

Statutory Interpretation — Textualism —
Fischer v. United States

The era of *Pax Scalia* may be over. Once upon a time, Justice Scalia’s brand of textualism — one that categorically shunned extratextual sources of statutory meaning — dominated among the Court’s textualists.¹ But divisions in textualism have emerged from the shadow of Justice Scalia. Recently, in *Fischer v. United States*,² the Court declined to apply the Sarbanes-Oxley Act of 2002³ to alleged “obstructive conduct” undertaken during the January 6 insurrection.⁴ The provision at issue, § 1512(c)(2), criminalizes anyone who “otherwise obstructs, influences, or impedes any official proceeding.”⁵ Rejecting the United States’s position that § 1512(c)(2) served as a general obstruction statute, the Court held that a prosecution under the provision requires action taken with respect to evidence tampering.⁶ The majority grounded this decision in several bases, one of which being that the Sarbanes-Oxley Act had been enacted in the wake of the Enron accounting scandal and aimed to close a loophole that had thwarted evidence-tampering prosecutions.⁷ It was doubtful, the majority reasoned, that Congress would create “a catchall provision that reaches far beyond the document shredding and similar scenarios that prompted the legislation in the first place.”⁸ By using the “mischief” that § 1512(c)(2) aimed at, *Fischer* demonstrates divisions within textualist methodology. Textualists have long urged the need to view “text in context,” and *Fischer* seemed to signal that a statute’s mischief is relevant “context” that any textualist may consider. But *Fischer* left unresolved questions on how textualists should determine this context moving forward.

On January 6, 2021, Congress met to certify the votes of the 2020 presidential election.⁹ As Congress did so, a mob of supporters of then-President Donald Trump violently breached the Capitol building, assaulting police officers and bringing the certification proceedings to a

¹ See, e.g., ROBERT A. KATZMANN, JUDGING STATUTES 39–40 (2014) (describing Justice Scalia’s textualism as an “assault on the dependence on any extratextual source in determining statutory meaning,” sustained by courts since the 1980s, *id.* at 40); see also William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 628, 658, 660 (1990) (documenting the early rise of Justice Scalia’s textualism, and predicting that it would become the majority approach to statutory interpretation on the Supreme Court “[i]f the new textualists on the Court [were to] gain one more ally at the expense of the [then-]four-person ‘liberal’ wing,” *id.* at 660).

² 144 S. Ct. 2176 (2024).

³ Pub. L. No. 107-204, 116 Stat. 745 (codified as amended in scattered sections of the U.S. Code).

⁴ *Fischer*, 144 S. Ct. at 2182–83, 2190.

⁵ 18 U.S.C. § 1512(c)(2).

⁶ *Fischer*, 144 S. Ct. at 2182–83, 2190.

⁷ *Id.* at 2186.

⁸ *Id.*

⁹ Brian Duignan, *January 6 U.S. Capitol Attack*, BRITANNICA (Sept. 12, 2024, 5:00 PM), <https://www.britannica.com/event/January-6-U-S-Capitol-attack> [https://perma.cc/4YVG-TL96].

halt.¹⁰ A federal grand jury returned a seven-count superseding indictment in the aftermath of the attack, charging Joseph Fischer, a former Pennsylvania police officer, with several crimes connected to the insurrection, including assaulting a federal officer, entering a restricted building, and engaging in disorderly conduct.¹¹ In one count, the government charged Fischer with obstructing an official proceeding — Congress’s certification of the presidential election — in violation of 18 U.S.C. § 1512(c)(2).¹² Section 1512(c) provides:

(c) Whoever corruptly —

(1) alters, destroys, mutilates, or conceals a record, document, or other object, or attempts to do so, with the intent to impair the object’s integrity or availability for use in an official proceeding; or

(2) otherwise obstructs, influences, or impedes any official proceeding, or attempts to do so,

shall be fined . . . or imprisoned not more than 20 years, or both.¹³

Fischer moved to dismiss this count, asserting that § 1512(c)(2) covered only efforts to impair the integrity of evidence — and that his actions on January 6 did not qualify as such.¹⁴ The district court granted Fischer’s motion.¹⁵ The court, relying on its reasoning in a previous case, concluded that the word “otherwise” in § 1512(c)(2) linked it to § 1512(c)(1) such that Fischer needed to have taken an action with respect to a “document, record, or other object” before he could be prosecuted under § 1512(c)(2).¹⁶ The United States appealed.¹⁷

The D.C. Circuit reversed.¹⁸ Writing for the panel, Judge Pan¹⁹ concluded that § 1512(c)(2) serves as a general statute barring the obstruction of an official proceeding, not just acts of obstruction related to evidence impairment.²⁰ While observing § 1512(c)(2)’s broad reach, Judge Pan determined that § 1512(c)(2) served as a “catch-all” provision intended to reach unforeseen situations.²¹ Judge Pan also rejected arguments that the statute’s structure, history, and purpose support a narrower reading,²² and noted that the provision’s “corruptly” mens rea

¹⁰ *Id.*

¹¹ Indictment at 1–3, *United States v. Fischer*, No. 21-cr-00234 (D.D.C. Mar. 15, 2022), ECF No. 52; Amy Howe, *Jan. 6 Defendant Asks Supreme Court to Throw Out Obstruction Charge*, SCOTUSBLOG (Apr. 9, 2024, 10:16 AM), <https://www.scotusblog.com/2024/04/jan-6-defendant-asks-supreme-court-to-throw-out-obstruction-charge> [<https://perma.cc/9VSY-EVD9>].

¹² Indictment, *supra* note 11, at 2.

¹³ 18 U.S.C. § 1512(c).

¹⁴ *Fischer*, 144 S. Ct. at 2182.

¹⁵ *United States v. Fischer*, No. 21-cr-00234, 2022 WL 782413, at *4 (D.D.C. Mar. 15, 2022).

¹⁶ *Id.* (citing *United States v. Miller*, 589 F. Supp. 3d 60, 71, 78 (D.D.C. 2022)).

¹⁷ *United States v. Fischer*, 64 F.4th 329, 334 (D.C. Cir. 2023).

¹⁸ *Id.* at 332.

¹⁹ Judge Pan was joined in part by Judge Walker.

²⁰ *Fischer*, 64 F.4th at 336.

²¹ *Id.* at 337.

²² *Id.* at 345–47.

requirement mollified potential concerns about the statute's overbreadth or surplusage.²³ Judge Walker concurred in part and concurred in the judgment but wrote separately to argue for a narrower definition of the statute's mens rea requirement.²⁴ Judge Katsas dissented, contending that the statute was ambiguous and should have been limited to acts impairing evidence.²⁵

The Supreme Court vacated and remanded.²⁶ Writing for the Court, Chief Justice Roberts²⁷ rejected the D.C. Circuit's interpretation of § 1512(c)(2) as extending to any form of obstruction of an official proceeding.²⁸ Instead, the Court held that a defendant violates § 1512(c)(2) only when they interfere with evidence to be used in an official proceeding.²⁹ Using the canons of *noscitur a sociis*³⁰ and *ejusdem generis*,³¹ the Court found that § 1512(c)(2)'s "otherwise" provision linked § 1512(c)(2) to § 1512(c)(1)'s focus on evidence spoliation.³² In other words, in order to have "otherwise obstruct[ed], influence[d], or impede[d] any official proceeding, or attempt[ed] to do so"³³ under § 1512(c)(2), a defendant must have taken some obstructive action with respect to a "record, document, or other object" as described in § 1512(c)(1).³⁴

Chief Justice Roberts continued that the majority's reading of § 1512(c)(2) "makes sense" given the provision's history as a response to the Enron scandal,³⁵ in which Enron's accounting firm shredded incriminating financial documents when faced with a criminal investigation.³⁶ According to Chief Justice Roberts, Congress "designed" § 1512(c)(2) to "plug [a] loophole" that had thwarted prosecution of the accounting firm.³⁷ And "[g]iven that subsection (c)(2) was enacted to address the Enron disaster, not some further flung set of dangers, it is unlikely that Congress responded with such an unfocused and 'grossly

²³ *Id.* at 339, 343, 348–49.

²⁴ *Id.* at 351–52 (Walker, J., concurring in part and concurring in the judgment).

²⁵ *Id.* at 363 (Katsas, J., dissenting).

²⁶ *Fischer*, 144 S. Ct. at 2190.

²⁷ Chief Justice Roberts was joined by Justices Thomas, Alito, Gorsuch, Kavanaugh, and Jackson.

²⁸ *Fischer*, 144 S. Ct. at 2185.

²⁹ *Id.* at 2190.

³⁰ *See, e.g.*, *United States v. Williams*, 553 U.S. 285, 294 (2008) ("[T]he commonsense canon of *noscitur a sociis* . . . counsels that a word is given more precise content by the neighboring words with which it is associated." (citing *Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307 (1961); NORMAN J. SINGER & SHAMBIE SINGER, *SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION* § 47:16 (7th ed.) (Westlaw) (last visited Aug. 24, 2024))).

³¹ The canon of *ejusdem generis* reflects "the idea that a general phrase following an enumeration of things should be read to encompass only things of the same basic kind." *Muldrow v. City of St. Louis*, 144 S. Ct. 967, 975 (2024).

³² *Fischer*, 144 S. Ct. at 2183–85.

³³ 18 U.S.C. § 1512(c)(2).

³⁴ *Id.* § 1512(c)(1); *Fischer*, 144 S. Ct. at 2186.

³⁵ *Fischer*, 144 S. Ct. at 2186.

³⁶ *Id.*

³⁷ *Id.*

incommensurate patch,” the Chief Justice concluded.³⁸ “It would be peculiar to conclude that in closing the Enron gap,” Chief Justice Roberts wrote, “Congress actually hid away in the second part of the third subsection of Section 1512 a catchall provision that reaches far beyond the document shredding and similar scenarios that prompted the legislation in the first place.”³⁹

Additionally, Chief Justice Roberts argued that interpreting subsection (c)(2) to cover all forms of obstructive conduct would render superfluous a wide array of obstruction statutes found elsewhere in the U.S. Code.⁴⁰ For example, § 1512 provides for several means of committing obstruction, with varying penalties spanning from three years to life in prison.⁴¹ Reading (c)(2) broadly, the Court reasoned, “would override Congress’s careful delineation of which penalties were appropriate for which offenses.”⁴² The Chief Justice was also concerned that the D.C. Circuit’s broader interpretation of § 1512(c)(2) “would criminalize a broad swath of prosaic conduct.”⁴³

Justice Jackson concurred, writing separately to emphasize how the majority’s reading of § 1512(c)(2) “follows from the legislative purpose that this statute’s text embodies.”⁴⁴ While noting that this legislative purpose was perceptible from the statute’s text,⁴⁵ Justice Jackson specifically accentuated § 1512(c)(2)’s legislative history. To Justice Jackson, a floor statement and a committee report revealed Congress’s intent for § 1512(c)(2) to target only obstruction related to document destruction.⁴⁶ Justice Jackson also expressed disbelief that Congress would have inserted a broad obstruction statute with a twenty-year maximum penalty amid more “granular” provisions, without giving indications of its intent to do so.⁴⁷

Justice Barrett dissented, joined by Justices Sotomayor and Kagan.⁴⁸ She contended that “otherwise” in (c)(2) simply meant that the provision prohibits obstructing official proceedings “in a different manner” from the document spoliation described in (c)(1).⁴⁹ Justice Barrett criticized the majority’s use of the *noscitur a sociis* and *ejusdem generis* canons, given that § 1512(c)(1) and (c)(2) are “distinct and independent

³⁸ *Id.* at 2190 (quoting *United States v. Fischer*, 64 F.4th 329, 376 (D.C. Cir. 2023) (Katsas, J., dissenting)).

³⁹ *Id.* at 2186.

⁴⁰ *Id.* at 2187–88.

⁴¹ *Id.* at 2187.

⁴² *Id.*

⁴³ *Id.* at 2189.

⁴⁴ *Id.* at 2190–91 (Jackson, J., concurring).

⁴⁵ *Id.* at 2192.

⁴⁶ *Id.*

⁴⁷ *Id.* at 2194.

⁴⁸ *Id.* (Barrett, J., dissenting).

⁴⁹ *Id.* at 2195 (quoting 10 OXFORD ENGLISH DICTIONARY 984 (2d ed. 1989); WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1598 (2002)).

prohibitions.”⁵⁰ Because § 1512(c) contained neither a list of terms with an ambiguous word (*noscitur*), nor a general term preceded by a list of specific words (*eiusdem*), Justice Barrett argued that the Court had inappropriately — and unprecedentedly — applied these canons to the provision.⁵¹ Finally, Justice Barrett argued that the Court overstated concerns about statutory overlap and § 1512(c)(2)’s breadth, noting that the “corruptly” mens rea element and lack of a minimum sentence provide adequate safeguards against overcriminalization.⁵²

In approvingly referring to the problem or “mischief” that inspired the Sarbanes-Oxley Act,⁵³ the *Fischer* majority, consisting of several of the Court’s most avowed textualists, appeared to violate traditional textualist principles. Textualists have traditionally viewed the “mischief rule”⁵⁴ as a purposivist tool, incompatible with textualism’s focus on statutory text and linguistic canons.⁵⁵ On this view, then, *Fischer* may represent a brazen act of purposivism by several of the Court’s leading textualists. On another view, however, *Fischer*’s use of the mischief rule demonstrates continued divisions within — rather than a repudiation of — textualism. The *Fischer* majority’s emphasis on the Enron scandal suggests that the mischief addressed by a statute can be permissible “context” that the honest textualist may consult.⁵⁶ If so, this view would represent an important division within textualist theory, given that such a position was roundly rejected by Justice Scalia — and, seemingly in the past, by other members of the *Fischer* majority.⁵⁷ But the *Fischer* majority left major implications of its invocation of the mischief rule unclear.

Textualism is a formalist mode of statutory interpretation that aims to constrain judicial discretion by prioritizing the ordinary meaning of statutory text.⁵⁸ While scholars debate the definition of textualism — and whether a singular definition of textualism even exists⁵⁹ — textualists generally believe in several key principles. First, textualists generally

⁵⁰ *Id.* at 2196–97 (quoting *United States v. Aguilar*, 515 U.S. 593, 615 (1995) (Scalia, J., concurring in part and dissenting in part)).

⁵¹ *Id.*

⁵² *Id.* at 2200–02.

⁵³ In statutory interpretation, a statute’s “mischief” often refers to “the problem that prompted the statute.” Samuel L. Bray, *The Mischief Rule*, 109 GEO. L.J. 967, 967 (2021).

⁵⁴ The “mischief rule” is the canon that “tells an interpreter to read a statute in light of the ‘mischief’ or ‘evil’” the statute was enacted to address. *Id.*

⁵⁵ See *infra* notes 67–71.

⁵⁶ See *Fischer*, 144 S. Ct. at 2190 (calling the “Government’s interpretation [of § 1512(c)(2)] . . . inconsistent with ‘the context from which the statute arose’” (quoting *Bond v. United States*, 572 U.S. 844, 860 (2014))).

⁵⁷ See Bray, *supra* note 53, at 989.

⁵⁸ Anita S. Krishnakumar, *Backdoor Purposivism*, 69 DUKE L.J. 1275, 1330 (2020).

⁵⁹ See Tara Leigh Grove, *The Supreme Court, 2019 Term — Comment: Which Textualism?*, 134 HARV. L. REV. 265, 267 (2020) (outlining various ideological divisions among textualists and calling into question whether the theory is best described as “textualism” or as a range of “textualisms”).

disdain the use of extratextual sources in interpreting statutes.⁶⁰ Textualists seek to constrain their inquiry to a statute’s text, alongside tools such as dictionary definitions, linguistic canons, and other statutory provisions (such as the whole act rule and whole code rule).⁶¹

Second, modern textualists are quick to assert that textualism is not simple literalism.⁶² Instead, textualists insist that statutory interpretation requires looking to “text in context.”⁶³ Textualists often prioritize “*semantic* context,” or “evidence about the way a reasonable person conversant with relevant social and linguistic practices would have used the words.”⁶⁴ (Purposivists, on the other hand, gravitate toward using “*policy* context,” which includes the mischief the law sought to address or the policy reflected in the statute’s structure.⁶⁵) Again, however, textualists have traditionally urged that this context be limited to only text-based sources. In their treatise on textualism, Justice Scalia and Professor Bryan Garner note that while “the purpose of the text . . . is a vital part of its context,” such contextual purpose must “be gathered only from *the text itself*.”⁶⁶

In keeping with their priority for statutory text and linguistic canons, textualists have shunned the mischief rule as impermissible purposivism. Justice Scalia believed that the mischief rule and purposivism were interchangeable⁶⁷ — and interchangeably impermissible — given that both hold “that a judge-interpreter should seek an answer not in the words of the text but in its social, economic, and political objectives.”⁶⁸ Justice Scalia’s refusal to heed the mischief of a statute is well-documented.⁶⁹ And as Professor Samuel L. Bray notes, “[b]y and large,

⁶⁰ KATZMANN, *supra* note 1, at 39.

⁶¹ See generally ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* (2012).

⁶² See, e.g., Krishnakumar, *supra* note 58, at 1286; John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 108 (2001) (“Modern textualists, however, are not literalists.”); *Biden v. Nebraska*, 143 S. Ct. 2355, 2379 (2023) (Barrett, J., concurring).

⁶³ See *Biden*, 143 S. Ct. at 2378 (Barrett, J., concurring).

⁶⁴ John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 91 (2006); see Bray, *supra* note 53, at 973 (“[T]extualists, especially, will sometimes in practice limit the relevant context to *laws* — that is, other provisions of the same statute, other statutes, and background principles of law.”); cf. SCALIA & GARNER, *supra* note 61, at 33 (noting that “the *purpose* of the text . . . is a vital part of its context,” but it must “be gathered only from the text itself”).

⁶⁵ Manning, *supra* note 64, at 91.

⁶⁶ SCALIA & GARNER, *supra* note 61, at 33 (emphasis added).

⁶⁷ See Bray, *supra* note 53, at 984.

⁶⁸ See SCALIA & GARNER, *supra* note 61, at 438.

⁶⁹ As an illustrative example, consider *Bond v. United States*, 572 U.S. 844 (2014). Here, the Court examined whether the petitioner’s use of toxic chemicals to inflict minor burns to the hand of another person fell under the Chemical Weapons Convention Implementation Act of 1998, Pub. L. No. 105-277, 112 Stat. 2681–856 (codified in scattered sections of 18, 22 U.S.C.). *Bond*, 572 U.S. at 848, 851–53. The Court found that it did not, in part because the animating concern of the statute was preventing international chemical weapons of war in the wake of World War I. *Id.* at 849, 863, 866. Concurring in the judgment, Justice Scalia declined to consider the mischief of the

textualists seem to have accepted Justice Scalia's rejection of the mischief rule.⁷⁰ Justices Alito, Gorsuch, and Kavanaugh have written (and Justice Thomas has joined) opinions that favorably cite Justice Scalia's broadsides against viewing statutes in light of the "principal evil" that the legislature sought to address.⁷¹

On this view, then, *Fischer* seems discordant with Justice Scalia's form of textualism. When the *Fischer* majority highlighted the mischief that the Sarbanes-Oxley Act ostensibly sought to remedy with § 1512(c)(2),⁷² it ventured outside the text. *Fischer* even specifically referenced legislative history — a longstanding textualist bugaboo⁷³ — to provide background information about the aims of the Sarbanes-Oxley Act.⁷⁴ In other words, *Fischer*'s use of the mischief rule relied on the sort of extratextual argumentation that Justice Scalia detested and refused to consider in cases like *Bond v. United States*.⁷⁵ This may not have been so odd for Chief Justice Roberts, who does not style himself a textualist and whose previous opinions can be said to have used a form of the mischief rule.⁷⁶ But *Fischer*'s lineup of Justices Thomas, Alito, Gorsuch, and Kavanaugh is eye-catching, given their self-avowed textualism and seeming disavowal of the mischief rule.

Thus, one wonders whether *Fischer* marks a blatant and conspicuous act of purposivism by a putatively textualist Court.⁷⁷ After all,

statute, and argued that "[a]s sweeping and unsettling as the [statute] may be," Bond's actions fell under the statute. *Id.* at 867 (Scalia, J., concurring in the judgment). As Bray put it: "In a separate opinion, Justice Scalia refused to read the text in light of the concerns that led to its enactment, and so found no ambiguity." Bray, *supra* note 53, at 975.

⁷⁰ Bray, *supra* note 53, at 988.

⁷¹ *Id.* at 989 (quoting *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998)).

⁷² See *Fischer*, 144 S. Ct. at 2190 ("Given that subsection (c)(2) was enacted to address the Enron disaster, not some further flung set of dangers, it is unlikely that Congress responded with such an unfocused and 'grossly incommensurate patch.'" (quoting *United States v. Fischer*, 64 F.4th 329, 376 (D.C. Cir. 2023) (Katsas, J., dissenting)).

⁷³ Ryan D. Doerfler, *Late-Stage Textualism*, 2021 SUP. CT. REV. 267, 277 (2022).

⁷⁴ *Fischer*, 144 S. Ct. at 2186 ("But the Enron accounting scandal revealed a loophole: Although Enron's 'outside auditor, Arthur Andersen LLP, had systematically destroyed potentially incriminating documents,' the statute curiously failed to 'impos[e] liability on a person who destroys records himself.' As a result, prosecutors had to prove that higher-ups at Enron and Arthur Andersen persuaded someone else to shred documents rather than the more obvious theory that someone who shreds documents is liable for doing so." (citation omitted) (quoting *Yates v. United States*, 574 U.S. 528, 535–36 (2015) (plurality opinion)) (citing S. REP. NO. 107-146, at 7)).

⁷⁵ 572 U.S. 844 (2014); see *supra* note 69.

⁷⁶ At least one scholar has identified Chief Justice Roberts's opinion in *King v. Burwell*, 576 U.S. 473 (2015), as an example of the mischief rule at work. Krishnakumar, *supra* note 58, at 1340; see also Bray, *supra* note 53, at 1001 (describing Chief Justice Roberts's opinion in *Bond* as a potential operation of the mischief rule).

⁷⁷ Some commentators have hinted at this. Paul Clement called *Fischer* the "son of *Yates*." Paul D. Clement, Partner, Clement & Murphy PLLC, Remarks at the 2024 Annual Supreme Court Round Up of the Federalist Society (July 25, 2024), <https://fedsoc.org/events/2024-annual-supreme-court-round-up> [<https://perma.cc/9L8C-PDYV>] (referencing *Yates*, a case some commentators have described as purposivist, see Richard M. Re, *The New Holy Trinity*, 18 GREEN BAG 2D 407, 409–13 (2015), and others have described as applying the mischief rule, see Anita S. Krishnakumar, *Passive Avoidance*, 71 STAN. L. REV. 513, 538–39 (2019)).

purposivists believe “that legislation is a purposive act, and judges should construe statutes to execute that legislative purpose.”⁷⁸ By using the mischief of the Sarbanes-Oxley Act, the *Fischer* majority arguably considered the law’s “purpose,” violating Justice Scalia’s warning against “a judge-interpreter . . . seek[ing] an answer not in the words of the text but in its social, economic, and political objectives.”⁷⁹ And even though the Sarbanes-Oxley Act’s mischief was not the sole or even primary basis for the *Fischer* majority’s decision,⁸⁰ it may be argued that the *Fischer* majority’s textual analysis was really window dressing for its true motivating force: its understanding of the Sarbanes-Oxley Act’s purpose. Justice Barrett seemed to imply as much.⁸¹ After all, as Justice Barrett rightfully criticized, the majority’s textual analysis occasionally seemed on shaky ground. For example, the Court applied the *ejusdem generis* and *noscitur a sociis* canons to § 1512(c)(1) and (c)(2) although they were distinct and separately lettered statutory provisions — an application of the canons that the Court had never made before (according to Justice Barrett).⁸²

But *Fischer* need not be seen as rank purposivism. Instead, *Fischer* may be a form of textualism that treats a statute’s mischief as a form of “context” that textualists can (and should) consider.⁸³ The *Fischer* majority explicitly said as much. “Given that subsection (c)(2) was enacted to address the Enron disaster, not some further flung set of dangers, it is unlikely that Congress responded with such an unfocused and ‘grossly incommensurate patch,’” the Chief Justice wrote.⁸⁴ “We therefore decline to adopt the Government’s interpretation, which is inconsistent with ‘the context from which the statute arose.’”⁸⁵ Here, the Chief Justice quoted a passage from *Bond v. United States* that emphasized the statute’s “context” of implementing a treaty focused on “chemical warfare and terrorism.”⁸⁶ In other words, *Fischer* appeared to explicitly envision that a statute’s mischief is permissible context.

This approach by the Court comports with scholarly arguments that textualism benefits from pragmatic enrichment like the mischief rule.

⁷⁸ KATZMANN, *supra* note 1, at 31.

⁷⁹ See SCALIA & GARNER, *supra* note 61, at 438.

⁸⁰ The *Fischer* majority employed linguistic canons, see 144 S. Ct. at 2183–84, and examined how the term “otherwise” is used elsewhere in the U.S. Code, *id.* at 2184–86 — classic textualist moves, see Eskridge, *supra* note 1, at 624.

⁸¹ See *Fischer*, 144 S. Ct. at 2202 (Barrett, J., dissenting) (“By atextually narrowing § 1512(c)(2), the Court has failed to respect the prerogatives of the political branches.”).

⁸² *Id.* at 2196–97.

⁸³ For a historical example of a textualist on the Court who seemed to invoke the mischief rule, see *CSX Transp., Inc. v. Ala. Dep’t of Revenue*, 562 U.S. 277, 298 (2011) (Thomas, J., dissenting), in which Justice Thomas used both textualist and mischief-oriented approaches to advocate an interpretation of a statute that he viewed as “consistent with the problem the statute addressed,” *id.*

⁸⁴ *Fischer*, 144 S. Ct. at 2190 (quoting *United States v. Fischer*, 64 F.4th 329, 376 (D.C. Cir. 2023) (Katsas, J., dissenting)).

⁸⁵ *Id.* (emphasis added) (quoting *Bond v. United States*, 572 U.S. 844, 860 (2014)).

⁸⁶ *Bond*, 572 U.S. at 845, 860.

Professor Bray has argued that the mischief rule is appropriate “context” for a textualist interpreter to consider.⁸⁷ Relatedly, Professor Lawrence B. Solum argues that textualists should consider as relevant the “Communicative Context” of a statute, which may include not just text-based sources but “general background facts that elucidate the aim or purpose.”⁸⁸ In other words, if an aim of textualism is to recover the meaning of “words as they would sound in the mind of a skilled, objectively reasonable user of words,”⁸⁹ then using a statute’s mischief can be crucial. When a speaker makes a statement, especially an ambiguous one, it helps to know *why* that speaker made such a statement. If my friend tells me to “shut it,” it’s helpful to know whether they are concerned about an open cabinet door or think that I am talking too loudly.

Indeed, Justice Barrett seemed to make a similar move in her concurrence in *Biden v. Nebraska*,⁹⁰ where she argued that the major questions doctrine is a contextual linguistic canon.⁹¹ Justice Barrett argued that the major questions doctrine is derived from the “commonsense principle[] of communication” that context matters.⁹² In the context of the principal-agent relationship between Congress and agencies, Justice Barrett wrote, an ordinary person would “expect Congress to speak clearly if it wishes to assign to an agency decisions of vast ‘economic and political significance.’”⁹³ Bray has made a similar observation in noting that the mischief rule shares a rationale with the major questions doctrine: Both hold “that a legal enactment is not integrated and complete in itself,” but must be “set against something else”⁹⁴ — a communicative context that sheds light on the language’s semantic meaning.

But even if *Fischer’s* use of the mischief rule does not offend textualism, *Fischer* left several unanswered questions, including how textualists should locate a statute’s “mischief.” Textualists may occasionally be able to identify the mischief from the text of the statute itself.⁹⁵ But more likely, textualists may have to glean the mischief extratextually, which further strays from traditional conceptions of textualism. Chief

⁸⁷ Bray, *supra* note 53, at 1003, 1013 (noting that the mischief rule “encourages the interpreter to think about what was in the eye of the legislature, not as a means of defeating or overriding the text, but as a way to understand it,” *id.* at 1003).

⁸⁸ Lawrence B. Solum, Pragmatics and Textualism 39–40 (July 10, 2024) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4881344 [<https://perma.cc/AM7E-QYB2>]; *cf.*, e.g., Kristen Syrett & Julien Musolino, *All Together Now: Disentangling Semantics and Pragmatics with Together in Child and Adult Language*, 23 LANGUAGE ACQUISITION 175, 176 (2016) (describing a sentence where “semantics generates multiple possible interpretations . . . [t]hen something else (pragmatic) steps in to filter out the readings that are not supported in a given context . . .”).

⁸⁹ Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J.L. & PUB. POL’Y 59, 65 (1988).

⁹⁰ 143 S. Ct. 2355 (2023).

⁹¹ *See id.* at 2376 (Barrett, J., concurring).

⁹² *Id.* at 2380.

⁹³ *Id.* (quoting *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014)).

⁹⁴ *See* Bray, *supra* note 53, at 1011.

⁹⁵ *See id.* at 994.

Justice Roberts got around this problem by relying on party presentation to find the mischief. He notes that “[t]he parties agree that to plug [the] loophole [at issue], Congress enacted Section 1512(c) . . . as part of the broader Sarbanes-Oxley Act.”⁹⁶ (This seems to imply that party agreement on the mischief of a statute is a sufficient condition for the Court to adopt it.)

But what happens if the parties disagree on the mischief? Then, it seems, the Court must engage in more fulsome analysis of a statute’s mischief — analysis that might give the honest textualist pause. As an example, Justice Jackson’s concurrence exhaustively examined the Sarbanes-Oxley Act’s legislative history to find the problem the statute addressed.⁹⁷ If “the mischief” is to be a legitimate part of the textualist enterprise, Justice Jackson’s approach — meticulous examination of the legislative history — may provide more evidence of a statute’s aim than the *Fischer* majority’s pithy stipulation of party agreement. But if textualists must rely on legislative history, are they textualists any longer?

All in all, the mischief rule is “a legal instantiation of a common sense point” that “[t]o understand statement *x*, an interpreter wants to know its setting.”⁹⁸ Context is everything,⁹⁹ and extratextual material can provide important perspective — a point that purposivists have long understood. *Fischer* shows the continued divisions within textualism about whether a statute’s mischief serves as appropriate context. Scholars should celebrate this development in textualism, given longstanding complaints of textualists’ “wooden” and mechanistic interpretations of underdeterminate text.¹⁰⁰ But *Fischer* still raises questions of how textualists should find this mischief.

⁹⁶ *Fischer*, 144 S. Ct. at 2186.

⁹⁷ *Id.* at 2192–94 (Jackson, J., concurring).

⁹⁸ Bray, *supra* note 53, at 975.

⁹⁹ Vice President Kamala Harris, Remarks by Vice President Harris at Swearing-In Ceremony of Commissioners for the White House Initiative on Advancing Educational Equity, Excellence, and Economic Opportunity for Hispanics (May 10, 2023), <https://www.whitehouse.gov/briefing-room/speeches-remarks/2023/05/10/remarks-by-vice-president-harris-at-swearing-in-ceremony-of-commissioners-for-the-white-house-initiative-on-advancing-educational-equity-excellence-and-economic-opportunity-for-hispanics> [<https://perma.cc/M2H4-K7BJ>] (“You think you just fell out of a coconut tree? You exist in the context of all in which you live and what came before you.”).

¹⁰⁰ See Doerfler, *supra* note 73, at 269; see also 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, 23 (Amy Gutmann ed., 1997) (referencing critiques of textualism as “wooden”).