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Mechanical Turk Jurisprudence

Shlomo Klapper[†]

INTRODUCTION: THE NEW MECHANICAL JURISPRUDENCE

> *"Not everything that counts can be counted and not everything that can be counted, counts"*
>
> —Albert Einstein[1]

This paper argues that data-driven interpretation does not create a mechanical jurisprudence—as many hope (or fear)—but rather creates a "Mechanical Turk" jurisprudence: a jurisprudence that appears mechanical but in fact is thoroughly human.

While the name "Mechanical Turk" today is most closely associated with Amazon's survey platform, or MTurk—on which many surveys in the data-driven interpretation literature are performed—its name originally refers to an 18th century sensation: a robot that could play chess.[2] The Mechanical Turk was invented in 1770 by Wolfgang von Kempelen. The contraption "consisted of a wooden cabinet behind which was seated a life-size figure of a man, made of carved wood, wearing an ermine-trimmed robe, loose trousers and a turban—the traditional costume of an Oriental sorcerer."[3] The automaton would play chess. The Mechanical Turk became a sensation, playing against global celebrities, including Napoleon Bonaparte and Benjamin Franklin, and touring Europe and America.

The hoax was only discovered 50 years later. Inside a concealed compartment in the Mechanical Turk would hide a human, who controlled the Mechanical Turk's movements. What appeared to be mechanical was actually thoroughly human.

The same can be said of today's Mechanical Turk-hosted surveys (or surveys conducted on other platforms) and of data-driven interpretation in general. Like the original Mechanical

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1 *See* THE NEW QUOTABLE EINSTIEN 293 (Alice Calaprice ed., 2005) (noting that this quotation may not have originated with Einstein).

2 *See generally* TOM STANDAGE, THE TURK: THE LIFE AND TIMES OF THE FAMOUS EIGHTEENTH-CENTURY CHESS-PLAYING MACHINE (2002).

3 *Id.*

Turk, data-driven interpretation gives the illusion of a "mechanical jurisprudence,"[4] whereas in reality it hides the humans making the machine move, whether the humans discerning the word senses in concordance entries or filling out surveys on the modern, Amazon-designed Mechanical Turk or other survey platforms.

This paper proceeds as follows. Part I outlines the intellectual history of data-driven interpretation, and argues that data-driven interpretation was and is intended to introduce a mechanical objectivity into interpretation, where the interpretative outcome remains the same no matter interprets a text. Part II, however, shows that these tools cannot create this hoped-for objectivity. Because legal corpus linguistics has been criticized elsewhere, this Part raises new criticisms of surveys as an interpretative tool. Notably, in addition to a host of practical problems of executions, surveys misunderstand the concept of "ordinary meaning" and threaten to undermine the value of faithful agency.

I. THE SEDUCTIONS OF QUANTIFIED INTERPRETATION

The tacit origin story of data-driven interpretation is that data-driven interpretation is a natural outgrowth of the information technology revolution.[5] Just as fields such as

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[4] *See* Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605 (1908) (coining this term).

[5] That corpus linguistics is "Lexis on steroids" has become a representative meme for this concept in the corpus linguistics literature. *See* Ben Zimmer, *The Corpus in the Court: "Like Lexis on Steroids,"* ATLANTIC (Mar. 4, 2011), https://www.theatlantic.com/national/archive/2011/03/the-corpus-in-the-court-like-lexis-on-steroids/72054/ [https://perma.cc/S8Q7-TSDG]. The phrase is quoted in over a dozen articles on Westlaw. *See* Thomas R. Lee & Stephen C. Mouritsen, *The Corpus and the Critics*, 88 U. CHI. L. REV. 275, 292 (2021); Andria Dorsten Ebert, *Corpus Linguistics Just Another Tool in the Judge's Toolbox?*, ABA SCI TECH L., Summer 2020, at 24, 26; *Statutory Interpretation—Interpretive Tools—Sixth Circuit Uses ERISA Dispute to Debate Corpus Linguistics*—Wilson v. Safelite Group, Inc., *930 F.3d 429 (6th Cir. 2019)*, 133 HARV. L. REV. 691, 691 (2019); Shlomo Klapper, *(Mis)judging Ordinary Meaning?: Corpus Linguistics, the Frequency Fallacy, and the Extension-Abstraction Distinction in "Ordinary Meaning" Textualism*, 8 BRIT. J. AM. LEGAL STUD. 327, 365 (2019) [hereinafter Klapper, *(Mis)judging Ordinary Meaning?*]; Neal A. Hoopes, *Reclaiming the Primary Significance Test: Dictionaries, Corpus Linguistics, and Trademark Genericide*, 54 TULSA L. REV. 407, 410 (2019); Thomas R. Lee & Stephen C. Mouritsen, *Judging Ordinary Meaning*, 127 YALE L.J. 788, 879 (2018) [hereinafter Lee & Mouritsen, *Judging Ordinary Meaning*]; Anya Bernstein, *Democratizing Interpretation*, 60 WM. & MARY L. REV. 435, 506 (2018); Kezziah Dale, *Legal Corpus Linguistics: Gambling to Gaming Language Powers and Probabilities*, 8 UNLV GAMING L.J. 233, 252 (2018); James A. Heilpern, D*ialects of Art: A Corpus-Based Approach to Technical Term of Art Determinations in Statutes*, 58 JURIMETRICS J. 377, 393 (2018); Lauren Simpson, *#ordinarymeaning: Using Twitter As A Corpus in Statutory Analysis*, 2017 B.Y.U. L. REV. 487, 517 (2017); Neal Goldfarb, *A Lawyer's Introduction to Meaning in the Framework of Corpus Linguistics*, 2017 B.Y.U. L. REV. 1359, 1415 (2017); Daniel Ortner, *The Merciful Corpus: The Rule of Lenity, Ambiguity and Corpus Linguistics*, 25 B.U. PUB. INT. L.J. 101, 142 (2016); Stephen C. Mouritsen, *Hard Cases and Hard Data: Assessing Corpus Linguistics As an Empirical Path to Plain Meaning*, 13 COLUM. SCI. & TECH. L. REV. 156, 205 (2012).

medicine and marketing have been transformed by data, law now has "its own Big Data revolution."[6]

But this narrative faces a problem: technology can only explain the supply of, not the demand for, data-driven interpretation. Instead of this exogenous, technology-driven narrative, I propose that data-driven interpretation arose because of endogenous developments in law, namely, textualism's objectivity crisis.

In the decades-long dispute over statutory interpretation, objectivity—as defined by an interpretative methodology's resistance to being commandeered for policy preferences—became the currency of these debates: one "wins" these debates to the extent one's methodology is more objective or is more resistant to its users being results-oriented. This is because each side has employed the "objectivity critique"—the accusation that the other has used its interpretative methodology as cover, covertly camouflaged in neutral-sounding terms, to smuggle in its policy preferences. Each side has deployed this critique to great effect.[7] Textualists claim that their interpretative methodology is more objective than purposivism because purposivism gives its users a wide berth to hide their policy preferences; now, textualists are hoisted by their own petard, as anti-textualists have criticized textualism on these same grounds.[8] The result is a stalemate in the interpretation debates and corroded body politic: neither side trusts the other because they think their interpretative method merely a thin veil for politics by other means. This is the crisis of objectivity.

Faced with a dearth of verifiable objectivity, textualists have attempted to thwart the objectivity critique in two ways. The first is the emphatic embrace of a wooden textualism, a hyper-formalism that leaves no room for discretion but recklessly misinterprets the text.[9] This hyper-formalism is self-evidently incorrect.[10]

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[6] Lee Strang, *How Big Data Increases Originalism's Methodological Rigor: Using Corpus Linguistics to Recover Original Language Conventions*, 50 U.C. DAVIS L. REV. 1181 (2017).

[7] *See infra* Section I.A.

[8] *See infra* Section I.A.

[9] Tara Leigh Grove, *Which Textualism?*, 134 HARV. L. REV. 265, 281 (2020) (arguing for formalistic textualism—"a relatively rule-bound method that promises to better constrain judicial discretion and thus a judge's proclivity to rule in favor of the wishes of the political faction that propelled her into power"—and praising the "almost algorithmic feel" of *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020)); Thomas v. Reeves, 961 F.3d 800, 825 (5th Cir. 2020) (Willet, J., concurring) ("In the *Bostock* majority's view, language codified by lawmakers is like language coded by programmers.").

[10] An interpretative method is "correct" to the extent that it is faithful to interpretative meta-norms: either legislative supremacy or the rule of law. A wooden textualism undermines both these values. First, the best way to respect legislative supremacy is to try to be as faithful as possible to the meaning of the words that Congress enacted. By submitting literalism for accuracy, hyper-formalism has Article III undermine Article I. Second, the rule of law, which states that the rule as applied should be as close as possible to

The second method is the focus of this symposium—data-driven or quantitative interpretation. Quantification carries with it a sense of mechanical objectivity. In our society, "empirical" means "scientific" means trustworthy means objective. Data-driven interpretation aims to piggyback on the rhetorical force of quantification to make interpretation more objective by making it more "scientific" and "empirical."[11] It thus will further textualism's cause by solving the objectivity critique.

A. Objectivity in Statutory Interpretation: An Intellectual History

The appeal of quantified interpretation becomes clear in light of the intellectual history of the thirty-year war over the proper way to interpret statutes. The major combatants in this conflict are textualism and purposivism (and, to a lesser extent, intentionalism and pragmatism).

The root of interpretation occurs when judges must adjudicate concrete borderline cases of indeterminate (or "ambiguous") text. When doing so, judges can choose from a number of interpretative options: they can scrutinize the text in question (often by consulting dictionaries), discern (or reconstruct[12]) the statute's purpose, or divine the authors' intentions.[13] Respectively, these methods are called textualism, purposivism, and intentionalism.

The primordial soup from which textualism emerged was the purposivist approaches of the Warren and Burger courts to interpretation. "[T]extualism arose as a challenge to a reigning 'orthodoxy' that dominated American jurisprudence after World War II, and that encouraged judges to take a 'purposivist' approach to the interpretation of statutes."[14] One illustration of this "aggressive, purposivist approach"[15] that prioritized congressional

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the rule on the books, presupposes accuracy. Deliberate or reckless inaccuracy undermines the rule of law: it would separate the rules on the books from the rules that are applied, which would mean that something other than the law governs.

[11] *See infra* Section I.B.

[12] Purposivists argue that a statute's purpose should be reconstructed along the "benevolent presumption . . . that the legislature is made up of reasonable men pursuing reasonable purposes reasonably." HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS 1148 (WILLIAM N. ESKRIDGE, JR. & PHILIP P. FRICKEY eds., 1994).

[13] ROBERT KATZMANN, JUDGING STATUTES 31 (2014) (purposivists argue "that legislation is a purposive act, and judges should construe statutes to execute that legislative purpose").

[14] Caleb Nelson, *A Response to Professor Manning*, 91 VA. L. REV. 451, 455 (2005).

[15] Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 COLUM. L. REV. 1, 15 (2006). *See* William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 624 (1989) ("Justice Scalia's approach, if adopted, would represent a significant change in

intent or objectified purpose over close textual analysis appears in *Citizens to Preserve Overton Park v. Volpe*: "The legislative history . . . is ambiguous . . . because of this ambiguity it is clear that we must look primarily to the statutes themselves to find the legislative intent."[16] One study reported that "[t]he frequency of citing legislative history in statutory cases [in the Supreme Court had reached] . . . 100% in 1981–1982."[17]

> The new textualism gained prominence in the 1980s, during the administration of Ronald Reagan. The judges who would make textualism famous—Frank Easterbrook of the Seventh Circuit, James Buckley and Kenneth Starr of the D.C. Circuit, Alex Kozinski of the Ninth Circuit, and particularly D.C. Circuit Judge and later Justice Scalia—were all Reagan appointees.[18]

"By the end of the 1980s, the Reagan and first Bush Office of Legal Policy had developed a comprehensive defense of textualism in statutory interpretation."[19]

The textualists' weapon of choice was the objectivity critique. "The normative appeal of textualism lies in its *objectivity*: by focusing on text, context, and canons of construction, textualism offers protection against ideological judging—a way to separate law from politics."[20]

"Originalism and textualism were united in their appeal to judicial restraint and their rejection of the methodological status quo. Proponents of the theories blamed the reigning 'judicial activism' for myriad social ills. Judicial restraint defined the Republican Party's vision for the federal judiciary."[21] While "such arguments tended to focus on constitutional originalism and the big-ticket constitutional issues of the time—abortion, crime control, affirmative action"[22]—the revolt against judicial activism extended to statutory interpretation as well.

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the way the Court writes its statutory interpretation decisions, and probably even the way the Court conceptualizes its role in interpreting statutes.").

[16] Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 412 n.29 (1971).

[17] ANTONIN SCALIA & BRYAN GARNER, READING LAW 374 (2012) (citing Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 197–99 (1982)).

[18] Margaret H. Lemos, *The Politics of Statutory Interpretation*, 89 NOTRE DAME L. REV. 849, 891–92 (2013) (reviewing SCALIA & GARNER, *supra* note 17) (citing Eskridge, Jr., *supra* note 15, at 647 nn.94–98 (citing textualist opinions by Reagan-appointed circuit court judges)).

[19] *Id.* at 894–95 (citing OFFICE OF LEGAL POLICY, U.S. DEP'T OF JUSTICE, USING AND MISUSING LEGISLATIVE HISTORY: A RE-EVALUATION OF THE STATUS OF LEGISLATIVE HISTORY IN STATUTORY INTERPRETATION (1989)).

[20] *Id.* at 908 (emphasis added).

[21] *Id.* at 895.

[22] *Id.* at 897 (citing Joseph Sobran, *Un-packing the Courts*, NAT'L REV., Apr. 11, 1986, at 32 (criticizing Warren and Burger Court decisions on "segregation, abortion, pornography, school prayer, and the like")).

> More than two decades later, Justice Scalia and Bryan Garner, in their book *Reading Law*, echoed those arguments when they assert that '[t]he descent into social rancor over judicial decisions is largely traceable to nontextual means of interpretation, which erode society's confidence in a rule of law that evidently has no agreed-on meaning.'[23]

At its core, the objectivity critique rests on the permeability in the American context between politics and law. As opposed to other jurisdictions, such as Germany, where there is truly a separation between law and politics, in the United States, the separation between law and politics is often not seen to exist. Into this breach stepped the textualists.

The objectivity critique had negative and positive aspects. On the negative side, textualists claimed that non-textualist judges are outcomes-oriented: they use their interpretative methods to further their political agendas. Textualists believed that judges should be constrained to follow the plain meaning of the statute because they do not trust judges to look beyond the text.[24] They feared that judges will insert their own personal political views in the name of effectuating legislative purpose.[25] "The judges' use of legislative history (especially when it alters the apparent textual meaning) increases their discretion to make illegitimate policy choices."[26] As Justice Scalia wrote, "the manipulability of legislative history has not replaced the manipulabilities of these other techniques; it has augmented them."[27] "By broadening the inquiry beyond the relatively concrete one of what the actual words of the statute mean, use of legislative history permits the Court to justify a broader range of answers and makes it easier for the

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[23] *Id.* at 895 (quoting SCALIA & GARNER, *supra* note 17, at xxviii).

[24] *See* Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 17 (1997) (If judges focus on "genuine but unexpressed legislative intent," then judges also "will in fact pursue their own objectives and desires"); Eskridge, Jr., *supra* note 15, at 674 (According to the new textualists, "a text alone . . . is a more concrete inquiry better constrain the tendency of judges to substitute for that of Congress.").

[25] *See, e.g.*, Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J. L. & PUB. POL'Y 59, 62 (1988) ("The use of original *intent* rather than an objective inquiry into the reasonable import of the language permits a series of moves. Each move greatly increases the discretion, and therefore the power, of the court.").

[26] *See* Eskridge, Jr., *supra* note 15, at 648. *See* Neil H. Buchanan & Michael C. Dorf, *A Tale of Two Formalisms: How Law and Economics Mirrors Originalism and Textualism*, 106 CORNELL L. REV. 591, 624 (2021) ("In this view, statutes reflect compromises, and so the purposivist idea of giving effect to a statute's underlying public-regarding purpose should be rejected. There is no such thing as a statute's public-regarding purpose, public-choice-inflected textualists say; there is only the aggregation of forces that bear on venal legislators seeking re-election by a large enough slice of the rent-seeking and otherwise selfish public.")

[27] *See* Scalia, *Common-Law Courts in a Civil-Law System*, *supra* note 24, at 36.

Justices to write their own preferences into the statute."[28] In the words of Judge Leventhal, citing legislative history is like "looking over a crowd and picking out your friends."[29] And some "friends" are imaginary friends, because the legislature, captured by powerful special interests, plant some bogus evidence.[30] In short, looking for purpose provided cover for judges to include their personal preferences and biases sub rosa: "The practical 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."[31]

Positively, textualists argued that textualism actively promotes objectivity.[32] Textualism is presented as objective and rule-bound: "statutory interpretation is governed as absolutely by rules as anything else in the law."[33] Justice Scalia argued that "most interpretive questions have a right answer."[34] If law students were better trained in the "skills of textual

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[28] *See* Eskridge, Jr., *supra* note 15, at 648; *see id.* n.104 (citing Ken Starr, *Observations About the Use of Legislative History*, 1987 DUKE L.J. 371, 376 ("It is often said that one generally finds in the legislative history only that for which one is looking."); Wallace v. Christensen, 802 F.2d 1539, 1559 (9th Cir. 1986) (Kozinski, J., concurring) ("The fact of the matter is that legislative history can be cited to support almost any proposition, and frequently is.").

[29] *See* Wald, *supra* note 17, at 214 (attributing this quip to Judge Harold Levanthal).

[30] *See* Frank H. Easterbrook, *Statutes' Domains*, U. CHI. L. REV. 533, 546 (1983); Antonin Scalia & John F. Manning, *A Dialogue on Statutory and Constitutional Interpretation*, 80 GEO. WASH. L. REV. 1610, 1612 (2012) (Justice Scalia: "[M]y objection goes beyond that. Legislative history is not just unlikely to reflect the genuine purpose of Congress; it is increasingly likely to portray a phony purpose . . . . [F]rankly, I don't care what the legislators' purpose is beyond that which is embodied in the duly enacted text.").

[31] *See* Scalia, *Common-Law Courts in a Civil-Law System*, *supra* note 24, at 17–18 ("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—which is precisely how judges decide things under the common law.") This is not dissimilar from the instruction given by the press secretary to Chicago's first Mayor Daley to local newspapers: "Don't print what he said. Print what he meant." Trevor Jensen, *Earl Bush: 1915–2006*, CHI. TRIB. (July 21, 2006), https://www.chicagotribune.com/news/ct-xpm-2006-07-21-0607210117-story.html [https://perma.cc/XWH6-MN5V].

[32] *See, e.g.*, SCALIA & GARNER, *supra* note 17, at 16 (arguing that textualism "rel[ies] . . . on the most objective criterion available: the accepted contextual meaning that the words had when the law was enacted").

[33] *Id.* at 61 (quoting JOEL PRENTISS BISHOP, COMMENTARIES ON THE WRITTEN LAWS AND THEIR INTERPRETATION § 2, at 3 (1882)). This relates to determinacy: the more courts confine judicial interpretation of statutes to their "ordinary meaning," the more courts constrain the judge's ability. As Professor Lemos insightfully notes: "The very format of the book, with the bulk of its discussion broken out into numbered maxims, seems designed to reinforce that perspective. So, too, does the authors' habit of referring to the book as a 'treatise.'" *See* Lemos, *supra* note 18, at 885 & n.185 (quoting SCALIA & GARNER, *supra* note 17, at 6 ("One object of this treatise is to remove a facile excuse for judicial overreaching—the notion that words can have no definite meaning. As we hope to demonstrate, most interpretive questions have a right answer. Variability in interpretation is a distemper.")).

[34] *See* SCALIA & GARNER, *supra* note 17, at 6.

interpretation,"[35] the "problems that plague modern statutory interpretation would be ameliorated."[36]

The objectivity critique was devastating. The legal landscape today is dominated by text, if not textualism. No judge could conceivably write a line like the one in *Overton Park* which views text so lightly. A focus on text is not necessarily a new concept in American jurisprudence.[37] But it is the vaunted place of text, over and above legislative intentions and purpose, which is new.[38] Now, the Supreme Court,[39] inferior federal courts, state courts,[40] and agencies[41] begin their analysis with analysis of the text. Further, they often end their analysis there as well. And

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[35] *Id.* at 7.

[36] *See* Lemos, *supra* note 18, at 885–86; *see id.* at 886 n.188 (citing SCALIA & GARNER, *supra* note 17, at 31 ("Through accurate knowledge of language and proper education in legal method, lawyers ought to have a shared sense of what meanings words can bear and what linguistic arguments can credibly be made about them."); *id.* at 33 ("The [textualist] endeavor requires aptitude in language, sound judgment, the suppression of personal preferences regarding the outcome, and, with older texts, historical linguistic research.").

[37] According to Justice Oliver Wendell Holmes Jr., the chief task for the interpreter of statutes is to determine "what [the statutory] words would mean in the mouth of an ordinary speaker of English, using them in the circumstances in which they were used . . . .We do not inquire what the legislature meant; we ask only what the statute means." Oliver Wendell Holmes Jr, *The Theory of Legal Interpretation*, 12 HARV. L. REV. 417, 417–19 (1899). Like the "reasonable person" in the law of torts, the "normal speaker" is "simply another instance of the externality of law." *Id.* For similar statements by earlier leading lights of American law, see, e.g., Gibbons v. Ogden, 22 U.S. 1, 71 (1824) (Marshall, C.J.); JAMES KENT, COMMENTARIES ON AMERICAN LAW 432 (1826); JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 157–58 (1833). However, each of these figures relied on legislative history. As Chief Justice Marshall put it, "where the mind labours to discover the design of the legislature, it seizes every thing from which aid can be derived." *See Lawrence M. Solan, Learning our Limits: The Decline of Textualism in Statutory Cases*, 1997 WIS. L. REV. 235, 258–59 (1997). Professor Eskridge also points out how Holmes relied on legislative history. *See* Eskridge, Jr., *supra* note 15, 647, n.100.

[38] *See* Eskridge, Jr., *supra* note 15.

[39] *See* Klapper, *(Mis)judging Ordinary Meaning?*, *supra* note 5, at 336 n.25 (collecting cases, including Clark v. Rameker, 573 U.S. 122, 127 (2014) ("[W]e give the term its ordinary meaning."); Bond v. U.S., 572 U.S. 844, 861, (2014) ("In settling on a fair reading of a statute, it is not unusual to consider the ordinary meaning of a defined term . . . ."); Mohamad v. Palestinian Auth., 566 U.S. 449, 454 (2012) ("Because the [Act] does not define the term 'individual,' we look first to the word's ordinary meaning"; as such, "individual," as used in the Torture Victim Protection Act, does not include an organization); Taniguchi v. Kan Pac. Saipan, Ltd., 566 U.S. 560, 568 (2012) (judging the relevant statutory term by how "the word is *ordinarily* understood in that sense" (emphasis in original)); Mac's Shell Serv., Inc. v. Shell Oil Prods. Co., 559 U.S. 175, 182 (2010) ("We . . . give [the relevant] terms their ordinary meanings."); Exxon Mobil Corp. v. Allapattah Services, Inc., 545 U.S. 546, 568 (2005) ("As we have repeatedly held, the authoritative statement is the statutory text, not the legislative history or any other extrinsic material."); Asgrow Seed Co v. Winterboer, 513 US 179, 187 (1995) ("When terms used in a statute are undefined, we give them their ordinary meaning.").

[40] *See, e.g.*, Apple, Inc. v. Superior Court, 292 P.3d 883, 885 (Cal. 2013); Cassel v. Superior Court, 244 P.3d 1080, 1087–88 (Cal. 2011); People v. Albillar, 244 P.3d 1062, 1067–69 (Cal. 2010); Williams v. State, 121 So.3d 524, 529–34 (Fla. 2013); Hampton v. State, 103 So. 3d 98, 110–13 (Fla. 2012); Smitter v. Thornapple Township, 833 N.W.2d 875, 880–83 (Mich. 2013); Barr v. City of Sinton, 295 S.W.3d 287, 297–99 (Tex. 2009).

[41] *See* Christopher J. Walker, *Inside Agency Statutory Interpretation*, 67 STAN. L. REV. 999, 1030–31 (2015) (reporting that federal agencies interpreting statutes focus on the "ordinary meaning" of the words enacted into law).

even when looking at the purpose, judges see text as setting the boundaries of interpretive acceptability.[42] "Even those who criticize the normative value of the ordinary meaning rule agree that it is descriptively ubiquitous and forms the 'standard picture' of statutory interpretation."[43] Attention to text has reached the level of diagramming sentences.[44]

But as textualism's fortunes have risen in the courts, textualism's opponents have counter-attacked using the very same objectivity critique. Again, this critique has negative and positive aspects.

On the negative side, critics have claimed that textualism does not breed objectivity.[45] Even if one endorses the value of determinacy, they argue that judges cannot find such determinacy in the mere "communicative content" or "ordinary meaning" of statutory text.[46] That is simply too much to ask of language. We have known since Aristotle that given the open-textured nature of language, even the smartest legislature cannot predict every possible application of a statute; judges will have to make judgment calls in specific cases or controversies.[47] Indeed, given the number of disagreements *among* textualists as to the meaning of a text, it seems evident that the text alone is indeterminate. Indeed, "Scalia and Garner come close to conceding textualism's indeterminacy

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[42] Not all textualists are bound to the text. In my view, there are two types of textualism: inclusive textualism and exclusive textualism (paralleling inclusive and exclusive legal positivism). The inclusive version of textualism says that one starts with text but then consider other evidence of meaning including precedent and history. The exclusive textualist, on the other hand, says that text is the beginning and the end of the matter; the interpreter should be blind to other context, particularly legislative history.

[43] *See* Klapper, *(Mis)judging Ordinary Meaning?*, *supra* note 5, at 337 (citing Mark Greenberg, *The Standard Picture and Its Discontents*, *in* 1 OXFORD STUDIES IN PHILOSOPHY OF LAW 39, 48 (Leslie Green & Brian Leiter eds., 2011) (describing the "Standard Picture"). *See* William Baude & Stephen E. Sachs, *The Law of Interpretation*, 130 HARV. L. REV. 1079, 1086 (2017) (speaking of the "Standard Picture," or the "view that we can explain our legal norms by pointing to the ordinary communicative content of our legal texts," in other words "an instrument's meaning as a matter of language").

[44] *See* Artis v. District of Columbia, 138 S. Ct. 594, 609–10 (2018) (Gorsuch, J., dissenting).

[45] Richard Posner, *Statutory Interpretation—In the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 817 (1983).

[46] *See* Richard H. Fallon, Jr., *The Meaning of Legal "Meaning" and Its Implications for Theories of Legal Interpretation*, 82 U. CHI. L. REV. 1235 (2015) (asserting that there accordingly is "no single, linguistic fact of the matter concerning what statutory or constitutional provisions mean"); Cass R. Sunstein, *There Is Nothing that Interpretation Just Is*, 30 CONST. COMMENT. 193, 194–95 (2015) (identifying possible notions of meaning, including authorial intention, public meaning, moral reading, and others).

[47] *See* Klapper, *(Mis)judging Ordinary Meaning?*, *supra* note 5, at 331 n.1 (citing Aristotle); Jonathan R. Siegel, *The Legacy of Justice Scalia and his Textualist Ideal*, 85 GEO. WASH. L. REV. 857, 907 (2017) ("The legislature, acting in advance, can never anticipate every situation to which its statutes will apply, and it therefore writes general language that covers some situations that legislators would probably not wish to cover if these situations had occurred to them. [Further,] it can never catch every drafting error in its work product.").

when they argue that its advantage over competing methods lies in its aspiration to objectivity and constraint."[48] What, then, fills these gaps? Anti-textualists argue that either the purpose or the legislative history can do so. But what about textualists? Though textualists may claim otherwise, anti-textualists argue that textualists fill the gaps using their own biases and values. They perform the same covert filling-in trick that textualists critiqued anti-textualists for. Anti-textualists argue that "interpreters' perception of the 'ordinary' meaning of text will be influenced by personal factors that will differ from judge to judge"[49] and that textualists look around dictionary definitions and "pick their friends." "Indeed, one can argue that textualists are *less* bound by law than judges who seek guidance in such sources as legislative history."[50] Instead, the critique is that textualists are as outcomes-driven as other judges, and covertly use their interpretative methods to further *their* political agendas.[51]

In addition to the negative arguments, anti-textualists have argued that non-textualism breeds more objectivity. The text alone offers a number of interpretative options. By narrowing down these options, non-textual sources could serve to constrain judicial discretion.[52] "Non-textualist judges

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[48] *See* Lemos, *supra* note 18, at 889 (citing SCALIA & GARNER, *supra* note 17, at 22 ("The common response of purposivists and consequentialists to criticisms of their theories is that textualism, with its crosscutting canons and competing principles, does not always provide a clear answer and hence can also be subjectively manipulated. Yet there is a world of difference between an objective test (the text)—which sometimes provides no clear answer, thus leaving the door open to judicial self-gratification—and tests that invite judges to say that the law is what they think it ought to be.")).

[49] *Id.* at 880.

[50] *See* Buchanan & Dorf, *supra* note 26, at 34 n.79 (citing William N. Eskridge, Jr., *The New Textualism and Normative Canons*, 113 COLUM. L. REV. 531, 536 (2013) (reviewing SCALIA & GARNER, *supra* note 17) (arguing that "the actual effect of the Scalia-Garner canons would not be greater judicial restraint but instead a relatively less constrained and somewhat more antidemocratic textualism")).

[51] *See* Victoria Nourse, *Textualism 3.0: Statutory Interpretation After Justice Scalia*, 70 ALA. L. REV. 667, 669 (2019) (arguing that "there is no plain meaning to the text" and that the "new, new, new" textualists chronically interpret text out of context); Victoria Nourse, *Picking and Choosing Text: Lessons for Statutory Interpretation from the Philosophy of Language*, 69 FLA. L. REV. 1409, 1409 (2017) (arguing that "in practice, textualists often create meaning rather than find it").

[52] *See* Lemos, *supra* note 18, at 889 (citing Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546, 572 (2005) (Stevens, J., dissenting) ("I believe that we as judges are more, rather than less, constrained when we make ourselves accountable to all reliable evidence of legislative intent."); Koons Buick Pontiac GMC, Inc. v. Nigh, 543 U.S. 50, 65 n.1 (2004) (Stevens, J., concurring) ("We execute our duty as judges most faithfully when we arrive at an interpretation only after seeking guidance from every reliable source.") (internal quotation marks omitted); *see also* Peter L. Strauss, *The Courts and the Congress: Should Judges Disdain Political History?*, 98 COLUM. L. REV. 242, 252–53 (1998) ("Language is imprecise and manipulable. Often we can do no better than identify a possible range of meanings a particular expression evokes . . . .Once we have identified a range of possible meanings, however, we are outside the realm where language alone can answer the question of meaning

therefore can claim to be even more constrained than their textualist colleagues, because their opinions must make sense of more evidence, leaving them less room to maneuver."[53]

> Requiring courts to justify their interpretations by reference to the hard facts of legislative history, they argued, would prevent judges from dressing up their own policy views in the garb of legislative intent. Said James Landis, an early proponent of legislative history: 'Strong judges are always with us. But the effort should be to restrain their tendencies, not to give them free rein.'[54]

These claims have hit home. Anti-textualists have fought textualists to a standstill, and textualists "have conceded that textualism's early claims to determinacy were overstated."[55] Instead, textualists defend "second-generation textualism," in which judges "have a duty to enforce clearly worded statutes as written, even if there is reason to believe that the text may not perfectly capture the background aims or purposes that inspired their enactment."[56] If textualism's ambit—the area where one looks to the text and only the text—is limited to "clearly worded statutes," it has not much force whatsoever. Most cases that reach courts deal with indeterminate statutes. "[T]he point of an interpretive philosophy is to address cases in which the law is unclear."[57] If textualism applies only when the text is clear, it has not much to say at all.

Thus, statutory interpretation finds itself in a "muddle."[58] The "divide between textualism and its competitors has narrowed

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for us. Why would we prefer a judge operating within such a range to be indifferent or oblivious to information about the political history of that legislation?").

[53] *See* Lemos, *supra* note 18, at 889. At *id.* at n.201, Lemos cites Bill Buzbee' analogy of data points:

> The primary statute's text creates data points to which any interpretation must conform . . . .Legislative history data points will frequently provide different potential arguments about appropriate interpretations, but when a judge who considers historical context interprets a disputed provision, that judge will need to examine text, historical context, and legislative history and then craft a judicial response that is defensible, taking all of these data points into account . . . .Mere text-to-text comparisons, in contrast, provide virtually no constraining data points that a judge must evaluate and explain in reaching a result.

William W. Buzbee, *The One-Congress Fiction in Statutory Interpretation*, 149 U. PA. L. REV. 171, 239 (2000). Lemos also cites Thomas W. Merrill, *Textualism and the Future of the Chevron Doctrine*, 72 WASH. U. L.Q. 351, 373 (1994) ("Having fewer tools to work with, the textualist . . . necessarily has to become more imaginative in resolving questions of statutory interpretation.").

[54] SCOTT SHAPIRO, LEGALITY 360 (2011) (quoting James Landis, *A Note on "Statutory Interpretation,"* 43 HARV. L. REV. 891 (1930)).

[55] *See* Buchanan & Dorf, *supra* note 26, at 35.

[56] John F. Manning, *Second-Generation Textualism*, 98 CAL. L. REV. 1287, 1290 (2010).

[57] *See* Buchanan & Dorf, *supra* note 26, at 35.

[58] *See* Fallon, Jr., *supra* note 46; Molot, *supra* note 15, at 4 ("Textualism has outlived its utility as an intellectual movement" because of the "convergence" of textualism and other approaches).

substantially. As Scalia and Garner emphasize, virtually everyone agrees that interpretation must begin with the relevant text. Moreover, most judges and theorists agree that interpretation must end with the text when the meaning is clear."[59] Most also agree on using canons.[60] Meanwhile, textualists recognize that "[t]he evident purpose of what a text seeks to achieve is an essential element of context that gives meaning to words."[61] Purposivism has snuck in through the textualists' back door through "pragmatic reasoning, as well as traditional textual canons such as noscitur a sociis and the whole act rule."[62]

> For their part, purposivists concede that the statute's text is the best indication of its purpose. Legislative history remains the primary source of disagreement between textualists and non-textualists, but even that divide should not be overstated. Judges rarely will permit legislative history to trump clear text, and legislative history itself will usually allow various conclusions. Even Scalia and Garner endorse the use of legislative history to illustrate 'linguistic usage' and to confirm that seemingly unthinkable statutory results were in fact not contemplated.[63]

Most judges practice a form of eclecticism, selecting various interpretative modalities at different times, rather than using a consistent methodology.[64] The impasse seems livable, if not ideal. Indeed, then-Judge Kavanaugh's endorsement of a "best reading" approach can be seen as a way of muddling through this impasse.[65]

Justice Kagan has famously claimed that "we are all textualists now." But that's not entirely true. Whether she intended it or not—and likely she did not, given that she is an exclusive textualist[66]—this phrase echoes Milton Friedman saying

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[59] *See* Lemos, *supra* note 18, at 859.

[60] *See* John F. Manning, *What Divides Textualists From Purposivists?*, 106 COLUM. L. REV. 70, 70 (2006) (answering: not much); *see id.* at 90 (discussing purposivists' embrace of the canons).

[61] *See* SCALIA & GARNER, *supra* note 17, at 20; Manning, *supra* note 60, at 75 ("In any case posing a meaningful interpretive question, the very process of ascertaining textual meaning inescapably entails resorting to extrastatutory—and thus unenacted—contextual cues.").

[62] Anita S. Krishnakumar, *Backdoor Purposivism*, 69 DUKE L.J. 1275, 1275 (2020).

[63] *See* Lemos, *supra* note 18, at 859.

[64] *See* Abbe R. Gluck & Richard A. Posner, *Statutory Interpretation on the Bench: A Survey of Forty-Two Judges on the Federal Courts of Appeals*, 131 HARV. L. REV. 1298, 1302 (2018) (describing predominant approach among federal appellate judges as "intentional eclecticism"); *see also* William N. Eskridge, Jr., & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 321–22 (1990) ("Many commentators argue that judicial interpretation is, or at least ought to be, inspired by grand theory. We think these commentators are wrong, both descriptively and normatively: Judges' approaches to statutory interpretation are generally eclectic, not inspired by any grand theory, and this is a good methodology.").

[65] Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV L REV 2118, 2134–44 (2016) (reviewing KATZMANN, *supra* note 13).

[66] *See supra* note 42 (describing the difference between exclusive and inclusive textualism).

that "we are all Keynesians now": it means more to say that Keynesiasm then, and textualism now, do not mean much.

B. Quantification as Objectivity

This is the context which gave birth to quantified interpretation: a context where objectivity is the weapon of choice, and if textualism can become more determinate and objective, it will score a blow in the interpretation wars.

Data-driven interpretation is one response to textualism's crisis of objectivity. Quantitative interpretation advocates "have touted the ability of corpus analysis to minimize subjectivity in textual interpretation."[67] They "frame the utility of corpus linguistics techniques in terms of a critique of other methods of interpretation, which are often derided as 'simple cherry-picking,' 'subjective,' or 'idiosyncratic.'"[68] In contrast with these indeterminate methods, corpus users have argued, "corpus linguistics techniques can 'help us deliver on the promise of an objective inquiry' by reducing the subjectivity that plagues the process of legal interpretation."[69] Article titles promise that corpus linguistics will make interpretation more "scientific"[70] and "empirical."[71] Purveyors of surveys as interpretative tools have made the same claims, often asserting that surveys are superior because they are *more* objective than legal corpus linguistics.

Why quantification? Quantification lends an aura of objectivity when trust is low. In the words of Ted Porter:

> What is special about the language of quantity?
>
> My summary answer to this crucial question is that quantification is a technology of distance . . . reliance on numbers and quantitative manipulation minimizes the need for intimate knowledge and personal trust. Quantification is well suited for communication that goes beyond the boundaries of locality and community. A highly disciplined discourse helps to produce knowledge independent of the particular people who make it. [This] implies nothing about truth to nature. It has more to do with the exclusion of judgment, the struggle against subjectivity . . . . **In science, as**

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[67] Evan Zoldan, *Corpus Linguistics and the Dream of Objectivity*, 50 SETON HALL L. REV., 401, 407.

[68] *Id.* at 409.

[69] *Id.*

[70] Clark D. Cunningham & Jesse Egbert, *Scientific Methods for Analyzing Original Meaning: Corpus Linguistics and the Emoluments Clause* (Ga. St. Univ. Coll. Law, Legal Studies Research Paper No. 2019-02, 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract id=3321438 [https://perma.cc/HWD4-KEPW].

[71] James C. Phillips, Daniel M. Ortner & Thomas R. Lee, *Corpus Linguistics & Original Public Meaning: A New Tool to Make Originalism More Empirical*, 126 YALE L.J.F. 21, 23–24 (2016).

> **in political and administrative affairs, objectivity names a set of strategies for dealing with distance and distrust.**[72]

Quantification offers "mechanical" objectivity: mechanical because it does not change based on who makes the decision; it "produce[s] knowledge independent of the particular people who make it."[73] This objectivity removes any element of human judgement.[74] "If there is a very clear and rigid quantitative form with which to process information, regardless of who processes that information, the same outcome should result."[75] Consider the multiple-choice test.

> [N]o individual judgment is required to determine whether an answer is correct or not . . . .The tests are designed so that there is one definitively correct answer for each question. Thus, there is no need for individual judgment on the correctness of a given answer . . . .Regardless of who grades the tests, the same score should result for each test.[76]

That is an ideal instance of mechanical objectivity.

This mechanical objectivity is desired when it "is believed that judgements, no matter how carefully reasoned and how much expertise and skill are relied upon, have an element of subjectivity which undermines their objectivity."[77]

> The appeal of numbers is especially compelling to bureaucratic officials who lack the mandate of a popular election, or divine right. Arbitrariness and bias are the most usual grounds upon which such officials are criticized. A decision made by the numbers (or by explicit rules of some other sort) has at least the appearance of being fair and impersonal. Scientific objectivity thus provides an answer to a moral demand for impartiality and fairness. **Quantification is a way of making decisions without seeming to decide.** Objectivity lends authority to officials who have very little of their own.[78]

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[72] THEODORE M. PORTER, TRUST IN NUMBERS: THE PURSUIT OF OBJECTIVITY IN SCIENCE AND PUBLIC LIFE ix (1995) (emphasis added).

[73] *Id* at ix.

[74] *See* Lorraine Daston & Peter Galison, *The Image of Objectivity*, 40 REPRESENTATIONS 81, 98 (1992) ("Finally, we come to the full-fledged establishment of mechanical objectivity as the ideal of scientific representation. What we find is that the image, as standard bearer of is objectivity is tied to a relentless search to replace individual volition and discretion in depiction by the invariable routines of mechanical reproduction.").

[75] HEATHER DOUGLAS; SCIENCE, POLICY, AND THE VALUE-FREE IDEAL 125 (2009) (writing that this type of mechanical or "procedural" objectivity "allows society to impose uniformity on processes, allowing for individual interchangeability and excluding individual idiosyncrasies or judgments from processes").

[76] *Id*.

[77] STEPHEN GAUKROGER, OBJECTIVITY: A VERY SHORT INTRODUCTION, 77 (2012).

[78] *See* PORTER, *supra* note 72, at 8 (emphasis added).

Replace "bureaucratic officials" with judges, and the story of data-driven interpretation is explained.[79] "Quantification is a way of making decisions without seeming to decide": that is one way of avoiding the objectivity critique. Whereas language and arguments are malleable, as good lawyers can paper them over to reach any ends, data are less malleable (or seem to be). Given that interpretation is fundamentally a matter of the "economy of trust,"[80] and given the importance of the objectivity critique in the past few decades, it makes perfect sense why a data-driven mechanical objectivity would be appealed to in order to deflect the charge that textualism lacks objectivity.

This history contains two warnings. First, while objectivity is an unimpeachable value, one must make sure it does not undermine accuracy. All quantitative measures are faulty; some are useful. Any measure "necessarily involve[s] a loss of information"[81] This is doubly true with something as complicated and indeterminate as language.[82] We should treat interpretative tools as just that—tools—and not fall prey to the McNamara fallacy:

> The first step is to measure whatever can be easily measured. This is OK as far as it goes. The second step is to disregard that which can't be easily measured or to give it an arbitrary quantitative value. This is artificial and misleading. The third step is to presume that what can't be measured easily really isn't important. This is blindness. The fourth step is to say that what can't be easily measured really doesn't exist. This is suicide.[83]

I would be skeptical of any tool that purported to perfectly capture language use, much less any tool that judges

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[79] Porter suggests that the United States "relies on rules to control the exercise of official judgment to a greater extent than any other industrialized democracy." *Id.* at 194.

[80] *See* SHAPIRO, *supra* note 54, at 331–52.

[81] *Id.* at 44.

[82] *See* H. L. A. HART, THE CONCEPT OF LAW 120–32 (1961) (describing the "open texture" of language).

[83] DANIEL YANKELOVICH, CORPORATE PRIORITIES: A CONTINUING STUDY OF THE NEW DEMANDS ON BUSINESS (1972); *see also* Frank H. Knight, *"What is Truth" in Economics?*, 43 Journal of Political Economy 1, n.10 (1940) ("The saying often quoted from Lord Kelvin (though the substance, I believe, is much older) that 'where you cannot measure your knowledge is meagre and unsatisfactory,' as applied in mental and social science, is misleading and pernicious" because "these sciences are not sciences in the sense of physical science, and cannot attempt to be such, without forfeiting their proper nature and function . . . .In th[ese] field[s], the Kelvin dictum very largely means in practice, 'if you cannot measure, measure anyhow!' That is, one either performs some other operation and calls it measurement or measures something else instead of what is ostensibly under discussion, and usually not a social phenomena. To call averaging estimates, or guesses, measurement seems to be merely embezzling a word for its prestige value. And it might be pointed out also that in the field of human interests and relationships much of our most important knowledge is inherently non-quantitative, and could not conceivably be put in quantitative form without being destroyed. Perhaps we do not 'know' that our friends really are our friends; in any case an attempt to measure their friendship would hardly make the knowledge either more certain or more 'satisfactory.'"). I believe language comprehension to be an area where "our most important knowledge is inherently non-quantitative, and could not conceivably be put in quantitative form without being destroyed."

could understand, much less operate. We must make sure that quantification serves accuracy, not that accuracy is sacrificed for quantification.

Second, fundamentally, the challenge is truly a distrustful culture. The solution is to focus on integrity and honesty over objectivity and determinacy. "Recent history suggests that the pursuit of mechanical objectivity cannot suffice to settle public issues in conditions of pervasive distrust."[84] Even as anti-textualists have evened the playing field on the best interpretative methodology, they have ingrained objectivity as the interpretative *summum bonum*. By incorporating its yardstick of a meta-interpretative norm—that is, objectivity and determinacy—they have inadvertently incorporated its presuppositions of non-bias being the proper method by which to evaluate an interpretative methodology. The more distrust brewing, the more textualism reigns ascendant[85]—but, more importantly, the more divided our discourse and polity becomes. If the other side's interpretative methodology is not objective, then it is not just wrong—it is illegitimate. When both sides think that the other is being intentionally not objective, then each side delegitimizes the other.[86] Thus one could argue that the anti-textualists might have won the battle—or at least fought it unto a standstill—but the textualists won the war. But the war has gone a long way towards making our civic environment less habitable.

II. DRAWBACKS OF SURVEYS

The previous Part showed that interpreters look to data-driven tools to provide objectivity in interpretation. But can these tools provide the sought-after objectivity? This Part argues that these tools will inevitably fall short of the hoped-for objectivity.

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[84] *See* PORTER, *supra* note 72, at 215.

[85] *See* SHAPIRO, *supra* note 54, at 331–52 (debates over the proper way to interpret texts center around the legal system's "economy of trust," and textualism best matches a culture of distrust).

[86] *See* Donald B. Verrilli, Jr., *The Rule of Law: More Than Just A Law of Rules*, 97 NEB. L. REV. 925, 929 (2019) ("It doesn't have to be this way. If each side of this debate afforded the other a presumption of good faith, I think the tenor of our discourse would be quite different. The debate would go something like this. The textualists and originalists would acknowledge that their approach has its shortcomings, can't answer all questions and sometimes produces results that don't make a lot of sense, but they would argue that their approach beats the alternative because without its constraints there is just too much risk that judges will impose their own policy preferences and value judgments rather than respecting the will of the People reflected in the duly enacted text. Those with a different approach—let's call them purposivists—would acknowledge the risk of subjectivity and value imposition, and would acknowledge that it sometimes happens, but would argue that their approach produces outcomes that more sensibly reflect what Congress was trying to achieve in a statute or that most sensibly reflect what a basic constitutional commitment means in a world very different from that of the Framers, and that the constraining force of precedent and established process norms limit the risk of subjectivity and value imposition.").

There are currently two main tools of data-driven interpretation: legal corpus linguistics and surveys. Corpus linguistics has its promoters and detractors in this symposium: Stephen Mouritsen, Jesse Egbert, Brian Slocum, and Stephen de Gries thoughtfully address the issues corpus linguistics raises.[87] Kevin Tobia and John Mikhail (and Slocum and Egbert as well) tout the benefits of surveys.[88] However, surveys are not beyond reproach, and because the criticisms of surveys are not otherwise addressed in this symposium, this essay will do so here.

This Part outlines two weaknesses of surveys. First, surveys face execution problems: even assuming surveys are conceptually sound, there are significant problems using them in practice. Second, surveys face conceptual problems: leaving the practical problems aside, surveys rely on problematic conceptual assumptions.

A. Execution Problems

1. Context

While surveys have a leg up on corpus linguistics insofar as they are flexible enough to add context, they still face a context problem. This problem is so profound that it threatens to entirely undermine the utility of surveys as an interpretative tool.

Context matters. Slight changes in context have a huge effect in outcomes.[89] The decision of the context to give puts a thumb sharply on the scales of what the answer should be. However, it is not so easy to provide "objective" content—in the form of "the factual background of those cases and precise language of the statute in question"—for a number of reasons. First, the context is often disputed or invisible. Second, even if one could discern the true, objective context, it is not possible to provide it in surveys because of space constraints as well as participants' lack of legal training.

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[87] *See generally* Stephen C. Mouritsen, *Natural Language and Legal Interpretation*, 86 BROOK. L. REV. 533 (2021) (promoting the virtues of the lay method of corpus linguistics (using addition based on data gleaned from the point-and-click interface of the Brigham Young University (BYU) corpora)); Stefan Th. Gries, *Corpus Linguistics and the Law: Extending the Field from a Statistical Perspective*, 86 BROOK. L. REV. 321 (2021) (criticizing the lay method and promote the expert method (using advanced computational methods on raw data)); Brian G. Slocum, *Big Data and Accuracy in Statutory Interpretation*, 86 BROOK. L. REV. 357 (2021) (same); Egbert, (that the relationship between surveys and corpora is not conflict but confluence).

[88] *See generally* Kevin Tobia & John Mikhail, *Two Types of Empirical Textualism*, 86 BROOK. L. REV. 461 (2021) (promoting the benefits of surveys over corpora).

[89] *See supra* Section II.B.

Context is often disputed. Consider the case of *Yates v. United States*.[90] In that case, a federal agent caught Captain John Yates fishing undersized red grouper in violation of a federal conservation statute. After the officer departed, Yates ordered a crew member to throw the fish overboard. For this, Yates was charged with violating the Sarbanes-Oxley Act of 2002, the law passed in the wake of the Enron accounting scandal, which states that anyone who "knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence" a federal investigation may be fined or imprisoned for up to 20 years.[91] Yates moved for acquittal, pointing to the statute's origin, and arguing that the statute's reference to "tangible object" subsumes objects used to store information, such as computer hard drives, not fish.[92] The trial court denied Yates' motion, convicting him of violating the statute.[93] The 11th Circuit affirmed.[94]

The Supreme Court reversed, deciding for Yates.[95] One of the main issues of contention between the majority and dissent was the context or purpose of the statute. The majority believed the purpose of the law in question focused on securities fraud, and therefore proved a fishy reason to go after Captain Yates; after all, the intent of passing Sarbanes-Oxley was to penalize financial fraud.[96] Writing for the plurality, Justice Ginsburg wrote that the government's reading of Section 1519 "covers the waterfront, including fish from the sea"[97] but that this interpretation "would cut [Section]1519 loose from its financial fraud mooring."[98] The prosecution was simply fishing for answers in the wrong place.

The dissent, however, also had a reasonable argument as to the statute's purpose. In a biting dissent, Justice Kagan argued that the statute's purpose was not to prevent financial fraud, but

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[90] Yates v. United States, 574 U.S. 528 (2015).

[91] *Yates*, 574 U.S. at 531 (citing Sarbanes-Oxley Act of 2002, 18 U.S.C. § 1519).

[92] *Id.* at 532.

[93] United States v. Yates, No. 2: 10-cr-66-FtM-29SPC, 2011 WL 3444093, at *2 (M.D. Fla Aug. 8, 2011).

[94] *See* Klapper, *(Mis)judging Ordinary Meaning?*, *supra* note 5, at 354; United States v. Yates, 733 F.3d 1059, 1065 (11th Cir. 2013).

[95] *Yates*, 574 U.S. at 549.

[96] *See id.* at 529; *id.* at. 552–53 (Kagan, J., dissenting); Brief for Honorable Michael Oxley as *Amicus Curiae* in Support of Petitioner at 1–2, Yates v. United States, 574 U.S. 528 (2015) (No.13-7451); *see also* John Yates, *A Fish Story: I Got Busted for Catching a Few Undersized Grouper. You Won't Believe What Happened Next*, POLITICO MAG. (Apr. 24, 2014), http://www.politico.com/magazine/story/2014/04/a-fish-story-106010.html [https://perma.cc/HPB5-GQS3] ("What do the former employees of Enron and I have in common? According to the Department of Justice, we're both guilty of the same crime. They spent their nights purging documents in order to hide massive financial fraud. I was accused of disposing of several purportedly undersized red grouper into the Florida surf from which I caught them.").

[97] *Yates*, 574 U.S. at 537 (Ginsburg, J., plurality opinion).

[98] *Id.* at 532.

to prevent the destruction of evidence in the obstruction of a federal investigation.[99] If so, Yates' actions count as the destruction of evidence and thus would fall under the statute.

Whether one thinks that the dissent went overboard and upset the scales of justice, what is clear is that there was a colorable dispute as to the statute's purpose: Is § 1519 about the destruction of evidence in general or about securities law in particular? The majority has the stronger claim, but the minority is not obviously incorrect. Context and purpose are rarely clear, but often they are the whole ballgame.

There is often invisible context as well. The audience for statutes differs; bankruptcy statues, even if interpreted in ordinary language, are going to be understood in a different way than statutes about vehicles in the park by the relevant audience.

> Consider what one of the foremost scholars of the philosophy of language, Scott Soames, says about legal interpretation. He argues that the narrow linguistic ("literal") meaning does fully not capture what the legislature "asserts" in a statute. This is not surprising, because linguistic communication always depends on the presuppositions and contexts that a speaker or groups of speakers share with their listeners;[100]

this is the difference between semantic and pragmatics.[101] "Just as in ordinary language, some matters are left unstated, so too in legislation."[102] Indeed, a recognition of this fact is one of the reasons that purpose is often important to what a statute asserts. "That is also why legal interpreters since Blackstone have warned that interpretation cannot descend into literalism."[103]

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[99] *See id.* at 564–65 (Kagan, J., dissenting) ("[T]he plurality characterizes records and documents as things that preserve information—and so they are. But just as much, they are things that provide information, and thus potentially serve as evidence relevant to matters under review. And in a statute pertaining to obstruction of federal investigations, that evidentiary function comes to the fore. The destruction of records and documents prevents law enforcement agents from gathering facts relevant to official inquiries. And so too does the destruction of tangible objects—of whatever kind. Whether the item is a fisherman's ledger or an undersized fish, throwing it overboard has the identical effect on the administration of justice.").

[100] John. O. McGinnis, *Errors of Will and Judgment*, LAW & LIBERTY BLOG, https://lawliberty.org/errors-of-will-and-of-judgment/ [https://perma.cc/G7DQ-R76K].

[101] *See* Lawrence B. Solum, *Contractual Communication*, 133 HARV. L. REV. F. 23, 28 (2019) (describing "The Mechanisms of Pragmatics").

[102] *See* McGinnis, *supra* note 100.

[103] *Id.* (linking to 1 ST. GEORGE TUCKER, BLACKSTONE'S COMMENTARIES 59–61 (1803) ("Words are generally to be understood in their usual and most known signification; not so much regarding the propriety of grammar, as their general and popular use. Thus the law mentioned by Pufendorf, which forbade a layman to lay hands on a priest, was adjudged to extend to him, who had hurt a priest with a weapon. Again: terms of art, or technical terms, must be taken according to acceptation of the learned in each art, trade, and science. So in the act of settlement, where the crown of England is limited 'to the princess Sophia, and the heirs of her body, being protestants,' it becomes necessary to call in the assistance of lawyers,

Even if these difficulties in discerning context could be waved away, it would not be possible to provide this context in a survey instrument. The question of "What context to add?" can lead to an infinite recursion: the legislative history? If so, only selected portions or the entire legislative history? The purpose? The whole statute? The other statutes? The corpus of precedent?

Survey participants do not have the attention span to read more than a few paragraphs of material, and given participants' lack of legal training these paragraphs cannot be too technical. But truncating context can make it nearly worthless. Consider *MCI v. AT&T*. In that case, "tariffs" did not refer to a one-off fee; it referred to a massive and complex regulatory system.[104] However, a survey of this case was forced to describe this entire regulatory system in one sentence. The judge's description of the tariff at issue does not capture the philosophy of tariff policy of the time period.

To capture the full meaning, then, we would need to provide respondents the entire context of the statute, the relevant statute, the legislative history, and relevant cases, and they would sift through that to determine the meaning of the statute as applied in a given situation. In other words, we would give ordinary people the job of the judge.

2. The Fragility of Survey Construction

Another survey weakness is the fragility of survey construction. The results that respondents give are very sensitive to how the survey is constructed. A survey question's wording changes the answers participants provide.

Survey fragility is borne out by a number of experimental findings showing the power of suggestive wording.[105]

- One study asked participants to guess measures such as height or length of time.[106] In one part of the study, the researchers showed participants a picture of a basketball player. They asked some participants "How tall was the

ascertain the precise idea of the words 'heirs of her body,' which in a legal sense comprise only certain of her lineal descendants.").

[104] MCI Telecomms. Corp. v. Am. Tel. & Tel. Co., 512 U.S. 218, 220 (1994).

[105] *See* Herbert H. Clark & Michael F. Schober, *Asking Questions and Influencing Answers*, *in* QUESTIONS ABOUT QUESTIONS: INQUIRIES INTO THE COGNITIVE BASES OF SURVEYS, 15, 25 (Judith M. Tanur ed., 1992) ("Reword a question and the answers often change."). "The choice of words and phrases in a question is critical in expressing the meaning and intent of the question to the respondent . . . . Even small wording differences can substantially affect the answers people provide." *Questionnaire design*, PEW RES. CTR., https://www.pewresearch.org/methods/u-s-survey-research/questionnaire-design [https://perma.cc/9MCS-TNLE].

[106] Richard J. Harris, *Answering Questions Containing Marked and Unmarked Adjective and Adverbs*, 97 J. EXPERIMENTAL PSYCHOL., 399, 399–401 (1973).

basketball player?" These participants answered, on average, that the basketball player measured 79 inches. The researchers asked other participants "How short was the basketball player?" These participants answered, on average, that the basketball player measured 69 inches. The players shrunk ten inches due to one word. In another part of the study, the researchers showed a movie to the participants. The researchers asked some participants "How long was the movie?" and others "How short was the movie?" The average answer of the "long" group was thirty minutes longer than the "short" group.[107] This study shows that even if questions are crafted accurately, changes in wording can have a profound impact on the answers given.

- In another study, the researchers showed study participants a brief clip of a car accident.[108] The researchers asked some participants "Did you see *the* broken headlight?" and others "Did you see *a* broken headlight?"[109] There was, however, no broken headlight in the film clip. Of the participants in the "the" condition, 15% said that they had seen the broken headlight; in contrast, only 7% of the respondents in the "a" condition stated that they saw a headlight. Thus, the experiment showed that subjects were more than *twice* as likely to report having seen a nonexistent object based only on the difference of one word—and a relatively unimportant one at that.[110]
- Another study[111] questioned participants who suffered from headaches. One group was asked: "In terms of the total number of products, how many other products have you tried? [One]? [Two]? [Three]?" Another group was asked: "In terms of the total number of products, how many other products have you tried? [One]? [Five]? [Ten]?"[112] The first group of respondents reported, on average, that they had used 3.3 products. The second group of respondents, on average, reported that they had used 5.2 products.[113] The researchers then asked the

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[107] *Id.*

[108] Elizabeth F. Loftus & Guido Zanni, *Eyewitness Testimony: The influence of the Wording of a Question*, 5 BULL. PSYCHONOMIC SOC'Y 86, 86–88 (1975).

[109] *Id.* at. 86. "The" presupposes the existence of the headlight, whereas "a" does not.

[110] *Id.* at 87–88.

[111] *See generally* Elizabeth F. Loftus, *Leading Questions and the Eyewitness Report*, 7 COGNITIVE PSYCHOL. 560 (1975).

[112] *Id.* at 561.

[113] *Id.*

> participants about the frequency of their headaches. One group was asked: "Do you get headaches frequently, and if so, how often?" Another group was asked: "Do you get headaches occasionally, and if so, how often?" The first group answered, on average, that they suffered 2.2 headaches; the latter group answered 0.7 headaches per week.[114]

Together, these studies show that even subtle changes in the wording of a survey can have a profound effect on the answers given. Surveys are not mechanical windows into the human soul and do not give perfectly unbiased views of human language competence.

3. The Trademark Problem

Though proponents of surveys claim trademark as a precedent for survey usage in statutory interpretation, this precedent poses two problems.

First, the trademark context is fundamentally different: it is ordinary people's perceptions of the trademark that has legal consequence. There is no way to access these perceptions outside of surveys. In contrast, the ultimate interpretative question is a legal one. Sometimes, this legal question looks to ordinary usage. But judges are just as much ordinary users of English as those in the surveys. In fact, the invocations of "ordinary meaning" are often lip service, as judges assume this "ordinary" person has

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[114] *Id.* Framing effects also matter.

> Perspectives get established more generally by how speakers frame what they say. Framing an issue includes not merely choices of wording—for example, *contact* versus *smash*, or *frequently* versus *occasionally*—but other choices as well. Consider the following two ways of describing what amounts to the same situation:
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> > 1. 'A company is making a small profit. It is located in a community experiencing a recession with substantial unemployment hut no inflation . . . .The company decides to decrease wages and salaries 7% this year.'
> >
> > 2. 'A company is making a small profit. It is located in a community experiencing a recession with substantial unemployment and inflation of 12% . . . .The company decides to increase salaries only 5% this year.'
>
> In a telephone interview, respondents given scenario 1 judged it as 'unfair' or 'very unfair' 62% of the time. This proportion was only 22% for scenario 2.

JUDITH TANUR, QUESTIONS ABOUT QUESTIONS: INQUIRIES INTO THE COGNITIVE BASES OF SURVEYS 21–22 (1992) (citing Daniel Kahneman et al., *Fairness as a Constraint on Profit Seeking: Entitlements in the Market*, 76 AM. ECON. REV. 728, 731 (1986) (second alteration in original)).

tremendous linguistic and legal sophistication.[115] Regardless, while surveys can be useful, they are not necessary in interpretation as they are in trademarks.

Second, trademark surveys are not an encouraging precedent. Surveys do not magically clarify trademark use. Rather, like almost all litigation in our adversarial system, trademark survey litigation is bogged down by dueling experts and conflicting surveys.[116] The same will happen in interpretation if it is up to the parties to provide surveys. It could be worse in interpretation, even. If focus groups become important to determining the meaning of statutes, we might expect advertising campaigns to influence people's views of the law. That will devalue the information from surveys.

4. Normativity

As studies in the data-driven interpretation literature show, ordinary people take their normative views of the value of the law into account when interpreting its language. This is problematic. If survey responses were followed, this would mean that the same words would carry different meanings depending on survey respondents' normative views. This would undermine the rule-of-law value of the law carrying the same meaning in every situation. Further, it might disadvantage groups with unpopular

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[115] *See infra* Section III.B.1.

[116] *See* Peter Weiss, *The Use of Survey Evidence in Trademark Litigation: Science, Art or Confidence Game?* 80 TRADEMARK REP. 71, 86 (1990) ("One might sum it all up by saying that the function of surveys in trademark litigation is to plumb the minds of the public in order to make up the minds of the judges."); 6 MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 32.158 (5th ed. 2021) ("The usual procedure is for one of the parties to the litigation to hire a survey taker to run an appropriate survey. The survey expert for the opponent may then attack the substance and form of the other side's survey and/or counter it with a different survey producing different results. Then ensues the 'battle of the experts,' a process that takes place in many trials of all kinds."); *id.* § 32.196 ("Probably, a part of a lingering judicial skepticism about survey evidence can be laid at the feet of parties and their attorneys who, in a desperate search for *some* kind of evidence, offer, with a straight face, a haphazard, self-serving survey. It may not be surprising that many judges view such purported 'scientific evidence' with distaste. They know that the techniques of testing and sampling buyer reactions have been developed to a fairly high degree of accuracy. Thus, there is no real excuse for a biased survey which attempts to measure buyer reaction by means of leading or irrelevant questions asked in an environment far removed from the marketplace. The reason, of course, that accurate and scientifically precise surveys are not always offered is that they are costly. Perhaps the best that can be said is that no survey at all is better than a survey obtained 'on the cheap.' As weak arguments detract from even a strong case, a weak survey may detract from even the strongest case of trademark infringement or unfair competition."); Robert C. Bird & Joel H. Steckel, *The Role of Consumer Surveys in Trademark Infringement: Empirical Evidence from the Federal Courts*, 14 U. PA. J. BUS. L. 1013, 1038 (2012) (surveys are usually submitted by a plaintiff to prove likely confusion); *see also* Note, *Public Opinion Surveys as Evidence: The Pollsters Go to Court*, 66 HARV. L. REV. 498, 498–513 (1953) (examining evidential and practical problems involved in using surveys in litigation).

opinions. Nor is it easy to disentangle the normative impact, given that not only do normative views influence interpretation, but interpretation shapes normative views. Disentangling the two is very difficult, if not impossible.

5. Terms of Art

Another execution problem is that survey designers need to make sure not to confuse ordinary terms with legal terms of art. In law, even terms that appear to be used in their "ordinary" English sense can be technical terms of art. Tammy Gales and Larry Solan argue that the phrase "labor or service" that is at dispute in *Holy Trinity* is actually borrowed from the Constitution and therefore is infused with legal rather than colloquial meaning; their argument is highly compelling.[117] It is difficult to determine which terms are ordinary terms and which are terms of art. Indeed, judges can disagree on this count.[118]

6. Linguistic Drift

The obvious limitation of surveys relates to the concept of linguistic drift—that the meaning of terms changes over time. For instance, the meaning of "domestic violence" in the Constitution, Article IV, Section 4—roughly, civil war—is very different from the meaning of "domestic violence" in the modern day—namely, physical or other abuse within a marriage.[119] Obviously, surveys cannot be used in constitutional interpretation to determine the meaning of "domestic violence" for this reason.

But even in statutory interpretation, often the statute in question is not modern. The statute in *Taniguchi*, for instance, 28 U.S.C. § 1920, was originally passed in 1948, but the interpreter provision was added in 1978.[120] It is not clear whether the meaning of "interpreter" changed in the course of four decades. But that is not something that surveys can account for, while corpus linguistics and dictionaries can account for linguistic drift by consulting then-contemporary documents.

So for surveys to function, they need to make substantial assumptions about linguistic drift. Alternatively, surveys need to

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[117] *See* Tammy Gales & Lawrence M. Solan, *Revisiting a Classic Problem in Statutory Interpretation: Is a Minister a Laborer?*, 36 GA. ST. L. REV. 491, 504 (2020).

[118] *See, e.g.*, United States v. Scott, 990 F.3d 94 (2d Cir. 2021) (judges disagreeing on whether the phrase "the use of physical force" is a term of art or not).

[119] U.S. CONST. art. 4, § 4.

[120] Taniguchi v. Kan Pac. Saipan, Ltd., 566 U.S. 560, 562, 565 (2012) (citing 28 U.S.C. § 1920); Court Interpreters Act of 1978, Pub. L. No. 95–539, §§ 1827–28, 92 Stat. 2040, 2040–44 (1978).

assume that the meaning of a term is "updated" every time a statute is re-passed. The *Taniguchi* statute was amended in 2008, so survey expositors could say that the meaning of "interpreter" was also updated in 2008.[121] While this might solve the linguistic drift problem, it raises a serious conceptual problem: they must assume that the meaning of statutory terms are updated every time a law is amended. While this is not an indefensible assumption, a sounder assumption in most cases would be that the Congress relied on the prior, established meaning.

B. Conceptual Problems

In addition to these practical problems of execution, surveys face two conceptual problems: First, they might misunderstand the concept of "ordinary meaning" by taking it too literally. Second, they pose problems for the idea of faithful agency.

1. The Drax Problem: Taking "Ordinary Meaning" Literally

Surveys take the concept of "ordinary meaning" too literally.

Much like someone who does not understand a joke because they take language hyper-literally, surveys might interpret the concept of "ordinary meaning" at face value, whereas legal users of this concept never quite meant the idea to be taken literally. This can be called the "Drax" problem. In Marvel's Guardians of the Galaxy series, one of the recurring gags is that the thuggish Drax the Destroyer—a crossover between Amelia Bedelia and the Hulk—understands language completely literally and is thus unable to understand metaphors. The films use this misunderstanding to comic effect.[122]

Surveys, however, have a less humorous "Drax" problem on their hands regarding the legal concept of "ordinary meaning." "Ordinary meaning" does not mean the meaning ordinary people would assign to the text.

Courts talk much about "ordinary meaning." Courts have used a number of designations to discuss the hypothetical member of the community who would be interpreting legal texts. The preferred American appellation is simply the "reasonable

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[121] *See Taniguchi*, 566 U.S. at 562; Judicial Administration and Technical. Amendments Act of 2008, Pub. L. No. 110–406, § 6, 122 Stat. 4291, 4292 (2008).

[122] *See Drax*, MARVEL, https://www.marvel.com/characters/drax/on-screen [https://perma.cc/G2UK-LPFQ]; *see also Guardians of the Galaxy, Dave Bautista: Drax*, IMDB, https://www.imdb.com/title/tt2015381/characters/nm1176985 [https://perma.cc/V45Y-PG4Z].

person."[123] Sometimes, judges will imply an ordinary audience by the example they provide. For instance, they might invoke the average person on the street,[124] the attendees at a cocktail party,[125] or a generic neighbor.[126] While there is some variation in exactly how to characterize this sort of objective observer,[127] the basic consensus seems to be "a reasonable reader, fully competent in the language," possessing "aptitude in language, sound judgement" and the capacity to disregard their own personal preferences.[128]

However, there is a yawning gap between what courts say the ordinary person is and how courts actually treat this so-called "ordinary" person when they interpret statutes. Even though judges say that they are looking for what ordinary people would say, they don't truly mean this statement literally—at least judged by their actions.[129] Rather, courts presume that this ordinary person possesses an extraordinary level of sophistication—both legally and linguistically.

First, courts assume that this ordinary person just happens to be familiar with the entirety of the law. As Justice Scalia writes, "a sort of 'objectified' intent—the intent that a reasonable person would gather from the text of the law, *placed alongside the remainder of the corpus juris*."[130] Here, he drops a bomb without hearing an explosion. Knowing the corpus juris makes such a person a lawyer, and an expert one at that.[131]

Second, even excluding legal knowledge, judges assume that ordinary people are *extra*ordinarily competent English

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[123] *See* John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2392–93 (2003) ("[Modern textualists] ask how a reasonable person, conversant with the relevant social and linguistic conventions, would read the text in context.").

[124] *See, e.g.*, City of Chicago v. Morales, 527 U.S. 41, 110–13 (1999) (Thomas, J., dissenting).

[125] *See, e.g.*, Johnson v. United States, 529 U.S. 694, 718 (2000) (Scalia, J., dissenting).

[126] *See, e.g.*, Yates v. United States, 574 U.S. 528, 550 (2015) (Alito, J., concurring in the judgment) ("[W]ho wouldn't raise an eyebrow if a neighbor, when asked to identify something similar to a 'record' or 'documents,' said 'crocodile'?").

[127] *See* KENT GREENAWALT, LEGISLATION: STATUTORY INTERPRETATION: 20 QUESTIONS 9 (1999) (noting that the "objective" person could refer to a few variations: the "average person," the "reasonable person," or the "most astute person (with capabilities exceeding those of ordinary people)").

[128] *See* SCALIA & GARNER, *supra* note 17, at 31.

[129] *See, e.g.*, Marc R. Poirier, *On Whose Authority?: Linguists' Claim of Expertise to Interpret Statutes*, 73 WASH. U. L.Q. 1025, 1034 (1995) ("When judges say plain meaning, they may not mean plain meaning in a sense that linguists would recognize as ordinary language.").

[130] *See* Scalia, *Common-Law Courts in a Civil-Law System*, *supra* note 24, at 17.

[131] *See* Green v. Bock Laundry Mach. Co., 490 U.S. 504, 528 (1989) (Scalia, J., concurring) ("The meaning of terms on the statute books ought to be determined . . . on the basis of which meaning is (1) most in accord with context and ordinary usage, and thus most likely to have been understood by the whole Congress which voted on the words of the statute (not to mention the citizens subject to it), and (2) most compatible with the surrounding body of law into which the provision must be integrated—a compatibility which, by a benign fiction, we assume Congress always has in mind.").

speakers. The supposedly ordinary person must enjoy "aptitude in language, sound judgment," the capacity to skillfully perform "historical linguistic research," and the capability to conquer "personal preferences regarding the outcome" from affecting the outcome.[132] That does not describe the ordinary speaker of English. Rather, the description is of a judge.

In addition, ordinary people misunderstand legal concepts. A number of recent experimental works have borne out the distinction between lay conceptions of legal terms and legal conceptions of these same terms.[133] This supports the notion that the law operates with a distinctive set of legal concepts, concepts that correspond to a term from ordinary language (e.g., "intentionality" or "causation"), but depart from the lay conceptions of these terms.

Taking "ordinary meaning" literally can also lead to a number of mind-boggling paradoxes. What if people ordinarily would read texts purposively? In that case, should textualists truly be purposivists? After all, a purpose-driven reading would be the ordinary meaning. If that is the case, the ordinary meaning inquiry would be self-defeating. A similar paradox would occur if ordinary people would defer to lawyerly expectations of reading. That is, they would think that the ordinary meaning of a text is more akin to the ordinary legal meaning of a text. Thus there would be no ordinary meaning, only ordinary legal meaning.

Ordinary meaning is meant to be understood with a wink and a nod. But the use of surveys in interpretation is premised on a view of ordinary meaning that understands the concept of "ordinary meaning" literally.[134] We should take ordinary meaning seriously, not literally.

2. Jettisoning Faithful Agency

Further, surveys make assumptions about interpretation that pose perilous problems for the concept of faithful agency.

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[132] *See* SCALIA & GARNER, *supra* note 17, at 31.

[133] *See, e.g.*, Raff Donelson & Ivar R. Hannikainen, *Fuller and the Folk: The Inner Morality of Law Revisited*, *in* 3 OXFORD STUDIES IN EXPERIMENTAL PHILOSOPHY 6, 6–26 (law); Markus Kneer & Sacha Bourgeois-Gironde, Mens rea *Ascription, Expertise and Outcome Effects*: *Professional Judges Surveyed*, 169 COGNITION 139, 139–46 (2017) (intentional action); James A. Macleod, *Ordinary Causation: A Study in Experimental Statutory Interpretation*, 94 IND. L.J, 957, 966–77 (2019) (causation); Christian Mott, *Statutes of Limitations and Personal Identity*, *in* 2 OXFORD STUDIES IN EXPERIMENTAL PHILOSOPHY 243, 243–69 (2018) (identity); Roseanna Sommers, *Commonsense Consent*,129 YALE L.J. 2232, 2232–2324 (consent); Kevin P. Tobia, *How People Judge What is Reasonable*, 70 ALA. L. REV. 293, 293–359 (2018) (reasonableness).

[134] *See, e.g.*, Bond v. United States, 572 U.S. 844, 859–60 (2014) (narrower than ordinary meaning applied); Yates v. United States, 574 U.S. 528, 539 (2015) (narrower than ordinary meaning applied); Chisom v. Roemer, 501 U.S. 380, 403–04 (1991) (broader than ordinary meaning applied).

One of the key questions in interpretation is: "whose meaning?" The meaning intended by the legislature, or the meaning the people hear?[135] Textualism is ambiguous: it tries to reflect both the legislature's meaning and the public understanding of the words. One way to resolve the conflict is so say that the public understanding is a means to congressional intent rather than an end in itself, based on the assumption that the best way to understand congressional intent is through the ordinary public meaning at the time of enactment.

Surveys ignore this answer do away with congressional intent. They focus *only* on the meaning as understood by the law-abiders. Given that most statutes being interpreted were not passed in the recent past, it becomes much harder to say that surveys find congressional intent by finding ordinary meaning. Rather, surveys seem to implicitly value ordinary meaning as an end *in itself*. This is a dangerous road, since it can lead to the abnegation of faithful agency.

Faithful agency is of critical importance for a number of reasons. First, faithful agency respects the constitutional separation of powers: courts interpret legislation; they do not promulgate legislation.[136] The "judicial power" of Article III means "the power to pronounce the law as Congress has enacted it."[137] The entire purpose of interpretation is to effect the congressional will. Another cluster of reasons relate to democratic accountability. Legislators, who face periodic elections, are more accountable to the democratic will than are judges. If the people want change, they can replace the former but not the latter. Judges are largely unaccountable to the people, giving rise to the concern that their decisions may be undemocratic.[138] This fact counsels courts to keep the power with the representatives of the people.

Textualists see themselves as "faithful agents" of Congress, even though textualists prioritize the text over Congress' presumed intent when the two appear to diverge. They do this by stating that "the statutory text is the only reliable indication of congressional intent."[139] Either textualists epistemically deny the value of legislative history, or, relying on public choice theory, argue that

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[135] *See* Fallon, Jr., *supra* note 46, at 1249–51.

[136] *See* Jonathan T. Molot, *Reexamining* Marbury *In the Administrative State: A Structural and Institutional Defense of Judicial Power Over Statutory Interpretation*, 96 NW. UNIV. L. REV. 1239, 1250–54 (2002).

[137] King v. Burwell, 576 U.S. 473, 515 (2015) (Scalia, J., dissenting).

[138] *See, e.g.*, ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 16–23 (2d ed.1986); James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 129–56 (1893).

[139] Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. Rev. 109, 112 (2010).

ordinary meaning is the only useful way to understand the meaning understood by Congress as a whole, because an often raucous multimember assembly with competing viewpoints can agree only on the text.[140] After all, if Congress intends something other than the ordinary meaning of its legislation's text, it can simply say so.[141] Consequently, "out of respect for the language adopted by our democratically elected and accountable representatives" a judge should adopt the ordinary meaning.[142] That is, even textualists agree that the point of interpretation is to effectuate congressional will.[143]

Surveys undermine the concept of faithful agency. Surveys assume that what the ordinary person understands is all that matters. There might be reason to ignore what Congress says and instead focus on what people hear; die-hard adherents of fair notice and rule-of-law values would say that we should prioritize how ordinary people interpret texts rather than what Congress intended.[144] However, this means that a statutory interpreter would essentially ignore Congress. This is a very radical proposition from a democratic theory perspective. Further, it threatens to make a Wittgenstein parlor game out of the law: without the referent of congressional intent, a text can potentially take on any meaning. At the very least, this abnegation of faithful agency needs to be called out into the open—and defended on the merits.

CONCLUSION

Data-driven interpretation is a developing area. It holds much promise, but its limitations must also be recognized. We should be honest about the tools' capabilities and limitations and not oversell how accurate the tools are. We should not treat our Mechanical Turk jurisprudence as a new mechanical jurisprudence.

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[140] *See* Manning, *supra* note 123, at 2410–11; Easterbrook, *supra* note 25, at 65; John F. Manning, *The Eleventh Amendment and the Reading of Precise Constitutional Texts*, 113 YALE L.J. 1663, 1714–15 (2004) ("[A] more general (and less cynical) understanding of compromise"—articulated by Jeremy Waldron—is that "compromise is routinely to be expected whenever enacted texts reflect 'the product of a multimember assembly, comprising a large number of persons of quite radically differing aims, interests, and backgrounds.'" (quoting JEREMY WALDRON, LAW AND DISAGREEMENT 125 (1999))).

[141] *See* Burrage v. United States, 571 U.S. 204, 217 (2014) (justifying the ordinary meaning as capturing the legislative intent through the use of a more loosely-worded counterfactual).

[142] WILLIAM N. ESKRIDGE, INTERPRETING LAW: A PRIMER ON HOW TO READ STATUTES AND THE CONSTITUTION 38 (2016). Hart and Sacks referred to this relationship between judges and legislators as "institutional settling." HART & SACKS, THE LEGAL PROCESS 4–5 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994).

[143] *See* John F. Manning, *Textualism and Legislative Intent*, 91 VA. L. REV. 419, 423 (2005).

[144] *See* Michael Francus, *Digital Realty, Legislative History, and Textualism After Scalia*, 46 PEPP. L. REV. 511, 514–15 (2019) (the "New New Textualism rejects faithful agency"); *id*. at 543 (the New New Textualism "finds a firm foundation in the philosophy of language").