

# BOOK REVIEW

## THE NEW TEXTUALISM AND NORMATIVE CANONS

READING LAW: THE INTERPRETATION OF LEGAL TEXTS. By Antonin Scalia and Bryan A. Garner. St. Paul: West, 2012. Pp. 567. \$49.95.

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*In Reading Law, Justice Scalia and his coauthor, Professor Bryan Garner, promise that text-based statutory interpretation can be rendered more predictable and constraining if 57 “valid canons” are followed. Admiring the enterprise, this Review maintains that this regime would not solve the problems of unpredictability or judicial policymaking Reading Law identifies. For any difficult case, there will be as many as twelve to fifteen relevant “valid canons” cutting in different directions, leaving considerable room for judicial cherry-picking.*

*Another problem afflicts their enterprise. Almost all of Scalia and Garner’s “valid canons” are, rather than strictly textualist, either explicitly grounded upon a normative precept or dependent on norms that require an assessment of a statute’s purpose to determine its application. Justice Scalia’s new textualism insists that judges avoid value judgments—but the Scalia and Garner canons make value judgments inevitable. Indeed, canons-based textualism would (if widely followed) be strongly undemocratic. We now have evidence that congressional drafters are not aware of most of Scalia and Garner’s canons—and several of their canons are rules that Congress cannot follow when enacting complicated legislation.*

*This Review concludes with a defense of the wide variety of canons actually followed by the Supreme Court. No valid approach to statutory interpretation can ignore the precedent-based canons or neglect the legislative history and purpose canons that the Court has long followed. Unfortunately, no canons-based regime will deliver complete predictability, judicial constraint, or fair results, but the multifactored regime followed by the Court is the best that mere judges can devise.*

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## INTRODUCTION

Justice Antonin Scalia is the leading theorist as well as practitioner of what has been dubbed *the new textualism*.<sup>1</sup> His judicial opinions, speeches, articles, and books have generated great debates, which have (ironically) revealed a substantial consensus about the ground rules for statutory interpretation. Thus, virtually all theorists and judges are “textualists,” in the sense that all consider the text the starting point for statutory interpretation and follow statutory plain meaning if the text is clear.<sup>2</sup> However, Justice Scalia’s new book, coauthored with linguist Bryan Garner, reveals that virtually all theorists and judges are also “purposivists,” in the sense that all believe that statutory interpretation ought to advance statutory purposes, so long as such interpretations do not impose on words a meaning they will not bear.<sup>3</sup> And virtually all theorists and judges insist that statutory context is important in discerning the meaning of statutory texts.

So what has the debate been all about? Doctrinally, the big debate has been whether interpretive context can include the internal “legislative history” preceding a statute’s enactment into law. The new textualists maintain that legislative history should be marginalized or ignored, unless used simply like a dictionary of word use; old textualists, purposivists, and pragmatic interpreters maintain that legislative history is often relevant and useful to figure out or confirm statutory meaning.<sup>4</sup> Theoretically, the big debate has focused on what the role of judges should be. Most textualists maintain that judges interpreting statutes ought to be nothing more than the faithful agents of the enacting legislature; most purposivists and pragmatic interpreters maintain that judges are partners in governance and ought to consider that role when they apply statutes to new circumstances.<sup>5</sup> Institutionally, the debate has pitted new textual-

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1. William N. Eskridge, Jr., *The New Textualism*, 37 *UCLA L. Rev.* 621, 624 (1990) [hereinafter Eskridge, *New Textualism*]. For Justice Scalia’s classic articulation, see generally Antonin Scalia, *A Matter of Interpretation* (1997) [hereinafter Scalia, *Interpretation*].

2. Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 16 (2012); Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 *Colum. L. Rev.* 1, 3 (2006).

3. See Scalia & Garner, *supra* note 2, at 63–65 (“A textually permissible interpretation that furthers rather than obstructs the document’s purpose should be favored.”). Although Scalia and Garner assail theories of interpretation where “purpose is king,” pushing text to one side, *id.* at 18, virtually no one advocates or follows such a theory. Most purpose-based theories are similar to the one endorsed by Scalia and Garner, where judges follow the interpretation that is most consistent with the statutory purpose but not if the interpretation would impose on the text a meaning it will not bear. E.g., Henry M. Hart, Jr. & Albert M. Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* 112 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994).

4. Scalia, *Interpretation*, *supra* note 1, at 29–37; John F. Manning, *What Divides Textualists from Purposivists?*, 106 *Colum. L. Rev.* 70, 75–76 (2006).

5. Compare John F. Manning, *Textualism and the Equity of the Statute*, 101 *Colum. L. Rev.* 1, 127 (2001) (arguing courts should be faithful agents of Congress in statutory

ists, who maintain that the rule of law as well as democracy requires that judges be tightly “constrained” by strict rules, against pragmatists and purposivists, who are concerned with enabling judges to adapt old statutes to new problems and who believe that the process of legal reasoning from text, legislative purpose, and precedent constrains judges.<sup>6</sup>

In *Reading Law*, Justice Scalia and his coauthor expand upon and provide examples for Scalia’s longstanding position in these debates: namely, that it is imperative that judges be tightly constrained or they will read their own values into statutes,<sup>7</sup> that the textualist methodology actually does constrain judges,<sup>8</sup> and that legislative history does not.<sup>9</sup> Scalia and Garner depict current practice as turning judges loose to read anything they want into statutes; thus, by their account, using legislative history to figure out statutory meaning is like “entering a crowded cocktail party and looking over the heads of the guests for one’s friends”<sup>10</sup> (paraphrasing the late Judge Harold Leventhal). In contrast, the proper textualist approach, they say, “will curb—even reverse—the tendency of judges to imbue authoritative texts with their own policy preferences”<sup>11</sup> and “will provide greater certainty in the law, and hence greater predictability and greater respect for the rule of law.”<sup>12</sup>

Critics of the new textualism claim that its methodology is no more constraining than a methodology that considers legislative history as an interpretive aid.<sup>13</sup> Indeed, because the regulatory terms that generate the

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interpretation), with Stephen Breyer, *Making Our Democracy Work: A Judge’s View* 88–105 (2011) (arguing courts should be cooperative partners with other institutions). I have argued previously that this debate is overstated, for a truly “faithful agent” is one who adapts old directives to deal productively with new and typically unanticipated circumstances. William N. Eskridge, Jr., *Spinning Legislative Supremacy*, 78 *Geo. L.J.* 319, 322 (1989).

6. Compare Scalia, *Interpretation*, supra note 1, at 18–25 (criticizing purpose-based theories as insufficiently constraining and urging textualism as a more constraining method), and Frank Easterbrook, *Foreword to Scalia & Garner*, supra note 2, at xxi, xxii–xxiv (asserting that great contribution of strict rules for statutory interpretation is that they hedge in judicial discretion), with William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 *Stan. L. Rev.* 321, 382 (1990) [hereinafter Eskridge & Frickey, *Practical Reasoning*] (positing that statutory interpretation methodology is eclectic and constraint comes from convergence of diverse materials).

7. Scalia & Garner, supra note 2, at 9–10.

8. *Id.* at 15–18.

9. *Id.* at 269–91, 344–46.

10. *Id.* at 377.

11. *Id.* at xxviii.

12. *Id.* at xxix. These points are also succinctly made in Judge Easterbrook’s *Foreword to Reading Law*. Easterbrook, supra note 6, at xxi–xxvi.

13. See, e.g., Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 *S. Cal. L. Rev.* 845 (1992); James J. Brudney & Corey Ditslear, *Canons of Construction and the Elusive Quest for Neutral Reasoning*, 58 *Vand. L. Rev.* 1, 6 (2005) [hereinafter Brudney & Ditslear, *Canons of Construction*] (arguing accepted canons of construction do not constrain judges from imposing ideology in decisions); James J. Brudney & Corey Ditslear, *The Decline and Fall of Legislative History?: Patterns of*

most intense statutory debates—such as “discriminate” in civil rights laws—have a variety of meanings, choosing one meaning of a word is “like entering a crowded cocktail party and looking over the heads of the guests for one’s friends.”<sup>14</sup> In practice, the Supreme Court and many lower courts have relied increasingly on dictionaries to escape this charge,<sup>15</sup> but, as Scalia and Garner point out, dictionaries are no panacea: Because there are so many of them and each offers a variety of definitions for common terms, dictionaries confirm or exacerbate the variety of choices rather than narrow them.<sup>16</sup> In other words, cherry-picking among interpretive sources is a problem for all methodologies, and the new textualism offers no solution to this ancient dilemma. Indeed, the most illuminating analyses in *Reading Law* are those in which the authors engage both sides of a close debate and admit that textualist sources offer no easy answers to some interpretive issues.<sup>17</sup>

Nonetheless, *Reading Law* offers what its authors consider a partial solution to the problem of judicial discretion in statutory interpretation. The thesis of the book is that there are “valid canons”<sup>18</sup> of statutory interpretation and that if all judges followed these “valid canons” they would be more constrained and law would be more predictable. The meat of the book consists of these “valid canons” that, by Scalia and Garner’s account, reflect “sound principles of interpretation”<sup>19</sup>: thirty-seven “principles applicable to all texts,”<sup>20</sup> plus twenty “principles applicable specifically to governmental prescriptions” when judges interpret statutes,<sup>21</sup> plus thirteen “falsities exposed” by the authors.<sup>22</sup> While the authors suggest that their list may be as few as one-third of the total number of “valid

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Supreme Court Reliance in the Burger and Rehnquist Eras, 89 *Judicature* 220, 229 (2006) (“Personal beliefs, policy preferences, and strategic considerations surely help shape the priority given to each interpretive resource.”); William N. Eskridge, Jr., *Textualism, the Unknown Ideal?*, 96 *Mich. L. Rev.* 1509, 1535 (1998) (book review) [hereinafter Eskridge, *Unknown Ideal*] (arguing textualism does not “narrow[] the options of Scalia’s *bête noire*, the willful judge”); Alan Schwartz, *The New Textualism and the Rule of Law Subtext in the Supreme Court’s Bankruptcy Jurisprudence*, 45 *N.Y.L. Sch. L. Rev.* 149, 159 (2000) (claiming legislative history often provides reliable “evidentiary basis from which to infer legislative intent”).

14. See *supra* note 10 and accompanying text.

15. Jeffrey L. Kirchmeier & Samuel A. Thumma, *Scaling the Lexicon Fortress: The United States Supreme Court’s Use of Dictionaries in the Twenty-First Century*, 94 *Marq. L. Rev.* 77, 103 (2010).

16. See Scalia & Garner, *supra* note 2, at 419–24 (listing “most useful and authoritative” dictionaries).

17. See, e.g., *id.* at 158–60 (highlighting *United States v. Hayes*, 555 U.S. 415 (2009), as “example of how various canons of interpretation point to different outcomes”).

18. *Id.* at 9.

19. *Id.* at 47.

20. *Id.* at 49–239 (describing canons 1–37).

21. *Id.* at 241–339 (describing canons 38–57).

22. *Id.* at 341–410 (describing “falsities” or anticanons 58–70).

canons,” they are satisfied that following these rules will make judging “easier” (albeit not “easy”).<sup>23</sup>

This candid book is an effort to retrieve a culture of judicial restraint and objectivity through the mechanism of the nineteenth century’s rule-filled treatise.<sup>24</sup> Quoting an 1882 treatise, for example, the authors say: “The sound view is that ‘statutory interpretation is governed as absolutely by rules as anything else in law . . . [O]n the whole, the rules of statutory interpretation are specially stable.’”<sup>25</sup> The Langdellian culture of law as categories and bright-line rules has long departed, and the rule-based treatise cannot serve as the legisprudence for the new millennium. Indeed, the treatise-based regime was never quite the “science” that Scalia and Garner suppose it to have been. Thus, in the early twentieth century, *Lochner*-loving federal judges deployed the “stable,” canons-based jurisprudence of the old treatises for dynamic and highly partisan purposes, such as providing novel statutory weapons to employers seeking to destroy labor unions.<sup>26</sup> The New Deal buried this canons-based reaction to the worker-friendly regulatory state with a purpose-based approach to statutory interpretation.<sup>27</sup>

Complementing its nostalgia for rule-based treatises, the conceptual agenda of the Scalia and Garner book seems to be largely a repetition of Justice Scalia’s frequently expressed views about textual interpretation, the proper role of the judge, and the many reasons judges should not rely on legislative history. What is new about the book is its effort to set forth a collection of “valid canons” of statutory construction and to demonstrate that these valid canons will constrain judicial decisionmaking in statutory cases. The authors do not succeed in this project. Indeed,

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23. *Id.* at xxviii.

24. J.G. Sutherland’s *Statutes and Statutory Construction* (Chicago, Callaghan & Co. 1891) has long been our nation’s leading collection of canons of statutory interpretation, with literally hundreds of them catalogued and illustrated. The most recent update, by Norman and J.D. Shambie Singer, was completed in 2012. The Scalia and Garner book looks a lot like the original Sutherland treatise, before it became so lengthy, and shares its aspiration to recover a scientific set of rules for interpreting statutes (and other legal documents). Cf. Scalia, *Interpretation*, *supra* note 1, at 14–15 (expressing nostalgia for Sutherland and other nineteenth-century treatises that recognized “science of statutory interpretation”).

25. Scalia & Garner, *supra* note 2, at 61 (alteration in original) (quoting Joel Prentiss Bishop, *Commentaries on the Written Laws and Their Interpretation* § 2, at 3 (Boston, Little, Brown, & Co. 1882)).

26. See William N. Eskridge, Jr., *Dynamic Statutory Interpretation* 81–105 (1994) [hereinafter Eskridge, *Dynamic*] (documenting antiworker deployment of *Lochner*-era statutory interpretation by railroad-appointed judges, who imported their own pro-business values into statutes through creative readings of text and deployment of canons such as rule against derogating from common law).

27. See William N. Eskridge, Jr. & Philip P. Frickey, *An Historical and Critical Introduction to Hart & Sacks*, *supra* note 3, at li, lxviii–xcvi (providing historical account of purposive “turn” in statutory methodology in late 1930s, classically codified in Hart and Sacks’s legal process materials of 1950s).

their exegesis of dozens of canons actually undermines the conceptual theses of the book and of Scalia's jurisprudence.<sup>28</sup> This Review will explore three big problems with the Scalia-Garner canons as a set of rules that constrain judges and implement original meaning, the Scalia-Garner metric. If I am right about these problems, the actual effect of the Scalia-Garner canons would not be greater judicial restraint but instead a relatively less constrained and somewhat more antidemocratic textualism.

One problem is that even their fragmentary list of approved canons<sup>29</sup> reveals significant possibilities for judicial cherry-picking. In any complex case, there will be several canons on every side of the issue, and the unscrupulous judge will have many cherries to pick under the approach favored by Scalia and Garner. Recall that the authors admit that theirs is a fragmentary list of "valid canons" and that there might be three times as many valid canons of statutory construction,<sup>30</sup> which is a rich orchard from which to pick cherries. Updated through 2012, my casebook coauthors and I found 187 different canons of statutory construction in the opinions of the Supreme Court under Chief Justices Rehnquist and Roberts.<sup>31</sup>

Moreover, even the most scrupulous of judges will be tempted to pick some cherries when the case raises issues of large public moment, especially for judges who harbor strong moral feelings regarding those issues. To illustrate this phenomenon, this Review examines one of Scalia and Garner's favorite cases, *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*.<sup>32</sup> More than a dozen Scalia and Garner-approved canons were relevant to judicial resolution of the statutory issue: Did the Department of the Interior have authority under section 9 of the Endangered Species Act (ESA) to prevent landowners from harming endangered species by destroying their essential habitat?<sup>33</sup> Both Justice

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28. The indeterminacy of the authors' canons-based methodology has been met with scorn by Judge Richard A. Posner. See Richard A. Posner, *The Incoherence of Antonin Scalia*, *The New Republic* (Aug. 24, 2012, 12:00 PM) (book review), <http://www.tnr.com/article/magazine/books-and-arts/106441/scalia-garner-reading-the-law-textual-originalism> (on file with the *Columbia Law Review*) (arguing general "pattern of equivocation exhibited throughout [the] book" and "authors' lack of a consistent commitment to textual originalism" creates "problem that undermines their entire approach").

29. Scalia & Garner, *supra* note 2, at xi-xvi.

30. See *supra* note 23 and accompanying text.

31. William N. Eskridge, Jr., Elizabeth Garrett & James J. Brudney, *Cases and Materials on Legislation: Statutes and the Creation of Public Policy* app. (4th ed. Supp. 2012). We do not represent that the number 187 includes all possible canons, only the ones we found for the Rehnquist and Roberts Courts. Consistent with Scalia and Garner's critique of Llewellyn, see *infra* note 49, and their own shorter collection, our collection includes canons and their caveats as one canon.

32. 515 U.S. 687 (1995). Scalia and Garner devote several pages to the case and quote extensively from the dissenting opinion (authored by Scalia), which they like quite a lot. Scalia & Garner, *supra* note 2, at 230-33.

33. 515 U.S. at 690.

John Paul Stevens, for the Court,<sup>34</sup> and Justice Scalia, for the dissenters, were able to assemble an impressive array of canons. Reading their dueling opinions, one is left with the impression that the deployment of canons by both distinguished jurists was a ritualized display masking dueling results that were driven by deeper institutional and even normative principles.

Thus, a related issue is what I call the norms problem. The cherry-picking problem suggests that judges who feel strongly about the issues in a case will have plenty of canons to choose from to support the process of reading their political preferences into statutes. The norms problem suggests that the canons themselves demand normative analysis and, therefore, discretionary choices on the part of judges. Among the 187 canons that my coauthors and I found for the Rehnquist and Roberts Courts, at least 134 canons (or 71.7%) are “substantive.”<sup>35</sup> Substantive canons are presumptions, clear statement rules, or even super-strong clear statement rules that reflect judicial value judgments drawn from the common law and from constitutional law (created by judges), as well as from statutes themselves (as understood and interpreted by judges). Although Justice Scalia signed onto almost all of the opinions recognizing or relying on these substantive canons, Scalia and Garner offer neither endorsement nor critique for as many as 120 of these substantive canons. They do sign onto the best known of the substantive canons, namely, the rule to seek interpretations that avoid serious constitutional questions<sup>36</sup> and the purpose canon favoring interpretations that advance rather than obstruct a statute’s goal.<sup>37</sup> What is most interesting is that Scalia and Garner’s more comprehensive discussion of the textual canons<sup>38</sup> demonstrates several ways in which a judge’s application of those canons depends, critically, on normative judicial judgments about statutory purpose.

Thus, statutory purpose looms large in the canons validated by Scalia and Garner—yet their hefty treatise (weighing in at more than 500 pages) offers virtually nothing useful to guide an interpreter who needs

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34. Justice Stevens is one of the great statutory interpreters in the Supreme Court’s history, and he and Justice Scalia have been dueling judges in a series of classic debates within the Court (with *Sweet Home* being their greatest debate). In a moment that wonderfully combines cogent legal analysis with professional graciousness, Scalia and Garner tip their hats to Justice Stevens at the beginning of their book, by providing a cogent defense of a Stevens dissent in a little-known case arising under the Flood Control Act. Scalia & Garner, *supra* note 2, at 1–3, 44–46.

35. This count is perhaps conservative, because it was limited to the canons we label “substantive” plus the “continuity” canons. Counting from the canons assembled in the fourth edition of the casebook, Professor Brudney counted 79% as substantive. James J. Brudney, *Canon Shortfalls and the Virtues of Political Branch Interpretive Assets*, 98 *Calif. L. Rev.* 1199, 1206 (2010) [hereinafter Brudney, *Canon Shortfalls*].

36. Scalia & Garner, *supra* note 2, at 247–51.

37. *Id.* at 63–65.

38. *Id.* at 167–239.

to figure out statutory purpose. To say, as Scalia and Garner do, that judges can deduce purpose from text risks circularity: The point of a purpose inquiry is to figure out how to construe an ambiguous or vague text, and the ambiguity of text will be replicated in an ambiguity (or a plurality) of purpose. Why not examine legislative history, which usually reveals a fair amount of consensus about what problems the statute was supposed to solve, what tradeoffs legislators were willing to make, and how far they were willing to go in solving the problem?<sup>39</sup> The most prominent examples of text-based discernments of purpose offered in *Reading Law* strike me as unpersuasive and, if anything, reinforce the impression that strict textualism is not particularly constraining.

Finally, there is a democracy problem with a canons-based textualism. If the canons overwhelmingly reflect judicial values and not legislative ones, they can be expected to operate in antidemocratic ways, especially if this Review is right about the cherry-picking and norms problems. The democracy problem is exacerbated if canons-toting judges overturn agency interpretations that are consistent with Congress's expectations, which is what Justice Scalia was trying to do in *Sweet Home*. And the democracy problem becomes a serious indictment if judges are imposing canons-based meanings onto statutes under circumstances where Congress is not aware of the canons judges are using or is unable to incorporate canonical rules into statutory drafting, given the conditions of the legislative process.

The democracy problem is not without remedy. As federal judges realized in the 1930s, the most obvious remedy to the democracy problem would be to give priority to the ordinary meaning of statutory lan-

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39. Scalia and Garner also set forth various constitutional and practical objections to the use of legislative history. See *id.* at 375–87 (arguing that legislative “intent” is worthless fiction, legislative materials are unreliable evidence of any conceivable intent, and treating materials generated by legislative subgroups as “authoritative” raises separation of powers concerns). For responses to these various arguments, see Lawrence M. Solan, *The Language of Statutes: Laws and Their Interpretation* 82–119 (2010) [hereinafter Solan, *Language*] (responding to argument that “legislative intent” is worthless fiction); Brudney & Ditslear, *Canons of Construction*, *supra* note 13, at 15–29 (responding to argument that legislative history enables judges to ignore rule of law, while textual canons constrain judges); James J. Brudney, *Congressional Commentary on Judicial Interpretation of Statutes: Idle Chatter or Telling Response?*, 93 *Mich. L. Rev.* 1, 41–56 (1994) [hereinafter Brudney, *Chatter*] (responding to argument that reliance on legislative materials undermines separation of powers or typically rests upon phony legislative history); Eskridge, *New Textualism*, *supra* note 1, at 673–76 (responding to separation of powers arguments for excluding legislative history). See generally William N. Eskridge, Jr., *No Frills Textualism*, 119 *Harv. L. Rev.* 2041 (2006) (reviewing Adrian Vermeule, *Judging Under Uncertainty* (2006)) (responding to argument that judges are experts at textual interpretation and incompetent or sneaky in using legislative history); Victoria Nourse, *Misunderstanding Congress: Statutory Interpretation, the Supermajoritarian Difficulty, and the Separation of Powers*, 99 *Geo. L.J.* 1119 (2011) (responding to separation of powers arguments for excluding legislative history and, indeed, turning those arguments around to favor legislative history).



guage, understood in the context of legislative history and purpose, before applying the judicial canons.<sup>40</sup> Professor James Brudney suggests that “judges who regularly rely on the canons have license to employ a systemic kind of discretion, in contrast to judges who regularly invoke legislative history or agency deference.”<sup>41</sup> Brudney worries about “this systemic discretion, especially given the efforts of some judges and scholars to enshrine the canons as an institutionally objective interpretive asset,” and argues that “[r]ather than enshrine them, we ought to limit the untethered role played by the canons, making them interstitial in comparison to the more anchored interpretive assets.”<sup>42</sup>

This is not the remedy suggested by Scalia and Garner, though they do concede that looking to legislative history is permissible “for the purpose of establishing linguistic usage,”<sup>43</sup> which should extend to include clues about the structure of the statute and the way words and phrases fit together. This is a potentially broad ambit for consideration of legislative history—and indeed this is the argument one hears for why original-meaning lawyers and judges consider *The Federalist Papers* (propaganda documents seeking to influence state ratification debates) when interpreting the Constitution. For the same reasons *The Federalist Papers* are useful as aids to figure out what the words of the Constitution mean and what purposes they serve, so committee reports and sponsors’ statements are useful as aids to figure out what statutory words mean and what purposes they serve.<sup>44</sup>

Notwithstanding the foregoing concerns, Scalia and Garner assume that there is no democracy problem for judges to rely on judge-generated canons of construction while largely ignoring legislator-generated legislative history. They think that almost all the “valid canons” are ones that anyone having common sense (generously including members of Congress) would recognize and follow. Yet they produce not one scintilla

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40. Some textualists maintain that legislative history is just too complicated and tricky for judges to handle. See, e.g., Adrian Vermeule, *Judging Under Uncertainty* 107–17 (2006) (arguing volume and heterogeneity of legislative history increase risk of judicial error). However, no textualist has ever demonstrated, with empirical evidence or even a review of important cases, that federal judges are unable to deal with legislative materials. Moreover, legal scholars with legislative experience and acumen are providing judges with useful guides. See, e.g., Victoria F. Nourse, *A Decision Theory of Statutory Interpretation: Legislative History by the Rules*, 122 *Yale L.J.* 70, 90–134 (2012) [hereinafter Nourse, *Rules*] (providing five principles for interpreting legislative history).

41. Brudney, *Canon Shortfalls*, supra note 35, at 1231–32.

42. *Id.*

43. Scalia & Garner, supra note 2, at 388.

44. I have suggested some possible reasons why original-meaning judges might look at *The Federalist* in constitutional cases, while ignoring legislative history in statutory cases. See generally William N. Eskridge, Jr., *Should the Supreme Court Read The Federalist but Not Statutory Legislative History?*, 66 *Geo. Wash. L. Rev.* 1301 (1998). While there are plausible reasons to treat these sources differently, I remain persuaded that legislative history is relevant and useful for statutory interpreters.

of evidence that this is the case—and there is now strong evidence that it is not, as will be demonstrated in Part III. Specifically, the “valid canons,” from a legislative point of view, are not the text-based canons lauded by Scalia and Garner, but are instead the canons that Scalia and Garner associate with unacceptable purposive, pragmatic, or dynamic interpretations.

This Review will conclude with some observations about the validity of the canons and the Supreme Court’s practice in statutory cases such as *Sweet Home*. A central problem with *Reading Law* is that it advances a proposed regime of canons that promises to make statutory interpretation more predictable, but without any evidence that its regime would have that effect (and increasing evidence that it would not). Implicitly, the authors believe that some of the canons can be defended by democratic and substantive reasoning but fail to integrate the potpourri of normative justifications into a systematic defense of the canons they support. Indeed, one might come away from reading their book with the view, previously advanced by Justice Scalia in his Tanner Lectures at Princeton University, that the textual canons are “commonsensical” and rather harmless and that most of the other canons are “a lot of trouble” for the “honest textualist.”<sup>45</sup>

The most problematic feature of *Reading Law* is its lack of appreciation for the virtues of the Court’s pragmatic approach to statutory interpretation. Contrary to Scalia and Garner, the Court’s practice is not fairly characterized as “confusion” worse confounded.<sup>46</sup> Since the New Deal, the Supreme Court has followed a pragmatic approach that can easily be identified and understood. (Indeed, Justice Scalia’s excellent dissent in *Sweet Home* follows the Court’s pragmatic approach,<sup>47</sup> and that gives his dissent much of its cogency.) The pragmatic approach can also be understood through the lens of the canons, but requires a much broader understanding of the canons than that offered in *Reading Law*.

#### I. CHERRY-PICKING PROBLEMS WITH THE NEW CANONS-BASED TEXTUALISM

One of the fundamental principles of statutory interpretation, according to Scalia and Garner, is this: “No canon of interpretation is absolute. Each may be overcome by the strength of differing principles that point in other directions.”<sup>48</sup> Such a candid, and correct, statement poses problems for a canons-based methodology that promises relative determinacy. Indeed, the most famous American law review article ever pub-

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45. Scalia, Interpretation, *supra* note 1, at 25–29.

46. Scalia & Garner, *supra* note 2, at 9–15.

47. See *infra* notes 96, 119, 168–183 and accompanying text (providing examples of extratextual normative, ideological, and statutory influence in *Sweet Home* dissent).

48. Scalia & Garner, *supra* note 2, at 59.

lished on statutory interpretation is Karl Llewellyn's mischievous demonstration that "there are two opposing canons on almost every point."<sup>49</sup>

Scalia and Garner respond to Llewellyn's witty display: Some of the canons mentioned by Llewellyn are controversial, and most of the pairs on Llewellyn's canon-counter canon list consist of rules with their caveats or exceptions.<sup>50</sup> But these astute responses raise questions of their own and, ultimately, do not answer Llewellyn's essential point, which is that the canons are not very constraining. Indeed, Scalia and Garner's book itself demonstrates new ways that canons do not constrain.

That is, the book makes clear that there are several preliminary questions that must be posed about the canons, and each inquiry reveals the manipulability of the canons. First, what canons are "valid"? Different interpreters will provide different answers to this question, and "valid" canons will change over time. Second, how does the judge apply the canons? Part II will demonstrate that judges cannot apply most of the "valid canons" without making normative judgments. Third, how does the judge handle competing or cross-cutting canons? Because there are so many canons, hard cases will offer the opportunistic or opinionated judge plenty of opportunities for cherry-picking.

#### A. What Rules Are "Canonical"?

There are a lot of potential canons: The Supreme Court follows as many as 187.<sup>51</sup> A small number of the canons are controversial within the Court, but among those that are *not* particularly controversial are various canons that direct judges to consider relevant committee reports and other legislative history to resolve statutory ambiguities. Yet Scalia and Garner consider these to be "anticanons" rather than canons from a textualist point of view.<sup>52</sup> This may be confusing for practitioners, who must be attentive to the majority practice, indeed to a practice that is almost unanimous within the Supreme Court. Thus, the lawyer who faithfully follows the Scalia and Garner book would be committing legal malpractice in those cases where there is relevant legislative history that almost all federal judges and eight (and sometimes nine) of nine Supreme Court Justices would consider before rendering a final answer in a statutory case.

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49. Karl N. Llewellyn, Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed, 3 Vand. L. Rev. 395, 401 (1950). Llewellyn followed up that assertion with a two-columned table, pitting one canon after another with its opposite. *Id.* at 401–06.

50. See Scalia & Garner, *supra* note 2, at 59–60 (describing some of Llewellyn's canons as "silly," "not canons of interpretation," or "not contradictions at all").

51. See *supra* note 31 and accompanying text (discussing study of canons in Court opinions).

52. See Scalia & Garner, *supra* note 2, at 59 & n.3 (describing nontextual, meaning- and purpose-based canons as "anticanons"); see also *id.* at 369–90 (attacking "false notion that committee reports and floor speeches are worthwhile aids in statutory construction").

This raises an important point. *Reading Law* is a normative book and not a descriptive one.<sup>53</sup> Because the authors denigrate various legislative history canons that are commonly invoked by judges and favor some canons that remain controversial, they are not describing current federal practice. Indeed, *Reading Law* does not include analysis of critically important canons that the authors themselves endorse, namely, the precedent-based canons. Together with the plain meaning rule,<sup>54</sup> the most important canon of statutory interpretation is the stare decisis canon: When applying statutory text to new cases, courts must consider their own precedents, which are to be followed when on point and whose reasoning and even dicta are guides from which judges should reason.<sup>55</sup> On the whole, the Supreme Court spends as much or more time analyzing its own statutory precedents as it does analyzing statutory texts,<sup>56</sup> and the Justices' decisions in antitrust and many other kinds of cases usually start with application of precedent and do not even quote the statutory text.<sup>57</sup> Almost as important are the various canons requiring judges to defer to agency interpretations of statutes. Scalia and Garner have no quarrel with these precedent-based canons<sup>58</sup> but do not incorporate them into their analysis.<sup>59</sup> For this reason, *Reading Law* provides an incomplete understanding of how statutory interpretation is done in the large majority of difficult cases.

And for cases that do not involve judicial or agency precedent, *Reading Law* offers only a normative theory of what the canons "ought" to include, from a textualist perspective.<sup>60</sup> This is another important feature of their book, and one that renders their approach potentially quite dynamic: A judge (like Scalia) interpreting statutory texts needs to figure out which canons are "valid" ones—and canons "valid" in one era may

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53. See *id.* at 9 ("Our approach is unapologetically normative, prescribing what, in our view, courts ought to do with operative language.").

54. The plain (or ordinary) meaning rule holds that "[w]ords are to be understood in their ordinary, everyday meanings—unless the context indicates that they bear a technical sense." *Id.* at 69–77.

55. *Id.* at 41.

56. Nicholas S. Zeppos, *The Use of Authority in Statutory Interpretation: An Empirical Analysis*, 70 *Tex. L. Rev.* 1073, 1093 (1992) (reporting that, in statutory interpretation cases from 1890 to 1990, Supreme Court cited and relied on precedent more often than any other authority, including text).

57. See Miranda McGowan, *Do as I Do, Not as I Say: An Empirical Investigation of Justice Scalia's Ordinary Meaning Method of Statutory Interpretation*, 78 *Miss. L.J.* 129, 164 (2008) (noting Court "has traditionally interpreted" antitrust, habeas corpus, and § 1983 statutes "in a common law fashion"). This is an important reason why Justice Scalia himself neglects statutory text in a large percentage of cases. See *id.* (observing Justice Scalia follows case law in "common law" statutory cases).

58. Scalia & Garner, *supra* note 2, at 411–14.

59. *Id.* at 41 ("Our advice in this treatise . . . pertains only to what a court ought to do when it is free to interpret a text on its own. When an ideological question of interpretation has previously been resolved . . . stare decisis renders [it] irrelevant . . .").

60. *Id.* at 9.

become “invalid” in the next. This is not only a dynamic textualism, but a potentially unfair approach to statutory interpretation. Congress has been legislating for decades under the assumptions of canons that Scalia and Garner would refuse to apply, such as the canons presuming the relevance of committee reports and sponsor statements to resolve textual ambiguities<sup>61</sup> or to confirm statutory plain meanings.<sup>62</sup> To change the rules on which Congress had plausibly relied when it adopted statutes is far from a methodology that tries to recapture the original meaning of statutory language, Scalia and Garner’s stated goal.

Moreover, it is not always clear what justifies the canons that Scalia and Garner consider valid. The textualist perspective lends little or no support to many of the canons that are included in the book. For example, canon 38 in the Scalia and Garner list is the rule that judges should avoid interpretations that would “raise serious questions of constitutionality” about a statute.<sup>63</sup> In other words, an interpretation suggested by the statutory text would not be the stopping point and could be displaced by a less plausible reading of the text if the likely meaning would raise constitutional questions that the interpreter thought “serious.”<sup>64</sup> This is not quite a “textualist” canon, and the authors admit as much. They defend it as a means of avoiding needless confrontations between the Court and Congress.<sup>65</sup> That defense is appealing, but that is also a reason for the Court to heed legislative history, including subsequent legislative history, and other interpretive moves the authors abhor.<sup>66</sup>

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61. See, e.g., *Brown v. Plata*, 131 S. Ct. 1910, 1937 (2011) (quoting House Report supplying judicial standard for ordering prison population caps); *Rumsfeld v. Forum for Academic & Inst. Rights, Inc.*, 547 U.S. 47, 54 (2006) (citing House Report clarifying statute at issue in response to lower court ruling); *United Steelworkers v. Weber*, 443 U.S. 193, 206–07 (1979) (citing statement of sponsor of statute that particular provision was intended to affect interpretation of statute); *Church of the Holy Trinity v. United States*, 143 U.S. 457, 464–65 (1892) (citing Senate Committee Report explaining Committee’s understanding of statute at issue).

62. See, e.g., *Carr v. United States*, 130 S. Ct. 2229, 2241–42 (2010) (citing House Judiciary Committee Report to support nonretroactive construction of statute); *Shinseki v. Sanders*, 556 U.S. 396, 406–07 (2009) (using Senate Report to clarify legislative definition of prejudicial error); *United States v. Ressaam*, 553 U.S. 272, 275–77 (2008) (reviewing differences in legislative history between firearms statute and explosives statute to interpret the latter); *TVA v. Hill*, 437 U.S. 153, 176–84 (1978) (citing House, Senate, and Conference Reports to support strict reading of Endangered Species Act).

63. Scalia & Garner, *supra* note 2, at 247–48.

64. For an excellent treatment of the avoidance canon, see generally Trevor W. Morrison, *Constitutional Avoidance in the Executive Branch*, 106 *Colum. L. Rev.* 1189 (2006).

65. Scalia & Garner, *supra* note 2, at 249.

66. See generally Brudney, Chatter, *supra* note 39 (arguing Court should use legislative history to prevent cost to Congress of overriding Court’s decisions); cf. Brudney, *Canon Shortfalls*, *supra* note 35, at 1218–24 (arguing Constitution’s Journal Clauses and early congressional practice establish superiority of public legislative materials over judicially generated canons, as matter of original constitutional meaning).

Relatedly, Scalia and Garner endorse the absurdity canon: “A provision may be either disregarded or judicially corrected as an error (when the correction is textually simple) if failing to do so would result in a disposition that no reasonable person could approve.”<sup>67</sup> It is hard to see how this canon is consistent with textualism; a dyed-in-the-wool textualist would apply statutes as written and perhaps strike them down if they are really beyond all reason. The absurdity canon is more consistent with a purposivist approach, which understands statutory text through the lens of legislative expectations.<sup>68</sup> Leading academic textualists agree with this evaluation,<sup>69</sup> yet Justice Scalia himself has stuck with the canon and in a recent case applied it more aggressively than would any purposivist now on the Court.<sup>70</sup> Objecting to his colleagues’ text-based application of a prisoner litigation statute to uphold a three-judge court judgment directing a state to release prisoners if it did not solve the problem of unconstitutional overcrowding, Justice Scalia opined that judges should “bend every effort to read the law in such a way as to avoid that outrageous result.”<sup>71</sup> The result of a simple application of the statutory text was “outrageous” to Justice Scalia but not to five of his colleagues, not to a unanimous three-judge court below, and not to me, for that matter. Indeed, what eight federal judges thought was constitutionally required, four judges said was “absurd,” “outrageous,” and a “travesty” (Justice Scalia’s language).<sup>72</sup> The ease with which Justice Scalia’s normative outrage dominated the apparent plain meaning of the law suggests the dangers, from a purely textualist theory, of the absurd results exception to the plain meaning rule.

The cherry-picking problem with the canons is a deep one, once one realizes there is this important preliminary question: What canons are canonical? There is no canonical collection of valid canons, and the Scalia and Garner book does not come close to filling that gap. Without a canonical collection, there is a great danger of making up the canons as you go along. Under such circumstances, using the canons is like inviting only your friends to a cocktail party and then picking out those friends who best serve your purposes on this particular occasion.

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67. Scalia & Garner, *supra* note 2, at 234–39.

68. See Eskridge, *Unknown Ideal*, *supra* note 13, at 1549 (criticizing new textualism for this inconsistency); cf. Jane S. Schacter, *Text or Consequences?*, 76 *Brook. L. Rev.* 1007, 1011 (2011) [hereinafter Schacter, *Consequences*] (demonstrating Justice Scalia is thoroughly normative in statutory interpretation and repeatedly demands that judges avoid absurd or even unreasonable interpretations).

69. See, e.g., John F. Manning, *The Absurdity Doctrine*, 116 *Harv. L. Rev.* 2387, 2392 (2003) (urging textualists to abandon absurd results canon); John C. Nagle, *Textualism’s Exceptions*, *Issues in Legal Scholarship*, Dec. 2002, art. 15, available at <http://www.degruyter.com/view/j/ils.2002.2.issue-2/ils.2002.2.2.1035/ils.2002.2.2.1035.xml> (on file with the *Columbia Law Review*) (same).

70. *Brown v. Plata*, 131 S. Ct. 1910, 1950 (2011) (Scalia, J., dissenting).

71. *Id.* at 1950–51.

72. *Id.*

B. *How Does the Interpreter Handle Competing Canons?*

Assume that the “valid canons” are not open to speculation. Will the canonical canons provide greater determinacy for statutory interpretation? Return to the Llewellyn critique that for every canon there is a counter canon.<sup>73</sup> Scalia and Garner have a good answer, that most of Llewellyn’s examples involve a canon and caveats or exceptions to the canon. But their answer begs the better question. In most cases involving any interpretive difficulty, the cherry-picking problem is *not* going to be that there is a canon on one side and a counter canon on the other; instead, the problem will be that there are a dozen or more canons that are applicable to the issue and they will push the interpreter in cross-cutting ways. The plethora of cross-cutting canons invites cherry-picking.

Consider *Sweet Home*.<sup>74</sup> Section 9(a)(1)(B) of the Endangered Species Act makes it an offense for any person to “take any [endangered] species within the United States or the territorial sea of the United States.”<sup>75</sup> Section 3(19) of the Act defines the statutory term: “The term ‘take’ means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.”<sup>76</sup> The Department of the Interior’s 1975 regulation, as revised in 1981, defines “harm” in the statutory definition of “take” as any activity that “actually kills or injures” endangered species, including an activity that results in “significant habitat modification or degradation . . . [that] significantly impair[s] essential behavioral patterns, including breeding, feeding or sheltering.”<sup>77</sup> Under that definition of harm, private landowners that disrupt breeding patterns by destroying a significant habitat for an endangered species are in violation of section 9(a)(1)(B).

In 1995, the Supreme Court considered the validity of the Department’s regulation. In dissent, Justice Scalia said the Department’s rule was outside of the statute’s plain meaning, while Justice Stevens wrote for the Court, finding the regulation within the statute’s plain meaning. There were more than a dozen cross-cutting Scalia and Garner-approved canons available for the Justices, and they deployed them like battlefield weapons. Thus, Justice Scalia maintained that “take” as a matter of both common law and ordinary meaning involves aggressive activity targeted at a particular animal<sup>78</sup>—but Justice Stevens responded that ordinary and common-law meanings are superseded when Congress has

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73. See *supra* note 49 and accompanying text (discussing Llewellyn’s dueling canons).

74. *Babbitt v. Sweet Home Chapter of Cmty. for a Great Or.*, 515 U.S. 687 (1995).

75. 16 U.S.C. § 1538(a)(1)(B) (2006) (emphasis added).

76. *Id.* § 1532(19).

77. Reclassification of the American Alligator and Other Amendments, 40 Fed. Reg. 44,412, 44,416 (Sept. 26, 1975), as amended at 46 Fed. Reg. 54,748, 54,750 (Nov. 4, 1981), and codified at 50 C.F.R. § 17.3 (1994) (defining terms of ESA regulations).

78. *Sweet Home*, 515 U.S. at 717–18 (Scalia, J., dissenting).

specifically defined the term to include any kind of “harm,” the ordinary meaning of “harm” supported the Department.<sup>79</sup> Justice Scalia countered with a caveat that congressional definitions should be read narrowly when they are in derogation of established meanings and with an argument that “harm” should be read to be similar to the other “action” verbs in the definition (i.e., the other verbs entailed action targeting specific animals).<sup>80</sup> Justice Stevens parried that such a narrow reading of “harm” would render it statutory surplusage, because a narrow reading of harm would simply duplicate the coverage of the other categories (trap, wound, harass, etc.).<sup>81</sup> Moreover, Justice Stevens maintained that his reading of “take”/”harm” was consistent with the statutory purpose of protecting habitats for endangered species,<sup>82</sup> which Justice Scalia countered with the rule of lenity: Given potential criminal prosecution for taking an endangered species, any ambiguity should be resolved against the government.<sup>83</sup>

Finally, both sides relied on the whole act rule, the precept that an interpretation more consistent with the other provisions of a statute should (all else being roughly equal) be preferred to an interpretation less consistent with the remainder of the statute. Justice Scalia argued that his narrow understanding of “take” is more consistent with the way that precise term is used elsewhere in both the ESA and in other statutes.<sup>84</sup> Moreover, he maintained that his interpretation fits better with the structure of the statute, which gives the federal government eminent domain and restricted use rules as the statute’s response to preserving habitat and imposes on private parties only obligations not to wound, kill, etc. endangered species.<sup>85</sup> In response, Justice Stevens pointed to legislative history contemplating that the anti-take provision of the endangered species bill would regulate habitat destruction by private parties and pointed out that section 10 of the ESA (as expanded by Congress in 1982) built upon, and implicitly ratified, the Department’s interpretation.<sup>86</sup>

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79. *Id.* at 697–98 & n.10 (majority opinion) (invoking interpretive direction canon and ordinary meaning canon for definitional term “harm”).

80. *Id.* at 719–20 (Scalia, J., dissenting) (invoking associated words canon).

81. *Id.* at 697–98 (majority opinion) (invoking canon against surplusage).

82. *Id.* (invoking canon against ineffectiveness).

83. *Id.* at 721–22 (Scalia, J., dissenting) (invoking rule of lenity to trump statutory purpose in case of ambiguity).

84. *Id.* at 722–23 (invoking presumption of consistent usage).

85. *Id.* at 723–24 (invoking whole act canon).

86. *Id.* at 700–01 (majority opinion) (invoking whole act canon and noting Congress was relying on Department’s interpretation of “harm” when it added administrative process providing relief for farmers and ranchers whose projects would incidentally harm habitat of endangered species). Congress also relied on the Department’s understanding when it amended the law in 1978. *Id.* at 703 n.17.



Even this simplified summary of the debate between the Justices reveals that a great many of Scalia and Garner's "valid canons" were available to each Justice. Just as if he was picking out friends from the crowd at a cocktail party, each Justice picked out friendly canons from the crowd of applicable rules and principles. Limited to the Scalia and Garner listing of "valid canons," the table below reveals how cross-cutting the canons were in that case.

Canons Invoked by Justice Stevens	Canons Invoked by Justice Scalia
Interpretive direction canon (225)	Ordinary meaning canon (69)
Ordinary meaning canon for definitional term (69)	Canon of imputed common-law meaning (320)
Surplusage canon (174)	Associated words canon (195)
Presumption against ineffectiveness (63)	Presumption against ineffectiveness caveat (63)
	Rule of lenity (296)
Whole text canon (167)	Whole text canon (167)
	Presumption of consistent usage (170)
	Material variation canon (170)

The numbers enclosed in parentheses indicate the pages in *Reading Law* where the particular canons are discussed.

Note that the table understates the matter. In addition to the foregoing canons, all of which are found in *Reading Law*, other canons that Justice Scalia himself endorses were relevant, especially the precedent-based canons. Thus, Justice Stevens relied on the *Chevron*<sup>87</sup> deference idea that any reasonable construction of the statute was permissible for the agency, and on various legislative history canons (to which Justice Scalia generally objects).<sup>88</sup> Moreover, Justice Stevens relied on language and reasoning from an earlier Supreme Court precedent, *TVA v. Hill*, the famous Snail Darter Case, that supported his approach to the statute.<sup>89</sup>

Although Justice Scalia believes that his array of canons-based reasoning is clearly superior to that of Justice Stevens, his claim is unpersuasive. Because the agency's interpretation was entitled to *Chevron* deference, a finding of ambiguity would have tilted in favor of the agency. Given the many arguments both ways, it is hard to see how there is a single plain meaning that trumped the agency's interpretation. Even limit-

87. *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 845 (1984). For further discussion of *Chevron* deference, see *infra* notes 167, 250 and accompanying text.

88. *Id.* at 703–08 (relying on *Chevron* canon and various legislative history canons).

89. *Id.* at 698–99 (relying on *TVA v. Hill*, 437 U.S. 153 (1976)).

ing one's attention to what Scalia and Garner consider the "valid canons,"<sup>90</sup> it is hard to see how their pure textualism creates more predictability and determinacy in the law, or how it will likely constrain judges.

C. *The Constant Temptation to Fudge*

Scalia and Garner are probably right to say that judges have a "tendency . . . to imbue authoritative legal texts with their policy preferences,"<sup>91</sup> but there is no evidence that the new textualism in any way ameliorates that tendency or constrains judges any more than other methodologies. In *Sweet Home*, Justice Scalia cherry-picked from dictionaries,<sup>92</sup> the common law,<sup>93</sup> and even statutory structure<sup>94</sup> to assail the Court's view that the explicit and broad statutory definition ("harm" to endangered species) covers the agency's rule. In doing so, however, Justice Scalia ignored his and Garner's admonition that "general terms are to be given their general meaning" and not cramped by judicially created exceptions or narrow readings.<sup>95</sup> Why was Justice Scalia so sure the agency was wrong in *Sweet Home*? The canonical arguments strike me as cutting both ways.

The language used in Justice Scalia's *Sweet Home* dissent suggests that he was doing something more than neutrally applying textualist canons. Thus, he opened his dissenting opinion not with a defense of the plain meaning rule or an objection to the legitimacy of the agency's dynamic interpretation of the 1973 Act, but with this normative *cri de coeur*: "The Court's holding that the hunting and killing prohibition incidentally preserves habitat on private lands imposes unfairness to the point of financial ruin—not just upon the rich, but upon *the simplest farmer* who finds his land *conscripted to national zoological use*."<sup>96</sup> An underlying theme that runs through the dissenting opinion is the idea that federal statutes ought to be construed to present as little interference as possible with the common law of property. Thus, Justice Scalia anchored his entire linguistic argument on the *Pierson v. Post*<sup>97</sup> understanding that "taking" an animal is a targeted violent act such as catching varmints in a trap and can-

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90. Scalia & Garner, *supra* note 2, at xxix.

91. *Id.* at xxviii.

92. *Sweet Home*, 515 U.S. at 719 (Scalia, J., dissenting) (citing variety of dictionaries to argue "harm" has "a range of meaning").

93. *Id.* at 718–19 (relying on common law definition of "take" to argue it runs contrary to majority's interpretation).

94. *Id.* at 722–24 (arguing majority's interpretation of "harm" is inconsistent with the other provisions and overall structure of ESA).

95. Scalia & Garner, *supra* note 2, at 101.

96. *Sweet Home*, 515 U.S. at 714 (Scalia, J., dissenting) (emphasis added).

97. 3 Cai. 175 (N.Y. Sup. Ct. 1805) (ruling mere pursuit of fox did not establish fox had been "taken" by pursuer).

not be an untargeted nonviolent act such as draining a swamp.<sup>98</sup> The opinion bristles with outrage that the federal government is telling “the simplest farmer” how to run his enterprise and reads into the ESA a policy that demands the government, if it wants to “conscript” private property for “national zoological use,” invoke its eminent domain authority to *take* the land and compensate those “simplest farmers” as conservatives think the Fifth Amendment requires for intrusive regulations. If Sir William Blackstone had been exhumed from the grave and briefed on the issue in *Sweet Home*, he would have been eager to join this dissenting opinion.

That the Court’s most conservative, land-protecting Republican Justices (Scalia, Thomas, Rehnquist) all joined a dissenting opinion protecting “the simplest farmer” against “conscript[ion] to national zoological use” (i.e., oppressive *socialism*) suggests that those Justices were deploying canons to imbue authoritative legal texts with their policy preferences. In practice, therefore, the canonical approach revealed in Justice Scalia’s *Sweet Home* dissent can be more of a normative than a neutral application of the rule of law.

Can this impression be generalized? Scalia and Garner are certain it cannot: “If pure textualism were a technique for achieving ideological ends, your authors would be counted extraordinarily inept at it.”<sup>99</sup> And they mention a number of cases where Justice Scalia voted for “liberal” results that he surely did not like as a political matter.<sup>100</sup> But recall that he and Garner do not accuse judges of *always* voting ideologically; they simply have a *tendency* to do so.<sup>101</sup> As Professors Miranda McGowan and Jane Schacter have demonstrated, in separate examinations of his opinions, that is true of Justice Scalia—presumably not as a matter of strategy, but instead as a matter of unconsciously importing Blackstonian (libertarian, property-protecting, and pro-business) values into choices about which canons to follow and how to argue them.<sup>102</sup>

Consider an empirical study. Lauren Baer and I collected and analyzed 1,014 Supreme Court opinions between 1984 and 2006 where a

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98. See *Sweet Home*, 515 U.S. at 720 (Scalia, J., dissenting) (arguing “[e]ven ‘taking’ activities in the narrowest sense, activities traditionally engaged in by hunters and trappers, do not all consist of direct applications of force” and therefore stripping “harm” of requirement of “direct force” is incorrect).

99. Scalia & Garner, *supra* note 2, at 17.

100. *Id.* (citing six cases in which Justice Scalia voted for “liberal” results using his new-textualist approach).

101. *Id.* at xxviii.

102. See McGowan, *supra* note 57, at 188 (concluding Justice Scalia “consults an eclectic set of extrinsic materials when construing statutes”); Schacter, *Consequences*, *supra* note 68, at 1010–12 (noting Justice Scalia’s textualism “accepts and accommodates a number of canons that can be, and have been, deployed in consequentialist fashion”).

federal agency statutory interpretation was offered to the Justices.<sup>103</sup> Even including criminal law cases where the rule of lenity augurs against the government, the agency interpretation prevailed more than two-thirds of the time, an amazing level of sustained success. We analyzed each Justice's voting pattern, including a comparison of how the political valence (liberal versus conservative) of the agency interpretation correlated with the votes of each Justice. If he were following a completely neutral approach to discerning statutory meaning, one would expect Justice Scalia to vote for liberal agency interpretations at about the same rate as conservative ones.<sup>104</sup>

Yet that is not what we found. When an agency interpretation was liberal, Justice Scalia went along with it 53.8% of the time, certainly an impressive display of neutrality—but one that pales in comparison to the 71.6% win rate when agency interpretations were conservative.<sup>105</sup> In contrast, Justice Breyer, a liberal who is the Court's best representative of a pragmatic or purposivist approach, voted to uphold conservative agency interpretations 64.9% of the time and liberal interpretations an even more impressive 79.5% of the time.<sup>106</sup> It is notable that the conservative-liberal ideology differential for Breyer is negative 14.6%, somewhat less than Scalia's differential of plus 17.8%. The contrast is more striking between the current Court's other leading textualist (Justice Thomas) and purposivist (Justice Ginsburg). Ginsburg's conservative-liberal differential is negative 16.8%, about the same level of difference as Scalia's (albeit in the opposite direction), but Thomas's is plus 29.0%, an astounding margin for a judge supposedly "constrained" by the textualist methodology.<sup>107</sup>

The data in the Eskridge and Baer study support Scalia and Garner's view that all judges (Breyer and Ginsburg as well as Scalia and Thomas) have a "tendency" to favor their own political preferences in statutory interpretation. However, I would add that Justices tend to be more merciful and generous when evaluating agency interpretations they sympa-

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103. William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from *Chevron* to *Hamdan**, 96 *Geo. L.J.* 1083 (2008).

104. This would not be the case if there were selection biases that brought to the Court cases where "liberal" agency interpretations were legally weaker than "conservative" ones—but there is no reason to believe this to have been the case. Indeed, for 15 of the 23 years covered by the survey (i.e., 1984–1992 and 2001–2006), agency interpretations were delivered to the Court by Republican Solicitors General who might have erred on the side of weak conservative interpretations if they erred at all. It is possible that GOP Solicitors General defended liberal interpretations less aggressively than conservative ones, but I am certain that is not the case, as I read all the briefs for the United States in our sample, and I found all of them to have been high quality and aggressive defenses of government positions.

105. Eskridge & Baer, *supra* note 103, at 1154 tbl.20.

106. *Id.*

107. *Id.*

thize with. Moreover, the study suggests that Justice Scalia's text-driven votes in statutory cases have a strong ideological tilt that cannot be explained by chance, a point that is even more striking for Justice Thomas. As a pair, Thomas and Scalia appear more ideologically driven and less constrained by their methodology (textualism) than Breyer and Ginsburg (purposivism). At the very least, these data establish that textualism is no more constraining, which is contrary to the claim of Scalia and Garner's *Reading Law*. Additionally, the data suggest the hypothesis that a methodology that focuses on statutory text and considers committee reports generated by the legislative process that produced the statute (Breyer and Ginsburg's purposivism) is one that is *more* constraining than a methodology that focuses on statutory text and considers "valid canons" created by judges (Scalia and Thomas's new textualism).

That hypothesis receives preliminary empirical verification from the work of law professor James Brudney and political scientist Corey Ditslear. Analyzing their database of more than thirty years of Supreme Court opinions in labor law cases, Brudney and Ditslear report that liberal Justices in those cases were more likely to vote in favor of employer interests (i.e., against their ideological preferences) when they relied on legislative history.<sup>108</sup> During the Burger Court (1969–1986), conservative Justices were more likely to vote in favor of worker interests (i.e., against their ideological preferences) when they relied on legislative history.<sup>109</sup> Since 1986, however, conservative Justices (including Scalia) have ratcheted up their pro-employer results, relying increasingly on canons of statutory construction and even legislative history to do so.<sup>110</sup>

The Brudney and Ditslear studies are inconsistent with Scalia and Garner's claim that the new textualism alone delivers neutral results and prevents judges from imbuing statutes with their political preferences. To the contrary, their data and their many case examples support precisely the opposite thesis, that a canons-based textualism is a relatively less constraining approach that enables pro-employer judges to import pro-employer policies into statutes that were adopted to protect workers. If any methodology is constraining, it is one where judges consult legislative materials to help them understand textual meaning. The next Part shall explore some reasons why this might be the case.

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108. James J. Brudney & Corey Ditslear, *Liberal Justices' Reliance on Legislative History: Principle, Strategy, and the Scalia Effect*, 29 *Berkeley J. Emp. & Lab. L.* 117, 143–44 tbl.6 (2008) (reporting "changes over time in the outcome-related reliance on legislative history by liberal and conservative Justices"). The differential was not statistically significant for liberal Justices as a group but was statistically significant for Justices White and Souter. *Id.* at 142 tbl.5.

109. *Id.* at 144 tbl.6.

110. *Id.* at 142–44; see Brudney & Ditslear, *Canons of Construction*, *supra* note 13, at 6 (reporting both data and specific case examples where conservative pro-business Justices have relied on text and canons to deliver pro-business interpretations that were contrary to expectations of enacting Congresses).

## II. THE NORMS PROBLEM WITH THE NEW CANONS-BASED TEXTUALISM

Statutory interpretation is a normative enterprise. Statutes are purposive, they pervasively affect our lives, and they even reflect our public values. A goal of *Reading Law* is to bleed the appearance of normativity out of statutory interpretation, yet the canons the authors present as neutral and canonical are saturated with norms and pervasively demand normative judgments from judges. Normative judgments entail discretion—and judicial discretion is the last thing on the agenda of Justice Scalia and Professor Garner. Although *Reading Law* offers its canonical rules as a strongly constraining methodology, the individual rules themselves (even without the cherry-picking problem) are so open-ended and normative that they offer many opportunities for judges to find friends at any interpretive cocktail party.

A. *The Normativity of the Canons*

What Scalia and Garner dub the “valid canons” of statutory interpretation are, both as a collection and individually, quite normative. That is, they reflect value judgments and, more important, require value judgments for judges to apply them. Some of the canons are openly normative, and some require some thought to see their normativity in operation. Consider a nonexhaustive list of examples.

1. *Libertarian Values*. — Normativity is obvious for the absurdity canon,<sup>111</sup> the constitutional-doubt canon,<sup>112</sup> and the rule of lenity<sup>113</sup> discussed above. All three canons require judges to make very difficult value judgments: Is the plain meaning “absurd” (so look for an alternative) or just really “unreasonable” (the textualist is stuck with it)? Is the better reading of the text one that raises “serious” constitutional problems (so the canon can be invoked), or is there just a whiff of constitutional difficulty with that reading (so the canon does not apply)? Has the defendant persuaded me that the criminal statute has two plausible meanings, one of which acquits him? Although all three of these canons are inspired by the U.S. Constitution,<sup>114</sup> the Constitution provides no guidelines for judges to make these difficult normative judgments. Hence, in particular

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111. Scalia & Garner, *supra* note 2, at 234–40.

112. *Id.* at 247–51.

113. *Id.* at 296–302; see also *supra* note 83 and accompanying text (discussing Justice Scalia’s invocation of rule of lenity in *Sweet Home*).

114. The absurdity canon is inspired by the due process/equal protection requirement that there be a nonarbitrary “rational basis” for every legal rule. See Scalia & Garner, *supra* note 2, at 239 n.18. The constitutional avoidance canon is inspired by constitutional respect for Congress, as well as respect for protecting the boundaries established in the Constitution. *Id.* at 250. The rule of lenity is frequently defended on grounds of due process notice or separation of powers, though Scalia and Garner defend it on more pragmatic grounds. *Id.* at 296–97.

cases, it is hard to predict how judges will apply the absurdity canon<sup>115</sup> or the avoidance canon.<sup>116</sup> “The main difficulty with the rule of lenity is the uncertainty of its application.”<sup>117</sup>

As understood by Justice Scalia, these constitutional canons protect liberties Americans (and corporations, under the authors’ artificial-person canon<sup>118</sup>) have long enjoyed and treasured. Thus, in *Sweet Home*, Justice Scalia invoked the rule of lenity to protect the liberty of the “simplest farmer[s]” (as well as multimillion dollar agribusinesses) to develop their land at the expense of endangered species habitats, and the outraged tone of his dissenting opinion suggests that he may have had avoidance concerns about unconstitutional takings in some cases and certainly thought that the Department’s rule bordered on absurdity.<sup>119</sup> This Blackstonian respect for property rights and our freedom to do with property whatever we wish (so long as it does not harm our neighbor) was overtaken in the twentieth century by the New Deal’s transformation of governance. In an era of pervasive regulation, it is far from absurd for the government to insist that property owners use their land consistent with preservation of the environment.<sup>120</sup>

2. *Federalism Values*. — Another set of constitutional canons are those inspired by federalism, the Constitution’s division of governmental responsibilities between state and federal governments. Although it is rare for the Supreme Court to strike down national legislation on federalism grounds, the Court has developed a fair number of canons to enforce this norm.<sup>121</sup> Scalia and Garner mention two: the strong presumption

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115. See *id.* at 237 (presenting Justice Story’s exacting interpretation of absurdity doctrine).

116. See *id.* at 250 (quoting Justice Stevens’s explanation of avoidance doctrine, *Gomez v. United States*, 490 U.S. 858, 864 (1989)).

117. *Id.* at 298.

118. *Id.* at 273–77.

119. *Babbitt v. Sweet Home Chapter of Cmty. for a Great Or.*, 515 U.S. 687, 714 (1995) (Scalia, J., dissenting).

120. See Philip Shabecoff, *A Fierce Green Fire: The American Environmental Movement* 271 (1993) (arguing only government “has the reach to address all of the interlocking complexities” of environmental reform); J. Peter Byrne, *Green Property*, 7 *Const. Comment.* 239, 241–45 (1990) (arguing “the individual possessor does not own the right to degrade the natural ecological system on his land” because “such a right must be held by the jurisdiction in trust for present and future members of the community”); Terry W. Frazier, *The Green Alternative to Classical Liberal Property Theory*, 20 *Vt. L. Rev.* 299, 319 (1995) (“[W]hen the free market fails to correct for an individual’s ignorance or denial of social responsibility, the rest of society must act collectively to regulate the use and enjoyment of private property.”); David B. Hunter, *An Ecological Perspective on Property: A Call for Judicial Protection of the Public’s Interest in Environmentally Critical Resources*, 12 *Harv. Envtl. L. Rev.* 311, 311 (1988) (arguing courts “must expand their view and uphold the public’s legitimate interest in ecological stability and integrity”).

121. See William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 *Vand. L. Rev.* 593, 619–29 (1992) [here-

against congressional abrogation of state sovereign immunity<sup>122</sup> and the presumption against federal preemption of state law.<sup>123</sup> This greatly understates the proliferation and aggressive deployment of federalism canons during Justice Scalia's tenure on the Court. In addition to the presumptions against abrogation of state immunity and preemption of state law, the Court (with Justice Scalia in the majority) has created a new super-strong rule against federal invasion of "core state functions,"<sup>124</sup> a strong presumption against statutory interpretations that would alter the federal-state balance,<sup>125</sup> a new super-strong rule against inferring conditions on federal grants to the states under the Spending Clause,<sup>126</sup> and a dozen or more smaller canons that play out in Supreme Court cases almost every term.

Moreover, the federalism idea drives many other Supreme Court opinions that do not explicitly invoke one of the many federalism can-

inafter Eskridge & Frickey, *Quasi-Constitutional*] (listing six pro-federalism canons Supreme Court adopted in 1980s).

122. Scalia & Garner, *supra* note 2, at 281–89.

123. *Id.* at 290–94.

124. See *Nixon v. Mo. Mun. League*, 541 U.S. 125, 140 (2004) (finding "federal legislation [that threatens] to trench on the States' arrangements for conducting their own governments should be treated with skepticism, and read in a way that preserves a State's chosen disposition of its own power"); *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 544 (1994) ("[W]hen the Federal Government takes over . . . local radiations in the vast network of our national economic enterprise . . . those charged with the duty of legislating [must be] explicit." (quoting Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 *Colum. L. Rev.* 527, 539–40 (1947) (alterations in original))); *Gregory v. Ashcroft*, 501 U.S. 452, 461–64 (1991) (requiring courts to be "absolutely certain that Congress intended" to displace state law before applying preemption).

125. See *Gonzales v. Oregon*, 546 U.S. 243, 275 (2006) (rejecting Attorney General's attempt to prohibit assisted suicide through Controlled Substances Act because "Congress did not have [the] far-reaching intent to alter the federal-state balance" required); *Owasso Indep. Sch. Dist. v. Falvo*, 534 U.S. 426, 432 (2002) (hesitating to interpret "statute to effect such a substantial change in the balance of federalism" because it was not "manifest purpose of the legislation"); *Raygor v. Regents of the Univ. of Minn.*, 534 U.S. 533, 543 (2002) (noting Congress must make "unmistakably clear" its intent to alter "the usual balance between the States and the Federal Government" (internal quotation marks omitted)); *Gregory*, 501 U.S. at 460 (same); *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 65 (1989) (same).

126. See *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981) ("[I]f Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously."); see also *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296 (2006) (stressing *Pennhurst's* unambiguity requirement); *Gonzaga Univ. v. Doe*, 536 U.S. 273, 280–81 (2002) (requiring clear and unambiguous intent to create private right of action to sustain suit based on Family Educational Rights and Privacy Act); *Barnes v. Gorman*, 536 U.S. 181, 187 (2002) (same as *Arlington*); *Blessing v. Freestone*, 520 U.S. 329, 341 (1997) (same as *Gonzaga* for suit based on Title IV-D of Social Security Act); *Suter v. Artist M.*, 503 U.S. 347, 363 (1992) (same as *Gonzaga* for suit based on Adoption Assistance and Child Welfare Act).



ons. Justice Scalia, for example, invoked federalism concerns to rewrite a provision of the Bankruptcy Code to minimize the Code's impact on state property rights.<sup>127</sup> It is very likely that federalism concerns played a role in his *Sweet Home* dissent, to protect the "simplest farmer" and ensure that state property law was not trumped for "national zoological use."<sup>128</sup> As before, however, federalism must give way to valid congressional regulation—and Scalia's preference for federalism over regulation is more of a mobile political preference than a consistent and neutral legal principle.

3. *Rule of Law/Continuity Values.* — Scalia and Garner's particular list of canons is dominated by a nonconstitutional value, that of *continuity*.<sup>129</sup> Continuity is a rule of law value: Americans rely on longstanding legal rules, plan their lives around them, and assume that most of the really important rules will continue to be in place. Similarly, the rule of law abhors uncertainty and fluctuating rules. These values of continuity undergird what Scalia and Garner call the "stabilizing canons," namely the presumption against change in common law,<sup>130</sup> the canon of imputed common-law meaning,<sup>131</sup> the prior-construction canon,<sup>132</sup> the presumption against implied repeals,<sup>133</sup> and a few technical canons.<sup>134</sup> Continuity values are also an important justification for the authors' supremacy-of-text principle,<sup>135</sup> fixed-meaning canon,<sup>136</sup> presumption of consistent us-

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127. *BFP*, 511 U.S. at 534, 544–45 (Scalia, J.) (affirming lower court decision that openly confessed to not following provision's plain meaning, based upon preference for not unsettling state property law); see also *Rapanos v. United States*, 547 U.S. 715, 738 (2006) (Scalia, J., plurality opinion) (requiring "clear and manifest" intent from Congress to extend Clean Water Act jurisdiction to regulate state-controlled wetlands).

128. *Babbitt v. Sweet Home Chapter of Cmty. for a Great Or.*, 515 U.S. 687, 714 (1995) (Scalia, J., dissenting); see also *supra* note 96 and accompanying text (discussing this language).

129. See David L. Shapiro, *Continuity and Change in Statutory Interpretation*, 67 *N.Y.U. L. Rev.* 921, 945–47 (1992) (arguing rules of construction based in continuity values are "sub-constitutional" or "extra-constitutional").

130. See Scalia & Garner, *supra* note 2, at 318–19 ("A statute will be construed to alter the common law only when that disposition is clear.").

131. *Id.* at 320–21 ("A statute that uses a common-law term, without defining it, adopts its common-law meaning.").

132. *Id.* at 322–26 ("If a statute uses words or phrases that have already received authoritative construction by the jurisdiction's court of last resort, or even uniform construction by inferior courts or a responsible administrative agency, they are to be understood according to that construction.").

133. *Id.* at 327–33 ("Repeals by implication are disfavored . . . [b]ut a provision that flatly contradicts an earlier-enacted provision repeals it.").

134. These include the repeal-of-repealer canon ("The repeal or expiration of a repealing statute does not reinstate the original statute.") and the desuetude canon ("A statute is not repealed by nonuse or desuetude."). *Id.* at 334–39.

135. *Id.* at 56–58 ("The words of a governing text are of paramount concern, and what they convey, in their context, is what the text means.").

age,<sup>137</sup> presumption against federal preemption,<sup>138</sup> and presumption against implied rights of action.<sup>139</sup> And of course the best example of a continuity-preserving canon is the stare decisis rule, which Scalia and Garner do not discuss but do endorse as an exception to textualism in many cases.<sup>140</sup>

But, like the other canons, the continuity canons are not absolute.<sup>141</sup> “If the context makes clear that a statute uses a common-law term with a different meaning,” the authors say, “the common-law meaning is of course inapplicable.”<sup>142</sup> So in *Sweet Home*, one would expect the meaning of “take” to be broader than the common-law meaning, because Congress explicitly defined the term more broadly.<sup>143</sup> Thus, judges are bound by the congressional definition—unless the definition itself is vague, in which case Justice Scalia sees his way clear to apply something close to the common-law meaning.<sup>144</sup> All of these moves entail value-laden choices on the part of Justice Scalia and his dissenting colleagues in *Sweet Home*: (1) to anchor judgment on the common-law meaning of “take,” (2) to read the statutory definition of “take” quite narrowly, and (3) to belittle the broad purpose of the statute as a reason to give the terms in the statutory definition their ordinary meaning. The agency

136. *Id.* at 78–92 (“Words must be given the meaning they had when the text was adopted.”).

137. *Id.* at 170–73 (“A word or phrase is presumed to bear the same meaning throughout a text; a material variation in terms suggests a variation in meaning.”).

138. *Id.* at 290–94 (“A federal statute is presumed to supplement rather than displace state law.”).

139. *Id.* at 313–17 (“A statute’s mere prohibition of a certain act does not imply creation of a private right of action for its violation. The creation of such a right must be either express or clearly implied from the text of the statute.”).

140. See *id.* at 411–14 (observing that stare decisis “is an exception to textualism . . . born not of logic but of necessity . . . [it] has been part of our law from time immemorial, and we must bow to it”).

141. I would make this caveat: The rule against implied repeals appears well-nigh absolute. The Supreme Court has rarely found implicit repeals, and the Justices will go to great lengths to preserve preexisting statutes against implied repeals. See, e.g., *Branch v. Smith*, 538 U.S. 254, 292 (2005) (Stevens, J., concurring in part) (describing plurality’s refusal to admit implied repeal as “tortured judicial legislation”).

142. Scalia & Garner, *supra* note 2, at 321.

143. See *id.* at 225–33 (describing interpretive direction canon: “Definition sections and interpretation clauses are to be carefully followed.”). Thus, under the common law rule of *Pierson v. Post*, the fox was not “taken” by the hunter who “pursued” it. See *supra* note 97 and accompanying text (discussing *Pierson* holding). In contrast, under the endangered species law, a hunter who “pursues” a fox that was an endangered species, is deemed to “take” that fox. See Endangered Species Act of 1973 § 3(19), 16 U.S.C. § 1532(19) (2006) (defining “take” to include “pursue”).

144. See Scalia & Garner, *supra* note 2, at 228–32 (arguing that when “a definition itself contains a term that is not clear . . . the meaning of the definition is almost always closely related to the ordinary meaning of the term being defined”).

made precisely the opposite value choices, and the 1982 ESA Amendments suggest that Congress ratified the agency's choices.<sup>145</sup>

4. *Normalization Values (Ordinary Meaning Canon)*. — Consistent with Supreme Court practice, the ordinary meaning canon posits that “[w]ords are to be understood in their ordinary, everyday meanings—unless the context indicates that they bear a technical sense.”<sup>146</sup> This would appear to be the classic neutral principle for statutory interpretation: Simply apply this nonpolitical rule, and your job is done. In practice, however, even the ordinary meaning canon is value-laden, and the primary value is normalization. Under this canon, there is a “normal” way of speaking English, and the Supreme Court is going to enforce its understanding of “normal” usage upon Congress. Moreover, the social practice of normalization can be highly political, and that politicization is well illustrated in statutory interpretation.

Justice Scalia once said that ordinary meaning requires judges to ask “whether you could use the word in that sense at a cocktail party without having people look at you funny.”<sup>147</sup> As in *Reading Law*, he considers nothing more neutral and law-like than normal use at a cocktail party, and he seems oblivious to the possibility that meaning might depend on what crowd the judge parties with, and I mean that literally. Recall the *Sweet Home* debate over what the ESA means when it says that private property owners cannot “take” an endangered species. In the 1990s, there was a heartfelt and strong reaction to “excessive” environmental regulation that limited property use, especially among farmers (and not just the simplest ones) and ranchers in the American West. Predictably, the antiregulatory discourse found its way into constitutional scholarship and public policy discourse<sup>148</sup>—and ultimately into Justice Scalia’s dissenting opinion in *Sweet Home*. If Justice Scalia had described the statutory scheme and said that the “simplest farmer” does not “take” an endangered species when he destroys its habitat, no one would look at him funny at a Federalist Society cocktail party—but Scalia would have gotten funny looks and a ferocious argument if he were partying with a Sierra Club crowd.

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145. See *infra* Part II.C (discussing *Sweet Home* dissent’s rationale and congressional action at issue).

146. Scalia & Garner, *supra* note 2, at 69.

147. *Johnson v. United States*, 529 U.S. 694, 718 (2000) (Scalia, J., dissenting).

148. See generally Jonathan H. Adler, *Back to the Future of Conservation: Changing Perceptions of Property Rights and Environmental Protection*, 1 N.Y.U. J.L. & Liberty 987 (2005) (providing overview of discourse); John McClaughry, *The New Feudalism*, 5 *Env’tl. L.* 675 (1975) (providing early normative declaration); Bruce Yandle, *Escaping Environmental Feudalism*, 15 *Harv. J.L. & Pub. Pol’y* 517 (1992) (comparing federal environmental law policy to feudalism). For a response, see generally Richard J. Lazarus, *Debunking Environmental Feudalism: Promoting the Individual Through the Collective Pursuit of Environmental Quality*, 77 *Iowa L. Rev.* 1739 (1992) (challenging analogy to feudalism).

The punch line of cocktail party textualism is that meaning depends on context—not just the words and provisions surrounding the text being interpreted, but also the supposed audience for the textual interpretation. When Justice Scalia opened his *Sweet Home* dissent with the crack about “conscript[ion] for national zoological use,” he was revealing his supposed audience, the guys he partied with—who were not members of Congress of 1973 or 1982, nor were they “ordinary” Americans, either. The most salient audiences for his dissent (his fellow cocktail partiers) were the Federalist Society, the Sagebrush Rebellion, and the Property Rights Social Movement. Most of the folks in this audience are fine people, but they are only part of America. A danger of the new textualism, revealed in Justice Scalia’s opinions and in *Reading Law*, is that using ordinary meaning to figure out statutory meaning is like entering a cocktail party populated by people who think like you and seeking their confirmation that everyone else uses language the way your group does.

5. *Purposive Values*. — In a comprehensive examination of Justice Scalia’s dissenting opinions (where he speaks in his own voice, with less modulation from his colleagues), Miranda McGowan reports that the Justice relies on purposive reasoning, rather than ordinary meaning analysis, in a large majority of cases.<sup>149</sup> Scalia and Garner’s *Reading Law* openly confirms McGowan’s findings, as it usefully states—as a “fundamental principle[]” of statutory interpretation—that “[a] textually permissible interpretation that furthers rather than obstructs the document’s purpose should be favored.”<sup>150</sup> Equally candid, and illuminating, is the authors’ admission that normative context determines the applicability of many of the textual canons that they survey. The remainder of this section provides examples of, and even expands upon, a few of the most famous (and controversial) textual canons.

The *inclusio* (or *expressio*) *unius* canon posits that the inclusion (or expression) of one thing implies the exclusion of all others.<sup>151</sup> Scalia and Garner include this in their list of “valid canons” but make the reader sharply aware of its limitations: “The doctrine properly applies only when the *unius* (or technically, *unum*, the thing specified) can reasonably be thought to be an expression of *all* that shares in the grant or prohibition involved. Common sense often suggests when this is or is not so.”<sup>152</sup>

Employing this useful principle typically involves normative reasoning, as illustrated by the following example. Parent tells Sally, “Stop biting and scratching your little brother!” If Sally stops those activities and then kicks the kid, she cannot invoke *inclusio unius* as an excuse,

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149. See McGowan, *supra* note 57, at 135 (reporting Justice Scalia considers purpose of statute or consequences of different interpretations in three-quarters of his dissenting opinions).

150. Scalia & Garner, *supra* note 2, at 63.

151. *Id.* at 107.

152. *Id.*

because it is unreasonable to think that biting and scratching exhaust all the activities entailed in the command. Indeed, one should interpret Parent's command to implicitly include kicking in its list of prohibitions. And the analysis would start with the notion that the command had as its purpose the prevention of harm to little brother and reason from that purpose *not only* that the command did not implicitly authorize the kicking, but *also* that the command implicitly forbade the kicking. If I am right about the purpose, I believe I am right about the scope of the command—but please be aware that the new canons-based textualism of the sort advanced by Scalia and Garner might (or might not) reject the second half of the analysis.<sup>153</sup>

Consider also the associated words (*noscitur a sociis*) canon, that one word in a list ought to be applied consistently with the theme of the list.<sup>154</sup> As before, Scalia and Garner provide a useful limiting principle: “For the associated-words canon to apply, the terms must be conjoined in such a way as to indicate that they have some quality in common.”<sup>155</sup> With this limiting principle in mind, Justice Scalia had no problem applying the *noscitur a sociis* canon in *Sweet Home*, where he argued that “harm” in the definition provision for “take” should be understood to have essential qualities in common with the other words in the list (“wound,” “trap,” “kill,” and so forth).<sup>156</sup> This is an intelligent deployment of *noscitur a sociis*, but my quarrel is that the commonality of the terms in the list could be specified in a variety of ways. Inspired by the common law of property and its use of the term “take,” Scalia focused on the way in which all the other terms entailed action targeted at a particular animal<sup>157</sup>—but I do not see why all the terms in the list do not have a more obvious commonality, namely, they all entail action by human beings that render an already endangered species somewhat more likely to become extinct.

The commonality that I find has the huge advantage of linking the explicit statutory definition with the explicit statutory purpose: Section 2(b) of the ESA specifically says that a core goal of the statute is to protect the habitat of endangered species. I am baffled that eminent jurists were not only unwilling to admit that the text-based purpose provided

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153. This move, adding implied activities, seems inconsistent with Scalia and Garner's omitted-case canon, that “[n]othing is to be added to what the text states or reasonably implies . . . . That is, a matter not covered is to be treated as not covered.” *Id.* at 93. It might also be contrary to their understanding of the rule of lenity, see *id.* at 296–99, because it would penalize as a family crime an activity not explicitly named. To be sure, Scalia and Garner, or others using their list (including me), could come out the other way by saying that kicking is “reasonably implied” in Parent's command. But, as this Part argues, that is a normative judgment that is hard to predict in advance.

154. *Id.* at 195–98.

155. *Id.* at 196.

156. *Babbitt v. Sweet Home Chapter of Cmty. for a Great Or.*, 515 U.S. 687, 719–20 (1995) (Scalia, J., dissenting).

157. *Id.*

the common feature required by *noscitur a sociis*, but apparently were unable to conceive of the possibility that this suggested commonality was even possible. Were they so outraged by the national conscription of the “simplest farmer” that they could not even imagine that the common theme in the verbs defining “take” was the broad purpose announced in the statutory text?

*B. How Legislative History Helps Us Understand Statutory Purpose*

Scalia and Garner’s *Reading Law* suggests, and this Review has developed more aggressively, how much *statutory interpretation by the rules* entails value judgments by judges and how those value judgments are driven by the judge’s understanding of the statutory purpose. How does the judge figure out the statutory purpose? Scalia and Garner maintain that statutory purpose should be derived from statutory text. Sometimes, and increasingly, enacted statutes will include purpose provisions, such as those contained in the ESA.<sup>158</sup> This is potentially quite helpful, but it is not a complete solution. Enacted statutory purposes are usually multiple (and potentially conflicting) and are set at a high level of generality, which makes them less than determinate aids for understanding how to apply statutory texts. Additionally, statutes often do not include a “purposes” provision on their face, and it is not clear how a judge derives unambiguous purpose from an ambiguous text. Without a robust theory of statutory purpose, Scalia and Garner provide lawyers and judges with little more than manipulable and indeterminate canons to argue about. Indeed, their book may seriously mislead lawyers about how statutes ought to be applied.

As an example, consider Scalia and Garner’s application of H.L.A. Hart’s famous hypothetical statute, “No person may bring a vehicle into the park.”<sup>159</sup> In a wonderful exercise in sophisticated linguistic analysis, Scalia and Garner work their way through a variety of dictionary definitions of “vehicle,” finding that none of them quite fits the statute. “The proper colloquial meaning in our view (not all of them are to be found in dictionaries) is simply a *sizable* wheeled conveyance (as opposed to one of any size that is motorized).”<sup>160</sup> Thus, the authors would apply the prohibitory ordinance to automobiles, golf carts, mopeds, and (“perhaps”) Segways—but not to “airplanes, bicycles, roller skates, and toy automobiles.”<sup>161</sup> This strikes me as an utterly judicious, well-informed, and highly illuminating linguistic analysis—but a crazy legal analysis.

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158. 16 U.S.C. § 1531(b) (2006).

159. Scalia & Garner, *supra* note 2, at 36–39 (“The example, according to Hart, illustrates that there are ‘debatable cases in which words are neither obviously applicable nor obviously ruled out.’”).

160. *Id.* at 37.

161. *Id.* at 38.

Let me explain the crazy point. I do not see how a judge can even begin to answer the interpretive questions in the no-vehicle law without understanding, from the perspective of the legislature and the political culture that produced the statute, what the purpose of the statute was. For example, the city council could have been responding to complaints that kids riding bicycles as well as motorscooters have been running into older park visitors and even little children, with injurious consequences. Responding to outrage from the AARP, parent groups, and other political powerhouses, the councilmember sponsoring the measure promised her colleagues and the voters that the ordinance “would head off accidents like these bicycling and motorscooter atrocities, by banning them from the park altogether.” If *that* were the legislative background of the ordinance, its purpose was to preserve public safety, especially for the very old and the very young persons using the city parks. To say, as Scalia and Garner do, that the statute does not apply to bicycles is quite crazy from the perspective of responsible governance. A no-vehicles law whose purpose is a prophylactic safety purpose is *not* one that should be applied based only on the size of the vehicle; some small vehicles can harm people more than big ones.<sup>162</sup>

To be sure, a purpose approach does not answer all interpretive questions. For example, given a safety purpose (and the previous bicycle accidents), does the statute ban tricycles? Those little contraptions can go pretty fast, but not nearly as fast as bicycles, and are usually operated by tiny tots who are unlikely to harm anyone. But how about adult tricycles? Should they be treated as bicycles? How about skateboards, which may be just as much a safety hazard as bicycles but are less susceptible to colloquial understanding as “vehicles?” These are questions that are hard to answer in the abstract—but knowing the statutory purpose helps us ask the right questions. And these are frequently the kinds of questions that legislators discuss in floor speeches and committee reports, which might provide illumination for judges seeking to follow legislative directives.

Scalia and Garner seem to think that statutory purpose can simply be divined from statutory text, so why forego such divination in the no-vehicles example? Surely the reason is that bare text does not tell us which of several purposes animated the legislature, nor does it tell us what kinds of dangers the legislature was most concerned with and which ones would have been considered *de minimis*. Scalia and Garner object that such a purpose-based inquiry is nothing more than a search for “legislative intent,” which they consider one of the greatest canards in

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162. There are other potential purposes that better fit the linguistic applications imagined by Scalia and Garner. If the ordinance were adopted to respond to complaints of noisy and air-polluting (motor) vehicles in the park, then the Scalia and Garner application (barring motor vehicles but not bicycles) would work much better. Although the statutory language is the same, the application ought to be different, given different statutory purposes.

statutory interpretation.<sup>163</sup> Linguist Lawrence Solan has responded, in some detail, to Justice Scalia's critique of legislative intent: The law presumes collective intent all the time, and the conventions of the legislative process render the notion of legislative intent readily intelligible in most instances.<sup>164</sup>

But even under the premises of Scalia and Garner's canons-based textualism, legislative history is useful, for it helps the judge, a stranger to the statutory project, understand how words are being used. It opens up the judicial mind to possibilities that might not have occurred to the judge—what I call the *hermeneutical value* of legislative history. This expansion of possible word usage is the textualists' justification for reliance on *The Federalist Papers* to understand the original meaning of the Constitution of 1789,<sup>165</sup> and it can be argued that legislative history is relevant for the same kinds of reasons as constitutional debating history. The next section provides a surprising example of how persuasive such materials can be.

### C. Legislative History, Statutory Purpose, and *Sweet Home v. Babbitt*

Recall the judicial debate over the meaning of the ESA's anti-take provision in *Sweet Home*. In support of his broad understanding of "take," Justice Stevens, for the Court, invoked the congressional purpose set forth on the face of the statute, namely, to protect endangered species in

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163. Scalia & Garner, *supra* note 2, at 391–96.

164. Solan, *Language*, *supra* note 39, at 82–83 (justifying judicial reliance on legislative intent based on ubiquitous attribution of "intent to a group of people based on the intent of a subset of that group"); Lawrence M. Solan, *Private Language, Public Laws: The Central Role of Legislative Intent in Statutory Interpretation*, 93 *Geo. L.J.* 427, 437–49 (2005) ("[T]he legislature would accept the notion that its intent is reflected in the intent of those who most had a stake in framing and negotiating . . . the law. . . . [T]he legislature's reliance on committees to work out the details of legislation is a formal part of the process and always has been."). For demonstrations that collective intent is a meaningful idea for congressional compromises and deals, see Brudney, *Chatter*, *supra* note 39, at 52–56 (describing congressional members' incentives to remain "honest and fair even during fierce partisan debates" and "not to overstate or understate the bill's . . . objectives"); Daniel B. Rodriguez & Barry R. Weingast, *The Positive Political Theory of Legislative History: New Perspectives on the 1964 Civil Rights Act and Its Interpretation*, 151 *U. Pa. L. Rev.* 1417, 1431–35 (2003) (asserting statutes and corresponding legislative history are reflections of legislative "specialization and expertise" and a "vitaly important object of trade and negotiation").

165. E.g., *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2655 (2012) (Scalia, Kennedy, Thomas & Alito, JJ., dissenting) (using *The Federalist No. 58* as argument against construction that "Individual Mandate merely imposes a tax" because Framers gave taxing power to House); *Arizona v. United States*, 132 S. Ct. 2492, 2511–12 (2012) (Scalia, J., concurring in part and dissenting in part) (citing *The Federalist No. 42* as evidence of Framers' original intent to give Congress naturalization power, "not to abrogate States' power to exclude those they did not want, but to vindicate it"); *Printz v. United States*, 521 U.S. 898, 910 (1997) (characterizing *The Federalist* as source that Supreme Court "usually regard[s] as indicative of the original understanding of the Constitution").



general and, more specifically, “to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved.”<sup>166</sup> That sounds like a winning argument, combining a broad statutory text with a specifically confirming statutory purpose and a longstanding agency understanding entitled to strong deference under the Court’s *Chevron* doctrine.<sup>167</sup>

But the devil is in the details—and Justice Scalia had a smart response to the majority’s argument. Yes, one purpose of the ESA was to protect the habitat for endangered species, but section 9, prohibiting private landowners from taking such species, was not the mechanism Congress intended as the vehicle for advancing this particular purpose. Two other provisions of the 1973 Act were explicitly concerned with habitat protection: Section 7 explicitly barred federal projects from harming the habitat of endangered species,<sup>168</sup> and section 5 authorized the Department to use its eminent domain power to secure needed habitat from private landowners,<sup>169</sup> thereby leaving section 9’s anti-take regulation probably concerned with more targeted activities.<sup>170</sup>

This is a good structural argument, but, as is often the case for structural arguments, it involves a pile of judicial inferences that are debatable. There was nothing in the explicit text of the 1973 Act that established the differentiated structure hypothesized by Justice Scalia. Reading nothing but the text of the statute, it is perfectly reasonable to say that sections 5 and 7 are the primary mechanisms for protecting habitat, with section 9 being an ancillary but important mechanism as well. Section 2(b)’s statement of the statutory protection-of-habitat purpose did not differentiate among the various strategies followed in the statute. As Scalia and Garner caution, “general words” are supposed to be applied generally,<sup>171</sup> and so if there is any ambiguity in the statute’s definition of “take” to include any “harm” to an endangered species, that ambiguity ought to be resolved to “further” the statutory purpose.<sup>172</sup> Ever going for the analytical jugular, however, Justice Scalia (or his contextually inclined law clerk) came up with some smoking guns that provide cogent support for his reading of the statutory structure.

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166. *Babbitt v. Sweet Home Chapter of Cmty. for a Great Or.*, 515 U.S. 687, 698–99 (1995) (quoting Endangered Species Act, 16 U.S.C. § 1531(b) (1988 & Supp. V 1994)).

167. See *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 866 (1984) (describing judiciary’s duty to “respect legitimate policy choices” made by federal agencies).

168. 16 U.S.C. § 1536(a); see *TVA v. Hill*, 437 U.S. 153, 193–95 (1978) (enforcing dramatically § 7’s habitat-protective rule by requiring TVA to halt construction of \$100 million dam that would allegedly have destroyed necessary habitat for endangered species).

169. 16 U.S.C. § 1534.

170. See *Sweet Home*, 515 U.S. at 727–30 (Scalia, J., dissenting).

171. Scalia & Garner, *supra* note 2, at 101.

172. *Id.* at 63.

The smoking guns were in the form of floor speeches by both Senate and House sponsors articulating the protection-of-habitat purpose with greater precision and, probably, reflecting the compromises reached among the coalition of legislators supporting the statute.<sup>173</sup> As the House manager put it:

[T]he principal threat to animals stems from the destruction of their habitat. . . . [*The bill*] will meet this problem by providing funds for acquisition of critical habitat . . . . It will also enable the Department of Agriculture to cooperate with willing landowners who desire to assist in the protection of endangered species, but who are understandably unwilling to do so at excessive cost to themselves.

Another hazard to endangered species arises from those who would capture or kill them for pleasure or profit. There is no way that the Congress can make it less pleasurable for a person to take an animal, but we can certainly make it less profitable for them to do so.<sup>174</sup>

The Senate floor manager made a similar speech before his chamber. These portions of the legislative history, unrebutted by the government's excellent brief (itself chock full of legislative history),<sup>175</sup> are exactly the kind of materials that are relevant to statutory interpretation: The authors of the statutory project openly explain, in documents or transcripts that are certain to be read by legislators and their staffs, what the statute's primary purpose is, how it is carried out in particular statutory provisions, and how it relates (if at all) to the provision in question. Complementing and indeed completing his analysis of statutory structure, Justice Scalia's analysis of legislative history persuades me that the 1973 Act did not require private property owners to avoid any harm to the habitat of endangered species.<sup>176</sup> Thus, the Department went too far

173. *Sweet Home*, 515 U.S. at 727–28 (Scalia, J., dissenting) (preferring “direct evidence” from Senate and House floor managers of bill over majority’s reliance on “various pre-enactment actions and inactions”).

174. 119 Cong. Rec. 30,162 (1973) (statement of Rep. Leonor Sullivan) (emphasis added), quoted in *Sweet Home*, 515 U.S. at 728 (Scalia, J., dissenting).

175. Brief for Petitioners at 25–30, *Sweet Home*, 515 U.S. 687 (No. 94-859), 1995 WL 89293, at \*25–\*30 (containing Solicitor General’s rendition of relevant legislative history for 1973 Act).

176. Another bit of legislative history, emphasized by the D.C. Circuit but not by Justice Scalia, is somewhat supportive of Scalia’s narrower reading of section 9(a). One of the bills deliberated by the Senate committee would have defined “take” to mean to “threaten, harass, hunt, capture, or kill [an endangered species] . . . or the destruction, modification, or curtailment of its habitat or range.” S. 1983, 93d Cong. § 3(6) (1973). The Senate committee opted for the more general definition, which added “harm” and other activities, but its refusal to go with the habitat-targeting language adds some cogency to Justice Scalia’s structural argument. Standing alone, the rejected proposal is not dispositive, because the committee deal may be construed as actually broadening the definition of “take”: the addition of “harm” made the definition so broad that the habitat-protecting language was unnecessary.

in 1975, when it originally adopted the habitat-protecting interpretation of “harm” for purposes of section 9(a)(1).

So two cheers for Justice Scalia, but his brief embrace of legislative history did not go far enough. One feature of Justice Scalia’s new and frequently dynamic textualism is that when Congress amends statutes, the amendments can expand or contract the meaning of the original statutory language.<sup>177</sup> And that is precisely what happened to the ESA. After the Department issued its broad habitat-protection regulation in 1975, Congress heard testimony from ranchers and farmers objecting to the Department’s broad regulation and considered bills to override that regulation’s statutory definition. Not only did Congress refuse to override the Department, but legislation amending the ESA in 1978 took as a working assumption that section 9(a)(1)(B) barred everyone from harming endangered species by destroying needed habitats.<sup>178</sup>

In 1982, a more serious challenge to the 1975 regulation emerged: The new Reagan Administration and the new Republican-controlled Senate favored an override of the Department’s habitat regulation—but the Democrat-controlled House did not. To compromise between the pro-environmental forces in the House and the pro-farmer and rancher forces in the Senate, Congress, in the ESA Amendments of 1982, built upon the Department’s interpretation of section 9(a)(1)(B) but provided for a broader exemption mechanism via permit application, in new section 10(a)(1)(B), for incidental and cost-justified habitat incursions by private enterprises.<sup>179</sup> The committee reports demonstrate that Congress in 1982 was both accepting the Department’s interpretation

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177. Cf., e.g., *United Sav. Ass’n of Tex. v. Timbers of Inwood Forest Assocs.*, 484 U.S. 365, 371 (1988) (Scalia, J.) (finding Bankruptcy Code legislative history’s silence on withdrawal of alleged, pre-Code absolute right to foreclose did not indicate intent to preserve right).

178. When Congress enacted the Endangered Species Act Amendments of 1978, Pub. L. No. 95-632, 92 Stat. 3751, in the immediate wake of the Court’s decision in *TVA v. Hill*, 437 U.S. 153 (1978), not only did Congress reject serious proposals to override the Department’s harm regulation, but the Amendments added section 7(o) to the ESA. Section 7(o) exempts from section 9 federal habitat-threatening projects (like the TVA dam) if they are granted an exemption from section 7(a)’s rules for federal projects through a new procedure Congress created in 1978. Endangered Species Act Amendments § 3, 92 Stat. at 3752–60 (codified as amended at 16 U.S.C. § 1536(o)); see also Brief for Petitioners, *supra* note 175, 1995 WL 89293, at \*31–\*33 (recounting legislative history of section 7(o)). Section 7(o) would have been superfluous if section 9(a) does not prohibit interference with the habitat of an endangered species. Because the new textualism has a strong presumption against statutory surplusage, Justice Scalia ought to have considered section 7(o) a strong support for the majority’s interpretation of section 9(a).

179. Endangered Species Act Amendments of 1982, Pub. L. No. 97-304, § 6, 96 Stat. 1411, 1422–25 (codified at 16 U.S.C. § 1539(a)(1)(B)) (establishing permit system for “takings” incidental to lawful activities and not for purpose of threatening endangered species); see also Brief for Petitioners, *supra* note 175, 1995 WL 89293, at \*34–\*38 (providing legislative history of revision of section 10 by 1982 Amendments).

and ameliorating its potentially harsh application.<sup>180</sup> But, after crediting floor statements to support his view of the 1973 Act, Justice Scalia refused to credit committee reports that went against his view of the 1982 Amendments, purportedly because the text of revised section 10 did not, on its face, codify the Department's 1975 regulation.<sup>181</sup>

This is judicial cherry-picking with a vengeance. Justice Scalia conceded that the Senate Report and the Conference Report explaining the 1982 ESA Amendments explicitly informed members of Congress that section 9(a) barred farmers and ranchers from depriving endangered species of needed habitat and that new section 10(a) was a measure to provide administrative relief from harsh applications of the now-established section 9(a) rule, but he belittled any harm that would occur were the Court to ignore congressional deals of this sort:

There is little fear, of course, that giving no effect to the relevant portions of the Committee Reports will frustrate the real-life expectations of a majority of the Members of Congress. If they read and relied on such tedious detail on such an obscure point (it was not, after all, presented as a revision of the statute's prohibitory scope, but as a discretionary-waiver provision) the Republic would be in grave peril.<sup>182</sup>

This is an astonishingly dismissive understanding of the serious work that Congress does and an unprincipled basis for distinguishing his own use of legislative history to interpret the original 1973 Act from his refusal to do so when construing the Act as amended in 1982.

The most judicious approach to *Sweet Home* is to learn something from both Justice Scalia and Justice Stevens: As Scalia argued, the Department's habitat regulation went beyond the authority it had under the 1973 Act, but Stevens was right that Congress ratified that regulation when it amended the statute in 1982. Given the *congressional* purpose, rather than the political agendas of the various Justices, I think this is the right answer—and it is not an answer easily secured without consulting

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180. See H.R. Rep. No. 97-835, at 29 (1982) (Conf. Rep.) ("This provision addresses the concerns of private landowners who are faced with having otherwise lawful actions . . . prevented by section 9 prohibitions against taking."); S. Rep. No. 97-418, at 10 (1982) ("The proposed amendment [to subsection 10(a)] should lead to resolution of potential conflicts between endangered species and the actions of private developers . . ."). The section 10 permit process was described in the Senate Report as being modeled after the response to a specific situation in San Mateo County, California, in which the "taking" of endangered butterflies was incidental to "the development of some 3000 dwelling units" on a site inhabited by the species—i.e., was incidental to habitat modification. *Id.* The Conference Report similarly discussed the San Mateo project and noted that large portions of the butterflies' habitat were privately owned and that the conservation plan developed through governmental and private efforts "preserves sufficient habitat to allow for enhancement of the survival of the species." H.R. Rep. No. 97-835, at 30–32.

181. *Babbitt v. Sweet Home Chapter of Cmty. for a Great Or.*, 515 U.S. 687, 727–30 (1995) (Scalia, J., dissenting).

182. *Id.* at 730–31.

the ongoing legislative history of critique and revision of the endangered species statute.<sup>183</sup>

### III. THE DEMOCRACY PROBLEM WITH THE NEW CANONS-BASED TEXTUALISM

The canons-based textualism explicated in *Reading Law* is, in practice, an episodically dynamic theory of statutory interpretation, partly because it demands that judges update statutes to take account of new statutory developments, and partly because it offers many opportunities for judges to read their political preferences into statutes. The cherry-picking and norms problems explored above create a democracy problem. In cases like *Sweet Home*, unelected, life-tenured federal judges are making important policy choices and trying to impose them upon statutes without regard to congressional goals and compromises and often without due deference to the longstanding policies followed by executive agencies and ratified by Congress. Elected representatives are accountable to the voters, who not only put them into office based on their policy positions but can remove them from office if they favor policies out of sync with their electorates. Although neither elected nor removable by voters, agencies accountable to the President have a modest accountability advantage over Article III judges, because the President is attentive to voters' preferences and because agency heads do rotate with the electoral cycles.<sup>184</sup>

One of the many values of legislative history for judges is that it connects them with the legislative (and, typically, the legislative-executive) deliberations that preceded the statute's enactment and that inform the rest of us who are intimately familiar with the normative choices made by our elected legislators. In other words, taking legislative history seriously, even when it does not have the smoking gun Justice Scalia's law clerk found in *Sweet Home*, ameliorates the countermajoritarian difficulty with judicial interpretation of statutes. This theoretical point is well illustrated

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183. The vacillation Justice Scalia revealed in *Sweet Home* is far from unique. Although it is well known that Scalia will pointedly refuse to join majority opinions that even mention legislative history, especially those written by "liberal" colleagues, he will often join majority opinions filled with legislative history when they are written by more conservative colleagues and reach property-protecting, pro-business conservative results. In the most remarkable example, Justice Scalia joined every sentence and every footnote of Justice O'Connor's lengthy recitation of legislative history in the FDA Tobacco Case, *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 123, 137–39, 143–56 (2000), even though there was a perfectly good textual basis for the Court's holding. See *id.* at 140–43 (relying in part on "straightforward reading" of Food, Drug, and Cosmetic Act to hold FDA does not have authority to regulate tobacco products).

184. See *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 866 (1984) (announcing new reason for deferring to agency decisionmaking, namely, accountability of agencies to President, which gives them democracy advantage over judges in rendering "political" judgments); Elena Kagan, *Presidential Administration*, 114 *Harv. L. Rev.* 2245, 2331–33 (2001) (arguing "presidential leadership enhances transparency" and makes bureaucracy more responsive to public).

in Supreme Court practice. Aggressively applying the canons set forth in *Reading Law*, Justice Scalia's own performance over a quarter century on the Supreme Court is an example of the democracy problem, where judges substitute their political judgments for the ones made by Congress or by agencies accountable to the President. In the labor cases that Brudney and Ditslear have analyzed, as well as civil rights and other kinds of cases, regulation-loving liberal Congresses enacted statutes that Justice Scalia and other Blackstonian Justices have been bending toward their own values.<sup>185</sup> In practice, the new canons-based textualism creates a big democracy deficit.

The democracy problem is especially acute when judges apply canons of construction that they have created and ignore legislative history that Congress has created.<sup>186</sup> For example, Scalia and Garner say that "[m]any established principles of interpretation" rest on "grounds of policy adopted by the courts."<sup>187</sup> They mention the rule of lenity, the requirement that punitive statutes can only be applied to conduct clearly described on the face of the statute.<sup>188</sup> The rule of lenity has a genuine, perhaps powerful, impact on statutory interpretation and makes it harder for Congress to create an aggressive regulatory criminal law regime.<sup>189</sup> What justifies this heavy judicial thumb on the scales?

Scalia and Garner do not defend the rule of lenity on its constitutional merits but instead say that "rules like these, so deeply ingrained, must be known to both drafter and reader alike so that they can be con-

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185. See Brudney & Ditslear, *Canons of Construction*, supra note 13, at 15–29 (engaging in empirical analysis of Supreme Court's labor cases, with emphasis on canons-based decisions after Justice Scalia joined Court); Brudney, *Canon Shortfalls*, supra note 35, at 1207 (describing some use of canons as "troubling forms of countermajoritarian judicial activism"). A similar point has been made for civil rights statutes. See William N. Eskridge, Jr., *Reneging on History? Playing the Court/Congress/President Civil Rights Game*, 79 *Calif. L. Rev.* 613, 683 (1991) (describing process whereby canon-wielding Justices read civil rights laws restrictively, triggering angry congressional overrides and charges that Justices were "reneging" on legislative bargains); Deborah A. Widiss, *Undermining Congressional Overrides: The Hydra Problem in Statutory Interpretation*, 90 *Tex. L. Rev.* 859, 942 (2012) (lamenting that even when Congress overrides Court, conservative Justices interpret override statutes as narrowly as possible); Kathryn A. Eidmann, *Comment, Ledbetter in Congress: The Limits of a Narrow Legislative Override*, 117 *Yale L.J.* 971, 979 (2008) (arguing legislative overrides are often insufficient to respond to overly conservative construction of statute).

186. See Brudney & Ditslear, *Canons of Construction*, supra note 13, at 15–29 (providing array of examples where pro-employer Republican Justices interpret statutes to advance employer interests over labor interests, even though legislative history examined by dissenting Justices demonstrates majority was reading statutory text incorrectly).

187. Scalia & Garner, supra note 2, at 30.

188. *Id.* at 296–302.

189. See Eskridge & Baer, supra note 103, at 1142 tbl.15 (reporting very low win rate, 36.2%, when Court applies or recognizes "anti-deference" presumptions, including rule of lenity, compared with overall agency win rate of 68.8% in statutory cases, 1984–2006).

sidered inseparable from the meaning of the text.”<sup>190</sup> For this proposition the authors cite nothing, and I believe there is nothing they could have cited, for most legislators and their staff are unaware of the rule of lenity, and when they become aware of it they pass statutes seeking to negate its force.<sup>191</sup> The rule of lenity, as the authors surmise, is one of the best known of their canons among academics and judges—and so drafters and legislators unaware of the rule of lenity are probably unaware of the more obscure canons that populate Scalia and Garner’s list.

Consider this broad point: Any collection of “valid canons” *must* provide a normative defense for why each canon or each cluster of canons is *legitimate* as a normative matter. Scalia and Garner do not provide persuasive or even tentative defenses for most of the canons they advance as “valid,” and some of the more loaded canons, such as their broad version of the avoidance canon,<sup>192</sup> are probably indefensible. In his earlier book, Justice Scalia assumed that most of the canons could be defended as commonsense presumptions about how any reader or speaker of the English language would approach a text.<sup>193</sup> I am doubtful that most of the authors’ canons would pass this test, and they provide zero evidence along these lines, but the democracy problem demands something more: Apart from the rule of lenity and other substantive rules, do the canons in Scalia and Garner’s interpretive regime reflect precepts that Congress even knows about? If Congress is aware of the canons, do legislators and their staff believe them valid? Are they able to consider such canons when they draft and enact statutes? These are surprisingly difficult questions for Scalia and Garner’s project.

For statutes adopted in and before 1990, Congress could not have anticipated Scalia and Garner’s interpretive regime, and if representatives and their staff had anticipated their “valid canons” they would not have approved of many of them. Before 1990, drafters and representatives in Congress would have reasonably assumed, and there is good evidence they did assume, that Article III judges would routinely consider

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190. Scalia & Garner, *supra* note 2, at 31.

191. See *infra* notes 232–233 (providing sources for legislator ignorance of or hostility to rule of lenity).

192. For classic critiques of the broad Scalia/Garner version of the avoidance canon, see Henry J. Friendly, Mr. Justice Frankfurter and the Reading of Statutes, *in* *Benchmarks* 196, 211–12 (1967) (emphasizing risk of avoidance canon’s misuse); Richard A. Posner, The Federal Courts: Crisis and Reform 285 (1985) (cautioning against “enlarg[ing] the already vast reach of constitutional prohibition[s]”); Lisa A. Kloppenberg, Avoiding Constitutional Questions, 35 *B.C. L. Rev.* 1003, 1004–05 (1994) (urging rejection of avoidance doctrine in many cases); John F. Manning, The Nondelegation Doctrine as a Canon of Avoidance, 2000 *Sup. Ct. Rev.* 223, 228 (contending avoidance doctrine subverts nondelegation doctrine); John Copeland Nagle, *Delaware & Hudson Revisited*, 72 *Notre Dame L. Rev.* 1495, 1497 (1997) (discussing doctrine’s origination).

193. Scalia, *Interpretation*, *supra* note 1, at 25–26; accord, Einer Elhauge, *Statutory Default Rules: How to Interpret Unclear Legislation* 113–48 (2008) (suggesting many canons are default rules probably reflecting preferences of typical enacting legislators).

committee reports and sponsors' statements that elaborated on the ambiguous or vague provisions in the statute.<sup>194</sup> The first empirical study of this topic established that drafting staff for congressional judiciary committees were substantially unaware of the Court's canons of statutory construction and did not draft statutes with the Court's precepts in mind.<sup>195</sup> This was not a big problem before 1990, because the Supreme Court almost always considered relevant legislative history and the canons did not play a primary role in the interpretation of federal statutes. The primacy has been reversed since 1990, with canons superseding legislative history for most of the Justices. Thus, the democracy problem has become more acute: Does Congress even know about the governing canons? Does Congress acquiesce in them?

The answer is surely affirmative for some important canons. Statutory drafters as well as elected representatives would very probably assume that the enacted text is the primary source for discerning statutory meaning;<sup>196</sup> that ordinary meaning<sup>197</sup> and precepts of grammar<sup>198</sup> will be critically important guides for lawyers as well as judges in figuring out what the text means; and that statutory definition sections will be carefully followed by interpreters,<sup>199</sup> though legislative drafters and representatives would certainly be astounded to learn that judges sometimes substitute a term's "normal" meaning for that contained in a statute's definitions section,<sup>200</sup> as Justice Scalia tried to do in *Sweet Home*.<sup>201</sup>

But what is the case for other canons? There are now data available for some tentative answers. Specifically, Professors Abbe Gluck and Lisa Bressman have conducted an unprecedented empirical survey of congressional drafters, and their results allow us to provide an up-to-date as-

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194. Statutory Interpretation and the Uses of Legislative History: Hearing Before the Subcomm. on Courts, Intellectual Prop., and the Admin. of Justice of the H. Comm. on the Judiciary, 101st Cong. 2 (1990) (statement of Rep. Robert W. Kastenmeier, Chairman, Subcomm. on Courts, Intellectual Prop., and the Admin. of Justice of the H. Comm. on the Judiciary) ("It is probably safe to say that most of us in Congress assume . . . legislative history can explain and amplify statutory language in ways that are instructive to the courts.").

195. Victoria F. Nourse & Jane S. Schacter, The Politics of Legislative Drafting: A Congressional Case Study, 77 N.Y.U. L. Rev. 575, 597-605 (2002) (finding congressional drafters generally do not consider and often are unaware of textual and substantive canons Court uses).

196. Scalia & Garner, *supra* note 2, at 56-58 (discussing canon 2, supremacy-of-text principle).

197. *Id.* at 69-77 (discussing canon 6).

198. *Id.* at 140-43 (discussing canon 17).

199. *Id.* at 225-33 (discussing canon 36).

200. *Id.* at 228-29 (suggesting there are instances when "normal meaning should be applied" instead of "defined meaning").

201. *Id.* at 230-32 (summarizing Scalia's reasoning in his *Sweet Home* dissent).



assessment of the Scalia and Garner interpretive regime.<sup>202</sup> Does Congress know about their canons? Does Congress find them acceptable? Do staff take them into account when they draft statutes? The answer to these questions is yes for many canons, no for many more canons, and yes for some of Scalia and Garner's anticanons.

Professors Gluck and Bressman report that, from the perspective of congressional staff and legislators, statutory text is critically important, and so their study confirms the conventional wisdom and the text-based premise of *Reading Law*—but their next-most-critical finding ought to be unsettling for Scalia and Garner. Even though the Supreme Court has curtailed its reliance on legislative history since 1990, Congress has not. Gluck and Bressman report that “legislative history was emphatically viewed by almost all of our respondents—Republican and Democrat alike—as the most important drafting and interpretive tool apart from text.”<sup>203</sup> Indeed, Congress does not sharply differentiate between statutory text and critical legislative history: Although each chamber formally votes only on the text of bills, members' votes are based upon their reading of legislative history and summaries of the bills without even glancing at the wording of those bills.<sup>204</sup> Moreover, based on their experience in government, congressional staff view committee reports as constraining upon judges, and not liberating.<sup>205</sup> Notice how these findings deepen the democracy problem with Justice Scalia's belittling reference to the committee reports accompanying the 1982 ESA Amendments.<sup>206</sup> Contrary to Justice Scalia's confident but unsupported assessment, legislators, staff, the executive department, and interest groups pay careful attention to representations in the relevant committee reports. The Gluck and Bressman report provides the most authoritative empirical support for what has long been the conventional wisdom among political scientists and law professors who have actually participated in and studied the legislative process.

Accordingly, the Gluck and Bressman report deepens the democracy problem inherent in Scalia and Garner's insistence that courts ought not consult legislative history and creates an even higher burden of justification for such an exclusionary rule. Their report also puts to shame Justice Scalia's cynical attitude toward the seriousness of committee delibera-

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202. Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside: An Empirical Study of Legislative Drafting, Delegation, and the Canons*, 65 *Stan. L. Rev.* (forthcoming May 2013) (on file with the *Columbia Law Review*).

203. *Id.* (manuscript at 57).

204. *Id.* (manuscript at 58–59). Surprisingly, some committees literally vote only on legislative history when they report bills to the chamber, and their members do not even have the text of the bills before them. *Id.* (manuscript at 59).

205. *Id.* (manuscript at 60).

206. *Babbitt v. Sweet Home Chapter of Cmty. for a Great Or.*, 515 U.S. 687, 730–31 (1995) (Scalia, J., dissenting).

tions and reports, as expressed in his *Sweet Home* dissent.<sup>207</sup> While Justice Scalia has repeatedly announced several normative justifications for an exclusionary rule, scholars have repeatedly demonstrated that none is cogent.<sup>208</sup>

Professors Gluck and Bressman also report that very few of the professional congressional staff have any idea what the avoidance canon stands for,<sup>209</sup> and their results are even more astounding for the new clear statement rules Justice Scalia and his colleagues have created to protect federalism and other values.<sup>210</sup> Only 28.5% of the professional staff said they could name a single one of the clear statement rules—and when asked to name one, only four of those “knowledgeable” staff members were able to correctly identify such a rule, with none able to identify any of the federalism clear statement rules.<sup>211</sup> Even the preemption canon<sup>212</sup> was not well understood; a mere 5.84% of the respondents correctly identified the presumption as protecting state law, with double that number (11.68%) believing the presumption went the other way, and the rest completely clueless.<sup>213</sup> None of the constitutional canons that Justice Scalia seems to think represent commonsense propositions are well known in Congress, and most of those canons are completely unknown to the legislators and their staff who formulate legislation.

The Gluck and Bressman report on textual canons is also filled with surprises. One big surprise is that congressional staff do understand the concepts underlying the Latin canons (*inclusio unius, noscitur a sociis, ejusdem generis*) and do follow those concepts when drafting statutes.<sup>214</sup> Thus, if they have a list of items exempted from a statutory requirement, congressional staff assume that the list is exhaustive and that the items share a common theme. If they want to negate inferences, they know to use language to that effect. So rather than saying, “Sally may not kick, bite, or scratch her little brother,” many drafters would know to say, “Sally may not harm her little brother, including harms resulting from her kicking, biting, or scratching little brother.”

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207. See *id.* (belittling committee reports for not capturing Congress’s “real-life expectations”).

208. See *supra* note 13 (supporting use of legislative history). Compare Scalia, *Interpretation*, *supra* note 1 (arguing textualism is neither simplistic nor result-oriented, but logically consistent and rigorous), with Eskridge, *Unknown Ideal*, *supra* note 13 (reviewing *Matter of Interpretation*).

209. Gluck & Bressman, *supra* note 202 (manuscript at 48).

210. See Scalia & Garner, *supra* note 2, at 281–94 (discussing presumptions against federal preemption and waiver of sovereign immunity).

211. Gluck & Bressman, *supra* note 202 (manuscript at 38).

212. See Scalia & Garner, *supra* note 2, at 290–94 (defining preemption canon as “presum[ption] that a federal statute does not preempt state law”).

213. Gluck & Bressman, *supra* note 202 (manuscript at 53).

214. *Id.* (manuscript at 39–40).

While some congressional staff were aware that the Supreme Court is updating statutory texts based upon the whole-text canon,<sup>215</sup> the presumption of consistent usage,<sup>216</sup> and the rule against surplusage,<sup>217</sup> they did not follow those rules when drafting statutes, for practical reasons.<sup>218</sup> Indeed, the Senate and House staffers surveyed by Gluck and Bressman followed an approach that inverts the rule against surplusage. The rule against surplusage says that statutory terms should be broadly construed so that they do not duplicate other terms,<sup>219</sup> but congressional staff tell us that they will purposely use redundant terms to make sure that all bases are covered and to satisfy interest groups and executive officials who are worried that their interests are not being adequately protected. Thus, when Congress defined “take” in the ESA, staff may have gone overboard in listing all the things humans can do to an endangered species. In light of this intelligence, the explanation from the House and Senate sponsors, who emphasized that the take provision covered attacks targeted at particular animals, ought to override the rule against surplusage that Justice Stevens invoked in *Sweet Home*.<sup>220</sup>

It is shocking that so few of Scalia and Garner’s “valid canons” are known or followed by congressional staff that draft statutes. It is especially surprising because the manuals used by the drafting offices of both the House and the Senate explicitly note most of the Scalia-Garner canons, and a great many more.<sup>221</sup> It is also surprising how little knowledge there still is regarding the Court’s whole act and constitutional canons, because Jacob Scott’s comprehensive survey of the fifty state legislated codes of statutory interpretation found that many or most state legislatures have codified not only the ordinary meaning rule, but also the whole act rule, the presumption of consistent usage, and the rule against surplusage.<sup>222</sup>

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215. Scalia & Garner, *supra* note 2, at 167–69.

216. *Id.* at 170–73.

217. *Id.* at 174–79.

218. Gluck & Bressman, *supra* note 202 (manuscript at 40–44).

219. See Scalia & Garner, *supra* note 2, at 174–79 (“[C]ourts [should] avoid a reading that renders some words altogether redundant.”)

220. See *Babbitt v. Sweet Home Chapter of Cmty. for a Great Or.*, 515 U.S. 687, 697–98 (1995) (“A reluctance to treat statutory terms as surplusage supports the reasonableness of the . . . interpretation [of ‘take.’]”).

221. B.J. Ard, Comment, *Interpreting by the Book: Legislative Drafting Manuals and Statutory Interpretation*, 120 *Yale L.J.* 185, 193 (2010) (listing canons included in congressional drafting manuals).

222. See Jacob Scott, *Codified Canons and the Common Law of Interpretation*, 98 *Geo. L.J.* 341, 357 tbl.1 (2010) (noting widespread codification of ordinary meaning and dictionary rules but virtually no codification of *inclusio unius, noscitur a sociis*, or *eiusdem generis*); *id.* at 368 tbl.3 (noting widespread codification of whole act rule and presumption of consistent usage, and moderate codification of rule against surplusage); *id.* at 388, 391 tbs.8–9 (revealing relatively few states have codified avoidance rule or other constitutional canons, except for presumption against retroactivity, which is widely codified).

Scott's survey also reports that twenty-two other states have codified the canon that an ambiguous statute should be interpreted to carry out the legislative purpose.<sup>223</sup> Contrary to Scalia and Garner,<sup>224</sup> nineteen state legislatures say that remedial statutes should be liberally construed, and seventeen states say that all statutes should be liberally construed.<sup>225</sup> Also contrary to Scalia and Garner,<sup>226</sup> eleven states have codified the presumption that the legislature intends "reasonable" results.<sup>227</sup> And, strongly contrary to Scalia and Garner, eleven states have codified the rule that legislative history "may" be considered under various circumstances; no state has legislated against consideration of legislative history.<sup>228</sup>

This Review refers to Scott's fascinating and unprecedented survey of state legislatively codified canons<sup>229</sup> not to assert they are binding on judges but because they are further evidence relevant to the question: How would a reasonable legislator expect her statutes to be read? The methodology that both federal (Gluck and Bressman) and state (Scott) legislators appear to expect from courts focuses on a statute's ordinary meaning, read in the light of regular principles of grammar and word use, the problem the legislature was addressing and the purpose of the statute, and the consequences and reasonableness of the possible interpretations. In my opinion, courts actually do follow this methodology most of the time, as the majority Justices did in *Sweet Home*,<sup>230</sup> and so their methodology in practice is usually consistent with the expectations of Congress. And so in most cases, there is not a huge democracy problem with current practice—though I believe there would be a significant democracy problem if the Supreme Court were to adopt and follow the canons-based textualism explicated in Scalia and Garner's *Reading Law*.

There is, to be sure, a democracy problem with the rule of lenity, a canon endorsed not just by Scalia and Garner,<sup>231</sup> but also by most judges and commentators (including me). Legislators and their staff do not

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223. *Id.* at 397 tbl.10.

224. Scalia & Garner, *supra* note 2, at 364–66.

225. Scott, *supra* note 222, at 402 tbl.11.

226. Scalia & Garner, *supra* note 2, at 343–54.

227. Scott, *supra* note 222, at 402 tbl.11.

228. *Id.* at 383 tbl.7.

229. Even though Scott's celebrated survey of legislatively codified canons was published two years ago, Scalia and Garner do not cite it in their most comprehensive bibliography and seem to be unaware that there are hundreds of legislatively codified canons. Scalia & Garner, *supra* note 2, at 244–45. Regardless, they disapprove of the practice because it is "likely to be an intrusion upon the courts' function of interpreting the laws." *Id.* at 245. This position would require much greater elaboration to be persuasive. Compare the brilliantly articulated position to the contrary in Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 *Harv. L. Rev.* 2085, 2148 (2002) (declaring canon codification "the most natural expansion of Congress' efforts to legislate interpretive strategies").

230. *Babbitt v. Sweet Home Chapter of Cmty. for a Great Or.*, 515 U.S. 687 (1995).

231. Scalia & Garner, *supra* note 2, at 296–302.

know about the rule of lenity,<sup>232</sup> and they do not approve of it when they have deliberated.<sup>233</sup> As Scalia and Garner say, therefore, the rule of lenity certainly cannot be justified by assuming reasonable legislator expectations,<sup>234</sup> but I believe it can be justified as a quasi-constitutional insistence by judges that the Due Process Clause demands that statutes imposing criminal penalties be relatively clear. In addition, the rule of lenity, almost unique among the canons, creates a productive dialogue between the Court and Congress: the rule of lenity cuts only one way, against the Department of Justice, which is almost always able to secure congressional consideration of an override bill if the Department thinks its rejected interpretation is really important to the administration of the criminal law.<sup>235</sup>

I am not as certain as Scalia and Garner that the avoidance canon can be justified as a matter of either institutional dialogue or our substantive commitments, and I am highly dubious that most of the other antidemocratic canons in *Reading Law* can be justified. The authors' anticanon opposing use of legislative history strikes me as profoundly misguided as well as undemocratic, for the reasons advanced above. The whole act canons<sup>236</sup> ought to be applied much less dogmatically and much more purposively than Scalia and Garner would suggest, with the rule against surplusage<sup>237</sup> retired from judicial action. The absurd results canon<sup>238</sup> ought to be applied in light of legislative purpose and expanded: If a statutory text seems to have a meaning that is unreasonable in light of the legislative purpose, the judge should reconsider her reading and study the legislative history more deeply (though sticking with the harsh reading if supported by the legislative history).

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232. Gluck & Bressman, *supra* note 202 (manuscript at 100–01 & n.470) (reporting fewer than 10% of legislators and staffers surveyed were familiar with rule of lenity).

233. Dan M. Kahan, Lenity and Federal Common Law Crimes, 1994 Sup. Ct. Rev. 345, 384 (“Unlike federal courts, state courts did aggressively enforce strict construction in the nineteenth and early twentieth centuries. In response, many state legislatures abrogated strict construction universally within their criminal codes.”)

234. See Scalia & Garner, *supra* note 2, at 299.

235. William N. Eskridge, Jr., Overriding Supreme Court Statutory Interpretation Decisions, 101 Yale L.J. 331, 344 & tbl.4 (1991) [hereinafter Eskridge, Overriding] (demonstrating leading category of congressional overrides of Supreme Court statutory opinions, 1967–1990, was criminal law overrides, where Congress accepted Department of Justice invitations to broaden criminal statute with more explicit language).

236. Scalia & Garner, *supra* note 2, at 167–233.

237. *Id.* at 174–79.

238. *Id.* at 234–39.

## CONCLUSION

A. *What Are the Canons For? How Should They Be Deployed?*

One important lesson I derived from *Reading Law* is that the canons of statutory construction are more complicated and problematic than I once thought. The late Professor Philip Frickey and I once suggested that the canons constitute an “interpretive regime” that renders statutory interpretation “more predictable, regular, and coherent.”<sup>239</sup> After *Reading Law*, I have learned a lot about the canons, though some of what I learned is not what Scalia and Garner were trying to teach me.

A central lesson I draw from *Reading Law* is that the canons of statutory interpretation require normative justification, both individually and as an overall interpretive regime. This is an important idea, but one that is not carried through in any systematic way by the authors. In this conclusion, I would like to sketch the contours of such a normative calculus. I shall start with the three different kinds of justifications that are relevant to evaluate or defend particular canons or a canonical regime more generally.

1. *Rule of Law Values*. — Most of the time, *Reading Law* operates under the assumption that the rule of law values of predictability, objectivity, and coherence are the linchpin for the “valid canons,” both individually and as an interpretive regime. The rule of law counts as a justification for a canon or cluster of canons that renders statutes more predictable in their application, that impels judges to read statutes without regard to their own political preferences, and that is coherent with the broad array of legal and constitutional rules we follow. Everyone believes in the rule of law generally and in the virtues of predictability and so forth. Indeed, rule of law justifications work very well for some of the textual canons. By insisting that statutes be read according to their ordinary meanings and accepted rules of grammar and punctuation, courts arguably contribute to law’s predictability—although I do not believe the Supreme Court needs to canonize these common-sense precepts in order for them to contribute to the rule of law. It is hard to tell whether the more technical textual canons, such as *inclusio unius* and *noscitur a sociis*, contribute to law’s predictability: because these canons depend on normative judgments about statutory purpose, they will operate less predictably. Indeed, there is no empirical, or even casually empirical, evidence that these canons make statutory law more predictable, and there is some evidence that they render law less predictable and more ideologically inflected.

If the case for most of the textual canons is shaky under rule of law criteria, the rule of law case is even harder to make for the substantive

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239. William N. Eskridge, Jr. & Philip P. Frickey, *The Supreme Court, 1993 Term—Foreword: Law as Equilibrium*, 108 Harv. L. Rev. 26, 66 (1994), noted with approval by Scalia & Garner, *supra* note 2, at 60 n.10.

canons. Many of the substantive rules, such as the avoidance canon, depend on unpredictable, context-driven substantive judgments by ideologically inspired judges; under those circumstances, the canons can undermine the rule of law. Thus, an interpretive regime populated only by the ordinary meaning and grammar canons would be much more predictable than one that also included the avoidance canon because that substantive canon takes away some of the predictability potentially engendered by these textual canons.<sup>240</sup> And when there are so many substantive canons, as the dozens that the Supreme Court has recognized, the predictability problems can only get worse.

Under rule of law criteria, the most defensible canons are those that Scalia and Garner do not include in their analysis (though they have no objection either), namely the stare decisis and the agency deference canons. To be sure, there is no rigorous empirical demonstration that stare decisis or agency deference increases law's predictability, but our legal culture credibly assumes that this is the case. Once the Supreme Court has authoritatively construed a statute, that issue and others closely related to it are resolved until Congress overrides the Court. And the Court's various deference canons enhance the predictability of law by assuring citizens that a nationwide agency interpretation resolves even difficult issues.<sup>241</sup> While stare decisis and agency deference are doctrines that can be evaded or manipulated at the margins, it is sensible to think that for the most part each doctrine makes law more predictable and constrains lower court judges in particular.

So many of Scalia and Garner's "valid canons" are hard or impossible to defend under the rule of law criteria the authors endorse. Moreover, the interpretive regime—the collection of canons—they endorse is one that is demonstrably at odds with the rule of law virtues. Thus, the empirical work of Professors Brudney and Ditslear suggests, tentatively for now, that judges following the Scalia and Garner textual canons and ignoring legislative history (as recommended by Scalia and Garner) are going to be less constrained by law than judges applying these canons in light of legislative history. This is a serious problem for the announced project of *Reading Law*.

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240. In *Sweet Home*, the statutory definition and ordinary meaning canons would create greater predictability: If all the judges applied only those canons, and purged their hearts of substantive concerns, there ought to have been unanimity among the D.C. Circuit judges and the Supreme Court Justices. But if you *add* the avoidance canon to the mix, some of the judges would be tempted to vote for the "simplest farmer," so as to avoid Fifth Amendment "takings" concerns with the agency's highly regulatory approach.

241. See Peter L. Strauss, *One Hundred and Fifty Cases Per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action*, 87 Colum. L. Rev. 1093 (1987) (arguing for agency deference as desirable in part because agency interpretations create nationwide uniformity more quickly and easily than case-by-case adjudication).

As I have suggested above, however, predictability and other rule of law justifications are not the only normative considerations that count when evaluating which are “valid canons” and whether an overall interpretive regime is legitimate or desirable. For example, an interpretive regime with a canon providing that statutes will be presumed to exclude “homosexuals” from governmental privileges and benefits is a regime that is pretty predictable (gay people generally lose), and indeed this is the regime the United States Supreme Court and Congress have traditionally followed.<sup>242</sup> But such a canon is now constitutionally questionable,<sup>243</sup> and an interpretive regime including such a canon is no longer acceptable. Likewise, a canon that statutory text should be given its plain meaning even when that reading is unreasonable in light of unquestioned congressional purpose<sup>244</sup> is also a canon that would yield more predictability in law, but such a canon can be doubted on separation of powers and democratic accountability grounds. Recall that legislators assume that their statutes will be applied reasonably, in light of their purpose(s); a strict, unbending plain meaning rule undermines their work, as the House of Lords found when it abandoned its exclusion-of-legislative history rule in 1992.<sup>245</sup> Correlatively, many canons and some canonical regimes might be defended by reference to values outside of the rule of law values embraced by Scalia and Garner.

2. *Democracy Values.* — Democracy counts as a justification for a canon or cluster of canons that facilitates Congress’s adoption of statutes that will, in operation, reflect the aims, goals, and compromises that drove the legislative process. The legitimacy of a statutory directive derives in large part from the fact that the directive has been endorsed by representatives not only elected by We the People, but also accountable to Us as well. So canons that link statutory interpretations to democratic accountability can be justified because they are consistent with the operation of our democratic governance structure.

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242. See, e.g., *Boutilier v. INS*, 387 U.S. 118, 122 (1967) (including homosexuals in groups considered “afflicted with a psychopathic personality” under Immigration and Nationality Act of 1952); see also Defense of Marriage Act of 1996, 1 U.S.C. § 7, 28 U.S.C. § 1738C (2006) (adopting broad statutory codification of this traditional canon of statutory interpretation). For a critique of *Boutilier* by Scalia and Garner, see Scalia & Garner, *supra* note 2, at 389–90 (criticizing Court’s use of legislative history to define term “psychopathic personality” instead of relying on historical meanings).

243. See *Romer v. Evans*, 517 U.S. 620, 635 (1996) (finding state constitution’s general exclusion of gay people from state protective laws violates Equal Protection Clause).

244. See Scalia & Garner, *supra* note 2, at 237–38 (approving absurd outcome in *Chung Fook v. White*, 264 U.S. 443 (1924), because absurdity doctrine is meant to correct obviously unintended dispositions, not absurd purposeful dispositions).

245. *Pepper v. Hart*, [1992] A.C. 593 (H.L.) 634 (U.K.); see James J. Brudney, *The Story of Pepper v. Hart: Examining Legislative History Across the Pond*, in *Statutory Interpretation Stories* 258, 274 (William N. Eskridge, Jr., Philip P. Frickey & Elizabeth Garrett eds., 2011) (identifying allowing courts to “give effect to the intention of Parliament” as primary reason for modifying exclusionary rule).



Exactly as Scalia and Garner suppose, democracy values are often connected to rule of law values. For the easiest example, the ordinary meaning and grammar canons, if rigorously applied by courts, facilitate the legislative process by rendering statutes more predictable to legislators. The Gluck and Bressman survey of congressional drafters suggests that *noscitur a sociis* and *inclusio unius* find support in democracy values, as Congress relies on these canons in statutory drafting.<sup>246</sup> On the other hand, some of the whole act canons are inconsistent with democratic values, because Congress is drafting statutes without attention to these canons. Indeed, the rule against surplusage, invoked by the *Sweet Home* majority,<sup>247</sup> is especially problematic because the legislative process operates under the opposite assumption and so that canon will often thwart legislative deals rather than enforce them. Likewise, most of the substantive canons are inconsistent with democratic premises and therefore require strong justification on some other basis.

The legislative history canons are democracy-enhancing because they help unelected judges, strangers to the statutory project, to understand the policy assumptions, trade-offs, purposes, and deals that characterize the serious process of statute-making in our system. Thus, everyone now endorses Hart and Sack's idea that statutes should be construed to carry out their purposes, so long as the best interpretation does not impose upon the words a meaning they will not bear.<sup>248</sup> In many cases, one cannot understand the nuances of congressional purpose(s) without attention to legislative history—often (as in *Sweet Home*) the history of statutory amendments. To be sure, Scalia and Garner are correct to worry that judges will not interpret legislative history astutely enough, and that concern is now animating the important work of Professor Victoria Nourse, who is generating rules (canons) for judicial use of legislative history.<sup>249</sup>

Democracy is also a potential justification for *Chevron* and some other canons of deference to administrative agencies and presidential decisionmaking. As the *Chevron* Court acknowledged, in cases where Congress has not answered an interpretive question, it is consistent with democratic governance for unelected judges to decline to substitute their policy judgments for those of agencies that are accountable to the President and/or Congress.<sup>250</sup>

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246. See *supra* note 214 and accompanying text.

247. *Babbitt v. Sweet Home Chapter of Cmty. for a Great Or.*, 515 U.S. 687, 697–98 (1995).

248. See Hart & Sacks, *supra* note 3, at 114–17 (discussing interplay of law and language).

249. Nourse, *Rules*, *supra* note 40.

250. *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 866 (1984). See Elhauge, *Statutory Default Rules*, *supra* note 193, at 79–111 (defending Court's *Chevron* doctrine on ground that agencies will reflect current legislative as well as presidential preferences); Bradley Lipton, *Accountability, Deference, and the Skidmore Doctrine*,

3. *Public Values.* — Substantive values that are unquestionably cherished in our history might justify canons that place a thumb on the scales of justice in support of those values. As Professor Philip Frickey and I have argued, statutory interpretation might be a situs for application of “underenforced” constitutional norms.<sup>251</sup> In all probability, the public values that courts can most effectively support are institutional or process values, such as separation of powers, federalism, and deliberation. Of course, judicial enforcement of public values typically comes at the expense of democracy and often the rule of law as well. How should a theorist deal with the devilish question of competing values?

Thus, each canon might be subject to *both* defense *and* critique on the basis of these three different values. For example, the case for the rule of lenity is rendered quite complicated by the foregoing array of values. I am inclined to agree with Scalia and Garner that the rule of lenity is applied so unevenly that it adds little or nothing to law’s predictability.<sup>252</sup> The evidence is strong that legislators do not approve of the rule of lenity, and so there is every reason to believe that the rule of lenity is undemocratic.<sup>253</sup> Should the rule be abandoned? I vote no, and I cannot improve upon the reason given by Scalia and Garner: “[W]hen the government means to punish, its commands must be reasonably clear. When they are not clear, the consequences should be visited on the party more able to avoid and correct the effects of shoddy legislative drafting—namely, the federal Department of Justice or its state equivalent.”<sup>254</sup>

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119 Yale L.J. 2096, 2120–22 (2010) (defending Court’s *Skidmore* doctrine on ground that agencies will reflect legislative preferences as well as nation’s political culture).

251. Eskridge & Frickey, *Quasi-Constitutional*, supra note 121, at 630–31. On the notion of “underenforced constitutional norms” and what to do about them, see generally Neal Kumar Katyal, *Judges as Advicegivers*, 50 Stan. L. Rev. 1709 (1998) (advocating judicial “advicegiving”—judges recommending rather than mandating particular courses of action—as alternative to aggressive judicial reform); Ronald J. Krotoszynski, Jr., *Constitutional Flares: On Judges, Legislatures, and Dialogue*, 83 Minn. L. Rev. 1, 8 (1998) (weighing desirability of judges “send[ing] constitutional flares . . . [or] clear warnings to Congress regarding the potential applicability of constitutional constraints on its policy choices”); Lawrence Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 Harv. L. Rev. 1212 (1978) (arguing underenforced constitutional norms are nonetheless valid to their conceptual limits and fully enforceable by Congress and state courts); Ernest Young, *Constitutional Avoidance, Resistance Norms, and the Preservation of Judicial Review*, 78 Tex. L. Rev. 1549, 1585–87 (2000) (defending avoidance canon and its use in cases under AEDPA and IIRIRA as means of enforcing Constitution).

252. Scalia & Garner, supra note 2, at 298–99.

253. See Robert Yablon, *Lenity Without Mercy: Matching the Rule to Its Purpose* 35 n.162 (2006) (unpublished Supervised Analytical Writing, Yale Law School) (on file with the *Columbia Law Review*) (identifying states that have legislated, usually without success, to negate the rule of lenity).

254. Scalia & Garner, supra note 2, at 299. For an earlier argument along these lines, see Eskridge, *Dynamic*, supra note 26; Eskridge, *Overriding*, supra note 235, at 376 (“In criminal law, the rule of lenity often impels the Court to demand greater precision from

So I am with Scalia and Garner in balancing the normative considerations for and against the rule of lenity, and their complicated normative analysis of the rule of lenity is exemplary. Unfortunately, it is also exceptional in their book, for most of the “valid canons” they list are accompanied by no careful balancing of normative pros and cons, and many of the valid canons find no defense whatsoever in the pages of *Reading Law*. To be sure, many of the canons on their list are ones where my own cost-benefit analysis would weigh heavily in favor of the particular canons Scalia and Garner endorse.<sup>255</sup> Other canons are so vaguely acceptable that they would probably pass any reasonable normative test, if for no other reason than their costs and benefits are indeterminate but their animating ideas are winsome enough to break any tie in their favor.<sup>256</sup> A good many of the canons are defensible, but only if articulated somewhat differently than Scalia and Garner characterize them.<sup>257</sup> Several of the Scalia-Garner canons strike me as indefensible and, indeed, are not defended by the authors by reference to empirical evidence or other relatively neutral argumentation.<sup>258</sup>

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elderly criminal statutes, which Congress, pressured by the Department of Justice, is often willing to provide.”).

255. Among the canons that I should endorse include the following: the supremacy- (I would say primacy-) of-text principle, Scalia & Garner, *supra* note 2, at 56–58; the purpose canon, *id.* at 63–65; the ordinary-meaning canon, *id.* at 69–77; the grammar canon, *id.* at 140–43; the preamble and title canons, *id.* at 217–24; the interpretive direction canon that courts should “carefully” follow statutory definitions, *id.* at 225–33; the presumption against retroactivity, *id.* at 261–65; and the presumption against implied repeal, *id.* at 327–33.

256. Among these vague but winsome canons are the following: the “interpretation” principle that every application of a text to particular circumstances entails interpretation, *id.* at 53–55; the presumption of validity, *id.* at 66–68; the general-terms canon, *id.* at 101–06; the whole-text canon, *id.* at 167–69; the presumption against preemption, *id.* at 290–94; and the desuetude canon that statutes are not repealed by nonuse, *id.* at 336–40.

257. For examples of canons that are indefensible in the form articulated by Scalia and Garner, I’d include the following: the absurdity doctrine, *id.* at 234–40, which ought to include an admonition against reading statutes to reach results that are unreasonable from the perspective of legislative purpose; the constitutional avoidance doctrine, *id.* at 247–51, which probably ought to be formulated more narrowly, as most scholars (from a wide array of perspectives) have maintained; the presumption against waiver or abrogation of sovereign immunity, *id.* at 281–89, which ought not to require that the disposition is “unequivocally clear,” *id.* at 281.

258. Thus, the authors’ rejection of the “false notion” that committee reports and sponsor statements can be “worthwhile aids in statutory construction,” *id.* at 369, strikes me as strongly inconsistent with democracy and public values and not supported by the rule of law concerns that persuade Scalia and Garner against these sources. I also do not see the normative case for the fixed-meaning canon, *id.* 78–92, which undervalues the dynamism of language and the shifting context for statutory meaning; for the negative-implication canon, *inclusio unius*, see *id.* at 107–11, which is highly manipulable in practice and represents an unjustified antiregulatory bias; for the unintelligibility canon, *id.* at 134–39, which is rarely, if ever, invoked by the Supreme Court; for the presumption of consistent usage, *id.* at 170–73, and the surplusage canon, *id.* at 174–79, both of which are strongly antidemocratic; for the associated-words canon, *noscitur a sociis*, *id.* at 195–98,

After thinking about Scalia and Garner's list of preferred canons and about the Supreme Court's much more elaborate collection of canons (most of which are substantive), I am beset by doubts whether either interpretive regime is justified by the kind of normative cost-benefit analysis conducted above. In the published version of his Tanner Lectures at Princeton University, Justice Scalia opined that the textual canons are "commonsensical" and rather harmless but that the "dice-loading" (substantive) canons are "a lot of trouble" for the "honest textualist."<sup>259</sup> Ironically, after the elaborate analysis of *Reading Law* provided in this Review, I find Scalia's earlier view increasingly attractive.

The Supreme Court might be wise to abandon the canons of statutory interpretation and to adopt the following simplified regime: Interpret statutory texts in light of ordinary meaning and correct grammar, authoritative precedent, and statutory purpose (discerned from the text and legislative history). If there is ambiguity, defer to an agency interpretation except in criminal cases (where the state should lose if ambiguity remains). Such a stripped-down approach is theoretically superior to that followed by the Supreme Court or propounded by Scalia and Garner: Its results are probably more predictable, the method is certainly more consistent with the assumptions of the legislative process, and it reflects the most important public value (lenity) judges can be trusted to enforce, while leaving to more accountable agencies most of the policy judgments.<sup>260</sup>

The Supreme Court of the United States is, by now, probably too invested in the canons to abandon that regime wholesale—but such an experiment could more easily be attempted by a state supreme court.<sup>261</sup> As much as the idea of a radically simplified interpretive regime for statutory interpretation attracts me, ultimately I believe that statutory interpretation in cases like *Sweet Home* is complicated, and so a complicated set of canons matches up with the enterprise itself. Additionally, a stripped-down regime would send many relevant interpretive considerations into a legal closet. One virtue of the Court's massive array of canons

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and ejusdem generis canon, *id.* at 199–213, which seem to be so manipulable in practice; or for the presumption against change in the common law, *id.* at 318–19, because changing the common law is the point of most federal super-statutes and many other laws. Most of the Scalia and Garner "falsities," *id.* at 341–410, are either overstated or unpersuasively justified by the authors.

259. Scalia, *Interpretation*, *supra* note 1, at 25–29.

260. Cf. Vermeule, *supra* note 40 (arguing for no-frills textualism that would jettison most canons, unfortunately including legislative history and purpose canons as well as rule of lenity, and would defer to agencies even more than my stripped-down approach would suggest).

261. See Abbe R. Gluck, *States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 *Yale L.J.* 1750, 1771–1811 (2010) (examining various state supreme court interpretive regimes, including one followed for almost two decades by Oregon Supreme Court, which bears some similarity to proposal in text).

is that they express the complexity and substantivity of the interpretive enterprise.

If we accept the complexity and numerosity of the canons, as Garner, Scalia, and I do, another matter becomes tremendously important. That is, how the canons interact is as important as the content and caveats for each individual canon.<sup>262</sup> *Reading Law* not only reflects that general proposition but also illustrates how canonical interaction is bound to be hierarchical: Some canons will trump others. Although Scalia and Garner do not openly endorse the hierarchy of canons, here is the hierarchy I derive from their book:

(1) At the top of the hierarchy are what Philip Frickey and I dubbed *super-strong clear statement rules*: judicial policies that Congress cannot trump by a statutory plain meaning and need, instead, to provide an “unequivocally clear” statement<sup>263</sup> to that effect.<sup>264</sup> As examples of such rules, Scalia and Garner endorse the requirement of unequivocally clear statements from Congress to waive federal and abrogate state sovereign immunity.<sup>265</sup> Their version of the constitutional avoidance canon, which allows avoidance unless Congress has spoken clearly,<sup>266</sup> might also qualify, for in practice the avoidance canon sometimes amounts to a super-strong clear statement rule that trumps ordinary meaning.<sup>267</sup> The rule against absurd results is an even stronger example and might be understood as a super-strong clear statement rule as well. The presumption against implied repeals<sup>268</sup> also operates, in practice, as a super-strong clear statement rule, especially in the hands of Justice Scalia, who loves this canon.<sup>269</sup>

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262. Scalia & Garner, *supra* note 2, at 59–62 (noting canons often “work against each other” but still have great value).

263. *Id.* at 281.

264. See generally Eskridge & Frickey, *Quasi-Constitutional*, *supra* note 121 (exploring advent of “super-strong clear statement rules” by judiciary and their effects).

265. Scalia & Garner, *supra* note 2, at 281–89.

266. *Id.* at 247–51 (endorsing canon that avoids statutory interpretations that would “even raise serious questions of constitutionality” unless meaning is absolutely clear).

267. Compare *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 129 S. Ct. 2504, 2508 (2011) (ignoring, for virtually unanimous Court including Justice Scalia, statutory definitional section and creating judicial exception that avoided constitutional evaluation of Voting Rights Act), with *id.* at 2517–18 (Thomas, J., concurring in part and dissenting in part) (demonstrating majority’s interpretation was squarely contrary to only plausible meaning of statutory text).

268. Scalia & Garner, *supra* note 2, at 327–33 (“The essence of the presumption against implied repeals is that if statutes are to be repealed, they should be repealed with some specificity.”).

269. Compare *Branch v. Smith*, 538 U.S. 254, 273 (2003) (Scalia, J., plurality opinion) (rewriting completely old statute to avoid conclusion that it was implicitly repealed by later one), with *id.* at 304 (O’Connor, J., concurring in part and dissenting in part) (ridiculing playfully Justice Scalia’s opinion for rewriting statutory text, contrary to rules in *A Matter of Interpretation*).

(2) Next are the *semantic, syntactical, contextual, and term of art* canons<sup>270</sup> that, understood as a cluster of textual canons, establish whether the statute has a plain meaning. Under the premises of the new textualism, plain meaning trumps everything else unless there is a super-strong clear statement rule in play. I would add to this important level the *stare decisis* canon: If the court of last resort has interpreted the statute, subsequent judges are bound by that interpretation when it is on point and, even where not controlling, will reason from the earlier precedent(s).

(3) The remainder of the canons are the *residual rules* that resolve statutory ambiguities. Thus, if there is neither a plain meaning nor a super-strong clear statement rule in play, judges are supposed to consider, where relevant, legislative purpose,<sup>271</sup> presumptions against retroactivity<sup>272</sup> and extraterritorial effect,<sup>273</sup> a presumption against preemption of state law,<sup>274</sup> the rule of lenity and the mens rea canon in criminal cases,<sup>275</sup> and the common law as the background norm where statutes do not control.<sup>276</sup> To these, I should add the various agency deference canons: Unless a statute has a plain meaning, agency interpretations usually fill the gap.<sup>277</sup>

This is a pretty tidy interpretive regime. It might not improve the predictability of judicial decisions and might be antidemocratic, but tidiness has an aesthetic value that appeals to many lawyers and judges.

If I had to choose between a stripped-down minimalist regime and the tidy interpretive regime outlined in Scalia and Garner's *Reading Law*, I would opt for the latter. This is, ultimately, the authors' best pitch for their list of "valid canons": In the modern era, they maintain, there is nothing but "confusion" among scholars and judges about statutory interpretation, and their book is the first to offer a "sound approach" to the subject.<sup>278</sup> I believe these claims are overstated and that there is a third choice that dominates both the minimalist regime and the Scalia and Garner regime. As the Justices' debate in *Sweet Home* illustrates, judges are not confused about statutory interpretation, and Justice

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270. Scalia & Garner, *supra* note 2, at 69–240, 320–26.

271. *Id.* at 63–65.

272. *Id.* at 261–65.

273. *Id.* at 268–72.

274. *Id.* at 290–94.

275. *Id.* at 296–312.

276. *Id.* at 318–19.

277. See *supra* note 167 and accompanying text (noting Court's *Chevron* doctrine of deferring to agencies' reasonable statutory interpretations).

278. See Scalia & Garner, *supra* note 2, at 3–15 (claiming their treatise is "the first modern attempt . . . to collect and arrange only the valid canons" in a world of confused statutory interpretation).

Scalia's approach is less sound than the one followed by the Supreme Court for most of the last century.<sup>279</sup>

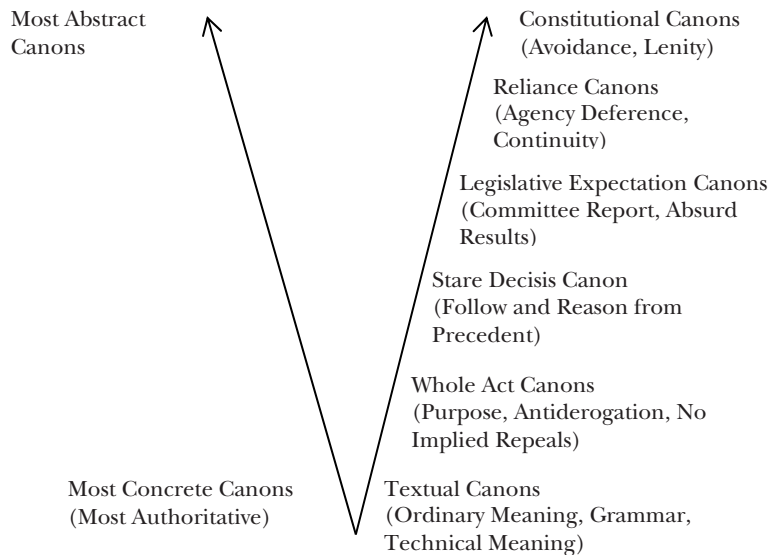
What is that approach? As Phil Frickey, Nick Zeppos, and I have demonstrated, the post-New Deal interpretive regime followed by the Supreme Court is pragmatic.<sup>280</sup> The Court considers its role in statutory interpretation to be responsive to concerns relating to the rule of law, democracy, and public values. No single norm always trumps the others, and each norm lends support to different sources for judges to apply in statutory interpretation. Like Scalia and Garner, we maintain that the Court follows and should follow a hierarchy, but instead of their hierarchy we maintain that the Court follows and should follow the "funnel of abstraction."

Translated into the canons, the funnel suggests that the most concrete canons (the textual ones) are the most normatively compelling when they are applicable (i.e., when the text is not vague or ambiguous). Thus, if a statute has a plain meaning, based on its ordinary meaning or its meaning in light of the whole act, that meaning should usually be applied because it is consistent with the rule of law, very probably reflects legislative expectations, and reflects the public value of democratic deliberation. Where these sources do not speak clearly enough, however, other canons will govern, such as those focusing on legislative purpose and expectations, agency constructions and reliance interests, and public values, depending on how strongly each canon cuts. See the chart below for our hierarchy, set forth canonically:

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279. See *supra* notes 96–98 and accompanying text (arguing Scalia's *Sweet Home* dissent was "deploying canons to imbue authoritative legal texts with [his] policy preferences" and that his "canonical approach" is "more of a normative than a neutral application of the rule of law").

280. See Eskridge & Frickey, *Practical Reasoning*, *supra* note 6, at 364–65 (describing tendency of Supreme Court to use pragmatic approach to statutory interpretation even while purporting not to); Zeppos, *supra* note 56, at 1091–1120 (providing empirical survey of use of authority by Court, 1890–1990, and reporting Court deployed eclectic range of sources, consistent with Eskridge and Frickey pragmatic model).



Both the majority and dissenting opinions in *Sweet Home* carefully adhered to the funnel of abstraction, and both invoked all six levels of canons—with the irony that Justice Scalia, the skeptic of legislative history, deployed the legislative history of the 1973 Act to win the debate about the original statute, in my opinion, only to see it slip away based on the legislative history of the 1982 Amendments.

I should add that our funnel metaphor is different from *Reading Law* in another way. Like Scalia and Garner, we think the canons “interrelate” to one another<sup>281</sup>—but unlike them, we think that they interrelate deeply rather than formally. That is, the judge applying the larger array of canons contemplated by the funnel of abstraction does not apply the textual canons in isolation. Instead, she or he forms tentative conclusions from thinking about the ordinary meaning and reconsiders them as she or he examines other sources, including legislative history. That is, a judge’s announcement that “the statute has a plain meaning” comes only after she or he has considered legislative history and purpose, precedent, agency views, reliance interests, and public values.

Thus, the textual canons do not operate independently of the purpose and precedent canons. Indeed, what I admire most about Justice Scalia’s interpretation of the original 1973 Act in *Sweet Home* is the way he integrated ordinary meaning, common law baselines, whole act and whole code analysis, legislative history and purpose, and quasi-constitutional norms to produce a powerful indictment of the agency’s overreaching in 1975. What I admire less about his dissenting opinion is that it ran out of steam at the critical moment, when Justice Scalia had to con-

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281. Scalia & Garner, *supra* note 2, at 59–62.



front the 1982 Amendments to the statute. Not only did he have no cogent response to the majority's reliance on legislative history (right after he had deployed it so effectively himself), but his snide put-down of committee reports leaves the reader with the impression of judicial rather than agency arrogance.

What fundamentally separates me from Scalia and Garner is not a lack of enthusiasm for textual analysis but instead my view that "prevailing confusion"<sup>282</sup> is not the right way to characterize the Supreme Court's practice in statutory interpretation. That statutory interpretation, in practice, considers different kinds of sources (legislative materials as well as text, agency views as well as judicial values) does not mean the interpretive regime is confused, unpredictable, or lawless. As Judge Frank Easterbrook puts it in the Foreword to *Reading Law*, "[p]rofessional norms—including norms about interpretive method—produce much more consensus than would be expected if judges' decisions mirrored the disagreement in legislative bodies or political debates."<sup>283</sup>

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282. *Id.* at 9.

283. Easterbrook, *supra* note 6, at xxiv.

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