Progressive Textualism

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Textualism is now the Court's lingua franca. In response, some have proposed a "progressive textualism," defined by the use of traditional textualist methods to reach politically progressive results. This Article explores a different kind of "progressive textualism." Rather than starting with the desired policy outcome—politically progressive or conservative—we begin from one of modern textualism's central values: a commitment to "democratic" interpretation. As Justice Barrett argues, this commitment views textualists as "agents of the people" who "approach language from the perspective of an ordinary English speaker." Textualists thereby claim to promote democracy by interpreting law consistently with what it communicates to the ordinary public. However, recent empirical studies reveal discrepancies between textualist interpretive commitments and how ordinary people understand legal texts. These discrepancies call into question claims that textualists' methodology is committed to democratic interpretation.

A textualism centered on democratic interpretation would be methodologically more progressive if it centered facts rather than fictions about how ordinary people interpret language. It would recognize that people understand legal language in light of linguistic "(co)text" and "(con)text," and sometimes nonliterally; they often understand ambiguous terms in law to have legal, not ordinary, meanings; and their understanding of law is informed by its apparent purpose and sometimes by interpretive rules that are conventionally justified on normative grounds. In contrast, current textualism is often methodologically regressive, crafting a fictional "ordinary person" more closely connected to ideological policy goals than facts about ordinary language comprehension.

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INTRODUCTION

Justice Kagan has rescinded her statement of textualism's ubiquity: "Some years ago, I remarked that '[w]e're all textualists now.' . . . It seems I was wrong. The current Court is textualist only when being so suits it."[1] Today, most judges claim fidelity to the text's meaning, but not all succeed. As this Article explains, some self-proclaimed "textualists" ignore text when convenient, rely on shoddy interpretive methods, and cling to fictions about how ordinary people understand language. Textualism sits at the heart of modern judicial interpretation, especially at the Supreme Court. Between 2005 and 2017, the Roberts Court relied on "text" or "plain meaning" arguments in almost fifty percent of majority or plurality opinions concerning statutory meaning.[2] "Ordinary" or "public" meaning is prioritized across both statutory and constitutional interpretation,[3] at the Supreme Court and within the lower federal courts as well.[4] Even in legal academia, a majority of professors report that they accept or lean toward textualism in statutory interpretation.[5] While courts increasingly rely on textualist principles to resolve interpretive disputes,[6] high-profile cases and empirical studies illustrate that a general commitment to the text does not guarantee uniform results, or even a consistent textualist theory.[7] Against this backdrop—that we are all "textualists now" (or at least claim to be)—the pressing question is: *Which kind of textualism*?[8]

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1. Justice Kagan remarked, "we're all textualists now," in Harvard Law School, *The 2015 Scalia Lecture | A Dialogue with Justice Kagan on the Reading of Statutes*, YOUTUBE, at 08:29 (Nov. 25, 2015), https://youtu.be/dpEtszFT0Tg. This statement depends upon an essential ambiguity: whether one begins or ends with the text. Kagan's recent recission comes in *West Virginia v. Env't Prot. Agency*, No. 20-1530, slip. op. at 28 (U.S. Feb. 28, 2022) (Kagan, J., dissenting).

2. *See* Anita S. Krishnakumar, *Cracking the Whole Code Rule*, 96 N.Y.U. L. REV. 76, 97 tbl.1 (2021) (referring to cases decided between 2005 and 2017).

3. *See* William N. Eskridge, Jr. & Victoria F. Nourse, *Textual Gerrymandering: The Eclipse of Republican Government in an Era of Statutory Populism*, 96 N.Y.U. L. REV. 1718, 1720 (2021).

4. *See* David Zaring, *The Organization Judge*, U. CHI. L. REV. ONLINE (Sept. 25, 2020), https://lawreviewblog.uchicago.edu/2020/09/25/zaring-judge/ [https://perma.cc/GL8T-FFBK] (describing the large cohort of young Trump judicial appointees).

5. *See* Eric Martínez & Kevin Tobia, *What Do Law Professors Believe about Law and the Legal Academy? An Empirical Inquiry*. 44 (Feb. 27, 2022) (unpublished manuscript) (on file with authors). Note that many of these respondents also accepted another option, such as purposivism, suggesting that many take themselves to be pluralistic textualists.

6. *See* John F. Manning, *Textualism and Legislative Intent*, 91 VA. L. REV. 419, 419–20 (2005) (explaining that at the close of the twentieth century "'textualism' emerged, producing a rather significant effect on both judicial behavior and academic writing").

7. *Compare* Bostock v. Clayton County, 140 S. Ct. 1731, 1743 (2020) ("For an employer to discriminate against employees for being homosexual or transgender, the employer must intentionally discriminate . . . in part because of sex."), *with id.* at 1757 (Alito, J., dissenting) ("Title VII does not reach discrimination because of sexual orientation or gender identity."), *and id.* at 1825 (Kavanaugh, J., dissenting) (urging the Court to follow "ordinary meaning" rather than "literal meaning"). *See generally* Victoria Nourse, *United Philosophy-Divided Court: Interpretive Conflict on the Trump Court* (Mar. 3, 2022) (unpublished manuscript) (on file with authors) (analyzing the 2020 Term).

8. For examples of literature analyzing new forms of textualism, see generally Victoria Nourse, *Textualism 3.0: Statutory Interpretation After Justice Scalia*, 70 ALA. L. REV. 667 (2019); Tara Leigh Grove, Comment, *Which Textualism?*, 134 HARV. L. REV. 265 (2020); and Kevin Tobia & John Mikhail, *Two Types of Empirical Textualism*, 86 BROOK. L. REV. 461 (2021). "Textualism" is a term sometimes confused with originalism. Public meaning originalism starts with the constitutional text, but

Ironically, "textualism" itself has an inexact and amorphous meaning.[9] Although the theory is referred to monolithically,[10] it encompasses a range of interpretive approaches.[11] In fact, other than a general commitment to privileging a legal text's linguistic meaning over the authors' intentions, it is uncertain whether there are any commitments constitutive of traditional textualism.[12] However, several tenets are present in most accounts of textualism: 1) skepticism that legislative intent exists or can be measured, 2) a narrow "faithful agent" view of the judicial role, 3) concern about judicial activism and discretion, 4) a belief that text-focused interpretations uniquely further rule of law values, and 5) a commitment to "democratic" interpretation focused on "ordinary people."[13]

These five principles—intent skepticism, faithful agency, judicial restraint, rule of law, and democracy—are not necessarily consistent. In fact, there are deep tensions among them. For example, one could easily imagine interpretive commitments that would greatly reduce judicial discretion but undermine one or more of the other textualist tenets. One might commit to always interpret criminal statutes in the defendant's favor, regardless of textual clarity. Such a commitment would reduce judicial discretion but comes at the cost of rule of law, faithful agency, and democratic goals.

Despite these multiple commitments, recent textualist scholarship and judging emphasize the theory's democratic virtues.[14] In fact, democracy may now be traditional textualism's justificatory and rhetorical centerpiece.[15] Justice Barrett has recently asserted that textualists "view themselves as agents of the people rather than of Congress and as faithful to the law rather than to the lawgiver."[16] Textualists thus "approach language from the perspective of an ordinary English speaker."[17] For this reason, textualism "insists that judges must construe statutory

there are different forms of originalist analysis. In statutory interpretation, new textualists have increasingly adopted statutory originalism. *See* Nourse, *supra*, at 676.

9. For instance, in *Bostock*, the majority and dissenting opinions all adopted a textualist methodology but reached differing interpretive conclusions. *See* Grove, *supra* note 8, at 266–68.

10. *See, e.g.*, John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70 (2006) (drawing distinctions between textualist and purposivist theories of interpretation without making distinctions among textualists).

11. *See* Grove, *supra* note 8, at 269–71 (distinguishing the difference between "formalistic" and "flexible" textualism).

12. *See* Manning, *supra* note 6, at 420 (explaining that textualism "does not admit of a simple definition").

13. *See infra* Section I.A (describing these common tenets of textualism). By "ordinary people," this Article refers to people who are neither lawyers nor involved in the legislative process. *Cf.* Skilling v. United States, 561 U.S. 358, 402–03 (2010) (referring to the requirement that statutes must define crimes "with sufficient definiteness that ordinary people can understand what conduct is prohibited").

14. *See infra* notes 88–95 and accompanying text.

15. *See* Anya Bernstein & Glen Staszewski, *Judicial Populism*, 106 MINN. L. REV. 283, 308 (2021); *see also* Anya Bernstein, *Democratizing Interpretation*, 60 WM. & MARY L. REV. 435, 466 (2018) (noting the argument that textualism is the way to prevent judicial lawmaking).

16. Amy Coney Barrett, Essay, *Congressional Insiders and Outsiders*, 84 U. CHI. L. REV. 2193, 2195 (2017).

17. *Id.* at 2194.

language consistent with its 'ordinary meaning.'"[18] Justice Kavanaugh explained: "Judges adhere to ordinary meaning for two main reasons: rule of law and democratic accountability."[19] These statements prioritize "democracy"—and to some extent, rule of law values—over other textualist values. Judges are no longer primarily faithful agents of the legislature; they are faithful agents of the people. That commitment may well mean the loss of judicial restraint, as popular-democratic appeals swallow the call of past precedent.[20]

This Article begins from this modern textualist starting point. Textualists, appealing to democracy, work to interpret legal texts from the perspective of an "ordinary English speaker."[21] We are not all textualists ourselves, but our claim is that *if* modern textualism centers a methodological commitment to ordinary people, it should advance that commitment in a methodologically sincere, sophisticated, and progressive way. In particular, textualists committed to ordinary people should consult evidence about ordinary people's understanding of language rather than rely on judges' intuitions or other ideological commitments.

Textualists thus privilege "ordinary meaning" to remain faithful to ordinary people and their understanding of law, but textualist interpretive practices fail to deliver on this promise.[22] Recent empirical studies provide insight into how ordinary people understand law, revealing that some traditional textualist practices diverge from the reality of ordinary understanding.[23] Textualists who, in spite of these empirical realities, cling to fictions about ordinary meaning are more accurately described as democratically "regressive textualists," whose methodology has no clear connection to ordinary people or their understanding of language.

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18. Amy Coney Barrett, *Assorted Canards of Contemporary Legal Analysis: Redux*, 70 CASE W. RSRV. L. REV. 855, 856 (2020) (citation omitted).

19. Bostock v. Clayton County, 140 S. Ct. 1731, 1825 (Kavanaugh, J., dissenting). The same kinds of appeals to democracy arise in constitutional contexts. Consider Justice Scalia on constitutional interpretation in *District of Columbia v. Heller*: "[T]he Constitution was written *to be understood by the voters*; its words and phrases were used in their normal and ordinary as distinguished from technical meaning." 554 U.S. 570, 576 (2008) (emphasis added) (quoting United States v. Sprague, 282 U.S. 716, 731 (1931)).

20. *See, e.g.*, Amy Coney Barrett, *Countering the Majoritarian Difficulty*, 32 CONST. COMMENT. 61, 80–82 (2017) (book review).

21. Barrett, *supra* note 16, at 2194. An "ordinary English speaker" may seem insufficiently sophisticated when an interpretive dispute involves a highly technical statute, but Justice Barrett imbues her "ordinary English speaker" with the knowledge of an attorney. *See infra* notes 282–84 and accompanying text. An alternate way of handling technical statutes is by acknowledging the empirical evidence indicating that ordinary people assume technical terms should receive technical meanings that are determined by experts. *See infra* notes 291–93 and accompanying text.

22. *Cf.* Bernstein & Staszewski, *supra* note 15, at 316–18 (arguing that textualism's logic is circular).

23. *See generally* Kevin Tobia, Brian G. Slocum & Victoria Nourse, *Ordinary Meaning and Ordinary People*, 171 U. PA. L. REV. (forthcoming 2023) [hereinafter Tobia et al., *Ordinary Meaning*], https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4034992 [https://perma.cc/7W29-SBLN] (analyzing the results of empirical studies designed to determine whether ordinary people expect that terms in legal texts will be given ordinary meanings); Kevin Tobia, Brian G. Slocum & Victoria Nourse, Essay, *Statutory Interpretation from the Outside*, 122 COLUM. L. REV. 213 (2022) [hereinafter Tobia et al., *From the Outside*] (urging a fundamental reconsideration of the "ordinary meaning" doctrine in light of empirical data about whether ordinary people implicitly invoke textual canons when interpreting rules).

Some textualists claim that their democracy-reinforcing commitment is *already* grounded in reality. That is, they argue that textualism ensures that judges will implement the linguistic meaning of legal texts, rather than a judge's view of the proper interpretation. Justice Gorsuch stated:

> 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. And we would deny the people the right to continue relying on the original meaning of the law they have counted on to settle their rights and obligations.[24]

Despite the rhetoric avowing that "the people" are able to "continue relying on the original meaning of the law," traditional textualists often guess at how ordinary people understand language or construct a hypothetical "ordinary" interpreter—one who just so happens to follow traditional textualist interpretive practices.[25] These traditional textualists interpret in overly literal ways, shop among conflicting dictionary definitions, and flexibly contract interpretive contexts in ways that ignore relevant context.[26]

Recently, Chief Justice Roberts alluded to the possibility of replacing speculation with data, posing a provocative question during oral argument:

> [O]ur objective is to settle upon the most natural meaning of the statutory language to an ordinary speaker of English. . . . So the most probably useful way of settling all these questions would be to take a poll of 100 ordinary – ordinary speakers of English and ask them what [the statute] means, right?[27]

There are obvious limits to polling ordinary people. Legal interpretation clearly should not proceed via "interpretive outsourcing": determining a specific statute's legal effect from a simple poll of laypeople.[28] But Chief Justice Roberts is correct to ask whether empirical evidence about ordinary people's understanding of language provides vital information to textualist interpreters. When textualists appeal to the understanding of an "ordinary reader of English," large datasets about lay understanding seem at least as helpful as one Justice's opinion

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24. *Bostock*, 140 S. Ct. at 1738.

25. *Id; see infra* notes 287–89 and accompanying text (describing how Justice Barrett's fictional ordinary interpreter conveniently follows textualist interpretive practices); *see also* Anita S. Krishnakumar, The Common Law as Statutory Backdrop 49–52 (Oct. 19, 2021) (unpublished manuscript) (on file with authors) (discussing how the Justices rely upon how "friends" speak to each other to determine ordinary meaning).

26. *See* Ellen P. Aprill, *The Law of the Word: Dictionary Shopping in the Supreme Court*, 30 ARIZ. ST. L.J. 275, 278, 300–01(1998); Eskridge, Jr. & Nourse, *supra* note 3, at 1721–22 (discussing how textualist judges start with two potentially outcome-determinative decisions: choice of text and choice of context).

27. Transcript of Oral Argument at 51–52, Facebook, Inc. v. Duguid, 141 S. Ct 1163 (2020) (No. 19-511).

28. *See also* Bernstein, *supra* note 15, at 435.

about what is acceptable to say at a cocktail party.[29] Legal scholars are responding to this call for empirical data by analyzing and conducting studies about how ordinary people understand law and language.[30] For methodologically progressive textualists, this data is essential because it enables textualists to take seriously facts about actual people rather than having to rely on untested assumptions or convenient fictions.

This Article builds on the idea of empirically based textualism, proposing a theory of *methodologically* progressive textualism. The key idea is that textualists who center "democracy" via ordinary people should look to evidence about people's understanding of language.[31] After all, if the point of law is to guide the behavior of ordinary citizens in a democracy, then we should search for how those citizens understand legal language. Looking to those facts could lead textualist courts to reconsider some traditional textualist tenets and interpretive principles.

Some might find our proposal regarding progressive textualism to be odd. Textualism is widely viewed as a politically conservative "method of statutory interpretation closely associated with Justice Scalia."[32] Indeed, textualism has been criticized as an "immoral" attempt to "effectuate a broader ideological agenda that seeks to reduce the state and its regulatory functions to the necessary minimum."[33] Notwithstanding these views, we begin with the premises of textualism, because textualism is, in large part, the Court's *lingua franca*.[34]

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29. *Cf.* Johnson v. United States, 529 U.S. 694, 718 (2000) (Scalia, J., dissenting) ("[T]he acid test of whether a word can reasonably bear a particular meaning is whether you could use the word in that sense at a cocktail party without having people look at you funny.").

30. Some of this research falls under the category of "experimental jurisprudence." Broadly speaking, experimental jurisprudence uses empirical methods (often experiments) to address questions typically associated with legal theory or legal philosophy. *See* Karolina Magdalena Prochownik, *The Experimental Philosophy of Law: New Ways, Old Questions, and How Not to Get Lost*, PHIL. COMPASS, Nov. 18, 2021, https://doi.org/10.1111/phc3.12791 [https://perma.cc/K2JL-E8PV]; Kevin Tobia, *Experimental Jurisprudence*, 89 U. CHI. L. REV. 735, 735 (2022); *see also* Roseanna Sommers, *Experimental Jurisprudence: Psychologists Probe Lay Understandings of Legal Constructs*, 373 SCIENCE 394 (2021); Niek Strohmaier, *Introducing: Experimental Jurisprudence*, LEIDEN L. BLOG (Dec. 1, 2017), https://www.leidenlawblog.nl/articles/introducing-experimental-jurisprudence [https://perma.cc/CH4F-LZZQ]. *See generally* THE CAMBRIDGE HANDBOOK OF EXPERIMENTAL JURISPRUDENCE (Kevin Tobia ed., forthcoming 2023) (collection of papers in experimental jurisprudence). Scholars have also begun to consider text as data, in the field of law and corpus linguistics. *See, e.g.*, Thomas R. Lee & Stephen C. Mouritsen, *Judging Ordinary Meaning*, 127 YALE L.J. 788, 788, 820, 847 (2018). Although this Article does not have space to adequately address this important research about legal corpus linguistics, we have written both critically and optimistically about those methods. *See, e.g.*, Brian G. Slocum & Stefan Th. Gries, *Judging Corpus Linguistics*, 94 S. CAL. L. REV. POSTSCRIPT 13 (2020) (critiquing some uses of legal corpus linguistics); Kevin Tobia, *The Corpus and the Courts*, U. CHI. L. REV. ONLINE (Mar. 5, 2021) [hereinafter: Tobia, *The Corpus and the Courts*], https://lawreviewblog.uchicago.edu/ 2021/03/05/tobia-corpus/ [https://perma.cc/CYZ5-AVVQ] (critiquing some uses of legal corpus linguistics). We restrict this Article's claims and focus to survey and experimental methods.

31. "Progressive textualism" is a theory of textualism, not necessarily a full theory of statutory interpretation. Even textualists, despite the name, apply principles that go beyond the text.

32. Barrett, *supra* note 18.

33. Andrei Marmor, *The Immorality of Textualism*, 38 LOY. L.A. L. REV. 2063, 2066, 2079 (2005).

34. See *supra* notes 1–4.

Insofar as many of today's judges are textualists committed to "ordinary people," it is worth interrogating that project and, for a new generation of judges, critiquing versions of ordinary meaning that fail to fulfill textualism's stated values.[35]

This *methodologically* progressive textualist project shares a name with a similar movement. Recently, there has been increasing interest in a *politically* "progressive textualism" that would use textualist tools to reach politically progressive outcomes.[36] This movement has at least one significant victory from which to build momentum. As the Court's recent decision in *Bostock v. Clayton County* illustrates, conservative textualists, such as Justice Gorsuch, are—at least sometimes—responsive to textualist arguments that support politically progressive outcomes.[37]

This Article considers a different type of progressive textualism. Our goal here is not to advocate in favor of politically progressive interpretive *outcomes*. Instead, we propose that if textualism claims to respect ordinary people's understanding of language, judges should adopt progressive (rather than regressive) *methodologies*. Currently, textualist judges purport to seek the linguistic understandings of ordinary Americans. As we have argued elsewhere, we worry that judges embrace notions of ordinary meaning with an "upper-class accent."[38] Furthermore, we worry that current textualist rhetoric espouses counterfactual, normatively motivated depictions of ordinary people.[39] In contrast, a methodologically progressive approach would seek evidence about how *actual* ordinary people understand legal language.

A growing body of empirical literature has already studied ordinary people's understanding of language in the context of legal interpretation. These studies reveal inconsistencies between some current textualist practices and ordinary people's understanding of language. Consider some empirical findings:

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35. This Article largely focuses on the Supreme Court's approach to textualism, but the arguments are equally applicable to lower federal courts and state courts. Lower courts are not bound by the Court's interpretive approach. *See* Abbe R. Gluck, *Intersystemic Statutory Interpretation: Methodology as "Law" and the* Erie *Doctrine*, 120 YALE L.J. 1898, 1902, 1907, 1917 (2011). Although the federal courts, including the Supreme Court, generally "give 'super-strong' stare decisis effect to *substantive* statutory precedents" (interpretations about what a statute substantively means), the federal courts generally do not treat the methodology (the rules, presumptions, or other tools it applies) as precedential for the next case, even where the same statute is being construed. *Id.* at 1917 (emphasis added). Nevertheless, lower courts are undoubtedly influenced by the Court's interpretive methodology (or, more accurately, methodologies) and, in any case, could adopt more empirically based approaches on their own.

36. *See infra* notes 122–26 and accompanying text.

37. 140 S. Ct. 1731, 1743 (2020) (articulating a textualist interpretation of Title VII that prohibits discrimination against gay and transgender employees).

38. Eskridge, Jr. & Nourse, *supra* note 3, at 1811.

39. *See* Tobia et al., *Ordinary Meaning*, *supra* note 23 (manuscript at 3).

- People understand language in light of *linguistic context*.[40]
- People do not always understand legal rules *literally*.[41]
- Some traditional "textual canons of interpretation" do not accurately reflect people's understanding of law.[42]
- Other linguistic generalities not *traditionally* recognized as legal "canons" nevertheless robustly characterize people's understanding of law.[43]
- People do not understand laws to communicate exclusively "ordinary" (that is, non-technical) meanings; rather, people are influenced by law's legal genre and often presume that laws express technical legal meanings.[44]
- People intuitively understand law in line with some textual canons, but also some "substantive" or "normative" canons.[45]
- People's understanding of a legal rule is, at least sometimes, informed by their understanding of the rule's *purpose*.[46]

In light of these findings about ordinary people, we propose several recommendations for textualists who seek to ground their "democratic" interpretation in facts about ordinary people:

- Textualists should stop focusing on decontextualized word meanings.
- Textualists should avoid adopting overly literal interpretations, assuming that statutory terms always take their literal meanings.
- Textualists should not assume that traditional or long-standing interpretive rules necessarily reflect ordinary people's language comprehension.
- Moreover, textualists should seek to develop and apply new interpretive rules that correspond with how ordinary people *actually* understand language.
- Textualists should avoid over-relying on ordinary (non-technical) meaning and should consider that terms may communicate *technical* (not ordinary) meanings.

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40. *See infra* Part II.

41. *See infra* Section III.A.

42. *See generally* Tobia et al., *From the Outside*, *supra* note 23 (analyzing the gap between canons and how ordinary people understand the law).

43. *See id*. at 75. For example, ordinary people understand rules referring to "he" to also include non-binary persons, but *traditional* "gender canons" refer only to the masculine, including the feminine, and vice-versa. *See id*. at 38–39.

44. *See generally* Tobia et al., *Ordinary Meaning*, *supra* note 23 (manuscript at 1) ("Ordinary people consider genre carefully and regularly take terms in law to communicate *technical legal meanings*, not ordinary ones.").

45. Kevin Tobia & Brian Slocum, The Interpretation of Law (Mar. 12, 2022) (unpublished manuscript) (on file with authors).

46. *See infra* Section III.B.

- Textualists should not assume that interpretive rules traditionally justified by normative considerations (so-called "substantive canons") are not reflections of ordinary people's understanding of law.
- Textualists should more readily evaluate what a legal text's purpose might contribute to its ordinary meaning.

Part I of this Article explains that textualism's principles of intent skepticism, faithful agency, limited judicial interpretive discretion, the rule of law, and democratic interpretation may conflict. For example, proponents have viewed textualism as restraining judicial interpretive discretion.[47] This view of interpretation is both mistaken and in tension with textualism's claim to "approach language from the perspective of an ordinary English speaker."[48] Textualists must therefore decide whether to embrace empirical evidence and democratic interpretation or, instead, their normative views of language and the judicial function.

Progressive textualists must also make choices. Politically progressive textualists have thus far advocated using traditional textualist methodologies to support interpretations with politically progressive effects (that is, they try to "beat conservatives at their own game.")[49] Alas, given that liberals have spent the past two decades refusing to put forth their own interpretive methodology,[50] a late-stage conversion to traditional textualism risks embracing textualism's objectionable characteristics (its antidemocratic leanings, textual dogmatism, and over-claiming) without providing a real methodological alternative. We present a different view of progressive textualism. Rather than focusing on outcomes, this version of progressive textualism focuses on methodology and a theory of democratic interpretation

47. *See* Grove, *supra* note 8, at 269 (advocating for "formalistic textualism" in statutory interpretation in part because it would restrict judicial interpretive discretion).

48. Barrett, *supra* note 16, at 2194. If taken to its extreme, the desire to limit judicial discretion comes at a high cost—it may preclude judges from using interpretive canons and principles that reflect ordinary language usage and that ordinary people (as well as lawyers and government officials) would apply when reading a statute.

49. Kathryn E. Kovacs, *Progressive Textualism in Administrative Law*, 118 MICH. L. REV. ONLINE 134, 135 (2019) (quoting Jeffrey Rosen, *How New Is the New Textualism?*, 25 YALE J.L. & HUMANS. 43, 44 (2013)).

50. Some liberal Justices have, in individual opinions, vociferously opposed textualism and its insistence that interpreters begin and end their interpretive analysis by focusing on the statutory text. For instance, Justice Stevens argued that "[t]here is no reason why we must confine ourselves to, or begin our analysis with, the statutory text if other tools of statutory construction provide better evidence of congressional intent with respect to the precise point at issue." Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ., 550 U.S. 81, 106 (2007) (Stevens, J., concurring). Furthermore, Justice Stevens argued, evidence of congressional intent may even overcome a "literal reading of the statutory text." *Id.* at 106–07, 107 n.3. Justice Breyer has offered a similar response more recently in Bedgerow v. Walters, 142 S. Ct. 1310, 1322 (2022) ("When interpreting a statute, it is often helpful to consider not simply the statute's literal words, but also the statute's purposes and the likely consequences of our interpretation. Otherwise, we risk adopting an interpretation that, even if consistent with text, creates unnecessary complexity and confusion. That, I fear, is what the majority's interpretation here will do.").

that begins from valid principles of language usage and comprehension, as measured by ordinary people.[51]

Part II argues that democratic interpretation comes with interpretive obligations. The most basic obligation is to fully and accurately account for both choice of text and context. Yet, textualists pick and choose the text and the context without justification—a practice that Nourse and Eskridge call "textual gerrymandering."[52] Neither ordinary people nor professional linguists reduce sentences to tiny words such as "a" or "so" as have recent Supreme Court opinions.[53] Progressive textualism requires that textualists stop selectively dissecting text in this manner and properly consider linguistic context: an interpretation that accounts for more text rather than less should be preferred. This Part first describes textual gerrymandering with respect to narrow sentence-level context before turning to broader, holistic context.

Part II also explains that, contrary to some traditional textualist practices, people understand legal rules to communicate *nonliteral* meanings. As a simple example, consider the following hypothetical rule: *No man may shoot rockets in the park*. People understand this rule to apply to women and non-binary persons (despite the literal meaning of "man") and to prohibit shooting just one rocket (despite the literal meaning of "rocket*s*"). Legal texts often communicate nonliteral meanings and textualists have generally failed to recognize that "non-literalness" is a systematic aspect of language itself.[54]

Part III turns to two broader issues for a methodologically progressive textualism. First, recent empirical research indicates that ordinary people do not assume that terms in legal texts will always be given ordinary meanings. Instead, people often understand the law to be communicating technical legal meanings. This finding puts textualism's commitment to *ordinary meaning* in tension with its deeper democratic commitment to *ordinary people*. Second, empirical study of ordinary people questions the traditional division between textual and normative interpretive canons. Perhaps surprisingly, some "normative" or "substantive" canons may find support in ordinary people.

Finally, and perhaps most controversially, Part IV argues that textualists committed to democracy (through interpretive methods tied to ordinary people) have reasons to integrate purposivist reasoning into their interpretations. Empirical evidence suggests that ordinary people understand texts in light of their respective purposes. If so, a textualist court could be in danger of deviating from the ordinary meaning of a legal rule by *not* considering its purpose. Purposivist reasoning

51. Nothing in this Article pretends to provide a complete progressive theory of statutory interpretation. It is possible, for example, that a form of progressive textualism begins by privileging the "ordinary" person's view of language, but this presumption could be defeated for good reasons.

52. Eskridge, Jr. & Nourse, *supra* note 3, at 1812.

53. *See* Niz-Chavez v. Garland, 141 S. Ct. 1474, 1481 (2021); Van Buren v. United States, 141 S. Ct. 1648, 1654 (2021).

54. There are exceptions. *See infra* Section II.A (discussing the Justices and literalism).

is not necessarily opposed to textualism (as it has often been portrayed), but is instead a crucial part of a theory of "ordinary meaning."[55]

Textualists of today claim that their interpretive process is faithful to ordinary people's understanding of law. This Article's survey of some recent empirical work about ordinary people's understanding of language is exactly the data that today's democracy-oriented textualists call for. But there is also a critical dimension to our project. As empiricists uncover facts about ordinary people's understanding of legal language, there is a spectrum of possible textualist responses to that data. One type of textualism ("regressive textualism") might ignore the data, continuing to assume facts—or even invent fictions—about people's understanding of language. A textualist who appeals to the ordinary person in the name of democracy, but fails to acknowledge facts about real people, is a textualist who fails by their theory's own terms. Textualists who are sincere in their commitment to ordinary people should avoid this "regressive textualism." In contrast, a methodologically "progressive textualism" would seek out facts about (all) people's understanding of language—not just that of the elite judge. If "we're all textualists now,"[56] we should at least be progressive in that interpretive methodology.

I. THEORIES OF TEXTUALISM

This Part describes five central textualist principles and explains conflicts among them. Textualist theories often appeal to some subset of these five motivating principles: 1) intent skepticism, 2) the judicial role as a "faithful agent," 3) concern about judicial interpretive discretion (judicial restraint), 4) interpretation as furthering rule of law values, and 5) a democratic view of interpretation.[57] Textualist theory often proceeds as if these principles are mutually reinforcing, but they sometimes conflict. Recently, textualists have emphasized their theory's democratic pedigree, which—if pursued seriously—is in tension with other textualist principles. This Part explains textualism's modern shift to "democracy," which sets the stage for our "progressive textualist" recommendation: if democratic interpretation is textualism's most compelling principle, textualists should do their best to learn facts about *actual* ordinary people.

A. THE DEFINING PRINCIPLES OF TEXTUALISM

1. The Intentionalist Rejection. One of textualism's best known principles is "intent skepticism," which typically emerges in arguments against intentionalist theories of interpretation.[58] Textualists take intentionalists to assume that "legislatures

55. One of us has argued that purposivism is not a complete theory because there are cases where we simply do not know the purpose. *See* Eskridge, Jr. & Nourse, *supra* note 3, at 1757; *see also* WILLIAM N. ESKRIDGE, JR., INTERPRETING LAW: A PRIMER ON HOW TO READ STATUTES AND THE CONSTITUTION 9 (2016) ("Text and purpose are like the two blades of a scissors; neither does the job without the operation of the other.").

56. Harvard Law School, *supra* note 1; *see* sources cited *supra* notes 4–7.

57. *Cf.* source cited *supra* note 12.

58. *See generally* John F. Manning, *Inside Congress's Mind*, 115 COLUM. L. REV. 1911 (2015) (addressing the difficulties of ascertaining legislative intent). As one of us has asserted, this kind of

have coherent and identifiable but *unexpressed* policy intentions" in the statutory text.[59] These intentions can then be used to "clarify or even alter" that text.[60] Textualists claim that intentionalism "anthropomorphize[s] the legislature" by treating a legislative command "as one would treat the speech of an individual human actor."[61]

Textualists maintain that intentionalism is premised on a fiction. "[A] complex, multimember body such as Congress lacks any subjective intention about the kind of difficult issues that typically find their way into court."[62] Instead, they claim, the only "collective will" that exists is the statutory text that navigates all of the procedural hurdles. As a consequence, interpreters should generally reject legislative history, which does not accurately represent the Congress's collective will.[63] For textualists, a "faithful agent" of the legislature[64] does not attempt to determine congressional intent, but rather "adhere[s] to the product of the legislative process."[65]

2. Faithful Agency. A second textualist principle is faithful agency. Every theory of statutory interpretation depends upon some version of the faithful agent rule.[66] For textualists, faithful agency involves interpretation from the standpoint of a "reasonable person."[67] The textualist "reasonable person" has a sophisticated and specific understanding of the legislative process. Specifically, the reasonable person (via courts) acknowledges the "crucial role of legislative compromise in our constitutional system and the consequences for interpretation that flow from such a conclusion."[68] Thus, "textualists believe that the only meaningful collective legislative intentions are those reflected in the public meaning of the final statutory text."[69] Crucially, this faithful agent theory ensures "Congress's ability to use

objection is rejected when the law deals with other corporate bodies. No one says that statements by corporate officers are not admissible because the corporation is made up of more than one person and does not have a unitary mind. *See* Victoria F. Nourse, *Elementary Statutory Interpretation: Rethinking Legislative Intent and History*, 55 B.C. L. REV. 1613, 1626–27, 1633–37 (2014).

59. Manning, *supra* note 6, at 424.

60. *Id.*

61. *Id.* at 423.

62. Manning, *supra* note 58, at 1911.

63. *See* John F. Manning, *Second-Generation Textualism*, 98 CALIF. L. REV. 1287, 1289–90 (2010) (explaining that "second-generation textualism" does not focus primarily on whether courts should consult legislative history).

64. *See* Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 415, 428, 435 (1989) (explaining the "faithful-agent" model of statutory interpretation, where "judges are agents or servants of the legislature"); *see also* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 3–4, 3 n.2 (2012) (asserting that courts should act as "faithful agents" of the legislature).

65. Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109, 124 (2010).

66. For a different theory, of the court as a "relational agent," see William N. Eskridge, Jr., *Spinning Legislative Supremacy*, 78 GEO. L.J. 319, 321 (1989).

67. Manning, *supra* note 10, at 70.

68. Manning, *supra* note 63, at 1290; *see also* Robert J. Pushaw, Jr., *Talking Textualism, Practicing Pragmatism: Rethinking the Supreme Court's Approach to Statutory Interpretation*, 51 GA. L. REV. 121, 231 (2016) (arguing that speculating about legislative intent involves judges projecting "onto Congress intents, purposes, and policy goals that fit with his or her personal, political, and ideological perspectives").

semantic meaning to express and record its agreed-upon outcomes."[70] Textualists contend that "asking how a reasonable person would understand the text is more objective than searching for a complex, multimember body's purpose."[71]

Under the textualists' faithful agent view, public meaning should be viewed from a language comprehension, rather than language production, perspective.[72] According to Dean John Manning, public meaning is not necessarily literal meaning because "the literal or dictionary definitions of words will often fail to account for settled nuances or background conventions that qualify the literal meaning of language and, in particular, of legal language."[73] Nevertheless, public meaning textualism implicates literal meaning insofar as it does not make interpretive allowances for seemingly problematic statutory applications.[74] Thus, "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."[75] Textualists believe it impossible to know whether the "legislature—constrained by the legislative process—would have been able to agree on wording that would include or exclude the troubling application or omission."[76]

3. Limiting Judicial Discretion. A third principle of textualism is the belief that textualism limits judicial interpretive discretion.[77] The basic textualist assertion is that language is largely determinate and textualist methodology uniquely recognizes and implements that determinacy.[78] According to Justice Scalia, "most

69. Manning, *supra* note 6, at 424 (emphasis omitted); *see also* Adrian Vermeule, *The Supreme Court 2008 Term—Foreword: System Effects and the Constitution*, 123 HARV. L. REV. 4, 47 (2009) (describing "universal textualism" as "an equilibrium[] in which legislative coalitions will place their instructions in the text").

70. Manning, *supra* note 63, at 1290.

71. Manning, *supra* note 10, at 70.

72. *Cf.* Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3, 17 (Amy Gutmann ed., new ed. 2018); *see also* Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J.L. & PUB. POL'Y 59, 61 (1988) ("Meaning comes from the ring the words would have had to a skilled user of words at the time, thinking about the same problem.").

73. John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2393 (2003).

74. *See* Manning, *supra* note 10, at 79–80.

75. Manning, *supra* note 6, at 424–25; *see also* SCALIA & GARNER, *supra* note 64, at 40 ("The soundest legal view seeks to discern literal meaning in context."); Manning, *supra* note 63, at 1290 (arguing that judges have a "duty to enforce *clearly worded* statutes as written, even if there is reason to believe that the text may not perfectly capture the background aims or purposes that inspired their enactment"); Marmor, *supra* note 33, at 2065 (arguing that "textualism urges judges to interpret statutes and statutory regulations as literally as possible").

76. Manning, *supra* note 73, at 2409–10.

77. *See* Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 COLUM. L. REV. 1, 26 (2006) (describing how textualists are motivated to constrain the interpretive discretion of judges); Adrian Vermeule, *Interpretive Choice*, 75 N.Y.U. L. REV. 74, 79 (2000) (arguing that textualism minimizes the costs of judicial decisionmaking).

78. *See* Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2121 (2016) (reviewing ROBERT A. KATZMANN, JUDGING STATUTES (2014)) ("not buying" such "excuses" as the claim that "[s]tatutory interpretation is an inherently complex process" that permits judges, who should

interpretive questions have a right answer" and "[v]ariability in interpretation is a distemper."[79] Textualism "narrow[s] the range of acceptable judicial decision-making and acceptable argumentation."[80] Textualism thus "does not invite the judge to apply his own willful predilections, whereas every other philosophy . . . invites the judge to do what he thinks is good, what he thinks is right."[81] Ultimately, by focusing on language instead of moral intuitions, the argument is that "textualism will provide greater certainty in the law, and hence greater predictability and greater respect for the rule of law."[82]

4. Rule of Law Values. A fourth textualist tenet involves the belief that interpretation should advance rule of law values. Governing rules should "allow people to plan their affairs" with reasonable confidence that they know in advance the legal consequences of various actions.[83] Some textualists argue that textualism uniquely follows from this basic rule of law requirement. For instance, Justice Scalia argues that because textualism requires that judges "adhere closely to the plain meaning of a text," the theory is able to recognize "general rules" that provide notice to ordinary people.[84] Recall that Justice Kavanaugh makes a similar argument, that "[j]udges adhere to ordinary meaning for two main reasons," one of which is the "rule of law."[85] Textualism promotes the rule of law by adhering to the "public meaning" of a text even when harsh outcomes result or the legislative history indicates that those results were unanticipated by the legislature.[86] In contrast, according to Justice Scalia, other interpretive methodologies such as intentionalism decline to recognize general rules and instead allow judges to

act as "umpires," to "largely define their own strike zones"); SCALIA & GARNER, *supra* note 64, at xxix (arguing that proper interpretation requires acknowledgement that "words convey discernible meanings"); Easterbrook, *supra* note 72, at 66 ("To claim to find missing answers by 'interpretation' is to seize power while blaming Congress.").

79. SCALIA & GARNER, *supra* note 64, at 6 (footnotes omitted); *see also* John F. Manning, *Justice Scalia and the Idea of Judicial Restraint*, 115 MICH. L. REV. 747, 748 (2017) (reviewing Scalia, *supra* note 72) (arguing that much of Justice Scalia's "theory of adjudication built on what he took to be a constitutionally warranted view of judicial restraint").

80. SCALIA & GARNER, *supra* note 64, at xxviii.

81. David Lat, *The Benchslap Dispatches: Justice Scalia on Judge Posner's 'Hatchet Job,'* ABOVE L. (Sept. 10, 2012, 5:11 PM), https://abovethelaw.com/2012/09/the-benchslap-dispatches-justice-scalia-on-judge-posners-hatchet-job/ [https://perma.cc/7CYR-EN57] (quoting Justice Scalia); *see also* Anita S. Krishnakumar, *Textualism and Statutory Precedents*, 104 VA. L. REV. 157, 158 (2018) (referring to the "oft-unspoken predicate assumption of textualism—that is, that there is a singular 'correct answer' to every question of statutory interpretation").

82. *See* SCALIA & GARNER, *supra* note 64, at xxix.

83. Richard H. Fallon, Jr., *"The Rule of Law" as a Concept in Constitutional Discourse*, 97 COLUM. L. REV. 1, 43 (2007).

84. *See* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1184 (1989).

85. Bostock v. Clayton County, 140 S. Ct. 1731, 1825 (2020) (Kavanaugh, J., dissenting). The same appeals to democracy arise in constitutional contexts. Consider Justice Scalia on constitutional interpretation in *District of Columbia v. Heller*: "[T]he Constitution was written *to be understood by the voters*; its words and phrases were used in their normal and ordinary as distinguished from technical meaning." 554 U.S. 570, 576 (2008) (emphasis added) (quoting United States v. Sprague, 282 U.S. 716, 731 (1931)).

86. *See* Manning, *supra* note 73, at 2392–95.

exercise seemingly unbounded "personal discretion to do justice."[87]

5. Democracy. Textualist theory has recently shifted its focus to a fifth principle: democracy.[88] Traditional faithful agent theory, by definition, attends to the legislative process (even if viewed "objectively"), but the democratic perspective has moved interpreters even further from legislators, to ordinary people.[89] Justice Barrett, one of the advocates of the democratic perspective, argues that textualism is a "democratic" mode of interpretation because it is faithful to the public's understanding of law.[90] "Process-based" interpretive theories, which Justice Barrett rejects, "approach language from the perspective of a hypothetical legislator—a congressional insider."[91] In contrast, textualists "view themselves as agents of the people rather than of Congress and as faithful to the law rather than to the lawgiver."[92] Textualists therefore "approach language from the perspective of an ordinary English speaker—a congressional outsider."[93] The Supreme Court has recently adopted this view of statutory interpretation, indicating that "affected individuals and courts alike are entitled to assume statutory terms bear their ordinary meaning."[94] Still, although textualists now emphasize the democratic pedigree of textualism, there is some disagreement about who, exactly, the "ordinary English speaker" is.[95]

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87. Scalia, *supra* note 84, at 1176.

88. *See* Michael Francus, *Digital Realty, Legislative History, and Textualism After Scalia*, 46 PEPP. L. REV. 511, 511 (2019) (claiming that textualism's latest development is rejecting "faithful agency" and replacing it with "democratic interpretation"); *see also* Joshua Kleinfeld, *Textual Rules in Criminal Statutes*, 88 U. CHI. L. REV. 1791, 1818 (2021) ("Rule-oriented textualism was built on ideas about democratic legitimacy."); Michael W. McConnell, *Active Liberty: A Progressive Alternative to Textualism and Originalism?*, 119 HARV. L. REV. 2387, 2404 (2006) (reviewing STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION (2005)) (arguing that textualism may serve "democracy-enhancing goals better than" intentionalist approaches).

89. *See* Ryan D. Doerfler, *Who Cares How Congress Really Works?*, 66 DUKE L.J. 979, 979–80, 984 (2017) (describing how the outside perspective consists of information salient to both the legislature and the audience as compared to the prevailing "eavesdropping" model of interpretation, where courts privilege congressmembers' perspective).

90. *See* Barrett, *supra* note 16.

91. *Id.* at 2194; *see also* Rebecca M. Kysar, *Interpreting by the Rules*, 99 TEX. L. REV. 1115, 1115 (2021) (describing the "promising new school of statutory interpretation . . . that tries to wed the work of Congress with that of the courts by tying interpretation to congressional process"). Even Justice Scalia, on occasion, referred to a hypothetical legislator when positing a hypothetical reader. *See* Chisom v. Roemer, 501 U.S. 380, 405 (1991) (Scalia, J., dissenting) ("We are to read the words of [a statutory] text as any ordinary Member of Congress would have read them and apply the meaning so determined." (citation omitted)).

92. Barrett, *supra* note 16.

93. *Id.* at 2194.

94. Niz-Chavez v. Garland, 141 S. Ct. 1474, 1482 (2021).

95. For example, according to Justice Barrett, the "ordinary English speaker" is actually an "ordinary lawyer." Barrett, *supra* note 16, at 2209 (explaining that textualists sometimes "use . . . the perspective of the 'ordinary lawyer' rather than the ordinary English speaker"); *see also* Richard H. Fallon, Jr., *Three Symmetries Between Textualist and Purposivist Theories of Statutory Interpretation—and the Irreducible Roles of Values and Judgment Within Both*, 99 CORNELL L. REV. 685, 685, 732–34 (2014) (explaining that "[p]urposivists inquire what reasonable legislators would have intended" while "textualists [ask] . . . how a reasonable person would understand statutory language in context"). The rationale for an ordinary lawyer standard is that "[i]n reading a statute as a lawyer would, a court is not betraying the ordinary people to whom it owes fidelity, but rather employing the perspective of the

B. THE PRINCIPLES OF TEXTUALISM IN CONFLICT

Textualists have relied on intent skepticism, faithful agency, limited judicial interpretive discretion, the rule of law, and democratic interpretation. While these foundational tenets may sometimes complement each other, they can also conflict. There is surely some textualist disagreement as to which interpretive commitment is fundamental. Yet, many of the Court's textualists are increasingly centering the democratic commitment.[96]

While the rhetoric of democratic interpretation is currently popular with some textualists on the Supreme Court, many textualist theorists have privileged a certain normative view of the judicial function regarding facts about ordinary people's understanding of law or language. Robert Pushaw, for instance, argues that "[o]ur constitutional democracy presumes that Congress uses words to convey their semantic meaning to a reasonable person, based on normal linguistic conventions and the context of the specific legislation (such as its entire text and its subject matter)."[97] As a result, Dean John Manning claims that textualism "remains distinctive because it gives priority to semantic context (evidence about the way a reasonable person uses words) rather than policy context (evidence about the way a reasonable person solves problems)."[98]

This claim about how legal language ordinarily communicates (that is, "priority to semantic context") follows from a normative view about our constitutional democracy: that Congress should be writing statutes to enhance direct communication with voters.[99] But exclusively prioritizing semantic meaning is not necessarily how a "reasonable person," or an "ordinary English speaker,"[100] "uses words."[101] What if ordinary people "solve[] problems" through their interpretation of language, in context, with purpose or policy in mind?[102] If so, language meaning and policy context cannot easily be disentangled. To ignore such evidence would, in essence, be to reject how "a reasonable person uses words."[103]

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intermediaries on whom ordinary people rely." Barrett, *supra* note 16, at 2209. Because ordinary people can consult lawyers, judges can assume that ordinary people are "capable of deciphering language that is sometimes specialized and technical." *Id.* Other textualists have also suggested something like the ordinary lawyer standard. For instance, John Manning explains that "under the reasonable-user approach, textualists readily give effect to terms of art—phrases that acquire specialized meaning through use over time as the shared language of specialized communities (legal, commercial, scientific, etc.). In decoding legal commands, the lawyer's lexicon of course assumes a particular prominence." John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 112 (2001).

96. *See, e.g.*, Barrett, *supra* note 16, at 2209; *see also* Bernstein, *supra* note 15, at 439 (recognizing misguided "democratic impulses" of judges who "outsource[]" statutory interpretation); Eskridge, Jr. & Nourse, *supra* note 3, at 1722 (noting that both political populism and statutory textualism aim to "lay[] claim to democratic legitimacy").

97. Pushaw, Jr., *supra* note 68.

98. Manning, *supra* note 10, at 70.

99. *See id.*; Bernstein & Staszewski, *supra* note 15, at 309–18 (explaining the populist claims of textualism).

100. Barrett, *supra* note 16, at 2195.

101. Manning, *supra* note 10, at 70.

102. *Id.*

103. *Id.*

The tension between the textualist commitment to language and an extremely narrow view of the judicial interpretive role is reflected in recent debates about textualism's fractures on the Supreme Court. Professor Tara Grove, for instance, argues that courts must choose between "formalistic textualism" and "flexible textualism."[104] In Grove's view, "[f]ormalistic textualism emphasizes semantic context and downplays normative and consequential concerns, while flexible textualism allows interpreters to make sense of the statutory language with an eye to social context, normative values, and practical consequences."[105] Crucially, the main normative justification for formalistic textualism is *not* that it reflects how ordinary people interpret texts. Rather, formalistic textualism purportedly constrains judicial discretion.[106] Thus, because interpretive sources such as "normative canons and clear statement rules" permit significant judicial discretion, formalistic textualism is skeptical about even long-standing canons and rules such as the absurdity doctrine and the canon of constitutional avoidance.[107]

The choice between formalistic textualism and flexible textualism reflects the tensions among textualism's foundational principles. If one truly wanted to limit judicial discretion, that may come at a high cost.[108] Even the most dogmatic textualist would acknowledge that, in some hard cases, it is difficult to determine what faithful agency of the legislature requires, or what the "ordinary meaning" of a statute implies about a particularly difficult application.[109] If textualists' single, fundamental goal is to limit judicial discretion, they should adopt a simple interpretive rule (for example, always decide for the defendant or for the government). That no textualist adopts such a rule suggests that limiting discretion is (at best) but one of textualism's benefits, not its guiding justification.

In fact, limiting interpretive discretion may well conflict with textualism's focus on ordinary meaning. For example, some textualists believe that judges should reduce their focus on canons because the choice of a proper canon may well increase judicial discretion. But that may preclude judges from using interpretive canons that reflect how ordinary people (as well as lawyers and government officials) would read a statute.[110] For instance, textual canons, just like substantive canons, permit judicial interpretive discretion based on the conditions

104. Grove, *supra* note 8, at 269–71.

105. *Id.* at 290; *see also id.* at 286 (explaining that flexible textualism "authorizes interpreters to make sense of the statutory language by looking at social and policy context, normative values, and the practical consequences of a decision").

106. *See id.* at 270.

107. *Id.* at 287, 292–93.

108. *See id.* at 271 (advocating for "formalistic textualism . . . as a way to protect judicial legitimacy").

109. *See, e.g.*, Niz-Chavez v. Garland, 141 S. Ct. 1474, 1480 (2021); Van Buren v. United States, 141 S. Ct. 1648, 1657 (2021).

110. *See generally* Tobia et al., *From the Outside*, *supra* note 23 (providing empirical evidence that some linguistic canons are implicitly triggered by ordinary people when interpreting legal texts); William N. Eskridge, Jr., *No Frills Textualism*, 119 HARV. L. REV. 2041, 2070 (2006) (book review) (arguing that "[n]o frills textualism would probably trigger more congressional overrides of judicial interpretations of federal statutes—maybe a lot more").

triggering their usage.[111] But many of these canons may help determine ordinary meaning.[112] More troubling to textualism, even determining "semantic" meaning—which many textualists view as the core of legal interpretation—can allow significant judicial discretion.[113] Furthermore, consider implied meanings.[114] Professor Grove argues that to presume Congress "legislates against the backdrop of certain longstanding conventions, such that they read a federal criminal statute to include a necessity defense," makes the interpretive process "quite flexible."[115] The flexibility comes, in part, from the lack of a "stopping point," such that one can assume, for instance, that "Congress legislates with an eye to 'societal norms.'"[116] Again, the problem for textualism is that, like other linguistic principles involving interpretive discretion, presuppositions—the linguistic term for implied conventions—are a normal aspect of communication generally.[117]

In sum, textualism's central defining features are not always consistent. Most significantly, textualism's desire to limit judicial interpretive discretion is in tension with textualism's claim to be a particularly democratic form of interpretation based on "ordinary" meaning. As an interpretive methodology purporting to take language seriously, textualism should strive to accurately reflect the ways in which people use and process language. But textualism does not always seek to implement how ordinary people use language and reason about legal texts. As we suggest later, if textualism does not require reliance on evidence of ordinary meaning, its other defining principles may be further undermined.[118]

C. A NEW APPROACH: METHODOLOGICALLY PROGRESSIVE TEXTUALISM

Textualism ostensibly insists that legal interpretations follow valid and neutral principles of linguistic meaning. But textualism's tenets reveal why the theory is

111. *See* Anita S. Krishnakumar, *Backdoor Purposivism*, 69 DUKE L.J. 1275, 1276 (2020) (explaining that textualist Justices engage in purposive analysis when applying textual canons).

112. *See From the Outside*, *supra* note 23.

113. *See generally* BRIAN G. SLOCUM, ORDINARY MEANING: A THEORY OF THE MOST FUNDAMENTAL PRINCIPLE OF LEGAL INTERPRETATION 213–76 (2015) (describing the discretion inherent in determining the semantic meanings of words).

114. *See infra* Section III.B (discussing implied meanings).

115. Grove, *supra* note 8, at 291–92.

116. *Id.* at 291.

117. *See infra* Section III.B.2. It may be reasonable to limit judicial creation of implied meanings based on fictional notions of legislative or public expectations. *Cf.* Marina Sbisà, *Presupposition, Implicature and Context in Text Understanding*, *in* MODELING AND USING CONTEXT 324, 324 (Paolo Bouquet et al. eds., 1999) (explaining that if the interpreter does not share the speaker's presuppositions, the interpreter might misunderstand her). To reject a presupposition supported by empirical evidence is to privilege a (quite contestable) notion of the proper judicial function over principles that reflect how language is used. Because they are an aspect of the normal functioning of language, the possibility of implied meanings should be amenable to textualists. John Manning argues that textualism maintains that "texts should be taken at face value—with no implied extensions of specific texts or exceptions to general ones." Manning, *supra* note 6, at 424–25. Such a view is normative in nature, rather than a description of how language functions. Manning defends the no-exceptions view as necessary to preserve the "bargain" struck by legislators in enacting the statute, *see id.* at 431, but this view fails to recognize that implied restrictions are sometimes necessary in order to preserve that bargain.

118. *See infra* Parts II, III, IV.

often associated with political conservatism.[119] Textualist concerns about judicial discretion and its narrow faithful agent view of the judicial role are principles that conservatives have traditionally found appealing.[120] Yet, adherence to valid principles of language usage is not inherently conservative. In fact, focusing on language and language comprehension is politically neutral, and may often favor progressive outcomes. Furthermore, textualists increasingly emphasize the connection between textualism and ordinary people—which is also not inherently conservative. Empirical studies reveal that ordinary people's understanding of legal language does not always reflect what leading textualists imagine.[121] Thus, there is no inherent reason why certain elements of textualism should not appeal to progressives, at least ones who are drawn to a language-centric interpretive methodology focusing on language comprehension.

It should therefore not be surprising that there is nascent support for progressive textualism. Progressive textualists argue that "[a]lthough textualism has often been viewed as a tool of conservative legal advocacy, it need not and ought not be viewed that way."[122] By focusing on the text, progressive textualists can "celebrate a methodology that places limits on the ability of biases and individual beliefs to infect judicial decision-making."[123] Thus, progressive textualism can "seek[] to beat conservatives at their own game by insisting that arguments about the text, history, and structure of the [law] often lead to liberal rather than conservative results."[124] By doing so, textualism "can serve as a bulwark against the exclusion of politically unpopular groups from the law's protections."[125] The Court's decision in *Bostock v. Clayton County*, using textualism to protect gay,

119. *See* Neil H. Buchanan & Michael C. Dorf, *A Tale of Two Formalisms: How Law and Economics Mirrors Originalism and Textualism*, 106 CORNELL L. REV. 591, 634 (2021) (arguing that textualism "in practice is predictably ideologically conservative"); Margaret H. Lemos, *The Politics of Statutory Interpretation*, 89 NOTRE DAME L. REV. 849, 901 (2013) (reviewing SCALIA & GARNER, *supra* note 64) ("[T]extualism has become a conservative brand.").

120. *See supra* notes 66–82 and accompanying text.

121. *See, e.g.*, Section III.B.3 (describing the relationship between ordinary people and substantive canons).

122. Katie Eyer, *Symposium: Progressive Textualism and LGBTQ Rights*, SCOTUSBLOG (June 16, 2020, 10:23 AM), https://www.scotusblog.com/2020/06/symposium-progressive-textualism-and-lgbtq-rights/ [https://perma.cc/RR9Y-HG5T] [hereinafter Eyer, *Progressive Textualism*]; *see also* Katie R. Eyer, *Statutory Originalism and LGBT Rights*, 54 WAKE FOREST L. REV. 63, 85 (2019) [hereinafter Eyer, *Statutory Originalism*] (noting that the success of textualism has led "even prominent progressives to proclaim that 'we're all textualists now'") (citation omitted).

123. Eyer, *Progressive Textualism*, *supra* note 122.

124. Kovacs, *supra* note 49 (first alteration in original); *see also* James E. Ryan, *Laying Claim to the Constitution: The Promise of New Textualism*, 97 VA. L. REV. 1523, 1527 (2011) ("[P]rogressive academics are engaging conservatives on their own turf and showing how numerous constitutional provisions are more in line with contemporary progressive values than conservative ones."); Eliot T. Tracz, *Words and Their Meanings: The Role of Textualism in the Progressive Toolbox*, 45 SETON HALL LEGIS. J. 355, 378 (2021) ("If textualism can help Progressives reshape the law, why not adopt it?"); Edward J. Sullivan & Nicholas Cropp, *Making It Up—"Original Intent" and Federal Takings Jurisprudence*, 35 URB. LAW. 203, 280 (2003) ("'[P]rogressive textualism' . . . starts with the text and goes from there.").

125. Eyer, *Progressive Textualism*, *supra* note 122.

lesbian, and transgender workers under Title VII, illustrates that this progressive textualist interpretive view is plausible.[126]

Thus far, progressive textualists have largely viewed progressive textualism as deploying traditional textualist methodology to reach politically progressive interpretations—that is, "beat[ing] conservatives at their own game."[127] But there are two reasons to consider a different kind of progressive textualism. First, textualism has long been criticized for being a disingenuous methodology that provides cover for conservative, results-oriented interpretations.[128] Adopting traditional textualist interpretive practices insofar as they reach politically progressive interpretations would provoke similar criticisms for being disingenuous, and thus illegitimate. Contrary to the belief that textualism places "limits on the ability of biases" to infect interpretation,[129] a politically progressive textualism would encourage motivated jurists to adopt results-oriented interpretations. The second reason is that some of textualism's founding principles are not compelling, especially to progressives. First, the idea that Congress should be cut out of consideration may actually increase judicial discretion to substitute judicial meaning for legislative meaning.[130] Moreover, the textualist preoccupation with limiting judicial interpretive discretion has largely been a failure because textualists on the Supreme Court frequently reach opposed results based on the same method.[131] Furthermore, the emerging "newest" tenet—democratic interpretation—has been poorly conceptualized and implemented by traditional textualists.[132]

Progressive textualism must therefore offer an interpretive theory that departs in some ways from traditional textualism, as well as other methodologies such as purposivism. Some progressive critics have argued that progressive textualism is necessarily "a version of rebranded purposivism."[133] But this argument fails to appreciate the distinction between a methodology that privileges the "language production" of the legislature (purposivism) and one that privileges the "language comprehension" of those subject to the law (textualism).[134] Elsewhere, one of us has urged that good evidence of speaker's meaning (public evidence of Congress's meaning) should help judges when there is no text to interpret or when the text is

126. *See generally* 140 S. Ct. 1731 (2020) (articulating a textualist interpretation of Title VII that prohibits discrimination against gay and transgender persons).

127. Kovacs, *supra* note 49.

128. *See* Lemos, *supra* note 119, at 851.

129. Eyer, *Progressive Textualism*, *supra* note 122.

130. *See* William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 674–75 (1990) (arguing that "it is mildly counterintuitive that an approach asking a court to consider materials generated by the legislative process[] in addition to statutory text . . . canons of construction . . . and statutory precedents . . . leaves the court with *more* discretion than an approach that just considers the latter three sources"). For examples where legislative evidence weighs heavily in favor or against the Court's interpretations, see *Textual Gerrymandering*, *supra* note 3.

131. *See, e.g.*, Eskridge, Jr. & Nourse, *supra* note 3, at 1727–29; Nourse, *supra* note 7.

132. *See id.* at 1727–28.

133. Buchanan & Dorf, *supra* note 119, at 672 n.230.

134. William N. Eskridge, Jr., Brian G. Slocum & Stefan Th. Gries, *The Meaning of* Sex*: Dynamic Words, Novel Applications, and Original Public Meaning*, 119 MICH. L. REV. 1503, 1510 (2021) (distinguishing between language production and language comprehension).

ambiguous.[135] But nothing in this paper depends upon that claim. Instead, here, we focus on the consumer economy of interpretation (how ordinary people understand legislation).

To distinguish itself from both purposivism and traditional textualism, progressive textualism requires a constitutive theory about how interpretation should proceed. Traditional textualism, like those who seek to dress liberal results in traditional textualist garb, rests upon a false vision of language: one which exaggerates its determinacy and reshapes words into weapons in a linguistic battle divorced from the reality of how language is used and understood.[136] Instead, textualism should focus on valid principles of language usage and comprehension reflecting the understandings of real, ordinary people, not those imagined by elite judges. Focusing on democratic interpretation can legitimize progressive textualism as a methodology rather than a grab bag of political ends. And it can offer a standard by which to measure its accuracy.[137]

II. TEXTUALISM AND CONTEXT

Textualists increasingly center democratic values as the theory's justification, claiming to interpret law as faithful "agents of the people." That commitment comes with interpretive obligations. Foremost, it requires that textualists focus on how the subjects of the law actually use and understand language when purporting to "approach language from the perspective of an ordinary English speaker."[138]

Taking textualists' proclaimed democratic commitments at face value, this Part begins to evaluate what it means to be a methodologically progressive textualist. Ordinary people's understanding of law depends on context. Textualists claim that context is essential to their determinations, but in practice often ignore this injunction.[139] Thus, to be methodologically progressive is to reject acontextual

135. Eskridge, Jr. & Nourse, *supra* note 3, at 1795.

136. *Cf.* William N. Eskridge, Jr., *All About Words: Early Understandings of the "Judicial Power" in Statutory Interpretation, 1776–1806*, 101 COLUM. L. REV. 990, 990 (2001) [hereinafter Eskridge, Jr., *All About Words*] (demonstrating that statutory interpretation during the Founding Period was not textualist). It is quite contestable whether traditional textualism in fact limits judicial discretion. *See, e.g.*, William N. Eskridge, Jr., *The New Textualism and Normative Canons*, 113 COLUM. L. REV. 531, 531 (2013) [hereinafter Eskridge, Jr., *The New Textualism and Normative Canons*] (reviewing SCALIA & GARNER, *supra* note 64) (explaining situational conflicts where "[f]or any difficult case, there will be as many as twelve to fifteen relevant 'valid canons' cutting in different directions, leaving considerable room for judicial cherry-picking").

137. To date, progressive textualists have not challenged traditional textualist views of meaning with few exceptions. One progressive textualist argument that differs from that of some traditional textualists is that the original meaning of the words of a legal text are fixed but the authors' intentions regarding how the language should apply are not binding. Instead, the text may apply differently over time as circumstances change. *See* Kovacs, *supra* note 49, at 136. For an examination of such an approach see generally Eskridge, Jr. et al., *supra* note 134.

138. Barrett, *supra* note 16, at 2194.

139. *See* Nourse, *supra* note 7, at pt. V.A.1 (showing how this occurred in the 2020 Supreme Court's term).

interpretation and consider context. A fundamental feature of *regressive* textualism, though, is the failure to properly consider text-within-context.

This Part first explains the relevance of explicit linguistic context. Explicit linguistic context includes sentence-level context as well as surrounding provisions' language. The broad principle that textualists should consider linguistic context is not controversial amongst textualists, even if in practice textualists systematically decontextualize and define terms in isolation.[140] Once a choice of a particular text is made, the choice of context is path-dependent, meaning that the initial choice will determine the propriety of the context. Nourse and Eskridge label this method "textual gerrymandering."[141]

This Part first describes textual gerrymandering with respect to narrow sentence-level context before turning to a discussion of broader linguistic context. It then argues that contextualism carries further implications that challenge traditional textualists' interpretive practices. One implication concerns interpretive rules triggered by context.[142] Because textualists prefer rules to more open-ended standards, they should readily accept that some "contextual patterns are so frequently repeated that they . . . trigger regular assumptions about 'ordinary meaning'" that can be represented by interpretive rules.[143] The bigger challenge for textualists is that these interpretive rules when applied sometimes result in nonliteral interpretations, consistent with how language operates generally. Textualists have traditionally emphasized that the semantic meaning of a text should control, but ordinary people often interpret rules nonliterally, either limiting or expanding semantic meaning[144] Ordinary meaning is therefore often not synonymous with literal meaning. This Part describes how existing interpretive rules capture some of the ways in which ordinary people interpret legal texts nonliterally. Not all of these potential interpretive rules are currently recognized by courts. Thus, we propose, textualists should consider interpretive canons as an *open set*. The traditionally recognized canons may not capture all relevant language generalizations.

A. CHOICE OF TEXT AND CONTEXT

Determining the linguistic meaning of a text requires the interpreter to make choices about both the text and context.[145] The degree to which a textualist should consider *extra*-textual context is debatable. If democratic interpretation is the textualist objective, such consideration may depend on whether ordinary people use such extra-textual context in understanding the relevant text. In contrast, it should

140. *See supra* Part II.

141. *See generally* Eskridge, Jr. & Nourse, *supra* note 3 (defining the phrase "textual gerrymandering").

142. *See* Tobia et al., *From the Outside*, *supra* note 23, at 235-239 (describing textual canons that require the consideration of context for their application).

143. *Id.*, at 6; *see* Caleb Nelson, *A Response to Professor Manning*, 91 VA. L. REV. 451, 452 (2005).

144. *See supra* notes 70, 98 and accompanying text (describing how traditional textualists emphasize the semantic meaning of legal texts).

145. *See* Eskridge, Jr. & Nourse, *supra* note 3, at 1721.

be uncontroversial that textualists should consider both holistic and sentence-level linguistic context.[146]

Typically, there are multiple aspects of the text on which the interpreter could focus, as well as multiple types of context that could be emphasized. By prioritizing one part of the text over others, the interpreter exercises judgments that should be defended.[147] By inappropriately focusing on one part of the text, without considering relevant "(co)text," the interpreter engages in textual gerrymandering.[148] Similarly, the discretion involved in selecting relevant linguistic "(con)text" can, to modify one of Justice Scalia's criticisms of legislative history, allow the interpreter to "look out over a crowd of contextual evidence and pick their ideological friends."[149] Privileging one aspect of context over others must therefore also be defended if the textualist goal of interpretive objectivity is to be furthered.[150]

Text and context are only two of the discretionary choices facing textualist judges. Both text and context are given meaning through the application of interpretive sources and principles. Traditional textualists appeal to a wide range of interpretive sources and criteria, including text, language canons, substantive canons, dictionaries, other statutes, common law and Supreme Court precedent, and even consequences, purpose, intent, and legislative history.[151] Without an announced interpretive hierarchy, textualists are free to exercise discretion in choosing among these sources. Moreover, room for choice exists within each of these sources. For instance, scholars have focused on how textualists shop among different dictionaries for definitions that help reach desired interpretations.[152] Textualists may do the same with interpretive canons.[153] Furthermore, textualist interpretive sources continue to expand. For instance, corpus linguistic analysis is increasingly popular among textualist judges.[154] Judges are beginning to rely on

146. Even with linguistic context, there are likely limits on how related a provision must be for ordinary people—or members of Congress—to consider it relevant to the interpretation of the provision at issue. *See, e.g.*, W. Va. Univ. Hosps., Inc. v. Casey, 499 U.S. 83, 88–90 (1991) (considering dozens of unrelated statutes in determining the meaning of "attorney's fees").

147. *See* Eskridge, Jr. & Nourse, *supra* note 3, at 1722, 1730.

148. *Id.* at 1731–32.

149. *See id.* at 1736; *cf.* Conroy v. Aniskoff, 507 U.S. 511, 519 (1993) (Scalia, J., concurring) (arguing that judicial use of legislative history is "the equivalent of entering a crowded cocktail party and looking over the heads of the guests for one's friends").

150. *See* Eskridge, Jr. & Nourse, *supra* note 3, at 1730 (explaining that "[o]nce one has homed in on putatively controlling text(s), one must ask whether there is context that clarifies the meaning of vague or ambiguous text or confirms one's immediate apprehension of a plain meaning").

151. *See* Krishnakumar, *supra* note 2, at 93.

152. *See* James J. Brudney & Lawrence Baum, *Oasis or Mirage: The Supreme Court's Thirst for Dictionaries in the Rehnquist and Roberts Eras*, 55 WM. & MARY L. REV. 483, 483 (2013); Aprill, *supra* note 26, at 297–30.

153. *See, e.g.*, Eskridge, Jr., *The New Textualism and Normative Canons*, *supra* note 136, at 531 (explaining how interpretive canons often conflict and point in other directions).

154. *See* Thomas R. Lee & Stephen C. Mouritsen, *Judging Ordinary Meaning*, 127 YALE L.J. 788, 795 (2018) (advocating that courts use corpus linguistics in their opinions).

that evidence,[155] but, like dictionaries and similar sources, there is great discretion in terms of when and how to use the tool.[156]

Textualists also exercise discretion in choosing between interpretive sources that provide information relevant to ordinary meaning and those relevant to technical meaning. For example, legal dictionaries often contain technical definitions, which are often not coextensive with ordinary definitions.[157] Traditional textualists typically do not explicitly consider whether these interpretive sources or the meanings they provide are accessible to ordinary people.[158] Thus, even when the text and context are explicitly selected by the court, the text may be given a meaning that may be inaccessible to ordinary people.[159]

1. *Smith v. United States* and Sentence-Level Context

Textual gerrymandering classically involves isolating and defining a word without proper consideration of how the rest of the sentence (the "cotext") may shape that meaning. Consider a classic case, *Smith v. United States*, which involved the interpretation of 18 U.S.C. § 924(c)(1)(A).[160] That section provides for enhanced punishment of a defendant who "uses" a firearm "during and in relation to . . . [a] drug trafficking crime."[161] In *Smith*, the defendant offered to trade an automatic weapon to an undercover officer for cocaine.[162] The Court held that the statute does not require that the firearm have been used *as a weapon,* and thus that the defendant was subject to the sentencing enhancement.[163]

Isolating the word "use" from the rest of the provision, the Court consulted two dictionaries and concluded that "use" means "to employ" or "to derive service from."[164] On the basis of the dictionary definitions, the Court concluded that exchanging a firearm for drugs "can be described as 'use' within the everyday meaning of that term."[165] In a dissenting opinion, Justice Scalia criticized the Court's failure to properly consider "(co)text" in determining the ordinary meaning of "use."[166] In essence, Justice Scalia argued that the Court failed to consider that "use" when combined with "a firearm"

155. *See id.* at 796 n.23; *see also* Tobia, *The Corpus and the Courts*, *supra* note 30 (discussing criticisms of corpus linguistics and offering a set of best practices for its use within legal interpretation).

156. *See* Kevin Tobia, *Dueling Dictionaries and Clashing Corpora*, DUKE L.J. ONLINE (forthcoming 2022). Moreover, evidence suggests that relying on corpus linguistics frequency analyses can lead to precisely the opposite conclusion one would draw from a broader dictionary definition. *See* Kevin P. Tobia, *Testing Ordinary Meaning*, 134 HARV. L. REV. 726, 734–35 (2020) [hereinafter Tobia, *Testing Ordinary Meaning*].

157. *See* Tobia et al., *Ordinary Meaning*, *supra* note 23.

158. *See* Eskridge, Jr. & Nourse, *supra* note 3, at 1761–62 (describing the "faux-populis[m]" of "elite judges" who "imagine themselves as ordinary people reading technical statutes as if they lived decades in the past").

159. *See* Tobia et al., *Ordinary Meaning*, *supra* note 23 (describing how ordinary people may not always have fair notice when courts give statutes technical meanings).

160. 508 U.S. 223, 225 (1993).

161. *Id.* at 227 (quoting 18 U.S.C. § 924(c)(1)(A)).

162. *Id.* at 226.

163. *See id.* at 240–41.

164. *Id.* at 228–29 (internal citations omitted).

165. *Id.* at 228.

166. *See id.* at 241 (Scalia, J., dissenting) (indicating that the Court failed to consider context when relying on dictionary definitions).

means something different than "use" by itself. Thus, "[t]o use an instrumentality ordinarily means to use it for its intended purpose."[167] Consequently, "to speak of 'using a firearm' is to speak of using it for its distinctive purpose, *i.e.*, as a weapon."[168]

Justice Scalia's approach to the interpretation of § 924(c)(1)(A) was superior to the Court's because Justice Scalia considered important "(co)text." In contrast, the Court started its opinion by gerrymandering the text, decontextualizing the single term "use," and elaborating it with dictionary definitions.[169] Furthermore, Justice Scalia's linguistic intuitions were consistent with linguistic research about expressions such as those in § 924(c)(1)(A). The structure of the provision contained an "event ellipsis," which the Court did not recognize.[170] "An 'event' is a type of situation in which something happens, in contrast to a 'state' where something just is."[171] Section 924(c)(1)(A) specifies the subject or agent (the defendant) and the direct object (the firearm), and requires a connection to a drug-trafficking crime, but it does not specify the event: how the defendant must "use" the firearm within the meaning of the provision. Expressions with fully specified event structures are "rare when the event is commonly associated with the noun."[172] Rather, "[f]ull event structures tend to occur only with less predictable activities."[173] Thus, Justice Scalia's argument that "as a weapon" was fairly implied by the statute is consistent with empirical linguistics.[174] In our terms, this is a more methodologically progressive textualism.[175] In contrast, the Court's gerrymandering of the text was methodologically regressive.[176]

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167. *Id.* at 242.

168. *Id.* Justice Scalia argued that, "[w]hen someone asks, 'Do you use a cane?,' he is not inquiring whether you have your grandfather's silver-handled walking stick on display in the hall; he wants to know whether you *walk* with a cane." *Id.* The words "as a weapon" are thus "reasonably implicit" from the context of the statute. *Id.* at 244. Note that Justice Scalia is using the prototypical application of the term "use," the one that most people would agree upon, not all potential meanings of the term.

169. *See id.* at 228–29 (looking to dictionary definitions to define "use").

170. A linguistic ellipsis is a "truncated or partial linguistic form . . . in which constituents normally occurring in a sentence are superficially absent, licenced by structurally present prior antecedents." *Ellipsis*, *in* 2 ENCYCLOPEDIA OF COGNITIVE SCIENCE 1094, 1094 (Lynn Nadel ed. 2002). It is a common way to avoid periphrastic constructions. For example, a case of verb-phrase ellipsis occurs in the following sentence: Anne went to the gym, and Bill did, too. SLOCUM, *supra* note 113, at 262. The sentence without ellipsis would read: Anne went to the gym, and Bill went to the gym, too. *Id.*

171. SLOCUM, *supra* note 113, at 214.

172. Matthew J. Traxler, Brian McElree, Rihana S. Williams & Martin J. Pickering, *Context Effects in Coercion: Evidence from Eye Movements*, 53 J. MEMORY & LANGUAGE 1, 1–2 (2005). Ellipsis is consistent with the empirical evidence indicating that speakers produce the minimum linguistic information sufficient to achieve the speaker's communicational needs. *See* JOHN A. HAWKINS, EFFICIENCY AND COMPLEXITY IN GRAMMARS 38 (2004).

173. *See* Traxler et al., *supra* note 172.

174. *Smith*, 508 U.S. at 244 (Scalia, J., dissenting).

175. Note the difference between a methodologically progressive position and whether the actual result is progressive. Readers can differ about whether the reading was the correct result from a policy or political perspective. If one believes, as did Justice Scalia, in a Second Amendment right, then any narrowing construction, such as this one, is likely to serve conservative interests. By contrast, a broader interpretation of the word "use," is likely to serve liberal interests seeking greater scope of gun control laws. Moreover, none of this tells us anything about the speaker's intended meaning, namely what

Justice Scalia's opinion in *Smith* may have been one of his linguistic high-water marks as a Justice, but the linguistic sophistication exhibited was not always present in his other writings.[177] For instance, in his 2012 book, Justice Scalia attempted to illustrate how textualism could solve H.L.A. Hart's famous hypothetical involving a "legal rule [that] forbids you to take a vehicle into the public park."[178] Justice Scalia purported to be seeking the general, semantic meaning of "vehicle," and indicated that deference should be given to the already existing work of linguists.[179] Justice Scalia thus approached the hypothetical by searching for the perfect dictionary definition of "vehicle" and, finding them all to define the term too broadly, created a definition on his own without pointing to any external evidence.[180] Justice Scalia did not consider though that, as in the *Smith* case, "vehicle" by itself might have a different meaning in isolation than it does when the context involves "tak[ing one] into the public park."[181] Taking the term "vehicle" out of context allows the interpreter to create a new "null" context that essentially ignores the actual rule's context.

In contrast, Justice Kavanaugh has indicated a sensitivity to how context shapes meaning.[182] When contemplating the "no vehicles may enter the park" rule, Justice Kavanaugh argued that the literal meaning of "vehicle" by itself would "encompass a baby stroller," but the ordinary meaning of "vehicle" would not.[183] Justice Kavanaugh did not explain exactly how literal and ordinary meaning should be distinguished.[184] Yet, his inclination to distinguish between the "literal" and "ordinary" meaning of "vehicle" could be understood as reflecting the significance of sentence-level context. It may be that a baby stroller is a "vehicle"

Congress thought. *See* Eskridge, Jr. & Nourse, *supra* note 3, at 1778–79, 1797 (arguing that Congress drafted the gun laws in light of state law terms of art given the political sensitivity of gun control).

176. These findings should have implications for ordinary meaning. If nothing else, they should convince courts that acontextual consideration of dictionary definitions, as occurred in the *Smith* case, will not necessarily result in interpretations that represent the ordinary meanings of the relevant provisions.

177. In most other situations, Justice Scalia was happy to rely on dictionary definitions. *See* Samuel A. Thumma & Jeffrey L. Kirchmeier, *The Lexicon Has Become a Fortress: The United States Supreme Court's Use of Dictionaries*, 47 BUFF. L. REV. 227, 261–62 (1999) (presenting empirical evidence that "Justice Scalia has relied on the dictionary more times than any other Justice in the history of the Court").

178. H. L. A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 607 (1958).

179. *See* SCALIA & GARNER, *supra* note 64, at 36–37.

180. *See id.* at 37 (conceding that "[a]nything that is ever called a *vehicle* (in the relevant sense) would fall within these definitions"). Instead, without citation to any authority, Scalia and Garner created their own "colloquial" definition of "vehicle" as "simply a *sizable* wheeled conveyance (as opposed to one of any size that is motorized)." *Id.* On the basis of this invented definition, they announced that "remote-controlled model cars, baby carriages, [and] tricycles" should not be considered "vehicles." *Id.* at 37–38.

181. Hart, *supra* note 178.

182. Although there were other flaws in Justice Kavanaugh's dissenting opinion. *See generally* Eskridge, Jr. et al., *supra* note 134 (outlining Justice Kavanaugh's interpretive flaws).

183. Bostock v. Clayton County, 140 S. Ct. 1731, 1825 (2020) (Kavanaugh, J., dissenting).

184. In a survey of ordinary people (and law students), fewer than 30% agreed that a baby stroller is a "vehicle." Tobia, *Testing Ordinary Meaning*, *supra* note 156, at 766 fig.5.

(at least sometimes), but the (co)text of the full sentence ("no vehicles may enter the park") suggests that baby strollers are *not* prohibited.[185] In the same way, a toy car is a "vehicle" but most people would not understand the no vehicles rule to prohibit toy cars from the park. Such consideration of (co)text is an improvement on the typical traditional textualist approach of isolating an individual word, looking up its definition in a dictionary or some other source, and then applying that definition without proper consideration of how the (co)text might help shape the meaning of the word at issue.

2. *King v. Burwell* and Holistic Context

A second type of textual gerrymandering occurs when a judge fails to consider holistic linguistic context located outside the specific provision at issue. Consider a classic case where the majority opinion relied heavily on holistic context but the dissenting opinion focused in isolation on the semantic meaning of one of the terms. In *King v. Burwell*, the Court interpreted the Affordable Care Act (ACA) by harmonizing the text rather than focusing on isolated parts of it and undermining the statutory plan.[186] The ACA encouraged the purchase of health insurance by providing public exchanges (Exchanges) on which people could buy health insurance policies and also created subsidies to help pay for the policies.[187] States were required to create Exchanges on which their citizens could purchase insurance —but, if they did not, then the Federal Department of Health and Human Services (HHS) would create "such Exchange within the State."[188] Section 36B(c)(2)(A)(i) addressed how the tax credits would be calculated.[189] That section defines a "coverage month" (when the taxpayer is eligible for subsidies) as one in which the taxpayer is covered by a plan purchased through "an Exchange *established by the State* under section 1311."[190] The interpretive question was whether people who purchased insurance on HHS-established Exchanges were eligible for the tax subsidies.[191]

After viewing the interpretive question in light of the entire statute, the Court held that the tax subsidies were available with respect to HHS-established Exchanges.[192] The Court noted that the opposite interpretation would "make little sense," and thus, "when read in context," the relevant provisions were "properly viewed as ambiguous."[193] By finding ambiguity, the Court was able to "avoid the type of calamitous result that Congress plainly meant to avoid" and offer a

185. If Justice Kavanaugh's argument is that the "ordinary meaning" of "vehicles" *always* excludes baby strollers, that assertion is likely incorrect. Consider, for example, the rule "all vehicles that carry children must be designed with safety features to reduce the severity of injuries." There are undoubtedly other contexts in which ordinary people would likely understand rules about "vehicles" to include baby strollers.

186. 576 U.S. 473 (2015).

187. *See id.* at 479 (quoting 42 U.S.C. § 18041(c)(1)).

188. *See id.* at 483.

189. *See id.* at 484–85.

190. *Id.* at 483 (quoting 26 U.S.C. § 36B(c)(2)(A)).

191. *See id.* at 479.

192. *See id.* at 498.

193. *Id.* at 487, 490–91.

justification for "interpret[ing] the Act in a way that" improves health insurance markets rather than "destroy them."[194] Viewing the tax credits as available to purchasers on both state and federal exchanges made sense of a good deal of text about federal exchanges that would otherwise have been unnecessary.

In dissent, Justice Scalia argued that the Court's interpretation meant that "[w]ords no longer have meaning."[195] Justice Scalia was correct in the narrow sense that "by the State" would likely be given a different meaning in other contexts.[196] But the narrow focus on a term in isolation—such as "by the State"—suggests a regressive textualism. People do not understand texts in such a manner. To the contrary, it is "widely recognized that . . . in order to understand a text, we must understand more than what is encoded in the text itself," including things that are "presupposed and/or implicated by the text."[197] If this sort of "broader comprehension" reflects how ordinary people understand texts, it is a mistake to interpret words and phrases in isolation without regard to broader contextual evidence.[198] To borrow from Justice Scalia's terms, his method slays a statutory elephant (the 900 page ACA), with a tiny mouse-size word ("by" instead of "for" the state).

B. INTERPRETIVE RULES AND NONLITERAL INTERPRETATIONS

The proper consideration of context is also necessary in order to avoid overly literal interpretations.[199] Recently, some textualists on the Supreme Court have charged each other with inappropriately literal interpretations.[200] For instance, Justices Gorsuch and Kavanaugh have both stated that it is error to focus on literal word meanings rather than larger phrasal and sentence meanings.[201] Similarly, Dean John Manning argues that dictionary definitions sometimes "fail to account for settled nuances or background conventions that qualify the literal meaning of language and, in particular, of legal language."[202] By "background conventions," Manning means principles relevant to the law, and the "relevant linguistic community" subject to the law, such as common law criminal defenses.[203]

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194. *Id*. at 498.

195. *Id*. at 500 (Scalia, J., dissenting).

196. *See id*. at 491 (majority opinion) (explaining that the ACA "contains more than a few examples of inartful drafting").

197. Sbisà, *supra* note 117, at 324.

198. *Id*.

199. *See generally* Bill Watson, *Literalism in Statutory Interpretation: What Is It and What Is Wrong with It?*, 2021 U. ILL. L. REV. ONLINE 218 (explaining that an interpretation is inappropriately literal if it fails to account for context in some essential way).

200. *See* Tobia et al., *From the Outside*, *supra* note 23, at 281–83; *see, e.g*., Niz-Chavez v. Garland, 141 S.Ct. 1474 (Kavanaugh, J., dissenting) (charging that Justice Gorsuch's focus on the word "a" was literalistic).

201. *See* Bostock v. Clayton County, 140 S.Ct. 1731, 1750 (2020) (Gorsuch, J., writing for the Court) ("[W]e must be attuned to the possibility that a statutory phrase ordinarily bears a different meaning than the terms do when viewed individually or literally."); *id*. at 1825 (Kavanaugh, J., dissenting) ("[C]ourts must follow ordinary meaning, not literal meaning. And courts must adhere to the ordinary meaning of phrases, not just the meaning of the words in a phrase.").

202. Manning, *supra* note 73.

203. *Id*. at 2466–67.

Gorsuch, Kavanaugh, and Manning correctly criticize judicial overreliance on literal meaning, but textualists in general have failed to appreciate that nonliteralness is a systematic aspect of language itself, rather than something occasionally mandated by a legal principle. Thus, one necessary feature of progressive textualism is recognizing that literal interpretations are often incorrect *as a matter of language*. Although (some) textualists now appeal to nonliteralism rhetorically, actually implementing such a commitment may change current textualist interpretive practices. While textualists may commonly assert the importance of context (often in a sort of boilerplate manner),[204] they also emphasize the importance of statutes' semantic meanings.[205] Correlatively, judicial use of dictionaries has increased dramatically along with the ascendancy of textualism, even though this depends upon a process of decontextualization.[206] Thus, textualists' recent rejection of overly literal interpretations as a matter of theory belies the larger textualist practice of decontextualization. Textualists claim to reject literalism and consider context, but they often deploy a method that ends up as literalism because it gives insufficient weight to context.

Basic linguistic principles provide that the interpretation of everyday non-legal communications requires considering context, which often indicates that a nonliteral meaning is correct.[207] The same is true with legal texts. Statutes contain complex expressions, with key terms embedded in specific contexts.[208] If the goal of textualism is to interpret a text in line with its *actual* ordinary meanings—a fact about how the ordinary person understands it—textualists should carefully consider the interpretive rules that help interpreters make sense of context. Interpretive sources such as dictionaries provide evidence of word meanings, but such information alone is not sufficient to determine the ordinary meaning of a provision because it depends upon pulling words out of their statutory context.[209]

Linguistic interpretive rules should therefore be designed to help interpreters make sense of how recurring contexts shape the meanings of words. General

204. Textualists may now rhetorically emphasize context's importance, but it is unclear whether this rhetoric has overcome the common perception of textualism as a literalist method of interpretation. *See* WILLIAM D. POPKIN, A DICTIONARY OF STATUTORY INTERPRETATION 194 (2007) (observing that "'[l]iteralism' is often used as a synonym for 'textualism'").

205. *See* Grove, *supra* note 8, at 269 (explaining that "[f]ormalistic textualism emphasizes semantic context"); Jeremy K. Kessler & David E. Pozen, *Working Themselves Impure: A Life Cycle Theory of Legal Theories*, 83 U. CHI. L. REV. 1819, 1849 (2016) (arguing that textualists "focus on the semantic structure of statutory texts rather than the policy debates surrounding their passage"); Manning, *supra* note 10, at 76 (arguing that "[t]extualists give precedence to *semantic context*").

206. *See, e.g.*, Brudney & Baum, *supra* note 152, at 483 (describing that the "Supreme Court's use of dictionaries . . . has dramatically increased during the Rehnquist and Roberts Court eras").

207. *See generally* FRANÇOIS RECANATI, LITERAL MEANING (2004) (noting that context plays an integral role in understanding meaning).

208. *See* Peter M. Tiersma, *Some Myths About Legal Language*, 2 L., CULTURE & HUMANS. 29, 36 (2006) (describing how the features of legal texts makes them complex and difficult to parse).

209. *See* M.A.K. HALLIDAY & COLIN YALLOP, LEXICOLOGY: A SHORT INTRODUCTION 24–25 (2007) (explaining that "the dictionary takes words away from their common use in their customary settings," which "can be highly misleading if used as a basis of theorizing about what words and their meanings are").

affirmations about the importance of context are therefore of limited usefulness. Rather, a nonliteralness theory in legal interpretation should consider the systematic ways in which context and language combine to require nonliteral meanings. Although not commonly viewed in such terms, some existing canons of interpretation address contextual patterns that lead to nonliteral meanings.[210] These existing canons of interpretation may not reflect nonlegal language usage. Some, however, are valid as reflections of ordinary meaning, and they illustrate that ordinary meaning often does not depend on selecting the correct dictionary definition.[211] Rather, ordinary meaning sometimes involves assessing how contextual evidence may sometimes dictate nonliteral meanings.

To see this, we first offer an example where nonliteralness is a systematic aspect of language itself. We then explain that nonliteralness is inherent in various textual canons of interpretation.

1. Quantifiers and Nonliteral Meanings

Consider literalism and quantifiers, which are words (that is, "all," "any," etc.) modifying an expression in terms of amount. Typically, modifiers are restricted in some way by context. Consider the following statement:

(1) Every napkin is frayed.

When interpreting this sentence, literalism holds that quantifiers such as "any" and "every" quantify with no limit.[212] On that view, the meaning of (1) is that *every napkin in existence* is frayed.[213] But even with little contextual evidence, ordinary people are likely to reject that literal meaning of (1)—every napkin in existence.[214] An ordinary listener will interpret "every" to quantify some smaller domain such as "in the house" or "on the table." As this example illustrates, the assignment of a limited domain to a quantifier is intuitively connected to the ordinary meaning of an expression, considered in its proper context (even if the context is unstated). Linguists readily treat terms such as "every" as typically being restricted, creating situations where there is a gap between intuitive meaning and literal meaning.[215] However, courts have not typically viewed quantifiers as

210. *See* Tobia et al., *From the Outside*, *supra* note 23, at 286.

211. *See id.* at 73–74.

212. *See* Isidora Stojanovic, *The Scope and the Subtleties of the Contextualism-Literalism-Relativism Debate*, 2 LANGUAGE & LINGUISTICS COMPASS 1171, 1172 (2008).

213. *See id.*

214. *See* RECANATI, *supra* note 207, at 11. Consider the example, "You are not going to die." Recanti writes:

> Kent Bach, to whom [the example] is due, imagines a child crying because of a minor cut and her mother uttering [] in response. What is meant is: "You're not going to die from that cut." But literally the utterance expresses the proposition that the kid will not die *tout court*—as if he or she were immortal. The extra element contextually provided (the implicit reference to the cut) does not correspond to anything in the sentence itself; nor is it an unarticulated constituent whose contextual provision is necessary to make the utterance fully propositional.

Id. at 8–9.

215. *See id.* at 9.

having contextually restricted domains.[216] Instead, a "common judicial assumption is that universal quantifiers are unlimited in scope."[217]

2. *Ali v. Bureau of Prisons* and Nonliteral Meanings

Consider a representative Supreme Court case, *Ali v. Federal Bureau of Prisons*, which turned on the meaning of a quantifier in the Federal Tort Claims Act (FTCA).[218] The provision at issue, § 1346(b), authorizes claims against the United States

> for money damages . . . for injury or loss of property . . . caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment.[219]

The FTCA exempts from this waiver certain categories of claims, including an exception in § 2680(c) which provides that § 1346(b) does not apply to

> [a]ny claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods, merchandise, or other property by any officer of customs or excise or any other law enforcement officer. . . .[220]

The Supreme Court, in an opinion written by Justice Thomas, interpreted § 2680(c) as encompassing all law enforcement officers, including prison guards.[221] The Court began its analysis by asserting that when "read naturally, the word 'any' has an expansive meaning," and quoted a dictionary definition (via one of its previous decisions) that defined "any" as "one or some indiscriminately of whatever kind."[222] The Court reasoned that using "'any' to modify 'other law enforcement officer' is most naturally read to mean law enforcement officers of whatever kind," emphasizing that "'any' is repeated four times in the relevant portion of § 2680(c)."[223]

The *Ali* opinion reflects confusion about quantifier phrases. Most importantly, the Court fails to realize that quantifiers are contextually restricted. Note the Court's claim that it was giving an unrestricted scope to the phrase "any other law enforcement officer," stating that it means "law enforcement officers of whatever kind."[224] Despite the Court's absolute language, in other contexts, the Court would certainly implicitly restrict the domain of "any other law enforcement officer." For instance, § 1346(b)(1) authorizes claims only for acts of federal government employees. For that reason, it is obvious that a Court would not read "officers of whatever kind" in § 2680(c) to include foreign or state law enforcement officers.[225] In that sense then,

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216. Tobia et al., *From the Outside*, *supra* note 23, at 240.
217. *See id.* at 27–30.
218. 552 U.S. 214, 218–19 (2008).
219. 28 U.S.C. § 1346(b)(1).
220. 28 U.S.C. § 2680(c).
221. 552 U.S. at 216.
222. *Id.* at 219 (quoting United States v. Gonzales, 520 U.S. 1, 5 (1997)).
223. *Id.* at 220. In addition, the Court emphasized that amendments to § 2680(c), although not applicable to Ali's claim, indicated that Congress viewed the section as having a broad meaning. *See id.* at 221–22.
224. *Id.* at 220.

contrary to the Court's assertion, the phrase does *not* mean "law enforcement officers of whatever kind."

Empirical data confirms that ordinary people restrict the scope of quantifiers in ordinary language.[226] Ordinary people also understand the scope of quantifiers to be restricted when those quantifiers appear in legal rules.[227] For instance, when presented with part of a law that describes "any law enforcement officer," ordinary people tend to restrict the scope of "any" even when no further context is provided.[228] However, textualists commonly assume the opposite. Consider Justice Thomas's dissent in *Small v. United States*: "In concluding that 'any' means not what it says, but rather 'a subset of any,' [a court] distorts the plain meaning of the statute and departs from established principles of statutory construction."[229]

Quantifier domain restriction presents a useful test case for textualists, considering that ordinary people tend to restrict quantifiers (like "any"). Textualists who claim to privilege ordinary people's understanding of law might even endorse "new" textual canons of interpretation, such as a "quantifier domain restriction canon," which would create a presumption that terms like "any" or "all" *X* do not mean *literally* any or all *X* but rather some contextually determined subset of *X*.[230] Textualists do not currently recognize such a canon, but textualists committed to interpreting law from the perspective of an ordinary person would have good reason to adopt such a nontraditional presumption.

Textualists thus face a choice. The first option is to employ the interpretive rules that accurately reflect how ordinary people understand language—whatever those true principles are. The second option is to employ interpretive rules that have been traditionally recognized as canons by elite judges and legal commentators. For textualists who claim to promote democracy through faithful agency to the people, the correct choice should be clear. Taking quantifier domain restriction as an example, empirical evidence—about ordinary and legal cognition—suggests that ordinary people tend to generally restrict the scope of quantifiers. The phase "every napkin is frayed" does not refer to literally every napkin in the world, and "any officer of customs or excise or any other law enforcement officer" does not mean literally any person who has authority to enforce law. This principle has never been recognized by textualists as a rule of interpretation, and in fact textualists like Justice Thomas have argued against such an interpretive principle. Nevertheless, textualists who claim to be faithful to ordinary people

225. *See id.* at 244 (Breyer, J., dissenting) (pointing out that, within the context of U.S. statutes, the phrase "*any* court" would not include consideration of "*foreign* court," and yet, the Court's interpretation narrows "any other law enforcement officer" to any U.S. law enforcement officer despite the absolutist language).

226. *See* Stojanovic, *supra* note 212; Isidora Stojanovic, *Domain-Sensitivity*, 184 SYNTHESE 137, 141–42 (2012).

227. *See* Tobia et al., *From the Outside*, *supra* note 23, at 261–62.

228. *See id.* at 49.

229. Small v. United States, 544 U.S. 385, 395 (2005) (Thomas, J., dissenting).

230. *See* Tobia et al., *From the Outside*, *supra* note 23, at 261.

should consider that their reliance on literal meaning puts them at odds with how ordinary people use language.

3. Existing Canons that Produce Nonliteral Meanings

Some interpretive principles known as "textual canons" already direct courts to adopt nonliteral interpretations.[231] "Textual canons" are interpretive principles "drawn from the drafter's choice of words, their grammatical placement in sentences, and their relationship to other parts of the 'whole' statute."[232] These presumptions are based on general principles of language usage rather than policy or legal concerns.[233]

One key feature of textual canons is that their application often involves more interpretive discretion than does choosing the literal meaning. For example, consider two possible statutes:

(2) No cars, motorcycles, or other vehicles are permitted in the park.

(3) No bicycles, scooters, or other vehicles are permitted in the park.[234]

One could interpret both (2) and (3) by giving each term its literal meaning. For both provisions, this would prohibit "vehicles" of any kind from the park. The only interpretive discretion involved with "vehicles" would be the selection of the meaning of "vehicle," perhaps by choosing between a broad or narrow dictionary definition.[235]

Yet, ordinary people likely understand "other vehicles" in (2) and (3) as referring to some *subset* of vehicles. They are unlikely, for example, to think of the vehicles known as "baby strollers" to be barred from the park.[236] Thus, neither rule should be understood to mean that *literally* every vehicle is prohibited from the park. This ordinary intuition is reflected in the traditional canon known as *ejusdem generis*: "When general words follow an enumerated class of things, the general words should be construed to apply to things of the same general nature."[237]

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231. *See id*. at 286.

232. WILLIAM N. ESKRIDGE, JR. & PHILIP P. FRICKEY, CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 634 (2d ed. 1995).

233. *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, 1330 (2018) (distinguishing between "'linguistic' or 'textual' canons, which are presumptions about how language is used," and "normative" or "policy" canons); William Baude & Stephen E. Sachs, *The Law of Interpretation*, 130 HARV. L. REV. 1079, 1121 (2017) ("[Linguistic canons] are just attempts to read whatever the authors wrote, according to the appropriate theory of reading . . . .").

234. Tobia et al., *From the Outside*, *supra* note 23, at 285.

235. *See* SCALIA & GARNER, *supra* note 64, at 36–39 (discussing how some dictionary definitions of "vehicle" are quite broad).

236. *See* Eskridge, Jr. et al., *supra* note 134, at 1537 (describing Justice Kavanaugh's view that baby strollers should be permitted).

237. Tobia et al., *From the Outside*, *supra* note 23, at 219; Larry Alexander, *Bad Beginnings*, 145 U. PA. L. REV. 57, 65 (1996); *see also infra* Part I (outlining the main animating tenets and theories of textualism).

Acknowledging interpretive rules like *ejusdem generis* because they reflect ordinary people's understanding promotes a more "democratic" interpretive philosophy. But it likely also leads to more interpretive choices. It would be fairly straightforward to give a literal meaning to each word of the rules in (2) and (3). The recognition that *ejusdem generis* applies (that the rule is *triggered*) is only the interpreter's first step.[238] An interpreter must then determine *how* the canon is applied, in context. With *ejusdem generis*, that involves determining the "general nature" of the enumerated class of things. Given the provision's language, perhaps a skateboard is understood to be *prohibited* under rule (3) but *permitted* under rule (2).

Canons directing interpreters toward nonliteral meanings highlight the tension among the tenets of traditional textualism. Giving literal interpretations to language is one way to limit judicial discretion—a long-standing concern of textualists—as would be the choice to give any term its first definition from Merriam-Webster's dictionary, or the choice to resolve all statutes in favor of the defendant. But ordinary people do not interpret language so simply and literally. Insofar as textualism prioritizes democratic values and a commitment to ordinary understanding, it should avoid the temptation to default to literalism.

4. *McBoyle v. United States* and Nonliteral Meanings

To further illustrate the *ejusdem generis* canon and nonliteral interpretations, consider the famous *McBoyle v. United States* case, which required the Court to determine whether an airplane is a "vehicle."[239] The National Motor Vehicle Theft Act punishes those who knowingly transport a stolen "automobile, automobile truck, automobile wagon, motor cycle, or any other self-propelled vehicle not designed for running on rails."[240] Justice Holmes found that the statute *did not* apply to an aircraft because an airplane is not a vehicle.[241]

Traditional textualists might view the case as turning on the correct meaning of "vehicle."[242] But, as with the examples above, focusing on "vehicle" would miss an important type of repeating context that may narrow the meaning of "vehicle." The general phrase "any other vehicle" comes after a long list of more specific terms: automobile, automobile truck, automobile wagon, and motor cycle. Perhaps, based on this linguistic context, an ordinary reader would understand the statutory rule to be more specific: "Vehicle" refers to automobiles, motorcycles, and similar entities, like buses, that are designed for traveling on land. But vehicles of a very different nature (for example, boats or airplanes) are not "vehicles" in this context.[243] "Vehicle" thus might communicate something different, and narrower, when it is placed at the end of a list in a rule.

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238. *See* Tobia et al., *From the Outside*, *supra* note 23, at 227–28 (distinguishing the triggering of *ejusdem generis* from its application).

239. 283 U.S. 25, 26 (1931).

240. *Id.* at 25.

241. *See id.* at 27.

242. *See* SCALIA & GARNER, *supra* note 64, at 36 (addressing a similar hypothetical by emphasizing the importance of the definition of "vehicle").

243. For Justice Kavanaugh, even the question of whether a baby stroller is a vehicle in this context may be difficult. *See supra* note 184 and accompanying text.

The *ejusdem generis* canon thus directs the interpreter to reject the literal meaning of the words in a catch-all in favor of some narrower meaning. The *ejusdem generis* directive is not unique in its non-literalism. Judges rely heavily on dozens of similar interpretive principles.[244] For instance, the *noscitur a sociis* canon—Latin for "words are known by their associates"—often serves the same function. In *Yates v. United States*, for instance, the Court's plurality opinion deployed the *noscitur* canon (and also cited to *ejusdem generis*) to select a subset of the literal meaning of "tangible object."[245] Even the rule against surplusage often points to a nonliteral interpretation in order to avoid redundancy.[246]

5. Gender and Number Canons and Nonliteral Meanings

The canons we have discussed so far tend to narrow literal meaning. Ordinary people understand "every napkin" as narrower than the phrase's literal meaning. Similarly, people understand "No bicycles, scooters, or other vehicles are permitted in the park" to include only a subset of entities that would fall under the literal meaning of "vehicles."

This might suggest that methodologically progressive textualism favors interpretations that narrow literal meaning. However, this is incorrect. Other canons *expand* literal meaning. Consider the traditional "gender" canons. One of the gender canons provides that male pronouns include women, which may not correspond with some dictionary definitions and could thus be viewed as a nonliteral meaning.[247] People generally understand a law referring to "his" or "her" to refer to men and women[248]—even if in popular culture, the gender-inclusive "he" and "her" are in decline.[249]

The same is true of the "number canons." Consider the rule, "no one may shoot rockets in the town." Taken literally, this rule seems to prohibit people from shooting two, three, or more rockets. To literally prohibit the shooting of one or more rockets, we would expect a rule to announce, "no one may shoot one or more rockets in the town." Of course, ordinary people do not understand rules so literally. They understand that a prohibition against shooting "rockets" also

244. *See* WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY, ELIZABETH GARRETT & JAMES J. BRUDNEY, CASES AND MATERIALS ON LEGISLATION AND REGULATION: STATUTES AND THE CREATION OF PUBLIC POLICY 1195–1215 (5th ed. 2014). (identifying 187 different interpretive canons).

245. 574 U.S. 528, 532, 543–44 (2015) (determining whether a fish is considered a "tangible object" within the meaning of the statute). The Court cited to *noscitur* and *ejusdem generis* as justification for its non-literal interpretation, which differed from Justice Kagan's literalist insistence that "[a] 'tangible object' is an object that's tangible." *Id.* at 553 (Kagan, J., dissenting).

246. *See, e.g.*, Gustafson v. Alloyd Co., 513 U.S. 561, 574–75 (1995) (interpreting "communication" to mean "documents of wide dissemination" in part based on the rule against surplusage).

247. *See, e.g.*, *His*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/his [https://perma.cc/6RZF-6GP3] (last visited Apr. 20, 2022) (defining "his" as "of or relating to him or himself especially as possessor, agent, or object of an action"). *But see He*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/he [https://perma.cc/AG6S-F7GK] (last visited Apr. 20, 2022) (defining "he" with both gendered and generic senses).

248. *See* Tobia et al., *From the Outside*, *supra* note 23, at 251.

249. *See* DENIS BARON, WHAT'S YOUR PRONOUN?: BEYOND HE & SHE 40 (2020).

prohibits shooting a "rocket."[250] This understanding is reflected in the canon that "the plural includes the singular." Like the gender canons, this number canon can be seen as expanding literal meaning. These canons—that the masculine includes the feminine, the feminine includes the masculine, the plural includes the singular, the singular includes the plural—have been recognized as *traditional* legal canons of interpretation.

However, our call for progressive textualism reminds textualists that insofar as *the ordinary public* is the source of interpretive justification, it should be the people—not judicial tradition—that guide judges in applying interpretive principles. Empirical research supports that ordinary people understand law in line with these traditional gender and number canons.[251] But research has also uncovered *new* gender canons—ones never endorsed explicitly by judges, but which reflect ordinary people's understanding of legal rules today. Consider the "nonbinary gender canon." Today, ordinary people understand legal rules about "he," "him," or "his" to also include women *and* nonbinary persons.[252] This may not have always been true, but textualist judges appealing democratically to "the people" should not confine themselves to interpretive rules of the past.

Those claiming fidelity to ordinary people should thoroughly investigate the linguistic generalities guiding people's understanding of law. It is in this sense that we argue textualists should be methodologically *progressive* textualists. In some cases this methodological progressivism may lead to political progressivism. Recognition of a robust nonbinary gender canon is likely one such example. But traditional textualists—by their own lights—should not ignore such interpretive principles simply because those principles may lead to politically progressive outcomes. To do so would amount to a hallmark of regressive textualism—a mode of textualism that clings to false assumptions about ordinary people and language, and which has no plausible claim to promote democracy.

III. TEXTUALISM AND BROADER INTERPRETIVE RULES

Progressive textualism requires that courts consider the linguistic context of a statute, as well as the interpretive principles triggered by that context—rather than overly literal interpretations and fictional assumptions about ordinary people and language.[253] The obligation to apply accurate interpretive rules is a general one that includes those interpretive rules that characterize ordinary people's understanding of rules.[254] This is not an argument that methodologically progressive approaches should be the *only* interpretive rules applied by courts. Courts often apply interpretive rules based on the Constitution or common law, even though those rules may not reflect ordinary people's understanding of language

250. *See* Tobia et al., *From the Outside*, *supra* note 23, at 252.

251. *See id.*, at 38–40.

252. *See id.* at 38–39.

253. *See supra* Parts II, III. On the use of hypotheticals involving "friends" for determining legal meaning, see Krishnakumar, *supra* note 25.

254. *See* Tobia et al., *From the Outside*, *supra* note 23, at 213–14.

or law.[255] If, however, a court purports to determine the linguistic meaning of a provision, it should apply those interpretive rules relevant to determining that meaning.[256]

This Part considers how progressive textualists should view interpretive rules that may help determine linguistic meaning. Most importantly, progressive textualists have an obligation to assess evidence regarding the accuracy of existing interpretive rules, as well as evidence suggesting that new interpretive rules should be acknowledged. As the last Part noted, not all rules that reflect ordinary people's understanding of law have been acknowledged by textualists as canons of legal interpretation. Ordinary people tend to restrict quantifiers, and therefore "every napkin" does not mean literally every napkin. People also tend to understand gender terms in law broadly and nonliterally. For example, in a legal rule, "his" is taken to refer to men, women, and nonbinary persons. Yet, textualists who claim to interpret as faithful agents of the people do not rely on a "quantifier domain restriction" or a "nonbinary gender" canon. Instead, they rely only on "traditional" interpretive rules, including some that may not accurately reflect people's understanding of language.[257]

This Part turns to two much broader ideas about interpretive rules grounded in "the people." First, we consider whether even the fundamental presumption of ordinary meaning (rather than technical meaning) should be reconsidered. Recent studies suggest, perhaps surprisingly, that ordinary people do not take terms in laws to automatically express their ordinary (general, non-technical) meanings. To the contrary, people understand legal texts to communicate some technical legal meanings. Although ordinary people cannot generally articulate those meanings themselves, they intuitively defer to legal experts and authority about those technical meanings.

Second, we consider the full implications of the idea that interpretive rules relating to linguistic meaning should start with how people use and understand

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255. *See* Baude & Sachs, *supra* note 233, at 1102, 1128–30 (explaining that only some interpretive principles reflect how ordinary people use or understand language).

256. Of course, interpretive principles relevant to linguistic, or ordinary, meaning are not important only to textualists. Most plausible interpretive theories share a commitment to "ordinary meaning." *See generally* SLOCUM, *supra* note 113; LAWRENCE M. SOLAN, THE LANGUAGE OF STATUTES: LAWS AND THEIR INTERPRETATION (2010) (exploring the difficulties and sources from which to deduce ordinary meaning); *see also* ESKRIDGE, JR., *supra* note 55 (reiterating the commitment to "ordinary meaning," regardless of how "abstract"); SCALIA & GARNER, *supra* note 64, at 40 (grounding the "fair reading" of the text on the "ordinary-meaning canon"). The commitment is due in part to the emphasis the current Court places on ordinary meaning. The Court has recently acknowledged that "[s]ometimes Congress's statutes stray a good way from ordinary English . . . [but] affected individuals and courts alike are entitled to assume statutory terms bear their ordinary meaning." Niz-Chavez v. Garland, 141 S.Ct. 1474, 1481–82 (2021). "Ordinary" language principles are legitimized on the basis of normative commitments such as fair notice, predictability, and the rule of law. *See* Eskridge, Jr. et al., *supra* note 134, at 1516–17.

257. For instance, the authors of this Article find that the traditional *expressio unius* canon does not reflect ordinary people's understanding of law. The canon holds that the explicit mention of one thing excludes others, but it is not clear that ordinary people apply this principle widely and generally. Some textualists have predicted as much. For example, John Manning suggested that *expressio unius* may be an overly broad principle. *See* John F. Manning, *New Purposivism*, 2011 SUP. CT. REV. 113, 179 (2011).

language. Based on how ordinary people use and understand language, textualists should consider understandings *implied by the text* as well as ones based on the explicit language. Thus, interpretive rules should be based not only on the meaning of explicit language but also on the presuppositions relevant to the interpretation of text.

Those interpretive principles relevant to ordinary meaning may also include ones that are traditionally viewed as being based on "normative" or "substantive," rather than linguistic, principles. Textualists have traditionally maintained that there is a bright line between language and policy, advocating that courts should focus exclusively on the former.[258] Textualists view this distinction as furthering the principles of faithful agency and limited judicial discretion.[259] But any distinction between how ordinary people use words and how they solve problems becomes harder to maintain when the question of how ordinary people understand language is properly framed. The proper judicial focus should be on how ordinary people interpret legal rules, as opposed to nonlegal language more generally.[260] With this more specific focus, empirical evidence indicates that ordinary people may sometimes understand the language of rules in ways that have traditionally been framed as "normative," but should nevertheless be viewed as linguistic in the same way as other rules traditionally thought of as linguistic.

A. ORDINARY VERSUS LEGAL MEANING

Due to the increasing importance of ordinary meaning, judges frequently rely on textual canons.[261] Textual canons are interpretive principles "drawn from the drafter's choice of words, their grammatical placement in sentences, and their relationship to other parts of the 'whole' statute."[262] These interpretive principles are said to be based on rules of language usage rather than policy or legal concerns.[263] Textual canons admit of some controversy,[264] but some textualists, such

258. *E.g.* Manning, *supra* note 10, at 70 (explaining that textualism "remains distinctive because it gives priority to semantic context (evidence about the way a reasonable person uses words) rather than policy context (evidence about the way a reasonable person solves problems)").

259. *See supra* Part I.

260. The "ordinary meaning" doctrine has traditionally stood for the proposition that legal and nonlegal language coincide. *See* Brian G. Slocum, *The Ordinary Meaning of Rules*, *in* PROBLEMS OF NORMATIVITY, RULES AND RULE-FOLLOWING 295, 296 (Michał Araszkiewicz et al. eds., 2015) ("[A]bsent some reason for deviation, such as words with technical or special legal meanings, the language used in legal texts should be viewed as corresponding with that used in non-legal communications."). A focus on nonlegal language usage though may be too broad because there may be something distinctive about how ordinary people interpret rules. *See* Tobia et al., *From the Outside*, *supra* note 23, at 277–80 (arguing that the ordinary meaning focus should be on how ordinary people interpret rules).

261. *See* Anita S. Krishnakumar & Victoria F. Nourse, *The Canon Wars*, 97 TEX. L. REV. 163, 163 (2018) ("Affection for canons of construction has taken center stage in recent Supreme Court cases"); Nina A. Mendelson, *Change, Creation, and Unpredictability in Statutory Interpretation: Interpretive Canon Use in the Roberts Court's First Decade*, 117 MICH. L. REV. 71, 71 (2018) ("[T]he lion's share of Roberts Court opinions considers and applies at least one interpretive canon.").

262. ESKRIDGE, JR. & FRICKEY, *supra* note 232, at 634.

263. *See* Gluck & Posner, *supra* note 233; Baude & Sachs, *supra* note 233.

as Justice Alito most recently, agree that canons are useful if they reflect ordinary meaning.[265]

"Debates about canons' justification center on two different empirical questions" about how to verify them.[266] "One concerns whether legislative authors contemplate the canon when drafting."[267] The other—the view held by most modern textualists—"concerns whether the canon reflects how ordinary people reading the statute would understand the language."[268] Under this latter view, a canon is valid if it is consistent with ordinary people's linguistic practices. The relevant question would be something like the following: is the interpretive canon generally an accurate reflection of how ordinary people would understand the relevant statutory language? For example, when considering a statute like the one in *McBoyle v. United States*,[269] would an ordinary person implicitly understand that the scope of "any other . . . vehicle" is partly restricted—meaning not literally *any* vehicle, but only those sufficiently similar to the enumerated ones?[270] If yes, this would legitimize *ejusdem generis* on the basis of ordinary meaning (via ordinary people), rather than through consistency with legislative intent.[271]

The latter means of verifying the accuracy of canons assumes that legal and nonlegal language often corresponds but does not require a claim that *all* nonlegal language corresponds with legal language. For instance, statutory language differs in some important ways from the language used at family dinners or on the basketball court. Ordinary people do not understand the language of a criminal law as they would the language of a cocktail party.[272] As we described previously, when interpreting rules people generally understand masculine terms to include the feminine. So, in law, "he" is generally understood to include "she,"[273] despite the steep decline in the use of the gender-neutral "he."[274] But the norms of ordinary communication do not inevitably translate to the norms of legal communication. Rather, it is likely more accurate to assert that norms relating to the interpretation of legal and nonlegal *rules* correspond.[275]

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264. *See, e.g.*, Jesse M. Cross, *When Courts Should Ignore Statutory Text*, 26 GEO. MASON L. REV. 453, 453, 459–60 (2018) (arguing that many textual canons are inaccurate and should be modified or eliminated by courts).

265. *See* Facebook v. Duguid, 141 S. Ct. 1163, 1175 (2021) (Alito, J. concurring).

266. Tobia et al., *From the Outside*, *supra* note 23, at 220.

267. *Id.*

268. *Id.*

269. 283 U.S. 25 (1931); *see supra* Section II.B.4 (analyzing the use nonliteral meaning of "motor vehicles" by the Court).

270. *See supra* Section III.A.4 (discussing *Bostock*).

271. *See* Tobia et al., *From the Outside*, *supra* note 23, at 221–22.

272. *Cf.* Johnson v. United States, 529 U.S. 694, 718 (2000) ("[T]he acid test of whether a word can reasonably bear a particular meaning is whether you could use the word in that sense at a cocktail party without having people look at you funny.").

273. *See* Tobia et al., *From the Outside*, *supra* note 23, at 250–51, 264–69 (providing empirical evidence of such understanding).

274. *See* BARON, *supra* note 249.

275. *See* Tobia et al., *From the Outside*, *supra* note 23, at 277–81.

1. The Textualist Version of Ordinary People

Today's textualists face a fundamental problem: how to reconcile ordinary meaning with the existence of technical terms. The problem is a serious one because legal texts are "replete with technical terms."[276] Some prominent scholars even argue that legal texts contain so many legal terms that legal language is *primarily* a technical language.[277] Some terms are obviously technical (e.g., *habeas corpus*, *res ipsa loquitur*). Other terms are "ambiguous," possibly communicating either an ordinary or a technical meaning (e.g., *land*, *intent, tribunal*).[278]

Technical terms in legal texts thus pose a particular challenge for textualists. Justices Scalia and Barrett have responded to the tension between democratic interpretation focused on ordinary people and technical language by positing a hypothetical "ordinary English speaker" who is an expert in comprehending specialized and technical textual language.[279] In this way, textualists can claim that ordinary meaning is synonymous with word meaning of whatever kind (whether technical or otherwise), without undermining fair notice, the rule of law, and democratic values.[280]

The problem for textualists is that their normatively constructed accounts of ordinary people undermine any claim that their version of ordinary meaning is an ideologically neutral principle reflecting how ordinary people understand language. Consider, for example, Justice Barrett's theory of textualism as democratic interpretation. Justice Barrett recognizes that textualists often interpret statutes in ways beyond the capacity of ordinary people.[281] This concession illustrates the tension between textualist interpretive methodology and their claims of democratic interpretation. Justice Barrett seeks to avoid the dilemma by arguing that the "ordinary English speaker" has regular access to an "ordinary lawyer."[282] Justice Barrett argues that the "ordinary lawyer" standard is defensible because "[i]n reading a statute as a lawyer would, a court is not betraying the ordinary people to whom it owes fidelity, but rather employing the perspective of the

276. Frederick Schauer, *Is Law a Technical Language?*, 52 SAN DIEGO L. REV. 501, 501, 508 (2015).

277. *See id.*; *see also* John O. McGinnis & Michael B. Rappaport, *The Constitution and the Language of the Law*, 59 WM. & MARY L. REV. 1321, 1321 (2017) (arguing that even ambiguous constitutional terms such as "good behavior" are better understood as legal terms).

278. Schauer, *supra* note 276, at 501–02. Common words frequently have both ordinary and technical meanings. *See, e.g.*, U.S. Forest Serv. v. Cowpasture River Pres. Ass'n, 140 S. Ct. 1837, 1852 n.4 (2020) (Sotomayor, J., dissenting) (recognizing that "land" has both an ordinary and a legal meaning).

279. *See* Barrett, *supra* note 16, at 2194–95.

280. *See* Tobia et al., *Ordinary Meaning*, *supra* note 23.

281. *See id.*

282. *See* Barrett, *supra* note 16, at 2209 (explaining that textualists sometimes "use . . . the perspective of the 'ordinary lawyer' rather than the ordinary English speaker"); *see also* Fallon, Jr., *supra* note 95, at 685 (explaining that "[p]urposivists inquire what reasonable legislators would have intended" while "textualists [ask] . . . how a reasonable person would understand statutory language in context").

intermediaries on whom ordinary people rely."[283] Thus, because ordinary people can consult lawyers, judges can assume that ordinary people are "capable of deciphering language that is sometimes specialized and technical."[284]

Justice Barrett's "ordinary lawyer" standard is regressive because it purports to be democratic but relies on a fiction to privilege an elite segment of the population. Survey evidence suggests that "[m]ost Americans have *not* received advice from a lawyer about how to understand a legal text" but "would have sought such advice (at some point) if those services were freely available."[285] "Although most Americans have not consulted a lawyer for interpretive advice, most . . . report having looked up what a law means on their own."[286] The vast majority of those people report relying on sources like Google.[287]

Justice Barrett also makes questionable assumptions about this "ordinary lawyer." For example, Justice Barrett's "ordinary lawyer" just so happens to be a textualist who rejects certain commonly consulted interpretive sources, such as the public legislative record.[288] It is unlikely, however, that this reflects the understanding of an ordinary lawyer.[289] Lawyers frequently consult and cite to legislative materials, courts give judicial notice to the congressional record, and lawyers presumably advise clients based on those materials.[290]

2. Ordinary People and Legal Meaning

Setting aside the "ordinary lawyer," there is another reason for textualists to appeal to technical legal meaning. Recent empirical studies reveal that ordinary people generally understand legal texts to contain many terms with *technical-legal* meanings.[291] Contrary to the assumptions of most modern textualists, a commitment to ordinary people does not imply an unwavering and broad commitment to ordinary meaning. Even some ambiguous terms (such as "intent" or "tribunal") are assumed to have *technical-legal*, not ordinary, meanings.[292] If textualism is justified by its connection to democracy via ordinary people,

283. Barrett, *supra* note 16, at 2209.

284. *Id.* Other textualists have also suggested something like an ordinary lawyer standard. For instance, John Manning explains that "under the reasonable-user approach, textualists readily give effect to terms of art—phrases that acquire specialized meaning through use over time as the shared language of specialized communities (legal, commercial, scientific, etc.). In decoding legal commands, the lawyer's lexicon of course assumes a particular prominence." Manning, *supra* note 95.

285. *See* Tobia et al., *Ordinary Meaning*, *supra* note 23, at 41.

286. *See id.*

287. *See id.*

288. *See* Barrett, *supra* note 16, at 2207 (arguing that textualists should consider legislative history only to the extent it reveals how ordinary people use language).

289. *See id.* at 2209 ("This is reason both to employ sources that capture ordinary meaning, such as usage canons and dictionaries, and to refuse to strain ordinary meaning to account for the vagaries of the legislative process.").

290. *See generally* ADRIAN VERMEULE, JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION (2006) (arguing that lawyers feel compelled to research and use legislative history when making legal arguments).

291. *See* Tobia et al., *Ordinary Meaning*, *supra* note 23, at 38–39.

292. *See id.* at 45.

interpreting such language in a technical way is therefore not merely consistent with modern textualism, it is *required*.[293]

The next Section explains how such a presumption of legal meaning could operate in practice. But first, consider how our methodologically "regressive" and "progressive" textualists might each respond to this data about ordinary people. We recognize that these are still early days of applying empirical research about ordinary people's understanding of language to textualist debates. But assuming that these early results are robustly replicated, how should modern democratic textualists respond?

We propose that a methodologically progressive textualist would be sensitive to these facts about real people. People generally take laws to include many terms with technical legal meanings, and people defer to legal authorities for those meanings. Thus, the most straightforward way for a textualist to interpret law in a way that respects ordinary people would be to give terms the legal meanings that ordinary people take them to have. Broadly speaking, this would have textualists looking less to ordinary dictionaries or hypotheticals about cocktail party conversations among friends (evidence of ordinary meaning) and more to sources including judicial precedent and legislative evidence (evidence of legal meanings).

3. Operationalizing Legal Meaning

The choice between ordinary and technical meaning can be decisive in many cases, but that choice is typically left unconsidered by courts. Instead, judges often give terms technical meanings and do so frequently without explicitly acknowledging the choice between ordinary meaning and technical meaning. Consider again the Court's recent blockbuster decision in *Bostock v. Clayton County*.[294] Textualists, all of whom sought to determine the "ordinary public meaning" of the text, wrote the majority and *both* dissenting opinions.[295] Despite this shared interpretive philosophy, the majority and dissenting opinions reached radically different conclusions about the ordinary public meaning of the phase "because of sex." Justice Gorsuch's majority opinion held that discrimination because of an employee's sexual orientation or gender identity *is* discrimination "because of" that employee's sex. Justice Alito and Justice Kavanaugh's dissenting opinions reached the opposite conclusion.

Several critics have argued that Justice Gorsuch's majority opinion takes "because of" to have a *technical legal* meaning.[296] Consider the crux of Gorsuch's argument:

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293. *See id.* at 5.

294. 140 S. Ct. 1731 (2020).

295. *See id.* at 1738 (referring to "ordinary public meaning"); *id.* at 1825 (Kavanaugh, J., dissenting) (indicating that "[t]he ordinary meaning that counts is the ordinary public meaning at the time of enactment").

296. *See, e.g.*, Mitchell N. Berman & Guha Krishnamurthi, Bostock *Was Bogus: Textualism, Pluralism, and Title VII*, 97 NOTRE DAME L. REV. 67, 72 (2021); Josh Blackman & Randy Barnett, *Justice Gorsuch's Halfway Textualism Surprises and Disappoints in the Title VII Cases*, NAT'L REV.

> [A]s this Court has previously explained, the "ordinary meaning of 'because of' is 'by reason of' or 'on account of.'" In the language of law, this means that Title VII's "because of" test incorporates the "'simple'" and "traditional" standard of but-for causation. That form of causation is established whenever a particular outcome would not have happened "but for" the purported cause. In other words, a but-for test directs us to change one thing at a time and see if the outcomes changes. If it does, we have found a but-for cause.[297]

The Court did not acknowledge that it was giving "because of" a specialized legal meaning, citing instead to "ordinary public meaning."[298] It is likely, however, that Justice Gorsuch *was* interpreting "because of" to have a technical-legal meaning. For one, empirical work pioneered by Professor James Macleod suggests that the criteria of the ordinary meaning of "because of" are not identical to a but-for test.[299] Perhaps the best way to understand Gorsuch's somewhat cryptic phrases ("ordinary public meaning" and "in the language of law") is through *legal* meaning. Ordinary people understand "because of" in the statute to have a legal meaning, which is articulated by legal precedents.

Ordinary people's inability to articulate the exact legal criteria is not necessarily a problem. Ordinary people can make sense of the proposition "elm trees turn yellow in the fall," even without being able to articulate the technical criteria of elm trees.[300] In the philosophy of language, the "division of linguistic labor" explains this phenomenon.[301] Ordinary people defer to scientists about the meaning of technical scientific terms (such as "elm"). Ordinary people similarly defer to legal authority for technical meanings of legal terms.

B. PRESUPPOSITIONS AND NORMATIVE VALUES

As a second broad issue, consider textualist views regarding normative or "substantive" canons of interpretation. For example, should new laws be applied only prospectively, or should they also apply retroactively? The presumption against retroactivity answers "only prospectively." Typically, this presumption is framed as a matter of fairness—not a matter of linguistic meaning.

(June 26, 2020, 6:30 AM), https://www.nationalreview.com/2020/06/justice-gorsuch-title-vii-cases-halfway-textualism-surprises-disappoints/.

297. *Bostock*, 140 S. Ct. at 1739 (citations omitted).

298. *Id*. at 1738.

299. *See* James A. Macleod, *Finding Original Public Meaning*, 56 GA. L. REV. 1, 25 & n.110 (2021); James Macleod, *Ordinary Causation: A Study in Experimental Statutory Interpretation*, 94 IND. L.J. 957 (2019); *see also* Tobia & Mikhail, *supra* note 8, at 473.

300. *See* Hilary Putnam, *The Meaning of "Meaning*,*"* 7 MINN. STUD. PHIL. SCI. 131 (1975); *see also* Lawrence B. Solum, *Semantic Originalism* (Ill. Pub. L. Rsch. Paper, Paper No. 07-24, 2008), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1120244.

301. *See* Edgar J. Andrade-Lotero & Robert Goldstone, Division of Linguistic Labor and Collective Behavior 2 (March 2016) (unpublished paper) (on file with author) (explaining that the division of linguistic labor theory rejects the assumption that "a language belongs to a community of speakers only if every speaker knows the meaning of every term in the language").

Traditionally, textualists have viewed normative concerns as irrelevant to the determination of the linguistic meaning of a text.[302] This view is similar to textualists' preferences for literal over nonliteral meanings and explicit terms over implied terms.[303] This Section argues that—from the modern textualist standpoint that prioritizes "democratic" interpretation—the traditional line between textual rules and substantive rules is blurrier than it first appears.

1. Textualists and Interpretive Canons

Consider the influence of normative judgments on interpretations. Ad hoc normative judgments made by courts present obvious conflicts with basic textualist tenets. Textualism's faithful agent theory views the "law" as the linguistic meaning of the text, which does not include the personal policy desires of judges.[304] Thus, the "point of legal interpretation is to discover an instrument's meaning as a matter of language."[305] The available interpretive tools for traditional textualists are therefore limited to those relevant to determining the linguistic meaning of the text. For instance, textual canons, as a class, qualify as linguistic principles because textualists view them as representing neutral, non-normative interpretive presumptions about how context influences the meanings of words.[306] In contrast, other interpretive sources, such as legislative history, that provide information that may conflict with the linguistic meaning of the text are considered inappropriate for judges to consult.[307]

Although textualists favor interpretive *rules*—because rules are thought to constrain judicial interpretive discretion—not all long-standing interpretive rules are acceptable to traditional textualists, even when those interpretive rules are based on normative values external to the judge.[308] Consider substantive canons. In contrast to textual canons, substantive canons, also referred to as "normative canons,"[309] are

302. *See supra* Part I.

303. *See supra* Parts II, III.

304. *See* Baude & Sachs, *supra* note 233, at 1086 (referring to this as the "Standard Picture" of legal interpretation); *see also* Jane S. Schacter, *Metademocracy: The Changing Structure of Legitimacy in Statutory Interpretation*, 108 HARV. L. REV. 593, 593–94 (1995) ("[Textualism] seeks to limit the role of judges to ascertaining and then effectuating the legislative will.").

305. Baude & Sachs, *supra* note 233, at 1086.

306. *See* Krishnakumar, *supra* note 111 (describing how textualists frequently use textual canons as cover for considering and implementing the purpose of a statute).

307. *See* John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673, 706–25 (1997) (arguing that it is inconsistent with the constitutional structure for judges to consult legislative history); *see also* John F. Manning, *Putting Legislative History to a Vote: A Response to Professor Siegel*, 53 VAND. L. REV. 1529, 1529 (2000) (warning that consideration of legislative history may allow "particular legislators who write that history [to] . . . effectively settle statutory meaning for Congress as a whole").

308. *See supra* notes 104–18 and accompanying text (describing a theory of "formalistic textualism" that would reject some interpretive rules that allegedly allow too much interpretive discretion).

309. *See* Stephen F. Ross, *Where Have You Gone, Karl Llewellyn? Should Congress Turn Its Lonely Eyes to You?*, 45 VAND. L. REV. 561, 563 (1992) (referring to substantive canons as "normative canons").

conventionally viewed as *not* representing facts about language usage.[310] Instead, substantive canons are "presumptions about statutory meaning based upon substantive principles or policies drawn from the common law, other statutes, or the Constitution."[311]

Because these canons are traditionally motivated by normative rather than linguistic principles, substantive canons may seem more difficult than textual canons to reconcile with faithful agent theory.[312] As canons created to vindicate normative values, scholars do not typically consider substantive canons as helping to determine the ordinary meaning of statutes.[313] Various scholars have argued that such canons are, in fact, inconsistent with the proper judicial function.[314] These scholars argue that substantive canons may be difficult for Congress to overcome through statutory language; they legitimize willful judges in evading statutory commands, and judges can revise or create substantive canons, thereby destabilizing statutory interpretation.[315]

Justice Barrett argues that substantive canons are legitimate interpretive tools only when they are used as "rule[s] of thumb for choosing between equally plausible interpretations of ambiguous text."[316] That is, "[t]extualists have no difficulty taking policy into account when language is ambiguous."[317] In contrast, more "aggressive" canons, which "permit[] a court to forgo a statute's most natural interpretation in favor of a less plausible one more protective of a particular value," undermine the judiciary's role as "faithful agents of Congress."[318] Thus, a "tie breaker" canon such as the rule of lenity, which directs that ambiguous criminal provisions be interpreted in favor of the defendant, is a legitimate interpretive rule.[319] In contrast, "'clear statement rules' that require a court to interpret a statute to avoid a particular result unless Congress speaks explicitly to accomplish it," are illegitimate.[320] The presumption against statutes operating retroactively is one such example.[321]

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310. *See* Baude & Sachs, *supra* note 233, at 1123 (discussing the traditional distinction between textual, or language, canons and substantive, or policy, canons).

311. ESKRIDGE, JR. & FRICKEY, *supra* note 232, at 634.

312. *See* Barrett, *supra* note 65, at 120 ("[L]inguistic canons, which pose no challenge to legislative supremacy, are preferable to substantive canons, which do.").

313. *See, e.g.*, Baude & Sachs, *supra* note 233, at 1123 ("Many [substantive] canons are common law default rules, so they keep chugging along until they're affirmatively displaced. If anything, the lack of knowledge about a canon *reinforces* the strength of that canon: what legislators were unaware of, they're unlikely to have displaced."); Eskridge, Jr., *The New Textualism and Normative Canons*, *supra* note 136, at 577 (arguing that an "interpretive regime" that focused on ordinary meaning "would be much more predictable than one that also included" substantive canons).

314. *See, e.g.*, Barrett, *supra* note 65, at 110.

315. *See* William N. Eskridge, Jr., *Textualism, the Unknown Ideal?*, 96 MICH. L. REV. 1509, 1543–46 (1998) (book review).

316. Barrett, *supra* note 65, at 109; *see id.* at 123 ("Substantive canons are in no tension with faithful agency insofar as they are used as tie breakers between equally plausible interpretations of a statute.").

317. *Id.* at 123.

318. *Id.* at 109–10.

319. *Id.* at 117–18.

320. *Id.* at 118.

321. *See id.* at 118–19.

Justice Barrett argues that textualists who attempt to classify substantive canons as linguistic have done so "only half-heartedly."[322] These efforts reflect "discomfort with the application of substantive canons in a legal climate where a strong vision of legislative supremacy is the dominant view."[323] Substantive canons are problematic because they "require a judge to adopt something other than the most textually plausible meaning of a statute."[324] Such interpretations cannot be reconciled with congressional intent, because that "intent is unknowable."[325] Substantive canons are also inconsistent with the "usual textualist practice of interpreting a statute as it is most likely to be understood by a skilled user of the language."[326] In any case, the "more fundamental textualist insistence [is] that a faithful agent must adhere to the product of the legislative process, not strain its language to account for . . . commonly held social values."[327]

2. Presuppositions and Clear Statement Rules

Traditional textualists misunderstand that some substantive canons may have a linguistic basis. This oversight stems from textualists' failure to adequately account for the linguistic concept of presupposition. To understand what a rule communicates to someone, the explicit words of the rule are important but so are the presuppositions that a person brings to it. For example, consider a professor's following rule: "No one may eat a sandwich during the lecture." Now suppose a clever student gulfs down *two* sandwiches during class. Did the student break the rule? Taking *just the words* of the rule leaves open some possibility of answering "no," the student did not technically violate the rule: There is a prohibition on eating "a sandwich" but none against eating "sandwiches." However, this answer is wrong. We all understand the rule to prohibit the student's action. Why? We generally understand prohibitions against singular violations to prohibit multiple violations. This is not a presupposition about language in general—in ordinary conversation, "sandwich" does not always mean "sandwiches." Rather, this is a presupposition ordinary people have about the meaning of *rules*.[328]

Consider presuppositions and substantive canons. A connection between substantive canons and linguistic meaning is not straightforward because substantive canons do not determine the literal meanings of statutory texts and are not triggered by any specific linguistic terms.[329] Nevertheless, some meanings are implied in communications. The concept of presupposition explains how

322. *Id.* at 120.
323. *Id.* at 121.
324. *Id.* at 123–24.
325. *Id.* at 124.
326. *Id.*
327. *Id.*
328. *See* Tobia et al., *From the Outside*, *supra* note 23, at 252 (discussing evidence regarding the "singular includes the plural" interpretive rule); *see also* 1 U.S.C. § 1 (codifying the interpretive rule that singular terms include the plural).
329. For a contrasting example, consider *ejusdem generis*. That canon is triggered by a list plus catch-all (e.g., "cars, trucks," and "and other vehicles") and quantifier domain restriction is triggered by a quantifier (e.g., "any"). *See supra* notes 212, 238 and accompanying text.

ordinary people routinely use implied understandings when interpreting language, and are likely to do so when interpreting legal texts. When a clear statement rule is applied, the linguistic meaning of a provision may thus not correspond to its literal meaning.[330]

A simple description of natural language communication illustrates that an interpretive canon that could be based on normative values may nevertheless be an aspect of ordinary meaning. The key understanding is that the interpretation of a communication often includes things that are *implicit*.[331] As Sbisà explains, to understand a text, we must understand more than what is encoded in the text itself; our broader comprehension of a text depends on contextual knowledge, including what is presupposed and/or implicated by the text.[332] The concept of presupposition describes how ordinary people utilize implied meanings when interpreting communications, including legal texts. "Presuppositions are ubiquitous in language and are part of the context in which a communication occurs."[333] To state the principle technically, "[a] presupposition denotes a background belief the truth of which is taken for granted. . . . *A* presupposes a statement *B* if *B* is a precondition of the truth or falsity of *A*."[334]

Consider someone who says, "Gavin's bicycle is grey." The speaker could be said to convey at least two propositions.[335] One is that "the bicycle is grey," and another is that "Gavin has a bicycle."[336] The former proposition is "asserted," while the latter is "presupposed."[337] Here, the presupposed proposition must be taken to be true in order for the asserted proposition to be evaluated as true or false; to assess "Gavin's bicycle is grey," we must assume that "Gavin has a bicycle" is true.[338] The speaker must therefore know and take account of the presupposition for the utterance to be considered appropriate in context.[339] The inquiry can be objectified in the sense that it can be said that *x* presupposes that *y* if, "normally speaking, a speaker who uttered [*x*] would thereby commit himself to

330. *See supra* notes 318–27 and accompanying text.

331. *See* Sbisà, *supra* note 117, at 324–25 (discussing implied terms, or "implicatures," including presuppositions).

332. *Id.* at 324; *see* Kent Bach, *Impliciture vs Explicature: What's the Difference?*, *in* EXPLICIT COMMUNICATION: ROBYN CARSTON'S PRAGMATICS 126, 126 (Belén Soria & Esther Romero eds., 2010) (explaining that speakers can communicate things not fully determined by the semantics of the uttered sentence).

333. Brian G. Slocum, *Rethinking the Canon of Constitutional Avoidance*, 23 U. PA. J. CONST. L. 593, 629 (2021); *see* EMIEL KRAHMER, PRESUPPOSITION AND ANAPHORA 3 (1998); ALAN CRUSE, A GLOSSARY OF SEMANTICS AND PRAGMATICS 139 (2006) (explaining that "presuppositions are [a] ubiquitous" aspect of language).

334. Slocum, *supra* note 333; *see* KRAHMER, *supra* note 333, at 139.

335. This example draws heavily from Slocum, *supra* note 333.

336. *Id.*

337. *Id.*

338. *See* M. LYNNE MURPHY & ANU KOSKELA, KEY TERMS IN SEMANTICS 127–28 (2010).

339. *See* CRUSE, *supra* note 333, at 138; *see also* Sbisà, *supra* note 117, at 325 (noting how presuppositions are detected by the listener even "in absence of text-independent information").

the presupposition that [*y*] is true."[340] Thus, a presupposition can arise from "general properties of the context and the expectations of the discourse participants."[341]

When applying clear statement rule canons, courts often narrow the literal meanings of statutes on the basis of the implicit understandings that the canons reflect.[342] That is, clear statement rules require a court to avoid a particular legal result unless the statute (more precisely than is usually required) indicates that the result was intended.[343] For instance, the presumption against retroactivity directs courts to apply a statute only prospectively unless the language of the provision clearly indicates that the legislature intended for the statute to apply retroactively.[344] Thus, the presumption against retroactivity allows courts to "infer exceptions to statutory provisions whose words, on their face, appear to cover all pending cases."[345]

The rule against retroactivity may seem substantive in nature, but the Court has suggested that ordinary people may share the same presupposition: "Because it accords with widely held intuitions about how statutes ordinarily operate, a presumption against retroactivity will generally coincide with legislative and public expectations."[346] This statement raises the obvious question of how the Court is aware of "public expectations" regarding "how statutes ordinarily operate."[347] Certainly, in terms of specific applications of the canon, the presumption against retroactivity requires knowledge that might exceed that of an ordinary member of the community. An interpreter applying the canon must understand the legal system and the concept and definition of "retroactivity," as well as the notion that

340. Bart Geurts, *Presupposition and Givenness*, *in* THE OXFORD HANDBOOK OF PRAGMATICS 180, 182 (Yan Huang ed., 2017).

341. Christopher Potts, *Presupposition and Implicature*, *in* THE HANDBOOK OF CONTEMPORARY SEMANTIC THEORY 168, 169 (Shalom Lappin & Chris Fox, eds., 2d ed. 2015).

342. *See* Carissa Byrne Hessick & Joseph E. Kennedy, *Criminal Clear Statement Rules*, 97 WASH. U. L. REV. 351, 360, 393 (2019) (explaining that "clear statement rules *require* judges to issue certain rulings unless the legislature explicitly and unambiguously says otherwise").

343. *See* Note, *Clear Statement Rules, Federalism, and Congressional Regulation of States*, 107 HARV. L. REV. 1959, 1959 (1994) (observing that clear statement rules "erect potential barriers to the straightforward effectuation of legislative intent"); *see also* William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 598 (1992) (arguing that the Court's clear statement rules "amount to a 'backdoor' version of the constitutional activism that most Justices on the current Court have publicly denounced").

344. *See* Immigr. & Naturalization Serv. v. St. Cyr, 533 U.S. 289, 316–17 (2001) (explaining that a statute must be "so clear that it could sustain only one interpretation" before it will be given retroactive effect (internal citation omitted)).

345. Caleb Nelson, *What is Textualism*, 91 VA. L. REV. 347, 384 (2005).

346. Landgraf v. USI Film Prods., 511 U.S. 244, 261, 272 (1994); s*ee also* Ronald M. Levin, *"Vacation" at Sea: Judicial Remedies and Equitable Discretion in Administrative Law*, 53 DUKE L. J. 291, 349 (2003) (explaining that the Court's motivation for recognizing a presumption against retroactivity centers on the unfairness involved in retroactive legislation and concern for the rule of law).

347. *Landgraf*, 511 U.S. at 272.

the literal meaning of statutory language is not always synonymous with its legal meaning.[348]

The particular scope and application of any clear statement rule may therefore be beyond the knowledge of ordinary people, but the rule's trigger may not be. Perhaps some clear statement rules reflect a general public assumption about what legal rules communicate—as the Supreme Court asserts with the presumption against retroactivity—even if an ordinary member of the public would be uncertain about their application in any given case.[349] Clear statement rules, or at least many of them, are triggered by situations involving a broad statutory phrase being applied to certain specific circumstances. It is thus possible to test whether the basic concern underlying a clear statement rule is shared by ordinary people. For instance, it may be that ordinary people would assume that a law enacted by Congress would operate only within the United States, even if the law did not explicitly contain such a restriction.[350] Similarly, it is possible that ordinary people would assume that an interpretation rendering a statute unconstitutional should be avoided.[351]

3. Ordinary People and Substantive Canons

Let us take stock. First, recall that modern textualist theory increasingly appeals to democratic values as its justification. On that view, textualist interpretation claims to respect *ordinary people's* understanding of law. Second, this appeal to ordinary people cannot be furthered by uniformly giving legal texts literal meanings. Rather, the most sophisticated forms of textualism should carefully consider relevant context. Some regularities about context are captured by traditional canons of interpretation. For example, the *ejusdem generis* and *noscitur a sociis* canons provide heuristics to assess the meaning of language in light of sentence-level context.

Third, as we have seen, some of the traditional textualist canons are not really regularities about general language use—language use in *any* context. Rather, they reflect generalities that tend to arise in (legal) *rules*. For example, ordinary people understand "his" in (legal) rules to refer gender neutrally. That is not a feature of ordinary language—in many ordinary contexts "his book" simply means "that man's book." But people understand that in rules, "his right" or "his claim," typically refers gender neutrally.

One could theorize law's gender canons in a "text-focused" way. For example, in legal rules, we presume that the word "his" also means "hers." And we would

348. For instance, "deciding when a statute operates 'retroactively' is not always a simple or mechanical task[,]" but rather one that requires a "court [to] ask whether the new provision attaches new legal consequences to events completed before its enactment." *Id.* at 268–70.

349. At a high level of generality, it may be that the public believes that statutes should, when possible, be interpreted in a manner consistent with "fundamental national principles." Einer Elhauge, *Preference-Eliciting Statutory Default Rules*, 102 COLUM. L. REV. 2162, 2256 (2002).

350. *See generally* William S. Dodge, *The New Presumption Against Extraterritoriality*, 133 HARV. L. REV. 1582 (2020) (describing the presumption against extraterritoriality). Ordinary people may assume that a law enacted by Congress would operate only within the United States even if they are unfamiliar with the presumption against extraterritoriality.

351. *See generally* Philip P. Frickey, *Getting from Joe to Gene (McCarthy): The Avoidance Canon, Legal Process Theory, and Narrowing Statutory Interpretation in the Early Warren Court*, 93 CALIF. L. REV. 397 (2005) (analyzing the canon of constitutional avoidance).

also need a similar text-based gender canon for the word "he" and one for "him." And the canon also applies in the opposite direction: In law, "hers," "she," and "her" include "his," "he," and "him" respectively. And, we would need additional permutations to account for nonbinary genders—"He" includes the singular "they" (and so on). Quickly, we have arrived at twelve gender canons. And given the existence of hundreds of pronouns,[352] we could quickly articulate many more.

Alternatively, one could theorize this set of rules in terms of a simple *substantive* presupposition: Today, ordinary people understand that legal rules generally apply to adult persons, regardless of their gender identity. One point in favor of this framing is parsimony. The simple substantive presumption is more parsimonious than a long list of (ever growing) text-based gender pronoun rules. The substantive presumption also holds greater explanatory power. This substantive presumption makes the same predictions as the long disjunction of text-defined gender canons with respect to the ordinary meaning of terms such as "his" in law. But the substantively defined presumption also explains a set of data that the textual definition does not. Consider that ordinary people presume and understand (all) laws to apply to people all genders, in the absence of any indication to the contrary—whether the law includes a gendered pronoun. People likely understand a rule that prohibits "employers" from discriminating to apply equally to men, women, and nonbinary employers. The rule only uses "employer" and "employer's," never referring with other pronouns (for example, "his"). We do not need an additional text-based "employer gender canon" to clarify that the word "employer" should be interpreted gender neutrally. This feature of ordinary understanding of law is explained by a simple presumption of gender neutrality in the application of legal rules. It is not immediately clear why this feature follows from a list of specific rules about pronouns such as "his" and "hers." This example begins to question the "textual" status of some traditional "textual" canons. Is the gender canon fundamentally about how to understand nine—or twelve or one hundred—pronouns? Or is it most fundamentally about our community's shared presupposition that laws typically apply gender neutrally?

We might also begin to question the "purely normative" status of some traditional substantive canons. Take for example, the presumption against retroactivity. Laws, particularly punitive laws, are presumed to apply prospectively but not retroactively. This presumption against retroactivity is commonly categorized as a "substantive" canon, one motivated by a sense of fairness rather than by the meaning of language. However, recent empirical evidence suggests that this presumption is not necessarily a normative add-on from the courts. In fact, ordinary people carry an intuitive presumption against retroactivity when assessing punitive rules.

An experimental study asked participants to consider either a legal, religious, business, or sports rule.[353] In each instance, the rule was established on January 1, 2020, and never repealed. One half of participants were told that a man named

352. *See generally* BARON, *supra* note 249 (detailing the origins and diversity of pronouns that have existed throughout history).

353. *See generally* Tobia & Slocum, *supra* note 45 (outlining the study methods, outcome, and its analysis).

John performed the exact type of conduct the rule described on January 1, 2021—one year after the rule was first established. The other half were told that John performed the exact type of conduct the rule described on January 1, 2019—one year before the rule was first established. In the former, *prospective* case, participants generally agreed that John broke the rule—across the business, legal, religious, and sports contexts. However, in the *retrospective* case, participants were significantly less likely to agree that John broke the rule—again, across all the contexts.[354]

These results suggest that the presumption against retroactivity is a commonly understood feature of rules. In other words, textualists who justify interpretive principles by appealing to ordinary understanding of language in law should not necessarily limit themselves to the "traditional" textual principles of interpretation. Empirical research is revealing that ordinary people come to law with a variation of presuppositions—about to whom the law applies (for example, gender canons), when the law applies (for example, retroactivity), and where the law applies (for example, extraterritoriality). Textualists who ground their theory in democratic appeals to "the people's" understanding of legal rules should take more seriously as linguistic principles the canons that have been often eschewed by textualists as inappropriately "substantive" canons.

IV. TEXTUALISM AND PURPOSIVE INTERPRETATION

Textualists have typically minimized the importance of statutory purpose and its role in interpretation.[355] The conventional view is that textualism is in contradistinction to purposivism: textualism privileges semantic meaning over purpose while purposivism privileges purpose over semantic meaning. Furthermore, textualists are often viewed as having discredited strong purposivism, leading judges to rely more on dictionaries, interpretive rules, and ordinary meaning and less on legislative history and other sources of purpose.[356]

Traditional textualists are thus skeptical of purposivist reasoning, but textualism's justificatory turn to democratic values via the ordinary public raises an important question: What if a rule's purpose helps explain ordinary people's understanding of law? Empirical research suggests that ordinary people's understanding of rules is partly informed by the rule's purpose. If ordinary people commonly understand legal rules with reference to their purposes, a court would be in danger of deviating from the ordinary understanding of a provision by refusing to consider that purpose.

This Part describes some of the recent empirical evidence showing that ordinary people consider purpose when interpreting rules. The empirical evidence raises issues about the relationship between textualism and purpose. The current

354. This short summary is slightly oversimplified. One further wrinkle concerned reward and punishment. Half of the participants were told that the rule punished bad actions, while the other half were told the rule rewarded good actions. The intuitive presumption against retroactivity applied very strongly for punitive rules and only weakly for rewarding rules.

355. *See supra* Part I.

356. *See* Molot, *supra* note 77, at 3.

textualist view of purpose may be insufficiently nuanced, although further empirical research is needed.

Recent empirical research has suggested that ordinary people rely on both text *and* purpose in interpreting rules.[357] For instance, Struchiner, Hannikainen, and Almeida presented experimental participants with ordinary rules in which an actor's action conflicted with (1) the rule's text and purpose ("core"), (2) just the rule's text ("overinclusion"), (3) just the rule's purpose ("underinclusion"), or (4) neither its text nor purpose. For example, consider the rule "No one may wear shoes in the house," which was established to keep the house clean. Consider four possible actions:

(1) Jane enters the house with dirty shoes.

(2) Jane enters the house with clean shoes.

(3) Jane enters the house with muddy bare feet (and no shoes).

(4) Jane enters the house with clean bare feet (and no shoes).

Did Jane violate the rule? The researchers found that participants overwhelmingly agreed in core cases like (1), a predicted probably of 93% agreed. A slimmer majority—a predicted probability of 62%—were inclined to agree in cases like (2); some, 22%, were still inclined to agree in cases like (3) and very few, 4%, in cases like (4).

These results suggest two implications for textualist interpretation. First, text seems to matter. Most—though certainly not all—people understand that a rule has been violated based on its text, even when the action is consistent with the rule's purpose. This is indicated by case (2). Second, purpose is not irrelevant to ordinary people's understanding of rules. A conflict with purpose, in addition to text, increases the understanding that the rule was violated by about

357. *See* Noel Struchiner, Ivar R. Hannikainen & Guilherme da F. C. F. de Almeida, *An Experimental Guide to Vehicles in the Park*, 15 JUDGMENT & DECISION MAKING 312, 324 (2020) (presenting evidence that both text and purpose affect ordinary interpretation); Ivar R. Hannikainen, Kevin P. Tobia, Guilherme da F. C. F. de Almeida, Noel Struchiner, Markus Kneer, Piotr Bystranowski, Vilius Dranseika, Niek Strohmaier, Sammy Bensinger, Kristina Dolinina, Bartosz Janik, Eglė Lauraitytė, Michael Laakasuo, Alice Liefgreen, Ivars Neiders, Maciej Próchnicki, Alejandro Rosas, Jukka Sundvall & Tomasz Żuradzki, Coordination and Expertise Foster Legal Textualism: A Multi-Country Investigation 16 (February 27, 2022) (unpublished manuscript) (on file with the authors); *see also* Jessica Bregant, Isabel Wellbery & Alex Shaw, *Crime but Not Punishment? Children Are More Lenient Toward Rule-Breaking When the "Spirit of the Law" Is Unbroken*, 178 J. EXPERIMENTAL CHILD PSYCH. 266, 271 (2019) (finding that children are more lenient toward actions that do not violate the "spirit" or purpose of the law); Tobia, *Testing Ordinary Meaning*, *supra* note 156, at 804 (presenting evidence consistent with purpose affecting ordinary interpretation); *see also* Stephen M. Garcia, Patricia Chen & Matthew T. Gordon, *The Letter Versus the Spirit of the Law: A Lay Perspective on Culpability* 9 JUD. & DEC. MAKING 479 (2014); Brian Flanagan, Gulherme Almeida, Noel Struchiner & Ivar R. Hannikainen, *Moral Appraisals Guide Intuitive Legal Determinations* (Nov. 2, 2021) (unpublished paper) (available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3955119); Guilherme Almeida, Joshua Knobe, Noel Struchiner & Ivar Rodriguez Hannikainen, *Purposes in Law and Life: An Experimental Investigation of Purpose Attribution*, CANADIAN J.L. & JUR. (forthcoming).

30%—compare case 2 (only text violated) against case 1 (text and purpose violated).

These results have been generally replicated in a larger study across fifteen different countries.[358] From the United States to Brazil and Lithuania, ordinary people understand what a rule communicates via the literal meaning of its words but also its perceived purpose. Empirically, ordinary people's understanding of law broadly matches that of some legal theorists: "Text and purpose are like the two blades of a scissors; neither does the job without the operation of the other."[359]

Traditional textualists may view these empirical results with skepticism. Interpretation, an objector might say, is about uncovering the text's semantic meaning.[360] However, modern textualists increasingly agree that interpretation is not just about semantic meaning—and rightly so. Modern textualists also consider *pragmatics*, asking what the text communicates to its readers.[361] That perspective invites a number of our amendments: attention to context, anti-literalism, and consideration of ordinary presuppositions about rules. It may also invite consideration of a rule's perceived purpose.

There are of course, possible objections to these empirical findings. For one, perhaps explicitly presenting the participants with the stated purpose of a law muddies the experimental waters. Participants may have felt pressure from the experimental paradigm to take seriously the purpose that the rule was stated to have.

Other empirical studies suggest that this cannot be a complete explanation. For example, consider a 2020 study that examined ordinary people's understanding of the term "vehicle."[362] One group of participants answered simple questions such as "is a bicycle a vehicle?" A second group answered questions with context: Consider a rule prohibiting "vehicles from the park;" is a bicycle a vehicle? While the first group were inclined to categorize bicycles as vehicles (about 60%), the second group concluded that bicycles were not prohibited from the park (only 20% indicating that bicycles are prohibited "vehicles").

As we noted previously, this difference is presumably caused by something within the sentence-level context (what is communicated to the second group by "from the park"). One possibility is that participants are engaging in *purpose-based* reasoning. To assess that hypothesis, consider a third group of

358. Hannikainen et al., *supra* note 357.

359. ESKRIDGE, JR., *supra* note 55.

360. *See* Manning, *supra* note 63, at 1290 (emphasizing the importance of semantic meaning); *see also* Christian Turner, *Submarine Statutes*, 55 HARV J. ON LEGIS. 185, 198 (2018) ("[W]e can label as textualist the privileging by an interpreting institution of semantic meanings as they would have been drawn from the bare text by the drafters themselves or by the drafters' contemporary audience or principal.").

361. *See* Manning, *supra* note 73 ("[T]he literal or dictionary definitions of words will often fail to account for settled nuances or background conventions that qualify the literal meaning of language and, in particular, of legal language.").

362. Tobia, *Testing Ordinary Meaning*, *supra* note 156.

participants in the 2020 study who received a rule with more detailed sentence-level context, but no discernable purpose. Those participants received the following rule: "All vehicles can display a blue sticker, but everything that is not a vehicle cannot display a blue sticker." In terms of the number of words, this rule has more than the "from the park" rule. But it lacks any basis for an inference about the rule's purpose. Prohibiting vehicles *from the park* is plausibly related to cleanliness or safety or some other purpose. Regulating blue stickers has no discernable purpose. As expected, the addition of the "sticker context" lead to judgments that were identical to that of the first group. In other words, participants' responses to the "all and only vehicles can display a blue sticker rule" were more similar to participants' responses about what is a vehicle—and less similar to responses about "no vehicles in the park."

Putting this all together, the results from these three groups provide a response to the initial objection. That objection was that, if an experimenter tells participants explicitly that "the purpose of the rule is *X*," the fact that participants' evaluation of the rule is influenced by *X* does not strongly support that people naturally rely on purpose in understanding rules. But in the 2020 study, *none* of the groups read a description of an explicit purpose. Participants simply evaluated the meaning of different texts—one about blue stickers and one about the park. The difference between groups' responses calls for explanation—and one plausible possibility is a difference in inferences that participants made about the purposes of these different rules.

As a second objection, perhaps the experimental studies do not actually reflect people's *understanding* of the rule, but instead capture some other judgment, such as people's *desired* application of the rule. Perhaps participants who agree that entering the house with dirty shoes (or even dirty feet) violates the no-shoes rule are not really expressing their linguistic understanding, but rather their blame for the person who has dirtied the house, or their desire for such events to be avoided in the future. It is not immediately clear that ordinary people have much at stake in these hypothetical examples. For instance, do people strongly desire that a hypothetical home not be muddied? Regardless, we see these types of objections as especially useful for further study.

It is important to note, however, that this type of objection (calling into question whether participants' responses reflect judgment of *meaning*—or something else) might be applied to ordinary people's reliance on text. One recent study contemplated whether the effect of text on participants' evaluation of rules is fully semantic, or whether people's reliance on text might actually be reflecting something besides their understanding of the rule. Participants were invited to play a "coordination game." Two participants were randomly paired and promised a bonus payment if, and only if, they responded to a scenario in the same way as their partner. Participants independently answered rule violation scenarios—similar to (1)–(4) above. In this "coordination" version, participants were strongly incentivized to enter a survey answer that matched the randomly assigned partner's answer, rather

than simply report their honest assessment of meaning. In the coordination version, participants' judgments become *more* reliant on text. In other words, participants were even more strongly convinced that (2) was a rule violation but not (3). Put another way, *a coordination incentive* increases reliance on text over purpose. This suggests that ordinary people's apparent reliance on a rule's text may not necessarily reflect (only) their understanding of the rule's meaning.

Of course, this study does not prove that empirical findings in support of literal meaning are distorted by the incentive to coordinate. But it does provide some support for the possibility that people's apparent reliance on literal meaning may not reflect their true understanding of a rule. It might instead reflect their desire to report what they perceive to be the most popular answer. Alternatively, perhaps some ordinary people expect most others to be woodenly literal. If that expectation is right, those participants would be wise to choose the literal interpretation in the experimental coordination game—or in any real world setting that rewards coordination.

This last set of empirical findings is surely relevant to textualism's claims about semantic meaning and may well offer a critical challenge to modern textualism. Textualists sometimes equate textualism with the meaning communicated just by the ordinary meanings of the terms on the page. But it is not clear that this accurately reflects how ordinary people understand rules. When people perceive a rule to have a purpose, the evidence suggests, that purpose also shapes the law's communicative content.

Some textualists have acknowledged that purpose (or the "spirit" of the law) is relevant to statutory construction. If text- or context-based interpretation provides no clear answer, a textualist might look to purpose to faithfully construct the legal effect, in line with the spirit of the law.[363] But the recent empirical studies described in this Section suggest a different thesis, placing purpose at the heart of ordinary meaning. If textualist interpretation aims to respect ordinary people's understanding of law, the law's communicated purpose may be crucial evidence of that understanding. In other words, empirical results suggest the relevance of purpose to not only textualist construction, but also to textualist *interpretation*.[364]

CONCLUSION

Textualism dominates American interpretive theory, but it faces a crisis. Modern textualism is elastic,[365] allowing choice of text and context, permitting interpreters to justify various and conflicting conclusions.[366] The recent emergence of politically "progressive textualism" underscores this feature. It is increasingly clear that textualism can be marshalled to support a range of

363. *See* John F. Manning, *Constitutional Structure and Statutory Formalism*, 66 U. CHI. L. REV. 685, 693 (1999) (explaining that textualists "routinely use purpose to resolve [statutory] ambiguity").

364. *See* Peter M. Tiersma, *The Ambiguity of Interpretation: Distinguishing Interpretation from Construction*, 73 WASH. U. L.Q. 1095, 1095–97 (1995) (explaining the difference between interpretation and construction).

365. *See generally* Eskridge, Jr. & Nourse, *supra* note 3.

366. *See, e.g.*, Bostock v. Clayton County, 140 S. Ct. 1731 (2020).

politically conservative or progressive interpretive outcomes. Because of its normative flexibility, textualists risk abandoning judicial restraint as the theory's central value.

Increasingly, today's textualists appeal to "democracy" and the rule of law. The newest textualism aims to interpret texts from the perspective of an *ordinary speaker of English*. This turn to ordinary people calls for empirical research. If textualists center the ordinary person's understanding of law, an essential empirical question becomes, "How do people understand law?" This Article has outlined several empirical findings about how people understand language, highlighting the importance of (1) linguistic *context*; (2) *nonliteral* interpretation; (3) ordinary presuppositions about rules; (4) technical legal meaning; (5) and the potential value of purpose. To varying degrees, these empirical findings are inconsistent with traditional textualism, providing critical challenges for textualists who claim to interpret law "democratically."

At the same time, the empirical studies presented are only a first wave. We hope that further empirical studies help clarify how people understand law and language, in the context of textualist debates. One area of particular promise concerns linguistic diversity and individual differences. As one of us has written elsewhere, judges may be inclined to intuitively embrace notions of ordinary meaning with an "upper class accent."[367] Empirical research could further illuminate whether textualist appeals to "the people" adequately reflect *all* people's understanding of language—or merely the understandings of some (perhaps elite or otherwise nonrepresentative) subset.

Future empirical studies might also identify other tensions between how ordinary people and traditional textualists use language. If textualism is to be a legitimate methodology in the future, it should welcome such findings and revise the methodology as needed. Textualists can pursue their stated commitment to "ordinary people" in various ways. One, which we call "methodologically progressive textualism," takes seriously empirical facts about how real people understand language. An alternative, which we call "methodologically regressive textualism," ignores data about ordinary people, relying instead on judicial speculation and tradition. Today's textualism is often a *regressive* textualism—unempirical, speculative, and unrestrained. Insofar as textualism claims to promote rule of law values and democracy by centering interpretation on the "ordinary public," it must at least begin looking to facts about ordinary people.

367. Eskridge, Jr. & Nourse, *supra* note 3, at 1811.