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RUSSELL C. BOGUE

## Statutory Structure

**ABSTRACT.** One of the least controversial tools of statutory interpretation the Supreme Court employs is also one of its least examined: the use of a statute’s “structure.” For decades – but particularly under Chief Justice Roberts – the Court has determined the meaning of ambiguous statutory provisions through reference to the “structure,” “scheme,” or “plan” of a statute. Despite its ubiquity in the Court’s opinions, however, structural argument in statutory interpretation has gone largely unexamined by scholars. This Note attempts to fill that gap.

Through an analysis of recent case law, this Note categorizes the types of structural argument employed by the Court in its statutory-interpretation cases and the various assumptions needed to motivate such arguments. This fine-grained mapping permits a closer normative evaluation of structural argument and, in particular, of its compatibility with different methodologies of statutory interpretation. All dominant methods for reading statutes have good reason – on their own terms – to employ some types of structural argument, which demonstrates its cross-methodological appeal. But purposive reasoning best embodies the assumptions of coherence and rational design that undergird structuralism. The sway of this type of argument over a hypertextualist Supreme Court thus suggests the enduring need for purposive reasoning, particularly as the traditional tools of purposivism – such as legislative history – have been largely abandoned.

**AUTHOR.** Yale Law School, J.D. 2023; University of Oxford, D.Phil. 2020, M.Phil. 2018; University of Virginia, B.A. 2016. Special thanks to William N. Eskridge, Jr. – who taught me not just how to read a statute, but also how to think about the act of reading a statute – for supervising this project and providing extensive feedback. I am indebted also to the following individuals for their invaluable commentary at various points of the drafting process: Katherine Fang, Robert C. Post, Daniel R. Ortiz, Judith Resnik, Isabella Soparkar, Kannon Shanmugam, and the Honorable Paul J. Watford. The editors of the *Yale Law Journal*, in particular Zachary J. Krislov, Jessica Huang, and Milo Hudson, were generous and insightful in bringing this Note to publication. This Note has been improved by those mentioned above and others unnamed; all errors or omissions are my own.



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## INTRODUCTION

It is now uncontroversial to start, and often end, statutory interpretation with the text of the statute to be interpreted.<sup>1</sup> The ascendancy of the “new textualism”<sup>2</sup> has transformed statutory interpretation at the Supreme Court, prompting extensive commentary on the methods and merits of textualist analysis.<sup>3</sup> The recent fissures within the textualist camp, exposed in *Bostock v. Clayton County*,<sup>4</sup> have only added grist to the mill.<sup>5</sup> As the Court’s interpretive practices have moved closer and closer to the statutory text, the academy’s attention has followed.

But another interpretive practice with nearly equal dominance has received scant scholarly attention: namely, argument from statutory structure. Every Justice on the Supreme Court in the October 2021 Term had previously authored or

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1. The proposition is so uncontroversial that it is now a trope to establish it via a citation to Justice Elena Kagan’s famous quip that “[w]e’re all textualists now.” Harvard Law School, *The Antonin Scalia Lecture: A Dialogue with Justice Elena Kagan on the Reading of Statutes*, YOUTUBE at 08:28 (Nov. 25, 2015), <https://www.youtube.com/watch?v=dpEtszFToTg> [<https://perma.cc/N97K-77W4>]; see, e.g., Tara Leigh Grove, *Which Textualism?*, 134 HARV. L. REV. 265, 265 n.1 (2020); Diarmuid F. O’Scainnlain, “*We Are All Textualists Now*”: *The Legacy of Justice Antonin Scalia*, 91 ST. JOHN’S L. REV. 303, 304 (2017).
  2. William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 623 (1990) (“The new textualism posits that once the Court has ascertained a statute’s plain meaning [through textual analysis], consideration of legislative history becomes irrelevant. Legislative history should not even be consulted to confirm the apparent meaning of a statutory text.”).
  3. For defenses of textualism (constitutional and statutory), see Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in A MATTER OF INTERPRETATION 3, 23-25 (Amy Gutmann ed., 1997); John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 96-109 (2006); and Akhil Reed Amar, *The Supreme Court, 1999 Term—Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26, 27-28 (2000). For critiques and alternatives, see William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1479-92 (1987); Jonathan R. Siegel, *The Inexorable Radicalization of Textualism*, 158 U. PA. L. REV. 117, 120-22 (2009); and VICTORIA NOURSE, *MISREADING LAW, MISREADING DEMOCRACY* 64-68 (2016).
  4. 140 S. Ct. 1731 (2020).
  5. See Grove, *supra* note 1, at 266-67; William N. Eskridge, Jr. & Victoria F. Nourse, *Textual Gerrymandering: The Eclipse of Republican Government in the Era of Statutory Populism*, 96 N.Y.U. L. REV. 1718, 1768-77 (2021); Abbe R. Gluck, *Justice Scalia’s Unfinished Business in Statutory Interpretation: Where Textualism’s Formalism Gave Up*, 92 NOTRE DAME L. REV. 2053, 2061-67 (2017); Victoria Nourse, *Textualism 3.0: Statutory Interpretation After Justice Scalia*, 70 ALA. L. REV. 667, 668-70 (2019).

joined an opinion that employed arguments from statutory structure.<sup>6</sup> Numerous casebooks and treatises describe and approve of the use of structural argumentation.<sup>7</sup> But despite this apparently widespread acceptance, little has been written to explain what, precisely, argument from statutory structure is. When the Court intones — as it often does — that its interpretation of a provision accords with a statute’s “design and structure,”<sup>8</sup> with “the structure of the statutory scheme,”<sup>9</sup> or with the broader “context and structure”<sup>10</sup> of an act of Congress, what does it mean to say? And what does it hope to accomplish? This Note offers some answers.

Of course, structural argument in *constitutional* law is nearly as old as the text of the Constitution itself. Chief Justice Marshall was an early and aggressive employer of structural argument in seminal cases such as *Marbury v. Madison*<sup>11</sup> and *McCulloch v. Maryland*.<sup>12</sup> The use of structural argument in constitutional interpretation has accordingly received much more scholarly attention.<sup>13</sup> However,

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6. See *Territory of Guam v. United States*, 141 S. Ct. 1608, 1613-14 (2021) (Thomas, J.); *King v. Burwell*, 576 U.S. 473, 492-98 (2015) (Roberts, C.J.); *Niz-Chavez v. Garland*, 141 S. Ct. 1474, 1482-85 (2021) (Gorsuch, J.); *Johnson v. Guzman Chavez*, 141 S. Ct. 2271, 2289-90 (2021) (Alito, J.); *HollyFrontier Cheyenne Refin., LLC v. Renewable Fuels Ass’n*, 141 S. Ct. 2172, 2187-88 (2021) (Barrett, J., dissenting); *Abramski v. United States*, 573 U.S. 169, 181-83 (2014) (Kagan, J.); *Roberts v. Sea-Land Servs., Inc.*, 566 U.S. 93, 101-04 (2012) (Sotomayor, J.); *Barton v. Barr*, 140 S. Ct. 1442, 1458-60 (2020) (Sotomayor, J., joined by Breyer, Kagan & Ginsburg, JJ., dissenting).
  7. See, e.g., WILLIAM N. ESKRIDGE, JR., ABBE R. GLUCK & VICTORIA F. NOURSE, *STATUTES, REGULATION, AND INTERPRETATION: LEGISLATION AND ADMINISTRATION IN THE REPUBLIC OF STATUTES* 464, 470-71 (2014) [hereinafter ESKRIDGE ET AL., *STATUTES, REGULATION, AND INTERPRETATION*]; ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 180-82 (2012); WILLIAM N. ESKRIDGE, JR., *INTERPRETING LAW: A PRIMER ON HOW TO READ STATUTES AND THE CONSTITUTION* 116 & n.80, 414 & nn.52-54 (2016) [hereinafter ESKRIDGE, *INTERPRETING LAW*]; WILLIAM N. ESKRIDGE, JR., JAMES J. BRUDNEY & JOSH CHAFETZ, *LEGISLATION AND STATUTORY INTERPRETATION* 246-53 (3d ed. 2022) [hereinafter ESKRIDGE ET AL., *LEGISLATION AND STATUTORY INTERPRETATION*].
  8. *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 353 (2013).
  9. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 61 (1978).
  10. *Burwell*, 576 U.S. at 497.
  11. 5 U.S. (1 Cranch) 137, 178-80 (1803); see also Amar, *supra* note 3, at 32 (commenting on the structural aspects of Justice Marshall’s opinion).
  12. 17 U.S. (1 Wheat.) 316, 381-88 (1819).
  13. See, e.g., CHARLES L. BLACK, JR., *STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW* 7-32 (1969); PHILIP BOBBITT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION* 74-92 (1982); AKHIL REED AMAR, *AMERICA’S UNWRITTEN CONSTITUTION* 1-47 (2012); Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 751-53 (1999) [hereinafter Amar, *Intertextualism*]; Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221, 1235-36 (1995); John F. Manning, *The*

despite some similarities to structural argument in statutory interpretation, argument from constitutional structure is also meaningfully different.<sup>14</sup> Ordinary statutes are not governing charters. In general, they are not meant to create a governing architecture from which foundational principles can be inferred. More often, they are precise, complex, and limited documents addressing a particular problem. The structural arguments made to interpret statutes thus deserve to be examined on their own terms.

Though the Roberts Court has made particularly fruitful use of structural argument, for at least seventy years the Supreme Court has recognized that its job is to give “all of [a statute] . . . the most harmonious, comprehensive meaning possible.”<sup>15</sup> Structural argument is thus a species of what some have called the “[w]hole act rule,” or the injunction that “[e]ach statutory provision should be read by reference to the whole act and the statutory scheme.”<sup>16</sup> Canons of construction that fall under this rule include familiar ones like the rule against surplusage (avoid construing a provision such that it would make another provision in the statute redundant) and the rule of meaningful variation (presume that differences in language between provisions in the same statute indicate differences in meaning).<sup>17</sup> Given its family resemblance to these well-known canons of construction – which have not themselves escaped scholarly attention<sup>18</sup> – it is all the more surprising that structural argument has so far received little critical analysis.<sup>19</sup>

It is also curious that a Supreme Court increasingly dominated by textualists has deployed structural arguments so widely and transsubstantively.<sup>20</sup> Structuralism pairs naturally with programmatic statutory schemes – like the Affordable

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*Supreme Court, 2013 Term—Foreword: The Means of Constitutional Power*, 128 HARV. L. REV. 1, 30–48 (2014); Casey L. Westover, *Structural Interpretation and the New Federalism: Finding the Proper Balance Between State Sovereignty and Federal Supremacy*, 88 MARQ. L. REV. 693, 695–99 (2005).

14. See *infra* notes 64–67 and accompanying text.

15. *Clark v. Uebersee Finanz-Korporation*, 332 U.S. 480, 488 (1947).

16. ESKRIDGE, *INTERPRETING LAW*, *supra* note 7, at 411.

17. *Id.* at 412–13.

18. See, e.g., Anita S. Krishnakumar, *Backdoor Purposivism*, 69 DUKE L.J. 1275, 1313–19 (2020) [hereinafter Krishnakumar, *Backdoor Purposivism*]; Anita S. Krishnakumar, *Dueling Canons*, 65 DUKE L.J. 909, 967–71 (2015).

19. This lacuna may be attributable to the Justices’ tendency to refer to “structure” when what they mean is really a *different* species of the whole-act rule, such as rules against surplusage or the rule of meaningful variation. See, e.g., *Alexander v. Sandoval*, 532 U.S. 275, 288–89 (2001); *HollyFrontier Cheyenne Refin., LLC v. Renewable Fuels Ass’n*, 141 S. Ct. 2172, 2187–88 (2021) (Barrett, J., dissenting).

20. See *infra* Section III.B (noting certain incompatibilities between textualism and structural argument).

Care Act (ACA)<sup>21</sup> or the Clean Air Act (CAA)<sup>22</sup>—for which questions about harmonious operation or implementation make the most sense. But the Justices have used the tools of structural analysis to interpret statutes without such ambitions, like civil-rights legislation<sup>23</sup> and federal criminal law,<sup>24</sup> which are mostly concerned with setting standards of liability. A central query of this Note is why the Court turns so frequently to structural argument, even outside the confines of Congress’s programmatic enactments.

By way of preview, one way to answer that question is: “purposivism.” The turn to structure could be considered a turn to purposivism. Now, this answer is admittedly incomplete. As I will show, some types of structural argument the Court uses are not explicitly premised on any articulable statutory purpose, but rather on appeals to coherence, symmetry, and context. And structural argument is explicitly tied to statutory text in a way that makes it highly attractive for textualist interpreters who are wary of purposivism’s traditional embrace of extrinsic sources of statutory meaning. Often, however, structural argument is plainly an attempt to understand what the statute is *meant to accomplish*—and thus to discern its purpose. Indeed, the reference to a statute’s “design” or “structure” presupposes coherence, implying a rational drafter with identifiable aims.<sup>25</sup> The wide appeal of structural argument, especially for textualist interpreters, suggests that it is where purposivism now lives on, clothed in new (textualist) garb. To adapt Justice Kagan’s quip,<sup>26</sup> if we are all textualists now, we might also all be purposivists.<sup>27</sup>

The goals of this Note are both descriptive and normative. Descriptively, it aims to document a widely used tool of statutory interpretation that has not yet received any sustained treatment. The *type* of argument that the Court is making when it argues from structure varies considerably, even when the terminology the Court uses does not. Thirty years after scholars first began to notice that a

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21. See, e.g., *King v. Burwell*, 576 U.S. 473, 492–97 (2015) (interpreting the Patient Protection and Affordable Care Act, Pub. L. No. 111–148, 124 Stat. 119 (2010) (codified in scattered sections of the U.S. Code)).

22. See, e.g., *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 319 (2014) (interpreting the Clean Air Act, 42 U.S.C. §§ 7401–7671q (2018)).

23. See, e.g., *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 353–54 (2013) (interpreting Title VII of the Civil Rights Act of 1964, Pub. L. No. 88–352, 78 Stat. 241 (codified as amended in scattered sections of 42 U.S.C.)).

24. See, e.g., *Dean v. United States*, 556 U.S. 568, 578–79 (2009) (Stevens, J., dissenting) (interpreting 18 U.S.C. § 924 (2018)).

25. See *infra* Part I.

26. See *supra* note 1.

27. Cf. Manning, *supra* note 3, at 78–91 (addressing the “common ground” between textualists and purposivists).

textualist Supreme Court was increasingly turning to structural argument to replace extratextual sources of statutory meaning,<sup>28</sup> a typology of structural argument will enable readers of the Court's opinions and regulated parties better to understand the reasoning upon which the Court's judgments rest.

To guide this inquiry, I map below three broad categories of structural argument that the Court has employed in statutory cases. All of these categories take root from a background assumption of *coherence*. That is, structural argument in all its forms presumes that statutes are, to some degree, "logically or aesthetically ordered or integrated," "having clarity or intelligibility."<sup>29</sup> But the categories I map below emphasize different dimensions of coherence, roughly in increasing levels of abstraction: starting with the coherence of how the words, paragraphs, and written provisions of the statute interrelate and ending with the coherence of a given interpretation with the normative policy or purpose of the statute.<sup>30</sup>

The first category of structural argument is what I call *compositional structuralism*. This type of structural argument draws inferences about meaning from the way a statute is composed in its constituent parts. The Court has used at least three subcategories of compositional-structural argument. One resolves ambiguity by paying attention to the "location" of a provision in either the original statute or the U.S. Code.<sup>31</sup> Another draws on what might be called the "geometry" of the statute, evidenced by recognizable physical patterns formed by the presentation of the provisions themselves, such as their sequencing or symmetry.<sup>32</sup> And a final one—"aperture"—calibrates the substantive specificity of a provision to the specificity of surrounding provisions, thus cabining the interpretive space.<sup>33</sup> These various forms of structural argument derive from the structure of a statute as a written text. They trade on the assumption that text drafters, whatever their substantive ends, compose documents in a coherent fashion for their readers.

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28. See Eskridge, *supra* note 2, at 660-63; George H. Taylor, *Structural Textualism*, 75 B.U. L. REV. 321, 341-54 (1995).

29. *Coherent*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/coherent> [<https://perma.cc/GPT3-UAMY>].

30. These categories, presented in the order found in this Note, might therefore be analogized to the "Funnel of Abstraction" that William N. Eskridge, Jr., Philip P. Frickey, and Elizabeth Garrett devised to illustrate their pragmatic method of statutory interpretation. See WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY & ELIZABETH GARRETT, *CASES AND MATERIALS ON STATUTORY INTERPRETATION* 297 (2012).

31. See *infra* Section II.A.1.

32. See *infra* Section II.A.2.

33. See *infra* Section II.A.3.

A second category is *operational structuralism*. Rather than assuming only that Congress drafts coherent texts, this type of argument assumes that Congress designs coherent statutory schemes, understood as legislative programs that provide direction to actors. Operational-structural arguments are primarily available for the interpretation of programmatic statutes. This type of structuralism resolves ambiguity by interpreting the statute in the most harmonious way possible and by declining to adopt interpretations of a provision that would undermine, contradict, or defeat the point of other provisions. It is both the most familiar<sup>34</sup> and the most easily manipulated form of structural argument. One casebook describes it as a way of showing how “each provision play[s] a role in constructing a coherent policy,” thus allowing interpreters to see “what role to assign the ambiguous provision.”<sup>35</sup> At its strongest, a structural argument of this type points out an incompatibility between the interpretations of two provisions: both cannot be true at the same time, either as a matter of practical operation or as a matter of logic.<sup>36</sup> Less demanding, operational-structural arguments attempt to show that one interpretation is “incoherent” with other parts of the statute, either because it would embody a contradictory premise or because it would “impute to Congress a purpose to paralyze with one hand what it sought to promote with the other.”<sup>37</sup>

On the other end of the spectrum, structure from coherence bleeds into an argument about the purpose of the statute – and thus, the third category presented in this Note, *purposive structuralism*. Strictly speaking, operational structuralism does not require drawing any conclusions about the normative or policy aims that Congress seeks to accomplish in its statutes; rather, it assumes that – whatever those aims – Congress will not pursue them in a contradictory fashion. Often, however, there is nothing strictly “incoherent” or “incompatible” about a certain interpretation other than that it would not as effectively serve the purpose of the statute as a judge or Justice conceives of it. This type of argument is purposive, even though it is gleaned from the structure of the statute. Purposive-structural arguments employ a notion of normative coherence, seeking to privilege one interpretation over another based on how closely it fits with the policy the statute seeks to advance. There is nothing magical about this type of argument: the Court simply uses the terminology of structural argument – which has broad appeal – to make arguments about the purpose of a statute. It is striking,

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34. See, e.g., Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 425 (1989) (describing structural argument as the maxim that “an interpretation should be disfavored if it would make the disputed provision fit awkwardly with another provision or produce internal redundancy or confusion”).

35. ESKRIDGE ET AL., LEGISLATION AND STATUTORY INTERPRETATION, *supra* note 7, at 247.

36. See *infra* Section II.B.1.

37. *Clark v. Uebersee Finanz-Korporation, A.G.*, 332 U.S. 480, 489 (1947); see *infra* Section II.B.2.



however, that a Court that has moved aggressively away from purposive reasoning still regularly engages in it under the guise of the uncontroversial argument from statutory structure.<sup>38</sup> For those who believe that a primary goal of statutory interpretation is to effectuate the rational purposes of the legislature, this is good news.

By clarifying an undifferentiated area of statutory interpretation, this Note will also permit better normative evaluation of the use of structural argument. Not all uses of structure are created equal, nor can all be easily squared with the theoretical justifications that dominate the Court. Thus, the second aim of this Note is to evaluate structural argument in light of the various interpretive methodologies on the Court. Both textualists and purposivists readily turn to statutory structure, and both have good reasons – on their own terms – for doing so. But the theoretical assumptions underlying structural argument sit uneasily next to some of the presuppositions of textualist methodology. Insofar as structural argument assumes a rational statute drafter or rational outside reader,<sup>39</sup> it asks much of an interpretive method that claims to take such individuals as they are. It is a puzzle, therefore, that the Court’s textualist Justices so readily employ all types of argument from statutory structure. Tracing the links and gaps between textualism and structural argument can help both to illustrate its enduring appeal across methodologies and to demonstrate the continuing need for purposive reasoning of *some* kind, despite the Court’s aversion to the word.

Finally, this Note seeks to bolster the legitimacy of structural argument as an interpretive practice. Structural argument has become all the more necessary as the current Court has shut the door to extrinsic sources of determining statutory meaning, like legislative history.<sup>40</sup> In an era of “unorthodox lawmaking,”<sup>41</sup> in which statutes are often cobbled together from disparate legislative committees,

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38. I am not the first one to point out that the Roberts Court engages in this “backdoor purposivism.” Krishnakumar, *Backdoor Purposivism*, *supra* note 18, at 1276; *see also* Richard M. Re, *The New Holy Trinity*, 18 GREEN BAG 2D 407, 417 (2015) (“[P]urposive and pragmatic considerations help set the Court’s interpretive expectations and so inform the Court’s textualist judgment.”). Nor am I the first to frame purposive arguments as a type of whole-act, structural argument. *See* ESKRIDGE, *INTERPRETING LAW*, *supra* note 7, at 105 (describing the “purpose canon” as the injunction that “the judge ought to interpret statutory provisions in light of the statutory plan”). However, I am the first to theorize the differences between purposive-structural arguments and other types of structural arguments and to demonstrate how structuralism is used to render purposive reasoning more palatable. Whether the Roberts Court, with its current conservative supermajority, continues to engage in such backdoor purposivism is a question that future scholarship will have to document.

39. *See infra* Sections III.B.1-2.

40. *See* *Azar v. Allina Health Servs.*, 139 S. Ct. 1804, 1814 (2019) (“[L]egislative history is not the law.” (quoting *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1631 (2018))).

41. BARBARA SINCLAIR, *UNORTHODOX LAWMAKING: NEW LEGISLATIVE PROCESSES IN THE U.S. CONGRESS passim* (5th ed. 2016).

there is some danger in interpretive practices that presume that regulated parties or statute drafters are really looking at the whole text. But, by assuming that Congress acts rationally – even if it drafts distractedly – structural argument can help to legitimize statutory interpretation. To varying extents, structural arguments can serve core interpretive values, such as the rule of law, democratic accountability, and good governance. It deserves to be taken seriously by statutory interpreters with disparate methodological commitments.

Moreover, structuralism’s value exceeds merely its capacity to accommodate purposive reasoning. In *King v. Burwell*, Chief Justice Roberts’s opinion for the majority relied heavily on structural arguments of various kinds, employing them to trump the plain meaning of the statutory terms in the ACA.<sup>42</sup> Justice Scalia, writing in dissent, accused the majority of hiding purposive reasoning behind the language of structure.<sup>43</sup> Though some of Roberts’s structural moves surely aimed to vindicate the purpose of the ACA, however, many others were simply commonsense methods of reading terms in their context or of avoiding internal contradictions. And Scalia himself deployed his own structural counters, implicitly conceding its utility as a method of argumentation.<sup>44</sup> Uncovering the logic and persuasive force of various forms of structural argument rebuts the argument that it is simply a form of dressed-up purposivism – even if, as I will show, it sometimes is, and even if that development is to be warmly encouraged.

Part I clarifies what judges and Justices mean when they invoke the term “statutory structure” and compares structural argument in statutory interpretation to its analog in constitutional interpretation and to other methods of using the “whole act” to interpret a statute. Part II maps three broad categories and five subcategories of structural argument and provides case examples to illustrate. Part III assesses structural argument normatively and methodologically. In addition to examining how structuralism serves rule-of-law, democratic-accountability, and governance values, this Part assesses how well the three categories of structural argument map onto the dominant interpretive theories of purposivism and textualism, concluding that each theory has good – but different – reasons to use at least some forms of structural argument. However, Part III also concludes that pragmatic and purposive methods of interpretation better match the underlying presuppositions of structural argument – that Congress pursues rational ends rationally – than do textualist methods. The genius of structural

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42. See *King v. Burwell*, 576 U.S. 473, 492-97 (2015).

43. See *id.* at 510-11 (Scalia, J., dissenting) (“Only by concentrating on the law’s terms can a judge hope to uncover the scheme of the statute, rather than some other scheme that the judge thinks desirable.”).

44. See *id.* at 508-09.

argument thus lies in its capacity to find justification in any interpretive framework while providing cover for a pragmatic and purposive way of reading statutes.

## I. STRUCTURE AND INTERPRETATION

Before examining doctrinal examples of structural argument, it will be useful first to situate this type of argument within the broader menu of interpretive tools available to judges. Parsing the word itself—“structure”—reveals the initial clues about what is at work. “Structure” is derived from the Latin *structus*, the past participle of *struo*, which means “to pile up, arrange,” “to set in order,” or “[t]o make by joining together; to build, erect, fabricate, make, form, construct.”<sup>45</sup> Two themes emerge from this etymology. The first is that a structure is a *construction* or *composition*, which means that it is made up of distinct parts that, when combined, form a distinct object. This constellatory aspect of structure implies that it can be degraded or destroyed, even without destroying its constituent parts. The second theme—related to the first—is that structure requires organization, which means it requires *coherence*. A jumble of plywood is not a structure, but a house made of that same wood is. Structures are the result, most minimally, of a discernable order or intelligibility, and, most fulsomely, of purposeful planning.

In the field of statutory interpretation, structural arguments draw on these two themes. If structures can be represented as objects composed of constituent parts, then the structure of a statute consists of the various provisions combined into a single bill—the words of a duly enacted federal law that show up, in a certain order, on a page in the *Statutes at Large* or the U.S. Code. Compositional-structural arguments, as we will see, employ a presumption of coherent drafting,

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45. CHARLTON T. LEWIS, *Struo*, in A LATIN DICTIONARY: FOUNDED ON ANDREWS' EDITION OF FREUND'S LATIN DICTIONARY 1767 (Charlton T. Lewis ed., Oxford Univ. Press 1989) (1879). In keeping with this etymology, *Black's Law Dictionary* defines the term “structure” variously as “[a]ny construction, production, or piece of work artificially built up or composed of parts purposefully joined together,” “[t]he organization of elements or parts,” and “[a] method of constructing parts.” *Structure*, BLACK'S LAW DICTIONARY (11th ed. 2019). Meanwhile, Merriam-Webster's online dictionary provides a menu of at least five distinct definitions, including “something arranged in a definite pattern of organization,” “the arrangement of . . . parts in a substance or body,” the “organization of parts as dominated by the general character of the whole,” and a “coherent form or organization.” *Structure*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/structure> [https://perma.cc/4ND3-YTVV]. Tellingly, Merriam-Webster also defines structure as “construction.” *Id.* The first definition listed for that word is “the act or result of construing, interpreting, or explaining.” *Construction*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/construction> [https://perma.cc/A52K-RK9G].

which in turn views the statute as a written thing with certain features: numbered provisions, thematic divisions, logical ordering, and symmetry. Consider an analogy: in a typical work of fiction, there is a cover, a title page, a copyright page, a table of contents, a numbered set of chapters, an author biography, and a back cover. These elements, and the decisions that underpin their inclusion, form part of the structure of the book. (Note that this compositional structure would be different from the plainly physical structure of the book, which would be the size of the paper, its strength and flexibility, the stiffness of the spine, and so forth.) If chapter ten were to be placed before chapter one, or the title page in between chapters four and five, the author or reader might legitimately protest that the structure of the book had been compromised. Conversely, if those choices were purposeful, the reader might legitimately see them as distinct *structural* choices with consequences for understanding how the rest of the document is to be read.<sup>46</sup>

Likewise, the *coherence* of structure shows up in statutory interpretation as a presumption that a statute is meant to instantiate a basic commitment to harmonious operation. To return to the example of the plywood: a certain amount of effort and organization must go into sourcing, cutting, chopping, and stacking lumber before gluing it together into pieces of plywood. It does not become a structure, however, until it is arranged in a way that gives it intelligible meaning—for example, as a shed in the backyard. In like fashion, structural argument presumes that statutes are meant to accomplish goals that are consistent with one another (*coherence*) or, at the very least, that statutes are not meant to require two impossible things at once (*compatibility*).

Structural argument thus requires looking holistically at a statute.<sup>47</sup> Within statutory interpretation, it fits naturally in the set of interpretive tools grouped under the category of the “whole act” canons, which “strive to make unified sense of the statute, with each word and each provision playing a role that advances the statutory plan.”<sup>48</sup> Other whole-act canons include the rule against surplusage (interpret a provision, where possible, so as not to render other provisions

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46. The coherence of certain drafting features over others may, indeed, depend on the genre of the written text. Novels, scientific reports, and statutes are all written according to different conventions, which themselves are informed by both the authors of the text and its intended audience. Identifying the “audience” or “author” of a statute is, however, both descriptively and normatively contested. To the extent that compositional-structural arguments draw on conventions informed by unrealistic assumptions, they are vulnerable to critique. See *infra* Section III.C.1. For more discussion of the genre of statutes, see *infra* notes 73-75 and accompanying text.

47. See ESKRIDGE ET AL., LEGISLATION AND STATUTORY INTERPRETATION, *supra* note 7, at 247 (“A structure-of-the-statute argument shows how a statute can be read holistically.”).

48. ESKRIDGE, INTERPRETING LAW, *supra* note 7, at 102.

redundant or unnecessary),<sup>49</sup> the rule of consistent usage (presume that “identical words used in different parts of the same act are intended to have the same meaning”),<sup>50</sup> and the rule of meaningful variation (the “flip side” of consistent usage: presume that different words have different meanings).<sup>51</sup> These well-recognized canons use specific word choices or provisions throughout the whole act as evidence in favor of one interpretation over another, but, unlike various structural arguments, they do not make any claims about the structure, scheme, or plan of a statute.<sup>52</sup>

The use of structural argument as a type of whole-act rule has been recognized but not examined in detail by any scholars,<sup>53</sup> even though it has made brief appearances in prominent treatises on statutory interpretation. Jabez Gridley

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49. See SCALIA & GARNER, *supra* note 7, at 174.

50. *Sullivan v. Stroop*, 496 U.S. 478, 484 (1990) (quoting *Sorenson v. Sec’y of Treasury*, 475 U.S. 851, 860 (1986)).

51. See ESKRIDGE, *INTERPRETING LAW*, *supra* note 7, at 109.

52. The rule against surplusage comes the closest to being a form of structural argument, but it need not be employed in a way that makes any claims about the overall coherence of the statutory scheme. It is not *incoherent* for Congress to include a redundant provision; it is simply unnecessary. However, arguments from surplusage that allege that an interpretation would render a provision a nullity—rather than merely a redundancy—are more akin to a type of structural argument and, on that basis, are often considered stronger evidence of an interpretive issue. See, e.g., *King v. Burwell*, 576 U.S. 473, 502 (2015) (Scalia, J., dissenting) (“So while the rule against treating a term as a redundancy is far from categorical, the rule against treating it as a nullity is as close to absolute as interpretive principles get.”). Other whole-act rules—like the rule of consistent usage and its mirror, the rule of meaningful variation—differ from structural argument in that they make no claim about the coherence of the statute. Rather, they treat the statute like a dictionary, assuming that a semantic meaning in one provision is the same throughout the statute unless there is good reason to presume otherwise. The Court itself is sloppy in its reference to structural argument, occasionally referring to it when actually employing one of the more specific whole-act rules. See *supra* note 19.

53. The most sustained scholarly treatment outside treatises are brief discussions in three articles published several decades ago and devoted to other subjects. The first is Cass R. Sunstein’s description of structure referenced in note 34, *supra*, and his critique that it inaccurately presumes internal coherence. See Sunstein, *supra* note 34, at 425–26. The second is Eskridge’s landmark examination of the “new textualism” inaugurated by Justice Scalia’s appointment to the Court. See Eskridge, *supra* note 2. Eskridge presciently observes that one feature of this new method of statutory interpretation is “[t]he [r]ise of [s]tructural [a]rguments,” and he notes some initial observations about what might more accurately be called holistic textualist interpretation. See Eskridge, *supra* note 2, at 660–63. The third is a 1995 article by George H. Taylor defending the new textualist method of statutory interpretation. Part II of the article examines “[t]ext as [s]tructure” and points out that textualist interpretation allows recourse to numerous whole-act canons as well as to aspects of the statutory design evident in the text of the statute itself. See Taylor, *supra* note 28, at 341–54. Despite these early references to structure, none of the articles examine structural argument in any granular depth or provide any detailed taxonomy of the various types of structural argument, especially as employed in the last three decades.

Sutherland's treatise recognizes structural argument in a footnote.<sup>54</sup> In *Reading Law: The Interpretation of Legal Texts*, Antonin Scalia and Bryan A. Garner recognize the existence of structural arguments in their twenty-seventh canon, the "harmonious-reading canon," in which they write that "there can be no justification for needlessly rendering provisions in conflict if they can be interpreted harmoniously."<sup>55</sup> But the various types of structural argument the Court has employed over the years go unexamined.

William N. Eskridge, Jr. and various coauthors have given more attention to the argument from structure, but only enough to summarize its basic outline. In his treatise *Interpreting Law: A Primer on How to Read Statutes and the Constitution*, Eskridge describes structural argument as the following rule: "Avoid interpreting a provision in a way that is inconsistent with the overall structure of the statute *or* with the assumptions of another provision *or* with the assumptions embedded in a subsequent amendment to the statute."<sup>56</sup> This conjunctive summary mirrors a similar formulation in a casebook on statutory interpretation that Eskridge coauthored with Abbe R. Gluck and Victoria F. Nourse, in which whole-act "derogation" is categorized in tripartite fashion: operational conflict between provisions, philosophical tension, and—a hybrid of the two—"structural derogation."<sup>57</sup> In *Legislation and Statutory Interpretation*, Eskridge, James J. Brudney, Josh Chafetz, and several coauthors devote five useful pages to argument from statutory structure, demonstrating how it could have been (but was not) employed in *United Steelworkers v. Weber*<sup>58</sup> and how it was employed in *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*<sup>59</sup> and *King v. Burwell*.<sup>60</sup>

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54. See 2A JABEZ GRIDLEY SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 47:2 n.8 (Shambie Singer & Norman J. Singer eds., 7th ed. 2022) ("Courts pay attention to a statute's internal structure and the functional relation between the parts and the whole.").

55. SCALIA & GARNER, *supra* note 7, at 180. It is not at all clear that the premises upon which Justice Scalia interpreted statutes support his contention that there is "no justification" for rendering provisions in conflict if the conflict results from the plain meaning of the language used. See *infra* Section III.A. A related canon advocated by Justice Scalia and Bryan A. Garner is the "irreconcilability canon," which counsels denying effect to two provisions if reconciliation cannot be reasonably achieved. See SCALIA & GARNER, *supra* note 7, at 189.

56. ESKRIDGE, INTERPRETING LAW, *supra* note 7, at 414 (internal footnotes omitted).

57. ESKRIDGE ET AL., STATUTES, REGULATION, AND INTERPRETATION, *supra* note 7, at 471.

58. 443 U.S. 193 (1979).

59. 515 U.S. 687 (1995).

60. 576 U.S. 473 (2015); see ESKRIDGE ET AL., LEGISLATION AND STATUTORY INTERPRETATION, *supra* note 7, at 246-50.

These helpful recognitions of the existence and use of structural argument have nonetheless refrained from excavating or categorizing the different subtypes of structuralism. As Part II will demonstrate, the Court has unselfconsciously employed a wide variety of structural arguments, lumping together disparate interpretive techniques under the same terminology or approach. Given its prominence and cross-methodological appeal, it is long past time to give structural argument the same sustained analysis that other interpretive tools have received.

Likewise, the relationship of structural argument to various theories of statutory interpretation has evaded scholarly examination. But the dominance of structural argument invites this analysis. For instance, those whom I term “inside-view textualists” justify their interpretive method on the basis of respecting the legislative compromises that make their way into enacted law through the precisely calibrated processes prescribed in Article I of the U.S. Constitution.<sup>61</sup> However, nothing in this account requires that those legislative compromises be internally coherent; indeed, the process of reaching compromise may *itself* riddle proposed legislation with inconsistent or contradictory directives. What, then, is the basis for a “harmonious-reading canon,” as Scalia and Garner proposed in their treatise?<sup>62</sup> How can that be *harmonized* with the conviction, expressed in the same treatise, that “it is not the court’s function to alter the legislative compromise”?<sup>63</sup> And can alternative methodologies—textualist or otherwise—escape the conundrums posed by structural argument? Part III takes up these questions. For now, it is simply worth keeping in mind that the various techniques of structural argument documented in this Note rest on assumptions of varying strength about either the statute drafter (Congress) or the statute reader (judges, regulated parties, and the ordinary reader). Whether these assumptions can be squared with the methodological commitments of the Justices who deploy structural argument is a question this Note turns to later.

One final word is in order. As mentioned, structural argument within constitutional law has long been an object of scholarly attention and debate.<sup>64</sup> Advocated most famously by Charles L. Black, Jr., structuralism in constitutional law explicates the relationship between various constitutional institutions and the principles that can be inferred from them.<sup>65</sup> For instance, Black argued that

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61. See *infra* notes 312-314 and accompanying text.

62. SCALIA & GARNER, *supra* note 7, at 180.

63. *Id.* at 21.

64. See *supra* notes 11-13 and accompanying text.

65. See BLACK, *supra* note 13, at 7. A different form of structural argument—what Akhil Reed Amar termed “intratextualism”—is roughly the constitutional equivalent of a whole-act rule. See Amar, *Intertextualism*, *supra* note 13.

various expressive freedoms whose constitutional home is currently the First Amendment would warrant constitutional protection in the absence of that Amendment because they are “part of the working of the national government” and therefore implied by the structure of representative government.<sup>66</sup> Laurence H. Tribe has referred to this type of argument as employing the “topology” of constitutional construction: it seeks to uncover the “basic precepts that underlie sound interpretation of those constitutional provisions that establish the shape or architecture of our government.”<sup>67</sup>

Though there are congruencies between structural argument in statutory interpretation and constitutional law, there are also obvious differences. Structural argument in constitutional law, particularly as practiced by the Roberts Court, proceeds at a higher level of generality than its cousin in the statutory realm. For instance, critics of the Roberts Court’s use of structural argument in constitutional cases, such as John F. Manning, have charged that the “new structuralism” practiced by the Court leaves judges with a fair degree of discretion: “This free-form structural inference first shifts the Constitution’s level of generality upward by distilling from diverse clauses an abstract shared value . . . and then applies that value to resolve issues that sit outside the particular clauses that limit and define the value.”<sup>68</sup> In the cases that will be discussed in the following Part, structural argument proceeds rather differently, limiting itself to the (semantic, operational, or purposive) compatibility of different provisions with each other.

More fundamentally, while structural argument in constitutional law attempts to understand the basic logic of a curt document that defines the *superstructure* of American politics, structural argument in statutory interpretation seeks to uncover the meaning of a specific text passed by both houses of Congress and signed by the President. Few Justices of the Court or advocates of structural argument in statutory interpretation use it to infer basic governing rules, because statutes do not, in general, set out a framework of governance or a series of foundational principles that are meant to interrelate.<sup>69</sup> It is thus worth examining structural argument in statutory interpretation on its own terms, leaving discussion of where and how it diverges from constitutional-structural argument for future work.

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66. BLACK, *supra* note 13, at 41.

67. See Tribe, *supra* note 13, at 1235. Note the physicality of this language, explicitly linking structural argument to a building with an “architecture.” *Id.*

68. Manning, *supra* note 13, at 31-32.

69. There are exceptions to this rule, most notably the Administrative Procedure Act (APA), 5 U.S.C. §§ 551-559, 701-706 (2018). Though beyond the scope of this Note, it is an interesting and underexamined question whether the APA may be amenable to constitutional-structural interpretation.



## II. USES OF STATUTORY STRUCTURE

This Part describes and illustrates three broad categories of structural argument: compositional, operational, and purposive structuralism. The categories are presented in ascending order of abstraction from a statute's text: compositional structuralism (Section II.A) makes inferences based on the semantic choices in the text of the statute itself; operational structuralism (Section II.B) infers meaning from the way the statute actually operates, given all its moving parts; and purposive structuralism (Section II.C) relies on inferences from the policy or purpose embodied by the statute's provisions. Despite the increasing distance between the statute's text and the inferences drawn from it, all categories of structural argument rely on only the text of the enacted statute and the inferences that can reasonably be made from it rather than on external evidence of statutory meaning (like legislative-history materials).

An alternative way to view these Sections is in ascending order of the magnitude of the assumption necessary for the argument to work. Thus, compositional structuralism assumes only that Congress drafts its statutes in a coherent manner, whatever its substantive goals – a minimal (though, as we will see, potentially unrealistic)<sup>70</sup> assumption. Operational structuralism, more demanding, assumes that Congress pursues its substantive goals in a coherent fashion, while purposive structuralism assumes that Congress drafts its statutes so as to achieve its purposes most effectively.

### A. *Compositional Structuralism*

The Court often draws inferences about the meaning of ambiguous statutory terms based on how the statute is composed as a written document. These structural inferences typically fall into one of three categories: the Court may resolve ambiguity by recourse to (1) the location of a statutory provision, either in the statute itself or in the U.S. Code; (2) the geometry of a statute, drawing on notions of sequencing and symmetry; and (3) the level of detail of neighboring provisions or of the statute as a whole. Though these three arguments differ in emphasis and implementation, they often overlap. All three are methods of using the physical layout of the statute's words on the page – the spatial relationships between provisions – to go beyond a word- or sentence-bound textualism.

Unlike arguments from operational or purposive structuralism, compositional arguments draw on the logic of *drafting* rather than on the logic of what the statute seeks to accomplish. Compositional-structural arguments presume that statutes – whatever their ultimate ends – are written in an organized, logical

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70. See discussion *infra* Section III.C.1.

fashion. In this way, compositional-structural arguments treat statutes the same as major religious or literary texts, which are read with the assumption that choices made about where and how to communicate the message of the text are meaningful ones.<sup>71</sup> Just as we presume the ending of a novel should not be placed in the middle of the book,<sup>72</sup> courts presume that decisions about the composition of a statute reflect choices intended to communicate its meaning most effectively.

Of course, statutes are not novels. The act of interpreting a statute confronts many unique problems, including that statutes are meant to regulate and coordinate action amongst the political branches and not merely to express ideas. As Robert M. Cover observed, “[I]t is precisely this embedding of an understanding of political text in institutional modes of action that distinguishes legal interpretation from the interpretation of literature, from political philosophy, and from constitutional criticism.”<sup>73</sup> Accordingly, the field of statutory interpretation has developed a unique set of conventions—including the “canons”<sup>74</sup>—that channel interpretive choices as part of an institutional dialogue oriented toward the practical application of statutory language to actual cases.<sup>75</sup> These particular conventions make statutes (like novels, plays, or scripture) their own *genre* of text.

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71. One prominent example of the use of structure in biblical interpretation is examination of the so-called “chiasmic structure” of various books of the Old and New Testaments. See, e.g., NILS W. LUND, *CHIASMUS IN THE NEW TESTAMENT: A STUDY IN THE FORM AND FUNCTION OF CHI-ASTIC STRUCTURES* (1992); William H. Shea, *The Prophecy of Daniel 9:24-27*, in *THE SEVENTY WEEKS, LEVITICUS, AND THE NATURE OF PROPHECY* 75 (Frank B. Holbrook ed., 1986). For a literary application, see John D. Niles, *Ring Composition and the Structure of Beowulf*, 94 PMLA 924, 924-25 (1979).
72. See, e.g., Edger H. Schuster, *Discovering Theme and Structure in the Novel*, 52 ENG. J. 506, 508 (1963) (“Every high school student knows (or should know) that the emphatic positions in a piece of writing are the first and the last. Thus in a novel the first and last chapter and the chapters at the beginning and the end of the sections of the novel . . . would be of special importance.” (emphasis omitted)).
73. Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1606 (1986).
74. See ESKRIDGE, *INTERPRETING LAW*, *supra* note 7, at 407-45 (cataloguing various canons). For a skeptical take, see generally 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 (1950), which matches received canons of statutory construction with equally well-established canons instructing the opposite.
75. Cf. William N. Eskridge, Jr. & Philip P. Frickey, *The Supreme Court, 1993 Term—Foreword: Law as Equilibrium*, 108 HARV. L. REV. 26, 66-67 (1993) (explaining how the canons are “presumptions” that lower the costs of drafting statutes by serving as a “gap-filling” interpretive regime). The canons have also been construed as universal rules of interpretation that even ordinary readers would apply. See, e.g., SCALIA & GARNER, *supra* note 7, at 51 (describing the canons as “principles of expression that are as universal as principles of logic”).

As with other genres of literary or religious text, compositional-structural argument within statutory interpretation looks to the way in which the text was composed—its thematic organization, sequence, and so forth—as probative evidence of its meaning. In this way, compositional-structural argument presumes a drafter intending to communicate meaning in a way that is legible (coherent) to the reader. We do not treat all texts this way. The layout of print articles on a newspaper broadsheet may communicate something about the importance of one news item relative to others, but it does not change the meaning of the articles themselves. A compilation of online product reviews likely reflects only the temporal order in which the reviewers submitted their comments. That courts treat statutes less as collections of disconnected individual directives than as texts to be read like *To Kill a Mockingbird*<sup>76</sup> or the Book of Hosea is what makes compositional-structural arguments possible. This Section catalogs three common instances of this type of argument.

### 1. Location

One of the most common forms of compositional-structural argument resolves textual ambiguity by reference to the location of a provision within the entire statute.<sup>77</sup> Consider in this regard the 2013 case *University of Texas Southwestern Medical Center v. Nassar*.<sup>78</sup> The legal question presented was whether claims of unlawful employer retaliation under Title VII of the Civil Rights Act of 1964 (CRA)<sup>79</sup> were required to meet a higher showing of causation than claims of status-based discrimination.<sup>80</sup> The original CRA divided its guidance regarding these two types of unlawful employment action into two separate sections. Status-based discrimination (e.g., firing someone because of their race, color, religion, sex, or national origin) was governed in general by section 703 of the original Act.<sup>81</sup> Unlawful retaliation against individuals bringing claims of status-based discrimination was governed in general by section 704 of the original Act.<sup>82</sup> In 1991, Congress—responding in part to the Supreme Court decision

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76. HARPER LEE, *TO KILL A MOCKINGBIRD* (1960).

77. See, e.g., *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 353–54 (2013); *King v. Burwell*, 576 U.S. 473, 501–02 (2015) (Scalia, J., dissenting); *Sandoz Inc. v. Amgen Inc.*, 137 S. Ct. 1664, 1677 (2017); *Johnson v. Guzman Chavez*, 141 S. Ct. 2271, 2289 (2021).

78. 570 U.S. 338.

79. Pub. L. No. 88-352, 78 Stat. 241 (codified in scattered sections of 42 U.S.C.).

80. *Nassar*, 570 U.S. at 343.

81. § 703 (codified at 42 U.S.C. § 2000e-2).

82. § 704 (codified at 42 U.S.C. § 2000e-3).

*Price Waterhouse v. Hopkins*<sup>83</sup> – amended the CRA by adding to section 703 a new subsection, 703(m), which clarified that an unlawful employment practice is established “when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.”<sup>84</sup> As a result, complainants bringing suits under section 703 need not prove that status-based discrimination was a but-for cause of the adverse employment action. Instead, as the *Nassar* Court recognized, “It suffices . . . to show that the motive to discriminate was one of the employer’s motives, even if the employer also had other, lawful motives that were causative in the employer’s decision.”<sup>85</sup>

The question the Court faced was whether subsection 703(m)’s lower causation standard also governed unlawful retaliation cases brought under section 704. Justice Kennedy’s opinion for the five-member majority held that it did not.<sup>86</sup> Kennedy started with the plain language of subsection (m), which specifically addresses discrimination on the basis of race, color, religion, sex, or national origin without mentioning retaliation claims. That omission, Kennedy argued, “indicates Congress’ intent to confine that provision’s coverage to only those types of employment practices.”<sup>87</sup>

But Justice Kennedy quickly moved on to a structural argument: subsection (m) is in a different section of the Act than section 704. “Just as Congress’ choice of words is presumed to be deliberate,” Kennedy wrote, “so too are its *structural* choices.”<sup>88</sup> The fact that Congress chose to insert the motivating-factor provision in section 703 – which governs status-based discrimination – indicated, to the majority, that the textual omission of any mention of retaliation claims was purposeful: it simply was not meant to apply to section 704. If Congress had wanted the motivating-factor provision to apply to *all* unlawful employment conduct, Kennedy reasoned, it would have placed it in a section of the Act that applies to all such conduct, such as section 706, “which establishes the rules and remedies

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83. 490 U.S. 228 (1989).

84. Civil Rights Act of 1991, Pub. L. No. 102-166, § 107, 105 Stat. 1071, 1075 (codified at 42 U.S.C. § 2000e-2(m)). The Act paired this relaxed causation standard with limitations on remedies for charges brought under § 703(m). See 42 U.S.C. § 2000e-5(g)(2)(B) (2018).

85. *Nassar*, 570 U.S. at 343.

86. See *id.* at 362.

87. *Id.* at 353.

88. *Id.* (emphasis added).

for all Title VII enforcement actions.”<sup>89</sup> For the majority, the difference of a single section number proved decisive.<sup>90</sup>

Justice Ginsburg, writing in dissent, accused the Court of “driv[ing] a wedge” between sections 703 and 704, which are “tightly bonded.”<sup>91</sup> Status-based discrimination claims and retaliation claims, she argued, are meant to have a “symbiotic relationship,” enabling claimants to protect their right to a merit-based workplace.<sup>92</sup> It was “of no moment” that the retaliation provision was placed in section 704 rather than in section 703, because other parts of section 703 also cover retaliation—such as subsection (n), which bars any collateral attack on a consent judgment reinstating someone discharged by retaliation, and subsection (g), which creates a national-security exemption to *all* otherwise unlawful employment practices, including retaliation.<sup>93</sup> It was thus impossible, according to Ginsburg, for the placement of subsection (m) in 703 over 704 to “bear the weight the Court places on it.”<sup>94</sup> And Ginsburg countered with a location-based structural argument of her own: Congress placed the motivating-factor provision at the *end* of section 703, rather than “tie” it to subsections (a)-(d), which are the principal provisions proscribing status-based discrimination.<sup>95</sup> If location truly matters, she seemed to argue, then perhaps it was relevant that subsection 703(m) was only two subsections away from section 704, but several subsections away from the primary proscriptions of section 703.

These types of location-based arguments are standard fare for the Court.<sup>96</sup> They often serve as evidence that some other argument—typically a plain-meaning textualist interpretation or an argument from structural coherence—has gotten it right already. Nonetheless, as in *Nassar*, location-based arguments can overcome or overshadow straightforward textualist arguments. As Justice Ginsburg pointed out—along with the brief from the Solicitor General<sup>97</sup>—on its plain

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89. *Id.* at 354; see 42 U.S.C. § 2000e-5 (2018).

90. The petitioner had made this structural argument in their original brief in a single line. See Brief for the Petitioner at 17, *Nassar*, 570 U.S. 338 (No. 12-484), 2013 WL 1141955. The reply brief fleshed it out at slightly greater length. See Reply Brief for the Petitioner at 6-8, *Nassar*, 570 U.S. 338 (No. 12-484), 2013 WL 1696013.

91. *Nassar*, 570 U.S. at 363-64 (Ginsburg, J., dissenting).

92. *Id.* at 367.

93. See *id.* at 377-78; 42 U.S.C. § 2000e-2(n) (2018).

94. *Nassar*, 570 U.S. at 378 (Ginsburg, J., dissenting).

95. *Id.* at 372.

96. See, e.g., *Johnson v. Guzman Chavez*, 141 S. Ct. 2271, 2289 (2021); *King v. Burwell*, 576 U.S. 473, 501-02 (2015) (Scalia, J., dissenting); *Sandoz Inc. v. Amgen Inc.*, 137 S. Ct. 1664, 1677 (2017).

97. See Brief for the United States as Amicus Curiae Supporting Respondent at 11-12, *Nassar*, 570 U.S. 338 (No. 12-484), 2013 WL 1462056.

terms, subsection 703(m) applies to “any employment practice.”<sup>98</sup> Retaliation is an “unlawful employment practice” and thus by definition “any” employment practice within the terms of 703(m).<sup>99</sup> On the other side of the ledger, yet unmentioned by the majority opinion, the provisions in section 703 that feasibly do apply to retaliation claims—subsections (g) and (n)—did not textually limit themselves to “race, color, religion, sex, or national origin” the way subsection (m) did.<sup>100</sup> Location-based structural arguments thus both defeated arguments from plain text and crowded out available text-based rebuttals.

The appeal of such arguments tracks the appeal of textual arguments generally. Indeed, they are tied to the text, drawing on its organizational logic rather than on the meaning of the individual words or omissions. Thus, Justice Kennedy believed that vesting with significance the omission of “retaliation” from the text of subsection 703(m) was consistent with “the design and structure of the statute as a whole” because the statute *itself* divided its unlawful employment practices across two distinct sections.<sup>101</sup> By contrast, Justice Ginsburg believed linking subsection (m)’s causation standard exclusively to status-based discrimination was unjustified given its distance from subsections (a)-(d).<sup>102</sup>

A different and more controversial use of location relies on the placement of a provision in the U.S. Code.<sup>103</sup> The codification of statutory text is carried out by an office within Congress called the Office of the Law Revision Counsel (OLRC), established in 1974<sup>104</sup> to turn Congress’s various enacted public laws into sections of the U.S. Code.<sup>105</sup> Because the purpose of the codification process is to integrate the statutes Congress passes with the existing body of U.S. law, the OLRC often “takes [the] statutes apart from the form in which they were

98. See *Nassar*, 570 U.S. at 372 (Ginsburg, J., dissenting).

99. See *id.*

100. See Reply Brief for the Petitioner, *supra* note 90, at 7.

101. *Nassar*, 570 U.S. at 353.

102. See *id.* at 372 (Ginsburg, J., dissenting).

103. Eskridge has referred to a species of this type of argument as *noscitur a legibus sociis*, or “it shall be known by its neighboring statutes.” ESKRIDGE, *INTERPRETING LAW*, *supra* note 7, at 118-20.

104. See Committee Reform Amendments of 1974, H.R. Res. 988, 93d Cong. (1974), enacted into law by the Act of Dec. 27, 1974, Pub. L. No. 93-544, 88 Stat. 1771, 1777. Although the Office of the Law Revision Counsel was established in 1974, Congress created the U.S. Code itself in 1926. See Act of June 30, 1926, ch. 712, 44 Stat. 777. The work of codification was given to the House Committee on the Revision of Laws, which was leanly staffed. See Will Tress, *Lost Laws: What We Can’t Find in the United States Code*, 40 *GOLDEN GATE U. L. REV.* 129, 143-44 (2010).

105. See 2 U.S.C. § 285a (2018) (“The principal purpose of the Office shall be to develop and keep current an official and positive codification of the laws of the United States.”). There are currently fifty-four subject-specific titles, though one—Title 53—is empty.

passed and reassembles them – moving and reorganizing sections around to integrate those statutes into a single, coherent subject-matter title in the Code.”<sup>106</sup> The statutory text that ends up in the U.S. Code may therefore be organized very differently from the text that ends up in the *Statutes at Large*, which prints the law as it was passed by both houses of Congress and signed by the President. The rearrangement in some titles has been passed by Congress, making those sections of the Code “positive law”;<sup>107</sup> others, however, have not been formally enacted and represent merely “prima facie evidence of the law.”<sup>108</sup>

The discontinuities between the text of enacted law as represented in the *Statutes at Large* and the text as it ends up in the U.S. Code have prompted a host of recent scholarship to point out some of the interpretive difficulties created.<sup>109</sup> For present purposes, the important point is that arguments from the placement of a provision within the U.S. Code run the risk of attributing to Congress a drafting choice actually made by lawyers within the OLRC. While Code placement may therefore provide useful evidence of how rational actors outside of Congress view the subject matter or the scope of a given provision, this evidence would be – as a formal matter – extrinsic to the actual statute.

The 2015 case *Yates v. United States* nicely illustrates the uses and pitfalls of Code-based location arguments.<sup>110</sup> John Yates was caught violating federal law by harvesting undersized red grouper in federal waters in the Gulf of Mexico.<sup>111</sup>

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106. Jesse M. Cross & Abbe R. Gluck, *The Congressional Bureaucracy*, 168 U. PA. L. REV. 1541, 1570 (2020).

107. *Id.* at 1571.

108. Mary Whisner, *The United States Code, Prima Facie Evidence, and Positive Law*, 101 LAW LIBR. J. 545, 547 (2009). One source estimates that only twenty-seven of fifty-four titles have been formally enacted as positive law. Shawn G. Nevers & Julie Graves Krishnaswami, *The Shadow Code: Statutory Notes in the United States Code*, 112 LAW LIBR. J. 213, 221 & n.50 (2020).

109. See, e.g., Jarrod Shobe, *Enacted Legislative Findings and Purposes*, 86 U. CHI. L. REV. 669, 673 (2019) (noting that enacted “purposes” and “findings” sections are often relegated to the notes of the Code, where they can be difficult to find); Nevers & Krishnaswami, *supra* note 108, at 236–39 (labeling the placement of binding statutory text in notes as the “shadow code”); Tress, *supra* note 104, at 130 (“To make our federal statutory law accessible to all, the misleading and obscure features in the U.S. Code must be minimized, and better tools must be developed to alert a researcher to those that remain.”).

110. 574 U.S. 528 (2015).

111. *Id.* at 533; see also 50 C.F.R. § 622.37(d)(2)(ii) (2007) (requiring immediate release of red grouper less than twenty inches long). During the pendency of Yates’s litigation, the minimum legal length for Gulf red grouper was lowered from twenty inches to eighteen inches. See 50 C.F.R. § 622.37(d)(2)(iv) (2009). None of Yates’s offending fish were smaller than eighteen inches. See *Yates*, 574 U.S. at 534.

After this discovery, however, Yates attempted to evade enforcement by throwing the offending fish overboard.<sup>112</sup> He was found out<sup>113</sup> and, almost three years later, was indicted for destroying property to prevent a federal seizure, in violation of 18 U.S.C. § 2232(a), and for destroying, concealing, and covering up evidence to impede a federal investigation, in violation of 18 U.S.C. § 1519.<sup>114</sup>

By the time the case reached the Supreme Court, the sole question was whether § 1519's language covered Yates's conduct. Section 1519 was passed as part of the Sarbanes-Oxley Act (SOX),<sup>115</sup> which the Court noted "was prompted by the exposure of Enron's massive accounting fraud and revelations that the company's outside auditor . . . had systematically destroyed potentially incriminating documents."<sup>116</sup> The text of the statute prohibits destroying, concealing, or changing any "record, document, or tangible object" in order to impede an investigation.<sup>117</sup> The issue confronting the Justices was thus whether Yates's decision to throw the undersized red grouper overboard counted as destroying a "tangible object."<sup>118</sup>

Justice Ginsburg's opinion for the four-member plurality thought not. Though she acknowledged that the dictionary definition of "tangible object" would seem to encompass "fish from the sea," Ginsburg argued that the meaning of terms must be derived from their "broader context."<sup>119</sup> And that broader context included the location of § 1519 in the U.S. Code. Section 1519 was placed at what was, in 2002, the end of Chapter 73 of Title 18, which deals with obstruction of justice.<sup>120</sup> Ginsburg found it significant that § 1519 followed preexisting §§ 1516-1518, which prohibited "obstructive acts in specific contexts" rather than being "within or alongside retained provisions that address obstructive acts relating broadly to official proceedings and criminal trials."<sup>121</sup> Other provisions of

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112. *Yates*, 574 U.S. at 533-34.

113. *Id.* at 533.

114. *Id.* at 534.

115. Sarbanes-Oxley Act of 2002 (SOX), Pub. L. No. 107-204, 116 Stat. 745 (codified in scattered sections of the U.S. Code).

116. *Yates*, 574 U.S. at 535-36.

117. 18 U.S.C. § 1519 (2018).

118. *Yates*, 574 U.S. at 532.

119. *Id.* at 537 (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997)).

120. Sections 1519 and 1520 were passed as part of the Sarbanes-Oxley Act at the same time. In 2008, § 1521 was added to protect federal judges and law-enforcement officers from retaliation as part of the Court Security Improvement Act of 2007, Pub. L. No. 110-177, § 201, 121 Stat. 2534, 2536 (2008) (codified at 18 U.S.C. § 1521).

121. *Yates*, 574 U.S. at 540.



SOX, she pointed out, were slotted in next to these more general provisions.<sup>122</sup> “This placement,” she concluded, “accords with the view that Congress’ conception of § 1519’s coverage was considerably more limited than the Government’s.”<sup>123</sup>

Justice Kagan’s dissenting opinion—joined by Justices Scalia, Kennedy, and Thomas—took issue with Justice Ginsburg’s structural argument. “As far as I can tell,” she wrote, “this Court has never once suggested that the section number assigned to a law bears upon its meaning.”<sup>124</sup> According to Kagan, the fact that § 1519 was placed at the end of the chapter was simply because it was “standard operating procedure” for sections to be added “chronologically” to the U.S. Code.<sup>125</sup> In dueling footnotes, the Justices hashed out whether Congress could have more sensibly codified § 1519 as part of or in proximity to other, preexisting provisions in order to indicate one meaning over another.<sup>126</sup>

What all Justices ignored was that Congress has explicitly disavowed drawing interpretive guidance from provision placement (or captions) within Title 18.<sup>127</sup> In a heading at the top of Title 18 entitled “Legislative Construction,” Congress has instructed: “No inference of a legislative construction is to be drawn by reason of the chapter in Title 18 . . . in which any particular section is placed, nor by reason of the catchlines used in such title.”<sup>128</sup> This language mirrors instructions in other titles similarly forbidding structural arguments on the basis of a provision’s placement in the code.<sup>129</sup> Justice Ginsburg’s plurality opinion ignored this interpretive instruction, as did Justice Kagan’s dissenting opinion and the Solicitor General’s brief.<sup>130</sup>

122. *Id.* at 541 (pointing to the addition of § 806 as 18 U.S.C. § 1514A, the addition of § 1102 as 18 U.S.C. § 1512(c), and the addition of section 1107 as 18 U.S.C. § 1513(e)).

123. *Id.* Justice Ginsburg got the fifth vote with a concurrence from Justice Alito, who relied, among other things, on the *nosctitur a sociis* and *eiusdem generis* canons to argue that “tangible object” should be construed to be the same type of object as a “record” or “document”—terms which were the preceding nouns. Therefore, “tangible object” was not anything that includes “[a] fish . . . an antelope, a colonial farmhouse, a hydrofoil, or an oil derrick.” *Id.* at 549–50 (Alito, J., concurring in the judgment).

124. *Id.* at 559 (Kagan, J., dissenting).

125. *Id.* at 560.

126. *See id.* at 541 n.4 (plurality opinion); *id.* at 560 n.2 (Kagan, J., dissenting).

127. Tobias A. Dorsey first pointed out this oversight shortly after *Yates* was decided. *See* Tobias A. Dorsey, *Some Reflections on Yates and the Statutes We Threw Away*, 18 GREEN BAG 2d 377, 379–80 (2015).

128. *See* Act of June 25, 1948, ch. 645, § 19, 62 Stat. 683, 862 (codified at 18 U.S.C. front matter).

129. *See* Dorsey, *supra* note 127, at 380–81.

130. *See* Brief for the United States at 19, *Yates*, 574 U.S. 528 (No. 13–7451), 2014 WL 4089202, at \*19.

Daniel J. Listwa has argued that these interpretive instructions – passed as part of the 1948 Act that codified Title 18 into positive law – should be overridden when Congress directly amends portions of the U.S. Code, as it did with the SOX: “The bill that the Senate considered and ultimately enacted into law specified both where in the Code it should be placed and the caption.”<sup>131</sup> This “subtle” distinction would require that courts take into account the placement of statutory provisions within the Code only when Congress has directly amended the Code itself, but not when the placement is solely the result of the codification process.<sup>132</sup> On this read, Justice Ginsburg was right to attribute meaning to Congress’s decision in 2002 to place § 1519 where it did in Chapter 73 because Congress was directly amending the Code the way it would amend a statute.

That may be so, but Justice Ginsburg had an even better location-based structural argument available: the location of the provision in the original statute supported her argument. The language that would become § 1519 in the U.S. Code was included as section 802 of SOX, which was entitled “Criminal Penalties for Altering *Documents*.”<sup>133</sup> The amicus brief of Representative Michael Oxley, one of the cosponsors of SOX, pointed out this fact, arguing that § 1519’s more limited meaning was “reflected *structurally* by the provision’s placement in SOX.”<sup>134</sup> There was thus no need for Ginsburg to wade through the “nuances” of whether Code placement legitimately reflected congressional design. The structure of the enacted statute itself supported her position.

*Yates* illustrates the additional complexity that interpreters must confront in a “republic of statutes,”<sup>135</sup> where those statutes often exist in slightly different forms depending on the reference consulted. In the compilation and presentation of statutory text, there is not always a single drafter; nor do the choices of all “drafters” matter equally. Interpreters who draw on the purported decision by Congress to place a statutory provision in a particular location must therefore make sure – at a minimum – that the placement reflects a genuine choice by elected lawmakers in the first place. Construing the statute as published in the *Statutes at Large* is frequently the safest course.

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131. Daniel J. Listwa, Comment, *Uncovering the Codifier’s Canon: How Codification Informs Interpretation*, 127 YALE L.J. 464, 486 (2017).

132. *Id.* at 479.

133. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 802, 116 Stat. 745, 800 (emphasis added).

134. Brief for the Honorable Michael Oxley as Amicus Curiae in Support of Petitioner at 8-9, *Yates*, 574 U.S. 528 (No. 13-7451), 2014 WL 3101371, at \*8-9 (emphasis added).

135. WILLIAM N. ESKRIDGE, JR. & JOHN FERREJOHN, A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION (2013).

## 2. Geometry

Structural-composition arguments can also draw on what might be called the “geometry” or “architecture” of the statute. The basic intuition behind such arguments is that the rational drafting of statutes will mirror coherent geometric patterns. Two such features in particular have appeared in the Court’s opinions. One infers meaning from the *sequencing* of a statute or the subsections of its provisions;<sup>136</sup> the other uses the *symmetry* between different parts of a statute.<sup>137</sup> Though related to location-based arguments, these geometric arguments work slightly differently. The key is not that a provision appears in one section of the statute rather than another—thus linking its substantive content to its neighbors’—but rather that it exists in a patterned, spatial relationship to other provisions that informs how they are meant to be read together. Geometric arguments pay attention to the larger patterns formed by multiple provisions, and they use those patterns to infer meaning about the constituent parts.

First, consider sequencing. In *Johnson v. Guzman Chavez*, the Court was asked to decide whether noncitizens challenging their detention pursuant to reinstated removal orders were eligible for bond hearings.<sup>138</sup> The question turned on which of two statutory provisions applied to the noncitizen respondents (who had previously been removed from the United States, had reentered without authorization, and were subject to reinstated orders of removal): 8 U.S.C. § 1226, which applies “pending a decision on whether the alien is to be removed from the United States,”<sup>139</sup> or 8 U.S.C. § 1231, which applies “when an alien is ordered removed.”<sup>140</sup> Section 1226 permitted noncitizens detained under its authority to

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136. See, e.g., *Dean v. United States*, 556 U.S. 568, 578–79 (2009) (Stevens, J., dissenting) (arguing that the “structure” of the sentencing-enhancement statute supported an inference that intent was necessary for the discharge of a firearm to increase a sentence because the sequence of the clauses in the relevant provision indicated “increasingly harsh punishment for increasingly culpable conduct”); *Territory of Guam v. United States*, 141 S. Ct. 1608, 1613 (2021) (determining compensation for environmental costs by looking at the “structure of the relevant text” and reading a series of provisions “in ‘sequenc[e]’” (quoting *New Prime Inc. v. Oliveira*, 139 S. Ct. 532, 538 (2019))).

137. See, e.g., *Culbertson v. Berryhill*, 139 S. Ct. 517, 522 (2019) (matching two fee provisions in the Social Security Act to distinct stages of litigation).

138. See 141 S. Ct. 2271, 2280 (2021).

139. 8 U.S.C. § 1226(a) (2018).

140. *Id.* § 1231(a)(1)(A).

be released on bond,<sup>141</sup> while § 1231 did not.<sup>142</sup> Although the noncitizen respondents had previously been ordered removed from the United States, they had applied for “withholding of removal,” which permits noncitizens under removal orders to contest their removal to a country where their “life or freedom would be threatened” because of certain protected characteristics.<sup>143</sup>

Justice Alito’s opinion for the six-member majority held that § 1231 governed respondents’ status and thus that they were not entitled to bond hearings.<sup>144</sup> His opinion started with the text of the relevant provisions, holding that the respondents had been previously “ordered removed” and that their orders of removal were therefore “administratively final.”<sup>145</sup> Withholding-only proceedings, by contrast to removal proceedings, were not meant to determine *whether* a noncitizen was to be removed, but only *to where* they would be removed; the decision to remove had already been made.<sup>146</sup> There was therefore no “pending . . . decision on whether” the respondents were to be removed from the United States.<sup>147</sup>

But Justice Alito “confirm[ed]” this textual reading by examining the “statutory structure.”<sup>148</sup> His first structural argument was a familiar argument from statutory location: because “[e]very provision applicable to respondents” was found in § 1231, it would be “odd if the provision governing respondents’ detention was located in § 1226, rather than § 1231, which contains its own detention provision.”<sup>149</sup> His next structural arguments focused on sequencing: first, the order of subsections within § 1231 itself, and then, the sequence established by surrounding provisions of the Immigration and Nationality Act (INA).<sup>150</sup> First, Alito observed that § 1231(b) contains three paragraphs: paragraph (1) governs

141. *See id.* § 1226(a)(2)(A) (“[T]he Attorney General . . . may release the alien on bond of at least \$1,500 . . .”).

142. *See id.* § 1231(a)(2) (“Under no circumstances during the removal period shall the Attorney General release an alien who has been found inadmissible . . . or deportable . . .”).

143. *Guzman Chavez*, 141 S. Ct. at 2282; *see also* 8 U.S.C. § 1231(b)(3)(A) (2018) (statutory provision).

144. *Guzman Chavez*, 141 S. Ct. at 2283–84.

145. *Id.* at 2284–85.

146. *Id.* at 2285–87. Justice Alito brushed aside evidence that noncitizens who successfully challenge their removal to a particular country are removed to an alternative country only in 1.6% of cases—thus functionally equating withholding-only proceedings with removal proceedings. *See id.* at 2286.

147. 8 U.S.C. § 1226(a) (2018).

148. *Guzman Chavez*, 141 S. Ct. at 2289.

149. *Id.*

150. Immigration and Nationality Act of 1952, ch. 477, 66 Stat. 163 (codified as amended in 8 U.S.C. ch. 12).

the countries to which noncitizens “arriving at the United States” may be removed; paragraph (2) governs the countries to which “other” noncitizens may be removed; and paragraph (3), the withholding provision, restricts the countries to which a noncitizen may be removed if they qualify for withholding of removal.<sup>151</sup> This sequence mirrors the logic of decision-making from the government’s perspective. First, noncitizens are removed according to the procedures for the most common situation—those who have arrived in the United States and been found inadmissible. Failing that, noncitizens are removed according to the procedures governing all “other” fact patterns. And finally, the government must ensure in both cases that there are no grounds to withhold the removal established under either paragraph (1) or (2).

Justice Alito followed this provision-specific sequencing argument with a broader argument about the sequence of provisions in part IV of Chapter 12 of Title 8, the section of the U.S. Code where the provisions had been codified. (Because the sequencing in the Code matched the sequence in the original Act, Alito was not running into any of the issues potentially present in *Yates*.<sup>152</sup>) Like the withholding-specific sequence in § 1231(b), the order of provisions in the statute “proceed[s] largely in the sequential steps of the removal process.”<sup>153</sup> The arrival of noncitizens is governed by §§ 1221-1224. Section 1225 “provides instructions for inspecting aliens,” while § 1226 “authorizes the arrest and detention of aliens pending a decision” on removal. Sections 1228, 1229, 1229a, and 1229b outline removal proceedings, both expedited and otherwise, and “specify the types of relief” that noncitizens can request. Voluntary departures are covered in § 1229c, eventual admission is covered in § 1230, and § 1231 “explains what to do if the alien is ordered removed.”<sup>154</sup> Since respondents had reached § 1231 in their process, they “could not go back in time” to invoke procedures available under § 1226.<sup>155</sup>

The power of Justice Alito’s structural argument is that it silently evades the question of whether statutory sequence must necessarily follow temporal or logical sequence. When the sequence of the provisions is laid out, it appears almost self-evident that noncitizens who have already been ordered removed from the

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151. *Guzman Chavez*, 141 S. Ct. at 2289; see 8 U.S.C. § 1231(b)(1)-(3) (2018).

152. Compare Immigration and Nationality Act of 1952, ch. 477, 66 Stat. 163 (the Immigration and Nationality Act (INA) as passed in the original act), with 8 U.S.C. §§ 1101-1537 (2018) (the INA as codified in the U.S. Code).

153. See *Guzman Chavez*, 141 S. Ct. at 2290.

154. *Id.*

155. *Id.* (quoting *Guzman Chavez v. Hott*, 940 F.3d 867, 888 (4th Cir. 2019) (Richardson, J., dissenting)). Justice Alito drew on Judge Richardson’s dissent in the Fourth Circuit below for both his argument from location and his sequential argument here. See *Guzman Chavez v. Hott*, 940 F.3d 867, 887-88 (4th Cir. 2019) (Richardson, J., dissenting).

country are governed by § 1231 instead of going “back in time” to § 1226. But Justice Breyer’s dissent—joined by Justices Sotomayor and Kagan—argued that the majority’s reasoning ignored the requirement that, “except as otherwise provided,” the “removal period” only begins once “the order of removal becomes administratively final.”<sup>156</sup> That excepting language created, according to Breyer, a break in the majority’s inference of time-bound sequential logic.<sup>157</sup> Indeed, how could it be that “most reinstated removal orders will have become administratively final many years before the proceedings during which they are reinstated”?<sup>158</sup> But Breyer’s argument, whatever its merits, lacked the structural coherence of Alito’s, for it required breaking from an otherwise simple narrative evidenced by the order of the provisions themselves.

In addition to viewing statutes as rationally sequenced, the Supreme Court occasionally views them as harmoniously symmetrical. Illustrative in this regard is Justice Gorsuch’s majority opinion in *Epic Systems Corp. v. Lewis*.<sup>159</sup> The case concerned a purported conflict between two statutes: the National Labor Relations Act (NLRA)<sup>160</sup>—which guarantees workers rights to self-organization, collective bargaining, and “other concerted activities for the purpose of collective bargaining or other mutual aid or protection”<sup>161</sup>—and the Federal Arbitration Act (FAA),<sup>162</sup> which the Court has construed to “require courts to respect and enforce agreements to arbitrate,” including “parties’ chosen arbitration procedures.”<sup>163</sup> Respondents were employees who had entered into arbitration agreements that mandated individualized arbitration.<sup>164</sup> The primary question for the

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156. *Guzman Chavez*, 141 S. Ct. at 2295-96 (Breyer, J., dissenting); 8 U.S.C. § 1231(a)(1)(A)-(B) (2018).

157. *See Guzman Chavez*, 141 S. Ct. at 2296-97 (Breyer, J., dissenting).

158. *Id.* at 2297.

159. 138 S. Ct. 1612 (2018).

160. 29 U.S.C. §§ 151-169 (2018).

161. *Id.* § 157.

162. 9 U.S.C. §§ 1-16 (2018).

163. *Epic Sys.*, 138 S. Ct. at 1621.

164. *Id.* at 1619-20. Whether the employees can be said to have “agreed” or “consented” to the arbitration contracts is, of course, contested. The Court proceeded on the assumption that where arbitration agreements were not “extracted . . . by an act of fraud or duress or in some other unconscionable way,” they were consented to. *Id.* at 1622. Scholars have questioned this assumption even in the popular press, pointing out that where, as in *Epic Systems*, the arbitration agreements were foisted on employees as a condition of their continued employment, any pretense of equal-bargaining positions is out the window. *See, e.g.*, Judith Resnik, *The Supreme Court’s Arbitration Ruling Undercuts the Court System*, HUFFPOST (May 25, 2018, 1:23 PM EDT), [https://www.huffpost.com/entry/opinion-resnik-forced-arbitration\\_n\\_5b08395ae4b0802d69caeb47](https://www.huffpost.com/entry/opinion-resnik-forced-arbitration_n_5b08395ae4b0802d69caeb47) [<https://perma.cc/5GEL-BNW8>].

Court was whether the NLRA's guarantee that workers might collectively bargain, and engage in "other concerted activities" to that end, displaced the FAA's mandate that courts enforce the terms of arbitration agreements.<sup>165</sup>

Relying in part on an argument from statutory symmetry, Justice Gorsuch wrote that the argument that the NLRA displaced the FAA was inconsistent with the NLRA's "broader structure."<sup>166</sup> He started with the language of the relevant provision—section 7 of the NLRA, codified at 29 U.S.C. § 157—guaranteeing workers "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."<sup>167</sup> This language, Gorsuch wrote, creates a list of concerted activities, for which the statute and later amendments establish an "applicable" "regulatory regime"<sup>168</sup>: various aspects of collective bargaining and labor-organization practices are regulated by §§ 158(a)(3), 158(b), 158(d), and 159; picketing is covered by § 158(b)(7); strikes by § 163; and adjudicatory proceedings before the National Labor Relations Board (NLRB) are governed by §§ 160-161. "But missing entirely from this careful regime is any hint about what rules should govern the adjudication of class or collective actions in court or arbitration."<sup>169</sup> The only reasonable conclusion, according to Gorsuch, was that "[s]ection 7 doesn't speak to class and collective action procedures in the first place."<sup>170</sup>

Justice Gorsuch's structural argument set up a sort of matching exercise: a specific labor activity mentioned in one section of the Act must have a matching regulatory provision in another section. Collective bargaining and labor organizing met this test; so, too, did other "concerted activities closely related to organization and collective bargaining," like picketing, strikes, and adjudication in front of the NLRB.<sup>171</sup> But respondents' attempts to read rights to aggregate litigation into section 7 alongside the others would have left aggregate-litigation rights orphaned, unmatched to other provisions in the NLRA that could provide "comparably specific guidance."<sup>172</sup> The symmetry would be broken, with one

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165. *Epic Sys.*, 138 S. Ct. at 1623-24.

166. *See id.* at 1625.

167. *Id.* at 1624 (quoting 29 U.S.C. § 157 (2018)).

168. *Id.* at 1625.

169. *Id.*

170. *Id.* at 1626.

171. *Id.* at 1625.

172. *Id.*

side (the regulated activities) longer than the other (the regulations). This asymmetric outcome was strong evidence that the NLRA did not provide the rights that respondents sought from it.

Justice Ginsburg found this argument from “structure” – which she placed in scare quotes – unpersuasive.<sup>173</sup> In particular, she pointed out that the original version of the NLRA, passed in 1939, was itself highly asymmetrical, providing regulations only for the selection of collective-bargaining representatives.<sup>174</sup> The matching exercise that Justice Gorsuch engaged in was only made possible by the addition of provisions added later.<sup>175</sup> “It is difficult to comprehend why Congress’ later inclusion of specific guidance regarding some of the activities protected by § 7 sheds any light on Congress’ initial conception of § 7’s scope,” she wrote. And besides, the Supreme Court had long understood section 7’s “other concerted activities” to protect plenty of actions with no matching regulatory regime, such as concerted appeals to the media, legislative bodies, and government agencies.<sup>176</sup> Whatever authority Gorsuch could muster for his argument from symmetry, it had long since been undermined.

Using an argument from symmetry to foreclose a potentially “asymmetric” reading of a statute runs into problems – including that there is no reason to think that Congress always creates statutes where rights and regulations precisely pair up. It was particularly problematic in *Epic Systems*, where, as Justice Ginsburg aptly pointed out, the NLRA had never purported to address precisely how all of the labor rights embraced in section 7’s expansive language would be regulated. Whether Justice Gorsuch was ultimately right on the outcome is, in this sense, somewhat beside the point. The structural argument was not the way to reach it.

The persuasive force of the argument from symmetry is that it appeals to notions of balance and harmony, just as the argument from sequence appeals to notions of order and narrative. The danger is precisely the type of outcome in *Epic Systems*: arguments from structural symmetry can easily be used to foreclose expansive interpretations of a statute’s terms that would recognize new rights or

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173. *Id.* at 1639 (Ginsburg, J., dissenting).

174. *Id.*; see National Labor Relations Act of 1935 (NLRA), ch. 372, § 9, 49 Stat. 449, 453.

175. Compare 49 Stat. 449–57 (1935), with 61 Stat. 141–42 (1947) (adding subsection 8(b) to proscribe specific labor-organization practices), and 61 Stat. 142–43 (1947) (adding subsection 8(d), governing collective-bargaining obligations), and 73 Stat. 544 (1959) (adding subsection 8(b)(7) to replace restrictions on picketing).

176. See *Epic Sys.*, 138 S. Ct. at 1637–40.



obligations, as they can require multiple, parallel statutory provisions to establish the existence of a right.<sup>177</sup>

### 3. *Aperture*

A final category of compositional-structural argument involves narrowing or widening the ambit of a provision's interpretive space to match the specificity or breadth of neighboring provisions or of the statute as a whole. This is structural argument as "aperture," used here to mean the opening of a photographic lens that admits the light.<sup>178</sup> Just as photographers adjust the aperture on their cameras to produce more or less finely detailed photographs, statutory interpreters—following the Court's lead—can adjust the aperture of available interpretations to match the detailed structure of the statute.

Recall *University of Texas Southwestern Medical Center v. Nassar*,<sup>179</sup> which illustrated the use of argument from placement or location. Justice Kennedy's majority opinion also employed an argument from structure as aperture to reject respondent's argument that subsection 703(m)'s mixed-motives causation standard in Title VII applied to unlawful retaliation. One of Nassar's main contentions was that the substantive antidiscrimination provisions of Title VII—primarily, subsection 703(a)—already encompassed a prohibition against retaliation because prior Supreme Court precedents had interpreted federal antidiscrimination law to encompass bans on retaliation.<sup>180</sup> Thus, any causation standard that applied to the status-based discrimination applied *a fortiori* to the

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177. Arguments from symmetry may have more force when used to uphold an obvious symmetry when an alternative interpretation would destroy it. Justice Thomas's opinion for a unanimous court in *Culbertson v. Berryhill*, 139 S. Ct. 517 (2019), illustrates this potential. The case involved the determination of how attorneys' fees would be capped for Social Security claimants contesting the denial of benefits. *Id.* at 519. Respondent's interpretation of the relevant section of the Social Security Act would have destroyed the symmetry between stages of adjudication (administrative adjudication followed by federal-court review) and the applicable regimes governing fee-capping, limiting the fees due to petitioner. *See id.* at 522 (examining 42 U.S.C. § 406(a)-(b) (2018)). Thomas drew on the provision's "structure" (as symmetry) to confirm his textual reading. *Id.*

178. *See Aperture*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/aperture> [<https://perma.cc/EHG9-UN33>].

179. 570 U.S. 338 (2013).

180. *See, e.g.,* CBOCS W., Inc. v. Humphries, 553 U.S. 442, 445 (2008) (discussing 42 U.S.C. § 1981 (2018)); Gómez-Pérez v. Potter, 553 U.S. 474, 479 (2008) (discussing 29 U.S.C. § 633a(a) (2018) (Age Discrimination in Employment Act)); Jackson v. Birmingham Bd. of Ed., 544 U.S. 167, 173, 179 n.3 (2005) (discussing 20 U.S.C. § 1681(a) (2018) (Title IX)); Sullivan v. Little Hunting Park, Inc., 396 U.S. 229, 235 n.3, 237 (1969) (discussing 42 U.S.C. § 1982 (2018)).

retaliation claim.<sup>181</sup> There was a straightforward response to this argument available: this reading of the statute would make the subsequent antiretaliation provision in subsection 704(a) – and references to this provision in other parts of the statute, such as subsection 706(g)(2)(A)<sup>182</sup> – superfluous, since retaliation would have been covered by section 703 already.

But Justice Kennedy did not take this easy out. Instead, he argued that it was inappropriate to read section 703's antidiscrimination provisions to encompass retaliation, as the Court had done in other statutes, because – unlike those other statutes – “Title VII is a detailed statutory scheme.”<sup>183</sup> Rather than speak in broad terms, the statute proscribes specific unlawful employment practices: it targets discrimination by employers, employment agencies, labor organizations, and training programs,<sup>184</sup> and it bans advertising any preferences based on protected characteristics.<sup>185</sup> Moreover, Kennedy noted, it is riddled with exceptions.<sup>186</sup> This detailed statutory scheme made it inappropriate to conclude that the Act's antidiscrimination provisions swept broadly to incorporate antiretaliation prohibitions. “This fundamental difference in *statutory structure*,” Kennedy concluded, “renders inapposite decisions which treated retaliation as an implicit corollary of status-based discrimination. Text may not be divorced from context.”<sup>187</sup> In other words, rather than take advantage of a simple textual counter (the deployment of the rule against superfluities), Justice Kennedy opted for a structural one.

Arguments from structure as aperture are, like other compositional-structural arguments, not always front and center. But the Court frequently resorts to them to shore up conclusions it has already reached through other means. Two high-profile cases, *Utility Air Regulatory Group v. Environmental Protection Agency*

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181. See Brief for Respondent at 12, *Nassar*, 570 U.S. 338 (No. 12-484), 2013 WL 1399321.

182. 42 U.S.C. § 2000e-5(g)(2)(A) (2018) (“No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or *in violation of section 2000e-3(a) of this title* [section 704(a) of Title VII].” (emphasis added)).

183. *Nassar*, 570 U.S. at 356.

184. See 42 U.S.C. § 2000e-2(a)-(d) (2018).

185. See *id.* § 2000e-3(b).

186. See *id.* § 2000e-2(i) (exemptions for business on or near an Indian reservation); *id.* § 2000e-2(g) (national security exception); *id.* § 2000e-1(a)-(b) (exemptions for religious employers and companies with foreign workers).

187. *Nassar*, 570 U.S. at 356 (emphasis added).

(EPA)<sup>188</sup> and *King v. Burwell*,<sup>189</sup> also relied on versions of structure as aperture. In the first, Justice Scalia's majority opinion held that, despite a prior Supreme Court holding that the term "air pollutant" in the CAA includes "greenhouse gases," the use of that same term in more specific—and detailed—provisions did not necessarily include greenhouse gases, especially where doing so "would be inconsistent with the statutory scheme."<sup>190</sup> And in *Burwell*, Chief Justice Roberts argued that the "structure" of section 36B of the ACA, which governed tax credits, foreclosed the interpretation that such credits were only available on state exchanges.<sup>191</sup> The reason? To get to that result, the phrase "Exchange established by the State" in the "sub-sub-sub section" 36B(c)(2)(A)(i) would have to govern the interpretation of the amount of tax due to applicable taxpayers in subsection 36B(a), and thus "the viability of the entire" Act.<sup>192</sup> "We doubt that is what Congress meant to do," Roberts concluded.<sup>193</sup>

*Utility Air* and *Burwell* illustrate slightly different ways of drawing on the specificity of a statute to cabin interpretive discretion. Justice Kennedy in *Nassar* rejected an expansive reading of Title VII on the basis of that statute's detailed overall scheme. In *Utility Air*, by contrast, Justice Scalia rejected an expansive definition of "air pollutant" on the basis of whether it served a detailed statutory role. When used as the Act-wide definition, it was "a description of the universe of substances" available for regulation and thus was permissibly broad; however, when used in the Act's detailed operative provisions, its "capacious" interpretation was inappropriate.<sup>194</sup> And in *Burwell*, Chief Justice Roberts rejected an interpretation of a highly specific sub-sub-sub section that would have stark ramifications for broader, more general provisions in the ACA—a type of priority rule articulated by the Court as the conviction that Congress "does not alter the fundamental details of regulatory scheme in . . . ancillary provisions."<sup>195</sup> Thus, arguments from aperture can use the detailed nature of a statute or provision in diverse ways to foreclose expansive interpretations of statutory terms.<sup>196</sup>

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188. 573 U.S. 302 (2014).

189. 576 U.S. 473 (2015).

190. *Util. Air*, 573 U.S. at 319; see Clean Air Act, 42 U.S.C. §§ 7401-7671q (2018).

191. *Burwell*, 576 U.S. at 497.

192. *Id.*

193. *Id.*

194. *Util. Air*, 573 U.S. at 319.

195. *Burwell*, 576 U.S. at 497 (quoting *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001)).

196. On occasion, an argument from aperture can also shore up expansive interpretations. Justice Gorsuch gestured toward an argument along these lines in *Bostock v. Clayton County*, 140 S.

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Compositional-structural arguments are various and common. The three subcategories listed in this Section are simply the most prominent; others surely exist. Identifying and mapping those interpretive conventions will be a useful endeavor for those seeking to understand the intuitive – if occasionally misplaced – appeal of compositional-structural arguments, especially for courts that limit their interpretive tools to the text of the enacted statute itself.

Unlike operational or purposive structuralism, discussed in the next Sections, compositional structuralism does not require the belief that Congress’s substantive goals are internally compatible or coherent – only that Congress *articulates* them coherently. The basis of this assumption is the same basis as the textualist assumption that Congress’s choice of words is meaningful and that differences in word choice throughout a statute may be used to infer differences in meaning.<sup>197</sup> Indeed, Justice Kennedy’s use of various compositional-structural arguments in *Nassar* equated them with textualist arguments, calling both of them examples of “deliberate” choices made by Congress.<sup>198</sup> Compositional-structural arguments are thus vulnerable to the same critiques leveled at textualist presumptions of careful legislative drafting – though, as will be discussed in Part III, not to the same degree.<sup>199</sup>

### B. Operational Structuralism

A second major category of structural argument that the Court employs to resolve textual ambiguity looks not to the coherence of the statute as a text but to the coherence of the statutory program. This type of argument is thus primarily utilized when it can fairly be said that Congress meant to create a scheme in

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Ct. 1731 (2020). In that case, employers protested that interpreting Title VII’s sex-based anti-discrimination provisions to apply to sexual orientation and gender identity would institute a major policy change through a “subtle” method and “hide elephants in mouseholes.” Brief for Respondents at 9, *Bostock*, 140 S. Ct. 1731 (Nos. 17-1618, 17-1623 & 18-107). But Gorsuch, while admitting that “today’s holding . . . is an elephant,” asked, “[W]here’s the mousehole?” *Bostock*, 140 S. Ct. at 1753. For Gorsuch, the breadth of the statutory language and “Congress’s key drafting choices” in other provisions foreclosed the argument that an expansive interpretation was inappropriate. *See id.*

197. *See* ESKRIDGE, INTERPRETING LAW, *supra* note 7, at 109-11; *Russello v. United States*, 464 U.S. 16, 23 (1983) (“We refrain from concluding here that the differing language in the two subsections has the same meaning in each. We would not presume to ascribe this difference to a simple mistake in draftsmanship.”).

198. *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 353 (2013).

199. *See infra* Part III.

the first place. Simply put, operational structuralism disfavors interpretations that would make Congress irrational. It counsels reading statutes “harmoniously,”<sup>200</sup> assuming that Congress does not mean to create Frankenstein’s monsters or legislative programs that constantly undermine themselves by pursuing contradictory goals or by coming into operational conflict.

When the Court employs structural arguments of this type, it can call on weaker and stronger assumptions of coherence. The weaker assumption is simply that Congress does not write laws that are operationally incompatible: one ought to be able to follow faithfully all the applicable provisions of a statute without practical or logical contradiction.<sup>201</sup> The stronger assumption is that Congress does not write laws that are incoherent, defined as either adopting contradictory assumptions, defeating their own aims, or creating unjustified barriers to their own successful implementation.<sup>202</sup>

### 1. Operational Compatibility

*Utility Air Regulatory Group v. EPA*<sup>203</sup> – discussed above as an example of argument from structure as aperture – also provides an example of structural argument from operational compatibility. The nub of the problem posed in *Utility Air* began years earlier, in *Massachusetts v. EPA*, in which the Supreme Court had held that the CAA required EPA to regulate greenhouse gases if the agency found that they contributed to climate change (which it had).<sup>204</sup> Following *Massachusetts*, EPA struggled to fit the regulation of greenhouse gases into the existing statutory framework of the CAA because “greenhouse-gas emissions tend to be

200. SCALIA & GARNER, *supra* note 7, at 180 (“The provisions of a text should be interpreted in a way that renders them compatible, not contradictory. . . . [T]here can be no justification for needlessly rendering provisions in conflict if they can be interpreted harmoniously.”).

201. See *United Sav. Ass’n of Tex. v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988) (“A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme . . . because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law.”).

202. See, e.g., *N.Y. State Dep’t of Soc. Servs. v. Dublino*, 413 U.S. 405, 419–20 (1973) (“We cannot interpret federal statutes to negate their own stated purposes.”); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (“A court must . . . interpret the statute ‘as a symmetrical and coherent regulatory scheme.’” (quoting *Gustafson v. Alloyd Co.*, 513 U.S. 561, 569 (1995))); *Gonzalez v. Thayer*, 565 U.S. 134, 143 (2012) (noting that it would be “passing strange” for a federal habeas requirement to be considered jurisdictional, as it would require circuit judges to engage in an inquiry “largely duplicative” of the requirement itself); *Nassar*, 570 U.S. at 353 (rejecting an interpretation “inconsisten[t] with the design and structure of the statute as a whole”).

203. 573 U.S. 302 (2014).

204. 549 U.S. 497, 533–35 (2007).

‘orders of magnitude greater’ than emissions of conventional pollutants.”<sup>205</sup> The Act had created statutory thresholds for the regulation of “major” stationary sources of pollution, which were set at either 250 tons per year or 100 tons per year of “any air pollutant.”<sup>206</sup> After *Massachusetts*, EPA felt obligated to read the term “any air pollutant” to encompass greenhouse gases.<sup>207</sup> Yet the framework for regulating these sources was designed to regulate “a relatively small number of large industrial sources,” not the massive number of sources that would newly fall under the regulatory framework on the basis of their greenhouse-gas emissions alone.<sup>208</sup>

EPA had attempted to circumvent this problem by changing the permitting thresholds for greenhouse gases, requiring a phase-in that started at—for sources not already subject to regulation because of other pollutants—100,000 tons per year of carbon-dioxide equivalents (CO<sub>2</sub>e).<sup>209</sup> Justice Scalia, writing for the Court, rejected this “tailoring” as inconsistent with the plain terms of the statute, which specified thresholds of 250 and 100 tons for “any” air pollutant.<sup>210</sup> Absent this tailoring, however, the permitting programs under the Act would experience “calamitous consequences”<sup>211</sup>: applications for one program would jump from 800 to 82,000; for another, from 15,000 to 6.1 million; and costs would balloon by an estimated \$22.4 billion.<sup>212</sup> In addition, it would bring about an “enormous and transformative expansion in EPA’s regulatory authority,”<sup>213</sup> all while EPA itself claimed that exercising such authority would render the statute “unrecognizable to the Congress that designed” it.<sup>214</sup>

These consequences convinced the Court that reading “any pollutant” to encompass “greenhouse gases” where that term appeared in the sections of the statute creating stationary-source permitting programs would be incompatible with

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205. *Util. Air*, 573 U.S. at 310.

206. *See id.* at 308-10; 42 U.S.C. § 7479(1) (2018).

207. *Util. Air*, 573 U.S. at 311-12.

208. *Id.* at 312 (quoting 75 Fed. Reg. 31514, 31555 (June 3, 2010)).

209. *See id.* at 313; 75 Fed. Reg. 31514, 31523 (June 3, 2010).

210. *See Util. Air*, 573 U.S. at 325.

211. *Id.* at 321.

212. *See id.* at 322.

213. *Id.* at 324.

214. 75 Fed. Reg. 31514, 31555 (June 3, 2010) (“It is not too much to say that applying [permitting] requirements literally to [greenhouse-gas] sources at the present time . . . would result in a program that would have been unrecognizable to the Congress that designed [the program].”).

those provisions.<sup>215</sup> Operative incompatibility was the lodestar: the proffered interpretation by EPA would make the statute inoperable in practice, which had led EPA to rewrite the terms of the statute in order to avoid the impracticality of interpreting it on its plain terms. On this structural point, there was unanimity. Writing in dissent for three others, Justice Breyer agreed that applying the permitting programs to sources that met the statutory thresholds solely because of greenhouse-gas emissions “would be extremely expensive and burdensome, counterproductive, and perhaps *impossible*.”<sup>216</sup> But he alleged that this structural incompatibility did not require reading greenhouse gases out of the term “any pollutant”; instead, it could be remedied by exempting sources that would only be included because they emitted minor amounts of CO<sub>2</sub>e.<sup>217</sup> This exemption, Breyer alleged, did no more textual violence to the statute than did Justice Scalia’s solution and would more sensibly fulfill the purpose of the statute by exempting facilities, rather than pollutants, from the permitting requirement.<sup>218</sup> Thus, though both Justices agreed on the structural incompatibility of interpreting the statute *as written*, they disagreed on the permissible textual fixes.

The divide between Justice Scalia and Justice Breyer illustrates the difficulty of arguments from incompatibility. When the fair reading of one provision would make it incompatible with the fair reading of another provision, one has to give way—but which one, as *Utility Air* demonstrates, can sometimes be a fairly unbounded choice. Scalia himself argued that, at times, the appropriate choice is to enforce neither.<sup>219</sup> Choosing between the two is likely to be a purposive exercise, whether admitted or not. At the very least, argument from incompatibility can end up clearing the way for interpretive discretion.

## 2. Operational Coherence

Arguments from operational compatibility require only that judges impute to Congress the ability not to write impossible statutes—a tall order, perhaps, but a necessary assumption if statutory interpretation is to get off the ground. A

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215. *Util. Air*, 573 U.S. at 322 (“Like EPA, we think it beyond reasonable debate that requiring permits for sources based solely on their emission of greenhouse gases at the 100- and 250-tons-per-year levels set forth in the statute would be ‘incompatible’ with ‘the substance of Congress’ regulatory scheme.” (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 156 (2000))).

216. *Id.* at 336 (Breyer, J., concurring in part and dissenting in part) (emphasis added).

217. *Id.* at 339-40.

218. *See id.* at 341.

219. *See* SCALIA & GARNER, *supra* note 7, at 189 (“If a text contains truly irreconcilable provisions at the same level of generality, and they have been simultaneously adopted, neither provision should be given effect.”).

steeper assumption is required of arguments from operational *coherence*: namely, that Congress writes statutes that are not only practically possible, but also consistent and harmonious. Arguments from operational coherence are the most intuitive application of the coherence principle that underlies structural argument generally. Such arguments veer dangerously (or, depending on one’s point of view, usefully) close to plain old purposive reasoning, which seeks to interpret statutes according to their purposes.<sup>220</sup> But, at their best, they pair a close reading of the statutory text with the attractive assumption that Congress does not generally write statutes whose various parts are dramatically in tension.<sup>221</sup> Despite the greater leap that arguments from operational coherence require, and despite their kinship with disfavored purposive arguments, they are common, and they have been used in some of the Court’s most landmark recent cases.<sup>222</sup>

The Court’s decision in *King v. Burwell*<sup>223</sup> stands as perhaps the most controversial use of this type of argument. The basic question in *Burwell* was whether the tax credits available under the ACA<sup>224</sup> would be available to individuals who purchased their health-insurance plans on exchanges established by the federal government rather than by the state.<sup>225</sup> The difficult textual problem the Court confronted was that the amount of the tax credit depended on whether the taxpayer had enrolled in a plan through “an Exchange established by the State under section 1311” of the Act.<sup>226</sup> Moreover, the Act defined individuals who were qualified to purchase health-insurance plans as those who “reside[] in the State that established the Exchange.”<sup>227</sup> Chief Justice Roberts admitted that the plain text, read in its most natural sense, would seem to preclude offering tax credits

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220. See ROBERT A. KATZMANN, *JUDGING STATUTES* 31-35 (2014).

221. See, e.g., *Roberts v. Sea-Land Servs., Inc.*, 566 U.S. 93, 102-04 (2012) (holding that an interpretation that reads a central provision out of a disability-compensation scheme entirely is at odds with the “Act’s design”).

222. See, e.g., *Babbitt v. Sweet Home Chapter of Cmty. for a Great Or.*, 515 U.S. 687, 700-01 (1995) (arguing that a statutory provision authorizing a permit for an “incidental” taking of an animal, which would require the preparation of a “conservation plan,” supports the interpretation of another provision that takings may be the indirect results of habitat modification); *Niz-Chavez v. Garland*, 141 S. Ct. 1474, 1490-91 (2021) (Kavanaugh, J., dissenting) (arguing that imposing a “single-document requirement” for one provision in the statute but not another, when the statute appears to treat the provisions as describing the same phenomenon, “makes little sense”).

223. 576 U.S. 473 (2015).

224. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010).

225. See *Burwell*, 576 U.S. at 479.

226. 26 U.S.C. § 36B(b)-(c) (2018).

227. 42 U.S.C. § 18032(f)(1)(A)(ii) (2018).



to those who did not purchase insurance on “an Exchange established by the State” – that is, on federal exchanges.<sup>228</sup>

“But when read in context,” he went on, “the meaning of the phrase ‘established by the State’ is not so clear.”<sup>229</sup> The “context” Chief Justice Roberts invokes here turns out to be a series of arguments from operational coherence. First, Roberts observed that the “natural meaning” of “qualified individual” – one who “resides in the State that established the Exchange” – would be inconsistent with the presumption of several other provisions in the Act that “qualified individuals” would exist for *all* exchanges.<sup>230</sup> Next, he observed that interpreting the statute to provide tax credits only for individuals who bought plans on state exchanges would also be inconsistent with the presumption of other provisions that “assume tax credits will be available on both State and Federal Exchanges.”<sup>231</sup> For instance, subsection 36B(f)(3), added to the ACA through its reconciliation amendment, requires that “[e]ach Exchange . . . under section 1311(f)(3) [State Exchanges] or 1321(c) [Federal Exchanges]” report to the Secretary of the Department of Health and Human Services “[t]he aggregate amount of any advance payment of such [tax] credit” and “[a]ny information provided to the Exchange, including any change of circumstances, necessary to determine eligibility for, and the amount, of such credit.”<sup>232</sup> Subsection

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228. *Burwell*, 576 U.S. at 487. It is widely believed that the difficulty caused by this language was a drafting error—an oversight by legislative staffers who did not mean to limit tax credits to state-run exchanges but used state-centered language on the assumption that most exchanges would, in fact, be set up by the states. See Abbe R. Gluck, *Imperfect Statutes, Imperfect Courts: Understanding Congress’s Plan in the Era of Unorthodox Lawmaking*, 129 HARV. L. REV. 62, 72 (2015). Chief Justice Roberts alluded to this likelihood, writing that “the Act is far from a *chef d’oeuvre* of legislative draftsmanship.” *Burwell*, 576 U.S. at 493 n.3 (quoting *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 320 (2014)).

229. *Burwell*, 576 U.S. at 487.

230. See *id.* at 488; see also 42 U.S.C. § 18031(d)(2)(A) (2018) (“An Exchange shall make available qualified health plans to qualified individuals and qualified employers.”); 42 U.S.C. § 18031(e)(1)(B) (2018) (“An Exchange may certify a health plan as a qualified health plan if . . . the Exchange determines that making available such health plan through such Exchange is in the interests of qualified individuals and qualified employers in the State or States in which such Exchange operates . . .”).

231. *Burwell*, 576 U.S. at 490; see also 42 U.S.C. § 18031(i)(3)(B) (2018) (requiring all Exchanges to create outreach programs distributing information about the availability of tax credits); 42 U.S.C. § 18031(d)(4)(G) (2018) (requiring all Exchanges to provide a calculator to determine the cost of coverage minus the tax credit); 26 U.S.C. § 36B(f)(3) (2018) (requiring all exchanges to report information on the plans they sell, including on the tax credits).

232. 26 U.S.C. § 36B(f)(3) (2018).

36B(f)(3) thus seems to presume the availability of tax credits on federal exchanges.<sup>233</sup> These crosscutting assumptions – some provisions that seem to limit tax credits and qualified individuals to state exchanges, while other provisions that appear to assume no such limit exists – meant that seemingly clear statutory language was not, in fact, “unambiguous.”<sup>234</sup>

In the face of this ambiguity, Chief Justice Roberts determined the meaning of the language “Exchange established by the State” by turning from “context” to “structure” (in reality, from one structural argument to another).<sup>235</sup> Petitioners’ interpretation would, Roberts argued, “destabilize the individual insurance market in any State with a Federal Exchange, and likely create the very ‘death spirals’ that Congress designed the Act to avoid.”<sup>236</sup> Citing various studies that predicted dramatic decreases in enrollment without tax credits, Roberts found it “implausible that Congress meant the Act to operate in this manner.”<sup>237</sup> To adopt petitioners’ reading, one would have to believe that Congress intended for the ACA to self-destruct if any significant number of states refused to set up insurance exchanges. Such a belief would not be “a fair understanding of the legislative plan.”<sup>238</sup> It would assume that Congress simultaneously sought to create a stable, affordable health-insurance market while destroying the possibility of ever realizing that goal.

Justice Scalia, writing in dissent, disagreed. Though starting with the obvious retort that it was an uphill climb to make the words “Exchange established by the State” mean one that is *not* established by a state,<sup>239</sup> he quickly engaged in a deft structural analysis of his own.<sup>240</sup> The majority’s interpretation, Scalia

233. See *Burwell*, 576 U.S. at 491 (“If tax credits were not available on Federal Exchanges, these provisions would make little sense.”). Justice Scalia’s response was that a federal exchange could simply report that “no tax credits have been paid out” – which would be “only oddity, not ambiguity.” *Id.* at 506 (Scalia, J., dissenting).

234. *Id.* at 492 (majority opinion).

235. *Id.*

236. *Id.*

237. *Id.* at 494. For this proposition, Chief Justice Roberts cheekily cited to the jointly authored dissent in the prior case upholding the Affordable Care Act (ACA). See *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 576 U.S. 519, 702 (2012) (Scalia, Kennedy, Thomas & Alito, JJ., dissenting) (“Without the federal subsidies . . . the exchanges would not operate as Congress intended and may not operate at all.”).

238. *Burwell*, 576 U.S. at 498.

239. *Id.* at 500 (Scalia, J., dissenting).

240. I will focus here on Justice Scalia’s argument from statutory coherence, but he also makes an argument from statutory location. See *id.* at 501 (arguing that the provisions governing exchanges set up by states are separate from those governing exchanges set up by the Secretary). Moreover, Scalia took issue with Chief Justice Roberts’s argument from structure as aperture,

claimed, would make “nonsense” of other parts of the Act, which, contrary to the majority’s arguments, seem to presume that state-created exchanges *were* separate from federally created ones.<sup>241</sup> The majority’s own inconsistent-assumptions arguments were smoke and mirrors: none of the cited provisions, in Scalia’s view, necessarily assumed that tax credits of nonzero amounts would be offered on the federal exchanges, nor did they assume that qualified individuals would be present on federal exchanges.<sup>242</sup> The attempt to read structural incoherence out of these provisions was “[p]ure applesauce”<sup>243</sup>: at most, they showed “only oddity, not ambiguity,” and “[l]aws often include unusual or mismatched provisions.”<sup>244</sup>

What the majority was really doing, Justice Scalia surmised, was purposive reasoning—and “even the most formidable argument concerning the statute’s purposes [cannot] overcome the clarity of the statute’s text.”<sup>245</sup> If the operation of the statute’s provisions destabilized the individual-insurance market, it “would show only that the statutory scheme contains a flaw . . . [not] that the statute means the opposite of what it says.”<sup>246</sup> Plus, there were plenty of plausible reasons why Congress might have wanted to make the tax credits available only on state exchanges, including to incentivize states to set up their own exchanges—surely an important *purpose* of the Act, even if potentially at odds with the *purpose* of creating a comprehensive national insurance market.<sup>247</sup>

The *Burwell* Court reveals both the promise and the difficulty of operational-coherence arguments. Chief Justice Roberts was surely right, as a factual matter, that Congress did not mean to create a two-track system of health-insurance exchanges—state and federal—and to preclude the key components and benefits of the law from those who bought their insurance on federal exchanges.<sup>248</sup> But, from Justice Scalia’s point of view, this outcome was possible—odd and short-sighted, perhaps, but not necessarily incoherent. More to the point, whether the statutory structure compels a given interpretation on the basis of “coherence”

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*see supra* notes 191-193 and accompanying text, arguing that “the structure [the Court] finds strange is in fact quite common,” *Burwell*, 576 U.S. at 508 (Scalia, J., dissenting).

241. *Burwell*, 576 U.S. at 504 (Scalia, J., dissenting); *see also* 42 U.S.C. § 1396w-3(b)(1)(D) (2018) (requiring states to ensure that the exchange uses a “secure electronic interface,” which would be difficult to do if the state did not run the exchange); 42 U.S.C. § 18031(f)(3) (2018) (giving states the ability to control the contracting decisions on their exchanges).

242. *Burwell*, 576 U.S. at 506-08 (Scalia, J., dissenting).

243. *Id.* at 507.

244. *Id.* at 506.

245. *Id.* at 510 (quoting *Kloeckner v. Solis*, 568 U.S. 41, 56 n.4 (2012)).

246. *Id.* at 511.

247. *Id.* at 512-13.

248. *See* Gluck, *supra* note 228, at 63-64.

depends on the expansiveness of the term. Crosscutting purposes can be cast either as incoherent improbabilities or as the fruit of complex, multivalent legislation; provisions partially undone by other provisions may be evidence of an interpretive wrong turn or the result of messy legislative compromises. And arguments from structural coherence may presume an unrealistic ideal: that Congress drafts with a single mind and a single pen, attentive to the ways the various parts of the statute fit together.<sup>249</sup>

On the other hand, embracing the opposite might entail enforcing statutes that eat themselves, undone by an interpretive technique that refuses to “revis[e]” statutes on the pretense that doing so “encourages congressional lassitude.”<sup>250</sup> The advantage of structural-coherence arguments is that they reduce the likelihood of reaching absurd results through a blinkered reading of statutes. They require reading the *whole* statute to understand how its parts will interact. And, despite the gray area between purely purposive reasoning and reasoning from structural coherence, they largely do not require speculating about Congress’s intent about a particular outcome or application. Rather, they examine only the text of the statute, and they draw on the appealing assumption that *whatever* Congress’s substantive policy goals, it means to pursue them in a rational way.

### C. Purposive Structuralism

Sometimes, however, the Court’s structural arguments are – as Justice Scalia alleged in *Burwell* – simply a strong form of purposive reasoning.<sup>251</sup> Professor Anita S. Krishnakumar has written that the Roberts Court in particular has engaged in “backdoor purposivism” by embracing the use of various whole-act inferences, including structural argument.<sup>252</sup> But neither she nor any other scholar has given purposive-structural argument any sustained treatment, nor has anyone demonstrated how structural argument on its own is used to fortify purposive argument against textualist critique. This Section takes up that task.

The line between argument from operational coherence and purposive structural arguments is, at times, unclear. The majority’s reasoning in *Food & Drug Administration (FDA) v. Brown & Williamson Tobacco Corp.*<sup>253</sup> exemplifies this

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249. See discussion *infra* Section III.C.1.

250. See *Burwell*, 576 U.S. at 516 (Scalia, J., dissenting).

251. See, e.g., *Sturgeon v. Frost*, 577 U.S. 424, 438-40 (2016) (pointing to multiple sections of the Alaska National Lands Conservation Act that treat Alaska as “unique” to sustain an argument that the purpose of the Act is to prove that “Alaska is often the exception, not the rule”).

252. See Krishnakumar, *Backdoor Purposivism*, *supra* note 18, at 1317-19.

253. 529 U.S. 120 (2000).

gray area. The question in that case was whether FDA's assertion of authority to regulate tobacco was consistent with its statutory mandate under the Food, Drug, and Cosmetic Act (FDCA).<sup>254</sup> The Court, through Justice O'Connor, held that it did not have this authority, relying heavily on an argument (largely reproduced from the Fourth Circuit majority opinion below)<sup>255</sup> based on the "statutory scheme" and "administrative structure" of the FDCA.<sup>256</sup> The basic thrust of the structural argument was that, based on FDA's own findings about the toxicity of tobacco products, the agency would have to ban tobacco products entirely if they were considered a "drug" or "device" under the FDCA.<sup>257</sup> However, given numerous other statutes in which Congress clearly presumed—or encouraged—a market for tobacco and smoking products, the Court concluded that "[a] ban of tobacco products by the FDA would . . . plainly contradict congressional policy."<sup>258</sup> FDA's attempt to assert jurisdiction over tobacco products it had found categorically unsafe while keeping them on the market was therefore at odds with the structure of its enabling statute.

Assuming the Court was right about the premise—which Justice Breyer disputed<sup>259</sup>—this argument was a good one. But it was, in effect, a purposive argument. There was nothing structurally incoherent about reading the FDCA to require the banning of all tobacco products if it found they had no therapeutic value. It was simply implausible that the ban of tobacco products reflected congressional policy, given numerous other congressional statutes reflecting just the opposite. Indeed, one such statute declared that it was congressional policy to "protect to the maximum extent [possible] the "commerce and national economy" associated with tobacco products, consistent with adequately informing consumers of the adverse health effects of cigarettes.<sup>260</sup> However implausible a total ban might seem in light of this evidence of congressional policy, though, it

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254. *See id.* at 125-26; *see also* Food, Drug, and Cosmetic Act § 321, 21 U.S.C. § 321(g)-(h) (2018) (defining "drug" and "device"). *See generally* Jurisdictional Determination Relating to Cigarettes and Smokeless Tobacco, 61 Fed. Reg. 44619 (Aug. 28, 1996) (asserting jurisdiction over cigarettes and smokeless tobacco products).

255. *See Brown & Williamson Tobacco Corp. v. FDA*, 153 F.3d 155, 163-67 (4th Cir. 1998).

256. *Brown & Williamson*, 529 U.S. at 125-26, 133.

257. *Id.* at 133-36. For instance, the Food and Drug Administration's (FDA) findings would classify tobacco and cigarettes "misbranded" devices, which the Act prohibits from introduction into "interstate commerce." 21 U.S.C. § 331(a) (2018); *see Brown & Williamson*, 529 U.S. at 135.

258. *Brown & Williamson*, 529 U.S. at 139.

259. Justice Breyer, following the argument of FDA, disputed that a finding that tobacco products had no therapeutic benefits compelled removing them from the market, especially where—as here—doing so would place millions of addicted adults at risk of even worse health consequences. *See id.* at 174-81 (Breyer, J., dissenting).

260. 15 U.S.C. § 1331 (2018).

was not *irrational* for Congress to override prior policy judgments by empowering FDA (through its delegated grant of rulemaking authority) to regulate tobacco products.<sup>261</sup> Still less would the plain text of the FDCA support such a conclusion.<sup>262</sup>

Yet this purposive argument was bolstered by the Court's grounding it in a structural analysis of the statute. By tracing the effects of a finding that tobacco products were "unsafe" through various provisions governing the marketing, branding, and premarket approval of drugs, Justice O'Connor was able to argue that the structure of the Act would require an outcome contrary to Congress's "clear intent."<sup>263</sup> Here, the congressional purpose that the Court divined was evidenced through separate legislative enactments rather than through separate provisions of the same statutory text. The reasoning was thus susceptible to the cogent critiques that some have made of arguments that rely on the "whole Code" to resolve textual ambiguities.<sup>264</sup> But a more common form of this type of structural-purposive argument simply divines two competing purposes from the text of the same statute, which permits the Court to reject an interpretation that would advance one at the cost of the other.<sup>265</sup>

The gray area between purposive arguments and structural-coherence arguments is illustrated also by the Court's decision in *Maracich v. Spears*,<sup>266</sup> which concerned the interpretation of various provisions of the Drivers Privacy Protection Act (DPPA).<sup>267</sup> Respondents were trial lawyers who obtained the names and addresses of thousands of individuals from the South Carolina Department of

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261. The "implausibility" argument was given added heft by a doctrine the Court now recognizes as the "major questions doctrine," which instructs that when the assertion of agency power is historically unprecedented or touches on questions of "economic and political significance," the Court has a "reason to hesitate before concluding that Congress" meant to confer such authority on the agency. *Brown & Williamson*, 529 U.S. at 159-60; see also West Virginia v. EPA, 142 S. Ct. 2587, 2607-09 (2022) (citing *Brown & Williamson* for this proposition).

262. The statute defines "drug" to include "articles (other than food) intended to affect the structure or any function of the body." 21 U.S.C. § 321(g)(1)(C) (2018). It defines "device" to mean, in part, "an instrument, apparatus, implement, machine, contrivance, . . . or other similar or related article . . . intended to affect the structure or any function of the body." *Id.* § 321(h). FDA found that nicotine was a "drug" under this statutory definition and that cigarettes and smokeless tobacco were "drug delivery devices." *Brown & Williamson*, 529 U.S. at 127.

263. *Brown & Williamson*, 529 U.S. at 126.

264. See ESKRIDGE, INTERPRETING LAW, *supra* note 7, at 118-19; LARRY M. EIG, CONG. RSCH. SERV., 7-5700, STATUTORY INTERPRETATION: GENERAL PRINCIPLES AND RECENT TRENDS 4 (2014).

265. See, e.g., *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 61-66 (1978) (holding that the "structure" of the Indian Civil Rights Act reflects the dual purposes of protecting tribal sovereignty and preserving the rights of tribe members "vis-à-vis the tribe," and thus that a right of action to enforce the substantive provisions of the Act could not be properly inferred).

266. 570 U.S. 48 (2013).

267. 18 U.S.C. §§ 2721-2725 (2018).

Motor Vehicles (DMV) in order to solicit plaintiffs for a lawsuit they had filed against various car dealers.<sup>268</sup> They claimed that these solicitations were permitted by one of the DPPA's fourteen exceptions to the ban on the disclosure of personal information—namely, the “litigation exception” in 18 U.S.C. § 2721(b)(4), which permits obtaining personal information “[f]or use in connection with” judicial proceedings, including “investigation in anticipation of litigation.”<sup>269</sup>

Justice Kennedy, writing for the Court, held that the (b)(4) exception could not be read to permit an attorney's solicitation of clients.<sup>270</sup> After arguing that the solicitation of clients is a commercial activity categorically distinct from the professional activities that lawyers must undertake during litigation,<sup>271</sup> Kennedy offered an argument from “statutory design”: a separate exception, (b)(12), governs bulk solicitations, and it requires “express consent.”<sup>272</sup> For Kennedy, the requirement of express consent for general solicitation in (b)(12) provided “additional evidence” that the breadth of the (b)(4) litigation exception should be cabined to exclude bulk solicitation of potential clients in preparation for litigation.<sup>273</sup> Otherwise, he contended, there would be “significant tension” between the two exceptions, “undermining . . . the statutory design.”<sup>274</sup>

Nonsense, Justice Ginsburg contended. The fact that a use permitted by one exception would be banned by another is common across all fourteen exceptions in the DPPA; adopting the Court's reasoning with regard to all exceptions would make the statute “totally unworkable.”<sup>275</sup> That the Court did not adopt such an approach but instead singled out (b)(12) as “so central a part of the DPPA that it alone narrows the scope of other exceptions” indicated that it was “the Court's opinion that create[d] tension,” and not the statute's structure.<sup>276</sup> What Justice

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268. *Spears*, 570 U.S. at 52.

269. 18 U.S.C. § 2721(b)(4) (2018).

270. *See Spears*, 570 U.S. at 52.

271. *Id.* at 63.

272. *Id.* at 65; *see* 18 U.S.C. § 2721(b)(12) (2018) (permitting disclosure “[f]or bulk distribution for surveys, marketing or solicitations if the State has obtained the express consent of the person to whom such personal information pertains”).

273. *Spears*, 570 U.S. at 67–68.

274. *Id.* at 68 (citing SCALIA & GARNER, *supra* note 7, at 180). Justice Kennedy further contended that a broad reading of “in connection with” to include bulk solicitation would create similar problems for other exceptions using this language, such as (b)(6) (allowing an insurer and other parties to obtain DMV information for use “in connection with . . . underwriting”) and (b)(10) (permitting disclosure “‘in connection with’ the operation of private toll roads”). *See id.* at 68–69 (quoting 18 U.S.C. § 2721(b)(6), (10) (2018)).

275. *Id.* at 93 (Ginsburg, J., dissenting).

276. *Id.* at 92–93.

Kennedy did, however, was (contestable) purposive reasoning. The purported structural tension between (b)(4) and (b)(12) only existed if one read (b)(12) to set out a general congressional policy regarding bulk solicitations: namely, that they should only happen with express consent. Absent that purposive reading, there was no conflict between the two provisions. One simply required express consent for general bulk solicitation; the other did not when such solicitation was made “in anticipation of” litigation. Whatever reasons there were for adopting the Court’s position – and there were others<sup>277</sup> – structural incoherence from the respondents’ preferred interpretation was not one of them.

Sometimes, the Court’s purposive reasoning is barely hidden behind the language of structure. Consider here Justice Kagan’s opinion for a sharply divided Court in *Abramski v. United States*.<sup>278</sup> The question for the *Abramski* Court was whether an individual’s misrepresentation as to the ultimate end-buyer of a gun, even if that ultimate owner could have nonetheless legally owned the gun, was a “fact material to the lawfulness of the sale” of the firearm under 18 U.S.C. § 922(a)(6).<sup>279</sup> In other words, the Court had to decide whether the use of a straw purchaser constituted a material misrepresentation, even in situations in which the ultimate owner could lawfully own the gun. Petitioner Bruce Abramski, a former police officer who had offered to buy a handgun for his uncle, argued that “[s]o long as the person at the counter is eligible to own a gun, the sale to him is legal.”<sup>280</sup>

The Court, through Justice Kagan, rejected this interpretation.<sup>281</sup> Relying principally on an argument from “statutory context, structure, history, and purpose,”<sup>282</sup> Kagan argued that multiple statutory provisions indicated that § 922, “in regulating licensed dealers’ gun sales, looks through the straw to the actual buyer.”<sup>283</sup> To hold otherwise would, in her view, permit felons to use straw purchasers to evade background checks (§§ 922(d), (t)(1)), record-keeping provisions (§§ 922(b)(5), 923(g)), and procedures designed to restrict the ability to

277. *See id.* at 60–65 (majority opinion).

278. 573 U.S. 169 (2014).

279. *See id.* at 175; 18 U.S.C. § 922(a)(6) (2018) (“It shall be unlawful . . . for any person in connection with the acquisition or attempted acquisition of any firearm or ammunition from a licensed importer, licensed manufacturer, licensed dealer, or licensed collector, knowingly to make any false or fictitious oral or written statement or to furnish or exhibit any false, fictitious, or misrepresented identification, intended or likely to deceive such importer, manufacturer, dealer, or collector with respect to any fact material to the lawfulness of the sale or other disposition of such firearm or ammunition under the provisions of this chapter.”).

280. *Abramski*, 573 U.S. at 177.

281. *Id.* at 188.

282. *Id.* at 179 (internal quotation marks omitted).

283. *Id.*



purchase guns from afar (§ 922(c)).<sup>284</sup> Focusing only on the immediate purchaser, without a view toward the “real” buyer, would render these provisions “utterly ineffectual,” thus “deny[ing] effect to the regulatory scheme.”<sup>285</sup>

That “effect” referred to was, however, simply what Justice Kagan took to be the “principal *purpose*” of the statute: “to curb crime by keeping firearms out of the hands of those not legally entitled to possess them.”<sup>286</sup> Nothing in the *structure* of the Gun Control Act of 1968 supported the inference that the purchaser the Act focused on was the ultimate owner of the gun, and not the person at the counter. Indeed, all of the provisions could be read completely harmoniously to create an entirely different statute, one that simply “ensur[es] that the person taking possession of the firearm from the dealer is eligible to receive and possess a firearm.”<sup>287</sup> As Justice Scalia pointed out in his dissent, that the Act might focus on the “man at the counter” would not render its provisions “meaningless” — only less effective at one of the Act’s purposes.<sup>288</sup> And further, this seemingly arbitrary line drawing could have been the result of a legislative compromise between those who wanted the statute to go further and those who would not have regulated the sale of guns at all.<sup>289</sup>

*Abramski* demonstrates the way structural argument can frame powerful purposive inferences. Justice Kagan’s reference to the “structure” of the statute and the grounding of her reasoning in various operative provisions implied that her preferred interpretation was the only one that imputed to Congress a rational mind. But behind this language was an argument about the purpose of the statute, just the same as those arguments couched in structural language in *FDA v. Brown & Williamson Tobacco Corp.* and *Maracich v. Spears*. Instead of simply putting her cards on the table (e.g., by stating that this interpretation of § 922 better accomplishes Congress’s evident purpose in the statute), Kagan shuffled them in with allusions to arguments from structural coherence. For those who still hold the view that the job of the federal courts in interpreting federal statutes is to do so in a way that best effectuates Congress’s purposes — gleaned from all the available sources of reliable information — this act of purposive legerdemain is a welcomed defensive maneuver. The trick is distinguishing the good purposive-structural arguments (*Brown & Williamson* and *Abramski*) from the bad (*Maracich*). The next Part turns to this task.

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<sup>284</sup> *Id.* at 181-83.

<sup>285</sup> *Id.*

<sup>286</sup> *Id.* at 181 (quoting *Huddleston v. United States*, 415 U.S. 814, 824 (1974) (internal quotation marks omitted) (emphasis added)).

<sup>287</sup> *Id.* at 199 (Scalia, J., dissenting).

<sup>288</sup> *Id.* at 198-99.

<sup>289</sup> *See id.* at 201-02.

### III. ASSESSING STRUCTURAL ARGUMENT

Structural argument, writ large, has no vocal detractors. Its appeal is so self-evident that textualist Judge Frank H. Easterbrook, in an article entitled “Text, History, and Structure in Statutory Interpretation,” managed to avoid discussing or analyzing structural argument altogether.<sup>290</sup> And, as previously mentioned, every sitting Justice on the current Supreme Court has authored or joined an opinion that used structural argumentation.<sup>291</sup> Despite this apparent consensus, however, it has not been made clear what the virtues of structural argument are or how this form of interpretive argument maps onto the prevailing interpretive methodologies.

In this Part, I tackle both of these tasks. First, I evaluate whether and to what extent structural argument is justified by three important interpretive values: advancing the rule of law, promoting good governance, and ensuring democratic accountability. I conclude that these values justify each type of structural argument, though to varying degrees depending on the category. For instance, while it is difficult to justify operational structuralism on the basis of democratic authority, it scores better than purposive structuralism in producing more predictable outcomes (a rule-of-law benefit). But the nuances should not obscure the bigger picture: structural argument has strong normative justification, regardless of the lens chosen.

Next, I examine how well various theories of interpretation align with the assumptions behind the three broad categories of structural argumentation. I focus primarily on two versions of textualism – the “inside-view” and “outside-view” approaches – because broadly purposivist or pragmatic approaches to interpretation have fewer methodological constraints and thus offer little objection to structural reasoning.<sup>292</sup> As with the normative evaluation, I find that both versions of textualism have reasons – though different ones – to use most forms of structural argument, at least on their own terms. The broad appeal of structural argument is thus partly attributable to various divergent justifications for the same interpretive practice.

However, textualist theories of interpretation cannot justify the wide – and widely accepted – uses of structural argument that show up in the Court’s opinions. Inside-view textualism is justified on the notion that it respects the com-

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290. Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL’Y 61 (1994).

291. See *supra* note 6 and accompanying text.

292. Eskridge, Frickey, and Garrett’s “Funnel of Abstraction,” for instance, permits the use of norms, legislative history, and purpose, as well as text. ESKRIDGE ET AL., *supra* note 30, at 298.

promises objectified in the constitutionally prescribed methods of enacting legislation.<sup>293</sup> Though this position might permit compositional-structural arguments as well as purposive arguments gleaned from text and structure, it lacks the theoretical resources to explain why operational-structural arguments are acceptable. Barring occasional – and contested – deviations for scrivener’s errors and absurdities, inside-view textualists have no theoretical warrant for seeking to impose coherence on a statute. The use of such arguments by avowed inside-view textualists – like Justice Scalia – thus rests uneasily next to their methodological commitments.

Conversely, outside-view textualism may have greater justification for the use of all categories of structural argument if we are to assume (heroically) that reasonable citizens read the entire statute with the goal of making it cohere.<sup>294</sup> But both the inside-view and outside-view variants of textualism bump up against the unreality of their empirical assumptions: Congress does not draft as carefully as inside-view textualists presume, and there is little evidence that average citizens see statutes as coherent, rational wholes. To justify structural argument on textualist terms, then, occasionally requires assuming away inconvenient realities.

The upshot is that pragmatic or purposive methods of interpretation, which draw on a long tradition of viewing courts as the cooperative partners of the legislature, are more justified in employing some of the structural techniques documented in Part II. Because textualism occasionally fits uneasily with structural argument – once both the theoretical and empirical presuppositions are examined – the uncontroversial use of such arguments by textualist judges represents an interesting puzzle. I suggest that it can be explained by the enduring need for purposive interpretation, which forces textualist courts to engage in a disguised purposivism through the use of structural argument.

#### A. *The Value of Structural Argument*

The value of structural argument – if any – cannot be determined merely through comparison to existing theories of statutory interpretation. Rather, it should also be established by reference to the social or political goals of statutory interpretation more broadly. This normative evaluation implicates questions of fundamental significance: why do we entrust judges or agency officials to interpret statutes in the first place, and what would a just method of interpretation seek to accomplish within the context of a pluralistic democracy? The parameters

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293. See *infra* notes 312-314 and accompanying text.

294. See *infra* notes 315-321 and accompanying text.

of such an inquiry are difficult to establish, but Eskridge has helpfully identified three broad values to evaluate the merit of a given approach:

We the People believe that the official application of statutes to new circumstances ought (1) to be both neutral and largely predictable, (2) to respect the democratic accountability of their elected representatives, and (3) to operate to advance (or at least not defeat) the purposes of the law and the public values of the community.<sup>295</sup>

Eskridge refers to these values as the rule-of-law, democratic-accountability, and governance features of statutory interpretation.<sup>296</sup> They surely do not exhaust the menu of options: Cass R. Sunstein, for instance, has proposed no fewer than twenty-seven norms or values (derived from “the constitutional backdrop, the promotion of sound institutional arrangements, and the prevention of statutory irrationality and injustice”)<sup>297</sup> that ought to guide statutory interpretation.<sup>298</sup> But the rule of law, democratic accountability, and good governance are values that surely *most* can agree are central to the enterprise of interpreting law, and, as such, they provide a useful frame for this discussion.

As Eskridge himself notes, these three values are sometimes in tension, and any interpretive approach – especially if done poorly – can end up advancing one at the cost of the others.<sup>299</sup> But they find support from judges and professors across the ideological and methodological spectrum. Rule-of-law values encourage methods of interpretation that increase predictability and neutral application (primarily by reducing judicial discretion) and that, consequently, provide parties with fair notice of their obligations.<sup>300</sup> Democratic-accountability values sanction approaches that respect the substantive value choices made by elected representatives.<sup>301</sup> Governance values are served when an interpretive approach provides “effective governance for a socially diverse and institutionally complex

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295. ESKRIDGE, *INTERPRETING LAW*, *supra* note 7, at 26.

296. *Id.* at 27.

297. Sunstein, *supra* note 34, at 463-64.

298. *Id.* at 468-89.

299. See ESKRIDGE, *INTERPRETING LAW*, *supra* note 7, at 7, 26-27.

300. See, e.g., Eskridge, *supra* note 2, at 674; SCALIA & GARNER, *supra* note 7, at xxvii-xxix; *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1749 (2020).

301. See, e.g., SCALIA & GARNER, *supra* note 7, at 3; STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING A DEMOCRATIC CONSTITUTION* 94-95 (2008); KATZMANN, *supra* note 220, at 29.

society.”<sup>302</sup> In particular, interpretive approaches that are well-suited to the competencies of the interpreter (e.g., judges) serve governance values, as do approaches that take account of “an interpretation’s consequences for social and political practice.”<sup>303</sup>

How, then, do the various types of structural argument explored in Part II score on these metrics? Compositional structuralism fares well on all of them. It is most defensible under rule-of-law values like objectivity, predictability, and transparency. Because compositional structuralism militates away from the construction of terms in isolation – which can introduce arbitrary or unpredicted results – it cabins discretion, tying judges to the drafting choices Congress itself has made. For similar reasons, compositional structuralism has a decent claim to promoting democratic accountability: its focus on the drafting choices of Congress purports to honor decisions made by the people’s elected representatives, down to the compositional organization of the statute itself. (To the extent that it is inaccurate or incomplete to consider drafting choices intentional, as will be discussed below, this justification loses force.<sup>304</sup>) Finally, some governance values also come out in favor of compositional-structural arguments: for instance, judges might be thought well-suited to paying exquisite attention to the composition of a text. In addition, the widespread use of compositional-structural arguments might encourage the drafting of balanced, symmetric, and coherently sequenced statutes, which are more easily read and interpreted.

Operational structuralism comes out slightly differently in this normative analysis. A strong case can be made that operational-structural arguments also serve rule-of-law values, primarily by ensuring that regulated parties are not subject to inconsistent or contradictory directives. When interpreters assume operational coherence, they also serve governance values by reducing the chance that Congress’s laws will be authoritatively construed to require what is impossible or impractical. The case for democratic accountability, however, is considerably weaker than it is for compositional structuralism. On the one hand, if it is a realistic assumption that Congress would not – as a matter of *fact* – draft statutes that are operationally incoherent, then democratic accountability is promoted by an interpretive approach that presumes operational coherence. On the

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302. ESKRIDGE, *INTERPRETING LAW*, *supra* note 7, at 11; *see also* RICHARD A. POSNER, *THE PROBLEMATICS OF MORAL AND LEGAL THEORY* 257–58 (1999) (“[A]t their best American appellate courts are councils of wise elders meditating on real disputes, and it is not completely insane to entrust them with responsibility for resolving these disputes in a way that will produce the best results in the circumstances rather than resolving them purely on the basis of rules created by other organs of government or by their own previous decisions, although that is what they will be doing most of the time.”).

303. WILLIAM N. ESKRIDGE, JR., *DYNAMIC STATUTORY INTERPRETATION* 201 (1994).

304. *See infra* Section III.C.

other hand, if—as is likely—this assumption has little basis, then democratic accountability requires enforcing the statute’s conflicting directives as written, incoherent warts and all.<sup>305</sup> The most honest assessment of this category of structural argument is that it likely cannot be justified at all by reference to respect for the democratic process.<sup>306</sup> Operational structuralism may promote good governance and generate greater predictability in the interpretation of statutes, but it does so at the cost of strict fidelity to the text passed by Congress.

Finally, consider structural arguments that seek to establish the purpose of a statute. Unlike compositional and operational structuralism, the purposive cousin has a much weaker claim to promoting the rule of law, especially if done poorly, because it permits the greatest degree of judicial discretion. This potential danger is simply a feature of purposive interpretation generally. As Eskridge notes, “The purpose that one might fairly attribute to Congress as a whole is often set at such a high level of generality that it could support a variety of interpretations.”<sup>307</sup> Nonetheless, when purposive argument is grounded in the structure of a statute, there is reason to think it is more constrained than other types of purposive argument, as it remains tied to the specific text passed by Congress, considered as a whole. Purposive-structural argument also has a decent claim to promoting democratic accountability by seeking to effectuate Congress’s purposes as revealed in the text of the statute. Justice Scalia criticized purposive interpretation for departing from the text enacted by both houses of Congress and

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305. See, e.g., Sunstein, *supra* note 34, at 425-26 (“If that assumption is false, the court’s treatment of statutes as internally consistent wholes cannot be justified as an accurate way of implementing legislative instructions.”); see also William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 335 (1990) (“It seems clear not only that reasonable people in the legislature do not always produce reasonable results, but that in some cases that is the last thing they want to do. Some statutes are little else but backroom deals. Judicial attempts to fancy up those deals with public-regarding rhetoric either are naive or simply substitute the judge’s conception of public policy for that of the legislature.”).

306. *King v. Burwell*, 576 U.S. 473 (2015), is a case study in how operational structuralism fares on these values. Chief Justice Roberts’s majority opinion rather obviously serves rule-of-law and governance values by wrangling Congress’s poorly written behemoth into something resembling a coherent legislative program. But whether it served democratic-accountability values depended on one’s point of view. A strong case can be made that it did, by saving from self-destruction the signal legislative achievement of President Obama’s first term. And indeed, the Chief Justice wrote that he was interpreting the ACA the way Congress “meant [it] to operate.” *Id.* at 494. But to Justice Scalia—and those who shared his point of view—the majority’s opinion did just the opposite: it “ignore[d] the American people’s decision to give Congress ‘all legislative Powers’ enumerated in the Constitution.” *Id.* at 515 (Scalia, J., dissenting) (brackets omitted) (quoting U.S. CONST. art. I, § 1). The extent to which operational structuralism serves democratic-accountability values thus appears to be dependent on one’s prior views about the correctness of the proffered interpretation.

307. ESKRIDGE, INTERPRETING LAW, *supra* note 7, at 8.

signed by the President.<sup>308</sup> But the brunt of this critique is weakened when the purpose is derived from an examination of the whole text and structure of the statute.<sup>309</sup> Likewise, purposive-structural argument promotes governance values by seeking to implement the programmatic value judgments of a coordinate branch of government.

Thus, while not all types of structural argument uniformly advance rule-of-law, democratic-accountability, and governance values, structural argument generally fares well as a technique. This assessment is not altogether surprising: any interpretive technique that both assumes and asserts coherence in legislative enactments likely improves the predictability, efficiency, and responsiveness of government. Regardless of one's methodological commitments, then, there are strong normative reasons to employ structural argument.

### B. *Textualism and Structural Argument*

The above normative evaluation of structuralism naturally raises the question of how well structural argument fits with prevailing methods of statutory interpretation. It is all well and good to say that interpreters have good reason to use structural argument. But statutory interpretation today is dominated by warring *methodologies*, which may or may not adopt a particular interpretive practice, regardless of its normative appeal. In particular, the methodology with the most constraints on the permissible sources of statutory meaning is textualism, which holds that “the alpha and the omega of statutory interpretation is the enacted text of the statute.”<sup>310</sup>

However, the dominance of textualism is now such that it is no longer responsible to speak of a single “textualist” methodology.<sup>311</sup> Among the many ways to split the textualism atom, two are particularly salient. One – the “inside” view – holds that limiting the interpretive tools to the text, structure, and (statutory) history of a statute is necessary because only the written law is what Congress enacted and the President signed, in accordance with Article I, Section 7 of the U.S. Constitution.<sup>312</sup> This legislative process reflects messy compromises between competing priorities and principles; thus, reading outside the text risks

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308. See Antonin Scalia & John F. Manning, *A Dialogue on Statutory and Constitutional Interpretation*, 80 GEO. WASH. L. REV. 1610, 1612-13 (2012).

309. See Taylor, *supra* note 28, at 351-52.

310. ESKRIDGE, *INTERPRETING LAW*, *supra* note 7, at 3.

311. See *supra* note 5 and accompanying text.

312. See U.S. CONST. art. I, § 7; Scalia, *supra* note 3, at 25 (“Before the wish becomes a binding law, it must be embodied in a bill that passes both houses and is signed by the President . . . Long

overriding those compromises.<sup>313</sup> A court seeking to be the “faithful agent” of the legislature must interpret the words that the legislature chose to include according to the meaning they had at the time of enactment.<sup>314</sup>

Another, ascendant view – the “outside” view – emphasizes textualist tools of interpretation because doing so better aligns with how ordinary people (“congressional outsiders,” to use Justice Amy Coney Barrett’s term) read statutes.<sup>315</sup> “What matters to the textualist,” Barrett has argued, “is how the ordinary English speaker – one unacquainted with the peculiarities of the legislative process – would understand the words of a statute.”<sup>316</sup> This “consumer perspective”<sup>317</sup> method of interpretation proceeds from a different normative baseline. It is concerned less with respecting the legislative compromises of Congress than with ensuring that those subject to the law know their obligations – a classic rule-of-law justification.<sup>318</sup> Its lodestar, as Justice Gorsuch has written, is a notion of fair notice to the parties subject to the law’s demands: “The people are entitled to rely on the law as written, without fearing that courts might disregard its plain terms based on some extratextual consideration.”<sup>319</sup> It may also represent, as some have argued, a type of “judicial populism,”<sup>320</sup> recasting courts as “agents of the people” rather than of Congress.<sup>321</sup>

### 1. “Inside-View” Textualism

How should these dominant theories of textualist interpretation view the three categories of structural argument? Consider, first, the inside view. On their own terms, textualists of this variety should readily embrace compositional-

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live formalism. It is what makes a government a government of laws and not of men.”); Frank H. Easterbrook, *Statutes’ Domains*, 50 U. CHI. L. REV. 533, 539 (1983) (“Under article I of the Constitution, not to mention the rules of the chambers of Congress, support is not enough for legislation. If the support cannot be transmuted into an enrolled bill, nothing happens.”).

313. See Grove, *supra* note 1, at 273; John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2390 (2003) (“[T]he precise lines drawn by any statute may reflect unrecorded compromises among interest groups, unknowable strategic behavior, or even an implicit legislative decision to forgo costly bargaining over greater textual precision.”).

314. See *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1757 (2020) (Alito, J., dissenting).

315. Amy Coney Barrett, *Congressional Insiders and Outsiders*, 84 U. CHI. L. REV. 2193 (2017).

316. *Id.* at 2194.

317. Eskridge & Nourse, *supra* note 5, at 1722.

318. See *Bostock*, 140 S. Ct. at 1828 (Kavanaugh, J., dissenting).

319. *Id.* at 1749 (majority opinion).

320. See Anya Bernstein & Glen Staszewski, *Judicial Populism*, 106 MINN. L. REV. 283, 309 (2021).

321. Barrett, *supra* note 315, at 2208; see also *id.* at 2194 (endorsing the view attributed to Justice Scalia).



structural arguments. Arguments from provision location, sequence, symmetry, or aperture are all attempts to derive interpretive guidance from the textual choices that Congress has made and that the President has signed into law. They require no greater leap than what is required to believe that the choice of a single word over another is a purposeful indication of the meaning of a statute.<sup>322</sup> Indeed, while most textualists readily admit that Congress occasionally makes drafting mistakes, or scrivener's errors, that the courts may legitimately correct,<sup>323</sup> it is rational for a textualist to believe that Congress rarely makes similar mistakes with regard to the composition of the statute as a whole.

There is also good reason for an inside-view textualist to embrace at least some kinds of purposive-structural reasoning. First, textualists of this stripe ought to prefer a purposive argument that proceeds from inferences about the enacted text to a similar argument that draws on legislative history or other extrinsic sources of meaning.<sup>324</sup> Insofar as textualist judges eschew purposive reasoning on legislative-history grounds alone, the structural type is more congenial to their method.<sup>325</sup> Moreover, enacted statutes often include "purposes" clauses, which give textual warrant to purposivist reasoning and therefore deserve to be taken seriously by any textualist interpreter.<sup>326</sup> When the purpose of a statute shows up in a text that met the demands of bicameralism and presentment, inside-view textualists are obligated to take it seriously.<sup>327</sup> And when the

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322. See SCALIA & GARNER, *supra* note 7, at 170 ("[W]here the document has used one term in one place, and a materially different term in another, the presumption is that the different term denotes a different idea."); ESKRIDGE, *INTERPRETING LAW*, *supra* note 7, at 413.

323. See Manning, *supra* note 313, at 2459-60 n.265; see also *United States v. Locke*, 471 U.S. 84, 117-19 (1985) (Stevens, J., dissenting) (arguing that the choice of language in a statute was "at best, 'the consequence of a legislative accident, perhaps caused by nothing more than the unfortunate fact that Congress is too busy to do all of its work as carefully as it should.'" (quoting *Del. Tribal Bus. Comm. v. Weeks*, 430 U.S. 73, 97 (1977) (Stevens, J., dissenting))).

324. *But see* Patricia M. Wald, *The Sizzling Sleeper: The Use of Legislative History in Construing Statutes in the 1988-89 Term of the United States Supreme Court*, 39 AM. U. L. REV. 277, 304-05 (1990) (arguing that purposive reasoning that relies exclusively on structural argument, rather than supplementing with legislative history, provides judges greater discretion to enact their own policy preferences).

325. See Taylor, *supra* note 28, at 352 ("Textualists tightly restrict any recourse to notions of purpose because of that approach's traditional reliance on legislative history, but still available is scrutiny of 'purpose' and 'design' to the extent it is decipherable *within* the text. Determination of the interrelations of the various parts of a statute and assessment of the statute's design or structure are not bound by the limits of a wooden literalism." (footnotes omitted)).

326. See Shobe, *supra* note 109, at 718-22.

327. See SCALIA & GARNER, *supra* note 7, at 217-20.

text of a statute alone supports reasonable inferences about the purpose the statute is meant to fulfill, there is no textualist bar to purposive reasoning.<sup>328</sup>

But purposive-structural argument can sometimes fit awkwardly in the inside-view textualist camp. Congress is perfectly capable of adopting – and often does adopt – legislation with crosscutting purposes, even when those are not reflected in the enacted language.<sup>329</sup> When the purposive inquiry is open-ended and the text of the statute does not directly address the issue, the key justificatory tool for inside-view textualists (fidelity to the text Congress enacted, and only to that text) is not available. It is therefore far from clear that an interpretive methodology that claims to respect the legislative compromises objectified in enacted law has the theoretical resources to justify purposive reasoning based on statutory provisions alone.

Operational-structural arguments have an even steeper theoretical hurdle. If the premise of inside-view textualism is that only the compromises objectified in the text of enacted law are the “intent” of Congress, then there is little basis for discounting an interpretation that renders part of a statute incoherent or incompatible with other provisions. In this sense, operational structuralism can be seen as a robust variant of the absurdity doctrine, which has long permitted courts to set aside results commanded by the text of a statute when that result would produce “outcomes [that] are so unthinkable that the federal courts may safely presume that legislators did not foresee those particular results and that, if they had, they could and would have revised the legislation to avoid such absurd results.”<sup>330</sup> But, as Manning has argued in relation to the absurdity doctrine, “[m]odern understandings” of the legislative process “suggest that very little is, in fact, unthinkable.”<sup>331</sup> Textualists who see judges as faithful agents of Congress have little basis for presuming that Congress does not write incoherent statutes and, therefore, little basis for employing arguments from structural compatibility or coherence. Justice Scalia and Bryan A. Garner’s harmonious-reading canon, which would encompass arguments from structure as coherence,<sup>332</sup> rests explicitly on a presumption of an “intelligent drafter,” which is nowhere justified

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328. For a good example of this type of purposive-structural reasoning, see the discussion of *Public Citizen v. U.S. Department of Justice*, 491 U.S. 440 (1989), in Eskridge & Nourse, *supra* note 5, at 1744-47.

329. See, e.g., Indian Civil Rights Act of 1968, 25 U.S.C. §§ 1301-1304 (2018); see also *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 62-63 (1978) (explaining the Act’s two competing purposes).

330. Manning, *supra* note 313, at 2394.

331. *Id.* at 2395.

332. See SCALIA & GARNER, *supra* note 7, at 180.

by a methodology that presumes to take Congress as it is and not as it should be.<sup>333</sup>

Despite these theoretical hurdles, inside-view textualists *do*, in fact, make use of operational-structural arguments. Take, for instance, Justice Scalia. I have written already of Scalia's structure-based counters to Chief Justice Roberts's arguments in *King v. Burwell*.<sup>334</sup> Scalia deployed a mirror strategy in his dissent in *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*,<sup>335</sup> decided two decades earlier. At issue in that case was a regulation promulgated by the Secretary of the Interior that defined the term "harm" in the Endangered Species Act (ESA)<sup>336</sup> to include "significant habitat modification or degradation."<sup>337</sup> Though "harm" was defined by regulation, the term itself was part of the definition for the term "take," which the statute defined as "to harass, *harm*, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct."<sup>338</sup> Because the statute made it unlawful to "take" any endangered species, the Secretary's definition of harm to include "habitat modification" troubled organizations and communities dependent on forest-products industries, which brought the suit.<sup>339</sup>

The resulting majority opinion by Justice Stevens and dissenting opinion by Justice Scalia are master classes in careful textual and structural argument.<sup>340</sup> But I focus here on Scalia's dissent, which insisted that the Secretary's definition of "harm" was unreasonable. To make this point, Scalia used every category of structural argument I have documented in Part II. Compositionally, Scalia pointed out that concerns with habitat modification were addressed in separate sections of the ESA from the taking provision (location), indicating that takings were not meant to solve the harms caused by habitat modification: where habitat modification was a focus, the statute was addressed only to the federal govern-

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333. George H. Taylor disputes that textualist interpreters necessarily presume coherence when they use structural argument, rather than simply engaging in a "scrutiny of potential relationships within the text." Taylor, *supra* note 28, at 353. But he admits that textualists may have a "bias toward finding a sense of design or coherent meaning," which, he claims, bedevils all hermeneutics. *Id.* at 354 n.150.

334. *See supra* notes 239-247 and accompanying text.

335. 515 U.S. 687, 714-36 (1995) (Scalia, J., dissenting).

336. Endangered Species Act (ESA) of 1973, Pub. L. No. 93-205, 87 Stat. 884 (codified as amended at 16 U.S.C. §§ 1531-1544).

337. *Babbitt*, 515 U.S. at 691 (quoting 50 C.F.R. § 17.3 (1994)).

338. *Id.* (quoting 16 U.S.C. § 1532(19) (1994) (emphasis added)).

339. *See id.* at 692.

340. Justice O'Connor issued a concurring opinion that mostly relied on nontextual arguments. *See id.* at 708-14 (O'Connor, J., concurring).

ment—not private parties—and the only authorized remedy was the federal acquisition of private lands.<sup>341</sup> On the purpose of the ESA, Scalia argued that the penalty provisions in the ESA, on the majority’s reading, would subject “[a] large number of routine private activities” (like “farming, ranching, roadbuilding, construction and logging”) to strict-liability civil penalties—“a result that no legislature could reasonably be thought to have intended.”<sup>342</sup>

And Justice Scalia relied critically on structural arguments that presumed operational coherence.<sup>343</sup> In a series of moves similar to those Chief Justice Roberts would employ later in *King v. Burwell*, Scalia pointed to provisions throughout the ESA that seemed to presume that a “taking” was an intentional, physical act done to an animal rather than an indirect harm through habitat modification. For instance, Congress had provided for the forfeiture of “[a]ll guns, traps, nets, and other equipment . . . used to aid the taking”<sup>344</sup> of protected animals but not for the forfeiture of “plows, bulldozers, and backhoes”—the likely tools of habitat modification.<sup>345</sup> Or, Scalia pointed out, look to the exemption for Alaska Natives, which applies “if such taking is primarily for subsistence purposes” and permits the “[n]on-edible byproducts of species taken” for those purposes to be sold “when made into authentic native articles of handicrafts and clothing.”<sup>346</sup> Does that make sense if a “taking” includes habitat modification? And what about the prohibition on the possession, sale, and transport of “species taken in violation” of the ESA?<sup>347</sup> How can one possess, sell, or transport a species that was killed because its habitat no longer exists?<sup>348</sup>

These were good questions. But they relied on an assumption that Justice Scalia’s philosophy did not permit him to make: namely, that Congress does not draft or amend statutes in inconsistent ways. Indeed, Scalia’s own words in his dissent in *King v. Burwell* provide a ready counter to his arguments in *Babbitt*:

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341. *See id.* at 728-29 (Scalia, J., dissenting) (“Habitat modification and takings, in other words, were viewed as different problems, addressed by different provisions of the Act.”); *see also id.* at 724-25 (developing this argument). Compare 16 U.S.C. § 1534 (2018) (authorizing federal agencies to acquire private land in order to protect endangered species), and 16 U.S.C. § 1536(a)(2) (2018) (barring only the federal government from actions that would “result in the destruction or adverse modification of habitat”), with 16 U.S.C. § 1538(a)(1)(B) (2018) (prohibiting private parties from taking endangered species).

342. *Babbitt*, 515 U.S. at 721 (Scalia, J., dissenting).

343. *See id.* at 722-23 (“[T]he Secretary’s interpretation of ‘harm’ is wrong if it does not fit with the use of ‘take’ throughout the Act. And it does not.”).

344. 16 U.S.C. § 1540(e)(4)(B) (2018).

345. *Babbitt*, 515 U.S. at 723 (Scalia, J., dissenting).

346. *Id.* (quoting 16 U.S.C. § 1539(e) (1994)).

347. 16 U.S.C. § 1538(a)(1)(D) (2018).

348. *See Babbitt*, 515 U.S. at 723 (Scalia, J., dissenting).

“even if” it were true that the various other provisions of the ESA seem to presume an active, physical taking, “it would show only oddity, not ambiguity. Laws often include unusual or mismatched provisions.”<sup>349</sup> Justice Scalia of 1995, meet Justice Scalia of 2015. The point, of course, is not that Scalia was occasionally inconsistent; all Justices are. It is rather that the deployment of certain structural arguments by textualists of Scalia’s stripe finds little warrant in their underlying methodological commitments.

The difficulty Justice Scalia faced was compounded by an additional factor: time. The ESA was amended twice before *Babbitt* was decided: in 1978 and 1982.<sup>350</sup> Yet the regulation in question – defining “harm” to include habitat modification – was promulgated in 1975.<sup>351</sup> These dates matter. Scalia may have been right that the original 1973 ESA did not contemplate indirect takings in the form of habitat modification. But the statute the Court faced in 1995 had been amended twice after the promulgation of the challenged regulation. Critically, the 1982 amendment revised section 10 of the ESA to authorize the Secretary to issue permits for takings otherwise prohibited “if such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity.”<sup>352</sup> For Justice Stevens, this incidental-taking permitting process was critical evidence that “Congress understood § 9(a)(1)(B) to prohibit indirect as well as deliberate takings” – that is, habitat modification.<sup>353</sup> It was thus possible that the 1982 Congress that added the new permitting provision and the 1973 Congress that wrote the original bill differed in their understanding of the statutory term “take.” Indeed, Scalia admitted that the 1982 committee reports “clearly contemplate that [the amendment] will enable the Secretary to permit environmental modification.”<sup>354</sup>

How to reconcile these time-bound understandings – which resulted in an ambivalent statute embracing two different understandings of the term “take” –

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349. *King v. Burwell*, 576 U.S. 473, 506 (2015) (Scalia, J., dissenting). Justice Scalia also quoted the Court’s majority opinion, written by Justice Kagan, in a case the year earlier: “This Court ‘does not revise legislation . . . just because the text as written creates an apparent anomaly.’” *Id.* at 507 (quoting *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 794 (2014)).

350. See Pub. L. No. 95-632, 92 Stat. 3751 (1978); Pub. L. No. 97-304, 96 Stat. 1411 (1982).

351. See 50 C.F.R. § 17.3 (2021) (initially promulgated as 40 Fed. Reg. 44412, 44416 (Sept. 26, 1975)).

352. § 6, 96 Stat. at 1422 (codified at 16 U.S.C. § 1539(a)(1)(B)).

353. *Babbitt*, 515 U.S. at 700.

354. *Id.* at 730 (Scalia, J., dissenting); see S. REP. NO. 97-418, at 10 (1982); H.R. REP. NO. 97-835, at 30-32 (1982) (Conf. Rep.). For a discussion of these reports and their relevance to the case, see ESKRIDGE ET AL., STATUTES, REGULATION, AND INTERPRETATION, *supra* note 7, at 489-90.

is a challenging methodological question.<sup>355</sup> Justice Scalia was forced to resort to a recitation of his belief that “legislative history [cannot] be summoned forth to contradict, rather than clarify . . . unambiguous statutory text.”<sup>356</sup> Other amended statutes, such as the Civil Rights Act of 1964, pose similar challenges.<sup>357</sup> The process of repeated amendment to the same statute has led to the use of so-called “statutory history” as an interpretive tool.<sup>358</sup> Though a comprehensive examination of the relationship between statutory history and statutory structure is beyond the scope of this Note, the difficulties confronting the Court in *Babbitt* exemplify the intriguing questions raised. For instance, if an operational-structural argument employs statutory provisions from different amendments, should the presumption of coherence be weakened? Does it make sense to view a statute as a structure enduring *through time*, with additions or renovations that change its overall shape—like updates to an old house? If so, which category of structural argument is most undermined or supported by statutory history?

As should be clear, all of these questions implicate the degree to which an interpreter can assume coherence in what Congress drafts, designs, or plans. Inside-view textualists, to the extent they limit their examination only to the outputs of the legislative process, lack ready tools to tackle those outputs.

## 2. “Outside-View” Textualism

On the other hand, outsider textualism may have a stronger claim to structural arguments of all stripes. If the goal is to interpret a text the way a reasonable “reader”—whether a layperson or a lawyer—would do,<sup>359</sup> then presumptions of coherence in either the drafting of the statute or its substantive ends are acceptable: the reasonable reader will read the entire statute and assume that its constituent parts are meant to fit together coherently. This reader will notice drafting

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355. The deepest engagement with this challenge is Eskridge’s theory of dynamic statutory interpretation. See generally Eskridge, *supra* note 3 (introducing the theory); ESKRIDGE, *supra* note 303 (expanding on the theory).

356. *Babbitt*, 515 U.S. at 730 (Scalia, J., dissenting).

357. See William N. Eskridge, *Title VII’s Statutory History and the Sex Discrimination Argument for LGBT Workplace Protections*, 127 YALE L.J. 322, 341-42 (2017).

358. See generally Anita S. Krishnakumar, *Statutory History*, 108 VA. L. REV. 263 (2022) (distinguishing statutory history from legislative history and analyzing the use of the former in the Roberts Court). See also James J. Brudney & Lawrence Baum, *Protean Statutory Interpretation in the Courts of Appeals*, 58 WM. & MARY L. REV. 681, 688-89, 746 n.248 (2017) (collecting cases invoking statutory history); Eskridge, *supra* note 357, at 331 (arguing for the importance of statutory history in interpretation).

359. See Barrett, *supra* note 315, at 2201-02.

decisions that textualists themselves look to for interpretive guidance: the placement of a provision in one section versus another, for example, or the sequencing of provisions to portray an agency's decision-making process. Because compositional-structural arguments track intuitive judgments that readers of texts are likely to make, interpreters with a methodological commitment to read statutes from the view of the reader should find them congenial.

To a slightly lesser extent, operational structuralism and purposive structuralism are also congenial to outside-view textualism. For instance, the outside reader of statutes will likely presume that provisions that contradict or undermine each other are evidence of an interpretive wrong turn. At the very least, there is no reason that the reasonable reader would not look to "harmonize" the statute, on the presumption that legal texts are generally meant to provide coherent direction or guidance through the provision of rules.<sup>360</sup> And when purposive reasoning is based on a reading of the structure of the statute, it is fair to assume that these purposes are generally available to anyone who reads the whole text—at least insofar as they are capable of making the same common-sense inferences that judges claim to be making.

Consistent with these findings, Justices on the Court who justify textualism "from the outside" readily employ all forms of structural argument. Indeed, the two most prominent proponents of this form of textualism—Justices Gorsuch<sup>361</sup> and Barrett<sup>362</sup>—recently dueled over the meaning of a provision in the INA,<sup>363</sup> deploying a range of powerful structural arguments. At issue in *Patel v. Garland*<sup>364</sup> was a provision of the INA, codified at 8 U.S.C. § 1252, that precluded from judicial review "any judgment regarding the granting of relief" under certain sections of the title, including § 1255.<sup>365</sup> Patel, the petitioner, who had previously entered the United States illegally, had applied to the Attorney General through the U.S. Citizenship and Immigration Services for adjustment of status under § 1255 in order to become a lawful permanent resident.<sup>366</sup> Yet, during this process, Patel falsely checked a box indicating that he was a U.S. citizen on his

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360. See Kevin Tobia, Brian G. Slocum & Victoria Nourse, *Statutory Interpretation from the Outside*, 122 COLUM. L. REV. 213, 224 (2022) ("[S]urprisingly little turns on whether people understand language as ordinary or legal, so long as it is language *in a rule* . . . . The canons . . . apply to interpretation of *rules*.").

361. See *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1749 (2020).

362. See Barrett, *supra* note 315, at 2202 (arguing that "the textualist construct does not privilege the way that legislative drafters as a subclass use language").

363. Immigration and Nationality Act of 1952 (McCarran-Walter Act), ch. 477, 66 Stat. 163 (codified as amended in scattered sections of 8 U.S.C.).

364. 142 S. Ct. 1614 (2022).

365. 8 U.S.C. § 1252(a)(2)(B)(i) (2018).

366. *Patel*, 142 S. Ct. at 1619; see 8 U.S.C. § 1255(i) (2018).

application for a Georgia driver’s license.<sup>367</sup> An immigration judge, believing this to be an intentional misrepresentation, denied Patel’s application for adjustment of status, which Patel then appealed all the way to the Eleventh Circuit.<sup>368</sup> The Eleventh Circuit eventually held, on rehearing en banc, that § 1252 stripped it of jurisdiction to review the immigration judge’s discretionary decision, including—the key issue in the case—any factual determinations on which that discretionary decision rested.<sup>369</sup>

Though both opinions used structural argument,<sup>370</sup> Justice Gorsuch’s dissent—like Justice Scalia’s in *Babbitt*—used every category documented in Part II. The basic thesis of Gorsuch’s argument was that § 1255 establishes a “two-step process” for an adjustment of an immigrant’s status: a first, factual determination of eligibility for adjustment of status, and a second, discretionary decision about whether to grant relief.<sup>371</sup> Gorsuch maintained that § 1252’s withdrawal of jurisdiction applied only to the second step, leaving judicial review of the first step intact.<sup>372</sup> A menu of compositional-structural arguments convinced him of his reading: language in a “neighboring statutory provision,” subject to the same jurisdictional constraints, that applied only to discretionary decisions (location);<sup>373</sup> the “two-step structure” followed by all of the other sections of the INA subject to § 1252’s jurisdiction stripping (symmetry);<sup>374</sup> and the inapplicability of another provision the majority opinion relied on given its general sweep (aperture).<sup>375</sup> Gorsuch also countered an operational-structural argument made by the majority opinion<sup>376</sup> before closing with a powerful purposive argument: the

367. *Patel*, 142 S. Ct. at 1619.

368. *Id.* at 1620.

369. *Id.* at 1620-21. Though Patel’s suit was against the Government, the Department of Justice took the position that § 1252 does *not* prohibit review of factual determinations made under 1255, and so the Court appointed an amicus curiae to argue that position. *See id.* at 1621.

370. *See*, for example, *id.* at 1625-26, for the majority’s use of location, and *id.* at 1627, for the majority’s use of purpose.

371. *Id.* at 1630-31 (Gorsuch, J., dissenting); *see* 8 U.S.C. § 1255(a), (i)(2)(A) (2018).

372. *See Patel*, 142 S. Ct. at 1631 (Gorsuch, J., dissenting).

373. *Id.* at 1633.

374. *Id.*

375. *See id.* at 1635. That provision was subparagraph (D) of the same section, which restored judicial review for constitutional claims and questions of law. *See* 8 U.S.C. § 1252(a)(2)(D) (2018). Congress enacted that provision in response to the Supreme Court’s suggestion in *INS v. St. Cyr*, 533 U.S. 289, 314 (2001), that “barring review of all legal questions in removal cases could raise a constitutional concern,” *Patel*, 142 S. Ct. at 1623. The majority opinion relied on this provision to argue that, since it created an exception only for constitutional claims and questions of law, it left in place—that is, exempted from review—questions of fact. *See Patel*, 142 S. Ct. at 1623.

376. *See Patel*, 142 S. Ct. at 1635-36 (Gorsuch, J., dissenting).



majority's position yielded the "inexplicable anomaly" that individuals seeking adjustment of status *outside* the removal context—for which judicial review is typically available at the district court—would be precluded from seeking judicial review of even their legal or constitutional claims because the provision preserving that level of review applied only to petitions for review filed in the courts of appeal.<sup>377</sup>

The INA has generated ceaseless litigation.<sup>378</sup> It is no coincidence that two of the cases discussed in this Note concerned the proper interpretation of provisions of this statute<sup>379</sup>: the use of structural argument to resolve the INA's many ambiguities serves the rule-of-law function of making the various provisions of a complex, frequently amended statute work together in a coherent fashion. Little surprise, then, that outside-view textualists like Justices Gorsuch and Barrett—who emphasize the value of textualism in providing predictability and order—found the use of structural argument useful in *Patel*. More worrying for their theory of interpretation is that they reached opposite conclusions.

In sum, while inside-view textualists have better reason to use compositional- and purposive-structural arguments than they do arguments from structural compatibility or coherence, outside-view textualists have a plausible justification for structural arguments of all stripes. On textualists' own stated assumptions, at least, structural argument is justified. We therefore see textualists of all persuasions readily employing structural argument. But, as the next Section explicates, the assumptions on which textualism rests do not always hold. As a result, the vocabulary that textualism would use to justify structural argument does not match the reality. If that is so, do we still have reason for structural argument?

### C. Legal-Process Rationalism and Structural Argument

#### 1. Unorthodox Lawmaking and the Reasonable Reader

If some of the textualist assumptions described in Section III.B sound unrealistic, it is because they are. It has long been apparent that the model of precise legislative draftsmanship that might justify exacting attention to text is infrequently a reality inside Congress. As Abbe R. Gluck and Lisa Schultz Bressman

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377. See *id.* at 1636-37.

378. Just last Term, for instance, the Court resolved—in addition to *Patel*—three other cases concerning the INA: *Johnson v. Arteaga-Martinez*, 142 S. Ct. 1827 (2022), *Garland v. Aleman Gonzalez*, 142 S. Ct. 2057 (2022), and *Biden v. Texas*, 142 S. Ct. 2528 (2022).

379. See *supra* notes 138-158 and accompanying text for a discussion of *Johnson v. Guzman Chavez*, 141 S. Ct. 2271 (2021), which is also an INA case.

have documented, the interpretive doctrines that textualist judges have developed to decode statutes do not match how congressional members and staffers themselves write them.<sup>380</sup> For instance, the rule against superfluities and the canon of consistent usage were both rejected by legislative staffers that Gluck and Bressman interviewed.<sup>381</sup> Staffers instead emphasized that they often purposefully include redundancies in order to satisfy various interest groups<sup>382</sup> and that the reality of omnibus legislation – cobbled together from the separate work of individual committees – decisively undermines the assumption that words are used consistently throughout the same statutory text.<sup>383</sup> Though Gluck and Bressman’s powerful study is relatively recent, these doubts about the internal rationality of statute-drafting have been around for decades.<sup>384</sup>

Whatever power such arguments have against various textualist canons, they pose similar challenges for a textualist who employs compositional-structural arguments. The location of statutory provisions, their sequencing or symmetry with other provisions, and whether their level of generality is consistent with surrounding sections may all be far less purposeful and rational than compositional-structural arguments presume. Unorthodox lawmaking challenges the textualist presupposition that Congress drafts legislation carefully and pays close attention both to the words themselves and to the structure of the overall document.<sup>385</sup> The appeal of compositional-structural arguments is that they sit closest to the text; by extension, they are the type of structural argument most vulnerable to empirical critiques of the textualist assumption of careful drafting. If a text is the product of multiple minds, rather than a single mind, presumptions about coherent drafting choices seem less reasonable.<sup>386</sup>

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380. See Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside – An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901, 906-07 (2013) [hereinafter Gluck & Bressman, *Statutory Interpretation from the Inside I*]; Lisa Schultz Bressman & Abbe R. Gluck, *Statutory Interpretation from the Inside – An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part II*, 66 STAN. L. REV. 725, 728-29 (2014).

381. See Gluck & Bressman, *Statutory Interpretation from the Inside I*, *supra* note 380, at 933-37.

382. See *id.* at 934.

383. *Id.* at 936.

384. See Eskridge & Frickey, *supra* note 305, at 333-35.

385. See Abbe R. Gluck, Anne Joseph O’Connell & Rosa Po, *Unorthodox Lawmaking, Unorthodox Rulemaking*, 115 COLUM. L. REV. 1789, 1799 (2015) (“Unorthodox policymaking is now often the norm rather than the exception.”).

386. Consider, here, the difficulties that Biblical interpreters have long faced in reconciling apparently conflicting accounts in the Gospels, which were written by four separate writers, or in producing holistic interpretations of both the Old and New Testaments. See GERALD O’COLLINS, *RETHINKING FUNDAMENTAL THEOLOGY* 235-59 (2011).

It may be the case, of course, that the presumption of coherent drafting is more reasonable for structural decisions, like the placement or order of provisions, than it is for more granular semantic choices, like the decision to use one verb over another. Compositional structuralism may therefore be less vulnerable to this critique than other canons of interpretation—like the rule of meaningful variation—that operate on the level of individual words. Moreover, various types of compositional-structural argument may be more realistic than others. For instance, while arguments from symmetry may end up linking provisions drafted and considered by entirely separate legislative committees (or provisions drafted for entirely different reasons, at different points in the drafting process), arguments from sequence are less likely to confront this issue because the sequenced provisions typically sit side-by-side and address the same topic. However, even if Congress is less likely to let slip a structural mistake than a word-choice mistake, there is no guarantee that massive, hastily assembled laws—like the ACA—will not contravene many of the assumptions of rational drafting.

Outside-view textualists face their own difficulties.<sup>387</sup> If the motivating justification for outside-view textualism is to interpret statutes the way that the average person or lawyer would, structural arguments run up against the practical difficulties and resource constraints of ordinary people. The ACA itself ran thousands of pages, leading Justice Scalia to compare the task of reading it to cruel and unusual punishment.<sup>388</sup> Only the most well-resourced litigants will have the time (or the money for lawyers) to understand how the operative statutory provision that applies to their conduct fits in with a larger statutory or administrative scheme. The appeal of clause-bound, dictionary-heavy textualist interpretation for outside-view textualists is partly that it is meant to be a more accessible method of interpreting statutes.<sup>389</sup> In addition, studies of how “ordinary readers” read statutes reveal that average citizens do not presume that specific statu-

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387. A burgeoning literature has developed that attempts to complement the Gluck and Bressman study by investigating statutory interpretation “from the outside.” See, e.g., Tobia et al., *supra* note 360, at 222-23; Kevin Tobia, Brian G. Slocum & Victoria Nourse, *Ordinary Meaning and Ordinary People*, 171 U. PA. L. REV. (forthcoming 2023) (manuscript at 6), <https://ssrn.com/abstract=4034992> [<https://perma.cc/VJM2-TVFU>]; James A. Macleod, *Ordinary Causation: A Study in Experimental Statutory Interpretation*, 94 IND. L.J. 957, 962-65 (2019); Thomas R. Lee & Stephen C. Mouritsen, *Judging Ordinary Meaning*, 127 YALE L.J. 788, 794-95 (2018).

388. See Transcript of Oral Argument at 38, *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012) (Nos. 11-393 & 11-400) (statement of Justice Scalia) (“[W]hat happened to the Eighth Amendment? You really want us to go through these 2,700 pages? . . . [D]o you really expect the Court to do that? Or do you expect us to give this function to our law clerks?”).

389. See *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1749 (2020) (“The people are entitled to rely on the law as written, without fearing that courts might disregard its plain terms based on some extratextual consideration.”).

tory terms even carry an ordinary meaning, much less that they must be harmonized with the text of unrelated provisions.<sup>390</sup> To the extent that these textualists embrace a normative vision of the “congressional outsider” that is at odds with the empirical reality of ordinary citizens, the basis for their reliance on structural argument is weakened.

## 2. *Courts as Cooperative Partners*

There is another way. Statutory interpreters who believe in a pragmatic, pluralistic approach to interpretation need not accept the theoretical presuppositions of textualism at the cost of closing their eyes to the realities of governance. What would it look like if courts saw themselves neither as the “faithful agents” of Congress—bound to enforce the terms of its laws, no matter their composition or substantive incoherence—nor as the “agents of the people”—bound, conversely, to ignore evidence of congressional meaning outside the text of the law—but as *cooperative partners* in the process of lawmaking?

This vision of courts’ role is a venerable one, if unfamiliar today. There is good evidence that early federal judges saw their role as both “equitable” interpreters of laws and as “partners in the enterprise of law elaboration,” empowered to interpose themselves between Congress and the people as guardians of individual liberty.<sup>391</sup> State judges, who often outstripped their federal brethren in stature and power (at least for the first fifty years of the Republic), saw their role similarly.<sup>392</sup> Farah Peterson has referred to this period as the “collaborative era in statutory interpretation,” and she links it to a more modern movement with a similar vision: the Legal Process School in the early- to mid-twentieth century.<sup>393</sup> Championed by Henry M. Hart, Jr. and Albert M. Sacks, legal-process theorists saw law as “the reasoned elaboration” of the collective purposes of society.<sup>394</sup> Drawing on the notion of the “organic rationality” of law, these theorists saw the process of statutory interpretation as primarily purposive in nature.<sup>395</sup> Though

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390. See Tobia et al., *supra* note 387.

391. See William N. Eskridge, Jr., *All About Words: Early Understandings of the “Judicial Power” in Statutory Interpretation, 1776–1806*, 101 COLUM. L. REV. 990, 992–95 (2001). *But see* John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 8–9 (2001) (rejecting the view that early American courts embraced this role).

392. See Farah Peterson, *Interpretation as Statecraft: Chancellor Kent and the Collaborative Era of American Statutory Interpretation*, 77 MD. L. REV. 712, 716–17 (2018).

393. See *id.* at 768–69.

394. See William N. Eskridge, Jr. & Philip P. Frickey, *An Historical and Critical Introduction to the Legal Process*, in HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS*, at li (William N. Eskridge, Jr. & Philip P. Frickey eds., 1985).

395. *Id.* at lxvii.

interpreters were not to give words “a meaning they will not bear,” they were to “interpret the words of the statute . . . so as to carry out the purpose” of the statute.<sup>396</sup> In perhaps the most famous – or infamous – direction, Hart and Sacks directed courts to “assume . . . that the legislature was made up of reasonable persons pursuing reasonable purposes reasonably.”<sup>397</sup>

The various forms of structural argument canvassed in Part II are best understood as attempts to carry out this last directive. Compositional-structural arguments take up the third, adverbial use (“reasonably”): they presume that Congress writes its statutes in a coherent manner, creating a document whose compositional features can be attributed to purposeful drafting choices. Crucially, this approach to interpretation self-consciously recognizes that this is a *presumption*. There is no pretense that Congress always writes statutes reasonably *in fact*, which is what must be true on textualist grounds. In other words, it matters little whether Hart and Sacks were correct as an empirical matter. If courts are to be the junior partners and collaborators of the legislature rather than merely its faithful agents, they are empowered to read Congress’s imperfect statutes with an eye toward a harmony that Congress itself may fail to achieve.<sup>398</sup>

The same goes for operational-structural arguments. Though coherence, strictly speaking, does not require a rational actor (as it can be imposed by an outside actor or viewer), it follows most naturally from the assumption that Congress *does* act rationally. Thus, if the statute can be read in a way that implies otherwise, that reading should be disfavored. That is a legal-process conviction. As Professor Gluck has written, the most striking aspect of Chief Justice Roberts’s opinion in *King v. Burwell* is his recognition that the Court’s holding followed directly from the “legislative plan” of the ACA rather than from the language included in the messy statute, a move that the legal-process theorists would have applauded.<sup>399</sup> Interpreting statutes so as to render them internally compatible or coherent takes up the second use (“reasonable” purposes): the legislature’s purposes must be reasonable, which means – absent very good evidence to the contrary – courts ought not interpret statutes to express a purpose to self-destruct.

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396. HART & SACKS, *supra* note 394, at 1374.

397. *Id.* at 1378.

398. Robert Post has persuasively suggested that “at the heart of the legal process school lies a mute but stubborn refusal to recognize the distinctively unreasonable aspects of politics.” Robert Post, *Theorizing Disagreement: Reconceiving the Relationship Between Law and Politics*, 98 CALIF. L. REV. 1319, 1336 (2010). Post imagines a potentially more fulsome role for judges than that put forth by the Legal Process School, arguing that it would be “self-defeating for judges to define their role in ways that ignore” fundamental political commitments. *Id.* at 1348.

399. See Gluck, *supra* note 228, at 89.

Moreover, using structural argument to divine the *purpose* of a statute gets at the heart of the legal-process approach (the reasonable “purposes”): to uncover what the legislature was aiming to do and to assist in that project. The notion of the cooperative partner does not imply *equal* partnership. Even on the legal-process approach, courts are the junior partners, taking direction from Congress. By seeking to understand Congress’s purposes – rather than its own – a legal-process court keeps itself in check. And divining those purposes from the structure of the law passed by Congress tethers this admittedly expansive inquiry to concrete indicators of meaning. Legal-process courts thus have very good reasons to employ such structural tools to interpret statutes, even if Congress itself turns out to be irrational or incoherent.<sup>400</sup> Textualist courts lack this intelligible justification.<sup>401</sup>

To the extent that the textualist conception of faithful agency is based on a theoretical commitment to democratic self-government and the separation of powers, this cooperative-partner model of judging may be off the table.<sup>402</sup> A valid textualist response to this argument is thus to abandon aspects of structural argument inconsistent with the norm of faithful agency. Conversely, to the extent that faithful agency is simply a method to constrain courts’ interpretive discretion and promote rule-of-law values,<sup>403</sup> structural argument need not be so threatening to textualists. As I have shown, most types of structuralism *do* promote rule-of-law values by increasing the consistency and predictability of legislative directives.<sup>404</sup> And textualists themselves have admitted that determining legislative purpose from the text of the statute itself is acceptable.<sup>405</sup> In other words, though structural argument fits somewhat awkwardly with textualists’ assumptions about congressional drafting and ordinary readers, it is more congenial to their practical concerns with unconstrained judicial discretion.

It is worth underscoring at this point that no one – and certainly not Chief Justice Roberts – believes that a willy-nilly determination of legislative purpose, entirely divorced from statutory text, is enough to trump the plain terms of a

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400. As Gluck and Bressman point out, however, their research indicates that Congress itself thinks of its statutes in these purposive terms, and thus the legal-process presumption of rationality likely tracks closer to reality than the textualist presumption of intentional word choice. See Gluck & Bressman, *Statutory Interpretation from the Inside I*, *supra* note 380, at 967-71.

401. See Gluck, *supra* note 228, at 89 (“One cannot be a faithful agent to a master who one believes speaks nonsense or who one finds incomprehensible.”).

402. See Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109, 112-17 (2010) (describing the norm of faithful agency).

403. See Manning, *supra* note 391, at 57.

404. See *supra* Section III.A.

405. See, e.g., Manning, *supra* note 313, at 2434 n.179 (making this point and citing to opinions by Justice Scalia to the same effect).

statute. As Gluck writes, the notion that legislative history or purpose can trump unambiguous text is “dead.”<sup>406</sup> The power of structural arguments is that they seek to make coherence from the text of the statute itself, explicating purpose from the way the document is composed or the operation of its various provisions. This is, indeed, the reason why the Court gets away with making plainly purposive arguments—as it did in *Abramski*—in the guise of making an argument from structural coherence: purposive reasoning itself has become explicitly text-based.

The challenge for textualists is thus that the old bogeyman is dead. Purposive reasoning no longer requires free-wheeling judicial reflection on the purposes of Congress, as evidenced by potentially unreliable texts in the legislative record.<sup>407</sup> Rather, structural argument—a tool textualists have never rejected—makes space for it. As documented, some forms of structural argument do not require much speculation about Congress’s substantive purposes.<sup>408</sup> They require only the assumption—congenial to legal-process theorists and slightly more awkward for textualists—that Congress drafts coherent documents (compositional structuralism) that work harmoniously (operational structuralism) in service to identifiable purposes (purposive structuralism). But the line between the *structural incoherence* of a proffered interpretation and its deviation from the clear, text-based *purpose* of a statute is thin.<sup>409</sup> For theories of statutory interpretation that feel no animosity toward purposive reasoning per se, structural argument is a natural—even necessary—tool.

## CONCLUSION

Though structural argument long predates the rise of the new textualism, it is almost certainly the case that its use has increased as reliance on legislative history and other extrinsic sources of purposive meaning has decreased.<sup>410</sup> Some criticize this trend, believing that it introduces greater judicial discretion under

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406. Gluck, *supra* note 228, at 90.

407. See, e.g., *Holy Trinity Church v. United States*, 143 U.S. 457, 464-65 (1892); *United Steelworkers of Am. v. Weber*, 443 U.S. 193, 202-04 (1979).

408. See *supra* Sections II.A-B.

409. See *supra* Section II.C.

410. Indeed, it is striking that two articles focused on an examination of this new form of textualism when it first arrived in the late 1980s and early 1990s both contain early treatments of “structural” argument and its role in textualist interpretation. See Eskridge, *supra* note 2, at 660-63; Taylor, *supra* note 28, at 341-53.

the guise of text-bound, holistic interpretation.<sup>411</sup> But as this Note has demonstrated, the uses of structural argument are many and varied, and not all of them can be categorized as forms of purposive reasoning *simpliciter*. Rather, they are forms of whole-act interpretation that use minimal assumptions of coherence to motivate occasionally unexpected constructions of textual provisions. Though both textualist and purposivist methods can and have accommodated structural argument, these assumptions of coherence are more at home in the traditionally purposivist methods that the Legal Process School made dominant in the mid-twentieth century.

One lesson is thus that structural reasoning is here to stay. Both court watchers and advocates should become fluent in the various forms of structural argument mapped here, as they can prove decisive when text is ambiguous (or they can create ambiguity where the language seems clear). But another, more tentative lesson is that the enduring and widespread use of structural argument testifies to the necessity of purposivism – in some minimal form or another. Professors Eskridge and Nourse have written of the “hermeneutical pinch” that textualism occasions by reducing the amount of information available to resolve difficult cases.<sup>412</sup> Structural argument is one way to resolve this pinch without openly admitting extrinsic sources of interpretive authority. To the extent that it therefore keeps alive a vision of courts as cooperative partners in effectuating the legislative purposes of Congress – long a feature of our constitutional tradition but recently under attack – it is a welcome development.

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411. See Wald, *supra* note 324, at 304-06.

412. Eskridge & Nourse, *supra* note 5, at 1737.