

**THE ENDURING RELEVANCE OF CONGRESS DESPITE  
THE COURT’S SHIFT TO “ORDINARY READER”  
STATUTORY INTERPRETATION**

*Abbe R. Gluck & Laila M. Robbins\**

*Has Congress become irrelevant to statutory interpretation? The dominant theoretical and doctrinal paradigm in American statutory interpretation has always been the conversation between Congress and the courts. Today, however, the Court’s new, second-generation textualists claim they have left Congress behind. They argue they have changed textualism’s perspective, from an “insider” perspective focused on Congress’s textual choices, to an “outsider” perspective based on how “ordinary people” read statutes. The Court’s self-professed shift away from a legiscentric approach, if true, would be a seismic shift in the conception of the judicial role. Whereas judges and scholars—including first-generation textualists—had for a century focused on legislative supremacy and Congress’s practices and intentions, today, a majority of the Court claims its role is something entirely different. Rather than serve as a “junior partner” of the legislature, the Court says its role is to enforce a populist conception of how regular people encounter statutes, as well as the value of fair notice. But as it turns out, divorcing statutory meaning from Congress is not as simple as it looks. Our review of statutory interpretation cases over the past six Terms illustrates that, despite their protests, even the most ardent textualists’ opinions that purport to turn on ordinary meaning are in fact riddled with implicit—and sometimes explicit—assumptions*

---

\* Abbe R. Gluck, Alfred M. Rankin Professor of Law, Yale Law School; Laila Robbins, Yale Law School Class of 2024. With thanks to Jamie Macleod and the symposium organizers, the *Brooklyn Journal of Law and Policy*, participants at the 2024 Legislation Roundtable at Georgetown, and of course, to Larry Solan.

*about congressional intent and how Congress drafts, including surreptitious uses of legislative history. This Essay explores the Court's rhetorical shift and why it has not been complete in doctrinal implementation. The congressional perspective in fact remains ubiquitous in the Court's interpretive work, even as the Court disavows it.*

## I. INTRODUCTION

Has Congress become irrelevant to statutory interpretation?

The dominant theoretical and doctrinal paradigm in American statutory interpretation has always been the conversation between Congress and the courts. Today, however, the Court's new, second-generation textualists claim they have left Congress behind. They argue they have changed textualism's perspective, from an "insider" perspective focused on Congress's textual choices, to an "outsider," populism-inspired, perspective based on how "ordinary people" read statutes.<sup>1</sup>

Of course, most ordinary people—and even most lawyers—do not read statutes. This Essay interrogates the newest textualists' claims about ordinary meaning, specifically with respect to the corollary that a focus on Congress has become irrelevant to statutory interpretation. Reviewing all statutory interpretation opinions by the Court's textualists over the past six Terms reveals that the Justices taketh with one hand what they giveth away with another. The congressional perspective in fact remains ubiquitous in the Court's interpretive work, even as the Court disavows it.

Larry Solan was genius—and a world-class mensch. He pioneered linguistic analysis in statutory interpretation. But he did so not to argue that words should be analyzed in a vacuum of dictionaries or computational tools like corpus linguistics and Chat GPT. Instead, his work often aimed to show the dangers of courts' efforts to reach conclusions about statutory meaning based on text alone, especially when judges act like amateur linguists.<sup>2</sup> He cared about Congress, purpose, legislative history, and statutory context,

---

<sup>1</sup> Amy Coney Barrett, *Congressional Insiders and Outsiders*, 84 U. CHI. L. REV. 2193 (2017).

<sup>2</sup> LAWRENCE M. SOLAN, *THE LANGUAGE OF JUDGES* 59–63 (1993).

and cautioned that decisions made by looking at text divorced from everything else risked injustice.<sup>3</sup>

This project was motivated by thinking about Professor Solan's impact. In many ways, he is the father of the current interpretive focus on language and ordinary speech. But he did not approve of the current pseudo-outsider turn, and always situated statutes in their legislative context. Are the newest textualists really that different?

With thanks to Professor Solan for inspiration and many years of collegueship and friendship, this project has launched a review of statutory interpretation decisions from the past six Supreme Court Terms to determine the current textualists' approaches to Congress. Our initial findings are so intriguing that we have extended the project into a complete analysis of the past six Terms, the results of which will be published in future work. Here, we present four preliminary findings that suggest the answer to our opening question is "No": Congress remains everywhere despite—and in many instances inconsistently with—the new, overarching "ordinary reader" paradigm.

*First*, and ironically, Congress is now being refenced with more respect. The Court's newest textualists have adopted, in their opinions, a concept of the "rational Congress" that, intriguingly, purports to hold Congress in *higher* esteem than did their textualist predecessors, who were notable for their cynicism about the inscrutability of the purposes of the legislature.<sup>4</sup>

*Second*, and relatedly, the newest textualists like to look to Congress's goals, most often in deploying their new quasi-canonical presumption that a rational Congress does not enact "self-defeating" statutes. This presumption requires the Court to explicitly assess Congress's purposes—otherwise one cannot know what is being

---

<sup>3</sup> LAWRENCE M. SOLAN, *THE LANGUAGE OF STATUTES: LAWS AND THEIR INTERPRETATION* 62–78, 118–19, 183–192 (2010).

<sup>4</sup> *See infra* Part III. *See, e.g.*, *HollyFrontier Cheyenne Ref., LLC v. Renewable Fuels Ass'n*, 594 U.S. 382, 388–89 (2021); *United States v. Taylor*, 596 U.S. 845, 861 (2022) (Thomas, J., dissenting).

defeated<sup>5</sup>—and so we see a new interest in statutory purpose that earlier textualists typically avoided.

*Third*, and perhaps most surprisingly, almost all of the newest textualists continue to use legislative history to discern congressional intent. Some uses are still overt.<sup>6</sup> Many others, however, are shockingly surreptitious: The Court often uses layered citations to older cases that themselves rely directly on legislative history materials for the proposition being cited—which is usually Congress’s legislative goal.<sup>7</sup> But the Court does not acknowledge it is secretly using legislative history in this way, and often does not even cite the legislative-history source relied upon.

*Fourth*, and finally, despite the insistence on a move from a congressional “insider” perspective to an “outsider” one, the Court continues to use canons and interpretive tools that rely on the perspective of legislators, rather than the ordinary reader—tools including assuming Congress knows terms of art,<sup>8</sup> making assumptions about why Congress took a particular position,<sup>9</sup> or assuming that because Congress legislated specifically in one part of the Code “it knows how to do so” and chose not to elsewhere.<sup>10</sup>

What is going on here? All four of these datapoints are inconsistent with a pure “ordinary reader” approach. Why say one thing and do another? One possible explanation is that an ordinary reader approach may not actually work without a theory of congressional rationality and competence. The textualist Court of

---

<sup>5</sup> See *infra* Part IV. See, e.g., *Quarles v. United States*, 587 U.S. 645, 650 (2019); *Borden v. United States*, 593 U.S. 420, 460 (2021) (Kavanaugh, J. dissenting); *Pugin v. Garland*, 599 U.S. 600, 607 (2023); *Jones v. Hendrix*, 599 U.S. 465, 479 (2023).

<sup>6</sup> See, e.g., *Home Depot U.S.A., Inc. v. Jackson*, 587 U.S. 435, 447–48, (2019) (Alito, J., dissenting).

<sup>7</sup> See, e.g., *Quarles*, 587 U.S. at 650; *Ysleta Del Sur Pueblo v. Texas*, 596 U.S. 685, 708–710 (2022) (Roberts, C.J., dissenting); *Turkiye Halk Bankasi A.S. v. United States*, 598 U.S. 264, 275 (2023).

<sup>8</sup> See *infra* Section VI.2. See, e.g., *United States v. Hansen*, 599 U.S. 762 (2023); *Biden v. Nebraska*, 600 U.S. 477 (2023); *Artis v. District of Columbia*, 583 U.S. 71 (2018).

<sup>9</sup> See *infra* Section VI.3. See, e.g., *Republic of Sudan v. Harrison*, 587 U.S. 1 (2018); *Azar v. Allina Health Services*, 586 U.S. 566 (2019).

<sup>10</sup> See *infra* Section VI.4. See, e.g., *Pugin v. Garland*, 599 U.S. 600 (2023); *Epic Systems Corp. v. Lewis*, 584 U.S. 497 (2018).

Justice Scalia often argued Congress was irrational and impossible to understand. Textualism thus tried to provide a set of coordinating rules to make up for the inscrutability of Congress—a framework that put Courts and Congress on the same page, even if they did not understand one another. Justice Scalia himself argued that the only legitimate presumptions of interpretation (the “canons”) were ones “based upon realistic assessments of congressional intent, and . . . well known to Congress—thus furthering rather than subverting genuine legislative intent.”<sup>11</sup> In other words, old-school textualists thought Congress could not be understood but still tethered their interpretive rules to it.

In contrast, today’s textualist Justices claim that the regular Joanne reads statutes, and that statutes are intelligible enough for ordinary people to understand. Both are fictions. But those fictions seem to *require* a view that Congress’s work is rational and intelligible; otherwise, how would Joanne be able to read a statute in a way so obvious that judges could figure out what Joanne thought? In other words, the ordinary reader approach *cannot* fully depart from Congress; it necessarily relies on understanding Congress or it lacks a rational basis.

This intuition, however, does not explain everything the current Court is doing. Relying on legislative history, congressional purpose, and legal terms of art is not consistent with the ordinary reader approach, even as just described. And the Court has made so many gaping exceptions to its ordinary reader approach that one questions just how sincerely held it is.

In short, Professor Solan continues to teach, provoke, and inspire, even after his passing. We are very grateful for that.

## II. BACKGROUND: THE RISE OF THE ORDINARY READER APPROACH AND THIS ESSAY’S METHODOLOGY

Consider the change of perspective that the newest Justices have purported to accomplish. As statutes came to dominate the legal terrain after the New Deal, the power of judges to make law was

---

<sup>11</sup> *Bond v. United States*, 572 U.S. 844, 872 (2014) (Scalia, J., concurring).

declared “an anachronism in an age of legislation”<sup>12</sup> with the new goal being “to discover the rule which the law-maker intended to establish.”<sup>13</sup> The Legal Process movement of the 1950s extended this theory, grounding interpretation in backdrop assumptions that “the legislature [i]s made up of reasonable persons pursuing reasonable purposes reasonably,” and that statutes “have purposes or objectives that are discernable.”<sup>14</sup> To Legal Process adherents, the task of the judge was to make sense of legislation in a way faithful to Congress’s objectives, and Congress’s objectives were viewed as rational.<sup>15</sup> In the subsequent intentionalist and purposivist eras, judges sought to excavate Congress’s “purpose,” what Congress “intended,”<sup>16</sup> and looked to materials from the legislative record to better understand Congress’s work product.<sup>17</sup>

Even with the rise of Justice Scalia’s textualism in the 1990s, Congress remained front and center. The core debate between textualists and purposivists for two decades was over which theory made judges better faithful agents of the *legislature* in interpreting statutes.<sup>18</sup> In other words, both sides shared the same goal, which put Congress at the top of the interpretive pyramid. The question

---

<sup>12</sup> Roscoe Pound, *Spurious Interpretation*, 7 COLUM. L. REV. 379, 381 (1907).

<sup>13</sup> *Id.* at 381–83.

<sup>14</sup> HENRY HART JR. & ALBERT SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 1415 (1958); ROBERT KATZMANN, *JUDGING STATUTES* 31 (2014) (“[L]egislation is the product of a deliberative and informed process. Statutes in this conception have purposes or objectives that are discernable. The task of the judge is to make sense of legislation in a way that is faithful to Congress’s purposes.”).

<sup>15</sup> KATZMANN, *supra* note 14, at 31.

<sup>16</sup> Peter L. Strauss, *The Common Law and Statutes*, 70 U. COLO. L. REV. 225, 227 (1999); *see also* Jonathan R. Siegel, *The Inexorable Radicalization of Textualism*, 158 U. PENN. L. REV. 117, 123–24 (2009).

<sup>17</sup> *See, e.g.*, Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845, 848 (1992).

<sup>18</sup> John F. Manning, *What Divides Textualists from Purposivists?*, 106 HARV. L. REV. 70, 92 (2006); John F. Manning, *Without the Pretense of Legislative Intent*, 130 HARV. L. REV. 2397, 2426–27 (2017); Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 17 (2018).

was simply which served Congress better. Textualists made constitutional arguments for their theory based on separation of powers: lawmaking belonged to Congress. And textualists justified their new interpretive doctrines—the “canons” of interpretation—as democratically and constitutionally legitimate by arguing that they reflected how Congress drafts<sup>19</sup> or at least served as a set of shared background rules<sup>20</sup> of interpretation that put courts and Congress in conversation.<sup>21</sup>

---

<sup>19</sup> ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 51 (2012) (arguing that the interpretive canons are “presumptions about what an intelligently produced text conveys”).

<sup>20</sup> *See* *Lockhart v. United States*, 546 U.S. 142, 148 (2005) (Scalia, J., concurring) (acknowledging that “legislative express-reference or express-statement requirements may function as background canons of interpretation of which Congress is presumptively aware”); John F. Manning, *The New Purposivism*, 2011 SUP. CT. REV. 113, 155 (“[T]he legal community shares a rich set of *established* background conventions that apply in recognizable situations”); *Bond v. United States*, 527 U.S. 844, 862 (2014) (“[I]t is fully appropriate to apply the background assumption that Congress normally preserves ‘the constitutional balance between the National Government and the States.’”); *City of Arlington v. FCC*, 569 U.S. 290, 296 (2013) (“*Chevron* thus provides a stable background rule against which Congress can legislate: Statutory ambiguities will be resolved, within the bounds of reasonable interpretation, not by the courts but by the administering agency.”); John F. Manning, *Continuity and the Legislative Design*, 79 NOTRE DAME L. REV. 1863, 1864–65 (2004) (“Because modern formalists (*qua* textualists) doubt that intent or purpose gleaned from the legislative history offers a reliable way to resolve statutory indefiniteness, they want clear and predictable background rules to help legislators and interpreters decode textual cues.”).

<sup>21</sup> Frank H. Easterbrook, *Statutes’ Domains*, 50 U. CHI. L. REV. 533, 540 (1983) (“[R]ules of statutory construction . . . spare legislators the need to decide and announce, law by law, the rules that will be used for interpreting the code of words they select.”); John F. Manning, *Inside Congress’s Mind*, 115 COLUM. L. REV. 1911, 1943 (2015) (“[T]he so-called ‘rejected canons’ still *make available* ‘off-the-rack’ rules for Congress to express itself more precisely, even if staffers do not necessarily take advantage of the tools provided.”); *see* Abbe R. Gluck, *Congress, Statutory Interpretation, and the Failure of Formalism: The CBO Canon and Other Ways That Courts Can Improve on What They Are Already Trying to Do*, 84 U. CHI. L. REV. 177, 181 (2017); *see also* Abbe R. Gluck,

In contrast, the Court's newest textualists—Justices Alito, Gorsuch, Barrett, and to a lesser extent, Kavanaugh, Roberts and Thomas—contend that they reject the idea of a Court-Congress dialogue. Instead, the Justices say they are “agents of the people rather than of Congress” and “faithful to the law rather than to the lawgiver.”<sup>22</sup> Rather than using the “construct of a hypothetical writer of a statute,” the newest textualists “use the construct of a hypothetical reader” (says Barrett)<sup>23</sup> to understand “how ordinary people understand the rules that govern them” (says Gorsuch)<sup>24</sup> and “the meaning a reasonable reader would derive from the text of the law” (says Kavanaugh),<sup>25</sup> variously defined as an “ordinary speaker of English”<sup>26</sup> and a person “familiar with the English language” (says Alito).<sup>27</sup> The goal of textualism is to “simply . . . interpret the law as an ordinary person would” (says Thomas),<sup>28</sup> and to discern how a “word is ordinarily used” (says Roberts).<sup>29</sup>

The Court's self-professed shift away from a legiscentric approach, if true, would be a seismic shift in the conception of the judicial role. Whereas judges and scholars had for a century “insisted that the legislative purposes and aims are the important guideposts for statutory interpretation,”<sup>30</sup> with the foundational concept being legislative supremacy, today, a majority of the Court claims its role is something different. Rather than serve as a “junior

---

*Imperfect Statutes, Imperfect Courts: Understanding Congress's Plan in the Era of Unorthodox Lawmaking*, 129 HARV. L. REV. 62, 65 (2015) [hereinafter *Imperfect Statutes, Imperfect Courts*] (“A second-best response to a Congress that courts can never understand is to devise clear legal doctrines that further rule-of-law values like predictability or coherence.”).

<sup>22</sup> Barrett, *supra* note 1, at 2195.

<sup>23</sup> *Id.* at 2200.

<sup>24</sup> *Niz-Chavez v. Garland*, 593 U.S. 155, 169 (2021).

<sup>25</sup> *Bostock v. Clayton Cnty.*, 590 U.S. 644, 784 (2020) (Kavanaugh, J., dissenting).

<sup>26</sup> *Comcast Corp. v. Nat'l Ass'n of Afr. Am.-Owned Media*, 589 U.S. 327, 333 (2020).

<sup>27</sup> *Facebook, Inc. v. Duguid*, 592 U.S. 395, 411 (2021) (Alito, J., concurring).

<sup>28</sup> *Tanzin v. Tanvir*, 592 U.S. 43, 52 (2020).

<sup>29</sup> *Biden v. Nebraska*, 143 S. Ct. 2355, 2368 (2023).

<sup>30</sup> James M. Landis, *A Note on Statutory Interpretation*, 43 HARV. L. REV. 886, 892 (1930).

partner” of the legislature,<sup>31</sup> the Court says its role is to enforce a populist conception of how regular people encounter statutes, as well as the notion of fair notice.

It is not our task here to address the normative or practical value of the ordinary reader approach. For now, we will say only this: Despite the purported populism of an approach that emphasizes the ordinary reader, regular people—including high ranking members of the government (and members of Congress)—do not actually read federal legislation.<sup>32</sup> Anyone who has picked up a federal statute knows those statutes are not written in narrative form. The ordinary reader concept also purports to enforce this populist idea of taking statutes as they “are”; a concept ostensibly based in public notice, despite the fact, again, that regular people do not encounter statutory text in the ordinary course of everyday life. The development of that critique will have to await another day.

#### A. Methodology

We were inspired by this volume dedicated to Professor Solan to review 466 individual opinions from 213 Supreme Court statutory interpretation cases from April 2017 through June 2023. We reviewed what we believe is the complete set of individual opinions—466 individual opinions in total—from 213 Supreme Court statutory interpretation cases from April 2017 through June

---

<sup>31</sup> See, e.g., Strauss, *supra* note 16, at 252 (“Legislators and judges are partners in the work of government.”); Richard H. Fallon, Jr. & Daniel J. Meltzer, *Habeas Corpus Jurisdiction, Substantive Rights, and the War on Terror*, 120 HARV. L. REV. 2029, 2041 (2007) (describing the common law model of statutory interpretation, where “courts play the role of junior partners to Congress by fleshing out legislative enactments and sometimes presuming that Congress would not have wanted to run up against possible constitutional prohibitions.”).

<sup>32</sup> Lisa Schultz Bressman & Abbe R. Gluck, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901, 940, 983–84 (2013); Lisa Schultz Bressman & Abbe R. Gluck, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part II*, 66 STAN. L. REV. 725, 737, 740–42 (2014).

2023 that mention Congress. To gather that set of statutory cases, we relied on both prior scholarly work and supplemental Westlaw searches. First, Georgetown Law Professor Anita Krishnakumar generously shared her manually coded list of all statutory interpretation cases from the 2015 through 2021 Terms. To supplement this list with cases from the 2022 Term, we searched Westlaw’s Key Numbers for statutes (361) and administrative law (15A) for all cases mentioning Congress. Within this dataset, we have extracted every mention of “Congress!”, “legislator,” and “legislature,” which covered 388 opinions in 204 cases. We excluded opinions that did not mention Congress at all or where Congress was only referenced non-substantively in passing. For example, in *Golan v. Saada*, the stand-alone statement in Justice Sotomayor’s majority opinion that “Congress implemented the Convention in the International Child Abduction Remedies Act” was excluded from our set of potentially relevant cases.<sup>33</sup> For our initial analysis, within the set of opinions that substantively referenced Congress, we primarily focused on opinions authored by the textualist justices—which included 216 opinions in 152 cases.

Our focus in this first paper is not quantitative. Our goal is to simply provide examples of the range of cases in which the Court is still focused on Congress, and explore preliminary findings. It is therefore more relevant to our inquiry that each Justice sometimes still relies on Congress than to quantify the number of cases that do not mention Congress at all. We defer full analysis of the dataset and the results for future work.

### III. THE NEWEST TEXTUALISTS EMBRACE A “RATIONAL CONGRESS”

Traditional textualists still saw themselves as faithful agents of Congress despite their cynicism about it. For them, textualism’s formalism offered a second-best alternative to a Congress that could never really be understood.<sup>34</sup> Public choice theorists provided empirical grounding for textualists, underscoring the difficulty of “aggregat[ing] individual legislators’ preferences into a coherent collective decision” and characterizing legislative choices as often

---

<sup>33</sup> *Golan v. Saada*, 596 U.S. 666, 671 (2022).

<sup>34</sup> *Imperfect Statutes, Imperfect Courts*, *supra* note 21, at 65.

irrational.<sup>35</sup> Justice Scalia, teeing off early legal realists like Max Radin,<sup>36</sup> argued that it was the *irrationality* and *inscrutability* of Congress that made the search for legislative intent an impossible one.<sup>37</sup>

Our study reveals that the newest textualists, however, especially Justice Gorsuch, rely on the opposite idea—that Congress is “rational.” As noted, an approach that turns on “ordinary public meaning”—i.e., that the public can actually understand statutes—might actually *require* an underlying assumption that Congress drafts rationally. But the co-optation of this Legal Process assumption also conveniently allows for deviations from any literalist or absurd results produced by an “ordinary meaning” interpretation: If we impose on the average Joanne the assumption that she thinks Congress legislates rationally when she reads a statute, Joanne will not read statutes to be absurd. The Court can then deviate from text to find a different meaning.

The rationality assumption also allows the Court, when it assumes Congress is “competent,” to make additional, nontextual, assumptions about what Congress considered. This is an insider tool in outsider clothing. Our review of the cases illustrates that the Court will consider the backdrop of state law or competing policy arguments, for example—materials many “ordinary” individuals are

---

<sup>35</sup> John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673, 685–86 (1997).

<sup>36</sup> Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 870–72 (1930) (“A legislature certainly has no intention whatever in connection with words which some two or three men drafted, which a considerable number rejected, and in regard to which many of the approving majority might have had, and often demonstrably did have, different ideas and beliefs . . . [T]he intention of the legislature is undiscoverable in any real sense.”).

<sup>37</sup> See, e.g., William N. Eskridge, Jr., *The New Textualism*, 37 U.C.L.A. L. REV. 621, 652 n.118 (1990) (quoting Antonin Scalia) (“That a majority of both houses of Congress (never mind the President, if he signed rather than vetoed the bill) entertained any view with regard to [interpretive] issues is utterly beyond belief. For a virtual certainty, the majority of Members were blissfully unaware of the *existence* of the issue, much less had any preference as to how it should be resolved.”).

not actually familiar with—because it assumes a “competent” Congress would do the same.

Since 2018, the Court (predominantly Justice Gorsuch) has used the phrase “rational Congress,” “reasonable Congress” or “rational drafter” in eleven opinions (six Gorsuch majority opinions, two Gorsuch dissents, one Thomas dissent, one Jackson dissent, and one Kagan dissent) to justify examining the text alone or rejecting purportedly absurd interpretations.<sup>38</sup> In contrast, between 1948 and 2017, these phrases were collectively used just five times.<sup>39</sup>

Justice Gorsuch often invokes Congress’s rationality as a reason to sneak a peek at policy and consequences before he declares his adherence to the text. One typical example appears in *HollyFrontier Cheyenne Refining, LLC v. Renewable Fuels Association*,<sup>40</sup> in which the Court considered whether a provision in the Renewable Fuel Program that initially exempted small fuel refineries from its

---

<sup>38</sup> *Niz-Chavez v. Garland*, 593 U.S. 155, 167 (2021); *Pereida v. Wilkinson*, 592 U.S. 224, 232 (2021); *Luna Perez v. Sturgis Pub. Sch.*, 598 U.S. 142, 150 (2023); *HollyFrontier Cheyenne Refin., LLC v. Renewable Fuels Ass’n*, 594 U.S. 382, 397-98 (2021); *Azar v. Allina Health Servs.*, 587 U.S. 566, 582 (2019); *United States v. Taylor*, 596 U.S. 845, 863 (2022) (Thomas, J., dissenting); *BP P.L.C. v. Mayor & City Council of Baltimore*, 141 S. Ct. 1532, 1542 (2021); *Yellen v. Confederated Tribes of Chehalis Rsrv.*, 594 U.S. 338, 378–79 (2021) (Gorsuch, J., dissenting); *Artis v. D.C.*, 583 U.S. 71, 99, (2018) (Gorsuch, J., dissenting); *W. Virginia v. Env’t Prot. Agency*, 597 U.S. 697, 781 (2022) (Kagan, J., dissenting); *Jones v. Hendrix*, 599 U.S. 465, 517, (2023) (Jackson, J., dissenting).

<sup>39</sup> The most closely analogous pre-2019 usage of a “rational Congress” was Justice Scalia’s majority opinion in *United States v. Santos*, 553 U.S. 507 (2008). In response to the Government’s argument that a “profits” interpretation “fails to give the federal money-laundering statute its proper scope,” Justice Scalia invoked the “rational Congress” language, finding both sides’ arguments equally plausible in order to justify reliance on a canon (the rule of lenity): “A rational Congress could surely have decided that the risk of leveraging one criminal activity into the next poses a greater threat to society than the mere payment of crime-related expenses and justifies the money-laundering statute’s harsh penalties.” Other pre-2019 invocations include: *F.B.I. v. Abramson*, 456 U.S. 615, 641 (1982) (O’Connor, J., dissenting); *Dan’s City Used Cars, Inc. v. Pelkey*, 569 U.S. 251, 265 (2013); *N. Haven Bd. of Ed. v. Bell*, 456 U.S. 512, 555 (1982) (Powell, J., dissenting); *Com. of Mass. v. United States*, 333 U.S. 611, 637 (1948).

<sup>40</sup> *HollyFrontier Cheyenne Refin., LLC v. Renewable Fuels Association*, 594 U.S. 382 (2021).

mandate and allowed for subsequent hardship-based “extensions” of the exemption permitted small refineries to apply for an “extension” of the exemption, even if their previous exemption had lapsed. Justice Gorsuch, writing for the majority, held that the refineries remained eligible, explaining that the ordinary meaning of “extension” does not require “unbroken continuity.”<sup>41</sup>

The “rational Congress” came in when Gorsuch addressed policy arguments of the objecting parties.<sup>42</sup> Gorsuch acknowledged that “a rational Congress” could have found merit and intended either policy position and that “*both* sides can offer plausible accounts of legislative purpose and sound public policy.”<sup>43</sup> It was precisely because of the existence of equally rational legislative purposes, Gorsuch concluded, that ordinary meaning could justifiably carry the day.<sup>44</sup>

This approach reminds us of what some scholars have called the old “soft plain meaning approach” of the pre-textualist era. The Burger Court of the 1970s and 1980s sought to rely on plain meaning, but usually would double-check purpose, history, or consequences to support its decisions and enhance their perceived legitimacy.<sup>45</sup> And like Gorsuch implied in *HollyFrontier*, the suggestion was always that a textual reading that did not gel with plausible congressional intent would not have prevailed—ordinary meaning notwithstanding—a view that echoes the purposive Hart and Sacks Legal Process position that “law is not supposed to be irrational.”<sup>46</sup>

Indeed, the current Court rejects proposed interpretations with policy results that a “rational Congress” could not have intended; that is, respect for a “rational Congress” is a reason to depart from

---

<sup>41</sup> *Id.* at 383.

<sup>42</sup> *Id.* at 397–99.

<sup>43</sup> *Id.* at 399–400.

<sup>44</sup> *Id.*

<sup>45</sup> This helpful label was coined by Eskridge and Frickey in the early editions of their casebook. WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY & ELIZABETH GARRETT, *STATUTORY INTERPRETATION STORIES* (2010), and is exemplified in *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 174–93 (1978).

<sup>46</sup> HART JR. & SACKS, *supra* note 14, at 1415.

text. Justice Thomas's dissent in *United States v. Taylor* provides an example. Justice Thomas argued that the majority took a "journey Through the Looking Glass" in holding that Taylor's "armed robbery that resulted in the victim's death" was not a "crime of violence" because a "hypothetical criminal could commit the same offense" without using force.<sup>47</sup> Justice Thomas's focus was *not* the plain statutory text of the elements clause, but the consequences; and consequences were fair game to review because of the overarching paradigm that legislation must be interpreted assuming Congress is rational. Make no mistake: This is a Congress-focused approach.

The point that the current Court is considering consequences more often is not new. Other scholars, including Anita Krishnakumar and Victoria Nourse,<sup>48</sup> have quantified this trend. And even Justice Scalia loved the so-called "absurdity exception"—allowing departure from a textual reading if it produced "absurd results."<sup>49</sup> Our point is that the theoretical underpinning for doing so is not really grounded in the ordinary reader, regardless of what the Court is now saying.

To be sure, the Justices *could* say instead that rational *readers* of statutes will assume that Congress did not mean to legislate odd consequences, and so ordinary Joes would read out absurd results. But that is not the language the Court uses in cases like *Taylor*. The

---

<sup>47</sup> *Taylor*, 596 U.S. at 861 (Thomas, J., dissenting).

<sup>48</sup> Anita S. Krishnakumar, *Textualism in Practice*, DUKE L. J. 573, 598 (2024) (finding that "practical consequences is the third-most-referenced tool across all statutory interpretation opinions, behind only text/plain meaning and Supreme Court precedent . . . The figures actually get *worse* if we look at only the Court's most recent, 2017-2020 Terms"); Victoria Nourse, *The Paradoxes of a Unified Judicial Philosophy: An Empirical Study of the New Supreme Court: 2020–2022*, 38 Const. Comment 1, 2 (2023) (forthcoming) (finding that "in a super-majority of cases where there is textual disagreement or interpretive conflict, the Justices turn to the policy consequences of their interpretation to reason for or against particular interpretations," and considering three possibilities for "how textualists might theoretically reconcile or defend their practice . . . consequentialism as harmless additive, consequentialism as textual 'construction,' and consequentialism as a modern return to the ancient absurdity rule.").

<sup>49</sup> Cf. John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2390–92 (2003) (arguing that rule against absurdities is inconsistent with textualism).

point of view there remains *Congress's*—not that of the ordinary Joe—and this Court's emphasis on respect for Congress's competence is different from what came before.

Appellate judges have taken notice. They have also started to incorporate references to the “rational Congress,” including when they justify rejecting an interpretation with absurd results. For example, the Eleventh Circuit recently held: “we may depart from the literal meaning of an unambiguous statute only where a rational Congress . . . could not conceivably have . . . intended the literal meaning to apply.”<sup>50</sup>

#### IV. NO “SELF-DEFEATING” STATUTES—A PURPOSIVE INQUIRY

Since 2019, Justices Kavanaugh and Thomas have invoked a presumption that Congress does not enact “self-defeating” statutes in four opinions.<sup>51</sup> But in order to determine whether a statute is self-defeating, their inquiry becomes purposive—as opposed to textualist.

Notably, this emerging quasi-canon arguably originated with Felix Frankfurter, one of the giants of the Legal Process School, which was famously purposive. In *Nardone v. United States*, in which the Court considered the admissibility of evidence procured in violation of § 605 of the Communications Act of 1934, Justice Frankfurter wrote, a “decent respect for the policy of Congress must save us from imputing to it a self-defeating, if not disingenuous purpose.”<sup>52</sup> The foundation for this conclusion is Frankfurter's

---

<sup>50</sup> *Vachon v. Travelers Home & Marine Ins. Co.*, 20 F.4th 1343 (11th Cir. 2021) (internal quotation marks omitted); *see also* *United States v. Garcon*, 54 F.4th 1274, 1283 (11th Cir. 2022); *United States v. Pate*, 84 F.4th 1196, 1205 n.3 (11th Cir. 2023); *De La Rosa v. Garland*, 2 F.4th 685, 688 (7th Cir. 2021); *Bledsoe v. Cook*, 70 F.4th 746, 751 (4th Cir. 2023); *Martz v. Horazdovsky*, 33 F.4th 1157, 1167 (9th Cir. 2022).

<sup>51</sup> *Borden v. United States*, 593 U.S. 420, 460 (2021) (Kavanaugh, J. dissenting); *Pugin v. Garland*, 599 U.S. 600, 607 (2023); *Quarles v. United States*, 587 U.S. 645, 653–54 (2019); *Jones v. Hendrix*, 599 U.S. 465, 479 (2023).

<sup>52</sup> *Nardone v. United States*, 308 U.S. 338, 341 (1939).

underlying interpretive commitment that “[l]egislation has an aim” that “is not drawn, like nitrogen, out of the air; it is evinced in the language of the statute, as read in the light of other external manifestations of purpose.”<sup>53</sup>

Turning to the current Court, as an example, consider *Quarles v. United States*, where the Court examined whether a “remaining in” burglary qualifying as a predicate offense for an Armed Career Criminal Act sentencing enhancement occurs “only if a person has the intent to commit a crime *at the exact moment* when he or she *first* unlawfully remains in a building or structure, or . . . when a person forms the intent to commit a crime *at any time* while unlawfully remaining in a building or structure.”<sup>54</sup> Writing for the majority, Justice Kavanaugh held:

To interpret remaining-in burglary narrowly, as Quarles advocates, would *thwart the stated goals* of the Armed Career Criminal Act . . . of imposing enhanced punishment on armed career criminals who have three prior convictions for burglary or other violent felonies. *We should not lightly conclude that Congress enacted a self-defeating statute.*<sup>55</sup>

For a statute to be “self-defeating,” it must have “goals”—and so an application of this presumption turns on the Court’s ascertainment of Congress’s purposes, as Justice Kavanaugh indeed explicitly does in *Quarles*.

Notably, Justice Kavanaugh suggests that the goals come from *Congress*, not the ordinary reader or the isolated statutory text. And for goals to matter, the Court must adhere to a presumption that Congress is rational enough not to draft statutes that fall to pieces. Recall that Hart and Sacks, in support of their purposive approach, argued that because “law is not supposed to be irrational,” judges should interpret statutes against the backdrop assumption that “the

---

<sup>53</sup> Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 538–39 (1947).

<sup>54</sup> *Quarles v. United States*, 587 U.S. 645, 647 (2019).

<sup>55</sup> *Id.* at 653–64 (emphasis added).

legislature [i]s made up of reasonable persons pursuing reasonable purposes reasonably.”<sup>56</sup>

In *Jones v. Hendrix*, the Court considered the relationship between the habeas corpus statute, 28 U.S.C. § 2241, and a statutory provision for alternative postconviction remedies, 28 U.S.C. § 2255.<sup>57</sup> Justice Thomas invoked the “self-defeating” statute language in working to put the provisions “in harmony, not set them at cross purposes.”<sup>58</sup> Justice Thomas argued that the “‘sole purpose’ of [the alternative postconviction remedy] . . . ‘was to minimize the difficulties encountered in habeas corpus hearings’” by “rerouting federal prisoners’ collateral attacks on their sentences to the courts that had sentenced them.”<sup>59</sup> Accordingly, the saving clause of § 2255 only “preserves recourse to § 2241 in cases where unusual circumstances make it impossible or impracticable to seek relief in the sentencing court, as well as for challenges to detention.”<sup>60</sup> Justice Thomas concluded that “[a]ny other reading would make AEDPA curiously self-defeating.”<sup>61</sup>

Thomas expressly connected this argument to congressional goals, suggesting that the alternative reading would mean “resurrecting the very problems § 2255 was supposed to put to rest.”<sup>62</sup> Despite gestures to the contrary, these are purposive opinions, and they are focused on Congress.

---

<sup>56</sup> HART JR. & SACKS, *supra* note 14, at 1415. Justice Kavanaugh adopted the same approach in *Borden v. United States*, 593 U.S. 420, 460 (2021) (Kavanaugh, J. dissenting); *Pugin*, 599 U.S. at 607.

<sup>57</sup> *Jones v. Hendrix*, 599 U.S. 465 (2023).

<sup>58</sup> *Id.* at 478–79.

<sup>59</sup> *Id.* at 473–74.

<sup>60</sup> *Id.* at 478.

<sup>61</sup> *Id.* at 479.

<sup>62</sup> *Id.* (internal quotation marks omitted).

V. LEGISLATIVE HISTORY—THROUGH THE FRONT AND BACK  
DOORS

Perhaps most surprisingly, the newest textualists continue to use legislative history materials.<sup>63</sup> This is surprising because one of Justice Scalia's most enduring contributions was his successful crusade against the federal courts' frequent use of legislative history.

For example, Justice Alito, a not-infrequent legislative history user when he was on the Third Circuit,<sup>64</sup> continues to expressly rely on legislative history materials on the Court. In *Home Depot U.S.A., Inc. v. Jackson*, a case concerning whether third-party counterclaim defendants can remove cases to federal court under two statutes providing for removal by "defendant[s]," Justice Alito's dissent looked to congressional purpose in enacting the Class Action Fairness Act.<sup>65</sup> He relied on the Senate Committee Report in explaining the problem the Act attempted to address.<sup>66</sup> He also argued in *Bostock v. Clayton County*, in which the question was whether Title VII of the Civil Rights Act applied to sexual-orientation, that "when there is ambiguity in the terms of a statute," it is "appropriate to look to other evidence of 'congressional intent,' including legislative history."<sup>67</sup>

A more shocking revelation is that some of the newest textualists *smuggle* legislative history into opinions through layered case citations, even as they purport to eschew its use. For example, in *Quarles v. United States*, discussed above, Justice Kavanaugh quoted *another* case, which expressly relied on legislative history for the proposition he quoted about Congress's aims, but Justice Kavanaugh's opinion did not cite to the legislative history.<sup>68</sup> Instead

---

<sup>63</sup> Cf. *Barr v. Am. Ass'n of Pol. Consultants, Inc.*, 591 U.S. 610, 615 (2020) (Justice Kavanaugh explaining that "A leading Senate sponsor of the TCPA captured the zeitgeist in 1991" and citing the Congressional Record).

<sup>64</sup> Elliott Davis, *The Newer Textualism: Justice Alito's Statutory Interpretation*, 30 HARV. J.L. & PUB. POL'Y 983 (2006-2007).

<sup>65</sup> *Home Depot U.S.A., Inc. v. Jackson*, 587 U.S. 435 (2019) (Alito, J., dissenting).

<sup>66</sup> *Id.* at 447-48.

<sup>67</sup> *Bostock v. Clayton Cnty., Georgia*, 590 U.S. 644, 720-21 (2020) (Alito, J., dissenting).

<sup>68</sup> See *Quarles v. United States*, 587 U.S. 645, 653-54 (2019).

it reads, “As the Court recognized in *Taylor*, Congress ‘singled out burglary’ because of its ‘inherent potential for harm to persons.’”<sup>69</sup> But *Taylor* relied extensively on legislative history, including hearing transcripts and committee reports, to conclude: “The *legislative history* also indicates that Congress singled out burglary . . . for inclusion as a predicate offense, both in 1984 and in 1986, because of its inherent potential for harm to persons.”<sup>70</sup> Kavanaugh used the same argument but cited only the Court’s own precedent and not the legislative history it relied on to conclude: “Congress, when enacting § 924(e) in 1986, would not have understood the meaning of burglary to hinge on exactly when the defendant forms the intent to commit a crime while unlawfully present in a building or structure.”<sup>71</sup> The opinion launders legislative history through the guise of precedent.

In *Jones v. Hendrix*, also discussed above, Justice Thomas wrote, “The ‘sole purpose’ of this innovation, as this Court acknowledged a few years later, ‘was to minimize the difficulties encountered in habeas corpus hearings by affording the same rights in another and more convenient forum.’ *United States v. Hayman*, 342 U.S. 205, 219 (1952).”<sup>72</sup> Justice Thomas simply cites *Hayman*, but the *Hayman* Court itself set forth the full drafting history of the Act in its opinion, adding that “At the request of the Chairmen of the House and Senate Judiciary Committees, a ‘Statement’ describing the necessity and purposes of the bills was submitted to Congress on behalf of the Judicial Conference Committee on Habeas Corpus Procedure.”<sup>73</sup>

In both cases, the Justices attribute a conclusion about congressional purpose to the “Court,” by citing a precedent. But the precedent cited relies expressly on legislative history. This is backdoor purposivism.

So too, Justice Roberts wrote in *Ysleta Del Sur Pueblo v. Texas*:

---

<sup>69</sup> *Id.*

<sup>70</sup> *Taylor v. United States*, 495 U.S. 575, 588 (1990) (emphasis added).

<sup>71</sup> *Quarles*, 587 U.S. at 653.

<sup>72</sup> *Jones v. Hendrix*, 599 U.S. 465, 473 (2023).

<sup>73</sup> *United States v. Hayman*, 342 U.S. 205, 215–16, 219 (1952).

Public Law 280 allows certain States to apply in full their criminal laws, and some of their civil laws, on tribal lands. See *Bryan v. Itasca County*, 426 U.S. 373 (1976); see also *ante*, at 3–4. The law was designed to address “the problem of lawlessness on certain Indian reservations.” *Bryan*, 426 U.S., at 379.<sup>74</sup>

But the *Bryan v. Itasca County* court had written, “The primary concern of Congress in enacting Pub. L. 280 that emerges from its sparse legislative history was with the problem of lawlessness on certain Indian reservations, and the absence of adequate tribal institutions for law enforcement.”<sup>75</sup> This statement was followed by a lengthy quote from the House Report.<sup>76</sup>

There are other similar examples from Justice Kavanaugh, in *Turkiye Halk Bankasi A.S. v. United States*<sup>77</sup> and even Justice Barrett, in *ZF Automotive U.S., Inc. v. Luxshare, Ltd.*, relied on backdoor legislative history in construing the “key phrase for purposes of this case.”<sup>78</sup> At issue was whether the scope of 28 U.S.C. § 1782(a), which authorizes a district court to compel testimony or discovery “for use in a proceeding in a foreign or international tribunal” includes private tribunals. Justice Barrett first noted that “a prior version of §1782 covered ‘any judicial proceeding’ in ‘any court in a foreign country,’ but in 1964, Congress expanded the provision to cover proceedings in a ‘foreign or international tribunal.’” She relied on a precedent, *Intel v. Advanced Micro Devices*, to hold: “As we have previously observed, that shift created ‘the possibility of U.S. judicial assistance in connection with administrative and quasi-judicial proceedings abroad.’”<sup>79</sup> The quote

---

<sup>74</sup> *Ysleta Del Sur Pueblo v. Texas*, 596 U.S. 685, 711 (2022) (Roberts, C.J., dissenting).

<sup>75</sup> *Bryan v. Itasca Cnty.*, 426 U.S. 373, 379 (1976).

<sup>76</sup> *Id.* at 379–80.

<sup>77</sup> See *Turkiye Halk Bankasi A.S. v. United States*, 598 U.S. 264, 275 (2023).

<sup>78</sup> *ZF Auto. U.S., Inc. v. Luxshare, Ltd.*, 596 U.S. 619, 628 (2022).

<sup>79</sup> *Intel Corp. v. Advanced Micro Devices, Inc.* 542 U.S. 241, 258 (2004) (alterations omitted).

from *Intel* was a *direct quote* from a Senate Report, but she cited only the opinion, not the report.<sup>80</sup>

These cases are surprising. It is one thing to argue that congressional intent is irrelevant to statutory interpretation—but it is another to claim that one is adopting an “outsiders” approach that eschews congressional materials, while nonetheless relying on them (without acknowledging as much), by laundering legislative history through previous opinions that cited it.

By insisting instead that the Court is merely holding a mirror up to the average Joe who reads the statute, when in fact it is doing a lot more “insider” work, the Court undermines the legitimacy of the stated basis of its own opinions. If the Court were trying to determine what the ordinary reader might know about the purpose of the statute, it might instead look to newspaper articles and television from the time, rather than old judicial opinions that in turn relied on legislative history materials. Or it would be explicit about references to Congress’s own statements.

The more interesting theoretical question is, why cite legislative purpose at all? In each of these opinions, the writing Justice feels the need to shore up their textual interpretation with reference to the purpose of the statute. There is an implicit suggestion here that alignment with statutory purpose strengthens the textualist, “ordinary meaning” result. Why not, then, acknowledge that the approach being followed is actually multi-faceted and somewhat eclectic—and perhaps not so different from the Legal Process, or soft-plain-meaning approach of yore?<sup>81</sup> Instead, the Court proffers

---

<sup>80</sup> *Id.* (“Section 1782 had previously referred to ‘any judicial proceeding.’ The Rules Commission’s draft, which Congress adopted, replaced that term with ‘a proceeding in a foreign or international tribunal.’ . . . Congress understood that change to ‘provid[e] the possibility of U.S. judicial assistance in connection with [administrative and quasi-judicial proceedings abroad].’ S. Rep. No. 1580, at 7–8 . . . We have no warrant to exclude the European Commission, to the extent that it acts as a first-instance decisionmaker, from § 1782(a)’s ambit.”)

<sup>81</sup> *Cf.* 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, 1302 (2018) (finding eclecticism as the dominant approach of lower courts, regardless of political affiliations of judges, concluding: “The

its ordinary meaning approach as some kind of streamed down, purer, more accessible approach. The cases reveal that depiction is simply inaccurate.

## VI. INSIDERS V. OUTSIDERS

In 2017, then-Professor Barrett wrote an article, partially responding to work by one of us, that advocated for interpretive methods more reflective of the legislative process. Barrett argued instead for textualists to “approach language from the perspective of an ordinary English speaker—a congressional outsider.”<sup>82</sup> She continued:

What matters to the textualist is how the ordinary English speaker—one unacquainted with the peculiarities of the legislative process—would understand the words of a statute. Congressional insiders and outsiders share common ground as English speakers, but there may be some respects in which their linguistic conventions differ. When they do, the outsider’s perspective controls.<sup>83</sup>

While Barrett’s charge has ostensibly been taken up by her fellow newest textualists in the announced shift toward the ordinary reader, in fact, many tools that all of the newest textualist Justices continue to use remain insiders’ tools.

To be clear, we value “insider” tools and do not criticize the Court’s reliance on them. Rather, we challenge the Justices to come up with a theory for what they are doing that acknowledges they are mixing “insider” and “outsider” approaches.

The following sections illustrate the various insider tools this Court commonly deploys.

---

approach that emerged most clearly from our interviews is not a single approach at all but rather what might be described as intentional eclecticism.”).

<sup>82</sup> Barrett, *supra* note 1, at 2194.

<sup>83</sup> *Id.*

### 1. Congressional Intent and Purpose

Looking to congressional purpose and intent, or otherwise considering statutes from Congress's perspective, is perhaps the most paradigmatic "insider" tool. Justice Thomas's opinion in *Home Depot*, discussed above, reflects an "old-school" textualist approach in the sense that its word analysis is aimed at discerning congressional intent. Justice Thomas wrote:

The use of the term "defendant" in related contexts bolsters our determination that Congress did not intend for the phrase "the defendant or the defendants" in § 1441(a) to include third-party counterclaim defendants . . . . [T]he limits Congress has imposed on removal show that it did not intend to allow all defendants an unqualified right to remove . . . . Neither clause—nor anything else in the statute—alters § 1441(a)'s limitation on *who* can remove, which suggests that Congress intended to leave that limit in place.<sup>84</sup>

Similarly, Justice Alito's dissent in the same case mixes textual analysis with congressional goals and, even more interestingly, analysis of whether Congress and the courts are in conversation, a focus that implies the relevant perspective is Congress's and not that of the average outsider. Justice Alito wrote:

To appreciate what Congress sought to achieve with CAFA, consider what Congress failed to accomplish a decade earlier with the Private Securities Litigation Reform Act of 1995 (Reform Act) . . . . Second, even if the lower courts all agreed, the "legal backdrop" created by their decisions would matter only insofar as it told us what we can "safely assume" about what Congress "intend[ed]." . . . So the less salient that backdrop would have been to Congress, the less relevant it is to interpreting Congress's actions . . . . But even if several higher courts had

---

<sup>84</sup> *Home Depot U.S.A., Inc. v. Jackson*, 587 U.S. 435, 442 (2019).

spoken—and spoken with one voice—there would be a problem: We have no evidence Congress was listening.<sup>85</sup>

What Congress intended and whether Congress was “listening” to lower courts should be irrelevant under a pure ordinary meaning or reasonable reader framework. These cases, instead, adopt an insider perspective.

## 2. *Terms of Art*

If anything is less accessible to the ordinary reader than Congress’s own perspective, it is terms of art, or specialized definitions that are known to experts in a field. The newest textualists love terms of art. In *United States v. Hansen*, which concerned the constitutionality of a statute that prohibits “encourag[ing] or induc[ing]” a noncitizen to “come to, enter, or reside in the United States, knowing or in reckless disregard” of its illegality,<sup>86</sup> Justice Barrett wrote: “‘Encourage’ and ‘induce’ have well-established legal meanings—and when Congress ‘borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word.’”<sup>87</sup> Likewise, in *Biden v. Nebraska*, in which the Court reviewed President Biden’s student loan forgiveness program, Justice Barrett again wrote:

Context is not found exclusively “‘within the four corners’ of a statute.” . . . Background legal conventions, for instance, are part of the statute’s context . . . . It is also well established that “[w]here Congress employs a term of art obviously transplanted from another legal source, it brings the old soil with it.”<sup>88</sup>

---

<sup>85</sup> *Home Depot U.S.A.*, 587 U.S. at 448 (Alito, J., dissenting) (internal citations omitted).

<sup>86</sup> 8 U.S.C. § 1324(a)(1)(A)(iv).

<sup>87</sup> *United States v. Hansen*, 599 U.S. 762, 774 (2023).

<sup>88</sup> *Biden v. Nebraska*, 143 S. Ct. 2355, 2378–79 (2023) (Barrett, J., concurring).

So too, Justice Gorsuch. In *Artis v. District of Columbia*, which concerned the impact of the federal supplemental jurisdiction statute's tolling provision on state limitation periods on refiling in state court after dismissal in federal court, a dissenting Justice Gorsuch wrote:

When Congress replants the roots of preexisting law in the federal code, this Court assumes it brings with it the surrounding soil, retaining the substance of the tradition it engages. Respect for Congress, this Court has held, means assuming it knows and “legislate[s] against a background of [the] common law . . . principles” found in the field where it is working.<sup>89</sup>

These cases are truly fascinating from an “insiders” and “outsiders” perspective. The public cannot be presumed to know “background legal conventions” and terms of art from the “legal tradition.” Nor do Justices make any claims to the contrary—they do not, e.g., argue the *public* knows the common law or terms of art. Instead, they argue expressly that *Congress* knows them and that's what matters.

It is a fiction to argue that the public's encounter with the statute is what matters and then rely on insiders tools that only Congress is assumed to know. Indeed, in considering terms of art, the Court focuses on congressional drafting practices—insofar as it assumes Congress “brings the old soil” to new laws—in a way that is also precisely the kind of approach that Justice Barrett critiqued in her insiders/outsiders manifesto.

### *3. Assuming Congress's Perspective/Standing in Congress's Shoes*

Similar to their reliance on terms of art, the newest textualists sometimes themselves assume Congress's perspective as key to interpretation. In *Republic of Sudan v. Harrison*, which considered whether the Foreign Sovereign Immunities Act § 1608(a)(3)'s

---

<sup>89</sup> *Artis v. D.C.*, 583 U.S. 71, 102 (2018) (Gorsuch, J., dissenting).

provision for service of process “addressed and dispatched . . . to the head of the ministry of foreign affairs of the foreign state concerned” allowed for service at an embassy in the United States, Justice Alito buttressed his textual reading with a focus on Congress, writing “*Congress presumably thought* that the individuals who signed for the service packet could be trusted to ensure that the service packet is handled properly and expeditiously. *It is easy to see why Congress could take that view . . .*”<sup>90</sup>

Who cares what Congress “presumably thought” or about putting oneself in Congress’s shoes to see “why Congress could take that view” if the Court is focused only on outsiders? Justice Alito has always been more Congress-focused (including using legislative history) than other textualists, so his opinion is not a surprise. More surprising is that his majority opinion speaks for eight out of nine justices.

One more example, this time from one of the staunchest ordinary meaning proponents on the Court, Justice Gorsuch, in a case about how Medicare calculates payments to hospitals with low-income patients, *Azar v. Allina Health Services*:

Nor is there any evidence before us suggesting that Congress thought it important to underscore this prosaic point in the Medicare Act (and yet not in the APA)—let alone any *reason to think Congress would have sought* to make the point in such an admittedly incoherent way . . . But the government supplies no persuasive account *why Congress would have thought* it necessary or wise to proceed in this convoluted way.<sup>91</sup>

Shouldn’t the question be how the ordinary person encounters the statute, and not what “Congress . . . thought”?

#### *4. Meaningful Variation (“Congress Knows How to Do X”)*

Finally, the Court continues to presume that Congress uses different phrases across the U.S. Code to convey intentional

---

<sup>90</sup> Republic of Sudan v. Harrison, 587 U.S. 1, 14 (2019) (emphasis added).

<sup>91</sup> Azar v. Allina Health Servs., 587 U.S. 566, 575, 577 (2019) (emphasis added).

variations in meaning. Where Congress explicitly legislates a given concept in one part of the U.S. Code, the Justices often reject a reading that less express language conveys the same concept in a different statutory section. The common refrain (most frequently invoked by Justice Kavanaugh) is that “Congress knew how to do X if it wanted to, because it expressly did X elsewhere in the U.S. Code.” This canon brings together many of the findings of this Essay, as it both privileges the perspective of the congressional insider and presumes that the insider drafts rationally and competently.

For a typical example, from *Pugin v. Garland*:

If Congress wanted to define offenses “relating to obstruction of justice” to have the same coverage [as another section of the U.S. Code], Congress knew how to do so: Congress could have cross-referenced . . . in the same way that Congress cross-referenced numerous other statutes . . . But Congress included no such cross-reference.<sup>92</sup>

That is, because Congress cross-referenced *some* statutes in § 1101, its choice *not* to cross-reference § 1503(a) conveyed an intentional legislative choice (not merely an oversight or sloppy drafting). But this approach still makes Congress the focus. It justifies an interpretation on the grounds that we assume it comports with congressional intent because Congress “knew how” to draft otherwise.

Justice Gorsuch invoked the same canon of meaningful variation to support a narrow reading of the National Labor Relations Act (“NLRA”) in *Epic Systems Corp. v. Lewis*.<sup>93</sup>

This insider canon is linked to the emphasis on a “rational Congress” previously discussed. Indeed, Gorsuch expressly says as much in *Epic Systems*: “[R]espect for Congress as drafter counsels against too easily finding irreconcilable conflicts in its work.”<sup>94</sup> But the question is not merely whether *Congress* is likely to draft

---

<sup>92</sup> *Pugin v. Garland*, 599 U.S. 600, 608 (2023).

<sup>93</sup> *Epic Sys. Corp. v. Lewis*, 584 U.S. 497, 514 (2018).

<sup>94</sup> *Id.* at 511.

consistently—empirical work by one of us strongly suggests it is not<sup>95</sup>—but whether an *ordinary reader* would (a) consider the statutory provision in conversation with other provisions, and (b) adopt the same legislature-centric canons the Court has historically adopted. What’s more, an ordinary reader would be unfamiliar with the structure of the U.S. Code, with the meaning conveyed by cross-references to other provisions, and with those other provisions in the first instance. The Court has never embraced the fiction that its “ordinary reader” is an omniscient one.

Consider an alternative. Perhaps the ordinary reader would instead understand later enactments to always supersede earlier statutes—to assume otherwise relies on the fiction that regular people peruse the U.S. Code. If ordinary readers presumed later laws superseded earlier ones, the result in this case would be the exact opposite.

## VII. THE LOPER BRIGHT *CURVEBALL*

If these inconsistencies were not puzzling enough, *Loper Bright Enterprises v. Raimondo*<sup>96</sup>—the case that overruled the canonical opinion on deference to agency statutory interpretations *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*<sup>97</sup>—clinches it. *Loper Bright* relied on the argument that *Chevron* neither reflects how Congress drafts nor captures congressional intent as reasons to declare *Chevron*’s rule illegitimate. Obviously that kind of Congress-centric justification for an interpretive rule is completely the opposite of the professed turn toward the ordinary reader and away from legislative process and “insiders.” Nevertheless, the *Loper Bright* majority made numerous statements like this one:

Presumptions have their place in statutory interpretation, but only to the extent that they approximate reality. *Chevron*’s presumption does not, because “[a]n ambiguity is simply not a

---

<sup>95</sup> Abbe R. Gluck, *Congress, Statutory Interpretation, and the Failure of Formalism: The CBO Canon and Other Ways That Courts Can Improve on What They Are Already Trying to Do*, 84 U. CHI. L. REV. 177, 178 (2017).

<sup>96</sup> *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024).

<sup>97</sup> *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

delegation of law-interpreting power. *Chevron* confuses the two.” . . . In neither case does an ambiguity necessarily reflect a congressional intent that an agency, as opposed to a court, resolve the resulting interpretive question.<sup>98</sup>

The Court’s concern over whether *Chevron* reflects congressional “reality” and “intent” is not an outsider’s perspective. The inquiry, under the Court’s announced turn outward, should have been whether ordinary readers would read ambiguities as delegations to implementers—maybe they would. But *Loper Bright* never asks that question and instead, as I have detailed elsewhere, offers a quintessentially insider’s statutory interpretation analysis.<sup>99</sup>

## CONCLUSION

Even after his passing, Larry Solan continues to teach us. Reflecting on his role as the father of statutory-interpretation linguistics even as he continued to advocate for attention to Congress led us to the fruitful project that this Essay has begun to pursue.

The newest textualists purport to have shifted the Court’s interpretive framework away from one of faithful agency to Congress toward one of laser focus on the ordinary reader. But in fact, as case after case reveals, the newest textualists remain tethered to Congress. In our next paper, with thanks to Professor Solan for continuing to inspire more work, we will consider in greater depth why the Justices still feel moved to tether their opinions to Congress; whether an ordinary meaning approach is compatible with, or even dependent on, a link to the legislature; and what these developments imply about current understandings about the nature of the judicial role and judicial power in statutory interpretation.

---

<sup>98</sup> *Loper Bright Enterprises*, 603 U.S. at 369.

<sup>99</sup> Abbe R. Gluck, *Overruling Chevron without a Coherent Theory of the Statutory Interpretation and the Court-Congress Relationship*, 62 HARV J. LEG. 20 (2024).