

# LINGUISTICS AND TEXTUALISM

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*Should linguistics inform textualism? When legal theories make claims about another discipline's subject, that discipline is often illuminating: History impacts originalist debates, economics shapes "law and economics" analysis, and psychology imbues behavioral legal studies. Linguistic claims abound in textualist decisions and debates, but linguistics—the scientific study of human language—less often informs these. Now, critics question whether it should.*

*This Essay defends the relevance of the field of linguistics to the theory, practice, and critique of textualism. We offer examples, including the Supreme Court's 2025 VanDerStok decision. Our argument implies neither that textualism is the correct interpretive theory nor that linguistics invariably bolsters it. Indeed, linguistics often challenges textualist assumptions and conclusions. The Essay's claim is simply that for both textualists and their critics, considering—rather than eschewing—linguistics makes discussion more sophisticated and productive.*

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INTRODUCTION

Textualism posits that judges should interpret a statute through the linguistic meaning of its text—rather than by consulting the intentions of the law’s drafters, its broader purpose, or interpretive consequences. Today, textualism is the dominant theory of American statutory interpretation, and every Supreme Court justice practices it.<sup>1</sup> Yet, this convergence reveals nuanced intra-textualist disputes and methodological developments.<sup>2</sup> We’re not all the same kind of textualist now.

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<sup>1</sup> Each sitting Justice has written highly textualist opinions, although each also appeals to other modalities alongside text, ranging from legislative history to interpretive consequences. See William N. Eskridge, Jr., Brian G. Slocum & Kevin Tobia, *Textualism’s Defining Moment*, 123 COLUM. L. REV. 1611, 1625 (2023). Yet, we are “all textualists now” in the sense that statutory opinions cannot eschew textualist argument. HARVARD LAW SCHOOL, *The 2015 Scalia Lecture Series: A Dialogue with Justice Elena Kagan on the Reading of Statutes*, at 08:29 (YouTube, Nov. 25, 2015) [hereinafter *Kagan, 2015 Scalia Lecture Series*], <https://youtu.be/dpEtszFT0Tg> (on file with the New York University Law Review). This quotation has been endorsed by Justices Gorsuch, see Neil M. Gorsuch, *Of Lions and Bears, Judges and Legislators, and the Legacy of Justice Scalia*, 66 CASE W. RESV. L. REV. 905, 906 (2016); Kavanaugh, see Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2118 (2016); and Barrett, see Amy Coney Barrett, *Congressional Insiders and Outsiders*, 84 U. CHI. L. REV. 2193, 2195 (2017). Justice Thomas joined a concurrence citing the phrase. See *Kisor v. Wilkie*, 139 S. Ct. 2400, 2425, 2442 (2019) (Gorsuch, J., concurring).

<sup>2</sup> See generally WILLIAM N. ESKRIDGE, JR., BRIAN G. SLOCUM & KEVIN TOBIA, *TWENTY-FIRST CENTURY TEXTUALISM: LANGUAGE, CONTEXT, AND STRUCTURE* (forthcoming 2026) (on file with the New York University Law Review) (describing multiple versions of textualism corresponding to different answers to theoretical questions). See also Victoria Nourse, *Textualism 3.0: Statutory Interpretation After Justice Scalia*, 70 ALA. L. REV. 667, 668 (2019)

Consider one new debate: Should the field of linguistics inform textualism? We answer yes. Linguistic theory, concepts, and evidence can and should enlighten textualism. Others answer no. In this issue of the *New York University Law Review*, Professor Cross critiques the “pathologies” of meeting textualism with linguistics,<sup>3</sup> a trend that he argues is exemplified in a “turning point” case from 2025: *Bondi v. VanDerStok*.<sup>4</sup>

We agree that *VanDerStok* is an instructive case. In that dispute about the statutory authorization of federal firearm regulations, the Supreme Court departed from the more familiar 6-3 pro-gun, anti-regulation split.<sup>5</sup> Instead, Justice Gorsuch’s 7-2 majority upheld the government’s firearm regulations through a textualist analysis that drew on theories and concepts from linguistics.<sup>6</sup> Justice Thomas’s dissent and Professor Cross’s article allege that *VanDerStok*’s majority drew “heavily” from a linguistics amicus brief, and both critique this “novel” use of linguistics.<sup>7</sup> We now respond as two authors of that brief to defend the contributions of linguistics to *VanDerStok*.<sup>8</sup>

Admittedly, *VanDerStok* is just one case—and not a constitutional blockbuster. But as Justice Holmes once noted, even the little cases can reveal “the germ of some wider” legal development.<sup>9</sup> Statutory cases

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(explaining that textualism is not neutrally applied); Tara Leigh Grove, *Which Textualism?*, 134 HARV. L. REV. 265, 266 (2020) (discussing how a recent Supreme Court case has revealed tensions within textualism and its use); Eskridge, Slocum & Tobia, *supra* note 1, at 1611 (describing how “inherent complexities” have surfaced in the use of textualism by the Supreme Court); Anita S. Krishnakumar, *Textualism in Practice*, 74 DUKE L.J. 573, 573 (2024) (outlining how the widespread embrace of textualism by judges has not led to predictability in case outcomes); ANITA S. KRISHNAKUMAR, *TEXTUALISM: AN EMPIRICAL ANALYSIS* (forthcoming 2026) (on file with the New York University Law Review) (explaining how the increased acceptance of textualism has not resulted in unanimity in statutory cases decided by the Supreme Court).

<sup>3</sup> Jesse M. Cross, *Amending Linguistic Textualism*, 101 N.Y.U. L. REV. 888, 903 (2026).

<sup>4</sup> 145 S. Ct. 857 (2025); Cross, *supra* note 3, at 890.

<sup>5</sup> See, e.g., *Garland v. Cargill*, 144 S. Ct. 1613 (2024); *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 142 S. Ct. 2111 (2022).

<sup>6</sup> *VanDerStok*, 145 S. Ct. 857 (majority opinion by Gorsuch, J., joined by Roberts, C.J., Sotomayor, Kagan, Kavanaugh, Barrett & Jackson, JJ.).

<sup>7</sup> *Id.* at 886, 892 (Thomas, J., dissenting); Cross, *supra* note 3, at 901.

<sup>8</sup> See Brief for Professors and Scholars of Linguistics and Law as Amici Curiae, *VanDerStok*, 145 S. Ct. 857 (2025) (No. 23-852), 2024 WL 3354719 [hereinafter *Linguistics Brief*]; see also Brandon Waldon, Cleo Condoravdi, James Pustejovsky, Nathan Schneider & Kevin Tobia, *Reading Law with Linguistics: The Statutory Interpretation of Artifact Nouns*, 62 HARV. J. ON LEGIS. 415 (2025) (an article written at the same time as the brief and published later, which expands on the brief’s arguments).

<sup>9</sup> Oliver W. Holmes, *John Marshall*, in *THE OCCASIONAL SPEECHES OF JUSTICE OLIVER WENDELL HOLMES* 134 (Mark De Wolfe Howe ed., 1962) (advising looking to the “little decisions . . . not deal[ing] with the Constitution . . . yet which have in them the germ of some wider theory, and therefore of some profound interstitial change in the very tissue of the law”).

make up much the Court's docket—and by some counts, *most* of it.<sup>10</sup> We admire Professor Cross's insightful attention to *VanDerStok*, a case he argues is a “landmark in statutory interpretation”<sup>11</sup> for exemplifying the Court's turn to linguistics. However, we disagree with his claims about f laws in the Court's decision and the merits of his alternative textualist approach to the case. We elaborate these responses in this Essay's Part III.

Cross's critique is that linguistics-informed textualism imposes three false interpretive “constraints.”<sup>12</sup> These are: (1) the “*temporal constraint*”—textualism “ignores (or minimizes) the multitemporal dimension of amended statutory law”;<sup>13</sup> (2) the “*textual constraint*”—it “artificially narrows the interpreted text to isolated statutory terms (such as ‘because,’ ‘so,’ and ‘a’)”;<sup>14</sup> and (3) the “*meaning constraint*”—it ignores technical meanings and assumes that statutory language takes (only) ordinary, general meanings.<sup>15</sup> Professor Cross's 2026 article offers these as critiques of “Linguistic Textualism,” as reflected in *VanDerStok*, while his 2025 article levels these same constraints more broadly, as mistakes of *textualism*.<sup>16</sup>

Accepting these rigid constraints would indeed be a mistake, and we join the chorus that has critiqued certain textualist opinions that commit similar mistakes: ignoring relevant statutory amendment,<sup>17</sup> hyper-focusing on acontextual word meaning,<sup>18</sup> and over-emphasizing “ordinary” meaning over technical meaning.<sup>19</sup> However, textualism does

<sup>10</sup> Victoria F. Nourse, *The Paradoxes of a Unified Judicial Philosophy: An Empirical Study of the New Supreme Court: 2020-2022*, 38 CONST. COMMENT. 1, 31 (2023) (“In our universe, more than twice as many cases involved statutory disputes (70) relative to constitutional disputes (31) . . .”).

<sup>11</sup> Cross, *supra* note 3, at 889.

<sup>12</sup> *Id.* at 890.

<sup>13</sup> Jesse M. Cross, *The Amended Statute*, 92 U. CHI. L. REV. 1291, 1338 (2025) (emphasis added) [hereinafter Cross, *The Amended Statute*].

<sup>14</sup> *Id.* at 1338.

<sup>15</sup> *Id.* at 1370.

<sup>16</sup> Cross, *supra* note 3, at 890.

<sup>17</sup> See, e.g., Eskridge, Slocum & Tobia, *supra* note 1, at 1630–35 (discussing challenges in identifying the “original date” of an amended statute for textualist-originalist analysis); Krishnakumar, *supra* note 2, at 578 (discussing textualist usage of older dictionaries to interpret more recently amended statutes).

<sup>18</sup> See, e.g., Victoria Nourse, *Picking and Choosing Text: Lessons for Statutory Interpretation from the Philosophy of Language*, 69 FLA. L. REV. 1409, 1437 (2017) (critiquing “a tendency to focus on small bits of text” as an “isolationist” method); see also William N. Eskridge, Jr. & Victoria F. Nourse, *Textual Gerrymandering: The Eclipse of Republican Government in an Era of Statutory Populism*, 96 N.Y.U. L. REV. 1718, 1737 (2021) (critiquing “gerrymandering” of text by focusing on individual words); Kevin Tobia, Brian G. Slocum & Victoria Nourse, *Progressive Textualism*, 110 GEO. L.J. 1437, 1445 (2021) (“Textualists should stop focusing on decontextualized word meanings.”).

<sup>19</sup> See, e.g., Tobia, Slocum & Nourse, *supra* note 18, at 1445 (“Textualists should avoid over-relying on ordinary (non-technical) meaning and should consider that terms may communicate technical (not ordinary) meanings.”).

not require these constraints. More sophisticated versions of textualism clearly reject the textual<sup>20</sup> and meaning constraints.<sup>21</sup> Our linguistics brief and the *VanDerStok* majority do not accept these constraints either. In fact, research from linguistics *sharpens* these very critiques of certain textualist opinions. This Essay's Part III elaborates this response.

Before that extended case study, this Essay addresses the broader question: Should linguistics inform textualism? Part I introduces our answer in the affirmative and argues that skeptics carry the burden of dismissing the relevance of linguistics to textualism. Although skeptics have not met that burden, Part II provides concrete examples of how linguistic theories, concepts, and evidence have usefully informed textualism, illustrating that "linguistics and textualism" cross paths in more ways than critics suppose. Linguistics can inform particular cases (e.g., *VanDerStok*), middle-level debates about interpretive principles (e.g., the form and validity of linguistic canons), and even abstract jurisprudential debates (e.g., the merits of textualism versus purposivism). And the forms of linguistic contributions range from delivering novel insights with empirical tools to drawing from decades-old paradigms in theoretical linguistics. At each level, these contributions could serve to augment textualism or to challenge it. Some linguistics work has supported textualist decisions (e.g., *VanDerStok*), but researchers have often leveraged linguistic ideas to critique textualist arguments and even textualism itself.

We do not see linguistics as a panacea, and the Essay's conclusion comments on reservations about bringing linguistics to textualism, including its potential to legitimate textualism, the Supreme Court, or the Court's decisions. We explain why this concern is outweighed in *VanDerStok* and elsewhere. Today, linguistic claims and assumptions regularly justify American courts' impactful statutory interpretations. To fully engage with this reality—whether to support, persuade, critique, or delegitimize the Court—scholarly and public focus on linguistics is not merely an acceptable part of the response, but one worthy of greater attention.

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<sup>20</sup> E.g., Lawrence B. Solum, *Pragmatics and Textualism*, 33 J.L. & POL'Y 2, 7 (2025) (explaining that interpretation depends on "both semantics (word meaning and grammar) and pragmatics (including contextual disambiguation and pragmatic enrichment), [so] textualist interpretation should not exclude the role of context in the production of meaning").

<sup>21</sup> E.g., *id.* at 7–8 (arguing that "bare semantic content is ambiguous, sparse, and incomplete"); John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 107 (2001) (noting textualists "recognize that statutory terms may have specialized (rather than ordinary) meanings"); Barrett, *supra* note 1, at 2202 ("[T]erms are sometimes used in their ordinary and sometimes in their technical sense . . .").

## I

## LINGUISTICS SHOULD INFORM TEXTUALISM

This Essay's broad claim is that *linguistics can and should inform textualism*. Here, "textualism" refers to the legal theory that posits that the statutory text's linguistic meaning (in context) should constrain judicial interpretation.<sup>22</sup> Legal theory's conventional "interpretation/construction distinction" highlights that even for textualists, resolving cases require more than simply identifying statutory meaning: First, the judge identifies the meaning of the text in context; then the judge gives legal effect to this meaning.<sup>23</sup> "Linguistics" refers to the scientific study of language and its structure by a broad, centuries-old field, composed of multiple and sometimes competing theoretical and empirical frameworks and perspectives.

A cautious and modest articulation of the claim—at least some linguistics research, in at least some circumstances, significantly enriches legal debates about textualism—strikes us as undeniable. Today, the Court applies textualist reasoning in every statutory case, a substantial portion of its docket, and some textualist judges and scholars extend the theory to other written legal instruments.<sup>24</sup> The field of linguistics is longstanding and vast. The plausible assumption that linguistics research has contributed knowledge about language, coupled with observation of textualism's ubiquity make it likely that attending to these programs' intersection has utility. Even tough critics of linguistics and textualism also seem to concede this general thesis,<sup>25</sup> and the burden of entirely

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<sup>22</sup> Throughout the article, we discuss statutory interpretation, although textualism has been applied to other contexts, such as constitutional and contractual interpretation. *See, e.g.*, Lawrence B. Solum, *Contractual Communication*, 133 HARV. L. REV. F. 23 (2019). We use "linguistic meaning" to refer to what the text, in context, communicates to an ordinary reader. This is what Professor Solum, *id.* at 23, describes as the text's "communicative content." There are important critiques of this focus. *See, e.g.*, Richard H. Fallon, Jr., *The Meaning of Legal "Meaning" and Its Implications for Theories of Legal Interpretation*, 82 U. CHI. L. REV. 1235 (2015).

<sup>23</sup> *See generally* Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 CONST. COMMENT. 95 (2010) (explaining the distinction between interpretation and construction).

<sup>24</sup> *See, e.g.*, Tun-Jen Chiang & Lawrence B. Solum, *The Interpretation-Construction Distinction in Patent Law*, 123 YALE L.J. 530 (2013) (on patents); Stephen C. Mouritsen, *Contract Interpretation with Corpus Linguistics*, 94 WASH. L. REV. 1337 (2019) (on contracts); Snell v. United Specialty Ins. Co., 102 F.4th 1208, 1222 (11th Cir. 2024) (Newsom, J., concurring) ("I'm . . . firmly of the view that '[t]he ordinary meaning rule is the most fundamental semantic rule of interpretation' and that it should govern our reading not only of 'constitutions, statutes [and] rules,' but also, as relevant here, of 'private instruments.'" (quoting ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 69 (2012) (applying textualism to an insurance contract))).

<sup>25</sup> For example, we read Professor Cross's critique as open to this weak thesis. *See* Cross, *supra* note 3, at 6 ("[T]here is an important place for the excellent work in law-and-linguistics that is occurring today . . ."). At the same time, some of Cross's rhetoric suggests broader

dismissing linguistics to textualism rests with skeptics. This simple burden-shifting argument is this first Part's primary, albeit modest, conclusion. The remainder of this Part elaborates this argument and some further general considerations about this debate.

Linguistics is likely to yield insights for textualism since textualist discussions implicate claims about language. Today's textualist interpretation centers linguistic canons, on the theory that these rules track ordinary linguistic practices,<sup>26</sup> and judicially created "homey examples,"<sup>27</sup> which serve to illustrate the ordinary reader's contextual understanding of the statutory language.<sup>28</sup> From this perspective, the Essay's claim is not to introduce, but to *critique* and *improve* judges' extant practice of linguistics in interpretation, by complementing judicial efforts with insights from the field of linguistics.

At the same time, the contributions of linguistics to textualism are limited: There is a diverse range of questions for which the field cannot be expected to play an outcome-determinative role across varied legal contexts. For one, textualism's simple instruction to "follow the text" does not provide a comprehensive theory of adjudication. Textualist judges need a theory of precedent, which linguistics research does not provide. In other cases, there is not one right textual interpretation to resolve the case, even if linguistics provides insight into the statute's meaning. In fact, linguistics may bolster an interpreter's confidence that a statute is linguistically indeterminate.

How linguistics informs textualism depends on the details. Part II reviews several examples and Part III details one case study: Linguistics research is useful to a textualist's analysis in *VanDerStok*, and the Court's treatment of concepts from linguistics rendered its decision a more sophisticated and persuasive example of textualism (compared to, say, Justice Thomas's dissenting opinion). At least concerning that case, there is some disagreement: Professor Cross describes the Court's turn

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skepticism. Consider the article's abstract: "It is incumbent upon the legal community to reckon with Linguistic Textualism, the article asserts—because if *VanDerStok* is the future of statutory interpretation, we are in some trouble." *Id.* at 1.

<sup>26</sup> See, e.g., Barrett, *supra* note 1, at 2204 ("Whether the canons actually capture patterns of ordinary usage is an empirical question. If they do not track common usage, then the textualist rationale for using them is undermined."); Facebook v. Duguid, 141 S. Ct. 1163, 1175 (2021) (Alito, J., concurring) ("[I]nterpretive canons attempt to identify the way in which 'a reasonable reader, fully competent in the language, would have understood the text at the time it was issued.'" (quoting SCALIA & GARNER, *supra* note 24, at 33)).

<sup>27</sup> Eskridge & Nourse, *supra* note 18, at 1728.

<sup>28</sup> See, e.g., Lockhart v. United States, 577 U.S. 347, 362 (2016) (Kagan, J., dissenting) ("Imagine a friend told you that she hoped to meet 'an actor, director, or producer involved with the new Star Wars movie.' You would know immediately that she wanted to meet an actor from the Star Wars cast . . . . That ordinary understanding of how English works . . . should decide this case.").

to linguistics in *VanDerStok* as reflecting “trouble” and “pathologies.”<sup>29</sup> He argues that courts should not adopt such a “Linguistic Textualism”<sup>30</sup> and suggests a broader skepticism about linguistics’ relevance to textualist judicial reasoning.

The label “Linguistic Textualism” underscores that there are multiple forms of textualism that compete at the Supreme Court, which have become more salient in the recent Roberts Court.<sup>31</sup> Although we are “all textualists now,”<sup>32</sup> the Court fractures in statutory cases. And it sometimes does so along non-partisan lines that reflect intriguing intra-textualist debates, some of which can be usefully organized into competing textualist theories.<sup>33</sup>

Given these fractures, it is a useful project to rebuild and elucidate sub-versions. But labeling one version “Linguistic Textualism” is a mistake. As an analogy, consider critical responses to decisions justified by originalism, say *Heller* or *Bruen*.<sup>34</sup> Many criticize the Court’s uses of history in these cases. But labeling the Court’s flawed methodology “historical originalism” risks obscuring the role that historical claims already play in many originalist theories and decisions and history’s possible roles in these debates, including critical roles. For critics of *Heller*, the right lesson is not for judges and scholars to jettison the field of history. The critics’ charge is that *Heller* *misused* history, and one appropriate response is to rely on *better* historical research.

Like history, linguistics is a broad and diverse discipline. The scholarly study of language could bear on textualism in various (and even conflicting) ways. Although we applaud Justice Gorsuch’s linguistic analysis in *VanDerStok*, we also think it would be a mistake to react to one judge’s use *or misuse* of history or linguistics by ceding that discipline *tout court* to the judge’s theory.

When considering linguistics and textualism, the analogy of history and originalism is instructive. “Originalism” is today’s prevailing theory of constitutional interpretation at the Supreme Court. Public meaning originalists seek to give constitutional provisions their original public meanings, such as the First Amendment’s 1791 meaning or the Fourteenth Amendment’s 1868 meaning. This approach often implicates historical facts, and there is a large and decades-old scholarly literature about the (mis)uses of history in originalist theory and argument.<sup>35</sup>

<sup>29</sup> Cross, *supra* note 3, at 890.

<sup>30</sup> *Id.* at 889.

<sup>31</sup> See sources cited *supra* note 2.

<sup>32</sup> Kagan, 2015 *Scalia Lecture Series*, *supra* note 1.

<sup>33</sup> See, e.g., sources cited *supra* note 1.

<sup>34</sup> *District of Columbia v. Heller*, 554 U.S. 570 (2008); *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 142 S. Ct. 2111 (2022).

<sup>35</sup> See, e.g., Jack M. Balkin, *The New Originalism and the Uses of History*, 82 *FORDHAM L. REV.* 641, 644 (2013) (discussing how using history at the time of the adoption of the Constitution blinds courts to more important realities).

Historians' amicus briefs regularly inform constitutional litigation.<sup>36</sup> Participants in the originalist debates have varied views: Some critics would replace originalism with common-law constitutionalism or living constitutionalism or pragmatism; others argue that originalist judges misuse history to reach politically preferred results; yet others argue that originalist judges fail to practice their originalism with the appropriate zeal. Despite disagreement about the best path forward, no one thinks originalist debate would improve by jettisoning history. So too for suggestions to advance debate about textualism by jettisoning linguistics.<sup>37</sup>

"Linguistics and textualism" is a broad tent. And some critiques apply to specific projects within that tent, like presenting linguistics through amicus briefs to prospectively inform textualist judicial decisions.<sup>38</sup> We defend that project but note that it is a small corner of current "linguistics and textualism." A study of nearly a century of Supreme Court linguistics amicus briefs finds thirty-three, only seven of which were cited in any opinion.<sup>39</sup> Of those listed, two were cited in a majority opinion. One is a linguistics brief that Justice Scalia dismissed in *D.C. v. Heller*.<sup>40</sup> The other is the brief in *VanDerStok*. In contrast, at

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<sup>36</sup> Joseph Blocher & Brandon L. Garrett, *Originalism and Historical Fact-Finding*, 112 GEO. L.J. 699, 707 (2023) (explaining how amicus briefing is the standard way that originalist arguments are adjudicated).

<sup>37</sup> See, e.g., sources cited *supra* note 1. Though we focus in this piece on the relationship of linguistics to textualism, we do not mean to suggest that the value of linguistics in legal interpretation is at all contingent on one's idiosyncratic choice of interpretive theory. Any theory of textual interpretation that takes seriously the role of text stands to benefit from the analytical insights of linguistics. For example, linguistics offers scientifically grounded guidance to purposivists who look to statutory text to help rationally reconstruct the policy objectives of a "reasonable" legislator. In Section III.C.3, *infra*, we explore the potential of linguistic theory to inform Professor Cross's own preferred amendatory approach to statutory interpretation. It is not surprising that linguistics' value should transcend these varied jurisprudential commitments: Language is not just a facet of the law but the medium in which law is formulated, and scholars have argued that the properties of human language that give rise to hard cases of interpretation—e.g., linguistic vagueness and context dependence—are also design features that uniquely position language to promote the Rule of Law. See, e.g., Timothy Endicott, *The Value of Vagueness*, in PHILOSOPHICAL FOUNDATIONS OF LANGUAGE IN THE LAW (Andrei Marmor & Scott Soames eds., 2011); Jeremy Waldron, *Vagueness and the Guidance of Action*, in PHILOSOPHICAL FOUNDATIONS OF LANGUAGE IN THE LAW, *supra*. When we jettison linguistics from legal theory, we deny the law all the knowledge and insights drawn from the scientific study of its arguably ideal medium.

<sup>38</sup> See *id.* at 724 (discussing concerns about courts' use of "historical" facts in interpretation); Hannah Walser, *Interpretive Facts: Textualism, Empiricism, and the Law-Fact Divide*, 101 IND. L.J. (forthcoming 2026) (manuscript at 3) (on file with the New York University Law Review) (discussing concerns about courts' use of "linguistic" facts in interpretation).

<sup>39</sup> Tilden "Tilly" Brooks, *Linguistics at the Supreme Court: Current Challenges and Potential Solutions*, 10 PROCS. LINGUISTICS SOC'Y AM., no. 1, 2025, at 1, 4, <https://journals.linguisticsociety.org/proceedings/index.php/PLSA/article/view/5945> [<https://doi.org/10.3765/plsa.v10i1.5945>].

<sup>40</sup> See Brief for Professors of Linguistics and English Dennis E. Baron, Ph.D., Richard W. Bailey, Ph.D. and Jeffrey P. Kaplan, Ph.D. in Support of Petitioners, District of Columbia v.

least seventeen historians' briefs have been cited in majority opinions,<sup>41</sup> out of over one hundred filed in just the last forty years.<sup>42</sup> The broader amicus brief denominator is larger: Over a sample of ten terms, amici filed over 8,000 briefs in ninety-six percent of all argued cases, and the Justices cited them in more than half of their rulings.<sup>43</sup>

But even if linguistics amicus briefs proliferate, linguistics can usefully inform various perspectives: textualist, anti-textualist critical perspectives, and studies that transcend textualist debate. Indeed, many scholars use linguistics to *critique* textualism: unmasking the false inexorability of past textualist decisions,<sup>44</sup> clarifying recurring flaws in textualists' tools or analyses,<sup>45</sup> and even challenging textualism's stated justifications.<sup>46</sup> Other projects address statutory interpretation theory with linguistics while explicitly disclaiming any practical uptake of these analyses.<sup>47</sup> Others address broader interpretive questions that transcend case outcomes.<sup>48</sup>

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Heller, 554 U.S. 570 (2008) (No. 07-290).

<sup>41</sup> M. Henry Ishitani, *Today's Brandeis Brief? The Fate of the Historians' Brief Amidst the Rise of an Originalist Court*, 2 J. AM. CONST. HIST. 1, 33 (2024).

<sup>42</sup> *Id.* at 25.

<sup>43</sup> Anthony J. Franze & R. Reeves Anderson, *Amicus Curiae at the Supreme Court: Last Term and the Decade in Review*, NAT'L L.J. (Nov. 18, 2020), <https://www.arnoldporter.com/-/media/files/perspectives/publications/2020/11/amicuscuriae-at-the-supreme-court.pdf> [<https://perma.cc/YTL4-LAS6>].

<sup>44</sup> See, e.g., Dennis Baron, *Corpus Evidence Illuminates the Meaning of Bear Arms*, 46 HASTINGS CONST. L.Q. 509, 510 (2018) (criticizing the Court's textual analysis in the Second Amendment context); Stefan Th. Gries, Michael Kranzlein, Nathan Schneider, Brian Slocum & Kevin Tobia, *Unmasking Textualism: Linguistic Misunderstanding in the Transit Mask Order Case and Beyond*, 122 COLUM. L. REV. 192, 195 (2022) (discussing how modern textualism strips individual words from their context and leads to undefended interpretive choices by courts).

<sup>45</sup> See, e.g., Lawrence M. Solan, *The New Textualists' New Text*, 38 LOY. L.A. L. REV. 2027 (2005) (informing textualism with psychology and linguistics).

<sup>46</sup> See, e.g., Nourse, *supra* note 18 (drawing on linguistic theory to critique textualist practice); VICTORIA NOURSE, *MISREADING LAW, MISREADING DEMOCRACY* 5 (2016) (same); Kevin P. Tobia, *Testing Ordinary Meaning*, 134 HARV. L. REV. 726, 735 (2020) (arguing that common textualist methods facilitate judicial discretion and reduce predictability).

<sup>47</sup> See, e.g., David Enoch, *Law, Philosophy and the Susceptible Skins of Living Beings*, 2025 OXFORD J. LEGAL STUD. 872 (arguing against the importation of philosophical insights into legal practice).

<sup>48</sup> For example, scholars have used linguistics to illuminate *historical* cases. See, e.g., TAMMY GALES, LAWRENCE M. SOLAN & KEVIN TOBIA, *CORPUS LINGUISTICS AND THE INTERPRETATION OF STATUTES OVER TIME: ELEMENTS IN FOREIGN LINGUISTICS* (forthcoming 2026) (on file with the New York University Law Review) (using linguistics to complicate classic cases like *Church of the Holy Trinity v. United States*, 143 U.S. 457 (1892), *Nix v. Hedden*, 149 U.S. 304 (1893), and *McBoyle v. United States*, 283 U.S. 25 (1931)). Other scholars have studied broader philosophical questions about text and purpose, with no specific aim to influence legal decisions. See, e.g., Noel Struchiner, Ivar R. Hannikainen & Guilherme da F. C. F. de Almeida, *An Experimental Guide to Vehicles in the Park*, 15 JUDGMENT & DECISION MAKING 312 (2020).

Our advice to critically minded scholars is: Don't throw the baby out with the bathwater! Scholars critical of originalism were mistaken to cede history to originalists, and critics of the Chicago school were mistaken to cede economics to it. If linguistics appears to be your target, consider whether objection is really to textualism or the Court or its decisions. If the first, the field of linguistics may supply you with uniquely effective critiques. In fact, scholars have leveraged linguistic theory to mount critiques of textualist decisions, principles, and broader assumptions.<sup>49</sup>

As a final introductory note, this Essay focuses on “linguistics and textualism.” But it would also be fair to describe our project more broadly as within the tradition of using *cognitive science* to engage law. “Cognitive science” is the interdisciplinary study of the mind, which includes philosophy, psychology, linguistics, neuroscience, anthropology, computer science, and other areas. There is a rich tradition of interdisciplinary legal work, melding linguistics, philosophy,<sup>50</sup> psychology,<sup>51</sup> and other disciplines.

## II

### LINGUISTICS CAN INFORM TEXTUALISM

As Part I explained, it's more plausible to assume that linguistics—the scientific study of language—has something, not nothing, to offer debates about textualism, a theory that makes claims about language and is now the most commonly applied American theory of statutory interpretation. The burden of argument rests with skeptic of linguistics in textualism who seek to dismiss its potential.

Nevertheless, this Part (II) develops a more detailed affirmative case for linguistics in textualism. The next Part (III) responds to a more specific criticism of linguistics in textualism, as applied in the *VanDerStok* case. Linguistics has informed American legal interpretation before *VanDerStok*. This has come at the level of individual cases: Another Gorsuch opinion (then an appellate judge) uses a tree diagram to model a statutory provision's grammatical structure.<sup>52</sup> Linguistics has

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<sup>49</sup> See, e.g., sources cited *infra* notes 57–76.

<sup>50</sup> See, e.g., Dawid Bunikowski, *The Origins of Open Texture in Language and Legal Philosophies in Oxford and Cambridge*, 47 *RECHTSTHEORIE* 141 (2016); Mateusz Zeifert, *Rethinking Hart: From Open Texture to Prototype Theory—Analytic Philosophy Meets Cognitive Linguistics*, 35 *INT'L J. SEMIOTICS L.* 409 (2022).

<sup>51</sup> E.g., Solan, *supra* note 45, at 2040–43 (drawing on work of the psychologist Eleanor Rosch).

<sup>52</sup> See *United States v. Rentz*, 777 F.3d 1105, 1109–10 (10th Cir. 2015) (en banc); see also Lisa Eichhorn, *Old Habits: Sister Bernadette and the Potential Revival of Sentence Diagramming in Written Legal Advocacy*, 13 *LEGAL COMM'N. & RHETORIC: JAWLD* 79, 80 (2016) (analyzing the tree diagram in *Rentz*).

also made broader contributions. For example, since 2018, courts have cited “corpus linguistics” to aid textualist interpretation.<sup>53</sup> For decades, legal scholars have developed textualism with “pragmatics,” the study of context’s contribution to meaning, drawing on theorists like Grice and Recanati.<sup>54</sup> And “law and language” scholarship has identified linguistic flaws in legal interpretation,<sup>55</sup> as well as the role of linguistics across legal areas.<sup>56</sup>

Consider three broad sets of projects. Linguistics can inform (1) individual case-level debates, (2) middle-level debates about interpretive principles (e.g., the form and validity of linguistic canons like *ejusdem generis*), and (3) abstract jurisprudential debates (e.g., the merits of textualism versus purposivism). At each level, linguistics has demonstrated the *constructive* potential to advance textualism as understood by textualists. That is, one can identify instances—reviewed below—in which linguists were cooperative (if perhaps reproving) interlocutors in conversations shaped by textualism’s core commitments, including a focus on “ordinary” meaning, the development of generalized interpretative heuristics (e.g., the canons of construction), and a privileged role afforded to “text” over so-called “purpose” when interpreting statutes.

However, at each of the three levels, there are also *critical* examples, in which analytical insights from linguistics threaten to upend, or at least substantially revise, the assumptions that shape these core commitments. These examples—also reviewed below—demonstrate that while it is possible to selectively assimilate linguistics’ theoretical insights and empirical methods into textualism, linguistics itself is not subordinate to textualism (or any other legal interpretative theory). Rather, we should expect that as an autonomous scientific enterprise, linguistics will at times support, and at other times radically depart from, the current textualist and legal orthodoxy.

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<sup>53</sup> Kevin Tobia, *The Corpus and the Courts*, U. CHI. L. REV. ONLINE 1, 12 (2021). See generally Thomas R. Lee & Stephen C. Mouritsen, *Judging Ordinary Meaning*, 127 YALE L.J. 788 (2017) (discussing how judges can better use corpus linguistics to ascertain the ordinary meaning of words); Stefan Th. Gries & Brian G. Slocum, *Ordinary Meaning and Corpus Linguistics*, 2017 BYU L. REV. 1417 (2017) (critiquing recent attempts by courts to utilize corpus linguistics in their textual analyses); Tammy Gales & Lawrence M. Solan, *Revisiting a Classic Problem in Statutory Interpretation: Is a Minister a Laborer?*, 36 GA. ST. U. L. REV. 491 (2020) (testing the Supreme Court’s use of corpus linguistics).

<sup>54</sup> See, e.g., M.B.W. Sinclair, *Law and Language: The Role of Pragmatics in Statutory Interpretation*, 46 U. PITT. L. REV. 373 (1985); Geoffrey P. Miller, *Pragmatics and the Maxims of Interpretation*, 1990 WIS. L. REV. 1179 (1990); Solum, *supra* note 20.

<sup>55</sup> See generally LAWRENCE M. SOLAN, *THE LANGUAGE OF JUDGES* (1993) (exploring how judges’ use of linguistics is “by no means consistent”).

<sup>56</sup> See generally THE OXFORD HANDBOOK OF LANGUAGE AND LAW (Lawrence M. Solan & Peter M. Tiersma eds., 2012) (discussing the impact of linguistics in various legal contexts, such as interactions between citizens and police, evidentiary issues, and intellectual property).

FIGURE 1: TAXONOMY OF LINGUISTIC CONTRIBUTIONS  
TO LEGAL DEBATES

	A. Case Level	B. Principle Level	C. Abstract Level
Theory and Concepts	<i>Theory-based critiques of judicial opinions;</i> <sup>57</sup> <i>overlooked classes of indeterminacy: scope, de dicto, de re.</i> <sup>58</sup>	<i>Caution against equating natural language with formal logic;</i> <sup>62</sup> <i>inconsistent use of definitional and prototypical analysis.</i> <sup>63</sup>	<i>The linguistic importance of non-textualist criteria (e.g., legislative intent);</i> <sup>66</sup> <i>critiques of a unitary “meaning.”</i> <sup>67</sup>
	Theory to support a best reading; <sup>59</sup> artifact nouns; <sup>60</sup> assessing generality. <sup>61</sup>	Types of indeterminacy (e.g., “categorical indeterminacy”) that clarify cases; <sup>64</sup> extensional vs. intensional definition. <sup>65</sup>	Pragmatics in textualism; <sup>68</sup> the linguistics of law’s “ordinary meaning.” <sup>69</sup>

<sup>57</sup> See, e.g., Solan, *supra* note 45, at 2031–36.

<sup>58</sup> See, e.g., Jill C. Anderson, *Just Semantics: The Lost Readings of the Americans with Disabilities Act*, 117 YALE L.J. 992 (2008) [hereinafter Anderson, *Just Semantics*]; Jill C. Anderson, *Misreading like a Lawyer: Cognitive Bias in Statutory Interpretation*, 127 HARV. L. REV. 1521 (2014); ELIZABETH COPPOCK, *The Square of Litigation: A Statutory Interpretation Tool* (Jill Anderson & Elizabeth Coppock) (YouTube, Nov. 17, 2024), <https://www.youtube.com/watch?v=wFVaunfJiD8> (on file with the New York University Law Review); Gideon Yaffe, *Trying To Kill the Dead: De Dicto and De Re Intention in Attempted Crimes*, in PHILOSOPHICAL FOUNDATIONS OF LANGUAGE IN THE LAW, *supra* note 37, at 184.

<sup>59</sup> See, e.g., Solan, *supra* note 45; Clark D. Cunningham, Judith N. Levi, Georgia M. Green & Jeffrey P. Kaplan, *Plain Meaning and Hard Cases*, 103 YALE L.J. 1561 (1994).

<sup>60</sup> See, e.g., Linguistics Brief, *supra* note 8, at 6–9.

<sup>61</sup> See, e.g., *infra* note 107 and accompanying text (discussing *Flowers Foods*).

<sup>62</sup> See, e.g., Brief for Amici Curiae Lucas Champollion, Brandon Waldon, Masoud Jasbi, Willow Parks & Cleo Condoravdi in Support of Noncitizens Campos-Chaves, Singh, and Mendez-Colin at 20, *Campos-Chaves v. Garland*, 144 S. Ct. 1637 (2024) (Nos. 22-674 & 22-884).

<sup>63</sup> See, e.g., Lawrence M. Solan, *Judicial Decisions and Linguistics Analysis: Is There a Linguist in the Court?*, 73 WASH. U. L.Q. 1069, 1074–76 (1995).

<sup>64</sup> See, e.g., Solan, *supra* note 45.

<sup>65</sup> See, e.g., Gries et al., *supra* note 44, at 204–11 (evaluating one court’s use of dictionaries (intensional definitions) and corpus linguistics (extensional definitions)); Jesse Egbert & Thomas R. Lee, *Prototype-by-Component Analysis: A Corpus-Based, Intensional Approach to Ordinary Meaning in Statutory Interpretation*, 4 APPLIED CORPUS LINGUISTICS, no. 1, Apr. 2024, at 1, <https://www.sciencedirect.com/science/article/abs/pii/S2666799123000382> [<https://doi.org/10.1016/j.acorp.2023.100078>]; see also Lawrence B. Solum, *Original Public Meaning*, 807 MICH. ST. L. REV. 807, 845 (2023) (“The original public meanings of constitutional words and phrases are the concepts that determine (and provide criteria for) their application. Original public meanings of words and phrases should be understood as their senses or intensional meanings, not their referents, extensions, or prototypical meanings.”); John Perry, *Textualism and the Discovery of Rights*, in PHILOSOPHICAL FOUNDATIONS OF LANGUAGE IN THE LAW, *supra* note 37, at 105–06 (distinguishing between “meaning textualism” and “conception textualism,” and noting that the former is “commonsensical and attractive,” while the latter is “confused, implausible, and unworkable”).

<sup>66</sup> See, e.g., Lawrence M. Solan, *Private Language, Public Laws: The Central Role of Legislative Intent in Statutory Interpretation*, 93 GEO. L.J. 427 (2004); Stephen Neale, *Textualism with Intent* 60–61 (Nov. 4, 2008) (unpublished manuscript) (on file with the New York University Law Review) [<https://perma.cc/596Q-BCX4>] (asserting that “a theoretically adequate description of textualism will entail that the first, unavoidable objective in interpreting statutes is to identify the intent of the legislature”).

<sup>67</sup> See, e.g., Fallon, *supra* note 22, at 1307–08; Michael L. Geis, *On Meaning: The Meaning of Meaning in the Law*, 73 WASH. U. L.Q. 1125 (1995).

<sup>68</sup> See, e.g., Solum, *supra* note 20; Miller, *supra* note 54, at 1225 (concluding that “insights captured by the maxims” of statutory interpretation (i.e., canons) “reflect common sense methods of interpreting utterances in ordinary conversation”); Robyn Carston, *Legal Texts and Canons of Construction: A View from Current Pragmatic Theory*, in 15 LAW AND LANGUAGE: CURRENT LEGAL ISSUES 8 (Michael Freeman & Fiona Smith eds., 2013).

<sup>69</sup> See, e.g., BRIAN G. SLOCUM, *ORDINARY MEANING: A THEORY OF THE MOST FUNDAMENTAL PRINCIPLE OF LEGAL INTERPRETATION* (2015).

FIGURE 1: TAXONOMY OF LINGUISTIC CONTRIBUTIONS  
TO LEGAL DEBATES CONTINUED

	A. Case Level	B. Principle Level	C. Abstract Level
Empirical Evidence	<i>Corpus linguistics critiques of historical<sup>70</sup> or prospective decisions.<sup>71</sup></i>	<i>Empirically critiquing uses of textualist tools.<sup>73</sup></i>	<i>Empirical study of lay purposivism.<sup>75</sup></i>
	Surveys to aid interpretation. <sup>72</sup>	Empirically testing linguistic canons. <sup>74</sup>	Cross-cultural studies supporting lay textualism. <sup>76</sup>

Taxonomy with examples of linguistics contributions (theory and concepts, or evidence) to legal debates about specific cases, mid-level principles, or abstract principles. Each cell contains italicized examples that have a generally *critical* valence and unitalicized examples that have a neutral or positive valence.

### A. The Case Level

*VanDerStok*, discussed in Part III, is an example of a “case”-level contribution of linguistics to textualism. This Section offers examples that demonstrate how linguistics can be used both to criticize textualism and to guide it at the case level.

We first introduce the use of linguistics to *criticize*, rather than guide, a textualist analysis of language. The *VanDerStok* example also illustrates two points from Part I. First, the courts are already engaging in forms of linguistic analysis. Second, linguistics and textualism is a broad tent, and even critics skeptical of supplying textualists with linguistics amicus briefs may support *critical* uses of linguistics.

<sup>70</sup> See, e.g., Gales & Solan, *supra* note 53. This example is difficult to characterize in terms of “valence.” On the one hand, Solan and Gales develop a textualist argument to support the original decision in *Holy Trinity Church v. United States*, 143 U.S. 457 (1892), which is usually understood as an example of strong purposivism. On the other hand, this competing interpretation can be used to challenge the determinacy of textualist argument. Rather than illustrating the flaws of purposivism and determinism of textualism, as Justice Scalia would have had it, *Holy Trinity* exemplifies the flexibility of textualist argument. See Nicole Steitz, Brian G. Slocum & Kevin Tobia, *The Broad Church of Modern Textualism*, 33 J.L. & POL’Y 94, 126–28 (2024).

<sup>71</sup> See, e.g., Baron, *supra* note 44 (critiquing the Court’s analysis of founding-era sources in *District of Columbia v. Heller*, 554 U.S. 570 (2008), to uncover the meaning of “bear arms” in the early republic).

<sup>72</sup> See, e.g., Kevin Tobia, Jesse Egbert & Thomas R. Lee, *Triangulating Ordinary Meaning*, 112 GEO. L.J. ONLINE 23 (2023).

<sup>73</sup> See, e.g., Kevin Tobia, *Testing Ordinary Meaning*, 134 HARV. L. REV. 726 (2020) (critiquing certain judicial uses of dictionaries and corpus linguistics, based on survey experiments).

<sup>74</sup> See, e.g., Kevin Tobia, Brian G. Slocum & Victoria Nourse, *Statutory Interpretation from the Outside*, 122 COLUM. L. REV. 213 (2022); Janet Randall & Lawrence M. Solan, *Legal Ambiguities: What Can Psycholinguistics Tell Us?*, in CAMBRIDGE HANDBOOK OF EXPERIMENTAL JURISPRUDENCE 578 (Kevin Tobia ed., 2025); Eric Martínez, *Traditional and Computational Canons*, 39 HARV. J.L. & TECH. 229 (2025).

<sup>75</sup> See Struchiner, Hannikainen & de Almeida, *supra* note 48.

<sup>76</sup> See Ivar Hannikainen et al., *Coordination and Expertise Foster Legal Textualism*, 119 PROCS. NAT’L ACAD. SCI., no. 44, Oct. 25, 2022, at 1, 7, <https://www.pnas.org/doi/10.1073/pnas.2206531119> [<https://doi.org/10.1073/pnas.2206531119>].

### 1. Case-Level Example 1: The Sanitation Case (A Critical Example)

The COVID-19 pandemic was estimated to have killed one million Americans by May 2022,<sup>77</sup> and mask wearing had been shown to reduce the disease's spread.<sup>78</sup> In response, the U.S. Centers for Disease Control and Prevention (CDC) issued the "transit mask order," which required mask wearing when traveling on conveyances such as buses and airplanes, and in ride shares (e.g., Uber) and transportation hubs.<sup>79</sup> The government cited as the statutory authority section 361 of the Public Health Service Act of 1944 (PHSA).<sup>80</sup> The Health Freedom Defense Fund challenged the mask requirement, and in April 2022, the U.S. District Court for the Middle District of Florida vacated the CDC's transit mask order.<sup>81</sup>

That district court presented its decision as textualist. It examined the original meaning of section 361's text, citing 1940s dictionaries and a novel corpus linguistic analysis of language at the time.<sup>82</sup> The relevant statutory provision from PHSA is:

The Surgeon General, with approval of the Secretary, is authorized to make and enforce such regulations as in his judgment are necessary to prevent the introduction, transmission, or spread of communicable diseases from foreign countries into the States or possessions, or from one State or possession into any other State or possession. For purposes of carrying out and enforcing such regulations, the Surgeon General may provide for such inspection, fumigation, disinfection, sanitation, pest extermination, destruction of animals or articles found to be so infected or contaminated as to be sources of dangerous infection to human beings, and other measures, as in his judgment may be necessary.<sup>83</sup>

The district court concluded that the PHSA does not authorize the COVID-19 transit mask order by focusing heavily on the word "sanitation."<sup>84</sup> The core textualist reasoning turned on four "moves."<sup>85</sup>

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<sup>77</sup> Rob Stein, *In Wave After Deadly Wave, COVID Has Claimed 1 Million Lives in the U.S.*, NPR (May 17, 2022), <https://www.npr.org/sections/health-shots/2022/05/17/1093651037/us-one-million-deaths> [<https://perma.cc/Z3HF-2BWF>].

<sup>78</sup> Gries et al., *supra* note 44, at 193 & n.4.

<sup>79</sup> Requirement for Persons to Wear Masks While on Conveyances and at Transportation Hubs, 86 Fed. Reg. 8025, 8026 (Feb. 3, 2021).

<sup>80</sup> Public Health Service Act of 1944, Pub. L. No. 78-410, § 361(a), 58 Stat. 682, 703 (codified as amended at 42 U.S.C. § 264).

<sup>81</sup> *Health Freedom Def. Fund, Inc. v. Biden*, 599 F. Supp. 3d 1144, 1178 (M.D. Fla. 2022).

<sup>82</sup> *Id.* at 1158, 1160.

<sup>83</sup> 42 U.S.C. § 264(a).

<sup>84</sup> See *Health Freedom Def. Fund*, 599 F. Supp. 3d at 1159–61.

<sup>85</sup> These moves are quoted from ESKRIDGE, SLOCUM & TOBIA, *supra* note 2 (manuscript ch. 3).

*Move 1: Narrowing focus to the second sentence.* The court read the first sentence as granting the CDC power to issue regulations necessary to prevent the spread of communicable disease, and the second sentence as “inform[ing] the grant of authority by illustrating the kinds of measures that could be necessary: inspection, fumigation, disinfection, sanitation, pest extermination, and destruction of contaminated animals and articles.”<sup>86</sup> In other words, “the second sentence narrows the scope of the first.”<sup>87</sup> In fact, the narrowing requires that “the power to [issue the transit mask order] must be found in one of the actions enumerated in the second sentence.”<sup>88</sup>

*Move 2: Narrowing focus to the single word “sanitation.”* The court stated that “[a] requirement that individual travelers wear a mask is not inspection, fumigation, disinfection, destruction, or pest extermination, and the government does not contend otherwise.”<sup>89</sup> Thus, the court reasoned, the power must be found in “sanitation” (or perhaps “other measures”).

*Move 3: Structuring the question about the meaning of “sanitation” as a choice between two competing senses: (1) actively cleaning what is not clean or (2) preserving what is already clean.* The court articulated two possible definitions of “sanitation” from 1940s dictionaries. It concluded that: “Put simply, sanitation as used in the PHSA could have referred to active measures to cleanse something *or* to preserve the cleanliness of something. While the latter definition would appear to cover the Mask Mandate, the former definition would preclude it.”<sup>90</sup>

*Move 4: The ordinary meaning of “sanitation” is limited to active cleaning measures.* Finally, the court reasoned that the former (“active cleaning”) definition was the “ordinary meaning.” To support that claim, the court analyzed the surrounding words in the statute (i.e., “inspection, fumigation, disinfection”) and performed a *sua sponte* corpus linguistic analysis.<sup>91</sup> Someone, presumably the judge or clerks, evaluated historical examples of the word “sanitation” and recorded the proportion that involved “active” cleaning versus “passive” keeping clean. Because hardly any uses (five percent) involved passive cleaning, “active” cleaning is the “ordinary” meaning of “sanitation.”<sup>92</sup>

<sup>86</sup> *Health Freedom Def. Fund*, 599 F. Supp. 3d at 1157.

<sup>87</sup> *Id.* (citation and internal quotation marks omitted).

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* at 1158.

<sup>91</sup> *See id.* at 1160.

<sup>92</sup> Sanitation is commonly referred to in the contexts of “garbage disposal, sewage and plumbing, or direct cleaning of a dirty or contaminated object.” *Id.* at 1160. The least common

A team of linguists (including one of us) criticized each one of these moves.<sup>93</sup> Briefly, issues included that: (1) The first move ignores the anaphoric relationship between the two sentences (as a matter of linguistic meaning, sentence two describes how to provide for “such regulations” authorized by sentence one); (2) the second move inappropriately hyper-focuses on the one word “sanitation”;<sup>94</sup> (3) the third move misreads a dictionary, dividing one conjunctive sense definition into two artificial senses, and quotes only part of one definition; and (4) the fourth move implausibly interprets corpus data (e.g., nearly half of the data refer to sanitation boards, which the court must have counted as involved only in “active” cleaning, despite their regular preventative work). This example illustrates that linguistics could have value in critiquing decisions, even if one is skeptical about offering linguistics concepts (e.g. anaphora) and principles (e.g. criteria of valid corpus linguistics) to guide textualist judges. One can also employ linguistics to highlight the false linguistics claims of textualists.

## 2. *Case-Level Example 2: The Truck Driver Case* (*A Constructive Example*)

Our next case study illustrates how the field of linguistics can further develop textualist principles. A foundational principle of textualism is that interpreters “must take seriously the signals that Congress sends through the level of generality reflected in its choice of words.”<sup>95</sup> Textualists regularly observe that statutes do not pursue their purpose at all costs; instead, judges should attend to the level of generality set by Congress’s choice of words. As a simple example, compare two rules, both passed for the purpose of avoiding classroom disruption: (1) “no eating food in the classroom” and (2) “no eating dinner in the classroom.” The purposivist would prohibit eating a bag of chips under either rule. But the textualist would attend to the level of generality set by the text: The second rule uses fewer general terms (“dinner,” not “food”) and thus communicates that some food may be allowed: A bowl of lasagna is prohibited, but a bag of chips is not.

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usage of “sanitation,” representing about five percent of the data set, “was of sanitation as a measure to maintain a status of cleanliness, or as a barrier to keep something clean.” *Id.*

<sup>93</sup> See Gries et al., *supra* note 44.

<sup>94</sup> Echoing critiques from, for example, Nourse, *supra* note 18, at 1437 (critiquing “a tendency to focus on small bits of text” as an “isolationist” method). See also Eskridge & Nourse, *supra* note 18, at 1718 (critiquing “gerrymandering” of text by focusing on individual words); Cross, *The Amended Statute*, *supra* note 13, at 1338 (“[T]he Court now subjects interpretations to a textual constraint, whereby it artificially narrows the interpreted text to isolated statutory terms (such as ‘because,’ ‘so,’ and ‘a’) . . .”).

<sup>95</sup> John F. Manning, *The New Purposivism*, 2011 SUP. CT. REV. 113, 116 (2012).

In the statutory context, textualists often link this focus on levels of generality to democratic principles that putatively justify textualism over its competitors. For example, purposivism seeks to reconstruct the policy considerations that would lead a “reasonable legislator” to support the enactment of a particular legal text. But “[i]f interpreters treat the statutory text as simply a proxy for the law’s ulterior purpose, they deny legislators the capacity, through their choice of words, to distinguish those statutes meant to embody specific policy choices from those meant to leave policy discretion to the law’s implementers.”<sup>96</sup> Textualism takes seriously the presence of more specific language as evidence of circumscribed directives often best understood as the result of hard-fought compromises among legislators; more general language, on the other hand, reflects legislative consensus around broader directives.

Textualists often repeat this view about generality but apply it in somewhat simple ways, as in our previous food versus dinner hypothetical. A rich tradition of linguistics research on generality offers frameworks to operationalize this textualist principle in more sophisticated ways. Consider the following as an example.

The first section of the Federal Arbitration Act (FAA) of 1925, to which we refer simply as Section 1, provides for the validity of certain agreements to arbitrate, explicitly exempting “contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.”<sup>97</sup> Some of the exemption’s language appears to reach broadly (i.e., to “any . . . class[es] of workers engaged in . . . interstate commerce”), but it also names specific types of workers (“seamen” and “railroad employees”). Understanding how the “general” and “specific” language interact to determine the scope of this exemption has been the focus of decades of textualist analysis.<sup>98</sup>

To navigate this problem of linguistic generality, the Court has at times turned to the *ejusdem generis* canon, which states that when general terms (e.g., “class of workers”) follow specific terms (e.g., “seamen,” “railroad employees”) in a list, the general term is limited to things of the same kind as those named by the specific terms. The Court applied this canon in *Circuit City Stores, Inc. v. Adams*:

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<sup>96</sup> *Id.*

<sup>97</sup> Federal Arbitration Act (FAA) of 1925 § 1, 9 U.S.C. § 1.

<sup>98</sup> *See, e.g.,* *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 113–19 (2001); *New Prime Inc. v. Oliveira*, 139 S. Ct. 532, 538–43 (2019); *Sw. Airlines Co. v. Saxon*, 142 S. Ct. 1783, 1788–90 (2022); *Bissonnette v. LePage Bakeries Park St., LLC*, 144 S. Ct. 905, 910–12 (2024).

Under [*eiusdem generis*] the residual clause [“any other class of workers”] should be read to give effect to the terms “seamen” and “railroad employees,” and should itself be controlled and defined by reference to the enumerated categories of workers which are recited just before it . . . .<sup>99</sup>

However, *eiusdem generis* does not provide exact guidance on how the specific language “control[s]” or “define[s]”<sup>100</sup> the more general phrase. The *Circuit City* court determined that the broader kind of work suggested by the named classes of “seamen” and “railroad employees” is transportation work; thus, the exemption is limited to “contracts of employment of transportation workers.”<sup>101</sup> From *Circuit City* and beyond, the Court has largely avoided discussion of the rich and complex history of the FAA,<sup>102</sup> as well as the consequences of its interpretations on employees, courts,<sup>103</sup> and employment law itself.<sup>104</sup> For the purpose of this example—illustrating linguistics’ contributions to textualism in current Supreme Court cases—we assume the holding of *Circuit City* and the focus on the text of 9 U.S.C. § 1 as our starting point.

In the decades since *Circuit City*, the Court has contended with the question of which transportation workers the exemption reaches and, by extension, how exactly *eiusdem generis* should apply. In *Southwest Airlines v. Saxon*, the Court rejected attempts by both parties to invoke the canon, ultimately ruling that airline cargo loaders constitute an exempt class because they are “directly involved in transporting goods across state or international borders.”<sup>105</sup>

In *Flowers Foods v. Brock*, the Court will consider whether the exemption applies to a “last-mile” delivery driver (Brock).<sup>106</sup> He loads goods from a warehouse onto his truck, and drives them to local destinations. Those goods have traveled across state lines, but Brock

<sup>99</sup> 532 U.S. at 115.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.* at 119.

<sup>102</sup> See, e.g., Amalia D. Kessler, *Arbitration and Americanization: The Paternalism of Progressive Procedural Reform*, 124 YALE L.J. 2940, 2940 (2014) (arguing that the FAA “emerged, at least in part, from a broader, Progressive commitment to procedural reform”).

<sup>103</sup> See, e.g., Judith Resnik, *Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights*, 124 YALE L.J. 2804, 2804 (2015) (arguing that “the cumulative effect of Supreme Court’s jurisprudence on arbitration has been to produce an unconstitutional system that undermines” legal rights and provides insufficient oversight of mandated arbitration).

<sup>104</sup> E.g., Cynthia Estlund, *The Black Hole of Mandatory Arbitration*, 96 N.C. L. REV. 679 (2018) (arguing that the move from public trials to the relatively secret arbitration proceedings stunts the development of law and public knowledge).

<sup>105</sup> 142 S. Ct. 1783, 1789 (2022).

<sup>106</sup> See *Brock v. Flower Foods, Inc.*, 121 F.4th 753 (2024), *cert. granted*, 146 S. Ct. 327 (Oct. 20, 2025) (No. 24-935).

himself never drives his truck across state borders. Much of the debate, in the briefs and lower court opinions, concerns how Brock relates to a chain of interstate commerce: Even if Brock's truck does not cross state lines, the bread he transports does, and is this sufficient to render him an exempt worker, engaged in interstate commerce? At the time we are writing, the Court has not yet heard the case, but it may decide it by this Essay's publication. Regardless of the outcome, our discussion below illustrates some linguistic principles that could bear on it.

A team of linguists (including both of us) filed an amicus brief in *Flowers Foods* that brings a different perspective to the debate over how to interpret 9 U.S.C. § 1.<sup>107</sup> The brief proposed that the key textualist question to ask in *Flowers Foods* is about whether Brock is part of a *class* engaged in interstate commerce, as 9 U.S.C. § 1 exempts classes of workers, not individuals. An intrastate railroad employee is part of the class of railroad employees and is eligible for Section 1 exemption in virtue of *that* class membership. Conversely, even if some tour guides—say one who works at the Four Corners Monument—cross state lines, that fact is not enough to conclude that the *class* of tour guides engages in interstate commerce. So the key question, the linguists argued, is about whether Brock is in an exempt class that engages in interstate commerce.

Next, one has to determine the level of generality of putatively exempt classes under 9 U.S.C. § 1. Should the Court analyze Brock as an “intrastate truck driver,” a “truck driver,” a “transportation worker,” or something else? The level of generality is critical. The linguistics brief offered theoretical linguistic insights and empirical linguistic data to address the generality problem posed by the Section 1 exemption. The linguists observed that the terms “seamen” and “railroad employees” share common linguistic and conceptual properties that can inform the Court's application of *eiusdem generis*. First, these terms denote classes that are *well established*, as opposed to not well established. Second, they denote classes *intermediate* in their level of abstraction, between narrower subordinate classes and broader superordinate classes. For example, “car” is intermediate between the superordinate category “vehicle” and the subordinate category “sport utility vehicle (SUV).”

Consider the first feature of well-established classes. Diagnostics from the theoretical linguistics literature—for example, whether definite singular noun phrases (e.g., “the railroad employee”) readily refer to an abstract class (rather than a salient individual member of the class)—serve to distinguish well-established classes from their less well-established counterparts. This “singular definite” diagnostic is

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<sup>107</sup> See Brief of Professors and Scholars of Linguistics and Law as Amici Curiae in Support of Respondent, *Flowers Foods, Inc. v. Brock*, No. 24-935 (U.S. Jan. 22, 2026).

illustrated by a widely-discussed contrast between the singular definite noun phrases “the Coke bottle” (which is capable of both class-level and individual-level reference) and “the green bottle” (which more heavily favors the individual-reference reading).<sup>108</sup> The class-level interpretation of “the Coke bottle” in sentence (1) below can be paraphrased as: *Coke bottles are a kind/class of bottle with a narrow neck*; the individual-level interpretation of the sentence can be paraphrased as: *a particular salient Coke bottle has a narrow neck*. English speakers tend to judge sentence (2) as appropriate only on the “individual-level” reading: *a particular salient green bottle has a narrow neck*.

*The ‘definite singular’ diagnostic for well-established classes:*

1. The Coke bottle has a narrow neck.  
(class level reading possible → “Coke bottle” denotes a well-established class)
2. The green bottle has a narrow neck.  
(class level reading not possible → “green bottle” does not denote a well-established class)

The linguists’ amicus brief in *Flowers Foods* provides ordinary language data to support the claim that “seamen” and “railroad employees” denoted well-established classes around the time of Section 1’s enactment. The singular definite noun phrases “the seaman” and “the railroad employee” regularly referred to these respective classes in the abstract (rather than referring to specific individuals), as the following examples demonstrate:

Example 1: Attention has been directed in many countries to the disadvantages under which merchant seamen suffer in regard to educational facilities. *The seaman* is entirely cut off from lectures, classes, and even from correspondence tuition, such as are available for workers on shore.<sup>109</sup>

Example 2: Passes always have been considered as part of *the railroad employee’s* wages. Several years ago, when salaries of railroad men were lower than those received by workers in other industries, there was a sufficient reason for pointing out to the rail-workers that the passes were a part of their remuneration.<sup>110</sup>

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<sup>108</sup> See Manfred Krifka, Francis Jeffrey Pelletier, Gregory N. Carlson, Alice ter Meulen, Godehard Link & Gennaro Chierchia, *Genericity: An Introduction*, in *THE GENERIC BOOK* 1, 10–12 (Gregory N. Carlson & Francis Jeffrey Pelletier eds., 1995).

<sup>109</sup> *Seek To Educate Merchant Seamen: Commission Finds that Placing of Libraries on Ships Has Been Helpful*, N.Y. TIMES, Aug. 12, 1923, at 19 (emphasis added).

<sup>110</sup> Franklin Snow, *Among the Railroads*, CHRISTIAN SCI. MONITOR, Jan. 4, 1924, at 6 (emphasis added).

Next, consider the second feature regarding generality. The linguist amici identify that “*seamen* and *railroad employees* are classes of workers that can be characterized by a mode of transportation (i.e., by boat or by rail) that the workers facilitate.”<sup>111</sup> This characteristic distinguishes the two named classes from broader superordinate classes (e.g., “transportation worker”). The named classes are also distinguishable from more granular subordinate classes, including those that can be characterized by “[a] mode of transportation *plus* a specific kind of area . . . over which that transportation takes place.”<sup>112</sup>

In light of these observations, the linguists proposed a novel solution to the Section 1 exemption’s generality problem, including a new implementation strategy for a familiar textualist heuristic. They argued that the Court’s application of *ejusdem generis* should lead to the result that the exemption’s “other class[es]” include classes that are similarly *well-established* and *suitably intermediate* in their level of abstraction. For example, the superordinate term “transportation worker” denotes a class that contains both seamen and railroad employees (among other classes). Transportation workers are no doubt among the workers contemplated by the exemption. But, in context, the class of transportation workers is “clearly an inappropriate candidate for ‘any other class’ since it encompasses the two explicitly listed classes, rendering that language superfluous.”<sup>113</sup> Similarly, “river pilots” and “suburban rail employees” reside at a lower level of abstraction than the named classes (“seamen,” “railroad employees”) and thus those classes are not suitable candidates for “other class[es]” in context. Finally, certain hypothetical classes—for example, “airline pilots who fly across multiple states”—are inappropriate at least in part because they are not well established. As discussed in the linguists’ amicus brief, “the airline pilot who flies across multiple states” does not readily admit of a class-level reading (unlike definite singular noun phrases denoting more well-established counterparts, e.g., “the airline pilot”).<sup>114</sup>

By contrast, “truck drivers” constitute a suitable class for the purposes of the Section 1 exemption. That class—like those classes denoted by “seamen” and “railroad employees”—“denot[es] workers who facilitate a specific mode of transportation (i.e., via a commercial truck).”<sup>115</sup> Moreover, both historical and contemporaneous language data supports the claim that “truck drivers” are a well-established

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<sup>111</sup> Brief of Professors and Scholars of Linguistics and Law as Amici Curiae, *supra* note 107, at 14.

<sup>112</sup> *Id.* (emphasis added).

<sup>113</sup> *Id.*

<sup>114</sup> *Id.* at 15.

<sup>115</sup> *Id.* at 28.

class. The following examples reported in the linguists' brief help to demonstrate that both in 1925 and today, mentions of the singular definite noun phrase "the truck driver" are routinely associated with the class of truck drivers in the abstract:

*The truck driver* is sometimes considered a lowly person and not to be given particular thought in the general scheme of things. He is a part of the machinery, one of the necessary extras of the truck itself, like the hydraulic hoist or the super-power carbureter [sic].<sup>116</sup>

*The truck driver* is the unseen link that connects all aspects of the supply chain, working long hours to keep the economy moving . . . . Furthermore, the pressures that truck drivers face extend beyond just their working hours.<sup>117</sup>

"Seamen," "railroad employees," and "truck drivers" thus share multiple linguistic and conceptual properties that are relevant to the interpretation of the Section 1 exemption. However, the exemption does not simply speak of "class[es] of workers"; exempt classes are also "engaged in foreign or interstate commerce."<sup>118</sup> But what does it mean for a *class* to be engaged in such activities? To address this question, the linguists appealed to insights from a long tradition of research on the interpretation of *generic* language. First, observe that English has multiple linguistic resources for expressing claims that hold generically of a class of entities, including bare plural noun phrases (e.g., "Dogs bark") and overtly class-denoting noun phrases (e.g., "This class of mammal barks").<sup>119</sup> The Section 1 exemption contains both kinds of generic language: "[S]eamen" and "railroad employees" are bare plural noun phrases that refer abstractly to two classes of workers; "any other class of workers" is an overtly class-denoting noun phrase.

As a matter of ordinary interpretation, generic statements readily admit of exceptions (e.g., "Dogs bark" is intuitively true even if not all dogs bark) and generic predicates may not even apply to a majority of class members (e.g., "Mosquitoes carry malaria" is intuitively true even though a small minority of mosquitoes will ever carry the disease). The generic statements "seamen are engaged in interstate commerce" and "railroad employees are engaged in interstate commerce" similarly

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<sup>116</sup> *The Useful Truck Driver*, CEMENT, MILL & QUARRY, July 20, 1925, at 44, 44 (emphasis added).

<sup>117</sup> *Truck Drivers: The Unsung Heroes and Backbone of our Economy*, DOUBLE D DISTRIBUTION (Apr. 24, 2025), <https://doubledistribution.com/truck-drivers-the-unsung-heroes-and-backbone-of-our-economy> [<https://perma.cc/AXR4-NLGC>] (emphasis added).

<sup>118</sup> FAA § 1, 9 U.S.C. § 1.

<sup>119</sup> The linguistics literature on generics more frequently talks of 'kinds' than of 'classes'; but the terms are equivalent for our purposes.

admit of exceptions. The linguists report “*many* examples of intrastate railroad employees who simply move people from one part of a state to another” and instances of seamen who “only move[] freight on legs within one state, such as an intra-Hawaiian freighter.”<sup>120</sup> Whether these workers should be regarded as personally engaging in interstate commercial activity is beside the point. “That some train conductors, barge captains, or airline pilots only work within a single state does not undermine the conclusion that each worker is part of a class that (generically) engages in interstate commerce.”<sup>121</sup>

Instead, the linguists suggested that what matters is the *propensity* of class members to engage in interstate commerce. The notion of relative propensity helps to explain, for instance, the intuitive truth of generic statements such as “mosquitoes carry malaria”: “Despite the fact that the predicate ‘carry malaria’ holds for just a small proportion of class members, mosquitoes’ propensity to carry malaria distinguishes them from other related classes[;] . . . there is a substantive causal relation between the biology of the insects and their ability to carry malaria.”<sup>122</sup> This notion also helps to explain why certain generic statements are intuitively false even if the predicate happens to hold all class members. Consider a hypothetical scenario—frequently discussed in the theoretical literature on generic language—in which all nine Supreme Court justices happened to have even social security numbers. Intuitively, “Supreme Court justices have even social security numbers” is false even in this hypothetical situation. This intuition can be explained by the fact that the “*propensity* to receive an even social security number . . . does not meaningfully distinguish Supreme Court justices from Americans writ large or from other classes of working professionals (even if the actual proportion of justices with even social security numbers happens, by random chance, to be 100 percent).”<sup>123</sup>

Relating these observations back to the exemption, the linguists argued that:

[T]he propensity to be “engaged in . . . interstate commerce” clearly distinguishes seamen and railroad employees within the American workforce writ large, in the sense that the flow of goods across state borders is an essential component of “interstate commerce” and the activities performed by these classes of workers uniquely enable that flow.<sup>124</sup>

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<sup>120</sup> Brief of Professors and Scholars of Linguistics and Law as Amici Curiae, *supra* note 107, at 9.

<sup>121</sup> *Id.*

<sup>122</sup> *Id.* at 25 (emphasis omitted).

<sup>123</sup> *Id.* at 24.

<sup>124</sup> *Id.* at 25 (alteration in original).

For the same reasons, “[t]ruck drivers encompass another paradigmatic class that engages in interstate commerce” in the sense contemplated by the Section 1 exemption.<sup>125</sup> The respondent in *Flowers Foods*, by virtue of belonging to the class of truck drivers, thus qualifies for that exemption (even if he does not personally engage in interstate commercial activity).

### 3. Case-Level Examples: Closing Thoughts

In *Health Freedom Defense Fund* and *Flowers Foods*, the linguists offered what they believed to be—based on linguistic analysis—the most plausible “ordinary” reading of the disputed statute. Even when linguists have stopped short of offering an interpretation of a disputed statute, their analyses have often involved fundamental critiques of ordinary meaning analysis as pursued by judges at the case level. This work frequently emphasizes that (1) out of context, the language giving rise to interpretative disputes often has *no* determinate reading as a matter of ordinary interpretation, and (2) judicial reasoning tends to obscure the extent to which statutory language is linguistically indeterminate and context sensitive.

For another example, in *Sedima, S.P.R.L. v. Imrex Co.*,<sup>126</sup> the Supreme Court was asked to interpret 18 U.S.C. § 1962, part of the federal Racketeer Influenced and Corrupt Organizations (RICO) statute, which prohibits “any person employed by or associated with any enterprise . . . [from conducting] such enterprise’s affairs through a pattern of racketeering activity.”<sup>127</sup> Professor Lawrence Solan argued that the locus of the dispute in *Sedima* was the interpretation of the structurally ambiguous noun phrase, “pattern of racketeering activity.”<sup>128</sup> Solan also argued that the statutory context of the provision did not provide a means of disambiguating between the two readings, and that both the majority and the dissent in *Sedima* had failed to identify the ambiguity in their respective opinions:

How to interpret [§ 1962] presents a difficult doctrinal question. But one thing is clear: the statute is not clear. To the extent that the Court is telling us that one result or the other is a necessary consequence of the plain language of the statute, we are experiencing efforts to mask a set of complicated and contingent inferences.<sup>129</sup>

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<sup>125</sup> *Id.* at 3.

<sup>126</sup> 473 U.S. 479 (1985).

<sup>127</sup> 18 U.S.C. § 1962(c).

<sup>128</sup> See SOLAN, *supra* note 55, at 99–104.

<sup>129</sup> *Id.* at 103–04.

Similarly, in *Smith v. United States*, the Court considered whether trading a MAC-10 automatic firearm and a silencer for two ounces of cocaine is to be considered a “use” of a firearm for the purposes of 18 U.S.C. § 924(c)(1), which states that: “[A]ny person who, during and in relation to any crime of violence or drug trafficking crime . . . uses or carries a firearm . . . shall, in addition to the punishment provided for such crime of violence or drug trafficking crime—be sentenced to a term of imprisonment of not less than five years . . . .”<sup>130</sup>

The putative debate in *Smith* was the ordinary meaning of “use[] . . . a firearm”: Employing dictionary definitions and armchair intuition pumps, the majority concluded that the disputed phrase, as a manner of ordinary meaning, includes any manner of use of a firearm.<sup>131</sup> Employing these same textualist tools, a dissenting Justice Scalia found that the ordinary meaning of “use[] . . . a firearm” precludes “the unusual ‘use’ of a firearm as a commodity.”<sup>132</sup> Professor Michael Geis’s linguistic analysis of § 924(c)(1) arrived at the same conclusion as the dissent.<sup>133</sup> However, Geis—a linguist by training—critiqued the textualist reasoning of both sides in *Smith*, arguing instead that “use[] . . . a firearm,” out of context, is compatible with both the majority’s preferred “broad” reading and the more restrictive reading offered by the dissent.<sup>134</sup> Geis assailed the Court’s “question-begging usage of dictionaries”<sup>135</sup> and its problematic tendency to conflate *conventional* linguistic meaning with *contextual* linguistic meaning:

[T]he Court seems too little to appreciate how rarely the language comprising disputed legal texts (which are the sorts of texts they tend to be asked to interpret) have a “plain meaning” or a “plain import” or “clear import,” all terms the Court uses. One consequence of this is that the Court sometimes attributes to the language of a legal text meanings that are at least in part dependent on contextual information.<sup>136</sup>

As far back as the 1990s, linguists have sought to offer lawyers and judges concrete guidance in hard cases of statutory interpretation, including

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<sup>130</sup> 508 U.S. 223, 225 (1993); 18 U.S.C. § 924(c)(1).

<sup>131</sup> *Id.* at 229.

<sup>132</sup> *Id.* at 245 (Scalia, J., dissenting).

<sup>133</sup> *See* Geis, *supra* note 67, at 1141.

<sup>134</sup> *Id.* at 1137; *see also* Clark D. Cunningham & Charles J. Fillmore, *Using Common Sense: A Linguistic Perspective on Judicial Interpretations of “Use a Firearm,”* 73 WASH. U. L.Q. 1159, 1178–80 (1995) (noting the importance of context in interpreting “use” in *Smith*).

<sup>135</sup> Geis, *supra* note 67, at 1144.

<sup>136</sup> *Id.* at 1130.

through amicus briefs.<sup>137</sup> From a bird's-eye view, it may be tempting to characterize this case-level work as an effort to assimilate the analytical constructs and empirical methods of linguistics to the jurisprudential enterprise of textualism. But many of the insights gleaned from linguistics at the case level clearly do not even depend on adopting textualism: Linguistics can help judges of all theoretical persuasions identify what an interpretive dispute is actually *about*. Sometimes, the indeterminacy giving rise to such a dispute is straightforward enough: Judges and laypeople alike can recognize that the word “bank” is ambiguous between multiple distinct senses and can appreciate how this ambiguity might lead to misunderstanding. But hard cases of interpretation (e.g., *Flowers Foods*, *Sedima*, and *Smith*) frequently implicate properties of language that require a more sophisticated analytical vocabulary to properly articulate the nature of the underlying dispute.<sup>138</sup>

Moreover, we have shown that when linguists engage with textualism, it is often to assail both textualist practice (i.e., flawed case-level analyses, such as the putatively textualist opinions in *Sedima*, *Health Freedom Defense Fund*, and *Smith*) and, in the process, textualist theory (i.e., the core theoretical commitments responsible for those flaws). This critical valence of much linguistics work propagates to higher levels of abstraction beyond the individual case level, as discussed in the next Section.

## B. *The Principle Level*

The second kind of project is to use linguistics to inform middle-level debates about interpretive principles. As with case-level contributions, linguists' principle-level contributions range in valence with respect to core textualist theory. Here we consider two examples: linguistic contributions to linguistic canons and linguistic perspectives on the notion of “ordinary meaning.” In both contexts, linguistics work has made both critical and constructive contributions.

### 1. *Mid-Level Principle Example 1: Canons*

“Linguistic canons” are principles that textualists often use to interpret statutes. For example, the *eiusdem generis* canon holds that

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<sup>137</sup> See, e.g., Brief Amicus Curiae of the Law and Linguistics Consortium in Support of Respondents at 2–3, *United States v. X-Citement Video, Inc.*, 513 U.S. 64 (1994) (No. 93-273), 1994 U.S.S. Ct. Briefs LEXIS 529, at \*2–3; Brooks, *supra* note 39, at 3 (recounting the history of linguists' engagement with the Court).

<sup>138</sup> More such contributions are reviewed in Figure 1. The work of Jill Anderson and Gideon Yaffe on the *de dicto/de re* ambiguity, which “is easily spotted and well-theorized in the field of linguistics . . . [but] has gone all but unnoticed in the law.” *Just Semantics*, *supra* note 58, at 997; Yaffe, *supra* note 58, at 185–86.

when a list of items is followed by a catch-all term, that latter terms should be construed to be limited to the theme of the list.<sup>139</sup> In the hypothetical rule “no cars, buses, or other vehicles may enter the park,” ejusdem generis would hold that the catch-all (“other vehicles”) should be restricted in context to vehicles like cars and buses. There are dozens—maybe hundreds<sup>140</sup>—of canons, and scholarly appraisals of the linguistic canons are often critical, appraising them as flawed,<sup>141</sup> or even downright “embarrassing.”<sup>142</sup>

One of the leading critiques of canons is that they are insufficiently sensitive to context. Linguists have amplified and sharpened this critique. For example, in two recent amicus briefs,<sup>143</sup> linguists and law scholars engaged with the Negative Proof corollary of the Conjunctive/Disjunctive canon, which speaks to the interpretation of two related types of sentences: “disjunctive” negative proof sentences and “conjunctive” negative proof sentences:

“Disjunctive” negative proof: “To be eligible, you must prove that you have not A, B, or C.”

“Conjunctive” negative proof: “To be eligible, you must prove that you have not A, B, and C.”

As presented in Scalia and Garner’s *Reading Law*, the Conjunctive/Disjunctive canon provides guidance on the interpretation of both types of sentences: “With the conjunctive negative proof, you must prove that you did not do all three . . . . With the disjunctive negative proof . . . [one] must have done none.”<sup>144</sup> In *Pulsifer*<sup>145</sup> and *Campos-Chaves*,<sup>146</sup> linguists used empirical tools—including linguistic corpora and (in *Pulsifer*) survey experimentation—to demonstrate that the canon offers an incomplete picture as to how the connectives “or” and “and” are ordinarily used and understood, particularly in the presence

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<sup>139</sup> See SCALIA & GARNER, *supra* note 24, at 199.

<sup>140</sup> William N. Eskridge Jr., *The New Textualism and Normative Canons*, 113 COLUM. L. REV. 531, 536 (2013) (reporting “187” canons in Rehnquist and Roberts court opinions).

<sup>141</sup> See, e.g., Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395, 401 (1950) (noting conflict between canons).

<sup>142</sup> Ryan D. Doerfler, *Late-Stage Textualism*, 2021 SUP. CT. REV. 267, 267.

<sup>143</sup> See Brief for Amici Curiae Lucas Champollion, Brandon Waldon, Masoud Jasbi, Willow Parks & Cleo Condoravdi in Support of Noncitizens Campos-Chaves, Singh, and Mendez-Colín, *supra* note 62, at 2; Brief of Amici Curiae Professors Thomas R. Lee, Kevin Tobia, and Jesse Egbert in Support of Neither Party at 9–10, *Pulsifer v. United States*, 144 S. Ct. 718 (2024) (No. 22-340).

<sup>144</sup> SCALIA & GARNER, *supra* note 24, at 120.

<sup>145</sup> *Pulsifer v. United States*, 144 S. Ct. 718 (2024).

<sup>146</sup> *Campos-Chaves v. Garland*, 144 S. Ct. 1637 (2024).

of negation.<sup>147</sup> But from the perspective of linguistics, the issues run deeper: The canon is not only empirically unsound, it is also justified on faulty theoretical grounds. In *Reading Law*, Scalia and Garner have this to say about the interaction of natural language connectives and negation:

After a negative, the conjunctive *and* is still conjunctive: *Don't drink and drive*. You can do either one, but you can't do them both. But with *Don't drink or drive*, you cannot do either one: Each possibility is negated. . . . The principle that “not A, B, or C” means “not A, not B, and not C” is part of what is called *DeMorgan's theorem*.<sup>148</sup>

The linguist amici in *Campos-Chaves* point out that Scalia and Garner's application of DeMorgan's theorem is simply incorrect: The theorem's transformational rules apply to statements of formal propositional logic, not sentences of English:

When lawyers and jurists attempt to apply logical laws directly to ambiguous natural language text, they commit a category error. No logical law (including de Morgan's law) provides any guidance on how to disambiguate natural language. . . . [T]he disambiguation of natural language relies on context . . . . To the extent that canons of construction erroneously equate natural language with formal logic, they threaten to obscure the vital role that context plays in linguistic interpretation.<sup>149</sup>

At the same time, other linguistics work is open to rehabilitating the canons. Recent leading textualists recognize that linguistics is well-positioned to facilitate inquiry into the canons, perhaps supporting their revision and development. In a 2021 concurring opinion, Justice Alito suggested that empirical methods from linguistics might help identify which canons are actually linguistically accurate, in the sense that they identify how “a reasonable reader, fully competent in the language, would have understood the text at the time it was issued.”<sup>150</sup> Justice Barrett expressed a similar view in a 2017 law review article:

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<sup>147</sup> Brief for Amici Curiae Lucas Champollion, Brandon Waldon, Masoud Jasbi, Willow Parks, and Cleo Condoravdi in Support of Noncitizens Campos-Chaves, Singh, and Mendez-Colín, *supra* note 62, at 10–11; Brief of Amici Curiae Professors Thomas R. Lee, Kevin Tobia, and Jesse Egbert in Support of Neither Party, *supra* note 143, at 13, 18.

<sup>148</sup> *Id.* at 119.

<sup>149</sup> Brief for Amici Curiae Lucas Champollion, Brandon Waldon, Masoud Jasbi, Willow Parks, and Cleo Condoravdi in Support of Noncitizens Campos-Chaves, Singh, and Mendez-Colín, *supra* note 62, at 20.

<sup>150</sup> Facebook, Inc. v. Duguid, 141 S. Ct. 1163 (2021) (quoting SCALIA & GARNER, *supra* note 24, at 147).

“Textualists use dictionaries and canons as a way of identifying the linguistic expectations of the regulated. . . . [T]he linguistic canons are designed to capture the speech patterns of ordinary English speakers and, in some cases, of the subclass of lawyers.”<sup>151</sup>

An emerging literature has developed this project, assessing whether different canons reflect ordinary understanding.<sup>152</sup> With Professors Victoria Nourse and Brian Slocum, one of us presented experiment participants with imaginary rules and laws to assess whether the pragmatic inferences contemplated by the canons are intuitive. For example, consider if a law concerning the regulation of “gin, bourbon, vodka, rum, and other beverages” includes orange juice.<sup>153</sup> Most survey participants said “no,” even though orange juice falls within the semantic meaning of “beverage.” This intuitive restriction of “other beverages” is consistent with the prediction of the canon *eiusdem generis*. The study tested dozens of canons, suggesting that some track ordinary understanding, while others do not. Professor Martínez recently employed large language models and survey experiments to study canons and found that many canons are intuitive, perhaps explaining their persistence in judicial opinions.<sup>154</sup> Professors Randall and Solan recently published a series of important studies on two dueling canons (the rule of the last antecedent and the series qualifier canon), which illuminate their subtle conditions and illustrate their extreme context-sensitivity.<sup>155</sup>

Here again, some of the linguistics research is critical of textualist practice, while other work aims to reform the canons. For example, some propose the addition of *new* canons. If, as Justices Alito and Barrett have claimed, canons are justified by tracking ordinary linguistic understanding, even Scalia and Garner’s large list of canons may not be comprehensive. One group of scholars proposed, on this basis, adding new canons: a “quantifier domain restriction” canon,<sup>156</sup> holding that quantifiers like “any” and “all” should be presumed to be restricted in context,<sup>157</sup> and additional gender canons, holding that masculine pronouns like “he” in law should be presumed to include people of all

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<sup>151</sup> Barrett, *supra* note 1, at 2203 (2017).

<sup>152</sup> See Randall & Solan, *supra* note 74, at 580. See Martínez, *supra* note 74; Tobia, Slocum & Nourse, *supra* note 74.

<sup>153</sup> Tobia, Slocum & Nourse, *supra* note 74, at 237.

<sup>154</sup> Martínez, *supra* note 74, at 54.

<sup>155</sup> Randall & Solan, *supra* note 74, at 601.

<sup>156</sup> Tobia, Slocum & Nourse, *supra* note 74, at 236.

<sup>157</sup> Note that this canon is in tension with some Court opinions. See, e.g., *Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 218–19 (2008) (interpreting “any other law enforcement officer,” by emphasizing that “[r]ead naturally, the word ‘any’ has an expansive meaning” (emphasis omitted)).

genders (not only men and women, as the traditional gender canon is framed). Empirical studies show that these rules reflect lay understanding of rules, even as American law has not explicitly recognized a “quantifier domain restriction” or “non-binary gender-inclusive” canon.

## 2. *Mid-Level Principle Example 2: Finding and Conceptualizing Ordinary Meaning*

Consider next the Ordinary-Meaning rule: the principle that “[w]ords are to be understood in their ordinary, everyday meanings—unless the context indicates that they bear a technical sense.”<sup>158</sup> The concept of “ordinary” linguistic understanding is central to textualism, and textualists consider the Ordinary-Meaning canon to be “the most fundamental semantic rule of interpretation.”<sup>159</sup> Here, as with the Conjunctive/Disjunctive canon, data-driven tools from linguistics can help to assess the empirical soundness of the canon: Do laypeople generally ascribe “non-technical” interpretations to legal texts? In fact, experimental research suggests that “ordinary people understand some laws to communicate technical meanings” rather than ordinary ones.<sup>160</sup>

This result calls into question an unwavering commitment to ordinary meaning when it comes to ascertaining how an “ordinary” or “reasonable” reader would understand a law. Of course, sophisticated forms of textualism acknowledge that statutes include technical meanings. But this empirical work puts pressure on the default presumption of ordinary (over legal) meaning, and clarifies that these presumptions should be framed as *contrastive* not absolute ones: While a general presumption of ordinary *over* certain technical meanings (e.g., scientific, religious meaning) is empirically supported, a presumption of ordinary over legal meaning is less empirically robust. Other linguistics work finds that technical legal meanings are also not the primary threat to actual notice: Laypeople are more puzzled by law’s unusual syntax (e.g., center-embedded clauses) than its technical concepts.<sup>161</sup>

Another recent debate concerns how to find ordinary meaning. In 2018, Professor (then Associate Chief Justice of the Utah Supreme Court) Thomas Lee and Stephen Mouritsen proposed that corpus linguistics methods offer a useful path forward.<sup>162</sup> In 2020, an empirical

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<sup>158</sup> SCALIA & GARNER, *supra* note 24, at 69.

<sup>159</sup> *Id.*

<sup>160</sup> Kevin Tobia, Brian G. Slocum & Victoria Nourse, *Ordinary Meaning and Ordinary People*, 171 U. PA. L. REV. 365, 371 (2023).

<sup>161</sup> See Eric Martínez, Francis Mollica & Edward Gibson, *Poor Writing, Not Specialized Concepts, Drives Processing Difficulty in Legal Language*, 224 COGNITION: INT’L J. COGNITIVE SCI., Mar. 4, 2022, at 2, 105070.

<sup>162</sup> Lee & Mouritsen, *supra* note 53, at 828–30.

project argued that typical legal uses of dictionaries and corpus linguistics to find “ordinary meaning” tends to lead to divergent verdicts.<sup>163</sup> Literature now debates which tool is best: corpus linguistics,<sup>164</sup> surveys and experiments,<sup>165</sup> word embedding analysis,<sup>166</sup> or prompting large language models.<sup>167</sup> These more recent efforts reflect constructive efforts, to identify the best tool(s) to find ordinary meaning. At the same time, some of the work in this line remains more critical: For example, the key lesson of the 2020 piece was not that one tool (dictionaries or corpus linguistics) is better, but that common judicial uses of these tools characteristically highlight *different* linguistic facts, each of which could be relevant to certain analyses of meaning in context but which do not reflect the same “ordinary meaning.”<sup>168</sup> As this example illustrates, the empirical linguistic contributions to these debates do not call for further empirical work to *displace* legal theory; instead, they often unearth empirical facts that clarify theory and call for theoretical refinement.

Consider the most recent addition of AI. In 2024, a federal circuit judge queried AI chatbot tools such as ChatGPT for the “ordinary meaning” of disputed language in an insurance contract and in the Federal Sentencing Guidelines.<sup>169</sup> A team of linguists, computer scientists, and legal scholars recently argued that this practice is flawed not simply because of the technological limitations and design characteristics of AI systems but because the question posed—*what is the ordinary meaning of “X”?*—perpetuates “an old problem for textualism cloaked in the

<sup>163</sup> Tobia, *supra* note 46.

<sup>164</sup> See Thomas R. Lee & Stephen C. Mouritsen, *The Corpus and the Critics*, 88 U. CHI. L. REV. 275 (2021) (highlighting the advantages of utilizing corpus linguistics in the search for ordinary meaning).

<sup>165</sup> E.g., Fenner Tanswell, Ben Davies, Ian Jones & George Kinnear, *Comparative Judgement for Experimental Philosophy: A Method for Assessing Ordinary Meaning in Vehicles in the Park Cases*, 38 PHIL. PSYCH. 1558, 1559 (2025) (proposing comparative judgment as an experimental method for assessing ordinary meaning and situating it against existing survey approaches). See generally James Macleod, *Surveys and Experiments in Statutory Interpretation*, in CAMBRIDGE HANDBOOK OF EXPERIMENTAL JURISPRUDENCE, *supra* note 74, at 185 (providing background on empirical methods for assessing ordinary meaning).

<sup>166</sup> E.g., Jonathan H. Choi, *Measuring Clarity in Legal Text*, 91 U. CHI. L. REV. 1, 19–21 (2024) (applying word embeddings to measure semantic similarity in legal text).

<sup>167</sup> E.g., Christoph Engel & Richard H. McAdams, *Asking GPT for the Ordinary Meaning of Statutory Terms*, 2024 U. ILL. J.L. TECH. & POL'Y 235 (2024); Yonathan Arbel & David A. Hoffman, *Generative Interpretation*, 99 N.Y.U. L. REV. 451 (2024).

<sup>168</sup> See Tobia, *supra* note 46, at 805–06 (explaining that common judicial uses of dictionaries and corpus linguistics tend to identify different criteria relevant to interpreting legal texts and thus can support diverging accounts of “ordinary meaning”); see also Kevin Tobia, *Experimental Jurisprudence*, 89 U. CHI. L. REV. 735, 776 (2022) (explaining how that survey of lay readers could inform “applied” efforts to identify which tool is best, but it was embedded in an experimental framework that also enabled critical reflection about what “ordinary meaning” in law is).

<sup>169</sup> *United States v. Deleon*, 116 F.4th 1260, 1270 (11th Cir. 2024) (Newsom, J., concurring).

mystique of new technology[:] . . . decontextualizing [disputed] terms and attempting to set the *in-context* meaning to an abstract context-independent meaning.”<sup>170</sup> There are clear parallels between this critique and, for example, the linguists’ critique of the Conjunctive/Disjunctive canon in *Campos-Chaves*, as well as Geis’s critique of the Supreme Court’s analysis in *Smith* some three decades prior.

The above discussion suggests that linguistics not only provides useful methods for empirically evaluating the interpretive principles that characterize the traditional textualist toolkit; it also offers analytical insights that may, in some cases, challenge (if not wholly undermine) the theoretical basis of those principles.

### C. *The Abstract Level*

Finally, linguistics research can bear on broader jurisprudential discourse. For example, legal theorists have debated for decades whether rule violation turns on the violation of a rule’s text or purpose. This “text-purpose dichotomy” is central to how legal theorists understand not just textualism but also its competitors, such as purposivism. The empirical tools of linguistics and related social scientific fields are well-suited to advancing jurisprudential debates that depend on this dichotomy. A rich literature has examined the question of text vs. purpose, finding that *both* factors affect lay judgment.<sup>171</sup> More broadly, empiricists have illuminated what explains these rule violation judgments,<sup>172</sup> how they vary with legal expertise and across cultures,<sup>173</sup> and the role of purpose and morals in these judgments.<sup>174</sup>

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<sup>170</sup> Brandon Waldon, Nathan Schneider, Ethan Wilcox, Amir Zeldes & Kevin Tobia, *Large Language Models for Legal Interpretation? Don’t Take Their Word for It*, 114 GEO. L.J. 115, 166, 181 (2025); see also James Grimmelman, Benjamin L.W. Sobel & David Stein, *Generative Misinterpretation*, 63 HARV. J. ON LEGIS. 229, 308 (2026) (remarking on the importance of context in considering LLM output); Thomas R. Lee & Jesse Egbert, *Artificial Meaning?*, 77 FLA. L. REV. 2235, 2252 (2025) (same).

<sup>171</sup> Struchiner, Hannikainen & de Almeida, *supra* note 48, at 312; Hannikainen et al., *supra* note 76, at 1. See generally Guilherme da Franca Couto Fernandes de Almeida, Noel Struchiner & Ivar Hannikainen, *Rules*, in THE CAMBRIDGE HANDBOOK OF EXPERIMENTAL JURISPRUDENCE, *supra* note 74, at 173 (discussing the role of textual and extratextual factors in judgment).

<sup>172</sup> See, e.g., Neele Engelmann, Ivar R. Hannikainen, Carlos González-García & María Ruz, *Understanding Rule Enforcement Using Drift Diffusion Models*, 46 PROCS. ANN. MEETING COGNITIVE SCI. SOC’Y 114, 119 (2024) (finding that it took survey participants longer to determine whether a rule violation had occurred where text and purpose were at odds).

<sup>173</sup> See Hannikainen et al., *supra* note 76, at 1 (finding differences across cultures).

<sup>174</sup> See, e.g., Neele Engelmann, Guilherme da Franca Couto Fernandes de Almeida, Felipe Oliveira de Sousa, Karolina Prochownik, Ivar R. Hannikainen, Noel Struchiner & Stefan Magen, *Apply the Laws, if They Are Good: Moral Evaluations Linearly Predict Whether Judges Should Enforce the Law*, 48 COGNITIVE SCI., no. 10, Oct. 2024, at 1, <https://onlinelibrary.wiley.com/doi/10.1111/cogs.70001> [<https://doi.org/10.1111/cogs.70001>] (finding that individuals are more likely to favor applying laws they find moral); Brian Flanagan,

At the same time, linguistic theoretical insights should encourage theorists of all persuasions—including textualists—to re-examine the text-purpose dichotomy. The journal article that accompanies the linguist brief in *VanDerStok* considers the classic “no vehicles in the park” hypothetical, which featured prominently in H.L.A. Hart and Lon Fuller’s philosophical debate in the late 1950s.<sup>175</sup> Recall that Hart argued that there were cut-and-dry cases (e.g., cars and trucks) for which text alone is sufficient to determine legal outcomes; only in edge cases at the “penumbra” is purpose a relevant consideration.<sup>176</sup> Fuller, as the common narrative goes, contended that purpose is *always* relevant.<sup>177</sup> In support of this argument, Fuller asks us to consider a non-functioning World War II truck placed in the park as a commemorative monument.<sup>178</sup> For Fuller, the role of purpose explains how the non-functioning truck, though clearly a “truck,” is intuitively permitted by the rule.<sup>179</sup>

The word *vehicle* is a model organism when it comes to the study of legal interpretation. It is also an artifact noun, denoting entities of human creation and/or assimilation. Taking this observation as a point of departure, the linguists in *VanDerStok* chart a third way through the Hart-Fuller debate: On their account,<sup>180</sup> “people construe *vehicle* to exclude this non-functional truck because they understand the in-context meaning of *vehicle* to make relevant a vehicle’s functionality—not because the rule’s purpose overrides the common truck-inclusive meaning of *vehicle*.”<sup>181</sup> A traditional view of Fuller’s hypothetical is that it illustrates that purpose sometimes trumps text;<sup>182</sup> another view is that the hypo illustrates the limits of a context-invariant ordinary meaning of “vehicle.” Sometimes that term includes trucks (and truck statues),

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Guilherme F.C.F. de Almeida, Noel Struchiner & Ivar R. Hannikainen, *Moral Appraisals Guide Intuitive Legal Determinations*, 47 *LAW & HUM. BEHAV.* 367, 367 (2023) (same).

<sup>175</sup> See generally H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 *HARV. L. REV.* 593 (1958) (defending positivism); Lon L. Fuller, *Positivism and Fidelity to Law: A Reply to Professor Hart*, 71 *HARV. L. REV.* 630 (1958) (criticizing Hart).

<sup>176</sup> Hart, *supra* note 175, at 607.

<sup>177</sup> E.g., Frederick Schauer, *A Critical Guide to Vehicles in the Park*, 83 *N.Y.U. L. REV.* 1109, 1111 (2008) (“Fuller meant to insist that it was *never* possible to determine whether a rule applied without understanding the purpose that the rule was supposed to serve.”).

<sup>178</sup> *Id.*

<sup>179</sup> *Id.*

<sup>180</sup> See also *infra* Section III.A.

<sup>181</sup> Waldon et al., *supra* note 8, at 50.

<sup>182</sup> FREDERICK SCHAUER, *THINKING LIKE A LAWYER* 156 (2009) (“[L]anguage could not . . . ever be sufficient to produce a core or clear case, because in at least some instances the clear application of clear language would nonetheless produce an absurd result. Only by always considering the purpose behind the rule, Fuller believed, could we make sense . . . of law itself.”).

and sometimes it doesn't. *In the context of the park rule*, the truck statue is not a vehicle.

The point of this discussion is not to fully jettison the text-purpose dichotomy, which has proven generally useful for conceptualizing and comparing theories of legal interpretation. However, it invites theorists—including both textualism's proponents and its detractors—to rethink the role of the dichotomy.

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Our first point is that linguistics research can feature at different levels: guiding (or critiquing) textualism in particular real cases, informing debates about mid-level interpretive principles (like linguistic canons), or speaking to more abstract and even philosophical questions in interpretation.

A second dimension of “linguistics in textualism” is *what* linguistics contributes. Above, we reviewed a range of contributions, including (1) theory, (2) concepts, and (3) evidence. Further examples of linguistic theory include Gricean pragmatics as a framework for understanding the role of context in interpretation.<sup>183</sup> But it also includes prototype theory,<sup>184</sup> and the distinction between intensional and extensional definition.<sup>185</sup>

Relevant linguistic concepts include artifact nouns, which we have discussed previously. But they would also include distinctions among sources of linguistic indeterminacy: vagueness, ambiguity, and polysemy. Anaphora is another important concept that sheds light in *VanDerStok*, *Health Freedom Defense Fund*, and other cases.

Linguistics in textualism can also contribute linguistic evidence, including (as discussed above) data that can help evaluate interpretive principles or adjudicate jurisprudential debates. Results from empirical corpus linguistic study or survey experiments of lay speakers can also contribute to case-level inquiries, as in *VanDerStok*.<sup>186</sup>

This contribution may seem more controversial, but it is less so compared to the current textualist baseline. It is extremely common for

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<sup>183</sup> See, e.g., Solum, *supra* note 20, at 2–3 (discussing the role of pragmatics in textualism).

<sup>184</sup> See, e.g., Lawrence M. Solan, *Patterns in Language and Law*, 6 INT'L J. LANGUAGE & L. 46, 51 (2017) (describing parallels between law and language generally, including prototype effects).

<sup>185</sup> See, e.g., Stefan Th. Gries, Brian G. Slocum & Kevin Tobia, *Corpus-Linguistic Approaches to Lexical Statutory Meaning: Extensionalist vs. Intensionalist Approaches*, 4 APPLIED CORPUS LINGUISTICS, no. 1, Apr. 2024, at 1, <https://www.sciencedirect.com/science/article/pii/S2666799123000394> [<https://doi.org/10.1016/j.acorp.2023.100079>] (defining ordinary meaning in intensionalist terms).

<sup>186</sup> See Waldon et al., *supra* note 8, at 20–29 (applying such methods to terms relevant to *VanDerStok*).

Justices to cite their own, hand-crafted “homey examples” in support of interpretive conclusions.<sup>187</sup> If one judge’s intuition, about an example they created, is relevant linguistic evidence, it seems that a well-constructed survey of hundreds of lay speakers (with no knowledge of the stakes of the case) would be at least equally probative. A second response is that, here too, the use of linguistic evidence could be cabined to *critical uses*, rather than uses that guide the court. For example, one of our projects tests an ordinary language hypothetical offered by a Supreme Court Justice to support an important doctrine.<sup>188</sup> The vast majority of ordinary participants did not share the Justice’s “common sense” intuition.<sup>189</sup>

We have only discussed some uses of linguistics in textualism, and we have largely focused on semantics and pragmatics, but our primary point is this breadth and variety. One specific project is to supply textualist Supreme Court Justices with empirical linguistic insights in particular cases. Although we find this a valuable project, others might not. For those skeptics, we also note the breadth of other linguistic contributions (such as concepts and theory) and the ability of linguistics to also contribute to debates about interpretive principles and debates about broader questions in interpretive theory.

### III

#### A CASE STUDY OF LINGUISTICS IN TEXTUALISM: *VAN DER STOK*

This Part considers *VanDerStok*<sup>190</sup> as an extended example of our broader thesis that linguistics can usefully inform textualism. We introduce the use of linguistics in our brief and the *VanDerStok* majority (III.A); respond to intra-textualist critiques of the majority’s use of linguistics—from both Professor Cross and dissenting Justice Thomas (III.B); and address Professor Cross’s alternative mode of textualist interpretation: “amendatory interpretation” (III.C). Section III.D responds briefly to updates to Professor Cross’s draft made after we submitted our invited response. This introduction clarifies some points about the debate.

*VanDerStok* presented two questions about the regulation of firearms under the Gun Control Act of 1968 (GCA).<sup>191</sup> The first was whether a

<sup>187</sup> Eskridge & Nourse, *supra* note 18, at 1777.

<sup>188</sup> See Kevin Tobia, Daniel E. Walters & Brian G. Slocum, *Major Questions, Common Sense?*, 97 S. CAL. L. REV. 1153, 1197 (2024) (testing Justice Barrett’s major questions doctrine hypothetical from *Biden v. Nebraska*, 143 S. Ct. 2355 (2023)).

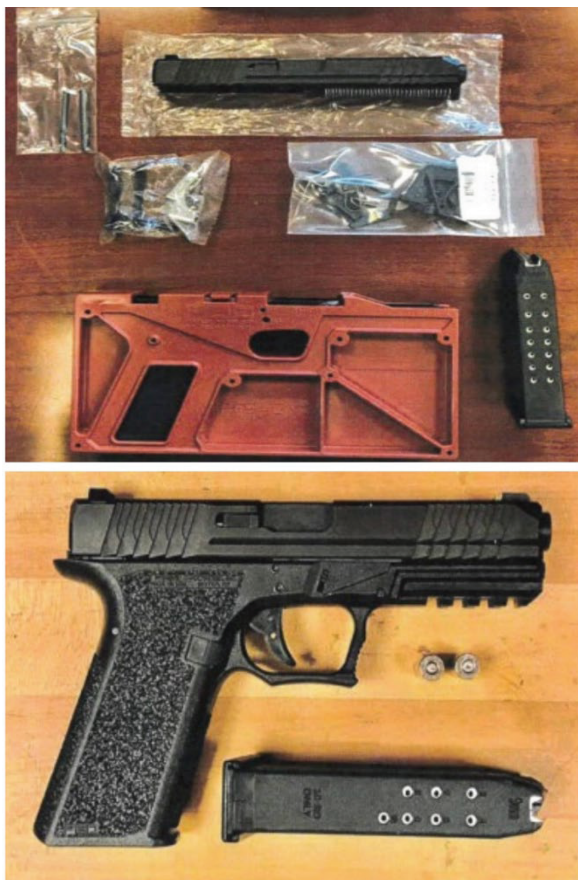
<sup>189</sup> *Id.* at 1204.

<sup>190</sup> *Bondi v. VanDerStok*, 145 S. Ct. 857 (2025).

<sup>191</sup> Petition for Writ of Certiorari at I, *VanDerStok*, 145 S. Ct. 857 (No. 23-852).

“gun parts kit”—a partly unfinished and unassembled kit of parts that could be converted into a firearm in a day’s work (see Figure 2 below)—falls under the GCA’s definition of “firearm,” subjecting it to regular firearm background check and serialization requirements. The second was whether a nearly complete but “unfinished” frame or receiver (parts of the gun holding the central firing mechanism) is a “frame” or “receiver” within the GCA.

FIGURE 2: POLYMER80’S “BUY BUILD SHOOT”  
KIT AND COMPLETED FIREARM



Polymer80’s “Buy Build Shoot” kit (top) and the completed firearm (below). In a government test, a person could complete the firearm in twenty-one minutes, using common tools and instructions.<sup>192</sup>

<sup>192</sup> *VanDerStok*, 145 S. Ct. at 866.

In hindsight, the Court's answer to both questions (yes) might seem inexorable. But before the argument, many anticipated that the Court's six Republican appointees might answer no,<sup>193</sup> especially since a year earlier, the Court split among familiar 6-3 partisan lines in another statutory firearm case.<sup>194</sup> *VanDerStok's* 7-2 answer, with the opposite political valence, makes the case an interesting example for debates about the Court's commitment to its methods (e.g., textualism) and the prospects of "progressive originalist" or "progressive textualist" arguments.

Of course, *VanDerStok* alone does not portend a shift in the Court's jurisprudence. Out of eight recent firearms cases, only one other held against firearms interests.<sup>195</sup> Across many other issues, the Court's docket is animated by partisan politics—a point emphasized in the past two years' *Harvard Law Review* Supreme Court Forewords.<sup>196</sup> Moreover, in no case—including *VanDerStok*—can one *prove* that textualism motivated the Justices. Perhaps *VanDerStok's* majority reasoned in the language of textualism but were motivated by policy concerns about ghost guns: 2024–2025 saw multiple presidential assassination plots as well as the widely publicized murder of the CEO of UnitedHealthcare, allegedly conducted by Luigi Mangione with a 3D-printed gun.<sup>197</sup>

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<sup>193</sup> See, e.g., STRICT SCRUTINY: *Steel Yourself for a New SCOTUS Term* (Spotify, Sep. 30, 2024) (expressing concern that the Court might find for the respondent).

<sup>194</sup> *Garland v. Cargill*, 144 S. Ct. 1613 (2024), concerned a bump stock device, which can fit on a semi-automatic rifle and effectively increase its rate of fire to 400–800 rounds per minute, *id.* at 1630, close to the rates of fully automatic weapons and some machine guns. *Cargill* asked if a bump stock is a "machinegun" within 26 U.S.C. § 5845(b), which is defined as one that fires "automatically more than one shot . . . by a single function of the trigger." *Id.* at 1617. Justice Thomas's majority (joined by the other five Republican appointees) answered no, and the three Democratic appointees dissented.

<sup>195</sup> The other is *United States v. Rahimi*, 144 S. Ct. 1889, 1896 (2024). *But see id.* at 1930 (Thomas, J., dissenting) (arguing that the majority's approach was inconsistent with *Bruen*). For cases siding with firearm interests, see *Smith & Wesson Brands, Inc. v. Estados Unidos Mexicanos*, 145 S. Ct. 1556, 1562 (2025) (unanimous opinion); *Cargill*, 144 S. Ct. at 1617; *N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111, 2122 (2022); *Caetano v. Massachusetts*, 577 U.S. 411, 412 (2016) (per curiam); *McDonald v. City of Chicago*, 561 U.S. 742, 750 (2010); and *District of Columbia v. Heller*, 554 U.S. 570, 629 (2008).

<sup>196</sup> See, e.g., Richard M. Re, *The Supreme Court, 2024 Term—Foreword: To a Conservative Warren Court*, 139 HARV. L. REV. 1, 3–4 (2025) (remarking that the Court "wields its power in pursuit of its ideological goals"); Karen M. Tani, *The Supreme Court, 2023 Term—Foreword: Curation, Narration, Erasure: Power and Possibility at the U.S. Supreme Court*, 138 HARV. L. REV. 1, 10 (2024) (discussing how ideology seems to play a role in determining which petitions for certiorari are granted).

<sup>197</sup> Andy Greenberg, *The 'Ghost Gun' Linked to Luigi Mangione Shows Just How Far 3D-Printed Weapons Have Come*, WIRED (Dec. 10, 2024), <https://www.wired.com/story/luigi-mangione-united-healthcare-3d-printed-gun-fmda-chairmanwon-v1> [<https://perma.cc/9LKP-XU2W>].

Debates about judicial motivations and the prospects of “progressive textualism” to persuade textualist Justices interest us. But in this Part we interrogate the Court’s logic of justification (i.e., its stated textualist reasoning), not its logic of decision (the reasons motivating the decision). We understand Professor Cross’s critique to share this focus. In assessing *VanDerStok*, Cross asks, “Did Linguistic Textualism provide an effective tool to access statutory meaning in *VanDerStok*?”<sup>198</sup> He also argues that a different version of textualism, “amendatory interpretation” does better—generally and in *VanDerStok*.<sup>199</sup>

Professor Cross’s objection is that “Linguistic Textualism,” in *VanDerStok* and elsewhere, imposes three flawed constraints: the temporal, textual, and meaning constraints.<sup>200</sup> One year ago, these same three constraints appeared in his important article on “The Amended Statute.”<sup>201</sup> There, however, these were critiques of *textualism*. This clarifies that the charge is not that bringing linguistics to textualism *introduces* or even *amplifies* flaws. The critique’s repetition underscores that Linguistic Textualism is, at worst, complicit in imposing the same flawed constraints that Professor Cross has already identified with dominant strands of textualism. However, our view is the opposite: Bringing more linguistics to textualism would further escape from, not further entrench, these constraints.

We agree with much of Cross’s critique of textualism in *The Amended Statute*. Layering linguistics references onto that flawed approach would also be worthy of critique; we simply disagree that this is a fair characterization of *VanDerStok*. These constraints are grounded in a flawed approach to textualism, but not linguistics. In fact, linguistics generally complements and even sharpens these critiques.

### A. *Linguistics in VanDerStok*

The GCA is codified at 18 U.S.C. §§ 921–928, within the U.S. Code’s Criminal Title (18), which Congress first enacted into positive law in 1948.<sup>202</sup> In June 1968, Congress repealed and replaced an older law (The Federal Firearms Act) and inserted the new text into Title 18.<sup>203</sup> In October 1968, Congress modified Title 18’s text again, enacting

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<sup>198</sup> Cross, *supra* note 3, at 902.

<sup>199</sup> *Id.* at 966.

<sup>200</sup> *Id.* at 902.

<sup>201</sup> Cross, *The Amended Statute*, *supra* note 13, at 1350.

<sup>202</sup> Act of June 25, 1948, ch. 645, 62 Stat. 683.

<sup>203</sup> Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, tit. IV, 82 Stat. 197, 226–35.

a law that replaced 18 U.S.C. §§ 921–928 with entirely new text.<sup>204</sup> This (October 1968) version is the Gun Control Act of 1968.

Congress has amended the GCA’s lengthy definitions section, 18 U.S.C. § 921, eighteen times since 1968, but the key provision at issue in *VanDerStok* has remained unchanged since October 1968:

The term “firearm” means

- (A) any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive;
- (B) the frame or receiver of any such weapon;
- (C) any firearm muffler or firearm silencer; or
- (D) any destructive device.

Such term does not include an antique firearm.<sup>205</sup>

The two questions in *VanDerStok* were whether part (A) of this definition included certain “firearm parts kits,” unassembled and/or partially unfinished kits of firearm parts; and whether part (B) included certain unfinished frames or receivers such as an “80% receiver,” which requires the consumer to complete the final 20% of manufacturing themselves, a process that many can complete in a day’s work.<sup>206</sup> The Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) had interpreted the GCA’s definition to include certain gun parts kits and unfinished frames and receivers.<sup>207</sup> The Fifth Circuit answered *no* to both questions, in a highly textualist opinion, emphasizing the ordinary meaning of the terms in the statutory definition.<sup>208</sup>

When the Supreme Court granted certiorari, its decision about *VanDerStok* was unpredictable.<sup>209</sup> The Court had granted a stay of the District Court for the Northern District of Texas’s judgment to vacate the ATF’s final rule, but Justices Thomas, Alito, Gorsuch, and Kavanaugh would have denied it.<sup>210</sup> All bets were that this would be a close case. Yet it was clear that the Justices’ debate and analysis would center on

<sup>204</sup> See Gun Control Act of 1968, Pub. L. No. 90-618, 82 Stat. 1213, 1214–26.

<sup>205</sup> 18 U.S.C. § 921(a)(3).

<sup>206</sup> *Bondi v. VanDerStok*, 145 S. Ct. 857, 864 (2025).

<sup>207</sup> See 27 C.F.R. § 478.11 (2025) (weapon parts kits); 27 C.F.R. § 478.12(c) (2025) (unfinished frames and receivers).

<sup>208</sup> *VanDerStok v. Garland*, 86 F.4th 179, 211, 212 (5th Cir. 2023).

<sup>209</sup> See, e.g., Ian Millhiser, *The Supreme Court Will Decide Whether To Let Criminals Get Guns Without a Background Check*, Vox (Oct. 1, 2024), <https://www.vox.com/scotus/372162/supreme-court-ghost-guns-garland-vanderstok> [<https://perma.cc/SH56-CWMF>] (noting that the outcome was unclear).

<sup>210</sup> *Garland v. VanDerStok*, 144 S. Ct. 44, 44 (2023) (mem.) (order granting stay).

textualist arguments about the ordinary meaning of the GCA.<sup>211</sup> Such textualist inquiries are increasingly framed by the Court as ones about how an informed “ordinary reader” would understand the text.<sup>212</sup> Yet, critics allege that the Court speculates on this ordinary reader with an (inaccurate) “upper-class, judicially-inflected accent.”<sup>213</sup>

Against this backdrop, we coordinated a team of linguists to reflect on the linguistic issues in the case. We considered ideas from linguistic theory, such as the longstanding distinction between natural and artifact kind terms. Broadly speaking, the semantics of natural kind terms (e.g., “egg,” “bird,” “water”) differs in important ways from that of artifact kind terms (e.g., “chair,” “table,” “firearm”).<sup>214</sup>

We also conducted empirical work, to inform the Court’s likely musings about “ordinary” understandings.<sup>215</sup> This included scouring the websites of gun part kit sellers to see whether *they* described their products exclusively as (non-firearm) “kits” or also as “firearms.” It also included a survey experiment of laypeople. We reported our findings and analysis in an article and summarized that in an amicus brief, submitted in support of the Government.<sup>216</sup>

Our analysis focused on the linguistic concept of an “artifact noun” and the associated linguistic theory about these nouns. *VanDerStok*’s key terms—“firearm,” “weapon,” “frame,” and “receiver”—are “artifact nouns,” denoting entities of human-made creation.<sup>217</sup> Other artifact nouns include “table,” “chair,” and “bicycle.” These terms are often contrasted with “natural kinds,” like “water,” “egg,” and “bird.”

Linguistic theory has emphasized that an artifact noun can be characterized by basic attributes that pertain to members of the category. The linguist James Pustejovsky (who joined our brief and article)

<sup>211</sup> See, e.g., Samuel Alito, *A Tribute to Justice Scalia*, 126 YALE L.J. 1605, 1608 (2017) (“[T]he federal courts’ approach to statutory interpretation has changed dramatically. Textualism has won, if not universal acceptance, at least the pole position among the competitors.”); STEPHEN BREYER, *READING THE CONSTITUTION: WHY I CHOSE PRAGMATISM, NOT TEXTUALISM* 16 (2024) (describing Justices’ textualist inclinations and affinity for ordinary meaning); William N. Eskridge, Jr., *Textualism, the Unknown Ideal?*, 96 MICH. L. REV. 1509, 1512 (1998) (noting that textualists start with ordinary meaning).

<sup>212</sup> See, e.g., Barrett, *supra* note 1, at 2205 (referencing the understanding of an ordinary speaker); Alito, *supra* note 211, at 1607 (“[Scalia’s] theory of statutory interpretation was textualism. He tirelessly preached that a statute should be read to mean what its words would convey to an ordinary reader.”).

<sup>213</sup> Eskridge & Nourse, *supra* note 18, at 1728.

<sup>214</sup> See Waldon et al., *supra* note 8, at 427, 457.

<sup>215</sup> See *id.* at 433–42.

<sup>216</sup> *Id.*; Linguistics Brief, *supra* note 8.

<sup>217</sup> See, e.g., Brandon Waldon, Cleo Condoravdi, Beth Levin & Judith Degen, *On the Context Dependence of Artifact Noun Interpretation*, 27 PROCS. SINN UND BEDEUTUNG 674, 675 (Maria Onoeva, Anna Staňková & Radek Šimík eds., 2023) (discussing artifact nouns generally).

developed an important framework that associates English words with a semantic structure reflecting the essential facets of artifact noun meaning: (1) the constitutive facet, about the relationship between an object and its parts; (2) the formal facet, about what distinguishes the object in the larger domain; (3) the telic facet, about the potential of an object to fulfill some purpose; and (4) the agentive facet, about what was involved in bringing about the object.<sup>218</sup>

These different facets of meaning are relevant in different contexts. Consider artifact nouns like “table,” “bicycle,” or “firearm.” Whether an object falls under the description varies across context. An unassembled IKEA table is not a table in a context in which someone asks you to “put dinner on the table.” But in other contexts, it is: If you explain that you just bought a new table and chairs for the kitchen, the unassembled IKEA table just is a table. Artifact nouns are highly context-sensitive, and in the absence of context they are underspecified. When asked “is an IKEA table a table?”, the right response is not “yes” or “no.” It is to ask: In which context? So too for “firearm.” This was our first important lesson for the Court: The “ordinary meaning” of an artifact noun like “firearm” is inherently underspecified with respect to unassembled members like gun parts kits and therefore critically context sensitive.

This insight clarifies the problem with an alternative, tempting textualist analysis of *VanDerStok*. The Court has emphasized “ordinary meaning” in interpretation, and one could imagine a Court analyzing the “ordinary” meaning of “firearm” by noting that most often “firearm” refers to a completed firearm, as most often “table” refers to a completed table. Therefore, this flawed argument might go, the “ordinary” meaning of “firearm” does not include gun parts kits. One could even lean on empirical evidence: Most naturally occurring uses of “firearm,” say in *The New York Times*, refer to *completed* firearms; that “completed sense” is the ordinary meaning. This analysis, which fortunately no Justice floated, would completely miss the point. There is a limit to analyzing the “ordinary meaning” of an artifact noun absent context; the “ordinary meaning” of “table” or “firearm” (absent context) is underspecified. *In a given context*, the term might or might not include unassembled members.

The second big point in *VanDerStok* concerns statutory context. The statute defines a firearm in terms of its functional (or telic) potential—any weapon that “may readily be converted” to expel a projectile. It also defines it by its design (agentive) facet—any weapon “designed” to

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<sup>218</sup> See James Pustejovsky, *The Generative Lexicon*, 17 *COMPUTATIONAL LINGUISTICS* 409, 426–27 (1991). The original paper describes “qualia roles.” The “facet” terminology is from D.A. Cruse, *On Polylexy*, 14 *DICTIONARIES: J. DICTIONARY SOC. N. AM.* 88, 92 (1992).

function in this way. This language underscores the relevance of *those* facets of meaning to the in-context meaning of “firearm” and “weapon.” In the statutory context, design and potential function are critical to specify the artifact nouns’ otherwise partly underspecified meaning.

Our article supplemented the theoretical analysis with an empirical one.<sup>219</sup> In a survey experiment of ordinary Americans, the majority analyzed a gun parts kit as a “firearm.” When we presented a different sample with the statutory definition (emphasizing convertibility and design), that number increased further. Courts should not outsource textualist interpretation to surveys, and a survey result is not dispositive for textualist interpretation (e.g., “51% of readers understood the provision to mean *X*”). Nevertheless, a carefully designed survey experiment can help test (and in this case support) linguistic theories as applied to more specific legal cases. We also considered how gun parts kit buyers and sellers describe the kits (in online advertisements and reviews). Those contexts show a number of descriptions of the kits *as* firearms. Consider a gun parts kit seller’s website, which at the time presented this description of its product: “Introducing the AR-40 4.5” MOD1 Billet Upper Receiver Pistol Build Kit, a powerful and compact firearm designed to deliver outstanding performance in the dynamic world of pistol builds.”<sup>220</sup>

The description features what linguists would call an “ascriptive noun phrase supplement”—a comma separates the product name (“AR-40 . . . Build Kit”) from the ascriptive phrase (“a powerful and compact firearm”).<sup>221</sup> By way of this construction, the manufacturer’s description implies that the kit is a firearm.<sup>222</sup>

The brief made several other linguistic arguments based on context.<sup>223</sup> As just one other example, consider the case’s second question: Is a partially unfinished frame or receiver a “frame” or “receiver” within the statutory definition? Recall the definition of “firearm”:

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<sup>219</sup> See Waldon et al., *supra* note 8, at 437–42.

<sup>220</sup> AR-40 4.5” Billet MOD1 Upper Receiver Pistol Build Kit, A1ARMORY, <https://a1armory.com/ar-40-4-5-billet-mod1-upper-receiver-pistol-build-kit> [<https://perma.cc/5KXL-4426>] (last visited Feb. 16, 2025) (emphasis added).

<sup>221</sup> See generally RODNEY HUDDLESTON & GEOFFREY K. PULLAM, *THE CAMBRIDGE GRAMMAR OF THE ENGLISH LANGUAGE 1356–57* (2002) (explaining how “the distinction between specifying and ascriptive complements applies also to supplements”).

<sup>222</sup> Ascriptive noun phrase supplements are routinely associated with this type of inference. For example, in the sentence “*Kim Jones, a quite outstanding student, won a scholarship to MIT.* . . . [A] *quite outstanding student* expresses a property that is ascribed to Kim Jones.” *Id.* at 1357.

<sup>223</sup> For example, the brief advances an argument about the consistent contextual resolution of indeterminacy. Linguistics Brief, *supra* note 8, at 30–33.

- (A) any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive;
- (B) the frame or receiver of any such weapon.<sup>224</sup>

Section (B) does not have the same language that underscores the relevance of design and potential function. If (B) read “anything designed to or readily be converted to function as a frame,” the question would be easier. But in the absence of such language (which exists in (A)), perhaps (B)’s “frame or receiver” does *not* include any unassembled or unfinished members.

However, the statute includes what linguists call *anaphora*. This is “a relation between two linguistic elements, wherein the interpretation of one (called an anaphor) is in some way determined by the interpretation of the other (called an antecedent).”<sup>225</sup> Here, Congress’s use of “any such weapon” in (B) to refer back to “weapon” as defined in (A) provides critical context to understand “frame” and “receiver.” Section (B) describes frames and receivers of “such weapons” that will, are designed to, or may readily be converted to expel a projectile. Understanding this anaphoric relationship clarifies why (B) would not include the completed metal receiver of a toy gun (literally, a “receiver” of a “weapon”). It also clarifies that an 80% receiver in a full gun parts kit (that would fall under (A)) should itself fall under (B).

Justice Gorsuch’s majority decision is detailed and rich, and we were pleased that some of its points cohere with our linguistic analysis. It identifies “weapon,” “firearm,” “frame,” and “receiver” as “artifact nouns,”<sup>226</sup> notes that (in some contexts) these can reach unfinished objects,<sup>227</sup> and concludes that because the statutory context emphasizes design and potential function, (A) can encompass gun parts kits.<sup>228</sup> The opinion also recognized the anaphoric relation in (B): “Any such weapon” in that definition “refers us back to weapons encompassed by subsection (A).”<sup>229</sup> The opinion saw this as an important reason to conclude that 80% frames and receivers fall under (B).

<sup>224</sup> 18 U.S.C. § 921(a)(3).

<sup>225</sup> YAN HUANG, *ANAPHORA: A CROSS-LINGUISTIC APPROACH* 1 (2000).

<sup>226</sup> See *Bondi v. VanDerStok*, 145 S. Ct. 868–70, 871 n.4, 873–75 (2025).

<sup>227</sup> See *id.* at 868.

<sup>228</sup> See *id.* at 868–70.

<sup>229</sup> *Id.* at 875.

## B. Critiques of Linguistics in VanDerStok

This Section addresses the three major critiques from Professor Cross and Justice Thomas about the linguistics-informed approach reflected in *VanDerStok*: (1) Its commitment to “ordinary meaning” inappropriately ignores statutory technical meanings (“meaning constraint”);<sup>230</sup> (2) its emphasis on word meanings inappropriately ignores statutory context (“textual constraint”);<sup>231</sup> and (3) it displaces normal statutory interpretation with the novel label, “artifact noun.”<sup>232</sup> Professor Cross articulates a fourth concern about the relevance of the 1938 predecessor statute and the linguistics-informed approach’s overemphasis on 1968 (“temporal constraint”).<sup>233</sup> We address that concern in Section III.C.4, in the context of discussing Professor Cross’s suggested methodology for deciding *VanDerStok*.

### 1. Ordinary Meaning, Technical Meaning, and Contextual Meaning

Professor Cross argues that “the meaning constraint . . . excludes consideration of types of linguistic meaning beyond ordinary meaning” and that this “meaning constraint was on full display in *VanDerStok*.”<sup>234</sup> He argues that this mistake was reflected in both the majority and

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<sup>230</sup> *Id.* at 886 (Thomas, J., dissenting) (“[Regardless of] whether, in casual conversation, some people might use ‘a word for a thing created by humans’ to discuss unfinished versions of that ‘thing.’ . . . In statutory drafting, where precision is both important and expected, the sort of colloquial usage on which the [majority] relies is not customary.” (quoting *Allison Engine Co. v. United States ex rel. Sanders*, 553 U.S. 662, 670 (2008))); Cross, *supra* note 3, at 903 (“The first artificial constraint of Linguistic Textualism is the *meaning constraint*. This excludes consideration of types of linguistic meaning beyond ordinary meaning.”).

<sup>231</sup> *VanDerStok*, 145 S. Ct. 857 at 886 (Thomas, J., dissenting) (“[W]e must evaluate . . . based on the GCA’s ‘entire statutory scheme,’ . . . not the ‘stereotypical conversational background’ on which the majority relies. That scheme—as reflected in the GCA’s text, context, and structure—confirms that unfinished objects in a weapon-parts kit do not meet § 921(a)(3)(B)’s terms.” (quoting Scott Grimm & Beth Levin, *Artifact Nouns: Reference and Countability*, in 2 PROCEEDINGS OF THE 47TH ANNUAL MEETING OF THE NORTH EAST LINGUISTIC SOCIETY 55, 58 (Andrew Lamont & Katerina Tetzloff eds., 2017))); Cross, *supra* note 3, at 924 (“The final artificial constraint of Linguistic Textualism is the *textual constraint*. Under this constraint, the Court artificially narrows the statute to isolated, individual terms . . . such as ‘because,’ ‘so,’ and ‘a.’ . . . [I]n this approach, the Court assumes that dispositive meaning can be found in small, decontextualized linguistic units.”).

<sup>232</sup> *VanDerStok*, 145 S. Ct. 857 at 886 (Thomas, J., dissenting) (“Dressing up colloquial usage with the ‘artifact noun’ label cannot override this conclusion . . . .”); *see also* Cross, *supra* note 3, at 903 (worrying that Linguistic Textualism “has given courts throughout the country new license to resolve statutory cases by reference to novel linguistics resources”).

<sup>233</sup> Cross, *supra* note 3, at 915 (“Another artificial constraint of Linguistic Textualism is the *temporal constraint*. Under this constraint, the Court artificially limits the time period for its analysis. . . . Linguistic Textualism . . . treats the assembled version of law found in the United States Code as authoritative, not the disassembled, amendment-by-amendment version found in our public laws.”).

<sup>234</sup> *Id.* at 903.

dissenting opinions, as well as the linguists' work: "This shared approach to *VanDerStok* is remarkable, because it is difficult to imagine a statute less amenable to the meaning constraint than the GCA."<sup>235</sup>

We agree that it would be a failure to analyze 18 U.S.C. § 921 by contemplating only the "ordinary meaning" of its terms, in the sense of their most common non-technical meanings, and prohibiting consideration of technical meanings, including legal ones. But the charge doesn't stick. Such a "meaning constraint" is not evident in the linguists' work, Justice Gorsuch's opinion, or Justice Thomas's. As one simple example, all three understand that the statutory definition of "firearm" includes objects that are not commonly understood to be firearms, like a muffler, silencers, and even "destructive devices," which the statute defines to include poison gas. It's clearly a technical statute, which constructs a specialized meaning of "firearm."

Part of the confusion, we think, traces to a conflation of "ordinary meaning," in the sense of the most common meaning, with non-contextual (what linguists would call "conventional") meaning. An important argument from our linguistics brief is that the "ordinary meaning" of artifact nouns in sparse context is *underspecified*. So, to examine "the ordinary meaning" of these terms in the GCA is a necessarily context-sensitive inquiry (regardless of whether we are in a colloquial or more specialized context), rather than the anti-contextualist one Cross assumes is associated with analysis of ordinary meaning.

Justice Thomas's dissent offered a different gloss on this critique:

It is beside the point whether, in casual conversation, some people might use "a word for a thing created by humans" to discuss unfinished versions of that "thing." . . . "In statutory drafting, where precision is both important and expected, the sort of colloquial usage on which the [majority] relies is not customary."<sup>236</sup>

This is an unusual critique from Justice Thomas, who in other cases is keen to draw on general (non-technical) sources of linguistic evidence and evidence about customary or colloquial usage. In *Garland v. Cargill*, another gun case from 2024, Justice Thomas's majority drew on definitions from general dictionaries—including the Oxford English Dictionary, American Heritage Dictionary, and Webster's New International Dictionary—and sources illustrating the conventional

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<sup>235</sup> *Id.* at 16–17.

<sup>236</sup> *VanDerStok*, 145 S. Ct. 857 at 886 (Thomas, J., dissenting) (first quoting *id.* at 868 (majority opinion); then quoting *Allison Engine Co. v. United States ex rel. Sanders*, 553 U.S. 662, 670 (2008)).

understanding of people who use firearms, like a popular book on “Gunsmithing the AR-15.”<sup>237</sup>

Nevertheless, we agree with part of Justice Thomas’s concern. The Court has been keen to draw on “homey examples” or ordinary usage to illuminate statutory interpretation, and there are risks that these can be cherry-picked.<sup>238</sup> Moreover, these examples may not be adequately analogous. For example, one of us has written skeptically about Justice Barrett’s account of Congress-agency communication that draws an analogy to communication between a parent and babysitter; Congress-agency communication differs from parent-babysitter communication in too many significant ways.<sup>239</sup>

In *VanDerStok*, too, we agree that there are limits to hypotheticals about IKEA tables or even how we would talk about firearms in other contexts. In fact, our survey experiment underscores this point. We found that people’s judgments about firearm parts kits did not perfectly mirror their judgments about other parts kits (e.g., bicycle parts kits).<sup>240</sup> As such, linguistic intuitions about a different parts kit (say a bicycle kit) are not necessarily representative of linguistic intuitions about the firearm parts kits at issue. More broadly, ordinary contexts often do not adequately match the legal one. The most important contribution of our survey experiment was that the statutory context matters for ordinary readers’ evaluation of the artifact noun “firearm”: In contexts (like the GCA’s) emphasizing design and convertibility, people even more strongly understand parts kits as firearms. For these reasons, we are puzzled by Professor Cross’s suggestion that “artifact noun” theory is limited to “ordinary” or “colloquial” usage, abstracted from the statute. The linguistic theory of artifact nouns helps explain why the (legal) statutory context is so crucial to the meaning of “firearm.”<sup>241</sup>

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<sup>237</sup> 144 S. Ct. 1613, 1620–22 (2024).

<sup>238</sup> See Eskridge & Nourse, *supra* note 18, at 1761–63; see, e.g., Lockhart v. United States, 577 U.S. 347, 361 (2016); Facebook, Inc. v. Duguid, 141 S. Ct. 1163, 1164 (2021).

<sup>239</sup> See Tobia, Walters & Slocum, *supra* note 188, at 1174–78.

<sup>240</sup> See Waldon et al., *supra* note 8, at 28.

<sup>241</sup> Beyond providing a theoretical account of our experimental results, Professor Pustejovsky’s framework explains other linguistic phenomena that are clearly not restricted to colloquial or non-technical contexts. One such phenomenon discussed in both the brief and article is the inherent ambiguity of sentences such as *Noel began a novel*, which on one interpretation implies that Noel began reading a novel but on another equally plausible interpretation implies that Noel began writing a novel. See Waldon et al., *supra* note 8, at 13. Another phenomenon is that of copredication, in which “*prima facie*, an entity is ascribed categorically incompatible properties” within a single sentence. See David Liebesman & Ofra Magidor, *Copredication and Meaning Transfer*, 40 J. SEMANTICS 70, 71 (2023) (discussing “Dual Nature” approaches broadly). Copredication is exemplified by sentences such as *John read the book on the table*, in which a single word (“book”) refers simultaneously to an abstract body of informational content (something to be “read”) and a physical object

Finally, reflecting beyond *VanDerStok*, there is no tension between a linguistics-informed approach to interpretation and consideration of technical meanings. Linguistics research observes that speakers' linguistic choices are context dependent and reflect an intended audience,<sup>242</sup> cohering with legal scholarship that emphasizes the relationship between statutory audience and technical meanings.<sup>243</sup> Professor Cross's article seems to infer that the appeal to "everyday speakers" and "ordinary speakers" implies that technical meanings cannot be relevant.<sup>244</sup> However, theoretical and empirical work on textualism further argues against this conclusion.<sup>245</sup> In fact, one study provides support for exactly the opposite: Ordinary people readily identify technical terms in law and expect those to have legal meanings.<sup>246</sup> A court tracking an "ordinary reader's" interpretation should regularly interpret language to have technical meanings.

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(something that can be "on the table"). In Professor Pustejovsky's framework, "book" is interpreted according to its telic facet as the direct object of "read" but according to its formal facet as a noun modified by the prepositional phrase "on the table." These phenomena are readily observed in both everyday and technical contexts; thus, the framework is useful for theorizing about linguistic interpretation in both types of settings. More generally, linguistics does not restrict its focus to colloquial registers of the natural languages it studies; indeed, the object of the science is to explain linguistic phenomena *across* registers and *across* languages. The broad scope of linguistics' scientific objective is hard to reconcile with attempts to equate linguistics with the study of so-called "ordinary" varieties of language.

<sup>242</sup> Herbert H. Clark & Gregory L. Murphy, *Audience Design in Meaning and Reference*, in *LANGUAGE AND COMPREHENSION* 287, 287 (J.-F. Le Ny & W. Kintsch, eds., 1982); Allan Bell, *Language Style as Audience Design*, 13 *LANGUAGE SOC'Y* 145, 145 (1984); Mary Bucholtz & Kira Hal, *Identity and Interaction: A Sociocultural Linguistic Approach*, 7 *DISCOURSE STUDS.* 585, 585 (2005); Penelope Eckert & Sally McConnell-Ginet, *Think Practically and Look Locally: Language and Gender as Community-Based Practice*, 21 *ANN. REV. ANTHROPOLOGY* 461, 465–67 (1992). Thanks to Tammy Gales for suggesting many of these references.

<sup>243</sup> See, e.g., David S. Louk, *The Audiences of Statutes*, 105 *CORN. L. REV.* 137, 144–45 (2019) (arguing that judicial focus on the plain textual meaning is more sensible for statutes addressing ordinary audiences, but not for statutes addressing agencies regulating sophisticated entities); see also Guha Krishnamurthi, *Textualism Step Zero*, *S. CAL. L. REV.* (forthcoming 2026) (manuscript at 5), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=5571300](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5571300) [<https://perma.cc/7F42-VKAT>] (proposing that textualist statutory interpretation begin by "determin[ing] who the relevant audience is for the legislation"); Anuj C. Desai, *Textualism Step Zero: Who is the Reader of Statutory Text?* 2–3 (Oct. 23, 2025) (unpublished manuscript), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=5649130](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5649130) [<https://perma.cc/43UA-9YUS>] (arguing that "before turning to the tools of statutory interpretation, a textualist must first determine the statutory text's objective reader").

<sup>244</sup> See Cross, *supra* note 3, at 904.

<sup>245</sup> See, e.g., Lawrence B. Solum, *Originalist Methodology*, 84 *U. CHI. L. REV.* 269, 279–80 (2017) (reviewing common methods for Originalist interpretation to dispel myths about textualism).

<sup>246</sup> See Tobia, Slocum & Nourse, *supra* note 160; see also Lawrence B. Solum, *Originalism and the Natural Born Citizen Clause*, 29 *IMMIGR. & NAT'Y L. REV.* 593, 596 (2008) (describing Hilary Putnam's concept of the division of linguistic labor and extending it to legal interpretive contexts).

## 2. *Word Meanings and Statutory Context*

The second critique alleges the imposition of a (false) “textual constraint” that requires linguistic analysis to resolve the case by an individual word’s meaning:

Under this constraint, the Court artificially narrows the statute to isolated, individual terms. In prior cases, this has led the Court to a myopic focus on terms such as: “*because*,” “*so*,” and “*a*.” When taking this approach, the Court assumes that dispositive meaning can be found in small, decontextualized linguistic units.<sup>247</sup>

Here again, we share Professor Cross’s general concern about this approach and have written critically about the Court’s overemphasis on word meaning in certain cases,<sup>248</sup> including in our *VanDerStok* article.<sup>249</sup> We appreciate that Professor Cross acknowledges this, as well as that our analysis (at least in theory) “seemingly permitted divergence from the *textual constraint* in order to empower more holistic and comprehensive readings of texts.”<sup>250</sup>

In fact, the primary theme of our linguistics work was the necessity of context in specifying the meaning of artifact noun terms. The central argument about the words “firearm,” “frame,” and “receiver” is that interpreters cannot answer the question about their meaning in *VanDerStok* without consulting context. We did focus on those terms—they are essential to the dispute in *VanDerStok*—but our argument was largely in line with Cross’s: The wrong approach is to pull those terms from context and define them by a dictionary. The right approach is to assess their meaning in the larger context of the statute.

Professor Cross’s specific concern was that we did not emphasize the statutory purpose sections as relevant context: “[The statute’s] purposes are relatively intuitive. The reasons why one might want background checks for firearms, or to prevent minors and felons from possessing firearms, reflect public safety goals any reader can surmise. Moreover,

<sup>247</sup> Cross, *supra* note 3, at 924.

<sup>248</sup> See Eskridge, Slocum & Tobia, *supra* note 1 (reviewing twelve points of issue in the Court’s textualist methodology).

<sup>249</sup> Waldon et al., *supra* note 8, at 47 (critiquing “relying exclusively on individual words in interpretation”). The locus of our criticism is decontextualized word-level analysis. Function words such as *because*, *so*, and *a* are ubiquitous in both spoken and written English, and their abstract semantic contributions are not easily articulated through folk intuition or dictionary definitions. Careful attention to such “small” words is not necessarily “myopic”—but analysis of such words should be grounded in context using linguistic theoretical principles and empirical methods. See, e.g., *supra* Section III.B.1 (discussing the linguists’ analyses of the function words *and*, *or*, and *not* in *Pulsifer* and *Campos-Chaves*).

<sup>250</sup> Cross, *supra* note 3, at 926.

two enacted versions of the GCA contained lengthy ‘Purpose’ sections that expressly outlined and codified its aim.”

We agree that enacted purposes are relevant context.<sup>251</sup> But that context is not as straightforward as “amendatory interpretation” assumes. The October 1968 purpose section references crime and safety, but it also states: “[I]t is not the purpose of this title to place any undue or unnecessary Federal restrictions or burdens on law-abiding citizens with respect to the acquisition . . . of firearms appropriate to . . . any other lawful activity.”<sup>252</sup> The 1986 amendments enact congressional findings including that “the rights of citizens . . . to keep and bear arms . . . require additional legislation to correct existing firearms statutes and enforcement policies.”<sup>253</sup> In this case, enacted findings and purposes don’t provide a simple answer: The stated purposes of the GCA and its amendments include reducing crime but also avoiding burdening firearm owners. These purposes do not point uniformly to an answer in *VanDerStok* about whether the category of “firearm” should be construed broadly or narrowly. To answer that question about what is a “firearm,” the context provided by the statutory text of § 921 is more helpful.

As a second example of our emphasis on context, consider our survey experiment. That study examined laypeople’s understanding of definitions of artifact nouns. The study showed that the specific statutory language of 18 U.S.C. § 921 (“which will, is designed to, or may readily be converted to”) caused more participants to understand the statute as reaching gun part kits. This, too, underscores the importance of context.

### 3. *Novel Terms Displacing Ordinary Interpretation*

A final objection is that the majority and our linguistics analyses displace normal statutory interpretation with (legally) novel labels like “artifact noun.”<sup>254</sup> We concede that no other opinion has drawn on the label “artifact noun,” but the distinction between human-made artifacts and natural kinds traces back to Aristotle’s *Metaphysics*.<sup>255</sup> Our brief builds on decades of robust linguistics scholarship written with no knowledge of the *VanDerStok* case.

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<sup>251</sup> See Jarrod Shobe, *Enacted Legislative Findings and Purposes*, 86 U. CHI. L. REV. 669 (2019) (arguing all enacted text of a statute must be read as part of the law itself).

<sup>252</sup> Gun Control Act of 1968, Pub. L. No. 90-618, 82 Stat. 1213, 1213–14.

<sup>253</sup> Firearm Owners’ Protection Act, Pub. L. No. 99-308, 100 Stat. 449, 449 (1986).

<sup>254</sup> *Bondi v. VanDerStok*, 145 S. Ct. 857, 886 (2025) (Thomas, J., dissenting) (“Dressing up colloquial usage with the ‘artifact noun’ label cannot override this conclusion.”).

<sup>255</sup> See ARISTOTLE, *METAPHYSICS* 1033a ff (W.D. Ross trans.).

Thus far, this Section has responded to critiques of linguistics in *VanDerStok*, articulated by Professor Cross and Justice Thomas. But Professor Cross also levels these critiques more broadly, suggesting that *VanDerStok* portends the arrival of a flawed new version of textualism: “Linguistic Textualism.” We agree that *VanDerStok* is an interesting and important case for its use of linguistics. But we do not agree that *VanDerStok* has a “revolutionary quality,”<sup>256</sup> representing a new form of textualism.

The use of linguistics to inform textualism is not committed to any of Cross’s three “constraints.” We agree that textualism’s adherence to the strong “meaning,” “temporal,” or “textual” constraints (as stated in the critique) would be fatal. This would imply that the interpreter could not consider technical meanings, meaning at multiple times, or sentence-level meaning. But these charges simply don’t stick to sophisticated forms of modern textualism (whether or not that textualism also draws on linguistics). The use of linguistic theories, concepts, and evidence in interpretation is entirely consistent with acknowledging a statute’s technical meanings, diachronic quality, and the significance of more than individual word meaning. In fact, we have previously written about how bringing linguistics to textualism helps *emphasize* and clarify the importance of technical meaning in law,<sup>257</sup> the complexities of multi-temporal interpretation of amended statutes,<sup>258</sup> and the significance of phrase, sentence-level, and contextual meaning.<sup>259</sup>

### C. “Amendatory Interpretation” in *VanDerStok*

We appreciate that Professor Cross does not just critique *VanDerStok*; he also points to his preferred form of analysis. His view, “amendatory interpretation,” centers the observation that the 1968 GCA’s statutory history includes the Federal Firearms Act of 1938.<sup>260</sup> Cross argues that his theory does reach the same result about *VanDerStok*’s first question, although the theory does not seem to provide an answer to *VanDerStok*’s second question.<sup>261</sup> Regardless of the theory’s answers, we argue that elevating inferences from comparisons to the 1938 predecessor would have been an inferior way to decide *VanDerStok* (III.C.1). We also note

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<sup>256</sup> Cross, *supra* note 3, at 889.

<sup>257</sup> See Tobia, Slocum & Nourse, *supra* note 74, at 224–25.

<sup>258</sup> See Eskridge, Slocum & Tobia, *supra* note 1, at 1639, 1658.

<sup>259</sup> See Tobia, Slocum & Nourse, *supra* note 18, at 1461.

<sup>260</sup> Cross, *supra* note 3, at 905; Federal Firearms Act, Pub. L. No. 75-785, 52 Stat. 1250 (1938), *repealed by*, Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, tit. IV, sec. 906, 82 Stat. 197, 234.

<sup>261</sup> See Cross, *supra* note 3, at 936–50 (applying an amendatory interpretation to several points of issue in *VanDerStok*).

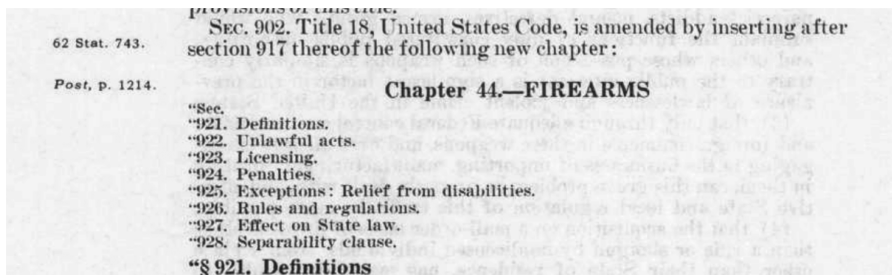
reservations about Professor Cross’s assumption that this approach best preserves “democratic decisions” (III.C.2). Although *VanDerStok* is an unsuccessful vehicle to illustrate the import of Professor Cross’s proposed form of analysis, we are sympathetic to the broader call for textualists to attend to statutory amendment—a point one of us has written about previously.<sup>262</sup> However, there is no conflict: Textualists can interpret statutes with sensitivity to both linguistics principles and amendment history (III.C.3).

### 1. “Amendatory Interpretation” in *VanDerStok*

Professor Cross focuses heavily on the Federal Firearms Act of 1938 (FFA),<sup>263</sup> “which eventually would be amended to become the GCA[.]”<sup>264</sup> He also critiques our analysis of the text of 18 U.S.C. § 921 as endorsing the (false) “temporal constraint”: “Linguistic Textualism . . . treats the assembled version of law found in the United States Code as authoritative, not the disassembled, amendment-by-amendment version found in our public laws.”<sup>265</sup>

Applying this charge in *VanDerStok*—an accusation of wrongly looking at the text in the U.S. Code rather than the FFA—would be misleading. Return to the relationship among the 1938 FAA, June 1968 Omnibus Crime Control and Safe Streets Act (OCCSSA), October 1968 GCA, and 18 U.S.C §§ 921–928.<sup>266</sup> The text that the OCCSSA amended in June 1968 was the U.S. Code (see Figure 3); Congress enacted Title 18 of the United States Code into positive law in 1948.<sup>267</sup> The OCCSSA *repealed* the FFA, which had been codified at 15 U.S.C. § 901, a non-positive title (see Figure 4).

FIGURE 3: PUBLIC LAW No. 90-351, 82 STAT. 226 (JUNE 19, 1968)



<sup>262</sup> See ESKRIDGE, SLOCUM & TOBIA, *supra* note 2.

<sup>263</sup> 52 Stat. 1250.

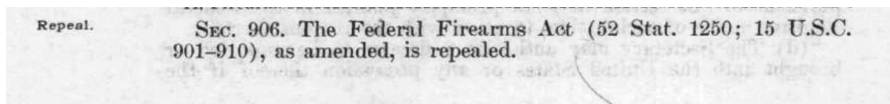
<sup>264</sup> Cross, *supra* note 3, at 905.

<sup>265</sup> *Id.* at 915.

<sup>266</sup> See *supra* notes 202–04 and accompanying text.

<sup>267</sup> Act of June 25, 1948, Pub L. No. 80-722, § 1, 62 Stat. 683, 683.

FIGURE 4: PUBLIC LAW No. 90-351, 82 STAT. 235 (JUNE 19, 1968)



The positive vs. non-positive law title distinction is admittedly subtle, but recent legislative process scholarship has rightly emphasized its significance.<sup>268</sup> For positive law titles, Congress amends the U.S. Code itself, and—as 1 U.S.C. § 204 explains—the text of the U.S. Code is evidence of the law contained therein. For non-positive titles, Professor Cross is right: The underlying acts reflect the law, and the U.S. Code’s text is merely “prima facie” evidence.<sup>269</sup> But even beyond this technical point, the “amendatory” framing of the FFA and GCA is also inaccurate from a broader social perspective. The 1938 FFA was a limited gun regulation measure, one “primarily drafted by the NRA,”<sup>270</sup> a fact from which some conclude that it “constituted an intelligent strategy for deflecting energy and attention from less acceptable approaches to gun control.”<sup>271</sup> The 1968 laws, while also products of compromise, reflected profound change over the repealed 1938 “ancestor.”<sup>272</sup>

Professor Cross’s article never uses the term “repeal.” Instead, it suggests that the FFA itself was amended over time, by new laws that add some language to it and others that remove some language from it, such that today’s law is constructed from a plurality of language that has remained since the 1938 FFA. Consider the reproduced figure from his

<sup>268</sup> See, e.g., Jarrod Shobe, *Codification and the Hidden Work of Congress*, 67 UCLA L. REV. 640, 658 (2020) (discussing how courts should conceptualize this distinction); Jesse M. Cross & Abbe R. Gluck, *The Congressional Bureaucracy*, 168 U. PA. L. REV. 1541, 1670 (2020); Daniel B. Listwa & Adam Flaherty, *Interpreting Code*, 61 HARV. J. ON LEGIS. ONLINE 69, 75 (2024).

<sup>269</sup> 1 U.S.C. § 204(a).

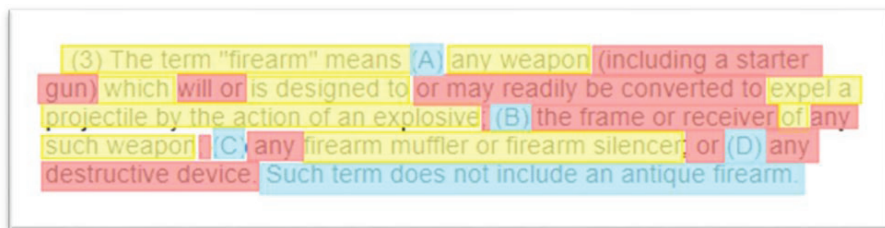
<sup>270</sup> William J. Vizzard, *The Impact of Agenda Conflict on Policy Formulation and Implementation: The Case of Gun Control*, 55 PUB. ADMIN. REV. 341, 342 (1995).

<sup>271</sup> Carol Skalnik Leff & Mark H. Leff, *The Politics of Ineffectiveness: Federal Firearms Legislation, 1919-38*, 455 ANNALS AM. ACAD. POL. & SOC. SCI. 48, 62 (1981); LEE KENNETT & JAMES LA VERNE ANDERSON, *THE GUN IN AMERICA: THE ORIGINS OF AN AMERICAN DILEMMA* 192–93 (1975); see also JOSH SUGARMANN, *NATIONAL RIFLE ASSOCIATION: MONEY, FIREPOWER AND FEAR* 30–31 (1992) (describing the NRA’s strategy of supporting the 1934 National Firearms Act to appear reasonable, despite not believing it to be effective); Patrick Luff, *Regulating Firearms Through Litigation*, 46 CONN. L. REV. 1581, 1587–88 (2014) (noting that the 1938 FFA was “rendered relatively toothless” by its criminal provisions, which made it almost impossible to obtain a conviction).

<sup>272</sup> Franklin E. Zimring, *Firearms and Federal Law: The Gun Control Act of 1968*, 4 J. LEGAL STUD. 133, 147 (1975); see also Brandon E. Beck, *The Federal War on Guns: A Story in Four-and-a-Half Acts*, 26 U. PA. J. CONST. L. 53, 70 (2023) (describing the GCA as a second era of regulation). See generally William J. Vizzard, *The Gun Control Act of 1968*, 18 ST. LOUIS U. PUB. L. REV. 79 (1999) (summarizing the events that led to the GCA’s passage).

article of the operative Gun Control Act text that highlights language “from 1938.”

FIGURE 5: CROSS’S ILLUSTRATION OF FFA/GCA LANGUAGE EVOLUTION



From Cross (2026), “with language from 1938 highlighted in yellow, from June 1968 in red, and from October 1968 in blue.”<sup>273</sup>

The full 1938 definition was: “The term ‘firearm’ means any weapon, by whatever name known, which is designed to expel a projectile or projectiles by the action of an explosive and a firearm muffler or firearm silencer, or any part or parts of such weapon.”<sup>274</sup> So, it is true that the yellow terms have appeared in an earlier law. But that law is a “predecessor law,” not something that, *as amended*, is law today. The predecessor statute may well be relevant to the interpretation of today’s law, but it’s not “authoritative.”

The 2024 Brief of the National Association for Gun Rights in *VanDerStok* floated a similar argument to Cross’s regarding the *interpretive* significance of the predecessor, arguing that “the predecessor” to the Gun Control Act had a definition of “firearm” and that “[t]hirty years later, in 1968,” Congress changed the definition.<sup>275</sup> That brief did not use colors but presented “additions” in *italics* and “deletions” with ~~strikethrough~~:

(A) any weapon, ~~by whatever name known~~, (*including a starter gun*) which *will or* is designed to *or may be readily converted to* expel a projectile ~~or projectiles~~ by the action of an explosive; (B) *the frame or receiver of any such weapon*; (C) ~~and a~~ any firearm muffler or firearm silencer; ~~or any part or parts of such weapon or~~ (D) any destructive device. *Such term does not include an antique firearm.*<sup>276</sup>

<sup>273</sup> Cross, *supra* note 3, at 916, fig. 2.

<sup>274</sup> Federal Firearms Act, Pub. L. No. 75-785, § 1(3), 52 Stat. 1250, 1250 (1938) (repealed 1968).

<sup>275</sup> Brief of the National Association for Gun Rights and the National Foundation for Gun Rights as Amici Curiae in Support of Respondents, *Bondi v. VanDerStok*, 145 S. Ct. 857 (2025) (No. 23-852).

<sup>276</sup> *Id.* at 10.

Comparing this to “amendatory” interpretation (Figure 5) illustrates the interpretive choice and flexibility in framing comparisons between a statute and its predecessors. The Gun Rights brief emphasizes additions *and* deletions. Professor Cross highlights only additions. “Amendatory interpretation” suggests that these statutory differences reflect important democratic choices, and the deletion of “any part or parts of such weapon” would seem significant.

The National Association for Gun Rights, the Fifth Circuit decision below, and Justice Thomas’s dissent made much of the absence of “any part or parts” from the 1968 definition.<sup>277</sup> Professor Krishnakumar has cautioned against such inferences: “[T]he use of statutory history to infer meaning—absent any contextual evidence corroborating the judicial deductions underlying the Court’s inferences—tends to decontextualize the interpretation of statutes and, in the process, to shift power from the legislature to the judiciary.”<sup>278</sup> Professor Cross draws different inferences from these comparisons. He explains the deletion of “part or parts” related to serialization requirements.<sup>279</sup> This usefully rebuts the inferences that Justice Thomas and the National Association for Gun Rights sought to draw, but it is hard to see this observation as a basis for the interpretation of 18 U.S.C. § 921 as applied to the facts of *VanDerStok* today.

Professor Cross also argues: “Consider the term ‘weapon.’ That term was inserted into law in 1938. The context that illuminates its original meaning, therefore, presumably would be the surrounding statutory language from 1938. To uncover its meaning, however, interpreters consistently looked elsewhere: They relied on numerous phrases not enacted until decades later.”<sup>280</sup> The suggestion that interpreters should emphasize language in the (repealed) 1938 Act over language in the (current) law is puzzling. Of course, the new definition has some similarity to the older law’s, including the word “weapon.” But the more relevant context for understanding the meaning of that term is the surrounding words in the 1968 Act, not the meaning of repealed text.

Professor Cross suggests that the amendment history clarifies an inconsistency “between the term ‘weapon’ and the subsequent description of its conversion into a firearm (i.e., into the very thing that presumably makes it a weapon).”<sup>281</sup> As best as we can understand it, the

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<sup>277</sup> See *id.* at 11; *Bondi v. VanDerStok*, 145 S. Ct. 857 (2025) (Thomas, J., dissenting).

<sup>278</sup> Anita S. Krishnakumar, *Statutory History*, 108 VA. L. REV. 263, 329 (2022).

<sup>279</sup> See also Stephen P. Halbrook, *Textualism, the Gun Control Act, and ATF’s Redefinition of “Firearm,”* 2024 HARV. J.L. & PUB. POL’Y: PER CURIAM 1, 6–7 (relating the deletion of “part or parts” to the Department of Treasury’s concern with serialization requirements and practicality of tracking small parts).

<sup>280</sup> Cross, *supra* note 3, at 920.

<sup>281</sup> *Id.* at 953.

concern is that there is something puzzling about the 1968 definition stating that a firearm is “any weapon which . . . may readily be converted to expel a projectile,” since something can only be a weapon once converted. Justice Thomas’s dissent also made this point, but we see no inconsistency. The statute uses “weapon” as a broad superordinate category and defines the members that fit as firearm-weapons. In the statutory context, an unboxed knife is a weapon but not a firearm; a gun parts kit is both a weapon and a firearm.

Ultimately, “amendatory interpretation” resolves the first question in *VanDerStok* by relying heavily on the phrase “converted to.”<sup>282</sup> So, in the end, amendatory interpretation, our linguistics argument, and Justice Gorsuch’s majority all share that common ground. Moreover, linguistics can help develop this critical observation of the amendatory account (and other textualisms). Our brief elaborated on why the statutory context about convertibility is so important: That language underscores the in-context relevance of functional potential in specifying the otherwise underspecified ordinary meaning of “firearm.”<sup>283</sup>

Concerning the second question in *VanDerStok*, amendatory interpretation provides no answer. We are grateful that Professor Cross concedes that a linguistics-informed approach helps with the question of frame or receiver:

That amendment [the 1968 GCA], unfortunately, said little about the [second] question in *VanDerStok*—a case involving the frames or receivers that were not, in fact, excused from coverage . . . .

And so it is here, in particular, that the linguistics research into artifact nouns is especially insightful for *VanDerStok*. That research provided a simple lesson: namely, that terms for manmade objects can capture more than fully-completed items. It was democratic evidence from committee reports, however, that illuminated a corresponding fact: The Congress that inserted “frame or receiver” into the GCA did, in fact, read those words in precisely that fashion. Courts are better for the ability to recognize that linguistic evidence, too.<sup>284</sup>

We agree that attention to amendment has no inherent conflict with attention to linguistics. Moreover, for some cases “amendatory interpretation” will yield no insights. Recall *Flowers Foods*, concerning the exemption from mandatory arbitration. The language of 9 U.S.C. § 1 originated in a 1925 Act and has never changed from its U.S.C. codification in 1947 through the present. As such, there is nothing for

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<sup>282</sup> *Id.* at 61.

<sup>283</sup> Linguistics Brief, *supra* note 8, at 20.

<sup>284</sup> *Id.* at 63–64.

“amendatory interpretation” to contribute. Although some statutes are amended, many others are not.

## 2. “Democratic Decisions, Encoded in the Statute”

In assessing textualist arguments, this Essay focuses on their merits in uncovering a statute’s linguistic meaning. We also understand Professor Cross to share this criterion. But, at several points, his article also suggests *democracy* as a criterion. The article repeatedly refers to the “democratic decisions” encoded in the statute.<sup>285</sup> It also suggests that democratic interpretation is promoted by attending to amendment history,<sup>286</sup> “democratic evidence from committee reports,”<sup>287</sup> and “floor statements from legislators.”<sup>288</sup> It summarizes: “[I]f the interpreter wishes to prioritize the value of *preserving democratic decisionmaking*, then they ought to prioritize a different category of meaning (*intended legislative meaning*) and different evidence to illuminate it (e.g., floor statements from legislators).”<sup>289</sup>

We make no claims about the ability of (linguistics-informed) textualism to promote democracy, and the notion of “democratic” decisions needs clarification. Nevertheless, we have concerns about the claim that democratic decisions are best respected by prioritizing statements of congressional intent gleaned from legislative history, especially that of predecessor statutes. First, there are well-established critiques of the proposal that one fine-grained legislative intent can be discerned from vast and conflicting legislative history: Congress is a “they,” not an “it.”<sup>290</sup> This worry looms larger for amended statutes. Cross writes about the decisions of a singular “Congress” and asks whether the Court’s textualism in *VanDerStok* uncovers “the democratic decisions that *Congress* encoded in” the statute.<sup>291</sup> But the provision at issue in *VanDerStok*, 18 U.S.C. § 921, is the product of multiple Congresses. Scholars criticize textualists for engaging in a “one-Congress fiction.”<sup>292</sup> Talk of the decisions “Congress” (singular) encoded into the statute engages the same fiction. For amended statutes, “Congress” is not merely a 535-person “they”; it is a several-thousand-person “they.” (Although

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<sup>285</sup> *Id.* at 4, 6, 15, 59–63, 71.

<sup>286</sup> *Id.* at 62–63.

<sup>287</sup> *Id.* at 64.

<sup>288</sup> *Id.* at 74.

<sup>289</sup> *Id.* at 74.

<sup>290</sup> See, e.g., Kenneth A. Shepsle, *Congress Is a “They,” Not an “It”: Legislative Intent as Oxymoron*, 12 INT’L REV. L. & ECON. 239 (1992).

<sup>291</sup> Cross, *supra* note 3, at 903 (emphasis added).

<sup>292</sup> William W. Buzbee, *The One-Congress Fiction in Statutory Interpretation*, 149 U. PA. L. REV. 171, 174–76 (2000).

we do not defend textualism in this Essay, here is an opportune place to recall that legislative complexity—such as the rise of omnibus statutes<sup>293</sup> and perhaps also frequently amended statutes—has often supported arguments for textualism over purposivism.<sup>294</sup> A similar argument is possible on the basis of the complexity of amended statutes.)

In locating the “democratic decisions” encoded in the 1968 Gun Control Act (as amended), Professor Cross emphasizes legislative history suggesting broad regulation. There are friends to find in the legislative history of the predecessor 1938 FFA, which he reads to reflect Congress’s intention to broadly regulate firearms. He also highlights later pieces of legislative history, like a 1975 floor statement that supports a similarly broad reading,<sup>295</sup> and part of a purpose statement in the 1968 GCA.<sup>296</sup>

But the story is more complicated. Other histories of the FFA read its intention differently, as an NRA-drafted measure that aimed to enervate broader gun control efforts.<sup>297</sup> The 1938 Act was repealed and replaced by the 1968 Act, whose enacted purposes were to better aid law enforcement in the fight against crime and violence *and* avoid placing any undue burden on citizens seeking to acquire firearms.<sup>298</sup> 18 U.S.C. §§ 921–928 was amended multiple times after 1968, including by the 1986 “Firearm Owners’ Protection Act.” Those 1986 amendments claim “to reaffirm the intent of the Congress, as expressed in section 101 of the Gun Control Act of 1968, that ‘it is not the purpose of this title to place any undue . . . restrictions . . . with respect to the acquisition, possession, or use of firearms.’”<sup>299</sup> This too, is a “democratic decision.” The full legislative and amendment history of the Gun Control Act of 1968 reveals a complicated picture of the intent(s) of Congress(es).

More broadly, Professor Cross’s critique assumes a close connection between (a) democratic interpretation and (b) respecting *intended* legislative meaning and legislative history. But this is controversial. Diverse interpretive theorists, ranging from Paul Kahn to Ryan Doerfler to Amy Coney Barrett, reject a strict connection between democracy

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<sup>293</sup> See BARBARA SINCLAIR, *UNORTHODOX LAWMAKING: NEW LEGISLATIVE PROCESSES IN THE U.S. CONGRESS* 151 (5th ed. 2016); Abbe R. Gluck, Anne Joseph O’Connell & Rosa Po, *Unorthodox Lawmaking, Unorthodox Rulemaking*, 115 COLUM. L. REV. 1789, 1803 (2015).

<sup>294</sup> See John F. Manning, *Inside Congress’s Mind*, 115 COLUM. L. REV. 1911, 1917–19, 1925–26 (2015); Elizabeth Garrett, *Attention to Context in Statutory Interpretation: Applying the Lessons of Dynamic Statutory Interpretation to Omnibus Legislation*, 2 ISSUES LEGAL SCHOLARSHIP 1, 12–13 (2002).

<sup>295</sup> Cross, *supra* note 3, at 944–45.

<sup>296</sup> *Id.* at 900.

<sup>297</sup> See sources cited *supra* notes 261–63.

<sup>298</sup> Gun Control Act of 1968, Pub. L. No. 90-618, § 101, 82 Stat. 1213, 1213–14.

<sup>299</sup> Firearm Owners’ Protection Act, Pub. L. No. 99-308, 100 Stat. 449, 449 (1986).

and adherence to intended legislative meaning, in the sense of meaning gleaned largely from legislative history.<sup>300</sup> For decades, textualists have argued against the use of legislative history as a democracy-promoting method.<sup>301</sup> The competing notion that textualism best promotes democracy is even older.<sup>302</sup> Various theories of interpretation label themselves as “democratic,” and there are multiple ways to conceive of this criterion.<sup>303</sup> Those claiming “democratic” benefits need to say more about what this criterion means. And again, to be fair, we have not developed our own theory of “democratic interpretation” here. Nevertheless, in the specific context of *VanDerStok*, we are puzzled by the claim that the most democratic way to interpret a statute first enacted in 1968, amended multiple times, and applied in 2025, is to mine the legislative history of a repealed predecessor act from 1938.

### 3. *Points of Broader Agreement*

“Amendatory interpretation” does not provide the best reading of 18 U.S.C. § 921 in *VanDerStok*, but we agree with a broader and more general version of Professor Cross’s claim: Attending to statutory amendment can raise insights for textualist analysis. Of course, this more general claim is not so controversial. Even textualists like Justices Scalia and Gorsuch agree.<sup>304</sup>

Even so, sometimes courts miss important amendments. On March 18, 2020, Congress provided relief for families impacted by COVID-19. Section 5104 of the Emergency Paid Sick Leave Act (EPSLA) prohibits employers from discriminating against an employee who “(1) takes leave in accordance with [EPSLA]; and (2) has filed any complaint

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<sup>300</sup> Paul W. Kahn & Kiel Brennan-Marquez, *Statutes and Democratic Self-Authorship*, 56 WM. & MARY L. REV. 115, 151 (2014) (arguing that the people are authors of statutes and emphasizing judicial interpretation as reflecting national narratives rather than discerning text or legislative intent); Ryan D. Doerfler, *Who Cares How Congress Really Works?*, 66 DUKE L.J. 979, 1038–40 (2017); Barrett, *supra* note 1, at 2209.

<sup>301</sup> 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 31 (Amy Gutmann ed., 1997); Kenneth W. Starr, *Observations About the Use of Legislative History*, 1987 DUKE L.J. 371, 375–76.

<sup>302</sup> Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 533 (1947) (“[N]o one will gainsay that the function in construing a statute is to ascertain the meaning of words used by the legislature. To go beyond it is to usurp a power which our democracy has lodged in its elected legislature.”).

<sup>303</sup> See generally Jane S. Schacter, *Metademocracy: The Changing Structure of Legitimacy in Statutory Interpretation*, 108 HARV. L. REV. 593, 608 (1995) (distinguishing between internal and instrument approaches to this question).

<sup>304</sup> See generally Cross, *The Amended Statute*, *supra* note 13 (noting that those Justices have appealed to amendment history).

[or given testimony in a proceeding] . . . related to [EPSLA].”<sup>305</sup> Since 2021, several courts quoted this language, whose use of “and” would seem to require (1) *and* (2).<sup>306</sup> However, that statutory language had been amended a week later, on March 27, 2020: “Section 5104(1) of the [EPSLA] is amended by striking ‘and’ after the semicolon and inserting ‘or.’”<sup>307</sup> A court in 2024 observed this amendment,<sup>308</sup> which has significant implications for EPSLA cases.

So attending to statutory amendments is critical to find the right text. It also matters for textualists who seek to find the right year. Many textualists are statutory originalists,<sup>309</sup> who seek to identify the text’s “original” meaning. Amended statutes complicate the selection of the relevant year for originalist analysis. For example, take *Bostock v. Clayton County Georgia*.<sup>310</sup> That case held that Title VII of the Civil Rights Act of 1964’s prohibition against discrimination “because of . . . sex”<sup>311</sup> prohibits discrimination against gay, lesbian, and transgender people. Justice Gorsuch’s majority, as well as Justice Kavanaugh’s and Justice Alito’s dissents were all textualist, and all emphasized 1964 as the relevant year to analyze statutory meaning.

Yet, Title VII is an amended statute, and the issues raised by *Bostock* critically implicated many of those amendments.

[T]he defendant in *Bostock* was Clayton County, Georgia, a government employer not covered by Title VII until its 1972 Amendments . . . Also, Alito[’s dissenting opinion] viewed § 703(m) as the key provision in play—but that was not part of Title VII until 1991. So what year is the observation point for “original” public meaning?<sup>312</sup>

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<sup>305</sup> Families First Coronavirus Response Act (FFCRA), Pub. L. No. 116-127, § 5104, 134 Stat. 178, 196–97 (2020) (including the Emergency Paid Sick Leave Act (EPSLA)).

<sup>306</sup> See, e.g., *Wilson v. Marshall Shredding LLC*, 616 F. Supp. 3d 633, 642–43 (W.D. Tex. 2022); *Hartzell v. Adaptable Sys. Corp.*, No. 21-cv-1873, 2022 WL 1500554, at \*18 (E.D. Pa. May 11, 2022); *Collazo v. Ferrovial Construcción PR, LLC*, No. 20-cv-1612, 2021 WL 4482268, at \*9 (D.P.R. Sep. 30, 2021); *Gracia v. L. Offices of Alexander E. Borell, P.A.*, 535 F. Supp. 3d 1268, 1270 (M.D. Fla. 2021); *Colombe v. SGN, Inc.*, No. 20-cv-374, 2021 WL 1198304, at \*5–6 (E.D. Ky. Mar. 29, 2021); *Piotrowski v. Signature Collision Ctrs., LLC*, No. 21-cv-02115, 2021 WL 4709721, at \*7 (E.D. Pa. Oct. 8, 2021).

<sup>307</sup> Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136, § 3611(8), 134 Stat. 281, 415 (2020).

<sup>308</sup> *Cruz v. Antezana & Antezana, LLC*, 741 F. Supp. 3d 291, 296–97 (D. Md. 2024). Thanks to Jasmine Donohue-Ozyar for bringing this example to our attention.

<sup>309</sup> Nourse, *supra* note 2, at 676–77.

<sup>310</sup> 140 S. Ct. 1731 (2020).

<sup>311</sup> 42 U.S.C. § 2000e–2(a)(1).

<sup>312</sup> See Eskridge, Slocum & Tobia, *supra* note 1, at 1633; see also William N. Eskridge, Jr., Brian G. Slocum & Stefan Th. Gries, *The Meaning of Sex: Dynamic Words, Novel Applications, and Original Public Meaning*, 119 MICH. L. REV. 1503, 1564–70 (2021) (recounting the evolution

Although textualist-originalists sometimes direct interpretive analysis far back in time, to the earliest date of an amended statute, grappling with amended statutes can complicate these inquiries.

In the *VanDerStok* debate, Professor Cross suggests that an inverse issue plagued the opinions: They all overemphasized a later date (1968) and failed to grapple with the original context of 1938. As explained previously, we disagree with the suggestion that promoting inferences from the 1938 legislative history offers a better textualist reading of 18 U.S.C. § 921. But we agree with the broader claim: Statutory amendments can be relevant, and they challenge “originalist” textualists who emphasize one particular time.

Moreover, there is no inherent conflict between linguistic analysis of a statute and one that recognizes its diachronic quality. In fact, there is precedent for integrating such approaches. Some three decades ago, the law scholar Clark Cunningham and linguist Charles Fillmore embarked on a collaborative effort to analyze the language of 18 U.S.C. § 924, the statutory provision that was the locus of the interpretive dispute in *Smith*.<sup>313</sup> Recall that in *Smith*, the question was whether trading a firearm for narcotics constituted a “use” of a firearm for the purposes of the statute, which penalizes individuals who “during and in relation to any crime of violence or drug trafficking crime . . . uses or carries a firearm.”<sup>314</sup> Two years after deciding *Smith*, the Supreme Court heard arguments in *Bailey v. United States*.<sup>315</sup> The two petitioners in that case had each been convicted of violating the same statutory provision because their respective firearms were “accessible” and “proximate” while they carried out their respective drug offenses, such that “the jury could properly infer that the defendant had placed the gun in order to further the drug offenses or to protect the possession of the drugs.”<sup>316</sup>

Cunningham and Fillmore’s analysis of *Bailey* combines analytical linguistic insights with a legal analysis of 18 U.S.C. § 924’s amendment history. The authors first observe that out of context, the phrase “use a firearm” is consistent with two readings, the “eventive” reading and the “designative” reading.<sup>317</sup> The authors’ linguistic analysis suggests

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of Title VII statutory interpretation in the courts to eventually include discrimination against gay men and lesbians).

<sup>313</sup> Cunningham & Fillmore, *supra* note 134; see *Smith v. United States*, 508 U.S. 223, 226–27 (1993).

<sup>314</sup> 18 U.S.C. § 924(c)(1)(A).

<sup>315</sup> 516 U.S. 137 (1995).

<sup>316</sup> *Id.* at 141–42.

<sup>317</sup> On the eventive interpretation, *use a firearm* indicates that a specific event took place in which the firearm played an instrumental role. On the designative interpretation, *use a firearm* may only designate a particular intended function for the firearm without any event having yet taken place. See Cunningham & Fillmore, *supra* note 134, at 1183.

that the statutory context supports an eventive rather than designative interpretation of the phrase.<sup>318</sup>

This conclusion is bolstered by a review of the amendment history of the provision, which leads back to none other than the Gun Control Act of 1968 and three subsequent amendments. The authors find that the phrase “use[] a firearm” is present in the original sentencing provision of the 1968 Act:

[924](c) Whoever—

- (1) uses a firearm to commit any felony which may be prosecuted in a court of the United States, or
- (2) carries a firearm unlawfully during the commission of any felony which may be prosecuted in a court of the United States,

shall be sentenced to . . . one . . . [to] 10 years.<sup>319</sup>

Moreover, the original statutory context clearly supports the eventive interpretation of that phrase.<sup>320</sup> The authors then observe that nothing about the language of the amendments themselves—or in the legislative history of the amendments—suggests an intention by Congress to impute a designative reading into “use[] a firearm.”<sup>321</sup> What’s more, the authors report failed attempts to amend the statute in a way that would have more clearly covered fact patterns akin to *Bailey*.<sup>322</sup>

Cunningham and Fillmore’s analysis, like Professor Cross’s, “focus[es] on the prior history of the text itself: original language [and] subsequent amendments.”<sup>323</sup> To this, Cunningham and Fillmore add “failed proposals to amend.”<sup>324</sup> Similar to Professor Cross, those authors propose to “explicate[] the text by interpreting it as part of a specialized Congressional discourse taking place over time.”<sup>325</sup> Where the authors differ is in *how* they implement this project: Cunningham and Fillmore draw heavily from the analytical constructs of linguistic theory to model the evolution of this “specialized . . . discourse”;<sup>326</sup> Professor Cross proposes distinct and novel interpretive heuristics, including a “dead-hand canon” for resolving statutory inconsistencies resulting from amendments.<sup>327</sup> The two approaches are complementary

<sup>318</sup> *Id.* at 1183–89.

<sup>319</sup> Gun Control Act of 1968, Pub. L. No. 90-618, sec. 102, § 924(c), 82 Stat. 1213, 1224.

<sup>320</sup> Cunningham & Fillmore, *supra* note 134, at 1190.

<sup>321</sup> *Id.*

<sup>322</sup> *Id.*

<sup>323</sup> *Id.*

<sup>324</sup> *Id.*

<sup>325</sup> *Id.*

<sup>326</sup> *Id.*

<sup>327</sup> Cross, *supra* note 3, at 969.

and are likely to promote more sound outcomes when used together rather than in isolation.

For example, Professor Cross's proposed dead-hand canon "provides that, when statutory inconsistency results from a new amendment sitting uncomfortably alongside older language, and when the amendment shows a plain or unambiguous democratic decision, courts should not allow the 'dead hand' of the older language to undermine that democratic decision."<sup>328</sup> Linguistics offers an analytical lens through which jurists who might subscribe to this canon could identify—and communicate through their opinions—both the nature and source of statutory inconsistencies. Empirical methods such as survey experiments could also shed light on, for example, variation in how lay readers understand the effect of an amendment on statutory meaning.

Cunningham and Fillmore, for their part, put another heuristic to work, one grounded in the defeasible assumption that a statute's amendment history is "a *coherent* discourse over time."<sup>329</sup> According to this heuristic, amendments that partly obscure (but do not clearly override) the eventive reading of "use[] a firearm" in the original 1968 Act are to be treated as "semantic anomal[ies]"<sup>330</sup>: The diachronic congressional "discourse" is made most coherent by assuming that the original eventive reading of "use[] a firearm" survives subsequent amendments. Cunningham and Fillmore's "coherent discourse" heuristic is fully compatible with Professor Cross's dead-hand canon: The former addresses obscure phrasing in amended statutes by looking backwards to earlier instantiations of the law; the latter allows new language to supersede inconsistent old language "when the amendment shows a plain or unambiguous democratic decision."<sup>331</sup>

In fact, Professor Cross's prior analysis of *Niz-Chavez* coheres with Cunningham and Fillmore's "coherent discourse" heuristic. The dispute in *Niz-Chavez* surrounded the interpretation of the Immigration and Nationality Act (INA), codified as amended at 8 U.S.C. §§ 1101–1537.<sup>332</sup> Under section 240A of the INA, codified as amended at 8 U.S.C. § 1229b, noncitizen aliens who are non-lawful permanent residents "are eligible for discretionary relief [with respect to deportation] if they have been physically present in the United States for a continuous period of not less than 10 years."<sup>333</sup> This eligibility is cancelled if, within that ten-year period, the government serves the noncitizen with "a notice to appear

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<sup>328</sup> *Id.*

<sup>329</sup> Cunningham & Fillmore, *supra* note 134, at 1163 (emphasis added).

<sup>330</sup> *Id.*

<sup>331</sup> Cross, *supra* note 3, at 969.

<sup>332</sup> *Niz-Chavez v. Garland*, 141 S. Ct. 1474, 1479 (2021).

<sup>333</sup> 8 U.S.C. § 1229b(b)(1)(A).

[in removal proceedings] under section 239(a)” of the Act.<sup>334</sup> Section 239(a), codified as amended at 8 U.S.C. § 1229, states in part:

- (a) Notice to appear
- (1) In general

In removal proceedings under section 1229a of this title, written notice (in this section referred to as a “notice to appear”) shall be given in person to the alien (or, if personal service is not practicable, through service by mail to the alien or to the alien’s counsel of record, if any) specifying the following . . . .<sup>335</sup>

The statute goes on to list several pieces of information that the noncitizen must receive, including “[t]he time and place at which the proceedings will be held.”<sup>336</sup> A first document sent by the government to petitioner Niz-Chavez in 2013 contained the information specified by § 1229(a)(1), with the exception of the required “time and place” information; a second document (sent two months later) contained that missing information.<sup>337</sup> The question in *Niz-Chavez* was whether these two documents together constituted valid “notice” for the purposes of the INA.<sup>338</sup>

The Supreme Court found in favor of Niz-Chavez, homing in on the INA’s requirement of “a notice to appear.”<sup>339</sup> For the *Niz-Chavez* Court, the singular “a” suggested that § 1229(a)(1) notice must arrive in the form of a single document; it is thus insufficient for the government to furnish the noncitizen with “notice” in the abstract (e.g., via multiple documents).<sup>340</sup>

Professor Cross arrives at the same result as the Court through different means. His criticism of the Court’s analysis invokes the same constraints that ostensibly characterize “linguistic” textualism (the *temporal* constraint; the *textual* constraint; the *meaning* constraint). His own analysis echoes Cunningham and Fillmore’s discursive approach to statutory amendments. Whereas Cunningham and Fillmore’s focus is on a diachronic “conversation” between successive Congresses, Professor Cross argues that the amendment history of the INA can be understood as “Congress . . . enter[ing] into a dialogue”<sup>341</sup> with that Act’s executing

<sup>334</sup> *Id.* § 1229b(d)(1).

<sup>335</sup> *Id.* § 1229(a)(1).

<sup>336</sup> *Id.* § 1229(a)(1)(G)(i).

<sup>337</sup> *Niz-Chavez*, 141 S. Ct. at 1479, 1487.

<sup>338</sup> *Id.* at 1479.

<sup>339</sup> *Id.* at 1480 (emphasis added) (quoting § 1229b(d)(1)).

<sup>340</sup> *Id.*

<sup>341</sup> Cross, *The Amended Statute*, *supra* note 13, at 1346.

agency, the United States Immigration and Naturalization Service (INS, since superseded by entities within the Department of Homeland Security):

Beginning in 1956, the INS would implement it by furnishing to aliens a particular document—one that it labeled an “Order to Show Cause.” Going forward, therefore, there would be a specific document Congress could envision (and reference) when it wanted to clarify notice practices under the INA. And that is precisely what it would do.<sup>342</sup>

Professor Cross provides a detailed argument for the claim that the heading of § 1229(a)—“Notice to Appear”<sup>343</sup> (prior to 2006: “ORDER TO SHOW CAUSE”)—tracks a “term[] of art [‘Order to Show Cause’] coined by [INS], in the effort to require modifications to [a] specific document[].”<sup>344</sup> Moreover, Professor Cross notes that while the original language of the 1952 Act provided that noncitizen aliens “shall be given notice” with regards to deportation proceedings, a 1990 amendment decomposed this requirement into two “notices,” further indicating that “Congress . . . now was thinking in terms of documents, not abstract notifications.”<sup>345</sup>

Citing the philosopher of language H. Paul Grice, Cross proposes to rationally reconstruct Congress’s choice of INA amendment language—exchanges in a “dialogue” across branches of government—“in the context in which it was chosen: that is to say, against the backdrop of the language it was replacing (or other-wise altering).”<sup>346</sup> A “coherence” heuristic animates both Cross’s analysis of *Niz-Chavez* as well as Cunningham and Fillmore’s analysis of *Bailey*: In the former case, this heuristic serves to recover the evolving communicative intentions of a Congress seeking to direct a federal agency’s practices; in the latter case, this heuristic serves to “explain away” anomalous changes to a statute over time.

Of course, linguistics has nothing to say about the dead-hand canon (or the “coherent discourse” heuristic) with regards to promoting democratic values or respecting the legislative process, and we’ve articulated some hesitation as to whether “democracy” is a viable selling point for amendatory interpretation generally. We’ve also expressed some reservations about Professor Cross’s use of the dead-hand canon

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<sup>342</sup> *Id.* at 1345 (quoting Reply Brief for Petitioner at 15, *Niz-Chavez v. Garland*, 141 S. Ct. 1474 (2021) (No. 19-863)).

<sup>343</sup> 8 U.S.C. § 1229(a).

<sup>344</sup> Cross, *The Amended Statute*, *supra* note 13, at 1350–51.

<sup>345</sup> *Id.* at 1346.

<sup>346</sup> *Id.* at 1341.

in the context of *VanDerStok* specifically: Linguistic theory suggests, contra Professor Cross, that there is no inherent tension between the “convertibility” language of the GCA as amended and the term “weapon” as appears in the statute.<sup>347</sup> Thus, the dead-hand canon (even if it were generally valid) simply would not apply in this case. Most broadly, we’re still not convinced that variation inferences from the 1938 Act’s language are probative for a textualist decision in *VanDerStok*—a point with which Professor Cross might ultimately agree. But our reasoning differs. To dismiss Justice Thomas’s inference, Cross’s account requires finding an “inconsistency” to trigger the “dead-hand canon” to ultimately elevate the 1968 text over the 1938. A shorter route begins with the operative legal text, reflected in 18 U.S.C. § 921, not that of a different and repealed firearms law.

That said, we are generally optimistic about the potential of statutory interpretation that’s both linguistically informed and diachronic in orientation. Cunningham and Fillmore’s analysis of *Bailey* is a promising proof of concept that demonstrates how the tools of linguistic theory can help legal theorists better understand the temporal dynamics of legislation. Professor Cross’s analysis of *Niz-Chavez* suggests that the amendatory approach can offer a robust alternative over more “static” approaches that neglect insights from amendment history. Insofar as the amendatory approach relies on careful attention to *how* language changes (as well as to *why* participants in the legislative “discourse” might update their linguistic practices over time), it stands to benefit from linguistic, analytical insights.

#### 4. *Amending* Amending Linguistic Textualism

Before concluding, we address some eleventh-hour amendments to *Amending Linguistic Textualism*. We had just five days with this version before finalizing this Essay, so our reply is tentative. But as the new version doubles down on pointed accusations—our “radical and worrisome”<sup>348</sup> theory reflects “pathologies”<sup>349</sup> that the “legal community” must “reckon with”<sup>350</sup>—we’re grateful to have the chance to say something.

The longest amendment is a new “Epilogue.”<sup>351</sup> It objects to this Essay’s descriptions of the FFA as a “repealed” “predecessor” to 18 U.S.C. §§ 921–928, and a “different” law than it.<sup>352</sup> When we were

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<sup>347</sup> See *supra* Section III.C.1.

<sup>348</sup> Cross, *supra* note 3, at 957.

<sup>349</sup> *Id.* at 888, 890, 893, 903.

<sup>350</sup> *Id.* at 888.

<sup>351</sup> *Id.* at 957.

<sup>352</sup> *Id.*

invited to respond to Professor Cross's critique of our linguistics brief in *VanDerStok*, we included these accurate characterizations to defend our analysis from a flawed allegation that the draft we were supplied (the "draft") suggested. That draft stated: "[T]he law-and-linguistics research tends to make an unspoken assumption about *which statutory text* is relevant: It treats the assembled version of law found in the United States Code as authoritative, not the disassembled, amendment-by-amendment version found in our public laws."<sup>353</sup> Our analysis focused on the language of the 1968 Gun Control Act as amended, codified at 18 U.S.C. §§ 921–928, and in the context of debate about *VanDerStok* the draft's critique presumably referred to our treatment of the FFA. The draft seemed to imply that we improperly analyzed text reflected in the U.S. Code (18. U.S.C. § 921 *et. seq.*) and ignored an authoritative statutory text (the 1938 FFA, part of the "amendment-by-amendment" version in the public laws). The original draft never used the terms "predecessor" or "repeal"; it included phrases like "[the FFA], which eventually would be amended to become the GCA",<sup>354</sup> and its Figure 2 (which appears immediately below the quote above) could visually imply that a "1938" law, as amended, persists as our authoritative law today. It also accused our view of "theoretical incoherence with amended statutes."<sup>355</sup> All this could lead some readers to infer that we committed an elementary mistake in analyzing *VanDerStok* by treating the GCA's text (as amended), reflected in the U.S. Code, as "authoritative," and not that of the FFA.

However, the FFA is not authoritative law, and in *VanDerStok* no lawyer or Justice treated it as such. The Justices were right to analyze the language contained in the positive law title of the U.S. Code, which reflects that of the Gun Control Act of 1968, as amended.<sup>356</sup> In the final article, the draft's error is corrected (with "sometimes"), but the allegation remains: "[T]he law-and-linguistics research tends to make an unspoken assumption about *which statutory text* is relevant: It treats the assembled version of law found in the United States Code as authoritative, not the disassembled, amendment-by-amendment version *sometimes* found in our public laws."<sup>357</sup> A more charitable amendment would remove, or even explicitly disclaim, the implication

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<sup>353</sup> Jesse M. Cross, Amending Linguistic Textualism 26 (Feb. 27, 2026) (unpublished manuscript) (on file with the New York University Law Review).

<sup>354</sup> *Id.* (manuscript at 17).

<sup>355</sup> *Id.* (manuscript at 64).

<sup>356</sup> See also 1 U.S.C. § 204 ("[W]henver titles of [the United States] Code shall have been enacted into positive law the text thereof shall be legal evidence of the law therein contained . . .").

<sup>357</sup> Cross, *supra* note 3, at 915 (emphasis added).

that we misidentified the law in *VanDerStok*—especially as our Essay treated the draft’s serious, and seriously flawed, implication very gently. But in any case, things could have ended politely here with the silent scrubbing of a scrivener’s error.

Instead, the final article needlessly attempts to saddle us with a different “radical and worrisome” view: that amendments by restatement and codifications “efface[] the history of statutory text.”<sup>358</sup> And it again calls upon the “legal community” to reckon with our radical view.<sup>359</sup> The only problem is, our Essay doesn’t endorse that view. From our simple clarification that the FFA is not authoritative law, the Epilogue concludes that we flatly reject the FFA as part of the law’s statutory history and assume its irrelevance to the *interpretation* of the law. Ironically, Professor Cross’s Article makes the case for this strawman reading by stripping single words in our Essay from context, like “different,” “repealed,” and “predecessor” law. Reading our Essay without this textual constraint reveals that we, of course, understand the FFA as statutory history potentially relevant to the interpretation of the law at issue in *VanDerStok*: It is a predecessor act, an important part of the history of today’s law that may uniquely inform its interpretation. Nothing in our Essay denies this. In fact, we commended Professor Cross’s use of this statutory history to rebut different inferences from the FFA made by Justice Thomas’s *VanDerStok* dissent.<sup>360</sup> As this example illustrates, we agree that statutory history may be relevant to interpretation, but the key question is: *How* is it relevant?<sup>361</sup>

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<sup>358</sup> Cross, *supra* note 3, at 957, 963.

<sup>359</sup> Cross, *supra* note 3, at 963.

<sup>360</sup> *Supra* notes 276–77 and accompanying text.

<sup>361</sup> *How* it is relevant depends on one’s theory of interpretation. For example, Justice Thomas’s dissent in *VanDerStok* makes extensive use of this statutory history. The article’s new Epilogue concedes that “amendatory interpretation” is not an interpretive theory, so we don’t have any general theoretical explanation of when, how, and why a predecessor is relevant. See Cross, *supra* note 3, at 957 n.412. Instead, the article simply insists that the laws’ texts are extraordinarily similar, but the interpretive implications of that similarity remain unclear. See Cross, *supra* note 3, at 960–62 (documenting textual similarities between the 1938 and 1968 statutes through a disposition table and provision-level comparison, without articulating a specific interpretive rule that follows from those comparisons). Regarding the similarity, the extensive table offers glosses on provisions in the FFA (as codified at 15 U.S.C.) and 18 U.S.C. §§ 921–928. We agree there are many striking similarities, but this table is also presented more polemically than descriptively. The table does not highlight the differences. As far as we can tell, not *one* provision is an identical reenactment; all have materially different words and phrases. Cross, *supra* note 3, at 962 n.439, appeals to the “reenactment rule,” but the Eskridge casebook defines the “reenactment rule” as “[i]f Congress reenacts a statute without making any material changes in its wording.” WILLIAM N. ESKRIDGE JR., JAMES J. BRUDNEY, JOSH CHAFETZ, PHILIP P. FRICKEY & ELIZABETH GARRETT, *CASES AND MATERIALS ON LEGISLATION AND REGULATION* 859 (7th ed. 2025). Other FFA provisions disappear. *E.g.*, Ch. 850 § (6). And many novel provisions are added in 1968. *E.g.*, 921(a)(4); 921(a)(5); 921(a)(6);

To conclude about *VanDerStok*. First, the authoritative law is reflected in 18 U.S.C. §§ 921–928 (codifying the 1968 Gun Control Act, as amended). Second, statutory history and amendment, including the 1938 FFA, might usefully aid interpretation of that law. Developing a general theory of *how* such history aids interpretation is a fascinating project, which amendatory interpretation might one day develop. But that isn't *our* project here. Third, to resolve *VanDerStok*'s first question, Professor Cross's article ultimately relies on the "design" and "convertibility" language in the statute's text.<sup>362</sup> Those are exactly the features with which our linguistics analysis begins. Fourth, to resolve *VanDerStok*'s second question, Cross's article acknowledges that the linguistics approach helps and amendatory interpretation doesn't provide an answer.<sup>363</sup>

To conclude about Professor Cross's critique of our approach: The final article still claims that linguistics-informed textualism—as well as textualism generally—requires false "constraints"<sup>364</sup>: the "*textual constraint*," which "artificially narrows the interpreted text to isolated statutory terms (such as 'because,' 'so,' and 'a')";<sup>365</sup> and the "*meaning constraint*," which ignores technical meanings and assumes that statutory language takes (only) ordinary, general meanings.<sup>366</sup> This Part has explained why these constraints don't characterize our analysis of *VanDerStok* and need not apply to linguistics-based approaches more broadly. Our Essay's initial defense sought to be responsive but measured. However, now that the Article doubles down on these claims and the dramatic stakes ("It is incumbent upon the legal community to reckon with Linguistic Textualism"<sup>367</sup>), it's useful to be a bit more blunt. The "textual" and "meaning" critiques are strawmen: To claim that a linguistics based approach to textual interpretation *cannot* consider technical meanings or more than individual word meanings overlooks more sophisticated work in linguistics and textualism. The

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921(a)(7); 921(a)(8); 921(a)(9); 921(a)(12); 921(a)(13); 921(a)(15); 921(a)(17); 921(a)(18). More broadly, these various laws deal with non-identical subject matter, they were passed with different enacted purposes, and the social understanding of these laws differed. See sources cited *supra* notes 270–72. These are all relevant to an analysis of *how* the predecessor bears on interpretation. But the epilogue doesn't engage this interesting question. Instead, it insists that the laws are extremely similar, presumably to "win" a debate against a view we don't hold: That the FFA is necessarily irrelevant to interpretation.

<sup>362</sup> Cross, *supra* note 3, at 955–56.

<sup>363</sup> *Id.* at 956 ("And so it is here, in particular, that the linguistics research into artifact nouns is especially insightful for *VanDerStok*.").

<sup>364</sup> *Id.* at 888.

<sup>365</sup> Cross, *The Amended Statute*, *supra* note 13, at 1338 (emphasis added).

<sup>366</sup> *Id.* at 1370 (emphasis added).

<sup>367</sup> Cross, *supra* note 3, at 888.

“*temporal constraint*”<sup>368</sup> is interesting, although it doesn’t problematize what we had to say about *VanDerStok*. This is underscored by the fact that Cross’s ultimate resolution of *VanDerStok* relies on the same language that we did.

To conclude about “amendatory interpretation”: The Epilogue posits that conversation about amendatory interpretation’s development “can begin only once we remove from legal discourse . . . the fiction of static, monotemporal (or atemporal) statutory text.”<sup>369</sup> We encourage Professor Cross and others to go right ahead. We’re not insisting on these fictions. In fact, this Section tried to develop some synergies between linguistics and the observation of statutory law’s intertemporal nature. It’s disappointing that the first response did not even attempt to engage with this more constructive effort and instead returned to an easier and more comfortable “debate” against views that no one holds. This Epilogue is an unfortunate last chapter on amendatory interpretation.

Yet, we hope it is not the last and eagerly await the next fruitful book. Professor Cross is asking important and interesting questions. Amendatory interpretation offers the useful observation that many statutes are amended and interpreters should grapple with that fact—a critical observation with which we agree.<sup>370</sup> To develop it further into a more complete and operable view—whether part of textualism, intentionalism, or something else—requires a *theory of interpretation*. Another amendment to the article clarifies that it abstains from identifying such a theory.<sup>371</sup> However, we hope to learn more about its theory in future work. This is the real next step: Conversation about “amendatory interpretation’s development” does not depend on its opponents, but on its proponents. And to clarify, although this Section expresses frustration with Professor Cross’s Epilogue, we count ourselves as fans of his work and remain optimistic about the prospects of an interpretive practice that takes seriously both linguistic principles and statutes’ diachronic quality.

## CONCLUSION

This Essay has defended the relevance of linguistics to textualism. Textualism’s central claim is about the linguistic meaning of statutory

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<sup>368</sup> Cross, *The Amended Statute*, *supra* note 13, at 1338 (emphasis added).

<sup>369</sup> Cross, *supra* note 3, at 963.

<sup>370</sup> See also Eskridge, Slocum & Tobia, *supra* note 1, at 1632–33 (describing a puzzle that statutory amendment raises for statutory originalist-textualists).

<sup>371</sup> Cross, *supra* note 3, at 957 n.412 (“For its own part, this Article does not categorize amendatory interpretation as belonging to any particular school of interpretation, instead leaving it to adherents of various schools to decide it for themselves . . .”).

text, and as that theory holds a central place in American interpretation, we expect there are many places for linguistics to contribute. Linguistics has already contributed evidence, concepts, and theory to textualist debates at multiple levels: specific cases, mid-level principles, and abstract debates. The second half of this Essay was a specific case study of *VanDerStok*, which Professor Cross argues portends a stronger turn to linguistics in textualism. We argued that the majority in *VanDerStok* deftly employed linguistic arguments in a more compelling textualist analysis of 18 U.S.C. § 921 than the textualism of Justice Thomas's dissent or the "amendatory" suggestion.

We conclude by addressing one additional critique: Presenting linguistics-based arguments *legitimizes* the current Supreme Court as a lawful and neutral actor, when it should instead be delegitimized. Professor Cross does not offer this critique, which might also apply if the Court took up his "amendatory interpretation." This is a concern that others, especially law students, linguistics students, and those skeptical of the current Supreme Court, frequently offer.

An important concern about meeting textualism with linguistics, particularly through amicus briefs, is improper legitimation of unjust decisions, principles, institutions, or even legal systems. Of course, linguistics does not have an inherent political valence (nor does textualism).<sup>372</sup> But many worry that the Supreme Court uses "textualist" rhetoric to justify hyper-partisan or even lawless decision-making.<sup>373</sup> Earnestly assisting the Court by supplying linguistics ideas risks bolstering its decisions and institutional status.

Three other factors weigh against this consideration. First is the value of truth telling. When the Court claims to decide cases based on its analysis of language, it is worth explaining how that analysis should go—even if it is entirely unlikely that the analysis will persuade the Justices. This is obvious in hindsight; when a linguist lambasts a faux-textualist opinion, that *ex post* critique can no longer change things, but it is still worthwhile. The same analysis applies *ex ante*. On the heels of pro-gun decisions justified by textualism—the Fifth Circuit's *VanDerStok* decision and the Supreme Court's *Cargill* decision—one might have expected a "faux-textualist" decision in *VanDerStok*. We felt it valuable to offer our view of an appropriate linguistics-based analysis.

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<sup>372</sup> See Katie Eyer, *Textualism as an Equality Practice?*, 104 TEX. L. REV. 901, 978 (2026); see also Richard M. Re, *Legal Realignment*, 92 U. CHI. L. REV. 1965, 1969–70, 1970 n.17 (2025) (discussing how both liberal and conservative ideologies can be both formalist and functionalist).

<sup>373</sup> See, e.g., LEAH LITMAN, *LAWLESS: HOW THE SUPREME COURT RUNS ON CONSERVATIVE GRIEVANCE, FRINGE THEORIES, AND BAD VIBES* (2025).

Second, in our view, the Court does sometimes simply follow the text. Legal realism explains much of the Court's jurisprudence, but not all of it. We saw linguistic intervention in *VanDerStok* as presenting an uncertain, but real, possibility to contribute to the good: The better linguistic analysis aligned with common-sense gun safety. As Professor Richard Fallon suggested, "[I]f we think that our participation in amicus briefs might produce good results, we may have duties to do our fair share in promoting those good consequences that law professors are singularly competent to bring about."<sup>374</sup>

Third, legitimation can arise from action *or* inaction. Assume that the Court in *VanDerStok* was poised to write a pro-firearm opinion justified by faux-textualism. Textualist scholars who abstain from engaging with the Court also risk legitimating *that* faux-textualism. So, we agree that legitimation is a risk of our approach. But on the other side of the ledger in *VanDerStok* was: (1) stating what we believed to be the best linguistic analysis; (2) harms potentially avoided by upholding sensible regulation of firearms; and (3) risk of a faux-textualist opinion appearing even more legitimate in the absence of scholarly analysis.

More broadly, *any* normative legal scholarship faces legitimation critiques. Legal recommendations are built upon and constrained by current circumstances, any of which may be worthy of critique. Consider: Some who critique "Linguistic Textualism" propose "amendatory interpretation"; others would criticize amendatory interpretation for legitimating the Court and call instead for disempowering the Court; and yet others would allege that calling to shift power from the Court to, say, Congress or the states legitimates America's fundamentally unjust constitutional or political system. Each critic has a point. But legitimation risks do not justify stasis. Even the most effective articulations of legitimation critiques do not conclude that normative scholarship should be abandoned.<sup>375</sup>

A response to those who remain unpersuaded about bringing linguistics to textualism is to underscore how much of the current project is critical. For scholars critical of textualism, linguistics offers a useful toolkit. More broadly, it would be a mistake for critics of originalism to argue against the use of history to engage with originalism (or against "historical originalism"). It has been a mistake for critics of "Law and

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<sup>374</sup> Richard H. Fallon, Jr., *Scholars' Briefs and the Vocation of a Law Professor*, 4 J. LEGAL ANALYSIS 223, 264 (2012). Fallon ultimately concludes that there are many ways to lead an ethically attractive life as a law professor. *Id.*

<sup>375</sup> See generally Robin West, *The Contested Value of Normative Legal Scholarship*, 66 J. LEGAL EDUC. 6, 15 (2016) (arguing on behalf of the social value of legal scholarship).

Economics” to cede the discipline to that school. It would also be a mistake for critical scholars to eschew engagement with linguistics.

And of course, it is possible to both engage and critique the legal system. As Mari Matsuda eloquently explained:

[T]o the feminist lawyer faced with pregnant teenagers seeking abortions it would be absurd to reject the use of an elitist legal system, or the use of the concept of rights, when such use is necessary to meet the immediate needs of her client. There are times to stand outside the courtroom door and say “this procedure is a farce, the legal system is corrupt, justice will never prevail in this land as long as privilege rules in the courtroom.” There are times to stand inside the courtroom and say “this is a nation of laws, laws recognizing fundamental values of rights, equality and personhood.”<sup>376</sup>

In today’s textualist world, linguistics offers a powerful toolkit to become both a more effective lawyer and critic.

This brings us to a final observation. Although our present linguistics project is engaged with idiosyncracies of our textualist world, linguistics would also be relevant in many other legal worlds. Law is the product of the human mind, and it is communicated through written and oral language. As such, cognitive science and linguistics offer rich theories, data, and tools to illuminate law. If our legal system moves beyond textualism, linguistics would undoubtedly remain relevant to the study of law.

In our imperfect world, no discipline—including linguistics—offers a legal panacea. In *VanDerStok*, the best linguistic interpretation aligned with good, common-sense gun safety. In other cases, the best linguistic arguments might favor abhorrent practical results—so too of arguments from history or economics, or even arguments from legislative history, statutory amendment,<sup>377</sup> or statutory purpose. Our goal is not to defend linguistics as a field that will unwaveringly bend textualist practice towards just outcomes (it won’t). Our claim is simply that the field of

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<sup>376</sup> Mari J. Matsuda, *When the First Quail Calls: Multiple Consciousness as Jurisprudential Method*, 11 WOMEN’S RTS. L. REP. 7, 8 (1989).

<sup>377</sup> And as Part III explains, *VanDerStok* is a case in which Professor Cross’s favored modality, attending to a repealed predecessor statute as a basis for interpretation of the successor statute, provided one of the best arguments for the opposite side. *See Bondi v. VanDerStok*, 145 S. Ct. 857, 870 (2025) (describing this as “[p]erhaps [the plaintiffs’] best argument” and explaining why it is unsuccessful); *see also id.* at 879 (Thomas, J., dissenting) (arguing that the Gun Control Act is “narrower” than its predecessor); Brief of the National Association for Gun Rights and the National Foundation for Gun Rights as Amici Curiae in Support of Respondents, *supra* note 275, at 10–11 (making the same argument).

linguistics offers varied and unique contributions that will clarify and advance the theory, practice, and critique of textualism.

Today, public opinion of the Supreme Court has slipped and become more polarized, and “textualism” justifies countless impactful legal decisions. There is an understandable instinct, particularly among students seeking legal justice, to recoil from America’s curious and shadowy interpretive landscape. Another response is to cast more light upon that landscape. The rich field of linguistics offers a most illuminating torch.