as an "animal." It decided a goose was not an animal within the meaning of the statute, asserting that "the goose [was] a proper bird to draw [the line] at,"[99] but its analysis said little more. The court justified its decision to draw the line at birds in part because "[b]irds have wings to move them quickly from places of danger."[100] But many other animals can move quickly from places of danger. Were they also not "animals" under the statute? The decision imposes a standard, not a rule, for what counts as an "animal": whether the animal is capable of saving itself from a collision with a train, and whether the animal "[is] such an obstruction as would cause the derailment of a train, if run over."[101] Whether the case was rightly decided is not of great importance here. But its use of the mischief rule at least signals the possibility that its use can lead courts to replace what the legislature intended as a rule with a standard. Justice Scalia recognized that "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."[102] Prioritizing semantic and legal context over policy and temporal context respects our constitutional structure and allows the legislature to set the level of generality at which it wishes to express its policies.

Even when declining to consider the mischief as part of the initial context for reading a statute, an interpreter may still put the mischief rule to some use. Professor Bray observes that today, where the mischief rule is discussed at all, it often "only comes into play for an ambiguous statute."[103] He suggests that this view is too narrow.[104] For the reasons discussed in this Note, however, a textualist may accept the narrower view but should reject a broader view of the mischief rule. As John Manning noted, "[b]ecause speakers use language purposively, textualists recognize that the relevant context for a statutory text includes the mischiefs the authors were addressing."[105] When a statute is ambiguous, some "textualists think it quite

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[99] Nashville & K. R. Co. v. Davis, 78 S.W. 1050, 1050 (Tenn. 1902).
[100] *Id.*
[101] *See id.* It is not clear that the court needed to resort to the mischief—nor concoct this standard—to avoid the *reductio ad absurdum* that "[s]nakes, frogs, and fishing worms," while admittedly being animals or "obstructions" to some extent, were not the kind of "obstructions" contemplated by the statute. *Id.* The court said that the statute required efforts to stop the train "when an 'animal or obstruction' *appears* on the track." *Id.* (emphasis added). If "appears" is interpreted to mean something like "comes into view," it is relatively clear that railroad companies are not liable under the statute if their trains run over snakes, frogs, and fishing worms because animals of that stature would not "appear" on the track.
[102] Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 79 (1998).
[103] Bray, *supra* note 11, at 986.
[104] *See id.*
[105] *What Divides*, *supra* note 3, at 84.

appropriate to resolve that ambiguity in light of the statute's apparent overall *purpose*."[106] The same could be said for mischief. Even when resolving ambiguities, though, an interpreter should employ the mischief rule with caution. The interpreter might misidentify the mischief, and even if she does not, her knowledge of the mischief does not by itself tell her the extent to which legislation purports to thwart the mischief.

B. MISCHIEF-CONSCIOUS TEXTUALISM AS A DESCRIPTIVE THEORY

Professor Bray's discussion of the mischief rule might succeed as a descriptive theory of how some judges decide hard cases. If so, it is worth pondering where this theory falls on the interpretive spectrum. Among the cases Professor Bray discusses are *Yates v. United States*[107] and *Bond v. United States*.[108] Those cases also figure prominently in two recent articles theorizing the Supreme Court's approach to interpretation: Anita Krishnakumar's *Passive Avoidance* and Richard Re's *The New Holy Trinity*.[109] A brief account of these two articles may help to situate Professor Bray's theory.

Krishnakumar describes the mischief rule as a tool of "passive avoidance," helpful for combating charges of judicial activism and preserving the Court's institutional legitimacy without any need to invoke the now-disfavored avoidance canon.[110] She notes that in cases like *Yates* and *Bond*, the mischief rule "enables the Court to claim fidelity to Congress's intent despite choosing a construction that conflicts with the statute's apparent plain meaning."[111] The Court "had to strain the statutory text . . . to argue that a fish is not a 'tangible object,' [and] that the use of toxic household chemicals to injure a romantic rival does not count as the use of a 'chemical weapon.'"[112] Unlike the approach that a purposivist Court might take, however, the current Court's version of the mischief rule "grounds the statute's core meaning not just in the history that motivated its enactment, but also in linguistic aids such as dictionary definitions, the whole act rule, and language canons like *noscitur a sociis*—that is, in textualist interpretive tools."[113] By Krishnakumar's lights, the Court employs the mischief rule to increase the range of plausible meanings of a text so that there is not just one textually required reading. Whereas more formal textualism might

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[106] *Id.* (emphasis added).
[107] 574 U.S. 528 (2015); *see* Bray, *supra* note 11, at 971–72.
[108] 572 U.S. 844 (2014); *see* Bray, *supra* note 11, at 974–75.
[109] Anita S. Krishnakumar, *Passive Avoidance*, 71 STAN. L. REV. 513 (2019); Richard M. Re, *The New Holy Trinity*, 18 GREEN BAG 2D 407 (2015).
[110] Krishnakumar, *supra* note 109, at 573–74.
[111] *Id.* at 536.
[112] *Id.* at 577 (footnote omitted).
[113] *Id.* at 574.

simply adopt the plain meaning in cases such as *Yates* and *Bond*,[114] mischief-conscious textualism folds the mischief into the statutory context and thereby discerns an ambiguity in the text that permits a choice among now-plausible readings.

Re also looks at these cases and discerns an interpretive approach that allows the Court to "avoid[] undesirable textual results" without invoking the avoidance canon at all.[115] He describes this approach, which "calls for consideration of non-textual factors when determining how much clarity is required for a text to be clear," as "The New Holy Trinity."[116] Re argues that the Court in *Bond*—like in *Holy Trinity*— "limit[ed] the relevant statute's scope to its apparent *purpose*."[117] This approach continues to place great value on text, but "the script calls for an ensemble cast. They [sic] key move is to view purposive and pragmatic considerations as relevant to the identification of textual clarity or ambiguity."[118] As a result, ambiguity is everywhere. Justice Scalia criticized the majority in *Bond* for finding ambiguity outside of the text, describing such a move as a "judge-empowering principle," one whose import is that "[w]hatever has improbably broad, deeply serious, and apparently unnecessary consequences … *is ambiguous*!"[119] For Re, that proposition "could serve as the New Holy Trinity's credo."[120] On this theory, "purposive and pragmatic considerations help set the Court's interpretive expectations and so inform the Court's textualist judgment."[121] The New Holy Trinity permits textualism to reign supreme in banal cases but holds "the text to a higher-than-normal standard" when the most plausible reading leads to alarming results, creating ambiguity where a textualist might typically find none and straining the most natural reading of the text to avoid the strange result.[122]

Krishnakumar's and Re's accounts bear some similarities to Professor Bray's. Professor Bray distances himself from Re's account of *Yates* and *Bond* by arguing that he "emphasize[s] the mischief while [Re] characterizes both cases as purposivist,"[123] but this distinction may be illusory for

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[114] In *Yates*, Justice Kagan embraced the plain meaning of "tangible object." *See* Yates v. United States, 574 U.S. 528, 552–53 (2015) (Kagan, J., dissenting) ("This case raises the question whether the term 'tangible object' means the same thing in §1519 as it means in everyday language—any object capable of being touched. The answer should be easy: Yes. The term 'tangible object' is broad, but clear."); *see also* Bond v. United States, 572 U.S. 844, 867 (2014) (Scalia, J., concurring) ("The meaning of the Act is plain.").
[115] *See* Re, *supra* note 109, at 408.
[116] *Id.*
[117] *Id.* at 411 (emphasis added).
[118] *Id.* at 417.
[119] *Bond*, 572 U.S. at 870 (Scalia, J., concurring).
[120] Re, *supra* note 109, at 411.
[121] *Id.* at 417.
[122] *Id.* at 421.
[123] Bray, *supra* note 11, at 975 n.45.

practical purposes.[124] All three accounts arguably support the Court's rejection of plain meaning in those cases. The Court is constrained by the text and employs traditional textualist tools of interpretation, but in difficult cases, it rejects plain meaning, broadens its view of the statute's context, and adopts a reading of the text that comports with the mischief the statute was allegedly designed to remedy but which avoids the undesirable results accompanying the text's plain meaning.

Although these accounts may be apt descriptive theories of the Court's approach to hard interpretation cases, there is reason to question whether the theory they describe is preferable to textualism. Professor Bray's theory of the mischief rule, like Re's and Krishnakumar's, affords judges greater discretion than does textualism. With greater discretion comes an increased risk of "biased, insincere, and unexpected rulings."[125] Such rulings harm the neutrality and predictability of the interpretive enterprise.

Professor Bray does not argue that the mischief rule will narrow judicial discretion and emphasizes that it is instead "fundamentally a doctrine of focus and rationalization."[126] The mischief rule "guides the interpreter, . . . allow[ing] her to express an intuition she has about the scope of a statute."[127] There is a certain appeal to this argument. But perhaps the judge's intuition will be the wrong one and will differ from the intuition captured in the statute. This Note has argued that the mischief rule is not as sure a guide for the interpreter as Professor Bray suggests it is. Of course, no theory of statutory interpretation eliminates judicial discretion entirely. But limiting the use of interpretive tools that increase judicial discretion and risk misleading the judge about the meaning of a law when the benefits of pulling that tool out of the toolbox are in doubt is a prudent course.

CONCLUSION

Statutory interpreters should seek to respect the complexity of the legislative process and leave undisturbed the various compromises that produce the texts that survive bicameralism and presentment. Although textualists may legitimately resort to mischief to help resolve ambiguities in texts that are unclear when read in their semantic context, an interpreter should not permit the mischief to create ambiguity where she would otherwise

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[124] *See supra* Section II.A.

[125] Re, *supra* note 109, at 418; *see* Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 551 (1983) (noting that greater judicial discretion in this context is dangerous because "[f]ew of the best-intentioned, most humble, and most restrained among us have the skills necessary to learn the temper of times before our births, to assume the identity of people we have never met, and to know how 535 disparate characters from regions of great political and economic diversity would have answered questions that never occurred to them").

[126] *See* Bray, *supra* note 11, at 1001.

[127] *Id.*

conclude that there was none. Allowing mischief to play the latter role risks disturbing the results of the complex process by which laws are made. The difficulties of separating mischief from purpose, identifying mischief in a principled and reliable way, and applying the mischief rule in a helpful way even if one can reliably identify the mischief also counsel against adopting Professor Bray's broad view of the mischief rule. Adding the mischief rule to the interpreter's toolbox without limiting its use to instances where other traditional textualist tools of interpretation fail increases judicial discretion, expands the variability of interpretive outcomes, and risks thwarting the legislature's prerogative to choose its policies and set the level of generality at which to express them.