

# ARTICLES

## The Mischief Rule

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*The mischief rule tells an interpreter to read a statute in light of the “mischief” or “evil”—the problem that prompted the statute. The mischief rule has been associated with Blackstone’s appeal to a statute’s “reason and spirit” and with Hart-and-Sacks-style purposivism. Justice Scalia rejected the mischief rule. But the rule is widely misunderstood, both by those inclined to love it and those inclined to hate it. This Article reconsiders the mischief rule. It shows that the rule has two enduringly useful functions: guiding an interpreter to a stopping point for statutory language that can be given a broader or narrower scope, and helping the interpreter prevent clever evasions of the statute. The mischief rule raises fundamental questions about the relationship of text and context, about the construction of ambiguity, and about legal interpretation when we are no longer in “the age of statutes.” In many of our present interpretive conflicts, the mischief rule offers useful guidance, for textualists and purposivists alike.*

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INTRODUCTION

A Tennessee statute imposed duties on railroad engineers. If a railroad engineer found an animal or obstruction on the tracks, the statute required “the alarm whistle to be sounded, and brakes put down, and every possible means employed to stop the train and prevent an accident.”<sup>1</sup> But what counted as an “animal” on the tracks? Cows and horses, yes. But what else? Did all the trains in Tennessee have to stop for squirrels?

The stop-the-train case poses difficult questions for some interpretive theories, especially textualism. The text does not identify a stopping point in what counts as an animal. Nor is there a dictionary definition that will include cows but exclude squirrels. Is a textualist interpreter duty bound to say that trains really do have to stop for squirrels?

There is a legal rule that allows the interpreter to escape this impasse. The mischief rule 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.<sup>2</sup> Put another way, the generating problem is taken as part of the context for reading the statute. In the real stop-the-train case, the court found the mischief to be (at least especially) the problem of train derailments; the court accordingly held that three domesticated geese were not “animals” within the meaning of the statute.<sup>3</sup> In the court’s view, failing to consider the mischief would have meant that trains had to stop even for “[s]nakes, frogs, and fishing worms.”<sup>4</sup>

This Article reconsiders and reevaluates the mischief rule. It argues that the mischief rule can help an interpreter give a better account of what the legislature has

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1. *Nashville & K. R. Co. v. Davis*, 78 S.W. 1050, 1050 (Tenn. 1902).  
 2. The canonical statement of the rule is in *Heydon’s Case* (1584) 76 Eng. Rep. 637; 3 Co. Rep. 7 a (Exch.). For its discussion, see *infra* Section I.A.  
 3. *Davis*, 78 S.W. at 1050.  
 4. *Id.*

actually decided. The reason 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. In technical terms, the interpreter needs not only semantics but also pragmatics.<sup>5</sup> It is therefore no surprise that courts are continually applying the mischief rule even without knowing it. Nevertheless, the rule has been widely misunderstood. It was celebrated by Henry Hart and Albert Sacks, who found in it the roots of purposivist interpretation,<sup>6</sup> and for that very reason it was rejected by Justice Scalia.<sup>7</sup> But the story is more complicated and more interesting.

The recent literature on legal interpretation includes many references to the mischief rule, but this Article is the first thorough consideration of it as a principle of statutory interpretation. Bill Eskridge considered the rule in a larger analysis of statutory interpretation at the American Founding.<sup>8</sup> Peter Strauss discussed the rule in his argument that an interpreter should look to a statute's "political history."<sup>9</sup> John Manning noted "the complex questions surrounding this traditional tool of construction" and warned of "uncritical application."<sup>10</sup> Anita Krishnakumar found that the Roberts Court is increasingly relying on this principle (including in *Yates v. United States*) in preference to the canon of constitutional avoidance,<sup>11</sup> and she has encouraged interpreters to check their conclusions about the text against "the background circumstances, often referred to as the 'mischief.'"<sup>12</sup> Stephanie Barclay noted conceptual affinities between the mischief rule and decisions that interpret statutes not to reach religious objectors.<sup>13</sup> Andrew Koppelman has written that to exclude something from the coverage of a statute if it is outside the mischief is "the most familiar" and "most legitimate" of the "subtractive moves" available to an interpreter.<sup>14</sup> And in a work on meta rules for interpretation, Richard Re considers the choice that English courts have in deciding between the mischief rule and other rules.<sup>15</sup> And yet this scholarship does not explore the mischief rule in

5. See generally Kent Bach, *The Semantics-Pragmatics Distinction: What It Is and Why It Matters*, in PRAGMATIK: IMPLIKATUREN UND SPRECHAKTE 33 (Eckard Rolf ed., 1997). On tacit domain quantifiers, see *infra* notes 200–03 and accompanying text.

6. See HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 1144, 1415 (tent. ed. 1958).

7. See ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 433–34, 438 (2012).

8. See generally William N. Eskridge, Jr., *All About Words: Early Understandings of the "Judicial Power" in Statutory Interpretation, 1776–1806*, 101 COLUM. L. REV. 990 (2001).

9. Peter L. Strauss, *The Courts and the Congress: Should Judges Disdain Political History?*, 98 COLUM. L. REV. 242, 256–61 (1998).

10. John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673, 733 n.253 (1997).

11. Anita S. Krishnakumar, *Passive Avoidance*, 71 STAN. L. REV. 513, 538, 573–77 (2019).

12. Anita S. Krishnakumar, *Backdoor Purposivism*, 69 DUKE L.J. 1275, 1347 (2020).

13. Stephanie H. Barclay, *The Historical Origins of Judicial Religious Exemptions*, 96 NOTRE DAME L. REV. 55, 113–118 (2020).

14. Andrew Koppelman, Bostock, *LGBT Discrimination, and the Subtractive Moves*, 105 MINN. L. REV. HEADNOTES 1, 21 (2020).

15. Richard M. Re, *Interpretive Permissions 2–3* (Jan. 12, 2021) (unpublished manuscript) (on file with author).

depth. The most extensive treatment in recent U.S. scholarship is about constitutional interpretation.<sup>16</sup>

What is the mischief rule and what does it do? It directs attention to the generating problem, which is public and external to the legislature, something that can be considered observable in the world. The mischief might be indicated in the statute itself or be established by judicial notice, evidence of public debate preceding enactment, or legislative history.<sup>17</sup> Nevertheless, there is no necessary relationship between considering the mischief and consulting legislative history. In the years when English courts applied the “Hansard rule,” refusing to consider debates in Parliament, they nevertheless continued to apply the mischief rule.<sup>18</sup>

The mischief rule serves two functions. First, a stopping-point function:<sup>19</sup> it offers a rationale for an interpreter’s choice about how broadly to read a term or provision in a legal text. Second, a clever-evasion function: it allows an interpreter to read a legal text a little more broadly to prevent a clever evasion that would perpetuate the mischief. Of these two, the stopping-point function is much more common.

The stopping-point function is useful because any, or at least almost any, legal text is susceptible of being read with different degrees of breadth. A famous hypothetical statute of medieval Bologna prohibited shedding blood in the municipal palace.<sup>20</sup> It could be read to prohibit all shedding of blood, including when a barber accidentally cuts a man while shaving his face, or it could be read more narrowly as prohibiting *violent* shedding of blood.<sup>21</sup> If the mischief were a recent spate of violence in the palace, the interpreter would have a reason to choose the narrower interpretation. Conversely, if the mischief lay in a popular belief that the presence of any shed blood would make the palace, and thus the city, ritually unclean, the mischief rule would suggest a different scope; then the case of the maladroit barber would be covered. This is the stopping-point function of the mischief rule: it gives the interpreter a reason to stop here instead of going further (or stopping short).

The mischief rule might lead an interpreter to choose a broader or narrower scope. But as time passes, and as a statute is pressed into service to answer questions never dreamed of at the time of its enactment, the mischief rule will tend to serve this stopping-point function by offering a narrower reading of the statute. In

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16. See generally Daniel Frost, *Getting into Mischief: On What It Means to Appeal to the U.S. Constitution*, 28 INT’L J. SEMIOTICS L. 267 (2015).

17. See *infra* Section II.B.

18. See Stefan Vogenauer, *A Retreat from Pepper v. Hart?: A Reply to Lord Steyn*, 25 OXFORD J. LEGAL STUD. 629, 630 (2005). This distinction is recognized in *FBI v. Abramson*, 456 U.S. 615, 638 n.8 (1982) (O’Connor, J., dissenting), albeit with overstatement regarding the “classical English approach” on legislative history. On the complexity of the English tradition, see generally John J. Magyar, *Debunking Millar v. Taylor: The History of the Prohibition of Legislative History*, 41 STATUTE L. REV. 32 (2020).

19. I have borrowed the name from Richard Re.

20. I am following the version in R. H. Helmholz, *The Myth of Magna Carta Revisited*, 94 N.C. L. REV. 1475, 1482 (2016).

21. See *id.*

other words, it will encourage the court not to update the statute, and to leave to the legislature the task of passing a new bill to address a new situation. By contrast, the clever-evasion function—which is rarer—typically guides the interpreter to choose a modestly broader scope for the statute.<sup>22</sup>

Consider three recent examples of the stopping-point function. First, *CSX Transportation, Inc. v. Alabama Department of Revenue* is a dispute that made two trips to the U.S. Supreme Court.<sup>23</sup> A federal statute prohibited discriminatory state taxes on interstate railroads, and the first three provisions of the statute explicitly indicated that the relevant comparison was to general commercial and industrial taxpayers.<sup>24</sup> The fourth provision of the statute did not have that explicit comparator, and referred simply to “another tax that discriminates against a rail carrier.”<sup>25</sup> Should the fourth provision be given a narrower interpretation—discrimination relative to *general commercial and industrial taxpayers*? Or should it be given a broader reading—discrimination relative to *any taxpayers*? In both cases, a majority of the Justices chose the broader reading, and the authors of the majority opinions (Justices Kagan and Scalia) made standard textualist moves.<sup>26</sup> In both cases, Justice Thomas dissented (joined by Justice Ginsburg), arguing among other things that it was important to adopt the narrower reading so the fourth provision would have “a reach consistent with the problem the statute addressed.”<sup>27</sup>

Second, in *Yates v. United States*, the U.S. Supreme Court considered a provision in the Sarbanes-Oxley Act that makes it a federal crime to destroy, conceal, or falsify “any record, document, or tangible object.”<sup>28</sup> This Act was famously passed in response to several major corporate and accounting scandals. But did the Act apply if a commercial fisherman was caught catching undersized grouper, and tried to evade prosecution by having the undersized fish thrown overboard? No, said the Court, because a fish did not count as a “tangible object” within the meaning of the statute.<sup>29</sup> The plurality opinion of Justice Ginsburg repeatedly hinted at the mischief to which this provision in the Sarbanes-Oxley Act was

22. See *infra* Section III.B.

23. Ala. Dep’t of Revenue v. CSX Transp., Inc. (*CSX II*), 135 S. Ct. 1136 (2015); CSX Transp., Inc. v. Ala. Dep’t of Revenue (*CSX I*), 562 U.S. 277 (2011).

24. *CSX II*, 135 S. Ct. at 1140–41.

25. *Id.* at 1141 (quoting and analyzing 49 U.S.C. § 11501(b)(4) (2012)).

26. See *CSX II*, 135 S. Ct. at 1141, 1143, 1144 (Scalia, J.) (“Subsection (b)(4) contains no such limitation . . . This is not our concept of fidelity to a statute’s text. . . . If the task of determining when that is so is ‘Sisyphean,’ . . . it is a Sisyphean task that the statute imposes.”); *CSX I*, 562 U.S. at 296 (Kagan, J.) (rejecting a narrow reading of the fourth provision as nothing more than “Alabama’s preference for symmetry” and stating “the choice is not ours to make” because “Congress wrote the statute it wrote”).

27. *CSX I*, 562 U.S. at 298, 301 (Thomas, J., dissenting) (describing the problem as “property taxes that soaked the railroads”); see *CSX II*, 135 S. Ct. at 1144–45 (Thomas, J., dissenting).

28. 135 S. Ct. 1074, 1078 (2015) (quoting and analyzing 18 U.S.C. § 1519 (2012)).

29. See *id.* at 1081.

directed.<sup>30</sup> Although Justice Ginsburg only said that she was “[m]indful” of the problem preceding the statute,<sup>31</sup> the mischief rule supported her stopping point.

Third, consider *Zarda v. Altitude Express, Inc.*<sup>32</sup> The Second Circuit, sitting en banc, held that Title VII’s prohibition on discrimination on the basis of “sex” includes within its reach discrimination on the basis of sexual orientation.<sup>33</sup> Judge Lynch dissented, appealing to among other things the “political and social history” that was the context for Title VII,<sup>34</sup> and his dissent shows a strong grasp and endorsement of the mischief rule.<sup>35</sup> Nevertheless, the Supreme Court affirmed the Second Circuit, reading “sex” broadly, and ignoring the mischief because “only the words on the page constitute the law adopted by Congress and approved by the President.”<sup>36</sup>

The mischief rule offers the organizing and justificatory principle for what Justice Thomas in *CSX*, Justice Ginsburg in *Yates*, and Judge Lynch in *Zarda* all sensed was the right reading. Yet it is worth noting that in none of these cases did a majority of the Supreme Court apply the mischief rule, and the discussion of the rule has ebbed in American legal scholarship. Why?

The most likely answer is simply that the rule is thought to be equivalent to purposivism. The distinction between mischief and purpose is worked out in more detail below,<sup>37</sup> but here consider a simple theory of action. There are certain things that spur us to consider acting. Spurred on, we act. But we do so not like a coracle, buffeted by the waves, rudderless and unpaddled. Instead, we have reasons for our actions. But the expression, “such and such was my reason for acting” is ambiguous. It could refer to the initial cause, the spur to acting. Or it could refer to the aim (or ultimate aim) that I had for acting. Both are, in a sense, my “reason.” Yet they can be assigned different locations in this sentence: “Because of *a*, the action *b*, so that *c*.” That ambiguity in my “reason” is precisely why the

30. *Id.* at 1079 (indicating that § 1519 has a “financial-fraud mooring” and that in the Sarbanes-Oxley Act, “Congress trained its attention on corporate and accounting deception and cover-ups”); *id.* at 1080 (recognizing § 1519 as part of a law that “target[s] corporate fraud”); *id.* at 1081 (noting the statute was “prompted by the exposure of Enron’s massive accounting fraud,” describing § 1519 as “cur[ing] a conspicuous omission,” and that “[i]n the Government’s view, § 1519 extends beyond the principal evil motivating its passage”).

31. *See id.* at 1079. *But cf.* Krishnakumar, *supra* note 11, at 538–40 (concluding that Justice Ginsburg’s opinion “relied heavily” on the mischief rule).

32. 883 F.3d 100 (2d Cir. 2018), *aff’d*, *Bostock v. Clayton Cty.*, 140 S. Ct. 1731 (2020).

33. *Id.* at 131.

34. *See id.* at 144–45 (Lynch, J., dissenting) (alteration in original).

35. *See id.* at 143 (“Legislation is adopted in response to perceived social problems, and legislators adopt the language that they do to address a social evil or accomplish a desirable goal. The words of the statute take meaning from that purpose, and the principles it adopts must be read in light of the problem it was enacted to address.”). For contrary arguments about the scope of Title VII’s prohibition of employment discrimination on the basis of “sex,” see generally William N. Eskridge Jr., *Title VII’s Statutory History and the Sex Discrimination Argument for LGBT Workplace Protections*, 127 *YALE L. J.* 322 (2017); Koppelman, *supra* note 14.

36. *Bostock*, 140 S. Ct. at 1738 (“If judges could add to, remodel, update, or detract from old statutory terms inspired only by extratextual sources and our own imaginations, we would risk amending statutes outside the legislative process reserved for the people’s representatives.”).

37. *See infra* Section II.C.

difference between mischief and purpose is usually obscured. The mischief is the spur, the “because of.” More technically, for law, the mischief is the problem that precedes the statute and the legal deficiency that allowed it; the mischief is what the statute responds to. The purpose imputed to the legislature is an aim going forward.<sup>38</sup>

There will be instances of convergence between the mischief and the purpose, instances in which the purpose is no more than the removal of the mischief (“because of *a*, the statute *b*, so that *not a*”). Yet there will often be more than that mere convergence; the imputable purpose will often be an extrapolation from the evil to something more abstract. Hart and Sacks are themselves quite clear on this point. They add a crucial step: the interpreter starts with the mischief and then from it infers “the general purpose.”<sup>39</sup> That step is significant. It makes the mischief grist for the mill of purpose. That additional level of abstraction is indeed valuable if a judge sees her role as faithfully interpreting a statute in a way that fulfills the legislature’s policy aims—a standard purposivist conception. But it would be an error if a judge sees her role as faithfully interpreting a statute so as to carry out the policy embodied in the statute itself—a standard textualist conception.<sup>40</sup>

Because this Article attempts to give the mischief rule a discrete existence, it is of course true that I am sharpening the contrasts between the mischief and other concepts, including purpose and the equity of the statute. In early modern England these concepts seem to have been entirely overlapping, and even though one can always find cases using the terms interchangeably, over time the concepts somewhat diverged. To a degree not appreciated in much of the literature on statutory interpretation, the purpose and the equity of the statute developed into roomier, more expansive concepts, while the mischief stayed narrower and more grounded.<sup>41</sup>

What is at issue is not mere legal taxonomy, but rather a critical question about the role of context in legal interpretation. Statutory 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. This Article argues for a broader understanding of context that includes the *setting* of legal enactments, one aspect of which is the mischief. Consider three implications of taking the mischief as part of context.

First, there is less pressure on the statutory language. Language never fully expresses intention, and the inadequacy of legal language has long been

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38. I am using *purpose* in the sense of a general aim imputed to Congress. On legislative intent, see *infra* notes 163–65 and accompanying text.

39. See HART, JR. & SACKS, *supra* note 6, at 1415–16. For discussion, see *infra* Section I.C.

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

41. On purpose, see *infra* Section II.C. On the equity of the statute, see *infra* note 95.

recognized.<sup>42</sup> That inadequacy is partially ameliorated by the mischief rule's stopping-point and clever-evasion functions. Both offer a certain kind of solace to the legislator. One offers some assurance that her decision today on  $x$  will not be read as a decision tomorrow on  $y$ . The other offers some assurance to the legislator that her statute will not be circumvented by clever tricks.

Second, there is less surprise and more notice. The functions of the mischief rule allow—and indeed require—judgment, characterization, and subjectivity on the part of the interpreter. Like other elements of context, the mischief rule does not reduce discretion; it does not exclude interpretive options and it may even expand them.<sup>43</sup> But 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. In *CSX*, *Yates*, and *Zarda*, for example, the application of the mischief rule would arguably make the reach of the statute less surprising—not just to the enacting Congress, but also to a reasonable reader at the time of enactment. Although the optimal amount of surprise for the enacting legislature and the reasonable contemporaneous reader is not zero, it is probably not massive.<sup>44</sup> And the mischief rule might keep the subsequent surprises smaller than they otherwise would be.

Finally, thinking about the mischief as part of context highlights a pivotal step in legal interpretation: the construction of ambiguity or non-ambiguity.<sup>45</sup> Once the interpreter has determined that a text is ambiguous, a host of canons and interpretive considerations come into play. Should the mischief rule be considered one of them? Or should it be part of the conscientious interpreter's "initial reading," which might determine whether the text is ambiguous?

An example of why this choice matters is *Bond v. United States*, in which the majority opinion of Chief Justice Roberts is pervaded by an argument that the statute (the Chemical Weapons Convention Implementation Act of 1998), when read in the context from which it arose, was "about" something.<sup>46</sup> That knowledge of what the statute was about—its mischief—led the Court to treat as

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42. E.g., 2 ARISTOTLE, *Nicomachean Ethics*, in *THE COMPLETE WORKS OF ARISTOTLE 1729, 1795–96* (Jonathan Barnes ed., 1984); see also FELIX FRANKFURTER, *SOME REFLECTIONS ON THE READING OF STATUTES* 16 (1947) (recognizing "the shorthand nature of language").

43. On the relationship between the mischief and discretion, see *infra* note 111 and accompanying text.

44. Cf. Caleb Nelson, *A Response to Professor Manning*, 91 VA. L. REV. 451, 454 (2005) ("Other things being equal, then, interpretive methods that identify legal directives consistent with the ones legislators thought they were establishing should be preferred to interpretive methods that systematically produce legal directives contrary to the ones legislators thought they were establishing.").

45. See Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2118 (2016) (reviewing ROBERT A. KATZMANN, *JUDGING STATUTES* (2014)) (calling the "initial clarity versus ambiguity decision" the "primary problem" in statutory interpretation); Adam M. Samaha, *If the Text Is Clear—Lexical Ordering in Statutory Interpretation*, 94 NOTRE DAME L. REV. 155 (2018) (demonstrating the prevalence of lexical ordering in statutory interpretation and exploring its trade-offs); see also Richard M. Re, *Clarity Doctrines*, 86 U. CHI. L. REV. 1497 (2019) (analyzing the concept of "legal clarity").

46. 572 U.S. 844, 856 (2014) ("But even with its broadly worded definitions, we have doubts that a treaty about *chemical weapons* has anything to do with *Bond's* conduct."); *id.* at 860 (considering "the context from which the statute arose—a treaty about chemical warfare and terrorism"); *id.* at 866



ambiguous its definition of “chemical weapon,” which if taken literally would have been extremely broad.<sup>47</sup> In a separate opinion, Justice Scalia refused to read the text in light of the concerns that led to its enactment, and so found no ambiguity.<sup>48</sup> To put his critique in a pointed form, we could say he thought the majority was placing the text on a Procrustean bed, tightening the text to align with the mischief. But that critique depends on the assumption that the text is logically prior to its context, as if it should be (or even could be) read without a context.<sup>49</sup> To the contrary, reading the text in its legal and temporal context is not an act of violence; it is a step toward understanding.<sup>50</sup> Context helps the interpreter see that there is a choice about the scope of the statute, and it guides the choice.<sup>51</sup>

The mischief rule is simply a legal instantiation of a common sense point about all interpretation. To understand statement *x*, an interpreter wants to know its setting. To understand a line of dialogue, it is helpful to know the preceding line of dialogue. It is also helpful to know the situation in which the characters find themselves, to know whether this line was spoken by a character in response to seeing a live shark or a rubber duck. Although the mischief rule has distinctive qualities that are relevant for law, the underlying intuition that context matters

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(concluding that “the context from which the statute arose demonstrates a much more limited prohibition was intended”).

47. See *id.* at 866. Richard Re recognizes that *Bond* and *Yates* used the same analysis both to identify and to resolve the textual ambiguity. See Richard M. Re, *The New Holy Trinity*, 18 GREEN BAG 2D 407, 409–13 (2015). Our readings differ because I emphasize the mischief while he characterizes both cases as purposivist, lumping them with *King v. Burwell*. *Id.* at 413–15. On *King v. Burwell*, see *infra* note 192. Ryan Doerfler understands *Bond* as centrally about the “class of cases the statute excluded implicitly.” See Ryan D. Doerfler, *High-Stakes Interpretation*, 116 MICH. L. REV. 523, 554–55 (2018). He criticizes *Bond* for failing to offer “a plausible linguistic story of implicit exclusion.” *Id.* at 555. I think the mischief generates such a story.

48. See *Bond*, 572 U.S. at 867–68, 873 (Scalia, J., concurring); see also Neal Kumar Katyal & Thomas P. Schmidt, *Active Avoidance: The Modern Supreme Court and Legal Change*, 128 HARV. L. REV. 2109, 2150–52 (2015) (agreeing with Justice Scalia that “[f]rom a textualist standpoint . . . *Bond* is hard to defend”). For further discussion of *Bond*, see *infra* notes 170–75 and accompanying text.

49. See, e.g., *Bostock v. Clayton Cty.*, 140 S. Ct. 1731, 1738 (2020) (stating that “only the words on the page constitute the law” and contrasting them with “extratextual sources and [judges’] own imaginations”).

50. See Ryan D. Doerfler, *Who Cares How Congress Really Works?*, 66 DUKE L.J. 979, 991–94, 997–98 (2017); Christopher R. Green, *Loyal Denominatorism and the Fourteenth Amendment: Normative Defense and Implications*, 13 DUKE J. CONST. L. & PUB. POL’Y 167, 171 (2017) (“[T]he text only expresses meaning in a context, and that context supplies implicit domain limitations.”); Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 199 (1983) (“In the context of the statute, other related statutes, or the problems giving rise to the statute, words may be capable of many different meanings.”).

51. This is a well-trod path in constitutional interpretation. *E.g.*, *Barron v. Mayor of Baltimore*, 32 U.S. (7 Pet.) 243, 247–50 (1833) (relying on legal and temporal context). Nevertheless, there are reasons to distinguish the Constitution. Knowing the mischief might be more necessary, given the spare text of the Constitution. Or it might have less weight because the Constitution is meant to endure longer than a statute. See *Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 165 (2d Cir. 2018) (Lynch, J., dissenting), *aff’d*, *Bostock*, 140 S. Ct. 1731. On constitutional provisions and their “paradigm cases,” see generally Jed Rubenfeld, *The Paradigm-Case Method*, 115 YALE L.J. 1977 (2006).

will persist as long as human beings use and make sense of language.<sup>52</sup> It is therefore no surprise that even as the concept of the mischief has receded from U.S. legal scholarship, the basic intuition persists in judicial interpretation, even though it is insufficiently developed and inadequately understood.

### I. EPISODES IN THE RECEPTION OF THE MISCHIEF RULE

There is a conventional narrative about statutory interpretation, which goes like this: the dominant approach in the mid- to late-twentieth century,<sup>53</sup> the purposive approach elaborated by Henry Hart and Albert Sacks, was already established in the time of Elizabeth I by *Heydon's Case*.<sup>54</sup> That case urged judges to identify the “mischief” to which the statute was directed, and then to interpret the statute to advance the drafters’ purposes.<sup>55</sup> The mischief rule was endorsed by William Blackstone, who equated it with interpreting a statute in light of its “reason and spirit.”<sup>56</sup> And so there is a direct line from the sixteenth century to the twentieth century, and now to the twenty-first.<sup>57</sup>

Yet the conventional narrative is subject to doubt. Here is the kernel of truth: *Heydon's Case* did endorse judicial consideration of the “mischief.” But there is no straight line in the reception of that idea. This Part introduces *Heydon's Case*

52. See *infra* notes 200–03 and accompanying text (discussing context, and especially tacit domain quantifiers).

53. See T. Alexander Aleinikoff, *Updating Statutory Interpretation*, 87 MICH. L. REV. 20, 28 (1988) (referring to Hart and Sacks’ purposivism as having “three decades of near hegemony” before the textualist resurgence).

54. (1584) 76 Eng. Rep. 637; 3 Co. Rep. 7 a (Exch.).

55. *Id.* at 638, 3 Co. Rep. 7 b.

56. 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 61 (Oxford, Clarendon Press 1765).

57. See ROBERT A. KATZMANN, JUDGING STATUTES 31 (2014) (“This [purposive] approach finds lineage in the sixteenth-century English decision *Heydon's Case*.”); William S. Blatt, *Interpretive Communities: The Missing Element in Statutory Interpretation*, 95 NW. U. L. REV. 629, 637 (2001) (“Scholars searching for objective purpose assume that the legislature systematically pursues the common good, an assumption incorporated in the rule in *Heydon's Case*.” (footnote omitted)); Anuj C. Desai, *The Dilemma of Interstatutory Interpretation*, 77 WASH. & LEE L. REV. 177, 251 (2020) (“Purposivism has its roots in the so-called ‘mischief rule,’ dating back at least to *Heydon's Case* in 1584.”); William N. Eskridge, Jr., *Legislative History Values*, 66 CHI.-KENT L. REV. 365, 392–93 (1990); Elizabeth Garrett, *Legislation and Statutory Interpretation*, in THE OXFORD HANDBOOK OF LAW AND POLITICS 360, 369 (Keith E. Whittington, R. Daniel Kelemen & Gregory A. Caldeira eds., 2008) (“The third foundational theory is purposivism, which has its roots in the ‘mischief rule’ articulated in *Heydon's Case* (1584).”); Michael P. Healy, *Legislative Intent and Statutory Interpretation in England and the United States: An Assessment of the Impact of Pepper v. Hart*, 35 STAN. J. INT’L L. 231, 235 (1999); John F. Manning, *The New Purposivism*, 2011 SUP. CT. REV. 113, 119 n.35 (“The leading English precedent for purposivism is *Heydon's Case*.”); Richard A. Posner, *Economics, Politics, and the Reading of Statutes and the Constitution*, 49 U. CHI. L. REV. 263, 265 n.6 (1982) (“For a modern statement of the theory of legislation implicit in *Heydon's Case*, see H. HART & A. SACKS . . . .”); Philip Sales, *Legislative Intention, Interpretation, and the Principle of Legality*, 40 STATUTE L. REV. 53, 56 & n.9 (2019); Frederick Schauer, *Formalism*, 97 YALE L.J. 509, 532 (1988); Strauss, *supra* note 9, at 256, 265 (“Purposive interpretation traces its roots to *Heydon's Case*.”). *But see* L.H. LaRue, *Statutory Interpretation: Lord Coke Revisited*, 48 U. PITT. L. REV. 733, 745 n.34 (1987) (cautioning against Hart and Sacks’ interpretation of *Heydon's Case* “to say that a judge should ascertain the purpose underlying the statute and then should apply the statute so as to advance that purpose”).

and then considers three moments of reception of the mischief rule: Blackstone, Hart and Sacks, and Scalia. Blackstone offers a conventional summary of the mischief rule; he never equates it with finding the “reason and spirit” of the law. Hart and Sacks make the mischief rule central to a judge’s inference of purpose, and their use of the rule is fundamentally transformative. And Scalia conflates the mischief rule with purposivism and rejects both, perhaps as a way to wall off an avenue by which legislative history might enter the interpretive process.

This Part is preliminary and explanatory. It is not so much an explanation of the mischief rule and how it works (for that, see Parts II and III), as it is an explanation for the rule’s shape-shifting quality in legal literature. The mischief rule is misunderstood and now neglected, though not because anything has changed about the basic intuition that a text should be read in context, including in its temporal context. Rather, as the following discussion will show, participants in various debates over statutory interpretation have found it useful to be silent about the mischief rule or to treat it as equivalent to purposivism. For those who embrace purposivism, it seemed unnecessary, something that could be deleted with a parsimony of concepts. For those who criticize purposivism, especially textualists, the equation of mischief and purpose has obscured an important aspect of legal interpretation.

#### A. HEYDON’S CASE

The canonical authority for the mischief rule is *Heydon’s Case*, a decision of the Court of Exchequer in 1584.<sup>58</sup> That case is not the origin of the use of the mischief in statutory interpretation, for the idea is certainly older and was a staple of English legal education.<sup>59</sup> Nevertheless, many interpreters have been drawn to the crisply stated propositions that are attributed to Chief Baron Manwood in Sir Edward Coke’s printed report<sup>60</sup>:

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58. 76 Eng. Rep. at 637; 3 Co. Rep. 7 a. The report is reprinted with brief editorial comments in 1 THE SELECTED WRITINGS AND SPEECHES OF SIR EDWARD COKE 78 (Steve Sheppard ed., 2003).

59. By the late Middle Ages, English statutes were understood as being “designed expressly to eradicate mischief.” NORMAN DOE, FUNDAMENTAL AUTHORITY IN LATE MEDIEVAL ENGLISH LAW 156 (1990). There were significant changes from the late Middle Ages to the early modern period in the conception of a statute and its relationship to the common law, to legislative authority, and to the judicial task. See generally A DISCOURSE UPON THE EXPOSITION & UNDERSTANDINGE OF STATUTES WITH SIR THOMAS EGERTON’S ADDITIONS 3–100 (Samuel E. Thorne ed., 1942) [hereinafter DISCOURSE UPON THE EXPOSITION & UNDERSTANDINGE OF STATUTES]. Yet already by the end of the fifteenth century, in the inns of court a “reader was expected to explain the ‘remedy’ by identifying the ‘mischief’ before the statute.” 6 JOHN BAKER, THE OXFORD HISTORY OF THE LAWS OF ENGLAND, 1483–1558, at 22 (2003) [hereinafter 6 BAKER, OXFORD HISTORY OF THE LAWS OF ENGLAND]; see also JOHN BAKER, THE REINVENTION OF MAGNA CARTA 1216–1616, at 222 (2017) [hereinafter BAKER, REINVENTION OF MAGNA CARTA] (noting, as of the late sixteenth century, that “[i]t had long been the practice for readers in the inns of court to begin their exposition of a statute by offering a historical explanation of the mischief at which it was aimed”).

60. At the time of *Heydon’s Case*, Coke was a lawyer of increasing prominence; it would be another twenty-two years before he became a judge. Coke’s manuscript report is apparently much shorter, and in it Chief Baron Manwood’s main point is that judges should consider the mischief instead of considering whether the statute enlarged or restricted the common law.

[F]or the sure and true interpretation of all statutes in general (be they penal or beneficial, restrictive or enlarging of the common law,) four things are to be discerned and considered:—

1st. What was the common law before the making of the Act.

2nd. What was the mischief and defect for which the common law did not provide.

3rd[.] What remedy the Parliament hath resolved and appointed to cure the disease of the commonwealth.

And, 4th. The true reason of the remedy; and then the office of all the Judges is always to make such construction as shall suppress the mischief, and advance the remedy, and to suppress subtle inventions and evasions for continuance of the mischief, and *pro privato commodo* [which translates to for private benefit], and to add force and life to the cure and remedy, according to the true intent of the makers of the Act, *pro bono publico* [which translates to for the public good].<sup>61</sup>

To a reader now, these phrases—“the true reason,” “according to the true intent of the makers,” “add force and life to the cure”—may seem like an ambitious charter for purposive interpretation. Yet far from being a prophetic intervention into debates today about statutory interpretation, *Heydon’s Case* is a product of its time.<sup>62</sup> The judges and lawyers of 1584 were familiar with the idea of the “true

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61. *Heydon’s Case*, 76 Eng. Rep. at 638, 3 Co. Rep. 7 b (enumeration omitted). The factual and legal milieu of the case is complicated, but the gist is that the Court of Exchequer, interpreting one of the Henrician statutes related to the dissolution of the monasteries, read a protection for “any estate or interest for life, year or years” as encompassing copyhold tenure (that is, tenure according to manorial custom). See *id.* That has understandably been read as a decision to expand the reach of the statute. But by the time of *Heydon’s Case*, the monasteries had been dissolved for more than four decades; there was no need to read the statute broadly to prevent clever evasions. By finding the Wares’ copyhold tenure to be within the protections of the statute, the court was recognizing the doctrinal evolution of copyhold in the intervening decades and assimilating copyhold, at least in this respect, to freehold. On that doctrinal evolution, see generally 6 BAKER, OXFORD HISTORY OF THE LAWS OF ENGLAND, *supra* note 59, at 644–50; and CHARLES MONTGOMERY GRAY, COPYHOLD, EQUITY, AND THE COMMON LAW (1963). This reading makes sense of the less famous rule of *Heydon’s Case*, which lays out presumptions for the interaction of copyhold and statutes. See 76 Eng. Rep. at 642, 3 Co. Rep. 9 a; see also 7 W. S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 301–04 (1926). Two decades before *Heydon’s Case*, the same result had already been reached by two judges of the Court of Common Pleas. See GRAY, *supra*, at 201 n.19. That fact reinforces the idea that *Heydon’s Case* was not so much a new broadening of the statute as it was a judicial recognition of a doctrinal reshuffling that had already occurred.

62. By the sixteenth century, statutory interpretation had become stricter. See 6 BAKER, OXFORD HISTORY OF THE LAWS OF ENGLAND, *supra* note 59, at 76–81; DISCOURSE UPON THE EXPOSITION & UNDERSTANDING OF STATUTES, *supra* note 59, at 42–47; 1 REPORTS FROM THE LOST NOTEBOOKS OF SIR JAMES DYER, at lix–lxi (J.H. Baker ed., 1994). *But cf.* THEODORE F. T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 333–35 (The Lawbook Exch., 5th ed. 2001) (1956) (asserting that “by the reign of Elizabeth . . . many lawyers . . . gloried in the liberty which the courts enjoyed in playing fast and loose with statutes”); WILLIAM D. POPKIN, STATUTES IN COURT: THE HISTORY AND THEORY OF STATUTORY INTERPRETATION 11–19 (1999) (emphasizing freedom and discretion in judges’ “equitable interpretation” of statutes in early modern England).

intent of the makers,” but they did not understand this to require a search for the subjective intent of members of Parliament. Rather, they recognized it could be “a kind of fiction, a constructive intention to be gathered from the wording.”<sup>63</sup>

Seen in this light, the four enumerated points in *Heydon’s Case* are more modest than they are often read to be by modern interpreters. Collectively, these points suggest that the interpreter should consider four things: (1) the old law; (2) the defect in the old law; (3) the new law; and (4) how the new law connects to the defect in the old law. In itself, this is not a manifesto for purposivism. It is an insistence that statutes are not to be read “in abstract, *in vacuo*.”<sup>64</sup> Faced with options and ambiguities, judges have guidance on how to resolve them: read the statute in light of the mischief, and as a remedy for the mischief.<sup>65</sup>

The mischief rule has had a long career. Although three episodes of reception will be discussed momentarily, it is worth noting that the rule is considered part of the law of interpretation.<sup>66</sup> It has often been used by federal and state courts,<sup>67</sup> and in some states it is codified.<sup>68</sup> It is intuitive for legislative

63. 6 BAKER, OXFORD HISTORY OF THE LAWS OF ENGLAND, *supra* note 59, at 79–80. Baker’s point is about “outsiders” and “later generations,” not contemporary expositors who knew the legislative process, though he goes on to show Elizabethan recognition that “[l]egislative intention is a fiction in any case, since a collective body does not have a mind.” *Id.*

64. S. E. Thorne, *The Equity of a Statute and Heydon’s Case*, 31 ILL. L. REV. 202, 215 (1936); *see also* LON L. FULLER, THE MORALITY OF LAW 83 (rev. ed. 1969) (drawing attention to “the central truth of the Resolution in Heydon’s Case, namely, that to understand a law you must understand ‘the disease of the commonwealth’ it was appointed to cure”). On the idea that the mischief rule directs the interpreter to read the statute in line with the common law, where possible, *see infra* note 238.

65. *See* EDWARD COKE, THE FIRST PART OF THE INSTITUTES OF THE LAWS OF ENGLAND; OR, A COMMENTARY UPON LITTLETON, *reprinted in* 2 THE SELECTED WRITINGS AND SPEECHES OF SIR EDWARD COKE 742 (Steve Sheppard ed., 2003) (discussing the mischief).

66. *See* Wong Yang Sung v. McGrath, 339 U.S. 33, 45 (1950) (“It is the plain duty of the courts, regardless of their views of the wisdom or policy of the Act, to construe this remedial legislation to eliminate, so far as its text permits, the practices it condemns.”); Jacob Scott, *Codified Canons and the Common Law of Interpretation*, 98 GEO. L.J. 341, 345 (2010). For two views of the law of interpretation, compare William Baude & Stephen E. Sachs, *The Law of Interpretation*, 130 HARV. L. REV. 1079 (2017), with Abbe R. Gluck, *Intersystemic Statutory Interpretation: Methodology as “Law” and the Erie Doctrine*, 120 YALE L.J. 1898 (2011), and Abbe R. Gluck, *The Federal Common Law of Statutory Interpretation: Erie for the Age of Statutes*, 54 WM. & MARY L. REV. 753 (2013).

67. *E.g.*, *Bd. of Supervisors v. King Land Corp.*, 380 S.E.2d 895, 897–98 (Va. 1989); *State v. Campbell*, 429 A.2d 960, 962–63 (Conn. 1980). For disagreement about the mischief rule, *see In re* House of Representatives Request for Advisory Op. Regarding Constitutionality of 2018 PA 368 & 369, 936 N.W.2d 241, 253 (Mich. 2019) (Clement, J., concurring) (considering the mischief as part of the statute’s historical context); *id.* at 266–67 (Markman, J., dissenting) (equating the mischief with purpose and rejecting it); *id.* at 275–78 (Viviano, J., dissenting) (rejecting the mischief rule).

68. *E.g.*, GA. CODE ANN. § 1-3-1 (West, Westlaw through 2020 Legis. Sess.) (“In all interpretations of statutes, the courts shall look diligently for the intention of the General Assembly, keeping in view at all times the old law, the evil, and the remedy.”); N.Y. STAT. LAW § 95 (McKinney, Westlaw through 2019) (“The courts in construing a statute should consider the mischief sought to be remedied by the new legislation, and they should construe the act in question so as to suppress the evil and advance the remedy.”); 1 PA. STAT. AND CONS. STAT. ANN. § 1921 (West, Westlaw through 2020 Act 79) (“When the words of the statute are not explicit, the intention of the General Assembly may be ascertained by considering, among other matters[,] . . . [t]he mischief to be remedied.”); *see also* N. X-Ray Co. v. State, 542 N.W.2d 733, 736 (N.D. 1996) (construing a state statute as codifying the mischief rule).

drafters.<sup>69</sup> It is intuitive for Executive Branch officials.<sup>70</sup> And it is intuitive for judges.<sup>71</sup> *CSX*, *Yates*, *Zarda*, and *Bond* all show that sometimes judges know the mischief matters.

#### B. BLACKSTONE'S CONVENTIONALITY

William Blackstone discusses general principles of legal interpretation in Section 2 of the introduction to his *Commentaries on the Laws of England*. In Section 3 he discusses the interpretation of English statutes, and only here—not in his general discussion—does he address the mischief rule.<sup>72</sup> This pattern of usage is revealing for the relationship of the mischief rule to other interpretive considerations.

To begin with, Blackstone's presentation of the mischief rule in Section 3 is straightforward, partly quoting from and partly glossing *Heydon's Case*:

There are three points to be considered in the construction of all remedial statutes; the old law, the mischief, and the remedy: that is, how the common law stood at the making of the act; what the mischief was, for which the common law did not provide; and what remedy the parliament hath provided to cure this mischief. And it is the business of the judges so to construe the act, as to suppress the mischief and advance the remedy.<sup>73</sup>

In Section 2, where Blackstone treats general principles of legal interpretation, he offers five “signs.”<sup>74</sup> These are “the words, the context, the subject matter, the effects and consequence, [and] the spirit and reason of the law.”<sup>75</sup> The absence of any reference to the mischief has been missed by some commentators, however, who have treated Blackstone's discussion of “the spirit and reason of the law” as if it were a discussion of the mischief rule.<sup>76</sup>

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69. See LAWRENCE E. FILSON & SANDRA L. STROKOFF, *THE LEGISLATIVE DRAFTER'S DESK REFERENCE* 31 (2d ed. 2008) (“The sponsor simply says in effect ‘here is my problem—fix it.’”).

70. See, e.g., *Libya and War Powers: Hearing Before the Comm. on Foreign Relations*, 112th Cong. 7, 16 (2011) (statement of Hon. Harold Koh, Legal Adviser, U.S. Dep't of State) (defending a narrow reading of *hostilities* in the War Powers Resolution in part because of the context in which it arose: “The Congress that passed the resolution in [1973] had just been through a long, major, and searing war in Vietnam”).

71. 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).

72. Cf. JEREMY BENTHAM, *A COMMENT ON THE COMMENTARIES: A CRITICISM OF WILLIAM BLACKSTONE'S COMMENTARIES ON THE LAWS OF ENGLAND* 99–100 (Charles Warren Everett ed., Scientia Verlag Aalen 1976) (1928) (recognizing that Blackstone's general rules of interpretation are distinct from his more specific rules for statutes).

73. 1 BLACKSTONE, *supra* note 56, at 87.

74. *Id.* at 59. On Blackstone's rules for statutory interpretation, see generally John V. Orth, *Blackstone's Rules on the Construction of Statutes*, in BLACKSTONE AND HIS COMMENTARIES: BIOGRAPHY, LAW, HISTORY 79 (Wilfrid Prest ed., 2009).

75. 1 BLACKSTONE, *supra* note 56, at 59.

76. E.g., William N. Eskridge, Jr., *Textualism, the Unknown Ideal?*, 96 MICH. L. REV. 1509, 1523–24 & n.46 (1998) (reviewing ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* (1997)) (equating “considering the reason and spirit” with the “mischief rule”); cf. William S. Blatt, *The History of Statutory Interpretation: A Study in Form and Substance*, 6 CARDOZO L. REV. 799,

But the relationship between the mischief rule and Blackstone's signs is more complicated. For one thing, the mischief rule cuts across several of the signs. For example, Blackstone's description of the subject matter could also fit the mischief: what was "in the eye of the legislator," the end toward which "all his expressions [are] directed."<sup>77</sup> Also fitting the mischief is part of Blackstone's description of the reason and spirit, for both can be characterized as the "cause which moved the legislator to enact" the law.<sup>78</sup> Note, however, that his illustration for reason and spirit moves beyond the mischief, because it emphasizes not a problem precedent as much as an affirmative legislative aim.<sup>79</sup>

What explains Blackstone's omission of the mischief rule in his account of the general principles of legal interpretation? Two explanations are possible, but each winds up having a similar implication.

One explanation is that Blackstone may have considered the mischief rule to be peculiar to English law. He may have thought of it as a rule specific to the relationship between statutes and the common law. It would then naturally come up in his discussion of English law, not in his discussion of legal interpretation more generally.

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804 (1985) (recognizing that Blackstone's "reason and spirit" and the mischief rule are distinct—calling them "scattered, discrete rules, applicable in differing circumstances"—but nevertheless classifying both as "embodi[ments]" of equity). The source of this misunderstanding might be found in Hart and Sacks' juxtaposition within a paragraph of references to *Heydon's Case* and Blackstone's "fifth rule" (that is, fifth sign—"reason and spirit"). See HART, JR. & SACKS, *supra* note 6, at 1242.

77. 1 BLACKSTONE, *supra* note 56, at 60. Blackstone's illustration for subject matter could also just as easily be used for the mischief because the knowledge of the problem precedent is guiding the interpreter's choice among the senses that an ambiguous term could have. As Blackstone explains:

Thus, when a law of our Edward III. forbids all ecclesiastical persons to purchase *provisions* at Rome, it might seem to prohibit the buying of grain and other victual; but when we consider that the statute was made to repress the usurpations of the papal see, and that the nominations to vacant benefices by the pope were called *provisions*, we shall see that the restraint is intended to be laid upon such provisions only.

*Id.*; cf. BENTHAM, *supra* note 72, at 117 (criticizing Blackstone's example of "subject-matter" and suggesting it is better explained in terms of the mischief to be suppressed).

78. *Id.* at 61. For recognition of this overlap, see *In re Di Torio*, 8 F.2d 279, 279 (N.D. Ill. 1925). In the *Institutes*, Coke glosses a statute's mischief as the "cause of the making of the same." COKE, *supra* note 65, at 682.

79. As Blackstone puts it:

An instance of this is given in a case put by Cicero, or whoever was the author of the rhetorical treatise inscribed to Herennius. There was a law, that those who in a storm forsook the ship should forfeit all property therein; and the ship and lading should belong entirely to those who staid in it. In a dangerous tempest all the mariners forsook the ship, except only one sick passenger, who by reason of his disease was unable to get out and escape. By chance the ship came safe to port. The sick man kept possession and claimed the benefit of the law. Now here all the learned agree, that the sick man is not within the reason of the law; for the reason of making it was, to give encouragement to such as should venture their lives to save the vessel: but this is a merit, which he could never pretend to, who neither staid in the ship upon that account, nor contributed any thing to it's preservation.

1 BLACKSTONE, *supra* note 56, at 61 (footnote omitted).

Another explanation begins with the need for parsimony. Unless the list of signs is going to be a vast mishmash, a selection is necessary. That still leaves the question of why he included other signs instead of the mischief.

Here it is helpful to see how the signs fit into Blackstone's larger argument. The five signs culminate in "reason and spirit," which Blackstone glosses as "equity."<sup>80</sup> And Blackstone was a famous skeptic of the division between law and equity.<sup>81</sup> He argues that law and equity are identical in their substance and aims, differing only in procedure.<sup>82</sup> To this end, Blackstone tries to show that equity is not distinctive because the common law courts themselves engage in equitable interpretation. That is what the signs are leading up to—all courts engage in equitable interpretation, and therefore it is not distinctive to courts of equity.

For this argument, for this shift from the final sign category to equity, Blackstone needs the final sign to be "reason and spirit," not "mischief." The mischief rule would focus attention backwards on the problem the legislators were attempting to solve. When new circumstances emerge, with cases unforeseen by the legislator, the mischief rule is not as good of a tool for extending the reach of the statute.<sup>83</sup> *This* statute addressed *this* mischief; when a new mischief emerges, a new statute may be needed. But "reason and spirit" is easier to connect with equitable interpretation as presented by Blackstone. It more easily allows Blackstone to argue that common law courts engage in equitable interpretation, and it more easily produces the danger Blackstone attributes to equitable interpretation—that it may "make every judge a legislator, and introduce most infinite confusion."<sup>84</sup> Blackstone's larger argument is therefore well served by omitting the mischief rule in Section 2.

80. *Id.* ("From this method of interpreting laws, by the reason of them, arises what we call *equity*.").

81. See DAVID LIEBERMAN, *THE PROVINCE OF LEGISLATION DETERMINED: LEGAL THEORY IN EIGHTEENTH-CENTURY BRITAIN* 83 (1989) (describing Blackstone's "guiding argument" as the proposition "that no theoretical construction could adequately explain the separation of law and equity in English jurisprudence"); Samuel L. Bray, *A Parsimonious Equity?: Discussion of Equity: Conscience Goes to Market*, 21 JERUSALEM REV. LEGAL STUD. 1, 2–3, 7 (2020).

82. See LIEBERMAN, *supra* note 81, at 84–85; see also John H. Langbein, *Introduction* to 3 WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND: A FACSIMILE OF THE FIRST EDITION OF 1765–1769*, at viii (The Univ. of Chi. Press 1979) (1768) ("[Blackstone] insisted that there were no material differences between the substantive law of the courts of law and equity, and he concealed or downplayed the facts that made this contention untenable."); Duncan Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFF. L. REV. 205, 249 (1979) ("[I]t was one of [Blackstone's] central theses that all the English courts did the same thing."). Note that there is an important equivocation, for Blackstone is using *equity* and its cognates in two distinct senses. One is Aristotelian, describing equity as the exceptional case unforeseen by the legislator—Blackstone cites Grotius, but the view is Aristotle's. The other is the more technical sense of *equity* associated with Chancery. For a discussion of these two senses in which Blackstone uses the term, see W. S. Holdsworth, *Blackstone's Treatment of Equity*, 43 HARV. L. REV. 1, 3–6 (1929). Rather than seeing this as a confusion, however, we should see the conflation of the two senses as critical to Blackstone's critique of equity.

83. On the mischief and the equity of the statute, see *infra* note 95.

84. 1 BLACKSTONE, *supra* note 56, at 62. For illustrations of Blackstone's concern about such a state of affairs, see generally Emily Kadens, *Justice Blackstone's Common Law Orthodoxy*, 103 NW. U. L. REV. 1553 (2009). For a contrasting view, arguing for tendencies toward dynamism in Blackstone,



The implications of Blackstone's reception of the rule are twofold. First, Blackstone helps us see that the mischief overlaps with other interpretive considerations (namely, some of his signs).<sup>85</sup> Second, it is nevertheless true that the mischief is not identical to any of those other interpretive considerations.

### C. HART AND SACKS' TRANSFORMATION

Hart and Sacks do not ignore the mischief, and in fact, they give it a place of central importance.<sup>86</sup> But they also transform it. In *The Legal Process*, where Hart and Sacks describe the technique for inferring purpose, they begin with the interpreter's goal of trying "to put itself in imagination in the position of the legislature which enacted the measure," with the assumption that "the legislature was made up of reasonable persons pursuing reasonable purposes reasonably."<sup>87</sup> Next:

The court should then proceed to do, in substance, just what Lord Coke said it should do in *Heydon's Case*. . . . The gist of this approach is to infer purpose by comparing the new law with the old. Why would reasonable men, confronted with the law as it was, have enacted this new law to replace it? Answering this question, as Lord Coke said, calls for a close look at the "mischief" thought to inhere in the old law and at the "true reason of the remedy" provided by the statute for it.

The most reliable guides to an answer will be found in the instances of unquestioned application of the statute. Even in the case of a new statute there almost invariably *are* such instances, in which, because of the perfect fit of words and context, the meaning seems unmistakable.

Once these points of reference are established, they throw a double light. The purposes necessarily implied in them illuminate facets of the general purpose. At the same time they provide a basis for reasoning by analogy to the disputed application in hand.<sup>88</sup>

Hart and Sacks proceed to further describe the process of inferring purpose. They conclude that if "significant choices" remain, the task "is essentially one of creative elaboration of the principles and policies initially formulated in the statute."<sup>89</sup> This is quite a long way from *Heydon's Case*—the imaginative reconstruction, the reasonable legislators, the creative elaboration.<sup>90</sup> But more

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provided the rituals of law were observed, see Jessie Allen, *Blackstone, Expositor and Censor of Law Both Made and Found*, in BLACKSTONE AND HIS CRITICS 41 (Anthony Page & Wilfrid Prest eds., 2018).

85. See *infra* note 129 and accompanying text.

86. See Jeffrey A. Pojanowski, *Reading Statutes in the Common Law Tradition*, 101 VA. L. REV. 1357, 1370 (2015) (noting that Hart and Sacks' "central example of this technique for inferring purpose is . . . *Heydon's Case*").

87. HART, JR. & SACKS, *supra* note 6, at 1414–15.

88. *Id.* at 1415 (alteration in original).

89. *Id.* at 1417.

90. For a more freewheeling adaptation, see Max Radin, *A Short Way with Statutes*, 56 HARV. L. REV. 388, 421–22 (1942) (suggesting that *Heydon's Case* could be "recast to serve a modern need," with

important for understanding the reception of *Heydon's Case* in Hart and Sacks is to see just how preliminary its work is. The mischief is not equated with general purpose; rather, the mischief is a basis for inferring purposes, which in turn “throw . . . light” on the general purpose.<sup>91</sup>

It is understandable that readers of Hart and Sacks would conflate the mischief rule and purposivism. If we look at *Heydon's Case* through a modern lens, with Hart and Sacks' own categories, it is easy to find purpose there. After all, the mischief rule 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. But this conflation is anachronistic, for the reasons discussed more thoroughly in Part II.

Nevertheless, there has been a widespread understanding of Hart and Sacks' approach as equivalent to the older common law approach.<sup>92</sup> Whether *Heydon's Case* supports Hart and Sacks is, however, not the point. The point here is simply that anachronistic histories have made it harder to think about the mischief rule as a distinct concept.

#### D. SCALIA'S REJECTION

The most influential person in the textualist resurgence of the last forty years was Justice Scalia, and he had definite views on the mischief rule. He was against it. In his late-career collaboration on statutory interpretation with Brian Garner, *Reading Law*, Justice Scalia equates the rule with purposivism.<sup>93</sup> Their definition of *mischief rule* points to the definition of *purposivism*:

[M]ischief rule: 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 problem and advance the remedy. • This is a primarily British name for purposivism. The classic and most ancient statement of the rule occurred in *Heydon's Case* . . . . The prevailing scholarly view today is that the mischief rule represents “the last remnant of the equity of a statute.” See PURPOSIVISM.<sup>94</sup>

The lexicographic loop is complete, for their definition of *purposivism* points back to the mischief rule:

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the interpreter first asking: “What is the purpose of the statute as a whole? . . . Is this statutory purpose one that the court feels is good?”).

91. HART, JR. & SACKS, *supra* note 6, at 1415.

92. *See supra* note 57.

93. SCALIA & GARNER, *supra* note 7. This is not Justice Scalia's best work, but it has rapidly become a leading source on statutory interpretation for the Supreme Court. By the end of the October 2019 Term, it had already been cited in thirty-nine Supreme Court opinions.

94. *Id.* at 433–34, 434 n.7 (emphasis omitted) (footnote omitted) (quoting J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 212 (4th ed. 2002)).

[P]urposivism: The doctrine that a drafter’s “purposes,” as perceived by the interpreter, are more important than the words that the drafter has used; specifically, the idea that a judge-interpreter should seek an answer not in the words of the text but in its social, economic, and political objectives. • Broadly speaking, *purposivism* is synonymous with *mischief rule*. Cf. EQUITY-OF-THE-STATUTE.<sup>95</sup>

In other words, Justice Scalia adopted the conventional narrative that draws a straight line from *Heydon’s Case* to Hart and Sacks. And there is little mystery about what Justice Scalia would think about the mischief rule, once that equation was made.

Justice Scalia also rejected the mischief rule in his judicial opinions. In *Oncale v. Sundowner Offshore Services, Inc.*—a Title VII decision that is widely cited in the various recent cases about that statute and discrimination on the basis of sexual orientation—he emphasized the disconnect between the text and the evil: “[S]tatutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.”<sup>96</sup> Although this may sound like a truism, it is noteworthy that *Oncale* cited no authority.<sup>97</sup>

In *Reading Law*, Scalia and Garner give a central place to *Oncale* in their exposition of something they present as if it were a traditional canon of interpretation, namely the “General-Terms Canon[:]. General terms are to be given their general

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95. *Id.* at 438 (emphasis omitted). Scalia and Garner’s definition of *equity of the statute*, in turn, is a fine piece of anachronism, reading the long history of statutory interpretation as a continuous battle between two sides:

[E]quity of the statute: The supposed fair application intended for an enactment, as the interpreter’s paramount concern—allowing departures from the statute’s literal words. • This statute-specific ally of purposivism arose in the Middle Ages, mostly fell into disuse by the Renaissance, was thoroughly rejected for most of the 19th century, and has made spasmodic comebacks in American law since then. See PURPOSIVISM.

*Id.* at 428 (emphasis omitted). In early modern legal usage, there does not appear to be any distinction between the mischief rule, the equity of the statute, and the fiction of legislative intention. There is, however, a distinction in St. Germain between the equity of the statute, used to bring in analogous cases; and equity in the Aristotelian sense, used to recognize exceptions out of the statute. See DISCOURSE UPON THE EXPOSITION & UNDERSTANDING OF STATUTES, *supra* note 59, at 78 & nn.163–64. Later on, a partial divergence seems to develop with *equity* being more easily used of broadening interpretation and *mischief* of narrowing interpretation. See Eskridge, Jr., *supra* note 8, at 999. Eventually, for an interpreter who wants to control a statute by reference to some external principle of political morality, equity would become a more congenial concept than mischief. For a conceptual rather than historical analysis of the two senses in which “equity of the statute” can be used, see generally James Edelman, *The Equity of the Statute*, in PHILOSOPHICAL FOUNDATIONS OF THE LAW OF EQUITY 352 (Dennis Klimchuk, Irit Samet & Henry E. Smith eds., 2020).

96. 523 U.S. 75, 79 (1998); see also *Lewis v. City of Chicago*, 560 U.S. 205, 215 (2010) (“It is not for us to rewrite the statute so that it covers only what we think is necessary to achieve what we think Congress really intended.”).

97. See *Oncale*, 523 U.S. at 79. There is, however, ample authority for the first part of the statement—that is, a statute may go beyond the precipitating evil. *E.g.*, *S. Beach Marina, Inc. v. Dep’t of Revenue*, 724 P.2d 788, 792 (Or. 1986); see also *Jerome Park Co. v. Bd. of Police*, 11 Abb. N. Cas. 342, 347 (Ct. Com. Pl. N.Y.C. & Cty. 1882) (recognizing that broad statutory language can apply to later emerging evils).

meaning.”<sup>98</sup> Such terms, they say, “are not to be arbitrarily limited.”<sup>99</sup> They acknowledge the objection that “those who adopted [a] provision had in mind a particular narrow objective,” but quote *Oncala* and consider its statement about statutes going beyond the principal evil to be a “conclusive response to this argument.”<sup>100</sup>

It is not, however, a conclusive response. Indeed, there are at least three ways to understand the observation that a statutory prohibition may go beyond (or for that matter stop short of) the principal evil. First, it could be a recognition that the mischief rule is not the only consideration, and that other interpretive considerations might counsel choosing a different scope that is not tied to the mischief.<sup>101</sup> In *United States v. Wiltberger*, for example, Chief Justice Marshall declined to read a statute as expansively as its mischief, not because the mischief was irrelevant, but because it was a penal statute and its structure supported a narrower reading.<sup>102</sup> Second, it could be an expression of the oft-stated idea that the mischief rule only comes into play for an ambiguous statute.<sup>103</sup> Third, it could be, as Justice Scalia takes it, a reason to entirely ignore the mischief.

Of these three ways of understanding the point, the first is compatible with the mischief rule as presented in this Article—the mischief is part of the context that an interpreter can use both to determine that the text is ambiguous and to resolve the ambiguity.<sup>104</sup> The second understanding is compatible with a narrower view of the mischief rule—one in which it may be used only if the interpreter has already found the text ambiguous. The third understanding, chosen by Justice Scalia, is not compatible with the mischief rule. But there is nothing obvious

98. SCALIA & GARNER, *supra* note 7, at 101, 104 (emphasis omitted). On general terms, see *infra* note 249.

99. SCALIA & GARNER, *supra* note 7, at 101.

100. *Id.* at 103–04, 104 n.7.

101. For example, the interpreter might simply think the best interpretation of the statutory provision is broader than the mischief. See, e.g., *Brewer’s Lessee v. Blougher*, 39 U.S. (14 Pet.) 178, 198–99 (1840).

102. See 18 U.S. (5 Wheat.) 76, 105 (1820); see also *United States v. Sheldon*, 15 U.S. (2 Wheat.) 119, 121–22 (1817) (“It may be admitted, that the mischief is the same, whether the enemy be supplied with provisions in the one way or the other; but this affords no good reason for construing a penal law by equity, so as to extend it to cases not within the correct and ordinary meaning of the expressions of the law, particularly when it is confirmed by the interpretation which the legislature has given to the same expressions in the same law.”). For Chief Justice Marshall’s consideration of the mischief in other cases, see, for example, *Brown v. State of Maryland*, 25 U.S. (12 Wheat.) 419, 440 (1827) (considering the mischief in constitutional interpretation) and *United States v. Daniel*, 19 U.S. (6 Wheat.) 542, 547–48 (1821) (considering the mischief in statutory interpretation). On penal statutes and the mischief rule, compare *Daggett v. State*, 4 Conn. 60, 63–64 (Conn. 1821) (rejecting use of mischief to support a broader reading of a penal statute), and *Glanville Williams, Statute Interpretation, Prostitution and the Rule of Law, in CRIME, PROOF AND PUNISHMENT: ESSAYS IN MEMORY OF SIR RUPERT CROSS* 71 (1981) (criticizing the use of the mischief rule to expand criminal statutes), with *United States v. Holte*, 236 U.S. 140, 144 (1915) (favoring a broader interpretation that aligned with the mischief, even in a penal statute), and *Ash Sheep Co. v. United States*, 252 U.S. 159, 169–70 (1920) (same).

103. For critique, see *supra* notes 45–51 and accompanying text, and *infra* notes 130–34 and accompanying text.

104. See *infra* notes 130–34 and accompanying text.

about the third option, and he gives no argument to justify it. At any rate, the bottom line is that Justice Scalia appears to leave no room for the mischief rule in the interpretation of statutes. For him, at least sometimes,<sup>105</sup> consideration of the mischief is nothing more than “result-driven antitextualism.”<sup>106</sup>

What explains Justice Scalia’s hostility to the mischief rule, and his resistance to allowing the mischief to be part of the statutory context? At least four explanations are possible.

First, Justice Scalia was trained in a world where Hart and Sacks dominated statutory interpretation, and perhaps he accepted their framing of their position as his foil.

Second, in deciding to exclude the mischief from the relevant context, Justice Scalia might have been working not so much *from context to sources* as *from sources to context*. In other words, perhaps he thought (not without reason) that one place to find the mischief would be legislative history. Absolutely committed to the rejection of legislative history, he could not ask a question to which legislative history might provide the answer.<sup>107</sup>

Third, Justice Scalia’s preference for rules over standards is well-known.<sup>108</sup> When declining to read a statute in light of the mischief, he sometimes argued that the resulting scope for the statute would be indeterminate and unpredictable.<sup>109</sup> His critique partly misses the mark: an interpretation of the text in light of the mischief will often be more predictable to the reasonable observer than the bare text read for all it is worth (for example, *Yates, Bond, Gonzales v. Oregon*).<sup>110</sup> But he is right that a text read in light of the mischief will tend to

105. For Justice Scalia’s consideration of the mischief under the rubric of “historical context,” see, for example, *Branch v. Smith*, 538 U.S. 254, 268–70 (2003) (noting that “[w]hen Congress adopted [the relevant statutory provision] in 1967, the immediate issue was precisely the involvement of the courts in fashioning electoral plans,” and thus concluding that “[w]ith all this threat of judicially imposed at-large elections, and (as far as we are aware) no threat of a legislatively imposed change to at-large elections, it is most unlikely that [the statutory provision] was directed solely at legislative reapportionment”), and *Vt. Agency of Nat. Res. v. U.S. ex rel. Stevens*, 529 U.S. 765, 781–82, 781 n.10 (2000) (“As the historical context makes clear, and as we have often observed, the FCA was enacted in 1863 with the principal goal of ‘stopping the massive frauds perpetrated by large [private] contractors during the Civil War.’” (quoting *United States v. Bornstein*, 423 U.S. 303, 309 (1976))).

106. *Bond v. United States*, 572 U.S. 844, 868 (2014) (Scalia, J., concurring); see also *id.* at 873 (rejecting the majority’s use of “the ‘concerns’ driving the Convention—‘acts of war, assassination, and terrorism’—as guideposts of statutory meaning”).

107. On the mischief rule and legislative history, see *infra* notes 153–59 and accompanying text.

108. See generally Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989).

109. See, e.g., *Bond*, 572 U.S. at 872–73 (Scalia, J., concurring); *Gonzales v. Oregon*, 546 U.S. 243, 287–98 (2006) (Scalia, J., dissenting).

110. The point is linguistic, not legal. Consider an example drawn from Timothy Endicott’s discussion of pragmatic vagueness: to whom does the expression “violinist” apply? TIMOTHY A. O. ENDICOTT, *VAGUENESS IN LAW* 51 (2000). If we applied it to everyone who had ever held a violin and drawn a bow across a string, there would be more determinacy but less predictability; but if we applied it “only to people who are reasonably skilful or at least persistent,” *id.*, the scope of the term would be less determinate yet closer to what the reader will usually expect. By contrast, Justice Scalia yoked rules and predictability. See Scalia, *supra* note 108, at 1179.

have a fuzzier boundary.<sup>111</sup>

Finally, there are tensions and inconsistencies in Justice Scalia's interpretive jurisprudence. Sometimes he is resolutely and purely textualist,<sup>112</sup> and at other times he strikes a decidedly traditional pose, allowing practices and conventions at the time of enactment to work as a safe harbor.<sup>113</sup> This variation cannot be explained in terms of statutory provisions versus constitutional provisions.<sup>114</sup>

By and large, textualists seem to have accepted Justice Scalia's rejection of the mischief rule. The rule does not appear in the decisions of Judge Easterbrook.<sup>115</sup> Admittedly, it has been suggested by John Manning that the mischief could be part of the context for a legal enactment,<sup>116</sup> but he has not developed the point,<sup>117</sup>

111. Examples include *Bond*, see *supra* notes 46–48 and accompanying text; *Nashville & K. R. Co. v. Davis*, 78 S.W. 1050 (Tenn. 1902), see *supra* text accompanying note 1; and the hypothetical statute requiring the leashing of dogs in a park, see *infra* notes 178–80 and accompanying text. When choosing a narrower construction because of the mischief, some courts have noted that the resulting scope is somewhat indeterminate. See, e.g., *State v. Smith*, 25 S.C.L. (Chev.) 157, 160 (Ct. App. 1840) (“We will leave the cases to be adjudged as they arise.”). Note that even though the mischief rule will tend to increase this at-the-line indeterminacy, that does not mean that it systematically increases judicial discretion. *But see* Tara Leigh Grove, Commentary, *Which Textualism?*, 134 HARV. L. REV. 265, 295–96 (2020). To the contrary, this Article argues that relying on context (including the mischief) can allow judges to temper their creativity and lessen legislative surprise at their interpretations. Nor should these effects be surprising because there is reason to doubt that increasing interpretive sources increases judicial discretion. See Thomas W. Merrill, *Textualism and the Future of the Chevron Doctrine*, 72 WASH. U. L.Q. 351, 373 (1994) (noting that a textualist court has “fewer tools at its disposal to particularize the meaning of the text,” and, “like the painter working with a small pallet,” the court “necessarily has to become more imaginative in resolving questions of statutory interpretation”). See generally Adam M. Samaha, *Looking Over a Crowd—Do More Interpretive Sources Mean More Discretion?*, 92 N.Y.U. L. REV. 554 (2017) (answering the titular question in the negative).

112. See, e.g., *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 78–82 (1998).

113. See, e.g., *United States v. Virginia*, 518 U.S. 515, 568–70 (1996) (Scalia, J., dissenting).

114. The leading example that Scalia and Garner give for their general-terms canon is the *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 72 (1872). SCALIA & GARNER, *supra* note 7, at 101–03. The tension between Justice Scalia's purer textualism and his traditionalism is not recognized in *Reading Law*; there are no citations to *United States v. Virginia*, 518 U.S. at 568–70 (Scalia, J., dissenting). Cf. Michael W. McConnell, *Textualism and the Dead Hand of the Past*, 66 GEO. WASH. L. REV. 1127, 1137 n.45 (1998) (noting inconsistency in Justice Scalia's interpretive approach); *infra* note 249 and accompanying text (same).

115. Judge Easterbrook rejects the mischief rule and has apparently never used it in a judicial opinion. Although he has said that when we interpret words, one aspect of context is “the problems the authors were addressing,” Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL'Y 61, 61 (1994), this passage comes in a broader description of interpretation, which he then retreats from for purposes of legal interpretation, *id.* at 64. For another line of thought in Judge Easterbrook's work that is more consistent with the mischief rule, see *infra* note 244.

116. See Manning, *supra* note 40, at 84–85 (“Because speakers use language purposively, textualists recognize that the relevant context for a statutory text includes the mischiefs the authors were addressing.”).

117. E.g., John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2456–76 (2003) (considering alternatives to the absurdity doctrine but not discussing the mischief).

and he has sometimes associated the mischief rule with purposivism.<sup>118</sup> In *Bostock v. Clayton County*, all of the opinions—which were written by Justices Gorsuch, Alito, and Kavanaugh—present themselves as textualist and cite with apparent approval Justice Scalia’s dicta in *Oncale* about the “principal evil”;<sup>119</sup> none clearly relies on the mischief.<sup>120</sup> For textualists, then, the dominant positions on the mischief rule seem to be rejection and silence.<sup>121</sup>

One consequence may be that textualists have tended to stress American exceptionalism (especially with respect to the separation of powers) as a way to distance American legal interpretation from what they perceive, because of the mischief rule, to be the more purposivist tradition of the common law. But this idea—that textualists, reacting to and being shaped by Hart and Sacks, have misunderstood how common law courts interpreted statutes and have emphasized constitutional structure in part to separate federal courts from the common law tradition—deserves more consideration than it can receive in this Article.

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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. Despite the inaccuracies of this narrative, it has a strong hold. Courts and scholars slide between mischief and purpose, sometimes using them interchangeably.<sup>122</sup>

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118. See John F. Manning, *Textualism and Legislative Intent*, 91 VA. L. REV. 419, 424–25 (2005) [hereinafter Manning, *Textualism and Legislative Intent*] (“[Textualists] subscribe to the general principle that texts should be taken at face value—with no implied extensions of specific texts or exceptions to general ones—even if the legislation will then have an awkward relationship to the apparent background intention or purpose that produced it.”); Manning, *supra* note 40, at 93 (placing “public knowledge of the mischief the lawmakers sought to address” within the policy context that is emphasized by purposivists); John F. Manning, *Federalism and the Generality Problem in Constitutional Interpretation*, 122 HARV. L. REV. 2003, 2055 (2005) (referring to “[l]ooking at the precise mischiefs that underlay the document’s adoption” as “a classic move of purposivism”).

119. See 140 S. Ct. 1731, 1749, 1751–52 (2020); *id.* at 1773–74 (Alito, J., dissenting); *id.* at 1834 (Kavanaugh, J., dissenting). For three views of how textualist the opinions are, see Mitchell N. Berman & Guha Krishnamurthi, *Bostock Was Bogus: Textualism, Pluralism, and Title VII* (Feb. 9, 2021) (unpublished manuscript) (available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3777519](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3777519) [<https://perma.cc/5P5D-JCAX>]); Grove, *supra* note 111; and Re, *supra* note 15.

120. The dissenting opinions did refer in passing to the mischief or problem to which the statute was directed. See *Bostock*, 140 S. Ct. at 1774 (Alito, J., dissenting); *id.* at 1835 (Kavanaugh, J., dissenting) (faulting the majority for ignoring “the social realities that distinguish between the kinds of biases that the statute sought to exclude from the workplace from those it did not” (quoting *Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 162 (2d Cir. 2018) (Lynch, J., dissenting), *aff’d*, *Bostock*, 140 S. Ct. 1731)). But neither relied on the mischief as Judge Lynch did in his dissent in *Zarda*. See *Zarda*, 883 F.3d at 143 (Lynch, J., dissenting).

121. Cf. Koppelman, *supra* note 14, at 21 (calling the mischief rule a “subtractive move[]” that “is probably barred by the new textualism”); *id.* at 25 (“The new textualism’s rejection of the mischief rule is one of its deepest weaknesses.”).

122. E.g., Sales, *supra* note 57, at 56 (noting that courts read a statute’s language “in the light of the scheme of the Act as a whole and its overall purpose (sometimes called the mischief rule)”).

Yet there is daylight between these concepts, if we know to look for it. In a recent article, Abbe Gluck and Judge Richard Posner reported the results of a survey of forty-two federal judges.<sup>123</sup> They found overwhelming support for considering purpose, or, as a subheading in their article puts it: “*Almost All Judges Invoked Purpose*.”<sup>124</sup> But it is fascinating to find that this is the authors’ gloss, not the statements of the judges themselves. As Gluck and Posner report: “Only four of the forty-two judges we spoke with did *not* mention purpose as an appropriate tool of statutory interpretation. The judges we spoke with interpreted the search for purpose in terms of ‘the mischief’ or ‘the problem that gave rise to the statute in the first place.’”<sup>125</sup> Why were the judges interviewed by Gluck and Posner more comfortable speaking in the language of mischief, than in the language of purpose? What exactly is the mischief?

## II. FINDING THE MISCHIEF

The word *mischief* was defined essentially the same way in *Black’s Law Dictionary* for a century: “In legislative parlance, the word is sometimes used to signify the evil or danger which a statute is intended to cure or avoid.”<sup>126</sup> A similar legal definition is offered in the *Oxford English Dictionary*: “[A] disability or wrong which a person suffers, *esp.* one which it is the object of a statute to remove or for which equity affords a remedy.”<sup>127</sup> The “mischief rule” is the instruction to courts to consider the mischief, as well as the way in which the statute is a remedy for the mischief.<sup>128</sup> As straightforward as this may seem, two preliminary qualifications need to be noted before the analysis in this Part proceeds.

First, the description of the mischief rule in this Part is more analytically crisp than the historical materials would support. *Mischief, purpose, intention, equity*, etc.—this cluster of terms related to statutory interpretation has been used with remarkable variety in the common law systems over the last five centuries: sometimes broadly and sometimes narrowly, overlappingly and then in contradistinction, to express one ideology or to reject another, with concerns about Stuart monarchs uppermost or concerns about the discretion of federal judges, as conventional terms that bear no special weight and as terms used with idiosyncratic force.<sup>129</sup> Thus there is no one historical

123. Gluck & Posner, *supra* note 71.

124. *Id.*

125. *Id.* (footnote omitted).

126. *Mischief*, BLACK’S LAW DICTIONARY (6th ed. 1990). This was the definition from the first edition (1891) through the sixth edition (1990). In subsequent editions the definition has grown bloated and imprecise, and the eleventh edition (2019) introduces the erroneous equation of the mischief rule with purposivism. See *Mischief Rule*, BLACK’S LAW DICTIONARY (11th ed. 2019) (stating that it “is a primarily British name for purposivism”).

127. *Mischief*, OXFORD ENGLISH DICTIONARY (3d ed. 2002).

128. See *supra* Section I.A (discussing *Heydon’s Case*).

129. See, e.g., 6 BAKER, OXFORD HISTORY OF THE LAWS OF ENGLAND, *supra* note 59, at 76–81 (discussing equity, mischief, and intent in the late fifteenth and sixteenth centuries); JOHN BELL & GEORGE ENGLE, STATUTORY INTERPRETATION 19 (2d ed. 1987) (describing “the purposive approach [as] more limited than one which tries to ‘suppress the mischief’”); DOE, *supra* note 59, at 173–74 (finding differences in how the common law and chancery of the fifteenth century approached “inconvenience”



concept of the mischief. If a historical definition were attempted, it would have to be a genealogy of these interconnected and impacting ideas, but that is not attempted here. Instead, the focus is on a discernible and demarcated concept of the mischief that is *one* of the things that travels under that name.

Second, the mischief is not here defined by recourse to the older texts on statutory interpretation. Some of them classify the mischief rule as an interpretive consideration that may resolve the meaning of an ambiguous statute, but that may not be used to identify an ambiguity.<sup>130</sup> Yet there are conflicting authorities on this point,<sup>131</sup> and there is reason for doubt: context is not a device for resolving ambiguity that comes into play only after the reading of the text. And the mischief is part of a legal enactment's context.<sup>132</sup> This view of the mischief as part of the interpretive process prior to the resolution of ambiguity accords with the function of other kinds of legal context, such as background principles of law.<sup>133</sup> It also fits the intuitions of Justice Thomas, Justice Ginsburg, and Judge Lynch in *CSX*, *Yates*, and *Zarda* respectively, as well as the majority of the Court in *Bond*: the mischief was logically anterior to the text, something the interpreter knew while reading the text itself.<sup>134</sup>

What follows, then, is an analytical description of the mischief rule, one that is in contact with how the mischief rule has functioned in the past but is especially

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and "mischief"); J. G. SUTHERLAND, *STATUTES AND STATUTORY CONSTRUCTION* 319–21 (Chicago, Callaghan & Co. 1891) (referring to intention, general purpose, subject matter, context, and mischief); Blatt, *supra* note 76, at 821 (showing fluctuations in terms for statutory interpretation); William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 *STAN. L. REV.* 321, 332 (1990) (distinguishing intentionalism from purposivism, but equating the latter with "a flexible 'mischief' approach"); *cf.* DISCOURSE UPON THE EXPOSITION & UNDERSTANDING OF STATUTES, *supra* note 59 (analyzing how the development of statutory interpretation between the Year Books and Blackstone was tied to changing conceptions of the statute and of legislative authority).

130. *See, e.g.*, SUTHERLAND, *supra* note 129, at 320 ("When the words are not explicit[,] the intention is to be collected from the context[,] from the occasion and necessity of the law[,] from the mischief felt, and [the objects and] the remedy in view; and the intention is to be taken or presumed[,] according to what is consonant [to] reason and good discretion." (quoting 1 JAMES KENT, *COMMENTARIES ON AMERICAN LAW* \*462 (Charles M. Barnes ed., 13th ed. 1884))). The more general proposition was that "if the statute is plain and unambiguous there is no room for construction or interpretation." THEODORE SEDGWICK, *A TREATISE ON THE RULES WHICH GOVERN THE INTERPRETATION AND APPLICATION OF STATUTORY AND CONSTITUTIONAL LAW* 231 (New York, John S. Voorhies 1857).

131. *E.g.*, *United States v. Lewis*, 192 F. 633, 639 (E.D. Mo. 1911) (considering the mischief even though "the language of that act is clear and free from ambiguity"); RUPERT CROSS, *PRECEDENT IN ENGLISH LAW* 185 (1961) (noting "conflicting schools of thought" on whether the mischief rule applies only "to cases of ambiguity"). Some statutes codifying the mischief rule direct that it should be used in all cases of statutory interpretation, and others direct that it should be used when there is ambiguity. *See supra* note 68. For an analysis of lexical ordering in statutory interpretation, see generally Samaha, *supra* note 45.

132. For discussion, see *supra* notes 45–51 and accompanying text.

133. *See, e.g.*, Frank H. Easterbrook, *The Case of the Speluncean Explorers: Revisited*, 112 *HARV. L. REV.* 1913, 1913–14 (1999).

134. *See infra* notes 170–74 and accompanying text; *see also* *Adoptive Couple v. Baby Girl*, 570 U.S. 637, 642, 649 (2013) (describing the abuses that "prompted" Congress to enact the Indian Child Welfare Act and concluding that the Court's interpretation of the act "comports with the statutory text [which] demonstrat[es] . . . the primary mischief the ICWA was designed to counteract"). Ryan Doerfler has criticized "double count[ing]" the same interpretive consideration when (a) deciding whether a text is ambiguous and (b) resolving the ambiguity. Doerfler, *supra* note 47, at 535–36. I consider the line between ambiguity-construction and ambiguity-resolution to be more fluid.

attendant to how it could function in the present. The mischief is analyzed as a problem antecedent to the law in Section II.A, the sources for identifying it are discussed in Section II.B, and mischief and purpose are distinguished in Section II.C.

#### A. THE MISCHIEF AS A PROBLEM ANTECEDENT TO THE LAW

The “evil” or “mischief” is logically prior to the enactment of a statute. It is also typical for the mischief to be temporally prior to the statute, but that is not strictly required. That is, the mischief could be anticipated but entirely future: a statute might be passed in the spring to remedy a mischief that will not occur until the following winter, for example.

Identifying the mischief “necessarily involve[s] placing the statute in a historical context.”<sup>135</sup> The mischief is sometimes described as (a) the problem that preceded the legislative act and to which the act was directed, or (b) the deficient state of the law prior to the legislative act. One might say that the problem was the law itself. Or one might say the law’s failure to remedy the problem was the real problem. Accordingly, some statements of the mischief rule emphasize the social and some the legal.<sup>136</sup>

These two concepts blend together, and both are critical to understanding the mischief. Although the problem that preceded the act is central—as the spur to the act—if it is a past event, then it cannot strictly speaking be remedied by the new law. The past cannot be undone. Thus, the mischief has a compound significance: it is the social problem, and it is also the inadequacy in the law that allowed or allows that problem.

This compound significance is unsurprising, given that the evil or mischief is a technical legal concept. Although the intuition that context and setting matter is pervasive in the interpretation of texts, the legal formulation cannot be applied willy-nilly to interpretation more generally. There is no mischief rule for poems. But legislatures exist to change the law to improve the social condition; problems out there in the world, so to speak, are the legislature’s concern.

The mischief is external to the legislators. The mischief is not so much in the mind of the legislator as in the sight of the legislator.<sup>137</sup> As the U.S. Supreme Court said in *Smith v. Townsend*, in words it considered equivalent to the mischief rule as stated in *Heydon’s Case*, “courts, in construing a statute, may with propriety recur to the history of the times when it was passed”;<sup>138</sup> and when “endeavoring to ascertain what the congress of 1862 intended, we must, as far as possible,

135. 6 BAKER, OXFORD HISTORY OF THE LAWS OF ENGLAND, *supra* note 59.

136. *E.g.*, WILLIAM TWINING & DAVID MIERS, HOW TO DO THINGS WITH RULES: A PRIMER OF INTERPRETATION 153 n.67 (4th ed. 1999) (“*Heydon’s Case* can be interpreted as taking mischiefs of the law, rather than social problems, as the starting point.”). It is especially apt to think of the evil as a legal deficiency when the legislative action is the repeal of a statute or the reversal of a judicial decision.

137. *See, e.g.*, *Ezekiel v. Dixon*, 3 Ga. 146, 158 (1847) (referring, in an opinion that extols the virtues of plain text, to “the mischief which the Assembly had in its eye at the time”).

138. *Smith v. Townsend*, 148 U.S. 490, 494 (1893) (quoting *United States v. Union Pac. R.R. Co.*, 91 U.S. 72, 79 (1875)). The quotation continues: “and this is frequently necessary, in order to ascertain the reason as well as the meaning of particular provisions in it.” *Id.*

place ourselves in the light that congress enjoyed, [and] look at things as they appeared to it.”<sup>139</sup> Or as the Court said in one of the less controversial parts of one of its more controversial statutory interpretation decisions, “another guide to the meaning of a statute is found in the evil which it is designed to remedy; and for this the court properly looks at contemporaneous events, the situation as it existed, and as it was pressed upon the attention of the legislative body.”<sup>140</sup>

It would be incorrect to see the mischief, this antecedent negative state of affairs, as something entirely objective. Anita Krishnakumar captures this fluidity by applying two different adjectives to the mischief: it is, at one and the same time, the “background mischief”<sup>141</sup> and the “motivating mischief.”<sup>142</sup> In other words, the mischief 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. Nevertheless, what is being sought is exterior to the legislator. As Peter Strauss has said, “This inquiry, properly regarded, is prelegal—an inquiry into the conditions generating legislative action, not the meaning of the action itself.”<sup>143</sup> That is relevant for the question of sources.

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139. *Id.* at 495 (quoting *Platt v. Union Pac. R.R. Co.*, 99 U.S. 48, 64 (1878)). The quotation continues: “and discover its purpose from the language used in connection with the attending circumstances.” *Id.*; see also *Kelly v. Dewey*, 149 A. 840, 842–43 (Conn. 1930) (considering “the circumstances and conditions known to the Legislature at the time of [the statute’s] enactment,” including the existing law, the known evil, and the official recommendation that “[t]he Legislature . . . had before it”); LaRue, *supra* note 57, at 753 (describing the technique in *Heydon’s Case* in terms of “two things: (1) the judge reads the statute in the context of pre-existing law, but (2) the judge examines that pre-existing law from the point of view of the legislator and not from his own point of view”).

140. *Holy Trinity Church v. United States*, 143 U.S. 457, 463 (1892). Nevertheless, in *Holy Trinity Church*, because of the clarity of the language, the best account of the legislative decision would have been that the statute simply went beyond the mischief. On the Court’s invocation of the evil being less remarkable than its use of legislative history, see Adrian Vermeule, *Legislative History and the Limits of Judicial Competence: The Untold Story of Holy Trinity Church*, 50 STAN. L. REV. 1833, 1843 (1998). As Vermeule puts it:

The Court also argued that the statute should be limited to the scope of the evil that the statute was designed to remedy, as evidenced by “contemporaneous events.” It was “common knowledge” that the act’s “motive” was to prevent an influx of “cheap, unskilled labor” in the form of “an ignorant and servile class of foreign laborers.”

So far the Court’s methods were familiar, whatever the merit of its conclusions. The Court’s next source for determining congressional intent, however, was internal legislative history, and the opinion gave no explanation for that break from traditional doctrine.

*Id.* (footnote omitted). On post-*Holy Trinity Church* developments that made use of legislative history routine, see generally Nicholas R. Parrillo, *Leviathan and Interpretive Revolution: The Administrative State, the Judiciary, and the Rise of Legislative History, 1890–1950*, 123 YALE L.J. 266 (2013).

141. Krishnakumar, *supra* note 12, at 1278 n.9, 1339, 1347.

142. *Id.* at 1319; see also *id.* at 1281, 1331 (“the mischief that motivated”).

143. Strauss, *supra* note 9, at 258. Strauss helpfully distinguishes a statute’s “political history” from its “legislative history,” *id.* at 243 & n.3, though he fails to press the distinction home, see *id.* at 257 (insisting on finding the mischief in “[h]earings, debates, and reports”).

## B. SOURCES FOR IDENTIFYING THE MISCHIEF

The mischief may be common knowledge, but as time passes a court may be more likely to discern the mischief through documentary evidence. As discussed here, that evidence might come from the statute itself, contemporaneous events, popular debate, and government reports; for some interpreters it might also come from legislative history.

At first, what the court relies on may simply be “general public knowledge of what was considered to be the mischief that needed remedying.”<sup>144</sup> In other words, judicial notice.<sup>145</sup>

When those contemporaneous events are not in the memory of the interpreter, however, or as they begin to fade from that memory or become a subject of dispute, they will need to be established in other ways. One of those ways is by examination of the statute itself, especially if there are enacted findings.<sup>146</sup> Note that there is some authority that the mischief can be gleaned only from the statute itself.<sup>147</sup> But such a limitation would not accord with the Court’s recent cases

144. HART, JR. & SACKS, *supra* note 6, at 1415; *see also* Duparquet Huot & Moneuse Co. v. Evans, 297 U.S. 216, 218 (1936) (Cardozo, J.) (“The evils and embarrassments that brought § 77B into existence are matters of common knowledge.”); *United States v. Black*, 24 F. Cas. 1156, 1158 (C.C.D. Mass. 1875) (No. 14,602) (“We must therefore endeavor to ascertain what the mischief intended to be remedied was. The framer of the act has not enabled us to determine this by any recital in the section itself, and we are therefore left to infer in from our knowledge of the state of the law at the time, and of the practical grievances generally complained of.” (quoting *Lyde v. Barnard* (1836) 150 Eng. Rep. 363, 368; 1 M. & W. 101, 114 (Exch. of Pleas))); *Edwards v. Barksdale*, 11 S.C. Eq. (2 Hill Eq.) 416, 418 (App. Eq. 1836) (“We know what the canons of the common law were, in relation to descents; and we perfectly well know the evil which was intended to be remedied.”).

145. *See, e.g.*, *Smith v. Townsend*, 148 U.S. 490, 495 (1893).

146. *E.g.*, *Adoptive Couple v. Baby Girl*, 570 U.S. 637, 649 (2013) (“The statutory text expressly highlights the primary problem that the statute was intended to solve.”); *Bulala v. Boyd*, 389 S.E.2d 670, 675 (Va. 1990) (stating “the problem described in the preamble,” which is the mischief, though also using the words *mischief* and *purpose* interchangeably); *see Jarrod Shobe, Enacted Legislative Findings and Purposes*, 86 U. CHI. L. REV. 669, 680 (2019) (“[F]indings often recite facts that Congress found as part of developing the legislation, which are generally an explanation of the ‘mischief’ that prompted the statute.”); *see also BENTHAM, supra* note 72, at 141–43 (using the mischief identified in a preamble to interpret a statutory reference to “sheep, or other Cattle”); DISCOURSE UPON THE EXPOSITION & UNDERSTANDING OF STATUTES, *supra* note 59, at 114 n.28 (citing early modern usage of preambles to ascertain the mischief—in Francis Bacon’s words, “the preamble sets up the mark, and the body of the law levels at it”); FRANKFURTER, *supra* note 42, at 24 (giving an example from the reign of Edward VI); 1 REPORTS FROM THE LOST NOTEBOOKS OF SIR JAMES DYER, *supra* note 62, at lx (“Dyer taught that preambles were ‘a key to open the minds of the makers of the act, and the mischiefs which they intended to remedy.’” (quoting *Stowell v. Lord Zouche* (1565), *Plowd.* 353v at fo. 369r)). An example of a court determining the subject of a statute from other words in the statute is *Morris v. United States*, 168 F. 682, 684–85 (8th Cir. 1909) (reading “every person” as referring only to oleomargarine manufacturers and dealers, “in harmony with the subject of legislation”).

147. *E.g.*, SEDGWICK, *supra* note 130, at 240–43; *cf.* SCALIA & GARNER, *supra* note 7, at 33 (arguing that “the purpose of the text . . . is a vital part of its context,” but that it should “be gathered only from the text itself”). *But see* *Brewer’s Lessee v. Blougher*, 39 U.S. (14 Pet.) 178, 198 (1840) (“It is undoubtedly the duty of the Court to ascertain the meaning of the legislature, from the words used in the statute, and the subject matter to which it relates.” (emphasis added)); *Black*, 24 F. Cas. at 1158 (citing *Lyde*, 150 Eng. Rep. at 368, 1 M. & W. at 114); W. Ivor Jennings, *Courts and Administrative Law—The Experience of English Housing Legislation*, 49 HARV. L. REV. 426, 453 (1936) (“To study the evils that social legislation is intended to remedy it is necessary to look outside the statutes.”).

using the mischief, such as *Bond* (referring to a painting by John Singer Sargent),<sup>148</sup> and *Adoptive Couple v. Baby Girl* (quoting a judicial gloss on the “rising concern” behind the statute).<sup>149</sup> Nor would the limitation be a sensible one—what is putatively gleaned from the statute itself will depend in part on the judge’s knowledge of the world.<sup>150</sup>

Another means of establishing the mischief is sources that show the popular debate preceding the enactment, including secondary sources that summarize that debate.<sup>151</sup>

Yet another means through which the mischief has been identified is the findings of committee reports or government commissions. When English courts applied the “Hansard rule,” refusing to consider Parliamentary debates, they nevertheless considered the findings in government reports that led to legislative action, using these reports to determine the mischief.<sup>152</sup>

Another possible source is legislative history more broadly conceived.<sup>153</sup> The statements of individual legislators and of committees may summarize, reflect, or interact with the debate preceding the legislative action.<sup>154</sup> (Of course, all of the

148. *Bond v. United States*, 572 U.S. 844, 847 (2014).

149. 570 U.S. at 642.

150. See Koppelman, *supra* note 14, at 21 & n.108 (critiquing Scalia and Garner for abandoning their precept that the purpose or mischief can only be found in the words of the statute when they add “sizable” to the “colloquial meaning” of *vehicle* in “[n]o vehicles in the park”); see also William N. Eskridge, Jr., *The New Textualism and Normative Canons*, 113 COLUM. L. REV. 531, 560–62 (2013) (reviewing SCALIA & GARNER, *supra* note 7). Indeed, in the sixteenth century, William Fleetwood criticized mistakes about the mischief that would occur when an interpreter tried to read it off the statute. See BAKER, REINVENTION OF MAGNA CARTA, *supra* note 59, at 222–23.

151. *E.g.*, *Chatwin v. United States*, 326 U.S. 455, 463 (1946) (citing, among other things, Hugh A. Fisher & Matthew F. McGuire, *Kidnapping and the So-Called Lindbergh Law*, 12 N.Y.U. L.Q. REV. 646, 653 (1935)); *Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 137–42 (2d Cir. 2018) (Lynch, J., dissenting) (citing secondary sources that summarize the popular debate preceding enactment of the Civil Rights Act of 1964), *aff’d*, *Bostock v. Clayton Cty.*, 140 S. Ct. 1731 (2020); *Cahn v. Berryman*, 408 P.3d 1012, 1015 (N.M. 2017) (citing previous cases describing the problem addressed by the legislature, including a case relying on Ruth L. Kovnat, *Medical Malpractice Legislation in New Mexico*, 7 N.M. L. REV. 5, 7 (1977)). Also useful may be summaries of the legal developments that preceded and generated the statute. See *Lofton v. State*, 416 So. 2d 522, 523 & n.2 (Fla. Dist. Ct. App. 1982) (citing Lawrence W. Smith, *Fla. Stat. § 806.01: Florida Arson Law—The Evolution of the 1979 Amendments*, 8 FLA. ST. U. L. REV. 81 (1980)).

152. See William S. Jordan, III, *Legislative History and Statutory Interpretation: The Relevance of English Practice*, 29 U.S.F. L. REV. 1, 13–17 (1994). On the English tradition regarding statutory interpretation, see generally Magyar, *supra* note 18.

153. See, *e.g.*, *Adoptive Couple*, 570 U.S. at 649; *Chatwin*, 326 U.S. at 462–63; *State v. Campbell*, 429 A.2d 960, 962 (Conn. 1980); *Gletzer v. Harris*, 909 N.E.2d 1224, 1228 (N.Y. 2009).

154. *E.g.*, *Elliot Coal Mining Co. v. Dir., Office of Workers’ Comp. Programs*, 17 F.3d 616, 631 (3d Cir. 1994); see also *Humphrey’s Ex’r v. United States*, 295 U.S. 602, 625 (1935) (“While the general rule precludes the use of these debates to explain the meaning of the words of the statute, they may be considered as reflecting light upon its general purposes and the evils which it sought to remedy.”); WILLIAM N. ESKRIDGE JR., *INTERPRETING LAW: A PRIMER ON HOW TO READ STATUTES AND THE CONSTITUTION* 5 (2016) (“[I]f the relevant congressional committee reports described the Lafayette Park statute as responsive to a series of accidents in which bicyclists and skateboarders had run into children and knocked over elderly visitors, the rule of law is not well-served by an abstract textualist approach that reads bicycles and skateboards out of the statute.”); Manning, *supra* note 10, at 733 (“Just as a book

familiar disagreements about legislative history reappear, including the constitutional and prudential arguments.)

The inquiry into the mischief should not, however, be conflated with the use of legislative history.<sup>155</sup> Max Radin said, “The ‘legislative history’ of a statute is taken to mean the successive forms in which the statute is found from the first draft presented until its final passage.”<sup>156</sup> He continued that it “is different obviously from the history of the agitation which resulted in the fact that such a statute was proposed at all. It is this latter history which is contained in the famous four considerations established by the barons of the exchequer in *Heydon’s Case* and popularized by Blackstone.”<sup>157</sup>

A court’s use of both common knowledge and additional sources is illustrated by *Ho Ah Kow v. Nunan*.<sup>158</sup> Justice Field, while riding circuit, had to consider a San Francisco ordinance that was on its face race-neutral but was widely recognized as intended to force Chinese men to pay a large fine rather than submit to having their “queues” cut. Justice Field said:

The ordinance was intended only for the Chinese in San Francisco. This was avowed by the supervisors on its passage, and was so understood by every one. The ordinance is known in the community as the “Queue Ordinance”. . . . The statements of supervisors in debate on the passage of the ordinance cannot, it is true, be resorted to for the purpose of explaining the meaning of the terms used; but they can be resorted to for the purpose of ascertaining the general object of the legislation proposed, and the mischiefs sought to be remedied. Besides, we cannot shut our eyes to matters of public notoriety and general cognizance.<sup>159</sup>

With any of these sources, what is sought can be considered a kind of equalization. For a new statute, the mischief is more likely to be well-known to all. It is fresh in the interpreter’s mind as context for the statute regardless of whether she wants to think of the mischief as a distinct category. What the mischief rule does, therefore, is twofold. For a new statute, the rule encourages the interpreter to bring this idea to the surface and to be open about this category, permitting contestation about what the mischief was. For an old or unfamiliar statute, the mischief rule allows the interpreter to try to consciously put herself in the position she would be in if the statute were new.

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or newspaper or law review article may reveal the reasons for passing legislation, so too might the legislative history, which is itself produced by well-informed observers on the scene.”).

155. *Cf.* *State v. Victor O.*, 128 A.3d 940, 949 (Conn. 2016) (“Although our research has not revealed any legislative history explaining the rationale for these amendments, it is well established that, “[i]n determining the true meaning of a statute when there is genuine uncertainty as to how it should apply, identifying the problem in society to which the legislature addressed itself by examining the legislative history of the statute under litigation is helpful.” (quoting *Campbell*, 429 A.2d at 962)).

156. Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 873 n.21 (1930).

157. *Id.* (citation omitted); *see also* *Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 144–45 (2d Cir. 2018) (Lynch, J., dissenting), *aff’d*, *Bostock v. Clayton Cty.*, 140 S. Ct. 1731 (2020).

158. 12 F. Cas. 252 (C.C.D. Cal. 1879) (No. 6,546).

159. *Id.* at 255.

## C. DISTINGUISHING MISCHIEF AND PURPOSE

One way to conceptualize the distinction between the mischief and legislative purpose, already implicit in the previous discussion, is that the mischief will tend to be a negative state of affairs antecedent to the law, whereas the purpose is more likely to be an affirmative principle or aim going forward. Indeed, this is one reason that not every statute has a mischief. A statute might be enacted for the creation of some new good, rather than for the resolution of an existing problem.<sup>160</sup> And within a statute, the provision in question might interact with some other provision of the statute, rather than responding to a discernible mischief in the world. Even so, as intuitive as the distinction just drawn is, it cannot bear the full definitional weight, because negative and positive can be a matter of characterization.

Consider, therefore, distinguishing mischief and purpose in terms of a theory of action.<sup>161</sup> As suggested in the Introduction,<sup>162</sup> we can distinguish the mischief (“*a*”), the statute that is the legislative act (“*b*”), and the purpose (“*c*”): “Because of *a*, *b*, so that *c*.” In more detail:

Mischief and purpose are distinct in their relation to intentional action. By describing the enactment of a statute as intentional action, I am not suggesting that interpreters should try to discern specific legislative intent.<sup>163</sup> But legislators do engage in “acts intended to make law,”<sup>164</sup> and therefore intend their acts to accomplish something in the world.<sup>165</sup> That sense of intention is sufficient to allow an interpreter to distinguish mischief and purpose, each representing an aspect of the “reason” for the legislature’s action.

First, there is the motivating or prompting reason, the state of affairs prior to the action. This is the locus of the mischief. It is *a* in the statement: “Because of *a* . . . .”<sup>166</sup>

160. Jeremy Bentham notes that a legislature might enact legislation “procuring benefits” rather than “suppress[ing] mischief,” and he gives this example:

Where was the mischief before the acts for the encouragement of the discovery of the Longitude? That the Longitude was not discovered? This seems rather harsh to say. Benefit is certainly a more palatable word: it were a pity to shut the door against the few occasions we can have to introduce it.

BENTHAM, *supra* note 72, at 139.

161. I owe this idea to a conversation with Jordan Lavender.

162. See *supra* notes 37–40 and accompanying text.

163. Apart from the text read in context, I take it that “the intention of the legislature is undiscoverable in any real sense.” Radin, *supra* note 156, at 870–71; see also FRANKFURTER, *supra* note 42, at 19–20; FULLER, *supra* note 64, at 86–87; SEDGWICK, *supra* note 130, at 382–83. For a sophisticated recent analysis, see Doerfler, *supra* note 50.

164. Joseph Raz, *Intention in Interpretation*, in *THE AUTONOMY OF LAW: ESSAYS ON LEGAL POSITIVISM* 249, 258 (Robert P. George ed., 1996); see also Doerfler, *supra* note 50, at 1024–25.

165. This is a step beyond simply saying “that legislators intend to enact a law that will be decoded according to prevailing interpretive conventions.” Manning, *Textualism and Legislative Intent*, *supra* note 118, at 432–33; see also Richard H. Fallon, Jr., *The Statutory Interpretation Muddle*, 114 *NW. U. L. REV.* 269, 314–17 (2019) (critiquing the attribution to a legislature of only minimal intentions); Nelson, *supra* note 44, at 453–63 (same).

166. One can soften the causal language: “In light of *a*, *b*.” Or: “After *a*, *b*.”

Second, there is the legislature's action—the statute. It responds to the motivational reason, though it may go beyond, or stop short of, fully responding to that motivational reason. It is *b* in the statement: “Because of *a*, *b* . . . .”

Third, there is what might be called the telic reason. This is the end, aim, goal, or purpose that on some interpretive theories could be imputed to the legislature. It is *c* in the statement: “Because of *a*, *b*, so that *c*.” The telic reason could be no more than a reproduction of the motivating reason; the legislature's general aim (if the expression may be used) could be stated as simply the mitigation of the prior state of affairs (that is, *c* could be *b*'s cure of *a*). But the general aim could go well beyond that.

Outside of law, it is easy to illustrate the difference: “Because of my stroke, I am exercising daily, so I can live a long life,” or “because I failed that exam, I am going to study harder, so I can have the career choices I want.”<sup>167</sup>

For a statutory example, consider again the *CSX* cases, involving a federal statute prohibiting state taxes that discriminated against rail carriers.<sup>168</sup> The Court was required to decide whether to read the fourth provision of the statute as implicitly limited to the mischief that was directly addressed in the first three provisions. That mischief was the use of state property taxes to burden railroads from out of state, or as Justice Thomas put it, the problem was “property taxes that soaked the railroads.”<sup>169</sup> The purpose would be the removal of the mischief, but with the broader aim of ensuring a free flow of interstate commerce.

Or consider *Bond v. United States*, where the Court interpreted the Chemical Weapons Convention Implementation Act.<sup>170</sup> Chief Justice Roberts made explicit his view of what prompted the enactment of the Convention and the statute. The first paragraph of his opinion for the Court describes “[t]he horrors of chemical warfare [as] vividly captured by John Singer Sargent in his 1919 painting *Gassed*.”<sup>171</sup> The next paragraph notes “the devastation that Sargent witnessed in the aftermath of the Second Battle of Arras during World War I.”<sup>172</sup> “That battle and others like it,” he said, “led to an overwhelming consensus in the international community that toxic chemicals should never again be used as weapons against human beings.”<sup>173</sup> The Chemical Weapons Convention was adopted, as its preamble says, “for the sake of all mankind, to exclude completely the possibility of the use of chemical weapons.”<sup>174</sup> These observations can be put into the formula suggested in this Article: “Because of the Second Battle of Arras and

167. I owe the examples to A.J. Bellia.

168. See *supra* notes 23–27 and accompanying text.

169. *CSX Transp., Inc. v. Ala. Dep't of Revenue (CSX I)*, 562 U.S. 277, 301 (2011) (Thomas, J., dissenting).

170. 572 U.S. 844 (2014).

171. *Id.* at 847.

172. *Id.* at 848.

173. *Id.* (emphasis added).

174. *Id.* at 849 (quoting Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, pmb., opened for signature Jan. 13, 1993, 1974 U.N.T.S. 318).



others like it, the Convention was adopted and the statute enacted, so that humanity would never again face the use of chemical weapons.”<sup>175</sup>

In short, the action of the legislature, in its relationship to the mischief and purpose, can be stated as the following: “Because of the mischief, the legislature enacts a statute, so that the purpose may be achieved.”<sup>176</sup> Some interpreters will happily seek the general purpose of the statute. Even for those of us who would not, the mischief is a distinct concept. Whether it is a useful concept is the question to turn to next.

### III. TWO FUNCTIONS OF THE MISCHIEF RULE

The mischief rule serves two functions. One is the stopping-point function; the other is the clever-evasion function.<sup>177</sup> In relation to the bare text, the first and more common function (stopping-point) tends to narrow the domain of the statute. The other (clever-evasion) tends to broaden it.

#### A. RATIONALIZING A STOPPING POINT

A pervasive problem in legal interpretation is determining the correct scope for a statutory term or provision. This is a staple of every article about “no vehicles in the park.” Or consider another one of the hypothetical cases in the statutory interpretation literature: Judge Easterbrook’s example of a statute that requires the leashing of “dogs.”<sup>178</sup> Is it the case, Easterbrook asks, that it “requires the leashing of cats (because the statute really covers the category ‘animals’) or wolves (because the statute really covers the category ‘canines’) or lions (‘dangerous animals’)”?<sup>179</sup> Easterbrook’s point is that the reference to “dogs” provides an outer bound on the domain of the statute.<sup>180</sup> But what about the breadth problem in the other direction? Does the statute require the leashing of a robotic dog? An aged and blind dog carried by its owner? A police dog that is in the park but inside a police car? A dead dog, just hit by a car, that has been moved into the park while its owners are being contacted?

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175. This statement is abbreviated so as not to be unwieldy, but one could expand the statement of the mischief to capture the legal inadequacy: “Because of the Second Battle of Arras and others like it, and the legal regime that made them possible and allows such uses of chemical weapons in the future, . . .”

176. See Shobe, *supra* note 146, at 683 (distinguishing enacted findings and purposes). Compare Quentin Skinner’s distinction between “motive” and “intention,” with the former being the reason for the writer or artist to begin, but the latter being the purpose that continues into and is involved with the work itself. Quentin Skinner, *Motives, Intentions and the Interpretation of Texts*, 3 *NEW LITERARY HIST.* 393, 401–02 (1972). Although Skinner’s distinction is not identical with the one here, and is concerned not with laws as much as with poems, it is of interest that he similarly distinguishes an antecedent setting that motivates the creation from a continuing authorial purpose.

177. Another function that might be elaborated is aid in choosing between two non-overlapping senses of a term that are ambiguous (in the technical sense, as contrasted to vagueness, see ENDICOTT, *supra* note 110, at 54). Compare Blackstone’s example about *provisions*. See 1 BLACKSTONE, *supra* note 56, at 60.

178. Frank H. Easterbrook, *Statutes’ Domains*, 50 *U. CHI. L. REV.* 533, 535 (1983).

179. *Id.*

180. *Id.* (“For rules about the rest of the animal kingdom we must look elsewhere.”).

One could of course say that a dog is a dog is a dog, and the text has no qualifications about the dog needing to be biological, healthy, unrestrained, or living. Or one could read the statute in light of its mischief (whatever that might be), treating some or all of these as the kinds of barber-in-Bologna cases that are within the bare text but not within the mischief, and thus potentially not within the statute.<sup>181</sup> In short, the breadth problem works in both directions, and interpreters are constantly called upon to choose an appropriate scope for a legal term or provision.

That is precisely the choice raised in the examples in the Introduction: “animals” in the stop-the-train case,<sup>182</sup> “discriminate” in the *CSX* cases,<sup>183</sup> “tangible object” in *Yates*,<sup>184</sup> “sex” in *Zarda*,<sup>185</sup> and “chemical weapons” in *Bond*.<sup>186</sup> In each case, the statutory text could be given a narrower reading in line with the mischief—or not.

In these cases, and others,<sup>187</sup> the mischief rule offers a rationale for choosing a narrower reading. Indeed, this function of the mischief rule was widely recognized by older interpreters when they insisted (1) that they had a choice about the scope of a statute, and (2) that in making that choice they should consider the mischief to which the statute responds. As Justice Story said, where a statute “is susceptible of two interpretations, one of which satisfies the terms, and stops at the obvious mischief provided against, and the other goes to an extent, which may involve innocent parties in its penalties, it is the duty of the court to adopt the former.”<sup>188</sup> Conversely, the mischief rule might suggest the choice of a broader scope. Again, Justice Story:

But where the words are general, and include various classes of persons, I know of no authority, which would justify the court in restricting them to one class, or in giving them the narrowest interpretation, where the mischief to be redressed by the statute is equally applicable to all of them.<sup>189</sup>

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181. On the medieval hypothetical case of the barber in Bologna, see *supra* note 20 and accompanying text.

182. *Nashville & K. R. Co. v. Davis*, 78 S.W. 1050, 1050 (Tenn. 1902).

183. See *supra* notes 23–27 and accompanying text.

184. See *supra* notes 28–31 and accompanying text.

185. See *supra* notes 32–35 and accompanying text.

186. See *supra* notes 46–48 and accompanying text.

187. *E.g.*, *N. X-Ray Co. v. State*, 542 N.W.2d 733, 737–38 (N.D. 1996) (relying on the mischief to read narrowly the ambiguous statutory term “contractor”); *State v. Smith*, 25 S.C.L. (Chev.) 157, 160 (Ct. App. 1840) (relying on the mischief to give a narrow reading to “disfiguring” in a statute about marking, branding, or killing animals).

188. *Prescott v. Nevers*, 19 F. Cas. 1286, 1288–89 (C.C.D. Me. 1827) (No. 11,390). Although here the mischief rule and the rule of lenity align, for Justice Story the mischief rule had independent force. He applied it even when doing so meant a broader reading of a penal statute. See *United States v. Winn*, 28 F. Cas. 733, 734–35 (C.C.D. Mass. 1838) (No. 16,740). *But see* *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 105 (1820) (per Marshall, C.J.) (rejecting a broad reading that relied on the mischief, because of the statute’s structure and penal classification). On the mischief rule and penal statutes, see *supra* note 102.

189. *Winn*, 28 F. Cas. at 734; see also *United States v. Trans-Missouri Freight Ass’n*, 166 U.S. 290, 324–25 (1897) (concluding that railroads, and not manufacturers alone, are within the Trust Act,

When faced with such choices, the judge should, as *Heydon's Case* puts it, “make such . . . construction as shall suppress the mischief.”<sup>190</sup>

An array of objections could be mounted—there may be disagreement about the mischief, there could be other canons or interpretive considerations that countenance the opposite conclusion, and so on. All true. Yet those same objections can be made to any aspect of interpretation.

My argument is not that the mischief rule will mark out the One True Interpretation, nor even simply that it will narrow judicial discretion.<sup>191</sup> Nor will the mischief rule allow a court to correct a mistake on the part of the legislature, as in *King v. Burwell*.<sup>192</sup> Instead, the mischief rule is fundamentally a doctrine of focus and rationalization. It guides the interpreter, directing her attention, and it allows her to express an intuition she has about the scope of a statute.

Although one could think of the mischief rule as a rationalization of whatever the interpreter thinks is good policy<sup>193</sup>—and that no doubt sometimes occurs—it is not the rationalization I have in mind. There is no reason to think Justice Thomas approved of tax-code goodies for favored Alabama firms. Or that Justice Ginsburg approved of the captain of a fishing vessel destroying the evidence that could be used against him. Or that Judge Lynch approved of Congress's failure to protect LGBT Americans from employment discrimination.<sup>194</sup> Yet they each had

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because “the evil to be remedied is similar” and the “general language [is] sufficiently broad to include them both”).

190. (1584) 76 Eng. Rep. 637, 638; 3 Co. Rep. 7 a, 7 b (Exch.).

191. On the mischief rule and discretion, see *supra* note 111. On the mischief rule and predictability, see *supra* note 110 and accompanying text.

192. 135 S. Ct. 2480 (2015). In *King v. Burwell*, the Affordable Care Act (ACA) had made tax credits available to any taxpayer who enrolled in an insurance plan through “an Exchange established by the State” under the Act. *Id.* at 2482. The Court had to decide whether the provision also included in its reach exchanges set up by the federal government. *Id.* at 2483. At least one scholar has read the opinion of the Court as relying on the mischief addressed by the ACA. See Krishnakumar, *supra* note 12, at 1340. In my view, however, the mischief rule was inapt. In *King v. Burwell*, the Court was not choosing between different degrees of breadth that the statutory phrase could bear or resolving a latent ambiguity; what it did was more like the correction of an error in the enacted statute. See Ryan D. Doerfler, *The Scrivener's Error*, 110 NW. U. L. REV. 811, 843–50 (2016); see also Abbe R. Gluck, *Justice Scalia's Unfinished Business in Statutory Interpretation: Where Textualism's Formalism Gave Up*, 92 NOTRE DAME L. REV. 2053, 2074 (2017) (describing four words in the ACA as a “potential drafting error”). An additional difficulty with applying the mischief rule in the case was the sheer enormity and complexity of the statute, which made it hard to state the mischief with the particularity that might distinguish it from a general purpose. Cf. Abbe R. Gluck, Anne Joseph O'Connell & Rosa Po, *Unorthodox Lawmaking, Unorthodox Rulemaking*, 115 COLUM. L. REV. 1789, 1792–93 (2015) (noting the ACA “is a 2700-page statute worked on by five congressional committees; it delegates not to a single federal agency but to multiple federal agencies, as well as to states, quasi-public actors, and an independent commission, to which it outsourced the controversial question of cutting Medicare”); Shobe, *supra* note 146, at 682–83 (noting that “Congress included several sets of findings throughout the [ACA],” and then listing some that seem indistinguishable from statements of general purpose). This difficulty is further considered in Part IV.

193. Cf. *Bostock v. Clayton Cty.*, 140 S. Ct. 1731, 1751 (2020) (“One could also reasonably fear that objections about unexpected applications will not be deployed neutrally.”).

194. To the contrary, Judge Lynch said:

Speaking solely as a citizen, I would be delighted to awake one morning and learn that Congress had just passed legislation adding sexual orientation to the list of grounds of

a strong intuition that the scope of the statute was not simply the scope of the bare words—that those words had to be considered in context, and that the context was not merely legal (that is, not merely other provisions of the statute, other statutes, and background principles of law). Rather, they each had a strong intuition that the term had to be read in the context of the problem to which the statute was addressed.<sup>195</sup> The context helped them decide what it was that Congress had actually done.<sup>196</sup>

The mischief rule is simply how judges have traditionally expressed their intuition about a stopping point for statutory language.<sup>197</sup> As familiarity with the mischief rule has receded, the intuitions have not dissolved. They remain, as they likely always will. Yet some interpreters do not have such intuitions about the scope of these statutes. The mischief rule is not so firmly established in contemporary statutory interpretation, nor so conclusive, that it *requires* that a term or provision be given a certain scope.<sup>198</sup>

At this point, the objection might be raised that judicial intuitions about a statute's stopping point are misguided, even dangerous. The legislature has chosen the scope; for example, it used the word “animal” in the stop-the-train case with no exception for geese.<sup>199</sup> Why should judges make exceptions?

This objection goes to the heart of how the mischief rule works, and more generally how context and pragmatic enrichment work. If we think most statutory texts are clear without looking to context, then there is reason to be concerned about the mischief rule. Adding considerations like the mischief will increase the

employment discrimination prohibited under Title VII of the Civil Rights Act of 1964. I am confident that one day—and I hope that day comes soon—I will have that pleasure.

Zarda v. Altitude Express, Inc., 883 F.3d 100, 137 (2d Cir. 2018) (Lynch, J., dissenting), *aff'd*, *Bostock*, 140 S. Ct. 1731.

195. *Cf.* Duparquet Huot & Moneuse Co. v. Evans, 297 U.S. 216, 221 (1936) (Cardozo, J.) (explaining how “[the words] came there freighted with the meaning imparted to them by the mischief to be remedied and by contemporaneous discussion[,] [i]n such conditions history is a teacher that is not to be ignored.” (citation omitted)).

196. *See, e.g.*, Chatwin v. United States, 326 U.S. 455, 462, 464 (1946) (discussing “the general problem to which the framers of the Federal Kidnapping Act addressed themselves,” and concluding that “the broadness of the statutory language does not permit us to tear the words out of their context, using the magic of lexicography to apply them to unattractive or immoral situations lacking the involuntariness of seizure and detention which is the very essence of the crime of kidnaping”); *Mkt. Co. v. Hoffman*, 101 U.S. 112, 116 (1879) (“To understand the true meaning of the clause, it is necessary to observe what the subject was in regard to which Congress attempted to legislate.”); SUTHERLAND, *supra* note 129, at 320 (“Legislatures, like courts, must be considered as using expressions concerning the thing they have in hand; and it would not be a fair method of interpretation to apply their words to subjects not within their consideration, and which, if thought of, would have been more particularly and carefully disposed of.”); *cf.* Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J.L. & PUB. POL’Y 59, 66 (1988) (“The novelty of a question suggests that the legislature did not answer it.”).

197. For a distinction between judges’ linguistic intuitions and judgments, with an endorsement of the former, see Fallon, Jr., *supra* note 165, at 280–81.

198. For an exploration of permissive interpretive rules, see generally Re, *supra* note 15.

199. *See* Nashville & K. R. Co. v. Davis, 78 S.W. 1050, 1050 (Tenn. 1902); *supra* text accompanying note 1.

risk of interpretive error. Thinking of a generally worded but clear text, we will see the mischief rule as something that allows a judge to ride in and carve out an ad hoc exception.

But legal language needs context to be understood.<sup>200</sup> It is true that statutory language is more formal than a conversation; it is not generated and used in a milieu of happy cooperation and generous implicature.<sup>201</sup> But statutory language is still language, and there remain trade-offs in how much is spelled out explicitly. The mischief rule can be seen as a reflection of the need for contextual enrichment, a tool that developed in law and is well adapted for judicial interpretation of statutory language.

Consider for example the context that is provided by “tacit domain quantifiers.” Although the name is technical (and the phenomenon travels under other names, too), the intuition is easy to grasp:

If I were to open the fridge in search of beer and say “there is no beer,” what you would probably understand me to be saying is that there is no beer *in the fridge*. In other words, you would take me to be tacitly restricting the domain of my quantifier to things in the fridge.<sup>202</sup>

The mischief rule encourages the interpreter to think about what was in the eye of the legislature, not as a means of defeating or overriding the text, but as a way to understand it.<sup>203</sup>

The stop-the-train case illustrates how the mischief rule does this.<sup>204</sup> “Animal” might seem clear, but once we understand the problem precedent, the ambiguity of the word comes into focus, and a reasonable reader will not understand the statute as saying that trains have to stop for squirrels and slugs. Nor is the text’s dependence on context at all unusual. The bare words of a statute are frequently ambiguous without context, yet the pervasiveness of this phenomenon tends

200. See Doerfler, *supra* note 50, at 991–94, 997–98, 1028–29; Green, *supra* note 50, at 171; see also Bach, *supra* note 5 (distinguishing semantics and pragmatics); Samuel L. Bray, “Necessary AND Proper” and “Cruel AND Unusual”: *Hendiadys in the Constitution*, 102 VA. L. REV. 687, 694 (2016) (noting that historical context is critical for determining whether a phrase should be interpreted as a hendiadys); Richard H. Fallon, Jr., *The Meaning of Legal “Meaning” and Its Implications for Theories of Legal Interpretation*, 82 U. CHI. L. REV. 1235, 1246–47, 1260–62, 1303 (2015) (distinguishing “contextual meaning” and “reasonable meaning”).

201. See Henry E. Smith, *The Language of Property: Form, Context, and Audience*, 55 STAN. L. REV. 1105, 1131 (2003); cf. Fallon, Jr., *supra* note 165, at 283–97 (critiquing the use of conversational models for statutory interpretation).

202. Green, *supra* note 50 (quoting DANIEL Z. KORMAN, OBJECTS: NOTHING OUT OF THE ORDINARY 42 (2015)). Whether such quantifiers should be classified as pragmatic is debated. See, e.g., Jason Stanley & Zoltán Gendler Szabó, *On Quantifier Domain Restriction*, 15 MIND & LANGUAGE 219, 220 (2000).

203. See Wald, *supra* note 50 (“In the context of the statute, other related statutes, or *the problems giving rise to the statute*, words may be capable of many different meanings, and the literal meaning may be inapplicable or nonsensical.” (emphasis added)). In his dissent in *Bostock*, Justice Kavanaugh makes this same point about the absurdity doctrine. See *Bostock v. Clayton Cty.*, 140 S. Ct. 1731, 1827–28 (2020) (Kavanaugh, J., dissenting).

204. *Davis*, 78 S.W. at 1050.

to be missed because interpreters supply the necessary context by instinct. An interpreter who is reading the legislative words in their context, which includes the mischief, is a more faithful agent.

Yet, as noted, knowing the mischief is not conclusive; it does not control and overpower the text. The meaning of some statutes is dependent on knowing the mischief, just as it is true of language that the meaning of some expressions is context dependent. But sometimes the words are so clear that the best account of the legislative decision is simply that it is broader or narrower than the mischief.<sup>205</sup> There is no meta rule for this. Sometimes—but only sometimes—a judge will be convinced that the best account of what the legislature actually decided is provided by the text and mischief in tandem. What the mischief rule does is direct the judge's attention to this possibility.<sup>206</sup>

As time passes and a law is pressed into service in new circumstances, the problem of scope will grow more pressing. The mischief rule will, accordingly, have more bite. At the time of a statute's enactment, a judge who considers the mischief might be just as likely to give the text a broader reading as a narrower one.<sup>207</sup> Over time, however, the mischief rule will tend to suggest a narrower scope, a domain for the statute that does not broaden. The reason is that the evil is fixed at a moment in time, even while new circumstances constantly arise. The statute, when its words are read by an interpreter attentive to the mischief, will thus tend to be enmeshed in the circumstances existing when it was enacted. As new problems emerge, as new mischiefs multiply, the relative fixity of "the mischief" will mean that in some cases where the bare text might be taken to reach a new problem, the application of the mischief rule will keep the statute from "growing" to meet the new challenge.

In this respect, the mischief rule can be compared with dynamic statutory interpretation.<sup>208</sup> Both share a skepticism of finding within the text itself full clarity

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205. See *supra* note 140 (discussing *Holy Trinity Church*); see also *Van Kleeck v. O'Hanlon*, 21 N.J.L. 582, 591–92 (1845) (Carpenter, J.) (simultaneously recognizing that "[t]he mischief, the old law, and the remedy, are doubtless to be considered in the construction of all remedial statutes," and refusing to adopt a proposed interpretation because "the supposed general intention of the legislature is to be considered in due subservience to the actual language used; and the language is not to be strained to support such supposed intention").

206. Cf. *Brewer's Lessee v. Blougher*, 39 U.S. (14 Pet.) 178, 198–99 (1840) (recognizing the Court's ability to read a statute narrowly if the Justices "are satisfied that the literal meaning of its language would extend to cases which the legislature never designed to embrace in it," yet declining to find any exception to the legislature's "general terms" because there was "no language showing any such design" of a narrower import).

207. For examples of the mischief rule encouraging a broader reading, see *infra* Section III.B. Another example is *NLRB. v. Hearst Publications, Inc.*, where the Court chose a broader reading for *employee*—that is, reading it not as a technical term excluding independent contractors—because "[t]he mischief at which the Act is aimed and the remedies it offers are not confined exclusively to 'employees' within the traditional legal distinctions separating them from 'independent contractors.'" 322 U.S. 111, 126 (1944). *Hearst Publications* was probably wrong at the time given the existing legal meaning of *employee*, and at any rate Congress later amended the relevant statute's language, which essentially reversed the Court's interpretation in *Hearst Publications*. See *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 324–25 (1992).

208. See generally WILLIAM N. ESKRIDGE, JR., *DYNAMIC STATUTORY INTERPRETATION* (1994). The two are not conceptually parallel. The mischief rule is a tool that can be used by interpreters holding any

about its scope.<sup>209</sup> But one difference is temporal: the mischief is in the past; it is usually a problem that immediately preceded the enactment of the statute. Dynamic statutory interpretation looks to societal values in the present, a rolling and evolving present. One might say that dynamic statutory interpretation asks what society would *now* consider to be the mischief addressed by the statute.<sup>210</sup>

Dynamic statutory interpretation also differs from the mischief rule in terms of bias with respect to the problem of scope or breadth. Present values might suggest taking a statute either broadly or narrowly. There is thus no intrinsic bias to dynamic statutory interpretation, for whether present societal values would suggest a broader or narrower reading is entirely contingent on the statute and on the intervening changes in societal values. By contrast, as noted, the mischief rule will more often than not suggest a narrower reading for the statute. The statute will simply do less: there will be more questions for which the answers do not lie within the statute's domain.<sup>211</sup>

#### B. THWARTING CLEVER EVASIONS

A second function of the mischief rule is the thwarting of clever evasions by suggesting a modestly broader scope. As *Heydon's Case* puts it, the judge should “suppress subtle inventions and evasions for continuance of the mischief.”<sup>212</sup> This could be considered a subset of the first function: the court is choosing a scope that will thwart a clever evasion. Yet it is distinctive enough to deserve separate discussion, especially because this second function of the mischief rule tends to work in the opposite direction from the first—it usually supports a court's choice of a broader reading.

In *Ash Sheep Co. v. United States*, the Court gave a modestly broader reading to a statute in order to prevent circumvention, and it was candid that the mischief was one of two decisive considerations in the case.<sup>213</sup> The statute said: “Every person who drives or otherwise conveys any stock of horses, mules, or cattle, to range and feed on any land belonging to any Indian or Indian tribe, without the consent of such tribe, is liable to a penalty of one dollar for each animal of such stock.”<sup>214</sup> The defendant corporation had ranged and fed *sheep*, and thus one question in the case was whether sheep came within the scope of “any stock of

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one of a number of different theories of statutory interpretation, while dynamic statutory interpretation is such a theory.

209. Similar skepticism of an innate scope in the text itself can be found in canons of statutory interpretation that encourage “broad” or “narrow” readings of certain kinds of statutes. *See, e.g.*, H. Tomás Gómez-Arostegui, *What History Teaches Us About US Copyright Law and Statutory Damages*, 5 *WORLD INTELL. PROP. ORG. J.* 76, 79–86 (2013) (analyzing the 1909 Copyright Act in light of one such canon).

210. Dynamic statutory interpretation of course goes beyond that, also considering (especially considering) affirmative values.

211. *See generally* Easterbook, *supra* note 178.

212. (1584) 76 Eng. Rep. 637, 638; 3 Co. Rep. 7 a, 7 b (Exch.).

213. *See* 252 U.S. 159, 168 (1920).

214. *Id.* at 163 (quoting U.S. REV. STAT. § 2117 (1875)).

horses, mules, or cattle.”<sup>215</sup> As the Supreme Court recognized, the word *cattle* was ambiguous.<sup>216</sup> It could refer to cows, as distinct from sheep and other animals, but it could also be used in a broader sense to refer to livestock (including cows and sheep). The narrower sense was more common, the Court said.<sup>217</sup> Indeed, the broader sense of livestock was sufficiently rare that the Court suggested it would not give that interpretation to a newly enacted statute.<sup>218</sup> Nevertheless, the Court read *cattle* as including sheep because the lower courts and the Department of Justice had accepted that broader reading for half a century, and because “the pasturing of sheep is plainly within the mischief at which this section aimed.”<sup>219</sup> Although not explicitly stated, the Court apparently considered the mischief to be that tribal lands were being used for grazing without the tribes’ consent.<sup>220</sup>

If the Court had allowed the grazing of sheep on the tribal lands, the statute could have been circumvented. Thus, the mischief rule “permits ambiguous legislation to be interpreted in such a way as to suppress the mischief which it was designed to eliminate.”<sup>221</sup>

Other examples could be given, too.<sup>222</sup> In these examples, there is a recurring note of modesty. As Chief Justice Marshall said, in a suit in which counsel pointed to *Heydon’s Case*:

It is the province of the legislature to declare, in explicit terms, how far the citizen shall be restrained in the exercise of that power over property which ownership gives, and it is the province of the court to apply the rule to the case thus explicitly described—not to some other case which judges may conjecture to be equally dangerous.<sup>223</sup>

When courts do employ the rule to stop a clever evasion, it is not that the court is preventing some other mischief, but rather, as *Heydon’s Case* says, the target is

215. *Id.* at 167.

216. *See id.* at 168–69 (discussing dictionary definitions, an earlier decision of the Court on whether the word *cattle* in a letter of credit included *hogs*, and an Attorney General’s opinion that invoked “[t]he standard lexicographers” on whether *cattle* included sheep). As Mark Greenberg and Harry Litman note, the Court was focused on the original meaning, not present meaning, of *cattle*. Mark D. Greenberg & Harry Litman, *The Meaning of Original Meaning*, 86 GEO. L.J. 569, 593 & n.95 (1998).

217. *Ash Sheep Co.*, 252 U.S. at 169.

218. *See id.* at 167 (“If this were a recent statute and if we were giving it a first interpretation we might hesitate to say that by the use of the word ‘cattle’ Congress intended to include ‘sheep.’”).

219. *Id.* at 169.

220. *See id.* at 167–68.

221. JOHN BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 224 (5th ed. 2019).

222. *E.g.*, *United States v. Union Supply Co.*, 215 U.S. 50, 54–55 (1909); *Smith v. Townsend*, 148 U.S. 490, 499–501 (1893); *The Emily*, 22 U.S. (9 Wheat.) 381, 388–89 (1824); *Commonwealth v. Trent*, 77 S.W. 390, 392 (Ky. 1903). For a possible example that is more recent and controversial, see *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339, 355 (2011) (stating that the Federal Arbitration Act “was enacted in 1925 in response to widespread judicial hostility to arbitration agreements,” and reading the saving clause of the Act narrowly to prevent circumvention of the Act).

223. *Schooner Paulina’s Cargo v. United States*, 11 U.S. (7 Cranch) 52, 61 (1812) (emphasis added).



evasions that would allow “continuance of the mischief.”<sup>224</sup> The clever-evasion function is therefore not meant to allow a judicial remaking of a statute—it is the patching of a hole, not the rebuilding of Theseus’s ship plank-by-plank. That is of course a matter of degree and judgment, and it requires good faith on the part of judges.<sup>225</sup> I see no way to offer a more precise definition.

It is probably not an accident that illustrations of the clever-evasion function tend to be from older cases. This function of the mischief rule is out of keeping with current American legal culture, with its simultaneous embrace of judicial command and discomfort with judicial discretion.<sup>226</sup>

#### IV. THE MISCHIEF RULE AND THE AGE OF STATUTES

The mischief rule is a creature of the common law world, not of the age of statutes.<sup>227</sup> That origin suggests certain limits on how it should be used today. But the question of this difference—that is, the gap between the age of the common law and the age of statutes—also raises questions about whether we are truly still in the latter. And if not, what are the implications for the mischief rule?

##### A. THE MISCHIEF RULE IN THE AGE OF STATUTES

Although the mischief rule corresponds to a widespread intuition among judges today, it is also a product of a different time and place.<sup>228</sup> When *Heydon’s Case* invoked the mischief, statutes were the exception and the common law was the norm.<sup>229</sup> It was therefore possible to see statutes as discrete interventions into a common law world. In such a world, not only were statutes thought of in relation to the common law, but even their interpretive frame was determined by exactly how things stood between the common law and the statute in question. Statutory interventions might displace the common law, and thus deserve narrow interpretation; or they might express or extend the common law, and thus deserve

224. (1584) 76 Eng. Rep. 637, 638; 3 Co. Rep. 7 a, 7 b (Exch.).

225. Cf. Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1294 (2007) (noting that judicial self-discipline is a matter of degree). The need for good faith in the exercise of a power, and the difficulty of spelling out in advance all the situations in which that power should and should not be used, is a familiar problem from the law of equity. See generally Henry E. Smith, *Equity as Meta-Law*, 130 YALE L.J. 1050 (2021); Henry E. Smith, *Fusing the Equitable Function in Private Law*, in PRIVATE LAW IN THE 21ST CENTURY 173 (Kit Barker, Karen Fairweather & Ross Grantham eds., 2017).

226. See Samuel L. Bray, *Equity: Notes on the American Reception*, in EQUITY AND LAW: FUSION AND FISSION 31, 32 (John C. P. Goldberg, Henry E. Smith & P. G. Turner eds., 2019).

227. See generally GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES (1982).

228. See *supra* Section I.A.

229. Cf. Radin, *supra* note 90, at 389 (“As long as the common law is basic, the rule of *Heydon’s Case* has much to commend it.”). It is possible to exaggerate the dominance of the common law, and there were periods with highly significant legislation. See BAKER, *supra* note 221, at 220 (“King Henry VIII’s parliaments were prodigiously industrious, passing some 677 statutes which occupy almost as much space as all the preceding legislation from Magna Carta onwards.”). For more on legislation in late medieval and early modern England, see *id.* at 216–20.

broad interpretation.<sup>230</sup>

The world in which *Heydon's Case* expounded the mischief rule is different from ours in ways that affect the rule's 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: the law would continue to change, but in the way the common law did under Coke, Holt, Mansfield, and so on.<sup>231</sup> In that world, a statute was more likely to have a single mischief. The breadth and array of mischiefs for a statute like the Affordable Care Act,<sup>232</sup> omnibus bills, and other modern forms of "unorthodox lawmaking"<sup>233</sup> were unknown. The relative narrowness of the statutes in the early days of the mischief rule made it easier to identify a mischief. And in that world, the fallback options were better; if a statute, read narrowly to fit the mischief, did not apply, the common law would. Despite the imperfections of the common law, it would be more intelligible than the fallback options for a massive modern statute like the Affordable Care Act.<sup>234</sup>

For all these reasons, the mischief rule fits the legal culture that produced it—a different legal culture from our own. That conclusion generates certain limits on the application of the mischief rule today.

First, not all statutes, and not all statutory provisions, will have a mischief.<sup>235</sup> A statute might be meant not to solve a problem in the past but to create something affirmative and new. Or a statutory provision might act on some other part of the statute, and not have any independent force.

Second, for some statutes, the mischief will be sufficiently broad and composite that it is basically indistinguishable from a general purpose.<sup>236</sup>

Third, some statutes create a framework for agencies (or states) to choose how to remedy a mischief, with flexibility to change their choices over time.<sup>237</sup> More difficult still, for applying the mischief rule, would be a case in which there was no agreement about what the mischief was, or even completely opposite views on

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230. *Heydon's Case* notes this dichotomy and says the mischief rule applies to both kinds of statutes. (1584) 76 Eng. Rep. 637, 638; 3 Co. Rep. 7 a, 7 b (Exch.). The difficulties in this dichotomy have been recognized since the sixteenth century. See 6 BAKER, OXFORD HISTORY OF THE LAWS OF ENGLAND, *supra* note 59, at 77–79.

231. On the mischief rule in the sixteenth century, see *supra* Section I.A.

232. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified as amended in scattered sections of U.S.C.).

233. See generally Gluck et al., *supra* note 192.

234. Patient Protection and Affordable Care Act, 124 Stat. 119. That fact has overshadowed the repeated bouts of litigation over the ACA, raising the stakes enormously for severability analysis and the scope of relief.

235. See *supra* note 160 and accompanying text. This was also true at the time of *Heydon's Case*. One possibility, suggested to me by Sir John Baker, is that the change from "mischief" in Coke's manuscript report to "mischief and defect" in the printed report is precisely to cover this possibility. See *Heydon's Case*, 76 Eng. Rep. at 638, 3 Co. Rep. 7 b.

236. Cf. *King v. Burwell*, 135 S. Ct. 2480, 2496 (2015) ("A fair reading of legislation demands a fair understanding of the legislative plan."). On *King v. Burwell*, see *supra* note 192.

237. See *Ass'n of Cal. Ins. Cos. v. Jones*, 386 P.3d 1188, 1202 (Cal. 2017) ("That the Legislature entrusted to the Commissioner the application of these and other statutory provisions to specific problems—problems the Legislature did not, and in some cases could not, anticipate—is precisely why enactment of section 790.10 makes sense in the broader statutory scheme.")

the question, with the only point of legislative concurrence being to let someone else decide both what the problem was and what to do about it.

Fourth, statutes prompted by a narrow mischief may have a broad array of purposes.

These limits suggest the mischief rule will not be useful for all modern statutes. Yet they do not give any reason to abandon the mischief rule where a statute or statutory provision does indeed have a mischief. And it is worth noting how different the mischief rule is from some other interpretive rules rooted in the world of the common law. Many of those rules, such as the rule that statutes in derogation of the common law should be narrowly construed, attempt to yank the statute into conformity with the general law. But the mischief rule is not so aggressive. It recognizes the independent existence of the statute and calls attention to the discontinuity between the statute and the preexisting body of law. Relative to the continuity canons, the mischief rule is a pro-disruption, pro-discontinuity influence.<sup>238</sup>

#### B. THE MISCHIEF RULE AFTER THE AGE OF STATUTES

The preceding discussion of the limited role for the mischief rule today rests on an assumption: the mischief rule is from the age of the common law, whereas we live in the age of statutes. But is it evident that we still live in such an age? Apart from a tax law and a coronavirus-relief bill,<sup>239</sup> there were no major statutes enacted during the Trump presidency. The last time there was a significant burst of legislative activity was the 111th Congress (2009–2011).<sup>240</sup> The idea of a legislating Congress—at least of the kind that produced the huge legislative achievements of the 1960s, 1970s, and 1980s—is receding.<sup>241</sup> For some legislators, the cost–benefit analysis favors blocking legislation over passing it. And the trend

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238. See *Pierson v. Ray*, 386 U.S. 547, 561 (1967) (Douglas, J., dissenting); Jennings, *supra* note 147, at 452. Note that some early American decisions read *Heydon's Case* as instructing courts to read statutes in line with the common law. The font for this line of argument appears to be Chancellor Kent, who cites *Heydon's Case* within an argument that statutes should be interpreted with reference to the common law. 1 JAMES KENT, COMMENTARIES ON AMERICAN LAW 434 (1826); cf. Karen M. Gebbia-Pinetti, *Statutory Interpretation, Democratic Legitimacy and Legal-System Values*, 21 SETON HALL LEGIS. J. 233, 259–60 (1997) (“[T]he well-known ‘mischief’ rule approached statutes from a common law perspective, urging courts to construe statutes as, essentially, gap-filling devices designed to alleviate harms not adequately addressed by the common law.”). On Chancellor Kent’s interpretation of statutes, see Farah Peterson, *Interpretation as Statecraft: Chancellor Kent and the Collaborative Era of American Statutory Interpretation*, 77 MD. L. REV. 712, 732–48 (2018).

239. See Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136, 134 Stat. 281 (2020) (codified as amended in scattered sections of U.S.C.); Tax Cuts and Jobs Act, Pub. L. No. 115-97, 131 Stat. 2054 (2017) (codified as amended in scattered sections of U.S.C.).

240. See Dodd–Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified as amended in scattered sections of U.S.C.); Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified as amended in scattered sections of U.S.C.); see also Josh Chafetz, *The Phenomenology of Gridlock*, 88 NOTRE DAME L. REV. 2065, 2077–78 (2013) (listing the 111th Congress’s accomplishments).

241. A note of caution about my argument is provided by Judge Friendly’s lecture decrying “legislative paralysis”—in 1963. See Henry J. Friendly, *The Gap in Lawmaking—Judges Who Can’t and Legislators Who Won’t*, 63 COLUM. L. REV. 787, 797 (1963), reprinted in HENRY J. FRIENDLY, BENCHMARKS 41, 53 (1967).

may pick up speed, as the loss of legislative expertise by attrition is reinforced by attraction: what draws new members to the House and Senate does not seem to be the craft of legislating.

Instead of asking how the mischief rule should operate in an age of statutes, it may be more apt to ask how it should work when Congress is enacting fewer statutes, especially if this new state proves enduring. The answer is twofold, for courts and agencies.

For courts, one logical way to respond is with aggressive dynamic interpretation. In the absence of new legislation, maybe judges should simply make each federal statute do more. Yet inaction by Congress has the effect of reinforcing the textualist critique of dynamic statutory interpretation.<sup>242</sup> No longer is there any pretense that Congress and the courts are cooperating, and we are left with the naked lawmaking of the federal courts—courts that may have increasing political volatility. Moreover, the longer the statutory drought continues, the harder it is to defend an aggressive dynamic response. Over time, it will become increasingly illogical and inefficient to fit all the new developments into the cubbyholes of old federal statutes. Statutes do not merely consist of individual terms that can be dialed up or down—terms like “discrimination” (*CSX*), “tangible object” (*Yates*), and “sex” (*Zarda*).<sup>243</sup> They set up complex institutional arrangements that cannot be neatly updated and yet are just as likely to be obsolete.

The alternative may seem counterintuitive: just at the moment in which there are fewer new federal statutes, we could emphasize the limited domain of each one. But this, too, is an intelligible response. As the federal statutes gray, we could candidly admit their limitations. The statutes addressed particular problems; they were not delegations, increasingly remote from us, to authorize unimagined solutions for unimagined problems.<sup>244</sup>

If we do not try to shoehorn legal change into old federal statutes, we can turn to other engines of legal development. One is more frank development of the common law, which is the background against which statutes operate.<sup>245</sup> Another is increased scope for state legislation. Each of these has its own weaknesses, including federal judges being out of practice on the former, and the fragmentation and political polarization attending the latter. But neither of these engines of legal development is hobbled by the structures of the old statutes. And perhaps, in time, the need for federal legislation will bring a change in Congress.

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242. See, e.g., *Bostock v. Clayton Cty.*, 140 S. Ct. 1731, 1836–37 (2020) (Kavanaugh, J., dissenting).

243. See *supra* notes 23–35 and accompanying text.

244. See *Henson v. Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1725–26 (2017); cf. Frank H. Easterbrook, *Abstraction and Authority*, 59 U. CHI. L. REV. 349, 361 (1992) (“A problem neither appreciated nor discussed is not resolved; texts do not settle disputes their authors and their contemporary readers could not imagine.”); Easterbrook, *supra* note 178, at 544 (suggesting that apart from so-called common law statutes “the domain of the statute should be restricted to cases anticipated by its framers and expressly resolved in the legislative process”).

245. Cf. GRANT GILMORE, *THE AGES OF AMERICAN LAW* 96 (1977) (“Eventually the problem of obsolescent statutes solves itself. . . . With luck, the statute will turn out to have nothing to say that is relevant to the new issues, which can then be decided on their own merits.”).

The other institution is federal agencies. They already exercise ample lawmaking authority, and they are more suited to this role, in terms of expertise, than courts are. But there is unease among the Justices about the extent of the existing delegations,<sup>246</sup> and one place that judicial unease might emerge is if the Supreme Court strongly endorses the “major questions” doctrine. That doctrine posits that Congress can leave minor questions to agencies, not major questions, unless the statute says so explicitly.<sup>247</sup>

The relevance of the major questions doctrine is not just that it could keep agencies from filling the void left by Congress. More interestingly, the major questions doctrine has an essential similarity with the mischief rule. Both instruct that a legal enactment is not integrated and complete in itself. Rather, it must be set against something else. Just as we need to know the mischief to which the statute responds, so too we need to know something about the question or topic to which the agency’s rule is responding—how big is it? And both the mischief rule and the major questions doctrine are interpretive intuitions that are widespread, even without a definitive contemporary formulation.

This sense of a law’s responsiveness to a preexisting question or problem is shared by what is sometimes called “the no elephants-in-mouseholes canon.”<sup>248</sup> That is, Congress “does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes.”<sup>249</sup> This canon, or “convention[] of expression,”<sup>250</sup> makes the same kind of move that the mischief rule does: it asks us to consider the object of attention.<sup>251</sup> If Congress was contemplating a mousehole, we should not presume

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246. See, e.g., *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019) (narrowly retaining but limiting *Auer* deference); *Gundy v. United States*, 139 S. Ct. 2116 (2019) (narrowly rejecting a nondelegation challenge to the federal Sex Offender Registration and Notification Act).

247. See *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000) (“In extraordinary cases, however, there may be reason to hesitate before concluding that Congress has intended such an implicit delegation.”); *ESKRIDGE JR.*, *supra* note 154, at 288. The contours and terminology, and even the existence, of this doctrine are not beyond dispute, as seen in the opinions of Judges Brown, Kavanaugh, and Srinivasan in *United States Telecom Ass’n v. FCC*, 855 F.3d 381, 383, 402, 419 (D.C. Cir. 2017).

248. See *ESKRIDGE JR.*, *supra* note 154, at 339 (calling this canon “a half-sibling to the major questions canon”). In a precursor to *Bostock*, one judge analyzed the question in terms of the no elephants-in-mouseholes canon. See *Wittmer v. Phillips 66 Co.*, 915 F.3d 328, 336 (5th Cir. 2019) (Ho, J., concurring).

249. *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 468 (2001). This vivid expression is Justice Scalia’s, but note the tension with his “general-terms canon.” See *supra* note 98 and accompanying text. That putative canon says that general terms are not to be limited; this one limits vague terms. Even Justice Scalia could not quite keep the canons from dueling.

250. *Gonzales v. Oregon*, 546 U.S. 243, 274 (2006).

251. See, e.g., *id.* at 269–70; *Chatwin v. United States*, 326 U.S. 455, 462–64 (1946). On the mischief being in the sight of Congress, see *supra* text accompanying note 139. The no elephants-in-mouseholes canon could be adapted to the example of tacit domain quantifiers given. See *supra* note 202 and accompanying text. It would be odd for a speaker to make a statement about there being no beer in the universe (an elephant of a statement) upon the occasion of looking into a refrigerator (a mousehole of an object of attention). Other canons can also be thought of as recognizing tacit domain quantifiers, such as the canon against extraterritorial application.

it was stuffed with an elephant. But how do we know whether Congress was contemplating a hole the size of a mouse or the size of an elephant? That is a question about something that lies outside the statute, part of the statute's context and setting.<sup>252</sup>

To date, much of the literature on the major questions doctrine and the no elephants-in-mouseholes canon has, understandably, been focused on administrative law and the relationship of courts and agencies.<sup>253</sup> But these are bespoke versions of a basic point about the interpretation of statutes: statutes should be interpreted not merely as texts, nor merely as texts set among other texts (though they are), but as texts that occur in a time and place. It is in the nature of laws that they transcend their time and place of origin. Taxes that discriminate against railroads could take unimagined forms; the Sarbanes-Oxley Act<sup>254</sup> regulates more than just Enron 2.0; our understanding of what it means to discriminate on the basis of sex is undeniably broader now than in 1964. The tension between this transcendence and particularity is what makes legal interpretation hard. Yet this is a moment in which a number of highly influential theories of interpretation are downplaying particularity, trying to sever the meaning of a legal enactment from its setting.<sup>255</sup>

The mischief rule calls us back to the particularity of a legal rule, its responsiveness to something beyond itself, its situatedness.<sup>256</sup> Something similar is done by the major questions doctrine and the no elephants-in-mouseholes canon. All of these doctrines remind us that, as Justice Holmes put it, “we ask, not what this man meant, but what those words would mean in the mouth of a normal speaker of English, *using them in the circumstances in which they were used.*”<sup>257</sup>

252. It might be deduced from the statute itself, with a judge's knowledge of the world, but the same is true of the mischief. *See supra* Section II.B (describing how the mischief might be identified).

253. *See generally* Kent Barnett & Christopher J. Walker, *Short-Circuiting the New Major Questions Doctrine*, 70 VAND. L. REV. EN BANC 147 (2017) (discussing the major questions doctrine in the context of *Chevron* deference); Michael Coenen & Seth Davis, *Minor Courts, Major Questions*, 70 VAND. L. REV. 777 (2017) (arguing that the Supreme Court alone should apply the major questions doctrine); Jacob Loshin & Aaron Nielson, *Hiding Nondelegation in Mouseholes*, 62 ADMIN. L. REV. 19 (2010) (connecting the no elephants-in-mouseholes doctrine to the nondelegation doctrine); Jonas J. Monast, *Major Questions About the Major Questions Doctrine*, 68 ADMIN. L. REV. 445 (2016) (discussing the major questions doctrine and comparing it to *Chevron* analysis).

254. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified as amended in scattered sections of U.S.C.)

255. Examples include Justice Scalia's rejection of the mischief rule as inconsistent with textualism, *see supra* Section I.D; Jack Balkin's move to separate out “original expected applications,” *see* JACK M. BALKIN, *LIVING ORIGINALISM* 7 (2011); and Larry Solum's centering of the distinction between interpretation and construction, *see* Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 CONST. COMMENT. 95, 95–96 (2010). For recognition of this in the latter case, *see* Frederick Schauer, *Constructing Interpretation*, 101 B.U. L. REV. 103, 122 (2021) (“[W]hat lies at the heart of the distinction between interpretation and construction is the idea that the meaning of language can (and must) be divorced from the implications, and especially the normative implications, of that language on a particular occasion.”).

256. *See, e.g.*, *Bond v. United States*, 572 U.S. 844, 860 (2014) (noting “the context from which the statute arose—a treaty about chemical warfare and terrorism”).

257. Oliver Wendell Holmes, *The Theory of Legal Interpretation*, 12 HARV. L. REV. 417, 417–18 (1899) (emphasis added).

## CONCLUSION

The mischief rule is familiar yet foreign. The term is widely known, yet it is considered to simply be an older vocabulary for purposivism. The concept is more interesting than that, however, and it speaks to present interpretive disputes.

The mischief rule does not neatly fit in the current interpretive landscape. It does not conform to a Scalia-style textualism. It does not generate the broader purpose so important to Hart-and-Sacks-style purposivism. It is out of step with dynamic statutory interpretation, which looks to the values of the present, not the mischiefs of the past. Yet the mischief rule still has something to offer to a wide array of interpreters. It can be used with a good conscience even by a textualist.<sup>258</sup> It reflects a widespread intuition of interpreters, legal and otherwise.<sup>259</sup>

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.<sup>260</sup> 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.

But that guidance is useful. It is inherent in language that sometimes the meaning of an expression depends on the context in which the expression appears, not only the textual context but also the temporal context. Sometimes, to give a faithful account of the legislative decision, an interpreter needs to know what the legislature said, and also what the legislature said it about.

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258. Nor does it need to be regarded as merely one of “textualism’s exceptions.” See John C. Nagle, *Textualism’s Exceptions*, ISSUES IN LEGAL SCHOLARSHIP, 2002, at 1–2 (discussing exceptions that textualists have admitted in which the statutory text is not “the end of the interpretive inquiry”).

259. Cf. PEGGY PARISH, AMELIA BEDELIA (1963) (recounting the eponymous character’s mistaken interpretation of instructions, such as “[c]hange the towels” and “[d]raw the drapes,” usually because she fails to understand the mischief).

260. Cf. *Rodriguez v. United States*, 480 U.S. 522, 525–26 (1987) (per curiam) (“[N]o legislation pursues its purposes at all costs.”); Manning, *supra* note 40, at 104 (“Legislators may compromise on a statute that does not fully address a perceived mischief, accepting half a loaf to facilitate a law’s enactment.”).