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“Any”

James J. Brudney & Ethan J. Leib*

Our statute books use the word “any” ubiquitously in coverage and exclusion provisions. As any reader of the Supreme Court’s statutory interpretation docket would know, a large number of cases turn on the contested application of this so-called universal quantifier. It is hard to make sense of the jurisprudence of “any.” And any effort to offer a unified approach – knowing precisely when its scope is expansive (along the “literal-meaning” lines of “every” and “all”) or confining (having a contained domain related to properties provided by contextual cues) – is likely to fail. This Article examines legislative drafting manuals, surveys centuries of Court decisions, and conducts in-depth pairwise comparisons of “any” cases to show the word’s flexible set of uses in its multiple statutory guises. After evaluating evidence of the variability of “any,” we recommend a new approach, a form of an “any” canon. We encourage adjudicators to appreciate the complexity of “any” more systematically and to consult a full range of sources – as even full-throated textualists have authorized from time to time – offering the relevant larger context judges will need to ascertain the scope of “any” in any given statutory scheme.

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INTRODUCTION

Anyone who knows anything about statutory interpretation opinions at the Supreme Court knows that many of them seem to turn on the word “any.” We concede that the prior sentence is anything but precise; at the same time, it is not easy to tell how a court—or a legislature—will choose to make use of this word in any given context.

The word “any” seems to be an essential element of statutory drafting. Laws of general application are enacted with an

1. Some of what we will say about “any” could apply to other universal quantifiers like “every” or “all,” which also populate our statutes. But in our respective decades of teaching and writing about statutory interpretation, it is “any” that stands out as the universal quantifier most often relevant with respect to statutory drafting and litigation. To take two notable drafting examples, the twenty-nine-page Civil Rights Act of 1964 (CRA) includes 302 instances of “any,” more than ten per page. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241. And the 906-page Affordable Care Act of 2010 (ACA) contains 1,774 uses of “any,” roughly two per page. Affordable Care Act of 2010, Pub. L. No. 111-148, 124 Stat. 119. This relative difference in frequency for two prominent “super-statutes” warrants
understanding that they will extend for years into the future and are likely to embrace unforeseen settings. Accordingly, legislatures must be attentive to the scope of what actions or individuals they are covering under their laws, and also what or whom they are excluding from coverage. The use of “any” as an adjective modifying a noun or series of nouns is one crucial way in which legislatures can establish that laws apply to, or exempt from coverage, certain groups of individuals or entities.

Congress or state legislatures may use “any” to indicate potentially expansive statutory coverage when establishing a basic norm of criminal or civil conduct. They also may use “any” to reflect a broad exception to a basic statutory norm. In these and other examples, “any,” as an adjective followed by a single noun or series of nouns, essentially means “every” — as in “any child knows that” or “any pharmacist will tell you the same thing.”

On the other hand, “any” as a modifier may convey a narrower scope, akin to “some,” without referring to or implying a quantity. Examples from ordinary usage include “do you have any money?”

Further attention than we can provide here. One possible explanation is that the CRA, declaring broad normative principles, reflects a heavy dose of prohibitions and protections that result in more extensive use of “any” within basic qualifying sections (compare the federal and state antidiscrimination examples infra note 2). By contrast, the ACA focuses more on technical operational guidelines for agencies, both federal (HHS, Labor, IRS) and state, and deals less with prescriptive inclusions or exclusions.

The prominence of “any” in Supreme Court litigation over many decades is the focus of our survey review in Part II and our deeper dive on eight decisions in Part III.

2. See, e.g., 18 U.S.C. § 1961(4) (defining “enterprise” to include “any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity” under the Racketeer Influenced and Corrupt Organization Act (RICO) title of 1970 Organized Crime Control Act); 29 U.S.C. § 633a(a) (specifying that personnel actions affecting employees or applicants at least forty years of age “shall be made free from any discrimination based on age” under the Age Discrimination in Employment Act (ADEA)); OR. REV. STAT. § 659A.400, or any person acting on behalf of such place, to make any distinction, discrimination or restriction because a customer or patron is an individual with a disability.”).

3. See, e.g., 9 U.S.C. § 1 (“[N]othing herein contained [within the Federal Arbitration Act] shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.”); 28 U.S.C. § 2680(j) (providing that the waiver of sovereign immunity in the Federal Tort Claims Act (FTCA) does not apply to “[a]ny claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war”); NEB. REV. STAT. § 13-910(7) (2019) (Nebraska Political Subdivisions Tort Claims Act) (exempting from waiver of sovereign immunity “[a]ny claim arising out of assault, battery, false arrest, false imprisonment, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights”).
or “I would appreciate any help you can provide.” Courts routinely decide that Congress or state legislatures have used “any” in a limiting sense, indicative of less-than-universal statutory coverage, or a less-than-expansive statutory exception to coverage. Yet courts have expressed frustration at the ambiguous meaning of “any” in a criminal statutory setting.

That Congress or state legislatures may draft expansively or narrowly is hardly news. And there are myriad decisions by the Court since the 1970s that showcase serious disagreements as to what Congress has said or meant when the word “any” appears in various statutory and factual settings. Moreover, depending on a judge’s preferences for the scope of “any” in a particular case, string cites are ready-to-hand at the Supreme Court for confining and expansive constructions. Yet the Court—ballasted by Justice

4. See Yates v. United States, 574 U.S. 528 (2015) (discussing coverage of “any . . . tangible object” under the Sarbanes-Oxley Act to cover records and documents, but not fish); Home Depot U.S.A, Inc. v. Jackson, 139 S. Ct. 1743 (2019) (deciding that the right of removal for “any defendant” under the Class Action Fairness Act does not include a third-party counterclaim defendant); People v. Davis, 766 N.E.2d 641, 646 (Ill. 2002) (deciding that state armed violence statute did not apply to BB gun because it was not “any other deadly or dangerous weapon or instrument of like nature”).

5. See Dolan v. U.S. Postal Serv., 546 U.S. 481, 494 (2006) (evaluating the exclusion of “any claim arising out of . . . negligent transmission” from the sovereign immunity waiver in the FTCA, and limiting it to only certain forms of negligent transmission); Univ. of Tex. at Arlington v. Williams, 459 S.W.3d 48, 51 (Tex. 2015) (holding that statutory limit on landowners’ liability when opening premises for public recreational use, including inter alia for hunting, fishing, swimming, birdwatching and “any other activity associated with enjoying nature or the outdoors[,]” does not limit liability for injury to spectator watching a soccer game).

6. See State v. Fourth Jud. Dist. Ct. of Nev., 481 P.3d 848 (Nev. 2021). The Nevada statute there prohibited a felon from possessing “any firearm”; the defendant, a convicted felon, possessed five firearms at a single time and place. The Nevada Supreme Court noted that other state criminal laws similarly use “any” to help define prohibited conduct; it concluded that “ambiguity arises because “[t]he word “any” has multiple, conflicting definitions, including (1) one; (2) one, some, or all regardless of quantity; (3) great, unmeasured, or unlimited in amount; (4) one or more; and (5) all.” Id. at 850 (internal citation omitted). After determining that other tools of interpretation did not resolve the relevant textual ambiguity, the court applied the rule of lenity, holding there was only a single violation of the felon-in-possession statute.


Kagan’s once-approving observation that “we are all textualists now”\textsuperscript{9}—has increasingly maintained that deciphering “any” in congressional work-product is or should be a reasonably straightforward textualist enterprise. To that end, the justices have taken to referring to the word’s “ordinary” meaning,\textsuperscript{10} and looking up “any” in the dictionary as confirmation of that concept,\textsuperscript{11} including in the Court’s most recent term.\textsuperscript{12} At the same time, the Court’s cases reveal tensions between a literal, dictionary-driven modality of defining “any” and an alternative way of finding “ordinary” meaning that is shaped or restrained by statutory context, more broadly understood.\textsuperscript{13}

This Article unfolds in four parts. First, we explore drafting manuals from Congress and state legislatures to get some sense of what legislatures think they are doing when including the word “any” in statutes. In Part II, we survey the Supreme Court’s many decisions invoking or explaining “any” in a statute to identify trends and furnish initial analysis about the Court’s disparate efforts to figure out what “any” means. We show that “any” can transcend traditional ideological alignments: Clashes feature conservative justices sharply disagreeing with one another and liberal justices at odds with other liberals. Even the Court’s liberal wing, which is more willing to look at extrinsic sources in some kinds of cases, goes oddly literalist at times when it comes to “any.” Part III then explores in detail four pairs of cases. These deeper dives reveal that a hyperfocus on text is unlikely to provide a useful “any” jurisprudence. Instead, judges must strive to better appreciate the statutory setting in which “any” is situated. This in turn


\textsuperscript{11} Gonzalez, 520 U.S. at 5 (Thomas, J.) (citing WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 97 (1976)); Yates, 575 U.S. at 555 (Kagan, J., dissenting) (citing WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 97 (2002)).

\textsuperscript{12} Patel v. Garland, 142 S. Ct. 1614, 1622 (2022) (Barrett, J.) (citing WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 97 (1993)).

requires greater attention to how linguistic and substantive canons—applied in light of statutory purposes and plans—help inform the function and scope of “any” in particular cases. Part IV concludes by linking our analysis and arguments to some recent scholarship on “textual isolationism,” contextual cherry-picking, and ordinary meaning, all of which might be usefully brought to bear on the Court’s continuing problem with interpreting the word “any” in statutes.

Unpacking the Court’s variable approaches to “any” illustrates a persistent indeterminacy of textualism and the central role of contextual framing for the interpretive process. Our bottom line is that it is very hard to learn the ordinary meaning of the word “any” in a statute without a rich understanding of context. Both textualist and purposivist justices should be willing to look at a range of intrinsic and extrinsic sources in order to grasp what Congress was up to when it used the language of “any.” Even the more devout textualists must stop looking up “any” in the dictionary or just italicizing it, and instead acknowledge what might be an “any” canon: “any” is an invitation to look for signals about its scope in a wide set of sources that include linguistic canons, substantive canons, and statutory plans or schemes. We show that textualists also have allowed themselves this critical context from time to time and argue that they should approach this ubiquitous word with modesty and humility.

I. LEGISLATIVE DRAFTING AND THE USES OF “ANY”

Laws of general application will always require some attention to clarifying a law’s scope. In this regard, “any” is known by linguists and philosophers as a “universal quantifier.”17 The literally expansive domain of a universal quantifier, however, is not always

17. See generally BRIAN G. SLOCUM, ORDINARY MEANING: A THEORY OF THE MOST FUNDAMENTAL PRINCIPLE OF LEGAL INTERPRETATION (2015). Slocum discusses the problem of universal quantifiers and how literal meaning and ordinary meaning can pull apart in linguistic usage of them—with courts legally construing them often to have literal meanings rather than ordinary meanings. E.g., id. at 26, 32-33, 153-67.
what is understood by an ordinary speaker and user of language, who may identify or implicitly rely on ways to restrict or adjust its scope.\textsuperscript{18} Similarly, legal drafters sometimes choose to pursue a usage that confines the domain of the universal quantifier and other times prefer to incorporate an approach that is unabashedly expansive. The use of “any” can establish that laws (i) apply broadly and without limitation; (ii) apply only to certain identified groups of individuals or entities, with the implication of not extending beyond those groups; (iii) apply to a presumptively circumscribed group limited by certain properties or characteristics while also contemplating broad and potentially unanticipated group members that arise in the future; or (iv) specify omissions from coverage for certain identified groups in each of the three ways coverage can be delineated—that is, without limitation, based on a limited enumeration, or reflecting an enumeration that is illustrative and broad. Part of the mystery of “any” is that it can do all of this varied work, sometimes in one statute, both for coverage provisions and exemption provisions. When courts are presented with interpretive disputes, statutes can be littered with the word “any,” each instance actually serving a different expositional function for judges to decode.

Although legislative drafters regularly include “any” as part of statutory provisions, relatively little specific guidance exists in federal and state drafting manuals.\textsuperscript{19} A short discussion in one federal manual offers general advice regarding the utility of the word. As an adjective modifying a singular noun, “any” may

\textsuperscript{18} See generally Jason Stanley & Zoltán Gendler Szabó, On Quantifier Domain Restriction, 15 MIND \& LANG. 219 (2000) (investigating the special case of context dependence—how context helps us understand utterances—that is quantifier domain restriction, in which the interpretation of words necessitates limits in scope).

illuminate breadth of coverage by reducing certain ambiguities, making clear that a statutory provision covers all possible individuals, entities, substances, or actions within the identified universe. Relatedly, “any” may be used at times to convey special emphasis regarding the breadth of a rule.

In addition, drafters may use “any” as a concise way to address uncertainty regarding whether a stated condition will actually occur, including when the condition itself is neither mandated nor perhaps even likely. For example, a law might provide for the EEOC to update a certain statutory test governing retirement benefits “in accordance with any standards established by the Commission.” Under this language, the agency may decide not to promulgate such standards, and it is not required to do so. Yet if the word “any” were removed, this would imply that the agency is expected to issue standards on the statutory retirement benefits test.

Beyond descriptions of positive uses for “any,” drafting manuals may feature words of caution regarding ambiguities the word can create. Some state manuals discourage the use of “any” for basic grammatical reasons, preferring a singular subject, or.

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20. See 1995 House Legis. Manual 61 (“‘Any employee who . . .’ works the same as ‘Employees who . . .’ yet it avoids any misreading that (1) an implicit precondition exists that 2 [or more] employees must be involved before either gets covered, or (2) the statement only applies to a group of employees, as such.”).

21. See, e.g., 42 U.S.C. § 7602(g) (“The term ‘air pollutant’ means any air pollution agent or combination of such agents, including any physical, chemical, biological, radioactive (including source material, special nuclear material, and byproduct material) substance or matter which is emitted into or otherwise enters the ambient air. Such term includes any precursors to the formation of any air pollutant, to the extent the Administrator has identified such precursor or precursors for the particular purpose for which the term ‘air pollutant’ is used.”) (relied on in Massachusetts v. EPA, 549 U.S. 407 (2007)).


23. The example is borrowed loosely from 29 U.S.C. § 631(c)(2), which deals with possible adjustment of a retirement benefit test under the Age Discrimination in Employment Act to provide for computation if not based on a straight life annuity. We are grateful to Jesse Cross for suggesting how use of “any” in the drafting process may help navigate such conditional situations.

24. If “any” is included, and should the agency decide to issue the standards, this would trigger the updating of the test.

25. See Pennsylvania Code & Bulletin Style Manual § 9.2 (5th ed.) (use “A nursing home requesting”; do not use “Any nursing home requesting”); Leg. Couns. Comm., Oregon Bill Drafting Manual ch. 4.6 (18th ed. 2018) (“Simple words such as “a,” “an” or “the” nearly always can be used instead of “any[ ]” . . . with an attendant gain in clarity.”).
warn against “common legalisms that are often unclear and nearly always unnecessary.”

State drafters’ manuals also focus on the relevance of context to the use of “any.” One manual cites to a U.S. Supreme Court decision when observing that, “[r]ead naturally, the word ‘any’ has an expansive meaning, that is, ‘one or some indiscriminately of whatever kind.’” At the same time, manuals express concern about settings in which “any” begins or ends an enumeration of particulars that includes general words or phrases in association with specific words. Illinois warns drafters, “Be careful when adding to a list of specific items that ends with a catchall item such as ‘any other information required by the Director.’” Oregon counsels that when a provision is to apply to an entire class, “it is generally safer if the class is named in general terms . . . even when the particulars [named] would be preceded or followed by general language. It is virtually impossible to make an enumeration all-inclusive, and omission may be construed as implying deliberate exclusion.” And Delaware observes that when used at the start of a non-exclusive enumeration provision, “any” can give rise to reasonable inferences of broad coverage unless words are added to negate such inferences.

26. See The Off. of the Revisor of Statutes, Minnesota Revisor’s Manual ch. 8.25 (2013 ed.) (recommending use of “a, an, the” and not “all, each, every, some,” and presumably “any” for the same reason). The most recent House Legislative Manual also discourages the use of “any,” indicating that the preferred style is “a” or “an” and that “any” should be used “only when necessary for special emphasis.” The Off. of the Leg. Couns., U.S. House Legislative Counsel’s Manual on Drafting Style 47 (Dec. 2022). Were drafters themselves to heed the calls—try ridding yourself of the use of “any” for a day to appreciate the challenge of being perfectly disciplined—it is likely true that interpretive disputes would be displaced onto other words with unclear scope. We would likely recommend contextual analysis then, too, but “any” is sufficiently at the center of so many statutory interpretation decisions that drawing attention to the issues here may well have trickle-down effects on interpretation whenever a court has to establish the domain or scope of words with a range of possible uses.

27. Oregon Bill Drafting Manual, supra note 25, at ch. 4.6 (quoting United States v. Gonzalez, 520 U.S. 1, 5 (1997)).


29. Oregon Bill Drafting Manual, supra note 25, at ch. 4.10(c).

30. See Leg. Council Div. of Rschl., Delaware Legislative Drafting Manual, r. 28(e) at 115 (citing to a public records code provision stating that “‘Person’ includes an individual, corporation, business trust, estate trust, partnership, association, joint venture, . . . or any other legal or commercial entity. [The term] does not include a government;
In light of such concerns about the effects of using general words like “any” in association with particular words, it is not surprising that some manuals invoke *ejusdem generis*, a familiar canon of construction related to word association. The Oregon Manual has a section on *ejusdem generis* in this regard, explaining that it is “based on the reasonable assumption that a drafter will not enumerate items if the drafter intends general words to have their unrestricted meaning,” and then illustrating with an example from a state supreme court case.31

The Delaware Manual provides additional guidance on how to draft enumeration provisions. It addresses *provisions that are exclusive* (use only the specific terms meant to be included; omit “includes”; and omit all general terms such as terms preceded by “any other”); *provisions that are nonexclusive or exemplary* (use “include” to precede the list; use both specific and general terms in constructing the list); and *provisions that are nonexclusive with some limitation* (use specific and general terms “of the same type or nature as each other”; the general term “must be one that clearly belongs to the same class as the specific terms”).32

Delaware explains that guidance on drafting exclusive provisions follows *expressio unius*, while guidance for drafting nonexclusive provisions with some limitation comports with *ejusdem generis*.33 Regarding this latter guidance, the manual’s Comment invokes a state court decision for emphasis, noting that “if the Legislature had intended the general word to be used in an unrestricted sense, no mention would have been made at all of the particular classes” and that the “words ‘other’ or ‘any other’ following an enumeration of particular classes are to be read as meaning ‘other such like’ and include only words of like kind or

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31. See OREGON BILL DRAFTING MANUAL, supra note 25, at ch. 4.10(b). The manual recounts specifics of the case, quoting *State v. Brantley*, 201 Or. 637, 645–46 (1954). “[A] statute that applied to any forged “record, writing, instrument or matter whatever” was held not to apply to [a forged] certificate of nomination for [public office] candidacy . . . , because . . . [t]he words “or matter whatever” were limited . . . by the preceding enumeration of particulars[,]” and the certificate was not a record, writing, or instrument as those terms were defined by law.

32. See DELAWARE LEGISLATIVE DRAFTING MANUAL, supra note 30, at r. 29C (c), (d), (e).

33. See id. at 120–21 (Comment on Rule 29C).
character.” 34 Whether the Delaware legislature actually drafts according to the parameters in the drafting manual is a different question, but the manual at least underscores that certain familiar canons of word association can be understood as consistent with expressed legislative intent. 35

Many manuals, unlike those just discussed, lack in-depth or nuanced analysis of the benefits and costs associated with using “any” in statutory text. Nonetheless, manuals in a number of states and the U.S. House pay attention to how “any” may assume constructively clear or concerningly cloudy usages based on surrounding context. This bottom-line insight from legislative drafters was echoed by a Supreme Court Justice in a relatively recent case, which we explore more carefully in Part III: 36 “it is context, not a dictionary, that sets the boundaries of time, place, and circumstances within which words such as ‘any’ will apply.” 37

Given that legislatures use “any” in both expansive and confining ways, and that they may add neighboring words to help reinforce or cabin the scope of this term, is there any lesson to be gleaned from the guidance transmitted by legislative drafters? One might borrow here from Richard Posner’s counsel for judges to “try to put [themselves] in the shoes of the enacting legislators . . . .” 38 And insofar as this is not possible, Posner’s advice suggests that the scope of a word like “any” should be based on “what attribution of meaning . . . will yield the most reasonable result . . . bearing in mind . . . that it is [the legislators’] conception of reasonableness, to the extent known, rather than the judge’s, that should guide decision.” 39 To be sure, strict textualists of the ordinary meaning subclass, who focus on citizen beholders of the statute rather than

34. See id. (quoting Bigger v. Unemployment Comp. Comm’n, 46 A.2d 137, 141 (Del. Super. Ct. 1946), aff’d, 53 A.2d 761 (Del. 1947)).
35. For some evidence that federal legislative staff drafts with respect for the potential applications of ejusdem generis and noscitur a sociis, even if drafters aren’t aware of the Latin canons by name, see Abbe R. Gluck & Lisa Schultz Bressman, Statutory Interpretation from the Inside – An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I, 65 STAN. L. REV. 901, 933 (2013).
36. See infra Part III.A.
39. Id. at 287.
average legislators passing the statute, might want a different benchmark. But as we have been urging and will continue to show, “any” doesn’t have just one ordinary meaning—and it is perilous to presume the literal expansive scope of the universal quantifier always prevails. In the two Parts to follow, we examine what the Supreme Court has done over the years with this term—and to what extent it is Congress, a conception of a reasonable Congress, or something else that has been driving results.

II. A SURVEY OF “ANY” IN THE SUPREME COURT

It is not surprising that Congress and state legislatures may draft either expansively or narrowly when they invoke the word “any.” At the same time, decisions by the Supreme Court over many decades showcase disagreements as to what Congress has said or meant when using “any”—whether to cover individuals or actions, or to exclude them. Although these disagreements have become more linguistically focused in the Roberts Court, the results are no more predictable.

A. From Context to Text

The Court’s evolution in its approach to “any” is part of a more general shift from routine reliance on purpose and legislative history to reliance on adjacent language and statutory structure, or simply ignoring statutory context in favor of literal meaning presented by dictionary definitions. In an early and famous case construing “any,” the Court recognized that the plain meaning of an immigration statute that prohibited “in any way” assisting or encouraging the importation of “any foreigner” under contract “to perform labor or service of any kind” did, in fact, include within its coverage a pastor for New York’s leading Protestant church. Still, the Court concluded that the “spirit” of the statute, as understood through its purpose and legislative history, trumped this unambiguously expansive plain meaning.

40. But see James J. Brudney & Lawrence Baum, Oasis or Mirage: The Supreme Court’s Thirst for Dictionaries in the Rehnquist and Roberts Eras, 55 WM. & MARY L. REV. 483, 533–35 (2013) (reporting that from the 1989 to 2010 terms, strict textualists Scalia and Thomas often relied on dictionaries close to an enactment date, on dictionaries close to the date a dispute arose, and on dictionaries published close to neither date of enactment nor date of case filing).
42. See id. at 458–64.
middle and latter part of the last century established the breadth of statutory coverage for “any” by first addressing purpose and legislative history, and then invoking the text to reinforce that reading. Alternatively, the Court has paid homage to text at the start of a decision but then later dwelled on purpose and history as underlying or reinforcing the result.

Even in the early 1990s, when the Court was faced with interpreting “any” as part of a key phrase in statutory text, it recognized the applicability or relevance of arguments based on congressional purpose. More recently, though, reflecting the Court’s larger interpretive approach, decisions construing “any” have often focused primarily on what is deemed the plain meaning of that word, as defined expansively in dictionaries, with support gleaned from string citations to earlier expansive plain meaning decisions.

43. See, e.g., United States v. Rosenwasser, 323 U.S. 360, 361-63 (1945) (construing “any of his employees” in a Fair Labor Standards Act overtime provision, and invoking Senate committee report and floor statement of leading sponsor); Shea v. Vialpando, 416 U.S. 251, 258-61 (1974) (construing “any expenses” under Social Security Act provisions as they evolved over several Congresses, and relying on this statutory history as well as committee reports).


B. Expansive Versus Confining Interpretations

Yet the Court in recent decades has not consistently construed “any” as having an expansive scope, despite suggestions to the contrary in certain settings. Since 1990, the Court’s caselaw is actually fairly evenly divided between expansive and confining constructions of “any.” Expansive readings primarily invoke the straightforward textualist mantra of plain or “ordinary” meaning and dictionary definitions. Confining constructions rely instead on various contextual factors, including word association canons such as ejusdem generis and noscitur a sociis, the whole act canon and related structural considerations; substantive canons such as the presumptions against federal preemption of state laws and against extraterritorial application of legislation; and the meaning of words accompanying “any” within compact textual phrases. The Roberts Court, however, rarely relies openly on purpose—much less legislative history—when seeking to discern the function of “any” in these statutory settings.
C. Minimal Role of Ideology in Disagreements Among Justices

Decisions presenting disagreement about the application of “any” have involved liberal justices doing intramural battle as well as conservatives facing off against one another. In addition, justices are not always consistent in their methodological approaches; they may pledge allegiance to the plain meaning expansiveness of “any” in some instances yet also author decisions imposing limits on scope. Further, the link between expansive or confining interpretations of “any” and ideologically-oriented results is not terribly instructive. Cases construing “any” in expansive terms have resulted in both liberal and conservative outcomes. The same may be said for cases that have imposed a limiting construction. Finally, while a handful of decisions construing “any” are unanimous, the cases more often involve disagreements as to the scope and significance of “any” in different statutory settings.

D. The Textualist Trump Card

This is now a solidly textualist as well as largely Republican-appointed Supreme Court. Thus, even justices who believe in the importance of statutory purpose and legislative history rarely rely


60. Over the past decade, justices who have openly endorsed such an approach have been those appointed by Democratic Presidents: Justices Ginsburg, Breyer, Sotomayor, Kagan, and, perhaps, the recently appointed Justice Jackson.
prominently on those resources when seeking to command a majority for their opinions. That said, in the past several terms, the Court’s dominant textualist wing has generated numerous dueling statutory opinions, including on the scope of “any.” And while Justices Thomas and Alito in particular have exhibited a strong predilection for dictionaries as expositors of ordinary meaning, other justices who have relied on ordinary meaning have at times faced textualist pushback from colleagues.

Stepping back, most decisions since 2000 involving interpretation of “any” have had relatively modest stakes when compared with the high-profile cases that have defined and deeply divided the Court in political and ideological terms. Perhaps relatedly, the justices have played their textualist cards with a certain collegial enthusiasm. Digging into dictionary definitions, maxims of word


64. A recent example is Wooden v. United States, 142 S. Ct. 1063 (2022). Justice Kagan for the majority relied on the ordinary meaning of “occasion,” citing dictionary definitions for support. Id. at 1069. Justice Gorsuch, concurring in the judgment, criticized Kagan’s ordinary meaning analysis and invoked the Rule of Lenity as a preferred grounds for the decision. Id. at 1080-82. See also Niz-Chavez v. Garland, 141 S. Ct. 1474 (2021) (Justice Gorsuch for majority relied on the meaning of “a” in clause “a notice to appear” under 1996 immigration statute; Justice Kavanaugh in dissent criticized majority for applying what he called literal meaning rather than ordinary meaning).

65. Of more than a dozen “any” cases decided since the early 1990s and discussed in this Part, Cir. City Stores, Inc. v. Adams, 532 U.S. 105, 114–15 (2001) and Massachusetts v. EPA, 549 U.S. 497 (2007) had predictably substantial policy consequences. Most other decisions involved discrete individuals seeking to avoid criminal prosecution or imprisonment, or to pursue civil remedies of various kinds.
association and statutory structure, and substantive canons, they at times almost seem to be having too much fun while the parties seek to preserve their liberty or recover a modicum of dignity. Yet because the justices substantially accept a dominant methodological approach to statutory interpretation (“we are all textualists now”), they engage with one another on what has become common legal ground—in stark contrast to the partisan and ideological chasms that divide them when the Court acts as a political branch.

Over this same period of two-plus decades, the justices have largely eschewed reliance on legislatively created resources such as legislative history and statutory purpose. Whether this approach is an appropriate way to manage the complexities associated with congressional reliance on certain key language—here, the word “any” in a range of settings—is worthy of deeper inquiry.

III. Deeper Dives

What follows below is an effort to pivot from a high-altitude perspective of “any” in the Court over time to a more ground-level analysis through pairwise comparisons of specific cases. We believe these case studies support two arguments. First, the Court’s willingness to embrace a literalist approach to ordinary meaning analysis is not going to produce reliable conclusions about the scope of “any” in any given statute. Indeed, limiting the arsenal of


67. See Yates, 574 U.S. at 553 (Kagan, J., dissenting) (relying on Dr. Seuss’s One Fish Two Fish Red Fish Blue Fish as textual support for broad scope of “tangible object”). See also Bostock, 140 S. Ct. at 1755 (Alito, J., dissenting) (describing the majority opinion as “like a pirate ship . . . sail[ing] under a textualist flag”); Ali, 552 U.S. at 243–44 (Breyer, J., dissenting) (relying on an imagined (?) conversation with his wife about there not being any butter in their refrigerator as support for a narrow reach of “any”). One has to wonder if Justice Breyer had recently been reading Nora Ephron, HEARTBURN 20–21 (1996) (noting that sometimes husbands say, “‘Is there any butter?’ . . . We all know whose fault it is if there isn’t, don’t we.”). Thanks to Ben Zipursky for the literary reference.

68. See generally John O. McGinnis, Our Two Supreme Courts, LAW & LIBERTY (May 6, 2015), https://lawliberty.org/our-two-supreme-courts (commentary based on Justice Kagan’s 2015 speech at Northwestern Law School, in which the Justice contrasted high-profile “political” cases featuring very brief discussion at conference as everyone just states their position, with other “legal” cases in which the justices deliberate at greater length and can persuade one another).
contextual clues to only literal meaning or only intrinsic sources will likely continue to leave the jurisprudence of “any” in its current state of confusion and indeterminacy. Second, demonstrating how even a textualist Court has marshalled context—including context beyond the linguistic dimensions of the text—supports our alternative argument. The most promising avenue for the Court to pursue in deciding what a statute that uses “any” means is to admit a wide range of sources to ascertain statutory plan or purpose.

Part III.A looks carefully at two cases, decided in quick succession, that reach divergent judgments on uses of “any” in contiguous sections of the same statute. Part III.B explores two cases in which the Court overtly considered the use of the linguistic canon of *ejusdem generis*, coming to different conclusions about its application to limit a use of “any.” Part III.C examines two cases applying different substantive canons as presumptions to help identify the appropriate use of “any” in a statutory scheme. Part III.D shows how purposive analysis can continue to be relevant even for a largely textualist Court that has not yet fully appreciated the inherent variety of legislative uses of the word “any.”

A. Parallel Exceptions Within a Single Statute

Legislators often use “any” as part of parallel or related provisions within a single statute, in connection with shaping coverage and exclusions. This is understandable given that an underlying statutory purpose may require specifying how a broad legal principle or standard will apply, or be limited, in a range of enumerated settings. The Federal Tort Claims Act (FTCA) provides a classic example.

The FTCA, enacted in 1946, abrogates the traditional doctrine of sovereign immunity by permitting private parties to sue the United States in federal court for most torts committed by persons acting on behalf of the government. Section 2680, however, contains various exceptions to this waiver, all starting with the phrase “any claim arising out of” and reflecting Congress’s purpose that immunity be preserved for particular areas of activity or function by federal officials. The two exceptions of interest here are the subsection dealing with torts involving U.S. Postal Service (USPS) activities (§ 2680(b)) and the subsection addressing detention of

goods, merchandise, or other property by certain federal officers (§ 2680(c)). Both subsections follow the “any claim” opener with specific descriptors linked to a more general phrase of uncertain meaning. For activities involving the USPS, the FTCA preserves immunity for “any claim arising out of the loss, miscarriage, or negligent transmission” of postal matter.\(^70\) For actions that involve detaining private property, the statute sustains immunity for “detention of any goods, merchandise, or other property by any officer of customs or excise or any other law enforcement officer . . . .”\(^71\)

The parallels in structure distinguish these two waiver exceptions from most other provisions of § 2680, where the “any claim” is followed by a descriptor phrase that is unambiguously broad and unqualified.\(^72\) Other lengthier FTCA waiver exceptions involve phrases that on their face have uncertain limits or ramifications,\(^73\) but they do not follow the compact parallel structure of subsections (b) and (c).

Those two exceptions were the focus of the Roberts Court cases decided two terms apart. Dolan v. U.S. Postal Service\(^74\) addressed the essence and scope of “negligent transmission” in § 2680(b); and Ali v. Federal Bureau of Prisons\(^75\) analyzed the scope of “any other law enforcement officer” in § 2680(c). Our interest here is in how courts—the Supreme Court and the lower courts—construed the two contested general phrases, and how the word “any” should be analyzed in those settings.

Because the two cases concern the scope of waivers of sovereign immunity, a venerable substantive canon might be relevant to the inquiry. This canon provides that such waivers must be

\(^70\) 28 U.S.C. § 2680(b) (emphasis added).

\(^71\) 28 U.S.C. § 2680(c) (emphasis added).

\(^72\) See, e.g., 28 U.S.C. § 2680(f) (no waiver for damages caused during a quarantine by the federal government), (k) (no waiver for claim arising in foreign country), (l) (no waiver for claim arising from activities of Tennessee Valley Authority), (n) (no waiver for claims arising from activities of a federal land bank or intermediate credit bank). See also 28 U.S.C. § 2680(e) (no waiver for claim arising out of act or omission by federal employee administering national defense provisions under title 50 of the U.S. Code), (j) (no waiver for claim arising from combatant activities during time of war), (d) (no waiver for claim where a remedy is provided under certain chapters of Title 46 of the U.S. Code relating to admiralty).

\(^73\) See 28 U.S.C. § 2680(a) (no waiver for claims by officials exercising due care or performing a discretionary function), (h) (no waiver for claims arising out of a range of intentional torts, with a proviso of exposure to liability for some of those torts if committed by investigative or law enforcement officers).


“unequivocally expressed” and are to be narrowly construed in favor of the sovereign. At the same time, the FTCA is itself a broad waiver of sovereign immunity, as recognized by the Court in its practice of “narrowly constru[ing] exceptions to waivers of sovereign immunity where that was consistent with Congress’ clear intent, as in the context of the ‘sweeping language’ of the Federal Tort Claims Act.” Further, when rejecting the government’s sovereign immunity argument in a non-FTCA case involving textual ambiguity, the Roberts Court declared that the canon “is [simply] a tool for interpreting the law, and we have never held that it displaces the other traditional tools of statutory construction.” We take up the interface between “any” and substantive canons more directly in Part III.C.

1. Dolan v. United States Postal Service

Dolan involved a postal customer injured when she tripped over mail negligently left on her porch by a mail carrier. The question was whether “negligent transmission” covered such a situation as part of the exception to the waiver of immunity, or whether instead the phrase applied only to conduct directly related to “loss and miscarriage”—that is, causing mail to be destroyed or misplaced, or delivered to a wrong address. A court might decide to construe “any” expansively, so that “any claim arising out of . . . negligent transmission” covers all possible instances of negligent transmission by postal officials. Apart from an argument based on the ordinary meaning of “any,” “negligent transmission” itself


77. Nordic Vill., 503 U.S. at 34 (citing to several precedents). See Kosak v. United States, 465 U.S. 848, 855–56 (1984) (discussing FTCA’s purpose of waiving sovereign immunity, with reference to § 2680(b)–(c)). See also SCALIA & GARNER, supra note 76, at 283 (describing the FTCA as having “largely eliminated” sovereign immunity with respect to tort claims).

78. Richlin Sec. Serv. Co. v. Chertoff, 553 U.S. 571, 589 (2008). The Court has been more generous reviewing how the sovereign immunity waiver should be applied once a statute is clear it has been waived. See, e.g., Gomez-Perez v. Potter, 553 U.S. 474, 491 (2008). See generally Gregory C. Sisk, Twilight for the Strict Construction of Waivers of Federal Sovereign Immunity, 92 N.C. L. REV. 1245 (2014) (discussing four cases in 2012 Term where Court invoked text, context, and legislative history without relying on narrow construction favoring the sovereign).

arguably encompasses consequences flowing from acts that are themselves negligent.\textsuperscript{80} This broader understanding is also grounded in practical realities, because the normal operation of the USPS includes not simply the sorting and transfer of the mail but also the ultimate act of delivering millions of letters and packages for which Congress arguably did not mean to attach liability.\textsuperscript{81} And even if such a reading is not fully persuasive, the postal exception could at least be deemed sufficiently ambiguous as to the scope of “any . . . negligent transmission,” allowing a court to invoke the canon favoring narrow construction of sovereign immunity waivers.\textsuperscript{82}

Alternatively, a court might take guidance from the Oregon and Delaware drafting manuals we discussed in Part I: with respect to a provision that is nonexclusive but exemplary, the reason to mention particular examples is to contextualize and shape the contours of the general words with which they are associated.\textsuperscript{83} The Supreme Court in fact adopted this approach in \textit{Dolan}, applying the \textit{ejusdem generis} canon so that the meaning of “negligent transmission” covered only negligence directly related to loss or miscarriage of the mail.\textsuperscript{84} As part of its reasoning, the Court also relied on the “meaningful variation” element of the “whole act” rule, contrasting subsection (b) on postal matters with numerous other FTCA waiver exceptions that “paint with a far broader brush.”\textsuperscript{85} In addition, the majority deflected efforts to rely on the sovereign immunity canon, arguing that unduly generous interpretations of this exception risk undermining the central purpose of the FTCA—to waive governmental immunity in sweeping language.\textsuperscript{86} Finally, the Court addressed the practical consequences raised by the government’s concern for millions of frivolous “slip-and-fall” claims related to delivery. The majority regarded the risk of such claims as analogous to risks faced by

\textsuperscript{80} See \textit{Dolan}, 546 U.S. at 497 (Thomas, J., dissenting).
\textsuperscript{82} See \textit{Dolan}, 546 U.S. at 497–98 (Thomas, J., dissenting); \textit{Dolan CA3}, 377 F.3d at 287–88.
\textsuperscript{83} See supra Part I, text accompanying notes 27–34.
\textsuperscript{84} See \textit{Dolan}, 546 U.S. at 486–87 (with Kennedy authoring the majority opinion). See also \textit{Raila} v. United States, 355 F.3d 118, 120 (2d Cir. 2004) (relying on companion canon, \textit{noscitur a sociis}, to reach same result).
\textsuperscript{85} See \textit{Dolan}, 546 U.S. at 489–90 (citing to § 2680(i), (j), (k), (l), (m), (n)).
\textsuperscript{86} See \textit{id.} at 491–92 (relying inter alia on \textit{Kosak} v. United States, 465 U.S. 848 (1984)).
private businesses under state tort law, and it deemed sufficient the ordinary protections available against frivolous litigation.87


Two years later, in Ali v. Federal Bureau of Prisons88 the Court had to interpret the meaning of “any other law enforcement officer” under § 2680(c). In Ali, a federal prisoner sued the Bureau of Prisons (BOP), alleging that during his transfer between prisons, BOP officers had lost several of his personal items, some of religious and nostalgic significance. The issue was whether these officers were immune from tort liability as “any other law enforcement officers.”

The Court could have adopted the same contextual analysis as in Dolan, concluding that congressional drafters included specific reference to customs and excise officers so as to restrict the scope of the general words “any other law enforcement officer” to officers concerned with customs and taxes.89 The Court might have found further contextual support by invoking statutory purpose. A key reason for carving out waiver exceptions in § 2680 was to preclude tort actions where other remedies already existed.90 And while such remedies had long existed against customs and excise officers, the same was not true for federal law enforcement officers outside the realm of customs and excise.91

On the other hand, certain contextual arguments favoring the government on the scope of “any” in § 2680(c) were not present

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87. See id. at 491.
89. See, e.g., Ali, 552 U.S. at 234–35 (Kennedy, J., dissenting) (relying on ejusdem generis); Andrews v. United States, 441 F.3d 220, 223–24 (4th Cir. 2006) (“Section 2680(c) presents a textbook ejusdem generis scenario”); Ortloff v. United States, 335 F.3d 652, 658–59 (7th Cir. 2003) (relying on ejusdem generis and noscitur a sociis). See also ABC v. DEF, 500 F.3d 103, 107 (2d Cir. 2007) (relying on rule against surplusage, to avoid reducing to a nullity Congress’s inclusion of “officer of customs and excise”).
90. See, e.g., Ali, 552 U.S. at 246 (Breyer, J., dissenting); Kosak, 465 U.S. at 858; Bazuaue v. United States, 83 F.3d 482, 484–85 (D.C. Cir. 1996); Ortloff, 335 F.3d at 659.
91. See Bazuaue, 83 F.3d at 485–86 (describing longstanding availability of common law remedies against customs officers for negligently damaging detained goods, and against excise officers for improper seizure of money or property, followed by nineteenth century federal laws allowing officers sued over their excise and customs work to be indemnified, which transformed suits against these officers to suits against the government; then contrasting this history with situation of plaintiffs injured by federal officers acting in general law-enforcement capacities, who had no way to recover in a suit against the government); Ali, 552 U.S. at 246 (Breyer, J., dissenting) (pointing to Bazuaue court’s analysis detailing this history).
with respect to § 2680(b) in Dolan. One involves a “whole act” reference to § 2680(h), which includes a definition of “law enforcement officer” as part of establishing a waiver exception for claims alleging libel, slander, and related torts by such officers.\(^\text{92}\) This definition could be construed in pari materia with the reference to “other law enforcement officers” in § 2680(c).\(^\text{93}\) A separate, broader contextual clue along the lines of what is sometimes called the “whole code” rule\(^\text{94}\) is that BOP officials are considered “law enforcement officers” under a range of other federal statutes.\(^\text{95}\) Such an argument invokes an understanding that law enforcement officers should be deemed covered under § 2680(c) without the need for further definition because the rest of the U.S. Code confirms that coverage.

More support is available from extrinsic sources that the modern Court rarely likes to consult. A central document in the legislative history of § 2680(c), previously relied on by the Supreme Court, arguably identifies a broader purpose behind that section because of its “special reference to the detention of imported goods in appraisers’ warehouses or customs houses, as well as seizures by law enforcement officials, internal revenue officers, and the like.”\(^\text{96}\) Thus, given the contested arguments based on context, structure, and history, a court might have a sounder basis for contending that there is truly sufficient ambiguity as to the scope of

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\(^\text{92}\) See 28 U.S.C. § 2680(h) (defining “investigative or law enforcement officer” for purposes of that subsection as “any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law”).

\(^\text{93}\) See Chapa v. U.S. Dep’t of Just., 339 F.3d 388, 390 (5th Cir. 2003); Bramwell v. U.S. Bureau of Prisons, 348 F.3d 804, 806–07 (9th Cir. 2003).


\(^\text{95}\) See Chapa, 339 F.3d at 390 (noting that Congress has identified BOP employees as “law enforcement officers” when determining eligibility for Civil Service premium pay and retirement benefits, and that someone who fatally injures a BOP employee while he is engaged in official duties may be charged with the felony of killing a “law enforcement officer”); Bramwell, 348 F.3d at 807 (same). See also Ysasi v. Rivkind, 856 F.2d 1520, 1525 (Fed. Cir. 1988) (holding that border patrol division employees of the Immigration and Naturalization Service who detained appellant’s truck were “law enforcement officers” under § 2680(c)).

§ 2680(c) to consider application of the sovereign immunity canon, in the final analysis.97

Yet the Supreme Court majority in Ali invoked none of the structural or purposive arguments relied on by other courts to support the government’s position. Instead, Justice Thomas for the Court focused on the use of “any” accompanying “other law enforcement officers,” emphasizing the expansive dictionary meaning of “any” and citing to prior Supreme Court precedents that had construed “any” in open-ended terms.98 The majority took time to deflect petitioner’s reliance on eiusdem generis, noscitur a sociis, and the rule against superfluities,99 and it also asserted support for its position based on language added to § 2680(c) in 2000.100 But in the end, Justice Thomas relied on his plain meaning analysis of “any,” concluding that “we are unpersuaded by petitioner’s attempt to create ambiguity where the statute’s text and structure suggest none[,]” and that “‘any other law enforcement officer’ [should be] read to mean what it literally says.”101 Preferring literal meaning to ordinary meaning, the Court revealed a confidence that it needs limited sources to derive the meaning of “any.”

These two FTCA decisions illustrate the importance of linguistic, structural, and pragmatic context in addressing so-called textual disputes that implicate “any.” In Dolan, disputes about plain meaning were eclipsed by these larger contextual considerations. The majority in effect tracked the drafting guidance set forth in certain state manuals regarding nonexclusive exemplary enumerations, supported by responses to the practical argument advanced by the government. Justice Thomas, in solitary dissent,

97. See Chapa, 339 F.3d at 391.
100. See id. at 221–23. The Civil Asset Forfeiture Reform Act of 2000 (CAFRA) added four subsections to § 2680(c), extending the waiver of sovereign immunity to settings where the goods injured or lost were detained as part of a property seizure “for the purpose of forfeiture under any provision of Federal law.” 28 U.S.C. § 2680(c)(3) (emphasis added). According to the majority, the 2000 CAFRA amendment confirmed the earlier scope of “law enforcement officer” as covering all officers who implement forfeiture laws, Ali, 552 U.S. at 222. Justice Kennedy in dissent contended that the amendment was fully consistent with the narrower scope of the waiver exception—because customs and excise officers effect forfeitures under all laws, not just customs and excise laws, the amendment simply extended their immunity to forfeiture actions taken pursuant to laws outside the customs/excise ambit.
101. Id. at 227–28.
relied on the asserted breadth of “any claim” in the postal exception, but he too contended that in practical terms negligence among postal carriers extends well beyond the two enumerated examples.

The Court in Ali reflects a more rigidly textualist approach to “any.” Especially striking is the majority’s conclusion that there is no ambiguity at all about an expansive reading, based principally on a dictionary definition and cites to prior Court decisions. Yet string-cite appeals to precedent on “any” have limited value, given that, as we showed earlier, there are innumerable Supreme Court cases on both sides of the line. In this instance, contextual arguments against an expansive reading of “any” included reference to canons on which congressional as well as state legislative drafters often rely, as well as appeals to the purpose of the customs and excise exception itself. And even defenders of an expansive reading made a decent case in the circuit courts for contextual coverage of all law enforcement officers, or at least ones in the BOP. While there is pushback available against these context-driven contentions for an expansive interpretation, it is at that level of context—be it canons of word association, canons of structural integrity, canons about sovereign immunity, congressional purpose, or, better, all of the above—that judicial battles should be waged. In this instance, it is disappointing that the Supreme Court majority embraced literal meaning as dispositive, while essentially eschewing more meaningful context from intrinsic and extrinsic sources.

103. While Thomas argued for sufficient ambiguity to invoke the sovereign immunity canon, the majority emphasized that the canon is “unhelpful” in the FTCA setting. Id. at 491–92 (citing Kosak v. United States, 465 U.S. 848 (1984)).
104. See supra Parts II.A & II.B.
105. See supra Part I for more on state drafting manuals and the canons—and for more information about drafters’ perspectives on canons in Congress, see generally Gluck & Bressman, supra note 35.
106. See supra notes 92–97, and accompanying text.
107. For example, regarding reliance on 28 U.S.C. § 2680(h) as in pari materia with its definition of “law enforcement officer,” the definition is deemed “for the purpose of this subsection” hence perhaps not expandable to 28 U.S.C. § 2680(c). See Andrews v. United States, 441 F.3d 220, 226 (4th Cir. 2006). With respect to other elements of the U.S. Code identifying BOP employees as “law enforcement officers,” no federal statute mentions the BOP in the context of property detention whereas out of nine federal statutes besides § 2680(c) referring to detention of goods, the majority are specific to customs and excise. See Ali v. Fed. Bureau of Prisons, 552 U.S. 214, 236–37 (2008). (Kennedy, J., dissenting).
B. Tension Between Internal and External Contexts

As our discussion of Dolan and Ali makes clear, debates about “any” often go hand-in-hand with arguments about the application of the linguistic canon of *ejusdem generis* (and sometimes its sister canon, *noscitur a sociis*). That is sensible, as the canon is traditionally applied so that general words in statutes (which often come with an “any” attached) are limited to some property holding together the enumerations of specific items that follow or precede the general category. The two case studies below take different approaches to the relevance of *ejusdem generis* in limiting the word “any.” Watching the two cases struggle with the issue side by side enables us to show the kinds of sources the Court has found relevant to figure out when “any” can be limited by the textual canon and when it cannot. Although the approach we describe in the first case feels like a relic from a time when the Court viewed legislative history as much more relevant to statutory interpretation, it is nevertheless instructive because the problem of knowing how to interpret “any” isn’t going away anytime soon. The Court needs a more systematic interpretive approach, with more tools in its arsenal than looking up “any” in the dictionary, or referencing ordinary meaning when actually implementing literal meaning with the use of italics and string cites.

1. Harrison v. PPG Industries, Inc.108

This case was about a jurisdictional provision of the Clean Air Act Amendments of 1977 that seemed to expand direct review in the Courts of Appeals for Administrator decisions at the Environmental Protection Agency (EPA). Section 307(b)(1) of the Act provides that a petitioner may have the Court of Appeals rather than a federal district court review “any other final action of the Administrator under [the Act] . . . which is locally or regionally applicable.”109 This provision follows a more specific enumeration of particular types of petitions, none of which covered PPG Industries’ (PPG) exact circumstance. The Regional Administrator of the EPA had notified PPG by letter that a part of a PPG facility would be subject to regulation under the Act as a

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statutory “new source.” Thus, the question arose for PPG whether it could seek review of that informal letter determination in the Court of Appeals rather than the district court under the “any other final action” section of the jurisdictional grant to the appellate court.

The Court held, italicizing “any” thrice, that the petitioners were correct in their “literal” rendering to have the jurisdictional grant reach any Administrator decision, so long as it was a “final” decision that “is locally or regionally applicable.” The respondents’ effort to get a limiting reading of “any” by looking to what might hold the prior enumerations in the statute together to constrain the domain of “any”—in an *ejusdem generis* application—was, the Court held, “misplaced.”

The law of *ejusdem generis* in *Harrison* is in some ways familiar to modern eyes but in other ways instructive about a different way of doing business from how the modern Court has much more summarily dealt with “any” problems. Familiarly, the Court looked to see if there really was some relevant property that tied together the prior enumerations in § 307(b)(1). The respondents had urged the Court to limit “any” because the vast majority of the enumerated kinds of Administrator decisions that were subject to direct review in the Court of Appeals were ones that would have had “a contemporaneously compiled administrative record . . . based on administrative proceedings reflecting at least notice and opportunity for hearing.” And the PPG letter didn’t have a robust administrative record associated with it, implicating the competence of the appeals court to review the decision; it would make more sense, the respondents argued, to have these kinds of informal adjudications reviewed first in a trial court, which has more capabilities to develop a factual record. But the Court found a fatal flaw with the argument: “at least one of the specifically enumerated provisions in § 307(b)(1) . . . does not require the Administrator to act only after notice and opportunity for a hearing.” Accordingly, this property could not be the basis to limit “any” along the lines

112. *Id.* at 587.
113. *Id.* at 587-88.
114. *Id.* at 587.
115. *Id.* at 588.
of *ejusdem generis*. That is a common enough way to do *ejusdem generis* business.

But less common for today’s Court was the second “more fundamental” reason the Court rejected the application of *ejusdem generis* in *Harrison*. The Court found there was no uncertainty created by the legislative history about the reach of “any” that would explain or justify limiting its application through a textual canon.\(^{116}\)

The Court reviewed the legislative history extensively — how Congress added the language in the 1977 amendment process as well as discussions in the House Committee on Interstate and Foreign Commerce about the statute’s coverage and its relationship to proposals and recommendations made by the Administrative Conference.\(^{117}\)

The Court also considered and rejected “the theory of the dog that did not bark.” Respondents had urged that the absence of extensive and explicit legislative history about such a radical change to the jurisdiction of the Court of Appeals and a stripping of jurisdiction of the district courts during deliberations of the 1977 amendments ought to be treated as evidence that “any” should be read in a limited way. The Court conceded that the legislative history it studied and summarized was not smoking gun evidence about the matter in controversy. Still, the Court ultimately thought the expansion of jurisdiction “would not appear so large as ineluctably to have provoked comment in Congress” and that the text was clear enough to require legislative history to make it more ambiguous — rather than using absence of legislative history in the way the respondents preferred.\(^{118}\)

Justice Blackmun’s concurring opinion underscored the point: although he found “it difficult to believe that Congress would undertake such a massive expansion in the number of Agency actions directly reviewable by the courts of appeals,” he “[n]onetheless” agreed “with the Court that the dearth of evidence to the contrary makes its broad interpretation” of “any” “inescapable.”\(^{119}\)

To sum up *Harrison*, then, we can say this: The Court is willing to use *ejusdem generis* to constrain a reading of “any” — but only if

\(^{116}\) Id. at 588–89.

\(^{117}\) Id. at 589–91 (citing H.R. 6161, 95th Cong. (1977) (enacted); H.R. REP. NO. 95-294, at 323–24 (1977)).

\(^{118}\) Id. at 591–92.

\(^{119}\) Id. at 595 (Blackmun, J., concurring).
(1) some clear property applies to all of the specific enumerations in the provisions, or (2) some uncertainty about the coverage of “any” presents itself either in the text or can be implied from the legislative history. Absence of legislative history might be relevant if a drastic change would have “ineluctably . . . provoked comment in Congress.” But the size of the jurisdictional shift encompassed by “any other agency action” was not of that magnitude—thus “dogs not barking” was ultimately irrelevant. Admittedly, the modern Court has a much more allergic reaction to the use of legislative history (and its absence!). Still, we need to bring more order to the problem of the statutory “any”—and Harrison points one way toward coherence, drawing from intrinsic and extrinsic sources. Even the primary dissent in Harrison—Justice Rehnquist’s—took legislative history to be essential to understanding “any,” although he disagreed about which parts of the legislative history could point the way to the right answer and how much to use the “dog didn’t bark” theory, rejected by the majority.120

2. Circuit City Stores, Inc. v. Adams121

A case like Harrison is hard to imagine in our current textualist Court, one that tends to eschew careful interrogations of legislative history. Circuit City then presents a more contemporary example of how “any” and ejusdem generis interface—though one that offers a cautionary tale for those unwilling to try to understand the legislative record.

This case focused on the Federal Arbitration Act’s122 (FAA) first section, which excludes from the FAA’s coverage “contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.”123 The Ninth Circuit had held—in conflict with all the other circuits to have considered the issue—that an arbitration agreement in an

120. Id. at 595–602 (Rehnquist, J., dissenting). The Rehnquist dissent in Harrison was drawn upon regularly by Justice Stevens when he deployed the “dog-didn’t-bark” canon of statutory interpretation. See Chisom v. Roemer, 501 U.S. 380, 396 n.23 (1991); Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 589 n.20 (1982) (Stevens, J., dissenting). Ironically perhaps, Stevens did not join the Rehnquist dissent in Harrison and wrote his own, one that was much less informed by a deep dive into the legislative history. Harrison, 446 U.S. at 602–07 (Stevens, J., dissenting).


123. Id.
employment contract was not subject to the FAA’s preemption of state law because a “contract of employment” comes within the exclusion language of “any other class of workers engaged in . . . interstate commerce.” The Ninth Circuit explicitly rejected the application of *ejusdem generis*—an important part of some other circuit court engagements with the question—arguing instead that (1) the § 1 exclusion had to be read in light of § 2’s coverage section; and, more importantly, (2) that the textual canon could not be used to defeat the clear legislative history and the legislative purpose of the FAA.

The Supreme Court’s conservative, then-five-justice majority in 2001 signed onto Justice Kennedy’s *ejusdem generis* argument reversing the Ninth Circuit. By 2001, Justices Kennedy, Thomas, O’Connor, Scalia, and Rehnquist were seemingly willing to consider “statutory context . . . in a manner consistent with the FAA’s purpose.” But their engagement focused rather narrowly on “the text” in isolation from the “legislative history of the exclusion provision” from which they might have understood more context and more nuanced purpose that was Congress’s rather than the Supreme Court’s own gloss thereupon. And although by the opinion’s end the Court offered a superficial engagement with what it called the “sparse” “legislative record on the § 1 exemption,” the majority also very clearly found the *ejusdem generis* argument to be an “insurmountable textual obstacle” that immunized it even from seriously “assess[ing] the legislative history.”

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124. See *Craft v. Campbell Soup Co.*, 177 F.3d 1083 (9th Cir. 1999). See also *Cir. City Stores, Inc. v. Adams*, 194 F.3d 1070 (9th Cir. 1999) (applying *Craft* to the contract between Circuit City and Adams).
126. *Craft*, 177 F.3d at 1092.
128. *Id.* at 118.
129. *Id.* at 118–19.
130. As Justice Stevens argues in dissent, “the Court is standing on its own shoulders” when it develops its purposive readings of the FAA. *Id.* at 132 (Stevens, J., dissenting).
131. *Id.* at 119–21 (majority opinion).
132. *Id.* at 114.
133. *Id.* at 119.
The Court essentially refused to resort to legislative history “to cloud a statutory text that is clear.” But as Justice Souter urged in his dissent for four justices, “the Court has repeatedly explained that the [ejusdem generis] canon is triggered only by uncertain statutory text . . . and that it can be overcome by, inter alia, contrary legislative history . . . . The Court [in the majority opinion] turns this practice upside down, using ejusdem generis to establish that the text is so clear that legislative history is irrelevant.”

Justice Stevens’s dissent (for three justices) walked through the legislative history for the Court. He found this history favored the Ninth Circuit’s reading because of how central commercial arbitration was in the bill that led to the FAA. Moreover, accusing the Court of “[p]laying ostrich,” Stevens described how the amendment that became § 1 was introduced by the bill’s principal supporters in order to remove opposition from organized labor over the possibility that the bill would cover labor disputes or workers’ contracts.

Justice Souter’s dissent also added some legislative history to the mix to support the Ninth Circuit, and offered a counter-canon of ex abundanti cautela: Congress sometimes lists specifics not to limit general terms but rather to make sure the enumerated items get covered with belts-and-suspenders. The Court, however, preferred to use ejusdem generis to assert textual clarity that couldn’t be defeated by substantial evidence of congressional intent. That isn’t where the Court was in the days of Harrison but may be where a more textually oriented Court will find itself today. That is a shame because, for all the lip service to “statutory context,” a Court playing ostrich about the congressional record and scheme—refusing “to look beyond the raw statutory text”—will find it
very challenging to figure out what “any” is doing in statutes by using only textual resources internal to the U.S. code.

C. The Impact of Policy Presumptions

Unlike the textually related canons addressed in sections A and B, which are purportedly derived from understandings about “normal uses of language by educated speakers,”\textsuperscript{142} substantive canons are generally rooted in policy judgments based on the structure or expected scope of government within our federal constitutional system. Two such policy judgments invoked by the Court with some frequency in its statutory decisions are the presumption against federal legislation applying to extraterritorial matters\textsuperscript{143} and the presumption against federal law preempting state authority.\textsuperscript{144} These presumptions, to be sure, can be overcome by sufficiently clear statutory text. The two cases that follow, from the late Rehnquist Court, invoke aspects of these presumptions and construe “any” in the context of deciding whether Congress has in fact been sufficiently clear to overcome them. In each case, the Court’s answer is no. The more general point, however, is that part of figuring out the function “any” serves in a given statute is to understand its embeddedness within an interpretive regime that includes some normative and policy presumptions the courts regularly consider and acknowledge.

1. Small v. United States\textsuperscript{145}

The issue in \textit{Small} arose under 18 U.S.C. § 922(g)(1), which prohibits any person from possessing a firearm if “convicted in any court” of a crime punishable by imprisonment for more than one year. Small was convicted in a Japanese court of trying to smuggle firearms and ammunition into that country and sentenced there to five years’ imprisonment. Upon returning to the United States, he was subsequently indicted for possessing a firearm in violation of § 922. He moved to dismiss the indictment, contending that

\textsuperscript{142} SCALIA & GARNER, supra note 76, at 243.
Congress’s reference to “any court” should be read to exclude convictions entered by a foreign court.

Justice Breyer for the majority began by invoking context, insisting that the word “any” considered alone could not answer the question whether foreign court convictions fall within the scope of the statute. In support of this contextual approach, Breyer quoted from Chief Justice Marshall’s hoary pronouncement that “general words, such as the word ‘any,’ must be limited in their application ‘to those objects to which the legislature intended to apply them,” and added the by-now familiar string cite supporting a contextual approach to “any.”

For the majority, the initial policy context was the “commonsense notion that Congress generally legislates with domestic concerns in mind,” and its statutes therefore are ordinarily meant to have domestic, not extraterritorial, application. Breyer acknowledged that the presumption against extraterritoriality did not map neatly onto this case because the statute was not being applied outside the territorial United States. But he found a similar assumption to be appropriate when considering the scope of the phrase “convicted in any court.”

It may seem counterintuitive to apply this assumption to conviction for gun possession itself, especially given that the district court had exhaustively examined the Japanese trial record and determined that Small’s conviction comported with standards of fundamental fairness. But the Court focused on the scope of “any” if applied to foreign convictions as a class rather than the factual details of this individual case. In the broader context, it concluded that for crimes punishable by more than one year’s imprisonment, foreign laws might well encompass conduct that domestic law would economically encourage, or constitutionally protect, or simply penalize with less than a year in jail.

Although the array of important distinctions between foreign and domestic criminal offenses supported the policy assumption

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146. Id. at 388 (quoting United States v. Palmer, 16 U.S. (3 Wheat.) 610, 631 (1818) (internal quotation marks omitted).
147. See supra note 7 (highlighting that Small cited four prior Court decisions on “any”).
148. Small, 544 U.S. at 388–89 (quoting Smith v. United States, 507 U.S. 197, 204 n.5 (1993)).
150. See Small, 544 U.S. at 389–90 (describing punishment for certain profitmaking conduct under Russian or Cuban law, for expressive propaganda activity under Cuban law, and for vandalism under Singapore law).
about the ordinary reach of domestic statutes, the Court emphasized that this was a presumption rather than a clear statement rule. Continuing with its examination of context, the Court stated that it was “ready to revise this assumption should statutory language, . . . history, or purpose show the contrary.” But the majority found no such convincing evidence to exist.

On text, the majority pointed to a series of contiguous statutory provisions that address exceptions, applications, or enhancements of the penalty for unlawful gun possession. Because all of these refer only to crimes under federal or state law, the inference was that Congress simply did not consider whether the phrase “convicted in any court” applies to foreign convictions. Justice Thomas in dissent invoked the expansive dictionary definition of “any” and cited to prior decisions taking a similarly literalist approach.

On legislative history, the Court acknowledged that the Senate bill, rejected in conference, contained language that would have restricted predicate offenses to domestic crimes, separately identifying “Federal” crimes and “State” felonies on that score. From the majority’s standpoint, the Conference Committee’s preference for the “convicted in any court” language reflected not a desire to incorporate foreign law but rather interest in a simpler approach that avoided problems should states adopt differing definitions of the term “felony.” Thus legislative history’s silence

151. Id. at 391.
152. See id. at 391–92 (provisions allowing gun possession for certain business regulatory crimes, specifying that predicate crimes include misdemeanor crime of domestic violence, and enhancing penalties for three predicate drug offense convictions).
153. The majority explained how construing “convicted in any court” to include foreign convictions would result in various anomalies; for instance, someone convicted of a Canadian antitrust offense could not possess a gun while someone convicted under federal or state law could do so; a person convicted of three serious drug offenses under federal or state law would suffer enhanced punishment but not if convicted three times under foreign law. Id. at 391–92.
154. Id. at 396–97 (Thomas, J., dissenting). Thomas also relied on linguistic context, asserting (per expressio unius) that unlike other sections of the firearms-control statute expressly referencing federal or state law, § 922(g)(1)’s simple reference to “any law” signified the absence of geographic limits as to scope. Id. at 397–98. Justices Scalia and Kennedy joined the Thomas dissent.
155. See id. at 393 (majority opinion).
156. See id.
on foreign law was simply a neutral factor, confirming that Congress did not even consider the issue.\textsuperscript{157}

Finally, on purpose, the majority conceded that one aspect of Congress’s purpose was keeping guns out of the hands of those who had demonstrated threatening capacities, and that conviction for a serious crime abroad might well reflect such a level of threat or dangerousness.\textsuperscript{158} The majority’s rebuttal was to point to empirical evidence that foreign convictions had only been a predicate for prosecution under § 922(g)(1) about a dozen times in the nearly four decades since 1968.\textsuperscript{159} This may be the majority’s least persuasive argument: even a dozen instances where courts found foreign conviction to be a suitable predicate for firearms-possession prosecution suggests that convictions in a foreign court may be recognized as appropriate under this statutory scheme.

But even with this less persuasive element of the Court’s analysis, the larger lesson from \textit{Small} is that the context for “any” can include—and indeed be framed by—substantive policy presumptions as well as language and structural canons. In response to this policy presumption, the majority finds it essential to consider a range of interpretive factors besides literal textual meaning. Indeed, apart from Justice Thomas’s dictionary-driven approach, he too seems prepared to accept this possibility, reinforcing his spare textualist position with arguments based on structural canons and legislative history.

2. \textit{Nixon v. Missouri Municipal League}\textsuperscript{160}

A section of the Telecommunications Act of 1996\textsuperscript{161} authorizes the preemption of state and local laws if they “prohibit[] the ability of any entity” to provide telecommunications services. In 1997, Missouri went ahead and passed a law prohibiting all political subdivisions of the state from offering telecommunications services.

\textsuperscript{157} See id. For Justice Thomas, hardly known to embrace the relevance of legislative history, the Conference Committee’s deletion of reference to “Federal” and “State” was probative: it was, for him, “strong confirmation of the fact that ‘any’ means not ‘any Federal or State,’ but simply ‘any.’” Id. at 406–07 (Thomas, J., dissenting).

\textsuperscript{158} See id. at 393–94.

\textsuperscript{159} See id. at 394.


\textsuperscript{161} 47 U.S.C. § 253.
services. Municipalities in the state then asked the FCC to declare Missouri’s law preempted under the statute. The FCC declined to preempt and the Court had to determine in this case whether the relevant class of entities in the “any entity” location in the law includes a state’s own subdivisions, ultimately affecting a state’s right to restrict its own subdivisions from delivering telecommunications services. The Eighth Circuit had reversed the agency because it found that the plain-vanilla language of “entity” modified with “any” was sufficiently clear to countermand the principle the FCC invoked from Gregory v. Ashcroft, that Congress needs to be clear before it constrains traditional state authority to order its [own] government. But the Court ultimately reinforced the Gregory v. Ashcroft presumption and essentially found that “any” had to be read in light of the substantive canon and not as a quick opt-out for it.

Indeed, the Court from the outset sought to be clear that “any” can and does mean different things depending upon the setting. It was underwhelmed with the Eighth Circuit’s cramped “analysis on the words ‘any entity,’ left undefined by the statute, with [too] much weight being placed on the modifier ‘any.’” Highlighting that “any entity” can mean public or private entities and that “any” can be “expansive” or “narrow,” the Court reached for a “broader frame of reference” than just the proverbial “writing on the page.”

That broader frame was “a working assumption that federal legislation threatening to trench on the States’ arrangements for conducting their own governments should be treated with great skepticism, and read in a way that preserves a State’s chosen disposition of its own power.” Citing to Gregory, the Court concluded that “the ability of any entity” language in the statute was not “forthright enough” nor was it limited to only one meaning. Without an “unmistakably clear statement,” the

| 165 | Nixon, 541 U.S. at 130 (citing 16 FCC Rcd. at 1169; Mo. Mun. League v. FCC, 299 F.3d 949 (8th Cir. 2002)). |
| 166 | Id. at 132. |
| 167 | Id. |
| 168 | Id. at 132-33. |
| 169 | Id. at 140. |
| 170 | Id. at 141. |
Court read “any” in light of the background of traditional legal meanings pursued through a substantive canon.

Lest anyone think this mode of reading “any” is only for liberals, the case’s core conclusion here was amplified in a concurrence by Justices Scalia and Thomas. They wrote separately to distance themselves from the Court’s reliance in part on consequentialist analysis and explained that the substantive canon sufficiently controlled the case—and that the “any” language could not be a source of required preemption from the FCC.171 It was Justice Stevens who dissented on grounds close to a “plain meaning” reading underwritten by some legislative history and purpose.172

What these two case studies illustrate is that the scope of “any” can often come from background normative priorities as evidenced by hoary substantive canons. Although we have drawn on relatively recent cases using presumptions disfavoring extraterritorial applications and interference in a state’s internal dispositions of power, it is not hard to see how other canons (such as the rule of lenity173 or the rule against interpreting statutes to be retroactive174) might come to inform the reach of “any” in a statutory context. The substantive canon is not in these renderings wholly extrinsic to the scope of “any” but instead helps supply context for its usage.

D. The Centrality of Purpose to the Hermeneutics of “Any”

We have thus far examined different kinds of context that can usefully guide courts about the function “any” serves in a statutory scheme; “any” is neither self-defining nor likely to be illuminated by the dictionary. Such context can come from linguistic canons like ejusdem generis. And it can come from other conventionally intrinsic textual sources like the “whole act” or the “whole code.” It can also be supplied by a substantive canon, as we just showed. For judges willing to consider other “extrinsic” sources of context, a particular
use of “any” in a given statute can be informed by the records of deliberation in the legislature, offering guidance as to whether an expansive or limiting usage is more appropriate. But an extrinsic source of context for “any” that is somewhat more acceptable to textualists is statutory purpose. That purpose is typically gleaned from evaluating the record and background information in the lead-up to introduction and enactment, in order to establish what the statute sought to accomplish. In the two cases we discuss below, one authored by Justice Scalia and one authored by Justice Thurgood Marshall, the Court invokes purpose to figure out how “any” operates in a statutory provision. Although we don’t offer these examples to sell the results reached by the Court, the two cases highlight the more general use of purpose in adjudicating the scope of “any” for judges with quite disparate methodological priorities.

1. AT&T Mobility LLC v. Concepcion175

Like Circuit City, this case also involved the proper interpretation of a part of the FAA.176 At issue was § 2’s command to render arbitration agreements “valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract . . . .”177 Because California courts had found unconscionable and therefore unenforceable class action waivers in consumer form contracts under certain conditions,178 the lower courts applying California contract law found that the class waiver in the arbitration agreement between the Concepcions and AT&T Mobility was also unconscionable and unenforceable. After all, the public policy proscription on class waivers would have been a ground for a finding of unconscionability for any consumer form contract, irrespective of whether the agreement contained an arbitration clause.

Nevertheless, the Supreme Court, in an opinion by Justice Scalia, deemed the generally-applicable unconscionability law of California—that would have disallowed a class action waiver to apply to any contract whether in a litigation or an arbitration glossary

177. Id. (emphasis added).
context—to be preempted by the FAA. Although Justice Breyer in opening his dissent for Justices Ginsburg, Sotomayor, and Kagan used the classic strategy of italicizing “any” in the statute to try to get the point across (perhaps forgetting his nuanced view of “any” in \textit{Ali} just three years earlier),\textsuperscript{179} the majority opinion focused on certain extrinsic evidence to decipher the language of “any” in the FAA. Indeed, Justice Scalia invoked legislative \textit{purpose} five times in the majority opinion to find that the FAA preempts California contract law: the majority argued that the “overarching purpose of the FAA . . . is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings.”\textsuperscript{180} Although claiming this purpose could be found in “the text of §§ 2, 3, and 4,”\textsuperscript{181} nothing in the FAA clearly announces a purpose focused on “streamlined proceedings” or takes a position about class actions. The Court pivoted quickly from the text of the FAA to the Court’s own longstanding gloss thereupon about its “principal purpose,” as if recognizing it would be better to cite itself than any specific intrinsic textual source on the centrality of individual rather than class arbitration or streamlined proceedings more generally.\textsuperscript{182} And without citation, the Court also argued that states were free to “require[ ] class-action-waiver provisions in adhesive agreements to be highlighted” so long as “[s]uch steps” don’t “frustrate” the FAA’s “purpose.”\textsuperscript{183}

From one perspective, there is nothing remarkable about this statement: standard “conflict preemption” analysis virtually requires investigation into legislative purpose to make sure state laws aren’t serving to undermine a federal statutory scheme.\textsuperscript{184} From another perspective, however, the willingness of the Court’s conservative majority to allow congressional purposes to inform

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\textsuperscript{179} \textit{ATC}, 563 U.S. at 357 (Breyer, J., dissenting); see also id. at 359 (italicizing “any” a second time). See our discussion of \textit{Ali supra} Part III.A.

\textsuperscript{180} \textit{ATC}, 563 U.S. at 344.

\textsuperscript{181} Id.

\textsuperscript{182} Id. (citing \textit{Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.}, 489 U.S. 468, 478 (1989)).

\textsuperscript{183} Id. at 347 n.6.

\textsuperscript{184} See, \textit{e.g.}, \textit{Geier v. Am. Honda Motor Co.}, 529 U.S. 861 (2000) (focusing on the centrality of purpose in conflict preemption analysis). The opinion was authored by Justice Breyer joined by Justices Scalia, Kennedy, Rehnquist, and O’Connor. The dissent—by Justice Stevens joined by Justices Thomas, Ginsburg, and Souter—didn’t dispute that purpose was significant for the analysis, but still relied in part on “any” in the statutory savings clause to argue against preemption in that case. Id. at 898 (italicizing “any,” as is traditional).
its reading of “any” in statutory language underscores that the jurisprudence of “any” even for largely textualist judges can invoke purposes to help navigate the word’s routine variability. But it wasn’t only Justice Breyer who forgot his “any” jurisprudence from three terms previous. Any-means-any Justice Thomas wrote a concurrence in AT&T that similarly departed from his views in Ali. Thomas simply thought “[i]t would be absurd to suggest that § 2 requires only that a defense apply to ‘any contract.’” Ultimately, in AT&T, Thomas was willing to read “any” in the statute contextually to permit only defenses to formation of contracts, not generally applicable contract law that applies to block enforcement of any contract whatsoever. By limiting the effect of “any” and focusing on contextual clues elsewhere in the text of § 2 and § 4, Thomas made a serious effort to vindicate a reading that would allow challenges to arbitration agreements arising from contract law defenses that apply only to block formation. Yet notwithstanding the textual and contextual arguments in his concurrence, he also provided the fifth vote for the majority’s purposive analysis, albeit “reluctantly.”

The liberal dissenters doubled down on the textual “any” in a more literalist rendering of § 2. But they did not ignore the centrality of purpose and the primary objective of the FAA in evaluating a statutory use of “any.” Rather, citing relevant House and Senate Reports associated with the FAA, the dissent identified a narrower purpose to put arbitration agreements and any other agreements “upon the same footing”—reinforcing its reading of “any.” Because the Senate Report specifically pointed to § 2 to express statutory purpose, the dissent thought the focus on streamlined procedures in the majority opinion was inappropriate as a purposive reading. Thus, in the final analysis, the debate about “any” really turns on legislative purpose. Judges with different methodological commitments will surely use different kinds of evidence to divine purpose, but both the majority and the dissent should have been more forthright that the scope of “any” in the statute could only come from some argument about statutory purpose, however ascertained.

185. AT&T, 563 U.S. at 352 (Thomas, J., concurring).
186. Id. at 353.
187. Id. at 359 (Breyer, J., dissenting).
188. Id. at 359–62 (citing H.R. REP. NO. 96-68, at 1 (1924); S. REP. NO. 536-68, at 2 (1924)).
2. Reves v. Ernst & Young\textsuperscript{189}

In this case, about the reach of the statutory language “any note” in the Securities Exchange Act of 1934,\textsuperscript{190} the Court likewise interrogated congressional purpose to conclude that promissory notes payable on demand by holders did fall within the “any note” definitional language of “security” under the Act. Although there was a textualist partial dissent from a portion of Justice Marshall’s otherwise unanimous opinion, the entire Court signed onto a purposive evaluation of Congress’s intent in regulating securities broadly.

At issue for the Court was whether an auditor could be sued under the antifraud provisions of the Securities Exchange Act for inflating the assets and net worth of a farmers’ cooperative that offered notes to members and nonmembers at variable interest rates in order to beat local financial institutions, and marketed them as an investment program backed by real assets held by the co-op and audited by the predecessor to Ernst & Young. Ernst & Young had successfully argued in the Eighth Circuit that the co-op notes could not be considered “any note” in the definition of “security” in the Act. But the Supreme Court disagreed.

Even before any textual analysis got off the ground, Justice Marshall invoked the “fundamental purpose undergirding the Securities Act[: ‘to eliminate serious abuses in a largely unregulated securities market.’”\textsuperscript{191} He emphasized that “Congress painted with a broad brush[,] . . . recognizing the virtually limitless scope of human ingenuity, especially in the creation of ‘countless and variable schemes devised by those who seek the use of the money of others on the promise of profits.’”\textsuperscript{192} Although mostly citing the Court’s own precedents to divine congressional purpose, Marshall also briefly quoted a House Report identifying that “the term ‘security’” should be defined “in sufficiently broad and general terms.”\textsuperscript{193} He then openly acknowledged that in deciding which instruments the Court would deem “securities” under the Act, it was necessary not to employ “legal formalisms,

\textsuperscript{189} Reves v. Ernst & Young, 494 U.S. 56 (1990).
\textsuperscript{190} 15 U.S.C. § 78c(a)(10).
\textsuperscript{191} Reves, 494 U.S. at 60.
\textsuperscript{192} Id. at 60–61.
\textsuperscript{193} Id. at 61 (quoting H.R. REP. NO. 85-73, at 11 (1933)).
but instead [to] take account of the economics of the transaction,” focusing on “Congress’ purpose” in a pragmatic way to determine the ambit of the Act.\(^{194}\)

All this led to the opinion being clear that “the phrase ‘any note’ should not be interpreted to mean literally ‘any note,’ but must be understood against the backdrop of what Congress was attempting to accomplish in enacting the Securities Acts.”\(^{195}\) Nevertheless, in light of that set of objectives the Court was willing to use the “any” language to establish a rebuttable “presumption that every note is a security.”\(^{196}\) From that presumption, the Court developed a test which drew upon lower court common law efforts to define which “notes” are “securities” under the Act and which are not—and the Court found no difficulty concluding that the co-op’s notes were covered as securities, consistent with congressional purpose.\(^{197}\)

Although the rest of the Court split in various ways about how to apply an exclusion at the end of the relevant statutory section about short-term maturity date notes—some offering more \textit{stare decisis} and legislative history-focused arguments\(^{198}\) and some offering more textual readings of the exception\(^{199}\) —the whole Court (including partial dissenters Rehnquist, White, O’Connor and Scalia) joined in the purpose-driven construal of “any note” in the primary definition of the Act’s coverage. Notwithstanding the partial dissenters’ conventional use of an italicized “any” to argue for a broadened use of the short-term maturity exemption,\(^{200}\) the separate opinion about the exclusion does nothing to undermine the appropriateness of drawing on congressional purpose to understand the primary definitional section of covered securities. Again, here, \textit{Reves} supports the general use of congressional purposes, however divined, in arriving at contextually persuasive ways to read the word “any” in legislative work-product.

\textsuperscript{194.} Id. \\
\textsuperscript{195.} Id. at 63. \\
\textsuperscript{196.} Id. at 65. \\
\textsuperscript{197.} Id. at 67–70. \\
\textsuperscript{198.} Id. at 73–76 (Stevens, J., concurring). \\
\textsuperscript{199.} Id. at 76–82 (Rehnquist, J., concurring in part and dissenting in part). \\
\textsuperscript{200.} Id. at 80.
IV. “ANY” AND CONTEMPORARY LEGISPRUDENCE

We don’t mean for this inquiry into drafting and interpretive practices surrounding the word “any” to be just another screed against textualism—or another effort to reveal the limits of that approach for a Court dead-set on embracing it in one form or another. From our vantage point, it isn’t simply that “ordinary meaning” textualists cannot agree on uses of “any” with the few tools they find relevant, defaulting too often to what they assert to be plain meanings. As we have shown above, these textualists have mostly relied on italicization, dictionaries, and some selectively invoked canons (linguistic, structural, and substantive) to bounce among purportedly clear meanings of “any” in any given statute. But we have also shown that they are capable, even within their textualisms, of reaching a little deeper for contextual cues to help inform their interpretations.

Although the Court’s textualists haven’t yet sought to use “ordinary meaning” textualism’s newer gadgets—such as experimental jurisprudence or corpus linguistics—we doubt those technologies are going to solve the problem of reining in the discretion judges operate with when they decide how to read “any” in a particular statute. That is because construing “any” in a statutory setting requires developing a rich story about legislative context. Put most directly, “any” adjusts the meaning of other words; it has a function rather than a definition. Indeed, it can have multiple functions that can affect other words in a statute; and those functions or uses are rooted in the communicative circumstances of the statutory utterance. Even textualists who want to avoid intentionalist inquiries must recognize context to understand the role played by “any.”

In life and law, universal quantifiers routinely are accompanied by a range of domain restrictions, furnished by background understandings that are appreciated by drafters and citizens alike. Yet rather than accepting that the Court should regularly look


outside the dictionary and statutory structure, we too often get opinions in majority and dissent by textualists that argue about the scope of “any judgment regarding the granting of relief” (in a recent term, for example) without being willing to explore seriously congressional purpose and plan—context which could help resolve the dispute.203

We tried to show above that even committed textualists of various types have found ways to allow purposive readings of “any” to matter in some cases—and that seems a promising pathway to help the Court know when an expansive or limiting reading of “any” makes the most sense of the statutory scheme at issue. Perhaps some judges will read this Article and see the need for a new “any” canon that allows them to view almost all uses of “any” as requiring a fair look at a broad range of contextual resources. Although “ambiguity” is not really the right concept, because the literal meaning of “any” standing alone is rarely the best way to start the inquiry, more literalist judges will often need something akin to a threshold ambiguity determination to start looking broadly at context. Perhaps more judges will adopt Chief Justice Roberts’ apparent willingness in statutory interpretation cases to permit a textualism inflected with careful attention to legislative planning and purpose.204 Our larger point, however, applies outside of the textualism of the moment, for it isn’t just conservative judges playing fast and loose with “any.” Liberal judges too could be doing better in their “any” jurisprudence, as they often are content to play by seemingly textualist rules without mounting fuller contextual investigations.

In this regard, we share certain concerns expressed by other scholars about the hegemony of textualism. One is a doubt that the Court’s persistent hyper-focus on statutory text makes these laws more understandable to ordinary citizens. As William Eskridge and Victoria Nourse put it, the growing inaccessibility of statutory meaning is due to a methodology that “combine[s] elasticity and opportunities for source-shopping with normative vacuity.”205


205. See Eskridge & Nourse, supra note 15, at 1737.
The prototypical “average citizen” seeking to understand the domain of “any” in federal statutes will not readily comprehend why parallel sections of the FTCA, using “any” in closely similar settings, yield totally opposite resolutions based on divergent textualist approaches. Or why the same language canon in one setting is deemed unnecessary to establish the textual clarity of “any,” while in another case it establishes the scope of “any” as so textually clear that there is no need to consider legislative background.

A related but distinct concern involves the declared objectivity of textualist sources, notably dictionaries and content-neutral language canons. We and others have suggested that this presumptively neutral or objective character is instrumentally valuable to those (including the justices) who seek to rebut charges of a politicized Court. But the sheer number of dictionary definitions and the lack of any canonical hierarchy undermine notions that judges wielding these resources are sensibly constrained or are ceding policy choices to legislators. Our review of “any” decisions illustrates that this capacious statutory universe reflects something beyond definitions of words and interactive phrases. One important lesson is that when it comes to “any” in a statutory scheme, context is more than an external constraint on the word’s scope; it is essential to determining that word’s use or function in the scheme.

More generally, statutes consist of substantive rules and standards established and negotiated by legislators, who draft and approve those rules and standards in order to accomplish certain objectives or purposes. When construing “any” — whether “labor or service of any kind,” “any tangible object,” “any other law enforcement officer,” or “convicted in any court,” to use examples we have discussed in this Article — a respect and appreciation for those purposes would seem essential if we are to be governed by

206. See supra Part III.A (comparing divergent readings of “any” in the FTCA in Dolan and Ali).

207. Compare supra Part III.B.1 (discussing the rejection of ejusdem generis in Harrison) with Part III.B.2 (discussing the preclusive impact of ejusdem generis in Circuit City).


209. Cf. SLOCUM, supra note 17, at 167.
legislative rather than judicial policy determinations. Even in the cases in which substantive canons inform the domain of “any,” at least some of those canons emerge over time as a background against which many legislators govern.210

As we have shown in Part II, isolating bits of text such as “any” and tearing “any” away from a richer contextual analysis of a statutory scheme is not just a textualist misstep by conservative judges. Rather, the dynamic of “textual isolationism” that Nourse has identified in many Court decisions211 is—while not an equal opportunity offense among liberal judges—something justices on the left similarly find themselves doing too when it comes to “any.” It just won’t do for judges to isolate “any” from a narrative of what the statute is trying to accomplish in its coverage or exceptions; textualists and purposivists alike need to remember as much.

If this Article accomplishes nothing else, we hope it invites all judges to embrace greater humility when adjudicating cases that turn on “any.” We know textualists won’t suddenly support a new “information economy,” as Nourse puts it,212 to increase their likelihood of getting “any” right with legislative history. But we also know all judges—right-wing and left-wing, textualist and purposivist—can do better by admitting reflections about a statute’s plan or scheme when deciding what “any” is doing in context and thinking about how “any” interfaces with other normative commitments evident in a set of well-entrenched linguistic and substantive canons. Although Nourse is modestly more optimistic that canons like ejusdem generis can help as a small corrective for isolationism,213 our study of “any” reveals that whether it is appropriate to apply ejusdem generis—or for that matter policy presumptions against preemption or extraterritorial application—probably requires a threshold investigation into the legislative plan or scheme. That is part of another takeaway from our inquiry into

210. There is mixed evidence about the ways the federalism and lenity canons may or may not make their way into drafting practices. See Gluck & Bressman, supra note 35, at 941–47 (exploring congressional staffers’ knowledge of some substantive canons).

211. See Nourse, supra note 14. Nourse accuses purposivists of this practice too, to be clear, and our survey of judges in their “any” decisions confirms the point. She also analyzes Yates in her paper—as we have above at various junctures in the Article—but she only highlights the complexity associated with “any” in that case in a footnote. See id. at 1422 n.72.

212. Id. at 1413.

213. Id. at 1433 (“In this sense, [ejusdem generis] should be seen as a defensive, rather than offensive tool, resisting isolationism . . . .”).
“any”: some words especially trigger the need for illuminating extrinsic context, and using only intrinsic sources of meaning limits judicial wisdom while increasing the risks of unbridled judicial discretion.

CONCLUSION

Our effort to expose variable drafting and interpretive approaches to the ubiquitous word “any”—dispersed throughout our statute books and federal reporters—is, in part, a case study about the way a word which has multiple uses needs a lot of context for sensitive interpretation appropriate to the relevant statutory setting. Literalism just won’t do—as philosophers and linguists recognize regarding universal quantifiers and as citizens know through their common sense. This Article—which examined legislative drafting manuals, surveyed centuries of Court decisions, and conducted in-depth pairwise comparisons of “any” cases—reveals that struggles in construing “any” come with the territory of dealing with a legislatively valued word that can do so many different things in statutory provisions. Our recommendation for the Court is that its “any” jurisprudence would be improved by conceding that “any” is facially inconclusive most of the time—and then permitting itself the widest range of contextual sources to decide its scope and function: call this a new “any” canon. We aren’t expecting the modal textualist to admit legislative history but we have shown that, notwithstanding frequent pronouncements about the “plain meaning” of the word, textualists and non-textualists alike have been willing to interrogate the legislative record and policy presumptions in service of purposive readings. Integrity requires judges to acknowledge that interpreting “any” will require a panoply of sources to inform its use in a given statutory context.

214. See generally SLOCUM, supra note 17; Stanley & Szabó, supra note 18.