TEXTUALISM AND OBSTACLE PREEMPTION

John David Ohlendorf[*]

TABLE OF CONTENTS

---

[*] Visiting Lecturer, Georgetown University Law Center and Fellow, Georgetown Center for the Constitution; J.D., Harvard Law School. For thoughtful comments on an earlier draft and for their generosity with their time, I would like to thank Greg Dickinson, Andy Koppelman, and Andrei Marmor. I also received helpful suggestions from the participants in Northwestern Law School's 2011 Faculty Scholarship Day, as well as from Tonja Jacobi and the students in her Fall 2011 class at Northwestern on Legislation.

I. INTRODUCTION

The Supreme Court has been paying a great deal of attention to statutory text lately. The unabashedly formalist justices continue to beat their textualist war drums, of course,[1] but the most striking development has taken place among the other justices. Justices whom one does not associate with textualism have donned their "grammarian's spectacles"[2] and given pride of place to the text in their more recent efforts at statutory interpretation, turning to background purposes and legislative history only after exhausting available textualist arguments,[3] and, even then, almost with an air of diffidence.[4] The statutory interpretation

---

[1] *See, e.g.*, DePierre v. United States, 131 S. Ct. 2225, 2237 (2011) (Scalia, J., concurring) ("Even if [a congressional expert witness] had *not* lectured an undetermined number of likely somnolent Congressmen on 'the damaging effects of cocaine smoking on people in Peru,' we would *still* hold that the words 'cocaine base' mean cocaine base." (citation omitted)); Staub v. Proctor Hosp., 131 S. Ct. 1186, 1195 (2011) (Alito, J., concurring) (examining "the statutory text, rather than principles of agency and tort law"); Hamilton v. Lanning, 130 S. Ct. 2464, 2482 (2010) (Scalia, J., dissenting) (criticizing the majority for being "[u]nable to assemble a compelling case based on what the statute says"); Samantar v. Yousuf, 130 S. Ct. 2278, 2293 (2010) (Thomas, J., concurring) ("[T]he Court's textual analysis is sufficient to resolve this case.").

[2] W. Va. Univ. Hosps., Inc. v. Casey, 499 U.S. 83, 113 (1991) (Stevens, J., dissenting), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1074, *as recognized in* Landgraf v. USI Film Prods., 511 U.S. 244 (1994).

[3] *See, e.g.*, Kasten v. Saint–Gobain Performance Plastics Corp., 131 S. Ct. 1325, 1330–31 (2011) (Breyer, J.) (noting that "[w]e begin with the text of the statute" and consulting various dictionaries before turning to the statute's "purpose and context" only after determining that the relevant text was "open to competing interpretations"); Kucana v. Holder, 130 S. Ct. 827, 835 (2010) (Ginsburg, J.) (examining the statutory context of the relevant text only after first determining that a key word in the text "is chameleon"—having "many dictionary definitions"). The trend has been markedly demonstrated by the opinions of the two newest members of the Court, Justices Sotomayor and Kagan. *See, e.g.*, Caraco Pharm. Labs., Ltd. v. Novo Nordisk A/S, 132 S. Ct. 1670, 1685 (2012) (Kagan, J.) (prioritizing text and context over legislative history); Tapia v. United States, 131 S. Ct. 2382, 2388 (2011) (Kagan, J.) (same); Carr v. United States, 130 S. Ct. 2229, 2241–42 (2010) (Sotomayor, J.) (same); Hui v. Castaneda, 130 S. Ct. 1845, 1854–55 (2010) (Sotomayor, J.) (same).

[4] *See Tapia*, 131 S. Ct. at 2391 (Kagan, J.) ("Finally, for those who consider legislative history useful, the key Senate Report concerning the SRA provides one last piece of corroborating evidence."); Microsoft Corp. v. i4i Ltd. P'ship, 131 S. Ct. 2238, 2249 n.8 (2011) (Sotomayor, J.) ("For those of us for whom it is relevant, the legislative history . . . provides additional evidence . . . ."); Milavetz, Gallop & Milavetz, P.A. v. United States, 130 S. Ct. 1324, 1332 n.3 (2010) (Sotomayor, J.) ("Although reliance on legislative history is unnecessary in light of the statute's unambiguous language, we note the support that

opinions from the Court's 2010 and 2011 Terms suggest that, in the roughly two-and-a-half decades since "new textualism" arrived in the mid-1980s, a weak form of textualism has emerged as the dominant interpretive methodology on the Court.[5]

The Court's drift towards statutory formalism has been widely recognized.[6] However, another nearly simultaneous trend also has attracted some attention: the Court's increasing willingness, over the past few decades, to find state laws preempted as "obstacle[s] to the accomplishment and execution of the full purposes and objectives of Congress"[7]—so called "obstacle preemption."[8] And the apparent tension between these two developments has not gone unnoticed. Commentators on the bench and in the academy have puzzled at the seeming incoherence of decrying reliance on a statute's background purposes but finding state laws preempted as inconsistent with those purposes.[9] Although textualists opine that

---

record provides for the Government's reading.").

[5] *Cf.* John F. Manning, *Second-Generation Textualism*, 98 CAL. L. REV. 1287, 1307 (2010) ("[The Court] has apparently reached an equilibrium that greatly tempers judicial reliance on legislative history as a source of evidence while enhancing judicial attention to the text.").

[6] *See* William N. Eskridge, Jr., *All About Words: Early Understandings of the "Judicial Power" in Statutory Interpretation, 1776–1806*, 101 COLUM. L. REV. 990, 1090 (2001) ("We are all textualists."); John F. Manning, *Justice Scalia and the Legislative Process*, 62 N.Y.U. ANN. SURV. AM. L. 33, 41 & n.35 (2006) (describing the current Court's textualist approach); Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 COLUM. L. REV. 1, 43 (2006) (noting textualism's recent success). For an argument that many state courts have reached a similar consensus in favor of a "modified textualism," see Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 YALE L.J. 1750, 1771–1811 (2010).

[7] AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1753 (2011) (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941)).

[8] A number of scholars have noted this trend. *See, e.g.*, Erwin Chemerinsky, *Empowering States When It Matters: A Different Approach to Preemption*, 69 BROOK. L. REV. 1313, 1314 (2004) ("Over the last several years, the Supreme Court repeatedly has found preemption of important state laws, and done so when federal law was silent about preemption or even when it explicitly preserved state laws."); Mary J. Davis, *Unmasking the Presumption in Favor of Preemption*, 53 S.C. L. REV. 967, 1006–13 (2002) (discussing the "new implied preemption doctrine"); *see also infra* notes 83–84 and accompanying text.

[9] Both textualists and proponents of more functional, dynamic interpretation have noted the inconsistency. *See* Wyeth v. Levine, 555 U.S. 555, 594–604 (2009) (Thomas, J., concurring in the judgment) (criticizing the Court's "purposes and objectives" preemption jurisprudence); Viet D. Dinh, *Reassessing the Law of Preemption*, 88 GEO. L.J. 2085, 2103–05, 2116–17 (2000) (describing obstacle preemption and its reliance on congressional purpose); Robert L. Glicksman & Richard E. Levy, *A Collective Action Perspective on Ceiling*

"vague notions of a statute's 'basic purpose' are . . . inadequate to overcome the words of its text,"[10] even some of the more formalist justices freely utilize the doctrine of obstacle preemption, which seems little more than "freeranging speculation about what the purposes of [a] federal law must have been."[11] While textualists generally use the inconsistency to advocate the abandonment of obstacle preemption[12] and functionalists run the argument in the other direction as part of an assault on the intelligibility or adequacy of textualism,[13] both sides of the debate share the assumption that textualism and obstacle preemption are, at bottom, irreconcilable.

It is this assumption that I wish to question. This paper argues that by giving the meaning contextually implied in a statutory text operative legal force, we can justify most of the current scope of obstacle preemption based solely on theoretical moves textualism already is committed to making. If this is correct, it not only

---

Preemption by Federal Environmental Regulation: The Case of Global Climate Change, 102 NW. U. L. REV. 579, 590–91 (2008) (describing the Court's reliance on implied preemption as "remarkable" given its movement toward textualism); Karen A. Jordan, *The Shifting Preemption Paradigm: Conceptual and Interpretive Issues*, 51 VAND. L. REV. 1149, 1201–28 (1998) (arguing that textualism is "incompatible" with implied preemption); John F. Manning, *Competing Presumptions About Statutory Coherence*, 74 FORDHAM L. REV. 2009, 2034 n.114 (2006) ("[T]he Court's approach to implied federal preemption . . . generally reflects . . . purposivism."); Manning, *supra* note 6, at 42 n.35 (noting that the Court's approach to implied federal preemption is purposivist); Daniel J. Meltzer, *The Supreme Court's Judicial Passivity*, 2002 SUP. CT. REV. 343, 362–68 (2002) (discussing the Court's departure from textualism in its implied preemption jurisprudence); Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 265–90 (2000) (arguing that there is no justification for a general doctrine of obstacle preemption and that "whether a particular federal statute requires obstacle preemption [should depend] on the specific words and context of the federal statute at issue"); Catherine M. Sharkey, *Against Freewheeling, Extratextual Obstacle Preemption: Is Justice Clarence Thomas the Lone Principled Federalist?*, 5 N.Y.U. J.L. & LIBERTY 63, 86–93 (2010) (discussing Justice Thomas's view that the Court should abandon the obstacle preemption doctrine); Note, *Preemption as Purposivism's Last Refuge*, 126 HARV. L. REV. 1056 *passim* (2013) (arguing that obstacle and field preemption are inconsistent with textualism).

[10] Mertens v. Hewitt Assocs., 508 U.S. 248, 261 (1993) (Scalia, J.).

[11] *Wyeth*, 555 U.S. at 595 (Thomas, J., concurring in the judgment).

[12] *See* Nelson, *supra* note 9, at 265–90 (arguing that there should not be a general doctrine of obstacle preemption but rather whether a particular federal statute preempts state law should depend on its text).

[13] *See* Jordan, *supra* note 9, at 1201–28 (arguing that purposivism better serves the important policies of preemption); Meltzer, *supra* note 9, at 378–408 (arguing that textualism relies excessively on Congress).

challenges widely shared assumptions about the inconsistency of textualism and one of the most common types of preemption but also has the potential to subtly alter our understanding of both textualism and obstacle preemption.

In Part II, I elaborate on the precise nature of the perceived conflict between textualism and obstacle preemption. In Part III, I introduce a theoretical framework borrowed from recent, important work in linguistics and the philosophy of language on the impact of context on the meaning communicated by uses of language. I then apply this framework to the doctrine of obstacle preemption, arguing that it can justify most of that doctrine's current scope. In Part IV, I argue that textualists are committed to accepting this justification of obstacle preemption because of theoretical presuppositions that underlie the argument for textualism. Finally, in Part V I note a few implications this argument may have for our understanding of textualism and for the doctrinal contours of obstacle preemption.

II. TEXTUALISM AND OBSTACLE PREEMPTION: TWO DEVELOPMENTS IN APPARENT CONFLICT

Briefly sketching the development of textualism and obstacle preemption may help us get our bearings and provide useful groundwork for understanding the apparent inconsistency between the two. This Part begins by exploring the origins and current outline of textualism and then undertakes a similar analysis with respect to obstacle preemption. Finally, it explores and articulates the apparent conflict between the two phenomena.

A. TEXTUALISM

For much of the twentieth century, statutory interpretation was dominated by a strongly purposivist approach.[14] This purposivism is generally associated with the Legal Process scholars,[15] who

---

[14] *See* WILLIAM D. POPKIN, STATUTES IN COURT: THE HISTORY AND THEORY OF STATUTORY INTERPRETATION 115–49 (1999) (tracing the development of puposivism during the early twentieth century); Molot, *supra* note 6, at 14–16 (discussing the rise of "an aggressive version of purposivism" during the late-nineteenth century).

[15] *See, e.g.*, John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L.

articulated an approach to legal theory that had grown out of—and in some ways reacted against—the earlier legal realist movement.[16] Starting from the conviction that "[e]very statute must be conclusively presumed to be a purposive act,"[17] Professors Hart and Sacks, the patron saints of Legal Process theory, enjoined interpreters to generally "assume . . . that the legislature was made up of reasonable persons pursuing reasonable purposes reasonably."[18]

Legal Process purposivism is grounded on a favorable estimation of legislatures and the laws they pass. "The early Legal Process scholars wrote their articles during the New Deal era, when the legislative process was widely regarded as public-seeking."[19] Hart and Sacks were led to this halcyon account of legislation by two strands of thought. First, as Professors Eskridge and Frickey argue, Hart and Sacks implicitly accepted

---

REV. 70, 78 (2006) (noting the scholars associated with Legal Process theory); Molot, *supra* note 6, at 23 ("[I]n hindsight, many scholars view the post-New Deal period, and the dominance of the Hart and Sacks legal process school, as purposivism's heyday."); Caleb Nelson, *A Response to Professor Manning*, 91 VA. L. REV. 451, 455–56 (2005) (suggesting that the strong purposivism "that dominated American jurisprudence after World War II" was "encapsulated in the teaching materials of Professors Henry Hart and Albert Sacks").

[16] *See* POPKIN, *supra* note 14, at 125–49 (describing the origins of purposivist interpretation in the early-twentieth century and suggesting that the Legal Process materials "closed out the era of modern purposivism"); William N. Eskridge, Jr. & Philip P. Frickey, *An Historical and Critical Introduction* to HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW, at li, c (William N. Eskridge, Jr. & Philip P. Frickey eds., Foundation Press 1994) [hereinafter Eskridge & Frickey, *Introduction*] (describing Legal Process theory as part of an effort to "synthesize lessons of pre-war American law," including legal realism). The Legal Process School, of course, is named after the unpublished course materials that were compiled by Harvard Law School professors Henry Hart, Jr. and Albert Sacks and that distilled ideas that had been dominant since the end of World War II. *See* William N. Eskridge, Jr. & Philip P. Frickey, *Legislation Scholarship and Pedagogy in the Post-Legal Process Era*, 48 U. PITT. L. REV. 691, 694 (1987) [hereinafter Eskridge & Frickey, *Post-Legal Process Era*] ("The philosophy of Hart & Sacks' materials reflected the spirit of the legal community in the 1950's."). On the relationship between Legal Realism and the Legal Process School, see LAURA KALMAN, THE STRANGE CAREER OF LEGAL LIBERALISM 26–42 (1996); POPKIN, *supra* note 14, at 116–49; Eskridge & Frickey, *Post-Legal Process Era*, *supra*, at 694–98; John F. Manning, *Legal Realism & the Canons' Revival*, 5 GREEN BAG 2D 283, 285–89 (2002); Molot, *supra* note 6, at 6–16.

[17] HART & SACKS, *supra* note 16, at 1124.

[18] *Id.* at 1378.

[19] William N. Eskridge, Jr., *Legislative History Values*, 66 CHI.-KENT L. REV. 365, 398 (1990).

the "optimistic pluralism" theory of politics, popular at the time, which taught "that the legislature produced generally good public policy because a variety of interests (representing a variety of views) would form around all salient issues."[20] Second and relatedly, Hart and Sacks's optimistic view of the legislative product followed from their beliefs about the legislative process; they maintained that "[a] procedure which is soundly adapted to the type of power to be exercised is conducive to well-informed and wise decisions."[21]

Hart and Sacks's faith in legislation reflected a consensus that had grown throughout the twentieth century.[22] Less widely shared was their vision of the judiciary's role in the constitutional structure. The Legal Process materials envisioned a relatively restrained role for judicial discretion and departure from the clear import of legislative commands. Hart and Sacks asked judges to "[r]espect the position of the legislature as the chief policy-determining agency of the society" and to refrain from giving the words of a statute "a meaning they will not bear."[23] Hart and Sacks's "tilt toward judicial restraint"[24] rested not only on their favorable view of legislation and the legislative process[25] but also on their rejection of the realists' critique of rules and language as radically indeterminate.[26] This comparatively humble vision of the

---

[20] Eskridge & Frickey, *Post-Legal Process Era*, *supra* note 16, at 697; *see also* HART & SACKS, *supra* note 16, at 689 ("The welding together of a legislative program is a far more complex matter than the summoning of the majority necessary to pass a single bill. . . . [T]here must be negotiation and accommodation of interests and desires among the representatives of many groups, economic, social, and geographical."); Eskridge, *supra* note 19, at 398–400 (describing the influence of optimistic pluralism on Hart and Sacks).

[21] HART & SACKS, *supra* note 16, at 154; *see also* POPKIN, *supra* note 14, at 148 ("Underlying [Hart and Sacks's approach] is an optimistic image of the legislative and administrative process, in which well-represented groups work out their differences in the public interest . . . ."); Eskridge, *supra* note 19, at 400 (discussing Hart and Sacks's "faith that good procedures would ensure policy rationality in the legislature").

[22] *See* POPKIN, *supra* note 14, at 119 (arguing that "[t]he foundation for purposivism was laid in the early twentieth century by the development of an affirmative image of the legislative process").

[23] HART & SACKS, *supra* note 16, at 1374.

[24] POPKIN, *supra* note 14, at 148.

[25] *See supra* notes 19–21 and accompanying text.

[26] *See* POPKIN, *supra* note 14, at 148 (discussing Hart and Sacks's "flight from [the] description" of judging as the exercise of "discretion"); Eskridge & Frickey, *Post-Legal Process Era*, *supra* note 16, at 695 (describing how Hart and Sacks "reaffirmed the

judicial role was a departure from some of the vigorous strands of purposivist thought upon which Hart and Sacks drew,[27] and this vision was, in turn, laid aside by some of the more forceful purposivists who came after them.[28]

Textualism emerged in the mid-1980s as a reaction against these more robust purposivists.[29] While the earlier "plain meaning" formalists had relied on an unsophisticated, mechanical theory of meaning and interpretation,[30] the "new textualists" join Hart and Sacks[31] in embracing the teaching of modern philosophy of language that words have meaning only in context.[32] Moreover, the new textualists adopt the humble account of the judicial role articulated by Hart and Sacks,[33] casting themselves within the long-dominant "faithful agent" paradigm.[34] While the aggressive

---

objectivity, indeed the legitimacy, of legal rules").

[27] *See* POPKIN, *supra* note 14, at 131–49 (discussing the emergence in the mid-twentieth century of "[a] more full-bodied purposivism" and describing Hart and Sacks as defenders "of the more guarded judicial approach associated with Judge Hand").

[28] *See* Eskridge & Frickey, *Introduction*, *supra* note 16, at cv ("The post-1958 Warren Court's approach to statutory interpretation was a very liberal version of the legal process philosophy—emphasizing interpretation of statutes consistent with their purposes and constitutional principles, and deemphasizing the philosophy's attention to rule-of-law values, procedural regularity, and the limited institutional competence of courts.").

[29] *See* William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 624 (1990) (describing textualism as a reaction against purposivism); Molot, *supra* note 6, at 5 (same); Nelson, *supra* note 15, at 455 (same).

[30] *See* John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2456–76 (2003) (differentiating modern textualists from "their literalist predecessors in the 'plain meaning' school"); Molot, *supra* note 6, at 34–35 ("Modern textualists have rejected the old 'plain meaning' version of textualism that served as a foil for purposivism in prior decades.").

[31] *See* HART & SACKS, *supra* note 17, at 1375 (emphasizing that "meaning depends upon context").

[32] *See* William N. Eskridge, Jr., *Textualism, the Unknown Ideal?*, 96 MICH. L. REV. 1509, 1532 (1998) (noting Scalia's agreement with the "truism that interpreting a text requires context"); Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3, 37 (Amy Gutmann ed., 1997) ("In textual interpretation, context is everything . . . .").

[33] *See supra* notes 22–28 and accompanying text.

[34] *See* Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL'Y 61, 63 (1994) ("[Judges] are supposed to be faithful agents, not independent principals."); Caleb Nelson, *What is Textualism?*, 91 VA. L. REV. 347, 371–72 (2005) ("It is quite common . . . for textualists to portray themselves as 'faithful agents' of the enacting legislature."). On the dominance of the faithful-agent theory, see Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109, 112 (2010) ("The view that federal courts function as the faithful agents of Congress is a conventional one.");

purposivists also conceived of themselves as faithfully carrying out Congress's instructions,[35] modern textualists argue that close adherence to precise statutory texts represents a purer form of fidelity[36] and cabins the judiciary's ability to—perhaps unwittingly—substitute its value judgments for the legislature's.[37]

The new textualism that emerged in the 1980s starkly parted ways with Hart and Sacks, however, in its account of the legislative process. While its emphasis on judicial restraint may have accounted for much of its appeal, the intellectual engine that propelled new textualism was its public-choice account of lawmaking.[38] Textualists drew on interest group theory[39] and social choice theory[40] to articulate a markedly skeptical view of the legislative process.[41] Where Hart and Sacks relied on interest

---

Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 415 (1989) ("According to the most prominent conception of the role of courts in statutory construction, judges are agents or servants of the legislature.").

[35] *See* Manning, *supra* note 9, at 2009 (suggesting that purposivists "start[ ] from the faithful agent theory"); Molot, *supra* note 6, at 23 ("In the immediate aftermath of the New Deal and legal realism, the Court's strong purposivism was perceived to be entirely compatible with legislative supremacy.").

[36] *See* Manning, *supra* note 15, at 91–110 (arguing that textualism "constitutes a superior means of fulfilling the faithful agent's duty to respect legislative supremacy"); Molot, *supra* note 6, at 24 ("Textualists argued that federal judges could aggrandize their power . . . by their very method of reading Congress's statutory instructions: aggressive purposivism.").

[37] *See* WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY & ELIZABETH GARRETT, LEGISLATION AND STATUTORY INTERPRETATION 237 (2d ed. 2006) (describing the textualists' view that purposivist interpretation "corrupt[s] the judiciary, inviting willful judges to substitute their political preferences for those legitimately adopted by the legislature"); Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 551 (1983) ("[E]ven the best intentioned will find that the imagined dialogues of departed legislators have much in common with their own conceptions of the good."); Scalia, *supra* note 32, at 35 ("On balance, [the use of legislative history] has facilitated rather than deterred decisions that are based upon the courts' policy preferences, rather than neutral principles of law.").

[38] *See* Manning, *supra* note 5, at 1292 (arguing that early textualists' "most influential line of argument against the use of legislative history was grounded in public choice theory").

[39] *See* POPKIN, *supra* note 14, at 160–62 (describing textualism's reliance on interest group theory); John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673, 686–89 (1997) (same).

[40] *See* POPKIN, *supra* note 14, at 162–63 (describing textualism's reliance on game theory and social choice theory); Manning, *supra* note 39, at 685–86 (same).

[41] *See* POPKIN, *supra* note 14, at 159–60 (arguing that, while purposivism was "fueled by optimistic assumptions about legislation," textualism relies on "a more cynical perspective on the legislative process"); Manning, *supra* note 5, at 1289 ("To many, early textualism's grounding in public choice theory seemed to reflect an antipathy to the legislative process

groups to stimulate consensus around an informed result,[42] textualists emphasized that "interest groups manipulate legislative outcomes for private gain."[43] Where Hart and Sacks expressed faith that legislatures following informed, deliberative, and efficient procedures would reach rational outcomes,[44] textualists drew on Arrovian social choice theory to argue that group decision-making is often arbitrary and incoherent.[45]

Not all early textualists stressed this "eat-your-spinach" assessment of the legislative process,[46] however, and the last two decades have seen considerable movement among modern textualists away from intent skepticism and toward a justification for their theory that emphasizes the lawmaking process's beneficial qualities rather than its warts.[47] In particular, recent textualist writing has argued that all legislation represents a compromise between competing policy values and that if judges are to respect the delicately crafted contours of these compromises—as well as the procedural framework of modern

---

or, at least, had a certain 'eat your spinach' quality to it.").

[42] *See supra* note 20 and accompanying text.

[43] Manning, *supra* note 5, at 1292.

[44] *See* HART & SACKS, *supra* note 16, at 695 (urging that the legislative process should be informed, deliberative, and efficient); *see also supra* note 21 and accompanying text.

[45] *See* KENNETH J. ARROW, SOCIAL CHOICE AND INDIVIDUAL VALUES 100–01 (Yale Univ. Press 2d ed. 1963) (1951) (arguing that although transitivity is generally considered an essential component of rational choice, a multi-member body choosing from among three or more options may be unable to arrive at a transitive set of preferences); Easterbrook, *supra* note 37, at 547 (applying Arrow's Theorem to statutory interpretation); Manning, *supra* note 30, at 2412–13 (describing textualism's reliance on Arrovian social choice theory).

[46] Manning, *supra* note 5, at 1289.

[47] *See* Manning, *supra* note 5, at 1303–17 (discussing textualism's shift in focus from public choice critiques of the legislative process to an emphasis on compromise); *see also* JEREMY WALDRON, LAW AND DISAGREEMENT 119–46 (1999) (contending that "the best arguments for the authority of statutes produced [by modern legislatures] are arguments which actually preclude any appeal to the intentions of particular legislators as a general interpretive strategy"); John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 74–78 (2001) (urging that the legislative process's protection of minority interests "would be undermined if judges claimed equitable powers to transform a clear, detailed statute into more coherent expression of policy"); Manning, *supra* note 39, at 706–37 (arguing that textualism is necessary to prevent Congress from sidestepping the beneficial procedural hurdles of bicameralism and presentment); John David Ohlendorf, *Textualism and the Problem of Scrivener's Error*, 64 ME. L. REV. 119, 123–26 (2011) (distinguishing intent-skeptical from process-based justifications for textualism and endorsing the latter).

legislative bodies that produces such compromises—they must strictly adhere to clearly worded statutory texts rather than pursue the legislature's supposed background aims.[48] By justifying their methodological approach in this way, modern textualists have returned to two themes stressed by Hart and Sacks: "the centrality of procedure"[49] and a faith that the competing policy impulses of interest groups can be blended to form rational, beneficial legislative outcomes that demand our respect.[50]

B. OBSTACLE PREEMPTION

The structure of preemption doctrine is straightforward. The Court divides preemption into two overarching categories: express and implied.[51] Express preemption occurs when "a federal law contains an express preemption clause," in which case the Court will "focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' preemptive intent."[52] Absent express preemption, the Court will move on to an implied

---

[48] *See, e.g.*, Barnhart v. Peabody Coal Co., 537 U.S. 149, 183–84 (2003) (Scalia, J., dissenting) ("The reality is that the Coal Act reflects a *compromise* between the goals of perfection in assignments and finality. . . . The best way to be faithful to the resulting compromise is to follow the statute's text . . . ."); Barnhart v. Sigmon Coal Co., 534 U.S. 438, 461 (2002) (Thomas, J.) (noting the statute's "delicate crafting reflected a compromise" and concluding that the Court's "role is to interpret the language of the statute enacted"); City of Joliet v. New West, L.P., 562 F.3d 830, 836–37 (7th Cir. 2009) (Easterbrook, C.J.) (noting that the legislative process requires deciding between competing values and concluding that when courts look to purpose "judges become effective lawmakers, bypassing the give-and-take of the legislative process"); *see also* Manning, *supra* note 5, at 1309–14 (describing later textualists' increasing emphasis on the argument from compromise). As Professor Manning notes, this theme was already evident in the early writing of some textualists. Manning, *supra* note 5, at 1311; *see, e.g.*, Edward Hines Lumber Co. v. Vulcan Materials Co., 861 F.2d 155, 157 (7th Cir. 1988) (Easterbrook, J.) ("Born of compromise, laws . . . do not pursue their ends to their logical limits. A court's job is to find and enforce stopping points no less than to implement other legislative choices." (citation omitted)); Easterbrook, *supra* note 37, at 546–57 ("[Textualism] is faithful to the nature of compromise in private interest legislation.").

[49] Eskridge & Frickey, *Post-Legal Process Era*, *supra* note 16, at 696; *see also supra* note 21 and accompanying text.

[50] *See supra* note 20 and accompanying text.

[51] Cipollone v. Liggett Grp., 505 U.S. 504, 516 (1992).

[52] Chamber of Commerce of the U.S. v. Whiting, 131 S. Ct. 1968, 1977 (2011) (quoting CSX Transp., Inc. v. Easterwood, 507 U.S. 658, 664 (1993)).

preemption analysis. Implied preemption occurs where "federal law so thoroughly occupies a legislative field 'as to make reasonable the inference that Congress left no room for the States to supplement it,' "[53] or where state law "actually conflicts with federal law."[54] This latter category of "conflict preemption" is further subdivided into two categories: "impossibility preemption," which exists when "compliance with both federal and state regulations is a physical impossibility,"[55] and "obstacle preemption," which exists where "state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' "[56] The Court also sporadically invokes the presumption "that the historic police powers of the States [are] not to be superseded by [a] Federal Act unless that was the clear and manifest purpose of Congress."[57]

While the roots of the Court's current preemption jurisprudence trace back to the Marshall Court's expansive articulation of federal power in cases like *McCulloch v. Maryland*[58] and *Gibbons v. Ogden*,[59] the modern doctrine began to take form in the 1930s.[60] The first decades of the twentieth century, like much of the nineteenth century, were dominated by an approach to federal–state relations known as "dual federalism," which held that

---

[53] *Cipollone*, 505 U.S. at 516 (quoting Fidelity Fed. Sav. & Loan Ass'n v. De la Cuesta, 458 U.S. 141, 153 (1982)).

[54] California v. ARC Am. Corp., 490 U.S. 93, 100 (1989).

[55] Gade v. Nat'l Solid Wastes Mgmt. Ass'n, 505 U.S. 88, 98 (1992) (quoting Fla. Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142–43 (1963)).

[56] *Id.* (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941)).

[57] Altria Grp., Inc. v. Good, 555 U.S. 70, 77 (2008) (first alteration in original) (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)); *see also* S. Candice Hoke, *Preemption Pathologies and Civic Republican Values*, 71 B.U. L. REV. 685, 733 (1991) ("The Supreme Court's devotion to its presumptions [against preemption] . . . can only be described as fickle."); Sharkey, *supra* note 9, at 78 ("[T]he Court's track record with respect to the presumption against preemption is murky.").

[58] 17 U.S. (4 Wheat.) 316, 436 (1819) ("[T]he states have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control the operations of the constitutional laws enacted by Congress . . . .").

[59] 22 U.S. (9 Wheat.) 1, 211 (1824) (concluding that state laws that "interfere with, or are contrary to the laws of Congress, ... though enacted in the exercise of powers not controverted, must yield to [them]").

[60] *See* Stephen A. Gardbaum, *The Nature of Preemption*, 79 CORNELL L. REV. 767, 805–07 (1994) (discussing the development of modern preemption doctrine); Davis, *supra* note 8, at 977–83 (discussing the development of preemption doctrine during the 1940s and 1950s).

"Article I's limits on Congress's powers and purposes . . . define separate 'spheres' of sovereignty for the federal and state governments . . . , neither of which permits intrusion or activity by the other level of government."[61] For the Court's preemption jurisprudence, this meant that although states could regulate many subjects within Congress's domain of competence until Congress saw fit to act, once Congress acted on the subject all state power was automatically preempted.[62]

By the early twentieth century, however, the legal realist critique of rigidly categorical thinking[63] had chipped away at the conceptual underpinnings of dual federalism's immutable separation of federal and state spheres.[64] And with the Court's retreat from aggressive enforcement of limits on federal power and the concomitant increase in the breadth and number of federal laws, the Court's automatic preemption doctrine threatened to eliminate any meaningful role for the states.[65] Whether an

---

[61] Ernest A. Young, *Dual Federalism, Concurrent Jurisdiction, and the Foreign Affairs Exception*, 69 GEO. WASH. L. REV. 139, 143 (2001); *see also* BARRY CUSHMAN, RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION 142 (1998) (describing dual federalism). For the classic statement, see Edward S. Corwin, *The Passing of Dual Federalism*, 36 VA. L. REV. 1, 4 (1950).

[62] *See* S. Ry. Co. v. Reid, 222 U.S. 424, 436 (1912) ("It is well settled that if the State and Congress have a concurrent power, that of the State is superseded when the power of Congress is exercised."); Gardbaum, *supra* note 60, at 801–05 (calling this the doctrine of "latent exclusivity"); David E. Engdahl, *Preemptive Capability of Federal Power*, 45 U. COLO. L. REV. 51, 53 (1973) (describing early preemption doctrine); Lawrence Lessig, *Translating Federalism:* United States v. Lopez, 1995 SUP. CT. REV. 125, 166 (same).

[63] *See* MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870–1960: THE CRISIS OF LEGAL ORTHODOXY 17–19 (1992) (describing formalism); G. EDWARD WHITE, THE CONSTITUTION AND THE NEW DEAL 167 (2000) (same).

[64] *See* CUSHMAN, *supra* note 61, at 141–76 (describing the collapse of the Court's early twentieth century Commerce Clause jurisprudence); HORWITZ, *supra* note 63, at 199–200 (describing the decline of formalism); WHITE, *supra* note 63, at 227 (same); Samuel R. Olken, *Historical Revisionism and Constitutional Change: Understanding the New Deal Court*, 88 VA. L. REV. 265, 304–26 (2002) (reviewing WHITE, *supra* note 63) (describing legal realism's role in the New Deal transformation of the Court's federalism jurisprudence). For a thoughtful but slightly more modest interpretation of legal realism's role in the early-twentieth century evolution of the Court's Commerce Clause doctrine, see Barry Cushman, *Formalism and Realism in Commerce Clause Jurisprudence*, 67 U. CHI. L. REV. 1089 (2000).

[65] *See* MICHAEL S. GREVE, THE UPSIDE-DOWN CONSTITUTION 209 (2012) ("[A]s the Commerce Clause assumed far broader contours, adherence to latent exclusivity threatened a wholesale collapse into the center."); Davis, *supra* note 8, at 978 ("The Court found itself in the unenviable position, then, of defining Congress's power under the Commerce Clause expansively, and through its preemption doctrine implicitly expanding that power even

intentional response to this development or not, the Court's preemption cases in the early 1930s began to place much more emphasis on the presence or absence of congressional intent to preempt,[66] and, by the end of the 1940s, congressional intent had assumed the primary justificatory role in the developing preemption doctrine.[67]

As the Court's "latent exclusivity" approach to preemption began to soften and give way to a focus on congressional intent, however, another more aggressive strand of preemption doctrine began to emerge: obstacle preemption. Like preemption generally, obstacle preemption's roots trace back to the Marshall Court.[68] And there were further glimmers of the nascent doctrine during the late nineteenth[69] and early twentieth[70] centuries. Obstacle preemption awaited full development, however, until the 1940s.

---

further."); Engdahl, *supra* note 62, at 54 n.10 ("With the increased exercise of federal power in the 1930's, continued adherence to the old preemption doctrine of inherent exclusiveness would have radically curtailed the traditional powers of the states."); Stephen Gardbaum, *The Breadth vs. the Depth of Congress's Commerce Power: The Curious History of Preemption During the* Lochner *Era*, *in* FEDERAL PREEMPTION: STATES' POWERS, NATIONAL INTERESTS 48, 68 (Richard A. Epstein & Michael S. Greve eds., 2007) ("Given the increased scope and exercise of federal power over interstate commerce, latent exclusivity threatened to eviscerate large areas of traditional state authority."); Ernest A. Young, *"The Ordinary Diet of the Law": The Presumption Against Preemption in the Roberts Court*, 2011 SUP. CT. REV. 253, 259 ("A national regulatory power this broad, however, could no longer be exclusive without wiping out virtually all state regulatory authority.").

[66] *See, e.g.*, Mintz v. Baldwin, 289 U.S. 346, 350 (1933) (emphasizing "[t]he purpose of Congress to supersede or exclude state action").

[67] *See, e.g.*, Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947) (emphasizing congressional intent).

[68] *See* Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 211 (1824) (holding that states cannot "interfere with" federal law); McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 436 (1819) (holding that state law may not "retard, impede, burden, or in any manner control" federal law); *see also* Perez v. Campbell, 402 U.S. 637, 649 (1971) (tracing obstacle preemption to *Gibbons*); Betsy J. Grey, *Make Congress Speak Clearly: Federal Preemption of State Tort Remedies*, 77 B.U. L. REV. 559, 567 (1997) (same); Hoke, *supra* note 57, at 715 (same). For a thoughtful critique of obstacle preemption's Marshall Court pedigree, see Nelson, *supra* note 9, at 266–72.

[69] For example, in a line of cases dealing with state regulation of federally chartered banks, the Court held that state law that "frustrates the purpose of . . . national legislation" is "absolutely void." Davis v. Elmira Sav. Bank, 161 U.S. 275, 283 (1896); *see also* Owensboro Nat'l Bank v. Owensboro, 173 U.S. 664, 667–68 (1899) (following *Davis*); McClellan v. Chipman, 164 U.S. 347, 351 (1896) (same).

[70] *See* N.Y. Cent. R.R. Co. v. Winfield, 244 U.S. 147, 153 (1917) (finding preemption of a state law that "disturb[s] the uniformity which the [federal] act is designed to secure and . . . depart[s] from the principle which it is intended to enforce"); Savage v. Jones, 225

In the 1941 case *Hines v. Davidowitz*,[71] the Court struck down Pennsylvania's Alien Registration Act,[72] which required certain aliens to register with the state, carry state-issued identification cards, and exhibit the cards upon demand.[73] Congress had recently enacted a Federal Alien Registration Act,[74] and the Court observed that the federal act "is supreme; and the law of the State, though enacted in the exercise of powers not controverted, must yield to it."[75] Citing a handful of cases from the last fifty years that had kept *Gibbons*'s and *McCulloch*'s prohibition of state "interference" alive,[76] the Court concluded that its role was "to determine whether, under the circumstances of this particular case, Pennsylvania's law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[77] Noting that Congress had rejected a requirement that aliens be forced to carry identification cards,[78] the Court determined that Congress had "provided a standard for alien registration" and had "plainly manifested a purpose to do so in such a way as to protect the personal liberties of law-abiding aliens . . . and to leave them free from the possibility of inquisitorial practices."[79] "Under these circumstances" Pennsylvania's law "cannot be enforced."[80]

U.S. 501, 533 (1912) ("If the purpose of the [federal] act cannot otherwise be accomplished—if its operation within its chosen field else must be frustrated and its provisions be refused their natural effect—the state law must yield to the regulation of Congress within the sphere of its delegated power.").

[71] 312 U.S. 52 (1941).

[72] 1939 Pa. Laws 652.

[73] Alien Registration Act §§ 1, 2, 1939 Pa. Laws at 652.

[74] Alien Registration Act of 1940, ch. 439, 54 Stat. 670.

[75] *Hines*, 312 U.S. at 66 (quoting Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 211 (1824)).

[76] *See id.* at 67 n.18 (citing Int'l Shoe Co. v. Pinkus, 278 U.S. 261, 265 (1929) ("States may not pass or enforce laws to interfere with or complement the Bankruptcy Act . . . .")); *id.* at 67 n.20 (citing Savage v. Jones, 225 U.S. 501, 533 (1912)).

[77] *Id.* at 67.

[78] *Id.* at 72–73.

[79] *Id.* at 74.

[80] *Id.* Latching onto *Hines*'s discussion of federal supremacy in foreign affairs and the Court's emphasis on the "all-embracing" nature of the federal law, *id.* at 74, some have suggested that *Hines* is not an obstacle preemption case at all, but rather a field preemption case, *see* Arizona v. United States, 132 S. Ct. 2492, 2502 (2012) (characterizing *Hines* as a field preemption case); Paul Wolfson, *Preemption and Federalism: The Missing Link*, 16 HASTINGS CONST. L.Q. 69, 75 (1988) (describing *Hines* as an "occupying the field" case); *see*

The Court cited *Hines* intermittently for the next several decades;[81] and it used similar logic in a line of preemption cases dealing with the National Labor Relations Board's jurisdiction.[82] But it was not until the 1980s that obstacle preemption fully blossomed. From the dawn of modern preemption in 1933[83] through the Court's 1979 Term, the Court heard thirty-five cases involving obstacle preemption, an average of 0.73 cases per Term; in October Term 1980, the Court heard five. From the 1980 Term through the 2010 Term, the Court heard fifty-seven cases involving obstacle preemption, an average of 1.84 cases per Term.[84] During the closing decades of the twentieth century, then,

---

also Davis, *supra* note 8, at 978 (describing *Hines* as "elaborate[ing] upon 'occupation of the field' preemption"); Hoke, *supra* note 57, at 740 (describing *Hines* as "enuciat[ing] a breathtakingly broad standard for field preemption"); Jordan, *supra* note 9, at 1166 (using *Hines* as an example of field preemption); Jamelle C. Sharpe, *Toward (a) Faithful Agency in the Supreme Court's Preemption Jurisprudence*, 18 GEO. MASON. L. REV. 367, 390 (2011) (calling *Hines* "the seminal field preemption case"). While the comprehensive nature of the federal scheme and the dominant federal interest in foreign affairs undeniably did some work in the opinion, referring to *Hines* as a field-preemption case *simpliciter* gives these factors too much credit. Had *Hines* rested entirely on an occupying-the-field rationale, the Court would not have taken the pains it did to recount the history of the federal act, its rejection of mandatory card-carrying, and the conflict between Congress's desire "to protect the personal liberties of law-abiding aliens" and the harsh terms of the Pennsylvania Act. *Hines*, 312 U.S. at 72–74. Characterizing *Hines* as an obstacle preemption case is, I submit, largely accurate.

[81] *See, e.g.*, Fla. Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 141 (1963) (citing *Hines*); Pennsylvania v. Nelson, 350 U.S. 497, 502 (1956) (same); Hill v. Florida, 325 U.S. 538, 542 (1945) (same); Cloverleaf Butter Co. v. Patterson, 315 U.S. 148, 157 (1942) (same).

[82] *See, e.g.*, Liner v. Jafco, Inc., 375 U.S. 301, 306–10 (1964) ("If the peaceful picketing complained of in this case [violates the National Labor Relations Act], Congress has ordained—to further uniform regulation and to avoid the inconsistencies which would result from the application of disparate state remedies—that only the federal agency shall deal with it. The issuance of the state injunction in this case tended to frustrate this federal policy." (citation omitted)); San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 245 (1959) ("[T]he States . . . must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted."); Garner v. Teamsters, 346 U.S. 485, 500–01 (1953) ("For a state to impinge on the area of labor combat designed to be free is quite as much an obstruction of federal policy as if the state were to declare picketing free for purposes or by methods which the federal Act prohibits.").

[83] *See* Mintz v. Baldwin, 289 U.S. 346, 350 (1933) (emphasizing the importance of congressional intent to preempt).

[84] Much of the uptick is accounted for by a dramatic spike in obstacle preemption cases during the 1980s. However, scholars also have suggested that the more recent case *Geier v. American Honda Motor Co.*, 529 U.S. 861 (2000), articulated a particularly aggressive vision of obstacle preemption, indicating that the trend continues. *See, e.g.*, Sharkey, *supra*

obstacle preemption came into its own. During the same period, of course, another dramatic change was underway: the "textualist revolution."[85] While these two developments roughly coincided, however, they seem far from consistent.

C. PREEMPTION CONFLICT?

While the Court's trend towards textualism occurred at roughly the same time as its increasingly "muscular employment"[86] of obstacle preemption, many commentators have perceived a tension between the two developments.[87] We are now in a position to appreciate why this assumption of inconsistency is so widespread and to explain why the perceived tension might have arisen. Since obstacle preemption emerged in the 1940s and 1950s, when the Court's methodology of statutory interpretation was dominated by a strongly purposivist approach,[88] it should be no surprise that the evolution of the Court's preemption doctrine reflected this broader milieu.[89]

---

note 9, at 89 (suggesting that *Geier* was "a high water mark for an expansive version of implied preemption"); Kenneth W. Starr, *Reflections on* Hines v. Davidowitz*: The Future of Obstacle Preemption*, 33 PEPP. L. REV. 1, 4–6 (2005) (describing *Geier* as a "muscular employment" of obstacle preemption). Throughout these two periods, the rate at which the Court found preemption remained roughly the same, at 60% from October Term 1932–October Term 1979, and 56% from October Term 1980–October Term 2010.

[85] *See supra* notes 29–50 and accompanying text. Judge Easterbrook published *Statute's Domains* in 1983. In 1985 and 1986, then-Judge Antonin Scalia spoke at several law schools critiquing the use of legislative history. Manning, *supra* note 5, at 1292 n.29.

[86] Starr, *supra* note 84, at 5.

[87] *See* sources cited *supra* note 9.

[88] *See, e.g.*, Markham v. Cabell, 326 U.S. 404, 409 (1945) ("The policy as well as the letter of the law is a guide to decision. Resort to the policy of a law may be had to ameliorate its seeming harshness or to qualify its apparent absolutes . . . ." (citing Church of the Holy Trinity v. United States, 143 U.S. 457 (1892))); Helvering v. Hammel, 311 U.S. 504, 510–11 (1941) ("[C]ourts in the interpretation of a statute have some scope for adopting a restricted rather than a literal or usual meaning of its words where acceptance of that meaning would . . . thwart the obvious purpose of the statute." (internal citations omitted)); United States v. Am. Trucking Ass'ns, 310 U.S. 534, 543 (1940) (noting that when the plain meaning of a statute conflicts with its purpose, the "Court has followed that purpose, rather than the literal words"); *see also* POPKIN, *supra* note 14, at 125–44 (describing the rise of purposivism during the first half of the twentieth century); *supra* notes 14–28 and accompanying text.

[89] *See* Jordan, *supra* note 9, at 1202–10 (arguing that "Supreme Court decisions during the formative years of the modern conception of preemption reflect a 'purposive' approach to interpretation" and that "[l]andmark implied preemption cases during the formative years

Indeed, the doctrine of obstacle preemption first articulated in the 1940s seems to rely on the same robust conception of the judicial role that undergirded much of twentieth-century purposivism. Purposivists would give judges significant leeway to abstract away from the precise terms of the statutory text in determining Congress's genuine intent,[90] and the doctrine of obstacle preemption similarly is committed to "[t]he purpose of Congress" as "the ultimate touchstone"[91] and apparently gives judicial actors substantial freedom to depart from textual detail in determining the scope of congressional purpose. By contrast, modern textualists counsel "stick[ing] close to the surface meaning of texts, where possible,"[92] emphasizing that the best way to be faithful to congressional enactments is to follow the statute's language.[93] Statutes generally reflect a compromise between competing purposes, and in a world of rival purposes, textualists suggest that any invocation of a congressional purpose *simpliciter* is either inaccurate or so hopelessly indeterminate as to lack any bite. Preemption based on "freeranging speculation about what the purposes of [a] federal law must have been,"[94] then, seems at war with textualist first principles.

While this assertion of inconsistency is compelling, the following two Parts will argue that a deeper understanding of both textualism and obstacle preemption demonstrates that the tension is apparent rather than real. Part III introduces a framework for understanding the way that context shapes the meaning of our language use and urges that this framework justifies the result in the vast majority of obstacle preemption cases. Part IV argues that textualists must accept this justification because of two crucial theoretical moves they already are committed to making.

---

reflect the influence of Hart and Sacks, especially those cases based on the 'stands as an obstacle' theory of preemption").

[90] *See supra* notes 22–28, 33–37 and accompanying text.

[91] Gade v. Nat'l Solid Wastes Mgmt. Ass'n, 505 U.S. 88, 96 (1992) (quoting Allis–Chalmers Corp. v. Lueck, 471 U.S. 202, 208 (1985)); *see also* Fid. Fed. Sav. & Loan Ass'n v. de la Cuesta, 458 U.S. 141, 152 (1982) ("The pre-emption doctrine . . . requires us to examine congressional intent.").

[92] ADRIAN VERMEULE, JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION 73 (2006).

[93] *See supra* notes 33–37 and accompanying text.

[94] Wyeth v. Levine, 555 U.S. 555, 595 (2009) (Thomas, J., concurring in the judgment).

III. IMPLICATED PREEMPTION

A. PRAGMATICS AND THE ROLE OF CONTEXT

The twentieth century witnessed a widening appreciation, in the legal academy as elsewhere, of the important role played by context in interpretation.[95] In linguistics, this appreciation led to the establishment of the field of linguistic pragmatics,[96] or "the study of meaning in relation to speech situations,"[97] which built on the foundation laid by philosophers of language like J.L. Austin,[98] John Searle,[99] and, in particular, Paul Grice.[100] To grasp the scope and contours of the field, it is helpful to begin with three basic but central distinctions within the theory of meaning.

The first is the distinction between the meaning of a sentence in the abstract and the meaning of a sentence on a particular occasion of use. Grice introduced the term "utterance" to aide in drawing this line.[101] While a *sentence* can be thought of as a

---

[95] In the philosophy of language, the appreciation of context is generally associated with a tradition beginning with the later Wittgenstein. *See* LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS § 43 (P.M.S. Hacker & Joachim Schulte eds., G.E.M. Anscombe et al. trans., Blackwell Publ'g 4th ed. 2009) (1953) ("For a *large* class of cases . . . the meaning of a word is its use in the language."). The emphasis on context is also present in much continental hermeneutic thought. *See* HANS-GEORG GADAMER, TRUTH AND METHOD 267–78, 289–304 (Garrett Barden & John Cumming eds., Continuum Publ'g 1975) (discussing the historicity of interpretation and introducing the concept of "historically effected consciousness"); MARTIN HEIDEGGER, BEING AND TIME 188–210 (John Macquarrie & Edward Robinson trans., 1962) (discussing the foregrounding of understanding and interpretation); PAUL RICOEUR, INTERPRETATION THEORY: DISCOURSE AND THE SURPLUS OF MEANING 9–22 (1976) (discussing the temporal context of discourse).

[96] The use of the term "pragmatics" in this way is generally traced to Charles W. Morris, *Foundations of the Theory of Signs*, *in* 1 INTERNATIONAL ENCYCLOPEDIA OF UNIFIED SCIENCE no. 2, at 1, 6 (Otto Neurath ed., 1938). The name unfortunately stuck, despite its similarity to "pragmatism," which refers to a distinct and unrelated school of philosophy (and, now, legal theory).

[97] GEOFFREY N. LEECH, PRINCIPLES OF PRAGMATICS 6 (1983). For a detailed exploration of the difficulties in defining the field of pragmatics with specificity, see STEPHEN C. LEVINSON, PRAGMATICS 5–35 (1983).

[98] J.L. AUSTIN, HOW TO DO THINGS WITH WORDS 1–11, 94–119, 132–63 (1962).

[99] JOHN R. SEARLE, SPEECH ACTS: AN ESSAY IN THE PHILOSOPHY OF LANGUAGE 3–53, 72–96, 131–56 (1970).

[100] PAUL GRICE, *Logic and Conversation*, *in* STUDIES IN THE WAY OF WORDS 22 (1989). Grice is often considered the father of modern pragmatics. Laurence R. Horn, *Implicature*, *in* THE HANDBOOK OF PRAGMATICS 3, 27 n.7 (Laurence R. Horn & Gregory Ward eds., 2006).

[101] PAUL GRICE, *Utterer's Meaning and Intentions*, *in* STUDIES IN THE WAY OF WORDS,

theoretical entity or "type," an *utterance* is a particular use of a sentence in a particular context—a "token" of the sentence type, either written or spoken.[102]

The second central distinction, building on the first, is between "sentence meaning" and "speaker's meaning."[103] While "sentence meaning" refers to the conventionally determined meaning of an abstract sentence or the utterance of a sentence on a particular occasion,[104] "speaker's meaning" refers to what the speaker meant *by* the utterance of the sentence. For example, when Romeo proclaims "Juliet is the sun,"[105] the literal meaning of the sentence he has uttered is roughly that Juliet is the yellow dwarf at the center of our solar system and, accordingly, is false. But what Romeo means *by* uttering the sentence "Juliet is the sun" is that Juliet is radiant, that she brings light and life, that she is the center of his life, and so on.

The third distinction critical to understanding pragmatics, again building on the two just introduced, is between two aspects of the total meaning communicated by an utterance: what is *said* and what is *implicated*.[106] What an utterance literally says is

---

supra note 100, at 86, 92.

[102] LEVINSON, *supra* note 97, at 18. A distinction along these lines can also be found as early as P.F. Strawson, *On Referring*, 59 MIND 320, 324–26 (1950).

[103] The first person to draw the distinction in these terms, to my knowledge, was JOHN R. SEARLE, *Metaphor*, *in* EXPRESSION AND MEANING: STUDIES IN THE THEORY OF SPEECH ACTS 76, 77 (1979). The distinction can be found in Grice, too, who refers to the two types of meaning as "utterance-type meaning" and "utterer's meaning." *See* GRICE, *supra* note 101, at 89–91; PAUL GRICE, *Utterer's Meaning, Sentence-Meaning, and Word-Meaning*, *in* STUDIES IN THE WAY OF WORDS, *supra* note 100, at 117, 117–22.

[104] The distinction between sentence meaning and speaker's meaning can cut across the distinction between a sentence and an utterance, depending on how you cash out "sentence meaning." For example, while Stephen Levinson distinguishes between a sentence and an utterance, as above, and uses "sentence meaning" in light of this distinction, so that it does not encompass disambiguation (determining which of two possible meanings ambiguous words in the sentence take) and reference assignment (determining the reference of names, indexicals, verb tense, etc.), *see* Levinson, *supra* note 97, at 17–20, Searle himself clearly intended the determination of "sentence meaning" to include disambiguation, reference assignment, and whatever else was necessary to obtain a truth-evaluable proposition, *see* SEARLE, *supra* note 103, at 78–81 ("[I]n general the literal meaning of a sentence only determines a set of truth conditions relative to a set of background assumptions which are not part of the semantic content of the sentence . . . .").

[105] WILLIAM SHAKESPEARE, ROMEO AND JULIET act 2, sc. 2.

[106] *See* GRICE, *supra* note 103, at 118 (dividing the "total signification" of an utterance into what is *said* and what is *implicated*). Grice introduced the term *implicate* (with its noun

determined by the semantic and syntactic conventions that govern the language in question;[107] for the utterance of a descriptive sentence, "what is said" is usually referred to as the proposition asserted.[108] Often, however, an utterance says one thing but implies another. For example, imagine that you are reading a letter of recommendation for a particular student, *A*, written by a professor, *B*. And imagine that the letter reads as follows: "*A*'s attendance in my class was perfect, and she always arrived to class on time."[109] What this utterance *says* is altogether complimentary; but the utterance implies something quite negative: that *A* is far from an exemplary student. While this latter, implied meaning is not part of the proposition asserted by the letter, it is clearly part—perhaps the central part—of what the letter communicates.[110]

---

version *implicature*) as "a blanket word to avoid having to make choices between words like 'imply,' 'suggest,' indicate,' and 'mean.' " GRICE, *supra* note 101, at 86. My purposes require less precision than Grice's, so I will use his term "implicate" and the more familiar "imply" more or less interchangeably.

[107] GRICE, *supra* note 100, at 25.

[108] Stephen Neale, *Paul Grice and the Philosophy of Language*, 15 LINGUISTICS & PHIL. 509, 521 (1992).

[109] This example is adapted from GRICE, *supra* note 100, at 33.

[110] Again, this third distinction is not quite parallel with the previous distinction between sentence meaning and speaker's meaning. For Grice, it is probably fair to say that the total meaning communicated by an utterance (his "total signification") is equivalent to speaker's meaning (or what Grice called "utterer's meaning"). Neale, *supra* note 108, at 520. But for Grice, what is said is not equivalent to sentence meaning, for at least two reasons. First, in his account of nonliteral speech such as metaphor and irony, Grice distinguishes between *saying x* and "making as if to say" *x*. GRICE, *supra* note 100, at 34; PAUL GRICE, *Further Notes on Logic and Conversation*, *in* STUDIES IN THE WAY OF WORDS, *supra* note 100, at 41, 41. Grice would say that Romeo did not actually *say* that Juliet is the yellow dwarf at the center of our solar system but rather "made as if to say" it. So while this is a fair paraphrase of the sentence meaning of Romeo's statement, Grice would not count it as part of what Romeo *said*. Second, Grice argues that there are "conventional implicatures," which contribute in a systematic, conventional way to the total meaning communicated—and accordingly might be thought of as part of sentence meaning—but which he did not want to include in "what is said." *See* GRICE, *supra* note 100, at 25–26 (describing conventional implicatures); GRICE, *supra* note 103, at 120–21; Neale, *supra* note 108, at 521–23 (explaining that, for Grice, "conventional meaning of a sentence *goes beyond* what is said," but conventional implicatures "play no part in determining what [was] *said*"). Roughly, then, Grice equated "what is said" with the *coincidence* of speaker's meaning and sentence meaning, minus any conventional implicatures. *See* GRICE, *supra* note 103, at 120–21; Neale, *supra* note 108, at 522–23, 554–56 ("On Grice's account, what is said is to be found in the area where sentence meaning and utterer's meaning overlap," but not including any conventional implicatures). So even for Grice, the "sentence

In his path-breaking William James Lectures, entitled *Logic and Conversation*,[111] Grice sketched an explanation of this second, "implicated"[112] meaning in light of the rational, cooperative nature of our language use. Grice proposed that human language interaction, like much of human interaction more generally, was essentially a cooperative, goal-oriented activity.[113] And he attempted to capture the cooperative nature of language interaction in his Cooperative Principle: "Make your conversational contribution such as is required, at the stage at which it occurs, by the accepted purpose or direction of the talk

---

meaning"/"speaker's meaning" and "what is said"/"what is implicated" distinctions cut across each other to some extent. Moreover, different theorists cut the cake of meaning in different ways, leading to further cleavage between the two distinctions. Grice may be happy to equate speaker's meaning with the total meaning communicated because he took speaker's meaning to be basic in an important sense. *See* GRICE, *supra* note 103, at 117 (describing his "basic notion of meaning"); Neale, *supra* note 108, at 550 (describing Grice's basic notion of meaning). Many pragmatists follow him in this. *See* LEVINSON, *supra* note 97, at 16–18 (same); DAN SPERBER & DEIRDRE WILSON, RELEVANCE: COMMUNICATION AND COGNITION 21–28 (2d ed. 1995) (same). But some theorists are less sure that speaker's meaning should be taken as basic in this way. *See* SEARLE, *supra* note 99, at 42–50 (arguing that Grice's account of meaning is inadequate). Further, there has been significant movement among pragmatists away from the traditional Gricean view that "what is said" and "what is implicated" are mutually exclusive and jointly occupy the field. Some would add an additional category of "implicitures," intermediate between what is said and what is implicated, which contextually complete or expand the proposition asserted. *See* Kent Bach, *Conversational Impliciture*, 9 MIND & LANGUAGE 124, 124–33 (1994) ("[T]he distinction between what is said and what is implicated is not exhaustive."); Horn, *supra* note 100, at 21–24 (comparing implicature and impliciture). Others would characterize "what is said" less parsimoniously, including within the idea a class of "explicatures" made up of any assumption that can be counted as a "development of a logical form encoded by [an utterance]." SPERBER & WILSON, *supra*, at 182; *see also* Robyn Carston, *Relevance Theory and the Saying/Implicating Distinction*, *in* THE HANDBOOK OF PRAGMATICS, *supra* note 100, at 633, 633 (defining explicatures); Horn, *supra* note 100, at 17–21 (discussing explicatures). Like these pragmatists, philosophers of language have also begun to argue for a more nuanced interaction between what is said and what is implicated. *See* 1 SCOTT SOAMES, *Drawing the Line Between Meaning and Implicature—and Relating Both to Assertion*, *in* PHILOSOPHICAL ESSAYS: NATURAL LANGUAGE: WHAT IT MEANS AND HOW WE USE IT 298, 316–21 (2009) [hereinafter SOAMES, *Meaning, Implicature, and Assertion*] (analyzing examples); 1 SCOTT SOAMES, *The Gap Between Meaning and Assertion: Why What We Literally Say Often Differs from What Our Words Literally Mean*, *in* PHILOSOPHICAL ESSAYS, *supra*, at 278, 279 (noting a "growing recognition . . . that [the traditional conception] needs to be modified").

[111] Later published, in a slightly revised form, as the first seven essays in STUDIES IN THE WAY OF WORDS, *supra* note 100.

[112] *See supra* note 106.

[113] GRICE, *supra* note 100, at 28–30.

exchange in which you are engaged."[114] Grice then suggested that this Cooperative Principle was instantiated in four maxims, which could be divided into various submaxims:

A. The maxim of Quantity, which he divided into the more specific maxims: "1. Make your contribution as informative as is required (for the current purposes of the exchange)," and "2. Do not make your contribution more informative than is required."[115]
B. The maxim of Quality, and the two resulting submaxims: "1. Do not say what you believe to be false" and "2. Do not say that for which you lack adequate evidence."[116]
C. The maxim of Relation: "Be Relevant."[117]
D. The maxim of Manner, which yields the submaxims: "1. Avoid obscurity of expression," "2. Avoid ambiguity," "3. Be brief," and "4. Be orderly."[118]

---

[114] *Id.* at 26.

[115] *Id.*

[116] *Id.* at 27.

[117] *Id.*

[118] *Id.* After Grice, pragmatists have actively disputed the proper number and articulation of the maxims, roughly dividing into two camps: the Relevance theorists and the Neo-Griceans. Relevance theorists build their theory on Grice's maxim of Relevance alone. *See* SPERBER & WILSON, *supra* note 110, at 155–63, 176–202 (discussing the principle of relevance); Robyn Carston, *Informativeness, Relevance and Scalar Implicature*, *in* RELEVANCE THEORY: APPLICATIONS AND IMPLICATIONS 179, 212–26 (Robyn Carston & Seiji Uchida eds., 1998) (discussing relevance theory). Neo-Griceans, on the other hand, have attempted to salvage more of Grice's framework. *See* LAURENCE R. HORN, A NATURAL HISTORY OF NEGATION 192–203 (1989) (discussing the neo-Gricean model); Jay David Atlas & Stephen C. Levinson, It-*Clefts, Informativeness, and Logical Form: Radical Pragmatics (Revised Standard Version)*, *in* RADICAL PRAGMATICS 1, 37–50 (Peter Cole ed., 1981) (discussing the Gricean maxims); Carston, *supra*, at 181–97 (describing the differences between neo-Griceans and relevance theorists). Almost no one today accepts Grice's framework in the specific form he articulated. Nevertheless, I will follow Grice's framework in this Article, not because it is common ground among pragmatists but because it is a common starting point. The influence of Grice's framework is such that all pragmatists feel compelled to relate their particular collection of principles back to Grice.

The gist of Grice's theory is that when a speaker utters a sentence that is insufficient, on the level of what is *said*, to meet the requirements of the maxims, the audience will preserve the presumption that the speaker is being cooperative by inferring *implicated* content to make up the difference.[119] Grice referred to the implication arrived at through this process as a "conversational implicature."[120] Take the letter-of-recommendation example introduced earlier. Because we expect such letters to speak in a certain amount of detail about the candidate's relevant qualifications, when we read a letter that only tersely mentions qualities not thought to be relevant, we are faced with an utterance that is, prima facie, in violation of the maxim of quantity. To preserve our presumption that the author of the letter, *B*, was being cooperative, we are forced to supply implicated content that explains the gap in informativeness. Here, we infer the conversational implicature that the student in question, *A*, simply does not *have* any relevant qualifications, so that *B* was being as informative as he could be without lying (and thereby violating the maxim of Quality).

Grice proposed that four features are essential to conversational implicatures and thus distinguish them from the other aspects of the total meaning an utterance communicates. First, conversational implicatures must be *cancelable* without logical contradiction.[121] For example, Professor *B*, after noting *A*'s regular attendance and punctuality, could not add "P.S. A was always late to my class," without contradicting himself. But if he closed the letter by remarking "A may have other great qualities as well, but I just don't know her that well," then the inference we would otherwise draw about *A*'s lack of qualifications would be effectively cancelled. Second, Grice suggested that conversational implicatures are essentially *nondetachable*—meaning that the speaker could convey the same implicature through another choice of words.[122] So if *B* wrote of *A* "she is always punctual" rather than

---

[119] GRICE, *supra* note 100, at 30–31.

[120] *Id.* at 30.

[121] *Id.* at 39.

[122] *Id.* More accurately, conversational implicatures *other than those generated by the maxim of Manner* are nondetachable. This is so because the maxim of Manner relies crucially on *how* something is said rather than on *what* is said. *See id.* (noting that manner

"she always arrived to class on time," the implication would be the same. Third, conversational implicatures are *nonconventional*: while what is said, follows from a linguistic community's semantic and syntactic conventions, hearers then take what is said as an input and derive conversational implicatures through an application of context, background knowledge, and the Cooperative Principle.[123] And fourth, Grice urged that conversational implicatures must necessarily be worked-out through this contextual, purposive reasoning process rather than following immediately from what is said: that is, they are *calculable*.[124]

Grice gives examples of implicatures derived from each maxim, but the maxim of Quantity has garnered the most attention from those who followed Grice. The Quantity maxim gives rise to a whole class of conversational implicatures, known as "scalar implicatures." As an example, imagine that you ask me how many children I have and I respond by saying "I have four children." Ordinarily, you will take me to have implicated that I have *no more* than four children; otherwise, my reply would have been less informative than necessary. An indication that this "no more than" meaning is an implicature rather than part of the semantic meaning of the word "four" is that it is cancelable. I can state "I have four children, maybe more" or "I have four children, in fact five" without, strictly speaking, contradicting myself. Were I to say "I have four children, in fact only one," however, I would be guilty of logical contradiction.

The cancelability of a number's upper bound ("no more than four") but not its lower bound ("at least four") indicates that the former does not contribute to the truth conditions, and therefore the semantic meaning, of the word. To see this, note that if I state "I have four children" when in fact I have only one, I have flat-out

---

implicatures are detachable).

[123] *Id.* at 39–40.

[124] *Id.* at 39–40. Other theorists have proposed further criteria to distinguish conversational implicature, *see* JULIA BELL HIRSCHBERG, A THEORY OF SCALAR IMPLICATURE 16–40 (1985) (discussing reinforceability); LEVINSON, *supra* note 97, at 118–22 (discussing reinforceability and universality); Jerrold M. Sadock, *On Testing for Conversational Implicature*, *in* 9 SYNTAX AND SEMANTICS: PRAGMATICS 281 (Peter Cole ed., 1978) (examining six criteria and concluding "more powerful tools will have to be developed"), but these need not detain us.

lied to you. But if I make the same statement when in fact I have five children, I will not have lied to you in quite the same way. Having only one child is logically inconsistent with my reply that I have four children, but my statement that I have four children is not logically inconsistent with having five children: in fact, it is logically *entailed* by it (everyone who has five children also has four children). So a number generally *entails* its lower bound (having four children entails that I have *at least* four children) but *implicates* its upper bound (my statement that I have four children is logically consistent with having five, but it certainly implies that this is not so).[125] This pragmatically implied upper bound is referred to as a "scalar implicature."

It is important to note that these scalar implicatures can be generated by more than just numbers. "Many of my students were at the party" entails that *at least some* of my students were at the party but ordinarily implicates that not *all* of them were. If I proclaim "there may be life on Mars," this entails that I think it *possible* that life exists on Mars, but I will generally be taken to have implicated that I am not in the position to make the more informative statement that there *definitely is* life on Mars. And if

---

[125] GERALD GAZDAR, PRAGMATICS: IMPLICATURE, PRESUPPOSITION, AND LOGICAL FORM 55–62 (1979); HORN, *supra* note 118, at 204–67; LEVINSON, *supra* note 97, at 132–47; Carston, *supra* note 118, at 179–81, 197–211. The approach described in the text is the classical Gricean one. The dominant modern view among both neo-Griceans and Relevance theorists is probably more complicated than this. Relevance theorists have a more capacious view of "what is said," *see* SPERBER & WILSON, *supra* note 110, at 176–83 (discussing relevance theory's understanding of "what is said"); Robyn Carston, *Quantity Maxims and Generalised Implicature*, 96 LINGUA 213, 237–41 (1995) (same), and accordingly would include in this category at least some scalar implicatures, Carston, *supra* note 118, at 197–211. There also seems to be some movement among neo-Griceans to recognize that at least those scalar implicatures generated by the use of the cardinal numbers contribute to an utterance's truth conditions and thus are part of "what is said." Horn, *supra* note 100, at 20–21. I adopt the classical Gricean account for two reasons. First, the Gricean approach, is at least a common starting point for more recent revisions. *See supra* note 118. And second, Grice's weaker conception of scalar implicature's contribution to "what is said" is sufficient for my thesis. If, as I argue below, textualists must give scalar inference a role in shaping a statute's legal content even if scalar implicatures do not contribute to "what is said," *see infra* notes 286–350 and accompanying text, then, *a fortiori*, textualists must give scalar implicatures such a role if they contribute to a statute's truth-conditional meaning. Therefore, I can adopt a modest conception of scalar implicature's contribution to meaning that all pragmatists would accept as a minimum and prescind from any assumption that scalar inference plays a more robust role.

I tell my wife that her glasses are "on the bedside table or the kitchen counter," that entails that the glasses are in one place or the other but seems to implicate that I do not know which.[126] Indeed, we can say that a scalar implicature is potentially generated by the use of any of a series of words that are generally ranked on a scale in order of informativeness.[127]

Moreover, we can easily see that the scalar phenomenon extends to normative, or deontic,[128] utterances as well. For example, imagine a statute that provides: "All drivers found to be violating the speed limit shall pay a fine of seventy-five dollars." While such a provision entails that offending drivers cannot get away with paying *less* than seventy-five dollars, it also strongly implicates that drivers need not pay *more* than seventy-five dollars—if the legislature had wanted drivers to pay a fine of one hundred dollars instead, it would have said so.[129] Similarly, when

---

[126] If I knew the glasses were on the bedside table, for example, I should have simply told her so; so the everyday use of "or" seems to be "non-truth-functional"—that is, that my reason for asserting the truth of "*p* or *q*" is other than my knowledge that either *p* or *q*, individually, is true. *See* GRICE, *supra* note 110, at 44–47; *see also* GAZDAR, *supra* note 125, at 69–74 (discussing the truth-functionallity of "and"); HORN, *supra* note 118, at 395–96 (addressing Grice's treatment of disjunction); SOAMES, *Meaning, Implicature, and Assertion*, *supra* note 110, at 304 (same).

[127] *See* HIRSCHBERG, *supra* note 124, at 47–67 (discussing scales of informativeness); LEVINSON, *supra* note 97, at 132–47 (same); Horn, *supra* note 100, at 8–12 (same). Generally, "informativeness" is defined in terms of entailment relations: so having five children entails having four children, which entails having three children; *definitely x* entails *x*, which entails *possibly x*; and so on. Professor Horn was the first to discuss these entailment-ordered scales of informativeness in the context of scalar implicature, so they are often referred to as "Horn-scales." *See, e.g.*, Yo Matsumoto, *The Conversational Condition on Horn Scales*, 18 LINGUISTICS & PHIL. 21 (1995). However, although entailment-ordering is a core type of informativeness, it is not a necessary condition. For example, <felony, misdemeanor> is not an entailment-ranked scale, but "smoking marijuana is a misdemeanor" potentially implicates "smoking marijuana is not a felony." *See* HIRSCHBERG, *supra* note 124, at 47–67, 83–113 (discussing entailment-orderings and informativeness); Carston, *supra* note 118, at 187–91 (discussing other informativeness rankings besides entailment-ordering); *see also* Matsumoto, *supra*, at 37–39 (arguing that "an implicature can . . . be licensed by lexical terms that are not usually regarded as being in the same semantic field"); Jan Van Kuppevelt, *Inferring from Topics: Scalar Implicatures as Topic-Dependent Inferences*, 19 LINGUISTICS & PHIL. 393 (1996) (proposing an alternative understanding of linguistic scales).

[128] By "deontic" I merely mean an utterance that changes the normative situation, such as a command, request, or permission.

[129] *See* EUGENE ROHRBAUGH, SCALAR INTERPRETATION IN DEONTIC SPEECH ACTS 67 (1997) (noting that "[y]ou must eat three green beans" entails "[y]ou must eat two green beans" but

the Constitution provides that the President "may, on extraordinary [o]ccasions, convene both [h]ouses [of Congress], or either of them,"[130] it seems to implicate that the President is not *required* to do so.[131] And if I tell my daughter that "you may not have three cookies," that entails that she also may not have four cookies, but it potentially implicates that she may have two.[132]

Potentially, but not necessarily. Indeed, I have hedged my examples by noting that a particular implicature is "generally" or "ordinarily" generated; it is now time to redeem the qualification. Because scalar implicatures are an aspect of the nonconventional total meaning communicated by an utterance, they are generated in a particular context, not tied to a form of words. Thus, while we can note that the use of a cardinal number like "three" will *often* or *generally* give rise to the scalar implicature "not four," the implicature is only *potential* until the number is embedded in a context.[133] For example, we have already seen that when you ask me how many children I have and I reply that "I have four children," there is a strong implication that I have no more than four. But if I make the same statement while discussing a tax credit available to parents of four or more children, the "no more than" implication does not seem to arise. Similarly, if I say of a friend taking an exam: "I think he can score a 93," I seem to have implicated that I do not think he can score a 94 or higher; but if I say the same thing when describing my friend's golf game, I will have implicated that I do not think he can score a 92 or lower.

Indeed, context affects the generation of scalar implicatures in at least four different ways. First, context can *cancel* a scalar implicature that otherwise would be generated. Just as a speaker can disclaim a potential implicature,[134] context can make clear that the hearer should not take the speaker to be committed to a "no more than" implication. For example, some types of discourse, like competitive debate, may have goals incompatible with the

---

implicates "[y]ou needn't eat four green beans").

[130] U.S. CONST. art. II, § 3.

[131] *Cf.* LEVINSON, *supra* note 97, at 134 (noting the scale "<must, should, may>").

[132] ROHRBAUGH, *supra* note 129.

[133] *See* LEVINSON, *supra* note 97, at 133–34 (distinguishing potential and actual implicatures).

[134] *See infra* notes 201, 206 and accompanying text.

observation of the Quantity maxim and may categorically "opt out" of following the maxim.[135]

Second, context plays a critical role in defining the particular scale in use. This phenomenon of *scale definition* can be broken into two subparts: *scale membership* and *scale ordering*. The effect of context on what items are included in the scale in use in a particular utterance is multifaceted. For one, consider the following sentence, said by a lawyer: "My client has three misdemeanor convictions." Is the relevant scale composed of <. . ., 4, 3, 2, 1>, or <felonies, misdemeanors>, or some combination of the two?[136] Further, assuming we know the *type* of scale in play, context can determine which *possible* values on the scale are *actual* values—in other words, how fine-grained the scale is. The statement "the water is 150 degrees" may invoke the scale <. . ., 151, 150, 149, . . .> for a cook but <. . ., 150.1, 150.0, 149.9, . . .> for a chemist.[137] And further still, assuming we know the *type* of scale

---

[135] Grice himself allowed for the possibility of "opting out" of the Cooperative Principle. GRICE, *supra* note 100, at 30; *see also* Robert M. Harnish, *Logical Form and Implicature*, *in* AN INTEGRATED THEORY OF LINGUISTIC ABILITY 313, 340 n.29 (Thomas G. Bever et al. eds., 1976) ("Grice nowhere says, nor would want to say, that all conversations are governed by the cooperative maxims."). The debate example is explored in Mitchell S. Green, *Quantity, Volubility, and Some Varieties of Discourse*, 18 LINGUISTICS & PHIL. 83, 99–100 (1995). *See also* Carston, *supra* note 118, at 215–17 (discussing less than fully informative speakers). For discussion of the objection that legislation and statutory interpretation, as a type of discourse, may have "opted out" of the Quantity maxim, see *infra* note 334.

[136] *See* HIRSCHBERG, *supra* note 124, at 171–73 (discussing the problem of multiple potential scales). We can imagine contexts supporting all three of these possibilities. If the lawyer has just been asked how many misdemeanor convictions the client has, the former scale is probably in use, generating the implicature that the client does not have four misdemeanor convictions, but not generating any implicature about the client's felony convictions. On the other hand, if the lawyer has just been asked if the client qualifies for a sentence enhancement imposed on defendants with both one felony conviction and at least three misdemeanor convictions, the latter scale is probably activated, implicating "no felony convictions" but not "*only* three misdemeanors." And if the lawyer has been asked simply "how many convictions does your client have," both scales seem to be in play.

[137] The lack of the implicature "the water is not 150.1 degrees" for a cook is perhaps explainable as a desire to avoid violating Grice's submaxim of Obscurity. Indeed, Matsumoto, generalizing from examples like this, elegantly argues that contextual limits on scalar inference can always be explained in terms of avoiding the violation of one of the other conversational maxims. Matsumoto, *supra* note 127, at 57. A similar constraint often discussed in the literature is that alternate values on a scale must be equally lexicalized. *See* Atlas & Levinson, *supra* note 118, at 44 ("[T]o constitute a genuine scale for the production of scalar implicatures, each item must be lexicalized to the same degree."). *But see* Matsumoto, *supra* note 127, at 44–48 (disputing the lexicalization condition).

in use and the *level of specificity* of the members of the scale, context can affect scale membership by capping the scale at a particular point. As noted above, while the statement "I have four children" ordinarily invokes the scale <. . ., 5, 4, 3, 2, 1>, if I utter the statement in the context of discussing a tax credit available to parents of four children or more, the scale seems to be "capped" at 4, and the "no more than" implicature will not be generated because the speaker has used the most informative member of the scale.[138]

Moreover, context plays a central role in determining the *direction* or *ordering* of a scale. As we have already seen,[139] discussion of exam scores may invoke the scale <100, 99, 98, . . .>, while discussion of golf scores will generally invoke the scale <. . ., 98, 99, 100, . . .>.[140] The direction of a scale can only be interpreted in light of context and information about background social practices, such as taking exams and playing golf.

Third, context can not only prevent a scalar implicature from being generated or, short of that, govern the definition of the scale, but it also determines a speaker's level of *epistemic commitment* to a particular implicature. My use of a less-than-fully informative item on a salient scale may implicate no more than my unwillingness to be more informative. For example, if you ask me "how many of your colleagues are Republicans?" and I maddeningly respond "oh, some . . . ," perhaps the only implicature I have communicated is that I do not care to specify how many.[141] Even more often, my use of an intermediate item on a scale implicates that I just do not know whether higher items hold or not. If you ask me "In 1975, were most Justices on the Supreme Court graduates of Harvard Law School?" and I hesitantly reply "some were," you will likely take me to have implied that I *do not*

---

[138] *See* Carston, *supra* note 118, at 189–90 (discussing contextually implied upper bounds); Van Kuppevelt, *supra* note 127, at 426, 432 (discussing "scale reduction"); *see also* Green, *supra* note 135, at 86–87 (discussing the interaction between the Gricean maxims and the evolving purpose of a conversation).

[139] *See supra* note 133 and accompanying text.

[140] For discussion, see HIRSCHBERG, *supra* note 124, at 94, 135–39 and Van Kuppevelt, *supra* note 127, at 423–26.

[141] *See* Carston, *supra* note 118, at 215–17 (discussing the difference between being unable and being unwilling to say); Green, *supra* note 135, at 96–97 (same).

know whether most of the Justices in 1975 graduated from Harvard, not that I know that most *did not*. However, if you ask me how many children I have and I respond "four," you can take me as strongly committed to the implication that I do not have a fifth child. A speaker's level of epistemic commitment to a scalar implicature, then, will often depend on the speaker's level of knowledge about the alternate items on the appropriate scale.[142]

Fourth and relatedly, although not discussed in the literature, the existence of *deontic* scalar implicatures[143] makes necessary a concept similar to a speaker's level of epistemic commitment, which I would like to call the level of *deontic commitment*. While epistemic commitment measures the degree to which a speaker is committed to a proposition's truth or falsity, deontic commitment measures the degree to which a speaker is committed to a possible action being required, permissible, or prohibited. For example, a state legislature that enacts a statute providing that "no one under the age of sixteen may drive a car without supervision" is strongly committed to the possible state of affairs "*A* is fifteen years old and drives a car without supervision" being prohibited. It also seems fairly committed, by virtue of an inference generated by the scale <. . ., 17, 16, 15, . . .>, to the possible state of affairs "*B* is seventeen years old and drives a car without supervision" being permissible. So far, so simple.

Things become more complex when we notice the possibility that more than one authority may have concurrent power over the same subject. For example, parents often have authority over their children past the age of sixteen. Is the state legislature, by enacting the above statute, committed to *B*, our seventeen-year-

---

[142] *See* HIRSCHBERG, *supra* note 124, at 75–81 (noting the connection between a speaker's knowledge and the force of an implicature); LEECH, *supra* note 97, at 86 (noting that lack of knowledge may be one reason for a weak response); LEVINSON, *supra* note 97, at 135–36 (discussing how a quantity implicatures can be "epistemically modified"); Atlas & Levinson, *supra* note 118, at 38–39 ("Given that there is available an expression of roughly equal length that is logically stronger and/or more informative, the failure to employ the stronger expression conveys that the speaker is not in a position to employ it."); Harnish, *supra* note 135, at 352–53 (noting the role of background knowledge in implicature); Horn, *supra* note 100, at 9–10 (same); Matsumoto, *supra* note 127, at 23–25 ("[I]n some cases a speaker who makes a weaker statement implicates that s/he does not know if a stronger statement holds . . . .").

[143] *See supra* notes 128–32 and accompanying text.

old, being permitted to drive a car without supervision *no matter what his parents say*? It seems far more likely that the state's deontic commitment to such a state of affairs being permissible extends only as far as *its own authority* on the subject; other authorities, such as parents, are still allowed to set stricter rules, regardless of the scalar implicature generated by the state law, which applies only to state actors. Where the relationship between the two authorities is configured differently, however, the level of deontic commitment might be much higher. For example, the Constitution provides that "[n]o person shall be a Representative who shall not have attained the age of twenty-five years,"[144] entailing that twenty-four-year-olds cannot be elected to the House and implicating that twenty-six-year-olds can. Although the Constitution also grants to each house of Congress the authority to "[j]udge . . . the . . . [q]ualifications of its own [m]embers,"[145] "determine the [r]ules of its [p]roceedings,"[146] and make all laws "necessary and proper for carrying into [e]xecution" these grants of authority,[147] it seems very likely that Congress does not have the authority to overrule the constitutional implication and refuse to seat a Representative for being under the age of twenty-six; the Constitution's implication, here, seems to be exclusive.[148] A speaker's level of deontic commitment to the implicature arising out of a deontic utterance, therefore, varies by context.

Although scalar implicature so often involves numbers or other scales that are easily quantifiable, we have seen that it would be a mistake to conclude that scalar inference is mechanical. Nevertheless, pragmatists have taught us a great deal about the phenomenon of scalar implicature, and to the extent that statutory interpretation—and preemption doctrine—is a contextual endeavor, applying the insights gleaned from the study of scalar inference to the problem of obstacle preemption holds promise.

---

[144] U.S. CONST. art. I, § 2, cl. 2.

[145] *Id.* § 5, cl. 1.

[146] *Id.* cl. 2.

[147] *Id.* § 8, cl. 18.

[148] *Cf.* Powell v. McCormack, 395 U.S. 486, 522 (1969) ("[T]he Constitution leaves the House without authority to *exclude* any person, duly elected by his constituents, who meets all the requirements for membership expressly prescribed in the Constitution.").

B. SCALAR INFERENCE AND OBSTACLE PREEMPTION

In the previous Section, we examined both the power and the limitations of the theory of scalar implicature as a framework for explicating contextually implied meaning. While the mechanism of scalar inference seems to provide a promising way of systematizing our intuitions about when the utterance of one thing can imply the negative of others, determining scalar inference remains an irreducibly contextual enterprise. In this Section, I argue that the theory of scalar inference can justify the result in most obstacle preemption cases. I will advance this argument by examining various obstacle preemption cases from the last several decades and showing that the doctrinal lines that emerge from these cases are largely justified by a nuanced, contextually sensitive effort to discern the scalar implicatures generated by the texts of the relevant federal laws and regulations.[149]

1. Some Initial Examples.

a. <. . ., 3, 2, 1>. As an opening example, consider the case *Gade v. National Solid Wastes Management Ass'n*.[150] In 1986, Congress directed the Occupational Safety and Health Administration (OSHA), the agency charged with administering the Federal Occupational Safety and Health Act of 1970 (OSH Act),[151] to promulgate regulations protecting the health and safety of "employees engaged in hazardous waste operations."[152] Pursuant to this directive, OSHA promulgated regulations governing hazardous waste worker training requirements, including the requirement that workers engaged in "activities which . . . potentially expose [them] to hazardous substances" must

---

[149] I do not claim, of course, that the Justices who decided these cases actually had the theory of scalar inference in mind. Further, I do not claim that *every* obstacle preemption case can be justified in this way, merely that most can. Nor do I attempt in this Article to examine every obstacle preemption case ever decided in order to determine what the percentage of slippage is and substantiate my claim that it is small. However, by presenting the examples in the pages that follow, I hope to convince the reader of the explanatory utility and power of the scalar-inference justification, at least giving intuitive plausibility to my claim that the amount of cases that cannot be so justified is small.

[150] 505 U.S. 88 (1992).

[151] Pub. L. No. 91-596, 84 Stat. 1590 (codified at 29 U.S.C. §§ 651–678 (2006)).

[152] Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, § 126(a), 100 Stat. 1613, 1690.

receive "a minimum of 40 hours of instruction off the site, and a minimum of three days actual field experience under the direct supervision of a trained, experienced supervisor."[153]

In 1988, the Illinois General Assembly enacted a series of licensing acts designed "to promote job safety and to protect life, limb and property."[154] Most saliently, the Hazardous Waste Crane and Hoisting Equipment Operators Licensing Act[155] required any worker who desired to "operate any crane or hoist . . . involving the disposal, cleanup or handling of hazardous waste" to obtain an operator's license from the state.[156] And in order to qualify for an operator's license, the applicant first had to submit "a certified record showing operation of equipment used in hazardous waste handling for a minimum of 4,000 hours,"[157] equivalent to a requirement of 500 days' experience.

National Solid Wastes Management Association, a trade association of businesses in the hazardous waste disposal industry, brought suit in federal district court seeking a declaratory judgment that Illinois's hazardous waste licensing laws were preempted by the regulations promulgated under the OSH Act. The district court rejected the bulk of the challenge,[158] but, on appeal, the Seventh Circuit reversed in part, concluding that the federal scheme preempted the 4,000-hour experience requirement for crane operators.[159] The Supreme Court affirmed, holding that the Illinois requirements were "impliedly pre-empted as in conflict with the full purposes and objectives of the OSH Act."[160] While acknowledging that the state laws were designed for a similar

---

[153] Hazardous Waste Operations and Emergency Response, 29 C.F.R. § 1910.120(e)(3)(i) (2012).

[154] 111 ILL. REV. STAT. 7702/2 (1989), *repealed by* Pub. Act 96-537, § 20 (2009); *id.* at 7802/2, *repealed by* Pub. Act 96-537, § 25 (2009).

[155] *Id.* at 7701/1, *repealed by* Pub. Act 96-537, § 20 (2009).

[156] *Id.* at 7704/4(a). The requirement was made subject to certain exceptions not relevant here. *Id.* at 7704/4(b)–(f).

[157] *Id.* at 7705/5(d).

[158] Nat'l Solid Wastes Mgmt. Ass'n v. Killian, No. 88 C 10732, 1989 WL 96438, at *8 (N.D. Ill. Aug. 17, 1989), *vacated*, 918 F.2d 671 (7th Cir. 1990), *aff'd sub nom*. Gade v. Nat'l Solid Wastes Mgmt. Ass'n, 505 U.S. 88 (1992).

[159] Nat'l Solid Wastes Mgmt. Ass'n v. Killian, 918 F.2d 671, 684 (7th Cir. 1990), *aff'd sub nom*. Gade v. Nat'l Solid Wastes Mgmt. Ass'n, 505 U.S. 88 (1992).

[160] *Gade*, 505 U.S. 88, 99 (1992) (citing Hines v. Davidowitz, 312 U.S. 52, 67 (1941)).

purpose as the OSH Act—the promotion of worker safety—the Court noted that " 'it is not enough to say that the ultimate goal of both federal and state law' is the same," since " '[a] state law also is pre-empted if it interferes with the methods by which the federal statute was designed to reach th[at] goal.' "[161] Tacking on an additional requirement of 4,000 hours of field experience was simply too disruptive to the OSH Act's scheme of licensing requirements—a scheme that, the Court concluded, was designed to "avoid subjecting workers and employers to duplicative regulation."[162]

I want to suggest that this result can easily be explained by the scalar-inference framework developed in the previous Section. A requirement of "three days actual field experience"[163] clearly entails as a matter of logic that workers seeking licensure must have *at least* three days' experience. However, a requirement of three days' field experience also implicates, as a pragmatic matter, that workers need not have *more* than three days of experience before licensure.[164] If Congress[165] wanted to subject workers to a

---

[161] *Id.* at 103 (quoting Int'l Paper Co. v. Ouellette, 479 U.S. 481, 494 (1987)).

[162] *Id.* at 100.

[163] 29 C.F.R. § 1910.120(e)(3)(i) (2012).

[164] *See supra* notes 125–32 and accompanying text (discussing the phenomenon of scalar implicature).

[165] Attributing the regulations directly to Congress is a bit artificial, of course, since they were in fact promulgated by OSHA. Throughout the discussion that follows, I would like to abstract away from the complications introduced by the fact that the ground-level federal rules of decision that actually preempt state law are frequently promulgated by an agency pursuant to a delegation by Congress that often does not even explicitly grant the agency authority to preempt state law. My justifications for leaving this rather glaring lacuna are threefold. First, it largely follows the Court's practice: the Court frequently sidesteps any administrative law issues by tracing the preemptive federal rule of decision directly to Congress. *See, e.g.*, *Gade*, 505 U.S. at 98–99 (attributing the OSH Act regulations to Congress); Ray v. Atl. Richfield Co., 435 U.S. 151, 161–64, 173–78 (1978) (attributing regulations promulgated by the Coast Guard pursuant to the Ports and Waterways Safety Act to Congress); Jones v. Rath Packing Co., 430 U.S. 519, 533–40 (1977) (attributing FDA regulations to Congress). Second, to the extent that the text of a regulation is a primary determiner of the regulation's meaning, *see generally* Auer v. Robbins, 519 U.S. 452, 461 (1997) (deferring to an agency's interpretation of its own regulation after concluding, based on textualist arguments, that "[t]he critical phrase [in the regulation] . . . comfortably bears the meaning the Secretary assigns"); Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 512 (1994) ("[W]e must defer to the Secretary's interpretation unless an 'alternative reading is compelled by the regulation's plain language or by other indications of the Secretary's intent at the time of the regulation's promulgation.' " (quoting Gardebring v. Jenkins, 485

requirement of 500 days' field experience, it would have said so; its use of the less informative "three days" requirement strongly implicates that the more informative "500 days" is *not* required.[166] And since Illinois's law was in conflict with this scalar implicature, it had to go.[167]

b. <must, may>. Gade, I maintain, is a clear example of a cardinal number entailing its lower bound and implicating its upper bound. But as we saw above, scalar inference is not confined to the number scale, and this holds true for obstacle preemption as well.[168] Take the case *Crosby v. National Foreign Trade Council*.[169] In 1996, motivated by the desire to "sanction Myanmar for human rights violations and to change Myanmar's domestic policies,"[170] the Massachusetts General Assembly enacted An Act Regulating State Contracts with Companies Doing Business with or in Burma (Myanmar).[171] The statute directed the establishment of a "restricted purchase list" containing "the names of all [individuals or business organizations] currently doing business with Burma (Myanmar),"[172] defined to include, inter alia, "providing any goods or services to the government of Burma

---

U.S. 415, 430 (1988))); *but see* Kevin M. Stack, *Interpreting Regulations*, 111 MICH L. REV. (forthcoming 2013), *available at* http://ssrn.com/abstract=2172954 (urging that regulations are especially susceptible to a purposive form of interpretation), the argument advanced below for giving legal force to scalar inference, *see infra* notes 286–350 and accompanying text, applies with as much force to formal rules as it does to statutes. Finally, peering past the curtain into administrative law would require addressing a host of dicey issues beyond the scope of this Article. For thoughtful explorations of some of these issues, see Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321, 1430–38 (2001); Gregory M. Dickinson, *Calibrating* Chevron *for Preemption*, 63 ADMIN. L. REV. 667 (2011); William N. Eskridge, Jr., *Vetogates,* Chevron, *Preemption*, 83 NOTRE DAME L. REV. 1441 (2008); Nina A. Mendelson, Chevron *and Preemption*, 102 MICH. L. REV. 737, 758–98 (2004); Thomas W. Merrill, *Preemption and Institutional Choice*, 102 NW. U. L. REV. 727, 759–79 (2008); Ernest A. Young, *Executive Preemption*, 102 NW. U. L. REV. 869 (2008).

[166] *See supra* notes 128–32 and accompanying text (applying scalar inference to deontic speech acts).

[167] Assuming, that is, that a legal enactment's scalar implications should have ordinary legal force, as I will later argue. *See infra* notes 286–350 and accompanying text.

[168] *See supra* notes 126–27 and accompanying text.

[169] 530 U.S. 363 (2000).

[170] Nat'l Foreign Trade Council v. Baker, 26 F. Supp. 2d 287, 291 (D. Mass. 1998), *aff'd sub nom.* Nat'l Foreign Trade Council v. Natsios, 181 F.3d 38 (1st Cir. 1999), *aff'd sub nom.* Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363 (2000).

[171] MASS. GEN. LAWS ch. 7, §§ 22G–22M (1997).

[172] § 22J(a).

(Myanmar)."[173] The statute then prohibited any state agency from purchasing goods or services from anyone on the restricted purchase list.[174]

Three months after the enactment of the Massachusetts Act, Congress passed its own legislation dealing with Myanmar.[175] The Act authorized the President to prohibit "United States persons" from "new investment" in Myanmar,[176] defined to include entry into a contract advancing "the economical development of resources located in Burma" but to specifically *exclude* "entry into . . . a contract to sell or purchase goods, services, or technology."[177] The act granted the President authority to waive any of the act's sanctions upon determining "that Burma has made measurable and substantial progress in improving human rights practices"[178] or by determining "that the application of such sanction would be contrary to the national security interests of the United States."[179]

National Foreign Trade Council (NFTC), a nonprofit corporation made up of members engaged in foreign commerce, sued in district court, asserting that Massachusetts's act was preempted by federal law.[180] The district court granted NFTC's motion for summary judgment and permanently enjoined enforcement of the Act,[181] and the First Circuit affirmed.[182] The Supreme Court granted certiorari and unanimously affirmed.[183] Critical to the Court's conclusion was its determination that "Congress clearly intended the federal Act to provide the President with flexible and effective authority over economic sanctions

---

[173] § 22G(d).

[174] § 22H.

[175] Foreign Operations, Export Financing, and Related Programs Appropriations Act, Pub. L. No. 104-208, § 570, 110 Stat. 3009-121, 3009-166 to -167 (1996).

[176] § 570(b).

[177] § 570(f)(2).

[178] § 570(a).

[179] § 570(e).

[180] Nat'l Foreign Trade Council v. Baker, 26 F. Supp. 2d 287, 289 (D. Mass. 1998), *aff'd sub nom.* Nat'l Foreign Trade Council v. Natsios, 181 F.3d 38 (1st Cir. 1999), *aff'd sub nom.* Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363 (2000).

[181] *Id.* at 292.

[182] *Natsios*, 181 F.3d 38, 78 (1st Cir. 1999), *aff'd sub nom.* Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363 (2000).

[183] *Crosby*, 530 U.S. 363, 388 (2000).

against Burma."[184] By making the sanctions on new investment conditional[185] and by vesting the President with limited authority to suspend the sanctions, Congress had given the President "as much discretion to exercise economic leverage against Burma . . . as our law will admit."[186] By providing for the *automatic* imposition of sanctions on investment in Myanmar, Massachusetts's Act "undermines the President's intended statutory authority by making it impossible for him to restrain fully the coercive power of the national economy when he may choose to take the discretionary action open to him."[187] The Court found it "simply implausible that Congress would have gone to such lengths to empower the President if it had been willing to compromise his effectiveness by deference to every provision of state statute or local ordinance that might, if enforced, blunt the consequences of discretionary Presidential action."[188]

Crosby is straightforwardly justifiable in terms of scalar inference. By making the imposition of sanctions on "new investment" in Myanmar *discretionary*, Congress implicated that these sanctions were not *required*. If Congress had wanted to simply ban the relevant investment, it could have done so, and its decision to use less informative language should not be ignored. In this context, in other words, "may" implies "not must."[189]

While the Court in *Crosby* recognized the potential implicature generated by the scale <must, may>, however, it has elsewhere given this implicature too little attention. In *Chamber of Commerce of the United States v. Whiting*,[190] the Supreme Court faced a conflict between federal immigration law and a 2007 Arizona act that sought to curb the employment of undocumented workers by employers doing business in the state.[191] While the bulk of the Court's opinion grappled with the question whether the

---

[184] *Id.* at 374.
[185] *Id.* at 369, 374.
[186] *Id.* at 375–76.
[187] *Id.* at 377.
[188] *Id.* at 376.
[189] *See supra* notes 130–31 and accompanying text (noting that "may" can implicate "not must").
[190] 131 S. Ct. 1968 (2011).
[191] ARIZ. REV. STAT. ANN. §§ 23-211 to -216 (2009).

state law was expressly preempted,[192] in Part III of the opinion the Court dealt with the petitioner's argument that the Arizona provisions relating to the Federal E-Verify system were invalid under the doctrine of obstacle preemption.[193] Established by congressional directive in 1996 as one of three "pilot programs of employment eligibility confirmation,"[194] E-Verify is an internet-based database system that allows employers to verify the work-authorization status of newly-hired employees.[195] The system is nominally free of charge to employers,[196] who submit a verification request to the system based on information and documentation provided by the employee.[197] The submitted information is then checked against the system's database, which issues either a confirmation or a tentative nonconformation of the employee's legal eligibility to work.[198]

In establishing E-Verify, Congress was careful to make clear that participation in the program is voluntary. Section 402 is titled "Voluntary Election to Participate in a Pilot Program," and subsection (a)—titled "Voluntary Election"—provides that "any person or other entity that conducts any hiring . . . in a State in which a pilot program is operating *may elect* to participate in that pilot program."[199] Moreover, subsection (a) further states that "the Attorney General may not require any person or other entity to participate in a pilot program."[200] Finally, § 402(e) *does* require the participation of certain entities—the Federal "Executive Departments;"[201] each "Member of Congress, each officer of Congress, and the head of each agency of the legislative branch;"[202]

---

[192] *Whiting*, 131 S. Ct. at 1973–81.

[193] *Id.* at 1985–87.

[194] Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 401(a), 110 Stat. 3009–546, 3009–655.

[195] *Whiting*, 131 S. Ct. at 1975.

[196] *E-Verify*, USCIS, http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=75bce2e261405110VgnVCM1000004718190aRCRD&vgnextchannel=75bce2e261405110VgnVCM1000004718190aRCRD (last updated June 26, 2012).

[197] *Whiting*, 131 S. Ct. at 1975.

[198] *Id.*

[199] § 402 (emphasis added).

[200] *Id.*

[201] § 402(e)(1)(A).

[202] § 402(e)(1)(B).

and certain violators of 8 U.S.C. § 1324A[203]—indicating that when Congress wanted to require participation, it said so. The voluntary nature of the E-Verify system for most employers is, in other words, part of a carefully calibrated legislative scheme. And although numerous proposals have been introduced to make E-Verify mandatory,[204] Congress has resolutely declined to do so.[205] Arizona's legislation, however, posed a direct challenge to Congress's determination to keep E-Verify voluntary, by requiring "every employer, after hiring an employee, [to] verify the employment eligibility of the employee through the e-verify program."[206] Given Congress's careful delineation of employers subject to either voluntary or mandatory participation in E-Verify, its repeated, deliberate refusal to make the program mandatory for most employers, and "the supremacy of the national power in the general field of foreign affairs, including power over immigration, naturalization and deportation,"[207] Congress's use of "may" in this context very strongly implicates "not must."

A majority of the Court disagreed, holding that Arizona's act did not pose an obstacle to Congress's objectives.[208] In so concluding, the Court relied on essentially two arguments. First, the Court noted that section 402(a) only limited *the Secretary of Homeland Security* from requiring participation in E-Verify[209] and that "[t]he Federal Government recently . . . approvingly

---

[203] § 402(e)(2).

[204] For examples of congressional bills that would make E-Verify mandatory, see S. 1505, 111th Cong. § 201 (2009); H.R. 3308, 111th Cong. § 201 (2009); H.R. 2083, 111th Cong. § 8 (2009); S. 1348, 110th Cong. § 301(a) (2007); H.R. 1951, 110th Cong. § 3 (2007); H.R. 19, 110th Cong. § 1 (2007); S. 2611, 109th Cong. § 301(a) (2006).

[205] *See* Brief of Business Organizations as *Amici Curiae* in Support of Petitioners at 22, Chamber of Commerce of the U.S. v. Whiting, 131 S. Ct. 1968 (2011) (No. 09-115) ("[A]s Congress has continued to study E-Verify, it has repeatedly declined to require private employers to use the program.").

[206] ARIZ. REV. STAT. ANN. § 23-214(A) (2009).

[207] Hines v. Davidowitz, 312 U.S. 52, 62 (1941).

[208] *Whiting*, 131 S. Ct. at 1985–87. Chief Justice Roberts and Justices Scalia, Kennedy, Alito, and Thomas all agreed that the Arizona provisions dealing with E-Verify were not preempted; Justice Thomas, who does not believe in obstacle preemption to begin with, declined to concur in Part IV-B of the Chief Justice's opinion—the discussion of E-Verify and obstacle preemption—leaving the reasoning in this Part (though not the ultimate result) without the support of a majority.

[209] *Id.* at 1985.

referenced Arizona's E-Verify law" when defending a 2008 "Executive Order mandat[ing] that executive agencies require federal contractors to use E-Verify as a condition of receiving a federal contract."[210] There are at least three problems with this argument, however. First, the Court's attempt to draw from section 402(a)'s specific mention of the Secretary of Homeland Security its own negative inference that other actors are allowed to make E-Verify participation mandatory is too cute by half. Section 402(a) quite naturally singles the Secretary of Homeland Security out because the Secretary is the official *charged with implementing the whole program*![211] It is hard to cut much ice with an *expressio unius* argument when one would not expect any *alterius*'s to be *expressio*'d.[212] Second, as Justice Breyer noted in dissent, "Federal contractors are a special group of employers, subject to many special requirements, who enter voluntarily into a special relation with the Government,"[213] making the example dubiously generalizable. And third—as Justice Sotomayor's separate dissent noted[214]—even ignoring the first two points, it is hard to see why the Executive Branch's litigation position in an unrelated case should do much to illuminate "the ultimate touchstone" in preemption cases: "[t]he purpose of Congress."[215]

The *Whiting* Court's second argument against preemption was that "Congress's objective in authorizing the development of E-Verify was to ensure reliability in employment authorization verification, combat counterfeiting of identity documents, and

---

[210] *Id.* (citing Exec. Order No. 13465, 73 Fed. Reg. 33,286 (2008)).

[211] § 401(a), 110 Stat. at 3009-655; *Whiting*, 131 S. Ct. at 1996 (Breyer, J., dissenting) (noting that the Secretary of Homeland Security's authority had been originally delegated to the Attorney General).

[212] *Cf.* Barnhart v. Peabody Coal Co., 537 U.S. 149, 168 (2003) ("[T]he canon *expressio unius est exclusio alterius* . . . has force only when the items expressed are members of an 'associated group or series,' justifying the inference that items not mentioned were excluded by deliberate choice, not inadvertence." (quoting United States v. Vonn, 535 U.S. 55, 65 (2002))). In terms of the framework developed in this Article, one might say that the expectation that a specific item will be mentioned *caps* the relevant scale at that item, blocking the scalar inference that items higher on the scale were deliberately excluded. *See supra* note 138 and accompanying text (noting that context can cap a scale).

[213] *Whiting*, 131 S. Ct. at 1997 (Breyer, J., dissenting).

[214] *Id.* at 2006–07 (Sotomayor, J., dissenting).

[215] Malone v. White Motor Corp., 435 U.S. 497, 504 (1978) (quoting Retail Clerks v. Schermerhorn, 375 U.S. 96, 103 (1963)).

protect employee privacy" and that "Arizona's requirement . . . in no way obstructs achieving those aims."[216] But as four formalist-leaning justices should well know, "no legislation pursues its purposes at all costs" and "[d]eciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice."[217] In particular, Justices Breyer and Sotomayor noted that Congress had also protected certain values by keeping E-Verify voluntary. The experimental nature of the program allowed any kinks and inaccuracies to be ironed out without impacting the vast majority of employers.[218] Moreover, operating E-Verify would be much more expensive if all employers were required to participate, and "[p]ermitting States to make use of E-Verify mandatory improperly puts States in the position of making decisions . . . that directly affect expenditure and depletion of federal resources."[219]

Indeed, this highlights an important difference between obstacle preemption as justified in this Article and obstacle preemption as it is sometimes applied. Done the way the *Whiting* majority did it—by abstracting away from a statute's text to determine a coherent set of "purposes and objectives" lurking in the wings and then determining whether the state law at issue "interferes" in some way with these purposes—obstacle preemption does seem very much subject to the traditional textualist critique of purposive interpretation.[220] Justified as a form of scalar inference, however, obstacle preemption is not a quest for otherworldly purposes but rather a contextual inquiry into the total meaning communicated by the utterance of a statutory text, including those meanings that are clearly implied along with those that are made explicit. In the particular context at issue in *Whiting*, the dissenters seem to have had a better ear for the ordinary meaning of the text.

c. <x and y, x>. Another obstacle preemption case that lends itself to justification in terms of scalar implicature is *Ray v.*

---

[216] *Whiting*, 131 S. Ct. at 1986.

[217] Rodriguez v. United States, 480 U.S. 522, 525–26 (1987) (per curiam); *see also supra* notes 46–50 and accompanying text; *infra* Part IV.A.

[218] *Whiting*, 131 S. Ct. at 1996 (Breyer, J., dissenting).

[219] *Id.* at 2006 (Sotomayor, J., dissenting).

[220] *See supra* notes 46–50 and accompanying text; *infra* Part IV.A.

Atlantic Richfield Co.[221] *Atlantic Richfield* dealt with the interaction between the Federal Ports and Waterways Safety Act of 1972 (PWSA),[222] which regulated vessel design, operation, and traffic in the navigable waters of the United States, and a Washington state law regulating the design and operation of oil tankers in Puget Sound.[223] The two statutes conflicted in a number of respects,[224] but the salient clash for our purposes was between the state and federal tanker-design requirements. Pursuant to the PWSA, the Secretary of Transportation had promulgated a detailed set of design, construction, equipment, and operation requirements for all tank vessels.[225] Washington, however, had promulgated its own design regulations that to some extent went beyond the federal requirements.[226]

Based on two factors, the Court determined that the federal regulations were meant to be exclusive, at least as to design requirements. First, the Court noted that the PWSA had established an intricate inspection and enforcement scheme, suggesting that "Congress, insofar as design characteristics are concerned, has entrusted to the Secretary the duty of determining which oil tankers are sufficiently safe."[227] And second, the Court observed that tanker regulation was a matter of international concern, a concern reflected in the various PWSA provisions deferring to international agreements[228] and the Act's legislative history.[229] Accordingly, the Court concluded that "Title II leaves no room for the States to impose different or stricter design requirements than those which Congress has enacted."[230]

---

[221] 435 U.S. 151 (1978).

[222] Pub. L. No. 92-340, 86 Stat. 424 (codified as amended at 33 U.S.C. §§ 1221–1236 (2006)).

[223] 1975 Wash. Sess. Laws 470 (codified at WASH. REV. CODE § 88.16.170 (1975)).

[224] *See Atl. Richfield*, 435 U.S. at 158–59, 171–78 (discussing conflicting provisions).

[225] 46 C.F.R. §§ 30–40 (1976).

[226] § 3(2), 1975 Wash. Sess. Laws at 471.

[227] *Atl. Richfield*, 435 U.S. at 163.

[228] *See* Pub. L. No. 92-340, § 201(5), 86 Stat. 424, 429 (providing that the regulations "shall not apply to vessels of a foreign nation having on board a valid certificate of inspection recognized under law or treaty"); *id.* § 201(7)(C) (prohibiting the promulgation of regulations before January 1, 1974, unless "consonant with international treaty, convention, or agreement").

[229] *Atl. Richfield*, 435 U.S. at 166–68.

[230] *Id.* at 168.

I submit that the Court's conclusion is consonant with a scalar-inference-based approach: a requirement of "x" may implicate "not y," based on a contextually salient scale <x and y, x>.[231] Here, the federal establishment of detailed design regulations that did not include the requirements imposed by Washington seemed to imply that these additional features were left optional—especially given the contextual cues that the federal scheme was meant to be exclusive. If Congress had wanted to yoke tankers with these additional requirements, it would have said so.

2. Context. Thus far, we have discussed a number of cases illustrating the variety of scales that can support a scalar inference justifying obstacle preemption. As noted above, however, scales are constituted, shaped, and limited by context.[232] The contextual nature of scalar inference has important implications for this Article's justification of obstacle preemption.

a. Scale Definition. Context can help define the particular scale in use by determining which items are members on the scale.[233] Consider *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Commission*.[234] In 1976, California enacted legislation imposing a moratorium on the state certification of new nuclear power plants until the State Energy Resources Conservation and Development Commission (Commission) certified that "there has been developed . . . a demonstrated technology or means for the disposal of high-level nuclear waste."[235] Pacific Gas and Electric sued, arguing that California's moratorium was preempted as an obstacle to federal law. The Federal Nuclear Regulatory Commission (NRC), they pointed out, had promulgated detailed safety regulations for the operation of nuclear facilities but had declined to halt their construction entirely.[236] At first blush, then, the state moratorium might seem a prime candidate for obstacle preemption under this Article's approach.

---

[231] *Cf. supra* note 126 and accompanying text (discussing the scale <x or y, x>).

[232] *See supra* notes 133–48 and accompanying text (discussing the role of context).

[233] *See supra* note 136 and accompanying text.

[234] 461 U.S. 190 (1983).

[235] Warren–Alquist State Energy Resources Conservation and Development Act, CAL. PUB. RES. CODE § 25524.2(a) (West 2012).

[236] *Pac. Gas & Elec. Co.*, 461 U.S. at 217–18.

The Court declined to find preemption, however, and looking at the role of context in defining the relevant scale can help show why. California had argued below that its moratorium was motivated not by safety concerns but by the fear that nuclear plants were not a cost-effective form of energy.[237] The Court of Appeals accepted this interpretation of the Act,[238] and the Supreme Court deferred to the appellate court on this point.[239] But cost efficiency was not in the NRC's wheelhouse. As the Court put it, "because the NRC's regulations are aimed at insuring that plants are safe, not necessarily that they are economical, [California's moratorium] does not interfere with the objective of the federal regulation."[240] Economic efficiency, in other words, did not make up part of the relevant scale.

b. Scale Specificity. Context can shape not only the membership of a scale but also the scale's level of specificity.[241] For example, in *Hillsborough County, Florida v. Automated Medical Laboratories, Inc.*,[242] the Court faced an alleged clash between federal and local efforts at regulating the collection of blood plasma.[243] The Food and Drug Administration (FDA), under the authority of the Public Health Service Act,[244] had promulgated regulations subjecting blood products and vendors to minimum safety, purity, and potency standards,[245] with the aim, among others, of "insur[ing] the availability of good quality plasma."[246] Hillsborough County, however, adopted its own set of licensing,

---

[237] *See id.* at 213–14 ("California has maintained . . . that [the moratorium] was aimed at economic problems, not radiation hazards.").

[238] *See* Pac. Legal Found. v. State Energy Res. Conservation & Dev. Comm'n, 659 F.2d 903, 925 (9th Cir. 1981) (finding that the moratorium was "directed towards purposes other than protection against radiation hazards").

[239] *See Pac. Gas & Elec. Co.*, 461 U.S. at 214–16 ("Our general practice is to place considerable confidence in the interpretations of state law reached by the federal courts of appeals.").

[240] *Id.* at 219.

[241] *See supra* note 137 and accompanying text.

[242] 471 U.S. 707 (1985).

[243] *Id.* at 711.

[244] Ch. 373, § 351(a), 58 Stat. 682, 702 (1944) (codified as amended at 42 U.S.C. § 262(a) (2006)).

[245] 21 C.F.R. §§ 640.60–.76 (2012).

[246] Current Good Manufacturing Practice for Blood and Blood Components, 39 Fed. Reg. 18,614, 18,615 (proposed May 28, 1974).

identification, testing, and record-keeping requirements governing plasma donation centers,[247] and it was Automated Medical Laboratories' contention that these regulations would increase the cost of plasma production, thereby reducing the number of plasma centers and obstructing the federal goal of ensuring an adequate supply of plasma.[248]

While the Court acknowledged that "overly restrictive local legislation could threaten the national plasma supply" and thereby interfere with federal objectives,[249] it noted that the district court had found the Laboratories' doomsday predictions to be speculative.[250] Even if Hillsborough County's regulations had *some* effect on the national market, "the record in this case does not indicate what supply the Federal Government considers 'adequate,' " and since the Court found "no reason to believe that *any* reduction in the quantity of plasma donated would make that supply 'inadequate,' " it concluded that "the Hillsborough County requirements do not imperil the federal goal of ensuring sufficient plasma."[251] In other words, while the FDA's plasma regulations did imply that requirements significantly more onerous might be preempted, the scale was not fine-grained enough to pick up on Hillsborough County's regulations.

c. Scale Capping. The phenomenon of scale capping[252] is also apparent in the preemption context. Take the case *Freightliner Corp. v. Myrick*,[253] which considered whether two state tort suits, both based on the theory that Freightliner was liable for a traffic accident because of its failure to install antilock braking systems in the tractor-trailers it manufactured, were preempted by federal motor vehicle safety standards.[254] Freightliner noted that the standards promulgated by the Secretary of Transportation, pursuant to the National Traffic and Motor Vehicle Safety Act of

---

[247] *See Hillsborough Cnty.*, 471 U.S. at 710 (discussing Hillsborough County's ordinances).
[248] *Id.* at 720.
[249] *Id.* at 721.
[250] *Id.* at 720.
[251] *Id.* at 721–22 (emphasis added).
[252] *See supra* note 138 and accompanying text.
[253] 514 U.S. 280 (1995).
[254] *Id.* at 282–83.

1966,[255] currently did not require antilock brakes, and, drawing on *Atlantic Richfield*, Freightliner argued "that the failure of federal officials 'affirmatively to exercise their full authority takes on the character of a ruling that no such regulation is appropriate.' "[256]

Unfortunately, Freightliner was too clever for its own good. In fact, the Secretary of Transportation *had* issued a safety standard effectively requiring the installation of antilock brakes, but the Ninth Circuit had suspended the standard as unsupported by substantial evidence.[257] Under these circumstances, the Court noted, the absence of a federal antilock brake requirement does not imply "that the minimum, objective safety standard . . . should be the absence of all standards," since the nonexistence of a federal regulation on point "stemmed from the decision of a federal court."[258] Accordingly, "[a] finding of liability against petitioners would undermine no federal objectives or purposes with respect to [antilock brakes] . . . ."[259] In other words, "x" does not imply "not x & y" when an obvious alternative explanation for the exclusion of "y" caps what would be the relevant scale, <x & y, x>, at x.[260]

d. Level of Deontic Commitment. The contextual determination of a speaker's level of deontic commitment to a given implicature[261] is critical in determining whether federal law preempts state law. Since obstacle preemption cases involve situations where both the federal and state governments have asserted authority over a given issue, the question whether a scalar implication arising from federal law binds state as well as federal actors will always be operating in the background, even if

---

[255] Pub. L. No. 89-563, 80 Stat. 718.

[256] *Myrick*, 514 U.S. at 286 (quoting Ray v. Atl. Richfield Co., 435 U.S. 151, 178 (1978)); *see also supra* notes 221–31 and accompanying text.

[257] Paccar, Inc. v. Nat'l Highway Traffic Safety Admin., 573 F.2d 632, 636–46 (9th Cir. 1978).

[258] *Myrick*, 514 U.S. at 286–87.

[259] *Id.* at 289–90.

[260] *See* Cal. Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 272, 284–90 (1987) (holding that the Federal Pregnancy Discrimination Act does not preempt a state law discriminating *in favor* of pregnant employees, since the Act was passed in response to the Court's holding in *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976), that Title VII did not prevent discrimination against pregnant employees).

[261] *See supra* notes 143–48 and accompanying text.

the answer is so obvious that we do not notice it. In *Gade*,[262] did the federal requirement of three days field experience—and its corresponding implication that no more than three days were required—really apply against the *state* governments, forbidding them from requiring more? How committed was Congress to preserving its grants of discretion and flexibility, in *Crosby*[263] and *Whiting*,[264] from state interference? And were the detailed design regulations in *Atlantic Richfield*[265] really so exhaustive that the states were impliedly prevented from adding to them? Questions like these qualify the conclusions we had seemed to reach about these cases. Determining Congress's level of deontic commitment is a project that must be undertaken retail rather than wholesale, with attention to the individual context of each case.

I want to suggest two factors that can help determine a speaker's level of deontic commitment in the context of two (or more) concurrent authorities. First, are both authorities equally authoritative over the particular choice in question, or is one more authoritative than the other? The authority relationship of interest to us here is something other than strictly hierarchical—if one of the authorities had supremacy over the other on every question, the context would not be one of concurrent authority, and the problem of deontic commitment would not arise. The world is full of more complex authority relationships, however: authority *A* might have dispositive power over some questions, authority *B* might have dispositive power over others, and there are various shades in between, where one authority's interest might be dominant but not exclusive.

Second, in these situations of roughly concurrent authority where one authority is *prima inter pares*, so to speak, there still remains the question whether the more authoritative entity means for its commands on this topic to be *exclusive*.[266] Authority *A* might well be supreme over authority *B* on a given topic but might still want to cooperate with *B*, or leave *B* some breathing space to

---

[262] *See supra* notes 150–67 and accompanying text.
[263] *See supra* notes 169–89 and accompanying text.
[264] *See supra* notes 190–220 and accompanying text.
[265] *See supra* notes 221–31 and accompanying text.
[266] I am grateful to Greg Dickinson for pressing me on this point.

exercise discretion within the outer bounds set by *A*. Speaking generally, then, to the extent that a speaker's authority over a particular question is higher than the authority of others and the context is such that the speaker's commands on the subject seem to be exclusive, we can expect *A*'s deontic commitment to scalar inferences bearing on that question to be fairly strong.

The relationship between the states and the federal government in the United States is one of concurrent authority over many subjects—at least since the New Deal.[267] Of course, the federal government's authority over some matters is exclusive by express constitutional designation,[268] and the Court's current commerce-clause jurisprudence indicates that there are still some enclaves subject to exclusive state authority.[269] But on the vast majority of issues, the state and federal governments both possess authority, and while the Supremacy Clause gives Congress the power to trump state authority as a matter of theory, Congress often leaves the states free rein over the field as a matter of fact.[270] For each issue in this no-man's-land of concurrent authority, then, we need to examine the relative authoritativeness of Congress and the States, as well as the exclusiveness *vel non* of Congress's directives, in order to determine Congress's level of deontic commitment to those scalar implicatures that are in tension with contrary state directives.

While this inquiry is necessarily a particularized one, we can draw a few helpful generalizations. In particular, two questions seem to bear on the level of Congress's deontic commitment in a

---

[267] *See* CUSHMAN, *supra* note 61, at 141–43 (discussing pre-New Deal dual federalism); Corwin, *supra* note 61, at 17–21 (discussing the post-New Deal shift toward "cooperative federalism"); Gardbaum, *supra* note 60, at 770–73, 785–807 (discussing the historical development of the relationship between federal and state power); Young, *supra* note 61, at 142–52 (discussing dual federalism and concurrent jurisdiction); *see also supra* notes 61–67 and accompanying text.

[268] *See, e.g.*, U.S. CONST. art. I, § 10 (prohibiting states from exercising certain powers related to foreign affairs and interstate and international commerce).

[269] *See, e.g.*, Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2589 (2012) (inaction); United States v. Morrison, 529 U.S. 598, 618 (2000) (domestic violence); United States v. Lopez, 514 U.S. 549, 567–68 (1995) (possession of firearms in a school zone).

[270] *Cf.* Robert A. Schapiro, *Monophonic Preemption*, 102 NW. U. L. REV. 811, 818–19 (2008) (articulating a "polyphonic" conception of federalism that "understands federal and state power as presumptively concurrent").

given subject area: Is this a subject of traditional state concern? And even if so, has federal legislation on this subject—though of recent vintage—become so pervasive as to have squeezed the traditional state role out? Both questions may seem familiar, because they are the questions that the Court traditionally has asked when analyzing an assertion of obstacle preemption.[271]

Certain issues, though technically within the domain of concurrent authority, so thoroughly implicate core federal concerns that the Court needs little urging to find that state interference poses an obstacle to federal interests. For example, part of the Court's rationale in *Hines v. Davidowitz*[272] for concluding that the Federal Alien Registration Act preempted Pennsylvania's stricter registration requirements was the "supremacy of the national power in the general field of foreign affairs."[273] Similarly, the Court's expansive, obstacle-preemption-like doctrine in the area of labor law[274] is inspired in part by the "commonplace that in passing the [National Labor Relations Act] Congress largely displaced state regulation of industrial relations."[275] In areas of dominant federal concern, the inference will often seem inescapable that the scalar implicature generated by Congress's use of a less-than-fully-informative term binds the states as well as the federal government.[276]

Conversely, some areas, though technically subject to concurrent federal and state control, have traditionally been dominated by the states. Thus, in *Florida Lime & Avocado Growers, Inc. v. Paul*, the Court backed up its conclusion that

---

[271] *See* Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947) (describing the test for preemption).

[272] 312 U.S. 52 (1941). *Hines* is discussed *supra* notes 71–80 and accompanying text.

[273] *Id.* at 62.

[274] *See* Int'l Ass'n of Machinists & Aerospace Workers v. Wis. Emp't Relations Comm'n, 427 U.S. 132, 154 (1976) (finding preemption of state law where "Congress intended that the conduct involved be unregulated"); San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 246–48 (1959) (denying state's ability to grant a remedy that the National Labor Relations Board cannot grant).

[275] Wis. Dep't of Indus., Labor & Human Relations v. Gould Inc., 475 U.S. 282, 286 (1986).

[276] Thus, my earlier, tentative endorsement of the Court's decision to preempt in *Crosby*, *see supra* notes 169–89 and accompanying text, and criticism of the Court's decision not to preempt in *Whiting*, *see supra* notes 190–220 and accompanying text, seem, on further consideration, sound, since both cases involved state interference with Congress's traditional dominance in the area of foreign affairs.

federal rules for determining the maturity of avocados did not preempt inconsistent state rules by noting that "the maturity of avocados is a subject matter of the kind this Court has traditionally regarded as properly within the scope of state superintendence."[277] And in *Hillsborough County*, the Court was motivated not only by the trivial effect on federal objectives of the local regulation of plasma donation[278] but also by the "presumption that state or local regulation of matters related to health and safety is not invalidated under the Supremacy Clause."[279] In these areas of traditional state dominance, the inference that a scalar implicature generated by a federal statute bars the states from setting their own independent, stricter requirements will seem more difficult to draw.

This observation provides some support for the Court's intermittent rule that "when Congress legislates 'in a field which the States have traditionally occupied . . . [,] we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.' "[280] This "presumption against preemption" is perhaps the most discussed feature of preemption doctrine; some advocate abandoning it,[281] some suggest strengthening it,[282] and some dispute whether it exists at all.[283] The approach defended in this Article provides a justification for the presumption, at least in obstacle preemption cases and at least

---

[277] 373 U.S. 132, 144 (1963).

[278] *See supra* notes 241–51 and accompanying text.

[279] 471 U.S. 707, 715 (1985).

[280] Geier v. Am. Honda Motor Co., 529 U.S. 861, 907 (2000) (alteration in original) (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)).

[281] *See, e.g.*, Dinh, *supra* note 9, at 2092–97 ("The federal structure does not support a general preemption presumption . . . ."); Robert R. Gasaway, *The Problem of Federal Preemption: Reformulating the Black Letter Rules*, 33 PEPP. L. REV. 25, 35–36 (2005) ("An obvious difficulty with [the] presumption is that its application can depend on how the inquiry is framed."); Nelson, *supra* note 9, at 290–303 ("Some applications of the presumption . . . make little sense [in] the current framework for preemption analysis.").

[282] *See, e.g.*, Chemerinsky, *supra* note 8, at 1328–32 (proposing that preemption should be found "where a federal law expressly preempts state law, and where federal and state law are mutually exclusive"); Hoke, *supra* note 57, at 760–63 (arguing that even the "clear statement" standard does not go far enough).

[283] *See generally* Davis, *supra* note 8 (arguing that the Court actually employs a presumption *in favor of* preemption).

in areas of traditional state control: to the extent that Congress has legislated against the background of longstanding state dominance, a scalar inference generated by Congress's use of less-than-fully-informative language seems, in context—and other things being equal—to bind only the federal government to the implicated upper bound, leaving the states free to exercise their traditional authority over the field.

Subject to one proviso. At times, the federal government's late entry into a field traditionally occupied by the states can be so far-reaching that the exhaustive nature of the federal scheme—even if not exhaustive enough to justify field preemption—may support the inference that Congress's level of deontic commitment is strong, that the scalar implicatures generated by the federal scheme of legislation are binding on the states. A similar inference might arise when either the subject matter or the nature of the federal scheme of regulation requires a certain degree of uniformity. Dipping once again into *Hines v. Davidowitz*, we can note that alongside the federal interest in foreign affairs, the Court was moved by the "broad and comprehensive" nature of federal immigration and naturalization law.[284] Further, in *Gade* the Court drew support from the "uniform" nature of the federal safety regulations, which indicated Congress's desire to "avoid[ ] duplicative, and possibly counterproductive, regulation."[285] In these cases, the exhaustiveness of the federal scheme or the importance of uniformity might indicate a high level of congressional deontic commitment even in an area of traditional state dominance.

In this Section, I have tried to give plausibility to my assertion that scalar inference can justify the doctrine of obstacle preemption. We have seen not only how the theory's main engine works but also how the role of context in shaping the particular scalar implicature at issue lends significant nuance to the approach. Indeed, I have asserted that once the theory of scalar inference is articulated in all of its complexity, it can explain the result in the majority of obstacle preemption cases. The theory's explanatory reach, however, is not alone *sufficient* to make it

---

[284] 312 U.S. 52, 69 (1941).

[285] 505 U.S. 88, 102 (1992).

plausible. The Court's obstacle preemption cases may be explained by the day of the week on which the cases are decided or the hair color of the attorneys arguing the cases, but that does not make these theories sound. I set out at the beginning of this Article to rebut the assumption of both textualists and purposivists that the doctrine of obstacle preemption is inconsistent with textualism by articulating a theory that could justify the doctrine based on moves that textualists are already committed to making. So far, I have articulated the theory. In the next Part, I set out the justification.

IV. TEXTUALISM AND IMPLICATED CONTENT

In the preceding Part, I argued that most of the scope of the Supreme Court's obstacle preemption doctrine could be explained if we hypothesized that the Court was taking the scalar implicatures generated by federal statutes into account when determining the legal content and preemptive reach of federal law. In this Part, I will complete my defense of obstacle preemption on textualist grounds by arguing that, as a matter of textualist first principles, the scalar inferences generated by federal law should in fact be given ordinary legal force. I will argue that textualism is committed to this result because of two critical, theoretical moves that modern textualists made in response to the shortcomings of older versions of statutory formalism: grounding their interpretive theory in a pluralist account of congressional purposes and accepting the role of context in determining textual meaning.

A. TEXTUALISM AND THE DELICATE BALANCE

As recounted above, modern textualists have subtly shifted the justification for their interpretive theory from an intent-skeptical critique of the interest-group-dominated legislative process to a more sympathetic account of lawmaking that emphasizes the complex ways in which disparate, competing policy goals interact to determine the final legislative output.[286] Modern textualism, then, finds its central motivation in the worry that by abstracting

---

[286] *See supra* notes 38–50 and accompanying text.

away from the statutory text to the "spirit of the act," judges threaten to undo the delicate, complex set of compromises that allowed the legislation to pass through the onerous, constitutionally prescribed legislative process.[287]

Though they often run together in practice, an examination of textualists' writings reveals at least three ways in which compromise between competing policy goals can shape statutory content. First, compromise can result "in a decision to go so far and no farther."[288] Congress may settle on a particular level of environmental regulation, for example, even though a higher level would better protect the environment, because of concerns about the loss of efficiency that stricter regulation might engender. Alternatively, the give and take of the legislative process can result in the adoption of disparate clauses in the same statute that seem at odds with each other.[289] The environmental lobby may convince Congress to adopt a higher level of regulation, but the industries that would be hit the hardest may demand a limited exemption as the price of compromise. Deciding where to draw

---

[287] *See supra* notes 46–50 and accompanying text.

[288] E. Associated Coal Corp. v. United Mine Workers, 531 U.S. 57, 69 (2000) (Scalia, J., concurring); *see also* Ragsdale v. Wolverine World Wide, Inc., 535 U.S. 81, 93–94 (2002) ("Like any key term in an important piece of legislation, the 12-week [period of family medical leave] was the result of compromise between groups with marked but divergent interests in the contested provision. Employers wanted fewer weeks; employees wanted more. Congress resolved the conflict by choosing a middle ground . . . ." (citation omitted)); Barnhart v. Sigmon Coal Co., 534 U.S. 438, 461 (2002) ("[The] negotiations surrounding enactment of this bill tell a typical story of legislative battle among interest groups, Congress, and the President. . . . Its delicate crafting reflected a compromise amidst highly interested parties attempting to pull the provisions in different directions."); Contract Courier Servs. v. Research & Special Programs Admin., 924 F.2d 112, 115 (7th Cir. 1991) ("Statutes do more than point in a direction, such as 'more safety'. They achieve a particular amount of that objective, at a particular cost in other interests.").

[289] *See, e.g.*, Barnhart v. Peabody Coal Co., 537 U.S. 149, 183–84 (2003) (Scalia, J., dissenting) ("The reality is that the Coal Act reflects a *compromise* between the goals of perfection in assignments and finality. It provides *some* accuracy in initial assignments along with *some* repose to signatory operators, who are given full notice of their obligations by October 1, 1993, and can plan their business accordingly without the surprise of new (and retroactive) liabilities imposed by the Commissioner."); Heath v. Varity Corp., 71 F.3d 256, 258 (7th Cir. 1995) ("Tensions among statutory provisions are common. Legislation reflects compromise among competing interests. That employers won a battle and secured the right to modify plans, while employees prevailed in a different skirmish and secured the right to qualify for benefits under existing plans, shows no more than that each side could claim some victories.").

these lines between competing values like environmental protection and economic efficiency is "the very essence of legislative choice."[290]

Second, compromise between competing values can affect the level of generality at which the statutory text is cast. As John Manning writes, "the statutory level of generality itself sends an important signal about what the legislature decided . . . ."[291] One party might insist on specific, narrowly drawn rules to limit the reach of a statutory provision as the price of its assent.[292] Alternatively, parties who cannot agree on the details of some issue might adopt abstract or vague language as a way of papering over their disagreement on the specifics.[293] "Given the central role that compromise thus plays in the design of the legislative process, judges should eschew rules of interpretation that shift the level of generality conveyed by the text, lest they disturb a (perhaps unrecorded) compromise that may have been essential to the legislation's enactment."[294]

Third—and relatedly—the decision, born of compromise, to cast the statutory terms at a particular level of generality may be reflected in the legislature's choice of means. As the Court has observed, "we . . . are bound, not only by the ultimate purposes Congress has selected, but by the means it has deemed appropriate, and prescribed, for the pursuit of those purposes."[295] "Congress may be unanimous in its intent to stamp out some vague social or economic evil; however, because its Members may differ sharply on the means for effectuating that intent, the final language of the legislation may reflect hard-fought

---

[290] Rodriguez v. United States, 480 U.S. 522, 526 (1987) (per curiam); *see also* Chi. Prof'l Sports Ltd. P'ship v. Nat'l Basketball Ass'n, 961 F.2d 667, 671 (7th Cir. 1992) ("Compromises draw unprincipled lines between situations that strike an outside observer as all but identical.").

[291] John F. Manning, *Federalism and the Generality Problem in Constitutional Interpretation*, 122 HARV. L. REV. 2003, 2019 (2009).

[292] John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1939, 2013 n.373 (2011).

[293] John F. Manning, *The Eleventh Amendment and the Reading of Precise Constitutional Texts*, 113 YALE L.J. 1663, 1707 n.159 (2004); Manning, *supra* note 292, at 1985.

[294] Manning, *supra* note 293, at 1717.

[295] MCI Telecomms. Corp. v. AT&T Co., 512 U.S. 218, 231 n.4 (1994).

compromises."[296] For example, Congress may choose to implement the mix of background purposes by means of a rule rather than a standard, or vice versa, and as Judge Easterbrook has written, "[b]oosting the level of generality by attempting to discern and enforce legislative 'purposes' or 'goals' instead of the enacted language is just a means to turn rules into standards."[297]

In short, modern textualism crucially relies on a vision of the legislative process in which proponents of rival policy goals reach discrete compromises that are then embedded in a precise statutory text that reflects a delicate balance between the competing background values. There is a striking affinity between the frequent invocation of the delicate, complex nature of legislative compromise by the Court's leading textualists and the rhetoric employed by the Court in obstacle preemption cases. For example, in *Crosby*,[298] the Court concluded that Massachusetts sanctions against Myanmar interfered with Congress's "calibrated Burma policy" that represented a "deliberate effort 'to steer a middle path.' "[299] And in *Edgar v. Mite Corp.*,[300] the Court was helped along to its conclusion that federal regulation of tender offers preempted Illinois' anti-takeover law by the observation that in passing the federal law in question "Congress intended to strike a balance between the investor, management, and the takeover

---

[296] Bd. of Governors of the Fed. Reserve Sys. v. Dimension Fin. Corp., 474 U.S. 361, 374 (1986); *see also* Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or., 515 U.S. 687, 726 (1995) (Scalia, J., dissenting) ("Deduction from the 'broad purpose' of a statute begs the question if it is used to decide by what *means* (and hence to what *length*) Congress pursued that purpose; to get the right answer to that question there is no substitute for the hard job . . . of reading the whole text.").

[297] Jaskolski v. Daniels, 427 F.3d 456, 462 (7th Cir. 2005) (Easterbrook, J.); *see also* Adams v. Plaza Fin. Co., 168 F.3d 932, 939 (7th Cir. 1999) (Easterbrook, J., dissenting) ("Congress may prefer standards over rules in some statutes, yet choose rules over standards in others. . . . [W]e disserve that legislative choice by deciding that standards really are the way to go."); Fox Valley & Vicinity Constr. Workers Pension Fund v. Brown, 897 F.2d 275, 283–84 (7th Cir. 1990) (Easterbrook, J., dissenting) ("[W]hether to have rules . . . or more flexible standards . . . is a decision already made by legislation."), *abrogated by* Kennedy v. Plan Adm'r for DuPont Sav. & Inv. Plan, 555 U.S. 258 (2009); Easterbrook, *supra* note 37, at 546–47 (arguing that courts should not "add to or subtract from Rule *Y* on the argument that, by doing so, it can get more of Goal *X*").

[298] 530 U.S. 363 (2000); *see supra* notes 169–89 and accompanying text.

[299] *Crosby*, 530 U.S. at 377–78 (quoting Hines v. Davidowitz, 312 U.S. 52, 73 (1941)).

[300] 457 U.S. 624 (1982).

bidder,"[301] and that the state law would "upset the balance struck by Congress by favoring management at the expense of stockholders."[302] Furthermore, the Court frequently observes that in determining whether a state law frustrates the purposes and objectives of federal law " 'it is not enough to say that the ultimate goal of both federal and state law' is the same,"[303] since "[a] state law also is pre-empted if it interferes with the methods by which the federal statute was designed to reach th[at] goal."[304]

This emphasis on the "delicate balance" between competing policy goals implicit in preemptive federal legislation fits well with the scalar-inference account of obstacle preemption. Scalar inferences are generated when a speaker chooses to use a less-than-fully-informative term, thereby implicating that higher values on the salient scale of informativeness do not hold.[305] In the context of legislation, Congress's use of a less-than-fully-informative term will often, perhaps overwhelmingly, represent "a decision to go so far and no farther"[306] in pursuit of a particular goal because of the pressing weight of competing values; the implicated upper bound of the scalar term protects this implicit compromise.

The argument thus far shows why textualists should be receptive to the scalar-inference approach to obstacle preemption articulated in this Article. However, a textualist still remains free to insist that the delicate balance struck by Congress may not include preemption of state law.[307] In other words, I have yet to

---

[301] *Id.* at 634.

[302] *Id.* at 639; *see also* Buckman Co. v. Plaintiffs' Legal Comm., 531 U.S. 341, 348 (2001) (finding preemption to avoid upsetting the "delicate balance of statutory objectives"); Bonito Boats, Inc. v. Thunder Craft Boats, Inc., 489 U.S. 141, 146–52 (1989) (finding preemption to avoid upsetting the balance struck by Congress); Int'l Paper Co. v. Ouellette, 479 U.S. 481, 494 (1987) (same); Wolfson, *supra* note 80, at 75–88 (contrasting the "Delicate Balance" approach to obstacle preemption with the "Floor, Not Ceiling" approach).

[303] Gade v. Nat'l Solid Wastes Mgmt. Ass'n, 505 U.S. 88, 103 (1992) (quoting *Ouellette*, 479 U.S. at 494).

[304] *Id.* (quoting *Ouellette*, 479 U.S. at 494) (alteration in original) (internal quotation marks omitted); *see also Crosby*, 530 U.S. at 379 ("The fact of a common end hardly neutralizes conflicting means . . . .").

[305] *See supra* notes 125–32 and accompanying text.

[306] E. Associated Coal Corp. v. United Mine Workers, 531 U.S. 57, 69 (2000) (Scalia, J., concurring).

[307] Note that our textualist skeptic cannot make the stronger argument that the default

provide a reason to think that the scalar implicatures generated by the precise statutory terms should have any legal effect in the ordinary course, or even that the maxim of Quantity applies to the legislative process in the first place. It is to these tasks that I now turn.

B. TEXTUALISM AND THE ROLE OF CONTEXT

Modern textualism's transition from a public-choice foundation to an emphasis on the delicate balance of legislative compromise was partly a response to certain weaknesses in the public-choice account of the legislative process.[308] But as discussed above,[309] textualists have rejected their heritage in another way. The late-nineteenth-century "plain meaning" formalists often spoke as though meaning were acontextual, somehow inherent in the marks on the page, such that "[w]here the language is plain and admits of no more than one meaning the duty of interpretation does not arise."[310] Modern textualists have self-consciously rejected this

---

position of federal legislation is "no preemption" and that since Congress knows how to include express preemption clauses, whenever it fails to do so we should read its legislation as not preemptive. This is so because, while it is true that Congress does frequently include preemption clauses, and while the Court has, on occasion, read its failure to do so as indicating a desire not to preempt, *see* Wyeth v. Levine, 555 U.S. 555, 574 (2009), Congress *also* frequently, though not always, includes *savings* clauses. The fact that Congress knows how to preempt when it wants to and how to save from preemption when it wants to but frequently does not do either suggests that there simply is no default rule on this issue, leaving the question whether Congress impliedly intended to preempt obstinate state law to be answered on a case-by-case basis. *Cf. Crosby*, 530 U.S. at 387–88 ("A failure to provide for preemption expressly may reflect nothing more than the settled character of implied preemption doctrine that courts will dependably apply . . . .").

[308] *See* Manning, *supra* note 5, at 1298–1304 (discussing the shift from first-generation to second-generation textualism).

[309] *See supra* notes 29–32 and accompanying text.

[310] Caminetti v. United States, 242 U.S. 470, 485 (1917); *see also* United States v. Gudger, 249 U.S. 373, 374–75 (1919) ("No elucidation of the text is needed to add cogency to this plain meaning, which would however be reinforced by the context if there were need to resort to it . . . ."); Procter & Gamble Co. v. United States, 225 U.S. 282, 293 (1912) ("No resort to exposition can add to the cogency with which the conclusion stated is compelled by the plain meaning of the words themselves."), *overruled on other grounds by* Rochester Tel. Corp. v. United States, 307 U.S. 125 (1939); White v. United States, 191 U.S. 545, 551 (1903) ("[I]f the language used is free from ambiguity it is the best evidence of the thing intended, and it is the duty of the courts to find . . . from the language used, the scope and meaning of the law."); United States v. Hartwell, 73 U.S. 385, 396 (1867) ("If the language be clear it is conclusive. . . . [The] intention must be gathered from the words . . . ."); JOEL

primitive theory of meaning in favor of a more nuanced, context-based approach.

Justice Thomas has written that "[s]tatutory language has meaning only in context,"[311] and Justice Scalia has proclaimed that "[i]n textual interpretation, context is everything."[312] Moreover, textualism's embrace of context is explicitly grounded in language theory. As John Manning has noted, "contemporary theories of textual interpretation . . . build on Wittgenstein's premise that language is intelligible by virtue of a community's shared conventions for understanding words in context."[313] Or as Judge Easterbrook put it, "[w]ords do not have meanings given by natural law. You don't have to be Ludwig Wittgenstein or Hans-

---

PRENTISS BISHOP, COMMENTARIES ON THE WRITTEN LAWS AND THEIR INTERPRETATION § 72 (Boston, Little, Brown & Co. 1882) ("Where the legislative meaning is plain, there is, not only no occasion for rules to aid the interpretation, but it is contrary to the rules to employ them."); J.G. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 234, at 310 (1891) ("If a statute is plain, certain and unambiguous, so that no doubt arises from its own terms as to its scope and meaning, a bare reading suffices; then interpretation is needless."); William S. Blatt, *The History of Statutory Interpretation: A Study in Form and Substance*, 6 CARDOZO L. REV. 799, 812–13 (1985) (discussing the plain meaning rule). *But see* John P. Figura, *Against the Creation Myth of Textualism: Theories of Constitutional Interpretation in the Nineteenth Century*, 80 MISS. L.J. 587, 600–13 (2010) (arguing that the nineteenth-century plain meaning formalists "cleaved to the plain meaning rule . . . only as a tactic to be used after arriving at a proper—and broadly purposivist—understanding" of the relevant text).

[311] Graham Cnty. Soil & Water Conservation Dist. v. United States *ex rel.* Wilson, 545 U.S. 409, 415 (2005) (Thomas, J.); *see also* Tyler v. Cain, 533 U.S. 656, 662 (2001) (Thomas, J.) ("We do not . . . construe the meaning of statutory terms in a vacuum. Rather, we interpret the words 'in their context and with a view to their place in the overall statutory scheme.' " (quoting Davis v. Mich. Dep't of Treasury, 489 U.S. 803, 809 (1989))); Jones v. United States, 527 U.S. 373, 389 (1999) (Thomas, J.) ("Statutory language must be read in context and a phrase 'gathers meaning from the words around it.' " (quoting Jarecki v. G.D. Searle & Co., 367 U.S. 303, 307 (1961))).

[312] Scalia, *supra* note 32, at 37; *see also* Textron Lycoming Reciprocating Engine Div. Avco Corp. v. United Auto. Workers, 523 U.S. 653, 657 (1998) (Scalia, J.) ("[I]t is a 'fundamental principle of statutory construction (and, indeed, of language itself) that the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used.' " (quoting Deal v. United States, 508 U.S. 129, 132 (1993))); United Sav. Ass'n v. Timbers of Inwood Forest Assocs., 484 U.S. 365, 371 (1988) (Scalia, J.) ("Statutory construction . . . is a holistic endeavor. A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme . . . .").

[313] Manning, *supra* note 30, at 2396; *see also* Manning, *supra* note 47, at 16 n.64 ("Textualist theory . . . incorporates the insights of modern language theory often associated with Ludwig Wittgenstein."); Manning, *supra* note 39, at 702 n.124 (noting that "even hard-core text-addicts embrace Wittgenstein's insight" that "words lack intrinsic meaning").

Georg Gadamer to know that successful communication depends on meanings shared by interpretive communities."[314]

Modern textualists' acceptance of the contextual nature of meaning has its roots in the deep theoretical foundations of textualism. In determining the meaning of a statute, textualists "ask how a reasonable person, conversant with the relevant social and linguistic conventions, would read the text in context."[315] Thus the importance of context is, in a way, built into the central methodological task that textualists set for themselves. Textualism's "reasonable person" methodological construct finds its justification, in turn, in the pluralist, compromise-oriented account of the legislative process that undergirds the entire theory.[316] Since the statutory text is the only legislative output that actually goes through the constitutionally mandated procedures for translating competing policy goals into authoritative legislative policy, textualists argue that the ordinary meaning of the text—which can only be the meaning that would be understood by an average person "conversant with the relevant social and linguistic conventions"[317] and the surrounding context—is what determines the content of the law.[318]

Textualists' acceptance of the contextual nature of statutory interpretation, then, goes deep. But in some sense, their commitment to giving legal force to some contextually determined meaning is also necessary in an almost trivial way. Consider the most simple but intimate ways that context determines meaning: disambiguation and reference assignment. An ambiguous word is

---

[314] Cont'l Can Co. v. Chi. Truck Drivers Union Pension Fund, 916 F.2d 1154, 1157 (7th Cir. 1990).

[315] Manning, *supra* note 30, at 2392–93; *see also* Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J.L. & PUB. POL'Y 59, 65 (1988) ("We should look at the statutory structure and hear the words as they would sound in the mind of a skilled, objectively reasonable user of words."); Scalia, *supra* note 32, at 17 (noting that textualists "look for a sort of 'objectified' intent—the intent that a reasonable person would gather from the text of the law, placed alongside the remainder of the *corpus juris*").

[316] *See supra* notes 46–50, 286–97 and accompanying text.

[317] Manning, *supra* note 30, at 2392–93.

[318] *See* WALDRON, *supra* note 47, at 119–46 (grounding textualism in respect for the legislative process); Manning, *supra* note 39, at 695–737 (articulating a textualist argument against consulting legislative history based on the procedural rule against legislative self-delegation); Ohlendorf, *supra* note 47, at 143–49 (offering a justification for textualism based on deference to the value choices that emerge from the legislative process).

a word with two or more discrete meanings: like "bank," which can mean a monetary institution or the stretch of land alongside a river. When faced with an utterance containing an ambiguous word, context must be consulted in order to determine which meaning to give the word. Indeed, textualists will eagerly consult context to determine which meaning to assign an ambiguous statutory term.[319]

Further, consulting context is necessary to determine the referent of referring expressions, like proper names, pronouns, or pure indexicals. Consider the case of indexicals: words like "I," "here," or "now," which can only be understood in context.[320] For example, if I utter the sentence "it is now twelve o'clock," you can only know whether the sentence is true if you know when I uttered it—what the word "now" refers to. It is often assumed that indexicals rarely occur in legislation,[321] but actually they are quite common. For example, statutory subsections frequently create rules "for purposes of this section,"[322] and the word "this" can be interpreted only in context. Like any reasonable theory of statutory interpretation, textualism will have to find some way of giving meaning to referring expressions like these, so once again textualism is forced to give context a role in determining the legal content of legislation.

If textualists allow context to shape the legal content of a statute in these ways, can they avoid giving legal force to the statute's scalar implicatures? Disambiguation and reference assignment are standardly included as part of "what is said" rather than "what is implicated," so the skeptic might be tempted

---

[319] *See* Carcieri v. Salazar, 555 U.S. 379, 391 (2009) (Thomas, J.) ("[T]he susceptibility of the word 'now' to alternative meanings 'does not render the word . . . whenever it is used, ambiguous' . . . . Here, the statutory context makes clear that 'now' does not mean 'now or hereafter' or 'at the time of application.' " (internal citation omitted) (quoting Deal v. United States, 508 U.S. 129, 131–32 (1993))); *Deal*, 508 U.S. at 131–32 (Scalia, J.) ("[A]ll but one of the meanings [of a potentially ambiguous word] is ordinarily eliminated by context.").

[320] *See generally* LEVINSON, *supra* note 97, at 54–96 (discussing indexicals); GEORGE YULE, PRAGMATICS 9–16 (1996) (same).

[321] *See, e.g.*, Andrei Marmor, *The Pragmatics of Legal Language*, 21 RATIO JURIS. 423, 426 (2008) ("[B]ecause it is widely recognized that the use of [indexicals] renders the content of the expression profoundly context-dependent, legal formulations normally try to avoid them.").

[322] *See, e.g.*, 18 U.S.C. § 21(b) (2006).

to draw the line there: welcoming the importance of context in determining what is said but refusing to give legal force to what is implicated.[323] We can press the point further, though, by considering those elements of a statutory text's "total meaning" that are contextually determined, that seem to be given legal force by all theories of statutory interpretation, including textualism, but that are not obviously part of what is said. Recent, post-Gricean pragmatic theory has emphasized that an utterance's contextually determined, pragmatic content can intrude on the semantic meaning of the words uttered.[324] For example, the exact meaning of genitive phrases seems to be underdetermined by their semantics. "Jill's horse" can mean the horse that Jill owns, the horse that she is riding, the horse standing next to her, the horse on which she has wagered, and on and on indefinitely. This cannot be a case of ambiguity (multiple meanings of the word "Jill's") unless we want to say that each genitive has an indefinite number of meanings. The more straightforward explanation is that a genitive like "Jill's" determines a *range* of possible meanings, with the actual meaning on any given occasion filled in by context.[325]

Semantically underdetermined words, similar to genitives, occasionally occur in statutes; when they do, textualists are usually open to giving context a role in determining their meaning. A deservedly well-worn example is *Smith v. United States*.[326] That case dealt with the proper interpretation of 18 U.S.C. § 924(c)(1), which provides for the imposition of a higher sentence for certain

---

[323] Actually, giving the skeptic even this out might be conceding too much. The division between the said and the implicated is, after all, arbitrary, *see* GRICE, *supra* note 103, at 118 (acknowledging that his definition of "what is said" is "in some degree artificial"), and contested, *see supra* note 110, so we might fairly demand of those textualists who hope to draw the line here to give us an account of what is included as part of "what is said," why some aspects of meaning are included and others are not, and why the aspects that are not included do not count as part of a statute's legal content.

[324] *See* SOAMES, *Meaning, Implicature, and Assertion, supra* note 110, at 316–21 (describing "pragmatic enrichment"); Bach, *supra* note 110, at 124–33 (discussing semantic underdetermination of meaning); Carston, *supra* note 110, at 636–43 (discussing pragmatic contribution to explicit content); Horn, *supra* note 100, at 17–24 (describing "pragmatic intrusion").

[325] *See* Bach, *supra* note 110, at 150–52 (discussing the semantic underdetermination of genitives); Carston, *supra* note 110, at 637 (same).

[326] 508 U.S. 223 (1993).

crimes if the defendant "uses . . . a firearm" during the crime.[327] Smith had been caught trading guns for drugs, and the question presented was whether this particular "use" of a firearm qualified Smith for § 924(c)(1)'s extra penalty.[328] The Court concluded that it did, reasoning that "Webster's defines 'to use' as '[t]o convert to one's service' or 'to employ'. . . . [Smith's] handling of the [firearm] in this case falls squarely within those definitions."[329]

Scalia famously dissented. Starting from the proposition that "[i]t is . . . a 'fundamental principle of statutory construction (and, indeed, of language itself) that the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used,' "[330] Scalia noted that "[t]hat is particularly true of a word as elastic as 'use,' whose meanings range all the way from 'to partake of' (as in 'he uses tobacco') to 'to be wont or accustomed' (as in 'he used to smoke tobacco')."[331] Elastic indeed. In fact, "use" seems to be semantically underdetermined, much in the same way as genitives are.[332] Scalia continued:

> To use an instrumentality ordinarily means to use it for its intended purpose. When someone asks, "Do you use a cane?," he is not inquiring whether you have your grandfather's silver-handled walking stick on display in the hall; he wants to know whether you *walk* with a cane. Similarly, to speak of "using a firearm" is to speak of using it for its distinctive purpose, *i.e.*, as a weapon.[333]

---

[327] *Id.* at 227.

[328] *Id.* at 225–27.

[329] *Id.* at 228–29 (quoting WEBSTER'S NEW INTERNATIONAL DICTIONARY 2806 (2d ed. 1950)).

[330] *Id.* at 241 (Scalia, J., dissenting) (quoting Deal v. United States, 508 U.S. 129, 132 (1993)).

[331] *Id.* at 241–42 (quoting WEBSTER'S NEW INTERNATIONAL DICTIONARY, *supra* note 329, at 2806).

[332] *See* SCOTT SOAMES, *Interpreting Legal Texts: What Is, and What Is Not, Special About the Law*, *in* 1 PHILOSOPHICAL ESSAYS, *supra* note 110, at 403, 408–15 (discussing the word "use" in *Smith* as an example of semantically underdetermined language).

[333] *Smith*, 508 U.S. at 242 (Scalia, J., dissenting).

Scalia's dissent in *Smith* illustrates that textualists not only embrace the role of context in determining "what is said"; they also are willing to give legal force to the contextually-determined, pragmatic intrusion of "what is implicated" into the semantic content of statutory language. This alone might be enough to clinch the case for giving scalar inference a role in shaping legal content. If some implicated content has legal force, why not scalar inferences?[334] However, we have not yet seen the most compelling

---

[334] One justification for declining to give conversational implicature—including scalar implicatures—legal force might be a belief that the legislative process is strategic rather than cooperative, meaning that the conversational maxims, derived as they are from the presumption that the participants in the relevant speech exchange are engaged in a cooperative exchange of information, *see* GRICE, *supra* note 100, at 26 (discussing the Cooperative Principle), simply cannot apply. For thoughtful reservations along these lines, see Marmor, *supra* note 321, at 435–40 and Andrei Marmor, *Can the Law Imply More Than it Says?—On Some Pragmatic Aspects of Strategic Speech* (U.S. Cal. Legal Studies Research Paper No. 09-43, 2009), *available at* http://ssrn.com/abstract=1517883.

An extended discussion of this objection is beyond the scope of this Article, but I can sketch three brief responses. First, I think Marmor overemphasizes the "strategic" aspects of the law-making and law-applying processes and underestimates their cooperative aspects. The faithful agent theory, which sees judges as faithfully carrying out the commands of their legislative principals, has long been dominant in American legal thought, *see supra* note 34 and accompanying text, and even those who reject it view "statutory interpretation as a partnership, in which the . . . court and the . . . legislature are collaborator-partners in creating statutory meaning," William N. Eskridge, Jr., *Spinning Legislative Supremacy*, 78 GEO. L.J. 319, 331 (1989). Second, even assuming a strategic legislature rather than a cooperative one, recent work in pragmatics has suggested that much less than full-on "cooperation" is necessary to get an account of quantity implicature going. As Laurence Horn, a prominent neo-Gricean, notes, "while cooperation is a key notion," it "need not be stipulated as an arbitrary convention, but rather constitutes a deduction from the general principle that we expect others to behave as best suits their goals." Horn, *supra* note 100, at 24 (citation omitted) (internal quotation marks omitted). Indeed, "the speaker's and hearer's joint (though tacit) recognition of the natural tendency to avoid unnecessary effort, and the inferences S expects H to draw from the former's efficient observance of this tendency, are more explicable directly from rationality than from cooperation as such," meaning that "collaboration need not be present . . . at least for the quantity maxims." *Id.* at 24–25. And hints of this sparer conception of "cooperation" were present in Grice from the beginning. *See* GRICE, *supra* note 100, at 29–30 (discussing types of talk exchanges that differ from cooperative transactions). In other words, modern pragmatists have deemphasized cooperation and instead grounded their theory on a vision of rational, self-interested behavior that looks rather like Marmor's own assumptions about the legislative process. *See* Marmor, *supra* note 321, at 435–37 (discussing the legislative process); Marmor, *supra*, at 11–14 (discussing strategic speech). Finally, the widespread use of the linguistic canons of construction and other principles of negative implication, *see infra* notes 335–49 and accompanying text, belie any suggestion that the maxim of quantity, at least, does not apply in the legislative setting.

A related concern is that perhaps the legislature and judiciary have simply "opted out"

argument in favor of giving scalar implications legal force: textualists are already committed to giving the maxim of Quantity a role in determining a statute's legal content.

Textualists have long embraced the linguistic canons of construction, including *expressio unius est exclusio alterius* (the expression of one thing implies the exclusion of others), the canon against surplusage (a statute should be interpreted so as to give meaning to every word), and *ejusdem generis* (a general term following a list of specific items should be interpreted to include only those things "of the same kind" as the listed items).[335] These canons appear to be straightforward applications of Grice's maxim

---

of the cooperative principle and maxims—a situation Grice allowed for, GRICE, *supra* note 100, at 30—preventing the derivation of any quantity inferences. Illustrating a concern along these lines, Professor Larry Solum argues that the "success conditions" for the communication of speaker's meaning are not met in the context of legal interpretation, because the contextual factors normally relied upon to determine speaker's meaning are not available in the unique context of law-making and law-applying. Lawrence B. Solum, *Semantic Originalism* 41–50 (Ill. Pub. Law & Legal Theory Research Paper No. 07-24, 2008), *available at* http://papers.ssrn.com/abstract=1120244; *see also* Heidi M. Hurd, *Sovereignty in Silence*, 99 YALE L.J. 945, 968–90 (1990) (arguing that features of the legal process make interpreting legislation according to a communicative approach impossible). Again, a thorough discussion of the ways in which Grice's maxims do and do not apply in the special context of law making and interpretation is beyond this Article's scope; suffice it to say that at least the maxim of quantity seems to apply, given the widespread use of the canons and principles of negative implication. *See infra* notes 335–49 and accompanying text. I do not take Solum to disagree. *See* Solum, *supra*, at 52–54, 56–57 (raising the possibility of "constitutional implicatures").

[335] *See, e.g.*, Bruesewitz v. Wyeth LLC, 131 S. Ct. 1068, 1076 (2011) (Scalia, J.) (*expressio unius*); Bloate v. United States, 130 S. Ct. 1345, 1354–55 (2010) (Thomas, J.) (surplusage); United States v. Santos, 553 U.S. 507, 519 n.6 (2008) (Scalia, J.) (surplusage); Norton v. S. Utah Wilderness Alliance, 542 U.S. 55, 62–63 (2004) (Scalia, J.) (*ejusdem generis*); Dastar Corp. v. Twentieth Century Fox Film Corp., 539 U.S. 23, 35 (2003) (Scalia, J.) (surplusage); Christensen v. Harris Cnty., 529 U.S. 576, 582–84 (2000) (Thomas, J.) (*expressio unius*); AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366, 408 (1999) (Thomas, J. dissenting) (*ejusdem generis*); Manning, *supra* note 292, at 2007 (calling a version of *expressio unius* "a commonsense approximation of how people use language"); Scalia, *supra* note 32, at 26 (describing the linguistic canons as "so commonsensical that, were [they] not couched in Latin, you would find it hard to believe anyone could criticize them"). Judge Easterbrook has been a noted dissenter from the use of the canons. *See In re* Cont'l Cas. Co., 29 F.3d 292, 294 (7th Cir. 1994) (Easterbrook, J.) ("We are skeptical of [*expressio unius*], for the omission of other items from a list may reflect no more than a belief that other options are provided for elsewhere."). *But see* Easterbrook, *supra* note 37, at 540 (defending "[a]t least some rules of statutory construction" as "off-the-rack provisions that spare legislators the costs of anticipating all possible interpretive problems and legislating solutions for them").

of Quantity.[336] The intuition behind *expressio unius*, for example, seems to be that Congress would not bother to enumerate some things if it intended unenumerated items to be included anyway. Moreover, if it wanted to include these other things, would not it say so?[337] In other words, we expect our legislatures to be "as informative as is required," but no "more informative than is required."[338] If textualists accept that quantity implicatures can shape legal content in this instance, how can they deny the same role to scalar inference—another type of quantity inference?[339]

One response available to the textualist skeptical of giving scalar implications legal force is to deny that the maxim of Quantity has any role in shaping legal content and to attempt to justify *expressio unius* and the other quantity-based canons on other grounds. The most plausible alternative justification, and one that textualists have in fact advanced, is that *expressio unius* and the other linguistic canons merely represent "off-the-rack" default rules,[340] "clear and predictable linguistic and syntactic rules [that] permit legislators and interpreters to decode enacted texts."[341] Justified in this way, the canons need not represent any attempt to accurately capture actual linguistic practices; rather,

---

[336] *See* David L. Shapiro, *Continuity and Change in Statutory Interpretation*, 67 N.Y.U. L. REV. 921, 942 (1992) (arguing that the canons reflect a preference for continuity over change and justifying that preference because "in a cooperative setting, a speaker wishing to use language efficiently and effectively will communicate as much as is necessary for purposes of the exchange, but no more."); *see generally* M.B.W. Sinclair, *Law and Language: The Role of Pragmatics in Statutory Interpretation*, 46 U. PITT. L. REV. 373 (1985) (explaining the canons in light of Grice's theory of conversation); Geoffrey P. Miller, *Pragmatics and the Maxims of Interpretation*, 1990 WIS. L. REV. 1179 (same).

[337] *Cf.* Manning, *supra* note 292, at 2006–07 (defending a version of negative implication on similar grounds).

[338] GRICE, *supra* note 100, at 26. Similarly, *ejusdem generis* is perhaps best grounded on the intuition that if a list of specific items were not taken to gloss the "catch all" word at the end of the list, the legislature need not have included the specifics at all; it could have eschewed the list and just used the catch-all word. *See* Miller, *supra* note 336, at 1199–1200 (explaining *ejusdem generis* in this way). And the canon against surplusage is generally supported by the argument that "Congress is not to be presumed to have used words for no purpose." Platt v. Union Pac. R.R. Co., 99 U.S. 48, 58 (1878). *Res ipsa loquitur*.

[339] Indeed, it could be argued that *expressio unius* is itself a scalar implicature, generated by the scale <x and y, x>. *See supra* notes 221–31 and accompanying text.

[340] Easterbrook, *supra* note 37, at 540.

[341] Manning, *supra* note 16, at 292.

canons like *expressio unius* are simply a "common point of reference for legislators and judges,"[342] legitimated "by virtue of longstanding prescription."[343] According to this conventionalist tack, the canons are, in a deep sense, arbitrary: *expressio unius est inclusio alterius* would be just as good as the more traditional *exclusio* version, if it had happened to catch on instead.[344]

The difficulty with this approach is not that it fails to justify the use of canons like *expressio unius*; rather, the problem is that the conventionalist justification would *always* justify applying the canon. The conventionalist justification of the canons fails because it cannot explain the occasions on which judges decline to adopt, say, an *expressio unius* reading, and the reasons they give for doing so. For *expressio unius* to be worthwhile as an off-the-rack default rule, it must be applied clearly and consistently; but commentators have long recognized that "[t]he maxim does not apply to a statute the language of which may fairly comprehend many different cases, in which some only are expressly mentioned by way of example merely, and not as excluding others of a similar nature."[345] Indeed, the Court has recently attempted to clarify the application of the *expressio unius* canon, suggesting that "it has force only when the items expressed are members of an 'associated group or series,' justifying the inference that items not mentioned were excluded by deliberate choice, not inadvertence."[346] This is the language of a Court attempting to develop a rule of construction that tracks actual linguistic usage, not one

---

[342] Manning, *supra* note 47, at 96.

[343] Manning, *supra* note 15, at 82; *see also* Marmor, *supra* note 321, at 440 (holding out the possibility of justifying the canons on conventionalist grounds).

[344] Of course, some default rules are less efficient than others: an *expressio unius, inclusio alterius* rule would essentially force legislators to try to imagine all possible includables and, if undesirable, affirmatively exclude them. The *exclusio* rule does a far better job of economizing on legislative decision costs, and I see no reason why conventionalists cannot take this into account. *See also infra* note 347 (discussing Einer Elhauge's "preference eliciting default rule" approach). This concession is not enough to rescue conventionalism, however, for two reasons. First, efficiency considerations like these are likely to underdetermine the choice of default rule. Second, the conventionalist approach—even supplemented by efficiency considerations—still fails to fit the actual practice of canon application *and nonapplication*. *See infra* notes 345–47 and accompanying text.

[345] SUTHERLAND, *supra* note 310, § 329.

[346] Barnhart v. Peabody Coal Co., 537 U.S. 149, 168 (2003) (quoting United States v. Vonn, 535 U.S. 55, 65 (2002)).

attempting to develop an arbitrary default rule. The conventionalist justification fails because it does not fit the way judges actually use and talk about the canons.[347]

Failing an alternative justification for the quantity-based canons, textualists skeptical of giving scalar inference legal force will simply have to do without them. But is this even imaginable? Can we imagine a world in which a statute providing "All cats born on or after January 1, 2010, shall be vaccinated for feline leukemia" would not fairly be read to let cats born before January 1, 2010 off the hook?[348] Moreover, without relying on some principle of negative implication, textualism arguably becomes self-defeating. To see why, note that textualism's central

---

[347] An alternative justification is offered by Einer Elhauge's important work on statutory default rules. Professor Elhauge argues that the linguistic canons, including *expressio unius*, are in fact "preference-eliciting default rules," which instruct judges to adopt the interpretation that "is more likely to be corrected by the legislature because it burdens some politically powerful group with ready access to the legislative agenda." EINER ELHAUGE, STATUTORY DEFAULT RULES: HOW TO INTERPRET UNCLEAR LEGISLATION 152 (2008). This is not the place for a full discussion of Elhauge's elegant work; suffice it to say that Professor Elhauge's account is far more persuasive with respect to the *substantive* canons than the linguistic ones. Regarding substantive canons, Elhauge offers a compelling argument that the substantive valence of these canons encourages interpretations that favor the politically powerless at the expense of those with relatively strong influence on the legislative process. *Id.* at 168–87. When it comes to the linguistic canons, however, Elhauge is left arguing that *if* the political forces *happen* to be aligned in such a way that the interpretation commanded by, say, the *expressio unius* canon disfavors the politically influential, application of the canon is justified. *Id.* at 190. If the distribution of political influence does not come out this way, however, Elhauge acknowledges that use of the canon is not justified. *Id.*

The problem with this approach is that Elhauge gives us no reason to believe that the alignment of political forces generally will fall out in the right way. This leaves the canons incompletely and contingently justified. If political influence is distributed the right way, then an *expressio unius* reading will happen to make sense; but the same thing is true of the contrary *inclusio* rule. Professor Elhauge attempts to rescue his account by suggesting that the disparate application and nonapplication of the canons accurately fit those situations in which the political forces are or are not aligned so as to support a preference-eliciting rule. But Elhauge's only argument that the pattern of application and nonapplication actually falls out this way is that the two cases cited in Karl Lwellyn's influential article happen to come out right. *Id.* at 190–92 (citing 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)). Of course, two cases is a very small sample size, and, as Elhauge is forced to concede, he can offer no reason to suspect that the fortunate match between these two cases and his theory will generalize, once we look at the *overall* pattern of the canon's application and non-application. *Id.* at 193. Without more, Elhauge's justification of *expressio unius* and the other linguistic canons is radically incomplete.

[348] Adapted from Miller, *supra* note 336, at 1196.

methodological move is to insist that when Congress provides a specific means *Y* for carrying out desired legislative goal *X*, judges should pursue the specific means rather than the general goal. But statutes rarely *say* this explicitly; a statute almost never provides "goal *X* shall be carried out by implementing means *Y*, and *Y shall be the exclusive means* of carrying out goal *X*." Instead, textualists essentially ask judges to read something like this "exclusivity clause" into each statute, whether it is there or not. Now this implication seems quite plausible: why would Congress bother to prescribe a specific means of pursuing its background aims if any means would do? But plausible or not, this central textualist move is based on *an implication*, and one that is quite plainly grounded on something like the quantity maxim.[349]

So textualists are not only committed by necessity and by their deepest theoretical presuppositions to giving context a role in shaping a statute's legal content; they must give implicatures derived from the maxim of quantity a similar role or risk undermining their own interpretive methodology. In the end, this should not surprise us. Textualism asks "how a reasonable person, conversant with the relevant social and linguistic conventions, would read the [statutory] text in context."[350] But surely any reasonable person would factor clear scalar implicatures into her understanding of the text. Accordingly, I conclude that the theory of scalar inference not only justifies the majority of the Court's obstacle preemption cases, but that textualists are committed to accepting this justification because of their own theoretical first principles.

V. IMPLICATIONS

Before concluding, let us briefly pause to consider a few implications—for our understanding of both textualism and preemption doctrine—of justifying obstacle preemption through the theory of scalar inference.

---

[349] In a recent article, Professor Manning comes quite close to recognizing this. *See* Manning, *supra* note 292, at 2006–17 (discussing "the exclusivity maxim").

[350] Manning, *supra* note 30, at 2392–93.

A. TEXTUALISM

Textualism is often reproached for being too wooden and inflexible. Some decry textualism as an "impoverished" form of interpretation that leaves "little room for the exercise of judgment," and accordingly "can occasionally end up with brilliant insights, but more often . . . ends up with nonsense."[351] Others criticize textualism as relying "on an insufficiently sophisticated understanding of the human language faculty."[352] And some take this criticism even further, arguing that since textualism relies on an "obviously mistaken" semantic theory, and since "textualists cannot be blind to the logical absurdity of their interpretative position," they must be secretly motivated by "a neo-conservative conception of the regulatory state," making the entire theory "deceptive and consequently immoral."[353]

This Article suggests that these criticisms are overblown. Far from "treating . . . statutes as a wooden set of self-sufficient words,"[354] textualism has the capacity to take into account a rich set of contextual implications generated by a statutory text. In a way, this has been implicit in modern textualism from the beginning, and textualists have been insistently calling our attention to the fact for some time now.[355] But seeing a concrete demonstration of textualism's commitment to the contextual nature of meaning—a textualist justification of obstacle preemption—may clarify the ways in which modern textualists have rejected the wooden literalism of their plain meaning ancestors.

---

[351] Suzanna Sherry, *Textualism and Judgment*, 66 GEO. WASH. L. REV. 1148, 1148, 1152 (1998).

[352] Lawrence M. Solan, *Learning Our Limits: The Decline of Textualism in Statutory Cases*, 1997 WIS. L. REV. 235, 236 (1997).

[353] Andrei Marmor, *The Immorality of Textualism*, 38 LOY. L.A. L. REV. 2063, 2065, 2066, 2077, 2079 (2005).

[354] Merrell Dow Pharm. Inc. v. Thompson, 478 U.S. 804, 810 (1986) (quoting Romero v. Int'l Terminal Operating Co., 358 U.S. 354, 379 (1959)).

[355] *See supra* notes 308–18 and accompanying text.

B. OBSTACLE PREEMPTION

Finally, this Article's effort to reconcile textualism and obstacle preemption carries implications for our understanding of obstacle preemption as well. Even if the theory pursued in this Article is consistent with the result in a large majority of the Court's obstacle preemption cases, the fit is not perfect, and the theory allows us to critique the doctrine around the edges, as well as justify its core. We have already seen one way in which the proposed justification of obstacle preemption can affect the contours of that doctrine. Conceived of as a form of scalar inference, obstacle preemption is less of a "freeranging speculation about what the purposes of [a] federal law must have been,"[356] and more of a focused, nuanced inquiry into the specific implications fairly generated by the terms of the statutory text, understood in context.[357] Before closing, I would like to discuss one further way that this Article's justification of obstacle preemption may affect the shape of that doctrine: the interaction of obstacle preemption and savings clauses.[358]

In *Geier v. American Honda Motor Co.*,[359] the Court faced a dispute centered around a Federal Motor Vehicle Safety Standard, issued by the Department of Transportation (DOT) pursuant to the National Traffic Motor Vehicle and Safety Act of 1966,[360] requiring certain automobile manufacturers to install either

---

[356] Wyeth v. Levine, 555 U.S. 555, 595 (2009) (Thomas, J., concurring in the judgment).

[357] *See supra* notes 190–220 (discussing Chamber of Commerce of the U.S. v. Whiting, 131 S. Ct. 1968 (2011)).

[358] The Court first addressed the interaction between express and implied preemption in *Cipollone v. Liggett Grp.*, 505 U.S. 504 (1992), holding that "[w]hen Congress has . . . included in the enacted legislation a provision explicitly addressing th[e] issue [of preemption], . . . there is no need to infer congressional intent to pre-empt state laws from the substantive provisions of the legislation." *Id.* at 517 (citation omitted) (internal quotation marks omitted). However, just three terms later, in *Freightliner Corp. v. Myrick*, 514 U.S. 280 (1995), the Court backed off, clarifying that "[t]he fact that an express definition of the pre-emptive reach of a statute 'implies'—*i.e.*, supports a reasonable inference—that Congress did not intend to pre-empt other matters does not mean that the express clause entirely forecloses any possibility of implied pre-emption." *Id.* at 288. This seems largely unobjectionable. I do not claim that an express preemption provision cancels any potential scalar implicatures, merely that an express savings clause generally will.

[359] 529 U.S. 861 (2000).

[360] Pub. L. No. 89-563, 80 Stat. 718.

automatic seatbelts, airbags, or some other approved passive restraint device, in their vehicles.[361] The Court held that this federal standard preempted a California tort suit based on the theory that Honda was liable for failing to install an airbag in one of its vehicles.[362] The Court noted that the DOT had "deliberately sought variety" by permitting "manufacturers to choose among different passive restraint mechanisms."[363] Reasoning that a "rule of state tort law . . . require[ing] manufacturers of all similar cars to install airbags rather than other passive restraint systems, such as automatic belts[,] . . . would have presented an obstacle to the variety and mix of devices that the federal regulation sought,"[364] the Court held the state tort suit to be preempted under the doctrine of obstacle preemption.[365]

At first blush, the Court's reasoning seems entirely consonant with this Article's approach. The federal regulation required airbags *or* automatic seatbelts, implicating that either one would do, by inference from the scale <x, x or y>. If the DOT had intended the automobile industry's options to be limited to just airbags, it would have said so.[366] However, there is a catch. The Traffic and Motor Vehicle Safety Act included a savings clause, providing that "[c]ompliance with any Federal motor vehicle safety standard . . . does not exempt any person from any liability under

---

[361] Federal Motor Vehicle Safety Standard 208, 49 C.F.R. § 571.208 (2012).

[362] *Geier*, 529 U.S. at 865.

[363] *Id.* at 878.

[364] *Id.* at 881.

[365] *Id.* at 886.

[366] *See supra* note 126 and accompanying text (discussing the scalar implicature generated by the use of "or"). In the literature, this is known as the problem of "free choice permission." *See* Hans Kamp, *Free Choice Permission*, 74 PROC. OF THE ARISTOTELIAN SOC'Y 57, 61–62 (1973) (noting that although "x" entails "x or y," and not vice versa, "you may x or y" entails "you may x," but not vice versa). Linguists have argued that free choice permission is explicable in pragmatic terms, *see generally* Hans Kamp, *Semantics Versus Pragmatics*, *in* FORMAL SEMANTICS AND PRAGMATICS FOR NATURAL LANGUAGES 255 (F. Guenthner & S.J. Schmidt eds., 1979) (giving a pragmatic account of free choice permission); Katrin Shulz, *A Pragmatic Solution for the Paradox of Free Choice Permission*, 147 SYNTHESE 343 (2005) (same), although the verdict is not unanimous, *see generally* Danny Fox, *Free Choice and the Theory of Scalar Implicatures*, *in* PRESUPPOSITION AND IMPLICATURE IN COMPOSITIONAL SEMANTICS 71 (Uli Sauerland & Penka Stateva eds., 2007) (arguing that free choice effects are not adequately explained by the theory of conversational implicature).

common law."[367] This would seem to be a rather large fly in the ointment, but the Court breezed past the problem. Noting that "[n]othing in the language of the saving clause suggests an intent to save state-law tort actions that conflict with federal regulations," the Court held "that the saving clause . . . does *not* bar the ordinary working of conflict pre-emption principles."[368]

This Article's justification of obstacle preemption suggests a different view. As noted earlier, a scalar implicature is cancelable.[369] If I say "there are two beers in the fridge . . . and maybe more," the implicature that there are no more than two beers in the fridge simply never arises. Accordingly, if standard obstacle-preemption reasoning is a form of scalar inference, then the inference should be cancellable. And perhaps the most straightforward way for Congress to cancel this type of inference is to include a savings clause prescribing that the federal standards set a floor rather than a ceiling.

VI. CONCLUSION

In this Article, I have attempted a rapprochement between textualism and obstacle preemption. The common belief that the two are ineluctably in tension with each other is understandable and, initially, even plausible in light of their respective histories. Obstacle preemption emerged during the heyday of purposivism, and textualism has largely defined itself in opposition to this purposivist tradition. That obstacle preemption has suspect lineage, from the textualist point of view, however, does not guarantee that the doctrine is unsound. Building on the insights of modern language theory, I have argued that obstacle preemption is justifiable as a form of negative inference from the statutory text. Moreover, I have contended that, conceived of in this way, the doctrine is not only compatible with textualism, but textualists are compelled to accept the doctrine because of the ways in which the foundations of their theory have developed.

---

[367] 15 U.S.C. § 1397(k) (1988).

[368] *Geier*, 529 U.S. at 869.

[369] *See supra* note 121 and accompanying text.

This Article has been technical, at times excruciatingly so. In one sense, this may be a knock against the approach advocated here. In another sense, however, increased attention to the insights of sophisticated language theory is perhaps an important consequence of the underlying forces that have motivated the trend towards textualism on the federal bench. The Supreme Court has been paying a great deal of attention to statutory text lately, and one reason for this must be a conviction that the language used by Congress is the best and perhaps only legitimate guide to the value choices made by that body. To the extent that our theory of authority demands deference to these choices, we might rightly resort to the most sophisticated tools available to mine Congress's language for content. When the Court dons its thick grammarian's spectacles, in other words, it is not out of laziness or a fetishism for the abstruse; it is out of the desire to be as faithful to the legislature's value choices as possible.