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ON VIEWING THE COURTS AS JUNIOR PARTNERS
OF CONGRESS IN STATUTORY INTERPRETATION
CASES: AN ESSAY CELEBRATING THE
SCHOLARSHIP OF DANIEL J. MELTZER

*Richard H. Fallon, Jr.**

Dan Meltzer liked to tell the story of an economist who, upon being reminded that many non-profit institutions thrive as the result of the labors of volunteers and employees who work at below-market rates, scoffed: “Yes, I know it works in practice, but does it work in theory?” Dan liked the story because it expressed his bemusement at academics who invert what he regarded as the proper relationship between theory and practice. Dan looked askance at purportedly positive academic theories that fail to attend sufficiently to how people actually behave. He also believed with quiet passion that the ultimate test of normative legal theories should lie in whether, if implemented, they would produce better results than current regimes—not under imagined ideal conditions, but in actual practice.

Although Dan’s practical orientation made him wary of abstract methodological argumentation, he took up the cudgels of theoretical debate to defend his views about statutory interpretation. Characteristically, Dan expressed his views in articles of carefully limited scope. Some of his broader pronouncements came in a piece that he and I co-authored entitled *Federal Habeas Corpus Jurisdiction, Substantive Rights, and the War on Terror*.¹ In it, we

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* Story Professor of Law, Harvard Law School. Dan Meltzer was my cherished friend and closest professional colleague and collaborator for thirty-three years. He was also as thoroughly admirable a human being as I have ever known. I have paid tribute to his character, and celebrated the stunning range of his personal and professional contributions, elsewhere. See Richard H. Fallon, Jr., *In Memoriam: Daniel J. Meltzer*, 129 HARV. L. REV. 400 (2015). In this Essay for this Symposium, I therefore limit my tribute to his scholarship, but with emphasis that a full celebration of his life would encompass much, much more. In preparing this Essay, I have benefited greatly from comments by Scott Dodson, Vicki Jackson, John Manning, Henry Monaghan, Judith Resnik, and David Shapiro and from excellent research assistance by Ephraim McDowell.

1 Richard H. Fallon, Jr. & Daniel J. Meltzer, *Habeas Corpus Jurisdiction, Substantive Rights, and the War on Terror*, 120 HARV. L. REV. 2029 (2007).

argued that the Supreme Court has appropriately adapted its interpretation of longstanding jurisdictional statutes in light of evolving understandings of the scope, and especially the geographic reach, of substantive constitutional rights.² Using the habeas corpus statutes as an illustration, our article defended a “common law model” in which courts play the role of “junior partners”³ of Congress in interpreting statutory language to operate sensibly and justly in circumstances that its authors and legislative supporters likely did not foresee.⁴ With history largely on our side,⁵ Dan joined me in wanting courts to continue an approach that we thought had long worked well, albeit of course not perfectly, in practice.⁶

Our arguments concerning interpretive methodology in *Federal Habeas Corpus Jurisdiction, Substantive Rights, and the War on Terror* substantially echoed Dan’s considered views as expressed elsewhere. Five years earlier, in *The Supreme Court’s Judicial Passivity*,⁷ Dan had criticized a set of cases in which the Court “sound[ed] the theme that . . . Congress has primary, if not exclusive,

2 *Id.* at 2033.

3 *Id.* at 2041.

4 See *id.* at 2033 (“[T]he Common Law Model views courts as having a creative, discretionary function in adapting constitutional and statutory language—which is frequently vague, and even more frequently reflects imperfect foresight—to novel circumstances.”). Especially in describing our preferred methodology as involving a “Common Law Model,” our article substantially accorded in its central themes and analysis with—but did not cite or discuss—a marvelous essay by Peter L. Strauss, *The Common Law and Statutes*, 70 U. COLO. L. REV. 225 (1999). In that essay, Professor Strauss describes our legal system as incorporating and requiring for its successful functioning a set of assumptions about the judicial role in relation to the legislative role that grow out of our common law heritage. On the legislative side, Strauss notes that statutes are seldom comprehensive or code-like, that they are often inartfully drafted due to peculiarities of the American legislative process, and that they perhaps typically are enacted to correct perceived deficiencies in a prior legal framework that they otherwise leave largely intact. On the judicial side, Professor Strauss emphasizes the role of stare decisis in clarifying and sometimes changing the meaning of statutes, with the effect, he argues, that the body of law of which statutes form a part is a joint legislative and judicial product, even in areas in which Congress has legislated actively. Although Strauss describes the role of courts in relation to Congress as that of “partners,” not “junior partners,” I do not understand that difference of terminology to signal a difference of substance concerning the appropriate judicial role, as Professor Strauss makes clear that Congress always “has the larger claim for respect for its judgments.” *Id.* at 252. Dan cited *The Common Law and Statutes* approvingly, but in support of relatively narrow points, in Daniel J. Meltzer, *The Supreme Court’s Judicial Passivity*, 2002 SUP. CT. REV. 343, 380 n.151, 385 n.166. In this Essay, I take no position about whether Professor Strauss’s broadest claims about the origins and foundations of the federal judiciary’s common-law-like role are correct or about whether Dan would have agreed with them in all of their particulars, despite a very large overlap of prescriptive conclusions.

5 See Fallon & Meltzer, *supra* note 1, at 2042.

6 See *id.* at 2044 (“[A] common law approach to habeas corpus issues has been not only historically dominant, but also, for the most part, historically successful.”); Meltzer, *supra* note 4, at 389 (citing “a conservative argument, in the sense of Burkean conservatism, against judicial passivity,” since “it constitutes a significant departure from historic norms”).

7 Meltzer, *supra* note 4.

responsibility for fleshing out the operation of schemes of federal regulation.”⁸ If followed consistently, he argued, the approach of those cases “would deprive the polity of an immeasurably important source of lawmaking authority [that courts have traditionally exercised], would impose unrealistic demands on the federal legislative process, and would give rise to needless injustices in routine disputes.”⁹ In Dan’s last published article, *Preemption and Textualism*,¹⁰ he examined the specific challenges that courts confront in preemption cases, in which one party argues that a federal regulatory statute, although without saying so expressly, has impliedly preempted or nullified otherwise applicable state regulatory requirements. In this piece, Dan defended “purposive” statutory interpretation, in which courts ask whether the continued enforcement of state regulations would substantially impede the realization of federal statutes’ purposes.¹¹ He regarded purpose-based interpretation as necessary to “the task of fashioning a workable legal system,” especially but not exclusively in preemption disputes.¹²

Dan’s opponents in debates about statutory interpretations were “textualists,” formalists, and proponents of an “agency model” who maintain—often for theoretical reasons—that courts should understand their role in interpreting statutes as that of the legislature’s “faithful agents” in a narrow sense of that term. On this view, courts typically should adhere closely to the language that Congress has chosen, and they should hesitate to ascribe purposes to the legislature beyond those minimally necessary to render its choice of language intelligible.¹³ Adherents of the approaches with which Dan took issue would acknowledge that Congress’s chosen language can sometimes require courts to exercise independent judgment.¹⁴ If, for example, a statute makes it unlawful to drive at an “unreasonable” rate of speed, courts will need to decide what is unreasonable under particular circumstances. The nub of disagreement between Dan and his textualist adversaries involved

8 *Id.* at 343.

9 *Id.* at 345.

10 Daniel J. Meltzer, *Preemption and Textualism*, 112 MICH. L. REV. 1 (2013).

11 *Id.* at 57.

12 *Id.* at 7.

13 See Fallon & Meltzer, *supra* note 1, at 2033 (“According to the Agency Model, courts should regard themselves as the agents of those who enacted, or ratified, pertinent statutory or constitutional provisions; they should assume that those provisions were framed to be as determinate as possible; and they should minimize judicial creativity. The Agency Model seeks to restrict courts to applying the law, not making it.”). Dan characterized his article *Preemption and Textualism*, *supra* note 10, as “in part, . . . a case study of the feasibility of textualism,” *id.* at 4, and concluded that textualism was inadequate, *see id.* at 56 (“Preemption cases highlight vividly the limits of textualism and the limited capacity of the legislature to prescribe, *ex ante*, a specific and comprehensive set of statutory directives that promise to provide a sensible, textually derivable set of outcomes to preemption decisions.”).

14 See, e.g., Frank H. Easterbrook, *Statutes’ Domains*, 50 U. CHI. L. REV. 533, 544 (1983) (“The statute books are full of laws . . . that effectively authorize courts to create new lines of common law.”); John F. Manning, Response, *Deriving Rules of Statutory Interpretation from the Constitution*, 101 COLUM. L. REV. 1648, 1655 (2001).

what he called “the enduring importance . . . of purposive interpretation by an engaged judiciary.”¹⁵ Although the difference can sometimes reduce to one of mood or degree—as I shall explain below—textualists maintain that if a statute’s language, as it would have been understood by a reasonable person at the time of its enactment, most naturally appears either to apply or not to apply to the facts of a case, then courts, as faithful agents, should execute their instructions as written, without inquiring deeply into the purposes that the language was meant to serve.¹⁶ On this view, moreover, courts should not assume that Congress would have wanted to accord them interpretive discretion or to invite their exercise of practical judgment in light of their appraisal of statutory goals.¹⁷

In contrast, Dan maintained that courts should interpret statutory language on the assumption that Congress would have meant to enlist the judiciary as junior partners in developing a just and workable body of law.¹⁸ In his view, courts were “junior” partners rather than Congress’s co-equals in statutory interpretation cases because Congress’s language and policy aims (as reconstructed by the judiciary) establish the outer limit of the judicial function. The judicial role is to interpret and implement the language that Congress has adopted, not to formulate a policy agenda. Indeed, there is even a sense in which courts are appropriately characterized as the faithful agents of Congress: they must enforce decisions that Congress has genuinely made.¹⁹ Nevertheless, the characterization of courts as junior partners rather than mere agents implies that they should regard themselves as trusted rather than distrusted agents, with some latitude to look beyond the letter of statutory language, especially when confronting cases of a kind that Congress

15 Meltzer, *supra* note 10, at 57.

16 See Easterbrook, *supra* note 14, at 544 (“My suggestion is that unless the statute plainly hands courts the power to create and revise a form of common law, the domain of the statute should be restricted to cases anticipated by its framers and expressly resolved in the legislative process.”).

17 See Fallon & Meltzer, *supra* note 1, at 2033 (“According to the Agency Model, courts should . . . assume that [statutory] provisions were framed to be as determinate as possible; and they should minimize judicial creativity.”).

18 See *id.* at 2041.

19 In this sense, I believe that Dan’s understanding of “the Common Law Model” had more in common with the “purposivist” approach of the Legal Process school than with what the most recent edition of the *Hart & Wechsler* casebook calls “common law theories of statutory interpretation” that, it says, reject “the assumption that federal judges must act as Congress’ faithful agents, whose duty is to ascertain and enforce legislative commands with accuracy.” RICHARD H. FALLON, JR., JOHN F. MANNING, DANIEL J. MELTZER & DAVID L. SHAPIRO, *HART & WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 655–56 (7th ed. 2015) [hereinafter *HART & WECHSLER*]. Although the difference can be a subtle one, I do not believe that Dan questioned the courts’ obligation to “enforce legislative commands” in cases in which, as properly interpreted, they applied. For a discussion of the relationship of contemporary federal courts scholarship—including Dan’s as well as my own—to “the Legal Process paradigm,” see Richard H. Fallon, Jr., *Reflections on the Hart and Wechsler Paradigm*, 47 *VAND. L. REV.* 953 (1994).

likely did not foresee at the time of a statute's enactment.²⁰ In such cases, courts should regard themselves as entrusted to assume—absent evidence to the contrary—that Congress would have intended statutory language to be interpreted and applied in light of good sense, pertinent constitutional values, reason, and experience. These, I acknowledge, are vague and controversial terms. Wisely, Dan sought to elucidate the limits of judicial power in interpreting federal statutes more by example than by articulation of bright-line rules.

As textualism and the faithful-agency view have emerged in judicial opinions and the surrounding literature, they reflect the conjunction of several premises.²¹ First, the separation of powers and democratic theory demand that the courts' lawmaking role should be subordinated as much as possible to that of the legislature.²² Second, the legislature of which courts are the agents is "a 'they,' not an 'it,'"²³ who frequently struggle to find compromises, often including unprincipled compromises, that can command the allegiance of a majority.²⁴ It is, accordingly, a mistake to view legislation, or to interpret it as if it should be viewed, as the effort of a rationally united majority to achieve a coherent, reasonable purpose or set of purposes that courts should seek to advance. To the contrary, laws are better viewed as deals among often antagonistic legislative factions.²⁵ Third, the language of a statute represents the singularly authoritative embodiment of the deal that Congress struck.²⁶ Accordingly, courts should interpret legislation to pre-

20 See Fallon & Meltzer, *supra* note 1, at 2041 ("Under the Common Law Model, courts remain agents, but agents with more leeway. The model's underlying assumption is that those who adopted open-ended constitutional or statutory provisions, aware of their limited foresight, would not have wanted to bind the courts or the country too rigidly.").

21 For a brisk summary of the tenets of "the new textualism," see HART & WECHSLER, *supra* note 19, at 654–55.

22 See, e.g., *King v. Burwell*, 135 S. Ct. 2480, 2505 (2015) (Scalia, J., dissenting) (deriding an interpretive philosophy that "ignores the American people's decision to give Congress '[a]ll legislative Powers' enumerated in the Constitution" under which "Congress, not this Court, [is] responsible for both making laws and mending them"); John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 70–78 (2001).

23 Kenneth A. Shepsle, *Congress Is a "They," Not an "It": Legislative Intent as Oxymoron*, 12 INT'L REV. L. & ECON. 239, 244 (1992). Echoing this formulation, textualists emphasize that legislatures are multimember bodies lacking shared psychological intentions. See, e.g., John F. Manning, *Textualism and Legislative Intent*, 91 VA. L. REV. 419, 428–31 (2005).

24 See, e.g., Easterbrook, *supra* note 14, at 540 ("Almost all statutes are compromises, and the cornerstone of many a compromise is the decision, usually unexpressed, to leave certain issues unresolved. Whether these issues have been identified (so that the lack of their resolution might be called intentional) or overlooked (so that the lack of their resolution is of ambiguous portent) is unimportant."); John F. Manning, *Foreword: The Means of Constitutional Power*, 128 HARV. L. REV. 1, 30 (2014) ("The Court's present textualist presumption—that Congress means what it says—gives Congress more reliable tools than before to exercise its acknowledged powers to enact the messy, incoherent, overbroad, incomplete, or buck-passing legislation that the Necessary and Proper Clause entitles it to enact.").

25 See, e.g., Easterbrook, *supra* note 14, at 547; Manning, *supra* note 23, at 428–31.

26 See, e.g., Manning, *supra* note 22, at 18.

serve the bargain that its language most plausibly reveals, even when the results in a particular case seem highly regrettable. In advocating this approach, proponents sometimes add, as a fourth argument, that it would help to empower Congress to craft the deals it wants by giving assurance that courts will apply statutory language as written.²⁷

On the surface, Dan's arguments against textualism and narrow versions of other faithful-agency theories of statutory interpretation were largely pragmatic.²⁸ He emphasized that Congress writes statutory language with limited time and foresight.²⁹ Especially when courts confront situations that Congress had almost surely not had in view, Dan thought that textualism would frequently lead to bad results. He also maintained that his preferred approach, if correctly practiced, would assist and empower Congress, not promote judicial usurpation of properly legislative functions.³⁰

In this Essay, written in tribute to Dan, I shall attempt to explicate his views regarding statutory interpretation in general, thematic terms. In doing so, I shall register my agreement with virtually all of Dan's conclusions and frequently echo his practically minded arguments in support of them. But I shall also advance arguments—with which I cannot be entirely sure he would have agreed—that seek to show that his position reflected theoretical insights about how language works, not only in law, but also more generally in life.

By seeking simultaneously to defend Dan's views and to build on them, this Essay may sometimes blur the line between explication and original argumentation. Its methodology is, accordingly, risky, but I do not believe it is misplaced. As I hope will become clear, my blending of descriptive and interpretive claims with normative argumentation in some ways parallels the approach that Dan thought courts should take in acting as Congress's junior partners.

27 See, e.g., Manning, *supra* note 24, at 25–26.

28 See, e.g., Meltzer, *supra* note 4, at 383 (“The question of the proper interpretation of statutes and the proper role of federal common lawmaking is ultimately a question of political and constitutional theory, but . . . that normative question cannot be intelligently addressed without considerable attention to matters that are far more empirical and pragmatic.”).

29 *Id.* at 384–85 (“[T]he American system of lawmaking . . . lacks the party discipline and executive control of the legislature that characterizes parliamentary systems. The latter are, accordingly, more conducive to the enactment of comprehensive statutes that reflect a coherent, integrated viewpoint and that can be rapidly amended if gaps or problems are revealed. In our system, the Executive Branch, though it helps to shape legislation, does not control its course as do executive ministries in many parliamentary systems. And within the Congress, party cohesion is often absent and agreement between House and Senate must be reached, leading inevitably to compromises and eleventh-hour revisions. Finally, American legislative drafting is less professional and centralized than that in a number of other countries. For all of these reasons, federal legislation is likely to be partial, unintegrated, reactive, and lacking in coherence.” (footnotes omitted)).

30 See generally Meltzer, *supra* note 4.

I. THE CONCEPTUAL FOUNDATIONS OF THE COURTS' JUNIOR PARTNERSHIP ROLE

Dan's views about statutory interpretation were boldly normative in some respects. In others, they relied on a descriptive account of historical judicial practice.³¹ In later parts of this Essay, I shall ally myself with most, if not all, of Dan's normative claims. In this Part, I undertake to occupy an analytical space that lies between, though it blends into, both the narrowly descriptive and the purely normative. More specifically, I hope to show that for courts to play a discretionary, policymaking role—or what Dan called that of a junior partner—is inescapable in light of irreducible features of law and language.

Much of what I say in this Part may seem banal. Nevertheless, the ensuing analysis is important for two related reasons. First, my claims about what courts inescapably must do will provide a foundation for later, more controversial arguments about how courts should discharge their functions as Congress's junior, lawmaking partners. Second, as I shall point out later, the analysis in this Part refutes premises on which textualists sometimes rely in objecting to more normatively controversial claims.

A. *The Inescapable Significance of the Intent of the Legislature*

In the literature on statutory interpretation, the leading debates concern whether courts should look at legislative history³² and, as it is often put, whether courts can use legislative history or imputed statutory purposes to “contradict” a clear statutory text.³³ But it is impossible to engage in the latter debate, in particular, without examining what it means for a text to be clear in its application to a case's facts.

31 See Fallon & Meltzer, *supra* note 1, at 2044 (noting that a common law approach to statutory interpretation “has been . . . historically dominant” and embracing “the bounds established by the norms of interpretive practice that constitute the Common Law Model”); Daniel J. Meltzer, *Jurisdiction and Discretion Revisited*, 79 NOTRE DAME L. REV. 1891, 1893 (2004) (“‘Is’ may not be ‘ought,’ but claims that judicial practices are politically illegitimate are far more difficult to sustain when those practices are widespread and long-standing and when there is a pattern not of congressional opposition but, instead, of apparent congressional acquiescence.”).

32 See William N. Eskridge, Jr., *The New Textualism and Normative Canons*, 113 COLUM. L. REV. 531, 532 (2013) (reviewing ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* (2012)) (noting that “the big debate” about the proper definition of the “interpretive context” for interpreting statutes involves the propriety of reliance on legislative history).

33 See SCALIA & GARNER, *supra* note 32, at 56–57 (discussing the “Supremacy-of-Text Principle”: “except in the rare case of an obvious scrivener’s error, purpose—even purpose as most narrowly defined—cannot be used to contradict text or to supplement it”); John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2434 n.179 (2003) (“[T]he modern textualists’ concerns come into play only when courts use background statutory purpose to contradict or vary the clear meaning of a specific statutory provision.” (emphasis omitted)).

In order to apply statutes, courts obviously need to ascertain their meanings or, as some would say, their “communicative content.”³⁴ Moreover, although some appeals to legislative intent engender controversy, all should acknowledge that the identification of a statute’s meaning requires an ascription of communicative intentions. Statutes are not mere words on a page with unknown authors and mysterious origins.³⁵ To the contrary, we think statutes worth interpreting, and deserving of application, only because they reflect the intention of a legislature, by making a law, to direct behavior or authoritatively stipulate what the consequences of behavior will be.

Nevertheless, when we think about courts ascribing communicative intentions to the legislature, we plunge almost immediately into theoretically puzzling territory.³⁶ Textualists like to say that the legislature “is a ‘they,’ not an ‘it.’”³⁷ This observation is undoubtedly true and important for many purposes. We should not forget it. But all members of the legislature, or at least all who vote for a bill, must have a minimal collective intention to enact a law and, by doing so, to communicate commands, stipulations, or information with the aim of affecting human behavior.³⁸

The most promising explanatory approach to this hypothesized phenomenon of collective legislative communication seems to me to lie in attempts by philosophers to explain collective, group, or what I shall refer to as “we-intentions.”³⁹ Roughly described, these are the individual intentions of multiple people to do something together—which, in familiar illustrations, might include taking a walk together or cooking dinner together—so that each of them can say “I intend that we” do something collectively or jointly. My intention that my wife and I should cook dinner together is different from my mere intention to cook dinner and her separate intention to cook dinner.

To begin to give content to the idea of we-intentions with respect to legislation, we might say that each member of the legislature who votes for a measure (a) intends that the legislature should enact it as law and (b) further intends to communicate whatever a reasonable member of the target audi-

34 See Lawrence B. Solum, *Communicative Content and Legal Content*, 89 NOTRE DAME L. REV. 479, 484 (2013).

35 See Larry Alexander & Saikrishna Prakash, “*Is That English You’re Speaking?*” *Why Intention Free Interpretation Is an Impossibility*, 41 SAN DIEGO L. REV. 967, 969 (2004) (“[O]ne cannot interpret texts without reference to the intentions of some author. Indeed, texts can only be identified as texts by reference to authorial intent.”).

36 For a lucid discussion of surrounding legal and philosophical debates, see generally RICHARD EKINS, *THE NATURE OF LEGISLATIVE INTENT* (2012).

37 See *supra* note 23 and accompanying text.

38 See Manning, *supra* note 23, at 432–33 (“[T]he demands of legislative supremacy require only that legislators intend to enact a law that will be decoded according to prevailing interpretive conventions. If so, then society can at least attribute to each legislator the intention ‘to say what one would ordinarily be understood as saying, given the circumstances in which one said it.’” (quoting Joseph Raz, *Intention in Interpretation*, in *THE AUTONOMY OF LAW: ESSAYS ON LEGAL POSITIVISM* 249, 268 (Robert P. George ed., 1996))).

39 See, e.g., EKINS, *supra* note 36, at 218–43.

ence would understand the law as communicating. This account depicts the challenge of statutory interpretation as beginning with an ascription of communicative intentions to the legislature. It also leads to an account of a statute's meaning or communicative content that roughly tracks the formulation offered by the best-known philosopher of language who has so far engaged deeply with issues of legal interpretation:

In general, what a speaker uses a sentence *S* to assert or stipulate in a given context is, to a fair approximation, what a reasonable hearer or reader who knows the linguistic meaning of *S*, and is aware of all relevant intersubjectively available features of the context of the utterance, would rationally take the speaker's use of *S* to be intended to convey and commit the speaker to.⁴⁰

As applied to issues of legal interpretation, this characterization situates courts in the role of a reasonable listener or hearer. Thus far, this focus accords with the views of most textualists, who emphasize that statutory interpretation depends on what a reasonable person would understand statutory language to mean or convey, in context.⁴¹ Accepting that account for present purposes, I mean only to insist that a reasonable reader or hearer will frequently if not invariably discern the meaning of legislation by making rough-and-ready ascriptions of policy goals to the legislature, whether self-consciously or not. As Justice Scalia wrote, the word “nails” means one thing when it appears in a building code, but something different in a statute regulating beauty salons.⁴² To know what the word means in context, we need to know, or reach judgments concerning, the goals that the legislature sought to achieve.

A so-called plain meaning school of statutory interpretation once rejected, or at least sometimes appeared to reject, these insights.⁴³ Today, however, nearly all participants in debates about statutory interpretation agree that meaning depends on context.⁴⁴ Moreover, although textualists seek to prioritize the understandings of a reasonable listener or hearer over

40 Scott Soames, *Deferentialism: A Post-Originalist Theory of Legal Interpretation*, 82 FORDHAM L. REV. 597, 598 (2013).

41 See, e.g., John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 91 (2006) (noting that textualists determine statutory meaning based on “evidence about the way a reasonable person conversant with relevant social and linguistic practices would have used the words”); see also SCALIA & GARNER, *supra* note 33, at 16 (“In their full context, words mean what they conveyed to reasonable people at the time they were written . . .”).

42 SCALIA & GARNER, *supra* note 33, at 20.

43 For discussion of the “plain meaning” approach to statutory interpretation, see, for example, Frederick Schauer, *Statutory Construction and the Coordinating Function of Plain Meaning*, 1990 SUP. CT. REV. 231.

44 See, e.g., Manning, *supra* note 33, at 2456 (“In contrast with their literalist predecessors in the ‘plain meaning’ school, modern textualists reject the idea that interpretation can occur ‘within the four corners’ of a statute.” (quoting *White v. United States*, 191 U.S. 545, 551 (1903))); Manning, *supra* note 41, at 73, 79–80 (discussing the centrality of notions of context to rival purposivist and textualist theories alike).

the intentions of the legislature, a context necessarily comprises a speaker as well as a listener. And in the context of legislation, the speaker—or at least the closest analogue—is a legislature with policy aims or intentions. So conceding, even textualists acknowledge that their approach needs to rely on or presuppose what they sometimes call an “objective” legislative intent.⁴⁵

In my view, the idea of an “objective” legislative intent can prove mysterious, even if one thinks it inescapable. Recognizing that textualists often invoke it in opposition to the “subjective” intent that they think some non-textualists look to legislative history to identify, we may make some progress by postulating that the objective intent is that of an imagined, hypothetical, possibly typical or reasonable legislature, abstracted from the known or possible vagaries of the members of the actual legislature who drafted, negotiated, and enacted a statute.⁴⁶ Crucially, however, legislative intent in this objective sense cannot be separated from imagined or imputed purposes. For example, we know that a reference to “nails” in a building code refers to something different from the word “nails” in a statute regulating beauty parlors because we impute a legislative intention or purpose of regulating the construction of buildings in one case and the provision of beauty-related products and services in the other.⁴⁷

With the exclusion of imputed purposes being admittedly impossible, textualists nevertheless demand limitations that they insist are more stringent than interpretive purposivists recognize. As a first approximation, we might therefore assume that textualist strictures proscribe courts from going any further than necessary in ascribing goals, purposes, or intentions to the legislature: the legislature’s objective intent reflects and derives from the sparsest set of policy aims that needs to be ascribed to the legislature to make sense of a statute’s language. In particular, courts should not ascribe purposes to the legislature at a level of generality that would tempt or authorize them to deviate from the otherwise clear import of a statute’s language.⁴⁸ As textualists rightly emphasize, legislatures make choices of means as well as ends.⁴⁹ A statute that sets speed limits seeks to promote highway safety, but only

45 See, e.g., 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 3, 17 (Amy Gutmann ed., 1997) (“We look for a sort of ‘objectified’ intent—the intent that a reasonable person would gather from the text of the law, placed alongside the remainder of the *corpus juris*.”); Manning, *supra* note 23, at 423 (“[T]extualists have sought to devise a constructive intent that satisfies the minimum conditions for meaningfully tracing statutory meaning to the legislative process.”); Caleb Nelson, *What Is Textualism?*, 91 VA. L. REV. 347, 353–57 (2005) (discussing textualists’ search for statutes’ “objectified intent”).

46 Cf. Seana Valentine Shiffrin, *Speech, Death, and Double Effect*, 78 N.Y.U. L. REV. 1135, 1155 (2003) (employing an “objective notion of intention as it is made manifest through the performance of actions of a certain type, actions that, because of what they involve, are typically motivated by a certain rationale and are reasonably interpreted as being so motivated”).

47 See *supra* note 42 and accompanying text.

48 See, e.g., Manning, *supra* note 24, at 25–26.

49 See, e.g., *id.*

through the means of regulating speed. It does not prohibit, or authorize a court to punish, a broader gamut of unsafe driving practices. Accordingly, textualists insist, courts should not rely on their judgments concerning what the realization of a statute's purposes would require to override language that limits the means through which Congress decided to pursue its goals.⁵⁰

B. *Some Complexities of Context*

Although these cautions from textualists are often valuable, the idea of “context”—on which all agree that statutory meaning depends⁵¹—introduces a large complication. As invoked in debates about statutory interpretation, a context embraces not only a speaker and readers or listeners, but also shared background understandings among speakers and listeners that make it possible for some things to go without saying.⁵² To develop this point, let me begin with some examples not from law, but from ordinary, non-legal conversation.⁵³

A vivid illustration comes from sarcasm. “Sam was a big help” can mean either that Sam was a big help or, in context, the opposite, that Sam was no help at all. The meaning of the utterance depends in large part on background understandings shared by the speaker and his or her listeners. To take another example, an emergency ward doctor who assures her patient “you are not going to die” does not offer a prediction that the patient will live forever—even though that is the literal meaning of the words that she utters.⁵⁴ In light of what we know or think we know about emergency ward doctors and their patients, we conclude confidently that “you are not going to die” constitutes a short-term prognosis. Significantly, however, the same string of words might have a quite different meaning if uttered, in the same hospital, by a Roman Catholic clergyman administering last rites to a terminal patient. In this case, a reasonable listener would indeed understand the speaker as offering an assurance of eternal life, though possibly of an extra-temporal character. Once again, shared background assumptions that both

50 *See id.*

51 *See* Manning, *supra* note 41, at 73, 79–80 (discussing the importance of context for both textualist and purposivist approaches to statutory interpretation).

52 The classic text explaining these shared background understandings is PAUL GRICE, *STUDIES IN THE WAY OF WORDS* (1989).

53 For discussion of the role of presuppositions in linguistic communication, see, for example, SCOTT SOAMES, 1 *PHILOSOPHICAL ESSAYS: NATURAL LANGUAGE: WHAT IT MEANS AND HOW WE USE IT* 3–130 (2008), and Robert Stalnaker, *Common Ground*, 25 *LINGUISTICS & PHIL.* 701, 701 (2002). Presuppositions can be distinguished in various ways. For example, Soames distinguishes among logical, expressive, and pragmatic presuppositions. *See* SOAMES, *supra*, at 75–76. Robyn Carston, *Legal Texts and Canons of Construction: A View from Current Pragmatic Theory*, in 15 *LAW AND LANGUAGE: CURRENT LEGAL ISSUES* 8, 9 (Michael Freeman & Fiona Smith eds., 2013), differentiates pragmatic from semantic presuppositions.

54 *See, e.g.,* Andrei Marmor, *The Pragmatics of Legal Language*, 21 *RATIO JURIS* 423, 426 (2008).

speaker and listener would understand as going without saying determine what the utterance means.

We might think that examples such as these—involving situations in which background understandings that can go without saying determine the meaning of utterances—have few if any analogues in law. Not so. The assumptions that disambiguate the reference to nails in a building code may well go without saying. When Article II of the Constitution provides that only “natural born Citizen[s]”⁵⁵ can serve as President, we know that it refers to people who were born in the United States or were citizens from birth and does not exclude citizens whose mothers gave birth by cesarean section.⁵⁶ In this case, once more, our confident judgment reflects assumptions and goals that we ascribe to the authors and ratifiers of the constitutional phrase. As Justice Scalia wrote, many of the canons of interpretation attempt to memorialize linguistic and culturally based assumptions that otherwise could go without saying.⁵⁷ If the law says that children over the age of six must attend school, it goes without saying that children under six need not. In explaining this conclusion, we might cite the interpretive canon that says “*expressio unius est exclusio alterius*,”⁵⁸ but we would reach the same judgment if the provision appeared in the laws of a state that has precluded judicial reliance on the canons as sources of statutory meaning.⁵⁹

As these examples suggest, the ascription of purposes to the legislature in light of what are taken to be shared background assumptions occurs ubiquitously in the law, most often unselfconsciously. An increasingly hackneyed but nevertheless useful example comes from *Smith v. United States*,⁶⁰ which involved a statute enhancing the penalty for drug offenses in which the defendant “use[s]” a firearm.⁶¹ The question involved the statute’s application or non-application to a defendant who had traded a gun for drugs.⁶² Writing for the majority, Justice O’Connor concluded that trading a gun constitutes “using” it and that the statute therefore applied.⁶³ Dissenting, Justice Scalia thought that a reasonable person would understand the statute as applying only to defendants who used firearms as weapons.⁶⁴ As between the majority and the dissent, the issue involved the purpose or intent that should

55 U.S. CONST. art. II, § 1, cl. 5.

56 Although there are debates about whether the relevant language requires birth in the United States or whether birth to a citizen parent abroad suffices, *see infra* note 86 and accompanying text, there is no serious argument that a person born by cesarean section would be ineligible for the presidency for that reason alone.

57 *See* SCALIA & GARNER, *supra* note 33, at 51.

58 *See id.* at 107.

59 A number of states have in fact barred reliance on some of the canons. *See* Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 YALE L.J. 1750, 1824–29 (2010).

60 508 U.S. 223 (1993).

61 *Id.* at 227.

62 *Id.* at 228.

63 *Id.* at 230.

64 *Id.* at 241–42 (Scalia, J., dissenting).

be imputed to Congress, and thus the meaning that should be ascribed to the statute, in light of background assumptions that both took to be obvious, widely shared, or most reasonably imputed. Justice O'Connor sought directly to ascertain what the legislature intended. For Justice Scalia, the legislature's assumptions and intentions played a less direct but no less important role. Although he focused his inquiry on the perspective of a reasonable reader or listener, Justice Scalia's analysis ultimately involved the purpose that a reasonable listener would have understood the statute to have: Would a reasonable person have understood Congress as intending to prescribe an enhanced penalty not only for someone who brandishes a gun coercively, but also for someone who trades a gun for drugs?

Smith, like most disputed statutory interpretation cases, illustrates the blurred line between law-applying and law-making in cases in which there is reasonable disagreement about the intentions that should be imputed to the legislature in light of further, reasonable disagreement about the background assumptions under which a reasonable reader or listener would identify statutes' meanings. On the law-making view, the statute is relevantly vague or ambiguous insofar as uncertainty or disagreement is reasonably possible, and courts need to make law that clarifies what the legislature left indeterminate in order to decide a disputed case. On the law-applying view, courts make interpretive judgments in ascribing communicative intentions and statutory purposes in light of the background assumptions that are most reasonably postulated. Even on the law-applying view, however, courts, in determining what statutes mean or whether they apply, need to make judgments that go beyond the bare determination of linguistic facts involving the definitions of words and the rules of grammar and syntax. In doing so, they need to act as junior partners of the legislature in the sense in which Dan Meltzer and I have wanted to use that term: they have to impute either sparer or further reaching regulatory purposes to Congress and resolve cases in light of those ascribed purposes. Doing so requires judgment and sometimes creativity in identifying the purposes that are most reasonably ascribed to Congress in a particular statutory context.⁶⁵

In many contexts, I want to emphasize, judgments of reasonableness—or of what a reasonable person would have intended or understood—are not purely descriptive. As a purely descriptive matter, people not only can, but sometimes do, disagree about what language means in context. In a case such as *Smith*, we might thus say with descriptive accuracy that the statute was vague or ambiguous and, so saying, might insist that, insofar as description alone is concerned, there is no more to be said. But the law cannot stop there. When the law invokes the notion of reasonable speakers and listeners to resolve issues about which reasonable people actually differ, it invites or requires conclusions about what would be most reasonable, from a normative

65 Cf. Meltzer, *supra* note 10, at 57 (asserting the “importance” and “inevitability” of “purposive interpretation”).

as well as a descriptive perspective, in light of all relevant circumstances.⁶⁶ In other words, the “reasonable” speakers and listeners on whom the law relies sometimes need to make normative judgments in order to achieve the determinate conclusions that the law relies on them to provide.

C. *The Generative Force of Seemingly Banal Conclusions*

In my view, the conclusion that courts must make judgments about which prescriptive intentions or purposes to ascribe to Congress in order to interpret statutes—even if the imputed intentions are characterized as objective and are identified without reference to legislative history—is an important one, for a reason that I laid out at the beginning of this Part. Although I have not, so far, said anything with which a textualist would necessarily disagree, I believe that I have established the theoretical foundations for further claims that would otherwise occasion significant controversy. To illustrate that point, recall textualists’ familiar refrain that courts must never rely on what they take to be statutes’ purposes in order to “contradict” the statutes’ clear textual meanings.⁶⁷ In light of the analysis that I have just developed, this statement is either confused or vacuous. Insofar as it assumes that statutes have clear textual meanings that are identifiable independently of a judgment concerning Congress’s intentions or purposes in enacting them, the statement is confused. Meaning depends on context. And context includes background presuppositions in light of which a reasonable listener or reader would determine whether Congress, as a speaker, intended a statute’s semantic or literal meaning to be its actual meaning in the circumstances of its utterance. Any appeal to a statute’s textual meaning to disqualify an effort to identify what it actually means in context—in light of background assumptions that bear on the intentions most plausibly and relevantly ascribed to Congress—is therefore fallacious.

Some textualists so recognize at least some of the time, as three brief examples may illustrate. First, when Congress assigns jurisdiction to the federal courts, the Supreme Court ordinarily construes the language through which it does so as mandatory.⁶⁸ Traditionally, however, courts have had discretion to decline to exercise equity jurisdiction.⁶⁹ Against that historical background, the Supreme Court has held repeatedly—with textualists agree-

66 See Richard H. Fallon, Jr., *Three Symmetries Between Textualist and Purposivist Theories of Statutory Interpretation—and the Irreducible Roles of Value and Judgment Within Both*, 99 CORNELL L. REV. 685, 710–15 (2014).

67 See *supra* note 33 and accompanying text.

68 See, e.g., *Sprint Commc’ns, Inc. v. Jacobs*, 134 S. Ct. 584, 591 (2013) (affirming that “a federal court’s ‘obligation’ to hear and decide a case [within its jurisdiction] is ‘virtually unflagging’” (quoting *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976))).

69 See generally David L. Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. REV. 543, 548–50 (1985) (tracing the longstanding practice of acknowledging judicial discretion to decline to exercise statutorily authorized jurisdiction, including but not limited to equity jurisdiction).

ing in the reasoning—that statutes conferring federal equity jurisdiction retain the courts’ traditional equitable discretion, even when they say nothing on their faces to indicate that the discretion they confer is other than mandatory.⁷⁰

Second, Judge Frank Easterbrook, who ranks among the foremost defenders of textualism, has argued that courts, for similar reasons, should read criminal statutes as implicitly incorporating historically recognized defenses:

For thousands of years, and in many jurisdictions, criminal statutes have been understood to operate only when the acts were unjustified. The agent who kills a would-be assassin of the Chief Executive is justified, though the killing be willful; so too with the person who kills to save his own life. . . . The process [by which courts interpret statutes in light of historical context] is cooperative: norms of interpretation and defense, like agreement on grammar and diction, make it easier to legislate at the same time as they promote the statutory aim of saving life.⁷¹

Third, in addressing the meaning of a preemption clause in the Employee Retirement Income Security Act that preempts state laws “insofar as they . . . relate to any employee benefit plan,”⁷² the Supreme Court—with its “two keenest textualists, Justices Scalia and Thomas, . . . entirely on board”⁷³—has unanimously renounced literal interpretation on the ground that it would sweep unreasonably broadly and has looked instead “to the objectives of the . . . statute as a guide to the scope of the state law that Congress understood would survive.”⁷⁴ As Justice Scalia later put it, “[t]he statutory text provides an illusory test, unless the Court is willing to decree a degree of pre-emption that no sensible person could have intended—which it is not.”⁷⁵

* * *

Without offering further examples, I would emphasize three points by way of conclusion. First, it is a species of confusion—albeit a frequently asserted one—to say that courts can never legitimately appeal to Congress’s intentions or purposes to contradict clear or precise statutory language. Clear meaning, like all meaning, depends on context; and an apparent

70 See, e.g., *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 717 (1996).

71 Frank H. Easterbrook, *The Case of the Speluncean Explorers: Revisited*, 112 HARV. L. REV. 1876, 1913–14 (1999). But cf. *United States v. Oakland Cannabis Buyers’ Coop.*, 532 U.S. 483, 490 (2001) (describing as “an open question whether federal courts ever have authority to recognize a necessity defense not provided by statute”).

72 29 U.S.C. § 1144(a) (2012).

73 Meltzer, *supra* note 10, at 21.

74 *N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 656 (1995).

75 *Cal. Div. of Labor Standards Enf’t v. Dillingham Constr., N.A., Inc.*, 519 U.S. 316, 335–36 (1997) (Scalia, J., concurring).

meaning that contradicts widely shared background understandings is not necessarily clear at all in the absence of a plausible explanatory purpose.

Second, for anyone who accepts them, the examples of judicial interpretation of statutes to reflect the traditions of equity, to contemplate necessity defenses, and to incorporate common-sense limitations refute the proposition that courts should always ascribe only the sparest set of congressional intentions or purposes that are necessary to make statutory language minimally coherent. History and common sense often justify the ascription of much more complex purposes.⁷⁶

Third, interpreting statutory language in light of purposes that sometimes need to be ascribed to Congress is a core judicial function, even though the requisite ascriptions require judgments that go beyond the determination of simple matters of historical or linguistic fact. Congress is indeed “a ‘they,’ not an ‘it.’”⁷⁷ If one thinks again of the *Smith* case, involving what “Congress” intended when it provided enhanced penalties for defendants who used firearms in the course of drug offenses, the answer depends on what a *reasonable* person would conclude, not a fact of the matter involving how many members of Congress thought one thing and how many thought another. If we were talking about individuals’ subjective intentions in that way, it would be impossible to combine them into the unitary psychological intent of a collective legislature. Determining which relevant intentions to impute to the collective Congress requires judgments of reasonableness with an irreducible normative component.

II. ROBUST JUNIOR PARTNERSHIP

So far I have laid the conceptual foundations for what Dan Meltzer and I have called a junior partnership role for the judiciary, but I have not yet given texture to the terms on which courts should exercise that role. I take up that challenge with trepidation. A central theme in Dan’s writing involved the limits of human foresight.⁷⁸ In theorizing about statutory interpretation and judicial common lawmaking, he embraced the constraints and obligations that he found implicit in the American legal tradition, but he emphasized that the tradition includes resources for pragmatically driven adaptation.⁷⁹

Without aiming for undue precision, we can further elucidate a common law interpretive approach or a junior partnership model by drawing three distinctions. The first is between two pictures or models of the way that language works, one that I call the model of coding and decoding and the

76 For a forceful argument that courts should generally resolve otherwise doubtful questions “in favor of continuity [with prior law] and against change,” see David L. Shapiro, *Continuity and Change in Statutory Interpretation*, 67 N.Y.U. L. REV. 921, 925 (1992).

77 See *supra* note 23 and accompanying text.

78 See, e.g., Meltzer, *supra* note 10, at 14–17; Meltzer, *supra* note 4, at 383–90.

79 See, e.g., Fallon & Meltzer, *supra* note 1, at 2033 (lauding “the courts’ characteristic approach of interpreting statutory and constitutional provisions as permitting gradual, policy-driven, common law-like adaptation”).

other the model of creative inference. The second is between foreseen and unforeseen kinds of cases arising under a statute. The third is between trusted and distrusted agents.

A. Alternative Theories of How Linguistic Communication Works

The distinction between a coding and decoding and a creative inference-based model of linguistic communication is admittedly somewhat overdrawn. Nevertheless, it reflects an important difference in interpretative attitude or perspective.

The model of coding and decoding imagines that natural languages such as English are in essence codes for the communication of meaning.⁸⁰ The principal elements of the code are words, the meanings of which dictionaries seek to inscribe. Also vital to the code are rules of syntax that determine how words function in combination to create meaningful sentences. As applied to law, the code model recognizes that words can have specialized usages, that context can clarify otherwise ambiguous meanings, and that speakers and their addressees can both rely on a background set of specifically legal conventions, but one that, according to the textualist theorist John Manning, should in principle be regarded as a “closed set.”⁸¹ According to the code model, competent users of a language rely on their knowledge of the meanings of words and the rules of grammar to encode and decode messages. Crucially, this model assumes that speakers, in choosing their words, have made considered and determinate decisions about what to encode. To a reasonable approximation, vague words convey vague meanings, but precise and specific words communicate determinate content.

As compared with the model of coding and decoding, the alternative model of creative inference is fluid and pragmatic. On this model, speakers use language as a device to convey meaning to others, and they frequently rely heavily on dictionary definitions and rules of syntax as part of their effort to do so. But they also depend on listeners and readers to determine meaning inferentially, based on a large, frequently unspoken body of what one philosopher of language calls “intersubjectively available features of the context of [an] utterance”⁸² and what another calls presuppositions or “common ground.”⁸³

Two illustrations may help to illustrate the application of the model of creative inference. Suppose that my wife asks me to “bring home a fresh vegetable” from the supermarket for dinner.⁸⁴ Without imagining that she

80 See DAN SPERBER & DEIRDRE WILSON, *RELEVANCE: COMMUNICATION AND COGNITION* 3–9 (1986).

81 Manning, *supra* note 33, at 2474.

82 Soames, *supra* note 40, at 598.

83 Stalnaker, *supra* note 53, at 701.

84 This hypothetical example bears important resemblances to the hypothetical instruction of a housekeeper to a domestic servant to “fetch some soupmeat” in FRANCIS LIEBER, *LEGAL AND POLITICAL HERMENEUTICS, OR PRINCIPLES OF INTERPRETATION AND CONSTRUCTION IN LAW AND POLITICS* 18 (William G. Hammond ed., 3d ed. St. Louis, F.H.

has set out to encode much of the information that should inform my action on her instruction, I know that she would regard tomatoes as a vegetable for this purpose (even if they could be classified as fruits instead); that she would not like me to bring home brussels sprouts, which she dislikes; that if we had had corn from the same supermarket the previous evening and it was not good, I should not repeat the mistake; and that if there had been no delivery of fresh produce to the supermarket for several days, and everything looked desiccated, I would better comply with her wishes if I brought home a frozen vegetable.

A second, specifically legal illustration of the model of creative inference involves the constitutional provision—to which I have referred already—specifying that only natural born citizens are eligible for the presidency. Although this reference is semantically ambiguous insofar as it might refer either to (a) those whose mothers did not give birth by cesarean section or (b) to those who were born in the United States or were citizens from birth, we resolve this particular ambiguity without difficulty because we take for granted the existence of linguistic presuppositions or common ground involving criteria of arguable practical relevance to service as president. We do so, moreover, even though no one drawing up a list of “conventions” governing proper usage of the English language would plausibly include an item concerning the disambiguation of the phrase “natural born.”

Now consider two complicating variations on the issues that the Natural Born Citizen Clause can pose. In 2008, when John McCain ran for president, a question arose about whether he was ineligible on account of having been born in the Panama Canal Zone where his father was serving in the U.S. Navy. Interestingly, nearly all seemed to agree that McCain qualified as a “natural born citizen.”⁸⁵ This conclusion obviously rested on imputed linguistic presuppositions about the purposes that these words should be understood to serve in context. By contrast, the scope of the underlying agreement

Thomas & Co. 1880) (1837), *reprinted in* 16 CARDOZO L. REV. 1883, 1904 (1995). For a lucid and sympathetic modern discussion of Lieber’s hypothetical, see William N. Eskridge, Jr., “Fetch Some Soupmeat”, 16 CARDOZO L. REV. 2209 (1995).

85 See generally Peter J. Spiro, *McCain’s Citizenship and Constitutional Method*, 107 MICH. L. REV. FIRST IMPRESSIONS 42, 43 (2008) (“A unanimously adopted resolution of the U.S. Senate, co-sponsored by then-leading Democratic candidates Barack Obama and Hillary Clinton, declares [McCain] to be natural born. Editorialists of various political stripes support his eligibility. A memo from two leading members of the legal-policy elite, Laurence Tribe and Theodore Olson—one Democrat, one Republican—reaches the same result. For all the venom of this presidential contest, there has been little effort by McCain’s opponents—either in the Republican primaries or now in the general election—to press the case that, if elected, McCain would be constitutionally barred from serving.”). Nevertheless, not everyone accepted this conclusion. See, e.g., Gabriel J. Chin, *Why Senator John McCain Cannot Be President: Eleven Months and a Hundred Yards Short of Citizenship*, 107 MICH. L. REV. FIRST IMPRESSIONS 1, 1–2 (2008) (“Senator McCain was born in the Canal Zone in 1936. Although he is now a U.S. citizen, the law in effect in 1936 did not grant him citizenship at birth. Because he was not born a citizen, he is not eligible to the office of president.”).

about the purposes, meaning, and proper application of the Natural Born Citizen Clause has been revealed as significantly limited by the case of Ted Cruz, who was born in Canada to a citizen mother, and thus was a citizen from birth, but who was not born on a U.S. military base and whose parents lacked any connection to the U.S. military.⁸⁶

In my view, any realistic appraisal of the legislative process will acknowledge that statutory language does not always reflect carefully formulated messages the sensible or intended import of which can be revealed as either vague or precise through a process that resembles decoding, without resort to creative inference. As I suggested above, even textualists seem to recognize as much in some cases,⁸⁷ though they seem to adopt the contrary view in others, as when they say that courts must not rely on statutory purposes to contradict clear or specific statutory language.⁸⁸ I shall offer further examples of cases in which the apprehension of meaning requires creative inference—in law as in other areas of life—below.

B. *Foreseen and Unforeseen Kinds of Cases*

Although successful communication often requires creative inference as much as it does decoding, the implications of this insight for specific legal issues are, admittedly, often far from obvious. We may gain some grasp of the challenge that courts confront, however, if we distinguish among some of the more and less foreseeable kinds of cases to which courts must apply statutes.

1. Statutory Examples

A first statutory example, drawn from the heart of the federal courts field in which Dan principally worked, involves a Reconstruction-era civil rights statute, 42 U.S.C. § 1983, which creates a cause of action for damages and injunctive relief against state officials who violate federal constitutional or statutory rights.⁸⁹ Section 1983 initially entered the statute books as part of the 1871 Ku Klux Klan Act.⁹⁰ The congressional debates focused heavily on Klan violence, not constitutional and statutory violations by state officials

86 See, e.g., Thomas Lee, Opinion, *Is Ted Cruz a “Natural Born Citizen”? Not if You’re a Constitutional Originalist*, L.A. TIMES (Jan. 10, 2016), <http://www.latimes.com/opinion/oped/la-oe-lee-is-ted-cruz-eligible-to-be-president-20160110-story.html>.

87 See *supra* notes 70–75 and accompanying text.

88 See *supra* note 33 and accompanying text.

89 The text of § 1983 provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983 (2012).

90 See, e.g., Theodore Eisenberg, *Section 1983: Doctrinal Foundations and an Empirical Study*, 67 CORNELL L. REV. 482, 484–85 (1982).

unconnected with the Klan.⁹¹ In creating a cause of action against state officials for violations of federal law, § 1983 lists no exceptions on its face. Although strictly literal, exception-less application would be possible—for example, on the assumption that no dictionary, code, or convention mandates the contrary—it seems highly doubtful that Congress could have foreseen, or meant to authorize or dictate responses to, all of the complexities that such an interpretation would generate. For instance, in applying the statute, the Supreme Court has had to decide whether, and if so, when, officials who violate constitutional rights, including judges and prosecutors, can claim “official immunity” from suits for damages based on analogies to the immunities that officials enjoyed in suits at common law;⁹² whether the statutory authorization of injunctive relief overrides pre-existing doctrines that would have precluded courts of equity from enjoining pending state criminal prosecutions;⁹³ when, if ever, prior state court decisions bar further litigation in federal court under doctrines of claim and issue preclusion;⁹⁴ and whether the § 1983 cause of action extends to state prisoners who could instead seek relief through habeas corpus actions.⁹⁵ In resolving such questions, even committed textualists have concluded that some exceptions to § 1983’s literal scope must exist.⁹⁶

A second kind of example comes from federal regulatory statutes designed to promote consumer health or safety, such as those that impose licensing and labeling requirements for federally regulated drugs. Clearly such statutes establish regulatory floors: drug manufacturers or sellers must comply with their mandates on pain of whatever penalties the statutes specifically prescribe. But other questions may also arise. Preemption cases, about which Dan wrote extensively,⁹⁷ present the question whether statutes that create federal obligations may, in some circumstances, impliedly preclude the states from imposing further, typically more onerous duties on federally regulated parties. If a state purports to establish safety requirements more

91 See *id.* at 485 (“[T]he entire Act of which section 1983 was a part addressed an enormously important, but nevertheless limited, problem. Racial attitudes in the South, blossoming in the form of Klan and other violence, and the failure of the states to cope with that violence, prompted its enactment.”).

92 For an overview of debates surrounding official immunity doctrine, see HART & WECHSLER, *supra* note 19, at 1038–55.

93 For a summary of pertinent doctrine and surrounding debates, see *id.* at 1094–1127.

94 See *id.* at 1377–91.

95 See *id.* at 1391–1404.

96 See Fallon, *supra* note 66, at 719–24. In doing so, textualist Justices have frequently but not invariably relied on the common law background against which § 1983 was enacted. See *id.* Lacking a common law background on which to rely, in *Nat’l Private Truck Council, Inc. v. Okla. Tax Comm’n*, 515 U.S. 582 (1995), the textualist Justice Clarence Thomas, in a majority opinion joined by Justice Scalia, reasoned that historical practice supported a “presumption that federal law generally will not interfere with administration of state taxes” and held on that basis that “Congress did not authorize injunctive or declaratory relief under § 1983 in state tax cases.” *Id.* at 588.

97 See generally Meltzer, *supra* note 10; Meltzer, *supra* note 4, at 362–78.

stringent than those that Congress has established, the threat of penalties or liability under state law might push up drug prices or even lead manufacturers to withdraw federally licensed drugs from the market. In cases involving threats of this kind, the federal courts have considered whether federal statutes impliedly preempt state regulations that would constitute an obstacle to the achievement of Congress's regulatory aims⁹⁸—an approach that Dan applauded.

2. Three Categories of Cases

Anticipating that courts will continue to confront questions of statutory interpretation analogous to those that they have faced in § 1983 and preemption cases, we can usefully consider the issue of limited congressional foresight—as viewed in light of the more general model of the dependence of successful communication on creative inference—by distinguishing three categories of cases.

The first consists of cases of the kind that Congress clearly had in view when it enacted a statute and that a reasonable person, aware of all that is readily publicly known about the problem that Congress sought to address, would understand the statute as intended to control. The control might take various forms. Among other possible effects, statutes can authorize action by public officials, assign consequences to action by private parties, or displace or preempt legal regulations that otherwise would have applied.

The second category involves kinds of cases that a reasonable person, familiar with publicly known facts about the context of a statute's enactment and all potentially relevant legal, cultural, and linguistic background, would understand as beyond the statute's reach.

The third category encompasses kinds of cases that Congress, in light of the publicly available record, appears not to have had in mind when it enacted a statute, or could not reasonably have foreseen, but that involve facts calling for a determination of whether the statute—construed in light of the purposes most reasonably imputed to Congress—applies. Dan's writing about statutory interpretation, which teems with references to unforeseen circumstances and the limited space on Congress's regulatory agenda, frequently took this kind of case as paradigmatic when arguing that courts should follow a common law interpretive model or act as Congress's junior partners.⁹⁹ He thought that any decent theory of statutory interpretation

98 See, e.g., *Sprietsma v. Mercury Marine*, 537 U.S. 51, 64 (2002) (articulating a standard under which federal law will be held impliedly to preempt state law that “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress” (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941))).

99 See, e.g., Fallon & Meltzer, *supra* note 1, at 2044 (“As important and unforeseen issues arise, we think it better for courts to accept responsibility for thinking through the problems of justice and sound practice that those issues present, within the bounds established by the norms of interpretive practice that constitute the Common Law Model, than to insist on viewing all of those issues as having been specifically resolved by past lawmakers.”).

should give courts the resources to reach what he took to be practically sensible results in cases of this third, largely unforeseen kind. And he did not think that courts acted in the teeth of Congress's code-like instructions in doing so. To the contrary, a reasonable understanding of how language works sometimes requires a creative non-literalism in identifying congressional purposes (in light of presuppositions about important, widely shared values) and an ascription of statutory meaning that reflects those purposes. The hypothetical case in which my wife asks me to "bring home a fresh vegetable," as discussed above, illustrates some examples of the need for creative inference for successful communication to occur in a non-legal context.

Having just sorted statutory interpretation cases into three categories, I want immediately to acknowledge that any effort to distinguish sharply between cases that Congress foresaw and those that it did not foresee would be grossly oversimplified. Everyone agrees that legislation can and must apply to situations that Congress did not specifically anticipate. In an effort to alleviate this difficulty (albeit without wholly dispelling it), I have referred to "kinds of cases" that Congress foresaw or likely would have foreseen, not to individual cases. We can, I believe, sensibly ask whether a case or kind of case arising in the post-enactment future, even if it plausibly comes within a statute's language, exhibits a difference in kind, rather than a mere factual variation, from the paradigmatic instances of application that most members of Congress would likely have had in mind when they enacted the statute.

Among other, further difficulties, different members of Congress may well have foreseen or failed to foresee different things. Here we should not pretend to false precision. The question whether a factual situation deviates from the kind of case that Congress should be understood as having sought to control through contested statutory language is ultimately a legal one, not a pure question of empirical or psychological fact. It involves how a reasonable person would understand Congress's language in light of the purposes most reasonably ascribed to Congress, given the language that it used in the historical, legal, and linguistic context in which it legislated.

In so saying, I might add, once more, that many textualists would not necessarily object to the conclusion that I have just drawn, though I am quite sure that some would. If courts must impute an "objective intent" to statutes in order to interpret them, judgments of reasonableness may enter into the requisite imputation as an aspect of appraisals of the pertinence of various elements of legal, cultural, and linguistic background.¹⁰⁰ To recur to the examples that I offered above, Justices of the Supreme Court who generally embrace textualism have joined in non-literal interpretations of § 1983¹⁰¹ and in conclusions that federal statutes, properly interpreted in the context of prior preemption jurisprudence, impliedly preempt state regulations.¹⁰²

100 See Fallon, *supra* note 66, at 695–96, 719–24.

101 See *id.* at 719–24.

102 See Meltzer, *supra* note 10, at 9 (noting "the persistence of implied preemption, even in the hands of judges who generally share a concern about excessive judicial lawmaking authority and a concomitant attraction to textualism in interpretation").

They have also held that federal statutes enacted subsequently to § 1983 that provide express remedies for violations of their provisions impliedly displace the cause of action for damages and injunctive relief that otherwise would exist under § 1983 against state officials who violate federal statutory rights.¹⁰³ In imputing an objective intent to Congress to withdraw rights to sue under § 1983, textualist Justices may reason that providing duplicate remedies would be so improvident that no reasonable Congress could have intended to do so.

Some textualists, however, believe that their methodology commits them to more literal interpretations of statutory language. Looking at the Supreme Court's § 1983 cases or its preemption jurisprudence, these purer textualists, as they might style themselves, maintain that the Court had no justification for deviating from clear statutory language by creating non-textual exceptions or upholding preemption claims under statutes that lacked express preemption clauses.¹⁰⁴ But that response, as we have seen already, is question-begging insofar as it assumes that a statute's literal or semantic meaning is also its clear, actual meaning. In context, a statute's actual meaning may differ from its literal or semantic meaning.

C. *Trusted and Distrusted Agents*

In my arguments so far, I have disparaged the possibility that there could be useful rules for determining—without the exercise of case-specific judgment—whether, when, or how far courts should construe statutes as going beyond, or as reaching less far than, the literal or semantic meaning of their terms. Moreover, Part I specifically resisted any suggestion that courts, in construing statutes in context, should always ascribe to Congress the sparest, least complex set of purposes or policy judgments that would make coherent sense of a statute's language and thus apply a statute as nearly literally as is reasonably possible—for example, by insisting that a statute that does not list any exceptions on its face necessarily contemplates no exceptions.

I want to return to that possible view now because an increasing number of textualists—though surely not all of them—seem to hold or at least approximate it.¹⁰⁵ One gets a hint of that view in textualist arguments, which

103 See *City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 121 (2005) (“The provision of an express, private means of redress in the statute itself is ordinarily an indication that Congress did not intend to leave open a more expansive remedy under § 1983.”); see also *Middlesex Cty. Sewerage Auth. v. Nat’l Sea Clammers Ass’n*, 453 U.S. 1, 20 (1981) (“When the remedial devices provided in a particular Act are sufficiently comprehensive, they may suffice to demonstrate congressional intent to preclude the remedy of suits under § 1983.”).

104 Justice Thomas has registered his skepticism of the Supreme Court's implied preemption jurisprudence. See, e.g., *Wyeth v. Levine*, 555 U.S. 555, 582–604 (2009) (Thomas, J., concurring in the judgment).

105 See *Barnhart v. Sigmon Coal Co., Inc.*, 534 U.S. 438, 460–61 (2002) (“Where the statutory language is clear and unambiguous, we need neither accept nor reject a particular ‘plausible’ explanation for why Congress would have written a statute [in a particular

Dan Meltzer specifically rejected in his article *Preemption and Textualism*,¹⁰⁶ that courts should never interpret federal statutes as preempting state law unless (1) Congress expressly indicated its preemptive intent or (2) compliance with both state and federal law is strictly impossible and federal law thus necessarily overrides state law under the Supremacy Clause.¹⁰⁷

There are multiple grounds on which textualists might support the position that I have just described and multiple grounds on which one might oppose it. More precisely, there is not just a multitude of available arguments but a multitude of categories of possible arguments on both sides. These include (a) linguistic arguments about the communicative content of statutory language,¹⁰⁸ (b) legal arguments about the presumptions, if any, that the Constitution requires or authorizes in ascribing intentions to Congress or otherwise determining the significance of statutory language as a matter of law,¹⁰⁹ and (c) policy arguments about the values that various interpretive approaches would promote or the consequences that they would produce.¹¹⁰ It could perhaps go without saying that these various kinds of arguments can prove very difficult to disentangle from one another.

Dan's arguments for adopting a view of the federal courts as trusted agents, to which I shall come very shortly, were predominantly legal, historical, and policy based. But I want to say a few words first about linguistically based arguments, partly because I believe that persuasive arguments in that domain help to license the legal and policy arguments that Dan made so effectively. The linguistic arguments link directly back to the admittedly oversimplified distinctions that I have drawn between competing models of the way in which language functions and between kinds of cases that Congress, in enacting a statute, could reasonably be viewed as either having had in mind or as unlikely to have anticipated. If we think about whether a reasonable person, occupying the role of a judge, would understand Congress's choice of statutory language as having dictated the proper resolution of cases in the unforeseen category, among the relevant considerations would be this:

way]. . . Dissatisfied with the text of the statute, the Commissioner attempts to search for and apply an overarching legislative purpose to each section of the statute. Dissatisfaction, however, is often the cost of legislative compromise.”); Manning, *supra* note 33, at 2390 (“Despite the absurdity doctrine’s deep roots, recent intellectual and judicial developments have undermined the doctrine’s strong intentionalist foundations.”); Jonathan R. Siegel, *The Inexorable Radicalization of Textualism*, 158 U. PA. L. REV. 117, 121 (2009) (arguing that a “pure” version of textualism would allow “absurd” results).

106 See Meltzer, *supra* note 10, at 8–34.

107 See, e.g., Note, *Preemption as Purposivism’s Last Refuge*, 126 HARV. L. REV. 1056, 1064–68 (2013).

108 See, e.g., Richard H. Fallon, Jr., *The Meaning of Legal “Meaning” and Its Implications for Theories of Legal Interpretation*, 82 U. CHI. L. REV. 1235, 1243–51, 1280–85 (2015); Solum, *supra* note 34, at 480–507.

109 See, e.g., Manning, *supra* note 22, at 27.

110 See, e.g., Easterbrook, *supra* note 14, at 549–51; Siegel, *supra* note 105, at 121.

Would the reasonable person, now imagined to be a judge, regard herself as a relatively trusted or a more nearly distrusted agent?¹¹¹

A principal who distrusts her agent will want the agent to construe her instructions relatively literally, and an agent who correctly understands her status will respond accordingly. Correspondingly, a principal who trusts her agent—for example, regards her as a junior partner in her projects—will likely intend her agent to construe her instructions as less restrictive of her judgment, especially in unforeseen circumstances quite different from those that the principal had in mind when issuing the instruction. And whether an agent is relatively trusted or more nearly distrusted will often be part of the set of background assumptions in light of which an utterance by a principal directed to that agent will draw its meaning “in context.”

I sought to offer a model of a relatively trusted agent when, above, I imagined a situation in which my wife asks me to “bring home a fresh vegetable” from the supermarket. In offering that instruction, she assumes—even if she does not pause so to reflect and to encode the information in her message—that we share a great deal of knowledge, have substantially convergent values, and, as a result, are likely to concur in our judgments of desirable and undesirable outcomes. In interpreting her instruction, I would therefore conclude that I had far greater scope for the exercise of judgment or discretion than if, most improbably, a gourmet chef of whose tastes and plans I knew nothing asked me to stop at the supermarket and purchase a fresh vegetable on my way to a dinner party. Lacking pertinent information, and recognizing that a gourmet chef would have no reason to trust my judgment, I would construe my instructions much more literally.

If this analysis is correct, I believe that the lesson applies to cases involving statutory interpretation by the federal courts, at least to this extent: the appropriate interpretation of statutory language may sometimes depend, in part, on whether courts should be viewed as relatively trusted or more nearly distrusted agents of Congress. In so saying, I do not mean to imply that general reflection on the nature of linguistic communication can resolve this question, only that such reflection can help to frame the question of how courts should approach their interpretive tasks. As I have said repeatedly, arguments purporting to resolve debated issues of statutory interpretation by appeal to purported matters of linguistic fact—as, for example, in claims that statutes have plain linguistic meanings from which courts must not deviate based on purported evidence of legislative purpose—are typically confused, fallacious, or at best incomplete.

Dan’s arguments for the junior partnership model of statutory interpretation wholly avoided such confusions. As a historical matter, Dan argued, courts had long played the role that he advocated, generally with good results. Characteristically, he sought to establish that conclusion by citing

111 Dan embraced this framing of the question. See Fallon & Meltzer, *supra* note 1, at 2033 (“[Under the Common Law Model,] judges remain agents, but, absent contrary evidence, they assume their principals invested them with bounded authority to interpret legal mandates in light of considerations of fairness, policy, and prudence.”).

specific examples in the substantive fields on which his scholarship focused. In one article, he and I looked at the Supreme Court's historic approach to interpreting the statutory grant of federal habeas corpus jurisdiction, especially as applied to cases involving federal detainees whose detentions had not been previously authorized by an Article III court.¹¹²

More recently, Dan wrote about preemption. In his article, he emphasized that Congress, when adopting a federal statute for the first time, could hardly be expected to know of, anticipate, or provide wisely for all possible interactions between that statute and the laws of all fifty states, some of which the states might not even have enacted yet.¹¹³ And a variety of difficulties, including shortage of time, preclude Congress from enacting thoughtful corrective legislation whenever it emerges in practice that continued operation of state law would frustrate manifest federal policy.¹¹⁴ It is, accordingly, practically imperative, he argued, for "courts are to play a large lawmaking role in preemption cases—one that necessarily involves their exercising judgment about complicated matters."¹¹⁵

In addition to the argument that statutory interpretation on a common law model produced more sensible and just results than the legal system could likely achieve otherwise, Dan made a subtler point about Congress's motivation to enlist the judiciary as junior partners or trusted agents: Congress needs junior partners or trusted agents in order to be able to legislate effectively.¹¹⁶ It was "implausible," he wrote, "to expect that Congress can specify in advance the answer to the complex questions that over time will arise" in the administration of a complex legislative scheme.¹¹⁷ Under these circumstances, "judicial passivity" in failing to interpret statutes and craft fed-

112 See generally *id.*

113 See Meltzer, *supra* note 10, at 15–16 ("First, the member of Congress would have to identify all of the state and local laws in existence in fifty states and countless localities that might intersect in some significant way with the new federal statutory scheme. . . . (A further difficulty . . . is that many preemption cases involve state or local laws that were enacted *after* the effective date of the federal statute claimed to preempt them.). Second, in order to think intelligently about how far to preempt, the member of Congress often would have to be able to predict how a new and untested federal statutory regime is going to operate. That would frequently be inordinately difficult, especially in cases in which important matters remain to be specified by administrative regulation. . . . [In addition,] there may be important facts in the real world (e.g., the cost, cost-effectiveness, and safety of airbags as compared to other devices) that are unknown at the time of enactment and that are subject to rapid change over time. . . . [I]n many cases, the member of Congress would [also] want to assess the force of the argument that a particular state-law scheme is so important, or so integrally interwoven with other parts of state law, that it should not be displaced, even if it does interfere to some extent with the federal statutory scheme. It should be clear that asking a legislator to try to specify in advance a textual preemption standard that is responsive to these considerations is asking the impossible.").

114 See *id.* at 17–18.

115 *Id.* at 46.

116 See Meltzer, *supra* note 4, at 345 ("[T]he Supreme Court's judicial passivity has rendered it more difficult for Congress to legislate effectively.").

117 *Id.* at 409.

eral common law to advance underlying congressional purposes—whether based on the assumption that the courts are distrusted agents or on other grounds—“poses threats to the effectiveness of congressional legislation every bit as much as does . . . judicial activism” in holding acts of Congress unconstitutional.¹¹⁸

D. *Qualification and Illustrative Examples*

Dan’s careful pairing of the threat of “judicial passivity” with that of “judicial activism” deserves emphasis. He never denied that willful courts could use ostensibly purposive interpretation as a device for superseding Congress, not empowering it. Accordingly, in arguing that courts should interpret statutes based on a common law model, or play the role of junior partners to Congress, I have not meant to assert that courts should routinely interpret statutes in ways that stray far from their literal meanings, especially in response to kinds of problems that Congress reasonably could have foreseen but failed to address. Above I offered a hypothetical example involving speed limits. A court, I said, should not interpret such a statute as applicable to other safety hazards, such as distracted driving. A non-hypothetical example comes from *Milner v. Department of the Navy*,¹¹⁹ in which the government argued that an exception to the Freedom of Information Act for agency records “relate[d] solely to the . . . personnel rules and practices”¹²⁰ applied to data that the Navy used in designing munitions storage facilities.¹²¹ However great the Navy’s policy interests in resisting disclosure, the Court rightly concluded that the problem to which the government sought to apply the statute was too far removed from the one that Congress had set out to address.¹²²

A more testing example for Dan’s interpretive approach comes from the question whether, and if so when, the courts should construe federal statutes that impose regulatory duties as impliedly creating private rights to sue. The best short discussion of which I know comes in the dialogic juxtaposition of arguments and counterarguments that Dan wrote for the Fourth Edition of *Hart & Wechsler’s The Federal Courts and the Federal System*¹²³ and that subsequent editions have substantially reproduced.¹²⁴ In my judgment, the recognition of an implied right to sue represents the kind of major policy

118 *Id.* at 410.

119 131 S. Ct. 1259 (2011).

120 5 U.S.C. § 552(b)(2) (2012).

121 *Milner*, 131 S. Ct. at 1262–63.

122 *Id.* at 1264–74.

123 RICHARD H. FALLON, JR., DANIEL J. MELTZER & DAVID L. SHAPIRO, *HART & WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 841–43 (4th ed. 1996). The powerful point-counterpoint organization of the discussion recalls David Shapiro’s observation that “an author’s ability to make compelling statements of contrasting views is, for me, a powerful indicator of the author’s worth as a scholar.” David L. Shapiro, Foreword, *A Cave Drawing for the Ages*, 112 HARV. L. REV. 1834, 1834 (1999).

124 In the most recently published Seventh Edition, see *supra* note 19, at 741–43.

judgment that a junior partner ought not lightly make on her own. That said, I believe that the Supreme Court ought to interpret statutes written during the era when federal courts commonly recognized implied rights of action in light of then-prevailing interpretive practices on which Congress might reasonably have relied.¹²⁵

The Supreme Court's recent decision in *King v. Burwell*¹²⁶ offers a last, illustrative example of the common law or junior partnership model in practice. The Patient Protection and Affordable Care Act (ACA or "the Act") seeks to expand the provision of health care through a series of interlocking reforms. One "bars insurers from taking a person's health into account when deciding whether to sell health insurance or how much to charge."¹²⁷ Another provides for the creation of an "Exchange" in each state "that allows people to compare and purchase insurance plans."¹²⁸ The Act initially provides that each state shall establish an Exchange but subsequently adds that if a state fails to do so, the Secretary of Health and Human Services (HHS) "shall . . . establish and operate such Exchange within the State."¹²⁹ The Act gives tax credits to purchasers of insurance by saying that the credits are available to a taxpayer who has purchased insurance through "an Exchange *established by the State*."¹³⁰ The central question in *King* was whether the language making tax credits available for purchases of insurance through "an Exchange established by the State" meant that those purchasing insurance on Exchanges established by the Secretary of HHS in states that had failed to establish Exchanges of their own could not qualify for tax credits.¹³¹

By a vote of six to three, the Supreme Court sensibly and appropriately held that the relevant language, read in context, authorizes tax credits for purchasers of insurance on federally as well as state operated Exchanges.¹³² Writing for the Court, Chief Justice Roberts began by noting, as I have emphasized, that "the meaning—or ambiguity—of certain words or phrases may only become evident when placed in context."¹³³ He continued by recognizing that "[i]f we give the phrase 'the State that established the Exchange' its most natural meaning,"¹³⁴ a variety of other features of the Act could not operate as plainly contemplated. And, as he pointed out in conclu-

125 It has not always done so. See, e.g., *Alexander v. Sandoval*, 532 U.S. 275, 287 (2001) ("Respondents would have us revert in this case to the understanding of private causes of action that held sway 40 years ago when Title VI was enacted. . . . Having sworn off the habit of venturing beyond Congress's intent, we will not accept respondents' invitation to have one last drink.").

126 135 S. Ct. 2480 (2015).

127 *Id.* at 2485; see 42 U.S.C. § 300gg (2012).

128 *King*, 135 S. Ct. at 2485; see 42 U.S.C. § 18031(b)(1).

129 42 U.S.C. § 18041(c)(1).

130 *King*, 135 S. Ct. at 2487 (quoting 26 U.S.C. §§ 36B(b)(2)(A), 36B(c)(2)(A) (2012)).

131 *King*, 135 S. Ct. at 2487–88.

132 *Id.*

133 *Id.* at 2489 (quoting *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 526 U.S. 120, 132 (2000)).

134 *Id.* at 2490.

sion: “Congress passed the Affordable Care Act to improve health insurance markets, not to destroy them. If at all possible, we must interpret the Act in a way that is consistent with the former, and avoids the latter.”¹³⁵ Under these circumstances, the Court determined that the statute’s provision of tax credits for purchases on “an Exchange established by the State” was ambiguous, not plain on its face,¹³⁶ and was best interpreted to embrace purchases on an Exchange established and operated by the federal government when a State had failed to establish an exchange of its own.¹³⁷

King exemplifies the role of the courts in construing statutes to assist Congress in the realization of its central purposes in enacting legislation. It also may illustrate some of the risks that attend that role. In ascribing to Congress the aim “to improve health insurance markets, not to destroy them,”¹³⁸ the Court formulated Congress’s relevant intent at what textualists frequently characterize as a high “level of generality.”¹³⁹ Doing so, textualists often say, risks substituting judicial for congressional judgment.¹⁴⁰ Textualists also insist with considerable frequency that when Congress uses “precise” language—as it arguably did when providing tax credits for insurance purchased through “an Exchange established by the State”—its precision should be read to signal that it meant to deprive the courts of any interpretive flexibility that more general language might have authorized.¹⁴¹

Although arguments such as these call attention to real hazards, intimations that abstract references to levels of generality and statutory precision

135 *Id.* at 2496.

136 *See id.* at 2491.

137 *See id.* at 2493–96.

138 *Id.* at 2496.

139 *See, e.g.,* John F. Manning, *Federalism and the Generality Problem in Constitutional Interpretation*, 122 HARV. L. REV. 2003, 2004 (2009) (applauding an interpretive approach built upon “the related propositions that lawmaking entails compromise, that enacted texts select means as well as ends, and that abstracting from a law’s specific means to its general aims dishonors the level of generality at which lawmakers choose to legislate” (emphasis omitted)); Manning, *supra* note 24, at 19–20 (criticizing “purposivist” approaches under which “legislative supremacy operates at a high level of generality” on the ground that such approaches “mak[e] it harder for Congress to . . . choose statutory means—and, in particular, to write incoherent, overbroad, or incomplete legislation”). In *King*, Justice Scalia thus protested in dissent that “[n]o law pursues just one purpose at all costs.” 135 S. Ct. at 2504 (Scalia, J., dissenting).

140 *See, e.g.,* John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1939, 1975 (2011) (“[W]hen a court abstracts from the specific to the general, the level of generality at which it enforces statutory policy reflects judicial, and not legislative, choice.”).

141 *See, e.g., King*, 135 S. Ct. at 2502 (Scalia, J., dissenting) (“To begin with, ‘even the most formidable argument concerning the statute’s purposes could not overcome the clarity [of] the statute’s text.’” (quoting *Kloeckner v. Solis*, 133 S. Ct. 596, 607 n.4 (2012))); Manning, *supra* note 140, at 1973 (“Treating a precise text as a placeholder for a more general background purpose or treating a broadly framed text as the placeholder for a more precise rule negates the lawmaker’s ability to determine the appropriate level(s) of generality at which to frame diverse provisions of law.”).

can resolve actual cases, including *King*, are typically either self-contradictory or question-begging. It borders on self-contradiction to assert that courts should avoid imputing purposes to Congress at a high level of generality while maintaining that the use of “precise” language likely reflects a high-order congressional purpose of narrowly restricting courts’ exercise of interpretive judgment. And it is often question-begging to label language as precise when the question for decision is whether, in context, a term is precise, vague, ambiguous, or possibly even demonstrably imprecise. The ACA’s reference to “an Exchange established by a State” furnishes a case in point.

As the majority opinion in *King* documented, the Affordable Care Act is a statute of nearly one thousand pages that “contains more than a few examples of inartful drafting” and “does not reflect the type of care and deliberation that one might expect of such significant legislation.”¹⁴² Legislation of its kind, as of many other kinds, cannot be implemented successfully unless the courts assume the role of a junior partner to Congress.¹⁴³ Dissenting in *King*, Justice Scalia protested that “[i]t is entirely plausible that tax credits were restricted to state Exchanges deliberately—for example, in order to encourage States to establish their own Exchanges.”¹⁴⁴ But he placed little weight on that unlikely speculation concerning the origins of the provision most centrally at issue¹⁴⁵—a statutory anomaly that emerged only after months of scrutiny of the ACA by lawyers who had opposed its enactment and implementation from the start.¹⁴⁶ Justice Scalia’s deeper objection seemed to be that the Court had sought to “assist” Congress in making the Act workable¹⁴⁷ when he thought it should have sent Congress back to the drawing board to reconsider whether and if so how to fix a statute that his interpretation would have rendered dysfunctional.¹⁴⁸ As I shall discuss more fully below, Dan Meltzer thought that approach more a disservice than a service to political democracy, and I could not agree more emphatically.

142 *King*, 135 S. Ct. at 2492 (majority opinion).

143 Justice Scalia’s dissenting opinion in *King* came close to acknowledging as much at one point. See *id.* at 2500 (Scalia, J., dissenting) (“The Affordable Care Act spans 900 pages; it would be amazing if its provisions all lined up perfectly with each other. This Court ‘does not revise legislation . . . just because the text as written creates an apparent anomaly.’” (quoting *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2033 (2014))). For a perceptive discussion of the challenges that the diversity of kinds of modern statutes and the means of their assemblage in Congress pose for interpreting courts, see Abbe R. Gluck, *Imperfect Statutes, Imperfect Courts: Understanding Congress’s Plan in the Age of Unorthodox Lawmaking*, 129 HARV. L. REV. 62, 96–109 (2015).

144 *King*, 135 S. Ct. at 2505.

145 See *id.* at 2502–05 (discussing statutory design largely without allusion to purpose).

146 See, e.g., Gluck, *supra* note 143, at 62–63, 69–70.

147 *King*, 135 S. Ct. at 2507 (Scalia, J., dissenting).

148 See *id.* at 2506.

III. CONFRONTING SOME PROBLEMS

Having explicated the view that the federal courts should imagine themselves as junior partners to Congress when interpreting federal statutes, I shall respond briefly to a few well-known objections.

A. *The Separation of Powers*

One criticism maintains that Article III limits the courts to applying the law, not making it.¹⁴⁹ Stated in crude form, this objection mistakes a banality for an argument. Article III authorizes the federal courts to decide cases and controversies. In doing so, the courts must apply Congress's directives in cases to which those directives apply. In statutory interpretation cases, however, the question is what statutes mean and whether, as properly interpreted, they apply to the facts at issue. Far from forbidding courts to interpret statutes to ascertain what they mean in context, Article III requires courts to do so.

In an article entitled *Textualism and the Equity of the Statute*, Professor John Manning makes a subtler argument.¹⁵⁰ According to him, "the structural policies implicit in the constitutional separation of lawmaking from judging and the requirements of bicameralism and presentment" rule out a common law approach to statutory interpretation.¹⁵¹ But evidence concerning historical understanding in the Founding era is mixed,¹⁵² and subsequent history is much more consistent with purposivism than with a narrow textualism. As Dan once wrote, "[i]s' may not be 'ought,' but claims that judicial practices are politically illegitimate are far more difficult to sustain when those practices are widespread and longstanding and when there is a pattern not of congressional opposition but, instead, of apparent congressional acquiescence."¹⁵³

Other commentators have offered a further, related objection. As Dan frankly acknowledged, judicial interpretation shades into judicial lawmaking along a spectrum.¹⁵⁴ So recognizing, he did not shrink from defending a

149 See, e.g., *id.* at 2505 ("The Court's decision reflects the philosophy that judges should endure whatever interpretive distortions it takes in order to correct a supposed flaw in the statutory machinery. That philosophy ignores the American people's decision to give Congress '[a]ll legislative Powers' enumerated in the Constitution. . . . They made Congress, not this Court, responsible for both making laws and mending them." (quoting U.S. CONST. art. I, § 1)).

150 Manning, *supra* note 22.

151 *Id.* at 127.

152 See 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) (arguing that early American practice in interpreting statutes was not narrowly textualist).

153 Meltzer, *supra* note 31, at 1893 (footnotes omitted).

154 See, e.g., Meltzer, *supra* note 4, at 379 (noting that because "the line between statutory interpretation and federal common lawmaking is indistinct, it would make little sense to address only purposive interpretation or federal common lawmaking rather than both" (footnote omitted)).

robust role for the federal courts in crafting federal common law.¹⁵⁵ According to Professor Bradford Clark, the Supremacy Clause of Article VI marks the Constitution, laws, and treaties of the United States as the exclusive embodiments of valid federal law and thus precludes any judicial lawmaking role that strays beyond the bounds of interpretation, broadly defined.¹⁵⁶ If advanced as a historical thesis about the original public meaning of Article III and its relation to Article VI, however, Professor Clark's thesis is far from clearly correct.¹⁵⁷ Moreover, given grounds for doubt, I would follow Dan in resisting the basing of important constitutional conclusions on originalist historical claims alone.¹⁵⁸ Under these circumstances, other factors matter and, what is more, strongly support the conclusion that the federal courts have the constitutional authority to play a common lawmaking role. The conclusion that the Supremacy Clause forbids federal common lawmaking is hard to square with longstanding, widespread practice and judicial precedent.¹⁵⁹ Finally, as Dan emphasized, a rejection of all federal common lawmaking would be pragmatically and prudentially unattractive.¹⁶⁰ In an opinion that Dan much admired, Justice Jackson once wrote: "Were we bereft of the common law, our federal system would be impotent. This follows from the recog-

155 He initially sounded that theme in his first published article, see Daniel J. Meltzer, *State Court Forfeitures of Federal Rights*, 99 HARV. L. REV. 1128, 1131–32 (1986), in which he argued that federal common law should govern the circumstances in which state courts could permissibly decline to entertain federal claims that criminal defendants had failed to raise in compliance with state procedural rules.

156 See, e.g., Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321, 1323–24 (2001).

157 See, e.g., Henry Paul Monaghan, *Supremacy Clause Textualism*, 110 COLUM. L. REV. 731, 742–55 (2010).

158 See Richard H. Fallon, Jr., *Appraising the Significance of the Subjects and Objects of the Constitution: A Case Study in Textual and Historical Revisionism*, 16 U. PA. J. CONST. L. 453, 477 (2013) (arguing that courts should proceed with caution when urged to upset settled doctrine based on recent, contestable historical and linguistic evidence).

159 As Professor Monaghan points out, Clark's thesis that only the Constitution and statutes can occupy the status of federal law is difficult to reconcile with the Supreme Court's frequent recognition of the de facto lawmaking power of federal administrative agencies. See Monaghan, *supra* note 157, at 757; see also Meltzer, *supra* note 31, at 1893 ("[C]laims that judicial practices are politically illegitimate are far more difficult to sustain when those practices are widespread and longstanding . . .").

160 As Dan put it:

On that view, not only administrative regulations and valid executive orders but also federal common law would neither bind the states under the Supremacy Clause nor provide the basis for district court or Supreme Court jurisdiction. . . . [In addition,] state courts, for example, would not violate the Supremacy Clause if they denied federal judgments any preclusive effect, for, as the Supreme Court has made clear (in an opinion by Justice Scalia), that preclusive effect is a product of federal common law.

Meltzer, *supra* note 4, at 381 (footnotes omitted).

nized futility of attempting all-complete statutory codes.”¹⁶¹ Dan amplified that argument in his article on statutory preemption.¹⁶²

B. *Legislation as Compromise*

In their litany of complaints about purposive approaches to statutory interpretation, textualists recurrently point out that legislation frequently embodies compromises.¹⁶³ From this truism it follows, textualists sometimes continue, that construing legislation in light of imputed coherent purposes risks upsetting possibly unprincipled congressional bargains and deprives Congress of the capacity to negotiate deals—which may stop short of doing all that full realization of otherwise reasonably imputed purposes would require—with assurance that the deals will stick.¹⁶⁴ One fallacy of this argument emerges from a narrowly logical point. Even if one assumes (as textualists insist) that the text of a statute provides the only reliable evidence of the compromise that a statute embodies, one must still interpret the statute in order to ascertain what the compromise was.

In a prominent version of the argument that courts should eschew any junior partnership role in interpreting statutes in order to avoid upsetting legislative compromises, Judge Frank Easterbrook relies heavily on the example of implied rights to sue, which I discussed briefly above.¹⁶⁵ As I suggested then, recognition or non-recognition of an implied right of action makes a major difference both to a statute’s benefits (for example, in providing compensation for and deterrence against violations) and to its costs (for example, in subjecting regulated parties to costly litigation of unfounded and even frivolous claims in some instances). Accordingly, courts, in my view, should not assume that a reasonable legislature that had decided to ban race- or gender-based discrimination, for example, would necessarily have intended to license implied private remedies. Easterbrook, however, seeks to go further by appealing to implied-right-of-action cases to support a proposed “distinction between application and interpretation.”¹⁶⁶ According to him, one should determine whether a statute “applies” to an issue or problem based on the statute’s text; if not, courts have no proper role in “interpreting” it to fill in “gaps,” for doing so goes beyond the terms of the legislative deal that a statute embodies.¹⁶⁷

In my view, Easterbrook’s proposed distinction fails to mark an intelligible, coherently enforceable difference. It is much too glib to insist categorically that it requires no interpretation to conclude that prohibitory statutes that fail to provide expressly for private remedies do not “apply” to private

161 D’Oench, Duhme & Co., Inc. v. Fed. Deposit Ins. Corp., 315 U.S. 447, 470 (1942) (Jackson, J., concurring).

162 See Meltzer, *supra* note 10, at 56–57.

163 See, e.g., Easterbrook, *supra* note 14, at 540; Manning, *supra* note 24, at 21–26.

164 See Easterbrook, *supra* note 14, at 544–47.

165 See *supra* notes 123–25 and accompanying text.

166 Easterbrook, *supra* note 14, at 535.

167 *Id.* at 546–47.

suits to enforce such statutes. So to assert assumes the answer to a question that may sometimes be a difficult one. At one time, for example, the federal courts routinely upheld implied private rights of action.¹⁶⁸ When Congress legislated during that period, the context may sometimes have supported an inference that Congress, along with other reasonable observers, would have anticipated that courts would construe a statute as incorporating an implied right to sue in the absence of statutory language indicating the contrary.¹⁶⁹ As I noted above, Judge Easterbrook has himself emphasized that courts should construe legislation in light of reasonable assumptions arising from background legal practices and traditions.¹⁷⁰

If Congress wants to enact a compromise of any kind, it is of course free, within constitutional limits, to do so. But it is impossible to identify compromises or their terms without interpreting statutes' language in light of their structure and history.

C. *Over-Optimism About Courts?*

A third issue arises on the practically minded plane onto which Dan frequently sought to direct legal argumentation: Overall, will encouraging courts to embrace the role of junior partners to Congress produce a better system of reasonably democratic lawmaking than would limiting the courts to the status of distrusted agents whose discretion Congress would want to cabin as far as possible? I laid out Dan's view as I understand it—which I, again, find wholly persuasive—in Part II. Because many would challenge his position, let me say a bit more in its defense.

In his writings about statutory interpretation and federal common law-making, Dan undoubtedly displayed an optimistic view about federal judicial competence. Part of the optimism rested on assumptions about institutional perspective. As Dan emphasized, Congress lacks the capacity to anticipate the myriad of factual situations to which a statute might imaginably apply.¹⁷¹ By contrast, courts are well situated to engage in fine tailoring.¹⁷² Emphasizing this distinction in institutional perspectives, Dan did not disparage Congress or "the [d]ignity of legislation."¹⁷³ Rather, he trained his gaze

168 See *J.I. Case Co. v. Borak*, 377 U.S. 426, 431 (1964); HART & WECHSLER, *supra* note 19, at 739.

169 See, e.g., *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 381 (1982).

170 See *supra* note 71 and accompanying text.

171 See Meltzer, *supra* note 4, at 387 (noting "the incapacity of legislators, no matter how willing to try to resolve statutory uncertainties, to anticipate all of the uncertainties that will arise, as well as the difficulties of crafting language that, in the myriad contexts to which it is applied, will avoid ambiguity").

172 See *id.* at 396 ("Often the pertinent legal question 'is difficult, if not impossible, to answer in gross. And the courts are functionally better adapted to engage in the necessary fine tuning than is the legislature.'" (quoting Shapiro, *supra* note 69, at 574)).

173 See generally JEREMY WALDRON, *THE DIGNITY OF LEGISLATION* (1999).

overwhelmingly on the cases that Congress had likely not foreseen or had not had in mind when legislating.

Admittedly, however, Dan's optimism about courts ran deeper. When courts confront occasions for the exercise of a junior partner's role in interpreting statutes or crafting federal common law, Dan expected them to meet a high standard. In this respect, his position largely tracked that of David Shapiro, his and my longtime co-author of *Hart & Wechsler's The Federal Courts and the Federal System*.¹⁷⁴ In a tribute-paying commentary on David's work, entitled *Jurisdiction and Discretion Revisited*,¹⁷⁵ Dan remarked on David's optimism about courts with deliberate detachment. "I am confident that a judiciary composed of David Shapiros would exercise discretion in a fashion that was sensible and perhaps that would become clear over time, but that is a different judiciary from the one that we have," Dan wrote.¹⁷⁶ Proceeding in that vein, he criticized the judge-made doctrine under which federal district courts will sometimes, but only sometimes, accept jurisdiction of a suit asserting a state law cause of action based on the premise that the suit nevertheless "aris[es] under" federal law.¹⁷⁷ In his view, the Supreme Court would have done better to insist on the discretion-limiting rule that a case does not arise under federal law unless federal law creates the plaintiff's cause of action.¹⁷⁸

Dan's insistence on appraising courts realistically exemplified his intellectual style. After having offered a number of clear-eyed comments on ways in which courts can go astray, however, he acknowledged that he ultimately "share[d Shapiro's] confidence in judicial capacity" and that any difference between them was "largely at the margin."¹⁷⁹ He explained: "[W]e must remind ourselves that if the choice is not one between judicial perfection and legislative shortcoming, neither is it one between legislative perfection and judicial shortcoming. It is between imperfect alternatives, and I think Shapiro's argument that a robust judicial role is to be preferred remains entirely convincing."¹⁸⁰

I shall return below to Dan's expectation that courts would perform their functions judiciously. For now, I would only reiterate that much of the

174 Dan described David Shapiro's position as follows:

First, it views Congress, when enacting jurisdictional grants, as not seeking, and appropriately not seeking, complete advance specification. Second, it views courts rather than legislatures as the appropriate institution to provide fine-grained specification. Third, it views Congress as having implicitly authorized such post hoc specification by courts. And finally, it rests on confidence that judicial elaboration of the reasons for jurisdictional decisions will eventually generate a body of law that is reasonably determinate.

Meltzer, *supra* note 31, at 1907.

175 *Id.* at 1891.

176 *Id.* at 1908.

177 *Id.* at 1911–15.

178 *See id.*

179 *Id.* at 1915.

180 *Id.* at 1924.

burden of Dan's argument for a relatively common law-like judicial role in the interpretation of statutes and the crafting of federal common law rested on comparative institutional perspectives, not a belief that courts were always repositories of exemplary judgment. By the time a case reaches the courts, the sometimes discrete set of issues raised by that case and others like it may have come much more sharply into focus than at the time when Congress drafted a statute. Dan believed that complicated issues should be resolved not inadvertently but by institutions that had thought them through.

D. Rhetoric and Comparative Risks

Part I argued that the judicial role in interpreting statutes necessarily requires the ascription of purposes to the legislature and the resolution of cases in light of those ascribed purposes. As I said at the conclusion of Part I, I believe that its schematic account of what courts necessarily do suffices to establish that they can and must function as junior partners of the legislature in important respects. As I also noted, however, some textualists would register no dissent from my claims in Sections I.A and I.B but would nonetheless disagree with much that I have said subsequently.

If the analysis of Sections I.A and I.B would not provoke objections, but the subsequent applications of that analysis would nevertheless prove contentious, a question obviously arises about the exact locus of disagreement between Dan and me, on one hand, and moderate textualists, on the other. A partial answer to that question almost surely resides in judgments about the appropriate choice of rhetorical frameworks and the comparative risks that alternative frameworks may carry.¹⁸¹ The rhetoric of faithful agency may imply that courts should assume that Congress intended to dictate specific answers to the questions that courts confront, even if it takes the exercise of judgment to determine what that answer is. By contrast, the language of junior partnership may encourage courts to exercise more independent judgment. If one viewed the courts as inevitably having dangerous tendencies to pursue their naked policy preferences in the guise of adjudication, one might think it desirable to insist on a description of the judicial function that emphasizes faithful agency and the greatest possible subordination of judges' policymaking role to the dictates of statutory language.¹⁸²

In the present climate of interpretive debate, however, I do not hold that view. As Dan emphasized, the judicial "passivity" that he identified in relatively wooden interpretations of statutory language—which the rhetoric of textualism abets and encourages—can entail serious costs of its own.¹⁸³ To

181 Cf. Meltzer, *supra* note 10, at 46 ("[I]f, as I urge, courts are to play a large lawmaking role in preemption cases—one that necessarily involves their exercising judgment about complicated matters—there remains an important question about the attitude with which they undertake that responsibility.").

182 See Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CINN. L. REV. 849, 862 (1989) (praising originalist over non-originalist approaches to constitutional adjudication on similar grounds).

183 See Meltzer *supra* note 4, at 409–10.

offer just one example, in the absence of a sympathetic reconstruction of congressional purposes, complex regulation of the kind attempted in the Affordable Care Act might frequently prove unworkable.¹⁸⁴ Considering the balance of costs and benefits, Dan believed that the risks of courts viewing themselves as distrusted agents exceed those of courts viewing themselves as Congress's trusted junior partners. Among other things, a court that views itself as distrusted may end up regarding Congress as comparably untrustworthy, possibly even capricious. No one should welcome this outlook.

In a further argument involving comparative risks, textualists sometimes say that, whatever the governing interpretive rules are, it is important for those rules to be clear and fixed in order to permit Congress to discharge its constitutional responsibilities.¹⁸⁵ Purposive interpretation, they maintain, leaves Congress uncertain about the significance of the language that it adopts. If the courts will simply lay down clear interpretive rules and abide by them, rather than presuming themselves to be junior partners in lawmaking with the authority to do what Congress ought to have done (if the courts are correct in their ascription of congressional purposes), then Congress will adjust and legislate for the future with those clear rules in mind.¹⁸⁶

This argument exhibits two deficiencies. First, as I argued above, it misunderstands how language works—both in law and in life more generally—and, as a result, could not be implemented consistently. Second, arguments that Congress will adjust to clearly propounded judicial rules of interpretation fail to reckon adequately with empirical studies showing that Congress tends not to adjust to the Supreme Court's methodological pronouncements, at least in the short term, largely because members of Congress and their staffs know less about the Court's interpretive practices than textualists appear to assume.¹⁸⁷ Busy legislators and even busy legislative staff do not study or internalize the methodological sections of judicial opinions. In theory, they might. And if they did, they would—in theory—adjust. In practice, however, members of Congress and their staffs persist in their assumption that the courts, by relying on legislative history and otherwise, will seek to identify Congress's animating purposes in enacting legislation and to interpret legislation practically, in light of those purposes.¹⁸⁸ Given this state of

184 See Gluck, *supra* note 143, at 80–93 (emphasizing the importance of imputing a coherent plan to Congress in enacting the Affordable Care Act).

185 See, e.g., Manning, *supra* note 24, at 70 n.408.

186 See *id.* (“At some level, it may not matter all that much whether the Court always ‘gets it right,’ as long as it is consistent. ‘What is of paramount importance is that Congress be able to legislate against a background of clear interpretive rules, so that it may know the effect of the language it adopts.’” (quoting *Finley v. United States*, 490 U.S. 545, 556 (1989))).

187 See Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901, 907 (2013) (discussing “disconnected canon[s]” of construction of which the congressional staff who draft legislation often have no awareness and noting that “clear statement rules” are a prime example).

188 See *id.* at 970.

affairs, Dan opted decisively for an approach that he expected to work reasonably well in practice over one that might work better in theory, but likely only in theory.

CONCLUSION: DAN MELTZER AND LAW'S OPTIMISM

As a champion of a common law approach to legal interpretation, Dan was a celebrant and practitioner of what the legal philosopher Ronald Dworkin called law's "optimism."¹⁸⁹ For Dworkin, law's optimism inhered in an approach to interpretation that the common law exemplifies.¹⁹⁰ That approach encourages the reading of texts in light of the values and purposes that underlie them. And it encourages judges, in ascribing purposes to texts, to view them charitably, as reflecting values and purposes worth extending into the future.¹⁹¹ As applied to the interpretation of statutes, this approach presupposes that courts can play a useful role, not only in assisting Congress, but also, by doing so, in promoting justice and human welfare.

Once again an objection looms. I have addressed it already, but it bears repeating. That objection maintains that we should celebrate legislatures as much as courts and accord legislative choices the dignity that they deserve, especially by insisting that courts must not alter the legislature's judgments. We might describe this objection as rooted in democracy's optimism. And some will say that democracy's optimism requires a minimization of the judiciary's creative role: although courts must inevitably ascribe purposes to the legislature, for courts to cast themselves as the legislature's junior partners risks usurping the legislative function.

As I have tried to show, this objection typically assumes, without demonstrating, its essential premise. No adherent of a common law model doubts the authority of the legislature to make binding decisions. Among other things, the legislature can always amend a statute to correct what it regards as a judicial misinterpretation. In statutory interpretation cases, however, the threshold question always involves what the legislature has decided already—and, in the kinds of cases with which Dan was most concerned, with whether the legislature should be treated as having decided a question that those who drafted the statute had never had occasion to think about specifically. In giving a negative answer to that question, Dan in no way disparaged democracy. Rather, he embraced a view about the role that a democracy can assign, and that our democracy sensibly has assigned, to the courts.

In short, Dan was an optimist both about courts and about democracy. His optimism with respect to both explains why he devoted so much of his professional life to studying the role of the federal courts in the federal system. Thinking theoretically, but with an acute sensitivity to practical consequences, he made it a central project of his professional life to illuminate the role that courts should play in making our distinctive scheme of democratic

189 RONALD DWORKIN, *LAW'S EMPIRE* 407 (1986).

190 *See id.* at 238–58.

191 *See id.* at 254–58, 413.

lawmaking the best that it can be. In combining theoretical sophistication with context-sensitive practical wisdom, the contributions of Daniel J. Meltzer were, and remain, unsurpassed.

