WHERE ARE ALL THE LEFT-WING TEXTUALISTS?

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What Professor William Eskridge once called "the new textualism" is not so new anymore. Statutory textualism has adherents on the Supreme Court, throughout the federal judiciary, and, increasingly, in academia as well. And almost all of them are politically conservative. Why is that true? This Note contends that it need not be. Taken at face value, textualism serves neither conservative nor liberal ends. However, those most closely identified with textualism—namely, Justice Antonin Scalia and Judge Frank Easterbrook—practice a form of textualism that creates institutional dynamics that tend to reconcile with a preference for limited government. Their textualism, which this Note dubs "clarity-driven textualism," constrains the functioning of Congress, executive agencies, and judges in ways that make government hard to do: Statutes are hard to write, agencies have tightly circumscribed authority, and judges have few opportunities to exercise discretion. This Note argues that textualism alone will not necessarily produce these outcomes. By identifying how clarity-driven textualism departs from the bare requirements of textualism itself, this Note seeks to rescue textualism's powerful interpretive approach from its current political entanglements.

INTRODUCTION

Imagine that Congress has passed a law requiring the filing of certain documents "prior to December 31" in order for a government agency to continue providing some service.[1] Not long after the law goes into effect, some poor soul files the appropriate documents on December 31, only to be told that she is a day late and that the agency must discontinue her service. Feeling that the statutory deadline is unclear, even willfully so, she challenges the agency's action through the appropriate administrative channels. Unsuccessful, she takes her claims to federal court arguing that the deadline was so misleading that discontinuing her service amounted to a deprivation of property without due process of law. The court is thus faced with what seems

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[1] These facts are adapted from *United States v. Locke*, 471 U.S. 84, 87–91 (1985).

like a simple question: Could "prior to December 31" effectively mean any time before the end of the year, or is the literal meaning—on or before December 30—the only reasonable interpretation?

It seems like the statute *could* mean merely that the documents must be filed by the end of the year. Perhaps the particular phrasing used in the statute is a product of oversight,[2] and it would be sterile of courts to interpret the statute with such literal-mindedness as to ignore a normal deadline (the year's end) in favor of a much more peculiar one (the day before the year's end).[3] After all, if such a weird deadline were intended, why does the statute not say "on or before December 30"?

The problem is that the words of the statute will not budge: "[P]rior to December 31" means December 30 at the latest. Deciding that the deadline is any day but December 30 requires a certain disregard for the letter of the law that might make some jurists wince. Their discomfort goes by the name of "textualism," a methodology for interpreting statutes commonly associated with two prominent jurists—Justice Antonin Scalia and Judge Frank Easterbrook of the Seventh Circuit.[4]

Textualism boils down to one principle: "The text is the law, and it is the text that must be observed."[5] This principle is not, in itself, controversial—nearly every theory of statutory interpretation tells us

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[2] *See* William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 677 (1990) ("The vast majority of the [Supreme] Court's difficult statutory interpretation cases involve statutes whose ambiguity is either the result of deliberate legislative choice to leave conflictual decisions to agencies or the courts, *or* the result of social or legal developments the most clairvoyant legislators could not have foreseen." (citations omitted)).

[3] There may be any number of reasons that one might read the statute to create a year-end deadline. For example, perhaps the statute contains dozens of deadlines and every other deadline is clearly set for the end of the year. Or perhaps, as was the case in *Locke*, the plaintiff had been told by the agency itself that the deadline was the year's end. 471 U.S. at 89–90.

[4] Caleb Nelson, *What Is Textualism?*, 91 VA. L. REV. 347, 347 (2005). Other textualists who will be mentioned less frequently in this Note include Justice Clarence Thomas, *e.g.*, Jackson v. Birmingham Bd. of Educ., 544 U.S. 167, 195 (2005) (Thomas, J., dissenting) (criticizing majority for going beyond text of statute), and Judge Alex Kozinski of the Ninth Circuit, *see generally* Alex Kozinski, *Should Reading Legislative History Be an Impeachable Offense?*, 31 SUFFOLK U. L. REV. 807 (1998) (arguing against use of legislative history in statutory interpretation). As I will explain in the last paragraph of this Introduction, *infra*, I am restricting my analysis to statutory, rather than constitutional, textualism.

[5] Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3, 22 (Amy Gutmann ed., 1997).

to start with the statute's text.[6] But where other theories are willing to look beyond the text when it fails to provide a clear answer,[7] textualism's dramatic gesture is to look no further. Any of the other common considerations that might influence a statute's interpreter—the subjective intent of the enacting legislature, the particular harms that the statute sought to address, or the practical effects of different interpretations—are considered irrelevant, even invidious, by textualists.[8]

Textualists justify the austerity of their methods by reference to the concepts of democratic legitimacy and the separation of powers.[9] They explain that the legislature voted on only the words of the statute, and they suspect that judges who look beyond the democratically approved language have a tendency to stray outside of their proper role as judges and into territory best reserved for legislators.[10]

Textualists are worried that unelected judges will stray from the democratically enacted language to impose their own views on the law.[11] They argue that when judges look past the language of a statute to decide how it should apply in a given case, they will cease to be guided by the democratically accountable legislature and will instead

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[6] *See* KENT GREENAWALT, STATUTORY INTERPRETATION: 20 QUESTIONS 35 (1999) ("No one seriously doubts that interpretation of statutes turns largely on textual meaning.").

[7] *See, e.g.*, HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 1377–80 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994) (urging that courts should examine "state of the law," "general public knowledge," and legislative history to understand purpose of statute); Roscoe Pound, *Spurious Interpretation*, 7 COLUM. L. REV. 379, 381 (1907) (noting acceptability of inquiring into statute's "reason and spirit" when language fails to provide clear answer).

[8] *See* Green v. Bock Laundry Mach. Co., 490 U.S. 504, 529–30 (1989) (Scalia, J., concurring) (criticizing majority's "lengthy discussion of ideological evolution and legislative history").

[9] *See, e.g.*, William N. Eskridge, Jr., *Textualism, the Unknown Ideal?*, 96 MICH. L. REV. 1509, 1511 (1998) (book review) (discussing separation of powers); Karen M. Gebbia-Pinneti, *Statutory Interpretation, Democratic Legitimacy and Legal-System Values*, 21 SETON HALL LEGIS. J. 233, 276–78 (1997) (discussing principles of democracy used to justify textualism).

[10] *See* Frank H. Easterbrook, *Textualism and the Dead Hand*, 66 GEO. WASH. L. REV. 1119, 1119–20 (1998) ("An interpreter who bypasses or downplays the text becomes a lawmaker without obeying the constitutional rules for making law."); *see also infra* Part I.A (summarizing textualists' arguments against judicial discretion in statutory interpretation context).

[11] Scalia, *supra* note 5, at 17–18 ("The . . . threat is that, under the guise or even the self-delusion of pursuing unexpressed legislative intents, common-law judges will in fact pursue their own objectives and desires, extending their lawmaking proclivities from the common law to the statutory field."). Various arguments for textualism are summarized in Part I, *infra*.

follow their own policy preferences.[12] Textualists conceive of their methodology as a bulwark against the pernicious influence of a judge's personal politics.[13] If the words of the statute are the only authority that judges are allowed to use in their interpretations, the judge can stray only so far.[14]

Curiously, while textualism purports to reduce—or ideally to remove—the influence of judges' political preferences on the interpretive enterprise, many commentators have noted that those most closely identified with textualism are politically conservative.[15] Recent empirical evidence also suggests that, aside from the fact that textualist judges are generally conservative, the use of textualist methods is disproportionately associated with conservative outcomes in certain cases.[16]

If textualism itself is politically neutral—if it is even antagonistic towards the politics of judges—then why do we not see textualists across the political spectrum? Why would an interpretive method that seeks to snuff out the influence of judges' political preferences be most strongly associated with judges, and even with particular opinions, whose politics are not only readily identifiable but also similar? Generally speaking, techniques for interpreting statutes would seem to be politically neutral,[17] which makes one ask: Is there something about textualism that is especially attractive to the conservative mindset? Where are all the left-wing textualists?

Some commentators have attempted to find ways in which textualism furthers conservative—or, more precisely, Republican—objectives by siphoning off power from Democrats in government.[18] These

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[12] *See, e.g.*, Jackson v. Birmingham Bd. of Educ., 544 U.S. 167, 195 (2005) (Thomas, J., dissenting) (arguing that when majority provided remedy not expressly authorized by statute, it "substitute[d] its policy judgments for the bargains struck by Congress").

[13] *See* Easterbrook, *supra* note 10, at 1119–20 (arguing that constraining use of intent in applying laws is only way to honor constitutional system).

[14] Scalia, *supra* note 5, at 36.

[15] Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 801 n.204 (1999); Eskridge, *supra* note 2, at 668; Nelson, *supra* note 4, at 373 ("[T]oday's textualists tend to be politically conservative.").

[16] *See* James J. Brudney & Corey Ditslear, *Canons of Construction and the Elusive Quest for Neutral Reasoning*, 58 VAND. L. REV. 1, 5, 6 (2005) (presenting empirical study finding that using canons of construction while excluding legislative history in Supreme Court majority opinions is associated with "overwhelmingly conservative results" in context of employment law).

[17] *Cf.* Amar, *supra* note 15, at 801 n.204 (arguing in constitutional context that "textual argument . . . is by no means an inherently politically conservative interpretive tool" and that "[a]ll proper techniques of constitutional interpretation can be used by both liberals and conservatives alike").

[18] *See generally* Stephen F. Ross, *Reaganist Realism Comes to Detroit*, 1989 U. ILL. L. REV. 399 (arguing that textualists construe statutes of Democratic Congresses narrowly

accounts of textualism have been unconvincing primarily because they rely on a Reagan-era power balance (with Democrats controlling Congress and Republicans controlling the executive branch and the judiciary) and fail to account for textualism's enduring salience after the legislative balance shifted back to the Republicans.[19] A more recent branch of scholarship has downplayed the politics of textualists and instead has emphasized the general success of textualism in influencing judges and commentators alike.[20] If textualism is truly ascendant, as this latter scholarship would suggest, it is all the more important to understand the connection, if any, between textualism and conservative politics. This Note will argue that the connection between textualism and political outcomes cannot be found at the conceptual level. Textualism, at least as a theory of statutory interpretation, is neither liberal nor conservative. If there is any connection between conservatism and textualism, it has nothing to do with reaching favored outcomes in particular cases (though textualism, like any method of interpretation, can certainly be contorted to reach any desired outcome). However, particular forms of textualism—such as the form practiced by Justice Scalia and Judge Easterbrook—have the

while deferring to agencies controlled by Republicans); Arthur Stock, Note, *Justice Scalia's Use of Sources in Statutory and Constitutional Interpretation: How Congress Always Loses*, 1990 DUKE L.J. 160, 160 (arguing that textualists' rejection of legislative history "reduces the power of the legislative branch" while allowing agencies and judiciary to pursue their own policy objectives).

[19] *See* Jane S. Schacter, *The Confounding Common Law Originalism in Recent Supreme Court Statutory Interpretation: Implications for the Legislative History Debate and Beyond*, 51 STAN. L. REV. 1, 15–16 (1998) (describing empirical study that found textualism's continuing powerful influence in 1996 Term of Supreme Court). Professor William Eskridge also notes that the "hidden-agenda" thesis cannot be reconciled with those instances in which textualists "deploy [their] methodology to endorse a liberal interpretation of a statute, over the objections of traditional conservatives." Eskridge, *supra* note 2, at 668–69 & 669 n.193 (citing numerous cases exhibiting this phenomenon). Furthermore, the "hidden-agenda" thesis fails to account for a phenomenon that will be of crucial importance to this Note—the lack of deference shown by textualists to administrative agencies. *See infra* Part II.B. *See generally* Thomas W. Merrill, *Textualism and the Future of the* Chevron *Doctrine*, 72 WASH. U. L.Q. 351 (1994) (presenting empirical evidence indicating that rise of textualism in Supreme Court is associated with less frequent grants of deference to agencies).

[20] *See* Jonathan R. Siegel, *Textualism and Contextualism in Administrative Law*, 78 B.U. L. REV. 1023, 1057 (1998) ("In a significant sense, we are all textualists now."). *See generally* Michael H. Koby, *The Supreme Court's Declining Reliance on Legislative History: The Impact of Justice Scalia's Critique*, 36 HARV. J. ON LEGIS. 369, 370 (1999) ("[T]here has been a significant decrease in the Supreme Court's reliance on legislative history documents, attributable at least in part to Justice Scalia's criticism of its use."); Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 COLUM. L. REV. 1 (2006) (noting wide embrace of textualism and advocating less scholarly emphasis on disagreements between textualists and nontextualists). *But see* Siegel, *supra*, at 1057 ("Contrariwise, almost no one is a textualist in the strictest or most absolute possible sense.").

potential to create institutional dynamics that generally correspond with a preference for limited government.

The connection we currently see between conservatism and textualism arises because of the particular kind of textualism that Justice Scalia and Judge Easterbrook practice. I call their version "clarity-driven textualism," and it reconciles with a vision of limited government by advancing three kinds of constraints: constraints on Congress, government agencies, and the judiciary.

With regard to the constraints placed on Congress, a clarity-driven textualist's rejection of legislative history threatens to burden the lawmaking process by requiring Congress to specifically articulate each compromise within the four corners of a statute, rather than allowing Congress to use vague language and to rely on recorded debates to illuminate what kind of bargains lay behind the words of the statute.[21] By reading statutes "with a strict literalism and with reference to well-established canons of statutory construction,"[22] clarity-driven textualists set ex ante rules of statutory interpretation that would force Congress to draft legislation with precision.[23] Having to draft with exactitude is a burden on the legislative process and thus a constraint on Congress's power to make laws. This kind of insistence on clarity leads Justice Scalia and Judge Easterbrook to refuse to apply statutes when their applicability is in doubt because of vague or ambiguous wording; in other words, they use the value of clarity to limit the applicability of statutes.[24]

With regard to constraints on administrative agencies, clarity-driven textualists dampen the authority of agencies by failing to find the statutory ambiguity necessary to trigger deference to an agency's interpretation under the first step of the framework set out in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*[25] Instead of finding ambiguous statutes inapplicable, in the *Chevron* context Justice Scalia finds clarity in statutory language where others do not. Thus there are two ways that an insistence on clarity operates in statutory interpretation: It can function as intolerance for vagueness, as when Justice Scalia and Judge Easterbrook read vague terms nar-

21 *See infra* Part II.A.1.

22 *See* Eskridge, *supra* note 2, at 677 (construing argument of Justice Scalia).

23 *See infra* Part I.D.

24 *See infra* Part II.A.2.

25 *See* 467 U.S. 837, 842–44 (1984) (holding that courts are to give deference to agency interpretations "if the statute is silent or ambiguous with respect to" question under consideration and if "the agency's answer is based on a permissible construction of the statute"); *infra* Part II.B.

rowly, or it can operate as a heightened ability to find clear meaning, as with Justice Scalia in the *Chevron* context.

With regard to constraints on the judiciary, clarity-driven textualists emphasize how their methods limit judges' opportunities to broaden, update, or supplement statutory language. This results in a limited role for the judiciary in solving statutory dilemmas.[26]

As suggested by the term "clarity-driven," these constraints are not the inevitable products of textualism itself but are instead the results of a textualism that is especially solicitous of clear meaning in statutory language. This Note does not contend that clarity-driven textualists actively seek to constrain government. Their stated goal is to provide judges with a rule-bound method of statutory interpretation that coincides with their vision of democratic lawmaking. Their basic methodology for achieving this goal—making judges stick to a statute's text when interpreting it—has no obvious political implications. In fact, the political neutrality of textualism is what provoked both this Note's title and its purpose: to reconcile textualism with its theoretical political neutrality by identifying how textualism has served prominent textualists' philosophical preference for limited government. This Note seeks to demonstrate that if there are no left-wing textualists, it is not due to a flaw in the general project of textualism.

Part I of this Note provides an overview of textualism by laying out the most common arguments made for the methodology. Part II examines the ways in which the kind of textualism practiced by Justice Scalia and Judge Easterbrook vindicates a preference for limited government by constraining Congress, agencies, and the judiciary. Part II also examines how those constraints derive not from textualism itself but from textualism in combination with an insistence on clarity in statutory text. Part III then examines two of Justice Scalia's dissents in which he specifically rejected the majority's textualist interpretation of a statute. These dissents illustrate the way in which Justice Scalia's textualism is infused with an insistence on clarity that has the effect of confining government.

Before proceeding any further, I should note that this Note's analysis of textualism is limited to statutory, rather than constitu-

[26] It is a difficult question whether textualism actually does, on the whole, limit the power of judges. Notice, for example, how the first two kinds of constraints limit the power of Congress and agencies only at the price of giving more authority to the judiciary, which gets to set the standards for drafting legislation and which has the final say on what an agency's organic statute means. *See* Muriel Morisey Spence, *The Sleeping Giant: Textualism as Power Struggle*, 67 S. CAL. L. REV. 585, 588 (1994) ("[T]extualism enhances judicial power at the expense of Congress' primacy as the authors and masters of statutes, and at the expense of Congress' right to determine the authoritative sources of statutory meaning."). Part II.C, *infra*, addresses this issue in more detail.

tional, textualism. It does so for two reasons. First, as a practical matter, the textualist cited most in this Note is Justice Scalia, whose constitutional theory is originalism, not textualism.[27] To import his views of textualism into matters of constitutional interpretation would be unfair to the interpretive distinction he makes between statutes and the Constitution.[28] Second, my analysis of the politics of textualism focuses on the balances that textualism strikes between the legislature and the courts and between courts and agencies. These balances are brought more clearly into relief when textualists are dealing with legislation than with the founding document.

I
INTRODUCTION TO TEXTUALISM

There are significant disagreements among textualists about the project in which they are engaged—such as disagreements about the value of "legislative intent"[29] or the desirability of the absurdity doctrine.[30] The following discussion, however, will focus on the general propositions on which textualists converge. Textualism is a rule-based method of statutory interpretation that boils down to two redundant prescriptions: (1) When interpreting a statute, only refer to its text, and (2) do not refer to anything else. This Note has identified six distinct arguments that textualists use to support these rules, some of which emphasize "only text," while others emphasize "not anything else." Cutting across these six arguments is a core belief that textu-

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[27] Scalia, *supra* note 5, at 38.

[28] This Note will not attempt to account for the divergence of Justice Scalia's originalism and his textualism with regard to extrinsic sources. In the case of the Constitution, extrinsic sources would include *The Federalist*, which is regularly consulted by Justice Scalia, *e.g.*, Printz v. United States, 521 U.S. 898, 910–24 (1997), and in the case of statutes, extrinsic sources include legislative history, which is emphatically rejected by Justice Scalia, Scalia, *supra* note 5, at 29–37. Justice Scalia contends that with both the Constitution and with statutes, he is interested in finding original meaning rather than original intent, *id.* at 38, but why such a distinction requires him to consult extrinsic sources in one context while rejecting them in another seems mysterious. For a convincing reconciliation of the positions not purely based on Justice Scalia's own writings, see William N. Eskridge, Jr., *Should the Supreme Court Read* The Federalist *but Not Statutory Legislative History?*, 66 GEO. WASH. L. REV. 1301 (1998).

[29] *Compare* Scalia, *supra* note 5, at 17 ("We look for a sort of 'objectified' [legislative] intent . . . ."), *with* Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 547 (1983) ("Because legislatures comprise many members, they do not have 'intents' or 'designs,' hidden yet discoverable.").

[30] *See generally* John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2388 (2003) (arguing that textualists should abandon absurdity doctrine, which dictates that "judges may deviate from even the clearest statutory text when a given application would otherwise produce 'absurd' results" (citation omitted)).

alism has a fundamental connection to democratic lawmaking.[31] The six arguments, which will be discussed in turn below, are: (A) Judicial discretion should be limited, (B) legislative history is unreliable, (C) public choice theory militates against inferring broad purposes behind legislation, (D) textualism enhances the legislative process, (E) textualism respects the legislative process, and (F) textualism prevents delegation of the legislative function.[32] There will be a fair amount of overlap among these arguments; as will be seen shortly, the way that textualism limits judicial discretion is related to textualism's stances on legislative history and the nondelegation doctrine. Nonetheless, the arguments are distinct enough to merit separate examination.

A. Limiting Judicial Discretion

Textualism is animated by an anxiety about how willful judges will go about the task of interpreting a statute. Textualists know that it is a rare judge who would say, "I know the statute says *X*, but I think it really *should* say *Y*," but they believe that a judge could achieve much the same thing by saying, "The face of the statute seems to suggest *X*, but all of this extraneous material points me to *Y*." The problem is that there is no easy way to tell if all of the extraneous material—such as the often voluminous legislative history that accompanies modern legislation—actually leads to the interpretation that the judge has suggested. Textualists have a sense that the extraneous material is so vast and diverse that it is an especially dangerous place in which to seek the meaning of a statute:

> Legislative history provides . . . a uniquely broad playing field. In any major piece of legislation, the legislative history is extensive, and there is something for everybody. As Judge Harold Leventhal used to say, the trick is to look over the heads of the crowd and pick out your friends. The variety and specificity of result that legislative history can achieve is unparalleled.[33]

Because this history is so vast, it is extremely difficult to tell whether a judge is really taking a balanced view of the legislative history or if she is just "picking out her friends":

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[31] *See* Easterbrook, *supra* note 10, at 1119 ("For the textualist a theory of political legitimacy comes first, followed by a theory of interpretation that is appropriate to the theory of obligation."); Scalia, *supra* note 5, at 17 ("[I]t is simply incompatible with democratic government . . . to have the meaning of law determined by what the lawgiver meant, rather than by what the lawgiver promulgated.").

[32] This is known as the "nondelegation doctrine," which is the principle that the lawmaking powers are vested in Congress by Article I of the Constitution, U.S. CONST. art. I, § 1, and cannot be delegated to another branch. *E.g.*, Mistretta v. United States, 488 U.S. 361, 371–72 (1989).

[33] Scalia, *supra* note 5, at 36.

> Since there are no rules as to how much weight an element of legislative history is entitled to, it can usually be either relied upon or dismissed with equal plausibility. If the willful judge does not like the committee report, he will not follow it; he will call the statute not ambiguous enough, the committee report too ambiguous, or the legislative history (this is a favorite phrase) "as a whole, inconclusive." It is ordinarily very hard to demonstrate that this is false so convincingly as to produce embarrassment.[34]

These concerns about legislative history become all the more dramatic when one considers how unreliable legislative history can be, a topic addressed in the next Section. Given its unreliability, inconsistency, and the lack of oversight, it is obvious how inquiries into legislative history create opportunities for the importation of judges' preferences.[35]

Textualists' anxiety about the willful use of discretion is brought even more clearly into relief when they discuss the proposition that the purpose of statutory interpretation is to determine the intent of the legislature and not merely to interpret the words of the statute. Textualists worry that inquiries into the legislature's intent create a risk that the judge's own preferences will have a sort of gravitational pull on her understanding of that intent:

> The *practical* threat is that, under the guise or even the self-delusion of pursuing unexpressed legislative intents, . . . judges will in fact pursue their own objectives and desires . . . . When you are told to decide, not on the basis of what the legislature said, but on the basis of what it *meant*, and are assured that there is no necessary connection between the two, your best shot at figuring out what the legislature meant is to ask yourself what a wise and intelligent person *should* have meant; and that will surely bring you to the conclusion that the law means what you think it *ought* to mean . . . .[36]

Textualists' concern with both legislative history and legislative intent is that they are too indeterminate as sources of a statute's meaning to effectively channel a judge's discretion, and, in fact, they end up expanding the field of interpretive options by diversifying the sources of statutory meaning. In other words, these sources do not limit what judges can do but instead give them more room in which to

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[34] *Id.* at 35–36.

[35] *See* Easterbrook, *supra* note 29, at 551 ("[E]ven the best intentioned will find that the imagined dialogues of departed legislators have much in common with their own conceptions of the good.").

[36] Scalia, *supra* note 5, at 17–18.

play. In the words of Judge Easterbrook, this "creates some profound and unwelcome changes in how judges see laws."[37]

B. The Unreliability of Legislative History

Textualists also argue against the use of legislative history on the ground that it is generated opportunistically by legislators for the specific purpose of influencing courts:

> [T]he more courts have relied upon legislative history, the less worthy of reliance it has become. In earlier days, it was at least genuine and not contrived—a real part of the legislation's *history*, in the sense that it was part of the *development* of the bill, part of the attempt to inform and persuade those who voted. Nowadays, however, when it is universally known and expected that judges will resort to floor debates and (especially) committee reports as authoritative expressions of "legislative intent," affecting the courts rather than informing the Congress has become the primary purpose of the exercise. It is less that the courts refer to legislative history because it exists than that legislative history exists because the courts refer to it.[38]

In other words, legislative history is an unreliable indicator of legislative intent because those who generate reports and floor statements are laying the groundwork for later judicial constructions to go in their favor instead of neutrally participating in the legislative debate. Former D.C. Circuit Judge Abner Mikva, also a former congressman, personally experienced the phenomenon:

> Two members will rise and engage in a colloquy for the purpose of "making legislative history." Frequently, however, the colloquy is written by just one of the members, not both. It is handed to the other actor and the two of them read it like a grade B radio script.[39]

Textualists also argue that while legislative history seems like a neutral component of the democratic process, legislators may use it to avoid making tough legislative choices, which is an abdication of their legislative responsibilities. Judge Easterbrook has characterized legislative history as a crutch, imagining that sponsors of a bill might try to get around the difficult and precarious process of formal lawmaking by using vague language in a statute that will easily garner support and then explaining what the language "really means" in committee reports or floor statements that are inserted into the congressional

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[37] Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL'Y 61, 62 (1994) (specifically addressing concern regarding legislative history).

[38] Scalia, *supra* note 5, at 34.

[39] Abner J. Mikva, *A Reply to Judge Starr's Observations*, 1987 DUKE L.J. 380, 384.

record on the sly.[40] "Actual statutory language is the dearest legislative commodity, and so once legislators become aware that legislative history influences courts, they and their agents (the staff) will try to achieve desired outcomes through the lower-cost mechanism of legislative history."[41] In other words, because lawmakers know that judges will read committee reports and floor statements, they treat legislative history like cheap legislation, a way to make law without paying the costs of approval by two houses and the signature of the executive.[42] By rejecting legislative history, textualists argue that they not only keep judges from playing into this circumvention of the lawmaking process, but, as will be discussed in Section D, they also enhance the legislative process by focusing every legislative player's efforts on formal lawmaking instead of the "black market" of legislative history.

C. Public Choice Theory

A major theme in Judge Easterbrook's arguments for textualism is that legislation is the outcome of a messy process of compromise in which lawmakers vote for or against legislation for complicated reasons that may have little or nothing to do with the content of the legislation itself.[43] These messy compromises make Judge Easterbrook dubious about the proposition that a legislature could have any coherent intent to guide a statute's interpreter.[44] Judge Easterbrook draws on the work of public choice theorists like Kenneth Arrow and Duncan Black[45] to argue that "it turns out to be difficult, sometimes impossible, to aggregate [individual legislators' preferences] into a coherent collective choice."[46] As Judge Easterbrook has noted, "It is

[40] *In re* Sinclair, 870 F.2d 1340, 1343 (7th Cir. 1989).

[41] John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673, 687–88 (1997) (footnotes omitted).

[42] *Cf.* Scalia, *supra* note 5, at 35 ("Congress can no more authorize one committee to 'fill in the details' of a particular law in a binding fashion than it can authorize a committee to enact minor laws.").

[43] *See* Easterbrook, *supra* note 29, at 547 (noting that legislatures' decisions depend on order in which decisions are made).

[44] *See id.* ("Because legislatures comprise many members, they do not have 'intents' or 'designs,' hidden yet discoverable. Each member may or may not have a design. The body as a whole, however, has only outcomes.").

[45] Some of the foundational works of public choice theory are KENNETH J. ARROW, SOCIAL CHOICE AND INDIVIDUAL VALUES (2d ed. 1963) and DUNCAN BLACK, THE THEORY OF COMMITTEES AND ELECTIONS (1958), both of which were cited by Judge Easterbrook in *Statutes' Domains*. Easterbrook, *supra* note 29, at 547 n.20.

[46] Easterbrook, *supra* note 29, at 547. One example of the problematics of collective intent is a paradox, developed by the Marquis de Condorcet and made famous by Kenneth Arrow, which posits that the order in which decisions are made, rather than majority preferences, dictates the outcomes of majority voting processes. Dwight G. Newman, *Collective Intent and Collective Rights*, 47 AM. J. JURIS. 127, 136–37 (2004) (discussing paradox

fairly easy to show that someone with control of the agenda can manipulate the choice so that the legislature adopts proposals that only a minority support."[47] Because any statute could be the product of sophisticated agenda control rather than the natural operation of majority preferences, one cannot assume that the statute represents an endorsement of purposes that are broader than the literal terms of the statute itself.

Another complicating dimension in the concept of collective intent is logrolling, where two legislators each agree to vote for the other's projects in order to secure the other's vote on their own projects. When a legislator votes for a statute not because she agrees with it but instead to get support for some other initiative, all that can be known about her intent is that she found the statute unobjectionable enough to merit a trade.[48]

The fact that legislation derives from compromises not only undermines the concept of a single legislative intent, it also suggests that statutes are limited in their ambitions. As Judge Easterbrook notes, "Almost all statutes are compromises, and the cornerstone of many a compromise is the decision, usually unexpressed, to leave certain issues unresolved."[49] In other words, legislation involves a deci-

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and its development through Condorcet and Arrow). *See generally* Cheryl D. Block, *Truth and Probability—Ironies in the Evolution of Social Choice Theory*, 76 WASH. U. L.Q. 975 (1998) (explaining history and implications of paradox and potential solutions).

[47] Easterbrook, *supra* note 29, at 547 (citing Michael E. Levine & Charles R. Plott, *Agenda Influence and Its Implications*, 63 VA. L. REV. 561 (1977)); *accord* Christopher Long & Susan Rose-Ackerman, *Winning the Contest by Agenda Manipulation*, 2 J. POL'Y ANALYSIS & MGMT. 123, 124–25 (1982); Richard D. McKelvey, *General Conditions for Global Intransitivities in Formal Voting Models*, 47 ECONOMETRICA 1085, 1085, 1106 (1979); Barry R. Weingast, *Regulation, Reregulation, and Deregulation: The Political Foundations of Agency Clientele Relationships*, LAW & CONTEMP. PROBS., Winter 1981, at 147, 154–61. A common example of the "cycling" phenomenon, which demonstrates that agenda control determines the outcomes of democratic process, is to imagine voters *A*, *B*, and *C* who are selecting among options *X*, *Y*, and *Z*. *A*'s order of preferences (from first to last) is *X*, *Y*, and *Z*; *B* prefers *Y*, *Z*, and *X*; and *C* prefers *Z*, *X*, and *Y*. If *A*, *B*, and *C* vote between *X* and *Y*, *X* will win (both *A* and *C* prefer *X* to *Y*); if they vote between *Y* and *Z*, *Y* will win (both *A* and *B* prefer *Y* to *Z*); and if they vote between *X* and *Z*, *Z* will win (both *B* and *C* prefer *Z* to *X*). Therefore, if any of them can control the order in which they vote, that person will get her preferred option. This holds true even if they hold a second vote to pick between the option that won the first vote and the option not yet voted upon: If *A* can control the agenda, she will ensure that the first vote is between *Y* and *Z* so that *Y* wins, and then *X*, *A*'s preferred choice, will win the vote between *X* and *Y*. *See* William N. Eskridge, Jr., *Politics Without Romance: Implications of Public Choice Theory for Statutory Interpretation*, 74 VA. L. REV. 275, 283–84 (1988) (providing similar example).

[48] *See* Easterbrook, *supra* note 29, at 548 ("[W]hen logrolling is at work the legislative process is submerged and courts lose the information they need to divine the body's design.").

[49] *Id.* at 540.

sion to go only so far and no further with the policies in play, so courts should be "especially cautious about reading statutes to reflect an underlying consensus on policy goals that extend beyond the statutes' terms."[50]

D. Enhancing the Legislative Process

Textualists argue that one benefit of their approach is that text-bound methods of interpretation allow legislators to draft laws with a clearer sense of how those laws will be applied, which will make the legislative process more effective.[51] When judges expand the scope of possible interpretations by making relatively unbounded inquiries into legislative intent, lawmakers cannot be sure what effect the laws they pass will have. As Justice Scalia noted in *Finley v. United States*,[52] it "is of paramount importance . . . 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."[53] Professor William Eskridge has rephrased Justice Scalia's point: "[I]f Congress is aware that its statutes will be read with a strict literalism and with reference to well-established canons of statutory construction, it will be more diligent and precise in its drafting of statutes."[54] As Professor Eskridge notes, "this is a nice economic argument (consider the ex ante effects of the rule you adopt)."[55] The ex ante argument amounts to a kind of "tough love" approach to statutory interpretation. In other words, courts should adopt strict rules of interpretation so that Congress is forced to draft with care.

E. Respecting the Legislative Process

While the previous Section suggested that textualism could improve the outputs of the legislative process by motivating Congress to draft clearer laws, Professor Jeremy Waldron argues that the process by which those laws are adopted provides another ground for subsequent interpreters to take a textualist stance.[56] Professor Waldron argues that since legislatures are made up of diverse individ-

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50 Nelson, *supra* note 4, at 371.

51 *See* Easterbrook, *supra* note 29, at 539–40 (arguing that clear interpretive rules make drafting legislation easier for Congress because it will not have to concern itself with how laws will be applied).

52 490 U.S. 545 (1989).

53 *Id.* at 556.

54 Eskridge, *supra* note 2, at 677.

55 *Id.*

56 JEREMY WALDRON, LAW AND DISAGREEMENT 69–87 (1999) [hereinafter WALDRON, LAW AND DISAGREEMENT]; Jeremy Waldron, *The Dignity of Legislation*, 54 MD. L. REV. 633, 663 (1995) [hereinafter Waldron, *The Dignity of Legislation*].

uals who "share very little beyond an overlapping sense of common problems,"[57] lawmakers are not likely to have many common understandings when they debate legislative proposals. "If any one says, in the rather cozy way that people have who share tacit understandings, 'Come on, you know what I mean,' the answer is likely to be: 'No, I don't know what you mean. You had better spell it out for me.'"[58]

Because of a diverse legislature's lack of tacit understandings, it cannot have freewheeling conversations like those among friends.[59] Instead, the legislature relies on formal rules of order to structure its deliberations.[60] One aspect of those rules is "the positing of a formulated text as the resolution under discussion,"[61] meaning that lawmakers use a specific text to create a focal point for their debate.[62] Professor Waldron argues that if lawmakers find orderly debate impossible without agreeing to keep their discussion focused on a specific statutory text, it would be rather cavalier for an interpreter of that statute to look past the text and to divine some kind of implicit understanding that was actually beyond the ken of the legislators themselves.[63]

F. The Nondelegation Doctrine

Because Article I of the Constitution vests "[a]ll legislative Powers" in Congress,[64] Professor John Manning argues that using legislative history violates the constitutional principle of nondelegation of the legislative function.[65] Congress can delegate specific decisionmaking authority to other bodies in certain circumstances, but it cannot create minilegislatures with full lawmaking authority.[66]

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57 WALDRON, LAW AND DISAGREEMENT, *supra* note 56, at 74.

58 *Id.* at 74.

59 *Id.*

60 *See id.* at 75–76 ("[A]n assembly like ours needs to *structure* and *order* its deliberations, if it is to achieve any of the advantages that the Aristotelian theory suggests may accrue from legislation by the many.").

61 Waldron, *The Dignity of Legislation*, *supra* note 56, at 663.

62 *See id. (*"[T]he sense of a determinate focus for discussion . . . seems absolutely indepensible for a large and diverse assembly of people whose knowledge and trust of one another is limited.").

63 *See* WALDRON, LAW AND DISAGREEMENT, *supra* note 56, at 86 (asserting that respect for legislature requires respect for its enactments and more formal aspects of its means of enacting statutes); Waldron, *The Dignity of Legislation*, *supra* note 56, at 663–65 (stating that respect for statutes involves respecting formal ways through which statutory text was created).

64 U.S. CONST. art. I, § 1.

65 *See* Manning, *supra* note 41, at 707, 714–15 (stating that courts' use of legislative history gives unconstitutional control over elaboration of law to Congress).

66 Scalia, *supra* note 5, at 35 ("The legislative power is the power to make laws, not the power to make legislatures.").

Manning argues that judges contravene the nondelegation doctrine when they place authoritative weight on legislative history, essentially allowing a committee or even one legislator to speak for the entire Congress.[67]

These six rationales form the theoretical foundation for textualism. These arguments do not mandate a specific method of reading a statute's text but rather justify a general approach to interpreting laws that is committed to reading the text and nothing else. As will be seen, often the specific method of textual interpretation employed will draw on reasons beyond the basic arguments for textualism, laid out here, to justify a particular set of interpretive choices.

II
TEXTUALISM AND LIMITED GOVERNMENT

While Part I laid out the basic arguments for textualism, this Part will look at texualism's effect on government operations. This Part argues that the kind of textualism practiced by the most prominent textualists threatens to constrain the powers of Congress, administrative agencies, and the judiciary. This Part also argues, however, that these constraints are not the products of textualism itself but are instead the result of textualism in combination with an insistence on clarity in statutory language.

As this Note argues more fully below, Justice Scalia and Judge Easterbrook are especially solicitous of clarity in statutory language. Justice Scalia, for example, is more likely to find clear meaning at step one of a *Chevron* analysis.[68] Judge Easterbrook argues that judges should limit statutes' applicability and turn matters back to the political branches for more definite resolution when vague or ambiguous wording makes it unclear whether a statute should apply in a given case.[69] It is important to recognize that textualism itself does not

[67] *See* Manning, *supra* note 41, at 707 ("When . . . the Court gives authoritative weight to a committee's subjective understanding of statutory meaning . . . it empowers Congress to specify statutory details—without the structurally mandated cost of getting two Houses of Congress and the President to approve them.").

[68] Antonin Scalia, *Judicial Deference to Administrative Interpretations of the Law*, 1989 DUKE L.J. 511, 521.

[69] *See* Easterbrook, *supra* note 29, at 544 ("[T]he domain of the statute should be restricted to cases anticipated by its framers and expressly resolved in the legislative process."). *Beler v. Blatt, Hasenmiller, Leibsker & Moore, LLC*, 480 F.3d 470 (7th Cir. 2007), illustrates Judge Easterbrook's approach in practice. In *Beler*, the plaintiff argued that a debt collector's freezing of her bank account was unlawful under 15 U.S.C. § 1692f, which provides that "[a] debt collector may not use unfair or unconscionable means to collect or attempt to collect any debt." *Id.* at 473 (citing 15 U.S.C. § 1692f (2000)). Judge Easterbrook noted that neither the statute nor the agency charged with enforcing the statute had clarified what constituted "unfair or unconscionable means," and so, he argued,

require that the text be clear; textualism merely requires judges to look no further than statutory text. More importantly, all but one of the constraints on government that will be discussed below derive not from textualism alone but rather from textualist interpretation combined with an insistence on clarity. The one constraint on government that remains even without an emphasis on clarity is the rejection of legislative history; this constraint is central to the textualist project. While the rejection of legislative history will be addressed at the end of this Part, Sections A, B, and C discuss how the other constraints flow directly from what this Note calls "clarity-driven textualism."

Before turning to clarity-driven textualism's constraints on government, it will be valuable to refer back to the six arguments that support textualist methodology from Part I and ask whether any form of textualism other than the clarity-driven variety is supported by them. This Note contends that an interpreter can still believe each argument without becoming a clarity-driven textualist. The first argument, that textualism limits judicial discretion, is driven by a concern that judges can use the interpretation of statutes to foist their own policy preferences on the law. Textualism limits judges' opportunities to do so by forcing them to be faithful to statutes' text rather than relying on any extraneous material. As will be argued more fully in this Part, however, vagueness and ambiguity are facts of life for statutes, so faithfulness to text is only a partial solution to the problem of judicial discretion. Judges will still have to decide what to do about vague or ambiguous language. As will be discussed below, clarity-driven textualists have unique approaches to textual indeterminacy, approaches that impose severe burdens on government. This Note's contention is that clarity-driven textualists' commitment to limiting judicial discretion should be balanced against the effects that their interpretive strategies have on the functioning of government. Textualism does not neccesarily require eliminating all discretion at any cost; it can still limit discretion while respecting the real-world truth that language goes hand-in-hand with indeterminacy.

As for the second argument, that legislative history is unreliable, there is simply no necessary connection between the unreliability of legislative history and the clarity of text. It is entirely acceptable to shun legislative history while accepting that statutory texts will contain ambiguity. The same is true for the third argument, that public choice theory undermines the concept of statutory purpose: The fact that

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the plaintiff "could prevail under § 1692f only if we were to declare, as a matter of federal common law," that the freezing of the bank account was "unfair or unconscionable." *Id.* at 474. Judge Easterbrook declined to do so, noting that the matter was more appropriate for resolution "through the administrative process or a statutory amendment." *Id.*

those purposes may be more imaginary than real has nothing to do with whether statutory texts will be clear. As with legislative history, one can believe that statutory purpose is a sham while accepting that texts will be ambiguous.

An insistence on clarity also does very little for the fourth argument, that textualism ensures that Congress will, ex ante, understand the effects of its laws. Any form of textualism will assure Congress that its laws will be interpreted only with regard to the words that they, collectively, have settled on. While clarity-driven textualism provides Congress with a kind of bright-line rule about how later interpreters will handle its legislation, this Part will argue that the benefits of such a rule come at a great cost in terms of the functioning of government. In addition, most of the benefits of improving Congress's understanding ex ante can be derived by a simple commitment to limiting interpreters to plausible readings of statutory text. Moreover, the benefits of textualism for Congress's ex ante position would not even accrue in those instances where statutory ambiguity arises because of circumstances that Congress did not foresee, which may well be the most common cause of ambiguity.[70]

The fifth argument, that textualism respects the legislative process, is not at all undermined and is perhaps strengthened, if the interpreter does not insist on textual clarity and instead accepts that certain ambiguities are inevitable. And finally, the insistence on clarity is not a necessary incident to the sixth argument, that textualism prevents delegation of the legislative function. Any form of textualism, whether clarity-driven or not, prevents judges from giving legal force to extraneous material like legislative debates.

A. Constraints on Congress

1. The Nature of the Constraints

Recall that textualists believe that if they set clear ex ante rules of interpretation, Congress will be able to draft statutes with a better understanding of how its laws will be enforced. One implication of this "tough love" approach is an argument made by Judge Easterbrook in his article *Statutes' Domains*: When a court is called upon to decide whether vague or ambiguous language in a statute should extend to circumstances to which it is not clear that the statute was intended to apply, a judge should simply declare the statute inapplicable.[71] I should note that Judge Easterbrook does not seem to

[70] Eskridge, *supra* note 2, at 677.

[71] Easterbrook, *supra* note 29, at 544. Judge Easterbrook allows a limited exception for when Congress explicitly grants the courts the authority to fashion federal common law.

make such extreme and wholesale declarations of inapplicability in practice. However, he will narrowly construe or refuse to apply statutes with particularly vague terms, preferring the process of clarification to occur in one of the political branches rather than through the judiciary.[72] This approach to vagueness and ambiguity in statutes—refusing to extend their applicability—is the bitter pill of Justice Scalia's argument for clear interpretive rules. If the whole justification for setting ex ante rules is that the laws themselves will be more predictable in application, vagueness and ambiguity in statutes undermine the entire arrangement by fostering unpredictability in the law. For the judge concerned with interpreting a statute in such a way that Congress will "know the effect of the language it adopts,"[73] the only appropriate response to vagueness and ambiguity is to shift back to Congress the task of defining the precise contours of the statute.[74]

One problem with this line of thinking is that most legislative ambiguity derives not from poor drafting but from unforeseen circum-

Id. ("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 explicitly resolved in the legislative process.").

[72] *See Beler*, 480 F.3d at 474 (commenting that statute's prohibition of "unfair or unconscionable" debt collection practices "is as vague as they come" and refusing to construe term, arguing that clarification should occur "through the administrative process or a statutory amendment rather than judicial definition of the phrase 'unfair or unconscionable'"); *see also* Village of Oconomowoc Lake v. Dayton Hudson Corp., 24 F.3d 962, 965–66 (7th Cir. 1994) (Easterbrook, J.) (refusing to extend term "waters of the United States" under Clean Water Act, 33 U.S.C. §§ 1281–1387 (2000), to ground water, arguing that "[m]embers of Congress have proposed adding ground waters to the scope of the Clean Water Act, but these proposals have been defeated, and the EPA evidently has decided not to wade in on its own"); NAACP v. Am. Family Mut. Ins. Co., 978 F.2d 287, 297–98 (7th Cir. 1992) (noting that Fair Housing Act's, 42 U.S.C. §§ 3601–3631 (2000), prohibition of racial discrimination in providing "services" in connection with provision of housing is ambiguous enough that it could cover discrimination in providing property insurance, but refusing to extend statute in this way).

[73] Finley v. United States, 490 U.S. 545, 556 (1989). In *Finley*, a party had suggested that the jurisdiction of the federal courts under the Federal Tort Claims Act, 28 U.S.C. §§ 2671–2680 (2000), could be expanded to encompass pendent party jurisdiction ("that is, jurisdiction over parties not named in any claim that is independently cognizable by the federal court"). *Id.* at 549. Justice Scalia determined that Congress had made no movements suggesting that pendent party jurisdiction was appropriate, though he noted that "our cases do not display an entirely consistent approach with respect to the necessity that jurisdiction be explicitly conferred." *Id.* at 556. In other words, the Court had at times inferred forms of jurisdiction without explicit congressional authorization. In uncharacteristically diplomatic language, Justice Scalia noted that the majority he carried in *Finley* had "no intent to limit or impair" the cases in which the Court had inferred jurisdiction, though he suggested that the tendency of inferring jurisdiction may frustrate Congress's ability to "know the effect of the language it adopts." *Id.* Like Judge Easterbrook, Justice Scalia would prefer a clear and unambiguous statement from Congress before giving courts the license to act.

[74] Easterbrook, *supra* note 29, at 544.

stances or from deliberate choices by Congress to leave certain questions to be resolved by courts or agencies.[75] In either case, "clear interpretive rules" will not have any effect on the way Congress writes laws.[76] Seen in this light, textualists' "tough love" position on legislative drafting, instead of getting a lazy Congress to do its job better, has the effect of forcing Congress to revisit statutes whenever unforeseen circumstances arise and prohibiting Congress from relying on other institutional actors to "fill in the gaps" of vague or ambiguous language.

The crucial point is that the "clear interpretive rules" argument for textualism, though it may initially seem to do a great service to Congress, actually ends up placing significant burdens on the legislative process. Sending statutes back to Congress for more definite answers whenever circumstances arise in which it is not clear whether the statutes apply, as Judge Easterbrook proposes to handle vagueness and ambiguity in statutes, would create such a logjam in the legislative process that Congress may not be able to provide all of the specific answers requested.[77] In a world in which drafting legislation is time-consuming and statutes are extraordinarily difficult to pass,[78] textualism's burdens on the legislative process threaten to undermine severely Congress's lawmaking powers.

2. *How the Constraints on Legislative Drafting Derive from Clarity-Driven Textualism*

The burdens on the legislative process outlined above do not inevitably flow from textualism; the toughness of textualists' "tough love" approach varies depending on a judge's insistence on clarity. If a judge makes especially strong demands for clarity in statutory language, she will be more likely to turn vague or ambiguous terms back to Congress for clarification. Conversely, if a judge uses any baseline of textual interpretation besides clarity, then textualism will likely lose much of its sting because Congress will not be forced to revisit every issue that it failed to address with exhaustive specificity.

The critical point is that when Judge Easterbrook argues that vagueness or ambiguity warrants a finding of inapplicability, it is not

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[75] Eskridge, *supra* note 2, at 677.

[76] *Id.*

[77] *See* McNollgast, *Legislative Intent: The Use of Positive Political Theory in Statutory Interpretation*, LAW & CONTEMP. PROBS., Winter 1994, at 3, 13 (asserting that rational political actors do not have enough time to create laws that minimize indeterminacy of statutory language).

[78] WILLIAM N. ESKRIDGE, JR. ET AL., LEGISLATION AND STATUTORY INTERPRETATION 75–76 (2d ed. 2006).

his textualism that drives him to this result, but rather a separate emphasis on clarity as an interpretive requirement. This emphasis is driven by a normative claim that statutes should only govern situations that Congress, at the time of passage, understood them to govern.[79] But textualism itself does not demand any particular foresight from Congress, nor does it require judges to read statutory text in a manner that promotes clarity. All textualism requires is text-bound interpretation. How a textualist handles the ambiguity that arises when a statute is called upon to apply in novel circumstances is a separate matter. And most importantly, the way that Judge Easterbrook proposes to handle these kinds of ambiguity problems in *Statutes' Domains* constrains Congress by requiring an overly burdensome degree of precision in crafting legislation.

B. Constraints on Agencies

1. The Nature of the Constraints

Clarity-driven textualism also constrains agencies because it fails to find ambiguity in statutory text—a necessary step in conferring power on agencies under the *Chevron* framework. Recall that in *Chevron*[80] the Supreme Court established a two-step framework for deciding whether a court should defer to an agency's interpretation of the statute that Congress has charged it with enforcing (often referred to as the agency's organic statute).[81] In the first step, a court asks "whether Congress has directly spoken to the precise question at issue."[82] If the relevant statutory language is clear or Congress's intent is readily apparent from the legislative history, "that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."[83] If the statutory language is silent or ambiguous and the legislative history is inconclusive, the court is to defer to the agency's interpretation, as long as that interpretation is "based on a permissible construction of the statute."[84]

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[79] Easterbrook, *supra* note 29, at 544 ("[T]he domain of the statute *should* be restricted to cases anticipated by its framers and expressly resolved in the legislative process." (emphasis added)).

[80] Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984).

[81] *Id.* at 842–43.

[82] *Id.* at 842.

[83] *Id.* at 842–43.

[84] *Id.* at 843. The question of whether legislative history is relevant in the *Chevron* step one inquiry is deeply contested, and commentators have noted that Justices writing for a majority will phrase the *Chevron* inquiry differently—sometimes eliding the reference to legislative history at step one—depending on whether a textualist has joined their opinions. *See* Charles Tiefer, *The Reconceptualization of Legislative History in the Supreme Court*,

Because of the invitation to courts at *Chevron* step one to search for congressional intent in both statutory language and legislative history, *Chevron* has become a significant forum for debating the relevance of legislative history.[85] Some textualists take the position that *Chevron* step one requires only an examination of the statute's language, and if the language is ambiguous on its face, a court is free to move to *Chevron* step two without looking any further.[86] However, this is where clarity-driven textualists can diverge from textualists who do not focus on clarity per se.

To understand how textualism can constrain agencies, it is important to keep in mind a basic feature of the balance of authority between judges and agencies under the *Chevron* framework. If a court decides that a statutory term is ambiguous and that Congress had no clear intent on an issue, not only will the agency's interpretation likely be upheld, but the agency also will be free to change its interpretation over time.[87] In this sense, ambiguous statutory terms create zones of authority for agencies in which they are capable of taking any action that fits within the broad scope of permissible constructions of the ambiguous term.[88] On the other hand, if a court determines that a statutory term is clear or that Congress's intention on a matter is apparent, the agency has no authority and no room to act otherwise.[89] It is stuck with the judicially assigned "clear meaning" until Congress decides to revisit the issue.[90]

2000 WIS. L. REV. 205, 246–47 & n.250 ("Thus, with some frequency, either a textualist would write the majority opinion, or if an uncommitted but conservative Justice wrote the opinion, the Justice might yet take into account the textualist methodology rather than drive Justice Scalia into writing separately and critically.").

[85] *See generally* Merrill, *supra* note 19 (considering relationship between *Chevron* doctrine and methods of interpretation); Richard J. Pierce, Jr., *The Supreme Court's New Hypertextualism: An Invitation to Cacophony and Incoherence in the Administrative State*, 95 COLUM. L. REV. 749 (1995) (same).

[86] *See* Scalia, *supra* note 68, at 521 (discussing differing approaches to *Chevron* step one analysis).

[87] United States v. Mead Corp., 533 U.S. 218, 247 (2001) (Scalia, J., dissenting) (noting that findings of ambiguity at *Chevron* step one "create a space, so to speak, for the exercise of continuing agency discretion").

[88] *Id.*

[89] *Id. Mead* itself did not address situations in which a court finds clear meaning at *Chevron* step one, but rather it addressed situations in which a court determines that Congress did not grant an agency authority to interpret a statutory term in the first place. *Id.* at 229–31 (majority opinion). But in either circumstance, a court would announce its interpretation of the relevant term, and the agency would be bound by the court's interpretation.

[90] *See* Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984) ("If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.").

In his dissent in *United States v. Mead Corp.*, Justice Scalia drew attention to this issue and noted that judges' overwillingness to find clear meaning in statutes would "lead to the ossification of large portions of our statutory law" because agencies would not be able to adjust their interpretations of statutes to changing circumstances.[91] There is a certain amount of irony in Justice Scalia worrying about the effects of judicial findings of clear meaning because he, in particular, often finds clear meaning at *Chevron* step one when other judges do not.[92] In fact, Justice Scalia has acknowledged the phenomenon himself:

> One who finds *more* often (as I do) that the meaning of a statute is apparent from its text and from its relationship with other laws, thereby finds *less* often that the triggering requirement for *Chevron* deference exists. It is thus relatively rare that *Chevron* will require me to accept an interpretation which, though reasonable, I would not personally adopt.[93]

2. *How the Constraints on Agencies Derive from Clarity-Driven Textualism*

A tendency to find clear meaning at *Chevron* step one does not inhere in the general theory of textualism. It is entirely acceptable in the world of textualism to find ambiguity in statutory language. In fact, much of the discussion in Part II.A.1 concerns what a clarity-driven textualist could do upon finding ambiguity: As Judge Easterbrook argues, judges faced with circumstances in which it is not clear that a statute should apply because of some vagueness or ambiguity in its wording should simply not apply the statute. That prominent textualists, like Justice Scalia, are known for finding clear meaning at *Chevron* step one indicates that they are driven towards clarity in a way that is not explainable by textualism itself. More importantly, their interpretive disposition towards clarity ends up constraining agencies by removing the zones of discretion created by ambiguous terms.

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[91] *Mead*, 533 U.S. at 247 (Scalia, J., dissenting).
[92] Scalia, *supra* note 68, at 521.
[93] *Id.*

C. Constraints on Judges

1. The Nature of the Constraints

As described in this Note's Introduction, constraining judges is one of the explicit goals of textualism.[94] Textualists emphasize that the limits their method places on judges in interpreting statutes temper judges' ability to impose their own political ideologies on interpretations.[95] By making judges stick to statutory text and refrain from making unbounded inquiries into legislative intent, textualism gives judges fewer materials on which to base interpretations chosen primarily because they further the judges' own preferred outcomes.[96]

What textualists say about the constraints their method places on judges would seem to be undermined by the constraints, discussed in the previous Section, that textualist judges place on agencies.[97] If textualists are more likely to find clear meaning at *Chevron* step one—thus removing discretion over interpretive matters from agencies—it appears that textualists are simply transferring interpretive authority from agencies to judges. In other words, where the agencies get poorer, textualist judges get richer.

The problem with this argument is that it confuses the kind of authority judges have in making *Chevron* step one determinations with the kind of authority that agencies have if judges find ambiguity at *Chevron* step one. Recall that when a judge finds ambiguity at *Chevron* step one, the advantage to the agency is that it will be permitted to change its interpretation over time, as long as any new interpretations are based on "permissible construction[s] of the statute."[98] However, a judge does not get the same benefit of changing her mind if she finds clear meaning at *Chevron* step one; it would be somewhat dubious if she later found a different "clear meaning" in a subsequent litigation.

Still, when a judge finds clear meaning at *Chevron* step one, she removes discretion from an agency and effectively sets agency policy. Such an act does not suggest judicial restraint. If textualists are truly more likely to find clear meaning at *Chevron* step one, the idea that textualism constrains judges in meaningful ways seems a bit simplistic. However, it is important to remember the end that breaking the pattern of judicial restraint serves for clarity-driven textualists: con-

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[94] *See* Scalia, *supra* note 5, at 23 (stating that textualism is driven, in part, by belief that "judges have no authority to pursue . . . broader purposes or write new laws").

[95] *Id.* at 17–18.

[96] *Id.* at 36.

[97] *See supra* Part II.B.

[98] Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843 (1984).

straining agency power to govern. The general emphasis on limiting the reach of government remains.

2. How the Constraints on Judges Derive from Clarity-Driven Textualism

Under any textualist approach—whether it emphasizes clarity or not—a judge faced with the task of interpreting a statute will be constrained because the material available to assist in the judge's interpretation will be limited. This constraint, however, does not necessarily limit the judicial role because there is no guarantee that a text-bound interpretation will be modest. To loosen this Note's restricted focus on statutory textualism for a moment and borrow from the constitutional context, Justice Hugo Black, a constitutional textualist, was able to wrest broad interpretations from strictly text-bound methods.[99] Since constitutional textualism does not prevent interpreters from reaching broad interpretations, then there is at least some indication that Justice Scalia and Judge Easterbrook's statutory approach imposes constraints on judges that derive from somewhere other than textualism itself.

As discussed in Part II.A, Judge Easterbrook argues that courts should not extend the reach of statutes to circumstances that Congress may not have intended to address, with the implication that these matters should be turned back to Congress for clarification. This is a restrictive understanding of the judge's role because it implies that in conditions of uncertainty judges should not make the effort to interpret statutory language to make it cohere with a statute's overall design.[100] But such an effort is entirely permissible under the rules of textualism so long as the judge sticks to methods of textual interpretation. In this sense, it is an insistence on clarity that confines how judges can interpret the letter of the law.

D. What About Legislative History?

1. How Refusing To Look at Legislative History Constrains Congress

The textualist rejection of legislative history is probably the most visible way in which textualists seek to influence the operations of government. At first glance, their position on legislative history seems

[99] *E.g.*, Adamson v. California, 332 U.S. 46, 74–75 (1947) (Black, J., dissenting) (determining, on basis of language of its first clause, that Fourteenth Amendment incorporated Bill of Rights against states).

[100] *See supra* Part I.C (explaining how public choice theory challenges notion that statutes represent broader congressional intent).

like a limitation on judges instead of legislatures—all they ask is that judges refrain from relying on legislative history, not that Congress refrain from creating it.[101] However, their rejection of legislative history is actually related to a more general position on the way legislation should be crafted. Textualists do not argue against the *kind* of information that legislative history contains; they merely insist that if judges are to consider that information, it has to be included within the four corners of a statute.[102]

In order to evaluate the plausibility of this suggestion, one must have an understanding of the legislative process and what it would mean for this process if legislative history were no longer part of the game. The political science collective that writes under the name McNollgast[103] argues that legislative history serves the important function of streamlining the process through which legislative coalitions make compromises on proposed legislation.[104] Noting that legislators have much more to do than write laws and thus "would never devote the effort necessary to minimize the indeterminacy of statutory language,"[105] McNollgast states that enacting coalitions use committee meetings and floor debates to address the concerns of their colleagues about proposed legislation, and there is reason to think that their statements in such circumstances are honest.[106] Justice Stephen Breyer has made a similar point about how the legislative process crucially relies on legislative history to get the work of lawmaking done: "Congress is a bureaucratic organization with twenty thousand employees, working full-time, generating legislation through complicated, but organized, processes of interaction with other institutions and groups . . . ."[107] Members of Congress rely on their staffs and the reports that are generated to make decisions about how to vote on legislation.[108]

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101 *E.g.*, Kozinski, *supra* note 4, at 813–14; Scalia, *supra* note 5, at 29–30.

102 Many statutes include some kind of statement of purpose or congressional findings, *e.g.*, 29 U.S.C. § 621 (2000); 29 U.S.C. § 1801 (2000); 42 U.S.C. § 3931 (2000); 42 U.S.C. § 4501 (2000); 42 U.S.C. § 6201 (2000), which, since they have been voted on by the full legislature, would seem to be fair game for textualists.

103 The collective is made up of Professors Mathew McCubbins, Roger Noll, and Barry Weingast. William N. Eskridge, Jr., *The Circumstances of Politics and the Application of Statutes*, 100 COLUM. L. REV. 558, 568 n.14 (reviewing WALDRON, LAW AND DISAGREEMENT, *supra* note 56).

104 McNollgast, *supra* note 77, at 12–16, *discussed in* Eskridge, *supra* note 103, at 568–71.

105 *Id.* at 13.

106 *Id.* at 25–27.

107 Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845, 858 (1992).

108 *Id.* at 859–60.

If, as textualists would like, courts accorded no weight to the assurances that legislators make to one another regarding unclear language in committees and during floor debates, or to the explanations of statutory initiatives included in reports by congressional staff, it is worth asking how the legislative process would change. Professor Eskridge argues that it might not change at all because legislators do not draft statutes with much concern for how the laws will be interpreted.[109] And even if they did have this concern, it would not make much difference because most statutory interpretation problems arise because lawmakers cannot foresee all of the circumstances in which a statute will later apply.[110] But McNollgast and Justice Breyer argue that if legislators cannot rely on courts to be faithful to legislators' intentions in making on-the-record but off-the-books compromises, "effective legislation would be too risky or perhaps even impossible to craft."[111] Every time a legislator raised a concern about a proposed piece of legislation, it would not be enough if all could agree that the language adopted, though vague, should be read to address her concern. The legislative wheels would grind to a halt while the coalition debated exactly what language would leave no doubt as to the result intended. And even if the appropriate language could be found, it would surely introduce its own set of vagueness problems.[112]

2. Why This Constraint Is Acceptable

The rejection of legislative history is one of the defining features of any kind of textualism, and thus the constraints that such a rejection places on Congress exist under any form of textualism, clarity-driven or not. This constraint is a significant hurdle for an argument, like this one, that textualism itself does not place *excessive* constraints on government.

The response to this challenge is two-fold. First, the nature of the constraint on Congress that results from rejecting legislative history is especially onerous under clarity-driven textualism. Clarity-driven textualism requires Congress not only to articulate every compromise within the four corners of a statute but also to do so with the heightened specificity that clarity-driven textualists demand of legislative drafting. If Congress feels assured that vague or ambiguous language will be construed reasonably and without an overbearing insistence on

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109 Eskridge, *supra* note 2, at 677.

110 *Id.*

111 Breyer, *supra* note 107, at 860; McNollgast, *supra* note 77, at 14.

112 McNollgast, *supra* note 77, at 13 ("[O]nly rarely can statutory language be precise in conveying either policy bargains or instructions to agencies. Nature has a nasty habit of creating situations in which the applicability of a statute is unclear.").

clarity, the prospect of ensuring that all compromises find a foothold in statutory language is somewhat less daunting. When deciding whether to amend vague or ambiguous language to make the underlying compromises more explicit, majority coalitions could possibly agree that the language, though indeterminate, would be reasonably construed by courts to arrive at the result they intend.[113]

The second response is to accept that some constraints are simply inevitable. These constraints may even be desirable. As noted in Part I, legislative history opens the door to circumvention of the democratic process by strategic legislators,[114] and its use by judges threatens the constitutional design by letting committees and individuals speak for the entire Congress.[115] Given the benefits identified by textualists of rejecting legislative history, perhaps whatever constraints remain would be worth the cost. A textualism that is not as insistent on clarity would not impose such significant constraints on government, and perhaps judges who do not have a general preference for limited government would then find textualism acceptable. Empirical studies indicate that judges from all points of the political spectrum have been relying less on legislative history since the recent resurgence of textualism,[116] which suggests that they find the governmental constraints that rejecting legislative history involves acceptable.[117]

III
Toward a Different Kind of Textualism

The textualism described in Part II makes government hard to do: It makes laws hard to pass, it leaves agencies with little flexibility, and it keeps judges from stepping in to ease the burdens. Arguing, as this Note has, that this form of textualism suffers from a government-burdening insistence on clarity naturally invites the question of what else textualism could look like. The beginning of this Note gave an example of a statute that required certain documents to be filed "prior to December 31."[118] Any textualist, whether she demands clarity or not, would have to determine that the deadline is December 30. But there will be cases in which clarity-driven textualists will depart from

113 *See id.* at 13–14 & n.30 (arguing that majority coalitions can take actions that maximize chance that agencies and courts implement their political objectives).

114 *See supra* Part I.B.

115 *See supra* Part I.F.

116 Merrill, *supra* note 19, at 355; Patricia M. Wald, *The Sizzling Sleeper: The Use of Legislative History in Construing Statutes in the 1988–89 Term of the United States Supreme Court*, 39 Am. U. L. Rev. 277, 298 (1990).

117 *See* Koby, *supra* note 20, at 392–93 (discussing empirical study tracking decreased reliance on legislative history in Supreme Court's statutory interpretation cases).

118 *See supra* note 1 and accompanying text.

other textualists. This Part examines two such cases. In both, Justice Scalia dissented from a majority that interpreted a statute using textualist methods. By examining the precise nature of Justice Scalia's disagreements with the majorities' interpretations, this Note hopes to illustrate two things. First, neither of these disagreements is about methodology—everyone is doing textualist interpretation—and the best way to explain the difference in outcomes is Justice Scalia's insistence on clarity. Second, Justice Scalia's clarity-driven interpretations, in each case, threatened to constrain the operations of government.

A. Example 1: Brand X

The central question in the *Chevron*-style case *National Cable & Telecommunication Ass'n v. Brand X Internet Services*[119] was whether a cable modem service qualified as a "telecommunications service" under the Communications Act of 1934[120] and thus was subject to the extensive "common carrier" regulations of the Act.[121] The Federal Communications Commission (FCC or Commission) had issued a declaratory ruling stating that cable modem service was not a "telecommunications service" and was thus not subject to common carrier regulation.[122] Consumer groups challenged the declaratory ruling, arguing that cable modem service should be categorized as a telecommunications service under the Act.[123]

The Act defined "telecommunication service" as "the offering of telecommunications for a fee directly to the public . . . ."[124] The word "telecommunications" was defined as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received."[125] The Commission conceded that the actual cable lines providing cable modem service amounted to a use of "telecommunications." It took the position, however, that cable modem service should not be considered a "telecommunications service" because the consumer only used the service for Internet access, which (for reasons not relevant to this discussion) the Commission had determined was *not* a "telecommunications service."[126] In other words, the Commission argued, because cable modem service only

119 545 U.S. 967 (2005).

120 47 U.S.C. §§ 151–614 (2000).

121 *Brand X*, 545 U.S. at 974.

122 Inquiry Concerning High-Speed Access to the Internet over Cable and Other Facilities, 17 F.C.C.R. 4798, 4819, ¶ 33 (2002) [hereinafter Declaratory Ruling].

123 *Brand X*, 545 U.S. at 979.

124 47 U.S.C. § 153(46).

125 *Id.* § 153(43).

126 Declaratory Ruling, *supra* note 122, at 4821–25, ¶¶ 38–43.

"offered" Internet access, which is not a "telecommunications service," the fact that cable modem service involved the use of telecommunications technology was not sufficient to consider such a service the "offering of telecommunications" under the Act. The question in the case, then, was whether this interpretation of "offer" was permissible.

Justice Thomas, writing for the majority, found that the word "offer" as used in the Act is ambiguous because it "admit[s] of two or more reasonable ordinary usages":[127]

> Cable companies in the broadband Internet service business "offe[r]" consumers an information service in the form of Internet access and they do so "via telecommunications," but it does not inexorably follow as a matter of ordinary language that they also "offe[r]" consumers the high-speed data transmission (telecommunications) that is an input used to provide this service.[128]

Justice Thomas analogized to buying a car: "Even if it is linguistically permissible to say that the car dealership 'offers' engines when it offers cars, that shows, at most, that the term 'offer' . . . is ambiguous about whether it describes only the offered finished product, or the product's discrete components as well."[129] Because telecommunications are as integrated into cable modem service as motors are in cars, it was not a "misuse of language" for the Commission to determine that cable modem service "offered" Internet access rather than telecommunications service for purposes of the Communications Act.[130] Justice Thomas was thus able to find the Communications Act ambiguous at *Chevron* step one, and he deferred to the Commission's interpretation of "offer" at *Chevron* step two.[131]

In dissent, Justice Scalia argued that "offer" could not be considered ambiguous in this context. He argued that the appropriate analogy for cable modem service was buying not a car but rather a pizza:

> If . . . I call up a pizzeria and ask whether they offer delivery, both common sense and common "usage" would prevent them from answering: "No, we do not offer delivery—but if you order a pizza from us, we'll bake it for you and then bring it to your house." The logical response to this would be something on the order of, "so, you *do* offer delivery." But our pizza-man may continue to deny the obvious and explain, paraphrasing the FCC and the Court: "No,

127 *Brand X*, 545 U.S. at 989.

128 *Id. (*alterations in original) (citations omitted).

129 *Id.* at 990.

130 *Id.*

131 *Id.* at 989, 997.

> even though we bring the pizza to your house, we are not actually 'offering' you delivery, because the delivery that we provide to end users is 'part and parcel' of our pizzeria-pizza-at-home service and is 'integral to its other capabilities.'"[132]

In Justice Scalia's view, cable modem service constituted an offering of telecommunications service that should have been subject to common carrier regulation under the Telecommunications Act.

It is difficult to know what to make of the majority and dissent's "warring analogies"[133] (to use Justice Thomas's phrase), but it seems fair to say that if the Court's two textualists reached different outcomes, textualism alone did not provide the tools necessary to resolve the case. The difference between the two positions can also be described in terms of clarity: Justice Scalia opted for a "clear meaning" approach to "offer" that encompassed any provision of telecommunications, whereas Justice Thomas was willing to accept a definition of "offer" that made the issue a fact-intensive inquiry into the integration of other services into telecommunications technology most appropriately decided by the agency. And because both Justices Thomas and Scalia staked their positions on purely textualist grounds, *Brand X* nicely illustrates the phenomenon noted in Part II.B: Justice Scalia found clarity where others did not—in a case where the difference cannot be explained on methodological grounds—and he therefore advocated removing a matter from agency discretion and thereby constraining the powers of the agency.

B. Example 2: Smith

The question before the Court in *Smith v. United States*[134] was whether 18 U.S.C. § 924(c)(1), which authorizes a sentencing enhancement for "any person who, during and in relation to any . . . drug trafficking crime[,] . . . uses . . . a firearm,"[135] should apply where a defendant trades a gun for drugs.[136] The case turned on what meaning the Court gave to the word "use," which was not defined by the statute. Both the majority and the dissent agreed that, in the absence of statutory definition, the term should be construed "in

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[132] *Id.* at 1007 (Scalia, J., dissenting) (citation omitted).

[133] *Id.* at 992 (majority opinion).

[134] 508 U.S. 223 (1993).

[135] 18 U.S.C. § 924(c)(1) (2000).

[136] As of this writing, the Supreme Court is considering whether the same statute should apply in the inverse situation, where a defendant traded drugs for a gun. Questions Presented, Watson v. United States, No. 06-571 (U.S. 2007), http://www.supremecourtus.gov/qp/06-00571qp.pdf.

accord with its ordinary or natural meaning"[137] and within its linguistic context.[138] Thus, while there were disagreements between the majority and dissent, they were not methodological disagreements: The divergence concerned what constituted a reasonable interpretation of the term "use."[139]

Justice Scalia's dissenting opinion gave the term a limited scope:

> To use an instrumentality ordinarily means to use it for its intended purpose. When someone asks, "Do you use a cane?," he is not inquiring whether you have your grandfather's silver-handled walking stick on display in the hall; he wants to know whether you *walk* with a cane. Similarly, speaking of "using a firearm" is to speak of using it for its intended purpose, *i.e.*, as a weapon.[140]

Justice Scalia went on to note that "use" could, under a broad definition, also refer to situations in which a defendant "used" a gun to scratch his head in the course of a drug crime.[141] Because one would not think it normal or ordinary for the phrase "uses a gun in a drug crime" to encompass such activity, Justice Scalia argued that "use" must be interpreted to mean "use as a weapon."[142]

Justice O'Connor, writing for the majority, noted that the words "as a weapon" do not appear in the statute, and Congress presumably could have included such qualifying language if it had so desired.[143] Accepting that "use as a weapon" is certainly one meaning included within the scope of § 924(c)(1), Justice O'Connor doubted whether such a narrow construction could be said to define the limits of the statute:[144]

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137 *Smith*, 508 U.S. at 228; *accord id.* at 242 (Scalia, J., dissenting) ("In the search for statutory meaning, we give nontechnical words and phrases their ordinary meaning." (citing Chapman v. United States, 500 U.S. 453, 462 (1991))).

138 *Compare id.* at 229 (majority opinion) ("Language, of course, cannot be interpreted apart from its context."), *with id.* at 241 (Scalia, J., dissenting) ("It is . . . a fundamental principle of statutory construction (and, indeed, of language itself) that the meaning of a word . . . must be drawn from the context in which it is used." (internal quotation marks and citation omitted)).

139 There is a bizarre passage in Justice Scalia's essay on textualism in the book *A Matter of Interpretation: Federal Courts and the Law*, where he accuses the majority in *Smith* of strict constructionism. Scalia, *supra* note 5, at 23–24. It is striking that Justice Scalia found reason to critique *Smith* at all; since the case was decided entirely on textualist grounds, one might expect him to tout it as an example of what the Court should do in *every* statutory case. That he did find reason to critique *Smith* suggests that he has a vision of statutory interpretation that cannot be accounted for by textualism alone.

140 *Smith*, 508 U.S. at 242 (Scalia, J., dissenting).

141 *Id.*

142 *Id.*

143 *Id.* at 229 (majority opinion).

144 *Id.* at 230.

> That one example of "use" is the first to come to mind when the phrase "uses . . . a firearm" is uttered does not preclude us from recognizing that there are other "uses" that qualify as well. In this case, it is both reasonable and normal to say that petitioner "used" his [gun] in his drug trafficking offense by trading it for cocaine . . . .[145]

Thus, in *Smith*, each side made its case from the text's ordinary meaning. It is interesting that Justice Thomas joined the majority in *Smith*: As in *Brand X*, the Court's two textualists split on this question, which demonstrates that the textualist methodology can be applied to reach opposing outcomes. The question was one of how narrowly to read the word "use," a question to which textualism itself provides no answer.

To understand Justice Scalia's interpretive move in *Smith*, it may be helpful to recall H.L.A. Hart's distinction between the core and the penumbral meanings of words: "There must be a core of settled meaning, but there will be, as well, a penumbra of debatable cases in which words are neither obviously applicable nor obviously ruled out."[146] In *Smith*, Scalia was willing to allow "uses a firearm" to cover the core sense of the phrase—use as a weapon—but he was not willing to allow it to cover penumbral cases, such as use as currency. Justice Scalia's refusal to apply the broad sense of "use" is an example of what Judge Easterbrook advocated for in *Statutes' Domains*:[147] Justice Scalia refused to apply a vague term, and had he written for a majority of the Court in *Smith*, the sentencing enhancement effectively would have been turned back to Congress for clarification. The core-penumbra distinction is clarity-driven in the sense that it only recognizes a clear, core meaning of "uses a firearm" and dismisses the range of possible penumbral meanings that the phrase could have. As described in Part II.A, this insistence on clarity in statutory text threatens to constrain Congress's legislative powers by forcing Congress to expend the resources necessary to articulate (and thus foresee) each penumbral case with specificity rather than allowing Congress to use broader terms that capture both the core and penumbral cases.

CONCLUSION

Although this Note is a critique of the kind of clarity-driven textualism practiced by Justice Scalia and Judge Easterbrook, in a sense

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145 *Id.*

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

147 *See supra* notes 74–77 and accompanying text.

this Note is deeply pro-textualism. Starting with the premise that the political similarities of the most prominent textualists should make us question the wider viability of their interpretive method, this Note has sought to show that textualism could be embraced more broadly by judges and commentators from a variety of political viewpoints. Whether they will do so is an open question. If they do, the debate about textualism will become far more interesting because it will shift from a question of whether textualism is an acceptable mode of statutory interpretation to considerations about what forms of textualism best suit our constitutional structure and the needs of government. Even if textualism does not have such a rosy future, it would be unfortunate if the kinds of questions we asked about textualism always concerned its general acceptability. As this Note hopefully has shown, there are more probing questions to be asked about textualism's inner workings and latent effects.