

# SYMMETRIES—AND ASYMMETRIES—BETWEEN THEORIES OF STATUTORY INTERPRETATION

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INTRODUCTION.....	182
I. SYMMETRIES .....	183
II. ASYMMETRIES .....	186
A. The Core Distinction Between Textualism and Other Methods—and Its Implications Beyond the Core .....	186
B. Is Statutory Interpretation a Cooperative Endeavor? .....	191
CONCLUSION.....	194

## INTRODUCTION

Richard Fallon exposes a myth of textualism.<sup>1</sup> Textualists like to criticize other interpretive methods for giving judges too much leeway to impose their values on society.<sup>2</sup> As Fallon explains, however, textualist and nontextualist interpreters alike must inevitably consider values in giving meaning to legal texts.<sup>3</sup> While recognizing that the choice among different interpretive methods has consequences, Fallon brings out this “symmetry” between different methods.<sup>4</sup> Fallon’s core observation is sound. I have previously made the similar points that it is an illusion to imagine that statutory interpretation can ever be reduced to a series of determinate, nondiscretionary rules,<sup>5</sup> that even clear texts are clear only because their authors share many extratextual

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<sup>1</sup> Richard H. Fallon, Jr., *Three Symmetries Between Textualist and Purposivist Theories of Statutory Interpretation—and the Irreducible Roles of Values and Judgment Within Both*, 99 CORNELL L. REV. 685 (2014).

<sup>2</sup> *Id.* at 688, 727; *see, e.g.*, ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 16–17 (2012) (“If any interpretive method deserves to be labeled an ideological ‘device,’ it is not textualism but competing methodologies such as purposivism and consequentialism, by which the words and implications of text are replaced with abstractly conceived ‘purposes’ or interpreter-desired ‘consequences.’”); ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 6–25 (1997) (critiquing the “Mr. Fix-it mentality of the common-law judge” as inappropriate for statutory interpretation and suggesting that reliance on legislative intent is an “invitation to judicial lawmaking”).

<sup>3</sup> Fallon, *supra* note 1, at 688.

<sup>4</sup> *Id.*

<sup>5</sup> Jonathan R. Siegel, *The Polymorphic Principle and the Judicial Role in Statutory Interpretation*, 84 TEX. L. REV. 339, 394 (2005) [hereinafter Siegel, *Polymorphic Principle*].

assumptions with their readers,<sup>6</sup> and that we should not be embarrassed to acknowledge the role that judicial choice plays in our system of statutory interpretation.<sup>7</sup> Fallon highlights the role that values play in making the judicial choices that are a necessary part of giving meaning to statutory texts, whether the interpreter uses textualism or some other method.<sup>8</sup>

At the same time, I place more emphasis than Fallon does on the distinction between textualism and other interpretive methods.<sup>9</sup> Textualism proceeds from the fundamental premise that “the text *is* the law.”<sup>10</sup> This premise, I have suggested, not only constitutes a core distinction between textualism and other methods, but is causing textualism to move further from other methods over time, as its implications become better understood.<sup>11</sup> This inexorable radicalization of textualism causes textualists to be suspicious of methods that allow use of some of the contextual considerations that Professor Fallon discusses. I also doubt that textualists would agree with Fallon’s suggestion that statutory interpretation is “necessarily a cooperative endeavor.”<sup>12</sup>

In Part I of this Comment, I briefly discuss ways in which I agree with Professor Fallon’s assessment of symmetries between textualism and other interpretive methods. Part II discusses some fundamental asymmetries between the methods that I think it is important to keep in mind.

## I

### SYMMETRIES

Textualists like to imagine that their interpretive methods possess a degree of definiteness that other methods lack, which arises in part from excluding potential sources of statutory meaning. Maxims such as “[w]hen the words of a statute are unambiguous . . . judicial inquiry is

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<sup>6</sup> Jonathan R. Siegel, *What Statutory Drafting Errors Teach Us About Statutory Interpretation*, 69 GEO. WASH. L. REV. 309, 338–40 (2001) [hereinafter Siegel, *Drafting Errors*].

<sup>7</sup> Siegel, *supra* note 5, at 394.

<sup>8</sup> Of course, in agreeing with Fallon, I am not endorsing a free-wheeling system in which judges impose their values on society in the guise of interpreting legislation (and neither, I am sure, is Fallon). I am merely agreeing that some degree of normative judgment is an inevitable part of the process of interpretation, as, for example, when an interpreter decides whether the meaning of apparently clear text requires further investigation or determines what counts as part of the context in which text must be understood. *See* Fallon, *supra* note 1, at 698–703, 712; *see also infra* notes 19–20 and accompanying text (discussing the absurdity doctrine).

<sup>9</sup> *See* Jonathan R. Siegel, *The Inexorable Radicalization of Textualism*, 158 U. PA. L. REV. 117 (2009) [hereinafter Siegel, *Inexorable Radicalization*].

<sup>10</sup> SCALIA, *supra* note 2, at 22 (emphasis added).

<sup>11</sup> Siegel, *Inexorable Radicalization*, *supra* note 9, at 145.

<sup>12</sup> Fallon, *supra* note 1, at 732.

complete”<sup>13</sup> or “[w]here [a statute’s] language is plain and admits of no more than one meaning the duty of interpretation does not arise, and the rules which are to aid doubtful meanings need no discussion,”<sup>14</sup> suggest that textualists are content to cut off “judicial inquiry” or “the duty of interpretation” in the face of an apparently clear meaning of statutory text. In particular, textualists like to imagine that their methods enable them to avoid the danger inherent in other methods that a judge will imbue statutory text with the judge’s own values.<sup>15</sup>

Professor Fallon exposes the fallacy in this claim. As he points out, modern textualists recognize that statutory text must be considered in context.<sup>16</sup> Once this point is admitted, Fallon explains, value judgments are an inevitable part of the process of interpretation. How, for example, can an interpreter know what counts as part of the context in which statutory text must be considered without consulting some value system? Fallon provides good examples of ways in which textualists sometimes broaden and sometimes narrow the context in which they interpret statutory text.<sup>17</sup> A court, Fallon observes, can know what counts as a valid part of the interpretive context only by exercising judgment within a system of values.<sup>18</sup>

I have previously made the similar point that textualist rhetoric often hides the degree of choice that even textualist judicial interpreters necessarily exercise. Textualists often claim that they had no choice but to reach certain results based on statutory text, when in fact they necessarily exercised judicial choice in reaching those results.

For example, when deploying the interpretive canon against redundancy, which provides that a statute should be interpreted so that no portion is redundant or without effect, textualist judges sometimes assert that this rule “cannot be overcome by judicial speculation as to the subjective intent of . . . legislators,” as though there were simply no

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<sup>13</sup> Carr v. United States, 560 U.S. 438, 458–59 (2010) (Scalia, J., concurring).

<sup>14</sup> Amalgamated Transit Union Local 1309 v. Laidlaw Transit Servs., Inc., 448 F.3d 1092, 1096 (2006) (Bybee, J., dissenting) (internal quotation marks omitted).

<sup>15</sup> See Fallon, *supra* note 1, at 686–87.

<sup>16</sup> *Id.* at 687.

<sup>17</sup> See, for example, *id.* at 723–24, where Fallon discusses *Egelhoff v. Egelhoff*, 532 U.S. 141, 152 (2001), in which the Supreme Court held that a provision of the Employee Retirement Income Security Act (ERISA) that calls for life insurance proceeds and pension plan benefits to pass to a decedent’s designated beneficiaries preempts state law that would assume that a decedent would not wish these amounts to pass to a divorced former spouse (even though the former spouse was still the designated beneficiary at the time of death), but hinted that ERISA might not preempt state law that provided that benefits could not pass to a beneficiary who had murdered the decedent (even if the murderer was the named beneficiary). *Cf.* Prudential Ins. Co. v. Athmer, 178 F.3d 473, 475–76 (7th Cir. 1999) (Posner, J.) (holding that the rule that a murderer cannot collect on the victim’s life insurance policy, even if named as the beneficiary, “is undoubtedly an implicit provision” of a federal statute that contained no indication of such a rule in the statutory text).

<sup>18</sup> Fallon, *supra* note 1, at 724.

room for choice in the matter.<sup>19</sup> Yet in other cases, the same judges sometimes reject statutory readings suggested by the antiredundancy canon, on the ground that Congress might have inserted redundant language “to remove any doubt.”<sup>20</sup> How does a court know when to apply the antiredundancy canon strictly and when to consider the possibility that the legislature included surplus language in a statute out of an abundance of caution? Plainly, even a textualist interpreter must exercise judicial choice in deciding how strongly to employ this canon of construction.<sup>21</sup> The rules for which choice to make can never be fully determinate and mechanical.

Indeed, as Fallon rightly observes, the very determination that statutory text is so clear as to exclude the need for interpretive tools inevitably involves value-based judgments.<sup>22</sup> Even an apparently clear instruction may bristle with alternative possible meanings that can be easily rejected only because the giver and receiver of the instruction share extratextual assumptions.<sup>23</sup> Distinguishing between alternative interpretations that can be rejected out of hand and those that create a degree of “interpretive dissonance”<sup>24</sup> that calls for more thorough consideration necessarily requires, as Fallon claims, the exercise of normative judgment. Indeed, the “absurd results exception” that is recognized within textualism expressly allows an interpreter to reject even clear textual meanings that “no reasonable person could approve,”<sup>25</sup> which *requires* interpreters to make value judgments as to whether to follow apparently clear text. Of course, these points do not mean that judges are free to impose their own values on society in the guise of statutory interpretation, but only that the process of interpretation inevitably calls upon the interpreter to make judgments that can occur only within a normative framework.

Thus, Fallon is right to see “symmetries” between textualism and other interpretive methods. Though textualists criticize other methods for opening the way to imposing the interpreter’s values on society, and though they might like to imagine that their method does not require consulting the interpreter’s values, some consideration of values is inevitable in the process of interpretation. There is no mechanical, fully determinate, value-free interpretive method.

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<sup>19</sup> *Bilski v. Kappos*, 130 S. Ct. 3218, 3229 (2010).

<sup>20</sup> *Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 226 (2008).

<sup>21</sup> Jonathan R. Siegel, *Naïve Textualism in Patent Law*, 76 BROOK. L. REV. 1019, 1030 (2011) [hereinafter Siegel, *Naïve Textualism*].

<sup>22</sup> See Fallon, *supra* note 1, at 724 (“If decisions to broaden an interpretive context are bound up with value-laden judgments of reasonableness, then so are refusals to do so.”).

<sup>23</sup> Siegel, *Drafting Errors*, *supra* note 6, at 338–40.

<sup>24</sup> Fallon, *supra* note 1, at 688.

<sup>25</sup> SCALIA & GARNER, *supra* note 2, at 234.

## II ASYMMETRIES

Although I broadly agree with Fallon's arguments, there are some points on which I differ, and it is on these that I shall dwell. This is not to suggest that there is any great distance between us but merely that it would be tedious and of little interest for me to recapitulate all of Fallon's points with which I agree.

### A. The Core Distinction Between Textualism and Other Methods—and Its Implications Beyond the Core

Fallon's article is in a vein that I have previously called "accommodationist."<sup>26</sup> Although he might resist that label,<sup>27</sup> he highlights similarities ("symmetries") between textualism and other interpretive methods.<sup>28</sup> By contrast, I have endeavored to highlight the core distinction between textualism and other methods and to explain why that core distinction is inexorably causing textualism to drift further from other methods and to become radicalized.

The core distinction is simple: textualists believe that "the text *is* the law."<sup>29</sup> They believe that the passage of statutory text through the legislative process imbues *that text* with legal force, regardless of what anyone intended or understood the text to mean.<sup>30</sup> Other interpreters disagree. Other interpreters recognize that while the text of a statute is obviously of great importance in its interpretation, there are occasions when the text is not the law and the interpreter must depart from the text.<sup>31</sup>

This distinction is so basic that one might think it hardly needs to be pointed out. In fact, pointing it out is essential, because it exposes the limits of some of the accommodationist points that Fallon makes. Fallon states, for example, that "[b]oth new textualist and purposivist theories affirm . . . that interpreters should never reach an interpretive judgment that a statute's language will not bear."<sup>32</sup> Actually, as I shall show in a moment, a crucial distinction between textualists and other interpreters arises in cases in which the others depart from statutory text and give it a meaning it will not bear. Fallon also observes that textualists accept that "actual statutory meaning always depends on

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<sup>26</sup> See Siegel, *Inexorable Radicalization*, *supra* note 9, at 125.

<sup>27</sup> See Fallon, *supra* note 1, at 727 (denying an intent to suggest that the difference between textualism and purposivism has no consequences); *id.* at 733 (same). Fallon's article is, indeed, not fully accommodationist; he is merely calling attention to a similarity between textualism and other methods.

<sup>28</sup> *Id.* at 688.

<sup>29</sup> SCALIA, *supra* note 2, at 22 (emphasis added).

<sup>30</sup> *Id.* at 34–35.

<sup>31</sup> See Siegel, *Inexorable Radicalization*, *supra* note 9, at 134.

<sup>32</sup> Fallon, *supra* note 1, at 726.

context.”<sup>33</sup> While that is in some sense true, the core distinction between textualism and other methods appears most starkly in cases in which meaning does not really depend on context—cases in which no amount of sensitive attention to context can cure the difficulties posed by the text of a statute.

These points are best explained by an example, and the choice of example is important. Fallon’s article, like other accommodationist writing, highlights examples where proper attention to context can help resolve difficulties in ascertaining statutory meaning.<sup>34</sup> But attention to context cannot always rescue a court from interpretive problems. Whether it can do so depends on the source of the problem.

As Fallon notes, interpretive difficulties arise from different sources.<sup>35</sup> Sometimes, interpretive difficulty arises from words that have multiple meanings. In such a case, context is all-important. When someone says, “I don’t drink,” we know from context that the word “drink” cannot have its broad and common meaning of “to take liquid into the mouth for swallowing,” but must be understood in the narrow sense, “to partake of alcoholic beverages.”<sup>36</sup> Context may help courts resolve similar ambiguities arising from statutory terms that have multiple potential meanings.<sup>37</sup>

In other cases, interpretive difficulty arises from the broad generality of a command, which leaves the interpreter wondering whether the command admits of implied exceptions. When a partner tells an associate, “this task is urgent—finish it before you leave the building today,” the partner does not add, “but if the building catches on fire, you may leave without finishing the task.”<sup>38</sup> That exception is nonetheless implied by context and background understandings, and if the associate left during a fire, the command would not be violated.<sup>39</sup> Similarly, as Fallon observes, even textualists have agreed that the apparently stark command of 42 U.S.C. § 1983 must be understood in the context provided by the background law of official immunity<sup>40</sup> and

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<sup>33</sup> *Id.* at 729.

<sup>34</sup> *See, e.g., id.* at 710 (discussing *Arizona v. Inter Tribal Council of Ariz., Inc.*, 133 S. Ct. 2247 (2013)).

<sup>35</sup> *See id.* at 697–99 (discussing ambiguity, vagueness, and “interpretive dissonance between first-blush statutory meaning and implicit assumptions” about legislative intent).

<sup>36</sup> MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 354 (10th ed. 1995).

<sup>37</sup> *See, e.g.,* SCALIA, *supra* note 2, at 23–24 (explaining how context could help a court choose among the potential meaning of the word “uses” in a statute that forbids “us[ing]” a gun in connection with a drug crime).

<sup>38</sup> Jonathan R. Siegel, *Judicial Interpretation in the Cost-Benefit Crucible*, 92 MINN. L. REV. 387, 416 (2007) [hereinafter Siegel, *Cost-Benefit Crucible*].

<sup>39</sup> *Cf. United States v. Kirby*, 74 U.S. 482, 487 (1868) (citing Plowden’s conclusion that a statute forbidding prison escapes would not be violated by a prisoner who breaks out during a fire: “he is not to be hanged because he would not stay to be burnt”).

<sup>40</sup> Fallon, *supra* note 1, at 691–92.

that an apparently unqualified statutory command may implicitly apply only within the territory of the United States.<sup>41</sup>

In these kinds of examples, the observation that “actual statutory meaning always depends on context” is highly pertinent, and the use of context can help a court resolve interpretive difficulties. But there are other kinds of cases where no amount of attention to context can cure an interpretive problem. The statutory text means what it means, and the only choice is to enforce the statutory text or to depart from it. These kinds of cases often arise where the source of interpretive difficulty is not multiplicity of meaning or breadth of expression but statutory drafting error.

An example, which I have previously highlighted,<sup>42</sup> is the Class Action Fairness Act of 2005 (CAFA). As originally enacted, the statute allowed a party to a covered class action that was removed from state court to federal court to appeal a remand order, provided the appeal was filed “not less than 7 days after entry of the order.”<sup>43</sup> This language was obviously an error. The background principle that appeal times are a time limit, not a waiting period, plus other internal and external evidence showed that the drafters of the statute intended to say “not *more* than 7 days after entry of the order.”<sup>44</sup> A drafting error produced a statute that said the opposite of what its drafters intended.

Still, the statute said what it said. In this kind of case, appeal to context does not help. There is no context in which “not less than 7 days” means “not more than 7 days.” Consideration of context would show what legislators *intended*, but it would not change the meaning of what the legislature *enacted*. Statutes such as CAFA expose the limits of the suggestion that “actual statutory meaning always depends on context.” Sometimes, it doesn’t.<sup>45</sup> Sometimes the meaning of a statute is so starkly clear and determinate that no amount of attention to context can alter it.

Statutes like CAFA also show the stark difference between different interpretive schools with regard to departures from statutory text. Not everyone agrees that “interpreters should never reach an interpretive judgment that a statute’s language will not bear.”<sup>46</sup> In fact, most real judges disagree. In numerous cases interpreting CAFA’s appeal

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<sup>41</sup> *Id.* at 707, 709.

<sup>42</sup> See Siegel, *Inexorable Radicalization*, *supra* note 9, at 137–42.

<sup>43</sup> *Id.* at 138 & n.116.

<sup>44</sup> *Id.* at 138.

<sup>45</sup> Of course, meaning always depends on context in some sense: for example, the meaning of the squiggles that make up this footnote can be understood only in the context of the English language. But that is not, I think, what people mean when they say that “actual statutory meaning always depends on context.” That statement suggests an indeterminacy of meaning that is not always present, as the CAFA example shows.

<sup>46</sup> Fallon, *supra* note 1, at 726.

provision, courts of appeals departed from the statutory text and read it as though it said “not more than 7 days,” even though the text will not bear that meaning.<sup>47</sup> Some textualist judges vehemently dissented and called the nontextualist reading an “abuse of . . . judicial power.”<sup>48</sup> Statutes like CAFA thus expose the core, ineradicable difference between those who believe that “the text *is* the law” and those who do not.<sup>49</sup>

Moreover, this core difference is causing textualism to become radicalized, as textualists, over time, come to realize its full implications. The effect of the difference is not confined to cases involving stark drafting errors. The distinction is spreading outward to cases where statutory meaning is more contestable, and it is, in particular, having an impact on textualists’ consideration of context, which is crucial to Professor Fallon’s arguments. Professor Fallon’s reasoning takes as its starting point general agreement, including recognition by textualists, that meaning depends on context.<sup>50</sup>

As Professor Fallon notes, textualists *do* recognize that meaning depends on context.<sup>51</sup> For example, Justice Scalia, in his 2012 book with Bryan Garner, says that, “[o]f course, words are given meaning by their context, and context includes the purpose of the text.”<sup>52</sup> So, at least ostensibly, textualists stand ready to consider context when determining the meaning of text and even to interpret text in light of its purpose.

Nonetheless, in actual cases, textualists continue to regard purposive argumentation with suspicion. Although textualists agree that text must be considered in context, and that context includes purpose, the fundamental textualist axiom that “the text *is* the law” implies that the text is the law even if it does not do a good job of

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<sup>47</sup> See *Estate of Pew v. Cardarelli*, 527 F.3d 25, 27–28 (2d Cir. 2008); *Morgan v. Gay*, 466 F.3d 276, 279 (3d Cir. 2006); *Miedema v. Maytag Corp.*, 450 F.3d 1322, 1326 (11th Cir. 2006); *Amalgamated Transit Union Local 1309 v. Laidlaw Transit Servs., Inc.*, 435 F.3d 1140, 1146 (9th Cir. 2006), *reh’g denied*, 448 F.3d 1092, 1094 (9th Cir. 2006); *Pritchett v. Office Depot, Inc.*, 420 F.3d 1090, 1093 n.2 (10th Cir. 2005). *But see Spivey v. Vertrue, Inc.*, 528 F.3d 982, 983–85 (7th Cir. 2008) (allowing appeals within seven days but not rejecting appeals after seven days).

<sup>48</sup> *Amalgamated Transit Union*, 448 F.3d at 1095 (Bybee, J., dissenting)

<sup>49</sup> Of course, even many interpreters who consider themselves textualists would apply the “absurdity doctrine” to statutes such as CAFA. See, e.g., SCALIA & GARNER, *supra* note 2, at 235 n.5 (citing the majority opinions in the CAFA cases with apparent approval, without considering the textualist dissents). Such interpreters sometimes even claim that an absurd statute really means what it means with the absurdity corrected. See, e.g., *id.* at 235–38; see also SCALIA, *supra* note 2, at 20; Caleb Nelson, *What Is Textualism?*, 91 VA. L. REV. 347, 356 (2005). This claim only highlights the importance of the problem that drafting errors pose for textualism. In reality, the meaning of the text does not change when the meaning is absurd; rather, the interpreter departs from the meaning in the service of some other value, such as implementing legislative intent.

<sup>50</sup> Fallon, *supra* note 1, at 687, 729.

<sup>51</sup> See *supra* notes 16–17 and accompanying text.

<sup>52</sup> SCALIA & GARNER, *supra* note 2, at 56.



servicing its purpose. Therefore, to the extent that a best reading of the text can be identified without consideration of purpose, textualists must look at least somewhat askance at any different reading that depends on consideration of purpose.<sup>53</sup>

Again, textualists might deny this. Scalia and Garner not only recognize the importance of considering purpose but acknowledge that “resolution of an ambiguity or vagueness that achieves a statute’s purpose should be favored over the resolution that frustrates its purpose.”<sup>54</sup> So it might appear that textualists would not hesitate to consider purpose in determining the meaning of statutory text.

In actual cases, however, textualists may give strong priority to textual over purposive argumentation. For example, in *Limtiaco v. Camacho*,<sup>55</sup> the Supreme Court had to determine the meaning of a provision in the Guam Organic Act that limited Guam’s public debt to ten percent of the “aggregate tax valuation” of property in Guam.<sup>56</sup> The question was whether the “tax valuation” of a property was its appraised value or its assessed value, with the latter being lower because Guam, like many jurisdictions, assessed property at only a percentage of its appraised value (thirty-five percent at the time of the case).<sup>57</sup> The Court, based almost exclusively on straightforward textual analysis, held that the term “tax valuation” means assessed value—the final number that is multiplied by the tax rate to determine the tax owed—even though that interpretation robbed the statute of any real purpose.<sup>58</sup> As the dissent observed, the evident purpose of the statute was to set a limit on Guam’s indebtedness so as to reduce the risk of default.<sup>59</sup> Under the Court’s reading, the statute sets no limit on indebtedness at all, because the assessed value is an arbitrary percentage of the appraised value, and Guam’s legislature could fix that percentage at any number (even a number greater than one hundred percent) and could do so without changing taxes, by simply reducing the tax rate proportionately.<sup>60</sup> The Court showed little interest in this argument. Having arrived at an understanding of what the text of the statute *meant*, it was not going to change that understanding because the text as thus interpreted served little, if any purpose.

Cases such as *Limtiaco*<sup>61</sup> show that, notwithstanding their ostensible

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<sup>53</sup> Siegel, *Inexorable Radicalization*, *supra* note 9, at 155.

<sup>54</sup> SCALIA & GARNER, *supra* note 2, at 56.

<sup>55</sup> 549 U.S. 483 (2007). The case is discussed in detail in Siegel, *Inexorable Radicalization*, *supra* note 7, at 157–61.

<sup>56</sup> *Limtiaco*, 549 U.S. at 485, 488–89.

<sup>57</sup> *Id.* at 488–89.

<sup>58</sup> *Id.* at 489.

<sup>59</sup> *Id.* at 495 (Souter, J., dissenting).

<sup>60</sup> *See id.* at 495.

<sup>61</sup> For another example, see Siegel, *Inexorable Radicalization*, *supra* note 9, at 161–68

acceptance of purpose as a guide to statutory meaning, textualist judges may be deeply suspicious of purposive reasoning in statutory interpretation. This suspicion necessarily follows from the textualist axiom that statutory text *is* the law. If the text is the law, it is the law regardless of whether it does a good job of fulfilling its purpose—or, indeed, any purpose. The disfavor with which textualists regard purposive argumentation widens the gap between textualists and other interpreters.

To be sure, this is not really inconsistent with Fallon’s point. Fallon would, I think, observe that even a textualist who firmly believes that “the text is the law” must still determine what the text means. That process of determining textual meaning is Fallon’s focus, and it is in that process that even textualists must inevitably make value-based choices, whether or not they acknowledge the need to do so.

Even if one agrees with Fallon on this score, however, I would still place more weight than he does on the importance of the textualist axiom. It has considerable implications for the distinctions between interpretive methods. Textualists accept that text must be considered in context, but their fundamental axiom affects the way they consider context. It inexorably drives them to disfavor contextual considerations and to fall back on acontextual analysis. Fallon correctly observes symmetries between textualism and other interpretive methods that bring the methods closer together, but the fundamental asymmetry that is inherent in the textualist axiom keeps the methods apart and will, I believe, only drive them further apart over time.

#### B. Is Statutory Interpretation a Cooperative Endeavor?

In his conclusion, Fallon remarks that “[t]he key to understanding the subtlety and context dependency of the interpretive enterprise lies in recognition that statutory interpretation . . . is necessarily a cooperative endeavor. Courts must cooperate with the legislature, not frustrate or impede its efforts.”<sup>62</sup> Textualists, I think, would disagree. Fallon’s statement brings out another asymmetry between textualists and other interpreters.

As I have remarked before, “[s]tatutory interpretation is not usually, or at least not openly, regarded as a game in which the courts and Congress are opponents, and in which the goal for each is to thwart the efforts of the other as much as possible.”<sup>63</sup> Rather, cooperation is essential. The United States (or even any one of the individual states) is a huge and complex system that is difficult to make work even under the best of circumstances. Anyone who has tried to run even a small

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(discussing *Zuni Pub. Sch. Dist. No. 89 v. Dep’t of Educ.*, 550 U.S. 81 (2007)).

<sup>62</sup> Fallon, *supra* note 1, at 732.

<sup>63</sup> Siegel, *Drafting Errors*, *supra* note 6, at 323.

committee knows how difficult it is to keep everyone informed of what the committee's objectives are and what each member is supposed to do. These difficulties become immensely magnified in the arena of government and legislation. Congress faces the tremendous task of conveying to a vast array of government officials and an even vaster public what it wants everyone to do. The system can work only if courts cooperate. If courts set out to frustrate or impede what the legislature has done, the government cannot function.

Textualists, however, seem to have a different understanding of the relationship between the courts and the legislature. The fundamental axiom that the text *is* the law leaves much less room for judicial cooperation. The textualists believe that the job of the courts is to apply the law according to its text. If doing so fails to achieve the legislature's objective, that is the legislature's problem, not the courts' problem.

Again, the drafting error cases provide clear examples of this distinction between textualists and other interpreters. If statutory interpretation is a "cooperative endeavor"—if the role of courts is to cooperate with the legislature and to make its statutes function, rather than to frustrate or impede the legislature's efforts—then one would expect courts to correct obvious drafting errors, for failure to correct such errors would surely frustrate or impede the legislature's efforts. And, on the whole, that is what courts do—most judges, as noted earlier, will correct an obvious legislative drafting error.<sup>64</sup>

But textualists resist. In the CAFA cases mentioned earlier, for example, textualist judges on the Ninth Circuit recognized that applying the statute as written might be regarded as "illogical," "dumb," and "stupid."<sup>65</sup> Nonetheless, they steadfastly maintained that fixing the statutory error was not a part of the judicial function but in fact was an "abuse of . . . judicial power."<sup>66</sup> They obviously did not regard cooperating with the legislature as a priority. Their expressly stated view was that "[i]f Congress intended to do something different, let Congress fix it."<sup>67</sup>

This uncooperative attitude is common among textualists. They believe that "[i]t is beyond our province to rescue Congress from its drafting errors."<sup>68</sup> Cooperating with Congress is not the courts' task; rather, "[i]f Congress enacted into law something different from what it intended, then it should amend the statute to conform it to its intent."<sup>69</sup>

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<sup>64</sup> See *supra* notes 42–47 and accompanying text.

<sup>65</sup> *Amalgamated Transit Union Local 1309 v. Laidlaw Transit Servis., Inc.*, 448 F.3d 1092, 1097 (9th Cir. 2006) (Bybee, J., dissenting).

<sup>66</sup> *Id.* at 1095.

<sup>67</sup> *Id.* at 1100.

<sup>68</sup> *Lamie v. U.S. Trustee*, 540 U.S. 526, 542 (2004) (quoting *United States v. Granderson*, 511 U.S. 39, 68 (1994)).

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

To be fair to textualists, they are not being uncooperative for the sheer pleasure of it. It is not their *goal* to frustrate or impede the legislature's efforts. To the contrary, they believe that textualist interpretation will, in the long run, *enhance* the legislature's ability to achieve its objectives, because "if courts are going to correct whatever they perceive to be Congress's mistakes, Congress should lose all confidence that courts will enforce statutes as written."<sup>70</sup> A firm judicial determination to do what Congress has said, even when what it has said appears to be an error, allows Congress to legislate with more confidence that its instructions will be followed and also eliminates frustration of congressional objectives that might arise from a court's mistakenly departing from statutory language because of what it wrongly perceives to be an error in that language.<sup>71</sup>

But even taking the textualist reasoning at face value, it places little weight on *cooperating* with the legislature—at least in the way I imagine Professor Fallon understands cooperation. The textualists, no doubt, regard their method as the truest form of cooperation, but even they would have to acknowledge that what they regard as long-term cooperation entails short-term frustration. When textualists refuse to correct obvious drafting errors, they frustrate and impede the legislature's efforts in the case before them, even if they believe that they are enhancing Congress's long-term ability to achieve its goals.

A high-stakes test of whether textualists agree with Professor Fallon that statutory interpretation is "necessarily a cooperative endeavor" is in fact working its way toward the Supreme Court in the context of the Affordable Care Act. Although the Supreme Court previously upheld the Act's constitutionality,<sup>72</sup> the Act's efficacy is once again in peril, this time because of a matter of statutory interpretation. And, as is so often the case, the problem arises from a drafting error.

The question concerns the availability of subsidies provided by the Act to help people buy health insurance. The Act provides that such subsidies are available for people who buy health insurance on an exchange "established by [a] State."<sup>73</sup> The question is whether, therefore, subsidies are available for people who buy insurance on HealthCare.gov, the exchange created not by a state but by the federal government for use in states that declined to create their own

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<sup>70</sup> *Amalgamated Transit Union*, 448 F.3d at 1099 (Bybee, J., dissenting).

<sup>71</sup> Of course, while the textualist strategy avoids frustration of congressional objectives resulting from improper judicial correction of an incorrectly perceived error, it entails frustration of congressional objectives resulting from improper failure to correct real errors. Whether the net result is more or less frustration of congressional objectives than would result from the nontextualist strategy of correcting errors is an empirical question. *See* Siegel, *Inexorable Radicalization*, *supra* note 9, at 177 (suggesting that the nontextualist strategy seems likelier to produce better results overall).

<sup>72</sup> *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012).

<sup>73</sup> 26 U.S.C. § 36B(c)(2)(A)(i) (2013) (emphasis added).

exchanges. The D.C. Circuit has held that the Act unequivocally denies subsidies to people who buy insurance on the federal exchange;<sup>74</sup> the Fourth Circuit has held that the Act is at least sufficiently ambiguous that a court should defer to the construction of the Act by the agency charged with administering it (the IRS), which determined that such subsidies are available.<sup>75</sup>

There is room for debate about the meaning of the statutory text. On the one hand, the phrase “established by [a] State” seems pretty clear; on the other hand, other language in the statute creates the possibility that when the federal government operates an exchange in a state that has not created one, that exchange should be *deemed* for statutory purposes to be an “Exchange established by [a] State.”<sup>76</sup> But whichever side has the better of it, the issue will help demonstrate whether judges regard statutory interpretation as a “cooperative endeavor” in which a court must not “frustrate or impede [the legislature’s] efforts.”<sup>77</sup> The D.C. Circuit’s ruling surely does exactly that.

The denial of subsidies to people who live in states that have not created a health-care exchange would be likely to have a very substantial and detrimental impact on the whole structure of the Affordable Care Act. The subsidies are necessary to make the Act work. And yet two judges of the D.C. Circuit were willing, in the name of textualism, to read the phrase “established by [a] State” strictly and to disregard the degree to which they would thereby frustrate and impede the whole structure of one of Congress’s most significant enactments in decades. So it seems to me that many textualists would disagree with Professor Fallon that “statutory interpretation . . . is necessarily a cooperative endeavor.”<sup>78</sup>

#### CONCLUSION

Fallon rightly exposes some symmetries between textualism and other methods that textualists might prefer to deny. Still, the methods are fundamentally distinct, and the distinction is likely to become greater over time as textualists yield to the inherent logic of textualism. The force of the textualist axiom that the text *is* the law radicalizes textualism and causes textualists to reject some contextual considerations that could bring textualism and other methods closer together. This is the fundamental asymmetry between textualism and other interpretive methods.

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<sup>74</sup> Halbig v. Burwell, No. 14-5018, 2014 WL 3579745, at \*1 (D.C. Cir. July 22, 2014).

<sup>75</sup> King v. Burwell, No. 14-1158, 2014 WL 3583800, at \*1 (4th Cir. July 22, 2014).

<sup>76</sup> *See id.*

<sup>77</sup> *See* Fallon, *supra* note 1, at 732.

<sup>78</sup> *Id.*